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Constitutional Courts Dealing with Electoral Systems: a Comparative Look at Constitutional Adjudication on Electoral Equality

Cortes Constitucionais julgando Sistemas Eleitorais: um olhar comparativo sobre os julgamentos constitucionais a respeito da Igualdade Eleitoral

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Abstract

The article employs comparative analysis to investigate the nexus between constitutional adjudication and electoral systems through the perspective of the principle of equality in elections. It delves into the different reasoning of the constitutional courts of Germany, Italy and Spain, trying to unpack the various interpretations attached to that principle under the case law of these courts. In particular, it explores the arguments revolving around the interpretation of equality as the “one person, one vote” rule and its potential wider meaning, comparing the approaches adopted in the case law of the three jurisdictions. On a theoretical level, this submission aims to provide insights on the functions and limits of constitutional review in electoral matters and, more generally,

Resumo

Este estudo aborda, de forma comparativa, o nexo entre a jurisdição constitucional e os sistemas eleitorais através da perspectiva do princípio da igualdade em matéria eleitoral. Desta maneira, o seu objetivo é examinar as linhas de argumentação dos tribunais constitucionais da Alemanha, Itália e Espanha, tentando desdobrar as diferentes interpretações desse princípio sob a jurisprudência dos países mencionados. Em particular, explora os argumentos que giram em torno da interpretação da igualdade como a regra de “uma pessoa, um voto” e seu potencial significado mais amplo, comparando as abordagens adotadas na jurisprudência das três jurisdições acima citadas. Em um nível teórico, o artigo tenta também realçar as funções e limites da revisão constitucional em matéria eleitoral e, mais em geral,

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to contribute to studies of constitutional law concerned with the tension between legislative discretion and the role of constitutional courts.

Keywords: equality; electoral law; constitutional jurisdiction; comparative constitutionalism; constitutional courts.

contribuir para estimular os estudos de direito constitucional focados em a tensão entre a discricionariedade legislativa e o papel dos tribunais constitucionais.

Palavras-chave: igualdade; Direito Eleitoral; jurisdição constitucional; comparação constitucional; cortes constitucionais.

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1. INTRODUCTION¹

With the evolution of constitutionalism has come the struggle to reduce inequality, one of the cornerstones of which is the progressive affirmation of equal access to the vote.² Together with the founding recognition of the equality principle, a common pattern of contemporary constitutions is, more specifically, to include equality in voting among the constitutional principles informing the holding of elections (*infra*). However, the electoral system and the features thereof that are adopted in a given country may, to varying degrees, increase inequality among voters, as a consequence of, inter alia, the (un)equal distribution of the population among districts, the existence of election thresholds or the introduction of a majority bonus. What voting equality represents under constitutional law and under what conditions the introduction of distortions of voting equality are consistent with the constitution remains controversial. Constitutional courts have engaged with this issue across ages and contexts.³ This paper investigates the role that constitutional adjudication has played in electoral matters in Germany, Italy and Spain, focusing more specifically on how the constitutional courts

¹ Forease of reading, quotations in German, Italian and Spanish in the main text have been translated by the author. Quotations in footnotes have been left in the original language, except where an official translation was available.

² For a political science perspective, see DALTON, Russell J. Political inequality and the democratic process. In: GIUGNI, Marco; GRASSO, Maria (Eds.). **The Oxford Handbook of Political Participation**. Oxford: Oxford University Press, 2022, pp. 912-930. p. 932, quoting Dahl: "in making collective decisions the [...] interest of each person should be given equal consideration. Insuring that the interests of each are given equal consideration, in turn, requires that every adult member of an association be entitled to participate in making binding and collective decisions affecting that person's good or interest. This principle in turn requires political equality".

³ On the role of Courts on the issue of redistricting see HANDLEY, Lisa. Electoral systems and redistricting. In HERRON, Erik S.; PEKKANEN, Robert J.; SHUGART, Matthew S. **The Oxford Handbook of Electoral Systems**. Oxford: Oxford University Press, 2018, pp. 513-532. p. 516.

of these three countries have interpreted the nexus between the principle of equality and elections, emphasizing the canons of interpretation that they have adopted to adjudicate on the electoral system, i.e., the set of rules determining how votes cast in an election are translated into parliamentary seats.⁴

A comparative approach to address this issue is highly relevant, as confirmed by the “incorporation” of comparative references in the German, Italian and Spanish constitutional courts’ judgments on electoral matters. Whereas the use of foreign legal sources or precedents is to varying degrees limited,⁵ if on the rise, it is interesting to observe their presence when the Courts deal with electoral legislation, specifically on the subject of electoral equality. In judgment no. 75/1985, the Spanish Constitutional Court – whose comparative references are rare – referred to the case law of the *Bundesverfassungsgericht* on election thresholds. The Federal Constitutional Court was also quoted in judgment no. 1/2014 (*infra*) of the Italian Constitutional Court.⁶ That decision, as well as judgment no. 35/2017 (*infra*), also contains references, if vague and implicit, to comparative law.⁷ In turn, when the Federal Constitutional Court was called on to adjudicate on the varying size of electoral districts, it commissioned the Max Planck Institute for Comparative Public Law and International Law for an expert opinion and comparative overview on how the size of electoral districts influences the equality

⁴ RAE, Douglas. **The political consequences of electoral laws**. New Haven: Yale University Press, 1967.

⁵ See generally GROPPI, Tania, PONTTHOREAU, Marie-Claire (Coords.). **The Use of Foreign Precedents by Constitutional Judges**. Hart Publishing: Oxford, 2013, and particularly the Chapter of GROPPI, Tania, PONTTHOREAU, Marie, Conclusion, p. 411. On Spain see ALEMÁN, Ángel Aday Jiménez. The Spanish Constitutional Court and Foreign and Comparative Law: Theory and Practice of a Marriage of Convenience. In: FERRARI, Giuseppe Franco. **Judicial Cosmopolitanism: The Use of Foreign Law in Contemporary Constitutional Systems**. Leiden: Brill, pp. 375-401, 2019; ARZOZ SANTISTEBAN, Xabier. La cita de jurisprudencia constitucional comparada por el Tribunal Constitucional Español. **Revista Española de Derecho Constitucional**, Madrid, vol. 125, may./aug., pp. 13-44, 2022, counts 46 decisions for the Spanish Constitutional Court from its inception until 2022. For Italy see PASSAGLIA, Paolo. L'utilizzo del diritto comparato da parte della Corte costituzionale italiana: Alcuni spunti di riflessione a partire dalla giurisprudenza del periodo 2000-2021. **Diritto pubblico comparato ed europeo**, [s.l.], ano 24, vol. 2, pp. 191-246, 2022, covering the period 2000-2021 and counting 74 decisions. For Germany see MARTINI, Stefan. Lifting the Constitutional Curtain? The use of foreign precedent by the German Federal Constitutional Court. In: GROPPI, Tania, PONTTHOREAU, Marie-Claire (Coords.). **The Use of Foreign Precedents by Constitutional Judges**. Hart Publishing: Oxford, 2013. and MARTINI, Stefan. **Vergleichende Verfassungsrechtsprechung: Praxis, Viabilität und Begründung rechtsvergleichender Argumentation durch Verfassungsgerichte**. Berlin: Duncker & Humblot, 2018. p. 59.

⁶ The judgments quoted are *BVerfGE* 3, 11, judgment of 25 July 2012; 197 of 22 May 1979 and judgment no. 1 of 5 April 1952.

⁷ On the so-called “closed lists” that constrain the ability of voters to cast a preference vote, judgment no. 1/2014 implicitly references comparative law when it states that “the legislation under examination is not comparable with other systems”, although the Court does not specify which systems it implicitly considers. Judgment no. 35/2017 quotes this passage of judgment no. 1/2014 and in a similar vein, on the bonus in a run-off round (*infra*), affirms that the voting system “is not comparable to other experiences”. Again, no explicit comparative reference is made here. For a critical account, see GRATTERI, Andrea. Il diritto straniero e la comparazione della Corte costituzionale: il caso delle “sentenze elettorali”. In: D'AMICO, Marilisa; BIONDI, Francesca (Coord.). **La Corte costituzionale e i fatti: istruttoria ed effetti delle decisioni**. Napoli: Editoriale Scientifica, 2018, pp. 229-240. p. 232.

principle and quoted the jurisprudence of several countries in its judgment.⁸ Another issue, which falls outside the scope of this paper, would be the “quality” of such foreign references and their weight or relevance in the Courts’ overall decisions.⁹

The focus on the German, Italian and Spanish experiences arises from the fact that electoral equality has represented and continues to represent a controversial issue in these jurisdictions, and has been addressed in varying ways by the respective constitutional courts. In addition, the way in which these Courts have adjudicated on the principle of equality in voting may be considered a lens through which we can look at the traditional *Spannungsfeld* of constitutional law on the discretion of the legislature. Furthermore, apart from their homogeneity and influences, these countries are engaged in constant constitutional dialogue¹⁰ and have experienced a process of mutual contamination,¹¹ including on electoral legislation specifically.¹² Moreover, they have adopted or continue to adopt proportional systems of representation,¹³ whose characteristics provide fertile ground for comparative analysis. If the constituent process of the Italian Constitution and the Basic Law alike was marked by a preference for the proportional system (albeit, as the respective constitutional courts confirm, for different reasons),¹⁴ both deliberately left specific electoral system in the hands of the legislature. By contrast, the Spanish Constitution is characterized

⁸ *BVerfGE* 95, 335.

⁹ On these aspects, see JAKAB, Andrés; DYÈVRE, Andrés; ITZCOVICH, Giulio (Coord.). **Constitutional Comparative Reasoning**, Cambridge: Cambridge University Press, 2017 and specifically the Chapters of the jurisdictions covered here, i.e., HAILBRONNER, Michaela; MARTINI, Stefan. The German Federal Constitutional Court. In: JAKAB, Andrés; DYÈVRE, Arthur; ITZCOVICH, Giulio (Eds.). **Comparative Constitutional Reasoning**. Cambridge: Cambridge University Press, 2017, pp. 356-393. p. 629.

¹⁰ See BLANKE, Hermann-Josef; MAGIERA, Siegfried; PIELOW, Johann-Christian; WEBER, Albrecht (Coord.), **Verfassungsentwicklungen im Vergleich: Italien 1947– Deutschland 1949 – Spanien 1978**. Berlin: Duncker & Humblot, 2021, and specially BLANKE, Hermann-Josef. Eckpunkte der Verfassungsordnungen Italiens, Deutschlands und Spaniens im Vergleich. In: BLANKE, Hermann-Josef; MAGIERA, Siegfried; PIELOW, Johann-Christian; WEBER, Albrecht (Coord.), **Verfassungsentwicklungen im Vergleich: Italien 1947– Deutschland 1949 – Spanien 1978**. Berlin: Duncker & Humblot, 2021. pp. 17-52 for a meaningful account of this constitutional dialogue and the “osmotische Prozesse” between Italy, Germany and Spain.

¹¹ For German influence in the Spanish constitutional system, see BALAGUER CALLEJÓN, Francisco; AZPI-TARTE SÁNCHEZ, Miguel. Das Grundgesetz als sein Modell und sein Einfluss auf die spanische Verfassung von 1978. **Jahrbuch des öffentlichen Rechts**, Tübingen, vol. 58, n. 1, pp. 15-39, 2020.

¹² For instance, references to the Spanish or German electoral systems, taken as blueprints, are frequent in the Italian political debate on electoral reforms.

¹³ With the entry into force of law no. 165/2017, Italy adopted a so-called “mixed system” (see *infra*). As per Germany, at the time of writing a reform of the federal election act is ongoing. For further details see VOLKMANN, Uwe. Wahlrechtsänderung mit einfacher Mehrheit?: Ein paar vorläufige Gedanken zu einer Forderung konstitutioneller Moral. **VerfBlog**, 2023/1/16. Available at: <https://verfassungsblog.de/wahlrechtsaenderung-mit-einfacher-mehrheit/>.

¹⁴ FARAGUNA, Pietro. Do You Ever Have One of Those Days When Everything Seems Unconstitutional? The Italian Constitutional Court Strikes Down the Electoral Law Once Again: Italian Constitutional Court Judgment of 9 February 2017 No. 35 (December 4, 2017). **European Constitutional Law Review**, Cambridge, vol. 13, n. 4, pp. 778-792, 2017.

by a detailed regulation of electoral matters, including the constitutionalization of proportional representation. Against this background, this article will compare how the constitutional courts of Germany, Italy and Spain have engaged with electoral matters, and electoral equality more particularly, to varying degrees according to their national singularities.

2. THE CONSTITUTIONALIZATION OF ELECTORAL MATTERS AND THE INTERPRETATION OF VOTING EQUALITY

The constitutionalization of electoral matters reflects the historical evolution of the form of the state. If constitutions during the liberal state era were generally silent about the electoral regime,¹⁵ the constitutions of pluralist democracies commonly featured principles and rules concerning the electoral system and procedure, albeit with such constitutional regulation naturally varying in “intensity” from one country to the next.¹⁶ In this context, equality was frequently set out as one of the constitutional principles governing exercise of the vote, along with the generality, liberty and secrecy of the vote.¹⁷

The constitutionalization of electoral matters has provided constitutional courts greater margin to engage with electoral matters, and against this backdrop, the equality principle has frequently been invoked to challenge the constitutionality of electoral legislation, which has turned into the “cornerstone of the constitutional jurisprudence in this area”.¹⁸ From the common understanding that the vote must be equal, however, various interpretations of this principle have arisen across time and jurisdictions. In its first meaning, it requires the establishment of equal rules for voters casting their ballot (“formal” equality). This understanding of voting equality represents one of the milestones of democratic constitutionalism, implying the prohibition of plural and multiple voting and the recognition of the “one person, one vote” rule. It also meant eliminating voting discrimination based on gender, race and other personal or social conditions. This achievement radically transformed the role, nature and activities of parliaments and contributed to the shift from the liberal to democratic form of the state during the 20th century. Formal equality means that the

¹⁵ The Constitution of Cadiz of 1812 represents a meaningful example in this regard. See PRESNO LINERA, Miguel Ángel. *El sistema electoral español desde sus orígenes hasta la Constitución de 1978*. **Journal of Constitutional History**, Macerata, vol. 19, pp. 89-121, 2018.

¹⁶ Beyond adopting constitutional provisions on elections, many countries provide for a specific sub-constitutional regulation of electoral matters, establishing that the electoral act must be a law approved by special procedures (see Article 81 of the Spanish Constitution, Article 40 of the Czech Constitution).

¹⁷ The Constitutions of the three countries considered in this paper set out this principle: see Article 38, para 1 of the Basic Law, Article 48, para 2 of the Italian Constitution, Article 68, para. 1 of the Spanish Constitution.

¹⁸ DELLEDONNE, Giacomo. **Costituzione e legge elettorale: Un percorso comparatistico nello Stato costituzionale europeo**. Napoli: Editoriale Scientifica, 2019. p. 120.

principle of equality is tested and applied when the ballot is cast but does not include an assessment of the result of the votes. This is the second reading of the principle, known as “substantive” equality, which aims to measure whether votes receive varying treatment when they are counted.

This further dimension of equality dates to the Weimar Republic, when legal scholarship and jurisprudence¹⁹ engaged in a meaningful debate between the *Zählwertgleichheit* and *Erfolgswertgleichheit*. This exerted long-lasting influence on not only the Federal Constitutional Court’s future understanding of equality, but also the jurisprudence of other countries, including that of the Italian Constitutional Court.²⁰ In that debate, Hermann Heller played a noteworthy role, systematizing the subject and influencing the jurisprudence during and after the Weimar period. In particular, in his expert opinion titled *Gleichheit in der Verhältniswahl nach der Weimar Verfassung*, he reasoned about two different phases²¹ of voting in order to determine whether electoral legislation complied with the principle of equality. Heller considers equality under a pure “mathematical perspective” (*Zählwertgleichheit*, from the German *Zählwert*, literally “counter value”), i.e., each vote has the same value and no vote must be counted more than once. However, with *Erfolgswertgleichheit* (from the German *Erfolgswert*, the value of the result), the equality of result, or “outcome equality”,²² is examined from a “legal perspective” and votes are considered according to their concrete result. In other words, equality refers to the equal chance that a single vote will contribute to the successful adjudication of a seat, which is to say, when votes are calculated, their impact or weight must be equal. However, distancing himself from the jurisprudence, Heller recognized that this second dimension of equality entails a certain degree of relativity, as departure from equality may be accepted under a certain legal system and not under

¹⁹ In that context it is particularly interesting to look at the jurisprudence of the *Staatsgerichtshof* and its changes under the influence of the German doctrine. In the first phase of this jurisprudence (between 1926 and 1929), the Tribunal took a position on the fight against the so-called splinter parties (“Bekämpfung der Splitterparteien”) declaring the unconstitutionality of some laws of the *Länder* that limited the access of minor parties to representative assemblies, thus adopting an *absolute interpretation of the equality of result*, by which every provision restricting political pluralism is incompatible with the principle of equality. Subsequently, in 1930, the *Staatsgerichtshof* changed its view and considered that the Prussian electoral law was not unconstitutional, reflecting the most recent contribution of the German doctrine and of Heller more particularly LEIBHOLZ, Gerhard. **Strukturprobleme der modernen Demokratie**. Karlsruhe: Verlag C. F. Müller, 1958.

²⁰ For a discussion of the influence of the *Erfolgswertgleichheit* in judgment no. 1/2014, see GRATTERI, Andrea. **La formula e il risultato**: Studio sulla rappresentanza proporzionale. Milano: Franco Angeli, 2019; ROMANO, Andrea. Accesso alla giustizia costituzionale ed eguaglianza del voto: Legittimazione delle Corti e discrezionalità legislativa. **Diritto Pubblico**, Roma, vol. 21, n. 2, pp. 431-508, 2015.

²¹ HELLER, Hermann. **Die Gleichheit in der Verhältniswahl nach der Weimarer Verfassung**: Ein Rechtsgutachten. Berlin: De Gruyter, 1929. Such phases related to the diversity of majority-proportional systems. In majority systems of voting the distribution of seats ends when all votes are counted and allocated. By contrast, in proportional systems an additional phase is needed to contrast total votes with votes received by a list and to allocate seats proportionally.

²² Translation provided by TOMUSCHAT, Christian. Germany’s Mixed-Member Electoral System: A Victim of its Sophistication? **German Law Journal**, Cambridge, vol. 14, pp. 213-237, 2013. p. 214.

another.²³ Nevertheless, any norm limiting the equality of result of the votes must be justified, for instance to counter political fragmentation, otherwise it may be deemed arbitrary and, therefore, unconstitutional.²⁴

In contemporary constitutional debates the first dimension of voting equality is commonly defined as “formal” equality because it represents application of the formal concept of equality to the electoral process, which impedes the legislature from discriminating against voters.²⁵ Known as “substantive” or outcome equality, the second dimension of electoral equality considers the concrete effects of the electoral system or result of the election. Outcome equality will depend on the characteristics and technicalities of the electoral system, such as the existence of an electoral threshold.²⁶

The nexus between electoral equality and the size of electoral districts, i.e., how many representatives are elected for each electoral district or, put another way, how many voters are needed to elect a representative in each district, is problematic. Disproportionality between the seats allocated in a given electoral district and the population residing therein (or other valid criterion) may amount to a violation of electoral equality. This has served to challenge the “formal” dimension of equality,²⁷ as it creates the risk that elected people represent (disproportionally) higher or lower numbers of voters.²⁸ However, another “layer of distortion” to electoral equality caused by seat allocation per electoral district involves a different dimension of equality, namely, the equality of opportunity between political parties and their candidates.²⁹ However, as the jurisprudence of the Federal Constitutional Court and various authors point out,

²³ See HELLER, Hermann. **Die Gleichheit in der Verhältniswahl nach der Weimarer Verfassung**: Ein Rechtsgutachten. Berlin: De Gruyter, 1929. p. 24. “Dieselbe Maßregel kann in dem einen Staat gerechtfertigt sein und in dem anderen nicht”. This expression was quoted by the jurisprudence of the *BVergGE*.

²⁴ HELLER, Hermann. **Die Gleichheit in der Verhältniswahl nach der Weimarer Verfassung**: Ein Rechtsgutachten. Berlin: De Gruyter, 1929. See also DELLEDONNE, Giacomo. Weimar e la costituzionalizzazione del principio proporzionale. **Forum di Quaderni costituzionali**, [s.l.], n. 3, pp. 407-431, 2021.

²⁵ MASSIMO, Rubechi. **Il diritto di voto**: Profili costituzionali e prospettive evolutive. Torino: Giappichelli, 2016. p. 112.

²⁶ MORLOK, Martin. Artikel 38. In: DREIER, Horst (Coord.). **Grundgesetz Kommentar**. Tübingen: Mohr Siebeck III Edition, 2009.

²⁷ In 1963, the US Supreme Court affirmed that malapportionment was hindered by the equal protection clause of the XIV amendment.

²⁸ CASANOVA, Daniele. **Eguaglianza del voto e sistemi elettorali**. Napoli: Editoriale scientifica, 2020. p. 74 “Per avere una equiparazione dei cittadini è necessario che la distribuzione dei seggi nei collegi avvenga in modo tale che agli elettori situati in collegi elettorali diversi sia garantita la stessa possibilità (prima dell’espressione del voto) di essere rappresentati in Parlamento, affinché non ce ne siano taluni in grado di essere rappresentati da un numero di deputati maggiore di altri, ooverosia per evitare che un eletto rappresenti potenzialmente una quantità di elettorato più alta di altri rappresentanti”.

²⁹ See for this perspective ESPAÑA. Comisión de Estudios del Consejo de Estado. **Informe del Consejo de Estado sobre las propuestas de modificación del régimen electoral general**. 24 de febrero de 2009. Available at: <https://www.consejo-estado.es/wp-content/uploads/2021/02/REGIMEN-ELECTORAL.pdf>. p. 164.

the size of an electoral district also impacts the outcome of an election on the *Erfolgswertgleichheit*,³⁰ since the more homogenous the population of an electoral district, the more adjusted the result will be to voters' expectations.³¹ Be that as it may, the Venice Commission's 2002 Code of Good Practice in Electoral Matters recommends that "seats [...] be distributed equally among the constituencies, in accordance with a specific apportionment criterion", and the "maximum admissible departure from the distribution criterion adopted [...] should seldom exceed 10% and never 15% except in really exceptional circumstances".

Thus, the dual understanding of the equality principle put forward by Heller and further discussed among scholars of his time,³² survived the Weimar period and continues to engage academics in Germany, Italy and Spain, with the latter showing increasing interest for the implications of outcome equality.³³ In particular, the constitutional courts of Germany, Spain and Italy have offered varying interpretations of whether the notion of equality is restrained to its formal aspect, or whether it embraces a substantive, or broader, meaning – *eine erweiternde Bedeutung* to borrow the language of the Federal Constitutional Court. The following sections will provide analysis of selected areas in which the principle of equality and related constitutional principles have been tested in Germany, Italy and Spain.

3. THE PRINCIPLE OF EQUALITY AND CONSTITUTIONAL REALITY (VERFASSUNGSWIRCKLICHHEIT) IN THE JURISPRUDENCE OF THE FEDERAL CONSTITUTIONAL COURT

Considering the Weimar Constitution's controversial constitutionalization of proportional representation, initial discussion in Germany centered on whether the

³⁰ BVerfGE 131, 316 (*Überhangmandate II*), MORLOK, Martin. Artikel 38. In: DREIER, Horst (Coord.). **Grundgesetz Kommentar**. Tübingen: Mohr Siebeck III Edition, 2009, "Die Erfolgswertgleichheit hängt auch noch von anderen Faktoren ab, zB von der Bevölkerungszahl des Wahlkreises. Das relative Gewicht der einzelnen Erststimme ist umso kleiner, je mehr Wahlberechtigte in einem Wahlkreis leben".

³¹ GRATTERI, Andrea. **La formula e il risultato**: Studio sulla rappresentanza proporzionale. Milano: Franco Angeli, 2019: "Un apportionment adeguato [...] ha la capacità di incidere anche sul risultato, che sarà tanto più fedele alle complessive preferenze dell'elettorato quanto più il riparto dei seggi fra le circoscrizioni sarà fedele al dato demografico e basato su circoscrizioni di magnitudine omogenea (se non addirittura eguale)".

³² See LEIBHOLZ, Gerhard. **Strukturprobleme der modernen Demokratie**. Karlsruhe: Verlag C. F. Müller, 1958.

³³ EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW. VENICE COMMISSION. **Code of Good Practice in Electoral Matters**. 30 October 2002. Available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2002\)023rev2-cor-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2002)023rev2-cor-e), defining the two dimensions as equality in voting rights (formal equality) and equality in voting power (substantive equality). See ESPAÑA. Comisión de Estudios del Consejo de Estado. **Informe del Consejo de Estado sobre las propuestas de modificación del régimen electoral general**. 24 de febrero de 2009. Available at: <https://www.consejo-estado.es/wp-content/uploads/2021/02/REGIMEN-ELECTORAL.pdf>. p. 163.

Basic Law, while not setting out a specific electoral system,³⁴ implicitly required one in light of the equality principle, laid down in Article 38, para. 3 of the Basic Law, or other principles of constitutional relevance.³⁵ Early constitutional jurisprudence on electoral legislation addressed this problem when the Court affirmed that, on the one hand, the Basic Law is neutral regarding the electoral system adopted and therefore the legislature is free to opt for a majority or proportional electoral system. It follows that a majority system would, in abstract terms, be compatible with the *Grundgesetz*.³⁶ On the other hand, once a proportional system is chosen, the Court will exercise stricter scrutiny in testing whether the *Erfolgswertgleichheit* is respected. Thus, considering it is constrained to formal equality when a majority electoral system is adopted, and embraces substantive equality, or the equality of result, when the legislature opts for a proportional system, the scope of the equality principle varies, and the principle itself interacts in different ways, depending on the electoral system.

Because Germany adopted a proportional electoral system – albeit with specific characteristics that led doctrine and jurisprudence to define it as a personalized proportional system (*personalisierte Verhältniswahl*)³⁷ – the Court has always been firm in considering that the principle of equality also means equality of result,³⁸ a fact that

³⁴ Article 22 of the Weimar Constitution established that delegates should be elected “according to the principle of proportional representation”, which was considered one of the main reasons leading to the political instability that paved the way to the crisis and dissolution of the Weimar Republic. See for this interpretation HERMENS, Ferdinand, **Democracy or anarchy? A study of proportional representation**. Notre Dame: University of Notre Dame, 1941. p. 293. For a “problematization” of this position and a recent account of proportional representation in the Weimar Constitution see DELLEDONNE, Giacomo. Weimar e la costituzionalizzazione del principio proporzionale. **Forum di Quaderni costituzionali**, [s.l.], n. 3, pp. 407-431, 2021.

³⁵ Article 38 of the Basic Law establishes that “Members of the German Bundestag shall be elected by general, direct, free and secret suffrage”.

³⁶ See, however, the position of MEYER, Hans. **Wahlsystem und Verfassungsordnung: Bedeutung und Grenzen wahlsystematischer Gestaltung nach dem Grundgesetz**. Frankfurt: Alfred Metzner Verlag, 1973. p. 192-195. Recently, on the relationship between the majority system of voting and the *Grundgesetz*, see KLUCKERT, Sebastian. Das Grabenwahlrecht auf dem Prüfstand der Verfassung. **Neue Zeitschrift für Verwaltungsrecht**, Frankfurt, vol. 17, pp. 1217-1223, 2020, according to whom “Dem Grabenwahlrecht ist zudem ein Verstoß gegen den Grundsatz der Gleichheit der Wahl immanent”.

³⁷ The *BVerfGE* 1, 208 (7,5 Sperrklausel) qualifies the electoral system as proportional. In the literature, some authors, particularly from the field of political sciences, define the system as mixed (see HAUG, Volker M. Das Bundesverfassungsgericht als Gesetzgeber anstelle des Gesetzgebers: Ein kritischer Blick auf das Wahlrechtssurteil vom 25. Juli 2012. **Zeitschrift für Parlamentsfragen**, Baden-Baden, vol. 43, n. 3, pp. 658-674, 2012). The first solution seems the most correct, as the first vote (*Erststimme*) does not affect a party’s quota of deputies as the entire distribution of seats is based on a proportional criterion: in fact, while the second vote serves to quantify the number of deputies to which a given party is entitled, the first vote has the function of personalizing, at least partially, that quota. Article 1 of the Federal elections act defines the system as a proportional system of voting combined with elements of the majority system ([Die Abgeordneten] werden [...] mit der Personenwahl verbundene Verhältniswahl gewählt”).

³⁸ *BVerfGE* 1, 208 (7,5% Sperrklausel), para. 117: “Geht man von dem Grundgedanken der Verhältniswahl aus und verbindet ihn mit dem Grundsatz der demokratischen Gleichheit aller Staatsbürger, so ist evident, daß dem Grundsatz der Gleichheit der Wahl *bei der Verhältniswahl* nicht schon dann genügt ist, wenn jede Stimme den gleichen Zählwert hat” (emphasis in the original text).

has opened it to criticism.³⁹ However, the Court's interpretation of equality is not absolute, as it admits compelling reasons (*zwingende Gründe*) of constitutional relevance for which deviation from equality may be justified.⁴⁰ This includes the need to preserve elected bodies' functional effectiveness, or their ability to act, take decisions and form a government.⁴¹

The *Bundesverfassungsgericht's* intense activity in relation to the principle of voting equality has involved many aspects of electoral legislation: the election threshold for the representative assemblies at varying levels (*Sperrklausel*),⁴² the direct seat clause (*Grundmandatsklausel*),⁴³ electoral districts (*Wahlkreise*),⁴⁴ and overhang seats (*Überhangmandate*)⁴⁵ are some of the most controversial aspects of the long jurisprudential path tread by the German Court.⁴⁶ If a red line can be identified in the extensive German jurisprudence, particularly as regards the balance it has reached between legislative discretion and the prescriptive nature of constitutional principles concerning elections, it is in the importance attached to "context", i.e., the nexus of constitutional reality (*Verfassungswirklichkeit*) and constitutional issues. This has significantly impacted whether those provisions of electoral legislation that alter the degree of proportionality and equality of the electoral system are assessed as constitutionally compatible.

From its earliest judgments on the election threshold, the Court established that electoral law cannot be evaluated as isolated legislation, rather, it must be linked to the

³⁹ See, critically, MORLOK, Martin. Artikel 38. In: DREIER, Horst (Coord.). **Grundgesetz Kommentar**. Tübingen: Mohr Siebeck III Edition, 2009. p. 1095: "Diese Abwaschung des gleichen Erfolgswertes jeder Stimme ist problematisch, bildet die Umsetzung in Mandate doch den eigentlichen Zweck der Wahl".

⁴⁰ See *BVerfGE* 34, 981 (*Wahlgleichheit*) where the Court states that the legislator is endowed with narrow leeway to create differentiations with regard to voting rights, specifying that such differentiations require special compelling justifications ("besonderer rechtfertigender, zwingender Gründe").

⁴¹ See, for instance, *BVerfGE* 6, 84 (*Sperrklausel*), at para. 27 "Die Wahl hat aber nicht nur das Ziel, den politischen Willen der Wähler als einzelner zur Geltung zu bringen, also eine Volksrepräsentation zu schaffen, die ein Spiegelbild der im Volk vorhandenen politischen Meinungen darstellt, sondern sie soll auch ein Parlament als funktionsfähiges Staatsorgan hervorbringen".

⁴² The first judgment (of many) is *BVerfGE* 1, 208 (7,5 *Sperrklausel*), on the 7.5 per cent election threshold of the electoral act of the *Land* Schleswig-Holstein. The 5 per cent election threshold is laid down in Article 6, para. 3 and 6 of the federal elections act.

⁴³ *BVerfGE* 95, 408 (*Grundmandatsklausel*).

⁴⁴ See, for instance, *BVerfGE* 16, 130 (*Wahlkreise*); *BVerfGE* 95, 355 (*Überhangmandate II*).

⁴⁵ This occurs when a political party obtains more direct mandates by virtue of the first vote compared to the mandates obtained through the proportional assignation of seats stemming from the second vote. The federal elections act explicitly provides for this possibility in Article 6, para 5. In consequence, the existence of these overhang seats allows the number of *Bundestag* members to increase accordingly.

⁴⁶ Although these are different elements of the electoral law, they are part of a complex mechanism in which the effects of the ones interact with those of the others. For example, the size of constituencies is relevant to the question of overhang seats (see *infra*), which in turn impact the per cent threshold. Meanwhile, the threshold is strictly linked to the *Grundmandatsklausel*.

concrete effects it generates.⁴⁷ For a long time, the Court's jurisprudence on electoral matters rejected constitutional complaints about the *Bundestag's* federal elections act (albeit not those concerned with the election acts of the *Länder*). However, the Court struck down the federal election act (*Bundestagswahlgesetz, BWahlG*) when the political circumstances of the time made maintaining the balance between legislative discretion and political stability impossible. That the first judgment declaring the unconstitutionality of the federal election act came after reunification is no coincidence. At the time, the Court found that the automatic extension of the five-per-cent threshold to the entire territory of Germany represented a breach of the principle of voting equality and equal chances of political parties tied to the former GDR.⁴⁸

Over the years, this importance attached to the political reality has provided fuel for interesting debate between the jurisprudence and doctrine. One meaningful example in this regard is the Court's judgment on the legitimacy of the *Grundmandatsklausel*.⁴⁹ In that case, the (scant) relevance that application of that rule had for the political forces and, especially, prognostic considerations about the impact of such a provision, let the Court to consider that such a rule was not liable to jeopardize the functionality of parliament, and it allowed the "integration of the people" insofar as it gave parliamentary access to local parties.⁵⁰ The Court's decision fit within the positions that had already emerged in the legal scholarship. Indeed, some authors have previously criticized the proviso of the *Grundmandatsklausel* and part of the doctrine criticized the outcome of the judgment, referencing insufficient justification of the factual reasons underpinning the Court's decision.⁵¹

In addition, one problem very specific to the German electoral system and its compatibility with the *Grundgesetz*, concerned the issue of so-called overhang seats. Notwithstanding its particularity, that issue allows us to reflect on some wider problems of the constitutional control of legislative choices in electoral matters. According to both the Basic Law and federal elections act, the number of seats in the *Bundestag* is not fixed and may vary from one election to another. This differs from several constitutions, where the number of deputies is established by either the constitution (e.g.,

⁴⁷ See again *BVerfGE* 1, 208 (7,5% *Sperrklausel*) "Nun sind die Entscheidungen des Bundesverfassungsgerichts auf politische Realitäten bezogen, und das Gericht darf nicht den politischen Raum außer acht lassen, in dem sich seine Entscheidungen auswirken."

⁴⁸ *BVerfGE* 82, 232 (*Gesamtdeutsche Wahl*).

⁴⁹ This is the clause, provided for in Article 6, para. 3 of the federal elections act, allowing the party that does not reach the 5 per cent threshold but obtains three "direct seats" by virtue of the first vote, to take part in the proportional allocation of seats. See judgment *BVerfGE* 95, 408 (*Grundmandatsklausel*).

⁵⁰ *BVerfGE* 95, 408 (*Grundmandatsklausel*), at para. 52, stating that the clause pursues a legitimate goal under the Constitution for it allows "eine effektive Integration des Staatsvolkes".

⁵¹ See KOTZUR, Markus. Freiheit und Gleichheit der Wahl. In: MERTEN, Detlef; PAPIER, Hans-Jürgen (Coord.). **Handbuch Grundrechte**. Vol. V, Deutschland Einzelgrundrechte. 2. ed. Heidelberg: C.F. Mueller, 2013, pp. 555-592. p. 588-589.

Italy) or the elections act (e.g., Spain). However, it has been deemed a consequence of the characteristics of the proportional personalized system, which is composed of the first and second vote according to Article 4 of the federal elections act (*Erst- und Zweitstimme*). The possibility of introducing overhang seats affects the principle of equality as well as the equal opportunity of the parties. The problem, in a nutshell, is that only the first votes of some voters (i.e., those who contribute to the election of an overhang seat) carry weight in how the *Bundestag* is formed; in addition, the party that obtains an overhang seat needs fewer second votes to obtain a seat than another party without such a mandate.

The issue of overhang seats polarized the doctrine. Some authors argued they were unconstitutional per se.⁵² Others sought to mitigate that position, arguing that a certain number of overhang seats are acceptable.⁵³ Again, the jurisprudence on this issue seems to confirm the relevance of the nexus between constitutional reality and constitutional principles applicable to electoral legislation, as doubt started to be cast on the legitimacy of overhang seats when their number began to increase following German reunification,⁵⁴ causing concrete prejudice to the principle of equality.⁵⁵ When the German Court initially addressed the issue, it found overhang seats acceptable within certain limits and warned the legislature about the risk of manipulation.⁵⁶ Subsequently, the issue divided the second Senate of the Federal Constitutional Court, which was split into two blocs: four judges voted to maintain the *Überhangmandate*, while the remaining four voted against it. One of the main arguments the first bloc of judges relied upon was that the overhang seats were a feature of the proportional personalized electoral German system and, as such, must be interpreted as *Direktmandate*, or an expression of the first vote. The second bloc argued that the increase in seats was in breach of the principle of equality.⁵⁷

In 2008 the German court took up this long-standing question once again, when it ultimately called into question their compatibility with the Basic Law given the potential violation of the equality principle.⁵⁸ In that decision the question of the overhang

⁵² MORLOK, Martin. Artikel 38. In: DREIER, Horst (Coord.). **Grundgesetz Kommentar**. Tübingen: Mohr Siebeck III Edition, 2009, p. 1104: “Sie sind unabhängig von ihrer Anzahl verfassungswidrig” and MORLOK, Martin. **Staatsorganisationsrecht**, 5 edition, Nomos: Baden-Baden, 2020. p. 109. See also MEYER, Hans. Demokratische Wahl und Wahlsysteme. In: ISENSEE, Josef; KIRCHHOF, Paul (Coords.). **Handbuch des Staatsrechts der Bundesrepublik Deutschland**. Vol. III, Demokratie-Bundesorgane. 3. ed. Heidelberg: C.F. Müller, 2005. p. 543.

⁵³ See generally HOLGER Jakob, **Überhangmandate und Gleichheit der Wahl**: Ein Beitrag zur aktuellen Wahlrechtsdiskussion. Frankfurt: Peter Lang, 1998.

⁵⁴ TOMUSCHAT, Christian. Germany’s Mixed-Member Electoral System: A Victim of its Sophistication? **German Law Journal**, Cambridge, vol. 14, pp. 213-237, 2013. p. 221.

⁵⁵ See LANG, Heinrich. **Wahlrecht und Bundesverfassungsgericht**. Baden-Baden: Nomos, 2014. p. 44.

⁵⁶ *BVerfGE* 7, 63 (*Listenwahl*). See also judgment *BVerfGE* 16, 130 (*Wahlkreise*).

⁵⁷ *BVerfGE* 95, 355 (*Überhangmandate II*). See the dissenting opinion (*Sondervotum*), at para. 153 and 184.

⁵⁸ *BVerfGE* 121, 266 (*Negatives Stimmgewicht*).

seats was linked to the so-called negative voting weight (*negatives Stimmgewicht*), according to which the second vote cast for political parties obtaining an overhang seat in one *Land* had a negative impact since these parties lost seats in the same or in another *Land*. The problem was particularly evident in the elections of 2005 in the constituency of Dresden, when the *Bundesverfassungsgericht* ruled that if second votes for the CDU had reached a certain threshold (41,225 votes), that party would have obtained one seat less; by contrast, if second votes had remained below this threshold, the party would have gained one seat more. The so-called negative voting weight provision of the federal elections act was therefore declared unconstitutional and the legislature was ordered to modify the law accordingly. That the Court acknowledged the distortion of the principle of equality linked to overhang seats is important.⁵⁹

In its reform of the law, the legislature introduced supplementary seats to compensate the *Überhangmandate*. Yet in 2012 the Court was challenged once again, when it issued a decision that represented an overruling of its earlier jurisprudence.⁶⁰ The Court's "distinguishing" was justified on the grounds that in its earlier case law, particularly the decision of 1997, the *Überhangmandate* were not found unconstitutional because of the political party scenario and, in particular, their number at that time. In contrast, in 2012, the Court declared that the possibility of having overhang seats without appropriate compensating or adjustment seats (*Ausgleichmandate*) violated the Basic Law, as this breached the *Erfolgswertgleichheit*.⁶¹ Moreover, the Court established that the *Überhangmandate* could not exceed 15. Notably, the result was reached on the grounds of the "changed political circumstances":

"Taking into account the current evolution of overhang mandates, whose number has markedly increased since the German reunification and has recently reached a considerable extent, and in view of the changed political circumstances, which increasingly favour the occurrence of overhang mandates, one may expect with a considerable degree of probability that in the foreseeable future, their number will regularly exceed by far exceed the number that is constitutionally acceptable. The legislature must therefore take precautions to prevent excessive numbers of overhang mandates occurring without compensation".⁶²

⁵⁹ *BverfGE* 121, 266 (*Negatives Stimmgewicht*), at para. 43.

⁶⁰ *BVerfGE* 131, 316, at para. 62. The Court ruled on Article 6, para. 1 and 5.

⁶¹ See in particular para. 124: "Thus, in addition to the second vote, the first vote also exerts influence on the political composition of the Bundestag. Since this effect only occurs for those voters who have given their first vote to a constituency candidate whose party achieves a surplus in the country concerned, the equality of success values is compromised".

⁶² <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2012/bvg12-058.html>. Emphasis added.

With this ruling, the Federal Constitutional Court placed itself in the middle of the opposing positions, between the zero-option solution and the 30 overhang seats solution, clarifying that *Überhangmandate* could total no more than 15. On a more general level, this judgment seemingly differed from the earlier jurisprudence on the relationship between the legislature and constitutional review, as the intervention in the legislative sphere proved greater, and rather than simply declaring the disputed provisions unconstitutional and ordering the legislature to set a ceiling on the number of possible overhang seats, the Court set the maximum constitutionally admissible threshold under the Basic Law.⁶³ After the judgment the federal elections act was reformed once again to comply with the Court's indications by introducing adjustment seats, whose function was to balance the disparity caused by the *Überhangmandate* and their prejudice to the equality principle.⁶⁴

In conclusion, from recognizing the principle of equality to the concrete outcome of elections, one might envisage reinforcing the prescriptive nature of the equality principle and, in consequence, intervening to a greater extent on the political discretion of the legislature. In contrast, the Court's understanding of the principle of equality has not traditionally entailed excessive limitations on legislative discretion, and the legislature's approach on the subject has often been qualified as prudent. However broad the concept of voting equality may be, in most cases the Court has recognized the existence of imperative reasons (*zwingende Gründe*) making it possible to see the federal elections act's "alteration" of the equality principle as constitutionally justified. Meanwhile, legal scholars have discussed whether recent judgments by the Court, including on overhang seats, represent a shift towards the legislature's margin of appreciation (*Einschätzungs prerogative*), which seems now more constrained in comparison to the approach traditionally maintained by the constitutional jurisprudence.⁶⁵

4. REASONABLENESS AND PROPORTIONALITY IN THE JURISPRUDENCE OF ITALY'S CONSTITUTIONAL COURT

Compared to the extensive jurisprudence of the Federal Constitutional Court, fewer rulings deal with the electoral system of the Italian Parliament, which, unlike in

⁶³ The way in which the Court determines the figure of 15 overhang seats does not seem sufficiently clear in the judgment, whose reasoning hinges on a systematic argument and the original intent of the legislator. As per the systematic argument, the judgment states that this is a matter of ensuring the threshold of admissible overhang seats is represented by half the number of deputies required to form a parliamentary group. On the original intent of the legislator, the Court argues it was to keep direct mandates to a minimum.

⁶⁴ See for the details BOEHL, Jörg. Erster Abschnitt Wahlsystem. In: SCHREIBER, Wolfgang (Org). *Bundeswahlgesetz (BWahlG) Kommentar*. 11 ed. Köln: Carl Heymanns Verlag, 2021, pp. 274-334. See Article 6, para. 4 and 5 of the federal elections act.

⁶⁵ See DELLEDONNE, Giacomo. *Costituzione e legge elettorale: Un percorso comparatistico nello Stato costituzionale europeo*. Napoli: Editoriale Scientifica, 2019.

the German and Spanish cases, has undergone radical changes over time.⁶⁶ The circumstances of the Italian Constitutional Court's judgments on this matter hinge on the procedural characteristics of the Italian judicial review of legislation that render the means of "accessing" the Court on electoral matters particularly complex.⁶⁷ In a seminal judgment on the nexus between constitutional principles and electoral law, the Court limited the scope of voting equality to formal equality (one person, one vote) when it affirmed that the principle of equality "does not extend to the concrete result of the manifestation of the voter's will".⁶⁸ This was coherent with the prevailing constitutional scholarship and jurisprudence at that time in Italy, which refused the possibility of extending the principle of voting equality to election results.⁶⁹ It was indeed generally accepted that the Constitution did not include any provisions on the concrete electoral system to be adopted, that choice having been left in the hands of the legislature.⁷⁰ According to that perspective, to accept the principle of equality of result would have meant considering a majority system of voting unconstitutional and thus recognizing the implicit constitutionalization of the proportional system.⁷¹ However, subsequent case law progressively undermined this finding, highlighting, on occasion, the possibility of declaring the elections act unconstitutional where the electoral system was manifestly unreasonable.⁷²

⁶⁶ In a nutshell, Italy adopted a proportional system between 1948 and 1993 –interrupted by law no. 148/1953 (so-called "legge truffa"), abolished shortly thereafter in 1954. The proportional system was superseded by a mixed electoral system in force between 1993 and 2005. Law no. 270/2005 reintroduced a full proportional system, but with a majority bonus (see *infra*). Following judgment no. 1/2014 of the Constitutional Court, the electoral system was reformed again with the entry into force of law no. 52/2015, which was partly struck down by judgment no. 35/2017. The current electoral system introduced by law no. 165/2017 is considered mixed (see *infra* note X). A short and recent account of this evolution is available in CARTABIA, Marta; LUPO, Nicola. **The Constitution of Italy: A Contextual Analysis**. London: Bloomsbury Publishing PLC, 2022. p. 55-67.

⁶⁷ This system lacks a means of direct complaint to the Constitutional Court. The Court may be challenged to examine the electoral law through incidental procedure, i.e. when, during an ordinary judicial proceeding, the judge raises an issue of constitutionality to the Constitutional Court. On the theoretical hurdles that have constrained the possibility of hearing and reviewing issues of constitutionality in electoral law, see LONGO, Erik; PIN, Andrea. *Judicial Review, Election Law and Proportionality*. **Notre Dame Journal of International and Comparative Law**, vol. 6, n. 1, pp. 101-118, 2016. p. 110.

⁶⁸ *Corte costituzionale*, judgment no. 43/1961 [author's translation].

⁶⁹ See, however, LAVAGNA, Carlo. *Il sistema elettorale nella Costituzione italiana*. **Rivista trimestrale di diritto pubblico**, [s.l.], vol. 2, n. 4, pp. 849-875, oct./dec. 1952.

⁷⁰ See, however, FARAGUNA, Pietro. *Do You Ever Have One of Those Days When Everything Seems Unconstitutional? The Italian Constitutional Court Strikes Down the Electoral Law Once Again: Italian Constitutional Court Judgment of 9 February 2017 No. 35 (December 4, 2017)*. **European Constitutional Law Review**, Cambridge, vol. 13, n. 4, pp. 778-792, 2017. footnote 2 stating that "the political landscape of the framers was certainly inspired by a proportional representation system".

⁷¹ LUCIANI, Massimo. **Il voto e la democrazia**: La questione delle riforme elettorali in Italia. Roma: Editori Riuniti, 1991. p. 36.

⁷² See *Corte costituzionale*, judgments no. 189 and 273 of 2012. See PINELLI, Cesare. *Bilanciamenti su leggi elettorali (Corte cost. nn. 1 del 2014 e 35 del 2017)*. **Diritto pubblico**, [s.l.], n. 1, pp. 1-9, 2017. p. 3.

This paradigm shift was made complete by judgment no. 1/2014, in which the Court was asked to deliver a judgment on, inter alia, the “majority bonus” or “majority premium”⁷³ introduced by law no. 270/2005 for the election of the Chamber of Deputies and the Senate of the Republic. The elections act established that the list or coalition of lists obtaining the largest number of votes would have the “absolute majority” of seats in both parliamentary chambers. The Court was challenged to declare whether a such provision breached the principle of popular sovereignty (Article 1, para. 2 of the Constitution), the principle of voting equality (Article 48, para 2 of the Constitution) and the principle of representative democracy (Article 67 of the Constitution) for it entailed potentially transforming a relative majority of votes – whatever they may be, as no minimum threshold was established – into an absolute majority of seats.⁷⁴

The Court declared the elections act unconstitutional, as it made it possible to allocate the majority of seats without requiring a minimum threshold of votes or seats be reached. The legislation was therefore considered unreasonable and disproportionate as it did not respect “the requirement of the least possible sacrifice of other interests and values protected under constitutional law”.⁷⁵ While this finding was widely shared among academics, both the Court’s decision to admit judicial review of the law and its reasoning on the merits of the constitutional plaintiff were extremely innovative and, as the first case in which the elections act was declared unconstitutional, ushered in a new phase of Italian constitutional jurisprudence on electoral legislation.

The Court stated that in a proportional system the principle of equality may have various “nuances” and established criteria to assess the distortion of the relationship between the votes cast and seat allocation. The Court affirmed that “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 proceedings of constitutional review if it proves *manifestly unreasonable*”.⁷⁶ In other words, distortions of equality can be tolerated insofar as they do not reach a manifest degree of unreasonableness. As the Court stated:

Certain problematic aspects were found to lie in the fact that the bonus mechanism presages an excessive over-representation of the list that 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

⁷³ Hereinafter we refer to the English version of the judgment provided by the Constitutional Court: https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/1-2014_en.pdf.

⁷⁴ The Court was also asked to examine further aspects of law no. 270/2005. For a complete account see LONGO, Erik; PIN, Andrea. Judicial Review, Election Law and Proportionality. **Notre Dame Journal of International and Comparative Law**, vol. 6, n. 1, pp. 101-118, 2016. p. 110.

⁷⁵ *Corte costituzionale*, judgment no. 1/2014.

⁷⁶ *Corte costituzionale*, judgment no. 1/2014, at para. 3.1, emphasis added.

*this case on such a broad scale as to compromise the system's compatibility with the principle of equality in voting in voting.*⁷⁷

In so doing, and in order to review the rationale of an electoral system and its internal coherence, the Court applied the assessment of the principle of electoral equality to the concrete electoral context envisaged by the legislature. Hence, the Court stated that if the legislature adopts a proportional system, the voters' anticipation of a certain election result cannot be compromised and distorted by the method of seat allocation operated through the majority bonus.⁷⁸ This finding allowed the Court to consider that the equality of result in voting may "coexist" with the Constitution's "neutrality" as regards the electoral system.

Having said that, the interpretation of the equality principle endorsed by the Italian Constitutional Court differed from that of the Federal Constitutional Court. Although the Court did not endorse the normativity of the principle of voting equality to the extent seen in Germany, it expressly recognized that this principle is "nuanced depending on the electoral system chosen". The main difference, therefore, would appear to lie in the following: the provisions of the Italian elections act are declared unconstitutional as they "do not comply with the requirement of the least possible sacrifice of other interests and values protected under constitutional law"⁷⁹ and do not pass the scrutiny of proportionality and reasonableness. Undoubtedly, this approximated the case law of the Federal Constitutional Court. However, the Court appears to have found an autonomous canon of reasoning, which is best suited to the Italian form of government characterised by a more instable electoral system. In essence, the principle of equality of result in voting appears to be the point of arrival of a decision that may arise from the outcome of the scrutiny of proportionality and reasonableness of the electoral legislation adopted. In other words, the outcome stems from criteria of proportionality and reasonableness, rather than the starting point, as with decisions of the

⁷⁷ *Corte costituzionale*, judgment no. 1/2014, at para. 3.1.

⁷⁸ *Corte costituzionale*, judgment no. 1/2014, at para. 3.1: "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 no imbalance will exist 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 to avoid impairing the proper operation of the parliamentary body".

⁷⁹ *Corte costituzionale*, judgment no. 1/2014, at para. 3.1.

Federal Constitutional Court, of the Court's scrutiny and the immediate implication of the legislature's choice of electoral system.

The Court's findings on electoral equality were confirmed in judgment no. 35/2017, in which elections act no. 52/2015, approved in order to comply with judgment no. 1/2014, was also declared (partially) unconstitutional.⁸⁰ Under the new elections act, the list that reached 40 per cent of first-round votes would obtain a majority bonus. If no list reached the 40 per cent threshold, a second round of voting between the two most voted lists would take place. In the second round, the law established a majority bonus for the most voted list. The Court considered that the majority bonus provided for in the first turn was consistent with the Constitution, for it complied with judgment no. 1/2014, establishing that a majority bonus is legitimate insofar as a minimum threshold of votes is provided. However, the Court found a violation of Article 1, para. 2, Article 48 and Article 67 of the Constitution with regard to the majority bonus provided for in the run-off round of voting.⁸¹ According to the judgment, "a given list may have access to the second round of voting despite having obtained only a slim consensus in the first round [higher than the 3% electoral threshold], and may, irrespective of this fact, attain the bonus and receive double the number of seats that it would have obtained on the basis of the votes it won in the first round". Such an outcome represented "a distorting effect similar to that identified by [the] Court in Judgment no. 1 of 2014". The Court's reasoning must be viewed in the light of the multi-party and highly fragmented Italian political system within which the elections act would have functioned. Taking into account the political reality of Italy, the elections act would have allowed "a list that boasts a limited consensus, or potentially even a very small one, into an absolute majority".⁸² In addition, the Court considered that the elections act introduced characteristics of a majoritarian system of voting into a proportional distribution of seats.⁸³ In conclusion, the legislature's objective of creating a stable political majority "comes at the cost of a deeply unequal evaluation of the weight of votes",

⁸⁰ See for a thorough view FARAGUNA, Pietro. Do You Ever Have One of Those Days When Everything Seems Unconstitutional? The Italian Constitutional Court Strikes Down the Electoral Law Once Again: Italian Constitutional Court Judgment of 9 February 2017 No. 35 (December 4, 2017). *European Constitutional Law Review*, Cambridge, vol. 13, n. 4, pp. 778-792, 2017.

⁸¹ The Court also found a violation of other provisions of the electoral act. They are not considered here as their relevance to this paper is limited. A short overview on the judgment is available in DELLEDONNE, Giacomo; BOGGERO, Giovanni. The Italian Constitutional Court Rules on Electoral System. *International Journal Constitutional Law Blog*, [s.l.], 8 February 2017. Available at: <http://www.iconnectblog.com/2017/02/the-italian-constitutional-court-rules-on-electoral-system>. For a complete account of this judgment see PERTICI, Andrea. La prevedibile incostituzionalità dell'Italicum e le sue conseguenze, *Quaderni costituzionali*, 2017.

⁸² *Corte costituzionale*, judgment no. 35/2017, at para. 9.2.

⁸³ See also DELLEDONNE, Giacomo. La legge elettorale. In: CAVINO, Massimo; CONTE, Lucilla; MALLARDO, Simone; Malvicini, Massimiliano (Coords.). *Dove va la Repubblica? Istituzioni e società ancora in transizione*. Bologna: Il Mulino, 2022, pp. 39-58. p. 43, emphasizing this aspect of the judgment.

which violates the voting equality established in Article 48, para. 2 of the Constitution,⁸⁴ conceived here as equality of result and, thus, confirming the paradigm shift triggered by judgment no. 1/2014.

In essence, from judgments no. 1/2014 and 35/2017 it is possible to extrapolate common features that define the new canon adopted by the Italian Constitutional Court on electoral matters. The elections act is tested against and scrutinized on reasonableness and proportionality,⁸⁵ within which the Court performs a balancing act between two countervailing interests of constitutional relevance, namely government stability and voting equality.⁸⁶ The Court found that the legislature has discretion on electoral matters, as the Constitution does not establish a given electoral system. Such discretion, however, is not unlimited, and although the legislature may opt for a proportional system, it cannot introduce a disproportionate distortion that compromises voting equality.⁸⁷

Following judgment no. 35/2017, the elections act was again reformed with the entry into force of law no. 165/2017, which provided for a mixed electoral system⁸⁸ whereby 37 per cent of seats are allocated by majority or voting system in single-member constituencies while the other 63 per cent by proportional representation. The elections act was drafted with the intent of providing the Parliament with electoral legislation after Court's above-mentioned judgments and avoiding further declarations of unconstitutionality. Notwithstanding, some academics have cast doubt on the constitutionality of the reformed elections act, alleging that a disproportional relationship between the population of the electoral district and the number of representatives elected therein placed it at odds with the principle of electoral equality.⁸⁹ However, the prevailing legal scholarship tends to consider that, despite its shortcomings, law no.

⁸⁴ Corte costituzionale, judgment no. 35/2017, at para. 9.2. See CASANOVA, Daniele. **Eguaglianza del voto e sistemi elettorali**. Napoli: Editoriale scientifica, 2020. p. 173.

⁸⁵ For the characteristics of such scrutiny in Italy see BARSOTTI, Vittoria, et al. **Italian constitutional justice in global context**. Oxford: Oxford University Press, 2016. p. 74.

⁸⁶ For a critical account of the balancing test adopted by the Court in these judgments no. 1/2014 and 35/2017 see PINELLI, Cesare. Bilanciamenti su leggi elettorali (Corte cost. nn. 1 del 2014 e 35 del 2017). **Diritto pubblico**, [s.l.], n. 1, pp. 1-9, 2017.

⁸⁷ On the "canon" and arguments adopted by the Court see IMARISIO, Luca. Declinazioni della ragionevolezza e paradigmi di coerenza nella giurisprudenza costituzionale in materia elettorale. In: LOSANA, Matteo; MARCENO, Valeria. **Come decide la Corte dinanzi a questioni "tecniche"**. Torino: Università degli Studi di Torino, 2020. Available at: https://iris.unito.it/bitstream/2318/1770974/1/Losana_Marceno_Imarisio.pdf.

⁸⁸ COSULICH, Matteo. Il sistema elettorale. In: **Il libro dell'anno del diritto**. Roma: Treccani, 2019. p. 246, defines the system as a "sistema maggioritario a compensazione proporzionale".

⁸⁹ See COSULICH, Matteo. Il sistema elettorale. In: **Il libro dell'anno del diritto**. Roma: Treccani, 2019. p. 247-248. See also COSULICH, Matteo. Much Ado About Nothing, ovvero dell'inutile compressione dell'eguaglianza del voto nella vigente legislazione elettorale parlamentare". **Nomos - Le attualità nel diritto**, Roma, n. 1, pp. 1-9. 2021.

165/2017 is not manifestly unreasonable.⁹⁰ It remains to be seen whether further reform of the electoral law now again on the table will supersede the current legislation.

5. THE JURISPRUDENCE OF THE SPANISH CONSTITUTIONAL COURT AND THE RELEVANCE OF PROPORTIONALITY SCRUTINY

Understanding the way in which the Constitutional Tribunal has ruled on equality in electoral matters requires a review of the characteristics of the electoral system outlined by the Constitution, which provides for a much more detailed regulation on elections than that laid down in the *Grundgesetz* and the Italian Constitution. Nevertheless, when the constitutionality of electoral legislation has been challenged before the Court, it has exhibited remarkable self-restraint. Article 68 of the Spanish Constitution describes the minimum features of the electoral system of the Congress of Deputies as an explicitly defined proportional electoral system, electoral districts corresponding to provinces (in addition to the autonomous cities of Ceuta and Melilla), and a minimum representation of one deputy in Ceuta and Melilla. Furthermore, the Constitution envisions a certain degree of flexibility as regards the number of deputies, establishing that these may number between 300 and 400. This detailed constitutional design is complemented by an “organic law” (*Ley Orgánica del Régimen Electoral General*, LOREG), a statute requiring the approval of an absolute majority of members of Congress according to Article 81 of the Spanish Constitution. Among other aspects, the LOREG sets a three per cent electoral threshold, applying at the district level and a minimum of two seats for each province-electoral district with the exception of Ceuta and Melilla. In addition, it sets the number of deputies at 400.

Academics have pointed out that the features of the electoral system outlined in the Constitution paved the way for a model that generates inequality in the outcome of the vote. In particular, this arises from the circumstance that small and medium electoral districts are over-represented whereas large electoral districts are under-represented. As a result, votes cast in the former have a greater impact in seat adjudication than votes cast in the latter, since fewer votes are needed to elect a deputy in small and medium electoral districts than in the latter.⁹¹ From this perspective, it has been argued that Article 68 itself entails a “constitutional antinomy”⁹² since “on the one hand, it rec-

⁹⁰ See DELLEDONNE, Giacomo. La legge elettorale. In: CAVINO, Massimo; CONTE, Lucilla; MALLARDO, Simone; Malvicini, Massimiliano (Coords.). **Dove va la Repubblica?** Istituzioni e società ancora in transizione. Bologna: Il Mulino, 2022, pp. 39-58. p. 48-49 stating that “nell’economia complessiva della legge Rosato appare modesto oppure, in ogni caso, meno decisivo di quanto non fosse per la legge Calderoli e poi per l’Italicum”.

⁹¹ See PAJARES, Emilio. Artículo 68. In: MONTESINOS PADILLA, Carmen; PÉREZ TREMPES, Pablo; SAIZ ARNAIZ, Alejandro (Coords.). **Comentario a la Constitución Española: 40 aniversario 1978-2018: Libro-homenaje a Luis López Guerra**. Vol. 1. Madrid: Tirant lo Blanch, 2018, pp. 1109-121. p. 1111.

⁹² URDÁNOZ GANUZA, Jorge. ¿Una antinomia constitucional? El sufragio (des)igual en la Constitución de 1978. **Teoría y realidad constitucional**, [s.l.], n. 45, pp. 353-378, 2020. footnote 46.

ognizes a right – the right to equal suffrage – and on the other, articulates a specific electoral system that impedes that right”.⁹³ This is due to the combination of a system of apportionment, the minimum representation in the constituency and the maximum number of deputies,⁹⁴ which dictates that the electoral system be one of the world’s most unequal, as the number of votes needed to elect a deputy within large electoral districts can be more than four times higher than that required in small or medium electoral districts.⁹⁵

The nexus between the electoral system and the equality principle seems to have gained new momentum in Spanish legal scholarship. Whereas this has long been an under-researched area of the electoral law in Spain, a number of authors have recently turned their attention to the problems associated with the “equality of result”.⁹⁶ Particular scrutiny has fallen on the limited role of the Spanish Constitutional Court in addressing the pitfalls of the system from the perspective of electoral equality. In particular, the Spanish Constitutional Court’s influence in addressing constitutional issues generated by the electoral system has been extremely limited compared to its German counterpart, and there are no turning-point judgments equivalent to ruling 1/2014 of the Italian Constitutional Court.

The cornerstones of the Spanish Constitutional jurisprudence on the electoral system date back to judgments delivered in the 1980s and these remain relevant and quoted in the most recent case law. Most importantly, the Court stated that “proportionality is, rather, a tendentious orientation or criterion [...] to such an extent that it

⁹³ URDÁNOZ GANUZA, Jorge. **Una Teoría del sufragio igual**. Madrid: Centro de Estudios Políticos y Constitucionales, 2021. p. 147 ss. [author’s translation]

⁹⁴ URDÁNOZ GANUZA, Jorge. ¿Una antinomia constitucional? El sufragio (des)igual en la Constitución de 1978. **Teoría y realidad constitucional**, [s.l.], n. 45, pp. 353-378, 2020: “Soria ha de elegir al menos un diputado. Con los datos de población de 2019, si los sorianos eligen un escaño, entonces, para poder proporcionar al resto de los españoles que no viven en Soria (que son 46.634.380) un voto con un valor igual al otorgado a los sorianos, tales españoles habrían de elegir, por una sencilla regla de tres, 526 escaños. Pero el 68.1 lo imposibilita, puesto que establece un máximo de 400 escaños para los españoles. Así, el 68.1 garantiza un derecho que la combinación del 68.1 con el 68.2 impide.”

⁹⁵ The quotient obtained dividing the number of inhabitants of the constituency of Madrid (6,685,471) by the deputies assigned to that constituency (37) is 180,688.405, which represents the “cost” of electing a deputy. If we repeat the same operation for the constituency of Soria (where the number of inhabitants is 89,612 and the number of deputies elected is 2), the result is 44,806. That means that the “cost” of electing a deputy in Madrid is more than four times higher than in Soria. Data retrieved from ALCUBILLA ARNALDO, Enrique et al. Encuesta sobre el sistema electoral. **Teoría y realidad constitucional**, [s.l.], vol. 45, pp. 19-110, 2020. p. 34.

⁹⁶ See ESPAÑA. Comisión de Estudios del Consejo de Estado. **Informe del Consejo de Estado sobre las propuestas de modificación del régimen electoral general**. 24 de febrero de 2009. Available at: <https://www.consejo-estado.es/wp-content/uploads/2021/02/REGIMEN-ELECTORAL.pdf>. p. 159 ss. See ALCUBILLA ARNALDO, Enrique et al. Encuesta sobre el sistema electoral. **Teoría y realidad constitucional**, Madrid, vol. 45, pp. 19-110, 2020, where one of the questions addressed in the “Encuesta” is the principle of equality. See also URDÁNOZ GANUZA, Jorge. **Una Teoría del sufragio igual**. Madrid: Centro de estudios políticos y constitucionales, 2021; GARROTE DE MARCOS, María. **El sistema electoral español**. Madrid: Marcial Pons, 2020; FERNÁNDEZ ESQUER, Carlos. **Sistemas electorales regionales en Estados multinivel: los casos de Alemania, Bélgica, Italia y España**. Madrid: Centro de Estudios Políticos y Constitucionales, 2021.

can be argued that any correction or legal development of the criterion to make its application viable requires a readjustment with respect to that abstractly considered purity of proportionality.⁹⁷ In so doing, the Court relativizes the constitutional implication of the “proportional representation” envisaged in the Constitution. This represents a substantial difference from the Federal Constitutional Court’s understanding of proportionality, given that, if the legislature opts for a proportional system, the Court will exercise stricter scrutiny to test whether the equality of result in voting is ensured (*supra*).

From that point on, the Spanish Constitutional Court’s case law on electoral matters has always justified such “corrections” and might be subdivided in two categories, election thresholds and seat allocation; moreover, whereas the larger part of this constitutional jurisprudence has dealt with the electoral systems of the Autonomous Communities, many authors consider it applicable to electoral law at the national level.⁹⁸ As for the first, the Court has justified the election thresholds provided for in regional elections on several occasions.⁹⁹ The arguments developed by the Spanish Constitutional Court to deem such electoral systems consistent with the Constitution relied on “rationalizing” the form of government, on the need to allow governability and to avoid the fragmentation of political representation.¹⁰⁰ Interestingly, in one seminal judgement the Court referred to the jurisprudence of the Federal Constitutional Court to justify the election threshold.¹⁰¹ However, the Spanish approach is markedly different from that adopted by the Federal Constitutional Court, where election thresholds have always been analyzed under the perspective of the equality principle, because the existence of such thresholds implies that the votes cast for the party that does not reach the required threshold are lost. One explanation

⁹⁷ *Tribunal Constitucional*, judgment no. STC 75/1985, para. 5 [author’s translation].

⁹⁸ See PAJARES, Emilio. Artículo 68. In: MONTESINOS PADILLA, Carmen; PÉREZ TREMPES, Pablo; SAIZ ARNAIZ, Alejandro (Coords.). **Comentario a la Constitución Española: 40 aniversario 1978-2018: Libro-homenaje a Luis López Guerra**. Vol. 1. Madrid: Tirant lo Blanch, 2018, pp. 1109-121. p. 1109-121.

⁹⁹ See judgment no. 75/1985 on the [3%] for the autonomic election in Catalonia, judgment no. 72/89 for the [5 per cent] threshold in Murcia, judgment no. 193/1989 related to the [6 per cent] threshold in Canary Islands and again judgment no. STC 225/1998 on Canary Islands. On this jurisprudence see FERNÁNDEZ ESQUER, Carlos. **Sistemas electorales regionales en Estados multinivel: los casos de Alemania, Bélgica, Italia y España**. Madrid: Centro de estudios políticos y constitucionales, 2021.

¹⁰⁰ *Tribunal Constitucional*, judgment no. STC 75/85, para. 5.

¹⁰¹ *Tribunal Constitucional*, judgment no. STC 75/85: “No es difícil, en efecto, percibir que esta cláusula se ha inspirado de modo muy directo, igual que varios de los elementos racionalizadores a que acabamos de hacer referencia, en el precedente de la República Federal de Alemania, donde las candidaturas electorales tienen la necesidad de superar también un porcentaje mínimo de votos -por cierto, superior al que se ha establecido en España, pues allí se trata de un 5 por 100- para tener derecho al reparto electoral. En esta situación, el Tribunal Constitucional Federal ha tenido ocasión de pronunciarse, en una serie de casos análogos al aquí suscitado, sobre la validez constitucional de ese límite, tanto en el plano federal como respecto al ordenamiento de algún Land; y en tales casos, aquel Tribunal siempre concluyó en la validez del límite, considerándolo como garantía legítima de la eficacia de las instituciones parlamentarias, en cuanto tiende a corregir fragmentaciones excesivas en la representación política obtenida mediante la proporcionalidad electoral.”

for the Spanish Court's conceptualization of the legitimacy of election thresholds is that voting equality has been examined through the perspective of the right to access public office *on equal terms*, enshrined in Article 23 CE,¹⁰² rather than under the principles of the electoral system, as laid down in Article 68 CE, which sets out equality among the principles of elections. Consequently, the legislature enjoys a wide margin of maneuver in establishing the conditions to exercise this right. Along these lines, the Spanish Constitutional Court has always justified even considerably elevated election thresholds. Illustrative of this approach is the judgment on the controversial electoral system in the Canary Islands, when the Court confirmed the legitimacy of a six per cent election threshold. The judgement hinged on the particularities of the Canary Islands, while recognizing that such a threshold is higher than the maximum normally tolerated in electoral processes.¹⁰³ This approach has often been subject to critical appraisals, for it goes beyond its ratio of avoiding excessive fragmentation and excludes small political parties from the circuit of representation.¹⁰⁴

Apart from electoral thresholds, the Spanish Court has dealt with the allocation of seats (*prorratio de escaños*) between electoral circumscriptions in a number of cases concerned with regional laws, always upholding them as in the previous case. The leading case is judgment no. 45/1992 on the election act of the Balearic Islands, in which the Court examined the constitutional compatibility of the fact that, as the electoral system was not adjusted to population changes, the circumscription of the Island of Ibiza apportioned one representative more than that of the Island of Menorca, whose registered population was greater.¹⁰⁵ Similarly to the case law on election thresholds, the Court did not find a violation of the right to accede on equal terms to public office (Article 23.2), as there was no "manifest and arbitrary disproportionality" to the extent that it legitimized "the Court's intervention in one of the central aspects of the electoral system that is up to the legislature to define".¹⁰⁶

Next, in three other judgments the Court considered electoral legislation in Castilla-La Mancha. Judgment no. 19/2011 related to the increase of seats in the regional assembly from 47 to 49 and their allocation to the provinces of Toledo and Guadalajara. The plaintiff alleged that one of the two new seats should have been apportioned to

¹⁰² See GARROTE DE MARCOS, María. **El sistema electoral español**. Madrid: Marcial Pons, 2020.

¹⁰³ *Tribunal Constitucional*, judgment no. STC 225/1998, para. 5

¹⁰⁴ See the critical remarks of FERNÁNDEZ ESQUER, Carlos. La reforma del sistema electoral de Castilla-La-Mancha de 2016. *Revista "Cuadernos Manuel Giménez Abad"*, n. 11, p. 76-85, 2016, highlighting the fact that during the 2015 regional election in Canary Islands, the election threshold meant approximately the 19 per cent of the votes cast were lost.

¹⁰⁵ FERNÁNDEZ ESQUER, Carlos. Algunos problemas en la articulación jurídica de los sistemas electorales autonómicos. *Revista de las Cortes Generales*, Madrid, n. 97-99, pp. 327-357, dic. 2016.

¹⁰⁶ *Tribunal Constitucional*, judgment no. 45/1992 [author's translation]. See FERNÁNDEZ ESQUER, Carlos. Algunos problemas en la articulación jurídica de los sistemas electorales autonómicos. *Revista de las Cortes Generales*, Madrid, n. 97-99, pp. 327-357, dic. 2016. footnote 90, for further details.

the province of Ciudad Real, whose population was higher than Toledo according to the most recent figures in the municipal register. While the Court recognized that other solutions were possible, it deemed the legislature's choice objective and reasonable. In addition, in two further judgments the Court took up with the opposite problem, namely, the reduction of the number of seats again in the legislative assembly of Castilla-La Mancha, which substantially decreased the size of the electoral district. This caused a higher "natural" threshold¹⁰⁷ to accessing the regional assembly of Castilla-La Mancha.¹⁰⁸ The Court however upheld the re-apportionment of the seats under the electoral district in all circumstances, as it did not find that electoral equality, among other aspects, was breached. By virtue of a formalistic reading that "did not assess the objective character"¹⁰⁹ of such implicit thresholds, the Court stressed that neither the legislature nor the Court itself could take those natural thresholds into account, as they revolve around "meta-juridical data"¹¹⁰ such as the number of candidates and electoral behavior.

Throughout the evolution of the Spanish Constitutional Tribunal's case law, electoral equality and its two different meanings here examined have escaped in-depth jurisdictional analysis, except for judgment no. 19/2011, in which the Court recognized a dual dimension of equality: "Having passed the stage of a formal conception, it has come to be understood in contemporary constitutionalism as a substantial requirement of voting equality that imposes both the equal numerical value and equal resulting value of the vote."¹¹¹ The Court's recognition of the concept of voting equality within "contemporary constitutionalism"¹¹² is arguably an implicit reference to the US and German constitutional adjudication on electoral matters. However, the need to override a

¹⁰⁷ This is the term used by the Commission of Venice (also defined as hidden, effective or informal), which defines it as "the number of votes needed to obtain one seat at district level, [which] is mainly dependent on the mean district magnitude". The natural threshold is different from the legal threshold, which is set out by the law. Commission of Venice, Compilation of Venice Commission opinion and reports concerning threshold which bar parties from access to Parliament, at 6, [https://www.venice.coe.int/webforms/documents/?pdf=C-DL-PI\(2018\)004-e#page6](https://www.venice.coe.int/webforms/documents/?pdf=C-DL-PI(2018)004-e#page6), quoted in GRATTERI, Andrea. **La formula e il risultato**: Studio sulla rappresentanza proporzionale. Milano: Franco Angeli, 2019. p. 185. See also FERNÁNDEZ ESQUER, Carlos. La reforma del sistema electoral de Castilla-La-Mancha de 2014. *Revista "Cuadernos Manuel Giménez Abad"*, n. 11, p. 76-85, 2016.

¹⁰⁸ *Tribunal Constitucional*, judgments no. STC 197/2014 and 15/2015.

¹⁰⁹ See GRATTERI, Andrea. **La formula e il risultato**: Studio sulla rappresentanza proporzionale. Milano: Franco Angeli, 2019. p. 185 and footnote 54, criticizing judgment STC 197/2014 and, interestingly, quoting the judgment of the Constitutional Court of Belgium no. 169/2015, which found it was unconstitutional to establish that an electoral district may allocate fewer than three seats, as such a regulation is incompatible with proportional representation.

¹¹⁰ GRATTERI, Andrea. **La formula e il risultato**: Studio sulla rappresentanza proporzionale. Milano: Franco Angeli, 2019.

¹¹¹ *Tribunal Constitucional*, judgment no. STC 19/2011, para. 9 [author's translation].

¹¹² *Tribunal Constitucional*, judgment no. STC 19/2011, para. 9.

“formal conception” of equality was not followed by a consequential application of the “substantial requirement of equality” in the Court’s subsequent judgments.¹¹³

Against this backdrop, what insights can be inferred from the Spanish Constitutional Court’s case law as regards the problematic configuration of equality in elections of the Congress of Deputies? The prevailing understanding of the current situation, which produces highly disproportional and unequal results, is that the Court is unlikely to find that the LOREG breaches the principle of equality.¹¹⁴ Indeed, preventing the possibility of the Spanish Constitutional Court declaring the electoral system unconstitutional is, according to De Cabo, the circumstance that the essential features of that system are enshrined in Article 68 of the Spanish Constitution. Here we must impute the responsibility of an electoral system to an impossible configuration.¹¹⁵ Be that as it may, the Court’s understanding of the nexus between the Constitution and the electoral system has been questioned in a seminal work by Torres del Moral, who defended the possibility of the Court examining in concrete terms the electoral solution adopted “to reveal whether the principle of proportionality is distorted (*se desvirtúa*) to the extent that it becomes a majority principle, since this is precisely where the unconstitutionality of the solution adopted would be detected.”¹¹⁶ Along these lines, some authors have argued that the electoral system designed by the LOREG produces an essentially majoritarian system, which violates the principles of equality and proportionality set down by the Constitution.¹¹⁷

¹¹³ See GARROTE DE MARCOS, María. **El sistema electoral español**. Madrid: Marcial Pons, 2020: “asume la diferencia, pero no distingue de manera precisa las exigencias derivadas de uno y de otro aspecto”.

¹¹⁴ See SÁNCHEZ NAVARRO, Ángel José. **Constitución, igualdad y proporcionalidad electoral**. Madrid: Centro de Estudios Políticos y Constitucionales, 1998. p. 117: “solo la vulneración del principio de igualdad en su faceta política y electoral podría fundamentar una declaración de inconstitucionalidad que obligara a modificar el régimen vigente. Y en el marco jurídico actual esa declaración no parece tener posibilidad alguna, aunque una eventual reforma podría poner en marcha los mecanismos de control constitucionalmente previstos con resultados, en principio, imprevisibles, que podrían llegar hasta a censurar la actuación del legislador en un ámbito que tradicionalmente le estaba reservado en exclusiva”.

¹¹⁵ DE CABO, Antonio. Constitución, igualdad y proporcionalidad electoral. **Revista Española de Derecho Constitucional**, Madrid, a. 19, n. 56, pp. 305-309, may./ago.1999: “es, sin embargo, muy dudoso que el sistema de la LOREG pueda calificarse de «inconstitucional» porque para que algo sea acorde con la Constitución, primero tiene que ser posible. Siendo imposible atender simultáneamente a las exigencias de igualdad, proporcionalidad y a los detalles concretos que impone la Constitución en cuanto a realización efectiva de las elecciones, parece que lo más prudente sea suspender el juicio jurídico”.

¹¹⁶ TORRES DEL MORAL, Antonio; LÓPEZ MIRA, Alvaro Xosé. Jurisprudencia del Tribunal Constitucional en materia electoral: Acotaciones críticas. **Revista de Derecho Político**, Madrid, n. 41, pp. 9-36, 1996. p. 18, [author’s translation].

¹¹⁷ See LÓPEZ GARRIDO, Diego. In: AA.VV. **La reforma del régimen electoral general**. Madrid: Centro de Estudios Políticos y Constitucionales, 1994: “se está incumpliendo la Constitución que dice que el sistema electoral es proporcional”. See also FERNÁNDEZ SEGADO, Francisco. **Aproximación a la nueva normativa electoral**. Madrid: Dykinson, 1989. p. 18, 122 and 100, 1989: “el sistema “no puede ser considerado con unos niveles aceptables de proporcionalidad”.

In the light of this backdrop, a number of academics have advanced a need to reform the electoral system, either by revising the Constitution so that circumscriptions coincide with the Autonomous Communities and not with the Provinces, or by addressing some of the pitfalls of the LOREG. This includes increasing the number of deputies to 400 and/or reducing to one the minimum number of deputies elected in each province,¹¹⁸ as well as using the electoral systems of Germany (Vidal Prado) or Sweden (Urdánoz Ganuza) as blueprints to introduce substantial electoral reform enhancing the equality of result without any amendment to Article 68. In this perspective, an exceedingly relevant problem, hitherto investigated to a limited degree by the scholarship and which might be interestingly analyzed in future by a systemic study, is whether a potential reform of the electoral system to address the lack of proportionality and equality might be struck down by the Constitutional Court.¹¹⁹

In sum, the jurisprudential path has demonstrated great deference towards the legislature, a phenomenon which has been subject to severe criticism by the legal doctrine.¹²⁰ Despite the limits of the constitutional jurisprudence, it bears recalling that the Court has actually recognized the dual dimensions of the equality principle, which may be subject to future developments in the Court's case law.

6. CONCLUSION

From the comparative analysis above, we can infer that constitutional adjudication on the equality principle and on electoral matters more generally follows three main patterns of scrutiny. Germany illustrates a model with a broad conception of the principle of equality and heightened scrutiny over the legislature's choices on electoral matters, characterized by an ample spectrum of reasoning techniques. One of these is the so-called *Entscheidung in eigener Sache*, whereby the legislature is confronted with a sort of *Kontrolldefizit* when its decision-making, such as on electoral matters, concerns it directly. This legitimates heightened scrutiny by the Federal Constitutional

¹¹⁸ URDÁNOZ GANUZA, Jorge. **Una Teoría del sufragio igual**. Madrid: Centro de estudios políticos y constitucionales, 2021, p. 157; GARROTE DE MARCOS, María. **El sistema electoral español**. Madrid: Marcial Pons, 2020. p. 149.

¹¹⁹ VIDAL PRADO, Carlos. **El sistema electoral alemán y su posible implantación en España**. Valencia: Tirant lo Blanch, 2012. p. 89. See URDÁNOZ GANUZA, Jorge. **Una Teoría del sufragio igual**. Madrid: Centro de estudios políticos y constitucionales, p. 158-160, 2021; VIDAL PRADO, Carlos. **El sistema electoral alemán y su posible implantación en España**. Valencia: Tirant lo Blanch, 2012. See GARROTE de MARCOS, María. **El sistema electoral español**. Madrid: Marcial Pons, 2020, for the problems associated with reducing the number of deputies to one, p. 150.

¹²⁰ VIDAL PRADO, Carlos. **El sistema electoral alemán y su posible implantación en España**. Valencia: Tirant lo Blanch, 2012, p. 90: "la conclusión que podríamos sacar es que el Tribunal constitucional español siempre defiende la tesis del legislador [...] y suele además defenderlo, sin utilizar una sólida argumentación jurídica, sino más bien con argumentos de conveniencia política".

Court.¹²¹ We must consider that, unlike the Italian and Spanish experiences, when the Federal Constitutional Court has been called on to engage with the meaning of equality in electoral matters, a constitutional tradition on that concept had already been formed by virtue of the dialogue between legal scholars and the *Staatsgerichtshof*. Constitutional debates throughout the Weimar period may thus have served as fertile ground upon which the Court has elaborated its reasoning.

As for Italy, the Constitutional Court has progressively engaged in adjudicating the features of the electoral system, moving along a long jurisprudential path culminating in judgments no. 1/2014 and 35/2017. The scrutiny proved by far less penetrating than that adopted by the Federal Constitutional Court. However, the Court's decision no. 1/2014 demonstrated receptiveness towards the Germans' conceptualization of electoral equality. In Spain, in turn, the highly detailed electoral model laid down in the Constitution has not been accompanied by heightened scrutiny towards the choices of the legislature. Quite the contrary, the scrutiny remains marked by substantial deference towards the electoral design laid out by the LOREG. It would appear illustrative that, whereas in Germany the principle of equality may be altered by "imperative grounds" (*zwingende Gründe*), the Spanish Constitutional Court's approach rests on "non-arbitrariness", seemingly less intrusive towards the discretion of legislature.

A further conclusion involves the evolution of the three jurisdictions examined. Although the cornerstones of the Federal Constitutional Court's jurisprudence have remained unchanged since its inception, the impact of constitutional adjudication on electoral legislation has increased in recent years, as evinced by, inter alia, the saga of overhang seats where the Court not only found the federal electoral act unconstitutional but determined the maximum number of legitimate *Überhangmandate* (see *supra*). As for continuity in the jurisprudence, or lack thereof, Italy is surely home to the greatest rupture, with judgment no. 1 /2014 representing an absolute turning point insofar as equality in electoral matters is conceptualized. In contrast and excepting certain *obiter dicta* involving a potential wider meaning of the equality principle and to date lacking any concrete impact on national electoral legislation (see STC 19/2011 and *supra*), the Spanish Constitutional Court's jurisprudence perpetuates the main arguments it has adopted since its initial judgments. It remains to be seen whether this line of reasoning combined with academics' increasing interest in the dimensions of the equality principle will gain momentum in the evolution of the Spanish case law.

¹²¹ See on that concept VON ARNIM, HANS. **Der Staat als Beute**: Wie Politiker in eigener Sache Gesetze machen. München: Knauer, 1993. The notion of *Entscheidung in eigener Sache* has been adopted by the Federal Constitutional Court in a number of judgments (see BVerfG, 40, 296 *Abgeordnetediaeten*).

7. REFERENCES

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