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**Rule of law and mutual trust:
a short note on constitutional courts as “institutions of pluralism”**

1. Expanding constitutional pluralism

On behalf of the President of the Italian Constitutional Court, I wish to express gratitude and appreciation for the invitation to be part of this Latvian anniversary, which gathers national and supranational institutions around the celebration of common values of democracy and the rule of law.

I want to develop the notion of constitutional pluralism, which has been recalled, among others, by Professor Encarnación Roca Trías, Vice President of the Spanish Tribunal Constitucional. I will also try to elaborate on the implications of President Ziemele’s final remark in her opening speech, whereby all legal orders should be interpreted as universal legal orders.¹ This is so because of the multiplicity of sources – national, supranational, international – all relevant and significant in constitutional adjudication. Legal sources appear more and more interconnected, despite their different origins and their different functions.

The core issue of current constitutional preoccupations is pluralism of sources, all insisting on the enforcement of fundamental rights. Such diverse levels of protection imply the combination of diverse standards and multiple interpretations of the same. National constitutional courts necessarily become, at the same time, interpreters of supranational and international standards and for this reason embody the role of **‘institutions of pluralism’**. This suggestion implies to expand even further a – by now deeply grounded – notion of constitutional pluralism, which has been so central in the construction of modern constitutional scholarship, as well as in the everyday practice of courts.

In the European tradition constitutional pluralism is nourished by a rich variety of sources at national level. The acknowledgment of such a variety marked a step forward in legal developments and represented the end of states’ monopoly on the production of norms as well as the increasing incidence of social realities, built on diversified social expectations and on common, shared interests. Scholarly work has magnified this multifaceted pluralism and has, in some cases, accentuated the role of spontaneous orders, where law is produced at the periphery of state centered legal systems. In countries like Italy and Spain constitutional pluralism was also the outcome of conflicting ideologies and conveyed historical and cultural implications. It was, as such, at the core of states reactions to undemocratic and dictatorial regimes.

This leads me to describe constitutional pluralism with an emphasis on **‘styles’** developed over the years by constitutional courts. Courts have been hesitant and resilient; at times they have been defensive or aggressive. Certainly, they have echoed their own constitutional history and interpreted their own democratic heritages, obeying to the rule of law.

In the last decade or so, European constitutional courts have been under pressure because of the consequences inflicted on individual and collective rights by austerity measures adopted by national parliaments, in contemplation of EU obligations. The tension in

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¹ Internal references to chapters in the conference proceedings

all countries most severely affected by such measures has been such to create, at times, split loyalties and to shake the equilibrium of legal systems.

Judicial activism took place even in countries, which were not signatories of Memoranda of Understandings with the European institutions but were, nevertheless, under severe budgetary restrictions.

For example, the Italian Constitutional Court ruled unconstitutional a wage freeze in the public sector, implemented as a quick and efficient response to the crisis in 2011 and then prolonged in the following years. The statute, which originally introduced the wage freeze, and all subsequent measures, were found in contrast with freedom of association and the right to organize (Art. 39 para. 1 of the Constitution).

Because of a lack of resources, in turn due to the absence of governmental initiative, no collective bargaining took place, following the original measure adopted in 2011. In holding unconstitutional the original measure and all subsequent ones confirming the wage freeze, the Court explicitly stated the enforceability of its own ruling for the future, thus imposing an obligation on government to act consequentially. In particular, the Court, which also recalled the judgment of 8 October 2013, *António Augusto da Conceição Mateus and Lino Jesus Santos Januário v. Portugal*, of the European Court of Human Rights, argued that:

‘the (...) systematic nature of this suspension has thus crossed the line, thereby now striking an unreasonable balance between trade union freedom (Article 39(1) of the Constitution), which is indissolubly related to other values of constitutional standing and already subject to legislative limits and far-reaching auditory controls (Articles 47 and 48 of Legislative Decree no. 165 of 2001), and the requirements relating to the rational distribution of resources and control of spending within a coherent financial programme (Article 81(1) of the Constitution). (...) It is only now that the structural nature of the suspension of bargaining procedures has been made fully evident that it may hence be concluded that it has become unconstitutional on a supervening ex post basis, the effects of which will apply following publication of this judgment. 18.- Having removed with future effect the limits applicable to the conduct of bargaining procedures in relation to the financial aspect, it will be for the legislator to provide a new impulse to the ordinary contractual dialectic, choosing the arrangements and forms that best reflect its nature, in a manner detached from any requirement as to the result. The essentially dynamic and procedural nature of collective bargaining may only be redefined by the legislator, in accordance with spending constraints, and will be without prejudice to the financial effects resulting from the provisions examined for the period that has already elapsed’.²

As the passage above shows, the implications of the Court’s decision are closely connected to the peculiarities of collective bargaining and to the on-going open function of negotiations, which are autonomously carried on by representatives of administrations and workers. The choice to make the judgment only enforceable in the future – a technique not too common in the Italian Court’s tradition – implies respect for the autonomy of negotiators and for budgetary policies agreed at a critical stage of the crisis. The Court’s ruling did not enter the technicalities of collective bargaining neither it considered wage increases that were lost as a consequence of the freeze. Respect for the autonomy of the social partners – which is also at the core of Art. 152 TFEU – was linked in the Court’s ruling to the centrality of the fundamental social right to organize, notwithstanding economic constraints.

The point to underline here is that in Italy, similarly to what happened in other countries, the frame of time in which austerity measures had to be enforced became a crucial

² English translation of ruling no. 178/2015 at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S178_2015_en.pdf Comments in G. Prosechi. ‘The Supremacy of the Right to Collective Bargaining: A Judgment of the Italian Constitutional Court on Austerity Measures’, 2 *International Labor Rights Case Law* (2016), 313-318; F. Trillo Párraga, ‘Políticas De Austeridad Y Negociación Colectiva En El Sector Público. Algunas Reflexiones En Torno A La Experiencia Italiana’, 71 *Revista de Derecho Social* (2015), 201-218.

point to address in constitutional adjudication. Sacrifices justified by the crisis on a temporary basis, may become unreasonable when prolonged for too long, since they infringe the fundamental right to organize and bargain collectively. As already recalled, the Italian Constitutional Court's ruling explicitly refers to significant international and EU sources, as a confirmation of the linkages that keep together labour standards and of the urgency to recall them all, when exceptional circumstances occur.³

However, to show how flexible constitutional adjudication must be when dealing with issues of public spending in a situation of restricted resources, the Italian Constitutional Court ruled constitutional legislation entered into force in 2011 and reiterated in 2014, setting an upper threshold on remunerations within the public sector and a maximum limit for the cumulative total of remuneration and pensions. The test was on reasonableness of the measures adopted, all aimed at rationalizing public spending.⁴

The example of the Portuguese Constitutional Court is also revealing, inasmuch as it shows all dilemmas raised by cuts in public spending. In twelve decisions taken in different phases of the crisis, the Court was asked to rule on pay cuts for public sector workers in the years from 2011 up to 2015. Cuts and other forms of economic reductions, described as solidarity measures, affected also retired people. In the latter cases the Court had to take into account legitimate expectations of the pensioners and consider this a relevant argument to rule unconstitutional some norms in the 2012 and the 2013 State budget laws.

As for pay cuts in the public sector, the Court's case law can, at first sight, appear incoherent. However, differences in the rulings are justified by the reiteration of the reductions imposed on public employees. Whereas in a first decision (396/2011) the Court declared that limited sacrifices are constitutional, rejecting the violation of the principle of equality, in a second one (353/2012) it found that additional cuts could not be justified by the urgency to pursue public interest. However, the ruling was effective for 2012 and not for the past, due also to the fact that previous pay cuts were maintained. The State budget law for 2013 was also challenged before the Court, among others, by the Head of state, who found that wage cuts were in violation of the 'proportional equality' principle, since they could be assimilated to taxes. The Court rejected this definition and found the law unconstitutional on the ground of unequal treatment, since the pay cuts hit public sector workers only.

It is worth mentioning that proportional equality – a new terminology adopted by the Portuguese Court in the so-called case law of the crisis – clearly portrays the adaptation of legal reasoning in exceptional circumstances. Inequality caused by compliance with European obligations – the Court maintained – should be accepted as long as it is proportional.⁵

The example of Portugal continues to raise interest, framed in a comparative perspective. In a recent case dealing with the reduction of remuneration for judges of the Court of Auditors, provided for in law n. 75/2014, the CJEU, in a Grand Chamber decision, clearly states that Article 19 TEU 'which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals'.⁶ The duty of collaboration is associated with the obligation to observe the law; the latter is fulfilled, when interpreting the Treaties. Cuts in salaries were, in this case, the result of measures aiming at eliminating an excessive budget deficit, in the context of a EU program of financial assistance and did not, as such – the CJEU maintained – affect judicial independence.

³ I have developed these points in S. Sciarra, *Solidarity and Conflict. European Social Law in Crisis* (CUP 2018).

⁴ English translation of Judgment n.124/2017 at:

https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_124_2017_EN.pdf

⁵ See A. M. Guerra Martins, 'Constitutional Judge, Social Rights and Public Debt Crisis', 22 *Maastricht Journal of European and Comparative Law* (2015), 695-696.

⁶ *Associação Sindical dos Juizes Portugueses*, C-64/16, at para. 32.

In this case – not to be reckoned as a marginal one – a justiciable rule of law clause is asserted by the CJEU, acting – as it has been pointed out – as a constitutional court in defense of judicial independence⁷ and interpreting Art. 19 TEU ‘in a federal sense, as a judiciary of the federation and its States. And the guarantor of the judiciary, the ultimate guarantor, is the Court of Justice’.⁸ In particular, the Court links together Art. 19 to Art. 2 TEU and explicitly recalls the rule of law as a founding value of the EU, common to the Member States. This step forward taken by the Court adds yet another dimension to an expanded notion of constitutional pluralism.

In a parallel and yet very different context the Polish Supreme Court lodged a preliminary reference to the CJEU, while suspending the application of the Polish law providing for early retirement of 65 years old judges of the Supreme Court, including the President of the Court, whose six years mandate is guaranteed by the Constitution. The government, in potential conflict with the rule of law, introduced a drastic change in legislation on retirement age. The timing of this reference is noteworthy, since it intersects numerous warnings sent by the European Commission on violation of judicial independence and the consequential infringement of Art. 19.1 TEU, as well as of Art. 47 of the Charter of Fundamental Rights. On 2 July 2018 the Commission’s initiative culminated in the formal notice of an infringement procedure against Poland, followed by a reasoned opinion sent on 14 August 2018.⁹

This stimulating climate of judicial activism finds yet another confirmation in the CJEU’s decision (C-216/18 *PPU, LM*)¹⁰ taken in response to a preliminary reference lodged by an Irish court with regard to the recognition of Polish arrest warrants, for an alleged contrast with the rule of law. In its 25 July 2018 ruling the Grand Chamber of the Court made important assertions with regard to the common values stated in Art. 2 TEU, on which the EU is founded. This ‘implies and justifies the existence of mutual trust between the Member States that those values will be recognized, and therefore that the EU law that implements them will be respected’ (at para. 15). It also pointed out very clearly, referring to Art. 19 TEU ‘which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU’ (at para. 50), that effective judicial review ‘designed to ensure compliance with the rule of law is of the essence of the rule of law’ (at para. 51).

In the Advocate General’s Opinion, the point had been made that ‘in principle’ denial of justice may occur when the lack of judicial independence ‘is so serious that it destroys the fairness of the trial’ (at para. 93). The Court elaborated on this and let a full notion of judicial independence emerge in *PPU, L.M.*, strengthened by the frequent quotations that it makes to its own ruling *Associação Sindical dos Juízes Portugueses*.

2. National constitutional protagonists

It can be maintained that, in all such cases, strenuous defenses of what is conceived as the underlying rationale of national constitutional orders may disentangle new fears, as if a national integrity of each order could be shaken, if not disrupted.

“**Fear**” – certainly not a technical legal term – is a metaphor for exacerbated self-inclusiveness and perhaps even intolerance towards open exchanges with other institutional counter-parts. “**Fear**” is opposed to “**trust**”, which should, in my view, constitute the leading

⁷ See M. Krajewski, ‘Associação Sindical dos Juízes Portugueses: The Court of Justice and Athena’s Dilemma’, 3 *European Papers* (2018), 395-407.

⁸ See D. Sarmiento, ‘On Constitutional Mode’, 6 March 2018, available at <https://despiteourdifferencesblog.wordpress.com/2018/03/06/on-constitutional-mode>.

⁹ https://ec.europa.eu/cyprus/news/20180814_en

¹⁰ A commentary at: <https://eulawanalysis.blogspot.com/2018/08/mutual-trust-and-independence-of.html?m=1>

theory supporting constitutional pluralism. “Trust” implies overcoming barriers and widening the horizon of international standards to be interpreted, to be enforced and, if necessary, to be adapted.

A too arduous defense of national constitutional legal orders may signal the danger of setting apart interchanges with other courts, thus generating what I suggest to call **‘national constitutional protagonists’**. This may happen whenever constitutional courts attempt to ascertain their own undisputable centrality within the ‘universal legal order’, to mention once more President Ziemele’s powerful expression. Courts overemphasizing national constitutional pride and diminishing trust in open arguments, if necessary in clarifications about the peculiarities of their own legal systems, become ‘constitutional protagonists’ and interrupt the necessary discursiveness of constitutional pluralism.

At the other end of the scale we find cases of preoccupied claims for democracy and the rule of law, which intensify the centrality of constitutional courts as guards of common EU values. The previously mentioned Polish preliminary reference stands as a remarkable case of judicial activism, which runs in parallel to actions already taken by the Commission in announcing sanctions under Art. 7 TEU. The ‘style’ here is not to act as protagonist; it is rather an articulated initiative within a sound institutional framework.

In EU law, recourse to preliminary ruling procedures is the paramount example of how constitutional courts act as powerful interlocutors of the Court of Justice. Their initiatives imply compliance with EU law and, at the same time, deliver coherence with the European legal system as a whole. In doing so, constitutional courts do not ignore national constitutional values, neither they neglect them. They pursue a broad general interest and share the ultimate goal of further integration within the EU legal system. I am inclined, at this regard, to underline the notion of **‘deference’**, which should complement ‘trust’. None of these notions imply subordination, nor insinuate hierarchies among courts. On the contrary, they rely on the unique architecture thought of by Europe’s founding fathers, whereby, despite the absence of a federal state, national judges were all called to be interpreters of a common supranational law and to strengthen in such a common effort all underlying values.

An equally open discourse on how to further the objective of coherence and improvement of constitutional guarantees takes place whenever Council of Europe sources are at stake. As an added value to the long lasting conversation that the Italian Constitutional Court has established with the Strasbourg Court, it is worth pointing to a recent case, in which the Italian Constitutional Court acknowledged the European Social Charter as a relevant parameter, with regard to freedom of association for the armed forces.¹¹ Here again, albeit with very different legal implications from the ones enshrined in the EU legal order, notions of ‘trust’ and ‘deference’ do not diminish the independence of constitutional courts, neither they affect the originality of their judgments.

The open circulation of international standards among courts is confirmed by a recent judgment delivered by the Supreme Court of Spain, arguing in favour of the legally binding nature of decisions taken by the UN Committee on the Elimination of Discrimination against Women (CEDAW). Obligations stemming from Art. 24 of the UN Convention on All Forms of Discrimination Against Women – the Court maintained – are such to impose on states parties the adoption of all measures ‘aimed at achieving the full realization of the rights recognized’. Art. 7(4) of the Optional Protocol provides that states parties ‘shall give due consideration to the views of the [CEDAW] Committee’.¹² Notwithstanding the specificity of this case (and of

¹¹ English version of judgment no. 120/2018 is available at <https://www.cortecostituzionale.it/action/judgment.do>,

¹²*María de los Ángeles González Carreño v Ministry of Justice*, Judgment No. 1263/2018 A commentary at: <https://altadvisory.africa/2018/08/01/spanish-supreme-court-affirms-that-decisions-of-un-treaty-bodies-are-legally-binding/>

the underlying facts at the origin of the litigation), the Spanish Supreme Court took a very important step, which is now echoed in the international community of scholars and courts.

'Trust' is part of the legal culture well described in Advocate General Sharpston's presentation in this conference, when she portrays an open and cross-fertilized EU legal system.¹³ 'Trust' can be seen as a direct consequence, in my view, of legitimacy of international sources, which have to be fully acknowledged. Hence, 'trust' is developed through a constant response to supranational and international sources. This brings me back to the suggestion made earlier on, about different 'styles' adopted by constitutional courts; they imply a special mode of conversation in talking to Luxembourg and to Strasbourg.

Widespread attention has been shown to the conversation initiated by the Italian Constitutional Court in '*Taricco*'. I shall attempt my own recollection of this – by now famous – case, concentrating on the final judgment delivered by the Italian Constitutional Court, hoping to interpret correctly a collegial point of view.¹⁴

In its final ruling, which closes the circle opened with the preliminary reference,¹⁵ the Court carries out a constitutional review and, at the same time, verifies what was required by the CJEU, namely that in the Italian legal system 'an institution that impacts the liability of persons to punishment, by linking the passage of time with the effect of blocking the application of a punishment, falls within the scope of the constitutional principle of substantive legality in criminal matters laid down by Article 25(2) of the Constitution in particularly broad terms' (at para. 10).

Furthermore, accepting that 'it is the exclusive competence of the Court of Justice to provide a uniform interpretation of EU law and to specify whether or not it has direct effect, it is likewise indisputable, as the *M.A.S.* judgment acknowledges, that an interpretive outcome that does not comply with the principle of legal certainty in criminal matters has no place in our legal system' (at para. 12).

This argument, developed throughout the Court's ruling, marked the end of the conversation and brought to declaring the questions initially raised 'unfounded, because, irrespective of the additional grounds for unconstitutionality that have been deduced, the violation of the principle of legal certainty in criminal matters serves as an absolute bar, without exceptions, on the introduction of the "*Taricco* rule" into our legal system' (at para. 14).

The 'style' of the Italian Constitutional Court was, without any doubt, very firm, but not intimidating, since it aimed at confirming the supreme values of the Italian legal order. At the same time, the Court meant to be deferential to the European Court of Justice. To go back to the metaphor I mentioned before, this was an attempt to control all possible 'fears' of losing centrality and seeing national sovereignty somehow weakened. It is clear, instead, that making recourse to preliminary references and establishing a correct exchange of information is a way to bring forward the long-lasting process of integration within the EU. The CJEU, on its side, showed a truly open attitude and an interest in feeding a virtuous communication.

A communicative attitude is displayed in a recent judgment delivered by the CJEU, whereby an emphasis is put on the function of preliminary references and on the obligation, laid down in Art. 267 (3) TFEU, to refer questions concerning the interpretation of EU law. The Court argued that 'a national court against whose decisions there is no judicial remedy is

¹³ On the connection between pluralism and cross-fertilization processes see e.g. N. Walker, 'The Idea of Constitutional Pluralism', 65 *Modern Law Review* (2008), 317-359; M. Delmas-Marty, *Ordering Pluralism* (Bloomsbury 2009); L. Pierdominici, 'The Theory of EU Constitutional Pluralism: A Crisis in a Crisis?', 9 *Perspectives on Federalism* (2017), 119-153.

¹⁴ English version of judgment no. 115/2018 is available at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_2018_115_EN.pdf.

¹⁵ Order no. 24 of 2017, available in English at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/O_24_2017.pdf.

required, in principle, to refer a question for a preliminary ruling concerning the interpretation of EU law even if, in the course of the same national proceedings, the constitutional court of the Member State concerned [in this case the Italian Constitutional Court] has assessed the constitutionality of national rules in the light of regulatory parameters with content similar to rules under EU law'.¹⁶ This clarification goes into the direction of diminishing the appeal for 'constitutional protagonists' and edging constitutional adjudication within its own legal framework.

The CJEU's confidence in strengthening an open supranational legal order is also confirmed by a recent initiative taken in Luxembourg, aimed at bringing together all national supreme courts and constitutional courts within a formally structured network, thought of as the place in which EU legal standards, adopted and applied at national level, are circulated and shared. The intrinsic value of this initiative is to be found in its institutional standing, well beyond a mere academic exercise. This is the enduring confirmation that integration through law has practical and political implications, as it constitutes the backbone of a common project, built on common values.

The ECtHR too promotes a '*réseau des cours supérieures*'. First announced in 2015, then followed by the Brussels Declaration, proclaimed during the Belgian presidency of the Council of Europe, this network, including 23 Supreme Courts of 17 member states at the end of 2016, is now joined by 68 courts of 35 member states and has been acting as a privileged channel of communication among them. An even stronger cooperative function in non-judicial procedures will be enhanced within the Council of Europe after the entering into force of Protocol n. 16.¹⁷

3. Styles in constitutional discourses

In the way of a short conclusion, I want to underline the main points made in my intervention, which have been inspired by the intense discussion developed in this conference. I have suggested that 'styles' adopted by constitutional courts, when they engage in conversations with the Court of Justice of the EU and with the European Court of Human Rights, are the ultimate outcome of national heritages, enriched by a never-ending acquisition of new communicative tools.¹⁸ Constitutional discourses taking into account supranational, as well as international standards, empower even further constitutional adjudication and constitutional courts, so much so that they act as 'institutions of pluralism'.

This optimal function covered by constitutional courts should be valued and framed in a comparative perspective, with a view to understanding why and in which context some of them act as 'constitutional protagonists'. The latter – I have argued – are the courts overemphasizing the centrality of national legal orders, cultivating 'fears', rather than 'trust'.

Thank you for your attention.

¹⁶ C-322/16 Global Starnet, at 26

¹⁷ This is the recollection of the ECtHR's President G. Raimondi, *La Convention européenne des droits de l'homme et les cours constitutionnelles et supremes européennes*, in *Mélanges en l'honneur de M. le professeur Jean Spreutels*, président de la Cour constitutionnelle de Belgique, forthcoming

¹⁸ At this regard, see in general P.-G. Monateri, *Legge, linguaggio e costume* (Editoriale scientifica 2013).