Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court and Its Aftermath

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Introduction and aims of work

Recently, constitutional courts have come under siege, with scholars criticising them for their abuse of the national (or, according to another terminology, constitutional[1]) identity argument. In this sense, Halmai[2] has also blamed the German *Bundesverfassungsgericht* for providing other constitutional courts (namely the Hungarian one) with a problematic series of techniques by provoking, in this way, a worrying (even dangerous, in his opinion) escalation of constitutional conflict. Moreover, constitutional pluralists have been accused of offering arguments to autocrats and populists to justify violations of the values set out in Article 2.[3] Against this background, the aim of this work is to reflect

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[1]For instance, E. Cloots, *National Identity in EU Law* (Hart Publishing 2015) p. 163 ff. and G. Di Federico, *L'identità nazionale degli stati membri nel diritto dell'Unione europea. Natura e portata dell'art. 4, par. 2, TUE* (Editoriale Scientifica 2017) p. 15.

[2]G. Halmai, 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E (2) of the Fundamental Law', 43 *Review of Central and East European Law* (2018) p. 23.

[3]R.D. Kelemen and L. Pech, 'Why autocrats love constitutional identity and constitutional pluralism. Lessons from Hungary and Poland', *Reconnect Working Paper* n. 2 (2018), ⟨reconnect-europe.eu/wp-content/uploads/2018/10/RECONNECT-WorkingPaper2-Kelemen-Pech-LP-KO.pdf⟩.

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upon a few recent judgments of the Italian Constitutional Court that have been harshly criticised by EU law scholars,[4] since this case law would pave the way for a new (and less cooperative) era in the relationship between the *Corte costituzionale* and the Court of Justice of the European Union. To put it briefly, with a few decisions delivered in 2017 and 2019 the Italian Constitutional Court has partly modified its long-standing approach regarding the judicial treatment of situations where national law potentially infringes both national fundamental rights and the EU's Charter of Fundamental Rights and invited national judges to activate constitutional review first.

As we will show, these decisions should not be seen as a dangerous step back or a *souverainiste* turning point, but they are actually a consequence of the latest developments in the process of supranational constitutionalisation. The Italian focus of this work is due to several reasons. First, the Italian Constitutional Court has traditionally (with the *Bundesverfassungsgericht*) played a major role in the dialectic with the Luxembourg Court by offering a role model for other constitutional justices. It is sufficient to mention the importance of the counter-limits doctrine (devised in 1973,[5] one year before the so-called '*Solange*' doctrine[6]). Second, the Italian Constitutional Court belongs to the club of constitutional courts that have accepted the preliminary ruling mechanism and the path offered by Article 267 TFEU. This is a crucial point which has been neglected by the first commentators, in our opinion. When exploring the most recent developments in this field it is necessary to make a distinction between constitutional courts that have used Article 267 TFEU and those that still refrain from doing so. Third, the Italian case law can be traced back to a broader trend that will be analysed in the second part of the work (Austria, Germany among others). These considerations confirm the relevance of the Italian scenario for a scholar of comparative law interested in the current dynamics of judicial interaction in Europe. The focus on a national case does not exclude the possibility of fruitful comparison.

This work is divided into three parts: in the first part (Section II), we recall recent developments in the case law of the *Corte costituzionale*. In the second part, we expand our focus by looking at the background, e.g. a few instances of resistance in the case law of the *Corte costituzionale* (Section III) and other constitutional courts (Section IV) that have accepted the practice of referring preliminary questions to the Luxembourg court, including the traditionally cooperative

[4]D. Gallo, 'Challenging EU constitutional law: The Italian Constitutional Court's new stance on direct effect and the preliminary reference procedure', 25 *European Law Journal* (2019) p. 434; R. Di Marco, 'The "Path Towards European Integration" of the Italian Constitutional Court: The Primacy of EU Law in the Light of the Judgment No. 269/17', 3 *European Papers* (2018) p. 883.

[5]Italian Constitutional Court, decision n. 183/1973.

[6]Started with the famous BVerfG 29 May 1974, 2 BvL 52/71 *Solange I*.

Austrian one. In the final part (Section V), we offer a few concluding remarks and place these judicial trends within the current constitutional *zeitgeist* concerning fundamental rights protection in Europe.

New trends in the case law of the Italian Constitutional Court on the treatment of national acts conflicting with the Charter: a problematic judicial 'quartet'?

The Italian Constitutional Court – after a long period of well-settled relations between the Court of Justice, national judges, and itself – has delivered, in recent years, a series of path-breaking decisions aimed at a significant recasting of its role *vis-à-vis* other judicial actors. In the well-known *Taricco* saga,[7] the Italian Constitutional Court challenged the assessment of the Court of Justice concerning the alleged duty of domestic judges to retroactively disregard criminal rules by invoking its power to safeguard the inviolable content and scope of constitutional guarantees in criminal matters as a limit to the effect of EU rules.[8]

With decision n. 269/2017,[9] the Italian Constitutional Court may have unleashed a less striking yet even more pervasive judicial revolution. With a sudden *révirement*, it announced that national judges are basically prevented from disregarding domestic rules that conflict with the rights enshrined in the Charter; they have to lodge an *incidenter* proceeding before the Italian Constitutional Court itself, mainly because of the need to preserve the centrality of the constitutional review of fundamental rights enshrined in the Constitution that are at risk of being set aside by an extensive judicial application of the Charter.

In particular, the Italian Constitutional Court has limited judges' power to directly apply the rights of the Charter, since they are 'a part of Union law that is endowed with particular characteristics due to the typically constitutional stamp of its contents' and therefore 'violations of individual rights posit the need for an *erga omnes* intervention by this Court, including under the principle that places a centralized system of the constitutional review of laws at the foundation of the

[7]ECJ 8 September 2015, Case C-105/14, *Ivo Taricco et al.*, ECLI:EU:C:2015:555, Italian Constitutional Court referral order n. 24/2017, ECJ 5 December 2017, Case C-42/17, *M.A.S., M.B.*, ECLI:EU:C:2017:936, Italian Constitutional Court, decision n. 115/2018.

[8]G. Piccirilli, 'The "Taricco Saga": The Italian Constitutional Court continues its European journey', 14 *EuConst* (2018) p. 814.

[9]The factual background of the ruling concerned the power of an independent authority to impose a financial levy on a certain set of entrepreneurs. The referring judges challenged, among other things, the legitimacy of such provisions in light of Arts. 49 and 56 TFEU covering the freedom of establishment and the freedom to provide services. Although violation of the Charter was thus not at stake, the Italian Constitutional Court took advantage of the opportunity to clarify its new stance with an extensive and highly detailed *obiter dictum*.

constitutional structure'.[10] The Italian Constitutional Court has thus vindicated its right to have the first word in the conflict between domestic law and the rights of the Charter in the framework of the *incidenter* proceedings, thereby reversing its traditional stance according to which it was up to the judge to directly apply enforceable EU rules and, if necessary, to lodge a preliminary reference with the Court of Justice. Both these tasks have thus been reserved as a matter of priority (though not exclusively, as we will see) by the Italian Constitutional Court, which has the 'first word' while leaving the 'last word' for the Court of Justice.[11]

The *révirement* initiated by decision n. 269/2017 on the judicial treatment of national legislation that is in conflict with EU fundamental rights is evidenced, from the outset, by the announcement of a new trend aimed at reversing its previous approach in this field. The basic elements of this new trend can be summed up as follows.

First, the established 'judicial protocol' which regulates conflict situations involving internal law and EU rules needs to be modified with regard to the area of fundamental rights, mainly because '[t]he principles and rights laid out in the Charter largely intersect with the principles and rights guaranteed by the Italian Constitution (and by other Member States' constitutions). It may therefore occur that the violation of an individual right infringes, at once, upon the guarantees enshrined in the Italian Constitution and those codified by the European Charter'.[12] The quest for effectiveness and legal certainty in fundamental rights protection requires that such conflict situations are taken charge of by the Italian Constitutional Court itself, even in light of 'the principle that places a centralized system of the constitutional review of laws at the foundation of the constitutional structure (Article 134 of the Constitution)'.[13]

Second, whenever a national act infringes both the rights of the Charter and the national constitutional rights (so-called 'dual preliminarity' situations), the concurrence of judicial remedies has to be managed by the domestic court in the light of *Melki*[14] and *A* v *B*[15] judgments of the Court of Justice, according to which EU law does not preclude the prior involvement of national constitutional courts,

[10]Italian Constitutional Court, decision n. 269/2017, para. 5.2, official translation, available at ⟨www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_269_2017_EN.pdf⟩.

[11]N. Lupo, 'The Advantage of Having the 'First Word' in the Composite European Constitution', 10 *Italian Journal of Public Law* (2018) p. 186.

[12]Italian Constitutional Court, decision n. 269/2017, para. 5.2.

[13]Ibid., para. 5.2.

[14]ECJ 22 June 2010, Case C-188/10, C-189/10, *Aziz Melki, Selim Abdeli*, ECLI:EU:C:2010:363.

[15]ECJ 11 September 2014, Case C-112/13, *A* v *B and Others*, ECLI:EU:C:2014:2195.

> 'provided that the ordinary judges are free to submit to the ECJ "any question that it considers necessary, at whatever stage of the proceedings it considers appropriate, even at the end of an interlocutory procedure for the review of constitutionality;" and "to adopt any measure necessary to ensure the provisional judicial protection of the rights conferred under the European Union's legal order;" to disapply, at the conclusion of the interim judgment of constitutionality, the national legislative provision at issue which has survived constitutional scrutiny, whenever, on other grounds, they consider it to conflict with Union law'.[16]

Third, as a final step in this line of reasoning, the Italian Constitutional Court imposes a duty for the domestic judge to activate an *incidenter* constitutional review 'where a law is the object of doubts concerning the rights enshrined in the Italian Constitution or those guaranteed by the Charter of Fundamental Rights of the European Union in those contexts where EU law applies' (lit.: '*in ambito di rilevanza comunitaria*'), even though – in line with *Melki* – the 'possibility of making a referral for a preliminary ruling for matters of interpretation or of invalidity of Union law, under Article 267 TFUE' must in any case be respected.[17]

Upon publication, this decision gave rise to either concern or enthusiasm. The insistence of the Italian Constitutional Court on the revitalisation of centralised constitutional review in the field of fundamental rights raised concern about its compatibility with the so-called '*Simmenthal* mandate', in particular with the duty of the domestic judge to refer questions to the Court of Justice and to consequently disapply internal law without any procedural limitation.[18] In the same line, some scholars have complained about the unjustified abandonment of well-established procedures and, in particular, have highlighted the risk of depriving judges of their role as the gatekeepers of EU rights in domestic law.[19] At the other end of the spectrum, many have warmly welcomed the re-centralisation of

[16]Italian Constitutional Court, decision n. 269/2017, para. 5.2.

[17]Ibid., para. 5.2.

[18]ECJ 9 March 1978, Case C-106/77, *Amministrazione delle finanze dello Stato* v *Simmenthal*, ECLI:EU:C:1978:49. M. Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing 2006) at p. 149. This point has been emphasised by L.S. Rossi, 'La sentenza 269/2017 della Corte costituzionale italiana: *obiter* "creativi" (o distruttivi?) sul ruolo dei giudici italiani di fronte al diritto dell'Unione europea', *Federalismi* (2018), ⟨www.federalismi.it/nv14/articolo-documento.cfm?Artid=35670&content=&content_author=⟩.

[19]A. Ruggeri, 'Svolta della Consulta sulle questioni di diritto eurounitario assiologicamente pregnanti, attratte nell'orbita del sindacato accentrato di costituzionalità, pur se riguardanti norme dell'Unione self-executing (a margine di Corte cost. n. 269 del 2017)', 1 *Rivista di diritti comparati* (2017) p. 234 ⟨www.dirittocomparati.it/wp-content/uploads/2019/05/7.-Ruggeri.pdf⟩; D. Gallo, 'Efficacia diretta del diritto UE, procedimento pregiudiziale e Corte costituzionale: una lettura congiunta delle sentenze n. 269/2017 e 115/2018', 9 *Rivista AIC* (2019) p. 220.

fundamental rights adjudication and, in particular, the renewed importance of national constitutional rights.[20]

Our impression is that the implications of this decision are much more blurred; in particular, it does not represent *per se* a hostile approach *vis-à-vis* the Court of Justice.

One initially detects, in the decision, a clear intention to reaffirm the European commitment of the Italian Constitutional Court, in particular by emphasising the need for 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 ECJ (. . .), in order that the maximum protection of rights is assured at the system-wide level (Article 53 of the EUCFR)'.[21] This duty of loyal cooperation is put to the test, however, when the Italian Constitutional Court recalls the *Melki* jurisprudence in order to set the reasons for and the limits of requests for its prior involvement whenever the rights of the Charter are at stake, combined with the persisting need to preserve the primacy and direct effect of EU law 'as consolidated in both European and constitutional case law'.[22]

Another crucial point deserving of a closer look is the 'constitutionalisation' of the Charter, i.e. the choice, by the Italian Constitutional Court, to use the rights of the Charter as a distinguishing yardstick of constitutional legitimacy. This has, in our opinion, a two-fold objective. On the one hand, it contributes to freeing the Charter from having its rules entrapped within the realm of EU ordinary legislation, thus bolstering its constitutional ambitions at both the European and national levels. On the other hand, this is a necessary step if it is ever to overcome, with regard to fundamental rights, the basic framework that, until recently, has governed the relationship between the Italian Constitutional Court itself and the ordinary judiciary with regard to the implementation of EU rules, i.e. the direct effect doctrine. This mixture of cooperative intent and strategic behaviour hints, at a more basic level, at a way of dealing with constitutional conflict that is able to activate a dialogue without falling into the trap of hierarchical relationships.

The last point is also in need of clarification. The prior involvement of the Italian Constitutional Court and the reversal of previous judicial protocols does

[20]A. Guazzarotti, 'Un "atto interruttivo dell'usucapione" delle attribuzioni della Corte costituzionale? In margine alla sentenza n. 269/2017', *Forum di Quaderni Costituzionali*, 18 December 2017, ⟨www.forumcostituzionale.it/wordpress/wp-content/uploads/2017/11/nota_269_2017_guazzarotti.pdf⟩, M. Massa, 'Dopo la "precisazione". Sviluppi di Corte cost. n. 269/2017', XII *Osservatorio sulle fonti* (2019) p. 1 at p. 3.

[21]Italian Constitutional Court, decision n. 269/2017, para. 5.2. On this point, *see* P. Faraguna, 'Constitutional Rights First: The Italian Constitutional Court fine-tunes its "*Europarechtsfreundlichkeit*"', *Verfassungsblog*, 14 March 2018, ⟨verfassungsblog.de/constitutional-rights-first-the-italian-constitutional-court-fine-tunes-its-europarechtsfreundlichkeit/⟩.

[22]Italian Constitutional Court, decision n. 269/2017, para. 5.2.

not result in a separation between the national catalogue of rights and those enshrined in the Charter. Although decision 269/2017 is not the final word in this matter, it follows from its reasoning that the Italian Constitutional Court plans to adjudicate, from now on, fundamental rights cases, if so requested by the referring judge, on the basis of the interplay between constitutional and Charter rights, since the latter are plainly deemed to be part of the legal parameters of judgment.

Confirmation of such a reading can be found in a triptych of decisions delivered by the Italian Constitutional Court in 2019, i.e. nos. 20, 63 and 117. In the first decision, the Italian Constitutional Court had to strike a balance between privacy and transparency in a case concerning the disclosure of the personal financial data of public servants. The case involved the application of both national and European rights, in particular the principle of equality (Article 3 of the Italian Constitution) and Articles 7 and 8 of the Charter in connection with Articles 6(1)(c), 7(c) and (e) and 8(1) and (4) of Directive 95/46, establishing, in particular, that the processing of personal data must be 'adequate, relevant and not excessive'. The main question, in this case, was whether and to what extent Article 8 of the Charter had to be interpreted in light of the procedural principles governing data treatment as laid out in the aforementioned directive. According to the Italian Constitutional Court, '[t]he principles laid out by the directive are marked, indeed, by a singular connection with the relevant provisions of the CFR, not only in the sense that they provide it with detail or implement it, but also in quite the opposite sense that they constituted the 'model' for those rules and, therefore, they can be used as evidence of their nature, as expressed in the Explanations Relating to the Charter of Fundamental Rights'.[23] That interpretation was indirectly upheld by the Court of Justice itself when it stated that those directive rules, although provided with direct effect, must be interpreted in light of the factual circumstances of the case by the national judge,[24] with the consequence that – in the words of the Italian Constitutional Court – 'there is no truly discernible self-executing regulatory scheme at the European level that applies to the present case'.[25]

Against this background, decision n. 20/2019 clarified a few controversial points that had been left undecided by the 2017 decision.[26] In particular, a clear statement was made on the concurrence of judicial remedies when both sets of rights are called into question; courts are now simply (and more convincingly)

[23]Official translation, para. 2.1. ⟨www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_20_2019_EN.pdf⟩.

[24]ECJ 20 May 2003, Case C-465/00, C-138/01 and C-139/01, *Rechnungshof and Österreichischer Rundfunk*, ECLI:EU:C:2003:294.

[25]Italian Constitutional Court, decision n. 20/2019, para. 2.

[26]O. Pollicino and G. Repetto, 'Not to Be Pushed Aside: The Italian Constitutional Court and the European Court of Justice', *Verfassungsblog*, 27 February 2019, ⟨verfassungsblog.de/not-to-be-pushed-aside-the-italian-constitutional-court-and-the-european-court-of-justice/⟩.

invited, not compelled, to refer questions to the Italian Constitutional Court first. The consequence of this is that a court's ability to lodge a preliminary reference with the Court of Justice remains unaffected at all stages of the proceedings and no matter the issue (even if that particular issue has previously been addressed by the Italian Constitutional Court).[27] One could argue that clarification was needed to avoid conflict with the Court of Justice: the duty to institute a constitutional review procedure could run counter to the parallel duty to disapply internal law, as established in *Simmenthal*. Resorting to the more viable *incidenter* procedure does not seem to be *per se* at odds with the *Simmenthal* and *Foto Frost*[28] mandates. A court could always decide not to institute constitutional review, and even if a response has been requested from the Constitutional Court, the court remains free to lodge a preliminary reference at any time pursuant to *Melki*.[29] Moreover, in light of the intertwinement of national and supranational guarantees, the Italian Constitutional Court has reiterated in clear terms that its task involves the cumulative application of both catalogues of rights; this is demonstrated by the fact that a balance between privacy and transparency has to be struck 'in keeping with the domestic constitutional provision cited by the referring Tribunal (Article 3), as supplemented by the principles of European extraction'.[30]

Two further decisions rendered by the Italian Constitutional Court in 2019 have a similar baseline. With decision n. 63/2019, which involved a complex issue related to the non-retroactive effect of a milder provision of criminal law (*lex mitior*), a step forward was made in terms of the procedural and substantive interplay between national and supranational rights. In particular, the Italian Constitutional Court invoked in clear terms its right to review national legislation even in light of the infringement of Charter clauses 'that protect, substantially, the same rights of the Constitution'. The final outcome is an increasing internalisation of the Charter via Articles 11 and 117(1) of the Constitution.[31] In addition, common courts are given a wide margin of appreciation when choosing which judicial actor to ask to address preliminary questions: a court remains basically free to decide whether to 'fly to Luxembourg' or 'take a train to Rome' and in any case

[27]*See* Italian Constitutional Court, decision n. 20/2019, para. 2.3.

[28]ECJ 22 October 1987, Case C-314/85, *Foto-Frost*, ECLI:EU:C:1987:452.

[29]On the potential clash between *Melki* and *Simmenthal*, *see* R. Mastroianni, 'La Corte di giustizia e il controllo di costituzionalità: *Simmenthal revisited*?', 58 *Giurisprudenza costituzionale* (2014) p. 4098.

[30]Italian Constitutional Court, decision n. 20/2019, para. 3.1.

[31]Art. 11 states that '[Italy] agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations', whereas Art. 117(1) reads as follows: 'Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations'.

the court remains free to disregard domestic law if it conflicts with the Charter – even after the Italian Constitutional Court route has been exhausted.[32]

The latest relevant decision to date was a referral order to the Court of Justice (n. 117/2019) concerning the compatibility of Directive 2003/6/EC and Regulation (EU) n. 596 with Articles 47 and 48 of the Charter, as a result of which the right to remain silent (*nemo tenetur se detegere*) is not relevant in administrative proceedings concerning the violation of rules meant to counter insider trading.[33] This decision would seem to fill the last remaining gap in the typology of this new phase of judicial interaction; the Italian Constitutional Court has made it clear that the convergence of the two different catalogues of rights cannot be directly enforced at the national level because the internal law implements mandatory provisions of EU law, holding that a preliminary ruling becomes a necessity when national authorities lack such a margin of discretion. In such a situation, a preliminary ruling should be made by Constitutional Court itself (as it did on this occasion) before reviewing the constitutionality of a national implementing act.[34]

As we will demonstrate in the following sections, there are at least two reasons why the recent case law of the Italian Constitutional Court should not be allowed to languish in splendid isolation. It is necessary to contextualise those decisions in light of certain domestic factors in order to understand their roots and rationale. Moreover, it is possible, as stated at the beginning of this article, to read the Italian case as emblematic of a broader trend existing at the comparative level. In the second part of the article, we will consider both the internal and external factors at play in the decisions.

The background, part I: an episode in a domestic judicial war?

In order to understand what provoked the Italian Constitutional Court to deliver decision 269/2017, it is necessary to recall several factors, both judicial and extra-judicial in nature, that epitomise the background of recent judicial developments in Italy. Judicial politics and inter-court competition[35] have always been crucial to

[32]In this way, convergence is achieved with the assessment of the Court of Justice in ECJ 20 December 2017, Case C-322/16, *Global Starnet Ltd* v *Ministero dell'Economia e delle Finanze*, ECLI:EU:C:2017:985, para. 26.

[33]On this case and, in particular, on the acceptance of the Italian Constitutional Court's stance by the Italian Court of cassation, *see* D. Tega, 'Il seguito in Cassazione della pronuncia della Corte costituzionale n. 269/2017: prove pratiche di applicazione', *Questione giustizia*, 12 March 2018, ⟨questionegiustizia.it/articolo/il-seguito-in-cassazione-della-pronuncia-della-cor_12-03-2018.php⟩.

[34]In this way, the Italian Constitutional Court seeks to keep up with the case law of the ECJ on mandatory provisions of EU law: *see* on this *Melki*, *supra* n. 14, para. 55 and, more recently, ECJ 24 October 2018, Case C-234/17, *XC, YB, ZA*, ECLI:EU:C:2018:853.

[35]K. Alter, 'Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration', in A.M. Slaughter et al. (eds), *The European Court and*

the development of EU law; to a certain extent, the Italian scenario is no different. In particular, Professor Augusto Barbera,[36] currently a member of the Italian Constitutional Court, delivered an important speech which offers interesting clues in this respect. On that occasion, Justice Barbera mainly recalled the problematic implications stemming from the constitutional chemistry between the European Convention on Human Rights, the Charter, and the Italian Constitution, i.e. the still ambiguous scope of application of the Charter, the tension brought about by the Taricco saga, and the distinction between rules and principles in the Charter. He shared his concerns about the risk of an 'overflowing Charter' ('una Carta traboccante'),[37] reminded us of the wording of Article 51 of the Charter and the lack of a general competence of the EU in the area of fundamental rights' protection, and criticised several domestic cases in which common courts had directly applied the Charter[38] in situations that were beyond its scope of application. Finally, Justice Barbera also reconstructed the third element of the fundamental rights' triangle, i.e. the European Court of Human Rights, and devoted some pages to the post-2007 case law of the Italian Constitutional Court concerning the potential for using the Convention as part of the yardstick employed by the *Corte costituzionale*. It is worth noting that the post-2007 case law was provoked by judicial dynamics somewhat similar to those at play now with the Charter, as recently confirmed by Justice Viganò in an extra-judicial contribution.[39]

In order to avoid a dangerous (in the eyes of the *Corte costituzionale*) trend that could have *de facto* led to a progressive diffusion of the (constitutional) judicial review of legislation, the Italian Constitutional Court decided to centralise the resolution of conflicts occurring between national norms and the European Convention on Human Rights by using the Convention as an external and occasional aspect of the yardstick employed to review the constitutionality of certain pieces of legislation. Even after judgments 348 and 349/2007,[40] there were several

National Courts – Doctrine and Jurisprudence. Legal Change in its Social Context (Hart Publishing 1998) p. 227.

[36]A. Barbera, 'La Carta dei diritti: per un dialogo fra la Corte italiana e la Corte di Giustizia', paper delivered on the occasion of a quadrilateral summit between the French, Italian, Portuguese and Spanish constitutional judges held in Seville on 26-28 October 2017, ⟨www.cortecostituzionale.it/documenti/convegni_seminari/SIVIGLIA_BARBERA.pdf⟩.

[37]Barbera, *supra* n. 36, p. 2.

[38]Barbera, *supra* n. 36, p. 4.

[39]F. Viganò, 'La tutela dei diritti fondamentali della persona tra corti europee e giudici nazionali', 39 *Quaderni Costituzionali* (2019) p. 481 at p. 484.

[40]Italian Constitutional Court, decisions nos. 348 and 349/2007. Without going into detail, the main contents of these two decisions can be summarised as follows: 1. The European Convention on Human Rights has a super-primary value (i.e. its normative ranking is half way between statutes and constitutional norms); 2. In some cases, the Convention can stand as an

episodes of resistance by lower courts and even attempts to involve the Court of Justice, as in the *Kamberaj* case.[41]

The rationale behind the twin judgments (and the subsequent case law of the Italian Constitutional Court[42]) is the following: national common judges (especially lower courts) could have performed a diffused judicial review of constitutionality in disguise by exercising some sort of control of compliance with the convention. To understand this, it is necessary to recall the ambiguity of the status of the European Convention on Human Rights in the case law of the *Corte costituzionale*. Since the accession of the Italian legal order to the European Convention on Human Rights was the result of an ordinary law (law 848/1955), the Italian Constitutional Court considered, for a long time and with certain exceptions,[43] that the European Convention on Human Rights was a source of law endowed with primary force, which explains the consequent application of the *lex posterior derogat legi priori* rule in case of conflict between a law covered by the Convention and another Italian norm. This situation persisted until the 1990s, when the *Corte costituzionale*, seemingly changing its mind, began to draw a distinction between the content and the form of the laws giving effect to international treaties.[44] In other words, since, from a material point of view, the content of the European Convention on Human Rights aims to protect rights codified in the Italian Constitution, it seemed to be necessary to rethink the previous case law. Another turning point was the constitutional reform of 2001, by which a new version of the first paragraph of Article 117 was adopted. It reads: 'Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations'. On the basis of this new provision, as the literature

'interposed parameter' for reviewing the constitutionality of primary laws, since the conflict between them and the Convention can result in an indirect violation of the Constitution; 3. This (no. 2) does not imply that the Convention has constitutional value; on the contrary, the Convention has to respect the Constitution; 4. The Convention cannot be treated domestically in the same way as EU law, as we will see below; 5. The constitutional status accorded to the European Convention on Human Rights implies the necessity to interpret national law in light of ECHR provisions. On this *see* F. Biondi Dal Monte and F. Fontanelli, 'The Decisions No. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System', 7 *German Law Journal* (2008) p. 889; O. Pollicino, 'The Italian Constitutional Court at the Crossroads between Constitutional Parochialism and Co-operative Constitutionalism. Judgments No. 348 and 349 of 22 and 24 October 2007', 4 *EuConst* (2008) p. 363; D. Tega, *I diritti in crisi* (Giuffrè 2012).

[41]ECJ 24 April 2012, Case C-571/10, *Kamberaj*, ECLI:EU:C:2012:233.

[42]Among others, Italian Constitutional Court, decisions nos. 311/2009, 317/2009 80/2011.

[43]*See*, for instance, Italian Constitutional Court, decision n. 10/1993, whereby the *Consulta* described the ECHR as an 'atypical source of law'.

[44]Italian Constitutional Court, decision n. 388/1999.

has already stressed,[45] Italian common judges started disapplying domestic norms that were in conflict with the European Convention on Human Rights,[46] a mechanism accepted as a consequence of the *Simmenthal* judgment and aimed at resolving conflicts between directly effective EU law provisions and national norms. Since 2007, the Convention has been viewed as a super-legislative source that could occasionally be used to review the constitutionality of domestic legislation even though it cannot be traced back to the realm of constitutional sources.

What does this have to do with decision 269/2017? Our point here is that the partial centralisation evoked by decision 269 can be explained as a reaction to the risks of the non-correct application (both in terms of scope and content) of the Charter, on the one hand, and as a consequence of the progressive constitutionalisation of EU law, on the other, that has introduced norms that in a way mirrors the contents of certain domestic constitutional norms. We have a system where the coexistence of 'multi-sourced equivalent norms'[47] has increased rather than decreased the risk of conflict due to the interpretative competition now existing between courts. In order to ensure the correct interpretation of the Charter and its own role as a constitutional interpreter, the Italian Constitutional Court has decided to step in as it did in 2007 with regard to the European Convention on Human Rights. It is interesting to look to some of the academic writing authored by Italian judges for confirmation of this. One of the judges of the Court of Cassation, for instance, described decision 269 as characterised by a 'lack of trust' of the Italian Constitutional Court towards the common judges.[48]

The background, part II: elsewhere, in the meantime . . .

As we have already seen, the *obiter dictum* included in decision 269/2017 of the Italian Constitutional Court quoted both *Melki*[49] and *A* v *B*,[50] two decisions that, although they did not originate from preliminary references made by constitutional courts, have in a way contributed to redefining the scope enjoyed by national constitutional interpreters. These references can be read in either way.

[45]Biondi Dal Monte and Fontanelli, *supra* n. 40; Pollicino, *supra* n. 40.

[46]For further details *see* Biondi Dal Monte and Fontanelli, *supra* n. 40, p. 891.

[47]To borrow the terminology employed by public international lawyers: T. Broude and Y. Shany (eds.), *Multi-Sourced Equivalent Norms in International Law* (Hart Publishing 2011).

[48]R. Conti, 'La Cassazione dopo Corte cost. n. 269/2017. Qualche riflessione, a seconda lettura', *Forum di Quaderni Costituzionali*, 28 December 2017, ⟨www.forumcostituzionale.it/wordpress/wp-content/uploads/2017/11/nota_269_2017_conti.pdf⟩. 'The lack of trust expressed by the Constitutional Court towards the common judges, unfortunately, it is evident and obvious', p. 11, our translation.

[49]*Aziz Melki, Selim Abdeli*, *supra* n. 14.

[50]*A* v *B and Others*, *supra* n. 15.

It is possible to argue that, precisely because of these references, the purpose of that *obiter dictum* was not to affect the *Simmenthal* mandate, as the Italian Constitutional Court was very aware of the relevant supranational case law in this ambit. Others instead see in these references a contradiction in the legal reasoning of the Italian Constitutional Court.[51]

In both cases, scholars have stressed the importance of judicial competition in the genesis of these judgments. *Melki* had its origins in the French reform introduced by Article 61-1 of the French Constitution by which the *incidenter* control of constitutionality was introduced. This provision was implemented by Organic Law no. 2009-1523, which amended Ordinance no. 58-1067 of 7 November 1958. After that reform, Article 23-5 of the Ordinance, second paragraph, provided for the priority of the question of constitutionality over the review concerning conformity with EU Law. Doubting the compatibility of this provision with the Court of Justice's case law, the French *Cour de Cassation* referred a preliminary question to the Court of Justice, asking whether Article 267 TFEU precludes legislation such as that resulting from the French reform 'in so far as those provisions require courts to rule as a matter of priority on the submission to the *Conseil Constitutionnel* of the question on constitutionality referred to them, inasmuch as that question relates to whether domestic legislation, because it is contrary to European Union law, is in breach of the Constitution?'.[52] Before the Court of Justice pronounced on this, the French *Conseil Constitutionnel* (on 12 May 2010)[53] had interpreted this provision in a manner consistent with the *Simmenthal*[54] and *Cartesio*[55] doctrines. In June 2010, the Court of Justice decided to take into account the decision of the *Conseil Constitutionnel*[56] which had in the meantime attempted to give an interpretation of the legislation consistent with EU law and with the Court of Justice's case law. In *Melki*, the Court of Justice pointed out the necessity of respecting the 'essential characteristics of the system of cooperation between the Court of Justice and the national courts'.[57] It specified that in no case is it possible, e.g. in proceedings regarding the constitutionality of national legislation implementing a directive, to infer the invalidity of the supranational directive in question from the judgment of a constitutional

[51]Gallo, *supra* n. 4, p. 442.

[52]*Aziz Melki, Selim Abdeli*, *supra* n. 14, para. 22.

[53]Conseil constitutionnel, decision no. 2010-605 DC.

[54]*Simmenthal*, *supra* n. 18.

[55]16 December 2008, Case C-210/06, *Cartesio*, ECLI:EU:C:2008:723.

[56]Conseil constitutionnel, decision no. 2010-605 DC. On this *see* F. Donnat, 'La Cour de Justice et la QPC: chronique d'un arrêt imprévisible et imprévu', 26 *Recueil Dalloz* (2010) p. 1640; D. Sarmiento, 'L'affaire Melki: esquisse d'un dialogue des juges constitutionnels et européens sur toile de fond française', 46 *Revue trimestrielle de droit européen* (2010) p. 588.

[57]*Aziz Melki, Selim Abdeli*, *supra* n. 14, para. 51.

court declaring the unconstitutionality of the national legislation, since this would result in a violation of the *Foto Frost* doctrine.[58]

After *Melki*, things have proceeded – more or less – smoothly between the French Constitutional Council and the Court of Justice, even in a much-discussed case involving the law on the protection of personal data[59] in which certain aspects of the *Economie numérique* doctrine[60] were extended from directives to regulations. This has been described as characterised by a cooperative flavour notwithstanding the reference to the notion of 'constitutional identity'. We refer to that case law of the Constitutional Council which reserves special treatment to acts aimed at implementing mandatory provisions of directives. In particular, according to that case law, such domestic acts 'are not subject to a review of their compatibility with the Constitution (unless France's constitutional identity is at stake)'.[61] In a more recent decision, the Constitutional Council extended the identity review to regulations as well, stating that

> 'transposing a directive or adapting a domestic law to a regulation cannot conflict with a rule or principle inherent to France's constitutional identity, except that which has been consented to. In the absence of questioning such a rule or principle, the Constitutional Council has no jurisdiction to oversee the constitutionality of legislative provisions that merely draw the necessary consequences of unconditional and precise provisions of a directive or the provisions of a European Union regulation'.[62]

In search of a traditionally euro-friendly Constitutional Court, it is interesting to look at the Austrian scenario. *A* v *B* had its origins in a preliminary reference made by the Austrian Supreme Court; commentators have emphasised, even in this case, the impact of judicial friction between national courts. The Austrian case (especially case n. U 466/11-18, U 1836/11-13) is perhaps more relevant than *Melki* to the reasoning of the Italian Constitutional Court. The latter did indeed refer to a decision of the Austrian Constitutional Court to justify the centralisation of decisions concerning conflict with the Charter, arguing that: 'Other

[58] *Foto-Frost*, *supra* n. 28.

[59] Conseil constitutionnel, decision no. 2018-765 DC.

[60] Conseil constitutionnel, decision no. 2004-496 DC. On constitutional identity in France, *see* F.X. Millet, 'Constitutional identity in France: vices and – above all – virtues', in C. Calliess and G. van der Schyff, *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) p. 134 at p. 141.

[61] L. Besselink et al., 'National constitutional avenues for further EU integration' (Report for the European Parliament's Committees on Legal Affairs and on Constitutional Affairs, n. PE 493.046) at p. 218, ⟨www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493046/IPOL-JURI_ET%282014%29493046_EN.pdf⟩.

[62] Conseil constitutionnel, decision no. 2018-765 DC; Millet, *supra* n. 60, p. 143.

national constitutional courts with longstanding traditions have followed an analogous line of reasoning (see, for example, the decision of the Austrian Constitutional Court, Judgment U 466/11-18; U 1836/11-13 of 14 March 2012)'.[63] That decision of the Austrian Constitutional Court is interesting for a variety of reasons. First, because the Austrian constitutional court centralised constitutional review by establishing a unitary yardstick which reflected not only the national constitutional norms and the European Convention on Human Rights (which has the rank of a constitutional source in Austria[64]) but also the equivalent norms of the Charter. Second, this decision is relevant because it shows that even traditionally compliant constitutional courts – such as the Austrian one – have been issuing warnings lately concerning the potential misuse of the Charter at the national level. Third, because the Austrian Constitutional Court also referred to the risks connected to the existence of the overlapping zone represented by those shared norms, as recalled by Article 6 TEU and the Charter:

> 'In light of the fact that Article 47(2) CFR recognizes a fundamental right which is derived not only from the ECHR but also from constitutional traditions common to the Member States, it must be heeded also when interpreting the constitutionally guaranteed right to effective legal protection (as an emanation of the duty of interpreting national law in line with Union law and of avoiding situations that discriminate nationals). Conversely, the interpretation of Article 47(2) CFR must heed the constitutional traditions of the Member States and therefore the distinct characteristics of the rule of law in the Member States. This avoids discrepancies in the interpretation of constitutionally guaranteed rights and of the corresponding Charter rights'.[65]

Precisely because of the centralisation of the judicial review carried out in that decision of the Austrian constitutional court, in *A* v *B* the Austrian Supreme Court raised a preliminary question in order to clarify the compatibility of this judicial shift with the established case law of the Court of Justice:

> 'According to the Oberster Gerichtshof, the effect of that judgment is that Austrian courts may not, of their own motion, refrain from applying a statute that is contrary to the Charter; rather, "without prejudice to the possibility of making a reference to the Court of Justice for a preliminary ruling", they must lodge

[63]Italian Constitutional Court, decision 269/2017, official translation of the Italian Constitutional Court.

[64]P. Cede, 'Report on Austria and Germany', in G. Martinico and O. Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws: A Comparative Constitutional Perspective* (Europa Law Publishing 2010) p. 55 at p. 63.

[65]Austrian Constitutional Court, U 466/11-18, U 1836/11-13, para. 59, official translation of the Austrian Constitutional Court.

> an application with the Verfassungsgerichtshof for that law to be struck down. Furthermore, the Verfassungsgerichtshof has ruled that, if a right guaranteed by the Austrian Constitution has the same scope as a right guaranteed by the Charter, it is not necessary to make a request to the Court for a preliminary ruling under Article 267 TFEU. In such circumstances, the interpretation of the Charter would not be relevant for the purposes of ruling on an application for a statute to be struck down, that being a decision which may be given on the basis of rights guaranteed by the Austrian Constitution. The referring court is uncertain whether the principle of equivalence requires the remedy of an interlocutory procedure for the review of constitutionality also to be available in respect of rights guaranteed by the Charter, given that it would prolong the proceedings and increase costs. The objective of securing a general correction of the law through the striking down of a statute that is contrary to the Charter could also be achieved after the proceedings have come to a close. Furthermore, the fact that a right under the Austrian Constitution has the same scope as a right under the Charter does not trigger a waiver of the obligation to make a reference for a preliminary ruling. The possibility cannot be ruled out that the Verfassungsgerichtshof might construe that fundamental right differently from the Court and that, as a consequence, its decision might encroach on the obligations flowing from Regulation No 44/2001'.[66]

The issue of the problematic implementation of the Charter is still debated in Austria. According to Klamert, 'the primary law status of the Charter under EU law has created frictions in the established division of competences between the highest courts in Austria'.[67] More recently, the Austrian Supreme Court again referred to the Court of Justice regarding the issue of the concept of equivalence of protection.[68]

No similar turmoil has taken place in Germany in recent years. Since the well-known *Solange II* decision,[69] the *Bundesverfassungsgericht* has repeatedly stated that the fundamental rights enshrined in the Basic Law and those stemming from EU law have to be kept strictly separated at the constitutional level since they have different spheres of application.[70] It, therefore, comes as no surprise that the Charter, as a legal yardstick, plays almost no role in the case law of the *Bundesverfassungsgericht*,[71] whereas it can be enforced by common judges

[66] *A* v *B and Others*, *supra* n. 15, paras. 25-26.

[67] M. Klammert, 'The implementation and application of the Charter of Fundamental Rights of the EU in Austria', 4 *Acta Universitatis Carolinae Iuridica* (2018) p. 88 at p. 88.

[68] ECJ 24 October 2018, Case C-234/17, *XC and Others*, ECLI:EU:C:2018:853.

[69] BVerfG 22 October 1986, 2 BvR 197/83, *Solange II*.

[70] *See* BVerfG 13 March 2007, 1 BvF 1/05, *Treibhausgas*; 11 March 2008, 1 BvR 256/08, *Vorratsdatenspeichrung*; 19 July 2011, 1 BvR 1916/09, *Anwendungserweiterung*; 4 October 2011, 1 BvL 3/08; 24 April 2013, 1 BvR 1215/07, *Antiterrordateigesetz*.

[71] For an exception, *see* BVerfGE 7 July 2009, 1 BvR 1164/07, *Lebenspartnerschaft*.

whenever a national legal act implements a mandatory rule of EU law. Against this background, the *Bundesverfassungsgericht* has a powerful role when it is called to utter the 'last word' on the compatibility of EU law with the Basic Law (identity control, *ultra vires*). On the other hand, its role seems to be narrower, according to many scholars,[72] in everyday life. Its shift away from the domestic implementation of the Charter leaves it little latitude when called to evaluate, through the direct complaint procedure (*Verfassungsbeschwerde*), whether a common court has used its power to lodge a preliminary reference to the Court of Justice in accordance with the constitutional ban on extraordinary courts (Article 101 Basic Law).[73]

Despite the growing dissatisfaction in recent legal scholarship with regard to this separationist setting (*Trennungsthese*),[74] there are no signs yet of a change in approach in the case law of the *Bundesverfassungsgericht*, even though a decision delivered in March 2018 announced that 'the Federal Constitutional Court reviews whether a national law is compatible with the Basic Law, including in cases where compatibility with the secondary law of the European Union is also in doubt'.[75]

This quick comparative overview would seem to confirm that even constitutional courts that have accepted the preliminary ruling mechanism are expressing concerns about the activism of the Court of Justice without, however, radically questioning or endangering the primacy of EU law. One of them, the Austrian Constitutional Court, has traditionally been very cooperative. These considerations lead us back to the very first lines of this contribution. Even in cases where national constitutional courts have threatened to raise the spectre of conflict (or have actually triggered conflicts) it is important to distinguish between courts that play fair, e.g. by exchanging arguments with the Court of Justice and trying to persuade the Luxembourg Court (looking for either direct or indirect forms of dialogue[76]) and constitutional courts that have acted in bad faith, e.g. by inappropriately playing the national identity card without consulting the

[72]C.D. Classen, 'Schwierigkeiten eines harmonischen Miteinanders von nationalem und europäischem Grundrechtsschutz', 52 *Europarecht* (2017) p. 347 at p. 359; M. Bäcker, 'Das Grundgesetz als Implementationsgarant der Unionsgrundrechte', 50 *Europarecht* (2015) p. 389 at p. 404.

[73]BVerfG 11 March 2008, 1 BvR 256/08, *Vorratsdatenspeichrung*.

[74]*See*, among others, D. Thym, 'Vereinigt die Grundrechte!', 70 *JuristenZeitung* (2015) p. 53 at p. 56 ff and Classen, *supra* n. 72, p. 357.

[75]BVerfG 21 March 2018, 1 BvF 1/13, *Verbraucherinformation*. According to F. Wollenschläger, 'Die Verbraucherinformation vor dem BVerfG', 73 *JuristenZeitung* (2018) p. 980 at p. 985, this decision shows some similarity with the tendency of the Italian Constitutional Court to have the 'first word' with regard to the ECJ in fundamental rights cases.

[76]On the indirect forms of dialogue existing beyond Art. 267 TFEU, *see* M. Cartabia, 'Taking Dialogue Seriously', Jean Monnet Working Paper n. 12 (2007), ⟨jeanmonnetprogram.org/paper/taking-dialogue-seriously-the-renewed-need-for-a-judicial-dialogue-at-the-time-of-constitutional-

Court of Justice beforehand.[77] It is, of course, difficult to discern a sharp dividing line. Use of the preliminary ruling mechanism could be seen as a sign of loyalty in the expression of dissent. This brings us back to prior case law, e.g. the *Honeywell* case,[78] where the possibility of declaring an EU act *ultra vires* was subordinated by the previous involvement of the Court of Justice via Article 267 TFEU.[79]

Thus, scholars[80] who have condemned the German Constitutional Court for devising the *ultra vires* doctrine or various identity doctrines fail when they conflate legitimate doubt ex Article 4.2 TEU with rebellion and when they underestimate the role that conflicts have traditionally had in the development of EU law.[81]

The 'judicial atmosphere' in Europe

Against this background, it can plainly be seen that the recent approach of the Italian Constitutional Court to the overlap of jurisdictional remedies in the field of fundamental rights protection is part of a wider constitutional *Zeitgeist* concerning the relationship between national fundamental rights and the rights enshrined in the Charter. The decision to subvert certain shared protocols for dealing with EU law in proceedings before the Italian Constitutional Court is closely related to the need for curtailing the domestic spillover effect of the Charter, its tendency to overflow, as critically highlighted by Justice Barbera.[82] As sketched

activism-in-the-european-union/⟩; G. Martinico, 'Judging in the Multilevel Legal Order: Exploring The Techniques of "Hidden Dialogue"', 21 *King's Law Journal* (2010) p. 257.

[77]Hungarian Constitutional court, decision n 22/2016 (XII.5) AB.

[78]BVerfG 6 July 2010, 2 BvR 2261/06.

[79]As Mayer pointed out: 'An ultra vires-control of European acts by the German Constitutional Court would only occur in extraordinary circumstances and obvious cases, and apparently a preliminary reference to the ECJ would have to take place first'. F. Mayer, 'Rashomon in Karlsruhe – A Reflection on Democracy and Identity in the European Union', Jean Monnet Working Paper, 5 (2010), ⟨jeanmonnetprogram.org/paper/rashomon-in-karlsruhe-a-reflection-on-democracy-and-identity-in-the-european-union/⟩.

[80]Halmai, *supra* n. 2.

[81]The literature is extensive. For instance: F. Schimmelfennig, 'Competition and community: constitutional courts, rhetorical action, and the institutionalization of human rights in the European Union', 13 *Journal of European Public Policy* (2006) p. 1247; M. Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty', 11 *European Law Journal* (2005) p. 262; G. Martinico, 'The "Polemical" Spirit of European Constitutional Law: On the Importance of Conflicts in EU Law', 16 *German Law Journal* (2015) p. 1343; D. Paris, 'Limiting the "Counter-Limits". National Constitutional Courts and the Scope of the Primacy of EU Law', 10 *Italian Journal of Public Law* (2018) p. 2015. On the difficult role of constitutional courts nowadays *see* J. Komárek, 'The Place of Constitutional Courts in the EU', 9 *EuConst* (2013) p. 420.

[82]Barbera, *supra* n. 36.

out in the previous section, such a strategic intention is part of a wider problem concerning certain still unresolved key issues involving the role and effects of the Charter at the national level.

In this light, it is a commonplace that the entry into force of the Charter has somehow modified the traditional balance between national and European rights and, in terms of the federal question, has opened Pandora's box.[83] *Fransson* is often invoked as a flagship decision of the Court of Justice in this field. Via Article 51(1), sectors of national legislation that had a weak link with EU law were incorporated into the regulatory framework of the Charter. In our opinion, the unifying potential of *Fransson* in the field of fundamental rights adjudication cannot be overestimated. In particular, the Court of Justice has made it clear that application of the Charter does not prevent a national court from ascertaining whether and to what extent a national standard of protection of fundamental rights can be applied in a case pending before it, provided the action of the national authorities is not entirely determined by EU rules.[84] In this way, the Court of Justice has set the scene for a potentially more balanced interaction with national authorities (and with national judges in particular), by giving them a certain amount of leeway when Member States enjoy a margin of discretion in the implementation of EU law. This opens up the possibility that the Charter could lose some of its pre-emptive power vis-à-vis national law since, in similar circumstances, the rights of the Charter and those enshrined in national constitutions are meant to interact, i.e. be applied jointly (or cumulatively) by the national judicial authorities.[85]

This is likely to be considered the strategic point that the Italian Constitutional Court sought to make in order to stake a claim to a role in a game that it had until recently refused to play. This comeback is, moreover, favoured by the emergence of Article 53 Charter as a possible counterpart of Article 51(1). The former clause, which seemed to have largely lost its purpose and content in *Melloni*,[86] is to a certain extent simultaneously rehabilitated in *Fransson*, i.e. as a conflict rule that governs the relationship between the national and the supranational regime of

[83]P. Eeckout, 'The EU Charter of Fundamental Rights and the Federal Question', 39 *CML Rev* (2002) p. 945.

[84]ECJ 26 February 2013, C-617/10, *Åklagaren v Hans Åkerberg Fransson*, ECLI:EU:C:2013:280, para. 29.

[85]E.M. Frenzel, 'Die Charta der Grundrechte als Massstab für Mitgliedstaatliches Handeln zwischen Effektivierung und Hyperintegration', 53 *Der Staat* (2014) p. 1 at p. 27.

[86]ECJ 26 February 2013, C-399/11, *Stefano Melloni* v *Ministerio Fiscal*, ECLI:EU:C:2013:107. As can plainly be seen, *Melloni* and *Fransson* were delivered on the same day. For an insightful reading of the implications thereof, *see* L. Besselink, 'The Parameters of Constitutional Conflict after Melloni', 39 *European Law Review* (2014) p. 531.

fundamental rights protection in those areas where the presence of discretionary powers of the States makes both levels of protection potentially applicable.[87] A similar stance was adopted by the Court of Justice in the *M.A.S. (Taricco II)* decision, where the referral to para. 29 of *Fransson* was made in order to enable a national court to assess whether and to what extent a national standard of fundamental rights' protection in criminal matters could prevent it from enforcing EU rules offering a lesser degree of protection,[88] with particular regard to a field (repression of VAT frauds) in which States enjoy a margin of discretion in the implementation of supranational law.

Against this backdrop, the recent judicial trend to allow an overlap of Articles 51(1) and 53 replicates, although from an unprecedented perspective, the dialectic between a *power* rationale (emerging in the 'incorporating' potential of Article 51(1)) and a *rights* rationale (closely related to Article 53)[89] which shapes, in pluralistic terms, every authentic federal arrangement. Another basic question needs to be answered, however, when addressing the terms of the current constitutional conflict involving the nature and scope of the Charter in its relationship to national systems; this involves the reconciliation of *unity* and *diversity* in the field of rights' protection. Undoubtedly, in the *pre*-Charter era, the meaning and scope of EU fundamental rights were strictly related to the unifying potential of their standing as 'general principles' of EU law whose enforcement was mainly delegated to national judges in a framework of a para-federal separation of functions between the internal and EU systems.

The substantive constitutional nature of a fully-fledged catalogue of rights like the Charter makes such an assumption untenable in the long run; the pervasive nature of its clauses demands a more balanced approach *vis-à-vis* the differing patterns of fundamental rights protection emerging at the national level. The logic underpinning the functioning of the Charter in its relationship to the legal orders of the Member States cannot rely exclusively on a strict separation of functions and ambits of application; this is still deemed to be a valid and viable approach –

[87]As Daniel Sarmiento convincingly argued, the shift to Art. 53 represents a vital turning point in the reestablishment of a pluralist setting in fundamental rights protection because '[t]his transfer of the centre of gravitation from issues of applicability towards issues of interaction between autonomous legal orders proves that the case law seems willing to assume a pluralist approach to constitutional issues': D. Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the new Framework of Fundamental Rights Protection in Europe', 50 *CML Rev* (2013) p. 1267 at p. 1302.

[88]*M.A.S., M.B.*, *supra* n. 7, para. 47.

[89]K. von Papp, 'A Federal Question Doctrine for EU Fundamental Rights Law: Making Sense of Articles 51 and 53 of the Charter of Fundamental Rights', 43 *European Law Review* (2018) p. 511 at p. 517, stressing that 'federal question' does not refer to the enforcement of EU rights by the ECJ 'but that of securing the existing rights of EU citizens in a multi-layered system of governance'.

but only when an EU rule entirely predetermines the scope and content of the national implementing act (as in *Melloni*, whose approach remains unaffected in such situations).[90] Whenever national authorities enjoy a margin of discretion in the implementation of EU rules, a strict separation of functions and ambits of application progressively gives way to a cumulative approach by which the various catalogues of rights arrive on the scene simultaneously and a different logic seems to be emerging vis-à-vis the functioning of the Charter: its standing is not as an ultimate yardstick governing a pre-established set of powers and competences but as a standard of protection that in extreme circumstances can even be derogated via Article 53 whenever national rights afford a more intensive (or more extended) level of protection.[91] In our view, the solution recently advanced by the *Corte costituzionale* seeks to find such a flexible setting by challenging the Court of Justice on its own terrain. In so doing, this judicial response seems capable of promoting dialogue without taming the conflicts surrounding fundamental rights protections.[92]

[90]In terms of effectiveness ('*Effektivitätskonzeption*'), *see* G. Britz, 'Grundrechtsschutz durch das Bundesverfassungsgericht und den Europäischen Gerichtshof', *Europäische Grundrechte Zeitschrift* (2015) p. 275 at p. 276.

[91]J. Masing, 'Unity and Diversity of European Fundamental Rights Protection', 41 *European Law Review* (2016) p. 490 at p. 508, B. De Witte, 'Art. 53 – Level of protection', in S. Peers et al. (eds.), *The EU Charter of Fundamental Rights. A Commentary* (Hart Publishing 2014) p. 1523 at p. 1533.

[92]We see in this a sign of the Italian Constitutional Court's institutional and interpretative relationality: *see* M. Cartabia, 'Of Bridges and Walls: the "Italian Style" of Constitutional Adjudication', 8 *Italian Journal of Public Law* (2016) p. 37 at p. 49.