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CORE ANALYSIS

# The Italian Constitutional Court, the plurality of legal orders and supranational fundamental rights: a discussion in terms of interlegality

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**Abstract**

This work aims to investigate the stance of the Italian Constitutional Court (ItCC) on ECHR and CFREU and their respective Courts, ECtHR and CJEU. The aim is to verify if the attitude of the ItCC could be described in terms of openness or closedness, understanding openness as an effort to practise loyal cooperation through procedural means and, substantively, as greater attention for the norms of supranational orders, and closedness as the setting aside of all forms of procedural ties with the supranational Courts and the voluntary dissociation from their outcome, with the purpose of prioritising domestic constitutional provisions. To conduct the analysis, the article refers to the theory of interlegality, questioning whether ItCC, operating 'on the borders between several normative orders', has a broader accountability to these different orders. The first part of the paper is devoted to some elements drawn from the case law indicating openness, such as the language use by the ItCC, the procedures, the legal reasoning, and the effects of judgements. Attention is given to the contextual reference to the recognition norms of both the Italian Constitution and European Union (EU) Treaties and to the increasing use of preliminary rulings to the CJEU. The second part of the paper discusses a substantive criterion created by the ItCC, the 'greatest extension of guarantees', demonstrating that it does not refer to the level of protection of individual rights, but to the balance of the entire constitutional system. Our conclusion is that the ItCC trends concerning supranational rights express a deferent and operational, but vigilant cooperation, retaining a margin to ensure the vitality of the domestic Constitution.

**Keywords:** Constitutional Court adjudication; ECHR; CFREU; interlegality; European Constitutional law

## 1. The subject: the ItCC's approach towards the ECHR and the CFREU through the lens of interlegality

This article investigates the behaviour of a national Constitutional Court in the application of supranational fundamental rights. It examines the stance of the Italian Constitutional Court (ItCC) on the European Convention on Human Rights (ECHR) and European Court of Human Rights case law (henceforth, ECtHR or Strasburg Court), the Charter of Fundamental Rights of the European Union (henceforth, CFREU or EU Charter), and the corresponding Court of Justice of the European Union (CJEU) case law.

Since two seminal judgements of 2007, the position of ECHR as part of the Italian legal order and the ItCC's role to assess compliance of domestic legislation with the ECHR and the Strasbourg Court interpretation are quite stable. On the contrary, the relation between domestic legislation and EU norms has been recently re-shaped, giving rise to a new turn of the ItCC approach towards EU fundamental rights. For this reason, this article will provide only an overview of the main

trends of ItCC case law on the ECHR, while it will focus deeply on the ItCC recent judgements on the interplay between constitutional and EU fundamental rights. The general aim is to verify if the course of the ItCC could be described in terms of openness or closedness. We understand openness as an effort to practice loyal cooperation with ECtHR and CJEU through procedural means and, substantively, as greater attention for the norms of their respective orders. On the contrary, we intend closedness as setting aside all forms of procedural ties with the supranational Courts and voluntarily dissociating from the outcome of their judgements, with the purpose of prioritising domestic constitutional provisions.

To conduct this analysis, we chose a particular lens: the theory of interlegality. This theory gives some useful tools to analyse the ItCC orientation towards supranational fundamental rights, for two reasons, evidenced in the following statement: Constitutional and Supreme Courts operate '[ . . . ] on the borders between several normative orders and their different basic objectives' and may 'not be accountable solely to the order to which [they] belong, since performing the tasks of justice imposes a new responsibility to uphold the full range of normative complexities involved, to avoid injustice and partiality in decisions, and to put first the effects on those subject to their authority'.[1] This statement indicates two features of interlegality. First, those Courts have a broader accountability to the normative orders on the borders of which they operate. Second, they must avoid 'injustice and partiality', aiming at the better level of protection of the individual subject, the applicant. The first aspect seems to concern formal mechanisms, languages, and structures of inter-relation between legal orders. In fact, the theory of interlegality places particular emphasis on the 'loyalty' of Constitutional and Supreme Courts to international and supranational systems of protections of rights and, in this sense, is a useful support to analyse the ItCC liability to all systems of protection. The second aspect seems to emphasise the degree of substantive integration between Charters of Rights necessary to pursue justice, impartiality, and the highest individual protection. These two sides of the coin, formal coordination and substantive integration, inform this contribution. In fact, the first part of the article is devoted to the ItCC orientations towards the mechanisms of coordination with the ECHR and the CFREU. The second part considers the degree of integration between ECHR, CFREU and Italian constitutional rights, discussing the existence and workability of the highest level of protection as a substantive criterion to coordinate them.

We can already anticipate the answers concerning these two levels of analysis. On formal coordination, the preliminary conclusion is that, over the last decade, the ItCC has not ignored, indeed it continues to develop, instruments able to clarify the force and meaning of supranational norms and to increase channels for inter-relation with the supranational Courts. Concerning the higher level of protection, the answer is double. On the one hand, we consider, as many authors, that no maximum level of protection of an individual right can in fact be determined and that therefore this cannot be a criterion for coordination between fundamental rights. On the other hand, it is true that the ItCC adopted a criterion referred to the 'the greatest expansion of guarantees' to coordinate Italian and supranational fundamental rights. However, as we will see, this criterion does not relate to the maximum protection of an individual right alone but enables the ItCC to harmonise the Strasbourg interpretation of rights with other constitutional rights and interests. Thus, the very formula 'maximisation of protection' offered by the ItCC serves to guarantee the unity of the constitutional system of rights in the face of the particularised vision offered by the Strasbourg Court. In the end, this criterion mirrors a theory of the Constitution as a whole, rather than a substantive factor for one right to prevail over another.

In conclusion, the ItCC trends concerning supranational rights express loyalty and deference, while retaining a margin to ensure the vitality of the domestic Constitution. This approach has been further strengthened in recent months, after the rule of law crisis and the beginning of the

[1]G Palombella, 'Interlegalità. L'interconnessione tra ordini giuridici, il diritto, e il ruolo delle corti' 2 (2018) Diritto e questioni pubbliche 315–42, esp 338 (our translation).

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war in Ukraine, as evidenced in the latest Annual Report on the ItCC Activity in 2021. This Annual Report contains an invitation to the other EU Member States' Constitutional and Supreme Courts to interact with the supranational Courts constantly and fruitfully, because only in this way can the existence and durability of the European Union and its founding values be guaranteed.

Let us now proceed, presenting some features of the theory of interlegality and discussing in more detail the boundaries of our work.

## 2. Some features of interlegality, and the structure and limits of this analysis

The current legal spectrum of norms has been described as 'a mixed environment that weaves together regulatory regimes and legal orders of different territorial, political, and social levels, endowed with distinct organisational and regulatory shapes, independently capable of virtually reaching different recipients on a spectrum that varies from sub-national to State, to international, and regional and global levels'.[2] In general terms, the theory of interlegality embraces the plurality of legal orders and the fact that they are reciprocally irreducible. This theory is based on several premises that may be summarised as follows: (a) the material interconnection of objects and situations contextually relevant to a plurality of regulatory orders; (b) the movement beyond state orders; (c) more generally, the inadequacy of the concept of a closed and self-sufficient legal order to explain current legal phenomena; (d) lastly, the fact that each system is able to identify which rules are valid and applicable according to its own rules, yet these remain silent and are unable to answer the questions that arise between different systems and whose solution lies beyond each of them.

Moreover, the theory of interlegality does not aim to be merely descriptive but also to be normative. From this perspective, the theory concerns the law and production of legal norms, adopting a Kelsenian approach. It argues that monism and dualism are unable to explain the relationship between the domestic, the international, and the supranational legal orders: monism refers to a closed order while dualism assumes that the two orders run parallel, one permeating the other only through transposition and by considering external sources to be factual. On the other hand, concerning the coexistence of many regulatory frameworks, interlegality argues that the radical form of the theory of constitutional pluralism is questionable since, although it recognises the plurality of competing legal orders, it does not envisage instruments of coordination but relies on the voluntary participation of players from different systems.[3] Interlegality therefore, in our understanding, aims to manage mechanisms, safeguards, languages, and structures in the relationships between different legal orders.

This article does not cover the whole spectrum of issues addressed by the theory of interlegality. The theory has been developed as a means of understanding the current plurality of regulatory systems and how they interact at different levels: national, supranational, international, global, public, and private. Our research is limited to a 'regional' dimension, ie the European area encompassing the national legal orders, so the Council of Europe, and especially the ECtHR, and the EU legal order, insofar as they both interact, with their different features, on the domestic order.

[2]Ibid., esp 318 (our translation). See also J Klabbers and G Palombella, 'Introduction. Situating Inter-Legality' in J Klabbers and G Palombella (eds), *The Challenge of Inter-Legality* (Cambridge University Press 2019) 1–20.

[3]Nevertheless, in the opinion of some authors supporting the theory of constitutional pluralism, the coordination between legal orders is a commitment. For example, MP Maduro, 'Three Claims of Constitutional Pluralism' in M Avbelj and J Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Bloomsbury 2012) 67–84. Other theories highlight the voluntary nature of Constitutional Courts' behaviour. Reflecting on the reasons why Constitutional Courts long refused to consider themselves as judges on the basis of Art 267 TFEU, G Martinico, 'Multiple Loyalties and Dual Preliminarity: The Pains of Being a Judge in a Multilevel Legal Order' 10 (2012) International Journal of Constitutional Law 871–96, esp 888. For a supportive, but critical overview of five main features of theories of constitutional pluralism, R Bifulco, 'L'Europa e il "Constitutional Pluralism": prospettive e limiti' 3 (2018) Diritto pubblico 805–26.

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Secondly, these systems are closely linked by institutional forms of coordination. Suffice it to recall that national courts are structurally responsible for implementing all three systems of protection. This institutional pattern might suggest that the relationship between national and supranational Courts in the European space does not constitute a fertile ground for the theory of interlegality, meaning that it adds nothing more to the existing institutional and structural mechanisms. However, as said, it remains true that the debate between monism and dualism is still unsettled and the rules of reference of each system alone are insufficient to explain the behaviour of the Courts. This is the reason why, in our opinion, even in a context of a strong institutional bond, the theory of interlegality retains its use as a lens for analysis and interpretation.

Our focus on the judicial dimension, especially on the way the Italian Constitutional Court (ItCC) acts in this context, is consistent with the premises of the theory of interlegality. According to the theory, not only a valid norm, but also broader *rationes* and competing principles must be applied in complex cases; the highest courts should fulfil a dual function, ie they must perform their duties of institutional loyalty,[4] but they must also consider the reasons supported by competing normative orders. Nevertheless, this focus on the judicial dimension is also a limit of our analysis. The intersections between European legal orders consist of tools of institutional and political coordination other than judicial intervention. These instruments include structural non-judiciary mechanisms and even purely political debate. In fact, analysis of this debate would perhaps reveal the perception of political actors vis-à-vis the degree of coordination between systems of protection and the acceptability, desirability, or advisability of varying levels of integration. By way of clarification, as a non-judiciary tool of coordination, we might consider the Council of Europe mechanism for the execution of judgements under the Committee of Ministers. Regarding political debate, we might recall the lively Italian debate on the ratification of Protocol no 16 ECHR.[5] None of these topics are covered here. On the other side, at the EU level Italy fulfils the obligations arising from its membership of the Union, passing the so-called European Law and the European Delegation Law each year in accordance with Law no 234 of 2012.[6] These instruments too, as well as the corresponding political debates, are beyond the scope of this essay.

## 3. The current orientation of the ItCC regarding the ECHR

Our first purpose is to highlight and measure the 'loyalty' of the ItCC to supranational fundamental rights and their interpretation by the ECtHR and by the CJEU. Our analysis will begin with the ECHR.

Before 2001 the ECHR obtained the force of ordinary law upon ratification and through an execution order. Legal scholars tried to find a constitutional 'anchor' for the ECHR, and several possibilities were suggested in an attempt to assign the Convention a higher position in the

[4]Outside the theory of interlegality, the term 'loyalty' has been used in a specific normative meaning by other theories to describe how, in a multilevel system, ordinary courts are guardians of the application of both national law and of EU law. See Martinico (n 3) esp 873. Regarding the 'institutional loyalty' on the part of Constitutional or Supreme Courts in the theory of interlegality, we assume that it concerns the mission of Constitutional Courts to act as guarantors of the constitutional autonomy of their legal order, in the meaning of M Cartabia, *Principi inviolabili e integrazione europea* (Giuffré 1995), quoted by G Martinico, op. cit., 887, referring to the so-called 'institutional issue' and distinguishing it from the parallel so called 'axiological issue', ie the necessity to preserve a certain standard of protection of fundamental rights, understood as a 'constitutional good'.

[5]Protocol no 16, named the 'Protocol of Dialogue', introduces a formal procedure of interim consultation between the Higher Courts and the ECtHR. About the Italian debate, E Lamarque, 'The Failure by Italy to Ratify Protocol no. 16 to the ECHR. Left behind but not lost' 1 (2021) The Italian Review of International and Comparative Law 159–70, with punctual references to opinions for and against the ratification.

[6]Law no 234 of 24 December 2012 (GU no 3 of 4 January 2013), *General Rules on the Participation of Italy in the Formation and Implementation of European Union Legislation and Policies*.

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internal hierarchy of norms.[7] However, the ItCC rejected them all. Nevertheless, especially during the late 1980s, the ItCC increasingly referred to the ECHR to supplement the provisions of the Italian Constitution. Thus, before 2001, while the ECHR formally enjoyed the force of ordinary law, in practice it was already treated as an interpretative tool to support constitutional rights at constitutional level.

The Italian Constitutional Law no 3 of 2001 added a specific reference to international obligations to Article 117, paragraph 1 of the Italian Constitution.[8] Six years passed – indicative of a general attitude of cautiousness – before the ItCC acknowledged the supra-legislative rank of the ECHR in its changes to Article 117.1 It. Const. Two landmark judgements, nos 348 and 349 of 2007, definitively changed the status of the ECHR, affirming its 'intermediate' ranking (as a *norma interposta*) between law and the Constitution, making a law in breach of the ECHR indirectly incompatible with Article 117.1 It. Const., thus requiring it to be quashed.[9] Hence, as of 2007, the ECHR enjoys a hierarchical status superior to that of ordinary law. In the same seminal judgements of 2007, the ItCC identified the protocol for resolving the incompatibility between the domestic rule and the ECHR, as follows. Ordinary courts must interpret domestic legislation following the interpretation given by the Strasbourg Court. If the conflict between domestic law and the ECHR cannot be settled through interpretation, that conflict must be brought before the ItCC as a constitutional conflict since the violation of the ECHR and its interpretation leads to an indirect violation of Article 117.1 It. Const.

Since 2007, the ItCC has relied heavily on Strasbourg case law, recognising the ECtHR's prominent role as interpreter of the ECHR. Already in 2007, however, as we will say about the criterion of the 'greatest expansion of guarantees' in Section 11, the ItCC had ruled out the automatic and inflexible application of Strasbourg interpretation, reserving for itself the search for a balance with constitutional rights and interests. In subsequent decisions, indeed, the principles displayed in the 'twin' judgements have been reshaped somewhat. The ItCC started using interpretative tools to justify a margin of discretion when applying the ECHR and Strasbourg interpretation, both in cases directly involving Italy and where conventional principles have been derived from decisions concerning other countries. The ItCC sometimes refers to the ECtHR's margin of appreciation doctrine whereby national authorities enjoy some discretion in fulfilling their obligations under the ECHR. On other occasions, potential conflicts between constitutional and conventional interpretation are resolved by distinguishing.[10]

[7]The different theories attempting to give the ECHR constitutional status despite its transposition into ordinary law are described in detail in G Martinico and O Pollicino, 'Report on Italy' in G Martinico and O Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Law. A Comparative Constitutional Perspective* (Europa Law Publishing 2010) 271–99, 282–83, and by D Tega, 'The Constitutional Background of the 2007 Revolution. The Jurisprudence of the Constitutional Court' in G Repetto (ed), *The Constitutional Relevance of the ECHR in Domestic and European Law. An Italian Perspective* (Intersentia 2013) 25–36, esp 26–27.

[8]'Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from European Union law and international obligations'. This introduced a special 'anchor' to international treaties into the Italian Constitution for the first time.

[9]On the decisions nos 348 and 349 see G Repetto, 'Rethinking a Constitutional Role for the ECHR. The Dilemmas of Incorporation into Italian Domestic Law' in Repetto (n 7) 39–41; O Pollicino, 'Constitutional Court at the Cross Road between Parochialism and Cooperative Constitutionalism' 4 (2008) European Constitutional Law Review 363 ff; F Biondi Dal Monte and F Fontanelli, 'The Decision No. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention on the Italian Legal System' 9 (2008) German Law Journal 889–932.

[10]For example, ItCC no 236 of 2011, on the principle of the retroactivity of more favourable legislation, intended to be a response to *Scoppola v Italy* (no 2) App no 10249/03 (ECtHR, GC, 17 September 2009). See, further, A Guazzarotti, 'Strasbourg Jurisprudence as an Input for 'Cultural Evolution' in Italian Judicial Practise' in Repetto (n 7) 55–68, 65.

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The current trend in the ItCC's adherence to Strasbourg case law has been summarised with the adage: 'A Falling Tree Makes More Noise Than a Growing Forest'.[11] There have been very few episodes of non-compliance identified by the ItCC itself.[12] These have indicated a conscious distancing from the general trend of broad quantitative and qualitative adhesion.[13] A recent example can be found in the field of administrative sanctions of a substantially criminal nature under Article 7 ECHR and the so-called Engels criteria set out by the ECtHR. The ItCC is gradually but determinedly shifting towards the more protective principles of criminal law.[14] Essentially, the ItCC has shown compliance with the ECHR and its interpretation, at the same time seeking ways to reserve a margin of discretion for itself. We will return to this trend below when addressing the doctrine of the 'greatest extension of guarantees'.[15]

## 4. The current orientation of the ItCC regarding the CFREU

For 35 years, the ItCC had always affirmed that priority must be accorded to EU law with direct effect in conflict with national law, and that the conflict must be solved by ordinary courts by not applying the domestic norm. The lead here was the case *Granital* no 170 of 1984, in which, in line with CJEU *Simmenthal* case of 1978, the immediate application of EU law with direct effect and its prevalence over conflicting domestic law was assured.[16] Moreover, the ItCC refused for many years to make preliminary rulings to the CJEU, self-excluding its qualification as a court or tribunal within the meaning of the EU Treaties. The result was that the ItCC remained outside the assessment of EU law incompatibility, leaving this assessment to be made only by the ordinary courts, with the support of the CJEU. Since then, under the *Granital* scheme, the ItCC only had jurisdiction on the conflict between a domestic norm and an EU norm without direct effect, such as the norm of a directive, and on the violation by EU law of the supreme constitutional principles of the Italian legal order, the so-called counter-limits, through the examination of the law of ratification and execution of the Treaties.

In 2009 the CFREU came into force and, thirty-five years after *Granital*, the quantity and quality of EU attributions had grown considerably. The ItCC aim has been to re-enter the circuit of the relationship between ordinary courts and the CJEU, especially in matters of fundamental rights. The *Granital* model changed in 2017. With the seminal judgement no 269 of 2017, the ItCC moved in a new direction. It now addresses questions of non-compliance of domestic legislation

[11]D Paris, 'A Falling Tree Makes More Noise Than a Growing Forest. On the Constitutional Courts' Underestimated Contribution to the Domestic Enforcement of the European Convention on Human Rights' ZaöRV 77 (2017) – Heidelberg Journal of International Law 581–4.

[12]ItCC no 264 of 2012 and ItCC no 49 of 2015. ItCC no 264 of 2012, the so-called 'Maggio case', followed ECtHR, *Maggio and others v Italy* judgement of 31 May 2011, about a law of authentic interpretation on the calculation system for the pensions of Italian workers employed in Switzerland; ItCC no 49 of 2015 followed ECtHR *Varvara v Italy* of 29 October 2013, concerning urban confiscation in the absence of a criminal sentence, and the ItCC affirmed the axiological priority of the Italian Constitution in respect of the ECHR, but this formula, as far as we know, has never been repeated since. ECtHR, GC, *G.I.E.M. S.R.L. and Others v Italy* of 28 June 2018 refuted ECtHR *Varvara* and shared the interpretation of Arts 6 and 7 ECHR offered by the ItCC in no 49 of 2015. For more details on 'discordant cases' between ECtHR and ItCC in a general setting of 'concordant cases', let us refer to A-O Cozzi, 'The Implicit Cooperation between the Strasbourg Court and the Constitutional Courts: A Silent Unity?' 10 (2018) Italian Journal of Public Law 226–53, *Constitutional Adjudication In Europe Between Unity And Pluralism*, Special issue edited by P Faraguna, C Fasone, and G Piccirilli.

[13]See also D Tega, 'The Italian Way: A Blend of Cooperation and Hubris' in 'A Falling Tree Makes More Noise Than a Growing Forest' (2017) ZaöRV – Heidelberg Journal of International Law 685–714, arguing that most judgements of the ItCC express a genuine quest for convergence and a sincere will to enforce the ECtHR's judgements.

[14]See ItCC no 63 of 2019 on the *lex mitior* principle; no 112 of 2019 on the principle of proportionality; ord. no 117 of 2019 and judgement no 84 of 2021 on the right to remain silent. Previously, see also ItCC nos 102 and 193 of 2016 and no 43 of 2017.

[15]Section 11.

[16]Case C-106/77 *Amministrazione delle finanze dello Stato v SpA Simmenthal* ECLI:EU:C:1978:49.

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with the fundamental rights guaranteed under the Italian Constitution and, at the same time, with the CFREU in areas of EU intervention.[17] Today, the new course is as follows: when a domestic norm conflicts with constitutional and similar norms of the CFREU (possibly linked to EU secondary law), ordinary courts may raise a question of constitutionality before the ItCC under Articles 11 and 117.1 It. Const. Before or after constitutional adjudication, ordinary courts may make a preliminary reference to the CJEU on grounds similar or different from the constitutional ones. Moreover, even after the question as to constitutionality has been settled, ordinary courts may not apply a domestic rule contrary to EU law even though it has not been declared unconstitutional. This new orientation has led to a lively debate between scholars on the requirements and the grounds for the partial re-centralisation of EU non-conformity.[18] Some scholars have perceived this new path as a reduction of the well-established and fruitful relationship between the ordinary courts and the CJEU, explaining it as a re-appropriation of adjudication which serves to prioritise the Italian Constitution, indicating closedness. Others have described it in terms of openness, as a better form of coordination with the CJEU. We share the second position, and we will justify it in Section 5.

## 5. Assessing ItCC case law: language, procedures, legal reasoning, and the effects of judgements as key elements demonstrating openness

Since judgement no 269 of 2017, the ItCC justified the new EU fundamental rights incompatibility course with the aim of building constitutional traditions:

> The Court will make a judgement in light of internal parameters and, potentially, European ones as well (per Articles 11 and 117 of the Constitution), in the order that is appropriate to the specific case, including for the purpose of ensuring that the rights guaranteed by the aforementioned Charter of Fundamental Rights are interpreted in a way consistent with constitutional traditions, which are mentioned in Article 6 of the Treaty on European Union and Article 52(4) of the EUCFR as relevant sources in this area.[19]

Certainly, the recognition of a constitutional tradition lies on the borderline between the Court's affirmation of its distinctiveness and the construction of a common heritage. In this Section we

[17]On this decision, G Martinico and G Repetto, 'Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court and Its Aftermath' 15 (2019) European Constitutional Law Review 731–51.

[18]See, among many, the contributions in the following edited books: C Caruso, F Medico and A Morrone (eds), *Granital Revisited? L'integrazione europea attraverso il diritto giurisprudenziale* (Bonomia University Press 2020), (buponline.com/prodotto/granital-revisited); D Tega, *La Corte nel contesto. Percorsi di ri-accentramento della giustizia costituzionale in Italia* (Bonomia University Press 2020) esp 237–49; B Caravita (ed), *Un riaccentramento del giudizio costituzionale? I nuovi spazi del Giudice delle leggi, tra Corti europee e giudici comuni* (Giappichelli 2021), and the contributions collected in the forum 'Carta dei diritti fondamentali UE e rapporti con l'ordinamento italiano' (forumcostituzionale.it). See also LS Rossi, 'La sentenza 269/2017 della Corte costituzionale italiana: obiter "creativi" (o distruttivi?) sul ruolo dei giudici italiani di fronte al diritto dell'Unione europea' 3 (2018) (federalismi.it), 31 January 2018; C Amalfitano, 'Il dialogo tra giudice comune, Corte di Giustizia e Corte costituzionale dopo l'obiter dictum della sentenza n. 269/2017' 2 (2019) (osservatoriosullefonti.it); G Repetto, 'Il significato europeo della più recente giurisprudenza della Corte costituzionale sulla "doppia pregiudizialità" in materia di diritti fondamentali' (2019) 4 (rivistaaic.it); F Donati, 'I principi del primato e dell'effetto diretto nel diritto dell'Unione in un sistema di tutele concorrenti dei diritti fondamentali' 12 (2020) (federalismi.it) 104–25; R Mastroianni, 'Sui rapporti tra Carte e Corti: nuovi sviluppi nella ricerca di un sistema rapido ed efficace di tutela dei diritti fondamentali' (2020) (europeanpapers.it) 1–30; N Lazzerini, 'Dual Preliminarity Within the Scope of the EU Charter of Fundamental Rights in the Light of Order 182/2020 of the Italian Constitutional Court' 3 (2020) (europeanpapers.eu) 1463–76. All scholars' positions are fully analysed by A Cardone, 'Dalla doppia pregiudizialità al parametro di costituzionalità: il nuovo ruolo della giustizia costituzionale accentrata nel contesto dell'integrazione europea' 13 (2020) (osservatoriosullefonti.it) 13–75, and *Liber Amicorum per Pasquale Costanzo*.

[19]ItCC no 269 of 2017, para 5.2 *Cons. dir.*

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suggest four elements drawn from case law that, in our opinion, map this new course in terms of openness. These elements are the language used by the ItCC, the procedures, the legal reasoning, and the effects of judgements. These will now be analysed in turn.

### A. Language

An analysis of language may not be sufficient in itself to assess a new judicial approach, because the concrete effects might run counter to those that the language may have been expected to produce. Nevertheless, the choice of words may be a good indicator of the context in which the ItCC seeks to work and the way it wishes to be understood. After judgement no 269 of 2017, and even more so in subsequent decisions, the ItCC introduced a centralised review of legislation within the framework of cooperation with the CJEU. Reference has been made to the fact that the 'Charter of Rights is a part of Union law endowed with particular characteristics due to the typically constitutional stamp of its contents. The principles and rights laid out in the Charter largely intersect with the principles and rights guaranteed by the Italian Constitution (and by other Member States' constitutions)'[20]; 'there is an inseparable link between the constitutional principles and rights invoked ... and those recognised by the Charter, as enriched by secondary law, which bodies of law complement each other and operate in harmony',[21] and that '[...] all of this plays out within a framework of *constructive and loyal cooperation between the various systems of safeguards*, in which the constitutional courts are called to enhance dialogue with the CJEU (see, more recently, Order no 24 of 2017), in order that the maximum protection of rights is assured at the system-wide level (Article 53 of the CFREU)'.[22]

### B. Procedure

Since judgement no 269 of 2017, and more clearly from judgement no 20 of 2019, the question of constitutionality has been presented as a concurrent remedy in the light of the criteria and requirements of the CJEU for preliminary rulings: 'On the other hand, the emergence of the guarantees found in the EUCFR and those provided by the Italian Constitution can generate *competing legal remedies*. In light of this, for cases of 'double prejudice' [*doppia pregiudizialità*] – ie disputes that may give rise to questions of constitutionality and, simultaneously, questions of compliance with Union law – the CJEU has, in turn, affirmed that Union law 'does not preclude' the overriding character of the constitutional determination that falls under the competence of the national constitutional courts, *provided that the ordinary judges are free to submit to the CJEU "any question that it considers necessary, at whatever stage of the proceedings it considers appropriate, even at the end of an interlocutory procedure for the review of constitutionality"*'. 'In general, the supervening value of the guarantees set down by the EU Charter with respect to those of the Italian Constitution generates *more legal remedies*, enriches the tools for protecting fundamental rights,

[20]ItCC no 269 of 2017, para 5.2 *Cons. dir.*; the same in ItCC no 20 of 2019, paras 2.1, 2.2; on the similarity between the Italian Constitutional rights, EU Charter Rights, and ECHR rights in question in the case, see ItCC no 63 of 2019, para 4.3 *Cons. dir*; ord. no 119 of 2019, para 2 *Cons. dir.*; ord. no 182 of 2020, para 3.2 *Cons. dir*. All references are taken from the English translations of judgements on the website of ItCC <www.cortecostituzionale.it>.

[21]ItCC ord. no 182 of 2020, para 3.2 *Cons. dir*.

[22]ItCC no 269 of 2017, para 5.2 *Cons. dir.*; on the concurrence of remedies and the loyal and constructive cooperation between Courts, also ord. no 119 of 2019, para 2 *Cons. dir.*, ord. no 182 of 2020, para 3.1 *Cons. dir.*: 'Where a referring court raises a question of constitutionality that also touches upon the provisions of the Charter, this Court cannot avoid assessing whether the contested provision at the same time violates both the principles of Italian constitutional law and the guarantees enshrined in the Charter (judgement no 63 of 2019, point 4.3 of the Conclusions on points of law). In fact, as the guarantees laid down in the Constitution are supplemented by those enshrined in the Charter, this "generates more legal remedies, enriches the tools for protecting fundamental rights, and, by definition, denies any restriction" (judgment no 20 of 2019, point 2.3 of the Conclusions on points of law)'.

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and, by definition, denies any restriction'.[23] Among these tools there is *also* the declaration of unconstitutionality of domestic legislation.[24] On the other hand, '[w]ithin an area that is marked by the growing influence of EU law, it is inconceivable not to promote a dialogue with the Court of Justice, which is charged with ensuring "that in the interpretation and application of the Treaties the law is observed" [Article 19(1) TEU]'.[25] Verification of constitutionality has thus been extended while seeking to strike a balance with the CJEU requirements to apply EU law in a uniform manner, considering the needs of both orders. This is why the ItCC has left the ordinary courts free to adopt any measure necessary to ensure provisional judicial protection of the rights conferred by the EU legal order and to disapply, at the conclusion of the interim constitutionality proceedings, the domestic provision at issue even if it is deemed not unconstitutional but in conflict with EU law.[26] At the same time, the position of the ItCC regarding the CJEU is that the ItCC gives itself the opportunity to say the 'first word', so to frame the question, rather than the power of the 'last word', avoiding a hierarchical approach.[27]

### C. Legal reasoning

In the case law following judgement no 269 of 2017, the ItCC carries out a parallel examination of domestic, ECHR, and EU norms in the light of ECtHR and CJEU case law. This analysis highlights the principles developed by the supranational courts, which the ItCC then compares with the domestic constitutional provisions. It is frequently stated that the plurality of sources of law examined (the Constitution, the ECHR, and the CFREU) converge towards a single principle or that the principles set out in the case law of the Strasbourg Court and the CJEU have a common *rationale* or highlight common limits.[28] In our opinion, this kind of reasoning has the merit of clarifying what Strasbourg and the CJEU say and from which cases their orientations have been formed, albeit keeping the respective sources and their corresponding interpretation distinct and making them speak separately. This technique allows for greater scrutiny of the argumentative process by other jurisdictional referents, scholars and, more broadly, public opinion.

[23]ItCC no 20 of 2019, para 2.3 *Cons. dir.*

[24]ItCC no 63 of 2019, para 4.3 *Cons. dir.*

[25]ItCC ord. no 182 of 2020, para 3.2 *Cons. dir.*, arguing that the preliminary reference was appropriate because the scope and depth of EU guarantees have implications for the constant evolution of constitutional principles, as part of a dynamic of mutual implication and fruitful supplementation.

[26]ItCC no 269 of 2017, para 5.2 *Cons. dir.*, expressly mentioning Case C–112/13 *A v B and others* ECLI:EU:C:2014:2195 and Joined Cases C–188/10 *Melki* and C–189/10 *Abdeli* ECLI:EU:C:2010:363. In fact, the requirement most frequently challenged by the new orientation of the ItCC is that of immediacy: The immediate, simultaneous, and automatic application of Regulations in all EU Member States. For a discussion of this aspect, as well as on the risk of 'patriation' of the CFREU, let us refer to A-O Cozzi, 'Sindacato accentrato di costituzionalità e contributo alla normatività della Carta europea dei diritti fondamentali a vent'anni dalla sua proclamazione' 3 (2020) *Diritto Pubblico* 659–714, esp 684–8, 694.

[27]ItCC no 20 of 2019, para 2.3 *Cons. dir.* The metaphor of the 'first word' is frequent in European constitutional law studies; see for example N Lupo, 'The Advantage of Having the "First Word" in the Composite European Constitution' 10 (2018) Italian Journal of Public Law 186–204, *Constitutional Adjudication in Europe Between Unity and Pluralism*, quoted above; D Thym, 'Friendly Takeover, or: the Power of the 'First Word'. The German constitutional Court Embraces the Charter of Fundamental Right as a Standard of Domestic Judicial Review' 16 (2020) European Constitutional Law Review 1–26, esp 3, referring to the so-called *Right to be forgotten I* e *II* judgements of the BVerfG, 6 November 2019, I BvR 16/13 and I BvR 276/17.

[28]In ordinance no 117 of 2019, for example, the ItCC began its legal reasoning by affirming that: 'All the provisions of the Constitution, the ECHR, the International Covenant on Civil and Political Rights and the CFREU cited by the Supreme Court of Cassation recognise – expressly, in the case of Art 14 of the International Covenant and implicitly, in all other cases – the right of the person not to be compelled to testify against themselves or to confess guilt (*nemo tenetur se ipsum accusare*)' (para 3 *Cons. dir.*); so the ItCC analyses the case law of the CJEU on hearing the interested party in proceedings relating to anti-trust offences, but defines it as outdated and questions its continuing relevance. Concerning the ECHR, in judgement no 63 of 2019, on the retroactivity of the *lex mitior* in matters of administrative penalties, there clearly emerges an attempt to frame and discuss supranational case law even when there are no precedents in Strasbourg case law and there is no consolidated orientation.

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### D. Effects

The judgements quoted above quashed the domestic legislation in conflict with EU law with *erga omnes* effects. Thus, as things stand, recentralising the review of constitutionality seems to bring advantages in terms of the coexistence between constitutional and EU principles, shaping the conformity of domestic law in relation to EU law without undermining its application.[29] These outcomes show that centralised review can indeed serve to expunge domestic rules that are also in conflict with EU rules, ensuring their uniform application. Legal certainty is increased precisely because the ruling of unconstitutionality has *erga omnes* effects, whereas non-application by ordinary courts has limited *inter partes* effects.

In conclusion, all the elements considered – ie the wording, the idea of concurrent remedies provided in constitutional law but coherent with (and not destructive of) EU principles, the legal reasoning that takes into account all the provisions and their interpretation by each Court, and the effects of decisions – are, in our opinion, signs of openness as an effort to practice loyal cooperation with ECtHR and CJEU through procedural means.[30] The EU supranational legal order and the internal orders are so strictly connected that ordinary courts are per se courts of both EU and domestic law. And the ItCC takes up the game once again and more vigorously.

## 6. Hints from interlegality: the conscious and deliberate reference to the recognition norms of different systems

Some other elements of the ItCC case law may be read in terms of closedness, reappropriation, or exclusion. In fact, the procedural scheme of EU incompatibility set out in judgement no 269 of 2017 could be steered in a less EU-friendly fashion. In fact, in both the ItCC case law on the ECHR, and now in its new orientation on EU fundamental rights, the ItCC seems to prioritise domestic constitutional provisions, in terms of retaining the power to annul a law on purely national grounds and absorbing the other grounds for unconstitutionality, including those related to EU law. Moreover, if no preliminary reference is made, the CJEU would be prevented from making its own proportionality assessment. Is this a sign of hierarchical priority? The theory of interlegality provides us as with a lens for analysis and suggests some further considerations. In terms of interlegality, we should keep in mind that 'each system is able to identify which rules are valid and applicable according to its own "recognition rules", but these remain silent and inadequate to answer questions that arise between several systems and whose solution goes beyond each of them'.[31] Here, the ItCC case law reveals an interesting feature. In the ItCC's reasoning, *there is continuous and voluntary oscillation between the norms of reference for the different systems of protection in both substantive and procedural terms*. In substantive terms, because the ItCC reasoning sets out and discusses all the relevant supranational principles and their respective jurisprudence and compares them with the constitutional principles (as mentioned above). In procedural terms – and this is the point here – because reference is made to the principles that build the architecture of both the constitutional and EU legal order. At the constitutional level, the ItCC decisions refer to Article 11 and Article 117.1, as the norms that open up the domestic system to international and supranational law; to Article 101.2 It. Const., which holds that judges are subject only to the law, where the notion of *law* is also extended to conventional and EU law[32]; to Article 134 It. Const., as the source of the centrality of the judicial review of

[29]ItCC judgements nos 20, 63, and 112 of 2019 declared the challenged domestic rules unconstitutional; ordinances nos 117 of 2019 and 182 of 2020 suspended the proceedings to raise a preliminary question. For the outcomes of these preliminary rulings, see Section 7 below.

[30]Section 2.

[31]Palombella (n 1) 331.

[32]ItCC no 49 of 2015, para 7 *Cons. dir*., where Art 101.2 It Const. is extended to ECHR, as incorporated into the domestic system by an ordinary implementing law; ItCC no 269 of 2017, referring Art 101.2 to EU law. About the meaning and function

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legislation with effects *erga omnes*.[33] But at the same time, reference is made also to Article 19 TEU and Article 267 TFEU, on the role of the CJEU and preliminary references, as well as to Article 6 TEU and to Article 52.4 of the EU Charter on common constitutional traditions, together with the individual substantive norms of the ECHR and of the CFREU in question.[34] Thus, the judicial basis for adjudication not only takes domestic provisions into account but also the requirements of the supranational sources. The same line of argument, the plurality of sources belonging to different legal systems, is emphasised by those authors who consider the new orientation of the ItCC as an expression of the meta-principle of loyal cooperation between the States and the Union deriving from Article 4.3 TEU and embedded in the national system in Article 11 It. Const.,[35] considering both norms together.

Certainly, it could be argued that the mere formal reference to the EU Treaties' rules could be only cosmetic. However, this reference is consequential, insofar as it is accompanied by a deliberate recourse to the preliminary reference. We now turn to this point. The theory of interlegality helps us to highlight it, again in terms of 'formal coordination'.

## 7. The ItCC increasing use of preliminary reference to the CJEU

The partial re-centralisation of questions of non-compliance between domestic legislation and constitutional and EU rights follows a trend begun several years ago, when the ItCC overruled its previous voluntary exclusion from the preliminary ruling procedure, and from the mechanism of institutional relations with the CJEU. The ItCC initially referred a preliminary question in a proceeding on State and regional legislative competences (2008) and then in an incidental proceeding (2013). In January 2017 the ItCC referred to the CJEU the famous *Taricco* case, on VAT fraud and the statutory limitation of offences. In that case, instead of applying the counter-limits control, the ItCC preferred to seek interpretative assistance from the CJEU.[36] These judgements are the premises of the recent EU non compatibility re-centralisation (starting

of 'law' in Italian Constitution in a European perspective, G Piccirilli, *La 'riserva di legge'. Evoluzioni costituzionali, influenze sovrastatuali* (Giappichelli 2019).

[33]In ItCC no 269 of 2017 the re-centralisation of adjudication on the grounds of the contextual violation of constitutional and CFREU rights is justified by referring, inter alios, to Art 134 It. Const. as 'a cornerstone of the constitutional architecture' (p 5.2. *Cons. dir.*). On whether the centralised review of legislation constitutes itself a supreme principle of the Italian constitutional order and a counter-limit, see, well before judgement no. 269 of 2017, A Cardone, *La tutela multilivello dei diritti fondamentali* (Milan 2012) 54 ff, 89 ff; for an opposing view, C Pinelli, 'Princìpi, regole, istituti' 1 (2015) Diritto pubblico 35–62, esp 55 ff, arguing that the supreme principle is the judicial review of legislation, whether it is entrusted to a special constitutional court or not.

[34]Reference is also made to supranational doctrines: see, for example, ItCC no 269 of 2017, para 7 *Cons. dir.* (referring to 'primacy and direct effect of European Union law as consolidated in both European and constitutional case law'); para 5.2 *Cons. dir.*, on Art 53 CFREU ('[ . . . ] all of this plays out within a framework of constructive and loyal cooperation between the various systems of safeguards, in which the constitutional courts are called to enhance dialogue with the CJEU (see, most recently, Order no 24 of 2017), in order that the maximum protection of rights is assured at the system-wide level'). Art 53 seems to be understood here as one of the reasons permitting a centralised review of constitutionality in the new terms provided for by the ItCC.

[35]N Lupo, 'Con quattro pronunce dei primi mesi del 2019 la Corte costituzionale completa il suo rientro nel sistema "a rete" di tutela dei diritti in Europa' <www.federalismi.it> 10 July 2019, 21.

[36]ItCC no 24 of 2017, English version in <www.cortecostituzionale.it/documenti/download/doc/recent_judgments/O_24_2017.pdf> and, following C–42/17 *M.A.S. and M.B.* (2017) CJEU GC 5 December 2017, ItCC no 115 of 2018, English version <www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_2018_115_EN.pdf>. See, among many, G Piccirilli, 'The 'Taricco Saga': The Italian Constitutional Court continues its European journey: Italian Constitutional Court, Order of 23 November 2016 no. 24/2017; Judgement of 10 April 2018 no. 115/2018 ECJ 8 September 2015, Case C-105/14, Ivo Taricco and Others; 5 December 2017, Case C-42/17, M.A.S. and M.B.' 14 (2018) *European Constitutional Law Review*. 814–33; M Bonelli, 'The Taricco Saga and the Consolidation of Judicial Dialogue in the European Union' 25 (2018) Maastricht Journal of European and Comparative Law 357–73; F Viganò, 'Melloni Overruled? Considerations on the 'Taricco II' Judgment of the Court of Justice' 9 (2018) New Journal of European Criminal Law 18–23, and all the contributions in A Bernardi and C Cupelli (eds), *Il caso Taricco e il dialogo tra le Corti.*

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with no 269, in December 2017). Clearly, these dates – 2008, 2013, and 2017 – demonstrate that this development has been slow, subtle, and certainly not automatic. Instead, it is the result of choices that have been refined over time. On the other hand, this slow development is not isolated but reflects a general trend beyond Italian borders. In the last decade, many national Supreme or Constitutional Courts have decided to make preliminary references to the CJEU.[37] In this way, the number of occasions increased on which the interpretation of domestic constitutional rights sits alongside the interpretation of supranational rights.

After 2017, the ItCC made four preliminary rulings: no 117 of 10 May 2019, on the right to remain silent and to avoid self-incrimination in procedures for administrative sanctions of a criminal nature; no 182 of 30 July 2020, on the exclusion of third-country nationals from maternity allowances and child-birth allowances; more recently, no 216 and 217, both of 18 November 2021, on the European arrest warrant. The first, ord. no 216 of 2021, asks whether Article 1(13) of the Council Framework Decision 2002/584/JHA, in the light of Articles 3, 4 and 35 CFREU, should be interpreted as meaning that the surrender of a person suffering from a serious chronic and potentially irreversible disease may be suspended if it may expose that person to the risk of serious harm to health. The right to health is protected under Article 32 It. Const. and Article 35 CFREU. The second referral, ord. no 217 of 2021, concerns Article 4(6) Framework Decision, in the light of Article 1(3) of that decision and Article 7 CFREU, asking whether it precludes legislation, such as the Italian one, that absolutely and automatically prevent the executing judicial authorities from refusing to surrender third-country nationals staying or residing in Italian territory, irrespective of the links those individuals have with that territory, and asking what criteria should be used to establish that such links are significant.[38]

In sum, the ItCC made a total of seven preliminary rulings, four of which in the last three years. Beyond the quantitative data, three observations can be made.

The first observation concerns the areas of legislation involved. The recent preliminary rulings include vital areas of EU law: welfare benefits to third-country nationals, equal treatment, and the European arrest warrant. Precisely in this field, almost entirely harmonised, the CJEU has seemed to replace an initial attitude of closure with a more flexible approach that gives room for national authorities.[39] Thus, the interaction between Constitutional Courts and CJEU seems important to raise common standards.

The second consideration deals with the coherence of outcomes. The CJEU judgements resulting from the preliminary references have been followed by the ItCC, that quashed the relevant domestic legislation. In detail, the CJEU Grand Chamber answered ItCC ord. no 117 of 2019 on the right to remain silent in *D.B.*, 2 February 2021, following the approach of the ItCC and

*L'ordinanza 24/2017 della Corte costituzionale* (Jovene 2017); and in A Bernardi (ed), *I controlimiti. Primato delle norme europee e difesa dei principi costituzionali* (Jovene 2017).

[37]On this recent trend, see the contributions in (2015) German Law Journal Special Issue *Preliminary References to the Court of Justice of The European Union by Constitutional Courts*, vol. 16, 6 and M Claes, 'The Validity and Primacy of EU Law and the Cooperative Relationship Between National Constitutional Courts and the Court of Justice of the European Union' 23 (2016) *Maastricht Journal of European and Comparative Law* 151–70 esp 164; M Wendel, J-H Reestman and M Claes, 'Better In Than Out: When Constitutional Courts Rely on the Charter', Editorial 16 (2020) European Constitutional Law Review 1, 1–7. See also D Paris, 'Constitutional Courts as European Union Courts: The Current and Potential Use of EU Law as a Yardstick for Constitutional Review' 24 (2017) Maastricht Journal of European and Comparative Law 792–821.

[38]Both questions are still pending, C–699/21, E.D.L. and C–700/21, O.G. See C Amalfitano and M Aranci, 'Mandato di arresto europeo e due nuove occasioni di dialogo tra Corte costituzionale e Corte di giustizia' (2022) 1<www.sistemapenale.it> 5–33.

[39]We refer, for closure, to Case C–399/11 *Melloni* (2013) CJEU GS 26 February 2013, precisely because the Framework Decision is based on mutual recognition, and flexibility to C–404/15 e C–659/15 PPU *Aranyosi e Căldăraru* (2016) CJEU GS 5 April 2016. In this sense G Anagnostaras 'Mutual Confidence Is Not Blind Trust! Fundamental Rights Protection and the Execution of the European Arrest Warrant: Aranyosi and Caldararu' 53 (2016) Common Market Law Review 1675–704, and N Lazzerini, 'Gli obblighi in materia di protezione dei diritti fondamentali come limite all'esecuzione del mandato di arresto europeo: la sentenza Aranyosi e Căldăraru' (2016), 445–52.

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interpreting the secondary legislation in the light of Articles 47 and 48 CFREU. The question went back to the ItCC that, in line with the CJEU reasoning, quashed the relevant Italian legislation in judgement no 84 of 2021. The same mechanism occurred with ItCC ord. no 182 of 2020, concerning childbirth allowance and maternity allowances for third-country nationals. CJEU Grand Chamber *O. D.*, 2 September 2021, found the domestic rule incompatible with the relevant EU law, and the subsequent ItCC no 54 of 2022 applied that judgement, quashing the referred Italian legislation.

Third – and maybe most relevant consideration – in recent times, the function of preliminary ruling changed. In the *Taricco* case, the choice to make a referral was the last chance to avoid enforcing the counter-limits, the ultimate boundaries of the constitutional system. The interaction between Courts therefore occurred on the verge of break down. On the contrary, in recent cases the preliminary reference is not reserved to extraordinary instances of alleged violation of the supreme principles. Preliminary references have become habitual, aiming at seeking interpretation for 'ordinary' constitutional rights and interests as they emerge from the cases. We will return to this point in Section 8, comparing the constitutional limitations to ECHR with constitutional limitations to EU law. The Section contains an interlude, on the extent to which ItCC attitude depends on the formal sources of the Italian Constitution and how much on the interpretation of the ItCC itself.

## 8. Openness as a feature of written norms

Some considerations should now be offered as to whether the ItCC attitude towards supranational rights depends directly on the characteristics of the Italian Constitution's norms on international and EU law or whether this approach mainly depends on their interpretation by the ItCC itself. Here again interlegality helps us, as we mentioned, highlighting the fact that the internal norms of a legal order are not enough to emphasise the current close interrelation between systems. But this consideration (the structural inadequacy of the norms of reference in an individual system) does not give rise to a different solution: there is (still) no general international set of norms able to serve as a reference for all national systems. It has even been claimed that a general constitutional supranational order does not exist.[40] So, from a normative perspective, it would not seem completely mistaken to start from a reflection on the constitutional norms of each system.

In this sense, Articles 10 and 11 It. Const. have been interpreted by scholars as the source and expression of a principle of 'openness' of the Italian Constitution across international and supranational legal orders.[41] This openness is not empty and neutral but is substantively addressed to the protection of individual human rights, as emphasised by reading Articles 10 and 11 in the light of Articles 2 and 3 It. Const. on inviolable rights and imperative duties, as well as the principle of equality in formal and substantial terms. A clear index of this substantive focus can be found in Article 11 itself, where limitations of sovereignty are conditioned by the purpose of 'ensuring peace and justice among nations'. So, the first point is that *the written Constitution* contains the seeds for the due consideration of international and supranational norms. Thus, 'openness' does not depend exclusively on judicial interpretation; rather, it is rooted in the wording of the Constitution.

This is the result of the historical premises of the Italian Constitution of 1948 – the personal circumstances of life of many of those involved in framing the new document, exiled under

[40]Klabbers and Palombella (n 2) 4–5, on the reasons why the idea of a constitutionalisation of the international order, which was very inspiring a decade ago, has somewhat lost ground.

[41]Art 10.1 It. Const. reads: 'Italian laws conform to the generally recognised norms of international law', while Art 11 It. Const. reads: 'Italy rejects war as an instrument of aggression against the freedoms of others peoples and as a means for settling international disputes; it agrees, on conditions of equality with other states, to the limitations of sovereignty necessary to create an order that ensures peace and justice among Nations; it promotes and encourages international organisations having such ends in view'. Art 11 was written to allow Italian membership of the United Nations.

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Fascism; the concomitant negotiations of the Paris Treaty during the discussion phase[42] – and subsequent implementation by parliament itself. It has been argued that the Constituent Assembly's openness to the international order was geared to Italy's active diplomatic participation in international relations as part of a new order of relations between States, much less conditioned by the awareness of orienting the Republic towards international instruments to protect human rights, which were only in the early stages at the time. But Italy's adhesion to the ECHR in 1955 represented recognition and acceptance of a common heritage of traditions and political ideals, respect for freedoms, and the pre-eminence of law, thus giving meaning and direction to a constitutional opening on the international level and with regard to some of its basic choices. The fact that the Preamble to the ECHR referred to the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948 led to the assertion that Italy accepted the supranational dimension of human rights, which had not been emphasised during the drafting of the Constitution debate. This implied voluntary acceptance of, rather than submission to, the constraints of the political clauses of the Peace Treaty.[43]

Conversely, other Constitutions undoubtedly have a more detailed and specific range of norms devoted to international human rights (for example the Spanish Constitution of 1978, Article 10.2, or Article 16.2 of the 1976 Portuguese Constitution)[44] and/or the EU integration process. These and other Constitutions have been amended following the evolution of EU Treaties (the German and French Constitutions of 1949 and 1958 respectively). In Italy, however, the evolution of EU integration did not go hand in hand with constitutional revisions; indeed Article 11 remains unchanged since 1948.[45] Consequently, compared with the more detailed provisions of other Constitutions, Articles 10 and 11, and the more recent Article 117.1 It. Const., allow a wider margin of interpretation. This margin will be discussed in Section 9, considering this time together the ItCC attitude towards ECHR and CFREU.

## 9. Openness arising from interpretation: Some common traits of the ItCC case law on ECHR and CFREU

As said, the Italian Constitutional provisions set out a principle of openness, at the same time leaving ample leeway to the interpreter. This Section is devoted to the use of this margin by the ItCC and gives us the chance for an integrated examination of both ECHR and CFREU *status* in the domestic order. The starting point is that, although the behaviour of the ItCC in many ways tends towards integration, the ItCC has always confirmed the principle of separation between the supranational and national legal orders (and this is one of the reasons for the theory of interlegality, disputing that a similar doctrine is still tenable, as well as the qualification of EU law as a

[42]A Cassese, 'Lo Stato e la Comunità internazionale (Gli ideali internazionalistici del costituente)' in G Branca (ed), *Commentario alla Costituzione*, *Art 1–12*, *Principi fondamentali* (Zanichelli Il Foro Italiano 1975) 461 ff.

[43]S Bartole, 'La nazione italiana e il patrimonio costituzionale europeo. Appunti per una prima riflessione' (1997) *Diritto pubblico* 1–26, now in S Bartole, *Scritti scelti*, introduced by Roberto Bin et al (Jovene 2013) 759–77, esp 760, as would be demonstrated by the Constituents' failure focus on the political clauses of the Peace Treaty and their effects on the domestic order, and esp 770 on adhesion to the ECHR, quoting F Cocozza, *Diritto comune delle libertà in Europa*, *Profili costituzionali della convenzione europea dei diritti dell'uomo* (Giappichelli 1994) 51 ff.

[44]For example, LFM Besselink, 'The Protection of Fundamental Rights Post-Lisbon. The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions, Questionnaire and General Report' (Tartu University Press 2012) Reports of the XXV FIDE Congress, Tallinn, vol. 1, 1–139, paper version in <www.pure.uva.nl/ws/files/1863964/122194_The_Protection_of_Fundamental_Rights_post_Lisbon_FINAL_corrected.doc> accessed June 2021, referred to the technique of national rights interpretation consistent with international human rights standard as implied in the Italian Constitution, quoting ItCC judgements no 348 and 349 of 2007 in note 23, while it is mandated explicitly in other Constitutions.

[45]On the inadequacy of Art 11 to handle the current degree of development of the European order, which no longer involves only limitations, but real transfers of sovereignty, among many others S Bartole, 'La nazione italiana e il patrimonio costituzionale europeo' (n 43) 775.

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factual source). Each pattern, ie separation or integration, has been thoroughly analysed and discussed by scholars, but here the point is that the contribution of the ItCC to defining the set of relations between domestic, international, and supranational norms has been extremely significant, as issues concerning the ECHR and EU law clearly indicate. Generally speaking, for both ECHR and EU law, the ItCC has acted by means of two different tools: a general resetting and a case-by-case adjudication. Periodically, the ItCC envisaged a general reset of the system–coordination mechanisms, addressed internally to national courts, lawyers, and applicants, and externally to the supranational Courts. This reset involved the source of law and the judicial forum for conflicts. Regarding the ECHR, it came about once and for all in 2007, as described above in Section 3, re-defining both the formal position of the sources and the fora of adjudication on grounds of conventionality. As for the CFREU, it was a gradual process, with a series of decisions being adopted since no 260 of 2017 and still ongoing, reformulating the conditions for making constitutional referrals.[46] This evolution, in fact, represents only the last of different phases concerning the relation between domestic legislation and EU law. It is impressive that, over time, the ItCC had set out four different methods to resolve the antinomies between domestic and EU law and they all have operated under the unchanged Article 11 It. Const..[47] For this reason, it may be argued that Article 11 is not specifically linked to either of these methods. Then, following the periodic general reset as the first tool, the second tool is an instrument for daily implementation: the work of the ItCC involves a process of fine tuning, which depends on the individual case in question.

Another sign of the interpretative breadth enjoyed by the ItCC arises when examining the constitutional limits to ECHR and EU law. Although the ItCC kept the gateway of conventional norms into the domestic legal order (Article 117.1 It. Const.) separate and distinct from that of EU law and CFREU (both Article 11 and Article 117.1 It. Const.), the recent case law led, in our opinion, to a convergence between the ECHR and the CFREU.[48] As things stand at present, the conventional norms, as 'interposed provisions' under Article 117.1 alone, formally encounter the limits of all constitutional provisions, while EU provisions, with Articles 11 and 117.1 It. Const., encounter the sole limit of the supreme principles of the legal system. But current constitutional case law challenges this sharp division, which is flawed on the one hand by excess, and on the other by defect. It is flawed by excess with respect to conventional provisions, since the trends in ItCC case law show that, in reality, the constitutional norms 'breathe' in the light of conventional provisions; they are understood to be porous and open to them, so the constitutional norms may be supplemented.[49]

[46]We have used a musical metaphor (fine tuning) to describe how the conventional route begun with the twin judgements of 2007 in a decisive way, relating to the force of the ECHR and constitutional adjudication on unconventionality as the first, crisp, and peremptory notes of Beethoven's *Fifth Symphony*, while the new EU law route begun in 2017 on tiptoe and is comparable to the sound of bells in Mozart's *Magic Flute*, in A-O Cozzi, 'Nuovo cammino europeo e cammino convenzionale della Corte costituzionale a confronto' (2020), in Caruso, Medico and Morrone (n 18) 47–65.

[47]Initially, a chronological criterion was adopted (judgement no 4 of 1964); later, the hierarchical criterion was introduced (judgements no 232 of 1975, 163 of 1977); in the third phase, with *Granital*, the criterion of competence in the form of non-application resulting from the retreat of domestic law to the spaces defined by the EU Treaties on the basis of the principle of attribution was applied. It should not be forgotten that, even before judgement no 269 of 2017, Art 11 It. Const. allowed for a centralised review in proceedings on constitutionality *in via principale* and in the incidental proceedings concerning EU rules without direct effect [see Section 4 above]. In essence, Art 11 It. Const., provides for all variations regarding the techniques and fora for resolving the antinomies between domestic and EU norms. On the 'European Journey' of the Italian Constitutional Court, see now M Cartabia and N Lupo, *The Constitution of Italy. A Contextual Analysis* (Hart 2022), 33–9.

[48]ItCC no 80 of 2011 is the seminal judgement that confirmed the distinction in constitutional treatment of the ECHR and the CFREU even after the entry into force of the Lisbon Treaty. The use of different yardsticks for ECHR, Art 117.1 It. Const., and EU law, Art 11 It. Const., has been discussed from three different perspectives: The techniques and procedural fora for resolving conflicts between internal and supranational norms; the different legal consistency of each system of protection, international for Coe and ECHR and supranational, normative and political, for EU and EU law; the resistance of constitutional norms to conventional or EU norms as external norms, in Cozzi (n 46).

[49]See Section 3 above.

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As for EU law, with the new trend introduced by judgement no 269 of 2017, EU norms are coming into more frequent contact with constitutional provisions. This contact, as we said considering the ItCC preliminary rulings, does not only call into question the supreme principles, as in the previous *Granital* framework, but, indeed, all the constitutional norms. In this renewed context, therefore, counter-limits do not appear to represent the only case in which the ItCC is required to make a preliminary reference to the CJEU, as in the *Taricco* case. But the reference may be useful in terms of the interpretation or validity of EU law in cases relating to *any* constitutional principle. Even in cases where the hard core of the Constitution is not in question, EU norms are called upon to interact with constitutional norms, as the recent preliminary references demonstrate.[50] Thus, looking at ItCC practice, a less defined and softer boundary is probably affirmed, in which the substance of constitutional rules is addressed one by one, together with both conventional and EU provisions.

These considerations help us here to demonstrate the flexibility the Constitution leaves to the ItCC. As we mentioned, there is certainly a substantive important link expressed in Article 11 It. Const., namely 'peace and justice among Nations'. And indeed, the direction undertaken by the ItCC has meant that the normative fulness of other formal expressions of Article 11, such as the reciprocity clause, have been devalued.[51] Furthermore, certainly the ItCC, as the other Constitutional and Supreme Courts, plays as one of the actors in a much more complex and plural framework, with distinct institutional and political centres, and reacts to the development of the system as a whole. But we tried to demonstrate that, for its part, the ItCC plays its role in terms that attest to a concurrent responsibility towards different systems of protection. We may, therefore, speak of interlegality in the sense outlined above.

## 10. Integration between Charters and the higher level of protection

At the beginning of this article, we proposed to use the theory of interlegality as a counterbalance for analysing the ItCC attitude towards supranational rights, adopting a double perspective. First, the mechanisms and structures of coordination, to which the previous Sections were devoted; then, the substantive integration in search for the higher level of protection for the applicants. This second perspective is now examined. We read that:

> What seems crucial is to abandon the point of view of the interests of the rulers, whether the monarch, the optimates, or the many, and to always embrace the common good, which becomes the ultimate parameter of value, a parameter whose respect is not automatically guaranteed, or intrinsic, in the constitutional formulas, given that they can lead to forms deviating from that parameter. And it is precisely onto this parameter that the epistemic perspective essential for the validation of constitutions shifts.[52]

In this way, the theory of interlegality seems to oscillate between a formal criterion relating to positive norms and a substantive criterion concerning the justice of the case. We will concentrate on this meaning here, confining our analysis to the extent to which interlegality may relate to the maximisation of individual protection. This consideration may give us the opportunity to concentrate on an – apparently – substantive criterion created by the ItCC, the so-called criterion of the 'greatest extension of guarantees'.

[50]See Section 7 above.

[51]Even if it is assumed that Art 11 does not apply to the ECHR, it should be noted that the reciprocity principle does not comply with the universal protection of human rights stated in Art 1 ECHR. The aims of peace and justice were considered enough for the application of Art 11 It. Const. to the United Nations Charter (ItCC judgement no 238 of 2014).

[52]Palombella (n 1) 325. See also 331: 'it is, however, a matter of considering (rather than ignoring) the overlapping of different normative rationalities as something that needs *its own measure of justice*' (our emphasis and our translation).

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In Italian constitutional scholarship, the criterion of maximum expansion of constitutional freedoms was part of an old and specific debate on explicit and implicit limits to constitutional rights and referred to the need for an extensive interpretation of constitutional norms concerning rights and liberties.[53] Years later, but well before the CFREU came into force, the issue of the level of protection emerged in a different sphere – that of the relationship between domestic and European protection systems. Notably, there is no clear dividing line between the different systems for the protection of rights, be they constitutional, conventional, or EU. Discussion regarding the level of protection provides one of the possible answers to the question of which law should apply to a case that is relevant to each of the systems. The terms 'higher level of protection' or 'more extensive level of protection' were understood to mean the most favourable protection offered to a subjective situation, as concretely claimed by the person concerned.[54] The level of protection may steer coordination between bills of rights, in terms of theory of sources, to select the applicable source and downgrade the potentially competing source, or in terms of theory of interpretation, so that the rule drawn from the applicable source assumes a meaning more favourable to the applicant thanks to interference from the rules provided by the other provisions.[55] Without going into detail, this kind of substantive criterion, both as a criterion to select sources or to drive interpretation, has long been questioned, observing that quantitative criteria, which focus on measuring the minimum and maximum standards of protection, are structurally unsuited to resolving conflicts between rights, given their relational nature.[56] We share this opinion. Nevertheless, for the purposes of this paper, it could be useful to analyse the level of protection as a technique of argumentation developed by the ItCC in its reasoning.[57] The purpose is to ascertain whether the argumentative doctrine developed by the ItCC refers to the most extensive individual protection.

[53]P Barile, *Diritti dell'uomo e libertà fondamentali* (Il Mulino 1984) 41, as recalled by Roberto Bin, *Critica della teoria dei diritti* (Franco Angeli 2018) 63.

[54]Scholars have proposed a number of solutions to harmonise national and supranational standards; these include a universalised maximum standard, a common minimal standard, or a local national maximum standard approach. For general references, see LFM Besselink, 'Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union' 35 (1998) Common Market Law Review 629–80, and Id, 'The Protection of Fundamental Rights post-Lisbon', (n 44), at 45.

[55]In practice, the distinction between a rule for applying sources and a rule for interpretation is often blurred. Nevertheless, in our opinion, the selection of sources and their interpretation remain logically distinct, and the first operation, the selection of sources, remain the ultimate guarantee of individual rights even in a system where different legal orders coexist. See R Bin, 'Gli effetti del diritto dell'Unione nell'ordinamento italiano e il principio di entropia' in *Studi in onore di Franco Modugno* (Editoriale Scientifica 2011) vol. I, 363–83, and 'Perché Granital serve ancora' in Caruso, Medico and Morrone (n 18) 15–20. The theory of interlegality cannot easily be combined with this assumption.

[56]Also because the consistency of each legal order lies not so much in the rights as their very *limits*, which are a consequence of the founding values adopted by each order, in JHH Weiler, 'Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights' in N Neuwahl and A Rosas (eds), *The European Union and Human Rights* (Martinus Nijhoff Publishers: Kluwer Law International 1995) now in JHH Weiler, *The Constitution of Europe* (Cambridge University Press 1999). Accordingly, among the authors already mentioned, LFM Besselink, 'The Protection of Fundamental Rights Post-Lisbon', (n 44), at 46, concerning the *Von Hannover* case, where the ECtHR and the BVerfG disagreed: one gave greater protection to privacy, whereas the other laid greater emphasis on safeguarding freedom of expression, so the criterion of the greater level of protection is structurally unsuited to resolving this kind of conflict. In the same vein, M Cartabia, 'Convergenze e divergenze nell'interpretazione delle clausole finali della Carta dei diritti fondamentali dell'Unione europea', a contribution during the seminar *60 anni dopo i Trattati di Roma. I diritti ed i valori fondamentali nel dialogo tra la Corte di giustizia e le Corti supreme italiane*, 25 May 2017, Rome <www.rivistaaic.it> (2017) 3, 16 July 2017.

[57]The level of protection is also a criterion formally expressed by written norms, in particular Art 53 ECHR and Art 53 CFREU, which is called precisely 'Level of protection'. Literature on these provisions is broad and there is no room here for a deep analysis. Suffice is to recall that Article 53 ECHR is a so-called non-regression clause, classic in international agreements to prevent the international source being used to lower the level of protection already achieved under domestic law or other international treaties. See RStJ Macdonald, F Matscher, and H Petzold (eds), *The European System of Protection of Human Rights* (Martinus Nijhoff 1993) 43. Interpretation of Article 53 CFREU has been much more controversial and shifted between subsidiarity and primacy, as part of the long and complex debate on the existence of constitutional limits to the primacy of EU law when this leads to less protection. See Bruno de Witte, 'Art 53' in S Peers, T Hervey, J Kenner, and A Ward (eds), *The EU*

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## 11. The ItCC criterion of the 'greatest extension of guarantees'

In one of the twin seminal judgements of 2007 on ECHR, no 348 of 2007, despite explicitly referring to ECtHR interpretation, the ItCC had already affirmed that the ECtHR precedents were not strictly binding on constitutional adjudication, given the need for a 'fair balance' between respect for international obligations and the protection of constitutional rights and interests.[58] In decision no 317 of 2009, again referring to the ECHR, the ItCC clarified the criterion of 'the greatest expansion of fundamental rights'.[59] The Court stated that:

> It is evident that this Court not only cannot permit Article 117.1 of the Constitution to determine a lower level of protection compared to that already existing under internal law, but *neither can it be accepted that a higher level of protection which it is possible to introduce through the same mechanism should be denied to the holders of a fundamental right*. The consequence of this reasoning is that *the comparison between the Convention* (sic) *protection and constitutional protection of fundamental rights must be carried out seeking to obtain the greatest expansion of guarantees*, including through the development of the potential inherent in the constitutional norms which concern the same rights.[60]

The Constitution and the ECHR are therefore brought together to pursue the greatest expansion of fundamental rights common to both documents.

This criterion may imply that if a different level of protection exists between constitutional and conventional norms, prevalence will be given to the rule that protects the individual right at stake more extensively. But in the same decision (no 317 of 2009), the ItCC continued:

> The concept of the greatest expansion of protection must include, as already clarified in judgement nos 348 and 349 of 2007, a requirement to weigh up the right *against other constitutionally protected interest, that is with other constitutional rules, which in turn guarantee the fundamental rights which may be affected by the expansion of one individual protection*. This balancing is to be carried out primarily by the legislature, but it is also a matter for this Court when interpreting constitutional law [ . . . .]. The overall result of the supplementation of the guarantees under national law must be positive, in the sense that the impact of individual ECHR rules on Italian law must result in an increase *in protection for the entire system of fundamental rights*.

So, in this formula, the maximum expansion of guarantees does not relate to an individual right alone but measures protection in relation to other constitutional interests. Some considerations

*Charter of Fundamental Rights. A Commentary* (Hart Publishing 2014) 1525, 1527, 1529. In Case C–399/11 *Melloni* (2013) CJEU GC paras 53–64 and Opinion no 2/13 (2014) CJEU, plenary session, 18 December 2014, the CJEU gave an interpretation of Article 53 CFREU much closer to the principle of primacy, granting no room for the application of constitutional standards, but overall, the use of Art 53 CFREU is rare. This is precisely because, in our opinion, this provision does not call into question the level of protection of the individual right at stake but the normative theories underlying the respective systems, while courts prefer to coordinate through daily case law.

[58]See in judgement no 236 of 2011, para 9 *Cons. dir.*, quoting no 317 of 2009: 'However, whilst this Court can certainly not replace its own interpretation of the ECHR for that of the Strasbourg Court, it may however "assess how and to what extent the results of the interpretation of the European Court interact with the Italian constitutional order"', as an ordinary operation, in terms of interpretation and balancing, that the Court always carries out in proceedings falling within its jurisdiction.

[59]Scholars sometimes use the concept of the 'maximum expansion of guarantees' for all the ItCC case law, Art 53 ECHR, and Art 53 CFREU. For example, L Cappuccio, 'La massima espansione delle garanzie tra Costituzione nazionale e Carte dei diritti' in *Studi in onore di Gaetano Silvestri* (Giappichelli 2016) vol. I, 412–31. In our text, however, we reserve the expression to ItCC case law to highlight that each legal context, although clearly interconnected and facing the same issues, uses a partly different language, indicating the existence of different doctrines and legal premises.

[60]Our emphasis. On this decision, see Repetto, 'Rethinking a Constitutional Role for the ECHR. The Dilemmas of Incorporation into Italian Domestic Law' (n 9) 47.

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can be made. Firstly, it is a substantial criterion which looks at the sphere of interests involved and implies the constitutional substance of the conventional rules, superseding their formal qualification as supra-legislative but sub-constitutional rules, as we mentioned earlier. Secondly – and this is the point here – the criterion concerns the relationship between entire systems of rights and duties, the ECHR, and the Italian Constitution as a whole, rather than the relationship between individual rights. It is based precisely on an overall assessment of the system, namely the constitutional and conventional systems. Without doubt, the affirmation of this criterion was instrumental in defining a different role for the ItCC with respect to the Strasbourg Court and in reserving the task of interpreting the constitutional system, seen as an overarching whole, to the Constitutional Court. Thus, the very formula 'maximisation of protection' offered by the ItCC serves to guarantee the unity of the constitutional system of rights in the face of the particularised vision offered by Strasbourg, the judge of the case. But it also corresponds to a theory of the Constitution in itself, as a composite and systemic ensemble which precludes fragmented interpretations of individual provisions disconnected from their contextual relationship with other constitutional principles.[61] This reading avoids an individualistic and monistic view of individual rights in order to grasp their respective correlations, expanding a constitutional fabric that is based – alongside rights – on duties of political, economic, and social solidarity, which translate into constitutional interests pertaining to a collective dimension.

In conclusion, this criterion does not lead to an a priori maximisation of the individual position at stake and does not, in our view, therefore correspond to our initial definition of the 'maximum level of protection'. It is rooted in interpretation rather than in a strict order of sources. It does not preclude the assimilation of conventional interpretations, where these offer greater protection, such as in cases of criminal administrative penalties. Nevertheless, it somehow reserves to ItCC the duty to carry out an autonomous balancing, safeguarding the constitutional system as a whole. By this way, it preserves the ability of the Constitution to contextualise individual cases within legal institutes and instruments expressing general constitutional interests.

## 12. Conclusions: a deferent and operational, but vigilant cooperation

This paper dealt with the direction followed by the ItCC vis-à-vis implementing ECHR and CFREU rights in the Italian domestic legal order, assessing the ItCC case law in terms of openness or closedness. In the first part, we analysed the ECHR's *status* in the domestic legal order, and we focused on recent ItCC course on the incompatibility between national and EU law on fundamental rights. We argued that, in this case law, an attitude of openness seems to arise from a number of different elements: language, the idea of competing remedies, legal reasoning, and the effects of ItCC decisions. To confirm this impression, we made use of the theory of interlegality. Interlegality is not an official doctrine of the ItCC, nor do we claim that is the theoretical scheme that best fits the ItCC case law. But this theory is a useful lens, allowing certain aspects of ItCC case law to be highlighted, notably, the ItCC reference to the rules of recognition of both the domestic system and the EU Treaties, and the increasingly frequent use of the preliminary reference. We then discussed how far this ItCC trend depends on the wording of the written Constitution and/or the margin of interpretation open to the ItCC itself, emphasising the degree of flexibility permitted by constitutional principles.

The second part of this paper was devoted to the substantive integration between Charters in terms of the search for the greater protection of individual rights. We analysed the criterion of the 'greatest expansion of guarantees' created by the ItCC, showing that it is a criterion not aimed at

[61]M Cartabia, 'Of Bridges and Walls: The "Italian Style" of Constitutional Adjudication' in *Constitutional Court of the Republic of Slovenia, 25 Years* (2016, Conference Proceedings, Bled, Slovenia) 69–84, esp 81–2 <www.us-rs.si/media/zbornik.25.let.pdf> accessed 15 December 2021 and 8 (2016) Italian Journal of Public Law 37–55.

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the search for the higher individual protection but at the protection of the entire constitutional system.

These considerations could lead to some general conclusions. In the last decade, the Italian constitutional case law both on ECHR and CFREU demonstrates a clear tendency towards harmonisation and an attitude of cooperation towards the supranational Courts. In terms of interlegality, the ItCC expresses 'loyalty towards the plurality of legal orders and strive to respect their *rationales*'. Nevertheless, at the same time the Italian Court has enucleated instruments, such as the criterion of the 'greatest expansion of guarantees', that enables room for an autonomous balancing. The conclusion is that the ItCC is aware of – and responds to – the different legal orders involved, while reaffirming its role as guarantor of the constitutional system as a whole. We could thus speak of a cooperation that is deferent and operational, but vigilant.[62] In sum, it is not so much a question of substantial justice seeking the greater protection of the position of the individual, a concept that is debatable in itself, as one of keeping alive formal, institutional mechanisms of cooperation. Following the words of a past President of the Italian Constitutional Court, attitude to compliance and participation seems to lie essentially in the construction and implementation of stable logical methods making frequent, open, transparent, and motivated the interaction between the Courts, even when the solutions differ.[63]

## 13. Afterword: a stand for cooperation as a consequence of the rule of law crisis and now the war

A final consideration must be made referring to the most recent months. The ItCC took the occasion of a pending question to further confirm and strengthen its adhesion to a cardinal principle of EU law, the principle of primacy.[64] The need to strongly reaffirm the compliance of the domestic legal order with this 'architrave' of the European Union may probably depend on an external factor, the rule of law crisis involving Poland and Hungary.[65] A sign of this explanation can

[62]The term 'deferent' is used by S Sciarra, judge and currently President of the ItCC, in 'Lenti bifocali e parole comuni: antidoti all'accentramento nel giudizio di costituzionalità' (2021) in Caravita (n 18) 49–66, esp 50, 63, where deference is not intended as subordination, being neither a sign of submissiveness nor a symptom of marginalisation. On the contrary, deference is used to indicate the need of interaction in a complex system in which national courts are embedded in a law-making circuit. The Author insists strongly on the need to specify the Courts' respective areas of intervention through a shared interpretation of the scope of the CFREU under Article 51(1), filling with increasingly precise content the phrase 'in the implementation of Union law'. The idea is that a common jurisprudential path might prevent any disorientation of ordinary courts faced with the choice of making a preliminary ruling or raising a question of constitutionality and would reassure the judge who consciously chooses the non-application of the domestic provisions held to be contrary to EU law.

[63]These are the concluding words of the relation of President Paolo Grossi for the year 2016: 'In the constitutional experience we are living through, the Court therefore seems to be increasingly taking on the role not so much of a guardian, almost like a museum, of values that are embalmed or immobilised in solemn formulas, but rather of a guarantor of logical methods, intrinsically characterised also on the ethical level, which allow those values, from time to time, between stability and change, to be recognised in their current and concrete consistency' <www.cortecostituzionale.it/documenti/interventi_presidente/Relazione_Grossi.pdf> (2016) on the activity of 2015 (our translation in English, any mistakes are only our responsibility).

[64]ItCC no 67, 11 March 2022, about the exclusion of third-country nationals from family allowances and non-discrimination. Before making the constitutional referrals, the Court of Cassation, which promoted the two questions decided by the ItCC, had made two preliminary references to the CJEU. The CJEU found a violation of EU law [C–302/19 *INPS v W.S.* (2020) CJEU 25 November 2020 and C–303/19 INPS v V.R. (2020) CJEU 25 November 2020] but the Court of Cassation held that there were no grounds for disapplication, questioning the direct effect of the relevant EU law, and asked the ItCC to quash the domestic legislation. The ItCC dismissed the questions because they lack the features for a constitutional judgement in the line with no 269 of 2017 and confirmed the persistent vitality of disapplication as a means to remove EU incompatibility. The ItCC defined itself as part of a legal system in which courts act as guarantors of reciprocal rights and obligations, strongly referring to the duty of cooperation with the CJEU through preliminary references, and to the principle of primacy as the architrave of the European system and its values. For a critique on the Court of Cassation constitutional referrals, S Giubboni and N Lazzerini, 'L'assistenza sociale degli stranieri e gli strani dubbi della Cassazione' (questionegiustizia.it, 6 May 2021).

[65]Case C–156/21, *Hungary v European Parliament and Council of the European Union* ECLI:EU:C:2022:97; Case C–157/21, *Republic of Poland v European Parliament and Council of the European Union* ECLI:EU:C:2022:98, both on Regulation

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be seen in the ItCC Annual Activity Report 2021, which was issued after the rulings of the CJEU of 16 February 2022 and after the Russian Federation invaded Ukraine on 22 February 2022. Referring precisely to these circumstances, the President of the Court, Giuliano Amato, emphasised that 'it is of particular importance that the mutual cooperation of the Courts belonging to the European Union is and remains strong'. He pointed out that the ItCC has always sought to avoid conflicts with the CJEU, leaving away the application of national counter-limits to promote convergent interpretations. The cooperation between Courts is defined 'one of the fundamental joints on which the fabric of our Union rests', with an invitation to other Constitutional and Supreme Courts:

> Not all the Constitutional Courts have followed this path, and it is our strong and urgent wish that they too do so. Of course, we all have a duty to safeguard our national identities, as, moreover, Article 4 TEU. But Article 4 comes after Article 2, which sets out our common principles and values: respect for dignity, freedom, democracy, equality, the rule of law, respect for human rights and for minorities (values common to a 'society characterised by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men'). On this article, first of all, we should forge the interpretative solutions we arrive at for Article 4 itself. It is on the balance between the two, in fact, that the unity in diversity of our legal system and of the Union itself rests. On the other hand, the culture that our Constitution, together with others, has helped to build in Europe under the force of law is founded on trust in dialogue and confrontation of arguments and values.[66]

The conclusions we have given in the previous Section do not change. But it is opportune to give notice of this strong standing for the common values on which the European Union is founded and of this call for cooperation, as the contribution that the Italian Constitutional Court considered to express, in its role, as a reaction to ongoing times.

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**Data availability statement.** The data that support the findings of this study are judgements and they are openly available respectively in www.echr.coe.int, for ECtHR judgements, in www.curia.europa.eu for CJEU judgements and in www.cortecostituzionale.it for Italian Constitutional Court judgements. Translations in English of Italian Constitutional Court judgements are openly available in the English part of the website here https://www.cortecostituzionale.it/actionJudgment.do

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[66]ItCC Annual Report on 2021 Activity, 7 April 2022 <www.cortecostituzionale.it/annuario2021/pdf/Relazione_annuale_2021.pdf>, 20–21, accessed 8 July 2022. The English translation is not available yet. Any mistakes are only our responsibility.

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