CONSTITUTIONAL DIALOGUES ON ELECTORAL LAW

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On the premise that the proportionality test is a common and shared practice between European Constitutional Courts and European Court of Justice, the Italian Constitutional Court – explicitly engaging with judicial foreign precedents – affirmed that also in a case in which the legislative discretion is wide (like in the case of the electoral law for the Parliament), the proportionality and reasonableness test must be followed to review the constitutionality of the law at stake: the restrictions to the fundamental rights of the citizens (i.e. the principle of equality of the vote) are subjected to the rule of balancing and to the rule of proportionality, so the majority prize and the closed-list of party candidates running for election (two main and contested aspects of the Italian electoral law under scrutiny) are clearly unconstitutional.

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I. INTRODUCTION[**]

As internationally stated in the European Commission for Democracy Through Law (Venice Commission)'s *Code of Good Practice in Electoral Matters*,[1] «any electoral system may be chosen» within the respect of the principles defined by the same Code.

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[1] Adopted by the Venice Commission at its 52nd Plenary Session (Venice, 18-19 October 2002; CDL-AD(2002)023rev). Available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev-e (last accessed: 10 June 2015).

The Venice Commission – aims at promoting the dissemination and the consolidation of a common European Constitutional Heritage implying common universal values, including in the electoral field (as a sort of European Electoral Heritage) – recalled also that, while there are no international standards recommending a specific electoral system or seat allocation method, the implementation of an electoral system implies a necessary respect to the principles of equality and proportionality.[2]

Following analogous lines of reasoning, with an innovative and unprecedented judgment (decision no. 1 of 13 January 2014),[3] the Italian Constitutional Court struck down two very contested aspects of the electoral law for both Houses of Parliament (Law no. 270/2005), namely the majority prize ("*premio di maggioranza*") and the closed-list of party candidates running for election ("*liste bloccate*").

The first mechanism gives extra seats to the party (or to the coalition of parties) that receives most votes (at national level, in the Lower House; and at the regional level, in the Upper House).

The second prevents voters from choosing their own parliamentary representatives, giving them only the option of choosing a party list, in which candidates are ranked in order of electoral priority by party leaders.[4]

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[2] Venice Commission, *Report on Electoral Systems – Overview of available solutions and selection criteria*, adopted by the Venice Commission in the 57th Plenary Session (Venice, 12-13 December 2003; CDL-AD(2004)003), available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2004)003-e (last accessed: 10 June 2015).

[3] English text at http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/12014_en.pdf (last accessed 10 June 2015).

[4] Recently (March 2015), the Venice Commission issue another comparative report on proportional electoral systems, and more specifically on the issue of the seat allocation inside the party lists, i.e. the open- or closed-list systems (*Report on Proportional Electoral Systems: The Allocation of Seats Inside the Lists (Open/Closed Lists)*, adopted by the Council for Democratic Elections at its 50th meeting (Venice, 19 March 2015) and by the Venice Commission at its 102nd Plenary Session, Venice, 20-21 March 2015, available at http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)001-e (last accessed: 10 June 2015). This topic is interesting from a comparative perspective as it provides a complete overview of the party-list systems used among the Venice Commission's 61 member states, more precisely of those applicable to parliamentary elections. An overview of the 61 countries analysed reveals that a vast majority of countries (56) use a proportional system in parliamentary elections. Among them, 43 countries use a pure proportional system whereas 13 countries use a mixed system. Among the 56 countries using a proportional system, 25 countries use a closed-list system (meaning with no preference and a pre-determined candidate list by the political parties), whereas 31 countries use an open-list system. According to the findings of that *Report*, in the case of closed-list systems, «the political parties have a very substantial power, since they determine the order in which candidates are elected» (p. 17).

The Court ruled that the majority prize is unconstitutional because it violates the principles of popular sovereignty (art. 1 Constitution), equality before the law (art. 3 Const.) and equality of the vote (art. 48 Const.).[5]

The Court also found that closed-list system violates the principle of the freedom of the vote (same art. 48 Const.).

The Court's judgment is very interesting in many ways, especially from constitutional and institutional domestic points of view, not to mention for the political consequences that it will entail.[6]

From a comparative constitutional law perspective, two main points are worth noting.

II. Dialogue with Parliament

The Court observed in its reasoning that this outcome was, to a large extent, inevitable, due to the legislative inertia following two "early warnings" the Court gave Parliament about the electoral law, one in 2008 (no. 15-16/2008) and one in 2012 (no. 13/2012), both in judgments related to the constitutional competence of permissibility of abrogative referenda of the same electoral law (no. 270/2005).[7]

So here the Court, called again – and, in this case, accepting the issue raised *incidenter* by the Supreme Court – to review the constitutionality of the electoral law for the two Chambers of Parliament, had only to point out the legislative inertia on the matter and consequently declare the provisions unconstitutional.

Reviewing the constitutionality of electoral laws in Italy is a sensitive political question, perhaps, like in other parts of the world, the most sensitive.

The Court must strike a delicate balance between its duty to engage in judicial review and to respect the legislature's right to make political choices which it considers to

[5] The majority prize (340 seats of 630 total seats of the Lower House, i.e. 55% of it) is attributed to the party (or to the coalition of parties) that wins (nationwide) a simple majority of the votes, without a minimum electoral threshold. So, it is theoretically possible that an election could produce an outcome where 9 parties gain almost 10% of the votes, and party 10 gains 10% plus one vote. Under this scenario, party 10 would wins the majority prize of 55% of the House seats (!).

[6] For an overview of this ruling, see E. Longo, A. Pin, *Don't Waste Your Vote (Again!). The Italian Constitutional Court's Decision on Election Laws: An Episode of Strict Comparative Scrutiny*, in ICON•S Working Paper – Conference Proceedings Series 1, no. 10/2015 at http://www.irpa.eu/wp-content/uploads/2015/02/ICON-S-WP-10-2015-Longo-and-Pin.pdf (last accessed 10 June 2015).

[7] On this competence of the Court and on its substantial and procedural limits, see http://www.cortecostituzionale.it/documenti/download/pdf/Cc_Checosa_2013_UK.pdf (last accessed 10 June 2015).

be in the best interests of the country, especially where, like in Italy, the electoral system is not directly enshrined in the Constitution.[8]

In this case, the Court engaged in a long dialogue with Parliament, starting with a judgment of 2008, with two formal warnings (the other one in 2012) about the incompatibility of part of the new electoral system with some fundamental features and principles of the Constitution.

In engaging in this dialogue, the Court reflected something analogous, in comparative terms, to weak-form constitutional review[9] – or the «new Commonwealth model of constitutionalism»[10] – where judicial/legislative dialogue «allow courts to inform a legislature of the courts' understanding of the constitutional provision, while allowing the legislature to respond and take conclusive action based in its own understanding».[11]

In the aftermath of the Court's judgment, Parliament can speak, if it wishes, with a wide margin of legislative discretion, recalling that no specific model of electoral system is imposed by the Constitution, which leaves the choice of the system considered most suitable and effective within the particular historical context to the discretion of the legislator.

Parliament can revise the current electoral system, or choose an entirely new one,[12] but subject to the specific limits now imposed by the Court: in particular, «*whilst the electoral system is the result of broad legislative discretion, it is not exempt from review, and may be challenged at any time in constitutional review proceedings if it proves to be manifestly unreasonable*».[13]

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[8] This is the first time the Italian Constitutional Court has declared unconstitutional the electoral law for the national Parliament.

[9] On the novelty of that model in comparative terms, see F. Duranti, *New Models of Constitutional Review*, in this *Review*, vol. V, no. 1/2014 at http://www.comparativelawreview.unipg.it/index.php/comparative/article/view/21/19 (last accessed 10 June 2015).

[10] S. Gardbaum, *The New Commonwealth Model of Constitutionalism. Theory and Practice*, Cambridge: Cambridge University Press, 2013.

[11] M. Tushnet, *The rise of weak-form judicial review*, in T. Ginsburg, R. Dixon (eds.), *Comparative Constitutional Law*, Cheltenham: Edward Elgar, 2011, 326.

[12] It is worth noticing that on April 2015 the Italian Parliament finally approved a new election law (Law no. 52 of 6 May 2015) – nicknamed *Italicum* – to appoint the members of the Lower House (*Camera dei Deputati*): see E. Longo, A. Pin, *Chain Reaction: Constitutional Change Through Election Law Reform in Italy–Likely Scenarios After the Recent Reform of the Parliament Election Law*, in *Int'l J. Const. L. Blog*, 9 June 2015, at http://www.iconnectblog.com/2015/06/chain-reaction-constitutional-change-through-election-law-reform-in-italy.

[13] Constitutional Court, decision n. 1/2014, 3.1 of *Conclusion on points of law*.

III. Dialogue with others Constitutional Courts

The Court also engaged in an interesting dialogue with other Constitutional Courts, namely the *Bundesverfassungsgericht* (Federal Constitutional Court of Germany), citing three of its judgments, the most recent one being decision no. 3/11 of 25 July 2012,[14] on the constitutionality of some provisions of the electoral law for the Federal Parliament of Germany (*Bundestag*).

On the premise that the proportionality test is a common and shared practice between European Constitutional Courts and European Court of Justice,[15] the Court affirmed that also in a case in which the legislative discretion is wide – like in the case of the electoral law – the proportionality and reasonableness test must be followed to review the constitutionality of the law at stake: the restrictions to the fundamental rights of the citizens (i.e. the principle of equality of the vote) are subjected to the rule of balancing and to the rule of proportionality.

Proportionality «is today accepted as a general principle of law by constitutional courts and international tribunals around the world and proportionality review – a structured form of doctrine – now flows across national lines, a seemingly common methodology for evaluating many constitutional and human rights claims».[16]

The German Constitutional Court was the first court to use proportionality test as an instrument of constitutional review: «for this reason, it has a long history to study and from which to draw lessons».[17]

Recalling the discretionary freedom of the Parliament to choose an electoral system, the Italian Constitutional Court held that – similarly to the comparable constitutional order of Germany, where the electoral system it is not constitutionalized – the choice of the system of proportional representation entailed strict systematic consequences: once the fundamental option has been made, the electoral law was bound to remain on this principle.

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[14] On these judgments, see C. Tomuschat, *Germany's Mixed-Member Electoral System: A Victim of its Sophistication?* (2012), *German Law Journal*, vol. 13, no. 5, at http://www.germanlawjournal.com/pdfs/Vol14-No1/PDF_Vol_14_No_1_213-238_Developments_Tomuschat.pdf (last accessed 10 June 2015).

[15] On the "migration" of proportionality review, see A. Barak, *Proportionality: Constitutional Rights and their Limitations*, Cambridge: Cambridge University Press, 2012, 181.

[16] V.C. Jackson, *Constitutional Law in an Age of Proportionality*, in *Yale L. Journ.*, vol. 124, 2015, 3094. As it is well known, the German Constitutional Court has been particularly influential, as has the Canadian Supreme Court, in developing proportionality test in ways that influence other countries: see also, A. Barak, *Proportionality*, in M. Rosenfeld, A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford: Oxford University Press, 2012, 738.

[17] N. Petersen, *Balancing and judicial self-empowerment: A case-study on the rise of balancing in the jurisprudence of the German Federal Constitutional Court*, in *Global Constitutionalism*, 2015, 52.

So, when proportional representation was chosen as a principle of seats allocation, outcome equality had to be realized by remaining faithful to that idea, in line with the analogous judgements of the *Bundesverfassungsgericht* in the same subject-matter.

In this case, the majority prize without an electoral minimum threshold to gain it, is in evident contrast with the principle of outcome equality, that the Court read in the principle of equality of the vote (art. 48 Const.).

This explicit judicial engagement with foreign constitutional jurisprudence is a sort of new experience for the Italian Constitutional Court.

Explicit reference to foreign law is very rare, and in most cases it is limited to the legislative formant (i.e. only to the legislation of another country).[18]

The Court also offered three justifications for its case-selection of precedents from the German Constitutional Court:[19]

a) The constitutional orders of Italy and Germany are homogeneous and reflect a common core of constitutional principles.

b) In neither system is the electoral system for the national Parliament enshrined in the Constitution.

c) The electoral law under review is a PR system (as a principle of seats allocation).

The German Court's precedents were extremely useful in this case: the Italian Constitutional Court had no precedent to help on the use of proportionality test in the scrutiny of the election laws.

Explicit reference to these German's precedents, consequently, «eased the Constitutional Court's role in deciding on election law for the first time»[20].

It is interesting to note that also the European Court of Human Rights (ECtHR) was invited – one years and half before the Italian Constitutional Court – to reach a

[18] Quantitative studies show that citations of foreign law in the judgments of the Italian Constitutional Court are limited in comparison with other Constitutional Courts: «it should be noted that these references are nearly always to statute law rather than a case law», G.F. Ferrari, A. Gambaro, *The Italian Constitutional Court and Comparative Law. A Premise*, in this *Review*, vol. 1, no. 1/2010, at http://www.comparativelawreview.com/ojs/index.php/CoLR/article/view/3/7 (last accessed 10 June 2015).

[19] The selection of jurisdictions and precedents must rationally be justifiable in the light of the purpose of the reference to foreign law and the claims based on it: on the specific importance of this step of the comparative judicial process, see V.C. Jackson, *Constitutional Engagement in a Transnational Era*, Oxford: Oxford University Press, 2010.

[20] E. Longo, A. Pin, *Don't Waste Your Vote (Again!). The Italian Constitutional Court's Decision on Election Laws: An Episode of Strict Comparative Scrutiny*, cit., 21.

decision on the issue of the voters' choice in closed-list systems in the case of *Saccomanno and Others v. Italy*.[21]

The applicants complained that they had not been able to express their preference for a candidate in the parliamentary elections since Italian law did not permit the direct election of representatives by voters (submission by political parties of closed candidate lists: the order of candidates elected on a list is established by the party itself and voters cannot express their preference for any particular candidate).

Considering the «*wide margin of appreciation enjoyed by the States in this regard and the need to assess electoral legislation as a whole in the light of political developments and on the basis of the country's historical and political context*», the ECtHR held that the closed list system had not been in breach of Article 3 of Protocol No. 1.

The ECtHR therefore decided that the complaint was inadmissible (complaint manifestly ill-founded).

This ECtHR precedent was quoted by the Italian Constitutional Court, but found non dispositive for the decision: probably, the Court refused the use of proportionality test by the ECtHR on the Italian electoral law, «in order to reuse the same test itself and reach a different conclusion on the same piece of legislation».[22]

IV. COMPARATIVE CONCLUSIONS

The explicit citation of foreign constitutional jurisprudence in an institutional case of a leading importance in Italy seems to confirm some general comparative remarks.[23]

1) «While institutional cases are brought before the Court more rarely and are often of a delicate nature because of their political background, at the same time institutional matters are not as densely affected by legislation and are thus more open to interpretation, leaving more spaces for a comparative argument».[24]

[21] ECtHR,13 March 2012; decision on the admissibility, application no. 11583/08.
[22] E. Longo, A. Pin, *Don't Waste Your Vote (Again!). The Italian Constitutional Court's Decision on Election Laws: An Episode of Strict Comparative Scrutiny*, cit., 22.
[23] In arguments, see recently M. Tushnet, *Advanced Introduction to Comparative Constitutional Law*, Cheltenham: Edward Elgar, 2014; R. Hirschl, *Comparative Matters. The Renaissance of Comparative Constitutional Law*, Oxford: Oxford University Press, 2014.
[24] T. Groppi, M.C. Ponthoreau, *Conclusion. The Use of Foreign Precedents by Constitutional Judges: A Limited Practice, An Uncertain Future*, in T. Groppi, M.C. Ponthoreau (eds.), *The Use of Foreign Precedents by Constitutional Judges*, Oxford: Hart Publishing, 2013, 417.

2) For obvious reasons, foreign experience is more likely to be used «to resolve, in a functionalist manner, questions about rights, but this method of use can assist with the resolution of institutional questions as well».[25]

3) Citations are more likely to occur in new and complex cases, or, at any rate, «in cases dealing with issues with a potentially important political and social impact».[26]

4) Recourse to foreign case law may be used to change consolidated positions, or «it is aimed at redefining constitutional interpretation with respect to consolidated methods and results».[27]

5) The rise of a global constitutional dialogue in the form of «voluntary judicial engagement with the laws of others, certainly in transitional or discordant constitutional settings, is at least as much an identity-constructing political phenomenon as it is a juridical one».[28]

6) Courts throughout the world have become more and more actively engaged in evaluating the design of democratic institutions and process: «in addressing various challenges to the way legislatives rules structure democratic participation and elections, Courts struggle to reconcile protection of essential democratic rights».[29]

7) The judicial engagement with comparative law «has crucial significance to help constitutional ideas to migrate across the world».[30]

It remains to be seen whether this explicit citation of foreign judicial precedents represents a new line of reasoning for the Italian Constitutional Court, which could indicate a new way towards future, interesting, further comparative developments.

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[26] T. Groppi, M.C. Ponthoreau, n 10 above, 430.
[27] G.F. Ferrari, A. Gambaro, n 9 above, 22. See also G. Halmai, *The Use of Foreign Law in Constitutional Interpretation*, in M. Rosenfeld, A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford: Oxford University Press, 2012, 1333.
[28] R. Hirschl, *In Search of an Identity: Voluntary Foreign Citations in Discordant Constitutional Settings*, in *Am. Journ. Comp. L.*, vol. 62, 2014, 584.
[29] R. Pildes, *Elections*, in M. Rosenfeld, A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, cit., 530.
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