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RELATIONSHIP BETWEEN THE ITALIAN LEGAL SYSTEM
AND THE EUROPEAN COMMUNITY**

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INTRODUCTION

The 1989 term of the Italian Constitutional Court constitutes the latest stage of the Court's dramatic and sometimes contradictory attempt to define the relationship between the Italian legal system and the European Community ("EC"). A first glance at the main decisions of the Court immediately reveals contradictions in its jurisprudence concerning judicial review relating to actions involving the relationship between Italian and Community norms. The Court began in 1964 by asserting that Community norms should be considered as the legal equivalent of acts of the Italian Parliament. At the other extreme, the Court ends in 1989 by treating Community norms as if they were equivalent to Italian constitutional norms. This vacillation in the Court's jurisprudence becomes even more mystifying in light of the dualist approach taken by the Italian Court to the relationship between the Community and Italian legal systems, where Community norms are considered as emanating from a completely separate legal order so that they can not even be compared with any kind of Italian norms.¹

This article will address how it has been possible that the same

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1. The Italian Constitutional Court takes a dualist approach toward both international and Community law. The European Court of Justice, on the other hand, takes a monist approach to the relationship between the Community and its Member States.

Monism and dualism produce antithetical consequences regarding the relationship between sources of law. Under the monist approach, Community and municipal norms are considered part of the same hierarchy of norms, where international or Community law is superior to any national norm. Under the dualist approach, Community and municipal legal systems each have their own sources of law and the conflict between them is solved by the principle of separation of attribution. Each of the two legal systems is empowered to produce norms only within its field of jurisdiction. In general, the European States follow the dualist approach with regard to Community law.

The most important commentator advocating the monist approach was Professor Kelsen. See, e.g., H. KELSEN, *DAS PROBLEM DER SOUVERÄNITÄT UND DIE THEORIE DES VOLKERRECHTS* (1920); Kelson, *Les Rapports de Système entre le Droit Interne et le Droit International Public*, 14 *RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL* 231 (1926); see

Court, interpreting the same Constitution and facing the same problems, has come to such contradictory conclusions, and will assess the impact of such conclusions on the institutional relationship between the EC and Italy.

In essence, the hopelessly confused nature of the Court's case law concerning Community matters has mainly been caused by the difficult and somewhat contradictory task of the Constitutional Court within the Italian legal order. Its institutional role within the Italian legal system demands that the Court act as the guardian of the national constitution² while at the same time it is asked to foster European integration. This dual role often places the Court into an awkward situation of having to manage these sometimes irreconcilable responsibilities.

The European integration requires the Member States to give away some of their powers and to grant them to the Community. Consequently, the attribution of powers to the different organs of the State as set out in the Italian Constitution has been partially modified. Membership in the EC necessarily implies a change in that part of the Constitution which provides for the organization of the State and the function of each institution. This is particularly evident with regard to the legislative power which is now shared between the Italian Parliament and the EC Council.³

The Member States were originally constructed as exclusively sovereign States whose powers have always been unlimited within the borders of their territory — all of that changed with their accession to the Treaty of Rome. Given this history, the Constitutional Court has an instinct to preserve the autonomy of the national powers as much as possible. Only when offered no other alternative does the Constitutional Court accept the supremacy of the Community's jurisdiction to regulate matters within Italy. On the other hand, because Italy entered the EC on the basis of a Constitutional provision, the Constitutional Court has a duty to ensure the Italian compliance with Community obligations. In this respect its role as guardian of the

also Balladore-Pallieri, *Le Dottrine di H. Kelsen e il Problema dei Rapporti fra Diritto Interno e Diritto Internazionale*, 14 RIVISTA DI DIRITTO INTERNAZIONALE 24 (1935).

2. Since the famous discussion between H. Kelsen and C. Schmitt, it is now generally accepted that in most European countries the guardian of the Constitution is the Constitutional Court. See C. SCHMITT, *DER HÜTER DER VERFASSUNG* (1931); Kelsen, *Wer Soll der Hüter der Verfassung Sein?*, 6 *DIE JUSTITZ* 576 (1931).

3. Article 11 of the Italian Constitution is the legal basis on which Italian membership to the Community has been justified. It allows the Parliament to limit the State's sovereignty in order to participate in international organizations which foster peace and justice. COSTITUZIONE [Cost.] art. 11 (Italy).

Constitution also tends to place it in the role of the guardian of Community law within the Italian system.

This, however, was not the situation envisioned by the drafters of the Treaty of Rome; the guardians of EC law within the Treaty are not the national constitutional courts. Instead, respect for EC law is supposed to be guaranteed partly by the European Court of Justice ("ECJ") and partly by national judges, who are expected to apply EC law within the context of their own procedural laws. From the European point of view, national constitutional courts are excluded from the task of ensuring respect for EC law. This organizational structure accounts for the difficulties present in attempting to build a relationship between a supranational legal order, such as the EC, and the municipal systems of the respective Member States. This also accounts for the embarrassing position of the Constitutional Court as the guardian of the Constitution as well. Hence, it is understandable why on the one hand the Constitutional Court complies with the European requirements while on the other one it opposes a new, if shifting, limit to European integration.

Moreover, the EC is a dynamic and expansive legal system: some basic principles of its legal order (e.g., the supremacy of Community law) were not even foreseeable when the Treaties were signed.⁴ The result of these unforeseen changes in the European legal structure has been a number of inconsistent and unprincipled statements by the Italian Constitutional Court which has tried, every five to ten years, to oppose the Community's encroachment upon Italian domestic sovereignty and, at the same time, to abide by Community principles. The Constitutional Court is thus responsible both for Italy's progress and regress toward its obligations to the EC. In this respect the case of Italy provides nothing more than a symbol of the drama played out in other Member States as a result of their membership in the European Community and their corresponding limitations of sovereignty. The existence of a Constitutional Court makes this drama all the more evident.⁵

The development of the Italian case law on Community matters mirrors the double institutional role of the Court. One can identify two streams within the constitutional case law corresponding to the two respective roles of the Court as enforcer of Community treaty obligations and guardian of the constitution. In a first group of deci-

4. On the dynamic character of the EC, see J. WEILER, *IL SISTEMA COMUNITARIO EUROPEO* 43-44 (1985).

5. It is not by mere chance that Germany, which has a Constitutional Court as well, has been facing problems similar to the Italian ones. See *supra* notes 60-62 and accompanying text.

sions, the Court follows step by step, even if with shortcomings and hesitations, the authority of the European Communities and in particular the European Court of Justice. In a parallel group of decisions, the Court goes in the exact opposite direction and tends to limit the full and immediate application of Community law within the Italian legal order. In the former group of cases the Court has gradually accepted the direct applicability and the supremacy of Community norms in Italy, while in the latter it has incrementally enlarged its power to exercise judicial review when Community matters are involved.

The two theoretical constructs upon which Italian membership to the Community is based are the dualism of the two legal systems and limitations of Italian sovereignty, as envisaged by article 11 of the Italian Constitution. The more the Court enhances dualism, and consequently the autonomy of the two legal systems, the more its case law is compatible with European integration; the more it stresses the idea of limitation of sovereignty, the more it deviates from European integration. However paradoxical (or surprising) it may appear, the path toward European integration is sustained by separation of the two systems because it leads the Court to surrender its functions of preserving Italian constitutional norms from Community infringement. When the Court relies on the idea of limitation of sovereignty, it has the pretension to submit Community law to judicial review in order to preserve, at least to some extent, some Italian rights and constitutional principles from violation by Community law. Any kind of national judicial review of Community law conflicts with both the supremacy of Community law and the process of European integration.

I. THE STREAM TOWARDS EUROPEAN INTEGRATION

The gradual and incremental nature of Italian compliance with the requirements of membership in the European Community can be seen in the evolution of the decisions of the Constitutional Court concerning the problem of the relationship between Community and national norms. The first statement of the Court about this problem was completely inconsistent with the Treaty and with the European Court of Justice case law. In 1964, the Constitutional Court, in the famous *Costa-ENEL* case,⁶ asserted that the relationship between Community and national norms was no different from the relationship between two national sources of law possessing the same binding authority. From

6. Judgment of Mar. 7, 1964, Corte cost., Italy, 9 *Giurisprudenza Costituzionale* [Giur. Cost.] 129.

the Court's point of view, there were no reasons to attribute a superior legal force to European norms.

Consequently, the Court held that where a national and EC norm conflict, the one most recent in time should prevail over the older one without regard to the origin of the norms. This meant that Italy, and particularly the Italian Parliament, was completely unbound by Community norms: it could at any time enact a statute contrary to Community law which would have superior binding authority within the Italian legal order. The Court went so far as to assert that Italy could also abandon its membership in the EC by means of a simple act of Parliament. Of course, if it chose to do so it could be held responsible at the international level for infringement of the Treaty. From the municipal constitutional point of view, however, it was not prevented from acting against the EC. It became clear that these statements would be unacceptable in the Community because, if every (or even just one) national Parliament had the power to disregard Community norms, the normative power of the Community would be rendered impotent and useless. The Community's concerns over such matters were in fact so profound that the European Court of Justice addressed the approach taken by the Italian Court by expressly establishing the doctrine of supremacy of Community law over national law in its review of the issues in the *Costa-ENEL* case.⁷

Nearly ten years later, the Italian Court altered its position so that it more closely conformed to the position of the European Court of Justice. In the 1970s,⁸ the Constitutional Court partially abandoned its previous statement by suggesting a procedure for review of statutes not conforming to a previously enacted Community norm. When a national norm inconsistent with Community law entered into force subsequent to the infringed Community norm, the case was to be referred to the Constitutional Court for judicial review. If the Court found that the norms were indeed inconsistent in this case, it would then declare the national norm unconstitutional for violation of article 11 of the Constitution. The Supremacy of Community laws within the Italian legal system was thus guaranteed in two ways: where the infringed Community norm was "older" than the national one, it would prevail in accordance with the rule of "*lex posterior derogat priori*;"

7. Although not explicitly envisaged by the Treaty, supremacy of Community law over municipal law has been established by the European Court of Justice. *Costa v. ENEL*, 1964 E.C.R. 585.

8. See Judgment of Oct. 30, 1975, Corte cost., Italy, 20 Giur. Cost. I 2211; Judgment of July 28, 1976, Corte cost., Italy, 21 Giur. Cost. I 1292, 1293; Judgment of July 28, 1976, Corte cost., Italy, 21 Giur. Cost. I 1299; Judgment of Dec. 29, 1977, Corte cost., Italy, 22 Giur. Cost. I 1524, 1525.

where the infringed Community norm was more recent than the national norm, the Community norm would be applied in preference to the municipal norms only after a finding of unconstitutionality.

It goes without saying that the European Court of Justice was not at all happy with this second way of ensuring supremacy of Community law because Community law could not be self-executing within the Italian legal order; this would prejudice the uniform application of Community law in all the European countries. The European Court of Justice, in the *Simmenthal* case,⁹ held that a national court, called upon within the limits of its jurisdiction to apply provisions of Community law, is under a duty to give full effect to those provisions without insisting on prior constitutional review. If necessary, it should refuse on its own motion to apply any conflicting provision of national legislation, even if adopted subsequently.

The next step towards European integration for the Constitutional Court came neither immediately nor at the first occasion offered it. In 1981, two cases which concerned the problem of relations between European and national norms were submitted to the Court. The Court avoided announcing a disposition on these issues in favor of finding the cases inadmissible (*inammissibile*).¹⁰ In principle, the two cases fit into the issue presented in the Court's case law of the seventies: they both concerned national norms enacted after a conflicting Community regulation. The Court found a way to allow the European norms to be applied over municipal regulations, but it did not change its theoretical position. The point of departure for the Court's reasoning was an interpretive rule which held that where a national provision can be interpreted to have several meanings, it should be applied in the manner most consistent with Italy's obligations under Community Law. In essence, the Court asserted a sort of presumption of conformity with Community law. Applying this presumption, the Court held that the cases at bar did not truly involve municipal statutes inconsistent with preexisting Community norms partly because the European Communities had just previously issued new regulations on the same matter and partly because the Italian Parliament had repealed the offending statute. The Court gave the repealing act of the Parliament a retroactive effect, so that Community norms could be considered as if they had been in effect since their promulgation. Consequently, in the Court's view, the national norms were not relevant to the case.

Although the concrete result of these decisions was consistent with

9. *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, 1978 E.C.R. 629.

10. Judgment of Oct. 26, 1981, Corte cost., Italy, 26 Giur. Cost. I 1543; Judgment of Oct. 26, 1981, Corte cost., Italy, 26 Giur. Cost. I 1564.

Community jurisprudence, the Court's rationale was unsatisfactory. Only with the *Granital* decision of 1984 did the Italian Court fully conform its doctrine in this area to that of the European Court of Justice.¹¹ In *Granital*, the Court explicitly reviewed its precedents on conflicts between EC and national norms and abandoned the rule requiring judges to refer questions of constitutionality to the Constitutional Court in cases dealing with statutes inconsistent with prior Community norms. The Court accepted that Community norms having direct effect should always prevail over national norms and should consequently be applied by judges, regardless of the time of their enactment. The Court stressed that technically national norms may not be abrogated by Community norms, nor are they to be considered null and void. They simply cannot be applied by judges — when the same concrete situation is governed by both a national and a Community norm, the former is no longer relevant to the case. Essentially, the Court sees the municipal and Community legal systems as existing side by side in Italy with the Community legal system superceding the municipal system in areas of conflict.

It is merely a question of choice: when a Community norm exists it must be chosen instead of the national one because of its preferential position in the legal system. This decision is important not only because it ends the conflict between the Italian and the European Court concerning the problem of relationship between Community and national norms, but also because of its underlying theoretical construction relied upon by the Court to explain the relationship between the two systems. The rationale of the *Granital* case is dualist in character: the two systems are separated and autonomous, if not coordinated.¹² It follows from this autonomy and separation that Community norms can be neither transformed into internal acts nor submitted to judicial review; indeed, nor is their relationship with national norms comparable to the relationship among national norms. The co-ordination of the two systems, as well as Member State consent to Community institutions and authority, implies that Community norms are valid in so far as the Community operates within its field of attributed powers.¹³ It is precisely due to this underlying conception of the relations between Italy and the EC that the Court was able to issue this decision

11. Judgment of June 8, 1984, Corte cost., Italy, 29 Giur. Cost. I 1098.

12. Although this was not the first time that the Court asserted the autonomy of the legal systems, it is the first time that the Court asserted it so clearly and so strongly along with its implications.

13. The Court does not, however, point out the difficulty of defining the Community attribution in light of this constant expansion. See Tizzano, *Lo Sviluppo delle Competenze Materiali delle Comunità Europee*, 21 RIVISTA DI DIRITTO EUROPEO 139 (1981).

which rightly has been considered as the height of the Court's compliance with EC law.¹⁴

II. THE STREAM ADVERSE TO EUROPEAN INTEGRATION

The relationship between the European Community and the Italian system, which the *Granital* decision appeared to have finally settled, has been partly modified by several recent decisions of the Italian Constitutional Court. The *FRAGD* case of 1989 reveals some of the most important features of this change,¹⁵ but its source is rooted in previous findings of the Court.

Since 1973 the Court has been developing the second stream of its case-law in Community matters. This stream flows from the concept of limitation of sovereignty which, under article 11 of the Italian Constitution, constitutes the constitutional foundation of Italian membership in the EC. In the *Frontini* case of 1973,¹⁶ the Court, interpreting the concept of limitation of sovereignty, asserted that the State's powers are now limited in the areas of legislative, judicial and executive functions by the attribution of part of these powers to the Community. In the field of Community competence, these functions are exercised by Community institutions, with Community forms and procedures, and according to Community guarantees: the Community is not be expected to operate through Italian forms or with Italian guarantees, such as referendum or judicial review by the Constitutional Court.

Every Community activity concerning a matter which falls within its sphere of competency is valid if Community procedures and guarantees are observed. Validity of Community actions may not be as-

14. It is worth remarking that the European Court of Justice took a completely different point of view as to the global outline of the relationship between the two legal systems: it adopts a monist attitude and views Community law as higher law. With regard to the problems of the supremacy of Community law, the distinction of the two theoretical premises does not imply any contradiction between the two Courts. On the contrary, as I hope to show later, it is in fact the dualist approach which permits the Italian Court to comply with Community obligations.

Concerning the *Granital* decision of 1984, see Judgment of June 8, 1984, Corte cost., Italy, 107 Foro It. I 2063, 2072 note A. Tizzano; Judgment of June 8, 1984, Corte cost., Italy, 29 Giur. Cost. I 1222, 1226 note G. Gemma; Judgment of June 8, 1984, Corte cost., Italy, 21 Comm. Mkt. L. Rev. 764 note G. Gaja; Capelli, *Una Sentenz Decisiva sui Rapporti fra Norme CEE e Leggi Nazionali*, 23 DIRITTO COMUNITARIO E DEGLI SCAMBI INTERNAZIONALI 204 (1984). A further step in favor of the EC is decision No. 389 of 1989 in which the Court held that even the European Court of Justice's decisions which interpret Community norms having direct effect should prevail over national norms. It is but a consequence of the *Granital* rationale. See Lotito, *Diretta Applicabilità delle Norme Comunitarie ed Efficacia delle Sentenze della Corte di Giustizia nella Giurisprudenza Costituzionale*, 10 QUADERNI COSTITUZIONALI 161 (1990).

15. Judgment of Apr. 21, 1989, Corte cost., Italy, 34 Giur. Cost. I 1001. Concerning the *FRAGD* decision, see Gaja, *New Developments in a Continuing Story: The Relationship Between EC Law and Italian Law*, 27 COMM. MKT. L. REV. 83 (1990); Schermers, *The Scale in Balance: National Constitutional Courts v. The Court of Justice*, 27 COMM. MKT. L. REV. 97 (1990).

16. Judgment of Dec. 27, 1973, Corte cost., Italy, 18 Giur. Cost. I 2401.

sessed in relation to Italian standards of procedure and substance. This assertion, moreover, is consistent with both theoretical approaches to the relationship between Italian and Community law. But the Court did not stop here; in its view, Community institutions are not empowered to break fundamental constitutional principles or fundamental rights. Should the Community have the power to affect these principles and rights, Italian sovereignty would be effectively nullified. Such a power to nullify Italian sovereignty is not included within article 11 of the Constitution. The State may agree to restrict its sovereignty under article 11 of the Constitution; however, the annulment of sovereignty exceeds its authority granted by the constitutional provision.

Whenever a question has arisen as to whether a Community act constitutes an infringement of fundamental constitutional principles and rights the Constitutional Court has judged the compatibility of the ratification act of the Treaty with the those principles and rights. Under this doctrine, the Court added that, because of the separation of the two legal systems, it could not review every single European norm but only the Italian ratification act which brought Italy's acceptance of the Treaty into force within the Italian legal system.¹⁷ As a result, the Court retained this exceptional power to intervene in Community problems when the core of the Constitution is threatened by Community institutions.¹⁸

Initially, this doctrine did not provoke much criticism because it appeared to defend the Italian legal system from any hypothetical anti-democratic developments in the European Community. By 1989, however, the Court had developed this doctrine in a way inconsistent with EC obligations. In the *FRAGD* case of 1989, the Court was asked to decide a question concerning the constitutionality of the Italian act of Parliament ratifying the EC Treaty, specifically that part of the act which ratified article 177 of the Treaty. In particular, the issue

17. [I]n base all'art. 11 Costituzione sono state consentite limitazioni di sovranità . . . ; deve quindi escludersi che siffatte limitazioni, concretamente puntualizzate nel Trattato di Roma . . . possano comunque comportare per gli organi della CEE un inammissibile potere di violare i principi fondamentali del nostro ordinamento costituzionale, o i diritti inalienabili della persona umana. Ed è ovvio che qualora dovesse mai darsi all'rt. 189 una sì aberrante interpretazione, in tale ipotesi sarebbe sempre assicurata la garanzia del sindacato giurisdizionale di questa Corte sulla perdurante compatibilità del Trattato con i predetti principi fondamentali. Deve invece escludersi che questa Corte possa sindacare i singoli regolamenti. . . .

Judgment of Dec. 27, 1973, Corte. cost., Italy, 18 Giur. Cost. I 2401, 2420.

18. This reservation of power is confirmed in Judgment of June 8, 1984, Corte cost., Italy, 29 Giur. Cost. I 1098, 1116 ("Questo Collegio ha nella sentenza 183 del 1973 già avvertito come la legge di esecuzione del Trattato possa andar soggetta al suo sindacato in riferimento ai principi fondamentali e ai diritti inalienabili della persona umana, nella ipotesi contemplata sia pure come improbabile, al n.9 della parte motiva della pronuncia").

under debate was the European Court of Justice's interpretation of article 177 giving the ECJ the power to deliver prospective decisions in preliminary proceedings. By using these prospective judgments, the Court prevents the judicial determination of invalidity¹⁹ from having effect on all legal disputes preceding the decision, including those of the parties involved in the matter before the Court.²⁰ According to the referring judge, the fundamental right to judicial protection guaranteed to parties by article 24 of the Italian Constitution to the main proceedings would be abridged by such prospective rulings since their dispute should be governed by those principles enunciated in the Court of Justice's preliminary ruling.

Under Italian constitutional law, the question before the Court concerned the validity of the act of ratification of the Treaty within the context of the ECJ's interpretation of article 177 and the requirements of article 24 of the Italian Constitution. *Prima facie* this question of constitutionality relates only to the consistency of the act of ratification of the entire Treaty with fundamental Italian constitutional rights and not to the constitutionality of the particular offending action of the Community (here the ECJ's interpretation of article 177).

The Italian Constitutional Court has had jurisdiction over these precise types of disputes since its holdings in *Frontini* (1973) and *Granital* (1984).²¹ However, it appears that the Court believed that it was highly unlikely that such a case would ever come before it. When the Court qualified the fundamental principles and the human rights as "counter-limits" (*controlimiti*) to the restriction of national sover-

19. The ECJ's power to give prospective preliminary rulings is not provided for in the Treaty. The Court, however, according to article 174, paragraph 2 can state which of the effects of a regulation, declared void in proceedings under article 173, should be considered as definitive. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 174, para. 2, 298 U.N.T.S 11, 76 [hereinafter Treaty of Rome]. The Court enlarged its power, by also applying article 174 to proceedings under article 177. See *Albert Ruckdeschel & Co. v. Hauptzollamt Hamburg-St. Annen*, 1977 E.C.R. 1753; *Société Coopérative "Providence Agricole de la Champagne" v. ONIC*, 1980 E.C.R. 2823; *Maïseries de Beauce v. ONIC*, 1980 E.C.R. 2883; *SA Roquette Frères v. French State Customs Administration*, 1980 E.C.R. 2917. See also R. JOLIET, *LE DROIT INSTITUTIONNEL DES COMMUNAUTÉS EUROPÉENES — LES CONTENTIEUX* 230-34 (1981).

20. The ECJ declaration of invalidity in this case concerned a regulation which required the payment of monetary compensatory amounts upon exporting glucose produced from processed maize. Because of the standards employed for establishing the size of the monetary compensatory amounts, this regulation was held unlawful.

The monetary compensatory amounts were determined on the basis of the amount of maize required for the production of the exported glucose disregarding the possibility that maize starch left over from the glucose processing might be reused. Hence, the monetary compensatory amounts were at least partially not due. See *Regulation (EEC) No. 1541/80 of 19 June 1980 altering the monetary compensatory amounts*, 23 O.J. EUR COMM. (No. L 156) 1 (1980).

21. Judgment of December 27, 1973, Corte cost., Italy, 18 Giur. Cost. I 2401; Judgment of June 8, 1984, Corte cost., Italy, 29 Giur. Cost. I 1098.

eighty set in favor of the Community system, it reserved to itself the power to judge the compatibility of the Treaty with the aforesaid fundamental principles. It, however, also defined the eventuality of such an examination as highly improbable.²² In fact, the Court itself seemed astonished when it was presented with just such a dispute in 1989; this astonishment may be seen in its statement that, "in any case, whatever is highly improbable, is nevertheless still possible."²³ The doctrine of "counter-limits" to limitations of sovereignty — fundamental constitutional principles and rules — as described in *Granital* and *Frontini*, provided that the Court would only pronounce a judgment against Community norms if the law of ratification — considered *as a whole* — broke the fundamental principles of the constitutional system:

In other words, the respect of [the fundamental] principles by the Community institutions cannot, in the Court's view, be protected at the national level, but in an extreme case the question might rise about the lasting 'compatibility' of the Italian membership of the community with the constitutional norms [but these are cases that the Italian Court carefully defined as "aberrant"].²⁴

This was the most widespread interpretation of the reservation of the fundamental principles asserted by the Italian Court in *Frontini* and confirmed in *Granital*. Moreover, this was the only interpretation which made the doctrine appear coherent and consistent with the au-

22. Judgment of June 8, 1984, Corte Cost., Italy, 29 Giur. Cost. I 1098.

23. "In buona sostanza, quel che è sommamente improbabile è pur sempre possibile. . . ." Judgment of Apr. 21, 1989, Corte cost., Italy, 34 Giur. Cost. I 1001, 1007.

24. Sorrentino, *La Tutela dei Diritti Fondamentali nell'Ordinamento Comunitario ed in Quello Italiano*, in *L'INFLUENZA DEL DIRITTO EUROPEO SUL DIRITTO ITALIANO*, 35, 49 (M. Cappelletti & A. Pizzorusso eds. 1982). See also Zagrebelsky, *Processo Costituzionale*, in *26 ENCICLOPEDIA DEL DIRITTO* 521, 536 (1987). This interpretation is also supported by several phrases contained in *Frontini*: "in any case this Court would always ensure its own control over the lasting compatibility of the Treaty . . . with the fundamental principles"; "this Court may not review individual regulations," and so on. On the other hand, however, Paolo Barile prophetically noted that the reservation set forth in *Frontini* could not only be interpreted as the basis of the Court's power to denounce the Treaty as a whole, but also as the basis of the Court's power to exercise the judicial review of every application of article 189 of the Treaty, and therefore to control every Community regulation: through the judicial review of the ratification act the Court could also bring "nell'alveo del sindacato di legittimità costituzionale la matrice delle norme comunitarie derivate." Judgment of Dec. 27, 1973, Corte cost., Italy, 18 Giur. Cost. I 2406, note P. Barile. This interpretation does not explain why the Court stresses that its review covers only the ratification act, explicitly excluding individual regulations from its jurisdiction. In any case it is hard to grasp the Court's real intentions: any interpretation of *Frontini* is no more than a mere supposition as to the aims pursued by the Court since it has never held on the merits any question concerning this matter. Following Sorrentino's and Zagrebelsky's interpretations, *FRAGD* appears to be a *retournement* in the Constitutional Court's case-law. Following Barile's interpretation, however, *FRAGD* is a further development of the doctrine implicitly contained in *Frontini*. In any event, the present article's critique of the *FRAGD* decision stands regardless of which of the two interpretations is accepted. Should Sorrentino's interpretation be accepted, then the critique is limited to the *FRAGD* decision; should Barile's view be taken, then the critique covers the *Frontini* and *Granital* decisions as well.

tonomy of the Community system from the national one, and with the requirements of Community law, such as the uniformity of European law.

In its previous judgments the Court took care to deny its authority to control every particular provision of Community law because of their incorporation in a system separate from the municipal. The Court seemed instead to refer to a more narrow class of general and important changes in the Community order of such magnitude as to call into question Italian membership in the Community. In this light, the Court's reservation of power was completely understandable, especially considering the open and dynamic character of the European Community which is open to major changes even in its essential structure.²⁵ The question which must be asked, then, is what was the cause of the shift in the likelihood, from the "improbable" to the "possible," that such issues might arise? In *FRAGD*, the Court, although relying on its own precedents, redefines its jurisdiction as the power to verify the constitutionality of *any Treaty provision as interpreted and applied by the Community institutions*, by means of judicial review of the act of ratification of the Treaty.²⁶

The Court now has power to decide not only cases involving the evolution of the EC at the macroscopic level when incompatible with the fundamental principles of the Italian system, but also cases involving questions concerning particular interpretations or applications of Treaty provisions. If every interpretation or application of a Treaty provision may undergo Italian judicial review, then the Constitutional Court may effectively review every Community norm. This authority of the Court covers all the provisions of the Treaty, as well as every rule of secondary law based on the Treaty since they may be seen as Treaty applications.²⁷ In the EC System, all secondary norms are law-

25. After all, the Italian Constitutional Court has already realized how deeply the EC could change: e.g., the legal doctrines of supremacy and direct effect of EC law significantly altered the structure of the EC. The material attributions of the EC have been constantly developing, partly because of certain Treaty provisions, partly because of the Court of Justice's case law and partly because of political decisions. The EC is therefore a dynamic legal system from both the structural and the material point of view. See J. WEILER, *supra* note 4, at 43-44. The author explains the constitutional evolution of the EC in light of his theory of "Community balance": whenever the Community normative super-nationality increases (e.g., direct effect or supremacy), its decisional super-nationality diminishes (e.g., the Luxembourg Agreement). See *id.* at 37-110. With respect to the evolution of Community attributions, he points out that the enumerated powers structure has over time been shattered little by little: the areas of Community action have been enlarged through a variety of procedures other than the revision provided in article 235. See *id.* at 112-210. See also Tizzano, *supra* note 13.

26. Judgment of Apr. 21, 1989, Corte cost., Italy, 34 Giur. Cost. I 1001.

27. Barile relies on article 189 of the Treaty to illuminate the link between EC secondary law and the Treaty. In my view, this link is somewhat formal. As I will demonstrate below, it is more persuasive to conclude that, since the Community is a system based on the principle of

ful only if linked to the powers attributed to the Community by the Treaty (or through the procedures therein considered).²⁸ This is why every single Community act is connected, directly or indirectly, to a provision of the Treaty and may be considered one of its applications.²⁹

The Constitutional Court's assertion of control over the ratification law is a mere fiction if the Court actually aims to protect fundamental constitutional principles with regard to every EC norm. Since the Constitutional Court professed to use the doctrine concerning the ratification law as a mere filter to control Community norms, it simply theoretically safeguards both the autonomy of the two legal systems and the limits of the Constitutional Court's jurisdiction set by article 134 of the Italian constitution. In fact, the Court later asserted its own power to invalidate EC law in contradiction to its earlier statement that "this court may not review individual regulations."³⁰

Having shifted the matter from the ratification law in its entirety to individual Community provisions, the Court's role in passing on issues dealing with fundamental principles takes on a completely different meaning. Should the issue under judicial review be the ratification law in its entirety — as seemed to be the case in *Frontini* and *Granital* — then the Court has the choice of either accepting supremacy of Community law as it is or of declaring the ratification act unconstitutional in its entirety. As has been noted,³¹ the question of the constitutional limits to Community law was transformed into the more general ques-

enumerated powers, every act of secondary law is valid only if linked to the material jurisdiction of the Community as set forth in the Treaty. As such, secondary law constitutes an application of the Treaty.

28. An objection may be raised to these statements: some of the Community attributions have no clear ground in the Treaty. For example, the environmental policy had been enforced long before the Single European Act of 1986. Nonetheless, even these kinds of attributions have always been at least indirectly connected to the Treaty either through the implied powers doctrine or through article 235.

Weiler stresses that every unforeseeable and arbitrary enlargement is particularly dangerous: the Community's attributions should only be enlarged incrementally because otherwise the national organs might mistrust the Community and the Community's constitutional framework might be put into question. He also questions the democratic character of these kinds of enlargements and the lack of representation of interests in the Community decision-making process. See J. WEILER, *supra* note 4, at 112-210.

29. According to the holding in the *FRAGD* case, the Constitutional Court's review also covers unwritten principles of the Community identified by the ECJ. After all the ECJ's power is based on several Treaty provisions (articles 164 and 173). For a discussion on the status of these unwritten principles, see, e.g., *Stauder v. City of Ulm*, *Sozialamt*, 1969 E.C.R. 419; *J. Nold, Kohlen, und Baustoffgrosshandlung v. Commission*, 1974 E.C.R. 491; *Internationale Handelsgesellschaft v. Einfuhr, und vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125; *Cinéthèque SA v. Fédération nationale des cinémas français*, 1985 E.C.R. 2605.

30. "Deve invece escludersi che questa Corte possa sindacare singoli regolamenti. . . ." Judgment of Dec. 27, 1973, *Corte cost.*, Italy, 18 *Giur. Cost.* I 2401, 2420.

31. *Zagrebelsky, supra* note 24, at 536.

tion of the constitutionality of continued membership in the Community. In this instance, the Constitutional Court was seemingly faced with a choice "between everything and nothing: everything, because the violation of fundamental constitutional principles paves the way only in the extreme case for the (unlikely) denunciation of the Treaty on the part of Italy; nothing, because in the meantime, every unconstitutional regulation would be applied in Italy."³²

In other words there are two possible legal alternatives to the constitutional problem of developments within the EC conflicting with the fundamental principles of the constitutional system: either Italy must leave the Community or accept Community law despite its inconsistency with the supreme values of the Italian Constitution.³³ Under this vision, the Italian claim to the power to review all Community norms would not be admissible while it remained part of the EC. This was the rationale of *Frontini* and *Granital*.

After *FRAGD*, on the contrary, the judgment of unconstitutionality would not necessarily invalidate the entire ratification law but only some of the Treaty's articles, interpretations or applications. Under this line of reasoning, the Court attempts to eliminate from the Italian legal order those Community rules which are inconsistent with the highest constitutional values, while preserving Italian membership in the EC. This new view reflects the belief on the part of the Court that a possible decision of unconstitutionality would appear less damaging to the goal of European integration than its previous remedy of withdrawal from the Community—the Court thus makes it clear that its self-ascribed power to review EC law is not merely rhetorical but could actually be used.

There emerges a paradox to the Court's reasoning here: while it apparently gives up the extreme sanction of forcing the withdrawal of

32. "Una indicazione che è apparsa eccessiva, quasi un'alternativa tra tutto e niente: tutto, perchè la violazione dei principi fondamentali costituzionali apre la strada, ma solo nel caso estremo, alla (improbabile) denuncia dei Trattati da parte dell'Italia; niente, perchè nel frattempo, di singoli regolamenti eventualmente incostituzionali non si potrebbe evitare l'applicazione nel nostro Paese." *Id.* at 536. The author seems to illuminate this alternative in order to criticize it: he seems to disagree with the Court's decision to give up its review of Community law yet, he deems that the only possible interpretation of *Frontini* is the alternative "between everything and nothing." I agree with the author with regard to his interpretation, but I have a positive judgement on it. As I will say below, in my view this is the only interpretation which is compatible both with the Community legal order and with the Constitutional Court's approach to the EC. Any other interpretation contradicts these two principles.

33. Another possibility could be that Italy modifies constitutional norms inconsistent with Community law. Certain constitutional rules would, however, forbid this kind of revision: supreme values and fundamental rights, because they have legal force superior to other constitutional norms, cannot be modified by means of the revision procedures provided in article 138. See Onida, *I Principi Fondamentali della Costituzione Italiana*, in *MANUALE DI DIRITTO PUBBLICO* 85 (G. Amato & A. Barbera eds. 1986).

the whole ratification law, what it actually does is even more severe. The Court's claim to invalidate Community norms while at the same time safeguarding Italian membership in the Community contradicts both the Treaty of Rome and the Constitutional Court's dualist approach to the Community system: the former, because the Treaty gives jurisdiction over the validity of Community acts only to the ECJ; the latter, because the dualist approach is rooted in the autonomy of the two legal systems, each one operating in its own field of competence.

This is why *FRAGD* is a development adverse to European integration. The Court could have used *Frontini*'s rationale in a way more coherent with the autonomy of the legal systems and with European obligations. On the contrary, with the decision of 1989 the Court goes back in some ways to its previous position by asserting the Constitutional Court's virtual control over all Community norms through the process of judicial review, even if it limits the Court's jurisdiction to infringements of fundamental principles and human rights.³⁴

III. THE RECURRING MISTAKES OF THE CONSTITUTIONAL COURT

Surprisingly, the Constitutional Court continually relapses into the same mistake throughout the development of its constitutional case law on Community matters. The Court faces Community questions with the implied conviction that Community norms can be treated as national norms in spite of the asserted separation of the two legal systems and in spite of the affirmed interdiction of transposing EC norms into internal acts.³⁵ However paradoxical it may sound, the Constitutional court is in tune with the EC when it applies the dualist approach, even if the ECJ has always adopted a monist attitude toward the relationship between the EC and national norms. In its earlier judgments, the Constitutional Court specifically stated that Community norms had the same legal effect as did acts of Parliament.³⁶

34. The Constitutional Court therefore exercises its review over virtually every Community norm. Its power is limited, however, because Community law is submitted for review only with respect to the fundamental principles of the Constitution. Who decides, however, which of the constitutional norms can be considered as fundamental constitutional principles? The power to give the rank of fundamental principle to a constitutional norm rests with the Constitutional Court. For example, article 24 of the Italian Constitution is considered to be a fundamental principle because the Constitutional Court so held in its Judgment of Feb. 2, 1982, Corte cost., Italy, 27 Giur. Cost. I 138.

35. See Judgment of Dec. 27, 1973, Corte cost., Italy, 18 Giur. Cost. I 2401; Judgment of Oct. 30, 1975, Corte cost., Italy, Giur. Cost. I 2211; Judgment of June 8, 1984, Corte cost., Italy, 29 Giur. Cost. I 1098.

36. Judgment of Mar. 7, 1964, Corte cost., Italy, 9 Giur. Cost. 129.

As demonstrated above, this conclusion provided the rationale for the Court's rejection of the argument concerning the supremacy of Community law and consequently was the cause of the application of the intertemporal rule of legal hierarchy applied to Community and national norms alike. In particular, the assertion that only Community norms subsequent to national norms should always prevail revealed that the Court had not yet accepted the supremacy of Community law. The effect of Community legal norms was still linked to the usual principle of *lex posterior derogat priori* which generally governs the relationship between Italian norms having the same legal force.

The second part of the judicial doctrine of this time, that judges should refer questions of constitutionality of national norms conflicting with Community rules, is also based on the idea of incorporating EC laws into the municipal system even if it formally respects the autonomy of the two systems. The legal basis of such findings of unconstitutionality is article 11 of the Constitution in that it incorporates the content of the Community norm violated by Italian law. Consequently, the real basis of judicial review of Italian norms conflicting with EC law is not article 11 but every single Community norm. This means that Community norms are "incorporated" within the municipal legal system. The Court, however, abandoned incorporation of EC law with the *Granital* decision.³⁷

The interpretation of Community norms as equivalent to national norms looms again in the more recent decisions. This step backwards, in conformity with previous decisions, does not put into question the accepted supremacy of Community law over Italian Parliament's statutes for the purpose of judicial review. The Court in fact considers Community law as national constitutional law which is superior to acts of Parliament in the legal hierarchy. The status of both constitutional and Community law consists of two essential elements: a) subjecting both constitutional and Community norms to the scrutiny of only the highest principles of the constitutional system in judicial review,³⁸ and b) using constitutional and Community norms to

37. Judgment of Dec. 27, 1965, Corte cost., Italy, 10 Giur. Cost. I 1322, was also fully based upon separation of powers. Judgment of Dec. 27, 1973, Corte cost., Italy, 18 Giur. Cost. I 2401, may have been intended to accord with the separation of the system as well.

38. Angiolini, *La Giurisprudenza Costituzionale Italiana sui "Principi Fondamentali" e la CEE*, 19 AMMINISTRARE 265, 269-70 (1989).

Nel mentre ha ribadito la tutela doverosamente accordata ai principi fondamentali della Costituzione, la Corte ha, parallelamente ed ormai in numerose pronunce. Ammesso che le manifestazioni del diritto comunitario possono ricevere applicazione anche a discapito di altre regole o principi costituzionali di diritto interno. . . . La Corte insomma ha salvato della Costituzione italiana nell'impatto con le Comunità Europee, soltanto ciò che può es-

solve both questions of constitutionality and conflicts of attributed powers³⁹ — both among the branches of the state organization and between the State and the Regions — brought before the Constitutional court. This trend towards the “constitutionalization” of Community norms, which can be seen in *FRAGD*, is more clearly illustrated in other decisions of the Italian Court. For instance, the holding in *FRAGD* that Community norms could be limited to situations not conflicting with important constitutional principles makes liberal use of the precedents of 1973 and 1984.⁴⁰ The Court also stated its power to review the Italian constitutional provisions in the light of the supreme values of the Constitution in the *Pahl* case of 1988.⁴¹ The point of departure of this decision was the assumption that there are certain limits to the revision of the Italian Constitution. Besides those limits explicitly set out in the Constitution itself (such as the republican character of the State, mentioned in article 139), the Court also identifies a set of principles which “belong to the essence of the highest values on which the Italian constitution is founded”⁴² which limit the range of legal change. Once the existence of implicit limits to constitutional revision are accepted, the Court, as an immediate consequence, asserts its power to examine the compatibility of the acts of revision and of the other constitutional acts with the highest principles of the constitutional order.⁴³ Therefore the Court has definitively established a hierarchy among the constitutional norms, with some principles

sero assunto come principio fondamentale, dando esplicitamente il proprio avallo a che il resto possa cedere il passo.

39. The functions of the Italian Constitutional Court are described in article 134 of the Italian Constitution. For our purposes, besides judicial review of national and regional acts (*controllo di legittimità costituzionale delle leggi e atti avanti forza di legge dello stato e delle regioni*), the Court settles jurisdictional conflict between the different branches of the state; between the state and the regions; and between regions themselves (*conflitti di attribuzione tra i poteri dello Stato, tra lo Stato e le regioni e delle regioni tra loro*).

40. For a discussion of the free use of Court's precedents in Community matters, see Judgment of Nov. 19, 1987, Corte cost., Italy, 32 Giur. Cost. 2816 note F. Sorrentino. The author criticizes the Court because in a 1987 decision it relies on its precedents by drawing from them several new inferences not at all evident, as if they were natural consequences of its previous decisions. *Id.* at 2819.

41. Judgment of Dec. 29, 1988, Corte cost., Italy, 33 Giur. Cost. I 5565.

42. *Id.* at 5569. The problem of restrictions to the revision of the Italian Constitution is under debate in Italy. See A. PACE, *PROBLEMATICA DELLE LIBERTÀ COSTITUZIONALI* 8 (1985). The idea of a “superconstitution” is rooted in the concept of a “material constitution”. See Mortati, *Costituzione*, 11 *ENCICLOPEDIA DEL DIRITTO* 139 (1962). See also 2 C. MORTATI, *ISTITUZIONI DI DIRITTO PUBBLICO* 1225 (1976); C. SCHMITT, *VERFASSUNGSLEHRE*, (1928). “The material constitution” consists of the main political goals set forth in the Constitution by the main political parties at the “*assemblea costituente*.” The “superconstitution” implies, from the internal point of view, that some constitutional principles cannot be revised and from the external point of view that the State cannot accept any limitation of sovereignty which affects those principles.

43. Judgment of Dec. 29, 1988, Corte cost., Italy, 33 Giur. Cost. I 5565, 5569.

ranking above the ordinary constitutional provisions.⁴⁴

It is worth noting that the court reached this goal by relying on its earlier cases relating to EC law and that it draws a parallel between Community and constitutional norms:

[A]fter all, this Court has already acknowledged that the highest principles of the constitutional order have a *force* higher than the *other norms or laws having a constitutional rank* . . . when it stated that *the law of ratification of the EC Treaty* is subject to review by this Court in so far as . . . the fundamental principles of our constitutional order and human rights are concerned.⁴⁵

The Court here relies on the implicit assumption that the law of ratification, although formally a statute, should be treated as if it were a constitutional law. In the context of the *FRAGD* rationale, it follows from this statement that every Community norm — primary or secondary, written or unwritten — has constitutional status for purposes of judicial review.

The ramifications of equating Community law with constitutional law in reality go beyond even this principle. On two occasions the Constitutional Court has invoked Community law as a basis for its decision.⁴⁶ In the 1987 *Regioni Emilia-Romagna e Liguria* case, the Court settled a conflict of attribution between the State and two Regions on the basis of an EC regulation.⁴⁷ On this occasion, the Constitutional Court again considered the case admissible because of the constitutional force of the Community norms:

Community norms [provided they are compatible with the fundamental principles of the constitutional order] replace national laws and if they derogate from the constitutional provisions, they must be considered of equal value with them, as a result of article 11 of the Italian constitution.⁴⁸

44. See G. ZAGREBELSKY, *LA GIUSTIZIA COSTITUZIONALE*, 119 (1977); 2 V. CRISAFULLI, *LEZIONI DI DIRITTO COSTITUZIONALE* 322 (1984). Identifying these fundamental principles is almost an unsolvable problem. The Italian literature usually mentions, among other elements, the democratic character of the Republic, the principle of equality and human rights.

45. Judgment of Dec. 29, 1988, Corte cost., Italy, 33 Giur. Cost. I 5565, 5569.

46. Because the Italian Constitutional Court is conceived of as the guardian of the Constitution, it is empowered to settle only those disputes involving constitutional provisions. As a result, the matter under dispute was the power to draft the IMP to be sent and approved by the Community Commission. See *Council Regulation (EC) No. 2088/85 of 23 July 1985 concerning the integrated Mediterranean Programmes*, 28 O.J. EUR. COMM. (No. L 197) 1 (1985). In particular, those regions denied the CIPE are empowered to review the draft proposed by the Regions.

47. Judgment of Nov. 19, 1987, Corte cost., Italy, 32 Giur. Cost. I 2807. The parties to the conflict were, on the one hand, two regions (Emilia-Romagna e Liguria) and, on the other, the State. The matter under dispute was the power to draft the IMP to be sent and approved by the Community Commission. See *Council Regulation (EC) No. 2088/85 of 23 July 1985 concerning the integrated Mediterranean Programmes*, 28 O.J. EUR. COMM. (No. L 197) 1 (1985). In particular, those regions denied the CIPE are empowered to review the draft proposed by the Regions.

48. Judgment of Nov. 19, 1987, Corte cost., Italy, 32 Giur. Cost. I 2807, 2812.

As has been noted,⁴⁹ under the guise of promoting a deeper European integration, the Court aims at restoring the "nationalization" of Community norms by inserting them in the Italian legal system of sources of law at the constitutional level. Also, decision No. 389 of 1989⁵⁰ displays a clear sign of tolerance towards the nationalization of EC law. This decision contains a tension between the doctrine formally expressed and its concrete result: on the one hand, it theoretically confirms that Community norms enter into the Italian system by their own force (as springing "from an external source with its own jurisdiction")⁵¹ and, on the other, validates a Governmental act (DPCM 28/10/1988)⁵² which merely reproduced, without any additions, an EC norm with direct effect. In this case the Italian government reproduced Community norms based on articles 52 and 59 of the Treaty as well as the ECJ's doctrine on such issues without mentioning their earlier origin. The Court held the act to be lawful because it merely aimed at making a Community obligation known to all State organs and Regions and did not produce any unlawful novation of the community norm.

This trend towards the nationalization of Community norms has been developing without modification of the dualist structural relationship between Community and municipal law, which formally is still based on the autonomy of both legal orders. However, the Court may in a sense make a contradictory end-run around the doctrine by considering the Community law directly incorporated into the municipal system. As a result of the incorporation of Community norms into the technically separate municipal system, the Constitutional Court's role regarding Community law becomes more important. On the one hand, the Court can constantly control the whole of Community law, albeit only in relation to the fundamental principles of the constitution. On the other hand, it acts also as the guardian of the Commu-

49. See F. Sorrentino, *supra* note 37 at 2819.

50. Judgment of July 11, 1989, Corte cost., Italy, 34 Giur. Cost. I 1757.

51. *Id.* at 1766.

52. The governmental act textually says:

Gli organi dello stato, le regioni a statuto ordinario e speciale, le province autonome di Trento e di Bolzano, gli enti pubblici e gli istituti esercenti il credito a favore dell'edilizia, [sic] nell'applicazione di norme e regolamenti, statali, regionali e provinciali, che disciplinano l'assegnazione di alloggi di edilizia economica e popolare e l'accesso al connesso credito ed ogni altro beneficio relativo ad interventi di edilizia residenziale pubblica, sovvenzionata ed agevolata, considereranno i cittadini di Stati membri della Comunità economica europea, che svolgano in Italia attività di lavoro autonomo e versino nelle condizioni soggettive ed oggettive della citata normativa, equiparati ai lavoratori autonomi cittadini italiani.

Decreto del Presidente del consiglio dei Ministri 28 ottobre 1988, reprinted in 1988 LEX LEGISLAZIONE ITALIANA 2355, 2356.

nity law within the national order, protecting it from infringements by contradictory national norms.

The Court's actions as protector of Community norms is illustrated by its decision in the *Pulos e altri* case, which went rather unnoticed at the time it was pronounced.⁵³ In this case the Court addressed the issue of admissibility of a claim that an Italian municipal law contradicted the Community policy of the free movement of goods in articles 12, 37, and 95 of the Treaty. The Court held that such a claim was admissible on the issue of the constitutionality of such conflict.

The court premised the admissibility on a principle set forth in the precedent judgments of 1984 and 1985.⁵⁴ In those cases the Court asserted its power to settle conflicts caused by national laws "preventing or jeopardizing observance of the Treaty with regard to either the system or the core of its principles."⁵⁵ This power essentially grants the Constitutional Court the authority to block acts of Parliament so inconsistent with the underlying structure and principles of the EC as to amount to a withdrawal from the Community. This doctrine essentially conflicts with the Court's prior precedent in *Costa-ENEL* because it follows that the Italian Parliament has no power to revoke the Italian membership of the EC with a simple statute.

In this case, however, the reference to this doctrine from prior decisions is rather more formal than substantive, because the Court essentially redefines the scope of its review. The Court's power over those laws capable of undermining the Community system considered as a whole or in its essential nature (1984) has been extended by the inclusion of a more precise and widespread power over specific violations of Community laws (1986).⁵⁶ In the 1986 case, a single, albeit important, principle of Community law appeared to be under threat: this kind of conflict can hardly be considered as a menace to the Community system or to the core of its principles. Nonetheless, the Court considered itself empowered to settle the question on the merits. The Court deemed the question admissible because it treated the national acts conflicting with the EC as if they were acts which aimed at removing the sovereignty restriction accepted with the Treaty of

53. Judgment of Dec. 23, 1986, Corte cost., Italy, 31 Giur. Cost. I 2309.

54. Judgment of June 8, 1984, Corte cost., Italy, 29 Giur. Cost. I 1098.

[N]ell'ipotesi formulata dalla sent. n. 170 del 1984 ed invocata dall'Avvocatura, il giudice costituzionale sarebbe chiamato ad occuparsi di una legge che vuol privare di efficacia, nell'ambito dello Stato, il sistema dei principi dell'ordinamento comunitario: sistema che viene, ai fini ora considerati, inteso nella sua interezza, o almeno nel suo nucleo essenziale.

Judgment of Apr. 23, 1985, Corte cost., Italy, 30 Giur. Cost. I 694, 707-08.

55. Judgment of June 8, 1984, Corte cost., Italy, 29 Giur. Cost. I 1098, 1117.

56. S. PISANA, IL DIRITTO COMUNITARIO EUROPEO DI FRONTE ALLA COSTITUZIONE ITALIANA 75 (1988), (confirming this interpretation).

Rome.⁵⁷

By extending its scope of review, the Constitutional Court, while intending to protect Community law, actually weakens it. The Court once again encroaches upon the powers of the ordinary judge in settling conflicts between Community and national laws, thus provoking undue delay in the application of Community law. Taking this position to its logical conclusion, the framework of the dualist relationship between EC and national law, outlined in 1973 and improved in 1984, would be upset.

By encroaching on the jurisdiction of ordinary national judges, the Constitutional Court fosters certain concrete problems apart from the aforesaid inconsistency with Community rules. The holding in *FRAGD* induces ordinary judges to submit questions concerning EC law to the Constitutional Court, overloading the Court with work and causing a useless delay in the settlement of lawsuits. Moreover, one can suppose that some problems concerning interpretation of EC law would arise. Ordinary judges can or must (under article 177 of the Treaty) submit to the ECJ every doubt about the interpretation of the EC law so that EC law is interpreted by the European judge in a uniform way throughout all the Member States. The Constitutional Court should also ask for a preliminary ruling from the ECJ when it faces problems involving the interpretation of EC law. However, because of its institutional role and authority, it is hardly conceivable that the Court will address to the ECJ any preliminary question of interpretation. It would mean that the Court accepts and recognizes the supremacy of the European Court of Justice.

The power of the Constitutional Court over Community matters threatens the uniform application of EC law, partly because the Court would delay the application of EC law in Italy and partly because it might very well give EC law a different interpretation from that of the ECJ. It is for these reasons that the Constitutional Court should be criticized for its acceptance of the admissibility of questions concerning EC law despite having never invalidated any Community norm. Such dangers to the EC system would be avoided if the Court refused to accept jurisdiction in such matters.

57. I F. SORRENTINO, CORTE COSTITUZIONALE E CORTE DI GIUSTIZIA DELLE COMUNITÀ EUROPEE 100 (1970), maintains that all the Parliamentary acts aiming to remove the restrictions of sovereignty (article 11) are unconstitutional, unless the EC no longer fulfills the conditions of article 11, e.g., purposes of peace and justice, and so on.

IV. THE THEORETICAL ORIGIN OF THE "NATIONALIZATION" OF EC LAW

The attitude of the Constitutional Court concerning Community matters is in some way caused by the double theoretical premise on which the relationship between Italy and the EC is founded. On the one hand, the Court takes for granted the dualist approach, the ramifications of which are autonomy, separation and co-ordination of the two legal systems. On the other hand, Italian membership in the European Community is founded on the limitation of national sovereignty, foreseen in article 11 of the constitution.

Initially, the limitation of national sovereignty served the purpose of maintaining autonomy of the two legal systems. By accepting that the State's powers could be limited to the extent provided in the Treaties, Italy created a space within its legal order in which Community institutions could operate independently. Therefore, the limitations of sovereignty were conceived as the prerequisite for the creation of fields of action and attribution for the EC legal system within Italy.⁵⁸ In this respect, the idea of counter-limits, implied in the notion of limitation of sovereignty,⁵⁹ meant that, since some principles and values are extremely important for Italy, respect for these values within the European Community was a condition for the validity of limitations of sovereignty and therefore for Italian membership in the EC. Counter-limits did not thus require the Constitutional Court to review EC norms in relation to the highest principles of the Italian constitution but merely required that the EC comply with certain basic values such as fundamental rights, equality and democracy. The lack of protection of these values on the part of the Community would invalidate the accepted restrictions on the State's power and would call into question Italian membership in the EC.⁶⁰

In recent years, on the contrary, the doctrine of the limitation of sovereignty has no longer been considered to be the foundation on which the autonomy of the two systems is based: it is treated as just another principle which must be considered with regard to the separation of the systems when attempting to solve substantive problems

58. This interpretation is illustrated in the Constitutional Court's Judgment of Dec. 27, 1965, Corte cost., Italy, 10 Giur. Cost. 1322; Judgment of Dec. 27, 1973, Corte cost., Italy, 18 Giur. Cost. I 2401.

59. Counter-limits are necessarily implied for constitutional reasons. See *supra* note 39 and accompanying text for the idea that a material constitution that can never be modified without transforming the present state into a different one.

60. This was the *Frontini* rationale in Judgment of Dec. 27, 1973, Corte cost., Italy, 18 Giur. Cost. I 2401. See *supra* note 17 and accompanying text. For a similar interpretation of limitations of sovereignty and of counter-limits, see Sorrentino, *supra* note 24.

which arise in the context of EC norms. As a result, the relationship between the EC and Italy is governed by two independent principles. Under the type of autonomy envisaged by this dualist approach, every legal order operates within its field of attribution without any limitation imposed by the other system. Yet from the notion of limitation of sovereignty, and above all from the counter-limits there implied, it follows that even when the Community operates within its field of attribution it must conform with certain constitutional principles of the national legal order.

In other words, the protection of fundamental constitutional principles and human rights falls within the State's (*i.e.*, the Constitutional Court's) jurisdiction in any matter, whether falling exclusively within the attribution of the Italian State or the EC. This is the interpretation of the limitation of sovereignty relied upon by the Court in the *FRAGD* case. Following this interpretation, however, the counter-limits to the limitation of sovereignty contradicts and jeopardizes the separation of the two systems because every Community norm would be subjected to the scrutiny of being judged against fundamental Italian principles and rights as provided in the Constitution.

This interpretation would be, unlike the dualist interpretation, unacceptable from the point of view of Community law. The principle of uniformity of Community law, the equality of citizens before it, and, above all, its autonomy and supremacy, require that national Courts have no power to invalidate EC law for breaching "higher" national rules. The Member States cannot expect the Community to protect the fundamental principles and rights in accordance with the constitutional standards of every single Member State. They should instead expect the Community to protect fundamental principles and rights according to the Community-determined standards.

With regard to human rights in particular, the protection of the European Court of Justice will never coincide perfectly with those of national constitutional courts. Apart from their universal core, human rights are liable to receive different levels of protection from country to country: each legal system selects the values worth privileging which, as a whole, describe the citizen's status within that system. This is why it is meaningless to analyze and formulate a judgment about the degree of protection granted by each legal order to every right when considered in isolation from the State system as a whole. It is, on the other hand, extremely useful to consider the citizen's position within the entire system of human rights protection. This observation is particularly true in the context of issues concerning economic

and social rights, which are the most relevant within the context of the EC.

It follows that the ECJ will privilege some values according to the collective needs arising in the societies of the twelve Member States while at the national level the choices will be influenced by the social environment of each country. It is certainly conceivable that the Constitutional Court could find a difference between the European standards and the Italian constitutional standards of protection at any time. For example, we can consider how deeply the different degrees of unemployment in each country can influence the protection of the right to employment or how the different levels of industrialization and urbanization determine the standards of environmental protection. Measures which seem extreme in one Country may be inadequate in another. Moreover, in the areas where the State transferred its power to the EC, not only did the national legal order change but so also did the shape of the society itself. Within the European Community, a single national society can no longer be considered separately but only as a part of the larger society of Western Europe. The individual should thus be protected as a member of the Community society. Furthermore, the fact that some areas of action have been handed over to the EC by the Member States means that effective protection of human rights must take place at the European level and according the Community standards. For these reasons, the validity of Community norms can only be decided by the European Court of Justice in accordance with European standards.

While this result can be obtained by relying on the dualist theory of autonomy of the two legal orders, the limitation of sovereignty doctrine insisted on by the constitutional Court — with its counter-limits — prevents the national system from abandoning its protection of human rights and fundamental principles. Although the theory of limitation of sovereignty seems to give the EC ample space to operate within the Italian system, in the context of the recent constitutional case law in this area, it is incapable of clearly delimiting the borders between the two systems and ends by depriving the doctrine of autonomy of its meaning. It contradicts the autonomy of the two legal systems by tending to build up hierarchical relations between national and Community norms and by transferring Community norms into the national legal order with the use of artificial devices.

In the final analysis, the counter-limits to the principle of limitation of sovereignty turn out to be inconsistent with EC law; they threaten the principle of uniform application of EC law by raising the possibility that a finding of unconstitutionality by a national court

might result in the ineffectiveness of the Community norm within that Member State.

V. THE RELATIONSHIP BETWEEN ITALY AND THE EC: A RELATIONSHIP BETWEEN LEGAL SYSTEMS.

Another important aspect of the shortcomings of the Constitutional Court's case law in Community matters is that the relationship between Italy and the European Community is effectively treated as a relationship between two groups of norms, while it is primarily a relationship between two legal *systems*. At the theoretical level, the Court accepts the division between the two legal systems, while at the practical level it focuses only on norms. The difference between the two approaches lies in the fact that a legal system consists not only of a group of norms but also of institutions.⁶¹

The relationship between the Community legal system and the Member States is, above all else, a relationship among institutions. Community institutions, legislative, executive or judicial, take the place of national institutions charged with equivalent functions. The relationship between EC and national norms is, as a result, but a consequence of the relationship between the two legislatures. Moreover, when the institutional aspect is stressed, the relationship between the two groups of norms cannot be understood without regard to issues concerning the institutions empowered to judge the validity of these norms. Since the Community is a new legal order independent from those of Member States — the European Court of Justice has made this clear in several of its most famous decisions⁶² — Community institutions not only have the power to enact new norms, but also to develop their own standards of validity and to have these standards applied by the European Court of Justice. As a result, the protection of fundamental rights and other basic principles within the EC legal system is properly left to the Court of Justice, applying Community standards. Under the Italian Constitution, the restrictions of sovereignty impact upon the powers of both the Constitutional Court and the Parliament. Under the Treaty, the Court of Justice is the only

61. For a discussion of the theory of legal systems as institutions, see S. ROMANO, *L'ORDINAMENTO GIURIDICO* (1945). Romano illustrates that a legal system is above all an institutional entity — without institutions it cannot exist as a normative entity. Norms are nothing more than the products of the legislative institution.

62. *N.V. Algemene Transporten Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen*, 1963 E.C.R. 1; *Costa v. ENEL*, 1964 E.C.R. 585. For an analysis of the EC as a legal system and about the alleged specificity of EC law, see De Witte, *Retour à "Costa": La Primauté du Droit Communautaire à la Lumière du Droit International*, 20 *REVUE TRIMESTRIELLE DU DROIT EUROPEÛN* 425 (1984).

institution empowered to interpret and control the validity of EC law. Moreover, the European Court of Justice ensures the protection of fundamental rights and fundamental principles within the Community.⁶³

Properly understood, then, the autonomy of the two systems implies that each has its own norms, standards of validity and judicial system to perform judicial review. This understanding should lead the Court to give up any claims to the authority to intervene in Community problems. It was on this very basis that the German Constitutional Court (*Bundesverfassungsgericht* or "*BVG*") denied its power to review Community law in relation to fundamental constitutional rights in so far as the EC provided protection for such rights within its own institutions.⁶⁴

This decision of the *BVG*, usually called "*Solange II*," is not only important for Germany, but also provides a meaningful example for Italy. Italy and Germany have very similar relationships with the European Community: the German Constitution contains a provision (article 24) analogous to article 11 of the Italian Constitution; Germany applies a dualist approach to international law; the *BVG* is very sensitive to the protection of fundamental rights and considers the *Grundrechte* as being superior to any other norm of the Constitution; and Germany has a Constitutional Court which exercises judicial review. As can be seen from these similarities, it was not by mere chance that, like the Italian Court, the *BVG* asserted its jurisdiction to review Community law (through the filter of the national acts which enforce it) in relation to the fundamental rights protected by the *Grundgesetz* before its holding in *Solange II*.⁶⁵ There is, however, a main difference between the Italian Constitutional Court's decision of

63. For the most important decisions of the European Court of Justice on this matter, see *Stauder v. City of Ulm*, Sozialamt, 1969 E.C.R. 419; *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125; *J. Nold, Kohlen- und Baustoffgrosshandlung v. Commission* 1974 ECR 491; *Rutili v. Minister for the Interior*, 1975 E.C.R. 1219; *Hauer v. Land Rheinland-Pfalz*, 1979 E.C.R. 3727; *Cinèthèque SA v. Fédération nationale des cinémas français* 1985 E.C.R. 2605.

64. Judgment of Oct. 22, 1986, Bundesverfassungsgericht, W. Ger., 73 Bundesverfassungsgericht [BVerfGE] 339. See generally E. Cannizzaro, *Un Nuovo Indirizzo della Corte Costituzionale Tedesca sui Rapporti fra Ordinamento Interno e Norme Comunitarie Derivate*, 71 RIVISTA DI DIRITTO INTERNAZIONALE 24 (1988); Angiolini, *supra* note 36; Lorenz, *Una Sentenza Decisiva Della Corte Costituzionale Tedesca*, 26 DIRITTO COMUNITARIO E DEGLI SCAMBI INTERNAZIONALI 475 (1987); Mengozzi, *La Tutela dei Diritti dell'uomo e il Rapporto di Coordinamento-Integrazione Funzionale fra Ordinamento Comunitario e Ordinamenti degli Stati Membri nei Recenti Sviluppi della Giurisprudenza Costituzionale Italiana e Tedesca*, 26 DIRITTO COMUNITARIO E DEGLI SCAMBI INTERNAZIONALI 479 (1987); Hartwig, *La Corte Costituzionale Tedesca e il Diritto Comunitario*, 7 QUADERNI COSTITUZIONALI 417 (1987).

65. See Judgment of May 29, 1974, Bundesverfassungsgericht, W. Ger., 37 BVerfGE 271 (commonly referred to as *Solange I*).

1989 and the *BVG* decision of 1986: of the two, only the *BVG* overtly recognized that the competent forum for the protection of fundamental rights against violation by EC institutions is the European Court of Justice.⁶⁶ By affirming the ECJ's exclusive power to protect fundamental rights against EC organs, the *BVG* accepted that membership in the Community necessarily implies a restriction not only of the German parliament's powers but also of the powers of the *BVG* as well. Hence, Germany took an institutional approach to the relationship with EC which the Italian Court has refused to accept.

The Italian Court neither acknowledges the European Court of Justice as the competent forum for such disputes nor denies its powers to intervene on EC matters. The entirety of the Constitutional Court's case law creates a suspicion that the Court has acted to protect its potential powers over the conflicts between Italian and Community legal matters. An illustration of this trend may be seen in the fact that the Court has never wholly given up its jurisdiction over Community matters: it only accepted some restrictions to its jurisdiction over EC law when those restrictions appeared to be necessary in order to comply with EC obligations. At the same time, however, it has refused to be completely excluded from these matters. Instead, the Court has safeguarded part of its power, at every phase of its decision-making on this issue, over EC matters either to control the conformity of Italian law with EC law or to protect the Constitution from any infringement by EC law.⁶⁷

That the power of the Constitutional Court over EC law does not correspond to its proper role is also illustrated by the devices used by the Court to make Community problems fall within its field of jurisdiction.⁶⁸ Under Italian law, the Constitutional Court can only review

66. *Solange II* is also different from *FRAGD* because: 1) the *BVG* takes into account the protection of fundamental rights guaranteed by the ECJ, while the Italian Court does not even mention it; and 2) it holds that only the core of the fundamental rights protected by the *Grundgesetz* should not be violated by EC institutions, while the Italian Court refers to provisions of the Italian Constitution.

67. For example, in 1964 and 1965 the Court could judge the constitutionality of every norm of the act of ratification in relation to every constitutional provision; in 1973, it had jurisdiction over the ratification act considered as a whole as to the infringements of the highest principles of the constitution; in 1975, it was empowered to treat every violation of EC law by national norms as a violation of article 11 of the Constitution; in 1984, it could intervene in the exceptional cases of infringements of the core of either the Italian or the Community system; in 1989 it extended its power as has been shown above.

68. It is worth remarking that even within the Italian legal system the Constitutional Court is empowered to review only Parliament's statutes. It cannot review any act issued by the other organs of the state (e.g., the Government, Public Administration, and so on). Its task is limited to ensure the conformity of Parliament's acts with the Constitution. Hence, for the Italian legal system, it is not strange that the Constitutional Court has no power over acts coming from institutions other than the Parliament (or the Regions). On the contrary, the opposite would be abnormal.

acts of the Italian Parliament (or of the Regions) in relation to the provisions of the Constitution. Article 134 of the Constitution forbids the Court both from reviewing all other acts and basing its judicial review on norms other than constitutional ones. As a result, the Court is compelled to use a filter when engaging in judicial review involving Community matters.⁶⁹ When the Court judges the constitutionality of EC law, it uses the ratification act as a filter; when it determines whether there has been a violation of EC law by Italian law, the filter is article 11 of the Constitution. In both cases, the rationale for the assertion of the power of judicial review is based on a fiction which reached an extreme level in the *FRAGD* case. The Court here inaugurated a new trend which enhanced its powers of review in Community matters. In this sense this new trend contradicts the "path towards European integration" (*cammino comunitario*) under which the Court's self-restraint approached the point of maintaining only extraordinary powers.

The fact that the Constitutional Court has tried to enlarge its field of action without impeding the enforcement of Community norms calls into question the Court's purposes. In *FRAGD*, the Constitutional Court, after having declared the admissibility of the question concerning its jurisdiction over the case, managed to avoid making a judgment on the merits by deciding that the issue was inadmissible on procedural grounds.⁷⁰ It seems that the Court has assiduously avoided disputes with Community institutions, especially with the European Court of Justice. Why, then, is the Constitutional Court so interested in claiming its own jurisdiction over questions it later judges unfounded on the merits or inadmissible for other reasons?

By carving out its own role in problems involving EC law the Court seems to have advanced purposes collateral to the issue of determining the issue of the constitutionality of the Community norm. If it were primarily concerned with such a purpose, the central aim of its role would be to give clear cut judgments of the consistency or inconsis-

69. The type of judicial review where the Court settles a conflict between two norms using a third norm as a "filter" is quite common in Italy (*giudizi di legittimità costituzionale per interposta norma*).

70. Once the knot of dates and references is untied, the Constitutional Court's reason for the irrelevant holding comes to light: the regulation had already been invalidated in October 1980 by a European Court decision in effect the day after its publication. *SA Roquette Frères v. French State—Customs Administration*, 1980 E.C.R. 2917.

The disputed moneys in *FRAGD* had been paid before the decision - July 1980 - so that its situation would not have been governed by the new decision. If the the Italian Constitutional Court were to judge the ECJ's decision of 1985 to be unconstitutional, the invalid regulation would nonetheless be applied to *FRAGD*. The Court's reasoning here is flawed. See Judgment of April 21, 1989, Corte cost., Italy, 34 Giur. Cost. I 1001, 1012, note, M. Cartabia.

tency of EC norms with the fundamental principles of the constitutional system. The Court does not, however, operate in this way when Community problems are involved.

It has been rightly said that "the Court's effort to settle the questions of constitutionality on the basis of fundamental principles is an illusion."⁷¹ Instead the Court seems to want to keep open the possibility that it might express its views on Community law, but with only non-binding statements. These views are to be expressed not with judgments on the merits but with wide analyses of EC law according to the fundamental constitutional principles — not with binding effect but instead as a form of authoritative advice to Community institutions and national judges. All this, of course, does not hinder the Court from a future use of its powers to give binding decisions. Nonetheless, for the moment, the Court's decisions on Community matters have a different purpose: to make strong suggestions concerning the necessary interpretation of Community law to ensure its agreement with the most important requirements of the Italian Constitution. The Court's discussions on fundamental principles are therefore neither a mere matter of form nor real judicial review; on the contrary, they are expressions of the Court's "soft-powers," such as advisory decisions (*sentenze monito*), in which the Court suggests guidelines to the Italian Parliament for future acts. In fact, should the Court really want to challenge a Community act, it could raise doubts about Community jurisdiction under the enumerated powers of the Treaty. This is a weakness of the Community system both because the division between Community and State attributions is not always clear and foreseeable *a priori*, and because sometimes the Community operates on the borders of its jurisdiction.

In *FRAGD*, for instance, the Court could have easily attacked the European Court of Justice's power to settle article 177 proceedings with prospective decisions by challenging its jurisdiction. The Treaty empowers the ECJ to state which of the effects of a norm declared void shall be considered prospectively only in decisions under article 173 of the Treaty.⁷² Although such a power is not provided for with regard to decisions made under article 177, the ECJ applies the powers attributed in article 174, paragraph 2 by analogy to proceedings under article 177 despite the fact that the two procedures have different underlying purposes. Pure prospective decisions do not fit with the preliminary character of article 177 proceedings whereas they do fit with

71. Angiolini, *supra* note 36, at 275.

72. See Treaty of Rome, *supra* note 19, at art. 174, par. 2.

autonomous proceedings which, *inter alia*, can be instituted only within two months of the publication of the act challenged before the Court.⁷³ The first reason for doubting the ECJ's power to restrict the effects of its preliminary decisions is the Treaty's failure to grant explicitly such a power in light of its affirmative grant in article 174; this omission implies that the language of article 177 was purposeful and that prospective rulings are outside of its proper scope. Second, preliminary rulings (under article 177) should either interpret or acknowledge the invalidity of a Community norm without making a ruling on what the solution in the main action should be.⁷⁴ It is up to the national judge to solve the underlying controversy according to national procedural rules, even if the consequences of the same declaration of invalidity may be different from case to case according to the different national procedural conditions governing actions at law. This proposition is further supported by the fact that the ECJ has stated, as a general rule, that every procedural question should fall within the competence of the national legal orders and not that of the Community.⁷⁵ A decision of the ECJ in this context should limit itself to establishing that an act is void, and leave it to the national authorities to draw the legal consequences of the validity within their own procedural rules.⁷⁶

It was on this very ground that the French judges declined to follow the ECJ's temporal restriction on the effects of the declaration of invalidity with regard to the same regulation governing monetary compensatory amounts at issue in the *FRAGD* case.⁷⁷ They took the view that only national courts had jurisdiction to determine the consequences of a declaration of invalidity. The Italian Constitutional Court could also easily have challenged the ECJ on this matter rather than assert its jurisdiction directly to review all Community actions. By so doing, the Italian Court would have turned the problem of "counter-limits" into the concrete but difficult question of establishing

73. See Ubertazzi, *Gli Effetti Ratione Temporis delle Sentenze Pregiudiziali in Materia di Validità degli Atti Comunitari*, 24 DIRITTO COMUNITARIO E DEGLI SCAMBI INTERNAZIONALE 75 (1985).

74. Actually, the European Court of Justice usually tends to determine the consequences of its interpretation or of its declaration of invalidity of Community norms, even if it is out of its jurisdiction.

75. See, e.g., *Rewe-Zentralfinanz v. Landwirtschaftskammer für das Saarland*, 1976 E.C.R. 1989, 1997-98; J. WEILER, *supra* note 4, at 222.

76. *Rey Soda v. Cassa Conguaglio Zuccheri*, 1975 E.C.R. 1279, 1306; *Express Dairy Foods Ltd. v. Intervention Board for Agricultural Produce*, 1980 E.C.R. 1887, 1899-1901.

77. Judgment of July 15, 1981, Trib. inst., Lille, 1982 *Receuil Dalloz-Sirey, Jurisprudence* [D.S. Jur.] 9.

which institution has the power of defining the competence of the European Community.

CONCLUSION

The framework of the relationship between Italy and the European Communities should be based on the following principles:

(1) the relationship between the institutions of the two legal orders should be stressed much more than the relationship between the individual norms;

(2) the restrictions of sovereignty should cover the powers of the Constitutional Court as well as those of Parliament in order to be compatible with the autonomy of the two legal systems;

(3) the autonomy of the European system from municipal systems should be strictly applied even in its ultimate consequences; any kind of "nationalization" of Community law should be avoided. At the same time, however, even if the Court is consistent with these principles, the development of Italian constitutional case law must not (and should not) be barred; these principles can only help the Court to avoid the difficulties described above.

The Constitutional Court is in some way bound to reconsider its attitude towards the EC, mainly because the Community itself is always evolving. Development is not to be criticized — on the contrary, the contradictions in Italy's case law concerning the Community are often caused by the fact that the Constitutional Court is bound by principles created at the origin of the EC in 1957. At this stage of the Community's evolution, some of these principles should be rethought.⁷⁸ It must also be recognized that it may be impossible to evolve along with the EC without changing the constitutional basis of Italian membership. Sometimes it would be useful to acknowledge a constitutional crisis and to be courageous enough to amend the Constitution.⁷⁹

78. It should be noted that the principle of limitation of sovereignty under article 11 was originally set in place so that Italy could become a member of the United Nations. In 1957, it was taken as the constitutional basis for membership in the EC, although this was not its original function.

79. See, e.g., *Crotty v. An Taoiseach, Ir. S.C.*, 1987 Irish Reports [I.R.] 713, where it was decided that the Irish Constitution should be amended in order to make it compatible with the Single European Act. See generally, Murphy & Cras, *L'Affaire Crotty: La Cour supreme d'Irlande rejette l'Acte Unique Européen*, 1988 CAHIERS DE DROIT EUROPÉEN 276.