

# THE ADVANTAGE OF HAVING THE “FIRST WORD” IN THE COMPOSITE EUROPEAN CONSTITUTION

*Nicola Lupo\**

## *Abstract*

The article deals with the role that courts, in particular Constitutional Courts, play in the enforcement of the composite European Constitution, in relation to other actors, ordinary judges and legislators, at national level, and the Court of Justice of the European Union, at supranational level. It is argued that more important than determining who is entitled to pronounce the “last word” in this complex setting, is to answer the question about who has the “first word”. Besides the role that domestic legislators are expected to play and that they often fail to fulfil, the article supports that Constitutional Courts are in the best position to frame constitutionally sensitive questions through the preliminary reference mechanism to the Court of Justice in order to let the composite European Constitution work properly and to allow national constitutional identities to be effectively taken duly into account by the Court in Luxembourg. With this regard, the “Taricco saga”, with a fruitful interplay between the Italian Constitutional Court and the Court of Justice, is illustrative of such a best practice.

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\* Full professor of Public Law at LUISS Guido Carli University of Rome.

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### **1. Introduction: when the first word is more important than the last one**

The growing interconnection of legal orders in the European Union increasingly questioned the existence of the fundamental pillars of the modern State. According to some, this phenomenon even changed the nature of the modern State, transforming it into a new kind of State, a sort of "Communitarian State" or "Member State"<sup>1</sup>. Regarding the judiciary, the identification of a supreme authority within a legal system has been increasingly challenged. The ultimate question has usually been framed in terms of the right to say the last word. Who has the right to the last word in case of a crucial constitutional conflict at European level?

This crucial question partly reminds of the debate between Hans Kelsen and Carl Schmitt, on who the guardian of the Constitution should be<sup>2</sup>, and emerges again within the framework of new dilemmas in the European legal space: who is entitled to the last word between national and supranational judicial institutions? What is left to national and EU legislators? Where is the ultimate source of constitutional authority? This contribution tries to flip the coin and addresses a different question, which may be less attractive at a first sight, but more promising in terms of answers: who has the right to the first word? What actors are empowered with the right of shaping ultimate constitutional conflicts in the first instance? The underlying assumption is that some of the traditional schemes of the modern State can be hardly applied to the European

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<sup>1</sup> See, converging on this idea, A. Manzella, *Lo Stato "comunitario"*, 22 Quad. cost. 2 (2003), at 273; R. Toniatti, *Forma di Stato comunitario, sovranità e principio di sovranazionalità: una difficile sintesi*, DPCE 3 (2003), at 1552; F. Palermo, *La forma di Stato dell'Unione europea. Per una teoria costituzionale dell'integrazione sovranazionale* (2005), espec. 228 ff.; moreover, in the political science literature, see A. Sbragia, *From 'Nation-State' to 'Member-State': The Evolution of the European Community*, in P. M. Luetzeler (ed.), *Europe After Maastricht: American and European Perspectives* (1994), 69 ff., espec. 87, and C. Bickerton, *European Integration: From Nation-States to Member States* (2012), 51 ff.

<sup>2</sup> The debate has been recently reported, in English, by L. Vinx, *The Guardian of the Constitution. Hans Kelsen and Carl Schmitt on the limits of constitutional law* (2015).

Union in the current constitutional dialogue, while it is not clear whether there is a Court that has the last word, the one that speaks first often plays a crucial role in framing the constitutional questions that other courts and, more in general, other institutions, will be called to answer.

In order to address these issues, the contribution starts by arguing for the necessity, in a composite European Constitution, of having fundamental charters and Courts that do not assume their principles and values in an unmitigated way. Likewise, EU Treaties and national Constitutions contain some clauses aiming to connect the domestic with the supranational legal systems, European and national Courts need to be prone to dialogue, not monopolizing the constitutional scene. This is confirmed also by the so called “Taricco saga”, a recent case of inter-judicial dialogue between Italian Courts and the Court of Justice of the EU, which has also confirmed the (often overlooked) role pertaining to legislators in the composite European Constitution. After re-affirming the need of direct channels of communication between different legal orders, the conclusion aims at showing the importance of who poses the initial question, thus framing the constitutional dialogue in the European legal space.

## **2. The reciprocal self-restraint of the European Treaties and Member States’ Constitutions**

The composite nature of the European Constitution implies, first in the fundamental documents – the European treaties and the national Constitutions – and then, above all, in the Courts asked, at European and at national level, to interpret their own provisions, the ability not to consider the principles and values of which they become carriers as absolute.

In this regard, the European treaties show considerable self-restraint. On the one hand, incorporating as “general principles” of EU law fundamental rights as guaranteed by the ECHR and as a result of common constitutional traditions (Article 6 (3) TEU, with its reference to the constitutional traditions common to the Member States); on the other, by committing to respect the national identities inherent in the “fundamental, political and constitutional structure” of each Member State (Article 4 (2) TEU, with its reference to the

national constitutional identities)<sup>3</sup>. In addition to these clauses, more general and potentially open to any possible contents, several provisions of both the TEU and the TFEU state that through the procedures they foresee, some decisions need to be adopted by each Member State, "in accordance with its own constitutional requirements"<sup>4</sup>. In doing so, they design a series of procedures that are regulated by both EU law and national norms and involve both EU and national institutions, and could thus be defined as "Euro-national procedures"<sup>5</sup>.

Similarly, and symmetrically, most Member States' Constitutions contain the so-called 'European clauses'. Namely, constitutional provisions that implicitly or explicitly, broadly or in a more specific way, aim at opening the domestic constitutional order to norms and principles adopted at European level<sup>6</sup>.

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<sup>3</sup> On these features see, among many and with different approaches, A. Celotto, T. Groppi, *Diritto UE e diritto nazionale: primauté vs. controlimiti*, in Riv. it. dir. pubbl. com. (2004), at. 1309; M. Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, 11 Eur. L. J. 3 (2005), at 262; M. Cartabia, "Unità nella diversità": il rapporto tra la Costituzione europea e le Costituzioni nazionali, in G. Morbidelli, F. Donati (eds), *Una Costituzione per l'Unione Europea* (2006), 185 f.

<sup>4</sup> For instance, articles 42(2) (common Union defence policy), 48(4) (ordinary revision procedure), 48(6) (simplified revision procedure), 49 (accession agreements), 50(1) (withdrawal) and 54 (ratification of the Treaty) TEU; 25 (additions to European citizenship), 218(8) (mixed agreements), 223(1) (European Parliament's elections), 262 (jurisdiction on intellectual property rights), 311 (system of own resources), and 357 (ratification of the Treaty) TFEU.

<sup>5</sup> A similar phenomenon has been spotted and analysed in the remit of EU administrative law: see, for instance, G. Della Cananea, *I procedimenti amministrativi composti dell'Unione europea*, in F. Bignami, S. Cassese (eds), *Il procedimento amministrativo nel diritto europeo* (2004) 307 f.; G. Mastrodonato, *Procedimenti amministrativi composti nel diritto comunitario* (2008), espec. at 99 ff.; C. Eckes, J. Mendes, *The right to be heard in composite procedures: Lost in between protection*, 36 Eur. L. R. (2011), at 651; F. Brito Bastos, *Derivative Illegality in European Composite Administrative Procedures*, 55 Comm. Mkt. L. R. (2018), at 101. It still needs to be analysed under the viewpoint of constitutional law, especially when it assumes a clearer procedural nature (as a supreme law regulating the intersections among the different legal orders on which the political actors operate): see A. Manzella, *Il parlamento federatore*, 22 Quad. Cost. 1 (2002), at 35.

<sup>6</sup> M. Claes, *Constitutionalizing Europe at its Source: The "European Clauses" in the National Constitutions: Evolution and Typology*, 81 Year. Eur. Law 1 (2012); M. Claes, *Le "clausole europee" nelle costituzioni nazionali*, 25 Quad. cost. 2 (2005), at 283.

The existence of clauses of ‘openness’ towards the international legal order is an original feature of the Italian and German constitutions. Both constitutions contained clauses allowing – respectively – ‘limitations’ (Article 11, in 1947) or ‘transfers’ (Article 24, in 1949) of sovereignty since the beginning, and they have been immediately used as ways for European Communities law’s entry into national legal orders. The inclusion of such clauses looks fully consistent with the lessons driven from the authoritarian experiences and from the Second World War.

The same model was then followed by other Member States, like the Netherlands (Article 62 in 1953, now Article 92), Luxembourg (Article 49 *bis*, in 1956), and Denmark (Section 20, in 1953), with the drafting of general constitutional clauses used as mechanisms for acceding to the European integration process<sup>7</sup>. Especially with the Treaty of Maastricht, when the constitutional nature and the political effects of the European Union were about to become more evident – after having been dissimulated for a long time<sup>8</sup> – a new series of clauses specifically referring to the European Union were inserted in many Member States’ constitutions. Their main aim was to ease the adaptation of domestic legal orders to some of the provisions included in the Treaty of Maastricht, but often also to implement a series of conditions and requirements for further openings or adaptations to the European integration process<sup>9</sup>.

Even in Member States without a codified Constitution, a similar constitutional phenomenon takes place. Without addressing here all the steps needed for the UK to become a member of the European Communities<sup>10</sup>, it might be sufficient to quote the Miller case, in which the United Kingdom Supreme Court

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<sup>7</sup> M. Claes, *Constitutionalizing Europe at its Source*, cit. at 6.

<sup>8</sup> This dissimulation was fully consistent with the approach followed among others by Jean Monnet, according to whom the best way to conduct the integration process was to avoid dramatic (and thus too-evident) spurts, and to proceed with the ‘politique des petits pas’.

<sup>9</sup> Along the same line of reasoning, see the analytic examination of the individual clauses (updated after the Lisbon Treaty) presented in Annex III of the study commissioned by the European Parliament (PE 493.046) and conducted by L. F. M. Besselink et al., *National Constitutional Avenues for Further EU Integration* (2014), 263 ff.

<sup>10</sup> See, for instance, using theories of constitutional pluralism, A.L. Young, *Democratic Dialogue and the Constitution* (2017), 276 f.

clarified, judging upon the constitutional consequences of the Brexit 2016 referendum, that as long as the European Communities Act 1972 “remains in force, the EU Treaties, EU legislation and the interpretations placed on these instruments by the Court of Justice are direct sources of UK law”<sup>11</sup>.

Such ‘European clauses’ entrenched in national constitutions enable the ‘communication’ between the EU and the domestic legal orders and support once more the idea of the existence of a composite Constitution<sup>12</sup>. They operate with mutual reference and ensure the openness of both the EU and national legal systems, somehow acting as ‘valves’: that is, like mechanical switches that can raise or lower the amount of (normative) fluid flowing through them, making the two legal orders communicate and interact as components of a unique whole<sup>13</sup>.

### **3. The necessary self-restraint of European and national Courts and the consequences of the inter-judicial dialogue in the EU**

In the same way, when you consider the legal interpreters’ viewpoint, and therefore the viewpoint of the European and national Courts, they must evidently be aware of the fact that they are not alone, and must not monopolize the scene. They are therefore required to show strong self-restraint. Moreover, to continue using the abused and discussed, although effective, metaphor of dialogue<sup>14</sup>, it is clear that if one never stops talking, or

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<sup>11</sup> See par. 61 of the judgment: United Kingdom Supreme Court, *Miller & Anor, R (on the application of) v Secretary of State for Exiting the European Union* (Rev 3) [2017] UKSC 5 (24 January 2017), available at <http://www.bailii.org/uk/cases/UKSC/2017/5.html>.

<sup>12</sup> L. F. M. Besselink, *A Composite European Constitution* (2007), at 15-20.

<sup>13</sup> M. Avbelj, *Supremacy or Primacy of EU Law-(Why) Does it Matter?*, 17 *Eur. L.J.* 6 (2011), at 744 reconstructs the mutual relationship between national and European law as ‘heterarchical’ and thus to be reciprocally coordinated rather than considered one subordinated to the other.

<sup>14</sup> In this special issue see the contributions by D. Paris, *Limiting the ‘Counter-Limits’*. *National Constitutional Courts and the Scope of the Primacy of EU Law*; A-O. Cozzi, *The Implicit Cooperation between the Strasbourg Court and Constitutional Courts: A Silent Unity?*; A. Edenharter, *Fundamental Rights Protection in the EU: The ECJ’s Difficult Mission to Strike a Balance Between Uniformity and Diversity*; G. Zaccaroni, *The Good, the Bad, and the Ugly: National constitutional judges and the EU*

if is convinced that he or she is the only one entitled to speak, no dialogue whatsoever can ever be established.

Inter-judicial dialogue in Europe is often depicted as a struggle among judges of different and intertwined legal orders, about which judge should have the “final word” or the “final say” on the interpretation of a certain legal provision<sup>15</sup>. This assumes that each one of the many Courts currently coexisting in Europe would aim at playing, in the European legal space, the role normally assigned, within the judiciary of each nation-state, to Supreme Courts or Courts of Cassation: that is, to solve judicial controversies on the interpretation of a certain legal provision, deciding upon appeal on the case-law previously decided by (lower) Courts, therefore stating what the law is. We could even say that every judge would love to play the role famously depicted by US Supreme Court justice Robert H. Jackson: “we are not final because we are infallible, but we are infallible only because we are final”<sup>16</sup>.

Indeed, in the inter-judicial dialogue that takes place within Europe, it is questionable whether the last word really is the most important. As no Court is going to play a role similar to the role of Supreme Courts or Courts of Cassation, the struggle for the “final word”, as appealing as this role could look like, would not make much sense. On the contrary, given the composite and constantly evolving nature of the European Constitution, with a high level of social and legal pluralism, it is likely that often there will be no proper “final” decision<sup>17</sup>.

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*Constitutional Identity*; C. Tovo, *Constitutionalizing the European Court of Justice? The Role of Structural and Procedural Reforms*.

<sup>15</sup> See, among many, M.R. Ferrarese, *Dal "verbo" legislativo a chi dice "l'ultima parola"*, 63 *Annuario di diritto comparato e di studi legislativi* (2011), espec. at 78 ff.

<sup>16</sup> US Supreme Court, judgment *Brown v. Allen* (344 US 443, 1953). As it has been remarked – by S. Cassese, *Fine della solitudine delle corti costituzionali, ovvero il dilemma del porcospino*, 149 *Acc. Sc. Torino Atti Sc. Mor.* 15 (2015), available at <https://www.accademiadelle scienze.it/media/1126>, at 16 f. – justice Jackson’s sentence assumes the existence of a superior Court, considering absolutely normal that when it exists, it would revert a significant percentage of previous judges’ decisions.

<sup>17</sup> See in particular 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*, 36 *Comm. Mkt. L. R.* 2 (1999), at 351 (arguing that

As Courts are called – similarly to the Constitutions they are required to apply – to move with a strong sense of self-restraint, it often happens that the “first word” becomes more important than the “final word”. Self-restraint, indeed, is an essential feature of good judges, in any case, especially of judges that in the past have played a crucial role in setting up the pillars of a certain legal order. In the current European Union context, a mention of some constitutional theories referred to the US Supreme Court, the so-called judicial minimalism, could be extremely useful: judges should say “no more than necessary to justify an outcome [...] leaving as much as possible undecided”<sup>18</sup>.

All this helps to explain why, in the European inter-judicial dialogue, a crucial role is eventually assigned to the Court that speaks first, not to the one that speaks last: the authority that first submits a legal challenge inevitably takes the centre stage and may affect to a significant extent the resolution of a judicial dispute and the prevailing interpretation of the legal provisions at stake.

This also implies, a bit paradoxically according to the traditional standards, some kind of reward – in terms of visibility and reputation – to the judge who is not afraid to appear humble<sup>19</sup> and decides in particular to ask a preliminary question to the Court of Justice of the European Union, rather than to the judge who thinks to play its role alone, without involving other judges or, more generally, other actors. To put it differently, a referring judge who does not isolate itself claiming its supreme judicial authority may have a much stronger impact in shaping the European legal

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“within a pluralist framework, it does not make sense to speak of a final arbiter of constitutionality in Europe”).

<sup>18</sup> See C.R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999), at 3 f.

<sup>19</sup> On the need for a constitutional judge to adopt a humble approach, see the interview to judge Silvana Sciarra, in this special issue (also connected with the need to build consensus within a collegial body). For an overview of the different approaches that constitutional judges (and interpreters, more in general) can embody see C. R. Sunstein, *Constitutional Personae* (2015).



discourse<sup>20</sup>. Within this picture, judicial humbleness might prove to be a much more effective attitude than judicial pride<sup>21</sup>.

As judge Giuliano Amato notes in his interview, many famous decisions by Constitutional Courts relating to European integration “were actually postponing a final word on the case”.

#### **4. The (good) example of the Italian Constitutional Court in the “Taricco saga”**

In their interviews included in this special issue, all the four judges of the Italian Constitutional Court quoted the “Taricco saga”, and more precisely order no. 24/2017 through which the Court they are members of referred a preliminary ruling to the Court of Justice<sup>22</sup>.

Indeed the “Taricco saga” offers a perfect example of how inter-judicial dialogue could work and, thanks to the self-restraint of the Italian Constitutional Court and the Court of Justice of the EU, helped to solve issues that could potentially create clashes and conflicts. As judge Amato remarked, the Taricco saga is an example of the fact that “there is no exclusive primacy in the interplay between national and European levels” and a further confirmation that “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”. It is thus useful to look a bit more into this case, to show the reasons why the

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<sup>20</sup> For a comparative picture of the different paths followed by the Constitutional Courts of EU Member States and the difficulties they have met see *The Preliminary Reference to the Court of Justice of The European Union by Constitutional Courts*, edited by M. Dicosola, C. Fasone, and I. Spigno, special issue of 16 Ger. L. J. 6 (2015).

<sup>21</sup> On the many reasons that justify the reluctance of the Constitutional Courts to use the preliminary reference procedure and to “engage in a formal dialogue” with the European Court of Justice see M. Claes, *Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure*, 16 Ger. L. J. 6 (2015), at 1331 (noting that some explanations have been found in legal arguments, others in behavioural factors).

<sup>22</sup> Italian Constitutional Court, Order no. 24/2017 of 23 November 2016, published in the Italian Official Journal, G.U of 1 February 2017. For a multi-disciplinary debate on it see A. Bernardi and C. Cupelli (eds.), *Il caso Taricco e il dialogo tra le Corti. L’ordinanza 24/2017 della Corte costituzionale* (2017).

approach of the Italian Constitutional Court could be considered a good example.

The Constitutional Court, in its order no. 24/2017, rightly avoided following the tempting path of affirming *a priori* and in absolute terms a yet fundamental constitutional principle, the principle of legality in criminal matters, as a "counter-limit" to assert with respect to EU law.<sup>23</sup> Instead, the Court preferred to ask the Court of Justice for a reassessment, especially in the light of a more careful consideration of the characteristics of the Italian constitutional system, of its own ruling on the "Taricco case". It thus demonstrated a will to face a difficult issue through a preliminary reference to the Luxembourg Court, a channel which the same Court had (a little too late) used, in the case of incidental proceedings, with order no. 207/2013<sup>24</sup>.

Similarly, in the M.A.S. judgement, the Court of Justice has carefully avoided abiding by the uncompromising and self-centered reading of the European Union's legal order proposed by Advocate General Bot<sup>25</sup>. In fact, in his conclusions, the Advocate General essentially denied the possibility of the Constitutional Court identifying the rights that make up the Italian constitutional identity pursuant to art. 4, par. 2, TEU and claimed that this task was instead a responsibility of the Court of Justice. Clearly, the acceptance of this interpretive approach on art. 4, par. 2, TEU would have meant disregarding the interpretation of this provision as a "valve clause", by which the European Union legal order limits itself in favour of the legal order of the Member States, in as much as constitutional identity profiles are at stake. It would even have turned it into a sort of an "aggressive clause", through which the Court of Justice could identify from above the elements making up the constitutional identity of each Member State, at least with

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<sup>23</sup>See, among many, M. Luciani, *Il brusco risveglio. i controlimiti e la fine mancata della storia costituzionale*, 2 Riv. AIC, [www.rivistaaic.it](http://www.rivistaaic.it), and C. Cupelli, *Il caso Taricco e il controlimite della riserva di legge in materia penale*, in A. Bernardi (ed.), *I controlimiti. Primato delle norme europee e difesa delle norme costituzionali* (2017) 331.

<sup>24</sup> Cf. G. Repetto, *Pouring New Wine into New Bottles? The Preliminary Reference to the CJEU by the Italian Constitutional Court*, 16 Ger. L. J. 6 (2015), at 1449.

<sup>25</sup> See Court of Justice of the European Union (Grand Chamber), case C-42/17, M.A.S., 5 December 2017, and the Conclusion of the Advocate General Bot delivered on 18 July 2017.

regard to the identity elements that the Union is obliged to respect and therefore able to limit the primacy of the Union law<sup>26</sup>.

On the contrary, the Court of Justice, with a very reasonable motivation managed to circumvent the main obstacles, the most difficult of which was certainly that of the "counter-limits" raised with the third question posed by the Constitutional Court and has partially re-evaluated its previously provided interpretation. In particular, as rightly noted<sup>27</sup>, the Court of Justice has dropped the conflict on constitutional identity as an element that differentiates one order from another (the "constitutional identity as difference") and has instead recovered the shared dimension of the European constitutional heritage, insisting on the principle of determination of criminal cases, and, anyway, focussing on European standards, rather than on the typical characteristics of the Italian legal order.

### 5. There are legislators, too

Another general indication that can be drawn from the “Taricco saga”, being coherent with the minimalist doctrine, consists in providing the umpteenth confirmation of an element that should be granted, but is not: that is, that the protection of fundamental rights does not belong exclusively to judges, be they national or European, but also requires an essential contribution from the legislator. The definition and shaping of the main features of the composite European constitution are not a task only for Courts.

The fact that, historically, the role played by the Court of Justice and by some Constitutional Courts has been absolutely

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<sup>26</sup>Critically, on the conclusions of the Advocate General, see L. Daniele, *Il seguito del caso Taricco: l'Avvocato generale Bot non apre al dialogo tra Corti*, 2 European Papers 3 (2017), at 987, [www.europeanpapers.eu](http://www.europeanpapers.eu), espec. 999 f. On the different interpretations of Art. 4, par. 2, TEU, see, among many, B. Guastaferrro, *Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause*, 31 Year. Eur. L. 1 (2012), at 263; F. Xavier-Millet, *L'Union européenne et l'identité constitutionnelle des États membres* (2013); E. Cloots, *National Identity in EU Law* (2015); G. Di Federico, *L'identità costituzionale degli stati membri nel diritto dell'Unione europea. Natura e portata dell'art. 4, par. 2, TUE* (2017); J. Sterck, *Sameness and selfhood: The efficiency of constitutional identities in EU law*, (early view) Eur. L. J. (2018).

<sup>27</sup>P. Faraguna, *Constitutional Identity in the EU. A Shield or a Sword?*, 18 Ger. L. J. 7 (2017), at 1617.

crucial does not mean that this judicial activism should be a permanent characteristic of the EU legal order. It is true, therefore, that the construction of the EU constitutional system has traditionally been a matter for Courts, in particular for the Court of Justice of the EU (CJEU) and the national Courts entitled to carry out constitutional review<sup>28</sup>. However, this does not mean that the main current constitutional issues have to be solved only through inter-judicial dialogue. On the contrary, the more the European integration process moves forward, addressing to care further public aims and dealing with fundamental rights, the higher the necessity of a dialogue between the Courts and the many legislators acting in the European legal space<sup>29</sup>, in order to solve the inevitably increasing number of constitutional conflicts<sup>30</sup>, including those regarding constitutional identities<sup>31</sup>.

The idea –affirmed above all in the United States, but which has had considerable success also in the Italian scholarship – according to which the protection of fundamental rights is an almost exclusive responsibility of judges is currently showing all its

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<sup>28</sup> C. Fasone, N. Lupo, *Constitutional Review and the Powers of National Parliaments in EU Affairs. Erosion or Protection?*, in D. Jancic (ed.), *National Parliaments after the Lisbon Treaty and the Euro Crisis. Resilience or Resignation?* (2017) 59 ff. On the European Court of Justice as “the most effective supranational judicial body in the history of the world” see A. Stone Sweet, *The Judicial Construction of Europe* (2004), at 1, and, more recently, S. Saurugger, F. Terpan, *The Court of Justice of the European Union and the Politics of Law* (2017), espec. 19 ff. On the role played by Constitutional Courts, especially the German and the Italian ones, see M. Kumm, *The Jurisprudence of Constitutional Conflict*, cit. at 3, at 263 and 293-298, J. Komarek, *The Place of Constitutional Courts in the EU*, 9 *EuConst* 3 (2013), at 420, M. Dani, *National Constitutional Courts in supranational litigation. A contextual analysis*, 23 *Eur. L.J.* 3-4 (2017), at 189.

<sup>29</sup> M. Dawson, *Constitutional Dialogue between Courts and Legislatures in the European Union: Prospects and Limits*, 19 *Eur. Pub. L.* 2 (2013), at 369, and M. Dawson, *The Political Face of Judicial Activism: Europe’s Law-Politics Imbalance*, in M. Dawson, B. De Witte & E. Muir (eds.), *Judicial Activism at the European Court of Justice* (2013), at 11.

<sup>30</sup> G. Martinico, *The Tangled Complexity of the EU Constitutional Process. The Frustrating Knot of Europe* (2013) 117 ff.; M. Dani, *Il diritto pubblico europeo nella prospettiva dei conflitti* (2013) 101 ff.; N. Scicluna, *European Union Constitutionalism in Crisis* (2014) 120 ff.

<sup>31</sup> See P. Faraguna, *Taking Constitutional Identities away from the Courts*, 41 *Brook. J. Int’l L.* 2, (2016), at 492.

downsides and limitations.<sup>32</sup> These are particularly evident when referred to ordinary judges, therefore deprived – in Italy as in most EU Member States, which adopt centralized systems of constitutional justice<sup>33</sup> – of the possibility of labelling with *erga omnes* effects a law as invalid. However, they also emerged in the presence of constitutional judges. In fact, it often happened that their intervention was not and could not be sufficient to ensure an adequate protection of the infringed fundamental rights.

It is therefore essential, both from a theoretical and above all from a practical point of view, that the legislator does not dismiss his role as a subject called to protect and implement fundamental rights. Moreover, to do this, as a rule, "in the first instance", leaving then to the judges, constitutional or not, the task of evaluating in a second phase whether and to what extent the protection guaranteed by the legislator proves to be adequate and in line with the provisions contained – depending on the specific cases in Court – in the ECHR, in the Charter of Fundamental Rights or in the Italian Constitution. Of course, if the legislator, as has at times unfortunately happened in the Italian case, on the most sensitive issues, does not provide any kind of protection, in particular as for "new" fundamental rights, then it is inevitable that the space for the judiciary, in all its articulations, expands considerably. If anything, due to the direct intervention of the judge on matters and rights not previously ruled by the legislator, there is an overexposure of the judge called to settle issues with strong political and ethical implications.

The “Taricco saga”, after all, originated from, to say the least, an unwise and unconscious action by the Italian legislator, as a result of a law designed “*ad personam*” as for its effects, in order to affect some ongoing trials against members of the centre-right majority supporting the Berlusconi government, yet capable of quite profound alterations of the general statute of limitations. In fact, law no. 251/2005 (also known as “*ex Cirielli*”), modified the

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<sup>32</sup> See the critiques on Dworkin’s theory by R. Bellamy, *Ronald Dworkin, Taking Rights Seriously*, in J.T. Levy (ed.), *The Oxford Handbook of Classics in Contemporary Political Theory* (2018) forthcoming (available online ahead of print) and J. Waldron, *The Core of the Case Against Judicial Review*, 115 *Yale L. J.* 6, (2006), at 1346.

<sup>33</sup> For a comparative picture see M. De Visser, *Constitutional Review in Europe. A Comparative Analysis* (2014).

rules on the statute of limitations in a reductive sense, replacing art. 157 of the Criminal Code (also with the purpose, as said, to affect certain trials in progress, including the IMI-SIR proceeding, which saw among the defendants Cesare Previti, at the time member of Parliament).

One of the innovative elements of the M.A.S. ruling with respect to the first Taricco judgment by the Court of Justice<sup>34</sup> consists precisely in a clarification of how the obligations under art. 325 TFEU refer primarily to the legislator, even before the national judge: "It is primarily for the national legislature to lay down rules on limitation that enable compliance with the obligations under Article 325 TFEU, in the light of the considerations set out by the Court in paragraph 58 of the Taricco judgement" (M.A.S., paragraph 41). In this light, moreover, the Court of Justice can better justify the reference to "a significant number of cases of serious VAT fraud", which, as the Constitutional Court correctly pointed out, involves a discretionary assessment which can hardly be requested to the individual judge, but which is completely admissible when, instead, it is addressed to the legislator.

## 6. The need for direct channels of communication

More generally, in the "Taricco saga", the choice of the Constitutional Court was the right one, and fully understandable only on the basis of the aforementioned order no. 270/2013, with the purpose of overcoming what had long been considered a taboo, and to activate a direct confrontation with the Court of Justice, through the preliminary reference procedure.

In this procedure, *the way* the reference is made to the Court of Justice is fundamental, and also to a certain extent, *the subject* who poses it. There is much discussion –even too much – on the "right to the last word", but often, in the dialogue between judges, the most important thing is having the first word (because it is due, or because the right is autonomously taken), so as to correctly define the interpretation of the legal provision and ask a question that

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<sup>34</sup> See Court of Justice of the European Union (Grand Chamber), case C-42/17, M.A.S., 5 December 2017. On it see, for a first case-note, M. Bassini, O. Pollicino, *Defusing the Taricco Bomb through Fostering Constitutional Tolerance: All Roads Lead to Rome*, Verfassungsblog, <https://verfassungsblog.de/>, 5 December 2017.

leads to a certain range of solutions rather than others. Moreover, as known and as already noted, in a pluralistic and multi-level order, no judge paradoxically takes the real last word, while the judge who speaks first has the opportunity to outline legal questions, to frame them and, often, to suggest an answer, in its own legal order or sometimes even outside of it.

In this key, specifically and always with reference to the “Taricco saga”, it is worth remembering that the question originally raised (by the Court of Cuneo) was not properly focused on the core question at stake: it referred, in fact, to the interpretation of articles 101, 107 and 119 TFEU, as well as art. 158 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax. Therefore, the Court of Justice, in its first decision, reformulated one of the four questions submitted by referring it, based on the grounds of the order, to the more general compatibility of EU law, thus with art. 325 TFEU (paragraphs 35 to 37 of the Taricco judgment). The way the first preliminary reference was framed did not ease the task of the Court of Justice in delivering its first judgment in the “Taricco saga”, in particular for what concerns a careful appraisal of the actual implications of that judgment in the Italian legal order.

In this context, it seems to me more than understandable that – not by chance, a few days after the M.A.S. ruling by the Court of Justice – the Constitutional Court has inserted in the motivation of the judgment n. 269 of 2017, a very significant *obiter dictum* (containing references both to the ruling by the Court of Justice and the Constitutional Court’s order no. 24/2017, from which the former originated), clearly aimed at ensuring its greater involvement, compared to the past, in the interpretation and implementation of the Charter of Fundamental Rights of the European Union<sup>35</sup>.

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<sup>35</sup> See the (many) case notes on judgment no. 269/2017, starting from A. Ruggeri, *Svolta della Consulta sulle questioni di diritto eurolunitario assiologicamente pregnanti, attratte nell’orbita del sindacato accentrato di costituzionalità, pur se riguardanti norme dell’Unione self-executing* (a margine di Corte cost. n. 269 del 2017), 3 Riv. dir. comp. (2017), A. Guazzarotti, *La sentenza n. 269 del 2017: un “atto interruttivo dell’usucapione” delle attribuzioni della Corte costituzionale*, 38 Quad. cost. 1 (2018), at 194, D. Tega, *La sentenza n. 269 del 2017: il concorso di rimedi giurisdizionali costituzionali ed europei*, *ivi*, 197, G. Scaccia, *L’inversione della “doppia pregiudiziale” nella sentenza della Corte costituzionale n. 269 del 2017: presupposti teorici e problemi applicativi*, Forum QC, [www.forumcostituzionale.it](http://www.forumcostituzionale.it), 25 January 2018. From the

So far, in this regard, the most significant role in the evaluation of the Charter of Fundamental Rights of the European Union has been played – in the Italian legal order – by ordinary judges. Moreover, the Constitutional Court somehow excluded itself from the inter-judicial dialogue in Europe, refusing to go through the phase of the preliminary reference to the Court of Justice<sup>36</sup>. Rather, in that phase, the Constitutional Court has invited ordinary judges to use the tool of the preliminary reference and, in those same years, has also freed itself by declaring inadmissible a series of delicate cases concerning the protection of fundamental rights. Now, strengthened by the encouraging outcome of the “Taricco saga”, the Constitutional Court seems willing to participate again in the game and play its legitimate role in a system with a centralized constitutional review of legislation. It goes without saying that this role will have to be carried out in practice, not only in theory, in a balanced and effective way, as it happened in the “Taricco saga”; otherwise it risks being placed again at the margins of the fundamental rights guarantee circuit in Europe. Indeed, if the Constitutional Court asks the right questions to the Court of Justice and proposes its interpretations of the Italian constitutional identity, the principles and values of the 1948 Constitution will be likely to find an entry path and protection, in a non-absolutistic way, in the composite Constitution of the European Union.

### **7. Conclusion. The importance of asking questions: from Dworkin’s “father example” to Cartabia’s “mother example”**

Finally, in order to underline, once more, the importance of the Court that takes the floor first, asking questions in the right way, it could make sense to conclude this contribution by proposing a parallel between a well-known example used by Ronald Dworkin and a similar one, on the relationship among Courts in Europe, more recently put forward by Marta Cartabia.

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Constitutional Court’s perspective, see A. Barbera, *La Carta dei diritti: per un dialogo fra la Corte italiana e la Corte di giustizia*, 38 Quad. cost. 38 (2018), at 149. Mainly from the perspective of ordinary judges see E. Scoditti, *Giudice costituzionale e giudice comune di fronte alla carta dei diritti fondamentali dell’Unione europea dopo la sentenza costituzionale n. 269 del 2017*, 143 Foro it. 2 (2018), at 406.

<sup>36</sup> See G. Repetto, *Pouring New Wine into New Bottles?*, cit. at 24, at 1449 ff.



Ronald Dworkin, to explain how Constitutions should be interpreted and, more specifically, the difference between (necessarily general) concepts, very frequently employed by the Constitutions, and (specific) conceptions, adopted by Courts in deciding concrete cases, put forward the so called “father example”<sup>37</sup>. He described the Constitution as a father, addressing concepts to his children, and refers to the concept (and conceptions) of fairness.

“Suppose I tell my children simply that I expect them not to treat others unfairly. I no doubt have in mind, or could quickly bring to mind, examples of the conduct I mean to discourage, but I would not accept that my ‘meaning’ was limited to these examples, for two reasons. First, I would expect my children to apply my instructions to situations I had not and could not have thought about. Second, I stand ready to admit that some particular act I had thought was fair when I spoke was in fact unfair, or vice versa, if one of my children is able to convince me of that later; in that case I should want to say that my instructions covered the case he cited, not that I had changed my instructions. I might say that I meant the family to be guided by the *concept* of fairness, not by any specific *conception* of fairness I might have had in mind”<sup>38</sup>.

From this example, as it is well-known, Dworkin derives a criticism towards those who, in the debate on the US Constitution, argue that constitutional interpretation should consist in giving legal provisions exclusively the meanings that were already devised by their drafters<sup>39</sup>. On the contrary, he maintains that the important judgments issued by the Warren Supreme Court in the Sixties and in the Seventies have adopted a correct method of constitutional interpretation, or, even better, have done exactly what Constitutional Courts should do: that is, interpreting concepts in a way that offers the “best understanding of concepts embodied

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<sup>37</sup> An in-depth analysis of this “father example” is offered by S. A. Barber, J. E. Fleming, *Constitutional Interpretation: The Basic Questions* (2007), 26 ff.

<sup>38</sup> R. Dworkin [1978], *Taking Rights Seriously* (new edition 1997), 134 ff. (italics in the original).

<sup>39</sup> Polemically, Dworkin uses the arguments employed by the then US President Nixon when it argued that the good judges would “enforce the law as it is, and not ‘twist or bend’ it to suit their personal convictions, as Nixon accused the Warren Court of doing” (see R. Dworkin, *Taking Rights Seriously*, cit. at 38, 131 ff.).

in the words” of the Constitution (so called philosophic approach to Constitutional interpretation).

A similar role could be played, regarding inter-judicial dialogue in the composite European Constitution, by what we might call the “mother example”, which was quoted by Marta Cartabia in a lecture held at LUISS University some years ago<sup>40</sup>. The aim – fully consistent with what has been argued in this contribution – is to demonstrate that sometimes the “first word” matters, in such a pluralistic legal space, even more than the “last word”.

The metaphor runs as follow. The preliminary reference made by a Constitutional Court to the Court of Justice of the European Union could be imagined like a child asking a question to her or his mother – of course, it could be her or his father too, but in this way the parallel with Dworkin’s father example would be less evident<sup>41</sup> –for instance in order to go out for the evening, or for a week-end with her or his friends. It is clear that if the question was well formulated and strongly motivated it would have more chances to receive a timely and positive answer.

In the past decades, as already remarked, most national Constitutional Courts in Europe never raised a preliminary reference<sup>42</sup>. In some way, they were reluctant even to ask, either for

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<sup>40</sup> The occasion was the opening lecture on “Courts and Rights in Europe: the construction of a legal system with multiple judicial controls” during the second week of the second edition of the LUISS School of Government’s Summer Program on Parliamentary Democracy in Europe, 15 July 2013. In other circumstances judge Cartabia has dealt with the topic in written essays, but she has never used the “mother example”. Nor, indeed, did she make any explicit spoken parallel with Dworkin’s “father example”.

<sup>41</sup> It should be added that the metaphor must obviously be taken as such, without pushing it too far. There is almost no need to recall that most Constitutional Courts are often “older” than the Court of Justice and in any case sufficiently grown-up to take in full their own responsibility. Consequently, they do not need any kind of permission by a “superior” authority. Nevertheless, as Constitutional Courts are normally judges of last resort (“against whose decisions there is no judicial remedy under national law”), they are obliged to bring before the Court of Justice questions concerning the interpretation of the Treaties or the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union, according to Article 267 TFEU.

<sup>42</sup> See M. Dicosola, C. Fasone & I. Spigno, *Foreword: Constitutional Courts in the European Legal System After the Treaty of Lisbon and the Euro-Crisis*, in 16 Ger. L. J. 6 (2015), at 1318 (remarking that the trend changed in the last decade and the

the fear of receiving a negative answer or, more plausibly, merely because in asking the question they would have recognised a kind of superior or at least an equal authority on constitutional matters to the Court of Justice. However, clearly, it is not by avoiding asking the question that the authority of the Court of Justice is put in doubt. On the contrary, there will be other judges (of the same Member State or of other Member States) who will ask the question differently, generally without a similar motivation and without the sensibility that only a Constitutional Court can have in submitting a certain question (bringing, together with it, the constitutional culture, values and identity of which the Constitutional Court should be the first interpreter).

If you want to go back to the metaphor, it is as if the question to the mother was asked not by her child but by someone else, on her or his behalf, of course using different words. None of them could clearly have the same sensibility and effectiveness that the child can have with her/his parent in asking the same question directly. Obviously, the chances of the mother fully understanding the question and giving a positive answer decrease significantly, if the question is not correctly or convincingly framed.

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Constitutional Courts of Austria, Belgium, France, Germany, Italy, Lithuania, Spain, Slovenia and Poland have issued preliminary references to the Court of Justice).