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# The Italian Court Through the Looking-Glass A Dialogue Between Constitutional Justices

with

*Sabino Cassese* and *Daria de Pretis*

Interviewed by

*Giacomo Rugge*\* and *Valentina Volpe*\*\*

The following interview with Professors *Sabino Cassese* and *Daria de Pretis*, Emeritus Justice and Justice, respectively, of the Italian Constitutional Court, took place on 12.11.2015 as part of *Dialoghi Italiani*, a discussion group of the Max Planck Institute for Comparative Public Law and International Law (MPIL) in Heidelberg which is dedicated to examining significant developments in the Italian political and institutional world.

The meeting – held in Italian and addressed to both Italian and international academics – followed the format of a double interview. Focusing on the most relevant issues that affect the functionality and working methods of the Italian Constitutional Court, it touched on the protection of acquired rights, the introduction of the dissenting opinion, internal decision-making dynamics and the role of comparison and informal networks of justices. The result was a lively exchange of ideas and opinions – at times convergent, at

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From 2014 to 2015, they led the MPIL discussion group *Dialoghi Italiani*. The questions and structure of the interview are the result of a joint reflection by the authors. The Italian version of this interview was published in the MPIL Research Paper Series, No. 6, 2016 as *La Corte oltre lo Specchio: un Dialogo tra Giudici Costituzionali, con Sabino Cassese e Daria de Pretis*. The authors wish to express their gratitude to *Violetta Ritz*, *Elisa Andreotti*, and *Giuseppina De Marco* for their helpful assistance in the editing and translation process.

times divergent – but always highly informative and insightful for an understanding of the true nature and role of the Court.

The title was inspired by the sequel to “Alice in Wonderland”,<sup>1</sup> whose incipit depicts Alice standing in front of a mirror, wondering if the reflection of the room she sees indeed corresponds to reality and what lies beyond her view. This dialogue-interview originated from the same curiosity that inspired Alice to ponder what she saw and what the mirror did not reveal. We are grateful to Emeritus Justice *Sabino Cassese* and Justice *Daria de Pretis* as well as to the Directors of the MPIL, *Armin von Bogdandy* and *Anne Peters*, for allowing us to conduct this interview and thus observe the Court “through the looking-glass”.

## The Appointment Process: Between Law and Politics

**GR:** *To date, the Italian Constitutional Court operates with twelve justices and the Parliament seems unable to reach an agreement on three appointments within its competence.<sup>2</sup> Do you believe this deadlock depends on rules or on politics? What are the limits and strengths of the current appointment system?*

**SC:** The Court assesses the constitutionality of laws. Laws are passed by the Parliament. One could therefore say that, if the Parliament does not appoint the justices within its competence, it ends up shooting itself in the foot. However, during my nine years as a constitutional judge, the Court did at times operate with thirteen or twelve members instead of fifteen. If you really want to know what can be seen “through the looking-glass”... fewer people work better – perhaps they work more but they certainly work better.

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<sup>1</sup> *L. Carroll*, *Through the Looking-Glass, and What Alice Found There*, 1871.

<sup>2</sup> The Italian Constitutional Court is composed of fifteen justices. Five justices are appointed by the Parliament in joint session with a secret ballot, five justices by the President of the Republic, and five justices by the Highest Courts (Court of Cassation, Council of State and Court of Auditors). From June 2014 until December 2015, the Court worked with less than fifteen justices, due to the inability of the Parliament to agree on the appointment of three replacements for the justices who had ceased from office: *Luigi Mazzella*, *Paolo Maria Napolitano* and *Sergio Mattarella* (the latter left the Court following his election as President of the Republic in January 2015). On 16.12.2015, after thirty-two ballots, the Parliament succeeded in appointing three new justices: *Franco Modugno*, *Giulio Prosperetti* and *Augusto Barbera*. After a long impasse, the Court was again complete.

**DdP:** The problem does not concern the working methods of the Court, which, in any case, can also operate and decide in a reduced composition. Nor do vacancies really increase each justice's workload. Apart from preliminary investigations, which are conducted by the rapporteurs, each justice must be prepared on every single issue to be decided by the Court. So, while a single rapporteur's activity may slightly increase, the general workload of each justice remains unaltered. The truth is that a Court without three of the five justices appointed by Parliament is not the Court designed by the Constitution. The model is altered precisely in the aspect that, perhaps, best characterises the Italian Constitutional Court: the balance between the three different appointing authorities (the President of the Republic, the Parliament and the High Courts). And this is, constitutionally speaking, a serious problem.

### From Professors to Justices ...

**VV:** *One thing you have in common is that you are both professors, moreover administrative law professors. Is a good, an excellent, professor also a good justice? What does an academic bring to the Court and what are the distinctive qualities – or limits – of a Justice-Professor?*

**DdP:** There is an element shared by the members of the Court, namely they all fulfil the same requirements. These requirements are well known: one has to be either an attorney-at-law with twenty years of experience, or a law professor, or a judge (even retired). Each institution responsible for the appointment of the Court's members, i.e. the President of the Republic, the Parliament and the Highest Courts, can freely choose within these three categories. However, experience tells us that the judges elect judges, that the Parliament makes more diverse choices and that the President of the Republic mostly designates academics.

Inside the Court one perceives more the differences deriving from the professional background of the various justices rather than those linked to the appointment procedure. Being academics or being judges, being accustomed or not to taking part in legal proceedings are conditions that are noticeable within the Court. Undoubtedly, these differences enrich the debate and offer wider and more varied analytical lenses.

I believe that justices should, as much as possible, abandon those habits and professional inclinations that might hamper the decision-making process. Academics in particular should put aside their doctrinal assumptions when necessary. While we as scholars tend to be rather assertive regarding

our scientific approach, the main goal of collegial work is to seek a point of possible convergence. This is also true as regards the writing of judgments. The rapporteur must be aware that (s)he has to faithfully convey the opinion and line of reasoning of the Court, even when these differ from her/his personal convictions.

**SC:** During my experience at the Court, I noticed two differences between professors and judges. Judges are much more faithful to precedents; they are more rigid and prisoners, to some extent, of ritual. Professors are in this sense freer, and for a justice this is – I believe – an asset rather than a liability.

The second difference is that judges and attorneys-at-law are more constrained by their way of reasoning, while professors are more willing to act like Tarzan, metaphorically speaking: academics are more ready to swing on a vine across the jungle, and to move from one tree to another. This ability is the main feature of a justice. In this respect, I do not consider the French model completely anomalous in allowing non-lawyers to be constitutional judges.

In fact, as we know, there has been a “*sociologue au Conseil constitutionnel*”.<sup>3</sup> This might be enriching for a constitutional court. One has to bear in mind that a constitutional court is not only a “court”, but is also the guardian of the Constitution. In this capacity, it is called upon to cooperate in the maintenance of the constitutional compact, that is, the basic law which regulates a society. The Constitution cannot be left only in the hands of lawyers and I would therefore not mind having a sociologist (or *une sociologue*) as a member of our Constitutional Court.

**DdP:** May I add something in this respect? I am not entirely persuaded by this suggestion. Of course, nowadays even law is increasingly following a multidisciplinary approach. Many of us are aware that this trend increases our capacity for developing legal knowledge. However, what is common among justices and what really fosters their cooperation are their shared professional training, legal methodology and terminology. Introducing other disciplines, other ways of reasoning, other vocabularies and methodologies into the Court might indeed enhance the Court’s knowledge. However, given the great variety of subjects the Court has to deal with – from embryos and treatment methods (just think of the *Stamina* case<sup>4</sup>) to mathematical

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<sup>3</sup> D. Schnapper, *Une sociologue au Conseil Constitutionnel*, 2010.

<sup>4</sup> In 2009, *Davide Vannoni*, holding a degree in Communications, established the *Stamina Foundation*, a Non-Governmental Organisation dedicated to the research of, and experimen-

economics and finance, from the sociology of the family to industrial policy – it is illusionary to believe that all or even the most relevant disciplines could find representation within the Court.

Therefore, only a very limited number of disciplines would be directly involved in the Court's work, while there would be a loss of uniformity in its composition. At the moment, the problem of opening up to other disciplines is solved empirically through contacts that the Court and its individual members can activate in order to acquire the technical and scientific expertise necessary for its decisions.

## Working as a Judge

VV: *In his book “Il mestiere di giudice” [Working as a judge],<sup>5</sup> Guido Calabresi considers writing the “great judgment” – the one that satisfies the vanity and narcissism of its author – as the most dangerous temptation for a judge. What is in your opinion the greatest – and worst – temptation for a justice?*

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tation on, adult stem cells for the treatment of neurodegenerative diseases. However, the administration method developed by the *Stamina Foundation* was not considered scientifically sound by the scientific community. In May 2013, after pressure from the media and public opinion, the Social Affairs Committee of the Italian Chamber of Deputies unanimously decided to launch clinical trials into the so-called “Stamina method”. Distinguished names of the national and international scientific community harshly criticised the decision, with numerous articles published in leading journals such as *Nature*. In September 2013, the scientific committee set up by the Ministry of Health declared in a consultative report that the Stamina method did not have any scientific evidence, and the trial phase was ultimately interrupted and deemed to be “dangerous for the health of the patients”.

In the same year, the Italian Constitutional Court was called upon to assess the constitutionality of Art. 2 of the Decree-Law No. 24 of 2013, by means of which the Parliament had limited the administration of the Stamina treatment only to those patients already on medication or whose treatment had been authorised by a judge. With Judgment No. 274 of 2014, the Court declared Art. 2 to be consistent with the Constitution, arguing that, given the exceptional circumstances, the disposition had to be considered as a derogation to the ban on experimentation decided by the legislature. The Court also stated that therapeutic decisions must be based on experimental evidence and not only on the political discretion of the Parliament. In 2015, *Davide Vannoni*, charged with fraud and criminal conspiracy, negotiated a plea bargain with the public prosecutor's office of Turin of one year and ten months of imprisonment, together with a prohibition on carrying out further experiments in Italy or abroad.

<sup>5</sup> G. Calabresi, *Il mestiere di giudice. Pensieri di un accademico americano*, in: B. Barbisan (ed.), 2013.

**DdP:** Of course, using the Court as a stage for expressing one's own scientific opinions is a strong temptation. This is especially true for those topics on which a justice has been working or innovating a lot. This is similar to what I said earlier about writing judgments. I am convinced that it is necessary to have the humility to use a different writing style than the one a justice would use in her/his own scholarly work. In this respect, I certainly agree with *Calabresi*. There are further temptations as well. The work of the Court is multifaceted. A temptation may be, for example, to overwhelm the others when it comes to deciding an issue on which a justice is perhaps more knowledgeable or experienced.

**SC:** The temptations of a Constitutional judge are basically twofold: the first is to be in the majority, the second is to leave a mark.

The temptation of being part of the majority essentially concerns the dynamic between winners and losers. This is the competition taking place in the Council Chamber. In the history of the Italian Constitutional Court, it reached its peak in a story that was reported to me. This was about a great President of the Court who could not accept the idea of being in the minority: the only time that this was going to happen, he changed his mind only for the sake of remaining in the majority.

The second temptation is to leave a mark by writing "the great judgment". This is the worst mistake a justice can make. It satisfies one's ego and thereby diminishes the value of the *collegium*, betraying the *quid proprium* of a constitutional court. A constitutional court is a pondering body. One can enter the Council Chamber with an idea, and leave it convinced of the opposite. There is room for persuasion.

The temptation to leave a mark, to write the great judgment, to set a cornerstone in the history of law is, to my eyes, a negation of the Court's vocation. In this respect, there is a tiny, yet important, detail: during the period in which the collegial body does not come together, justices often meet in small groups. A famous book on the US Supreme Court, "the Brethren,"<sup>6</sup> reveals that it is in this kind of interaction – of two, three and four – that the origins of a judgment can be traced.

This really is a key issue as well and represents the antithesis of "the great judgment". It is indeed a way of constructing, incrementally, a common reasoning, a way of persuading and being persuaded. This process often takes

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<sup>6</sup> B. Woodward/S. Armstrong, *The Brethren. Inside the Supreme Court*, 1979. See also more recently C. Sunstein, *Constitutional Personae. Heroes, Soldiers, Minimalists, and Mutes*, 2015.

place around the dinner table, rather than in the Council Chamber. I always remember that *Valerio Onida*, a former President of the Italian Constitutional Court, used to tell me that when he arrived in Rome from Milan, where he lived, he often noticed some small news inside the Court. These were the result of contacts between two, three, or four. These informal contacts fostered the emergence of a common understanding, which then became majority, which ultimately became a judgment. That is how decisions should be taken in a constitutional court.

**GR:** *In his book, Guido Calabresi also maintains that sleepless nights are one of the most typical traits of a judge's life. Although the author has in mind the utmost injustice, the death penalty, he is aware that less tragic cases can still trouble the conscience of a judge. When it comes to making a decision, should justices focus on their personal moral standards or act on behalf of the society as a whole?*

**SC:** Since I left the Court, I have been sleeping much better; there is no doubt about that. However, the reason is different from the one pointed out by *Guido Calabresi*. After all, during my nine years in office the cases before the Constitutional Court were not so dramatic. There were two or three cases, though, which caused me some troubles and on which I kept changing my mind: initially I came to one conclusion, then to a different one, and then again to its opposite. One of these cases concerned an Albanian woman, legally residing in Italy, who, after a car accident, could not access the national health care and welfare system. The case was brought before the Constitutional Court. The Court had to rule on the constitutionality of a law which conditioned foreign citizens' access to social benefits on a minimum income requirement.<sup>7</sup> The person in question was in a vegetative coma and was likely to remain in this state for another twenty or thirty years, thereby generating high costs for the national health care system. This was a person who had been living in Italy for six years. There are two different approaches to this case: you can either assume that health care is a fundamental and thus universal right or, differently, that members of a community have both rights and obligations. Here rights are invoked, but obligations have not been fulfilled. What then is the solution?

There was a similar case that gave me some thought. A regional law linked access to social services to a minimum residence requirement of thirty-six months.<sup>8</sup> One could ask: is such a requirement fair? Maybe not, as

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<sup>7</sup> Italian Constitutional Court, Judgment No. 306 of 2008, ECLI:IT:COST:2008:306.

<sup>8</sup> Italian Constitutional Court, Judgment No. 40 of 2011, ECLI:IT:COST:2011:40.



everybody should enjoy social rights; or maybe yes, since, by meeting such a requirement, one proves his willingness to belong to a community. These are just two examples of decisions that tormented me.

As for the second question: should you listen to your own morals or act on behalf of the society as a whole? I have a clear opinion about this. A constitutional judge should never broaden too much her/his horizon; s/he should never take the general problems of justice upon her/himself. In my experience, whenever I felt the desire to tackle more fundamental issues by embracing wider criteria, I realised that I was about to make a mistake and I hope I corrected myself.

**DdP:** To be sure, the Italian Constitutional Court does not face dilemmas comparable to those that *Calabresi* refers to in his book. Fortunately, in Italy, *Beccaria* is part of our tradition and capital punishment was abolished a long time ago. Besides, the Constitutional Court does not adjudicate on the merits, even though our decisions may have an immediate impact on a specific case. Please allow me to go back to the question concerning the collegial character of deliberations. Sometimes, you consider a decision to be the right one, even though it differs from your personal convictions; other times, you might have been able to influence someone else's proposal by introducing a certain set of values or legal parameters.

Sleepless nights are a metaphor for musing on the possible outcomes of a judgment. This is somewhat unavoidable, when your decision is going to have an impact on such a wide range of recipients. I must confess that sometimes I felt distressed *after a* decision had been taken, asking myself whether I had done all I could to steer the decision in a certain direction. Although the great majority of decisions are the result of widely shared views, perhaps of compromises, there are also debated, even lacerating, decisions.

I agree with Professor *Cassese* on the importance of "not broadening our horizon" too much. Justices need to focus on the case before them and analyse it from all possible angles, without at the same time trying to solve general problems. Nevertheless, it is necessary to be aware that our decisions can, and usually do, have consequences well beyond the specific case. Moreover, they can entail relevant expenditures and thus have an impact over an array of interests that do not find direct representation in the case. It is therefore just to reflect also on these consequences. This is when each justice's sensitivity and personal background come into play. Before sitting on the Court I was Rector of a University, and in that role I was dealing with the uncertain fate of young researchers. However, this has not so much to do with "broadening the horizon" as with each justice's sensibility and appreciations.

## Dissenting

**VV:** Professor Cassese, when reading your book “Dentro la Corte” [*Inside the Court*],<sup>9</sup> one may get the impression that one is reading your personal dissent about your years at the Court. Why, in discussing the functioning of the Italian Constitutional Court, was the introduction of the dissenting opinion never seriously considered? What are the reasons against it and why do they keep prevailing?

**SC:** I believe the reasons against the dissenting opinion originate from a sophism. People indeed argue that Italy is a conflictual country and that the Court should therefore avoid getting involved in political quarrels. But I disagree with this approach. As correctly highlighted by *Nino Scalia* – for once I agree with him – dissent in the Court is *reasoned* and contributes to enriching the public debate.

I still hope to see the dissenting opinion introduced by 2035/2040 and I have good reasons to believe it will be. The Constitutional Court discussed the matter three times and the third time I took part in the debate. If I am not mistaken, the first time there was only one vote in favour, that of *Costantino Mortati*; the second time, the votes were two; the third time four, including mine. If this trend continues, within twenty or thirty years, our Court will probably have the dissenting opinion. However, beware that there is also a “dissenting opinion” about the introduction of the dissenting opinion. Indeed, many maintain that the dissenting opinion cannot be introduced by the Court itself, but that its introduction would require a law, probably a constitutional law.

**GR:** Professor de Pretis, do you think it would make sense to introduce the dissenting opinion? During a meeting of our *Dialoghi Italiani* that took place some months ago, we discussed with Professor Pasquale Pasquino the option of anonymous dissenting opinions. Such an option would have the advantages, but not the disadvantages, of the traditional dissenting opinion, especially in terms of personal exposure and political involvement of justices. Do you think this might be a viable solution for our Court?

**DdP:** Yes, I think this is a possibility. Indeed, other courts, which initially did not provide for the traditional dissenting opinion, adopted this solution later on. For example, the German Constitutional Court started by anonymously reporting votes in favour and against, and then introduced the dis-

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<sup>9</sup> S. Cassese, *Dentro la Corte*. Diario di un giudice costituzionale, 2015.

senting opinion. Without a doubt, the dissenting opinion would partially change the nature of our Court. I have not yet made up my mind on this matter, but I am aware of the risks that expressing dissent might entail. Revealing arguments supporting the legitimacy of a different decision might compromise the authority of the judgment and confuse public opinion, which is generally not accustomed to soberly assessing the pros and cons of a certain decision. Furthermore, this might convey the image of a divided Court, diminishing the prestige of the institution. Above all, I see a possible risk for the collegial decision-making process of the Court, which I consider a value to preserve. In fact, the possibility of expressing dissenting opinions might make it more difficult for the Court to reach joint solutions. Currently, being aware that the dissent gets absorbed into the final decision, dissenting justices are to some extent encouraged to channel their dissent in a different way, for example by trying to influence the content of the judgment.

I consider this to be an asset. To be sure, from a justice's personal point of view, it is extremely relieving to be allowed to state: "No, I did not agree with that conclusion and I hereby explain why the outcome should have been different." There is no doubt that a direct knowledge of the debate and of the different positions inside the Court would help a mature and moderate public opinion to better understand the decision-making dynamics. Additionally, the introduction of the dissenting opinion might offer a visible stage to dissent-prone justices. In this respect, anonymous dissenting opinions might be an effective remedy.

### Voices from Outside ...

*VV: Reportedly, upon deciding a particularly controversial case, Hugo Black, a former US Supreme Court Justice, prevented his assistants from reading newspapers and from watching TV. Over the last years, our Constitutional Court has also been called upon to decide very controversial issues, such as euthanasia and in vitro fertilisation, which triggered very heated debates in the country. How does the Constitutional Court defend itself from the "voices from outside" and, in particular, from the influence of public opinion?*

**SC:** Why should the Court defend itself? I do not think this is necessary. "Voices from outside" are often interesting and important. I used to attentively read the press when we were discussing particularly controversial is-

sues. During my term as a justice, the Court had to deal with the *Englaro* case,<sup>10</sup> which concerned the life or death of a young woman in a vegetative coma. I read and learned a lot from newspapers and from Italian constitutional and administrative law scholars who engaged in public debates and published books ahead of the Court's judgment. Therefore, I do not think that Constitutional judges should defend themselves from these "voices".

A completely different story is how to respond to a more personal kind of pressure. During my nine years at the Court, I received only one phone call, from a university professor. I spoke to the then-President of the Constitutional Court telling him: "Somebody called me ... ." He answered: "This person called me as well." These are the cases where we should defend ourselves. However, in similar circumstances, I believe that a justice's personality is very important. If a person is known for her/his integrity, people are less likely to approach her/him. Unlike what one can find in the press, I believe that the Italian Constitutional Court is rather immune from the pressures of lobbyists, friends and acquaintances.

### ... and Voices from Inside

**GR:** *Conversely, how should the Court interact with the outside world and, in particular, with the press?*

**DdP:** I agree with what Professor *Cassese* has just said about the external influences on the Court. Not only do I consider these influences as harmless, but I am convinced that it is good that justices stay in touch with the real world, if only because this might help widen their knowledge and perspectives in a useful manner. Instead, there is an issue concerning the communication between the Court and the outside world, especially when it comes to informing the general public of the decisions taken. More generally, there is a problem of interaction with the media, which – I think – calls for improvement.

Judgments need to be appropriately presented and divulged. In other countries, public opinion is informed, kept up-to-date and is aware of the real impact of the issues submitted to supreme and constitutional courts. In this sense, relations with the press are crucial and have to be in line with our times. We live in an information society and I believe that our Constitutional Court should also be equipped so that it can effectively operate in this

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<sup>10</sup> Italian Constitutional Court, Order No. 334 of 2008, ECLI:IT:COST:2008:334.

context. In our case, there is still room for improvement, but we are conscious of the problem and we are working to properly address it.

## The Hard Impact of “Soft Talks”<sup>11</sup>

**GR:** *What role do personal relationships play and how do informal processes, “soft talks”, influence the decision-making process? Is there room for leadership?*

**DdP:** We have already mentioned that there are informal discussions among justices, as is always the case among colleagues. I commute from my hometown to Rome. When I can, I try to be at the Court also when there are no official meetings, during the so-called “white week”. And I find it useful, because meetings and talks are usually carried out in a more relaxed atmosphere and this allows participants to deepen the discussion with more freedom than in normal working weeks. Personal affinities also play an important role, as it is always the case when it comes to teamwork. As far as leadership is concerned, it is clear that within every group there are people who are particularly persuasive due to their prestige, their empathy and their ability to lead. These dynamics take place inside the Court as well.

**SC:** I agree, personal relationships do indeed play a role. However, as far as leadership is concerned, I am cautious. This topic should be addressed from a broader perspective. In Italy, external observers of the Court’s work focus only on single decisions and do not realise that, for the “insiders”, it is the case flow that really matters. The real challenge for a good justice is to dissimulate the exercise of leadership and, if possible, to abstain from exercising it at all. The Court is indeed a place for pondering, and when voting, the opinion of every single justice has the same weight. When justices exercise strong leadership, or hold emphatic speeches during Council Chamber meetings, they will probably end up being in the minority. Indeed, these aptitudes often trigger the opposite reaction. Again, what really matters is the case flow and that these decisions are the fruit of consideration by fifteen (or twelve) justices who behave as if they all had the same intellectual capacity. As if ...

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<sup>11</sup> The reference is to the expression “The Hard Impact of Soft Law” by *Anne-Marie Slaughter*, in *A. M. Slaughter, A New World Order*, 2004, 178 et seq.

**VV:** *It seems to me that there is also an external dimension to these “soft talks”: I am thinking of networks of judges, mutual visits to the respective courts, the Yale Global Constitutionalism Seminar or the World Conference on Constitutional Justice of the Venice Commission. How does this global interaction affect national justices and their decisions? Can this be considered as a sort of “informal” cross-fertilisation?*

**SC:** Throughout my nine years at the Court, I took part in many meetings of judges and non-judges. Many colleagues used to invite me to such gatherings to discuss the role of courts. Sometimes, although less frequently, I also represented the Italian Constitutional Court at official meetings of foreign courts. These get-togethers are useful for two reasons: on the one hand, they have a significant impact on the general culture of justices, as they facilitate a better understanding of the reasoning criteria and canons of other courts; on the other hand, they enable justices to gain deeper insight into specific cases, which may be relevant in future decisions of their own courts.

In this respect, let me bring you an example. Once, I was looking into the preparatory material to the Italian Constitutional Court’s decision on abortion and I came across the US Supreme Court’s famous judgment in *Roe v. Wade*,<sup>12</sup> both in the original version and in the Italian translation. Therefore, one may infer that the US judgment perhaps influenced the decision of our Court.<sup>13</sup> Of course, it would be better if apart from reading judgments of foreign courts, justices could also discuss them with those who took part in the decisions.

## The Court and Comparative Law

**GR:** *In its more recent case law, the Italian Constitutional Court seems to increasingly, yet still timidly, engage with foreign law and with other constitutional courts’ decisions. For example, in its Judgment No. 10 of 2015, the Court strengthened its line of reasoning by referring to foreign law. What role does such a comparative approach currently play in the work of our Court?*

**SC:** If I were asked about the most important thing that occurred during my nine years at the Court, I would say it has been the acknowledgement of

<sup>12</sup> US Supreme Court, *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>13</sup> Italian Constitutional Court, Judgment No. 27 of 1975, ECLI:IT:COST:1975:27.

the relevance of foreign law, European Law and common constitutional traditions. Shortly after my appointment, I drafted a judgment recognising the principle of transparency in public administration as a principle belonging to the European constitutional heritage.<sup>14</sup> Recently, I happened to re-read this judgment while preparing a lecture to be held at the University of Naples and I felt very pleased with the decision.

Think also about the very troubled “twin decisions” of 2007,<sup>15</sup> which concerned the relationship between domestic law and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). To my mind, these decisions, together with the Court’s first preliminary references to the European Court of Justice (ECJ), initially on a direct question<sup>16</sup> and then on an incidental question,<sup>17</sup> represented crucial developments for the Court.<sup>18</sup> Throughout my nine years, we set out some basic principles, namely the opening of the Italian legal system to foreign law – similar to the model invoked by *Stephen Breyer* in “The Court and the World”<sup>19</sup> – and the relationship with both the European Court on Human Rights and the ECJ. But beware: I am not simply talking about how different legal systems relate to each other, but also about the Italian Constitutional Court’s evolving relationship with supranational courts, along with the consequences this entails. In this respect, a fundamental implication of these developments is the unavoidable containment of the Italian Constitutional Court. I therefore consider as a huge achievement the fact that the Court acknowledged the relevance of both addressing supranational courts and complying with their rulings. To my eyes, this has been a true turning point.

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<sup>14</sup> Italian Constitutional Court, Judgment No. 104 of 2006, ECLI:IT:COST:2006:104.

<sup>15</sup> Italian Constitutional Court, Judgments Nos. 348 and 349 of 2007, ECLI:IT:COST:2007:348 and 349.

<sup>16</sup> Italian Constitutional Court, Order No. 103 of 2008, ECLI:IT:COST:2008:103.

<sup>17</sup> Italian Constitutional Court, Order No. 207 of 2013, ECLI:IT:COST:2013:207.

<sup>18</sup> To date, three preliminary reference procedures have been initiated by the Italian Constitutional Court. Indeed, on 26.1.2017, the Court deposited a referral order by means of which it asked the ECJ to clarify the content and scope of its judgment in the *Taricco* case (ECJ, C-105/14, *Taricco and Others*, ECLI:EU:C:2015:555). In its order of reference, the Constitutional Court highlighted possible elements of collision between the ECJ’s judgment and certain Italian supreme constitutional values, especially the principle of legality in criminal matters as enshrined in Art. 25 of the Italian Constitution. Given the Constitutional Court’s request for application of the expedited preliminary ruling procedure, the answer of the ECJ is awaited soon (ECJ, C-42/17, *M.A.S. and M.B.*).

<sup>19</sup> *S. Breyer*, *The Court and the World. American Law and the New Global Realities*, 2015.

**DdP:** The most important step in this direction has already been taken. Now, however, we cannot just sit back and relax. Indeed, there are still grey zones and controversial issues in the case law of the Court. For instance, I have in mind the judgment adopted, before my appointment, on state immunity for Nazi-era war crimes and compensations for the victims,<sup>20</sup> which challenged a previous decision of the International Court of Justice. Professor *Cassese* is an absolute expert, a *Maestro*, in this field and there is little I can add to his remarks. I just want to point out that the legal world around us is ever-changing and constitutional judges have to navigate unfamiliar waters.

The phenomenon that scholars conventionally define as “judicial dialogue” may not appear as an uncontested mode of interaction among courts in a multilevel system. Indeed, this relationship is susceptible to different interpretations: some courts put the emphasis on exchange and cooperation, others on closures and independence. Needless to say, there are different ways of tackling such new challenges. However, I have to add that within the Court, I discovered a certain habit, if not a practice, of taking into consideration foreign case law. I also happened to bring some important foreign judgments to the attention of my colleagues when discussing issues that other courts had already addressed. I believe that there is a shared view as regards the relevance of foreign judgments and my feeling is that the Court pays close attention to its interaction with other legal systems.

## Whose Rights?

**VV:** *The Court upholds rights ... but whose rights? When rights entail costs, when there are budgetary constraints which have now been enshrined in the Constitution, don't you think that somebody's rights risk becoming the non-rights of someone else? Why has the Court paid so much attention to “acquired rights” and so little to their impact on younger generations? Can the narrative of “acquired rights” also be challenged from a legal viewpoint?*

**DdP:** This question concerns the core of political choices. When issues of this kind are brought before the Court, justices inevitably have to deal with their political dimension. In these cases, the Court has to confine itself to a strict judicial review, paying great attention to its case law. Precedents, in this sense, are not just a burden, but also a legitimising tool for the Court's

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<sup>20</sup> Italian Constitutional Court, Judgment No. 238 of 2014, ECLI:IT:COST:2014:238.



activity. However, when it comes to deciding issues involving rights, judges need to adopt a broader perspective. Indeed, budgetary constraints are not just a matter of balancing figures. Behind figures, there are political choices which affect the protection of rights and which involve costs. Apart from legal techniques, personal sensibilities play a meaningful role in these judgments. We know that there is a certain degree of subjectivity in every judicial decision and that this degree tends to increase together with the contentiousness of the issue under decision. Subjectivity means that one's personal understanding and views affect the decision-making process and, in this domain, it is clear that the justices' backgrounds and personal stories have a weight.

**SC:** The key issues here are the rights to be acquired and the acquired rights. The rights of the "others", of foreigners, belong to the former category. The Court has been making relevant steps forward in the last ten years. In this respect, we are more advanced than other countries. However, the case law of the Court has been quite contradictory. I carried out a study concerning the social rights of foreigners<sup>21</sup> and I re-read all the judgments taken by the Court in the last ten years. When studying and analysing them, I realised that we gave very different reasons for our decisions, founding them sometimes on Art. 14 of the ECHR, other times on Art. 2, 3 or 10 of the Italian Constitution. Therefore, it is not always easy to reconstruct the reasoning of the Court, but I would say that, all in all, we can be satisfied with the final outcome. We have been moving towards the kind of openness advocated by *Hannah Arendt*.

Unfortunately, "acquired rights" – this unpleasant expression of the legal vocabulary – always prevail in conservative courts and during my mandate the Court used to follow a rather conservative approach. For example, some fellow justices maintained that the salaries of judges (unlike those of other civil servants) could not be reduced since they are "acquired rights".

## Lessons Learned

**GR:** *How has your perception of the Court evolved during your mandate? How would you describe the "Court of today" and what are the perspectives of the "Court of tomorrow"?*

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<sup>21</sup> S. Cassese, I diritti sociali degli "altri", in: *Rivista del Diritto della Sicurezza Sociale* (2015), 677 et seq.

**SC:** I perceived the Court as a distant reality. I would have never imagined serving as a justice, but this experience taught me a lot. Given that I have never practiced as an attorney-at-law, it was at the Court that I realised how important it is to *argue*. *Arguing* is not exactly the same as the Italian word *argomentare*, which has a wider meaning, similar to reasoning or discussing. When it came to presenting or rebutting a thesis inside the Chamber, my colleagues, who were attorneys, were in better stead. In an academic context, this back and forth between arguments and counter-arguments is inspired by an ideal of truth and a correspondence to reality. Differently, inside the Court's Chamber, this exchange can be based on wider criteria, especially when it aims at persuading someone and gaining a majority.

As for the Court's future, the Court has gone through different cycles, which have been thoroughly studied. In its initial stage, the Court was very proactive; then it experienced a setback. I expect these developments to be cyclical and to continue in the future. Hence, there will be phases where the Court will be more deferential and phases where it will be more resolute. At the beginning of my mandate, the Court was really hesitant; when I left it, the Court was much braver. As evidence of this, one might take into account the significantly decreased number of inadmissibility decisions between 2005 and 2014.

**DdP:** My appointment to the Court was also rather unexpected. I was not familiar with its working methods. What really impressed me from the very beginning was the quality and openness of the discussions inside the Council Chamber. I feared finding an overly conservative and formal environment, and I was therefore delighted to see deliberations taking place in an informal manner and with great focus on the substance of the cases. The Court is a serious institution, where decisions are taken only after a thorough investigation and a genuine, constructive debate. From an internal perspective, the outcomes are good and often very good. In addition, the Court does not fear innovation and, in an ever-changing world, this is a necessary condition for the persistence of an institution. Ultimately, the future of the Court will depend on its decisions. Indeed, the Court gains its legitimacy mainly from the quality of its judgments and from its ability to reconcile authority with sensitivity, rigour with balance, continuity with modernisation.

