



# WORKING PAPERS

LAW 2017/06  
Department of Law

Constitutional identity in Italy:  
European integration as the fulfilment of the  
Constitution

Federico Fabbrini and Oreste Pollicino



European University Institute  
**Department of Law**

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AS THE FULFILMENT OF THE CONSTITUTION**

Federico Fabbrini, Oreste Pollicino

EUI Working Paper **LAW** 2017/06

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ISSN 1725-6739

© Federico Fabbrini, Oreste Pollicino 2017  
Printed in Italy  
European University Institute  
Badia Fiesolana  
I-50014 San Domenico di Fiesole (FI)  
Italy  
[www.eui.eu](http://www.eui.eu)  
[cadmus.eui.eu](http://cadmus.eui.eu)

## **Abstract**

The paper examines the notion of constitutional identity in Italy, with the aim to question whether the highest constitutional authorities of the Italian state have identified a core or fundamental elements of the Constitution which define its individuality. By analyzing the words and deeds of the President of the Republic and the case law of the Constitutional Court the paper claims that these two supreme constitutional authorities always refused to identify a set of constitutional values which cannot be touched by the European Union (EU). On the contrary, the paper suggests that both the President of the Republic and the Constitutional Court have endeavoured to emphasize the axiological overlap between the Italian Constitution and the project of European integration, considering Italy's membership to the EU as the best way to fulfil the Constitution's mandate. As the paper maintains, the same approach is visible in the recent *Taricco* judgment of the Italian Constitutional Court: while in this reference to the European Court of Justice (ECJ) the Constitutional Court mentioned for the first time ever the words 'constitutional identity', its ruling was mostly grounded on the notion of common constitutional traditions. The Constitutional Court invited the ECJ to revisit a previous ruling, emphasizing how that substantially conflicted not only with Italy's Constitution, but also with the principles enshrined in the EU Charter of Fundamental Rights. As the paper suggests, therefore, the Italian case offers an example of a founding EU member state where no identity narrative has been developed as a defense against the EU.

## **Keywords**

Constitutional identity; Italy; President of the Republic; Constitutional Court; ECJ

**Author contact details:**

Federico Fabbrini  
School of Law & Government  
Dublin City University  
federico.fabbrini@dcu.ie

Oreste Pollicino  
Law Department  
Bocconi University  
oreste.pollicino@unibocconi.it

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## 1. Introduction\*

The goal of this paper is to explore the contours of constitutional identity in Italy, one of the founding member states of the European Union (EU). For the purpose of this paper we consider constitutional identity to mean the core or fundamental elements or values of a particular member state's constitutional order as an expression of its individuality.<sup>1</sup> Admittedly this is not the only possible definition of the concept of constitutional identity.<sup>2</sup> Nevertheless, this is the meaning embraced in the German constitutional context by the Federal Constitutional Court (*Bundesverfassungsgericht*).<sup>3</sup> This paper questions whether a concept of constitutional identity akin to that developed by the German Constitutional Court (BVerfG) can be identified and applied in the Italian constitutional context. To do so, it examines the discourse and practice of the two key public authorities in the Italian institutional regime: the President of the Republic (*Presidente della Repubblica*) and the Constitutional Court (*Corte Costituzionale*). According to the Italian Constitution, the President of the Republic and the Constitutional Court are the two organs specifically entrusted with the function to preserve, and guarantee the stability of the State's constitutional settlement (*organi di garanzia*).<sup>4</sup> Pursuant to Article 87 of the Italian Constitution, the President of the Republic "is the Head of State and represents the unity of the nation," and on the basis of Article 134 of the Italian Constitution, the Constitutional Court is empowered to review the constitutionality of legislation, decide on the conflicts of attribution between organs of the State and judge the President of the Republic in case of impeachment for high treason. It therefore seems reasonable to examine the extent to which these two supreme constitutional authorities have embraced the idea of constitutional identity as part of their rhetoric and action during 70 years of Italian institutional life.

As the paper claims, however, the analysis of the words and deeds of the Italian President of the Republic and the Constitutional Court reveals that the language of constitutional identity is not part of the Italian constitutional vocabulary. The Italian *organi di garanzia* have consistently promoted a cooperative approach vis-à-vis the EU, holding that participation to the project of European integration represents the ultimate way to fulfill Italy's constitutional obligations. The President of the Republic, in particular, as the figure constitutionally embodying the Italian nation, has used his moral pulpit to reaffirm at every turn the cause of European integration – even to the point of suggesting that patriotism and European unification substantially coincide.<sup>5</sup> The Italian Constitutional Court (CC) at the same time engaged in a long and complex dialogue with its European brethren, the European Court of Justice (ECJ),<sup>6</sup> but has always refused to draw red lines vis-à-vis the EU with the aim to shield a core of constitutional matters from supranational influence. While the CC recognized the theoretical existence of counter-limits

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\* A first draft of this paper was presented on 10 February 2017 at a Seminar organized at the Law Department of the European University Institute by the "Constitutionalism and Politics" Working Group. We would like to thank Bruno de Witte, Filippo Donati, Oliver Garner, Gabor Halmai, Barbara Oomen, and Tomi Tuomin and the other participants to the seminar for their helpful comments. We also would like to thank Pietro Faraguna for his remarks on an earlier draft. Needless to say, all errors remain our own. While the paper is the result of a joint efforts by the two authors, sections 1, 2, 3 and 6 have been primarily drafted by Federico Fabbrini, while sections 4 and 5 have been by Oreste Pollicino.

<sup>1</sup> See Gerhard van der Schyff, "EU Member State Constitutional Identity" (2016) 76 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1, 3 (defining "constitutional identity as "the individuality or essence of an order").

<sup>2</sup> See Barbara Oomen, "Strengthening Constitutional Identity where there is None: the Case of the Netherlands" (2016) 77 *Revue Interdisciplinaire d'études juridiques* 235.

<sup>3</sup> See BVerfG 123,267 (*Lissabon*) and BVerfG BvR 2728/13 (*Gauweiler*) on which see Federico Fabbrini, "After the OMT Case" (2015) 16 *German Law Journal* 1003.

<sup>4</sup> Symbolically, the President of the Republic and the Constitutional Court are located one in front of the other, on the top of the highest hill of Rome: the Quirinale. See Gaetano Silvestri, *Le garanzie della Repubblica* (Giappichelli 2009)

<sup>5</sup> See Maurizio Viroli, "Patria", *Enciclopedia Italiana*, ad vocem

<sup>6</sup> See Marta Cartabia et al., *Italian Constitutional Justice in Global Context* (OUP 2015)

(*contro-limiti*) to the primacy of EU law within the national legal order, it never invoked such limits in practice.<sup>7</sup> on the contrary the CC developed a constructive dialogue with the ECJ, aimed at emphasizing the common constitutional tradition of Europe more than the specific identity of Italy.<sup>8</sup>

In our view, this approach underpins also the very recent *Taricco* ruling,<sup>9</sup> where the CC used for the first time ever, in the context of the relationship between the domestic and the EU legal orders, the word ‘constitutional identity.’<sup>10</sup> In this major case the CC referred a preliminary question to the ECJ asking it to clarify whether its previous judgment in *Taricco*<sup>11</sup> – which required Italian criminal courts to set aside domestic statute of limitations rules whose effect was to undermine the prosecution of tax crimes against the financial interests of the EU – ought to be applied even if this conflicted with the constitutional principle of legality in criminal law. In its reference, the CC underlined how this constituted a fundamental principle of the Italian constitutional system,<sup>12</sup> and flagged its concern for the practical application of the previous ECJ ruling.<sup>13</sup> However, the CC phrased its reference in a cooperative manner: the CC recognized the importance of the primacy of EU law,<sup>14</sup> and endeavored to prod the ECJ to revisit its previous ruling by underlying the fact that the principle of legal certainty constitutes “a common requirement to the constitutional traditions of the member states, is present in the system of protection of the ECHR, and as such it enshrines a general principle of EU law.”<sup>15</sup> Hence, while the CC kept open the possibility to invoke the counter-limits doctrine against the future ruling of the ECJ, it did not embrace a confrontational position premised on the idea that the constitutional identity of Italy was undermined by the EU: rather, the CC stressed the correspondence between the constitutional tradition of Italy and the values underpinning the project of European integration and asked the ECJ to recognize the common constitutional heritage linking the EU and its member states.

In sum, the paper argues that neither the President of the Republic nor the CC have articulated or embraced a notion of constitutional identity characterized by a conflictual matrix as was done by the BVerfG. As we suggest, to some extent this may be paradoxical: the Italian Constitution of 1948 found its roots in the “*Resistenza*”, the resistance movement against Nazi-Fascism,<sup>16</sup> and it was the result of a wholly autonomous process of self-governance.<sup>17</sup> In fact, Italy is one of the few EU member states whose written constitution pre-dates the founding of the EU with the Treaty of Paris 1951 and Treaty of Rome 1957 – which might have led to assume constitutional identity to be a defining feature of Italian

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<sup>7</sup> But see Italian Constitutional Court. n. 238/2014 (applying the *contro-limiti* doctrine against the International Court of Justice)

<sup>8</sup> See Silvana Sciarra & Giuseppe Nicastro, “A New Conversation: Preliminary References from the Italian Constitutional Court” in Federico Fabbrini (ed), “The European Court of Justice, the European Central Bank and the Supremacy of EU Law” Special Issue (2016) 23 Maastricht Journal of European & Comparative Law 195

<sup>9</sup> Italian Constitutional Court n. 24/2017

<sup>10</sup> Ibid §6

<sup>11</sup> See Case C-105/14 *Taricco* ECLI:EU:C:2015:555

<sup>12</sup> Italian Constitutional Court n. 24/2017 §5

<sup>13</sup> Ibid

<sup>14</sup> Ibid §8

<sup>15</sup> Ibid §9

<sup>16</sup> This is well reflected in the words of Piero Calamandrei, a member of the Constitutional convention, who famously argued in his *Discorso ai giovani sulla Costituzione nata dalla Resistenza*, delivered in Milano on 26 January 1955: “Se voi volete andare in pellegrinaggio nel luogo dove è nata la nostra Costituzione, andate nelle montagne dove caddero i partigiani, nelle carceri dove furono imprigionati, nei campi dove furono impiccati. Dovunque è morto un Italiano per riscattare la libertà e la dignità della nazione, andate là [...] col pensiero, perché là è nata la nostra Costituzione. [If you want to go on a pilgrimage to the place where our Constitution was born, go into the mountains where the partisans fell, in the jails where they were imprisoned, in camps where they were hanged. Wherever an Italian died to redeem the nation's freedom and dignity, go there [...] with the thought, because it's there that our Constitution was born].”

<sup>17</sup> See Augusto Barbera, “Costituzione della Repubblica Italiana”, Enciclopedia del Diritto, ad vocem and Bruce Ackerman, “Three Paths of Constitutionalism” (2015) 45 British Journal of Political Science 705.

law and practice. Nevertheless, for cultural and historical reasons, the highest constitutional authorities of Italy have always rejected an interpretation of the Italian Constitution as a defensive shield against European integration. In our view, the Italian experience offers therefore a cautionary tale against the emphasis recently put on the notion of constitutional identity. While this idea is *à la mode*, and probably captures the current *Zeitgeist* of increasing disillusionment vis-à-vis the EU, constitutional identity is a notion which is simply not common to all member states.<sup>18</sup> On the contrary, Italy epitomizes the case of a founding EU member state where the supreme institutional actors have never systematically identified a core set of fundamental elements or values functionally designed to protect the identity of the polity against supranational interference.<sup>19</sup>

The chapter is structured as follows. Section 2 briefly outlines Italian constitutional history, setting the context for a discussion about constitutional identity in Italy. Section 3 surveys the discourse of Italian Presidents of the Republic, focusing specifically on the messages that the last three Presidents delivered on topics of constitutional patriotism and European integration. Section 4 instead outlines the case law of the CC on the core principles of the constitution, summarizing the long dialogue between it and the ECJ both through informal means and, as of late, via the preliminary reference procedure. Section 5, then, examines the recent *Taricco* judgment of the CC and suggests that this case should be seen as in continuity with the traditional approach of the CC vis-à-vis the project of European integration, inspired by the willingness to build bridges, and not walls, between national constitutional law and EU law. In light of that, Section 6 concludes by claiming that the rhetoric of constitutional identity is not home-grown in the Italian constitutional tradition and therefore criticizes the scholarly enthusiasm which seems to have been mushrooming also in Italy for an idea which – in our view – should be buried as a nuisance toward the *Europarechtsfreundlich* nature of the Italian constitutional system.

## 2. Italian national identity and the Constitution

Any discussion about constitutional identity in Italy should be preceded by some quick reflections on the notion of national identity, and the role of the constitution, in the Italian context.<sup>20</sup> As leading historians and social scientists have explained, the notion of national identity in Italy has been, and is, very weak.<sup>21</sup> From an historical point of view, Italy was a late-comer in the process of nation-building<sup>22</sup> – with the establishment of the Kingdom of Italy taking place only in 1861.<sup>23</sup> During the Romantic Era intellectual élites, mostly in Northern Italy, had divined about the existence of an Italian nation accustomed by the same language, culture and traditions – a view reflected in the fact that the process of Italian unification was named “*Risorgimento*”, meaning a resurrection of a mythological *ethnos*, comprising all the populations of the Italian peninsula, who had allegedly been kept separate by centuries of foreign domination.<sup>24</sup> Nevertheless, the social reality on the ground during the 19<sup>th</sup> century was very

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<sup>18</sup> For a lively debate on the use and abuse of the idea of constitutional identity in a number of EU member states see Gabor Halmai, “The Hungarian Constitutional Court and Constitutional Identity” in [www.verfassungsblog.de](http://www.verfassungsblog.de).

<sup>19</sup> See Maurice Adams & Jacco Bomhoff, “Comparing Law: Practice and Theory” in Maurice Adams & Jacco Bomhoff (eds), *Practice and Theory in Comparative Law* (CUP 2012) (criticizing the idea that all legal systems face issues which are functionally analogous, regardless of how they are being called or construed in the domestic legal tradition)

<sup>20</sup> See Pietro Faraguna, *Ai confine della Costituzione* (Franco Angeli 2015)

<sup>21</sup> See Carlo Tullio Altan, *Italia: Una nazione senza religione civile* (Istituto editoriale veneto friulano 1995), p. 65 and Ernesto Galli della Loggia, *L'Identità Italiana* (Il Mulino 1998), p. 154.

<sup>22</sup> See Christopher Duggan, *The Force of Destiny: A History of Italy since 1796* (Harcourt 2008).

<sup>23</sup> This is well reflected in the words of Prince von Metternich, the Chancellor and chief diplomat of the Austrian Empire, who famously wrote in a letter to the Austrian ambassador to France in April 1847 that “*Italien ist nur ein geografischer Begriff* [‘Italy’ is just a geographical expression].”

<sup>24</sup> See Federico Ferretti, “Inventing Italy: Geography, *Risorgimento* and National Imagination” (2014) 180 *Geographical Journal* 402.

different, and major diversity existed across regions throughout the country.<sup>25</sup> Moreover, that diversity has persisted over-time. In fact, it has been claimed that it is not until the 1950s, with the establishment of a national broadcasting channel, that Italians came to speak the same language throughout Italy.<sup>26</sup>

The weaknesses in the notion of national identity were complemented by – and, in turn, impacted on – the weakness of the Italian institutional system. The unification of Italy did not produce any founding moment: in 1861, the Constitution of the Kingdom of Sardinia of 1848 was simply extended to the rest of the country – and that act governed public life in Italy for a century, including during the twenty years of the Fascist regime.<sup>27</sup> Only the tragedy of World War II (WWII) and the military and moral collapse of the country lead to a constitutional break with the past. On 2<sup>nd</sup> June 1946 Italians voted in a referendum to abolish the monarchy, and an ad hoc convention drafted a new Constitution for the Italian Republic, which entered into force in 1948.<sup>28</sup> The Constitution of Italy entrenched the republican form of government, codified for the first time a catalogue of fundamental rights and created new institutions, including a Constitutional Court, to secure the application of the Constitution even against acts of Parliament. However, as Sabino Cassese has masterfully explained, the adoption of a new Constitution did not imply a complete overhaul of the Italian state:<sup>29</sup> in fact, great institutional continuity exists between the pre-Fascist and the republican period – and many of the novelties of the 1948 Constitution were left unimplemented for long: the CC became operative only in 1956, regions were not established till 1970, and the constitutional provision on popular referenda was not given legal effect until 1975.<sup>30</sup>

For sure, the 1948 Constitution has slowly but incrementally consolidated its position within the Italian legal order. From the 1970s onwards, all political parties have pledged allegiance to it,<sup>31</sup> and thanks to the jurisprudence of the CC, the Constitution has become a living document in Italian public life.<sup>32</sup> Nevertheless, the Italian Constitution has been subject to recurrent and periodic revisions: since 1948, it has been amended 16 times, and integrated by the adoption of other statutes with constitutional status 24 times. Moreover, several major proposals of reform of the Constitution – and specifically of its Second Part, which regulates the form of government, inter-institutional relations and regionalism – have succeeded themselves (albeit so far unsuccessfully) during the last two decades.<sup>33</sup> Moreover, the memory of fascism has tamed any resurgence of nationalism in Italy to these days: while efforts were made during the 1990s to breed a sense of civic patriotism,<sup>34</sup> Italy has also recently experienced strong regional pulls, challenging the unity of the country.<sup>35</sup> If this is combined with the traditional pro-European stance of the Italian population, it is easy to understand why a popular conception of constitutional patriotism never quite took roots in Italy.

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<sup>25</sup> This is well reflected in the words of Massimo D’Azeglio, the Prime Minister of the Kingdom of Sardinia and one of the leading proponents of Italian unification, who famously said in his *memoirs* published in 1867 that “fatta l’Italia dobbiamo fare gli Italiani [We have made Italy. Now we must make Italians].”

<sup>26</sup> See Tullio De Mauro, *La cultura degli italiani* (Laterza 2010)

<sup>27</sup> See Roberto Martucci, *Storia costituzionale italiana: Dallo Statuto Albertino alla Repubblica* (Carocci 2002)

<sup>28</sup> See Donald Sassoon, *Contemporary Italy: Politics, Economy and Society since 1945* (Longman 1986)

<sup>29</sup> See Sabino Cassese, *Governare gli italiani* (Il Mulino 2014)

<sup>30</sup> See Giuliano Amato & Augusto Barbera (eds.), *Manuale di diritto pubblico* (Il Mulino 1988).

<sup>31</sup> See Pietro Scoppola, *La repubblica dei partiti* (Il Mulino 1991)

<sup>32</sup> See Enzo Cheli, *Il giudice delle leggi* (Il Mulino 1996)

<sup>33</sup> See Carlo Fusaro, “Per una storia delle riforme istituzionali (1948-2015)” (2015) 65 *Rivista trimestrale di diritto pubblico* 431.

<sup>34</sup> See Maurizio Viroli, *Per amore della patria* (Laterza 1995) and Gian Enrico Rusconi, *Possiamo fare a meno di una religione civile?* (Laterza 1999)

<sup>35</sup> See Gianfranco Miglio & Augusto Barbera, *Federalismo e secessione: un dialogo* (Il Mulino 1996)

### 3. Constitutional identity and the President of the Republic

In light of the previous discussion, we shall now turn to examine the possible intimations of constitutional identity in the practice of the highest constitutional authorities of Italy, starting with the President of the Republic. The role of the President of the Republic in the Italian constitutional system has been the object of a lively doctrinal debate.<sup>36</sup> According to the conventional narrative, which dates to the early years of the Republic, the President is a neutral power, and is tasked with the function to guarantee the equilibrium between the organs of the state, and to guard the respect of the Constitution.<sup>37</sup> In reality, as Carlo Fusaro has thoroughly explained, this view of the President's role – inspired by Constant's idea of the *pouvoir neutre*, and Schmitt's *Hüter der Verfassung* – underestimates the active political, executive function that the President can play under the terms of the Constitution,<sup>38</sup> and practice since 1948 has indeed revealed how influential the President can at times be, even in the formation of governments and the dissolution of Parliament.<sup>39</sup> Be that as it may, the conventional narrative on the role of the President of the Republic has recently received a strong confirmation by the CC:<sup>40</sup> this makes it particularly apposite to examine the extent to which the President has articulated a conception of constitutional identity in Italy.

The analysis of the presidential role in the possible elaboration of an Italian variant of the notion of constitutional identity should focus on the last three of Italy's 12 Presidents: Carlo Azeglio Ciampi (1999-2006), Giorgio Napolitano (2006-2015) and Sergio Mattarella (2015-). Limiting the examination to these presidencies is justified by the following reasons. First, the role of the President of the Republic has profoundly changed since the 1990s, as a result of the transformation of the Italian party system, with a transition toward a competitive democracy – but one mired by recurrent political and economic crises.<sup>41</sup> Second, it is in this period – a time where major steps were taken in the process of EU integration, with implications on Italy's constitutional system – that the function the Italian presidency as an external representative and international contact-person of the country has grown.<sup>42</sup> Third, it is also during the last presidencies that the idea of patriotism has been revived in the Italian public debate: in particular, President Ciampi made a deliberate pedagogical choice to renew Italians' civic pride and sense of affection for their homeland, and took cultural initiatives to this end, which were later shared by his successors.<sup>43</sup>

Considering the perceptions that Presidents of the Republic have had of their role as guardians of the Constitution, one could have expected them to use their pulpit to advance a strong conception of national

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<sup>36</sup> See Leopoldo Elia, "Forma di governo" in *Enciclopedia del diritto*, ad vocem

<sup>37</sup> See Serio Galeotti, *Il Presidente della Repubblica garante della Costituzione* (Giuffrè 1992)

<sup>38</sup> Carlo Fusaro, *Il Presidente della Repubblica* (Il Mulino 2003)

<sup>39</sup> See Irene Pellizzone, "Il peso specifico della prassi nella configurazione delle attribuzioni presidenziali" (2013) *Quaderni Costituzionali* 79

<sup>40</sup> See Italian Constitutional Court Judgment 1/2013 §9 (holding that the communications of the President of the Republic cannot be intercepted by the office of the public prosecutor, because the President is "the supreme guarantor of the equilibrium between the organs of the state").

<sup>41</sup> See Giuseppe Ugo Rescigno, "Il Presidente della Repubblica e le crisi del sistema", in Antonio Baldassarre & Gino Scaccia (eds.), *Il Presidente della Repubblica nell'evoluzione della forma di governo* (Aracne 2011), p. 93 and in comparative perspective Francesco Clementi, "Garante o governante? La figura del Capo dello Stato nella recente esperienza dei paesi dell'Unione europea a regime repubblicano" (2016) *Diritto pubblico comparato europeo* 617

<sup>42</sup> See Vincenzo Lippolis & Giulio Salerno, *La Repubblica del Presidente* (Il Mulino 2013) and Sergio Fabbrini, "Il Presidente della Repubblica tra cambiamenti interni ed europei" (2016) 23 *Quaderni di Scienza Politica* 177

<sup>43</sup> President Ciampi, among others, reinstated a national holiday for 2<sup>nd</sup> June (the day of the 1946 referendum monarchy v. republic), with a military parade in the capital city; he started renovation of the Vittoriale, a monument erected in Rome at time of Italian unification; and (contrary to his predecessors) he moved to live in the Quirinale, the palace hosting the presidency of the Republic – opening it to the public. President Napolitano then organized celebrations for the 150<sup>th</sup> anniversary of Italian unification. See Paolo Peluffo, *La riscoperta della patria* (Rizzoli 2012).

constitutional identity. Instead, it is remarkable how, from a quantitative viewpoint, the expression *identità costituzionale* (constitutional identity) *never* appears in the 752 speeches and official messages by President Ciampi,<sup>44</sup> in the 961 by President Napolitano,<sup>45</sup> and in the 176 delivered by President Mattarella (till the end of 2016).<sup>46</sup> While these Presidents have emphasized the importance of the 1948 Constitution as the achievement of project of national unification,<sup>47</sup> which started with the *Risorgimento* and continued with the *Resistenza* they never identified a core of Italian constitutional values which had to be proclaimed defensively against an expanding EU. On the contrary, the last three Italian Presidents have been among the strongest proponents of European integration, seeing this as a part and parcel of Italy's constitutional mission.<sup>48</sup> In fact, from a qualitative perspective, it is remarkable that reference to the importance of achieving European unity is made in almost *every* message by Ciampi, Napolitano and Mattarella on two of the most important dates of national unity – Liberation Day (25<sup>th</sup> April), and Republic Day (2<sup>nd</sup> June), celebrating respectively the end of Nazi-Fascism in 1945 and the proclamation of the Republic in 1946. Presidential rhetoric, in other words, denied the idea of conceptual clash between the Constitution and the EU, and rather sought to promote a form of European patriotism.

Hence, President Ciampi, speaking in front of the European Parliament in 2005, emphasized that the EU is “from its origins a polity; a land a rights; a constitutional reality which does not contrast with our beloved national Constitutions, but rather connects them and complements them. It is a polity which does not turn down the identity of our nation States but rather strengthens them.”<sup>49</sup> And the following year he underlined how the goal of “a united and free Europe, not least than a free and united Italy, has been the Polar Star enlightening my way until now.”<sup>50</sup> On the same vein, President Napolitano among others underlined how “Europe is for us Italians a second homeland,”<sup>51</sup> and how the work for a united Europe should be the goal of all actions,<sup>52</sup> and President Mattarella called for European unity,<sup>53</sup> and praised the “emergence of a European ‘demos’.”<sup>54</sup> Moreover, on the occasion of the 60<sup>th</sup> anniversary of the Italian Constitution, the President explicitly emphasized “the deep element of identity between our [Constitutional] Charter and the orientations of the EU Treaties;”<sup>55</sup> and at the 150<sup>th</sup> anniversary of Italian unity he stressed how the “generous utopian vision of a United States of Europe was part of the baggage of ideas of the *Risorgimento*.”<sup>56</sup> In fact, one of the most explicit correlations between the Italian and the European experiments of unification<sup>57</sup> was made by President Ciampi, when he stated in 2004 that “we

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<sup>44</sup> All speeches by President Ciampi are available at: <http://presidenti.quirinale.it/Ciampi/dinamico/ElenchiCiampi.aspx?tipo=discorso>

<sup>45</sup> All speeches by President Napolitano are available at: <http://presidenti.quirinale.it/elementi/Elenchi.aspx?tipo=Discorso>

<sup>46</sup> All speeches by President Mattarella are available at: <http://www.quirinale.it/elementi/Elenchi.aspx?tipo=Discorso>

<sup>47</sup> See Andrea Frangoni, “La tradizione risorgimentale”, in *Dialoghi con il Presidente* (Edizioni della Normale 2008), p. 137

<sup>48</sup> See Francesco Pigozzo, “Unità italiana e unità europea”, in *Dialoghi con il Presidente* (Edizioni della Normale 2008), p. 371

<sup>49</sup> Carlo Azeglio Ciampi, Speech, Strasbourg, 5 July 2005 (“è fin dalle origini un organismo politico; una terra di diritti; una realtà costituzionale, che non si contrappone alle nostre amate Costituzioni nazionali, ma le collega e le completa. E' un organismo politico che non nega l'identità dei nostri Stati nazionali, ma li rafforza” (our translation)).

<sup>50</sup> Carlo Azeglio Ciampi, Speech, Rome, 25 April 2006 (“L'Europa unita e libera, non meno dell'Italia libera e unita, è la Stella Polare che fino ad oggi ha guidato il mio cammino” (our translation)).

<sup>51</sup> Giorgio Napolitano, Speech, Rome, 15 maggio 2016 (“l'Europa è per noi italiani una seconda patria” (our translation)).

<sup>52</sup> See Giorgio Napolitano, Speech, Strasbourg, 14 February 2007.

<sup>53</sup> See Sergio Mattarella, Speech, Varallo, 25 April 2016

<sup>54</sup> Sergio Mattarella, Speech, Strasbourg, 25 November 2015 (“emergere di questo nuovo ‘demos’ europeo” (our translation))

<sup>55</sup> Giorgio Napolitano, Speech, Rome, 23 January 2008 (“profondo elemento di identificazione tra la nostra Carta e l'orientamento dei Trattati europei” (our translation)).

<sup>56</sup> Giorgio Napolitano, Speech, Rome, 17 March 2011 (“presenza, nel bagaglio ideale risorgimentale, della generosa utopia degli Stati Uniti d'Europa” (our translation)).

<sup>57</sup> See footnote n. 24

must make sure that the [European] Constitution is perceived by all European peoples as a common heritage. We have made Europe, we must now still make the Europeans.”<sup>58</sup>

What explains the approach of Presidents of the Republic in emphasizing Europe’s common constitutional heritage,<sup>59</sup> rather than Italy’s unique constitutional identity? Certainly, in a monocratic office such as the presidency, the personal life experience of the office-holder matters.<sup>60</sup> From this point of view, both Presidents Ciampi and Napolitano were born in the inter-war period, and had experienced the tragedy of WWII: as they repeatedly acknowledged, for them the project of European unification was a life obligation to ensure that never again would Europeans go to war against one another.<sup>61</sup> Moreover, both Ciampi and Napolitano had played important roles in the advancement of the EU: while Ciampi as Italy’s Prime Minister in the early 1990s had been one of the craftsman of the euro – in his words: “the foundation of a new common European sovereignty”<sup>62</sup> – and had led Italy within the common currency,<sup>63</sup> Napolitano had served from 1999 to 2004 as President of the European Parliament Constitutional Affairs Committee, playing a key role in promoting the two conventions that drafted the EU Charter of Fundamental Rights and the European Constitution.<sup>64</sup> In a way, therefore, for them the success of the EU, and Italy’s firm pledge toward the cause of European project, was a personal mission.<sup>65</sup>

Nevertheless, besides the individual motives, the presidential conviction that Italy ought to be involved in the EU, and promote the cause of European integration, found its deeper reasons in a widespread cultural understanding that considered the creation of the Italian Republic and of the EU as the two sides of the same coin.<sup>66</sup> This emerges prominently in the rhetoric of President Mattarella, who contrary to his two predecessors did not experience as a young adult WWII, and never held EU offices – but clearly affirmed since the day of his sworn-in that “Italy found the affirmation of its sovereignty within Europe, a safe harbor.”<sup>67</sup> There is indeed a noble intellectual tradition in the Italian élites – which draws from the underground reflections elaborated in the 1930s and 40s by anti-Fascist thinkers such as Carlo Rosselli, Luigi Einaudi and Altiero Spinelli – which maintained that the establishment of free and democratic states in Europe could only be achieved within the framework of a European federation, taming the evil of nationalism.<sup>68</sup> And notwithstanding growing popular contestation for the policies of the EU,<sup>69</sup> Italian Presidents of the Republic have remained committed to this vision – if the case may be also by reproaching any possible hesitation vis-à-vis the European integration project by some recent

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<sup>58</sup> Carlo Azeglio Ciampi, Speech, Rome, 27 July 2004 (“dobbiamo far sì che la Costituzione [europea] venga sentita da tutti i popoli europei come un patrimonio comune. Fatta l’Europa bisogna ancora fare gli europei” (our translation)).

<sup>59</sup> See Alessandro Pizzorusso, *Il patrimonio costituzionale europeo* (Il Mulino 2002)

<sup>60</sup> See Giuseppe Mammarella & Paolo Cacace, *Il Quirinale* (Laterza 2011).

<sup>61</sup> See Giorgio Napolitano, *Europa politica. Il difficile approdo di un lungo percorso* (Donzelli 2003) and Carlo Azeglio Ciampi, *Da Livorno al Quirinale. Storia di un Italiano* (Il Mulino 2012), p. 82

<sup>62</sup> Carlo Azeglio Ciampi, Speech, Milano, 4 October 1999 (“fondamento della nuova sovranità comune europea” (our translation))

<sup>63</sup> See Carlo Azeglio Ciampi, *Un metodo per governare* (Il Mulino 1996)

<sup>64</sup> See Giorgio Napolitano, “Introduzione”, in *Per un’Europa costituzionale* (Ediesse 2006)

<sup>65</sup> See Giuseppe Martinico, “La Costituzione europea”, in *Dialoghi con il Presidente* (Edizioni della Normale 2008), p. 395

<sup>66</sup> See Carlo Azeglio Ciampi, “Patriottismo repubblicano, Costituzione, Europa” (2009) 74 *Il Politico* 5, and Giorgio Napolitano, *Europa, politica e passione* (Feltrinelli 2016)

<sup>67</sup> Sergio Mattarella, Speech, Rome, 3 February 2015 (“Nella nuova Europa l’Italia ha trovato l’affermazione della sua sovranità; un approdo sicuro” (our translation)).

<sup>68</sup> See Piero Graglia, *Unità europea e federalismo* (Il Mulino 1996)

<sup>69</sup> See Edoardo Bressanelli, “E’ finita la luna di miele? La contestazione dell’Unione europea nell’opinione pubblica e nella classe politica italiana” in *Dialoghi con il Presidente* (Edizioni della Normale 2008), p. 401.

Italian governments.<sup>70</sup> It is within this cultural milieu – well reflected in the Constitution’s entrenchment of Italy’s consent to limiting sovereignty for the creation of international organizations promoting peace and justice among nations<sup>71</sup> – that we must consider also the case law of the CC.

#### 4. Constitutional identity and the Constitutional Court

As it is well known, it is exactly in Article 11 of the Italian Constitution that the CC identified in 1973 the hook to grant a constitutional rank to EU laws.<sup>72</sup> The provision was drafted in order to give a constitutional basis to Italy’s accession to the United Nations, but the CC adapted it to accommodate the development of the project of European integration.<sup>73</sup> The immediate consequence of this decision was to abandon the application of the chronological criteria in the case of a clash between the national and EU laws.<sup>74</sup> In the same judgment, however, the CC held that this mechanism would operate only if one crucial condition is met: that EU law complies with the protection of fundamental rights. It is by developing such condition that the CC, for the first time in the European jurisprudence, brought forward, even if without naming it, the notion of “counter-limits”. According to the CC, the limits to national sovereignty encapsulated in Article 11 of the Constitution are not absolute, but are relative and connected to the achievement of the goals identified in the same provision.<sup>75</sup> This means that: “It must be excluded that those limits could justify the existence of an inadmissible power for [EU] institutions to violate the fundamental principles of the constitutional legal order or non-transferable rights of human beings.”<sup>76</sup> If this were ever to happen, the counter-limits doctrine would be activated and the CC would be entitled to declare the unconstitutionality of the legislation incorporating the European treaties in *parte de qua*.

It seems quite clear, looking at first time in which the CC made clear its reservations to the enforcement of the primacy of EU law, that there is no reference to the notion of constitutional identity. In fact, before the recent *Taricco* judgment,<sup>77</sup> the words “constitutional identity” or national identity never appear from a quantitative point of view in the case law of the CC.<sup>78</sup> Contrary to the BVerfG, which has over-time developed constitutional identity review on top of fundamental rights- and democracy-based judicial review of EU acts, the CC has focused its counter-limit doctrines exclusively to the field of the protection of fundamental rights. This approach is evident in the other relevant CC decisions dealing with the relation between the national and the EU legal order, including *Frontini*,<sup>79</sup> and *Granital*.<sup>80</sup> Moreover,

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<sup>70</sup> See Sergio Bartole, “La politica comunitaria del Presidente della Repubblica” (2002) *Forum Costituzionale*

<sup>71</sup> See Art. 11 It. Const. (saying that “Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organizations furthering such ends.”)

<sup>72</sup> See Italian Constitutional Court n. 183/1973

<sup>73</sup> See Antonio Cassese, “Articolo 11” in Giuseppe Branca (ed), *Commentario alla Costituzione* (Zanichelli – Società Editrice del Foro Italiano 1975) 565

<sup>74</sup> See C. Const. n. 14/1964

<sup>75</sup> See Marta Cartabia, *Principi inviolabili e integrazione europea* (Giuffrè 1995)

<sup>76</sup> Italian Constitutional Court n. 83/1973 §9

<sup>77</sup> See *infra* section 5

<sup>78</sup> The CC only made references to the concept of “constitutional identity” and “national identity” in a completely different context than that one related to the possible conflict between the EU and the national legal orders. See Italian Constitutional Court n. 262/2009 and Italian Constitutional Court n. 203/1989.

<sup>79</sup> See Italian Constitutional Court n. 183/1973 (holding that the national norm contrasting with the European Treaties must be considered unconstitutional. However, this unconstitutionality could only be declared by the Constitutional Court itself)

<sup>80</sup> See Italian Constitutional Court n. 170/1984 (holding that the national norm contrasting with the European one could be disapplied by every judge).



with judgment 1146/1988,<sup>81</sup> the CC offered an interpretation of Article 139 of the Italian Constitution – which prohibits constitutional revisions undermining the Republican nature of the state<sup>82</sup> – and made another step in its fundamental rights (and not constitutional identity) based narrative. In this case, the CC clarified, in substance, that those principles which cannot be modified even through a constitutional revision are the same principles which resist to the primacy of EU law.

The circumstance that constitutional identity control is substantially extraneous to the CC case law is confirmed by the first (and last until now) judgment in which the CC used expressly the expression “counter-limits”: the so-called German reparation case.<sup>83</sup> In this decision, the CC declared unconstitutional certain domestic provisions that obliged Italian courts to comply with the judgment of the International Court of Justice (ICJ) in *Germany v. Italy*,<sup>84</sup> thereby excluding the jurisdiction of the national courts in cases concerning actions for civil damage resulting from war crimes and crimes against humanity committed by German military forces during WWII. In this ruling, the CC found a (counter) limit to the entrance of customary international law in the Italian legal order, because of the violation of Article 24 of the Italian Constitution, which protects the right to defense. The CC held that “there is no doubt that the fundamental principles of the constitutional order and inalienable human rights constitute a limit to the introduction [...] of generally recognized norms of international law, to which the Italian legal order conforms under Article 10(1) of the Constitution and serve as ‘counter-limits’ [*controlimiti*] to the entry of European Union law, as well as limits to the entry of the Law of Execution of the Lateran Pacts and the Concordat. In other words, they stand for the qualifying fundamental elements of the constitutional order. As such, they fall outside the scope of constitutional review (Articles 138 and 139 Constitution, as was held in Judgment No. 1146/1988).”<sup>85</sup>

Hence, in the only case in which it has invoked the counter-limits doctrine against the ICJ, the CC has not articulated resistance to international law as a matter of constitutional identity. Otherwise, the openness of the CC is confirmed also by the dialogic approach embraced vis-à-vis the ECJ. Contrary to other national constitutional courts, the CC has developed a dialogue with the ECJ, and not a self-referential closing,<sup>86</sup> on the understanding that this is the best way to promote the convergence between the constitutional values which are dear to the Italian system and those of the EU. As Marta Cartabia, now vice president of the CC, said before being appointed to the bench: “The national constitutional traditions (and national constitutional identity) do not have a voice unless the national subjects and institutions speak for them on the European stage.”<sup>87</sup>

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<sup>81</sup> See Italian Constitutional Court n. 1146/1988 (holding that the Italian Constitution enshrines some supreme principles that cannot be modified or changed even by constitutional revision act. These principles are both those expressly listed in Art. 139 Const. as limits to the power of constitutional revision and those on which the essence of Italian Constitution lies)

<sup>82</sup> See Art. 139 It. Const. (saying that “the republican form of government cannot be the object of constitutional revision”)

<sup>83</sup> See Italian Constitutional Court n. 238/2014

<sup>84</sup> See *Germany v. Italy*, judgment of 3 February 2012, ICJ Reports, 2012, 99

<sup>85</sup> Italian Constitutional Court n. 238/2014 §3.2

<sup>86</sup> See Oreste Pollicino and Giuseppe Martinico, *The Interaction between Europe’s Legal Systems* (Elgar 2013)

<sup>87</sup> Marta Cartabia “Taking Dialogue Seriously. The Renewed Need for a Judicial Dialogue at the Time of Constitutional Activism in the European Union” (2007) 12 *Jean Monnet Working Paper*.

As is well known, the CC made its first reference to the ECJ only in 2008,<sup>88</sup> in a direct proceeding.<sup>89</sup> Even before then, however, the CC had built an indirect, “silent”<sup>90</sup> conversation with the ECJ by using a technique called “double preliminary.”<sup>91</sup> The CC established that, in cases in which the same legislation gave rise to both a question of constitutionality and of conformity with EU law, the national judges were authorized to raise the constitutional question before the constitutional judges only after having raised the EU law question before the ECJ. By building this ‘judicial triangle,’ the CC not only confirmed its view on the separation between the domestic and the European legal orders, but also aimed to maintain the ‘last word’ with regard to its interaction with the ECJ. When the judge *a quo* raises a question of constitutionality with regard to a piece of national legislation which, according to the same judge might also be in conflict with EU law, the CC would return the question (by declaring it ‘inadmissible’) to the ordinary judge, asking it to raise the question of the conformity of the national legislation with EU law before the ECJ. This indirect dialogue however backfired and about the further marginalisation of the CC from the circuit connecting the common judges and the ECJ. The common judges, once having consulted the ECJ as requested by the CC pursuant to the technique of double preliminary, have increasingly tended to solve the pending judicial dispute without suspending it for a second time to raise a question of constitutionality before the CC.

In 2013 therefore, the CC, finally decided to take the final step and to seek a preliminary ruling request in an *incidenter* proceeding.<sup>92</sup> In this case the CC considered a reference from two district courts concerning employment legislation which permitted various classes of supply teachers to be appointed under successive fixed-term contracts, without setting a limit on the total duration of such appointments or the number of renewals, and with no provision for the payment of damages in the event of their abuse. The CC held that the question as to whether the organizational requirements of the Italian school system constituted objective reasons within the meaning of Directive 1999/70/EC fell to be resolved by the ECJ, along with the question as to whether the fact that certain time limits had not been stipulated for the holding of competitive examinations for permanent appointments was compatible with clause 5(1) of the framework agreement. It accordingly sought a preliminary ruling from the ECJ and stayed proceedings pending receipt of that ruling.

In sum, the CC has traditionally avoided developing a notion of constitutional identity in the Italian constitutional context. While the CC was the first national court to outline counter-limits to the supremacy of EU law, it always restricted this doctrine to the field of the protection of fundamental rights only. Moreover, while the CC has eventually invoked the notion of counter-limits against a decision of the ICJ, it has never done so against the ECJ. On the contrary, the CC sought to build a cooperative relation with the ECJ – first through an indirect dialogue and lately through the preliminary reference procedure. By making a preliminary reference also in the indirect proceeding, the CC finally understood that it can better represent the Italian voice in the EU only by engaging in a full dialogue with the ECJ. Overall, therefore, the CC has refrained from assertively invoking some alleged specificity

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<sup>88</sup> See Italian Constitutional Court n. 103/2008 on which see Giuseppe Martinico & Filippo Fontanelli, “Between Procedural Impermeability and Constitutional Openness” (2010) 16 ELJ 345

<sup>89</sup> The CC can be called upon in its activity of constitutional review in two ways: in the *incidenter* proceedings (*giudizio in via incidentale*), it is for the judge handling a case to ask the CC for a constitutional review after having considered that the relevant provisions to be applied are likely to be in conflict with the Constitution; on the other hand, in the so ‘direct proceedings’ (*giudizio in via principale*), the relevant governmental bodies of either the State or the concerned Regions can request the constitutional review of the respective laws and statutes within a term of sixty days as of the approval of the same, regardless of the commencement of judicial proceedings before a court.

<sup>90</sup> Giuseppe Martinico, “Judging in the Multilevel Legal Order: Exploring the Techniques of Hidden Dialogue” (2010) 21 King’s Law Journal.

<sup>91</sup> Marta Cartabia, “Considerazioni sulla posizione del giudice comune di fronte a casi di ‘doppia pregiudizialita’ comunitaria e costituzionale” (1997) 22 Foro Italiano.

<sup>92</sup> See Italian Constitutional Court n. 207/2013, on which see Oreste Pollicino, “From Partial to Full Dialogue with Luxembourg: the Last Cooperative Step of the Italian Constitutional Court”, (2014) 10 EuConst 151.

of the Italian constitutional order against the process of European integration, rather seeking to reconcile the two.

## 5. *Taricco*: toward constitutional identity?

Another confirmation of the CC cooperative position is given by its very recent request for preliminary reference to the ECJ in the *Taricco* case, in which the notion of constitutional identity is used for the first time.<sup>93</sup> In this case the CC referred back to the ECJ a case that it had already adjudicated before. Specifically, the CC asked the ECJ to clarify whether its decision in *Taricco*<sup>94</sup> does actually leave national courts the power to dis-apply domestic norms even to the extent that this contrasts with a fundamental principle of the Constitution, namely the principle of legality.<sup>95</sup>

In the case at issue, Mr. Taricco and other individuals had been placed under investigation by the Court of Cuneo over alleged VAT frauds. The frauds occurred between 2005 and 2009. Under the Italian Criminal Code, as amended during the governments headed by Silvio Berlusconi, the statute of limitation for prosecuting tax fraud cases is quite narrow. According to the Judge for Preliminary Hearing of the Court of Cuneo, all the crimes would have been time-barred by 8 February 2018 at the latest, before a final judgment could be delivered. As a result, the defendants would have likely enjoyed *de facto* impunity. In the view of the Court of Cuneo, by establishing a strict limitation period, Italy was in breach of the obligation under EU law to take measures to contrast illegal activities affecting the financial interest of the Union. Therefore, the Judge for Preliminary Hearing asked the ECJ whether such a limitation was compatible with EU law. Clearly, the goal of the reference to the ECJ was to obtain a *nulla osta* from EU judges to prosecute these cases of tax fraud beyond the limits set by the national statute of limitations.

The ECJ, not without substantially reframing the preliminary questions, based its judgment on the interpretation of Article 325 TFEU. According to the ECJ, this provision, on the one hand, “obliges the Member States to counter illegal activities affecting the financial interests of the European Union through effective deterrent measures,”<sup>96</sup> while, on the other one, “obliges them to take the same measures to counter fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own interests.”<sup>97</sup> The ECJ then held that a provision of national law on limitation periods for proceedings which, for reasons relating to the scheme of that provision, has the effect in many cases of exempting from punishment the perpetrators of fraud in matters of VAT is incompatible with the aforementioned provisions of EU law.<sup>98</sup> Accordingly, the ECJ concluded that in pending criminal proceedings, the national courts must refrain from applying such a provision.<sup>99</sup> The ECJ also excluded that requiring national courts to do so would amount to a breach of the principle of legality under Article 49 of the EU Charter of Fundamental Rights.<sup>100</sup> In the ECJ view, in fact, the principle of legality does not apply to the statute of limitations, which is a purely procedural matter that falls out of the scope of the principle of retroactivity in criminal law.

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<sup>93</sup> See Italian Constitutional Court n. 24/2017

<sup>94</sup> Case C-105/14 *Taricco*

<sup>95</sup> See on the case among others Massimo Luciani, “Il brusco risveglio. I controlimiti e la fine mancata della storia costituzionale” (2016) 2 *Rivista Associazione Italiana Costituzionalisti* and Ernesto Lupo, “La primauté del diritto dell’UE e l’ordinamento penale nazionale” (2016) 1 *Rivista diritto penale contemporaneo*.

<sup>96</sup> Case C-105/14 *Taricco* §37

<sup>97</sup> *Ibid*

<sup>98</sup> *Ibid* §47

<sup>99</sup> *Ibid* §49

<sup>100</sup> *Ibid* §54

The ECJ judgment raised a wide range of uncertainty among Italian scholars and courts. Although the ECJ has not specified whether in case the conditions above are met national courts shall apply a longer limitation period or not apply any limitation period at all, this outcome would anyways be in contrast with the principle of legality as enshrined in Article 25 of the Italian Constitution. Unlike the ECJ, in fact, the CC has interpreted the principle of legality as prohibiting a retroactive application *in peius* of statutes of limitations.<sup>101</sup> The different understanding of this principle has then resulted in a conflict between EU law and the Italian Constitution. How to resolve this clash? Were domestic courts to apply the ECJ judgment? Or should the CC apply the counter-limits doctrine as a means of protecting the national Constitution vis-à-vis EU law in order to prevent the EU institutions from exerting any inadmissible power to violate the fundamental principles of the constitutional order? A few days after the ECJ handed down the decision, the CC was thus asked by several courts, including the Supreme Court of Cassation, to rule on whether the doctrine of counter-limits prevented national courts from enforcing the *Taricco* judgment.

In its preliminary reference to the ECJ, the CC does not specifically take position on this. However, it is clear that the order constitutes the attempt to avoid a ruling that would enforce the counter-limits doctrine to prevent the *Taricco* decision from interfering with the fundamental principle of legality. Despite identifying the existence of a contrast between the ruling in *Taricco* and the Italian constitutional order, the CC has not applied the counter-limits doctrine, but has preferred, for the third time in history, to seek interpretative assistance and guidance from the ECJ – hence confirming its cooperative understanding of European constitutionalism. However, the enforcement of the counter-limits doctrine could be simply postponed in this case. In fact, more than a request of assistance and guidance, the CC reference is an urgent request for clarifications. The CC has decided to give a last chance to the ECJ to clarify, or better to rectify, its view in *Taricco* and interpret Article 325 TFEU in a way that would overcome the conflict with the supreme constitutional principle of legality. The reference indeed is not even a request for clarification, but for revisitation and, in other words, the last attempt to avoid a constitutional collision between the two legal orders.

The CC summarizes the gist of the problem as follows: “It is not disputed that, when it comes to criminal law, the principle of legality amounts to a supreme principle of the legal order aimed at protecting inviolable rights of individuals to the extent that it requires criminal provisions to be precise and it prevents criminal provisions from having any retroactive effects *in peius*.”<sup>102</sup> In light of this, the CC stresses that: “If Article 325 [TFEU] results in a legal norm that is contrary to the principle of legality, as noted by the referring ordinary courts, the Constitutional Court will have the duty to prohibit it.”<sup>103</sup> The CC is aware that the conflict between Article 325 TFEU and the principle of legality stems from the different understanding of the latter at national and EU level. Even if most of the Member States treat statute of limitation as a purely procedural matter not affecting the principle of legality, the CC emphasizes that the existence of a common view in this regard among the member states is not needed and that EU countries are free to consider the statute of limitation as a matter either of procedural law or substantive criminal law.<sup>104</sup>

The assessment to be carried out, in the view of the CC, is twofold. First, it must be determined whether an individual might reasonably foresee, in light of the legal framework in force at the time of his conduct, that Article 325 TFEU would have prevented national courts from applying the national provisions on statute of limitations, provided that the conditions set forth by the *Taricco* judgment were met.<sup>105</sup> The answer of the CC to this question is a negative one but the CC calls on the ECJ to clarify the correct

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<sup>101</sup> See Italian Constitutional Court n. 143/2014

<sup>102</sup> Italian Constitutional Court n. 24/2017 §2

<sup>103</sup> Ibid

<sup>104</sup> Ibid §4

<sup>105</sup> Ibid §5

significance of Article 325 TFEU. Second, a similar assessment must be carried out on whether the powers of national courts are properly circumscribed when it comes to applying the provisions regarding the statute of limitation.<sup>106</sup> In this respect, the principle of legality does not come into question inasmuch as the retroactivity of criminal law provisions is concerned but rather to the extent that the power to amend the existing provisions rests in the hands of legislators and not of judges. According to the CC, it is problematic that the decision to prosecute a case or to declare the crime time-barred would hinge on a discretionary evaluation – and not on a precise legal requirement – whose outcome may even vary from one court to another. Thus, even in the case the ECJ found that statute of limitation must be interpreted as a purely procedural matter, in the CC's view another constitutional obstacle to the enforcement of the *Taricco* judgment might lie with the requirement that the power to determine the content of criminal law provisions rests solely in the hands of legislators and not of judges.

Having focused on the reasons why a clash occurs between the principle of legality and the *Taricco* ruling, the CC wonders if the ECJ actually imposed its ruling to be enforced by domestic courts even in case it conflicts with a fundamental principle of the national legal order.<sup>107</sup> The CC thinks the answer to be negative but asks the ECJ for clarification. According to the CC, the ECJ in *Taricco* expressly recognized the power for national courts to carry out the assessment on the compatibility of the decision with the constitutional order. On the one hand, the ECJ had noted that “if the national court decides to disapply the national provisions at issue, it must also ensure that the fundamental rights of the persons concerned are respected.”<sup>108</sup> On the other, the judgment specifies that the disapplication is nevertheless “subject to verification by the national court.”<sup>109</sup> Then, the key question that the CC refers to the ECJ is whether by these statements the ECJ assumed that Article 325 TFEU (and therefore the *Taricco* ruling, in the end) is applicable only provided that it is compatible with the national constitutional identity of the concerned member state and that is for the competent authority of that member state to carry out that assessment.<sup>110</sup> If this interpretation were correct, according to the CC there would be no contrast between EU law and the Italian legal order. As a result, the reference made by the ordinary courts to the CC would be rejected as unfounded.

Some observations can be made on the reference by the CC to the ECJ. Firstly, the CC attempted to differentiate *Taricco* from *Melloni*,<sup>111</sup> suggesting that the case at hand did not raise a problem of supremacy of EU law.<sup>112</sup> In *Melloni* it was questioned whether the domestic legislation was compatible with EU law to the extent that it introduced additional requirements for the execution of a European arrest warrant (EAW). According to the CC, in that case a different decision by the ECJ would have compromised the unity of EU law, most notably in a field such as the EAW based on mutual trust between member states.<sup>113</sup> On the contrary, for the CC the primacy of EU law is not called into question in *Taricco*. As the CC tries to claim, its ruling does not challenge the ECJ interpretation of Article 325 TFEU but rather highlights the existence of a constitutionally-mandated obstacle to the enforcement of the same, resulting from a different understanding of the principle of legality. For the CC, EU law does not prevent member states from offering a higher degree of protection of human rights like that enshrined in the Italian Constitution, since the same does not impact the primacy of EU law.<sup>114</sup> This clarification

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<sup>106</sup> Ibid

<sup>107</sup> Ibid §7

<sup>108</sup> Case C-105/14 *Taricco* §53

<sup>109</sup> Ibid §55

<sup>110</sup> Italian Constitutional Court n. 24/2017 §7

<sup>111</sup> See Case C-399/11 *Melloni* ECLI:EU:C:2013:107

<sup>112</sup> Italian Constitutional Court n. 24/2017 §8

<sup>113</sup> Ibid

<sup>114</sup> Ibid

is in many ways not entirely convincing.<sup>115</sup> However, it is a very important aid that the CC is offering to the ECJ as a way to diffuse conflict. The CC, in fact, aims at safeguarding in principle the primacy of EU law and, generally speaking, the supremacy of the European Union.

Secondly, the CC employed the concept of constitutional identity, but sought to limit its weight.<sup>116</sup> The CC specified that the principles that came into question in *Taricco* concern the constitutional identity of Italy. However, the CC particularly emphasized the importance of the constitutional traditions, including both the national and the European ones.<sup>117</sup> In the view of the CC, the existence of a common constitutional tradition does not deprive each member state of the autonomy to adopt a specific understanding of the same principle, most notably where the relevant area of law has not been subject to EU harmonization. This factor is noteworthy since what a constitutional court could be expected to object to the application of EU law on the basis that its constitutional identity may be undermined. Instead, the CC takes a different view and, even without neglecting the relevance (also) of constitutional identity, it focuses more on the notion of constitutional tradition(s).<sup>118</sup> The CC seems to propose a language with regard the protection of the untouchable core of the constitutional legal order, which partially contrasts with that of the BVerfG.<sup>119</sup> It is the language of the necessary protection of constitutional tradition, which turns out to be by design a European law concept and for sure is more in line with the idea of cooperative constitutionalism in Europe. This is another important signal of the cooperation that the CC wishes to maintain with the ECJ. A court willing to contrast the primacy of EU law would have played the game differently, through the stronger defense of the constitutional identity.

This is reflected by the shift that the CC makes in its judgment from the national constitutional tradition to the European one.<sup>120</sup> In the conclusive part of its preliminary reference, the CC suggests that the interpretation of the principle of legality given by the ECJ in *Taricco* may most likely be in contrast with the same Article 49 of the Charter.<sup>121</sup> The CC notes that the scrutiny on the compatibility of the *Taricco* “rule of conduct” with the Charter was limited to the profile related to the retroactivity of criminal law, while no argument was made to the extent that the principle of precision of criminal law is concerned. As the CC proactively suggests, however, this principle is itself a common constitutional tradition among the member states (at least in continental Europe), as long as it prevents judicial interference with law-making, most notably when it comes to criminal law.<sup>122</sup> According to the CC, leaving courts the power to define a key element of a criminal offense, like allowing courts to prosecute a crime or not depending on whether crimes are time-barred in a significant amount of cases, would therefore infringe the European constitutional tradition on the principle of legality. In conclusion, while the CC in *Taricco* outlines the potential conflict between the EU law (as interpreted by the ECJ) and the Italian Constitution, it signals that the concern raised in Italy on the importance of legal certainty in criminal law is a shared heritage of the European constitutional tradition, of which the EU itself is a part: hence, the language of common constitutional traditions prevails on one which focuses on constitutional identity.

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<sup>115</sup> Among other, in *Melloni* the supremacy of EU law affected a norm of secondary EU law, whereas in *Taricco* it concerned a provision of the EU treaties itself. We are grateful to Filippo Donati and Pietro Faraguna for making this point clear to us.

<sup>116</sup> Ibid §6

<sup>117</sup> Ibid §9

<sup>118</sup> Ibid

<sup>119</sup> See Pietro Faraguna, “The Italian Constitutional Court in *Taricco*: “Gauweiler in the Roman Campagna“, in [www.verfassungsblog.de](http://www.verfassungsblog.de) (comparing the Italian CC in *Taricco* and the German BverfG in *Gauweiler*)

<sup>120</sup> Italian Constitutional Court n. 24/2017 §9

<sup>121</sup> Ibid

<sup>122</sup> Ibid

## 6. Conclusion

This paper analyzed the concept of constitutional identity in Italy. The paper contextualized the debate by outlining the peculiar historical and cultural conditions that have prevented the rise of a strong nationalist feeling in Italy. At the same time, it sought to go beyond a pure judicially-focused analysis of constitutional identity,<sup>123</sup> by considering whether, and in case how, this notion has emerged in the practice of both the CC and the President of the Republic. As the paper claimed, the study of the words and deeds of the two highest constitutional authorities of the Italian State reveals the absence of a constitutional identity mentality in Italy. On the one hand the Italian Presidents of the Republic – and particularly Ciampi, Napolitano and Mattarella – have consistently affirmed the axiological overlap between the process of democratization in Italy and the project of European unification, based on the understanding that both the Italian Constitution and the EU treaties are the product of the resistance movement against Nazi-Fascism. On the other hand, the Italian CC, despite theoretically recognizing potential limits to the primacy of EU law in Italy, has never drawn red-lines against the EU: on the contrary, the CC developed, especially in the last 10 years, a cooperative dialogue with the ECJ aimed at valorizing the elements of contact, more than those of conflict, between national constitutional law and EU law.

In fact, the word constitutional identity (*identità costituzionale*) has never been used as a way to define the relation between the national and the European legal orders either by the Presidents of the Republic or by the CC – until the very recent *Taricco* judgment. However, as we explained, the preliminary reference of the CC to the ECJ in *Taricco* should be seen as yet another step in the dynamic of cooperation and openness between the national and the European legal orders. In this case, the CC asked the ECJ to revisit its previous interpretation of Article 325 TFEU, with a view toward overcoming its potential clash with the principle of legality in criminal law. By performing such request for clarification, or better, for revisitation, the CC focused, with regard the hard constitutional core of the principle of legality, more on the concept of constitutional tradition than on that one of constitutional identity. It is not only a formal, linguistic, difference, but a substantial one. The constitutional tradition is by definition pluralistic in nature, whereas the reference to the constitutional identity, by design, is not. As we pointed out, the CC reasoning shifts from the national constitutional tradition to the European one, seeking to prod the ECJ to reconsider its previous judgment in light of values which are part of the European constitutional heritage.

In conclusion, we claim that in *Taricco* the CC has – rightly – disappointed that growing crowd of national constitutional lawyers who had flirted with the notion of constitutional identity, dreaming to import in the Italian constitutional system a legal concept which is mostly extraneous to the Italian constitutional tradition. As we pointed out, in fact, both the President of the Italian Republic and the CC have consistently promoted a different vision of the Italian Constitution – one which is reinforcing the project of European integration, not resisting or undermining it based on some alleged specificities or unique features of the nation-State. While this paper does not consider whether other EU member state can plausibly claim to have a constitutional identity that cannot be reconciled with the process of European integration, it has shown that certainly constitutional authorities in Italy have never articulated a set of core or fundamental elements or values which are only exclusive of a single state. The Italian constitutional vocabulary is inspired by the language of common constitutional tradition – not by that of individual constitutional identity. In the case of Italy, a founder of the EU, the process of European integration represents the most perfect fulfillment of the Constitution.

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<sup>123</sup> See Pietro Faraguna, “Taking Constitutional Identity Away From the Courts” (2016) 41 Brooklyn Journal of International Law 491





