Chapter I

# INTRODUCTION. DIALOGUE AS A METHOD

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The Italian Constitutional Court represents one of the earliest, strongest, and most successful examples of constitutional judicial review established in the last century. Following its delayed implementation in 1956, eight years after the Constitution of the Italian Republic entered into force, the Court immediately took up a strong position among the other Italian political institutions [1] and ever since then it has always been well respected at the domestic level. Beyond national borders, together with the Constitutional Court of Germany, it has served as an important forerunner of the "post-war paradigm" [2] and one of the principal prototypes for later constitutional tribunals in other parts of Europe, from Spain and Portugal in the 1970s and 1980s, to Central and Eastern Europe after the collapse of the communist regimes in the 1990s, to the more recent reform of the French *Conseil Constitutionnel* in 2008. [3] Its value transcends Europe, moreover: it has a fascinating and instructive history for any country seeking to create and consolidate a new constitutional regime including a system of judicial re-

[1] B. ACKERMAN, *Revolutionary Constitutionalism*, Cambridge, Belknap Press, 2019, 174 (numbers refer to pages of the electronic version of Bruce Ackerman, *The Rise of World Constitutionalism. Volume One: Revolutionary Constitutions).*

[2] L.E. WEINRIB, *The Post-War Paradigm and American Exceptionalism*, in S. CHOUDHRY (eds.), *The Migration of Constitutional Ideas*, Cambridge, Cambridge University Press, 2006, 89-90.

[3] See generally T. GINSBURG, *The Global Spread of Constitutional Review*, in D. KELEMAN, K. WITTINGTON (eds.), *The Oxford Handbook of Law and Politics*, Oxford, Oxford University Press, 2008, 81-95.

view in its institutional architecture.[4] It belongs to the Continental European tradition of Kelsensian-style constitutional courts, but it is distinctive in its structural, procedural, and institutional dimensions. It produces a sophisticated jurisprudence, with a unique voice distinguishing it among global constitutional actors, on a broad range of topics from fundamental rights and liberties to the allocations of governmental powers and regionalism.

Yet, the Italian experience of constitutional review has been either neglected or misinterpreted in a number of comparative constitutional law studies, especially those which rely primarily on secondary literature available in English. The aim of this book is to offer a deeper understanding of the experience and work of the Italian Constitutional Court, based on primary sources and on examination of certain key features of the Italian system in a comparative perspective.

This book qualifies as a "sequel". In a previous volume,[5] we meant to offer a concise but comprehensive introduction to constitutional adjudication in Italy. Our aim was to make the Italian Constitutional Court and its jurisprudence more accessible and familiar to scholars and judges engaged in comparative constitutional dialogue. We sought to do so by providing a broad introduction to the development of the Court, from its formation and early history to its growing insertion into the regional European constitutional space. The book offered an overview of the Court's structure – a dynamic hybrid of centralized and diffuse judicial review – as well as its judicial processes and its principal patterns of reasoning and methods of interpretation. We also delved into several of the most important substantive areas of the Court's case law: key rights and freedoms; the allocation and interrelationship of powers among the branches of government; and the distribution of authority between the central State and more local entities. In short, the book presented some of the most salient themes that make the Italian Constitutional Court an interestingly distinctive and important contributor to our understanding of constitutional law and politics in the global context in which we find ourselves today. The aim of that book was not in the first instance to be a critical evaluation of Italian constitutional law. Instead, we addressed an audience of readers who were likely to encounter

[4] As Bruce Ackerman suggests in his analysis of the rise and consolidation of Revolutionary Constitutional regimes around the world: he describes a pattern common to a number of States where, after some phases in which the Constitution is in the hands of the political actors that lead the fundamental change, the judiciary emerges on the stage.

[5] V. BARSOTTI, P. CAROZZA, M. CARTABIA, A. SIMONCINI, *Italian Constitutional Justice in Global Context*, Oxford, Oxford University Press, 2016.

the Italian Constitutional Court for the first time in any detail and we wanted the Court's own voice to emerge. For this reason, the book includes a larger number of longer excerpts from the Court's judgments so that the reader can become acquainted with the Court's own judicial style.

Fifty years after John Henry Merryman introduced the idea of an "Italian style" to comparative law in general,[6] we can see in the Italian Constitutional Court today an "Italian style" of constitutional justice. The core idea that emerges from the previous book is that the "Italian Style" of constitutional adjudication is most centrally characterized by the *relational approach* of the Court both internally in its own structure and methods, and externally in its interactions with other judicial and political actors. The key word, *relationality*, merits some further elaboration.

## 1.1. Relationality as the hallmark of the Italian Style of constitutional adjudication

In a way, the idea of relationality addresses questions of judicial activity and style that have animated many other studies of the behavior of courts in the past: judicial activism vs. self-restraint or deference;[7] passive and active virtues of courts;[8] strong and weak models of judicial review;[9] classic and romantic judges;[10] heroes, mutes, soldiers, and minimalist judges;[11] and more. The originality of the relational approach to constitutional justice lies in the fact that the focus is both on the types of interactions that the individual justices have inside the Court and also on the interactions that the Court as an institution cultivates with other actors external to it.

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[6] J.H. MERRYMAN, *The Italian Style: Doctrine,* in 18 *Stanford Law Review* 39 (1965); J.H. MERRYMAN, *The Italian Style: Law,* in 18 *Stanford Law Review* 396 (1966); J.H. MERRYMAN, *The Italian Style: Interpretation,* in 18 *Stanford Law Review* 639 (1966).

[7] R.A. POSNER, *The Rise and Fall of Judicial Self-Restraint*, in 100 *California Law Review* 519 (2012).

[8] A. BICKEL, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics*, New Haven and London, Yale University Press, 1962.

[9] S. GARDBAUM, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, in 53 *Columbia Journal of Transnational Law* 285 (2015); R. DIXON, *The Core Case for Weak-Form Judicial Review*, in 38 *Cardozo Law Review* 2193 (2017).

[10] M.A. GLENDON, *A Nation Under Lawyers. How the Crisis in the Legal Profession is Transforming American Society*, Cambridge, Harvard University Press, 1996.

[11] C.R. SUNSTEIN, *One case at a Time. Judicial Minimalism on the Supreme Court*, Cambridge, Harvard University Press, 2001 and *Id., Constitutional Personae*, Oxford, Oxford University Press, 2015.

Like any judge in well-functioning systems of justice generally, the Constitutional Court is indeed independent from other branches of government. As a body called to exercise a *judicial* review of *legislation*, however, the Constitutional Court also has to come to terms with other judicial and political bodies. They are therefore endowed with a composite character. [12] More than other institutional actors such as legislatures, chief executives, and ordinary courts, specialized constitutional courts are always required to find and preserve their place in the constitutional map in a location equidistant from both the judicial and political branches, so that they are effectively in a position to relate to both audiences.

One of the major challenges for a constitutional court taking its first steps, therefore, is to be both self-assertive and yet cooperative with the legislative branch. Although any court required to review acts of legislation is in a certain sense necessarily in opposition to the legislature, after its inauguration in 1956 the Italian Constitutional Court was not seen to be a true antagonist of the more democratically representative bodies. This was mainly because it spent its initial energy, beginning with its very first decision, on eliminating all the Fascist vestiges from the new constitutional order. In the beginning, the natural target of judicial review was the old Fascist legislation still contained, for example, in the civil code and in the criminal code and patently incompatible with the new Constitution. The activity of the new legislature only came under the Court's scrutiny years later. This made for a vital and constructive initial alliance between the new Parliament and the Constitutional Court against the Fascist legacy, which politically strengthened the legitimacy of the Constitutional Court vis-à-vis the political institutions and in Italian society as a whole. Instead of taking sides in current political disputes, therefore, the Court emerged originally as a defender of the shared values entrenched in the anti-Fascist Constitution and was able to disseminate the new constitutional principles in a legal system that was very much in need of renewal. [13]

If there is an assertive tone in the first expressions of the Constitutional Court's jurisprudence, it was in its clear pronouncements on the binding character of all constitutional provisions as higher law, strengthening the normative force of the Constitution in the context of what had otherwise

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[12] H. KELSEN, *Judicial Review of Legislation: A Comparative Study of the Austrian and American Constitution*, in 4 *The Journal of Politics* 183 (1942), 187; A. STONE SWEET, *Governing with Judges: Constitutional Politics in Europe*, Oxford, Oxford University Press, 2000, 135-137.

[13] See V. BARSOTTI, P. CAROZZA, M. CARTABIA, A. SIMONCINI, *Italian Constitutional Justice in Global Context,* op. cit., 5-39.

been a strong Italian tradition of "legislative constitutionalism" – that is, constitutional texts amendable by a simple piece of legislation approved by the Parliament. [14]

Over time, the doctrines elaborated by the Court have helped to maintain smooth relations with Parliament. For example, the fundamental "interpretive judgments" doctrine, separating the *norme* from the *disposizioni*, [15] allowed the Court to strike "interpretations" down, while keeping the parliamentary "texts" alive. In many ways even the judgments that add, substitute, or remove something from a statute (*sentenze manipolative*) can be understood as attempts at cooperation with the legislature, given that in those cases the Court preserves the parliamentary act, introducing only the revisions strictly necessary to make that act consistent with the Constitution. [16] All of these techniques contribute to the remarkable absence (especially from an American perspective) of concern over the counter-majoritarian difficulty [17] in Italian constitutional and political debate ever since the Court began its activity.

A particularly noteworthy recent example of a dialogical relation with the Parliament is Order n. 207 of 2018 on assisted suicide. [18] Following the example of Canada [19] and the UK, [20] the Constitutional Court, while recognizing the need to update the existing legislation on end-of-life issues, made a rare use of its procedural powers and postponed a final judgment, in order to allow room for the Parliament to introduce a new regulatory framework through legislation. The one-year delay established by the Court expired and – unlike its British and Canadian counterparts – the Italian Par-

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[14] T. GROPPI, *The Italian Constitutional Court: Towards a Multilevel System of Constitutional Review?*, in A. HARDING, P. LEYLAND (eds.), *Constitutional Courts: A Comparative Study*, Wildy, Simmonds & Hill Publishing, 2009, 139.

[15] See V. BARSOTTI, P. CAROZZA, M. CARTABIA, A. SIMONCINI, *Italian Constitutional Justice in Global Context*, op. cit., 82-85.

[16] See V. BARSOTTI, P. CAROZZA, M. CARTABIA, A. SIMONCINI, *Italian Constitutional Justice in Global Context*, op. cit., 82-91.

[17] J.H. ELY, *Democracy and Distrust. A Theory of Judicial Review*, Cambridge, Harvard University Press, 1980.

[18] The order can be retrieved in English at https://www.cortecostituzionale.it/ documenti/download/doc/recent_judgments/S_207_2018_EN.pdf. The Court can issue orders (*ordinanze*) or judgments (*sentenze*). Generally speaking, orders are only briefly reasoned and are similar to *per curiam* opinions, whereas judgments are fully reasoned. It is worth recalling that no separate opinions are allowed: the decision always appears on the face of it as the decision of the whole Court.

[19] Supreme Court of Canada, Judgment of 6 February 2015, *Carter v. Canada*, 2015 SCC 5.

[20] Supreme Court of the United Kingdom, Judgment of 25 June 2014, *Nicklinson and another*, [2014] UKSC 8.

liament did not pass any legislation. In these types of cases, parliaments and constitutional courts can sometimes act together as "co-legislators", as Michel Troper puts it,[21] because the court is required to invalidate the piece of legislation that contradicts the constitution, but does not have the power to fill the gap and to create a new positive legislative framework, which is the task of the Parliament. In this case, the Parliament failed to act and was not able to take advantage of the opportunity offered to it by a *relational* Court extremely respectful of the prerogatives of the legislative branch. Eventually, the Court issued decision n. 242 on 26 September 2019, holding that although the originally contested provision of the criminal code on assisted suicide is still valid, there are some limited cases in which it cannot be applied without breaching the Constitution. The Court pointed out that medical advancements today enable people, like the plaintiff in the underlying case, to survive severely damaging illnesses and events, leaving them dependent upon medical technologies for basic survival, in severe pain, but with their intellect intact. It recalled the existing right of these persons to demand cessation of such treatments to allow death to take its course (a request binding upon third parties), and the right to be heavily sedated during the time between cessation of treatment and death. The Court then held that under these circumstances the law cannot punish those who help mentally competent persons making a free and informed decision to commit suicide, but are unable to carry out the act themselves due to their medical state.[22] Not surprisingly, this controversial decision has been both celebrated by some and sharply criticized by others, both because of the outcome mandated by the Court and because the Court ultimately assumed an affirmative legislative role in the matter. Whatever one's overall evaluation of the substance of the judgment, however, it does represent a paradigmatic example of the Constitutional Court's give-and-take engagement with the legislative branch.

Cooperative relations with other national judicial bodies have been equally crucial for the Italian Constitutional Court. On the one hand, the Court firmly discarded the old assumption of the Court of Cassation of 1948 on the programmatic nature of the Constitution that would have de-

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[21] M. TROPER, *Pour une théorie juridique de l'État*, Paris, Presses Universitaires de France, 1994.

[22] The relational approach of the Italian Constitutional Court in the assisted suicide case recalls closely that of Judge Calabresi's concurrent opinion in *Quill v. Vacco*, 80 F3rd 716, 738 (2nd Cir. 1996). The facts of the two cases are very similar and Calabresi, considering that the New York statute under attack regulating assisted suicide was very old and that on the issue public opinion was particularly sensitive, suggested a "constitutional remand" in order to offer an occasion of dialogue to the legislative branch.

prived the Constitution of any normative force and the Constitutional Court's activity of any teeth. On the other hand, the Constitutional Court has not been jealous of its mission as the "guardian of the Constitution" and has encouraged the ordinary judiciary to participate in the implementation of the Constitution. After all, in Italy the main avenue to bring cases before the Court is the incidental referral procedure, where the ordinary courts are gatekeepers of the Constitutional Court, deciding which cases will be referred to the Constitutional Court for judgment and which ones will not. This implies strict cooperation among the courts. It is worth recalling that the participation of ordinary judges in the implementation of the Constitution was spelled out in the 1965 "Gardone National Congress" of the judiciary, and soon became a milestone in the evolution of the judicial function in Italy.[23] In fostering this cooperative relationship, the Constitutional Court has over time shown a great deal of trust in the ordinary judiciary, for example by preserving the latter's competence as the primary interpreter of legislation, and by favouring the ordinary judiciary's use of creative methods of interpretation "in conformity with the constitution" (*conforme a costituzione*) in order to avoid having to refer matters to the Constitutional Court. Most decisions of the Constitutional Court, in fact, presuppose a healthy cooperation with the ordinary judiciary, both with lower courts and with the highest courts (the *Corte di Cassazione* and the *Consiglio di Stato*). Without this interjudicial relationality, the pronouncements of the Constitutional Court would remain ineffective.

As to the relations with the European Courts – the Court of Justice of the European Union and the European Court of Human Rights – and with foreign constitutional courts, the Italian Constitutional Court has dramatically changed its attitude over time. Indifference and formal segregation of jurisdictional authority were the Cartesian coordinates that described the starting position of the Court vis-à-vis its supranational and foreign counterparts. Then, a period of informal and silent reciprocal influence followed, during which the Italian Constitutional Court avoided all formal reference to the jurisprudence of the two European Courts but showed itself implicitly to be well aware of the case law developed in Luxembourg and in Strasbourg.[24] The Constitutional Court currently gives a similarly implicit and silent but influential consideration to foreign law and to comparative sources: whereas in recent years the Italian Constitutional Court

[23] A. MENICONI, *Storia della magistratura italiana*, Bologna, Il Mulino, 2012, 312 ff.

[24] See V. BARSOTTI, P. CAROZZA, M. CARTABIA, A. SIMONCINI, *Italian Constitutional Justice in Global Context*, op. cit., 205-230.

has only occasionally referred openly to the case law of other constitutional tribunals, the influence of the latter is much deeper than is apparent on the surface.[25] In sum, Italian constitutional justice incrementally entered into an active relationship with European, international, and comparative law, and especially with the judge-made law of the two European supranational courts, in particular in human rights cases. While in some areas the impact of these external sources has induced the Constitutional Court to revise its previous jurisprudence and to develop new principles and standards, in some other cases the Court intentionally takes a position distinct from European or foreign courts, especially when the core values of Italian constitutional identity are at stake. In short, the Court engages now in open and direct relations with external judicial bodies, but those relations are not oriented to an unreasoned importation of judicial solutions from outside; it is rather a two-way relation among peers, a dialogue that triggers constructive convergence but also leaves room for difference and distinctiveness.

If the assisted suicide case is a good recent example of a relational attitude of the Constitutional Court vis-à-vis the national legislative body, the well-known *Taricco* saga may show the virtues of a dialogic relation between the Court and a supranational body and may also show the constructive effects of a conversational posture. Given the importance of the case, it is worth summarizing the sequence of events.

With the judgment handed down in the *Taricco* case on 8 September 2015, the Court of Justice of the European Union (CJEU) established that in criminal proceedings for infringements relating to the value added tax (VAT), national courts should not apply existing national statutes of limitation in two cases: (a) if they lead to impunity in a significant number of cases of serious VAT fraud; and (b) if, in the national legal system, analogous crimes of fraud committed against the Member State concerned are subject to longer statutes of limitation. The CJEU did not consider the "Taricco rule" – as formulated in these terms – to conflict with the principle of legality in criminal matters, because it considered statutes of limitation to be procedural matters. In the Italian legal system, however, according to the broad formulation of Article 25(2) of the

[25] See V. BARSOTTI, P. CAROZZA, M. CARTABIA, A. SIMONCINI, *Italian Constitutional Justice in Global Context*, op. cit., 78-82. A judgment making extensive reference to foreign case law is n. 186 of 2017. Interesting notes from "inside" the Court on the issue, among many others, of the use of the comparative method can be found in S. CASSESE, *Dentro la Corte: diario di un giudice costituzionale*, Bologna, Il Mulino, 2015. See also P. Passaglia, *Corte costituzionale e comparazione giuridica: una analisi (molto sineddotica), una conclusione (quasi sinestetica)*, in *I rapporti civilistici nell'interpretazione della Corte costituzionale nel decennio 2006-2016*, Naples, Esi, 2018.

Constitution ("[n]o one may be punished except on the basis of a law in force at the time the offence was committed"), this statute of limitation falls within the scope of substantive criminal law because it affects punishability. A statute of limitation thus conforms to the Constitution only if it complies with the rules of specificity and non-retroactivity according to the principle of legality in criminal matters, as the Constitutional Court has held on several occasions. For this reason, Italian scholars perceived the "Taricco rule" as failing to consider a supreme principle of the Italian constitutional order with regard to criminal matters, both because it applies to actions committed before it was pronounced and because of its absolute indeterminacy, which made it unpredictable for society at large and impossible for judges to apply. The doubts fostered by the legal debate were taken up by the ordinary courts, which turned them into subjects of questions of constitutionality that they referred to the Constitutional Court. The Constitutional Court in turn concluded that the "Taricco rule" contradicted the constitutional principle of legality in criminal matters. However, it refrained from expunging the rule from the legal system. The Court rejected the request to declare the law ratifying the Treaty on the Functioning of the European Union (TFEU) unconstitutional insofar as it required application of Article 325 TFEU – as interpreted by the CJEU – and consequently the setting aside of two provisions of the Criminal Code regarding statutes of limitation. In Order No. 24 of 2017, the Constitutional Court chose to refer a set of questions to the CJEU for a preliminary ruling. Without calling into question the CJEU's interpretation of Article 325 TFEU, the Constitutional Court simply underscored the substantive nature of statutes of limitation in the Italian legal system and the fact that, consequently, they fall within the scope of the principle of legality in criminal matters. That principle, which Article 49 of the Charter of Fundamental Rights of the European Union and the constitutional traditions common to several Member States recognize as fundamental and worthy of protection, would be violated by judicial application of the "Taricco rule" because of its retroactivity and lack of determinacy. In *M.A.S. and M.B.*, handed down on 5 December 2017, the CJEU acceded to the Italian Constitutional Court's view and acknowledged the substantive nature of statutes of limitation in the Italian legal system. Furthermore, the CJEU made it possible for national courts to not apply the "Taricco rule" where they deem it to conflict with the principle of legality in criminal matters enshrined in Article 49 of the Charter of Fundamental Rights of the European Union. The *M.A.S.* judgment does not significantly depart from the approach adopted in *Taricco*, but rather recasts it in light of the new information on the

national legal system that the Italian Constitutional Court presented to the CJEU in its request for a preliminary ruling. The matter was finally closed when the Italian Constitutional Court handed down Judgment No. 115 of 2018, in which it identified the contradiction between, on one hand, Article 325 TFEU and the "Taricco rule", and, on the other, the Italian Constitution's supreme principle of legality in criminal matters, thereby conclusively rejecting the possibility that criminal courts could set aside the relevant rules on limitation. It must be emphasized that this conclusion was not based on national constitutional law alone, but also on the application of Union law as detailed by the CJEU. In other words, the dialogue between the Italian Constitutional Court and the CJEU made it possible to elaborate a rule shared by the two legal orders, with a view to assuring respect for human rights. After the Taricco cases both the Italian Constitutional Court and the CJEU were enriched by a positive legal experience that makes their relationship stronger and reinforces mutual trust.

Where does this *institutionally relational* mindset of the Italian Constitutional Court originate? Nuno Garoupa and Tom Ginsburg have recently argued that there is a positive correlation between the composition of a constitutional court and its inclination to take a conflictual or cooperative stance with other institutional bodies.[26] Although the final outcome of the research is debatable at least in relation to the Italian case, we agree with the thesis and share the view that the overall external attitude of the Constitutional Court as such is very much dependent on its internal structure.

In the Italian Constitutional Court, the Justices tend to have diverse perspectives because of their different appointment sources – some selected by highest courts of the ordinary judiciary, others by the Parliament, and still others by the President of the Republic – and because of their different backgrounds, with career judges working alongside university professors and practicing lawyers. They are all united broadly by a common legal education, but differ completely in their professional trajectories and in their personal cultural formation.[27] This pluralism has always been a great asset for the Court, and it has to a degree compensated for the otherwise deficient diversity of the Court along certain other sociological lines such as age, geography, or – most pointedly – gender.

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[26] T. GINSBURG, N. GAROUPA, *Building Reputation in Constitutional Courts: Political and Judicial Audiences*, in 28 *Arizona Journal of International and Comparative Law*, No. 3, 539 (2011), 539-568.

[27] See V. BARSOTTI, P. CAROZZA, M. CARTABIA, A. SIMONCINI, *Italian Constitutional Justice in Global Context*, op. cit., 43-46.

Notwithstanding these differences, the Justices are nevertheless prompted to use dialogue and agreement because of the *principle of strict collegiality* that governs the work of the Court. The internal organization and working procedures of the Court are designed to spur the justices to work intensely in common with one another; they are obliged to dialogue with one another. They sit in deliberation chambers for hours and hours and have oral debates over every single word written in every decision of the Court. This fosters reciprocal cross-fertilization among the members of the Court and their respective ideas, political and social backgrounds, cultures, and mentalities, and serves as the principal growth factor in the Court's internal capacity for building interpersonal relations. The absence of separate opinions and the requirement that texts be discussed together in chambers and approved collectively, for instance, fosters a consensual approach and encourages the Justices to incorporate broadly the particular views of their various individual colleagues into the final text. [28]

That inclusive approach that the individual justices are impelled to take internally to the Court, thanks to the principle of collegiality which pervades all the Court's activities, also shapes the *external* posture of the Court as an institution. The Constitutional Court has developed a self-understanding that it is a part of a broader system, and that its mission in the democratic polity is not to take on the entire responsibility of constitutional governance, but instead to cooperate with other actors, according to the specific constitutional role of each one.

In short, a first examination of the Italian Constitutional Court reveals its relational approach in many different dimensions: internal and external; judicial and political; institutional and interpretative; national and transnational.

## 1.2. Relationality revisited

The first volume – *Italian Constitutional Justice in Global Context* – and its core idea of relationality were presented and discussed in universities such as Notre Dame, Bocconi in Milan, Harvard, the Central European University in Budapest, Berlin, Bologna, and King's College in London. As always happens, we learned much from the debates, which helped us to think afresh about the relational nature of the Italian Constitutional Court. These first discussions made it clear that the idea of relationality as a framework

[28] See V. BARSOTTI, P. CAROZZA, M. CARTABIA, A. SIMONCINI, *Italian Constitutional Justice in Global Context*, op. cit., 46-49.

to understand the effective role of a Constitutional Court is promising, helping to capture the overall stance of the institution and to distinguish its position from comparable bodies. Yet, the debates with academics of these different milieus have also emphasized that the idea of relationality requires further clarification and nuance.

### 1.2.1. Relationality vs. weakness: perception and reality

This relational approach of the Italian Constitutional Court is easily misinterpreted, as it can be perceived as a sign of weakness. In fact, the Italian Court has often been compared to its German sister and a common remark is that the Italian "twin" came to be overshadowed by the *Bundesverfassungsgericht* because it did not speak with the same "assertive" voice.[29] Moreover, the "war" that occasionally broke out between the Italian Supreme Court of Cassation and the Constitutional Court[30] has been misrepresented as a sign of the constitutional tribunal's inferiority or subordination to the older, well established apex judge of the ordinary system. In the same vein, it has been said that "the main source for the difficult relationship between the Italian Constitutional Court and regular courts is the process of submitting legal questions".[31] Similarly, the fact that the Court neither is polarized nor publishes dissenting opinions is considered a sign of its insecurity.[32]

In our view, accounts like this do not reflect the real experience of the Italian Constitutional Court. The fact that there is neither a stable, predictable majority, nor a strong polarization between a majority and a minority in the Court does not imply that it has a weak or undecided stance

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[29] T.G. DALY, *The Alchemists*, Cambridge, Cambridge University Press, 2017, 68 ff., 81 ff.

[30] J. FEREJOHN, P. PASQUINO, *Constitutional Adjudication, Italian Style,* in T. GINSBURG (eds.), *Comparative Constitutional Design*, Cambridge, Cambridge University Press, 2012, 294. To be fair, they are not representative of the ordinary relations between the Constitutional Court and the Supreme Court of Cassation in Italy.

[31] Id. 561-562.

[32] T. GINSBURG (eds.), *Comparative Constitutional Design*, op. cit., 543: "Constitutional Courts that are weak vis-à-vis their supreme courts, such as those in France and Italy, take a long time to become polarized; even now France and Italy preserve the façade of unanimous decisions and do not publish dissents". On the story and practice of separate opinions in Europe, see respectively A. DI MARTINO, *Le opinion dissenzienti dei giudici costituzionali. Uno studio comparativo*, Naples, Jovene Editore, 2016 and K. KELEMEN, *Judicial Dissent in European Constitutional Courts*, Abingdon, Routledge, 2018.

in the constitutional system. On the contrary, the fact that the majority that governs the court is variable and unpredictable is a strong feature of the composition of the Court. It encourages consensual decisions and deliberative processes based more on the logic of persuasion than on the law of numbers, and that privileges seeking consensus rather than simply casting votes.

Similarly, occasional divergences with other courts – both national and European – do not indicate that the Italian Court entertains a conflictual or confrontational relationship with other judges. In its recent case law the Italian Constitutional Court has engaged in a number of dialogues with the Court of Justice of the European Union,[33] has accepted with some distinctions the jurisprudence of the European Court of Human Rights,[34] and has entertained a relationship of mutual respect with the Supreme Court of Cassation, even in a delicate phase in which the Constitutional Court has slightly adjusted its jurisprudence related to the implementation of European law.[35] Like any relationship, even the judicial relationships of the Constitutional Court require understanding, comprehension, mutual respect, and the resolution of conflicts.[36]

Even less true is the statement that the Constitutional Court's incidental procedure undermines its authority vis-à-vis ordinary judges. In fact, as Elisabetta Lamarque demonstrates in her contribution to this volume, it facilitates a cooperative and constructive relationship among the different branches of the judiciary and is less imposing than other forms of direct complaint where the constitutional court plays the role of a judge of final appeal over the decisions of all other judicial bodies.

As Armin von Bogdandy and Davide Paris show in the final essay of this book, there is a paradoxical strength of the Italian Court that becomes evident under the guise of an accommodating attitude. However, in order for the reader to go beyond appearances and to be persuaded that relationality is not equal to weakness, it is necessary to delve deeper into the jurisprudence of the Constitutional Court.

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[33] The apex of this dialogue is the famous Taricco case, Judgment n. 24 of 2017 described supra at 18 ff.

[34] For example Judgment n. 49 of 2015.

[35] See Judgment n. 117 of 2019 that summarizes an evolution started with Judgment n. 269 of 2017 and continued with Judgments n. 20 and 63 of 2019.

[36] On the conditions for a veritable judicial dialogue see G. LATTANZI, M. CARTABIA, *Dialogue Between Courts and the Taricco Case,* https://www.cortecostituzionale.it/documenti/news/CC_NW_20190404.PDF.

### 1.2.2. Relationality "unpacked"

Relationality is a very complex, nuanced notion, and can be useful only if it is "unpacked" in different chapters. An institution can be well disposed to open relations in some areas of its activity even while it maintains a defensive position in other ones. In order to appreciate the experience of the Italian Constitutional Court from the perspective of its relational approach, it is necessary to consider separately and independently different aspects of the system.

For instance, although we have shown that the Italian Constitutional Court is deeply relational if we take into consideration its posture toward other national and European courts or the national Parliament, we reach a different conclusion if we examine its posture with respect to public opinion and the social sector more generally. So far, the Court has done little to encourage a more open and transparent participation of civil society. Traditionally, the circle of subjects allowed to officially intervene in the constitutional process was strictly limited to the parties that were able to trigger the process to the exclusion of all others. Nevertheless, on January 11, 2020 a press release was posted on the web page of the Constitutional Court, titled "The Court Opens to Hearing the Voice of Civil Society", announcing that the Court amended its Rules introducing, among other things, the great novelty of *amicus curiae* briefs in the Italian system of constitutional procedure. [37]

More generally, ordinary citizens largely ignore the Constitutional Court and its justices. Among the constitutional institutions of the Italian Republic, it is the one surrounded by an air of mystery: remote, obscure, and inaccessible. In media surveys, the Constitutional Court is often confused with the Supreme Court of Cassation. The function of judicial review of legislation, the core mission of the Court, is inscrutable for most people except jurists and academics specialized in the field of constitutional law. Public opinion perceives the Constitutional Court as a distant institution that speaks an arcane language. The public generally is unfamiliar with the names, faces, and backgrounds of the Justices who compose it. Despite a good start, when the Court took the relationship with public opinion very seriously in its early years, over time it has lost contact with the public. It is only in very recent times, when the Court decided to celebrate its 60th anniversary with a conference dedicated to "the decisions that have changed the life of Italians", [38] that things have begun to take a different course.

[37] T. GROPPI, A.M. LECIS COCCO ORTU in this volume, especially the post scriptum.

[38] https://www.cortecostituzionale.it/jsp/consulta/documentazione/convegni_seminari.do.

Since then the Court has devoted a lot of energy to being more proactive in reaching out transparently to civil society, scholars, and professionals through a number of concurrent channels.[39]

For example, in the past the Court's press releases used to be a sort of preview of the final words of its decisions, written in the same technical language as the legal documents. In recent years, however, the Court has strengthened its press office with professional journalists and now provides the public with a new style of press release on the website and announces the most important decisions with a note that explains the Court's position and its effects in a language capable of being communicated directly through the media. Moreover, in most cases a summary of the reasoning of the Court (in both Italian and English) accompanies the publication of the decision. In addition, the Court continues its traditional habit of holding an annual press conference, but again the style of communication has been modernized in order to reach a broader audience, not only academics and institutional actors and lawyers.

However, the most important initiatives have been the "journeys of the Court".[40] Well aware of the distance that separates the Court from the lives of the people, the Court decided to open the doors of the beautiful building of the Consulta Palace in which it is located, not only to let people in but also to have the Justices reach out to all the regions of Italy. Since 2018, the Court has set up a program with the Minister of Education to visit schools in every corner of the Italian territory, especially those in more remote areas, to speak to the students about the values of the Constitution and the role of the Constitutional Court in the protection and implementation of the Constitution. Encouraged by the success of this first venture, the Court decided to sail off into more troubled waters, and began a second journey in a number of prisons. The success of this unprecedented adventure cannot be spelled out only in words; it requires participation. That is why the Court has recorded footage of these encounters between justices, detainees, police officers, and prison administrative staff that will be made into a documentary.[41] These journeys of the Court into different sectors of

[39] For the first time, the Constitutional Court's communication strategy is becoming a topic of scholarly reflection: see for example D. CHINNI, *La comunicazione della Corte costituzionale: risvolti giuridici e legittimazione politica*, in *Diritto e Società*, No. 2, 255 (2018), 255-280.

[40] The first journey in the Italian schools is documented below: https://www. cortecostituzionale.it/jsp/consulta/viaggioItalia/viaggio_home.do; the second journey in prisons can be followed here https://www.cortecostituzionale.it/jsp/consulta/vic/vic_home.do.

[41] https://www.raiplay.it/video/2019/06/Speciale-Tg1-c24535fb-96d4-428a-90bc-7174abe1163f.html.

society are very helpful instruments for disseminating the values of the Constitution and the role of its custodian among the people.

These are only some examples that confirm the necessity of articulating the relational capacity of the Court to different audiences: the *institutional* relationality of the Court, which in turn can be sub-divided into *judicial* and *political* relationality; the *social* relationality of the Court is another thing. Definitely, relationality as a benchmark for a realistic and effective understanding of the role of the Constitutional Court needs to be disaggregated and unpacked.

### 1.2.3. Official vs. Unofficial relationality

In the same vein, the relational behavior of the Court can be more fully grasped if the observer takes into account not only its explicit words and activities, but also the implicit signs that appear on the surface and whose meaning needs to be more deeply investigated, decoded, and uncovered. In fact, the relations of the Court can be *official* – such as those taking place institutionally between the Constitutional Court and the ordinary judiciary – and *unofficial.* The latter exists when contacts are through informal and less visible channels.

For example, dialogue between the Italian Constitutional Court and legal scholars seems at first glance to be completely absent in the Italian system. The Court refrains from explicitly quoting any piece of scholarship in its decisions. Nevertheless, it is no mystery that the Court maintains close relations with academics: first, a significant number of justices are university professors (today, 10 out of 15); second, in the files of the Court one can find significant references to scholarly sources; third, when the Court wants to reform some aspects of its practice it often organizes seminars and debates with scholars and experts in the field. These and other kinds of relationships are dealt with in Paolo Passaglia's chapter where he illustrates these and many other informal avenues through which scholarship filters into the Court's work and opinions. Perhaps, in this case, an informal way of communication is more efficient than a formal one because it allows Justices to take into account scholars' thoughts without showing explicitly their preferences and because it allows Justices not to reveal the theoretical sources of their ideas, thereby avoiding academic jealousies.

Parallel observations can be made regarding the use of comparative law by the Italian Constitutional Court. It is only in the most recent developments of the case law of the Court that some particular references to the jurisprudence of other sister courts have been made explicitly, as happened in Order 207 of 2018 on assisted suicide and in decision n. 141 of 2019 on

prostitution.[42] However, the practice of taking into account other constitutional experiences in a comparative perspective dates back to some decades ago. For example, Sabino Cassese[43] has testified that at the time of the first decision on abortion, n. 27 of 1975, the Court was aware of other court decisions including that of the US Supreme Court in *Roe v. Wade*, thanks to the contribution of the Research Office of the Court, the staff of which includes comparative law experts.

In some cases, however, informal relations can also have some costs. If we think about how "closed" the Italian constitutional procedure used to be until the Rule's reform of January 2020, the Court's position presented some problems. The traditionally closed and formal character of the Italian constitutional process seemed to be inconsistent with the richness of the reasoning of the Court. For example, the Court was not inclined to make use of its official investigative powers. Nevertheless, its decisions were generally well documented even in terms of technical knowledge outside of the law (see decision n. 5 of 2018 on vaccinations, for example). Some informal channels of information were probably used by the Research Office, other members of the staff, clerks, and the Justices themselves to develop the necessary fact-finding activity, especially in economic, financial, medical, scientific, and statistical matters. This implies that there was some discrepancy between the Court's closed attitude to official relationality in the *procedural* sphere even when in fact there was some unofficial reliance on other sources in its rich and comprehensive *investigative* activity. Such discrepancy will eventually disappear with the adoption of the 2020 reform.[44]

A slightly different example that recalls the idea of unofficial relationality is the way through which the Court "compensates" for the lack of a direct complaint mechanism.[45] The Court compensates for not having an *official* way for litigants to gain direct access to it by amplifying its ordinary jurisdiction.[46] In any case, there still are some "blind spots" and "dark sides" which remain out of reach, both official and unofficial, of the Italian Court, as Ferreres Comella shows.

For all these reasons we felt the need to test the idea of relationality as the hallmark of the Italian Constitutional Court's attitude toward its powers of constitutional judicial review, and to submit it for a broader discus-

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[42] See *supra* text and notes 18-21.

[43] S. CASSESE, *Dentro la Corte: diario di un giudice costituzionale*, op. cit.

[44] See T. GROPPI, A.M. LECIS COCCO ORTU in this volume especially the post scriptum.

[45] See the conversation between Lamarque and Ferreres Comella in this volume.

[46] See, for example, Judgment n. 1 of 2014 and Judgment n. 18 of 2019.

sion among a number of Italian and foreign colleagues capable of seeing it in a comparative perspective.

## 1.3. Dialogue as a method

In the end, the relational approach reflects simultaneously both the substance and the method of the project. This book offers an interpretative key to the Italian experience of constitutional adjudication focused on its dialogical approach; yet, the book itself is the result of an approach based on *dialogue as a method.*

Like the first book, this "sequel" also represents a conscious effort by all four of the coauthors to work in a systematically collaborative way. All the coauthors contributed substantially to the whole enterprise. In this, we have sought to emulate some of the most successful examples of comparative legal scholarship, which so often depend on collaborative efforts to be able to bridge the gaps of understanding across legal traditions. Comparative research is necessarily a cooperative effort. Our labours have brought together two comparatists and two constitutionalists, three Italians and one American, two women and two men, a constitutional judge and three professors – in short, a microcosm of constitutional dialogue to contribute to the macro-dynamics of global constitutionalism.

However, we decided to extend the conversation to other scholars – from Italy, elsewhere in Europe, and the United States, with three main purposes in mind:

a) to elaborate more on the core idea of the book, i.e. relationality as a distinguishing feature of the Italian Constitutional Court;
b) to fill some gaps left open in the first book, which have been the subject of important Italian scholarly debate on constitutional adjudication; and
c) to put the hypothesis of "relationality" to the test in areas we didn't explore or we didn't explore sufficiently in the first book, including in comparison with the experiences of other constitutional courts.

We decided to adopt the same methodology that we used for the first volume, but also including more actors, who are the contributors to this book. We convened a workshop focusing on six topics that needed a deeper analysis of the idea of relationality and amplified our method. For each of the six topics we had two main goals: (a) to assess the presence and effectiveness of a relational approach in the work of the Italian Constitutional Court; and (b) to compare the Italian situation with other constitutional systems. To this end, for each topic an Italian scholar first prepared a paper focused on the Italian debate, but with an eye toward engaging in a comparative exchange.

A scholar from outside of Italy then assumed the task of responding to the Italian colleague and amplifying the comparative perspective through their dialogue. In the end, we therefore hope to have achieved the result of analyzing *relationality* through a *relational* method: a real experiment in cooperative comparative constitutional law.

The workshop was held in Rome on 12-13 July 2018, thanks to the generosity of the University of Notre Dame. During the seminar the non-Italian scholars presented the Italian papers, each topic was deeply examined collectively, and for each one the discussion was dense and vibrant. The results of the debate were fruitful and somewhat unexpected showing the soundness of the method. All of us learned from one another: some of the ideas we had about the relational nature of the Italian Constitutional Court have evolved as a result of the workshop, and the present volume can be considered a step forward vis-a-vis *Italian Constitutional Justice in Global Context*.

The results of this comparative exercise provided some evidence that the idea of relationality is potentially applicable to a broader spectrum of cases, well beyond the Italian experience, and might be useful as a benchmark to classify different constitutional systems and also as an indicator of new emerging trends in global constitutional justice. Relationality can be adopted as a touchstone in order to measure and classify the various systems of constitutional adjudication along a scale from more relational toward less relational systems. [47]

## 1.4. Relationality and constitutional pluralism

When our first book was published at the beginning of 2016, the globalization process appeared still to be ascendant. It was (and to some extent still is) a commonplace to recognize that the world was in a dynamic age of transnational constitutional dialogue and exchange, with a rich and growing network of interactions among constitutional norms and systems around the world. Comparative constitutional studies had exploded in scope and grown in sophistication, and tribunals around the world were increasingly acquiring the habit of drawing on the practical experience and jurisprudence of their counterparts in other countries. Both scholars and judges widely read, borrowed, and cited the jurisprudence of the high courts of other legal systems. In that atmosphere a main purpose of our work was to fill an important gap

[47] See V. BARSOTTI, *External Relationality. New Colors for the European Model of Constitutional Justice*, in *Annuario di diritto comparato e studi legislativi*, Part I, Naples, Edizioni Scientifiche Italiane, 2017.

in those global constitutional dialogues, adding the voice of the Italian Constitutional Court to the choir of the other courts. We began from the simple fact that constitutional adjudication in the twenty-first century had acquired an undeniably transnational dimension. The transnational character of constitutional justice had become a structural component of globalization itself. Whatever the reader's normative approach to globalization, it is an observable fact that the transnational dimension of our juridical and political environment in the early twenty-first century is undeniable.

Although these facts are in our view irreversible to some extent, the spirit of the time has quickly changed over the past few years. Today, walls replace bridges; exit overcomes voice; particularities overshadow commonalities; withdrawals are more frequent than new connections; divergences prevail over convergences. Nowadays, especially in Europe, society is shaken by opposing forces. The constant search for European cohesion clashes with the strong desire to protect constitutional identities. The ideal of an inclusive transnational community is often at odds with a rapidly evolving multiculturalism and the various social and political reactions to it. The tension between global and local is becoming dramatically more evident: "the very notion of the 'public' (and public space) has changed. We experience, as never before, being part of a local (at times non spatial) space, a national (still strong everywhere) space, and a transnational and global space". [48] Even at the national level, the overall tonality of political relations is frequently dominated by conflict, anger, resentment, fear, distrust. For the first time in Europe, some systems of constitutional justice appear to be at risk, in terms of their independence and autonomy. [49] Relationality in any form seems to be dimming if not eclipsed.

It has been said that in this context, judicial review is going through a new phase where a number of constitutional courts give voice to "identitarian" challenges and are questioning the legitimacy of a number of international and transnational norms. In a seminal article, Doreen Lustig and Joseph Weiler, [50] borrowing from Mauro Cappelletti's metaphor of the waves of judicial review around the world, [51] argue that we are witnessing a third wave in the development of judicial review. The first wave was marked by

[48] D. LUSTIG, J.H.H. WEILER, *Judicial Review in the Contemporary World – Retrospective and Perspective*, in 16 *I-CON*, No. 2, 315 (2018), 370.

[49] One for all: W. SADURSKI, *Poland's Constitutional Breakdown*, Oxford, Oxford University Press, 2019.

[50] D. LUSTIG, J.H.H. WEILER, *Judicial Review in the Contemporary World – Retrospective and Perspective*, op. cit., 318-319, 369-371.

[51] M. CAPPELLETTI, *Judicial Review in the Contemporary World*, Indianapolis-Kansas City-New York, Bobbs Merrill Co.,1971.

the postwar horizontal spread of judicial review within national legal orders.[52] The second one was characterized by the emergence of transnational orders of higher law (like the European Court of Human Rights and the European Union in Europe) that could be used by national courts as a basis for judicial review. Moreover, transnational courts were set up with the power to review national acts and actions directly. The third wave is a reaction to the first two, to some extent a course correction and a backlash against them, and is marked by a visible turn to identity and more local forms of belonging as a consequence of the cosmopolitan impact of international law on constitutional law. In their account, this wave cannot be confused with the old nationalistic or sovereigntist approaches. National courts are becoming an instance of control of transnational and international governance on identitarian grounds, and they introduce an identitarian (vs. sovereigntist) element to constitutional discourse.

Against this background, constitutional courts are called to face unprecedented challenges. More specifically, adjudicatory authorities must find new ways to tame the complexities of the world and to mediate between conflicting values, if not to make "tragic choices",[53] in order to develop a common language for a plural society.

Within this scenario, channels of relationship between institutions, and between institutions and society, are gaining importance. Constitutional courts are often called to solve hard cases and to balance different values, bridging the national and the transnational. If the courts' decisions are not perceived by all the political actors as the "last word" but as part of an ongoing dialogue, then perhaps the decisions, even the hard ones, will be more easily accepted.

In this context, the relational nature of constitutional court activity is becoming an increasingly important resource that we can all benefit from in a number of ways.

First, from a methodological point of view, courts enjoy a number of qualities that make them naturally more receptive to the dynamics of transnational interactions. They resolve issues case by case; therefore, judicial lawmaking is interstitial and smoothly percolates between gaps. Judicial lawmaking is also incremental, proceeding on a trial-and-error basis from one case to the next, and therefore leaves room for changes and adjustments. Courts generally adhere to similar procedural rules, commonly re-

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[52] T. GINSBURG, M VERTEEG, *Why do Countries Adopt Constitutional Review*, in 30 *Journal of Law, Economics and Organization* 587 (2014).

[53] G. CALABRESI, P. Bobbit, *Tragic Choices. The conflicts society confronts in the allocation of tragically scarce resources*, New York, Norton, 1978.

spected: for instance, they hear the parties and give reasoned explanations of their decisions. The relationship between constitutional courts, when they communicate and borrow principles and practices, is more horizontal than hierarchical, and courts thus tend to form a sort of network and in fact participate in a number of judicial networks.[54] Courts can also recognize and establish general principles, standards, and doctrines – like proportionality, reasonableness, balancing – that are very broadly applicable and easily transferrable, but also flexible enough to be adjusted according to different contexts and thus adaptable to local realities. Judicial lawmaking can thereby link the local and the global dimensions of justice, the identitarian and the universal, by both appealing to common shared principles and giving plural and differentiated answers to varied situations and demands.

From the point of view of the substantive contents of constitutional adjudication, the globalization of courts' activities is also driven by an increasing number of problems brought to the bench that can no longer be contained merely within the limited horizons of the nation-state.[55] Some issues draw constitutional justice into a transnational space for what might be called "external" characteristics. That is, international or foreign law is implicated because the empirical reality of the problem before the courts necessarily crosses national borders: to name just a few examples, people's mobility and migration, financial flows and foreign investments, or transnational standards in the fields of environmental protection. Other disputes deal with questions that tend toward the global dimension because of their internal characteristics – norms and principles that intrinsically claim a certain universality that transcends borders. Here, human rights claims are paradigmatic. The role of courts as human rights adjudicators has evolved rapidly, along with the amplification of "rights talk"[56] generally, since the final decades of the twentieth century, and today the language of rights is often the primary mode for speaking about new challenging social and legal problems (e.g., non-discrimination issues, or questions arising out of the development of new technologies). This evolution greatly affects the role of judges, not only because it asks courts to become protagonists of social

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[54] M. CLAES, M. DE VISSER, *Are You Networked Yet? On Dialogues on European Judicial Networks*, in 8 *Utrecht Law Review* 100 (2012).

[55] This is the thesis by S. BREYER, *The Court and the World: American Law and the New Global Realities*, New York, Vintage, 2016, showing the reasons why even the US Supreme Court, always tempted by the "American exceptionalism", cannot ignore the global context.

[56] M.A. GLENDON, *Rights Talk. The Impoverishment of Political Discourse*, New York, Free Press, 1991.

change but also because a rights culture inevitably fuels transnational judicial interactions. Human rights, by virtue of their appeal to a transcendent dignity of all persons, have a natural vocation to trespass beyond the border of any single country. Moreover, as subjective rights belong to individual persons, the rights claims move as their holders themselves move, bringing together the external and the internal factors impelling judicial globalization. It is no surprise, therefore, that human rights are one of the most fertile grounds for transnational judicial dialogue and exchange.

For these and other reasons, constitutional courts still maintain a certain advantage over parliaments in their capacity to adapt to the demands of keeping connections with their peers. In the volatile conditions of the present era "reactive" institutions, such as courts, appear better suited than "active" institutions such as parliaments (to use Mirjan Damaska's well-known distinction[57]) to giving prompt answers to complex problems and to mediating between global and local interests, between unity and diversity. Courts are in a good position to take up these challenges and work as a transmission belt between the local and global, the particular and the universal, the national and the supranational, since they are still deeply entrenched in the domestic legal system, but they also belong to the global space, establishing links with other national, international, and supranational legal orders and with their respective courts. It is worth emphasizing that this observation is not to advocate for a new form of judicial supremacy or juristocracy.[58] Indeed, a relational understanding of the role of constitutional courts necessarily recognizes that they are embedded in, and in some ways dependent on, a network of other actors and relationships in order to accomplish their goals. Their place is not to supplant the democratically accountable political institutions, but to work with them.

Some courts are more reluctant than others to adjust their traditional competences and methods to a wider and more complex legal order, and instead seem inclined to keep the use of transnational law to a minimum level in their own decisions, to decide cases on domestic grounds rather than on European ones, to avoid formal references to supranational law, and to resist engagement with other foreign or supranational courts.[59] Occasionally certain courts have even challenged directly the applicability of a

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[57] M. DAMASKA, *The Faces of Justice and State Authority*, New Haven, Yale University Press, 1986.

[58] R. HIRSCHL, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*, Cambridge, Harvard University Press, 2004.

[59] T. GROPPI, M.C. PONTHOREAU (eds.), *The Use of Foreign Precedents by Constitutional Judges*, Oxford, Hart Publishing, 2013.

decision of a European or an international court, opening a phase of silent conflict. In most cases, however, national courts (at least in Europe) proactively cooperate with other judges and willingly take part in the global judicial conversation, although with different voices and even more diverse tonalities. In recent years, an increasing number of national constitutional courts have contributed to the development of common legal principles, taking an active role on the European and global stage through their interpretation and enforcement of common transnational standards.

However different the attitudes of the various courts may be, a realistic approach to constitutional adjudication today has to come to terms with a transnational dimension of the role of courts along with their domestic mission. In an age of nationalism and populism, constitutional courts are in a strategic position that allows them to preserve both national self-awareness and transnational connections. The relational capacity of constitutional courts in this context becomes all the more important as a vital instrument to preserve and develop the essential value of constitutional pluralism, which implies that the different components are in a way simultaneously linked and separate: apparently a contradiction, but in fact a sort of paradox of this era of ours, that is not so much to be resolved as it is to be lived through. [60]

[60] N. MACCORMICK, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth*, Oxford, Oxford University Press, 1999; M. KUMM, *Who is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice*, in 36 *Common Market Law Review*, Issue 2, 351 (1999), 351-386; M.P. MADURO, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in N. WALKER (eds.), *Sovereignty in Transition*, Oxford, Hart Publishing, 2003, 502-537; N. WALKER, *The Idea of Constitutional Pluralism*, in 65 *Modern Law Review* 317 (2002), 317-359; A. VON BOGDANDY, *Pluralism, Direct Effect, and the Ultimate Say: on the Relationship Between International and Domestic Constitutional Law*, in 6 *I-CON* 397 (2008), 397-413.