

THE USE OF NATIONAL AND COMMON CONSTITUTIONAL
TRADITIONS IN ITALIAN LEGAL SCHOLARSHIP
AND HIGH-LEVEL COURTS

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Abstract

The article analyses how the Italian legal scholarship and highest courts have construed the Italian constitutional tradition and the notion of common constitutional traditions. It starts with a brief overview of the notion of “legal tradition” in comparative legal scholarship, and then considers the differences between the latter and other neighbouring, but different, concepts. After that, the work gives an account of the authors who have provided the most valuable contributions in the field, and then surveys how the high courts have made use of the expression of (common) constitutional traditions. The conclusion suggests a categorization of such uses**.

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«Comparison is thus a *process* of peaceful coexistence of those who are taken as equals, in spite of even major difference in belief, circumstance or tradition»

P.H. Glenn, *The National Legal Tradition*,
in *General Reports of the XVIIth Congress of the International Academy
of Comparative Law*, edited by K. Boele-Woelki and S. Van Erp,
Brussels, Bruylant, 2007, 15

1. The framework: the relevance of the notion of “legal tradition” in the comparative legal literature and the purposes and methodology of the analysis

«Comparative law, understood as a science, necessarily aims at the better understanding of legal data. Ulterior tasks such as the improvement of law or interpretation are worthy of the greatest consideration but nevertheless are only secondary ends of comparative research»¹. I would like to begin this brief inquiry into the substance of the Italian constitutional tradition from this observation on the benefits of a comparative perspective. Comparative law – affirmed the prominent Italian legal scholars who convened in Trento in 1987 – is a scientific effort *per se*, because of its contribution to the advancement of knowledge.

Moreover, comparative law can also serve a specific purpose. As Ajani, Pasa and Francavilla explain, facilitating the task of legal interpretation is among these aims: an example in point is «the use, by the European legal interpreter, [...] of the “constitutional traditions common to the Member States” [art. 6 TEU, that incorporates the Charter of Fundamental Rights of the European Union of 2000, by equating it to the Treaties] in order to distil the rule to apply to a particular case»². And this is precisely the purpose that this work will try to serve.

To be sure, the background of comparative legal scholarship is even more relevant to the study of common

¹ First Trento thesis, as cited by R. Sacco, *Legal Formants: A Dynamic Approach To Comparative Law*, 39 *Am. J. Comp. L.* 1 (1991), 4-5, footnote 6.

² G. Ajani, B. Pasa, D. Francavilla, *Diritto comparato. Lezioni e materiali* (2018), 6 (the translation is mine). The Authors also refer to B. Markesinis, J. Fedtke, *Judicial recourse to foreign law: a new source of inspiration?* (2006), 9 ff. of the Italian translation, *Giudici e diritto straniero. La pratica del diritto comparato* (2009).

constitutional traditions (from now on also referred to as CCTs), because of the in-depth studies it performed on the very notion of legal tradition³. Merryman was the first author to offer a definition of this expression, in the following terms: «A legal tradition, as the term implies, is not a set of rules of law about contracts, corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition. Rather it is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. 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»⁴.

Krygier was another prominent scholar who investigated the notion of tradition in relation to law: «Like all complex traditions, law records and preserves a composite of (frequently inconsistent) beliefs, opinions, values, decisions, myths, rituals, deposited over generations. [...] Traditions, particularly recorded traditions, provide us with store-houses of possibly relevant analogies to our present problems, and successful and unsuccessful attempts to solve them [...]. The relevance of this to law is obvious. Law deals with myriad practical problems which individuals who use it have not, indeed could not, alone foresee or forestall»⁵.

This Author made a substantial contribution to the understanding of the dynamic nature of constitutional traditions, that he showed were not in opposition to the notion of 'change'. As Sadurski captured very well, Krygier «helpfully suggested [that] we use the language of a (legal) tradition when we attempt to describe how legal past is relevant to the legal present. It is about the power of the past-in-the-present»⁶.

³ See broadly G. Ajani, B. Pasa, D. Francavilla, *Diritto comparato*, cit. at 2, 16-17.

⁴ J.H. Merryman, *The Civil Law Tradition. An Introduction to the Legal Systems of Western Europe and Latin America* (1969), 2.

⁵ M. Krygier, *Law as Tradition*, 5 *Law & Phil.* 237 (1986), 241 ff.

⁶ W. Sadurski, *European Constitutional Identity?*, EUI Working Papers LAW No. 2006/33, available at <https://cadmus.eui.eu/bitstream/handle/1814/6391/LAW-2006-33.pdf> 4. The

In the following pages, after providing some necessary clarifications on how the notion of constitutional tradition differs from others that typically come up in this domain (par. 2), I will present the result of an analysis of how the Italian literature and case-law have contributed to defining the national constitutional tradition, which – together with the other national constitutional traditions – is to be intended as a building block of *common* constitutional traditions (Art. 6 TEU).

To be sure, a fully-fledged treatment of the challenging task to define the Italian constitutional tradition in all its main components still appears to be lacking, and it is beyond the purposes of this work to present a comprehensive picture⁷. However, an attempt will be made to contribute to the reflection in the field in an indirect way, *i.e.* by looking at how the notion of *common* constitutional traditions has been understood and used by the Italian constitutional scholarship and case-law: this effort is

quotation proceeds in the following way: «Krygier goes on by identifying three indicia of such past-in-the-present. First, a subject of tradition is drawn from a real or imagined past [...]. Second, the hold of the past over the present is authoritative: it is not a mere description of what elements of the past are incrustated into our modern world but in a presence-talk the past is treated as significant. It has a normative force. [...] Third, there is a factor of transmission of the past into the present: the past is not dug out from the profound layers of history but passed on to us from an immediate predecessor era; hence, there is a real or imagined continuity between past and present». On top of Krygier's article mentioned above in the previous footnote, Sadurski refers to the following works of his: *Traditionality of Statutes*, 1 Ratio Juris 20 (1988); *Tipologia della tradizione*, 5 Intersezioni: Riv. storia id. 221 (1985); *Thinking Like a Lawyer*, in W. Sadurski (ed.), *Ethical Dimensions of Legal Theory* (1991), 67 ff.. See also, *Tradition*, in A.-J. Arnaud (ed.), *Dictionnaire encyclopédique de théorie et de sociologie du droit* (1988), 423 ff.; *Legal Traditions and Their Virtue*, in G. Skąpska, K. Pałeczki (eds.), *Prawo w Zmieniającym Się Społeczeństwie* (1992), 243 ff.; cf. as well the following writings with A. Czarnota are worth mentioning: *Revolutions and the Continuity of European Law*, in Z. Bańkowski (ed.), *Revolutions in Law and Legal Thought* (1991), 90 ff.; *From State to Legal Traditions? Prospects for the Law After Communism*, in J. Frentzel-Zagórska (ed.), *A One-Party State to Democracy: Transition in Eastern Europe* (1993), 91 ff.. Finally, much more recently, see *Too Much Information*, in H. Dedek (ed.) *Cosmopolitan Jurisprudence. Essays in Memory of H. Patrick Glenn* (forthcoming 2020).

⁷ I would anyway like to refer to my reflections on what I submit to be the quintessential feature of the Italian constitutional traditions, *i.e.* the “social principle”, currently being peer-reviewed by the law review *Federalismi.it*.

meant to be read in the context of a broader research project, the one of the European Law Institute on common constitutional traditions⁸. The methodological assumption is that *common* constitutional traditions are best identified once *national* constitutional traditions have been carefully described⁹.

I will therefore briefly review the most relevant national legal scholarship in the field (par. 3), and then move on to the judicial formant, considering how frequently Italian high-level courts use the notion of constitutional tradition (and some other closely connected notions) (par. 4). In the final paragraph, I will offer my conclusive remarks, by proposing a possible classification of the different uses of this notion by top Italian courts (par. 5).

2. The need to trace boundaries with other concurring (but different) notions

First of all, before proceeding with the actual analysis, a linguistic caveat is in order: the aforementioned Art. 6 TEU refers to the word “traditions” (“*tradizioni*”, in the Italian version). It would go beyond the scope of this work to investigate the implications of such a choice. For the purposes of this article, the term (national) constitutional tradition can be taken as encompassing the fundamental features of a certain constitutional order. From a slightly different perspective, a tradition is a set of principles, so it can arguably be used to encompass the word “principles”¹⁰. In the text, the word ‘principle’ will therefore be employed as a subset of the word ‘tradition’: from this perspective, a series of particularly relevant principles make up a tradition. In the Italian case, such principles can arguably be grouped under the label “social principle”, which will be the

⁸ The article mentioned in the previous footnote is part of the same inquiry and should be read in close connection to the present one.

⁹ Cf. Glenn, *Doin' the Transsystemic: Legal Systems and Legal Traditions*, 50 McGill L.J. 863 (2005): «By examining the traditions that form the foundations of particular legal systems, it is possible to gain a fuller understanding of the interrelationship of the laws of the world and to move beyond the theoretical constraints of traditional legal positivism» (abstract at p. 863).

¹⁰ A recent study of the latter is the one by N.W. Barber, *The Principles of Constitutionalism* (2018).

underlying theme of this analysis. In summary, when the article mentions principles, it takes them as strands of the *genus* 'tradition'.

However, reference will inevitably be made to another key word: "identity". In fact, what I am interested in is trying to set out the features that make the Italian constitutional tradition stand out in relation to the constitutional traditions of the other EU Member States. In other words, the present analysis attempts to capture a few distinctive features that are typical of the Italian tradition to such an extent that they define the country's constitutional identity¹¹. This work is then intended to be compared with similar national reports on other EU Member States, in order to comparatively assess the distinctive features of the respective '*iura propria*', and use this groundwork to help define, by contrast, what is "really" *common* among the various national constitutional traditions¹². Hopefully, this type of analysis might be of some use to the courts, especially European ones, which have so far have shied away from in-depth considerations

¹¹ From this perspective, the present article lays out the basis for the further research performed by my closely connected article already mentioned in footnotes 7 and 8, which carries out the task described in the text in even greater detail. On the relationship between tradition and identity, P. Glenn, *Legal Traditions of the World. Sustainable Diversity in Law* (2000), 30 ff.. By this Author, see also *A Concept of Legal Tradition*, 34 QLJ 427 (2008), on top of the works cited in the epigraph at the beginning of the article, and above in footnote 9. More broadly, some fundamental works on the subject include M. Rosenfeld, *The Identity of the Constitutional Subject. Selfhood, Citizenship, Culture, and Community*, (2009); G.J. Jacobsohn, *Constitutional Identity* (2010); E. Cloots, *National Identity in EU Law* (2015) (cf. especially the first part); C. Calliess, G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (2019). See also T. Drinóczi, *Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach*, 21 Germ. L.J. 105 (2020).

¹² In this regard, B. Markesinis, J. Fedtke, *Judicial Recourse to Foreign Law: a new source of inspiration?*, cit. at 2, 119-20: «the formula so frequently found in ECJ judgments – that the Court 'draws inspiration from the constitutional traditions common to the Member States' – is in fact often a code for comparative work previously conducted by the Advocate Generals. Moulded into a corpus of Community law by the ECJ, the lines between national ideas thereby eventually fade and, over time, disappear». Again, the comparative effort described in the text is envisioned within the framework of the mentioned ELI project.

when asserting the existence of a common constitutional tradition¹³.

Inevitably, as well, the question arises of the intersection between the outcome of this inquiry and the notion of ‘counter-limits’ (*controlimiti*)¹⁴, on the one hand, and the connected study on non-amendable parts of the constitution¹⁵. There is indeed a partial overlap between what makes up the national constitutional identity and the fundamental choices of a constitutional order that cannot be reversed, or even questioned, either by superior legal orders such as the EU legal system, or by way of national constitutional amendment¹⁶.

However, major differences exist: by definition, the notion of counter-limits is a tool to that can be made use of only in borderline cases, to defuse a potential conflict between the national constitutional order and that of the EU. They may never actually be employed, only “threatened” (as, most recently, in the case of the well-known *Taricco* saga), and only in residual, highly controversial and highly sensitive situations. A national constitutional identity, instead, is a more general notion: it almost certainly encompasses everything that could be activated as a counter-limit, but is definitely not restricted to this last-resort notion.

Similarly, the unamendable parts of the constitution of a country are typically a component of its constitutional identity, or

¹³ R. de Caria, M. Graziadei, *The «Constitutional Traditions Common to the Member States» in the Case-law of the European Court of Justice: Judicial Dialogue at its Finest*, 67 Riv. Trim. Dir. Pub. 949 (2017).

¹⁴ Among many contributions of the Italian scholarship in English on the subject, see one of the most recent, D. Paris, *Limiting the ‘counter limits’. National constitutional courts and the scope of the primacy of EU law*, 10 It. J. Pub. Law 205 (2018). This doctrine was introduced by the Italian and German constitutional courts, respectively with judgments *Frontini* (18 December 1973, No. 183) and *Solange I* (29 May 1974, BVerfGE 37, 271 [1974]), as a response to ECJ’s judgment in *Internationale Handelsgesellschaft*, the ruling where the European Court introduced the notion of CCTs; see also B. Markesinis, J. Fedtke, *Judicial Recourse to Foreign Law: a new source of inspiration?*, cit. at 2, 117.

¹⁵ On this topic, broadly Y. Roznai, *Unconstitutional constitutional amendments. The Limits of Amendment Powers* (2017).

¹⁶ For some enlightening reflections on these issues, M. Cartabia, *La Costituzione italiana e l’universalità dei diritti umani*, in *Astrid* (2008), available at www.astrid-online.it.

tradition, but this latter notion is arguably broader¹⁷: a tradition is a lasting feature that is destined to remain unchanged even though it is not declared unchangeable, at least until or unless a complete paradigm shift takes place, bringing up a *Grundnorm*¹⁸ change. In other words, unamendable parts of a constitution, in spite of their name, appear less immutable than the inner, often unwritten underpinnings of a legal system that make up its tradition (and define its identity). I would therefore argue that what it takes to amend an unamendable part of a constitution, is merely the political will and consensus to bring about such change¹⁹.

Admittedly, a distinguished line of thinking on constitutional scholarship argues that fundamental principles also constrain a new constituent power²⁰, and in the same vein the literature in the field of international law usually affirms the existence of some international constitutional limitations for the adoption of a new constitution, such as its cornerstones (which it is the job of international organisations offering constitutional advice to identify, the Venice Commission above all)²¹. However, one could be more cynical and acknowledge that, should the popular will be strong enough to bring about an unconstitutional constitutional change, such a change would be effective, no matter how fundamental the principle was in the previous legal order. On the contrary, a tradition does not simply change by an act of political will, not even a very popular one²²: a tradition has its

¹⁷ Broadly on this subject M. Cartabia, *Principi inviolabili e integrazione europea* (1995), 26 ff., where the Author deals with the role of CCTs in the shaping of general principles of EU law.

¹⁸ The obvious reference is to H. Kelsen, *Pure Theory of Law* (1960, 1934).

¹⁹ C. Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty* (1922).

²⁰ Among many, M. Dogliani, *Potere costituente e revisione costituzionale*, 15 Quad. cost. 7 (1995).

²¹ In this regard M. De Visser, *A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform*, 63 Am. J. Comp. L. 963 (2015).

²² Let me just refer here to the touchstone by S. Romano, *L'ordinamento giuridico. Studi sul concetto, le fonti e i caratteri del diritto* (1918), recently translated into English by M. Croce (*The legal order*, 2017): Santi Romano writes, for instance: «it is, in the first place, the complex and multi-faceted organization of the Italian and French states, the numerous mechanisms and gears, the links between authorities and forces, that produce, modify, enforce, guarantee legal norms,

roots in different pre-constitutional moments, or anyway in constitutional moments that precede the Constitution that happens to be in force at any given moment²³.

3. An overview of the relevant national literature

I believe it is necessary to begin my analysis with a brief inquiry into the scholarship that has investigated this subject.

First of all, it should be noted that most of the relevant Italian literature appears to be focused mainly on the constitutional traditions common to the EU, rather than on explicitly trying to define the Italian constitutional tradition *per se*, a line of research that has been comparatively less investigated.

After a number of seminal works by Alessandro Pizzorusso, who raised some important points regarding what he defined as «the dialectic between the national and supranational principles»²⁴, and by Luigi Lacchè, who envisioned that the principles derived from constitutions and from common constitutional traditions might lead to the processing of a “new common right” that took into account the past and the history of single member States and, at the same time, looked to the future²⁵, the Italian literature on CCTs has grown extensively, welcoming contributions from a number of prominent scholars, and is in fact too broad to be effectively summarized here²⁶.

but cannot be identified with them» (p. 7 of the English translation). The legal tradition has arguably much to do with the notion of legal order in Santi Romano’s sense.

²³ From this perspective, some connections also appear to exist with the ‘conventions’, that are deemed to be a crucial unwritten component of the UK constitution: see, among many, G. Marshall, *Constitutional Theory* (1980).

²⁴ A. Pizzorusso, *Common constitutional traditions as Constitutional Law of Europe?*, Sant’Anna Legal Studies Research Paper No. 1/2008, available at www.stals.sssup.it, and Id., *Il patrimonio costituzionale europeo* (2002); it is also worth recalling the two seminal volumes edited by the same Author, *Italian Studies in Law* (1992 and 1994).

²⁵ L. Lacchè, *Europa una et diversa. A proposito di ius commune europaeum e tradizioni costituzionali comuni*, *Forum Historiae Iuris* (2003), available at forhistiur.de.

²⁶ F. Belvisi, *The “Common Constitutional Traditions” and the Integration of the EU*, 6 *Dir. & quest. pub.* 21 (2006); Id., *Fundamental Rights in the Multicultural European Society*, in B. Henry, A. Loreton (eds.), *The Emerging European Union:*

Among the authors who have written most extensively on the subject in recent years, Oreste Pollicino and Marta Cartabia are certainly among them. As for the former, on top of substantially contributing to the ongoing revitalization of studies on the subject (insightfully characterizing the discourse regarding their death as a premature chronicle²⁷), he carefully reflected on the intersection

Identity, Citizenship, Rights (2004), 177 ff.; P. Carrozza, *Tradizioni costituzionali comuni, margine di apprezzamento e rapporti tra Corte di Giustizia delle Comunità europee e Corte europea dei diritti dell'uomo. Quale Europa dei Diritti?*, in P. Falzea, A. Spadaro, L. Ventura (eds.), *La Corte costituzionale e le Corti d'Europa* (2003), 567 ff.; M. Cartabia, *L'ora dei diritti fondamentali nell'Unione europea*, in Ead. (ed.) *I diritti in azione* (2007), 13 ff.; L. Cozzolino, *Le tradizioni costituzionali comuni nella giurisprudenza della Corte di giustizia delle Comunità europee*, in P. Falzea, A. Spadaro, L. Ventura (eds.), *La Corte costituzionale e le Corti d'Europa*, cit. just above, 3 ff.; G. De Vergottini, *Tradizioni costituzionali comuni e Costituzione europea*, in www.forumcostituzionale.it (2005); S. Gambino, *Identità costituzionali nazionali e primauté européenne*, 32 *Quad. cost.* 533 (2012); A. Guazzarotti, *Il paradosso della ricognizione delle consuetudini internazionali. Note minime a Corte cost. n. 238 del 2014*, in www.forumcostituzionale.it (2014); G. Marini, *La costruzione delle tradizioni giuridiche nell'epoca della globalizzazione*, 1 *Compar. Dir. Civ.* 31 (2010); G. Martinico, B. Guastaferrò, O. Pollicino, *The Constitution of Italy: Axiological Continuity Between the Domestic and International Levels of Governance?*, in A. Albi, S. Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (2019), 493 ff.; S. Ninatti, *Ieri e oggi delle tradizioni costituzionali comuni: le novità nella giurisprudenza comunitaria*, in G. D'Elia, G. Tiberi, M.P. Viviani Schlein (eds.), *Scritti in memoria di Alessandra Concaro* (2012), 533 ff.; C. Pinelli, *Il momento della scrittura: contributo al dibattito sulla Costituzione europea* (2002); Id., *The Formation of a Constitutional Tradition in Continental Europe since World War II*, 22 *Eur. Pub. Law* 257 (2016); G. Repetto, *Argomenti comparativi e diritti fondamentali in Europa. Teorie dell'interpretazione e giurisprudenza sovranazionale* (2011); P. Ridola, *La Carta dei diritti fondamentali dell'Unione Europea e le "tradizioni costituzionali comuni" degli stati membri*, in Id. (ed.), *Diritto comparato e diritto costituzionale europeo* (2010), 163 ss; A. Ruggeri, *"Tradizioni costituzionali comuni" e "controlimiti", tra teoria delle fonti e teoria dell'interpretazione*, 5 *DPCE* 102 (2003); A. Ruggeri, *Trattato costituzionale, europeizzazione dei "controlimiti" e tecniche di risoluzione delle antinomie tra diritto comunitario e diritto interno (profili problematici)*, in S. Staiano (ed.), *Giurisprudenza costituzionale e principi fondamentali* (2006), 827 ff.; V. Sciarabba, *Tra fonti e corti. Diritti e principi fondamentali in Europa: profili costituzionali e comparati degli sviluppi sovranazionali* (2008); L. Trucco, *Carta dei diritti fondamentali e costituzionalizzazione dell'Unione europea. Un'analisi delle strategie argomentative e delle tecniche decisorie a Lussemburgo* (2013).

²⁷ O. Pollicino, *Common constitutional traditions in the age of the European bill(s) of rights: Chronicle of a (somewhat prematurely) death foretold*, in L. Violini, A.

between the notion of CCTs and the one of constitutional identity: «the concept of common constitutional traditions crosses the notion of constitutional identity»²⁸ and this intersection cannot be simply considered as a clash of common traditions against a specific national tradition²⁹. As for Cartabia, the notion of CCTs surfaces and underlies many of her writings³⁰, and has been a recurring theme also in her judgeship at the Italian Constitutional court, of which she became President in the final year of her tenure.

In summary, such authors are undoubtedly among those who should be most credited for reviving this concept in Italian public law scholarship, which until now has perhaps not attributed much relevance to it: there appears to be no trace of extensive works on the notion of constitutional tradition before its use by the ECJ in 1970, and its potential has never been fully exploited up until now.. Instead, the initiative of authors such as Cartabia and Pollicino appears to have paved the way for facilitating the fullest deployment of this concept and its potential within the national constitutional framework as well as within

Baraggia (eds.), *The Fragmented Landscape of Fundamental Rights Protection in Europe* (2018), 42 ff..

²⁸ O. Pollicino, *Corte di giustizia e giudici nazionali: il moto "ascendente", ovvero la l'incidenza delle "tradizioni costituzionali comuni" nella tutela apprestata ai diritti dalla Corte dell'Unione*, Consulta Online (2015, No. 1), 244, available at www.giurcost.org (the translation is mine).

²⁹ Besides the writings mentioned in the previous footnotes, see M. Bassini, O. Pollicino, *Article 8*, in R. Mastroianni, O. Pollicino, O. Razzolini, S. Allegrezza and F. Pappalardo (eds.), *Commentary to the Charter of Fundamental Rights of the European Union (in Italian)* (2016), 134 ff.; O. Pollicino, *Presentazione. Costruendo le tradizioni dei diritti in Europa: il senso di un gerundio, e di un seminario*, 7 *La cittadin. Eur.*, fasc. supp. *Costruendo le tradizioni dei diritti in Europa* (2016), 5 ff.; Id., *Della sopravvivenza delle tradizioni costituzionali comuni alla Carta di Nizza: ovvero del mancato avverarsi di una (cronaca di una) morte annunciata*, 21 *Dir. Un. Eur.* 253 (2016); Id., *Las tradiciones constitucionales comunes en la edad de la codificación (europea) de los derechos*, in C. Pizzolo, L. Mezzetti (eds.), *Tribunales supranacionales y tribunales nacionales*, II (2016), 183 ff.; Id., *"Transfiguration" and Actual Relevance of the Common Constitutional Traditions: Past, Present and Future*, 18 *Global Jurist* (2018); M. Fichera, O. Pollicino, *The Dialectics Between Constitutional Identity and Common Constitutional Traditions: Which Language for Cooperative Constitutionalism in Europe?*, 20 *Ger. L. J.* 1097 (2019).

³⁰ See in particular, among many, the ones referenced *supra* in footnotes 16, 17 and 26.

that of the EU. From this decidedly Euro-friendly perspective, CCTs are a possible means to connect the two, by framing the Italian identity as part of a multi-level set of identities, compatible with the EU legal order, to which it contributes, and not in contrast with it, as the opposing sovereigntist narrative puts it.

In parallel, the Italian-led ELI research project on CCTs has already seen the involvement of several scholars. Their preliminary writings were hosted by the *Rivista Trimestrale di Diritto Pubblico*, in a 2017 issue to which Cassese, Comba, Graziadei-de Caria and Porchia³¹ contributed.

As observed above, the Italian literature on the subject has perhaps been keener to define and identify the CCTs, and to look at them from the European perspective, instead of defining the fundamental components of the Italian constitutional tradition. However, some interesting debates have taken place in this direction, especially with regard to the so-called economic constitution, a typically controversial topic. For instance, some divergence exists among different authors on whether the balanced budget rule is the expression of a constitutional tradition or not³².

³¹ Issue 4 of 2017. Cassese was also the leading mind behind the ELI project mentioned in the text, in which Cartabia, Comba, della Cananea, Pollicino (as well as the Author of this article) were involved. Within the framework of this project, Cassese prepared two very important articles: *Ruling from below. Common Constitutional Traditions and their role*, and *Toward the end of solitude of national legal orders?*, both currently forthcoming. The ELI project was also brought forward in connection with the ERC-awarded project on the Common Core of European Administrative Law, led by Giacinto della Cananea (by this Author, an in the framework of this project, see also *Il nucleo comune dei diritti amministrativi in Europa* (2019)).

³² For the former thesis, O. Chessa, *Fondamenti e implicazioni della norma costituzionale sul pareggio di bilancio*, in A. Ruggeri (ed.), *Scritti in onore di Gaetano Silvestri*, I (2016), 558 ff., 561; for the latter one, Chessa himself mentions G. Della Cananea, *Lex Fiscalis Europea*, 34 Quad. cost. 7 (2014), and A. Morrone, *Pareggio di bilancio e stato costituzionale*, Riv. AIC (2014, No. 1), 1 ff., in particular 12. Also by G. Della Cananea, see, among many, *Ius Publicum Europaeum: Divergent National Traditions or Common Legal Patrimony?*, in M. Ruffert (ed.), *Administrative Law in Europe: Between Common Principles and National Traditions* (2013), 125 ff., and *Le tradizioni costituzionali comuni prese sul serio*, 2 Riv. dir. comp. 17 (2018, No. 1), where he reflects on the possible «complementarity between constitutional traditions».

Overall, it does not seem possible to actually identify different schools of thought in the field: the different authors have all contributed to a better understanding of the notion, from their respective standpoints, and their contributions appear complementary, rather than antagonistic. Also, it would be possible to go back several decades, and identify several “*monstres sacrés*” of Italian legal scholarship who reflected on the relationship between Italian legal culture and tradition, and other national experiences. For instance, Vittorio Emanuele Orlando, in his famous Programme opening the new publication *Archivio di diritto pubblico*, observed that «the various national scientific schools [...] infuse the subjective varieties of the single peculiarities of the different populations in the objective unity of the subject (an issue that I would define as international scientific cooperation)»³³, thus acknowledging that, while theoretical national representations diverged, there was a substantive commonality of principles.

In any case, much has been written by many prominent legal scholars but a lot arguably remains to be investigated, particularly with regard to the Italian contribution to the development of CCTs and to the focalization of the quintessential elements of the Italian constitutional tradition; this work specifically attempts to provide a small contribution to studies on the subject with such a perspective in mind.

4. A quantitative analysis

Moving on to how Italian high-level courts relate to the notion of CCTs, I will immediately submit that neither the Constitutional Court, nor the Court of Cassation, nor the Council of State have dealt with this notion in any depth. Nevertheless, it is possible to identify certain bedrocks that, in the case-law of all the three high-level courts, make up the building blocks of the Italian constitutional tradition.

Despite its deep reflection on the relationship between national law and EU law, which has led it to carefully consider the extent to which the Italian constitutional tradition can embrace the

³³ V.E. Orlando, *Programma*, 1 Arch. Dir. Pub. 3 (1891).

principles of EU law (and to overturn its own initial rulings along the way), the Constitutional Court has not developed a proper jurisprudence on what it means by common constitutional traditions (nor for that matter – at least explicitly – on what makes up the Italian constitutional tradition).

A search into the database of the Constitutional Court³⁴ returned only the following results: four entries for “tradizione costituzionale” (constitutional tradition)³⁵, twenty-five for “tradizioni costituzionali” (“constitutional traditions”)³⁶; none for “tradizioni comuni” (common traditions); one for “tradizione comune” (common tradition)³⁷; none for “tradizioni nazionali” (national traditions); one for “tradizione nazionale” (national tradition)³⁸.

Even the judgment with perhaps the highest number of textual references, ruling No. 80 of 2011³⁹, concerning the relationship with the European Court of Human Rights, is not particularly helpful in determining the content of common (or

³⁴ The figures in the text result from a search in the database of the Constitutional Court performed in July 2020; in making these queries, I built on a previous search performed in May 2018 by Professor Paolo Passaglia, to whom I express my deepest gratitude.

³⁵ Judgment No. 223 of 2012 (only in the “Facts of the case” part); judgment No. 1 of 2014 (only in the “Facts of the case” part); order No. 24 of 2017 (also mentioned in the following footnote); judgment No. 142 of 2018 (only in the “Facts of the case” part, quoting from the referring order).

³⁶ Judgment No. 393 of 2006; order No. 93 of 2007; order No. 266 of 2007; judgment No. 348 of 2007 (only in the “Facts of the case” part); judgment No. 349 of 2007; judgment No. 72 of 2008 (only in the “Facts of the case” part); judgment No. 215 of 2008; judgment No. 106 of 2009; judgment No. 80 of 2011; order No. 179 of 2011; order No. 215 of 2011; order No. 216 of 2011; judgment No. 236 of 2011; order No. 295 of 2011; order No. 306 of 2011; order No. 311 del 2011; judgment No. 223 of 2012 (only in the “Facts of the case” part); judgment No. 230 of 2012 (only in the only in the “Facts of the case” part); judgment No. 214 of 2013 (only in the “Facts of the case” part); order No. 24 of 2017 (also returned in the search referred in the previous footnote); judgment No. 269 of 2017; judgments No. 20 and 112 of 2019; order No. 117 of 2019 (explicitly citing “common constitutional traditions” in the questions referred to the CJEU); judgment No. 102 of 2020 (the latter three were written by judge Viganò).

³⁷ Judgment No. 380 of 1999.

³⁸ Judgment No. 443 of 1997 (the reference here is to a tradition not concerning the law).

³⁹ Constitutional Court, judgment 11 March 2011, No. 80.

national) constitutional traditions. Essentially, this ruling reaffirmed the practical difference between the EU legal order, and the ECHR system: laws contrary to the latter still normally need to be declared unconstitutional by the Constitutional Court and cannot be directly disapplied by the ordinary judges.

In spite of being cited very often by other judgments in relation to common constitutional traditions (together with the subsequent judgment No. 210/13, which does not mention constitutional traditions), judgment No. 80 of 2011 does not provide any relevant indications on how to construe them. This is even truer for the other judgments (including two of 2019 that have appeared to signal a revival of the notion within the Court⁴⁰), with only minor exceptions⁴¹. I would mention the following two: judgment No. 380/1999, identifying an Italian remote tradition, shared with «countries of ancient and consolidated democracy», of not punishing «the offenses contained in the writings presented or in the speeches given by the parties or their sponsors in the proceedings before the judicial authority»; and judgment No. 106/2009, identifying an Italian tradition, that is also a common constitutional tradition, that prohibits the practice of so-called extraordinary renditions, as well as one establishing the relatively wide reach for the protection of state secrets⁴².

Similar conclusions apply when we consider textual references in the other two top courts of the Italian legal order, *i.e.* the Court of Cassation and the Council of State. From the research in the database of the former (limited to the years from 2013 to 2018⁴³), 85 results emerge using the keywords “constitutional tradition” or “constitutional traditions”, 79 results using the keyword “common constitutional traditions”, 88 results using keywords “common traditions” or “common tradition”, and 11 results (all not relevant) using the keywords “national tradition” or “national traditions”.

⁴⁰ Judgment No. 20 of 21 February 2019 and order No. 117 of 10 May 2019

⁴¹ Constitutional Court, judgment 30 September-7 October 1999, No. 380.

⁴² Constitutional Court, judgment 3 April 2009, No. 106.

⁴³ Last performed in November 2018: the database of all the judgments and orders of the Court of Cassation is indeed freely accessible only with regard to the rulings of the past five years.

By cross-checking the different results and eliminating the rulings containing several keywords, it emerges that there is a total of 105 rulings (81 judgments and 24 orders) that contain the chosen keywords, with a slight numerical prevalence of the decisions of the criminal sections of the Court of Cassation (58 to 47). The distribution of rulings over time would appear to indicate a reduction in the use of these concepts in the Court's arguments over the years: in 2018, there were 7 decisions, in 2017 only 1, 11 in 2016, 8 in 2015, 25 in 2014, while there were 53 in 2013 (over half of the total).

As for their content, 83 judgments contain only a generic reference to the constitutional traditions common to the Member States, 2 concern the prohibition of discrimination, 5 the principle of legality, 45 the principle of the retroactive application of the more lenient penalty, and 14 judgments that are not relevant. In fact, out of the total 105 rulings, 44 actually contain a reference to common constitutional traditions only because of the fact that they refer to the judgment of the CJEU in the case *El Dridi*⁴⁴, of which they often quote entire passages, again concerning the principle of the retroactive application of the more lenient penalty.

From an overall analysis of the rulings examined, it also emerges that the Italian Supreme Court never formally examined the notion of Italian constitutional traditions, almost always dealing with the topic of common constitutional traditions in a generic way. Indeed, leaving out the generic references to common traditions, the only judgment deserving a particular mention is No. 1804/2013⁴⁵, concerning the expropriation of private property, which affirms that the legality of the expropriation procedure is a necessary precondition of the acquisition of the condemned property by the state, «consistently with a solid constitutional tradition that originates from art. 29 of the Albertine Statute (“[...] when legally ascertained public interest requires it, one may be obliged to give up [...] property wholly or in part, with just compensation and in conformity with the law)⁴⁶, and was sanctioned in the Italian Constitution (Article

⁴⁴ CJEU, Section I, 28 April 2011, in the proceeding C-61/11 PPU, *El Dridi*.

⁴⁵ Court of Cassation, judgment 28 January 2013, No. 1804.

⁴⁶ This translation was taken from users.dickinson.edu.

42, paragraphs 2 and 3 [...]). Similarly, Article 1 of the Additional Protocol to the Convention on Human Rights states that “No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law”». Instead none of the considered judgments makes a comparable analysis with regard, for example, to the principle of retroactive application of the more lenient law, that – as I briefly mentioned above – is instead recalled in many rulings.

Finally, from a search into the case-law of the Council of State⁴⁷, by using as keywords “common constitutional traditions”, “constitutional tradition”, “constitutional traditions”, “national tradition”, and “national traditions”, only six rulings emerge (1 in 2016, 1 in 2014, 2 in 2012, and 2 in 2010), containing generic references to Article 6, paragraph 3 TEU, mostly with regard to the right to education⁴⁸, property and occupation *sine titulo*⁴⁹, the right to respect of private and family life⁵⁰, and the right to an effective judicial protection⁵¹, on top of an irrelevant document.

Finally, it is worth mentioning order 754/2014⁵², that quotes in full sizeable paragraphs of the above-mentioned judgment No. 80/2011 of the Constitutional Court (as well as the subsequent judgment No. 210/2013, that reaffirmed the same principles), where the latter is credited for accomplishing a «precise reconstruction of the relations between the ECHR, European law and domestic law in their recent evolution».

5. Conclusion: a possible categorisation

The analysis of the Italian scholarship on common constitutional traditions has shown that the latter seems to address its efforts towards the construction of the CCT notion, rather than on trying to define what parts of the Italian constitution define the Italian constitutional identity.

⁴⁷ Also performed in November 2018.

⁴⁸ Interim opinion No. 960/2016.

⁴⁹ Judgment No. 4808/2012.

⁵⁰ Judgment No. 7200/2010.

⁵¹ Opinion No. 5679/2010.

⁵² Order N. 754/ 2014.

The case-law study has showed that the Italian high-level courts very rarely engage in an explicit definition of what comprises part of the national constitutional tradition (and, even less, the meaning of CCTs). With a few notable exceptions, such as the *Taricco* order, there are several fundamental rulings that simply do not mention the word ‘tradition’, and, conversely, those that do never engage in an in-depth analysis of the distinctive features of the Italian tradition, simply using the term as a rhetorical tool.

When some cornerstone of the Italian tradition is involved, other notions tend to be referred to, such as the fundamental principles, unamendability, limits to the revision process and counter-limits. But these are indeed different notions, and also it happens rarely that single elements are discussed: for example, counter-limits are typically evoked much more than they are actually employed. In any case, even though many judgments mentioned do not include a reference to the Italian constitutional tradition, or explicitly state their goal to build it, it is beyond doubt that they instead contribute to define it and better understand it.

Admittedly, the analysis of the case-law shows an increase, over recent years, in the use of the notion by top Italian courts. However, this does not yet seem to correspond to a quantum leap in the qualitative use of this formula. In other words, the more recent surge in registered references does not mean that a more thorough discussion of the notion has become part of the case-law, with only limited exceptions.

In this vein, the rulings of the three highest Italian courts can arguably be categorised in three groups⁵³.

A first type of reference to common constitutional traditions is the one made with “defensive” purposes. The most

⁵³ I would like to express my deepest gratitude to Professor Giacinto della Cananea for suggesting this classification to me. For a broad discussion on the “argumentative techniques” employed by the Italian constitutional court, see the systematic analysis conducted by the research group led by Mario Dogliani at the University of Turin: http://www.dircost.unito.it/SentNet1.01/def/sn_presentazione.shtml. See also some very insightful remarks in S. Cassese, *Dentro la Corte: Diario di un giudice costituzionale* (2015).

prominent example is the very famous Constitutional Court order No. 24 of 2017 (*Taricco I*)⁵⁴.

A second subset is represented by the rulings that instead use the notion of common constitutional traditions to foster a dialogue with the other courts; referral order 117 of 2019 on the principle of *nemo tenetur se ipsum accusare* is the most prominent ruling falling into this category⁵⁵.

Finally, by far the largest category is the one grouping rulings whereby the notion of constitutional tradition (or equivalent ones, for that matter) are used with a merely ornamental or rhetorical purpose.

This approach is in line with the one I identified in the Court of Justice of the European Union in a similar analysis I performed, again within the framework of the ELI research project⁵⁶.

This conclusion does not mean that the (rising) importance of this notion for the highest Italian courts should be downplayed. After all, as Sabino Cassese brilliantly wrote in his behind-the-scenes account of his nine years at the Constitutional Court: “*Non c’è dubbio che il lavoro della Corte consista in un grande esercizio di logica e di retorica, la prima usata per analizzare e capire, la seconda per convincere*” (“There is no doubt that the Court’s work consists of a great exercise in logic and rhetoric, the first used to analyse and understand, the second to convince”)⁵⁷.

However, as important as rhetoric can be in the Court’s job, it seems to be warranted to conclude, from the analysis carried out, that both the Italian legal scholarship and the Italian high-

⁵⁴ Recourse to the “defensive” strategy reached one the most extreme levels in judgment No. 238 of 2014: this judgment does not refer to “constitutional traditions”; however, its recourse to the counter-limits makes it close to the *Taricco I* order from this perspective.

⁵⁵ A similar dialogical approach is adopted by the judgment of the Constitutional Court No. 115/2018 (the so called *Taricco II* judgment): however, neither this judgment refers to “constitutional traditions”, only making a cursory reference to the “countries of continental tradition”.

⁵⁶ I published the results of that inquiry in an article written with Michele Graziadei: R. de Caria, M. Graziadei, *R. de Caria, M. Graziadei, The «Constitutional Traditions Common to the Member States» in the Case-law of the European Court of Justice: Judicial Dialogue at its Finest*, cit. at 13.

⁵⁷ S. Cassese, *Dentro la Corte: Diario di un giudice costituzionale*, cit. at 53.

level courts still have a long way to go before exploiting the reference to (common) constitutional traditions in the Treaties to its fullest potential. It is this author's hope that this article can humbly contribute to the great effort needed in this direction.