Special Issue – Preliminary References to the CJEU
Part Two

# The Decision of the Austrian *Verfassungsgerichtshof* on the EU Charter of Fundamental Rights: An Instrument of Leverage or Rearguard Action?

*By Andreas Orator*[*]

## A. An "Instant Classic" Decision

In a landmark decision of 2012 on the relevance of the EU Charter of Fundamental Rights (CFR) in domestic constitutional adjudication, the Austrian *Verfassungsgerichtshof* (Constitutional Court) substantially extended the applicable yardstick, according to which the constitutionality of ordinary laws and administrative action may be assessed, to certain Charter rights.[1] At the same time, the *Verfassungsgerichtshof* claimed its active commitment to judicial dialogue with the Court of Justice of the European Union (CJEU) through the preliminary reference procedure pursuant to Article 267 TFEU to effectively protect Charter-based fundamental rights of individuals. Arguably, both the domestic and Union-wide ramifications of this "instant classic" case of a domestic constitutionalization of the Charter are substantial, delivering insight not least as to the transformative role of the Charter for domestic fundamental rights protection and the adaptations of domestic constitutional courts in such a changed environment.

In this article, the reasoning of the *Verfassungsgerichtshof* shall be traced back to its status as a domestic constitutional court, its rapport with the CJEU, as well as the overall relationship of Austrian constitutional law and EU law. In order to better understand the Court's astonishing approach in its Charter decision, the profound impact of the entry into force of the binding and directly applicable CFR on fundamental rights protection in Austria needs to be taken into account. Following an assessment of the Charter judgment itself, the article seeks to investigate possible ramifications for the Austrian system of constitutional adjudication in general and the role of the *Verfassungsgerichtshof* as a fundamental rights court vis-à-vis other domestic supreme courts in particular. In all

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[1] VfSlg 19.632/2012. All quotes are taken from the judgment's English translation made available by the *Verfassungsgerichtshof*, http://www.vfgh.gv.at/cms/vfgh-site/attachments/9/6/0/CH0006/CMS1353421369433/grundrechtecharta_english_u466-11.pdf.

likelihood, the *Verfassungsgerichtshof* will employ the preliminary reference procedure more often and will become a more "active" player, especially with regard to the system of Charter rights protection.

**B. A "Model Pupil" Constitutional Court**

Despite Austria's accession to the EU only in 1995, its *Verfassungsgerichtshof* was still among the very first constitutional courts of an EU Member State to take recourse to the procedure of preliminary reference.[2] In Austria, it is commonly claimed that the *Verfassungsgerichtshof* was the first constitutional court of an EU Member State to refer questions to the CJEU. While being incorrect, this assertion might also indicate the character of a "model pupil" constitutional court which, from the outset, actively engages in a judicial dialogue with the CJEU.[3] To this can be added the fact that, in general, Austrian courts and tribunals have eagerly made use of the reference procedure, making Austria today the Member State with the second-most frequent usage of the preliminary reference procedure per capita.[4]

In 1999, four years into Austria's EU membership, the *Verfassungsgerichtshof* considered a question of interpretation of European law to be relevant to deciding a domestic constitutional issue and accepted, without reservations, its obligation under EU law to refer it to the CJEU.[5] These and two other early referrals are notable not least because disputes relating to European law generally could not be argued before the *Verfassungsgerichtshof*, since the Court's measuring yardstick was limited to formal Austrian constitutional law.[6] Theoretically, questions relating to EU law could raise unconstitutionality proceedings if EU law were to take precedence over a domestic norm,

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[2] *See* THEO ÖHLINGER & MICHAEL POTACS, EU-RECHT UND STAATLICHES RECHT. DIE ANWENDUNG DES EUROPARECHTS IM INNERSTAATLICHEN BEREICH 175 n. 706 (2014); Heinz Schäffer, *Österreich und die Europäische Union—Erfahrungen und Leistungen des österreichischen Verfassungsgerichtshofs*, 60 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 345, 378 (2005).

[3] For the first referral by the Belgian (then) *Cour d'arbitrage* see Case C–93/97, Fédération belge des chambres syndicales de médecins ASBL v. Flemish Government, Government of the French Community, Council of Minister, 1998 E.C.R. I–04837, *see* Jan Komárek, *The Place of Constitutional Courts in the EU*, 9 EUR. CONST. L. REV. 420, 432 (2013). The *Cour d'arbitrage* has been a member of the "Conference of European Constitutional Courts" since 1990 and was renamed *Cour constitutionnelle* in 2007. The Belgian Court's referral dates from 1997, the Austrian *Verfassungsgerichtshof* referred its first case two years later, see VfSlg 15.450/1999.

[4] *See* BEDANNA BAPULY & GERHARD KOHLEGGER, DIE IMPLEMENTIERUNG DES GEMEINSCHAFTSRECHTS IN ÖSTERREICH 583-737 (2003); Hannes Rösler, *Die Vorlagepraxis der EU-Mitgliedstaaten—Eine statistische Analyse zur Nutzung des Vorabentscheidungsverfahrens*, 47 EUROPARECHT 392, 398 (2012).

[5] VfSlg 15.450/1999. The Constitutional Court had accepted the CJEU's supremacy case-law from the outset, see, in particular, VfSlg 14.886/1997.

[6] *See* in detail, *infra* at C.

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be it either a constitutional norm or a domestic measure challenged before the *Verfassungsgerichtshof*. In the former case, Austrian constitutional law would no longer constitute the applicable yardstick given the blocking effect of directly applicable EU law.[7] In the latter case, the supremacy of EU law would result in what the Court understands as lack of "applicability," which, however, is a decisive procedural requirement in cases of "concrete" judicial review.[8]

Thus, in the 1999 case, the *Verfassungsgerichtshof* pondered the consequences of its recognition of the supremacy of EU law over Austrian law for a domestic provision on partial energy tax refunds, which possibly violated provisions on state aid pursuant to (today's) Article 103 TFEU. The challenged domestic measure would either be rendered inapplicable or have to be interpreted in conformity with EU law. In two subsequent cases, the Court referred further questions to the CJEU on the interpretation of EU law provisions possibly conflicting with a domestic measure.[9] Whilst following these three early referrals the *Verfassungsgerichtshof* did not initiate further preliminary reference proceedings until 2011, it should have been sufficiently clear that the Court was ready to accept and willing to activate this instrument of cooperation under EU law.[10] At the same time, however, EU law would still not constitute "a standard for its own judicial review."[11]

## C. The Charter as a Domestic "Game Changer"

### *I. Three Apex Courts with Respective Functions*

Traditionally, the three supreme judicial bodies—the *Verfassungsgerichtshof*, the *Verwaltungsgerichtshof* (Supreme Administrative Court), and the *Oberster Gerichtshof* (Supreme Court of Justice)—have been characterized as equally ranking peer courts, which have been attributed respective functions.[12] As for general judicial review, the jurisdiction

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[7] On this issue of "Präjudizialität," cf. Michael Potacs, *Die Bedeutung des Gemeinschaftsrechts für das verfassungsgerichtliche Normprüfungsverfahren*, *in* DAS VERFASSUNGSGERICHTLICHE VERFAHREN IN STEUERSACHEN 245, 251 (Michael Holoubek & Michael Lang eds., 2010); Gerhard Baumgartner, *Verfassungsgerichtliche Normenkontrolle und EU-Recht*, 65 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 295, 305 (2010).

[8] *See also* for cases of individual complaints and differences from abstract review ÖHLINGER & POTACS, *supra* note 2, at 163–68.

[9] VfSlg 16.050/2000, VfSlg 16.100/2001.

[10] Michael Holoubek, *Das Verhältnis zwischen europäischer Gerichtsbarkeit und Verfassungsgerichtshof*, *in* KOOPERATION DER GERICHTE IM EUROPÄISCHEN VERFASSUNGSVERBUND. GRUNDFRAGEN UND NEUESTE ENTWICKLUNGEN 12. ÖSTERREICHISCHER EUROPARECHTSTAG 2012, 157, 163 (Christoph Grabenwarter & Erich Vranes eds., 2013).

[11] VfSlg 19.632/2012, para. 24, with further references

[12] Matthias Jestaedt, *Die (Möglichkeit einer) Gesetzesbeschwerde an den Verfassungsgerichtshof*, *in* DIE VERWALTUNGSGERICHTSBARKEIT ERSTER INSTANZ 395, 400 (Michael Holoubek & Michael Lang eds., 2013).

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of the *Verfassungsgerichtshof* would only cover the "illegality" of domestic (administrative) regulations pursuant to Article 139 Federal Constitutional Act (B-VG) as well as the "unconstitutionality" of domestic laws pursuant to Article 140 B-VG, which does not entail primary or secondary EU law.[13] The Constitutional Court would be exclusively competent to strike down domestic regulations and laws;[14] in this sense, judicial review is concentrated before the *Verfassungsgerichtshof*,[15] which may and must remove from the domestic legal order provisions which are deemed incompatible with constitutional law.

The *Verfassungsgerichtshof* would also be the main fundamental rights court of the land: it is competent to repeal administrative decisions which violate constitutionally guaranteed rights. Furthermore, the review of legality of administrative decisions would be shared between the Supreme Administrative Court and the *Verfassungsgerichtshof*. It is noteworthy that EU law as a measuring yardstick would generally fall within the Supreme Administrative Court's realm. While EU law generally would not qualify as a standard of review before the Constitutional Court, it consistently acknowledged in its case law that administrative breaches of EU law had to be equated with breaches of Austrian statutory provisions, whose compliance would be controlled by the *Verwaltungsgerichtshof*: "[A] violation of [EU] law would be tantamount to a violation of a simple (i.e. not of constitutional status) domestic law, which would be for the Supreme Administrative Court to address."[16]

Finally, the jurisdiction of the *Oberster Gerichtshof* would mainly stretch to the legality review of civil and criminal cases. Originally, with the exception of "abstract" judicial review, parliamentary statutes on civil and criminal matters would not be reviewable by the *Verfassungsgerichtshof* unless the *Oberster Gerichtshof* referred a case to the Constitutional Court; under that "division of labor" of the constitution the *Oberster Gerichtshof* would independently consider whether a judicial decision complied with constitutionally guaranteed rights in particular and the Austrian constitution in general.[17] Recently, this balance of judicial powers has been modified, since there is now a right to file a complaint to the *Verfassungsgerichtshof* to constitutionally challenge regulations and statutes applicable in civil and criminal proceedings.[18]

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[13] *See* ÖHLINGER & POTACS, *supra* note 2, at 168.

[14] VfSlg 19.632/2012, para. 33.

[15] *Id.* at para. 41.

[16] *See* VfSlg 14.886/1997 (as quoted in the English translation of VfSlg 19.632/2012).

[17] Art. 92 Federal Constitutional Act (Bundes-Verfassungsgesetz, "B-VG"), *cf.* Eckhart Ratz, *Der Oberste Gerichtshof in Österreich als Grundrechtsgericht*, 73 ÖSTERREICHISCHES ANWALTSBLATT 274 (2013). See, however, the interlocutory proceedings for constitutionality review before the *Verfassungsgerichtshof*, Art. 89 para. 2 B-VG.

[18] The "*Subsidiarantrag auf Normenkontrolle*" came into effect on 1 January 2015, Federal Law Gazette BGBl. I 114/2013.

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*II. The Impact of the Charter*

The general "division of labor" among the three apex courts with regard to domestic constitutional and EU fundamental rights should be borne in mind when assessing the impact of the binding - and directly applicable—Charter of Fundamental Rights upon the entry into force of the Lisbon Treaty.[19] Given the very broad scope of application of the Charter, whose rights have to be observed in domestic legal disputes whenever Member States are "implementing" EU law pursuant to Article 51(1) CFR, many civil and administrative cases involving issues of Charter rights would have to be decided by the *Verwaltungsgerichtshof* or the *Oberster Gerichtshof*.[20]

As long as the *Verfassungsgerichtshof* would adhere to its formally restrictive approach for issues involving EU law in general, it would need to accept the compelling consequences flowing from the principle of supremacy of EU law (including Charter rights), the wide scope of application of EU law, and, subsequently, the CFR.[21] The Constitutional Court would often have to share its role as a "fundamental rights court" with the two other domestic apex courts, and, arguably, the CJEU as the final arbiter on the interpretation of CFR provisions.

**D. Charter Rights as a Constitutional Yardstick**

*I. The Domestic Constitutionalization of the Charter*

It is against this backdrop that the *Verfassungsgerichtshof* rendered its landmark judgment of 14 March 2012.[22] Two non-EU citizens seeking asylum had been refused international protection pursuant to the Austrian Asylum Act, which, *inter alia*, was considered to transpose Directives 2004/83/EC and 2005/85/EC on minimum standards for the qualification and status of third country nationals as well as minimum standards on asylum procedures.[23] Pursuant to Article 51(1) of the Charter, the competent authorities, the

[19] On the impact of the "visibility" of Charter rights, cf. Daniel Thym, *Die Reichweite der EU-Grundrechte-Charta—Zu viel Grundrechtsschutz?*, 32 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 889 (2013).

[20] *See* Andreas Orator, *Herausforderungen der österreichischen Verfassungsgerichtsbarkeit zur effektiven und legitimen Letztentscheidung unter Integrationsbedingungen*, *in* TAGUNGSBAND 53. ASSISTENTENTAGUNG ÖFFENTLICHES RECHT "DAS LETZTE WORT—RECHTSETZUNG UND RECHTSKONTROLLE IN DER DEMOKRATIE" 237, 244 (Dominik Elser *et al.* eds., 2014).

[21] On the scope of application of the Charter, see, *e.g.*, Koen Lenaerts, *Exploring the Limits of the EU Charter of Fundamental Rights*, 8 EUR. CONST. L. REV. 375 (2012).

[22] VfSlg 19.632/2012.

[23] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Official Journal L 304/12, 30 September 2004, Council Directive

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Federal Asylum Office and the Austrian Asylum Tribunal, were therefore under a duty to apply respective provisions of the Charter. In particular, the Federal Asylum Tribunal had dismissed the complainants' motion for oral hearing. Before the Constitutional Court, the complainants, therefore, exclusively argued that this dismissal violated their constitutionally guaranteed rights to an effective remedy and a fair trial according to Article 47(2) of the Charter.[24] They did not, however, invoke any fundamental right formally guaranteed under the Austrian Constitution as required under the proceedings of the (then) Article 144a B-VG.[25] When applying the above-mentioned restrictive case law of the VfGH on EU law not being a constitutional yardstick, the complaints could only have been dismissed from the outset.

Interestingly enough, however, the *Verfassungsgerichtshof* took a different course of action. It engaged in a surprisingly long discussion on the value of invoking Charter rights in constitutional proceedings in situations involving the implementation of EU law.[26] While it dismissed the complaints as unfounded, it held, *obiter*,[27] that in cases brought before it in which the Charter was generally applicable, those Charter rights which were "similar in its wording and purpose"[28] to fundamental rights guaranteed under Austrian constitutional law would henceforth be regarded as a formal constitutional yardstick against which the validity of administrative decisions and even general norms could be tested.

*II. The Role of the Principle of Equivalence*

This surprising domestic constitutional appreciation of Charter rights "normatively follows,"[29] *inter alia*, from the Court's understanding of the EU principle of equivalence, which, under the case law of the CJEU, requires that as long as EU procedural rules are lacking, domestic "rules governing actions for safeguarding rights which individuals derive from [EU] law" apply

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2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Official Journal L 326/13, 13 December 2005.

[24] VfSlg 19.632/2012, paras. 1–14.

[25] *Id.* at para. 16.

[26] On the traditional style of reasoning of the *Verfassungsgerichtshof*, which has been characterized as relatively "cautious" or "reserved," see Kurt Heller, *Die Anwendung der Grundrechte der Europäischen Union durch den Verfassungsgerichtshof*, 134 JURISTISCHE BLÄTTER 675 (2012).

[27] *See* Magdalena Pöschl, *Verfassungsgerichtsbarkeit nach Lissabon. Anmerkungen zum Charta-Erkenntnis*, 67 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 587, 602 (2012).

[28] VfSlg 19.632/2012, para. 35.

[29] Holoubek, *supra* note 10, at 166 n. 38 (relativising the Court's use of the principle of equivalence served as a mere "starting point and occasion"); *cf. Verfassungsgerichtshof*, B 166/2013-17, 12 March 2014, at n. 22.

> provided, however, that such rules are *not less favourable* than those governing similar domestic actions […] and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.[30]

From this and the Member States' obligation of sincere cooperation pursuant to Article 4(3) TEU, the *Verfassungsgerichtshof* concludes that, as a competent domestic court, it must ensure that "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."[31]

The Court then assesses the *Pontin* judgment of the CJEU, which calls upon the respective domestic court to "consider whether the actions concerned are similar as regards their purpose, cause of action, and essential characteristics",[32] and finds that the Charter entails "rights as they are guaranteed by the Austrian constitution in a similar manner as constitutionally safeguarded rights."[33]

At this point, it must be highlighted that many rights, which are guaranteed under the Austrian constitution, that is, Austrian fundamental rights, stem directly from the catalogue of the European Convention of Human Rights (ECHR), which enjoys constitutional rank in the Austrian legal order. In other words, Convention rights are part of the formal constitutional yardstick and can be directly invoked as constitutionally guaranteed rights.[34] Unsurprisingly, this peculiar situation alleviates the Court's search for "comparable" fundamental rights, since many fundamental rights protected under the ECHR served as models, "both in wording and intention"[35] for respective Charter rights. For instance, according to the Charter's Explanations, Article 47 CFR is directly based on the wording of Article 13 ECHR (in its first paragraph) and Article 6(1) ECHR (in its second paragraph); in its scope, however, Article 47(2) CFR is not limited to "disputes relating to civil law rights and obligations", but applies to "all rights guaranteed by Union law."[36]

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[30] Case C–326/96, B.S. Levez v. T.H. Jennings (Harlow Pools) Ltd, 1998 E.C.R. I–07835, para. 18, with references to earlier case-law (italics not in original).

[31] VfSlg 19.632/2012, para. 29.

[32] Case C–63/08, Virginie Pontin v. T-Comalux SA, 2009 E.C.R. I–10467, para. 45.

[33] VfSlg 19.632/2012, para. 30.

[34] Federal Law Gazette BGBl. 59/1964.

[35] VfSlg 19.632/2012, para. 31.

[36] See the explanations to Article 47 CFR, Official Journal 2007 C 303/29.

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Whilst the Court's reasoning is tied to its understanding of the EU principle of equivalence,[37] it is coupled with two main functions of the *Verfassungsgerichtshof*, namely its tasks as a quasi-centralized fundamental rights court[38] and as a "negative legislator"[39] (i.e., a centralized court to judicially review parliamentary acts and administrative regulations). From these EU and domestic principles, the *Verfassungsgerichtshof* concludes its domestic competence "to adjudicate on largely congruent rights"[40] in the Charter, both in fundamental rights proceedings as well as general judicial review proceedings.[41]

*III. Partial Constitutionalization, Pronounced* En Passant

This approach evidently deviates from the previous case law of the *Verfassungsgerichtshof* on the value of (parts of) EU law in constitutional proceedings.[42] Nevertheless, the Court seems to be keen to contain its overruling of the former general non-invocability of EU law in constitutional proceedings by limiting the effect to certain Charter rights only. In order to do so it aims at, first, presenting the Charter as "an area that is markedly distinct from the 'Treaties.'"[43] Second, it confines its new approach to Charter rights "similar in its wording and purpose to rights that are guaranteed by the Austrian Federal Constitution,"[44] that is, in particular congruent rights under the ECHR. Third, it reserves its right "to decide on a case-by-case basis" which Charter provisions contain (comparable) "rights" and which would rather constitute (non-comparable) "principles" according to Article 51 CFR.[45]

Finally, the *Verfassungsgerichtshof* draws on the argument of codification of EU fundamental rights, deriving from general principles of law which had been developed by CJEU case law, as sufficient a leap to accept (only) certain "codified" Charter rights as a national standard of review in constitutional proceedings: "[T]he applicability of a detailed

[37] However, see the qualification, *supra* note 29.

[38] VfSlg 19.632/2012, para. 33 ("The system of legal protection set out in the Federal Constitutional Act provides in general for a concentration of claims for violation of constitutionally guaranteed rights with one instance, i.e. the Constitutional Court [. . .]").

[39] Hans Kelsen, *Wesen und Entwicklung der Staatsgerichtsbarkeit*, 5 VERÖFFENTLICHUNGEN DER VEREINIGUNG DEUTSCHER STAATSRECHTSLEHRER (1929) 26 ("negativer Gesetzgeber").

[40] VfSlg 19.632/2012, para. 34.

[41] Art. 144 B-VG as well as Arts. 139–140 B-VG.

[42] *See* Franz Merli, *Umleitung der Rechtsgeschichte*, 20 J. FÜR RECHTSPOLITIK 355, 355-356 (2012).

[43] VfSlg 19.632/2012, para. 25.

[44] *Id.* at para. 35.

[45] *Id.* at paras. 34, 36.

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catalogue of rights and duties as set out in the [CFR] is not comparable to the derivation of legal positions from general legal principles."[46]

For the sake of that argument, the *Verfassungsgerichtshof* had to ignore the fact that the CJEU not only regularly drew on the similarly detailed and, in particular, written, fundamental rights catalogue of the ECHR when sketching out the contents of such principle-based fundamental rights. What is more, already the pre-Lisbon version of Article 6(3) TEU had explicitly referred to the standard of those general principles "as guaranteed by the" written catalogue of the ECHR.

The *Verfassungsgerichtshof* seeks to further legitimate its discriminate treatment of (certain) EU fundamental rights based in the Charter on the one hand and other EU fundamental rights (or, for that matter, other directly invocable provisions guaranteed by the Treaties) by the new wording of Article 6 TEU. One cannot help but describe its respective citation as distorting. The Court cites the passage of "the Charter of Fundamental Rights and the Treaties," to underline the distinctiveness of the Charter as opposed to the Treaties, yet omits the subsequent wording of Article 6(1) TEU that states that both instruments "shall have the same legal value."[47] This omission is all the more surprising since the *Verfassungsgerichtshof*, only several paragraphs earlier, had correctly presented the Charter as EU primary law which had been explicitly attributed the same legal value as the Treaties pursuant to Article 6(1) TEU.[48] From these and other arguments it becomes obvious that the *Verfassungsgerichtshof* was eager to confine the effect of the equivalence principle to rights arising from the Charter as opposed to directly applicable rights arising from other sources of EU primary law and not completely overrule its previous case law. The astounding result of this partial constitutionalization of EU primary law thus comes at the price of considerable argumentative inconsistencies.

What is more, the Court's eventual dismissal of the case – it did not find a violation of Article 47(2) CFR for lack of an oral hearing before the Austrian Asylum Tribunal – turned the bold argumentative move of the *Verfassungsgerichtshof* into a drop of bitterness for the complainants, who relied exclusively on constitutional arguments, which would have been futile from the outset before this constitutionalization of the Charter. The Court apparently took the first case which had come along to modify its case law after having made the necessary preparations.[49] It did not wait for a case involving an actual violation

[46] *Id.* at para. 38.

[47] *See* Pöschl, *supra* note 27, at 591–92.

[48] VfSlg 19.632/2012, para. 18.

[49] On those, see the earlier literary statement of Justice Rudolf Müller, *Verfassungsgerichtsbarkeit und Europäische Grundrechtecharta*, 67 ÖSTERREICHISCHE JURISTEN-ZEITUNG 159 (2012).

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of constitutionalized Charter rights, turning its reasoning in an exceptionally extensive *obiter dictum*.[50]

As a result, Charter rights such as Article 47(2) CFR would henceforth be regarded as a formal constitutional yardstick against which the constitutional validity of administrative decisions and even general norms could be tested. In that vein, the *Verfassungsgerichtshof* has, since then, declared further Charter rights to be constitutionally guaranteed rights.[51] More recently, on the grounds of a violation of Article 47(2) CFR the *Verfassungsgerichtshof* invalidated several administrative decisions, and, in its exercise of general judicial review, declared a statutory provision unconstitutional.[52] Thus, it has become the first constitutional court of an EU Member State to apply parts of the Charter as a constitutional standard of review.[53]

**E. Judicial Cooperation Coming with Strings Attached?**

Apart from this spectacular move to partially constitutionalize the Charter for the Austrian legal order, the *Verfassungsgerichtshof* is keen to reiterate its readiness to cooperate with the CJEU by referring relevant issues of interpretation of EU law to the Luxembourg court for a preliminary ruling.[54] However, the Charter decision leaves room for questions as to whether the Constitutional Court's commitment to judicial cooperation under the procedure pursuant to Article 267 TFEU is fully in line with CJEU case law.

First of all, the *Verfassungsgerichtshof* seems to interpret the *CILFIT* doctrine of the CJEU, providing for exceptions to Article 267 TFEU situations,[55] in a way that the criterion of "irrelevance" of the issue should also apply "if a constitutionally guaranteed right,

[50] Heller, *supra* note 26, at 675. It took the Court another year to actually invalidate a decision based on a violation of Charter rights, see *infra*, note 52.

[51] See Arts. 7, 8, 11, 15, 16, and 21 para. 1 CFR; *cf.* VfSlg 19.673/2012, VfSlg 19.702/2012, VfSlg 19.749/2013, Case B 166/2013.

[52] *See, e.g.*, Case U 1257/2012, 26 June 2013. Since the Charter decision, the Verfassungsgerichtshof has reversed about a dozen administrative decisions, so far almost exclusively on the grounds of violations of the right to an oral hearing under Article 47, paragraph 2 CFR. For the same reasons, on one occasion the *Verfassungsgerichtshof* declared unconstitutional an already expired provision of the Federal Asylum Tribunal Act, exercising general judicial review based on the Charter as a constitutional yardstick for the first time, Case G 86/2013, 27 February 2014.

[53] On other European Constitutional Courts, see Maartje De Visser, *National Constitutional Courts, the Court of Justice and the Protection of Fundamental Rights in a post-Charter Landscape*, 14 HUM. RTS. REV. 1 (2013).

[54] VfSlg 19.632/2012, para. 40.

[55] Case 283/81, Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health, 1982 E.C.R. 3415, Case C–495/03, Intermodal Transports BV v. Staatssecretaris van Financiën, 2005 E.CR. I–8151.

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especially a right of the ECHR, has the same scope of application as a right of the [CFR]."[56] The *Verfassungsgerichtshof* concludes that in these instances it would rest its decision on a congruent fundamental right under formal domestic constitutional law, to which ECHR rights belong rather than on an equivalent Charter right, refraining from referring a respective question at hand to the CJEU. To say the least, it is far from clear that the CJEU holds an identical understanding of the relevance criterion of the CILFIT doctrine,[57] which is why this issue should be eventually decided by the CJEU itself.

What is more, it has already become evident that the Constitutional Court's interpretation of the principle of equivalence is anything but clearly based in CJEU case law.[58] According to the *Verfassungsgerichtshof*, the principle of equivalence requires that directly applicable Union rights "must be enforceable in proceedings that exist for comparable rights deriving from the legal order of the Member States."[59] The Constitutional Court seems to imply that rather than equivalent legal protection, identical procedures in cases of comparable rights are warranted.[60] As supporting evidence, the *Verfassungsgerichtshof* cites a passage from the CJEU's *Pontin* judgment:

> The principle of equivalence requires that the national rule at issue be applied without distinction, whether the infringement alleged is of [EU] law or national law, where the purpose and cause of action are similar.[61]

When continuing its quotation from the *Pontin* judgment, the Court omits the following sentence: "However, that principle is not to be interpreted as requiring Member States to extend their most favourable rules to all actions […]."[62] It is striking that the *Verfassungsgerichtshof* did not refer to a CJEU statement which clearly excluded an understanding of the principle of equivalence demanding the "most favourable" or even identical procedure. Domestically, there are good reasons to take the view that the

[56] VfSlg 19.632/2012, para. 44.

[57] *See* Pöschl, *supra* note 27, at 598.

[58] Merli, *supra* note 42, at 356–57.

[59] VfSlg 19.632/2012, para. 29.

[60] *See* Merli, *supra* note 42, at 356.

[61] Case C–63/08, Virginie Pontin v. T-Comalux SA, 2009 E.C.R. I–10467, para. 45, as cited in VfSlg 19.632/2012, para. 29.

[62] *Id.* at para. 45.

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procedures at hand before the *Verwaltungsgerichtshof* as an "EU fundamental rights court"[63] are generally *not* unfavorable.[64]

Thus, the Charter decision of the *Verfassungsgerichtshof* entails a number of important issues of interpretation of EU law, some of which are even essential to delivering the Court's conclusion for partial constitutionalization of the Charter. Arguably, some of these issues do not fall under the category of an *acte clair* and, therefore, should have been referred to the CJEU.[65] One is tempted to speculate about the reasons for which the *Verfassungsgerichtshof*, traditionally and ostensibly committed to judicial cooperation under Article 267 TFEU, chose not to present these issues as triggering a duty under EU law to seek a preliminary judgment.[66] Here, the idea suggests itself that the Constitutional Court precisely sought an EU law-based "leverage" to constitutionalize Charter rights, which it found in a *possible*, but in all likelihood not *compelling* interpretation of the principle of equivalence. Under that assumption, the *Pontin* or *Levez* case law of the CJEU strongly indicates that a referral would not have "delivered" the interpretive results that the *Verfassungsgerichtshof* might have wished for from the CJEU. In that respect, the Charter decision, despite its clear language of commitment to cooperation with the CJEU, remains ambiguous.

To this can be added a number of complications resulting from the traditional understanding of a non-hierarchical relationship of the three Austrian apex courts. It hardly came as a surprise that the Charter decision met with judicial reactions by the other two supreme courts.[67] Less than a year after the Charter decision, the *Oberster Gerichtshof* challenged the Constitutional Court's questionable understanding of the principle of equivalence and referred, *inter alia*, a question to the CJEU under Article 267 TFEU which also aimed at an interpretation of the principle of equivalence.[68] In its preliminary ruling,

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[63] Michael Potacs, *Rechte der EU-Grundrechte-Charta als verfassungsgesetzlich gewährleistete Rechte*, 134 JURISTISCHE BLÄTTER 503, 511 (134); see also the reaction of the *Verwaltungsgerichtshof* in Case 2013/15/0196, 23 January 2013.

[64] *See* Pöschl, *supra* note 27, at 594–95.

[65] *See id.* at 597.

[66] In particular, see the Court's fragmented citation of the *Pontin* case; cf. Merli, *supra* note 42, at 356 n. 2; further, see the relativization in the Constitutional Court's follow-up case-law, e.g. Case B 166/2013–17, 12 March 2014, para. 22; *see* Pöschl, *supra* note 27, at 603; Christoph Brenn, *VfGH versus Unionsrecht*, 67 ÖSTERREICHISCHE JURISTEN-ZEITUNG, 1062, 1065 (2012).

[67] For a literary reaction, see, *e.g.*, Ratz, *supra* note 17, at 278.

[68] Order of the *Oberster Gerichtshof* for a preliminary ruling, 17 December 2012, 9 Ob 15/12i; *see* CJEU, Case C–112/13, A v. B and Others, 2014 E.C.R. I–00000, para. 27 ("In the case of rules of procedural law under which the ordinary courts called upon to decide on the substance of cases are also required to examine whether legislation is unconstitutional but are not empowered to repeal legislation generally, this being reserved for a specially organised constitutional court, does the 'principle of equivalence' in the implementation of European Union law

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the CJEU reiterated its previous case law as prescribing the application of "detailed procedural rules governing actions for safeguarding an individual's rights under EU law [...] *no less favourable* than those governing similar domestic actions."[69] However, yet rather unsurprisingly, the CJEU avoided directly commenting on the Constitutional Court's interpretation of the principle of equivalence, which the *Oberster Gerichtshof* had obviously wished for.[70] Rather, the CJEU identified, "from the reasoning of the order for reference,"[71] the relevant question in the issues of domestic, possibly constitutional, interlocutory proceedings with a view to Article 267 TFEU obligations of ordinary courts as well as in the principle of primacy of EU law.

There, the CJEU rather positively perceived the Constitutional Court's reference to its earlier case law on that matter.[72] In its Charter decision, the *Verfassungsgerichtshof* had raised that issue:[73] In the *Melki and Abdeli* judgment the CJEU argued that such interlocutory proceedings could be compatible with Article 267 TFEU as long as, *inter alia*, "national courts or tribunals remain free to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary."[74]

Thus, the constitutionalization of Charter rights, taken together with a national procedural provision requiring ordinary courts to request the invalidation of domestic legislation deemed unconstitutional, must not in any way limit the unconditional right of the national court to refer preliminary questions to the CJEU. In a sense, this reflects the traditional *Simmenthal* principle that "it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means,"[75] for otherwise the effectiveness of the procedure under Article 267 TFEU could be impaired. In its order for a preliminary ruling, the *Oberster Gerichtshof* seemed to take up precisely that possible

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mean that, where legislation infringes [Art 47 CFR], the ordinary courts are also required, in the course of the proceedings, to request the constitutional court to set aside the legislation generally, and cannot simply refrain from applying that legislation in the particular case concerned?").

[69] Case C–112/13, A v. B and Others, 2014 E.C.R. I–00000, para. 45, quoting from previous case-law (italics added).

[70] In its order for a preliminary ruling, the *Oberster Gerichtshof* cites from the Charter decision, see order of the *Oberster Gerichtshof* for a preliminary ruling, 17 December 2012, 9 Ob 15/12i, section 3.7.

[71] Case C–112/13, A v. B and Others, 2014 E.C.R. I–00000, para. 29.

[72] *Id.* at para. 32.

[73] VfSlg 19.632/2012, para. 42.

[74] Joined Cases C–188/10 and C–189/10, Aziz Melki and Sélim Abdeli, 2010 E.C.R. I–5665, para. 57.

[75] Case C–106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA, 1978 E.C.R. 629, para. 24.

blocking effect of the *Melki* case law with regard to Article 89 paragraph 2 B-VG, which obliges ordinary courts, if they consider an applicable general norm to be unconstitutional, to refer the issue to the *Verfassungsgerichtshof* as the centralized authority for judicial review. To the disappointment of the *Oberster Gerichtshof*, the CJEU did not (have to) take sides, but only generally pointed to the importance of compliance with the *Melki* criteria.[76]

At closer inspection, therefore, the Constitutional Court's offer to cooperate seems to be incomplete and possibly inconsistent, whereas the constitutionalization of parts of EU fundamental rights openly challenges the previous "division of labour" between three domestic apex courts.[77]

**F. Preserving Endangered Functions?**

The outcome of the Charter decision, that is, the partial domestic constitutionalization of an EU catalogue of fundamental rights, undoubtedly represents a landmark case both under Austrian constitutional law and under EU law. From the outside, the motives for this rather spectacular decision, remain, however, less clear. Nonetheless, one might trace the Court's general motives from the judgment's language, from the literary comments of a number of (former) constitutional justices, and from the academic debate on the judgment.

Here, the affirmation of the role of the *Verfassungsgerichtshof* as a quasi-exclusive fundamental rights court of last resort and as the "monopolist" of general judicial review runs like a central theme throughout the Charter decision.[78] With a view to the entry into force of a directly applicable Charter, blocking the application of conflicting national rules including national fundamental rights, the *Verfassungsgerichthof* proved to have a good sense of the profound impact of the Charter on the exercise of these central constitutional functions.[79] In that sense, the Charter decision might be viewed as a "rearguard action" to protect those functions of the Constitutional Court which it considered to be at risk due to a directly applicable Charter.[80]

Insofar as its role as a quasi-exclusive fundamental rights court is concerned, the Constitutional Court fears the multiplication of actors competent to decide on fundamental rights issues. Under the Charter, each national court and tribunal would

[76] Case C–112/13, A v. B and Others, 2014 E.C.R. I–00000, para. 46.

[77] For a reaction of the other supreme court, see *Verwaltungsgerichtshof*, Case 2013/15/0196 of 23 January 2013.

[78] On the "guiding function" of the Constitutional Court, cf. Holoubek, *supra* note 10, at 166.

[79] Already on similar "fears" after Austria's accession to the EU, *see* Schäffer, *supra* note 2, at 371.

[80] *See* Pöschl, *supra* note 27, at 590.

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become an "EU fundamental rights court"; as apex courts of all civil and criminal or administrative courts, the *Oberster Gerichtshof* and the *Verwaltungsgerichtshof* would be strengthened, let alone the CJEU via the Article 267 TFEU procedure. In that vein, the Charter decision might be viewed as a countervailing action by providing several instruments to compensate for such a partial functionary loss.[81] In a remarkable literary statement heralding the Charter decision, Justice Müller unmasked the tone of the Court's alternative of inaction: the *Verfassungsgerichtshof* would "abdicate" in favor of ordinary and administrative courts and would utterly "surrender" the constitutional function of being a guardian of fundamental rights.[82]

Concerning the Court's function as to centralized judicial review, that is, the right to remove general norms from the legal order due to their unconstitutionality, the *Verfassungsgerichtshof* seems to fully understand the threat that the primacy of directly applicable EU norms in general and Charter provisions in particular might pose to its function. To the extent that national authorities abide by the principle of the primacy of the (broadly applicable) Charter provisions and simply disapply conflicting national provisions, the Constitutional Court as a "negative legislator," charged with eliminating unconstitutional norms from the legal order, could even become superfluous;[83] the additional task of formally removing inapplicable and also unconstitutional norms from the legal order could be performed by the parliamentary legislator.[84]

In its Charter decision, the *Verfassungsgerichtshof* infers from the principle of equivalence that administrative decisions or general norms contravening Charter rights are to be annulled or struck down in proceedings before the *Verfassungsgerichtshof*. This leads one to ask whether such an alternative system of legal protection would not eventually amount to an aggravation compared to the *status quo ante*: Under the proposed system, a citizen would often need to use an additional procedure before the *Verfassungsgerichtshof* to strike down the conflicting provision, whereas other authorities could simply disregard the domestic provision which violated Charter rights.[85] One of the most convincing critiques of

[81] *See* Müller, *supra* note 49, at 167; Brenn, *supra* note 66, at 1065; Merli, *supra* note 42, at 359. Citing from that literature, one justice admits to these "explanations" for the Charter decision, *see* Holoubek, *supra* note 10, at 169.

[82] Müller, *surpa* note 49, at 167. To the extent that these instruments developed through the Charter decision relate to an intensified relationship with the CJEU, *see infra* at G.

[83] However on this function of "Rechtsbereinigung," i.e. "removal" of conflicting domestic law, see already VfSlg 19.632/2012, para. 33.

[84] *See* Brenn, *supra* note 66, at 1065.

[85] *See* Pöschl, *supra* note 27, at 596.

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the Charter decision demonstrates that such a longer procedure might result in a situation in which a citizen could be eventually even worse off.[86]

Clearly, the Constitutional Court anticipated the shift of balance in the separation of judicial powers with regard to its function as a fundamental rights court. The Charter decision may therefore be read as an attempt to counter or even "override" the other supreme courts' potentially enhanced roles as EU fundamental rights courts.[87] Irrespective of its future role under Article 267 TFEU, the Constitutional Court's fear of losing control over the judicial development of fundamental rights protection in Austria seems not only to be justified, but also inevitable in view of the functioning of the EU principles of primacy and effectiveness. Seen in this light, the Charter decision might be a rather symbolic and ostensive "act of self-assertion of a constitutional court,"[88] coming closely, therefore, to a "rearguard action" vis-à-vis the other domestic apex courts.

**G. An Instrument of "Leverage"**

Far from that, the *Verfassungsgerichtshof* arguably comprehended the leveraging potential of the "Charterization" of fundamental rights control. Not only did it grasp the potential impact of the Charter on domestic fundamental rights protection, but its Charter judgment may also be seen as a measure of empowerment, seizing an early opportunity to co-shape the future of European fundamental rights protection together with the CJEU through the preliminary reference procedure. In this vein, Justice Holoubek called the decision an "offer for a European fundamental rights community."[89]

As a young fundamental rights catalogue, containing many "untested" Charter rights, an unclear distinction between rights and principles, and a number of unresolved horizontal issues relating to the relationship between the Charter, the Convention, and domestic fundamental rights, the Charter will have to be fleshed out through case law of the CJEU. The *Verfassungsgerichtshof* seems prepared to make intensified use of the preliminary reference procedure to actively shape that future EU fundamental rights case law and, therefore, to leverage its influence on a European scale. In that sense, the Constitutional Court "dialogue" with the CJEU does not only go well beyond, but is diametrical to, the

[86] Merli, *supra* note 42, at 357.

[87] However, see the unaltered case law of the *Verwaltungsgerichtshof*, Case 2013/15/0196, 23 January 2013.

[88] Stefan Mayr, *Verfassungsgerichtlicher Prüfungsgegenstand und Prüfungsmaßstab im Spannungsfeld nationaler, konventions- und unionsrechtlicher Grundrechtsgewährleistungen*, ZEITSCHRIFT FÜR VERWALTUNG 401, 409 (2012).

[89] Holoubek, *supra* note 10, at 166.

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traditional resolution mechanisms (such as the "*Solange*" doctrines) of conflicting fundamental rights protection regimes.[90]

In order to better understand the Constitutional Court's willingness to internalize an international fundamental rights catalogue, one needs to point to the peculiar status of the ECHR within the Austrian legal order. Besides its status as an international treaty that the Republic of Austria adheres to, the ECHR was incorporated into domestic law, meaning that it formally enjoys constitutional rank. For more than 50 years, and more intensively than most other constitutional courts in Europe, the *Verfassungsgerichtshof* has been citing judgments of the Strasbourg Court.[91] ECHR fundamental rights are now inherent in the domestic fundamental rights culture.[92] Consequently, in practice the Constitutional Court is not at all adverse to referring to "European" fundamental rights in its domestic jurisprudence. Taking recourse to another "European" catalogue of fundamental rights such as the CFR, which, in addition, both in substance and procedure is closely intertwined with the ECHR, might therefore be more easily acceptable than for other constitutional courts and might have additionally reassured the Court of the feasibility of their approach in the Charter decision.

It is here that the *Verfassungsgerichtshof* offers the CJEU its services to become a "privileged partner" in a judicial dialogue in what has been described as filtering domestic cases, clarifying them on their own, preparing them for the CJEU, and adapting the preliminary rulings for the peculiarities of the domestic legal order.[93] The Constitutional Court could also support the CJEU in coordinating the respective overall concepts of fundamental rights interpretations.[94] In a "division of labour"[95] between the CJEU and the Constitutional Court, the latter would act as a kind of gatekeeper and clearing house for national cases.

In case of congruence of Charter rights with domestic ECHR rights, and given the existence of relevant case law of the European Court of Human Rights (ECtHR), national constitutional courts could decide autonomously "in the sense of the principle of

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[90] *See* Komárek, *supra* note 3, at 422. On the function of "Solange" doctrines within the judicial dialogue of the CJEU and national courts, see Charles F. Sabel & Oliver Gerstenberg, *Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order*, 16 EUR. L. J. 511 (2010).

[91] *See* Christoph Grabenwarter, *Europäische Grundrechte in der Rechtsprechung des Verfassungsgerichtshofes*, 20 J. FÜR RECHTSPOLITIK 298, 299 (2012).

[92] *See id.* at 304.

[93] Merli, *supra* note 42, at 360; Holoubek, *supra* note 10, at 167.

[94] *See* Holoubek, *supra* note 10, at 168.

[95] Heller, *supra* note 26, at 677; Grabenwarter, *supra* note 91, at 304.

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subsidiarity."[96] Here, the *Verfassungsgerichtshof* must have also had in mind the overloaded ECtHR, suggesting leaving more room to develop domestic case law on Charter rights.[97] In this respect, the Charter decision may be read as bringing the Constitutional Court "back into the equation"[98] by fully realizing the Court's potential to shape the future content of the Charter in particular and of European fundamental rights protection in general.

In keeping with this strategy of "Charterization" of fundamental rights control, the *Verfassungsgerichtshof* referred, only months after its Charter decision, several questions concerning the Data Retention Directive and Charter provisions for a preliminary ruling. The main question related to the validity of several provisions of the contested Data Retention Directive in the light of Articles 7, 8, and 11 of the Charter.[99] In that sense, the Constitutional Court reinforced its statements from the Charter decision with regard to its obligations under Article 267 TFEU, that is, to refer not only question of interpretation of Charter provisions, but also questions of the conformity of EU secondary law with the Charter.[100] To this was added a set of five detailed interpretive questions, regarding the scope and interpretation of rights and principles (Article 52 CFR, the right to respect for private and family life (Article 7 CFR), and the right to protection of personal data (Article 8 CFR)).[101] Again, the Charter decision may thus also be seen as an act of "self-assertion";[102] in procedures for a preliminary ruling, national constitutional courts may significantly

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[96] Grabenwarter, *supra* note 91, at 304.

[97] *See* Müller, *supra* note 49, at 168.

[98] Merli, *supra* note 42, at 360; Müller, *supra* note 49, at 165; Clemens Jabloner, *Das Verhältnis zwischen europäischer Gerichtsbarkeit und Verwaltungsgerichtshof*, *in* KOOPERATION DER GERICHTE IM EUROPÄISCHEN VERFASSUNGSVERBUND. GRUNDFRAGEN UND NEUESTE ENTWICKLUNGEN, 12. ÖSTERREICHISCHER EUROPARECHTSTAG 2012, 171, 183 (Christoph Grabenwarter & Erich Vranes eds., 2013) .

[99] *See* VfSlg 19.702/2012 and CJEU, Joined Cases C–293/12 and C–594/12, Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others, 2014 E.C.R. I–00000, para. 21.

[100] VfSlg 19.702/2012, para. 27.

[101] *See, e.g.*, the first question: "In the light of the explanations relating to Article 8 of the Charter, which, according to Article 52(7) of the Charter, were drawn up as a way of providing guidance in the interpretation of the Charter and to which regard must be given by the *Verfassungsgerichtshof*, must [Directive 95/46] and Regulation (EC) No 45/2001 of the European Parliament and of the Council [of 18 December 2000] on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [OJ 2001 L 8, p. 1] be taken into account, for the purposes of assessing the permissibility of interference, as being of equal standing to the conditions under Article 8(2) and Article 52(1) of the Charter?", CJEU, Joined Cases C–293/12 and C–594/12, Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others, 2014 E.C.R. I–00000, para. 21.

[102] Mayr, *supra* note 88, at 409.

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contribute to the interpretative work of the CJEU. It is likely that the *Verfassungsgerichtshof* will follow suit in other Charter cases.

**H. Conclusion**

By comparison to its earlier case law, the Charter decision of the *Verfassungsgerichtshof* represents a remarkable example of activist judicial constitutionalization.[103] Despite its argumentative inconsistencies, the decision provides evidence of a court's consciousness of the profound impact of a directly applicable EU fundamental rights catalogue on its traditional constitutional functions. On the one hand, the Court's reaction to a shift of judicial powers towards the other domestic apex courts as well as the CJEU with regard to its function as a fundamental rights court resulted in a rather symbolic "rearguard action" vis-à-vis the other two supreme courts. On the other hand, the *Verfassungsgerichtshof* pledges to actively engage in a judicial dialogue with the CJEU to effectively protect Charter-based fundamental rights of individuals. In doing so, the Constitutional Court recognizes a substantial leveraging potential to shape European fundamental rights under the auspices of the Charter together with the CJEU.

The Court's domestic adjudicatory functions as a "negative legislator" and as a fundamental rights court, which have both been limited under the influence of Europeanization, are then complemented by the dialogical function of the network of European constitutional courts.[104] In this respect, this development fits well with the emerging concept of a "*Verfassungsgerichtsverbund,*"[105] a compound of the CJEU and national constitutional courts.[106]

[103] This is to be contrasted with the "constitutionalization" of another European fundamental rights catalogue, the ECHR, through formal constitutional amendment. *See* Orator, *supra* note 20, at 248.

[104] Another indication of the Constitutional Court's awareness for and willingness to use this dialogical function are the (prompt) publications of English translations of important judgments of the *Verfassungsgerichtshof*, *see, e.g.*, VfSlg 19.632/2012 (Charter decision), VfSlg 19.702/2012 (referral of the Data Retention Directive case).

[105] Andreas Voßkuhle, *Der europäischer Verfassungsgerichtsverbund*, 29 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 1 (2010).

[106] In favor of such a "dialogue on the same subject in a common language," *see* Holoubek, *supra* note 10, at 167.

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