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*

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The centralised model of judicial review of legislation and the principle of primacy of EU law: a difficult coexistence

The *Simmenthal* judgment of 1978 shed light for the first time on the tension between the centralised model of judicial review of legislation[1] and the principle of primacy of EU law.[2] However, it has only been in recent years that the difficult coexistence of the two systems has become evident, so much so

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[1] By the centralised model of judicial review of legislation I mean those systems where ordinary courts are not allowed to set aside ordinary laws as unconstitutional, since only a specific judicial authority, the constitutional court, is entrusted with the task and the power to strike down unconstitutional laws with *erga omnes* effect. This model, also referred to as 'Kelsenian' or 'European', is generally contrasted with the American model of diffuse review. Literature on the topic is prolific. For a comprehensive account *see* V. Ferreres Comella, *Constitutional Courts and Democratic Values. A European Perspective* (Yale University Press 2009); for a recent overview of the different systems on a country-by-country basis *see* A. von Bogdandy et al. (eds.), *Handbuch Ius Publicum Europaeum. Band VI: Verfassungsgerichtsbarkeit in Europa* (Müller 2015, forthcoming).

[2] ECJ 9 March 1978, Case 106/77, *Amministrazione delle Finanze dello Stato* v *Simmenthal*. On the impact of the *Simmenthal* doctrine on constitutional courts *see* M. Claes, *The National Courts' Mandate in the European Constitution* (Hart 2006) p. 387, and, with specific reference to the centralised model of judicial review, Ferreres Comella, *supra* n. 1, p. 125.

European Constitutional Law Review, 11: 389–407, 2015

doi:10.1017/S157401961500022X

that it now questions the fundamental role of the centralised review of legislation as hitherto known in Europe, and perhaps, in the long run, its very survival.[3]

Technically, what is particularly challenged by the principle of primacy is a specific way of access to constitutional courts, through a question of constitutionality raised by ordinary courts. In a centralised system of judicial review of legislation, ordinary courts are not allowed to set aside statutes if they consider them unconstitutional: they have to stay the proceedings and refer the question to the constitutional court, which is the only judicial institution empowered to strike down unconstitutional laws with *erga omnes* effect. This mechanism exists in almost all EU countries that subscribe to the model of centralised review of legislation[4] and in some cases, for example in Italy, it represents the main way to bring a case before the Constitutional Court.

When domestic legislation allegedly infringes both the constitution and EU law, the principle of primacy, which entails the duty for ordinary courts to refuse application to domestic laws that are inconsistent with EU law, questions the very foundations of this mechanism. The prohibition for ordinary courts to deny application to domestic laws for reasons of unconstitutionality can indeed be circumvented by disapplying the same law for its inconsistency with EU law. As far as the two yardsticks − the national constitution and EU law − do not overlap, the cases where a statute is at the same time inconsistent with EU law and with the constitution are rare and the coexistence of the two systems does not cause relevant friction. If ordinary courts are confronted with a conflict between national legislation and the constitution, they will ask the constitutional court to invalidate the former, while in case of conflict between national legislation and EU law they will simply refuse to apply national legislation, after having raised a preliminary reference to the Court of Justice of the European Union (henceforth: the Court of Justice, or: the Court), if appropriate.

[3] *See* A. Torres Pérez, 'The Challenges for Constitutional Courts as Guardians of Fundamental Rights in the European Union', in P. Popelier et al. (eds.), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2013) p. 49 at p. 53 and M. de Visser, *Constitutional Review in Europe. A Comparative Analysis* (Hart 2014) p. 427. Michal Bobek suggests that the Charter could represent the *capitis deminutio maxima* for constitutional courts, i.e. their complete exclusion from the review of the majority of national legislation: *see* 'The Impact of the European Mandate of Ordinary Courts on the Position of Constitutional Courts', in M. Claes et al. (eds.), *Constitutional Conversations in Europe. Actors, Topics and Procedures* (Intersentia 2012) p. 207 at p. 301. An analysis of the recent case law of the ECJ on the issue can be read in J. Komárek, 'The Place of Constitutional Courts in the EU' 9 *EuConst* (2012) p. 420 at p. 428, where he criticises the Court's 'doctrine of displacement', 'which marginalises constitutional courts by allowing other actors, particularly ordinary courts, to circumvent their authority or even directly challenge it' (p. 449).

[4] *See* de Visser, *supra* n. 3, at p. 133.

https://doi.org/10.1017/S157401961500022X Published online by Cambridge University Press

On the contrary, the more the two yardsticks overlap, the more problematic the interaction of the two systems becomes. That is the reason why the entry into force of the Lisbon Treaty represents a turning point. By ascribing to the Charter of Fundamental Rights of the European Union (henceforth: the Charter) the same legal value as the Treaties, it inserts into EU law a catalogue of rights which is fairly similar to those enshrined in national constitutions. Although even before fundamental rights were part of EU law as general principles, the Charter and the Lisbon Treaty made them more 'visible', also to ordinary courts. Thus, within the Charter's scope of application, the two forms of review cross each other frequently and the hypothesis of simultaneous inconsistency both with the constitution and with EU law ceases to be an exception and becomes rather the rule: if a domestic statute allegedly infringes a constitutional right, it is likely to be contrary to a Charter right as well, and vice versa. This might lead to the drying up of one of the most important routes of access to constitutional courts:[5] if ordinary courts can directly disapply a law for its inconsistency with EU law, why should they stay the proceedings and wait for the constitutional court to decide on the constitutionality of the law?

Obviously, this is not just a question of pure procedure. What is at stake is the constitutional courts' 'core business', i.e. the protection of fundamental rights that might be taken away from them to the benefit of ordinary courts in partnership with, and under the guidance of, the Court of Justice.

Two models to respond to the risk of marginalisation

The recent evolution of the French and the Austrian systems of judicial review of legislation provides two interesting models of how the potential marginalisation of constitutional courts in the field of fundamental rights can be faced; both of them have been questioned before the Court of Justice.

Since its leading decision on abortion of 1975, the *Conseil constitutionnel* refuses to review domestic legislation in the light of international and EU law.[6] Following this decision, first the *Cour de Cassation* in 1975, then the *Conseil d'État* in 1989, affirmed the so-called *contrôle de conventionnalité*, i.e. the duty of all judges to ensure the precedence of international treaties over national legislation.[7] This led to the peculiar situation that after a French law entered into force no judge could challenge it for its unconstitutionality, but all judges could set it aside for its

[5] With regard to the Italian system, where, as noticed, the mechanism of the question of constitutionality plays a pivotal role, the impact of the Charter on the Constitutional Court and the latter's possible marginalisation was carefully analysed, before the Charter was given legal binding force, by M. Cartabia and A. Celotto, 'La giustizia costituzionale in Italia dopo la Carta di Nizza' 47 *Giurisprudenza costituzionale* (2002) p. 4477 esp. at p. 4489.

[6] *Conseil constitutionnel* 15 January 1975, 74-53 DC.

[7] *Cour de Cassation* 24 May 1975, *Jacques Vabre* and *Conseil d'État* 20 October 1989, *Nicolo*.

https://doi.org/10.1017/S157401961500022X Published online by Cambridge University Press

inconsistency with EU and international law: the fundamental rights listed in the Constitution were therefore replaced in practical effect by the corresponding rights enshrined in international law, and, in particular, in the European Convention on Human Rights (henceforth: the Convention).[8] In France, therefore, a diffuse judicial review of legislation in the light of the fundamental rights has developed well before the entry into force of the Charter.[9]

When a form of *ex post* constitutional review of legislation was established in 2008 through a constitutional reform, the so-called *question prioritaire de constitutionnalité* (henceforth: *QPC*), the new mechanism had to be protected by the concurrence of the mentioned diffuse review: as mentioned above, judges are unlikely to trigger the long procedure before the *Conseil constitutionnel* for the review of a law that allegedly infringes a constitutional right if they can simply set it aside for the alleged infringement of a corresponding right of the Convention or, after the Lisbon Treaty entered into force, of the Charter. That is why a priority rule was introduced in 2009 in the law implementing the reform:[10] when a court is asked to rule on arguments which challenge both the constitutionality of a statute and the failure of the same statute to comply with international law, the court must address the issue of constitutionality as a priority. This prevents ordinary courts from ignoring the newly-established *QPC* mechanism and aims at placing the *Conseil constitutionnel* at the centre of fundamental rights protection.

Following this reform, the French system therefore faces the mentioned risk of marginalisation through the separation of constitutional review from review in the light of international and EU law, and through the former's precedence. On the one hand, the *Conseil* confines itself to examining the law in the light of the Constitution, leaving to ordinary courts the task to review it in the light of international and EU law. On the other hand, the *Conseil* enjoys the benefit of performing its constitutional review before ordinary courts examine the same law in the light of international and EU law and possibly raise a preliminary reference to the Court of Justice. In the *Melki and Abdeli* judgment, the Court of Justice

[8] *See*, for a general account, D. de Béchillon, 'De quelques incidences du contrôle de la conventionnalité internationale des lois par le juge ordinaire (Malaise dans la Constitution)' 14 *Revue française de droit administratif* (1998) p. 225.

[9] *See* O. Dutheillet de Lamothe, 'Contrôle de constitutionnalité et contrôle de conventionnalité' in *Juger l'administration, administrer la justice. Mélanges en l'honneur de Daniel Labetoulle* (Dalloz 2007) p. 315 at p. 320 ff.

[10] *See* D. Simon and A. Rigaux, 'La priorité de la QPC: harmonie(s) et dissonance(s) des monologues juridictionnels croisés' 29 *Les Nouveaux Cahiers du Conseil constitutionnel* (2010) p. 63. A similar priority rule was first introduced in Belgium in 2009 for similar reasons: *see* J. Velaers, 'The Protection of Fundamental Rights by the Belgian Constitutional Court and the *Melki-Abdeli* Judgment of the European Court of Justice', in Claes, *supra* n. 3, p. 323.

expressed its view on this model and its compatibility with Article 267 TFEU:[11] although it did not rule out the whole mechanism of the *QPC*, it nevertheless set strict limits for its application, inasmuch as to challenge the very priority of the question of constitutionality.[12]

Things went differently in Austria. There, since 1964, the Convention has enjoyed constitutional status and it is used by the Austrian Constitutional Court (henceforth: the Constitutional Court) as a standard of review for its decisions: in no other European country has the Convention exercised a similar influence on the jurisprudence of the Constitutional Court.[13] The same does not count for EU law: since Austria's accession to the EU, the Constitutional Court has accepted the principle of primacy and, at the same time, has maintained that EU law is not a standard of review for its decisions.[14] The Constitutional Court landmark judgment of 14 March 2012[15] partly changed this picture by introducing an exception to the mentioned rule. The Constitutional Court stated that, within the Charter's scope of application, Charter rights can be invoked before the Constitutional Court so far as they correspond, in their wording and purpose, to constitutional rights, including Convention rights.

The Austrian system therefore clearly evolved toward the integration of different forms of review in the hands of the Constitutional Court. Whereas in France the violation of international and EU law does not amount, by itself, to a violation of the

[11] ECJ 22 June 2010, Joined Cases C-188/10 and C-189/10, *Aziz Melki and Sélim Abdeli*.

[12] This point is emphasised in particular by X. Magnon, 'La QPC face au droit de l'Union: la brute, les bones et le truand', 84 *Revue française de droit constitutionnel* (2010) p. 761 at p. 786.

[13] *See* C. Grabenwarter, 'Verfassungsrecht, Völkerrecht und Unionsrecht als Grundrechtsquellen' in D. Merten et al. (eds.), *Handbuch der Grundrechte. Band VII/1: Grundrechte in Österreich* (Müller, Manz 2014) p. 51 at p. 60, and, for some examples, *Id.*, 'European Fundamental Human Rights in the Case Law of the Austrian Constitutional Court', in L. Weitzel (ed.), *L'Europe des droits fondamentaux. Mélanges en hommage à Albert Weitzel* (Pedone 2013) p. 59 at p. 60. Note that ordinary courts cannot disapply a statute for its inconsistency with the Convention: Article 89, para. 1 of the Austrian Constitution spells out that they are not entitled to examine the validity of duly published laws. If the law cannot be interpreted in a way that avoids the conflict with the Convention, ordinary courts must refer the question to the Constitutional Court. As of 1 January 2015, any court can refer a question to the Constitutional Court, whereas prior to that date the courts of first instance were excluded: *see* Articles 89 and 140 of the Constitution, as amended by constitutional law BGBl I 2013/114.

[14] *See* T. Öhlinger and M. Potacs, *EU-Recht und staatliches Recht* (LexisNexis 2014) p. 168. In the Constitutional Court case law *see* e.g., VfSlg. 14.886/1997, 15.189/1998, 15.215/1998, 15.753/2000, 15.810/2000 and 18.266/2007, which expressly confirmed that the conformity of a law with EU law is not, as such, an object of the constitutional review.

[15] *Verfassungsgerichtshof* 14 March 2012, VfSlg. 19.632/2012; full English translation available at <www.vfgh.gv.at/cms/vfgh-site/attachments/9/6/0/CH0006/CMS1353421369433/grundrechtecharta_english_u466-11.pdf.>, visited 6 August 2015.

https://doi.org/10.1017/S157401961500022X Published online by Cambridge University Press

Constitution[16] and it is not for the *Conseil* to review domestic legislation in the light of international and EU law, in Austria not just the violation of the Convention, but also, under the mentioned conditions, the violation of the Charter is now by itself a violation of the Constitution, and review in the light of the Charter has become a matter for the Constitutional Court. As will be elaborated on in the next section, this might be seen as an attempt by the Constitutional Court to reduce the risk of being sidestepped on the protection of fundamental rights and to safeguard its position in this field. The judgment in *A* v *B and others*[17] therefore represents for the Austrian system of centralised review of legislation what *Melki* represented for the French system: it is the response of the Court of Justice to the system's evolution as promoted by the Austrian Constitutional Court, in which the Luxembourg Court clarifies the extent to which it will accept such a system of centralised review of legislation in the light of the Charter.

In this case note, I first summarise the decision of the Austrian Constitutional Court, focusing on its reasoning and goal, then I discuss the *A* v *B* judgment, in particular by contrasting it to the *Melki* judgment. In the conclusion, I outline some brief reflections on the Court of Justice's approach toward constitutional courts and on the prospects for centralised judicial review of legislation following this decision.

The decision of the Austrian Constitutional Court of 14 March 2012: The Constitutional Court as a European Judge

The case which led to the Constitutional Court decision is fairly straightforward. The applications for international protection filed by two Chinese asylum seekers were first disallowed by the Federal Asylum Office. Their complaints against the administrative decision were rejected by the Federal Asylum Tribunal, which refused their request to hold an oral hearing. The latter's decision was challenged by both applicants before the Constitutional Court, pursuant to Article 144a of the Austrian Federal Constitutional Act, which allows complaints against the decisions of the Federal Asylum Tribunal to the extent that the appellant alleges the violation of a constitutionally-granted right.[18]

[16] In the words of the *Conseil constitutionnel*, in its 1975 judgment (*supra*, n. 6) para. 5: 'A statute that is inconsistent with a treaty is not ipso facto unconstitutional'. More recently, the same doctrine was confirmed just after the entry into force of the *QPC*: 'The argument based on the incompatibility of a statutory provision with the international and European commitments of France cannot be deemed to constitute an argument as to unconstitutionality' (*Conseil constitutionnel* 12 May 2010, 2010-605 DC, para. 11).

[17] ECJ 11 September 2014, Case C-112/13, *A* v *B and others*.

[18] The Federal Asylum Tribunal, established in 2008, has been abolished in the context of the introduction of a two-tier system of administrative jurisdiction by constitutional law BGBl I Nr. 51/

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What is peculiar in this case is that, claiming the violation of their rights to an effective remedy and a fair trial, the two applicants relied only on Article 47 of the Charter, and not on Article 6 of the Convention. That is why the case at hand represented for the Constitutional Court the perfect occasion to overrule its well-established case law.[19] Had the Constitutional Court reaffirmed that EU law is not a standard of review for its decisions, it should have declared the complaint inadmissible, leaving the two applicants without an effective remedy against the decision of the Federal Asylum Tribunal, whose judgments can only be challenged before the Constitutional Court. The Constitutional Court seized the occasion.

The overruling of a consolidated line of precedents is justified by the entry into force of the Lisbon Treaty: according to the Constitutional Court, its own previous case law, which excluded the possibility to use EU law as a yardstick for constitutional review, 'cannot be transferred to the Charter of Fundamental Rights. In European Union law, the Charter is an area that is markedly distinct from the "Treaties" (compare also Article 6(1), TEU: "the Charter of Fundamental Rights and the Treaties"), to which special provisions apply arising from the domestic constitutional set up'.[20]

Curiously enough, the Constitutional Court's reasoning is grounded in a doctrine developed by the Court of Justice: the principle of equivalence. According to this principle, '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'.[21] This principle represents the starting point for the Constitutional Court to develop a strict syllogism, which can be summarised as follows:[22]

a) several Charter rights correspond with Convention rights;
b) Convention rights enjoy constitutional status in Austria and are protected through the 'concentration of claims for violation of constitutionally guaranteed rights with one instance, i.e. the Constitutional Court';

2012 (*Verwaltungsgerichtsbarkeits-Novelle 2012*). As of 1 January 2014, its competences are exercised by the newly-established administrative courts of first instance.

[19] *See* M. Pöschl, 'Verfassungsgerichtsbarkeit nach Lissabon: Anmerkungen zum Charta-Erkenntnis des VfGH', 67 *Zeitschrift für öffentliches Recht* (2012) p. 587 at p. 590.

[20] Para. 25.

[21] ECJ 1 December 1998, Case C-326/96, *Levez*, quoted in the Constitutional Court judgment at para. 27.

[22] Paras. 30-36; the following quotations are taken from para. 33 and para. 35 respectively.

c) thus, by virtue of the principle of equivalence, within the scope of application of the Charter, Charter rights must also be allowed to be invoked before the Constitutional Court, so far as they are similar in their 'content and purpose' to Convention rights, which must be decided on a case-by-case basis.

Some clarifications follow the core of the decision. Particularly relevant is the statement that both ordinary courts and the Constitutional Court will continue to raise preliminary references to the Court of Justice, pursuant to Article 267 TFEU. The Constitutional Court nevertheless introduces two exceptions to the duty to bring a matter to the Court of Justice for a preliminary ruling:

a) if, 'in particular in light of the European Convention on Human Rights and pertaining case law of the European Court of Human Rights and other supreme courts', no doubt arises on the interpretation of a provision of EU law, including the Charter;[23]
b) 'if a constitutionally guaranteed right, especially a right of the European Convention on Human Rights, has the same scope of application as a right of the Charter of Fundamental Rights. In such a case, the Constitutional Court will base its decision on the Austrian Constitution without there being a need for reference for a preliminary ruling under the terms of Article 267 TFEU'.[24]

Two aspects of the decision need to be emphasised. First, the reasoning is based on a combination of an EU law ground − the principle of equivalence − and specific features of the Austrian legal order − the constitutional status of the Convention and the centralised protection of fundamental rights. The duty to consider Charter rights as a standard of review before the Constitutional Court arises from the application of the principle of equivalence to a legal order where the Convention enjoys constitutional status and the protection of fundamental rights is concentrated in the Constitutional Court. Nevertheless, it is to be noted that the Constitutional Court follows a very peculiar reading of the principle of equivalence.

In the Luxembourg Court's case law, this principle requires that national procedures for the safeguarding of rights arising from EU law are not less favourable than those governing similar domestic actions. Had the Constitutional Court adhered to this reading, it should have proved that the current protection of Charter rights before ordinary courts is less favourable than the protection before

[23] Para. 40.

[24] Para. 44. Note that this second exception seems to contradict the core of the ruling: *see* Pöschl, *supra* n. 19, p. 598 and F. Merli, 'Umleitung der Rechtsgeschichte' 20 *Journal für Rechtspolitik* (2012) p. 355 at p. 358.

the Constitutional Court, which is not easy to demonstrate.[25] The fact that Charter rights cannot be invoked before the Constitutional Court is not in itself a sufficient ground for the application of the principle of equivalence. This principle can be relied upon only when the overall protection of Charter rights, which includes the power of ordinary courts to not apply domestic legislation in conflict with them, is less favourable than the overall protection of constitutional rights.[26] In other words, it is not necessary to grant Charter rights the same treatment as constitutional rights: they can be protected in a different way, provided that the overall protection is not less favourable than the one granted to constitutional rights.

The Constitutional Court rather follows another reading of the principle of equivalence. In its view, the *prohibition* on treating Charter rights *worse* than constitutional rights turns into the *duty* to grant Charter rights the *same* treatment as constitutional rights.[27] In the words of the Constitutional Court, 'rights which are guaranteed by directly applicable Union law must be enforceable in proceedings that exist for comparable rights deriving from the legal order of the Member States'.[28]

[25] At least as far as the judicial review of legislation triggered by ordinary courts is concerned: *see* the Opinion of the AG, *infra* n. 38.

[26] In its case law on the principle of equivalence the Court of Justice has reiterated that 'every case in which the question arises as to whether a national procedural provision is less favourable than those concerning similar domestic actions must be analysed by the national court by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies': *see* ECJ 8 July 2010, Case C-246/09, *Bulicke*, para. 29, and, in the same sense, ECJ 1 December 1998, Case C-326/96, *Levez*, para. 44, ECJ 16 May 2000, Case C-78/98, *Preston*, para. 61 and ECJ 29 October 2009, Case C-63/08, *Pontin*, para. 46. Furthermore, according to the Court of Justice, the principle of equivalence 'is not to be interpreted as requiring Member States to extend their most favourable rules to all actions brought in a certain field of law': ECJ 26 January 2010, Case C-118/08, *Transportes Urbanos y Servicios Generales SAL*, para. 34, with further reference to the Court's case law. In this judgment, however, the Court of Justice seems to apply the principle of equivalence to a specific procedural rule instead of taking into account the whole protection system of the rights conferred by EU law: *see* M. Magrassi, 'Bussate e vi sarà aperto. La Corte di giustizia sulla presunzione di rilevanza delle questioni pregiudiziali e sul principio dell'equivalenza procedurale' 12 *Diritto Pubblico Comparato ed Europeo* (2010) p. 867 at p. 870. According to Koen Lenaerts, 'the *Transportes Urbanos* case highlights the fact that the principle of equivalence prohibits "positive discriminations" in favour of actions based on national law, whatever the reasons behind such discrimination. The ECJ did not subscribe to the view that such discrimination could be justified by way of "compensation" for alleged procedural disadvantages encountered only in a purely national context': *see* 'The Decentralised Enforcement of EU Law: The Principles of Equivalence and Effectiveness' in *Scritti in onore di Giuseppe Tesauro* [*Essays in honour of Giuseppe Tesauro*] (Editoriale Scientifica 2014) Vol. II, p. 1057 at p. 1063.

[27] *See* Pöschl, *supra* n. 19, p. 594-595 and Merli, *supra* n. 24, p. 356-357.

[28] Para. 29. Note that the rest of EU law continues not to be used as a standard of review; the Constitutional Court did not ruled out the principle that EU law is not a yardstick for constitutional

Second, it must be kept in mind that the case arises in the context of a direct recourse to the Constitutional Court against a decision of the Federal Asylum Tribunal. Therefore, for the mere purpose of solving the case, it was sufficient for the Constitutional Court to state that Charter rights may be invoked as a standard of review in the context of direct recourses against the decision of the Federal Asylum Tribunal, which, as mentioned above, can only be challenged before the Constitutional Court.[29] This could have been more easily justified in the light of the principle of equivalence and would have not affected the right or the obligation of ordinary courts arising from Article 267 TFEU. Nevertheless, the Constitutional Court clearly goes a step further and holds that the Charter is a standard of review not just in all proceedings stemming from direct recourses, but also for the review of legislation triggered by ordinary courts by means of a question of constitutionality.[30] It is exactly this extension that is difficult to reconcile with Article 267 TFEU and the principle of primacy.

Strikingly, the decision does not sufficiently clarify what ordinary courts are expected to do when confronted with a statute they consider contrary to a Charter right that corresponds with a constitutional or Convention right. There are two possible answers.

The Constitutional Court's decision could be interpreted as imposing on ordinary courts a duty, in the case mentioned, to refer the question to the Constitutional Court instead of disapplying the law or raising a preliminary reference to the Court of Justice. This reading clearly clashes with the Court of Justice case law, since ordinary courts would be put in the same situation which led to *Simmenthal*, where the Court of Justice ruled that the solution of the conflict between domestic legislation and EU law could not be taken away from ordinary courts and reserved to the Constitutional Court.

However, the fact that the Constitutional Court verifies the ordinary courts' power to refer questions to the Court of Justice and expressly quotes *Melki* suggests a different reading: ordinary courts are not under any duty to refer a question to the Constitutional Court, but are allowed to choose between referring the question to the Constitutional Court, who could then strike down the law with general effect, or refusing to apply the law, if necessary after a preliminary reference to the Court of Justice. This interpretation, if less problematic in the light of *Simmenthal*, nevertheless raises significant questions in the light of domestic constitutional law. In fact, courts can refer a question to the Constitutional Court

review, but qualified it by introducing an exception limited to those Charter rights that correspond to constitutional rights. *See* C. Grabenwarter and M. Holoubek, *Verfassungsrecht. Allgemeines Verwaltungsrecht* (Facultas 2014) p. 161.

[29] *See* Merli, *supra* n. 24, p. 356.

[30] *See* in particular paras. 35 and 43.

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only when they have to apply a law whose constitutionality they doubt: but if the principle of primacy requires them to set aside national laws which clash with EU law, they will never have to apply a law which is contrary to the Charter. The Constitutional Court's new stance therefore seems to imply a shift in the requirements for raising a question to the Constitutional Court;[31] however, this issue is neither tackled, nor even mentioned in its decision.

At the end of the day, one has the impression that the decision's general goal is much clearer than its reasoning and consequences. The Constitutional Court intended to react to the European trend that shifts the protection of human rights towards the joint action of the ordinary courts and the Court of Justice, sidestepping the constitutional courts.[32] Acting as a European judge, and, in particular, as the supreme national judge of EU rights[33] is likely to appear to the Constitutional Court's eyes as the best solution to safeguard its leading role vis-à-vis ordinary courts and to engage in a dialogue on an equal footing with the Court of Justice. To reach this goal, it did not hesitate to take the risk of a very daring reasoning, stretching the principle of equivalence somewhat to make it say more than it effectively does say,[34] and overruling its well-established and sound case law on the prohibition of using EU law as a standard of review in constitutional adjudication. This clearly amounts to an attempt by the Constitutional Court to keep its central position in fundamental rights protection, despite the current pressure toward decentralisation: an attempt that has to withstand the scrutiny of the Court of Justice.

The *A* v *B* judgment and the prospects for the centralised judicial review of legislation

No later than nine months after the Constitutional Court decision was handed down, the question of the compatibility of this new case law with the principle of primacy reached the Court of Justice, by virtue of a preliminary reference of the *Oberster Gerichtshof*, the highest Austrian court in civil and criminal matter.

The facts of the main proceedings can be briefly summarised as follows: B and others brought an action for damages against A before an Austrian court of first instance, claiming that A abducted their husbands or their fathers in Kazakhstan. The

[31] *See* Pöschl, *supra* n. 19, p. 604-606 and Merli, *supra* n. 24, p. 357 and 360.

[32] *See* Merli, *supra* n. 24, p. 359.

[33] As emphasised by Christoph Grabenwarter, judge at the Austrian Constitutional Court who participated in the decision, in this judgment's light the Constitutional Court can be referred to as a 'European Union judge' (*supra* n. 13, p. 69).

[34] As Pöschl (*supra* n. 19, p. 597) points out, the Constitutional Court took a principle conceived to protect the individual's rights and used it to protect its own position.

jurisdiction of the Austrian court was justified by the fact that A at that time had his normal place of domicile on Austrian soil. Nevertheless, after several attempts to serve the documents instituting the proceedings, the court of first instance concluded that A was no longer domiciled at the addresses indicated for service. Therefore, pursuant to Article 116 of the Austrian code of civil procedure, on request of the plaintiffs, a representative *in absentia* was appointed. The latter lodged a defence, without challenging the jurisdiction of the Austrian court. This was challenged only later, when A learned of the proceedings and instructed a law firm to defend him.

This being the case, the jurisdiction of the Austrian court became dependent on the interpretation of Article 24 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which states that 'a Court of a Member State before which a defendant enters an appearance shall have jurisdiction'. In the words of Advocate General Bot, Article 24 'entails a tacit prorogation of the jurisdiction of the court before which the defendant enters an appearance, even where, strictly speaking, that court does not have jurisdiction under the rules laid down in that regulation'.[35] If the appearance entered by a representative *in absentia* is to be considered an appearance for the purpose of Article 24, then Austrian courts will have jurisdiction. If not, Austrian courts do not have jurisdiction, provided that the circumstances material to the proceedings occurred in Kazakhstan and the defendant was not domiciled in Austria at the time the action was lodged.

The court of first instance denied its jurisdiction, holding that the appearance of a representative *in absentia* could not amount to an appearance of the defendant for the purpose of Article 24. The court of appeal took the opposite view, on grounds that, under Austrian law, the procedural acts of a court-appointed representative *in absentia* have the same legal effect as those of an ordinary legal representative. Before the *Oberster Gerichtshof*, A alleged a violation of his right of defence, referring to Article 6 of the Convention and Article 47 of the Charter. Conversely, B and others claimed that the same articles also granted their right to an effective remedy, which made necessary the appointment of a representative *in absentia*. The *Oberster Gerichtshof* referred three questions to the Court of Justice.

Questions 2 and 3 concern the merits of the case. The referring court asks essentially whether, in the light of Article 47 of the Charter, Article 24 of Regulation No 44/2001 must be interpreted in the sense that an appearance of a court-appointed representative is equivalent to the appearance of a defendant for the establishment of the court's international jurisdiction.[36]

[35] Opinion of Advocate General Bot, delivered on 2 April 2014, para. 36.

[36] In this case note I focus only on Question 1, which concerns the Austrian Constitutional Court decision. To Questions 2 and 3 the Court answered that the appearance entered by a

The first question challenges the very essence of the Constitutional Court decision: it asks the Court of Justice whether, in a system such as the Austrian one, when national legislation is deemed to be contrary to a Charter right, the principle of equivalence effectively requires ordinary courts to make a reference to the Constitutional Court for the statute being struck down, instead of simply refraining from applying the law.[37] In so doing, the *Oberster Gerichtshof* adheres to the stricter interpretation of the Constitutional Court's decision, reading it as imposing a duty, in the case mentioned, to bring the matter to the Constitutional Court. Significantly, the referring court stresses an aspect that the Constitutional Court avoided considering through its peculiar reading of the principle of equivalence: the interlocutory procedure before the Constitutional Court prolongs the proceedings and increases costs and cannot therefore be plainly considered more favourable for the applicant.[38]

The answer of the Court's fifth Chamber to the first question consists of three parts. First, the Court rephrases the question; second, it repeats the word-by-word contents of *Melki*; third, it adds only a few words on the principle of equivalence.

The Court's first step consists in rewriting the question raised by the referring court in two ways.

First, whereas the *Oberster Gerichtshof* asked whether the principle of equivalence truly requires the solution suggested by the Constitutional Court, the Court of Justice considers that the question to be answered is not whether the principle of equivalence *requires* such a solution, but rather whether the principle

court-appointed representative does not amount to an appearance being entered by the defendant for the purpose of Article 24.

[37] By the mere reading of the Court decision, Question 1 does not seem to be relevant. The case does not raise a question on the consistency of a national law with the Charter, but rather a question on the interpretation of EU law. Therefore, in no case should the *Oberster Gerichtshof* have referred a question to the Constitutional Court, which makes Question 1 not relevant. According to the Advocate General, Question 1 is relevant 'only if the answer to Questions 2 and 3 is that EU law precludes national legislation such as that at issue in the main proceedings' (para. 32 of the Opinion), which does not seem to be the case.

[38] In the same sense *see* para. 68 of the AG's Opinion: 'In the circumstances, I do not see how refraining, in a given dispute, from applying a national statute that is contrary to EU law would be less favourable for the individual than initiating an interlocutory procedure for the review of constitutionality with a view to having that statute struck down. On the contrary, as the referring court itself points out, the implementation of such a procedure is relatively cumbersome, involving expense and additional delays for the parties to the proceedings, whereas the national court is able, directly in the course of the proceedings before it, to establish that a national statute is incompatible with EU law and to disregard that statute, thus securing immediate protection for the parties'. For an interesting comparison in the light of the principle of equivalence between the (Spanish) centralised review of the constitutionality of legislation and the diffuse review of the compatibility of domestic legislation with EU law *see Transportes Urbanos*, n. 26, *supra*, along with the Opinion of AG Poiares Maduro, in particular paras. 35-40.

of primacy *allows* it.[39] Thus, the decision clearly amounts to a judgment on the Constitutional Court decision: in the Court of Justice's words, the question is 'whether that case-law is consistent with the obligations of the ordinary courts under Article 267 TFEU and the principle of primacy of EU law'.

Second, the Court of Justice corrects the *Oberster Gerichtshof*'s interpretation of the Constitutional Court judgment, pointing out that the latter expressly confirms the consideration of the requirements the Court set forth in *Melki*. Unlike the referring court, the Court of Justice chooses the more EU-friendly interpretation of the Constitutional Court decision, reading it not as imposing a duty, but rather as allowing a possibility for ordinary courts to refer a question to the Constitutional Court in case of conflict between national legislation and the Charter. Consequently, the Court of Justice's main concern becomes setting the limits to this possibility.

The reasoning core is technically a 'copy and paste' of the *Melki* reasoning: paragraphs 34 to 43 of the judgment correspond word-for-word to paragraphs 40-41, 43-45 and 52-56 of the judgment mentioned. Thus, the Austrian system of judicial review designed by the Constitutional Court case law is also not precluded by EU law, to the extent that it respects the same conditions set forth for the French system: on the one hand, that ordinary courts remain free to make a reference to the Court at whatever stage of the proceedings they consider appropriate, to adopt any measure necessary to ensure interim judicial protection of rights conferred under the EU legal order and to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law; on the other hand, that the Constitutional Court does not undermine the jurisdiction of the Court of Justice alone to declare an act of the EU invalid, when assessing a national law that merely transposes the mandatory provisions of an EU directive. As in *Melki*, the Court concludes that 'it is for the referring court to ascertain whether the national legislation at issue before it can be construed in such a way as to meet those requirements of EU law'.[40]

The mechanical repetition of the *Melki* reasoning is somehow striking, since the French and the Austrian systems differ considerably. As explained above, the French *Conseil constitutionnel* is expected to review national legislation *in the light of the Constitution* and *before* the Court of Justice examines it in the light of EU law; on the other hand, the Austrian Constitutional Court intends to review national legislation *in the light of the Charter* and, at least to a certain extent, not prior to but *instead of* the Court of Justice. However, the very fact that the Court repeats the same reasoning vis-à-vis two different systems is somehow telling of the

[39] *See* paras. 28 and 29, from where the following quotation is taken.

[40] Para. 46. Note that what is at stake before the referring court is the Constitutional Court's case law rather than 'national legislation'.

Court's view: the systems of centralised review chosen by member states are essentially unimportant to the Court of Justice, to the extent that they do not interfere with: (a) the power of ordinary courts to refer a matter to the Court of Justice and to disapply domestic legislation they consider to be contrary to EU law; and (b) the jurisdiction of the Court of Justice alone to declare an act of EU law invalid.

To the *deus ex machina* of the Constitutional Court decision, the principle of equivalence, the Court does not devote more than a brief concluding remark, pointing out that 'reliance on the principle of equivalence may not relieve the national courts, in the application of domestic procedural rules, of their duty to observe in full the requirements flowing from Article 267 TFEU'.[41] In other words, the Court reestablishes a clear supremacy of the principle of primacy over the principle of equivalence and seems to say to the Constitutional Court that if it wants to use the Charter as a standard for its decision, it had better find other reasons than the principle of equivalence, which can in no way be relied upon to support a possible weakening of the principle of primacy.

In substance, the Court of Justice rules out the referring court's interpretation of the Constitutional Court decision and subjects to the *Melki* prerequisites the possibility for ordinary courts to bring to the Constitutional Court a conflict between national legislation and the Charter. Following *A* v *B*, ordinary courts are under no duty to refer a question to the Constitutional Court when they consider a national law to be contrary to the Charter. The referral to the Constitutional Court, however, is neither compulsory, nor precluded. Ordinary courts can refer a question to the Constitutional Court if they consider it appropriate.[42] In this case: (a) they must adopt the interim measures necessary to assure the protection of rights conferred by EU law; and (b) at the end of the procedure, if the Constitutional Court does not strike down the law, they can disregard the latter's decision, either by raising a preliminary reference to the Court of Justice, or by simply stating that the law which the Constitutional Court considered not to be in conflict with the Charter in fact does violate the Charter, and must therefore be denied application.

In summary, the *A* v *B* judgment leaves ordinary courts a certain leeway for choosing to which judge to refer a question. The Court of Justice's answer on the consistency with EU law of the Constitutional Court's case law is therefore not entirely negative. Nevertheless, it downsizes, or at least sheds lights on the boundaries of, the privileged position the Constitutional Court tried to design

[41] Para 45.

[42] This is excluded only in case of domestic legislation that merely transposes the mandatory provisions of an EU directive: in this case the preliminary reference to the Court of Justice enjoys priority (paras. 41-43).

for itself by means of its decision of 2012: in the field of application of the Charter, the Constitutional Court's review of national legislation through the mechanism of the question of constitutionality relies essentially on the preference of ordinary courts.

The judgment raises two main questions. First, does this decision represent, along with *Melki*, an attenuation of the *Simmenthal* doctrine to the benefit of constitutional courts? Second, what are the prospects for the centralised review of legislation at national level within the limits set forth by the Court of Justice in this decision?

Simmenthal *attenuated?*

Commenting on *Melki*, some scholars argue that the Court of Justice qualified its *Simmenthal* doctrine for the benefit of constitutional courts.[43] This remark relies on the observation that the Court attenuated the obligation imposed by *Simmenthal* on ordinary courts 'to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent community rules from having full force and effect'.[44] Following *Melki*, they are allowed to refer a question to the constitutional court instead of simply setting aside legislation, provided that they adopt interim measures to ensure provisional protection of the rights conferred under the EU legal order. In this sense, the present judgment should be read as a confirmation and development of this milder stance of the Court of Justice: again, the Court accepts the immediate primacy of EU law to be postponed to make space for the review by the constitutional court, this time in the light of the Charter.[45] This position can be shared, but should not be overestimated.

In fact, even if the Court of Justice accepts a certain delay in the enforcement of the primacy of EU law, this attenuation does not seem to modify its approach to constitutional courts, which is confirmed both in *Melki* and in *A* v *B*: the centralised review of legislation, be it in the light of the constitution or in the light of the Charter, can be tolerated to the extent that it does not interfere with the essence of the principle of primacy, i.e. with ordinary courts' right to refer questions to the Court of Justice and to set aside domestic legislation. In this sense, the Court seems to look at constitutional courts more as potential obstacles which

[43] *See*, in particular, D. Sarmiento, 'L'arrêt *Melki*: esquisse d'un dialogue des juges constitutionnels et européens sur toile de fond française', 46 *Revue trimestrielle de droit européen* (2010) p. 588 at p. 594.

[44] *Simmenthal*, n. 2 *supra*, para. 22.

[45] In this sense *see* R. Mastroianni, 'La Corte di giustizia ed il controllo di costituzionalità: *Simmenthal revisited*?' 59 *Giurisprudenza costituzionale* (2014) p. 4089 at p. 4097, who criticises the weakening of the principle of primacy brought about by *Melki* and confirmed by *A* v *B*.

https://doi.org/10.1017/S157401961500022X Published online by Cambridge University Press

might jeopardise the full force and effect of EU law than as potential allies in a common endeavour. The prospect of having a constitutional court acting as a supreme judge of EU rights at national level does not seem to be met with any enthusiasm by the Court of Justice, which apparently does not see any advantage in this.[46]

In other words, the Court is not ready to depart from the core of its doctrine on the primacy of EU law[47] in order to establish a partnership with constitutional courts and it is questionable whether the current attenuation of the *Simmenthal* doctrine is significant enough as to grant an appropriate space to the review performed by constitutional courts by means of questions of constitutionality raised by ordinary courts. In no way does the *A* v *B* judgment take into consideration the peculiarities of constitutional courts,[48] nor does it consider how they can contribute, through the special position they enjoy within the member states, not just to the goal of the full effectiveness of EU law, but also to the wider challenge of creating a common space of democracy and the rule of law. The very fact that in two significantly different situations, the Court confines itself to the mechanical repetition of the limits that the centralised review of legislation shall not overstep, with no consideration to the peculiarities of the systems at stake, shows how far the Court is from embracing this approach.

The prospects for the centralised model of judicial review of legislation after A *v* B

To the extent that the Court's approach to constitutional courts will not depart from the current stance, the prospects for the centralised review of legislation triggered by ordinary courts are bleak in EU member states. Within the limits set forth by the Court, the very survival of the mechanism of the question of constitutionality relies basically on two assumptions: the limited scope of application of the Charter, and the ordinary courts' tendency to prefer their national constitutional court over the more distant Court of Justice. In the long run both premises could prove weak shelters for constitutional courts.[49]

[46] Note that the Austrian Constitutional Court judgment was presented by Christoph Grabenwarter as a landmark decision, which was likely to provide an example to other constitutional courts (*supra* n. 13, p. 69). This being the case, the answer of the Court of Justice sounds particularly cold.

[47] For similar criticisms *see* M. Bossuyt and W. Verrijdt, 'The Full Effect of EU Law and of Constitutional Review in Belgium and France after the *Melki* Judgment', 7 *EuConst* (2011) p. 355 at p. 385.

[48] *Id.* at p. 387; in Bossuyt and Verrijdt's view the organisation and functioning of constitutional review should enjoy protection under Article 4.2 TEU, as part of national identity (p. 388).

[49] It is not by chance that one of the last frictions between the Court of Justice and the German Constitutional Court concerns the Charter scope of application. *See Bundesverfassungsgericht* 24 April 2013, 1 BvR 1215/07, *Counter-Terrorism Database*, where the German Constitutional

However, it is to be noted that other functions of constitutional courts are not so difficult to reconcile with the principle of primacy of EU law as the review of legislation triggered by ordinary courts. The abstract review of legislation, for example, not only does not affect ordinary courts' rights and duties under Article 267 TFEU, but also gives constitutional courts the opportunity to contribute to the enforcement of EU law and enables a dialogue with the Court of Justice on an equal footing.[50] Similar considerations apply to the direct recourse to constitutional courts for the violation of fundamental rights.[51] In these cases, constitutional courts contribute to a sound European system of fundamental rights protection and their relationship with the Court of Justice can be read rather in terms of integration than as mutual exclusion. In other words, the marginalisation of constitutional courts is not the unavoidable outcome of the primacy of EU law and, more generally, of the process of European integration.

At the same time, constitutional courts cannot expect to preserve the central position they enjoyed in the past, now that many of the sovereign powers of the

Court held that a broad interpretation of the Charter scope of application, as provided by the Court of Justice in *Åkerberg Fransson*, could be found to be *ultra vires*. On this judgment *see* D. Thym, 'Separation versus Fusion – or: How to Accommodate National Autonomy and the Charter? Diverging Visions of the German Constitutional Court and the European Court of Justice' 9 *EuConst* (2013) p. 391. More recently, in ECJ 6 March 2014, Case C-206/13, *Siragusa*, ECJ 27 March 2014, Case C-265/13, *Torralbo Marcos* and ECJ 10 July 2014, Case C-198/13, *Julian Hernández* the Court of Justice took a more restrictive view on the scope of application of the Charter.

[50] The abstract review of legislation performed by the Italian Constitutional Court is a case in point. According to Article 127 of the Italian Constitution the Government can challenge a regional law within 60 days from its publication and a Region can challenge a State law within the same term; in this proceeding EU law can be invoked as a standard of review and it is not rare that a regional law is struck down for its inconsistency with EU law. In this way the Constitutional Court strongly contributes to the enforcement of EU law: domestic legislation incompatible with EU law is quickly removed from the domestic legal order, which represents a better solution than its mere disapplication by ordinary courts (in this sense *see* the decision of the Austrian Constitutional Court, para. 43, with reference to the established case law of the Court of Justice). Note that it was in the context of abstract review of legislation that the Italian Constitutional Court raised its first preliminary reference to the Court of Justice (order No 103, 15 April 2008); only five years later a preliminary reference was raised in the context of the review of legislation triggered by ordinary courts (order No. 207, 18 July 2013): *see* O. Pollicino, 'From Partial to Full Dialogue with Luxembourg: The Last Cooperative Step of the Italian Constitutional Court' 10 *EuConst* (2014) p. 143.

[51] A telling example is *Tribunal Constitucional* 2 July 2012, n. 145, *Iberdrola* v *Comisión Nacional de la Energia*: *see* D. Sarmiento, 'Reinforcing the (domestic) constitutional protection of primacy of EU law' 50 *CML Rev* (2013) p. 875. As mentioned above, that what is problematic in the Austrian Constitutional Court's decision of 14 March 2012 is not the use of the Charter as a standard of review in proceedings stemming from direct recourses, but its use for the review of legislation triggered by ordinary courts.

member states have been transferred to the EU. What is to be preserved is not the constitutional courts' position as such, but the balance between the protection of fundamental rights and the respect for the political decision of the legislature.[52] On the national level, the establishment of constitutional courts has been of paramount importance to guard this balance and avoid at the same time both the risk of an omnipotent legislature and the risk of the so-called 'government of the judges'.[53] Now the question to be answered is how they can contribute to the same balance at the present stage of European multilevel constitutionalism. In its *A* v *B* judgment, the Court of Justice missed a good opportunity to tackle this question.

[52] That the marginalisation of constitutional courts by the Court of Justice affects the balance between individual and public autonomy in Europe is strongly claimed by J. Komárek, 'National Constitutional Courts in the European Constitutional Democracy' 12 *International Journal of Constitutional Law* (2014) p. 525.

[53] The expression comes from the classic work of E. Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis. L'expérience américaine du contrôle judiciaire de la constitutionnalité des lois* (Giard 1921). On the establishment of constitutional courts in Europe as a way to 'provide the benefits of judicial review, without turning into a government of judges' *see* A. Stone Sweet, *Governing with Judges. Constitutional Politics in Europe* (Oxford University Press 2000) p. 35.