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Cover Page Footnote

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Judicial Review, Election Law, and Proportionality

Erik Longo[†] & Andrea Pin[‡]

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A Introduction: Constitutional Engineering Through Judicial Review

With its decision January 2014,[1] the Italian Constitutional Court (ICC) struck a blow to the Italian Parliament's election law,[2] increased Italian judicial review of legislation and rights adjudication, bolstered the judiciary use of comparative law, and gave a powerful stimulus to the Parliament, which eventually led to a

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1 *See* Corte Cost., 13 gennaio 2014, n. 1, Foro Italiano [Foro It.], I, 677 (It.), *translated at* `http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/1-2014_en.pdf`.

2 Legge 21 dicembre 2005, n. 270 (It.).

new election law.[3] More broadly, the ICC moved closer to the global constitutional ideal that "everything is justiciable"[4]: it made an unprecedented review of Italian electoral legislation,[5] borrowed the level of scrutiny and the legal ideas it used from other jurisdictions, and re-read the election rules from a human rights perspective. The decision, on one hand, is highly symbolic and relevant for the Italian history of judicial review of legislation to the point that its implications are barely foreseeable;[6] on the other hand, it exemplifies the progressive alignment of Italian constitutionalism to some core ideas of global constitutionalism.[7] Such a judgment would have been impossible without a sweeping recourse to comparative law and human rights language.

As to the traditional Italian of review of legislation, the ICC's judgment is unprecedented.[8] In order to hear the case, the ICC re-read its admissibility caselaw, reframed its role as an outlet for human rights claims, and enabled itself to hear virtually any case in which a human right could be at stake.

Why did the Italian ICC make such a ruling? Because, even though the Italian Parliamentary election law had been widely criticized, the relevant legislation hardly could have been subjected to the judicial review. The overwhelming Italian legal doctrine thought that there was no way that the Parliament's election law could be scrutinized by the ICC,[9] since the ICC is the only organ in charge

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[3] The annulment of the law has forced the Parliament to quickly approve a new election law. On May 5, 2015, the Italian Parliament enacted the Legge 6 maggio 2015, n. 52 (It.), which introduces a new electoral system (journalistically called the "Italicum") for the election of the Chamber of Deputies. The *Italicum* will be effective only since next legislature, when Parliament will pass the amendment of the Constitution and transform the Senate into a non-directly elected legislative body. This reform is now in discussion in the Chamber of Deputies for the first vote. The completion of the reform is attended for the end of 2015.

[4] This dictum has been attributed to Aharon Barak and can be found in RAN HIRSCHL, TOWARDS JURISTOCRACY. THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 169 (2004).

[5] *See* Roberto Romboli, *La riforma della legge elettorale ad opera della Corte costituzionale: attenti ai limiti (Nota a Corte Cost. 13 gennaio 2014, n.1) - Parte I*, 139 FORO ITALIANO [FORO IT.] 677–681 (2014), *available at* `http://www.foroitaliano.it/corte-cost-13-gennaio-2014-n-1-i-666-elezioni-parlamentari-incostituzionalita-del-porcellum/`; Eva Lehner, *Il Diritto di Voto Dopo la Conquista della "Zona Franca"*, 59 GIURLSPRUDENZA COSTITUZIONALE [GIUR. COST.] 54–59 (2014); Marco Benvenuti, *Zone Franche che si Chiudono e Zone d'Ombra che si Aprono nella Sent. n. 1/2014 della Corte Costituzionale*, NOMOS/LE ATTUALITÀ NEL DIRITTO (2014), *available at* `http://www.nomos-leattualitaneldiritto.it/wp-content/uploads/2014/03/M.\-Benvenuti-Zone-franche-che-si-chiudono-e-zone-dombra-che-si-aprono.pdf`.

[6] *See* Giovanni Serges, *Spunti Di Giustizia Costituzionale a Margine della Declaratoria di Illegittimità della Legge Elettorale*, RIVISTA AIC, no. 1, 2014, *available at* `http://www.rivistaaic.it/spunti-di-giustizia-costituzionale-a-margine-della-declaratoria-di-illegittimit-della-legge-elettorale.html`; Mario Perini, *Incostituzionalità della Legge Elettorale ed Effetti sulle Camere e sulla loro Attività: il Punto di Vista del Diritto Parlamentare*, 56 RASSEGNA PARLAMENTARE [RASS. PARL.], April/June 2014, at 305; Giuseppe Ugo Rescigno, *Il Diritto Costituzionale di Voto Secondo la Corte di Cassazione e la Corte Costituzionale*, 59 GIURISPRUDENZA CONSTITUZIONALE [GIUR. COST.] 27–34 (2014).

[7] Neil Walker, *The Idea of Constitutional Pluralism*, 65 MODERN L. REV. 317–359 (2002).

[8] *See* Rescigno, *supra* note 7, at 28.

[9] For Italian legal doctrine, the electoral law is the perfect example of a law that slips away from constitutional adjudication. For more on this concept, *see* Gustavo Zagrebelsky, *Processo Costituzionale*, 36 ENCICLOPEDIA DEL DIRITTO [ENC. DIR.] 606 (1987).

of the judicial review of legislation. Given the characteristics of Italian judicial review, it was hard to think of a situation in which individuals concretely challenge elections to the point of initiating a trial that will finally call on the ICC to intervene.[10] But the ICC wanted to bring election law within its field of scrutiny precisely in order to avoid the denial of justice. This is why the decision the ICC rendered is so innovative that it could really prompt a powerful change in the roles of both the ICC and the judicial review of legislation.[11]

The other important news in this case regards its reference to foreign jurisprudence and call to global constitutionalism. The ICC, which is considered to be particularly parsimonious when it comes to quoting its foreign colleagues,[12] literally borrowed ideas and the conceptions of scrutiny from other jurisdictions quite explicitly, through quoting the German Federal Constitutional Court and the Court of Justice of the European Union.[13]

The recourse to foreign law was relevant in admitting the case as well as in deciding it. The ICC was aware that sister Constitutional Courts, such as the German one, are able to scrutinize their domestic electoral legislation; it also could not disregard that the European Court of Human Rights had even been able to scrutinize the very same Italian election law before the ICC in *Saccomanno v. Italy*.[14] It would have been paradoxical, even shameful, to deny hearing to an Italian case for procedural reasons after the European Court was able to hear it.

Moreover, in this ruling the ICC crafted for the first time the use of a "proportionality test" as an instrument to scrutinize the constitutionality of statutes.[15] The ICC's case-law was already familiar with the word, but used it interchangeably with other expressions. Borrowing from other jurisdictions, the ICC singled this phrase out and crystalized its meaning as an asset to check the relationship between the aims and the means of legislative provisions.[16]

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[10] Cesare Pinelli, *Eguaglianza del voto e ripartizione dei seggi tra circoscrizioni*, 55 Giurisprudenza Costituzionale [Giur. Cost.] 3322 (2010).

[11] For an analysis of the role the Constitutional Court traditionally plays in the Italian legal system, *see generally* William J Nardini, *Passive Activism and the Limits of Judicial Self-Restraint: Lessons for America from the Italian Constitutional Court*, 30 Seton Hall L. Rev. 1 (1999) (comparing this system to the United States' system); Mary L. Volcansek, Constitutional Politics in Italy: the Constitutional Court (2000) (describing the Italian Constitutional Court); Gianfranco Pasquino, *What is Constitutional Adjudication About?* (NYU Law, Working Paper 2002).

[12] Vincenzo Zeno Zencovich, *Il Contributo Storico-Comparatistico nella Giurisprudenza della Corte Costituzionale Italiana: una Ricerca sul Nulla*, 4 Diritto Pubblico Comparato ed Europeo [DPCE] 1993–2020 (2005).

[13] *See* the critical position of Andrea Morrone, *L'eguaglianza del Voto Anche in Uscita: Falso Idolo o Principio?*, 59 Giur. Cost. 50–51 (2014).

[14] App. No. 11583/08 (Eur. Ct. H.R. 2012), `http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110318` (last visited: March 4, 2015).

[15] Since the introduction of proportionality test in this decision the Court has referred to it several times. See for example Corte Cost. 11 February 2015, n. 10. Text available in English at `http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S10_2015_en.pdf`.

[16] Aharon Barak, Proportionality: Constitutional Rights and Their Limitations 131 (2012).

In sum, the ICC gave a powerful judgment that harmonized with foreign jurisdictions in (a) the decision to hear the case; (b) the schema that the ICC decided to adopt to assess the case; and (c) the substance of the decision itself.

In this article, after providing a brief overview of the technicalities of the relevant Italian laws that made the case so complex, we explore the particularities of this decision and its background. In Part II, we sketch out the main features of the election law that the ICC struck down, and highlight its most critical parts: namely, the "majority prize," which the ICC found excessive, and the "closed-list system," which the ICC targeted because it frustrated the voter's freedom to choose his or her own preferred candidates. In Part III, we summarize the main features of the judicial review of legislation under the Italian Constitution, explain the role and the powers of the ICC, and underline why many believed that there was no way it could deal with the election law. In Part IV, we summarize the most important and innovative feature of the judgment: the radical change in the election law that it prompted. The ICC struck down fundamental parts of the legislation that had been largely criticized, and supplanted them with a very different type of electoral system. In Part V, we describe the election law and how it was brought to the ICC's attention. The election law had been widely criticized because of its purportedly unreasonable majority prize and closed-list candidates system, which was said to have deprived voters of the power to select their representatives. The ICC was able to scrutinize both only by broadening its scope of judicial review beyond what it had allowed up to that point. In Part VI, we analyze the reasoning behind the decision, which struck down both the election formula and the closed-list system largely through recourse to foreign models of judicial review and distilled the "proportionality test" scrutiny. In Part VII, we address the expansive attitude of the Italian model of judicial review of legislation that this decision demonstrated. In Part VIII, we briefly reflect on the impact of the ICC's decision on the election law, which basically turned back time and restored the old multiparty, unstable political system, and its partial replacement with a new election law for the House of the Deputies. We conclude in Part IX.

B 2. The Election Law for the Italian Parliament: Its characteristics and flaws

Italian Parliament is composed of two Houses (Chamber of Deputies and Senate of the Republic): the Chamber of Deputies, which is composed of 630 members; and the Senate of the Republic, which has 315 members plus a small number of Senators for life. The President of the Republic can appoint up to five lifetime Senators;[17] moreover, all former Heads of the State are Senators for life.[18]

The passive and active electorate for the two houses are different: Senators should be at least 40 years old, and their electors 25,[19] while the Chamber of

17 *Id.* art. 59.
18 *Id.*
19 *Id.* art. 58.

Deputies requires ages 25 and 18 respectively.[20]

The two Houses share the same powers: the core Parliament's functions are passing the bills,[21] which become law with the promulgation of the President of the Republic;[22] granting and withdrawing the confidence to the Government;[23] collectively electing the President of the Republic[24] and five of the fifteen ICC's judges.[25]

Parliament's members are elected by the Italian people. Although the Constitutional Framers left the electoral system open-ended, the electoral system is governed by some basic constitutional principles:[26] (a) as already stated, the Bicameral Parliament must accord confidence to the Government (the so called "double confidence");[27] (b) the votes cast by voters must be equal in value;[28] (c) deputies and senators have the right to change parliamentary groups or even to change coalitions.[29]

The 2005 Parliament legislation created a proportionality system but counterbalanced it with majoritarian effect: since the Parliament must grant confidence to the Government, the election law then in force provided the winning coalition with extra seats, in order to back political stability and ensure that the Government enjoys the majority of both Houses. Moreover, the 2005 election law tried to encourage discipline among party members, in order to discourage the formation of new political coalitions and Government crises, through a rigid party-driven selection of the candidates.

For this purpose, the election law had some characteristic features.

(A) First, it provided the "winner's bonus" (or "majority prize"), which ensured that (i) in the Chamber of Deputies, the winning party list or coalition of lists had no less than 340 seats out of 630, and (ii) in the Senate, the list or coalition of lists that won in a Region received the majority of seats that were allotted to that Region. The only areas in which the bonus did not apply were the Valle d'Aosta Region and the districts for Italian who resided abroad.

(B) Second, it provided a closed-list system, which governed the distribution of seats *within* each party. Since every voting district elected more than one candidate, therefore each party enlisted a series of candidates for each district: the closed-list system established that all the seats that the party gains in the district are allotted to candidates depending on the order in which appear in the

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20 *Id*. art. 56.

21 Art. 70 Constituzione [Cost.] (It.). "The legislative function is exercised collectively by both Houses."

22 Art. 73 Cost.

23 Art. 94 Cost.

24 Art. 83 Cost.

25 Art. 135 Cost.

26 *See* Paolo Caretti, *La Forma di Governo*, 47 Rass. Parl. 583, 583–598 (2005).

27 "The Government must have the confidence of both Houses." Costituzione art. 94 ¶ 1 (It.), *translated in* Constitution of the Italian Republic, Senato della Repubblica, `https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf` (last visited Feb. 27, 2015).

28 *Id*. art. 48.

29 "Each Member of Parliament represents the Nation and carries out his/her duties without a binding mandate." *Id*. art. 67.

list. Since voters could not cast any preferential vote in favor of any specific candidate within a party list, this should have discouraged the creation of internal party conflicts among candidates. The candidates could also run in multiple districts.

(C) Finally, the election law established national thresholds that each party or coalition had to meet in order to participate in the seats' distribution; otherwise they would have been excluded from the participation to the Chamber. Such provisions were intended to keep small parties out from the Houses and incentivize political coalitions. At the Chamber of Deputies, the thresholds amounted to 4% for single parties and to 10% for coalitions; at the Senate, they were 8% for single parties and 20% for coalitions.[30]

From its very inception, the election law displayed evident failings, including the circumstances under which this new law was approved. Even though it would govern the political game in which all had a stake, the election law bill was backed only the governing coalition, without the opposition's approval or agreement.

From a political perspective, the 2005 electoral system produced anomalous outcomes. Since it prized coalitions, it allowed a proliferation of parties and permitted small parties to maintain some independence from their coalition partners. Moreover, it emphasized the role of parties over candidates by eliminating voters' preferential voting for individual candidates, but it made it harder for any party or coalition to win a substantial majority in the Senate and secure stable government majorities.[31] In fact, the bonus assignment concretely randomized the political majority in the Senate. Since the regional seat bonus depended on each Region's population, the majority of seats were allocated to the party or coalition that scored the seat bonus in the largest Regions, not to the one that had the majority of votes among Italians. The randomization of political majorities at the Senate caused by the Region-based seat-bonus, prompted the formation of different political majorities in the Chambers, and stimulated some deputies and senators to change their political affiliation and join the majority.

These flaws clearly demonstrate why the 2005 election law makes governing particularly difficult.[32] It produced the premature end of the first legislature (2006–2008) elected through this law, the turmoil of the center-right coalition during the 16th legislature (2008–2013), and the problematic results of the 2013 general elections.[33] It is therefore understandable why several referenda were held or proposed in order to amend or repeal the existing election law, and why the ICC warned the Parliament twice that the law needed to be changed.

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30 *See* art. 1 and 3, Legge 21 dicembre 2005, n. 270 (It.).

31 Alan Renwick et al., *Partisan Self-Interest and Electoral Reform: The New Italian Electoral Law of 2005*, 28 ELECTORAL STUD. 437, 438–439 (2009).

32 "[T]he 2005 law was unanimously regarded as an instrument for the construction of broad coalitions fit to win elections but unfit to run the country." Carlo Fusaro, *Party System Developments and Electoral Legislation in Italy (1948–2009)*, 1 BULL. ITALIAN POL. 49, 60 (2009).

33 *See* Gianfranco Pasquino & Marco Valbruzzi, *Post-Electoral Politics in Italy: Institutional Problems and Political Perspectives*, 18 J. MOD. ITALIAN STUD. 466 (2013).

B.1 The ICC, the "*a posteriori*" judgment, and the consequences for the election law scrutiny

In the Italian legal system, the ICC is the sole organ empowered with the judicial review of legislation.

One of the ICC's particularities is that it controls the constitutionality of the law only through two ways of access: the direct appeal to the ICC, which can be used only by the State against Regional laws, or by Regions against State laws or other Regions' laws; and the so-called "*a posteriori*" access, which is the way of access that prompted the decision no. 1/2014. For what interests us, the *a posteriori* judgment postulates that a domestic jurisdiction must deal with a law that is questioned as incompatible with the Constitution. The judge that is treating the case brings the issue before the ICC, which will decide about the constitutionality of the law. Then the case goes back before the judge that requested the ICC's ruling.

Italian judges have strong power when they introduce an issue to the ICC. Though, in this phase they must follow strict admissibility prerequisites, without which the ICC will refuse to judge and instead declare the case brought to its attention inadmissible. Judges who refer a case to the ICC must satisfy two conditions: the issue must be "relevant" and "not manifestly groundless."[34] In addition, according to the ICC's case law, they have to explain why they cannot provide an alternative interpretation of the statute they are challenging that would be in accordance with the Constitution ("*interpretazione adeguatrice*").[35]

The "relevance" requisite is of particular importance in our case: a provision can be brought to the attention of the ICC and challenged as unconstitutional only if it needs to be applied in the case before the referring court. Therefore, there must be a pending case in which a judge needs to apply the statute. If the statute does not require application, the ICC will consider it irrelevant and consequently declare the case before it inadmissible. In sum, in the Italian judicial review of legislation, 'abstract' (i.e. non-concrete) questions are deemed irrelevant and therefore inadmissible.[36] Thus, the referring court should refrain from challenging a statutory provision that it does not need to apply, since the ICC will refuse to hear the case.

[34] According to the Italian Act governing the Constitutional Court procedure, the referring judge must be positively convinced of the unconstitutionality of the statute, mere doubts will not suffice. Art. 23, Legge 11 marzo 1953, n. 87 (It.): "L'autorità giurisdizionale, qualora il giudizio non possa essere definito indipendentemente dalla risoluzione della questione di legittimità costituzionale o non ritenga che la questione sollevata sia manifestamente infondata, emette ordinanza con la quale, riferiti i termini ed i motivi della istanza con cui fu sollevata la questione, dispone l'immediata trasmissione degli atti alla Corte costituzionale e sospende il giusdizio in corso." For a broad consideration of the Italian Constitutional adjudication *see* Vittoria Barsotti, Paolo G. Carozza, Marta Cartabia & Andrea Simoncini, Italian Constitutional Justice in Global Context (Oxford University Press, 2015).

[35] *See generally* Andrea Pugiotto, Sindacato di Costituzionalitá e "Diritto Vivente:" Genesi, Uso, Implicazioni (1994) (describing Italian jurisprudence).

[36] *See* Vezio Crisafulli, Lezioni di Diritto Costituzionale 280 (1986); Massimo Luciani, Le Decisioni Processuali e la Logica del Giudizio Costituzionale Incidentale 121 (1984); Gustavo Zagrebelsky & Valeria Marcenò, Giustizia Costituzionale 286 (2012).

The prohibition of 'abstract' questions implies that lower courts need also to comply with the prohibition of *fictio litis* ("*false challenge*").[37] The plaintiffs at the lower court need to seek a result that does not nullify of the statutory law, but only involves it. The type of satisfaction that they are seeking cannot be merely incidental to the nullification of a statutory provision. Therefore, the case before a lower court cannot directly challenge the constitutionality of the statutory law. This issue was the most delicate part of the Court of Cassation's reasoning, as we will see shortly.

B.2 THE DECISION OF THE ICC: AN OVERVIEW

As is now usual in seminal cases, the ICC announced in a short press release on December 4th, 2013, that the 2005 Italian electoral law had been declared partly unconstitutional.[38]

This case is the first in which the ICC addressed the merits of the 2005 Italian election law. Two previous decisions had been handed down on this subject. Yet, since those cases addressed two requests for a referendum to repeal the electoral legislation, the ICC had ruled solely on the admissibility of the referendum request and not on the law's compatibility with the Constitution.[39] Nonetheless, in the referendum cases, the ICC's judges took the chance to give the Parliament two early warnings about the unconstitutionality of the electoral system, which had been widely criticized by legal scholars.[40] Unfortunately, the attempts to prod the national Parliament into taking ameliorative action did not change the situation; the Parliament failed to heed the Court's admonitions.

With this judgment 1/2014, the Court eventually was able to set aside two main problems of the 2005 electoral system for the Parliament. (A) First, it struck down the "winner's bonus," which grants (i) in the Chamber of Deputies, that the winning party list or coalition of lists had no less than 340 seats out of 630, and (ii) in the Senate, that the list or coalition of lists that won in a Region received the majority of seats that were allotted to that Region. (B) Second, it invalidated the closed-list system: such a system—the ICC reasoned—prevented voters from choosing among each party's candidates.

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[37] Giorgio Repetto, *Il Divieto di Fictio Litis come Connotato della Natura Incidentale del Giudizio di Costituzionalitá. Spunti a Partire dalla Recente Ordinanza della Corte di Cassazione in Tema di Legge Elettorale*, RIVISTA AIC (Mar. 21, 2014), http://www.rivistaaic.it/download/-p8_tygAhIzsmaDU3eRnW6AEABZFpEzYa93eQLiNFnw/3-2013-repetto.pdf

[38] Incostituzionalità della Legge elettorale n. 270/2005 (2013), http://www.cortecostituzionale.it/comunicatiStampa.do

[39] *See* Corte Cost. 30 gennaio 2008, nn. 15 and 16; Corte Cost., 24 gennaio 2012, n. 13. In 2008, the Court held that two requests of referendum, one for the Senate and one for the Chamber of Deputies, were admissible. In 2012, the Court ruled the inadmissibility of the request for two referenda.

[40] *See* Carlo Fusaro, *Party System Developments and Electoral Legislation in Italy (1948-2009)*, 1 BULL. OF ITALIAN POL. 49, 59–60 (2009); Gianfranco Pasquino, *Tricks and Treats: The 2005 Italian Electoral Law and its Consequences*, 12 S. EUR. SOC'Y & POL. 79, 79–93 (2007); Renato Balduzzi & Matteo Cosulich, *In Margine alla Nuova Legge Elettorale Politica*, 50 GIUR. COST. 5179, 5179–5206 (2005).

The Court struck down (A) the provisions on the majority prize because they violated the constitutional principles of popular sovereignty,[41] equality before the law,[42] and equality of the vote,[43] and (B) the provisions on the closed-list system because they violated the constitutional freedom of the vote.[44]

Given the scattered opposition to the 2005 election law, with the judgment no. 1/2014 the ICC gained popularity, and, most importantly, the ICC's decision to strike down the election law had a huge political effect. It was not just because the electoral system is the cornerstone of democracy and one of the most sensitive political questions; it was also because of the scattered backlash that derived from this legislation's enforcement. The ICC's ruling bolstered the ongoing process of Italian election law reformation, and a wider reform process more broadly, which should go beyond election law and replace the obsolete Bicameral Parliament.

C Before the Decision: the Role of the Court of Cassation

In order to understand why and how the ICC decided this case, it is important to take a quick glance at the turbulent facts that brought this judgment. The ICC's decision is only the latest in a long list of suits that a group of citizens, led by a lawyer named Aldo Bozzi, filed in Italian lower courts during and after the Italian general election of 2006.

In the suits that reached the ICC, the plaintiffs were voters in the Italian general election. They filed an action of declaratory judgment ("*azione di mero accertamento*") before the Tribunal of Milan, seeking a judicial declaration that their right to vote had been violated.

In the complaint, the plaintiffs argued about two aspects of the law. First, they maintained that, since citizens have a personal and direct right to vote, they also have the right to express preference for single candidates, whereas the election law inhibited the voter from preferring one or more candidates.[45] Second, they asserted that the automatic allocation of a national majority (for the Chamber

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[41] "Italy is a Democratic Republic, founded on work. Sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution." Art. 1 Costituzione (It.), *translated in* Constitution of the Italian Republic, Senato Della Repubblica https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf

[42] "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions." *Id.* art. 3 ¶ 1.

[43] "Any citizen, male or female, who has attained majority, is entitled to vote. The vote is personal and equal, free and secret. The exercise thereof is a civic duty. The law lays down the requirements and modalities for citizens residing abroad to exercise their right to vote and guarantees that this right is effective. A constituency of Italians abroad shall be established for elections to the Houses of Parliament; the number of seats of such constituency is set forth in a constitutional provision according to criteria established by law. The right to vote cannot be restricted except for civil incapacity or as a consequence of an irrevocable penal sentence or in cases of moral unworthiness as laid down by law." *Id.* art. 48.

[44] *Id.*

[45] *See* Costituzione art. 48 (It.), *translated in* Constitution of the Italian Republic, Senato Della Repubblica, https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

of Deputies) and a regional majority (for the Senate) to the list or coalition of lists with the highest number of votes, irrespective of the actual percentage of votes obtained, violates the equality of the vote.

On April 18, 2011, the Tribunal of First Instance found the action in part inadmissible, since the plaintiffs lacked standing ("*interesse ad agire*"), and in part ill-founded.[46]

In the appeal against the Tribunal's decision, the plaintiffs continued to challenge the majority prize and the closed-list system. The Court of Appeal rejected the request as manifestly inadmissible and ill-founded on April 24th, 2012, so Bozzi and the other plaintiffs filed an appeal to the Court of Cassation requesting the electoral law be brought before the ICC. The Court of Cassation suspended the trial and on May 17th, 2013 requested that the ICC rule on the case.[47]

C.1 The Admissibility of the Constitutional Issues

In the referral order, the Court of Cassation addressed the admissibility of the constitutional issues using an interpretation that stretched the lower courts' powers to refer a question of constitutionality.

As said before, in order to meet the admissibility requisites for the ICC legislation scrutiny, the referring judge must show that the issue that they are investing the ICC with is 'relevant' and 'not manifestly groundless' for the decision of the case: in other words the referring judge must be dealing with a real case, for which the challenged law is necessary, and the doubt that such law is unconstitutional must be perceived as reasonable. Moreover, the referring judge must prove that the case before them is not directly challenging the constitutionality of the statutory law.

This time, the Court of Cassation shortcut these restrictions in the name of protecting the equal right to vote, and construed an argument to have the ICC hear the case.[48]

The Court of Cassation began its analysis addressing the plaintiffs' need for judicial protection in the form of a declaratory judgment about the infringement of the right to vote. The Court reasoned about the 'relevance' of the constitutional issues in an out-of-the-ordinary way. Their opinion discussed two arguments the plaintiffs used to justify the need of a preventive constitutional review.

[46] Fusaro, *supra* note 32, at 40.

[47] Cass., Sez. prima, 17 maggio 2013, n. 12060. Text and summary of the case are available in Italian at http://www.giurcost.org/cronache/Cass-ordLegge270.

[48] *See* E. Rossi, *La Corte Costituzionale e la Legge Elettorale: un Quadro in Tre Atti dall 'Epilogo Incerto'*, FEDERALISMI.IT (Jun. 5, 2013), http://www.federalismi.it/ApplOpenFilePDF.cfm?artid=22587&dpath=document&dfile=04062013151311.pdf&content=La+Corte+costituzionale+e+la+legge+elettorale:+un+quadro+in+tre+atti+e+dall%E2%80%99epilogo+incerto+-+stato+-+dottrina+-+; *See also* F. Dal Canto, *La Legge Elettorale Dinanzi alla Corte Costituzionale: Verso il Superamento di una Zona Franca?*, FORUM DI QUAD. COST. (Jun. 14, 2013), http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/temi_attualita/sistema_elettorale/0032_dal_canto.pdf; *See also* R. Romboli, *La Costituzionalità della Legge Elettorale 270/05: la Cassazione Introduce, in Via Giurisprudenziale, un Ricorso Quasi Diretto alla Corte Costituzionale?*, 138 FORO IT. 1836–56 (2013).

The first argument concerns the characteristics of the plaintiffs' action. In an important passage of its referral order to the ICC, the Court of Cassation highlighted the particularity of the suit filed by the plaintiffs. The plaintiffs filed a particular 'joint-action' ("*accertamento costitutivo*"):[49] formally, they requested to have their right to vote affirmed by the Court of Cassation, but substantially they sought the protection of it through the nullification of the election law.[50] This request ran the risk of being considered as a *fictio litis*; after all, the plaintiffs had no other request than the nullification of some parts of the election law. The plaintiffs' claim substantially consisted in challenging the law; the ICC normally would declare such a case inadmissible.[51]

The Court of Cassation therefore would normally refrain from referring a case that would be rejected by the ICC as inadmissible. But here it pushed the envelope and reasoned that the need for judicial protection of electoral rights overcame the admissibility rules.[52] They used a trick: the Court of Cassation maintained that the request of the plaintiffs combined challenging the law with the affirmation of their right to vote. After all, the Court of Cassation reasoned, the ICC's judgment was the only way through which the plaintiffs could fully enjoy their right to vote.

The Court of Cassation's second argument reinforced the first one. Some had maintained that, since there was no way to construe a concrete case in which someone would challenge a non-legislative act in the field of election laws and one could call into question the election law in itself only indirectly, there was no way to bring the election laws to the attention of the ICC. Such laws—the argument went—were therefore spared from the constitutional review of legislation. The Court of Cassation firmly rejected this argument by highlighting that it would be paradoxical to run a democracy with unconstitutional election laws, which are crucial as well as indispensable to the democratic process, only because there is no way to have the ICC scrutinize them.[53]

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[49] Italian scholars consider essential for this type of action a 'qualified' interest. *See* Andrea Proto Pisani, *Appunti sulla Tutela di Mero Accertamento*, in STUDI IN MEMORIA DI SALVATORE SATTA 1202 (1982). (Discusses remedies in the Italian legal system).

[50] *See generally* MAURO CAPPELLETTI & JOSEPH M PERILLO, CIVIL PROCEDURE IN ITALY 144–172 (1965).

[51] Italian scholars have made several critiques on this jurisprudence. Piero Calamandrei, *Corte Costituzionale e Autoritá Giudiziaria*, 10 RIVISTA DI DIRITTO PROCESSUALE [RIV. DIR. PROC.] 13 (1956). For more recent critiques see Sergio Cupellini, *La Fictio Litis e le Azioni di Accertamento dei Diritti Costituzionali*, 48 GIUR. COST. 1377 (2003); Giovanna Pistorio, *Il Curioso Caso di una Fictio Litis (Tre Volte) Inammissibile*, 54 GIUR. COST. 315 (2009); Luca Imarisio, *Lites Fictae e Principio di Incidentalitá: la Dedotta Incostituzionalit⊠ Quale Unico Motivo del Giudizio a Quo*, 156 GIUR. IT. 589 (2004).

[52] Some scholars have considered this reason as expression of political realism without legal foundation. *See* Adele Anzon-Demmig, "*Un Tentativo Coraggioso ma Improprio per far Valere l'Incostituzionalitá della Legge per le Elezioni Politiche" (e per Coprire una "Zona Franca" del Giudizio di Costituzionalitá)*, RIVISTA AIC (Jul. 7, 2013), `http://www.rivistaaic.it/download/R0febHJfuCCgjJ8OXnI1FTJv3rOuyfr8DVf5hR8YgJ4/3-2013-anzon.pdf`.

[53] In decisions about referendum admissibility, the repeal of election laws is deemed impossible because the existence and validity of these laws is considered indispensable in order to guarantee the functioning and continuity of elected bodies that are necessary for the life of the Italian Republic. *See* Judgment no. 13 of 2012, *supra* note 39. *See also* Alessandro Mangia, *La Legge Elettorale, tra*

C.2 THE MERIT OF THE CLAIMS

Concerning the merits of the plaintiffs' claims, the Court of Cassation only opted to refer to the ICC the issues on i) the winner's bonus and ii) the closed-list system.[54]

On the first issue, the winner's bonus, the Court held that the automatic allocation of the majority without the provision for any minimum number of votes and/or seats required represented a drastic alteration of democracy. The winner's bonus aimed to incentivize a dichotomous structure of party competition. In pursuit of the winner's bonus, big parties would have strong reason to coalesce into broad coalitions and small parties would have an added incentive for doing so: rather high thresholds (4% at the Chamber of Deputies; 8% at the Senate) excluded small parties from the distribution of seats, unless they joined a broader coalition. The lack of a vote minimum, however, substantially altered political representation, since parties or coalitions scoring relatively low results could still gain the bonus, if no competitor scored better.

As the Court of Cassation highlighted, the election law was flawed in three ways. Firstly, it did not prevent coalitions from splitting: after the election, parties could leave the coalition or ally with other parties forming different majorities. Secondly, the election law gave some votes a lower value: on one hand, since the votes cast for the winning party were awarded the seat bonus, the other votes were valued less; on the other hand, those cast by residents abroad and in the Valle d'Aosta Region were completely excluded from the count for the assignation of the seat-bonus. Thirdly, the different computation of the bonus in the two Chambers was inconsistent with the bicameral nature of the Italian parliament. The different operation of the seat-bonus in the Senate, where it was allocated for each Region and not nationwide, increased the risk of diverging outcomes in the Chamber and the Senate.

On the second issue, the Court of Cassation had serious doubts about the constitutionality of the closed-list system. In providing that voters had one single vote and chose only among party lists (the allocation of seats to each list was determined on a national or regional basis) the election law did not consider adequately that citizens have an equal right to vote directly for the candidates they prefer, and therefore it did not "ensure the free expression of the opinion of the people in the choice of the legislature," as the European Convention of Human Rights commands.[55]

Abrogazione e Annullamento, QUADERNI COSTITUZIONALI [QUAD. COST.] 973, 974 (2013).

[54] Fulco Lanchester, *Non ci sono "zone franche" nello Stato di diritto costituzionale*, NOMOS (2013), http://www.nomos-leattualitaneldiritto.it/wp-content/uploads/2013/07/Seminario-Le-corti-e-il-voto.-introduzione-Lanchester.-Nomos-1-2013.pdf.

[55] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, art. 3, protocol 1 [hereinafter Convention].

D Constitutional Court's Decision: The Details

The ICC issued a decision on two grounds: first, it clearly struck down the majority prize for the Chamber and the Senate; second, it declared the exclusion of voter preferences unconstitutional and established a principle to be used by the legislator to enact new legislation.[56] The judgment, however, was auto-applicative, in the sense that the norms resulting after the decision's issuance were immediately usable for elections, in case the Parliament was unable to introduce new legislation before it expired.

D.1 The Access to the Constitutional Court

The judgment no. 1/2014 was unprecedented since it paved the way for a new role for the ICC. The ICC adopted an innovative line of reasoning, by recognizing the right to access the judicial review of legislation by filing a complaint that has the sole purpose of that judicial review.[57]

In the introduction to the part of the judgment that sets out the grounds of the decision, the ICC decided in favor of the admissibility of the question using two lines of argumentation.

First, the ICC rejected the notion that the requests for judicial review it received on the election law itself and the trial that inspired it were identical on their merits.[58] Indeed, the referring judge remained in charge of reviewing the other conditions that are necessary for the right to vote: once the pieces of legislation were nullified, the referring court would still need to evaluate the plaintiffs' case.[59] After all, the ICC concluded, the referred case more than merely challenged a piece of legislation.

Second, the ICC stressed the "the special nature and constitutional significance on the one hand of the right to which the action seeking a declaration judgment relates" and the need to strike down a statute considered to be of "suspected unconstitutionality."[60] The Court assumed that the admissibility of the judicial review in this case constitutes "inevitable corollary of the principle

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[56] Nardini, *supra* note 11, at 29.

[57] The Italian indirect access to the Constitutional Court occurs normally when, in the course of a litigation involving a concrete case, an issue of constitutionality is raised either by the litigants or by the judge. Judges are akin to 'Constitutional Court ushers.' Piero Calamandrei, *La Corte Costituzionale e il Processo Civile*, Studi in Onore di Enrico Redenti 203 (1951). Therefore, the Constitutional Court's workload arrives only from courts, which must certify constitutional questions on an interlocutory basis as they arise in pending cases.

[58] By using its power to assess that the challenge is relevant, the ICC has developed a strong doctrine against hypothetical, theoretical, and artificial questions. Indeed, the Court avoids deciding cases in which the incidental method could not be applied. Constitutional review refers to deciding constitutional legitimacy in the context of a real controversy with specific facts and live, disputing parties. Nardini, *supra* note 11, at 25.

[59] "Furthermore, in the present case, the issue concerns the right to vote—a constitutional fundamental right whom essential feature is the link to an interest of the entire people—has been raised for the specific purpose to put an end to the situation of uncertainty produced by the norms object of scrutiny".

[60] Judgment no. 1 of 2014, 7 (2014).

that protection must be afforded to the inviolable right."[61] As a matter of fact, it maintained that statutes such as the election law cannot be deprived of judicial review simply because of the difficulties in bringing them to the attention of the ICC. In other words, had the ICC refused to judge, this law would have remained in place despite being unconstitutional, since the plaintiffs could not use other legal means to raise the constitutional issues. In this sense, the ICC made an implicit reference to the doctrine that admits declaratory judgment actions when unconstitutional statutes restrict constitutional rights and there is an "actual and well-founded fear that the law will be enforced."[62]

In sum, the ICC agreed substantially with the conclusions of the Court of Cassation: ruling on the law's constitutionality was, on one hand, the only remedy for the infringed right to vote and, on the other, the only legitimate way to reduce holes in judicial review.[63] Actually, in a long dictum, the ICC stressed the importance of preventing the creation of a 'free zone' in the Italian system of adjudication—especially in such an important area for democratic government.[64]

The issue of admissibility created sharp debate among Italian commentators before the ICC's judgment. Many predicted a ruling of inadmissibility considering the difficulty to overrule a well-established jurisprudence and doctrine.[65] But, through declaring inadmissibility, the ICC would have certified its weakness, even impotence before crucial constitutional cases. This ruling therefore can be read as a sign of courage, as well as an effort to reinvigorate both the ICC's role and the effectiveness of constitutional review.[66] The decision acknowledging the ICC's capacity to manage the evolution of the polity expresses the Court's effort

[61] *Id.*

[62] CAPPELLETTI & PERILLO, *supra* note 50.

[63] AUGUSTO CERRI, CORSO DI GIUSTIZIA COSTITUZIONALE PLURALE 154–155 (2012).

[64] The Court states that "the questions of constitutionality raised are admissible, having regard also to the requirement that laws such as those relating to elections to the Chamber of Deputies and the Senate, which set out the rules governing the composition of constitutional bodies that are essential for the proper operation of a representative democratic system, and which therefore cannot be immune from such review, must not be subtracted from constitutional review. Any other conclusion would end up creating a free-for-all within the system of constitutional justice, precisely in an area which is closely related to the democratic framework as it involves the fundamental right to vote; for this reason, it would end up causing intolerable harm to the overall constitutional order." *See supra* note 60, at 7–8.

[65] *See* Corte Cost., sent. 3 Juglio 1961, n. 42 and ord. 24 febbraio 2006, n. 79 (It.). Italian doctrine has often highlighted the impossibility to scrutinize the election law for the Constitutional Court. *See* Leopoldo Elia, Elezioni Politiche: Contenzioso, 14 ENC. DIR. 789 (1965); Valerio Di Ciolo & Luigi Ciaurro, *Elezioni Politiche: Contenzioso*, 12 ENCICLOPEDIA GIURIDICA [ENC. GIUR.] 21 (1989); Michela Manetti, *L'accesso alla Corte Costituzionale nei Procedimenti Elettorali*, PROSPETTIVE DI ACCESSO ALLA GIUSTIZIA COSTITUZIONALE 146 (Adele Anzon et al., eds., 2000); Massimo Siclari, *Il Procedimento in Via Incidentale*, LE ZONE D'OMBRA DELLA GIUSTIZIA COSTITUZIONALE. I GIUDIZI SULLE LEGGI (Renato Balduzzi & Pasquale Costanzo, eds., 2007); Alessandro Pizzorusso, *"Zone d'Ombra" e "Zone Franche" della Giustizia Costituzionale Italiana*, STUDI IN ONORE DI PIERFRANCESCO GROSSI 1021 (2012).

[66] Here we can find a different approach, distant from "passive activism." *See* Giulio Maria Salerno, *Il Giudizio di Costituzionalitá delle Leggi Elettorali Come "Tramite" per il Pieno Ripristino del Diritto di Voto*, CORRIERE GIURIDICO (2013). *See generally* Nardini, *supra* note 11 (discussing the Italian Constitutional Court).

to reclaim centrality as the guardian of constitutional rights and democracy.[67]

There remains some doubt about whether the ICC's innovation is successful. The judgment paved a new way to constitutional review of legislation; its implications for the Italian constitutional system are hard both to predict and to trace back to the intentions of the 1948 Constitution's Framers. The ICC's decision, however, is still understandable because, in drawing such an important piece of legislation as election law into its field of scrutiny, it aligned itself with the principle of "good governance," which contemplates the full justiciability of democratic life.[68]

This judgment represents a historical turning point. It marks the beginning of a new age for the 'access' to the ICC—not just an ephemeral season for the protection of the right to vote. The new philosophy of access to the ICC is an asset that the ICC will be able to use in the future, for different reasons, in various fields.

D.2 The "Proportionality Test"

The ICC's decision drew extensively from other jurisdictions in shaping the "proportionality test," which it utilized to scrutinize and outlaw the provisions that accord the seats bonus in both Houses. Although the seats bonuses also were declared unconstitutional because they violate Art. no. 1 Const., which accords sovereignty to the people,[69] Art. no. 48, second paragraph,[70] and Art. no. 67,[71] the main tool in the ICC's hands was the "proportionality test."

The ICC insisted that this test was well embedded in its case-law, quoting a 1988 decision.[72] There is rather clear evidence, however, that such a "proportionality test" was quite new in the ICC's case law. Actually, it is reasonable to say that the ICC took the opportunity of aligning its jurisprudence with the "most widespread approach to constitutional interpretation in contemporary constitutional Courts," including European national and supranational Courts, namely "proportionality review."[73] Although the use of "proportionality" as a

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[67] Massimo Luciani, *Le Funzioni Sistemiche della Corte Costituzionale, Oggi, e L'interpretazione "Conforme a"*, Federalismi.It (Aug. 8, 2007), http://www.federalismi.it/nv14/articolo-documento.cfm?artid=8314.

[68] Alec Stone Sweet, *Constitutional Courts*, The Oxford Handbook of Comparative Constitutional Law 816–30 (Michel Rosenfeld & András Sajó, eds., 2012).

[69] "Sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution." Costituzionale art. 1 (It.), trans. Constitution of the Italian Republic, Senato Della Repubblica, https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

[70] "The vote is personal and equal, free and secret. The exercise thereof is a civic duty." *Id.* art. 48.

[71] "Each Member of Parliament represents the Nation and carries out his duties without a binding mandate." *Id.* art. 67.

[72] *See* Corte Cost., 14 dicembre 1988, n. 1130. G.U. 1989, 1, 4 (It.): "Tale giudizio deve svolgersi 'attraverso ponderazioni relative alla proporzionalitá dei mezzi prescelti dal legislatore nella sua insindacabile discrezionalitá rispetto alle esigenze obiettive da soddisfare o alle finalitá che intende perseguire, tenuto conto delle circostanze e delle limitazioni concretamente sussistenti."'

[73] *See* Jack M. Balkin, *Why Are Americans Originalist?*, in Law, Society, and Community: Socio-legal Essays in Honour of Roger Cotterell (David Schiff & Richard Nobles, eds.,

means to scrutinize legislation had a scattered fortune throughout the ICC's decisions, its features were all but clear.[74] It was virtually indistinguishable from other kinds of scrutiny that pointed to the inner coherence of the Italian legal system and its rationality. All such means of scrutiny were carved by the ICC out of the constitutional principle of equality, which is enshrined in Art. no. 3 of the Italian Constitution but does not include proportionality, rationality, or any other synonym or analogous wording.[75] The ICC was able to craft means to scrutinize legislation to maintain the system's inner coherence and balance interests, but failed in providing guidance between the different wordings that it used.

The lack of a definite "proportionality test" was denounced even by the ICC's members a little before the decision on the election law was delivered. In a public seminar held in October 2013 at the ICC, Justice Marta Cartabia lamented that there was no distinction between the tests of proportionality and reasonableness in the ICC's case-law:[76] the elaboration and the systematization of a sequenced proportionality test existent in other jurisdictions was alien to the Italian experience.[77]

In Cartabia's words, the systematization that the Italian legal system was lacking, should adhere to a four-step approach: 1) focusing on the "legitimate aim" of the legislation; 2) considering the relationship between the legislation's aims and the means through which such aim is pursued; 3) checking the "necessity" of the legislation, namely that the law under scrutiny is using the "least restrictive means," with respect to other rights and interests; 4) using a "strict proportionality test," examining the "effects" of the legislation and pondering the beneficial and the adverse effects of the legislation.[78]

Such description of the "proportionality test," which, Cartabia stresses, is found in the case-law of several European States as well as the Court of Justice of the European Union and the European Court of Human Rights, lies at the core of the n. 1/2014 decision.[79]

The decision stated that "The proportionality test used by this Court and by

2015). *See also* MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE 126 (2013).

[74] *See, e.g.*, Corte Cost. 1 giugno 1995. n. 220, G.U. 1995 (It); sent. n. 16, 1964, Corte Cost. 11 ottobre 1985, n. 231, G.U. 1985 (It.) (Text available in Italian at http://www.cortecostituzionale.it/actionPronuncia.do).

[75] "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions." COSTITUZIONE art. 3 (It.), translated in CONSTITUTION OF THE ITALIAN REPUBLIC, SENATO DELLA REPUBBLICA, https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

[76] Marta Cartabia, I Principi di Ragionevolezza e Proporzionalit� nella Giurisprudenza Costituzionale Italiana, Address at the Conferenza Trilaterale delle Corte Costituzionali Italiana, Portoghese e Spagnola 4–5 (October 2013), http://www.cortecostituzionale.it/documenti/convegni_seminari/RI_Cartabia_Roma2013.pdf.

[77] *Id.* at 5.

[78] *Id.*

[79] *Id.* at 4. In the field of election law, a European Court of Human Rights decision that uses the proportionality test is Yumak and Sadak v. Turkey [GC], App. No. 10226/03, ¶ 118 (Eur. Ct. H.R. 2008), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87363.

many other European constitutional courts, which is often paired with a reasonableness test and is an essential instrument of the [CJEU] within the judicial review of the legality of acts of the Union and of the Member States, requires an assessment as to whether the provision under review, along with the arrangements stipulated for its application, is necessary and capable of achieving legitimately pursued objectives by requiring that the measure chosen out of those most appropriate is the least restrictive of the rights in play and imposes burdens that are not disproportionate having regard to the pursuit of those objectives."[80]

There is a striking parallel between the description of the proportionality test that Justice Cartabia acknowledged the ICC was lacking, and the proportionality test that the same ICC distilled in this election law decision. All the four steps were sharply described in the judgment: 1) a legitimate aim; 2) the means-aims relationship; 3) the least restrictive means test; 4) the weighing of beneficial and adverse effects of the legislation.

The ICC claimed to be familiar with this test; indeed, it looks like that, before this decision, the Court was aware that this test existed and it was eager to introduce it into its case-law.

This is not to say that the ICC illegitimately introduced a novelty inconsistent with the ICC's role and the Italian constitutional text. Instead, the proportionality test, albeit mentioned in its prior case-law, merely was undeveloped. It needed clarification. So the ICC took the opportunity while reviewing the election law to distil it into clear terms. Interestingly, in order to do so, it explicitly borrowed from other courts.

It did not merely copy other jurisdictions' tools. The proportionality test has been said to be "fraught with difficulty. In part because it is so widely used by different courts, the term has defied consistent definition."[81] To import the "proportionality test" means to reshape it and align it to the domestic judicial review.

Why did they do so? After all, the decision on election law was unprecedented in its content—this was the first time that the judicial review of legislation dealt with the electoral legislation for the national Parliament. The declaration of unconstitutionality of such legislation was going to be extremely relevant for political life and institutions. Was the ICC wise in adopting the proportionality test, an unprecedented means of scrutiny, drawing from other jurisdictions, to deliver an unprecedented judgment? After all, even the term "proportionality" had never been used before this decision in the cases that involved the election law at issue: the three decisions that warned the Parliament about the flaws of the election laws had make no mention of such "proportionality" requisite.[82]

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[80] Corte Cost., 13 gennaio 2014, n. 1, Foro it. 2014, I, 677 (It.) ¶ 3.1. English translation provided by the ICC and available at `http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/1-2014_en.pdf(lastvisited:6March,2015)`.

[81] David S Law, *Generic Constitutional Law*, 89 Minn. L. Rev. 652, 702 (2005) (internal quotations omitted).

[82] *See* Corte Cost., 30 gennaio 2008, n. 15 e 16 (IT); 24 gennaio 2012, n. 13 (IT).