Italy after the Constitutional Referendum: Legal and Political Scenarios, from the Public Debate to the 'Electoral Question'

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Abstract

The aim of this paper is to illustrate and critically discuss events, debates, legal and political facts developing after the rejection of the constitutional reform by the constitutional referendum occurred in the past December.

In the section I the paper takes into consideration the crisis of government, underlining its characters and peculiarities; in the section II it studies the consequences of the crisis, with a special attention to the kind of government created due to the crisis.

The sections III, IV and V focus on the main post-referendum issue, which is the choice of the electoral system. The paper analyzes the problems deriving from the rejection of the constitutional reform for the (potential) application of the legge 6 May 2015 no 52. Then, it studies the complaints filed to the Constitutional Court, investigates the ways open to the Court, and, at the end, makes a focus on the recent decision of the Constitutional Court (judgment no 35 of 2017).

The last section proposes some concluding remarks, taking into consideration three main features that seem to be affected by the 'post-referendum' events: the system of government; the relationship between representative and direct democracy; and the role of the Constitutional Court, permanently swinging between politics and jurisdiction.

I. The Crisis of the Government (or of the Prime Minister?): Premises and Peculiarities

This essay describes and critically discusses the events, debates and legal and political facts unfolding in the aftermath of the constitutional referendum held on 4 December 2016.

In this referendum, the Italian people rejected the constitutional reform proposed by the Matteo Renzi Government, whose main target was the amendment of the bicameral Parliament and the functioning of the legislative procedure, and some changes in the territorial organization and regional powers.

The article focuses on the topic that has drawn the most political and legal attention from the media and jurists alike: the reconsideration of the rules governing the electoral system that have been formulated over the last few

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years, rules which allegedly sought to alter the composition of the Parliament and, above all, to establish a different relationship between the Government on one hand, and, respectively, the Chamber of Deputies and the Senate on the other. Such a reconsideration is very much necessary, as the abovementioned reforms have demonstrably failed in their goals.

The political (and constitutional) debate concerned also the crisis of the Italian Government and the change in its leadership – factors that will influence the duration and the goals of the current Government, as well as its possible resistance to immediately holding new elections.

A premise that must be considered when discussing the government crisis sparked by the outcome of the referendum is that, with regards to the constitutional reform, the political parties and the Government acted in an illogical, irrational and non-linear manner. Indeed, a linear path towards the overall reform of the constitutional and political system (with specific regards to the functioning of the Parliament, the relationships between the Government and the Parliament, the role of the President of the Republic, and the form of government as a whole), would have first and foremost led to a definitive adoption of the constitutional reform, and (only) secondarily to an intervention on the electoral legislation.[1]

The subsidiary nature of electoral legislation is well known, as is the relationship between the form of government, the framework regulating political parties' activity and electoral systems.[2] From these aspects, two main considerations obtain. On one hand, it is recommended to make a homogeneous amendment to the form of government (including the position of the Head of the State, whose election procedure was partly modified by the constitutional reform, without any change to the office's constitutional status or powers), rather than introducing separate provisions concerning the Parliament, the Regions, advisory bodies, etc. On the other hand, as noted above, the logical precedence of a constitutional amendment to the electoral system should have been taken into consideration.

Unfortunately, the proponents of the reform were not sensitive to these circumstances, and this insensitivity contributed to the government crisis that followed the outcome of the referendum.

To shed some light on this crisis, it should be emphasized that the creation of the new cabinet, led by Paolo Gentiloni, was caused by two main factors: (i) the failure of the parliamentary opposition to take political responsibility for the creation of a new cabinet, coherently with the solicitations made by the resigning Renzi; and (ii) the material impossibility to vote for a new Parliament

[1] V. Lippolis, 'L'Italicum di fronte alla Corte e i tempi del referendum sulla riforma costituzionale' *federalismi.it*, 1-4, 2-3 (2016), available at http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=32462 (last visited 20 March 2017).

[2] In Italian legal literature, see especially L. Elia, 'Governo (forme di)' *Enciclopedia del diritto* (Milan: Giuffrè, 1970), XIX, 638.

with the existing electoral system. The latter point was confirmed by the President of the Republic himself.[3]

These political circumstances, and, especially, the dynamics determined by the political parties in their approach to electoral legislation and institutional rules more generally, deeply influenced the Head of State's choice of the new Government. Indeed, the situation substantially deprived the President of the Republic of the constitutional possibility to dissolve the legislative assembly and call new elections.

Indeed, although the Constitution formally confers upon the President of the Republic the power to dissolve Parliament before its ordinary deadline in case of a (political or parliamentary) crisis, the *de facto* absence of a logical and functioning electoral law prevented the President from doing so. Some jurists have emphasized that there are no legal remedies against this institutional 'disabling', and thus alleged that a legitimate option would be for the President to file an appeal with the Constitutional Court to challenge the Parliament's wrongful conduct. However, even if the Constitutional Court were to decide this hypothetical appeal in favour of the President, the only effect would be to bring the issue back to the attention of the Parliament.[4]

The political crisis lasted very little, because it was necessary to account to the European Union (EU). Indeed, the EU increasingly appears to be the real partner in a 'confidence relationship' with the Government, and Government appears to be effectively accountable to the European institutions even more so than to the Parliament. A meeting of the European Council had been scheduled for 15 December 2016, and for the occasion, Italy needed a fully-empowered Prime Minister, to reassure the European institutions and international investors of the country's political solidity and cohesion. For these purposes, President Gentiloni was found to be the best solution.

However, the incongruence between the *de facto* consequences of the crisis and the constitutional provisions governing both the crises and the creation of government emerged in sharp relief, especially with regards to the substantive reasons that led to the crisis.

Differently from the vast majority of political crises, in the present case, there had not been any evolution in the Government's policies, nor any changes to the composition of the political group supporting it: therefore, at the constitutional level, the legal conditions justifying a government crisis at the constitutional level did not exist.[5]

[3] President Sergio Mattarella stated that it was impossible to vote using the existing electoral system during his speech of 31 December 2016.

[4] A. Ruggeri, 'Le dimissioni di Renzi, ovverosia la crisi di governo del solo Presidente del Consiglio, le sue peculiari valenze, le possibili implicazioni di ordine istituzionale' *forumcostituzionale.it*, 1-3 (2016), available at http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2007/01/ruggeri.pdf (last visited 20 March 2017).

[5] Ibid; Id, *La crisi di governo tra ridefinizione delle regole e rifondazione della politica*

Indeed, the crisis was not a 'government crisis' but rather a 'crisis of the Prime Minister': a crisis affecting Renzi, who, having transformed the constitutional referendum into a 'plebiscite' on his own political legitimacy and career, was obliged to translate the 'no' vote into something akin to a negative 'vote of confidence'.[6] This also explains why his ministers remained basically unaffected by the outcome of the referendum.

II. The Consequences of the Crisis: What Type of Government?

The main consequence of the crisis was the establishment of a new government. However, it is worth exploring whether the Government led by Paolo Gentiloni is a truly new one, and what type of government it may be.

The best way to answer these questions is perhaps to define the current Italian Government in a 'negative' manner, specifying what it *is not*, rather than what it *is*.

In this author's view, this Government is neither a 'technical executive', nor a '(strictly) political executive', nor an 'executive of discontinuity'. It is not a technical executive because technical skills – so fundamental in previous experiences, such as the Government led by Mario Monti – do not seem to have influenced the President of the Republic in his appointment of Gentiloni. Indeed, Gentiloni has had a long political career, and characterizes himself as a long-standing politician rather than as a technocrat (Gentiloni was part of the City Council of Rome in the 1990s, a Member of Parliament since 2001, the Minister of Communications from 2006 to 2008, and Minister of Foreign Affairs in Matteo Renzi's Government).

Gentiloni's Government is also not a political government, or an ordinary government within a representative and democratic system. Indeed, the features of a political executive differ from those of the current Government. First, a political executive enjoys the support of a political majority, generally pursuant to elections in which political alliances confront one another on various issues, themes and political perspectives. A political executive is also characterized by the enjoyment of support from a political majority built not only on the need to maintain power and endorse the Government, but also on a common project and shared ideas for the social and economic development

(Milano: Giufffrè, 1990) and Id, 'Le crisi di governo tra "regole" costituzionali e "regolarità" della politica' *Politica del diritto*, 79 (2000); R. Cherchi, 'Le crisi di governo fra Costituzione ed effettività' *costituzionalismo.it*, 1 (2011), available at http://www.costituzionalismo.it/articoli/390/ (last visited 20 March 2017); N. Maccabiani, 'Gli sforzi congiunti del Presidente del Consiglio dei ministri e del Presidente della Repubblica per evitare la crisi di governo' 1 *Osservatorio AIC*, 1-15 (2013).

[6] The instrument used by the Italian Parliament, even if it is not disciplined by the written Constitution, by which the Government asks to the Chambers to vote on a fundamental legislative proposal knowing that a negative vote on that would be equivalent to a positive vote on a motion of no confidence.

of society at large. Finally, a political government normally benefits (albeit indirectly) from the people's mandate – this was not the case, neither for the previous Government, led by Renzi, nor for the current one.

Finally, Gentiloni's Government is not one of discontinuity. This is chiefly due to the fact that its relationship with the previous Government is one of substantial continuity, both in terms of its political composition (and 'nonpolitical' nature) and of the men and women actually covering governmental roles.[7]

Indeed, President Gentiloni has given his own definition of 'his' Government: one of a 'government of responsibility'. However, this appears to be rather inaccurate for several reasons. First, because every government is accountable to the public system and to society at large. Second, governments are necessarily connected to the Parliament by a relationship of (political) responsibility. Finally, because today, governments are vested with an additional form of responsibility with respect to traditional internal political responsibility: responsible towards the European institutions, the (international) market and financial actors.

Finally, some jurists have defined Gentiloni's Government as one of 'necessity' or as an 'inevitable government',[8] referring to the fact that it was actually the only viable solution after the government crisis triggered by Renzi.

At any rate, the current Government legitimately claims to enjoy full powers and has assured its total commitment to the resolution of the country's various political, social and economic problems, as any ordinary government would following the usual electoral and political process.

However, the sword of Damocles in the hands of the Constitutional Court (consisting in its decision on the electoral law) has been hanging over the Government from the very first moment of its entry into power. Indeed, it was very well known that an 'immediately applicable electoral system' would have encouraged many political parties to call for immediate elections.

III. The Main Issue after the Referendum: Which Electoral System to Apply? The Political Debate and Problems Arising from the Rejection of the Constitutional Reform for the (Potential) Application of the *Italicum*

Everybody knows that the electoral law known as the *Italicum*, would

[7] The only changes made were not particularly significant, and regarded: the relocation of the former Minister of Constitutional Reform, Maria Elena Boschi, to the position of Secretary of State at the Presidency of the Council of Ministers, due to the fact that the topic of constitutional reforms was removed from the new Government's programme; the transfer of Minister Angelino Alfano from the Ministry of Home Affairs to that of Foreign Affairs; and, finally, the replacement of Stefania Giannini with Valeria Fedeli at the Minister of Education, University and Research.

[8] A. Ruggeri, n 4 above.

certainly have had a different application if the constitutional reform proposed in the referendum had been confirmed. Indeed, the *Italicum* concerned only the Chamber of the Deputies, because it was linked to the new (potential) constitutional provision that abolished the confidence relationship between the Government and the Senate.

In addition, the points considered by the Constitutional Court – which are analysed further below – change completely, depending on whether they do or do not accompany an institutional system such as that which the constitutional reform sought to design.

The 'no' vote reinstated the 'game' over the electoral law, which the Parliament should have quickly reformed to prevent the next political elections from taking place using two different electoral systems, one for the Chamber of Deputies and the other for the Senate. Indeed, as already underlined, the *Italicum* (which entered into force in July 2016) only regulates the elections to the Chamber of Deputies. When Parliament passed the law, it was assumed that the constitutional reform would be adopted and, therefore, that the Senate would no longer be elected by universal suffrage.

Any political elections that might have been held before the Constitutional Court handed down its judgment (which will be discussed in Section V below) would have applied the *Italicum* for the Chamber of Deputies and the so-called *Consultellum* for the Senate: the latter being the strongly proportional system arising pursuant to judgment no 1 of 2014 of the Constitutional Court, which repealed some provisions of the so-called *Porcellum*,[9] or legge 21 December 2005 no 270, on the previous electoral system (which was formally proportional but fundamentally majoritarian).

The *Italicum* establishes a proportional electoral system with some majoritarian correctives: a two-round system, electoral thresholds and a majority bonus. The law creates one hundred multi-member electoral constituencies, and party lists that are closed with regards to the top candidates. Voters may express no more than two preferences; if two preferences are cast, one woman and one man should be chosen: if both preferences were for candidates of the same sex, the second choice is to be considered void.

The list or party obtaining more than forty per cent in the first round (or that wins the second round) also gains the majority bonus of three hundred and forty upon six hundred and thirty seats. The remaining two hundred and ninety seats are assigned to the other parties. Regardless of whether anyone succeeds in obtaining forty per cent of the votes cast, the second round would be open to the two parties or lists that had obtained the most votes at the first round. The minimum threshold was fixed at three per cent.

[9] This author does not approve of the frequent use, especially in recent years, of a mangled Latin to define the various electoral statutes, and will seek to restrict it as much as possible. However, these terms will occasionally be used for the sake of brevity.

As mentioned above, in judgment no 1 of 2014 (which will be examined in further detail in Section V of this paper), the Constitutional Court actually transformed the previous electoral system pending the adoption of a new statute, which was supposed to be the *Italicum*. Indeed, by handing down a declaration of unconstitutionality, the Court transformed the electoral system into a strictly proportional one, with a threshold of eight per cent for individual parties and of twenty per cent for coalitions.

Therefore, as things stood prior to the Constitutional Court's decision on the latest electoral law, the Italian Parliament would have been elected on the basis of two distinct electoral systems: one applying to the Chamber of Deputies (the *Italicum*) and the other to the Senate (*Consultellum*). However, such an ambiguous – and perhaps dangerous – framework did not change after the Court's judgment, because the latter addressed only the electoral system for the Chamber of Deputies. In other words, the system's serious heterogeneity remains, thus sending a strong warning to the legislator to provide for a coherent framework as soon as possible.

Furthermore, the *Italicum* had already drawn criticism before the referendum's outcome was known, mainly for the following reasons: first, it created a very large majority bonus, which imperiled the fairness of the relationship between the legislative and the executive power; second, because of issues relating to the adequate representativeness of parliamentary minorities of the top candidates,[10] which, being in closed positions on the party lists, would not have been chosen by the voters but by the political parties. Parliament could have regulated these issues in a very different manner, (see the Constitutional Court's statements in judgment no 1 of 2014 on legge 21 December 2005 no 270).[11]

For these reasons, many proposals to modify the statute were advanced. These were proposed chiefly by the Democratic Party, which had elaborated the statute in the first place. Prior to the referendum, this political group, which was closest to the former Prime Minister Renzi, had also proposed to reduce the majority bonus, to allay the wishes expressed on this point by a minority within the party. Other proposals concerned a return to the so-called *Mattarellum* system (the majoritarian and one-round system in force from 1994 to 2005), and an amendment of legge 6 May 2015 no 52 to provide for a majority bonus of ninety seats for the winning list and the elimination of the second round.

Another public proposal, that the press had colloquially termed *Mattarellum*

[10] The expression 'top candidates' indicates the first candidates in their lists within the constituency in which they compete. This position entails a greater possibility of election due to the absence of preferential voting, as will be discussed in the following paragraphs.

[11] I. Nicotra, 'Proposte per una nuova legge elettorale alla luce delle motivazioni contenute nella sentenza della Corte costituzionale n. 1 del 2014' *giurcost.it*, 1-19 (2014), available at http://www.giurcost.org/studi/Nicotra2.pdf (last visited 20 March 2017).

2.0, provided for the election of four hundred and seventy-five deputies upon six hundred and thirty within single-member and single round constituencies. The remaining one hundred and forty-three seats (with the exception of the seats elected by the constituency of Italians residing abroad) would be assigned as follows: a majority bonus of ninety seats would be assigned to the winning list, with a limit of three hundred and fifty deputies; thirty seats to the second list or coalition; and twenty-three seats distributed among the lists that have obtained more than two per cent of votes cast and have less than twenty candidates elected.

The faction of the Democratic Party led by Matteo Orfini, which gathers the party's younger executives, proposed a proportional system based on the Greek electoral system: a single round and a majority bonus for the winning party, of fifteen per cent of seats (equal to fifty MPs upon three hundred and fifty).

The smallest centre-right parties proposed to maintain legge 6 May 2015 no 52 (the majority bonus, double-round system, preferences, blocked top candidacies)[12] but with a substantial amendment, assigning the majority bonus to a coalition of parties. This would arguably foster the creation of coalitions of lists, rather than the autonomy of single (major) parties.

The Movimento *Cinque Stelle* – or Five-Star Movement, the radical movement that for some years now has challenged the established political scenario with new forms of communication and populist messages transcending traditional 'left' and 'right' conceptions of politics and society – proposed a pure proportional system, without thresholds and with intermediate constituencies and preferences. This, however, seemed to be more of a provocation than a real and substantial position, because the *Italicum* would have strongly favoured this party.

Other legislative proposals were advanced by individual MPs, and were thus clearly unlikely to be approved. For example, some deputies proposed cancelling the two-round system to establish a majority bonus pursuant to which the party in question would automatically obtain forty per cent of the votes; the president of the 'Mixed Group' of the Chamber of Deputies proposed to assign the majority bonus only to coalitions, and that the second round would be valid only if voter turnout reached the threshold of fifty per cent.

After the referendum, however, all of the criticisms levelled against the electoral system's problematic pale in comparison to the issue of the heterogeneity between the electoral system applied to the Chamber of Deputies and that governing elections to the Senate.

Indeed, it is evident that, without modifications to the current electoral law, it would be almost impossible to establish a parliamentary majority that is capable of voting a new government into power.

[12] On these points, see G. Azzariti, 'La riforma elettorale' 2 *Rivista AIC*, 1-13, 2 (2014).

Even a projection made by ‘*Scenari politici*’,[13] which elaborated electoral polls on a regional basis, concluded that the use of the *Italicum* for the Chamber of Deputies and of the *Consultellum* for the Senate would inevitably lead to the Parliament being seriously incapable of voting into power not just a *political* government, but perhaps even any other type of government (technical, compromise, etc).

The numbers shown in *Table 1* below reveal that even a ‘coalition’, an ‘agreement’ between the Democratic Party and Forza Italia (the political movement led by Silvio Berlusconi, now separated from the other wing party, deriving from the same experience, led by the Minister Angelino Alfano) would obtain one hundred and fifty-four senators in the Senate – far from the majority required to support a government.[14]

REGIONI	SEGGI	PD	ALTRI CSX	FORZA IT	LEGA N.	FRAT D'IT	ALTRI CDX	5 STELLE	SVP	FARE-AP
Piemonte	22	7	1	3	4	0	0	7	0	0
Valle D'Aosta	1	1	0	0	0	0	0	0	0	0
Lombardia	47	17	0	6	13	0	0	11	0	0
Trentino Alto Adige	7	2	0	1	1	0	0	1	2	0
Veneto	24	7	0	2	6	1	0	6	0	2
Friuli Venezia Giulia	7	2	0	1	2	0	0	2	0	0
Liguria	8	2	0	1	1	1	0	3	0	0
Emilia Romagna	21	10	0	2	3	0	0	6	0	0
Toscana	18	9	0	1	3	0	0	5	0	0
Umbria	7	3	0	1	1	0	0	2	0	0
Marche	8	3	0	1	1	0	0	3	0	0
Lazio	27	9	0	4	2	2	0	10	0	0
Abruzzo	7	2	1	1	0	0	0	3	0	0
Molise	2	1	0	0	0	0	0	1	0	0
Campania	30	10	2	6	0	1	0	11	0	0
Puglia	21	8	0	4	0	1	2	6	0	0
Basilicata	7	3	0	1	0	0	0	3	0	0
Calabria	10	3	0	2	0	1	0	3	0	1
Sicilia	26	7	1	4	0	1	2	9	0	2
Sardegna	9	3	0	1	0	1	1	3	0	0
Estero	4	2	0	1	0	0	0	1	0	0
Totale partiti	313	111	5	43	37	9	5	96	2	5
Totale coalizioni	313	116		94				96	ScenariPolitici	

Table 1. Projections made by scenaripolitici.com on the possible results for the Senate, based on polls and on the application of the electoral system resulting pursuant to judgment no 1 of 2014 of the Constitutional Court.

[13] A website that compiles and collects political surveys. See http://www.scenaripolitici.com.

[14] See also ‘*Consultellum*: se si va al voto senza modificare l’*Italicum*, il Senato sarà paralizzato. Anche con un nuovo “Nazareno” ’ *Huffington Post*, 16 November 2016 available at http://www.huffingtonpost.it/2016/11/16/consultellum-legge-elettorale_n_13008656.html (last visited 20 March 2017).

IV. The Cases Brought to the Constitutional Court: An Analysis of the Issues and the Ways Open to the Court

This section does not focus on the debate surrounding the date scheduled by the Constitutional Court to hear the case. Indeed, several discussions have centred upon the Court's adoption of a 'political' attitude in its choice to decide (or refrain from deciding) the case after the referendum was held. From a political point of view, this would have amounted to a sort of 'confession' that institutional, political, social and economic factors do influence the Court's decisions. Indeed, on some views, the constitutional judges awaited the popular verdict on the constitutional reform to decide the fate of the electoral system accordingly. Should the reform have passed, this system would have concerned the only Chamber linked to the Executive branch by a relationship of confidence.

The Court explained the reasons for the (late) scheduling in various public statements.

The Court justified scheduling the hearing on 24 January on the ground that an earlier date would have deprived the parties of the opportunity to rely on the deadlines established in law to bring proceedings. In early 2017, Paolo Grossi, the President of the Constitutional Court, signed the decree to schedule the public hearing for the reference orders remitted by the Tribunals of Trieste and Genoa. These courts had submitted to the Court some questions on legge 6 May 2015 no 52 that were similar to those in other orders that had already been scheduled for the same hearing.

In particular, both Tribunals referred questions concerning the second round and the right of option granted to the top candidates elected in more than one constituency. The Tribunal of Genoa also referred questions concerning the assignation of the majority bonus at the first round and on the proportional reallocation of the votes in Trentino Alto-Adige.

Therefore, the Court stated that its scheduling respects the due dates within which the parties were to submit their pleadings, because these orders reached the Court's Registry on 5 and 12 December 2016 respectively, and were published *per saltum* in the no 50 of the *Gazzetta Ufficiale* (Official Journal of the Italian Republic), on 14 December 2016.

To analyse the issues raised and to consider the various hypothetical solutions, three main points relating to the orders will be discussed:

a) the relationship between the existing electoral mechanisms and the constitutional reform;
b) the admissibility of the claims; and
c) their merits.

With regards to (a), it is first necessary to emphasize that the referendum's outcome critically affects the Constitutional Court's evaluation, in particular its judgment on the proportionality between the ways used to

achieve the constitutional aim of government stability (the majority bonus) and the compression of the parliamentary assembly's representative function (judgment no 1 of 2014, para 3.1). It is important to recall that this proportionality is the parameter on which the cancellation of a part of legge 21 December 2005 no 270 was based.

Indeed, the majority bonus assumes different values in a system in which only one assembly is linked to the Executive power in a relationship of confidence (ie what would have happened if the referendum had approved the reform) and in systems in which two chambers are politically linked to the Executive power, and in which the second chamber is elected via a proportional method.

The Court's review should concern not only the balance between stability and representativeness in a given electoral system, but should also consider the consequences of the system on the overall institutional context.[15]

If the law adopted in 2015 should coexist, in a context of equal bicameralism, with a pure proportional electoral system such as that ensuing from judgment no 1 of 2014, several problems would emerge. In particular, a majority bonus assigned after the second round (ie a bonus granted to those lists that failed to achieve forty per cent of the votes in the first round) would not make sense if the Senate were to be elected by means of a proportional system. Indeed, the bonus would fail in its purpose of ensuring governmental stability and solidity. The majority bonus could perhaps be reasonable if assigned to a list achieving forty per cent of votes for the Chamber of Deputies if it could be assumed that, given such a high consensus, it would also be capable of obtaining the majority of seats at the Senate with the *Consultellum*. However, it is difficult to justify the bonus in the second round, because the winning list is unlikely to gain the majority at the Senate too.

All these reflections suggest that the constitutional review of the provision on the second round should be stricter within the current context of equal bicameralism, because the likelihood of attaining the intended result – in terms of governmental stability – would diminish due to its application to a single chamber.

As for point (b), it is submitted that this is the more technical – and crucial – point. The Constitutional Court's role, its 'behaviour' and its position within the constitutional system must also observe the rules governing its activity and the constitutional process as a phenomenon of a (constitutional) jurisdiction. In any case, the choice to decide or to not decide is closely connected with the timing and the ways in which the proceedings are launched.

The Tribunal of Messina made its reference to the Court when the *Italicum* was yet to enter into force. This case clearly lacked the requirement of relevance of the Court's decision for the solution of the referred proceedings.

[15] See V. Lippolis, n 1 above.

Art 23 of legge 11 March 1953 no 87 establishes that when a judgement cannot be defined independently from the resolution of the question concerning the constitutionality of a given provision, the judicial authority issues an order referring the case to the Constitutional Court. In the case of legge 6 May 2015 no 52, the referral order of the Tribunal of Messina had been proposed with regards to a law that had yet to become effective, and that could not therefore violate the constitutional rights mentioned by the civil court. Indeed, the entry into force of the *Italicum* was postponed to 1 July 2016, and the Tribunal of Messina delivered its order on 16 February 2016, thus before the law could be applied: this should lead to the Court holding that the relevance of the questions of constitutionality submitted by the Tribunal of Messina is unfounded and, therefore, issuing a declaration of inadmissibility.

The Constitutional Court has always stated that, to be relevant, a provision must at least be applicable to a specific case (judgments no 115, 125, 149, 180 and 255 of 2001; 240 of 2012; and 184 of 2013). If political elections had been held before 1 July 2016, the electoral system applied would have been that deriving from legge 21 December 2005 no 270 as amended by judgment no 1 of 2014. This demonstrates the *fictio litis* nature of the question referred to the Constitutional Court.[16]

Conversely, the orders referred by the Tribunals of Turin and of Perugia are subsequent to the date on which the law entered into force. However, they too present substantial problems of admissibility.

First, admissibility depends on the specific moment in which the requirement of relevance (for the referred proceedings) of the constitutional decision is to be evaluated. Indeed, if this moment coincides with the date on which the (referring) court reserved judgment after the hearing, in the case of both tribunals, such date precedes the day of entry into force of the *Italicum*.

A further reason undermines the admissibility of the questions. The even that gave rise to the proceedings is very different from that which led to the Constitutional Court's judgment in 2014. In that case, the case concerned elections that had already occurred.

In 2016, no political elections had taken place; and, consequently, no violations of the right to vote, which is protected and guaranteed by Art 48 of the Italian Constitution.

To declare the question admissible would imply a deep transformation of the overall constitutional arrangements, considering that the Italian legal system envisages neither a form of *amparo constitucional* nor the prior review of legislation for constitutionality.

Moreover, judgment no 1 of 2014 is not the only precedent that the

[16] S. Pizzorno, 'L'*Italicum* alla prova della Corte costituzionale, tra questioni di ammissibilità e di merito' *forumcostituzionale.it*, 1-8, 4 January 2017, available at http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2015/05/pizzorno.pdf (last visited 20 March 2017).

Constitutional Court can take into consideration: rather different indications seem to derive from judgment no 193 of 2015. In this ruling, which regarded the constitutionality of the electoral law of the Lombardy Region, and more specifically the assignment of the majority bonus to the coalition that has obtained the greatest number of votes, the Constitutional Court's review was based on concrete electoral results, by means of which it verified that the potential risks deriving from the allocation of the bonus to minority lists or coalitions did not arise because the lists linked to the President of the Lombardy had obtained a significant majority.

The third point (c), concerns the merit.

Both the Tribunal of Turin and the Tribunal of Perugia submitted the same questions, concerning (i) the holding of a second round of voting between the two lists that have obtained the most votes in the first round, and the consequent assignment of the majority bonus to the winning list, without a minimum threshold; and (ii) the provision enabling multiple candidacies on part of individual candidates, with the possibility for the top candidates elected in more than one constituency to choose the constituency in which to result as having been elected, without any limit or obligation.

The Tribunal of Messina alone presented a question on the substantial differences between the two electoral systems for the election of the Chamber of Deputies and of the Senate. In addition, the Tribunal of Messina presented various other questions, concerning the majority bonus, the three per cent threshold, the breach of the principle of territorial representation and direct vote, and the difference between the thresholds applying to the Chamber of Deputies and to the Senate. The Tribunal of Messina considered the majority bonus to be rational, but also worthy of discussion in light of the fact that such bonus depends on a percentage of valid votes, rather than on the number of voters, and because of the threshold of three per cent, which clearly limits the system's representativeness.

All of the issues raised by the various tribunals focused on the main issue of the majority bonus. This topic was extensively discussed by scholars, who reached very different conclusions on the matter.

The first position supports the notion that there are no doubts on the constitutionality of the minimum threshold established by the electoral legislation in 2015 for assigning the bonus. On this view, the threshold is a rational and logical compromise between the Constitution's requirements (set out in judgment no 1 of 2014) to fix not only a minimum, but also an appropriate, threshold: one that could not be excessively low, to prevent a small party from possibly gaining the bonus, nor excessively high, to avoid frustrating the bonus' usefulness.

Therefore, the threshold of forty per cent could be rational, even compared

to the entity of the bonus, which consists in fifty-four per cent of the seats.[17]

Instead, another position supports the view according to which, although the threshold is logical in itself, problems derive from assigning the majority bonus to the winning list at the second round, without any consideration of the votes it actually obtained in the first round.[18]

V. The Constitutional Court's Judgment on the Electoral Law

On 24 January 2017, the Constitutional Court held the public hearing in the case on legge 6 May 2015 no 52 (as mentioned above, also known as the *Italicum*), referred by five different tribunals. The day after the hearing, the Court published on its website a brief public statement with three main points.

The first point regarded the role of the Constitutional Court, as it established that the claims of inadmissibility argued by the Attorney General were rejected. The Court also declared the inadmissibility of the request, submitted by the parties' respective counsel, to autonomously raise and consider the question of the constitutionality of the procedure followed to pass the law.

The second point concerned the substance of the provisions: the Court rejected the question of constitutionality regarding the 'majority bonus' raised by the Tribunal of Genoa, but accepted those raised by the Tribunals of Turin, Perugia, Trieste and Genoa on the second round, declaring the unconstitutionality of the provisions establishing the electoral mechanism. Moreover, the Court upheld the question, raised by the same courts, on the provision that allows the top candidates on the electoral list to choose the constituency of their election. In the public statement, the Court also ruled (correctly, in this author's view) that this declaration of unconstitutionality maintains the criterion of the random draw, already provided for by law (by Art 85 of the decreto del Presidente della Repubblica 30 March 1957 no 361).

The third and fundamental point constitutes the decision's real result. In the public statement, the Court declared that, after the judgment, the (resulting) electoral law could be immediately applied. This ultimately means that the Constitutional Court (temporarily?) substituted itself for the legislator, thus assuming the role of actual lawmakers in electoral matters.

From this, a wise and forward-thinking Court seems to emerge with regards to the guilty inactivity of Parliament, where opposing political tendencies and (above all) the fear of losing the chance to be elected to the Chambers are

[17] G. D'Amico, 'Premio di maggioranza, soglia minima e ballottaggio', in A. Ruggeri and A. Rauti eds, *Forum sull'Italicum. Nove studiosi a confronto* (Torino: Giappichelli, 2015), 8.

[18] G. Sorrenti, 'Premio di maggioranza, soglia minima e ballottaggio', in A. Ruggeri and A. Rauti eds, n 17 above, 9-10.

paralysing the capacity to formulate new (constitutionally compatible and efficient) electoral legislation.

The Constitutional Court's is not surprising; the Court appears to consider judgment no 1 of 2014 as an actual precedent, and to have elaborated a theory of constitutional review of electoral matters, by bypassing the 'grey area' (or 'free zone') of the electoral law.[19] The decision is clear:

> '(...) as regards national political elections, the right to vote could not be judicially protected due to the provisions contained in Art 66 of the Constitution and in Art 87 of the decreto del Presidente della Repubblica

[19] Much has been written on the historical judgment of the Constitutional Court that declared the unconstitutionality of the statute 21 December 2005 no 270, evidently bypassing the procedural rules on constitutional adjudication and formulating a new power of the Court. Among these, see A. Anzon Demmig, 'Accesso al giudizio di costituzionalità e intervento "creativo" della Corte costituzionale' 1 *Rivista AIC*, 1-4 (2014); F. Bilancia, ' "Ri-porcellum" e giudicato costituzionale' *Costituzionalismo.it*, 1-9 (2013), available at http://www.costituzionalis mo.it/articoli/465/ (last visited 20 March 2017); R. Bin, ' "Zone franche" e legittimazione della Corte' *Forum di Quaderni costituzionali*, 1-5 (2014), available at http://www.forumcostituzionale.it/ wordpress/images/stories/pdf/documenti_forum/giurisprudenza/2014/0018_nota_1_2014_bi n.pdf (last visited 20 March 2017); B. Caravita, 'La riforma elettorale alla luce della sent. 1/2014' *federalismi.it*, 1-7 (2014), available at http://www.federalismi.it/nv14/articolo-documento.cfm?a rtid=24022 (last visited 20 March 2017); F. Dal Canto, 'Corte costituzionale e giudizio preventivo sulle leggi elettorali. Seminario del Gruppo di Pisa Corte costituzionale e riforma della Costituzione Firenze, 23 ottobre 2015', available at http://www.gruppodipisa.it/wp-content/uploads/ 2015/11/Dal-Canto-Giudizio-preventivo-30-ottobre.pdf (last visited 20 March 2017); A. D'Aloia, 'La sentenza n. 1 del 2014 e l'*Italicum*', available at http://gspi.unipr.it/sites/st26/files/allegatipa ragrafo/22-12-2015/daloia_la_sentenza_n._1_del_2014_e_litalicum.pdf (last visited 20 March 2017); S. Gambino, 'Democrazia costituzionale e *Italicum*' 3 *Osservatorio AIC*, 1-9 (2015); A. Martinuzzi, 'La fine di un antico feticcio: la sindacabilità della legge elettorale italiana' *Forum di Quaderni costituzionali*, 1-23 (2014), available at http://www.forumcostituzionale.it/wordpress/ima ges/stories/pdf/documenti_forum/giurisprudenza/2014/0019_nota_1_2014_martinuzzi.pdf (last visited 20 March 2017); A. Morrone, 'La sentenza della Corte costituzionale sulla legge elettorale: *exit porcellum*' *Quaderni costituzionali*, 119 (2014); R. Pastena, 'Operazione di chirurgia elettorale. Note a margine della sentenza n. 1 del 2014' 1 *Osservatorio AIC*, 1-9 (2014); A. Pertici, 'La sentenza della Corte costituzionale sulla legge elettorale: l'incostituzionalità ingannevole' *Quaderni costituzionali*, 122 (2014); L. Pesole, 'L'incostituzionalità della legge elettorale nella prospettiva della Corte costituzionale, tra circostanze contingenti e tecniche giurisprudenziali già sperimentate' *costituzionalismo.it*, 1-29 (2014), available at http://www.co stituzionalismo.it/articoli/484/ (last visited 20 March 2017); A. Riviezzo, 'Nel giudizio in via incidentale in materia elettorale la Corte forgia un tipo di dispositivo inedito: l'annullamento irretroattivo come l'abrogazione. È arrivato l' "abroga-mento"?' *Forum di Quaderni costituzionali*, 1-9 (2014), available at http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documen ti_forum/giurisprudenza/2014/0009_nota_1_2014_riviezzo.pdf (last visited 20 March 2017); G. Serges, 'Spunti di giustizia costituzionale a margine della declaratoria di illegittimità della legge elettorale' 1 *Rivista AIC*, 1-14 (2014); L. Trucco, 'Il sistema elettorale "*Italicum*" alla prova della sentenza della Corte costituzionale n. 1 del 2014 (note a prima lettura)' *giurcost.it*, 1-16 (2014), available at http://www.giurcost.org/studi/trucco10.pdf (last visited 20 March 2017); Id, 'Il sistema elettorale "*Italicum-bis*" alla prova della sentenza della Corte costituzionale n. 1 del 2014 (Atto secondo)' *giurcost.it*, 1-22 (2015), available at http://www.giurcost.org/studi/truc co12.pdf (last visited 20 March 2017); G. Zagrebelsky, 'La sentenza n. 1 del 2014 e i suoi commentatori' *Giurisprudenza costituzionale*, 2959 (2014).

> 30 March 1957 no 361, as interpreted by the ordinary courts and Parliament when it controls the result of the elections, coherently with the non-implementation of the delegation contained in Art 44 of legge 18 June 2009 no 69 in which it authorized the Government to establish the exclusive jurisdiction of the administrative tribunals over disputes concerning elections (...) even for the parliamentary elections. (...) Because the need to avoid, for the political electoral system, (the emergence of) a "free zone" (immune from) constitutional review persists, the Court must restate that which it decided in judgment no 1 of 2014, with the same limits.' (para 3.1., *Considerato in diritto*).

To reprise the points emphasized by the Court in its statement, I analyse the first: that on admissibility.

Three problems emerge with regards to this topic: (i) the electoral law was not yet in force when the interlocutory question of constitutionality was raised in the referred proceedings; (ii) the electoral law has never been used before the proceedings; and (iii) it was difficult to distinguish the subject of the referred proceedings (the ordinary proceedings), from that of the constitutional review.

As for the first point, the Court stated (para 3.3., *Considerato in diritto*) that the objective uncertainty surrounding the effects of the right to vote is directly linked to the changes in the legal system caused by the entering into force of the electoral legislation. Therefore, the postponement of the entry into force of the legislative provisions is irrelevant, because Parliament merely established that the new electoral rules would enter into force on 1 July 2016, but did not provide for a suspension clause. The entering into force of the statute does not depend on a hypothetical future event, because the lawmaker defined a due date for its application. Therefore, the Court stated that the parties have an interest in the legal action, an interest based on the legal provisions that have entered into force even if they are not yet significant.

As for the second point (no application of the law), the Court quoted the Italian Court of Cassation, recalling that the specific type of action used in the case does not require a previous and concrete violation of the right to have occurred. Indeed, such action could also be used to prevent future injuries. The Court refers to judgment no 1 of 2014, the direct precedent. In this judgment, it stated that the holding of admissibility derived from the need to protect the right to vote from being (even potentially) jeopardized by unconstitutional electoral legislation.

Finally, as for the third point, the Court held unfounded the objection that the questions would not be preliminary due to the fact that the subject matters of the ordinary judgments and of the constitutional review were indistinct. Recalling judgment no 110 of 2015 and (again) judgment no 1 of 2014, the Court asserted that, while in ordinary proceedings, the main issue is the

request to verify the effectiveness of the right to vote, the constitutional proceedings concern the declaration that the right to vote has jeopardized by the current electoral legislation. Therefore, according to the Court, the subject matter of the proceedings ordinary courts – namely the verification of the effectivity of the right to vote – has autonomous value.

As for the merit of the legislative provisions, the Court took into consideration two points to declare the unconstitutionality of some of the provisions evaluated: those concerning the majority bonus (para 9.2., *Considerato in diritto*), and those on the choice of the top candidates (para 12.2., *Considerato in diritto*).

With regards to the majority bonus, the Court stated that it is beyond doubt that the legislator is entitled to establish a majority bonus within a proportional system as long as such mechanism does not lead to an extreme overrepresentation of the list that obtained the simple majority (see also judgment no 1 of 2014). In this case, the legislator had established a minimum threshold for the allocation of the majority bonus, also providing for a second round to be held if none of the lists achieved three hundred and forty seats at the first round. The Court, however, believed that the actual procedures to assign the majority bonus at the second round contrast with the constitutional principle of popular sovereignty and with the constitutional right to vote.

Indeed, the second round, as regulated by legge 6 May 2015 no 52, is not a new and different voting exercise, but rather constitutes a 'continuation' of sorts of the first round. According to the Court, this much is revealed by the provisions governing the second round: only the two lists that had obtained the most votes in the first round may gain access to the second, and the lists could not make any alliances and coalitions between the first and the second round, in order to become stronger at the second round. Moreover, even after the second round, the percentages according to which the parliamentary seats are distributed remain the same as those established for the first round, except for the winning list and for the list that had taken part (and lost) in the second round.

According to the Court, this type of majority bonus failed to protect the constitutional need to prevent an excessive compression of the representativeness and equality of the vote. Indeed, a list could gain access to the second round even by obtaining a small consensus in the first round, and with such consent obtain the majority bonus in the second round: thus, the seats obtained by the list would be more than double those that the list would have obtained in the first round. These considerations led the Court to state that the challenged provisions on the second round reproduce the distorting effect that rendered the previous legislation (legge 21 December 2005 no 270) unconstitutional. In this case too, indeed, the legitimate and constitutionally oriented aim to endow the executive bodies with stability leads to a

disproportionate restriction of other constitutionally protected interests (ie the representativeness and equality of the vote). Therefore, the review for proportionality and rationality led the Court to hold that the majority bonus was unconstitutional.

Another interesting point concerns the judgment's 'outcome'.[20] The Court stated that it does not have the power to modify the concrete procedures with which the majority bonus is assigned, neither by means of additional interventions nor by introducing corrective mechanisms such as those suggested by the ordinary courts. Only the legislator could make such decisions (for example, whether to assign the majority bonus to a single list or to a coalition of lists). According to the Court, however, the legal framework that remains in force after the declaration of unconstitutionality was immediately applicable. In the Court's own words, 'it is adequate to guarantee the replacement, in any moment, of the Constitution's elected body, as required by constant constitutional case-law'.

With regards to the choice of the top candidates, the Court stated that the absence of any objective criteria in the provisions analyzed – an absence that is coherent with the will expressed by the voters, as it aims to orient the decisions made by top candidates elected in more than one constituency – manifestly contrasts with the personal identification of candidates by voters that legge 6 May 2015 no 52 permits by means of the preferences.

The option provided by the law allows the top candidate returned in more than one constituency to choose the constituency to which to be officially returned and thus, indirectly, to choose the candidate that will be returned in another constituency. This mechanism would intrude upon the very effect of the preferences expressed by the voters and violates the constitutional principles of equality and personal nature of the right to vote.

Moreover, it would be difficult to identify another constitutional value capable of balancing such a breach. Indeed, the capacity to freely choose the constituency to which one could be elected, which was justified to initiate a specific relationship of political accountability with the voters, may, if ever, have been reasonable if the candidates in question were to obtain the majority of votes. However, this was certainly not the case with 'closed' top candidates (compared to candidates that have obtained preferences by the voters).

After the Court's intervention, the decision of a (yet again) delegitimized Parliament are now awaited, in the hope that this time, rules conforming to the Constitution will be elaborated: it would be the first time since 1993![21]

[20] On the outcome of the judgment, A. Morrone, 'Dopo la decisione sull'*Italicum*: il maggioritario è salvo, e la proporzionale non un obbligo costituzionale' *Forum di Quaderni costituzionali* (2017), available at http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2017/01/morrone_nota_35_2017.pdf (last visited 20 March 2017).

[21] A. Pertici, 'L'incostituzionalità dell'*Italicum*' (6 February 2017), available at http://www.paradoxaforum.com/lincostituzionalita-dellitalicum/ (last visited 20 March 2017).

Thus far,[22] an analysis of the parliamentary works, and in particular of the works of the Constitutional Affairs Commission, shows that only three bills were assigned to the Commission after the constitutional referendum. In addition, some other bills that were previously assigned to it contain proposals that are more or less similar to those discussed in Section III above.

A bill drafted by various deputies of the Popular Party proposes a system with a first round, in which all the parties compete with one another on the basis of a proportional method, with a threshold of three per cent and the possibility to cast a preferential vote. The system also provides for a majority bonus (up to fifteen per cent) to be assigned to the list that obtains more than forty per cent of the votes in the first round.

If no list achieves forty per cent, the bill establishes that a second open round be held, either with all the lists gaining at least thirty per cent of the vote in the first round, or with the coalitions achieving thirty per cent together. If no list has reached thirty per cent of the votes and no coalitions were created for the purpose, a second round is not called and the seats are distributed according to a pure proportional method. The second round leads to the attribution of a majority bonus, consisting of up to three hundred and twenty-one seats (or fifty-one per cent of the seats in the Chamber of Deputies).

Deputy Giuseppe Lauricella presented the second proposal submitted to the Constitutional Affairs Commission. This proposal aimed to extend the electoral discipline to the Senate, essentially eliminating the second round.

Another proposal (by Pierpaolo Vargiu and Salvatore Mattarese) sought to annul legge 21 December 2005 no 270 and legge 6 May 2015 no 52 and reactivate the previous framework, the aforementioned *Mattarellum*, which applied in the elections held in 1994, 1996 and 2001.

A reactivation in any form of the *Mattarellum* appears to be the most likely prospect today, although there is no single path to achieve this objective. Indeed, at the time of writing, the political context and the rift within the Democratic Party greatly complicates the issue, making it even more difficult to achieve agreement on a reform of the electoral law.

VI. Concluding Remarks. What the Post-referendum Developments Say about: (a) The System of Government; (b) Democracy and Referenda (Representative Democracy and Direct Democracy); and (c) the Role of the Constitutional Court, from Politics to Adjudication

The discussion developed in this article has sought to provide many details on various aspects of the Italian political and institutional system, its

[22] The review was updated in February 2017.

evolutions, its peculiarities and its perspectives.

Three main areas appear to be affected by the events occurring after the referendum: (a) the system of government; (b) the relationship between representative and direct democracy, and the balance to be struck between these to achieve substantive democracy and fair popular participation; and (c) the role of the Constitutional Court and the true nature of its powers, which perpetually swings between politics and adjudication.

As for (a), for many years now, in Italy there has been much debate on the evolution of the system (or form) of government. This debate began as early as the beginning of the 1990s, when the adoption of a mixed electoral system and the dissolutions of the existing political parties, due to the well-known court cases and the phenomenon of *Tangentopoli* led to a (partially) different (and directly popular) means to legitimate the Government, and its progressive institutional strengthening. Such strengthening regarded both the relationship with the President of the Republic and that with the Parliament, especially in the field of legislative power.

This evolution is ongoing, and would not have stopped even if the constitutional reform had been approved. Indeed, the reform would not have affected the system of government, leaving the constitutional framework on this subject unchanged.

However, once again, the recent government crisis highlights the important role played by the President of the Republic, who, despite his personal attitude – which is not particularly proactive – has truly made a mark on these developments. The gap between the form of government designed by the Constitution and the 'actual' system of government is not especially wide, in terms of the beginning and end of a government's lifespan: these two moments reveal the constitutionally strong role that the Head of State may play and the complete divide between the elections and the selection of the government.

The evolution of the form of government also takes place on another level: that of lawmaking. In this context, it is evident that not only has the role of the Government has significantly increased, but also that the overall system is changing: its hierarchical nature, its derivation from the principle of sovereignty, its incorporation into the Parliament, and its political dimension. In recent years, all of these features have been transformed, and the evolution is still very much ongoing.

The post-referendary events also confirm the Prime Minister's current role. The events show that the Council of Ministers is not a genuinely collegial body, neither in its decisions nor in its responsibilities. The entire history of the constitutional referendum underscores the Prime Minister's enhanced role of political supremacy and exposure.

On the other hand, it is uncertain whether this experience can lead to

general arguments on this specific point. The supremacy of the Prime Minister may very well be linked to the present historical context, to Renzi's highly political character, and to his place within the Democratic Party and the political framework.

Another important fact on the system of government deriving from the events unfurling after the referendum concerns the relationship between the electoral system and the form of government. Judgment no 35 of 2017 clearly rejects the idea that the Italian Constitution establishes a proportional electoral system.[23] The constitutional provisions on the subject do not require an absolute form of representativeness, which perfectly reproduces the distribution of votes and political consensus. Conversely, pursuant to the Constitutional Court's judgment, the Constitution allows for the creation of electoral systems that foster the stability and solidity of Governments, also by means of mechanisms aiming to substantially alter the vote through majority bonuses and thresholds. The impact on the system of government is evident: it is the lawmaker (and therefore mainly Parliament; sometimes the Government ...) that is called upon to discretionally establish the extent to which it will foster the representative principle or stability and the majoritarian principle; this choice will determine the nature of each Government, ie coalition Governments, single-party Governments or others.

As for (b), the relationship between democracy and referendum appears to have been strengthened by the constitutional referendum. The populist use of the referendum turned against its proponents, who had believed that they would benefit from it.

Renzi's request for political confidence by confirming his constitutional reform was rejected by the Italian people, which voted on the basis of political reasons more than on the effective contents of the constitutional amendment. Thus, the people denied confidence to the leader of the Executive (rather than to the branch as a whole), thus causing a political (and not legal) obligation to resign.

From this point of view, the resignation does not illustrate the evolution of the system of government towards a direct relationship between the elections and the creation of a Government itself. To a much lesser extent, therefore, does it encompass the existence of a *simul stabunt simul cadent*, that is by now unconceivable (the current Government is the fourth to have taken power in the present legislature ...); rather, it exemplifies the particular value of the referendum and the Prime Minister's political defeat.

What emerges from the outcome of the referendum, in terms of the value of the referendum itself, is the democratic revival of this instrument. However, this instrument should be an (exceptionally used) institution for direct democracy, and remains within a representative system in which the 'call to

[23] A. Morrone, n 20 above.

the people' is never the political weapon to grant effectiveness, legitimation, and reliability to decisions taken without any participation on part of the political and parliamentary minorities.

As for the final point, (c), or what the post-referendum events say about the role of the Constitutional Court, it is impossible to exhaustively investigate the dual nature and legitimation of the Court, and of the constitutional jurisdiction more generally, in this article.[24] Nevertheless, new prospects have already appeared after judgment no 1 of 2014. In recent years, the topic of elections has revealed a (partly) new face of the Court: a Court that openly contravenes certain firmly entrenched procedural rules – largely self-defined in its own case law – on the admissibility of the cases. A Court that analyses the merits and resolves questions which it 'technically' could not address, entering, with its judgments, into one of the most important 'grey areas' of constitutional review, making this choice in the name of the transparency of the representative system and the right of voters to choose and to matter.

Therefore, the Constitutional Court plays the role of a strong political institution that seeks to assure the constitutional protection of the system overall, rather than that of a jurisdictional body.

[24] The legal literature on these topics is abundant. In Italy, the main work is that by C. Mezzanotte, *Corte costituzionale e legittimazione politica* (Roma: Tipografia Veneziana, 1984). More recently, an interesting investigation has drawn attention to the question of the legitimacy of constitutional courts and the complexity of their role in a comparative overview, L. Pegoraro, *Giustizia costituzionale comparata. Dai modelli ai sistemi* (Torino: Giappichelli, 2015).