

FUNDAMENTAL RIGHTS BETWEEN THE EUROPEAN COURT OF JUSTICE AND THE NEW POWERS OF THE FRENCH 'CONSEIL CONSTITUTIONNEL'

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One of the thornier issues confronting European regulations that include mechanisms for constitutional control is that of "double reference for a preliminary ruling". A recent case came to be of interest after it was subject to a reference ex art. 267 TFEU by the French Court of Cassation and was concluded only after the intervention of the Court of Justice. Thus, with the objective to understand the possible ramifications of the French constitutional reforms on the entire European system, this paper shall explore what appear to be the new elements of the French system regarding the primacy of European law.

1. Premise. The risk of an increase in the possibility of "double reference for preliminary ruling".

One of the thornier issues confronting European regulations that include mechanisms for constitutional control is certainly that of "double reference for a preliminary ruling".

¹ For further research into the problems of double prejudicial enquiries see M. Cartabia, (1997) "Considerazioni sulla posizione del giudice comune di fronte a casi di «doppia pregiudizialità», comunitaria e costituzionale", *Foro italiano*, N.5., pp. 222-225.

This situation exemplifies those circumstances in which, due to the peculiar configuration of the relationships between Court of Justices and internal judicial systems, significant legislation aimed at resolving original contentious issues simultaneously enters in conflict with European regulations and the constitution. Situations of this type are caused by the unclear relational configurations between the various legal systems and, when they find their way into actual court cases, can force ordinary judges to decide between referring to the Court of Luxembourg for preliminary rulings, or internal institutions whose jurisdictions include constitutional control². It should be noted that a hypothesis such as this, while not in itself particularly problematic, can create interference owing to a certain intrusiveness that as much characterises judgments regarding constitutional parameters, which will often result in the direct involvement in the original controversy, as those relating to European conformity which, as well as invading the jurisdiction of the first judge, tends to imply innate constitutional control. In virtue of these circumstances, judges can be called upon to enact two substantially different norms.

Therefore, the choice of the sequence of the referrals can result in situations where the final judicial institution that intervenes can in some measure influence the choice of the other. On the other hand, the judicial institution that has pronounced first is that which, owing to the undeniable weight of the preliminary ruling and above all to the precautionary nature of judicial bodies, hands down the solution that is

² M. Cartabia, *op. cit.*, p.222 emphasizes that, given the circumstance for which the both the European regulations and the national regulations find themselves in the situations in which the same internal judge composes the conflict between the ordinary legislation and the parameter (common law or constitutional), not all the configurable cases of the abstract hypothesis of double prejudicial referencing demand double retrials and therefore, before choosing the order in which to execute the hearings, the judge must verify that they are both actually necessary.

materially applied to the normative conflict. The sequence can therefore be fundamental for both avoiding dangerous and embarrassing contrasts between the sentences of the judicial institutions involved in the original case, and for arriving at concrete decisions³.

The issue is therefore destined to become more delicate and be subject to increasing circumstances in which the two systems can come into contact with each other and, in this respect, recent developments in European treaties seem destined to produce a significant increase in litigious situations. This is already the case in the juridical arena where the full acknowledgment of the legal value of the Charter of Fundamental Rights of the European Union and the forecast future adhesion of the European Union to the system of guaranteed protection by the European Convention of Human Rights, above and beyond the normative mechanisms created to define the respective fields of competence, open the possibility of European judicial participation in areas traditionally presided over by national constitutional courts⁴. Furthermore, in a situation in which the constitutional judges continue to claim jurisdiction to execute *ultra vires review*⁵, even the traditional expansive tendency of European jurisprudence can, at least potentially, create jurisdictional tensions. A perfect example here is the borderline case of *Mangold*, recently confirmed or even

³ It is what could have happened as a result of the two decrees with which the Court of Milan had arranged the separated transmission of the acts to the constitutional Court and the Court of Justice, without referencing the contexts for a double preliminary ruling. For further reference to the case in question see F. Vecchio, "Il Trattato di Lisbona e le ipotesi di «doppia pregiudizialità»: differenti prospettive di tutela e pericoli di pronunce incoerenti", in *www.giustamm.it*.

⁴ It is that which had already been argued by M. Cartabia; A. Celotto, (2002) "La giustizia costituzionale in Italia dopo la Carta di Nizza", *Giurisprudenza costituzionale*, N.6., pp.4477- 4508.

⁵ For further information regarding *ultra vires review* refer to F. Vecchio, "Competenza e gerarchia nella sentenza Lisbona del Tribunale federale tedesco: verso un diritto costituzionale asimmetrico?", in *www.diritto.it*.

exceeded by *Kücükdeveci*⁶, which extends the borders of European regulations and could induce internal constitutional courts to retaliate indirectly against the lack of respect of the limits imposed by the attribution of competencies⁷.

It is evidently a matter that, due to its nature being entirely, and perhaps optimistically, exclusively dependant on the loyal collaboration of the judges, it is always susceptible to change and for this reason also requires continuous monitoring. A recent case became of particular interest after it was subject to reference for a preliminary ruling *ex art.* 267 TFEU by the French Court of Cassation that, albeit indirectly, also involved the *Conseil Constitutionnel* and was concluded only after the intervention of the Court of Justice. In order to avoid sanctions from the highest European judicial institution the French constitutional body, recently given the power to exercise *a posteriori* checks for constitutionality, interpreted the new disposition in *art.* 61 – 1 of the national Constitution and supplied its own version of the relationships between ordinary jurisdiction, constitutional jurisdiction and European jurisdiction.

Thus, with the objective of attempting to understand the possible ramifications of the French constitutional reforms on the entire European system, and the implications for Italian regulation, this paper shall rapidly review the consolidated method with which the Italian and European jurisprudence resolves the age old problem of double referencing for preliminary rulings and will introduce those which seem to be the new elements of the French system regarding the acknowledgment of the primacy of European law. The intention is to affirm that, in spite of the attempt of the *Conseil Constitutionnel* to

⁶ Sentence C – 555/07, *Kücükdeveci*, 19th January 2010.

⁷ Even if under a partly different profile V. Sciarabba, “La sentenza *Kücükdeveci* e le prospettive della giustizia costituzionale europea”, in *www.astrid-online.it* exemplify situations creating interference between the European judge and the national judges and they require a rethinking of the system of relations between the juridical systems.

diminish the anti European connotations of the new norms, the ambiguity of the French legislation and the precaution of the European Court of Justice, besides potentially reopening a season of tension between the constitutional and European jurisdictions, leaves open questions that could go as far as to debate the ways in which Italian legislation interacts with its European counterpart.

2. The German solution: from *Solange* to *Banamarket*.

Despite some ambiguous decrees with which the *Bundesverfassungsgericht* has accepted the implications of the direct effect and the primacy of European legislation over statute⁸, there is no doubt that the *Solange I* case represents the first true reaction of the German judges to the revolutionary doctrines with which the Court of Justice builds a European judicial system and attempts to impose itself as the last word on the interpretation of law in Europe⁹. In fact, with this decision pronounced in reaction to the sentence *Internationale Handelgesellschaft* in which the Court of Justice attempts to affirm itself as the exclusive arbitrator of the relationships between the juridical systems¹⁰, the magistrates of Karlsruhe affirm the notion of an internal foundation in the European process and, while acknowledging the intangibility of European law, on the basis of this renationalisation of the juridical system propose an initial model of judicial cooperation

⁸ See the decisions of *Bundesverfassungsgericht* tedesco *BVerfGE*, 22, 134, *Re tax on Malt Barley* of 5th July 1967; *BVerfGE*, 22, 293, *EWG-Verordnungen*, 18th October 1967 e *BVerfGE*, 31, 145, *Milchpulver*, of the 9th June 1971.

⁹ Sentence of the German *Bundesverfassungsgericht*, *BVerfGE*, 37, 271, *Solange*, of the 29th May 1974. For a commentary see I. Feustel, (1976) "Diritto comunitario e diritto interno nella giurisprudenza italiana e tedesca", *Rivista di diritto europeo*, N.1., pp.187-226.

¹⁰ For a reconstruction of the entire hearing see Alter, Karen (2001) *Establishing the supremacy of European law*. New York, USA: OUP, pp.86-92.

that entrusts the European judge with the interpretation of European legislation and the German judge with a definition of the limits in which the *Grundgesetz* confines the phenomena of supranational integration. Defining such jurisdictional reserve, they refuse to consider constitutional control as being absorbed by the control of European conformity. Instead, in order to resolve the hypotheses of contemporary relevance of the supranational and constitutional parameters, they propose a system in which the first judge must, having subsequently resorted to the mechanism of referencing for a preliminary ruling as per *art. 177* of the EEC Treaty (today *art. 267* TFEU), conform to the deliberations of the European judge even going as far as to disallow the national law contrary to European law. The same judge is, however, required to activate a second referral to the Court of Karlsruhe, each and every time there is reason to believe that the solution handed down in Luxembourg could be harmful to the fundamental principles of the national Constitution¹¹.

Even though German constitutional jurisprudence has reviewed its position in matters relating to European law many times, the choice to refer constitutional questions following decisions pronounced by European judges represents a characteristic element of the German model for the resolution of issues relating to "double referencing for preliminary ruling". Thus, while acknowledging the progress made by European juridical system in matters relating to the protection of fundamental rights and while introducing a relative presumption of convergence between constitutional guidelines and European prescriptions, the *Solange II* decision does not refute the idea that constitutional control

¹¹ It should be specified that the constitutional judges reserve their right to intervene not for any type of contrast between European law and German Constitution, but for only the very limited process of *identity review*, that is in case of contrast between constitutional norms that expresses the constitutional identity of the system.

is executed after the control of conformity¹². The *Maastricht* sentence similarly, while extending constitutional control to the hypotheses of damaging the principle of attribution by the European institutions, is still based on the notion that it is up to the judges of Karlsruhe to verify the control deliberated by their colleagues in Luxembourg¹³. Finally, even the *Bananenmarktordnung* sentence in rejecting the question of unconstitutionality confirms the right to the last word of the national constitutional system¹⁴.

While also certainly stemming from an initial desire to maintain some form of national control of European rulings by the Court of Justice and more importantly in consideration of the extreme precaution with which constitutional jurisprudence has admitted decrees, or direct appeals, against the implicative decisions of European judges, it seems difficult to deny that this choice has not brought about significant consequences beyond maintaining serious theoretical divergence and has instead produced substantial convergence in the positions emerging from European affairs¹⁵. Thus, between a system that presumes the absorption of constitutional control into the control of European conformity and a system that anticipates

¹² Sentence of the German *Bundesverfassungsgericht*, *BVerfGE*, 73, 339, *Solange II*, of 22nd October 1986.

¹³ Sentence of the German *Bundesverfassungsgericht*, *BVerfGE*, 89, 155, *Maastricht*, of 12th October 1993. For relevant commentary see, amongst the many, D. Grimm, (1996) "Una Costituzione per l'Europa?", in J. Luther et al., eds. *Il futuro della Costituzione*. Bari, IT: Laterza, pp.340-368 and J. Habermas, (1996) "Una Costituzione per l'Europa? Osservazioni su Dieter Grimm", in J. Luther et al., eds., *op. cit.*, pp. 369-375.

¹⁴ Sentence of the German *Bundesverfassungsgericht*, *BVerfGE*, 102, 147, *Bananenmarktordnung* of the 7th June 2000. For a reconstruction of the controversial episode and respective commentary see G. Itzcovich, (2004) "L'integrazione europea tra principi e interessi. Giudici nazionali e Corte di Giustizia nella "guerra delle banane", *Materiali di storia della cultura giuridica*, N.2., pp.358-424 e K. Alter, *op. cit.*, pp.110-117.

¹⁵ Only recently has the *Bundesverfassungsgericht* begun to declare the unconstitutionality of acts deriving from the execution of European

the rulings of the European judges but never takes corrective action and always conforms to their material decisions, the difference seems largely virtual in nature.

3. The Italian solution: from *Frontini* to *Granital*.

Compared to their German colleagues, the Italian constitutional judges have demonstrated even greater reluctance to accept the implications of the doctrine of the *primauté* and with the *Costa* case, while recognizing the direct effect of European law, initially flatly refusing to recognize that European dispositions can prevail over their national counterparts¹⁶. The Italian participation in the process of European integration cannot put into question the criterion for the temporal succession of the laws and therefore a norm subsequent to the ratification law prevails over the contrasting European regulation¹⁷.

Only with the *Frontini* case, in a certain sense anticipated by the *Acciaierie San Michele* case¹⁸, did the judges decide to abandon this rigid perspective and, in recognizing the supremacy over statute, pose the possibility of a prevalence

law, see *BVerfGE*, 113, 273 of the 18th July 2005. For commentary regarding the historical decision refer to F. Palermo, "La sentenza del Bundesverfassungsgericht sul mandato di arresto europeo", in *Quaderni costituzionali*, N.4., 897–904. For something more recent see the decision adopted by the same court the 2nd March 2010.

¹⁶ Sentence of the Italian Constitutional Court 14/64 of 7th March 1964. For a reconstruction of the intricate hearing (that gave rise to a consequent deliberation by the Court of Justice) see G. Itzcovich, (2006) *Teorie e ideologie del diritto comunitario*. Torino, IT: Giappichelli, pp.210–214.

¹⁷ According to the effective formula used by the Italian judges, even as a result of the Italian participation in the integration process, the relationship between execution laws and internal laws remain solidly associated with the "empire of the retroactive laws".

¹⁸ Sentence of the Italian Constitutional Court 98/1965 of 16th December 1965. For further commentary see M. Mazziotti di Celso, (1973) "Osservazioni alla sentenza del 27 dicembre 1965", *Giurisprudenza costituzionale*, N.3., pp.1329–1342.

of supranational guidelines over internal equivalents chronologically successive to the ratification law¹⁹. As in the *Solange* case, the Constitutional Court established the acknowledgment of primacy on the basis of national regulations and reserves the exceptional right of intervention in cases where the application of the principle in question violates the fundamental principles of national regulation. Owing to the principle of national supremacy it is presumed to be the exclusive competence of the national judge to administer its application.

As opposed to their German colleagues, in the *Frontini* case the Italian judges did not specify the procedural profiles relating to the primacy of European law and only with the *ICIG* pronouncement did they clarify their position regarding the issue²⁰. Specifically, when faced with the rather abstract situation of guaranteeing supremacy via disapplication by the first judge or through the declaration of unconstitutionality, the constitutional judges opted for the second solution with the 1975 decision. In doing so they wove a system in which conflict resolution between European legislation and national law, configured as a conflict between two internal laws with at least one covered by *art. 11* of the Constitution, requires that the first judge, after having used the mechanism provided for in *art. 177 TCEE*, invoke the Italian Constitutional Court²¹.

¹⁹ Sentence of the Italian Constitutional Court 183/73 of 27th December 1973. You see also the considerations of P. Barile, (1973) "Il cammino comunitario della Corte", *Giurisprudenza costituzionale*, N.6., pp.2406 – 2419.

²⁰ Sentence of the Italian Constitutional Court 232/75 30th October 1975. For further see A. Tizzano, (1976) "Sull'«incostituzionalità» delle leggi italiane incompatibili con i regolamenti comunitari", *Foro italiano*, N.6., pp.2229–2315.

²¹ Ensuring that the Constitutional Court can exercise its role as filter between the regulatory bodies as per the "controlimiti" principle is deemed so necessary that with decree 206/76 of 28th July 1976 the constitutional judges, having doubts regarding the existence of a contrast between European and national law and refusing to directly invoke the Court of Justice, push as far as to impose referencing for preliminary

After having initially manifested indifference towards the procedures adopted at a national level in order to guarantee *primauté*, the Court of Justice with the *Simmenthal* sentence posed this model, where the Italian Constitutional Court was positioned as a review body for the decisions of the European judges²², into question. In full contrast with the dispositions of the Roman magistrates, this deliberation established that the first judge has been obliged to immediately misapply the contrasting internal legislation regardless of any national constitutional control in order to avoid the subsequent undermining of European uniformity arising from differing national applications of law.

The Italian Constitutional Court, under pressure from the supranational judicial institution, changed the control mechanism behind the *Frontini* decision completely, almost totally aligning itself with the system proposed by the *Bundesverfassungsgericht*. Thus, while confirming the national foundation of European law and the idea of the separation of the juridical systems, the Italian constitutional judges via the *Granital* sentence recognized the disapplication procedure available to the first judge and reserved the right in exceptional circumstances to intervene when the decisions of the European judges threaten the fundamental principles of national regulation thereby violating the only remaining

ruling *ex art.* 177 CEE on the judge *a quo* and to invite the same to re-propose the constitutionality incident only after the deliberations of their Luxemburg colleagues. Instead, with decision 163/77 of 29th December 1977 the judges of the Constitutional Court formally decree the unconstitutionality by violation of *art.* 11 of a national law successively declared (with decision C - 70/77 *Simmenthal* of the 28th June 1978) by the judges of Luxemburg not contrasting with European law.

²² Even authors traditionally favorable to the application of the supremacy like M. Berri (1978) "Brevi riflessioni sulla "lezione" della Corte comunitaria", *Giurisprudenza italiana*, N.6., pp.1153-1156 express strong criticism to the pronouncement.

limitation imposed by the national legal system against the advancing tide of integration²³.

Following the indications deriving from this declaration, which have never officially been rebuked²⁴, it seems feasible to confirm that, while following a more laborious route divided into many phases, even the Italian Constitutional Court, in a similar fashion to its homologous Karlsruhe, ends up defining its relationships with the Court of Luxembourg in a way that in theory allows constitutional judges to review the rulings of European colleagues, but, in practice, whether due to the very narrow application in which this type of control is foreseen, or the absolute rigidity with which constitutional judges regard this area of intervention, or to the reluctance of judges to actuate double referencing, has favoured the stance of the Court of Justice positioning itself as the sole judge of the relations between the regulatory bodies²⁵.

4. The new control *a posteriori* of constitutionality in France.

With the Constitutional Review Law n. 2008 - 724 of the 23rd July 2008²⁶ and the backdrop of a total reorganization of the equilibrium between the powers of the fifth Republic,

²³ Sentence of the Italian Constitutional Court 170/84 of the 5th June 1984. For a comment regarding the decision see A. Tizzano, Antonio (1984) "La Corte costituzionale e il diritto comunitario: venti anni dopo...", *Foro italiano*, N.6., pp. 2063-2074.

²⁴ While having applied the European law as the judgment criteria, the Italian Constitutional Court continues to pursue its line of argument based on the separation of regulatory bodies and the internal foundation of European law. For further observations on this matter see G. Itzcovich, *op. cit.*, pp.236-242.

²⁵ *Cfr.* the sentence of the Italian constitutional Court, 232/89, of the 13 April 1989, (for a comment on the decision see M. Cartabia, (1989) "Nuovi sviluppi nelle competenze comunitarie della Corte costituzionale", *Giurisprudenza costituzionale*, N.3., pp.1012-1023).

²⁶ For a reconstruction of the path followed by the project of constitutional reform refer to F. Fabbrini, "Il progetto di riforma costituzionale del

France has also partially overcome the so-called transalpine “exceptionalism”²⁷ introducing an incidental and *a posteriori* review of constitutionality²⁸.

Given the necessity of joining the new authority to the older duties of the *Conseil Constitutionnel*, and above all with the actions of first judges and European judges, the reform of organic law n. 2009 - 1523 of 10th December 2009 art. 61 - 1²⁹ details a highly articulated procedure³⁰. Thus, in order to coordinate the review of constitutionality *a posteriori* with the preliminary review and ordinary jurisdiction, the law establishes that in the event that one of the parties of a jurisdictional procedure wishes to present the judge a request, with a doubt relating to the conformity between a legislative provision and the rights and the freedoms guaranteed by the national Constitution, the judge, after having reviewed the relevance, novelty and seriousness of the issue³¹, refers the

Comité Balladur e la proposta di introdurre in Francia un controllo di costituzionalità delle leggi a posteriori”, in *www.forumcostituzionale.it*.

²⁷ The expression is used in T. Groppi, “Riformare la giustizia costituzionale: dal caso francese indicazioni per l'Italia?”, in *www.astrid-online.it* to indicate some anomalies, not completely overcome by the reform, that have traditionally characterized the French system of parliamentary justice.

²⁸ According to the first codicil of art. 61-1 of the French Constitution “In the case of a jurisdictional procedure, it is presumed that a law compromises the rights and the freedoms guaranteed by the Constitution, the constitutional Council can be invoked on such issue on referral by the Council of State or the Court of Cassation, that is pronounced within an established time limit”.

²⁹ According to the second codicil of art. 61-1 of the French Constitution “The conditions of application of the present article are established with organic law”.

³⁰ With respect to the examination of the procedure relative to the approval of the organic law under investigation refer to F. Fabbrini, (2010) “La loi organique sul controllo di costituzionalità in via incidentale e lo scrutinio preventivo del Conseil constitutionnel”, *Quaderni costituzionali*, N.1., pp.123-126.

³¹ See art. 23-2 of the *Ordonnance* n. 58-1067, on the problems relative to the profile of the novelty - clearly introduced in a posteriori order

proceedings to the final appeals judge who conducts further review and finally refers to the *Conseil Constitutionnel*³² within the time limit of three months³³. Conversely, when regulating the relationships regarding European jurisdiction and the control of conformity to international agreements, *in primis* the European Human Rights Convention, that are exercised by first judges³⁴ according to art. 55 of the Constitution and art. 23 - 2 and 23 - 5 of *Ordonnance n. 58 - 1067*- introduced via organic law n. 2009 - 1253, no longer reserving the requirements deriving from French participation in the European Union³⁵, they limit themselves to coordinating the procedural priority of the review of constitutionality³⁶.

to coordinate the control of constitutionality with that a priori - see F. Fabbrini, "La loi organique", cit., p.125.

³² It should be noted that according to art. 23-10 of *Ordonnance n. 58-1067*, the *Conseil constitutionnel* has a term of three months in order to pronounce itself.

³³ See art. 23-4 e 23-5 of *Ordonnance n. 58-1067*.

³⁴ According to art. 55 "On condition of reciprocity, the Treaties or agreements regularly ratified and approved have, once published, supremacy over the laws". The *Conseil constitutionnel* traditionally has refused to execute the conventionality control in order to verify if the laws are consistent to the international agreements assumed by France: arguing that the norm in issue only imposes that in the hierarchical scale the treaties enjoy a higher ranking to that of ordinary law, the constitutional judges have proposed that from this does not derive the constitutional illegitimacy of a control exercised by common judges, in place of a centralized control exercised by the same *Conseil*. For further reference on this characteristic element of the French system of adaptation of the French legislation to European and international law see, M. Calamo Specchia, "Il Conseil Constitutionnel e l'exception d'inconstitutionnalité" in *www.astrid-online.it*.

³⁵ F. Fabbrini, "La loi organique", cit., p.125 signals that in the parliamentary passage of the text the reference - present in the bill introduced by the government - of art. 88 - 1 of the Constitution, is missing.

It should be remembered that the law in question is commonly recognized as the basis of the effects of European law in France and that it specifies that "the Republic participates in the European Community and the European Union, constituted from States that have chosen freely, in virtue of the treaties that they have instituted, to exercise some of their competences in common.

Now, if due consideration is given to the fact that the new third codicil of *art. 62* establishes that “against the decisions of the Constitutional Council no form of appeal is admitted *and that* they are obligatory for the public authorities and all the administrative and jurisdictional authorities”, the problems of conformity to European law produced by this reform become immediately evident. Thus, following the logic emerging from the combined dispositions of *art. 62* of the Constitution and of *art. 23 - 2* and *23 - 4* of the *Ordonnance*, the impression is given that in a case having simultaneous relevance to European and constitutional parameters the judge is obliged to raise the constitutional issue immediately, and once the ruling of the *Conseil* has been obtained the judge must oblige without further questioning the decision of the national constitutional body. The literal tone of the reform hence permits a reconstruction for which, in absolute contrast with that stipulated in the *Simmenthal* decision, the review of constitutionality of the provision excludes the control of conformity from international agreements and therefore, even more boldly than the *Frontini* sentence that in relation limited itself only to requiring the obligatory participation of the Italian Constitutional Court but had not excluded the possibility of the participation of the European judge, precludes the route for participation of the Court of Justice each and every time a constitutional question comes to light³⁷.

Participation to the European Union exists according to the conditions previewed by the treaty of Lisbon signed 13 December 2007, that modifies the treaty of the European Union and the institutive treaty of the European Community”.

³⁶ See *art. 23-1* e *23-5* of *Ordonnance n. 58-1067*.

³⁷ Emphasizing an at least theoretical possible interpretation of this type F. Fabbrini, “La loi organique”, cit., p.125 e V. Sciarabba, *op. cit.*.

5. The war of the French judges.

The subversive potential of an interpretation such as we have just seen explains why the laws relating to the new constitutional control have been at the centre of a right and proper judicial *querelle*.

The *Conseil Constitutionnel*, aware of the compatibility problems with European law, uses the opportunity presented by the preventative control of constitutionality of the law n. 2009 – 1523 and immediately concerns itself with circumscribing the anti European effects of the new reform³⁸. More precisely, while declaring the constitutionality of the provision, the French constitutional body, by reintroducing the clause protecting the international agreements introduced by the Government in the original reform project, recognized that the priority attributed to constitutional control has the single purpose of confirming the superiority of the Constitution in the hierarchy of the sources and can not in any way be taken as a renegotiation of the assumed international responsibilities of the country³⁹.

The reassurances of the *Conseil Constitutionnel* have not convinced the French Court of Cassation, however, who with a decision on the 16th of April put the entire system of constitutional justice⁴⁰ into question. Charged with

³⁸ See the decision 595 DC of 3 December 2009.

³⁹ The decision reads: "imposing the priority of the control of constitutionality on the control of conformity of the law to the assumed international engagements by France, the organic law is meant to guarantee the respect of the Constitution and its position of superiority, in internal legislation; that the priority has as its only scope to guarantee the order of examination of the issues introduced to the Court; that, once carried out the control of constitutionality, this does not limit the possibility of guaranteeing the respect and the superiority of the laws of the treaties or of ratified or regularly approved agreements of the laws of the Union; it is possible to conclude that the dispositions under investigation violate neither article 55 of the Constitution, nor article 88-1 [...]".

⁴⁰ Decision 12003 of the 16 Aprile 2010. For a comment on the decision see P.

determining the relevance of a constitutional issue raised by the Court of Lille, the supreme transalpine jurisdictional body, rather than making a deliberation on the whether the claim was founded, as envisioned in *art. 23 - 4 of Ordonnance n. 58 - 1067*, preferred instead to resort to the procedural tool found in *art. 267 TFEU* and asked the Court of Justice if a national regulation that limits the possibility of the first judge to refer to the European judge for preliminary review is compatible with European law. Now, if on one hand it is without doubt that the Court of Cassation has operated this referral in order to be able to take advantage of the “alternative use of the prejudicial competence⁴¹”, it seems equally certain that, notwithstanding the result of the corrective intervention of the constitutional body, the system is characterized by significant numbers of fundamental ambiguities.

The desire to clarify the terms of legislation before a concrete intervention of the Court of Luxembourg has stimulated the *Conseil Constitutionnel* to review the problems arising from constitutional reform and organic law⁴² with a certain immediacy. Thus, taking advantage of the opportunity offered by a preventative review of constitutionality of a law regarding the liberalization of gambling management, the French institution has tried to respond to the perplexities raised by the Court of Cassation and has clarified its interpretation of the relationship between the control of constitutionality and of conformity to international and European treaties. According to the *Conseil*, as opposed to Italy and Germany, the problems relating to eventual conflicts between a legislation norm and the obligation deriving from an international or European agreement cannot be defined as constitutional issues in

Costanzo, “Decolla in Francia la questione prioritaria di costituzionalità: la Cassazione tenta di spargliare le carte, ma il Consiglio costituzionale tiene la partita in mano (una cronaca)”, in *www.giurcost.org*.

⁴¹ See P. Costanzo, *op. cit.*.

⁴² See the decision 2010-605 DC of 12 May 2010.

France⁴³ and therefore remain under the jurisdiction of the first judge⁴⁴ which are free to give prevalence to international dispositions even over internal dispositions that have passed any review of constitutionality⁴⁵, in accordance with the *Simmenthal* doctrine. The only exception to this establishment of relationships between ordinary jurisdiction and constitutional jurisdiction is the control of the correct enactment of the directives that according to a consolidated jurisprudence of the same judicial organ is defined as under constitutional control⁴⁶. French constitutional judges, furthermore, claim that the rapid review time and the availability to the first judge of all the suitable preliminary instruments to guarantee

⁴³ According to the decision "it can therefore be concluded that, if in relation to the envisaged conditions, this disposition [*art. 55 of the Constitution*] confers to the treaties a superior effectiveness to that of the law, it does not prescribe nor implies that the respect of this principle must be guaranteed from the control of conformity of the law to the Constitution". In the same sense a little afterwards it is asserted that "it can therefore be asserted that the incompatibility of the law with international and European engagements of France cannot be considered as a violation of the Constitution".

⁴⁴ According to the decision "the competence is up to the ordinary judge and the administrative judge to control an eventual violation of the law of the European Union".

⁴⁵ In this sense the decision explicitly asserts that "the effectiveness conferred from article 62 of the Constitution to the decisions of the constitutional Council do not hinder the possibility that the administrative judge and the ordinary judge can, also in the event in which the law has been declared constitutional, guarantee the prevalence of the international engagements over the internal laws".

⁴⁶ On this point the decision under investigation, the *Conseil* after having emphasized that "the transposition of a directive cannot go against an inherent rule or a principle French constitutional identity" and that "having to stipulate within the term envisaged by *art. 61 of the Constitution*, the constitutional Council cannot resort to the mechanism of referencing for preliminary ruling", it concludes that "the Council can declare the unconstitutionality of a legislative disposition manifestly incompatible with the directive that it proposes to transpose" while it is up to the ordinary judge to resort to the mechanism of referencing for prejudicial enquiry.

the subjective positions governed by European law even while waiting for the outcomes of a constitutional review, ought to help exclude every possibility of conflict⁴⁷.

6. The prudence of the Court of Justice.

Bearing in mind the rigid time limits imposed by the French constitutional reform for the new *a posteriori* review, the Court of Justice used the dispositions regarding accelerated procedures⁴⁸ and on the 22nd June 2010, in little more than two months after the prejudicial referral, gave a ruling on the complex issue⁴⁹.

The perspectives from which the decision is discussed introduce some ambiguities that need to be underlined. In one sense, the judges of Luxembourg make a decisive criticism regarding the part of the decision 2010 - 205/DC in which the residual competence of the French constitutional body to control the constitutionality of the internal laws enacting European law is affirmed: concerned about the possibility of this practice gradually extending itself, the Court specified that the declaration of unconstitutionality of a law actuating a European disposition excludes the validity control that is their exclusive right and therefore it declared that this passage is not in compliance with European law⁵⁰.

Furthermore, continuing along the same supervisory line, the judges refute the arguments proposed by their French

⁴⁷ In such sense it is explicitly sustained that "the same judge can suspend all the eventual produced effects of the incompatible law with the law of the Union, he can assure the rights recognized by the international and European commitments of France and can guarantee the full effectiveness of the decision".

⁴⁸ The accelerated procedure is governed by *art. 23 bis* of the Charter of the Law Court of the European Union and from the first paragraph of *art. 104 bis* of the Regulations of Procedure.

⁴⁹ Sentence of the Court of Justice of the European Union, *Melki*, C-188/10 of the 22 June 2010.

⁵⁰ In paragraph 55-56 the Court of Justice.

colleagues and demonstrate a certain degree of inflexibility in asserting that, irrespective of the time limits imposed by the incidental review, the *Conseil Constitutionnel*, as with any other jurisdictional body, is obliged to employ referencing for preliminary review of the Court of the Luxembourg⁵¹: effectively, as the decision under review clearly demonstrates, the rapidity of the accelerated procedure would have to be able to exclude the possibility of incompatibility of terms between the judicial constitutional review, including preventive review, and referencing for preliminary review.

On the other hand, however, in reference to the issue of European legitimacy of the new French constitutional dispositions, the European judges prefer not to take a position and, while specifying that under no circumstances is a national norm permissible that in any way prevents or limits referencing for preliminary review *ex art.* 267 TFEU, the doors have not been definitively closed on the normative procedure envisioned for the new incidental review of constitutionality. More precisely according to the reasoning manifested, for constant jurisprudence of the Court the national judge is required to choose the interpretation which better satisfies the demands of the European legislation from the several meanings attributable to the national reform. Therefore, with several interpretations possible, as with the same interpretative conflict between Court of Cassation and *Conseil Constitutionnel*⁵², the Court basically concluded that the norm in question in abstract terms could not produce compatibility conflicts with European law⁵³.

⁵¹ In paragraph 56 of the sentence judges are very clear in stipulating that "Moreover, the organization of the total duration of the review within a very restricted term, cannot prevent the prejudicial referencing".

⁵² It should be noted that in order to confirm the plausibility of the interpretation proposed by the constitutional judges the Court of Justice recalls decision 312305 with which, on 14 May 2010 the Council of State expressed its position on the interpretation of the norms.

⁵³ See paragraph 57 of the decision.

7. The problems left open by the two decisions.

It is evident from re-examination of some of the passages of the legal reasoning of the *Conseil Constitutionnel* that the Court of Justice is primarily concerned with diluting the more problematic aspects of the new French constitutional reform. In particular, following the judicial guideline expressed by the transalpine constitutional organ and excluding via interpretation that the conditions placed on all the jurisdictional and administrative authorities prevents or limits the possibility of referring to the European judge, the Court of the Luxembourg takes some of the seriousness out of the issues raised by the reform.

Nevertheless, the decision does not prevent any possible unexpected eventualities, and even imagining a prompt and complete homologation of the French judicial and administrative system to the interpretative directives made by the Court of Justice and the *Conseil*, the system of French constitutional justice maintains grey areas relating to the relationships with European law. In fact, if, in the system proposed by the *Solange* and *Granital* jurisprudence, and generally accepted by the Luxembourg jurisprudence, the first judge is required, under the penalty of restitution of the acts, to consult the European Court immediately, in the system proposed by the two decisions it instead seems that the French judge who is confronted with a hypothesis of contemporary relevance between European and constitutional parameters simply has the possibility of resorting preventively to referencing for preliminary ruling art. 267 TFEU. Given that "art. 61-1 of the Constitution and art. 23-1 and successive do not disallow judges the possibility, or in some cases the duty, to rise at any time deemed necessary the use of referencing for preliminary ruling according to art. 267 of TFEU", the *Conseil* at least gives the impression of allowing the possibility that the judge chooses the order of referral. Obviously, by not citing the Italian and German constitutional jurisprudence over the obligation

of guaranteeing preliminary rulings by the European judge, the Court of Justice seems to ratify this interpretation.

Certainly, the concerns that induced the transalpine institutions to undertake paths differing from those established in Germany and Italy are understandable and given the cumbersome and invasive interventionism of the Court of Justice and given the strict limits imposed by the Jacobin traditions, instrumentally resumed by Gaullism, of parliamentary sovereignty and the law as the expression of the general will⁵⁴, a “self-exclusive” approach in which the judges had explicitly declared that in the case of “double prejudicial review” they would have simply limited themselves to a, hypothetical, review of the previous rulings of the European judge, would have ended up transforming itself into an further compression of the already limited room for application of a *posteriori* constitutional review⁵⁵. Equally comprehensible are the political motives that induced the Court of Justice to follow the solution preferred by the Commission⁵⁶ not to take too strong a stance with respect to an internal judicial *querelle* and give confidence to the French system of justice.

On the other hand, however, the potential problems arising from a situation that effectively entrusts the judge with the choice of the order of referencing cannot be ignored. Firstly, the interpretation offered by the *Conseil Constitutionnel* runs the risk of creating confusion and ends up legitimizing the “alternative use of prejudicial competence” that has pushed the Court of Cassation to refer the issue to the supranational judicial institution. Not being able to stipulate either the priority of the *question prioritaire de constitutionnalité* of the preliminary review in flagrance of European law, or the priority of the referral art. 267 TFEU for constitutional review

⁵⁴ See E. Cheli, “La riforma del controllo di costituzionalità delle leggi in Francia”, in *www.astrid-online.it*.

⁵⁵ See F. Fabbrini, “La loi organique”, cit., 125.

⁵⁶ The position of the European Commission is reproduced by the judges in paragraphs 38 and 39.

limiting its own participation and in any case in conflict with the dispositions of the French Constitution, the constitutional justice institution has defined a situation in which, in case of conflict between the jurisdictions, the common judge ends up being the arbitrator. Moreover, given that there is no guarantee that future judgments of the *Conseil*, analogous to what the decisions coming from Luxembourg do in the current system, would be limited to evaluations on the constitutional aspects of the law only and would not push further to defining specific solutions. It must simply be presumed that the judge will, as happens today, but with inverted roles, in other national systems that are confronted with the problems of double referencing for prejudicial review, directly apply the ruling emerging from the first referral. This would produce very ominous consequences for European regulation by excluding the participation of the Luxembourg judge and would put the primacy of European law and uniform application of supranational law in serious danger⁵⁷.

Such circumstances are aggravated by at least two considerations. In the first instance, in the event in which the *Conseil* begins to accept constitutional issues with implied European relevance not yet addressed by the Court of Justice, beyond the infraction procedure that does not allow any review of the actual case and that is in any case subordinate to the political filter of the Commission, the European judge would not have any procedural instrument to rectify an eventual exclusion operated by the first judge as a result of the immediate application of a proposed ruling from the French constitutional body. It is worth noting that reference to the traditional estrangement of the *Conseil* from the notion of primacy is not a valid diminishment of the potential foreseeable problems. The prevision of a new *a posteriori* constitutional control of, beyond the problems of legal insecurity arising from a lack of procedural coordination for prejudicial reviews, offers a

⁵⁷ *Cfr.* with that sustained by P. Costanzo, *op. cit.*.

new and attractive alibi for those judges who do not wish to recognize the primacy of European law and therefore demand the establishment of specific measures of guarantee.

Secondly, given the general effectiveness of the decisions of the Court of Justice, the passages for the decision in which the legitimacy of a preventative constitutional control is asserted can also produce effects beyond the French borders and reawaken, at least for the moment, dormant "autarkic" temptations of the other authorities specialised in constitutional control. In particular, in virtue of a slackening of conditions imposed by the *Simmenthal* jurisprudence, the Italian constitutional judge could also be induced into rethinking the procedures for the control of the European system, review "self-exclusion" and accept legal rulings before the participation of the Luxembourg Court. This type of decision would reproduce the same risk of alternative use of prejudicial competence and would contribute to putting the primacy of European law into question⁵⁸.

Only time will tell if these risks will be confirmed in the future praxis of the European judicial institutions. In any case, for reasons of legal rigor and of political opportunity the conclusion is that, once the distance that passes between the *Simmenthal* model and the French model of relations between the regulatory bodies and once the dangers associated with this are realised, it would be favourable if the Court of Justice take advantage of the opportunity produced by an identical issue raised by a Belgian court and confirm with force the obligatory alternative of the ordinary judge to *immediately* invoke the Court of Justice or disapply the internal dispositions contrasting with the European counterparts without further hesitation.

⁵⁸ Cfr. S. Gambino, "I diritti fondamentali dell'Unione europea tra Trattati di Lisbona e Costituzione", in *www.federalismi.it*.

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