



The European Court and National Courts—Doctrine and Jurisprudence

Legal Change in Its Social Context

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• HART •
PUBLISHING

OXFORD

1998



*The Italian Constitutional Court and the Relationship
Between the Italian legal system and the European
Union*

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THE THEORETICAL BASES OF THE ITALIAN MEMBERSHIP
TO THE EUROPEAN UNION

Before analysing in detail the case-law of the Italian Constitutional Court regarding the basic principles of the European integration—i.e. supremacy, direct effect and division of powers—it might be useful to recall that the Italian Constitutional Court approached the incipient European integration in 1957 with the same theoretical tools used in the Italian legal system to deal with the problems of international law. Even if during these 40 years of membership of the Community the case-law of the Constitutional Court has developed dramatically, the initial choice of setting community law in the frame of international law kept on influencing the relationship between Italy and the European Community. At the beginning Community law was considered as international law, partly because the very nature of the European Community and its peculiarity were not that evident, and partly because the Italian constitutional system did not provide specific provisions regulating the relationship with European law. During the years that followed these theoretical bases inherited from international law have been maintained as landmarks of the Italian path towards European integration, notwithstanding the changes which have taken place both in the European and in the Italian system. The original theoretical principles on the basis of which Italy entered the Community have been adapted little by little to the changing structure of European law without introducing any specific amendment to the Constitution.

The first of these theoretical principles is *dualism*. Like many other European countries, Italy has traditionally adopted dualism as the theoretical construct upon which the Italian relationship to international law is based.¹

¹ In Italy, the first scholars who adopted the "dualist" position were D. Anzilotti, *Corso di diritto internazionale*, Rome, 1928 and S. Romano, *La pluralità degli ordinamenti giuridici e le loro relazioni*, in *L'ordinamento giuridico*, Firenze, 1945, 86 ss.

Under dualism European and national systems are separated. Each legal system is empowered to regulate its own field of competence, without interference from any other system. From the dualist point of view, Community norms are considered as emanating from a completely separate legal order, so that they do not take part in the national hierarchy of norms nor national norms are part of European hierarchy of sources of law. Under the dualist approach, the separation of attributions and the division of powers play the most important role in the relationship of the two legal systems, because the validity and the efficacy of each norm depends on whether it falls within the proper field of jurisdiction.

Considering its content, the dualist principle seems to be more respectful of the sovereignty of the "national-states" than the monist principle,² because according to the former each legal system is wholly autonomous within its field of jurisdiction. That's probably the reason why at the beginning it was quite natural for the Court to appeal to dualism in order to define the constitutional treatment of community law. That's probably the reason why at the present stage of European integration dualism still marks deeply the Italian relationship with Europe, although in recent decisions concerning Community law the Constitutional Court has taken a "soft version" of dualism.

The other important principle which conditions the legal treatment of Community law in Italy is the principle of *limitation of sovereignty*, established in article 11 of the Constitution. For want of specific constitutional provisions concerning the membership to the European Community, the Constitutional Court turned to article 11 of the Constitution as the constitutional basis for the Italian accession to the Community, even if that provision was originally addressed to the United Nations. Article 11 states that Italy can accept, at the same conditions of the other countries, those limitations of sovereignty that are necessary to take part to international organisations aiming at fostering peace and justice among nations. The European community was considered as one of these international organisations aiming at peace and justice, so that Italy consented to suffer a limitation of power on the basis of article 11 in order to build up European integration. But article 11 of the Constitution while opening the way to a transfer of powers to European institutions, it also marks the limits of the reduction of powers that can be imposed to national institutions: "limitation" of sovereignty cannot become "loss" of sovereignty; consequently article 11 of the Constitution consents to the membership of European integration as far as it does not imply a loss of sovereignty. And the Constitutional Court is demanded to watch over European integration in order to prevent it from overstepping the borders of limitation of Italian sovereignty.

² See H. Kelsen, *Il problema della sovranità e la teoria del diritto internazionale* (1920), translated by A. Carrino, Milano, 1989.

THE ITALIAN CONSTITUTIONAL COURT CASE-LAW CONCERNING THE SUPREMACY OF EUROPEAN LAW: FROM THE DENIAL OF SUPREMACY TO THE SUPREMACY UNDER CONDITION

As regards supremacy of European law, an important development occurred in the case law of the Italian Constitutional Court. The Court began in 1964 by asserting that Community norms should be considered as the legal equivalent of acts of Italian Parliament—that means that the Court began by denying the supremacy of Community law. At the other extreme, nowadays the Court recognizes that European norms prevail over all sort of national norms and can even depart from constitutional provisions, although they are not endowed with the same “value” of Italian constitutional norms (decision 31 March 1994, n. 117 and decision 8 June 1994, n. 224).

Constitutional case-law concerning supremacy of European norms could be split up in three periods: since 1964 to 1973; since 1973 to 1984; since 1984 up to now.³

The first one is the period of the “denial of supremacy”. In the famous *Costa/ENEL* case (7 March 1964, n. 14, point 6) the Constitutional Court asserted that the relationship between Community norms and national norms was not different from every other relationship that occurs between two sources of law possessing the same binding authority. From the Court’s point of view, there were no reasons to attribute to European norms a legal force superior to that possessed by the Italian Parliament’s acts. *Lex posterior derogat priori* should be the principle regulating the relationship between Community and national norms. In other words, the Court held that where a national and an 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 the Italian Parliament was completely unbound by Community norms: it could at any time enact a statute contrary to Community law. In the *Costa/ENEL* decision the Court went so far to assert that Italy could even abandon its membership of the Community 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. However, from the constitutional point of view, nothing prevented Italy from abandoning the EEC.

These statements were unacceptable for the European Court of Justice because if every national Parliament had the authority to disregard Community norms, the power transferred to Community institutions would be rendered useless. It is worth remarking that in fact in the *same* case *Costa/ENEL* of 1964, the European Court of Justice established for the first time the doctrine of supremacy of Community law.

³ This division of the Italian Constitutional Court case-law into three periods is due to F. Sorrentino, *La Costituzione italiana di fronte al processo di integrazione europea*, in “Quaderni costituzionali”, 1993, 71 ss.

In that time, the two Courts took opposite positions.

It was only during the seventies that the Italian Constitutional Court accepted the doctrine of supremacy of European law (starting with decision of 27 December 1973, n. 183). This second period (1973–1984) was distinguished by the fact that the Constitutional Court held that the jurisdictional guarantee of supremacy of Community law should be judicial review of Italian legislation conflicting with European norms. It meant that only the Constitutional Court had the power to invalidate national norms infringing Community obligations. To be more precise, the Constitutional Court suggested that when a national norm inconsistent with Community law entered into force after the infringed Community norm, the case was to be referred to the Constitutional Court for judicial review. In fact the Court retained that the national norms conflicting with Community law indirectly infringed article 11 of the Constitution (30 October 1975, n. 232; 28 July 1976, n. 205 and n. 206; 29 December 1977, n. 163). In other words, the supremacy of Community law within the Italian legal system was guaranteed in two ways: where the infringed community norm was “more recent” than the national one, it would prevail in accordance with the rule *lex posterior derogat priori*, and it was up to ordinary judges to ensure the supremacy of community law; on the contrary, where the infringed Community norm was older than the national one, the Community norm would be applied only after a finding of unconstitutionality, enacted by the Constitutional Court.

The European Court of Justice was not at all satisfied with this “two-folded” judicial guarantee of supremacy of Community law; in particular it contested the monopoly of the Italian Constitutional Court in invalidating national norms subsequent to the infringed Community norms. Actually, in the Simmenthal case of 1978 the European Court of Justice held that every national judge, and in particular every ordinary judge, called upon to apply provisions of Community law is under the duty to give full effect to those provisions, without applying for constitutional review.

This divergence of view between the European Court and the Constitutional Court brought about a lively debate in Italy.⁴ The main problem to accepting the European Court’s point of view was that in the Italian legal system judges are submitted to the law (article 101 Const.): following the French tradition in Italy judges are conceived as “*la bouche de la loi*”, so that they are expected to apply the legislation, not to put it into question. To be more precise, as Professor Mezzanotte⁵ pointed out, in the present constitutional system, Italian judges are submitted both to the *principio di legalità* (rule of law) and to the *principio di costituzionalità* (rule of the Constitution). Since judges are submitted to the “rule of law”, they are bound to apply all the provisions enacted by the Parliament. However, since they are submitted also to the superior “rule of the Constitution”, when they doubt the

⁴ See AA.VV. *Il primato del diritto comunitario e i giudici italiani*, Milano, 1978.

⁵ C. Mezzanotte, *Corte costituzionale e legittimazione politica*, Roma, 1984.

coherence with the Constitution of the acts of the parliament, they must suspend the process and refer the question to the Constitutional Court for judicial review. The only "judge" who is endowed with the power of invalidating legislation is the Constitutional Court.

Given this context it becomes clear that with the Simmenthal decision the Court of Justice of the European Community was demanding an important change in the role of judges; it was demanding the Italian legal system to depart from the basic constitutional principle that submits judges to the will of Parliament. As a demonstration of the *bouleversement* demanded by the Court of Justice it could be noticed that nobody of the "constitutional scholars" has ever doubted that the Constitutional Court was right in pretending that it was reserved to the Constitutional Court to invalidate national norms conflicting with Community law.⁶

It took about ten years before the Constitutional Court complied with the requirements stated by the European Court of Justice with regard to the judicial guarantee of supremacy of Community law. To tell the truth, the Constitutional Court was presented with several opportunities to change its doctrine and to conform to the European Court of Justice's Simmenthal decision. However more than once the Court avoided the problem, by declaring the questions inadmissible (see e.g. 26 October 1981, n. 176 and n. 177).

In the Granital decision of 1984 (8 June 1984, n. 170) the Court reviewed its precedents on conflict between Community and national norms and abandoned the rule requiring ordinary judges to refer questions of constitutionality in cases dealing with statutes inconsistent with Community law. The Court accepted that Community norms having direct effect should immediately prevail over national norms and should consequently be applied by ordinary (or administrative) judges, regardless of the time of their enactment. Faithful to the dualist approach, the Court stressed that Community law does not have the power to repeal national law. Nevertheless when the same concrete situation is governed by both Community and national norms, the latter is no longer relevant to the case and the judge should apply Community law, instead of the national one.

Granital's rationale suffers three kinds of limitations.

First of all it is intended to regulate conflicts between Community and national norms, provided Community norms have direct effect. In case of Community provisions lacking direct effect, conflicts with national norms are still within the exclusive jurisdiction of the Constitutional Court.

Second, Granital's rationale applies only in "preliminary rulings" before the Constitutional Court, that is only in those procedures in which a question of constitutionality arises during a process before an ordinary judge, because only in that case there is a judge who can ensure the direct effect of commu-

⁶ See e.g. F. Sorrentino, *Corte costituzionale e Corte di Giustizia delle Comunità europee*, Milano, 1973; P. Barile, *Il cammino comunitario della Corte*, "Giurisprudenza Costituzionale" 1973, 2405 ss.

nity law; on the contrary Granital does not apply in the other procedures before the Constitutional Court, in particular in the "direct procedures" between the State and the Regions (see decisions n. 384 of 1994 and n. 94 of 1995), so that in these cases the Constitutional Court is still playing an important role in the European game, because it has the power to erase all the norms which conflict with Community law from the Italian legal system. This result—says the Constitutional Court—complies with the European Court of Justice's case law, because it has always asked the member States not only to give ordinary judges the power to enforce Community law having direct effect, but also to "clean" the legal system, by the elimination of all the laws which do not agree with the European law.

Third, the Constitutional Court maintains its competence whenever Community law is suspected to infringe the fundamental principles of the Italian constitutional order. In other words Community law is endowed with supremacy within the Italian legal system, "*sous reserve*" that it does not threaten the very fundamental constitutional principles on the basis of which the whole legal system is built up. This "reserve" flows from the idea of limitation of sovereignty, which implies that power is not completely transferred to the Community: *limitation of sovereignty* has to have some "counter-limits", otherwise it would turn into transfer or *loss of sovereignty* in favour of the Community. These counter-limits consist of the fundamental values of the constitutional system, like fundamental rights, the democratic principles, the unity of the State, and some other "organisational" principles. This doctrine of "counter-limits" loomed for the first time in 1965 (27 December 1965, n. 98), but it was explicitly stated by the Court in the Frontini case of 1973, recalled in the Granital decision of 1984, and developed in 1989, in the Fragd decision (21 April 1989, n. 232). Following this doctrine every judicial authority that is called upon to apply Community law, if it suspects that Community law could violate fundamental rights or other basic values protected by the Italian Constitution, shall apply to the Constitutional Court for judicial review of Community law (*rectius*: for judicial review of the Italian act of ratification of the Community treaties, specifically of that part of the act on which the contested Community norm is based). Up to now the Constitutional Court has never declared any Community provision unconstitutional. Nevertheless the Court has used this competence of ensuring the respect of fundamental values in order to suggest to the European Court of Justice that some European rules were hardly acceptable within the Italian legal system—it was the case of perspective decisions of the European Court of Justice, which appeared to conflict with the right of defence, guaranteed by article 24 of the Italian Constitution (Fragd 1989). A first impression over these cases involving counter-limits and fundamental values is that they constitute an opportunity for the Constitutional Court to co-operate,⁷ rather than to enter

⁷ For more considerations on this point see M. Cartabia, *Principi inviolabili e integrazione europea*, Milano, 1995.

into conflict, with the European Court of Justice, in order to work out the basic values of the European system.

To summarise, we can say that at present Italy has accepted by and large the supremacy of Community law and it guarantees it with methods that fully comply with the requirements stated by the European Court of Justice. However, in Italy supremacy of Community law is still under condition: first, Community law cannot be applied in Italy if it infringes the fundamental values of the Constitution; second in some recent decisions the Constitutional Court has stated that although Community provisions are endowed with the power to derogate from Italian constitutional provisions, they do not have the same binding power, nor are they subject to the same "legal treatment" reserved to constitutional norms (one can guess that the difference is in structure and content, rather than in formal authority). For example, whereas some years ago (decision of 19 November 1987, n. 399) the Constitutional Court had recognised to Community norms the powers to shift the borders of division of powers between the State and the regions in Italy—that means recognising to Community norms the same authority of constitutional norms, because regional powers are enumerated within the text of the Constitution (article 117)—last year the Court in an *obiter dictum* explicitly renounced that affirmation, by asserting that in any case Community provisions do not have the authority to influence the division of powers between State and regions (sent. n. 115 of 1993). More recently, in the decision n. 224 of 8 June 1994, the Court went back to the previous rationale and accepted that Community norms, as well as national norms that execute Community directives, can derogate to the constitutional provisions establishing the division of powers between the State and the Regions. It was the case of the regional powers concerning the bank system, that have almost been deleted by directive EEC/89/646.

Apparently, the Court presents an inconsistent case-law about the relations Community law and national constitutional law. But the shortcomings disappear in the rationale of the decision n. 117 of 31 March 1994 where the Court said that community norms cannot be qualified as having "constitutional value" because they belong to a separate legal system, although they are empowered to derogate to national constitutional provisions, providing they respect the basic fundamental values of the constitutional system. This rationale complies with the requirements of supremacy of Community law over constitutional law. Nevertheless Community norms are not considered as the equivalent of constitutional norms, because the structure and the content of the two kinds of norms are "incommensurable". In other words, Community norms are able to prevail over constitutional norms without pretending to take their place in the national system, and in any case, they cannot derogate to the fundamental principles of the constitutional system.

Supremacy of Community law is not absolute. The conditions imposed by the Constitutional court to the supremacy of Community law are fully justi-

fied from the Constitutional point of view. Nevertheless they might cause new conflicts with the European Court of Justice, considering that since the decision *International Handelgesellschaft* (1979) the European Court has established that supremacy means that Community law should prevail over every national norm, including constitutional provisions, with no limits.

THE ITALIAN CONSTITUTIONAL COURT CASE-LAW CONCERNING THE
DIRECT EFFECT OF EUROPEAN LAW

As regards the direct effect of Community law, the Italian Constitutional Court seems to have plainly accepted the doctrines established by the European Court of Justice. I dare say that to some extent the Constitutional Court anticipated the Court of Justice in drawing some important consequences from the principle of direct effect. Although the principle of direct effect and the principle of supremacy of Community law are strictly connected, one could contend that the Italian legal system imposed much less resistance to the doctrine of direct effect than to the doctrine of supremacy of Community law.

The first decisions concerning direct effect of Community law were rendered during the 1970s and they aimed at forbidding the practice of reproducing Community regulations into acts of the Italian Parliament. This practice had been condemned several times by the European Court of Justice, mainly because it abridged the direct applicability of regulations. Complying with the requirements of article 189, as interpreted by the European Court, the Italian Court said that EC regulations cannot be transposed into Italian acts because their transposition would differ or condition the coming into force of Community regulations within the Italian legal system. Furthermore, such a transposition would change the nature of the source of Community regulations so that they would be binding in Italy as "national" acts: consequently their legal treatment would change, including the rules of interpretation and the authorities competent to verify their validity or to interpret them (dec. n. 183 of 1973; n. 232 of 1975; 206–206 of 1976).

As to the problem of defining the sources of Community law which can have direct effect within the national system, the Constitutional Court has adopted a generous attitude. Since 1985—notice: one year later the fundamental decision n. 170 of 1984 (*Granital*)—the Constitutional Court has been accepting that every source of Community law which responds to the characters established by the European Court of Justice can receive direct effect within the Italian legal order. So, in decision 23 April 1985, n. 232 the Court stated that decisions rendered by the European Court of Justice in proceeding *ex* article 177 of the EC treaty should be applied by ordinary judges and should immediately prevail over national norms having a different content. Subsequently, in decision 11 July 1989, n. 389 the Constitutional Court

expanded the previous rationale, by asserting that every decision enacted by the European Court of Justice, both in proceedings *ex* article 177 and in other types of proceedings, like those described in article 169 of the EC treaty, should receive direct effect.

It goes without saying that the Constitutional Court accepted without any problem that directives can have direct effect, under the conditions fixed by the Court of Justice. And although the first decision that explicitly recognizes direct effect to directives is dated 1990 (decision 2 February 1990, n. 64, confirmed by decision 18 April 1991, n. 168) it could be surely affirmed that in cases even before those decisions Community directives were given direct effect in the Italian system.

Briefly, every source of Community law is susceptible of having direct effect, provided it complies with the requirements established by the European Court of Justice.

From this perspective the Italian system presents no problems with direct effect. However it is worth remarking that it is not completely clear which is the authority competent to declare the direct effect of Community norms. For example, in decision n. 168 of 1991 the Constitutional Court said that it shares with the European Court of Justice and with ordinary judges the competence to decide whether a directive has direct effect. The Court retained to have "faculty"—notice: not the duty—to refer the problem of interpretation of directives to the European Court of Justice, by means of preliminary rulings provided in article 177 of the Treaty. But up to now the Constitutional Court has never used the faculty and has always interpreted community law on its own, without asking the European Court for a preliminary interpretation. Moreover, in recent years the Constitutional Court has changed its mind about its relationship with the European Court of justice: in decision n. 537 of 1995, confirmed by decision n. 319 of 1996, the Court said that it cannot be qualified a "jurisdiction" for the purposes of article 177 CE, and consequently it is not in its power to apply to the European Court of Justice for preliminary rulings about the validity or the interpretation of Community law.⁸ If the Italian Court will maintain this position, one could easily foresee that in the future it might happen that different Courts give different interpretations of the same provision and that new conflicts might arise between the European Court of Justice and the Italian Constitutional Court about the direct effect of Community law.

As regards the identification of the national authorities which are called upon to ensure direct effect to community norms, it is interesting to remark that at the same moment when the European Court of Justice was establishing the rule that not only judges, but also administrative authorities are imme-

⁸ About this problem see F. Sorrentino, *Rivisitando l'art. 177 del trattato di Roma, Lo stato delle istituzioni italiane*, Milano, 1994, 637 ss.; M. Cartabia, *Considerazioni sulla posizione del giudice comune di fronte a casi di "doppia pregiudizialità", comunitaria e costituzionale*, "Foro italiano", 1997.

diately bound by Community provisions having direct effect (*Costanzo case*, 1989), the Italian Constitutional Court was pronouncing the same doctrine. Certainly the Italian Court was not informed of the forthcoming decision of the European Court of Justice, because although it usually takes into account the case law of the European Court when necessary to decide questions under its jurisdiction, there is neither direct communication nor exchange of information between the two Courts. Nevertheless on that occasion the two Courts were "in tune" and both decided for endowing administrative authorities, as well as judges, with the power of immediately applying Community law having direct effect, instead of the relevant national provision, which in this case has to be set aside (for the Constitutional Court see decision n. 389 of 1989).

Like in the *Granital* decision, also in this case the Constitutional court prompted a deep change in the Italian legal system. As I have already said, one of the general principles of the Italian legal system is the "rule of law: (*principio di legalità*), which requires all the administrative and executive authorities—including the Government—to be bound by the acts of Parliament. Moreover the Italian version of the "rule of law" requires that every competence of administrative or executive institutions is based on an act of the Parliament: the idea implied in the Italian version of the rule of law is that administrative authorities should be explicitly authorised by the legislator before exercising any kind of power. As a consequence, administrative authorities should find in the acts of Parliament the basis and the measure of the power that they are entitled to exercise. Therefore it is evident that within decision n. 389 of 1989 the Constitutional Court accepted that, as far as community law is concerned, the rule of law can be disregarded by administrative institutions. After that decision Community law can surrogate the acts of the Italian Parliament as to the requirements of the rule of law. This means that in practice administrative authorities can find the basis of their powers within community law, notwithstanding different rules prescribed by Italian law. In order to understand the importance of this doctrine, one should consider that the Italian decision making process of Community law is entirely granted to the Government, both in the ascending phase and in the descending one. By consequence, through Community law, the executive branch is now free to decide the measure of its power, almost without parliamentary control.

THE ITALIAN CONSTITUTIONAL COURT AND THE *KOMPETENZ-KOMPETENZ* PRINCIPLE

The Italian Constitutional Court has never had to tackle the problem of deciding which of the two legal systems—the European one or the Italian one—possess the "*kompetenz-kompetenz*". Nevertheless, one could suppose that in case the Court would say that the competence of deciding over the competence belongs to the States, and more precisely to the national supreme Courts.

To demonstrate this speculative affirmation it is necessary to turn our minds to the whole construct of the relationship between Italy and Europe adopted by the Constitutional Court. I contend that from the idea of limitation of sovereignty and from the dualistic principle it follows that the competence over the competence remains within the States' jurisdiction.

First of all, the Court has affirmed and reaffirmed several times that the European Community and the European Union are endowed only with the enumerated powers established in the Treaties, whereas Italy, as well as the other member States, is entitled to all the remaining competencies. In particular in decision n. 183 of 1973 (Frontini) the Court insisted that in order to give some normative power to the Community institutions the States transferred a part of their powers to the Community, on the basis of the precise division of competence established in the Treaty, following which the Community is allowed to intervene within the matters listed in parts II and III of the EC Treaty. In this decision, the idea of limitation of sovereignty (article 11 of the Constitution), implies that the "general" competence should belong to the States, whereas the Community should act within the limits established by the Treaty. Consequently, in the Court's view the Community does not have power to enlarge its field of jurisdiction on its own and its actions are valid so long as they remain within the borders prescribed by the Treaty. It is implied within the idea of limitation of sovereignty, on the basis of which Italy entered the Community, that it is the State that decides the measure of the power to be transferred to the Community and that controls the respect of the enumerated power established in the Community treaties.

Also the dualistic principle leads to a similar result. Let us take the "soft" version of the dualistic principle, enunciated by the Court in decision n. 170 of 1984 (Granital), which is still the leading case on the relationship between Italy and the European Community. The Court says: "There is a reference-point in the Court's construct of the relationship between community law and national law: the two systems are shaped as autonomous and distinct, although co-ordinate on the basis of the division of power established and guaranteed in the Treaty". Dualism—i.e. distinction and independence of the two systems—needs co-ordination, otherwise the two systems would not even enter into relations with each other, and co-ordination is based on the separation of powers described in the Treaty. Also dualism, as well as limitation of sovereignty, leads the Court to insist on the limits of the enumerated powers which belong to the Community on the basis of the Treaty. In this perspective it seems necessary that the competence over the competence belongs to the unity (i.e. the State) which is entitled to the general competence.

Moreover, in the latest decision of October 1993 concerning the Treaty of Maastricht, the *Bundesverfassungsgericht* explicitly affirmed that the Community does not have the *kompetenz-kompetenz* power and that the German constitutional court would control that Community acts fall within the European field of jurisdiction. What is interesting is that the German con-

stitutional court arrived at this important affirmation on the basis of article 38 of the *Grundgesetz* which guarantees the right to vote: since the Court has the power and the duty to protect the inviolable "core of value" of the fundamental rights, including the right to vote, it follows that the protection of the right to vote of each citizen demands the Court to watch that the Community remains within the limits of its jurisdiction. These conclusions are all the more interesting for Italy, because the Italian constitutional court, like the German one, has always maintained the power of protecting the inviolable "core of value" of the fundamental rights. Possibly the Italian Court will join the German Court as regards the control over the limitation of powers that binds Community actions.

THE CONTRIBUTION OF "LA DOCTRINE" TO THE DEVELOPMENT OF THE
ITALIAN CONSTITUTIONAL COURT'S ATTITUDE TOWARDS EUROPEAN
INTEGRATION

Generally speaking, the attitude of the Italian constitutional "doctrine" towards the "Constitutional Court's path towards European integration" has been receptive. The development of the case-law of the Constitutional Court was seen as an increasing assent to the ideals of European integration, and scholars, who were generally well-disposed towards Europe, in most cases applauded the Court's compliance with the Community requirements.

After the Maastricht Treaty, "*la doctrine*" split up into two parties taking two distinct positions: whereas some scholars are enthusiastic about the European Union as laid out in the Maastricht Treaty,⁹ some others are critical and would like the Constitutional Court to be more watchful towards European law.¹⁰ The Maastricht Treaty seems to threaten some aspects of Italian constitutional architecture, because it enhances the role of "market"¹¹ in the economic system, and gives small place to the "social rights", which are protected by the Italian Constitution. As a consequence, the role of the Constitutional Court as the "guardian of constitutional values" becomes more urgent and more crucial in regards to Community law.

During the period before Maastricht, whereas constitutional scholars have generally only annotated and commented the decisions of the Constitutional Court, it is worth mentioning at least one case in which a constitutional essay has possibly influenced the case-law of the Constitutional Court concerning

⁹ See e.g. G. Bognetti, *La Costituzione economica italiana*, Milano, 1995; G. Guarino, *Pubblico e privato nell'economia, La sovranità tra Costituzione e istituzioni comunitarie*, "Quaderni costituzionali", 1992, 21 ss.

¹⁰ M. Luciani, *La Costituzione italiana e gli ostacoli all'integrazione europea*, in "Politica del diritto", 1992, 101 ss.

¹¹ The relations between the idea of "market" in the Maastricht Treaty and in the Italian Constitution is becoming a topic of the Italian "doctrine": see, among many other, P. Bilancia, *Modello economico e quadro costituzionale*, Torino, 1996.

Community law: in fact the Frontini decision of December 1973 seems to have drawn inspiration from a book published a few months before, both in the theoretical construct and in the practical results. It is the book by Federico Sorrentino, *Corte costituzionale e Corte di Giustizia delle Comunità europee*, vol. II, published in June 1973.

After analysing all the different constructs of the relationship between the member States and the Community proposed by the scholars, and after refusing all construct that presupposes a hierarchy between the two systems, the author assumes dualism and division of competence as the criteria that give to the relations between the two legal systems a persuasive and acceptable shape. In Sorrentino's view, dualism and separation do not lead to the indifference of the legal systems, because of some important rules of connection that link community law to national law. The most important of them is the rigid division of powers between national law and community law, after which national law cannot regulate those matters described in the treaty because they are reserved to the Community (once the Community has enacted its norms).

Having established this general principle, the author says that the way of resolving conflict between national and community law changes in each national legal system, because it depends on the system of sources of law that each State has adopted. For the Italian case he suggests the "two-folded" guarantee that has been adopted by the Constitutional Court in Frontini and that marked the Italian position throughout the 1970s: if a Community norm comes into force after a conflicting national norm, the former has the force to repeal the latter, so that each jurisdictional authority, called upon to apply that Community norm, has the power and the duty to make Community norms prevail over any different national provision. In the opposite case, when the national norm is subsequent to the Community one, the Italian legislator has infringed the division of power between the two systems and, by consequence it has infringed article 11 of the Constitution: the power of resolving the conflict between the two norms is then granted only to the Constitutional Court.

Given the peculiarity of the solution proposed it is hardly deniable that this book was at least taken into account by the Constitutional Court when deciding the Frontini case. After all the Frontini rationale was consonant with the constitutional principles governing the sources of law, the role of judges, the role of the Constitutional Court, and so on: the following position taken up by the Constitutional Court demanded, as we already said, deep changes within the constitutional system. No wonder, then, if the main contribution of the constitutional doctrine was concerned only with the Frontini decision.

In fact, it was only *after* the Simmenthal decision of the European Court of Justice that some of the constitutional scholars very cautiously suggested that the Italian system could find a way of adhering to the position of the European

Court of Justice.¹² In any case these suggestions seem to have been urged more by the necessity of resolving the conflict with the European Court of Justice than by constitutional precepts.

¹² See e.g. the contributions of P. Barile and G. Motzo, in *Il primato del diritto comunitario e i giudici italiani*, Milano, 1978.

