JUDGMENT NO. 1 YEAR 2014

In this case the Court heard a referral from the Court of Cassation questioning the constitutionality of certain provisions of the electoral law for the Houses of Parliament providing for a majority premium for the largest list or coalition of lists and insofar as it did not enable voters to vote for their preferred candidate. The Court referred to its previous rulings which indicated that the legislation was unreasonable and not proportionate in that it did not stipulate a minimum threshold of votes or seats as a prerequisite for eligibility for the majority premium and concluded that, given Parliament's failure to act, the objection to the rule providing for the majority premium was well founded. This was because the legislation did not comply with "the requirement of the least possible sacrifice of other interests and values protected under constitutional law". The legislation applicable to the Senate was struck down on the grounds that there was not necessarily any relationship between the majority of seats allocated and the actual majority of votes cast nationwide. The Court struck down the system of list voting on the grounds that voters were unable to express any preferences and that the lists were so large that the identities of many candidates were unknown to voters. Finally, the Court held that the electoral law would still be effective even after the removal of the provisions declared unconstitutional.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Articles 4(2), 59 and 83(1) no. 5 and (2) of Presidential Decree no. 361 of 30 March 1957 (Approval of the consolidated text of laws laying down rules governing elections to the Chamber of Deputies), as in force following the enactment of Law no. 270 of 21 December 2005 (Amendments to the rules governing elections to the Chamber of Deputies and the Senate of the Republic); Articles 14(1) and 17(2) and (4) of Legislative Decree no. 533 of 20 December 1993 (Consolidated text of laws laying down rules governing elections to the Senate of the Republic), as in force following the enactment of Law no. 270 of 2005, initiated by the Court of Cassation in the civil proceedings pending between Aldo Bozzi and others and the Office of the President of the Council of Ministers and another by the

referral order of 17 May 2013, registered as no. 144 in the Register of Orders 2013 and published in the Official Journal of the Republic no. 25, first special series 2013.

Considering the entry of appearance by Aldo Bozzi and others;

having heard the judge rapporteur Giuseppe Tesauro at the public hearing of 3 December 2013;

having heard Counsel Claudio Tani, Counsel Aldo Bozzi and Counsel Felice Carlo Besostri for Aldo Bozzi and others.

[omitted]

Conclusions on points of law

1.– The Court of Cassation questions the constitutionality of certain provisions of Presidential Decree no. 361 of 30 March 1957 (Approval of the consolidated text of laws laying down rules governing elections to the Chamber of Deputies) and Legislative Decree no. 533 of 20 December 1993 (Consolidated text of laws laying down rules governing elections to the Senate of the Republic), as in force following the enactment of Law no. 270 of 2005 (Amendment of rules governing elections to the Chamber of Deputies and the Senate of the Republic) concerning the allocation of a majority bonus on a national level in the Chamber and on regional level in the Senate and the provisions that, in regulating the arrangements governing the casting of list votes, do not enable voters to state any preference.

1.1.– In particular, the Court of Cassation challenges first and foremost Article 83 of Presidential Decree no. 361 of 1957 insofar as it provides that the National Electoral Office shall ascertain "whether the coalition of lists or individual list that has obtained the largest number of valid votes cast has won at least 340 seats" (paragraph 1, no. 5) and shall rule that, if this is not the case, "it shall be allocated the number of seats necessary in order to reach that level" (paragraph 2).

These provisions are claimed to violate Article 3 of the Constitution in addition to Articles 1(2) and 67 of the Constitution on the grounds that, by failing to subject the allocation of the majority bonus to the achievement of a minimum threshold of votes, thereby transforming a relative majority of votes (which may potentially even be very modest) into an absolute majority of seats, they unreasonably cause an objective and serious impairment of democratic representation.

In addition, the mechanism for allocating the bonus which has been introduced is claimed to be unreasonable since, in the first place, it contrasts with the need to ensure governability, as it incentivises the conclusion of agreements between lists for the sole purpose of securing the bonus, without averting the risk that the beneficiary coalition may collapse or that one or more parties comprising it may leave, even immediately after the elections. Secondly, it is claimed to upset institutional equilibria, taking account of the fact that the majority that receives the bonus would be able to elect guardian bodies that remain in office for longer than the duration of the legislature.

The arrangements for allocating the majority bonus laid down under the aforementioned provisions are also claimed to violate the principle of equality in voting, that is the equal status of voters at the time each vote is cast, in breach of Article 48(2) of the Constitution. The resulting distortion of the principle does not in fact constitute a merely factual inconvenience, but is claimed to be the result of an irrational mechanism planned through legislation in order to achieve that result.

1.2.– Similar objections are directed against Article 17 of Legislative Decree no. 533 of 1993 (laying down the rules governing elections to the Senate of the Republic), insofar as it provides that the regional electoral offices shall ascertain "whether the coalition of lists or the individual list that has received the largest number of valid votes cast in the constituency has secured at least 55 percent of the seats allocated to the region, rounded up to the nearest unit" (paragraph 2) and that, if this is not the case, "the regional electoral office shall allocate to the coalition of lists or to the individual list that has received the largest number of votes a number of additional seats necessary in order to hold 55 percent of the seats allocated to the region, rounded up to the nearest unit" (paragraph 4).

Since these provisions also do not subject the allocation of the regional majority bonus to the receipt of a minimum threshold of votes, they are also claimed to bring about unreasonably an objective and serious impairment of democratic representation. Moreover, the provisions are claimed to have created an inherently irrational mechanism, which runs contrary to the aim of ensuring governability. In fact, since the bonus differs from region to region, the result is claimed to be a chance sum total of the regional bonuses, which could end up overturning the result achieved by the lists or coalitions of lists on national level, thereby favouring the creation of different

parliamentary majorities in each house of Parliament, even where votes are distributed in a substantially homogeneous manner, thereby impairing both the proper functioning of parliamentary government, in which the Government must receive a vote of confidence from both houses (Article 94(1) of the Constitution), as well as the exercise of legislative powers, which Article 70 of the Constitution allocates to the Chamber of Deputies and the Senate.

The above provisions are also claimed to violate Articles 3 and 48(2) of the Constitution on the grounds that, since the size of the bonus awarded to the list or coalition that has received most votes varies from region to region and is greater in larger and more populous regions, the weight of each vote – which should be identical and should be counted in the same way for the purpose of calculating seats – differs depending upon the geographical location of the individual voter.

1.3.– Finally, the Court of Cassation challenges Article 4(2) of Presidential Decree no. 361 of 1957 and, consequently, Article 59 of that Presidential Decree, along with Article 14(1) of Legislative Decree no. 533 of 1993, insofar as they provide, respectively, in Article 4(2) of Presidential Decree no. 361 of 1957, that "Each voter may cast one vote for the list chosen for the purposes of allocating seats on a proportional basis, which must be stated on one single ballot bearing the symbol of each list"; in Article 59 of Presidential Decree no. 361 that "A ballot that validly chooses a list shall constitute a list vote"; and in Article 14(1) of Legislative Decree no. 533 of 1993 that "A vote shall be cast by marking one single sign, which may have any shape, in pencil on the ballot paper in the rectangle containing the symbol of the list chosen".

In the opinion of the referring court, these provisions violate: Articles 56(1) and 58(1) of the Constitution, which provide that members of the Chamber of Deputies and Senators shall be elected by direct suffrage; Article 48(2) of the Constitution, which provides that votes shall be personal and free; Article 117(1) of the Constitution, in relation to Article 3 of the 1st Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 (hereafter, ECHR), ratified and implemented by Law no. 848 of 4 August 1955 (Ratification and implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and the Additional Protocol to the Convention, signed in Paris on 20 March 1952), which grants the people

the right to the "choice of the legislature"; and Article 49 of the Constitution. Since these provisions do not enable voters to state any preference in favour of certain candidates, but only to choose a party list, within which all candidates are included, they in fact render votes essentially "indirect", given that parties are not permitted to act in place of the electorate and Article 67 of the Constitution presumes that mandates are granted direct by voters. Moreover, in depriving voters of the right to choose their elected members, votes end up being neither free nor personal.

2.– As regards the admissibility of the questions of constitutionality under examination, it must be stated at the outset that, according to the settled case law of this Court, constitutional review pursuant to Article 23 of Law no. 87 of 11 March 1953 (Provisions on the establishment and functioning of the Constitutional Court) "must be limited to the issue of the adequacy of the reasons provided in support of the arguments according to which the proceedings before the referring court may be said to have been effectively initiated in the specific case, the aim of which – i.e. the remedy sought – must be separate and distinct from the question of constitutionality on which the referring court is required to decide" (see *inter alia* Judgment no. 263 of 1994). When assessing the relevance of an interlocutory question of constitutionality, the examination of the interest to sue and the verification of the standing of the parties, in addition to the jurisdiction of the referring court, are moreover matters to be assessed by that same court and cannot be reviewed by this Court, unless they are based on implausible reasons (see most recently Judgments no. 91 of 2013, no. 280 of 2012, no. 279 of 2012, no. 61 of 2012 and no. 270 of 2010).

In the present case, the Court of Cassation plausibly argued, supported by broad, detailed and in-depth reasons, both that the questions of constitutionality needed to be resolved as a preliminary matter in order to reach a decision in the main proceedings, and also that those questions were relevant.

It asserted that the main proceedings involved an action seeking a declaration judgment concerning the right to vote with the aim – as is the case for all actions of that kind, the general admissibility of which is inferred from the principle of interest to sue – of establishing the scope of the right, which was considered to be uncertain. The fact that such an interest and jurisdiction subsist – the referral order stresses – is moreover an issue that has been definitively resolved within the proceedings. In fact, the question

of the interest to sue and the availability of jurisdiction were disputed by the public authority in the merits stage, by an objection which was rejected by the court of first instance and by the Milan Court of Appeal, an objection which was not brought also before the Court of Cassation by an interlocutory appeal, with the result that any review of that issue must be deemed to be definitively precluded.

The referring court also stressed with regard to the nature and object of the action, arguing in a plausible manner, that the claimants had acted with the goal "of resolving a detriment" resulting from "an alteration (which had already occurred) of the legal framework which, it is argued, should be removed by further legal and material activity enabling voters to exercise the right to vote in a genuine fashion and to the full in accordance with constitutional values". In its opinion, the claimants thus requested the ordinary court – acting in its capacity as a court ruling on the existence of rights – to ascertain the scope of their right to vote, which had been rendered uncertain by electoral legislation considered to be unconstitutional, by referring a question of constitutionality if appropriate. Therefore, acceptance of the questions of constitutionality would not constitute the full remedy sought in the main proceedings, which would only be realised through a ruling in which the ordinary court ascertained the substantive content of the claimant's right, in the light of the judgment of this Court.

As regards the prerequisites for the relevance of the question of constitutionality, it must be recalled that, according to a principle which has been asserted by this Court ever since its first rulings, "the fact that the alleged unconstitutionality of one or more legislative provisions constitutes the sole reason for the application to the lower court does not prevent the prerequisite of relevance from being fulfilled where it is possible to establish that a remedy is sought within the main proceedings that is separate and distinct from the question (or questions) of constitutionality on which the referring court has been requested to rule" (Judgment no. 4 of 2000; however, an analogous assertion was already made in Judgment no. 59 of 1957), *inter alia* for the purpose of avoiding a situation in which "all forms of guarantee or control were excluded" over certain legislative acts (in this case, *leggi-provvedimento* [laws having highly specific content]: see Judgment no. 59 of 1957).

That requirement has been met in the case under examination, since the remedy sought in the main proceedings is a ruling confirming the existence of the right

actioned, which is considered to be conditional upon the decision regarding the questions of constitutionality raised, and the ruling requested from the ordinary courts does not coincide entirely with the judgment of this Court, as it would be necessary to verify the other preconditions for the right to vote which are imposed by law. Moreover, in the case under examination, the question relates to a fundamental right protected under the Constitution – the right to vote – an essential corollary of which is its association with an interest of society as a whole, and has been proposed with the aim of putting an end to a situation of uncertainty regarding the effective scope of that right caused by "an alteration (which had already occurred) of the legal framework", which is considered to result from the contested provisions.

It may be inferred that the questions of constitutionality raised within those proceedings are admissible precisely due to the special nature and constitutional significance on the one hand of the right to which the action seeking a declaration judgment relates, and on the other hand of the law which, owing to its suspected unconstitutionality, renders its scope uncertain. The admissibility of the question is also the inevitable corollary of the principle that protection must be afforded to the inviolable right to vote, which – according to the referral order – has been prejudiced by electoral law that does not comply with principles of constitutional law, irrespective of the manner in which it has been applied, since the uncertainty as to the scope of the right itself constitutes legally significant harm. Thus, due to the need to guarantee the principle of constitutionality, it is essential to conclude that the review power of this Court – which "must cover the legal system as fully as possible" (see Judgment no. 387 of 1996) – must also apply to laws, such as that relating to elections to the Chamber of Deputies and the Senate, "which would be more difficult to subject to [the Court's scrutiny] in any other manner" (see Judgments no. 384 of 1991 and no. 226 of 1976).

In the light of those principles, 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.

3.– On the merits, the first of the questions under examination relates to the majority bonus allocated following elections to the Chamber of Deputies. Article 83 of Presidential Decree no. 361 of 1957 provides that the National Electoral Office shall ascertain "whether the coalition of lists or individual list that has obtained the largest number of valid votes cast has won at least 340 seats" (paragraph 1, no. 5) on the basis of a proportional allocation of seats; and shall rule that, if this is not the case, it shall be allocated the number of seats necessary in order to reach that level (paragraph 2).

According to the Court of Cassation, since they do not render the allocation of the majority bonus conditional upon the receipt of a minimum threshold of votes, therefore transforming a relative majority of votes (which may even be very modest) into an absolute majority of seats, these provisions are claimed to have laid down, in breach of Article 3 of the Constitution, a mechanism for allocating the bonus which is manifestly unreasonable, such as to cause an objective and serious impairment of democratic representation and to harm the very principle of equality in voting, notwithstanding that it is not even capable of ensuring stable government.

3.1.– The question is well founded.

This Court has recalled for some time that, "whilst stating its approval, through the adoption of a motion, of the proportional system for elections to the Chamber of Deputies, [the Constituent Assembly] did not intend to set such matters in stone on a legislative level by constitutionalising any choice in favour of proportional representation or making formal provision regarding electoral systems, the structuring of which is reserved to ordinary legislation" (see Judgment no. 429 of 1995). Therefore, the "specification of electoral arrangements and electoral systems is an area of law in which the political nature of the legislative choice is expressed with the utmost clarity" (see Judgment no. 242 of 2012; Order no. 260 of 2002; Judgment no. 107 of 1996). This Court has also held that the constitutional principle of equality in voting requires that the right to vote must be exercised under conditions of equality since "each vote potentially contributes with equal effect to the formation of elected bodies" (see Judgment no. 43 of 1961), but "does not extend […] to the specific result of the

electorate's expression of its wishes […] which depends […] exclusively on the system adopted by ordinary law – as the Constitution has made no provision in this regard – for general elections and local elections, taking account of the changing requirements attaching to popular elections" (see Judgment no. 43 of 1961).

In other words, no specific model of electoral system is imposed by the Constitution, which leaves the choice of the system considered most suitable and effective within the particular historical context to the discretion of the legislator.

However, whilst the electoral system is the result of broad legislative discretion, it is not exempt from review, and may be challenged at any time in constitutional review proceedings if it proves to be manifestly unreasonable (see Judgments no. 242 of 2012 and no. 107 of 1996; Order no. 260 of 2002).

In the present case, precisely in relation to the provisions of the electoral law for the Chamber of Deputies (under examination in these proceedings) concerning the allocation of a majority bonus without any requirement for a minimum threshold of votes or seats, although this Court did rule that it was not possible to consider grounds for unconstitutionality – relating in particular to the reasonableness of the legislation – within proceedings concerning the admissibility of a referendum seeking to repeal the legislation, it did state the requirement that Parliament must carefully consider certain aspects of such a mechanism. Certain problematic aspects were found to lie in the fact that the bonus mechanism presages an excessive over-representation of the list that has secured a relative majority in that it enables a list that has received even a relatively small number of votes to obtain an absolute majority of seats. This may result specifically in an imbalance between the votes cast and the allocation of seats which, whilst present in any electoral system, occurs in this case on such a broad scale as to compromise the system's compatibility with the principle of equality in voting (see Judgments no. 15 and no. 16 of 2008). Given the failure by the legislator to act, this Court subsequently renewed its invitation to Parliament to consider carefully the problematic aspects of the legislation, as resulting from the legislative changes introduced by Law no. 270 of 2005, once again stressing the irrational aspects highlighted in the previous rulings noted above involving the "allocation of majority bonuses without provision for any minimum threshold of votes and/or seats" (see

Judgment no. 13 of 2012); however, such aspects were considered to be ineligible for review within proceedings other than constitutional review proceedings.

Given the continuing failure by the ordinary legislator to act, these findings can only be reiterated, and consequently the challenges relating to Article 83(1) no. 5 and (2) of Presidential Decree no. 361 of 1957 must be deemed to be well founded. In fact, these provisions do not pass muster with reference to the requirements of proportionality and reasonableness, to which provisions governing electoral systems are also subject.

In areas characterised by broad legislative discretion, such as that under examination, in such a review this Court must satisfy itself that the balance between constitutionally significant interests has not been struck in such a manner as to cause one of these interests to be sacrificed or impaired to an excessive degree, such as to render it incompatible with the requirements of the Constitution. Such assessments must involve "a consideration of the proportionality of the means chosen by the legislator when exercising its absolute discretion vis-a-vis the objective requirements to be met or the goals it intends to pursue, taking account of the specific circumstances and restrictions that obtain" (see Judgment no. 1130 of 1988). The proportionality test used by this Court and by many other European constitutional courts, which is often paired with a reasonableness test and is an essential instrument of the Court of Justice of the European Union 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.

These conditions have not been met in this case.

The contested provisions are intended to facilitate the formation of an adequate parliamentary majority, with the purpose of guaranteeing stable government for the country and streamlining the decision making process, which is undoubtedly an objective that is consistent with the Constitution. This objective is pursued through the allocation of a bonus, which will be activated whenever voting according to the proportional system has not secured any list or coalition of lists a number of votes that

is capable of translating into a majority, which is greater even than an absolute majority of seats (340 out of 630). Thus, in the event of such an outcome, the bonus mechanism would guarantee additional seats (up to the threshold of 340 seats) to the list or coalition of lists that has obtained even one vote more than the others, even where the number of votes is not high in absolute terms, given the lack of any provision for a minimum threshold in terms of votes and/or seats.

However, the contested provisions are not limited to introducing a corrective mechanism (in addition to that already provided by the minimum threshold clauses pursuant to Article 83(1) no. 3 and no. 6, which are not contested here) to the system for transforming votes into seats "in a proportional manner", as required under Article 1(2) of Presidential Decree no. 361 of 1957, with the legitimate objective of favouring the formation of stable parliamentary majorities and thus stable governments, but rather run entirely contrary to the rationale underlying the electoral system chosen by the legislator in 2005 of ensuring a representative parliamentary assembly. In this way, these provisions result in an excessive imbalance between the composition of the politically representative body, which lies at the heart of the system of representative democracy, and the parliamentary form of government stipulated by the Constitution on the one hand, and the wishes of the people expressed through votes, as the principal instrument for expressing popular sovereignty under Article 1(2) of the Constitution on the other hand.

In other words, the provisions under examination do not require the list (or coalition of lists) with a relative majority of votes to achieve a minimum threshold or votes; rather, they automatically allocate to it a number of seats, which may even be significant, capable of transforming – hypothetically – a grouping which has achieved a very low percentage vote into one with an absolute majority in the Chamber of Deputies. It is therefore clear that they thereby permit an unlimited impairment of the representative status of the parliamentary assembly, which is incompatible with the constitutional principles according to which the Houses of Parliament are the exclusive locus for "national political representation" (Article 67 of the Constitution), that they are formed on the basis of elections and hence on popular sovereignty and that, by virtue of this fact, they are vested with fundamental functions of "a typical and unique nature" (see Judgment no. 106 of 2002), including the direction and control of the

government along with the delicate functions associated with the guarantee itself of the Constitution (Article 138 of the Constitution): indeed, it is this fact which sets Parliament apart from representative local government bodies.

Since the mechanism used for allocating the majority bonus adopted by the contested provisions, as incorporated into the proportional system introduced by Law no. 270 of 2005, is combined with the lack of a reasonable minimum threshold of votes in order to establish eligibility for the bonus, it is therefore liable to interfere with the democratic system defined by the Constitution, which is based on the fundamental principle of equality in voting (Article 48(2) of the Constitution). In fact, whilst this does not require ordinary legislation to choose any given system, it nonetheless demands that each vote potentially contribute with equal effect to the formation of elected bodies (see Judgment no. 43 of 1961) and is nuanced depending upon the particular electoral system chosen. Within constitutional systems similar to the Italian system into which that principle is also incorporated, whilst the specific form of electoral system is not afforded constitutional status, the constitutional courts have for some time expressly acknowledged that, if the legislator adopts a proportional system, even only partially, it will create a legitimate expectation on the part of the electorate that there will not be any imbalance in the effects of each vote, that is differing assessments of the "weight" of each vote "on the outcome" when allocating seats, except insofar as necessary in order to avoid impairing the proper operation of the parliamentary body (see German Federal Constitutional Court, Judgment 3/11 of 25 July 2012; however, see previously Judgment no. 197 of 22 May 1979 and Judgment no. 1 of 5 April 1952).

Whilst the contested provisions pursue an objective of constitutional significance, namely that of ensuring stable government for the country and efficient decision making processes within Parliament, they enact legislation which does not comply with the requirement of the least possible sacrifice of other interests and values protected under constitutional law, thereby violating Articles 1(2), 3, 48(2) and 67 of the Constitution. Ultimately, that legislation is not proportionate having regard to the objective pursued, given that it excessively limits the representative function of the Chamber of Deputies, as well as the equal status of each individual right to vote, in such a manner as

profoundly to alter the composition of the democratic representative bodies on which the entire architecture of the prevailing constitutional order is based.

Therefore, Article 83(1) no. 5, and (2) of Presidential Decree no. 361 of 1957 must be declared unconstitutional.

4.– The same arguments must also apply to the challenges raised on the basis of the same constitutional parameters against Article 17(2) and (4) of Legislative Decree no. 533 of 1993, which governs the majority bonus for elections to the Senate of the Republic. The provisions state that if the coalition of lists or the individual list that has received the largest number of valid votes cast in the constituency has secured at least 55 percent of the seats allocated to the region, the regional electoral office shall allocate to that coalition of lists or those individual lists a number of additional seats necessary in order to hold 55 percent of the seats allocated to the region.

In allocating the absolute regional majority bonus in this way to the list (or coalition of lists) that has received simply a numerically greater number of votes than other lists, without having to reach a minimum threshold, these provisions are manifestly unreasonable, impairing the status of the parliamentary assembly through which popular sovereignty is expressed in a disproportionate manner having regard to the objective pursued (guaranteeing stable government and an efficient decision making system), whilst also impinging upon equality in voting, in breach of Articles 1(2) 3, 48(2) and 67 of the Constitution.

In the present case, the proportionality test highlights not only the lack of proportionality *stricto sensu* of the contested legislation, but also that it is incapable of achieving the stated objective in a more decisive manner than the legislation applicable to elections to the Chamber of Deputies. In fact, in providing that the majority bonus is to be allocated for each region, the effect is that the majority within the Senate is the chance result of the sum total of regional bonuses, which may end up overturning the result obtained by the lists or coalitions of lists on national level, favouring the formation of disparate parliamentary majorities in the two Houses of Parliament, even if the overall distribution of votes is substantially homogeneous. This risks compromising both the proper functioning of the form of government delineated by the republican Constitution under which the government must enjoy the confidence of both houses (Article 94(1) of the Constitution) as well as the exercise of legislative powers, which

Article 70 of the Constitution vests collectively in the Chamber of Deputies and the Senate. Ultimately, it risks thwarting the intended result of a sufficiently stable parliamentary majority and government. Although these aspects are largely the result of political choices reserved to ordinary legislation, this Court has however a duty to ascertain whether the legislation manifestly violates the principles of proportionality and reasonableness – as is the case here –and thus breaches Articles 1(2) 3, 48(2) and 67 of the Constitution.

Article 17(2) and (4) of Legislative Decree no. 533 of 1993 must therefore be declared unconstitutional.

5.– It is necessary finally to examine the challenges relating to Article 4(2) of Presidential Decree no. 361 of 1957 and, consequently, Article 59(1) of that Presidential Decree, along with Article 14(1) of Legislative Decree no. 533 of 1993, insofar as they provide, respectively, in Article 4(2) of Presidential Decree no. 361 of 1957, that "Each voter may cast one vote for the list chosen for the purposes of allocating seats on a proportional basis, which must be stated on one single ballot bearing the symbol of each list"; in Article 59 of Presidential Decree no. 361 that "A ballot that validly chooses a list shall constitute a list vote"; and in Article 14(1) of Legislative Decree no. 533 of 1993 that "A vote shall be cast by marking one single sign, which may have any shape, in pencil on the ballot paper in the rectangle containing the symbol of the list chosen".

According to the referring court, since these provisions do not enable voters to state any preference, but only to choose a party list, within which all candidates are designated and enumerated in a specific order, they render votes essentially "indirect", given that parties are not permitted to act in place of the electorate and Article 67 of the Constitution presupposes that mandates are granted direct by voters. This is claimed to violate Articles 56(1) and 58(1) of the Constitution and Article 117(1) of the Constitution in relation to Article 3 of the 1st Protocol to the ECHR, which grants the people the right to the "choice of the legislature", and Article 49 of the Constitution. Moreover, in depriving voters of the right to choose their elected members, votes end up being neither free nor personal, in breach of Article 48(2) of the Constitution.

5.1.– The question is well founded insofar as set out below.

The contested provisions, which regulate the arrangements governing elections of members respectively of the Chamber of Deputies and the Senate of the Republic, were

enacted against a legislative backdrop within which votes are cast for competing lists of candidates (Article 1(1) of Presidential Decree no. 361 of 1957; Article 1(2) of Legislative Decree no. 533 of 1993), presented "according to a specific order", the number of which is "not less than one third and not greater than the number of seats allocated to the constituency" (Article 18-bis(3) of Presidential Decree no. 361 of 1957 and Article 8(4) of Legislative Decree no. 533 of 1993). The electoral constituencies, the rules governing which have not been contested, correspond for the Senate in all cases to the individual regions (Article 2 of Legislative Decree no. 533 of 1993); for the Chamber of Deputies (Annex A to Law no. 270 of 2005), the constituencies correspond to the individual regions, with exception of the larger regions, which contain two constituencies (Piedmont, Veneto, Lazio, Campania and Sicily) or three (Lombardy).

Moreover, seats are divided between the competing lists on a proportional basis, followed by the allocation of the majority bonus, if necessary (Article 1(2) of Presidential Decree no. 361 of 1957), which is defined for the Senate as a "regional coalition" bonus (Article 1(2) of Legislative Decree no. 533 of 1993); in addition, "the candidates included in the list shall be duly elected in the order of presentation [in the list], up to the limit of seats to which each list is entitled" (Article 84(1) of Presidential Decree no. 361 of 1957 and Article 17(7) of Legislative Decree no. 533 of 1993).

Within this framework, in providing that a vote cast by a voter, which is intended to determine the overall composition of the Chamber of Deputies and the Senate, is a vote in favour of a list, the contested provisions deny the voter any right to decide on the election of his or her own representatives. The election of candidates is dependent not only, obviously, on the number of seats obtained by the list of origin, but also by the order in which candidates are presented within the list, which is essentially decided by the parties. In other words, the choice made by the voter amounts to a preference vote exclusively for the list which – due to the fact that lists are presented in very large constituencies, as noted above – contains a very large number of candidates, which may be the same as the entire number of seats allocated to the constituency, which consequently means that it is difficult for candidates to be identified by voters.

These rules deprive voters of any ability to choose their own representatives, which is left entirely to the parties. In this regard, this Court has clarified that "the functions allocated to political parties under ordinary legislation with the aim of electing the

Houses of Parliament – such as the 'presentation of electoral alternatives' and the 'selection of candidates for elected public office' – do not enable the existence of constitutional powers to be inferred, but rather constitute solely the instrument by which ordinary legislation has considered it appropriate to link the right guaranteed to individuals, which is recognised under the Constitution, to associate themselves in a variety of parties, with political representation, which is necessary in order to compete against one another in elections, and are only grounded on Article 49 of the Constitution" (see Order no. 79 of 2006). Such functions must therefore be aimed at facilitating participation in politics by individual voters and at realising the policy goals that political groupings submit to the electorate, in order to enable a clearer and more informed choice also in relation to candidates.

This Court has already adopted a ruling based on similar arguments, albeit in relation to the electoral system applicable in 1975 to municipalities with less than 5,000 inhabitants, which also involved the division of seats on a proportional basis between competing lists of candidates. On that occasion, the Court held that the fact that the legislator had left to parties the task of indicating the order in which candidates were presented did not in any way impinge upon the electoral freedom of voters; however, this was subject to the proviso that voters "remain free, and that their ability to state their intentions is guaranteed, both in the choice of the grouping participating in the election and also over whether or not to vote for one candidate or another included in the chosen list by casting a preference vote" (see Judgment no. 203 of 1975).

That freedom is restricted in this case, since voters are called upon to elect all Members of the Chamber of Deputies and all Senators by voting in favour of a list of candidates which is often very long (in the more heavily populated constituencies), where it is unlikely that the candidates will be known. Indeed, candidates are identified on the basis of choices made by the parties, which are reflected in the order of presentation in the list, which in turn means that even expectations concerning the very order itself of the list may be frustrated, given that multiple candidacies are possible and that elected candidates have the right to choose to serve in other constituencies on the basis of the indications issued by the party.

Ultimately, it is the fact that, without exception, no Member of Parliament elected is supported by the individual votes cast by voters which violates the requirement of

representativity enshrined in the Constitution. Due to these voting conditions which require voters to select a list and thereby choose *en masse* also the numerous candidates included in the list, whom they have not had the opportunity to know and assess and who, by virtue of their position in the list, are automatically destined to become Members of the Chamber of Deputies or Senators, the legislation under examination is not comparable either with other systems in which there are closed lists only for some seats, or with those comprised of geographically smaller electoral constituencies in which the number of candidates to be elected is sufficiently low that it is effectively possible to know them and correspondingly that the efficacy of the choice and freedom in voting are guaranteed (as occurs in single-member constituencies).

By contrast, the conditions laid down by the contested provisions are liable to alter the representative relationship between voters and elected officials for the entire body of members of Parliament. In fact, by preventing Parliament from being constituted correctly and directly, they constrain the freedom of choice of voters when electing their own representatives in Parliament, which is one of the principal manifestations of popular sovereignty, and thus run contrary to the democratic principle, impairing the freedom in voting itself guaranteed under Article 48 of the Constitution (see Judgment no. 16 of 1978).

Articles 4(2) and 59 of Presidential Decree no. 361 of 1957 and Article 14(1) of Legislative Decree no. 533 of 1993 must therefore be declared unconstitutional insofar as they do not enable voters to state their preferred candidates in order to ensure their election.

Therefore, the question raised with reference to Article 117(1) of the Constitution in relation to Article 3 of the 1st Protocol to the ECHR is moot. Indeed, the judgment of the European Court of Human Rights of 13 March 2012 (*Saccomanno and others v. Italy*), given following an appeal filed by certain Italian citizens who alleged that this principle had been violated precisely by the electoral law under examination here is not relevant. In that judgment, all of the grounds of appeal were ruled manifestly groundless due to the "broad margin of discretion available to States in this area" (paragraph 64). It is ultimately for this Court to verify whether the provisions in question are compatible with the Constitution.

6.– The legislation remaining in force following the declaration that the provisions covered by the questions raised by the Court of Cassation are unconstitutional is "as a whole, capable of guaranteeing the renewal of the elected constitutional organ at any time", as required under the settled case law of this Court (see most recently Judgment no. 13 of 2012). In fact, electoral laws are "constitutionally necessary" as they are "indispensable in order to ensure the proper functioning and continuity of constitutional bodies" (see Judgment no. 13 of 2012; for analogous rulings, see Judgments no. 15 and no. 16 of 2008, no. 13 of 1999, no. 26 of 1997, no. 5 of 1995, no. 32 of 1993, no. 47 of 1991, no. 29 of 1987), as it is also possible to avert the possibility that "the power of dissolution vested in the President of the Republic pursuant to Article 88 of the Constitution may be paralysed" (see Judgment no. 13 of 2012).

In particular, the legislation remaining in force stipulates a mechanism for transforming votes into seats which enables all seats to be allocated on the basis of electoral constituencies, which remain unchanged both for the Chamber of Deputies and for the Senate. Moreover, the residual provision includes precisely the proportional mechanism laid down by Article 1 of Presidential Decree no. 361 of 1957 and Article 1 of Legislative Decree no. 533 of 1993, shorn of the allocation of the majority bonus; furthermore, the contested provisions relating to the casting of votes are supplemented in such a manner as to enable preference votes to be cast. It does not fall to this Court to assess whether that mechanism is advisable or effective, as its sole task is to verify the constitutionality of specific contested provisions and whether it is possible to conduct elections immediately under the residual legislation, a condition associated with the nature of electoral law as a "constitutionally necessary law" (Judgment no. 32 of 1993). On the other hand, the referring Court of Cassation clarified – significantly – that "the question of constitutionality proposed does not seek the annulment of Law no. 270 of 2005 in its entirety or to replace it with another similar law, thus encroaching upon the discretionary powers of the legislature, but to reinstate content that is mandatory under constitutional law into the electoral law (concerning the rules governing the majority bonus and preference votes), without compromising the ongoing capacity of the electoral system to guarantee the renewal of constitutional bodies", and without prejudice to "the eventuality that it may be necessary for the Constitutional Court to

carry out merely legislative cosmetic work and to clean out the text owing to the existence of residual legislative content, exercising the powers available to it".

This decision cannot go further than the remedy proposed and requested by the referring court.

As regards the ability of voters to cast a preference vote, any apparent drawbacks may be resolved by applying ordinary canons of interpretation, in the light of legislation already in force, as construed in a manner compatible with the judgments of this Court, provided that they "do not impinge upon the operation of the electoral system or paralyse the functional status of the organ" (see Judgment no. 32 of 1993). This is the case for example in relation to the provisions laid down by Article 84(1) of Presidential Decree no. 361 of 1957, and Article 17(17) of Legislative Decree no. 533 of 1993 which, insofar as they provide that the candidates included in the list shall be duly elected "in the order of presentation", up to the limit of seats to which each list is entitled, do not appear to be incompatible with the introduction of preference votes, as it must be concluded that the order in the list will apply only if no preference votes are cast. The same applies to the manner in which electoral ballots are created pursuant to Article 31 of Presidential Decree no. 361 of 1957 and Article 11(3) of Legislative Decree no. 533 of 1993 which, in providing that the ballot must reproduce the symbols of all lists duly standing in the constituency, in accordance with the facsimile set out in the schedules, do not prevent ballots from including a space in which a preference may be stated. Finally, it also allows for the possibility of construing the expression of a preference as a single preference, in line with the result of the 1991 referendum, ruled eligible by Judgment no. 47 of 1991, concerning proportional electoral systems. Moreover, such drawbacks may also be resolved through secondary legislation intended merely to give technical effect to this ruling and the interpretative solutions specified above. Nevertheless, it is clear that, should it be considered appropriate, ordinary legislation "may correct, amend or supplement the residual provisions" (see Judgment no. 32 of 1993).

7.– Finally, it is evident that, since the decision to cancel the contested provisions has altered the legislation governing elections to the Chamber of Deputies and the Senate, it will only take effect during the next general election, which will have to be

held either according to the rules contained in the legislation remaining in force following this decision, or according to new electoral legislation enacted by Parliament.

Therefore, it does not in any way affect any actions carried out as a consequence of decisions made whilst the annulled provisions were in force, including the outcome of elections held and measures adopted by the Parliament thereby elected. However, it hardly needs to be recalled that, in line with Article 136 of the Constitution and Article 30 of Law no. 87 of 1953, the principle according to which the effects of judgments by this Court that rule legislation unconstitutional must be backdated from the time when the contested provision entered into force – a principle "which is usually expressed by reference to the "retroactivity" of such judgments – only applies to legal relations that are still producing their effects, and hence does not apply to those the effects of which have expired, which continue to be regulated by the law struck down as invalid" (see Judgment no. 139 of 1984).

The elections held under the terms of electoral legislation that has been ruled unconstitutional are ultimately, and quite obviously, a settled matter since the process of composing the Houses of Parliament is concluded with the proclamation of the candidates elected.

Similarly, any acts which the Houses of Parliament may adopt before new elections are held will not be affected.

The fundamental principle in this case is the continuity of the State, which is not an abstract entity and is thus ensured through the continuity in particular of its constitutional bodies: this includes all constitutional bodies, starting with Parliament. It is therefore beyond any reasonable doubt – and is hardly necessary to repeat– that this decision is not capable of impinging in any way even on the acts which the Houses of Parliament may adopt before the next elections: the Houses are constitutionally necessary and essential bodies and cannot cease to exist or lose their capacity to act at any time. Indeed, precisely in order to ensure the continuity of the State, the Constitution itself provides for example that, following elections, powers must continue to lie with the previous Houses "until the new Houses have been convened" (Article 61 of the Constitution), and also requires that "during dissolution, Parliament shall be specially convened and shall sit within five days" in order to convert into law any decree-laws adopted by the Government (Article 77(2) of the Constitution).

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

1) declares that Article 83(1) no. 5 and (2) of Presidential Decree no. 361 of 30 March 1957 (Approval of the consolidated text of laws laying down rules governing elections to the Chamber of Deputies) are unconstitutional;

2) declares that Article 17(2) and (4) of Legislative Decree 20 December 1993, no. 533 (Consolidated text of laws laying down rules governing elections to the Senate of the Republic) are unconstitutional;

3) declares that Articles 4(2) and 59 of Presidential Decree no. 361 of 1957 and Article 14(1) of Legislative Decree no. 533 of 1993 are unconstitutional insofar as they do not enable voters to state their preferred candidates.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 4 December 2013.