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Dialogue between Courts and the *Taricco* Case

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At the core of the European legal space the Member States have placed the basic values of democracy, human rights, freedom, equality, solidarity and the rule of law, according to Art. 2 of the Treaty on European Union (TEU.) Similar values are embedded in our national Constitutions.
The protection of these values commits national constitutional courts as well as European Courts, especially in cases involving fundamental rights. In this field cooperation and dialogue between courts is essential in order to foster an enhanced protection of individuals and to preserve the true role of constitutional courts as *guardians, counterweights, custodians* of basic values.
The Italian Constitutional Court has recently interacted with the Court of Justice of the European Union (CJEU) in a productive dialogue that resulted in a more robust understanding of the principle of legality in criminal matters, one of the basic individual guarantees the rule of law implies. From this case—the well-known *Taricco* case—some paradigmatic lessons can be learned and shared with a broader audience.

1. The internationalization of fundamental rights and the corresponding proliferation of the judicial bodies called upon to protect them have generated interpretative plurality in at least two ways.
First and foremost, these phenomena have not eliminated the role and importance of national courts—both ordinary judges and constitutional courts—which, as a rule, are (even if only in chronological terms) the first bodies called upon to protect rights, and doing so they refer both to their constitutions and national laws, and to Union law and international conventions. Indeed, it is well known that national judges sit as EU judges when dealing with subjects within the EU's sphere of competence; likewise, the case law of the European Court of Human Rights (ECtHR) states that, in judicial proceedings, affirmation of the rights enshrined in the European Convention of Human Rights (ECHR) is first a matter for national courts.

Second, European courts' interpretative activities overlap: they may very well find themselves deciding on issues relating to the same rights, albeit within their respective spheres of competence.

When considered in their abstract form, charters of rights inevitably tend towards looking like each other, for simple reasons: they meet the same human needs for freedom, justice and dignity that are crystallized in the corresponding specific freedoms; each charter wields a driving force over the others; they even contain references to one another, in a relation of mutual complementarity—an example being Article 6 of the Lisbon Treaty.

In addition, in contemporary globalized societies, the problems arising from the need to share scarce resources and the dynamics of societal evolution are undergoing a homogenizing force that is making conflicts look similar, to the point that they are submitted in the same terms before national courts first, and before European courts, later.

Nevertheless, this does not—and cannot—mean that disputes are resolved in the same way wherever they are brought. Quite the contrary: it is well known that the broad converging trend characterizing abstract

formulations—and the litigation to be decided upon based on those—is countered by the historical and axiological uniqueness of each legal system. They shape law with their own specific content, which cannot always be reduced to a single common denominator.

Dialectical interaction between courts can ensure that the multilevel protection of rights results in a reasonable balance—and not a sterile, hegemonic opposition—between legal systems and their judges. In other words, the parties involved cannot simply impose their own positions on the others, as in a unilateral conception of the situation; nor would it be acceptable for certain bodies to compel the others to surrender the positions they have adopted based on their own constitutional orders. Instead, it is reasonable to believe that the contending values could be more successfully reconciled—and not only in the short term—by balancing the courts' respective positions, given that it would be easier for such a solution to be accepted by the relevant legal systems and practitioners. In the longer term, this balance could lay the foundations for a common "home" for rights, where the various historical and national systems could coexist in a single shared space, in a competition of judicial remedies that enriches the protection granted to fundamental rights and, by definition, rules out every possibility of excluding one of them (Constitutional Court, Judgment no. 20 of 2019).

2. Thus we turn to discuss dialogue between courts. This dialogue is necessary in light of the current state of affairs, because the same set of facts may be subjected first to a national judgment, and to a supranational judgement later, resulting in the former no longer being able to afford to overlook the latter. In addition, sound interpretative standards appear to support the engagement in such a dialogue, because it would be impoverishing if controversies involving rights that are common to all Western countries—as mentioned above—were resolved without considering how they have been discussed and decided by other bodies. Inter-courts dialogue is facilitated by the sharing of databases and the rapid circulation of ideas within the European context. Also, it is honed through the use of effective juridical instruments, such as the ability to refer questions to the CJEU for a preliminary ruling—abandoning its previous position, the Italian Constitutional Court now considers that it may make such references itself—or, in the longer term, Protocol No. 16 of the ECHR, at least in those countries that ratified it or will ratify it in the future.

In practice, there are two types of dialogue and each of them is valuable.

In the first type, there is no need—or way—to bring specific cases to the attention of another court, for it has to provide immediate indications based on the law under which it is the qualified interpretative authority. Rather, and as a preliminary matter, it is a question of engaging in continuous discussion not only with the case law issued by international courts, but also with the rulings handed down by national constitutional courts, taking into consideration the various approaches adopted for the ultimate purpose of guiding, and if necessary aligning, one's own interpretative stance. Until relatively recently, the Italian Constitutional Court would rarely cite the case law of other courts or compare different views in its judgments. Nowadays however, a review of Italian constitutional case law would precisely show that the opposite is true, as reference is frequently made to the rulings handed down in other countries. Furthermore, even when no express reference is made, the preparatory research for each case compiled by the Court's judicial *référendaires* draw the constitutional judges' attention to the approaches adopted abroad, when the case at hand raises issues that are common to many legal systems. In particular, the judgments of the ECtHR and of the CJEU are constantly taken into consideration.

In this sense, inter-courts dialogue is not a component of a codified decisional method. Rather, it is the expression of a cultural attitude that acknowledges that the great problems afflicting pluralistic societies these days can only be

juridically resolved if the contributions of the wider community of legal practitioners—each bringing their own specific experience which then converges in the decision—are considered.
In addition to this type of dialogue, that we could call *cultural*, there is also a *decisional* type of dialogue. Here, European case law is called upon for the specific purpose of resolving a dispute or—as in the case of the Constitutional Court—deciding on a question of constitutionality that requires the application of EU or ECtHR law.
With regard to proceedings before the Constitutional Court, the term "interposed norms" (*norme interposte*) is frequently encountered. National legislation is challenged because it allegedly contrasts with EU or ECtHR law, and this contrast leads to a breach of the constitutional provisions which require that Italy complies with its European and international commitments. Although the benchmark formally remains the Constitution, the Court must clearly evaluate whether national provisions are actually incompatible with European law. That is, the Constitutional Court's task is to implement a source of law which uniform interpretation is entrusted, by EU treaties and the ECHR, to dedicated courts.

Indeed, the CJEU contributes to the construction of the European edifice, by ensuring that Union law is applied in all Member States equally. As for the ECHR, Italian constitutional case law has long recognized that it exists in accordance with the meaning ascribed to it by the ECtHR, as long as this meaning is consolidated by the "living law" (*diritto vivente*) (Judgments No. 348 and 349 of 2007; No. 49 of 2015).

Of course, the Constitutional Court is also called upon to interpret European law, if necessary in light of the unique features of the national legal system. However, although this activity may go hand in hand with, and facilitate, the work of European courts, it certainly cannot replace it. The Constitutional Court's interpretation may be valuable in that it may provide European courts with material for consideration drawn from the Italian constitutional system, thus enriching the constitutional traditions that are common to States. However, it would not be fair to insist on giving European law a different meaning from that identified by the court which is institutionally mandated to interpret it. Nevertheless, it remains for the Constitutional Court to evaluate whether said meaning—once it has been unequivocally defined by the European Court—is compatible with the Constitution or, in the case of European Union law, with the supreme principles of the Constitution.

Thus, the existence of procedural mechanisms which allow referring questions to European courts on the meaning of provisions that are affirmed as interposed measures in constitutional proceedings is of fundamental importance.
On this subject, the Italian Constitutional Court has done one of its (rare) overrulings, bearing witness to the decisive significance that is recognized to the preliminary reference mechanism. Indeed, for a long time it has been held (Order No. 536 of 1995) that the Constitutional Court could not be considered as a judicial forum able to refer questions to the CJEU for preliminary rulings, given the peculiarity of its tasks and its position in the national legal system.

Thus, inter-court dialogue was reduced to its purely cultural dimension, leaving aside the decisional component. This increased the risk that courts express dissimilar attitudes on a same issue.

It is only with the 2008 Judgment No. 102 that the constitutional case law on the subject changed. This first occurred in the framework of proceedings brought directly by the State against some legislation enacted by Regions (or *vice versa*), and then in incidental proceedings, which are raised by ordinary courts to ascertain the constitutionality of a legislation (Order No. 207, 2013; Order No. 24, 2017.)

Ultimately, what first appeared to be a partial abdication of its position as the supreme body mandated to protect the Constitution later turned out to be an essential tool for cooperation—as will be seen in the example that will be discussed shortly. This much became clear when it was ascertained that the statement of the correct meaning of European provisions, as set by the competent court, does not define the decision on constitutionality as well. Indeed, the Constitutional Court is still mandated to evaluate national provisions in the light of the meaning specified by the CJEU, and in any event to check whether the constitutional principles involved continue to hold firm. Indeed, the CJEU itself often entrusts national courts with ensuring Union law's practical application in light of the national context, to ensure its effective application.

Protocol No. 16 of the ECHR establishes a similar mechanism. The Protocol, which entered into force in August 2018—and which Italy has yet to ratify—, establishes that in pending proceedings, the highest courts and tribunals of the Contracting Parties—as designated by the Parties themselves—may request the ECtHR to issue a non-binding, advisory opinion.

This will make it easier to prevent violations of the ECHR using internal remedies only, also because the general principles forming the ECHR can be accurately applied in practice only if reference is made to the specific case at hand. However, it is also important to emphasize that the advisory opinion is not binding. This preserves the national courts' decisional autonomy, save for the power of the parties to the dispute to apply to the ECtHR. In this way, the highest courts build a relationship that is imbued with a spirit of *cooperative decisional dialogue*; a relationship that is not defined by the advisory opinion of the ECtHR but is rather enriched by it. Indeed, advisory opinions propose views, to which the national court may respond with others, thereby introducing different perspectives that may turn out to be important if the case were to be heard by the ECtHR.

Indeed, every dialogue is a two-way communication that serves to achieve a common aim, and it needs to be driven by good faith and respect for the views of the other parties. European case law needs the foundational "bricks" provided by national judges and demands mutual attention. For this reason, the Italian Constitutional Court has recognized the obligation of national courts to implement the ECHR in the terms established by the ECtHR, provided that these terms have developed into "living law" (Judgment No. 49 of 2015). If no such development has occurred yet, it is fair to expect that the ECtHR's position may evolve in light of any convincing arguments that national courts may present.

3. Inter-court dialogue, especially between constitutional courts and European courts, is not automatically bound to succeed, despite the cultural and juridical frameworks within which it may exist today. Rather, if this dialogue is to be effective, certain conditions must be met. Two dangers in particular must be averted, through a careful use of arguments and speech.

The first danger is the temptation to consider the act of listening to others' views as a formality, a step that must be taken before one's own final decision can be made. If, by the end of the interaction, the parties to the dialogue have not changed their positions in the least and have made no reciprocal concessions for each other, one may certainly doubt that they took part in the dialogue in a spirit of loyalty, with the purpose of listening before reaching a decision. The second danger, which may be more trivial—but in practice is more likely to occur—, consists in the impossibility of mutual understanding because of the cultural differences and contingent fluctuations to which different legal orders may subject juridical institutions that are only apparently similar. On the one hand, constitutional courts use European sources of law, the interpretation of which is entrusted to European courts; on the other, without reference to national law, European courts may find it difficult to fully evaluate the individual

situations to which those sources are to be applied. Moreover, national law may in turn call into play various factors that may be difficult to reconcile with each other.

Against this backdrop, the preconditions for dialogue detailed below should not be taken as an exhaustive list, but rather as a good starting point. Experience suggests that the following may be particularly useful.
Adoption of a common language: even though dialogue is facilitated by the fact that it concerns juridical terminology only, it is necessary to carefully specify the meaning of the expressions used, because semantically similar terms may have different meanings in different legal systems.

Information sharing: inclusion of as many explanations as possible on the legal order and on the operation of the legal principles and institutions that must be applied to decide on the issue; as obvious as they may be to practitioners of the same legal system, it should be recalled that they might even seem strange to outsiders.

Respect for the exclusive competences of the other parties: dialogue should take place only along the lines where the involved decisional powers meet—as well as on the question of defining the boundaries between powers themselves. The discussion should not include subjects drawn within the orbit of only one of the parties.

Multilateralism in dialogue: that is, an approach that is not limited to a mere comparison of the positions of the parties to the dialogue, but that also considers those held by other—national and European—courts. This should be done not only to seek a common constitutional tradition, but also to ensure that the solution which is reached in specific cases may truly serve as a universal rule for analogous cases that may arise in future.

A recent case involving the CJEU and the Italian Constitutional Court may show that dialogue can be productive when at least these four conditions are met.

4. With the judgment issued in the *Taricco* case on 8 September 2015, the CJEU established that in criminal proceedings for infringements relating to value-added tax (VAT), national courts should disapply rules on 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, the same crimes committed against the concerned Member State are subject to more severe national rules on limitation.

The CJEU reached this decision by means of an interpretation of Article 325(1) and (2) TFEU, which require Member States to counter fraud and any other illegal activities affecting the financial interests of the Union, considering that systematic impunity of fraud relating to this form of taxation due to the expiration of the limitation period adversely affects European finances.

While reserving the opportunity of the national court's evaluation, the CJEU did not consider the "*Taricco* rule"—as formulated—to conflict with the principle of legality in criminal matters, because limitation is unrelated to the description of offences or penalties. In this field, it is therefore possible to provide for a more stringent treatment than that established under the Criminal Code and which applied at the time the offence was committed.

In the Italian legal system, according to a well-established legal tradition based on the broad formulation of Article 25(2) of the Constitution—"[n]o one may be punished except on the basis of a law in force at the time the offence was committed")—limitation affects the punishability, and therefore falls within the scope of substantive criminal law. Limitation thus conforms to the Constitution only if it complies with the rules of specificity and non-

retroactivity following the principle of legality in criminal matters, as our Constitutional Court held on several occasions.

For this reason, Italian jurists saw 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 makes it unpredictable for society at large and impossible for judges to apply. In particular, judges were allegedly unable to quantify the "significant number of cases" that would trigger the effectiveness of the "*Taricco* rule", precisely because this quantity was not adequately established. Likewise, individuals—who should be the recipients of clear and intelligible criminal precepts—would never be able to foresee that Article 325 TFEU will give rise to a complex juridical operation culminating in the disapplication of a peculiar aspect of limitation in criminal matters, to their detriment.

The doubts fostered by the legal debate were taken up by ordinary courts, which turned them into subjects of questions of constitutionality. The Constitutional Court considered that the "*Taricco* rule" contradicts the principle of legality in criminal matters. However, it refrained from expunging the rule from the legal system, by rejecting the request to declare unconstitutional the law ratifying the Treaty insofar as it required application of Article 325 TFEU—as interpreted by the CJEU—and consequently the disapplication of two provisions of the Criminal Code regarding limitation.

In the 2017 Order No. 24, 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 limitation in the Italian legal system and the fact that it consequently falls within the scope of the principle of legality in criminal matters, a principle that would be violated by the judicial application of the "*Taricco* rule" because of its retroactivity and lack of determinacy—a principle that 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.

5. In *M.A.S. and M.B.*, issued on 5 December 2017, the CJEU entertained the Italian Constitutional Court's view and acknowledged the substantive nature of limitation in our legal system. Furthermore—and in addition to excluding the application of the relevant provisions to acts committed before 8 September 2015—, the CJEU made it possible for national courts to disapply the "*Taricco* rule" when 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 reference for a preliminary ruling.

The matter was closed when the Italian Constitutional Court issued Judgment No. 115 in 2018, in which it identified the contradiction between, on one hand, Article 325 TFEU and the "*Taricco* rule" and, on the other hand, the supreme principle of legality in criminal matters, thereby conclusively rejecting the possibility that criminal courts disapply the relevant rules on limitation.

It must be emphasized that this conclusion was not based on national constitutional law only, but rather on the application of Union law as detailed by the CJEU. In other words, dialogue made it possible to elaborate a rule that is shared by the two legal orders, with a view to ensuring the respect of human rights.

6. Therefore, the outcome of the *Taricco* matter was highly satisfactory. Given its genesis, there was a serious risk that a EU Member State would infringe the principle of primacy of Union law on the basis of the supreme principles of its own constitutional order. This would have given rise to unpredictable litigations regarding criminal law and the respect owed to human rights vis-à-vis public sanctioning powers, both highly sensitive fields.

Avoidance of this outcome may be due to the dialogue the courts engaged in, a dialogue that took place in full observance of the aforementioned preconditions for success.

The quest for a *common language* required a definitional effort, to foster understanding of the legal framework on limitation in Italian criminal law. This way, the European legal order, which addresses the legality of offences and penalties in Article 49 of the Charter of Fundamental Rights of the European Union, was able to bring limitation into the sphere of criminal matters, from which it was previously excluded.

Information sharing turned out to be decisive and necessary. Once an acceptable degree of correlation between legality in criminal matters and limitation was established, it became a question of explaining how, in the Italian legal system, this correlation is not only theoretical but, rather, consistently and rigorously enforced in law and constitutional case law.

Respect for the other parties' exclusive sphere of competence was a cornerstone of the legal reasoning of both courts. The Italian Constitutional Court did not question the CJEU's interpretation of Article 325 TFEU. If it had done so, conflict would have inevitably ensued, because no national court can infringe the uniform application of Union law as defined by its institutionally mandated interpreter. However, having acknowledged the content of the relevant European provisions—that only the CJEU is empowered to define—the Constitutional Court checked whether they were compatible with the principle of determinacy in criminal matters and whether they were likely to be directly applied by judges, reaching a negative conclusion.

Finally, the dialogue was *multilateral* in that the Constitutional Court made reference to the constitutional traditions of the other European civil law countries—and especially Spain—where limitation falls under substantive criminal law.

7. In a word, after the *Taricco* case both the Italian Constitutional Court and the CJEU are enriched by a positive legal experience that makes their relationship stronger and reinforces mutual trust.

Moreover, and more important, their mutual cooperation has improved the understanding of one of the basic principle of the rule of law and bolstered the safeguards for individuals in criminal proceedings.

Each of us, the constitutional and the European courts, are responsible for the common enterprise of preserving and promoting the basic democratic values of equality, liberty, solidarity and the rule of law. Each one in its own sphere of jurisdiction; each of one in the shared common space.