Europe today: Bridges and walls

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Europe is going through a time of crisis. Indeed, three major difficulties have beset Europe: public debt, migrants, terrorism. The impact of the crisis has unleashed a number of centrifugal forces: distrust is creeping in among the member states; some of them openly question the values promoted by the European project. To be sure, Europe has always lived on crises. The Union was born out of the ruins of World War II and its history is one of stops and goes. A historical perspective shows that every crisis is an undecided conjuncture: it can prepare a deadlock or lead to a new beginning. Lessons from history show that Europe has been able to recover from difficult times when it has managed to be faithful to its origin. Europe is the offspring of a culture of integration, dialogue and generativity. What enabled our peoples to overcome the crises of the past was a capacity to integrate, a capacity of dialogue, a capacity of generativity. Today, some good examples of this constructive reaction to the crisis may be seen in the records of the judicial relations among some of the courts in Europe: living seeds of the original spirit of Europe not to be neglected and to be further cultivated by other branches of government.

L'Europa è dunque in un turbine di problemi e di tensioni—al suo interno e nell'impatto con l'esterno—di sfide e di interrogativi . . .
(Giorgio Napolitano [1])

1. Europe 2.0: Times of crisis

Problems, tensions, challenges, questions: even in the words of an outstanding ever-committed pro-European political actor like Giorgio Napolitano, Europe and crisis are undeniably perceived as joined at the hip.

This perception has permeated current public opinion and is gaining ground in political discourse.

Also in legal scholarship in the last eight to ten years, "crisis" is a topos of European studies, and rightly so. As Yves Mény has pointed out: "Une simple recherche

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[1] G. Napolitano, Europa, politica e passione 23 (2016).

bibliographique montre à quel point déplus une dizaine d'années l'UE est largement associée à l'idée de crise."[2]

Public debt, migrants, terrorism: indeed, Europe has been hit by three major difficulties in the past few years. First and foremost, the enduring financial crisis and economic recession started in 2008, the symbol of which is the situation in Greece; second, the migration emergency exploded in summer 2015 when the atrocities in the Middle East countries prompted hundreds of thousands of refugees to rush toward the old continent; third, the revival of terrorist attacks in a number of European cities, starting with Paris—Charlie Hebdo, Le Bataclan—going on with Bruxelles, Berlin, Nice, Munich, London, Manchester, and Barcelona, just to mention some of them.

Suddenly, three relevant frontlines appear out of control in the European fortress: economy, immigration, and security. There are troubles enough to put the European Union in shock.

In turn, this multifaceted crisis has prompted a secondary line of crises affecting the institutional and constitutional structure of the European Union. The impact of the crisis has unleashed a number of centrifugal forces that are straining the EU. It has brought to light deep cleavages between the north and south of the Eurozone—the creditors versus the debtors; the migration crisis has revealed a creeping distrust among the member states: walls were built, Schengen suspended, the member states blame one another, as well as the Dublin regulation; moreover the EU and the states were not able to reply in concert to the terrorist attacks and in many a country emergency legislation was approved.

Generally speaking, under the pressure of the crisis the EU is loosening the ties that brought together six and then nine and then twelve, fifteen, up to twenty-eight national states. It is experiencing a revival of intergovernmental methods to the detriment of supranational institutions.[3] Euro-skeptical political forces and nationalist parties are contaminating public opinion throughout the continent.

And then, here came Brexit.

The image of a "Europe of bits and pieces"—as Deidre Curtin[4] said many years ago—sounds more appropriate than ever. And some pieces are being left behind, while others are leaving.

Today, a European crisis is as undeniable as its perception. This is something that some political actors are exploiting to gain political consent, provoking the paradox that the radical left and right now share the same anti-Europe feelings, though for different, even opposite, reasons: some political leaders consider that Europe is too involved in economic, market, and fiscal matters regardless of social problems; some others, on the contrary, think that market and fiscal issues should be further developed and implemented.[5]

[2] Y. Mény, *La crisi politica*, Rivista trimestrale di diritto pubblico, 2016, at 622, quoting D. Chabanet et al., *Le thème de la crise ou des chrysantèmes pour l'Europe*, 4 No. 50 Politique europeenne (Faut-il continuer à étudier l'Union Européenne?) (2015), 100–119.

[3] S. Fabbrini, *La crisi dell'Euro e le sue conseguenze*, Rivista trimestrale di diritto pubblico, 2016, at 651–668.

[4] D. Curtin, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, 1 Common Mkt. L. Rev. 17 (1993).

[5] *Cf.* M. Ferrera, Rotta di collisione 6 et seq. (2016).

According to public opinion, the desire of Europe has been quickly declining, thus revealing that a veritable European culture has yet to plant deep roots in social life.

2. Crisis as a key factor in Europe constitution

Yet, crisis is at the very core of the origin itself, not only of Europe but also of the idea of Europe. Europe as we know it today arises from the ruins of a continent that World War II had wasted. It is worth recalling once again that it was the urge of reconstruction, the demand of peace and prosperity after the war that prompted European construction, starting in 1951 with the limited but strategic European coal and steel community.

Later, a number of other crisis marked new steps and stages in the process of the European integration: since the 1950s, the process of integration was spotted by crises, starting with the failure of the European Defense Community; in the 1960s, with the crisis of the "empty chair" and the Luxembourg compromise, mainly due to the French reaction to the common agricultural policy; in the 1970s, the European Parliament's rejection of the budget of the European communities; and later the national constitutional reactions to the Maastricht Treaty by a number of member states—France and Denmark *in primis*—concerned about European citizenship and the first moves of the economic and monetary union; then there was the rejection of the Constitutional Treaty by the shocking results of the referendums in France and in the Netherlands. Now it is the turn of economy, immigration, and security. And of Brexit, indeed.

According to the vivid and eloquent words recently recalled by Sabino Cassese "Europe lives on crisis" (l'Europa vive di crisi),[6] crises are part and parcel of European history. Indeed, crises hurt. However, in Europe, crises have also been a major trigger of change and this is one of the most important features of the European character, if any.

The history of European integration is one of stops and gos. It is driven by a clear and noble ideal—bringing peace and therefore prosperity to the continent—and it is slowed down and redirected by all kinds of difficult junctures. Redirected, but so far never stopped thanks to a resilient, flexible attitude of the leaders, tirelessly adjusting and accommodating the project to the constraints of reality.

Luisa Torchia rightly said that Europe is an *ideal without a model.*[7] The ideal is a European polity set free from war; the institutional model is indefinite, she says. Right: because the model is always in progress.

[6] This is a quotation from one of H. Schmidt's speeches from Bundestagsreden und Zeitdokumente 249 (1975), *in* Discorsi per l'Europa 246 (B. Olivi ed., 1987) (in Italian) and S. Cassese, *L'Europa vive di crisi*, Rivista trimestrale di diritto pubblico, 2016, at 779.

[7] L. Torchia, *In crisi per sempre? L'Europa fra ideali e realtà*, Rivista trimestrale di diritto pubblico, 2016, at 617.

3. Lessons from the past: Crises as opportunities; Crises as verdicts

More than 70 years of European history teach that crises are undecided conjunctures. The outcome is unpredictable.

From a linguistic point of view, the word "crisis" comprises a number of synonyms that are attracted by two opposite poles and can be grouped in two different clusters. One carries a very negative meaning, such as big trouble, catastrophe, deadlock, disaster, impasse, trauma; the other conveys the idea of discernment, judgment, the ability to make fine distinctions, the turning point of a disease, a possible change for better or for worse; as such, it implies the chance for a move, change, development. Whether the output is positive progress or decline remains unpredictable.

So a crisis may be the herald of a new beginning as well as the usher of hard times.

Then the open, crucial question is: what helps to convert a crisis into a new beginning? What helps to make a new beginning out of a crisis?

Hannah Arendt offers a methodological key: "A crisis forces us back to the questions themselves and requires from us either new or old answers, but in any case, direct judgments. A crisis becomes a disaster only when we respond to it with preformed judgments, that is, with prejudices. Such an attitude not only sharpens the crisis but makes us forfeit the experience of reality and the opportunity for reflection it provides."[8]

A direct, unbiased, fresh, creative understanding of reality as it is can make the difference in times of crisis. A crisis requires leaving behind prejudices, old projects, formats, and schemas.

Crises may be opportunities rather than verdicts. But a positive outcome cannot be taken for granted.

Let's pause for a moment to hear the precious words of another great figure and supporter of the European project. The very first visit by President Giorgio Napolitano after his election was to Altiero Spinelli's grave. In his speech on that occasion Napolitano said: "[Quella di Spinelli] resta una grande lezione di metodo: non chiudere le proprie analisi in alcuno schema, confrontarsi creativamente con la realtà nella sua evoluzione, ispirarsi tenacemente a idealità non passeggere come quelle dell'unità e del comune destino dell'Europa, saper risollevarsi da ogni sconfitta."[9]

Forget old projects, plans and strategies, or preformed outlines: crisis requires fresh, open, dynamic, and creative thinking suitable to changing conditions.

Different words, different context, different personalities: both of them call for a fresh, genuine, unbiased understanding of reality as it is, as it evolves. From the methodological point of view, the first urge is to loyally listen to the request that emerges from social life and come to terms with the ever-changing historical context. In a word: reality first.[10]

[8] H. Arendt, Between Past and Future: Six Exercises in Political Thought 174 (1961).

[9] Intervento del Presidente della Repubblica Giorgio Napolitano alla manifestazione per il ventesimo anniversario della scomparsa di Altiero Spinelli, Ventotene, 21 maggio 2006, http://presidenti.quirinale.it/elementi/Continua.aspx?tipo=Discorso&key=734 (last accessed date September 11, 2018).

[10] *Cf.* "Realities are greater than ideas." Pope Francis, *Evangelii Gaudium*, 233.

4. Reality first: Pluralism and dynamism

If it is true that in time of crisis additional realism is required, one should start once again from history and consider what European construction looks like today. Lessons from history aimed not to repeat old patterns but to recover the original spirit and unleash vision and courage.

From the constitutional point of view, the EU—and before it, the European communities—has always been an original construction, difficult to define and classify. The idea of a "supranational organization" was meant to stress the original model of European integration, something between an international system and a state. "Europe has charted its own brand of constitutional federalism," as Joseph Weiler[11] said years ago when he considered Europe's *Sonderweg*.

However indefinable and original, EU construction has had some distinguished features, since the beginning. A couple of them can for sure be singled out.

The first characteristic is pluralism and complexity—*united in diversity*.

The second is its incremental evolution—*an ever closer union*.

First, if there is a feature that can undeniably describe European construction as it was at its origins and as it still is, it is pluralism and complexity.

As we all know, so far the EU comprises twenty-eight members, twenty-four languages, and an estimated population of more than 500 million people—which would set the EU in third place after China and India—whereas at its foundation in 1957 by the *Inner Six,* the European communities had a population of fewer than 170 million people. As to the size of the member states, their populations range from more than 80 million in Germany to fewer than 500 thousand in Malta.

United in diversity is the official motto of the EU which has been drawn by the Latin version—*In varietate unitas!*—coined for himself by Ernesto Teodoro Moneta, the Italian Nobel Peace Prize Laureate in 1907 for his commitment to propagandize for disarmament, a league of nations, and settlement of international disputes by arbitration. This motto contrasts, in a way, the phrase *E pluribus unum*, which can be read on the Great Seal of the United States of America. The first suggesting an unresolved complexity, better: a complexity meant to remain unresolved; the second suggesting a centripetal move: from a number of colonies to the federation.

Second, the European project has always been meant to be a process, a journey, an ongoing incremental path—indeed: "an ever closer union among the peoples of Europe," as the preamble of the Treaty on the European Union reads. The European project has had a dynamic dimension since its origin. It suffices here to recall the ID card of the project itself as worded by Robert Schuman in the Declaration of 1950: "Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto* solidarity."

On his side, the historian Paolo Prodi, in his research about modernity in Europe, states the importance of the processes that made Europe the first laboratory of modernity. "Modernity" implies the idea of movement based on the Latin origin of the word

[11] J.H.H. Weiler, *Federalism Without Constitutionalism: Europe's Sonderweg*, *in* The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union (K. Nicolaidis & R. Howse eds., 2001).

modus-modo-modernus. At the height of the Renaissance humanism, a new idea of history as movement, rises.[12] Thus, Europe, modernity, and movement go hand in hand, are intertwined ideas.

Let's give credit where credit is due: in the legal domain, it is the merit of the group of legal scholars who elaborated the doctrine of constitutional pluralism that was able to highlight the dynamic features of the European experience in order to suggest them as descriptive and normative tools for a proper understanding of the EU in its legal and constitutional dimensions.[13]

They move from the simple fact that a multiple variety of actors, powers, and institutions coexist in the European space, with no unique, final, supreme power. They consider that member states and the union are "interactive systems" and the relations between them are pluralistic rather than monistic, interactive rather than hierarchical. In particular, they focus on the role of the courts and refuse the idea of the "final arbiter in Europe," stressing the need for smooth relationships between national courts—especially national constitutional courts—and the Court of Justice of the European Union, calling for mutual respect, cooperation, and balance as opposed to hierarchy, dominance, and subordination.

As has been said in the European Union, "forget Kelsen and all the pyramidal frameworks."[14]

The first result of the contribution of constitutional pluralism is to question the myth of the final authority. It puts forward a new map design of the authorities—courts in particular—in the EU and beyond. It is a design that reminds us more of Pollock's paintings than Mondrian's.[15]

[12] P. Prodi, Homo Europaeus 15 (2015).

[13] Besides the seminal book by N. MacCormick, Questioning Sovereignty: Law, State, and Nation in the European Commonwealth (1999), the idea of constitutional pluralism was widely debated. See at least the following works on constitutional pluralism and the European constitutional mosaic: M. Kumm, *Who Is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice*, 36(2) Common Mkt. L. Rev. 351 (1999); M. P. Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, *in* Sovereignty in Transition 502 (N. Walker ed., 2003); N. Walker, *The Idea of Constitutional Pluralism*, 65 Mod. L. Rev. 317 (2002); A. von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law*, 6(3–4) Int'l J. Const. L. 397 (2008). More recently, *see* The Many Constitutions of Europe (K. Tuori & S. Sankari eds., 2010); A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood (A. Arnull, C. Barnard, & E. Spaventa eds., 2011); Europe's Constitutional Mosaic (N. Walker, J. Shaw, & S. Tierney eds., 2011).

[14] F. Tulkens, Asylum and Migration Today: An Indispensable Reflection on the Notion of Border, Keynote speech presented at ICON•S Conference, Borders, Otherness and Public Law, Humboldt University, Berlin, June 17–19, 2016, https://youtu.be/ifxyACZ7Mk0?list=PLljW4VOt-et-Qc1RnHMje6YBtu_1bSOs8V. (last accessed date September 11, 2018).

[15] The comparison between the different figurations of the two painters and the representation of global law rose in a conversation between Sabino Cassese and myself at the workshop How Judges Think in a Globalized World? European and American Perspectives (European University Institute, December 14, 2013, http://globalgovernanceprogramme.eui.eu/news-events/high-level-policy-seminars/how-judges-think-in-a-globalised-world-european-and-american-perspectives (last accessed date September 11, 2018)).

The lack of order and geometrical construction may be something of a nightmare to the rational tidy-minded continental legal scholars. Still, however complicated it might be, this arrangement is nevertheless productive.

The second result of constitutional pluralism is a stress on dynamics rather than on statics. It requires a discursive practice among all the actors involved, whose common basis is to be ensured by a set of common principles.

The institutional dimension of legal pluralism is a flexible differentiated integration[16], that is already an experience in place in many areas, starting with the Eurozone and Schengen, just to mention two major examples.

Thus, constitutional pluralism is not a theory of disorder; rather, it is a discursive theory heading toward harmony, unity, and coherence without requiring uniformity, without relying on a final authoritative decision, without single top-down impositions.

5. On "walls and bridges"

Not only does constitutional pluralism acknowledge that the EU is a composite and ever complex entity—which is undeniable—but also it insists on the interactions among all the units, rather than on their location. It is more concerned about connections, movements, fluxes, and interplays than allocation of spaces and assignment of ranks. It is more historical than geographical. It focuses more on processes than on spaces. It is more generative than preservative.

This understanding of the institutional relations within the EU applies to all the actors, even to courts—even if they tend to be less dialogical than political institutions, especially if they are final. I will focus on the role of courts; but similar remarks could be repeated for all the other institutions.

As a matter of fact, courts in Europe are currently confronted with a number of baffling problems due to discrepancies, if not veritable clashes, between national legal and constitutional principles and their European version. This is somehow inevitable given the open texture of the constitutional principles that can give rise to conflicting constitutional interpretations. Consider the number of constitutional controversies concerning the European Arrest Warrant, showing different sensibilities, different standards, and different balancing of competing principles. Indeed, criminal law and criminal procedure are now at the forefront of the tensions between the national and the supranational constitutional principles. The *Melloni* case[17] is probably the most popular and telling one.

[16] On this point see the rich paper by A. De Feo, *Relaunching the European Project: Reforms without Changing the Treaties*, Jean Monnet Working Paper 16/17, https://jeanmonnetprogram.org/wp-content/uploads/JMWP-16-Alfredo-De-Feo.pdf (last accessed date September 11, 2018),

[17] The Judgment of the Grand Chamber of the Court was issued on February 26, 2013. The final decision of the Tribunal Constitucional, Madrid, was rendered on February 13, 2014, STC 26/2014. For a critical analysis of the case, *see* A. T. Pérez, Melloni *in Three Acts: From Dialogue to Monologue*, 10(2) Eur. Const. L. Rev. 208 (2014). Following this case, the Italian legislation has been modified by Law No. 67 of April 28, 2014.

Other examples came to light a long time ago, since the Maastricht Treaty, with a number of national constitutional courts being asked to decide about the conformity to the national constitution of the European citizenship and the incipient economic and monetary union. The same thing occurred with the Constitutional treaty and the Lisbon treaty. More recently, a number of pronouncements were issued in relation to the European Stability Mechanism (ESM)[18] and other measures taken to tame the sovereign debt crisis.

National courts have different reactions in light of these tensions. They can take opposite stances: they can play a defensive or a cooperative role; they can be conflictual or dialogical; inclusive or exclusive.

As much as the positions may be nuanced, they can be boiled down to two basic attitudes: some of them show a defensive stance[19]; others engage in mutual interactions.

They are always in front of alternative choices: exit or voice—to recall the famous dichotomy by A. Hirschman—or, if you want, walls or bridges, as I will repeat in a minute.

Indeed, the main instrument for the reciprocal interaction is still the preliminary ruling ex article 267 of the TFEU (Treaty on the Functioning of the European Union).

Among many constructive examples, I would like here to briefly recall some recent cases where a dialogical and fruitful attitude can be recognized.

The first one is the *Gauweiler* case, where the German *Bundesferfassungsgericht* referred a preliminary ruling—the first ever in the history of the German membership in the European Union—concerning the OTM (outright monetary transactions) program, aimed at the purchase of government bonds of member states of the Eurozone on the secondary market by the European systems of Central Banks. The final decision of the BVG, rendered on June 21, 2016,[20] followed the decision of the Court of Justice of the European Union[21] and yet under condition and not without spelling out a number of objections.

In fact, on the one hand, the German Constitutional Court held that the national constitution is not violated provided the conditions formulated by the Court of Justice and intended to limit the scope of the OTM program are met. The Court warns the German government and the Bundestag to closely monitor any implementation of the OTM program, in order to make sure that the European authorities do not act *ultra vires* (or in violation of the identity clause), i.e., the European Central Bank neither manifestly exceeds its mandate nor encroaches upon economic policy. On the other hand, the German Court does not refrain from highlighting a number of objections to the legal reasoning supporting the decision of the Court of Justice of the European

[18] The most relevant case in this context is the *Pringle* case: Court of Justice of the European Union, Full Court, Judgment of November 27, 2012, C-370/12—Thomas Pringle v. Government of Ireland.

[19] *See* Polish and Czech cases discussed by O. Pollicino, *Qualcosa è cambiato? La recente giurisprudenza delle Corti costituzionali dell'est vis à vis il processo di integrazione europea*, Il Diritto dell'Unione europea, 2012, at 765.

[20] BVG June 21, 2016—2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13.

[21] Court of Justice of the European Union, Grand Chamber, Judgment of June 16, 2015, C-62/14—Peter Gauweiler and Others v. Deutscher Bundestag.

Union. These objections concerned the way the facts were established, the way the principle of conferral was discussed, and the way the judicial review of acts of the European Central Bank that relate to the definition of its mandate was conducted.

Nevertheless, everything considered, *Gauweiler* was a remarkable and constructive example of judicial cooperation, concerning a very sensitive and crucial issue which is at the core of the present European agenda. It was the practical implementation of the idea of *Verfassungsgerichtsverbund*, elaborated years ago by Andreas Vosskchule, the current chief justice of the BVG.

Indeed, it was an example of successful judicial dialogue, although—as has been noted[22]—surely not a gentlemen's conversation.

Less popular, and yet very relevant, the Italian saga regarding the fixed-term teachers concluded with the decision of June 15, 2016,[23] which inter alia had the merit of paving the way to the more popular *Taricco* case.

The first controversy was about the conformity of the Italian system of recruitment of teachers in public schools with the European legislation concerning fixed-term work. The case was momentous, considering that it concerned some 100,000 teachers and staff. The Italian Constitutional Court referred a preliminary ruling to the Court of Justice in the context of an incidental procedure—and unprecedented case[24]—for the interpretation of the relevant European regulation. It is worth remarking that a similar case was already pending in front of the European court but nevertheless the Constitutional Court decided to add its own voice to the judicial conversation under way.

While the case was pending in front of the European court, the Italian government radically reformed the recruitment system, fixing the most relevant inconsistencies with the European requirements.

Indeed, the European court concluded[25] that the previous legislation was in breach of the European directive, and so did the Italian Constitutional Court[26] in the wake of the European court's decision. However, considering the amendment approved in the meanwhile, a significant number of teachers received a tenured position and many others are expected to get one soon, thanks to the competitive procedures scheduled by the new legislation.

Harmony was restored; a number of workers were given a tenured position; some inefficiencies of the system were fixed and some amount of public money was saved.

Thanks to this positive experience, the Italian Constitutional Court decided to go down the same road again when a veritable constitutional war about deflagrating arose a few years later. To make a long story short, the conflict was originated by the *Taricco* decision of 2015,[27] where the Court of Justice of the European Union interpreted a

[22] P. Faraguna, *La sentenza del* Bundesferfassungsgericht *sul caso* OMT/Gauweiler, Diritti comparati, 1/2016, at 10.

[23] Decision No. 187 of 2016,

[24] Apart from a previous minor case in a direct procedure, Judgment No. 103 of 2008.

[25] Court of Justice of the European Union, third chamber, Judgment of November 26, 2014, C-22/13, C-61/13 to C-63/13 and C-418/13, Mascolo and others.

[26] Italian Constitutional Court, Decision No. 187 of 2016.

[27] Court of Justice of the European Union, Grand Chamber, Judgment of September 8, 2015, C-105/14, Taricco and others.

provision of the Treaty (at 325 TFEU) as requiring that national judges disregard any national legislation that would prevent full compliance with the European principles on financial frauds. The treaty imposes on member states the duty to implement effective and deterrent sanctions in order to counter frauds that affect the financial interests of the EU. Therefore, in the Court of Justice's conclusion, if the national judges consider that the Italian legislation on statute limitation is too mild to comply with the European provisions, they are requested to disapply it so that those responsible for VAT (value-added tax) frauds can be condemned.

In a way, the *Taricco* decision simply repeated the *Simmenthal* doctrine, which has been accepted since 1978. Nonetheless, *Taricco* was the first decision where such broad discretion was explicitly required from national ordinary courts in *criminal* matters. In some countries, statute of limitation provisions are part of the substantial punishing legislation and are ruled by the same constitutional guarantees, first of all the principle of strict legality. Giving the judiciary such broad power in criminal matters is considered unacceptable from the constitutional point of view: the *Taricco* decision had hit to the heart of the national constitutional principles in criminal matters, and the case for triggering the *counterlimits* doctrine was loudly made by the academy and the judiciary alike. No other judicial decision has attracted so much attention in recent years in Italy.

Nonetheless, the Italian Constitutional Court decided otherwise and sent a second preliminary ruling to the Court of Justice (ord. no. 24 of 2017), asking for a new consideration of article 325 of the Treaty on the Functioning of the European Union as construed in the previous *Taricco* decision. It is interesting to note that in the preliminary ruling the Constitutional Court insisted on the fact that the principle of legality in criminal matters and the related principle of legal certainty are not only part and parcel of the national constitutional identity of Italy (article 4.2 Treaty on the European Union) but also of the constitutional traditions common to the member states (article 6 Treaty on the European Union) and are protected as well by the Charter of Fundamental Rights of the EU at article 49. So, the request to reconsider the previous interpretation was not only grounded in the national constitution as opposed to European law but also in the law of the EU itself, at the very highest level.

In the preliminary ruling the Italian Constitutional Court spoke with a double voice: on the one hand, the Court followed the classical speech pattern of the *counterlimits* doctrine, with all its conflictual tonality; on the other hand, the overriding tone was dominated by a more cooperative and constructive approach. The key to this successful judicial cooperation is to be found in those parts of the preliminary ruling where the Italian Court gave evidence to the fact that the national constitutional requirements at stake are not foreign or opposed to the European ones, but—on the contrary—are part of the very same constitutional discourse.

To the wonder of many commentators, the Court of Justice found a way to accommodate[28] the competing legal principles and the constitutional conflict was avoided.[29]

[28] Court of Justice of the European Union, Grand Chamber, Judgment of December 3, 2017, C-42/17, M.A.S. and M.B.

[29] Italian Constitutional Court, Decision No. 115 of 2018.

Taricco is another successful story to be celebrated. Indeed, the Italian style was different from the German one. The former showing more of a resilient disposition while the latter more of an assertive spirit—both, however, taking a constructive step at a critical juncture.

6. Concluding remarks: Integration, dialogue, and generativity

Speaking of judicial dialogue may sound like an inappropriate and meager reply to the epochal crisis that the EU is suffering. Indeed, each component of the crisis requires specific answers: many voices call for more political cohesion in the EU on migration, security, external action, fiscal policy, and many other fronts. Indeed, the crisis summons political leaders to take a bold step forward. Indeed some "essential reforms" in governance, policy and vision are urgently needed.[30]

The value of recalling the aforementioned examples of judicial dialogue is methodological in nature. Confronted with puzzling and critical tensions, the two courts engaged in a dialogue with their counterparts, rather than locking the door to secure the national tradition. In both cases, dialogue, although different in style, was very fruitful. It liberated a generative energy.

"Re-generating Europe"—as Hartman and de Witte[31] said, and a whole generation of young scholars echoed in a collective reflection in the *German Law Journal*, a few years ago—is the great possibility that this crisis opens up.

Everybody, every institution, every professional is at the forefront of the crisis. As such, everyone stands at a crossway. Every step is either a dividing move—building walls—or a connecting step—walking on bridges.

In the address delivered for the conferral of the Charlemagne Prize on May 6, 2016, Pope Francis, who was recognized as an outstanding figure by all the leaders of the EU for his "exceptional work performed in the service of European unity," warned that "Europe is tending to become increasingly 'entrenched,' rather than open to initiating new social processes," whereas "Europe, rather than protecting spaces, is called to be a mother who generates processes."

Starting new processes instead of protecting spaces; building bridges instead of walls.

Looking back to the origin of the EU, Pope Francis urges the European leaders to "re-appropriate those experiences that enabled our peoples to surmount the crisis of the past." From those experiences, he articulates three lines of development, that are worth recalling as a conclusion of the present remarks.

The first line is the "capacity of integrate" in new synthesis the most varied and discrete cultures, according to the original "identity of Europe", which "is, and always has been, a dynamic and multicultural identity."[32]

[30] I refer to the insightful analysis by A. De Feo, *supra note* 16.

[31] M. Hartman & F. de Witte, *Regeneration Europe: Towards Another Europe*, 14(5) German L.J. 441 et seq. (2013).

[32] This sounds close to what Ferrera says in his book, *Rotta di collisione*, Euro contro Welfare?, Bari-Roma, 2016, XII et seq.: "*Sistemare e riconciliare*: queste le priorità per far sì che l'unione di parti (gli Stati membri) continui a essere più di una mera somma aritmetica e torni a produrre benefici diffusi ed equamente distribuiti per tutti i cittadini."

The second one is the "capacity of dialogue"—this is a veritable emergency, because from the culture of dialogue and encounter emerges the possibility of rebuilding the fabric of society and the possibility of peace.

The third is the "capacity to generate," since "no one can remain a mere onlooker or bystander. Everyone, from the smallest to the greatest, has an active role to play in the creation of an integrated and reconciled society."

This culture of integration, dialogue, and generativity can shed a new light on this Europe in crisis. Some constructive examples are already in the records, in the judicial sphere. Indeed, this culture does not provide on its own a solution to the multifaceted crisis of the EU; nor does it deliver a set of practical proposals for the necessary reforms to come. Yet, it is an essential asset that the European history offers to leaders, public intellectuals, academics, lawyers, judges, politicians and all other European actors to take the most fruitful stance in front of this unprecedented crisis. A timeless and evergreen lesson from European history.