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Part II

Italy and the EU

An ever closer Union is the EU's (informal) motto, quoted in the treaties' provisions ever since the Preamble of the EECT in 1957. It offers the sense of the European project's dynamic nature as well as the scope of the Union (or, as it has been said, its *telos*), as represented by the steady integration of Member States.
The evolutionary nature of the integration process is not unidirectional. In some 60 years since the Rome Treaties, the EU's powers have increased, as have the attributions and influence of EU institutions. These processes were fostered by formal amendments to the treaties approved over the years, and the evolution of informal practices among the European institutions.
The same process has also involved the Member States, which have been transformed over time through their EU membership. The domestic legal systems of EU Member States have also changed in significant ways due to the transfer of powers to the supranational level and the parallel reorganization of statehood. In the words of Peter Lindseth, European integration may be considered a consequence of «the post-war constitutional settlement of administrative governance at the national level», namely a new understanding of traditional state structure, necessarily open to international law and cooperation with other States.
To understand this process, its starting point, and the results of this evolution, it should be remembered that behind the original idea of European integration there was the strong adhesion to a specific set of political ideals. Not by chance, Adenauer, De Gasperi and Schuman were all part of the same political family as Christian Democrats (and German speakers as one of their mother tongues). All of them worked towards the precise aim of securing peace and increasing living conditions in their countries, to prevent the involution of post-war democracies. Hence, at the time of the signing of the Treaties of Rome, the six founder Member States had some structural features in common: they were all based on a parliamentary system and thus were experiencing similar

dynamics between their legislatures and governments. This is an important point of reference because it also influences the way in which citizens perceive the institutional balance among EU institutions.
Italy has been and still is part of this process. As a founder member of the ECs since the beginnings and then of the EU, it has contributed to the shaping of continental integration. In turn, its internal structures and procedures have been deeply influenced by seventy years of continuous exchanges with European institutions and the implementation and application of EU law.
In the following paragraphs, the aim is to provide a sense of the importance of Italy and the ECs/EU to one other: the significance of the Italian contribution to the definition of the EU's most fundamental aspects and, in turn, the real depth of the transformation of the Italian constitutional system as a consequence of multiple European influences.
This Part is structured as follows.
Section A) analyses those specific ideas, instruments, theories and experiences that now constitute **parts of the backbone of the EU and that owe to Italians an important part of their origins**.
Section B) reverses the perspective, highlighting how much the Italian legal order has been transformed in its process of Europeanisation. Its institutions, its system of the sources of law, the way to protect of fundamental rights and its economic development have been decisively influenced by EU Membership.
Finally, **Section C)** looks at the **interaction between the two legal orders**, focusing on their respective autonomy and their further development in the broader global scenario.

SUMMARY: A) THE ITALIAN CONTRIBUTION TO EUROPEAN INTEGRATION. – 1. Foundations: The Ventotene Manifesto and beyond. – 2. Instruments: Symmetries Between Incidental Proceedings and Preliminary Reference. – 3. Theories: Legal Pluralism, Dualism, Counterlimits. – 4. Experiences: Constructive Judicial Dialogue with the ECJ. – B) EUROPEAN DRIVERS IN THE INNOVATION OF THE ITALIAN LEGAL ORDER. – 1. The Institutional System. – 1.a. The Europeanisation of Parliamentary Functions. – 1.b. The European Role of the President of the Republic. – 1.c. The Presidentialisation of the Government. – 1.d. European Regional Blindness *vs.* the Federalisation Process. – 2. Sources of Law. – 2.a. The Slow Entrance of the EU into the Text of the Constitution. – 2.b. A New Concept of Legality. – 2.c. The Annual European Session. – 2.d. Support to the Expansion of Delegated Legislation. – 3. Protection of Fundamental Rights. – 3.a. The Incorporation of the ECHR. – 3.b. Competing Systems of Fundamental Rights Protection. – 3.c. The Decision not to Ratify Protocol No. 16 ECHR. – 4. Economic Integration. – 4.a. The External Bond in Structural Reforms: a Loss of Sovereignty? – 4.b. Membership as a Financial Constraint (SGP). – 4.c. Procedures of the European Semester. – 4.d. The New Perspective of Next Generation EU. – C) AUTONOMY OF LEGAL ORDERS: EUROPEANIZATION OF COUNTERLIMITS AND EU CAPACITY OF TREATY-MAKING. – 1. Italian Constitutional Identity and its Protection, a Third Wave à l'Italienne? – 2. International Treaties between EU Member States. – 3. The Case of EU-Negotiated Trade Agreements. – References.

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A) THE ITALIAN CONTRIBUTION TO EUROPEAN INTEGRATION

In the analysis of the **mutual influence** developed in seventy years of Italian EU membership, the focus will be placed first on the Italian contribution to the European construction. It will be highlighted what Italy gave in terms of **intellectual proposals** as well as of **institutional instruments and practices** to contribute to the integration project that became parts of the backbone of the European framework. They comprise **Altiero Spinelli**'s original intuition, that of conceiving of a (federal) Europe before anyone else; the procedural design that introduced the main tools for legal integration, such as the instrument of the **preliminary reference**; the theoretical systematisation of the balance that exists between European law and national constitutional constraints, such as the doctrine of the so-called **counterlimits** (*controlimiti*); and finally, the proposal for a **cooperative** (and, as it had been recently defined by Daniel Sarmiento «seductive») **attitude to the judicial dialogue** between national constitutional courts and European courts, which is preferred to the more adversarial approaches developed by others (and significantly the German *Bundesverfassungsgericht*).

1. Foundations: The Ventotene Manifesto and beyond

A famous quote from Pietro Calamandrei refers to the birthplace of the Italian Constitution in the mountains where the *partigiani* fought and died for a free and dignified Italy in the liberation of Italy following the tragic years of the fascist regime. Similarly, if one wants to find the **birthplace of European integration**, they should visit **Ventotene**, a wild and charming **island in the Tyrrhenian Sea**, where **in 1941 Altiero Spinelli and Ernesto Rossi** wrote their pamphlet entitled *For a Free and United Europe. A Draft Manifesto* during their detention as anti-fascist prisoners.

The year 1941 thus saw the origins of the European ideal but was also, paradoxically, the darkest phase of World War II: Nazi Germany was occupying most of the western and central part of the continent and even invading the eastern part with the so-called *Operation Barbarossa*; Japan was cementing its claims and furthering its expansion in the Pacific, and the USA was still not directly engaged as the attack in Pearl Harbor would only occur at the end of that year. At this time, the most likely future scenario was an overwhelming victory of the Tripartite Pact and the collapse of European democracies.

However, a small group of **anti-fascist intellectuals** who had been deported to Ventotene began debating their hopes for the post-war period, revealing an outstanding capacity to maintain a clear mind in such difficult conditions.

The **Ventotene *Manifesto*** has **an explicit federalist perspective**, denouncing the limits of «a balance of independent European States» and of the principle of classical international law of non-intervention in internal matters, indeed

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identifying in each national constitution a «vital interest» for other European countries as well. These ideas were stressed even further. Not only did it advocate for the rejection of competing sovereignties, the *Manifesto* also drew attention to the limits of international cooperation mechanisms witnessed in the previous decades. At the basis of its proposal there was the conception of a new form of statehood and, indeed, a new approach to sovereignty in more limited and open terms.

This ideal heritage reverberated in Article 11 of the Constitution that epitomized the ECs' aims some years prior to its foundation. In it can be found the repudiation of war, linked to the constitutional principle of openness, the acceptance of the limitations of state sovereignty in the name of «peace and justice among nations». Not surprisingly, it would constitute the main reference for the participation of Italy in the ECs/EU.

The original content of the Ventotene *Manifesto* was later echoed by the **Schuman Declaration (1950)**, which clarified the instrumental nature of cooperation between France and Germany with regard to the aim of maintaining peace.

> The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims.
>
> The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible. The setting up of this powerful productive unit, open to all countries willing to take part and bound ultimately to provide all the member countries with the basic elements of industrial production on the same terms, will lay a true foundation for their economic unification.

On the contrary, the objective of combining the fundamental raw materials for heavy industry – coal and steel – had the declared aim of **making the war «materially impossible»** once the economies of the two main European countries became interdependent. As in the Ventotene *Manifesto*, in the Schuman Declaration too the traditional means of international law were considered insufficient to achieve the ambitious aims it proposed, indicating that «for a transitional period» it was necessary to have **a broad mechanism of the harmonization and convergence of individual state economies**, to be implemented under the arbitration of a subject that was to be identified by **mutual agreement**. Thus, briefly, the principle was established whereby cooperation between states was coordinated by an external body, the bearer of purely 'unitary' or 'supra-state' interests.

Even prior to their beginnings, the ECs were conceived as a different subject from traditional international law, with an instrumental nature designed for

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definitively political, rather than economic purposes. This design was created in the early 1950s on raw materials and sealed in 1952 with the establishment of the European Coal and Steel Community (ECSC). In order to strengthen the military relationship between the contracting States, it should have immediately followed up by a **European Defence Community** (EDC), a natural continuation of this design. However, the EDC treaty was rejected at the stage of its ratification by the French National Assembly, thus constituting the first of many setbacks in the process of European integration, which was nevertheless not to be halted.

The reaction to this first failure was the relaunch of continental integration with the EEC and Euratom, maintaining the idea of the crucial importance of economic integration in a broader perspective. This **gradualist approach** can first be traced back to another great protagonist of the commencement of the integration process, **Jean Monnet**, to whom the idea of the so-called «*Europe de petits pas*» is owed, i.e., the progressive construction of the results of convergence between the Member States.

Gradualism, however, should not be interpreted as a renunciation of the **constitutional ambitions of the European project**, but rather as an exercise in pragmatism, a way in which to continue practising the same objectives. This is the basis underlying the «ever closer union», which is contained in the preamble to the Treaty of Rome of 1957 and which subsequent Treaties were to expand upon, and which still today constitutes the founding basis of what is defined as the process of European integration, indicating its evolutionary nature. This gradual approach was also explicitly embraced by the Italian Government in the Report that accompanies the bill for the authorization of the ratification of the Rome Treaties (A.C. 2814, II leg., at 45), in which they are referred to as being «not perfect, albeit necessitating the instrument for their improvement» and requesting for this purpose «the will of Governments and commitment of the citizenry». This document already contained the undisguised **constitutional ambition**, which anticipated the possibility of the direct election of a European Parliament, together with the idea of a future transfer of European sovereignty to this assembly.

Yet Italy maintained its attitude towards a constitutional evolution of the integration process. A confirmation of this can be found in the **advisory referendum held on 18th of June, 1989**, on the occasion of the election of the European Parliament. Italian citizens were asked to vote on an issue which included the request to transform the then-existing Communities «into an actual Union, with a government accountable to the parliament» and to attribute to the latter the mandate «to establish draft European Constitution to be directly submitted to the ratification of the competent bodies of the Member States». The referendum, which took place only a few months prior to the fall of the Berlin Wall – but which was conceived with a spirit that already looked further ahead – was remarkably successful, with a turnout of over 80% and consensus higher than 88% of the

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voters. Its impact on the European level can be considered marginal, as no such mandate was given and no «European Constitution» was debated because of that. However, the simple fact that it was held, the participation that it triggered and the consensus reached in the population are good indicators of what was the sentiment in Italy some 30 years after the beginning of the European integration.

The Italian position has undergone some notable changes in subsequent years. This does not seem to be due to the evolution of the political context and, in particular, to the emergence of Eurosceptic political parties. On the contrary, the growing **Euroscepticism** in national politics seems to be rather the cause of a change in Italy's attitude towards European integration, an effect of the change in Italy's position within the European framework. The Italian perspective on European integration has had two notable turning points. The first concerns the **Maastricht Treaty** when, with a view to adopting the single currency, macroeconomic requirements were introduced which were difficult to reconcile with the management of the national budget, which had until that point been inclined towards deficit spending policies. Indeed, the moment at which Italy's European membership began to constitute not only a source of economic development but also a significant source of macroeconomic constraints may be identified to have been at the very start of the 1990s. The second turning point can be identified as being the progressive **enlargement** of the number of Member States. Over time, the 6 founding states were joined by Great Britain, Denmark, Ireland, Greece, Portugal, and Spain, as well as – in the mid-1990s – Austria, Finland, and Sweden. The real change then occurred with the 2004 enlargement in which 10 new States, mostly from Central and Eastern Europe, joined the EU. It was then completed in the subsequent years with further adhesions, all from countries from the former Eastern bloc. This new geographical arrangement of Europe, together with Italian progress in its decades-long EU membership, gave Italy a very different position to that which it held at the end of the 1950s. Indeed, from a comparatively undeveloped and poor country, particularly in its South, fifty years later Italy presented itself as one of Europe's most advanced countries, especially in its Northern regions. The consequence of this was also a **radical change of positioning** with respect to the potential for the attraction and use of the significant European funds that aimed to achieve territorial cohesion and the structural development of the Member State. These funds had already been significantly drained by the German reunification process and at this point were being mainly allocated to the new Member States.

The combination of these two trends lead to a dual change of perspective for Italy. In the light of the evolution of the European integration process, there was a widespread loss of consensus within public opinion due to the drop of its output legitimacy (which is the capacity of improving life conditions of the citizens). In short, over recent years, belonging to the EU has no longer been perceived to be

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an opportunity or source of greater well-being, as was previously the case, but is rather seen as a cost that is difficult to tolerate considering the considerable constraints that membership imposes.

The overall result of this has been the **emergence of populist and Eurosceptic political parties**, which in recent years also started to hold significant positions in the Italian government. However, here it will be the way in which Italy's long membership of the EU has deeply influenced party politics and contributed to the domestication of the more extreme parties by including them in both national and European responsibilities that will be discussed.

2. Instruments: Symmetries Between Incidental Proceedings and Preliminary Reference

The Italian contribution to Europe's formation was not merely intellectual and political. **Italian lawyers** have long been an essential part of the community of scholars and legal practitioners who have contributed to the legal design of the ECs (Pavone 2022).

The importance of the **preliminary reference** mechanism in the evolution of European integration has long been established up to the point of indicating the **«judicial» nature of Europe's construction** (Stone Sweet 2004). The current design of this fundamental tool was reached also thanks to the contribution of the Italian delegation in the drafting of the Rome Treaties, when there was an extensive revision of the preliminary reference as regulated before.

In the 1951 Paris Treaty, the preliminary reference mechanism was limited to assessing the validity of the deliberations of the High Authority (Article 41). The drafters intended to make a clear distinction between the powers of national judges and those of the European Court of Justice (ECJ), leaving untouched the jurisdiction of the former and involving the latter only in cases of possible treaty violation by a European act of secondary rank. This procedure proved to be largely unsatisfactory. Not only did it remain unused in practice, without a single reference issued by national courts in the period between 1952 and 1957, but it was also unfit to sustain the development of the integration process. As it was limited to the assessment of the validity of the deliberations of the High Authority, it aimed to enforce the ECSC Treaty over the action of other institutions. Therefore, its results could only have sanctioned the integration progresses, and had no potential for furthering it more significantly.

It was only with the 1957 Treaties that the possibility of a preliminary reference for the **uniform interpretation of community law** (both concerning the treaties and acts of secondary law) was added. A crucial role in this regard was played by the Italian delegation, and in particular by **Nicola Catalano** (later a key

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member of the ECJ), who elaborated the procedure **based on the incidental proceeding in accessing the ItCC** that had been drafted just few years earlier in the Law No. 87/1953 (see *I.E).3.*). The proposal was modelled on the basis of Article 23 of Law No. 87/1953, as an ordinary and necessary instrument of dialogue between common judges and the sole interpreter of the Constitution.

The addition of an interpretative capacity to the ECJ for national referrals has been fundamental to European integration. Indeed, it constituted the primary means by which some of the core principles of EU law could be asserted, such as direct effect and primacy. Most of the ECJ's landmark cases were decided on the basis of this procedure, including ***van Gend & Loos* (1963) and *Costa/ENEL* (1964)**.

The monopoly of the ECJ's interpretation of European Law was the premise for its uniform application, and the mechanism enabling the referral of cases for preliminary rulings constitutes its most distinctive and effective feature.

There are clear **symmetries between the Italian system of access to constitutional adjudication and the process for requesting a preliminary ruling by the European Court**.

One key similarity is the **centralized nature of the scrutiny**. Just as the Constitutional Court is the only judge of the constitutionality of domestic laws, so the ECJ is the sole institution that is entitled to interpret European sources. This confirms the necessity of the unification of institutions in both legal orders, with a court that embodies the unifying nature of the codified *constitutional* document. Although the actual application of European law is diffused (and performed by ordinary – national – judges) it is only the Court of Justice that may be considered to offer a «secure and reliable» interpretation of the Treaties. A further consequence of this has been the attribution to a common institution of the interpretation of the treaties, thereby avoiding the possibility of a differentiated interpretation that relies on national institutionalism and national legal traditions.

Secondly, both tools can be activated **by all judges**. In contrast to other systems (e.g., the *question prioritaire de constitutionnalité* introduced in the French system in 2008, which is limited to the highest judges, such as the Court of Cassation and the Council of State), in both the Italian and the European systems the idea is to make the instruments of judicial dialogue accessible at all stages of the application of law.

In brief, there is in both approaches an **underlying idea of relationality**, meaning the insufficiency of the individual judge (and the individual legal system) in comprehensive adjudication. The result is the creation and development of **legal interdependence between national and European legal orders.**

The autonomy of the ordinary judge, both in the national context as well as in the European legal order, is of utmost importance; however, autonomy alone is

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not necessarily sufficient when higher values come into play. Such higher values may include the compatibility with constitutional principles (and fundamental rights), in the first place, and the uniform application of European law (and thus equality among Member States in respecting common obligations) in the second.

There are also differences between the two remedies regarding the question of constitutionality (brought before the ItCC) and preliminary reference (before the ECJ).

The effects of the decisions are different. The **ItCC is directly entitled to declare the unconstitutionality** of the law infringing the Constitution. The **ECJ is called upon 'only' to clarify the interpretation to be given to European law**, and it is up to the national judge to take the consequences of that interpretation (if necessary, by the non-application of conflicting domestic norms). This difference is inherent in the autonomy that will necessarily be attributed to each legal order. It is, however, consistent with the approach that the ECJ fosters regarding granting primacy (rather than supremacy) of EU law over national law: as will be said more in detail below, at the end of a long elaboration by the ItCC, EC/EU law is not considered to be hierarchically higher than national law. It claims for its priority within the matters conferred to the European level. Conflicting national law will not be repealed or annulled. It will be set aside by the priority granted to EU law.

3. Theories: Legal Pluralism, Dualism, Counterlimits

Italian literature was well-equipped to frame the theoretical complexities of several different legal systems co-existing and overlapping in a variety of ways. As early as 1917-18, Santi Romano – arguably the most influential Italian legal scholar of the twentieth century – in his *L'ordinamento giuridico* (The Legal Order) put forward a twofold theory: institutionalism, which affirms an intrinsic correspondence between societal organization and legal norms, unified in the socio-legal notion of 'institution'; and legal pluralism, which considers the coexistence of several social organizations and, as a logical consequence, of different legal systems to be physiological. This, in turn, begged the question of how this pluralism, and the conflicts that could ensue, should be managed. In answer to this, it should be said that Romano still had great confidence in the traditional state as the overarching legal institution. Today, Romano's volume (translated into English only in 2018 but widely circulated in other languages for decades) is a cornerstone of the theories current today which explain supra- and international legal integration in terms of pluralism (one the most recent examples of work following this line of thinking is the theory of inter-legality elaborated by Klabbers/Palombella 2019).

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Notwithstanding the strong political will to create the ECs, the exceptionally advanced legal integration entailed by them has proven to be challenging both in theory and in practice, namely in the courts. Therefore, the Italian approach to European legal integration has involved **substantial critical reflection**. **The ItCC has also progressively assumed a crucial role** in shaping the approach and in setting the conditions in which Italy participated in the European process.

The text of the Constitution did not provide for a proper European clause. The political situation in the 1950s and 1960s (during which there was a deep division between the major political parties regarding Italy's place in the international scenario) would not have allowed for a constitutional amendment to be added to it. The constitutional amendment procedure requires a two-thirds majority, and until 1970 the other option for approval, through an absolute majority plus a popular referendum, was not available, as the rules for the latter were still absent until the approval of the Law No. 352/1970. Furthermore, until the late 1990s, general opinion allowed for the amendment of the constitution with only a large parliamentary majority, although on certain subjects this was impossible to achieve.

In light of this situation, **the Italian approach to legal integration within the ECs could not be based on a modification of the constitution that legitimized it**. In the absence of the potential for amending the black letter of the Constitution, the ItCC achieved a similar goal through the **progressive interpretation of the existing norms**, granting them an evolutionary (and rather innovative) content in comparison with the original one. Over time, the ItCC significantly changed its position, recognizing the autonomy of EC law from public international law and its different interactions with domestic law.

Most of the vocabulary that was used in the scholarly debate, and which continues to be used to describe the approach to legal integration in the ECs, and later in the EU, was in fact created by **Paolo Barile**, an influential interpreter of the Italian constitutional evolution for many years. To him we owe many key expressions, such as the **«European journey» of the ItCC** or «counterlimits», both of which derive from the progressive refinement of the case law and his innovative interpretative work regarding constitutional texts (Barile 1973).

This depiction of a «European journey» that is fundamentally **evolutionary in nature** was proposed to reflect the development of the Court's positioning, observed in the adaptation of domestic categories to the specific needs of European integration. This process consisted of **a certain number of steps** and, upon each of them, the ItCC refined its understanding of EC law, its status in the Italian legal order and, consequently, the criteria necessary for the resolution of clashes between EC and conflicting domestic law.

In the name of the Italian legal order's **dualistic nature**, the composition of the conflicts existing between international law and domestic law requires an

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instrumental premise, consisting of the **transformation of the foreign legal order into a domestic rule**. The former takes the nature, the rank and the status of the domestic norm enabling its entrance into the legal order. This passage is necessary for the use of those categories that a domestic court can handle in a dualistic system. In this framework, international treaty law is considered as having the same rank of national legislation, in the name of the legislative authorization for the purpose of ratification that is provided for in Article 80.

At the beginning of this journey, the ItCC demonstrated significant **resistance** to accepting the novelties that were already emerging from the ECJ's case law. If the latter had already stated the direct effect and the primacy of EC law in light of the early case law elaborated by the ECJ, the ItCC was still unable to find any significant difference between public international law and European law. Community norms were treated in Italy exactly like international ones, specifically as international treaties, and so to be understood as having the same rank of the domestic legislation that ratified it.

The most important decision of this phase is **Judgment No. 14/1964**. This was based on the same principal litigation of the ECJ case *Costa/ENEL*. The conclusions of the ItCC, in this case, could not have been more different from those of the European court. In transforming EC law in domestic legislation due to the rank of the act that authorized the ratification of the ECT, the conflict was perceived as being between two (domestic) legislative sources, which could be solved through ordinary **chronological criteria**. Consequently, with a significant paradox, the application of EC law was ensured only *vis-à-vis* domestic norms that were older than the law authorizing the ratification of ECT, thus jeopardizing the uniform application of European law.

The second step of the ItCC's European journey came some 10 years later. It was also most probably the decisive step as it was on this occasion, in **1973**, that the Court found **Article 11 to be the constitutional reference for European integration**. Following the same dualist approach, the identification of a constitutional basis for the application of EC law in the domestic legal order implied that it shared the same constitutional rank. In this context, the necessary consequence of the conflict with domestic legislation was the latter's unconstitutionality, which was a direct result of the application of the general hierarchical criteria.

The solution proposed in the ***Frontini* Judgment (No. 183/1973)** had multiple and uncertain implications. The outcome was the granting of the application to EC law. Thus, at least at first glance, it could be interpreted as being closer to the approach pursued by the ECJ. Nevertheless, it was not only the underlying motivation that was different (as it was based on the hierarchal superiority of EC law and not on its primacy due to its necessary uniformity), but its procedures and its

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consequences had further problematic aspects. As for the procedures, the **unconstitutionality of the domestic law that conflicted with EC law** meant that the application of the latter depended on its involvement with the ItCC. Due to the centralized system of constitutional adjudication, only the ItCC could have been capable of resolving such conflicts, thus delaying the application of EC law to the constitutional judgment, and thereby **depriving the ordinary judges of their autonomy in ensuring the primacy of the application of EC law**. Secondly, the effect of a decision of unconstitutionality is the annulment of conflicting legislation, which is something that is not requested by the ECJ. In the event of a subsequent modification of EC law, annulled domestic law could no longer be applied, although no such conflicts exist any longer.

The most important contribution to the European debate of this journey has been the doctrine of **counterlimits** (*controlimiti*), another expression that Paolo Barile proposed. It is the result of an elaboration on the wording of Article 11 Const., indicating the existence of the **limits to those «limitations» (to sovereignty)** – these are the «*counter*-» limits – that **Italy is willing to accept to pursue «peace and justice among Nations».**

The ItCC has never used the exact word «counterlimits» in its decisions related to European integration. To date, albeit in international public law, this wording was in fact explicitly used in the *Ferrini* case (Judgment No. 238/2014), confirming that counterlimits became a general doctrine for the ItCC. However, ever since the *Frontini* case, the entire role of the ItCC in relation to European integration has been shaped around the potential it offers for the identification of a violation of counterlimits, denoting the detection of whether, and how, EC/EU law may determine an infringement of the Italian Constitution's core values up to the point at which its application may be ruled out. Interestingly, the doctrine of counterlimits was proclaimed by the ItCC **one year prior to the *Solange* judgment** issued by the German Federal Constitutional Court, thereby contributing to the circulation of an Italian model to the conditional acceptance of the primacy of EC law and its relationship with the protection of fundamental rights as enshrined in the national constitution.

The capacity of the ItCC to assess counterlimits was later confirmed and detailed in the subsequent ***Granital* judgment (No. 170/1984)** in which, significantly, the **judge rapporteur was Antonio La Pergola** (prominent lawyer, later President of the ItCC, Minister of EU affairs, MEP, member of the ECJ and Advocate General). In this landmark case, the ItCC affirmed a new principle and reiterated part of what had already been stated in *Frontini*. On the one hand, it confirmed Article 11 as the basis for the introduction of the domestic legal order of EC law. However, in contrast to *Frontini*, it did not derive from this basis any necessary hierarchical superiority based on national law. Instead of

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the invalidity of domestic legislation conflicting with EC law, the ItCC discovered **a new equilibrium** through the establishment of a **division of competences between national and EC law**, requesting the **disapplication of domestic law** in the sectors that were attributed to the European level.

The reasons leading to this further change of approach by the ItCC are to be found also in the evolution that was taking place in the case law of the ECJ. Just in between *Frontini* and *Granital*, the ECJ had released the fundamental *Simmental* Judgment (case C-106/77) in which it claimed, within the principle of conferral, the primacy of European law notwithstanding the rank and the status of the conflicting domestic norm.

> «by virtue of the principle of primacy of Community law [...] the national judge, charged with applying [...] the provisions of Community law, has the obligation to ensure the full effectiveness of these rules, disapplying, if necessary, on his own initiative, any conflicting provision of national legislation, without having to request or wait for its prior removal by legislative means or by any other constitutional procedure».

This shift to the further **criteria of the competent lawmaker** implied a decisive difference in the role of national judges: this was to detect the potential conflict between national and EC law, but they also possessed the authority to solve these conflicts, without the necessity of the prior involvement of the ItCC. National judges were granted the power of the disapplication of national legislation in order to be able to secure full application of EC law. Only in the event of potential conflicts with the fundamental principles of the Constitution, the inviolable rights of the person or, in general, when counterlimits were at stake, was there a requirement to raise the issue of constitutionality, similarly to what was generally expected after the *Frontini* case.

In brief, the core of the doctrine' of counterlimits is the following: the **primacy granted to EU law is not absolute** and the principle of openness entailed in Article 11 must be balanced with the further **supreme principles of the Constitution**, later defined by the same ItCC as those principles that cannot be modified even through a constitutional amendment (Judgment No. 1146/1988). The role of the ItCC in enforcing these principles is latent, in the sense that the ItCC claims to have this capacity even without a significant practice. The ItCC was careful to recall the existence of this supervisory role in the interactions between legal systems in later decisions. For example, in **Judgment No. 232/1989 (*Fragd* case)** the ItCC was keen to underline its powers in this respect. While recognizing the improvements in the protection of fundamental rights by the ECs (which already at that time constituted an «integral and essential part of the community

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legal system»), the ItCC reaffirmed its role in checking the compliance of EC law with the fundamental principles of the Italian constitutional order, with specific regard to the **inalienable rights of the human person**. That statement was followed by the recognition that «what is highly improbable is still possible», as the premise for the necessity of preserving the arbitrary role of the Court for the sake of the integrity of Italian constitutional (supreme) principles.

The potential for the application of counterlimits may be described as a sort of reserve power on the part of the ItCC that has been developed as a general doctrine of Italian dualism. It has been applied not only to international public law (as said, in the Judgment No. 238/2014), but also in cases concerning the relationship with the Vatican State (Judgment No. 18/1982). In both occasions, the fundamental right of **access to justice was enforced as a supreme principle of the Italian Constitution**. The openness of the legal order is thus limited to the aim of ensuring the integral protection of individual rights.

In conclusion, the Italian contribution to the European debate on the relationship between core constitutional values and European law concerns the mutual interdependence of the two legal orders. The doctrine of counterlimits aims to reconcile the inherent openness of the contemporary state with an acknowledgement of its boundaries, to allow a nation-state to participate in European integration and, at the same time, to assert its most fundamental values, such as the inviolable rights of its citizens.

4. Experiences: Constructive Judicial Dialogue with the ECJ

The ItCC's European journey did not end with the *Granital* judgment. The acceptance of a division of competences at the national and European levels did not signify the full embrace of the position that the ECJ has fostered since the decisions of *Van Gend & Loos* and *Costa/ENEL*.

In particular, the ItCC was for many years **resistant to participating in any dialogue with the ECJ** through the instrument of the **preliminary reference**. Like many other constitutional courts (Claes 2015), the notion of being required to depend on another subject to be able to define its own judgments led the ItCC, for a long time, to fail to consider using this instrument. Indeed, at least until the mid-1990s, the ItCC offered only confused arguments in support of its refusal to directly engage with the ECJ. Firstly, it considered that issuing a question about the interpretation or the validity of EC law was merely a **possibility**, even though it was a court of last, indeed only, instance (Judgment No. **168/1991**). It even **denied its eligibility to access it at all**, asserting that it was not included in that definition of «court or tribunal of a Member State» as per Article 234 ECT, based on its previous jurisprudence in the field of judicial organizations (**Order No. 536 /1995**).

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In line with the *Granital* doctrine, in cases of **dual preliminarity**, the ItCC asked ordinary judges to issue the preliminary reference first, and then to potentially raise a question of constitutionality, if relevant, once any doubts concerning the interpretation of EC law had been clarified, where doubts concerning constitutionality persisted. Otherwise, when issues were brought to its attention that also concerned aspects of compatibility with EC law, these were always declared inadmissible, precisely because it was first deemed necessary to activate dialogue with the ECJ through the tool of preliminary reference (e.g., Order No. 319/1996).

However, it was evident that this approach could not be sustainable in the long run. First of all, the idea of deferring to the main trial judge for the issue of a preliminary reference first was completely unacceptable in cases of **principal proceedings**, i.e. when it was not the judges who referred the matter to the ItCC, but rather the Government or the Regions (Cartabia/Weiler 2000).

Not by chance, it was in this context exactly that the ItCC raised its **first preliminary reference** (**Order No. 103/2008**). The motivation that the ItCC gave was a sort of acknowledgement that previous decisions had been somewhat mistaken, even though it claimed a sort of continuity. In particular, the ItCC confirmed its exclusion from the national judiciary, qualifying itself as the **supreme constitutional guarantor**. However, the ItCC supported its decision regarding the activation of dialogue with the ECJ as its decisions cannot be appealed, rendering it a body of last (actually only) instance. Moreover, it further supported the argument (rendering it even more EU-friendly) by stating that «were it not possible to make a preliminary reference […] in constitutionality proceedings where the court has been seized directly, the general interest in the uniform application of Community law […] would be harmed».

Five years later, the ItCC issued a **further preliminary reference**, the first one in an **incidental proceeding** (**Order No. 207/2013**). This occurred because the question of interpretation concerned an EU directive that did not have direct effect, enacted in the national legal order via delegated legislation. The referring judge doubted the constitutionality of the subsequent legislative decree and raised a question of constitutionality for the purpose of checking its compliance with Article 76 Const. (via comparison to the delegating law). In this context, only the ItCC was in the position to apply the EU directive, at the time of using the delegating law as an interposed norm in the judgment on the legislative decree.

However, even after Order Nos. 103/2008 and 207/2013, the European journey of the ItCC cannot be considered as concluded. On the contrary, they both appear to be perfectly compliant with the *Granital* doctrine, due to the absence of judges who could refer a preliminary question to the ECJ, and also because judges involved in the affair were not called to apply the European provision

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subject to interpretative doubt (an activity that only the ItCC could have exercised when dealing with the question of constitutionality).

In some way, even the subsequent reference for a preliminary ruling in relation to the so-called ***Taricco* saga** (Order No. 24/2017) did not seem to deviate from the doctrine that has been defined in the case law of the ItCC since 1984. Indeed, although the tone of the order was extremely harsh, as if to indicate an ultimatum made by the ItCC to the ECJ, its procedural contours are perfectly consistent with the theoretical framework defined at the time (Piccirilli 2018). Ordinary judges had recognized a possible violation of the counterlimits and, precisely in line with the *Granital* doctrine, could do nothing but involve the ItCC by issuing questions of constitutionality that used Article 11 Const. as the parameter for the decision. In light of the parameter used, the ItCC was unable to declare the questions raised inadmissible, because – following *Granital* – it was one of those cases in which the compatibility of European law with counterlimits was questioned.

The real rupture with the *Granital* doctrine occurred with the subsequent **Judgment No. 269/2017**. As will be discussed later (at *II.B).3.b.*), in this decision the ItCC proposed an inversion of the remedies in cases of dual preliminaries where there exists an overlap between the fundamental rights protected by the Italian Constitution and those rights contemplated in the Charter of Fundamental Rights of the European Union (**CFREU)**. With this proposal, also in light of the subsequent refinements of this new approach, the ItCC is promoting a constructive dialogue with the ECJ, one which has been particularly appreciated in scholarly debate. Unlike the «revolt and frustration» of the German Federal Constitutional Court and the «pragmatic resignation» of the Spanish one, the way the ItCC is now handling this tool appears to be significantly more promising (Sarmiento 2021). Instead of claiming an absolute and exclusive monopoly (as the former does) or taking for granted a definitive transfer of the power of adjudication (as in the second approach), the ItCC proposes itself as an equal interlocutor, with a view to the constitution of a network for the protection of fundamental rights. The German approach appears perhaps rather illusory in a system that is inspired by the European composite constitution, and excessively passive the Spanish one. **The Italian proposal is more «seductive»**, as it opens a dialogue with the ECJ with a view to collaborative schemes, suggesting real practicable solutions.

However, behind a formal openness to dialogue, the ItCC continues to play a pivotal role in the relations between Italy and the EU according to a rigidly dualistic model. The *Taricco* saga had already demonstrated the extent to which the ItCC, while activating the preliminary reference, essentially asked the ECJ several rhetorical questions, to which it obtained the expected responses. Indeed, in its final judgment (No. 115/2018) the ItCC went even further, asserting its point of view in disagreement with the ECJ, but only once the dialogue was over.

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In the end, the ItCC showed how it is possible to practice counterlimits, without, however, explicitly stating them (Gallo 2019).

With the subsequent Order No. 117/2019, the ItCC opened another season in its European journey. This was the first preliminary reference on the validity of an EU measure made by ItCC, concerning the verification of the interpretation of a directive and, alternatively, its compliance with the CFREU. This attitude towards the ECJ is particularly representative of the Italian way of managing the relationship with Luxembourg. It was not a continuous challenge of the **right to have the last word**, nor a passive abdication to the *fait accompli* of an ECJ as the reference organization in the relationship between states and the EU level. The aim of the ItCC is to consolidate a network for the protection of fundamental rights, defining its role as the final stage of the national system and the first point of contact between it and the EU legal system.

B) EUROPEAN DRIVERS IN THE INNOVATION OF THE ITALIAN LEGAL ORDER

In this section the focus will be inverted. After having analysed the Italian contribution to the construction and the evolution of the EU, the focus will shift to the **influence that the European membership had in the evolution that the Italian legal order**. The latter appears deeply transformed and many of the changes that can be registered have to be read as a consequence of its participation in the European integration.

The analysis will focus on four different dimensions: the institutional system, the sources of law, the protection of fundamental rights and economic integration.

1. The Institutional System

Following the order in which constitutional bodies are tackled by the Constitution in its Second Part, attention will be paid on the novelties related to the Parliament, the President of the Republic, the Government and the Regions, following the order in which they are mentioned in the Constitution. No specific focus will be made on the judiciary and on the ItCC, as they are largely addressed in the paragraphs devoted to the protection of fundamental rights (at *II.B)3.*).

1.a. The Europeanisation of Parliamentary Functions

Parliaments are perhaps the most **reluctant** constitutional branches in respect of their relationships with processes such as **internationalisation or Europeanisation**. They traditionally constitute the *fora* of **national representation** and the places of **exercise of state sovereignty**. It is therefore natural for them to resist any attempt of rethinking statehood or the sharing of legitimacy.

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Inherent to the nature of parliamentary bodies are structural characteristics that lead them to act as natural locations for discussion and exchange. As has been authoritatively remarked since the times of Hegel, they traditionally act as **intermediate institutions between the government and the people**, a sort of *portico*, namely a middle space that is not yet part of the buildings where public power is exercised and is still accessible by the people in the streets.

Moreover, the process of European integration has always been characterised by a real or presumed **democratic deficit**. European institutions have attempted to respond to this in two different ways over time. In the first phase, an attempt was made to recognise **an ever more incisive role for the European Parliament**, which since 1979 has been directly elected by the citizens of all the Member States. Decision-making procedures have been progressively amended in order to increase the role of the EP. Then, in the second phase, starting from the 2000s, this empowerment of the European Parliament began to be considered unsatisfactory with regard to increasing the level of democratic participation of citizens. Thus, also in response to the widespread discontent and loss of public opinion with respect to the integration project of Europe, **National Parliaments** (hereafter 'NPs') were therefore **directly involved**, becoming recognised as considerable powers of direct intervention in the vital decisions of the EU.

The decisive step in this direction was taken by the **Lisbon Treaty**, also defined (perhaps, with some excessive emphasis) as **the Treaty of Parliaments**. Among its many institutional innovations, the Lisbon Treaty expanded the application and renamed as the **ordinary legislative procedure** the one previously known as 'codecision', i.e. the one in which the European Parliament acts on an equal basis with respect to the Council. Moreover, it has recognised NPs, granting them extensive powers with regard to important segments of the institutional life of the Union, both by incorporating initiatives that were in the meantime launched by the Commission, and through a profound innovation of the relationship between European and national institutions.

A further innovation introduced by the Lisbon Treaty consisted of adding to the Treaty on European Union (TEU) a **Title specifically dedicated to democratic principles (Articles 9-12)**. Of particular importance is Article 10, which affirms the **foundation of the Union on representative democracy**. Its purpose is not only to further reaffirm the European Parliament's capacity to represent European citizens, but also to anchor the activity of Governments in the Council and in the European Council to the relationship they have with the respective parliaments. Furthermore, Article 12 TEU expressly refers to the **contribution of NPs to the good functioning of the EU**, thus linking their role to European policies, regulated in the TFEU.

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The new **powers of the NPs** established by the Lisbon Treaty can be organised into three different categories: those based upon a direct mention in the Treaties; those indirectly deriving from the Treaties' provisions referring to national constitutional procedures; and those that derive implicitly from the provisions of the Treaties that specify the powers of national governments, and that have the potential to be developed in a dialogue between the executive and the representative body (especially in Member States, like Italy, which have parliamentary forms of government).

Some powers of NPs that are based on a direct mention in the Treaties existed also prior to the Lisbon Treaty but were limited to **passive rights to be informed** upon regarding the draft European acts under discussion in Parliament and the Council. With the Lisbon Treaty – and in particular due to **Protocols Nos. 1 and 2** – NPs have been called upon to actively contribute to the implementation of the **principles of subsidiarity and proportionality** (Articles 5 TEU and 69 TFEU). In the matter of the shared competencies between EU and Member States, NPs are empowered to report possible violations of those principles, requesting the Commission to re-evaluate its initiative. Furthermore, NPs hold specific powers in key facets of the institutional life of the EU: in participation with their representatives in the **Conventions for the reform of the Treaties**, according to the ordinary procedure (Article 48 TEU); intervening in the discussion regarding the accession of new Member States (Article 49); discussions with EU institutions concerning decisions related to family law with cross-border implications (Article 81(3) TFEU); and in the adoption of regulations on Eurojust and Europol (Articles 85 and 88 TFEU).

NPs are indirectly involved in a series of complex procedures which have a first phase at the European level and a second one within the Member States. There are many references in the Treaties to such **Euro-national procedures** when the finalisation of a decision taken by EU institutions needs to be approved by the Member States **in accordance with their respective constitutional requirements**. These procedures address some strategic areas such as, among others, the initiative aimed at the establishment of a common defence (Article 42(2) TEU); the ratification of Treaty amendments and the approval of revisions in simplified form (Article 48(4) and (6) TEU); the approval of agreements subsequent to the accession of new Member States (Article 49); the decision to leave the EU (Article 50); the adhesion to the ECHR (Article 218(8) TFEU); the adoption of a «uniform procedure» or «principles common to all Member States» for the election of the European Parliament (Article 223); and the determination of the Union's resources (Article 311(3)).

Finally, NPs may acquire a further role in those cases when Treaties grant national governments the power to delay decisions or to refer some specific

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dossier from the Council to the European Council. This mechanism (informally termed the *emergency brake*) may be activated in the following cases: when «important aspects» of an individual Member State's social security system may be affected by the adoption of measures related to the freedom of movement for workers (Article 48 TFEU); and also when «fundamental aspects» of an individual Member State's criminal justice system may be affected by the adoption of a directive on some selected issues (Articles 82(3) and 83(3) TFEU). Although no parliamentary power is explicitly envisaged in these areas, the dynamics of the parliamentary form of government can lead to a dialogue between the NP and the government responsible for declaring the application of the **emergency brake** at the European level. For example, the Italian legislation implementing this power foresees that a parliamentary motion can be approved for the purpose of providing the government with indications on how to act in the European Council.

In short, the Lisbon Treaty grants powers to the NPs concerning matters such as defence, democracy, fundamental rights, economic resources, membership of the Union and the *constitutional* rules of the latter. These may be considered amongst the most delicate issues with which the EU deals, especially in relation to the mutual relationships between its Member States and the prospects for its constitutionalisation. The contribution of NPs to the good functioning of the EU is therefore extremely concrete. Furthermore, **NPs are co-protagonists of the constitutional avenues for the further development of integration** (Besselink et aal. 2014).

The involvement of NPs in these decision-making processes deserves attention not only because it shapes their emerging European role, but also because it is significant in relation to the evolution of their functions within national legal orders. These new powers can also contribute to a partial **rebalancing with their respective governments**, which have certainly benefitted the most from their EU membership.

With regard to the **Italian Parliament**, the implementation of its new European powers had several difficulties. Following the ratification of the Lisbon Treaty and its entry into force on 1st of November, 2009, there was no immediate follow-up for their implementation. This was due to a complicated situation in domestic politics, with the crisis that faced the Berlusconi government and the resignation of the Minister for EU policies, as well as a long phase in which the management of the financial crisis was taking up the majority of institutional attention.

It was only in 2012 that there was a decisive initiative by the parliamentary committee on EU policies, later supported by the new Government led by Mario Monti, and in particular by the Minister for EU affairs, Enzo Moavero Milanesi. The result was the approval of Law No. 234/2012 which profoundly transformed

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the domestic framework of the implementation of EU law (see *infra II.B).2.c.*) and also provided a comprehensive framework for the innovations of the Lisbon Treaty.

In particular, **Law No. 234/2012** was significant for its distinctive framing of the new parliamentary powers deriving from the Lisbon Treaty on the basis of the purpose of the specific contribution that NPs give to the Euro-national procedure. When parliamentary votes are requested to support a decision taken at the European level, Law No. 234/2012 requests the approval of a law (this occurs in relation to the establishment of a common defence, simplified revisions of the Treaties, and decisions on the EU's resources: Articles 42(2), 48(6) TEU and 311(3) TFEU). In contrast, when the power of NPs is only required for the vetoing of an initiative put forward by the EU institutions (for instance, proposals to lower the majority needed for the decision in the Council or proposals concerning family law with cross-border implications (Articles 48(7) TEU and 81(3) TFEU), Law No. 234/2012 requests a simpler deliberation of the Houses. Therefore, they could pass a motion or vote more flexibly, without the requirement of the formality of the law-making procedure (Lupo/Piccirilli 2017).

Finally, with regard to powers attributed to the individual House, (subsidiarity scrutiny, political dialogue, etc.) Law No. 234/2012 provides indications regarding improved coordination between the Houses and in their relationship with the regional level. This was a wise choice that was also made for the purpose of preserving parliamentary autonomy.

1.b. The European Role of the President of the Republic

EU membership has also influenced how the **President of the Republic** exerts his role as **«head of State» and «representative of national unity»**.

This is notwithstanding the stability of the black letter of the articles of the Constitution dedicated to the President of the Republic (see at *II.B).2.a.*). However, some consequences should be expected in light of European integration. It can only be expected that consequences would follow for the role of the «head» of the Member State of a broad project of continental integration.

The Constitution stipulates that the role of the President of the Republic represents not merely the «Republic» (in the general sense) or the nation (the representation of which is attributed to the Members of Parliament), but its very «unity». In this way, its **representative function has multiple meanings**. On the one hand, it indicates that one task of the President of the Republic is to offer «representation», so to speak, in terms of mirroring the country, presenting himself as a permanent and visible symbol of national unity and identity. On the other hand, it also indicates something rather more dynamic and proactive, because as the President is unable to limit himself solely to the registration of syncretic

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