EUROPE TODAY: BRIDGES AND WALLS*

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

Nei momenti di crisi e di svolta [occorre] sprigionare visione e coraggio[2].

1 EUROPE 2.0. TIMES OF CRISIS

Problems, tensions, challenges, questions: in the words of Giorgio Napolitano – former President of Italy and outstanding and committed political actor on the European theater -, Europe and crisis are perceived as joined at the hip.

The same perception has permeated current public opinion.

Also in legal scholarship in the last 8-10 years, "crisis" is a topos of European studies. And rightly so.

As Yves Mény has recently pointed out: «Une simple recherche bibliographique montre à quel point déplus une dizaine d'années l'UE est largement associée à l'idée de crise»[3]. Just to mention one of the most recent contribution in the Italian scholarship, in 2016 one of the issues of the *Rivista Trimestrale di Diritto Pubblico*[4] has collected a bunch of valuable papers and essays dealing with the European crisis, starting with the insightful opening remarks by Luisa Torchia, *In crisi per sempre? L'Europa tra ideali e realtà,* through a wide range of analytical investigations covering issues like the economic and social crisis, immigration, fundamental rights, security, administrative and political crisis[5].

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[1] G. NAPOLITANO, *Europa, politica e passione*, Feltrinelli, Milano 2016, 23.

[2] G. NAPOLITANO, *Europa, politica e passione*, 31.

[3] Y. MÉNY, *La crisi politica*, in «Rivista trimestrale di diritto pubblico», forthcoming in 2016, 622, quoting D. CHABANET (and others), *Le thème de la crise ou des chrysantèmes pour l'Europe*, in «Politique europeenne», 2015/4, No. 50, O. ROZENBERG (ed.), *Faut-il continuer à étudier l'Union Européenne?*, Paris, L'Harmattan.

[4] «Rivista trimestrale di diritto pubblico» 2016 forthcoming issue.

[5] L. TORCHIA, *In crisi per sempre? L'Europa tra ideali e realtà*, in «Rivista trimestrale di diritto pubblico», forthcoming in 2016, 617-620.

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

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

On its turn, this multifaced crisis has prompted a secondary line of crises affecting the institutional and constitutional structure of the European Union. The impact of the crisis has unleashed a number of centrifugal forces that are putting the Union under strain. It has brought to light deep cleavages between the north and south of the Eurozone – the creditors versus the debtors; the migration crisis has revealed a creeping distrust among the member states: walls were built, Schengen suspended; the States of the Union were not able to reply in concert to the terrorist attacks.

Generally speaking, under the pressure of the crisis the Union is loosening the ties that brought together 6 and then 9 and then 12, 15, up to 28 national States. It is experiencing a revival of the intergovernmental methods at the detriment of the supranational institutions[6]. Euro-skeptical political forces and nationalist parties are contaminating the public opinion throughout the continent.

And then, here came Brexit.

The image of a "Europe of bits and pieces" – as Deidre Curtin[7] said many years ago – sounds most appropriate than ever. And some pieces are being left behind, while others are leaving.

Today, a European crisis is as undeniable, as undeniable is its perception. This is something that some political actors are exploiting to gain political consent, provoking the paradox that radical left and right now share the same anti-Europe feelings, though for different, even opposite, reasons: some people consider that Europe is too involved in economic, market and fiscal matters regardless of social problems, some people, on the contrary, think that market and fiscal issues should be further and implemented[8].

In the public opinion, the desire of Europe has been declining.

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[6] S. FABBRINI, *La crisi dell'Euro e le sue conseguenze*, in «Rivista trimestrale di diritto pubblico», forthcoming in 2016, 651-668.

[7] D. CURTIN, *The Constitutional Structure of the Union: A Europe of Bits and Pieces*, in «Common Market Law Review», 1 (1993), 17-69.

[8] Cf.M. FERRERA, *Rotta di collisione*, Laterza, Roma-Bari 2016, 6 *et seq.*

2 CRISIS AS A KEY FACTOR IN EUROPE CONSTITUTION

Yet, crisis is at the very core of the origin itself not only of Europe but also of the idea of Europe. Europe as we know it today arises from the ruins of a continent that World War II had wasted[9]. It was the urge of reconstruction, the demand of peace and prosperity after the war that prompted the European construction, starting in 1951 with the limited, but strategic European Coal and Steel Community.

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

According to the vivid and eloquent words recently recalled by Sabino Cassese "Europe lives on crisis" – "l'Europa vive di crisi"[10], crises are part and parcel of the European history. As everywhere, also in the process of the European integration crises hurt. However, as to Europe, crises have also been a major trigger of change and this is one of the most important feature of the European character, if any.

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

Luisa Torchia rightly said that Europe is an *ideal without a model*[11]. The ideal is a European polity set free from war; the institutional model is indefinite, she says. Right: because the model is always in progress.

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[9] Historians show that some traces of the idea of a political union in Europe are found in the studies of many political scholars and statesmen of the 18th century as responses to wars and other political conflicts amongst States.

[10] This is a quotation from one of H. Schmidt's speeches from *Bundestagsreden und Zeitdokumente*, Bonn, Bertelsmann Verlag, 1975, 249 - published in Italian in B. OLIVI (ed.), *Discorsi per l'Europa*, Roma, Presidenza del Consiglio dei ministri, s.i.d. (but 1987), 246 - by S. CASSESE, *«L'Europa vive di crisi»*, in «Rivista trimestrale di diritto pubblico», forthcoming in 2016, 779.

[11] L. TORCHIA, *In crisi per sempre? L'Europa fra ideali e realtà*,
617.

3 CRISES AS OPPORTUNITIES; CRISES AS VERDICTS

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

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

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

Then the open, crucial question is: what helps converting a crisis into a new beginning? What helps making a new beginning out of a crisis?

Hannah Arendt offers a methodological key: «A crisis forces us back to the questions themselves and requires from us either new or old answers, but in any case, direct judgments. A crisis becomes a disaster only when we respond to it with preformed judgments, that is, with prejudices. Such an attitude not only sharpens the crisis but makes us forfeit the experience of reality and the opportunity for reflection it provides»[12].

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

Crises are opportunities, not verdicts. But a positive outcome cannot be taken for granted: the difference is a matter of method.

Let's pause again for a moment on the precious words of another great figure and supporter of the European project. The very first visit by President Giorgio Napolitano after his election was to Altiero Spinelli's grave. In the speech pronounced in that occasion he said: «[Quella di Spinelli] resta una grande lezione di metodo: non chiudere le proprie analisi in alcuno schema, confrontarsi creativamente con la realtà nella sua evoluzione, ispirarsi tenacemente a idealità non passeggere come quelle dell'unità e del comune destino dell'Europa, saper risollevarsi da ogni sconfitta»[13].

A question of method: forgetting old projects, plan and strategies, or preformed outlines. Crisis require an open, dynamic and creative thinking suitable to the

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[12] H. ARENDT, *Between Past and Future: Six exercises in political thought*, Viking Press, New York 1961, 174.

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

changing conditions. Again, with the words of Giorgio Napolitano: «Nei momenti di crisi e di svolta» occorre «sprigionare visione e coraggio»[14].

Different words, different context, different personalities: both of them call for a fresh, genuine, unbiased understanding of reality as it is, as it evolves. From the methodological point of view, the first urge is to loyally come to terms with the emerging, ever-changing historical context.

Indeed, our perspective is a legal one: we are all legal professionals – lawyers, civil servants, members of the judiciary, academics, etc. From different points of view, we all look at the world through the lens of the legal glasses. So, let's focus on the legal framework of the present day Europe. Indeed, legal structures mirror the social, economic and cultural texture of the community polity they refer to. However, for the purposes of the following reflection we will stick to legal and constitutional issues and leave the social life in the background. After all, law and regulation plays a major role in the EU, which is a space of intense juridification[15].

4 Reality First[16]: Pluralism and Dynamism

From the constitutional point of view, the EU – and before it, the European Communities – has always been an original construction, difficult to define and classify. The idea of a "supranational organization" was meant to stress the original model of the European integration, something between an international system and a State. «Europe has charted its own brand of constitutional federalism», as it has been said years ago by Joseph Weiler[17] in his considerations about Europe's *Sonderweg*.

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

The first character is pluralism and complexity – *united in diversity*.

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

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

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[14] G. Napolitano, *Europa, politica e passione*, 31: «La politica è un crogiuolo, come magistralmente lo descrisse Thomas Mann, di calcoli, di espedienti, di amoralità, di "elementi troppo umani e contaminati di volgarità", e insieme di motivazioni etiche, di scelte rivolte al bene comune, di comportamenti ispirati a una personale coscienza della nobiltà di una missione al servizio della società. Ebbene, la politica, oscillando tra questi estremi, è chiamata – nei momenti di crisi e di svolta – a giustificarsi e riabilitarsi sapendo sprigionare "visione e coraggio" […] "visione per superare pericoli di stagnazione, coraggio per spingersi in territori sconosciuti"».

[15] R. D. Kelemen, *Eurolegalism. The Transformation of Law and Regulation in the European Union*, Cambridge, Harvard University Press, 2011.

[16] Cf. «Realities are greater than ideas», Pope Francis, *Evangelii Gaudium*, 233.

[17] J. H. H. Weiler, *Federalism without Constitutionalism: Europe's Sonderweg*, in K. Nicolaidis and R. Howse, *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*, Oxford University Press, Oxford 2001.

As we all know, so far the EU comprises 28 members (including the UK), 24 languages, an estimated population of more the 500 millions of people - what would set EU at the 3rd place after China and India. At the foundation in 1957 by the *Inner Six*[18] the European Communities had a population of little less than 170 million people; after the first enlargements the EU population raised to about 372 million people; the following big enlargement in 2004 gave access to the EU to most of the East Europe countries[19] bringing the EU to 25 members and to about 456 million people; last, in 2007 and 2013, Bulgaria, Romania and Croatia joined the group. As to the size of the member states, their population ranges from the more than 80 million of Germany to the less of 500.000 of Malta. Should the 5 recognized candidates actually enter the Union that would rise the population to 595 million.

United in diversity is the official motto of the EU which has been drawn by the Latin version - *In varietate unitas!* - coined for himself by Ernesto Teodoro Moneta, the Italian Nobel Peace Prize Laureate in 1907 for his commitment to propagandize for disarmament, a league of nations, and settlement of international disputes by arbitration.

This motto contrasts, in a way, the phrase *E pluribus unum* that can be read on the Great Seal of the United States of America.

The first suggesting an unresolved complexity, better: a complexity which is meant to remain unresolved; the second suggesting a centripetal move: from a number of colonies to the federation.

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

On his side, the historian Paolo Prodi, in his research about modernity in Europe states the importance of the processes that made Europe the first laboratory of modernity. The ever-changing notion of "modernity" includes the idea of movement based on the Latin origin of the word: *modus-modo-modernus*. At the height of the Renaissance humanism, a new idea of history as movement and being on the way rises[20]. Thus, Europe, modernity and movement go hand in hand, are twin ideas.

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[18] The *Inner Six* are Belgium, France, Italy, Luxembourg, Netherlands, West Germany as opposed to the *Outer Seven* (Austria, Denmark, Norway, Portugal, Sweden, Switzerland, United Kingdom). Five of the *Outer Seven* later joined the European Communities.

[19] Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

[20] P. PRODI, *Homo Europaeus*, il Mulino, Bologna 2015, 15: «L'approccio che qui presento [pone] al centro l'analisi dei processi che hanno reso l'Europa il primo laboratorio della modernità. Tale esperienza non si inscrive in un tempo unitario, come troppo a lungo ha suggerito la definizione

Let's give the credit where the credit is due: in the legal domain, it is the merit of a group of legal scholar to highlight these features of the European experience in order to suggest them as a descriptive and as a normative tool for a proper understanding of the EU in its legal and constitutional dimensions[21].

It was Neil MacCormick's seminal book – *Questioning Sovereignty*[22] – that prompted a lively legal debate about *constitutional pluralism* at the beginning of the XXI century[23]. They move from the simple fact that a multiple variety of actors, powers, institutions coexist in the European space, with no unique, final, supreme power. They consider that member states and the union are "interactive systems" and the relations between them are "pluralistic rather than monistic" "interactive rather than hierarchical"[24]. In particular, they focus on the role of the courts and refuse the idea of the "final arbiter in Europe", stressing the need for smooth relationships between national courts – especially national constitutional courts – and the Court of Justice of the European Union (as well as with the European Court of Human Rights), calling for mutual respect, cooperation, balance as opposed to hierarchy, dominance and subordination.

Constitutional pluralism implies that the European components are in a way simultaneously linked and apart: apparently a contradiction, but in fact a sort of paradox that is not to be resolved. Common fundamental values link together all the components of the union, as well as different understanding of them keep them apart.

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tradizionale di un'«epoca moderna» (*early modern*), che andava dalle grandi scoperte geografiche fino all'età delle rivoluzioni. (…) La nozione di modernità è infatti relativa e, a sua volta, mutante. Reinhart Koselleck ci ha insegnato l'approccio più efficace per recuperarne il significato più profondo nella semantica del concetto di movimento (…); qualcosa il cui valore massimo consiste proprio nel mutamento. (…) possiamo cogliere un nuovo concetto della storia come mutamento, come cammino dell'umanità».

[21] See at least the following works on constitutional pluralism and the European constitutional mosaic: K. TUORI-S. SANKARI (eds.), *The Many Constitutions of Europe*, Routledge, London 2010; A. ARNULL-C. BARNARD-M. DOUGAN-E. SPAVENTA (eds.), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood*, Hart Publishing, Oxford 2011; N. WALKER-J. SHAW-S. TIERNEY (eds.), *Europe's Constitutional Mosaic*, Hart Publishing, Oxford 2011.

[22] N. MACCORMICK, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth*, Oxford University Press, Oxford 1999.

[23] M. KUMM, *Who is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice*, in «Common Market Law Review», (1999) 36, Issue 2, 351–386; M. P. MADURO, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in N. WALKER (ed.), *Sovereignty in Transition*, Hart Publishing, Oxford 2003, 502-537; N. WALKER, *The Idea of Constitutional Pluralism*, in «Modern Law Review», Vol. 65 (2002), 317-359; A. VON BOGDANDY, *Pluralism, Direct Effect, and the Ultimate Say: on the Relationship Between International and Domestic Constitutional Law*, in «I•CON» 6 (2008), 397-413.

[24] N. MACCORMICK, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth*, 117-121.

That's why, in order to properly understand the European institutional construction, as Françoise Tulkens said a few months ago: «forget Kelsen and all the pyramidal frameworks»[25].

The first result of the contribution of constitutional pluralism is to question the myth of the final authority. It puts forward a new map design of the authorities – courts in particular - in the Union and beyond. It is a design that reminds more to Pollock's paintings than Mondrian's[26].

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

The second result of constitutional pluralism is a stress on dynamics rather than on statics.

In particular, Miguel Maduro's contra-punctual law theory, inquires on how this admittedly pluralist, "heterarchical" integration remains in harmony in a type of contrapunctual music: «It's contrapunctual and not a mere cacophony or dissonance» as recalled by Miguel Maduro[27]. It requires a discursive practice among all the actors involved, whose common basis is to be ensured by a set of contrapunctual principles.

Thus, equally valuable constitutional claims are developed and supported in the European context, always flowing from one jurisdiction to another: from the national to the supranational, and the other way round. And moreover, from the national to the national, with or without the interposition of the supranational. Constitutional pluralism looks at the diverse legal traditions as a repository for the never ending forging of the European legal principles. That's something that echoes the ELI mission where it says: «Building on the wealth of diverse legal traditions, its mission is the quest for better law-making in Europe and the enhancement of European legal integration»[28].

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

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[25] F. TULKENS, *Asylum and Migration Today: An Indispensable Reflection on the Notion of Border*, Keynote Speech at ICON•S Conference, *Borders, Otherness and Public Law*, 17–19 June 2016, Humboldt University, Berlin (https://youtu.be/ifxyACZ7Mk0?list=PLljW4VOt-et-Qc1RnHMje6YBtu1bSOs8V)

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

[27] M. Avbelj-J. Komárek, Four Visions of Constitutional Pluralism, in «European Journal of Legal Studies» Vol. 2 N. 1 (2008), 325-370.

[28] ELI Mission (http://www.europeanlawinstitute.eu/about-eli/our-mission)

5 ON "WALLS AND BRIDGES" OR "EXIT AND VOICE"

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

This understanding of the institutional relations within the Union – which applies to all the actors - is very much appealing and promising for a member of a court, as I am.

As a matter of fact, courts in Europe are currently confronted with a number of baffling problems due to discrepancies, if not veritable clashes, between national legal and constitutional principles and their European version. This is somehow inevitable given the open texture of the constitutional principles that can give rise to conflicting constitutional interpretations. Just to mention one example, consider the number of constitutional controversies concerning the European Arrest Warrant, showing different sensibilities, different standards, and different balancing of competing principles. Indeed, criminal law and criminal procedure is now at the forefront of the tensions between the national and the supranational constitutional principles. The Melloni case[29] is probably the most popular and telling one.

Other examples came to light long time ago, since the Maastricht Treaty, with a number of national constitutional courts being asked to decide about the conformity to the national constitution of the European citizenship and the incipient economic and monetary union. The same thing occurred with the Constitutional treaty and the Lisbon treaty. More recently a number of pronouncements were issued in relation to the ESM – European Stability mechanism[30] - and other measures taken to tame the sovereign debt crisis.

National courts have different reactions in front of these tensions. They can take opposite stances: they can play a defensive or a cooperative role; they can be conflictual or dialogical; inclusive or exclusive[31].

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[29] The reference for a preliminary ruling was issued by the Tribunal Constitucional, Madrid (Spain) on June 9th 2011, order 86/2011 and lodged at the Court of Justice on July 28th, 2011, Case C-399/11. The Judgment of the Grand Chamber of the Court was issued on February 26th, 2013. The final decision of the Tribunal Constitucional, Madrid, was rendered on February 13th 2014, STC 26/2014. For a critical analysis of the case, see A. T. PÉREZ, Melloni *in Three Acts: From Dialogue to Monologue*, in « European Constitutional Law Review», Vol. 10 No. 2 (2014), 308-331. Following this case, the Italian legislation has been modified by Law no. 67 of 28 April 2014.

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

[31] Cf. M. CARTABIA, *Constitutional Courts between Constitutional Law and European Law*, speech for the XVIth Congress of the Conference of European Constitutional Courts, Theme: *The Cooperation of Constitutional Courts in Europe. Current Situation and Perspectives*, May 12-14, 2014, Vienna.

Much as nuanced the positions may be, they can be boiled down to two basic attitudes: some of them show a defensive stance[32]; others engage in mutual interactions.

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

Indeed, the main instrument for the reciprocal interaction is the preliminary ruling ex art. 267 of the TFEU.

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

The first one is the Gauweiler case, where the German *Bundesferfassungsgericht* referred a preliminary ruling – the first ever in the history of the German membership to the European Union – concerning the OTM program, aimed at the purchase of government bonds of Member States of the Euro zone on the secondary market by the European systems of Central Banks. The final decision of the BVG, rendered on 21 June 2016[33], followed the decision of the Court of Justice of the European Union[34] and yet under condition and not without spelling out a number of objections.

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

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

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[32] See the Polish and Czech cases discussed by O. POLLICINO, *Qualcosa è cambiato? La recente giurisprudenza delle Corti costituzionali dell'est vis à vis il processo di integrazione europea*, in «Il Diritto dell'Unione europea», 2012, 765-787.

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

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

Indeed, it was an example of successful judicial dialogue; although – as it has been noticed[35]- surely not a gentlemen's conversation.

Less popular, and yet very relevant, the Italian saga on the fixed-term teachers, concluded with the decision of 15 June 2016, n. 187.

The controversy was about the conformity of the Italian system of recruitment of teachers in public schools with the European legislation concerning fixed-term work. The case was momentous, considering that it concerned some hundred thousand teachers and staff. The Italian Constitutional Court referred a preliminary ruling to the Court of Justice in the context of an incidental procedure – and unprecedented case[36] - for the interpretation of the relevant European regulation. It is worth remarking that a similar case was already pending in front of the European court and nevertheless the Constitutional Court decided to add its own voice to the judicial conversation under way.

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

Indeed, the European court concluded[37] that the previous legislation was in breach of the European directive, and so did the Italian Constitutional Court[38] in the wake of the European court's decision. However, considering the amendment approved by the Parliament in the meanwhile, a significant number of teacher have already got a tenured position and many others were expected to get one soon, thanks to the competitive procedures scheduled by the legislator.

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

Indeed, the Italian style was different from the German one. The former showing a lenient disposition; while the latter an assertive spirit.

Both, however taking a constructive step in a critical juncture.

6 CONCLUDING REMARKS: INTEGRATION, DIALOGUE AND GENERATIVITY

Speaking of judicial dialogue may sound an inappropriate and meager reply to the epochal crisis that the European union is suffering. Indeed, each of the component of the crisis require specific answers: many voices demand more political cohesion[39] in the Union on migration, security, external action, fiscal policy and many other fronts. Indeed, the crisis summons the political leaders to take a bold step ahead.

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[35] P. FARAGUNA, *La sentenza del* Bundesferfassungsgericht *sul caso* OMT/Gauweiler, in «Diritti comparati», 1/2016, 10.

[36] Apart from a previous minor case in a direct procedure, the Judgment no. 103 ot 2008.

[37] Court of Justice of the European Union, 3rd chamber, Judgement of 26 November 2014, C-22/13, C- 61/13 to C-63/13 and C-418/13 - *Mascolo and others*.

[38] Italian Constitutional Court, Decision n.187 of 2016.

[39] Cf., for example, G. NAPOLITANO, *Europa, politica e passione*.

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

"Re-generating Europe" – as M. Hartman and F. de Witte[40] said and a whole generation of young scholars echoed in a collective reflection on the German Law Journal, a few years ago. Re-generating Europe is the great possibility that this crisis opens up.

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

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

Bridges instead of walls.

Starting new processes instead of protecting spaces.

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

First, the "capacity of integrate" in new synthesis the most varied and discrete cultures. Because "the identity of Europe is, and always has been, a dynamic and multicultural identity" [41].

Again, pope Francis, in his Apostolic Exhortation *Evangelii Gaudium* at number 236 suggesting that the whole is greater than the part says: «Here our model is not the sphere, which is no greater than its parts, where every point is equidistant from the center, and there are no differences between them. Instead, it is the polyhedron, which reflects the convergence of all its parts, each of which preserves its distinctiveness».

Second, the "capacity of dialogue" – this is a veritable emergency in his view, because from the culture of dialogue and encounter depends the possibility of

[40] M. HARTMAN-F. DE WITTE, *Regeneration Europe: Towards Another Europe*, in «German Law Journal», 2013, vol. 14, n. 5, pp. 441 *et seq.*

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

rebuilding the fabric of society and the possibility of peace: «Let us arm our people with the culture of dialogue and encounter».

Third, the “capacity to generate”, since «no one can remain a mere onlooker or bystander. Everyone, from the smallest to the greatest, has an active role to play in the creation of an integrated and reconciled society».

The present situation – he continues – is a forceful summons to personal and social responsibility”.

As the legal actors of Europe, we can offer our contribution to this culture of integration, dialogue and generativity so that the current crisis can reveal itself as nothing more than a crisis of growth.

Indeed, it will entail an ongoing process, a road to be travelled on and on, where the aim is but a step toward a further problem and a further achievement.