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THE EUROPEAN DIMENSION TO THE CONSTITUTION OF THE REPUBLIC OF ITALY

Abstract

Italy was one of the countries that signed the Treaty of Rome in 1957, which created the European Economic Community. Despite initial resistance and the numerous difficulties encountered during subsequent years, the choice to commit to Europe was widely shared, becoming irreversibly embedded in the national consciousness. However, whilst other legal systems chose at various stages of their European journey to amend their constitutions by incorporating a European clause, this never happened in Italy. Italy did not change its Constitution as a result of joining the European Economic Community, and has not done so subsequently after becoming part of the European Union with the Maastricht Treaty, following the adoption of the Treaty of Lisbon, nor indeed at any subsequent stage in the process of European integration. It was only in 2001, with the reform of Title V of the Constitution involving changes in the allocation of powers between the state, the regions, and the local authorities, that the expression “Community law” was incorporated into the Constitution. Given the absence of a European clause, the relationship between the Italian Constitution and Europe has been shaped by the Constitutional Court. First and foremost, it interpreted Article 11 of the Constitution, which lays down a generic clause intended to enable the exercise of sovereign powers by international organizations, in such a manner as to bring the European project within its scope. The Constitutional Court developed its case law in its subsequent decisions, even though progress was at times hard-fought, and in some cases marked by contradictions; Italy’s cohabitation with Europe was undoubtedly welcome, but this did not mean that it was painless.

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INTRODUCTION

Italy was one of the countries that signed the Treaty of Rome in 1957,¹ which created the European Economic Community. Despite initial resistance and the numerous difficulties encountered during subsequent years, the choice to commit to Europe was widely shared, becoming irreversibly embedded in the national consciousness. However, whilst other legal systems² chose at various stages of their European journey to amend their constitutions by incorporating a European clause, this never happened in Italy. Italy did not change its Constitution as a result of joining the European Economic Community, and has not done so subsequently after becoming part of the European Union with the Maastricht Treaty, following the adoption of the Treaty of Lisbon, nor indeed at any subsequent stage in the process of European integration.

It was only in 2001, with the reform of Title V of the Constitution involving changes in the allocation of powers between the state, the regions, and the local authorities, that the expression “Community law” was incorporated into the Constitution. Given the absence of a *Europa-Artikel* such as for example Article 23 of the German *Grundgesetz*, which was introduced in 1992,³ the relationship between the Italian Consti-

¹ Italy is a signatory country of the Treaty establishing the Economic European Community (EEC) which brought together 6 countries (Belgium, Germany, France, Italy, Luxembourg, and the Netherlands) to work towards integration and economic growth, through trade. The Treaty of Rome was signed in parallel with a second treaty which set up the European Atomic Energy Community (Euratom). Six years before, Italy had also signed the Treaty establishing the European Coal and Steel Community, which applied from 1952 for 50 years until it expired in 2002.

² See in this regard M. Claes, *Constitutionalizing Europe at its Source: The ‘European Clauses’ in the National Constitutions: Evolution and Typology*, “Yearbook of European Law”, Vol. 24, Issue 1, 2005, p. 81. See also B. de Witte, *Sovereignty and European Integration: The Weight of Legal Tradition*, “Maastricht Journal of European and Comparative Law”, June 1, 1995, p. 145.

³ Constitutional provisions specifically addressing Germany’s membership of the EU were introduced into the German Basic Law for the first time in December 1992 in

tution and Europe has been shaped by the Constitutional Court.⁴ First and foremost, it interpreted Article 11 of the Constitution, which lays down a generic clause intended to enable the exercise of sovereign powers by international organisations, in such a manner as to bring the European project within its scope. The Constitutional Court developed its case law in its subsequent decisions, even though progress was at times hard-fought, and in some cases marked by contradictions; Italy's cohabitation with Europe was undoubtedly welcome, but this did not mean that it was painless.

Considering the extremely broad scope of the issue, in this paper I shall attempt to outline briefly some of the problematic aspects of the relationship between the Italian Constitution and Europe. In order to do so, it is first important to present the historical background in summary form, referring to the keystone principles of the Italian constitutional framework, also as regards the state's international relations.

It is important to state at the outset that it will not be possible within the short space available in this paper to provide an account of the various legal problems surrounding such a broad and fluid issue. These problems are extremely complex and concern principally questions that are not only strictly ideological and political in nature, but also historical, sociological, and economic. However, reference may be made to some specific points in order to highlight the Constitutional Court's role as a major player in establishing the European dimension to the Italian Constitution.

relation to the Maastricht Treaty. Major subsequent revisions took place on the occasion of the second reform of the Germany federalist system in 2006, and also in relation to the Treaty of Lisbon in 2009. See F. Mayer, M. Wendel, *Die verfassungsrechtlichen Grundlagen des Europarechts*, [in:] A. Hatje, P.C. Müller-Graff (eds), *Enzyklopädie Europarecht*, Vol. 1, Nomos, Baden-Baden, 2014, § 4.

⁴ See M. Cartabia, *The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Union*, [in:] A.M. Slaughter, A. Stone Sweet, J. Weiler (eds), *The European Court and National Courts. Doctrine & Jurisprudence: Legal Change in its Social Context*, Hart Publishing, Oxford, 1998.

I. THE ADOPTION OF THE ITALIAN CONSTITUTION IN 1948: THE HIGHLY DISPARATE NATURE OF ITS POLITICAL GROUPINGS, AND THE DIFFERENCE IN ITALY'S ORIGINAL STANCE IN RELATION TO EUROPE

The drafting of the Italian Constitution in the aftermath of the Second World War was the result of a reconfiguration of the Italian political fabric as well as a deal struck between the political forces involved in the drafting of the Constitution. Or rather – as is unanimously asserted within the literature – it was born of a compromise: and this compromised reached within the Italian Constitution has experienced crises of various sorts, without ever having been fundamentally and definitely resolved.⁵

The characteristics of the Italian Constitution may only be comprehended to the full in the light of the historical events which accompanied its adoption and then its implementation.⁶ The drafting of the republican Constitution by the Constituent Assembly, which was elected by the people of Italy on 2 June 1946,⁷ occurred during the aftermath of the twenty-year dictatorship, the painful defeat in the war and the Resistance, and marked the restoration and rebirth of democratic institutions. It was necessary to rebuild Italy in both a material and a moral sense out of the ruins of the fascist regime and the previous liberal regime.

The Italian Constitution thus amounts to the end-point of a political process which started with the fall of Fascism, in the aftermath of which the anti-fascist political parties organized into the Committee of National Liberation (C.L.N.) subsequently came to the fore as major players. These forces, which were profoundly divided amongst themselves, shared in common the aim of creating a state that was diametrically op-

⁵ See G.F. Ferrari, *Introduction to Italian Public Law*, Giuffrè, Milan, 2008.

⁶ G. Bogneri, *Introduzione al diritto comparato. Il metodo*, Giappichelli, Turin, 1994, p. 23.

⁷ Italians chose the Republic in the institutional referendum of 2 June 1946, which was the first vote to be held according to universal suffrage without any distinction on the grounds of gender. At the same time, 556 members of the National Assembly were elected.

posed to the fascist state and also, broadly speaking, substantially new compared to the pre-fascist state.⁸

The essential values of the democratic state, such as freedom, equality and solidarity, represent the *common* starting points of the political forces present within the Constituent Assembly, as the conceptual and foundational basis for the new Constitution. As is also unanimously accepted within the literature, there was very broad consent also as regards international relations and involvement in international organizations.⁹

In asserting the values of freedom and equality also within international relations, the Italian Constitution can be classified as a constitution that is highly attuned to the aspect of the state's foreign relations, and that it is particularly sensitive to the need to develop international legal frameworks. There was a fundamental consensus amongst all parties that both the ill-fated fascist dictatorship and the excessive nationalism of the past had to be repudiated absolutely. This is the context within which Articles 10 and 11 of the Constitution must be considered, having been included not by chance amongst the "fundamental principles" intended to define the characteristics of the new state, which were approved by the Constituent Assembly without any controversy. Article 10 introduces a mechanism for the automatic adaptation of domestic law in line with the general principles of international law, in providing that "The Italian legal system conforms to the generally recognized principles of international law". In this respect, Tomaso Perassi, an internationalist and member of the Constituent Assembly, spoke of a "permanent transformationist dynamic", which would allow the incorporation of all norms falling under this category arising at international level.¹⁰ Article 11 provides that "Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for

⁸ C. Pavone, *The General Problem of the Continuity of the State and the Legacy of Fascism*, [in:] J. Dunnage (ed), *After the War: Violence, Justice, Continuity and Renewal in Italian Society*, Troubador, Market Harborough, Leics, 1999, p. 5.

⁹ See on all points C. Mortati, *Lezioni sulle forme di governo*, Cedam, Padua, 1973, p. 222; A. Cassese, *Lo Stato e la Comunità internazionale*, [in:] G. Branca (ed) *Commentario della Costituzione*, Vol. I. *Principi fondamentali, Art.1-12*, Zanichelli, Bologna, 1975, p. 485 et seq.

¹⁰ T. Perassi, *Lezioni di diritto internazionale*, Padua, Cedam, 1957, p. 29.

the settlement of international disputes. 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 Nations. Italy promotes and encourages international organizations furthering such ends". This Article had been conceived of essentially as an instrument for enabling Italy to participate in the United Nations; however – as mentioned above – it would subsequently be used also as the legal basis for European integration, for which that provision provided a constitutional foundation.

It was thus clear to all political parties that the peoples of Europe had fought two massive, fratricidal wars, and as a result had destroyed the political, economic, and social pre-eminence around the globe that Europe had previously enjoyed¹¹ (as was stressed in the speeches given by Churchill, De Gasperi, and Schuman). It was thus necessary to prevent any wars of that type from ever breaking out again in the future. However, leaving aside these common elements for the various political groupings present within the Constituent Assembly, it is important to note the highly heterogeneous and profoundly diverse composition of the ideological groupings represented by the deputies elected within the Constituent Assembly. There is full agreement within the literature concerning the fact that the Italian Constitution is the result of a compromise¹² between Catholic, Liberal, Socialist, and Marxist politi-

¹¹ See the speech delivered by Winston Churchill at Zurich University on 19 September 1946, currently available at: <https://rm.coe.int/16806981f3> [last accessed 25.6.2022]. Italian Prime Minister Alcide De Gasperi, who is considered to be responsible for most of Italy's post-war reconstruction, was an inspired mediator for democracy and freedom in Europe and an enthusiastic proponent of international cooperation. See his speech before the Parliamentary Assembly of the Council of Europe given on 10 December 1951, currently available at: <http://www.assembly.coe.int/nw/xml/Speeches/Speech-XML2HTML-EN.asp?SpeechID=48> [last accessed 25.6.2022]. See also the Schuman Declaration presented by French Foreign Minister Robert Schuman on 9 May 1950, which proposed the creation of a European Coal and Steel Community at a time when the nations of Europe were still struggling to recover from the devastation wrought by World War II. The Declaration is currently available at: https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en [last accessed 25.6.2022].

¹² V. Barsotti, P.G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice in Global Context*, Oxford University Press, 2016, p. 241.

cal forces.¹³ This disparity within the Constituent Assembly was evident from the outset also as regards the launch of the process of European integration.

As far as is relevant for our present purposes, it should be pointed out that, even though there was a broad consensus concerning the underlying choices and openness to international cooperation, the anti-fascist coalition fell apart during this very same period, i.e. over 1947 and 1948. Developments in the international situation (such as adherence to the North Atlantic Treaty), external pressure,¹⁴ and the results of the first parliamentary election gave rise to profound changes to the

¹³ It is not superfluous to point out that the Communists had been a central pillar of the Resistance and that the Marxist parties made up more than 40% of the Constituent Assembly. Following the “*conventio ad escludendum*” (namely the political shift that established the end of coalition governments between Catholics, Socialists, and Communists followed by the exclusion of the last two parties from the government in April 1947), the Italian Communist Party maintained constant relations with the Soviet Union and established a stable consensus amongst around 25/30% of the electorate. See R. Drake, *The Soviet Dimension of Italian Communism*, “*Journal of Cold War Studies*”, Vol. 6, No. 3, p. 115.

¹⁴ A general election was held in Italy on Sunday 18 April 1948 to elect the first Parliament of the Italian Republic. The 1948 Italian general election was characterized by foreign financial and propaganda interference and is considered to be Italy’s most significant and controversial election. It pitted the country’s Christian Democrats against the Popular Democratic Front in which the Italian Communist Party, the largest communist party outside the Soviet Union, was the dominant partner. Alcide De Gasperi, founder of Christian Democracy, was able to lead the DC to a historic success, achieving 48% of the votes (the highest share of the vote ever achieved by any party in Italy) and was appointed as Italy’s first Prime Minister of the republican era. After the 1948 election, the Italian Communist Party would not occupy any position in national government for another twenty years. De Gasperi did so under pressure from US Secretary of State George Marshall, who had informed him that anti-communism was a pre-condition for receiving American aid, and Ambassador James C. Dunn, who had directly asked De Gasperi to dissolve the parliament and disband the Communist Party. On the other hand, the Italian Communist Party relied on Soviet financial assistance more than any other communist party supported by Moscow. On this issue see M. Einaudi, *The Italian Elections of 1948*, “*The Review of Politics*”, Vol. 10, No. 3, 1948, pp. 346-361, Cambridge University Press; E. Di Nolfo (ed), *The Atlantic Pact forty Years later: A Historical Reappraisal*, (see especially Section 3. Italy and the Atlantic Pact), Walter de Gruyter, Berlin, New York, 1991, p. 207 seq; S.J. Corke, *US Covert Operations and Cold War Strategy: Truman, Secret Warfare and the CIA, 1945-53*, Routledge. London, New York, 2008, pp. 47-48; p. Ginsborg, *A History of Contemporary Italy, Society and Politics, 1943-1988*, Palgrave Macmillan Houndmills, Basingstoke, Hampshire, England, 2003,

relations between national political parties. These in turn triggered the crisis in the constitutional consensus on which these relations had been premised in the immediate aftermath of the war, resulting in a series of distortions and delays in the development of constitutional practice.

In particular, the interrelationship and confusion between international policies and internal political objectives became more heightened, leading to the emergence of clear dividing lines between political parties and social groupings, also as regards the process of European integration. This is not the appropriate place to review the debate into the historical, political, and social aspects of the Italian crisis, which has in any case been addressed in detail by numerous scholars. It is sufficient to recall that the process of European integration was viewed with considerable hostility by the Communist Party which, whilst being excluded from government, accounted for a considerable and influential part of the political parties in opposition.¹⁵

In 1957 the Communist Party was the only party to vote against the approval of the Treaty of Rome (the Socialist Party abstained).¹⁶ The PCI's relationship with the process of European integration was a troubled one, with the party completely changing its position in the long run.

pp. 106–113; J. Barth Urban, *Moscow and the Italian Communist Party, From Togliatti to Berlinguer*, I.B. Tauris, London, 1986.

¹⁵ See the speech given by Palmiro Togliatti (founder of the Italian Communist Party) to the Chamber of Deputies: “What we are asking for, what is necessary in order to maintain peace, is that all peoples are free to choose their own course; free to decide their own issues on their own; free to build themselves that new order to which they aspire and which reflects their wishes. *When you propose establishing a federation of European peoples above their heads, you must honestly acknowledge that you do not want to unite Europe, but rather to split it [emphasis added]*” The speech is currently available at: http://legislature.camera.it/_dati/leg01/lavori/stenografici/sed0145/sed0145.pdf [last accessed 25.6.2022]. See in particular pages 4999 and 5010. See also D. Wilsford, *Palmiro Togliatti*, [in:] D. Wilsford (ed), *Political Leaders of Contemporary Western Europe: A Biographical Dictionary*, Greenwood Press, West Port, Connecticut, 1995, p. 456.

¹⁶ See the speech by Giuseppe Berti, the person who tabled the motion asking that the Treaty Establishing the EEC be not ratified “It makes no sense to say that the Common Market is one thing and monopoly capitalism is another: the Common Market is the supranational form that monopoly capitalism takes on in western Europe”. The speech was printed by *L'Unità* (the daily newspaper of the Communist Party) on 28 July 1957, p. 1.

It was only with Enrico Berlinguer,¹⁷ who became National Secretary in 1972, that the Italian Communist Party fully committed itself to the European project, thanks to his direct engagement within the European Parliament.

Opposition to Europe thus gradually abated, so much so that today European integration is no longer a controversial issue within Italian political debate, even though the old ideological prejudices do flare up from time to time. It can be concluded that, whilst differences remain, they are not so great as to affect fundamental choices and the underlying consensus.

II. THE EUROPEAN DIMENSION TO THE ITALIAN CONSTITUTION

Having thus set out in broad terms the political and constitutional context out of which Italy's involvement in the process of European integration emerged, we can now illustrate in detail the European dimension to the Italian Constitution. We shall consider below some of the ways in which the Italian Constitution has responded to the impact of European law and how the European experience has affected the structure and development of the Italian legal system.

Naturally, considering the extremely broad range of institutional problems raised by Italy's involvement in European integration, we shall focus here on some of the most significant aspects of EU law. For reasons of space, despite their considerable significance, we shall not consider relations between Italy, the ECHR, and the European Court of Human Rights.¹⁸

In particular, we shall briefly consider the long series of disputes that have arisen in relation to attempts to strike a convincing overall bal-

¹⁷ See: p. Lange, *Crisis and Consent, Change and Compromise: Dilemmas of Italian Communism in the 1970s*, [in:] p. Lange, S. Tarrow (eds), *Italy in Transition: Conflict and Consensus*, Abingdon, Frank Cass & Co. 1980, p. 110.

¹⁸ M. D'Amico, C. Nardocci, *The Constitutional Court*, [in:] V. Onida (ed), *Constitutional Law in Italy*, Wolters Kluwer 2019 (see especially §12 "The Constitutional Court and the Supranational System of rights protection: on the relationship with the European Court of Human rights").

ance in relations between EU law and Italian law. These disputes have inevitably concerned the full range of issues associated with those relations, from the search for a constitutional basis for Italy's participation in the European Community, and later the European Union, to the constitutionality of the legislation ratifying the Community treaties, from the relationship between EU law and national law to the safeguarding of the fundamental principles set forth in the Constitution, and so on.

These problems have arisen in parallel with the rapid and profound evolution that Community law has been undergoing in the meantime, including specifically the assertion of the principle of the primacy of Community law over the legal systems of the Member States along with the principle of the "direct applicability" of Community law within the legal systems of the Member States. A prominent role has been played by the Constitutional Court, the case law of which has been characterized by progressive convergence with the positions of the Court of Justice, thus departing on a number of occasions from its own previous judgments. However, as we shall see, the Court of Justice has also altered its own case law in the area of fundamental rights, moving towards the position of the Italian Constitutional Court.

III. ITALY'S ACCEPTANCE OF COMMUNITY LAW.

ARTICLE 11 OF THE CONSTITUTION AND THE CONSTITUTIONAL ANCHOR

In almost all Member States throughout Europe, membership of the European Community in the first place, and acceptance of its most significant developments thereafter, have been accompanied by constitutional reforms. None of this has happened in Italy. Italy's adherence to the original Treaty establishing the European Economic Community, as well as the subsequent treaties amending or supplementing it such as the Maastricht Treaty and the Treaty of Lisbon, has always been authorized and implemented by ordinary legislation.¹⁹

In precisely the same way as for any other international treaty, accession to the European Community and acceptance of subsequent trea-

¹⁹ Law no. 1203 of 14 October 1957.

ties has occurred in accordance with Article 80, which provides that "Parliament shall authorize by law the ratification of such international treaties as have a political nature, require arbitration or a legal settlement, entail change of borders, spending, or new legislation".

The only legislation that "regulated" Italy's accession to the EEC was the law authorizing the ratification of the Treaty of Rome (and all subsequent treaties) as well as the implementation order provided for thereunder. This characteristic feature of Italian law has given rise to a number of contradictions, so much so that the Constitutional Court has been forced to rule even on the constitutionality of Italy's involvement in the process of European integration.

In fact, the failure to incorporate a European clause into the Constitution gave rise to an overall problem of constitutional law: international treaties impinge in particular on the legislative powers of Parliament, both at the outset and with increasing prevalence over time by imposing limits not provided for in the Constitution and by broadening the scope of primary sources of law, even though this scope is considered to be limited without exception to the sources of law set out in the Constitution. There is thus a question as to whether primary legislation, i.e. legislation that does not have constitutional status, can provide for a transfer of sovereignty. Was it possible for Community treaties and Community law to have constitutional implications despite having the force of law according to only ordinary legislation?

In other words, it became apparent from the outset that the process of European integration undoubtedly entailed a qualitative leap forward in international cooperation. The European communities (in the plural form comprising the EEC, the ECSC and Euratom) were not equivalent to the numerous other forms of international organization that were starting to flourish during that period.

As a result, there was some debate within the literature concerning which type of law and procedure was necessary in order to ratify the Treaties establishing the European Communities and how they could be incorporated into Italian law. The literature also considered whether it would be necessary to enact a constitutional law in order to authorize the ratification and implementation of the Treaties establishing the European Communities. Opinions were divided on this issue. Some argued that the treaties should be ratified and implemented by a constitu-

tional law owing to the fact that they established a legal basis for a number of significant departures from the Constitution and also entailed a relinquishment of sovereignty.²⁰

Others however took the view that an ordinary law would be sufficient, provided that a provision was incorporated into the Constitution that could give “constitutional coverage” to the law ratifying and implementing the treaties.

Albeit with some dissent, the question was resolved by the Constitutional Court, which opted in favour of the latter solution in its famous judgment in *Costa v. Enel*.²¹

The Constitutional Court referred to Article 11 insofar as it provides that “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”. On this view, the basis for ratificatory legislation and the automatic applicability of Community law within Italian law was Article 11 of the Constitution since Community law entailed limitations of sovereignty under conditions of equality with other states.

In actual fact however, both the wording of and the context to this provision clearly show that it had been conceived of for entirely different purposes. As noted above, the purpose of this clause was to enable Italy to participate in a reconstituted League of Nations (which subsequently became the UN).

At the time it was adopted, the purpose of Article 11 was thus to strengthen the mechanisms by which the UN could take action in order to guarantee peace. The Constitutional Court thus decided to construe Article 11 as a constitutional authorization for the transfer of elements of national sovereignty in order to adhere to the European Communities under conditions of equality. In doing so however, it turned a blind

²⁰ G. Vedovato, *I rapporti internazionali dello Stato*, [in:] p. Calamandrei, F. Levi (eds), *Commentario sistematico alla Costituzione italiana*, Firenze, Barbera, 1950, p. 87; S.Cassese, *Art. 11*, [in:] G. Branca (ed), *Commentario della Costituzione*, Zanichelli, Bologna, 1975, p. 565.

²¹ See Italian Constitutional Court, judgment no. 14 of 6 March 1964, *Costa v. ENEL*, in Loveland: *Constitutional law, Administrative Law and Human Rights* 8e: Online Casebook, Oxford University Press, currently available in English at: https://oup-arc.com/static/5c0e79ef50eddf00160f35ad/casebook_91.htm [last accessed 25.6.2022].

eye to the fact that it is extremely difficult to argue that, having become involved in trade wars and having been accused on various occasions of selfish conduct for the benefit of its own producers, the European Community's purpose was to ensure peace and justice amongst nations.²²

Having identified the constitutional foundation, it thus legitimised Italy's membership of the European Communities as well as the resulting commitments and limitations. However, the precise configuration of the mechanism by which provisions of EC law were incorporated into Italian law remained uncertain. In other words, there was a lack of specific rules to govern relations between Italian law and European law, as the generic wording contained in Article 11 and in Article 80 was certainly not sufficient.

As a result, the entire body of rules intended to govern relations between Italian law and European law was developed within constitutional case law. It was only with the reform of Title V of the Constitution in 2001 that an explicit reference to "EC legislation" was finally introduced into Article 117 of the Constitution (see below).

For this reason, in order to be able to refer to a European dimension to the Italian Constitution it is necessary to refer to the case law of the Constitutional Court as well as the stages in the development of the Constitutional Court's engagement with European law. Through a slow and gradual evolution in its case law, the Constitutional Court has re-configured the issue of relations between the Constitution and EU law in terms of a dialogue at a distance (which has not been without its contrasts) with the Court of Justice of the European Union.

IV. THE STAGES LEADING TO THE EMERGENCE OF THE COMMUNITY DIMENSION TO THE ITALIAN CONSTITUTION

What happens if a provision of national law violates a provision of Community law? Having been requested on various occasions to rule on conflicts between ordinary legislation and Community law, the Con-

²² R.Bin, G. Pitruzzella, *Diritto Costituzionale*, Giappichelli, Turin, 2021, p. 446.

stitutional Court has provided various answers to this question, applying different criteria for resolving discrepancies.

Initially, in its judgment in *Costa v. Enel* the Constitutional Court applied the principle of *lex posterior derogat legi priori*, holding that in the event of any conflict between Italian law and Community law the legislation most recently enacted should prevail. In finding Community law (regulations) to be of substantially equivalent status to national law (ordinary legislation), the Constitutional Court held that relations between the two sources of law *should be determined with reference to the time when each was enacted* [emphasis added]: according to the principle of “*lex posterior derogat priori*”, the most recently enacted provision should repeal any incompatible previous legislation without raising any issue of constitutionality.

In order to clarify the issue it is useful to recall the facts of the case. The case was brought by a lawyer called *Costa*, an Italian national who owned shares in the electricity company *Edisonvolta*, which had been affected by Italian legislation nationalising the infrastructure for producing and distributing electricity.²³ Considering himself to have been harmed by this legislation, he refused to pay a very small bill due to the new undertaking (ENEL), asserting that the law nationalising it violated certain provisions of the Treaty of Rome. The *giudice conciliatore* (judicial conciliation body) before which the case was brought decided to seek a preliminary ruling from the Court of Justice.²⁴

In the meantime, ruling on the merits of the law establishing ENEL, the Constitutional Court held that, *since the Community treaties had been ratified by ordinary legislation* [emphasis added], they were not immune to the ordinary principles of *lex posterior derogat priori*, and therefore could be repealed or amended by subsequently enacted national legislation (*sic!*).

²³ See Law no. 1643 of 6 December 1962 (electricity nationalization law) establishing the *Ente nazionale per l'energia elettrica* (Enel) [National Electricity Agency], which was charged with the task of managing the production, importation, exportation, transport, transformation, distribution and sale of electricity throughout the country.

²⁴ It should be noted that the Italian Government argued that the *preliminary reference* made to the Court of Justice by the *Giudice Conciliatore* was inadmissible on the grounds that, as a matter of Italian law, this judge was obliged to apply Italian law, even if it ran contrary to the provisions of an international treaty.

Thus, although the Italian Constitution allowed for sovereignty to be restricted in favour of international institutions such as the EEC, this did not prevent the principle of *lex posterior derogat priori* from applying and, since the Treaty of Rome had been signed in 1957 and implemented in Italian law by legislation enacted in 1958, it could not prevail over legislation on the nationalisation of the electricity sector adopted in 1962.²⁵

Naturally, this solution could not be accepted by the Court of Justice, which had undertaken to guarantee always and under all circumstances that Community law must prevail. The possibility that a national law could “repeal” a Community regulation or even a Community treaty could amount to nothing short of a violation of Community law itself. This was the view taken by the Court of Justice only a few months after the judgment of the Constitutional Court ruling on the same case, asserting that: “The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5 (2) and giving rise to the discrimination prohibited by Article 7”.²⁶

Thus, in an attempt to strike a compromise with the Court of Justice as regards the relationship between Community law and national law, the Constitutional Court attempted to alter its case law. It applied the criterion of *lex superior derogat legi inferiori*, which means that any Italian law in breach of a previous regulation of the European Union should be challenged before the Constitutional Court on the grounds that it indirectly violated Article 11 of the Constitution, i.e. owing to the violation

²⁵ “There is no doubt that the State is bound to honour its obligations, just as there is no doubt that an international treaty is fully effective in so far as a Law has given execution to it. *But with regard to such Law, there must remain inviolate the prevalence of subsequent laws in accordance with the principles governing the succession of laws in time* [emphasis added]; it follows that any conflict between the one and the other cannot give rise to any constitutional matter”. See Italian Constitutional Court, Decision no. 14 of 6 March 1964, *Costa v. ENEL*, cit., section 6. The underlying framework adopted by the Constitutional Court was clearly “dualist”. The Constitutional Court started from the consideration that the two systems of national and Community law were distinct and “autonomous”, whilst however being “coordinated” with each other. This is a precondition for granting European law its own power to become enforceable within the national legal system.

²⁶ See Judgment of the European Court of Justice Judgment of 15 July 1964, *Flaminio Costa v. E.N.E.L.*, Reference for a preliminary ruling: Giudice conciliatore di Milano – Italy. – Case 6/64, Grounds. currently available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61964CJ0006> [last accessed 25.6.2022].

of the commitments and limitations that Italy had accepted in ratifying a treaty adopted in order to give effect to Article 11.

By two judgments issued in the mid-1970s,²⁷ whilst acknowledging the primacy of Community law, the Constitutional Court nonetheless reserved the right to review it in the event of any conflict with ordinary legislation. According to this view, any provision of national law at odds with the treaties would be unconstitutional. However, that unconstitutionality had to be established by the Constitutional Court itself, and the lower courts were categorically refused any right to disapply any such legislation directly.-

“As far as later domestic legislation is concerned, passed by statute or instruments having the same binding nature, this Court holds that the law as it stands does not confer upon an Italian judge the right to disregard it (...). It does not even appear possible to give the possibility of disregarding later domestic legislation as a result of a choice between Community and domestic law, which the Italian judge is allowed to do from time to time, on the basis of an evaluation of their respective resistance. In that hypothesis, the Italian judge would have to have the power to identify the only provision validly applicable, which would be the same as admitting he had the power of ascertaining and declaring the absolute lack of jurisdiction of the national legislature, albeit limited to certain areas, a power which, as the law currently stands, the judge certainly has not got’.²⁸

However, this solution too was not without its drawbacks. It was adopted in the 1970s when the Constitutional Court was busy with the first and only criminal trial involving a number of ministers embroiled in the Lockheed scandal,²⁹ and an extremely large backlog of cases

²⁷ See Italian Constitutional Court, Decision no. 232 of 30 October 1975, *Industrie chimiche dell'Italia Centrale v. Ministero del Commercio con l'estero* (currently available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A81975IT1022%2801%29>) and Decision no. 183 of 23 December 1973, *Frontini Franco e s.r.l. Commercio Prodotti Alimentari v. Ministero delle finanze* (currently available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A81973IT1218%2801%29>) [last accessed 25.6.2022].

²⁸ See Italian Constitutional Court, Decision no. 232 of 30 October 1975, *Industrie chimiche dell'Italia Centrale* cit., section 6.

²⁹ It was only in 1989 that Article 96 of the Constitution was reformed, after which jurisdiction over offences committed by ministers was vested in the ordinary courts. The Italian branch of the Lockheed scandal involved the bribery of Christian Demo-

had built up. The upshot of this would be that the relevant Community regulation that had been violated would be suspended for several years, pending a declaration that the national law was unconstitutional. In other words, the procedure mooted by the two judgments adopted in the 1970s made the review of the compatibility of national law with Community law excessively unwieldy in requiring the merits courts to refer questions to the Constitutional Court, as the sole court competent to declare legislation unconstitutional. This outcome ran contrary to the principle of the direct effect of Community law, the scope of which was reined in by a national judicial framework that was quite impractical and cumbersome.

Indeed, the Court of Justice did not shrink back from objecting to the approach taken by the Constitutional Court. By the *Simmenthal* judgment of 9 March 1978, the Luxembourg court held that it was necessary to ensure that Community law took effect within the individual legal systems and to consolidate the case law on the primacy of Community law. The dispute that resulted in the decision by the Court of Justice had arisen in Italy and concerned a possible violation of one of the pillars of the EEC Treaty, namely the free movement of goods. Thanks to its cooperation with the Italian merits court, the ECJ took the opportunity to consolidate its case law on primacy and to set it out clearly within the Community legal order.³⁰ The judgment held that “A national Court

crat and Socialist politicians to favour the purchase by the Italian Air Force of C-130 Hercules transport planes.

³⁰ Judgment of the Court of 9 March 1978. – *Amministrazione delle Finanze dello Stato v. Simmenthal SpA.* – Reference for a preliminary ruling: *Pretura di Susa – Italy.* – Annulment by the national court of a law contrary to Community law. – Case 106/77. The facts are well known. Simmenthal S.P.A., an Italian company that produced canned meat, was obliged to pay health control charges in relation to the importation of a batch of beef from France. The Italian company argued that this constituted a violation of Article 30 of the Treaty (prohibition between Member States of quantitative restrictions on imports and of all measures having equivalent effect), and asked that the charges unduly paid be reimbursed to it. *Rather than referring the matter to the Constitutional Court* in order to obtain a declaration that the Italian law imposing a requirement to pay for health checks on meat was unconstitutional, as required according to the case law of the Constitutional Court, the *Pretore di Susa* [Susa District Court Judge], before whom the proceedings were brought, sent a reference to the Court of Justice according to the procedure laid down by Article 177 of the Treaty (The Court of Justice shall have jurisdiction to give *preliminary rulings* concerning the interpretation of the Treaty). The Italian ordinary court

which is called upon, within the limits of its jurisdiction, to apply provisions of community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provisions of national legislation, even if adopted subsequently, and it is not necessary for the Court to request or await the prior setting aside of such provisions by legislative or other constitutional means".³¹

The judgment in *Simmenthal* attempted to alter the viewpoint of the national courts, which were bound by the rulings of the Court of Justice. The Court of Justice had substantiated the content of the clause providing for the supremacy of Community law in a peremptory and unequivocal manner. That stance taken by the highest European Court had significant legal implications in requiring a reconsideration of the hierarchy of sources of law within the legal systems of the individual Member States.

The Italian Constitutional Court then adopted the judgment in *Granital*.³² This constituted an extremely important step which made further, far-reaching changes to the case law of the Constitutional Court on relations between Community law and national law. In its *Granital* judgment, which was adopted twenty years after the judgment in *Costa v. Enel*, the Constitutional Court finally held that any provision of national law that violated Community law should be disapplied directly by the individual court.³³

had thus identified the weakness within the method proposed by the Constitutional Court along with the danger that the rights protected under Community law might not be sufficiently safeguarded under the procedure described in particular in the judgment in *Industrie Chimiche dell'Italia Centrale v. Ministero del Commercio*.

³¹ Judgment of the Court of 9 March 1978, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA. cit.*, Operative part.

³² See: G. Gaja, *Constitutional Court (Italy)*, Decision No. 170 of 8 June 1984, *S.p.a. Granital v. Amministrazione delle Finanze dello Stato*, "Common Market Law Review", Vol. 21 (4) – 2 January 1984., p. 184; see also: A. La Pergola, p. del Duca, *Community Law, International Law and the Italian Constitution*, "American Journal of International Law", Vol. 79, Issue 3, July 1985, pp. 598–621.

³³ See paragraph 6 of the judgment: "[...] Therefore the regulation is always applied, whether it follows or precedes the national statute incompatible with it. And the national judge who has to apply it may possibly, if he considers it necessary, ask for assistance on interpretation from the Court of Justice, under Article 177 of the Treaty, in order to ascertain the interpretation of the regulation".

The Constitutional Court thus aligned its position with that set out by the ECJ in the *Simmenthal* judgment. The Constitutional Court acknowledged the role of the Court of Justice in interpreting and applying Community law: in fact, the latter was recognized as being the sole body with authority to interpret the meaning, scope, and manner of application of Community law. In particular, the Constitutional Court held that in the event of any conflict with national law, Community law as interpreted within the judgments of the Court of Justice issued following a reference for a preliminary ruling was directly applicable.

The dispute marked the end point of what has been defined as the Constitutional Court's "surrender".³⁴ In its 1984 judgment in *Granital* it accepted that the ordinary courts had the power to review compatibility with Community law, and also accordingly the power to disapply any provision of national law in breach of Community law. Within a legal system such as Italian law that is characterised by a system of central constitutional review in which incidental proceedings play a fundamental role, this represented a significant departure, which could only with difficulty be reconciled with the overall system.³⁵

For more than 20 years the Italian Constitutional Court and the Court of Justice of the European Communities disputed the proper relationship between Community law and national law. In *S.p.A. Granital v. Amministrazione finanziaria*, the Constitutional Court finally adopted a position that was consistent with the Community Court's view of the supremacy of Community law.

³⁴ See A. La Pergola, *Il giudice costituzionale italiano di fronte al primato e all'effetto diretto del diritto comunitario: note su un incontro di studio*, *Giurisprudenza costituzionale*, 2003, p. 2432, who even speaks in terms of the "invisibility" of Italian law. See also F. Astengo, *The Europeanisation of the Italian Constitutional Court*, *Journal of European Integration*, Vol. 26, 2004, Issue 2, p. 125.

³⁵ It is also important to consider the possibility of so-called "dual preliminary", i.e. when the ordinary court concludes that a provision of internal law violates both Community law and the Constitution. According to the Constitutional Court, the issue of Community law is "logically and legally prior to the question of constitutionality", and must consequently be resolved before making any incidental reference to the Constitutional Court. See Constitutional Court, Decision no. 284 of 4 July 2007, section 3. On this matter see G. Martinico, *Multiple loyalties and dual preliminary: The pains of being a judge in a multilevel legal order*, *ICON*, Vol. 10 No. 3, 2012, p. 871 et seq. See also M. D'Amico and C. Nardocci, *The Constitutional Court cit.*, especially Chapter 9, §13 (The Constitutional law and the ECJ).

This therefore resolved the differences between the approaches of the Italian Constitutional Court and the European Court of Justice, which had lasted from 1964 until 1984. However, precisely the delay by the Constitutional Court in issuing this judgment is emblematic of the infeasibility of a system under which Community law could only be disapplied in Italy where it had previously been declared unconstitutional by the Constitutional Court: the *Granital* case arose out of a dispute between an Italian undertaking and the Italian customs administration concerning the duty that was payable on imports of barley from Canada. The issue was extremely complicated, and involved the interpretation of a European rule on tariffs. However, the important aspect for our present purposes is that the dispute arose in 1972, whereas the *Granital* judgment was issued in 1984, a full 12 years after the events at issue in the case took place. The Court of Justice could not accept a solution of this type: although the application of the principle of *lex superior derogat legi inferiori* appeared to ensure the primary of European law in conceptual terms, in practice, delays ended up causing serious harm. For the entire duration of the period between the time when the Community law was adopted and the challenge to the Italian law in breach of it before the Constitutional Court, through to the judgment on the constitutionality of that provision, the European rule had as a matter of fact been disregarded.

At the end of the process described above, the Constitutional Court so to speak “self-emarginated” itself³⁶ from the issue of Community law, allowing the respective questions to be ruled upon by the ordinary courts, which could refer questions directly to the Court of Justice where appropriate.

³⁶ The expression “self-emargination” is used by A. Celotto, *Ancora un'occasione perduta per mettere chiarezza sulle interferenze tra giudizio di costituzionalità e giudizio di 'comunitarietà*, *Giurisprudenza costituzionale*, 2004, p. 1732.

1. THE DOCTRINE OF “COUNTER-LIMITS” ON LIMITATIONS OF SOVEREIGNTY

Over the course of its “journey towards Community law”, the Italian Constitutional Court elaborated and refined a variety of arguments and techniques, which did not fail to arouse interest in other legal cultures,³⁷ both within the European Community and further afield. One of these arguments and techniques that has aroused particular interest has been the doctrine of “counter-limits”.

As an indication of how strained the relationship between Italian law and Community law has been in terms of relations between the Constitutional Court and the Court of Justice, it should be pointed out that (reiterating the position taken in the *Frontini* judgment,³⁸ and in a similar manner to the approach taken in other countries³⁹), the Constitutional Court has reserved the right to review Community law “with reference to the fundamental principles of our constitutional order and inalienable human rights”, holding the issue of fundamental rights to constitute a non-transferable element of national sovereignty. This doctrine is known as the theory of counter-limits.⁴⁰

The Constitutional Court has specified that, were a provision or act of EU law to violate such a fundamental principle or right, the ordinary courts should refer to the Constitutional Court a question concerning the constitutionality of the Italian legislation implementing the European treaties insofar as it violates those fundamental principles.

³⁷ R. Bifulco, D. Paris, *Der italienische Verfassungsgerichtshof*, [in:] A. von Bogdandy, C. Grabenwarter, P.M. Huber (eds). *Handbuch Ius Publicum Europaeum: Band VI: Verfassungsgerichtsbarkeit in Europa*, C.F.Müller, Heidelberg, 2016, p. 349; L.K. Mannefeld, *Verfassungsrechtliche Vorgaben für die europäische Integration: Die europäische Integration*, Mohr Siebeck, Tübingen, 2017, p. 180.

³⁸ *Supra* note 27.

³⁹ See the ground-breaking judgments of the Federal Constitutional Court of Germany, such as *Solange I* and *Solange II*, which represented milestones for the overall process of European integration.

⁴⁰ See M. Cartabia, *The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Community*, “Michigan Journal of International Law”, Vol. 12, Issue 1, 1990, p. 183; L. Gordillo, *Interlocking Constitutions: Towards an Interordinal Theory of National, European and UN Law*, Hart Publishing Oxford, 2012, Part 1, § 2.2.

The theory of counter-limits was developed by the Constitutional Court as a last resort in order to safeguard the supreme principles and fundamental rights of the constitutional order against any possible risk of internal or external “aggression”. It has been developed with greater force and vigour in the face of the expansion of the process of European integration. According to this theory therefore, no limitation of sovereignty under Article 11 of the Constitution is capable of justifying the sacrifice of core constitutional rights.

However, it is clear that any judgment of the Constitutional Court that actually applied the theory of counter-limits could have serious repercussions on relations between Italy and the European Union. The possibility of invoking the doctrine of counter-limits was recently considered in the *Taricco* case,⁴¹ in which the Italian Constitutional Court made a reference for a preliminary ruling questioning the compatibility with the fundamental principles laid down by the Italian Constitution (including in particular the constitutional principle of legal certainty in criminal matters under Article 25(2) of the Italian Constitution) of the Court of Justice’s interpretation of certain principles of European law.

The “Taricco rule” called for the Italian courts to disapply certain provisions of Italian law concerning statutes of limitations (or limitations periods) in tax evasion cases involving value added tax (VAT), where certain conditions were met. The effect of the “Taricco rule” was that some cases that were time-barred under Italian law could still be prosecuted in Italian courts, based on the disapplication of the Italian provisions.⁴²

⁴¹ See the press release of the Constitutional Court, EU FRAUD AND LIMITATION PERIODS: THE “TARICCO RULE” IS INCOMPATIBLE WITH THE PRINCIPLE OF CERTAINTY IN CRIMINAL LAW. An emblematic case of dialogue between Courts, Rome, 31 May 2018, currently available at: https://www.cortecostituzionale.it/documenti/comunicatistampa/CC_CS_20180607121930.pdf [last accessed 25.6.2022]. See also G. Piccirilli, *The ‘Taricco Saga’: the Italian Constitutional Court continues its European journey*, “European Constitutional Law Review”, Vol. 14, Issue 4, 2018, pp. 814-833; R. Di Marco, *The ‘Path Towards European Integration’ of the Italian Constitutional Court: The Primacy of EU Law in the Light of the Judgment No. 269/17*, “European Papers”, 14.07.2018. Currently available at: <http://www.europeanpapers.eu/en/europeanforum/path-towards-european-integration-italian-constitutional-court> [last accessed 25.6.2022].

⁴² See https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_2018_115_EN.pdf

The Constitutional Court asked the Court of Justice of the European Union to interpret differently the Community provision that was considered to violate the fundamental principle of Italian law laid down by Article 25(2) of the Constitution. In its response, the Court of Justice in part accepted the arguments submitted by the Constitutional Court.⁴³ The specific issue under examination was of fundamental significance within the context of the more general relations between constitutional courts and the Court of Justice: the choice of mitigating the principle of the uniform application of EU law in the name of respect for fundamental rights. The Court of Justice and the Constitutional Court have perhaps struck a balance between the primacy of EU law and the doctrine of counter-limits.

V. FINAL REMARKS. THE CONSTITUTIONAL REFORM OF 2001

Fifty years after the Constitution was adopted, the reform of Title V of the Constitution approved in 2001⁴⁴ introduced a provision of fundamental importance as regards relations with external systems of law, even though its purpose was to recalibrate relations between the state and the regions. The provision in question is Article 117(1), which provides that: „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“.

In actual fact, the new provision, which refers explicitly to Community law, can be construed as confirmation of the framework previously defined within the case law. The Constitutional Court held that:

“Article 117(1) of the Constitution therefore expressly confirmed in part what had already been the position under Article 11 of the Constitution, namely the duty of the State and regional legislatures to respect

⁴³ The judgment of the Court of Justice removed the basis for the discrepancy between national law and Community law, convincing the Constitutional Court that it should rule on the case in judgment no. 115 of 31 May 2018.

⁴⁴ See constitutional reform no. 3 of 18 October 2001. The 2001 constitutional reform reshaped Italian regional governance by changing the way in which powers are distributed among levels of government.

the limits resulting from Community law. (...) However, the limit on the exercise of legislative powers imposed by Article 117(1) of the Constitution is only one of the relevant aspects of the relationship between internal law and European Union law – a relationship which, considered overall and as delineated by this Court over the course of recent decades, still has a ‘secure foundation’ in Article 11 of the Constitution.

Indeed, all of the consequences resulting from the limitations on sovereignty which only Article 11 of the Constitution allows, in both substantive and procedural terms, for the administration and the courts, in addition to the limitations on the legislature and the relative international responsibility of the State, have remained in place even after the reform”.⁴⁵

Following calls in several judgments⁴⁶ for rules to be enacted in order to prevent the regions from adopting any provisions in breach of EU law (or to annul any such provisions previously adopted), the reform to Article 117 of the Constitution provided a definitive solution to the problem.

This is the only Article of the Constitution that refers to Community law. The European dimension to the Italian Constitution has thus been framed almost entirely by the Constitutional Court.

⁴⁵ See Decision no. 227 of 24 June 2010, section 7.

⁴⁶ See Decisions no. 384 of 10 November 1994 and no. 94 of 30 March 1995.