

Breaking the Isolation? Italian Perspectives on the Dialogue Between the European Court of Justice and Constitutional Courts

Stefano Civitarese MATTEUCCI^{*}

This article focuses on the relationships between the Italian Constitutional Court (ICC) and the Court of Justice of the European Union (ECJ) when the necessity of managing policies affecting delicate constitutional issues is at stake. The mechanisms which govern the use by national courts and particularly constitutional courts of the preliminary reference are put under scrutiny. The author claims that for the dialogue between the two courts to work is important to review the legal premises on which the involvement of a constitutional court in matters of European Union (EU) law is based. In Italy in principle only when EU law lacks direct effect would there be room for the ICC to intervene in the process of adaptation of the domestic legal system to the European, irrespective of the matter at stake. In this way the role of a constitutional court is barely distinguishable from regular courts.

The article purports that this situation is unsatisfactory from a normative point of view according to which constitutional courts should take part – using preliminary reference to the ECJ – in a broader European constitutional discourse and that a concept of ‘sensitive constitutional issues’ should instead inspire the mechanism by which constitutional courts deal with the area covered by Article 267 TFEU.

1 INTRODUCTION

The relationships between the Italian Constitutional Court (ICC) and the Court of Justice of the European Union (ECJ) have recently been marked by the determination of the ICC to open up a direct channel of communication with the ECJ via the use of the preliminary ruling mechanism.

This determination is by no means uncontroversial and the analysis of the overall legal context in which it has to be inscribed reveals in fact some interesting constitutional issues common to the European order as a whole.¹

^{*} Professor at the University of Chieti Pescara and honorary visiting professor 2016–2021 at the York Law School (UK)

A first draft of this article was presented at an Edinburgh Law School Constitutional Discussion Group seminar on 26 May 2015. I want to thank all the participants to the seminar for their valuable comments. I am also indebted to Prof. Stefan Enchelmaier for having read an update version of the article and provided many useful suggestions. The usual disclaimers apply.

¹ Or at least to those several Member States which adopt a system of centralized, concrete and *a posteriori* review of legislation. See M. de Visser, *Constitutional Review in Europe* 94–96 (Hart Publishing 2014).

This article focuses on the managing of policies affecting at the same time sensitive national constitutional issues and the European Union (EU) legal system. There is a widespread notion that constitutional courts should give up their reluctance to use preliminary references and move towards a credible dialogue with the ECJ in order to enrich the European constitutional discourse. How this would occur is unclear though.

The preliminary reference is the mechanism with which the special relationship between regular courts and the ECJ has been forged since *Van Gend & Loos*, whose achievement is the cluster primacy-direct effect of EU law. The functioning of the latter is in principle indifferent to the nature of any conflicting domestic legal provision, constitutional norms included.² According to this simple picture a constitutional court which resorts to a preliminary reference to the ECJ, indirectly raising any constitutional concern, is all but different from any other national judge in light of Article 267 of TFEU.

In other words the idea that a dialogue between two sorts of 'constitutional courts' – one supervising the European constitutional order and the other the national one – can be set out through the preliminary ruling mechanism is pointless within the constraints of EU orthodoxy. The trouble is that absolute primacy is at odds with a 'conversational attitude' and one is compelled to wonder why a constitutional court should be summoned into an open dialogue with the ECJ if this does not make any difference.

There are only two possible strategies to answer this challenge.

The first is 'political', that is to say that the difference would rest upon the more persuasive force that a reference made by a constitutional court supposedly produces compared to a reference made by any other national court. This hypothetical moral suasion can be only measured empirically and we shall see that nothing of the sort seems detectable.

The second is legal and it consists in softening the absoluteness of primacy when important constitutional issues are at stake.

I assume that a mix of both strategies is desirable.

If neither of them is feasible then it would be better for constitutional courts to maintain their traditional wariness towards such a dialogue. As we shall see, the alleged benefit of expounding their constitutional view directly to the ECJ does not make up for the cost of losing the constitutional courts' leeway in dealing with EU matters by sending out 'indirect' signals through their judgments.

² S. Weatherill, *Law and Integration in the European Union* 106 (OUP 1995), brilliantly observes that 'even the most minor piece of technical Community legislation ranks above the most cherished constitutional norm'.

Instrumental in making the dialogue work is assessing the legal premises on which the involvement of a constitutional court in matters of EU law is based. In Italy in principle only when EU law lacks direct effect would there be room for the ICC to intervene in the process of adaptation of the domestic legal system to the European.

I will purport that this doctrine is both ambiguous and inapt to satisfy the needs of the said dialogue and that a concept of ‘sensitive constitutional issues’ should instead inspire the mechanism to involve constitutional courts in the area covered by Article 267 TFEU.

2 MEANING AND LIMITS OF THE REFERENCE TO THE DIALOGUE BETWEEN COURTS

The relationship between the ICC and the ECJ is one of the many instances of the constitutional conversation going on within the EU legal order.³

This is in fact a peculiar kind of conversation where bilateral dialogues between national constitutional or higher courts and the ECJ presuppose a broader, albeit virtual, stage – the legal space which links together all the Member States and EU legal systems – where supposedly all the speakers converse with each other under the superintendence of the ECJ.

However, the contours of this stage are disputed. Like in quantum mechanics its features vary depending on the point of view of the observer. Each and every of the actors conceive such a stage as having a different shape. Fortunately the stage is partly covered by the curtain and only rarely dare the players cast a glance at such hidden corners. They mutually share the conviction that it is better to focus their activity on the visible space on the stage. However, every now and then, one of the national players warns the director that behind the curtain the reality is not necessarily as he or she (the ECJ) claims it to be.

As regards this, we find in the literature the astute idea of a hidden dialogue, which would be, in fact, a sort of interaction between constitutional courts and the ECJ based on the assumption that the road to the use of the preliminary reference under Article 267 TFEU is blocked and therefore the dialogue is conducted through different means.⁴

The established doctrine of the ICC as regards the relationships with EU law, which we shall discuss in the next section, can be considered an instance of such a hidden dialogue.

³ See *Constitutional Conversation in Europe* (M. Claes, M. de Visser, P. Popelier & C. Van de Heyning eds., Intersentia 2012).

⁴ G. Martinico, *Judging in the Multilevel Legal Order: Exploring the Technique of ‘Hidden Dialogue’*, 21 King’s L.J. 257–281 (2010). On this implicit or indirect interaction see also de Visser, *supra* n. 1, at 405–407.

An important question is whether hidden and open dialogue are in fact compatible and to what extent going towards a conversational openness entails that some of the benefits or advantages of the hidden dialogue get lost.

I assume that the most important advantage of a hidden dialogue is conveyed by the metaphor of the stage just mentioned. It is that while in an open structured conversation any of the participants has to acknowledge the role undertaken by the counterpart, in a hidden dialogue one can take for granted such features and keep behaving as if any of the different perspectives is the right perspective.

This image of a hidden dialogue fits a pluralistic account of the integrated EU-domestic legal order, namely one in which there is not a single rule of recognition in the legal system and therefore there can be rules of adjudication giving adjudicative supremacy to different courts.⁵ It precisely depends on which model of relationship between EU law and national law we favour and how we conceive the concept of primacy given that there are more than one. We shall come back to this point in the last section.

However, a sizeable strand of literature has been holding for many years that what we need is an actual, formalized, dialogue. Marta Cartabia, a leading public law scholar and now a Constitutional judge, in an article pointedly titled ‘Taking Dialogue Seriously’ observed that:

the destiny of the national cultural traditions in Europe is in the first instance entrusted to the constitutional courts which should express the lively voice of their societies and the respective national constitutions. The European Court of Justice bases its work on the voices and traditions that make themselves heard, and if one is missing the cultural patrimony of the whole of Europe is diminished ... the Court of Justice is requested to show great respect for all the national constitutional traditions when interpreting the principles of the EU Charter of Fundamental Rights, but to this purpose it is indeed necessary that also the national constitutional courts change their behaviour and use all the tools at their disposal to convey their own constitutional traditions within the European Union’s system. Among these a crucial role is reserved for the preliminary ruling ex art. 234 TEC (267 TFEU).⁶

What remains in the shade in this stance is how – given the constraints of the preliminary ruling procedure – constitutional courts can actually make their

⁵ N.W. Barber, *Legal Pluralism and the European Union*, 12 ELJ 306 (2006). In this article, the theoretical debate about which sort of pluralism, if one, fits the relationship between the EU and Member States best will be not addressed. I just take for granted that both a monist and a dualist explanation are unsatisfactory.

⁶ M. Cartabia, ‘Taking Dialogue Seriously’ *The Renewed Need for a Judicial Dialogue at the Time of Constitutional Activism in the European Union*, Jean Monnet WP 12/07, <http://www.jeanmonnetprogram.org/paper/taking-dialogue-seriously-the-renewed-need-for-a-judicial-dialogue-at-the-time-of-constitutional-activism-in-the-european-union/> (last visited 10th October 2016) www.JeanMonnetProgram.org.

constitutional traditions count. We shall deal with this crucial aspect of our topic especially in sections 5 to 8.

As regards this debate a recent cornerstone in Italy is constituted by the Order no. 207 of 23 July 2013 (*Napolitano*) whereby the ICC lodged for the first time a preliminary ruling with the ECJ pursuant to Article 267 TFEU in a proceedings in which the former had been seized on an interlocutory basis.⁷

That this decision of the ICC was made following a preliminary reference made by a regular court to solve a litigation before itself is important, for there was another case of a preliminary reference to the ECJ in 2008 where, though, the ICC was seized via a so called direct recourse for an abstract constitutional review, which is not the ordinary procedure of constitutional review. Direct recourse only regards conflicts between the state and the regions concerning their respective law-making competences. The normal way to access the ICC is by raising a preliminary reference in a proceedings before a regular court. Hence it resembles how judges refer to the ECJ.

While in the 2008 case the Court could argue that it was just the unique character of the direct recourse proceedings which compelled it to make use of the preliminary ruling, acknowledging itself exceptionally as a judge under Article 267 TFEU, now the Court has simply moved forward, accepting the status of a 'national court' under Article 267. Thus, the previous argument that the possibility of getting involved as a Constitutional Court was justified only because the regular judge, who is the natural guardian of EU law primacy at the domestic level, is totally absent from the scene in a direct proceedings, is now pushed aside without much explanation.

One should bear in mind that in another seminal judgment (no. 536 of 1995) the ICC was keen to rule out that it could be considered 'a court or tribunal of a Member State' pursuant to Article 267 TFEU, upon the argument that it essentially exercises a function of constitutional review, without parallel in the Italian legal system, which is different in nature from the duties of regular courts.⁸

Most of the Constitutional courts throughout the EU have now made a preliminary reference to the ECJ at least once,⁹ but what this trend means is

⁷ On which see S. Civitarese Matteucci, *The Italian Constitutional Court Strengthens the Dialogue with the European Court of Justice Lodging for the First Time a Preliminary Ruling in an Indirect ('Incidentier') Proceeding*, 20 EPL 633–646 (2014); O. Pollicino, *From Partial to Full Dialogue with Luxembourg: The Last Cooperative Step of the Italian Constitutional Court*, 10 ECLR 143–153 (2014).

⁸ The judgment no. 536/1995 represented in turn a sort of overruling of another judgment (18 Apr. 1991 no.168), where the ICC had acknowledged that in principle it could make use of the preliminary reference to the ECJ.

⁹ The last to do so was the Slovenian Constitutional Court, in case U-I-295/13, <http://odlocitev.us-rs.si/en/odlocitev/ANZZ26?q=U-I-295%2F13> (last visited 10th October 2016) <http://odlocitev.us-rs.si/en/odlocitev/ANZZ26>.

unclear. Is this a good move from a constitutional court perspective to shift from a hidden to an open dialogue? I shall try to articulate some partial answers in the following.

3 THE DOCTRINE OF THE ICC REGARDING PRIMACY AND DIRECT EFFECT OF EU LAW

The interaction between different courts, all claiming a sort of primacy, within the EU space gives rise to a number of issues, such as ultra-vires rule (kompetenz-kompetenz), identity control, fundamental rights as they result from constitutional traditions common to the Member States, direct effect of EU law and how to make EU law concretely prevail, and monistic versus dualistic approaches.¹⁰

This article deals with the relationship between direct effect and the dualistic stance of the ICC insofar as they relate to the 'dialogue'.

It is fitting to begin by setting out the position of the ICC as regards the functioning of EU law, which after a long evolution over the Sixties and Seventies, it is still the one established in the *Granital* judgment (no. 170/1984).¹¹

The *Granital* doctrine comprises two tenets.

The most famous and prominent regards primacy and direct effect being framed in a clear dualistic conception, which can be seen as one of the instances of the hidden dialogue, to create a sort of undetermined area where the rule of recognition is uncertain or disputed.

Overruling its previous case law, the ICC ruled here that thanks to the filter represented by Article 11 of the Constitution every court has the obligation to apply directly enforceable EU law and not apply any conflicting domestic law, irrespective of whether enacted before or after the EU source of law came into force.¹²

¹⁰ The literature on such topics is overwhelming. For an outline see P. Craig & G. de Búrca, *EU Law* 256 (OUP 2011). Many of these questions have been recently addressed by the literature on constitutional pluralism. See N. Walker, *The Idea of Constitutional Pluralism*, 65 *Modern L. Rev.* 317 (2002); G. de Búrca & J.H.H. Weiler, *The Worlds of European Constitutionalism* (CUP 2012); M. Avbelj & J. Komárek, *Constitutional Pluralism in the European Union and Beyond* (Hart 2012).

¹¹ See M. Cartabia, *The Italian Constitutional Court and the Relationship Between the Italian Legal System and the European Union*, in *The European Court and National Courts—Doctrine and Jurisprudence* 133–146 (A-M Slaughter, A. Stone Sweet & J.H.H. Weiler eds., Hart 1998) for an account of such an evolution.

¹² According to Art. 11 of the Constitution the Italian state can bear an express limitation of sovereignty, in conditions of reciprocity with other states, in order to create 'a world order ensuring peace and justice among the Nations; hence, the constitution of the Italian Republic promotes and favours the birth of international organizations aimed at this goal. In turn Article 117(1) of the Constitution, as amended following a 2001 constitutional reform, requires both state and regional legislation to comply with the limits coming from the European legal system and international obligations', in addition to the Constitution itself.

The two key-concepts employed by the ICC are separation and coordination: Community law and Italian law, while separate and independent, must necessarily be coordinated and a coordination is worked out especially by regular courts by carefully distinguishing what is the concrete source of law which covers the case at hand.

When facing a case covered by EU law, the relevant provision 'is applied with reference only to the legal system applicable to the supranational organisation ... Conflicting provisions in a national statute cannot constitute an obstacle to the recognition of the binding force conferred by the Treaty on Community regulations as a source of directly applicable rules'.

A very important implication of such a stance is that it is always a regular court which is expected to evaluate whether it is necessary to make a preliminary reference to the ECJ.

Another consequence of such a separation is that the ICC normally refuses to use EU law as a means to review the constitutionality of statutory law.

As regards this, the *second tenet* stands out, stating that regular courts are meant to stay proceedings and raise a question of constitutionality to the ICC concerning the indirect violation of Article 11 brought about by the domestic rules conflicting with the EU law should the EU rule not have direct enforceability.

In abstract terms, this is a clear and coherent consequence of the combination between the dualistic stance of the ICC and the principles of primacy and direct effect, for if a case cannot be decided using a norm belonging to the 'legal system applicable to the supranational organisation', then a norm of the domestic legal system is to be chosen to solve the case. It might still be, however, that the latter conflicts with an EU rule or principle even though they are not directly applicable. In such circumstances the review of the domestic norm is made by the ICC using an EU norm as a parameter.

As has been noted by many commentators, the application of each of the two *Granital* tenets brings about two very different outcomes not easily justifiable despite their coherence with the dualistic stance of the ICC.¹³

In the first case the mere non-application of the domestic rule occurs, making the latter coexist with its own European illegality, while in the second case the repeal/annulment of the domestic conflicting law occurs.

In both cases a preliminary reference to the ECJ regarding the interpretation of the Treaties is an actual possibility.

¹³ O. Pollicino, *The Italian Constitutional Court and the European Court of Justice. A Progressive Overlapping Between the Supranational and the Domestic Dimension*, in Claes, de Visser, Popelier & Van de Heyning eds., *supra* n. 3, at 106.

However, in using a preliminary reference courts have not taken much heed of whether or not a problem of direct effect was at stake¹⁴ and the ICC, in turn, has always kept a benign eye on this attitude.

In fact, until quite recently, also in cases where the presence of direct effect might have been clearly arguable, the courts have been implicitly encouraged by the ICC to refer to the Court of Justice rather than to the ICC itself. When a court did not deliver a preliminary ruling to the Court of Justice but directly raised a question of constitutionality, the ICC normally declared the question inadmissible (see for example Orders No. 415 of 2008 and 100 of 2009).

Hence, the confirmation of the EU illegality of domestic law is usually deemed sufficient by the ICC to discharge the internal preliminary question irrespective of whether the relevant EU rule does possess direct effect. In other words a divergence between theory and practice has been going on as regards the two *Granital* tenets.

4 THE RATIONALE BEHIND THE USE BY THE CONSTITUTIONAL COURT OF THE PRELIMINARY RULING

In this section I shall provide some evidence about a new trend in the case law in the last five years, consisting in a sudden rediscovery of the second *Granital* tenet, trying to fathom the rationale of such a trend or better to pave the way for a more convincing rationale than the one hingeing on the direct enforceability of an EU norm.

First we need to stress that we can think of two quite different ways of looking into the use of the preliminary reference to the ECJ by a constitutional court.

The first is the mere procedural perspective. As we have seen, in Italy the *condicio sine qua non* is that the relevant EU rule does not possess direct effect. This is the ‘technical reason’ that should convince a regular court to raise a preliminary question to the ICC, which is independent from any interpretive question regarding the relevant EU law in a particular case. It would be up to the constitutional court then to appreciate whether a reference to the ECJ is needed.¹⁵

Hence there would be no more ‘constitutional import’ in the use of preliminary reference by the ICC than the one which is in the backdrop anytime the

¹⁴ From a pure EU law perspective we should note that when EU law is not directly enforceable only the duty to apply national law consistently with EU law would be operating, but not the duty to set aside the domestic law. As already mentioned from this point of view the *Granital* second tenet is formally correct.

¹⁵ We do not deal here with the consequent question regarding the obligation of constitutional courts to refer under Art. 267 TFEU as a highest court ‘against whose decisions there is no judicial remedy under national law’.

two orders meet up, that is to say when a regular court raises a preliminary reference pursuant to Article 267 TFEU.

It is unsatisfactory, though, to think that this bare procedural account tells the whole story, as the mere fact that the ICC gets involved seems to attach some sort of different ‘constitutional substance’ to the situation.

An indirect, albeit not decisive, hint of such relevance is that a large part of the literature has historically prompted constitutional courts to give up the reluctance to use the preliminary reference device to enrich the constitutional discourse.¹⁶ necessarily implying that only by doing so some constitutional issues may be raised which otherwise would not.

The idea is that the ICC can cope with relevant constitutional questions affected by EU law in a way that regular courts are unable to do. Here we come close again to such difficult questions as the ones that the integration within the EU legal order poses. We need, namely, to square the circle between primacy, indifferent to any constitutional subtlety, and this assumption that constitutional courts, qua constitutional courts, matter.

Factually if not legally the point is that absolute primacy is at odds with this conversational attitude: if a Constitutional Court (CC) steps in, this ought to make a difference, otherwise there would be no point in summoning it into the dialogue with the ECJ.

This point is important to devise the mechanism on which the preliminary reference is to be based: if there is something substantive at stake the same procedural device – the switch which sets in motion the CC intervention – should reflect this fact.

In order to give a response to this question we should start noting that at some point – dealing with cases apparently not that much different from many others before – the ICC came to hold references by regular courts involving the interpretation of EU law and to quash conflicting domestic norms.¹⁷

I shall contend that this shift occurred just because of a belated application of the second *Granital* tenet (non-direct enforceability of EU law) and instead that it should be at least partly expounded on substantive grounds.

Before going into this, a brief analysis of the direct effect doctrine is required.

We do not exactly know, indeed, what the ICC means by EU norms having direct effect, also because this notion has considerably changed since the setting up of the *Granital* doctrine. There are different ways whereby one can make sense of the direct effect doctrine, the most typical one is by referring to a norm conferring

¹⁶ See recently A. Arnall, *Judicial Dialogue in the European Union*, J. Dickson & P. Eleftheriadis, *Philosophical Foundations of European Union Law* 123 (OUP 2012).

¹⁷ A feature of this area of law is that we have to work with few cases, so that one can barely capture empirical evidence and instead has to fathom new trends from hunches.

rights on individuals, which is, to that purpose, sufficiently clear, precise and unconditional.

According to a more comprehensive proposition 'direct effect can be defined as the capacity of a norm of Community law to be applied in domestic court proceedings'.¹⁸

This definition sheds light on the actual scope of direct effect as employed within the EU integrated legal order and building on this broader approach it has been shown that the cluster constituted by direct effect, consistent interpretation and primacy of EU law brings about a 'three step model of application' of EU law by domestic courts, which consists in a threefold obligation to apply, interpret and disapply.¹⁹

The obligation to disapply is derived from the primacy (or supremacy) principle, but it only arises if the obligation to apply requires so, in other words an inconsistency between domestic and EU norms is detected.

Such an inconsistency may be solved by resorting to a consistent interpretation, allowing the court to continue relying on an adequately constructed domestic norm. Should this not even be the case, then the solution has to be found in the (direct) application of EU law, which can mean different things.

A first set of possible applications has been called the 'exclusionary effect'.²⁰ Often, that is to say, the simple non-application of domestic law satisfies the plaintiff's claim, when for example he or she is merely seeking the quashing of an administrative decision via a legality review²¹ and to this aim a private party can rely on an EU norm, such as the one deduced from a directive, even though it leaves margins of discretion to the national authority.

In many circumstances this might not be sufficient, for a 'substitution effect' is demanded.²² This pattern covers both the case that an EU provision (adequately constructed) is employed to replace a domestic provision and the case that no domestic provisions could be found.

One might want to stick with the substitution effect as to the scope of direct effect (there must be a norm conferring rights), but still one cannot deny that using an EU provision as a standard of review of domestic law implies that this provision has in fact to produce a certain immediate effect.²³

¹⁸ B. De Witte, *Direct Effect, Supremacy, and the Nature of the Legal Order*, in *The Evolution of EU Law* 177 (P. Craig & G. De Búrca eds., OUP 1999).

¹⁹ S. Prechal, *Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union*, in *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* 41 (C. Barnard ed., OUP 2007).

²⁰ *Ibid.*, at 43.

²¹ S. Prechal, *Does Direct Effect Still Matter?*, 37 CMLR 1050 (2000).

²² Prechal, *supra* n. 19, at 43.

²³ G. Pescatore, *The Doctrine of 'Direct Effect': An Infant Disease of Community Law*, Eur. L. Rev. 155 (1983); Prechal, *supra* n. 21, at 1052.

As has been noted, in addition, different Member States can hold different views on direct effect considering what they mean by 'right', for the term 'right' can have different meanings in different contexts.²⁴ For example, it might refer to a substantive situation or just a remedy, such as standing.

The same case law of the ECJ does not make it clear whether the EU norm has to confer a substantive or procedural right to possess direct effect and both findings can be supported.²⁵

This notion of a broad meaning of direct effect – in plain words simply conceived as the use of an EU provision in whatever fashion by a domestic court – seems to fit what has been the practice regarding the framework presented above of the relationship between the ICC, regular courts and the ECJ. Actually, neither the ICC nor regular courts have elaborated on what the scope of direct effect is relating to the abstract obligation of regulator courts to resort to the ICC rather than lodging a preliminary reference with the ECJ according to the second tenet of the *Granital* doctrine.

However, this would have been uneasy. Let us assume, for discussion's sake, that one wished to embrace the more narrow definition of direct effect as rights conferred to a person. If this were the case one would have to overcome conceptual problems and much uncertainty. It depends, indeed, on a case-by-case analysis whether a provision confers rights on individuals, for any EU sources of law can produce such an effect, which can be derived from the content of a legal provision irrespective of its legal form.

It is not, though, the linguistic structure of the disposition that is decisive. If, in fact, very accurate and detailed provisions are normally thought to possess such a sort of direct effect, sometimes principles are also deemed to be suitable for this purpose.

In such cases context-related evaluations lead the ECJ to establish that vague norms (as principles are) are to be applied in court (vertically or horizontally) insofar as they express a right which cannot be trumped.

In the end it is for the regular courts to decide (possibly with the help of the ECJ) whether or not an EU norm enjoys direct effect and such decisions necessarily entail interpretive – again controversial – choices.

These considerations lead us back to the shift referred to above as regards the use of the second *Granital* tenet, that when regular courts and the ICC began to take this tenet seriously.

²⁴ Prechal, *supra* n. 2, at 1053–1055.

²⁵ S. Prechal, *Directives in European Community Law* s. 7.2–7.3 (OUP 1995).

There are two cases decided in 2010, one in 2012 and the recent *Napolitano* we mentioned earlier.

The first of such cases (judgment n. 28/2010) represents another significant step in the evolution of the relationships between the ICC and EU law, as for the first time with this decision the ICC quashed a statutory law on the grounds of it conflicting with an EU norm.

It dealt with the interpretation of the notion of waste in the Directive 2008/98/EC of 19 November 2008 in order to establish whether or not a certain substance resulting from an industrial process was a by-product. The Italian criminal law was found to be inconsistent with EU law as long as it listed that particular substance as by-product irrespective of the condition laid down in the directive (Article 5.1 a) that ‘further use of the substance or object is certain’.

In this circumstance the ICC argued that the EU directive did not possess direct effect because from its application a criminal liability and not a right was derived. Hence, it was not the nature or content of the EU provision to make a difference, but how, or in which field of law, it had to be applied. If the same provision – which defines what a by-product is – is applied, say, to decide whether or not an administrative authority can authorize a particular use of that object, then one might well claim that it enjoys direct effect.

It is worth noting that as a consequence of the repeal of the exempting domestic rule by the ICC, the criminal court *a quo* had to go for the criminal liability for not having appropriately disposed of a substance irrespective of the fact that it was not waste according to the national law. In the end, thus, EU law enjoyed anyway a direct application in court.

A second decision in 2010 (n. 227) revolved around the alleged incompatibility between the European framework decision on arrest warrant and the national law executing the framework decision where it allowed the Italian national judge to reject the implementation of an European Arrest Warrant, and thus not to surrender a person to the foreign judicial authorities in case the competent Court of Appeal disposed to implement the sanction in Italy. The reason the ICC gave to retain the reference was that – given that non self-executing directives and framework decisions cannot have the effect of setting aside conflicting national rules – the only path to secure the primacy of EU law – in accordance with Articles 11 and 117(1) of the Constitution – would be to quash domestic rules through constitutional review.²⁶

In a decision of 2012 (no. 75) the ICC again quashed a domestic norm in conflict with the Travel Package directive (90/314/EEC of 13 June 1990) as long as the former introduced limits to the compensation for damage to the physical

²⁶ However the ICC stated in this particular case the domestic rule was not in conflict with EU law.

integrity of consumers arising from a failure to perform or improper performance of the services involved in the package not allowed by the directive. In this case the ICC confined itself to reporting the referencing court's opinion that the directive at hand would not possess direct applicability without approaching the issue.

The *Napolitano* case itself is the most significant in such a strand, where a conflict between social policies and rights was at stake, bluntly put labour rights versus the right to education. The point is that it is partial to explain this case law just by stressing the technical reasons given in such decisions as relating to the direct or non-direct effect of the provisions involved, for there were many other cases before and after these ones in which one could have invoked the same reasons. What I submit it is plausible to say instead is that the reasons behind such a new trend in the four cases we glanced through were of a pragmatic and substantive nature as well and relating to the matters at stake: the awkwardness of using EU law as a direct source of criminal liability, the sensitiveness of consumer protection policy when serious personal damage is involved, and the necessity of balancing fundamental rights in the *Napolitano* case.

In the following section I shall concentrate the analysis on the latter, not least because it is the one that involved a dialogue with the ECJ. Besides, having the chance to analyse the response of the ECJ to the reference made by the ICC will let us evaluate in context a specific justification for the use of preliminary reference by the constitutional court and to suggest the attitude of the ECJ which, in my view, would suit such a justification best.

Let us stress two points from the discussion so far.

The first is that, on the analytical side, the direct effect doctrine is something too controversial and variable across different contexts to be relied upon as a device to set in motion an intervention of the constitutional court which is justifiable under a discernible rationale.

The second is that – in empirical terms – there is no point in trying to analyse the Italian case law relating to the use of the preliminary references through the lens of the distinction between EU norms enjoying direct effect or not, whichever meaning we want to give to such an expression.²⁷

To this regard it is worth explaining that from now on the search for the justification/application of the second tenet of the *Granital* doctrine in the case law will give progressively give way to a normative argument for of the desirability of a different mechanism which involves the constitutional court in the dialogue.

²⁷ We do not need to demonstrate either what actually led the judges to raise such questions to the ICC or what was their inner conviction. For the sake of our argument – which is of a normative nature – it is sufficient to argue that it is possible that there are situations in which the courts sense that they cannot apply the EU provision straightforwardly lest to undermine some constitutional values.

5 THE MASCOLO-NAPOLITANO CASE

The *Napolitano* case, as we mentioned in section 2, is a very significant test bench for what we have discussed hitherto as regards the triangular interplay between regular courts, the ICC and the ECJ.

Dealing with the same facts as the ones brought before the ICC, a regular court (Tribunale di Napoli) decided to refer directly to the ECJ regarding the question as to whether clause 5(1) of the Council Directive 99/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP must be interpreted as prohibiting a national law which permits state schools to renew ad libitum fixed-term contracts to fill post of teachers and other staff and excludes any possibility, for those teachers and staff, of obtaining compensation for any damage suffered.

This was in contrast with the view taken by those other courts that in fact referred an almost identical question to the ICC, on the assumption that, on the one hand, there were no doubts on the conflict between the domestic legislation and EU law, and on the other hand, the latter lacked the direct effect requirement. It is worth noting that the Tribunale di Napoli glossed over this point altogether. It had not dawned on the judges that they should assess the type of effect of the EU law at stake.

The ECJ, in turn, addressed by both the Tribunale of Napoli and the ICC, in *Mascolo* considered the two references as one and found (with some caveats) the Italian law illegal.²⁸

In order to appreciate the issue between the two major courts (the ‘marrow’ of this particular instance of the dialogue) we start mentioning the essential ICC argument in the reference. The somewhat rhetorical question posed by the ICC was whether the organizational requirements of the Italian school system and its peculiar structure constituted such an objective reason as to make Italian law, which does not provide for a right for damages in relation to the hiring of fixed-term school staff, coherent with EU law legislation.

It is quite clear from the reasoning of the constitutional court that at stake in this particular case was a tactical equilibrium between two general interests and two different sets of rights to satisfy within the framework of the actual financial resources: the right to education, on the one hand, and the right to a permanent job on the other hand.

The ICC stressed that structural factors – such as the constant change in the school population, immigration, and the frequent need to replace personnel on leave due to the large appointment of women as teachers, etc. – demanded

²⁸ Case C-22/13 of 26 Nov. 2014, 2015/C 026/03.

flexibility of school staff so as to avoid an unbearable burden on public finance which could cause the actual collapse of the school service.

The ECJ, in turn, in *Mascolo* offers a general acknowledgment of such concerns when it points out that ‘education is a fundamental right guaranteed by the Constitution of the Italian Republic which obliges that State to organise the school service in such a way as to ensure that teacher–pupil ratios are constantly appropriate’ and that such an appropriate balance depends on multiple factors difficult to control or predict. The management of these factors requires flexibility which can provide ‘an objective justification under clause 5(1)(a) of the Framework Agreement for recourse to successive fixed-term employment contracts’.

It goes as far as asserting that the presence of such an ‘objective reason’ excludes the existence of abuse. But this is just ‘in principle’ and the whole point lies here. In fact, if an overall assessment of the circumstances surrounding the renewal of the relevant fixed-term contracts reveals that they do not cope with a temporary need, then there is indeed an abuse.

It emerges, then, that the argument advanced by the ICC amounts in principle to an objective reason, but that certain ‘overall circumstances’ can nevertheless determine a violation of EU law.

This argument is not easy to grasp from the perspective of a constitutional court and it creates uncertainty.²⁹ A regular court (the Tribunal of Napoli in this case) can assess the circumstances of the litigation at hand and, by consistently interpreting the national provisions, conclude that in that particular case, despite the existence of an objective reason, a misuse has occurred.

However, a constitutional court has to review the legislation against a general parameter and not any particular context. Hence, by merging the two references and using the usual type of judging and reasoning tailored to solving a litigation before a regular court, the ECJ ruling proves to be inconsistent with what the constitutional court was looking for.

The ICC in its reference had limited itself to seeking ECJ’s advice on whether or not the organizational discretionary requirements of the education system constitutes a social-policy objective pursuant to clause 5(1)(a) of the Framework Agreement.

The ECJ, apparently leaving the assessment of the said overall facts to the referring courts, rules that the challenged legislation ‘does not make it possible to

²⁹ G. Repetto, *I mutevoli equilibri del rinvio pregiudiziale: il caso dei precari della scuola e l’assestamento dei rapporti tra Corte costituzionale e Corte di Giustizia*, Diritti Comparati at, <http://www.diritticomparati.it/2014/12/i-mutevoli-equilibri-del-rinvio-pregiudiziale-il-caso-dei-precari-della-scuola-e-lassestamento-dei-r.html>, (last visited 10th October 2016) underlines how peculiar it appears that the ECJ bestows on the ICC the onus to ascertain how facts stand in order to definitely assess the legislation at hand.

be sure that the actual application of that objective reason, having regard to the particular features of the activity concerned and to the conditions under which it is carried out, is consistent with the requirements of the Framework Agreement' (paragraph 108).

This outcome has created a convoluted situation where, as a consequence of the same ECJ decision, on the one hand, a court (Napoli) went on to apply the ruling of the ECJ in terms of a right conferred on individuals to have their fixed-term contract transformed into a tenured position as teachers in public schools via a specific judicial order.³⁰ On the other hand, the ICC with its decision no. 187 of 20 July 2016, has declared constitutionally unlawful the statutory provisions which allowed schools to renew fixed-terms contracts without time frame limit. At the same time, though, the ICC has ruled that the Act of Parliament 13 July 2015, no. 107, called 'the good school', by providing a sort of mass recruiting of teachers in the same position as Ms Mascolo and introducing the rule that from 1st September 2016 fixed term contracts cannot exceed a period of thirty-six months totally, has "cancelled" the infringement of EU law. By doing so the ICC has ruled out, however, any subjective right of teachers either to obtain a tenured position or to be compensated.

There are some lessons we can draw from this chain of cases.

First of all we can understand in hindsight why until recently the ICC had barely interfered in the 'dialogue' between regular courts and the ECJ. We can argue that it had been doing so to avoid the kind of embarrassing situations we have described above, where the ECJ has interpreted its role in the (supposed) dialogue with a not very conversational attitude with the constitutional court.

Taking heed of such a point, we can also better understand the conflict of the judges who have to handle difficult, controversial and highly sensitive constitutional issues whose concern appears to be less to determine whether the EU law at stake possesses direct effect than to find the right course of action.

In the following section we shall weave together these threads to build a normative framework capable of replacing the second *Granital* tenet.

6 A PROPOSAL FOR A DIFFERENT RATIONALE TO JUSTIFY THE INVOLVEMENT OF THE ICC IN EU LAW MATTERS

In this section I argue that the intervention of the ICC in matters of EU law should be no longer based on the unsteady distinction between EU rules possessing direct

³⁰ See Tribunale di Napoli decision of 21 Jan. 2015, <http://www.gildains.it/public/documenti/4046DOC-387.pdf> (last visited 10th October 2016) where the labour judge, consistently interpreting the domestic law in light of the *Mascolo* judgment, declares that between the claimant and the Ministry of Education a tenured work relationship has been established since 2011.

effect or not but on the capacity of the courts to detect a ‘sensitive constitutional issue’.

Besides what we saw in the previous section, another difficulty regarding the idea according to which the necessity of involving the ICC in matters of EU law only arises when the EU norm does not possess direct effect, is that when the ICC quashes the ‘illegal domestic norm’ in conflict with an EU norm not having direct effect, the court from which the reference to the ICC comes still finds itself under the duty to seek a norm to apply to solve the litigation before it, in other words to fill a legal vacuum.³¹

It is true that it might be the case that the ICC provides some directions (by adopting a so called rule – or principle – adding decision), but in practical terms an EU norm non-directly enforceable will constitute the source from which the referring court extracts the rule to decide the case at hand.

Arguing from this situation it has been claimed that to assess whether an EU rule has direct effect so as to establish when an obligation to resort to the ICC arises should be abandoned in favour of a model where regular courts always go for the non-application of domestic norms however in conflict with EU law.³²

This is in a way both an equal and opposite theory to the one I want to defend. They agree on the point that using the direct-non direct effect distinction is misleading, but they disagree on whether it would be sufficient, according to that proposal, to bestow regular courts with the management of any possible conflicts between domestic and EU legal orders.

This particular position is adopted within a conceptual framework where a kind of radical monism is professed, one where all the ‘European Constitutional Charters of rights’ (national, EU, ECHR) form a ‘hyper constitutional catalogue of rights’. This means each court is expected to find the optimal interpretive solution driven by the overarching imperative (Grundnorm) of the best guarantee of rights.³³

Leaving aside any consideration regarding the political and epistemic assumptions that such an idea makes, I confine myself to pointing out (1) what seems to me a drawback of this position and a (2) different proposition stemming from the inconsistency of the direct-non direct effect distinction.

³¹ A. Ruggeri, *Effetti diretti delle norme comunitarie e costituzione*, Rivista Associazione Italiana Costituzionalisti (2015), <http://www.rivistaaic.it/effetti-diretti-delle-norme-eurounitarie-e-costituzione-db1.html> (last visited 10th October 2016) <http://www.rivistaaic.it/effetti-diretti-delle-norme-eurounitarie-e-costituzione-db1.html>.

³² *Ibid.* According to another view, though, the second *Granital* tenet is barely virtually separable from the first one (V. Onida, ‘*Armonia tra diversi*’ e problemi aperti. *La giurisprudenza costituzionale sui rapporti tra ordinamento interno e ordinamento comunitario* 22 Quaderni costituzionali 551–552 (2002).

³³ *Ibid.*

As to the first, the idea that regular courts have always to set aside (non-application) conflicting domestic norms leads to the outright exclusion of the ICC from any possible active (hidden or not) interaction with the ECJ.

However, the shift I have highlighted in the recent case law as to the application of the ‘second tenet’ of the *Granital* doctrine testifies that there is room and need for the ICC to be involved and it is quite obvious to observe that the more the EU project evolves and touches on national sovereignty the more the ‘dialogue’ mood is put under stress and the sensitivity regarding such things as constitutional identities and traditions is destined to increase.

As to the second, we saw that the new trend in case law relating to the involvement of the ICC in EU law matters is hardly explicable as a belated application of the formal requirement of the *Granital* doctrine.

We noted that it is plausible to sustain that the shift was at least partly driven by the substance of the matter at stake and besides it is also plausible to argue that a different awareness about the extent to which the two orders compete may have played a role. Also the activism of other Constitutional courts and the new debate aroused by the entry into force of the Treaty of Lisbon (the identity clause Article 4(2) TEU especially) can be a factor to take into consideration as regards this issue. We shall come back on the *Mascolo/Napolitano* case as to this in a moment.

Thus, on normative grounds, I stipulate that we should favour a trend where the substance of the litigation is what drives regular courts to resort to the ICC by making a sensible use of the dual preliminary device.

To sum up: having assumed the inconsistency of the direct-non direct effect divide and having said that we do not want the ICC to stand aside, then another mechanism has to be devised to establish when the ICC should deal with EU law issues.

The idea is that a proper step to take into consideration is to replace the present doctrine (*Granital*) regarding circumstances and limits of the ICC intervention in matters of EU law, moving from the use of the direct-non direct effect distinction to the different concept of ‘sensitive constitutional issues’.

I argue that this is a lesson we should learn from the *Napolitano/Mascolo* case.³⁴

What seems to make a difference in this particular case is not whether there is an enforceable European right hindered by domestic law – which is the core meaning of direct effect – but that constitutional turmoil was predictable.

³⁴ This interpretation of such a decision was first proposed by G. Repetto, *La Corte costituzionale effettua il rinvio pregiudiziale alla Corte di giustizia UE anche in sede di giudizio incidentale: non c'è mai fine ai nuovi inizi*, *Diritti Comparati* at, <http://www.diritticomparati.it/2013/10/la-corte-costituzionale-effettua-il-rinvio-pregiudiziale-alla-corte-di-giustizia-ue-anche-in-sede-di.html#sthash.P8JviuWg.dpuf> (last visited 10th October 2016) where he observes that in such a case the activation of the preliminary reference to the ECJ ‘is explainable with the constitutional relevance of values and principles which encroaches on the spreading out of the content of the EU directive in the domestic system’.

It is important to stress that by a ‘sensitive constitutional issue’ I do not mean something coinciding with fundamental rights, for on the contrary a perspective relying on rights only (rights conferred on individuals which are directly enforceable) may be misleading and generally speaking it is not even desirable.³⁵

In terms of a mature constitutional discourse regarding the EU integrated system we should focus on policies rather than rights. According to Gareth Davies in the Lisbon judgment of the German Federal Constitutional Court one can note a shift towards new and broader grounds of potential conflict between EU law and national constitutions, no longer confined to the field of conventional human rights, but dealing with every aspect of the ‘freedom left to define life’ in a Member State.³⁶

If this is plausible, regular courts should be encouraged to resort to the ICC whenever they feel that the conflict between national norms and EU law involves also a conflict between the latter and the freedom to define life pursuing a certain constitutional goal. We have to accept that this freedom is today far from absolute, but it is right here that the conversational mood comes centre stage.

Also such a concept as sensitive constitutional issues is obviously remarkably vague, but it is not vaguer – and counter intuitive – than the distinction between the direct and non-direct effect of EU law.³⁷

Furthermore the practice of the dialogue between regular courts and the ICC regarding EU law topics, which this pattern would favour, would bring about a progressive refinement of the notion of sensitive constitutional issues.

Ultimately this is an image to designate an intermediate space, whose borders are blurred, between the mere violation of any constitutional provision and the menace to trigger the ‘immunity bomb’ by raising a question affecting the irreducible (epistemic) core of the legal system. This hypothetical situation is called ‘counter-limits’ doctrine, outlined in the same *Granital* judgment of the ICC, to indicate those ultimate barriers to the penetration of EU law into the domestic legal system constituted by the fundamental values and bedrock principles of the constitution.³⁸

³⁵ Many authors admonish us about the risk of impoverishment of rights as a consequence of the incremental rise of their number. See R. Bin, *Nuovi diritti e vecchie questioni*, in *Desafios para los derechos de la persona ante el siglo XXI* 91 (A. Peres Miras, G. G. Taruel Lozano, E.C. Raffiotta & Aranzadi eds., Vida y Cienca, 2013).

³⁶ G.T. Davies, *Constitutional Disagreement in Europe and Search for Pluralism*, Avbelj & Komárek, *supra* n. 10, at 274–275.

³⁷ The political opportunity to adopt a vague, metaphorical notion will better emerge in the following section.

³⁸ It could be the case indeed that interpreting national provisions in the light of both constitutional principles and EU law the ICC comes to the point of facing a problem of counter-limits. And here, by the way, one of the secondary (non-essential) advantages of this pattern lies, that is to say to make sure that the ICC is the one which handles these delicate situations rather than regular courts.

What that image suggests is a procedural device rooted in substantive considerations (the constitutional importance of a question brought before a regular court) that should promote an assessment by the constitutional court. It is palpable, however, that when a court faces the possible conflict between a constitutional principle or rule and EU law – or domestic law merely implementing EU law – there is at least a hint that a sensitive constitutional issue might be looming.

We enter uncharted waters in this way, where the use of the preliminary reference (at both the EU and domestic constitutional levels) by regular courts might be put under strain.

However, it is worth pointing out that if it is not the case that a sensitive constitutional issue is at stake, then there should be no way of raising a preliminary question to the ICC, irrespective of whether the EU provision at hand enjoys direct effect. From this point of view the practice – historically endorsed by the ICC – of referring to the ECJ regarding the interpretation of EU law which is not directly enforceable would continue upon more solid grounds.

In the next section some of the problems stemming from the different proposition advocated above will be discussed. Obviously we are fully aware that there are aspects which would need further research and clarification and that are open to further discussion.

7 CONTRADICTIONARY SIGNALS IN THE ECJ CASE LAW REGARDING ‘DUAL PRELIMINARY’ REFERENCES

The main issue is that this model might appear in sheer contrast with the ECJ *Simmenthal* doctrine regarding primacy and direct effect.³⁹ Moreover, it does not suit the standard explanation and classification of the ways in which a regular court can find itself before the option of raising a (double) preliminary question respectively to the ECJ and/or the ICC.

As is well known in *Simmenthal* [paragraph 36] the Court held that a national court that is called upon, within the exercise of its jurisdiction, to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing its own motion to apply any conflicting provision of national legislation, even if adopted subsequently. In such a case it is not even necessary for the court to request or await the prior setting aside of such a provision by legislative or other constitutional means.

However, two disputed recent judgments of the ECJ have introduced contradictory elements in the *Simmenthal* scheme, at least from a procedural perspective.

³⁹ C-106/77, *Simmenthal* II (1978) ECR 629.

First in *Melki* and then in *A. v. B.* the ECJ has acknowledged the possibility for regular courts of referring a question to the constitutional court before deciding a case involving the application of an EU provision.⁴⁰

The remarkable aspect is that a mechanism which prevents a national court from immediately setting aside a national legislative provision which it considers to be contrary to EU law is deemed to be lawful by the ECJ.

It is interesting to stress that while in France it is a statutory law which provides for an obligation of the courts to refer to the Conseil Constitutionnel (*Melki*),⁴¹ in the Austrian case was the constitutional court itself, with a sort of creative ruling, to establish the priority of the constitutional review over the non-application of the domestic conflicting law (*A v. B.*).

There are, of course, conditions attached by the ECJ to avoid threatening primacy, namely three.

First, domestic courts must be free to adopt any measure necessary to ensure the provisional judicial protection of the rights conferred under the EU's legal order.

Second, their power to lodge simultaneously a preliminary reference to the ECJ should be guaranteed.

Third, a domestic court should be able to set aside, at the end of the interlocutory procedure before the constitutional court and irrespective of the decision made by the constitutional court itself, a national legislative provision if that court holds it to be contrary to EU law.⁴²

The caveats dictated by the ECJ in such cases have stirred up the debate regarding where the ECJ intends to place the bar as regards primacy and direct effect.⁴³ The third condition is especially troublesome, for it reaffirms the primacy of EU law by condemning the decision of the constitutional court to irrelevance. This creates a sense of uneasiness regarding the endorsement given to a domestic rule which makes, in turn, the disapplication of the domestic norm in conflict with EU law conditional on the prior reference to the constitutional court. This is yet another instance of the awkwardness that the constitutional relationships between the EU and national legal systems always bring about.

⁴⁰ Cases C-188/10, *Melki*, and C-189/10, *Abdeli* (2010) ECR I 0000; C-112/13 *A v. B* EU:C:2014:2195.

⁴¹ Loi organique 10 Dec. 2009, no. 1523 implementing Art. 61-1 of the French Constitution.

⁴² And the other way around one should say, even though the case of the application of a norm with the court holds to be consistent with the EU law despite the fact that the constitutional court stated the opposite is not considered by the ECJ in the two judgments at hand.

⁴³ R. Mastroianni, *La Corte di giustizia ed il controllo di costituzionalità: Simmenthal revisited?* *Giurisprudenza Costituzionale* 4089–4100 (2014).

Also in this case we can discern a sort of hiatus between the procedural device and the substance at stake. The procedural device is a preliminary reference to the constitutional court to assess whether a domestic rule is inconsistent with an EU provision so that the former can possibly be repealed. In principle, that is to say, the duty to refer to the constitutional court pre-empts the duty to set aside a domestic norm.

The substance, though, is that the ruling of the constitutional court does not bind the regular court whose duty towards the EU legal order (and the ECJ ruling) cannot however be mediated by any other authority. So what would be the point in waiting for the constitutional court's response?

From a judge's perspective, this is a conundrum, where a court finds itself literally stuck in the middle between two 'loyalties'. There is no doubt, indeed, that for any national judge a decision of the constitutional court is binding.

As regards this situation we can sense a similarity with the difficulty encountered above in justifying on substantive constitutional grounds the argument in favour of the use of the preliminary reference to the ECJ by a constitutional court.

At a closer view these two situations are in fact correlated, for the internal dialogue between a constitutional court and regular courts that the *A v. B* scenario boosts is in fact not strictly confined to a sensible use of the preliminary reference to the ECJ, because on the contrary it primarily regards how to cope with the constitutional issues necessarily implicated by the functioning of the European integrated order.

We are here at the crossroads of one of those questions which a recent study refers to as intractable.⁴⁴ I think, though, that the notion of 'sensitive constitutional issues' might help us to find a way through.

It is true that *A v. B* and *Melki* concede something to the constitutional courts by admitting that they can ordinarily be involved in matter of EU law even if the EU provisions at stake do possess direct enforceability. I argue that the ECJ was prepared to relax the *Simmenthal* requirements a bit in so far as the question at stake was of a type which in the Italian literature is called 'dual preliminary stricto sensu', meaning that the question of constitutionality is merely derived from the violation of EU law.⁴⁵ In such an occurrence it is clear that the ECJ is able (and eager) to reaffirm who is the one who enjoys without any exception the power to interpret EU law authoritatively. The third condition expounded above reflects such a concern.

However, one can imagine many other occurrences where a dual preliminary question comes out in a way that involves a problem of a constitutional nature

⁴⁴ J.E. Fossum & A.J. Menendez, *The Constitution's Gift* 163 (Rowman and Littlefield 2011).

⁴⁵ Where, that is to say, there are constitutional clauses which work as a filter between the two legal orders authorizing a cession of national sovereignty to the EU. See *supra* n. 10.

because of a potential or actual conflict between EU law provisions and national constitutional provisions.⁴⁶

It is in such circumstances – and not where dual preliminary *stricto sensu* is at stake – that the proposal we made in section 6 should operate so as to make the preliminary ruling an actual means of the ‘dialogue’.

In such kinds of situations the attitude of the ECJ is far less tolerant, though. We can refer to them as the *Arcelor/Melloni* scenario,⁴⁷ to mean those hypotheses in which a court doubts that the law correctly applying EU law (or EU law in fact) is in conflict with the Constitution. In abstract terms in these circumstances it would be barely necessary to involve the ECJ and the application of the primacy/direct effect cluster should lead straightforwardly to setting aside such constitutional provisions.

However, both in *Arcelor* and *Melloni* the French Council of State and the Spanish Constitutional court, respectively, sought to reconcile the two conflicting loyalties.

The ingenious move of the Conseil d’État in *Arcelor* was to transfer the conflict between the EU provision and the provision of the national constitution to the Union sphere, asking the ECJ whether a violation of the first could amount to a violation of any equivalent EU principle.

In *Melloni* we find something alike where the Spanish Constitutional Court, starting from the consideration that the Framework Decision 2002/584 violates the Spanish constitution, asks the ECJ to assess the compatibility of the former with the fundamental rights protected in the legal order of the EU [paragraph 45].

In his opinion in *Arcelor* AG Maduro famously endorses the concept of legal pluralism to ‘reconcile the irreconcilable’. Such concurrent claims to legal sovereignty would be the very manifestation of the legal pluralism that makes the European integration process unique:

Far from resulting in a breach of the uniform application of Community law, those claims have prompted the Conseil d’État to seek, through the preliminary ruling procedure, the assistance of the Court of Justice in guaranteeing the observance by Community acts of the values and principles also recognised by its national constitution. There should be nothing surprising about that request, the Union itself being built on the constitutional principles common to the Member States, as reiterated in Article 6(1) TEU. In reality, what the

⁴⁶ A set of examples is offered by G. Martinico, *Multiple Loyalties and Dual Preliminary: The Pains of Being a Judge in a Multilevel Legal Order*, 10 I•CON 872–877 (2012). In the Italian literature it is frequent to set out a sort of taxonomy of the hypothesis of dual preliminary. See recently R. Romboli, *Corte di Giustizia e giudizi nazionali: il rinvio pregiudiziale come strumento di dialogo* 3 (2014), *Rivista Associazione Italiana dei Costituzionalisti*, <http://www.rivistaaic.it/corte-di-giustizia-e-giudici-nazionali-il-rinvio-pregiudiziale-come-strumento-di-dialogo.html>. (last visited 10th October 2016) My opinion is that these descriptions, albeit useful, fail to grasp the crux of the matter.

⁴⁷ Case C-127/07 *Arcelor Atlantique v. Prime Minister* (2008) ECR I-9895; *Melloni v. Ministero Fiscal* (C-399/11) (2013) Q.B. 1067 (ECJ (Grand Chamber)).

Conseil d'État is asking the Court to do is not to verify the conformity of a Community act with certain national constitutional values – which it could not do anyway – but to review its lawfulness in the light of analogous European constitutional values (paragraph 15).

Under the umbrella of pluralism and the appeal to Article 6 (now Article 4.2) as paying the respect due to national constitutional values, though, what the case shows is that national constitutions have to yield to the principles of EU law as interpreted by the ECJ. Indeed the case was decided by the ECJ without any reference to Article 6 TEU or the constitutional concerns raised by the French Council of State, but simply by assessing the legality of the directive with the general principle of equal treatment as a general principle of Community law.

The ruling in *Melloni* is in the same vein and the debate that it has prompted is already familiar to constitutional law scholars across Europe.⁴⁸

In brief, also regarding such clauses as constitutional identity and common constitutional traditions the ECJ's view is that they are 'functionalised' to the EU legal system: they are first detected and then balanced exclusively at the level of the Union and they are not conceived as an external limit to the functioning of EU law.

The system in which the ECJ thrives was born and has developed for the creation of the internal market as a non-negotiable target, where respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Union.⁴⁹

My conclusion is that *Mascolo*, even though apparently dealing with different, less dramatic, challenges, belongs to the same kind of cases where difficult constitutional and political issues are at stake. This is the reason why it is finally worth coming back to it so as to gauge the options actually available to the dialogue pattern.

8 CONCLUSIONS: PRELIMINARY RULING INVOLVING SENSITIVE CONSTITUTIONAL ISSUES AS A MEANS OF A HETERARCHICAL MODEL

The decision by the ICC to make a preliminary reference to the ECJ in *Mascolo* must be put in the context of a typical uncertainty scenario, where concurring social needs and different political choices were on the table. I assume as demonstrated (in section 6) that the decision regarding what set of rights or values had to

⁴⁸ A. Torrez Perez, *Melloni in Three Acts: From Dialogue to Monologue*, 10 ECLR 308–331 (2014); L.F.M. Besselink, *The Parameters of Constitutional Conflict After Melloni*, Eur. L. Rev. 531–552 (2014).

⁴⁹ *Internationale Handelsgesellschaft* C-11/70 (1970) ECR 1125.

prevail was not the point. There were more nuanced and complex social and political issues available.

In such circumstances a polity can legitimately opt for judicial restraint and it is plausible to hold that the ICC took a deferential approach deliberately. It stressed, indeed, that a social-policy objective was at stake according to a balance struck by the legislature against a particular political and social backdrop. In this vein the ICC offered the ECJ a solution which incorporated such a kind of prudential ruling.

As we have seen according to the ICC's argument the relevant social need, the need to secure that the service of education is viable, effective and sustainable, appears to be systematically affected by a condition of unpredictability and change which can only be managed by means of attentive policy and administration.

Thus, only within this framework should the right/aspiration to a tenured job be pursued.⁵⁰

One could have envisaged a slightly different response by the ECJ given such premises, one which would let it veer away from getting involved in the balancing of constitutional values. Yet the ECJ indirectly ended up doing exactly this by essentially circumventing the reasons given by the ICC.

The ruling in *Mascolo* shows that the ECJ's view of the system is straightforward. It sees courts just as peripheral organs of the EU system, no matter what their role or position in their own legal system is. Despite all the debate regarding constitutional pluralism and constitutional dialogue within Europe, the ECJ still appears somewhat monochromatic, not willing to undertake that special role that an apex court is expected to play in public law cases, where 'judges move beyond the resolution and settlement of private disputes, and towards the reinforcement of the "public values" expressed in public law'.⁵¹

This implies that the option, say, for a deferential court – the option chosen by the ICC in this particular case – is unavailable.⁵² We can, of course, applaud the ECJ in the *Mascolo* case for having been the champion of precarious workers' rights, but it is still not a constitutional court as we mean it according to our common constitutional traditions, capable of nuanced reasoning and committed to

⁵⁰ By the way the same argument was used by the Supreme Court, Corte di Cassazione, with the judgment n. 10127 of 20 June 2012, which maintained it would be unnecessary to refer to the ECJ though. See the decision here, (last visited 10th October 2016) <http://www.dirittoscolastico.it/wordpress/wp-content/uploads/Corte-di-Cassazione-Sentenza-n.-10127-2012-.pdf>.

⁵¹ K.G. Young, *Constituting Economic and Social Rights* 198 (OUP 2012). It is meaningful that the *Mascolo* case concerns social rights, for it is especially in such a field – social rights adjudication – that the conflict in the future is more likely to happen and where an 'incrementalist' attitude of the courts is most opportune and desirable. See J. King, *Judging Social Rights* 289 (CUP 2012).

⁵² J. Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, 17 Eur. L.J. 80–120 (2011), advocates a systematic use of the possibilities of 'deference' by the European courts so as to boost a more effective dialogic pattern.

taking into account the institutional position of a ‘political court’ within a complex institutional arrangement.

This is an important point to consider, because, given that we have to cope with the constraints descending from the necessary acceptance of EU primacy and we do not want to extend the limited domain of the counter-limit doctrine – which is the denial of any pluralistic stance – the inner value of a preliminary reference issued by a constitutional court rests upon something which cannot be formalized in precise legal terms.

We can express this value by evoking a sort of political and symbolic force that the position of a constitutional court in a domestic legal system should confer on the request – the act initiating the conversation – delivered to the European Court.

The acknowledgement and sensible management of what has been defined heterarchical model to give reason to the coexistence of overlapping legal systems within the European order seems most necessary here.⁵³

According to such a model there is no hierarchy between state and European legal orders. The principle of primacy, which rules the relationship between these still autonomous legal orders, is a unique feature of EU law, the consequence of its somewhat special nature.⁵⁴

Disapplication, or non-application to use the language of the ICC, represents at the same time the key and the exclusive tool used by national courts to fulfil the aim of primacy. The main role is played by the two principles of direct effect and sincere cooperation though interpreted in a quite different light from how they are in a hierarchical model. Direct effect, indeed, is not at the service of a supremacy clause but it is what permits the setting in motion of the primacy.⁵⁵

At the same time such a heterarchical model must accept a kind of grey or vague area in which we cannot definitely say either on what ultimate rule the solution of the conflict rests or which authority has the last word. As has been underlined by Barber with reference to the inconsistent claims about the supremacy of the German Constitutional Court and the Court of Justice, the key practical point is the willingness of the main actors to accommodate such rival claims ‘by carefully avoiding pushing the issue to a crisis’.⁵⁶

In my opinion a shrewd and attentive use – in the interaction between constitutional courts and regular courts within national legal systems – of

⁵³ K. Jaklic, *Constitutional Pluralism in the EU* 195 (OUP 2014), about pluralism as the ‘third way’ characterized by heterarchy which ‘differs from hierarchy (monism) precisely in holding that both constitutional orders and their sources have to relinquish their traditional absolutist claims and instead concede that neither is any longer ultimately superior over the other’.

⁵⁴ M. Avbelj, *Supremacy or Primacy of EU Law – (Why) Does It Matter?*, 17 Eur. L.J. 744 (2011).

⁵⁵ *Ibid.*

⁵⁶ Barber, *supra* n. 5, at 327.

preliminary reference mechanisms involving sensitive constitutional issues is in fact a means of the heterarchical model.

Without the management of this grey area, the mutual acknowledgement of a space of manoeuvre to accommodate allegedly irreconcilable claims, for example by accepting that a reference made by a constitutional court counts, that is to say it possesses a special moral added value, the idea of a constitutional court taking its agenda to the ECJ remains vague and inconsistent.

In the continuing absence of such a conceptual and moral framework – which requires a change of attitude also on the part of the ECJ – the best option would be for constitutional courts to retreat to the quarters of the hidden dialogue, leaving the stage of open dialogue to the regular courts.

The radical objection to this approach is that the attitude of the ECJ, its mission, is structurally unfit for assuming the habit and style of a constitutional court.⁵⁷ This would depend, in turn, on structural factors beyond the grip of the courts, namely the absence both of a European public and constitutional space and of a European polity.⁵⁸

The lack of convergence between the terms ‘constitutional’ and ‘European’ would be the objective barrier to a dialogue having the characteristics sketched above and such a convergence could not be achieved by the courts only. The ECJ especially, being compelled to deal with the imperative of the harmony and unity within the market, cannot ontologically cope with the asymmetries – constitutional, political, economic, social, linguistic, etc. – which still characterize the EU as a whole. In other words for the ECJ to abandon monochromatism is not an actual option.⁵⁹

This is of course a very serious objection, which it is not my intention to discuss here. However, if we accept that these are the actual borders in which the dialogue can take place, then we have encountered yet another reason to advise constitutional courts to refrain from the ‘open dialogue’.

⁵⁷ F. Balaguer Callejón, *Los tribunales constitucionales en el proceso de integración europea*, *Revista de derecho constitucional europeo* 327–378 (2007).

⁵⁸ *Ibid.*

⁵⁹ C. Pinelli, *I diritti fondamentali in Europa tra politica e giurisprudenza* *Politica del Diritto* 39, 50 (2008), argues that the ECJ cannot be either a counter majoritarian court or an institution that can make the EU more democratic by managing fundamental rights issues.

