THE ITALIAN COURT OF CASSATION AND DUAL PRELIMINARITY

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Abstract

The essay analyses how case law by the Court of Cassation has interpreted the dual preliminary doctrine, which the Constitutional Court unexpectedly proposed in Judgment No. 269/2017, subsequently qualified – and, to some extent, complicated - in 2019 and 2020. The Constitutional Court has no way to force ordinary courts, including the Court of Cassation, to follow this doctrine: they can only be encouraged in this direction. Case law on the matter remains limited and of varying outcomes. Yet, when the doctrine of dual preliminarity was followed by the Court of Cassation, the Constitutional Court was effectively provided with good opportunities to open a dialogue with the Court of Justice; in almost every case, the relevant national legislation was annulled definitively, and with general effects. On many occasions, the Court of Cassation chose to refer preliminary questions to the Court of Justice, or to disregard national legislation altogether, directly refusing its application: this was correct, as those were not true cases of dual preliminarity.

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From my perspective[1], the *clarification* in Judgment No. 269/

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[1] D. Tega, *The Italian Constitutional Court in its context. A narrative*, 17 Eur. Const. Law Rev., 3 (2021), 369; Id., *La Corte nel contesto* (2020), 183-257.

2017 and the subsequent new judicial doctrine[2] serve as an update that contains elements of reassurance both for national courts and for the EU Court of Justice[3]. They also represent a departure from the so-called "Granital doctrine" (170/1984[4]).

I have explained elsewhere the elements that led to this bypass in the name of defending the review of constitutional legitimacy. The proclamation of the EU Charter of Fundamental Rights [CFREU] certainly played a crucial role[5] – the Treaty of Lisbon equates it to Treaties as far as its legal value is concerned – with the direct effect of some of its articles being recognised by the Court of Justice. But there is also the huge success that the reference for a preliminary ruling has enjoyed in the Italian legal system. The risk that the Constitutional Court (ItCC) saw and had to avoid was that of the circuit of European jurisprudence (the national courts and EU Court of Justice together) overlapping with that of constitutional justice, to the point of pushing it into the background. A prime example is the so-called 'Taricco saga', which began with a preliminary ruling (which missed the mark) by an ordinary judge in Cuneo, and ended a few years later following a foreseeable, albeit also criticised, preliminary ruling by the

[2] On the meaning of Constitutional Court's judicial doctrine see D. Tega, *La Corte nel contesto*, cit. at 1, 61.

[3] For a partially different reading of Judgment No. 269/2017 see G. Martinico and G. Repetto, *Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court and Its Aftermath*, 15(4) Eur. Const. Law Rev. 731 (2019). For the critical EU scholar's appraisal on the Judgment, in particular regarding its compatibility with EU law, see D. Gallo, *Challenging EU constitutional law: The Italian Constitutional Court's new stance on direct effect and the preliminary reference procedure*, 25 Eur. Law J. 434 (2019).

[4] On the thoughts of the judge rapporteur, Antonio La Pergola, see the extensive work by C. Pinelli, *Limiti degli ordinamenti e rilevanza di un ordinamento per un altro nel pensiero di Santi Romano*, 1 Giur. cost. 1856 (1986); Id., *Antonio La Pergola, giurista costruttore*, 2 Dir. pubb. 571 (2007); Id., *Intervento*, in *Atti della giornata in ricordo del Presidente emerito della Corte costituzionale Antonio La Pergola*, Palazzo della Consulta, 17 December 2008, 43.

[5] A.O. Cozzi, *Sindacato accentrato di costituzionalità e contributo alla normatività della Carta europea dei diritti fondamentali a vent'anni dalla sua proclamazione*, 3 Dir. pubb. 659 (2020).

Constitutional Court[6] to the EU Court of Justice[7]. This conduct is not only based on the *institutional responsibility* of the constitutional judge but also in seeking out *legitimacy*, to be understood as the ability to attract questions of legitimacy that emerge before ordinary judges[8].

I concluded my reflections postponing the evaluation of the type of follow-up that the *clarification* would have had with the ordinary judges.

Would the judges have found themselves *gravely embarrassed* in their dual capacity as national judges and judges of EU law? Would they have felt as if their hands were tied, so to speak, seeing as though their intervention was not only delayed by an appeal to the Constitutional Court but also *stripped of* many crucial assessments, including the most expedient and quickest way to deliver justice as soon as possible[9]?

After some years, it is time to verify if and how the nudging of the Constitutional Court was *effective* as regards the position of the Court of Cassation[10].

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[6] It was referred by the Court of Milan and the Court of Cassation, which, although they could have made a reference to the Court of Justice for a preliminary ruling on the interpretation of the correct meaning to be given to Article 325 TFEU and the 'Taricco ruling', preferred to refer the matter to the Constitutional Court.

[7] It was only after the referral made by Order No. 24/2017 that the ECJ clarified that the obligation of disapplication was not intended to apply in cases where such would have entailed a breach of criminal procedure law of the participating state, or rather of a constitutional principle that, concluding the 'Taricco saga', ItCC' Sentence No. 115/2018 defined as supreme. See G. Piccirilli, *The "Taricco Saga": The Italian Constitutional Court continues its European journey*, 14 European Constitutional Law Review, 4 (2018), 814.

[8] D. Tega, *La Corte nel contesto*, at 1, 84.

[9] G. Bronzini, *La sentenza n. 20/2019 della Corte costituzionale italiana verso un riavvicinamento all'orientamento della Corte di giustizia? Questione giustizia*, (2019), at https://www.questionegiustizia.it/articolo/la-sentenza-n-202019-della-corte-costituzionale-it_04-03-2019.php.

[10] On the position of the Court of Cassation see A. Cosentino, *La Carta di Nizza nella giurisprudenza di legittimità dopo la sentenza della Corte costituzionale n. 269 del 2017*, 3 Oss. Fonti 1 (2018); Id., *La sentenza della Corte costituzionale n. 269/2017, ed i suoi seguiti, nella giurisprudenza del giudice comune*, in C. Amalfitano, M. D'Amico & S. Leone (eds.), *La Carta dei diritti fondamentali dell'Unione europea nel sistema integrato di tutela, Atti del convegno svoltosi nell'Università degli Studi di Milano a venti anni dalla sua proclamazione* 213 (2022). See also La giurisprudenza delle Sezioni Civili Anno 2019, Gli orientamenti delle Sezioni Civili, vol. I,

Examining the answers of the Court of Cassation is certainly significant given its obligation to provide a preliminary ruling (Art. 267.3 TFEU).

This behaviour is not uniform, at least as of now.

Significant questions have emerged with respect to this new doctrine: *i*) should the question of constitutionality always be raised before a preliminary ruling? *ii*) following a rejection (or only partial acceptance) on the merits of the issues raised, is the referring judge precluded from contacting the Court of Luxembourg? And, based on the answers received, is it possible to not apply Italian law? *iii*) can the innovative solution, while certainly not lacking in its logic and rationale, be considered in line with EU jurisprudence? *iv*) does the guarantee of priority intervention by the Constitutional Court also extends to cases where an overlap exists between rights guaranteed in the Constitution and fundamental rights that are *not* included in the Charter, or *not only* in it, such as those because they are recognised by EU directives?

2. Acceptance of the *clarification*

Cases in which the *clarification* is accepted are limited. Almost all of them offered the Constitutional Court the opportunity to make a preliminary reference followed by a ruling on the merits[11]. The establishment of dual preliminarity thus seems to have had a clear initial effect: it was accompanied by the enhancement of the

https://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/Rassegna_civile_2019-vol_1-2-3.pdf.

[11] Reference is made to decisions nos. 84/2021 e 54/2022. Regarding the first decision see T. Guarnier, *Corte costituzionale, Corti sovranazionali, giudici comuni e legislatore. Lo scenario a seguito della sentenza n. 84 del 2021 della Corte costituzionale*, 2 Nomos (2021); S. Filippi, *Sulle più recenti evoluzioni dei rapporti tra Corti: riflessioni a partire da Corte cost, sent. 30 aprile 2021, n. 84*, 3 ConsultaOnline 767 (2021). Regarding the second decision, see B. Nascimbene e I. Anrò, *Primato del diritto dell'Unione europea e disapplicazione. Un confronto fra Corte costituzionale, Corte di Cassazione e Corte di giustizia in materia di sicurezza sociale*, *Giustizia Insieme*, 31 March 2022; A. Ruggeri**,** *Alla Cassazione restìa a far luogo all'applicazione diretta del diritto eurounitario la Consulta replica alimentando il fecondo "dialogo" tra le Corti (a prima lettura della sent. n. 67/2022)*, 1 ConsultaOnline 252 (2022).

preliminary ruling as an instrument of dialogue with the Court of Justice.

It is no coincidence that in 2020 (Constitutional Court Order No. 182, see below) the Constitutional Court specified that the referral for a preliminary ruling takes place "within a framework of constructive and loyal cooperation between the various systems of safeguards, in which the constitutional courts are called to enhance dialogue with the [Court of Justice] […], so that the maximum protection of rights is assured at the system-wide level (Article 53 [CFREU]) (Judgment No 269 of 2017, point 5.2 of the Conclusions on points of law)." The intervention seeking clarification requested to the Court of Justice was also functional to ensure the uniform interpretation of the rights and obligations deriving from European Union law.

In addition, the Constitutional Court demonstrated, as is already seen in the referral regarding the 'Taricco saga', to understand the preliminary reference as the channel of communication functioning not only to *receive* but also to *transmit* constitutional problems to the EU Court of Justice posed by certain its decisions, as suggested by Weiler at the AIC Conference in Perugia in 1999[12].

The very first application of the *clarification* led to truly positive results. On 16 February 2018, with Order n. 54 Bolognesi v. CONSOB - just under two months after the publication of Sentence no. 269/2017 - the Second Civil Section applied the *clarification* while also highlighting its critical profiles. For example, the order asked the Court whether the phrase "on other grounds" contained in the clarification meant that the violations of the CFREU excluded in the constitutional judgment could no longer be the subject of review by the ordinary courts.

In summary, the Court of Cassation, faced with a case of sanctions applied by CONSOB for the abuse of privileged information and obstruction of investigations by the CONSOB itself, was confronted with two sets of problems that called the fundamental principles of criminal law into question (*nemo tenetur se detegere* and the

[12] Id., *L'Unione e gli Stati membri: competenze e sovranità*, 1 Quad. cost. 5 (2000); M. Cartabia, *Europe and Rights: Taking Dialogue Seriously*, 5 Eur. Const. Law Rev. 1(2009); D. Gallo, *Efficacia diretta del diritto Ue, procedimento pregiudiziale e Corte costituzionale: una lettura congiunta delle sentenze n. 269/2017 e 115/2018*, 1 Rivista AIC 220 (2019); N. Lupo, *The Advantage of Having The "First Word" In The Composite European Constitution*, 10 IJPL 186 (2018).

proportionality between offences and sanctions), which were of such importance that they had both national and supranational importance. The varied dimensions of these principles led to a problem of dual preliminarity for each of them: violation of both the Constitution (and of international sources, such as the ECHR, which operate through the mediation of Article 117(1) of the Constitution) and the CFREU was suspected.

The referral order was notable for its precision and detail. The Constitutional Court, for its part, was not unprepared: it made a particularly complex preliminary ruling on both the interpretation and validity. It argued the need to fully recognise a "right to silence"[13], referring to articles 6 ECHR, 14 of the International Covenant on Civil and Political Rights, 48 and 49 of the CFREU and Art. 24 of the Constitution. Based on the clarification stated in the *obiter* of Judgment No. 269/2017, when examining potential issues of contravention of the provisions of national laws to the Charter, the Court is in a position to assess whether the challenged provision violates the assurances provided simultaneously by both the Constitution and the CFREU, also by "submitting a request for a preliminary ruling to the EU Court of Justice whenever that proves necessary to clarify the meaning and the effects of the Charter's rules [...]"[14].

In the 2019 preliminary reference, the ItCC specified the need to understand (i) whether national legislation – which provides for the obligation to sanction non-cooperation with supervisory authorities of financial markets, in implementation of EU law – must be interpreted as enabling Member States not to sanction those who refuse to answer questions from the competent authority if such could reveal their liability for wrongdoing punished with administrative sanctions of a "punitive" nature; (ii) whether, if the answer is negative, this obligation is compatible with Articles 47 and 48 of the Charter, also in light of case law of the European Court of Human Rights on Article 6

[13] In proving to be very up-to-date and aware of case law of both the Strasbourg and Luxembourg Courts, the order does not fail to explain the so-called right to silence. Although it does not enjoy express constitutional recognition it constitutes an essential corollary of the inviolability of the right of defence, a right recognised by Article 24 of the Constitution, which characterises the Italian constitutional identity.
[14] The reference for a preliminary ruling had been recommended by multiple subjects among others, L.S. Rossi, *Il "triangolo giurisdizionale"*, 16 federalismi.it 7 (2018).

ECHR and constitutional traditions shared amongst Member States, insofar as those provisions require sanctions to also be imposed on persons who refuse to answer questions posed by the competent authority that could reveal their liability for wrongdoing punished with administrative sanctions of a "punitive" nature.

The preliminary ruling thus turned out to be more complex than that hypothesised by the order of the Court of Cassation, as it essentially was a reference that concerns the validity of secondary legislation, as well as the interpretation of the CFREU. The Constitutional Court seemed to master this instrument with extreme familiarity, so much so that the dialogue with the EU Court of Justice was further complicated (considering the more limited scope of the referral hypothesis elaborated by the Court of Cassation). The *quid pluris* was given by the singular nature of the task entrusted to constitutional adjudication. This preliminary reference was a response to those who, in the aftermath of the *clarification*, contentiously wondered in what respects the referral might differ, depending on whether it was proposed by the Constitutional Court or ordinary courts.

But the third actor of this trifecta did not behave differently.

The response that the Court of Justice gave to this order in its decision of 2 February 2021, DB v. CONSOB, Case C-481/19[15], was striking for the first time it recognised that an individual cannot be penalised for his refusal to provide the competent authority with answers that could determine his liability for an offence punishable by administrative penalties of a criminal nature or criminal liability. The recognition of this 'right to silence' was obtained thanks to the arguments put forward by the Italian constitutional judge, in the absence of direct precedents in national case law. Nothing further was said by the Luxembourg court concerning the compatibility of the clarification with the primacy of EU law[16].

[15] L. Lonardo, *The Veiled Irreverence of the Italian Constitutional Court and the Contours of the Right to Silence for Natural Persons in Administrative Proceedings: Judgment of the Court (Grand Chamber) 2 February 2021, Case C-481/19, DB v Consob*, 17(4) Eur. Const. Law Rev. 707 (2021).

[16] The new role acquired by Italian Constitutional Court is eulogizes by D. Sarmiento, *The Consob Way – Or how the Corte Costituzionale Taught Europe (once again) a*

In this case, it seems to me that the three leading courts have shown their wisdom: the first because, even if it was ready to make a reference for a preliminary ruling, as can be seen from the in-depth rationale contained in the order for reference, had the clarity and flexibility to take the uncertain path indicated by Judgment No. 269/ 2017, without feeling in any way defrauded of its role as a European judge; the second was willing and able to make a preliminary referral, reassuring the Court of Justice of its loyalty to the primacy of EU law; the third enhanced the efforts of the first two, offering a virtuous example of a real multi-level protection of rights.

In 2019, the orders of the Court of Cassation, Labour section, Nos. 175, 177-182, 188-190, addressed a question of legitimacy to the Court concerning the discrimination of foreigners in accessing the birth allowance (a subject on which the dispute with INPS is substantial). Although they acknowledged that the issue could have been examined in light of EU anti-discrimination law, possibly after a preliminary ruling, they opted for the issue of constitutional illegitimacy, quoting, *ad colorandum*[17], Article 34 of the Charter to obtain an assessment of reasonableness capable of producing effects *erga omnes*[18].

With Order No. 182/2020, the Constitutional Court also turned to the Court of Justice for an interpretative clarification. Once again,

Masterclass in Constitutional Dispute Settlement, in *EU Law Live*, Weekend Edition 54, 16 April 2021.

[17] As S. Giubboni writes in a comment criticising Order No. 182/2020, *L'accesso all'assistenza sociale degli stranieri alla luce (fioca) dell'art. 34 della Carta dei diritti fondamentali dell'Unione europea (a margine di un recente rinvio pregiudiziale della Corte costituzionale)*, 4 Giur. cost. 1982 (2020).

[18] A. Cosentino, *La sentenza della Corte costituzionale n. 269/2017, ed i suoi seguiti, nella giurisprudenza del giudice comune*, at 10.

the referral was carefully structure[19]. The Court of Luxembourg[20] affirmed the incompatibility of Italian legislation with Art. 12(1)(e) of Directive 2011/98/EU, on equal treatment between third-country nationals and nationals of Member States (§ 34). It was specified that the question submitted by the Constitutional Court should only be examined considering Directive 2011/98/EU, and not with reference to Art. 34 of the Charter to which the directive gives effect[21].

In 2021, the Court of Cassation[22] made an eccentric use of the *clarification* in a case regarding the recognition of the household allowance, offering the Constitutional Court the opportunity to make an important elucidation.

The Court of Cassation referred the matter twice: firstly, to the Court of Justice and secondly to the Constitutional Court. The Court of Justice stated that the contested rule on the recognition of the household allowance was contrary to European Union law (25 November 2020, Cases C-302/19 and C-303/19). The Court of Cassation decided to not proceed with the non-application of the provision.

On the contrary, it addressed to the ItCC two referral orders claimed the violation of Articles 11 and 117, first paragraph of the

[19] Even at this juncture, a well-founded sentence was reached: Sent no. 54/2022. It declares the constitutional illegitimacy of the provisions that exclude non-EU foreigners who do not hold a long-term EU residence permit from certain social benefits (baby bonus and maternity allowance), because "[…] By introducing stringent income requirements for entitlement to support measures for the neediest families, the challenged provisions establish a system that is irrationally more cumbersome solely for third-country nationals, reaching beyond the albeit legitimate goal of granting welfare benefits only to those who reside regularly and not just occasionally in the country", and deny appropriate protection precisely to those who find themselves in conditions of more serious need.

[20] Judgment 2 September 2021, *O.D. e altri c. INPS* (C-350/20).

[21] "It is apparent from the Court's case-law that, where they adopt measures which come within the scope of application of a directive which gives specific expression to a fundamental right provided for by the Charter, the Member States must comply with that directive (see the judgment of 11 November 2014, Schmitzer, C-530/13, EU:C:2014:2359, paragraph 23 and cited case-law). It follows that the question referred must be examined considering Directive 2011/98. The scope of Article 12(1)(e) of this directive is determined by Regulation No. 883/2004. § 47". See S. Giubboni, *L'accesso all'assistenza sociale degli stranieri, cit., at 17.*

[22] Labour section, Ord. nos. 110 and 111 of 8 April 2021.

Constitution, in relation to Directives No. 2003/109/EC, on the status of third-country nationals who are long-term residents, and No. 2011/98/EU, on the status of third-country nationals who hold a single residence and work permit.

Neither order referred to the violation of the Charter of Fundamental Rights of the European Union.

In the referral orders, the Court of Cassation held that it could not proceed with the non-application of the provision as, concerning the social benefit in question, EU law does not dictate a complete provision that is to be applied in place of that declared incompatible[23].

The Court of Cassation made a mistake that the Constitutional Court, with Decision no. 67/2022[24], led back to inadmissibility, with a call for non-enforcement of the national provision with a clear reaffirmation of the primacy of EU law[25].

3. Refusal of the *clarification*

[23] For a very critical comment on the Court of Cassation's choice concerning disapplication, see S. Giubboni, N. Lazzerini, *L'assistenza sociale degli stranieri e gli strani dubbi della Cassazione*, Questione Giustizia, 6 May 2021. See also D. Gallo, A. Nato, L'accesso agli assegni di natalità e maternità per i cittadini di Paesi terzi titolari di permesso unico nell'ordinanza n. 182/2020 della Corte Costituzionale, 4 Eurojus, 308 (2020).

[24] Regarding this decision see B. Nascimbene, I. Anrò, *Primato del diritto dell'Unione europea e disapplicazione. Un confronto fra Corte costituzionale, Corte di Cassazione e Corte di giustizia in material di sicurezza sociale*, cit. at 11; A. Ruggeri, *Alla Cassazione restia a far luogo all'applicazione diretto del diretto eurounitario la Consulta replica alimentando il fecondo "dialogo" tra le Corti (a prima lettura della sent. n. 67/2022)*, cit. at 11; A.O. Cozzi, *Per un elogio del primato, con uno sguardo lontano. Note a Corte cost. n. 67 del 2022*, 2 Consulta Online 410 (2022).

[25] "[…] Thus, the object of the aforementioned directives is not to regulate social security benefits – specifically the family unit allowance. As the Court of Justice explained in its judgments in response to the twofold reference for a preliminary ruling, organizing the social security systems falls under the competences of the Member States, which may conform and modify the benefits system in keeping with domestic needs to attain overall sustainability. […] The substance of the European Union's intervention is, therefore, to establish the duty not to distinguish the treatment of third-party nationals from that reserved for citizens of the states where they legally work. The duty is imposed by the directives cited above in a clear, precise, and unconditional way, and is, thus, endowed with direct applicability."§ 12. Silvana Sciarra, rapporteur of the decision, also expressed this position very clearly in Id., *Lenti bifocali e parole comuni: antidoti all'accentramento nel giudizio di costituzionalità*, 3 federalismi.it 40 (2021).

In other cases, the nudging of the ItCC was not welcomed because i) the approach of the interpretative preliminary referral followed by non-application has been deemed prevalent, and sufficient; ii) because immediate non-application took place. These are cases in which the binding value of the *clarification* is denied; in which judges deal with secondary EU law with direct effect, or in which they recognise direct and immediate application to the CFRUE.

The Court of Cassation, Labour section, Decision No. 4223 of 21 February 2018, reprising a judgment – brought by an intermittent worker dismissed when he turned 25 – after its suspension following a preliminary referral[26], ruled out further room for questions of constitutionality, as the worker's defence had requested. Although there is no explicit mention of the *clarification*, the court states that there is no reason to believe that constitutional adjudication offers more intense anti-discrimination protection to young people.

With Decision No. 12108 of 17 May 2018, the Labour Section disapplied national legislation on the retirement age of dancers, as the EU Court of Justice, on the basis of a preliminary referral made in the same proceeding, established that it is discriminatory to fire female dancers for reaching retirement age if this is different from that provided for men (given the prohibition of discrimination based on sex according to Article 14 of Directive 2006/54/EC, self-executing). The

[26] The referring court asks whether Article 21 of the Charter and Article 2(1), Article 2(2)(a) and Article 6(1) of Directive 2000/78 must be interpreted as precluding a provision, such as that at issue in the main proceedings (Legislative Decree no. 276 of 2003, Art. 34) , which authorises an employer to conclude an on-call contract with a worker under 25 years of age, regardless of the nature of the services to be provided, and to dismiss such worker as soon as he reaches the age of 25 years.On 19 July 2017 (C-143/2016, Abercrombie and Fitch v. A.B.), the Court of Justice ruled that Article 21 of the Charter of Fundamental Rights of the European Union and Article 2(1), Article 2(2)(a) and Article 6(1) of Council Directive 2000/78/EC of 27 November 2000, in establishing a general framework for equal treatment in employment and occupation, must be interpreted as not precluding a provision, such as that at issue in the main proceedings, which authorises an employer to conclude an on-call contract with a worker of under 25 years of age, regardless of the nature of the services to be provided, and to dismiss such worker as soon as he reaches the age of 25 years, since that provision pursues a legitimate aim of employment and labour market policy and the means laid down for the attainment of that objective are appropriate and necessary.

Court of Cassation did not deem it appropriate to raise a question of constitutional legitimacy because the *clarification* does not have a binding nature. Furthermore, the conflict between Italian legislation and EU law did not involve the Charter of Rights and its Art. 21. In fact, the Charter remained completely extraneous to the argument of the Court of Luxembourg, and it was not used as a primary source of EU law even beforehand[27].

As regards the retirement age, another referral was made for a preliminary ruling by the Labour Section[28]. It stated: *i)* that the automatic termination of the employment relationship, upon reaching the age of 60, for pilots (employed by a company operating for the secret services) conflicted with Directive 2000/78 and Art. 21 CFREU; *ii*) the non-binding nature of the 2017 *clarification* and that the direct dialogue with the Court of Justice was the most direct and effective tool[29].

The issue of dual preliminarity also resurfaces in two well-known sentences of the Court of Cassation on the matter of *ne bis in idem*[30]. Decisions which, starting from the response received from the Court of Justice[31], gave a direct and immediate application to the provisions of Art. 50 CFRUE[32]. Such application, according to the judges, was not in conflict with domestic law. The interpretation embraced by the Court of Cassation prevented both the emergence of a question of non-application of national provisions by reason of the primacy of EU law and the relevance of doubts of constitutionality that may be abstractly conceivable.

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[27] A. Cosentino, *La sentenza della Corte costituzionale n. 269/2017, ed i suoi seguiti, nella giurisprudenza del giudice comune*, cit. at 10, 216.

[28] Ord. No. 13678 of 30 May 2018.

[29] A. Cosentino, *La sentenza della Corte costituzionale n. 269/2017, ed i suoi seguiti, nella giurisprudenza del giudice comune*, cit. at 10, wrote that the order created a criterion for choosing between the preliminary ruling and the question of constitutional legitimacy - that of the national or European prevalence - which was then variously elaborated upon within the subsequent doctrinal debate.

[30] Civil Section, nos. 31632 (Di Puma) and 31633 (Zucca) of 26 September 2018.

[31] Judgment of 30 March 2018 in combined cases C-596/16 and C-597/16.

[32] No one shall be liable to be tried or punished again in criminal proceedings for an offence for which they have already been finally acquitted or convicted within the Union in accordance with the law.

The Court of Cassation, Labour Section, in its Order No. 451 of 10 January 2019[33], articulated a preliminary reference centred on whether the employee is entitled to compensation for unused vacation time in the period between wrongful dismissal to reinstatement. The Court did not consider it necessary to follow the *clarification* because it was not binding and because the Constitutional Court did not prejudice the power of the ordinary judge to order a preliminary referral according to Art. 267 of the TFEU. The Court of Cassation stated that direct dialogue with the Court of Justice appears to be the most direct and effective tool in this case.

4. Conclusion

The Constitutional Court modified the original Granital doctrine, seeking for a renewed centrality. The ItCC updated the procedure relating to cases giving rise to the dual preliminarity by nudging ordinary judges to raise a question of constitutionality first, looking for a sort of "re-centralization" [34] regarding the scrutiny of fundamental rights questions.

This shift is primarly a consequence of the way EU law (especially as regards fundamental rights) and case law of the Court of Justice (especially concerning the primacy of EU law) have evolved. The very same attitude of several ordinary courts toward the national Constitution surely was an additional push of the ItCC. Many ordinary courts have developed the (wrong) belief that the national Constitution is not one and only, but consists of a plurality of instruments that can be assimilated with each other (including the ECHR and the EU Charter) and, to some extent, can be mixed at discretion to achieve substantive judicial outcomes. The risk that the EU justice circuit (made up by the dialogue between ordinary national judges and the CJEU) could overshadow the constitutional justice circuit (which comprised ordinary national judges and the ItCC) pushed the Italian

[33] The referral order from the Labour Section was also expressed in the same terms, as decided on 27 November 2018, and filed with the Court of Luxembourg on 21 January 2019.

[34] I have discussed that expression in The Italian Constitutional Court in its context, quoted at fn 1.

Constitutional court to re-establish its position by 're-entering' the arena.

It is still too early to have an idea of how the *clarification* will impact relevant jurisprudence. To date, the attitude is still unclear and varied. As specifically shown by the referral orders to which the Constitutional Court responded in ruling No. 67/2022, there is a need to help the national courts not to confuse the application of the new doctrine with the violation of the primacy of EU law when directly effective EU secondary law is at stake (in the name of clear, precise and unconditional content) on the subject of rights or the principle of equality (both of which are provided for in the Charter). On this point, the Constitutional Court should provide further clarifications[35].

The issues identified in the *clarification* and the following constitutional case law do not constitute many cases. Consequently, and correctly, the decisions for a preliminary ruling or direct non-application prevail, in line with the so-called Granital doctrine.

It is equally clear that when the Court of Cassation had applied the *clarification*, correctly providing the Constitutional Court with valuable material the ItCC had the chance not to miss the opportunity to hold a dialogue with the Court of Justice, finally abandoning the judicial ego[36] that had restricted it for far too many decades. More importantly, it achieved the *erga omnes* elimination of the challenged provision from the national legal system. From this point of view, the Romboli proposal of 2014[37] could be useful to eliminate instrumental uses of the new doctrine, as the Court of Cassation seems to have done in 2019 by raising a question to the Constitutional Court on the childbirth allowance (see above).

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[35] See, for example, the proposal drafted by M. Massa in this same publication.

[36] J.H.H. Weiler, '*Editorial: Judicial Ego*', 9 Int. J. Const. Law 1 (2011).

[37] Before the clarification of 2017, Roberto Romboli proposed in 2014 that the judge of last instance - even if he proceeds to disapply national law - refer the question of constitutionality to the Constitutional Court, on the sole basis of no manifest lack of grounds (by definition, disapplication excludes relevance). This would allow the Court to proceed with the declaration of unconstitutionality and eliminate the act from the legal system or provide indications for the purposes of the interpretation and application of the contested provision, Id., *Corte di giustizia e giudici nazionali: il rinvio pregiudiziale come strumento di dialogo*, 3 Rivista AIC 1 (2014).

Through this path, the Constitutional Court ensured the systemic and non-fractional protection[38] it wrote about in reference to the ECHR in the well-known Swiss pension case decided upon in 2012[39].

The message that the Constitutional Court seeks to pass on is ultimately as follows: considering the catalogues of rights contained in the Constitution, the CFREU or ECHR as conceptually superimposable is erroneous, not only due to the different content or degree of protection ensured, but rather because the former is part of a composite constitutional architecture that the law is incidentally called upon to guarantee through the systemic and integrated protection of rights. In the cases mentioned in this article, the word 'systemic' appears to acquire a less defensive and more collaborative meaning than in 2012.

[38] A. Cosentino, *La Carta di Nizza nella giurisprudenza di legittimità*, cit., mentions this in reference to the Consob affair.

[39] "[…] the comparison between the protection provided for under the Convention and the constitutional protection of fundamental rights must be carried out whilst aiming to achieve the broadest scope for guarantees, a concept which – as clarified in judgments no. 348 and no. 349 of 2007 – must be deemed to include a balance with other interests protected under constitutional law, that is, with other provisions of the Constitution that in turn guarantee fundamental rights liable to be affected by the expansion of individual protection. […] within the assessments of this Court, […] the protection of fundamental rights must be systemic and not gradually across a series of uncoordinated provisions in potential conflict with one another" Judgment No. 264 of 2012.