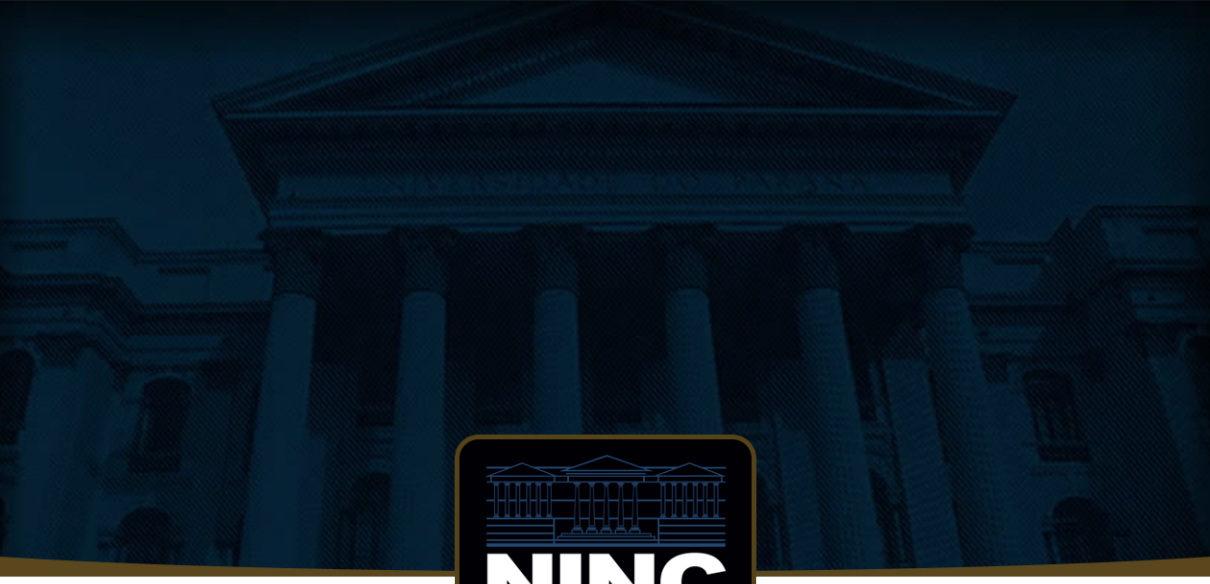

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REVISTA DE INVESTIGAÇÕES CONSTITUCIONAIS

JOURNAL OF CONSTITUTIONAL RESEARCH

vol. 8 | n. 2 | maio/agosto 2021 | ISSN 2359-5639 | Periodicidade quadrimestral
Curitiba | Núcleo de Investigações Constitucionais da UFPR | www.ninc.com.br

Revista de Investigações Constitucionais
ISSN 2359-5639
DOI: 10.5380/rinc.v8i2.72900

Securing "Functional" Legal Eternity in Italy: Parliamentary Procedures, Electoral Legislation and the Free Mandate for Members of Parliament*

Garantindo a eternidade jurídica "funcional" na Itália: procedimentos parlamentares, legislação eleitoral e mandato livre para membros do Parlamento

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Recebido/Received: 15.04.2020 / April 15th, 2020
Aprovado/Approved: 24.11.2020 / November 24th, 2020

Como citar esse artigo/*How to cite this article*: : PACINI, Fabio; MARTINICO, Giuseppe; DALLEDONNE, Giacomo. Securing "Functional" Legal Eternity in Italy: Parliamentary Procedures, Electoral Legislation and the Free Mandate for Members of Parliament. **Revista de Investigações Constitucionais**, Curitiba, vol. 8, n. 2, p. 321-346, maio/ago. 2021. DOI: 10.5380/rinc.v8i2.72900.

* This article is the result of the joint reflection of the authors. Nevertheless, sections 3 and 6 should be attributed to Fabio Pacini, sections 2 and 5 to Giuseppe Martinico and section 4 to Giacomo Delledonne; paragraph 1 was written by the authors together.

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Abstract

This article addresses the subject of the free mandate for parliamentarians in Italy in relation to eternity clauses or inadmissible changes of the constitution, considering Italy's constitution prevents amendments regarding some of its principles. This sort of counter-majoritarian devices protect constitutions from major changes and it gains importance due to the rise of new forms of populism. The article examines the relation between the electoral system and the free mandate for parliamentarians in Italy, recently changed by populist forces. Therefore the research outlines the context of Italian constitutionalism, and then addresses the role of parliaments and the "procedures" in this scenario, reaching the subject of the role of electoral legislation on the constitutional order, especially regarding the involvement of constitutional courts in electoral law. Finally, it discusses the free mandate for MPs, showing how complex constitutional principles are at stake, such as equality and representation. It concludes that electoral law should be interpreted and reviewed in the light of all the relevant constitutional principles and also should be protected from populist moves. The article uses a logical-deductive methodology with legislative and theoretical analysis of the subject.

Keywords: free mandate; eternity clauses; populism; constitucional change; electoral law.

Resumo

Este artigo aborda o tema do mandato livre para parlamentares na Itália em relação às cláusulas pétreas ou mudanças inadmissíveis da constituição, considerando que a Constituição italiana impede alterações em alguns de seus princípios. Esse tipo de dispositivo contramajoritário protege as constituições de grandes mudanças e ganha importância devido ao surgimento de novas formas de populismo. O artigo examina a relação entre o sistema eleitoral e a liberdade para o exercício do mandato dos parlamentares na Itália, recentemente modificada por forças populistas. Assim, a pesquisa delineia o contexto do constitucionalismo italiano e, em seguida, aborda o papel dos parlamentos e os "procedimentos" nesse cenário, chegando ao tema do papel da legislação eleitoral na ordem constitucional, especialmente no que diz respeito ao envolvimento dos tribunais constitucionais no direito eleitoral. Por fim, discute a liberdade para o exercício do mandato dos deputados, mostrando como estão em jogo princípios constitucionais complexos, como igualdade e representação. Conclui que o Direito eleitoral deve ser interpretado e revisto à luz de todos os princípios constitucionais relevantes e também deve ser protegido de movimentos populistas. O artigo utiliza uma metodologia lógico-dedutiva com análise legislativa e teórica da matéria.

Palavras-chave: *mandato livre; cláusulas pétreas; populismo; mudança constitucional; Direito eleitoral.*

CONTENTS

1. RESEARCH GOALS

In essence, our article aims to highlight the role of the preliminary assumptions and basic tenets of western constitutionalism (e.g. the free mandate for parliamentarians) in shaping the contents of constitutions and defining the scope of (in)admissible change.

Our case study is Italy. Italy can be traced back to "post-totalitarian constitutionalism", as its constitutional framework mirrors what philosophers have called "the memory of evil",[1] by excluding some principles from constitutional amendment. The topic has regained attention in the light of the rise of new forms of populism, especially

[1] TODOROV, Tzvetan. **Memory as a Remedy for Evil**. Kolkata: Seagull Books, 2010.

in Europe. Constitutional amendment[2] offers a privileged perspective for exploring the impact of populism on constitutional democracy, as it inevitably leads to the idea of constitutional rigidity as one of the most important counter-majoritarian devices of post-World War II constitutionalism. Against this background, we focus on the existence in Italy of supreme principles of (democratic) organization, recognizing that in each political regime there are inevitable organizational and procedural "surviving conditions".

These conditions are necessary for the preservation of the untouchable constitutional core guaranteed by eternity clauses. Limits to constitutional amendment are generally linked to fundamental structural choices, like the republican form of a state, and safeguardsof fundamental rights. What can be said, however, about provisions regulating the institutional architecture? Among these, we examine the continuum between the electoral system and the free mandate for parliamentarians, which has been recently challenged, in particular, by populist forces such as the Five Star Movement.

Elections and voting systems are extensively discussed during constitution-making processes. This should come as no surprise, as electoral rules are underpinned by basic assumptions and understandings regarding the functioning of representative democracy. In this respect, the Italian Republic is no exception. No specific voting system (say, proportional representation) is entrenched in the Italian Constitution or in the German Basic Law. However, silence and an absence of specific provisions are hardly the signals of constitutional agnosticism in this area. There are a number of tacit assumptions, resulting, for example, from agreements between the actors involved in the drafting of the constitution, that can be seen as somehow entrenched even thoughthey are "unwritten", and they are essential to the functioning of the constitution itself, as is clear from the analysis of recent decisions of the Italian Constitutional Court. More and more often, however, the selection of representatives has been linked in the public debate to another "core value" of representative democracy, the free mandate for MPs. As the Venice Commission stated, "imperative mandate is generally awkward to Western democracies. The constitutions of many countries explicitly prohibit imperative mandate".[3] At the same time, scholars have argued that "populists' claim to the imperative mandate can be understood as a […] sign of the dissatisfaction of a huge part of the population with a kind of democracy in which those in power are increasingly distant from the governed",[4] which is – again – at the very core of the perception of a functioning

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[2] See comprehensive analysis by ALBERT, Richard. **Constitutional Amendments:** Making, Breaking, and Changing Constitutions. Oxford: Oxford University Press, 2019.

[3] Report on the imperative mandate and similar practices adopted by the council for democratic elections at its 28th meeting (Venice, 14 March 2009) and by the Venice Commission at its 79th plenary session (Venice, 12-13 June 2009).

[4] TOMBA, Massimiliano. Who's Afraid of the Imperative Mandate?**Critical Times**, vol. 1, n. 1, p. 108-119, Jan/Dec 2018.p. 108.

democracy. The debate on how representatives are chosen and what can (or cannot) be done to ensure their compliance with their mandate is crucial in any reflection on constitutional change.

2. SETTING THE SCENE

"Constitutions belong to all but are not 'empty' (politically neutral)".[5] With these words, an eminent constitutional lawyer reacted to a series of attacks launched on the Italian constitution by certain political parties at the beginning of the new millennium. Indeed, the irony in this is that the new wave of populism has been obliging constitutional lawyers to deal with some long-standing issues, including that of the neutrality of the constitution.

One of these long-standing issues is the relationship between constitutionalism and democracy, and the limits posed to constitutional change by the need to preserve some fundamental goods that may or may not be codified in an explicit constitutional provision. The unamendability of some provisions of the Italian Constitution is related to its lack of neutrality, and to the rejection of the totalitarian past that is codified in Article 139, the so-called "Republican form". This article reads: "The form of Republic shall not be a matter for constitutional amendment". Scholars have placed this clause within the context of a broader trend of comparative law. However, if it is true that Article 139 is not the only example of an unamendable clause in comparative law, it set the trend for the much more famous eternity clause included in the German Basic Law.

> *In the twentieth century, explicit unamendability has become a popular constitutional design: in the post-war constitutional wave, almost one third of the newly adopted constitutions included one or more unamendable clauses. In the post-cold war constitutional wave, this figure staggered to 50 per cent approximately. However, even if the unamendable clause of the 1948 Italian Constitution does not represent a significant novelty in the comparative scenario, its historical premises are worthy of attention. In fact, its inclusion in the last article of the constitution is due to a peculiar limitation of the primary constituent power of the Constituent Assembly, whose election was contextual to the referendum on the form of the state. Since the Constituent Assembly had no power to review the decision of the people on the form of state, it decided to eternally bind the constitutional amendment powers on this point.*[6]

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[5] SPADARO, Antonino. Costituzionalismo versus populismo: sulla c.d. deriva populistico-plebiscitaria delle democrazie. In: BRUNELLI, Giuditta; PUGIOTTO, Andrea; VERONESI, Paolo (Coord.). **Scritti in onore di Lorenza Carlassare**, vol. V. Napoli: Jovene, 2009. p. 2007-2042.

[6] FARAGUNA, Pietro. Unamendability and Constitutional Identity in the Italian Constitutional Experience. **European Journal of Law Reform**, vol. 21, n. 3,p. 329-344, Jul/Sep 2019. p. 333.

The Italian constitution belongs to the group of constitutions that Mortati called "constitutions born from the Resistance",[7] as they were forged with the clear intention to deny and overcome all of the "values" (or anti-values) that had characterized the totalitarian era.

In the reference to"constitutions born from the Resistance", Mortati included other constitutions, such as the French (Fourth Republic) and West German ones. As Carrozza[8] noted, today we could include within this group the Portuguese, Spanish and Greek constitutions that were drafted during the 1970s.

It is possible to find this element in many constitutions born from the Resistance, as these were the product of political compromises between very different democratic forces. These forces had, as their only common point, the rejection of the totalitarian experience. This explains why these constitutions are inspired by the sincere denial of the features of the previous regime and by the need for an entirely different society. Some of these constitutions (including the Italian one) claimed that there was a need for new societal models, and were very rich in declarations of principle, reflecting a wish to produce a break with the past. In some cases, these so-called 'promised revolutions[9] have remained solely on paper, as was bitterly acknowledged by one of the most influential members of the Italian Constituent Assembly, Piero Calamandrei, with regard to many provisions of the Italian Constitution, a few years after it came into force.[10]

This programmatic character implied the need for a real turning point, not only in the ways of conceiving the values and premises of social life within the national boundaries. Frequently, the founding fathers of these constitutions born from the Resistance were induced to gamble on the codification of the values that should inspire the life and contribution of their nation in the international arena and community (external openness).

According to Carrozza, there are at least three central points in the evolution of Western constitutionalism: the distinction between constituent power and constituted power, the affirmation of the idea of the constitution as "higher law" and the

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[7] MORTATI, Costantino. **Lezioni sulle forme di governo**. Padova: Cedam, 1973. p. 222 ff.

[8] CARROZZA, Paolo. Constitutionalism's Post-modern Opening. In: LOUGHLIN, Martin; WALKER, Neil (Coord.). **The Paradox of Constitutionalism:** Constituent Power and Constitutional Form. Oxford: Oxford University Press, 2007. p. 169-187, p. 180.

[9] Calamandrei wrote about a "promised revolution" in exchange for the failed revolution that had been sought by the Leftist forces, i.e. a rupture with the past that had to be even more radical than was envisaged at that time. CALAMANDREI, Piero. Cenni introduttivi sulla Costituente e i suoi lavori. In: CALAMANDREI, Piero; LEVI, Alessandro (Coord.). **Commentario sistematico alla Costituzione italiana**. Firenze: G. Barbera, 1950. Now in: CALAMANDREI, Piero. **Opere giuridiche**, vol. III, **Diritto e processo costituzionale**. Napoli: Morano, 1965.p. 511-595.

[10] CALAMANDREI, Piero. La Costituzione e le leggi per attuarla. In: AA.VV. **Dieci anni dopo: 1945-1955**. Roma: Laterza, 1955. Now in: CALAMANDREI, Piero. **Opere giuridiche**, vol. III, **Diritto e processo costituzionale**. Napoli: Morano, 1965, p. 511-595. p. 553 ff.

combination of this idea with the discovery of the judicial review of legislation and, finally, the tension between universal aspiration (inherited from the rationalism of the Enlightenment) and national–territorial identity. In the light of these three central points, what Carrozza called "openness in post-modern constitutionalism" "may be intended, according to Spadaro, as precisely the re-awakening and re-sensitization of the legal/political system to a superior human aspiration to justice, one that challenges the closure of a positivist legal/political system in which justice is reduced to formal legality. Not relativism, but reasonableness and proportionality, is the leitmotif of post-modern constitutionalism".[11]

Both constitutional openness and the unamendability clause can be seen as the direct offspring of the rejection of the legal nationalism that had characterized the totalitarian phase in Italy. They are both functional to the preservation of some higher goods that cannot be affected by the choices of the contingent majority in office. As such, these higher goods are beyond the political process and are untouchable. As Faraguna pointed out: "The formulation of the unamendability clause of the Italian Constitution israther short and vague when compared with the formulation of unamendability clauses of the same generation. In fact, unamendable provisions grew not only numerically but also in length and complexity, increasingly covering more and more protected values".[12]

In Judgment 1146/1988, the Italian Constitutional Court partly remedied this ambiguity by clarifying that the concept of "Republican form" had to be interpreted in a broad manner so as to include the supreme principles codified in the first part of the Constitution:

> *The Italian Constitution contains some supreme principles that cannot be subverted or modified in their essential content, either by laws amending the Constitution, or by other constitutional laws. These include both principles that are expressly considered absolute limits on the power to amend the Constitution, such as the republican form of State (Art. 139) as well as those principles that even though not expressly mentioned among those principles not subject to the procedure of constitutional amendment, belong to the essence of the supreme values upon which the Italian Constitution is founded. This Court, furthermore, has already recognized in numerous decisions how the supreme principles of the constitutional order prevail over other laws or constitutional norms, such as when the Court maintained that even the prescriptions of the Concordat, which enjoy particular "constitutional protection" under Art. 7, paragraph 2, are not excluded from scrutiny*

[11] CARROZZA, Paolo. Constitutionalism's Post-modern Opening. In: LOUGHLIN, Martin; WALKER, Neil (Coord.). T**he Paradox of Constitutionalism:** Constituent Power and Constitutional Form. Oxford: Oxford University Press, 2007.p. 169-187. p. 182.

[12] FARAGUNA, Pietro. Unamendability and Constitutional Identity in the Italian Constitutional Experience. **European Journal of Law Reform**, vol. 21, n. 3, p. 329-344. Jul/Sep 2019. p. 333.

> *for conformity to the "supreme principles of the constitutional order" (see Judgments 30/1971, 12/1972, 175/1973, 1/1977, 18/1982), and also when the Court affirmed that the laws executing the EEC Treaty may be subject to the jurisdiction of this Court "in reference to the fundamental principles of our constitutional order, and to the inalienable rights of the human person" (see Judgments 183/1973, 179/1984).*[13]

This judgment represented a turning point, developing the potential implicit in Article 139 and paving the way for a new approach to the "Republic" clause. It confirmed the need for a systematic interpretation of the constitutional principles.

3. THE ROLE OF PARLIAMENTS AND THEIR "PROCEDURES" IN THE FRAMEWORK OF EUROPEAN POST-TOTALITARIAN CONSTITUTIONALISM

A few years after the beginning of the current Italian constitutional system, a major study on legislative procedure commenced in the following manner: "The juridical phenomenon of the legislative procedure, the fact of law which subjects the very moment of its formation to the constraint of its own rules, seems almost utopia […]. And yet the right of our new order, which, based on a rigid constitution […] intends to implement the postulates of the rule of law in every moment of the state action, has such a confidence in its possibilities and in its means that this is precisely this – almost magical – goal that it aspires to achieve".[14]

This idea obviously aligns with the thought that the "*volonté du peuple*", or the "people's will", is justified not only because it is the "will" of the majority, but also because it fits into forms that guarantee the most reasonable and fair expression of this "will".[15]

Although it is indisputable that the (democratic) legislative procedure is, as a whole, governed by the majority rule, it is evident that it is preferable to other modes of normative production only to the extent that it maintains and protects its main characteristics, by ensuring the effective possibility of participation for all parliamentarians and guaranteeing a high rate of transparency in discussions.[16]

However, in the context of an analysis of the Italian experience, it has recently been pointed out that, "as Walter Bagehot […] taught long ago, the centrality of

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[13] Corte costituzionale, Judgment 29 December 1988, No. 1146. Translation quoted by P. FARAGUNA, Pietro. Unamendability and Constitutional Identity in the Italian Constitutional Experience. **European Journal of Law Reform**, vol. 21, n. 3,p. 329-344, Jul/Sep 2019. p. 336, note n. 6.

[14] GALEOTTI, Serio. **Contributo alla teoria del procedimento legislativo**. Milano: Giuffrè, 1957. p. 1.

[15] MIRKINE-GUETZÉVITCH, Boris. **Les nouvelles tendances du droit constitutionnel**. Paris: Marcel Giard, 1931.

[16] LUPO, Nicola. "Populismo legislativo?": continuità e discontinuità nelle tendenze della legislazione italiana. **Ragionpratica**, vol. 27, n. 1, p. 251-271, Jan/Mar 2019. p. 265.

parliament has, with the exception of the finance law, little to do with lawmaking. The power of parliament manifests itself in the formation (and in the transformation, termination and reconstruction) of the government; in the provision of space for the opposition; in negotiations aimed at reconciling the interests and preferences of parliamentarians and their parties representing the majority and the opposition(s)".[17]

Populism, by definition, stands against everything that appears to make public decisions less "easy", thus making the law-making process one of its natural targets.[18]In fact, the essence of the legislative procedure is not to make decisions instant but to subject them to a series of intermediate steps. Hence, a populist movement clashes with this process once it enters parliament.However, it is necessary to distinguish between two scenarios, and Italy has given interesting examples of both: when a populist movement is in opposition and when it is in the majority.[19].

It is known that the debate on procedural guarantees in public law continued through a good part of the twentieth century. In the Italian context, it passed from a rather sceptical attitude towards the relevance of procedural guarantees, moving on to the progressive (but still contrasted) recognition of its centrality *entre-deux-guerres*[20] and then to the unanimous recognition of theirimportance.[21] Related to this is its instrumentality with respect to the "step forward" of the constitutional state in its most modern version, which is aimed at the effective and democratic involvement of all citizens in the management of public affairs,[22], with a *vis expansiva*that was likely to encompass even *political* and *legislative* decisions, with very few exceptions, thus making it a task of unprecedented difficulty in societies that are extremely complex in terms of interests.[23]

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17 PASQUINO, Gianfranco. The state of the Italian Republic. **Contemporary Italian Politics**, vol. 11, n. 2, p. 195-204, Apr/Jun 2019. p. 195.

18 We use the expression "law-making process" in order to encompass a broader meaning as compared to "legislative procedure" (see PIZZORUSSO, Alessandro. The Law-Making Process as a Juridical and Political Activity. In: PIZZORUSSO, Alessandro (Coord.). **Law in the Making. A Comparative Survey**. Berlin: Springer-Verlag, 1988. p. 1-87; ZANDER, Michael. **The Law-Making Process**. London: Bloomsbury, 2015), including in particular, as far as it is relevant here, the initiative phase which takes place within the government.

19 BRESSANELLI, Edoardo; NATALI, David. Introduction. **Contemporary Italian Politics**, vol. 11, n. 3, p. 208-219, Jul/Sep 2019.

20 SANDULLI, Aldo M. **Il procedimento amministrativo**. Milano: Giuffrè, 1940.

21 BENVENUTI, Feliciano. Funzione amministrativa, procedimento, processo. **Rivista trimestrale di diritto pubblico**, vol. 2, n. 1, p. 118-145, Jan/Mar 1952.

22 GIANNINI, Massimo Severo. **Diritto amministrativo**. Milano: Giuffrè, 1970; seeCHITI, Edoardo. La dimensione funzionale del procedimento. In: FIORENTINO, Luigi et al. **Le amministrazioni pubbliche tra conservazione e riforme. Omaggio degli allievi a Sabino Cassese**. Milano: Giuffrè, 2008, p. 211-240.

23 This is obviously something that did not concern Italy alone. See, for example MASHAW, Jerry L. Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development. **The Journal of Law, Economics, and Organization**, vol. 6, special issue, p. 267-298, jan. 1990 and MASHAW, Jerry L. **Due Process in the Administrative State**. New Haven, Conn.: Yale University Press, 1985. Furthermore, it is well known that Niklas Luhmann, from a sociological point of view, stressed "legitimization through process" (see LUHMANN, Niklas. **Legitimation durch Verfahren**. Frankfurt: Surhkamp, 1983).

Within the context of a tough *reductio ad unum* of the formal and substantive aspects of a regime that can be defined as "democratic", Carlo Lavagna essentially identified "the problem of democracy [...] right here: in the choice of the most suitable means to legally regulate […] the supreme activities of the State, preparing not their general content but rather the ways to exercise them". Their aim is to facilitate or even impose a compromise, given the "impossibility of achieving satisfactory and effective substantial norms of political and legislative activities",[24] or to reduce democracy to mere majority rule.

This kind of transition is clearly evident on a smaller scale in parliamentary law, which has passed from being the expression of a single social class to being the arena for a pluralism that has powerfully entered the constitutional mechanisms. The compromise is notoriously crucial in Weber's analysis of politics,[25] and the work of Kelsen himself is marked by his "enthusiastic defense of compromise", a conception forged "in the specific discursive context of the German interwar period, during which this notion acquired a strongly depreciative connotation, mainly by authors such as Carl Schmitt and Rudolf Smend", at a time when, not by chance, "the strongest critics of compromises or coalitions sometimes emerged from the same source that denounced the deleterious effects of parliamentarism and political parties".[26]

Essentially, each law, understood here as a *parliamentary law*, is approved following a legislative procedure, which creates a balance between social pluralism and the unity of the legal system. Today, the formula of law as an expression of the general will is no longer useful in terms of content, but remains fundamental on a procedural level if there is a functioning legislative procedure that allows the active participation of the generality of *political* subjects.[27]

4. ELECTORAL LEGISLATION AS A PART OF THE CONSTITUTIONAL ORDER: THE INVOLVEMENT OF CONSTITUTIONAL COURTS IN ELECTORAL LAW

The growing involvement of constitutional courts in electoral law might be described as being part of a wider trend towards the judicialization of politics.[28]. This

[24] LAVAGNA, Carlo. Considerazioni sui caratteri degli ordinamenti democratici. **Rivista trimestrale di diritto pubblico**, vol. 6, n. 2, p. 392-422, Apr/Jun 1956. p. 392 ff.

[25] WEBER, Max. **Wirtschaft und Gesellschaft**. Tübingen: Mohr, 1921-22.

[26] BAUME, Sandrine. What Place Should Compromise Be Given in Democracy? A Reflection on Hans Kelsen's Contribution. **Négociations**, vol. 27, p. 73-89, Jan/Jun 2017. p. 74.

[27] LUPO, Nicola. "Populismo legislativo?": continuità e discontinuità nelle tendenze della legislazione italiana. **Ragionpratica**, vol. 27, n. 1, p. 251-271, Jan/Mar 2019. p. 253.

[28] In this respect, see, among othersFEREJOHN, John. Judicializing Politics, Politicizing Law. .**Law and Contemporary Problems**, vol. 65, n. 3, p. 41-68, Jul/Sep 2002; HIRSCHL, Ran. **Towards Juristocracy**: The Origins and Consequences of the New Constitutionalism. Cambridge, Mass.: Harvard University Press, 2004; HIRSCHL,

term emerged in the last quarter of the twentieth century and hints at "the ever-accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions and political controversies".[29]. More specifically, the courts have become increasingly involved in conflicts whose solution used to be seen as reserved for constitutional conventions and gentlemen's agreements among the political branches.[30].

Against this backdrop, electoral laws have proved to be no exception. This is true of both well-established democracies and countries that have recently departed from authoritarian regimes and embraced liberal constitutionalism. Pildes has stated that:

> *Over the last generation, we have witnessed … 'the constitutionalization of democratic politics'. … Court decisions now routinely engage certain expressive aspects of democracy and elections … In addressing various constitutional challenges to the way legislative rules structure democratic participation and elections, courts struggle to reconcile protection of essential democratic rights; the need to permit popular experimentation with the forms of democracy; the risk of political insiders manipulating the ground rules of democracy for self-interested reasons; and the need to protect democracy against anti-democratic efforts that arise through the political process itself.*[31]

The Italian Constitution of 1947 was drafted in the immediate aftermath of World War II and, unlike the German Basic Law of 1949, is an example of the weak rationalization of parliamentary government[32]. The Italian Constitutional Court and its (West) German counterpart are among the oldest constitutional courts in continental Europe, and the establishment of the Italian court can be described as a typical reaction to a totalitarian past.

Some preliminary definitions are needed before we address the major issues underlying the judicial review of electoral laws. These concern the various possible

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Ran. The Judicialization of Mega-Politics and the Rise of Political Courts.**Annual Review of Political Science**, vol. 11, p. 93-118, Jan/Dec 2008; CASSESE, Sabino. The Will of the People and the Command of the Law: Constitutional Courts, Democracy and Justice.In: BARSOTTI, Vittoria; VARANO, Vincenzo (Coord.). **Il nuovo ruolo delle Corti supreme nell'ordine politico e istituzionale.** Dialogo di diritto comparato. Napoli: Edizioni Scientifiche Italiane, 2012, p. 17-33.

29 HIRSCHL, Ran. The New Constitutionalism and the Judicialization of Pure Politics Worldwide. **Fordham Law Review**, vol. 75, n. 2, p. 721-753, Oct/Nov 2006.

30 As noted by SPERTI, Angioletta. **Corti supreme e conflitti tra poteri.** Spunti per un confronto Italia-Usa sugli strumenti e le tecniche di giudizio del giudice costituzionale. Torino: Giappichelli, 2005. p. 83.

31 PILDES, Richard H. Elections. In: ROSENFELD, Michel; SAJÓ, András (Coord.). **The Oxford Handbook of Comparative Constitutional Law**. Oxford: Oxford University Press, 2012, p. 529-544. p. 529.

32 See MIRKINE-GUETZÉVITCH, Boris. **Les nouvelles tendances du droit constitutionnel**. Paris: Marcel Giard, 1931. p. 23; RUBECHI, Massimo. La forma di governo dell'Italia Repubblicana. Genesi, caratteristiche e profili evolutivi di un nodo mai risolto. In: CORTESE, Fulvio; CARUSO, Corrado; ROSSI, Stefano (Coord.). **Immaginare la Repubblica.** Mito e attualità dell'Assemblea Costituente. Milano: Franco Angeli, 2018. p. 175-209. p. 181 ff.

notions of electoral law, the relationship between constitutional provisions and (ordinary) electoral laws, and the position of electoral laws within the constitutional order.

First and foremost, what is meant by (national) electoral laws for the purposes of this essay? It might be argued that electoral laws are complex norms, as they regulate a number of distinct, although closely intertwined, issues – they might fittingly be described as systems of concentric circles. At the heart of electoral law lies the electoral system or voting system that provides rules for turning votes into seats and might also include prescriptions for the boundaries of constituencies. A "second circle" is made up of rules concerning who is entitled to vote or to be elected. Finally, a third, external circle encompasses other norms, whose ultimate goal is to ensure that electoral fairness is respected; these deal, for example, with voting procedures, the oversight of elections, the regulation of electoral communications and opinion polling, campaign financing, the reimbursement of election expenses, and so on.[33] For the purposes of this essay, only the legislative and supra-legislative regulation of the voting system will be considered.

The relationship between the relevant constitutional provisions and electoral legislation can only be properly understood from a dual vantage point. Electoral laws are generally ordinary laws, and they often enjoy a very peculiar status within the legal order. Italian constitutional scholarship has striven to grasp the ambiguous status of electoral law. It has been defined as the core of the material constitution, as it determines how the prevalent political forces are represented (and selected) and ultimately shape the course of state action.[34] Regardless of its formal status, electoral law is closely connected to the fundamental principles and values of the Constitution.[35] For these reasons, electoral law lends itself to being described as part of the constitutional order, whose core is the Constitution, as it strongly affects the functioning of representative government and the exercise of voting rights.[36]. What clearly emerges is that electoral legislation might influence the way in which some of the provisions of the Constitution are applied.

On the other hand, constitutions do not necessarily contain detailed prescriptions on electoral law.[37] The constitutionalization of the electoral system was quite a

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[33] SeeLANCHESTER, Fulco. Il sistema elettorale in senso stretto dal "Porcellum" all'"Italicum". **Democrazia e diritto**, vol. 52, n. 1, p. 15-29, Jan/Mar 2015.

[34] SeeFROSINI, Tommaso Edoardo. Sistemi elettorali e sistemi di partito. In: CARROZZA, Paolo; DI GIOVINE, Alfonso; FERRARI, Giuseppe Franco (Coord.). **Diritto costituzionale comparato**. 2. ed. Roma-Bari: Laterza, 2014. p. 877-892.p. 879.

[35] SeeLANCHESTER, Fulco. Il sistema elettorale in senso stretto dal "Porcellum" all'"Italicum". **Democrazia e diritto**, vol. 52, n. 1, p. 15-29, Jan/Mar 2015.note 34.

[36] See BARBERA, Augusto. Costituzione della Repubblica italiana. In: AA.VV., **Enciclopedia del diritto.** Annali, Vol. VIII. Milano: Giuffrè, 2015, p. 263-358. p. 277 ff.

[37] See detailed overview by GIGLIOTTI, Alessandro. Sui principi costituzionali in materia elettorale. **Rivista AIC**, vol. 5, n. 4, p. 1-25, Oct/Dec 2014; SEUROT, Laurent. Faut-il constitutionnaliser le mode de scrutin aux

frequent option in the aftermath of World War I, at a time when proportional representation was seen as an inevitable consequence of the rise of democratic government and mass political parties.[38] The overall picture has become more complex since 1945. The four largest Member States in the European Union have no constitutionally entrenched electoral system. Because of the alleged failure of parliamentary regimes based on proportional representation in France (Fourth Republic), Germany (Weimar Republic) and Italy (shortly before the March on Rome), in those constitutional orders no specific voting system has been constitutionally entrenched, and the legislature enjoys some degree of discretion and flexibility in the electoral domain. Still, 16 out of the 28 Member States of the European Union have some form of constitutionalization of the electoral system. The relevant provisions may be extremely vague[39] or quite detailed[40]; in Portugal, they are even unamendable.[41] However, constitutional provisions concerning the guarantee of voting rights, most notably the right to an equal vote, or mandating equal opportunities for political parties, provide constitutional courts with another major standard for reviewing electoral laws. This is all the more relevant in jurisdictions in which no specific voting system has been formally entrenched.

Leaving aside substantive issues, the circumstances under which an electoral law is passed have also become increasingly important. The Code of Good Practice in Electoral Matters, adopted in October 2002 by the Venice Commission of the Council of Europe,[42] focuses not only on the "underlying principles of Europe's electoral heritage" (e.g. universal, equal, free and secret suffrage) but also on the *conditions* for implementing these principles. For the purposes of this paper, it is important to underline that:

> *a. Apart from technical and detail rules – which may be included in regulations of the executive – rules of electoral law must have at least the rank of a statute.*
> *b. The fundamental elements of electoral law, in particular the electoral system proper, membership of electoral commissions and the drawing of constituency boundaries, should not be open to amendment less than one year before an election, or should be written in the constitution or at a level higher than ordinary law.*[43]

élections législatives? **Revue française de droit constitutionnel**, vol. 26, n. 3, p. 657-678, Jul/Sep 2015. p. 669 ff.

38 See CARROZZA, Paolo. *È solo una questione di numeri? Le proposte di riforma degli artt. 56 e 57 Cost. per la riduzione dei parlamentari*. **Diritto pubblico comparato ed europeo**, vol. 21, special issue, p. 81-100, 2019. p. 93 f.

39 See e.g. Art. 68(3) of the Spanish Constitution of 1978: "The election in each constituency shall be conducted on the basis of proportional representation".

40 See Arts. 16(4) and 18(5) of the Constitution of the Republic of Ireland of 1937, providing a detailed regulation on the *single transferable vote*.

41 See Art. 288 of the Constitution of 1976.

42 Available at www.venice.coe.int/webforms/documents/?pdf=CDL(2002)139-e.

43 Code of Good Practice in Electoral Matters, Guidelines on Elections, § II.2 (emphases added).

More recently, the Venice Commission has made it clear that:

> *It is important that methods of allocation of seats and any other fundamental elements of the electoral legislation are determined by a broad political consensus. A broad public consultation and acceptance of the election legislation encourages public trust and confidence in the electoral process.*[44]

Regarding the relevant constitutional provisions, it should be noted that the Italian Constitution of 1947 does not provide for the adoption of a specific electoral system. Therefore, the Constitutional Court has to rely on other constitutional provisions when reviewing electoral laws. The most important provisions concern the fundamental right to an equal vote and, possibly, the need for the intrinsic rationality of the legislative provisions at stake.

Starting with the main relevant provisions in the Italian Constitution, Article 48(2) defines voting rights in a typical way –vote is "personal and equal, free and secret. The exercise thereof is a civic duty". On the other hand, no constitutional provision explicitly entrenches any specific electoral system, and debates at the Constituent Assembly show that some of the constituent fathers were in favour of entrenching proportional representation, at least with regard to elections to the lower house. The text that was passed by the Assembly does not mention any specific voting system.[45] However, a number of counterarguments have been deployed in order to decipher the meaning of constitutional silence[46] in this area. The first counterargument has to do with the origin of the Constitution: the key role of the political parties participating in the National Liberation Committee during the critical years from the downfall of the Fascist regime through the advent of the Republic is implicitly recognized in the text of the Constitution: therefore, proportional representation seemed to be best placed to guarantee the individual positions of the parties that founded the Republic[47]. Some years later, an influential constitutional law scholar, Carlo Lavagna, has argued that a clear preference for proportional representation could be read into the Constitution itself.[48] The starting point of his claim is that the Constitution clearly protects linguistic,

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[44] Venice Commission, Opinion no. 662/2012 on the Act on the Elections of Members of Parliament of Hungary, § 31.

[45] SeeTRUCCO, Lara. **Democrazie elettorali e Stato costituzionale**. Torino: Giappichelli, 2011. p. 513 f.

[46] See general remarks by FOLEY, Michael. **The Silence of Constitutions:** Gaps, 'abeyances' and political temperament in the maintenance of government. London and New York: Routledge, 1989.

[47] See CRISAFULLI, Vezio. I partiti nella Costituzione. In: **Studi per il ventesimo anniversario dell'Assemblea costituente**, vol. 2, Le libertà civili e politiche. Firenze: Vallecchi, 1969, p. 105-143. p. 108 f.; BETTINELLI, Ernesto. **All'origine della democrazia dei paritit.** La formazione del nuovo ordinamento elettorale nel periodo costituente (1944-1948). Milano: Edizioni di Comunità, 1982. p. 269.

[48] See LAVAGNA, Carlo. Il sistema elettorale nella Costituzione italiana. **Rivista trimestrale di diritto pubblico**, vol. 2, n. 4, p. 849-875, Oct/Dec 1952. p. 558 ff.

religious and political minorities. Moreover, some provisions that are still in force require a parliamentary majority vote and even a two-thirds vote: this is the case, for example, for the election of the President of the Republic and the judges of the Constitutional Court, and the approval of constitutional amendments. All these norms take for granted "the necessity for minorities to be represented in Parliament".[49] Against this basic framework, proportional representation seems to be a self-evident consequence of some of the basic assumptions underlying the Italian constitutional arrangements of 1947. Lavagna's theses have not been generally accepted either by scholars or by the case law of the Constitutional Court. They are, however, very much respected, as they provide a comprehensive reading of the provisions of the Constitution.[50] Finally, another influential scholar, Gianni Ferrara, also argued that the implicitly constitutional status of proportional representation in the Italian Republic is the result of a joint reading of the fundamental principle of equality and the constitutional recognition of the role of political parties.[51]

Thus, the principle of equal suffrage provides the main constitutional parameter for the judicial review of electoral laws. Leaving aside the general prohibition on plural or weighted voting, this principle lends itself to both moderate and strict readings. Strict readings, for instance, have become more influential in the case law of the German Federal Constitutional Court (FCC). A moderate reading of equal suffrage merely demands that the "one person, one vote" principle is respected; the German FCC refers to this as *Zählwertgleichheit*. However, if the principle of equal suffrage is to be fully respected, electoral law should also be required to ensure that each vote is equally efficient, that is, that there is equal opportunity for success at the polls, or *Erfolgswertgleichheit*, according to the FCC.

In Italy, a moderate reading of the principle of equal suffrage clearly prevailed until the Constitutional Court rendered Judgment 1/2014. Carlo Lavagna argues that the implicit constitutional entrenchment of proportional representation requires Article 48 of the Constitution and the principle of equal votes to be construed to ensure that there is not only formal equality of voters but also substantial equality, thereby confirming the quasi-constitutional status of proportional representation.[52]

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[49] See LAVAGNA, Carlo. Il sistema elettorale nella Costituzione italiana. **Rivista trimestrale di diritto pubblico**, vol. 2, n. 4, p. 849-875, Oct/Dec 1952. p. 866,note 49.

[50] See CROCE, Marco. Appunti in tema di Costituzione italiana e sistemi elettorali (rileggendo Carlo Lavagna). **Rivista AIC**, vol. 2, n. 1, p. 1-10, Jan/Mar 2011, www.rivistaaic.it/appunti-in-tema-di-costituzione-italiana-e-sistemi-elettorali-rileggendo-carlo-lavagna.html.

[51] See FERRARA, Gianni. **Il governo di coalizione**. Milano: Giuffrè, 1973. p. 50.

[52] See LAVAGNA, Carlo. Il sistema elettorale nella Costituzione italiana. **Rivista trimestrale di diritto pubblico**, vol. 2, n. 4, p. 849-875, Oct/Dec 1952. p. 871, note 49.

However, constitutional courts are becoming involved with reviewing electoral lawsmore often.[53] This is more striking in western European democracies, in which conflicts concerning electoral laws had traditionally arisen only in relation to agreements among the political actors. Consequently, the legislature was assumed to enjoy a wide discretion within the framework of the constitution.[54] On the whole, this trend might be seen as a signal of a growing lack of connection between the political elites and the public, and also between established political parties and emerging parties and movements. Political elites might have been perceived to have exploited their established institutional position in order to shape the contents of the electoral law to their own advantage, thereby ensuring self-perpetuation. The jurisdiction in which an activist attitude of the constitutional court is most clearly recognizable is undoubtedly that of the Federal Republic of Germany. The FCC has developed a strict reading of the principle of equal suffrage and a generous interpretation of the voting rights protected by Article 38 of the Basic Law, treating it as a constitutional clause justifying the admissibility of constitutional complaints in this area.[55]

Italy's political institutions during the period from 1948 to the beginning of the 1990s "have often been considered rather inefficient: this is because they were characterized by heterogeneous coalitions racked by internal strife, unstable cabinets, a cumbersome legislative process and a mass of legislation, consisting mainly of small-scale measures incapable of generating any incisive process of reform even when the country was up against an alarming level of growth in public debt, as was the case in the 1980s", and featured "a multiplicity of party-political and institutional veto players, variously distributed across both the centre and the outer fringes of the political arena, both in government and in parliament". Nevertheless, one of the consequences of such a consensual system was the so-called "centrality of parliament", "the place where governing parties conducted continuous negotiations, and where, in the 1970s in particular, attempts were made to include the PCI [*i.e. the Italian Communist Party*] in the decision-making process".[56]

Since the 1980s this style of government progressively lost legitimacy, with profound changes being made at the end of the Cold War and after a huge bribery scandal.

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53 See e.g. D'ALOIA, Antonio. Dai voti ai seggi. Limiti costituzionali alla distorsione della rappresentanza elettorale. **Rassegna parlamentare**, vol. 56, n. 4, p. 813-842, Oct/Dec 2014; DELLEDONNE, Giacomo. Corti costituzionali e legislazione elettorale: una comparazione italo-tedesca. **Rivista trimestrale di diritto pubblico**, vol. 64, n. 4, p. 1031-1062, Oct/Dec 2014.

54 See PINELLI, Cesare. Eguaglianza del voto e ripartizione dei seggi tra circoscrizioni. **Giurisprudenza costituzionale**, vol. 55, n. 4, p. 3322-3326, Jul/Aug2010..

55 See ROMANO, Andrea. Accesso alla giustizia costituzionale ed eguaglianza del voto. Legittimazione delle Corti e discrezionalità legislativa. **Diritto pubblico**, vol. 21, n. 2, p. 431-508, May/Aug 2015. p. 431.

56 VASSALLO, Salvatore. Government under Berlusconi: The functioning of the core institutions in Italy. **West European Politics**, vol. 30, n. 4, p. 692-710, Sep/Oct 2007. p. 692

The party system, along with the electoral system, was completely changed, shifting to a majority system. Everything began revolving around the polarizing presence of Silvio Berlusconi.

The establishment of a bipolar political system "saw the demise of a number of practices adopted during the First Republic, […]. Each coalition has also been headed by a leader who is that coalition's chosen candidate for the premiership. Thus, elections have become decisive, and as a consequence certain features that are characteristic of majoritarian democracies have emerged both within parliament and in the workings of the cabinet. […] Briefly speaking, the Prime Minister's position within the cabinet has been strengthened, an adversarial dynamic has emerged within parliament, and government has acquired greater agenda-setting powers".[57]

This shift generated "a profound transformation in Italy's main socio-political structures, as well as in public communication and debates", so that "more than twenty years after that historical phase, it is safe to say that Italian society and politics have taken a markedly populist direction, to the point where Italy today is perhaps the only country in the world where several populist forces compete with each other and where a widespread political communication characterized by populist tones and styles prevails".[58]

In Italy, it seemed difficult, at least initially, to challenge the national electoral law in the Constitutional Court.[59] The main reason for this is that, under Article 66 of the Constitution, the two houses of parliament are in charge of verifying the credentials of their members. It is therefore practically impossible to lodge a complaint with an ordinary or administrative court concerning the application of the national electoral law. In principle, proceedings before the Constitutional Court cannot be initiated by parliamentary minorities or other political office-holders. Constitutional complaints are not admitted. Regions can only challenge a state law before the Court insofar as it impinges upon their own competencies.[60] In the light of this, it seemed very difficult to conceive of a constitutional review of electoral laws before the Court rendered its landmark judgment (Judgment1/2014). It should be noted, however, that the Renzi–Boschi constitutional amendment – which was eventually rejected in a popular referendum on 4 December 2016 – tried to address this issue. If the constitutional amendment had

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57 VASSALLO, Salvatore. Government under Berlusconi: The functioning of the core institutions in Italy. **West-European Politics**, vol. 30, n. 4, p. 692-710, Sep/Oct 2007. p. 692.

58 ANSELMI, Manuel. **Populism. An Introduction**. London: Routledge, 2018. p. 66.

59 Italian electoral laws regulating the election of regional legislative assemblies and of the European Parliament lie outside the scope of this essay.

60 See BARSOTTI, Vittoria; CAROZZA, Paolo G.; CARTABIA, Marta; SIMONCINI, Andrea. **Italian Constitutional Justice in Global Context**. Oxford: Oxford University Press, 2016. p. 52 ff.

come into force, the revised text of Articles 73 and 134 of the Constitution would have empowered parliamentary minorities (at least a quarter of the members of the lower house or one third of the members of the Senate) to initiate an a priori review of national electoral laws by the Constitutional Court.[61] These procedural difficulties were discussed in depth by scholars, with some suggesting that the Court should avail itself of preventive judgments on the admissibility of referendum initiatives in order to review national electoral laws on its own initiative.[62]

Access to constitutional justice is not the only major difference between the German and the Italian constitutional courts in this area. The effects of judicial decisions that strike down legislative provisions and the possibility of the publication of dissenting opinions should also be mentioned.

Italian constitutional provisions are quite rigid as regards the effects, most notably the temporal effects, of decisions rendered by the Constitutional Court. According to Article 136(1) of the Constitution, "[w]hen the Court declares the constitutional illegitimacy of a law or enactment having the force of law, the law ceases to have effect the day following the publication of the decision". In some cases, the Court has tried to address this problem by making its judgments come into effect gradually,[63] and this might be particularly urgent with regard to national electoral laws, which the Court has consistently described as constitutionally mandated laws (*leggicostituzionalmente necessarie*).[64] Under this doctrine of the Court, the electoral law is constitutionally mandated because it is needed for the correct working of the legislature. For this reason, there should always be a fully-fledged, immediately applicable electoral law; this doctrine, which was developed with regard to referendum initiatives, has a considerable effect on the review performed by the Court when an electoral law is at stake.[65]

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61 See ROSSI, Emanuele. **Una Costituzione migliore? Contenuti e limiti della riforma costituzionale**. Pisa: Pisa University Press, 2016. p. 127 ff.; DAL CANTO, Francesco. Corte costituzionale e giudizio preventivo sulle leggi elettorali. **Quaderni costituzionali**, vol. 36, n. 1, p. 39-60, Jan/Mar 2016. p. 671.

62 See CROCE, Marco. "Se non ora quando?": sui possibili vizi di costituzionalità della legge elettorale (e sui possibili modi per farli valere). **Forum di Quaderni costituzionali**, 9 December 2007, www.forumcostituzionale.it.

63 See BARSOTTI, Vittoria; CAROZZA, Paolo G.; CARTABIA, Marta; SIMONCINI, Andrea. **Italian Constitutional Justice in Global Context**. Oxford: Oxford University Press, 2016. p. 87 ff.

64 Corte costituzionale, Judgment no. 26/1997.

65 As noted by BARSOTTI, Vittoria; CAROZZA, Paolo G.; CARTABIA, Marta; SIMONCINI, Andrea. **Italian Constitutional Justice in Global Context**. Oxford: Oxford University Press, 2016. p.51. More recently, see Judgment 10/2020, in which the Constitutional Court declared to be inadmissible the proposed referendum question on the "Abolition of the proportional method of allocation of seats in multi-member constituencies, in the electoral system currently in force for the Chamber of Deputies and the Senate of the Republic" (the request had been submitted by eight Regional Councils with a centre-right majority).

5. FREE MANDATE FOR MPS

Having clarified the quasi-constitutional dimension of electoral legislation in Italy, it is time to move on to the free mandate of MPs, which has recently been under siege. The particular understanding of democracy advanced by the Five Star Movement is at odds with many fundamental principles of the Italian Constitution, such as the principle of the free mandate for parliamentarians. The prohibition of the imperative mandate has been defined as a "'cornerstone of European democratic constitutionalism" by the Venice Commission.[66] The debate surrounding the prohibition of the imperative mandate (expressly established by, among others, Art. 67 of the Italian Constitution,[67] Art. 38(1) of the German Basic Law[68]and Art. 27 of the French Constitution[69]) is directly linked to another feature of populism, namely the idea that representatives must respond immediately to the demands of the people, having almost no autonomy in performing their public function, as if they were bound by a specific contract. This risks reducing representation to a private law scheme, and this narrative is confirmed in the idea of the "contract for government"[70] signed between the Five Star Movement and the League. The idea of a contract is not entirely new, since Berlusconi also presented and signed the famous "contract with the Italians" during a very famous talk show (*Porta a Porta*) on 8 May 2001. This demonstrates that these forms of populism did not emerge completely out of the blue. In addition, the very idea of a "contract"– according to the populist rhetoric of the Five Star Movement – implies that there is a need to overcome the prohibition of the imperative mandate or at least to mitigate it by insisting on party discipline or pecuniary sanctions.[71]

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[66] The European Commission for Democracy through Law (Venice Commission), 'Report on the Imperative Mandate and Similar Practices' (2009) http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2009)027-e.

[67] Art. 67 of the Italian Constitution: 'Each Member of Parliament represents the Nation and carries out his duties without a binding mandate'.

[68] Art. 38(1) of the German Basic Law: 'Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people, not bound by orders or instructions and responsible only to their conscience'. Among the possible violations of the principle of the free mandate, German constitutional law scholarship mentions blank resignation letters, penalties for leaving a parliamentary group without resigning, the practice of inactive mandate (*ruhendesMandat*), and rotation of elective offices (MAGIERA, Siegfried. Artikel 38. In: SACHS, Michael (Coord.). **Grundgesetz-Kommentar**. 5. ed. München: C.H. Beck, 2009. p. 1177-1205. p. 1189; see also KLEIN, Hans Hugo. Status des Abgeordneten. In: ISENSEE, Josef; KIRCHHOF, Paul (Coord.). **Handbuch des Staatsrechts der Bundesrepublik Deutschland**, vol. III, Demokratie – Bundesorgane. 3. ed. Heidelberg: C.F. Müller, 2005. p. 741-768. p. 742 ff.).

[69] Art. 27 of the French Constitution: 'No Member shall be elected with any binding mandate. Members' right to vote shall be exercised in person. An Institutional Act may, in exceptional cases, authorize voting by proxy. In that event, no Member shall be given more than one proxy'.

[70] For a recent work on this concept see: DI MARZIO, Fabrizio. **La politica e il contratto. Dalla** affermazione dei valori alla negoziazione degli interessi. Roma: Donzelli, 2018.

[71] GRASSO, Giorgio. Mandato imperativo e mandato di partito: il caso del MoVimento 5 Stelle. **Osservatorio AIC**, vol. 5, n. 2, p. 1-7, May/Aug 2017, https://www.osservatorioaic.it/it/osservatorio/ultimi-contributi-pubblicati/giorgio-grasso/mandato-imperativo-e-mandato-di-partito-il-caso-del-movimento-5-stelle.

These phenomena respond to the idea of democracy endorsed by Davide Casaleggio in a recent speech given at a workshop organized by the United Nations[72] and in an article published in *Corriere della Sera*.[73] Without giving a detailed analysis of his thoughts, it is sufficient to underline his strong support for direct democracy and his frontal attack on the actors in traditional politics, namely political parties and parliamentary arenas. On this basis, the former minister Riccardo Fraccaro[74] denounced classic representative democracy as inadequate, and stressed the need for more direct democracy, especially with the advent of new technologies. Davide Casaleggio recently said that "the overcoming of representative democracy is inevitable".[75] These are vital considerations that deserve attention and should not necessarily be seen as populist ideas, but one can nevertheless express concern, especially as regards the maximum dose of direct democracy that a system of representative democracy can tolerate.

6. CONCLUDING REMARKS

This analysis has shown that controversies about parliamentary procedures, electoral legislation and the free mandate for MPs are currently among the crucial challenges for constitutional law. Complex constitutional principles are at stake, most notably the principles of equality and representation, but also that of the efficient operation of the parliamentary regime. At the same time, constitutional courts face massive pressure from both the public and the political elites. The political debate that preceded Judgment no. 35/2017 of the Italian Constitutional Court provides a convincing example of this. Following the constitutional referendum on 4 December 2016, the electoral system looked doomed because of the case pending before the Court and also for political reasons. In fact, after the apparent failure of Matteo Renzi's reform attempts, even "his" electoral law seemed to have lost political support. In the end, however, the political elites decided not to change it, and they waited instead for the judgment of the Court as if they were listening to an oracle. The frequent involvement of the constitutional courts in this area of the constitutional order may well mean that we are "mov[ing]

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72 The speech can be watched at the following link: https://www.facebook.com/associazionerousseau/videos/davide-casaleggio-allonu-per-promuovere-la-cittadinanza-digitale/244735723118310/

73 https://www.corriere.it/politica/19_settembre_17/06-politico-t7ccorriere-web-sezioni-29ff88c4-d8bb-11e9-a64f-042100a6f996.shtml

74 BERTINI, Carlo. Riccardo Fraccaro: "Meno onorevoli e più referendum. In cinque leggi il piano di riforme". **La Stampa**, 11 September 2018, www.lastampa.it/topnews/primo-piano/2018/09/11/news/riccardo-fraccaro-meno-onorevoli-e-piu-referendum-in-cinque-leggi-il-piano-di-riforme-1.34044271.

75 CASALEGGIO, Davide. Casaleggio: i 7 paradossi della democrazia, a sbagliare non è mai chi vota. **Corriere della Sera**, 17 September 2019, www.corriere.it/politica/19_settembre_17/06-politico-t7ccorriere-web-sezioni-29ff88c4-d8bb-11e9-a64f-042100a6f996.shtml.

closer to the global constitutional ideal that 'everything is justiciable'".[76] This also points to the weakness of the representative political elites, who appear disconnected from the general public.[77] The increasing volatility of electoral laws is a direct consequence of the increasing volatility of voting behaviours, the intrinsic frailness of present-day party systems and the clear trend towards a further fragmentation of society.

The formidable challenge that constitutional courts are facing is to bear this factual background in mind and to treat electoral law as a (non-detached) part of the constitutional order. Electoral law should thus be interpreted and reviewed in the light of all the relevant constitutional principles.

At the same time, we have focused on how the fierce disputes on parliamentary procedures and the freedom of the mandate given to MPs clearly highlight – in Italy as in other European states – the pressures to which the pillars of modern and contemporary constitutionalism are subject.

What can be expected in the future? Solutions "will certainly not come from Italian society as long as it remains fragmented and corporatist, and marred by interpersonal mistrust. But the weakest link is represented by the parties (most of which no longer even deserve this name) and by the deconstructed nature of the party system. Will Italy be the first political system to have a working democracy in a situation in which parties have practically disappeared?".[78]

Obviously, this is not a desirable scenario, and it is to be hoped that the new phase inaugurated by the second Conte government will help Italian politics to regain the path of a functioning democracy.

From a broader perspective, as has been recently noted, "populist" legislator tends to over-emphasize the mere input legitimacy, stressing the directly elective nature of parliament itself, and therefore a possible solution is to use, even for the analysis of individual state systems, the full potential of "throughput legitimacy",[79] "an 'umbrella concept' accompanying the other two umbrella concepts of input and output legitimacy, as criteria for dynamic and 'multi-centric' processes of policy formulation and implementation".[80] Throughput legitimacy is "judged in terms of the efficacy, account-

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[76] LONGO, Erik; PIN, Andrea. Judicial Review, Election Law, and Proportionality. **Notre Dame Journal of International and Comparative Law**, vol. 6, n. 1, p. 101-118, Jan/Dec 2016. p. 102.

[77] See PISANESCHI, Andrea. Giustizia costituzionale e leggi elettorali: le ragioni di un controllo difficile. **Quaderni costituzionali**, vol. 35, n. 1, p. 135-156, Jan/Mar 2015. p. 139.

[78] PASQUINO, Gianfranco. The state of the Italian Republic. **Contemporary Italian Politics**, vol. 11, n. 2, p. 195-204, Apr/Jun 2019. note 17.

[79] LUPO, Nicola. "Populismo legislativo?": continuità e discontinuità nelle tendenze della legislazione italiana. **Ragionpratica**, vol. 27, n. 1, p. 251-271, Jan/Mar 2019. p. 253, note 16,

[80] SCHMIDT, Vivien; WOOD, Matthew. Conceptualising Throughput Legitimacy: Procedural Mechanisms of Accountability, Transparency, Inclusiveness and Openness in EU Governance. **Public Administration**, vol. 97, n. 4, p. 727-740, Oct/Dec 2019. p. 737.

ability and transparency" of governance processes, not in opposition but "along with their inclusiveness and openness to consultation with the people", within "the space between the political input and the policy output, which has typically been left blank by political systems theorists". It focuses on the quality of the governance processes "as contributing to a different kind of normative legitimacy from both the performance-oriented legitimacy of output and the participation-oriented legitimacy of input".[81]

However, an important novelty seems to move in the opposite direction as regards all the three topics on which this article focuses. In October 2019, the Italian Parliament approved a constitutional bill aimed at reducing the number of parliamentarians: from the 630 current members of the "lower" House to 400, and from 315 senators to 200. The whole electorate had been called to approve this text, through the referendum provided for in Article 138 of the Constitution that had been requested by 71 senators. The referendum was scheduled for 29 March 2020 but was postponed because of the COVID-19 emergency.

As mentioned in a report by the parliamentary office, "following the constitutional change, the average number of inhabitants for each elected member changes […]. For the Chamber of Deputies, this ratio increases from 96,006 to 151,210. The average number of inhabitants for each senator increases, in turn, from 188,424 to 302,420".[82] This, for arithmetical reasons, "would certainly entail a downsizing of the degree of representativeness of the organ. [...] More specifically, on the side of the active electorate the ability of individual voters to influence the outcome of the election would decrease [...]; while on that of the passive electorate, the various candidates would need more consent to be elected. Which is to say that it would increase the cost of each seat in terms of votes".[83] Apart from this, the inevitable enlargement of the constituencies could further accentuate the detachment of the representatives from their electorate, in a context in which the media are having an extraordinary impact, ending up heavily influencing the outcome of any vote.[84] Furthermore, at least in the absence of further constitutional and electoral reforms, another problematic element appears in the more accentuated "distance" that would be produced "in the ratio between the

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81 SCHMIDT, Vivien. Democracy and Legitimacy in the European Union Revisited: Input, Output, *and* 'Throughput'. **Political Studies**, vol. 61, n. 1, p. 2-22, Jan/Mar 2013. p. 2.

82 See http://documenti.camera.it/leg18/dossier/pdf/AC0167f.pdf 5.

83 TRUCCO, Lara. Audizione in merito al d.d.l. S. 881 su "Legge elettorale: per una determinazione dei collegi indipendente dal numero dei parlamentari" (Commissione Affari Costituzionali del Senato – giovedì 29 novembre 2018). **Consulta online**, vol. 20, n. 1, p. 13-19, Jan/Apr 2019,www.giurcost.org. p. 14.

84 *Ex plurimis*, seeANANIA, Francesca. "In ogni epoca lo spettacolo della politica": le elezioni alla televisione. In: BALLINI; Pierluigi; RIDOLFI, Maurizio (Coord.). **Storia delle campagne elettorali in Italia**. Milano: Bruno Mondadori, 2002, p. 238-260.

number of seats allocated ex ante and the average population, especially with regard to certain territorial areas". This would entail evident breaches of the principle of equality of suffrage, by over-representing or under-representing some areas with respect to others[85]: to use litotes, nothing to be optimistic about.

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[85] TRUCCO, Lara. Audizione in merito al d.d.l. S. 881 su "Legge elettorale: per una determinazione dei collegi indipendente dal numero dei parlamentari" (Commissione Affari Costituzionali del Senato – giovedì 29 novembre 2018). **Consulta online**, vol. 20, n. 1, p. 13-19, Jan/Apr 2019,www.giurcost.org.p. 15, note 84.

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