

Constitutional courts dealing with electoral laws: comparative remarks on Italy and Hungary[♦]

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Abstract: **Il controllo di costituzionalità delle leggi elettorali: osservazioni comparatistiche sui casi italiano e ungherese** – The essay discusses and compares some major trends in the case law of the Italian and Hungarian constitutional courts concerning the constitutionality of electoral laws. Comparative analysis of these two cases should allow the development of a general conceptual framework for studying the possible role of constitutional courts in this peculiar area of the constitutional order. In so doing, it makes some general points on the growing involvement of constitutional courts in this area of the constitutional order and the related challenges.

Keywords: Constitutional Adjudication; Constitutional Reasoning; Electoral Laws; Italy; Hungary.

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1. Introduction

This essay discusses and compares some major trends in the case law of the Italian and Hungarian constitutional courts concerning the constitutionality of electoral laws. Comparative analysis of these two cases should allow the development of a general conceptual framework for studying the possible role of constitutional courts in this peculiar area of the constitutional order.

The growing involvement of constitutional courts with electoral laws might be described as being part of a wider trend towards the judicialization of politics¹. This locution emerged in the last quarter of the 20th century and hints at “the ever-accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy questions and political controversies”². More specifically, courts have become increasingly involved in conflicts whose

[♦] I would like to thank Nicola Lupo and Balázs Schanda for their useful suggestions and comments. All views are my own.

¹ In this respect, see, among others, J. Ferejohn, *Judicializing Politics, Politicizing Law*, in 65 *Law and Contemporary Problems* no. 3, 41 (2002); R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Cambridge, Mass., 2004; R. Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, in 11 *Annual Review of Political Science* 93 (2008); S. Cassese, *The Will of the People and the Command of the Law: Constitutional Courts, Democracy and Justice*, in V. Barsotti, V. Varano (Eds), *Il nuovo ruolo delle Corti supreme nell'ordine politico e istituzionale. Dialogo di diritto comparato*, Napoli, 2012, 17.

² R. Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, in 75 *Fordham Law Review* 721 (2006).

solution used to be seen as reserved for constitutional conventions and gentlemen's agreements among the political branches³.

Against this backdrop, electoral laws have proven to be no exception. This is true both of well-established democracies and countries which have departed from authoritarian regimes and embraced liberal constitutionalism recently. 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”⁴.

Why might it be useful to compare the Italian and the Hungarian cases? The answer combines elements drawn from the “most different cases” and “most similar cases” principles for selecting cases in comparative constitutional research⁵.

The constitutions of Italy and Hungary belong to different “waves” of constitution making in Europe. 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 weak rationalisation of parliamentary government⁶. Hungary was part of the “third wave” of liberal constitutionalism and in the Central and Eastern European constitutional landscape, the Hungarian case is among the most interesting ones. Hungary is the only country in that region of Europe in which the Communist Constitution, dating back to 1949, was not replaced but massively amended. In 2011, an entirely new Fundamental Law came into force.

These circumstances are quite relevant when it comes to constitutional adjudication. The Italian Constitutional Court, like its (West) German counterpart, is one of the oldest constitutional courts in continental Europe and its establishment can be described as a typical reaction to a totalitarian past. The Hungarian Constitutional Court was established in 1989⁷, by which time constitutional courts had become a key component of liberal constitutionalism,

³ As remarked by A. Sperti, *Corti supreme e conflitti tra poteri. Spunti per un confronto Italia-Usa sugli strumenti e le tecniche di giudizio del giudice costituzionale*, Torino, 2005, 83.

⁴ R.H. Pildes, *Elections*, in M. Rosenfeld, A. Sajó (Eds), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012, 529, 530.

⁵ See R. Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, in 53 *Am. J. Comp. L.* 125, 132 ff. (2005).

⁶ See B. Mirkine-Guetzévitch, *Les nouvelles tendances du droit constitutionnel*, Paris, 1931, 23; M. Rubechi, *La forma di governo dell'Italia Repubblicana. Genesi, caratteristiche e profili evolutivi di un nodo mai risolto*, in F. Cortese, C. Caruso, S. Rossi (Eds), *Immaginare la Repubblica. Mito e attualità dell'Assemblea Costituente*, Milano, 2018, 175, 181 f.

⁷ Act XXXI of 1989, amending the Constitution of 1949.

so much that “virtually no one writes a constitution today without providing for rights protection and a mode of review”⁸. Among the “third wave” constitutional systems, the Hungarian Constitutional Court, at least in the first two decades of its existence, has played a major role both during the transition to liberal democracy⁹ and afterwards. László Sólyom, first President of the Court (and later President of the Republic) famously defined it as the most powerful constitutional court in the world¹⁰.

Both countries have experienced some kind of institutional transition after the end of the Cold War. Needless to say, these have been deeply different, as no authoritarian regime was in place in Italy before 1990. However, the collapse of the traditional post-war party system in the wake of the Tangentopoli scandals paved the way not only for a reorganisation of the political system but also for a debate on whether and how to amend the Constitution¹¹, most notably its provisions on the executive-legislative relations. As of today, these attempts have largely been unsuccessful¹².

In Hungary, constitutional reform was also the subject of heated debates in the 1990s and 2000s. This happened because the decision to modify the Constitution of 1949 instead of drafting an entirely new one was widely seen as unsatisfactory. This view, typical of conservative circles, arose because there had been no radical, formally entrenched departure from Communism and, in fact, the 1989 amendments were the result of a compromise between the Communist elites and wide sectors of the opposition parties, the Round Table Talks¹³. For all the radical differences between Communist government and the constitutional settlement after 1989, the peaceful, smooth character of the post-Communist transition was one of the reasons of “the lack of emotional attachment that the population felt towards the 1949/1989 Constitution”¹⁴. It is necessary to keep these preconditions in mind in order to assess the events which have followed Prime Minister Viktor Orbán’s return to office and the elaboration and drafting of an entirely new Fundamental Law. Incidentally, the Fundamental Law

⁸ A. Stone Sweet, *Constitutional Courts*, in M. Rosenfeld, A. Sajó (Eds), *The Oxford Handbook of Comparative Constitutional Law*, cit., 816, 819.

⁹ See P. Paczolay, *Judicial Review of the Compensation Law in Hungary*, in 13 *Michigan J. Int’l L.* 816 (1992).

¹⁰ See C. Dupré, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity*, Oxford, 2003, 6.

¹¹ See C. Fusaro, *Per una storia delle riforme costituzionali (1948-2015)*, in *Riv. trim. dir. pubbl.*, 2015, 431, 480 ff.

¹² See M. Bassini, O. Pollicino, *Nothing left to do but vote – The (almost) untold story of the Italian constitutional reform and the aftermath of the referendum*, in *Verfassungsblog*, 15 December 2016, at verfassungsblog.de/nothing-left-to-do-but-vote-the-almost-untold-story-of-the-italian-constitutional-reform-and-the-aftermath-of-the-referendum; P. Passaglia (Ed), *The 2016 Italian Referendum: Origin, Stakes, Outcome*, a special issue of *Italian Law Journal*, 2017.

¹³ See J. Kis, *Introduction: From the 1989 Constitution to the 2011 Fundamental Law*, in G.A. Tóth (Ed), *Constitution for a Disunited Nation: On Hungary’s 2011 Fundamental Law*, Budapest, 2012, 1, 3 ff.; G. Spuller, *Transformation of the Hungarian Constitutional Court: Tradition, Revolution, and (European) Prospects*, in 15 *German L. J.* 637, 641 (2014).

¹⁴ A. Jakab, P. Sonnevend, *Continuity with Deficiencies: The New Basic Law of Hungary*, in 9 *Eur. Const. L. Rev.* 102, 105 (2013).

currently in force has significantly affected and, according to critics, undermined the institutional position and powers of the Constitutional Court¹⁵. Furthermore, the far-reaching reform of the Constitutional Court has been described as one key component in the transition towards an illiberal democracy.

Electoral legislation and electoral reform have played a major role in constitutional politics discussions in both countries throughout the last three decades. This is closely related to the peculiar positions of electoral laws within the constitutional order.

The next section will clarify some basic elements concerning the notion of electoral law and the relevant constitutional provisions in Italy and Hungary. Section 3 discusses the (possible) role of the two constitutional courts in terms of access to constitutional justice. The fourth section concisely presents the evolution of electoral laws in Italy and Hungary in the last three decades. Section 5 analyses the case law of the two constitutional courts in this sector and the last section discusses the main results of the comparative analysis.

2. Electoral legislation as part of the constitutional order

2.1. Preliminary definitions

Some preliminary definitions are needed before addressing the major issues underlying judicial review of electoral laws in Italy and Hungary. These concern the possible notions of electoral law, the relation 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 be fittingly described as systems of concentric circles. At the heart of the electoral law lies the electoral system or voting system which provides rules for turning votes into seats and might also include prescriptions concerning the delimitation 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, e.g. voting procedures, oversight of elections, regulation of electoral communication and opinion polling, campaign financing, reimbursement of election expenses and so on¹⁶. For the purposes of this essay, only the legislative and supralegislativa regulation of the voting system will be considered.

¹⁵ On this see L. Sólyom, *Das ungarische Verfassungsgericht*, in A. von Bogdandy, C. Grabenwarter, P.M. Huber (Eds.), *Handbuch Ius Publicum Europaeum*, vol. 6, *Verfassungsgerichtsbarkeit in Europa: Institutionen*, Heidelberg, 2016, 705, 727 ff.

¹⁶ See F. Lanchester, *Il sistema elettorale in senso stretto dal “Porcellum” all’“Italicum”*, in *Democrazia e diritto*, no. 1/2015, 15.

The relation between relevant constitutional provisions and electoral legislation can only be properly understood from a double vantage point. The electoral law is generally an ordinary law and often enjoys a very peculiar status within the legal order. Italian constitutional scholarship has striven to grasp the ambiguous status of this law. The electoral law 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 action¹⁷. Regardless of its formal status, the electoral law is closely connected to the fundamental principles and values of the Constitution¹⁸. For these reasons, the electoral law lends itself to being described as part of the constitutional order, whose core is the Constitution, as it deeply affects the functioning of representative government and the exercise of voting rights¹⁹. What clearly emerges is that electoral legislation might influence the way some of the provisions of the Constitution are applied.

On the other hand, constitutions do not necessarily contain detailed prescriptions on electoral laws²⁰. The constitutionalisation of one electoral system was a quite 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 parties²¹. 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 (4th 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 kind of discretion and flexibility in the electoral domain. Still, 16 out of 28 Member States of the European Union have some form of constitutionalisation of the electoral system. The relevant provisions may be extremely vague²² or quite detailed²³; in Portugal, they are even unamendable²⁴. However, constitutional provisions concerning the guarantee of voting rights, most notably the right to equal vote, or mandating equal opportunities for political

¹⁷ See T.E. Frosini, *Sistemi elettorali e sistemi di partito*, in P. Carrozza, A. Di Giovine, G.F. Ferrari (Eds), *Diritto costituzionale comparato*, 2nd edition, Roma-Bari, 2014, 877, 879.

¹⁸ See F. Lanchester, *Il sistema elettorale in senso stretto dal "Porcellum" all'"Italicum"*, cit., 15.

¹⁹ See A. Barbera, *Costituzione della Repubblica italiana*, in *Enciclopedia del diritto*, Annali VIII, Milano, 2015, 263, 277 f.

²⁰ See detailed overview by A. Gigliotti, *Sui principi costituzionali in materia elettorale*, in *Riv. AIC*, no. 4/2014, 2 f., available at www.rivistaaic.it/sui-principi-costituzionali-in-materia-elettorale.html; L. Seurot, *Faut-il constitutionnaliser le mode de scrutin aux élections législatives?*, in *Rev. fr. dr. const.*, 2015, 657, 669 ff.

²¹ See P. Carrozza, *È solo una questione di numeri? Le proposte di riforma degli artt. 56 e 57 Cost. per la riduzione dei parlamentari*, in *Diritto pubblico comparato ed europeo*, special issue, 2019, 81, 93 f.

²² 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".

²³ See Arts. 16(4) and 18(5) of the Constitution of the Republic of Ireland of 1937, providing a detailed regulation the *single transferable vote*.

²⁴ See Art. 288 of the Constitution of 1976.

parties provide constitutional courts with another major standard for reviewing electoral laws. This is all the more relevant in jurisdictions, like Italy and Hungary, in which no specific voting system has been formally entrenched.

Leaving aside substantial issues, the circumstances under which an electoral law has been 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 Europe²⁵, 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 essay, it is important to underline that:

“a. Apart from rules on technical matters and detail – 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*”²⁶.

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”²⁷.

Compliance with the guidelines laid down in the Code of Good Practice in Electoral Matters has turned into a contentious issue both in Italy and Hungary in the last decade. The *Ekoglasnost v. Bulgaria* case shows that the European Court of Human Rights has not refrained from finding a Member State of the Council of Europe in violation of Art. 3 of Protocol no. 1 of the European Convention on Human Rights, as specified by the Code of Good Practice in Electoral Matters²⁸.

2.2. Relevant provisions

Regarding the relevant constitutional provisions, it should be noted that the Italian Constitution of 1947, the Hungarian Constitution of 1949 (amended in

²⁵ Available at [www.venice.coe.int/webforms/documents/?pdf=CDL\(2002\)139-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL(2002)139-e).

²⁶ Code of Good Practice in Electoral Matters, § II.2 (emphases added).

²⁷ Venice Commission, Opinion no. 662/2012 on the Act on the Elections of Members of Parliament of Hungary, § 31.

²⁸ See P. Bonetti, *Ekoglasnost c. Bulgaria: la stabilità delle regole elettorali nell'anno precedente le elezioni*, in *Quad. cost.*, 2013, 168; P. Faraguna, *Le “buone” riforme elettorali: ce le chiede l'Europa?*, in *Quad. cost.*, 2013, 409; L. Trucco, *The conditions of participation in elections as part of the fundamental electoral rules*, in *Diritti comparati*, 7 February 2013, at www.diritticomparati.it; C. Fasone, G. Piccirilli, *Towards a Ius Commune on Elections in Europe? The Role of the Code of Good Practice in Electoral Matters in ‘Harmonizing’ Electoral Rights*, in 16 *Election L. J.* 247, 254 (2017).

1989) and the Hungarian Fundamental Law of Easter 2011 do not provide for the adoption of a specific electoral system; rather, they contain guarantees of voting rights²⁹. Therefore, the constitutional courts of the two countries have to rely on other constitutional provisions when reviewing electoral laws. The most important provisions concern the fundamental right to equal vote and, possibly, a necessity of intrinsic rationality of the legislative provisions at stake. Finally, both in Italy and Hungary, for different reasons, there is or has been speculation about the semi-constitutional status of a specific electoral system. A particular electoral system has sometimes been seen to enjoy a peculiar constitutional status in both countries even in the absence of more explicit constitutional norms.

As said before, this article only focuses on the constitutional case law concerning voting systems. It is worth mentioning that voting rights have been highly contentious in a jurisdiction, like Hungary, in which the links between citizenship and nationhood have always been quite troubled³⁰. Voting rights of Hungarian citizens belonging to national minorities and of Hungarian nationals living outside Hungary are a highly topical question in discussions about the Fundamental Law currently in force³¹.

Starting with the main relevant provisions in the Italian Constitution, Art. 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 a 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 lower house elections. The text which was passed by the Assembly does not mention any specific voting systems³². However, an influential constitutional law scholar, Carlo Lavagna, argued that a clear preference for proportional representation could be drawn from the Constitution³³. The starting point of his claim is that

²⁹ The only possible exception is the Constitution of the Hungarian Republic of Councils under Russian influence, which was drafted in 1919: see M. Toscano, *Prime soluzioni costituzionali comuniste (Finlandia – Ungheria)*, Firenze, 1946, 41 f.

³⁰ See M.M. Kovács, J. Tóth, *Country Report: Hungary*, EUDO Citizenship Observatory, Country Report, RSCAS/EUDO-CIT-CR 2010/36, at <http://eudo-citizenship.eu/docs/CountryReports/Hungary.pdf>.

³¹ According to Article 2(2) of the Fundamental Law, “[n]ationalities living in Hungary shall participate in the work of Parliament in the manner defined by a cardinal Act”. Cardinal Act CLXXIX of 2011 defines legally recognized nationalities as “all ethnic groups resident in Hungary for at least one century” (Art. 1, § 1), i.e. the Bulgarian, Greek, Croatian, Polish, German, Armenian, Roma/Gypsy, Romanian, Ruthenian, Serbian, Slovak, Slovene, and Ukrainian minorities. As regards representation of historic minorities in the Italian Parliament, see F. Guella, *Le garanzie per le minoranze linguistiche nel sistema elettorale c.d. Italicum*, in *Riv. AIC*, no. 3/2015, at www.rivistaaic.it/le-garanzie-per-le-minoranze-linguistiche-nel-sistema-elettorale-c-d-italicum.html; M. Monti, *Rappresentanza politica preferenziale delle minoranze e uguaglianza del voto: considerazioni alla luce della recente disciplina del c.d. Rosatellum e del sindacato della Corte in materia elettorale*, in *federalismi.it*, 2018, at www.federalismi.it/nv14/articolo-documento.cfm?Artid=35838.

³² See L. Trucco, *Democrazie elettorali e Stato costituzionale*, Torino, 2011, 513 f.

³³ See C. Lavagna, *Il sistema elettorale nella Costituzione italiana*, in *Riv. trim. dir. pubbl.*, 1952, 849; id., *Istituzioni di diritto pubblico*, 5th edition, Torino, 1982, 558 ff.

the Constitution clearly protects linguistic, religious and political minorities. Moreover, some provisions, which are still in force, require parliamentary majority votes and even two-thirds votes, e.g. the election of the President of the Republic and the judges of the Constitutional Court or the approval of constitutional amendments. All those norms take for granted “the necessity for minorities to be represented in Parliament”³⁴. 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 scholarship or by the case law of the Constitutional Court. They are, however, very prestigious as they provide a comprehensive reading of the provisions of the Constitution³⁵. At all institutional layers, the Italian electoral legislation embraced “pure” proportional representation until the early 1990s.

Art. 71(1) of the Hungarian Constitution of 1949 (as amended in 1990) stated that:

“(1) Members of Parliament, the members of the representative bodies of villages, townships and of the districts of the Capital, the legally defined number of the members of the representative body of the capital city, moreover, the Mayor in cases defined in the law, are elected by *direct secret balloting on the basis of the universal and equal right to vote*. ... (3) Separate laws provide for the election of the Members of Parliament, the Mayor and the members of the local representative bodies. For the adoption of these laws the votes of *two thirds of the MPs present* are necessary” (emphases added).

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Unlike other provisions of the constitutional charter currently in force, Art. 2(1) of the Fundamental Law of 2011 does not dramatically depart from its antecedent, as it provides that “[c]itizens eligible to vote shall exercise *universal and equal suffrage* to elect the Members of Parliament by direct and secret ballot, in elections which guarantee free expression of the will of voters, in accordance with the procedures laid down in a *cardinal Act*” (emphases added)³⁶. The most interesting point about these provisions is that a legislative supermajority is required in order to adopt electoral laws. The very same supermajority was and is required in order to amend the Constitution³⁷. This confirms the special status of the electoral law among non-constitutional sources of law but the reasons underlying these procedural requirements may well be very different, as will be shown later in greater detail. It is enough to recall that the Fundamental Law currently in force states that a great many areas of the legal system should be regulated by cardinal Acts. According to critics, including the Venice

³⁴ See C. Lavagna, *Il sistema elettorale nella Costituzione italiana*, cit., 866.

³⁵ See M. Croce, *Appunti in tema di Costituzione italiana e sistemi elettorali (rileggendo Carlo Lavagna)*, in *Riv. AIC*, 2011, available at www.rivistaaic.it/appunti-in-tema-di-costituzione-italiana-e-sistemi-elettorali-rileggendo-carlo-lavagna.html.

³⁶ Under Art. T(4) of the Fundamental Law, cardinal Acts are defined as Acts of Parliament “for the adoption or amendment of which the votes of two-thirds of the Members of Parliament present shall be required”.

³⁷ See Art. 24(3) of the Constitution of 1949/1989 and Art. S(2) of the Fundamental Law.

Commission³⁸, “several of these should be left to ordinary legislation. ... In the present legislative cycle, the governing parties possess the necessary majority to adopt these cardinal Acts. However, a future government having a simple majority without support from the opposition will be limited in shaping its economic and financial policies”³⁹.

Thus, the principle of equal suffrage provides the main constitutional parameter for the judicial review of electoral laws. Leaving aside the general prohibition of plural and weighted voting, this principle lends itself both to 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, for the principle of equal suffrage to be fully respected, the electoral law should also be required to ensure that each vote is equally efficient, i.e. there is equal opportunity for success at the polls, *Erfolgswertgleichheit* according to the FCC.

In Italy, a moderate reading of the principle of equal suffrage clearly prevailed until the Constitutional Court rendered its Judgment no. 1/2014. Carlo Lavagna argued that the implicit constitutional entrenchment of proportional representation required Art. 48 of the Constitution and the principle of equal voting 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 representation⁴⁰.

3. Constitutional courts facing electoral laws

Constitutional courts are becoming more often involved with reviewing electoral laws⁴¹. This is more striking in Western European democracies, in which conflicts concerning electoral laws were traditionally reserved for agreements among the political actors. Consequently, the legislature was supposed to enjoy wide discretion within the framework of the constitution⁴². On the whole, this trend might be seen as a signal of growing disconnection between political elites and the public and also between established political parties and emerging parties and movements. Political elites might have been perceived to have

³⁸ Venice Commission, Opinion no. 621/2011 on the new Constitution of Hungary, § 22 ff.

³⁹ P. Sonnevend, A. Jakab, L. Csink, *The Constitution as an Instrument of Everyday Party Politics: The Basic Law of Hungary*, in A. von Bogdandy, P. Sonnevend (Eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania*, Oxford, 2015, 33, 78 f.

⁴⁰ See C. Lavagna, *Il sistema elettorale nella Costituzione italiana*, cit., 871.

⁴¹ See e.g. T. Abbate, G. Milani, *Giurisprudenze costituzionali e sistemi elettorali: la sentenza n. 1/2014 della Corte costituzionale italiana in prospettiva comparata*, in *Rass. parl.*, 2014, 913; A. D’Aloia, *Dai voti ai seggi. Limiti costituzionali alla distorsione della rappresentanza elettorale*, in *Rass. parl.*, 2014, 813; G. Delledonne, *Corti costituzionali e legislazione elettorale: una comparazione italo-tedesca*, in *Riv. trim. dir. pubbl.*, 2014, 1031.

⁴² See C. Pinelli, *Eguaglianza del voto e ripartizione dei seggi tra circoscrizioni*, in *Giur. cost.*, 2010, 3322.

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 more clearly recognisable is undoubtedly the Federal Republic of Germany. The FCC has developed a strict reading of the principle of equal suffrage and a generous interpretation of voting rights protected by Art. 38 of the Basic Law as a constitutional clause justifying the admissibility of constitutional complaints in this area⁴³.

The Italian and the Hungarian constitutional courts have both been involved in those discussions and conflicts, which are always somehow embarrassing for constitutional judges because of some long-standing assumptions about electoral laws being very peculiar laws. Leaving aside the issue of legislative discretion, another major problem arises, in terms of legal effects, after an electoral law has been totally or partially struck down by the Constitutional Court.

Some superficial similarities, however, should not conceal fundamental differences between the margins of manoeuvre of the two courts. The most important difference has to do with access to constitutional adjudication in Italy and Hungary and, more specifically, with the possibility of challenging the electoral law before either Constitutional Court. Because of its relative youth (see above at par. 1), access to the Hungarian Constitutional Court is generally easier, as it includes cases initiated by ordinary courts, constitutional complaints, referral of laws by parliamentary minorities as well as, until 2011, *actio popularis*⁴⁴ (*ex post* review). Furthermore, before an ordinary law comes into force, it may also be referred to the Constitutional Court upon request of the National Assembly or of the President of the Republic (*ex ante* review)⁴⁵. This makes it quite easy for opposition groups, inside and possibly outside the legislature, to challenge the electoral law before the Constitutional Court. In recent times, before being promulgated, the electoral law currently in force was referred to the Court by President János Áder, who is generally seen as not being particularly

⁴³ See A. Romano, *Accesso alla giustizia costituzionale ed eguaglianza del voto. Legittimazione delle corti e discrezionalità legislativa*, in *Dir. pubbl.*, 2015, 431.

⁴⁴ President Sólyom famously defined the *actio popularis*, as regulated by the Constitution, “a substitute for direct democracy”, as it enabled ordinary citizens to participate in the process of transformation of the old legal system: see W. Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, 2nd edition, Dordrecht, 2014, 16 f. In general terms, see R. Uitz, *May Less Be More? Public Interest Standing and the Protection of Constitutional Rights. Lessons from: Hungary’s Actio Popularis*, in P. Pasquino, B. Randazzo (Eds), *La giustizia costituzionale ed i suoi utenti*, Milano, 2006, 89; M. Caielli, *Cittadini e giustizia costituzionale. Contributo allo studio dell’actio popularis*, Torino, 2015.

⁴⁵ See Art. 6, paras. 2, 4 and 6 of the Fundamental Law. Detailed regulation can be found at Sect. 23 of Act CLI of 2011 on the Constitutional Court (available at [www.alkotmanybirosag.hu\(rules/act-on-the-cc\)](http://www.alkotmanybirosag.hu(rules/act-on-the-cc))). According to Art. 26(4) of the Constitution of 1949/1989, “[s]hould the President of the Republic have reservations about the constitutionality of any provision of a law, he may refer such law to the Constitutional Court for review within the period of time specified in Par. (1) prior to ratification”.

hostile to the policies of Prime Minister Viktor Orbán⁴⁶. The provisions concerning preliminary voting registration were declared unconstitutional by the Court⁴⁷.

In Italy, it seems much more difficult, at least initially, to challenge the national electoral law before the Constitutional Court⁴⁸. The main reason is that under Art. 66 of the Constitution, the two houses of Parliament are in charge of verifying the credentials of their members. For this reason, it is practically impossible to lodge a complaint with an ordinary or administrative court concerning the application of the national electoral law. Moreover, 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 competencies⁴⁹. In light of this, it seemed very difficult to conceive of constitutional review of electoral laws before the Court rendered its landmark judgment no. 1/2014. It should be noted, however, that the Renzi-Boschi constitutional amendment – finally rejected in a popular referendum on 4 December 2016 – tried to address this issue. If the constitutional amendment had come into force, the revised text of Arts. 73 and 134 of the Constitution would have empowered parliamentary minorities, i.e. at least one-fourth of the members of the lower house or one-third of the members of the Senate, to initiate a priori review of national electoral laws by the Constitutional Court⁵⁰. These procedural difficulties were discussed in depth by scholars with some suggesting that the Court take avail of preventive judgments on the admissibility of referendum initiatives in order to review the national electoral law by its own initiative⁵¹.

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

First, Italian constitutional provisions are quite rigid as regards the effects, most notably temporal effects, of decisions rendered by the Constitutional Court. According to Art. 136(1) of the Constitution, “[w]hen the Court declares the

⁴⁶ See K. Kelemen, *Hungary: voter registration declared unconstitutional*, in *Diritti comparati*, 5 February 2013, at www.diritticomparati.it. As regards the constitutional and political role of the Hungarian indirectly elected head of state, see J. Dieringer, *Das politische System der Republik Ungarn. Entstehung – Entwicklung – Europäisierung*, Opladen, 2009, 163 ff.

⁴⁷ Hungarian Constitutional Court, judgment no. 1/2013 (English translation available at hunconcourt.hu/letoltesek/en_0001_2013.pdf).

⁴⁸ Italian electoral laws regulating the election of regional legislative assemblies and of the European Parliament lie outside the scope of this essay.

⁴⁹ See V. Barsotti, P.G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice in Global Context*, Oxford, 2016, 52 ff.

⁵⁰ See E. Rossi, *Una Costituzione migliore? Contenuti e limiti della riforma costituzionale*, Pisa, 2016, 127 f.; F. Dal Canto, *Corte costituzionale e giudizio preventivo sulle leggi elettorali*, in *Quad. cost.*, 2016, 671.

⁵¹ See M. Croce, “*Se non ora quando?*”: sui possibili vizi di costituzionalità della legge elettorale (e sui possibili modi per farli valere), in *Forum costituzionale*, 9 December 2007, at www.forumcostituzionale.it.

constitutional illegitimacy of a law or enactment having 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 cope with the problem of graduating the temporal effects of its judgments⁵² and this might be particularly urgent with regard to national electoral laws, which the Court has consistently described as constitutionally mandated laws (*leggi costituzionalmente necessarie*)⁵³. 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, considerably affects the review performed by the Court when an electoral law is at stake⁵⁴. In the last few years, also because of the need to take into account the implications of the financial crisis, the Constitutional Court has been experimenting with more sophisticated decision-making techniques⁵⁵.

In Hungary, on the other hand, the power of the Court to graduate the temporal effects of its decisions is more clearly and comprehensively regulated at Sect. 45(4) of Act CLI of 2011. This strengthens the institutional position of the Court vis-à-vis the legislature when reviewing so crucial a law as the national electoral law. Moreover, the Court may also point at an unconstitutional omission of the legislature and call upon it to meet its legislative duty before the expiration of a judge-set deadline. This was the case, for instance, with judgment no. 22/2005 (see later).

A final relevant point is the willingness of a constitutional court to engage, more or less explicitly, in a comparative “dialogue” with the case law of its counterparts in other jurisdictions, thereby borrowing arguments and citing judgments of other courts. In this sector of the legal order, the activist approach of the German Federal Constitutional Court and its demanding interpretation of the principle of equal suffrage are an obvious, prestigious reference. On the other hand, both the Italian and Hungarian constitutional courts have been criticised for their rather unsystematic, inconsistent use of comparative arguments in their respective case laws⁵⁶.

⁵² See V. Barsotti, P.G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice in Global Context*, cit., 87 f.

⁵³ Italian Constitutional Court, judgment no. 26/1997.

⁵⁴ As remarked by V. Barsotti, P.G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice in Global Context*, cit., 51.

⁵⁵ See C. Bergonzini, *The Italian Constitutional Court and Balancing the Budget*, in 12 *Eur. Const. L. Rev.* 177 (2016).

⁵⁶ See P. Passaglia, *Il diritto comparato nella giurisprudenza della Corte costituzionale: un'indagine relativa al periodo gennaio 2005-luglio 2015*, in *Giurcost.org*, 13 July 2015, at www.giurcost.org/studi/passaglia6.pdf; Z. Szente, *Hungary: Unsystematic and Incoherent Borrowing of Law. The Use of Foreign Judicial Precedents in the Jurisprudence of the Constitutional Court, 1999-2010*, in T. Groppi, M.C. Ponthoreau (Eds), *The Use of Foreign Precedents by Constitutional Judges*, Oxford, 2013, 253; A. Jakab, J. Fröhlich, *The Constitutional Court of Hungary*, in A. Jakab, A. Dyeve, G. Itzvovich (Eds), *Comparative Constitutional Reasoning*, Cambridge, 2017, 394, 418 f.

4. The evolution of electoral legislation in Italy and Hungary since the 1990s

According to classical political science analyses, electoral systems “tend to be very stable and resist change”⁵⁷. In the last two decades, however, electoral reform has been a major issue on the political agenda both in Italy and Hungary. Those debates have been somehow ambiguous, as the involved actors have discussed both about modifying the system in place and switching to a new one. In Italy, the relative instability of electoral legislation since the early 1990s, as well as before the establishment of the Republic, in the pre-Fascist phase of the history of the Kingdom of Italy, has been viewed as providing evidence of a long-lasting troublesome relationship between voters and political elites⁵⁸. The Hungarian case is slightly different as after 1989, it was marked by apparent stability because of the lack of political consensus about how to modify the provisional electoral law of 20 October 1989⁵⁹. After 2010, the electoral system has been modified in the framework of the wider process of constitutional overhaul promoted by Viktor Orbán’s government.

In the 1990s, both countries adopted electoral systems which somehow resemble the German mixed system of “personalised proportional representation” (*personalisierte Verhältniswahl*) but fundamentally differ from it as they are more concerned with political stability than with proportionality. Thus, the majoritarian component of those electoral systems is no less important than the proportional one. In Hungary, the adoption of a mixed electoral system was part of the Transition settlement, with Communist and Free Democrats favouring single-member districts and the “historic parties”⁶⁰ favouring a return to the electoral system of 1945, based on proportional representation⁶¹. Possibly for this reason, the final compromise, a two-round voting system with a 5 percent threshold, 176 MPs elected in single-member constituencies, 152 on the basis of district lists and 58 on the basis of national lists, was somehow “eternised” by Art. 71(3) of the Constitution, which ensured its stability until Fidesz won a two-thirds majority at the 2010 general election. Hungarian

⁵⁷ A. Lijphart, *Electoral Systems and Party Systems: A Study of Twenty-Seven Democracies 1945-1990*, Oxford, 1994, 52.

⁵⁸ See S. Cassese, *Governare gli italiani. Storia dello Stato*, Bologna, 2014, 80 ff.

⁵⁹ See M. Dezső, *Electoral System in Hungary 1985-2005*, in A. Jakab, P. Takács, A.F. Tatham (Eds), *The Transformation of the Hungarian Legal Order 1985-2005: Transition to the Rule of Law and Accession to the European Union*, Alphen aan den Rijn, 2007, 50, 62.

⁶⁰ I.e. the Christian Democrats and the Independent Smallholders’ Party.

⁶¹ See M. Dezső, *The New Electoral System of the Hungarian Republic*, in 32 *Acta Juridica Hungarica* 129 (1990); S. Bartole, *Riforme costituzionali nell’Europa centro-orientale. Da satelliti comunisti a democrazie sovrane*, Bologna, 1993, 73; B. Owen, *I nuovi sistemi elettorali nei paesi dell’Est europeo*, in M. Luciani, M. Volpi (Eds), *Riforme elettorali*, Roma-Bari, 1995, 391, 393; G. Tóka, *Seats and Votes: Consequences of the Hungarian Election Law*, in G. Tóka (Ed), *The 1990 Elections to the Hungarian National Assembly*, Berlin, 1995, 41; J.W. Schiemann, *Hedging Against Uncertainty: Regime Change and the Origins of Hungary’s Mixed-Member System*, in M.S. Shugart, M.P. Wattenberg (Eds), *Mixed-Member Electoral Systems: The Best of Both Worlds?*, Oxford, 2001, 231. As regards the electoral law of 1945, see detailed description by P. Santarcangeli, *La legge elettorale ungherese*, Firenze, 1946, 26 f.

electoral legislation, which has “rarely ran in tandem with European trends” suddenly became “modern by European standards ... when embracing multi-party democracy ... in 1989”⁶² as it succeeded in fulfilling the basic requirements of representation and proportionality and ensured the governability of the country⁶³.

In the wake of the Tangentopoli scandals, the end of the Cold War and the fatal decline of the once-dominant Christian Democracy party, Italian electoral laws underwent a process of deep transformation. Laws no. 276/1993 and 277/1993, known as Mattarella laws, chose mixed electoral systems for the Chamber of Deputies and the Senate, combining single-member constituencies and proportional representation. Their goal was to reconcile representation and governmental stability and to foster a bipolarisation of the political system⁶⁴.

After that, electoral reform proposals were frequent and ultimately successful. In the Hungarian political debate, the main controversial points were the two-round system and constituency boundaries. In Italy, on the other hand, political elites were suspicious of single-member districts.

In Hungary, a new electoral law was passed by Parliament on 23 December 2011 (cardinal Act CCIII on the Elections of Members of Parliament of Hungary)⁶⁵. The system is based, again, on a combination of proportional representation and single-member districts (*egyéni választókerületek*). However, there are two major differences from the previous regulation, with the elimination of the two-round vote and the introduction of a winner compensation mechanism. Under the latter, the votes cast for the winning candidate in a single-member constituency and the number of votes remaining, after deducting the number of votes for the runner-up candidate plus one, are considered as surplus votes during the distribution of the mandates from the party list⁶⁶.

The Venice Commission issued an opinion on the new electoral law of Hungary, in which it signalled both the positive and more worrying aspects. The latter had to do with the confrontational climate prior to the approval of the law and with its contents – “While it is advisable that the rules governing the constituencies’ delimitation are included in a cardinal law, particularly, the distribution formula, the inclusion of a detailed list of constituencies in the cardinal law undermines an efficient method of updating the constituencies in

⁶² M. Dezső, *Electoral System in Hungary 1985-2005*, cit., 50.

⁶³ M. Dezső, *Electoral System in Hungary 1985-2005*, cit., 62.

⁶⁴ See F. Clementi, *Vent’anni di legislazione elettorale (1993-2013). Tra il già e il non ancora*, in *Riv. trim. dir. pubbl.*, 2015, 557.

⁶⁵ See F. Vecchio, *Teorie costituzionali alla prova. La nuova Costituzione ungherese come metafora della crisi del costituzionalismo europeo*, Padova, 2013, 89 ff.; M. Szánthó, “May There Be Peace, Freedom and Accord” – the Background, Adoption Contents and Content of Hungary’s New Electoral System – Part I, in 6 *Hungarian Review* no. 5 (2015); M. Szánthó, “May There Be Peace, Freedom and Accord” – the Background, Adoption Contents and Content of Hungary’s New Electoral System – Part II, in 6 *Hungarian Review* no. 6 (2015) (both available at www.hungarianreview.com).

⁶⁶ In practical terms, this means that if the winning candidate (belonging to party A) gets 15000 votes, with the runner-up (candidate of party B) getting 12400, the number of surplus votes is $15000 - (12400 + 1) = 2599$.

respect of the principle of equality of voting rights, as it requires a qualified majority”⁶⁷. Scholarly analyses were no less nuanced: the new electoral law was unlikely to “fail simple tests of constitutionality”, while “probably distort[ing] the expression of the popular will in seat distributions and thus generat[ing] cynicism regarding democratic institutions and a drop in political legitimacy in Hungary”⁶⁸. In the same vein, Arato defined the new electoral law as “an incumbent protection measure incompatible with both the essence of written democratic constitutions, and parliamentary representation, which seek to protect the polity and the citizens against the self-aggrandizement of incumbents”⁶⁹.

In Italy, single-member districts were eliminated shortly before the general election of 2006: that move generated some criticism because of the opportunistic attitude of the then parliamentary majority. The new electoral law (law no. 244/2005) introduced a peculiar voting system based on proportional representation and a 340-seat bonus (out of 630 seats in the lower house) for the winning coalition of party lists, regardless of its share of votes. With regard to the Senate, bonuses for winning coalitions were allocated at the regional level. Members of Parliament would be elected from closed lists (*liste bloccate*), which greatly strengthened the power of party elites in choosing candidates for parliamentary seats. After fundamental provisions of law no. 244/2005 were declared unconstitutional by the Constitutional Court in judgment no. 1/2014, the legislature passed a new electoral law (law no. 52/2015, known as *Italicum*) which reproduced, with some modifications, the structure of the electoral system previously in force. Law no. 52/2015 only applied to the lower house, whereas the Senate was supposed to turn into an indirectly elected assembly had the Renzi-Boschi constitutional amendment come into force. Under law no. 52/2015, recently reviewed by the Constitutional Court in judgment no. 35/2017, the party list getting at least 40 percent on the first ballot or 50 percent on the second ballot would have automatically got the 340-seat bonus. Meanwhile, the closed list mechanism had somehow been moderated, being restricted to top candidates. A few months before the general election of 2018, the electoral law currently in force (law no. 165/2017, also known as *Rosatellum*) was approved. The current electoral law does not provide for any bonuses and puts in place a mixed system with a prevalingly proportional inspiration.

⁶⁷ Venice Commission, Opinion no. 662/2012 on the Act on the Elections of Members of Parliament of Hungary, § 17.

⁶⁸ G. Tóka, *Constitutional Principles and Electoral Democracy in Hungary*, in E. Bos, K. Pócsa (Eds), *Verfassunggebung in konsolidierten Demokratien. Neubeginn oder Verfall eines politischen Systems?*, Baden-Baden, 2014, 309, 327. See also G. Halmai, K.L. Scheppelle (Eds), *Opinion on Hungary's New Constitutional Order: Amicus Brief for the Venice Commission on the Transitional Provisions of the Fundamental Law and the Key Cardinal Laws*, February 2012 (available at http://lapa.princeton.edu/hosteddocs/hungary/Amicus_Cardinal_Laws_final.pdf).

⁶⁹ A. Arato, *Post-Sovereign Constitution Making: Learning and Legitimacy*, Oxford, 2016, 212.

5. The case law of the two constitutional courts

For the reasons mentioned above, constitutional review of electoral laws for the national legislature has generally been seen as less “dramatic” in Hungary than it used to be in Italy.

5.1. *The case law of the Italian Constitutional Court*

Until the dramatic turning point embodied by judgment no. 1/2014, it was very difficult for the Italian Constitutional Court to review the national electoral law. Still, the Court had the chance to review electoral laws applying to municipal and provincial representative bodies, regional legislative assemblies and the High Council of the Judiciary. In those judgments, the Court favoured a moderate reading of the principle of equal suffrage entrenched at Art. 48 of the Constitution⁷⁰.

After 2005, dissatisfaction with the new electoral law (law no. 244/2005) became more and more evident among the public. This mainly had to do with massive resort to closed list and the possible irrational disproportion between the 340-seat bonus and the actual share of votes of the winning coalition⁷¹. As the legislature could not or did not want to amend law no. 244/2005, there were repeated attempts to abrogate some of its main provisions and to manipulate its contents by means of referendum initiatives. The Constitutional Court had to rule on the admissibility of two referendum initiatives. In both cases, it took care of warning that “questions concerning the constitutionality of the Law affected by the request for a referendum or of the resulting legislation cannot be considered during proceedings to review the admissibility of referenda”. On the other hand, Parliament was invited to pay attention to the “problematic aspects” of law no. 244/2005, “with particular regard to the allocation of an automatic majority, both in the Chamber of Deputies and the Senate of the Republic, irrespective of the achievement of any minimum number of votes and/or seats”⁷².

Widespread dissatisfaction with this law led to judgment no. 1/2014, which came as a surprise in many respects. A group of voters had claimed before ordinary courts that the existing electoral law was violating their voting rights under Art. 48 of the Constitution and the Court of Cassation finally referred the case to the Constitutional Court. The Court decided to hear the case in spite of a well-established line of case law, pursuant to which such complaints would probably have been declared inadmissible. The reason for this decision was that

⁷⁰ Italian Constitutional Court, judgments no. 43/1961, 6/1963, 60/1963, 168/1963, 39/1973, 438/1993, 429/1995, 456/1995, 107/1996, 356/1998, 260/2002, 173/2005, and 15/2008.

⁷¹ By way of example, at the general election of 2013 the left-wing coalition got 29,55 percent of the votes compared with 29,11 percent for the right-wing coalition and 25,55 percent for the Five Star Movement. Still, the leftist parties won the 340-seat bonus at the lower house.

⁷² All citations are drawn from judgment no. 13/2012 of the Italian Constitutional Court (English translation available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S2012013_Quaranta_Cassese_en.pdf). See also judgment no. 16/2008.

“in the case under examination, the question relates to a fundamental right protected under the Constitution – the right to vote – an essential corollary of which is its association with an interest of society as a whole and has been proposed with the aim of putting an end to a situation of uncertainty regarding the effective scope of that right ... due to the need to guarantee the principle of constitutionality, it is essential to conclude that the review power of this Court – which ‘must cover the legal system as fully as possible’ (see Judgment no. 387 of 1996) – must also apply to laws, such as that relating to elections to the Chamber of Deputies and the Senate, ‘which would be more difficult to subject to [the Court’s scrutiny] in any other manner’ (see Judgments no. 384 of 1991 and no. 226 of 1976)”⁷³.

In previous judgments, concerning electoral systems for other representative bodies, the Italian Court had generally stuck to the assumption that the principle of equal suffrage is about *Zählwertgleichheit* and not *Erfolgswertgleichheit*. In judgment no. 1/2014, the Court decided to depart from this assumption. In order to justify this major innovation, it resorted to distinguishing and explained why Parliament should be set apart from other elective bodies. The Court argued that

“the Houses of Parliament are the exclusive locus for ‘national political representation’ (Article 67 of the Constitution) ... they are formed on the basis of election and hence on popular sovereignty and ... by virtue of this fact, they are vested with fundamental functions of ‘a typical and unique nature’ (see Judgment no. 106 of 2002), including the *direction* and *control of the government* along with the delicate functions associated with the *guarantee itself of the Constitution* (Article 138 of the Constitution) [i.e. amending the Constitution]”⁷⁴.

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Having in mind this and the mainly proportional nature of law no. 244/2005, the Court held that

“the fundamental principle of equality in voting ... whilst this does not require ordinary legislation to choose any given system, it nonetheless demands that each vote potentially contribute with equal effect to the formation of elected bodies (see Judgment no. 43 of 1961) and is nuanced depending upon the particular electoral system chosen. *Within constitutional systems similar to the Italian system into which that principle is also incorporated, whilst the specific form of electoral system is not afforded constitutional status, the constitutional courts have for some time expressly acknowledged that, if the legislator adopts a proportional system, even only partially, it will create a legitimate expectation on the part of the electorate that there will not be any imbalance in the effects of each vote, that is differing assessments of the ‘weight’ of each vote ‘on the outcome’ when allocating seats, except insofar as necessary in order to avoid impairing the proper operation of the parliamentary body...*”⁷⁵.

⁷³ Italian Constitutional Court, judgment no. 1/2014 (English translation available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/1-2014_en.pdf). See also A. Baraggia, *Italian Electoral Law: A Story of an Impossible Transition?*, in 16 *Election L. J.* 272 (2017).

⁷⁴ Italian Constitutional Court, judgment no. 1/2014 (emphases added).

⁷⁵ Ibid. (emphasis added).

Interestingly, the Court resorted to comparison with the case law of the German Federal Constitutional Court in order to strengthen its point about the two-sided meaning of the principle of equal suffrage.

On the other hand, the provisions attributing a bonus to the winning coalition – regardless of its share of votes – were declared unconstitutional as they failed the proportionality test. Governmental stability may well be “an objective of constitutional significance”; however, it cannot be pursued in a way that “excessively limits the representative function of the Chamber of Deputies, as well as the equal status of each individual right to vote, in such a manner as profoundly to alter the composition of the democratic representative bodies on which the entire architecture of the prevailing constitutional order is based”⁷⁶.

Finally, the Court considered the wider impact of its judgment on the sitting Parliament and did not declare it illegitimate – “this decision is not capable of impinging in any way even on the acts which the Houses of Parliament may adopt before the next elections: the Houses are constitutionally necessary and essential bodies and cannot cease to exist or lose their capacity to act at any time”⁷⁷. This point became highly controversial in the heated discussion about the legitimacy of the Renzi-Boschi reform⁷⁸.

In January 2017, the Italian Constitutional Court rendered its much-awaited judgment regarding the electoral law no. 52/2015 (judgment no. 35/2017⁷⁹). Again, it decided to hear the case raised by groups of voters and activists before ordinary courts, thus confirming its judgment of 2014.

The Court upheld the 40 percent threshold which the winning list has to pass on the first ballot in order to receive the bonus. On the other hand, the provisions concerning the second ballot were declared unconstitutional, as the possible national victory of a list having collected a modest share of votes on the first ballot might turn into an unreasonable sacrifice of the constitutional principles of representation and equal suffrage. Again, the legislative provisions at stake – aiming at favouring governmental stability – failed the proportionality test. Moreover, the possible second ballot is not unconstitutional per se but could be conceived as such because it is held at the national level and is incorporated into an allegedly proportional voting system. The final point of the judgment is perhaps the most interesting one. After judgment no. 35/2017, Italy was left with two clearly different voting systems for the Chamber and Deputies and the Senate. In its reasoning, the Court seems to embrace a no-nonsense approach: having two different voting systems for the houses of parliament is not forcedly unconstitutional. This, however, should be reconsidered in the aftermath of the massive rejection of the Renzi-Boschi constitutional amendment last December:

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ See e.g. G. Azzariti, R. Bifulco, F. Bilancia *et al.*, *Dieci domande sulla riforma costituzionale*, in *Quad. cost.*, 2016, 219.

⁷⁹ See P. Faraguna, *Do You Ever Have One of Those Days When Everything Seems Unconstitutional?: The Italian Constitutional Court Strikes own the Electoral Law Once Again*, in 13 *Eur. Const. L. Rev.* 778 (2017).

“while the Constitution does not oblige the legislature to introduce identical electoral systems for the two branches of Parliament, it does nevertheless require that the systems adopted, in order not to compromise the correct functioning of the parliamentary form of government, and despite their potential differences, must not impede, upon the outcome of elections, the formation of homogeneous parliamentary majorities”⁸⁰.

It is interesting to note that most of these arguments have been used by the Court with regard to proportional voting systems. The issue would be addressed in a significantly different way if the legislature decided to adopt again a voting system based on single-member constituencies⁸¹.

As of today, the Constitutional Court has not rendered any judgments regarding the *Rosatellum* law. On the whole, it seems that one rationale is detectable by default in the electoral law currently in force, i.e. a willingness to avoid any manifest violations of substantive constitutional principles.

5.2. *The case law of the Hungarian Constitutional Court*

From the beginning of the post-Communist constitutional transition, the Hungarian Constitutional Court has generally shown greater reluctance in the area of electoral laws. In a way, its cautious attitude is in sharp contrast with the generally proactive role which the Court was so willing to play in the first decade after the transition⁸². In practical terms, this means that the Court has generally stuck to a moderate reading of the constitutional principle of equal suffrage. In this respect, the leading case is judgment no. 3/1991, which upheld the 4 (later 5) percent threshold required for getting parliamentary seats in the party-list component of the electoral law of 1989. According to the Court:

“the principle of equality does not include the criterion of success at the polls; it does not mean that each person’s vote is equally efficient. The fact that suffrage is equal does not and cannot mean that all political intentions expressed at election can be expressed with the same efficiency. ... the result is inevitably disproportional. In view of this interpretation, the Constitutional Court has declared that the parliamentary threshold requirements do not infringe the requirement of equality of suffrage (judgment no. 3/1991)”⁸³.

⁸⁰ Italian Constitutional Court, judgment no. 35/2017 (English translation available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/2017_35_EN.pdf)

⁸¹ See A. Pertici, *La Corte costituzionale dichiara l’incostituzionalità della legge elettorale tra attese e sorprese (con qualche indicazione per il legislatore)*, in *Forum costituzionale*, 4 February 2014, 1, 6, at http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/giuri_sprudenza/2014/0003_nota_1_2014_pertici.pdf.

⁸² In this regard, see A. Sajó, *Reading the Invisible Constitution: Judicial Review in Hungary*, in 15 *Oxford J. Legal St.* 253 (1995).

⁸³ M. Dezső (with B. Somody, A. Vincze, E. Bodnár, N. Novoszádek, B. Vissy), *Constitutional Law of Hungary*, Alphen aan den Rijn, 2010, 126.

On the other hand, the Hungarian Court showed greater concern for the respect of the principle of equal suffrage with regard to the size of single-member constituencies. In its judgment no. 22/2005,

“the Constitutional Court has stated that it is a constitutional requirement derived from the principle of equal suffrage that there should be a minimized difference between the numbers of eligible voters in the individual constituencies”⁸⁴.

In that judgment, the Hungarian Court did not only establish an unconstitutional legislative omission, it also called upon the Parliament to meet its legislative duty by 30 June 2007. In setting the deadline, the Constitutional Court paid attention to the constitutional concerns related to amending the Act directly before the general election of 2006. At last, the legislature did not fulfil its own legislative duty and constituency boundaries were not reviewed before the comprehensive electoral reform of 2011 was passed.

The Court also made it clear that

“the Parliament has a wide scale of discretion in establishing the system of election and the rules of procedure of the election. The legislator is free to define the constituency systems and the rules pertaining to the nomination of candidates voting and the obtainment of mandates. The Parliament may exercise this freedom of discretion in establishing the rules of election only within the constitutional limits and it is required to adopt rules that do not violate the provisions of the Constitution and do not unconstitutionally restrict any fundamental right regulated in the Constitution”⁸⁵.

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This overall cautious attitude has been put under stress after the Fundamental Law of 2011 came into force. In compliance with Art. 2(1) of the Fundamental Law, the legislature passed a new electoral law – in the form of a cardinal Act – on 23 December 2011 (Act CCIII on the Elections of Members of Parliament of Hungary). Again, the new voting system can be described as a mixed system. Harsh critics agree that it does not depart dramatically from the Hungarian legislative tradition in this area of the legal order but it still undeniably strengthens the position of the most successful party at the election, thanks to the combination of plurality (one-round) voting and voting compensation mechanism. Undoubtedly, the voting compensation mechanism does not foster the proportional component of the voting system regulated by cardinal Act no. CCIII of 2011. According to critics, there is some kind of mutual implication between the great number of cardinal Acts mentioned in the Fundamental Law – and of constitutional amendment passed after it came into force – and the majority enhancing⁸⁶ electoral laws of post-Communist Hungary.

The task of the Court appeared even more complicated as a constitutional amendment passed on 25 March 2013 had formally eliminated all decisions of the Court prior to 2011 as precedents.

⁸⁴ Ibid.

⁸⁵ Hungarian Constitutional Court, judgment no. 22/2005 (English translation available at hunconcourt.hu/letoltetek/en_0022_2005.pdf).

⁸⁶ But not majority-assuring, as it was the case with Italian laws no. 244/2005 and 52/2015.

The electoral law was first reviewed by the Constitutional Court in 2012 with regard to the voting registration issue. In 2014, it was challenged before the Court again. In judgment no. 3141/2014 of 9 May 2014, the Court adjudicated a constitutional complaint initiated by a political party with parliamentary representation called *Együtt* (Together)⁸⁷. The complainant argued that winner compensation is contrary to the principle of equal vote – the party winning a single-member constituency is not only awarded that particular mandate but also extra points in the party-list calculations when it wins by more votes than needed.

In accordance with its case law, the Constitutional Court pointed out that the Fundamental Law does not contain detailed provisions about the electoral system itself; rather, it only prescribes some principles. On the other hand, the Court tried to develop a “reasonableness” test for the legislative provisions at stake: the relevant point was whether – and if so, to what extent – these norms limited the rights of the petitioners to vote and stand as candidates. At last, they did not fail this test.

The judgment was followed by a concurring opinion of Judge Béla Pokol and two dissenting opinions drafted by Judge László Kiss and Judges Miklós Lévay and András Bragyova respectively. Judge Lévay’s opinion is quite interesting in that it tries to read the principle of equal suffrage in connection with fundamental rights and general guarantees of the rule of law. Furthermore, it also stressed that an opinion of the Court striking down the new electoral law should have limited the temporal effects of the annulment, so as to preserve the functionality of the Parliament elected at the general election of 2014.

6. Concluding remarks

Comparative analysis has shown that the judicial review of electoral laws is currently one of the most formidable challenges for constitutional adjudication. Complex constitutional principles are at stake, most notably equality and representation but also the efficient operation of a parliamentary regime. At the same time, constitutional courts face massive pressure from both the public and political elites. The political debate which preceded Judgment no. 35/2017 of the Italian Constitutional Court provides a convincing example for this claim. Following the constitutional referendum on 4 December 2016, the *Italicum* 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 the *Italicum* electoral law seemed to have been deprived of political support. In the end, however, political elites decided not to change it

⁸⁷ See press release here: hunconcourt.hu/sajto/news/press-release-on-the-examination-of-the-provisions-of-act-on-elections-concerning-the-surplus-votes. A summary of the decision (in English) is available here: www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm&vid= (full text in Hungarian available at public.mkab.hu/dev/dontesek.nsf/0/6EF7470F49B0A567C1257CC90033F3C7?OpenDocument).

and instead to wait for a judgment of the Court akin to listening to an oracle. The Hungarian case, in turn, shows some of the problems which a Constitutional Court operating in the framework of massive constitutional transformation has to face.

The frequent involvement of constitutional courts in this area of the constitutional order may well mean that these are “mov[ing] closer to the global constitutional ideal that ‘everything is justiciable’”⁸⁸. They also point at the weakness of representative political elites, which looks disconnected from the general public⁸⁹. This is clearly the case in the last decade and it was possibly the case of Hungary in the first decade of the 21st century. 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 clear trends pointing at a further fragmentation of society and its elected representatives.

The formidable challenge which constitutional courts are facing is to bear in mind this factual background and to treat the electoral law as a (non-detached) part of the constitutional order. As such, it should be interpreted and reviewed in the light of all the relevant constitutional principles. This has become even more crucial, as recent developments in both countries have shown how closely intertwined constitutional reform and electoral reform might be.

On a different note, some peculiar aspects of the Hungarian case, including the apparent constitutionalisation of “everyday party politics”⁹⁰, seem to show that a significant transformation is possibly taking place. The European constitutional heritage in this field, as reflected by the Code of Good Practice in Electoral Matters, valued the stability of electoral laws highly: therefore, it seemed appropriate to recommend the constitutionalisation of some basic aspects of the electoral system. In the light of the peculiar circumstances of the self-styled “illiberal democracies” in Central and Eastern Europe, this point has to be reconsidered: emphasis should be put not so much on stability as on the openness of the political process and the good functioning of democracy.

⁸⁸ E. Longo, A. Pin, *Judicial Review, Election Law, and Proportionality*, in 6 *Notre Dame J. Int'l Comp. L.* 101, 102 (2016).

⁸⁹ See A. Pisaneschi, *Giustizia costituzionale e leggi elettorali: le ragioni di un controllo difficile*, in *Quad. cost.*, 2015, 135, 139.

⁹⁰ See P. Sonnevend, A. Jakab, L. Csink, *The Constitution as an Instrument of Everyday Party Politics*, cit.