Special Issue – Preliminary References to the CJEU
Part Two

Pouring New Wine into New Bottles? The Preliminary Reference to the CJEU by the Italian Constitutional Court

By Giorgio Repetto[*]

A. Introduction

In the ongoing debate about preliminary references raised by constitutional courts, the Italian *Corte costituzionale* (Constitutional Court, hereafter, ICC) is apparently a latecomer. Despite its pivotal role in the founding era in which the relationships between Community law and national legal orders were assessed, its reluctance towards preliminary references to the ECJ (since 2009: Court of Justice of the European Union, CJEU)[1] has repeatedly been invoked as a standard in legal scholarship. Whereas from the early 1960s onwards it engaged dialectically with the CJEU, and contributed to some basic tenets of EC law *vis-à-vis* national law (direct effect, primacy, limits concerning basic constitutional principles, so-called *counter-limits*),[2] it appeared for a long time to be almost silent on the crucial aspect concerning its ability to enter into a direct dialogue with the CJEU via the preliminary reference procedure. Although this ambivalence may appear contradictory, one should not forget that behind the scenes, dialogue took place along indirect or "hidden" channels. Either in response to claims raised by the judiciary in *incidenter* proceedings, or in adjudicating disputes between State and Regions in *principaliter* ones, the ICC often sent messages and alerts to the CJEU. In so doing, it indirectly contributed to shaping the relationships between EU law and domestic law.[3] In the long run, the absence of the ICC's direct involvement in the relationships with the CJEU has, however, estranged its action from the core of EU law in favor of the partnership between the CJEU and the common judges (both ordinary and administrative).[4]

---

[*] Associate Professor of Constitutional Law, University of Perugia.

[1] For the sake of uniformity, throughout the present article I will use the current denomination of the Court even when I refer to pre–2009 cases and situations, whereas EU law is used to refer to Union law in general.

[2] Like in the seminal *Costa* (judgment 7. March 1964, no. 14), *Frontini* (judgment 17. Decembrer 1973, no. 183) and *Granital* (judgment 8. June 1984, no. 170) cases. All judgments and orders of the ICC are available at http://www.cortecostituzionale.it/actionPronuncia.do. A selection of recent cases (since 2006) translated into English is available at http://www.cortecostituzionale.it/ActionPagina_1260.do.

[3] For an insightful overview on hidden dialogue, see Giuseppe Martinico, *Judging in the Multilevel Legal Order: Exploring the Techniques of 'Hidden Dialogue,'* 21 K.L.J. 257 (2010).

[4] Moving from the functions demanded of Constitutional Courts in the process of European legal integration as elaborated by Monica Claes and Bruno De Witte, one may summarize the overall approach of the ICC in the

https://doi.org/10.1017/S2071832200021210 Published online by Cambridge University Press

In my article, I will firstly demonstrate that the long-standing refusal of the ICC to raise a preliminary reference is not to be deemed an illogical consequence of the dialogical attitude emerging from the *Granital* case, but rather the direct corollary of the peculiar pluralism enshrined in that decision. Far beyond the formal reasons referred to by the ICC in justifying that refusal, its crucial objective was that of shielding constitutional adjudication from interferences stemming from the CJEU. In this way, the integration model centered upon "coordination and separation" between EU and national law did not affect the autonomy of the ICC to establish the boundaries and the conditions of the relationship (B). In the second section of this article, I will examine the first preliminary reference raised by the ICC in 2008 in the renowned case concerning "luxury tax." Despite the importance accorded to this decision, for the most part it must be considered to apply *Granital*, since its origin in a *principaliter* proceeding does not call into question the need for the ICC to be shielded against the displacement of the "right to the last word" to the alliance between the CJEU and the judiciary (C). In the third section, I will focus on the most recent preliminary reference raised by the ICC in 2013, concerning fixed-term workers in public schools. On first glance, this case could be depicted as the carrying out of the traditional attitude of the ICC *vis-à-vis* the CJEU, since the EU norms at stake were not deemed to have direct effect and were not, therefore, directly enforceable by judges. Against this background, my argument is that this case paves the way for a new era of relationships between the two Courts, in which the ICC dismisses the most conservative and defensive aspects of its case law (D), first of all those connected to the problem of dual preliminarity and to the rigid alternative between direct and indirect effect (E). In reaching a new balance, the ICC seeks, however, a new way to avoid dismantling its systemic role of "last resort guardian." Within this context, I argue that its peculiar role should be that of a conveyor of constitutionally sensitive issues at supranational level. In the final section, I will briefly sketch out the systemic consequence of this paradigm shift, both at internal and at supranational level. On the one hand, if the ICC is likely to inaugurate a phase of direct dialogue aimed at injecting constitutional blood at EU level, it should provide a clearer guidance of its action, for example by abandoning the most hostile traits of its case law concerning dual preliminarity. On the other hand, the CJEU is called to encourage this attitude, by showing a peculiar responsiveness towards voices and reasons that seek to enlarge the constitutional foundations of EU law (F).

---

following terms: extensive *facilitation* of the legal integration between Community law and domestic law, procedural *resistance* against a shift of ultimate judicial authority in internal law, and a minor direct *contribution* to the development of a common constitutional heritage for Europe. Monica Claes and Bruno De Witte, *The Role of National Constitutional Courts in the European Legal Space*, *in* THE ROLE OF CONSTITUTIONAL COURTS IN MULTILEVEL GOVERNANCE 77, 81 (Patricia Popelier, Armen Mazmanyan & Werner Vandenbruwaene eds., 2013).

https://doi.org/10.1017/S2071832200021210 Published online by Cambridge University Press

B. Form and Substance in Establishing Reluctance: *Granital* and Preliminary References

If one tries to briefly outline the main judicial episodes in which the ICC has shown its reluctance towards the preliminary ruling procedure, it appears to be quite evident that the formal reasons adopted in the cases as to the ICC's unwillingness to enter into a direct dialogue are only a part of the story. At a deeper level, its refusal goes hand in hand with the basic theoretical mindset that has shaped the relationships between EU law and domestic law over the years.

I. On Strategic Dualism

As is well known, the current state-of-the-art of these relationships can be summarized by the doctrines enshrined in *Granital*, in which the ICC fully accepted the basic tenets of the *Simmenthal* case law of the CJEU, whilst at the same time offering a framework different to that of the monist one adopted by the CJEU in order to justify its acceptance of the basic principles enshrined therein. Unlike in its previous case law, on that occasion the ICC acknowledged a direct and prevailing effect of EU law and consequently accorded to the judiciary the possibility of directly setting aside conflicting domestic law, without needing to involve the ICC in order to declare it unconstitutional. The acceptance of the *Simmenthal* doctrine is, however, limited to the final outcomes of the relationship between national and supranational law, since the theoretical background of *Granital* is devoted to sharply contrasting the monist tenets of the CJEU in favor of a sort of "strategic dualism." Even if the ICC declared that, due to Article 11 of the Constitution,[5] EU law amounted to a directly enforceable law within the domestic legal order and prevailed over conflicting internal law, this was made possible by stating that the two legal orders were "autonomous and separated, even if coordinated according to the separation of competence established and guaranteed by the Treaty."[6] The autonomy of the two legal orders, in other words, is the key theoretical instrument that allows the ICC to let EU law "in" whilst ensuring that this is made possible by an autonomous choice of the Italian legal order. This sort of unease towards a strict compliance with the CJEU's doctrines is, moreover, demonstrated by the fact that, according to *Granital*, the internal act that conflicts with EU law is not properly set aside or disregarded (*disapplicato*), but rather *non-applied* (*non applicato*), that is, simply ignored by the judges. Though the difference may appear irrelevant or quite formalistic, the rationale behind this choice is to enforce a separation between legal orders, in that domestic law is not illegal as a consequence of a violation of EU law as a higher law, but as an autonomous choice of the Italian legal order to accord a prevalence to the latter over the former within the framework of a separation of competence. In the words of the rapporteur in *Granital*, Antonio La Pergola:

[5] Article 11 reads, "Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends."

[6] Judgment No. 170/1984 at para. 4.

https://doi.org/10.1017/S2071832200021210 Published online by Cambridge University Press

> [t]he dualist rationale behind this result is that Italy has chosen to grant superiority to international law *by withdrawing its national law* … Italy applies Community law because the Constitutional Court interprets Italian constitutional principles as indicating that the Italian legal orders *chooses not to impede the application of Community law, not because Italian law is subordinate to Community law as maintained by the Court of Justice*.[7]

A similar commitment to strategic dualism is, moreover, evident when *Granital* traces the boundaries of its doctrine along the distinction between EU law provided with direct effect and not. While in the former case, the withdrawal of national law allows supranational law to be directly enforceable by judges, in the latter case the national rule maintains its validity and is therefore subject to review by the ICC, which is exclusively entitled to declare it as conflicting with Article 11 of the Constitution. This reinforces the "separate but coordinated" principle, since when non-directly enforceable EU law is at stake, the task of the judiciary is to involve primarily the ICC, that re-expands its role *vis-à-vis* supranational law. Within this kind of "separation of sovereignty,"[8] the distinction between direct and indirect effect is of utmost relevance, because it provides the main criterion that judges must rely on in order to convey their claims to the two different regimes (non-application or declaration of inconstitutionality) and therefore to the two Courts that are the ultimate guardians of those regimes (the CJEU and the ICC).

Against this background, one may ask whether this strategic dualism exerted an influence on the possibility of the ICC itself raising a preliminary reference. Before *Granital*, in the only case in which the ICC had been called on to raise such a reference, it refused to do so and delegated this task to the referring judge.[9] At first sight, this solution appeared extravagant, because following the decision of the CJEU, the ICC in the pre-*Granital* regime would have been called on to reexamine the case anyway.[10] Nevertheless, the solution

---

[7] Antonio La Pergola and Patrick Del Duca, *Community Law, International Law and the Italian Constitution*, 79 AM. J. INT'L L. 598, 614, 615 (1985) (emphasis added). The doctrinal roots of a similar judicial strategy must be seen in the pluralist theory of Santi Romano, whose seminal oeuvre L'ORDINAMENTO GIURIDICO 146 (1951, 1st ed. 1918) is devoted, among others objectives, to challenging the idea that relationships between legal orders are entirely shaped by the principle of exclusivity. In this light, coordination occurs as the outcome of the acceptance by one legal order of the rules adopted by another, that are acknowledged by the former not as a mere fact but in their proper legal relevance.

[8] La Pergola and Del Duca, *supra* note 7, at 615.

[9] Order 28. July 1976, No. 206.

[10] Marco Dani, *Tracking Judicial Dialogue—The Scope for Preliminary Rulings From the Italian Constitutional Court*, 16 MAASTRICHT J. EUR. & COMP. L. 149, 154 (2009).

https://doi.org/10.1017/S2071832200021210 Published online by Cambridge University Press

provided in that case demonstrates that within that framework, the ICC was undoubtedly more directly involved with EU law and, paradoxically, even though supranational law was accorded a minor status, it was easier for the ICC to enter a direct dialogue with the CJEU.[11] On the contrary, with *Granital,* the task of dealing with EU law was for the most part delegated to common judges. This had the effect of indirectly displacing the ICC from its role of interlocutor with the CJEU. At a deeper level, from that moment on the difficulty for the ICC to raise a preliminary reference has been dramatized by the effort of the Court to expand the premises of the "separated but coordinated" principle from the sphere of the relationship between legal orders to the one involving the relationship between judicial actors. In other words, just as *Granital* hallows the self-limitation of national law when EU law is invoked, in the same vein the ICC decided autonomously to retire from the dialogue with the CJEU and to delegate this task to the judiciary. In doing so, while the judiciary was completely entrapped in the doctrines of primacy and direct effect developed by the CJEU, the role of the ICC remained shielded by the supremacy accorded to the Italian Constitution and to the reservation of sovereignty enshrined therein.[12]

II. Separation of Powers and De Facto *Monism*

The founding rationale of *Granital* lies therefore in linking the normative status of EU law in the domestic legal order (which is fully consistent with the *Simmenthal* doctrine) with a delegation to the common judges of the task of managing the application of supranational law and references to the CJEU.[13] This accommodation led to a misplacement[14] of the ICC, since its action was increasingly detached from the application of EU law and from the chance of an interaction with the CJEU.[15] From the internal point of view, this solution is

[11] Federico Sorrentino, *Svolta della Corte sul rinvio pregiudiziale: le decisioni 102 e 103 del 2008*, *in* 52 GIURISPRUDENZA COSTITUZIONALE 1288, 1289 (2008).

[12] Enzo Cannizzaro, *Rinvio pregiudiziale e Corti costituzionali nazionali*, *in* SCRITTI IN ONORE DI GIUSEPPE TESAURO, 819, 822 (2d vol. 2014). On a similar dialectic between primacy and supremacy, see Giuseppe Martinico & Federico Fontanelli, *Between Procedural Impermeability and Constitutional Openness: The Italian Constitutional Court and Preliminary References to the European Court of Justice*, 16 EUR. L. J. 345, 349 (2010).

[13] In so doing, the ICC took into account the need to integrate in the same theoretical setting what Joël Rideau, *Les garanties juridictionnelles des droits fondamentaux dans l'Union Européenne*, *in* L'UNION EUROPÉENNE ET LES DROITS FONDAMENTAUX 75, 91 (Stéphane Leclerc, Jean-François Akandji-Kombé & Marie-Joëlle Redor eds., 1999), defined as "*hiérarchies normatives*" and "*hiérarchies institutionnelles*".

[14] One of the earliest and most insightful accounts of this misplacement has been made by Sergio Panunzio, *I diritti fondamentali e le Corti in Europa*, *in* I DIRITTI FONDAMENTALI E LE CORTI IN EUROPA 3, 23 (Sergio Panunzio ed., 2005).

[15] An insightful critique of a similar misplacement can be found in Marta Cartabia, *Europe and Rights: Taking Dialogue Seriously*, 5 EUR. CONST. L. REV. 5, 25 (2009).

https://doi.org/10.1017/S2071832200021210 Published online by Cambridge University Press

perfectly consistent with a pluralist approach that works "under shifting *grundnorms*,"[16] since the full acceptance of direct effect and *primauté* at internal level coexists with the preservation of the autonomous role of the ICC, which entails the safeguarding of a sphere of constitutional identity and not the application of EU law. As in the words of the former President of the ICC, Valerio Onida: "to each one his own job."[17]

One may argue that a similar outcome, if assumed in general, was not inevitable. As has been previously highlighted, the ICC remained formally entitled to decide and to give effect to Community law in those cases where not directly enforceable EU law was at stake. But on several occasions, the ICC decided simply "not to decide" these cases, either because domestic law was not deemed to conflict with supranational law[18] or because the task of raising a preliminary reference was anyway shifted to common judges. If priority had been given to the referral of constitutionality—so argued the ICC[19]—the decision of the ICC risked being unnecessary because the CJEU was entitled to proffer subsequently a different interpretation that was binding for the referring judge.[20]

The capacity of the strategic rationale of *Granital* to expand its premises is even more evident if one considers that whenever the CJEU was involved by judges in cases concerning EU law *without* direct effect, its judgment could in any case be enforced by the referring judge. According to the case law of the ICC,[21] the CJEU's decisions must be accorded direct effect, so that at the end of a preliminary ruling procedure the referring judge is entitled to give it effect without needing to further involve the ICC (which, if anything, would declare the referral inadmissible, as in every other case concerning directly applicable EC law). The distinction between direct and indirect effect, though formally effective, appeared therefore to be quite fictitious in grasping the exceptions to the *Granital* doctrine, since even in these cases the common judges were called to apply EU law and to enter into a dialogue with the CJEU. The combination of these jurisprudential strains, a mix of judicial isolationism and commitment to legal integration,

[16] Daniel Sarmiento, *The Silent Lamb and the Deaf Wolves. Constitutional Pluralism, Preliminary References and the Role of Silent Judgments in EU law*, *in* CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND 285, 289 (Matej Avbelj & Jan Komárek eds., 2012).

[17] Valerio Onida, *«Armonia tra diversi» e problemi aperti. La giurisprudenza costituzionale tra ordinamento interno e ordinamento comunitario*, 22 QUADERNI COSTITUZIONALI 549, 551 (2002).

[18] Order 23. June 1999, No. 267.

[19] Orders 29. December 1995, No. 536; 26. July 1996, No. 319; 18. April 2008, Nos. 108 and 109.

[20] According to the rules regulating the procedure before the ICC, an order of referral raised by a judge is admissible insofar as the decision of the ICC is necessary in order to define the case pending before it (*criterio della rilevanza*).

[21] Judgment 23. April 1985, No. 113 and judgment 11 July 1989, No. 389.

increased the misplacement of the ICC and left the core of the judicial dialogue to the alliance between the CJEU and the common judges.

Besides this, the only real *Granital* free area is that concerning *principaliter* rulings, raised by State and Regions in cases of conflicts concerning the exercise of legislative competences. In these proceedings, as will be further shown, the ICC operates as the only judge, so that nobody else can be delegated the responsibility of giving full effect to supranational law and, consequently, of raising a preliminary reference to the CJEU. Despite this, until 2008 the ICC decided on several occasions to declare internal legislative provisions which conflicted with the EU Treaties as void,[22] but never referred to the CJEU.

Apart from *principaliter* rulings, the basic tenets of the "separated but coordinated" principle, first of all the divergence in the relationships between legal orders and those among judicial actors, represent the theoretical framework within which the question of the preliminary reference by the ICC should be grasped. As we will see in the next part, the reasons given over the years to justify its reluctance are nothing but a plain corollary of the stance taken in 1984.

III. Preliminary References and "Definitional Struggles"

Given the need to reinforce a separation of powers between the CJEU and the ICC and in light of the delegation of the task to refer to the judiciary, the explicit refusal of the ICC to raise a preliminary reference should come as little surprise. Following the precedent set by Case No. 206/1976,[23] the ICC eluded the issue for a second time in 1991[24] when, in rather abstract terms, it stated that the establishment of the direct effect of an EC Directive could be ascertained by the CJEU upon referral of the judge or, alternatively, of the same ICC. Despite this potential opening, this precedent has remained isolated, since the ICC has never used this possibility.

In subsequent decisions, the ICC clearly formulated the terms of its refusal to be engaged in a dialogue with the CJEU, by stating that its role is strictly linked to a function of constitutional control and of supreme guarantor of the allegiance to the Constitution by the constitutional organs of the State and of the Regions, so that it cannot be considered to be a national judicial authority in the terms of the then Article 177 TEC (currently Article 267 TFEU).[25] Although the argument based on the non-judicial nature of the function

[22] Judgments 10. November 1994, No. 384; 30. March 1995, No. 94; 13. January 2004, No. 7; 28. March 2006, No. 129.

[23] Order 28. July 1976, No. 206.

[24] Judgment 18. April 1991, No. 168.

[25] *See*, *inter alia*, orders 29. December 1995, No. 536; 26. July 1996, No. 319.

https://doi.org/10.1017/S2071832200021210 Published online by Cambridge University Press

exercised by the ICC has since played a key role in justifying the reluctance of the Court, it has always appeared as a mere *façade* hiding the institutional balance displayed by the "strategic dualism" solution.[26] Much more than a similar definitional struggle, what is worth highlighting is the set of judicial arguments used by the ICC to further enhance the shield mentioned above, which has aimed to prevent direct contact with the CJEU's decisions.

On the one hand, the ICC has declared inadmissible those judicial referrals affected by dual preliminarity, both when the judge decided not to refer to the CJEU before addressing its claim to the Constitutional Court, and when the judge decided to contemporarily raise two referring orders to the CJEU and to the ICC. In the same vein, the ICC on several occasions[27] gave the file back to the referring judge (*restituzione degli atti*) because a subsequent judgment of the CJEU made it necessary for him to evaluate whether the claim was still necessary.

All these arguments have been widely criticized by many legal scholars because of their inconsistency with some basic assumptions that regulate both the role of the ICC at internal level and the relationships between supranational and domestic law.[28] It suffices here to recall that the status of "court or tribunal of a Member State" is an autonomous notion of EU law that cannot be self-standingly defined by national legal orders. Moreover, one may add that the general prohibition of dual preliminarity does not take into account the fact that the two questions can arise independently from each other, so that the decision of the constitutional adjudicator is not necessarily destined to possible conflict with the one adopted by the CJEU (and *vice versa*).[29]

For all these reasons, it should be clear why I decided to define the arguments used by the ICC in order to pinpoint its refusal as nothing more than "definitional struggles." They each appear to be largely incapable of providing a sound justification for the isolationist view

---

[26] Not to mention the legal flaw of a similar stance, given that the ICC previously qualified itself as a "judge" in order to raise a constitutional referral before itself. Tania Groppi, *La Corte costituzionale come giudice del rinvio ai sensi dell'art. 177 del trattato CE*, *in* GIUDICI E GIURISDIZIONI NELLA GIURISPRUDENZA DELLA CORTE COSTITUZIONALE 171, 187 (Pietro Ciarlo, Giovanni Pitruzzella & Rolando Tarchi eds., 1997).

[27] Orders 14. March 2003, No. 62; 20. April 2004, No. 125; 24. February 2006, No. 70.

[28] An extensive account of these critical stances can be found in Marta Cartabia, *La Corte costituzionale italiana e il rinvio pregiudiziale alla Corte di giustizia europea*, *in* LE CORTI DELL'INTEGRAZIONE EUROPEA E LA CORTE COSTITUZIONALE ITALIANA 99, 107 (Nicolò Zanon & Valerio Onida eds., 2006).

[29] AUGUSTO CERRI, CORSO DI GIUSTIZIA COSTITUZIONALE PLURALE 181 (2012). In a similar vein, see Marta Cartabia, *Considerazioni sulla posizione del giudice comune di fronte a casi di «doppia pregiudizialità» comunitaria e costituzionale*, 120 II FORO ITALIANO 222, 224 (1997). On dual preliminarity as a more general problem concerning multiple loyalties of judges in multilevel contexts, *see* Giuseppe Martinico, *Multiple loyalties and dual preliminarity: The pains of being a judge in a multilevel legal order*, 10 I·CON 871 (2012).

https://doi.org/10.1017/S2071832200021210 Published online by Cambridge University Press

purported by the ICC. Taken as a whole and considered from the theoretical standpoint elaborated by the ICC, they appear for what they are: corollaries of a more general precommitment towards a separatist attitude established by the ICC in order to find a balance between the normative bounds deployed by EU law on the domestic legal order and the institutional autonomy that the ICC carved out *vis-à-vis* the CJEU.[30]

Two cases decided by the ICC in 2002 and 2004 provide a useful example of both problems raised by this approach for the effectiveness of judicial protection and the underlying implications for the relationships between domestic and EU law.

The first case is the prequel of the well-known *Pupino* saga, decided by the ICC in 2002.[31] The referral order raised by the *Tribunale di Firenze* sought to extend the application of the "special inquiry procedure" for young children regulated by Article 398 of the Code of Criminal Procedure with regard to offences other than sexual crimes. In its decision, the ICC dismissed the claim by stating that the provision at stake was to be considered *lex specialis* and therefore could not be extended to similar situations. What matters, in this decision, is that the ICC in substance ignored the argument put forward by the referring judge, according to which the extensive interpretation was supported by a Framework decision,[32] though lacking direct effect, that required the introduction of similar inquiry proceedings when vulnerable subjects were involved in a criminal case. The rest of the story is well known and does not need to be analyzed in detail.[33] The decision of the CJEU,[34] while extending the notion and the consequences of the direct effect doctrine to the Third Pillar and to Framework decisions, in a certain way confirmed the impossibility of extending the special procedure in the case at stake, since the consistent interpretation of national law could not be pursued *contra legem*. The point, as highlighted by Marco Dani, is that the refusal of the ICC to deal with the effects of the Framework decision by lodging a preliminary reference to the CJEU leaves the common judge without a clear yardstick for the decision. While the ICC justified the narrower interpretation of the procedural rules, it did not state that the interpretation endorsed by the CJEU was unconstitutional, with the consequence that it was not clear whether the extensive interpretation had to be considered *contra legem*: "[a] similar uncertainty could have probably been avoided had

[30] The intertwining of these two aspects has been highlighted by Cartabia, *supra* note 15, at 115 and Dani, *supra* note 10, at 157–58.

[31] Judgment 18. December 2002, No. 529.

[32] EU Framework decision 2001/220 of 15 March 2001, O.J. 2001 L 82/1.

[33] *See* Eleanor Spaventa, *Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Decision in* Pupino, 3 EUCONST 5 (2007).

[34] Case 105/03, Criminal proceedings against Maria Pupino, 2005 E.C.R. I–5285, para. 47.

https://doi.org/10.1017/S2071832200021210 Published online by Cambridge University Press

the Constitutional court referred the case to the Court of Justice, a wise solution that the former apparently did not consider."[35]

The second case concerned the criminal norms that mitigated the punishment for the offence of false accounting (*falso in bilancio*). Several judges turned alternatively to the ICC and to the CJEU and claimed that the norms at stake conflicted both with the Constitution and with an EC Directive that required adequate sanctions for similar offences.[36] Before the ICC, the claim was raised as to whether the challenged legislation conflicted with Articles 11 and 117(1)[37] of the Constitution, due to its inconsistency with the Directive in question. Whilst the ICC simply updated the question without taking a decision on the merits,[38] the CJEU stated that the challenged legislation was not consistent with the aims pursued by the Directive, but that the application of this could not have the effect of increasing the criminal liability in the specific case, due to the principle of the retroactive application of the more lenient penalty.[39] As in *Pupino*, and given the persisting refusal of the ICC to decide the case pending before it, the difficulty of the CJEU in providing a viable answer to the referring judges could have been balanced (if not eliminated) by a major involvement of the ICC, that could have conveyed constitutional arguments aimed at resolving the *impasse* that the judges had to face in both cases.[40]

C. The 2008 "Luxury Tax" Case: Upheaval in Continuity?

The reluctance of the ICC has for the most part relied upon technical considerations aimed at justifying a separation of powers with the CJEU; it has rarely taken into account substantive reasons that could have pushed it to set before the CJEU a set of constitutional arguments capable of conveying a distinct internal constitutional perspective (as it should have been for both the *Pupino* and the *Berlusconi* cases).

In the light of the critiques addressed to this case-law, it could appear inevitable that the ICC was led over time to rethink the premises of its isolationism—an isolationism that increasingly revealed itself to be ineffective in the face of the growing *de facto* monism that the same ICC had upheld since the end of the 1980s.

---

[35] Dani, *supra* note 10, at 157.

[36] EEC Directive 68/151 of 9 March 1968, O.J. L 65.

[37] Art. 117(1) reads, "Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations."

[38] Order 1. June 2004, No. 165.

[39] Joined Cases C–387/02, C–391/02, and C–403/02, Silvio Berlusconi, 2005 E.C.R. I–3565, para. 75.

[40] The exemplarity of the *Berlusconi* saga is thoroughly investigated by Cartabia, *supra* note 28, at 110.

https://doi.org/10.1017/S2071832200021210 Published online by Cambridge University Press

A similar rethinking occurred in a quite routinely *principaliter* proceeding activated in 2008, when the State government challenged a series of fiscal measures adopted by the Sardinia Region in order to reform its tourism policy. In particular, a regional law of 2007 created taxes on capital gains accruing from the transfer of holiday homes, fees in the landing of aircrafts and mooring of sports boats, and a general tourist tax. Among the different standards of review, the State government complained that the tax on planes and boats (the only one that raised problems of compatibility with EU law) conflicted with Article 117(1) of the Constitution in relation to Article 12 TEC (the prohibition of discrimination on grounds of nationality), Article 49 TEC (freedom to provide services), and Article 87 TEC (the prohibition of state aids). The core of the case involved the heavier burden posed by these measures on providers not resident in Sardinia and, consequently, the indirect advantage of local suppliers of tourism services. An in-depth analysis of the general legal background of the case is not necessary here.[41] What is worth highlighting, however, is that the ICC adopted a twofold approach in dealing with the claims. On the one hand, it reiterated the basic assumptions governing the relationships between supranational and internal law as far as the preliminary reference procedure is concerned, and, on the other hand, it highlighted the difficulty of dealing with the case at stake as it had done in the past, when it had stated that the absence of doubts as to the application of the relevant EU law made a reference to the CJEU unnecessary (pursuant to the *acte claire* and to the *acte éclairé* doctrines).

In relation to the first set of arguments, the judgment No. 102/2008 reaffirms the differences between *incidenter* and *principaliter* proceedings.[42] Only in the former is the duty to give full effect to EU law demanded of the common judge, who is consequently entitled to lodge a preliminary reference with the CJEU. In *principaliter* cases, quite on the contrary, the absence of a judge shifts to the Constitutional Court the duty to transform the question of compatibility of internal law with EU law into a question of constitutionality, through the medium of Article 117(1) of the Constitution. In the words of the judgment:

> In cases in which the Constitutional Court is seized directly […], the assessment of the conformity of the regional law with Community legislation occurs, by way of Article 117(1) of the Constitution, in constitutional proceedings, and accordingly where it is found to be incompatible, the court does not set aside the law,

[41] *See* Fontanelli & Martinico, *supra* note 12, at 350.

[42] Judgment 15. April 2008, No. 102, para. 8.2.8.1. (official translation available at http://www.cortecostituzionale.it/documenti/ download/doc/recent_judgments/S2008102_Bile_Gallo_en.pdf).

https://doi.org/10.1017/S2071832200021210 Published online by Cambridge University Press

> but—as noted above—declares it unconstitutional *erga omnes*.[43]

These arguments are not deemed to be a novelty in the case law of the ICC, given that the reference to Article 117 is not meant to make any valuable difference in respect of what is enshrined in Article 11. In fact, the apparently major involvement in EU law issues does not exclude that the judgment is in line with the main corollaries mentioned before, such as the general prohibition on dual preliminarity.[44]

With the second set of arguments, the ICC reveals its unease with a solution that simply replicates its previous case law in terms of reliance on the *acte claire* doctrine. The need to provide an answer, which the ICC on this occasion does not hold to be self-evident, leads it to lodge a preliminary reference with the CJEU in relation to the conflicts with Articles 49 and 87 TEC.[45] On these premises, the ICC states that in *principaliter* proceedings, its position can be fully equated with that of every referring judge, since its nature, despite its peculiar role, is judicial and, moreover, because in these proceedings it is the *only* judge able to solve the case.

Against this background, it seems necessary to assess whether this precedent can be considered as a breakthrough with respect to the doctrines of "strategic dualism" or whether it is rather to be understood as a peculiar enhancement of that theoretical baseline. Some points of the decisions at stake represent an undoubted novelty, like when the ICC gets rid of every definitional taboo about its judicial nature.[46] Even more importantly, it is crucial to highlight the attention shown in this case towards the need for the CJEU (and not the ICC) to assess the discriminatory nature of the contested taxes. This second element in particular demonstrates that the decision to refer breaks with the most blatant premises of strategic dualism. On the other hand, it is plain to see that the ICC emphasizes the continuity with its precedents, because, as I highlighted before, *principaliter* proceedings have traditionally been the only *Granital*-free area in relation to the procedural relationship with the CJEU.

In the end, one might say that the meaning of the luxury tax case by itself is not particularly innovative, because the ICC does its best to link the novelties with the

---

[43] Judgment No. 102/2008 (note 43), para. 8.2.8.1.

[44] "[…]where the ordinary courts question the compatibility of national law with EC law, the failure to make a preliminary reference to the European Court of Justice means that any question of constitutionality raised by it is not relevant and therefore inadmissible." *See id.*

[45] Order 15. April 2008, No. 103 (official translation http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/O2008103_Bile_Gallo_en.pdf).

[46] Sergio Bartole, *Pregiudiziale comunitaria e «integrazione» di ordinamenti*, 36 LE REGIONI 898, 900 (2008).

https://doi.org/10.1017/S2071832200021210 Published online by Cambridge University Press

coherent development of what was included in the *Granital* doctrine.[47] On further analysis, however, the impression is that of a tentative message, a sort of *ballond'essai* directed at both national and (mainly) supranational interlocutors (the CJEU in particular), that announces the dawn of a new era of mutual relationship and, alongside this, an in-depth rethinking by the ICC of the most strict isolationist premises of its action *vis-à-vis* supranational law.[48] To become reality, however, this message needed to be further developed and its basic premises clarified.

D. The "Fixed-Term Workers" Case and the Quest for Constitutional Sensitivity

After 2008, the absence of further preliminary references by the ICC has led many scholars to believe that that episode had to remain isolated and its rationale confined to the less relevant area of *principaliter* judgments. If so, it would have been forceful to consider that the long-run effects of the 2008 precedent had to be grasped within a strain of continuity with the traditional mindset of the ICC's case law.

However, what seemed hardly possible became reality in 2013, when the ICC[49] lodged for the second time ever a preliminary interpretive reference with the CJEU, and this time in the framework of an *incidenter* proceeding. The case concerned the terms of employment of fixed-term workers in public schools. The circumstances of the case are worth highlighting, since they shed light on the overall approach of the ICC and on the doubts as to whether this case is another application of well-established principles or, on the contrary (as I argue), it represents the beginning of an unprecedented way of dealing with EU law and with the CJEU in particular.

The referral orders concerned the constitutionality of Article 4(1) and (11) of Law no. 124 of 3 May 1999 (*Urgent provisions on school staff*) and were raised by the *Tribunale di Roma* and by the *Tribunale di Lamezia Terme* with reference to Article 117(1) of the Constitution, as related to Clause 5(1) of the framework agreement concluded by ETUC, UNICE and CEEP on fixed-term work, annexed to Council Directive no. 1999/70/EC of 28 June 1999.[50]

The applicants in the main proceedings were teachers and administrative staff who worked in different schools under the terms of numerous successive fixed-term contracts. They claimed that the internal legislation was unconstitutional on the grounds that a similar

[47] "The overruling should not be overemphasized." Cartabia, *supra* note 15, at 24.

[48] Bartole, *supra* note 46, at 902.

[49] Order 18. July 2013, No. 207 (official translation http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/207-2013.pdf).

[50] *Council Directive concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP*, O.J. L 175/43.

https://doi.org/10.1017/S2071832200021210 Published online by Cambridge University Press

system of limitless substitute teaching (*supplenze*) conflicted with Directive 1999/70 in that this sought to prevent and punish the abuse of such contracts and called on States to set time limits and a right to damages in case of violation. Since 2001, in Italian law this time limit amounts to a maximum of thirty-six months and, after this period, in the public sector the work contract cannot be converted into a permanent one, but the worker is entitled to payment of damages. Within the public sector, the school is the only exception to this rule, and according to the challenged norms fixed-term workers that are employed for more than thirty-six months cannot benefit from any compensatory damages either. The constitutional justification for these limitations lies in the fact that, while according to Article 97 of the Constitution public workers can be employed exclusively after an administrative competition (and not as a consequence of a conversion of a contract), in public schools in particular the more restrictive regime reflects the need to adapt the education service over time to the constantly changing student population. Only this adaptive and flexible recruiting system, so the ICC argued, can guarantee a qualitatively and quantitatively adequate level of education, enabling full enjoyment of the right to education (Article 34 of the Constitution).

On first glance, the key element of the case is the fact that Directive 1999/70 lacks any direct effect.[51] As I earlier recalled, whenever the ICC is called upon to decide on cases concerning EU norms without direct effect, its ability to rule on the case and, eventually, to refer to the CJEU is not theoretically in question. Despite this, on several occasions the ICC dismissed similar claims by stating that the interpretive doubts as to EU law should be conveyed to the CJEU by the ordinary judges; it did this even in recent cases in which the direct nature of the EU provisions at stake needed to be further ascertained.[52] In all these cases, the rather abstract competence of the ICC to deal with supranational law remained entangled by a sort of "dual preliminarity trap" that pushed the ICC to overemphasize the procedural rules regulating its action[53] rather than its duty to give effect to EU law when judges are not entitled to directly enforce it. What the ICC constantly reaffirmed in the past is, however, evidently absent on this occasion, since the ICC refuses to delegate to the referring judge the task of making a preliminary reference and accepts being engaged in a conversation with the CJEU in which it justifies, in light of internal constitutional law, the legislative choices concerning the organization of public schools.[54]

---

[51] Barbara Guastaferro, *La Corte costituzionale ed il primo rinvio pregiudiziale in un giudizio di legittimità costituzionale in via incidentale: riflessioni sull'ordinanza n. 207 del 2013*, FORUM DI QUADERNI COSTITUZIONALI 1 , 7 (Oct. 21, 2013), *available at* www.forumcostituzionale.it).

[52] Order 17. December 2008, Nos. 415 and 2. April 2009, No. 100.

[53] See *supra* note 20.

[54] The outcome is even more striking if one highlights that, with a judgment issued in 2012 (No. 10127 of 20 June 2012) the Italian Court of Cassation stated that the norms at stake did not have to be challenged before the CJEU because of its univocal case law on this matter. *See* O. Pollicino, *From Partial to Full Dialogue with Luxembourg: the Last Cooperative Step of the Italian Constitutional Court*, 10 EUCONST 151 (2014).

https://doi.org/10.1017/S2071832200021210 Published online by Cambridge University Press

The ambivalent terms of the "luxury tax" precedent become clearer in this case, since the uncertainties surrounding that reasoning and the doubts as to its generalization were swept away when the ICC placidly overruled case law that had stood for thirty years and stated that "it must be concluded that this Court also has the status of a 'court or tribunal' within the meaning of Article 267(3) of the Treaty on the Functioning of the European Union within proceedings in which it has been seized on an interlocutory basis."[55]

Alongside the question of the formal reasons handed down in the referring order, the question arises of why there was such a judicial breakthrough. The triggering factor seems to be strictly linked to substantive reasons that entail both the constitutionally sensitive area in which the ICC had to decide and the quest for a "qualified" interaction with the CJEU.[56] As to the former, the ICC aims at demonstrating that a plain application of the Directive 1999/70 conflicts with the basic constitutional principles regulating the right to education and the need for administrative competition for public workers. In this light, the core of the case can be summarized in the second question raised by the ICC, when the CJEU is asked to assess whether the

> organi[z]ational requirements of the Italian school system as set out above constitute objective reasons within the meaning of clause 5(1) of Directive no. 1999/70/EC of 28 June 1999 thereby rendering compatible with EU law legislation such as Italian law which does not provide for a right for damages in relation to the hiring of fixed-term school staff.[57]

In the constitutionally sensitive nature of the case is thus to be seen the reason that led the ICC not to declare inadmissible the order raised by the referring judges, but rather to share those doubts and to further qualify them in constitutional language.[58]

This explains why, for the ICC, it is necessary that a particularly "qualified" view supporting internal law is conveyed before the CJEU. While in ordinary cases the common judges are best suited to guarantee the full and uniform application of EU law, when constitutional

[55] Order No. 207/2013.

[56] Cannizzaro, *supra* note 12, at 827 (arguing that this need for a justification can be qualified in terms of "active cooperation").

[57] Order no. 207/2013.

[58] A similar opinion is shared by Stefano Civitarese Matteucci, *The Italian Constitutional Court Strengthens the Dialogue with the European Court of Justice Lodging for the First Time a Preliminary Ruling in an Indirect ('Incidenter') Proceeding*, 20 EUR. PUB. L. (2014), 641.

https://doi.org/10.1017/S2071832200021210 Published online by Cambridge University Press

issues are at stake it is up to its guardian to make the case, since in doing this its role is irreplaceable. Although this stance is not directly purported in the case, it can be assumed to emerge in one of the most debated points of the order, where the "last resort" nature of the jurisdiction of the ICC is called into question with reference to Article 267(3) TFEU. In the "luxury tax" case, the assimilation of the ICC to a last resort judicial authority was justified by the fact that in *principaliter* proceedings, the ICC is not only the *higher* judge to deal with the case, but more simply the *only* one, since common judges do not enter the scene there. Moreover, a similar conclusion relied upon the fact that, according to Article 137 of the Constitution, "[n]o appeals are allowed against the decision of the Constitutional Court." If the latter argument remains true even for *incidenter* rulings, it is much more questionable to assume that in these cases the ICC is either the higher or the only judge to deal with the case. Despite this, in 2013, the ICC, as in 2008, plainly assumed that its jurisdiction is that of a last resort judge in terms of Article 267(3) TFEU, and that it is therefore subject, like every other last resort judge, to a duty to refer to the CJEU. The imposition upon the ICC of a similar duty to refer must, however, not be overstated. Unlike last instance common judges, the ICC has an intrinsically wider leeway when evaluating whether a claim must be referred to the CJEU, and this derives from the *sui generis* nature of its jurisdiction, that is still aimed at safeguarding the basic systemic conditions of the "separated but coordinated" principle. In other words, it must be assumed that the ICC is in a preferred position to assess whether it has a duty or not to refer. On the one hand, this is because, *de facto*, it still freely sets the terms of its engagement with the CJEU, as, for example, when it recalls the doctrines of *acte claire* and *acte eclairé,*[59] or when it recently argued that a preliminary reference can only be raised when it is called to decide on the basis of the constitutional parameters of Article 11 and 117(1) of the Constitution,[60] or, lastly, when it offers an autonomous interpretation of EU law.[61] On the other hand, it is important to consider that the overcoming of the most blatantly isolationist premises of its previous case law has not led the ICC to an unhindered acceptance of the judicial monism that basically equalizes every judicial authority under the CJEU. In so doing, the ICC could maintain the last word on its commitment towards EU law while at the same time safeguarding a pluralistic setting for judicial relationships.[62]

[59] Judgments 23. December 2008, No. 439; 21. January 2010, No. 16; 16. October 2014, No. 235.

[60] Judgment 31. March 2015, No. 56.

[61] Judgment 7. July 2015, No. 130.

[62] For a partially different stance, according to which in this case the ICC has accepted to be engaged in a "full dialogue" with the CJEU. *See* Pollicino, *supra* note 54, at 153.

https://doi.org/10.1017/S2071832200021210 Published online by Cambridge University Press

E. Dual Preliminarity and Direct Effect Revisited

If the ICC has been able to pour new meanings into the old framework regulating its relationships with the CJEU, this did not occur as a breakthrough but rather thanks to a learned and cautious rethinking of two governing doctrinal tools that it largely used until now: dual preliminarity and the doctrine of direct effect. I will examine the transformations affecting these doctrines in the following parts of the article, reserving the analysis of their long-term effects to the final considerations.

I. Dual Preliminarity in Constitutionally Sensitive Claims

Although the ICC has regularly inhibited common judges from raising preliminary references to the CJEU after or at the same time as a constitutional referral in indirect (*incidenter*) proceedings, signals of a possible revirement arrived shortly before the order no. 207/2013.[63] An example is the mentioned order no. 165/2004,[64] when the ICC simply updated the question without declaring it inadmissible, or the judgment No. 94/2013,[65] where, according to Augusto Cerri, the ICC signaled a certain unease with its established case law.[66] These episodes reveal the growing need for the ICC to rethink the absoluteness of its ban on dual preliminarity, at least in terms of separating the claims where supranational and internal (constitutional) claims are strongly intertwined (so-called 'strong alternative') from those where, on the contrary, the two profiles are basically independent from each other (weak alternative).[67] While in the latter case the ICC could righteously uphold its previous approach, in the former it should allow the common judge to refer its doubts with more procedural ease to the two Courts.

In the "fixed-term workers" case, the ICC dealt with a different situation. Although the internal and the supranational profiles regarding the legislation on school personnel are strongly enmeshed, the need for the ICC to turn to the CJEU derived from the urgent need to provide a constitutional justification for the challenged measures. In this light, it must be emphasized that the same internal norms have been challenged before the CJEU, though in a different perspective, by the *Tribunale di Napoli*.[68] At a deeper sight, the fact that some judges decided to turn to the ICC and others to the CJEU must not be linked to a mere divergence regarding the circumstances of the case or the nature (direct/indirect) of

[63] *See supra* note 50.

[64] *See supra* note 38.

[65] Judgment 22. May 2013, No. 94.

[66] Augusto Cerri, *La doppia pregiudiziale in una innovativa decisione della Corte*, 57 GC 2897, 2898 (2013).

[67] *Id.* at 2900; Onida, *supra* note 17, at 557.

[68] Decisions of 2, 15, and 29 January 2013.

https://doi.org/10.1017/S2071832200021210 Published online by Cambridge University Press

the EU law in question. This fact reflects, on the contrary, a systemic necessity which is strongly linked to the different roles of the ICC and the common judges whenever they are called to give effect to EU law lacking direct effect. On the one hand, the latter seek a continuity between internal and EU law since their action is more directly embedded in the circumstances of the case, so that they claim first and foremost the uniform application of supranational law (first-order justification). On the other hand, the former deals with the need to provide a justification for the choices adopted by internal law, moving from a perspective that is systemic because: a) in substance, it places (constitutional) national and EU law on an equal footing, and b) it basically ignores the concrete circumstances of individual applicants (second-order of justification).[69]

If this is the case, it is inevitably necessary to analyze finally whether a similar outcome could occur even with regard to EU law *with* direct effect. If no one can doubt that here the basic premises of the *Granital* doctrine remain unchallenged and thus the preliminary reference can be raised only by common judges (with the exception of counter-limits cases), what if a similar need of qualified interaction emerges even in these cases? Are the substantive reasons underpinning a constitutional choice sufficiently and adequately conveyed to the CJEU by common judges, even if they do not endanger a severe constitutional momentum (as in the case of *counter limits*)? Even if one may have doubts as to whether this setting will remain unchallenged in the future, it is hard to provide an answer. Whereas the ICC is unlikely to abruptly reverse its overall approach on this point in the next future, major changes could come from a rethinking of apparently technical or minor issues: the divide between direct and indirect effect could be one of those.[70]

II. Direct Effect: Beyond Van Gend En Loos*?*

As has been highlighted, direct effect has been the pivotal doctrinal tool that the ICC has relied upon in order to set a clear-cut distinction between its functions *vis-à-vis* EU law and the powers delegated to the common judges. The fixed-term workers case called this distinction into question, because it was left in the background while the quest for a substantive interaction was privileged. From a more general perspective, this rethinking coincides with an overall reshaping of the doctrine of direct effect at supranational level, so that a sort of variable reliance on it at internal level can find further justifications in the near future.

[69] The difference between first order and second order of justification is drawn by NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 99 (1994).

[70] In a similar vein, Cartabia, *supra* note 15, at 29, argued that "[d]octrines like direct and indirect effect could easily be interpreted so as to involve also the supreme and constitutional courts, instead of banning them."

https://doi.org/10.1017/S2071832200021210 Published online by Cambridge University Press

The classical stance of *Granital* went hand in hand with the basic premises of the doctrine emerging from *Van Gend en Loos*,[71] according to which direct effect was nothing more than the intrinsic *nature* of an EU norm, whose ascertainment was to be deemed as the inquiry on a matter of *fact*. The expansion of EU competences, the growing interconnections between national and supranational judicial actors, the *montée en puissance* of consistent interpretation, the process of constitutionalization of the EU and the entry into force of the Charter of Fundamental Rights have progressively altered such a paradigm, that was for the main part grounded on the objective nature of Community law norms[72] and on a simplified interaction between judicial actors (the *post-Simmenthal* paradigm). More recent analysis show that the rationale of the doctrine of direct effect is shifting from a (supposed or real) clear-cut legal ontology to the convergence of multiple and variable factors, such as: a) the concurrence of variable norms stemming from different sources (OMC, soft law, general principles, and so on), whose direct effect appears as the outcome of a process of interpretive combination rather than selection; b) the expansion of its role beyond the State-individual (vertical) relationship and the connected capacity to impose burdens and duties on individuals (horizontal direct effect); c) the entry into force of the Charter of Fundamental Rights, which imposes on the CJEU the duty to assess whether national courts can enforce the same Charter rights as are enshrined in national constitutions.[73]

Against a similar background, it is possible to argue that the decreasing reliance on the distinction between direct and indirect effect in the case law of the ICC is not only an episode, but more probably the assessment of a changing paradigm in the relationships between domestic and EU law, whose main focus, as far as the role of Constitutional Courts is concerned, regards the contribution and the place of fundamental rights in the European legal landscape.[74] If it is unquestionable that they represent the most important domain "in which EU law effectiveness is challenged, these days, in relation with the issue of applicability of EU and national law,"[75] a growing activism of Constitutional Courts seems inevitable in the light of the competing interaction between judicial actors.

---

[71] One might see in this the acceptance by the ICC of the systemic combination of direct effect and preliminary reference as it has been emphasized by Joseph H.H. Weiler, Van Gend en Loos*: The individual as subject and object and the dilemma of European legitimacy*, 12 I·CON 94, 95 (2014).

[72] Sacha Prechal, *Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union*, *in* THE FUNDAMENTALS OF EU LAW REVISITED: ASSESSING THE IMPACT OF THE CONSTITUTIONAL DEBATE 35, 36 (Catherine Barnard ed., 2007).

[73] These transformations involving the doctrine of direct effect are deeply analyzed by Sophie Olivier-Robin, *The evolution of direct effect in the EU: Stocktaking, problems, projections*, 12 I·CON 165 (2014).

[74] In this (slightly different) perspective, I share the assumption of Dani, *supra n*ote 9, at 169, according to which "[a]s long as the EU judicial architecture will maintain its current post-*Simmenthal*structure, the task of conveying constitutional traditions to Luxembourg cannot but rest with ordinary courts."

[75] Olivier-Robin, *supra* note 73, at 185.

https://doi.org/10.1017/S2071832200021210 Published online by Cambridge University Press

As far as the ICC is concerned, the relativization of that distinction calls into question a further problem that involves the persistent sustainability of the rationale of *Granital*. In other words, behind the solution given to the "fixed-term workers" case, a potential contradiction is to be grasped: while the clear-cut distinction between direct and indirect effect of EU law is increasingly being blurred, the most defensive premises of the "separated but coordinated" principle become mutually contradictory, since the spheres of normative and institutional relationships no longer instantiate two autonomous and self-sufficient domains. In a complex system like the EU, the enforcement of supranational law at national level requires an elaborate judicial construction in which the nature of norms is assessed thanks to a multi-faceted judicial interpretation, where the role played by the rigid alternative direct/indirect effect is increasingly replaced by the more flexible instrument of consistent interpretation.[76] If that separation is not the only viable theoretical instrument for the ICC to establish a relationship with EU law (and with the CJEU in particular), an adequate commitment should be given to the elaboration of a doctrine of "constitutional sensitivity", which could be the rising paradigm called to govern in the near future the concurring ambits of European and national judges whenever fundamental rights are at stake.[77]

F. Conclusions

The changing attitude of the ICC toward the CJEU and the use of the preliminary reference procedure is quite evident, although its deep theoretical underpinnings ought to be further assessed in future referrals. On the one hand, the "fixed-term workers" case reveals that the most blatantly isolationist premises of the *Granital* doctrine are no longer tenable in the current European legal scenario. In this light, the overcoming of the definitional struggle on the judicial nature of the ICC and the partial acceptance of dual preliminarity pave the way for a growing involvement of the ICC whenever its engagement is necessary in order to convey constitutionally qualified arguments to the CJEU. On the other hand, it should not be forgotten that this major involvement is not tantamount to encapsulating its future action within the monist setting pleaded for by the CJEU. As the question concerning the qualification of the ICC as a last instance court demonstrates, once the most untenable aspects of its previous case law are swept away, it must be entitled to carve out the "how" and "why" of its participation in the preliminary reference procedure,

[76] Prechal, *supra* note 72, at 37.

[77] A similar view is shared by Stefano Civitarese Matteucci, *Breaking the Isolation? Italian Perspectives on the Dialogue between the CJEU and Constitutional Courts*, PAPER PRESENTED AT THE EDINBURGH LAW SCHOOL CONSTITUTIONAL DISCUSSION GROUP SEMINAR, 26 May, 2015, unpublished (courtesy of the Author) and, albeit in a not coincident perspective, by Cannizzaro, *supra* note 12, at 831, that emphasizes the "functional decoupling" (*duplicità funzionale*) between the CJEU and Constitutional Courts.

https://doi.org/10.1017/S2071832200021210 Published online by Cambridge University Press

since it has at least the final say over the double allegiance (to the Constitution and to EU law) under which it operates.[78]

In this light, reinforcing the pluralist virtuality of the "separated but coordinated" principle in terms of a contrapunctual interaction between judicial actors could lead to an emphasis on the cooperative nature of the ICC's engagement, as happened in both the 2008 and in the 2013 cases, instead of the antagonist attitude inherent in the various forms of *ultra vires* control triggered by other Constitutional Courts.[79] While the ICC has not hesitated in recent times to invoke a reservation of sovereignty in the face of decisions of the International Court of Justice[80] or the European Court of Human Rights,[81] it is widely acknowledged that in respect of EU law the activation of the *counter-limits* is likely to be a quite abstract possibility that could become merely hypothetical in case of a growing willingness on the part of the ICC to purport on a regular basis the "internal point of view" before the CJEU.

In sum, the strategic tenets of the solution provided for by the ICC seem to offer a viable response to the dilemmas of integration, since they tackle the challenges emerging from European constitutional pluralism in a spirit that is dialogical but not hostile and is centered upon dialogical attitudes[82] and instruments rather than on an uncritical openness.[83]

---

[78] Cannizzaro, *supra* note 12, at 830.

[79] Needless to refer, among others, to the *Landtová* case decided by the Czech Constitutional Court (Judgment of 31 January 2012, Pl. ÚS 5/12, *Slovak Pensions XVII*) or to the *OMT* case of the German Federal Constitutional Tribunal (Decision of 14 January 2014, 2 BvR 2728/13).

[80] ICC, Judgment 22. October 2014, No. 238 with respect to *Jurisdictional Immunities of the State* (Germany v. Italy), ICJ Reports 2012, 96.

[81] ICC, Judgment 28. November 2012, No. 264.

[82] GIUSEPPE MARTINICO, THE TANGLED COMPLEXITY OF THE EU CONSTITUTIONAL PROCESS. THE FRUSTRATING KNOT OF EUROPE 116 (2013).

[83] As far as the role of Constitutional Courts in the European legal landscape is concerned, the pluralist setting enshrined in the "constitutional sensitivity" approach could lead to an understating of the clash between the "jurisprudence of constitutional conflict" setting. *See* Mattias Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, 11 ELJ 262 (2005). For the strain toward the establishment of a "European constitutional democracy" recently proposed by Jan Komárek, see Jan Komárek, *National Constitutional Courts in the European Constitutional Democracy*, 12 I·CON 525 (2014). Their mutual commitment to constitutional pluralism can be emphasized in that the need to provide a balance between European and national constitutional supremacy cannot find a solution only in the reasons and arguments advanced by (national and supranational) courts, because a more deep commitment to the value choices enshrined in the *continuum* EU-national law is required: either in terms of the relevant principles governing the "constitutionalism beyond the State" paradigm ("the formal principle of legality, jurisdictional principle of subsidiarity, the procedural principle of democracy, and substantive principle of the protection of basic rights or reasonableness," Kumm, *supra* in this note, at 299) or by recalling the capacity of Constitutional Courts to

https://doi.org/10.1017/S2071832200021210 Published online by Cambridge University Press

It must, however, be noted that the effort to overcome the ICC's previous misplacement risks being nullified if the CJEU does not take into account the preferred position of the ICC (as of every other Constitutional Court) in order to convey before it constitutionally sensitive claims. As the decision taken by the CJEU in the fixed-term workers case demonstrates,[84] the European adjudicator is persistently reluctant to bring to light the constitutional tone of its responses to the referring judges, whereas it traditionally showed a masterly ability to deal with constitutional claims in implicit and silent forms.[85] However, when the reference involves basic constitutional values and stems from a Constitutional Court, the *octroyée* construction of constitutional traditions[86] cannot be the solution. On the contrary, *Voice* (by national Constitutional Courts) and *Loyalty* (by the CJEU) are more and more necessary in order to take those constitutionally shaped arguments into account, since the constitutional pluralism embodied in the European space "finds its roots in the *nature* of cases before courts, and develops a methodology for the resolution of the conflict, particularly when it entails a normative clash and judicial review must be put into action."[87]

In the light of the growing acceptance by the Constitutional Courts of the preliminary reference procedure, and even more so in the face of the cooperative attitude displayed by many of them (like the ICC), the time should indeed be right for the CJEU to place the nature and the scope of the references raised by them on a different footing than the rest of cases and to show a major concern for their arguments whenever a constitutionally responsive judgment is required.

---

revitalize the communicative arrangement for those who are *de facto* excluded by the enjoyment of EU individual freedoms (Komárek, *supra* in this note, at 539).

[84]Joined Cases C–22/13, C–61/13 to C–63/13, and C–418/13, 2014, Raffaella Mascolo v. Ministero dell'Istruzione, dell'Università e della Ricerca, (Nov. 26, 2014), http://curia.europa.eu/.

[85] Daniel Sarmiento, *National Voice and European Loyalty. Member State Autonomy, European Remedies and Constitutional Pluralism in EU Law*, *in* THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF MEMBER STATES 325, 336 (Hans-W. Micklitz & Bruno De Witte eds., 2012). It must however be observed that *Mascolo* was mainly addressed to the legislator because of the persistent and massive noncompliance of the school recruitment system with the basic criteria of EU law with regard to fixed-term employment.

[86] Dani, *supra* note 10, at 168. In a similar vein see Fabian Amtenbrink, *The European Court of Justice's Approach to Primacy and European Constitutionalism—Preserving the European Constitutional Order?*, IN THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF MEMBER STATES, 35, 60 (Hans-W. Micklitz & Bruno De Witte eds., 2012).

[87] Sarmiento, *supra* note 85, at 344, with reference to A.O. HIRSCHMANN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES (1970).

https://doi.org/10.1017/S2071832200021210 Published online by Cambridge University Press