THE «DUAL PRELIMINARITY» DOCTRINE IN THE CASE LAW OF ORDINARY COURTS OF FIRST INSTANCE AND APPEALS

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Abstract

This essay summarizes and discusses upon how some ordinary (civil and criminal) courts of first instance and appeals have employed the EU Charter of Fundamental Rights in the light of the «dual preliminarity» doctrine affirmed by the Italian Constitutional Court (ItCC) in judgment No. 269 of 2017. Overall, this doctrine fulfilled its aims and the ItCC receives some cooperation from ordinary courts. Yet the new doctrine is not entirely clear in all its respects, and one of them particularly deserves further clarification: whether «dual preliminarity» applies when national law infringes (not only on Charter provisions, but) also on EU secondary legislation endowed with direct effect, and not only on the Charter.

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1. Premises and questions

This essay summarizes and comments upon how ordinary (civil and criminal) courts of first instance and appeals have employed the EU Charter of Fundamental Rights in the light of the «dual preliminarity» [«doppia pregiudizialità»] doctrine first affirmed by the Italian Constitutional Court (ItCC) in an extensive *obiter dictum* in

judgment No. 269/2017[1]. In a nutshell, this doctrine modifies the preexisting «EU preliminarity», with a double aim: preserving the ItCC's jurisdiction on fundamental rights; allowing the ItCC, in such cases, to make preliminary references to the CJEU on its own terms.

The old «EU preliminary» doctrine was established by the ItCC in its *Granital* judgment[2], in the wake of the *Simmenthal* case[3]. It concerns all the instances when national law is questioned for its compatibility with provisions of EU law having direct effect: such a challenge is adjudicated by ordinary courts, which may make preliminary references to the CJEU if needed and must apply EU law instead of national law if the latter is incompatible with the former. In such cases, national law does may not become the object of constitutional challenges before the ItCC: it is simply ignored, not applied, and remains irrelevant to the controversy at hand.

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[1] Judgment 14 December 2017, No. 269, para. 5.2 (law). Translations in English of this and many other recent constitutional rulings are available in the ItCC website (www.cortecostituzionale.it/actionJudgment.do). Italian scholarship on the new doctrine and its developments immediately became torrential. Monographic studies may be found in D. Tega, *La Corte nel contesto* (2020), 183; A. Amato, *Disapplicazione giudiziale della legge e Carta di Nizza* (2021), 123. See also D. Tega, *The Italian Constitutional Court in its Context: A Narrative*, 17 Eur. Const. L. Rev. 369 (2021); 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*, 15 Eur. Const. L. Rev. 731 (2019). For a collegial discussion, see also C. Caruso, F. Medico & A. Morrone (eds.), *Granital revisited? L'integrazione europea attraverso il diritto giurisprudenziale* (2020). I myself have commented on the «dual preliminarity»: in *La prima parola e l'ultima. Il posto della Corte costituzionale nella tutela integrata dei diritti*, 3 Dir. pubbl. comp. eur. 773 (2019), I have analyzed its legal basis and argued in its favor, as, albeit not entirely aligned with current EU case law, it expresses an existential necessity for the national system of constitutional justice, intensifies communications between the ItCC the CJEU, and helps preventing divergences among them; in *Dopo la «precisazione». Sviluppi di Corte cost. n. 269/2017*, 2 Oss. Fonti 1 (2019), a first assessment was made of the aftermath in Italian and EU case-law, still arguing in favor of the new doctrine, provided it goes hand in hand with a frequent use by the ItCC of preliminary references to the CJEU. The bibliography in these essays is supplemented and updated here but remains merely illustrative and far from complete.

[2] Judgment 8 June 1984, No. 170.

[3] Judgment 6 March 1979, C-106/77.

The new «dual preliminarity» introduces an exception – a «clarification», in the modest language of Judgment No. 269 – concerning only the cases when national law is questioned for its compatibility with rights enshrined both in the Charter and in the Italian Constitution. This double antinomy is not a remote possibility, the ItCC remarks: «[t]he principles and rights laid out in the Charter largely intersect with the principles and rights guaranteed by the Italian Constitution (and by other Member States' Constitutions)». In these cases, irrespective of the direct effect that the Charter and its provisions might have, ordinary courts are not *bound* to ignore and refuse to apply national law, and *may always* challenge it before the ItCC[4], which therefore finds itself in the position to decide whether and how to make a preliminary reference to the CJEU and eventually annul the challenged law, with general and retroactive effect. Ordinary courts may still grant *interim* relief, and if the law is not annulled by the ItCC, they may also make subsequent preliminary references of their own to the CJEU, and still in the end refuse to apply the questioned national provisions.

From the perspective of ordinary courts, the newly minted doctrine displayed a twofold face. On the one hand, especially in its first and tentative wording, it seemed like an attempt at stifling the powers of ordinary court when they act in their EU capacity: ordinary courts were directed not to take the Luxembourg road straight away (preliminary reference and disapplication) when a EU fundamental right was at stake, and instead to pass through Rome first, leaving the ItCC to decide whether to manage the issue with purely national tools, or get their European colleagues involved. This could appear as an attempt to curb the adjudication options of ordinary courts, as well as the feed of high-profile rights cases to the CJEU.

[4] Indeed, Judgment No. 269 of 2017, cit. at 1, couched the new doctrine in a language suggesting that ordinary courts *were bound* to challenge national law before the ItCC, due to «the principle that places a centralized system of the constitutional review of laws at the foundation of the constitutional structure (Article 134 of the Constitution) ». Subsequent rulings toned down this requirement, and reframed it as mere suggestion or possibility, emphasizing the other reason given in Judgment No. 269, i.e., that «violations of individual rights posit the need for an *erga omnes* intervention», which only the ItCC may enact.

On the other hand, especially if one took seriously the collaborative overtones already present in Judgment No. 269[5] and further stressed in subsequent judgments, the «clarification» could be seen as the lending of a helping hand to ordinary courts: not only constitutional rulings may amplify *erga omnes* the courts' censures to national law; but rights' guarantees in the Italian Constitution and the Charter may have more or less significant differences, whose handling requires specific competences, attention to systemic impact, and – when it comes to conversing with the CJEU – an authoritative say on constitutional tradition and its role as an essential part of national identity. Not every court has the time and capacity to handle this, and misunderstandings may arise, as the *Taricco* saga had recently shown when the «clarification» was made[6]. The ItCC can be a powerful ally, as it may share and bring into better focus the doubts and challenges raised by ordinary courts. Ultimately, the new doctrine could also be seen as an initiative to relieve and support lower judges in navigating the complexities of multi-level rights protection.

This ambivalence is even more interesting, as the ItCC lacks any effective tool to enforce the «dual preliminarity» doctrine. The Italian system of constitutional justice does not allow citizens to access the ItCC directly[7]. Only courts may question the constitutionality of a legal

[5] Reference was made there to a «framework of constructive and loyal cooperation between the various systems of safeguards, in which the constitutional courts are called to enhance dialogue with the ECJ» (Judgment No. 269 of 2017, cit. at 1).

[6] A few days before Judgment No. 269 of the ItCC, in Judgment 5 December 2017, *M.A.S. and M.B.*, C-42/1, the CJEU – deciding on a reference from the ItCC – had in its turn clarified a previous Judgment (of 8 September 2015, *Taricco and Others*, C-105/14) – made on a reference from an ordinary Italian court – which had raised concerns for its compatibility with the principle of strict legality in criminal law. See N. Lupo, *The Advantage of Having the "First Word" in the Composite European Constitution*, 10 It. J. Pub. Law 186, 200 (2018). 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).

[7] See E. Lamarque, *Direct Constitutional Complaint and* Italian Style *do not Match. Why Is That?* in V. Barsotti, P.G. Carozza, M. Cartabia & A. Simoncini, *Dialogues on Italian Constitutional Justice. A Comparative Perspective* (2020), 143. Direct recourse to the ItCC is only provided for Regions when they challenge national laws (or laws of other Regions) as infringing on their legislative autonomy, and for the Government when it impugns regional laws. See M. Cartabia & N. Lupo, *The Constitution of Italy. A*

provision they would otherwise apply in one of their judgments. Consequently, the ItCC depends on other Italian courts for the provisions of cases, and can neither force them to do so[8], nor prevent them from preferring preliminary references to the CJEU.

Several questions arise: did the new doctrine fulfill its aim? Were ordinary courts persuaded, did they cooperate with the ItCC, or instead did they frustrate its efforts using preliminary references just as they did until 2017? More broadly, how did they act in cases where a national law apparently collided both with the Constitution and the Charter? Or in cases where the collision was also with provisions of other sources of EU law?

2. Answers: summary and examples

To answer these questions, about thirty rulings, in civil and criminal proceedings, were selected as examples of a variety of attitudes that ordinary courts kept in such cases[9]. The rulings were classified depending on the use of the Charter made by the courts: as a mere complementary, or even ornamental, reference, besides the Constitution (or the European Convention on Human Rights, ECHR; as a legal parameter in challenges to national laws, suspected of incompatibility with EU provisions clearly lacking direct effect; as a parameter in constitutional questions raised before the ItCC, in preliminary references to the CJEU, and in judgments who refused to apply national laws due to their incompatibility with EU having direct effect; in some preliminary references made after a constitutional challenge had been dismissed; in a couple of instances where a

Contextual Analysis (2022), 151-152, 187; M. D'Amico, C. Nardocci, *The Constitutional Court*, in V. Onida (ed.), *Constitutional Law in Italy* 234 (2019).

[8] If the parties of a judgment raise a constitutional objection, and the competent court declines to bring the question to the ItCC (i.e. the court considers the question irrelevant or manifestly ill-founded), the parties may raise the objection again at higher levels of judgment (Law 11 March 1953, No. 87, Article 24, second para.). It will still be a (higher) ordinary court that will decide whether the ItCC is to be addressed.

[9] A full listing and analysis can be found in an earlier version of this paper: *La «precisazione» nella giurisprudenza dei giudici ordinari di merito*, in 2 Eurojus 259 (2022). The collection relied also on the work of the *Observatory on the practices of inter-legality by Italian courts*, in www.cir.santannapisa.it.

constitutional question and a preliminary reference were made in parallel.

The main findings of the survey can be summarized as follows:

- ordinary courts often trusted the ItCC and its readiness to answer and help when dealing with rights guaranteed both in the Constitution and in the Charter. This trust also allowed the ItCC to make some important preliminary references to the CJEU[10].
- Immediately after Judgment No. 269, some ordinary judges (above all some sections of the Court of Cassation) manifested their dissatisfaction with the «dual preliminarity» doctrine, considering it a non-binding proposal, a mere and questionable *obiter*. No such discontent was recorded in the survey summarized here.
- However, ordinary courts have preferred preliminary references to the CJEU, when the underlying substantive questions, if framed with internal parameters, appeared likely to be dismissed by the ItCC, in the light of its case law or that of other national high courts[11].
- Superficial or at least cursory uses of the Charter still occur: the Charter is invoked for the simple literal similarity of its provisions to those of the Constitution (or the ECHR), without any reference to how those provisions were elucidated and constructed in the case law concerning same or similar situations.

[10] E.g., ItCC Orders 18 November 2021, Nos. 216 and 2017, on questions raised by the Courts of Appeals of Milan and Bologna (on the European arrest warrant). In this case, the referring courts could not disapply the national provisions (as the relevant EU legislation lacks direct effect) but could nonetheless address the CJEU before the ItCC. Instead, they chose to raise a constitutional challenge, which led to the preliminary references by the ItCC to the CJEU.

[11] E.g., see CJEU Judgment 16 July 2020, C-658/18, *UX*, on a request for a preliminary ruling from the Justice of the Peace of Bologna. This is the turning point of a long controversy on the legal status of justices of the peace in the Italian legal system (subsequently settled in law 30 December 2021, No. 234, Article 1, para. 629 ff.): a long-standing Italian case-law refused to consider justices of the peace as workers, while under EU law it could be argued that they were fixed-term workers.

- Sometimes the Charter has been used as a complement to other EU sources, to signify that certain *fundamental* rights are, indeed, the *foundation* for more precise and detailed guarantees set out in a piece of secondary legislation, which was more immediately relevant to the case at hand[12].
- As noted above, at least in two occasions a constitutional question and a preliminary reference have been made simultaneously by the same judge during the same proceedings[13]. It is still unclear how the ItCC and the CJEU evaluate this strategy: in both cases, the questions raised by ordinary judges were dismissed on different procedural grounds[14].

3. Comments

3.1. The new doctrine in action

Overall, the «clarification» fulfilled its aims[15]. It allowed the ItCC to take an active part in the «jurisprudential workshop» of fundamental rights, at a juncture in time when their protection has acquired a European dimension which has «definitively entered the cognitive and operative horizon of the guardians of national constitutions»[16]. Under the previous doctrine, whenever a right

[12] E.g., see CJEU Judgment 7 April 2022, C-236/20, *PG*, § 26, as one of the questions raised by the referring court is understood as not requesting an autonomous interpretation of the relevant Charter provisions, as they are referred to only in support of the request for interpretation of a directive.

[13] Court of Appeals of Naples, two Orders 18 September 2019; Justice of the Peace of Lanciano, Orders 18 and 28 May 2020.

[14] On the two couples of orders mentioned in the footnote above, see respectively CJEU, Order 4 June 2020, C-32/20, *TJ*, and ItCC, Judgment 26 November 2020, No. 254: CJEU, Order 10 December 2020, C-220/20, *XX*, and ItCC, Judgment 3 February 2022, No. 31.

[15] 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*, 13 federalismi.it 1-25 (2019).

[16] M. Cartabia, *La tutela multilivello dei diritti fondamentali. Il cammino della giurisprudenza costituzionale italiana dopo l'entrata in vigore del Trattato di Lisbona,* report at the meeting of the Italian, Portuguese and Spanish constitutional courts (2014), in www.cortecostituzionale.it, 20, 21.

enshrined in the Charter had been recognized as having direct effect[17], the ensuing non-application of incompatible national laws would have pre-empted any constitutional question. Now, ordinary courts are requested, invited or at the very least allowed to transfer their doubts – whenever they may be framed both in constitutional and European terms – to the ItCC. The latter, in its turn, finds itself in the position to offer a twofold «constitutional mediation»: in the ascending phase, it can paint a large and detailed depiction of the national legal system and its problems; in the descending phase, it may decide with binding and general effect[18].

3.2. Ordinary courts trust the ItCC

Despite some initial resistance and criticism of the «dual preliminarity», and very likely also a certain degree of surprise and confusion induced by the new doctrine, several (civil and criminal) courts of first instance and appeals were willing to submit their Charter-related doubts to the ItCC. This is not surprising. On the one hand, the ItCC has demonstrated its sincerely collaborative attitude[19] through a significant increase in the number of its preliminary

[17] And the CJEU has not always been shy in this: see some references in T. Guarnier, *Corte costituzionale, Corti sovranazionali, giudici comuni e legislatore. Lo scenario a seguito della sentenza n. 84 del 2021 della Corte costituzionale*, 2 Nomos 15-16 (2021); D. Gallo, F. Nato, *L'accesso agli assegni di natalità e maternità per i cittadini di Paesi terzi titolari di permesso unico nell'ordinanza n. 182/2020 della Corte costituzionale*, 4 Eurojus 308, 321-322 (2020). See also CJEU, Judgment 8 March 2022, C-205/20, NE (whenever an EU directive requires proportionate penalties, with a clause no more specific than the principle in the Charter, Article 49, para 3, any national judge must disapply the part of the relevant national legislation which triggers a disproportion). This Grande Chambre ruling rightfully prompted even a very Europafreundlich constitutional judge to extol the virtues of the «dual preliminarity» doctrine: see F. Viganò, La proporzionalità della pena tra diritto costituzionale italiano e diritto dell'Unione europea, Sistema penale (2022).

[18] B. Randazzo, *Il 'riaccentramento' del giudizio costituzionale nella prospettiva di un sistema integrato di giustizia costituzionale*, 3 federalismi.it 144, 159 (2021).

[19] See also G. Amato, M. Cartabia, D. de Pretis & S. Sciarra, *Constitutional Adjudication within a European Composite Constitution. A View from the Bench*, 10 It. J. Pub. Law 485 (2018): an interview with four constitutional judges which exemplifies their positive attitude towards the openness of the legal order to international and supranational law.

references[20], thereby allaying concerns that the new doctrine would undermine European jurisdiction, integration, or commitment to fundamental rights[21]. On the other hand, not only is the European system of rights protection remarkably complex, but – as the *Taricco* saga showed – it may work along coordinates which are not perfectly aligned to the national system[22]; this accrues to the intrinsic difficulties that ordinary, non-specialized judges may find in handling EU substantive and procedural law[23]; and the consequence may well be the courts feel relieved that they can voice their doubts to a familiar, eminent and specialized court, such as the ItCC. The ItCC, after all, is in the best position to put any single issue in a broader perspective, and to turn the occasional divergences with the EU system from possible battlegrounds into occasions for diplomatic exchange[24].

3.3. Cursory uses of the Charter must be avoided

There is still work to be done for ordinary courts to become acquainted with the Charter and its judicial enforcement. This becomes evident when one considers how often the Charter is used in a cursory fashion: as a mere normative quotation juxtaposed to the Constitution

[20] P. Faraguna, M. Massa, D. Paris & D. de Pretis, *Italy*, in R. Albert, D. Landau, P. Faraguna, Ŝ. Drugda (eds.), *The I-CONnect-Clough Center 2021 Global Review of Constitutional Law* 186 (2022). Even when, questioned about a possible double antinomy, the ItCC chooses to enforce only the constitutional standard (striking down the suspect provision on these grounds and leaving EU law censures undecided), it still considers EU law and case-law to argue that the decision and its premises are compatible with them: see R. Mastroianni, *Sui rapporti tra Carte e Corti: nuovi sviluppi nella ricerca di un sistema rapido ed efficace di tutela dei diritti fondamentali*, 5 Eur. Papers 493, 520-521, (2020)

[21] Such concerns have been expressed e.g. by A. Ruggeri, *Il giudice e la "doppia pregiudizialità": istruzioni per l'uso*, in 6 federalismi.it 211, 213 (2021); G. Bronzini, *Il lungo viaggio della Carta dei diritti fondamentali nell'ordinamento europeo: dai tribunali al confronto costituzionale sul futuro dell'Unione*, 3 Riv. giur. lavoro 465 (2021).

[22] This has gradually become a staple of some leading Italian public law scholarship: e.g., R. Bin, *Critica della teoria dei diritti* 69 (2018).

[23] A factor strongly highlighted in T. Pavone, *The Ghostwriters. Lawyers and the Politics behind the Judicial Construction of Europe* (2022), 52. Naturally, this consideration may not be valid for courts which have a long-standing expertise in EU law: e.g., for administrative courts, L. Lorenzoni, *The Doctrine of "Dual Preliminarity" in the Case-Law of Italian Administrative Courts*, in this *Issue* 42-69.

[24] T. Guarnier, *Corte costituzionale, Corti sovranazionali*, cit. at 17, 11, 12.

or the ECHR; without any serious analysis of the case law that specifies the content and scope – under Article 51 – of its provisions, particularly whether a given national rule falls within the notion of «implementing Union law». This kind of references to the Charter are considered inadmissible, or merely ancillary and lacking any autonomous legal relevance: in both cases, ultimately pointless. Such superficiality in referring to the ECHR should be avoided.

3.4. A certain degree of ambiguity lingers

This generally positive assessment does not imply that the «dual preliminarity» doctrine is unproblematic. On the contrary, in several aspects it remains remarkably ambiguous[25]: if both a constitutional question and a preliminary reference may be raised, the former must, should or simply may take precedence? If ordinary courts enjoy some discretion in this choice, what criteria should they follow[26]? Surely this can be neither a matter of purely personal preferences[27], nor detached from consideration of the relevant legal texts[28].

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[25] See A. Cosentino, *Doppia pregiudizialità, ordine delle questioni, disordine delle idee*, Quest. giust. (2020). The author is the rapporteur of an important ruling in which the Court of Cassation applied the «dual preliminarity» doctrine (it led to two important constitutional decisions: Judgment 10 May 2019, No. 112, and Order 10 May 2019, No. 117, which referred to the CJEU the preliminary questions decided with Judgment 2 February 2021, C-481/19, *D.B.*; see then ItCC Judgment 30 April 2021, No. 84).

[26] The literature on this question is extensive: e.g., C. Amalfitano, *Il dialogo tra giudice comune, Corte di giustizia e Corte costituzionale dopo l'obiter dictum della sentenza n. 269/2017*, 2 Oss. Fonti 19 (2019); Ead., *Il rapporto tra rinvio pregiudiziale alla Corte di giustizia e rimessione alla Consulta tra disapplicazione e rimessione alla luce della giurisprudenza "comunitaria" e costituzionale*, in 1 Riv. AIC 296, 304, 312 (2020); D. Gallo, F. Nato, *L'accesso agli assegni*, cit. at 17, 314; S. Leone, *Il regime della doppia pregiudizialità alla luce della sentenza n. 20 del 2019 della Corte costituzionale*, in 3 Riv. AIC 642, 648 (2019); N. Lupo, *Con quattro pronunce*, cit. at 15, 19; R. Mastroianni, *Sui rapporti tra Carte e Corti*, cit. at 20, 518.

[27] G. Repetto, *Il significato europeo della più recente giurisprudenza della Corte costituzionale sulla "doppia pregiudizialità" in materia di diritti fondamentali*, in 4 Riv. AIC 1, 11 (2019). On the other hand, C. Amalfitano, *Il rapporto tra rinvio pregiudiziale alla Corte di giustizia e rimessione alla Consulta*, cit. at 23, 308, recognizes some factual relevance also to the personal sensibilty of each judge.

[28] Some commentators split the problem in two: the procedural order of precedence (between constitutional question and preliminary reference) and the choice of the substantive benchmark (national Constitution, Charter or a combination of the two):

Would it be possible to pursue both avenues at the same time, and how should the ensuing scenario be managed by the ItCC and the CJEU? This option has been mostly contested in legal scholarship, as it could overdramatize the issue at stake and provoke divergences among the ItCC and the CJEU[29]: this is indeed a possibility, in the abstract; but such concerns might underestimate the capacity of the two courts to coordinate themselves in practice, also informally, and make the necessary adjustments to their working agenda.

More generally, in the situation which is at the crux of the matter (double antinomy of national law with the national Constitution and the Charter, and ensuing possibility of preliminary questions both before the ItCC and the CJEU) a certain degree of flexibility might be natural and destined to be governed more in concrete constitutional practice, than with a comprehensive and unambiguous theory. It is worth recalling some remarks made by Giuliano Amato at the eve of Judgment No. 269 of 2017: he found it «fascinating that courts (and even Constitutional Courts) can come to a clash in a pluralistic system such as the European one, as they testify the different sensitivities and the different legal cultures that live together in the continent»; he saw «many decisions of Constitutional Courts related to the expansion of EU competences» as «actually postponing a final word» on issues which can eventually find stable answers only in politics, not in law; and pragmatically concluded that, «[i]n general, and with specific regard to the European pluralism, the role of the constitutional judge is to find solutions to huge challenges, finding a way that is procedurally acceptable, legally sustainable and practically viable

A. Cardone, *Dalla doppia pregiudizialità al parametro di costituzionalità: il nuovo ruolo della giustizia costituzionale accentrata nel contesto dell'integrazione europea*, 1 Oss. fonti 13, 48, 57 (2020); C. Masciotta, *La doppia pregiudizialità nella più recente giurisprudenza costituzionale*, 3 Oss. fonti 1259, 1280, 1289 (2020).

[29] See specifically P. Gambatesa, *Sulla scelta di esperire simultaneamente la questione di legittimità costituzionale e il rinvio alla Corte di giustizia nelle ipotesi di doppia pregiudizialità*, 2 Riv. Gruppo di Pisa 150 (2020); M. Losana, *Tutela dei diritti fondamentali e (in)stabilità delle regole processuali*, 2 Quad. cost. 2020, 305, 313. See also G. Bronzini, *Il lungo viaggio della Carta dei diritti fondamentali*, cit. at 21, 476; R. Mastroianni, *Sui rapporti tra Carte e Corti*, cit. at 20, 513. C. Amalfitano is more open to this possibility: see *Il dialogo tra giudice comune, Corte di giustizia e Corte costituzionale*, cit. at 23, 18; *Il rapporto tra rinvio pregiudiziale alla Corte di giustizia e rimessione alla Consulta*, cit. at 23, 311.

(meaning also, up to some extent, in financial and political terms)»[30]. Indeed, the lingering uncertainties of the «dual preliminarity» doctrine reflect the dynamic balance at the core of every constitutional pluralistic construction, which leaves more room to case-by-case management, than to any kind of authoritative closure by any one of the courts involved[31]. In a mobile and delicate environment, pragmatism, restraint, and a constructive use of silence could befit courts more than the vindications of allegedly ultimate supremacy that each of them might advance. Even one of the most vocal critics of the «dual preliminarity» conceded that, over time, conflicts among courts generally end in «honorable compromises», rather than irreconcilable divergences, and that, until now, both the ItCC and the CJEU showed good faith and will on the issue at stake[32]. As long as this endures, it may be also considered acceptable, and not unmanageable, that ordinary judges do a kind of forum shopping, positing their question (framed in purely EU terms) to the CJEU, when they are convinced that

[30] G. Amato, *Constitutional Adjudication*, cit. at 19, 492, 499.

[31] In Italian scholarship, see N. Lupo, *Con quattro pronunce*, cit. at 15, 22 (an order of precedence does not need to be determined *a priori*); I. Massa Pinto, *Il conflitto sulle regole d'ingaggio tra Corte costituzionale e Corte di Giustizia: spunti di riflessione alla ricerca di un soggetto che "chiuda" il sistema*, 19 federalismi 326, 333 (2020) (the ItCC has been wise to leave wide discretion to both ordinary courts and itself); B. Randazzo, *Il 'riaccentramento' del giudizio costituzionale*, cit. at 18, 149 (discretion is intrinsic in some issues, more so when they deal with legal systems which are integrated only in part); O. Pollicino, G. Repetto, *La sentenza della Corte costituzionale n. 20 del 2019. A ciascuno il suo: ancora sui rapporti tra Carte e corti*, 2 Quad. cost. 434, 436 (2019) (the ItCC has designed a framework where interactions among judicial actors are less rigidly codified); G. Repetto, *Il significato europeo*, cit. at 26, 10 (interactions in rights protection have become thicker, and their outcomes may not be shifted entirely towards either the national or supranational axis). In a broader theoretical perspective, A.O. Cozzi, *Interlegality, the Italian Constitutional Court and supranational fundamental rights: a discussion*, Center for Inter-legality Research WP No. 13/2021, 3, places a discussion of the «dual preliminarity» doctrine against a background (i.e., «interlegality») which emphasizes the need for legal instruments of coordination among the plurality of legal systems.

[32] A. Ruggeri, *Il giudice*, cit. at 21, 225; Id., *La Carta di Nizza-Strasburgo nel sistema costituzionale europeo*, in 3 Riv. AIC 130, 137 (2020). Ruggeri generally supports the previous «EU preliminary» doctrine, as paramount for maximum expansion and certainty for rights, through the application on an equal footing of all the relevant constitutional instruments (Constitution, ECHR, Charter etc.), ultimately mediated by ordinary judges presiding on individual litigations.

it (if framed also or only in constitutional terms) would be rejected by the ItCC. As it has been wrily noted[33], here the judge acts somehow like a child that seeks to obtain something and requests it strategically first to a parent, then to the other: in a non-dysfunctional family, this would be physiological, and one parent would not answer without faithfully consulting the other, very possibly agreeing on a common ground.

3.5 One aspect requires further clarification

And yet at least one aspect of the «dual preliminarity» requires some further clarification, as it matters greatly for the actual scope of the new content: what should an ordinary judge do, when national legislation collides not only with a right enshrined in the Italian Constitution and in the Charter, but also with EU secondary legislation (having direct effect) designed to implement the relevant fundamental right. Should the judge follow the «dual preliminarity» doctrine (there is an antinomy with both the Constitution and the Charter), or the traditional «EU preliminary» (there is an antinomy with EU secondary legislation having direct effect)?

In 2020, the Court of Appeals of Florence[34] refused to apply a national provision, restricting the access of non-EU citizens to childbirth allowance[35], as incompatible with both the Charter, Article 21, and Directive 2011/98/EU, Article 12[36]. In the same year, the same provision came before the ItCC, for several constitutional violations, including of Article 117, para. 1, of the Italian Constitution, as it requires national legislation to comply with EU law, Article 21 of the Charter. The ItCC did not invite the remitting court (the Court of Cassation) to follow the example of the Florentine judges: instead,

[33] N. Lupo, *Con quattro pronunce*, cit. at 15, 23-24 (quoting Giuseppe Martinico).
[34] Judgment 12 May 2020, No. 180.
[35] Law No. 190 of 2014, Article 1(125). Access was granted only to non-EU citizens holding a long-term residence permit.
[36] Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State. Article 12, para. 1(d), grants third-country workers a right to equal treatment in social security.

applying the «dual preliminarity» doctrine, it retained the case, referred a preliminary question to the CJEU[37] and, in 2022, struck down the suspect legal provision[38]. Again in 2022[39], the ItCC refused to judge on the merits of a question for infringement of Article 117, para. 1 of the Italian Constitution, in connection with a similar directive provision[40]: the «dual preliminarity» doctrine was deemed irrelevant, as no Charter provision had been invoked; the referring judge should have simply refused to apply national law and, instead, enforce the individual right arising from a clear, precise, and unconditional State obligation grounded in the directive.

The difference in outcome is noteworthy: constitutional annulment (by the ItCC) under the new «dual preliminarity» doctrine vs. disapplication (by the ordinary judge) under the traditional «EU preliminary». Several questions arise, and one is particularly poignant. Is the existence of secondary EU legislation, besides the Charter, immaterial to the issue at stake? Does the «double preliminarydual preliminarity» apply (and consequently may a constitutional question be raised) when national law infringes also on secondary legislation endowed with direct effect, and not only on the Charter?

The Charter's rights are mostly a codification of guarantees already established in pre-existing legal materials, as the Explanations relating to the Charter make clear[41]. Many individual guarantees set out by secondary legislation can trace their axiological origin to the rights first proclaimed at Nice in 2000. Nevertheless, one thing is applying the Charter *per se*, with «the typically constitutional stamp of its contents»[42]; another is applying secondary legislation and the set of detailed and coordinated definitions, provisions, exceptions etc., in which it develops a right's fundamental core. The former may be

[37] Order 30 July 2020, No. 182. The questions submitted to the CJEU also concerned Article 12 of Directive 2011/98/EU. The CJEU answered with Judgment 2 September 2021, C-350/2021, *O.D.*

[38] Judgment 4 March 2022, No. 54.

[39] Judgment 11 March 2022, No. 67.

[40] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents; Article 11, concerning equal treatment – again – in social security.

[41] See R. Mastroianni, *Sui rapporti tra Carte e Corti*, cit. at 20, 504.

[42] Judgment No. 269 of 2017, cit. at 1.

similar to constitutional adjudication, while the latter is more akin to solving ordinary contradictions in a complex legal system. At any rate, should the «dual preliminarity» apply also when specific secondary legislation is available to solve the controversy at stake, the *Granital* principle would not be only delimited, but virtually subverted in its entire scope: an outcome which the ItCC has been keen to avoid[43] and critics of the CJEU would find excessive[44].

Due to its vast impact on legal practice and theory, this point must be clarified. Until now, the ItCC considered it only in a single instance. It applied «dual preliminarity» in a case where the remitting judge had invoked the principles of proportionality, pertinence, and non-excessiveness in personal data processing, as sanctioned both in Directive 95/46/EC[45] and in the Charter (Articles 7, 8 and 52). The ItCC noted that «the principles laid out by the directive are marked […] by a singular connection with the relevant provisions of the [Charter], not only in the sense that they provide it with detail or implement it, but also in quite the opposite sense that they constituted the "model" for those rules». In this case, primary and secondary provisions shared the same stamp and bore the same principles. Would the same conclusion be valid, if secondary legislation goes well beyond fundamental principles, and weaves around them a thick network of detailed provisions, entirely sufficient for determining the outcome of a dispute? Several scholarly opinions point to a negative answer: they suggest that the «dual preliminarity» is not appropriate if EU law entirely predetermines the legal regime of a situation[46], does not leave

[43] E.g., in Judgments No. 269 of 2017, cit. at 1, para. 5.1 (law), and No. 67 of 2022, cit. at 38.

[44] R. Bin, *Perché* Granital *serve ancora*, in C. Caruso, F. Medico & A. Morrone (eds.), *Granital revisited?*, cit. at 1, 15.

[45] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals regarding the processing of personal data and on the free movement of such data.

[46] E.g. A. Cardone, *Dalla doppia pregiudizialità*, cit. at 27, 53; F. Donati, *I principi del primato e dell'effetto diretto del diritto dell'Unione in un sistema di tutele concorrenti dei diritti fondamentali*, 12 Federalismi.it 104, 121-122 (2020). This conclusion is modelled on a certain reading of CJEU Judgment 26 February 2013, C-617/10, Åkerberg Fransson, as it leaves some room for national rights standard in situations «where action of the Member States is not entirely determined by European Union law»

room to a national balancing of the relevant interests[47], and immediately offers a specific solution to a concrete controversy[48].

(para. 29). See also G. Repetto, *Il significato europeo*, cit. at 26, 8-9; R. Mastroianni, *Sui rapporti tra Carte e Corti*, cit. at 20, 497, 515.

[47] D. Gallo e F. Nato, *L'accesso agli assegni*, cit. at 17, 314.

[48] S. Leone, *Il regime della doppia pregiudizialità*, cit. at 25, 654-655.