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## *THE RANDSTAD CASE: MELKI RELOADED? THE FUNDAMENTAL RIGHT TO EFFECTIVE JUDICIAL PROTECTION AS BATTLEGROUND FOR JUDICIAL SUPREMACY IN EUROPEAN LAW*

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# The *Randstad* Case: *Melki* Reloaded? The Fundamental Right to Effective Judicial Protection as Battleground for Judicial Supremacy in European Law

Orlando Scarcello*

**ABSTRACT**

This paper will examine the recent preliminary reference to the European Court of Justice issued by the Italian Court of Cassation in the *Randstad* case, aimed at rearranging the internal constitutional separation between ordinary and administrative courts (article 111(8) of the Constitution). I will first provide some context on both the relations between Italian and EU courts (§ 2.1) and on the confrontation between the Court of Cassation and the Constitutional Court in interpreting article 111 (§ 2.2). I will then specifically examine the referring order to the ECJ (§3), focusing on the role of general clauses of EU law as articles 4(3) and 19 TEU and 47 of the Charter in it. Finally, I will draw some conclusions regarding the possible abuse of "connective" norms like article 47 of the Charter on the right to effective judicial protection (§§4-5). Although these provisions can work as tools to handle inter-legal scenarios, they can also be used instrumentally to serve specific purposes of judicial politics. This would amount to a paradigmatic case of "abuse" of interlegality.

**KEY WORDS:** Charter of Fundamental Rights of the EU – Article 47 – Connective Norms – "Abuse" of Interlegality

## 1. Introduction

In this paper I will consider how in the EU ordinary judges use supranational law strategically to overturn established interpretations of domestic provisions. To show how this strategic use might happen, I will consider the paradigmatic *Rundstad* case, involving the Italian Court of Cassation, the European Court of Justice (ECJ), and the Italian Constitutional Court (the latter as a "stone guest"). This case will show that EU norms

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safeguarding fundamental rights, in particular the right to effective judicial protection as in articles 19 TEU and 47 of the Charter of Fundamental Rights, can de facto be used strategically by domestic courts to dictate their interpretation of fundamental rights independently from the opinion of constitutional courts on the matter.

The paper is structured as follows.

First, I will first introduce the broader context, stressing how the enlargement of protection of fundamental rights in EU law has fostered an even growing overlap between supranational and domestic guarantees and, therefore, interpretive competition. The wide scope of application of the Charter plays a special role in this inter-legal scenario. I will also situate the judgments within the larger confrontation between the Cassation and the Italian Constitutional Court on the interpretation of article 111(8) of the Italian Constitution regarding the division of competences ("jurisdiction" in the domestic legal vocabulary) between ordinary and administrative judges.

I will then consider the referring order *ex* article 267 TFEU by the Italian Court of Cassation in *Randstad* to show a paradigmatic instance of the "strategic" role of supranational law in judicial politics.

Finally, it will be possible to draw some conclusions regarding the critical position of referring judges, more and more autonomous guardians of fundamental rights through EU law, and on the role of "interfacial" norms as article 47 of the Charter in the intertwined environment of European law. It will be argued that, once attempts of functional separation such as article 51(1) of the Charter fail and dual applicability of EU and domestic law is allowed, judges might use cross-the-board clauses as article 47 instrumentally, pursuing specific judicial policies under the cloak of a proper inter-legal reasoning. In fact, this is what is happening in *Randstad*. In a sense, using the vocabulary of XIX continental theory of rights, I argue that this might be depicted as an "abuse" of inter-legality.

## 2. Situating *Rundstad*: Supranational and National Context

In this paragraph I will situate *Rundstad* within the broader context, examining both the supranational and the national context (2.1). I will focus on the supranational context, mainly the progressive expansion in the scope of application of the Charter of Fundamental

Rights and the reaction of constitutional courts. The national context, presenting the disagreement between the Cassation and the Constitutional Court on article 111(8) of the Constitution, will be introduced in 2.2.

### *2.1. The Supranational Context: Substantive Overlap of Fundamental Rights in Europe*

The EU and its predecessors, the Communities, were not born endowed with a catalogue of fundamental rights: cases like *Stork* are famous vestiges of that past.[1] It is equally known that the lacuna was filled up by the ECJ itself by means of the so called "general principles" of European law, in turn drawn from the "common constitutional traditions" of the Member States and from the European Convention on Human Rights, a treaty signed and ratified by all Member States.[2] Despite always rejecting the direct application of domestic norms on rights,[3] through the general principles, also endowed with horizontal effects,[4] the Court granted review of rights and appeased disappointed constitutional courts.[5] Decades later came Charter: initially aimed at clarifying the rights and making them more visible and certain, with the Lisbon Treaty it added a new tool for judicial review of rights to the arsenal of the ECJ.[6] The Charter did not merely substitute the general principles by codifying them: the relation between the two instruments of rights' protection is still unclear and currently amounts to the cumulative use of both codified rights and general principles.

Most importantly to our aims, however, the Charter has been object of incremental interpretive extension in several directions. Some fundamental rights were considered as horizontally applicable, therefore ensuring protection against both public authorities and private actors.[7] Extraterritorial application, for instance to agreements with third parties, is

[1] ECJ, C-1/58, *Stork*.
[2] ECJ, C-4/73, *Nold*; ECJ, C-36/75, *Rutili.*
[3] ECJ, C-11/70, *Internationale Handelsgesellschaft*.
[4] ECJ, C-144/04, *Mangold*.
[5] Bundesverfassungsgericht (BVerfG), Solange I, 37, 271 1971; Solange II, 73, 339 1983; Italian Constitutional Court (ICC) judgment 183/1973 Frontini; judgment 170/1984 Granital.
[6] Grainne De Burca, *The Drafting of the EU Charter of Fundamental Rights*, 26(2) European Law Review (2001).
[7] See the up-to-date analysis by Eleni Frantizou, *The Horizontal Effect of the Charter: Towards an Understanding of Horizontality as a Structural Constitutional Principle*, Cambridge Yearbook of European Legal Studies (2020) 8-12.

more and more discussed as a possible consequence of the Charter's scope of application.[8] Most notably, the internal scope of application certifies the ever growing extension of the Charter. Article 51(1), specifying that the Charter is binding on the institutions and bodies of the Union and on the Member States only when implementing EU law, was initially a source of uncertainty, mainly regarding the meaning of the "implementation". For instance, whether it regarded only actions or omissions too was unclear; so was whether Member States derogating from EU law were bound by the Charter.[9]

However, in 2013 the pivotal *Akerberg Fransson* and *Melloni* judgments clarified several points under discussion.[10] *Fransson* specified that every time Member State actions felt within the scope of EU law, that action did count as implementation of EU norms by Member States, even when unintended.[11] Therefore, what did count was not the subjective will of national authorities to implement EU law, but the objective functionality of the enacted provisions to do so, even accidentally.[12] Later cases mostly confirmed the objective and functional approach of *Fransson*: although recalling among the various criteria to determine the applicability of the Charter the aim pursued by domestic authorities, this was in fact enlisted as one of the criteria to take into account, not as a necessary condition.[13] In *Siragusa* and *Iida* the ECJ enlisted four criteria to establish the applicability of the Charter to Member States action: the intent to implement EU law, the convergence of the aims pursued by States with an objective covered by EU law, the objective impact on EU law, and the existence of specific rules of EU law on the matter.[14] The *Ledra* judgment, regarding the ESM treaty, granted the applicability of the Charter to EU institutions and bodies even outside the EU legal framework, provided that the ESM was anyway instrumental to supplement the objectives of the EU.[15] The *Fransson* doctrine was to some extent limited in later cases, such as *TNS*, which allowed Member States to ensure higher standards of

[8] Eva Kossoti, *The Extraterritorial Applicability of the EU Charter of Fundamental Rights: Some Reflections in the Aftermath of The Front Polisario Saga*, 12(2) European Journal of Legal Studies (2020) and Chiara Macchi, *With trade comes responsibility: the external reach of the EU's fundamental rights obligations*, 11(4) Transnational Legal Theory (2020), 5-17.
[9] Koen Lenaerts, *Exploring the Limits of the EU Charter of Fundamental Rights*, 8 European Constitutional Law Review (2012) 375.
[10] ECJ C-617/10 *Åkerberg Fransson*; ECJ C-399/11, *Melloni*.
[11] Filippo Fontanelli, *Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog*, 9 European Constitutional Law Review (2013) 322-325.
[12] Filippo Fontanelli, *Hic Sunt Nationes*, 325-327.
[13] ECJ C-206/13, *Siragusa*, § 25.
[14] C-206/13, ivi; ECJ, C-40/11, *Iida*, §79. The criterion of EU law's specificity is the most used by the Court. See Benedikt Pirker, *Mapping the Scope of Application of EU Fundamental Rights: A Typology*, 3(1) European Papers (2018) 139-150.
[15] ECJ, C-8 and 10/15, *Ledra*, § 67.

rights' protection outside the scope of application of the Charter when adopting opt-outs on the basis of minimum harmonization standards.[16] Anyhow, the general result of this seminal case was an extension in the scope of application of the Charter, encompassing *prima facie* doubtful cases too.[17]

To properly understand the supranational context of *Randstad*, *Fransson* must be read together with the twin *Melloni* judgment.[18] Issued on the very same day, *Melloni* stated that article 53 of the Charter allowed Member States to apply domestic standard on fundamental rights only when these would not undermine the level of protection provided by the Charter and when primacy, direct effect, and uniformity of EU law would be left uncompromised.[19] As a result, diverging measures at the national level, even when aiming at a higher level of protection, face strict limits. This marks a strong difference between the two decisions. In fact, in *Fransson* a certain margin of appreciation was left to the domestic authorities on the level of protection of rights, with the Charter working as a minimum standard. This likely depended on the partial level of harmonization (EU law did not determine the type of sanctions that ought to be implemented discussed in *Fransson*). *Melloni*, on the other hand, was entirely determined by EU law, therefore the margin of maneuver left to States was minimum.[20]

Read together, *Fransson* and *Melloni* entailed a strong "federalizing force": the combination of a widely applicable Charter (*Fransson*) and of a limited room for national constitutional standards (*Melloni*) is such that the Charter becomes a pretty wide-ranging standard of judicial review of rights.[21] Briefly, the Charter must be applied frequently and trump national (constitutional) standards of review. Moreover, domestic judges are famously the first guardians of EU law and apply it directly, sometimes after referring a preliminary question to the ECJ (the so called *Simmenthal* mandate). In fact, recent data

[16] See Maxime Tecqmenne, *Minimum Harmonisation and Fundamental Rights: A Test-Case for the Identification of the Scope of EU Law in Situations Involving National Discretion?*, 16 European Constitutional Law Review (2020) 7-13 and 17-20.
[17] E.g. consider ECJ, C-411/10, *N.S.*, §§ 64-69, in which the Charter is considered applicable even to cases in which a certain degree of discretion is left to the Member State in implementing EU law.
[18] See Nikos Lavranos, *The ECJ's Judgments in Melloni and Akerberg Fransson: Une ménage à trois difficulté*, 4 Grundrechte (2013).
[19] C-399/11, §§55-60. For an exhaustive commentary on *Melloni* see Aida Torres Pérez, *Melloni in Three Acts: From Dialogue to Monologue*, 10 European Constitutional Law Review (2014).
[20] C-399/11, 324-329.
[21] Aida Torres Pérez, *The federalizing force of the EU Charter of Fundamental Rights*, 15 International Journal of Constitutional Law (2017) 1081-1090.

show that domestic courts are using the Charter in preliminary references more frequently and in a more appropriate manner, with ever fewer requests deemed inadmissible.[22]

Partly as a reaction to *Fransson-Melloni*, constitutional courts started using the Charter themselves as a yardstick of constitutionality. The broad interpretation of article 51(1) meant that the attempt to functionally separate the Charter and national catalogues of rights (usually at the constitutional level) had failed. Consequently, in a variety of cases two regimes of rights were destined to overlap ("parallel" or "tandem" applicability[23]). The list of constitutional courts explicitly relying on the Charter is growing:[24] after the pioneering experience of Austria,[25] the cases of Italy[26] and Germany[27] aroused particular attention. The direct application of the Charter by constitutional courts clearly marked a departure from milder models, such as the mere indirect use of the Charter as a tool to interpret domestic constitutional rights typical of Spain or Belgium.[28]

On the one hand, the "appropriation" of the Charter by constitutional courts might be viewed favorably, as constitutional courts would finally be "taking the Charter seriously" and ensuring that the argumentation regarding the law applicable to the case under scrutiny is as complete as possible. On the other hand, there is another aim, more or less explicitly stated, beyond the process of constitutional "appropriation": avoiding the risk of being marginalized by the de facto creation of a decentralized system of judicial review of rights performed by ordinary judges. The widely applicable Charter, directly used by national judges, risks "cutting off" constitutional courts. Mechanisms like the (rebuttable) presumption of prior application of the German Constitution are explainable as attempts by

[22] European Union Agency for Fundamental Rights, *Ten Years On: Unlocking the Charter's Full Potential* (2020) 7-8, available at Fundamental Rights Report 2020 | European Union Agency for Fundamental Rights (europa.eu).
[23] Sara Iglesias Sanchez, *Article 51: The Scope of Application of the Charter*, in Michal Bobek and Jeremias Adams-Prassl (eds.), The EU Charter of Fundamental Rights in the Member States, Hart Publishing (2020) 410-412.
[24] *Ten Years On*, 8-9.
[25] Verfassungsgerichtshof (VfGH), U 466/11-18, U 1836/11-13. See Andreas Orator, *The Decision of the Austrian Verfassungsgerichtshof on the EU Charter of Fundamental Rights: An Instrument of Leverage or Rearguard Action?*, 16 German Law Journal (2015).
[26] ICC, judgments 269/17, 20/19, 63/19. See Giuseppe Martinico and Giorgio Repetto, *Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court and Its Aftermath*, 15 European Constitutional Law Review (2019).
[27] BVerfG, Right to Be Forgotten I, 1 BvR 16/13 and Right to Be Forgotten II, 1 BvR 267/17. See Daniel Thym, *Friendly Takeover, or: the Power of the 'First Word'. The German Constitutional Court Embraces the Charter of Fundamental Rights as a Standard of Domestic Judicial Review*, 16 European Constitutional Law Review (2020). In Germany, *Fransson* also fostered the first case in which the First Senate of the Constitutional Court committed itself to *ultra vires* review.
[28] See Clara Rauchegger *The Charter as a Standard of Constitutional Review in the Member States*, in Michal Bobek and Jeremias Adams-Prassl (eds.), The EU Charter of Fundamental Rights in the Member States, Hart Publishing (2020), 495-497.

constitutional courts, the *Bundesverfassungsgericht* in this case, to "resist" the process of rights' decentralization.[29] Comparative analysis shows that in the case of the Italian Constitutional Court, absent a mechanism of individual direct action for constitutional review, the danger of marginalization is even higher.[30]

In other words, and briefly, *Randstad* must be understood in a context in which the possibility for ordinary judges to affirm their own interpretation of fundamental rights is higher thanks to the existence of an independent and broad system of EU review of rights, even in jurisdictions characterized by a centralized system of review. Constitutional courts, on the other hand, progressively internalize the Charter, partly with the goal of avoiding marginalization. Although in limited cases constitutional courts are used to directly apply EU law more in general,[31] the Charter enjoys the special status of an intrinsically "constitutional" section of EU law,[32] to be used simultaneously with national constitutional catalogues.

### *2.2. The National Context: Overcoming the Dual System of Judicial Review?*

To properly understand *Rundstad*, the national context, namely the domestic dual system of judicial review, must be examined too. The Italian organization of the judiciary follows the "French" doctrine of a special and separate system of courts to obtain redress against government actors.[33] The *droit administratif*, in other words, has its own system of courts, with regional tribunals as courts of first instance and the Council of State (*Consiglio di Stato*) as the supreme administrative court.

[29] Dana Burchardt, *Backlash against the Court of Justice of the EU? The Recent Jurisprudence of the German Constitutional Court on EU Fundamental Rights as a Standard of Review*, 21 German Law Journal (2020) 6-8 and MW/JHR/MC, *Editorial - Better in Than Out: When Constitutional Courts Rely on the Charter*, 16 European Constitutional Law Review (2020) 1-3. For the milder limiting strategy of the VfGH, see Orator, *ivi*, 1436-1438 and 1442-1444.

[30] Clara Rauchegger, *National Constitutional Courts as Guardians of the Charter: A Comparative Appraisal of the German Federal Constitutional Court's Right to Be Forgotten Judgments*, 1 Cambridge Yearbook of European Legal Studies (2020) 14-17 and Id., *The Charter as a Standard of Constitutional Review*, 489-493.

[31] David Paris, *Constitutional courts as European Union courts: the current and potential use of EU law as a yardstick for constitutional review*, 30 Maastricht Journal of European and Comparative Law (2018) 7-19.

[32] See VfGH, U 466/11-18, U 1836/11-13, §5 and ICC, 269/17, § 5.2 and ICC, judgment 269/2017, § 5.2

[33] Francesca Bignami, *Regulation and the courts: judicial review in comparative perspective*, Francesca Bignami and David Zaring (eds.), Comparative Law and Regulation, Edward Edgar (2018) 277-283.

There are, however, two main differences when comparing the Italian model to the French. First comes the (in)famous concept of "legitimate interest" describing the legal interest of the individual against the administration to review acts or omissions of the latter. This concept, hardly distinguishable conceptually from a special form of legal right, identifies the specific kind of legal interest which can be preserved by administrative courts, while legal rights *stricto sensu* of the individual against the administration shall be brought to ordinary judges. The distinction between legitimate interests (sued in special courts) and legal rights (sued in ordinary courts) is often hard. Thus, the Constitution itself identifies a legal authority endowed to solve the possible conflicts between the two jurisdictions (ordinary and special). Here comes the second difference from the classic French model: there is no mixed body in which judges from the two peak courts mingle (as in the *Tribunal des Conflits*, made of members of the *Conseil d'État* and of the *Cour de Cassation*). According to article 111(8) of the Constitution, all conflicts are solved by the supreme court (*Corte di Cassazione*) alone.[34] As a result, the mechanism of judicial review is dual, with a separate system of administrative tribunals, but not perfectly symmetrical. One of the two peak courts, the Court of Cassation, enjoys a certain primacy over the Council of State, for it has the power to decide over "reasons of jurisdiction". However, clarifying what a reason of jurisdiction is turns out to be rather hard. Moreover, since article 111(8) is a constitutional provision, the appropriate interpreter is not the Cassation, but the Constitutional Court. The result of this complex institutional arrangement is a certain degree of interpretive competition between the Cassation and the Constitutional Court on article 111.

To the extent that this issue of domestic law is relevant here, suffice it to say that in the last years the Court of Cassation has occasionally favored an "expansive" or "dynamic" interpretation of article 111(8).[35] According to the Cassation, "jurisdiction" had to be interpreted broadly as referring not only to the norms regarding the establishment and functioning of the judiciary, but also to misguided interpretation of procedural or substantive norms which could de facto deprive plaintiffs and defendants of their rights.[36]

[34] Article 111(8): "Appeals to the Court of Cassation against decisions of the Council of State and the Court of Accounts are permitted only for reasons of jurisdiction". Official translation in English available at https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf .

[35] The "dynamic" interpretation of article 111(8) of the Constitution is far from being dominant in the Court of Cassation itself. See Pier Luigi Tomaiuoli, *Il rinvio pregiudiziale per la pretesa, ma incostituzionale, giurisdizione unica*, at https://www.giurcost.org/studi/tomaiuoli2.pdf, 693-694.

[36] Giuseppe Tesauro, *L'interpretazione della Corte costituzionale dell'art. 111, ult. comma: una preclusione impropria al rinvio pregiudiziale obbligatorio*, 34 Federalismi (2020) 247-249.

In 2018, the Constitutional Court issued a pivotal decision, judgment 6/2018, which severely restricted this expansive interpretation of article 111(8). According to the Constitutional Court, article 111(8) merely allows the Cassation to censor cases in which administrative tribunals invade the prerogatives of ordinary courts (or the other way around), when they intrude into competences reserved to the legislator or the executive, or when they refuse to decide over questions reserved to their competence. Any other norm does not belong to the notion of "jurisdiction" and, if wrongly interpreted or applied by a court, must be considered as mere infringement of law (*violation de loi*).[37]

As a result, the domestic context must be understood considering this confrontation on the notion of jurisdiction and on the interpretation of article 111(8), which entails heavy consequences regarding the possible expansion or restriction of the powers of the Court of Cassation over administrative courts.

The domestic confrontation between the Cassation and the Constitutional Court must be understood by also focusing on the specific attitude of Italian judges towards EU law in general and towards the application of the Charter through preliminary reference in particular. In preliminary rulings between 2010 and 2018, Italian judges have mentioned the Charter more than their peers in other Member States in absolute numbers and score above the European average with respect to the proportion of references that mention it,[38] but they also collected the highest percentage of dismissals for lack of jurisdiction by the ECJ in the EU (one out of four *circa*).[39] Thus, Italian judges seem particularly ready to use the preliminary reference mechanism and the Charter in particular, but are often dismissed by the ECJ. This might reinforce the idea that at the domestic level the Charter is used in a rather nonchalant manner and confirm the ICC's (partly unspoken) fear of possible instrumental use of the Charter to overcome unappreciated internal legal arrangements, such as the interpretation of article 111(8) of the Constitution. As mentioned in the previous section, a certain centralization of review on the basis of the Charter is happening in other jurisdictions too. In Italy this specifically took the form of a direct message to ordinary

[37] ICC judgment 6/2018, §§ 11-15.

[38] See David Reichel and Gabriel N. Toggenburg, *References for a Preliminary Ruling and the Charter of Fundamental Rights: Experiences and Data from 2010 to 2018*, in Michal Bobek and Jeremias Adams-Prassl (eds.), The EU Charter of Fundamental Rights in the Member States, Hart Publishing (2020), 471-472. Italian judges fare quite bad in general in preliminary references and are often dismissed by reasoned order, see Arthur Dyevre, Monika Glavina and Michal Ovádek, Case selection in the preliminary ruling procedure, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3489741>, 13-17.

[39] David Reichel and Gabriel N. Toggenburg, *References for a Preliminary Ruling*, 473.

judges. While already in its previous case law the Constitutional Court referred to the Charter,[40] in 2017 it started using it directly as a parameter of constitutional review and it required ordinary judges to reverse the habitual order of references by first referring to Rome and only later to Luxemburg in case fundamental rights' infringement.[41] The review of the relevant legislation would be performed in the light of both the Constitution and the Charter directly by the ICC. This rule was eventually softened in later cases and turned into a mere suggestion,[42] but it clearly remarked the ICC's will to engage into autonomous review by means of the Charter.

Briefly, the domestic context shows tense confrontation between the Cassation and the Constitutional Court regarding the interpretation of article 111(8), together with a judiciary generally speaking willful to use the Charter in preliminary references and a Constitutional Court visibly worried of the decentralization of review on rights that might follow.

## 3. The Preliminary Ruling: Order 19598/20

Given this complex national and supranational context, order 19598/20 (the *Randstad* order) by the Court of Cassation, submitting three preliminary questions to the Court of Justice, does not come as a surprise.

There is no need to conjecture: by means of the order, the Supreme Court is explicitly trying to overcome decision 6/2018 by the Constitutional Court and looks for help in Luxemburg. When looking at the argument of the Cassation, article 47 of the Charter, coupled with a series of other structural provisions of EU law (articles 4.3 and 19 TEU and 267 TFEU) is pivotal. In other words, the risk that the Constitutional Court was trying to limit, that of de facto decentralization of judicial review cutting the ICC off, seems tangible

[40] Silvana Sciarra and Angelo Jr. Golia, *Italy: New Frontiers and Further Developments*, in Michal Bobek and Jeremias Adams-Prassl (eds.), The EU Charter of Fundamental Rights in the Member States, Hart Publishing (2020) 243-249.
[41] ICC judgment 269/17, § 5. Judgment 269/17 must likely be read together with the equally "recentralizing" *Taricco* saga, in which recentralization mainly focused on the "supreme principles" of the Constitution. See Giovanni Piccirilli, *The 'Taricco Saga': the Italian Constitutional Court continues its European Journey*, 14 European Constitutional Law Review (2018) 822-833.
[42] ICC judgments 20/19, § 2.3 and 63/19, § 4.3.

in the *Randstad* order. While it is true that a single referring order is not enough to claim that the scenario the Constitutional Court wanted to limit is happening, it is equally true that empirical studies suggest that preliminary references from peak courts are generally speaking treated as more important by the ECJ.[43] Thus, a single order coming from a supreme court as the Cassation is probably more threatening than a bunch coming from lower judges.

Factually, the order comes from an issue in public procurement. A public competitive procedure was called in Region Valle d'Aosta, but the two-stage tender immediately excluded several tenderers based on technical criteria set by the contracting authority. In the second stage, the remaining bids were considered from the financial point of view to select the most economically advantageous. The company Randstad Italia Spa was not admitted to the second stage and challenged the decision in court. The Regional Administrative Tribunal examined two groups of complaints. On the one side, the plaintiff protested against the mistaken technical evaluation of the offer, which led to the exclusion from the second stage. On the other, a series of faults in the second stage were underlined regarding the composition of the evaluating committee, the specification of the criteria to evaluate the financial viability of tenders, and the justification of the final decision. The Regional Administrative Tribunal examined and rejected both groups of complaints. The decision was appealed, and the Council of State rejected the demand again, but this time refused to even consider the second group of complaints, stating that a tenderer excluded in the first stage could only challenge the exclusion (first phase), not the second phase too (other vices). This decision was appealed again, and the appellant asked the Cassation to declare the judgment by the Council of State unlawful as it denied effective judicial protection by refusing to examine the second group of complaints. In fact, according to the appellant, the Cassation, as guardian of the proper division of judicial functions under article 111(8) of the Constitution, was entitled to declare whether the dismissal by the Council of State was valid. The Court of Cassation suspended the proceeding and issued a preliminary ruling to the ECJ asking three separate questions. However, it is the first that deserves particular scrutiny to our aims.

[43] Michal Ovádek, Wessel Wijtvliet and Monika Glavina, *Which Courts Matter Most? Measuring Importance in the EU Preliminary Reference System*, 12 European Journal of Legal Studies (2020) 142-153.

With the first question, the Court of Cassation asks whether articles 4(3) and 19(1-2) TEU, and 267 TFEU, "also read in the light of article 47 of the Charter", are incompatible with a domestic interpretation which does not allow decisions incompatible with the ECJ's judgments on public procurement to be appealed in front of the Court of Cassation. The domestic interpretation is explicitly connected to judgment 6/2018 by the Constitutional Court and it allegedly threatens the uniform application and effective judicial protection of EU law.

With the second question, the Cassation asks whether the very same EU provision are, again, incompatible with a domestic interpretation that prevents appeals to the Cassation of decisions by the Council of State which unlawfully avoid a preliminary reference to the ECJ (beyond the strict conditions enlisted in *CILFIT*[44]). Such interpretation would deprive the ECJ of its role of the guardian of EU legality and threaten the uniform application and effective judicial protection of EU law.

With the third question the Court asks whether under EU law a plaintiff may be prevented from challenging a public competition once it was excluded from participating after a first preliminary stage, also in the light of a series of previous decisions by the ECJ.[45]

The first preliminary question is grounded in rather interesting arguments.

First, the Court of Cassation explicitly asks the ECJ to overcome a national interpretation provided by the Constitutional Court. There is no hidden disagreement between the two courts; on the contrary, the divergence is plainly exposed and the ECJ is conceived as a possible external arbiter. The first question is supported by recalling at length the already mentioned domestic conflict on the notion of "jurisdiction". By explicitly recalling both article 111(8) of the Constitution and the interpretation given by the Constitutional Court in judgment 6/2018, the Court of Cassation is clearly asking the ECJ to declare the duty under EU law to disapply a national constitutional provision, at least as interpreted by the Constitutional Court. For this reason, the Cassation quotes the (in)famous *Internationale Handelgesellschaft*[46] and the *Taricco I*[47] judgments by the ECJ as

[44] ECJ, C-238/81, *CILFIT*, §§ 14-20. Famously, the national courts are released from their obligation to refer questions under article 267 TFEU only when the ECJ has already dealt with the point of law or when the interpretation is obvious (so called *acte clair*).
[45] ECJ C-333/18, *Lombardi*; C-689/13, *Puligienica*; C-100/12, *Fastweb*.
[46] ECJ, C-11/70, *Internationale Handelsgesellschaft*.
[47] ECJ, C-105/14, *Taricco.*

justifications of the possible disapplication of the constitutional provision. It is worth noting that the Cassation does not mention the reactions to the two cases, namely the *Solange I*[48] decision by the BVerfGE after *Internationale Handelgesellschaft* and order 24/2017 by the Italian Constitutional Court after *Taricco I*, this way de facto abstracting the two judgments from their rather confrontational context. All in all, this preliminary ruling seems to openly foster constitutional conflict. In fact, what might follow is the Constitutional Court lifting the counter-limits against a decision in Luxemburg accepting the arguments used by the Cassation.[49] Truly, whether the possible disapplication of article 111(8) would trigger the counter-limits doctrine is not obvious, as Italian lawyers themselves do not agree on that,[50] but the possibility of open conflict is tangible. There is no need to believe that the use of EU law to solve a domestic disagreement between the Cassation and the Constitutional Court is insincere or specious. On the contrary, some form of the principle of charitable interpretation obliges the reader to understand the Cassation as genuinely believing that the national interpretation of article 111(8) is incompatible with EU law. Nevertheless, the risk of conflict, provided that the Constitutional Court reads the order and the answer in Luxemburg as an invasion of its own prerogatives, is probably higher than one might believe by simply reading the preliminary reference. All the more so as the *Taricco* saga too was crucially rooted in the inability of the Italian Republic to ensure effective protection of the EU's financial interests, so that there is at least one crucial element of similarity between the two cases:[51] the (attempted) overcoming of a national constitutional provision based on the need to grant the effectiveness of EU law.

Second, the referring judge draws an abstract distinction between cases in which ordinary judges fail to apply national law in areas under EU competence and cases in which the failure regards areas outside the scope of EU law. Only in the latter case we may speak of infringement of law in the classic sense of continental administrative law (*violation de*

[48] BVerfG 37, 271 1971.
[49] ICC, 183/1973, *Frontini*, § 9; 170/1984, *Granital*, § 7; 24/2017, *Taricco*, § 7.
[50] E.g. Roberto Bin argues that counter-limits may be used in *Randstad* (*È scoppiata la terza "guerra tra le Corti"? A proposito del controllo esercitato dalla Corte di Cassazione sui limiti della giurisdizione*, Federalismi (2020) 8-10), while former AG in Luxemburg and former President of the Constitutional Court Giuseppe Tesauro, takes the opposite stance (*L'interpretazione della Corte*, 240 and 254).
[51] An equally crucial difference, however, lies in the fact that the underlying constitutional principle, article 25(2) of the Italian Constitution on the principle of legality in criminal law was much more likely to belong to the core of the Constitution and therefore to trigger the counter-limits. On *Taricco* see Silvia Allegrezza, *C-105/14 – Taricco and Others On Legality in Criminal Matters between Primacy of EU Law and National Constitutional Traditions. A Study of the Taricco Saga*, in Valsamis Mitsilegas et al (eds.) The Court of Justice and European Criminal Law: Leading Cases in a Contextual Analysis, Oxford, Hart Publishing (2019) for the criminal law perspective.

*loi*): here the judge would be an institution, part of a broader sovereign State, failing to properly perform the judicial function. In the former case, on the other hand, the judge is merely the executor of the EU's will, it acts as a supranational judge. In the material fields conferred to the EU, the State has given up its sovereignty: not even the legislator could regulate them. Thus, when a judge interprets domestic law on public procurement inconsistently with EU law (*qua* the ECJ's case law), she is not simply infringing the law, she is properly creating new (judicial) law in areas beyond the sovereignty of the State. Therefore, since in this case the judge is creating the law, she is exercising the legislative, not the judicial power and, consequently, she is intruding into an area which should be reviewable by the Court of Cassation. The idea that in areas conferred to the EU Member States have given up their sovereign powers and judges merely grant application to EU law is interestingly substantiated by referring to a series of decisions by the ECJ, including classic judgments as *Van gend en Loos*, *Costa*, *Simmenthal*, and Opinion 1/91. It does not, however, quote the pivotal *Granital* decision by the Constitutional Court, which explicitly recognized the autonomy of EU law and the mere effectiveness which national institutions, including judges, were bound to grant it.[52]

Lastly, the classic EU principle of procedural autonomy is recalled, but the Cassation immediately points out that procedural autonomy is limited by the countervailing principles of equivalence and effectiveness. The Cassation suggests that refusing to examine the second group of complaints threatens the uniform application and effectiveness of EU law. The only remedy under domestic law would be the posthumous and allegedly inadequate action for State liability for breaches of EU law. Effectiveness, meant as judicial effective protection of rights, is the key principle of EU law on which the Cassation relies when trying to overcome the domestic interpretation of article 111(8) of the Constitution.

[52] Corte costituzionale, 170/1984, *Granital*, §§ 4-5.

## 4. The Instrumental Role of Connective Norms: Abusing Inter-Legal Scenarios?

At first sight, *Randstad* is reminiscent of the previous *Melki* saga. *Melki* too was a *guerre des judges* in which a domestic court, the French *Cour de Cassation*, asked the ECJ about the compatibility with EU law of a domestic constitutional arrangement, namely the constitutional reform introducing the so-called *question prioritaire de constitutionnalité*. In principle we can see a similar dynamic, with the "supreme court" reacting to a possible power shift from its hands towards other courts by looking for advice (and support) in Luxemburg.[53] However, there is a crucial difference in the parameters of review. In *Melki*, the French Cassation referred to article 267 TFEU to try unhinging the new mechanism of preliminary reference to the Constitutional Council. In *Randstad* the Italian Cassation relies on a wider series of EU norms: article 267 TFEU is only one of them.

The first preliminary question, as previously mentioned, refers to articles 4(3), 19(1-2) TEU, and 267 TFEU, "*also read in the light of article 47 of the Charter*". This wording is not perfectly clear, but it seems reasonable that is suggests consistent interpretation with article 47 of the other provisions on effective judicial protection. In other words, given various possible meanings of articles 4(3), 19(1-2) TEU, and 267 TFEU, one should look at article 47 to assess their "proper" interpretation.[54] Effectiveness of EU law, in the form of effective judicial protection, is the core principle of supranational law on which the Cassation is grounding its attempt to overcome decision 6/2018 and article 47 is likely considered the most explicit codification of this principle.[55]

The principle of effective judicial protection is the key of the entire reference. Born as a general principle, it is usually considered an instantiation of the principle of loyal

[53] For a commentary of *Melki* see Arthur Dyevre, *The Melki Way: The Melki Case and Everything You Always Wanted to Know About French Judicial Politics (But Were Afraid to Ask)*, in Monica Claes et al. (eds.), Constitutional conversations in Europe: actors, topics and procedures, Intersentia (2012) 309-322

[54] This would be a particular case of normative hierarchy (an interpretive one) between legal norms which is not new to the case law of the ECJ. Let me recall my own Orlando Scarcello, *On the Role of Normative Hierarchies in Constitutional Reasoning: A Survey of Some Paradigmatic Cases*, 31(3) Ratio Juris (2018), 358-360 for a comment of a similar reasoning in Opinion 2/13 by the ECJ.

[55] See Kathleen Gutman, *Article 47: The Right to an Effective Remedy and to a Fair Trial*, in Michal Bobek and Jeremias Adams-Prassl (eds.), The EU Charter of Fundamental Rights in the Member States, Hart Publishing (2020) and Steve Peers, Tamara Harvey and Herwig Hofmann, *The Right to an Effective Remedy and to a Fair Trial - Article 47 of the Charter and the Member States*, in Angela Ward (eds), The EU Charter of Fundamental Rights: A Commentary, Hart Publishing (2019) 1211-1228.

cooperation, together with the principles of equivalence and procedural autonomy.[56] In applying EU law, Member States shall cooperate loyally by granting equivalent protection to both domestic and EU rights in an effective manner (the enforcement of the EU right shall not be impossible in practice), and this must happen under the shield of the judiciary.[57] In doing so they have a margin of maneuver in deciding how to organize the domestic system of courts (procedural autonomy).

While it is true that the general principle of loyal cooperation is per se a norm connecting the EU to Member States, effective judicial protection is more and more *the* device connecting the two levels. As the EU does not have a proper system of courts, domestic judges act as both national and EU bodies and the principle of effective judicial protection is the most important connective norm between different legalities. In fact, in recent years effective judicial protection has been consistently ranked above procedural autonomy.[58]

In its instantiation under article 19 TEU, effective judicial protection has been considered applicable to every field covered by EU law, irrespective of whether the Charter applies too.[59] In its form under article 47 of the Charter, it scores by far as the most mentioned right in preliminary references and amounts to a sort of "right to have rights" under EU law.[60] Moreover, as Torres Pérez has noticed, if article 47 is read together with the broad interpretation of the scope of application of the Charter given in *Fransson* and following cases, it is possible that "once a situation is deemed within the fields covered by EU law according to Article 19(1) TEU, for that same reason, it could be argued that the Member States are 'implementing' EU law and thus the Charter applies".[61] Therefore, any difference in the scope of application of articles 19 TEU and 47 of the Charter might disappear. Finally, it has been also argued that article 47 may serve as a specification of one of the values of the EU under article 2 TEU and as such be applied even beyond the scope of EU law, according to the so-called *Reverse Solange* doctrine.[62]

[56] Herwig Hofmann, *The Right to an Effective Remedy*, 1211-1212.
[57] ECJ, C-33/76, *Rewe*.
[58] Marcus Klamers, *The Principle of Loyalty in EU Law*, 127-128.
[59] See ECJ, C-64/16, *Associaçao Sindical dos Juízes Portugueses*, §§ 29-37.
[60] David Reichel and Gabriel N. Toggenburg, *References for a Preliminary Ruling*, 475-478.
[61] Aida Torres Pérez, *Rights and Powers in the European Union: Towards a Charter that is Fully Applicable to the Member States?*, 1 Cambridge Yearbook of European Legal Studies (2020) 18-19.
[62] Armin von Bogdandy and Luke Dimitrios Spieke, *Protecting Fundamental Rights Beyond the Charter: Repositioning the Reverse Solange Doctrine in Light of the CJEU's Article 2 TEU Case-Law*, in Michal Bobek

In the recent *A.B.* judgment on the Polish National Council of the Judiciary, decided on 2 March 2021, the ECJ has likely questioned the necessary connection between the article 47 and the other provisions on effective judicial protection by grounding the disapplication of national legislation on the risk of jeopardizing the application of articles 4(3) and 19 TEU and of article 267 TFEU, while excluding article 47 when EU secondary law (a directive in that case) is not applicable.[63] However, even if the previous interpretations turn out to be dismissed by the Court of Justice, the fact that they have been advanced in the same period of time in which *Randstad* was proposed to Luxemburg is telling of the intellectual climate in which the reference was conceived. Moreover, while the ECJ did not recognize the applicability of article 47 as no secondary provision was implemented, it still used article 47 both as an interpretive parameter for the other provisions on effective judicial protection[64] (exactly as the *Cassazione* did in the preliminary reference) and autonomously, as it recognized direct effect to article 47(2) to the extent it refers to the "independency" of the ordinary judges, something that article 19 TEU does not state explicitly. As a result, the right to effective judicial protection under EU law seems more and more the result of a compound of provisions (article 4(3) and 19 TEU, article 267 TFEU, article 47 of the Charter).

Briefly, effective judicial protection works as a connective device, a tool to link domestic and EU law: by requiring Member States to grant in courts regulated by domestic law the equivalent and effective protection of EU law, it necessarily generates inter-legal situations. Moreover, effective judicial protection under EU law is grounded in a series of general provisions. *Randstad*, more than its predecessor *Melki*, is grounded in all these connective clauses, with a special role reserved to article 47 of the Charter. It is by using this complex arrangement that the Court of Cassation attempts to decentralize the judicial review of (constitutional) rights and maybe even circumvent article 111(8) of the Italian Constitution.

Now we must ask ourselves, what happens when inter-legal situations are used instrumentally? Here we might recover a venerable concept in continental legal scholarship, that idea of "abuse of rights". With a certain simplification, a legal right is abused when it

and Jeremias Adams-Prassl (eds.), The EU Charter of Fundamental Rights in the Member States, Hart Publishing (2020) 537-538.

[63] ECJ, C-842/18, *A.B.*, §§ 85-89.

[64] Ivi, §§ 115 and 143-146.

is exercised by its holder in a way that is incompatible with the purpose the right was supposed to serve.[65] Typically, examples regard the use of goods by the owner with the sole aim of damaging their neighbors. What we might be witnessing in *Randstad* is an abuse of inter-legality: connective norms, article 47 of the Charter in particular, are used instrumentally to reach a specific goal of judicial politics (overcoming the current interpretation of article 111(8)).

Of course, the typical definition of abuse of rights refers to a legal norm (the right and the various mechanisms for its exercise) used instrumentally, beyond the original aim. In the case I am referring to, on the other hand, what it used instrumentally is a rule of argumentation. In the entangled European legal order, in which EU and domestic law are closely connected, the idea of granting due consideration to the various legalities is not new and it has been proposed by scholars, for instance, through the idea of "constitutional tolerance"[66] or of the "harmonic principles of contrapunctual law".[67] In a similar yet more general manner, the theory of inter-legality suggests that when various legalities are connected, the judge must take into account the entire series of norms potentially applicable to the case at stake (the *composite* law) and substantively scrutinize them to avoid injustice.[68] The duty to consider the whole law relevant to the case is a procedural norm of argumentation which aims at ensuring the widest examination and justification of the legal reasons applicable to the case. If, however, the norms are recalled not that much with the aim of examining the whole law relevant to the case, but rather having in mind a different goal (e.g. overcoming article 111(8)), then the inter-legal reasoning might well be specious and "abusive".

In other words, the material interconnectedness of various legalities offers to the interpreter a variety of argumentative paths, some of which may serve goals of judicial politics under the cloak of due consideration of the legalities at stake in the specific case. This does not necessarily close the possibility of a "proper" and not instrumental inter-legal

[65] On the history and definition of this notion see James Gordley, *The Abuse of Rights in the Civil Law Tradition*, in Rita de la Feria and Stefan Vogenauer (eds), Prohibition of Abuse of Law A New General Principle of EU Law?, Hart Publishing (2011) 33-42.
[66] Joseph Weiler, *Europe: The Case against the Case of Statehood*, 4 European Law Journal (1998) 61-62.
[67] Miguel Poiares Maduro*, Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in Neil Walker (ed.), Sovereignty in Transition, Hart Publishing (2003).
[68] See Gianluigi Palombella, *Theory, Realities, and Promises of Inter-Legality A Manifesto*, in Gianluigi Palombella – Jan Klabbers (eds.), The Challenge of Interlegality, Cambridge University Press (2017) 383 and Jan Klabbers, *Judging Inter-Legality*, in The Challenge of Interlegality, 362.

reasoning: *Randstad* is not proof that such reasoning is doomed to fail. But it is a warning to keep in mind and a possibility that the theory shall contemplate. The contribution that an examination of *Randstad* can bring to the theory lies in the awareness it fosters: the theory must be able to disentangle genuine from disingenuous inter-legal reasonings. Such distinction, I argue, would be greatly beneficial.

## 5. Conclusion

In this paper I have briefly considered the *Randstad* case. Everlasting tensions characterize the European legal order and the Charter of Fundamental Rights, as the wider category of general principles of EU law too, are at the center of a complex game of chess between judicial actors. While the use of the Charter by ordinary judges grows, the risk of being sidestepped is more and more perceived by constitutional courts, some which are reacting by internalizing the Charter. Article 47, as an instantiation of effective judicial protection, is a key norm in this process. In *Randstad*, the Italian Court of Cassation is in fact using several EU norms, and article 47 in particular, to circumvent the Constitutional Court's interpretation of a key constitutional parameter, article 111(8) of the domestic Constitution. *Randstad* paradigmatically illustrate the danger that constitutional courts have tried to avoid by attempting to recentralize judicial review of rights.

The *Randstad* preliminary reference really resembles an instrumental use of EU law to solve internal disagreements between courts, in a way that recalls and perhaps overshadows cases like *Melki*.[69] It is not clear whether we are destined to see instrumental uses of EU law growing, diminishing, or remaining constant in number and importance. What we can perhaps tell starting from *Rundstad* is something more theoretical. The rise of entangles legalities has fostered theories of international and supranational law which underline the importance of dialogue and due consideration for the entire legality applicable to the case. The recent theory of interlegality is particularly focused on this aspect: judges are the guardians of jurisdiction, in the original meaning of *ius dicere*, tell what the law is. Courts cannot take one-sided perspectives, unilaterally dismiss the normative pull of some of the involved legalities (in this case, EU and domestic law), and declare it irrelevant to

[69] See a similar comment on the *Landtová* case by Jan Komárek, *Czech Constitutional Court Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires*, 8 European Constitutional Law Review (2012) 324.

the case at stake. The various legalities must be taken seriously, and this due consideration can only be evaluated by looking at how carefully judges examine the specific content of the different legal orders at stake. It is, so to say, a matter (and a culture) of justification,[70] and a justification from the perspective of law.

Cases like *Rundstad*, however, perhaps illustrate the limits of argumentation and justification. Connective norms, general clauses like article 47, can be abused from the perspective of a theory of inter-legality as long as they are used in argumentation serving aims of judicial politics. Article 47 is, together with the other quoted norms, a battleground for judicial politics. This is not new per se: recent cases have shown that general norms with a high degree of indeterminacy and ethical pull are prone to engender interpretive conflicts. *Taricco* on legality in criminal law is again a case in point; *Weiss*/*PSPP* on proportionality is another.[71] It is hardly deniable that the preliminary reference in *Rundstad* actually is a richly justified order, but in the context of an institutional confrontation, the sophisticated juristic argumentation seems like a weapon to circumvent the Constitutional Court, more than a way of avoiding the injustice of a legally unilateral perspective. If it is true that law is an argumentative practice, then we must also bear in mind that legal arguments can be powerful instruments of the practice politics through law.

[70] Borrowing Mureinik's famous wording. See Etienne Mureinik, *A Bridge to Where - Introducing the Interim Bill of Rights*, in 10(1) South African Journal on Human Rights (1994) 31-48.
[71] BVerfG, 2 BvR 859/15; ECJ, C-493/17, *Weiss and others v Bundesregierung*.