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Electoral laws, judicial review and the principle of "communicating vessels"[*]

by

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TABLE OF CONTENTS: 1. Introduction: decision n. 1 of 2014 – 2. The ever-increasing value of the precedent: decision n.35 of 2017 in the context of constitutional case law on electoral laws – 3. The relationship between political activity and function of constitutional guarantee in the actual institutional practise – 4. The "Renzi-Boschi" constitutional reform attempt – 5. A judge "owner" of the trial?

1. Introduction: Decision n. 1 of 2014.

Recent Italian political events have marked the failure of approving a new electoral law applicable to both Chambers of the Parliament, inspired by the example set by the so-called German model , through the use of a basically proportional system, with a threshold of votes of 5%. This was a confirmation of the inability of the current political-party system to reach an agreement to pass the "most political" of the laws, as the electoral law can be considered, since political parties through them regulate, in a certain sense, how to self-select to occupy – to use a strong word – the parliamentary assemblies and from them, more generically, the institutions.

This situation is not new; it can be traced back to the approval of law n. 270 of 2005 and the controversies in subsequent years on its application and the calls for its modification on the basis that it infringed the Constitution, especially for the lack of the so-called "preferential vote", as well as for the mechanism to award the "majority premium". Hence (partially) unconstitutional it was declared by the Constitutional Court in its well-known (and controversial) decision n. 1 of 2014, which manifested

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some distortions in the mechanism to access judicial review, as most scholars lamented. In particular, the decision was criticized for consenting – under the cover of preliminary reference – to substantially gain direct access to judicial review, which was instead legally conceived as an "indirect" mechanism; judicial review being regulated as preliminary ruling to arise in the course of a case requiring the application of the alleged unconstitutional law .

Indeed, the Constitutional Court's position in the 2014 decision, which considered admissible the constitutional issue – arisen in the course of a case dealing with the scope of the right to vote of a citizen-elector allegedly hurt by the 2005 electoral law – has led to the doubt that the Judge of the laws, in this instance, agreed to a fictio litis to be able to proceed reviewing the law , even if with the laudable intent to undermine what had come to constitute a sort of "free area" of the judicial-review process . Indeed, it is relevant in this matter the Chambers' exclusive competence to "verify the powers" ex art. 66 Const. (as applied by art. 87, I co. D.P.R. n. 361/1957) which, in the extensive interpretation given by the case law, was extended to embrace all that could encompass the potential "legal case" for political elections, comprising the verification of formal compliance of electoral operations, up to including constitutional issues regarding the electoral system . Hence this scope ended up constituting a considerable vulnus of constitutional principles regarding access to justice, in particular constitutional justice, more and more evident as the rigorous observance of the principle of parliamentary autonomy gave up to considerations on the necessities of a system based on checks and balances, whereby powers respect, but also limit, each other. Furthermore, the substantial lack of interest of political representatives (as well as of the Chambers as a whole) to solicit a judgment by the Constitutional Court on the norms upon which their legitimacy is funded contributed to explain the long-standing lack of judicial review on electoral laws .

2. The ever-increasing value of the precedent: Decision n. 35 of 2017 in the context of constitutional case law on electoral laws

However, from a procedural point of view, the decision of 2014 disclosed the risk of introducing a new general possibility to access judicial review for the protection of constitutional rights through mere-ascertainment decisions . Possibility confirmed,

more recently, by decision n. 35 of 2017, in which the Constitutional Court declared the (partial) illegitimacy of law n. 52 of 2015, (so-called Italicum) for the election of (only) the Chamber of deputies, which had meanwhile been supported by the Renzi Government in view of the constitutional reform of the bicameral system. In this wide reform proposal, indeed, only the low Chamber would have remained directly elected. Hence – in view of a favourable outcome of the constitutional referendum – the Government of the time did not consider necessary to intervene in order to pass a new electoral law applicable to the Senate. Then followed complaints by numerous judges at a time in which the electoral law had not yet ever been applied (and even in a case was not yet applicable), whilst constitutional scholars solicited the Court to more strictly comply with the rules of judicial review, particularly for what concerns admissibility, with reference to the requisite of so-called "relevance" . But not even this time the urge desisted the consideration of the issue, which resulted in the Constitutional Court delivering decision (of partial illegitimacy) n. 35 of 2017.

The situation created is, therefore, the current effectiveness of two different electoral systems for the two Chambers, not wholly homogenous as a result of the alterations produced on law n. 270 of 2005 (for the Senate of the Republic) and n. 52 of 2015 (for the election of the Chamber of deputies) by the already-mentioned decisions of the Constitutional Judge , whose interventions substantially rewrote the above-mentioned laws. Indeed, some argue that, by doing so, the Constitutional Court undermined legislative discretion beyond the legal limits , ending up expanding beyond its natural "guardian" function, to a substantial role of positive law-maker .

This constitutional-law anomaly manifests politics' inability to overcome it by decisively intervening modifying one law, or both, in order to make homogenous (hence compliant with the current system of the so-called "perfect" bicameralism) the electoral system for the two Chambers. Indeed, this last possibility is particularly relevant for the fact that the political decision makers in this way seem (at least for now) willing to give up on exercising their own function, i.e. the political-legislative one, even in the most political context, as electoral laws have already been described. This impasse can be explained in relation to the well-know current difficulties of the Italian system, including, among other factors, the fluidity of its political actors, which can hardly be still defined "parties" in the traditional sense.

However, such impasse is also unsurprising considering the political-institutional history of our Country. Indeed, even in the different framework created in time by the same political-party system, for reasons not always and not only determined by the very electoral reforms, in Italy the evolution of legislation in the matter has often been substantially interfered with and conditioned by the intervention of the constitutional Judge.

Firstly, it occurred in the form of admissibility of the referendum, initially negated, but later allowed within the limits (refined time by time), which now constrain the "Promoters" to operate in a substantially manipulative way on the legislative text in order to make self-applicable the resulting laws, so to pass the Court's control .

In this way, from the admissibility of referendums on electoral laws would stem a true "dialogue", meaning a confrontation between the constitutional Court and Promoters . Indeed, considering the way the referendum request is redacted, the Court's decision would derive in a sort of positive indication, destined to be valued and followed by the Promoters, thereby leading to the substantial revision of the norms, a process that would therefore include the constitutional Judge. Even more in relation to the strength that precedents seem to have acquired, not only regarding the credibility of the constitutional Court before public opinion, but also with reference to the force that they end up exercising on Promoters in their formulation of the issue in view of overcoming the admissibility bar.

More recently one has seen a change in the Court's chance to intervene as the constitutional Judge delivered first decision n. 1 of 2014 and later decision n. 35 of 2017 in legitimacy judgement, which both concluded– as already recalled – the partial illegitimacy of the laws.

It is not necessary here to recall in detail the doubts expressed by scholars already about the admissibility itself of the issue . Rather deserving, instead, is to underline how the so-called "substantial rewriting" of electoral laws has become even more direct and punching, not having to submit either to the "mediation" of a promoting Committee, or the risky response of the electoral body, given the already-mentioned 2014 and 2017 decisions' self-applicability. Moreover, the consolidated practice by the Judge of the laws to explicate those that ought to be considered true fundamental principles in electoral matters has been alleged to undermine, in the future, lawmakers'

discretion . Indeed, even without affirming the establishment of the constitutional necessity of the proportional method , once the constitutional-justice body indicates principles in this subject, these could hardly be later abandoned by lawmakers in subsequent amendment of the matter .

3. The relationship between political activity and function of constitutional guarantee in the actual institutional practice

Therefore, after years of inertia (and/or inability) of the political class in modifying the electoral norms, the initiative and direction of the activity of Lawmakers have come from decisions (even though originated in different venues and occasions) by the constitutional-justice body, recently criticized for going much beyond its institutional role and functions, thereby invading the very ones of political-legislative activity .

However, considering generally, the Italian political-institutional history shows that, notwithstanding the distinction that the Constitution has established between bodies of political scope and bodies of constitutional guarantee and their relative functions, in practice the relationships between the two often appears to take on dynamics resembling the principle of "communicating vessels", as it is often the case that given a strong recession by politics, the activity of the guarantee bodies comes to expand (and "spill") their scope into the political sphere. In the same sense, even in a totally different context, ought to be read the practice of interventions of the Head of State upon the formation of Governments. Indeed, in opposition to the so-to-say "notary" role of mere registration of the political context, so far exercised perhaps only by President Einaudi in the first years of the Republic during the hegemony of the democristian party of Alcide De Gasperi, one can find – depending on political circumstances as well as the personality of the several Presidents of the Republic – interventions at time exceedingly pervasive by the Head of State, even in the political formula of the coalition agreement and sometimes even on the contents of the Governments' programs ; not being alien to the Italian historical-political experience, from Gronchi onwards, the practice of "bonded mandates" , until episodes, still fresh in current memory, that manifest the pervasive role exercised by President Napolitano (at the very least) in occasion of the formation of, in order, Governments Monti, Letta and Renzi.

It is fair then to wonder on the meaning of the observation and the answer does not seem to differ from all cases in which the application of the Constitutional Chart on the realm of the material Constitution shows significant departures of the latter from the former. Indeed, this distance ought to be a stimulus in the alternative between an update of the fundamental text to the new scenarios required by the political context and, more in general, by society or, on the contrary, towards a more rigorous compliance with the formal Constitution, not only by political actors, but, more in general, by all bodies playing in the institutional life. This second option, in particular, seems compulsory whenever the first one proved impossible because it would upset the very structural principles of the constitutional order, such is to be considered the one stating the distinction between functions of political decision and functions of protection of constitutional legality.

It is then on the basis of this principle that Parliament cannot and should not escape its own function of making laws, including electoral laws ; whereby if it gave up acting, it ought to be called to its tasks by the bodies of guarantee, but with the instruments institutionally entrusted to them, in order to close the distance, rather than "spilling" these latter (still and even more so) outside their own field.

4. The "Renzi-Boschi" constitutional reform attempt

Indeed, a – later failed - attempt to renew the constitutional order and so to reduce that distance can be found in the provision – among the many contained in the so-called "Renzi-Boschi" law – of a preventive legitimacy control on electoral laws , which, at least for the future, should have avoided those contortions of the regulation of judicial review via preliminary ruling, occurred upon the establishment of the review leading to the already-mentioned decision n. 1 of 2014.

Even more significant, the general provision of a preventive judicial review of electoral laws would have avoided for the future, where agreeing to hear the case, the norms approved by the Parliament would have been undercut by different norms deriving from the decision of the Court, given that the laws hypothetically declared unconstitutional would have not been promulgated and, therefore, would not have entered in force, thereby remitting the ball in the playing field of properly political decision (and compromise). Once rejected the constitutional reform, of course also this

possibility waned and with it also all the inconveniences that such preventive review as it had been conceived, by initiative of qualified minorities, could on the other hand have revealed about the danger of a systematic drag, in practice, of the Court into the political arena , whereby instead of resolving, would rather have radicalized the above-mentioned general overlap between function of guarantee and practical political activity nowadays disapproved of (or entrusted to, depending on the point of view) the Constitutional Court. The latter – as often recalled – is nowadays criticized, in particular, for having distorted the scope of the norms regulating the exercise of its jurisdiction, which according to scholarship would have required, in both the above-mentioned circumstances, that the Court limited itself to declare the issue inadmissible.

5. A Judge "owner" of the trial?

However, it is a consolidated practice of the constitutional Court to go well beyond the "heteronomous" dispositions regulating its functioning, because, despite being a body that exercises its functions in judicial ways, according to its own constitutional nature it enjoys a wide autonomy, including the normative one, as shown by the so-called "integrative norms". And moreover, it is not rare that they from time to time receive (and thus formalize) rules practically sprout from the very case law, thereby showing the uniqueness of a Judge able to regulate the proceeding before themselves.

Indeed, it is well known as the Court often "escapes" from the legislative regulation of its functions and as this "escape" leads precisely to the result, currently feared, of a trespass of its intervention in a terrain, the political one, in which the body acting as an arbiter should limit itself to monitor from a neutral standpoint to ensure compliance with the rules of the game played by the different "teams" in the field: political majority and minorities.

Like, to give an example, as generally already occurred with the increase of tools entertaining the issue, well beyond the mere (also partial) annulment, in particular with the decisions so-called "manipulative" and among them, primarily of the "additive" ones, with respect to which the Court long failed to self-restrain, notwithstanding the reiterated urges not to intervene in the matters in way that would substantially create new norms, in order to respect the legislative autonomy, in particular in cases affecting the State's financial framework.

Or again recently, one must recall the cases of modulation of the temporal effects of the decisions in which the constitutional Judge stated the non-retroactivity of the effects deriving from hearing the case, not only in case of supervening unconstitutionality, but also following the ascertainment of original unconstitutionality , when it asked the judge "a quo" (and judges with pending judgments) to apply anyway the norm declared unconstitutional, with a clear twist, therefore, of the meaning that art. 30 of law n. 87 of 1953 gave of art. 136 of Italian Constitution. In these cases, indeed, the Court shows its intention to use "a power that seems to be insulated from any attempt to fix criteria and presumptions, assuming the features of an absolutely-discretionary power much more similar to the lawmaker's (though ad interim) rather than the judge's" .

In light of these and other examples that we could bring, of at least substantial derogation in single instances or possibly of a true general redefinition of the norms regulating the functioning of trial, it does not come as a surprise that also with respect to electoral laws, the Court has forced the procedural norms, assessing the merits.

The consequence in this case, as anticipated before, was not only to intercept legislative discretion, but also – consolidating in 2017 the precedent of 2014 – of leading the system towards a substantial twist of judicial review, as it was originally conceived, which from practical judgement would end up becoming an abstract control, through the substantial emptying of the already-recalled art. 23, l. 87/53, at least for what concerns the filter of "relevance", in the moment in which the Court agreed to assess a law even if never yet applied, continuing, in other instances, to manifest the uniqueness in the system of a Judge who does create by themselves, time after time, the rules of their own trial.

However, the price to pay could be high for a body that roots its legitimacy also on the trust that it enjoys among the sovereign people, as guarantor in rigorous judicial forms of constitutional legality. Therefore, the circumstance urges a prudent use of the procedural techniques and instruments fixed in the norms previously laid down by the Legislator for the exercise of the Court's functions.