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The European Court and National Courts Doctrine and Jurisprudence: Legal Change in its Social Context

Report on Italy

FRANCESCO P. RUGGERI LADERCHI

EUI Working Paper RSC No. 95/30

European University Institute, Florence

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The European Court and National Courts

by Francesco P. Ruggeri Laderchi[1] [2]

Jean Victor Louis when commenting on a landmark judgment of the Italian Constitutional Court[3] quoted the following phrase from the opinion of AG Lagrange in *Costa v. Enel* :

> "I do not for a moment consider that Italy, which has always been in the forefront amongst the promoters of the European idea, the country of the conference of Messina and of the Treaty of Rome, cannot find a constitutional means of allowing the Community to live in full accordance with the rules created under its common charter".

A similar kind of uneasiness would probably still be the natural reaction of an external observer towards the striking contradictions between the strong, if often illusory, Europeanism of Italian politics and the Italian people and the creeping mistrust of the Constitutional Court towards the supremacy of Community Law[4] which is the *leitmotif* of thirty years of case law, which have been carefully described in Cartabia's paper.

The search for a constitutional device by means of which the doctrines emanating from Luxembourg could be accepted in Italy has been more prolonged and difficult than AG Lagrange expected. It would be very easy to say that the "euro-skepticism" experienced by the Italian Constitutional Court

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[3] Annotation to 232/75, *ICIC*, [1975] *Giurisprudenza Costituzionale*, 3227.

[4] One could analyze this apparent contradiction under the conceptual categories proposed by Weiler in " The Dual Character of Supranationalism".[1981] YEL 268. It might be a fascinating exercise to prove that normative supranationalism would not work in Italy because of the strong political supranationalist drive. It is submitted that this is probably excessive. It is certainly true that one of the reasons for the apparent supranationalism of Italian politics and of the public opinion is the fact that Community law was not taken very seriously by politicians. It was not considered as a source of 'real' obligations.

paralleled the experience of other supreme courts and that according to the famous dictum of Lord Devlin "enthusiasm is not a judicial virtue".

However, the reasons for the attitude of the Italian Constitutional Court seem to a certain extent to be peculiar to it. Similarly the doctrinal construction that led to a qualified acceptance of direct effect and supremacy in 1984[5] is very peculiar. This paper will attempt to examine those peculiar reasons, adding some observations to the analysis of the law made by Cartabia. These observations will be based on a non doctrinal approach. To a certain extent my analysis will cover subjects on which Cartabia has touched upon, but the perspective will be different. A particular effort will be placed at taking a somehow external point of view, namely at describing the foundations of the discourse of the legal actors rather than accepting the accepted wisdom as a point of departure. This approach is contestable according to the standards of Italian legal writers but it aims at providing some further elements of reflection.

In particular I will try to look at the emergence of the doctrine of separation of the two legal orders in the early case-law of the Constitutional Court. This doctrine is an element of continuity which has characterized the whole development of the case law. One cannot consider the constant reference to it simply as some kind of fig's leaf to cover the reversal of the Constitutional Court's attitude towards community law. I will try to show that these doctrinal elements were so solidly entrenched in the mind of the actors of the play as to represent a fundamental element which explains the development of the action and the outcomes. A few observations will be made questioning the constant reference from the Constitutional Court to *Granital* as representing a proper description of the law to date. This long awaited and highly praised solution was probably too precious in the eyes of the Constitutional Court to be put openly into question.

Cartabia has correctly pointed out that the Court has not addressed the issue of *Kompetenz Kompetenz*. Nonetheless the theory of separation of legal orders in the case law of the Constitutional Court is based on the idea of competence. The debate initiated by the German Maastricht decision could pave the way to new developments in Italy, which will pose big theoretical and procedural dilemmas for the Constitutional Court. I will briefly speculate on this issue in my concluding remarks.

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[5] Constitutional Court decision 170/84, *Granital*, [1984] *CMLRev* 756, with annotation by G. Gaja.

BEYOND THE DOCTRINE

a. The actors: judges

The *"primadonna"* in the play is generally acknowledged to be the Constitutional Court. Other courts generally did not feel in a position to accept the doctrines emanating from Luxembourg on their own accord. The Constitutional Court's rejection of supremacy in *Costa v. Enel*[6] placed Community law outside the realm of private litigants and ordinary judges. It is interesting to note that for more than four years[7] following *Costa v. Enel* no preliminary references were made to the Court of Justice.

Presumably litigants and judges had a tendency to assimilate the procedure for seeking preliminary ruling of the Court of Justice to the procedure for judicial review of legislation by the Constitutional Court.[8] As long as the alleged incompatibility of national law with Community law did not enable the former to be set aside, there was not much point in enquiring into such incompatibility.

The Italian administration itself was largely unaware of Community law and would apply it only after its transposition into administrative circulars or even statutes.[9]

The weight of the ordinary courts should not however be underestimated. In contrast to the situation in Germany, litigants do not have direct access to the Constitutional Court. The evolution of the case-law was prompted by the orders from lower courts referring matters to the Constitutional Court. Moreover, in order for such references to be admissible, lower courts are required to outline the reasons why the question submitted is relevant for the solution of the case at hand and demonstrate that the doubts on the constitutionality of the statute subject to review are not manifestly unfounded.

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[6] Case *Costa c. Enel e soc. Edisonvolta*, March 7, 1964, n. 14, *Foro Italiano* [1964] I, 465.

[7] The first 177 procedure after *Costa v. Enel* and *Albatros* (Case 20/64, judgement of February 4, 1965; [1965] ECR 29) which was referred on the 18 of January 1964 (before *Costa v. ENEL*) has been *Salgoil* which was referred by an order of July 9, 1968.

[8] This could easily explain the framing of the references to the Court of Justice in terms such 'is the national provision xyz, compatible with article x of the Treaty?'.

[9] The habit of transposing regulations into national acts was condemned by the Court of Justice in 34/73 *Variola* [1973] ECR 981, and in 94/77 *Zerbone* [1978] ECR 99, and by the Constitutional Court in *Frontini*.

Lower courts since the seventies have been particularly enthusiastic in using the procedure of preliminary ruling to the Court of Justice. It is undeniable that the making of references to Luxembourg by *Pretori*[10] would feature at the center of the attention of the world of lawyers. Their judgments which are normally not reported, would be published in important law journals. The approval of their analysis by the Court of Justice, would demonstrate that they are citizens of the world and that "they get Community law right" while the Professors in the Constitutional Court or senior judges did not grasp the importance of Community Law. The quest for notoriety might be a psychological explanation of the attitude of lower courts.

Lower courts in a number of cases cast doubts on the validity of the Treaty. Sometimes those doubts were only raised in order to present the Constitutional Court with some of the consequences of its previous statements and consequently to make the case more difficult for the Constitutional Court and oblige it to accept certain principles of Community law.[11] In other cases lower courts seemed eager to exacerbate the conflict between the Court in Rome and the one in Luxembourg and require the Constitutional Court to defend certain national principles against the incoming tide of Community law.

Judicial empowerment of lower courts is a very important element of a non-doctrinal analysis of the reception of supremacy. The fact that orders making a 177 reference are not subject to appeal amplified the power of lower court making references as superior courts not only could not impede such references but would be bound by the answer coming back from Luxembourg.

However, the fundamental constitutional principle which states that courts other than the Constitutional Court are subject to Parliament made it impossible for the lower courts to accept supremacy without the endorsement of the Constitutional Court. Although lower courts played an important role they remained behind the scenes acting with the intermediation of the Constitutional Court and of the Court of Justice until *Granital. Granital* was the green light to lower courts to apply Community law by their own motion, which they did with great enthusiasm although sometimes rather imprecisely. At other times lower

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[10] *Pretori* are lower judges, often sitting in small provincial cities, who until very recently had extremely wide powers in both civil and criminal matters. They had a very important and nearly revolutionary role also in other fields of law. Judges in Italy are *civil servants* appointed following a very difficult national competitive examination at the end of their university studies. They form a very independent body within the State. Discipline, career and other organizational matters rest largely within the *Consiglio Superiore della Magistratura*, an independent constitutional organ whose member are appointed for two thirds by the judiciary and one third by Parliament.

[11] This is probably the sense of the question submitted to the Court in *Frontini*.

courts' decisions reveal very deep knowledge of and reflection upon Community law. In the meantime they kept prompting the Constitutional Court towards further evolution. The overly intellectual nature of the doctrine of *Granital* may possibly explain this search for more clear cut solutions.

The absolute predominance of the Constitutional Court in the reception of Community law can also be explained by the lack of a doctrine of precedent in Italian law. It is only recently that lawyers have started studying and quoting in their pleadings case-law.[12] The study of case-law is still exceptional in Italian universities. Statute books were normally not annotated with case-law. Even the judgments from the *Corte Suprema di Cassazione* were generally reported in extremely short abstracts prepared by a service of the Court (Ufficio massimario). There is no *Commissaire du Gouvernement* and the conclusions of *Procuratore Generale* in the *Cassazione* are never reported.

In contrast, the decisions of the Constitutional Court are binding on all courts. Once a statute is declared contrary to the Constitution it is as if the former were repealed. The Court's case-law has over the years devised more sophisticated forms of judgments. It can declare that a piece of legislation is not contrary to the Constitution provided it is interpreted in a certain way;[13] or even that it is contrary to the Constitution in as much as it can be interpreted in a certain way.[14] In a system in which -at least in theory- judges cannot make the law, the Constitutional Court can. One could say that the Constitutional Court has a true, albeit limited, legislative power.

Moreover, the Constitutional Court is much more open than other courts to policy arguments and even if it is at times extremely doctrinal, at least on the surface of its discourse, it tends to be less formalistic than other courts. This is not only due to its position in the system but also to the educational and professional background of the judges.

One third of the judges are appointed by Parliament, another third by the judges in the civil supreme (*Cassazione*) and administrative supreme (*Consiglio di Stato, Corte dei Conti*) courts and the final third by the President of the

[12] Administrative law is an exception to this general rule. The *Consiglio di Stato* developed the whole construction of judicial review.

[13] Ordinary courts could of course still interpret it differently, and even refer it again to the court on the basis of such an interpretation. This happens sometimes. The Court would often discard these rebel references with an order declaring the question manifestly unfounded.

[14] This type of modification of the scope of a provision is on the contrary binding on every court.

Republic.[15] The judges are senior judges, lawyers and university professors. The particular attention that the Court pays to *la doctrine* is not surprising. The members appointed by Parliament and by the President of the Republic, often a law Professor himself, are mostly law professors. The post of judge of the Court has enormous prestige and is probably the zenith in the *cursus honorum* of a lawyer.

Decisions are discussed orally amongst the judges and drafted by the judge *rapporteur*. No dissenting opinions exist and similarly to the Court of Justice, all decisions are considered unanimous. The main decisions concerning Community law have been drafted by academics with a background in international law. The personal theoretical approach of the drafter is a key element particularly as far as *obiter dicta* are concerned. The influence of *la doctrine* in those judgments is even greater as counsel for the parties were often famous law professors who developed in their pleadings their own theories.

Another element to take into consideration is the involvement of a limited number of people in the handling of Community law matters. The same individuals were lawyers or judges in the Constitutional Court and in the Court of Justice.[16] The Italian government has systematically designated law professors as judges and Advocates General in the Court of Justice. Judges of the Constitutional Court and of the Court of Justice come from the same *milieu universitaire* and have all given their contribution to the debate on Community law.

Yet another factor which has certainly played a role is the *Avvocatura dello Stato*.[17] The Italian government is in facts always represented in the Court of Justice by a special team in the *Avvocatura dello Stato* of Rome. The *Avvocatura dello Stato* of Rome also plays a very important function in Constitutional Court proceedings as well. This role is similar to the one of the Advocate General in the Court of Justice. The *Avvocatura* intervenes on behalf

[15] This is one of the few real powers of the President under the Constitution.

[16] Just as an example one could note that Nicola Catalano a former *Avvocato dello Stato* was a negotiator of the Treaty of Rome, a judge in the Court of Justice, he annotated *Costa v. Enel* in the *Foro Italiano* (the most important law journal for practitioners) and in the *Common Market Law Review*, he pleaded in a number of cases in front of the Court of Justice, and he was counsel for the private parties in the Constitutional Court case 232/75 *ICIC* the other Counsel for private parties in the action was Leopoldo Elia, who was going to be the president of the Constitutional Court at the time of *Granital*.

[17] The *Avvocatura dello Stato* is a very competent and respected body which forms part of the Italian administration. They are lawyers, working pretty much in the same fashion as private lawyers, entrusted with the representation of the state in civil and administrative proceedings in which the State is a party.

of the government invariably in order to defend the legality of the statutes under review. The Constitutional Court takes account of these pleadings and often quotes them in its decisions.

b. The actors: la doctrine

Looking from a non-doctrinal point of view at the case-law one has to acknowledge that the main point of reference of the Constitutional Court was *la doctrine*. The public at large and the press did not pay much attention to the whole debate. *Granital* and *Frontini,* which were followed by a press conference given by the President of the Court -something extremely unusual-, were in fact the only occasion in which public opinion was aroused. These cases were perceived as "steps towards Europe", something for which there was a generic, yet not much reasoned, praise and favor.

Lawyers and academics, in contrast, addressed the relationship between the Italian legal order and the Community's in endless debates, conferences and writings.[18] *Simmenthal* provided further stimulus towards the flowering of new theories. By and large *la doctrine,* like the Constitutional Court, found the supremacy of Community law *per se* unacceptable, at least in the terms of *Costa v. Enel* and *Simmenthal*, as decided by the Court of Justice. There has been constant attempts both by the Constitutional Court and *la doctrine* to make Community law work within the framework of generally accepted Italian doctrines.

It is impossible to give an account of the different theories. If one reads the first commentaries on *Costa v. ENEL* one realizes that there were already a dozen or more different theories proposed by academics in order to solve the divergence between Rome and Luxembourg. When looking back over thirty years of debate it is very arbitrary to refer to specific contributions. Nonetheless there are certain approaches that are common to several authors. It is therefore still useful to refer to them.

It is not very difficult to conclude that the fact that the authors of these theories had a background of international or constitutional law played a certain role. The former would dilute Community law in international law while the latter would rely mainly on the constitutional rules granting supremacy, thus recognizing supremacy only because of these rules.

As an example of the first approach one could look at the first pages of

[18] Just to have a sample of the quantity of theories one could look at the authors quoted by P. De Caterini in his note to *Frontini* in [1975] *Cahier de Droit Européen,* 115. After *Simmenthal*: *Il primato del diritto Comunitario e i giudici Italiani*, Milano 1978.

one of the most widely used Community law handbooks:[19]

> "The insufficiency of this approach [i.e. Community law as an autonomous body of law] to define scientifically 'community law' does not need a specific demonstration, in the light of the consideration that the legal phenomenon of the Community has its basis and its discipline in a set of norms belonging to international law and that the Community can only be seen as a part of international law".

Further:

> "In this respect the statements of the Court of Justice in *Van Gend & Loos* and *Costa v. ENEL* are not convincing when they affirm that the EEC Treaty is more 'than an agreement which merely creates mutual obligations between the contracting states' and that it would be different from 'ordinary international treaties'. The EEC Treaty [..] on the contrary is an international treaty like any other, and it only creates a series of rights and obligations between the contracting states [..]".

These kind of statements are not uncommon. They do not mean that the authors do not acknowledge supremacy, but simply that they would prefer the supremacy of EC law to fall within the framework of the general international law principle of supremacy of treaties and they would rather stress the traditional principle of *interpretation conforme* or other rules of construction[20] in order to avoid conflicts between domestic provisions and Community provisions.

A role has also been played by the set of theories based on article 10 of the Constitution.[21] These theories were put forward by international lawyers and have never been accepted. Due to their intellectual fascination and to the prestige of Rolando Quadri, their main advocate, everybody felt obliged to discuss them even if only in order to discard them later. The *Corte di Cassazione* and the Constitutional Court discarded them only in *Frontini*. These theories when compared to the 'soft monism' of other international lawyers can

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[19] F. Pocar, *Diritto delle Comunità Europee*, 4th ed. Milan, 1991, 2-3.

[20] B. Conforti, another important international lawyer, stressed the fact that rules of Community law are *special* in relation to ordinary statutes. Hence conflicts should be solved with the rule of interpretation *lex specialis derogat generali*. See lastly *Diritto Internazionale*, 3rd, Napoli, 1987.

[21] Which reads as follows:" The Italian legal order conforms with the generally recognized principles of international law [..]".

be seen as a radical form of monism. If Italy had accepted this approach it would have adopted a very similar if not more radical position towards Community law than the Netherlands.

Rolando Quadri's theory roughly goes as follows. Art. 10 incorporates by reference general international law into the Italian legal system. The most important rule of general international law is *pacta sunt servanda*. Treaties are therefore incorporated into the national legal order. This theory was not however specifically elaborated in relation to Community law. Quadri himself adapted it to Community law stressing that the rules incorporated by art. 10 would have supremacy over ordinary legislation. The rejection of this approach which appeared to most authors and presumably to the Constitutional Court as an unrealistic intellectual game and as using 'a sledgehammer to crack a nut' is symptomatic of how deeply rooted dualism is in the Italian legal culture.

On the other hand one can see those authors who were more influenced by Constitutional law. Their position was closer to the position of the Court. Cartabia has pointed to the role played by the theories of Federico Sorrentino who is a professor of constitutional law. It is probably worth mentioning the role of the theories of Antonio La Pergola. When referring to his book[22] published in 1961, but written earlier, one would find much of what is said in the subsequent case-law, and indeed in *Granital* which was drafted by La Pergola himself. He very much developed the concept of the 'atypical sources of law' in relation to the acts reproducing rules of international law in the internal legal order. "Atypical sources of law" are ordinary acts which because of some specific constitutional guarantee cannot be modified by other ordinary acts. Although the whole theory is dualist La Pergola emphasized the practical irrelevance of choosing between monism and dualism.

The Constitutional Court never uses the term 'dualism' which seems to have some kind of negative and provincial flavor. It rather relies on the theory of the plurality of legal orders.[23] This theory is well established in Italian Constitutional law tradition. Even if it can be traced back to the 'Republic' of Plato, it finds its main expression in the writings of Santi Romano. This reference remains mainly an attempt to grant cultural nobility to the dualist approach.

Dualism after all is too entrenched in the Italian legal tradition to be

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[22] A. La Pergola, *Costituzione e adattamento dell'ordinamento interno al diritto internazionale*, Milano, 1961.

[23] In case 168/91 *Giampaoli* (*infra*) the Court while restating *Granital* literally said "the fundamental principle (inspired by the doctrine of the plurality of legal orders) according to which the two legal orders, the Community and the State legal orders, are 'distinct and in the same time coordinated'".

abandoned and is linked with the fundamental doctrinal and political concern to avoid a shifting of 'grundnorm'.

On the other hand most people sooner or later realized that the contrast between the Court of Justice and the Constitutional Court on the status of Community Law in Italy were unsustainable. Legal certainty has a very appealing quality for every lawyer and the contrast between the courts far from enhanced legal certainty. *La doctrine* shared the same concerns and the same *Weltanschauung* as the Constitutional Court and suggested, discussed and invented solutions, with a fervor that probably was not matched in any other country.

Looking back at the case-law it is still worth repeating what a very influential commentator wrote in a note to *Granital*:

> "[.. The Constitutional Court] was obliged to negotiate a path between the inflexibility of the legal rules; the requirements of the process of integration, [..] the more or less discrete pressure from the Community Institutions, [..] the behavior of the legislature and of the administration often incoherent and sometimes schizophrenic and in striking contradiction between a 'labial' Europeanism in permanent service and a different if not opposed behavior; the contrasting stimuli of a strongly involved *doctrine*, divided, unstable, verbose and maybe even confusing for the unbelievable quantity and variety of solutions imagined and reasons given."[24]

c. Cross Fertilization

The experience of other countries and of Germany in particular has been very important for the Constitutional Court. The influence was important both at the doctrinal level and at the judicial policy level.

La doctrine has always been very open in every field of law to foreign models. In the nineteenth century the French model was absolutely dominant. This is quite understandable as the Italian civil code was little more than a translation of the Napoleon code. Nonetheless German *doctrine* later became extremely influential. The 'Begriffe Jurisprudenz' first influenced Roman and in Civil law studies then became the model to which all Italian academics tried to conform in every field of legal studies. Despite the fact that the knowledge of the German language was not generally widespread it became a necessary

[24] A. Tizzano, "La Corte costituzionale ed il diritto comunitario: vent'anni dopo...",[1984] *Foro Italiano* I, 2063.

tool for any respectful academic. The footnotes to every classic civil or public law handbook often quote more German than Italian authors.

The shift away from the French to the German model, particularly evident in the civil code of 1942, has been carefully studied by comparative lawyers with particular attention to private law. The attention to German model in the field of public law was possibly even more marked. It is probably more common to find references to Jellineck and Laband in Italian text-books than in German ones. The Weimar Constitution was a very influential model in the drafting of the Italian Constitution. The fact that Italy and Germany were the only two founding Member states of the Community to have a Constitutional Court, ensured that it was natural for both *la doctrine* and the Court to look carefully to the German solutions.

The Court certainly found in the *Solange* case-law support for the limits to Community law for protection of Human rights that were set in *Frontini*. In the beginning these limits, it is submitted, had more to do with theoretical worries than with actual problems in the application of Community law in Italy. The fact that the whole question of Human rights was so relevant in Germany was a very compelling reason for retaining these limits in Italy as well.

The importance of German examples is openly revealed in *Granital*, where the Constitutional Court itself acknowledges that one of the reasons for accepting the decentralized control of conformity of legislative acts with Community law was the fact that this type of control was accepted everywhere including Germany.

Other influences can also be found in different respects. *Granital* or at least its discourse, is based on the idea of *'pre-emption'*. The influence of American federal doctrines is not totally extraneous to this approach.

In a different manner one could also see some kind of cross-fertilisation between the Court of Justice and the Constitutional Court. The Constitutional Court could not be unaware of the dimensions of the conflict and was very careful whenever it entered the mined field of the relationship between national and Community law. This attention became of course more evident in the *post-Granital* case-law. It has already been pointed out that the two courts were acting in the same *milieu*. It is submitted that the parallelism between the Constitutional Court case *Bolzano*[25] and Court of Justice case *Flli Costanzo*,[26] to which Cartabia has referred, for instance, was far from being accidental.

At a later stage the Constitutional Court even tried to "steer" the case-law

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[25] 369/89 *Provincia di Bolzano*, [1990] *Diritto Comunitario e degli scambi internazionali* 395.

[26] 103/88 [1989] ECR 1839.

of the Court of Justice. The signal that was sent up with the *Fragd*[27] decision is very symptomatic.

In contrast, in minor cases, which were not perceived to contain large Constitutional issues, the Constitutional Court did not only appear to forget the complicated doctrines that it devised in the *grands arrêts*, but at times misinterpreted Community law. It is possible to find *obiter dicta*, and at times actual decisions, completely at variance with the case-law of the Court of Justice. In this respect the refusal to use the procedure for preliminary rulings to the Court of Justice becomes particularly regrettable.

The above mentioned peculiarities of the Italian legal system are of course too simplistic to be 'explanations' of the story that Cartabia has described in detail. They are merely elements which from within the system seem too trivial to be taken into consideration. Looking at the system from outside however, they are necessary factors in order to make sense of the Constitutional Court's case-law and to limit, at least to a certain extent, the puzzled unease that AG Lagrange, Jean Victor Louis and many other external observers experienced when faced with the Italian rebellion to Community law.

In the light of the foregoing it might be useful to go back to the history of the story and see how the elements just mentioned played a role.

LOOKING BACK AT THE 'COMMUNITY PATH' OF THE CONSTITUTIONAL COURT

a. The origin of the constitutional Court's doctrines: a device used in order not to declare the Treaty contrary to the Constitution

i. The background

Bruno de Witte has correctly pointed out that national courts when confronted with Community Law had to face problems of different kinds. Only once the national courts had accepted that the Treaties had been lawfully ratified (Membership) could they proceed to examine the effects of the Treaties and to solve the conflicts between the Treaties and national legislation (the supremacy direct effect cluster).

This distinction is particularly true for the Italian Constitutional Court. The distinction between the different types of problems, is more logical than chronological. It is however undeniable that the solutions given to the problems

[27] 13/4/89, n. 168, *Fragd*,[1990] *Foro Italiano* I, 1855.

of direct effect and supremacy and the choice of procedural means for granting supremacy have been influenced -nearly determined in hereditary manner- by the choices and the compromises made in order to accept the constitutional legality of the membership to the Communities.

The dualist constitutional orthodoxy and a plain reading of the Constitution seem to offer very little support to the legality under Italian Constitutional law of the Community Treaties.

Treaties, like any other rule which is not created by the constitutional organs endowed with the power to create such rules, do not have any effect *per se* in the national legal order. It is a national act that either by reproducing them or by referring to them gives them effect. As Parliament cannot modify the Constitution by ordinary statute, it cannot ratify and implement by statute treaties which result in a modification of the Constitution, unless some express rule in the Constitution grants this power.

The Constitution of 1947 was a compromise, and to a certain degree the last compromise, between all the political forces that succeeded to power following the collapse of the fascist regime. Later however, major choices, especially with regard to foreign policy and the inclusion of Italy in the Western block, were made in the face of opposition from the strongest Communist party in Western Europe.

A so called constitutional statute ("legge costituzionale"), having the same force as the Constitution and hence the force to derogate from the latter, could not be passed in Parliament in order to implement the Community Treaties as it would had been impossible to achieve the required two thirds majority of votes. It might seem banal, but all the theories and the Court's doctrines devised in order to affirm the legality of the statutes implementing the Treaties, are merely means to avoid the consequences of the original sin of not having used the special procedure of revision of the Constitution when implementing the Treaties.

One should keep in mind that the Constitutional Court was not even in place at the time of the entry into force of the Treaty of Paris. Ordinary judges and the administration were to a large extent unacquainted with the idea of the supremacy of the Constitution over ordinary statutes. The Constitutional Court, once established in 1956, had to fight a long struggle to give effect to many principles of the Constitution that had been considered as merely 'programmatic' as opposed to rules in the constitution having binding effect.

One could be forgiven for thinking that at the time of ratification of the Treaties, the -probably well founded- doubts as to the legality of the means (an ordinary statute passed in Parliament) used to give effect to them, were merely some kind doctrinal formalism. Nobody could seriously have imagined the Constitutional Court questioning such an important political choice.

ii. A difficult start

A legal realist, at the time of the ratification of the Treaty of Rome, would never have predicted that any court on the basis of the Treaties founding the common market could have prevented Parliament from proceeding to the nationalization of the electric industry. Nationalization of the industry was an enormous political issue and amounted to a major societal choice. It was perceived as a step towards a new economic model, refusing -to a certain extent- capitalism and was the result of a significant political shift.

In *Costa v. Enel* the Constitutional Court was not directly faced with the issue of the legality of the Treaties. The judge Conciliatore, when ruling on a cleverly 'invented' case,[28] assumed a) that the Treaty of Rome was properly ratified and executed by means of a statute, b) that a statute contrary to the Treaty would be unconstitutional.

It is well known that the Constitutional Court declared that indeed the State is bound by the Treaties but only as a subject of the international legal order. A statute contrary to the Treaties would hence be considered as a violation of international law but would not lose its value as a statute. The Constitutional Court noted that art. 11[29] only means "that under certain conditions, it is possible to enter into agreements which limit sovereignty, and that it is possible to implement them by an ordinary statute". However "[..] art. 11 has not given to the ordinary statute that implements the Treaty a superior effect to the one of any other statute".

To a certain extent the Italian Government itself caused the bold reaction of the Court of Justice in *Costa*. The case that came to the Court of Justice was not technically speaking the same that went to Rome, it was in fact a case pending before a different *Conciliatore*. The Italian Government nonetheless, relied on the decision of the Constitutional Court in order to argue the inadmissibility of the 177 reference. It was argued that the questions were irrelevant insofar the national judge was bound to apply the statute creating ENEL and not the Treaty which was enacted previously. The Court of Justice prompted by AG Lagrange reacted in -by now well known- words to that plea.

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[28] L. Ferrari Bravo "L'issue de l'affaire Costa c. ENEL devant le Conciliatore de Milan", [1967] *Cahier de Droit Européen*, 194.

[29] Which reads as follows:
"Italy condemns war as an instrument of aggression against the liberties of other peoples and as means for settling international controversies; it agrees on conditions of equality with other states, to such limitation of sovereignty as may be necessary for a system designed to ensure peace between Nations: it promotes and encourages international organizations having such aims".

However, in *Albatros,* which was decided immediately thereafter, the Court of Justice seemingly took a more cautious approach. Perhaps to avoid further frontal clashes with national jurisdictions or perhaps because the French government did not introduce arguments of the type used by the Italian government. The Court of Justice merely interpreted some articles of the Treaty without dealing with their effects on the subsequent French legislation in question.

It is commonplace to stigmatize the solution chosen by the Constitutional Court and to compare it to the one proposed by the Court of Justice as a reaction to it. What is certain is that the judgment of the Constitutional Court was hasty[30] and formalistic. One has the impression that the Court was not really interested in the process of European integration and was very annoyed at having to deal with something so important as the annulment of the nationalization of electricity industry as requested by Mr Costa in order not to pay an electricity bill of 1925 Liras (Little more than one dollar at today's rate).

It has however to be noted that at the time the legal situation was not so clear cut at the Community level either in relation to the effects of the Community obligations. It was often argued at the time that art. 5 of the Treaty showed that it rested upon the Member States to ensure the conformity of their legislation with Community law.[31]

Even the recognition of the legality of the Treaty on the basis of art. 11 was far from being a forgone conclusion. The article is drafted in very different terms both from art. 55 of the French constitution and from art. 24 of the German basic law. It was argued that art. 11 was drafted in order to enable Italy to adhere to the UN and that it could not be recycled and made applicable to the Community. Some authors claimed that it was merely programmatic and deprived of any legal value. Very respected and influential writers were still calling for the use of art. 10 as a peg on which to hang Community law (Quadri's theory).

The applicability of art. 11 to the Community Treaties, as to enable their valid ratification and implementation by ordinary statute was ascribed to Perassi.[32] During parliamentary discussions on the act of ratification of the ECSC Treaty the rapporteur (Ambrosini) referred to art. 11 in order to counter the objections of those requesting the use of a special 'constitutional statute'. It

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[30] The Court calls the Commission '*ad hoc* Commission' or 'Consultative Commission' and the Court of Justice 'High Court of Justice'.

[31] This was argued by the Italian Government in the Court of Justice in *Costa v. ENEL.*

[32] *La Costituzione Italiana e l'ordinamento internazionale*, 1952, now published in *Scritti giuridici*, Milan 1958.

was in fact Nicola Catalano that placed more emphasis than any other on art. 11. He remained nonetheless extremely critical of the judgment of the Constitutional Court.[33] To his mind art. 11 should have been interpreted so as to grant supremacy.

iii. Further steps. *San Michele* and the adoption of the theory of separation of legal orders.

The legality of Membership to the Community in *Costa v. ENEL* remained an *obiter dictum*. The very limited effect that the Constitutional Court reasoning gave to art. 11 left many questions open in respect of the legality of the Treaties. Private parties therefore, tried to contest the legality of the treaties, in particular the legality of the Coal and Steel Treaty in order to challenge, in the Italian courts, penalties imposed within the framework of the latter.[34] Some courts[35] in the wake of the decision of the Constitutional Court in *Costa v. ENEL* were able to discard the argument with a generic reference to art. 11 of the Constitution, while others went on to assess the legality of the provisions of the Treaties.[36]

The tribunal of Turin on the 19 of December 1964[37] made a reference to the Constitutional Court.It expressed doubts both as to the legality of an ordinary statute as the basis for Membership and as to the compatibility with art. 102 and 113[38] of the Constitution of the exclusive jurisdiction of the Court of Justice in the annulment and suspension of decisions of the High Authority. The tribunal, on the basis of the statement in *Costa* in accordance to which art. 11 did not give any specific value to the rules deriving from the Treaty, argued that these rules could not validly derogate from the above mentioned articles of the

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[33] See his annotation to *Costa v. Enel* in [1964] *Foro Italiano* I,465; [1965] *CMLRev.*

[34] *E.g.* Tribunale di Napoli, April 22, 1964, *Societa Metallurgica di Napoli s.p.a. c. CECA*, *Rivista di diritto Internazionale Privato e Processuale* [1965] 110; Tribunale di Roma, September 22, 1964, *S.p.a. Acciaierie ferriere di Roma c. CECA*, ibid., 116; Tribunale di Milano, September 28, 1964, *S.p.a. Meroni c. CECA*, ibid., 121.

[35] Pretura di Roma, order of March 11, 1964, *Giustizia civile* [1964] III, 130.

[36] Cases quoted *supra*, n° 32.

[37] The order is published in [1965] *Rivista di diritto internazionale privato e processuale*, 126.

[38] Which prohibit the creation of special courts and establish the principle of judicial protection.

Constitution.

The case *San Michele* was another step in a long saga that saw a number of Italian iron scrap users contesting in two occasions, without success, High Authority decisions before the Court of Justice.[39] The Constitutional Court in its decision[40] assessed *ex professo* the legality of the Treaties and established a framework of reference for the subsequent case-law. The Constitutional Court did not follow the suggestions of the parties to the main proceedings, which requested a general review of the conformity of the Treaty with the Constitution. The Constitutional Court referred to *Costa* in order to show that art. 11 authorized Membership.

The Constitutional Court firstly said that the constitutional guarantees deriving from the above mentioned articles applied only to individuals as part of the domestic legal order. It continued by stating that the Treaty, which involved more states formed a completely separate legal order. The Court further stated that the domestic legal order did not incorporate the Community legal order. The domestic legal order only recognized the international co-operation that is within the aims of the Community. Finally the domestic legal order determined the cases in which the activity of the organs of the Community, within their respective competence, had internal effects. The determination of the internal legal effects had to take into account the inviolable principle of judicial protection.

The Constitutional Court finally decided that the prohibition in article 104 of the Constitution on the establishment of special courts is valid only in connection with the domestic legal order and cannot be applied to the organs of the ECSC because they are part of a 'separate legal orbit' and are not subject to the sovereign powers of the Member states. The Constitutional Court went on nonetheless to decide that the rules of the Community were not in breach of the principle of judicial protection.

The *dictum* of the case is not extremely clear and looks very much to be a compromise. It is clear that the Constitutional Court refused to evaluate *en bloc* the legality of the statute implementing the Treaty. It stated that it would check only the compatibility of specific rules with the Constitution. Art. 11 was hence definitely established as a valid legal basis for Membership of the Communities. It was not clear however to what extent art. 11 enabled the Treaty to derogate from the other substantive provisions of the Constitution.

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[39] Joined cases 5 to 11 and 13 to 15/62 *San Michele and others v. High Authority* [1962] ECR 449 and Joined cases 2/63 to 10/63 *San Michele and others v. High Authority* [1963] ECR 327.

[40] 27/12/65 n° 98 *Acciaierie S. Michele c. CECA*, [1966] *Rivista di diritto Internazionale privato e processuale*, 106.

The fundamental result of this case is the adoption of the theory of separation of the two legal orders. The theory was used mainly as a device in order not to apply the specific rules of the Constitution to the organs of the Community. The subsequent case-law built upon this legal device.

One could try to read more in this case. In its theory of separation of the two legal orders the Constitutional Court seemingly hints to the idea of *Kompetenz-Kompetenz*. The effects of the activities of the organs of the Community are recognized in the internal order only within the limits of their sphere of competence. On top of this, before having effect in the internal order, Community acts should comply with human rights.

As a final remark about *San Michele* it is interesting to note that the Community was a party to the main proceedings and submitted observations to the Constitutional Court. In its observations the High Authority stressed that article 11 was the legal basis not only for Membership but also for supremacy. Prof. Giuliano,[41] counsel for the Community, had already adhered to Catalano's theories. The *Avvocatura* while recognizing the legality of Membership through art. 11 sustained the theory of the separation.

iv. The first in depth analysis: *Frontini*

It is well known that it was only in *Frontini*[42] that the Constitutional Court tried to spell out the principles contained in *San Michele*. For the first time the Constitutional Court ventured into a detailed analysis of the Community legal order. The tone rather than the theoretical framework is radically different from the previous decisions.

In their orders for reference to the Constitutional Court the Tribunal of Turin and Genoa contested the legality of the legislative power of the Community. The Constitutional Court declared that art. 11 not only authorized Membership but that in order not to deprive art. 11 of any significance it should be interpreted as allowing the Treaties to derogate from the Constitution without recourse to the special procedure of amendment. It went on to analyze the Community system proving that it complied with the conditions of art. 11.

In *Frontini* as in *San Michele*, the Constitutional Court on the one hand says that the provisions of the Italian Constitution are not applicable to the Community legal order and on the other hand it still goes on to demonstrate that

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[41] "Droit communautaire et droit interne des Etats membres" [1966] *Rivista diritto internazionale privato e processuale*, 220.

[42] 27/12/73 *Frontini e altro c. Ministero delle Finanze*, [1974] *Rivista di diritto internazionale privato e processuale*, 154.

the Community legal order offers analogous guarantees. If the theory of the separation of the orders is formally the *ratio* of these cases, it is clear that the Constitutional Court needed some policy arguments on which to base its judgment and it was convinced only by them.

Moreover, while addressing the alleged violation of the principle of judicial protection enshrined in the Constitution the Constitutional Court does not even use the theory of separation but rather demonstrates that the Community system offers an equivalent level of protection.

The recognition of the direct effect of regulations[43] was used to counter an objection raised by the *Avvocatura* which claimed that the regulations in question could not be applied by the judges in the main proceedings as they were bound to apply the subsequent national legislation reproducing them. This recognition was based once again on the doctrine of separation of the two legal orders. The distinct legal orders are nonetheless co-ordinated according to the distribution of competences guaranteed by the Treaty. The State, having limited its sovereignty, could no longer intervene in the sphere of competence of the Community.

The famous reservation on human rights seems to have been made *ad abundatiam*. On the one hand the Constitutional Court says that the legislative competence of the Community is limited to economic relations and on the other hand that there are rules in the Treaty which guarantee that Community law will not conflict with the Constitution in the area of civil and political rights. Nonetheless if art. 189 of the Treaty of Rome was to be interpreted as allowing the Community to trespass in this area the acts adopted on the basis of such an interpretation would be outside the scope of the limitations of sovereignty allowed by art. 11.

This reservation was prompted by *la doctrine*. The so called counter-limits, that is to say the limits to the limitations of sovereignty, are material rules prohibiting the Community from violating human rights and the fundamental principles of the Constitution. The Constitutional Court bases its reasoning on the fact that the limitations on sovereignty are allowed only for the aims of art. 11 and that the Treaty sets out concretely the limitations on national sovereignty.

The language used is the language of competence. In the decision the Constitutional Court noted that the legislative power of the Community is based on the precise allocation of competences. This construction which is the most persistent element in the evolution of the case-law, does not make things very clear in practice. The Treaty as a matter of fact establishes an allocation of

[43] The order of the Tribunal of Genoa was in fact contesting the legality of the regulations only in order to obtain a declaration of their direct effect. See De Caterini *op.cit.*

competences that is far from clear and in many areas the Member States and the Community have concurrent competences. The doctrine of the Constitutional Court has been interpreted practically as meaning wherever there is a piece of Community law it has precedence because it is in the Community sphere of competence.

The possibility that an act of the Community would be beyond the Community competence seemed in *Frontini* merely theoretical. The reservation is expressed in a short paragraph without much reasoning. Two different approaches are confused. The Constitutional Court when referring to the fact that the Treaty deals only with economic questions and does not interfere with political rights is referring, although quite roughly, to a real problem of competence; while by framing the limit of human rights in the same terms the Constitutional Court irremediably confuses the matters.

b. From *Frontini* to *Granital*: few remarks

i. The centralized control

It is well known that the doctrine of the separation of the legal orders and the acceptance of supremacy and direct effect in *Frontini* were not a solution for all the problems. It was not outlined what the judge should do when faced with a clash between Community legislation and subsequent domestic provisions.

The *ICIC*[44] case-law and the choice of centralizing enforcement in the hands of the Constitutional Court was a solution which was not only approved by a large section of *la doctrine* but seemed to many authors to be compatible with Community Law and the principle of Institutional autonomy of Member states. It had the enormous advantage of coming squarely within the accepted doctrines on the Constitutional system.

The Constitutional Court has continuously tried to systematize its case-law. The whole system of "atypical sources" and the possibility of declaring a statute unconstitutional for breach of rules incorporated by reference by the Constitution is rather common. The review of constitutionality of statutes for indirect breach of the Constitution is a device used, *inter alia*, in relation to statutory instruments in breach of the authorizing statute, for regional statutes in breach of national framework statutes and in all kinds of other instances. The *ICIC* doctrine put Community law in a similar, if not identical, constitutional position to the position of the agreement between the Catholic Church and the State and in a partially analogous position to the position of the agreements with other Churches. Community Law would have the same constitutional position

[44] 232/75 *Industrie Chimiche Italia Centrale* [1975] *Giurisprudenza Costituzionale*, 2211.

of international treaties on the treatment of non-nationals and so on.

The reaction of the Court of Justice in *Simmenthal* to supremacy 'all'italiana', was perceived in Italy by the majority of *la doctrine* as an abusive interference in the procedural autonomy of Member States. The Tribunal of Milan put the Constitutional Court in a very difficult position when it required it to declare the Treaty contrary to the Constitution in so far as Community law, as interpreted in *Simmenthal,* would be contrary to the fundamental principles of the Constitution.[45]

The Tribunal of Milan was basically requiring the Constitutional Court either to accept *Simmenthal* and the decentralized control or to take a clear position against it. The Constitutional Court found a very clever escape route by stating that in the pending case there was no clash between domestic and Community law, and hence the question was irrelevant.

To make such a dilatory decision the Constitutional Court took nearly three years. To take a clear position on the issue in the case of *Granital* the Constitutional Court took nearly five years. This is a hint of the conflicts in the Constitutional Court and the difficulties involved by the acceptance of decentralized enforcement of Community law. *Granital* presented itself to the Constitutional Court as the ideal case for the reversal of the previous case-law. It was the State which invoked Community law against a statute.

It is clear that the Constitutional Court wanted to terminate the conflict with the Court of Justice. The policy reasons for accepting the change are set out quite overtly in the decision. The conflict with the Court of Justice was unsustainable. The fact that in all the other Member states of the Community a satisfactory solution was found was clearly a further stimulus. Docket control reasons should not be forgotten. Constitutional Court proceedings are long and cumbersome. The Constitutional Court had an enormous back-load of cases since the seventies. Leaving lower Courts to deal with Community law would make things easier. Even if the solution of the conflict was very much sought after the Constitutional Court had to find a way to do it. As the drafter of the judgment once said 'One does not divorce only because his wife spends too much'.

Simmenthal required to move away from the doctrine of *ICIC.* That scheme, after all, meant that Community law had supremacy because of article 11 of the Constitution. The *ICIC* doctrine was in fact the supremacy of art. 11. However, the reasons for which the Constitutional Court could not accept, in *ICIC,* the supremacy of EC law *per se*, were still there.

There were two main obstacles to this acceptance. The first is that if one were to consider -as the Constitutional Court did- the conflicts between domestic

[45] 6/10/81 n. 176 *Comavicola* [1982] *Foro Italiano* I, 359 note Tizzano.

and Community Law as a conflict of competence and not as a hierarchical conflict of norms it would follow that domestic provisions in breach of Community law would only be in breach of the superior rule that defines the respective spheres of competence of the domestic and of the Community legislature. This superior rule is art. 11. The conflict between statutes and rules in the Constitution -like art. 11- can be solved only by the Constitutional Court.

Beyond the doctrinal concern derived from the theoretic dualist model there is a more fundamental one. The acceptance of the superiority of Community law *per se* would have meant accepting a shifting of the *grundnorm*. The Court felt that it was impossible to accept such a change as a result of the signing of the Treaty or even worse as a result of doctrines emanating from the Court of Justice.

The main result of *Granital* is showing that it was conceptually possible to solve the problem of supremacy without giving up the doctrine of *Frontini*. The effort to show that nothing much was changing is very evident throughout the whole judgment. It is clear that this was meant to obtain a *consensus* within the Constitutional Court. But it is more than that. The effort to stick to the model of separation and to show that the power of every judge not to apply domestic provisions conflicting with Community law was the logic consequence of *Frontini* is the response to the two above mentioned fundamental concerns of the Constitutional Court.

Granital can be defined as direct effect without supremacy. The Constitutional Court pointed out in *Granital*, and repeated forcefully in *Giampaoli*,[46] that the judge who applies Community law and does not apply the conflicting national provisions is not qualifying the national provisions as unconstitutional or void due to a trespass on the Community competence. The judge only applies Community law within its sphere. The conflicting domestic provisions are in another sphere.

The division of spheres of competence is established by the statute implementing the Treaty and granted by art. 11. This can explain the reservation of jurisdiction against statutes designed to attack the core principles of Community law. The Court seemingly considered that whenever Parliament changed the boundaries of the spheres of competence as established by the statute implementing the Treaty, the problem cannot be solved anymore by a reference to the respective spheres of competence. The only criterion for deciding on the legality of a 'denunciation' of the Treaties is the Constitution. The Constitutional Court considers the power to remove the limits to sovereignty the bottom line of sovereignty. Renouncing it would have been a change of *grundnorm*: a revolution.

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[46] 168/91 *Giampaoli* [1992] *Foro It.* I 660, with note Daniele.

With *Granital* the Court considered that the conflict with the Court of Justice was solved and in the process a revolution was avoided. The Court was cheating when it said that the results of its new doctrines coincided with the requirements set by the Court of Justice. What was probably true is that they wanted the conflict to be solved once and for all.

SKETCHY OBSERVATIONS ON THE POST-*GRANITAL* CASE-LAW

It is submitted that there are at least three strands in the post *Granital* case-law that has been described in detail in Cartabia's Paper. In one way or another they all depart from the nice construction of *Granital*.

a) Some cases extend the scope of the *Granital* doctrine. In doing so, the Court, especially in the cases that are perceived as being important, redefines in long *obiter dicta* the whole scheme of the relationship between the two legal orders. The Constitutional Court claims that its case-law is a mere application of *Granital*. But it extends its scope[47] and at times comes out with solution hardly compatible with the Community law orthodoxy, if not in the result in the reasoning.

As an example the Constitutional Court stated that the rulings of the ECJ have direct effect[48] or that it is possible to legislate (through a referendum)[49] against Community directives in consideration of the fact, that, given the directives direct effect, the legislation would be inapplicable.

However, this line of case-law remains the most coherent even in the cases in which the clash with the Court of Justice is deliberate, as it was in *Fragd*.[50] The "pouvoir reservé" that the Court retained is some kind of security

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[47] This extension has avoided many of the inconsistencies of a strict reading of *Granital* with the requirements set by the ECJ. For a very convincing analysis of these inconsistencies see BARAV "Cour Constitutionnelle Italienne et Droit Communautaire: le fantôme de Simmenthal", [1985] *Revue trimestrielle de droit Européen,* 313.

[48] 113/85 *BECA*, [1985] *Giurisprudenza Italiana* 388 for 177 rulings, and 369/89 *Provincia di Bolzano*, [1990] *Diritto Comunitario e degli scambi internazionali* 395, for 169 rulings.

[49] 64/90 *referendum on pesticides* [1990] *Diritto Comunitario e degli scambi internazionali* 445, [1991] *RTDE* 296.

[50] 13/4/89 n. 232 *Fragd* [1990] *Foro Italiano* I, 1855.

valve. Federico Sorrentino has recently shown[51] that this represents a sign of a situation in which notwithstanding the supremacy of Community law (which in the formal traditional analysis would mean that sovereignty has passed from the State to the Community) the final decision in critical cases ("exceptional cases" to use C. Schimitt terminology used by Sorrentino) remains with the State.

All these cases could be considered logical developments of *Granital*. Even if the Constitutional Court does not accept supremacy in *Simmenthal* terms, the system works as if supremacy was there. Pre-emption makes the sphere of competence of the Community flexible. Hence whenever there is a rule of Community law it is applied despite the conflicting national provisions.

In the early post-*Granital* cases, in particular, the Constitutional Court has been very careful in sending to lower courts the message that the control of legislation against Community law should be decentralized. To do so the Constitutional Court discarded even cases in which the clash with Community law was not the only ground of unconstitutionality.[52]

What one may regret is the refusal of the Court to make 177 references. The Court recognized that it had a faculty to make references for preliminary rulings to the Court of Justice in *Giampaoli*,[53] but it did not make use of it. Previously[54] the Constitutional Court sent a case for which a 177 was needed back to the judge who made the Constitutional reference telling him to make a reference to Luxembourg. This made things in practice very difficult but the Constitutional Court was not flagrantly violating article 177.

One might have thought that the Constitutional Court was not a national court within the meaning of article 177. The acknowledgment by the Constitutional Court that it is entitled to make references to the Court of Justice makes it impossible for the Constitutional Court not to be considered a 'court against whose decisions there is no judicial remedy' within the meaning of article 177. There might be room for arguing this in relation to constitutional review proceedings upon reference, in which the ruling is only an "incidente" of other proceedings. It is clear however that the Constitutional Court is acting as a supreme administrative court in cases of conflict between State and Regions. In these cases the Court gives a ruling without appeal at the end of a

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[51] "La Costituzione Italiana di fronte al processo di Integrazione Europea" [1992] *Quaderni Regionali*, 417.

[52] This is very clear in case 113/85 *BECA*, [1985] *Giurisprudenza Italiana*, 388.

[53] 18/4/91 n.168 [1992] *Foro It.* I 660, with note Daniele.

[54] Case 206/76 [1976] *Foro It.*, I . 2298, with note Tizzano.

contentious procedure.

No other Constitutional Court makes 177 references, but *Giampaoli* was meant to be a Community friendly move and ended up by being a blatant violation of the Treaty.

b) There is a second line of cases, particularly very minor ones, in which the Community law issues are sometimes not fully appreciated.

The Constitutional Court sometimes showed itself to be careless. In case 286/86 *Pulos*[55] while quoting *Granital*, the Court checked the conformity of Italian legislation with Community law, in a pure pre-*Granital* fashion. The case did not seem to fall under the reservation made for legislation affecting to the core principles of the Treaties.

Another example is case 172/89 *Solcio*[56] where they seem to say that external commercial policy is outside of the scope of the EC competence.

What is particularly striking in this line of cases is the wording of the Constitutional Court's dicta. At times they are completely at variance with *Granital*. L. Daniele[57] notes that "De tels passages sont peut-être le signal d'une certaine fatigue intellectuelle de la part de la cour vis-à-vis d'une vision somme toute artificielle et pourtant difficile à maîtriser.."

c) Finally there are the cases in which *Granital* simply does not work. In particular the Constitutional Court is not satisfied with decentralized control in many cases.

In an impressive line of decisions[58] on regional legislation in breach of a Community directive the Constitutional Court went on to rule on the issue itself rather than sending the case to the referring judges according to the *Granital* orthodoxy. It has been argued that the directive did not have direct effect. It might be true. Nonetheless it remains an whole area of law in which legislation in breach of Community law needs to be declared unconstitutional by the Constitutional Court rather than being disapplied.

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[55] [1987] *Giurisprudenza Costituzionale 2309.*

[56] Order 172/89 *Cantieri Nautici Solcio* [1989] *Giurisprudenza Costituzionale*, 806.

[57] Après l'arrêt *Granital..*" [1992] *Cahier de Droit Européen,* 3.

[58] n° 14/91 *Incampo*, n° 117/91 *Edino Jancovits*; n° 213/91 *Benedetti and other*; n° 307/91 *Ragogna*, n° 306/92 *Locatelli*; all these judgments are summarized in [1994] *Rivista di diritto Europeo*, 610.

THE PROBLEM OF COMPETENCE

I tried to show in section 2 that the framework of the doctrines of the Constitutional Court is the concept of 'Competence'. The Court does not necessarily use this word but it refers to the idea of competence. Since 'the separate legal orbits' of *San Michele* the basic idea is that each legal order has its sphere of competence and cannot interfere with the other legal order.

In *Frontini* it is said that the distribution of these competences is established by the Treaty. The Constitutional Court has not built upon this, as it was more concerned with material limits to Community intervention. The fact that in *Frontini* the material limit of human rights was framed in terms of competence has probably misplaced the question.

In *Frontini* the Court apparently considered that should the Treaty be interpreted by the Community Institutions as giving power to violate human rights it would be deprived of its effect in Italy. In the case of *Fragd* the Constitutional Court has applied for the first and only time this doctrine. If one looks more carefully one can even spot a further variation on the theme. One might have thought that a community act violating human rights would be - according to *Frontini*- beyond the scope of the Treaty and hence beyond the scope of article 11 of the Constitution being the fruit of an 'aberrant' interpretation of the Treaty. In *Fragd* in order to put its power of control into practice the Constitutional Court had to bend once again its own doctrine. In order to have a peg on which to hang its reprobation of a doctrine of the Court of Justice it had to decide whether article 177, as interpreted by the Court of Justice, fell under article 11 of the Constitution and not whether the 'aberrant' ECJ case law on temporal effects of preliminary rulings fell under article 177 of the Treaty.

In the wake of the German decision on Maastricht, can one expect the Court to control the legality of Community acts allegedly beyond Community competence, as established by the Treaty, but not contrary to a material rule deriving from the Italian constitutional order? The influence of the German model should never be underestimated.[59] There is nonetheless a big procedural problem. The Constitutional Court, according to its dualist model, can review only the statute implementing the Treaty. In other words it can review only Treaty articles and acts adopted on the basis thereof. The Constitutional Court in order to check the conformity with human rights of a regulation would

[59] Sorrentino has immediately drawn the attention on the implications for Italy of the approach of the *Bundesverfassungsgericht*. "Ai limiti dell'integrazione europea: primato delle fonti o delle istituzioni comunitarie?" [1994] *Politica del diritto* 189 also in *Scintillae Iuris-Studi in memoria di G. Gorla*, Giuffré, Milan, 1994.

actually assess the legality of art. 189 of the Treaty in as much as it granted to the Council the power to enact the contested regulation. This is precisely what happened in *Fragd*.

This type of review procedure can not work for *ultra vires* acts. To say that an act is beyond the competence of the Community means that it was not taken on the basis of the Treaty. The Constitutional Court would not find anything in the statute implementing the Treaty to be declared contrary to the Constitution.

Only decentralized control by every court could be possible in relation to *ultra vires acts*. It does not seem very likely that the Court would accept to have lower judges checking the legality of Community acts.

One can accept that under the dualist model of the Constitutional Court *Kompetenz-Kompetenz* is for the national courts, but should the Constitutional Court decide to exercise the control over competence, it will be blocked by a procedural deadlock.

It is submitted that the Constitutional Court will try to control even Community acts *ultra vires* according to the material criteria set out in *Frontini* and *Granital*.

The Constitutional Court took upon itself in the eighties to overcome the doctrinal and philosophical barriers concerning the recognition of supremacy. There were several reasons for this. Certainly the Constitutional Court did not want to remain the *arrière-garde* of the world of lawyers in Europe. On top of that, the Court realized the necessity to grant effectivity to a legal system, the one of Community law, which, largely due to the inefficiency of the Italian administration, was not giving to Italian citizens and economic operators the rights to which they were entitled to.

The changing of the political inclination towards the Community together with a more realistic appreciation of the process of European Integration, which is no longer considered as some kind of providential source of rights for the citizens and efficiency for the administration, as well as the coming of the *Bundesverfassungsgericht* to positions that recall a traditional legalistic perception of the process of European integration -which the Corte Costituzionale has never definitely abandoned- may lead to the development of the case-law in new directions.

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