Case Note

If You Can't Beat Them, Join Them

The French Constitutional Council's First Reference to the Court of Justice (*Jeremy F.* v. *Premier ministre*, 4 April 2013)

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Not unlike national parliaments, which have seen their influence eroded as power gradually shifted to Brussels, constitutional courts are, if anything, net losers of the integration process.[1] At least lower domestic courts had some incentives to embrace the constitutional revolution initiated by the Court of Justice. For them, the twin doctrines of supremacy and direct effect combined with the *Simmenthal* mandate[2] came as a promise of empowerment. It was a promise of empowerment against domestic legislators as lower courts gained the power to set aside statutes, in legal systems that had either made it the exclusive preserve of constitutional courts or denied it altogether to the judicial branch.[3] But equally, it was a promise of empowerment against the higher echelons of the domestic judicial hierarchy as EU law and the European Court afforded lower court judges a convenient avenue to challenge established lines of case law.[4] None of this applied to constitutional courts. Not only did legal integration entail the loss of a cherished monopoly that

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[1] *See* A. Dyevre, 'The French Parliament and European Integration', 18 *Eur. Pub. L.* (2012) p. 527 (highlighting similitudes in the manner in which integration affects constitutional courts and domestic legislatures).

[2] *See* M. Claes, *The National Courts' Mandate in the European Constitution* (Hart 2006) (discussing the European mandate of national courts under the Simmenthal doctrine).

[3] The locus classicus of the empowerment thesis is J.H.H. Weiler, 'A Quiet Revolution', 26 *Comp. Polit. Stud.* (1994) p. 510.

[4] *See* K.J. Alter, 'Explaining National Courts Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration', in Anne-Marie Slaughter et al. (eds.), *The European Court and National Courts – Doctrine and Jurisprudence* (Hart 1998), p. 232 (arguing that lower courts have incentives to use EU law to circumvent the established pecking order of the domestic judiciary).

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was a distinctive trait of the Kelsenian model of constitutional review. But it also meant that, as the body of EU law expanded, so too did the Court of Justice's remit and influence. Very much like in a zero-sum game, any jurisdictional gain for the Court of Justice came at a commensurate loss for constitutional judges. Worse still, for the constitutional courts that used to exert a tight grip on the operations of ordinary courts, or wished to establish such control, the ever-expanding reach of EU law together with the emergence of a powerful European Court posed a potentially ominous challenge to their authority over ordinary judges.

In sum, as far as their institutional ego is concerned, constitutional courts had every reason to be wary of EU law and of the EU's creeping competences. Not surprisingly, two constitutional courts – the Italian and the German one – were at the forefront of the domestic resistance against the Court of Justice's constitutional agenda in the early years of the European project.[5] In the post-2004 enlarged European Union, however, constitutional judges have diverged in their attitude towards legal integration. Some have stuck to the path of defiance, issuing repeated warning to the EU institutions that overreach at EU level would meet with disobedience on the domestic front. Of all domestic judicial bodies, the German Constitutional Court has certainly been the most vocal in articulating its constitutional red lines. But it has not been the only dissenting voice. Borrowing the German-made *ultra vires* doctrine, the Czech and Polish constitutional courts have clearly elected to side with the Eurosceptic camp. Yet, as the Czech constitutional judges may have realized at their own expense after pressing the big red button in the controversy over the pension rights of Czechoslovak citizens,[6] defiance is a game that only domestic judicial superpowers such as the German Constitutional Court can credibly play.[7] This is an insight that has not been lost on a

[5] For the German Constitutional Court *see* Daniel Thym, 'Separation versus Fusion – or: How to Accommodate National Autonomy and the Charter? Diverging Visions of the German Constitutional Court and the European Court of Justice', 9 *EuConst* (2013) p. 391 at p. 398-401 (charting the evolution of the FCC jurisprudence from *Solange* to *Honeywell*); K.J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2001). For a summary of the evolution of the Italian Constitutional Court's case-law on integration *see* Oreste Pollicino's note on p. 143. For a broader elaboration on this theme *see* J. Komárek, 'The Place of Constitutional Courts in the EU', 9 *EuConst* (2013) p. 420.

[6] *See* J. Komárek, 'Czech Constitutional Court Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires; Judgment of 31 Jan. 2012, Pl. ÚS 5/12, Slovak Pensions XVII', 8 *EuConst* (2012) p. 323 (discribing how the Czech Constitutional Court shot itself in the foot by declaring the ECJ *Landtová* decision *ultra vires*).

[7] *See* Arthur Dyevre, 'Domestic Judicial Non-Compliance in the European Union: A Political Economic Approach', *LSE Working Paper in Law and Society* (2013), <www.lse.ac.uk/collections/law/wps/wps1.htm> (last visited Sept. 20, 2013) (analysing the conditions under which domestic courts may have leverage over the ECJ).

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second set of constitutional courts. These courts have realized two things. One is that the EU and the Court of Justice will not go away. There are here to stay. The other is that they have more to lose than to gain from a direct confrontation with the European judges. So these courts have, if somewhat belatedly, come to the conclusion that they might as well try to make the best of the new legal order. This includes cooperating with the European Court when the occasion arises. As the saying goes, 'if you can't beat them, join them'. Courts falling in this category have buried the judicial hatchet, shedding the language of *ultra vires* and non-compliance threats for a more placating rhetoric. Crucially though, they have started to make use of the preliminary ruling mechanism. While integration-friendly scholars may wish to celebrate this late conversion to EU law and judicial dialogue as some once rejoiced over the return of the prodigal son, the late move to inter-judicial cooperation is, of course, not entirely disinterested. An early practitioner of the preliminary ruling mechanism, the Belgian Constitutional Court, for one, seemed on various occasions to seek in the Luxembourg Court a means to outsource the resolution of hot-button policy issues revolving around the Belgian question and its linguistic and political fault lines.[8] Similarly, the first reference submitted by the Spanish Constitutional Tribunal appeared to be motivated by the Spanish judges' own reluctance to overrule their longstanding jurisprudence on *in absentia* convictions.[9] As Oreste Pollicino suggests in the present issue, concerns over the Court's institutional standing within the Italian judiciary may also have played a part in spurring the Italian Constitutional Court to request what is its first reference in the context of concrete review proceedings.

Broadly speaking, the first reference for a preliminary ruling ever filed by the French Constitutional Council follows the same pattern of constitutional judges switching from passivity or downright hostility to active cooperation. Similar to the aforementioned Italian case, the reference in the *Jeremy F.* case[10] arose in the context of domestic interlocutory proceedings under what is known as the priority constitutional referral or, in the French original, as '*question prioritaire de constitutionnalité*'. This French constitutional première has been largely commented in French constitutional scholarship.[11] Yet one need not be particularly inclined

[8] *See* e.g. Decision No. 51/2006, 19 April 2006 (challenge brought against a decree of the Flemish region restricting access to health care for those residing outside Flanders); Decision No. 49/2011, 6 April 2011 (measure introducing restrictions on the sale of real-estate property to newcomers in Flemish towns adjacent to Brussels).

[9] *See* R. Alonso García, 'Guardar Las Formas En Luxemburgo', *Revista General de Derecho Europeo*, 2012, 1 (discussing the referrence submitted by the Spanish Constitutional Tribunal in the *Melloni* case).

[10] Decision No. 2013-314P QPC, 4 April 2013.

[11] A round-up should include the following contributions M.-C. De Montecler, 'Première question préjudicielle du Conseil constitutionnel à la CJUE', *L'actualité juridique droit administratif*

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to cynicism to observe that it is unlikely to mark the beginning of a juridical honeymoon between the Council and the Court of Justice. Nor should one expect a sudden flurry of references in the years to come. For one thing, the Council still faces severe procedural constraints when it comes to submitting references. For another, the facts of the case that gave rise to the reference were, as some commentators have noted, rather exceptional in nature, meaning the Council could hardly evade the EU law question. All in all, the true significance of the case lies probably less in its limited doctrinal implications than in the symbol it conveys, namely the willingness of constitutional judges to cooperate with the Court of Justice.[12]

The legacy of *Melki*

The dynamics of judicial communication at work in this case cannot be adequately accounted for without first returning to the *Melki* controversy. Remember that in *Melki* the issue referred to the Court of Justice by the French Court of Cassation pertained to the compatibility of the very same interlocutory procedure that gave rise to the *Jeremy F.* reference.[13] The new mechanism, which by then had just come into force, stipulates that when parties to a dispute challenge the application of a statute both on constitutional and on treaty grounds, the judge in the main cause should give priority to the constitutional challenge.[14] This entails that the judge

(2013) p. 711; D. Rousseau, 'L'intégration du Conseil constitutionnel au système juridictionnel européen', 125-127 *Gazette du Palais* (2013) p. 13; D. Berlin, 'Dans le silence du texte, ce qui n'est pas interdit est permis [...] voire préconisé', 25 *La Semaine Juridique – édition générale* (2013) p. 1229; J.-C. Bonichot, 'Le Conseil constitutionnel, la Cour de justice et le mandat d'arrêt européen', *Recueil Le Dalloz* (2013) p. 1805; F. Chaltiel Terral, 'Le dialogue se poursuit entre la Cour de justice de l'Union européenne et le Conseil constitutionnel', 149 *Petites affiches* (2013) p. 4; C. Mauro, 'La Cour de justice de l'Union européenne revient sur le mandat d'arrêt européen', 29-34 *La Semaine Juridique* (2013) p.1456; D. Simon, 'Mandat d'arrêt européen. Réponse de la Cour de justice au renvoi préjudiciel historique du Conseil constitutionnel français: consécration du droit au recours juridictionnel, mais dans des limites complexes', 7 *Europe* (2013) p. 22; M. Aubert et al., 'Chronique de jurisprudence de la CJUE', *L'actualité juridique droit administratif* (2013) p. 1686; A. Levade, 'Premier arrêt sur renvoi préjudiciel du Conseil constitutionnel: ce que la Cour de justice dit [...] et ne dit pas', *Constitutions: revue de droit constitutionnel appliqué* (2013) p. 189.

[12] *See* F. Mayer, 'Es geht eben doch: Nochmals zur ersten Vorlage des Conseil Constitutionnel an den EuGH', *Verfassungsblog* (2013), <www.verfassungsblog.de/de/es-geht-eben-doch-nochmals-zur-ersten-vorlage-des-conseil-constitutionnel-an-den-eugh/> (accessed 4 Dec. 2013) (contrasting the positions of the German and French constitutional judges towards the ECJ and EU law).

[13] On the introduction of (filtered) concrete review and the *Melki* crisis in France *see* A. Dyevre, 'Filtered Constitutional Review and the Reconfiguration of Inter-Judicial Relations', 61 *AJCL* (2013) p. 729.

[14] *See* Art. 23-2(5) of the Organic Law on the Constitutional Council as revised by the Organic Law No. 2009-1523 of 10 Dec. 2009.

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in cases where he regards both challenges in a case as serious has to suspend proceedings and refer the constitutional question to the supreme court (i.e., *Conseil d'Etat* or Court of Cassation). The supreme court in turn decides whether to forward the constitutional referral to the Constitutional Council. Doubts could reasonably be entertained as to the conformity of the new procedure with the *Simmenthal* doctrine, which provided that domestic courts should all have power to set aside measures contrary to EU law immediately. Yet the Council was desirous to avert an ECJ ruling that would have killed the constitutional reform.

So, only a couple of weeks after the Court of Cassation had submitted *Melki*, the Council, in a completely unrelated case, issued an unusually lengthy *obiter dictum* which suggested a more accommodating construction of the legislation implementing the new priority constitutional referral.[15] The compromise offered by the Council sought to save the new mechanism while preserving most of the *Simmenthal* doctrine. Six weeks after the Council had issued its obiter dictum, the Court of Justice rendered its expedited preliminary ruling.[16] Not only did the European Court accept the compromise hammered out by the Council, thereby relaxing the stringency of the *Simmenthal* doctrine to allow national judges to wait for the outcome of domestic interlocutory proceedings prior to enforcing EU law norms. But, by delivering its ruling in record time, the Luxembourg Court also demonstrated that the Council, too, could make use of Article 267 TFEU. In a 2006 opinion the Council had ruled out the possibility to submit references to the Court of Justice. In abstract review proceedings French constitutional judges were required to hand out their decision within a month of receiving the referral. This, it was implied, left the Council no time to wait for a preliminary ruling.[17] Yet, under the new concrete review mechanism the Council was required to hand out its decision within three months of receiving the referral, instead of one in abstract review cases. So the lesson from *Melki* was that, at least in theory, the Council had just enough time to seek and wait for an expedited ECJ ruling. In brief, time was no longer a sufficient excuse to refuse to submit a reference.

The Constitution and the European Arrest Warrant

While amply covered by the more sensationalist English tabloid press, the facts of the case that gave rise to the Council's reference are relatively straightforward. British math teacher Jeremy F. travelled to France with his fifteen years old female student. The Crown Court in Maidstone charged him with child abduction and

[15] *See* Decision No. 2010-605 DC, 12 May 2009, at point 14.

[16] Cases C-188/10 and C-189/10, *Aziz Melki and Selim Abdeli*, 22 June 2012 [2010] ECR I-05667.

[17] Decision No. 2006-540 DC, 26 July 2006, at point 20.

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issued a European arrest warrant to have him extradited to the United Kingdom. Jeremy F. was soon arrested on French soil. Thereupon, the Investigation Chamber of the Court of Appeals of Bordeaux ordered that he be surrendered to British authorities pursuant to the Crown Court's arrest warrant. Yet, barely had F. returned to the UK, where he was to remain in custody until his trial, that the Crown Court filed a new request to the investigating chamber in Bordeaux. The British Court sought to extend the initial warrant to charges of sexual activity with an under-age female minor. The Bordeaux Investigation Chamber granted the extension. Under the provisions of the French Code of Criminal Proceedings implementing the Framework Decision on the European Arrest Warrant no redress was available against the decision of the Investigation Chamber. Article 695-46 of the Code explicitly specified that the decision of the Investigation Chamber was to be 'final'. Jeremy F., however, brought an appeal before the Court of Cassation in which he challenged, among other things, the constitutionality of the statutory provisions implementing the Framework Decision. He alleged, among other things, a violation of his right to proper judicial redress. The Court of Cassation forwarded the constitutional question to the Constitutional Council.

Now, to the extent that French statutory legislation effectively implements the Framework Decision it is in principle immune to a constitutional challenge. Indeed, Article 88-2 of the French Constitution explicitly authorizes the ratification and implementation of the Framework Decision: 'Statutes shall determine the rules relating to the European Arrest Warrant pursuant to the acts enacted by European Union institutions'.[18] As a result, the resolution of the constitutional issue would essentially turn on whether the Framework Decision ruled out any kind of judicial redress. Should it be so construed, the implementing legislation would be covered by the *ad hoc* immunity in Article 88-2.[19] But if not, then the Council was to consider the fundamental rights challenge brought against the implementing legislation as a purely domestic constitutional matter. So, rather than taking

[18] Translation is mine. Art. 88-2 has its origins in a 2002 advisory opinion of the *Conseil d'Etat* which insisted that the Framework Decision was incompatible with the Constitution and that it ratification, therefore, required a constitutional revision. *See* Opinion No. 368.282, 26 Sept. 2002.

[19] What makes this reasoning specific to the EAW is precisely the degree of specificity that characterises Art. 88-2. Because its meaning is so clear, it would take much imagination and creativity for the Constitutional Council to craft a convincing argument to the effect that the authorisation to implement the Framework Decision must somehow be balanced against other constitutional principles. By contrast, the duty to implement directives – which the Council claimed to derive from Art. 88-1 of the French Constitution in its Decision No. 2004-496 DC (10 June 2004) – appears less absolute. In subsequent decisions, the Council could afford to say, without contradiction, that the duty found its limit in 'the rules and principles inherent to the constitutional identity of France'. *See* Decision No. 2006-540 DC, 27 July 2006, at point 17-20; 2006-543 DC, 30 Nov. 2006, at point 4-7; 2008-564 DC, 19 juin 2008, at point 42-45; 2010-605 DC, 12 May 2010, at point 17-19; 2010-79 QPC, 17 Dec. 2010, at point 3; 2011-631 DC, 9 June 2011, at point 45.

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pretext from implausible arguments based on plain meaning or the *acte clair* doctrine, the Council elected to submit a reference asking the Court of Justice to make a determination on whether Articles 27 and 28 of the Framework Decision precluded any form of judicial redress against decisions extending a warrant to new charges.

The Court of Justice accepted to review the reference under the expedited procedure. Breaking the record established by *Melki*, it handed out its ruling on 30 May 2013, less than two months after the Council had submitted its reference. While the letter of the Framework Decision seemed to speak against domestic provision for judicial redress, the Court of Justice went for a more liberal reading. The European Court, speaking through its second chamber, held, in effect, that the Framework Decision did not regulate the possibility for the member states to provide for an appeal suspending decisions regarding a European arrest warrant.[20] This meant that it was for domestic law to decide whether an appeal could be filed or not.

The preliminary ruling had thus cleared the Article 88-2 hurdle. The Council was now free to consider the merits of the constitutional challenge brought by Jeremy F.. On 14 June, the Council ruled Article 695-46 of the Code of Criminal Proceedings unconstitutional on the grounds that it violated due process guarantees of the Declaration of the Rights of Man.[21]

In the meantime, criminal proceedings against Jeremy F. followed their normal course in the UK. On 21 June 2013, the Lewes Crown Court found him guilty on counts of child abduction and sexual activity with a child. He was to serve a five-and-a-half years prison sentence.[22] Whether the Council's decision will call his conviction into question remains to be seen.

Conclusion

All things considered, the Council's first reference was not a bad deal for the judges immediately concerned. For the European judges the case can only serve to boost their legitimacy. That the Council has already made use of the preliminary ruling mechanism will help name and shame the constitutional courts that continue to resist the move to judicial cooperation – not least among them the German Federal Constitutional Court. As for the Council, the case afforded it the opportunity to return the favour the Court of Justice had arguably done to the French

[20] Case C-168-13 PPU, *Jeremy F.* v. *Premier ministre*.

[21] Constitutional Council, Decision No. 2013-314 QPC, 14 June 2013.

[22] *See* Lewes Crown Court, *R* v. *Jeremy Forrest*, 21 June 2013, Sentencing Remarks of Judge Lawson QC, available at: <www.crimeline.info/uploads/cases/2013/forrest.pdf> (accessed 7 Dec. 2013).

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constitutional judges in *Melki* by accepting to relax its *Simmenthal* doctrine. What is more, for an institution staffed with former politicians that was initially designed more as an instrument of the executive branch against parliamentary excesses than as a judicial body,[23] submitting a reference possessed, in itself, important symbolic value. After all, carrying out a quintessentially judicial act is not an ineffective way to assert one's credentials as a judicial institution.

In sum, the case highlights what 'judicial dialogue' in the context of the heterarchical, multi-level legal order is really about. Contrary to what the phraseology of 'dialogue', with its Socratic connotations, may suggest, this is not about judges using reason to arrive at some supposedly transcendent legal truth. Rather, it is about issue-trading, logrolling, and backscratching. In short: it is about judicial bargaining.

[23] *See* A. Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (Oxford University Press 1992) (conceptualising the Council as a third-chamber of Parliament).

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