

CONSTITUTIONAL COURT AND CONSTITUTIONAL DIALOGUES

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With decision no. 1/2014, delivered on January 13, 2014, the Italian Constitutional Court struck down two very contested aspects of the electoral law for both Houses of Parliament (no. 270/2005), namely the majority prize (*premio di maggioranza*) and the closed-list of party candidates running for election (*liste bloccate*).

The first mechanism gives extra seats to the party (or to the coalition of parties) that receives most votes (at national level, in the Lower House; and at the regional level, in each of the 20 Regions, in the Upper House). The second prevents voters from choosing their own parliamentary representatives, giving them only the option of choosing a party list, in which candidates are ranked in order of electoral priority by party leaders.

The Court ruled that the majority prize is unconstitutional because it violates the principles of popular sovereignty (art. 1 Const.), equality before the law (art. 3 Const.) and equality of the vote (art. 48 Const.). The Court also found that closed-list system violates the principle of the freedom of the vote (same art. 48 Const.).

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

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

1) Dialogue with Parliament

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

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

Reviewing the constitutionality of electoral laws in Italy is a sensitive political question, perhaps, like in other parts of the world, the most sensitive. The Court must strike a delicate balance between its duty to engage in judicial review and to respect the legislature's right to make political choices which it considers to be in the best interests of the country, especially where, like in Italy, the electoral system is not directly enshrined in the Constitution.

In this case, the Court engaged in a long dialogue with Parliament, starting with a judgment of 2008, with two formal warnings (the other one in 2012) about the incompatibility of part of the new electoral system with some fundamental features and principles of the Constitution. In engaging in this dialogue, the Court reflected something analogous, in comparative terms, to weak-form

constitutional review – or the «new Commonwealth model of constitutionalism» – where judicial/legislative dialogue «allow courts to inform a legislature of the courts' understanding of the constitutional provision, while allowing the legislature to respond and take conclusive action based in its own understanding».

In the aftermath of the Court's judgment, Parliament may now speak, if it wishes, with a wide margin of legislative discretion. Parliament can revise the current electoral system, or choose an entirely new one, subject to the limits imposed by the Court.

2) *Dialogue with foreign Constitutional Courts*

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

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

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

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

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

This explicit judicial engagement with foreign constitutional jurisprudence is a sort of new experience for the Italian Constitutional Court. Explicit reference to foreign law is very rare, and in most cases it is limited to the legislative formant (i.e. only to the legislation of another country).

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

- a) The constitutional orders of Italy and Germany are “homogeneous” and reflect a common core of constitutional principles.
- b) In neither system is the electoral system for the national Parliament enshrined in the Constitution.
- c) The electoral law under review is a PR system (as a principle of seats allocation).

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

1. «While institutional cases are brought before the Court more rarely and are often of a delicate nature because of their political background, at the same time institutional matters are not as densely affected by legislation and are thus more open to interpretation, leaving more spaces for a comparative argument».
2. For obvious reasons, foreign experience is more likely to be used «to resolve, in a functionalist manner, questions about

rights, but this method of use can assist with the resolution of institutional questions as well».

3. Citations are more likely to occur in new and complex cases, or, at any rate, «in cases dealing with issues with a potentially important political and social impact».
4. Recourse to foreign case law may be used to change consolidated positions, or «it is aimed at redefining constitutional interpretation with respect to consolidated methods and results».

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

The very complex electoral systems for both Houses of Parliament (it is PR in principle, but with various electoral thresholds and with the decisive, aforementioned, majority prize) is not the object of this brief note. For a quick synthesis, see <http://electionresources.org/it/> (last accessed 21 January 2014).

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

On this competence of the Court and on its substantial and procedural limits, see http://www.cortecostituzionale.it/documenti/download/pdf/Cc_Checosa_2013_UK.pdf (last accessed 21 January 2014).

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

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

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

On these judgments, see C. Tomuschat, *Germany's Mixed-Member Electoral System: A Victim of its Sophistication?* (2012), *German Law Journal*, vol. 13, no. 5, at http://www.germanlawjournal.com/pdfs/Vol14-No1/PDF_Vol_14_No_1_213-238_Developments_Tomuschat.pdf (last accessed 21 January 2014).

On the migration of proportionality, see A. Barak, *Proportionality: Constitutional Rights and their Limitations*, Cambridge University Press, 2012, 181 ff.

Quantitative studies show that citations of foreign law in the judgments of the Italian Constitutional Court are limited in comparison with other Constitutional Courts: "it should be noted that these references are nearly always to statute law rather than a case law," G.F. Ferrari, A. Gambaro, *The Italian Constitutional Court and Comparative Law. A Premise* (2010), *Comparative Law Review*, vol. 1, n. 1, 4, at <http://www.comparativelawreview.com/ojs/index.php/CoLR/article/view/3/7> (last accessed 21 January 2014).

T. Groppi, M.C. Ponthoreau, *Conclusion. The Use of Foreign Precedents by Constitutional Judges: A Limited Practice, An Uncertain Future*, in T. Groppi, M.C. Ponthoreau (eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart Publishing, 2013, 417.

C. Saunders, *Judicial engagement with comparative law*, in T. Ginsburg, R. Dixon (eds.), *Comparative Constitutional Law*, Edward Elgar, 2011, 582.

T. Groppi, M.C. Ponthoreau, *op. cit.*, 430.

G.F. Ferrari, A. Gambaro, *op. cit.*, 22. See also G. Halmai, *The Use of Foreign Law in Constitutional Interpretation*, in M. Rosenfeld, A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2012, 1333.