AN EMPIRICAL ANALYSIS: PRACTICES OF ITALIAN COURTS ON DUAL PRELIMINARITY (2018-2022). A MIXED RESPONSE

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Abstract

In this paper, I examine, from an empirical perspective, the reaction of Italian courts from every rank and specialization to the 269-doctrine. A sample of around sixty cases was collected over a period of 5 years (2018-2022) and cases were coded based on whether they accepted (A) or dismissed (D) the doctrine. Data on which rights were mentioned more often and how acceptance rates changed in time are reported as well. The study shows a split judiciary, since in roughly half of the cases judges refused to follow the 269-doctrine (around 55% of the sample). A few notable cases are then examined separately and in more detail. Decisions on how these were classified are also explained.

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1. Introduction

In this paper I consider how Italian judges reacted to Judgement No. 269/2017 of the Italian Constitutional Court (ItCC). The decision exposed a new doctrine of "dual preliminarity", commanding

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ordinary courts to refer first to the ItCC and only later to the Court of Justice (ECJ) when national law was suspected to contrast with rights enshrined in both the Charter of Fundamental Rights of the European Union (CFREU) and in the national Constitution. What originally seemed like a mandate was later fine-tuned by the ItCC into a mere invitation to revert the order of preliminary references, but the issue remains whether judges abided by this doctrine or not.

In the paper, I first explain the context in which the doctrine was developed: I specify why it was important for the ItCC to elaborate and expose the 269-doctrine in the first place (§ 2). I then expose the methodology followed to collect the sample of cases (§3) and explain the results (§ 4). The latter, I can anticipate, show a mixed response to the 269-doctrine, as it turns out that broadly half of the judges have followed it, while the other half have not. I then briefly underline the specificities of some notable cases among those collected in the sample (§ 5). Finally, a few concluding remarks are added at the end of the paper (§ 6).

2. Context: Shaping the 269-Doctrine

In December 2017 the pivotal Judgment No. 269 was published[1] and was immediately perceived as the most significant innovation in the relations between Italian law and EU law since *Granital*[2].

Significant changes at the EU level led to the new stance inaugurated by Judgement No. 269-2017. The Maastricht Treaty and the later Lisbon Treaty enlarged the competences of the Union and, consequently, also expanded the actions potentially labelled as "implementation" of EU law. In Lisbon, the CFREU acquired binding value too[3] and its scope of application was interpreted in a quite expansive manner in judgments like *Fransson*[4]. As a result, the scope

[1] ItCC Judgment of 14 December 2017 No. 269.
[2] ItCC Judgment of 8 June 1984 No. 170.
[3] See article 6(1) of the Treaty on the European Union (TEU): "The Union recognises the rights, freedoms and Principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties".
[4] C-617/10 Åklagaren v Hans Åkerberg Fransson of 26 February 2013. See also the following case Siragusa, C-206/13 Cruciano Siragusa v Regione Sicilia –

of application of EU rights inevitably grew, as did the circumstances under which national judges would therefore be able to disapply national law due to its conflict with the CFREU.

If we also consider the large substantive overlap between EU rights and rights enshrined under the Italian Constitution, we face a scenario under which Italian judges could potentially begin to review rights autonomously by disapplying provisions inconsistent with the CFREU and possibly by referring to the ECJ through the preliminary ruling mechanism (Article 267 of the Treaty on the Functioning of the EU, TFEU), right when they may have been expected to refer to the ItCC instead.

The risk for the ItCC was that of being "cut off", while a de facto de-centralized mechanism of judicial review of rights was established[5]. This risk was quite clearly identified by one of the members of the ItCC, Justice Augusto Barbera, just a few months before the 269 judgment[6].

Moreover, in 2017 Italy was right in the middle of the *Taricco* saga[7] and prominent scholars even considered the possibility of activating the counter-limits for the first time against EU law as an acceptable scenario[8]. Thus, the risk of diverging interpretations of extremely similar provisions on rights (the so-called "parallel" or "tandem" applicability[9]) was tangible.

Soprintendenza Beni Culturali e Ambientali di Palermo of 6 March 2014. On Fransson see the commentary by F. Fontanelli, Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog: Court of Justice of the European Union, 9 Eur. Const. Law Rev. 315 (2013).

[5] Such risk for constitutional courts had been assessed in the literature even before the Charter became binding. See V. Ferrares Comella, *The European Model of Constitutional Review of Legislation: Toward Decentralization*, 2 Int'l J. Const. L. 461 (2004) 479-482.

[6] https://perma.cc/NNG7-EZPR

[7] The *Taricco* saga has been widely discussed. For a reconstruction in English from a constitutional law perspective, see G. Piccirilli, *The "Taricco Saga": The Italian Constitutional Court Continues Its European Journey*, 14 Eur. Const. Law Rev. 814 (2018).

[8] See e.g., M. Luciani, Il brusco risveglio. I controlimiti e la fine mancata della storia costituzionale, 2 Rivista AIC 1 (2016).

[9] S. Iglesias Sánchez, Article 51: The Scope of Application of the Charter, in M. Bobek, J. Adams-Prassl (eds.), The EU Charter of Fundamental Rights in the Member States (2020), 410-412.

Judgment No. 269/2017 was published in this context 2017 with a double function. On the one hand, it acknowledged the objectively "constitutional stamp" of the CFREU, something that the German Constitutional Court too would do soon enough[10]. On the other hand, the ItCC also stated that in cases of "dual preliminarity" (when a domestic provision could be deemed in conflict with both EU rights in the CFREU and domestic constitutional rights), and with the exception of directly effective EU norms, Italian judges were under a duty to *first* refer to the ItCC and then *later*, if they still found it necessary, to the ECJ. This mandate to ordinary judges was explicitly motivated by recalling the risk of a de facto de-centralized system of judicial review[11]. By speaking first, the Constitutional Court aimed at gaining a decisive advantage in legally qualifying the case[12]. Moreover, the ItCC also stressed that it would have used *directly* both the Constitution and the CFREU to assess the compatibility of the provisions under scrutiny with rights preserved by Italian law, be them of EU or domestic origin, mirroring what had already happened in Austria in 2012 and preannouncing what was going to happen in Germany in 2019[13].

Briefly, Judgement No. 269/2017 issued a directive to Italian judges to reverse their ordinary practice in cases of dual preliminarity, switching from "Luxemburg-then-Rome" to "Rome-then-

[10] BVerfG 2 BvR 1845/18, para. 37.

[11] D. Gallo, Challenging EU Constitutional Law: The Italian Constitutional Court's New Stance on Direct Effect and the Preliminary Reference Procedure, 25 Eur. Law J. 1 (2019) 11-14.

[12] N. Lupo, *The Advantage of Having the "First Word" in the Composite European Constitution*, 10 IJPL 186 (2018) 193: "All this helps to explain why, in the European inter-judicial dialogue, a crucial role is eventually assigned to the Court that speaks first, not to the one that speaks last: the authority that first submits a legal challenge inevitably takes the centre stage and may affect to a significant extent the resolution of a judicial dispute and the prevailing interpretation of the legal provisions at stake".

[13] Verfassungsgerichtshof (VfGH) U 466/11-18, U 1836/11-13 (Austria) and BVerfG Right to Be Forgotten I 1 BvR 16/13; Right to Be Forgotten II 1 BvR 267/17 (Germany). For a comparative analysis of the Austrian, Italian, and German cases see C. Rauchegger National Constitutional Courts as Guardians of the Charter: A Comparative Appraisal of the German Federal Constitutional Court's *Right to Be Forgotten* Judgments 22 Camb. Yearb. Eur. Leg. Stud. 258 (2020) 272-275 and C. Rauchegger, *The Charter as a Standard of Constitutional Review in the Member States*, in M. Bobek, J. Adams-Prassl (eds.), *The EU Charter*, cit. at 10, 489–493.

Luxemburg". This would help recentralizing the protection of fundamental rights in the hands of the ItCC[14].

Two later judgements adjusted what appeared to be a mandate to national courts in Judgement No. 269/2017: they clarified that more than *requiring* judges to reverse the order of preliminary questions, Judgement No. 269 had to be interpreted as merely *allowing* this reversal[15]. Moreover, the ItCC confirmed its mostly (although not exclusively) Europhile tradition in later references to the ECJ: *Consob*[16], *Inps*[17], and ultimately the still pending Orders No. 216/21 and 217/21. By using article 267 TFEU, the ItCC confirmed it had no intention of dropping its dialogue with the ECJ[18]. Indeed, re-centralization does not necessarily entail closure towards the ECJ[19].

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[14] D. Tega, The Italian Constitutional Court in Its Context: A Narrative, 17 Eur. Const. Law Rev. 369 (2021).

[15] ItCC Judgement of 21 February 2019 No. 20 and Judgement of 21 March 2019 No. 63.

[16] ItCC Order of 10 May 2019 No. 117. The ECJ eventually confirmed the interpretation of EU law suggested by the ItCC (C-481/19 *DB v Commissione Nazionale per le Società e la Borsa (Consob)* of 2 February 2021). Scholars saw this new reference as a particularly effective coordination between the ECJ and a constitutional court. See D. Sarmiento, 'Long Read: "The Consob Way - or How the Corte Costituzionale Taught Europe (Once Again) a Masterclass in Constitutional Dispute Settlement"' (*EU Law Live*, 16 April 2021) https://eulawlive.com/long-read-the-consob-way-or-how-the-corte-costituzionale-taught-europe-once-again-a-masterclass-in-constitutional-dispute-settlement-by-daniel-sarmiento/ . The ItCC spelled its final word on the case in Judgement of 30 April 2021 No. 84.

[17] ItCC Order of 30 July 2020 No. 182. See the commentary by N. Lazzerini, *Dual Preliminarity Within the Scope of the EU Charter of Fundamental Rights in the Light of Order 182/2020 of the Italian Constitutional Court*, 5 European Papers 1463 (2020) and D. Gallo, A. Nato, *L'accesso agli assegni di natalità e maternità per i cittadini di Paesi terzi titolari di permesso unico nell'ordinanza No. 182/2020 della Corte Costituzionale*, 4 Euro Jus 308 (2020). Decided by the Grand Chamber in C-350/20 O.D. and Others v Istituto nazionale della previdenza sociale (INPS) of 2 September 2021. The Constitutional Court followed up with Judgement of 4 March 2022 No. 54.

[18] 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. Law Rev 731 (2019).

[19] See also further judgements by the ItCC: Judgement of 11 March 2022 No. 67 (especially para 11), Judgement of 16 June No. 149, and Judgement of 26 July 2022 No. 198. The first one was commented by Ilaria Gambardella, *The Italian Constitutional Court and the Court of Justice of the European Union – A Step towards a More Constructive Dialogue on Fundamental Rights Matters?*, Public Law 470 (2022).

To summarize, the reversal of dual preliminarity as stated in judgement No. 269-2017 must be placed in a context of generally cooperative relations between the ItCC and the ECJ: later judgements fine-tuned the original 269-mandate and transformed it into an advice, way less threatening for the obligation established in *Simmenthal* to disapply immediately national law in conflict with EU law[20]. Even cases in which the constitutional need for a centralized system of review has been especially remarked (e.g., Judgements No. 67 and 149/2022), the ItCC has also been careful to reassure that judges retain their power of disapplication, with no procedural obligations under constitutional law delaying it.

That said, a question still remains: what was the reaction of Italian judges to the "269-mandate" (later the "269-advice")? In the past, cases of judicial disobedience to specific directives from the ItCC happened, e.g., in the *Kamberaj* case, in which the "twin-decisions" concerning the judicial treatment of the ECHR required by the ItCC were defied[21]. What was the reaction of Italian judges to what we may call the "269-doctrine"?

3. Methodology

To answer this question, I looked for references both to the ECJ and to the ItCC by Italian judges to verify whether the 269-doctrine was accepted or not. For reasons of reliability, I summarize here the procedure used to collect the cases, so that other scholars can replicate or update the research. It is worth mentioning immediately that the collection of cases was influenced by the way the search forms of the ECJ and of the ItCC are designed. Indeed, as it will be immediately apparent, they are quite different one another. However, this is a necessary step, since the two courts are the only institutions storing the

[20] C-106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA of 9 March 1978.

[21] Case C-571/10 *Servet Kamberaj v Social Housing Institute of the Autonomous Province of Bolzano (IPES) and others* of 24 April 2012. The referring judge tried to involve the ECJ by arguing that conflict between Italian law and the ECHR would be equal to conflict with EU law via article 6 TEU. The ECJ replied that, insofar as the accession to the ECHR was not completed, such equation would be mistaken.

relevant data. I have tried to set the forms of the two institutions in such way to filter the large number of cases lodged by Italian judges and restitute only those relevant to the research question. To do that, some choices (arbitrary to a certain extent) were necessary. Moreover, some cases worth considering may well have remained excluded from the selection. Thus, although the case selection still seems to me reasonable, the method has its inevitable limitations and probably does not collect all relevant cases.

Given these *caveats*, I enlist the methods for both repositories.

As for the ItCC, I simply searched for decisions in the years 2018-2022 in which the "269-2017" judgment was recalled in completed *incidenter* proceedings[22]. I also considered pending *incidenter* proceedings (which have a different search form[23]). In the case of pending proceedings, because of the way the search form is designed (not allowing for textual research), I looked at the cases in which the parameter of scrutiny between 2018 and 2022 was the CFREU[24]. The initial results of both searches were then assessed on a case-by-case basis to discard irrelevant cases: for instance, because Judgment No. 269/2017 was recalled for reasons different from the reverse preliminarity (e.g., the judgement has an autonomous significance in tax law) or because the Charter was recalled for merely rhetorical purposes by the referring judge. Of course, other researchers may disagree to a certain extent and include in the sample a few cases that I discarded.

As for the ECJ, I set the CURIA search form as follows. I looked at both decided and pending cases in front of the Court of Justice only (of course, the GC and the former Civil Service Tribunal do not decide on preliminary references right now). Only cases lodged between 01 June 2018 and 31 December 2022 were considered. Indeed, Judgement No. 269/2017 was decided in December 2017: references based on the Charter only but issued in, say, March 2018, may *look* like disobedience to Judgment No. 269/2017, but be simply based on ignorance of the

[22] https://www.cortecostituzionale.it/actionPronuncia.do .
[23] https://www.cortecostituzionale.it/actionOrdinanze.do .
[24] The website of the ItCC has two different wordings for the CFREU: "Carta dei diritti fondamentali dell'Unione europea di Nizza" (Charter of Fundamental Rights of the EU of Nice) and "Carta dei diritti fondamentali UE" (Charter of EU Fundamental Rights). I looked for both.

judgment and of its implications. I assumed that a lag of approximatively 6 months was enough for the Italian judiciary at large to keep up with the 269-doctrine and start meaningfully deciding whether to abide by it. Of course, other researchers may make different assumptions on this point. I set the "procedure and result" command on "Reference for a preliminary ruling" and "Preliminary reference - urgent procedure" and set the "case law or legislation" command (grounds of judgement) to "Treaty" and "Charter of Fundamental Rights of the EU (2007)". Finally, and naturally, I limited the origin of the question to Italian courts. The CURIA database often allowed to directly read the preliminary reference to the ECJ. When this was not published, the content was reconstructed by looking at either the ECJ's decision or at the summary of the reference. Again, and as in the case if the ItCC, it was then necessary to look at the cases one by one to check whether they were relevant to the research question (e.g., discarding cases of provisions with direct effect, not under the 269-doctrine, or cases in which the Charter was recalled directly by the ECJ rather than by the referring judge). This assessment of the cases is of course debatable too.

Cases C-419/19 and C-334/21 and their corresponding preliminary references were erased from the ECJ's register, but they are still included in this survey. Lastly, the preliminary references that led to the Judgements C-762/18 and C-37/19, C-282/19, C-497/20, and C-302-303/21 (perfectly good examples of disregard for the 269-doctrine) were added separately, as they were not spotted via the search on CURIA. This shows, again, the limits of the designed research, which surely misses other pertinent cases as well. However, the goal of this paper is to give a broad picture of the Italian courts' reaction to the 269/2017 judgement and, therefore, remains valid as long as a sufficiently wide sample is collected.

4. Results

The cases collected in both repositories were then coded as follows. Cases in which Italian judges mentioned constitutional rights, Charter rights, or both and referred first to the ItCC were coded as cases of acceptance of the 269-doctrine (A), while cases in which they first referred to the ECJ were coded as cases of refusal of the doctrine

(D). I also tried to assess how the doctrine was followed throughout the time, especially to see whether it was more strictly followed before Judgment No. 63/2019 by the ItCC transformed the mandate into mere advice, and to find out what articles from both the Italian Constitution and the CFREU were recalled more often. I excluded articles 11 and 117 of the Italian Constitution, as they are always recalled: indeed, these are the clauses that allow for the Italian participation to the EU and, according to Judgement No. 269/2017, for the ItCC to adjudicate on the CFREU. Therefore, they have a merely procedural role and do not provide any meaningful information on what substantive rights are more often recalled. Finally, the outcome of the references is shown as well, recalling the resulting decisions of either the ItCC or the ECJ after the first reference (or both in case of simultaneous references). Cases still to be decided by either the ItCC or the ECJ on 31 December 2022 are labelled with "TBD". Further information, such as reference numbers, the substantive rights at issue, or links to the orders and to decisions available online, can be found at the webpage of the *Observatory on the Practices of Inter-legality by Italian Courts*[25]. The Observatory is part of a broader research project on the phenomenon of inter-legality, namely the peculiar situation in which a variety of norms from different legal systems regulate simultaneously the same event. The project, which was developed by a series of scholars since 2018, is an attempt to study systematically a series of such cases in various areas of law and contexts. Particular emphasis was given to the role of judges, the officials that more frequently have to find ways to coordinate the simultaneous normative claims while performing their tasks.[26] Dual preliminarity, characterized by the simultaneous applicability of the CFREU and of the Constitution, is an example of an inter-legal situation and the 269-doctrine a possible criterion to handle the intermingled scenario. A study in the ways in which Italian judges responded to the 269-doctrine is an empirical enquiry in the way in which a specific case of inter-legality was handled.

Briefly, excepting a few notable cases examined in the next section, this paper does not engage into a qualitative analysis of the

[25] https://perma.cc/2Y4U-MF24

[26] See the collection of essays in J. Klabbers, G. Palombella (eds.), *The Challenge of Inter-legality* (2019).

references, does not develop a specific taxonomy to that aim, and does not evaluate the results from a normative perspective. I only examine whether the 269-doctrine was accepted or denied, the evolution in time, and the mentioned rights.

The cases are summarized in the following table (tab. 1).

TABLE 1

No	Date of the first referring order	Judge	A/D on 269-doctrine	Mentioned Const. Articles	Mentioned CFREU Articles	Outcome
1	15/06/2018	Cassation	D	-	21	ECJ C-396/18
2	28/06/2018	Tribunal of Milan	D	-	47	ECJ C-422/18 PPU
3	16/07/2018	Council of State	D	-	15, 16	ECJ C-465/18
4	01/10/2018	Justice of the peace, L'Aquila	D	36, 97, 102, 106, 111	31, 47	ECJ C-618/18
5	22/10/2018	Justice of the peace, Bologna	D	-	31	ECJ C-658/18
6	29/10/2018	Regional Administrative Court, Sardegna	D	-	21	ECJ C-670/18
7	05/11/2018	Council of State	D	-	16, 17	ECJ C-686/18
8	26/09/2018	Regional Administrative Court, Lazio	D	21, 41	11, 49	ECJ C-719/18
9	12/12/2018	Regional Administrative Court, Lazio	D	-	15, 20, 21, 31	ECJ C-789/18 and C-790/18
10	17/12/2018	Regional Administrative Court, Lazio	D	-	16, 17	ECJ C-798/18 and C-799/18
11	21/01/2019	Cassation	D	36	31	ECJ C-762/18 and C-37/19
12	19/02/2019	Cassation	D	-	20, 21	ECJ C-129/19
13	26/03/2019	Regional Administrative Court, Lazio (Order 99)	A	3, 41	16, 20, 21	ItCC Judgement 49/2021
14	26/03/2019	Regional Administrative Court, Lazio (Order 100)	A	3, 41	16, 20, 21	ItCC Judgement 49/2021
15	03/04/2019	Tribunal of Naples	D	-	21	ECJ C-282/19
16	15/04/2019	Regional Administrative Court, Lazio	D	-	16, 17	ECJ C-306/19, C-512/19, C-595/19 and

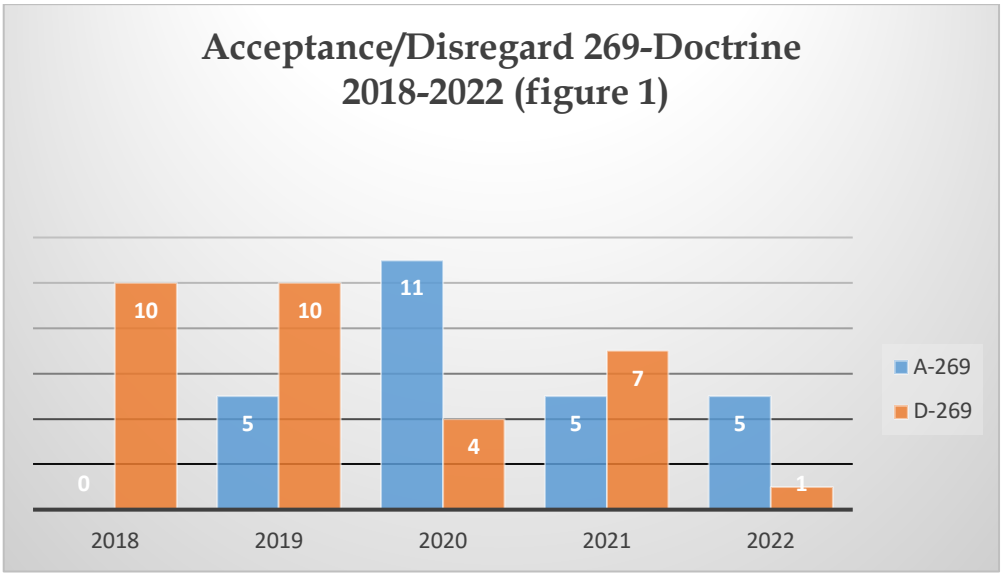
						from C-608/20 to C-611/20
17	29/05/2019	Regional Administrative Court, Lazio	D	-	54	ECJ C-419/19
18	17/06/2019	Cassation	A	3, 31	20, 21, 23, 33, 34	ItCC referred to the ECJ (Order 182/2020). C-350/20
19	23/07/2019	Council of State	D	-	16, 28	ECJ C-561/19
20	02/09/2019	Tribunal of Milan	D	-	20, 30	ECJ C-652/19
21	13/09/2019	Tribunal of Milan	D	-	47	ECJ C-693/19
22	18/09/2019 and 22/01/2020	Court of Appeal, Naples	D	3, 34, 38	20, 21, 30, 34, 47	ECJ C-32/20 and ItCC Judgement 254/2020
23	17/10/2019	Tribunal of Bolzano	A	2, 3, 29	7, 21	ItCC Judgement 131/2022
24	12/12/2019	Council of State	D	-	21	ECJ C-914/19
25	16/12/2019	Arbitration Chamber of the Italian Anti-corruption Authority	A	3, 97	-	ItCC, Judgement 239/2021
26	14/01/2020	Regional Administrative Court, Puglia	D	-	41	ECJ C-17/20
27	04/02/2020	Cassation	A	3, 27	7, 21	ItCC Order 60/2021
28	10/02/2020	Regional Administrative Court, Lazio	A	3, 24, 28, 47, 97, 101, 102, 103, 111, 113	47	ItCC Judgement 248/2021
29	02/05/2020	Tribunal of Brescia	A	2, 3, 38	20, 31, 34	ItCC Judgement 196/2021
30	18/05/2020 and 28/05/2020	Justice of the peace, Lanciano	D	3, 4, 32, 36, 38, 76, 77, 97, 101, 102, 104, 106, 107, 108, 111	1, 6, 15, 20, 21, 30, 31, 34, 45, 47	ECJ C-220/20 and ItCC Judgement 31/2022
31	04/06/2020	Regional Administrative Court, Emilia-Romagna	D	-	20, 21, 31, 33, 34, 47	ECJ C-236/20
32	02/07/2020	Cassation	A	3, 41, 45, 47, 53	16, 41	ItCC, Judgment 149/2021

33	10/07/2020	Tribunal of Bergamo	A	2, 3, 31, 38	20, 21	ItCC, Judgement 19/2022
34	17/09/2020	Court of Appeal, Milan	A	2, 3, 32, 111	35	ItCC referred to the ECJ (Order 216/2021). Pending
35	06/10/2020	Tribunal of Trieste	A	2, 3, 23, 42, 48, 51, 53, 64, 67, 68, 69, 97	21, 25	ItCC Judgement 182/2022
36	30/09/2020	Cassation	D	111	47	ECJ C-497/20
37	27/10/2020	Court of Appeal, Bologna	A	2, 3, 27	7	ItCC referred to the ECJ (order 217/2021). Pending
38	06/11/2020	Court of Appeal, Lecce	A	-	48	ItCC, Judgment 182/2021
39	10/11/2020	Tribunal of Rome	A	3, 27	48	ItCC, Judgement 152/2022
40	11/12/2020	Court of Appeal, Lecce	A	-	48	ItCC, Judgment 182/2021
41	29/12/2020	Court of Appeal, Salerno	A	2, 3, 24, 29, 30, 111	24	ItCC, Judgement 177/2022
42	10/03/2021	Court of Auditors, Campania	D	-	47	C-161/21
43	26/03/2021	Arbitral Board, Vicenza	A	3, 24, 41, 111	16, 52	TBD
44	11/04/2021	Cassation	D	-	34	ECJ C-302/19 and C-303/19
45	21/04/2021	Council of State	D	-	47	ECJ C-261/21
46	26/04/2021	Council of State	A	3	49	ItCC Judgement 198/2022
47	12/05/2021	Council of State	D		21	ECJ C-304/21
48	26/05/2021	Tribunal of Rieti	D	-	7, 8, 11, 52	ECJ C-334/21
49	23/06/2021	Cassation	A	3, 10, 24, 111	18, 19, 47	ItCC Judgement 13/2022
50	12/07/2021	Tribunal of Florence	A	2, 3, 23, 24, 41, 42, 45, 47, 111	17, 47	ItCC Judgement 225/2022
51	20/07/2021	Tribunal of Vercelli	D	-	14, 20, 21	ECJ C-450/21

52	16/09/2021	Council of State	D	-	21	ECJ C-569/21
53	27/01/2022	Tribunal of Milan	A	3, 27, 42, 111	17, 48, 49	TBD
54	06/04/2022	Justice of the peace, Lecce	D	-	49	ECJ C-243/22
55	28/04/2022	Tribunal of Padova	A	3, 4, 32, 35	52	TBD
56	12/05/2022	Court of Appeal, Salerno	A	2, 3, 13	7	TBD
57	31/05/2022	Court of Appeal, Milan	A	3	21, 34	TBD
58	27/06/2022	Justice of the peace, La Spezia	A	3, 4, 16, 27, 34	47, 49	TBD

The selected sample shows 26 cases in which the referring judges followed the 269-doctrine (A - 45%) and 32 cases in which they did not follow it (D - 55%) out of 58 overall.

When a sample is small (slightly more than 50 observations), and probably incomplete too, it is extremely dangerous to identify trends or make causal inferences, as one may be tempted to do. One result, however, seems solid: the 269-doctrine was not immediately and uniformly accepted by ordinary judges in Italy: the sample is split into two. This is the main upshot of this article. Limited as the sample can be and questionable as the interpretation of the individual cases may be, the existence of two separate groups of cases, one accepting the 269-doctrine, the other refusing it, seems too pronounced to disappear, even if a larger sample were selected and even to scholars having a somewhat different view of whether a case is or is not a form of "disregard" for the 269-doctrine.



A certain growth of the cases of acceptance in time seems to be a plausible result as well. Future research may confirm this view, perhaps based on larger samples and after the doctrine has had more years to be absorbed by courts. Judgment No. 63/2019, decided in February 2019 and theoretically making the final clarification on behalf of the ItCC that the 269-mandate was indeed only advisory rather than binding, does not seem to have a clearly identifiable impact.

When disaggregating for the origin of the cases, and specifically when looking at whether the judge was an ordinary or an administrative one, ordinary judges seem more inclined to accept the 269-doctrine (20 cases of acceptance, 16 of denial) than their administrative counterparts (4 cases of acceptance, 15 of denial). Once more, the limited size of the sample demands particular caution in drawing conclusions, but a more pronounced acceptance from ordinary courts seems in line with the findings of Massa and Lorenzoni in this issue of the journal.[27] Moreover, all the preliminary references

[27] M. Massa, The Dual Preliminarity Doctrine in the Case-Law of Ordinary Courts of First Instance and Appeal and L. Lorenzoni, The Doctrine of Dual Preliminarity in the Case-Law of Italian Administrative Courts both in this *Special issue*.

from the ItCC to the ECJ after Judgement No. 269/2017 were based on submissions from ordinary courts.[28]

Another point to be further evaluated in the future is the rather nonchalant manner in which some judges accepting the 269-doctrine operate with the Charter: internal legislation often is challenged on multiple grounds, the Charter being one of them.[29] Little space is saved to verify whether the domestic provision is indeed implementing EU law and therefore falls into the scope of application of the Charter as in article 51(1) CFREU.

The most quoted article of the Italian Constitution is Article 3 (equality and non-discrimination), followed by Article 111 (jurisdiction and due process). Article 21 (non-discrimination) is the most quoted article of the CFREU, followed by Article 47 on effective judicial protection and article 20 (equality before the law). All in all, the two most quoted groups of provisions in the two catalogues of rights, namely equality and due process, are quite similar. Tables 2 and 3 and figures 2 and 3 illustrate these data for, respectively, the Italian Constitution (table 2 and figure 2) and the CFREU (table 3 and figure 3).

TABLE 2

Articles (Italian Constitution)	Mentions
3	26
111	10
2	9
41	6
97	5
27	5

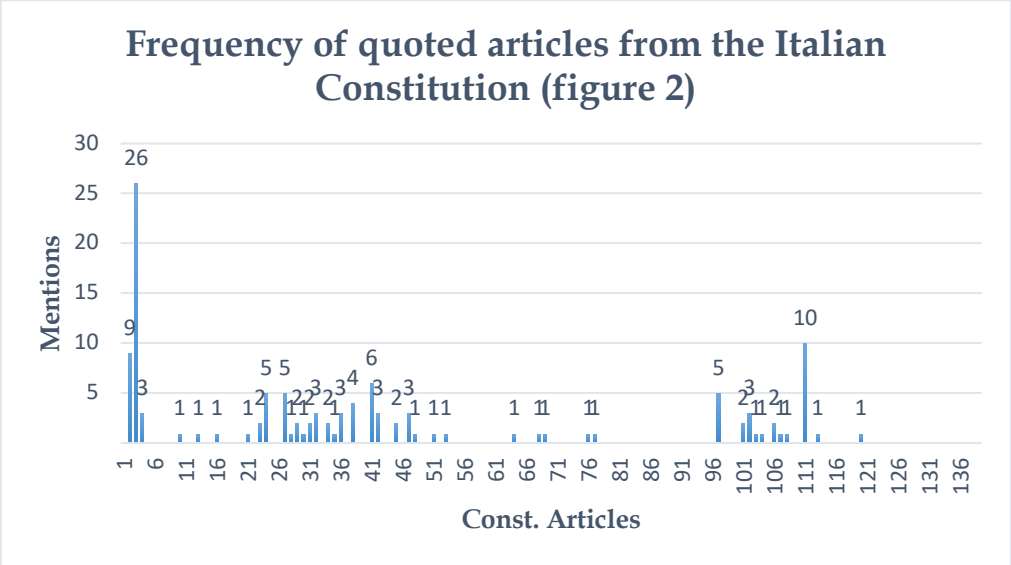
[28] ItCC Order of 10 May 2019 No. 117; Order of 30 July 2020 No. 182 (table 1, No. 18; Order of 18 November 2021 No. 216 and 217 (table 1, No. 34 and 37 respectively). ItCC Order No. 117/2019 is not coded in table 1 since the reference to the ItCC was submitted in February 2018, during the 6-month lag in 2018 (January to June) not accounted for in the data (see para 3 on methodology).

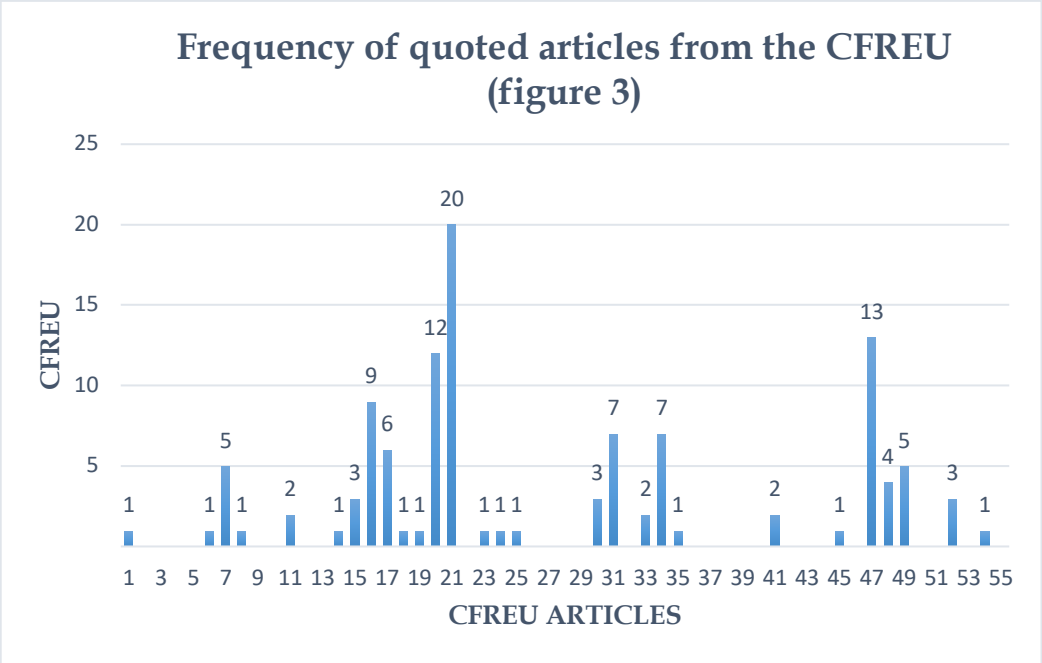
[29] As a proxy to evaluate this phenomenon, table 1 suggests that in around one third of the cases, 19 out of 58, the referring court relied on 5 provisions or more from either the Constitution or the Charter to challenge legislation.

24	5
38	4
102	3
47	3
42	3
36	3
32	3
4	3
106	2
101	2
45	2
34	2
31	2
29	2
23	2
120	1
113	1
108	1
107	1
104	1
103	1
77	1
76	1
69	1
68	1
64	1
53	1
51	1
48	1
35	1
30	1
28	1
21	1
16	1
13	1
10	1

TABLE 3	
Articles (CFREU)	**Mentions**
21	20
47	13
20	12
16	9
31	7
34	7
17	6

7	5
49	5
48	4
15	3
30	3
52	3
11	2
33	2
41	2
1	1
6	1
8	1
14	1
18	1
19	1
23	1
24	1
25	1
35	1
45	1
54	1





5. Notable Cases

Some of the examined cases have special characteristics when it comes to the adoption of the 269-doctrine. They are briefly summarized here.

Occasionally, referring judges have *explicitly* recalled Judgment 269/2017, either to endorse it or to criticize it. In cases like Order No. 183/2020 issued by the Court of Cassation on 02 July 2020 and later decided by the ItCC (Decision No. 149/2021), the referring judge relied explicitly on Judgment No. 269/2017 to justify the prior involvement of the ItCC (table 1, No. 32). More recently, on 31 May 2022, the Court of Appeal of Milan quoted Judgement 269-2017 at length and recalled the later judgements by the ItCC to justify its previous reference to the Constitutional Court in a controversy concerning non-discrimination of EU citizens and the right to social security (table 1, No. 57). To exemplify the opposite inclination, the Justice of the Peace for L'Aquila on 1 October 2018, openly questioned the centralization in the hands

of the ItCC and decided to refer to the ECJ instead (table 1, No. 4)[30]. The same is true of the Court of Cassation in its preliminary reference of 21 January 2019: in referring to the ECJ, the Cassation explicitly denied the binding value of the 269-doctrine, specifying that it was merely expressed in an *obiter dictum* (table 1, No. 11).

Similarly, a particularly well-known judgement, the *Randstad* case, showed how judges may still try to overcome explicit statements by the ItCC relying on the ECJ, even after Judgment No. 269/2017[31]. In the case at stake, by referring to the ECJ the Court of Cassation attempted to establish its own interpretation of the right to effective judicial and circumvent the opposite understanding offered by the ItCC in interpreting Article 111(8) of the Constitution (table 1, No. 36). In *Randstad*, the 269-doctrine was ignored, as it was clear that a reference to the ItCC would fail in obtaining the desired interpretation, while the "road to Luxemburg" was still open. Eventually, the Court of Justice rejected the proposed interpretation of the right to effective judicial protection and did not intrude into the quarrel on the meaning of Article 111(8) between the Cassation and the Constitutional Court[32].

In two cases, the 269-doctrine was interpreted as allowing a simultaneous reference to both the ECJ and the ItCC (table 1, No. 22 and No. 30). Both attempts failed. In this report, cases of simultaneous reference were considered as refusals to follow the 269-doctrine (D), as they likely jeopardize the aim of centralizing the review in the hands of the ItCC and take away from the ItCC the chance to have the "first word".

A question of constitutionality asked by the Arbitral Board for Vicenza on 26 March 2021 is equally hard to classify: an arbitral board, as the order points out too, is not allowed to use the preliminary reference mechanism, so that in case of dual preliminarity referring to the ItCC using parameters from both the Charter and the Constitution

[30] The reference was then deemed inadmissible by the ECJ (C-618/18 *Gabriele Di Girolamo v Ministero della Giustizia* of 17 December 2019).

[31] I have commented on the entire Randstad saga in O. Scarcello, *Effective judicial protection and procedural autonomy beyond rule of law judgments: Randstad Italia*, 59 Common Mark. Law Rev. 1445 (2022).

[32] Case C-497/2021 Randstad Italia SpA v Umana SpA and Others of 21 December 2021.

is simply the only viable path (table 1, No. 43). It was still coded as a form of acceptance of the 269-doctrine.

The twin references of 6 and 11 November 2020 by the Corte d'Appello di Lecce are the only case in which a judge referred to the ItCC first (269-acceptance) and used supranational parameters as sole substantive parameters of constitutionality, namely article 48 CFREU and article 6 ECHR (table 1, No. 38 and No. 40). Articles 11 and 117 were the only recalled constitutional norms and these, as already mentioned, merely have the function of allowing Italy's participation to supranational integration, while not preserving any substantive right. The referring judge explicitly mentioned the 269/2017 judgement to argue that Article 48 CFREU was a pertinent provision to review Italian legislation in the case at stake. The court also reconstructed the supranational notion of presumption of innocence looking extensively at the case law of the Court of Strasbourg and of the ECJ. The case is particularly interesting as supranational rights are proposed instead of national constitutional provisions in front of the ItCC regarding criminal procedure, one typically associated with the reserved domain of the Member States. This may be explained by recalling that the parallel provision under the Italian Constitution, namely Article 27(2), is quite laconic. The ItCC discussed the proposed interpretation in Judgement No. 182/2021 but disagreed with the referring judge on the merits: the relevant legislation was not found to be inconsistent with the proposed supranational parameters. However, it is worth mentioning that at the same time the ItCC did not question the use of Article 6 ECHR and 48 CFREU to adjudicate on the constitutionality of internal legislation. If anything, the ItCC recalled its previous case law on dual preliminarity in deciding the admissibility of the case and granted it. Indeed, in Judgement No. 182/2021 "dual" preliminarity seems to merely mean abstract overlap between constitutional rights and Charter rights. Theoretically, we may assist again in the next future to cases in which CFREU rights are used as sole parameters of constitutionality in front of the ItCC.

Lastly, in fall 2020, the Courts of Appeal of Milan and Bologna referred to the ItCC questions concerning the Italian implementation of the European Arrest Warrant (table 1, No. 34 and No. 37). One year later, with the two already mentioned orders drafted by Justice Viganò, the ItCC used the preliminary reference mechanism and referred the

questions to the Court of Justice.[33] It is worth noting how, despite the area is fully harmonized by EU law, the courts of Milan and Bologna relied only cursorily on the CFREU (especially the court of Milan) and focused more on the possible violation of the national Constitution. Moreover, Judgement No. 269/2017 was de facto followed but not quoted by the two courts of appeal. It was the Constitutional Court which, on the other hand, clearly stated that national and EU rights overlapped in the matter at stake and that the 269-doctrine required to ask for the interpretation of EU law given by the Court of Justice[34].

6. Conclusion

Five years have now passed since Judgement No. 269/2017, so that it is possible to draw preliminary conclusions on the consequences of the decision. Judgement No. 269/2017 was not entirely successful in overcoming the previous *Granital* doctrine and making of the ItCC the court that ordinary judges consult when fundamental rights are at stake. Trying to completely recentralize protection of fundamental rights in the hands of the ItCC probably was not a realistic aim to reach in the short term for a court like the ItCC, which is particularly dependent on the cooperation of ordinary judges[35]. Indeed, the responses of ordinary judges to the 269-doctrine seem overall mixed: some embraced it (more or less) enthusiastically, other openly or implicitly defied it. Full recentralization was not accomplished. Italian judges will likely keep using both channels and occasionally ignore the initial 269-doctrine for a variety of reasons, including open disagreement with the ItCC.

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[33] ItCC, Orders of 18 November 2021 No. 216 and 217.

[34] At the time of writing, the cases have not been decided yet by the ECJ, but the Opinions of Advocate General Manuel Campos Sánchez-Bordona were published (C-699/21 and C-700/21 respectively) and they seem to propose outcomes quite close to those suggested by the ItCC. See C-699/21 E.D.L. of 1 December 2022 and C-700/21 O.G of 15 December 2022.

[35] A. von Bogdandy, D. Paris, *Power Is Perfected in Weakness: On the Authority of the Italian Constitutional Court*, in V. Barsotti and others (eds.) *Dialogues on Italian Constitutional Justice: a Comparative Perspective* 267-269 (2021).

On the other hand, if the aim of the ItCC was simply to gain a more active role in fundamental rights protection, instead of reaching full-recentralization, then the 269-doctrine turned out to be effective. Despite cases of open disagreement, a good number of judges (almost half of cases in this sample) have indeed embraced the 269-doctrine. Most importantly, this number seems to be growing, although more empirical research will be needed before this claim can be made convincingly. Moreover, when the ItCC was called by ordinary courts, it did not show closure to its role of "European" judges and, as cases as *Consob* show, proved that the Judgement No. 269/2017 did not entail that the ItCC would give up using the 267 TFEU mechanism. Only time will tell what the future reaction of judges will be, and the full acceptance of this doctrine by ordinary judges may turn out to be a very slow process.