Editorial

The Dance of Justice

Time appears in the development of law in several capacities. One of its powers is to provide relief for courts gridlocked in contradictory claims of hierarchy. That is the topic of this editorial. A showcase is provided by the *Melki* saga, as it recently unfolded in a rich and rushed contention between the French courts and the Court of Justice of the European Union.[1]

Melki and Abdeli, two Algerian *sans papiers* in France, were arrested in 2010 pursuant to an identity check in the Belgian border area and kept for deportation. Before the court they invoked rights under the French Constitution and under the EU treaties. The constitutional question was referred to the French *Cour de Cassation* under a new procedure based on Article 61-1 of the Constitution and effective from 1 March 2010. Upon referral from the *Conseil d'État* or the *Cour de Cassation*, the *Conseil constitutionnel* is allowed to test a legislative provision's compatibility with (French) constitutional rights and liberties. The organic (institutional) legislature[2] turned this procedure into a *question prioritaire de constitutionalité* to give precedence to review of a contested legislative provision against the Constitution by the *Conseil constitutionnel* over review against international instruments by the ordinary and administrative courts. In the words of the *Conseil constitutionnel*, 'Parliament, when enacting the Institutional Act, intended to ensure compliance with the Constitution and confirm the place of the latter at the apex of the national legal system.'[3]

In the *Melki* case, in defiance of the priority rule, the *Cour de Cassation,* instead of referring Melki's question to the *Conseil constitutionnel*, referred the new procedure itself to the Court of Justice for a review against EU law. This was 16 April 2010. Less than four weeks later, on 12 May, the Constitutional Council took advantage of another dispute to convey its view that there had been no reason for the Cassation Court to worry: the constitutional question priority procedure does

[1] Marc Bossuyt and Willem Verrijdt, 'The Full Effect of EU Law and of Constitutional Review in Belgium and France after the *Melki* Judgment', 7 *EuConst* (2011) p. 355-391.

[2] Loi organique n° 2009-1523 du 10 décembre 2009 relative à l'application de l'article 61-1 de la Constitution.

[3] Decision n° 2009-595 DC of 3 December 2009, para. 14.

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not deprive the administrative and ordinary courts of the power to do 'all and everything necessary to prevent the application in the case at hand of statutory provisions impeding the full effectiveness of the norms and standards of the European Union.' Nor does it take away their freedom or duty to ask for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union.[4] Two days later again the French Council of State followed suit with a similar reassurance.[5]

A few weeks later again, on 22 June, the Court of Justice gave its blessing to the new French procedure under the terms proposed by the two French public law courts, albeit under one important condition. This concerns the situation in which a legislative provision whose constitutionality is contested merely transposes the mandatory provisions of a European Union directive. In that case, the constitutionality of the underlying directive is at stake, albeit indirectly, and the Court of Justice must have had the opportunity to rule on the validity of that directive before the Constitutional Council rules on the constitutionality of the legislative provision: 'In the case of a national implementing law with such content, the question of whether the directive is valid takes priority, in the light of the obligation to transpose that directive.'[6]

The upshot of the Melki saga is that the Court of Justice conceded to a limitation of its supremacy dogma in favour of French constitutional law. It accepted a national procedure 'which would prevent the national court from immediately disapplying a national legislative provision which it considers to be contrary to EU law' (para. 53), something which it had forcefully rejected in the famous *Simmenthal* decision of 1978. But another element of the saga interests us even more here.

In the *Melki* string of rulings the temporal aspect that is the most interesting is decidedly that of *succession*. Of course, the Court of Justice was well aware that the Constitutional Council does not accept the primacy of Union law unconditionally. Indeed, although the Council qualifies the duty of the French parliament to implement directives as a constitutional one, such implementation may not 'run counter to a rule or principle inherent in the constitutional identity of France unless the Constituent power has agreed' to it.[7] Similarly, the Court of Justice was well aware that it was unable to prevent the referral of legislative provisions that implement mandatory provisions of a directive to the Constitutional Council for constitutional review. Therefore it claimed the right to rule *first* on the question of the validity or constitutionality of the directive or legislative provisions. And

[4] Decision n° 2010-605 DC of 12 May 2010, paras. 14 and 15.
[5] CE 14 May 2010 (*Rujovic*).
[6] CJEU 22 June 2010, Joined Cases C188/10 and C-189/10 (*Melki and Abdeli*), para. 56.
[7] Decision n° 2010-605 DC of 12 May 2010, para. 18.

the Court of Justice got its way. The Constitutional Council, in its judgment of 12 May 2012, unmistakably accepted that when the *Cour de cassation* and the *Conseil d'Etat* refer a *question prioritaire de constitutionnalité* to the Constitutional Council, they also have to put a preliminary question to the Court of Justice if the validity of the directive is at stake.

Such a preliminary question will in turn put the Court of Justice under time pressure, as the decisions of the highest referring courts and that of the Constitutional Council concerning a *question prioritaire de constitutionnalité* are subject to strict time limits: the *Cour de cassation* and the *Conseil d'Etat* have only three months to decide whether or not to refer, and the Constitutional Council has the same time span to answer the constitutional question. If the preliminary question is posed at the same time as the constitutional question, the Court of Justice consequently has less than three months.

Between the German *Bundesverfassungsgericht* and the Court of Justice, a similar dance is taking shape. So far between these two competitors, a relationship had developed roughly combining intransigence as to formally contradictory claims of supremacy with actual trade-offs as to substance. This relationship, going back to the first *Solange* ruling, has worked well but is ultimately unsatisfactory for both law and legal doctrine, as the contradiction of supremacy claims nurtures judicial unrest. Pluralism is no solution to these shortcomings. And there are other undesirables.

Let us look at the rule of succession that emerged between these two contenders for primacy. On 6 July 2010 the *Bundesverfassungsgericht* ruled that the Court of Justice must be able to rule on an EU *ultra vires* issue before the German Court itself does.[8]

What is happening here, apart of course from the gesture of deference, is that both sides are seeking to address their hierarchical conundrum by finding a regulated, accepted, succession of appearances, a taking of turns. There is no denying that a change is slipping in with the rule that the EU Court must first have had its say before a domestic court may judge on an alleged conflict. What change? In such a succession, the claims of the last word and of highest authority are losing ground to an underlying agreement about the order of succession. And where there is agreement, the claims of ultimate hierarchy are put into perspective.[9] Incidentally, this succession of appearances might be said to be inherent in the preliminary

[8] BVerG, 2 BvR 2661/06 (*Honeywell*).

[9] More fundamentally: hierarchy is often based on agreement, as is well expressed in the French maxim: *Grattez le décret et vous trouverez le pacte*: scratch the (vertical) decree and you'll find the (horizontal) deal. But the wisdom is also found in figures of thought such as social contract as the basis of authority.

proceedings of Article 267 TFEU and is accepted on that basis by several other constitutional courts.

Why is the agreement acceptable to all courts involved? As to the form and in terms of logic and primacy, strictly, the French and German Courts keep the last word, while the Court of Justice will find solace in the rule that the one who has *préséance* is the more important one. More substantively, the agreement institutionalizes the oft-praised dialogue between the courts and minimizes the chances of *accidents de parcours*: the Court of Justice ruling with priority on the validity of secondary Union law is able to cater for national constitutional sensitivities and, in case the Court upholds a contested Union act, the national courts ruling subsequently are at least fully informed of the reasons for this.

So what does this mean for the law and doctrine? Succession is the way for time to proceed and produce development through a chain of events. Nature uses it, life does. And so does the law, which has put this power of time to controlled use in rules of procedure, in a way we are all familiar with.

The succession of events, to return to this aspect of time, also aids the development of a rough form of the law outside of this regulated sphere, as the rulings in the Melki dance above well demonstrate. Judicial rulings are always historical events in the first place (and all law is really a specific form of history). Between the French rulings from competing instances and the ruling of an even more distant court (the Court of Justice), there is a very obvious chain. The chain is, however, not governed by procedural law, as it links up different legal orders and different systems of judicial procedure.

Or is it? Are there no rules of procedure in any form, governing or guiding the succession of rulings? We would suggest taking a better look: there might be some rules there, and more might be in the making. The French constitutional procedure of the *question prioritaire de constitutionnalité* is obviously a legal rule governing the intercourse between distinct legal systems inside France in a temporal, procedural way. The *Melki* ruling by the CJEU (and its underlying consent) extends the reign of this rule to some extent into the EU legal order. As Arthur Dyevre demonstrates in his delightful piece on 'The Melki Way', the CJEU 'accepted the *modus vivendi* offered by the *Conseil d'Etat* and the Constitutional Council.'[10]

Why is all of this so fundamentally interesting? For one thing, because in all discussion about pluralism and intercourse between legal orders, so far, the idea of bringing this intercourse (dialogue, etc.) under some incipient form of law is generally refused (it was mooted by this journal a few years ago).[11] What is hap-

[10] A. Dyevre, 'The Melki Way: The Melki Case and Everything You Always Wanted to Know about French Politics (but Were Afraid to Ask)', in M. Claes et al. (eds.), *Constitutional Conversations in Europe. Actors, Topics and Procedures* (Cambridge, Intersentia 2012) p. 309-322.

[11] '"The Law of Laws" – Overcoming Pluralism', 4 *EuConst* (2008) p. 395-398.

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pening here is just that: the creation of procedural law, regulating a succession of steps, bridging legal orders in a normative, non-hierarchical way, on the basis of agreement.

But is this *law*, really? Constitutional doctrine generally refuses to acknowledge a form of law between distinct legal orders, because this law would have no hierarchically supreme instance on which to draw its authority. Now that is precisely what time and succession allow: an escape from the shackles of hierarchy.

Can courts of law be parties in an agreement leading to law? Let us turn to our last case in point. In the negotiations for accession of the European Union to the European Convention, the Court of Justice has intervened to secure the same sort of prior review by itself of EU rules before these come under the scrutiny of the Strasbourg Court. The Strasbourg Court has accepted this formula, and together the two courts have addressed their agreement to the negotiators following one of their periodic meetings, on 17 January 2011. It is included in the draft agreement on the accession of the EU to the ECHR of 14 October 2011 and likely to be part of the accession instruments.[12]

It is natural for legal scholarship to find fault with courts from different legal orders seeking a role in the legislative or treaty-making process, as is happening here, and thus bridging the gulf between systems in a sort of contractual way. But one may also appreciate it as a way to shed the shackles of system and harness the powers of time.

There is no need to go back to founders of ancient Greek philosophy such as Anaximander and Heraclitus, but it may help, to see how at some point in our intellectual history, Time (and the time of succession specifically) was seen to be the ultimate court and source of law. It is a poor rudiment of this understanding when we defer to History as our ultimate court of law. In our modern understanding, the virtues of logic and system have in many respects imposed themselves

[12] 'In proceedings to which the European Union is co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the Conventionrights at issue of the provision of European Union law as under para. 2 of this Article, then sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment and thereafter for the parties to make observations to the Court. The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court'; Art. 3(6) of the Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms <www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Meeting_reports/CDDH_2011_009_en.pdf>, last visited on 10 March 2013. The non-EU member states who participate in the present negotiations opposed to the prior involvement mechanism, which is viewed as contrary to the subsidiarity principle and creating a privilege for the European Court of Justice, see Appendix III, section 3, Meeting report, Fourth Negotiating Meeting, at p. 15, <www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/Web_47_1%282013%29R04_EN_final.pdf>, last visited on 10 March 2013.

upon law, to the detriment of the virtues of time. That is understandable and it helps to run complex modern systems of law. But when law is entering poorly chartered waters such as that of the composite constitutional order involving the EU and its member states, we should not be so averse to the powers of Time as to shun them as more direct sources of our legal understanding and even of law.

The situation may be expressed by saying that judicial instances are entering together into a scheme of time-sharing. This is, then, part of their sharing a legal development. This shared reality, also between judicial instances of different origins, is most obvious from the succession of judicial events and from procedures regulating such succession.

Here is the wide subject now put to constitutional scholarship for it to pick up and develop further.

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