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Open Questions in the Relation between National and Community Systems:  
The Italian Case

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**Panel 9E. The Politics and Power of the European Court of Justice**

The assumption of this paper is that with the launch of the Convention created by the Declaration of the December 2001 European Council of Laeken, a 'constituent' process for the European Union is in place<sup>1</sup>. What does this imply for the Italian system? What kind of relationship can be envisaged between the Italian and the European legal orders? What of the role for the Constitutional Court? Are the constitutional instruments regulating the Italian participation in European construction appropriate?

These are some of the questions that this paper will try to address in the following pages. In the first part, some of the elements which might contribute to define the current process as 'constituent' will be emphasized; in the second part, the particular relationship between the Italian and EU systems, as well as the peculiar relationship (or non-relationship) between the Constitutional Court on one side, and the European Court of Justice on the other, will be recalled in order to address the questions surrounding the novelty represented by the Constitutional Court's decision 135/2002; finally, some points of reflection concerning the constitutional treatment of the Italian participation in the European process of integration and the role of the Constitutional Court will be suggested.

### **I. A Constituent Process for Europe?**

We will not investigate here, the question of whether Europe does or does not require a constitution, nor if for that matter a European constitution already exists. These two questions have engaged scholars in a lively debate over the past years and some very rich literature has been produced in this regard<sup>2</sup>. Opinions are divided between those thinking that the EU already has a constitution and those believing that it does not; among the latter category, opinions are further divided between the supporters of the idea that Europe should indeed have a constitution and the supporters of the idea that such a constitution is not only unnecessary, but also undesirable at this stage of European integration. This issue is extremely complex and it involves major questions concerning the sovereignty of member states, and the capacity of their constitutional orders to 'survive' in the midst of the European integration process. Difficulties are primarily related to the uneasiness in reaching a consensus on the meaning of the term 'constitution'. Secondly, they arise from the practical impossibility of transferring to the

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<sup>1</sup> There is no doubt that a 'constitutionalisation process' has been taking place in the EU. By it "is meant the process by which the EC treaties evolved from a set of legal arrangements binding upon sovereign states, into a vertically-integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within EC territory". A. Stone Sweet, *Constitutional Dialogues in the European Community*, in J.H.H. Weiler, A.M.Slaughter, A.Stone Sweet, *The European Courts and National Courts. Doctrine and Jurisprudence*, Oxford, Hart Publishing, 1998, p. 306. On the contrary, a constituent process involves the creation of a new legal and political subject.

<sup>2</sup> Among others, J.H.H.Weiler, *The Constitution of Europe*, Cambridge, Cambridge University Press, 1999; J.Shaw, 'Postnational Constitutionalism in the European Union', in *Journal of European Public Policy*, 1999, p.579 and "Process and Constitutional Discourse in the European Union", in *Journal of Law and Society*, 2000, p.4; I. Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?', in *Common Market Law Review*, 1999, p.703; D.Blanchard, *La constitutionnalisation de l'Union Européenne*, Rennes, Editions Apogée, 2001; P.Magnette (ed.), *La Constitution de l'Europe*, Brussels, Editions de l'Université de Bruxelles, 2002; D.Grimm, 'Una costituzione per l'Europa?', in G.Zagrebelsky, P.P.Portinaro, J.Luther (eds.), *Il futuro della costituzione*, Turin, 1996, 353; A. Barbera, 'Esiste una "costituzione europea"?', in *Quad. Cost.* 1/2000, p.59; P.Craig, 'Costituzioni, costituzionalismo e l'Unione Europea', in *Riv.It.Dir.Publ.Com.* 2002, p.357.

EU experience, categories that are typical of constitutional law, which is a discipline dealing with the State, an entity that cannot be assimilated to the European Union<sup>3</sup>.

We shall further not examine whether, on the basis of the available data, the proceedings of the Convention will result in a 'real' Constitution for Europe as this is in the hands of the Intergovernmental Conference, which will make this determination in 2004. Within the Convention, visions on the future of Europe vary according to different political leaders. Germany's Minister of Foreign Affairs Fischer proposed a federation containing 'some elements' of the nation state while British Prime Minister Blair is reluctant to even talk about federalism. The French President Chirac stressed the importance of the national state, while the President of the Commission Prodi insisted on the Monnet method, which goes beyond the very concept of State itself<sup>4</sup>. Whatever shape a 'new' Europe takes<sup>5</sup>, it is worth noting that the only EU country not having a written constitution, Britain, abandoned its reticence towards such an act, by proposing, through the voice of its Foreign Secretary, Jack Straw, that the European Union should indeed have a constitution, which is "a set of basic rules, a framework for the operation of that institution. Part of the problem with Europe at the moment is that you can't turn to a single document and see all these set out in a basic framework with the law for those institutions"<sup>6</sup>. Consensus on its content, however, is far from being reached.

Instead, we shall attempt to outline some features regarding the Convention, whose task is, in the Laeken Declaration's words, "to consider the key issues arising for the Union's future developments and try to identify the various possible responses" that may lead up to the conclusion that indeed, a constituent process is taking place in Europe.

The **atmosphere** surrounding the creation of the Convention is typical of the 'big events' and expectations are very high especially considering the crucial timing in which the Convention started its work, on the brink of enlargement to Central and Eastern European countries. The Laeken Declaration used - for the first time openly and without hesitation - the **word** Constitution, and further, in a paragraph titled 'Towards a Constitution for European Citizens', it considered the eventuality of the adoption of 'a constitutional text in the Union'. Significantly, this passage immediately precedes the one containing the creation of the Convention on the future of Europe, whose aim is, in its president's

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<sup>3</sup> This exercise has occupied academia for a long time. It is not an easy task to even identify at which point some scholars decided to 'take disparate legal doctrines, to baptize them as "constitutional", and to put them together with the bold assertion that the whole was greater than the parts'. J.H.H.Weiler, *The Constitution of Europe*, (n.2 above), p. 226.

<sup>4</sup> Over the past few years the future of Europe has been a recurrent topic in major leaders' political discourse. See e.g. J.Fischer, *From Confederacy to Federation- Thoughts on the finality of European Integration*, Speech at the Berlin Humboldt University, 12 May 2000; J.Chirac, Speech before the Bundestag, 27 June 2000; Italian President Ciampi, speech at the Lipsia University, 6 of July 2000; German president Rau, speech at the European Parliament, 4 April 2001.

<sup>5</sup> Most probably the Europe of the future will contain a mixture of the various formulas suggested today. See R. Dehousse, 'European Institutional Architecture after Amsterdam: Parliamentary System or Regulatory Structure', in *Common Market Law Review*, 1998, p.596; R. S. Katz and B. Wessels (eds.), *The European Parliament, the National Parliaments and the European Integration*, Oxford, 1999, p.16

<sup>6</sup> See A. Grice, 'Tories condemn Straw's proposals for an EU constitution', *The Independent*, 28 August 2002.

words, 'to open the way towards a Constitution for Europe'. Recently, President Giscard d'Estaing drew a parallel between the crossroads faced by the Philadelphia Convention in 1787 and the European Convention, warning that in some way, the task of the latter is trickier because "we are a Europe of many nations, and with strikingly disparate dimensions, territorial and demographic, wealth and living standards"<sup>7</sup>.

The **name** chosen for the body in question is significantly 'Convention', as if to ambitiously evoke the assignments of an organ having a constituent power, entrusted with the responsibility of founding a new political order.

From a **political point of view**, the idea of assembling a Convention in charge of elaborating a constitution for Europe might have originated by a climate of indifference, if not hostility, surrounding the whole European enterprise. Since the process of ratification of the Maastricht Treaty took place, the distance between political leaders on one side, and public opinions on the other, became evident. The narrow result of the 1992 French referendum and the first Danish 'no' are only the first two illustrations of the disillusionment of European civil societies with Europe. International political factors such as the end of the cold war and German reunification, played a pivotal role in influencing the elaboration and the signature of the TUE, however the question of the impact of that new treaty on European civil society did not receive the appropriate level of attention by politicians. Since then, the EU has engaged in a sort of semi-permanent process of revision of its Treaties<sup>8</sup>. Neither the developments of Amsterdam or Nice generated genuine enthusiasm among European societies. On the contrary, both have been difficult to negotiate, have not met their original goals, and entered into force among virtually widespread indifference. Furthermore the 2001 Irish referendum's rejection of the Nice Treaty stands as an example of the fallacy of taking for granted the support for more integration from any European people, even those generally assumed to be the most enthusiastic or belonging to countries which benefit the most from participation in the Community system. Overall, among the many signals of change taking place in Europe's societies over the past decade, one which is increasingly striking, is the unpopularity of the European cause, which is reflected by an abstention rate in the European Parliament elections of 1999, where the 50% threshold was exceeded for the first time.

New Factors such as globalization, rediscovery of local powers and peripheral entities, disillusionment with political leaders, the economic costs of Europe (at least in their perception as 'sacrifices' in order to qualify for the criteria to adopt a single currency), and concerns about enlargement, combined with older existing realities including the remoteness of European bureaucracy, confusion in decision-making, lack of transparency, and a democratic deficit of the EC system have all added up to a widespread lack of confidence in the whole European project. In such a context, a new constitution appeared to be the appropriate answer to the need for clearer decision-making, a more credible institutional architecture, and to the quest for a 'closer' Europe. In a word, a new constitution appeared to be as the ideal *relance* of the European project<sup>9</sup>.

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<sup>7</sup> V. Giscard d'Estaing, *The Henry Kissinger Lecture*, Library of Congress-Washington, 11th February 2003.

<sup>8</sup> B. De Witte, 'Il processo semi-permanente di revisione dei trattati', in *Quad. Cost.*3/2002, p. 499.

<sup>9</sup> However, critics underlined that "when things are changing, the attempt to stabilize them with a constitution is particularly inappropriate. A piece of paper will not stop, nor give a new address to a fluid process, on the contrary, it would further confuse that flow. What we really need is to elaborate adequate and practicable ways to manage monetary policy, defence, immigration. A constitution requires either a

Furthermore, the **image** of the Union in its relationship with its members should be improved especially if one looks at the goal to achieve a better division and definition of competence between the Union and the Member States. In fact, the inclusion of this issue in the post-Nice process 'expresses a strategy aiming to manage the crisis of legitimacy of the Union, partially deriving from the fact that Europe's citizens perceive the latter as a too amorphous and ample entity'. It also responds to the need to address the concern of national authorities in charge of the implementation of EC law (in particular German *Länder*), as well as to the intention to contrast the diffused idea of 'zero sum game' logic in the relationship between EC and national competences<sup>10</sup>.

The idea of a Convention shows the will to at least partially remedy the classical **method of revision** of the treaties, exclusively involving the executives of member states in the negotiating phase<sup>11</sup>. Participation in the constitutional debate is enlarged, allowing that *public débat d'idées* on major options<sup>12</sup>, which is one of the main inputs to the creation of a constitution. This represents remarkable progress from the normal process of revision of treaties, which so far is a monopoly of governments. Obviously the procedure of art.48 of the EU Treaty remains unchanged. Governments are still the masters of the treaty in the sense that any modification of the treaties has to be approved by member states and ratified by each of them. However this time, at least in the phase of preparation, the number of actors involved is larger and their typology is more diversified. For example the involvement of the European Parliament and national parliaments has been emphasized as one of the more interesting elements of attraction of the 'Convention model'<sup>13</sup>.

Unlike the body that elaborated the Charter of Fundamental Rights, which was largely **composed** by jurists and presided over by a former president of the German Constitutional Court (as well as President of the Republic), the new Convention includes political personalities of great weight, both at national and European level. This bears witness to the fact that political leaders assigned the highest importance to the Convention as the workshop of the future of the Union and that from the very beginning they wanted to influence its works from 'inside'. While in the former the moment of discussion was reserved to the final phase, to the Nice Council, in the second the political debate is taking place already at the source, as it occurs in a real legislative body. Moreover, the presence of representatives of candidate countries is a signal of the will to rethink Europe in a global process and to lay the foundation for the future of an enlarged Union.

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'zero hour', in which to start from zero, or a moment in which conquests may be converted into rules" (my translation). R.Dahrendorf, "Non basta una carta per fare l'Europa" in *La Repubblica*, 14.11.2000.

<sup>10</sup> See A.Von Bogdandy and J.Bast, 'The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform', in *Common Market Law Review* 39, 2/2002, pp.227-268.

<sup>11</sup> On the limits of the Intergovernmental Conference method, N.Walker, 'European Constitutionalism and European Integration', in *Public Law*, 1996, pp. 266, 281.

<sup>12</sup> J.-V.Louis, *Le modèle constitutionnel européen: de la Communauté à l'Union*, in P. Magnette and E.Remacle, *Le nouveau modèle européen*. Vol.I: Institutions et gouvernance, Bruxelles, 2000, p.45

<sup>13</sup> B. De Witte, 'Il processo semi-permanente di revisione dei trattati' (n.8 above), p.518.

While the tasks of the Charter solemnly proclaimed at the Nice Council in December 2000 were limited to the recognition of already existing rights and the enunciation of a patrimony already belonging to the European people, the would-be content of the constitution is by far more **ambitious**. To be sure, if on one side the task of the Convention is limited to the preparation of a text to submit to the IGC, on the other the items on the agenda invest all the major profiles of the constitutional structure of the Union. As summarized by its President, the questions to which the Convention is supposed to give an answer “fall into six broad groups: fundamental questions on Europe’s role; the division of competence in the EU; simplification of the Union’s instruments; how the institutions work and their democratic legitimacy; a single voice for Europe in international affairs; and finally, the approach to a Constitution for European citizens”<sup>14</sup>.

In the words of Vice-President Giuliano Amato the text elaborated by the Convention will likely contain in order: missions of the future Europe; rights of its citizens; Union’s competences; Union’s institutions and powers; relationship between Union and Member States; modalities of future amendments<sup>15</sup>. That is to say, the typical content of a Constitution.

Thus, if it is true that an universal declaration of human rights such as the one expressed in the Charter is not enough to create a constitution because it only provides a philosophical concept of constitution and ‘neglects to take into account that in order to be a real constitution (i.e. a normative act aiming to govern a political society) a constitutional document has to include, besides solemn proclamations of values, also institutional tools regulating the use of political power and therefore allowing the realization of those values’<sup>16</sup>, it is also true that the process charged with giving precise indications concerning the institutional architecture of the EU has entered into full action. So far, European Treaties do not claim to be a constitution, nor do they declare the ambition to become one, whereas for the first time the ambitions carried out by the Convention are qualitatively different.

At this stage it is still quite unpredictable whether another modification of the treaties like all previous ones will be introduced or, in Giscard’s words, a ‘constitutional treaty for Europe’ will be adopted. Much will depend, among other things, on the type of document presented by the Convention, which will be the starting point for the discussion in the IGC. As the President of the Convention reminded his fellow delegates: “there is no doubt that in the eyes of the public, our recommendation would carry considerable weight and authority if we could manage to achieve broad consensus on a single proposal which we could all present” because “the principle underlying our existence is our unity”. In principle, governments can adopt a position that can be partially or totally different from the proposed text. However, if the Convention is able to present a single, agreed-upon proposal, the Council would then be in a ‘take it or leave it’ position of and chances for its adoption would be higher.

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<sup>14</sup> V. Giscard d’Estaing, *Introductory Speech to the Convention on the Future of Europe*, 26 February 2002.

<sup>15</sup> G. Amato, *La Convenzione Europea. Primi approdi e dilemmi aperti*, in *Quad Cost.* 3/2002, p449.

<sup>16</sup> N. Anzon, ‘La Costituzione europea come problema’, in *Riv. It. Dir. Pub. Com.* 3-4/2000, p. 638.

No doubt, the Convention is still far from embodying that idea of Europe in which the sovereign people first actively take part in the elaboration of the Fundamental Charter through their own representatives and second, give their opinion on it directly, or again through representatives. Without a constituent assembly elected by the people of Member States and without a popular decision in the final phase, neither of the two conditions mentioned is satisfied and the idea of a sovereign people holding constituent power cannot be realized. Rather, at a further stage, European people may be invited to express themselves on the proposed text through the European Parliament, as the organ representing the peoples of Member States, if not the people of Europe. Alternatively such a proposal could be directly submitted to popular scrutiny by means of a referendum to be held simultaneously in all Member States, perhaps at the occasion of the next European elections. In any case, it is up to the each country to decide, based on constitutional requirements or political considerations, whether or not to involve their citizens in this matter.

All the same, if not a constitution in the most rigorous sense of the term<sup>17</sup>, the outcome of the Convention's works will be the closest thing to it ever produced in European history. From a juridical point of view, it will consist of a new material to be introduced into national legal orders through the traditional instruments provided for this purpose and that, according to the supremacy principle, will prevail on any national legal source, including the Constitution.

In the light of these remarks, and regardless of terminological definitions concerning the document about to be produced (Fundamental Treaty, Fundamental Chart, Constitutional Treaty, Constitution), it seems unquestionable that a constituent process for Europe has been set in motion. In fact, it seems that the Convention 'operates *as if* it is writing a Constitution'<sup>18</sup>, *as if* it is laying the foundation for a new political system. A system based on the new constitution, which is in turn complementary to the Charter of Fundamental Rights, as the result of the modern vision, where powers and rights are two sides of a single reality. The fact that the Charter and the Constitution are intrinsically intertwined is also reflected in a certain parallelism between the new Convention and the one charged with the drafting of the Charter: the latter also 'worked as if it was elaborating a text destined to acquire a juridical value, using editorial and linguistic techniques which are typical of legal texts having a constitutional nature'<sup>19</sup>. In this regard, it has been suggested that the current rule of constitutionalism, which could replace the old 'no taxation without representation', should instead be 'no power without rights' or 'no power without a declaration of rights'<sup>20</sup>. In fact, many consider the Charter as the core of the European Constitution, as a sign of maturity of a legal order which is so strong that it gives its citizens an instrument they can use against its own institutions<sup>21</sup>.

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<sup>17</sup> In this regard, see the distinction between a narrow and more ample concept of constitution made by J.Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in *Constitutionalism*, L.Alexander (Ed.), Cambridge University Press, 1998, p.152.

<sup>18</sup> See M.Cartabia, "Riflessioni sulla Convenzione di Laeken", in *Quad. Cost.* 3/2002, p. 439.

<sup>19</sup> *Ibid.* p.440.

<sup>20</sup> G. Zagrebelsky, *Corti Europee e Corti Nazionali*, Seminar 12 January 2001, in [www.luiss.it](http://www.luiss.it)

<sup>21</sup> See L.S.Rossi, 'La Carta dei diritti come strumento di costituzionalizzazione dell'ordinamento dell'UE', in *Quad. Cost.* 3/2002, p.574. More skeptical is J.H.H.Weiler, 'Diritti umani, costituzionalismo ed integrazione: iconografia e feticismo', *ivi*, p.526. Before the adoption of the Charter, A.Pizzorusso, 'Il rapporto del comitato Simitis', in *Diritto pubblico comparato ed europeo*, 1999, p.559, noted that the

## II. The uneasy relation between the Union system and national legal orders: the Italian case.

If a new phase in the history of European integration has been opened, a few questions need to be addressed concerning the very delicate field of the relation between the European entity that is being shaped and national legal orders. For the Italian case, the main questions revolve around the role of the Constitutional Court in this context and the overall philosophy behind the participation of Italy in the European enterprise.

It is worthwhile to briefly recall, at this point a) the juridical and theoretical basis of the Italian participation in the Community system b) the status of EC law in Italy through the position of the Italian Constitutional Court and then c) the role of the Court within this framework

a) The **formal basis** for the Italian participation in the EC is art.11 of the 1948 Constitution, which permits such limitations of sovereignty as are necessary to international organizations aiming at ensuring peace and justice among nations. No doubt that the European Communities would fall within such a category, so that article 11, which was originally conceived in view of Italy's participation in the United Nations, has been used both by the 'doctrine' and the Constitutional Court as the legal basis for regulating the relationship with European integration.

Significantly, it is not art.10 of the Constitution (which reads "The Italian legal order conforms with the generally recognized principles of international law") that provides the legal basis for the acceptance of EC law by the national system. If applied to Community law, this automatic incorporation of the general principle of international law into the national one would imply that since one of the very fundamental rules of international law is *pacta sunt servanda*, EC treaties (*pacta*), would become part of the national legal order, and hence would have supremacy over national legislation thanks to the constitutional guarantee of article 10. Such an interpretation would have meant the full acceptance of the monism predicated by the Court of Justice. Despite being appealing, this theory<sup>22</sup>, did not encounter the favor of the majority of Italian scholars, nor of the Constitutional Court and the choice of art.11 as the 'door' for Europe prevailed. However, the utilization of art.11, that is, an already existing norm as opposed to the introduction of a new *ad hoc* norm in the Constitution, specifically designed for the European Communities implied several problems. Firstly, the 'doctrine', especially at the beginning of the European integration, preferred to set up the relationship between Italy and the European Community in the framework of international law. According to it, in order to solve the problems of conflict between a domestic and a Community provision, scholars suggested that the principle of supremacy of EC law would derive from the general international principle of supremacy of treaties (*lex specialis derogat generali*). Secondly, the Constitutional Court, which has always been attentive to '*la doctrine*' -

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creation of a Bill of Rights 'will allow to really talk about a European Constitution deriving its foundations, rather than from the transfer of States' partial sovereignty in favor of the Union, from the Union's taking on of the role of an institution endowed with its own sovereignty (although not an exclusive one) ... based on the supremacy of EC law over national law' (my translation).

<sup>22</sup> This theory was mainly upheld by R. Quadri, *Diritto internazionale pubblico*, Naples, 1960.



often being the same people<sup>23</sup> - not willing or being able to accept the position adopted by the ECJ, had to turn to the principle of the 'plurality of legal orders'<sup>24</sup>, which is commonly known for what concerns the relationship between national and EC system as 'dualism'<sup>25</sup>.

Dualism -even though never explicitly referred to by the Constitutional Court- became the theoretical basis of the whole relationship between Italian and EC legal order, as opposed to the 'monist' approach adopted by the Court of Justice.

The doctrine of separation of the two legal orders (as opposed to the hierarchical one), even with the addition of subsequent 'nuances', has been the *leitmotif* inspiring the constitutional case-law for more than forty years.

b) The question of the **relationship between national law and EC law** has been extremely problematic for the Italian judge. Surely, the initial distance between the ECJ on one side and the Italian Constitutional Court on the other has been reduced over the years and the latter moved from a phase of complete denial of supremacy of EC law to one of acceptance of such principles, although not in unconditional terms. The European Court of Justice solved the problem by declaring in its early jurisprudence that the EEC Treaty established 'a new legal order of international law for the benefit of which the states have limited their sovereign rights (...) and the subject of which comprise not only Member States but also their nationals' (*Van Gend en Loos*, 1963) and that 'by contrast with international treaties, the EEC Treaty has created its own legal system which (...) became an integral part of the legal system of the member states and which their courts are bound to apply" etc. (*Costa/Enel*, 1964).

The Italian Constitutional Court dealt with the same issue, but it took several years before its positions towards the European integration and the treatment of EC law by the national system was considered acceptable by the ECJ.

We will not review the too well known constitutional case-law concerning the acceptance of the principles of direct effect and supremacy of EC law over national one<sup>26</sup>. Suffice it to recall here some of the most significant phases in the so-called 'Community path'<sup>27</sup> of the Constitutional Court.

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<sup>23</sup> F. Ruggeri Laderchi, "Report on Italy", in J.H.H. Weiler, A.M. Slaughter, A. Stone Sweet, *The European Courts and National Courts. Doctrine and Jurisprudence*, pp.147-170.

<sup>24</sup> The most accomplished formulation of this theory can be found in Santi Romano, *L'ordinamento giuridico*, 1918.

<sup>25</sup> In simple terms, according to the dualist theory, international law and national law are conceived as separate legal orders, whereas according to the monist approach, they are operating in different spheres but are both part of a single, hierarchical system. In the case of conflict, dualism applies the chronological criteria between legal sources (legislation and transposed treaty) having equivalent legal status, whereas monism recognizes supremacy to treaty provisions.

<sup>26</sup> For a recognition see G. Gaja, 'New Developments in a Continuing Story: The Relationship between EEC law and Italian Law', in *Common Market Law Review*, 1990, p.83.

<sup>27</sup> This expression, coined by P. Barile, 'Il cammino comunitario della Corte', in *Giurisprudenza Costituzionale*, 1973, p.2405, describes the evolution in the positions assumed by the Italian Court and those expressed by the Luxembourg Court. There has been a certain correspondence between the positions of the two Courts. Up until the mid eighties, each time the latter would yet again affirm the supremacy of EC law the former, while maintaining a dualistic approach, tried to 'protect' the national legal system from external invasions and, in the end, its own prerogatives. Later, the Italian Court aligned itself with the positions expressed in Luxembourg, at least under the profile of results, if not under the one of premises.

No serious problem arose with regard to the **direct effect** of EC law and since the first years of European integration the Constitutional Court condemned the reproduction of regulations into Italian legislation. On the contrary, scholars even suggested that to a certain extent the Court “anticipated the Court of Justice in drawing the same important consequences from the principle of direct effect” (for example in affirming that not only judges, but also administrative authorities are immediately bound by EC law having direct effect in decision 11 July 1989, n.389)<sup>28</sup>. Thus, direct effect within the national legal order has been recognized to every source of EC law responding to the characters established by the ECJ: regulations (decision 27 December 1973, n.183), directives (decision 22 July 1976, n.182; 19 November 1987, n.403; 2 February 1990, n.64; 18 April 1991 n. 168), decisions rendered by the ECJ, both in preliminary ruling under art.177 (decision 23 April 1985, n.113; 16 June 1993 n.285; order 23 June 1999 n. 255) and enforcement against member states under art.169 (decision 11 July 1989, n.389).

As far as **supremacy** of EC law over national law is concerned, things have been more complicated. The problems linked to the acceptance of the supremacy originated by the fact that in Italy the accession to the European Communities was not done through the introduction of a new norm in the constitution, nor with a constitutional statute (having the same force as the Constitution), but rather with a simple ordinary statute. In other words, the *status* of the treaties was not any higher than any ordinary statute adopted by the Parliament. Consequently, the latter was not considered bound in any way by the treaties and could adopt legislation contrary with EC law. Thus, since the constitutional system did not provide any instrument to deal with the question of the treatment of EC law within the Italian system, the issue of what to do in case of conflict between a national norm and a EC norm was left in the hands of the Constitutional Court.

In extreme synthesis we may recall that at the beginning, the relationship of Italian law with EC law was regarded as a traditional relationship with international law. Due to the legal force of the statute of ratification of the treaties, EC law (primary or secondary) was considered as having the same binding power as ordinary acts of legislation. As a consequence, conflicts between the two were to be solved according to the principle *lex posterior derogat priori* regardless of their origin (Costa/ENEL, decision 7 March 1964, n.14).

Later, while affirming that national norms infringing community obligations indirectly infringed art.11 of the constitution, the Constitutional Court asserted the rule requiring ordinary judges to refer questions of constitutionality in cases of conflict between EC law and national law. Whenever a conflict between EC law and a subsequent national law would arise, the case was to be referred to the Constitutional Court for judicial review. In other words, ‘older’ EC law had supremacy because of art.11 of the Constitution, however its application had to be conditional to a previous declaration of unconstitutionality of the conflicting Italian norm. (decision 27 December 1973 n.183; 30 October 1975, n.232; 28 July 1976, n.205 and 206; 29 December 1977, n.163)

Such an approach obviously did not satisfy the ECJ which felt the need to (indirectly) give its Italian counterpart some guidelines for the future. Some of its statements in *Simmenthal* (1978) seemed to be tailor-made for the Italian Court: “every national court

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<sup>28</sup> See M.Cartabia, *The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Union*, in J.H.H. Weiler, A.M.Slaughter, A.Stone Sweet, *The European Courts and National Courts. Doctrine and Jurisprudence*, pp. 139-142

must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers to individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule” and “a national 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 provision by legislative or constitutional means”.

Finally, when it became clear that the discrepancy between the two courts had to be resolved in the name of legal certainty and effectiveness, the Constitutional Court made a complete reversal of course of its jurisprudence with the decision of 8 June 1984, n.170. *Granital* marked a turning point because for the first time the Court accepted that in order to give effect to the supremacy of EC law, Italian courts must disregard conflicting national law and apply EC law directly. That case provided the Court with the opportunity of combining the conceptual separation between the two legal systems on one side, and the practical implications of an unitary approach such as that followed by the ECJ, on the other<sup>29</sup>. The Court stated that Community law and national law are “autonomous and distinct legal systems, albeit co-ordinated in accordance with the division of power laid down and guaranteed by the treaty”, so that no problem of chronological order would arise, nor any need for abrogation or nullity of national law. Leaving lower courts -and public administration, as established in decision 389/1989- to deal with EC law did not mean, as later reaffirmed in other occasions (see for example case 168/1991) that when applying EC law instead of a conflicting domestic law the judge would qualify national provisions as unconstitutional. Instead, the fact that the two conflicting provisions belong to two separated spheres simply means that the judge would limit himself to apply EC law within its sphere and to disapply *-rectius*: not apply- the internal one.

Today Community norms prevail over every sort of national norms, including constitutional ones. Their legal treatment is not the same reserved to the constitutional norms, in other words they do not have a constitutional status because they belong to a separate legal system (Const. Court, decision 31 March 1994 n.11), but they can derogate to the constitution itself. Such an acceptance is not absolute since it is submitted to the respect, by EC law, of the fundamental values of the Constitution. The Court in fact elaborated its famous doctrine of ‘counter limits’ to the limitations of sovereignty *ex art. 11* Constitution, to balance its concessions to the ‘invasion’ of EC law in the Italian system on one hand, and to protect fundamental rights whose guarantee was not considered as sufficient -at least over the first few decades- at the European level, on the other (Decisions 27 December 1965, n.98; n.183/1973; n.170/1984; 21 April 1989, n.232; 31 March 1994, n.117; 18 December 1995, n.509; 22 March 2001, n.73). According to it, the control over the respect of these fundamental constitutional principles, which include fundamental rights, democratic principles, the unity of State, and other organizational principles, is reserved to the Constitutional Court<sup>30</sup>. This implies that in the hypothesis -

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<sup>29</sup> R. Petriccione, ‘Italy: Supremacy of Community Law over National Law’, in *ELRev.* 11/1986, p.320.

<sup>30</sup> It is worth remarking that it was also due to the impetus of the Italian Constitutional Court (as well as the German one) that the ECJ began to deal with the question of the protection of fundamental rights by the

considered remote but not impossible but the Court itself- of a violation by EC law of fundamental rights or basic values protected by the Italian Constitution, the Court, which cannot directly judge on EC legislation, would declare the Italian law of ratification of the Treaty, and more specifically that part of it allowing for such violation, as unconstitutional<sup>31</sup>.

c) **The role of the Constitutional Court.** Outside of the 'counter limits' field, the Italian Constitutional Court has voluntarily restrained itself from any involvement in questions concerning EC law (except for EC law not having direct effect, and for 'direct procedures' between the State and the Regions)<sup>32</sup>, leaving the solution of those questions to ordinary judges. Such a policy of self-restraint, which does not allow much space for dialogue with European institutions, is further confirmed by the Court's refusal to use the procedure for preliminary ruling to the ECJ. In fact, after admitting to having the faculty to refer questions related to the interpretation of directives to the ECJ for preliminary ruling under art.177 (decision 18 April 1991, n.168), the Italian Court later denied (decision n.537 of 1995 and n. 319 of 1996) the possibility of being qualified as a 'jurisdiction' for the purposes of art.177 (234), that is a court 'against whose decisions there is no judicial remedy under national law'. Such an attitude is also reflected in the tendency adopted by the Court in the so called 'double preliminary questions' cases, requiring double judicial review, both from the Constitutional Court and the ECJ, which are either returned to the lower court for a possible use of judicial review before the ECJ under art.234, or dismissed as not admissible (recently, see ord.12 July 2001 n.249 and ord. 21 March 2002 n. 85)<sup>33</sup>.

The choice of the Italian Constitutional judge to place himself outside a jurisdictional circuit whose apex is occupied by the ECJ is an expression of the will of not being subject to a judge proclaiming himself as superior to constitutional Courts. This is why, in Italy, the relationship between the EC and national system is built on the basis of competence, rather than of hierarchy. The basic ideas are that the Community, and the EU, only acts within the limits established by the treaties, that each legal system has its own sphere of competence and they cannot interfere with each other. On the contrary, the

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Communities. See remarks by F. Sorrentino, *L'influenza del diritto comunitario sulla Costituzione italiana*, in *Studi in Onore di L.Elia*, Milan, 1999, II, p.1637.

<sup>31</sup> So far the 'counter limits' theory has never been invoked or implemented in concrete. This is mainly due to the progressive attention for fundamental rights at the community level.

<sup>32</sup> In both cases the structure of the judgment before the Court is 'trilateral': the internal norm is judged for violation of art.11 Constitution with reference to the EC norm suspected to be violated by the Italian norm. See M.Cartabia, J.H.H.Weiler, *L'Italia in Europa*, 2000, p.191. However, while sometimes the Court decided in the sense of absence of contrast between the two norms in the case at hand, more frequently it returns the question to ordinary judges, in order for them to obtain a decision by the ECJ, which is considered EC law having direct effect (Decisions 113/1985 and 389/1989). With regards to 'direct procedure', the Constitutional Court "is still playing an important role in the European game, because it has the power to erase all the norms which conflict with Community law from the Italian legal system". M.Cartabia, *The Italian Constitutional Court...* (n.28 above), p. 138. However, in practice, there are very few cases dealt with by the Court in this regard.

<sup>33</sup> For a detailed analysis, F. Salmoni, *La Corte Costituzionale e la Corte di Giustizia delle Comunità Europee*, paper presented at the 2002 Conference of the "Gruppo di Pisa", *La Corte Costituzionale e le Corti d'Europa*, in [www.unicz.it](http://www.unicz.it). See also the acute reflections of F. Sorrentino, 'È veramente inammissibile il "doppio rinvio"?' , in *Giurisprudenza costituzionale*, 2/2002, pp.781-784

approach presupposing a hierarchy between the two systems would have denied the sovereignty of the State and the philosophy behind art. 11, which deals with limitations, not transfer (or loss) of sovereignty. After all, the Italian Court's objective was to preserve the existence of the national system itself and at the end, its own prerogatives within that system. The 'dualist orthodoxy' was too deeply rooted in the Italian legal culture to be dismissed, whereas its maintenance implied that it was not necessary for the Constitutional judge to make a choice between one legal order or the other.

This is why the Constitutional Court did not address the question of competence over competence (**Kompetenz-Kompetenz**), that is, who in the final analysis is called upon to decide the limits of each legal system. Better said, the Italian Court never drew the consequences of the premises inspiring the whole construction of the relationship between the two systems: separations of legal orders and limitations of sovereignty. The question has been left open, but one can easily infer that if obliged to choose, the Court would opt for the idea of Kompetenz-Kompetenz remaining within the States' jurisdiction.

Indeed, the Court never endorsed the claim by the ECJ of having the exclusive power to determine which powers belong to the Community<sup>34</sup>, thus falling under the jurisdiction of the ECJ, and which powers are outside this sphere, thus falling under national jurisdiction. Constitutional Judge Onida, recently indicated this as being one of at least three **problematic points** in the relationship between the two Courts<sup>35</sup>. In fact, if a doubt arose as to whether or not a certain subject falls within the competence attributed to the EU by the Treaties, the question would be an insoluble one, given the different approaches (monist and dualist) followed by the two Courts. On the one side, this would be a question of interpreting the Treaties, therefore a problem of EC law 'par excellence'. However, on the other side, it would also be a problem of interpretation of the Italian law of ratification of the treaties, on which the transfer of national sovereignty to European institutions is based, and therefore a problem of definition of those limits recalled in art.11 of the Constitution that 'could belong to the competence of the national judge'. The second 'open problem' concerns the 'counterlimits', which is the area the Court has kept for its own jurisdiction. One can easily imagine that with the enlargement of EC competences in areas traditionally belonging to the States involving delicate profiles of fundamental rights protection, such as justice or public order, the impact on those rights and therefore the possibility of contrast in the jurisprudence of the Courts will increase. Finally, the third point concerns the case in which an Italian law is contested before ordinary judges because it is suspected to be in contrast both with the Italian Constitution and with EC law and questions are brought both before the Constitutional Court and the Court of Justice. For example, the Court had to deal with the problem of how to proceed, in a case in which it was informed that the same case was pending before the ECJ for judicial review (like in *Costa/ENEL!*). In one case the ordinary judge brought the case before the two Courts for judicial review by means of a single act and for that reason, the Constitutional Court dismissed it as non-receivable (Order 21 March 2002, n.85). So far, the Italian Court has always given priority to the ECJ's decision, but there is no rule in this regard, and one can easily see that there is ground for confusion and trouble for ordinary judges.

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<sup>34</sup> Case 314/85, *Firma Foto-Frost v. Hauptzollamt Lübeck-Ost*, in *CMLR* 3/1988, 57.

<sup>35</sup> V. Onida, *Armonia tra diversi e problemi aperti* in *Quad. Cost.* 3/2002, pp. 549, 556.

### III. New developments. The Constitutional Court's Decision 135/2002.

As mentioned above, following the dualist approach, the Italian Constitutional Court has always been very cautious in avoiding any interference between the national legal order on one side, and the European legal order on the other. There have been a few cases in which the Court directly referred to the Community<sup>36</sup>, however, according to Constitutional Judge Capotosti, these are to be considered as isolated episodes, rather than an expression of the abandonment of the Granital doctrine<sup>37</sup>.

A true element of novelty in the position of the Constitutional Court pertaining to the European system is the recent decision of 24 April 2002, n.135 in which the Court directly refers to the European Charter of Fundamental Rights<sup>38</sup>. In a case dealing with a suspected violation by Italian legislation of the constitutionally guaranteed liberty of domicile, the Court stated that such a legislation (concerning videotaped recording for investigative aims) is not in contrast with the Constitution and to support its arguments - based on the right to privacy and freedom of communication- it added that 'a restriction in the typology of interferences of public authority in the liberty of domicile would not be confirmed by (...) the Charter of the Fundamental Rights of the European Union proclaimed in Nice in December 2000 (artt.7 and 52)'.

Until formally inserted in a treaty, this document solemnly proclaimed in 2000 is an instrument of soft law, that is to say a joint declaration of the European Parliament, the Council and the Commission, having a very high political value but no formal juridical effects<sup>39</sup>. Nevertheless, its relevance as a tool of interpretation of EC law in the field of Human rights has been proven by several references made to it by Advocates General conclusions<sup>40</sup> and by the EC Court of First instance<sup>41</sup>. In other words, rather than being a

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<sup>36</sup> For example, the Court referred to "Community firms" (Decision 443/1997), made references to EC norms concerning obligations for the State in the organization of university studies (Decision 383/1998), and mentioned EC legislation on full-time and part-time work as a reason for not admitting an abrogative referendum in this field (Decisions 40 and 45/2000).

<sup>37</sup> A. Capotosti, 'Quali Prospettive nei Rapporti tra Corte Costituzionale e Corte di Giustizia', in *Quad. Cost.* 3/2002, p.561

<sup>38</sup> This was not the first time an Italian judge referred to the Charter. Previously, the 'Corte d'Appello di Roma-sez lavoro' mentioned it (Order 11 April 2002) in a decision that has been defined by critics as extravagant and reckless. See A. Celotti, *La Carta Europea e la Crisi del Sistema Europeo di Giustizia Costituzionale: Impatti Interpretativi della Carta*, Manuscript, and R. Calvano, *La Corte D'Appello di Roma applica la Carta dei Diritti UE. Diritto Pretorio o Jus Comune Europeo?* In [www.associazionedeicostituzionalisti.it](http://www.associazionedeicostituzionalisti.it)

<sup>39</sup> On this point, see the Commission's *Communication on the legal nature of the Charter of Fundamental Rights of the European Union* (COM (2000) 644 final, 11th October, 2000): "it is reasonable to assume that the Charter will produce all its effects, legal and others, whatever its nature." And: "it is clear that it would be difficult for the Council and the Commission, who are to proclaim it solemnly, to ignore in the future, in their legislative function, an instrument prepared at the request of the European Council by the full range of sources and European Legitimacy acting in concert." Despite being reasonably "likely that the Court of Justice will seek inspiration in it" and that "the Charter will become mandatory through the Court's interpretation of it as belonging to the general principles of Community law" the Commission considered preferable "for the sake of visibility and certainty as to the law, for the Charter to be made mandatory in its own right and not just through its judicial interpretation".

<sup>40</sup> See for example the conclusions of Advocates General Alber (case C-34/99), Tizzano (case C-173/99), Mischo (cases C-122 and C-125/99), Jacobs (cases C-377/98 and C-50/00), Léger (case C-309 and C-353/99), Stix Hackl (cases C-49, C-131 and C-244/00).

creator of new rights, the Charter functions as a guide in the interpretation of existing law, giving concrete content to the general call for “respect for human rights and fundamental freedoms” which are “common to the Member States” made by art.6 of the TUE. However, its lacking of formal legal value is compensated for by its material and substantial value, which goes beyond the simple codification of the law created by other sources of the European legal system. In fact, lack of legally binding force does not imply lack of legal effects<sup>42</sup>.

According to art.51, provisions of the Charter “are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity, and to the member States only when they are implementing Union law”. However, one thing is a Community judge, another is a national constitutional judge. The fact that the Italian Court mentioned the Charter (and other international agreements<sup>43</sup>) as an argument *ad adiuvandum*, in support of its motivations, when on the contrary such a reference was redundant for the decision in the specific case, is particularly interesting for the following reasons. Firstly, it seems that the Court wanted to make a point of recalling the European Charter. If that document had no value whatsoever, there would have been no need for the Constitutional Judge to make a reference to it. On the contrary, with its statement the Court not only recognized the value of the Charter regardless of its nature and legal *status*, but it also made clear that the Charter has a concrete influence on the activity of national judges. Further, such a statement can also have significant repercussions on the future attitude of ordinary judges in the implementation of European legislation concerning fundamental rights. To a certain extent, the Court opened the door to the temptation of them directly applying the Charter against a contrary national legislation, instead of addressing the Court for judicial review. Secondly, despite the clarification that a reference was made to the Charter (in particular to articles 7 and 52) ‘notwithstanding devoid of juridical value, because of its character which is expressive of the common principles of European legal systems’ (§2.1 *considerato in diritto*), in practice the Court assigns to it the function of a parameter of constitutionality. The Charter becomes an interpretative instrument of the Constitution, not because it is directly mentioned in it, but because it is recalled by the highest constitutional authority. Finally, the Court seems to

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<sup>41</sup> Judgements 30 January 2002, case T-54/99 (*Max.mobil Telekommunikation Service v. Commission CE*); 3 May 2002, case T-177/01 (*Jégo-Quéré & Cie SA v. Commission CE*); and the very recent 15 January 2003, joined cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 (*Philip Morris International, Inc and Others v. Commission CE*).

<sup>42</sup> See the reflections of R. Alonso Garcia, *The General Provisions of the Charter of Fundamental Rights of the European Union*, Jean Monnet Paper n.4/2002, in [www.jeanmonnetprogram.org](http://www.jeanmonnetprogram.org). To prove this point, the author refers to ‘the role that the European Convention of Human Rights has played in the Community legal order, acting as an essential source of inspiration for the Court of Justice in shaping the community fundamental rights’.

<sup>43</sup> They are the European Convention on Human Rights (art.8) and the International Covenant on Civil and Political Rights (art.17). The Court’s choice of recalling international these documents has been highly criticized because these ‘European Charters are all less protective than our Constitution, at least with reference to civil liberties’. See A.Pace, ‘Le videoregistrazioni “ambientali” tra gli artt. 14 e 15 Cost’, in *Giur. Cost.*2/2002, p.1075. Underlying that ‘the Court did not apply to the case at hand art.53 of the EU Charter (which guarantees the better level of discipline of national constitutional orders) the author concludes that ‘unfortunately this confirms the concern that within the EU there is a strong push... toward the homogenization of levels of protection of fundamental rights, to the detriment of more evolved legal orders’.

endorse another major consequence of the internal system. Already the Charter puts into crisis the doctrine of counterlimits, which was designed to allow the Court to maintain a central role within the Italian system, for the protection of fundamental rights -and principles of the Constitution- in areas falling under EC competence, and one can only infer that with its eventual transformation into a document having binding effects, significantly to be decided also by the 2004 IGC, such a crisis will become even more apparent. In fact, with the formal declaration of the guarantee of human rights by the European Union, which according to some scholars transforms the ECJ into a 'constitutional judge' in charge of protecting fundamental rights<sup>44</sup>, the field of action of the Constitutional Court is significantly reduced. Thus, the Court risks to be left out of every controversy concerning fundamental rights especially if one considers that any right can be put into relation with EC policies<sup>45</sup>. Except for the quite improbable violations of the fundamental principles of the Constitution, the area of residual sovereignty of the State *vis à vis* the Union that is reserved to the Court is becoming more and more narrow.

**IV. Problematic conclusions.** In light of these new tendencies, a few questions arise. So far, the Italian Court has insisted on the separation of legal orders and dualism, but at this point what is left of dualism, and what is left of the counterlimits doctrine? Has the approach that founded the relationship between the Italian and the European legal order on the principle of competence rather than the hierarchical one become outdated? By recalling the Charter, did the Italian Court implicitly admit to being subject to a legislation coming from a different legal order, until now considered as totally separated from the national one? Has the choice of self-restraint, allowing the Court to place itself outside the circuit ultimately headed by the ECJ, finally come to an end?

Decision 135/2002 is highly relevant to the perspective that we are analyzing here, that is the re-foundation process taking place in the EU and its impact on the relation with national systems, because it is an indicator of the fact that even the traditionally circumspect Italian Constitutional judge recognizes that an unprecedented constituent process is taking place in Europe, of which the Chart is an integral part. However, if the Italian Court somehow recognizes that the current phase is different from any previous revision of the treaties, and if, by taking such step, to a certain extent it intended to anticipate or even influence the work in progress of the Convention on the Future of Europe, doesn't it admit that after all, the whole construction of the Italian relationship with the European system requires a profound rethinking?

Furthermore, Decision 135/2002 can be also interpreted as the first step, made by the Italian Court towards the opening of a dialogue with the European system, and ultimately with the European Court of Justice<sup>46</sup>. Perhaps, following the example of other

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<sup>44</sup> On this point L.S.Rossi, 'La Carta dei diritti come strumento di costituzionalizzazione dell'ordinamento dell'UE', (n.21 above), p.569. More cautious is R.Calvano, 'Verso un sistema di garanzie costituzionali dell'UE? La giustizia costituzionale comunitaria dopo il trattato di Nizza', in *Giurisprudenza costituzionale* 1/2001, p.209.

<sup>45</sup> G. Zagrebelsky, *Corti Europee e Corti Nazionali* (n.20 above) p.6, recalls as an example of this situation the case *Bickel v. Franz*, C-274/96.

<sup>46</sup> 'Judicial dialogue and 'cross-fertilization' are two of the topics addressed by various contributors in J.H.H. Weiler, A.M.Slaughter, A.Stone Sweet, *The European Courts and National Courts. Doctrine and*



colleagues<sup>47</sup> the Court is ready to abandon its refusal to apply to the ECJ for preliminary ruling.

It has been noted that the Charter, and eventually the European Constitution, rather than eroding the space and competences of the Constitutional Court, are instead challenging it to redefine its relationship with other judges, both European and national, in order to preserve an appropriate role in the protection of fundamental liberties<sup>48</sup>. Only by renouncing self-imposed 'splendid isolation' can the Court 'maintain a voice within the field of the protection of fundamental rights in the European dimension' and finally avoid its definitive alienation. This would imply the abandon of two consolidated approaches followed by the Court. First, the refusal to use art.234 TUE, which is intended to avoid the risk for the Italian Court of being submitted to the ECJ's authority, but in fact prevents the former from the opportunity to influence the jurisprudence of the latter. Second, the tendency to ask ordinary judges to directly address the ECJ in cases where questions concerning constitutional legitimacy can be solved at community level by the Court of Justice and in cases of double judicial review, which in fact discourage those judges from having a constructive dialogue with the Constitutional Court in areas presenting a European profile<sup>49</sup>.

More generally, in the presence of a process of pervasive revision of the fundamental documents of the Union, the very cornerstones of Italian participation in the European enterprise, that is to say, the separation of legal orders and limitations of sovereignty with the corollary of the counter limits, need to be revised. If a radical change in the fundamental principles, the structure, and the objectives of the Union is taking place; if the developments of European integration require that one no longer thinks in terms of limitation of national sovereignty and transfer of competences in favor of a supranational entity; if what is going to be 'absorbed' by national legal orders is no longer a document that can be qualified as an international treaty but, on the contrary, the original act creating a new political subject incarnating that patrimony of essential values which constitute the core of the unity and identity of a people, the traditional tools employed until now appear to be obsolete, to say the least.

For years scholars have been discussing the limits of the use of art.11 as the 'constitutional cover' for the limitation of national sovereignty implied by the European integration. At the occasion of each treaty revisions including Maastricht, Amsterdam and Nice, the constitutional impact of developments of European integration have been

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*Jurisprudence* (n.1 above). See also K.Alter, *Establishing the Supremacy of European Law*, Oxford University Press, 2001.

<sup>47</sup> For example the Belgian Court d'Arbitrage and the Austrian Constitutional Court both addressed the ECJ for preliminary ruling. See C-93/1997, Judgment of 16/07/1998, *Fédération belge des chambres syndicales de médecins v. Gouvernement flamand and others* (Rec.1998, p.I-4837); and C-143/97 Judgment of 08/11/2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (Rec.2001,p.I-8365).

<sup>48</sup> M.Cartabia, *La Carta dei diritti fondamentali dell'Unione Europea e la crisi della giustizia costituzionale*, Manuscript presented in Taormina, Giornata Italo-Spagnola di giustizia costituzionale, 4 October 2002 in [www.unime.it](http://www.unime.it).

<sup>49</sup> With this jurisprudence, the Constitutional Court is trying to reserve for itself the possibility of intervening after the Court of Justice, in the name of - it seems - a "right to the last word"; however in truth, it risks to be... forever silent'. M. Cartabia, *La carta dei Diritti...*, (n. 48 above), p.7.

underlined<sup>50</sup> and voices demanding the abandon of the continuous use of art.11 are punctually raised.

When other countries 'adjusted' their constitutions and constitutional courts declared the incompatibility of new treaty dispositions with the national constitutions (in Ireland for the SEA, in Spain for the TUE, in France both for the TUE and the Amsterdam Treaty), or, without doing so, set constitutional limits for further modifications (in Germany for the TUE)<sup>51</sup>, Italy preferred to rely on constitutional case-law stretching the content of art.11 to its extremes. Until the very recent reform of Title V of the Constitution, concerning the Regional state<sup>52</sup>, the European Union was not even mentioned in the fundamental law of the State. Possible suggested solutions include the modification of single parts of the Constitution susceptible to contrast with European obligations, the ratification of the new act by means of a constitutional statute, and the insertion of a European article on the German model<sup>53</sup>, which would give Europe a more prestigious and definitive placing in the Italian legal order.

As the whole European project has entered a new phase, and the Constitutional Court is showing signs of openness, the moment has come to move in the direction of radical change.

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<sup>50</sup> Concerns include, for example, changes in the role of national institutions, in the division of powers between the legislative and the executive and between central and local powers, the different protection of individual rights under national and community law, etc. Academics have been passionately discussing these themes over the past decade and literature in this regard is immense. We may recall, among others, the interventions of the major scholars in constitutional law gathered in *Le Prospettive dell'Unione Europea e la Costituzione*, Atti del Convegno AIC del 1992, Milan, 1995; M. Cartabia, *Principi inviolabili e integrazione europea*, Milan, 1995; A. La Pergola, *Quale Europa-Artikel per l'Italia?* in *Scritti in onore di G.F. Mancini*, II, Milan 1998, p.537; V.G. Guarino, *La grande rivoluzione: l'Unione Europea e la rinuncia alla sovranità*, in *Convivenza nella libertà, Studi in onore di Giuseppe Abbamonte*, Naples, 1999, p. 777; L. Cozzolino, *Note in tema di principio di legalità ed integrazione europea*, in C. Anelli (ed.), *Amministrazione e legalità. Fonti normative e ordinamenti*, Atti del Convegno di Macerata 21-22 Maggio 1999, Milan, 2000, 113; S. P. Panunzio, *I costituzionalisti e l'Europa. Riflessioni sui mutamenti costituzionali nel processo di integrazione europea*, Milan, 2002

<sup>51</sup> De Witte, 'Il processo semi-permanente di revisione dei trattati' (n.8 above), p.510, underlines the importance of Constitutional Courts as internal actors not to be neglected by governments negotiating a new treaty, not only because their decisions in the short term impose a constitutional revision in order to ratify the treaty, but also because in the long term, they establish a parameter of constitutional compatibility for future treaty modifications.

<sup>52</sup> Following Constitutional statute n.3 of 2001, art.117 of the Constitution establishes that State and Regions have to respect, in exercising their legislative power, 'obligations deriving from the Community system and international obligations'.

<sup>53</sup> Art.23 of the 'dualist' German Constitution was introduced after the adoption of the Maastricht treaty. Of similar tenor is article 88 of the 'monist' French constitution, also introduced at that time.