Das neue italienische Wahlrecht: immer noch verfassungsrechtlich fragwürdig?

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Sentence 01/2014 published on the 15th of January 2014 by the Italian Constitutional Court declared the Electoral Law 270 of the 21st of December 2005 unconstitutional. The law (famously known in Italy as the *Porcellum* or "pigsty" to stress the quality of its content) had been drafted by a member of the right-wing xenophobic *Lega Nord* (Northern League) party. The Northern League was at the time in government together with Silvio Berlusconi's *Forza Italia* (Go Italy!) party and the law was approvedby the ruling coalition against the votes of all opposition parties.

While the law drew harsh criticism from a variety of political scientists, constitutional experts and public commentators both in Italy and abroad for its many shortcoming, the Constitutional Court concentrated its criticism of Law 270 on fundamentally two aspects.

A first criticism of the Court pertained to the fact that the "electoral prize" *(premio di maggioranza)* that was to be granted to the party or coalition that had won the majority of the popular vote was to be assigned without this having had to reach a minimum threshold in the percentage of the total popular vote obtained. Such an arrangement would have made it possible, in theory, for a party or coalition that had obtained a very low percentage of the popular vote but just one vote more than the second-best performing party or coalition to effectively be given an absolute majority in at least one of the two chambers of Parliament.

A second critique of the Constitutional Court had to do with the exceptional length of the "blocked lists" *(liste bloccate)* provided at the ballot box. (NB: Italian citizens cannot vote for an MP but, rather, only for a party which presents its candidates in a pre-determined order). While implicitly questioning the lack of choice given to citizens in selecting their MPs though the *liste bloccate*, the Constitutional Court's criticism focused on the fact that, because the electoral lists presented dozens of candidates for each party, it was effectively impossible for voters to actually know or at least recognize all the candidates presented by the parties.

By declaring electoral law 270 of December 2005 unconstitutional, the Italian Constitutional Court removed the *premio di maggioranza* and effectively made it impossible for any party or coalition to gain an absolute majority in either chamber of Parliament. Furthermore, the Constitutional Court has *de facto* re-introduced a pure proportional system and the possibility for citizens to express a preference for their MP for what concerns the elections for the Upper Chamber of Parliament *(Senato della Repubblica)*.

Matteo Renzi's *Partito Democratico* (Democratic Party) and Silvio Berlusconi's *Forza Italia* (but not Beppe Grillo's *Movimento Cinque Stelle* or "Five Star Movement") have now felt compelled to draft a new electoral law known as the *Italicum*. So what features of the electoral reform advocated by Signor Renzi and Signor Berlusconi and now just approved by the Chamber of Deputies *(Camera dei Deputati)* have been included in the *Italicum* to address the concerns of the Constitutional Court?

On the one hand, the *premio di maggioranza* is now given to the party or the coalition that obtains at least 37% of the votes on a national basis. This is to be guaranteed a "prize" of 15% of the seats. However, should a party or coalition gain more than 37% of the popular vote, the *premio di maggioranza* cannot exceed 54% of the seats. Should no party or coalition obtain at least 37% of the vote, the two most voted parties or coalitions will go to a run-off to eventually face each

other and win an absolute majority through the *premio di maggioranza*.

On the other hand, provisions allowing for the very long and so called *liste lenzuolo* (bed sheets lists) listing the names of dozens of candidates from each party have been dropped. Italian political parties will now be able to list only a maximum of three to six candidates in each one of Italy's 120 electoral districts. This provision recalls the Spanish electoral law and should make it finally possible for the average citizen to recognize most of the candidates that he or she is supposed to support by voting for the party that presents the candidates.

The proposed electoral reform could be criticized on account of the many flaws that it either fails to address or even manages to introduce anew. Still, this article limits itself to an investigation of the implications of the draft electoral law that most closely touch upon the criticism levied to law 270 of December 2005 by the Constitutional Court. Indeed, the two provisions aiming to address the concerns expressed by the Italian Constitutional Court can be questioned on both political and constitutional grounds.

To begin with, while a threshold has now been put in place at 37% of the popular vote to assign the *premio di maggioranza*, other thresholds established to limit the mushrooming of smaller political parties might conjure to give birth to an even less representative distribution of seats. Indeed, that would be the case in a situation whereby the largest party of the winning coalition would win all the seats assigned with the *premio di maggioranza*. A state of affairs that could present itself should the smaller parties within the winning coalition fail to reach the 4,5% threshold required for them to enter Parliament. This is something that smaller parties within the Italian parliament will fight hard to change as the draft electoral law still has to go through the *Senato della Repubblica* in order for it to come into force.

Furthermore, while shorter "blocked lists"would be welcomed by the Constitutional Court as a means to make it easier for voters to identify the candidates, the *Italicum* still manages to undermine the principle of meaningful direct representation between voter and candidate. This is now the case because the *Italicum* allows each party to present the same candidate in eight different electoral districts at the same time. Indeed, as each candidate would theoretically have to campaign in eight electoral districts at the same time, it looks rather unlikely that the aspiring MP will manage to build a meaningful relationship with each one of its eight potential constituencies. A state of affairs, this one, that effectively makes it once more very difficult for the average voter to gain a clear understanding of the proposals and views put forward by the candidates of its electoral district.

Thirdly and from a more exclusively political perspective, the fact that an electoral reform might be approved by Parliament not only against the wishes of most smaller parties but, rather surprisingly, against the opposition of the party that received the most votes in the elections of February 2013 is questionable to say the very least. Indeed, Beppe Grillo's *Movimento Cinque Stelle* was the single party that received the largest proportion of the popular vote (25,56%) in February 2013. Because of the intricacies of electoral law 270 and because, unlike Renzi's *Partito Democratico* and Berlusconi's *Forza Italia,* Beppe Grillo refused to run within a coalition, the *Movimento Cinque Stelle* did not obtain a relative majority of the seats within the *Camera dei Deputati*. Still, it is rather unusual that an electoral reform should be approved against the wishes of the party that obtained the largest share of the popular vote.

Last but certainly not least and to complicate things further, the unclear "constitutional status" of the *Senato della Repubblica* might upset the whole electoral reform. Indeed, for the *Italicum* to come into force, the proposed electoral reform has also to be approved by the *Senato della Repubblica.* However and rather surprisingly, the proposed electoral reform only applies to the *Camera dei Deputati* and not to the *Senato della Repubblica.* This is the case because Renzi and Berlusconi have agreed, *inter alia*, that the *Senato della Repubblica* shall over the coming months be demoted to an *Assemblea delle Autonomie* (Assembly of the Regions) through a constitutional reform; thus

effectively affecting the finely balanced bicameral nature of the Italian parliamentary system.

However, in order change the status of the *Senato della Repubblica*, a constitutional law (as opposed to a regular legislative process as the one employed to reform the electoral law) will have to be approved by both chambers of Parliament. Article 138 of the Italian Constitution states that, in order for a constitutional law to come into force, this has to be approved twice by each chamber of Parliament with an interval of at least three months between each reading with an absolute majority of the votes in the second reading. A tall order for a Parliament where the two largest coalitions have already had troubles mustering the required votes to pass the afore-mentioned electoral reform in the Chamber of Deputies.

Within this context, should the constitutional reform pertaining to the *Senato della Repubblica* envisioned by Renzi and Berlusconi fail to materialize before new legislative elections, the consequences could be of a Kafkian nature to say the very least. Indeed, such a situation would see Italian voters going to ballot box with two distinct electoral laws in place. The *Italicum* would regulate the election of the *Camera dei Deputati* while electoral law 270 of December 2005 as amended by the Constitutional Court would still apply to the *Senato della Repubblica*. The most likely result of such an election would be one characterized by two radically different results (and relative majorities!) in the two chambers of Parliament.Sentence 01/2014 published on the 15th of January 2014 by the Italian Constitutional Court declared the Electoral Law 270 of the 21st of December 2005 unconstitutional. The law (famously known in Italy as the *Porcellum* or "pigsty" to stress the quality of its content) had been drafted by a member of the right-wing xenophobic *Lega Nord* (Northern League) party. The Northern League was at the time in government together with Silvio Berlusconi's *Forza Italia* (Go Italy!) party and the law was approvedby the ruling coalition against the votes of all opposition parties.

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