

CONSTITUTIONAL JUSTICE IN ITALY AND BEYOND: A COMPARATIVE (AND PRIVATE) LAW PERSPECTIVE*

*Mauro Bussani***

Abstract

This article takes a comparative law perspective to examine a series of issues that, through the lense of the recently published book 'Italian Constitutional Justice in Global Context', appear to be closely interconnected. It starts with a survey of the overall global circulation of Italian legal models. Secondly, it focuses on the general features and inner limits of so-called global constitutionalism. Thirdly, it addresses the interactions at work in a civil jurisdiction between the Constitutional Court and the other domestic, European and Western legal formants. The final part of the paper chooses private law as a litmus test to review the practical dimension of the above-mentioned interactions.

TABLE OF CONTENTS

1. A book of virtues.....	12
2. Italian law in the world.....	13
3. Constitutional justice between localism and globalism.....	17
4. A story of dialogues.....	22
5. Looking through the private law keyhole.....	24

1. A book of virtues

'Italian Constitutional Justice in Global Context' makes a strong contribution to disseminating knowledge about the Italian Constitutional Court within the marketplace of ideas – a marketplace that, by definition, transcends national borders and is largely globalised.

* This essay was delivered on February 15th, 2016 at the University of Notre Dame, Rome Global Gateway in Rome, at the Symposium "Italian Constitutional Justice in Global Context". The original text and colloquial tone of the lecture have been preserved. Footnotes have been added.

* Professor of Comparative Law, University of Trieste. Adjunct Professor at the University of Macao, S.A.R. of the People's Republic of China.

This effort at dissemination is meritorious in itself – regardless of any virtues that the book may, and actually does, possess. It is meritorious because, despite the authentic or derived originality that Italian legal architectures and their scholarly foundations often possess¹, Italian law is little known compared with the law of the Western jurisdictions which are (or are deemed to be) paradigmatic. Limited knowledge of Italian law abroad is an issue that deserves brief discussion here, also because one of the reasons why I was invited to speak today is, I suppose, that I have worked on a project examining this very issue, from which a book has recently been produced².

2. Italian law in the world

The project aimed to turn the widespread and servile opinion that post-unification Italy³ has merely been a taker – rather than a maker – of legal rules, into a provocation, and into a series of questions, including, ‘Is legal Italy only an imitating country?’ and ‘Haven’t the Italian legal tradition and models in turn been known, admired, and imitated by others?’

A word of clarification: the underlying idea was not to solicit answers imbued with pride, or to take a nationalistic stance. The goal was rather to do an exercise in comparative law and to understand how and why Italian law has been able, or has failed, to make itself known beyond domestic circles.

It goes without saying that the legal dimension I refer to is not only that of State legislation. A legal tradition is of course made up of a number of authoritative rules set out by legislators

¹ See the contributions in S. Lanni, P. Sirena (eds.), *Il modello giuridico – scientifico e legislativo – italiano fuori dell’Europa*, Atti del II Congresso Nazionale della SIRD (2013).

² M. Bussani (ed.), *Il diritto italiano in Europa (1865-2014). Scienza, giurisprudenza, legislazione*, in *Annuario di diritto comparato* (2015).

³ Before the political unification of the peninsula in 1861, history gave Italian law a primary and incessant role in producing a substantial part of the legal infrastructure of continental Europe: from Roman law to municipal statutes, from *ius commune* to *iura mercatorum*, from Muratori to Filangieri to Beccaria. See, for example., P. Cappellini, P. Costa, M. Fioravanti, B. Sordi (eds.), *Enciclopedia italiana. Il contributo italiano alla storia del pensiero giuridico* (2012) XXXIII.

and judges. But this is not the whole story. Any legal tradition, including the Italian one, is best understood as “a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in society and polity, about the proper organisation and functioning of a legal system, and about the way law is or should be made, applied, studied, perfected and taught”⁴. From this cultural perspective, law emerges as a social infrastructure, relentlessly built and re-built by many different formants and actors, all with their own functions, aspirations, and roles.

Seen from this perspective, the Italian legal tradition (like many others) cannot but prove to be the long-term product of a mixed past⁵. What we dub ‘Italian law’ is the mobile result of a many-faceted history of legal transplants and transmitting of ideas, original solutions, and reinterpretations of borrowed ones. It is a history shaped by different forces, moving at different speeds and in different directions. A history of coexistence and competition among a plurality of legal orders and local variations. A history, like other legal histories, full of departures and returns, of renaissances and changes, of confrontation and dialogue with otherness⁶.

Unlike other Western legal sub-traditions, our post-unification legal system has never hidden its mixity. Over time, Italian jurists have endured, questioned, and proclaimed the ‘mixedness’ of their legal culture, and have always been able to convert it into a valid currency for their domestic intellectual exchanges. Thanks to a cultural modesty to which I shall come

⁴ J. Merryman, R. Perez-Perdomo, *The Civil Law Tradition* (2007), 1-2 (who then add: “The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective”).

⁵ E. Öricü, *General Introduction. Mixed Legal Systems at New Frontiers*, in Ead. (ed.), *Mixed Legal Systems at New Frontiers* (2010), 1 (“a great variety of legal systems have developed from mixed sources and all modern systems of any sophistication or complexity are mixed to a certain extent”); Ead, *What is a Mixed Legal System: Exclusion or Expansion?*, *ibid.*, 53, 54 (“all legal systems are mixed, whether covertly or overtly”).

⁶ M. Infantino, *The Italian Legal Recipe: Basic Ingredients and the Bustle of Time*, 6 J. Comp. L. 70-85 (2011). See also P. Cappellini, P. Costa, M. Fioravanti, B. Sordi, *Introduzione*, in *Enciclopedia italiana*, cit. at 3.

back later, Italian jurists have more sparingly used that currency for their exchanges with other national traditions.

The frequency and quantity of these exchanges have, of course, differed through time and across places. Outside Europe, and particularly in Latin America, in the Horn and North of Africa, and (in the last thirty years) in China, the demands of Italian law – above all, although not exclusively, of scholarly law – have been intense, and most of the time fully met⁷. Throughout Europe, too, our proposals and debates have circulated widely in many fields – from Roman law to international law, from criminal procedure⁸ to research on the Common Core of European Private Law⁹ to constitutional justice itself¹⁰.

What should be noted is that the above ‘proposals’ and ‘debates’ were, and still are, almost exclusively put forward by scholars. In reality, it was the academic élites that took, and still take Italian codes, statutes and case law beyond our borders, acting as our ‘heralds of the Italian legal tradition’¹¹. It is scholars who make Italian-born ideas known elsewhere. Scholars explain Italian case law and legislation to those who have no access to

⁷ Some illustrations are offered in S. Lanni, P. Sirena (eds.), *Il modello giuridico – scientifico e legislativo – italiano fuori dell’Europa*, cit. at 1.

⁸ See the contributions by M. Brutti, *I romanisti italiani in Europa*, 211-54; E. Cannizzaro, *Il mutamento dei paradigmi della scienza giuridica internazionalista e la dottrina italiana*, 77-98, and M. Chiavario, *Il diritto processuale penale italiano e i suoi quattro codici: luci e ombre di una «presenza» in Europa*, 149-96, in M. Bussani (ed.), *Il diritto italiano in Europa*, cit. at 2.

⁹ The project was founded more than twenty years ago by Ugo Mattei and the author of this paper with the aim of unearthing what is common and what is different within and across European private laws. For more information about the methodology, contents and results of the project, see M. Bussani and U. Mattei, *The Common Core Approach to the European Private Law*, 3 *Columbia Journal of European Law* 339 (1997/98); M. Bussani, “*The Common Core of European Private Law*” *Project Two Decades After: An Endless Beginning*, *European Lawyer Journal* 12 (2016), forthcoming; see also F. Fiorentini, *Un progetto scientifico che stimola e affascina l’Europa: «The Common Core of European Private Law»*, in M. Bussani (ed.), *Il diritto italiano in Europa*, cit. at 2, 275-306.

¹⁰ See especially Martia Cartabia’s study on Italian incidental procedure as a model for European constitutional justice: M. Cartabia, *La fortuna del giudizio di costituzionalità in via incidentale*, in M. Bussani (ed.), *Il diritto italiano in Europa*, cit. at 2, 27-53.

¹¹ In these terms, but regarding commercial law studies, see P. Grossi, *Scienza giuridica italiana. Un profilo storico 1860-1950* (2000), 187.

them. Scholars are read, (sometimes translated), often appreciated, and discussed in foreign *fora*. The list of Italian scholars who are highly thought of abroad is long – and includes the Italian authors of the book we are discussing here.

That being said, we are also obliged to acknowledge the limits and fragilities currently besetting Italian legal culture and its outward projection. If “‘legal culture’ (in its narrowest meaning) can be defined as the legal narrative of a society told from the perspective of the legal professionals operating in that society”¹², we are forced to conclude that a substantial portion of the Italian professional class is today constraining Italian legal culture between petty parochialism and pure fantasy. The parochialism is plain to see: it lies in the tardiness and superficiality with which many Italian legal professionals receive streams (not to say: fragments) of others’ debates and discuss them in the absence of any comparative contextualisation. Yet parochialism is often overwhelmed by fantasy. Fantasy takes hold of multitudes of domestic lawyers who naïvely believe that “legal experience cannot but be intrinsically local”¹³, and often are as assertive and self-congratulatory within their national borders as they are stuttering and unheard beyond them.

To say the very least, this legal culture serves neither itself, nor the present or the future of the country of which it is the expression. Nor does it support the work of judges and lawyers, whose task it is to participate in the world of ideas not only as listeners, but also as active debaters and transmitters of vision, critiques, and solutions.

Against this framework, the book under review presents itself as an austere challenge to local provincialism, and as a fertile promise of the dissemination of Italian views in the transnational marketplace of ideas. I will shortly highlight what I consider to be the volume’s most remarkable virtues. Before doing so, however, let me sketch some piecemeal comments on the text.

¹² P. Cappellini, P. Costa, M. Fioravanti, B. Sordi, *Introduzione*, in *Enciclopedia italiana*, XXXI, cit. at 3, (“‘cultura giuridica’ (in senso stretto) è la rappresentazione *more iuridico* che un ceto professionale offre di una determinata società”).

¹³ A. Gambaro, *Il modello giuridico – scientifico e legislativo – italiano fuori dell’Europa. Riflessioni conclusive*, in S. Lanni, P. Sirena (eds.), *Il modello giuridico – scientifico e legislativo – italiano fuori dell’Europa*, cit. at 1, 459, 460.

3. Constitutional justice between localism and globalism

Since I do not intend to renege on my 'dialoguing' scholarly role, I have forced myself to find some criticisms regarding the volume.

My first and most general observation is that the book implicitly embraces some of the mainstream narratives on constitutional adjudication. The authors probably had no alternative, given their commendable aim of speaking to, and being heard by the transnational public at large. What the authors could perhaps have done, however, would have been to set out some of these narratives in a more critical light. For instance, the authors could have better contextualised their historical account and critique of the limited independence of the judiciary in post-unification Italy (p. 8). On the formal level, one might recall that for centuries in England, until the recent Constitutional Reform Act 2005, the Lord Chancellor was at the same time the head of the judiciary, a member of the executive, and the presiding officer of the House of Lords¹⁴. On the substantive level, one might observe that, in the legal tradition that the book most often takes as a benchmark, i.e., the United States, judges are selected through either competitive election or political appointment. Illustrations such as these would have helped to show that the fabric and backbone of judicial independence, beyond and before positive law, have never resided in institutional constraints or selection procedures only, but have always had to do with the internal and external perception (of the law and) of the judges' role within the given legal tradition.

In the same vein, the authors could have placed more emphasis on the historical precedents for the story they are narrating, a story wholly centred on the American model of judicial review. History shows us that the overlap between judicial and political power was a characteristic feature of the Middle Ages, in France as in England. This feature was taken to, and maintained in, the United States even after the formation phase of the Republic, when the judicial power to say what the law is was associated with the mixed judiciary-legislative power to tell the legislature what the law could not be. True, in eighteenth-century

¹⁴ See, for example, J. Bell, *Judiciaries within Europe. A Comparative Review* (2006) 310, 320.

England, Blackstone emphatically rejected judicial authority to uphold established principles against legislation that violated them, no matter how gross that violation was. Yet, at the basis of the U.S. model of judicial review, there is the old English practice of controlling legislation through common law. That practice percolated from England to the United States, where scholarly and judicial engagement perpetuated and transformed it into the American doctrine of judicial review – a doctrine whose roots are deeply anchored in England’s legal past.

For a long time, continental and Italian history – as the authors know much better than I – has been a different one. Continental judges, like their English colleagues, became lions under the throne, as Francis Bacon¹⁵ put it, or the ‘bouche de la loi’, to quote Montesquieu¹⁶. On the European continent, the pressure to resist legislative centralism by counter-majoritarian, or simply technocratic means of controlling parliamentary powers, has only emerged cumulatively as the result of multiple instances¹⁷.

Our history was different, as I have just mentioned. But many of its current features are now common to Anglo-American ones. Think for instance of the reference that often recurs in the volume at hand (as well as in the specialised literature), to formulas such as that of ‘constitutional patriotism’ (*Verfassungspatriotismus*)¹⁸. What I want to stress here is that only Westerners could have conceived of a political organisation, such as the State, as being built upon ideals such as that of constitutional patriotism. Indeed, it is one thing to look at Constitutions as ‘narrating selves’ or identity narratives (and even from this perspective, questions about which Constitution, written by whom, interpreted by whom and for whom, read as a portrait of what – the present, the recent past, the future – would

¹⁵ Francis Bacon, *Of Judicature*, in *Essays* (1625).

¹⁶ *Esprit des Lois*, Liv. XI. Chap. VI.

¹⁷ M. Bussani, *Il diritto dell’Occidente. Geopolitica delle regole globali* (2010), esp. 189-191.

¹⁸ J. Habermas, *Warum braucht Europa eine Verfassung?*, in *Die Zeit*, 28 June 2001, n. 27, 7.

straightforwardly emerge¹⁹). It is quite another to believe that the text of a constitution can lay the foundations for a system's legality, and the sense of unity and identity of people living in that system. Behind such a belief there is nothing more than strategic opportunism or a dangerous naiveté²⁰. Suffice it to consider that, taken at face value, such a belief implies that neither a system's legality, nor people's sense of unity and identity, could exist

¹⁹ See, for example, C.R. Sunstein, *Designing Democracy: What Constitutions Do* (2001), 3, 239; M.R. Ferrarese, *Il diritto al presente. Globalizzazione e tempo delle istituzioni* (2002) 97; see also A. Simoncini, *Beyond Representative Democracy: The Challenge of Participatory Democracy and the Boundless Galaxy of Civil Society*, in M. Cartabia, N. Lupo & A. Simoncini (eds.), *Democracy and Subsidiarity in the EU. National Parliaments, Regions and Civil Society in the Decision-Making Process* (2013) 45. In this light, an examination of U.S. constitutional discourse may be of particular interest. On the one hand, U.S. efforts to transplant their own Constitution are premised, in the domestic legal and political debate, upon the 'civilising' mission Americans attribute to their own law. On the other hand, the same debate largely denies that comparison with other legal experiences should matter in domestic constitutional adjudication (and sometimes refers to constitutional comparative exercises as a 'meretricious practice': R. A. Posner, *The Supreme Court 2004 Term. A Political Court*, 119 *Harvard L. Rev.* 31, 98 (2005)). See, for example., A. Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A. Scalia et alii, *A Matter of Interpretation: Federal Courts and the Law* (1997) 3, 37.; R. Bork, *Coercing Virtue: The Worldwide Rule of Judges*, New York, Random House (2002), 135; A. Scalia, S. Breyer, *Justice, U.S. S. Ct., Discussion at the American University Washington College of Law* (Jan. 13, 2005), 3 *Int'l J. Const. L.* 519 (2005). But for a fierce and accurate defense of the view that would oblige (at least) the Supreme Court to consider and understand foreign ideas and the international circulation of ideas, see S. Breyer, *The Court and The World. American Law and the New Global Realities* (2015).

²⁰ See for instance N. MacCormick, *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth* (1999) 63; M.J. Horwitz, *Constitutional Transplants*, 10(2) *Theoretical Inquiries in Law* 535 (2009); D. Chiro, *Does Democracy Work in Deeply Divided Societies?*, in Z. Barany, R.G. Moser (eds.), *Is democracy exportable?* (2009) 85; D.H. Levine, *Rule of Law, Power Distribution, and the Problem of Faction in Conflict Intervention*, in M. Sellers, T. Tomaszewski (eds.), *The Rule of Law in a Comparative Perspective* (2010), 147. A good illustration of the opportunism/naiveté mentioned in the text comes from the U.S. Department of State, *The Future of Iraq Project*, a series of 13 volumes written between October 2001 and September 2003, and available under National Security Archive Electronic Briefing Book n. 198, at: gwu.edu), chapter 4, *Democratic Principles and Procedures*, 49: "The first task of politics is to restore the faith of the people of Iraq in the idea of a founding document, a Constitution".

without a constitution. However, everybody would agree that no constitution (and, more generally speaking, no statutory law) could create a legality, or a sense of unity and identity from the scratch, that is, without the support of widespread circles of cultural and social consensus production.

In this perspective, the ‘global context’ – to which the book belongs and speaks – should be understood as a purely Western story. Current constitutional debates, and the notions and ideas they produce, are rarely supplied with data, elements and observations stemming from beyond the Western dimension – a dimension that, far from being merely geographical, overlaps with the area dominated by Western cultural influence²¹. In other words, what falls outside the Western radar screen is attention to the impact that our debates might have on non-Western experiences, whose cultural frameworks for discussing public reasons, for selecting who is to handle societal and legal conflicts, and for identifying who can claim what against whom, are variable, often distant, and sometimes dramatically different from Western ones²².

Let us be clear: scholars do their work. They build perspectives, set horizons of meaning, and propose solutions. There would be nothing wrong if scholars, when making comparisons, especially ‘global’ ones, called the results of their research ‘studies on Western constitutional law’, or ‘studies on Western constitutional justice’. Yet this does not normally happen,

²¹ For some observations on the distinction between a ‘transcendental’ and ‘comparative’ approach to the problems and priorities of global justice, and on the practical effects that can derive from such a distinction, see A. Sen, *The Idea of Justice* (2009), esp. 403.

²² Suffice it to mention, on the one hand, that John Rawls – one of the most authoritative and respected voices of the debate on the notion of justice – centres his vision on the model of a ‘self-contained’ and ‘closed’ society (explaining such an abstract choice ‘because it enables us to focus on certain main questions free from distracting details’: *Political Liberalism*, Columbia U.P., 1993, rev. ed. 1996, 12), and, on the other hand, that the same author limits his analysis of international relations to relationships between ‘liberal and decent peoples’: *The Law of Peoples*, (1999) 3. Among the rich literature on these issues, see the critiques raised against Rawls’ views by G. Teubner, *Self-subversive Justice: Contingency or Transcendence Formula of Law?*, 72 *Mod. L. Rev.* 1-23, esp. 3 (2009).

since in most cases their discourses show a vocation that is implicitly (yet undisputedly) universal.

Allow me to better explain what I am referring to with a brief example taken from Islamic countries – that is, from a large part of the ‘legal global’ that is allegedly addressed by mainstream constitutional discourse. Firstly, comparison with Islamic countries makes clear the relative significance and limited relevance of our assumptions about the centrality of Western-style constitutional frameworks (as we know them). Both in the West and in the Islamic world, there is invariably a level of ‘constitutional’ legality which is higher than the will of any single parliament or government. When these bodies, both in Islamic societies and in the West, issue any law, they do so in their capacity as organs bound by ‘superior’ laws, principles and values – the ones embedded, respectively, in our constitutions and in sharia. The crucial point is therefore the content and, even more so, the way the superior constitutional structure operates, which is the way(s) we in the West know, but which arises ‘there’ from the complex interaction between sharia and the State-positing law, the *siyasa*. This is why there is a lot more than just the formal existence of a ‘law of the land’ and/or the articulation and balance of powers it guarantees that makes our constitutions not just a ‘sacred’ text, but an instrument for political battles transferred to legal grounds and then disputed or disputable before the (secular) Courts.

Secondly, what should be stressed even more is the dialectic relationship existing – in the West as well as in Islamic countries – between civilisation and legal tradition: the ‘secular’ legal tradition is a fundamental pillar of our civilisation, as much as the ‘Koranic’ tradition is for the Islamic countries. In other words, within both traditions we can observe: a) a one-to-one correspondence between the values of civilisation and the values of the law, and b) the main role, in the development of those values, played by the jurist or legal practitioner – a layman in the West, a religious figure in the Islamic countries – as the maker and messenger of that complex of rules which make up the historical and current ground of the different societies²³.

²³ In a similar vein, see, for instance, A. Quraishi, *Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and*

This is just an example of the many possible crossover points of the discourse. Yet ‘global’ legal scholarship, even the most sophisticated, rarely considers these points of juncture worthy of analytical (not to mention: critical) attention. Was the task of the volume we are celebrating today to overturn such an attitude? I do not think so. I nevertheless think that the narratives on global contexts should give greater consideration to otherness and embrace broader horizons.

4. A story of dialogues

As I mentioned, the above considerations are simply fragmentary footnotes to the volume – raindrops falling into the sea of suggestions, visions, and information that flow from this book.

Among the many virtues of the book under review – and in addition to what I said in section 1 and at the end of section 2 – two further features deserve mentioning. The first is immediately clear to any scholar of comparative law, and permeates every single chapter of the book. A virtue that emerges from the emphasis placed on the constant dialogue between the Italian Constitutional Court and other domestic, European and Western legal formants.

Starting from the European and Western perspective, the authors rightly point out that interaction between the Italian Constitutional Court and other (constitutional and supranational) judicial authorities is, today, a fundamental necessity (see esp. pages 231-2). We live in a world where rules controlling a large number of fields, such as trade, banks, currencies, loans, environment, space and energy, air and maritime transportation, the management of marine resources, fisheries, agriculture, food, telecommunications, intellectual property – not to mention finance – are largely denationalised. All these rules are neither determined, nor exclusively influenced, by States. Rather, they are the by-product of centres of legal production located in regional and global arenas. These centres have a huge impact on domestic

American Jurisprudence, 28 Cardozo L. R. 67 (2006); T. Kuran, *The Rule of Law in Islamic Thought and Practice: A Historical Perspective*, in J.J. Heckman, R.L. Nelson, L. Cabatingan (eds.), *Global Perspectives on the Rule of Law* (2010), 71.

legal systems. Such an impact is sometimes mediated by States, whose involvement may be necessary for the enforcement of rules. At other times the impact is direct, with no domestic intermediation²⁴, and at still other times it is the result of the ever deeper collaboration between States and global judicial authorities²⁵.

Against this framework, cross-jurisdictional dialogue is not only necessary, but it is a key for surfacing and dismantling the guileful posturing of legal parochialism one can find everywhere. I would like to underline that the authors' perusal of the nature, quality and quantity of the Court's dialogues is as admirable and accurate as it is rare in current legal scholarship.

²⁴ "[M]ost citizens greatly underestimate the extent to which most nations' shipping laws are written at the IMO in London, air safety laws at the ICAO in Montreal, food standards at the FAO in Rome, intellectual property laws in Geneva at the WTO/WIPO, banking laws by the G10 in Basle, chemical regulations by the OECD in Paris, nuclear safety standards by IAEA in Vienna, telecommunication laws by the ITU in Geneva and motor vehicle standards by the ECE in Geneva": K. Braithwaite and P. Drahos, *Global Business Regulation* (2000) 488. See also J.E. Alvarez, *International Organizations as Law-Makers* (2005) 217, 608.

²⁵ S. Cassese, *I tribunali di Babele. I giudici alla ricerca di un nuovo ordine globale* (2009) *passim* and esp. 89; Id. (with E. D'Alterio), *Introduction: The Development of Global Administrative Law*, in Id. (ed.), *Research Handbook of Global Administrative Law* (2016) 1, esp. 7-9; E. Benvenisti and G.W. Downs, *Court Cooperation, Executive Accountability and Global Governance*, Tel Aviv University Law Faculty Papers, 2009, paper 108, 1, 6; E. Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 *Am. J. Int'l L.* 241, 247 (2008); G. della Cananea, *Il diritto amministrativo globale e le sue Corti*, in F. Mangarano and A. Romano Tassone (eds.), *Dalla cittadinanza amministrativa alla cittadinanza globale* (2005), 137; V. Barsotti, *Tra il dialogo e la cooperazione. Il nuovo ruolo delle corti nell'ordine giuridico globale*, in L. Antonioli, G.A. Benacchio & R. Toniatti (eds.), *Le nuove frontiere della comparazione. I Convegno Nazionale della SIRD* (2012), 199-215. For an analysis of the mixed fate encountered in domestic jurisdictions by the horizontal application of international treaties, that is, the ability of individuals to invoke a provision from a treaty against another individual, see, in general, D. Shelton, P. Carozza, *Regional Protection of Human Rights* (2013), 126-135; D. Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement. A Comparative Study* (2009); with a special focus on Europe, see A. Colombi Ciacchi, *European Fundamental Rights, Private Law, and Judicial Governance*, in H.-W. Micklitz (ed.), *Constitutionalization of European Private Law* (2014), 102; M. Cartabia, *L'ora dei diritti fondamentali nell'Unione Europea*, in Ead. (ed.), *I diritti in azione* (2007).

5. Looking through the Private Law Keyhole

The second (and final) note concerns the domestic side of the picture and is presented from the private law perspective²⁶. It aims to praise another virtue of this book, i.e. the accuracy and acuity with which the authors analyse the interchange between the Constitutional Court and local formants.

Private lawyers have long noted that when the Constitutional Court is called to enter into private law domains, it always does so through a dialogue with the other interpretive formants: directly with judges, and, through them, with legal scholarship. What is worth observing is that, as far as private law is concerned, it is often judges of the lower courts who ask the Constitutional Court to review the constitutional legitimacy of a line of case law. The phenomenon is easy to explain. The discretion of trial judges is culturally (although not formally) bound by *stare decisis*²⁷. These judges have very little occasions to criticise the decisions of their colleagues, especially those who sit at the upper levels of the hierarchy. Resorting to the Constitutional Court, by contrast, provides the judges of the lower courts with an instrument to express disapproval of other judges' (including the Court of Cassation's) positions, and to open or sharpen the debate on given issues, putting pressure on all legal formants to take a stance. Thus, the Constitutional Court is frequently called within the circle of production of private law rules to act as the ultimate arbiter of conflicts, at whose core is the constitutionality not of a legal provision, but of a judicial interpretation.

²⁶ To be noted in passing (but the note may be useful to most constitutional lawyers) is the counter-power role private law has played in the history of both common and civil law. Private law has in fact long been the legal dimension in which the driving force of individual freedom has been fed and increasingly protected by rules developed by scholars and/or judges. This was done over time and before any code or constitution came into play to seal the achievements of private law practitioners – esp. the idea that individual sovereignty over personal, social, and economic relationships is as worthy of protection as rulers' sovereignty over their country. See M. Bussani, *Il diritto dell'Occidente. Geopolitica delle regole globali* (2010), esp. 187-188; Id., *Democracy and the Western Legal Tradition*, in M. Bussani and U. Mattei (eds.), *The Cambridge Companion to Comparative Law* (2012), 384, 385-387.

²⁷ M. Cappelletti, *Doctrine of Stare Decisis and the Civil Law: A Fundamental Difference or No Difference At All?*, in *Festschrift für Konrad Zweigert* (1981), 381.

What is also interesting to analyse is the way in which the Constitutional Court has managed its relationships with lower and upper level judges until now. Among the sizeable amount of possible instances, let me focus on some tort law developments.

In this field it is easy to realise how often the Court emphasises the exclusive jurisdiction of trial judges in distributing the cost of the accident between the parties in the light of the overall circumstances of the case. The Constitutional Court has repeatedly stressed that the decision on how to allocate the burden of damage undergone can only be made “against the facts of the case”²⁸, and that the general tort law clause of Art. 2043 of the Italian Civil Code²⁹ “allows judges to adapt the liability rule to a specific conflict through the assessment of the importance of the victim’s interests vis-à-vis those of the the defendant in light of the evolving social conscience and of the legal system as a whole, as well as of the other instruments of protection available to plaintiffs”³⁰.

²⁸ Constitutional Court, 16 October 2000, n. 243, in *Giust. civ.*, 2001, I, 306; see also Constitutional Court, 24 October 2001, n. 340, in *Giur. It.*, 2001, c. 165, as well as Constitutional Court, 10 May 1999, n. 156, in *Giust. civ.*, 1999, I, 1927.

²⁹ “Any malicious or negligent act that causes a wrongful injury to another obliges the person who has committed the act to pay damages”.

³⁰ The provision of Article 2043 of the Civil Code “consente al giudice l’adattamento di tale norma alle circostanze del caso attraverso la valutazione dei limiti di meritevolezza degli interessi pretesamente lesi, anche in relazione ad altri interessi antagonisti, secondo l’evolversi della coscienza sociale e del sistema giuridico generale nonché degli strumenti normalmente a disposizione dei soggetti titolari di tali interessi”: Constitutional Court, 10 May 1999, n. 156, in *Giust. civ.*, 1999, I, 1927. Incidentally, it should be noted that the realism thus displayed by the Constitutional Court does not prevent it from performing a pedagogical role. In many opinions, besides clarifying the doubts that triggered the request for judicial review, the Court seizes the opportunity to remind the remittal judge and his colleagues about the fundamentals of liability: M. Bussani and M. Infantino, *La Corte costituzionale, l’illecito e il governo della colpa*, in M. Bussani (ed.), *La responsabilità civile nella giurisprudenza della Corte costituzionale* (2006) 34; similar observations can be read in F.D. Busnelli, *Il danno biologico dal “diritto vivente” al “diritto vigente”* (2001), 142, 146; G. Ponzanelli, *Corte costituzionale e responsabilità civile: rilievi di un privatista*, in *Foro it.*, 1988, I, c. 1057, 1059. For an illustration of the technique mentioned in the text, see: Constitutional Court, 14 July 1986, n. 184, in *Giur. it.*, 1987, I, c. 392; and then Constitutional Court, 11 July 2003, n. 233, in *Foro It.*, 2003, I, c. 2201; Constitutional Court, 27 October 1994, n. 372, in *Giur. It.*, 1995, I, c. 406; Constitutional Court, 16 October 2000, n. 423, in *Foro It.*, 2001, I, c. 4;

Further, even when the Constitutional Court's opinions on tort law are welcomed by the debate due to their wealth of innovation, what the Court in fact does is to select and reshape the best constitutionally oriented arguments from among those produced and refined by scholars, and then percolated down, or up, through the judicial hierarchy³¹. Let me recall, for instance, the Constitutional Court's approach to personal injury and 'biological damage' ('danno biologico')³². With regard to this issue, the Constitutional Court followed the path already opened by the Court of Cassation (that, in its turn, was driven by legal scholarship) in connecting the notion of 'injustice' under Art. 2043 of the Italian Civil Code to the constitutional provision on the protection of health under Art. 32 of the Constitution³³. But one may also think of the current framework of compensation for non-patrimonial damage, which was made possible by an expansion of the area of recoverable injury advocated by scholarship, implemented by justices of peace, enforced by trial and appellate

Constitutional Court, 18 April 1996, n. 118, in *Giust. civ.*, 1996, I, 1879. An analysis of the structure of the Constitutional Court's opinions in these cases is offered, among others, by E. Lamarque, *La tutela dei diritti costituzionali in Italia tra Corte costituzionale e giudici comuni (2003-2008)*, in M. Cartabia, A. Simoncini (eds.), *La sostenibilità della democrazia nel XXI secolo* (2009), 277; G. Tucci, *Danno non patrimoniale, valori costituzionali e diritto vivente*, in *Danno resp.* 17 (2004), 701, 703.

³¹ Moreover, one should note that the Constitutional court displays a remarkable tendency to keep its activity separated from that of ordinary judges. This implies that, every time justices are required to assess the legitimacy of the interpretation given to black-letter rules by ordinary courts (especially by the Court of Cassation), they are inspired by a noteworthy self-restraint. Multiplication of summary judgments on inadmissibility and manifest groundlessness of the claim in this area is evidence of the Court's cautiousness when reviewing ordinary judges' work: M. Bussani, M. Infantino, *La Corte costituzionale*, 33; on the same lines, see also P. Cendon, P. Ziviz, *Vincitori e vinti (...dopo la sentenza n. 233/2003) della Corte costituzionale*, in *Giur. it.*, 2003, c. 1776.

³² Namely, the Italian method of assessing the non-economic consequences of personal injuries on the basis of pre-established models, translating into monetary terms the victim's percentage of temporary or permanent disability.

³³ For a more detailed illustration of these developments, see M. Bussani, *Introduzione*, in M. Bussani (ed.), *La responsabilità civile nella giurisprudenza della Corte costituzionale*, VII, IX-X.

judges, and then finally legitimised by the Constitutional Court itself³⁴.

Naturally, the clock of history sometimes swings towards harmony between ordinary and constitutional judges, and sometimes moves towards disharmony. Yet both in times of harmony and disharmony, the Court always performs a difficult and praiseworthy balancing role in reading at the same time the formal constitutional text and its unwritten, 'living' contents³⁵. This role obliges the Court to relentlessly take a position amidst interpretive disputes, and to measure itself against other (national and supranational) courts, as well as the great and powerful grande dame of civil law, i.e., the *scientia iuris* – understood as the sophisticated and (unavoidably) transnational upper side of legal scholarship.

The contents, style and method displayed in the analysis of the role played by the Italian Constitutional Court has already earned this new and fascinating book a front row seat in the arena of transnational legal scholarship. I am certain that it will set the quality standard for future efforts to describe and understand (not only Italian) constitutional justice.

³⁴ Cf. Constitutional Court, 11 July 2003, n. 233, in *Foro It.*, 2003, c. 2201, and the two previous opinions of the Court of Cassation, 12 May 2003, nn. 7281, 7282, 7283, published in *Foro it.*, 2003, 2274; *Resp. civ. prev.*, 2003, 676 and *Giur. it.*, 2004, 1130 respectively.

³⁵ M. Bussani, *Introduzione*, XI, cit. at 33.