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DON'T WASTE YOUR VOTE (AGAIN!). THE  
ITALIAN CONSTITUTIONAL COURT'S  
DECISION ON ELECTION LAWS: AN EPISODE  
OF STRICT COMPARATIVE SCRUTINY

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# Don't Waste Your Vote (Again!). The Italian Constitutional Court's Decision on Election Laws: An Episode of Strict Comparative Scrutiny

Erik Longo and Andrea Pin<sup>1</sup>

## Abstract

*With a single judgment (sent. 1/2014), the Italian Constitutional Court has almost revolutionized Parliamentary election law, the national political landscape, the types of controversies with which it deals, and the means through which it reviews domestic legislation. In order to do so, the Court drew from globalized concepts and levels of scrutiny such as the so-called “proportionality test,” making explicit references to foreign decisions, while downplaying the Constitutional Framers’ intention. Although this decision has brought Italy closer in line with the trends that characterize contemporary global constitutionalism, its concrete effects on Italian law and the political system are not so promising or clear. This paper investigates the explicit and implicit sources of inspiration for the decision, its hidden implications, and it resonates with globalized trends in constitutional law.*

## 1. Introduction: constitutional engineering through judicial review

With its decision 1/2014,<sup>2</sup> the Italian Constitutional Court (ICC) struck a blow to the Italian Parliament's election law, increased Italian judicial review of legislation and rights adjudication, bolstered the judiciary use of comparative law, and gave a powerful stimulus

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<sup>2</sup> See Corte Cost., 13 gennaio 2014, n. 1. Text available in English at [http://www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/1-2014\\_en.pdf](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/1-2014_en.pdf) (last accessed: March 14, 2015).

to the Parliament. More broadly, the ICC moved closer to the global constitutional ideal that “everything is justiciable”<sup>3</sup>: it made an unprecedented review of Italian electoral legislation,<sup>4</sup> borrowed the level of scrutiny and the legal ideas it used from other jurisdictions, and re-read the election rules from a human rights perspective. The decision, on one hand, is highly symbolic and relevant for the Italian history of judicial review of legislation to the point that its implications are barely foreseeable;<sup>5</sup> on the other hand, it exemplifies the progressive alignment of Italian constitutionalism to some core ideas of global constitutionalism. Such a judgment would have been impossible without a sweeping recourse to comparative law and human rights language.

As to the traditional Italian of review of legislation, the ICC’s judgment is unprecedented.<sup>6</sup> In order to hear the case, the ICC re-read its admissibility case-law, reframed its role as an outlet for human rights claims, and enabled itself to hear virtually any case in which a human right could be at stake.

Why did the Italian ICC make such a ruling? Because the relevant legislation hardly could have been brought before it through other means.<sup>7</sup> The ICC wanted to bring election law within its field of scrutiny in order to avoid the denial of justice. Given the characteristics of Italian judicial review, it is hard to think of a situation in which individuals concretely challenge elections to the point of initiating a trial that will finally call on the ICC to intervene. This is why the decision the ICC rendered is so innovative that it could really prompt a powerful change in the roles of both the ICC and the judicial review of legislation.<sup>8</sup>

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<sup>3</sup> This dictum has been attributed to Aharon Barak and can be found in RAN HIRSCHL, *TOWARDS JURISTOCRACY. THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 169 (2004).

<sup>4</sup> See Roberto Romboli, *La Riforma della Legge Elettorale ad Opera della Corte Costituzionale: Attenti ai Limiti (Nota a Corte Cost. 13 Gennaio 2014, n.1) - Parte I*, 139 FORO ITALIANO [FORO IT.] 677–681 (2014), available at <http://www.foroitaliano.it/corte-cost-13-gennaio-2014-n-1-i-666-elezioni-parlamentari-incostituzionalita-del-porcellum/>.

<sup>5</sup> See Giovanni Serges, *Spunti di Giustizia Costituzionale a Margine della Declaratoria di Illegittimità della Legge Elettorale*, RIVISTA AIC, no. 1, 2014, available at <http://www.rivistaaic.it/spunti-di-giustizia-costituzionale-a-margine-della-declaratoria-di-illegittimit-della-legge-elettorale.html>; Mario Perini, *Incostituzionalità della Legge Elettorale ed Effetti sulle Camere e sulla loro Attività: il Punto di Vista del Diritto Parlamentare*, 56 RASSEGNA PARLAMENTARE [RASS. PARL.], APRIL/JUNE 2014, at 305; Giuseppe Ugo Rescigno, *Il Diritto Costituzionale di Voto Secondo la Corte di Cassazione e la Corte Costituzionale*, 59 GIURISPRUDENZA COSTITUZIONALE [GIUR. COST.] 27–34 (2014).

<sup>6</sup> See Rescigno, *supra* note 5, at 28.

<sup>7</sup> For Italian legal doctrine, the electoral law is the perfect example of a law that slips away from constitutional adjudication. For more on this concept, see Gustavo Zagrebelsky, *Processo Costituzionale*, 36 ENCICLOPEDIA DEL DIRITTO [ENC. DIR.] 606 (1987).

<sup>8</sup> For an analysis of the role the Constitutional Court traditionally plays in the Italian legal system, see generally William J Nardini, *Passive Activism and the Limits of Judicial Self-Restraint: Lessons for America*

The other important news in this case regards its reference to foreign jurisprudence and call to global constitutionalism. The ICC, which is considered to be particularly parsimonious when it comes to quoting its foreign colleagues,<sup>9</sup> literally borrowed ideas and the conceptions of scrutiny from other jurisdictions quite explicitly, through quoting the German Federal Constitutional Court and the Court of Justice of the European Union (hereinafter: CJEU).<sup>10</sup>

The recourse to foreign law was relevant in admitting the case as well as in deciding it. The ICC was aware that sister Constitutional Courts, such as the German one, are able to scrutinize their domestic electoral legislation; it also could not disregard that the European Court of Human Rights (hereinafter: ECtHR) had even been able to scrutinize the very same Italian election law before the ICC in *Saccomanno v. Italy*.<sup>11</sup> It would have been paradoxical, even shameful, to deny hearing to an Italian case for procedural reasons after the European Court was able to hear it.

Moreover, in this ruling the ICC crafted for the first time the use of a “proportionality test” as an instrument to scrutinize the constitutionality of statutes. The ICC’s case-law was already familiar with the word, but used it interchangeably with other expressions. Borrowing from other jurisdictions, the ICC singled this phrase out and crystalized its meaning as an asset to check the relationship between the aims and the means of legislative provisions.<sup>12</sup>

In sum, the ICC gave a powerful judgment that harmonized with foreign jurisdictions in *a)* the decision to hear the case; *b)* the schema that the ICC decided to adopt to assess the case; and *c)* the substance of the decision itself.

In this article, we explore the particularities of this decision and its background. In Part II we summarize the most important and innovative feature of the judgment: the

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*from the Italian Constitutional Court*, 30 Seton Hall L. Rev. 1 (1999) (comparing this system to the United States’); MARY L. VOLCANSEK, CONSTITUTIONAL POLITICS IN ITALY: THE CONSTITUTIONAL COURT (2000) (describing the Italian Constitutional Court); Pasquale Pasquino, *What is Constitutional Adjudication About?*, NYU Law Working Papers (2002), available at <http://www.jeanmonnetprogram.org/archive/fellowsforum/pasquino.html>

<sup>9</sup> Vincenzo Zeno Zencovich, *Il Contributo Storico-Comparatistico nella Giurisprudenza della Corte Costituzionale Italiana: una Ricerca sul Nulla*, DIRITTO PUBBLICO COMPARATO ED EUROPEO [DPCE], no. 4, 2005 at 1993–2020 .

<sup>10</sup> See the critical position of Andrea Morrone, *L’eguaglianza del Voto Anche in Uscita: Falso Idolo o Principio?*, 59 GIUR. COST. 50–51 (2014).

<sup>11</sup> App. No. 11583/08 (Eur. Ct. H.R. 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110318> (last visited: 4 March 2015).

<sup>12</sup> AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 131 (2012).

radical change in the election law that it prompted. The ICC struck down fundamental parts of the legislation that had been largely criticized, and supplanted them with a very different type of electoral system. In Part III we describe the election law and how it was brought to the ICC's attention. The election law had been widely criticized because of its purportedly unreasonable majority prize and closed-list candidates system, which was said to have deprived voters of the power to select their representatives; the ICC was able to scrutinize both only by broadening its scope of judicial review beyond what it had allowed up to that point. In Part IV we analyze the reasoning behind the decision, which struck down both the election formula and the closed-list system largely through recourse to foreign models of judicial review and distilled the "proportionality test" scrutiny. In Part V we briefly reflect on the two main implications of this ruling: first, the ICC's judgment rendered inapplicable debatable election law provisions, but supplanted them with the old multiparty system that Italy had strived to leave behind; second, the ICC expanded the Italian model of judicial review of legislation. We conclude in Part VI.

## **2. The decision of the Court: An overview**

As is now usual in seminal cases, the ICC announced in a short press release on December 4<sup>th</sup>, 2013, that the 2005 Italian electoral law had been declared partly unconstitutional.<sup>13</sup>

This case is the first in which the ICC addressed the merits of the 2005 Italian election law. Two previous decisions had been handed down on this subject. Yet, since those cases addressed two requests for a referendum to repeal the electoral legislation,<sup>14</sup> the ICC had ruled solely on the admissibility of the referendum request and not on the law's compatibility with the Constitution. Nonetheless, in the referendum cases, the ICC's judges took the chance to give the Parliament two early warnings about the

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<sup>13</sup> Press release available at <http://www.cortecostituzionale.it/comunicatiStampa.do> (last visited: 4 March 2015).

<sup>14</sup> Corte Cost. 30 gennaio 2008, n. 15. Text available in English at [http://www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/S2012015\\_Quaranta\\_Crisuolo\\_en.pdf](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S2012015_Quaranta_Crisuolo_en.pdf). Corte Cost. 30 gennaio 2008, n. 16. Text available in Italian at <http://www.cortecostituzionale.it/actionPronuncia.do>. Corte Cost., 24 gennaio 2012, n. 13. Text available in English at [http://www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/S2012013\\_Quaranta\\_Cassese\\_en.pdf](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S2012013_Quaranta_Cassese_en.pdf)

unconstitutionality of the electoral system, which had been widely criticized by legal scholars.<sup>15</sup> Unfortunately, the attempts to prod the national Parliament into taking ameliorative action did not change the situation; the Parliament failed to heed the Court's admonitions.

With this judgment 1/2014, the Court eventually was able to set aside two main problems of the 2005 electoral system for the Parliament, which is composed of two Houses having the same powers. Parliament's members are elected by the Italian people. *A)* First, it struck down the "winner's bonus" (or "majority prize"), which ensured that *i)* in the Chamber of Deputies, the winning party list or coalition of lists had no less than 340 seats out of 630, and *ii)* in the Senate, which is composed of 315 members (plus a small number of Senators for life), the list or coalition of lists that won in a Region received the majority of seats that were allotted to that Region. This bonus assignment concretely randomized the political majority in the Senate: since the regional seat bonus depended on each Region's population, the majority of seats were allocated to the party or coalition that scored the seat bonus in the largest Regions, not to the one that had the majority of votes among Italians. *B)* Second, it invalidated the closed-list system, which governed the distribution of seats *within* each party: such a system prevented voters from choosing among each party's candidates, instead assigning all the seats that the party gained only in the order that candidates appear in the list.

The Court struck down *A)* the provisions on the majority prize because they violated the constitutional principles of popular sovereignty,<sup>16</sup> equality before the law,<sup>17</sup> and equality of the vote,<sup>18</sup> and *B)* the provisions on the closed-list system because they violated the constitutional freedom of the vote.<sup>19</sup>

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<sup>15</sup> See Carlo Fusaro, *Party System Developments and Electoral Legislation in Italy (1948-2009)*, 1 BULL. OF ITALIAN POL. 49, 59–60 (2009); Gianfranco Pasquino, *Tricks and Treats: The 2005 Italian Electoral Law and its Consequences*, 12 S. EUR. SOC'Y & POL. 79, 79-93 (2007); Renato Balduzzi & Matteo Cosulich, *In Margine alla Nuova Legge Elettorale Politica*, GIUR. COST. 5179, 5179–5206 (2005).

<sup>16</sup> "Italy is a Democratic Republic, founded on work.

Sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution." COSTITUZIONE art. 1 (It.), *translated in* CONSTITUTION OF THE ITALIAN REPUBLIC, SENATO DELLA REPUBBLICA [https://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf) (last visited Feb. 27, 2015).

<sup>17</sup> "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions." *Id.* art. 3 ¶ 1.

<sup>18</sup> "All citizens, male and female, who have attained their majority, are voters. The vote is personal and equal, free and secret. The exercise thereof is a civic duty. The law lays down the requirements and modalities for citizens residing abroad to exercise their

From its very inception, the election law displayed evident failings, including the circumstances under which this new law was approved. Even though it would govern the political game in which all had a stake, the election law bill was backed only the governing coalition, without the opposition's approval or agreement.

Although the Constitutional Framers left the electoral system open-ended, the electoral system is governed by some basic constitutional principles. The Italian Constitution circumscribes the boundaries of the election law and gives it some direction:<sup>20</sup> a) the Bicameral Parliament (Chamber of Deputies and Senate of the Republic) must accord confidence to the Government (the so called "double confidence");<sup>21</sup> b) the votes cast by voters must be equal in value;<sup>22</sup> c) deputies and senators have the right to change parliamentary groups or even to change coalitions.<sup>23</sup>

From a political perspective, the 2005 electoral system produced anomalous outcomes. It allowed a proliferation of parties and permitted small parties to maintain some independence from their coalition partners. Moreover, it emphasized the role of parties over candidates by eliminating voters' preferential voting for individual candidates, but it made it harder for any party or coalition to win a substantial majority in the Senate and secure stable government majorities.<sup>24</sup> In fact, the randomization of political majorities at the Senate caused by the Region-based seat-bonus, prompted the formation of different political majorities in the Chambers and stimulated some deputies and senators to change their political affiliation and join the majority.

These flaws clearly demonstrate why the 2005 election law makes governing particularly difficult.<sup>25</sup> It produced the premature end of the first legislature (2006-2008)

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right to vote and guarantees that this right is effective. A constituency of Italians abroad shall be established for elections to the Houses of Parliament; the number of seats of such constituency is set forth in a constitutional provision according to criteria established by law.

The right to vote cannot be restricted except for civil incapacity or as a consequence of an irrevocable penal sentence or in cases of moral unworthiness as laid down by law." *Id.* art. 48.

<sup>19</sup> *Id.*

<sup>20</sup> See Paolo Caretti, *La Forma di Governo*, 47 RASS. PARL. 583, 583–598 (2005).

<sup>21</sup> "The Government must have the confidence of both Houses." COSTITUZIONE art. 94 ¶ 1 (It.), translated in CONSTITUTION OF THE ITALIAN REPUBLIC, SENATO DELLA REPUBBLICA [https://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf) (last visited Feb. 27, 2015).

<sup>22</sup> *Id.* art. 48.

<sup>23</sup> "Each Member of Parliament represents the Nation and carries out his/her duties without a binding mandate." *Id.* art. 67.

<sup>24</sup> Alan Renwick et al., *Partisan Self-Interest and Electoral Reform: The New Italian Electoral Law of 2005*, 28 ELECTORAL STUD. 437, 438–439 (2009).

<sup>25</sup> "The 2005 law was unanimously regarded as an instrument for the construction of broad coalitions fit to win elections but unfit to run the country." Fusaro, *supra* note 14, at 59.

elected through this law, the turmoil of the center-right coalition during the 16th legislature (2008-2013), and the problematic results of the 2013 general elections.<sup>26</sup> It is therefore understandable why several referenda were held or proposed in order to amend or repeal the existing election law, and why the ICC warned the Parliament twice that the law needed to be changed.

It is not strange at all, then, that the ICC's decision to strike down the election law had a huge political effect. It was not just because the electoral system is the cornerstone of democracy and one of the most sensitive political questions; it was also because of the scattered backlash that derived from this legislation's enforcement. The ICC's ruling bolstered the on-going process of Italian election law reformation, and a wider reform process more broadly, which should go beyond election law and replace the obsolete Bicameral Parliament.

### **3. Before the decision: the role of the Court of Cassation**

In order to understand why and how the ICC decided this case, it is important to take a quick glance at the turbulent facts that brought this judgment. The ICC's decision is only the latest in a long list of suits that a group of citizens, led by a lawyer named Aldo Bozzi, filed in Italian lower courts during and after the Italian general election of 2006.

In the suits that reached the ICC, the plaintiffs were voters in the Italian general election. They filed an action of declaratory judgment ("*azione di mero accertamento*") before the Tribunal of Milan, seeking a judicial declaration that their right to vote had been violated.

In the complaint, the plaintiffs argued about two aspects of the law. First, they maintained that, since citizens have a personal and direct right to vote,<sup>27</sup> they also have the right to express preference for single candidates, whereas the election law inhibited the voter from preferring one or more candidates. Second, they asserted that the automatic allocation of a national majority (for the Chamber of Deputies) and a regional

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<sup>26</sup> Gianfranco Pasquino & Marco Valbruzzi, *Post-Electoral Politics in Italy: Institutional Problems and Political Perspectives*, 18 J. OF MOD. ITALIAN STUD. 466, 466–484 (2013)

<sup>27</sup> COSTITUZIONE art. 48 (It.), *translated in* CONSTITUTION OF THE ITALIAN REPUBLIC, SENATO DELLA REPUBBLICA, [https://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf) (last visited Feb. 27, 2015).

majority (for the Senate) to the list or coalition of lists with the highest number of votes, irrespective of the actual percentage of votes obtained, violates the equality of the vote.

On April 18<sup>th</sup>, 2011, the Tribunal of first instance found the action in part inadmissible, since the plaintiffs lacked standing<sup>28</sup> (“*interesse ad agire*”), and in part ill-founded.

In the appeal against the Tribunal’s decision, the plaintiffs continued to challenge the majority prize and the closed-list system. The Court of Appeal rejected the request as manifestly inadmissible and ill-founded on April 24<sup>th</sup>, 2012, so Bozzi and the other plaintiffs filed an appeal to the Court of Cassation requesting the electoral law be brought before the ICC. The Court of Cassation suspended the trial and on May 17<sup>th</sup>, 2013 requested that the ICC rule on the case.<sup>29</sup>

### 3.1. The admissibility of the constitutional issues

In the referral order, the Court of Cassation addressed the admissibility of the constitutional issues using an interpretation that stretched the lower courts’ powers to refer a question of constitutionality.

Italian judges – including the Court of Cassation – have strong power when they introduce an issue to the ICC. Though, in this phase they must follow strict admissibility prerequisites, without which the ICC will refuse to judge and instead declare the case brought to its attention inadmissible. Judges who refer a case to the ICC must satisfy two conditions: the issue must be “relevant’ and ‘not manifestly groundless’.<sup>30</sup> In addition, according to the ICC’s case law, they have to explain why they cannot provide an

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<sup>28</sup> Fusaro, *supra* note 14, at 60.

<sup>29</sup> Cass., Sez. prima, 17 maggio 2013, n. 12060. Text available in Italian at <http://www.giurcost.org/cronache/Cass-ordLegge270>.

<sup>30</sup> According to the Italian Act governing the Constitutional Court procedure, the referring judge must be positively convinced of the unconstitutionality of the statute, mere doubts will not suffice. Law 11 March 1953, no. 87, art. no. 23: “L’autorità giurisdizionale, qualora il giudizio non possa essere definito indipendentemente dalla risoluzione della questione di legittimità costituzionale o non ritenga che la questione sollevata sia manifestamente infondata, emette ordinanza con la quale, riferiti i termini ed i motivi della istanza con cui fu sollevata la questione, dispone l’immediata trasmissione degli atti alla Corte costituzionale e sospende il giudizio in corso.” See generally MALFATTI ET AL., GIUSTIZIA COSTITUZIONALE 107 (4th ed. 2013). Gian Paolo Dolso, *Interpretazione adeguatrice: itinerari giurisprudenziali e problemi aperti*, in SCRITTI IN ONORE DI LORENZA CARLASSARE\_1305-1306 (2009)

alternative interpretation of the statute they are challenging that would be in accordance with the Constitution (“*interpretazione adeguatrice*”).<sup>31</sup>

A further requisite operates: a provision can be brought to the attention of the ICC and challenged as unconstitutional only if it needs to be applied in the case before the referring court. Therefore, there must be a pending case in which a judge needs to apply the statute. If the statute does not require application, the ICC will consider it irrelevant and consequently declare the case before it inadmissible. In sum, in the Italian judicial review of legislation, ‘abstract’, i.e. non-concrete, questions are deemed irrelevant and therefore inadmissible.<sup>32</sup> Thus, the referring court should refrain from challenging a statutory provision that it does not need to apply, since the ICC will refuse to hear the case.

The prohibition of ‘abstract’ questions implies that lower courts need also to comply with the prohibition of *fictio litis* (“*false challenge*”). The plaintiffs at the lower court need to seek a result that does not nullify of the statutory law, but only involves it. The type of satisfaction that they are seeking cannot be merely incidental to the nullification of a statutory provision. Therefore, the case before a lower court cannot directly challenge the constitutionality of the statutory law. This issue was the most delicate part of the Court of Cassation’s reasoning, as we will see shortly.

This time, however, the Court of Cassation glossed over these restrictions in the name of protecting the equal right to vote, and construed an argument to have the ICC hear the case.

The Court of Cassation began its analysis addressing the plaintiffs’ need for judicial protection in the form of a declaratory judgment about the infringement of the right to vote. The Court reasoned about the ‘relevance’ of the constitutional issues in an out-of-the-ordinary way. Their opinion discussed two arguments the plaintiffs used to justify the need of a preventive constitutional review.

The first argument concerns the characteristics of the plaintiffs’ action. In an important passage of its referral order to the ICC, the Court of Cassation highlighted the particularity of the suit filed by the plaintiffs. The plaintiffs filed a particular ‘joint-action’ (“*accertamento costitutivo*”): formally, they requested to have their right to vote affirmed by

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<sup>31</sup> See generally ANDREA PUGIOTTO, SINDACATO DI COSTITUZIONALITÀ E “DIRITTO VIVENTE:” GENESI, USO, IMPLICAZIONI (1994) (describing Italian jurisprudence).

<sup>32</sup> See VEZIO CRISAFULLI, LEZIONI DI DIRITTO COSTITUZIONALE 280 (1986); MASSIMO LUCIANI, LE DECISIONI PROCESSUALI E LA LOGICA DEL GIUDIZIO COSTITUZIONALE INCIDENTALIALE 121 (1984).

the Court of Cassation, but substantially they sought the protection of it through the nullification of the election law.<sup>33</sup> This request ran the risk of being considered as a *fictio litis*; after all, the plaintiffs had no other request than the nullification of some parts of the election law. The plaintiffs' claim substantially consisted in challenging the law; the ICC normally would declare such a case inadmissible.

The Court of Cassation therefore would normally refrain from referring a case that would be rejected by the ICC as inadmissible. But here it pushed the envelope and reasoned that the need for judicial protection of electoral rights overcame the admissibility rules. They used a trick: the Court of Cassation maintained that the request of the plaintiffs combined challenging the law with the affirmation of their right to vote. After all, the Court of Cassation reasoned, the ICC's judgment was the only way through which the plaintiffs could fully enjoy their right to vote.

The Court of Cassation's second argument reinforced the first one. Some had maintained that, since there was no way to construe a concrete case in which someone would challenge a non-legislative act in the field of election laws and one could call into question the election law in itself only indirectly, there was no way to bring the election laws to the attention of the ICC. Such laws – the argument went – were therefore spared from the constitutional review of legislation. The Court of Cassation firmly rejected this argument by highlighting that it would be paradoxical to run a democracy with unconstitutional election laws, which are crucial as well as indispensable to the democratic process,<sup>34</sup> only because there is no way to have the ICC scrutinize them.

### **3.2. The merit of the claims**

Concerning the merits of the plaintiffs' claims, the Court of Cassation only opted to refer to the ICC the issues on *i*) the winner's bonus and *ii*) the closed-list system.

On the first issue, the winner's bonus, the Court held that the automatic allocation of the majority without the provision for any minimum number of votes and/or seats required

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<sup>33</sup> See MAURO CAPPELLETTI & JOSEPH M PERILLO, CIVIL PROCEDURE IN ITALY 144 (1965).

<sup>34</sup> In decisions about referendum admissibility, the repeal of election laws is deemed impossible because the existence and validity of these laws is considered indispensable in order to guarantee the functioning and continuity of elected bodies that are necessary for the life of the Italian Republic (see judgment no. 13 of 2012). See Alessandro Mangia, *La Legge Elettorale, tra Abrogazione e Annullamento*, QUADERNI COSTITUZIONALI [QUAD. COST.] 973, 974 (2013).

represented a drastic alteration of democracy. The winner's bonus aimed to incentivize a dichotomous structure of party competition. In pursuit of the winner's bonus, big parties would have strong reason to coalesce into broad coalitions and small parties would have an added incentive for doing so: rather high thresholds (4% at the Chamber of Deputies; 8% at the Senate) excluded small parties from the distribution of seats, unless they joined a broader coalition. But the lack of a vote minimum substantially altered political representation, since parties or coalitions scoring relatively low results could still gain the bonus, if no competitor scored better.

As the Court of Cassation highlighted, the election law was flawed in three ways. Firstly, it did not prevent coalitions from splitting: after the election, parties could leave the coalition or ally with other parties forming different majorities. Secondly, the election law gave some votes a lower value: on one hand, since the votes cast for the winning party were awarded the seat bonus, the other votes were valued less; on the other hand, those cast by residents abroad and in the Valle d'Aosta Region were completely excluded from the count for the assignation of the seat-bonus. Thirdly, the different computation of the bonus in the two Chambers was inconsistent with the bicameral nature of the Italian parliament. The different operation of the seat-bonus in the Senate, where it was allocated for each Region and not nationwide, increased the risk of diverging outcomes in the Chamber and the Senate.

On the second issue, the Court of Cassation had serious doubts about the constitutionality of the closed-list system. In providing that voters had one single vote and chose only among party lists (the allocation of seats to each list was determined on a national or regional basis) the election law did not consider adequately that citizens have an equal right to vote directly for the candidates they prefer, and therefore it did not "ensure the free expression of the opinion of the people in the choice of the legislature," as the European Convention of Human Rights commands.<sup>35</sup>

#### **4. Constitutional Court's decision: the details**

The ICC issued a decision on two grounds: first, it clearly struck down the majority prize for the Chamber and the Senate; second, it declared the exclusion of voter

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<sup>35</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, art. 3, protocol 1 [hereinafter Convention].

preferences unconstitutional and established a principle to be used by the legislator to enact new legislation<sup>36</sup>. The judgment, however, was auto-applicative, in the sense that the norms resulting after the decision's issuance were immediately usable for elections, in case the Parliament was unable to introduce new legislation before it expired.

#### 4.1. The access to the Constitutional Court

The judgment no. 1/ 2014 was unprecedented since it paved the way for a new role for the ICC. The ICC adopted an innovative line of reasoning, by recognizing the right to access the judicial review of legislation by filing a complaint that has the sole purpose of that judicial review.<sup>37</sup>

In the introduction to the part of the judgment that sets out the grounds of the decision, the ICC decided in favor of the admissibility of the question using two lines of argumentation.

First, the ICC rejected the notion that the requests for judicial review it received on the election law itself and the trial that inspired it were identical on their merits.<sup>38</sup> Indeed, the referring judge remained in charge of reviewing the other conditions that are necessary for the right to vote:<sup>39</sup> once the pieces of legislation were nullified, the referring court would still need to evaluate the plaintiffs' case. After all, the ICC concluded, the referred case more than merely challenged a piece of legislation.

Second, the ICC stressed the "the special nature and constitutional significance on the one hand of the right to which the action seeking a declaration judgment relates" and the need to strike down a statute considered to be of "suspected unconstitutionality"<sup>40</sup> The

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<sup>36</sup> Nardini, *supra* note 8, at 29.

<sup>37</sup> The Italian indirect access to the Constitutional Court occurs normally when, in the course of a litigation involving a concrete case, an issue of constitutionality is raised either by the litigants or by the judge. Judges are akin to 'Constitutional Court ushers.' Piero Calamandrei, *La Corte Costituzionale e il Processo Civile*, in *STUDI IN ONORE DI ENRICO REDENTI* 203 (1951). Therefore, the Constitutional Court's workload arrives only from courts, which must certify constitutional questions on an interlocutory basis as they arise in pending cases.

<sup>38</sup> By using its power to assess that the challenge is relevant, the ICC has developed a strong doctrine against hypothetical, theoretical, and artificial questions. Indeed, the Court avoids deciding cases in which the incidental method could not be applied. Constitutional review refers to deciding constitutional legitimacy in the context of a real controversy with specific facts and live, disputing parties. Nardini, *supra* note 8, at 25.

<sup>39</sup> "Furthermore, in the present case, the issue concerns the right to vote—a constitutional fundamental right whom essential feature is the link to an interest of the entire people—has been raised for the specific purpose to put an end to the situation of uncertainty produced by the norms object of scrutiny".

<sup>40</sup> Par. 2.

Court assumed that the admissibility of the judicial review in this case constitutes “inevitable corollary of the principle that protection must be afforded to the inviolable right.”<sup>41</sup> As a matter of fact, it maintained that statutes such as the election law cannot be deprived of judicial review simply because of the difficulties in bringing them to the attention of the ICC. In other words, had the ICC refused to judge, this law would have remained in place despite being unconstitutional, since the plaintiffs could not use other legal means to raise the constitutional issues. In this sense, the ICC made an implicit reference to the doctrine that admits declaratory judgment actions when unconstitutional statutes restrict constitutional rights and there is an “actual and well-founded fear that the law will be enforced.”<sup>42</sup>

In sum, the ICC agreed substantially with the conclusions of the Court of Cassation: ruling on the law’s constitutionality was, on one hand, the only remedy for the infringed right to vote and, on the other, the only legitimate way to reduce holes in judicial review.<sup>43</sup> Actually, in a long dictum, the ICC stressed the importance of preventing the creation of a ‘free zone’ in the Italian system of adjudication – especially in such an important area for democratic government.

The issue of admissibility created sharp debate among Italian commentators before the ICC’s judgment. Many predicted a ruling of inadmissibility<sup>44</sup>. But, through declaring inadmissibility, the ICC would have certified its weakness, even impotence before crucial constitutional cases. This ruling therefore can be read as a sign of courage, as well as an effort to reinvigorate both the ICC’s role and the effectiveness of constitutional review.<sup>45</sup> The decision acknowledging the ICC’s capacity to manage the evolution of the polity expresses the Court’s effort to reclaim centrality as the guardian of constitutional rights and democracy.<sup>46</sup>

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<sup>41</sup> *Id.*

<sup>42</sup> CAPPELLETTI & PERILLO, *supra* note 29.

<sup>43</sup> AUGUSTO CERRI, CORSO DI GIUSTIZIA COSTITUZIONALE PLURALE 154–55 (2012).

<sup>44</sup> Massimo Siclari, *Il Procedimento in Via Incidentale*, in LE ZONE D’OMBRA DELLA GIUSTIZIA COSTITUZIONALE. I GIUDIZI SULLE LEGGI (Renato Balduzzi & Pasquale Costanzo, eds., 2007).

<sup>45</sup> Here we can find a different approach, distant from “passive activism.” See especially Giulio Maria Salerno, *Il Giudizio di Costituzionalità delle Leggi Elettorali Come "Tramite" per il Pieno Ripristino del Diritto di Voto*, *Corriere giuridico* (2013). See generally Nardini, *supra* note 8 (discussing the Italian Constitutional Court).

<sup>46</sup> Massimo Luciani, *Le Funzioni Sistemiche della Corte Costituzionale, Oggi, e l’Interpretazione “Conforme a,”* FEDERALISMI.IT (Aug. 8, 2007), <http://www.federalismi.it/nv14/articolo-documento.cfm?artid=8314>.

There remains some doubt about whether the ICC's innovation is successful. The judgment paved a new way to constitutional review of legislation; its implications for the Italian constitutional system are hard both to predict and to trace back to the intentions of the 1948 Constitution's Framers. The ICC's decision, however, is still understandable because, in drawing such an important piece of legislation as election law into its field of scrutiny, it aligned itself with the principle of "good governance,"<sup>47</sup> which contemplates the full justiciability of democratic life.

This judgment represents a historical turning point. It marks the beginning of a new age for the 'access' to the ICC – not just an ephemeral season for the protection of the right to vote. The new philosophy of access to the ICC is an asset that the ICC will be able to use in the future, for different reasons, in various fields.

#### 4.2. The "proportionality test"

The ICC's decision drew extensively from other jurisdictions in shaping the "proportionality test," which it utilized to scrutinize and outlaw the provisions that accord the seats bonus in both Houses. Although the seats bonuses also were declared unconstitutional because they violate Art. no. 1 Const., which accords sovereignty to the people,<sup>48</sup> Art. no. 48, second paragraph,<sup>49</sup> and Art. no. 67,<sup>50</sup> the main tool in the ICC's hands was the "proportionality test."

The ICC insisted that this test was well embedded in its case-law, quoting a 1988 decision.<sup>51</sup> There is rather clear evidence, however, that such a "proportionality test" was quite new in the ICC's case-law. Actually, it is reasonable to say that the ICC took the opportunity of aligning its jurisprudence with the "most widespread approach to constitutional interpretation in contemporary constitutional Courts," including European

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<sup>47</sup> Alec Stone Sweet, *Constitutional Courts*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 816-830 (Michel Rosenfeld & András Sajó, eds., 2012).

<sup>48</sup> "Sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution." COSTITUZIONE art. 1 (It.), *translated in* CONSTITUTION OF THE ITALIAN REPUBLIC, SENATO DELLA REPUBBLICA [https://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf) (last visited Feb. 27, 2015).

<sup>49</sup> "The vote is personal and equal, free and secret. The exercise thereof is a civic duty." *Id.* art. 48.

<sup>50</sup> "Each Member of Parliament represents the Nation and carries out his duties without a binding mandate." *Id.* art. 67.

<sup>51</sup> See Corte Cost., 14 dicembre 1988, n. 1130 (It.): "Tale giudizio deve svolgersi «attraverso ponderazioni relative alla proporzionalità dei mezzi prescelti dal legislatore nella sua insindacabile discrezionalità rispetto alle esigenze obiettive da soddisfare o alle finalità che intende perseguire, tenuto conto delle circostanze e delle limitazioni concretamente sussistenti»."

national and supranational Courts, namely “proportionality review.”<sup>52</sup> Although the use of “proportionality” as a means to scrutinize legislation had a scattered fortune throughout the ICC’s decisions, its features were all but clear.<sup>53</sup> It was virtually indistinguishable from other kinds of scrutiny that pointed to the inner coherence of the Italian legal system and its rationality. All such means of scrutiny were carved by the ICC out of the constitutional principle of equality, which is enshrined in Art. no. 3 of the Italian Constitution but does not include proportionality, rationality, or any other synonym or analogous wording.<sup>54</sup> The ICC was able to craft means to scrutinize legislation to maintain the system’s inner coherence and balance interests, but failed in providing guidance between the different wordings that it used.

The lack of a definite “proportionality test” was denounced even by the ICC’s members a little before the decision on the election law was delivered. In a public seminar held in October 2013 at the ICC, Justice Marta Cartabia lamented that there was no distinction between the tests of proportionality and reasonableness in the ICC’s case-law:<sup>55</sup> the elaboration and the systematization of a sequenced proportionality test existent in other jurisdictions<sup>56</sup> was alien to the Italian experience.<sup>57</sup>

In Cartabia’s words, the systematization that the Italian legal system was lacking, should adhere to a four-step approach: 1) focusing on the “legitimate aim” of the legislation; 2) considering the relationship between the legislation’s aims and the means through which such aim is pursued; 3) checking the “necessity” of the legislation, namely that the law under scrutiny is using the “least restrictive means,” with respect to other

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<sup>52</sup> See Jack M. Balkin, *Why Are Americans Originalist?*, in *LAW, SOCIETY AND COMMUNITY: SOCIO-LEGAL ESSAYS IN HONOUR OF ROGER COTTERELL* (David Schiff & Richard Nobles, eds., 2015). See also MOSHE COHEN-ELIYA & IDDO PORAT, *PROPORTIONALITY AND CONSTITUTIONAL CULTURE* 126 (2013).

<sup>53</sup> See, e.g., Sent. n. 220, 1995; sent. n. 16, 1964, sent. n. 231, 1985. Text available in Italian at <http://www.cortecostituzionale.it/actionPronuncia.do>

<sup>54</sup> “All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions.” COSTITUZIONE art. 3 (It.), *translated in CONSTITUTION OF THE ITALIAN REPUBLIC, SENATO DELLA REPUBBLICA* [https://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf) (last visited Feb. 27, 2015).

<sup>55</sup> Marta Cartabia, *I Principi di Ragionevolezza e Proporzionalità nella Giurisprudenza Costituzionale Italiana*, Address Before the Conferenza Trilaterale delle Corte Costituzionali Italiana, Portoghese e Spagnola (October 4, 2013), *available at* [http://www.cortecostituzionale.it/documenti/convegni\\_seminari/RI\\_Cartabia\\_Roma2013.pdf](http://www.cortecostituzionale.it/documenti/convegni_seminari/RI_Cartabia_Roma2013.pdf).

<sup>56</sup> See Luc B. Tremblay, *An Egalitarian Defense of Proportionality-Based Balancing*, 12 *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW* [INT’L. J. CONSTIT. L.] 864 (2014)

<sup>57</sup> *Id.* at 5.

rights and interests; 4) using a “strict proportionality test,” examining the “effects” of the legislation and pondering the beneficial and the adverse effects of the legislation.<sup>58</sup>

Such description of the “proportionality test,” which, Cartabia stresses, is found in the case-law of several European States as well as the CJEU and the ECtHR,<sup>59</sup> lies at the core of the n. 1/2014 decision.

The decision stated that “The proportionality test used by this Court and by many other European constitutional courts, which is often paired with a reasonableness test and is an essential instrument of the [CJEU] within the judicial review of the legality of acts of the Union and of the Member States, requires an assessment as to whether the provision under review, along with the arrangements stipulated for its application, is necessary and capable of achieving legitimately pursued objectives by requiring that the measure chosen out of those most appropriate is the least restrictive of the rights in play and imposes burdens that are not disproportionate having regard to the pursuit of those objectives.”<sup>60</sup>

There is a striking parallel between the description of the proportionality test that Justice Cartabia acknowledged the ICC was lacking, and the proportionality test that the same ICC distilled in this election law decision. All the four steps were sharply described in the judgment: 1) a legitimate aim; 2) the means-aims relationship; 3) the least restrictive means test; 4) the weighing of beneficial and adverse effects of the legislation.

The ICC claimed to be familiar with this test; indeed, it looks like that, before this decision, the Court was aware that this test existed and it was eager to introduce it into its case-law.

This is not to say that the ICC illegitimately introduced a novelty inconsistent with the ICC’s role and the Italian constitutional text. Instead, the proportionality test, albeit mentioned in its prior case-law, merely was undeveloped. It needed clarification. So the ICC took the opportunity while reviewing the election law to distil it into clear terms. Interestingly, in order to do so, it explicitly borrowed from other courts.

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<sup>58</sup> *Id.* at 5.

<sup>59</sup> *Id.* at 4. In the field of election law, a ECtHR decision that uses the proportionality test is *Yumak and Sadak v. Turkey* [GC], App. No. 10226/03, ¶ 118 (Eur. Ct. H.R. 2008), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87363>.

<sup>60</sup> Corte Cost., 13 gennaio 2014, n. 1, Foro it. 2014, I, 677 (It.) ¶ 3.1. English translation provided by the ICC and available at [http://www.cortecostituzionale.it/documenti/download/doc/recent\\_judgments/1-2014\\_en.pdf](http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/1-2014_en.pdf) (last visited: 6 March, 2015).

It did not merely copy other jurisdictions' tools. The proportionality test has been said to be "fraught with difficulty. In part because it is so widely used by different courts, the term has defied consistent definition."<sup>61</sup> To import the "proportionality test" means to reshape it and align it to the domestic judicial review.

Why did they do so? After all, the decision on election law was unprecedented in its content – this was the first time that the judicial review of legislation dealt with the electoral legislation for the national Parliament. The declaration of unconstitutionality of such legislation was going to be extremely relevant for political life and institutions. Was the ICC wise in adopting the proportionality test, an unprecedented means of scrutiny, drawing from other jurisdictions, to deliver an unprecedented judgment? After all, even the term "proportionality" had never been used before this decision in the cases that involved the election law at issue: the three decisions that warned the Parliament about the flaws of the election laws had made no mention of such "proportionality" requisite.<sup>62</sup>

It was, however, probably wise for the ICC to adopt the "proportionality test" explicitly here. In fact, the analysis concerning the distortion of votes' weight caused by granting the prevailing party a seats bonus regardless of their score fell within the scope of 3) the least restrictive means test and 4) the balance between beneficial and adverse effects. In the ICC's wording, the seat bonus "doesn't respect the duty of affecting other interests and constitutionally-protected values in the smallest measure."<sup>63</sup> And the distortion was even more evident in the context of the senatorial elections, which were dominated by regional seats bonuses which, while distorting the weight of each vote, did not provide the Senate with a majority and therefore political stability. Each party's final outcome at the Senate depended on the sum of all the seats bonuses that each party got in each Italian Region. The Senate could be dominated by a party that has been selected by a minority of the popular vote: its territorial distribution could give it more Regional seats bonuses than the most popular party. Moreover, the Senate and the Chamber of Deputies could be composed of different majorities, with the effect of slowing down the passing of bills and requiring the creation of broad coalitions, which would need to include both Chambers' majorities. All things considered, the ICC borrowed good ideas – such as the

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<sup>61</sup> David S Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 702 (2005) (internal quotations omitted).

<sup>62</sup> See Corte Cost., 30 gennaio 2008, n. 15 e 16; 24 gennaio 2012, n. 13. *Supra* note 14.

<sup>63</sup> Corte Cost., 13 gennaio 2014, n. 1. *Supra* note 1.

“proportionality test” – to craft its own instruments in a better way and address the case properly.

### 4.3. The German Constitutional Court’s precedents and their role in the decision

The German Federal Constitutional Court’s precedents were a powerful booster in the ICC’s decision. The German Court repeatedly had decided election law cases that had been brought to its attention through direct access. Such cases were addressed in a way that the ICC substantially followed in this decision. The ICC has looked into German Constitutional Court’s case law to decide cases multiple times. But it has been quite reluctant to openly quote the German Court’s decisions; rather, it has made reference to other countries’ tendencies, without further specification about its sources or its preference for foreign legislation or case-law.<sup>64</sup>

This time, the ICC openly quoted three of the German Constitutional Court’s decisions.<sup>65</sup> It did so when it specified that the proportional systems created a sort of expectation in the voter that there would be no disequilibrium between the vote and its parliamentary outcome,<sup>66</sup> namely, that the weight of each vote is balanced through a bonus seat only as long as this is necessary to secure the Parliament’s functionality.<sup>67</sup> Votes, especially within proportional systems, must be treated equally, since they all concur to elect Parliamentary members on a proportional basis. Therefore, the ICC portrayed the proportionality system as requiring a sort of inner coherence: since a proportional system is understood to accord each vote a proportional political representation, so that the outcome of each vote is expected to be the same; variations are justified only if they do not betray the spirit of the proportional system.<sup>68</sup> And betrayal happens when excessive weight is given to some parties, therefore diminishing the value of the remaining parties’ voters.

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<sup>64</sup> Zencovich, *supra* note 9.

<sup>65</sup> See Corte Cost., 25 luglio 2012, n. 3 and 11; 22 maggio 1979, n. 197; 5 aprile 1952, n. 1. Text available in Italian at <http://www.cortecostituzionale.it/actionPronuncia.do>.

<sup>66</sup> Francesco Duranti, *Constitutional Dialogues in Italy*, I-CONNECT (Jan. 22, 2014), <http://www.iconnectblog.com/2014/01/constitutional-dialogues-in-italy/>.

<sup>67</sup> Corte Cost., 13 gennaio 2014, n. 1. *Supra* note 1.

<sup>68</sup> Adele Anzon-Demming, *Accesso al Giudizio di Costituzionalità e Intervento “Creativo” della Corte Costituzionale*, RIVISTA AIC 2 (2014).

The 2012 German Court's decision – and, more broadly, a vast portion of the German Court's jurisprudence on the election law subject – had precisely this rationale: “ballot equality” must be followed by “outcome equality” within the proportional system.<sup>69</sup> The ICC decision paralleled the German line of decisions on this topic, which “has constantly maintained that the choice of the system of proportional representation entailed strict systemic consequence. Once the fundamental option had been made, the law was bound to remain on that course. Any departure required specific justification.”<sup>70</sup> The analogy between the ICC decision and the German Court's line of reasoning is striking.

The German Court's precedents were extremely important: the ICC had no precedent to help on this topic. No proportionality test had been used before in the scrutiny of the election laws; and the domestic precedents pertaining to equality in the field of election law were rather old.<sup>71</sup> The German precedents, although not binding in any sense – Italian legal system does not follow the *stare decisis* regime or make formal references to foreign decisions – eased the ICC's role in deciding on election law for the first time.

John Rawls wrote that, in the public forum, “the discourse of judges in their decisions, and especially in the judges of the supreme court,” needs strict justification, in comparison with other categories of public figures.<sup>72</sup> If it is so, here the German jurisprudence probably acquired a cornerstone role in the ICC's decision through justifying it.

Admittedly, such justification is selective, both from a comparative law perspective and from a constitutional interpretation perspective.

As to the comparative law, the then very recent case that involved Italian legislation, *Saccomanno v. Italy*,<sup>73</sup> was quoted but found nondispositive for the decision. In *Saccomanno*, the ECtHR dismissed an application that claimed that the Italian seats bonus violated Protocol no. 1, article 3, of the European Convention of Human Rights, which commands that the State must “hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people

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<sup>69</sup> Christian Tomuschat, *Germany's Mixed-Member Electoral System: A Victim of Its Sophistication*, 13 GERMAN L. J. 213, 214 (2012).

<sup>70</sup> *Id.* at 225.

<sup>71</sup> The only precedent that the Court quotes is decision 3 luglio 1961, n. 43.

<sup>72</sup> See John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 767, 767–768 (1997).

<sup>73</sup> App. No. 11583/08 (Eur. Ct. H.R. 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110318>.

in the choice of the legislature.”<sup>74</sup> In that case, the European Court made use of the “proportionality test,”<sup>75</sup> but affirmed that this article neither commands that all votes must have an equal weight towards the election’s outcome, nor says that each candidate must have equal chances to be elected: no voting system can avoid the “lost votes” phenomenon.<sup>76</sup>

The ICC intentionally ignored *Saccomanno*’s rationale and use of the “proportionality test,” instead deferring its means of scrutiny to the German Constitutional Court. The ICC probably preferred to ease its decision by ignoring this precedent. In fact, it mentioned the CJEU’s use of the proportionality test, although election law falls within the scope of the ECtHR much more easily than that of the CJEU, since the European Union’s competencies do not cover member states’ domestic institutional life, and its Court is unlikely to deal with state election laws. The ICC purposely ignored how the ECtHR had used the “proportionality test” on the Italian election law, in order to reuse the same test itself and reach a different conclusion on the same piece of legislation.

Conclusively, with this decision, the ICC made an unusually large use of comparative law. Normally, the recourse to comparative law is made in the context of human rights adjudication.<sup>77</sup> Here, the scrutiny involved the functioning of a national institution such as the Parliament.<sup>78</sup> But it is worth noticing that this scrutiny of election law came from a human rights perspective: namely, from the right to vote. The very use of the “proportionality” scrutiny confirms this. In fact, it is commonly construed as a right-protecting type of scrutiny: it is “the set of rules determining the necessary and sufficient conditions for a limitation of a *constitutionally protected right* by a law to be constitutionally permissible.”<sup>79</sup> We therefore can conclude that human rights provided the key for the use of comparative law, as usual.

#### **4.4. The non-textualist reading of the Constitution and its consequence on the election law**

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<sup>74</sup> Convention, *supra* note 31, art. 3.

<sup>75</sup> *Saccomanno*, App. No. 11583/08, Par. 49.

<sup>76</sup> *Id.*, Par. 53.

<sup>77</sup> See Tania Groppi & Marie Claire Ponthoreau, *Conclusions*, in *THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES* 416 (Tania Groppi & Marie Claire Ponthoreau, eds., 2013).

<sup>78</sup> Duranti, *supra* note 58.

<sup>79</sup> BARAK, *supra* note 12, at 3 (emphasis added).

From a constitutional interpretation perspective, the ICC probably downplayed the Framers' original intent. The bicameral Parliament was initially intended to provide the political forum a large room for debate and reflections. According to the Constitution, each bill needs to pass the two Chambers without modifications in order to be approved; if either of the Chambers slightly modifies the text of a bill, then it must go back to the other chamber in order to have two approbations on the identically worded law. This slows down the legislative process, and has become almost unacceptable in times in which decisions and legislation must be enforced quickly.

But slowing down the path of legislation was one of the Framers' intents.<sup>80</sup> The records of the debate at the Constituent Assembly reveal disagreements, doubts and swinging opinions about the role, purpose and structure of bicameralism amongst the Framers. But some were so reluctant to have a political monopoly of a party or coalition in the Parliament<sup>81</sup> that they crafted the Senate differently from the Chamber of Deputies precisely to plant the seeds of potential political discrepancies between the two and prevent the establishment of tyrannical majorities. The Framers initially established different terms for the Senate and the Chamber of Deputies: respectively, six and five years (art. 60).<sup>82</sup> This proviso later was modified to make the two terms coincide,<sup>83</sup> but the Constitution still admits different political majorities in the two Chambers. For instance, the President of the Republic can still dissolve and prompt new elections for only one Chamber – which can create conflicting majorities between the two Chambers. Moreover, the selection of the Senators must be made on a Regional basis, whereas no such prescription for the Chamber's deputies exists.<sup>84</sup> The passive and active electorate is different: Senators should be at least 40 years old, and their electors 25,<sup>85</sup> while the Chamber of Deputies requires ages 25 and 18 respectively.<sup>86</sup> And the President of the Republic can appoint up to five lifetime Senators;<sup>87</sup> moreover, all former Heads of the State

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<sup>80</sup> Enzo Cheli, *Bicameralismo*, 2 Dig. disc. pubbl. 322 (1987).

<sup>81</sup> *Id.* at 323.

<sup>82</sup> "The Chamber of Deputies is elected for five years, the Senate of the Republic for six years." COSTITUZIONE DELLA REPUBBLICA ITALIANA, SENATO DELLA REPUBBLICA [http://www.senato.it/documenti/repository/relazioni/libreria/Costituzione\\_anastatica.pdf](http://www.senato.it/documenti/repository/relazioni/libreria/Costituzione_anastatica.pdf) (last visited: 3 March 2015).

<sup>83</sup> Constitutional Law n. 2, 1963, Art. 3.

<sup>84</sup> Italian Constitution, Art. 57.

<sup>85</sup> *Id.* art. 58.

<sup>86</sup> *Id.* art. 56.

<sup>87</sup> *Id.* art. 59.

are Senators for life.<sup>88</sup> All these details would confirm that the Framers declined to have two identical Chambers, with the same political composition; they wanted debates and negotiations instead.<sup>89</sup> Stable governments and Parliamentary majorities surely were not among their primary goals.

Even more interestingly, some of the Framers thought that the election laws in the Senate and the Chamber of Deputies had to be different in order to create different majorities in each branch of the Parliament: the first election laws that were voted by the Constituent Assembly had this differentiation among their goals.<sup>90</sup> The electoral system in the Senate was initially conceived to be plurality-based, while the system in the Chamber of Deputies was meant to be proportional. Practically speaking, they both functioned as proportional,<sup>91</sup> and the structural differences between the Chamber and the Senate did not play a major role in differentiating the majorities in each Chamber.<sup>92</sup> All parties scored roughly the same results in both Chambers. But the legislation didn't foreclose the possibility of rival majorities in the Senate and the Chamber of Deputies.

Although the enactment of the Constitution inadequately reflected the Framers' intent, for decades political parties made no effort to reshuffle the Parliament's structure and create the conditions for different majorities in the two Chambers.<sup>93</sup> They realized that different seat distributions would have slowed down the legislature's work and complicated the government coalition's life; and the legal scholarship embraced the idea that the proportional system was not just the natural, but even the necessary, system for both the Chambers of the Parliament.<sup>94</sup> For all these reasons, since the enactment of the Constitution, there has been no aspiration for two different majorities in the Parliament.

With decision no. 1, 2014, the ICC has openly joined a quest for what would be a "governing democracy," which aims to put "into office, more or less directly, the party or

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<sup>88</sup> *Id.* art. 59.

<sup>89</sup> Henri Schmit, *La Sentenza 1/2014 e i Diritti Elettorali Garantiti dalla Costituzione*, FORUM DI QUAD. COST. (March 13, 2014), [http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti\\_forum/giurisprudenza/2014/0011\\_nota\\_1\\_2014\\_schmit.pdf](http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/giurisprudenza/2014/0011_nota_1_2014_schmit.pdf).

<sup>90</sup> Livio Paladin, *Bicameralismo*, 5 ENCICLOPEDIA GIURIDICA [ENC. GIUR.] 4 (1988).

<sup>91</sup> *Id.* at 6.

<sup>92</sup> *Id.* at 6.

<sup>93</sup> *Id.* at 7.

<sup>94</sup> See Carlo Lavagna, *Il Sistema Elettorale nella Costituzione Italiana*, RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO [RIV. TRIM. DIR. PUBBL.] 855 (1952); Giuliano Amato, *Il Dilemma del Principio Maggioritario*, QUAD. COST. 178–181 (1994).

coalition of parties which will govern the country until the next election (or the first crisis).”<sup>95</sup> The ICC has interpreted its role – and the Constitution itself – with this goal in mind; therefore, it has downplayed the Constituent Assembly’s opinions that were favorable to different compositions in the two Chambers. At the time the Constitution entered into force (1948), such opinions were so widespread that they prompted the passing of different election laws for the two Chambers. But later on, the concern about governmental stability took over: the ICC itself put it among its top concerns. This preoccupation does not stem from the Constitutional text, but it is commonplace among contemporary political institutions in Italy and has been at the core of Constitutional reform’s projects for at least thirty years. In a few words, political stability has risen to be among the top constitutional interests beyond the Constitutional text.

#### 4.5. The closed-list system

In its decision, the ICC also outlawed the party-list system. The two Parliamentary Chambers were composed of members enlisted by parties. The provision that was struck down stated that candidates “on closed lists are elected in the order in which they appear on the list,”<sup>96</sup> with no chance for the voter to express his or her preference.

The ICC said that this provision “constrain[ed] the freedom of choice of voters when electing their own representatives in Parliament:” the choice amongst the candidates was made by the parties that compile the lists.<sup>97</sup> Therefore, the ICC concluded that this provision violated Art. no. 48 of the Constitution, which accords the freedom of vote to electors.

The closed-list system, in itself, is neither peripheral to election law engineering nor bluntly against the basic tenets of democracy. Closed lists of candidates are in good standing in comparative law: in Spain<sup>98</sup> and Germany<sup>99</sup>, one Chamber is totally or partially elected with a closed-list system.

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<sup>95</sup> European Commission for Democracy through Law (Venice Commission), *Electoral Law*, August 27, 2013, CDL-EL(2008)029, ¶¶ 92-93, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-EL\(2008\)029-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-EL(2008)029-e) [hereinafter Venice Commission, *Electoral Law*].

<sup>96</sup> *Id.* ¶ 31.

<sup>97</sup> Par. 5.1 of decision no. 1, 2014. *Supra* note 1.

<sup>98</sup> L.O.R.E.G. art. 163, let. e (Spain), [http://noticias.juridicas.com/base\\_datos/Admin/lo5-1985.t2.html#a163](http://noticias.juridicas.com/base_datos/Admin/lo5-1985.t2.html#a163) (last visited Feb. 28, 2015).

<sup>99</sup> Bundeswahlgesetz [BWahlG or BWG] [Federal Elections Act], July 23, 1993, § 1, translated in FEDERAL ELECTIONS ACT, BUNDESWAHLLEITER (May 3, 2013),

Also, supranational human rights policies and adjudication enlist closed lists as legitimate means – or even one of the best means – through which parliamentary members are chosen.

The influential *European Commission for Democracy Through Law*, the Council of Europe’s advisory board in constitutional matters known as the *Venice Commission*, in its paper *Electoral Law* has stated that the “list system,” coupled with “proportional representation”, is the “most functional electoral system”<sup>100</sup> for the “mass democracy model.” According to the *Venice Commission*, the closed-list system “corresponds to the exploitation of the political potential of universal suffrage through mass organizations having the aim of mobilizing electors.”<sup>101</sup> Each party’s candidates tend to attract voters and interest to their own party instead of competing with each other, since the more votes their list collects, the more possibilities they have of being elected.

The aforementioned ECtHR’s decision *Saccomanno v. Italy*<sup>102</sup> also dealt with the party-list system and legitimized it. The Court found no violation of the Protocol that addressed the issue. Through collecting comparative law information about election laws, the European Court made it clear that, out of the twenty-two member States that have electoral legislation comparable to the Italian one, thirteen adopt party-lists, while five have the preferential vote system (which allows voting based on individual candidates) and four have an intermediate solution (which includes both seats allotted according to voters’ preference and seats allotted through party-lists).<sup>103</sup> Party-lists are more the norm than the exception for the European Court.

And, the European Court added, reasons for backing the pro-party list option are not lacking. In its words, such party lists can be adopted to “facilitate candidatures amongst women, minorities, or intellectuals.”<sup>104</sup> According to the European Court, in Italy closed-lists were even conducive to good electoral behaviors: since voters casted their vote to the whole list, and not to single candidates, this system helped oppose crime organizations’

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[http://www.bundeswahlleiter.de/en/bundestagswahlen/downloads/rechtsgrundlagen/bundeswahlgesetz\\_engl.pdf](http://www.bundeswahlleiter.de/en/bundestagswahlen/downloads/rechtsgrundlagen/bundeswahlgesetz_engl.pdf).

<sup>100</sup> Venice Commission, *Electoral Law*, supra note 89, ¶ 2.2.

<sup>101</sup> *Id.* ¶ 2.2.

<sup>102</sup> App. No. 11583/08 (Eur. Ct. H.R. 2012),

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110318>.

<sup>103</sup> *Id.* ¶ 26.

<sup>104</sup> *Id.* ¶ 60.

infiltrations into parties, or vote trades:<sup>105</sup> criminal organizations could not tell their members to vote for single candidates with which they had negotiated special treatments or favors. Since each candidate depended on the party's score for his or her victory, these corruptive phenomena were discouraged.

The European Court correctly mentioned some of the preoccupations that had previously led to the cancellation of preferential votes in Italian Parliamentary elections in the early Nineties. The preferential vote system was abolished because it lent itself to collusion with criminal organizations, and prompted inner party conflicts amongst the candidates. They competed with each other to get preferential votes and, after the elections, such conflicts prompted party and government instability. The adoption of a wholly closed-list system hadn't given satisfactory results, however: its enforcement had been widely criticized for depriving voters of the power to choose their "best representatives."<sup>106</sup>

The ICC was aware that foreign electoral systems included closed-lists, but, in its decision, it gave precedence to the results of latest Italian general elections, which ended up with profoundly different political majorities in the two Chambers and prompted governmental instability, and, notwithstanding the ECtHR's opinion, it outlawed the relevant piece of legislation. In other words, the ICC surely gave special importance to the fact that the European Court was able to scrutinize the Italian election law in order to innovate its own case-law on admissibility, but disregarded the European Court's opinion on the Italian election law itself.

The ICC gave particular importance to the aspects that, in its opinion, distinguished the Italian legislation on Parliamentary elections from others. Closed lists systems, the ICC said, are applied abroad "only for a part of the seats," as in German Federal elections;<sup>107</sup> and other systems – such as the Spanish one – have electoral districts of more limited

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<sup>105</sup> *Id.* ¶ 61.

<sup>106</sup> Guido Tabellini, *L'evoluzione dei Sistemi Elettorali del Parlamento Italiano* (July 22, 2013), MINISTRA PER LE RIFORME COSTITUZIONALI E I RAPPORTI CON IL PARLAMENTO <http://riformecostituzionali.gov.it/documenti-della-commissione/riforma-della-legge-elettorale/92-l-evoluzione-dei-sistemi-elettorali-del-parlamento-italiano.html>.

<sup>107</sup> Bundeswahlgesetz [BWahlG or BWG] [Federal Elections Act], July 23, 1993, §§ 1, 41, *translated in* FEDERAL ELECTIONS ACT, BUNDESWAHLEITER (May 3, 2013), [http://www.bundeswahlleiter.de/en/bundestagswahlen/downloads/rechtsgrundlagen/bundeswahlgesetz\\_engl.pdf](http://www.bundeswahlleiter.de/en/bundestagswahlen/downloads/rechtsgrundlagen/bundeswahlgesetz_engl.pdf).

dimensions,<sup>108</sup> with fewer representatives elected in each of them,<sup>109</sup> which make them more comprehensible for the voters.

Crucial is a series of specifications that the ICC offered. Firstly, in the Italian law, lists of Parliamentary candidates are “very long,” and they run for seats in rather populated districts: electors have no real possibility of knowing each party’s candidates and familiarizing with them. Secondly, the order of candidates can also be undermined: each candidate can run for the same elections in a limitless number of districts. Therefore, a candidate that has been elected in more than one district is completely free to decide which district he will represent; in the other districts he will be replaced by other candidates of the same party, who received less votes and are less representative of the population. Consequently, the results of elections are randomized by the combination of multiple-district candidatures and the winners’ free choice to decide which district they want to represent. All such factors can frustrate voters’ choices.

Overall, the ICC did not ignore the fact that the party system, per se, was consistent with the basics of democratic constitutionalism; but it focused on the combination of three factors, which collectively violated art. 48 Const.: *a)* the closed-list system as the sole election formula, along with *b)* the multiple candidatures and *c)* the crowdedness of districts. Only *a)* was outlawed; but *b)* and *c)* also were censured. The result was an immediately applicable regime that confers voters the right to choose the candidate in the party list and a proportional Parliamentary distribution of seats, with no bonus for the winning parties or coalitions.

Three aspects are worth consideration.

The first aspect is the nullification of the list-system. Since the ICC quashed the seats bonus, it could have saved the closed-list system, which, after all, is not radically incompatible with the fundamentals of democracy, as we could notice. Through declaring unconstitutional the list-system, the ICC wanted to give back to voters the control of the Parliament. But, for this purpose, the nullification of the seat bonus could have been enough. In fact, the probable effect of declaring the seats bonus unconstitutional would be to increase the number of parties. The voter therefore is given a broader chance of

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<sup>108</sup> Franco Bassanini, *Legge Elettorale e Forma di Governo: Ipotesi per una Riforma Condivisa*, in LEGGE ELETTORALE E FORMA DI GOVERNO: IPOTESI PER UNA RIFORMA CONDIVISA 57, (Dario Nardella, ed. 2007).

<sup>109</sup> Stefano Ceccanti, *Scheda sul Sistema Elettorale Spagnolo*, ASTRID-ONLINE, <http://www.astrid-online.it/dossier--r1/documenti/scheda-sistema-elett.-spagna.pdf> (last visited Feb. 28, 2015).

choosing his or her representatives. The choice of the candidates is not in the party's hands as it was with the seats bonus in force; now electors can choose among more parties, with no fear of voting for small parties, whose votes will probably be lost at the advantage of the big ones. Moreover, those willing to run for a Parliamentary seat have a wider spectrum of possibilities: there are more parties now. They are not condemned to choose between the few parties that are more likely to gross the seat bonus.

The second aspect deals with the perils of the preferential vote, which the ICC reintroduced with its judgment. The ICC did not consider the pros and cons of such a voting system. The frequency of corruption and the instability of government coalitions that were attached to such a system, to which the ECtHR alluded in *Saccomanno v. Italy*, were ignored. It is understandable that the ICC did not want to emphasize the downfalls of the system it was restoring; but it must be acknowledged that the preferential vote has its flaws. Moreover, since multiple candidatures and crowded circuits are still in force, the more direct relationship between the voter and the elected the Court wants to inspire is not secured.

But the third – and perhaps most important – aspect that needs to be underlined is that the ICC did not address the most criticized effect of the Italian closed-list system: namely, the virtual inability of Italian voters to control Italian parties. The ICC could not address this topic directly, since this feature had not been brought to its attention; still, it gave no room for reflection on such a decisive issue.

Closed lists in the Italian political system are biased by the fact that the parties that compile their lists of candidates are not required to meet any inner democratic criteria. According to the widely accepted interpretation of Art. No. 49 of the Constitution,<sup>110</sup> Italian parties have no obligations to adopt any democratic structure or to select their leaders through internal consultations or elections.<sup>111</sup> And, since party-lists leave the choice of the representatives in the hands of each party, this lack of accountability has created a potentially self-referential political system, in which electors are obliged to choose amongst concurrent political lists compiled by parties' leaders, who are not democratically

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<sup>110</sup> "All citizens have the right to freely associate in parties to contribute to determining national policies through democratic processes." COSTITUZIONE art. 49 (It.), *translated in* CONSTITUTION OF THE ITALIAN REPUBLIC, SENATO DELLA REPUBBLICA [https://www.senato.it/documenti/repository/istituzione/costituzione\\_inglese.pdf](https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf) (last visited Feb. 27, 2015).

<sup>111</sup> Giulio Enea Vigevani, *Art. 49*, in COMMENTARIO ALLA COSTITUZIONE 49 (Sergio Bartole & Roberto Bin, eds., 2008).

elected.<sup>112</sup> The need to overcome this political deadlock, which parties appeared to have no interest in removing, probably inspired the ICC's decision, even if there is no mention of the flaws of Italian political system in the judgment. Still, the idea that preferential votes are better because Italian parties are not expected to be democratic has been a trademark of Italian constitutional scholarship and lies beneath the surface of the ICC's affirmation that the Italian closed-list system deprived the voter of "any kind of choice of its representative."<sup>113</sup>

## 5. After the decision

The decision of the ICC is having deep effects on the political agenda as well as on the judicial review of legislation itself.

The German understanding of the proportional system, on which the ICC has tailored its decision concerning the seat bonus, will probably affect the ICC's decisions on this subject in the future, and is surely affecting the Parliamentary efforts to innovate the election laws. Since the ICC stated that the proportional system commands that votes are treated as equally as possible even at the time of the outcome, the legislature is warned that the ICC will closely scrutinize deviations from "outcome equality," mainly through the "proportionality test." In fact, the ongoing debate around Italian election law reform concerns the threshold for the seat bonus that would be "proportionate" if scrutinized by the ICC.

Also, the party-list is being debated at the moment. The ICC outlawed the closed-list system, because it was paired with large districts, which made each party-list particularly long, and inspired multiple candidatures. The election law bill that is most likely to pass shortcuts the decision of the ICC: it reaffirms multiple candidatures and closed-lists, but creates smaller districts. Then the real issue is if the new districts are small enough.<sup>114</sup>

The bill's drafters have guidance from comparative law. Since the ICC stated that the Italian legislation did not parallel foreign election laws that had smaller districts and a seat

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<sup>112</sup> Bassanini, *supra* note 106, at 54; CESARE PINELLI, *Legge Elettorale e Forma di Governo*, in LEGGE ELETTORALE E FORMA DI GOVERNO: IPOTESI PER UNA RIFORMA CONDIVISA 24, (Dario Nardella, ed. 2007).

<sup>113</sup> Par. 5.1.

<sup>114</sup> The bill is currently being processed by the Chamber under the name of "Atto Senato n. 1385," and can be found at <http://www.senato.it/japp/bgt/showdoc/17/DDLMESS/901855/index.html> (last visited Feb. 28, 2015).

bonus threshold, then they can draw from foreign experience. If they introduce a law that copycats foreign districts and bonus thresholds in force elsewhere, then it will be hard for the ICC to quash it.

But the newness of the ICC decision does not lie solely in the political debate that it has prompted. In fact, the decision has immediate effects on the election law now in force, as a direct outcome of the decision, as well as on the understanding of the judicial review of legislation.

### **5.1. A new judicial review of legislation?**

The first novelty present in the ICC's decision arises with the scope of the judicial review of legislation. One of the ICC's particularities is that it controls the constitutionality of the law only through two ways of access: the direct appeal to the ICC, which can be used only by the State against Regional laws, or by Regions against State laws or other Regions' laws; and the so-called *a posteriori* access, which is the way of access that prompted the decision no. 1/2014. For what interests us, the *a posteriori* judgment postulates that a domestic jurisdiction must deal with a law that is questioned as incompatible with the Constitution. The judge that is treating the case brings the issue before the ICC, which will decide about the constitutionality of the law. Then the case goes back before the judge that requested the ICC's ruling. In so doing, the ICC deals with fewer cases than if it had to respond to direct individual complaints of unconstitutionality. This restriction of the right to file a complaint of unconstitutionality before the ICC only to the State, to Regions, and to domestic judges obviously reduces the number of cases with which it needs to deal. But capping the number of cases that are brought before the ICC is needed, since the ICC does not control its docket; if it was asked to address a much larger number of cases, it still could not select those that are worth its consideration, and would be buried with cases.

These ways of access have limited the number of cases that the ICC needs to address. Excluding the late eighties, when the number rose above one thousand, the ICC usually takes less than 400 decisions per year.

This system has been so successful to the extent that it has inspired other States' constitutionalization of the judicial review of legislation,<sup>115</sup> as well as the preliminary ruling system before the CJEU,<sup>116</sup> and the optional protocol no. 16 that will allow the ECtHR, if requested by domestic courts, to give opinions about the European Convention's interpretation.<sup>117</sup> But this system works progressively and piecemeal: a decision only can outlaw single parts of domestic law. And this is because the ICC scrutinizes the law only when and because the judiciary needs to enforce it.

In the recent past, this ICC's access structure led it to dismiss the request that the election law be scrutinized during the referendum process. The ICC must check if referendum proposals on law provisions are compatible with the Constitution before the referenda are held. When requested to declare if the referendum to repeal that very election law could be done without violating any Constitutional provision, it also faced the possibility of scrutinizing the election law itself. But the ICC maintained that it could not review the legislation because it was only requested to check the referendum's compatibility with the Constitution: after all, it had to rule on the referendum, not on the law that the referendum was trying to repeal. The ICC therefore concluded that it could not review the legislation without a case in which the relevant piece of legislation must be concretely applied.<sup>118</sup>

With the judgment no. 1/2014, the ICC left this logic behind. The ICC needed to ascertain the existence of a right to vote that the election law in itself infringed; the plaintiffs addressed their grievances directly against the election law's provisions. In hearing the case, the ICC admitted a quasi-direct suit. Such kind of suit, as construed by the ICC itself, is only formally filtered through domestic jurisdictions, and cannot find resolution in those courts: the concrete issue at stake is the claim of unconstitutionality in

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<sup>115</sup> Sandro Staiano, *Introduzione*, in GENESI ED EVOLUZIONE DEI SISTEMI DI GIUSTIZIA COSTITUZIONALE: ITALIA, FRANCIA E SPAGNA IX, (Sandro Staiano, ed. 2012) [hereinafter GENESI ED EVOLUZIONE].

<sup>116</sup> See Ditlev Tamm, *The History of the Court of Justice of the European Union since its Origin*, in THE COURT OF JUSTICE AND THE CONSTRUCTION OF EUROPE: ANALYSES AND PERSPECTIVES ON SIXTY YEARS OF CASE-LAW-LA COUR DE JUSTICE ET LA CONSTRUCTION DE L'EUROPE: ANALYSES ET PERSPECTIVES DE SOIXANTE ANS DE JURISPRUDENCE 19 (2013).

<sup>117</sup> "Highest courts and tribunals of a High Contracting Party, as specified in accordance with Article 10, may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto."

The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it." Steering Committee for Human Rights, European Court of Human Rights, *Protocol No. 16 to the Convention of Human Rights and Fundamental Freedoms*, COUNCIL OF EUROPE (Oct. 2, 2013), art. 1, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/214.htm>.

<sup>118</sup> Corte Cost. 30 gennaio 2008, n. 15, Par. 6.1.

itself. This is proved by the fact that the final decision delivered by the Court of Cassation simply adhered to the ICC's judgment.<sup>119</sup> It explicitly said that the plaintiffs received full satisfaction with the ICC's decision that, through striking down the election legislation, "restored the constitutional legality."<sup>120</sup> The only aspect that the Court of Cassation added consisted in requiring the state administration to compensate the plaintiffs for their trial expenses.

This new third way of access to the ICC has been said to prompt a whole "wave of appeals" before the Court.<sup>121</sup> This is a serious risk, which is quite common in countries that have ways of direct access to the judicial review of legislation. The Spanish Constitutional Tribunal has greatly suffered from a huge backlog of direct access cases, which amounts to 90% of its entire workload,<sup>122</sup> to the extent that it had to amend its legislation on judicial review to trim down the possibility of direct access.<sup>123</sup> Conversely, France, which has come to introduce the *a posteriori* judicial review quite recently, has circumscribed this review attentively to avoid an excessive caseload. When the French drafted this new way of judicial review, they followed the classical Italian system of judicial review of legislation,<sup>124</sup> as it was conceived until the ICC's judgment no. 1/2014.

The ICC now can be reached by an unlimited number of cases that are brought to its attention by domestic judges, as long as they think that the case before them, although being substantially about a law and not about its application to the plaintiff, *a*) violates a fundamental right and that *b*) the constitutional system provides no other remedies other than bringing the law before the ICC. In other words, from now on plaintiffs can merely claim that their rights are infringed by some piece of legislation and challenge it quasi-

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<sup>119</sup> Cass., sez. un., 16 aprile 2014, n. 8878/2014, available at <http://www.italgiure.giustizia.it/xway/application/nif/clean/hc.dll?verbo=attach&db=snciv&id=./20140417/snciv@s10@a2014@n08878@tS.clean.pdf> (last visited Feb. 28, 2015).

<sup>120</sup> *Id.*

<sup>121</sup> Anzon-Demming, *supra* note 62.

<sup>122</sup> José Lozano Miralles, *El Recurso de Amparo ante el Tribunal Constitucional Español. Análisis de la Problemática del Juicio de Admisión: La Denominada Transcendencia Constitucional*, in GENESI ED EVOLUZIONE, *supra* note 109.

<sup>123</sup> *Id.* at 79. See also Manuel Aragón Reyes, *La Reforma de la Ley Orgánica del Tribunal Constitucional*, 85 REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 11 (2009) (discussing the reforms of Spain's Constitutional Tribunal).

<sup>124</sup> See Xavier Philippe, *La question Prioritaire de Constitutionnalité: à L'aube d'une Nouvelle ère pour le Contentieux Constitutionnel Français*, 82 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL [REV. FR. DR. CONST.] 273 (2010); Thierry Santolini, *La Question Prioritaire de Constitutionnalité au Regard du Droit Comparé*, 93 REV. FR. DR. CONST. 83 (2013).

directly; they will not need to claim that the law they want to challenge concretely affects their very situation or elaborate on how it does.

The violation of a fundamental right is the same condition for direct access to the judicial review of legislation in countries such as Germany; and it was through this means of redress that the German Constitutional Court scrutinized the cases that the ICC quoted in this decision.

This explains why the ICC insisted that these two conditions –*a*) the violation of a fundamental rights and *b*) the absence of any other way of redress – are necessary to have it consider the case. These conditions will enable the ICC to select the cases that are relevant enough to be reviewed. This type of review also means that the ICC will need to control its docket somehow: it will single out cases that deserve its attention, and dismiss the rest as inadmissible.<sup>125</sup> The only guidance for the ICC will be exactly the existence of a right and the absence of other ways of redress.

The more the ICC labels rights as fundamental, the more it will be obliged to consider if a way of redress is provided by the Italian legal system. This is problematic, precisely because the law scrutinized before the ICC does not really need to be enforced in a separate case. The Court must therefore preliminarily imagine if the law could ever be enforced in a way that will allow domestic courts to address it; if this is the case, the ICC must dismiss the case before itself and wait until a “concrete” case is brought to its attention.

The novelty in constitutional adjudication is confirmed by the debate on the election law reform that is taking place right now. Parties are discussing the basics of a new election law, bearing in mind that the ICC could again judge the new piece of legislation. And, thanks to the new features of the quasi-direct access to the Court, this could take place in any moment, before or after the elections.

This is why some have proposed to empower the ICC with an advisory opinion power for the election law bills. The ICC could give an opinion before the election law enters into

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<sup>125</sup> Serges, *supra* note 5.

force, and ensure its compatibility with the Constitution.<sup>126</sup> Although this proposal later disappeared from the political agenda, it is worthy of some theoretical consideration.

The ICC's advisory opinion would be able to anticipate that the election law is most likely to survive the ICC's own scrutiny, in the event the law is brought to its attention after it enters into force. But if the ICC were given the power to review the bill and deliver an advisory opinion on it, then this would bring the judicial review of electoral legislation *a posteriori* to an end. In fact, as we have seen, the ICC granted its review to the election law because there was no other way to bring this kind of legislation to its attention. If a new substantial power were given to the ICC to intervene in the election law drafting, then there would be no grey zone of judicial redress that would need to be covered anymore; once the legislation would enter into force, it already would have been scrutinized by the ICC.

Such innovation could temper the impact of the ICC's no. 1/2014 decision, but only with reference to the judicial review of the election law. Other grey zones would remain untouched, and feed the ICC more cases to be addressed through the new quasi-direct way of access to it.

Even more importantly, if the ICC were given this new power to review the election law bill, its scrutiny on the election law would change greatly. The ICC would need to predict the effects of the new election bill on fundamental rights, the political system, and the relationships between the state institutions. Blatant violations of the right to vote can be quite easily detected; but it would be harder for the ICC to predict if the new legislation perverts political and institutional life. After all, the Italian legal and political system cast its hopes in the closed-list system in early Nineties. It was only after many years that they realized that things were getting worse, and that it was better to restore the preferential vote through the ICC's intervention.

## **5.2. The Court's "election law:" A true step forward?**

In outlawing the seats bonus and the party-list, the ICC restored a purely proportional election regime, with the only limitation being the threshold that parties must meet in order to participate in the distribution of seats. At the Chamber of Deputies, the thresholds

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<sup>126</sup> Giulio Salerno, *Renzi Sta Violando Tutte le Regole*, ILSUSSIDIARIO (July 7, 2014), <http://www.ilsussidiario.net/News/Politica/2014/7/7/ITALICUM-II-giurista-Renzi-sta-violando-tutte-le-regole/512565/>.

amount to 4% for single parties and to 10% for coalitions; at the Senate, they are 8% for single parties and 20% for coalitions<sup>127</sup>. Obviously, after the ICC's decision, the parties' interest in coalescing into coalitions has dramatically decreased.

In so doing, the ICC basically turned back time,<sup>128</sup> with the exception of the high threshold. Until early Nineties, the Italian political environment was dominated by a multi-party system, which was largely unstable and led to short-term government, that swung between coalitions; even the co-members of the parties engaged in political conflicts which provoked several Government falls for inner parties' rivalries. The preferential votes also incentivized the emergence of several prominent figures within the same party who played as rivals. The only corrective factor was the so called "*conventio ad excludendum*," an international political agreement that stemmed from the "Iron Curtain doctrine" and precluded the leftist parties from entering the Government and participating in the Government parliamentary coalition. Had leftists sat in the government of Western European countries such as Italy, this would have endangered the East-West political equilibrium in Europe between pro-American and Pro-Soviet Union states.<sup>129</sup> The leftist voters knew they were casting their votes to the opposition. And remaining parties and voters knew which parties were in the position to create a coalition.

The "*conventio ad excludendum*" ended with the cold war, and now virtually all parties are apt to form a political coalition. This makes all political parties appealing to voters willing to influence the Government coalition.

The no. 1, 2014 ICC judgment propelled the political environment into the "logic of proportional representation," which, according to the so-called "Duverger's law", tends to "multipartyism."<sup>130</sup> This system naturally gives "preference to the function of

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<sup>127</sup> See Renzo Dickmann, *La Corte Dichiara Incostituzionale il Premio di Maggioranza e il Voto di Lista e Introduce un Sistema Elettorale Proporzionale Puro Fondato su una Preferenza (Prime Osservazioni a Corte Cost. 13 gennaio 2014, n. 1)*, FEDERALISMI.IT (January 22, 2014), <http://www.federalismi.it/ApplOpenFilePDF.cfm?artid=24020&dpath=document&dfile=17012014103127.pdf&content=La+Corte+dichiara+incostituzionale+il+premio+di+maggioranza+e+il+voto+di+lista+e+introduce+un+sistema+elettorale+proporzionale+puro+fondato+su+una+preferenza+-+stato+-+dottrina+-+>

<sup>128</sup> Renwick et al., *supra* note 21, at 438 ("From the 1940s to the early 1990s Italy used a highly permissive system of open list proportional representation. [...] The system came to be blamed for many of Italy's governance problems, and by the early 1990s there was a strong movement to reform.").

<sup>129</sup> Paladin, *supra* note 75, at 52.

<sup>130</sup> Commission for Democracy through Law (Venice Commission), *Draft Comparative Report on Thresholds and Other Features of Electoral Systems which Bar Parties from Access to Parliament*, October 1, 2008, CDL-EL(2008)018, ¶ 4, available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-EL\(2008\)018-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-EL(2008)018-e).

representation over the function of investiture.”<sup>131</sup> The fact that constituencies have numerous seats increases this dynamic and transforms the election into a “mere poll of all the existing political tendencies.”<sup>132</sup> The Parliament represents virtually the whole national spectrum of political opinions, but makes political institutions’ lives and coherency extremely vulnerable. These downfalls were criticized at least as early as 1980, by scholars and politicians who advocated the introduction of plurality system in both Chambers.<sup>133</sup>

After the ICC’s decision, however, the return to such features of “multipartyism” is not a given. Now, the existence of high thresholds can deter the return of such downfalls.<sup>134</sup> At the moment, such high thresholds are prompting the introduction of a new election law amongst both big parties and small parties. In fact, the big parties are willing to restore the seat bonus, or another majoritarian correction, in order to ease the formation of stable Governments and to persuade voters that their votes will be lost if they do not vote for a big party. Small parties are interested in negotiating the law’s provisions in order to lower the threshold and make the distribution of seats more accessible to them.

The threshold therefore plays a role in the current political and parliamentary debate. But even the threshold may be considered a problematic part of the surviving election law. In the ECtHR’s *Yumak and Sadak v. Turkey* decision, after considering comparative law, the Court observed that “an electoral threshold of about 5% corresponds more closely to the member States’ common practice,” although it must be added that “any electoral legislation must be assessed in the light of the political evolution of the country concerned, so that features that would be unacceptable in the context of one system may be justified in the context of another.”<sup>135</sup> Even with the noticeable caveat that each threshold must be scrutinized in the light of the political system to which it applies, the 8% threshold at the Senate sounds highly problematic.

Nonetheless, knowingly or not, with its decision,<sup>136</sup> the ICC restored an old-styled form for elections, which was said to prompt highly ideological conflicts between the

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<sup>131</sup> Venice Commission, *Electoral Law*, *supra* note 89, ¶ 92.b.

<sup>132</sup> *Id.*

<sup>133</sup> Amato, *supra* note 79, at 183.

<sup>134</sup> Venice Commission, *Electoral Law*, *supra* note 89, ¶ 92.b.

<sup>135</sup> *Id.* ¶ 132.

<sup>136</sup> Beniamino Caravita, *La riforma elettorale alla luce della sent. 1/04*, FEDERALISMI.IT (January 2014), <http://www.federalismi.it/AppOpenFilePDF.cfm?artid=24022&dpath=document&dfile=17012014190345.pdf&content=La+riforma+elettorale+alla+luce+della+sent.+1/2014++stato++dottrina++>.

parties,<sup>137</sup> instead of leading towards a “governing democracy.”<sup>138</sup> At the very same time, and thanks to the survival of a rather high threshold for the distribution of Parliament’s seats, the ICC also laid the premises for a fruitful debate about changing the election law.

## 6. Conclusions

With its decision no. 1, 2014, the ICC innovated the Italian legal system deeply. The decision *a*) broadened the ways of accessing the ICC to encompass “grey zones,” and prompted a new conception of the role of the judicial review of legislation; *b*) crafted the “proportionality test;” and *c*) scrutinized the national Parliament’s election law in depth. In all such aspects, a selective use of foreign precedent proved relevant, if not decisive.

A special role in all this was given to the CJEU’s case-law and its use of “proportionality test.” This is not strange. The European Union has become a legal umbrella for the transplantation of some domestic legal concepts into other domestic legal orders. The “German, or for that matter [an] Italian [...] legal order is inseparable from the European one;”<sup>139</sup> the EU order facilitates transplants from one State legal system to another.

The only reliable explanation for such a dramatic innovation and change in the ICC’s case law must be found not in the ICC itself, but in politics and in the Parliament. Had the Parliament demonstrated its concrete capacity of reforming the relevant legislation, the ICC probably would have refrained from such a high level of scrutiny. But these expectations had been frustrated; and the ICC knew that there were no other means to amend the election law, since a referendum on the electoral system’s key features was impossible. The ICC engaged in a “kind of political-economy realism about how [Parliament] functions,”<sup>140</sup> and therefore demonstrated a realistic approach to the life of Republican institutions.<sup>141</sup> The ICC understood its role as subsidiary to that of the Parliament; since the Parliament wasn’t able to address the election law reform, the ICC stepped in.

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<sup>137</sup> Lavagna, *supra* note 79, at 875.

<sup>138</sup> Venice Commission, *Electoral Law*, *supra* note 89, ¶¶ 92–93.

<sup>139</sup> Armin von Bogdandy & Joseph H.H. Weiler, *Reflections on Comparative Public Law: A German Perspective*, 11 INT’L J. CONST. L. 924 (2013).

<sup>140</sup> Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law* 2013 SUP. CT. REV. 1 (2014), available at [http://lsr.nellco.org/cgi/viewcontent.cgi?article=1459&context=nyu\\_plltwp](http://lsr.nellco.org/cgi/viewcontent.cgi?article=1459&context=nyu_plltwp).

<sup>141</sup> *Id.* at 1.

Nevertheless, the ICC is not in the position of supplanting the Parliament. In fact, it declared the unconstitutionality of the election law in the name of “governing democracy,” but actually gave the Parliament a pure proportionality system that does not count stability among its purposes. The ICC surely prompted the Parliament’s reaction. The ICC did not want Italians to waste their vote again, and therefore struck down several core parts of the election law. But it cannot give Italians full command of the Parliament and governmental stability on its own: it needs the help of the Parliament.

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