JUDGMENT NO. 269/2017 AND DUAL PRELIMINARITY IN THE EVOLUTION OF THE JURISPRUDENCE OF THE ITALIAN CONSTITUTIONAL COURT

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Abstract

This article considers the problems and perspectives related to the recent developments of the Italian Constitutional Court's case law with regard to issues of "dual preliminarity", i.e. those situations in which a national judge argues that an internal rule conflicts with the fundamental rights stemming from both the Charter of Fundamental Rights of the EU and the Italian Constitution. In these cases, Judgment No. 269/2017 has affirmed for the first time that the referring judge is entitled to priorly activate constitutional review, so as to reaffirm the integrated protection of national and European rights.

In the first section, the article discusses the reasons and the implications of this turning point, which can be summarized in the judicial strategy of the ItCC aiming at regaining centrality without questioning the main principles of functioning of EU law. In the second section, some undecided issues are considered, with regard to the concurrence of judicial remedies (the preliminary reference procedure and the *incidenter* review), the potential for using both remedies at the same time and the expansion of the ItCC's review beyond the field of fundamental rights. In the last section, doubts are expressed in relation to the possibility that the further expansion of the ItCC's review may be reliant upon the need to safeguard the centralization of judicial review.

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1. Judgment No. 269/2017: the reasons and the direction of a turning point

As is well known, Judgment No. 269/2017 of the Italian Constitutional Court (hereinafter: ItCC) unlocked a new era in its relationship with European Union law, with particular regard to the handling of judicial conflicts between domestic law and the fundamental rights stemming from both the EU Charter and the Italian Constitution. By modifying its previous approach on these issues, according to which similar situations involve exclusively the ordinary judges and the EU Court of Justice, the ItCC affirmed that judges are entitled to priorly raise an *incidenter* review of constitutionality whenever the fundamental rights of the EU Charter do overlap with those enshrined in the Italian Constitution.

There are two key reasons for this turning point.

On the one hand, the ItCC has sought to gain room for *manoeuvre* against the risks of an increasing displacement of its review in issues of fundamental rights in favor of ordinary judges. In the aftermath of Judgment No. 269/2017, this appeared to several commentators the main reason for a sort of repatriation of constitutional review[1].

On the other hand, a further triggering reason for the *revirement* is related to the need to respond to the constitutional evolutions that have impacted EU law in the aftermath of the Charter's entry into force. Its novelty and its "content of typically constitutional imprint" (thus, Judgment No. 269/2017) has posed, not only in Italy, the problem of measuring the impact of its application in national legal

[1] A. Barbera, *La Carta dei diritti: per un dialogo fra la Corte italiana e la Corte di giustizia*, 37 Quad. cost. 1 (2018), at 149.

systems by reviewing the foundations that were forged in the earlier years of the European integration process[2]. In the Italian case, this has led to a critical consideration of the continuing effectiveness of the "Granital model" (as established in Judgment No. 170/1984) in absorbing the impact of a text like the Charter, that indicated from the outset a much higher potential for federalization than that traditionally contained within "classic" EU law[3]. If the "Granital model" was able to effectively secure relations between EU and domestic jurisdictions for decades, this was because it reflected the characters of a mechanism of integration that found in direct effect a useful and (tendentially) unambiguous criterion in separating the tasks between national judges of the Court of Justice, on the one hand, and the Constitutional court on the other.

The Charter of Fundamental Rights, with its set of provisions that no longer refer only to direct or non-direct effect[4], has undoubtedly called into question the functionality of the previous scheme. Whenever the Charter's clauses are invoked and applied in courts, even aside from the fact that they have direct effect[5], the conditions are created for the Charter to occupy operational spaces for which the "Granital model" neither foresees nor provides.

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[2] G. Scaccia, *Sindacato accentrato di costituzionalità e diretta applicazione della Carta dei diritti fondamentali dell'Unione europea*, in C. Amalfitano, M. D'Amico, S. Leone (eds.), *La Carta dei diritti fondamentali dell'Unione europea nel sistema integrato di tutela* 156 (2022).

[3] P. Eeckout, *The EU Charter of Fundamental Rights and the Federal Question*, 39 Com. Mkt. Law Rev. 945 ss. (2002); K. von Papp, *A Federal Question Doctrine for EU Fundamental Rights Law: Making Sense of Articles 51 and 53 of the Charter of Fundamental Righs*, 43 Eur. Law Rev 512 (2018). For a fruitful comparison on the incorporation doctrines elaborated by the US Supreme Court and the CJEU see A. Buratti, *Diritti fondamentali e integrazione federale. Origini, interpretazioni e applicazioni della* due process clause *nella Costituzione americana*, Riv. dir. comparati 1 (2020).

[4] With the words of Sophie Robin-Olivier, "[t]he rise of fundamental rights […] has shown—as has become more obvious with the Charter of Fundamental Rights—that seeking direct effect was not always the most appropriate, or the most effective, method of sustaining claims in situations covered by EU law": *The evolution of direct effect in the EU: Stocktaking, problems, projections*, 12 Int. J. Const. Law 170 (2014).

[5] E.g., because they are linked to provisions emanating from secondary law by virtue of Art. 52 of the EU Charter, or because they support an interpretation consistent with EU law or identify general principles of EU law.

In addition, the federalizing potential of the Charter has over time increased as a result of the Court of Justice's case law with regard to the scope of application of the Charter itself (Art. 51, para. 1). Moving from the famous *Fransson* case[6], the Court of Justice has equated the Charter's scope of application with the more general scope of EU law[7].

Against this background, the ItCC's response leads to a concurrence of judicial remedies available to the ordinary judge, so that the possibility for the latter to refer a preliminary ruling to the Court of Justice no longer precludes, as it has been in the past, the possibility that, as a preliminary step, the Constitutional court is invited to review an internal act with respect to both domestic and European fundamental rights. The key result of the "269 scheme" therefore, is that the Constitutional Court eliminates the separation previously governing the relations between the two remedies, overcoming the impediments that it had erected in its previous case law[8].

This result has been achieved by virtue of of an ongoing adjustment of the principles laid down in Judgment No 269/2017.

Whereas in this case the ItCC seemed to impose upon domestic judges a *duty* to activate constitutional review before the preliminary reference procedure, subsequent decisions delivered in 2019, which

[6] *Åklagaren v. Hans Åkerberg Fransson*, C-617/10 (26 February 2013).

[7] Consequently, "[T]he Charter is the 'shadow' of EU law. Just as an object defines the contours of its shadow, the scope of EU law determines that of the Charter": K. Lenaerts, J.-A. Gutiérrez-Fons, *The Place of the Charter in the EU Constitutional Edifice*, in S. Peers, T. Hervey & A. Ward (Eds.), *The EU Charter of Fundamental Rights: A Commentary* 1568 (2014). The implications of such an equation have been investigated, among others, by D. Sarmiento, *Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe*, 50 CMLR 5 (2013), at 1267 and I. Gambardella, *L'application de la Charte des droits fondamentaux de l'Union européenne aux États membres: le critére de mise en oeuvre du droit de l'Union comme obstacle à son effectivité*, 57 Cahiers de droit européen 1 (2021), at 241.

[8] For an overview see G. Repetto, *Pouring New Wine into New Bottles? The Preliminary Reference to the CJEU by the Italian Constitutional Court*, 16 Ger. L. J. 6 (2015), at 1449, 1451 ff.

the next section will explore in greater detail, reveal the intention of the ItCC to qualify this precedence in terms of a more viable *option*[9].

In so doing, it paved the way to a concurrence of judicial remedies that, while not questioning the power of the Court of Justice to elucidate the scope of the Charter, does not exclude the possibility that, in the same matter, a constitutional review will take place if requested by the national court. Thus, the ItCC's strategy is aimed at granting constitutional review a precise role, that is to eventually give voice to constitutional reasoning prior to Court of Justice's decision, so as to prevent conflicts rather than attempting to resolve them afterwards[10].

This outcome indicates a more general reassessment of the "Granital model". In fact, once direct effect is no longer deemed the sole criterion[11], a new one has to be found so as to specify the sphere within which both courts will be called upon to intervene.

This criterion seems to be identified with the increasing relevance of national authorities' *margin of discretion in the implementation of EU law*, to which ordinary judges may refer in order to activate one or the other judicial remedy[12].

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[9] C. Amalfitano, *Il rapporto tra rinvio pregiudiziale alla Corte di giustizia e rimessione alla Consulta e tra disapplicazione e rimessione alla luce della giurisprudenza "comunitaria" e costituzionale*, 1 Riv. AIC 296, 300 (2020).

[10] On the need to preserve self-restraint of national courts in the European context and to give more relevance to the "first word" rather than to the "final say" see N. Lupo, *The Advantage of Having the "First Word" in the Composite European Constitution*, 2 Ital. J. Pub. Law 193 (2018).

[11] In 2009, Marta Cartabia observed that, in light of the constitutional courts' displacement in the field of EU-related fundamental rights, "[d]octrines like direct and indirect effect could easily be interpreted so as to involve also the supreme and constitutional courts, instead of banning them": *Europe and Rights. Taking Dialogue Seriously*, in 5 Eur. Const. Law Rev. 29 (2009).

[12] A. Cardone, *Dalla doppia pregiudizialità al parametro di costituzionalità: il nuovo ruolo della giustizia costituzionale accentrata nel contesto dell'integrazione europea*, 1 Oss. fonti 39 ss. (2020); F. Donati, *Un riaccentramento del giudizio costituzionale? I nuovi spazi del giudice delle leggi, tra Corti europee e giudici comuni*, in B. Caravita (ed.), *Un riaccentramento del giudizio costituzionale? I nuovi spazi del Giudice delle leggi, tra Corti europee e giudici comuni* 19 (2021); G. Martinico, *Corte costituzionale e diritti fra armonie e disarmonie giurisprudenziali*, in C. Caruso, F. Medico & A. Morrone (eds.) *Granital revisited? L'integrazione europea attraverso il diritto giurisprudenziale* 144 (2020); C.

In accordance with such criterion, the emerging picture could be that of a division between: (a) an area entirely monitored by the Court of Justice (where the fundamental rights of the EU Charter are closely linked to European rules that are immediately binding on national authorities); (b) an area entirely presided over by the Constitutional Court (where there is no triggering factor with EU law, as in "purely internal situations") as well as c) a further sphere (that coincides with the discretionary implementation of rules and principles pertaining to Charter's rights) in which *both jurisdictions are entitled to intervene*, without any preclusion, at the request of ordinary judges[13].

Outside of this scheme, because of its transversality to each of the mentioned areas, is the power of the Constitutional Court to intervene with a view to activating the counter-limits. This, however, will not be dealt with in this article.

2. The patterns of the case law of the ItCC after 2017: settlement, enlargement, loyalty

The first and most important development of constitutional jurisprudence following Judgment No. 269/2017 regarding cases of dual preliminarity is articulated in a series of judgments delivered in 2019. Through this jurisprudence[14], the Court improved the operational protocols of the "269 scheme", mitigating some strictures of the 2017 judgment: from the above mentioned obligation, for the common court, to refer in advance to the Court itself (demoted to a mere faculty), to the possibility to make use of the preliminary reference so as to subsequently refer to the Court of Justice any

Masciotta, *La doppia pregiudizialità nella più recente giurisprudenza costituzionale*, 3 Oss. fonti 1283 (2020).

[13] In countries like Belgium, France, Austria and Germany, albeit with minor differences, a similar trend has emerged: on this see M. Wendel, *Europäischer Grundrechtsschutz und nationale Spielräume: Grundlagen und Grundzüge eines Spielaraumtests im europäischen Grundrechtspluralismus*, 3 Europarecht 334 (2022), and Editorial, *Better In than Out: When Constitutional Courts Rely on the Charter*, 16 Eur. Const. Law Rev. 1 (2020).

[14] Judgments Nos. 20, 63 and 112/2019; Order No. 117/2019.

question (interpretative or concerning validity) that it deems necessary (and not only those unexamined by the Constitutional Court).

This approach opens the arena to more ordered concurrence among judicial remedies that "exclude[s] all preclusion" (thus, Judgment No. 20/2019) and introduces the ItCC's review into a course in which the basic assumptions of EU law (i.e. preliminary reference, primacy and direct effect) coexist with the ItCC's decisions[15].

The need to achieve a *settlement* between the role of the two Courts is visible in the emphasis that further decisions of the ItCC placed on the "loyal and constructive cooperation between the different jurisdictions, which are called - each for its part - to safeguard fundamental rights in the perspective of a systemic and non-divided protection". The roots of this cooperation can be found in in Article 19 TEU, which considers "in the same context - so as to reveal its inseparable link - the role of the Court of Justice, called upon to safeguard 'respect for the law in the interpretation and application of the Treaties' (paragraph 1), and the role of all national courts, custodians of the task of ensuring 'effective judicial protection in areas governed by Union law' (paragraph 2)" (Judgment No. 254/2020).

At the same time, Judgment No. 20/2019 deals with the possibility that the ItCC's review affects not only the rights contained in the Charter, but also (as in that case) norms of secondary law, even with direct effect, variously related to those same rights, thus extending its scrutiny to areas until then apparently excluded from it. By ruling on the constitutional legitimacy of the domestic rules concerning the obligation to publish the income and tax data of a large category of public executives with respect to, among others, Articles 6 and 7 of Directive 95/46/EC, as functionally related to Articles 7 and 8 of the Charter, the ItCC showed a clear intention to broaden its scope of judgment, so as to encompass rules of EU law foreign to the Charter.

Such *enlargement* of the ItCC's control *vis-à-vis* EU secondary law is the second pattern that emerged after 2017 with regard to issues of dual preliminarity, although further decisions[16] have merely hinted

[15] S. Sciarra, A. Jr. Golia, *Italy: New Frontiers and Further Developments*, in M. Bobek, J. Adams-Prassl (eds.), *The EU Charter of Fundamental Rights in the Member States* (2020), 239, at 248.

[16] Judgments Nos. 11 and 44/2020.

at that possibility, without providing any a clear statement on this specific point.[17].

It would however be difficult to understand the overall approach taken in the post-2017 case law if a third and final direction were not highlighted, and this concerns the issue of *loyalty* of the ItCC to the aforementioned cornerstones of EU law.

In a case in which the Italian Court of Cassation invoked a confirmation of the direct effect nature of Article 12(1)(e) of Directive 2011/98/EU with regard to social-security benefits for third-country nationals, the ItCC declared the question inadmissible because the case law of the CJEU clearly affirmed the duty for national judges to directly enforce EU rules (Judgment No. 67/2022). On that occasion, the ItCC added in general terms that "the principle of the primacy of EU law and Article 4(2) and (3) TEU are the cornerstones on which the community of national courts rests" and that "the centralized review of constitutionality enshrined in Article 134 of the Constitution is not an alternative to the widespread mechanism for implementing EU law (…), but rather merges with them to build an increasingly well integrated system of protections"[18].

After the epilogue of the "Taricco saga" (Judgment No. 115/2018)[19], the ItCC sought to rebalance its relationships with the ECJ through a cooperational relationship that was aimed at settling the most significant conflicts that had developed with regard to the issue of fundamental rights. It suffices to recall that after 2017, the number of preliminary rulings made by the ItCC was significantly higher than those made in the previous ten years[20] and that were all motivated by the intention to promote a greater and more coordinated protection of national and European rights.

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[17] For a critical reading of these cases see R. Mastroianni, *Sui rapporti tra Carte e Corti: nuovi sviluppi nella ricerca di un sistema rapido ed efficace di tutela dei diritti fondamentali*, in 5 *European papers* 1 (2020), 493, at 501.

[18] On this case see A.O. Cozzi, *Per unelogio del primato, con uno sguardo lontano*, in 2 Consulta Online 410 (2022).

[19] For a joint reading of judgement No. 269/2017 and the *Taricco* saga see D. Gallo, *Challenging EU constitutional law: The Italian Constitutional Court's new stance on direct effect and the preliminary reference procedure*, in 25 Eur. Law J. 434 (2019).

[20] Orders nos. 117/2019, 182/2020, 216 and 217/2021.

The cases concerning the right to silence in administrative procedures in respect of the imposition of substantially criminal sanctions (Order No. 117/2019 and Judgment No. 84/2021) and the discrimination suffered by long-term non-resident foreigners excluded from the maternity allowance and "newborn benefits" (Order No. 182/2020 and Judgment No. 54/2022) may be considered emblematic of what is to be demonstrated.

In the first case, by giving entry to a question raised by the Court of cassation immediately after Judgment No. 269/2017 and by referring to Luxembourg with the aim to introduce a right not provided for in EU law[21], the ItCC finalized dual preliminarity to the expansion of the European catalogue of fundamental rights in a direction fully coherent with the constitutional text[22]. In the second case, the decision to make a reference for a preliminary ruling was determined by the national administrative practice which, although faced with pronouncements that repeatedly set aside domestic law conflicting with norms of secondary law endowed with direct effect, failed to comply with the decisions of ordinary courts, forcing the ItCC to obtain the endorsement of the Court of Justice[23], so as to clothe the latter's *dictum* with the *erga omnes* effect of its pronouncements.

This is an interpretative orientation that reveals the constant search for a *consonant interaction* between the ItCC and the Court of Justice, thanks to which the former does not limit the action of the latter, whereas constitutional review regains its role as a systemic guardian of the implementation, at the domestic level, of both domestic and European fundamental rights[24].

3. Open issues I: how free is the concurrence between judicial remedies?

Against this background, one is tempted to believe that

[21] *DB v. Consob*, C-481/19 (2 February 2021).
[22] D. Sarmiento, *The Consob Way – or how the* Corte Costituzionale *taught Europe (Once Again) a masterclass in constitutional disputes settlement*, in EU Law Live (April 16, 2021).
[23] *OD et al. v. INPS*, C-350/20 (2 September 2021).
[24] S. Sciarra, *Lenti bifocali e parole comuni: antidoti all'accentramento nel giudizio di costituzionalità*, 3 Federalismi.it 37 (2021).

cooperation between courts occurs without any significant problem.

In reality, for the common judge, who lost the certainties of the "Granital model", problems arise when called upon to decide which judicial remedy should be activated (and in what order of priority) whenever a domestic rule is at odds with both the Constitution and the rights guaranteed therein, and with EU law and the Charter of Fundamental Rights.

In fact, the ItCC has not provided judges with any guidelines as to the remedies that may be activated, leaving them at the mercy of a "free competition" that would allow them to turn first to the ItCC and then to the Court of Justice or the reverse, without excluding the possibility of referring to the two courts at the same time[25].

One can attempt, as has been done, to preach in the abstract the prevalence of the constraint, for the common court, to the raising of the incident of constitutionality or, conversely, to the activation of the preliminary reference and the consequent potential disapplication of domestic law. However, if the question were to be addressed at this level of generality, a solution would be difficult to find, because it is not possible to establish a clear order of priority with respect to obligations arising from different legal orders[26].

On the contrary, it seems preferable to consider that the common judges are called upon to pragmatically integrate the two remedies, taking into consideration different variables, which may lead them, from time to time, to opt for one or the other solution.

Therefore, in cases of "dual preliminarity" there may be a preference for the (prior) raising of the preliminary reference in all cases where, alternatively or, even more so, jointly: *i*) the latter is not interpretative, but rather concerns validity; *ii*) where the proceeding court is of last resort; and *iii*) the EU law claiming to be applied is unquestionably endowed with direct effect.

On the contrary, a constitutionality review should be prefered in all cases in which (even if the above-mentioned conditions are met):

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[25] A. Ruggeri, *La Consulta e il tiro alla fune con gli altri giudici*, in G. Campanelli, G. Famiglietti & R. Romboli (eds.), *Il sistema "accentrato" di costituzionalità* 255 (2020); A.O. Cozzi, *Nuovo cammino europeo e cammino convenzionale della Corte costituzionale a confronto*, in *Granital* revisited*?*, cit. at 7, 58.

[26] M. Massa, *The Dual Preliminarity Doctrine in the Case-Law of Ordinary Courts of First Instance and Appeals*, below at 27.

i) the violation of a counter-limit is at stake, or *ii*) the referring court deduces the violation of of a constitutional rule having (logically) preliminary value to that concerning the violation of a Charter right: e.g. a domestic rule allegedly conflicting with a domestic and European fundamental right, but even before contained in a legislative decree in excess of delegated powers (Article 76 It. Cost.) or in a decree law that lacks the characters of necessity and urgency (Article 77 It. Const.).

Further variables may require the judge to weigh the features of the concrete case, for example, considering: (*i)* whether there is a simultaneous violation of the Charter and the Constitution (which, in itself, would prompt favoring the constitutional review), (*ii*) whether a violation of secondary EU law is also at stake and whether or not this falls within a fully harmonized sphere (an element, the latter, that would argue in favor of prior review by the Court of Justice) and, again, (*iii)* whether there are Court of Justice precedents and what kind they are: that is, whether these establish an unconditional obligation to disapply, or delegate to the court the power to balance the principle of EU law with other elements (be they other principles of national law or findings of fact)[27].

From the number of variables taken into consideration, and others that could be added, it can be understood how the choice of remedy to be experienced is far from easy. At the same time, it does not seem that today the judge is called upon to make an assessment fully free from any point of reference, even more so where he or she is dealing with "hints" such as, among others, those mentioned above, that suggest a sharper preference for one remedy or the other.

4. Open issues II: contextual preliminarity?

Another unresolved problem in the current structure of the "269 scheme" is related to the possibility for the common judge to address the two courts at the same time, by simultaneously activating the two judicial remedies.

[27] For a converging view see C. Amalfitano, *Il rapporto tra rinvio pregiudiziale alla Corte di giustizia e rimessione alla Consulta e tra disapplicazione e rimessione alla luce della giurisprudenza "comunitaria" e costituzionale*, in 1 Rivista AIC 305 (2020).

Although the problem has not been discussed yet by the ItCC, indications of a potential new approach have emerged in recent years.

In Judgment No. 31/2022, the Court noted that the referring judge had made a contextual reference for a preliminary ruling, but it had been declared inadmissible by the Court of Justice, which did not prevent the ItCC from noting different and additional profiles of inadmissibility. The Court arrived at similar results, again in the face of a contextual reference and a European decision of inadmissibility, in the Judgment No. 254/2020.

Moreover, in a more recent order (No. 137/2022), with regard to a case of double contextual referral that had already been decided by the Court of Justice on the merits, the Constitutional Court opted for the return of the documents to the referring judge (*restituzione degli atti*), motivated by the fact that the Court of Justice had made the obligation to disapply contingent upon a concrete verification of the facts of the case. At the same time, the ItCC added that the judge deciding to turn (as in that case) first to the Court of Justice and then only later (but while the case in Luxemburg is still pending) to the ItCC, is under a duty to give "an account of the reasons that prompted him to activate the two judicial remedies".

These precedents seem to exclude the rigid approach taken by the ItCC in the past years, when it declared inadmissible that the referring judge turns contextually to both courts, since this potentially deprives constitutional review from a direct influence in the case at stake[28].

More systemic reasons could then be presented in support of the admissibility, in principle, of questions raised at the same time to the two courts.

The Court of Justice has been far less selective in considering preliminary references raised by national courts when these have contextually referred questions of constitutional legitimacy to its own constitutional court[29]. In the light of this approach, the question is

[28] Among others, Order No. 85/2002.

[29] In a significant passage from the decision *Kernkraftwerke Lippe Ems* (Judgment June 4, 2015, in Case C-5/2014), the Court of Justice held that "Article 267 TFEU must be interpreted as meaning that a national court which has doubts as to whether national legislation is compatible with both EU law and with the Constitution of the Member State concerned neither lose the right nor, as the case may be, is exempt from the

whether the restrictive attitude of the ItCC in this regard risks undermining the functioning of the "269 scheme" and the claimed priority of constitutional review, by eventually making the preliminary reference a preferable move for the ordinary judge who detects a conflict with the Constitution and the Charter.

Nor is the point entirely decisive that, by allowing cases of "double referral" or "contextual preliminarity", the ItCC would expose itself to the risk of short-circuits with the Court of Justice[30]. The whole scheme of open, dual investigation by these courts opens up the possibility of them being variously "engaged" on the same issues, and indeed the possibility of a prompt response could facilitate subsequent and contrapunctual interactions between the two courts.

5. Open issues III: dual preliminarity beyond the Charter?

There is a further open issue in the dynamics opened by the "269 scheme" concerning the sphere of action of the dual preliminarity protocol beyond the terrain of fundamental rights.

As discussed above, the ItCC has already addressed this problem, albeit in terms not yet fully defined. Yet it is also the one in which, perhaps, the most significant developments can be expected in the near future.

As a first step, the ItCC could confirm an expansive review whenever the allegedly violated supranational rule, while not fully coinciding with a Charter's right, turns out to be materially and/or functionally connected to it, as often happens when the violation of one of the freedoms of movement guaranteed by the Treaties or a principle contained in a directive is invoked. In all these cases, the ItCC should not be prevented to rule on the merits, whenever it detects the

obligation to submit questions to the Court concerning the interpretation or validity of that law, on the ground that an interlocutory procedure for review of the constitutionality of that legislation is pending before the national court responsible for carrying out such review" (para. 39).

[30] N. Lupo, *Con quattro pronunce dei primi mesi del 2019 la Corte costituzionale completa il suo rientro nel sistema "a rete" di tutela dei diritti in Europa*, 14 Federalismi.it 22 (2019).

substance of a violation of fundamental rights, including European ones[31].

In a broader perspective, however, one could not rule out an inclination of the ItCC to place itself definitively as the domestic body guaranteeing the uniform application of EU law even in areas that *are not related to the protection of fundamental rights*. In this regard, the *erga omnes* effects of its rulings could be invoked as a justification for conforming domestic law to those supranational obligations not adequately enforced by the legislature, so as to pursue a more integrated correspondence between domestic and supranational law.

Even though this scenario has not openly emerged in constitutional jurisprudence, it may nonetheless have potential, both because the material scope of intervention of dual preliminarity has not been entirely clarified, and because the ItCC could find support in some remote precedents[32].

Currently, the aforementioned Judgment No. 67/2022 appears to have excluded such an eventuality, since it highlighted the absence of a reference to the violation of the Charter as a qualifying feature of the case at stake and consequently reaffirmed the importance of the principle of the primacy of EU law, closely linking it to the disapplication of a rule that has direct effect.

In any case, beyond this important precedent, the expansion of the "269 scheme" beyond the protection of fundamental rights entails the risk of a complete abandonment of the "Granital model", precisely because disapplication would then constitute, for the common judge, a remedy whose functioning entirely coincides with the activation of constitutional review, but with the difference that the latter is

[31] This could be even more necessary whenever the CJEU refuses to clarify *erga omnes* meaning and content of a fundamental right enshrined in the Charter: D. Gallo, *Effetto diretto del diritto dell'Unione europea e disapplicazione, oggi*, 3 Oss. fonti (2019), 1, at 39.

[32] In Judgment No. 389/1989, for example, it affirmed (in the full force of the "Granital model") that disapplication may not be a decisive instrument for settling contrasts between legal systems, because it does not affect the existence and content of national provisions, with the consequence that "it remains the case that the Member States must make the necessary amendments or repeals to their domestic law in order to purify it of any incompatibility or disharmony with the prevailing Community rules".

equipped with *erga omnes* effects[33]. It is hard to doubt that this would end up creating overlaps and potential conflicts in the spheres of action of the two courts.

6. The internal point of view: centralized constitutional review vs. interpenetration of national and European legality

The evolutions of the new judicial protocol inaugurated in 2017 by the ItCC reveals both positive and negative aspects.

Many of the open issues dealt with in previous pages can be regarded from different standpoints, be them related to the relationships of national judges with the CJEU or to purely internal dynamics, such as the competition between common judges and the ItCC in the protection of fundamental rights.

Among these different perspectives, some final remarks will be devoted to the role of the ItCC in the integrated system of fundamental rights' protection and the attempt to regain the central role it lost in the decades of the unconditional application of the "Granital model".

One of the central arguments of Judgment No. 269/2017 insisted on placing the need for *erga omnes* intervention in cases of violation of fundamental rights at the foundation of the new jurisprudential approach. Against this background, should the Court wish to make the centralization of its judgment the cornerstone around which the new structure of relations between domestic and supranational jurisdictions have to be built, many of the problems discussed earlier could find accommodation by expanding its review: such as, for example, by extending the margins of operation of the "269 scheme" to cases outside the sphere of fundamental rights or by taking a generous approach to questions of dual preliminarity, even when the referring judge might be entitled to set aside internal rules that conflict with EU law.

However, an excessive insistence on *centralized* constitutional review may not be a useful approach.

[33] For a critical appraisal on this point see C. Pinelli, *Ma cosa ha detto "un'ormai copiosa giurisprudenza costituzionale"? Ancora sul contrasto di leggi nazionali con la Carta dei diritti fondamentali dell'Unione europea*, in 68 Giur. cost. 1574 (2022).

From a first point of view, the intention that has guided the ItCC since 2017 has been to reaffirm its role, but in ways that are fully compatible with respect for the structural assumptions of EU law, i.e., primacy, preliminary ruling and disapplication. Indeed, the re-centralization of constitutional adjudication that has taken place in recent years is marked by a clear collaborative approach and is informed by a principle of loyalty to the Court of Justice, which, while not excluding a close dialectic with it[34], seeks as far as possible to avoid conditions capable of leading to a systemic conflict between jurisdictions and systems of protection. The "269 scheme", as tempered by the criteria laid down in 2019 cases, has proven to be effective in that the ItCC has decided to take part *from within* to operationalize the Charter's rights at the domestic level[35]. This strategy may work as long as it does not jeopardize that balance in relation to the fundamental principles of the functioning of EU law.

From a second point of view, the question is whether the ItCC is able to uphold the principle of centralization. After all, it must be considered that the downgrading of the prior referral of the question of constitutionality from an *obligation* to a *faculty* was also due to the realistic account that, had it remained within the first option, the Court would still have been deprived of the power to enforce that obligation imposed upon the judiciary. In the Italian system, the common judge has the last word about whether and how to lodge an *incidenter* proceeding to the ItCC, and this decision can neither be forced by the Court, nor can it be reviewed by higher courts.

This element leads, in conclusion, to reflect on the significance that the saga of dual preliminarity might assume in the evolution of

[34] The aforementioned case of the right to silence, lastly decided in Judgment No. 84/2021, is a good example of this trend, as highlighted by D. Sarmiento (see above, nt. 22) and L. Lonardo, *The Veiled Irreverence of the Italian Constitutional Court and the Contours of the Right to Silence for Natural Persons in Administrative Proceedings*, 17 *Eur. Const. Law Rev* 707 (2021).

[35] This strategy could be deemed to favor a constitutional pluralist setting in that the ItCC seeks to purport an "[i]nterpretive pluralism within EU law [that] brings the potential conflict inside, so that where interests and views clash the legal conversation is about what EU law is and should be, rather than which legal system is top": G. Davies, *Interpretive pluralism within EU law*, in M. Avbelj and G. Davies (Eds.), *Research Handbook on Legal Pluralism and EU Law* (2018), 323, at 333.

the case law of the ItCC. Many of the questions dealt with, and the connected and (apparently) irresolvable problems, reveal that dual preliminarity is more than a procedural problem, since it is the sign of an increasing *interpenetration between different spheres of legality*. Particularly in the field of fundamental rights, internal judges (and the ItCC among them) have to take constitutional principles, legislative instruments and European rules into account and to merge them in operational arguments and tests that must be enforced in concrete cases.

The distinction and autonomy of the different legal orders, while remaining untouched from the perspective of the *validity* of norms, seem in fact to be significantly reshaped by the coordination between the same orders that manifests itself primarily in the their joint *application*, which takes place today, with more evidence than was the case in the past, with regard to the *material integration* of fundamental rights. If today's dynamics are thus identified by the closer interpenetration between spheres of legality, it could be inferred that the role of the ItCC should be to ensure the centrality and irreplaceability of its contribution in a pluralist system fundamental rights' protection.