

SPECIAL SECTION - INTERVIEWS

CONSTITUTIONAL ADJUDICATION WITHIN A EUROPEAN COMPOSITE CONSTITUTION – A VIEW FROM THE BENCH

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1. What role did international and European law play in your legal education? Is the impact on each judge's legal education a meaningful variable in the Court's position towards European and international law?

Giuliano Amato: A major role in my education was played by comparative law and the study of US constitutional law. The experience of the Master at Columbia University was a turning point in my education. I was in the first years of my academic career, I had just published my first monograph on the relationship between legislative and governmental sources of law. While attending the course of constitutional law in New York, the instructor stimulated me and the other students to propose an alternative solution to a case at that time just decided by the US Supreme Court. Some days after the class, I prepared a paper with a very elegant thesis, in which I applied the traditional categories that I had been introduced to in my previous legal education, with the typical attitude of the civil law jurist to objectivize law and find systematic solution in the comprehensive body of the law in force. The professor said that I was totally wrong. I completely underestimated the role acknowledged in common law countries to the intent of the legislator, which can be (and often is) completely independent from the law already in force, making it impossible to sort out any systematic interpretation whatsoever.

Comparative law has been a fundamental training also for approaching European Law, showing me how different cultural paradigms can be referred to the same substantive issues.

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Marta Cartabia: In a recent conference I was introduced to the audience as a “rooted cosmopolitan scholar”, borrowing from Bruce Ackerman. I was flattered by that introduction, that in fact captures the very nature of my profile: I feel firmly and proudly rooted in the Italian community of constitutional scholars, and at the same time I have always been nurtured by mutual exchanges with colleagues from all over the world. My legal education has been oriented to a supranational perspective since the discussion of my bachelor thesis on “does a European constitutional law exist?”. It was 1987 and back then it was quite hard to imagine what happened a few years later, with the drafting of the ill-fated constitutional treaty, the approval of the Charter of fundamental rights and many other developments of the European legal system. Working on these issues has been a great challenge that brought me to look for unpublished sources, to do field research in Bruxelles, to share ideas with scholars and professors with different disciplinary backgrounds. As a postgraduate, I was admitted to the European University Institute, where I have pursued my PhD studies. At EUI, I have dug deeper into European studies, and the research path I have inaugurated at that time always remained in the core of my research and teaching activities. In those years I have been part of a great community of students coming from many different European countries. The overwhelming majority of the teaching staff, including my own supervisors, were not Italians. My very first publications were published on international journals. It is in those years that I have developed a European and international legal mindset: since then my approach to any legal problem – connected to any field of public law, such as democratic institutions, justice, rights, sources... - takes into account how the same problem is regulated in other jurisdictions, starting from European and ECHR member states’ jurisdictions. This mindset certainly affects also my work as a constitutional judge. Every single judge’s approach to his or her office is affected by his or her professional background and legal education and this is one of the Court’s most precious richness.

Daria de Pretis: I was trained in the line of the tradition of my particular academic discipline, which is administrative law. European and transnational law was not at the core in the very first years of my legal education and academic career. Indeed, back then

administrative law scholars were primarily focused on domestic law. However, I have had the great chance to meet academic mentors who have soon urged me to deal with comparative law and, hence, with European law. Those latter studies have been crucial for my legal training.

Being trained in comparative, European and supranational law is a very significant, if not decisive, feature in the approach followed by a constitutional judge. This is such not only where, obviously, constitutional judges are called upon to decide on issues involving the application of European legal sources or sources of supranational reach; a situation that, by the way, has become more and more frequent. A specific training in comparative, European and supranational law is rather important, more generally, in the ordinary way to tackle constitutional problems and, thus, also for addressing purely “domestic” issues. From what I see, being accustomed to use a comparative approach and to pay attention to supranational legal elements lead to greater flexibility, to develop the ability to catch multiple aspects of the same problem, and to favor an imaginative attitude towards the adoption of new and inedited solutions.

Silvana Sciarra: In my years as a student in the Law School I have been able to explore comparative law and to get acquainted to pluralism of legal sources in labour law, the legal discipline I chose for my dissertation, which then became the field of my professional specialization. International law has been important in my training, for the impact of ILO and Council of Europe sources on the Italian legal system and for the close interrelation of those standards with the evolution of constitutional values. European law became my elective field of research a few years later, despite the slow movement of Italian legal education towards this approach. I was able to develop an interest in European law travelling to other countries and appreciating the way in which academic curricula included the study of supranational sources and in particular of the case law of European courts. I was also very lucky in holding the chair of European labour and social law for eight years at the European University Institute. That experience opened up completely new worlds to me. From my supervisees, coming from different parts of Europe, I have learnt immensely and developed

new energies. I shall never be able to fully express my gratitude to them.

The multifaceted training I was lucky to acquire and to cultivate in academia has become an invaluable support in my new commitment as a constitutional judge. I believe in developing close links between national and EU sources and in ascertaining that constitutional adjudication encourages the integration of national and supranational legal systems. In my experience as a constitutional judge I am equally inspired by references to the ECHR as interpreted by the Strasbourg Court. The cautious approach followed by the Italian Constitutional Court (ICC) implies that references to that rich and diversified case law be made in ways that should be mediated by constitutional standards. Enhancing the protection of fundamental human rights requires a special effort in safeguarding an overall consistency of constitutional adjudication. Constitutional courts, as final adjudicators on rights, are responsible for a combined interpretation of sources – national and supranational – coming together in congruent approaches, so that fundamental rights may emerge in their unitary legal nature and be interdependently protected.

In my early attempts to deal as a judge rapporteur with the case law of the ECtHR, memories from research in comparative law have come back and have fortified my conviction that diversities in national legal traditions should never be mechanically transposed to different legal contexts. This implies that references to the ECtHR's specific case law must be read with special attention, in order to integrate them into the arguments developed by the ICC in its own rulings. They provide further guide in setting up a specific legal reasoning within a concrete and well-defined case of constitutional relevance. Filtering such references through the lenses of constitutional judges is, at the same time, a sign of deference towards a supranational court and a search for coherence inside a national legal system.

2. What role did the transnational scholarly debate play in your professional career as a legal scholar? Did this play any role on everyday challenges that you are called to face from the bench?

Giuliano Amato: There is an intrinsic connection between institutional experience, research and teaching activity. One of the most influential meeting I had was with Claus-Dieter Ehlermann, at that time Director-General of the Legal Service of the European Commission. We were both teaching at the EUI and there were many occasions to exchange opinions just between the two of us and with the students.

Furthermore, I consider that among the most thought-provoking authors or speakers in scholarly debates are of course Joseph Weiler, Paul Craig and Dieter Grimm, even though I often disagree with them.

Marta Cartabia: I have never lost contact with the transnational scholarly debate, both for the literature I follow and for the audience that I target through my publications. I feel myself embedded within the Italian academic community, but at the same time I am tied to academic and intellectual relationships beyond the national boundaries, in particular in Europe and North America. At the beginning of my career, I had been often asked whether I was part of the community of constitutional lawyers, of comparative lawyers or of European lawyers. The truth is that I struggle to really understand those differences. How could a legal problem, for example linked to fundamental rights, be faced without resorting simultaneously to domestic, European, international and transnational sources? How poor our academic thought would be without these openings beyond each own backyard!

These considerations on my work as a legal scholar also apply to my activity as constitutional court's judge. At the Italian Constitutional Court there is a valuable team working within the research office with experts able to carry out study in the field of European and comparative law and with whom we speak with regard to the most significant issues we have to address. From time to time, in the judgments a gaunt reference to "foreign law" does appear, while most often the Court cites the case law of the European Courts. However, this is just the tip of the iceberg: those few lines appearing in the judgment are in fact symptom of a

broader and in-depth knowledge that judges have developed in a transnational setting. Last but not least, during these years at the Constitutional Court, I have had the opportunity to participate in a number of judicial networks where to exchange experiences, ideas, solutions and working methods. The Court itself maintains stable relationships with some Constitutional Courts and is a member of the Conference of European Constitutional Courts and of the World Conference on Constitutional Justice. I have greatly benefited from these relationships and especially from the participation in the Global Constitutionalism Seminar that takes place every year at Yale (USA), where a group of judges and scholars from all over the world discuss, reflect, elaborate for days on different current common problems, from a judicial perspective.

Daria de Pretis: I have started my activity as an academic by comparing Italian administrative law with that of other countries. I have studied in particular the German legal system, but I have focused as well on other systems, especially for what concerns administrative justice. For the sake of my research activity, I have always been in touch and cooperated with foreign colleagues. Some, in turn, have become a judge and this allows to be engaged in an even more fruitful conversation. The constant dialogue, essential in the framework of the research activity, is very important also in my work as a judge. The knowledge and the understanding of what happens elsewhere is nourished by reading foreign scholarship and case law as well as by means of meetings and dialogues, more or less formal, with foreign experts and judges. More and more often as judges of the Constitutional Court we are compelled to weigh the decisions of other courts that may have a direct influence on our case law. Take as a paramount example the judgments of the European Court of Human Rights that we must take into consideration when assessing the compliance of Italian legislation with the standards offered by the Convention. It is not infrequent to deal with issues that other courts, or scholars in other countries, have already addressed or are in the process to address. Moreover, it also happens that the coexistence of different legal systems causes overlaps with the jurisdiction of other courts and, with them, it could threaten tensions and conflicts.

Silvana Sciarra: The academic circle in which I discovered my vocation as a young labour lawyer was very open to transnational exchanges. A two years US fellowship, early on in my academic career, exposed me to the challenges of a legal system distant from the civil law tradition and, precisely for this reason, incredibly useful in displaying new research paths. I became aware of 'uses and abuses' in comparative law, following Otto Kahn-Freund's scholarship.

This awareness has been with me over the years and is combined with a sense of humbleness, whenever I come into contact with new developments in foreign law, as well as in EU law. I am convinced that a humble approach allows to ask oneself new questions about the legal system in which one operates. This is very similar to what a constitutional judge must do in facing everyday challenges and in building consensus within a collegial body. Every new case is a new discovery leading to new questions. The composite structure of the ICC and the lack of dissenting opinions magnify the search for collegiality.

My experience from the bench, so far, brought back memories of travelling to new countries and discovering new legal arguments. I am convinced that transnational experiences in legal scholarship encourage curiosities and enhance respect for those who think differently. So, I find myself now, as I did as a young scholar, eager to learn and even impatient for new ideas, the same way I felt embracing transnational legal discussions. Although this analogy may sound extravagant, I like to think that the exercise of exploring comparative and transnational legal developments is as challenging as entering the courtroom and engaging in collegial meetings. In both cases – I like to think – curiosity leads the way and reveals possible solutions, which then become the creation of a composite judicial body.

3. Did your experience in the Constitutional Court modify your attitude towards the openness of the legal order to international and supranational law?

Giuliano Amato: After several years in national institutions (as a member of the Parliament, of the Government, and in the Antitrust authority) and European institutions (as vice-President of the

Convention on the Future of Europe), I am having the opportunity to experience the inner dynamics of the legal system and its “external relations” from a further point of observation, and a very peculiar one: Constitutional Courts may be considered the less Europeanized national institutions, especially if compared to governments, ordinary judges, independent authorities and now even parliaments. But their role is extraordinary, as they have to be the guarantors both of the domestic Constitution and of its openness.

I find it fascinating that courts (and even Constitutional Courts) can come to a clash in a pluralistic system such as the European one, as they testify the different sensitivities and the different legal cultures that live together in the continent. Much more difficult is when we face political clashes that are riskier and potentially far more dangerous for the European integration. It is not a case that many decisions of Constitutional Courts related to the expansion of EU competences were actually postponing a final word on the case: this is the Solange rationale, and – in the end of the day – also of the counterlimits’ doctrine: we are gatekeepers, we are entitled to define the framework, but the concrete actions have to be pursued by democratically legitimate bodies.

Marta Cartabia: As a member of the Court I have had the opportunity to test in practice what I previously studied as an academic. I am referring to the fruitful mutual influences among legal systems. Let me stress the concept: “mutual” influences, because it is not only domestic law to become more dynamic due to European and international law, but also the latter are increasingly enriched in this process. For instance, the dramatic problem of prison overcrowding has been tackled with important results by Italian institutions also thanks to the pushing decisions by the European Court of Human Rights (e.g. in the case *Torreggiani*).

Another example may help: in the saga of the “Swiss pensions”, some privileged retirement treatments had been retroactively repealed by the legislature as an austerity measure during the economic crisis, when a comprehensive package of cuts was approved within the framework of general reconsideration of unjustified expenses. Whereas the European Court of Human Rights considers such retroactive abolition of pensions’ regime as a violation of fundamental rights of their owners, the Italian

Constitutional Court did not annul that austerity measures, giving precedence to the solidarity among generations and affirming that the abolition of such privileges is instrumental for the equality of chances for future generations.

Divergences among courts may depend on the different points of view from which they approach the problem and not necessarily on a disagreement on the legal principles behind. However, the most important thing is to preserve legal pluralism in Europe, and continue the dialogue.

Daria de Pretis: I do not think so. During my experience at the Constitutional Court I found the confirmation, if anything, of the importance of international and transnational law. Little wonder: This is exactly what I was expecting. Though, I found remarkable the diffused awareness of my colleagues on this. All constitutional judges, even those apparently with a background less used to the openness of the legal order, proved to be very sensitive to the transnational dimension and are committed to take it into account. I had occasion to measure my expectations in the concreteness of the decisions and sometimes in their dramatic nature.

Silvana Sciarra: Delivering the presentation of a case in front of 14 judges, in secret close-doors sessions, can be quite a challenging experience. Challenges increase when supranational sources are at stake. This is so because there can be different points of view regarding the level of openness of the national legal system that courts should encourage. An academic – as I am – carries with her the attitude to expand the spectrum of analysis and to broaden the approach. I have tried, so far, not to modify this predisposition and, in agreement with my colleagues, to widen the angle of interpretation, whenever appropriate, so to include international and EU law.

Apart from cases in which parties involved in the legal proceedings which gave rise to the issue refer to such fonts in their papers and even in oral hearings, I am in favour of quoting sources and rulings of supranational courts *ad adiuvandum*, with a view to strengthening the leading arguments supporting constitutional adjudication. My preference goes into the direction of merging standards, whenever they serve the purpose of enhancing fundamental rights and clarifying the scope of constitutional arguments.

Such an approach is reflected into the – in my view evergreen – theory of integration through law, which must be read as a constant commitment for interpreters to build on common grounds. Integration is still a valid metaphor for setting common constitutional standards within the EU. In this perspective it is important to broaden all networks of constitutional courts, as well as of supreme and supranational courts. Judicial activism in such open spaces is a form of transnational communication, which contributes to exchanges of practices and helps developing theories of justice. This is, among others, the message one can read in ‘Between facts and norms’, when Habermas discusses the enactment of constitutional rights within a given legal community and, at the same time, their relevance for ‘persons’, as holders of human rights residing in a territory. The ICC has adopted this approach in extending to third country nationals access to essential social benefits, in particular with regard to the right to health. ‘Communicative’ actors keep all such concurrent sources within their angle of observation.

‘Space’ is a recurring metaphor, whenever it disguises tensions among legal orders and questions their connections to specific territories. The proposal, as Armin von Bogdandy cleverly suggests, to discuss current developments in terms of a common European legal space – in which Constitutional Courts act dynamically, adding their activism to diplomacy carried on by departments of foreign affairs in national administrations – is evocative of a changing scenario, running in parallel to theories on integration through law.

4. Which are, in your view, the most significant decisions of the Constitutional Court – recent as well as of past times – which have contributed to the “Europeanisation” of the Italian system of constitutional adjudication? Could you please provide some examples?

Giuliano Amato: The decision to submit a preliminary reference to the CJEU in the case known as “*Taricco*” was a success in itself and also a starting point for further evolution. The insertion of article 4(2) in the TEU means a lot more than just giving a European dimension to the counterlimits’ doctrine. This is the kind of

provision that gives courts the power to set their decisions at the crossroads of different legal systems, functioning like an accordion in order to adjust the primacy of either level of government, depending on the individual case. Order no. 24/2017 in the “*Taricco saga*” confirmed this reconstruction. There is no exclusive primacy in the interplay between national and European levels. We are living in times of “constitutional duplicity” and the specific task of each constitutional judge is to contribute to the dialogue among legal culture and legal charters.

A different trend in the case-law of the Italian Constitutional Court is to narrow the distance in the interpretation of fundamental rights with the Strasbourg Court. When there is an overlap between the fundamental rights of the Italian Constitution and those of the ECHR it is natural to converge, explicitly or – if the case allows – implicitly. Last year we took a significant decision on the surname, declaring as unconstitutional the default attribution of only the father’s surname even before a different agreement of both the parents had been reached. In doing this we had well in mind the robust case-law of the European Court of Human Rights (and in particular the case *Cusan and Fazzo v. Italy*), but we decided to base the declaration of unconstitutionality only on domestic constitutional parameters (in particular, with regard to personal identity, principle of equality and safeguard of the unity of the family). It was not (only) made for a mere institutional pride that does not allow to abdicate the protection of fundamental rights in favor of the supranational level. There was also the will of affirming that the domestic constitution (and its guarantor) are well equipped on their own to face contemporary challenges to fundamental rights.

Marta Cartabia: In the Constitutional Court’s case law there are many topical cases that are related with the development of European law (*Costa* in 1964, *Frontini* in 1973, *Granital* in 1984) and with the relationship with the ECHR legal system (the “twin decisions” 348-349 in 2007). These historical decisions aside, more recently the most remarkable interactions with the European legal order passed through two important references for preliminary ruling that were submitted by the Italian Constitutional Court to the Court of Justice of the European Union in the framework of the incidentaliter proceeding. The first preliminary reference

concerned the use and abuse of fixed term work in public schools and was submitted by the Constitutional Court with its order no. 207 of 2013; the second one – the so-called *Taricco* case – concerned the regulation of statute of limitations and the principle of legality in criminal matters and was submitted by the Italian Constitutional Court with its order no. 24 of 2017. In past times, the Court refused to make direct use of the reference for preliminary ruling, assuming that the latter was not in line with the Constitutional Court's prestige, authority and position within the constitutional system. Therefore, I hold these decisions as crucial: they provide for a constructive methodology. When disagreements arise, dialogue should be the first strategy to adopt as to clarify which justifications supports a certain stance. In the same way as it happens in personal relationships, also in institutional ones, I hold as essentially important to pursue the path of dialogue, explanation, elucidation with honesty and truthfulness (at the end of the day, institutions consist of persons...). This method is a constructive one, while institutional clashes are in general detrimental for all.

Daria de Pretis: It is not easy to pick and choose. A first (and very rich) group of decisions is related to the ECHR. Among them, it is obvious to underline the so called “twin” judgments no. 348 and 349/2007. Since then, the number of decisions in which the Convention and its interpretation by the Strasbourg Court has been used as an interposed norm in the judicial review of legislation has grown exponentially. This is also due to the fact that ordinary courts increasingly raise questions of constitutionality referring to the violation of the Convention and so of Article 117 of Italian Constitution.

A second group concerns the relationship with EU law. First and foremost, I would like to stress the importance of the three preliminary references issued by the Italian Constitutional Court: the first preliminary reference in a *principaliter* judgment (order 103/2008); the first also in an *incidenter* proceeding (order 207/2013); and, finally, the most recent one (order 24/2017). This last reference related to the so called “*Taricco* saga” deserves specific attention, as it implied a possible contrast with a decision of the CJEU. By issuing the preliminary reference, the Italian Constitutional Court opted not to come to a final confrontation with the Luxembourg Court, and preferred to establish a dialogue, by

asking for a new decision. The latter answered in turn with a very open and communicative decisions, so joining the judicial dialogue. A further decision related to EU law that I find worth mentioning is no. 187/2016, on the use and abuse of fixed term work in public school, which represents the follow-up to its second preliminary reference. The Italian Constitutional Court acknowledged the interpretation of the CJEU (according to which the continuous renewal of fix term contracts infringed EU law) but had the occasion to redefine its own remaining margin of maneuver. Finally, in the third group there are decisions in which the Court makes reference to comparison with foreign case-law and legislation related to the issue involved in the case. Sometimes there is no express mention of such tools in the final text of the decisions, but they often play a significant role. A recent example is in the judgment no. 5/2018 on vaccination (at § 8.2.2), where the Court offers a summary of the legislation on force in other countries on the compulsory vaccinations.

Silvana Sciarra: To answer this question I shall start mentioning the three preliminary references lodged by the ICC to the CJEU (103/2008; 207/2013; 24/2017). Although originated within very different contexts, they show an equally relevant – and increasingly strong – trust of the Court in its own prerogatives. They prove what Judge Pescatore once said, namely that within the Community, and now the Union, judges are never alone, since they are kept together by common aims and bound by the same law. However, these recent developments are the aftermath of a long and often controversial progress of the Constitutional Court's case law dealing with European matters.

In looking backwards to this long epiphany, I have in mind the ruling delivered by the ICC in *Costa v Enel* (14/1964). A case, which now appears completely out of touch with the evolution of the European legal order as a whole, can be seen as the symptom of a national legal system eager to build its own rudimentary instruments of analysis and to establish its own place within a newly born supranational order. Arguing on the principle '*lex posterior derogat priori*', the Court refrained from lodging a preliminary reference. The disagreement expressed soon after by the Court of Justice (C-6/64) was an opportunity for the latter to clarify the principle of supremacy, based on the unique nature of

the (then) EEC Treaty, compared with other international treaties and to its binding nature as an 'integral part of the legal systems of the Member states'. The 1963 leading decision in *Van Gend en Loos*, establishing the principle of direct effect and arguing for the uniform and effective enforcement of European law, was further specified with regard to the principle of supremacy. The combined impact of these two principles requires coherence in constitutional adjudication, particularly in current discussions characterized by fears that the rule of law could be shaken, if not infringed.

Hence, the urgency to provide coherent – albeit at times critical – support to membership of the Union is of primary importance and should be balanced against expressions of self-esteem, which go beyond national constitutional pride. The theory of counter-limits, crucial in establishing the borders of fundamental values and intangible rights within each national legal system, needs to be re-contextualized if the urgency to support democracy throughout the Union becomes a priority. Constitutional Courts must be independent – but not totally detached – from the perseverance of other institutions in bringing forward reforms. In fact, they may send – as they often do – meaningful and authoritative messages to national legislatures and even to EU institutions.

Preliminary references are segments of more diversified institutional balances, which should be carefully preserved, trusting the empowerment of ordinary EU judges in enforcing all principles of EU law. Such trust, by now a patrimony of the European community of judges, is the outcome of a long history, in which Italian judges played their own role, referring to the Court in Luxembourg, having in mind compliance with the principle of uniform interpretation of EU law.

In a famous decision (170/1984) the ICC, confirming a dualist approach, specified that the immediate enforceability of a Regulation 'as it is' within national legal systems is an undisputable sign of its origins within a separate legal order, nevertheless capable to impede that contrasting national norms display any relevance. This sophisticated legal construction was formulated in such a way that no derogatory effect could be attributed to an external and separate source, such as a Regulation.

Two more rulings are worth mentioning, dating back to the late Nineteen Eighties and early Nineteen Nineties, because they insist on the delicate point of how to solve discrepancies between national

and European norms. When a directly applicable principle of European law is at stake – in this case non-discrimination on grounds of nationality – it is the task of the legislature to guarantee legal certainty and to eliminate contrasting norms, since the mere non-enforcement of the latter does not produce their eradication from the system (389/1989). On a different ground, art. 11 of the Italian Constitution indicates limits to national sovereignty, up to the point of implying ‘non-enforcement’ of national law in contrast with what was then EC law (168/1991). Notions of pluralism of legal orders permeate the latter ruling, with an emphasis on ‘dualist’ theories, which might now require closer attention.

I believe the ICC should favour forward looking interpretations, whereby the unity of the European legal order is supported by a combined effort of all actors involved in the institutional game, including ordinary judges required, in the first place, by the CJEU to interpret national law in conformity with EU law. The common ground in which all European judges operate is the one intended by art. 2 TEU, where the fundamental values supporting the Union are clearly put forward. This unity of intents establishes linkages among Member States, and demands a proactive role of European institutions. Disillusion for what Europe has not done – or has done not so efficiently – should not go as far as breaking those linkages.

5. Which is ultimately the role of a constitutional judge in reconciling pluralism and unity in the European context? Which tools/techniques can be used and what developments can be foreseen?

Giuliano Amato: In general, and with specific regard to the European pluralism, the role of the constitutional judge is to find solutions to huge challenges, finding a way that is procedurally acceptable, legally sustainable and practically viable (meaning also, up to some extent, in financial and political terms). We are bound by multiple limitations, first of all we cannot select our cases and we can decide only on cases that have been correctly introduced by other subjects. Thus, we have to perform our role if and within the terms of the questions that we receive, and it is not easy to find the right case to say the right thing.

For sure, Constitutional Courts as institutions are subject to a sort of learning process themselves: it is not a case that the early case-law of the Polish Constitutional Court with regard to EU law resembles the first decisions of the Italian Constitutional Court, although taken some fifty years before. In other words: the individual judge learns a lot in participating in the discussion, in proposing solutions and in receiving feedbacks from colleagues. But even the institution improves and advances after each case, enriching its experience and the awareness of its role in an increasingly complex European constitutional framework.

Marta Cartabia: As already pointed out, dialogue is crucial. From a methodological point of view, an attitude inclined towards openness, to develop relationships and to interact with other colleagues in different legal systems is decisive. A wonderful article by Sabino Cassese is titled "*Fine della solitudine delle corti costituzionali, ovvero il dilemma del porcospino*" [The end of the Constitutional Courts' loneliness, or rather the dilemma of the porcupine]. That's it. In a context that is constitutionally interconnected it is no longer possible to play any game alone. Indeed, Courts operate in legal systems populated by several other actors from whom Courts must take advantage. Together with some colleagues we have written a book on the Italian Constitutional Court in English and we have asked ourselves what is the Italian style in constitutional adjudication. The Italian contribution can be condensed precisely in the ability to build up relationships, with other judges, national and international, with other institutional actors, with the Legislature and the Government. However, in order to enter in a peaceful relation with the other institutions one has to be very confident about its own identity: an identity that, in fact, requires more to be promoted than protected, as a contribute to the common enterprise of constitutionalism, which is shared life.

Daria de Pretis: In the current state of the integration process, with a remarkable and inescapable overlap of regulatory provisions in many fields, occasions for conflicts between national Constitutional Courts and supranational Courts are increasingly frequent. A top-down solution of these conflicts does not exist at the moment, and it is moreover very tough to imagine in the future. Means and

techniques of coexistence and conflict rules may only be developed by the praxis of involved courts. Therefore, courts play a crucial role in this process. Within this picture, a cautious and dialogical approach is certainly the wisest one. And, in my opinion, this is the approach that is emerging in the relation between the Italian Constitutional Court, the Court of Justice of the European Union, and the Strasbourg Court.

European Law remains an extraordinary example of integration process in respect of diversities. The European Court of Justice has been the main force of this integration process. However, the success of its story is indebted with the accurate respect that the Court always devoted to national diversities. On the national front, many supreme and Constitutional Courts (the Italian Constitutional Court being certainly among these) have shown an increasingly open approach toward European law. Also for them, it is important to highlight their good will to keep the reasons for unity into account, beside the steady claim to safeguard national constitutional identities.

In other words, Constitutional Courts should take into account two important and complementary approaches: on the one hand their claim of being guardians of the national constitution, on the other hand the need to take into account the unity of European law. Seminal examples of the effort of the Constitutional Court to take both these approaches into account are two decisions that I have already mentioned.

The first paradigmatic example is the judgment n. 187 of 2016 on the use and abuse of fixed term work in public schools. As previously mentioned, the Constitutional Court submitted a reference for preliminary ruling to the European Court of Justice on the compatibility of an Italian piece of legislation providing a legal regulation for the fixed term work in the schools with the European framework agreement on fixed-term work. The European Court of Justice found the national legislation to be incompatible with European law (*Mascolo* Judgment of 2014). The Italian Constitutional Court acknowledged the judgment of the European Court of Justice but claimed an autonomous space for interpretation of the impact of the latter judgment on the Italian legal system, further observing that the relevant legal framework had been amended in the meanwhile. Thus, the Italian Constitutional Court affirmed that the object of the reference for

preliminary ruling and the object of the question of constitutionality were not identical: the latter was not entirely part of the former, but on the contrary, in light of the *jus superveniens* “completing the European Court’s pronouncement is a necessary exercise of the aforementioned national discretion, and it is a task which falls to this Court”. The intention of the Court to strike a balance between unity and diversity emerges clearly in the judgment. In fact, on the one hand the primacy of EU law remains untouched, and the national piece of legislation is therefore struck down as unconstitutional. On the other hand, the Court claims for itself the evaluation regarding the appropriateness of new measures introduced by the Italian legislator with the aim of removing the consequences of the breach of EU law. It is also clear that the Italian Constitutional Court put a remarkable effort in finding in the EU legal system support for its claim of protection of diversities. In this framework, the Italian Constitutional Court relied on the European Court of Justice case law affirming that it falls within the Member States’ discretionary power to resort to measures for purposes of preventing abusive use of fixed-term employment contracts.

The second seminal example consists of the already famous so-called “*Taricco*” order (ord. 24/2017). The main focus of the decision is put on the relation between European law and fundamental principles of the national constitutional order. The Constitutional Court approached the case through the angle of the protection of national constitutional identity, affirming that the Court would disapply European law where in conflict with national constitutional identity; at the same time, the Court took up the angle of unity, and preferred to submit a reference for preliminary ruling to the European Court of Justice. Additionally, a further aspect is worth of attention: in fact, the Italian Constitutional Court asked the European Court of Justice to consider an issue that had been overlooked in the first *Taricco* judgment of the European Court. The reference notes that in the first *Taricco* Judgment the European Court of Justice failed to examine the issue of the sufficient determinacy of European law in light of the constitutional traditions of the Member States, of the ECHR and of the European Court of Justice case law. By doing so, the Italian Constitutional Court shed light on an issue of compatibility of the European decision with EU primary law, triggering a dialogue with its

counterparts that is entirely comprised in the European legal system and, once again, is fully inspired by a collaborative logic serving the principle of unity.

Silvana Sciarra: I believe constitutional adjudication is a medium in communication among national and supranational courts. This exchange of messages occupies a place of its own, since the origins of the European Community. The EU legal system provides a privileged field for exercises of mutual learning and for enhancing mutual deference. Pluralism is inherent in European constitutional traditions, and is a rich heritage of European legal culture, emerged from the dark history of the war and the tragedy of oppressive regimes. Respect for the rule of law includes respect for diversities, within a clear-cut notion of democracy and of separation of powers. Hence, I am in favour of heightening reconciliation of pluralism within the leading and unitary principles of EU law. This statement does not imply a hierarchical structure, whereby European law impinges upon national legal systems. On the contrary, courts are part of a dynamic evolution of the system as a whole, which reflects the original choices of Member States in signing the Treaties and, when so required, changing them. A defensive attitude of national courts, in particular with regard to the adjudication of fundamental rights, does not serve the purpose of strengthening national constitutional traditions. It may, on the contrary, favour the weakening of the EU system as a whole, which should constantly be nourished by pluralism, in order not to loosen sight of its mission. Furthermore, constitutional judges cannot ignore that fundamental rights have been strengthened in national constitutions through the circulation of standards, which are the outcome of evolving principles in international law.

The Charter of fundamental rights of the European Union is the emblem of a virtuous circle, within which national constitutional traditions and fundamental rights enshrined in the ECHR should find a terrain for coherent interpretations. The unitary structure of the Charter is inclusive of last generation rights and was conceived as an instrument of coordination – rather than marginalization – of national courts. The CJEU has not, so far, fully clarified the direct effect of the Charter, but constantly recalls the direct enforceability of general principles of EU law. One can hear this voice from

Luxembourg as an incitement for national judges to operate in this field.

Constitutional Courts in the EU have, over the years, increased their trust in preliminary rulings and have opened up new communications with the CJEU, proving that they do not feel marginalized, neither disempowered. This technique, not to be considered an *ultima ratio*, is an instrument to be handled with care, paying equal respect to constitutional prerogatives and to supranational competences. The – by now too traditional – metaphor of ‘dialogue’ has been supplanted by complex exchanges of messages, due to the increased legal technicalities involved, as well as to the preoccupations that some courts display for an excessive interference of the CJEU in national parliamentary prerogatives.

A similar trust to the one shown in preliminary references is, in my view, developed whenever Constitutional Courts devote attention to the case law of the CJEU. First of all, constitutional judges should feel entitled to monitor the appropriateness of references to CJEU’s rulings made by the parties raising issues of constitutionality. They can also go as far as quoting developments in the CJEU’s case law, which may enhance the overall coherence of constitutional courts rulings. In other words, there should be no hidden strategy in integrating the Luxembourg Court’s case law in the legal reasoning of Constitutional Courts. The techniques to be privileged are those enabling direct exchanges among courts, based on transparent arguments and on mutual respect.