FROM GOOD NEIGHBOURS TO BROTHERS IN ARMS?

The EU Charter as Avenue For Horizontal Constitutional Interaction

Marco Galimberti*

1. INTRODUCTION

Inspired by Edward Albee's famous play "*Who's Afraid of Virginia Woolf?*", in an essay published in 2013 and titled "*Who's Afraid of the Charter?*" Daniel Sarmiento highlighted the importance of the Charter of Fundamental Rights of the European Union (hereinafter "the Charter") as a unique opportunity for the development of a cooperative framework of fundamental rights protection in Europe.[1] In this regard, the Author argued that the time was ripe for the Court of Justice of the European Union ("CJEU") and the Constitutional Courts of the EU Member States to move beyond the respective illusions of unilateral supremacy under which they had lived until then.

A few years later, one may well observe that such advocated process of judicial engagement with the Charter has truly been under way since it came into force in 2009. As a matter of fact, an increasing number of explicit references to the Charter provisions are made by the CJEU[2] as well as by national judges,

* Research Fellow, PhD in Public and International Law, University of Milano-Bicocca.
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1 Sarmiento D., *Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe*, Common Market Law Review, Volume 50, Issue 5, 2013, pp. 1267–1304.

2 Particularly, the European Commission (2018) 2017 Report on the application of the EU Charter of Fundamental Rights. Luxembourg, Publications Office of the European Union highlighted that the number of CJEU decisions quoting the Charter "*increased from 43 in 2011 to 87 in 2012 and further to 113 in 2013 to 210 in 2014. Following a decrease to 167 in 2015, the number increased again to 221 in 2016, only to then fall slightly to 195 in 2017. Overall this reflects a tendency by the EU courts to quote the Charter in their decisions*". In this

especially when they make a reference for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union (TFEU).[3] This ongoing trend gives tangible evidence of an ever-expanding space that the EU catalogue of fundamental rights has been able to carve out both in the domestic and in the supranational case law.

Alongside these ever-growing references from a purely "quantitative" point of view, a significant breakthrough in terms of a new "qualitative" approach to the Charter may also be recognized in the national constitutional jurisprudence over the last decade. The latest example of this shift can be found in two joint orders of the German Federal Constitutional Court, which fine-tuned the Karlsruhe case law by invoking EU fundamental rights as a standard of review in November 2019. Interestingly enough, the recent Charter-related jurisprudence of the *Bundesverfassungsgericht* aligns with the path that, *mutatis mutandis*, the French legislator and other foreign jurisdictions (such as the Austrian *Verfassungsgerichtshof* and the Italian *Corte costituzionale*) took in their own legal orders over the last few years.

Against this backdrop, the present work primarily seeks to shed some light on two competing paradigms: on the one hand, a "decentralizing" tendency underlying the CJEU case law, which challenges – and, to some extent, even marginalizes – the role of Constitutional Courts as fundamental rights adjudicators (section 2); on the other hand, a national tendency to make the Charter a standard of judicial review of laws, thereby giving priority to the interlocutory review of constitutionality over the preliminary reference procedure before the CJEU (sections 3–5).

By retracing these opposite narratives, the paper aims to explore whether – and, if so, to what extent – Charter-based claims to a right to speak first witness, from a comparative point of view, the "horizontal" circulation of a common legal reasoning among European Constitutional Courts. In this perspective, the article suggests a possible reading of the Charter-related case law through the prism of constitutional justice models and hints at the difficult cohabitation thereof within a multilevel system of fundamental rights protection.

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regard, in Bronzini G., *The Charter of Fundamental Rights of the European Union: a tool to strengthen and safeguard the rule of law?*, www.diritticomparati.it, 2016, it is observed that the CJEU made over 500 explicit references to the Charter in its post-Lisbon rulings.

[3] According to the EU Agency for Fundamental Rights' 2018 Annual Report, national courts over the last few years have continued referring to the Charter for guidance and inspiration, even in a substantial range of cases falling outside the scope of EU law.

2. THE CHARTER'S DECENTRALIZING EFFECT: BITS AND PIECES OF A FEDERALIST PATTERN

In order to frame the first narrative of our analysis and to look at its distinctive attributes, it is useful to recall in brief some landmark steps that the Luxembourg jurisprudence took before and after the signature of the Charter. As a matter of fact, a glance at the CJEU relevant case law – even though, needless to say, confined to the purposes of our study – allows to set the background and to grasp the rationale of what can be understood, as we will see, as a kind of defensive counter-narrative set up by European Constitutional Courts.

As is well-known, since the foundational rulings *Costa*[4] and *Van Gend en Loos*,[5] the CJEU has consistently put the principles of primacy and direct effect of EU law into a safe, through a steady enhancement of its synergy with lower courts. A major milestone of this pathway can certainly be identified in the seminal *Simmenthal* decision, which made clear that each domestic judge called upon to apply provisions of EU law "*is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation*", without requesting or awaiting the prior setting aside of such provision by legislative or other constitutional means.[6] As the literature has perceptively remarked, the "*Simmenthal* mandate"[7] empowers each and every ordinary court to operate, therefore, as a *longa manus*[8] of the EU judicial mechanism.[9]

After three decades, the CJEU confirmed the core of the *Simmenthal* doctrine in its judgment *Filipiak* (2009), where the referring court asked whether a preliminary reference made by a national Constitutional Court could prevent ordinary judges from respecting the *primauté* and, as a consequence, from dis-applying domestic statutes found to be in contrast with EU law.[10] In its rejoinder, the CJEU firmly reiterated the domestic courts' obligation to abide by the principle of primacy of EU law and, thus, to decline to apply conflict-

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[4] CJEU, Case 6/64, *Flaminio Costa v ENEL* (1964).

[5] CJEU, Case 26/62, *Van Gend en Loos v Netherlands Inland Revenue Administration* (1963).

[6] CJEU, Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (1978).

[7] This expression is taken from Claes M., *National Courts' Mandate in the European Constitution*, Oxford, Hart Publishing, 2006, p. 69 and 108.

[8] In this regard, lower judges are perceptively defined as "*peripheral arms of the European judicial system*" in Cartabia M., *La fortuna del giudizio di costituzionalità in via incidentale*, in Ruggeri A. (ed.), *Scritti in onore di Gaetano Silvestri*, Volume 1, Torino, Giappichelli, 2016, p. 485.

[9] As regards the system of judicial review established in *Simmenthal*, together with the principles of primacy and direct effect of EU law, see *ex multis* Weiler J.H.H., *The European Court and National Courts—Doctrine and Jurisprudence: Legal Change in Its Social Context*, Oxford, Hart Publishing, 1998; Id., *A quiet revolution: The European Court of Justice and its Interlocutors*, Comparative Political Studies, Volume 26, Issue 4, 1994, pp. 510–534. On the same matter, Dyevre A., *Domestic Judicial Defiance in the European Union: A Systemic Threat to the Authority of EU Law?*, Yearbook of European Law, Volume 35, No. 1, 2016, pp. 106–144.

[10] CJEU, Case C-314/08, *Krzysztof Filipiak v Dyrektor Izby Skarbowej w Poznaniu* (2009).

ing statutes, regardless of any previous judgment rendered by a Constitutional Court that would keep it in force on a provisional basis.

After the Charter's entry into force, the CJEU emphasized the binding nature of such obligation upon lower courts also in *Åkerberg Fransson*,[11] which was delivered on the very same day of the equally famous judgment *Melloni* (2013).[12] Sitting in Grand Chamber, the Court provided for a broad interpretation of the scope of the Charter as defined in Article 51(1) thereof,[13] which stipulates in a somewhat cryptic way that the Charter provisions are addressed to the Member States "only when they are implementing Union law".[14] According to the clarification given in *Åkerberg Fransson*, such clause refers generally to any case falling within the "scope of application" of EU law.[15] In this respect, the decision at hand made clear that "*situations cannot exist which are covered* […] *by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter*" (para. 21).

In view of the foregoing, the CJEU made the key point that the scope of application of the Charter cannot be narrower than that of EU law itself. Drawing on this broad definition of the matters falling within the scope of EU law, the Court eventually rejected a national judicial practice which made the obli-

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[11] CJEU, Case C-617/10, *Åklagaren v Hans Åkerberg Fransson* (2013). For an analysis of the case see, among others, Hancox E., *The meaning of "implementing" EU law under Article 51(1) of the Charter: Åkerberg Fransson*, Common Market Law Review, Volume 50, Issue 5, 2013, pp. 1411–1432; Van Bockel B., Wattel P., *New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after Åklagaren v Hans Åkerberg Fransson*, European Law Review, Volume 38, Issue 6, 2013, pp. 863–880; Lenaerts K., Gutierrez Fons J., *The Place of the Charter in the EU Constitutional Edifice*, in Peers S., Hervey T., Kenner J., Ward A. (eds.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford, Hart Publishing, 2014, pp. 1566–1568.

[12] In *Åkerberg Fransson*, the CJEU expressly referred to CJEU, Case C-399/11, *Stefano Melloni v Ministerio Fiscal* (2013) by pointing out that "*national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised*" (para. 29). See Groussot X., Olsson I., *Clarifying or Diluting the Application of the EU Charter of Fundamental Rights? – The Judgment in Akerberg and Melloni*, Lund Student EU Law Review, Volume 2, 2013, pp. 7–35.

[13] For a thorough assessment of Article 51 of the Charter and the CJEU relevant case law, see Spaventa E., *The interpretation of Article 51 of the Charter of Fundamental Rights: the dilemma of a stricter or broader application of the Charter to national measures*, Study commissioned by the PETI Committee European Parliament, PE 556.930, www.europarl.europa.eu/RegData/etudes/STUD/2016/556930/IPOL_STU(2016)556930_EN.pdf.

[14] However, according to the broader interpretation provided in the Explanations Relating to the Charter of Fundamental Rights (to which the CJEU itself referred to), "*the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law*". See Explanations Relating to the Charter of Fundamental Rights, in Official Journal of the European Union, 14 December 2007, C 303/17.

[15] CJEU, Case C-617/10, *Åklagaren v Hans Åkerberg Fransson* (2013), para. 19.

gation to set aside provisions contrary to EU fundamental rights conditional upon that infringement being clear from the text of the Charter or its relating case law.[16] Accordingly, ordinary courts are entitled to review domestic statutes in the light of EU law, and especially of the Charter, on their own authority. What is more, as the CJEU stressed from *Filipiak* onwards, lower courts are not only empowered to set aside national provisions found to be inconsistent with the Charter but rather are also enabled to disregard any previous decision given by a Constitutional Court as concerns the validity of domestic legislation.

There is therefore no doubt that, when it comes to checking the compliance of laws with EU fundamental rights, common judges shall act under the aegis of the Luxembourg Court as to the interpretation of the Charter.[17] Arguably, the malleability of the Charter's scope of application set forth in *Åkerberg Fransson* further enhances the authority of the CJEU as a fundamental rights adjudicator and, meanwhile, strengthens the role of lower courts as decentralized EU judges.

Another prominent example of this trend can be detected in the CJEU recent case law concerning the direct effects of the Charter. To be more precise, decision *Vera Egenberger* (2018)[18] is just one of the latest bricks that the Court added to a wide array of cases – which include, among others, *Defrenne*,[19] *Mangold*,[20] *Kücükdeveci*[21] and *Association de médiation sociale*[22] – concerning the direct effect of the Charter provisions.[23] Particularly, judgment *Egenberger* recognized that both Article 21 (prohibition of discrimination) and Article 47 of the Charter (right to effective judicial protection) are able to produce horizontal

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[16] According to the CJEU, such judicial practice adopted in Sweden "*withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice, whether that provision is compatible with the Charter*" (*ibi*, para. 48).

[17] According to Victor Ferreres Comella, ordinary judges work under the guidance of the CJEU as the "supreme interpreter" of EU law, including the EU fundamental rights guaranteed under the Charter. See Ferreres Comella V., *Constitutional Courts and Democratic Values*, New Haven, Yale University Press, 2009, p. 111 et seq.

[18] CJEU, Case C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* (2018).

[19] CJEU, Case C-43/75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* (1976).

[20] CJEU, Case C-144/04, *Werner Mangold v Rüdiger Helm* (2005).

[21] CJEU, Case C-555/07, *Seda Kücükdeveci v Swedex GmbH & Co. KG* (2010).

[22] CJEU, Case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT and Others* (2014).

[23] On the horizontal direct effect of EU fundamental rights see, *ex multis*, Frantziou E., *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis*, Oxford, Oxford University Press, 2019; Spaventa E., *The Horizontal Application of Fundamental Rights as General Principles of Union Law*, in Arnull A. et al. (eds.), *A Constitutional Order of States – Essays in Honour of Alan Dashwood*, Oxford, Hart Publishing, 2011, pp. 199–218; Leczykiewicz D., *Horizontal Application of the Charter of Fundamental Rights*, European Law Review, Volume 38, Issue 4, 2013, pp. 479–497.

direct effect between private parties.[24] By virtue of the direct effect that these provisions enjoy, the European judges drew the conclusion that lower courts shall ensure judicial protection deriving therefrom and guarantee full effectiveness "*by disapplying if need be any contrary provision of national law*".[25] Similarly, in *Max-Planck-Gesellschaft*[26] and *Bauer and Broßonn*[27] the Court acknowledged for the first time the horizontal direct effect of Article 31(2) of the Charter in employment relationships.[28] On top of that, in *Cresco* (2019)[29] the CJEU took a further step forward: lower courts have not only to set aside any statute being in conflict with EU law but also to apply, instead of it, any provision granting a higher level of protection to the rights of the individual.[30]

Most recently, ruling *TSN and KT*[31] seems to set some initial boundaries to a feared overstretching of the scope of the Charter under Article 51(1), at least in cases of so-called EU "minimum harmonisation".[32] In fact, it is com-

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[24] In this respect, the CJEU made clear that both Article 21 and Article 47 of the Charter are sufficient in themselves: they do not need to be made more specific by any provision of EU or national law to confer on individuals "a right they may rely on as such" in disputes between them in a field covered by EU law.

[25] CJEU, Case C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* (2018), paras. 76–79. After *Egenberger*, in Case C-68/17, *IR v JQ* (2018) the CJEU pointed out that "*the prohibition of all discrimination on grounds of religion or belief, now enshrined in Article 21 of the Charter, is* […] *a mandatory general principle of EU law and is sufficient in itself to confer on individuals a right that they may actually rely on in disputes between them in a field covered by EU law* […] *Accordingly, in the main proceedings, if it considers that it is impossible for it to interpret the national provision at issue in a manner that is consistent with EU law, the referring court must disapply that provision*" (paras. 69–70).

[26] CJEU, Case C-684/16, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Tetsuji Shimizu* (2018).

[27] CJEU, Joined Cases C-569/16 and C-570/16, *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn* (2018).

[28] *Ibi*, para. 85: "*The right to a period of paid annual leave, affirmed for every worker by Article 31(2) of the Charter, is* […], *as regards its very existence, both mandatory and unconditional in nature, the unconditional nature not needing to be given concrete expression by the provisions of EU or national law* […] *It follows that that provision is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter*". Among many others, the cases of *Bauer* and *Max-Planck* are also touched upon, from the interesting perspective of Article 52(1) of the Charter in light of the CJEU jurisprudence and the constitutional traditions of the Member States, in Tridimas T., Gentile G., *The Essence of Rights: An Unreliable Boundary?*, German Law Journal, Volume 20, Issue 6, 2019, p. 808.

[29] CJEU, Case C-193/17, *Cresco Investigation GmbH v Markus Achatzi* (2019).

[30] More specifically, in a case dealing with discrimination on grounds of religion under Article 21 of the Charter, the CJEU held that "*a national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and must apply to members of the disadvantaged group the same arrangements as those enjoyed by the persons in the other category*" (*ibi*, para. 80).

[31] CJEU, Joined Cases C-609/17 and C-610/17, *Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v Hyvinvointialan liitto ry and Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Satamaoperaattorit ry* (2019).

[32] On the matter of "minimum harmonisation" and horizontal direct effects, see also CJEU, Case C-581/18, *RB v TÜV Rheinland LGA Products GmbH and Allianz IARD S.A.* (2020)

mon ground that EU minimum harmonising measures contribute to curb the application of the Charter and, in the case at issue, dilute the direct effects of its Article 31(2). However, if we take into consideration that the contested legislation falls outside the scope of the Charter because it falls outside the scope of EU law, *Fransson*'s principle that "*the applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter*" can be said to remain substantially intact.[33]

In light of the Luxembourg jurisprudence we have traced so far, it is thus possible to identify a common thread, i.e. a kind of federalist design underlying the EU judicial system. Accordingly, EU fundamental rights protection is entrusted to the CJEU in close connection with lower courts by means of a twofold tool, such as the preliminary reference mechanism under Article 267 TFEU and the power to set aside a piece of legislation at variance with EU provisions endowed with direct effect. This federalist architecture brings about a progressive shift of the centre of gravity for fundamental rights protection: on the one hand, this tendency fosters the entrenchment of a "decentralized"[34] system of fundamental rights protection; on the other hand, it side-lines the position of national Constitutional Courts as fundamental rights gatekeepers, even though it does not directly affect their review of legislation in any way whatsoever.[35]

Nevertheless, this pressure towards decentralization characterizing the CJEU case law has to reckon with an equal and opposite "re-centralizing" reaction by constitutional jurisdictions.[36] From this perspective, in the next pages we

and CJEU, Case C-588/18, *Federación de Trabajadores Independientes de Comercio (Fetico) and Others v Grupo de Empresas DIA S.A. and Twins Alimentación S.A.* (2020).

33 See, in this respect, Gennusa M., *Le misure nazionali più favorevoli: un limite all'applicabilità della Carta? Il caso TSN e AKT*, Quaderni costituzionali, No. 1, 2020, pp. 165–169.

34 However, some Scholars opted for the opposite expression of "centralizing tendencies" when referring to the relevant case law of the CJEU. In this sense, see De Visser M., *National Constitutional Courts, the Court of Justice and the Protection of Fundamental Rights in a Post-Charter Landscape*, Human Rights Review, Volume 15, Issue 1, p. 44. On the "centralizing effect" generated by the interpretation and application of EU fundamental rights, see also Claes M., De Visser M., *The Court of Justice as a federal constitutional court: a comparative perspective*, in Cloots E., De Baere G., Sottiaux S. (eds.), *Federalism in the European Union*, Oxford, Hart Publishing, 2012, pp. 83–109.

35 Accordingly, see Ferreres Comella V., *Constitutional Courts and Democratic Values*, *cit.*, pp. 125–126; Torres Perez A., *The Challenges for Constitutional Courts as Guardians of Fundamental Rights*, in Popelier P., Mazmanyan, Vandenbruwaene W. (eds.), *The Role of Constitutional Courts in Multilevel Governance*, Cambridge, Intersentia, 2013, p. 53. In particular, De Visser highlighted that Kelsenian Constitutional Courts risk being side-lined by regular judiciary with regard to the determination of constitutional issues which can also be expressed in terms of EU law. See De Visser M., *Constitutional review in Europe: A Comparative Analysis*, Oxford, Hart Publishing, 2014, p. 427.

36 Paris D., *Constitutional Courts as Guardians of EU Fundamental Rights? Centralised Judicial Review of Legislation and the Charter of Fundamental Rights of the EU. European Court of Justice (Fifth Chamber), Judgment of 11 September 2014, Case C-112/13, A v B and others*, European Constitutional Law Review, Volume 11, Issue 2, 2015, p. 399.

will see the attempts of an ever-growing number of European Constitutional Courts to "re-nationalize" fundamental rights protection by making the Charter a standard of judicial review and, in particular, claiming their right to the first word *vis-à-vis* the CJEU in cases of "dual preliminarity". It is exactly within this dynamic framework spanned by decentralizing and re-centralizing strains that a "horizontal" interplay among Constitutional Courts comes to the fore as a further (yet still largely undiscovered) area of judicial interaction.

3. TOWARDS NATIONAL RE-CENTRALIZATION: FIRST CALLS FOR A *JUS PRIMI VERBI*

A pioneering example of domestic claim to a "right to speak first" can be identified in the French constitutional reform that introduced the so-called "*question prioritaire de constitutionnalité*" (hereinafter "QPC") in 2009.[37] According to the QPC, lower judges are required to submit a question of constitutionality to the *Conseil Constitutionnel* as a priority rule whenever the same piece of national legislation raises doubts of compatibility with, on the one side, the French Constitution and, on the other side, EU law or international law.

More precisely, this *ex post* constitutional review does not prevent ordinary courts from carrying out their dispersed review of legislation under EU law, but rather delays the exercise thereof. Indeed, all French judges retain their power to set aside domestic provisions they find to be in contrast either with EU law (including the Charter) or with international obligations (such as the European Convention on Human Rights, "ECHR") once the *Conseil Constitutionnel* has completed its review of constitutionality.[38] In this respect, some insightful comments underlined that the QPC mechanism aims at placing the *Conseil* at the very centre of the judicial review of laws and, especially, of the system of fundamental rights protection.[39]

Considering a referral from the French *Cour de Cassation* which questioned the compatibility of the QPC with the EU legal system, in *Melki and Abdeli* (2010) the CJEU firmly upheld that a lower court being called upon to enforce EU provisions has a duty to give them full effect and, if necessary, to deny "of

[37] Organic Law no. 1523 of 10 December 2009.

[38] Bossuyt M., Verrijdt W., *The Full Effect of EU Law and of Constitutional Review in Belgium and France After the Melki Judgment*, European Constitutional Law Review, Volume 7, Issue 3, 2011, pp. 372–373.

[39] See Komarek J., *The place of constitutional courts in the EU*, European Constitutional Law Review, Volume 9, Issue 3, 2013, p. 420; Id., *National constitutional courts and the European Constitutional Democracy*, International Journal of Constitutional Law, Volume 12, Issue 3, 2014, p. 526; D. PARIS, *Constitutional Courts as Guardians of EU Fundamental Rights? Centralised Judicial Review of Legislation and the Charter of Fundamental Rights of the EU. European Court of Justice (Fifth Chamber), Judgment of 11 September 2014, Case C-112/13, A v B and others*, cit., p. 392.

its own motion" the application of any conflicting statute.[40] According to the reasoning carried out in *Melki*, national judges still have an obligation to make a reference for a preliminary ruling even when a question of constitutionality on the very same matter has already been raised before the *Conseil Constitutionnel*.[41]

However, the CJEU made clear that EU law does not preclude the *Conseil*'s right to the first word, insofar as lower courts remain free to submit pursuant to Article 267 TFEU at whatever stage of the proceedings – even at the end of an interlocutory procedure for the review of constitutionality – any question they consider necessary; to adopt any measure intended to ensure provisional judicial protection to the rights conferred under the EU legal order; and to dis-apply, even at the end of an interlocutory procedure of constitutionality, the internal provisions found to be in contrast with EU law.[42]

Just a few years later, the same arrangement set out in *Melki* was essentially transplanted to a case involving the Austrian centralised system of judicial review. Taking a step backwards, it is worth reminding that since the early days of its European jurisprudence the Austrian Constitutional Court (*Verfassungsgerichtshof*, hereinafter "VfGH") showed deference toward the primacy of EU law, whilst refusing to make EU provisions a benchmark of review.[43] Yet, in March 2012 the VfGH overturned its long-standing jurisprudence by incorporating EU law (and, specifically, the Charter) into the judicial review of laws.[44]

In so doing, a momentous ruling of the VfGH explained that its earlier case law cannot find application in relation to the Charter since the Lisbon Treaty came into force. As a matter of fact, the Charter is a significantly distinct area from the European Treaties, "*to which special provisions apply arising from the domestic constitutional set-up*" (para. 25). In particular, this clarification relied upon the so-called "principle of equivalence" by which "*in the absence of Community rules governing the matter it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, however, that such rules are not less favourable than those governing similar domestic actions*" (para. 27).

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[40] CJEU, Joined Cases C-188/10 and C-189/10, *Aziz Melki and Sélim Abdeli* (2010), paras. 43–44.

[41] In this regard, the CJEU held that the QPC as interpreted by the *Cour de Cassation* would be inconsistent with EU law and, especially, with its primacy, since lower courts could be prevented from exercising their right – or fulfilling their obligation – pursuant to Article 267 TFEU. See CJEU, Joined Cases C-188/10 and C-189/10, *Aziz Melki and Sélim Abdeli* (2010), paras. 45–47.

[42] *Ibi*, paras. 52–53.

[43] By way of example, the VfGH made clear that compliance of a domestic provision with EU law cannot be the object of constitutional review in Judgments no. 14.886/1997, 15.189/1998, 15.215/1998, 15.753/2000, 15.810/2000 and 18.266/2007.

[44] Austrian Constitutional Court, Joined Cases U 466/11-18 and U 1836/11-13, Judgment of 14 March 2012.

Starting from this assumption, the VfGH's reasoning can be summarized in three key steps. First, it drew attention to the fact that several Charter rights correspond with the rights laid down in the ECHR. Second, the Convention is directly applicable and enjoys constitutional status within the domestic hierarchy of norms: the VfGH ensures protection to the rights contained therein, as the Austrian legal system provides for a "*concentration of claims for violation of constitutionally guaranteed rights with one instance, i.e. the Constitutional Court*" (paras. 31–33). Third, on the basis of the recalled principle of equivalence, the Charter rights being comparable to the ones protected under the ECHR may also be invoked as constitutionally guaranteed rights.[45]

As a result of this syllogism, the rights enumerated in the Charter should be considered as a standard for review before the VfGH inasmuch as they are similar in their "wording and purpose" to those guaranteed under the Constitution.[46] In the same vein, the Court added that it will continue to looking at Luxembourg jurisprudence and to refer a matter for a preliminary ruling "*if there are doubts on the interpretation of a provision of EU law, including also the Charter*" (para. 40). However, there is no duty to raise a preliminary reference before the CJEU if a constitutionally guaranteed right – and, in particular, a right protected under the ECHR – has the same scope as a Charter's right.[47] All in all, this decision entitled for the first time the VfGH, borrowing its own words, "*to decide on a case-by-case basis which of the rights of the Charter of Fundamental Rights constitute a standard of review for proceedings before the Constitutional Court*"(para. 36).

Two years later, in *A v. B and others* (2014) the CJEU ruled on the consistency of the Austrian *revirement* with the EU legal system.[48] Relying on its

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[45] On this syllogism the VfGH followed since 2012, see Orator A., *The Decision of the Austrian Verfassungsgerichtshof on the EU Charter of Fundamental Rights: An Instrument of Leverage or Rearguard Action?*, German Law Journal, Volume 16, Issue 6, 2015, p. 1443 and Paris D., *Constitutional Courts as Guardians of EU Fundamental Rights? Centralised Judicial Review of Legislation and the Charter of Fundamental Rights of the EU. European Court of Justice (Fifth Chamber), Judgment of 11 September 2014, Case C-112/13, A v B and others*, cit., p. 393 et seq.

[46] Austrian Constitutional Court, Joined Cases U 466/11-18 and U 1836/11-13, Judgment of 14 March 2012, paras. 34–35. According to the VfGH, it would be unconstitutional if it were not competent to adjudicate on the rights enshrined in the Charter, given the largely overlapping areas of protection between the Charter itself and the ECHR.

[47] *Ibi*, para. 44. In order to buttress this point, the VfGH mentioned CJEU judgments *Cilfit* and *Intermodal*, which had excluded the need to make a reference for a preliminary ruling.

[48] CJEU, Case C-112/13, *A v. B and others* (2014). For an analysis see De Visser M., *Juggling centralized constitutional review and EU primacy in the domestic enforcement of the Charter: A. v. B.*, Common Market Law Review, Volume 52, Issue 5, 2015, pp. 1309–1337; Düsterhaus D., *Procedural Primacy and Effective Judicial Protection: A Trilogue*, Maastricht Journal of European and Comparative Law, Volume 23, No. 2, 2016, pp. 317–331; Paris D., *Constitutional Courts as Guardians of EU Fundamental Rights? Centralised Judicial Review of Legislation and the Charter of Fundamental Rights of the EU. European Court of Justice (Fifth Chamber), Judgment of 11 September 2014, Case C-112/13, A v B and others*, cit., p. 399 et seq.

well-established case law, it maintained right away that the referral to the VfGH for the general striking down of national statutes "*does not affect the right of the ordinary courts to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate*".[49] According to the CJEU, whenever a domestic provision is deemed to be at variance with both EU law and the Constitution, lower courts neither lose their powers (nor are relieved of their duties) to make a preliminary reference under Article 267 TFEU and to set aside a statute contrary to EU law, for the mere fact that the declaration of unconstitutionality is subject to the submission of a mandatory reference to the Constitutional Court.[50] In a nutshell, it can be inferred that EU law as such does not hinder the incorporation of the Charter into the centralized system of judicial review, as long as neither the preliminary reference procedure nor the remedy of dis-application is impaired.[51]

In light of the above, the reasoning carried out in *A v. B and others* closely adhered to the one the CJEU had already followed in *Melki*.[52] Not without a certain degree of comparative creativity, it is precisely this clear-cut affinity that allows to make a comparison between the Austrian and French cases. First of all, a patent element of differentiation can be identified in their legal grounds: while in France a priority rule was adopted through a constitutional reform, in Austria a judicial *revirement* by the Constitutional Court took centre stage. In addition to this, it may be argued that the ultimate goal of the Austrian overruling was not the drawing up of a priority rule in favour of the interlocutory procedure for constitutional review. Rather, the strategy pursued by the VfGH seems to be a more radical one, i.e. the use of EU fundamental rights as a yardstick for review, on account of the principle of equivalence and the constitutional status that the Charter enjoys in Austria. In other words, unlike the QPC mechanism codified in France, the VfGH claimed not only to speak first but even to have the only word, whenever the rights guaranteed by the Charter correspond with rights protected under the Constitution. In comparison with the French QPC, the

49 CJEU, Case C-112/13, *A v. B and others* (2014), para. 32.

50 *Ibi*, paras. 36–38. Indeed, the CJEU stated that the very essence of EU law is contrary to any national provision and any legislative, administrative or judicial practice that impairs the effectiveness of EU law by withholding from national courts the power to set aside a piece of legislation which might prevent EU rules from having full force and effect.

51 *Ibi*, para. 40: "*in so far as national law lays down an obligation to initiate an interlocutory procedure for the review of constitutionality, the functioning of the system established by Article 267 TFEU requires that the national court be free, first, to adopt any measure necessary to ensure the provisional judicial protection of the rights conferred under the EU legal order; and, second, to dis-apply, at the end of such an interlocutory procedure, that national legislative provision if that court holds it to be contrary to EU law*".

52 In this sense, Paris D., *Constitutional Courts as Guardians of EU Fundamental Rights? Centralised Judicial Review of Legislation and the Charter of Fundamental Rights of the EU. European Court of Justice (Fifth Chamber), Judgment of 11 September 2014, Case C-112/13, A v B and others*, cit., p. 402 noticed that in *A v. B and others* "*the reasoning core is technically a 'copy and paste' of the Melki reasoning*".

Austrian case could then open a deeper breach in the acceptance of the *primauté* and of the CJEU monopoly on the interpretation of EU law.

The cautious openness of CJEU judgment *A v. B and others* to the new course of the Austrian case law[53] – albeit subject to strict compliance with the *Simmenthal* doctrine and the requirements laid down in *Melki* – can be construed as an effective way out that avoids direct collision with the VfGH, as well as with any other Constitutional Court which would opt for an analogous paradigm. From the perspective of a multilevel system of fundamental rights protection, the legal reasoning in *Melki* and *A v. B and others* are then oriented towards closer integration (rather than separation) between the national and supranational legal orders – and between their respective catalogues of rights – in the name of the maximum standard of protection.

In spite of this conciliatory approach taken by the CJEU, one may still wonder whether the expansion of such a "re-centralizing" attitude beyond the French and Austrian legal frameworks would raise further concerns for the harmonic coexistence of a variety of charters and judicial remedies within the European realm of fundamental rights protection. In this regard, Christoph Grabenwarter perceptively foresaw that the VfGH's *revirement* could also set an appealing example for the jurisprudence of other European Constitutional Courts.[54] And in fact, as we will see in the next paragraphs, the Italian and the German case law have confirmed to some extent that prediction.

4. ALL ROADS LEAD (FIRSTLY) TO ROME?

Broadening now the scope of our analysis to the Italian legal context, it should first be noticed that the Charter has been a seductive siren call for common judges since it entered into force. In line with the CJEU case law, lower courts and tribunals frequently set aside provisions they find incompatible with the Charter, rather than submitting a question of constitutionality to the Italian *Corte costituzionale* (hereinafter "ICC"), even when the fundamental rights guaranteed under the Charter correspond with rights protected under the Constitution. Yet, in some cases it happened that common judges dis-apply statutes deemed to be in contrast with EU law without bearing in mind that the Charter

[53] With regard to the following case law of the VfGH, see Kieber S., Klaushofer R., *The Austrian Constitutional Court Post Case-Law After the Landmark Decision on Charter of Fundamental Rights of the European Union*, European Public Law, Volume 23, No. 2, 2017, pp. 221–236.

[54] Grabenwarter C., *Verfassungsrecht, Völkerrecht und Unionsrecht als Grundrechtsquellen* in Merten D. et al. (eds.), *Handbuch der Grundrechte. Band VII/1: Grundrechte in Österreich*, Müller, Manz, 2014, p. 69.

is however addressed to the EU Member States "only when they are implementing Union law".[55]

According to some voices within the legal scholarship, such failure to abide by the material limits laid down in Article 51 of the Charter would ultimately result in a "spill-over effect" of the Charter itself.[56] This phenomenon fuels the risk that the partnership between the CJEU and lower courts through the avenue of the preliminary ruling mechanism, along with the remedy of dis-application, could end up sidestepping the role of the *Corte costituzionale* as a fundamental rights adjudicator. As a response to the warning about such scenario and, at the same time, to the calls for closer connection with Luxembourg, Judgment no. 269 of 2017 paved the way for a new season of ICC's European jurisprudence.[57]

By means of an *obiter dictum*, this decision provided a crucial "specification" about the remedies for the resolution of antinomies between EU law and national law in the event of so-called "dual preliminarity": that is to say, a dispute in which the same piece of legislation raise questions of constitutionality and, in the meantime, doubts of compatibility with EU law.[58] When considering cases of dual preliminarity, the ICC had constantly maintained that the

[55] An interesting example of this approach can be found in the Court of Cassation's judgment no. 54467/2016, which gave direct application to the principles of the Charter in order to deny the extradition of a Turkish citizen. In this ruling, the Italian Supreme Court maintained that Article 51 of the Charter is to be "interpreted in an extensive way", thus allowing the application of the Charter in all those cases in which a piece of domestic legislation affects an area of competence of the EU or a field governed by Union law, even though it does not implement EU law. According to the Court, in cases concerning fundamental rights protection a single element of connection with EU law is sufficient to justify the application of the Charter, even though such connection does not emerge in terms of strict implementation or enforcement of EU law. Another exemplary judgment is the one delivered in 2017 by a local ordinary court which dis-applied a piece of legislation regulating the use of surnames in the event of civil unions. In that circumstance, the ordinary court expressly refused to raise a question of constitutionality before the ICC by alleging that the domestic statute at issue had certainly infringed human dignity and the supreme interest of the child, which are both guaranteed under the Charter.

[56] See in particular Barbera A., *La Carta dei diritti: per un dialogo fra la Corte italiana e la Corte di giustizia*, report presented at the meeting between the Constitutional Tribunals and Courts of Spain, Portugal, France and Italy (Seville, 26–28 October 2017), www.rivistaaic.it, 2017, p. 4.

[57] Among the countless number of comments on this case see, in English, Faraguna P., *Constitutional Rights First: The Italian Constitutional Court fine-tunes its "Europarechts freundlichkeit"*, www.verfassungsblog.de, 14 March 2018; Di Marco R., *The "Path Towards European Integration" of the Italian Constitutional Court: the Primacy of EU Law in the Light of Judgment No. 269/17*, European Papers, European Forum, 14 July 2018, pp. 1–13.

[58] On the matter of "dual preliminarity" in the Italian legal framework see, *ex multis*, Cartabia M., *Considerazioni sulla posizione del giudice costituzionale di fronte a casi di 'doppia pregiudizialità' comunitaria e costituzionale*, Il Foro Italiano, Volume 120, No. 5, 1997, p. 222 et seq. For an analysis of the same issue in multilevel contexts, see Martinico G., *Multiple loyalties and dual preliminarity: The pains of being a judge in a multilevel legal order*, International Journal of Constitutional Law, Volume 10, Issue 3, 1 July 2012, pp. 871–896.

preliminary reference mechanism under Article 267 TFEU takes "logical and legal precedence" over the interlocutory procedure for constitutional review. Pursuant to this deeply entrenched case law, common judges must first make a reference for a preliminary ruling to the CJEU and only afterwards, if they still find it necessary, knock on the door of the Constitutional Court.

Nonetheless, Judgment no. 269 of 2017 specified that whenever a provision is liable to infringe at once the rights embedded in the Constitution and the rights guaranteed under the Charter, lower courts shall henceforth raise primarily the question of constitutionality even when the EU provisions at stake are self-executing. To be more precise, this reversal of the judicial remedies rests on two major premises, i.e. the "typically constitutional stamp" of the Charter and the large intersection of the latter with the rights and principles codified in the Italian Constitution (as well as in the Constitutions of other Member States).

Accordingly, it is made clear that any violation of the person's rights requires the *erga omnes* intervention of the ICC, also due to the principle which places a centralized system of judicial review at the foundation of the constitutional structure. When dealing with these cases, the Court shall thus carry out its scrutiny in the light of internal parameters "*and, possibly, in the light of European ones as well, in the order that is appropriate to each individual case*".[59] Furthermore, a point somewhat reminiscent of the logic underlying ICC's Order no. 24 of 2017 in the famous *Taricco* saga emphasized that all of this arrangement plays out "*within a framework of constructive and loyal cooperation between the various systems of safeguards, in which the Constitutional Courts are called to enhance dialogue with the CJEU*", so that the maximum protection of rights is assured at the system-wide level under Article 53 of the Charter.[60]

That being said, one of the most interesting aspects of the decision at hand, for our purposes, is the comparative landscape in which the ICC sets its *obiter dictum*. As a matter of fact, the Court first quoted in full some relevant excerpts from *Melki and Abdeli* and *A v. B and others*, in order to dispel any possible

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[59] In this respect, the ICC held that the new procedural order in cases of dual preliminarity is also aimed at ensuring that the rights guaranteed under the Charter are interpreted as relevant sources of law in this area, in harmony with the "constitutional traditions" as cited in Article 6 TEU and Article 52(4) of the Charter.

[60] In this perspective, we can also mention the recent Order no. 117 of 2019 by which the ICC grasped the opportunity to make a reference for a preliminary ruling to the CJEU in a case of dual preliminarity involving the interpretation of EU secondary law on the right to silence. Before carrying out the review of constitutionality, the ICC found it necessary to request a clarification on the interpretation and, possibly, the validity of EU law, in the name of "*the aforementioned spirit of loyal cooperation between national and European courts as to the definition of common levels of fundamental rights protection*". The latest example of this trend can be seen in ICC's Order no. 182 of 2020, which put forward to the CJEU a question concerning the interpretation of Article 34 of the Charter (social security and social assistance) on the matter of eligibility of third-country nationals for childbirth allowance and maternity allowance.

doubt as to the compatibility of the new priority rule with the EU legal system.[61] In evoking the CJEU jurisprudence, it is overtly underscored that EU law "does not preclude" as such the precedence of constitutional review, provided that this new procedural order complies with the principles set out by the Luxembourg jurisprudence. This explicit reference to the CJEU replies to similar questions raised by the French and Austrian judges bears witness to the watchful eye of the Italian justices on the foreign case law on the same matter. Moreover, the ICC substantiated its stance by adding that "*other national Constitutional Courts with longstanding traditions*", such as the Austrian one, follow an analogous line of reasoning.[62]

It goes without saying that the wording of Judgment no. 269 of 2017 does not allow in itself to grasp the degree of influence that the foreign case law had in practice on the ICC's legal reasoning. Yet, the exemplary reference made to the VfGH rests on more than one element of proximity with the Austrian case. A first common trait is that both courts fine-tuned their jurisprudence by way of an *obiter dictum*; whereas, as we have seen, the French QPC was the outcome of a constitutional reform. Apart from this lack of legislative grounds, another point of convergence lies in the constitutional rank that the Charter enjoys in the Austrian and Italian legal systems. By leveraging on this status, both the VfGH and the ICC conclude that the review of legislation in the light of the Charter falls within their own jurisdiction.

At the same time, a comparison between the above cases does not mean to overlook their substantive discrepancies. Particularly, we should keep in mind that the "constitutionalization" of the Charter in Austria lies upon certain assumptions which are typical of the domestic legal context. First, the VfGH directly applies the ECHR as a standard of review, due to the constitutional status that it enjoys in Austria. Second, its jurisprudence "constitutionalized" the Charter on the basis of the principle of equivalence between this latter and the ECHR. Third, any internal statute being at variance with the Charter must be struck down as a result of a proceedings before the VfGH, to the extent that EU fundamental rights correspond in their "content and purpose" with the rights guaranteed under the Constitution and the ECHR.

In view of the different status that the ECHR enjoys in the Austrian legal order, the VfGH's overruling seems thus to be underpinned by more justified grounds than the ICC's *obiter dictum*. In stark contrast to its Austrian peer, the *Corte costituzionale* has always denied to acknowledge constitutional rank to the ECHR. Moreover, letting aside the asymmetries between the two legal orders in terms of normative hierarchy, the VfGH has proved to be so far much

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[61] In addition to *Melki and Abdeli* and *A v. B and others*, see also CJEU, Case C-5/14, *Kernkraft-werke v Hauptzollamt Osnabrueck* (2015).

[62] By way of example, the ICC made reference to the aforementioned decision of the VfGH, Judgment U 466/11-18; U 1836/11-13 of 14 March 2012.

more deferential than the ICC toward the European Court of Human Rights.[63] Similarly, another distinctive character of the Austrian legal context lies in the commitment of its constitutional judges to enter into mutual interaction with the CJEU. In fact, as is well-known, the VfGH was one of the very first Constitutional Courts to make use of the preliminary reference procedure under Article 267 TFEU.[64] Conversely, the ICC was reluctant for a long time – as many other Constitutional Courts[65] – to actively engage in direct dialogue with Luxembourg, at least until it made its first references for a preliminary ruling to the CJEU in 2008 and 2013.[66]

The above inconsistencies that can be detected between the Austrian and Italian legal contexts, as well as their diverging attitude toward the European Courts, suggest that a certain degree of cautiousness is all the more necessary when it comes to comparing their Charter-related case law. Neither, whilst keeping in mind such divergences, one could take it for granted that a possible response of the CJEU to the ICC's *obiter dictum* would be as conciliatory as the one given to the Austrian (and French) judges.[67]

Moving from this connection between the Austrian and Italian decisions, it can be noted that the use of the comparative reasoning stands out as a turning point in the ICC's argumentative strategy. At first reading, the reference to the Austrian precedent may actually appear as a purely additional or ornamental

63 Borrowing Andreas Orator's words, "*for more than 50 years, and more intensively than most other constitutional courts in Europe, the Verfassungsgerichtshof has been citing judgments of the Strasbourg Court* […] *ECHR fundamental rights are now inherent in the domestic fundamental rights culture*". See Orator A., *The Decision of the Austrian Verfassungsgerichtshof on the EU Charter of Fundamental Rights: An Instrument of Leverage or Rearguard Action?*, cit., p. 1445.

64 Among many others, see Bobek M., *The impact of European mandate on ordinary courts*, in Claes M., De Visser M., Popelier P., Van De Heyning C., *Constitutional Conversations in Europe*, Cambridge, Intersentia, 2012, p. 301; Orator A., *The Decision of the Austrian Verfassungsgerichtshof on the EU Charter of Fundamental Rights: An Instrument of Leverage or Rearguard Action?*, cit., p. 1430.

65 As regards the topic of preliminary references made by Constitutional Courts to the CJEU see, among others, Claes M., De Visser M., Popelier P., Van De Heyning C., *Constitutional Conversations in Europe*, cit., and Dicosola M., Fasone C., Spigno I. (eds.), *The Preliminary Reference to the Court of Justice of the European Union by Constitutional Courts*, German Law Journal, Volume 16, No. 6, 2015.

66 Italian Constitutional Court, Judgments no. 103/2008 and no. 207/2013. See Barsotti V., Carozza P., Cartabia M., Simoncini A., *Italian Constitutional Justice in Global Context*, Oxford, Oxford University Press, 2015, p. 110 et seq.

67 Shortly thereafter, in *Global Starnet* (2017), the CJEU upheld that lower courts are required to refer a question for a preliminary ruling "*even if, in the course of the same national proceedings, the constitutional court of the Member State concerned has assessed the constitutionality of national rules in the light of regulatory parameters with content similar to rules under EU law*" (para. 26). Moreover, in *XC, YB and ZA v. Austria* (2018), the CJEU insisted that common judges are under a duty to give full effect to EU law, if necessary refusing of their own motion to apply any conflicting national provision. And, in what sounds as a cautionary backlash to the ICC, they do not have "*to request or to await the prior setting aside of that provision of national law by legislative or other constitutional means*" (para. 44).

cross-reference. At a closer look, however, this exemplary (and not exhaustive) reference – enshrined not by accident in an *obiter dictum* – seems to reflect a more far-reaching step inasmuch as it gives evidence of a common approach by a number of constitutional jurisdictions.

In this sense, the reference to "other national Constitutional Courts with longstanding traditions" hints at a horizontal cross-fertilization between Constitutional Courts having in common a long-standing pattern of constitutional justice.[68] More precisely, if we read between the lines of the ICC's legal reasoning, when justifying the need for its *erga omnes* intervention the Court let it be understood that the centralized system of review ensures that the principle of legal certainty is not impaired. In this respect, any deviation towards the non-application of statutes being at variance with EU law inevitably results in "*a form of unacceptable decentralized constitutional review of laws*":[69] a decentralization which would weaken the principle of legal certainty, i.e. one of the main values informing the Kelsenian paradigm of constitutional justice.[70]

Hence, it is precisely in the name of the principle of legal certainty that the *obiter* relates the staunch defence of the centralized model of constitutional review to the claim of a right to the first say whenever the Charter rights are involved in cases of dual preliminarity. In the ICC's legal reasoning we may then trace echoes of the awareness that, as Victor Ferreres Comella observed about the centralized system of review of laws, "*the sooner the constitutional court speaks, the more quickly any legal doubt would be dispelled*".[71] And, as the legal scholarship has aptly argued, the Constitutional Courts' right to speak first can be often even more important than the right to the last word.[72]

This being the case, one may then wonder whether a propagation of this new Charter-related jurisprudence across European Constitutional Courts might further sharpen the dichotomy between the centralized review of constitutionality and the EU decentralized judicial system. In the next section of the paper, we will see how such question is further fuelled by the German Federal Constitutional Court, whose case law recently started moving along a path similar to the one already undertaken in Austria and Italy.

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68 On the relation among institutionalized design of constitutional justice and Constitutional Courts' predisposition to look for argumentative support through references to external authority, see Bobek M., *Comparative reasoning in European Supreme Courts*, Oxford, Oxford University Press, 2013, p. 61 et seq.

69 Italian Constitutional Court, Judgment no. 269 of 2017, para. 5.3. *Conclusions on points of law*.

70 V. Ferreres Comella, *Constitutional Courts and Democratic Values*, cit., pp. 20–26.

71 *Ibi*, p. 23.

72 Lupo N., *The advantage of having the first word in the composite European Constitution*, Italian Journal of Public Law, Volume 10, No. 2, 2018, pp. 186–204.

5. WHEN THE GOING GETS TOUGH, KARLSRUHE GETS GOING

Just a few months before the ground-breaking decision on the European Central Bank's PSPP of 5 May 2020,[73] the *Bundesverfassungsgericht* (hereinafter "BVerfG") delivered on the same day two joint orders which fine-tuned its European case law in relation to fundamental rights protection.[74] In a first proceedings concerning a legal dispute about a matter that falls within the scope of application of EU law but that allows for different legislative designs at Member State level ("Right to be forgotten I"),[75] the First Senate of the Federal Constitutional Court upheld its past case law, which had always refrained from accepting EU fundamental rights as a standard of review of domestic legislation.[76] More specifically, the BVerfG maintained that, in cases dealing with a matter of ordinary legislation which is not fully harmonised under EU law, the fundamental rights enshrined in the Basic Law (*Grundgesetz*) remain the primary standard for reviewing the interpretation of national statutes, even though EU fundamental rights may also be applicable.[77]

Yet, in a parallel proceedings the First Senate issued a second order concerning a legal dispute governed by legal provisions that are fully harmonised under EU law and, thus, apply in a uniform way in all Member States ("Right to be forgotten II").[78] Strikingly enough, on that occasion the Federal Court for the first time held that when EU fundamental rights take precedence of application

[73] German Federal Constitutional Court, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15.

[74] For a comment see Wendel M., *The two-faced guardian – or how one half of the German Federal Constitutional Court became a European constitutional rights court*, Common Market Law Review, Volume 57, Issue 5, 2020, pp. 1383–1426 and, in this Journal, Greib M., Iacovides M., *Fundamental Rights Protection in Germany: The Right to Be Forgotten Cases and the Relationship between EU and German law*, Europarättslig tidskrift, No. 3, 2020, p. 441 et seq.

[75] German Federal Constitutional Court, Order of the First Senate of 6 November 2019, 1 BvR 16/13 (Right to be forgotten I).

[76] Notably, this holds true even where the German fundamental rights are found to be inapplicable due to the precedence of EU law and where the Charter, pursuant to its Article 51(1), is also applicable in the individual case. By way of example, for a list of decisions in which the Karlsruhe Court discarded the possibility of directly invoking EU fundamental rights in its review of domestic legislation see Schneider K., *The Constitutional Status of Karlsruhe's Novel "Jurisdiction" in EU Fundamental Rights Matters: Self-inflicted Institutional Vulnerabilities*, German Law Journal, Volume 21, Issue 51, 2020, p. 20, footnote no. 4.

[77] According to the BVerfG, this follows from the finding that where EU law affords leeway to design, it seeks to accommodate the diversity of fundamental rights regimes and it rests on the presumption that the application of German fundamental rights simultaneously ensures the level of protection required under the Charter as interpreted in the case law of the CJEU. An additional review on the basis of EU fundamental rights is only necessary if there are specific and sufficient indications showing that the Basic Law does not afford adequate fundamental rights protection under EU law.

[78] German Federal Constitutional Court, Order of the First Senate of 6 November 2019, 1 BvR 276/17 (Right to be forgotten II).

over German fundamental rights, as it was in the case at issue, it shall directly review the application of a piece of legislation by domestic authorities on the sole basis of EU law rather than of the *Grundgesetz*.[79] By means of incorporation of the Charter into the standard of review in constitutional complaint proceedings, the BVerfG thus "*discharges its responsibility with respect to European integration*" under Article 23(1) of the Basic Law.[80] According to the Federal Court, there would otherwise be a gap in protection as to the lower courts' application of EU fundamental rights due to the fact that, in contrast to the German legal order, individuals have no direct access to the CJEU to assert a violation of EU fundamental rights.[81]

In particular, with regard to this novel kind of review which rests on EU fundamental rights, the BVerfG boosts, though, the pursuit of a "close cooperation" with the CJEU. Such cooperative effort between the two courts hinges on drawing a distinction between the concepts of "interpretation" (on which Luxembourg aims to retain the last word) and "right application" (on which, by contrast, Karlsruhe claims final authority) of EU law, including the Charter's fundamental rights.[82] On the basis of this theoretical framework, the First Senate explains that where a question of interpretation has not yet been clarified in the CJEU case-law and the answer is also not clear from the outset based on established principles of interpretation – for instance, by drawing on the case law of the European Court of Human Rights[83]–, it will be up to the BVerfG itself to refer the question for a preliminary ruling pursuant to Article 267 TFEU.[84]

To a certain extent, such acknowledgment of CJEU's ultimate authority on the interpretation of EU law and the Federal Court's dialogic approach resemble

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79 *Ibi*, para. 32. By making a comparison with its earlier case law, the First Senate clarified that "*in its past decisions, the BVerfG has not yet expressly considered the possibility of directly invoking EU fundamental rights in its review*".

80 *Ibi*, para. 53. In this respect, the First Senate clarified that "*the Basic Law's openness to EU law under Article 23(1) GG does not relieve the German state of its responsibility in matters for which competences have been transferred to the EU; to the contrary, this provision provides for the participation of German state organs, which includes the Federal Constitutional Court, in developing and giving effect to European integration*".

81 *Ibi*, paras. 60–61. Moreover, it was specified that, when invoking EU fundamental rights as the relevant standard of review, the BVerfG will limit its review "*to whether the challenged decisions of ordinary courts sufficiently give effect to the EU fundamental rights and reflect the required balancing of conflicting rights with a tenable outcome*" (para. 111).

82 *Ibi*, paras. 68–69. However, it is made clear that this does not affect the duty for national courts of last instance to make a referral to the CJEU, as established in CJEU judgment *CILFIT* (1982).

83 In this regard, the Strasbourg Court case law serves as a supplementary source of interpretation in light of Article 52(3) of the Charter.

84 However, in the present case the First Senate found that it was not necessary to request a preliminary ruling from the CJEU, since the application of the EU fundamental rights did not raise any questions of interpretation to which the answer is not already clear from the outset nor questions that have not been sufficiently clarified in the Luxembourg case law.

the very same spirit of "constructive and loyal cooperation" among the different systems of fundamental rights protection that the Italian *Corte costituzionale*, in the wake of *Taricco*, endorsed in its Judgment no. 269 of 2017. By claiming a *jus primi verbi* towards the CJEU, both the ICC and the BVerfG thus prove to be aware of the strategic weight of their own preliminary reference to Luxembourg. While the past jurisprudence had always left in the hands of ordinary courts (in cooperation, if need be, with the CJEU) the review of whether EU fundamental rights are respected, the recent Charter-related decisions disclose the convergent aim of the ICC and the BVerfG to act as direct interlocutors of the CJEU in the logic of an ever-closer dialogue and, therefore, to legitimize themselves as European judges as well.[85]

In addition to the similarities that we can recognize between the Italian and German instances, the BVerfG's second order on the right to be forgotten seems to take a further step forward in terms of "horizontal" constitutional interaction. As a matter of fact, Karlsruhe interprets the aforementioned duty of cooperation with the CJEU as contingent upon the degree of convergence in the legal practice of the Member States "*from a systemic perspective, rather than on a case by case basis*".[86] This means that, in order to decide whether to apply or not Article 267 TFEU in a given case, the BVerfG shall undertake a comparative analysis of the standards of protection being provided not only in the case law of the CJEU, but also of other European Constitutional Courts. From this standpoint, it may be argued that the BVerfG, even more explicitly than the ICC did in Judgment no. 269 of 2017, goes beyond what may appear as a sporadic cross-reference and looks, instead, at an in-depth horizontal connection on a more systemic level.

Notably, we can recall that the Federal Court had used the comparative reasoning also in its first preliminary reference to the CJEU in the *Gauweiler* case (2015), where it quoted the jurisprudence of several Constitutional and Supreme Courts to demonstrate that its own interpretation of the principle of constitutional identity is shared by many other Member States.[87] In that circumstance, such cross-references sounded as an exceptional episode, since it is usually the other way around: as is well-known, the BVerfG's case law – suffice it to mention the *Maastricht-Urteil* and *Lissabon-Urteil* – has often been a refer-

[85] For a thorough comparison between ICC's Judgment no. 269 of 2017 and the two recent orders of the BVerfG on the right to be forgotten, see Repetto G., *Il Bundesverfassungsgericht e l'Europa: nuovi equilibri? La violazione congiunta dei diritti nazionali e della Carta Ue*, Quaderni costituzionali, No. 2, 2020, pp. 329–352; Rossi L.S., *Il "nuovo corso" del Bundesverfassungsgericht nei ricorsi diretti di costituzionalità: bilanciamento fra diritti confliggenti e applicazione del diritto dell'Unione*, www.federalismi.it, No. 3, 2020.

[86] German Federal Constitutional Court, Order of the First Senate of 6 November 2019, 1 BvR 276/17 (Right to be forgotten II), para. 71.

[87] German Federal Constitutional Court, Judgment of 14 January 2014, 2 BvR 2728/13.

ence model for many of its foreign brethren.[88] Even though the cross-references in *Gauweiler*, as Claes and Reestman pointed out, might be considered as somewhat misleading,[89] the joint reading of the BVerfG's first order for preliminary reference to the CJEU and the more systemic shift envisaged in the orders on the right to be forgotten suggest that the practice of cross-referencing is nowadays an increasingly recurrent hallmark of Karlsruhe's European case law. Likewise, it is not to be excluded that the recent adjustments taking place in the German case law, joining the Austrian and Italian ones, will have an impact on foreign jurisprudence, should the latter be called to face similar cases involving EU fundamental rights or principles.

6. CONCLUSIONS

As Michal Bobek noticed with his usual insight, in the aftermath of the Charter's entry into force the ongoing discovery of its potential makes it all the more difficult for European Constitutional Courts to preserve their deep-rooted attitude of "splendid isolation" towards EU law.[90] Indeed, as we have seen, the Charter offers fertile ground today for a "vertical" interaction between the CJEU and national jurisdictions: an interplay on which the legal scholarship has extensively focused by placing special emphasis on the Constitutional Courts' engagement with the preliminary ruling procedure. In addition to this first dimension, the Charter-based case law sows the seeds also for the blossoming of a (still largely unmapped) substantive relationship among Constitutional Courts themselves.

The rationale for such "horizontal" interaction can be traced back to a shared alarm set off by the so-called "spill-over effect" of the Charter and the ensuing risk for Constitutional Courts to be side-lined in the multilevel system of fundamental rights protection. The recent tendency to make the Charter a

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88 In this respect see, in an exemplary way, Baquero Cruz J., *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, European Law Journal, Volume 14, Issue 4, 2008, pp. 389–422; Rideau J., *The Case-law of the Polish, Hungarian and Czech Constitutional Courts on National Identity and the 'German Model'*, in Saiz Arnaiz A., Alcoberro Llivina C. (eds.), *National Constitutional Identity and European Integration*, Cambridge, Intersentia, 2013, pp. 243–262. Similarly, in Grabenwarter, C., *The Cooperation of Constitutional Courts in Europe – Current Situation and Perspectives*, General Report, XVIth Congress of the Conference of European Constitutional Courts, 2014, p. xxiv, it is observed that "*Many national reports submitted by other constitutional courts* […] *mention the German Federal Constitutional Court as the most frequently cited foreign constitutional court, regardless of regional or linguistic factors, especially in matters relating to fundamental rights*".

89 Claes M., Reestman J.H., *The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case*, German Law Journal, Volume 16, Issue 4, 2015, pp. 917–971.

90 Bobek M., *The impact of European mandate on ordinary courts*, in Claes M., De Visser M., Popelier P., Van De Heyning C., *Constitutional Conversations in Europe*, cit., p. 287 et seq.

benchmark of judicial review of laws reflects, therefore, an increasingly widespread claim to reaffirm the role of Constitutional Courts as fundamental rights gatekeepers. Accordingly, such centripetal bias in favour of a re-appropriation of their pre-eminence in the fundamental rights domain can be interpreted as *actiones finium regundorum*[91] toward the CJEU and, in the meantime, the common judges.

Against this background, a gradual move from cross-references on a case-by-case basis to a more systemic search for horizontal convergence seems to be under way in the Charter-related case law.[92] This shift let it be understood, in a more or less explicit way, that Constitutional Courts are closing the ranks around the bulwark of the centralized model of constitutional review. Reading between the lines, it is precisely this centralized pattern of constitutional adjudication to provide a common denominator for the development of a shared constitutional grammar. In this direction, in parallel with the horizontal migration of other legal principles such as the counter-limits doctrines,[93] it seems that "*some slow, convergent steps towards a shared vision of the Charter are beginning*" among European Constitutional Courts.[94]

The rise of a common vocabulary – of which the Charter appears to become part and parcel – is even more remarkable in the context of the manifold relationships that have gained momentum through the recent establishment of a growing number of judicial networks. In this regard, as the General Report of the Conference of European Constitutional Courts in 2014 pointed out, the use of the European constitutional case law is liable to contribute to the creation of a "European standard" of converging jurisprudence in Europe.[95] It is also through these networks and shared understanding among judges that, arguably, there would be no wonder if the case law of the more authoritative

[91] This expression is borrowed from Bin R., *L'interpretazione conforme. Due o tre cose che so di lei*, www.rivistaaic.it, 2015, p. 13. Some Authors have also defined this strategy as an "act of self-assertion" or as a "rearguard action" by Constitutional Courts. See Mayr S., *Verfassungsgerichtlicher Prüfungsgegenstand und Prüfungsmaßstab im Spannungsfeld nationaler, konventions- und unionsrechtlicher Grundrechtsgewährleistungen*, Zeitschrift Fur Verwaltung, No. 3, 2012, pp. 401–417; Orator A., *The Decision of the Austrian Verfassungsgerichtshof on the EU Charter of Fundamental Rights: An Instrument of Leverage or Rearguard Action?*, cit., pp. 1442–1444.

[92] In this direction, Ana Bobić underscored that the practice of cross-referencing among constitutional jurisdictions shows "both the substantive and the institutional elements of a pluralist heterarchical judicial setting". See Bobic A., *Constitutional Pluralism Is Not Dead: An Analysis of Interactions Between Constitutional Courts of Member States and the European Court of Justice*, German Law Journal, Volume 18, Issue 6, 2020, pp. 1420–1421.

[93] Last but not least, the recent Judgment no. 422/2020 of the Portuguese Constitutional Court refers extensively to the Italian "counter-limits" theory as well as to the *Solange* saga, the *Maastricht-Urteil* and *Lissabon-Urteil* of the BVerfG.

[94] Bronzini G., *The Charter of Fundamental Rights of the European Union: a tool to strengthen and safeguard the rule of law?*, cit.

[95] General Report, XVIth Congress of the Conference of European Constitutional Courts, 2014, p. 9.

Constitutional Courts blazed a trail for their foreign peers to fine-tune (or even reverse) hereinafter their own jurisprudence.

In a nutshell, the strengthening of such convergence can be acknowledged as a valuable step forward in European law in terms of ever-closer integration between Charters as well as between Courts, especially insofar as it points to a higher level of fundamental rights protection. At the same time, we cannot overlook that the centralized model of judicial review underlying Constitutional Courts' efforts to take back hermeneutic spaces is at odds with (and, thus, impinges upon) the inherently decentralized EU judicial system.

Taking into account these two divergent paradigms living together within the same legal space, it is still to be seen whether an ever-growing horizontal commonality – in its intertwining with the said vertical interplay – will bring to a mutual accommodation or, rather, to any open clash between Constitutional Courts and the CJEU. Regardless of who speaks first and who retains the last word, the major challenge for judicial actors in an integrated system remains that of bringing together and counter-balancing their respective claims, competences and protection levels in order to achieve a point of equilibrium: a mission certainly not easy but not even impossible, as the cases of *Melki* and *A v. B and others* have already witnessed.