

THE VIOLATIONS OF THE CHARTER OF
FUNDAMENTAL RIGHTS AS QUESTIONS
OF CONSTITUTIONALITY: NEW PERSPECTIVES
FROM THE ITALIAN
CONSTITUTIONAL COURT

ABSTRACT: *The aim of this note is to give a brief analysis of a significant excerpt of the Italian Constitutional Court judgment of 14 December 2017, n. 269. Indeed, the Court identifies the new criteria for the application of the provisions of the Charter of Fundamental Rights of the EU by lower judges. In cases in which a national law is potentially infringing both the Italian Constitution and the CFREU (so-called Dual Preliminarity), the Italian Constitutional Court has affirmed the need for its erga omnes intervention, even if the CFREU norms would be susceptible of direct application. Once clarified the main content of the new case law, the analysis wonders on the following of this decision, also because the Constitutional Court seems to affirm that, on the one hand, the question of constitutionality must be raised, but, on the other hand, that is left in place the possibility of making a referral for a preliminary ruling for matters of interpretation or invalidity of European Union law (Art. 267 TFEU). Maybe soon there will be occasion to better clarify the roles played by both the Italian Constitutional Court and the European Court of Justice, when dealing with issues concerning fundamental rights.*

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1. Introduction

The Italian Constitutional Court decision of 14 December 2017, no. 269, con-

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cerned the constitutional review of the funding system of the Italian Competition Authority. The question of constitutionality was referred by a lower judge as, is typical in the Italian constitutional review system (the “*incidental*” constitutional review of law). The issue also concerned the compatibility between the EU law and the Italian norms, in particular between the latter and the TFEU.

However, the significant excerpt dealt within the grounds of the ruling, which the present work aims to comment on, concerns the Court’s statements about the direct application of the Charter of Fundamental Rights of the European Union (hereinafter “*CFREU*”) by the lower judges. Hence, the “*clarification*” did not entail important effects on the case at hand, but it is, however, relevant since it has stated something new in terms of relationships between the Italian legal system and EU law, between national courts and the European Court. These statements are very similar to those issued by the Austrian Constitutional Court in 2012: it might be affirmed that both Courts aim to strengthen the role of constitutional judges in the European system of human rights’ protection.

2. The implications of the typically constitutional content of the CFREU

In para. 5.2 of the Conclusions on points of law, the Constitutional Court clarified what the lower judges should do when a national law is potentially infringing both the Italian Constitution and the CFREU.

In particular, the Court held that the criteria usually applied to regulate the relationship between national law and European law should be reconsidered, taking into account that the CFREU has a “*special*” content, a “*typically constitutional*” content. In the Court’s opinion, “the principles and rights laid out in the Charter largely intersect with the principles and rights guaranteed by the Italian Constitution (and by the other Member States’ Constitutions)”. As a consequence, “violations of individual rights posit the need for an *erga omnes* intervention by this Court”; “this Court holds that, 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, the question of constitutionality must be raised, leaving in place the possibility of making a referral for a preliminary ruling for matters of interpretation or of invalidity of Union law, under Article 267 TFEU.”¹

1 Italian Constitutional Court, Judgment no. 269 of year 2017, para. 5.2, Conclusions on points of Law.

Where an Italian provision clashes with the EU law, judges used to assess whether the EU provision was directly applicable or not:² if so, the EU law deserves the primacy over the national legislation, therefore direct application. In other terms, where European legislation is directly applicable to a specific legal fact, the Italian law will not be used to solve the proceeding; it seems “pointless” to rule on its constitutionality (according to constitutional procedure, Italian law would not be considered “*relevant*” in the case at hand).³ However, it seems the Constitutional Court now considers that, in case a contrast with the CFREU arises out, even though it has the same legal status of the Treaties, what it has to be considered is neither the structure nor the effectiveness of these provisions, but the nature of their content: “the typically constitutional stamp of [their] contents”. According to this substantial or axiological criterion, the violation of constitutional norms is a Constitutional Court’s issue. As a consequence, the structural differences, recognized by the Charter itself (see the Explanations Relating to the CFREU), between “*rights*” and “*principles*” were not given significant relevance.

In any case, judgment no. 269 does not represent an unprecedented or isolated position. Indeed, this kind of approach can be found in recent doctrinal works; “the humus in which such a decision has grown⁴” is easily identifiable. Moreover, the decision affirms to follow the previous case law established by other European Constitutional Courts, in particular by the Austrian Constitutional Court, by referring to decision U 466/11-18; U 1836/11-13. Indeed, the latter has stated that “the CFREU has now enshrined rights as they are guaranteed by the Austrian Constitution in a similar manner as constitutionally guaranteed rights” and that “it follows from the equivalence principle that the rights guaranteed by the CFREU may also be invoked as constitutionally guaranteed rights.” Furthermore, it pointed out that “this is true if the guarantee contained in the CFREU is similar in its wording and purpose to rights

2 See ECJ, “*Simmenthal*” case, C-106/77, 9 March 1978, and, concerning Italy, the Constitutional Court decision of 1984 n. 170, so called “*Granital*” case. The criteria to be used to solve contrasts among national Law and EU Law are underlined in the Constitutional Court decision here discussed, para. 5.1 of Conclusions on points of Law.

3 Most recently, see Corte cost., judgment of 2017 no. 111. Indeed, the Constitutional Court, only admitted to submit a question of constitutionality when the issues on interpretation or on the effects of EU Law were solved.

4 R. G. CONTI, *La Cassazione dopo Corte cost. n. 269/2017. Qualche riflessione, a seconda lettura*, in *Forum di Quaderni costituzionali*, 2017, 2.

that are guaranteed by the Austrian Constitution”, and, as a consequence, “one would therefore have to decide on a case-by-case basis which right of the CFREU constitutes a standard of review for proceedings before the Constitutional Court.” The Italian Constitutional Court perhaps has kept a more general approach, assuming that most of the violations of the CFREU present cases of “*dual preliminaryity*”. The Constitutional Court also underlines that this approach is in line with the ECJ case law (Melki and Abdeli, C-188,189/2010), which allows, in cases of dual preliminaryity, to refer the question to the Constitutional Court.

3. Reasons and aims of this case law

Depending on which part of the argument is focused on, it can be assumed that the Italian Constitutional Court wanted to fulfill different purposes.

Firstly, it can be assumed that the Italian Constitutional Court wanted to emphasize its central role when dealing with constitutional rights protection, in order to “avoid any bypassing (contourner) of the Constitutional Court’s functions, caused by the direct relationship between CJEU and ordinary judges.”⁵ This would lead to a different perspective, regarding the Charter of Nice, far from the content expressed by the “*Granital*” decision. On the other hand, it is plausible that the Italian Constitutional Court meant to increase the cooperation with ECJ, in human rights matters, seeking a fair dialogue between Courts, which are both aimed at safeguarding the rights provided by the Charter of Fundamental Rights. “The Court will make a judgment in light of internal parameters and, potentially, European ones as well (per Articles 11 and 117 of the Constitution), in the order that is appropriate to the specific case”; “moreover, all of this plays out within a framework of constructive and loyal cooperation between the various systems of safeguards, in which the constitutional courts are called to enhance dialogue with the ECJ (see, most recently, Order no. 24 of 2017), in order that the maximum protection of rights is assured at the system-wide level (Article 53

⁵ See A. BARBERA, *La Carta dei diritti: per un dialogo fra la Corte italiana e la Corte di Giustizia*, in *Rivista dell’Associazione Italiana dei Costituzionalisti*, 4, 2017, p. 3. The translation of the scholars excerpts are not official; they shall be responsibility of the Author of this note.

of the EUCFR).⁶” Such a mention of the different cases in which the Constitutional Court has been requested preliminary ruling might be read as a real commitment to the dialogue,⁷ which would avoid the intent to create a “monopoly” regarding the human rights protection. “The decision of the Italian Constitutional Court bears an ambivalent meaning. On the one hand, its tone and register is fully European-law friendly. [...] On the other hand, [the Court seems to say that] as long as fundamental rights are protected by the national Charter, national Constitutional adjudication should prevail over the European circuit of adjudication.⁸”

Looking at the relationships between different legal systems, it can be assumed that the Italian Constitutional Court wants to avoid the so called “*spill-over effect*” of the CFREU, basically avoiding the latter from being applied by judges beyond its scope-defined within the spheres of competence of EU – as outlined in its Art. 51. Indeed, it has been argued that lower judges apply the Charter of Nice, even when the right at stake is guaranteed in the Italian Constitution.

In other words, it has been underlined that there are cases where the national rule, in conflict with the CFREU, is not applied and no question to the Constitutional Court is submitted, and not indicating whether the matter of the dispute belonged to the EU competence.

Recently the following question has been proffered “What is the main value of a Constitution if it is not perceived by the community as the place where the fundamental rights are located?.”⁹ A similar *situation* concerned the European Convention of Human Rights (hereinafter “*ECHR*”), which was directly applied by the judges, entailing the uncontrolled disapplication of national provisions; furthermore, it was recommended as a parameter of constitutionality, even though there were constitutional norms aimed to play the same role. Indeed, it has been affirmed that, when possible, the national parameter had to take precedence over the conventional ones, since the

6 Textually reproduced from Judgment no. 269 of year 2017, para. 5.2, Conclusions on points of Law.

7 See Italian Constitutional Court’s Orders: no. 103/2008, no. 207/2013, n. 24/2017 (mentioned in the decision).

8 P. FARAGUNA, *Constitutional Rights First: The Italian Constitutional Court fine-tunes its “Europarechtsfreundlichkeit”*, VerfBlog, 2018.

9 A. BARBERA, *La Carta dei diritti: per un dialogo fra la Corte italiana e la Corte di Giustizia*, in *Rivista dell’Associazione Italiana dei Costituzionalisti*, 4, 2017, p. 4.

Italian legal system of protection of fundamental rights does not always need to be supplemented by international conventions. The ECHR “should work as a “residual” tool, only applicable when no other constitutional norms can be used properly.¹⁰” The enhancement of the national constitutional parameter, even though international norms have the same content, seems to be the logical premise in what was assessed in the decision here discussed. Actually, judgment no. 269/2017 establishes that “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 constitutional structure (Article 134 of the Constitution)”, as already stated by the Austrian Constitutional Court.¹¹

4. Judges and the Charter of Fundamental Rights, future directions

The ruling here analyzed is particularly relevant because it pointed out that Courts have to refer a question of constitutionality to the Constitutional Court in cases where a national provision might be deemed as a violation of the CFREU. Therefore, it seems appropriate to reflect on the aftermath of this decision, and it could be useful to consider two different scenarios. When a violation of the CFREU is likely, or predictable “the question of constitutionality must be raised, leaving in place the possibility of making a referral for a preliminary ruling for matters of interpretation or of invalidity of Union law, under Article 267 TFUE”: the two different targets objectives of the Court’s regaining of a relevant role, and the intensification of the “*dialogue*” between the two courts are both involved in the reasoning, therefore it may be interpreted in two different ways.

On the one hand, the role of the ECJ as an “optional interlocutor” in the dialogue could be questioned, raising the risk that the new recommendations might be ignored. On the other hand, the new case law might be followed by judges, making the alleged violations of the CFREU questions of constitutionality. Hypothetically, enlarging upon the reasoning of this ruling, judges could also question the Constitutional

¹⁰ See M. RUOTOLO, *L'incidenza della CEDU sull'interpretazione costituzionale. Il “Caso” dell'Art. 27, comma 3, Cost., in Rivista dell'Associazione Italiana dei Costituzionalisti*, 2013, p. 7.

¹¹ See para. 5.2 of Conclusion of points of Law, judgment no. 269/2017; para. 5.5 of the *Consideration*, judgment U 466/11-18; U 1836/11-13 of 14 March 2012.

Court in cases in which the national legislation is in contrast with European provisions when the latter are considered “constitutional in a material sense”, even if they are part of other European sources of law (for instance, of the TEU or the TFEU). Obviously, this approach has to be considered quite difficult, since there are many reasons to put its legitimacy in doubt. Indeed, the principle of primacy of European law over the national law and the traditional role of arbiter of the European Treaties played by the Court of Justice might be questioned.

After the no. 269/2017 ruling, two questions of constitutionality have been submitted to the Italian Constitutional Court by the *Corte di Cassazione* in cases of “*dual preliminarity*” (either Constitutional and European).¹² On the other hand, in two other similar occasions, no question of constitutionality was raised.¹³ In any case, within the grounds of the referral order, the Supreme Court seeks clarification on the meanings of the new case law established by decision no. 269: specifically, it asks whether it is still abstractly possible, where the Italian provision survives constitutional scrutiny, to submit a reference for a preliminary ruling to the ECJ to decide on the compatibility with EU law and, if need be, to disapply the national provision because of this contrast.

When the Italian Court’s jurisdiction is invoked, does the Constitutional Judge have the “last word”? If so, the Supreme Court seems to believe that this approach could lead to a contrast with ECJ case law, which allows for (prior) constitutional review, so long as judges are entitled to ask the Court of Justice for a preliminary ruling, when required.¹⁴

12 See *Corte di Cassazione civile*, order of 2018, no. 3831.

13 See *Corte di Cassazione Lavoro*, judgement of 2018, no. 13678; *Corte di Cassazione Lavoro*, judgement of 2018, no. 12108: para. 12-13 the *Corte di Cassazione* affirms that the submission of the question of constitutionality is not an obligation, it’s just a “methodological advice”.

14 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*, in *federalismi.it*, 2018, argues that the Constitutional Court does not mean to prevent from referring to the Court of Justice. What really concerns the constitutional judge is to promote the constitutional review of national norms whether the CFREU is directly (or indirectly) applicable, discouraging the spread of a sort of decentralized model of constitutional review.
