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**ABSTRACT**

Electoral laws and mechanisms are, in *re ipsa*, the very heart of political democracies. As electoral laws define the procedural rules of the democratic principle, they primarily and indissolubly connect the principle of people's sovereignty to the legitimacy of political representation: as such, these laws fall within a highly sensitive field, in which the boundaries between the political and the legal are very blurred. This is especially true in the Italian constitutional system, where – starting from its very beginning – the decision about the best electoral mechanism for Italy was left to the democratic and political process. For many years, legal scholars argued that there were no constitutional limits to the range of possible electoral mechanisms, and the Italian Constitutional Court has been resilient in entering in a highly political sensitive field as the electoral rules. Then, in 2014, Italian constitutional judges stepped in this political field and re-shaped the main features of the Italian electoral system. This paper deals with the most recent rulings of the Italian Constitutional Court on the constitutionality of the electoral laws (decision no. 1/2014 and no. 35/2017) in the light of the tension between Political Constitutionalism and Legal Constitutionalism theories, and in the light of the separation of powers theory. The double decision of our Constitutional Court was probably related to the political crisis that our system is still facing and originated by the persistent legislative inertia of our Parliament. Constitutional judges probably embraced a sort of “judicial subsidiarity”, entering a field that was left to the discretion of Parliament for many years, because of the inadequacy of this institution. But judicial subsidiarity is supposed to work in two directions: it calls for judicial activism when politics is absent, but it implies judicial deference when politics is ruling.

**KEYWORDS:** Electoral law, judicial subsidiarity, political/legal constitutionalism

# *The Italian Electoral Law Saga: Judicial Activism or Judicial Subsidiarity?\**

Antonia Baraggia – Luca Pietro Vanoni\*\*

## **1. Political Constitutionalism in Electoral Law: a theoretical framework**

In a seminal work of some years ago, Prof. Jeremy Waldron questioned the democratic authority of constitutional judges to strike down legislation “when they are convinced that it violates individual rights”<sup>1</sup>. The hard core of Waldron’s thesis is that judicial review is not politically legitimate “so far as democratic values are concerned: by privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality”<sup>2</sup>.

Prof. Waldron’s thesis echoes Richard Bellamy’s idea of *Political Constitutionalism*<sup>3</sup>, which was developed in contrast to *Legal Constitutionalism* theory. The tension between these two legal theories was highly debated, especially in UK, where the constitutional framework is traditionally based on an unwritten political constitution. The “basis of political constitutionalism within the UK predominantly rests on the principle of parliamentary sovereignty” that was rooted in UK constitutional history starting from the days of the Glorious Revolution of 1689. In contrast “a legal constitution is theoretically based upon the rule of law”, and “the historical and political constitution of the UK has thus become fractured in recent years with a shift towards a more legal constitution, and a consequent breakdown of the traditional

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<sup>1</sup> J. Waldron, *The Core of the Case Against Judicial Review*, in 115 Yale Law Journal 6, 2006, p. 1346. He opens his paper with the following question: “Should judges have the authority to strike down legislation when they are convinced that it violates individual rights?”

<sup>2</sup> Id., p. 1353. According to Waldron, “there are two issues that make judicial review vulnerable: “judicial review is vulnerable to attack on two fronts. It does not, as is often claimed, provide a way for society to focus clearly on the real issues at stake when citizens disagree about rights... And it is politically illegitimate, so far as democratic values are concerned: by privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality”.

<sup>3</sup> R. Bellamy, *Political Constitutionalism. A Republican Defence of the Constitutionality of Democracy*, Cambridge University Press, 2007.

Westminster model”<sup>4</sup>. Born in UK, the clash between Political Constitutionalism and Legal Constitutionalism is one of the main topics of global constitutional debate<sup>5</sup>.

On the one hand, people supporting the first theory argued judicial power to overrule legislatures is in contrast with democratic principles, because, as Richard Bellamy argued, “a system of ‘one person, one vote’ provides citizens with roughly equal political resources; deciding by majority rule treats their views fairly and impartially; party competition in elections and in Parliament institutionalizes a balance of power that encourages the various sides to hear and pay attention to each other, promoting mutual recognition through the construction of compromises. According to this political conception, the political democratic process *is* the Constitution”<sup>6</sup>. In summary, for Bellamy, as for Waldron, judicial review is incoherent with democratic principles because it gives power to unelected judges to overrule legislation enacted by elected deputies.

On the other hand, people supporting Legal Constitutionalism pointed out judicial review was born to protect minorities from the tyranny of majority, and for that reason the hard core of the democratic principle is enforcing individual rights through the decision of appointed judges. As Christopher Eisgruber stated, “the institution of judicial review is a sensible way to promote non-majoritarian representative democracy”<sup>7</sup>, because - as noted by Corey Brettschneider - Courts “can act democratically by overriding majoritarian decision making” when “the core values of democracy”<sup>8</sup> are at stake. Both these authors reject simplistic majoritarian conceptions of democracy and the idea judges have to be deferential to a statutory text. Rather, they embrace a conception of democracy that looks at the judges as leading actors in the democratic process, and demands of them they defend (or even produce) moral interpretations of the constitution.

As we already said, both these positions are highly discussed and debated. The aim of this paper is to look at the recent Italian case law on electoral systems within the clash of these two different conceptions. The use of this theoretical framework is grounded in two main reasons.

First, electoral laws and mechanisms are, in *re ipsa*, the very heart of political democracies. As electoral laws define the procedural rules of the democratic principle, they

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<sup>4</sup> S. Pearson, *Political Constitutionalism and Legal Constitutionalism: Where does the Judiciary Lie at the Heart of this Tension?*, 3 Southampton Student L. Rev. 29, 2013, p. 30.

<sup>5</sup> See (for example) C. Brettschneider, *Democratic Rights and the Substance of Self-Government*, Princeton University Press, 2007; C.L. Eisgruber, *Constitutional Self-Government*, Harvard University Press, 2001; A. Lever, *Democracy and Judicial Review: Are They Really Incompatible?*, 7 Perspective on Politics 4, 2009, p. 85 ss.

<sup>6</sup> R. Bellamy, (supra note 3), p. 5.

<sup>7</sup> C.L. Eisgruber, (supra note 5) p. 210.

<sup>8</sup> C. Brettschneider, (supra note 5) p. 152 quoted also by A. Lever (supra note 5) p. 89.

primarily and indissolubly connect the principle of people's sovereignty to the legitimacy of political representation<sup>9</sup>: as such, these laws fall within a highly sensitive field, in which the boundaries between the political and the legal are very blurred. As we will see in Italy, if the effect of judicial intervention is to change the essential nature of an electoral system (i.e. from a majoritarian oriented to a proportionally oriented system) this affects the concrete realization of the principle of people's sovereignty.

The second reason is strictly rooted in the peculiarities of the Italian political and constitutional system. Right from its origins, our Constitution does not prescribe a specific electoral system; even if the majority of our Framers clearly preferred a proportional one, they decided not to constitutionalize it because, as Deputy Conti argued during the work of the Constitutional Assembly, "it is not wise to bind into a rigid Constitution all the particularities that inform the electoral rules"<sup>10</sup>. Consequently, the decision about the best electoral mechanism for Italy was left to the democratic and political process. As Massimo Luciani pointed out, the "Constitutional Framers thought that future transformations of the Italian political system might affect future electoral rules"<sup>11</sup>.

For more than 40 years, the Italian electoral system was proportional but, because "the choice of Constitutional Assembly was strictly *political*"<sup>12</sup>, legal scholars argued that there were no constitutional limits to the range of possible electoral mechanisms<sup>13</sup>, and that the only express limit was related to the electoral constituency of the Senate, which according to art. 57 of the Constitution, has to be regional<sup>14</sup>. Then, when our political system started to change in the Nineties, the introduction of electoral mechanisms based on majoritarian rules were

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<sup>9</sup> As pointed out by T. Giupponi, "*Ragionevolezza elettorale*" e discrezionalità del legislatore tra uguaglianza del voto e art. 66 Cost., in Forum Quad. Cost., 18 June 2017, p. 3, electoral laws are "by nature" the laws in which there are the "highest standard of parliamentary discretionality" because they translate people's sovereignty into political accountability.

<sup>10</sup> See Deputy Giovanni Conti's intervention at the Constitutional Assembly, quoted by M. Luciani, *Il voto e la democrazia*, Editori Riuniti, 1991, p. 19.

<sup>11</sup> M. Luciani (supra note 9), p. 26.

<sup>12</sup> Id. p. 27.

<sup>13</sup> See (for all) A. Pin, E. Longo, *Judicial Review, Election Law, and Proportionality*, 6 Notre Dame (IN), University of Notre Dame 1, 2016, p. 102-103: "the overwhelming Italian legal doctrine thought that there was no way that the Parliament's election law could be scrutinized by the ICC, since the ICC is the only organ in charge of the judicial review of legislation. Given the characteristics of Italian judicial review, it was 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".

<sup>14</sup> Art. 57 Italian Constitution: "The Senate of the Republic is elected on a regional basis, with the exception of the seats assigned to the overseas constituency. The number of senators to be elected is three hundred and fifteen, six of whom are elected in the overseas constituency. No Region may have fewer than seven Senators; Molise shall have two, Valle d'Aosta one. The division of seats among the Regions, with the exception of the number of seats assigned to the overseas constituency and in accordance with the provisions of Article 56 above, is made in proportion to the population of the Regions as per the latest general census, on the basis of whole shares and highest remainders".

discussed by politicians, legal scholars and, as we will see, by the Italian Constitutional Court (ICC). This raised the question of the limits of judicial review of Italian electoral laws.

Looking beyond these two specific reasons, it is also necessary to examine Italian case law about the electoral system in the light of the ongoing crisis of the separation of powers.

The separation of powers is, at the same time, one of the foundations of western democracy and one of the most complex concepts in constitutional theory. According to Giovanni Bogneri, the separation of powers is a principle that must be investigated from a historical perspective, looking at the evolution of our legal system and the transformation of our societies. The separation of powers “is strictly linked to other principles that are central in the theory of modern constitutionalism, such as, those of ‘rule of law’ and the ‘representative state’”<sup>15</sup>. Exploring the role of Parliaments and Constitutional Judges in electoral laws and the specific limits of judicial review in this sector might be helpful to understand our modern democracies.

This contribution addresses this issue looking at the specific case of the Italian electoral law saga. Section 2 gives an overview of the development of Italian electoral laws, paying specific attention to the two most recent laws (l. no. 270/2005 and l. no. 52/2015). Section 3 explores judicial intervention in electoral law by analyzing the two Italian Constitutional Court cases (n. 1/2014 and n. 35/2017). Section 4 highlights the most critical effects of judicial intervention in light of separation of powers theory.

## **2. Italian electoral laws in context**

Before addressing the issues posed above, we need to briefly summarize the main point of the Italian electoral law saga. Italy has shown a sort of “hyperkinetic”<sup>16</sup> attitude towards changing its electoral law, especially beginning in the 1990s. Since 1993<sup>17</sup>, three electoral laws have been approved, corresponding to the most critical phases of the history of the Italian Republic: 1) Law nos. 276 and 277 of August 1993 were approved at the beginning of the so-called “Second Republic” (1993–2005); 2) Law no. 270/2005 was introduced during the “transitional phase” (2005–2014); and 3) Law no. 52/ 2015, known as “Italicum”, was approved during the reform season (2015–present).

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<sup>15</sup> G. Bogneri, *Dividing Powers. A theory of the separation of powers*, Wolters Kluwer Cedam, 2017, p. 5.

<sup>16</sup> Prof. Lanchester argues this is a situation unknown in other democratic constitutional systems established after the end of World War II and, in general, after the expansion of suffrage. F. Lanchester, *La Corte e il voto: riflettendo su un Comunicato Stampa*, 1 Nomos 2, 2017.

<sup>17</sup> On the evolution of the Italian electoral legislation starting from 1948, see C. Fusaro, *Party System Developments and Electoral Legislation in Italy (1948-2009)*, in *Bulletin of Italian Politics*, vol. 1 no. 1, 2009, p. 49-68.

The most recent steps of Italian electoral law saw unprecedented intervention by the judiciary, which re-shaped the main features of the electoral systems.

Indeed, both the two most recent electoral laws, l. no. 270/2005 and no. 52/2015, have been the subject of judicial intervention, which posed several critical concerns, especially from the aforesaid political constitutionalism perspective. Before addressing criticism of judicial intervention in electoral law matters (a phenomenon that has been significantly called “electoral justice”<sup>18</sup>) a short appraisal of the main features of the electoral systems introduced by l. no. 270/2005 and by l. no. 52/2015 is necessary in order to better understand the Court’s intervention. In 2005, at the height of the Berlusconi era, Electoral Law no. 270/ 2005 was approved solely by parties belonging to the government coalition (right wing) and it was inspired by an attempt to consolidate a bipolar system, which seemed to be the imminent result of the political landscape.

In order to foster the polarization of the system, the law established the adoption of a majority premium for the coalition or list that obtained a majority of votes (independent of any minimum threshold) in order to assign an absolute majority of seats in the Chamber of Deputies (340 seats). The threshold was 10% for coalitions and 4% for a list not in a coalition. Moreover, parties in a coalition would have access to seat distribution if they could obtain a minimum threshold of 2% in the Chamber of Deputies election and of 3% in the Senate election. With regard to the latter, a majority premium (55% of all the seats of the region) was assigned on a regional basis to the list or the coalition that obtained a majority in each region. The seats were allocated on a proportional basis with a threshold of 20% for the coalitions and 8% for each list not in a coalition represented in the Senate. With regard to the Senate, a majority premium (55% of all the seats of the region) was assigned on a regional basis to the list or the coalition that obtained a majority in each region. The seats were allocated on a proportional basis with a threshold of 20% for the coalitions and 8% for each list not in a coalition represented in the Senate.

In summary, the system can be defined as a “majority assuring proportional system”<sup>19</sup>, because it is committed to “creating” a majority, thanks to the premium given to the list or coalition with the most votes. This system built on the possibility to “create” a majority revealed at least two basic flaws, strongly compromising the original intent of the legislator. On the one hand, the system favored the heterogeneity of the coalitions of the two main political poles and on the other did not prevent the possible formation of different majorities in the Chamber of

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<sup>18</sup> See E. Catelani, F. Donati, M.C. Grisolia (eds), *La giustizia elettorale*, Jovene, 2013.

<sup>19</sup> See M.S. Shugart, M.P. Wattemberg (eds), *Mixed-Member Electoral Systems*, Oxford University Press, 2001, p. 598; C. Fusaro (supra note 17) p. 58.



Deputies and in the Senate, due to the differences inherent in the electoral system adopted by each chamber. Such flaws of the Electoral Law were clearly revealed in 2013, when the election resulted in a divided parliament, with none of the primary parties able to obtain a strong majority in both chambers<sup>20</sup>.

Later, in 2014 l. no. 270/2005 was partially struck down by the Italian Constitutional Court in historical Decision no. 1/2014, which represents, for different reasons, both procedural<sup>21</sup> and substantial, the leading, ground-breaking case of ICC jurisprudence on electoral law.

In 2015 after the Court's intervention, Parliament finally approved the last chapter of the Italian electoral saga, Law no. 52/2015 for the Chamber of Deputies only, through a hotly debated procedure that significantly altered the ordinary legislative process, limiting the time for parliamentary debate.

In order to better understand the overall meaning of Italicum<sup>22</sup>, it is necessary to contextualize it within the timeframe of the Reform of the Second Part of the Italian Constitution<sup>23</sup>. The Italicum was designed to assure a clear majority in the Chamber of Deputies, which, in the reform project, would have been the only chamber bound by a confidence vote from the government, whereas the Senate would have been elected indirectly by the Regional Councils. Looking at the legislator original intent, the electoral mechanism adopted by the Italicum was mixed: a two-round proportional system with a majority bonus. The intervention aimed to balance government stability and the representative principle, in compliance with the opinion of the ICC in Decision no. 1/2014.

The former was encouraged through the adoption of a majority bonus applied only to the list and not the coalition (as it was in Law No. 270/2005), thus strengthening the position of the list's leader. The latter (the representative principle) was – at least on the first ballot – guaranteed because a threshold of 40% was needed to obtain the majority bonus of 340 seats (out of the 630 total seats).

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<sup>20</sup> See N. Lupo and G. Piccirilli, *Introduzione. I percorsi delle riforme istituzionali nella XVII Legislatura*, in N. Lupo and G. Piccirilli (eds.) *Legge elettorale e riforma costituzionale: procedure parlamentari "sotto stress"*, il Mulino, 2016, p. 14.

<sup>21</sup> From a procedural point of view, there is debate about the fact that the Court declared the complaint admissible, and in so doing it weakened some features of the "direct way" of access to the Court. See L. Trucco, *Sentenza Italicum: la Consulta tra diritto, non considerato e lasciato intendere*, 31 marzo 2017 available at [www.giurcost.it](http://www.giurcost.it).

<sup>22</sup> From a strictly political point of view, Italicum was one of the main issues of a broader change encompassing a political agreement between Renzi and Berlusconi, the leaders of the two major political forces at time, in order to "neutralize" the role of the Five Star Movement and other small parties (the so-called "Patto del Nazareno").

<sup>23</sup> L. Violini and A. Baraggia, *The Italian Constitutional Challenge: An Overview of the Upcoming Referendum*, Int'l J. Const. L. Blog, Dec. 2, 2016, [www.icconnectblog.com](http://www.icconnectblog.com).

The thornier issue in relation to representativeness was the no threshold provision of the second ballot that was used to determine which party to assign the bonus if neither list gained the minimum 40% on the first ballot. Italian legal scholars were divided on the issue. Some declared the second ballot odd and potentially in contrast with the principles set forth in ICC Decision no. 1/2014. Others argued, though it is not a very common opinion, that the use of a second ballot to determine the bonus has been adopted in other systems (Mexico, South Korea, Republic of San Marino) and that an electoral system must be tailored to the concrete constitutional and institutional reality<sup>24</sup>. Moreover, it has also been argued that it was perfectly consistent with the balance between representation and governability as required by Decision no. 1/2014 because only the two main lists would have access to the second ballot and the entire electoral corpus would have been called to cast its vote again. Thus, according to Fusaro, the second ballot was the only tool that could balance the high threshold needed to obtain the majority bonus and create a strong majority<sup>25</sup>. In other words, at stake was the affirmation of a clear majority with the contextual reinforcement of the form of government through the parliamentary regime of the prime minister.

Another contested provision of Italicum was the possibility of the top candidate of each list from multiple constituencies to choose, after the election, the constituency that was to be elected. The main issue with this provision was not the multi-candidate issue itself, but its immediate consequences: the choice of the top candidates could indirectly influence the election of the candidates second on the list, creating a distortion of voter preferences.

All of these provisions were promptly contested in front of the ICC by several ordinary judges (using the debated procedure established by Decision no. 1/2014). A decision was expected in October 2016, but the court decided to postpone the judgment, awaiting the outcome of the constitutional referendum to be held on December 6, 2016.

After the failure of the constitutional reform, which condemned the Italicum to a de facto death, finally the Court ruled, also in the light of the referendum results, declaring two provisions of Italicum unconstitutional: the second ballot and the possibility for the top candidate of each list from different constituencies to determine which constituency would be elected (implicitly determining the election of the second-place candidates on the lists).

In the following sections, we analyze judicial intervention and its effects through the lens of political constitutionalism theory. Within this framework three main concerns arise: 1. The

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<sup>24</sup> C. Fusaro, *Le critiche al ballottaggio dell'Italicum o del rifiuto di rafforzare la governabilità per via elettorale attraverso il premio alla lista*, in Forum di Quaderni Costituzionali, June 18, 2015, p. 1.

<sup>25</sup> Id., p. 1-2.

intrusiveness of the judiciary within the “most political” of the laws<sup>26</sup>; 2. the transformative effect of the judicial intervention; and 3. the “judge/legislator dilemma”.

### **3. Opening Pandora’s Box: intervention of the judiciary in electoral law matters**

Is the intervention of the judiciary in electoral law a kind of trespass into the realm of parliamentary political discretionality? Bearing in mind this fundamental question may help to delve deeply into the systemic consequences of such intervention within the separation of powers framework.

Decision no. 1/2014 of the ICC represents a turning point in the history of Italian electoral law and constitutional judgment. First, it represents the first time in which the Court decided to enter a politically sensitive field such as electoral law – by making decision of constitutionality and breaking the taboo of constitutional scrutiny in a historically “free zone.”

In doing so, and this is the second ground-breaking element of the decision, the Court intervened in a field where Parliament was consistently inactive, even after the Court’s warnings over time in several 2008 Decisions.

The Court examines the question raised by the Court of Cassation in Order no. 12060 of 17 May 2013, concerning the constitutionality of (1) the allocation of a majority bonus on a national level in the Chamber of Deputies and on a regional level in the Senate without a threshold, and (2) of the introduction of “blocked” long lists that would prohibit voters from stating a preference and choosing the candidates.

After recognizing broad legislative discretion in this field, the Court requires the electoral arrangement achieve a fair balance of the different interests protected by the constitution with regard to the right to vote, the constituency of the parliamentary body, and the issue of governability. Such assessments must involve “consideration of the proportionality of the means chosen by the legislature when exercising its absolute discretion vis-a-vis the objective requirements to be met or the goals it intends to pursue, taking account of the specific circumstances and restrictions that exist.” In the words of the Court, the proportionality test requires an assessment as to whether the provision under review is necessary and capable of legitimately achieving the pursued objectives; it does so if the measure chosen is the least restrictive of the rights at stake and imposes proportionate burdens as regards those rights. In the case referenced above, the Court found the provisions of the law were not proportionate or

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<sup>26</sup> A. Ciancio, *Electoral Laws, judicial review and the principle of “communicating vessels*, in *Dirittifondamentali.it*, 2/2017, p. 1.

rational. The second milestone in Italian electoral law determination is Decision no. 35/2017 on the constitutionality of Italicum. The ICC, in line with its previous Decision no. 1/2014, declared the question admissible—even though Italicum never having been concretely applied may have raised some doubts, since abstract constitutional scrutiny does not exist in Italy<sup>27</sup>. In terms of merit, the ICC declared only two provisions of Italicum unconstitutional: the second ballot and the possibility for the top candidate of each list from different constituencies to determine which constituency would be elected (implicitly determining the election of the second-place candidates on the lists).

We will focus on the Court’s reasoning that led to the declaration of the unconstitutionality of the second ballot. The ICC declared that a runoff was not unconstitutional, per se, in the Italian system, but it was in the specific way it was designed by Law No. 52/2015. This use differs from other comparative experiences where a second ballot is used in a first past-the-post competition. In particular, the Court struck down the provision due to the lack of any type of correction of the distortive effect on representativeness where only two lists—the two that gained the most votes on the first ballot—are admitted.

The only requirement to be admitted to the second ballot was a very low threshold of 3% of votes. This implies that a list with very low consensus on the first ballot could be admitted to the second ballot and even obtain the majority bonus, resulting in a disproportionate alteration of representativeness in the Chamber of Deputies in the name of creating a clear parliamentary majority that can ensure the stable support of the executive. Once again, the proportionality test was at stake. The purpose of the second ballot, which was not only to favor but to assure the creation of a stable majority, was determined to excessively sacrifice other constitutionally protected values, namely, the representative principle and the equality of each vote. This was because it was capable of “artificially transforming” a list with a relatively low consensus into an absolute majority.

The Court stressed the disproportionate effect of the runoff between the two most voted lists, which makes the second ballot a kind of “ideal prosecution” of the first ballot. In light of this very narrow scrutiny, we cannot exclude that the Court’s reasoning—and therefore the result of the scrutiny—would have been different if Italicum had conceived the runoff as a new electoral competition, admitting coalitions of parties instead of restricting it to only two lists. To conclude, in declaring the second ballot unconstitutional, the judgment of the ICC brings back a

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<sup>27</sup> See R. Bin, *Chi è il responsabile delle “zone franche”?* Note sulle leggi elettorali davanti alla Corte, in Forum di Quaderni Costituzionali, 9 giugno 2017.

proportional system with only the potential for a majoritarian bonus, which, however, in light of the current party system, looks like very difficult to obtain.

The overall effect of the declaration of the unconstitutionality of the electoral law provision highlights a second contested issue regarding judicial intervention in electoral matters: the possible “transformative” effect on the electoral system. This is particularly clear looking at the effects of the Decision no. 1/2014: Indeed, after striking down the provisions of l. no. 270/2005, the Court underlined the legislation that remained in force, following the declaration of unconstitutionality, could guarantee the renewal of the elected constitutional organ at any time. In particular, the annulment of the majority bonus maintained a proportional system with a high threshold, frustrating the majoritarian aim of l. no. 270/2005. From this point of view, the effects of Decision no. 35/2017 are more nuanced<sup>28</sup>: in declaring the second ballot unconstitutional, the judgment of the ICC brings back a proportional system with only the potential for a majoritarian bonus, which, as already argued would be very difficult to obtain in the present political context. However, as Morrone highlights,<sup>29</sup> the ICC recognized the full legitimacy of the majoritarian bonus as a corrective measure for the proportional system.

The transformative effect is not written only in the sand, since the Court itself declared that annulling those provisions left the resulting electoral system capable of governing new elections (only for the Chamber of Deputies), defining it “self-applicative”.

Finally, the ICC is perfectly aware of the impact of such a decision on the overall balance of power. Indeed, the Italian Judges recognized - several times (almost obsessively) during the decision - that “the legislator has broad discretion in choosing the electoral system that it considers to be best suited to the historical-political context in which that system is intended to operate, limiting its possibility for intervention only to those cases in which the established regulatory scheme is manifestly unreasonable”.

However, it is on the thin line of the test of proportionality that the Court intervenes. After admitting that “[i]n light of the discretion to which the legislator is entitled in this area, an analysis in concrete terms of the constitutionality of the minimum threshold chosen by the legislator falls outside the realm of constitutional scrutiny as a matter of principle”, the Court argued that “it remains to review the proportionality pertaining to the hypotheses in which the stipulation of an unreasonably low threshold of votes for assigning a majority bonus effects so great a distortion of the representative nature that it amounts to a sacrifice thereof that is

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<sup>28</sup> See contra, S. Ceccanti, *I sistemi elettorali per le elezioni politiche dopo la 35/2017: una sentenza figlia del referendum, ma per il resto deludente per i proporzionalisti!*, in *Federalismi.it*, 15 febbraio 2017.

<sup>29</sup> See A. Morrone, *Dopo la decisione sull'Italicum: il maggioritario è salvo e la proporzionale non un obbligo costituzionale*, in *Forum di Quaderni Costituzionali*, 13 febbraio 2017.

disproportionate to the legitimate objective guaranteeing the stability of the government of the Nation and facilitating the decision-making process”. As Pinelli<sup>30</sup> argues, the Court tries to balance constitutional principles (representativeness, equality of vote) with goals of constitutional relevance.

In more general terms, are these constitutional principles to be safeguarded via judicial review by sacrificing the democratic principle itself? The Court’s reasoning is quite clear, but, quoting Bockenforde, “it requires a way of ensuring that constitutional jurisdiction does not turn from one way of safeguarding the constitution into domination over the constitution and thus depart from the democratic ground. Can this be done, and if so, how?”

#### **4. Judicial supremacy or judicial subsidiarity? Final reflections in the light of the separation of powers theory**

Bockenforde’s question raised some theoretical and practical issues that we cannot properly address in this paper. Starting from this question, we just more modestly present two partial conclusions raised by the electoral law saga.

First, the double decision of our Constitutional Court is probably related to the political crisis that our system (and more generally, all the democratic institutions of western democracies) is still facing. As we showed before, the Constitutional Court started warning the legislators and political parties of the inadequacy of the Law No. 270/2005 in some 2008 decisions, inviting them to “pay attention to the problematic procedures” of the law, especially because “the bonus mechanism could presage an excessive over-representation of the list that has secured a relative majority”<sup>31</sup>. Then in 2014, because of the political parties’ inability to overcome their divisions, Constitutional judges decided to cross the thin line that separated the political from the legal in the Italian electoral system, declaring the unconstitutionality of Law No. 270/2005. In summary, in Decision no. 1/2014 the judges stepped into a very sensitive field because of the inertia of our Parliament; in doing so, they have probably embraced a sort of “judicial subsidiarity”, entering a field that was left to the discretion of Parliament for many years, because of the inadequacy of this institution.

This was not, though, the case of the Court’s ruling in 2017. On that occasion, Parliament finally stepped into the field of electoral law, enacting Law No. 52/2015 that was struck down by the Court in Decision no. 35/2017. Judicial subsidiarity, indeed, works in both

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<sup>30</sup> C. Pinelli, *Bilanciamenti su leggi elettorali (Corte cost. No. 1 del 2014 e 35 del 2017)*, in *Diritto Pubblico* no. 1/2017, p. 227.

<sup>31</sup> See Decision n. 15/2008, par. 6.1.

directions: it calls for judicial activism when politics is absent, but it implies judicial deference when politics is ruling. As Oreste Pollicino pointed out, “as legislative inertia and political failings are good reasons for judicial activism, by contrast, when democracy advances and politics asserts its claim judges are bound to take a step back”<sup>32</sup>.

There are probably two “political” reasons for the 2017 ruling: first, it came after the failure of the Constitutional referendum that was the structural framework in which this electoral law was conceived and enacted; second, it came after Decision no. 1/2014, that basically opened up Pandora’s box of judicial intervention on electoral laws in Italy. Constitutional judges are quite meticulous in conserving their powers, and once they step into a particular field it is not easy for them to step back: as the Greek myth so clearly explained, once opened, the box is not easy to close.

The Italian Parliament now has the opportunity to take a step forward enacting a new electoral law. Even if the political chronicles are not encouraging, we hope that political parties eventually find an agreement on that topic and enact this new law before the 2018 political election.

Finally, from a more theoretical point of view, the Italian saga of electoral laws showed that ultimately it is a matter of separation of powers. As Giovanni Boggetti pointed out, in the social model a new fundamental function has risen: “judicial custodian of the Constitution. This function has been created in relation to all State powers, including the legislative branch”<sup>33</sup>. The spread of judicial review is an uncontested phenomenon in our contemporary legal systems; however, drawing the boundaries of such expansion is an ongoing attempt, which cannot be performed in abstract terms but has to take into account the history, the developments and the transformations of any given legal context. In other words, “Courts that are the guardians of the constitution clearly do not have unlimited freedom to determine the content of constitutional values at will. In practice, they are constrained by the ‘political formula’ that is most widely accepted by public opinion at a given time in history”<sup>34</sup>.

One of the main goals of constitutional law scholars is not only to describe the transformation of our legal systems but also to restore the correct balance between separate powers that, since its origin, has been used as a powerful instrument to protect the liberty of citizens from the authority of the State. If the heart of this principle is the relationship between Authority and Liberty, rather than separation between powers we are now facing the challenge

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<sup>32</sup> O. Pollicino, *Legal reasoning of the Court of Justice in the Context of Principle of Equality Between Judicial Activism and self-restraint*, in German Law Journal, 2004, 283 ss.

<sup>33</sup> G. Boggetti (supra note 15), p. 46.

<sup>34</sup> Id., p. 59.

of dividing Power which, like energy, cannot be created or destroyed, but only take on a new form. This is why, especially in our times, Constitutional scholars are vested with the task of taking care of every misalignment of power, because “excessively bitter disputes between Powers damage the vital balance of contemporary states”<sup>35</sup>.

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<sup>35</sup> Id., p. 60.