# GUEST EDITORIAL

## DUAL PRELIMINARITY, TODAY. EVALUATING THE IMPACT OF JUDGMENT NO. 269/2017 OF THE ITALIAN CONSTITUTIONAL COURT

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### 1. Focusing on Italian Judges Dealing with Dual Preliminarity

This *Special Issue* collects the contributions presented at the seminar on the topic "*Sentenza 269/2017 della Corte costituzionale italiana e doppia pregiudizialità, oggi*", held at Luiss Guido Carli on 20 May 2022. The seminar, as well as the Special Issue, were organized and produced with the co-funding from the Erasmus+ Program: Jean Monnet Chair on *Understanding EU Law in Practice: EU Rights in Action before Courts* and the PRIN project on "The Challenge of Inter-legality", funded by the Ministry of University and Research.

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As it is evident from the title of the Seminar, its principal goal was to assess the impact that the landmark Judgment No. 269/2017 rendered by the Italian Constitutional Court (hereinafter ItCC) had on the Italian judiciary. Furthermore, the Seminar was also meant to dive into Judgment No. 269/2017 from the standpoint of the Court of Justice of the EU, as well as of the other Member States.

Against this background, rather than focusing specifically on the decision, its motivations or the (variegated) reactions that followed to it in the scholarly debate, the focus chosen as the *leitmotif* of our debate has been its influence over Italian courts. It was, thus, decided to analyze the trends on dual preliminaries, in practice, by examining not only the subsequent case law of the ItCC, but also and in depth the case law of ordinary and administrative judges, in order to identify the underlying trends and the effective rate of innovation determined by the *obiter dictum* enshrined in that fundamental ruling.

Certainly, one of the profound reasons of this jurisprudential turn was the reaffirmation of the centralized scrutiny on fundamental rights by the ItCC[1]. And the reasons for this re-centralisation must be identified in the capacity of the constitutional judge to deliver *erga omnes* effects judgments on the "rights of the person"[2].

Now, from the point of view of the enforcement of the law in practice, the most fruitful research perspective is looking at the true protagonist of the innovative approach entailed by Judgment No. 269/2017, that is the ordinary and administrative judges. Indeed, having the ItCC itself clarified that the new order of remedies does not constitute an obligation (as it had controversially[3] stated at first), but an "opportunity"[4], it is clear that who ended to be strengthened is, at the end of the day, the judge of the main trial. The latter, in fact, is the

[1] G. Martinico & G. Repetto, 'Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court and Its Aftermath', 4 *Eur. Const. Law Rev.* 731-751 (2019); D. Tega, *La Corte nel contesto. Percorsi di «ri-accentramento» della giustizia costituzionale in Italia* (2020).

[2] Judgment No. 269/2017, §5.2 in law.

[3] On this matter, as well as on others, see, for an EU law critique, D. Gallo, 'Challenging EU constitutional law: The Italian Constitutional Court's new stance on direct effect and the preliminary reference procedure', 4 *European Law Journal* 434-456 (2019).

[4] ItCC, Judgment n. 20/2019, §2.1 in law.

one called to apply domestic law on which the twofold doubt of compatibility with both the Constitution and EU law arises[5]. It is therefore a matter for the single judge to decide between a European loyalty or a constitutional one and, condequently, to determine whether or not to adhere to the new course outlined by Judgment No. 269/2017.

In this framework, given the peculiar judicial architecture in Italy, it seemed necessary to distinguish in the discussion the analysis of the activity of ordinary judges from that of administrative ones, to then concentrate in a separate forum on the Court of Cassation.

## 2. Recent Trends between Italy, the EU and fundamental right protection

To better frame the jurisprudential evolution analyzed in this Special issue, it is perhaps appropriate to recall some elements that can help to reconstruct the institutional context in which Judgment No. 269/2017 took place.

In recent years there have been many important changes in the relationship between the Italian legal system and EU law, both in general and with specific reference to the ItCC. In less than fifteen years since the entry into force of the Treaty of Lisbon and, with it, of the Charter for the Protection of Fundamental rights of the EU (CFREU), numerous innovations arose which, in fact or in law, contributed to reshape the relationship between Italy and the EU, and render it different from the past.

It is no coincidence that in the period between the signing and the entry into force of the Treaty of Lisbon there was the shift in the position of the Constitutional Court with respect to the use of the preliminary ruling. Opening a new phase of its long "European journey"[6], the ItCC has suddenly reversed its position with respect to

[5] This centrality of the moment of application for the purpose of activating the preliminary ruling is moreover consistent with the case law that the Constitutional Court had referred to itself, when it was preparing to open a dialogue with the CJEU in view of the first preliminary reference in 2008. See ItCC, Judgment No. 102/2008, §8.2.8.3. in law.

[6] The expression is notoriously due to P. Barile, 'Il cammino comunitario della Corte, in *Giurisprudenza costituzionale*, 1973, p. 2406-2420.

it. After having long denied even its ability to access the tool[7], first in the limited context of the principaliter proceeding[8] and then also in the incidenter one[9], the ItCC paved the way for formal dialogue with the CJEU.

Furthermore, between 2015 and 2018 the so-called "*Taricco* saga" developed between ordinary judges, the CJEU and the ItCC, which brought the clash between the two legal systems to the highest levels[10]. Although the story ended without the formal application of the counter-limits, *de facto* they appear to have been exercised in practice[11], leading to the non-application of the principles set out by the CJEU in relation to a provision of EU primary law.

These years have also led to further systemic innovations. For example, although without replacing Article 11 of the Constitution as the true European clause, there has been important constitutional amendments. One of them (inserting the balanced budget clause and the sustainability of the public debt "in accordance with the European Union law"[12]) can certainly be defined as "EU- driven". Hence, there has been the concrete confirmation of the judicial doctrine of counter-limits, with their sensational application in the different context of the relationship with public international law, within the well-known *Ferrini case*[13].

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[7] See Order No. 536/1995.

[8] See Order No. 103/2008, M. Dani, *Tracking Judicial Dialogue. The Scope for Preliminary Rulings from the Italian Constitutional Court*, Jean Monnet Working Paper (2008).

[9] Order No. 207/2013, O. Pollicino, 'From Partial to Full Dialogue with Luxembourg: The Last Cooperative Step of the Italian Constitutional Court', 1 *Eur. Const. Law Rev*. 143-153 (2014).

[10] For a recent account in English see G. Piccirilli, 'The "Taricco Saga": the Italian Constitutional Court continues its European journey', 4 *Eur. Const. Law Rev*. 814-833 (2018).

[11] For some observations on this point in English see D. Gallo, 'The *Taricco* Saga: When Direct Effect and the Duty to Disapply Meet the Principle of Legality in Criminal Matters', in P. Craig, R. Schütze (eds.), *Landmark Cases in EU Law*, Oxford, Hart Publishing, forthcoming.

[12] Art. 97(1) of the Constitution, as amended in 2012.

[13] Judgment no. 238/2014 constitutes, among other things, the only case in which the ItCC has explicitly used the term "controllimits" in the motivation on points of law (§3.2.).

More generally, the ItCC has been undergoing a profound rethinking of its institutional role and its procedural tools, also in the light of the evolution of the Italian institutional context [14].

As for the multilevel protection of fundamental rights, further elements of novelty came also in the interaction with the Council of Europe and the refusal by Italy to ratify Protocol no. 16 to the ECHR. Although Italy signed it, and the Government introduced before the Parliament the bill to authorize its ratification together with Protocol no. 15[15], the Parliament decided to take out from it the mechanism for a prior involvement of the Strasbourg Court. The main reason to do so – emerging also in the hearings of scholars during the pre-legislative scrutiny[16] – was exactly in the sense of avoiding the erosion of the monopoly of the ItCC in setting the standard of interpretation for constitutional fundamental rights.

In short, Judgment No. 269/2017 constitutes, at the same time, the arrival point of a long journey (which involves the relationship between Italy and the EU, as well as the role of the ItCC itself) and the starting point of new and important trends.

### 3. The Structure of the Special Issue

The study of the developments in the case law subsequent to the Judgment n. 269/2017 has made it possible to highlight a point of conjunction between two current lines of research in the Luiss Law Department. The innovative perspective of the evolution in courts on dual preliminarity in relation to the CFREU represented, on the one hand, the natural development of the theme on which the Jean Monnet Chair held by Daniele Gallo is based; on the other, it has been seen a concrete venue for testing the theoretical proposal constituted by inter-legality, authoritatively proposed by a volume edited by Jan Klabbers

[14] D. Tega, 'The Italian Constitutional Court in its Context: A Narrative', 3 *Eur. Const. Law Rev*. 369-393 (2021).

[15] See already, in 2017, the bill no. 2772 (Senate) and then, in the subsequent legislative term, bill no. 1124 (Chamber) in 2018.

[16] E. Albanesi, *Abbiam fatto quindici, possiam fare anche sedici… Sull'approvazione della legge di autorizzazione alla ratifica del Protocollo n. 15 alla CEDU da parte dell'Italia (e sulle prospettive del Protocollo n. 16)*, 1 *Consulta OnLine* 186-191 (2021).

and Gianluigi Palombella[17], and carried out by a PRIN research project also active with a local Luiss unit, led by Giovanni Piccirilli.

The individual reports were entrusted to colleagues from different universities in Italy, who were identified in relation not only to the topics to be covered, but also on the basis of a certain consonance of methodological approach.

The Special Issue starts with the analysis of the Judgment No. 269/2017, as well as of the refinements and developments that the Constitutional Court itself offered in subsequent cases (Repetto). It then moves to ordinary and aministrative courts (respectively, Massa and Lorenzoni), and to the Court of Cassation (Tega). Furthermore, it seemed appropriate to compare the evolution of the Italian legal system with the interpretation of the dual preliminarities doctrine from the persective of the CJEU (Amalfitano-Cecchetti), and with a view to the practice in the legal systems of the other Member States (Martinico). In support of these analyses, an analytical appendix has been added, offering a presentation of the data collected in the *Observatory on the practices of inter-legality by Italian courts*[18], in which dozens of rulings subsequent to 269/2017 were surveyed, in order to verify the follow-up given by the judges (Scarcello).

As the reader will easily grasp, a clear divide can be drawn from the analyzes of the essays regarding the jurisprudential evolution triggered by Judgment No. 269/2017. Indeed, if the ordinary courts are more sensitive to the *ratio* underpining the famous *obiter dictum*, a much higher resistance to this innovation comes from the administrative jurisdictions, which – except for a few isolated cases – seem to have remained solidly anchored to the *Granital* scheme. It should be remembered, however, that the new approach to dual preliminaries outlined by the ItCC, at least according to the development of jurisprudence to date, has in any case been limited to the overlaps between the Constitution and the CFREU relating to "personal rights". And, consequently, the diversity of developments on the part of the ordinary judges and the administrative judges is perhaps understandable.

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[17] J. Klabbers, G. Palombella (eds.), *The Challenge of Inter-Legality* (2019).

[18] https://www.cir.santannapisa.it/observatory-practices-inter-legality-italian-courts-2018-2022

Overall, what can be remarked with regard to the case law of the Italian judiciary, as demonstrated by the practice of the Cassation Court, is the ambivalence in the akwnoledgement and enforcement of the *obiter*'s formula. As a matter of fact, some courts, or some sections of the Cassation Court, in situations of dual preliminarity, tend to preliminarily raise questions of constitutional legitimacy before the ItCC, while other judges issue references before the CJEU pursuant to Article 267 TFEU. Moreover, should EU provisions endowed with direct effect be at stake, what remains today not clear is whether the ItCC should declare as inadmissible the question(s) of constitutionality raised before it[19] or proceed by delivering on its own a decision on such question(s),[20] each court (ItCC and the CJEU) "using their own instruments and each within the scope of their respective competences",[21] possibly after having submitted a preliminary reference to the CJEU.

In the light of the observations above, it is hoped that the contributions collected in this Special Issue will be a useful resource for colleagues, students, judges, practitioners confronted with the doctrine of dual preliminarity and, more generally, with the fascinating matter of the (more or less tense) reationships between the CJEU and national supreme/constitutional courts, incuding the ItCC.

*Special thanks go to post-doc fellows Dr. Lorenzo Cecchetti and Dr. Alberto Di Chiara, who offered valuable help for the better realization of the seminar and for the essential editorial work for this publication.*

[19] See Judgment No. 67/2022.
[20] See Judgment No. 54/2022.
[21] See Judgment No. 149/2022, §2.2.2. in law.