From Partial to Full Dialogue with Luxembourg: The Last Cooperative Step of the Italian Constitutional Court

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Introduction

The year 2013 will be remembered as a very good year for the evolution of the judicial conversation between the Court of Justice and the constitutional courts of the member states. This is true at least with regard to the particular form of judicial cooperation that may be considered the institutional channel of dialogue between the Luxembourg Court and national judges: the preliminary ruling mechanism. In 2013 the French *Conseil Constitutionnel*[1] for the first time in its history sent a request for a preliminary ruling to the ECJ and the latter answered[2] the first preliminary ruling sought in 2011 by the Spanish *Tribunal Constitucional*. Moreover, the Italian *Corte Costituzionale* decided for the first time to raise a preliminary reference[3] to the Luxembourg judges in the context of *incidenter*

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[1] *See* the case note by Arthur Dyevre in this issue, *infra* on p. 154 and, in Italian, S. Catalano, 'Il primo rinvio pregiudiziale del Conseil Constitutionnel alla Corte di giustizia dell'Unione europea: contesto e ragioni di una decisione di non rivoluzionaria', <www.aic.it>, visited 25 Jan. 2014.

[2] ECJ 26 Feb. 2013, Case C-399/11, *Stefano Melloni* v. *Ministerio Fiscal, see* M. Iacometti, 'Il caso Melloni e l'interpretazione dell'art. 53 della Carta dei diritti fondamentali dell'Unione europea tra Corte di giustizia e Tribunale costituzionale spagnolo', <www.associazionedeicostituzionalisti.it>, visited 25 Jan. 2014.

[3] Italian Constitutional Court, judgment No. 207, 18 July 2013. For the first comments in Italian, *see*, among others, U. Adamo, 'Nel dialogo con la Corte di giustizia la Corte costituzionale è un organo giurisdizionale nazionale anche nel giudizio in via incidentale. Note a caldo sull'ord. n. 207/2013', <www.forumcostituzionale.it>, visited 25 Jan. 2014; B. 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', <www.forumcostituzionale.it>, visited 25 Jan. 2014; G. Repetto, 'La Corte costituzionale effettua il rinvio pregiudiziale alla Corte di giustizia UE anche in sede di giudizio incidentale: non c'è mai fine ai nuovi inizi', <www.dirittocomparati.it>, visited 25 Jan. 2014; I. Spigno, 'La Corte costituzionale e il rinvio pregiudiziale nel

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proceedings.[4] This represents a second step, following an initial one taken in 2008 in so called direct proceedings.[5] The new judicial path of the Italian Constitutional Court (ICC) is in line with the new season of cooperative constitutionalism in Europe.[6]

To identify the resulting added value of the new step, this contribution will contextualise the decision of the Italian Constitutional Court to raise a preliminary reference in an *incidenter* proceeding. First, the evolution of the constitutional case-law concerning the possibility for the Court to make use of the preliminary procedure (Article 267 TFEU) will be examined and, secondly, the content of the 2013 decision and its legal reasoning. Finally the reasons behind the last cooperative step and its added value to the 2008 decision will be discussed.

From the lack of any direct interaction to partial dialogue

As is well known, until 2008 the ICC not only had never raised a preliminary question, but totally dismissed the idea of a dialogue with the Court of Justice in preliminary proceedings.

In its decision No. 13 of 1960,[7] the Italian Court decisively denied that that the Court itself could be included among the judicial institutions that are part of the Italian judicature (and thus, implicitly and consequently, that it could be involved in preliminary procedures). The reason was that 'several and deep differences' existing between the judiciary and the Constitutional Court. The most

giudizio in via incidentale (nota a Corte cost. ord. n. 207/2013)', <www.associazionedeicostituzionalisti.it>, visited 25 Jan. 2014.

[4] As it is well known, the Italian Constitutional Court can be called upon in its activity of constitutional review in two ways: in the *incidenter* proceedings (*giudizio in via incidentale*), it is for the judge handling a case to ask the Court for a constitutional review after having considered that the relevant provisions to be applied are likely to be in conflict with the Constitution; on the other hand, in the so 'direct proceedings' (*giudizio in via principale)*, the relevant governmental bodies of either the State or the concerned Regions can request the constitutional review of the respective laws and statutes within a term of sixty days as of the approval of the same, regardless of the commencement of judicial proceedings before a court.

[5] The reference in this case is the order No. 103, 15 April 2008, when the ICC raised for the first time a preliminary reference to the ECJ in the context of a direct in the case of a direct proceeding (*giudizio in via principale*), *see supra* n. 3. *See* for a comment on the decision, G. Martinico and F. Fontanelli, 'Cooperative Antagonists – The Italian Constitutional Court and the Preliminary Reference: Are We Dealing with a Turning Point?', 5 *Eric Stein Working Paper* (2008). *See also* M. Dani, 'Tracking Judicial Dialogue – The Scope for Preliminary Rulings from the Italian Constitutional Court', 10 *Jean Monnet Working Paper* (2008).

[6] A. Sajò, 'Learning Co-operative Constitutionalism the Hard Way: The Hungarian Constitutional Court Shying Away from EU Supremacy', 2 *Zeitschrift für Staats- und Europawissenschaften* (2004) p. 351.

[7] Constitutional Court, judgment No. 13, 23 March 1960.

profound of these differences was, according to the constitutional judges, the absolutely peculiar function of constitutional control played by the ICC: the highest guarantee of the respect of the Constitution by the State and the Regions. In the well-known *Granital* decision, No. 170/1984, the Constitutional Court made clear that it was for the common judges to raise preliminary references to the Court of Justice. In Decision No. 536/1995, the constitutional judges confirmed their position, stating that the Constitutional Court is not among the national courts in the sense of (former) Article 177 EEC because of substantial difference between the role and powers of the ICC, without any precedent in the Italian legal system, and the role and the powers which characterize, traditionally, the activity of the common judges in Italy.

It should be also added that the justification given by the ICC for this radical approach was not convincing. On the one hand, as has been noted, 'Constitutional Courts are not alien to the jurisdictional function. So, highlighting their original nature is not sufficient to conclude that they are not endowed with the ability to seek a preliminary ruling before the Luxembourg Court.'[8] On the other hand it has been rightly pointed out[9] that the fact that the ICC did not consider itself to be an *a quo* referring judge was in evident contradiction to the circumstance that the same Court, according to its own consolidated case-law,[10] has always considered itself a judge *a quo* with regard to the possibility to raise before itself questions of constitutional review concerning national legislation. As has been noted, it were true that the ICC is not a jurisdictional authority, it would not then even be able to raise before itself a question of constitutional review of legislation, since that possibility is reserved only to judge in the course of a judicial process.[11] The refusal of the Constitutional Court to have recourse to the preliminary ruling procedure has been explained by its wish to prevent itself from being subjected to the European Court, for fear of harming its own honour and credibility.[12]

However, in 2008 the Constitutional Court, in the aforementioned order No. 10, in a case concerning direct proceeding, suddenly decided to raise a preliminary reference before the Court of Justice. The question is: why did this change take place?

[8] M Cartabia, 'Taking Dialogue Seriously. The Renewed Need for a Judicial Dialogue at the Time of Constitutional Activism in the European Union', 12 *Jean Monnet Working Paper* (2007), <centers.law.nyu.edu/jeanmonnet/papers/index.html>, visited 25 Jan. 2014, at p. 26.

[9] *See* F. Fontanelli and G. Martinico, 'Between Procedural Impermeability and Constitutional Openness: The Italian Constitutional Court and Preliminary References to the European Court of Justice', 16 *European Law Journal* (2010) p. 345.

[10] *See* orders No. 22/1960, 225-297/1995, 183-197/1996, 42, 156, 288/2001.

[11] Cartabia, *supra* n. 8.

[12] Ibid.

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The answer probably lies in the misfiring of the ICC's institutional strategy to build an indirect, silent[13] conversation with the Court of Justice by using a technique called 'double preliminarity'.[14] By using this technique, the ICC was able to avoid a direct confrontation with the Court of Justice by establishing that, in cases in which the same legislation gave rise to both a question of constitutionality and a question of EU conformity, the national *a quo* judges were authorised to raise the former question before the constitutional judges only after having raised the question before the Court of Justice and having received a preliminary ruling from the same Court.

The Constitutional Court first implicitly referred to this principle Decision No. 206/1976. It was expressed explicitly in the aforementioned Case No. 536/95 in which the Court declared itself incompetent to raise a preliminary reference to the Court of Justice: precisely due to this alleged lack of competence, it is for the judge *a quo,* in a case in which it considers the assumed violation of a directly applicable EC norm as a pre-requisite of the alleged conflict with the national disposition of the Constitution, to refer, in the absence of a univocal case-law of Court of Justice, a preliminary reference to the latter, in order to have an interpretation that is certain and univocal of the (at that time) EC disposition at stake. The Court added that this interpretation (and the subsequent preliminary reference to the Court of Justice) is fundamental in order to integrate the two evaluations that the judge *a quo* must assess before raising the question before the ICC. In the absence of a preliminary referral to the Court of Justice, the question will be consequently considered inadmissible.

The reason underlying the use of this mechanism is quite evident: by building this 'judicial triangle,' the Constitutional Court not only confirmed its view on the separation between the domestic and the European legal orders, but also aimed to preserve control over the common judges and to maintain the 'last word' with regard to its interaction with the Court of Justice. In other words, according to the *theory* of 'dual preliminarity principle', when the judge *a quo* raises a question of constitutionality with regard to a piece of national legislation which, according to the same judge *a quo* might also be in conflict with EU law, the ICC would return the question (by declaring it 'inadmissible') to the ordinary judge, asking him to raise the question of the conformity of the national legislation with EU law before the Court of Justice.

Unfortunately for the constitutional judges, *in practice*, things did not go as planned. The argumentative tool that was supposed to be a mechanism to preserve

[13] G. Martinico, 'Judging in the Multilevel Legal Order: Exploring the Techniques of Hidden Dialogue', 21 *King's Law Journal* (2010) p. 257.

[14] M. Cartabia, 'Considerazioni sulla posizione del giudice comune di fronte a casi di 'doppia pregiudizialità' comunitaria e costituzionale', 22 *Foro Italiano* (1997) p. 120.

the central role of the ICC in the assessment of the constitutionality of supranational law turned out to be a 'judicial boomerang' which brought about the further marginalisation of the ICC from the circuit connecting the common judges and the Court of Justice. The common judges, once having consulted the latter as requested by the ICC pursuant to the technique of double preliminarity, have increasingly tended to solve the pending judicial dispute definitively without suspending it for a second time to raise a question of constitutionality before the ICC. There are at least two reasons for the common judges' attitude. The first reason is related to a procedural issue and the second to a substantive one.

With regard to the first point, the pathological length of the judicial process in Italy is very well known, especially in Strasbourg. In other words, once a judge has suspended a pending proceeding for an average period of 16 months while it is awaiting the answer of the Court of Justice, suspending the process another time to raise a question of constitutionality before the ICC would be too protracted and difficult. This is the reason why the national judge tends to solve the case definitively after receiving the preliminary ruling of the Court of Justice without giving the last word to the ICC, despite the ICC's idea of a three-cornered dialogue[15] involving the lower courts, the Court of Justice and itself.

However, the reluctance of the common judges to strictly apply the 'dual preliminarity mandate' is not solely rooted in a procedural issue. There is something else that has more to do with the cooperation and even the complicity that the Court of Justice has been able to build with the common, and especially the lower, courts in Italy since the time of the preliminary reference of the *giudice conciliatore* of Milan in *Costa* v. *Enel*. It is because of the privileged relationship of the Italian common judges with the Court of Justice, and their consequent trust in its judgments, that they have become used to considering its interpretations as definitive in solving concrete disputes, even when those disputes involve issues related to the constitutionality of the legislation under interpretation.

In light of this, the Italian Constitutional Court's innovative decision to send a preliminary reference to the Court of Justice for the first time in 2008 appears to be a reaction against that further marginalisation. Was the Court's 2008 decision a true *revirement*? Yes and no. Or, more appropriately: Yes, but only partially.

Without doubt, it was a true *revirement* with regard to the Court's self-perception as a national judge competent to raise a preliminary reference before the Court of Justice. In fact, in its 2008 order, the Court clearly affirmed that 'regarding the existence of the conditions necessary in order for this court to make a preliminary reference to Court of Justice for the interpretation of Community law, it should be pointed out that, albeit in its particular role as supreme constitutional guarantor of the national legal order, the Constitutional Court amounts to a national

[15] Cartabia, *supra* n. 8, at p. 31.

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court within the meaning of (former) Article 234(3) of the EC Treaty and, in particular, a court of first and last instance (since – pursuant to Article 137(3) of the Constitution – its decisions are not subject to appeal).'

It was also a true *revirement* perspective regarding the relationship between the Italian legal order and the European one.[16] The Court does not any longer view the two legal orders as 'autonomous and distinct,' though coordinated, as in the *Granital* decision, but as 'integrated legal orders'. From a separation based perspective to a integration based one, without the parochialism that was exhibited in the previous judgment. The confirmation of this new attitude can be found in the Court's affirmation that if it were not possible to make a preliminary reference in accordance with (former) Article 234 of the EC Treaty in a direct constitutional proceeding, the general interest in the uniform application of Community law, as interpreted by the Court of Justice of the European Communities, would be harmed.' The idea is clearly to achieve, in the most effective way, the main goal – effectiveness – of EU law and no longer to stress the 'peculiar' nature of the Constitutional Court.

However, the significance of the new approach of 2008 should not be overestimated. In fact, with regard to the inclusion of the ICC among the 'national courts' within the meaning of the current Article 267 TFEU, the constitutional judges added that 'only in constitutionality proceedings in which the court is seized directly, does it have the right to make a preliminary reference to the European Court of Justice.' In other words, the ICC admitted the possibility for a direct dialogue with the only in the 'direct proceedings activated by the State and the Regions and not in the incidenter proceedings'. In 2013 the ICC, which, in the meantime, has been integrated by a very influential European constitutional law scholar, Marta Cartabia, who in her academic capacity has been among the most convinced supporters[17] of a direct and full dialogue between the ICC and the Court of Justice, finally decided to take the final step and to seek a preliminary ruling request in an *incidenter* proceeding. This step will be analysed in the next paragraphs.

[16] *See* S. Bartole, 'Pregiudiziale comunitaria ed 'integrazione di ordinamenti', 4-5 *Le Regioni* (2008) p. 898; L. Pesole, 'La Corte costituzionale ricorre per la prima volta al rinvio pregiudiziale. Spunti di riflessione sull'ordinanza n. 103 del 2008', <www.federalismi.it>, visited 25 Jan. 2014; I. Spigno, 'La Corte Costituzionale e la vexata quaestio del rinvio pregiudiziale alla Corte di. Giustizia', <www.osservatoriosullefonti.it>, visited 25 Jan. 2014.

[17] *See* M. Cartabia, 'La Corte costituzionale italiana e il rinvio pregiudiziale alla Corte di giustizia Europea', in N. Zanon (ed.), *Le corti dell'integrazione europea e la Corte costituzionale italiana* (ESI 2006), p. 119.

The last step: Towards a 'full' dialogue

In the 2013 case, the Italian Constitutional Court considered a reference from two district courts related to the asserted conflict between Article 4(1) of the Constitution and Section (11) of Law No. 124 of 3 May 1999 (Urgent provisions on school staff), with particular reference to Article 117(1) of the Constitution[18] and Clause 5(1)[19] of the framework agreement concluded by the European Trade Union Confederation (ETUC), Union of Industrial and Employers' Confederations of Europe (UNICE) and European Centre of Employers and Enterprises providing Public services (CEEP) on fixed-term work, annexed to Council Directive No. 1999/70/EC of 28 June 1999.[20.]

The national employment legislation that was under constitutional scrutiny permits various classes of supply teachers to be appointed under successive fixed-term contracts without setting a limit on the total duration of such appointments or the number of renewals, and contains no provision for the payment of damages in the event of their abuse. According to the referral orders, the only reason for this system was the need to save public resources, an objective which, as important as it may be, could not constitute, in the words of the same judges, a 'social policy goal[,] the pursuit of which – according to the case-law of the Court of Justice – justifies the use of successive fixed-term contracts of employment.'

According to the same judges, there could be no doubts in the present case concerning the interpretation of the relevant EU legislation that would require a preliminary reference to the Court of Justice because, in their view, the conflict between the EU and national legislations was evident. The referring judges further advanced that they could not resolve the identified conflict by setting aside the national legislation deemed to be incompatible with Community law; in order to do so, the beneficial provision of the Directive would have to be directly effective,

[18] According to which '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.'

[19] According to which 'To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures: (a) objective reasons justifying the renewal of such contracts or relationships; (b) the maximum total duration of successive fixed-term employment contracts or relationships; (c) the number of renewals of such contracts or relationships. 2 […] Member States after consultation with the social partners and/or the social partners shall, where appropriate, determine under what conditions fixed-term employment contracts or relationships: (a) shall be regarded as "successive" (b) shall be deemed to be contracts or relationships of indefinite duration.'

[20] Council Directive concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

and hence, unconditional and sufficiently precise. In the present case, however, the Court of Justice had held that clause 5(1) of the aforementioned framework agreement was neither unconditional nor sufficiently precise to be relied upon by an individual before a national court.[21] Since, in the opinion of the judges, it was also not possible to interpret the challenged provision in a manner compatible with constitutional law, they had no other option but to raise a question concerning the constitutionality of the provision due to the violation, as has been mentioned, of Article 117(1) of the Constitution, supplemented by the beneficial provision of the Directive.

That the Constitutional Court nevertheless asked a preliminary question to the Court of Justice is even more astonishing if one takes cognizance of a decision of the Italian Court of Cassation of one year before.[22] In that decision the Italian Supreme Court, in deciding if the relevant national legislation was structured in such a manner that the hiring of school staff under fixed-term contracts was in compliance with the objective reasons required under clause 5(1) of the Directive No. 1999, had clearly affirmed that there was no need to seek a preliminary ruling of the Court of Justice with regard to the interpretation of the aforementioned provision because of the univocal case-law of the EU judges regarding the matter. In other words, it was a clear case for the highest ordinary judge in Italy[23] that the 'acte claire' doctrine could be applied.[24]

In another time, the ICC would have been quite happy to rely on the absence of doubt and the 'certitude' of the referring judges, and especially of the Court of Cassation, in order to argue that there was no need to involve the CJEU in the matter. This time, however, the reaction of the ICC was very surprising and shows its new mood in favour of dialogue[25] and a deeper trust in the new season of cooperative constitutionalism in Europe.

More precisely, despite the lack of any 'interpretative' doubts by the referring common judges (in terms of contrast between the national legislation and the EU

[21] *See* ECJ 15 April 2008, Case C-268/06, *Impact* v. *Minister for Agriculture and Food and Others* and ECJ 23 April 2009, Joint Cases C-378/07 to C-380/07, *Angelidaki and others* v. *Organismos Nomarchiakis Autodioikisis Rethymnis e Dimos Geropotamo.*

[22] Italian Court of Cassation, judgment No. 10127 of 20 June 2012.

[23] The Court of Cassation explicitly recalled the 'acte claire' doctrine at p. 66 of its judgment.

[24] ECJ 6 Oct. 1982, Case C-283/81, *CILFIT and Lanificio di Gavardo SpA* v. *Ministry of Health*.

[25] *See* G. Martinico, 'Preliminary Reference and Constitutional Courts. Are You in the Mood for Dialogue?', in F. Fontanelli et al. (eds.), *Shaping Rule of Law through Dialogue* (Europa Law Publishing 2010), p. 219. It should be also mentioned that the Tribunal of Naples had already sought a preliminary reference to the CJEU with regard to the interpretation on the clause 5(1) of the Directive No. 1999/70. Another time it would have been more than enough to refrain the ICC from raising a very similar question before the Luxembourg's judges. Not this time. Another confirmation of the new cooperative approach of the Italian constitutional judges

one) and even more remarkably, as has been mentioned, by the Court of Cassation (in terms, this time, of lack of contrast) and although the ICC itself admitted the the Court of Justice had already handed down various judgments on the matter, the Constitutional judges concluded that was 'necessary to request the CJEU to give a preliminary ruling on the interpretation of clause 5(1) of Directive No. 1999/70/EC in relation to the question of constitutionality referred to this Court'.

A motive analysis

Two questions finally arise: is the decision a departure in comparison to order No. 106/2008? What motivated the Court's change of direction and why did it decide, after so many years, that the right moment had (finally) arrived to do it?[26]

It is quite evident that the answer to the first question depends upon the interpretation given to the scope of application of the first preliminary reference in a *in via principale* proceeding in 2008. Did the Court limit its self-perception as a 'national court' solely to cases in which its constitutional adjudication is limited to such direct proceeding, or was it a more general, though implicit, statement that meant the Court also has the status of national Court in an *incidenter* proceeding?

Some scholars[27] have argued that the decisive step was taken in 2008, when the Court, for the first time, recognized itself as a 'national judge' competent to refer to the Court of Justice in the context of a direct proceeding. According to this thesis, once this had been done, it would be obvious that the Court had acknowledged its new *status* both in a direct proceeding and an indirect proceeding: a different typology of access to constitutional justice cannot be a cause for a different qualification of the ICC's nature as having or not having a jurisdictional character.[28]

However, that argument is difficult to reconcile with the express words of the Constitutional Court in order No. 103/2008 according to which 'in these types of constitutionality proceedings, in contrast to those concerning an incidental

[26] I have tried to apply this approach in O. Pollicino, *Discriminazione sulla base del sesso e trattamento preferenziale nel diritto comunitario. Un profilo giurisprudenziale alla ricerca del nucleo duro del new legal order* (Giuffré 2005).

[27] *See* Guastaferro, *supra* n. 3.

[28] It has been noted as the in some previous judgments the ICC made in a way understand that that was already considering itself as a 'national judge' also in the *incidenter* proceeding. *See* Guastaferro, *supra* n. 3, where the author makes specific reference to the order No. 102/2008, in which the Court seems to identify its competence to raise a preliminary question not on the basis of its identification as a 'national judge' but in the light of distinction between EU legislation directly applicable (no competence for the Court) and EU legislation not directly applicable (competence of the ICC).

appeal, this Court has the sole right to pass judgement on the dispute and [...] if it were not the ICC itself to make a preliminary reference in accordance, nobody could do so (in the absence of judge *a quo*)'. Also, the idea of a new *revirement* fits better with the statement of the Constitutional Court in order No. 206/2013 that 'it must be concluded that this Court also has the *status* of a "national court" 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.' If clarification in this regard was needed, this means, according to the constitutional judges, that until it was provided, their position as 'national judges' was clear only with regard to a direct proceeding.

The second question: why did the ICC decide to take this new step? Approximately one year before the judgment under analysis the need[29] for the ICC to also open a direct dialogue with Luxembourg in the framework of *in via incidentale* proceedings was emphasised by stating as the ICC would be able to prevent the risk of further insulation only by deciding to [also] play an active role as [a] referring judge in indirect proceedings.[30] The reasons put forward to support this statement seem to be the same ones providing the basis, today, for the ICC's new and cooperative steps.

First, the direct proceeding has more to do with the constitutional court's role as an *arbiter* of powers and dealing with the division of competences between the state and regions, than its role as a judge of fundamental rights at a crossroad between constitutional and supranational legal orders. The *incidenter* proceeding is the privileged arena in which the ICC can fully play this role by engaging in a direct dialogue with the Court of Justice

There are at least two other elements propelling the ICC in the same direction.

First, as has been discussed above, the ICC did not achieve its desired aim by the application of the mechanism of double preliminarity.[31] What should have guaranteed the last word for the constitutional judges, with no direct involvement by them in the preliminary ruling procedure, had a contrary effect in practice; it

[29] O. Pollicino, 'The Italian Constitutional Court and the European Court of Justice: A Progressive Overlapping between the Supranational and the Domestic Dimensions', in M. Claes et al. (eds.), *Constitutional Conversations in Europe. Actors, Topics and Procedures* (Intersentia 2012), p. 101.

[30] Ibid.

[31] In the light of the judgment under analysis it is the entire system of double preliminarity which should now be reconsidered. If the Court now recognize its competence to seek a preliminary ruling in a *incidenter* proceeding at the place of the referring judge who is dealing with the contrast between national not and EU not directly applicable legislation, than it means that the scope of application of the above mentioned mechanism should be limited what common judges deals with the interpretation of directly applicable EU legislation.

resulted in their further insulation and caused them to be bypassed by the 'special' relationship between the common judges and the Court of Justice.

Lastly, and maybe even more importantly, as was specifically pointed out,[32] every constitutional court that cuts itself off from a constitutional dialogue with the Court of Justice does a disservice to its own constitutional order and also to the European constitutional system, which must be continually fed by the national constitutions.

If this is true, following this line of reasoning, it seems that the Italian Constitutional Court has finally understood that it can officially represent[33] the Italian voice in Luxembourg regarding the fundamental rights issues that are increasingly handled in the supranational judicial circuit only by engaging in a full dialogue with the Court of Justice and, consequently, can 'inject' a pluralistic view in the EU fundamental rights narrative together with other member state Constitutional Courts.

In order to take the European Union's obligation to respect the constitutional identity of the member states encapsulated in Article 4.2 of TFUE seriously, the current opportunity for the national, and particularly the constitutional, courts to establish clear borders and content regarding this identity should be taken equally seriously.

[32] Cartabia, *supra* n. 9. *See also*, id., 'Europe and Rights: Taking Dialogue Seriously', 5 *EuConst* (2009) p. 5.

[33] *See* Dani, *supra* n. 5.

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