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## Editorial

### Editorial: COVID-19 and I•CON; Guest Editorial: Courts' relations; Once upon a time in Catalonia ...; In this issue

#### COVID-19 and I•CON

We are pulled in opposite directions in the face of a global upending of normal life. At one level it is reassuring, even if hunkered down at home, as is our editorial team in three different countries, to continue serenely with our normal work in the face of such abnormal times. The life of the mind, the scholarly endeavor continuing—even when juggled with caring responsibilities—not least as an act of faith in better times to come. Unlike war—a metaphor that is widely used and abused—we are not faced by the actions of evil men and women against whom one should rise in indignant protest. Yes, incompetence and irresponsibility might have played a role, but one should not rush to throw the first stone. With time such issues can be and will be sorted out.

And yet, in the face of spreading death and imploding economic circumstances on a truly global scale, to continue as if nothing is happening would be unacceptable and would border on the callous. That grave consideration apart, there are obvious issues of public law for which I•CON should be a forum for serious reflection. Do we wait till the dust settles, the crisis is overcome and then turn with distance and perspective to serious and rigorous reflection and analysis? In some respects, one does not have that luxury—there are issues happening in real time that will not wait for that perspectival reflection and on which we are all looking for ongoing insight and understanding.

It is our fortune at I•CON that we do not have to face that choice. I•CONnect, our sister blog and website, has never been a locus of gossip or “from the hip” commentary. It is a forum, as is proven week in and week out, for brief but incisive legal commentary, oftentimes of the indispensable doctrinal genre (legal or illegal) in which immediate reactions to the COVID-19 crisis have already appeared and will continue to appear. The deeper reflection, conceptual and theoretical, doctrinal and otherwise, will appear organically in I•CON as time passes and the community of scholars engage with this perspectival dimension to our work.

I•CON is a community—of readers and authors. We continue to connect with and support one another as part of that scholarly community through these difficult times. Remember our collective and individual resilience, and know that we will eventually emerge on the other side. In the meantime, Keep Safe!

We would like to end by publishing here, with the permission of the poetess, Lynn Ungar (<http://www.lynnungar.com/>) her evocative poem *Pandemic*. It speaks for itself.

## *Pandemic*

Lynn Unger

What if you thought of it  
as the Jews consider the Sabbath—  
the most sacred of times?  
Cease from travel.  
Cease from buying and selling.  
Give up, just for now,  
on trying to make the world  
different than it is.  
Sing. Pray. Touch only those  
to whom you commit your life.  
Center down.

And when your body has become still,  
reach out with your heart.  
Know that we are connected  
in ways that are terrifying and beautiful.  
(You could hardly deny it now.)  
Know that our lives  
are in one another's hands.  
(Surely, that has come clear.)  
Do not reach out your hands.  
Reach out your heart.  
Reach out your words.  
Reach out all the tendrils  
of compassion that move, invisibly,  
where we cannot touch.

Promise this world your love—  
for better or for worse,  
in sickness and in health,  
so long as we all shall live.

*GdeB and JHHW*

We invited Marta Cartabia, member of I•CON's Advisory Board and President of the Italian Constitutional Court, to write a Guest Editorial.

## Courts' relations

In her seminal book *Law's Relations*, which deserves attention for many reasons, Jennifer Nedelsky advocates for the push to give prominence to *relations* in legal and political talks. The first lines read: "Relationships are central to people's lives [...] but they are not treated as constitutive." She considers and discusses the liberal theories of rights and calls for "a shift in emphasis that moves relationship from the periphery to the center of legal and political thought and practice."<sup>1</sup>

In a similar way, if on a different plane, relations are central in institutional organizations,<sup>2</sup> and they are similarly neglected. They are a variable that affects the overall position and authority of each institution in the constitutional architecture. Take, for example, the chief of the executive branch: his effective capacity to lead and influence the political direction of a country depends, inter alia, on his relations with the other branches of government. After all, it is the nature and quality of the relationships between the institutional actors that characterize a regime. But despite all this, institutional relations are hardly ever referred to in legal theory.

Constitutional courts<sup>3</sup> are not an exception. To paraphrase Nedelsky's statement, relations are fundamental to a court's office, but they are not treated as constitutive. Constitutional Courts speak and interact with a number of different audiences: other courts, legislatures, legal scholarship, civil society. As a scholar and a practitioner of constitutional law, I have come to consider *institutional relations* a central tenet of constitutional courts' self-understanding and a key element of their *authority*.

In ancient Rome, *auctoritas* was distinct from *potestas*, and generally referred to the role of the Senate, whose force depended on its level of prestige, influence, and clout. The Senate's words were less than a command and more than advice: they amounted to advice that could not be ignored. *Potestas in populo, auctoritas in senatu* (Cicero).

Like any other institution, a court's authority is not defined only by the powers it is entitled to exercise. Its strength also depends on other elements: courts that belong to the same family and that look similar in terms of composition and powers may, in fact, play different roles, perform their functions in different ways, and reach different

<sup>1</sup> JENNIFER NEDELSKY, *LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW* 4 (2011). The book revisits all the central ideas of constitutional liberal theories, and the key terms of her analysis are "relational self," "relational autonomy," and "relational approach to law and rights." Her theory can be ascribed, in a way, to the critics of liberalism and liberal understanding of individual rights, claiming that the current narrative shades "the full dimension of the self—particular, embodied, affective and relational." *Id.* at 186.

<sup>2</sup> The credit for a relational approach to constitutional adjudication goes to my academic friendship with Vittoria Barsotti, Paolo Carozza, and Andrea Simoncini, with whom I co-authored *ITALIAN CONSTITUTIONAL JUSTICE IN GLOBAL CONTEXT* (2015). Responsibility for the views expressed in the following pages is mine personally and does not involve the Italian Constitutional Court as such.

<sup>3</sup> According to this definition I would like to comprise all courts entrusted with the function of judicial review of legislation, be they ordinary or special courts.

outcomes, depending on the type of respect they command from other actors. And respect, in turn, depends very much on relations.

Indeed, the main feature of courts is their independence. They are always required to remain non-accountable to other powers and to avoid any form of direction or supervision coming from outside. Unlike electoral bodies, courts have no reason to please any other stakeholder. “The mandate of the judges not being renewable, they have no particular *incentive* to be biased in favor of one or the other party in constitutional interpretation conflict. Their opinions (considering that in general the vote of the members of the [constitutional courts remains] undisclosed) will not have an impact on the renewal of their office (which is impossible) or on possible other appointments at the end of the mandate.”<sup>4</sup> Yet, courts’ independence does not contradict their interdependence: constitutional courts, like other institutions, such as legislatures and chief executives, are also required to find and preserve their place on the constitutional map, in relation to the other branches, in order to effectively perform their duties.

Comparative studies on judicial review usually work on *models*: for example, they draw a contrast between the American and the European prototypes and traditionally distinguish between diffused and centralized systems.<sup>5</sup> Another line of comparative studies makes a distinction between concrete and abstract review,<sup>6</sup> depending on the procedure for access to courts. All of these classifications are highly relevant and useful, indeed. And so are the analyses that highlight the distinguishing features of judicial review in specific contexts, like, for example, post-communist countries<sup>7</sup> or new democracies.<sup>8</sup> However, there are some features of constitutional courts that can only be understood if their institutional relations are taken into account. A missing element in the very rich scholarship on constitutional courts, judicial review, and constitutional adjudication is an analysis that puts the *courts’ relations* at the center.

Somewhat closer to a courts’ relations analysis is the brand of studies that focuses on judicial behaviors by contrasting, for example, judicial activism and self-restraint or deference,<sup>9</sup> passive and active virtues of courts,<sup>10</sup> strong and weak models of judicial

<sup>4</sup> Pasquale Pasquino, *A Political Theory of Constitutional Democracy. On Legitimacy of Constitutional Courts in Stable Liberal Democracies*, in *MORALITY, GOVERNANCE, AND SOCIAL INSTITUTIONS. REFLECTIONS ON RUSSELL HARDIN 226* (Thomas Christiano, Ingrid Creppell, & Jack Knight eds., 2018).

<sup>5</sup> MAURO CAPPELLETTI, *JUDICIAL REVIEW IN CONTEMPORARY WORLD* (1971), was the pioneer of this line of studies, which has been followed ever since.

<sup>6</sup> MICHEL FROMONT, *LA JUSTICE CONSTITUTIONNELLE DANS LE MONDE* (1996), followed by many others.

<sup>7</sup> *CONSTITUTIONAL JUSTICE, EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE* (Wojciech Sadurski ed., 2002).

<sup>8</sup> TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES. CONSTITUTIONAL COURTS IN ASIAN CASES* (2003).

<sup>9</sup> R. A. POSNER, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. (2012).

<sup>10</sup> ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

review,<sup>11</sup> classic and romantic judges,<sup>12</sup> constitutional personae,<sup>13</sup> and so on. Yet, a comprehensive comparative investigation of courts' relations is still missing.

An analysis that takes courts' relations into account would be interested in comparative constitutional *experiences*. While it would include abstract legal *models*, it would also take into account the historical, concrete dynamics of each institution and would reveal courts in action.

So far, the idea of judicial relations has been explored, to a narrow extent, in the limited field of "judicial interchange" with foreign experiences<sup>14</sup> and in the context of composite transnational legal orders. In particular, judicial dialogues and judicial conversations are a *topos* in studies that look at "multilevel" systems, especially on the European continent.<sup>15</sup> The interaction between the national and transnational dimensions of constitutional law has drawn some attention to the relations between courts, in particular in the wake of the theory of constitutional pluralism.<sup>16</sup>

A recent and very insightful reflection on the swinging movements between the national and transnational levels in constitutional adjudication is provided by Lustig and Weiler in their pathbreaking article on the three waves in the judicial review of legislation.<sup>17</sup> In their analysis, the third wave encompasses a broad range of cases that show a diffuse reaction to the expansion of transnational orders of higher law, which took place during the second wave. The authors suggest that these examples are not isolated dots. They are, rather, connected by lines that sketch a visible inward turn in judicial review, as compared to the open attitude that national constitutional courts

<sup>11</sup> Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813, 821 (2003); Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV., 1895 (2004); Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53 COLUM. J. TRANSNAT'L L. 285 (2015); Rosalind Dixon, *The Core Case for Weak-Form Judicial Review*, 38 CARDOZO L. REV. 2193 (2017).

<sup>12</sup> M. A. GLENDON, *A NATION UNDER LAWYERS. HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1996).

<sup>13</sup> CASS R. SUNSTEIN, *ONE CASE AT A TIME. JUDICIAL MINIMALISM ON THE SUPREME COURT* (2001); CASS R. SUNSTEIN, *CONSTITUTIONAL PERSONAE* (2015).

<sup>14</sup> This debate is very rich in the USA and in Europe. Among the many scholars who participated in it, allow me to mention at least Justice STEVEN BREYER, *THE COURT AND THE WORLD* (2015), at 7 and *passim*, who stresses the need for courts to listen to "many voices" and insists on the importance of judicial discussions and conversations as an opportunity for "an exchange of information and ideas, an open invitation for each judge to consider his or her own system in light of others. The result is a broadening of vision." *Id.* at 270.

<sup>15</sup> A recent valuable overview is provided by Pietro Faraguna et al., *Constitutional Adjudication in Europe between Unity and Pluralism* 10 ITAL. J. PUB. L. 157 (2018).

<sup>16</sup> NEIL MACCORMICK, *QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH* (1999); Mattias Kumm, *Who Is the Final Arbitrator of Constitutionality in Europe? Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice*, 36 COMMON MKT. L. REV. 351 (1999); Miguel Póiares Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in *SOVEREIGNTY IN TRANSITION* 501 (Neil Walker ed., 2003); Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317 (2002); Armin 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); MATEI AVBEJ & JAN KOMÁREK (Eds.), *CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND* (2012).

<sup>17</sup> Doreen Lustig & J. H. H. Weiler, *Judicial Review in the Contemporary World—Retrospective and Perspective*, 16(2) INT'L J. CONST. LAW 315 (2018).

had shown during the previous decades. From a historical point of view, no doubt they capture an ongoing trend that poses new fundamental questions not only about the role of courts but also about the interconnections between the national and the transnational.

Yet, if a courts' relations analysis were added to this picture, the dots and the lines that Lustig and Weiler examine would appear neither identical nor uniform. The impressive range of cases that can be ascribed, with good reason, to the "third wave"—from Argentina to Israel and from South Korea to Germany to Italy—in fact encompasses very diverse responses if courts' relations are added to the picture.

Consider an example taken from the institution that I am most familiar with. Lustig and Weiler mention Case no. 238 of 2014, in which the Italian Constitutional Court determined that national constitutional fundamental principles on human dignity and the right to defense required an interpretation of the international customary rule on immunity of states from jurisdiction to exclude acts classified as war crimes and crimes against humanity. In that case, the Italian Court was openly contradicting the International Court of Justice, which had reached an opposite decision on the very same issue a couple of years before.<sup>18</sup> The Italian Court was blatantly challenging the International Court of Justice and disregarded its decision. Now compare this case to another well-known decision by the same Italian Court, that of the *Taricco* saga, no. 24 of 2017, on European Union (EU) fraud and limitation periods. In a way, the two cases are similar because, in the *Taricco* decision, too, the Italian Constitutional Court identified a discrepancy between some fundamental constitutional principles on criminal law and the interpretation given by a supranational court: in this case the European Court of Justice (ECJ). However, in this second case the divergence did not give rise to an unsettled conflict, as it had in the previous one, and the problem found a solution shared by the two courts, national and international. The two cases were very similar: the national court's concern, in both cases, was the protection of some basic constitutional principles, as interpreted at the domestic level. In both cases, it achieved this goal. But, in the first case, the relation with the International Court of Justice was *confrontational and conflictual*, with the relative costs in terms of reciprocal trust; in the second one, the relation was *dialogical, cooperative and constructive*, with the relative benefits.

It may be noted that the major difference between the two cases had to do with the preliminary ruling procedure. Whereas, in the EU context, courts are able to interact via preliminary ruling *ex* article 267 TFEU (Treaty on the Functioning of the European Union), they do not have this opportunity when it comes to the International Court of Justice. Therefore, the Italian Court was able to interact with the ECJ and reach a common, shared solution, whereas this kind of interaction was impossible with the International Court, due to a lack of procedural infrastructure. This procedural difference is highly relevant. If we want to prevent plurality and diversity from turning into

<sup>18</sup> International Court of Justice, Judgment of Feb. 3, 2012, *Germany v. Italy and Greece (intervening)*.

fragmentation, we need institutional bridges that facilitate connection, agreements, and common understanding.

Still, procedures merely provide opportunities. The substantive difference is made by the relational approach of each actor.

A brilliant example of a “relational analysis of constitutional adjudication” in a comparative perspective can be found in a recent paper by Armin von Bogdandy and Davide Paris.<sup>19</sup> They examine similar cases decided by the German and the Italian Constitutional Courts, in the same European context, in which the two national courts invoked very similar doctrines about national identity and “counterlimits.” Yet, the portraits of the two judicial bodies look very different.

They note that, when confronted with an actual or foreseeable conflict between EU and constitutional law, “the German Constitutional Court tends to instruct the Court of Justice clearly on the limits within which it is prepared to accept the primacy of EU law. The German Constitutional Court sets the boundaries, and the Court of Justice better not overstep those boundaries.”<sup>20</sup> The Italian Constitutional Court follows a different approach. The Italian “*Consulta*” tends not to sketch the decision it wishes to receive from the Court of Justice but confines itself to stating the existence of a conflict. By doing so, the authors highlight, the Italian Constitutional Court retains the ability to respond when the case comes back to it after the European decision. They compare the Italian Constitutional Court to a poker player: it plays a first, very open move and then waits to see the reaction of the ECJ. Both the German and the Italian approach can be effective. But their posture is different. One is more like a wrestler; the other is like a poker player. The conditions are the same, and the problems are similar, but the voices speak in different tones.

Courts are ideally engaged in a constant ideal conversation with a number of external audiences—to borrow from Nuno Garoupa and Tom Ginsburg<sup>21</sup>—made up of other national courts, parliaments, supranational and international courts, legal scholars, civil society, and public opinion at large. A focus on courts’ relations would, at least, require a map of the *actors*—political, social, and judicial—that interact with constitutional courts, an assessment of the toolkit of *procedures* that allow the courts to cooperate with other bodies, and a discussion of the *legal doctrines* elaborated by each court to leave room for other bodies in accomplishing their mission and to shape a balanced relationship with each of them.

In a couple of experimental works<sup>22</sup> that I co-authored with some distinguished colleagues, courts’ relations were taken as a paradigm to assess the Italian Constitutional Court in a comparative perspective. Judicial relations were “unpacked”

<sup>19</sup> Armin von Bogdandy & Davide Paris, *Building Judicial Authority: A Comparison Between the Italian Constitutional Court and the German Federal Constitutional Court*, MPIL Research Paper Series No. 2019-01 (2019), [https://papers.ssrn.com/abstract\\_id=3313641](https://papers.ssrn.com/abstract_id=3313641).

<sup>20</sup> *Id.* at 13.

<sup>21</sup> An interesting contribution that moves in the suggested direction is given by Nuno Garoupa & Tom Ginsburg, *Building Reputation in Constitutional Courts: Political and Judicial Audiences*, 28 ARIZ. J. INT’L & COMP. L. 539 (2011).

<sup>22</sup> Vittoria Barsotti et al., ITALIAN CONSTITUTIONAL JUSTICE IN GLOBAL CONTEXT (2015); Vittoria Barsotti et al., DIALOGUES ON ITALIAN CONSTITUTIONAL JUSTICE. A COMPARATIVE PERSPECTIVE (forthcoming 2020).

along with the different “audiences” that the Court speaks to. The results were very thought-provoking and rendered an image of the Italian Court quite different from the usual one. Let me articulate a possible pathway for a “relational analysis” of the Italian Constitutional Court, with the understanding that the same map could be used for all other courts and, moreover, in a comparative perspective.

As far as the relation with common judges is concerned, it is commonplace to observe that constitutional courts’ relations with other *national judges*, especially with other higher courts, are bound to be conflictual and confrontational.<sup>23</sup> This is true in theory and has been true in some isolated occasions in Italian history, which, however, are not representative of more ordinary times. In this area, the Italian *experience* has been influenced by the indirect, incidental procedure (called *procedura in via incidentale*) which is the main avenue for bringing cases before the Constitutional Court. This procedure is similar to the preliminary ruling in the EU system (the European Treaties were, in fact, influenced by the Italian model<sup>24</sup>), and it implies strict cooperation with the ordinary courts, which are the “gatekeepers” both of the Constitutional Court and of the European Court of Justice, deciding which cases will be referred for judgment and which will not. This cooperative model is less imposing than direct forms of complaint, in which constitutional courts play the role of a judge of final appeal over the decisions of all other judicial bodies. As a result, constitutional adjudication in Italy relies on close cooperation between the Constitutional Court and the ordinary judicial branches and represents a point of convergence between a centralized and a diffused model.<sup>25</sup>

The relationship between the Italian Court and *supranational and international judges* has changed over time. For long decades the Court showed indifference and formal distance from them. Then, a long period of informal and silent reciprocal, indirect influence followed. More recently, as described above, the Constitutional Court has incrementally entered into an active relationship with the judge-made law of the two European supranational courts, in particular in human rights cases. The Court now engages in open and direct relations with external judicial bodies, but it is important to note that these relations are not oriented toward the unreasoned acceptance of judicial solutions from other courts. Rather, it is a two-way relationship between peers, a dialogue that triggers constructive convergence but also leaves room for difference and distinctiveness.<sup>26</sup>

Indeed, courts’ audiences are both judicial and political.<sup>27</sup>

<sup>23</sup> There have been some episodes of this in Italian history that have been examined, for example, by John Henry Merryman & Vincenzo Vigoriti, *When Courts Collide: Constitution and Cassation in Italy*, 15 AM. J. COMP. L. 665 (1967); John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication Italian Style*, in *COMPARATIVE CONSTITUTIONAL DESIGN* (Tom Ginsburg ed., 2012). In reality, they are not representative of the ordinary relations between the Constitutional Court and the Supreme Court of Cassation in Italy.

<sup>24</sup> I developed this topic further in *La fortuna del giudizio di costituzionalità in via incidentale*, ANNUARIO DI DIRITTO COMPARATO E STUDI LEGISLATIVI 27 (2014).

<sup>25</sup> ELISABETTA LAMARQUE, *CORTE COSTITUZIONALE E GIUDICI NELL’ITALIA REPUBBLICANA* (2012).

<sup>26</sup> In relation to the ECHR, see, for example, Judgment no. 49 of 2015, and for the European Court of Justice, see Order no. 117 of 2019.

<sup>27</sup> Garoupa & Ginsburg, *supra* note 21.

In a way, the relationship between a constitutional court and the legislature is bound to be antagonistic and confrontational. After all, a constitutional court has the power to review parliamentary legislation and, if necessary, to invalidate it. But in Italy the relationship with the legislature has been less conflictual than in other contexts. The counter-majoritarian difficulty was discussed when the Constitutional Court was founded, but over time it has not affected the activity and reputation of the Court. Over the first decades of the Court's existence, Parliament and the Court shared the common mission of cleaning up the legal system from all the dross left over from the fascist regime. This shared and undisputable task has dramatically reduced the rate of conflictuality between the Court and the Legislature. Nevertheless, while they have not been conflictual, relations with the legislator have also not been very satisfactory. In a number of decisions, the Constitutional Court has required Parliament to intervene in order to fill gaps in legislation or to reform the legislation in force in order to conform to constitutional principles, by means of so-called *sentenze monito* (warning decisions), but these requests are usually ignored. The Italian Parliament is not as amenable to cooperation with the Court as, for example, the Colombian legislator is with the Constitutional Court of that country.<sup>28</sup> In a recent case on assisted suicide,<sup>29</sup> following the example of Canada<sup>30</sup> and the UK,<sup>31</sup> the Constitutional Court decided to suspend the proceeding pending before it in order to allow time and space to Parliament to introduce a new regulatory framework through legislation. The one-year delay established by the Court expired and—unlike its British and Canadian counterparts—the Italian Parliament had not passed any legislation. In cases of this kind, parliaments and constitutional courts should act together as “co-legislators,” as Michel Troper puts it, because the Court is required to invalidate the piece of legislation that contrasts with constitutional principles but lacks the power to fill the gap and to construe a new positive discipline, which is the task of Parliament. This kind of relationship is still to be developed in the Italian context.

Another audience common to all constitutional courts is *legal scholarship*. From a formal point of view, unlike the German BVerfG or the US Supreme Court, the Italian Court is very reluctant to enter into an open discussion with *legal scholarship* in the reasoning of its decisions. The same can be said of its approach to the comparative jurisprudence of *other national constitutional courts*, although in some recent decisions<sup>32</sup> the Court has appeared more willing to engage in a direct comparison with other legal systems. In any case, the Court is well informed and well aware of the doctrinal debates and of foreign jurisprudence, even when no direct mention is made of them

<sup>28</sup> Manuel José Cepeda-Espinosa, *Judicial Activism in a Violent Context: The Origin, Role and Impact of the Colombian Constitutional Court*, 3 WASH. U. GLOBAL STUD. L. REV. 529 (2004).

<sup>29</sup> Italian Constitutional Court, decision no. 207 of 2018.

<sup>30</sup> Supreme Court of Canada, judgment of Feb. 6, 2015, *Carter v. Canada*, 2015 SCC 5.

<sup>31</sup> Supreme Court of the United Kingdom, Judgment of June 25, 2014, *Nicklinson and another*, [2014] UKSC 8.

<sup>32</sup> Orders no. 207 of 2018 (on assisted suicide) and no. 141 of 2019 (on prostitution).

in the body of its decisions. The Court has a very active Research Office, the staff of which includes experts in comparative law, and is deeply engaged in maintaining contacts with other European courts. In this respect, its relations with legal scholarship and with “foreign law” are not at all poor, but they lack transparency and develop along *unofficial* lines.

By contrast, the Court has done very little thus far to encourage more open and transparent participation by *civil society*, especially through its procedural rules.<sup>33</sup> Until very recently, the Italian Constitutional Court has not followed the practice of the European Court of Human Rights, the US Supreme Court, and the many other courts around the world that accept *amicus curiae* briefs or allow third-party interventions in their public hearings. Yet, courthouse doors should be open to the contribution of civil society, especially when the case to be decided involves, for example, controversial issues on fundamental social values concerning family, procreation, end of life, and education. It is only with a very recent reform of the rules of procedure of the Court (January 8, 2020) that the Court has foreseen the possibility of *amicus curiae* briefs and hearings of experts.

More generally, *ordinary citizens* in Italy largely ignore the Constitutional Court, its competence, and its justices. The public is generally unfamiliar with the names, faces, and backgrounds of the justices who compose it. Only very recently, when the Court decided to celebrate its sixtieth anniversary with a conference dedicated to “the decisions that have changed the life of Italians,”<sup>34</sup> have things begun to take a different course. Since then, the Court has devoted a great deal of energy to being more proactive in reaching out transparently to civil society, scholars, and professionals through a number of concurrent channels.

These are only some examples—mainly taken from the Italian experience, but they could be repeated for all other courts—that confirm the need to take into account a plurality of relations in order to get to a realistic portrait of any given court. Moreover, the previous examples underscore the need to articulate the relational capacity of each constitutional court according to different audiences, distinguishing the *institutional* relations (which may, in turn, be subdivided into *judicial* and *political* relations) from the *academic* and *social* relations.

Indeed, much more could be added along these lines.

In our day, personal, social, political, and institutional relations are in crisis in many respects. Distrust prevails over confidence; exit overcomes voice; walls replace bridges; exclusion attracts more than inclusion; peculiarities overshadow commonalities; withdrawals are more frequent than new connections; divergence prevails over convergence. The never-ending search for cohesion clashes with the strong desire to protect identities. The tension between global and local is becoming more and more dramatically evident. Even at the national level, the overall tone of

<sup>33</sup> It is worth mentioning that a reform of the internal rules of procedure is under discussion for introducing *amicus curiae* and expert testimony.

<sup>34</sup> See [https://www.cortecostituzionale.it/jsp/consulta/documentazione/convegni\\_seminari.do](https://www.cortecostituzionale.it/jsp/consulta/documentazione/convegni_seminari.do).

political relations is frequently dominated by distrust, conflict, anger, resentment, fear, or insecurity.<sup>35</sup> Public opinion reflects a chasm between the institutions and people's everyday lives. Political *stasis* is always a risk in every *polis*, at any time in history especially when fragmentation is the hallmark of a given society. The outbreak of the pandemic COVID-19 has further exacerbated the sentiment of fear and distrust. In such a context, all institutions are required to contribute to maintaining and reconstructing social bonds. Courts that cultivate open and solid relations with other judicial, political, and social actors are gaining authority and can use their authority for the endless mission of polity-building. Constitutional courts are located in a privileged position to that purpose, because they do not belong to any of the other branches but are at the junction of all of them. In a fragmented era, relations matter also at the institutional level, and they deserve a prominent place in a collective, reasoned, and dispassionate reflection.

Marta Cartabia  
*Professor of Constitutional Law*  
*President, Italian Constitutional Court*

## Once Upon a Time in Catalonia...

The year 2025 was a turning point in the never-ending Catalan saga. A new Spanish Government, wanting to reach "Once and For All Closure," agreed to endorse a referendum in Catalonia—believing the Remainers would win. They took all necessary constitutional steps to allow the referendum to go ahead.

A fierce but orderly campaign ensued. It was, however, the Independence vote, with a small majority, which eventually prevailed: 51-49 per cent. Catalonia emerged as an independent state. A new Constitution, declaring Catalonia "...eternally sovereign and indivisible," was drafted, and was approved by a small majority in the new legislature as well as in a subsequent referendum which replicated the secession result. The Constitution could be amended by a similar two-step process.

The social divisions produced by the process were keenly felt, not least by the large number of Catalan citizens of Castilian origin, but also by Catalan Remainers who were dubbed sometimes as "traitors." In the referendum there was a sizeable number of towns and villages with a majority of Remainers.

Independence was uneventful, though not quite the "bed of roses" that had been promised during the referendum campaign. Negotiations for entry into the European Union dragged on—several Member States weary of the Catalan secession precedent put up a variety of obstacles and delaying tactics. Admission to the Union requires unanimity. Direct foreign investment continued but at a markedly reduced pace than before, especially given the uncertain status of Catalonia in the Union.

<sup>35</sup> MARTHA NUSSBAUM, *ANGER AND FORGIVENESS: RESENTMENT, GENEROSITY, JUSTICE* (2016)

Social tensions deepened, predictably around issues of language, education and culture, the government firmly rejecting any autonomy on these issues to those municipalities with a majority of Remainers. A new issue, migration of Castilians to Catalonia, emerged with quite strict requirements for obtaining Catalan citizenship, notably mastery of language, the fear being a reversal of the slim majority of secessionists. In short order, a new movement, the Unionists, emerged, calling for a reversal of the referendum result and a return to union with Spain. Campaigning with the slogan, “Better Together,” they pointed to the several examples within the Union of a “second referendum” called to reverse the result of a previous one.

The Catalan government and legislature—the Catalan Constitutionalists—roundly rejected a call for a new referendum to reverse independence, claiming this would violate the “Eternal Sovereign” clause of the Catalan Constitution. They pointed to the irreversibility of the German Eternal clause as precedent. And although all opinion polls indicated that the Unionists might prevail in a referendum, the necessary majority in the legislature for a constitutional change did not exist.

In a meeting of mayors of those municipalities with a majority of Remainers (now called Unionists) a decision was taken to organize an unofficial referendum, a decision endorsed by the councils of those municipalities.

The Government was firm in declaring such a referendum illegal, in violation of the Constitution and Catalan criminal law (which by and large replicated Spanish criminal law). A petition by the Unionists to the Catalan supreme judicial authorities was unsuccessful—the Courts affirmed the illegality and unconstitutionality of such an unauthorized referendum, the grave threat to the rule of law, and warned of criminal liability for the organizers.

The Government of Spain also declared its displeasure with such an illegal referendum, but widespread populist voices in Spain demonstrated in support.

Eventually, the Unionist movement in Catalonia announced their intention to hold such a referendum on October 1 2027. The Catalan General Prosecutor, in a terse statement, announced that the law would require her to bring criminal charges against the organizers should concrete moves be taken to realize such a plan. Any involvement of public officials would open them to criminal liability for aggravated misuse of public funds, aggravated instigation of public disorder and might even amount to sedition. The General Prosecutor warned that under Catalan law no discretion lay in her hands and that arrest warrants would be issued swiftly and automatically.

This warning notwithstanding, the Unionist organizers proceeded with their plan. In those municipalities with a Unionist majority the mayors contrived to hold the referendum, setting up voting booths and providing referendum ballot papers. The incensed government attempted to confiscate them on the day. By and large they managed such with little violence, though a photograph—some claiming it to be fake—of a blood-covered face, was published around the world. Participation was patchy, but over a million votes were counted.

True to her word and the law, the General Prosecutor issued arrest warrants for the principal organizers on charges of misuse of public funds and public disorder and announced that the issue of sedition was being studied further, thus avoiding the expected negative international reaction to such a charge. One of the organizers escaped to Paris. The General Prosecutor steadfastly refused to seek his extradition, commenting dryly: "He's better in Paris than Barcelona; let him enjoy fine French cuisine whilst his fellow criminals enjoy our prison food."

At the ensuing trial the General Prosecutor requested the maximum penalties, given the deliberate disregard to the judicial orders of the Catalan courts. The trial was swift and the organizers were sentenced to jail terms of three to nine years.

Violent demonstrations erupted in Madrid.

JHHW

## In this issue

In issue 17:2 of 2019, the *International Journal of Constitutional Law* published its second Foreword, authored by Ran Hirschl and Ayelet Shachar. The Foreword challenged assumptions about the decline of state sovereignty, the nation-state, and its borders and put forward a counter-narrative centered on the spatial dimensions of public law and the state. In dialogue with the Foreword, our first issue of the year opens with the Afterword section, which features responses by *Michèle Finck*, *Jaclyn L. Neo*, *Oran Doyle*, and *Paul Linden-Retek*, as well as a rejoinder by *Ayelet Shachar* and *Ran Hirschl*.

Our Articles section features two contributions. First, *David Kenny* and *Conor Casey* discuss the negative effects of pre-enactment by analyzing different jurisdictions. They focus on what they call "shadow constitutional review," which takes place in certain jurisdictions where pre-enactment review has effects antithetical to political constitutionalism. Second, *Michael Hein* examines decisions issued by the European constitutional and supreme courts in order to argue that although constitutional entrenchment clauses matter, they are not always instruments for the protection of democratic constitutionalism.

In our Critical Review of Governance section, *Tarunabh Kaitan* and *Jane Calderwood Norton* continue their discussion on the differences between the right to freedom of religion and the right against religious discrimination (initiated in our previous issue, 17:4) by analyzing the key doctrinal implications that follow from that distinction.

This issue also inaugurates a new occasional series, Cross-Cultural Borrowings, which includes two contributions. First, *Xie Libin* and *Haig Patapan* examine the reception and influence of Carl Schmitt's thought in contemporary China and how certain Schmittian concepts have been deployed by different groups of contending scholars. Second, *Masahiro Kobori* argues that the two main ideas prevalent among Japanese scholars about parliamentary government were not held, nor did they originate, in

British constitutional theory. In fact, the author claims that contrary to what constitutional scholars in Japan believe, they were derived from French scholarship.

Our Symposium section features a collection of papers on participatory constitution-making. *Sujit Choudhry* and *Mark Tushnet* introduce the symposium by raising a number of questions posed by the more recent developments in popular participation in constitution-making. The first article, by *Hélène Landemore*, focuses on the recent Icelandic constitutional process in order to explore what public participation in constitution-making entails and when it matters. Next, *Gabriel Negretto*, based on the analysis of aggregated data, argues that while direct citizen participation is important, cooperation among a plurality of elected political representatives is more likely to lead to the establishment of effective limits on state power and, thus, to a more robustly liberal democracy. Thereafter, *Ruth Rubio-Marín* emphasizes the exclusion of women from constitution-making and the structural dimensions of said exclusion and traces women's participation in constitution-making in different jurisdictions. Finally, *Abrak Saati* analyzes and compares two Fijian participatory processes of constitution-making that took place in a transitional context and claims that these processes were merely symbolic and failed to genuinely extend the Fijians' possibility of influencing the content of the Constitution.

In the Book Review section, in addition to a number of reviews, *David Dyzenhaus* revisits the eternal question how lawyers should act in a legal system that is wholly or partially illegitimate in his review essay on two recent books engaging with the roots and origin of South African post-apartheid constitutionalism: *Ngcukaitobi's The Land is Ours: South Africa's First Black Lawyers and the Birth of Constitutionalism* (2018) and *Ngqulunga's The Man Who Founded the ANC: A Biography of Pixley ka Isaka Seme* (2017).

*JHHW and GdeB*