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CONSTITUTIONAL DEVELOPMENTS IN ARMENIA: NEW ELECTORAL SYSTEM, (B)OLD PARTY SYSTEM[1]

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1. – Introduction. 2. – The Armenian party system. 3. – The new electoral code. 4. – A critical assessment of the new Electoral Code. 5. – The Italian electoral law. 6. – Reading the case of Italy and Armenia in a comparative perspective. 7. – Conclusion.

1. INTRODUCTION

On December 6, 2015 the citizens of Armenia approved a far-reaching constitutional reform by referendum. The new constitution formally provides more extended protection of fundamental rights and freedoms.[2] In addition, it introduces a new institutional framework, whereby Armenia becomes a parliamentary democracy. Armenia is, therefore, going to be a case-study of importance, as it is one of the few democracies transitioning from a semi-presidential regime to a parliamentary regime (to my knowledge, another example in this sense is the Republic of Moldavia). Time and

1 The article has been submitted for consideration to the journal in July 2017. It does not therefore reflect the changes that the Italian electoral law as undergone, following the decision no. 35/2017 of the Italian Constitutional Court, which partially struck it down.

2 The constitutional reform goes beyond the topic of the paper and it is not possible to go through it. However, as to fundamental rights enshrined in the new text, it can be argued that they are formulated in a more accurate fashion, in compliance with the most advanced, third-generation constitutions and with the recommendations of the Council of Europe (Venice Commission). A major criticism has however been done as far as the social and economic rights are concerned. Some scholars submitted that such rights were given a lower constitutional *status* for they are not be guaranteed now by the state, but merely protected (*e.g.*, the right to housing).

constitutional jurisprudence will tell whether the Constitution will concretely be a "thrust for a new beginning", as stated by Armenian President Serzh Sargsyan, or another tool in the hand of the government to further entrench its political power.

The present paper aims to outline the basic features of the new Electoral Code, which was adopted by parliament on May 25, 2016. The constitution required, in fact, parliament to adopt a new code in a fairly short amount of time, that is by June 1, 2016.

In framing the new electoral system the legislature expressly drew from the Italian electoral law no. 52/2015 (so-called *Italicum*). Therefore, the paper intends to examine, in turn, the Armenian Electoral Code and the Italian electoral law,[3] providing. It further aims to engage in a comparative analysis between the Armenian and Italian electoral system to see how the original model has been interpreted and whether a legal transplant occurred. Finally, by outlining the structural similarities and differences between the two countries, the aim is to assess whether the reform can be successful in striking a proper balance between representation and governmental stability, which is the declared purposes of the reform.

2. THE ARMENIAN PARTY SYSTEM

Every republic in the former USSR, upon the collapse of the Soviet Union, enshrined in their declarations of independence (and/or in their constitutions) the basic principles of the democratic state, and the most important tools for their fulfillment, among which the separation of power and a multiparty system.[4] A multiparty system stood sharply at odds with both democratic centralism and the leading role of the Communist Party of the Soviet era. Therefore, by enshrining a multiparty system, former Soviet republics, including Armenia,[5] meant to transition to democracy, but the primarily goal was to make a clear cut with the past.

By way of introduction, it can be submitted that at least two diverging trends have been observed in the Armenian party system. However, their explanatory power can be better appreciated by considering their interaction with one another.

3 The Italian Electoral law has undergone changes following the decision no. 35/2017 of the Italian Constitutional Court. However, these amendments will not be addressed. For purposes of making a comparison, suffice it to compare the Armenian law and the Italian law at the time it was used as a "source of inspiration."

4 C. Filippini, 'L'evoluzione costituzionale delle Repubbliche dell'ex URSS', *in* S. Bartole - P. Grilli di Cortona (Eds.), *Transizione e consolidamento democratico nell'Europa centro-orientale : èlites, istituzioni e partiti*, Giappichelli, Torino 1998, pp. 93-95.

5 The multiparty system of the Republic of Armenia is enshrined in Article 7 of the Constitution enacted in 1995, which read as follows: "A multi-party system is recognized in the Republic of Armenia. Parties are formed freely and assist in the formation and expression of the people's political will. Their activity cannot contradict the Constitution and the laws, nor can their structure and way of working contradict the principles of democracy. Parties provide for the openness of their financial activity."

On the one hand, under the previous regime, Armenian political parties were heavily influenced by the super-presidential executive,[6] in terms of limited pluralism. According to some scholars, among the aspects curtailing the development of most parties is the hostility they systematically face in the process of their consolidation.

On the other hand, political groups could indeed benefit from a mixed electoral system. In particular, since the Proportional Representation system (PR) partially embraced by the electoral law granted a more favorable environment for parties to establish roots. This is even truer if one compares it to the single-member district plurality system adopted in Kyrgyzstan and Ukraine,[7] due to which parties faced major obstacles in gaining representation in parliament.

As a consequence of those trends, Armenian opposition parties can be defined as being 'poorly rooted,' as opposed to parties that completely lack any form of consolidation (*e.g*., in Kyrgyzstan).

From a diachronic perspective, Armenian political parties can be classified as historic parties, independence parties, and third generation parties.[8] Amongst the first group is the Armenian Revolutionary Federation (ADR), also known as 'Dashnak,' founded in Georgia in 1890 as a group a variety of movements striving for independence. Other parties also belong to this group, like Social Democratic Party and the Liberal Democratic Party, which, however, either no longer exist or gradually became extra-parliamentary forces.

Independence parties were affected by the general ban on political activity issued during the communist period. The core of what is the main independence party, the Armenian National Movement (ANM), is to be found in the leaders of the Karabakh Committee. The party played major role in achieving the independence of the country. The Republican Party, now the ruling party, the Democratic party of Armenia, and the National Democratic Union also belong to this group.[9]

Finally, the third generation parties emerged subsequent to the 1991 presidential election. Amongst the third generation parties, those currently represented in parliament are the Rule of Law Party (conservative, pro-European), Heritage (national-liberal), and Prosperous Armenia Party (social and liberal conservative).[10]

6 We refer here to the notion of superpresidentialism stipulated by Steven Fish: "An apparatus of executive power that dwarfs all other agencies in terms of size and the resources it consumes; a president who enjoys decree powers; a president who *de jure* or *de facto* controls most of the powers of the purse; a relatively toothless legislature that cannot repeal presidential decrees and that enjoys scant authority and/or resources to monitor the chief executive; provisions that render impeachment of the president virtually impossible; and a court system that is controlled wholly or mainly by the chief executive and that cannot in practice check presidential prerogatives or even abuse of power." *See*: M. Steven Fish (2000), The Impact of the 1999–2000 Parliamentary and Presidential Elections on Political Party Development, paper presented at the 2000 meeting of the Midwest Political Science Association, Chicago, IL.

7 J.T. Ishiyama - R. Kennedy, 'Superpresidentialism and Political Party Development in Russia, Ukraine, Armenia and Kyrgyzstan', *Europe-Asia Studies*, Vol. 53, No. 8, 2001, pp. 1177-1191.

8 J.C Baumgartner (Ed.), *Party Politics in Armenia: A Primer, Occasional Paper,* Center for Policy Analysis, American Univ. Armenia, 2002, pp. 2-6.

9 The Republican Party, the Democratic party of Armenia, and the National Democratic Union gained respectively 52, 23 and 9 seats at the 1990 parliamentary elections. For a comprehensive overview of independence parties *see*: *Ibidem*, p. 7.

10 Other parties currently represented in Parliament are: the Republican Party (leading party with 69 seats), ANC and ARF (opposition parties).

However, an ideology-based classification could provide a deeper understanding of the political landscape. One would then expect a classification that sorted parties based on their views. Such a classification, however, would actually explain very little about politics in Armenia since it would not consider what has been the major cleavage since independence: nationalism v. pacifism.[11] Politics is deeply intertwined with foreign affairs, to the extent that foreign affairs can serve as a metonym for politics. Former Armenian President Levon Ter-Petrossian was defeated in 1998, after 7 years of uninterrupted presidency, over his pacifist approach to handling the Nagorno-Karabakh conflict; positions on granting dual citizenship to members of the diaspora, establishing political relationships with Turkey, and on leaning toward either Russia or the European Union are equally divisive matters.

The main pacifist party in Armenia is the ANC, which, as previously seen, has almost disappeared from the public scene after Levon Ter-Petrossian's defeat. The party's foreign policy agenda includes a balanced approach toward all major international actors, namely the EU, Russia and USA, and a similarly cautious approach in normalizing bilateral relationships with Turkey;[12] the leading Republican Party, the Prosperous Armenia Party[13] – which was allegedly created by the Republican Party – and the Rule of Law party have somehow followed this path in their foreign policy agenda.

On the opposite side of the spectrum are the parties with a deeply rooted feeling of national identity. First and foremost is the Armenian Revolutionary Federation (ARF), which, notwithstanding its affiliation with the Socialist International since 1907, has held a firm stance on ceasing all relationships with Turkey as long as Ankara does not recognize the Armenian genocide and supporting Nagorno-Karabakh in its quest for formal independence from Azerbaijan.

It is also worth noting that Armenian political parties are not fully institutionalized; they developed around charismatic leaders instead of distinguishing themselves through a specific ideology. An observed trend is the creation of new political factions by former government officials who lost the elections or by leaders splitting away due to differing opinions on specific issues (for example, the Communist party split into six parties, and the National Democratic Union split into four).[14] In addition, differences in policies are blurred so no clear difference exists between the right and left. This ideological weakness is counterbalanced by a strong sense of national identity, which cuts across the majority of groups. Moreover, in the end electoral competition, is more about "positioning for power[15] than taking a position on issues".[16]

11 G. Ter-Gabrielian, 'Explaining Armenia: an Insider's View', *Armenian News Network / Groong,* 1998. Available at <www.groong.org/ro/ro-19980207.html> [accessed: 1 June 2016].

12 EuFoA, *Armenia 2012: An introduction to the political party landscape*, 2012, p. 4. Available at: <www.eufoa.org/uploads/ArmeniaPoliticalPartyGuide.pdf> [accessed: 1 June 2016].

13 The firm support for the foreign policy of the government has lessened since former Foreign Minister Oskanian, known for being critic toward the RP, joined the party.

14 S. Nelson - B. Katulis, *Armenia Political Party Assessment: Final Report,* ARD inc. Report for the United States Agency for International Development, 2005, p. 16. Available at: <armenia.usembassy.gov/root/pdfs/political_assistance.pdf> [accessed: 2 June 2016].

15 Gagik Tsarukyan, Samvel Aleksanyan, Mher Sedrakyan are well-known millionaire businessmen. Also, the current Prime Minister Abrahamyan is a wine and brandy producer, and the owner of roughly 24 important companies as of now. *See*: A. Ishkanian, 'Self-Determined Citizens? New Forms of Civic Activism and Citizenship in Armenia', *Europe-Asia Studies*, Vol. 67, No. 8, 2015, 1213.

16 *Ibidem*, p. 6.

Another distinctive feature of the Armenian party system: attempts to modify the political landscape and reduce its fragmentation have been pursued through a policy of overt hostility toward opposition parties rather than through orthodox ways, such as a selective electoral system. An important exception to that general rule is the 5 percent threshold, which was 'successful' in drastically reducing the number of parties represented in parliament – due to the fact that many parties did not exceed the threshold or because they had no incentives in running as part of electoral blocs.

But, most importantly, parties refrained from participating in the political contest due to the systematic hostility they faced in their process of consolidation. A major example for this is the ban on ARF issued in 1994 by then President Levon Ter-Petrossian, upheld by the Supreme Council[17] and lifted only upon his defeat. Similarly, eight more parties, one bloc and 36 percent of candidates were banned in 1994 under a variety of – often specious – justifications.[18]

Other major obstacles in this sense have been electoral irregularities and frauds. If it is correct to say that elections are the traditional 'acid test' for democracy, then Armenia does not usually 'ace' the test. Too often the electoral process ends up being marred by frauds. The short Republican era has been characterized by elections deemed by NGOs and internationals observers to be non-compliant with international standards (probably with the sole exception of 2012 parliamentary elections).[19] Often, in the aftermath of the elections, a widespread sense of non-acceptance of electoral results arises, leading the country to the verge of a political crisis (2003 parliamentary elections,[20] 2005 and 2015 constitutional *referenda* are significant examples). Furthermore, voting lists are not always up-to-date (in that they include deceased or non-resident citizens); military voting, i.e. soldiers had to vote under the instructions of officers; ballot stuffing, discrepancies in the vote count were observed; the government apparatus is often exploited to channel votes to those in power ('machine politics'); OSCE delegates even reported protocol tampering, reminiscent of the Stalin's adage "it's not who you vote for that matters, but who counts the votes".[21] There are few incentives for political groups to participate in the competition, due to its perceived unfairness, and to accept the so-called rules of the game.

Also, small disincentives, including the fee to participate in the race; the possibility to 'buy' additional time in electronic media; the *de facto* uneven coverage of the candidates; and other issues have all been used with the intended purpose of discouraging participation.

If one wants to sum up the current political landscape, the following conclusions might be drawn:

17 The ban was upheld on the ground that the party violated the rules prohibiting membership of non-citizens and the leadership being based abroad. The ARF is in fact a diaspora party with several stable cells in countries with a significant Armenian population, where it conducts numerous political and cultural activities.

18 I. Bremmer - C. Welt, 'A Break with the Past? State and Economy in Post-communist Armenia', *Helsinki Monitor*, Vol. 8, No. 1, 1997.

19 According to Freedom House, however, as it turned out, also 2012 elections were marred with fraud. *See*: A. Iskandaryan, *'Armenia', Nations in Transit*, Freedom House report, 2013. Available at the following URL: <www.freedomhouse.org/report/nations-transit/2013/armenia#.VaZpOk1OW72> [accessed: 15 June 2016].

20 OSCE/ODIHR, *Final Report on Presidential Elections in Armenia1*, 18 April 2003. Available at: <www.osce.org/odihr/elections/armenia/14054?download=true>. [accessed: 4 Feb. 2016].

21 E. Herzig, *The New Caucasus: Armenia, Azerbaijan and Georgia*, Royal Institute of International Affairs, London, 1999, p. 33.

i. Parties are ideologically weak and poorly institutionalized;

ii. A focus on past rather than present exists, and nationalism weighs more than the political stance on internal issues within the overall (pseudo)ideology of a party;

iii. Parties are led by autocratic leaders focusing on either preserving or gaining positions of power;

iv. Electoral manipulations and systematic hostility toward opposition parties demonstrate an insufficient acceptance of pluralism and basic principles of democracy.[22]

3. THE NEW ELECTORAL CODE

Before going through the elements of the new Electoral Code, it is useful to briefly outline how Armenian electoral laws have developed over time. The last parliamentary elections held under the Soviet regime was pure single-member district plurality voting (SMDP), with candidates competing in 260 single-member districts. In 1995 the first elections after independence were held. A newly adopted electoral law provided for a mixed system: 40 deputies out of 190 were elected through proportional representation (PR) from the national party list, and the remaining seats were allocated through SMDP, in so far as the candidate had to obtain the most votes and the total had to be equal or more than 25 percent of valid votes cast (VVC). In addition, the law called for a 5 percent threshold. The 1999 elections were held under a slightly different system: 75 seats out of 131 were assigned through the SMDP system and the remaining 56 through PR (with the 5 percent threshold still in force). The new system was intended to be less selective, as shown by the moderate shift toward proportional representation.

Another electoral reform occurred in 2011. Under Article 103 of the 2011 Electoral Code:

> "90 deputies shall be elected under the proportional electoral system from one multi-mandate constituency …, from among candidates for deputies nominated by political parties (alliance of political parties) in the electoral lists. 41 deputies shall be elected under the majoritarian electoral system: one deputy shall be elected per constituency".

Despite some differences in the number of seats falling under the PR or the SMDP systems, the Armenian electoral systems have therefore always been mixed in nature.

22 According to Nelson and Katulis, many of such features are a legacy of the Soviet system. *See*: S. Nelson - B. Katulis, *Armenia Political Party Assessment*, *supra* note 12, p. 21.

The recently enacted constitution called for a new Electoral Code to be adopted by June 1, 2016. Article 89 of the constitution contains only the main principles and sketched elements on the functioning of the electoral system:

> "The National Assembly shall be elected by a proportional electoral contest. The Electoral Code shall guarantee the formation of a stable parliamentary majority. If no stable parliamentary majority is formed as a result of the election or by building a political coalition, then a second round of the election may be held. In case a second round is held, it shall be allowed to form new alliances. The restrictions, conditions and procedure of forming a political coalition shall be prescribed by the Electoral Code".

In other words, the Article states that the electoral law for the National Assembly shall be proportional in essence, and (indeed, 'but') at the same time it shall be able to guarantee a stable parliamentary majority. The statement is one of a mixed nature: while the first proposition refers to a general electoral formula (PR), the second proposition refers to specific effects – and in a sense to a specific outcome – that ought to derive from the enacted system. Furthermore, it is not clear what the stability requirement means in terms of numbers of votes or electoral seats: leaving 'stable parliamentary majority' undefined is a voluntary choice made by the drafters pursuant to the recommendations of the Council of Europe (Venice Commission), in order not to overly inhibit the functioning of the electoral system.[23]

According to the wording of the Article, if no 'stable parliamentary majority' is achieved, either as a result of the vote or of political bargain, then a second round of vote may be held. Interestingly enough, the use of the verb 'may' in place of 'shall' seems to declassify the 'stable parliamentary majority' to a merely preferable, and thus renounceable, end to achieve. It then references the Electoral Code as the proper source to set out restrictions, conditions and the formal procedure of forming a political coalition.

Although the Italian model has been expressly taken as a benchmark, Article 89 does not seem to demand but only to permit the introduction of some peculiar aspects of *Italicum* (*e.g.*, a second round for coalitions is a sharp deviation from the Italian system, where it is confined to sole parties). Some concerns regarding the import of the Italian law were expressed by the Venice Commission, according to which "[t]his system has been adopted after a rather long period of instability and with the aim of finding a better balance between governability and representation. This system is the

23 Venice Commission, *First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia (Opinion n° 757/2014)*, 2015, para. 80, p. 14, <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)037-e> [accessed: 22 Feb. 2015]. The mentioned paragraph reads as follows: "This is why the Venice Commission rapporteurs had recommended enshrining in the Constitution only the main principles of the electoral system, in order to ensure the necessary flexibility in the future development of that system. Many details have thus been removed from Article 89. Yet, the possibility of a second round between the two most voted parties of alliances is mentioned, which gives a binding framework for the adoption of a certain type of proportional electoral system. In reality, the electoral system is thus enshrined to a large extent in the Constitution. Paragraph 4 of Article 89 should be removed; the possibility of a second round should be regulated in the Electoral Code."

fruit of a long experience. It is not necessarily transferrable to a country which is making the choice of a parliamentary system and will experiment it for the first time".[24]

To sum up, Armenia will transition from a mixed system to a mainly proportional one, which is a two-tier system with candidate lists at the national constituency level, and at the district level (13).[25] Districts tend to correspond to provinces (*marzes*), except for two *marzes* which are joined into one district and the city of Yerevan, which is made up of 4 constituencies.

The electoral system combines the closed list system with a preferential list system. The ballot is composed of two pages: on the first page one has to indicate the chosen party (or coalition), while on the second page one may indicate a district candidate (not mandatory). The Code provides that a candidate's name shall be present on both pages of the electoral ballot.

The share of valid votes received by each party is calculated at the national level through the largest remainders method, after having aggregated the votes gained within the districts. At this stage, it is determined which parties meet or exceeded the national minimum threshold of 5 percent of VVC (7 percent for coalitions).

Following that step, the national share of votes is split into two parts. 50 percent of mandates gained by each party is assigned from the party list, where seats are filled based on the order of the names of the list, starting from the top. The other 50 percent of mandates is allocated in a proportional manner to the district lists, through the D'Hondt method: the aggregated national share is now disaggregated to calculate how many seats are to be allocated to each district and votes are counted in order to select the candidates. Seats here are filled according to the number of votes each candidate receives. As the Code provides that a candidate shall be present on both the national and district list, once a candidate is elected as a district candidate, he/she is then removed from the national list.[26]

The Code then provides for a second round system (or 'ballotage'). The second round is not necessary when:

i. A party or coalition has obtained a majority of seats, i.e. 53 seats out of 105 (101 is the minimum set out by the constitution, plus 4 reserved seats for national minorities). In this case, the distribution of seats occurs pursuant to the previously seen sequence.

ii. A coalition is formed after the elections and within 6 days from the announcement of the official results, provided that coalition is able to reach the majority of seats according to the preliminary distribution (53 seats), and that parties come to an agreement as to the candidate or Prime Minister.

24 *Ibidem*, para. 79, p. 14, <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)037-e> [accessed: 22 Feb. 2015].

25 Venice Commission, *Armenia: Preliminary Joint Opinion on the Draft Electoral Code as of 18 April 2016*, 2016, para. 33, p. 10, <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2016)004-e> [accessed: 2 June 2016].

26 *See*: Article 100, para. 1 of the Armenian Electoral Code.

In both cases (under i. and ii.) if the party (or alliance) or post-electoral coalition obtain the majority of seats but less than 54 percent of mandates, additional seats will be distributed; Article 96, para. 1 of the Code notes that when a political party or alliance obtains a majority of VVC but less than 54 percent, it shall be given as many additional seats as necessary to reach 54 percent. In a similar vein, under Article 97, para. 3 of the Code, when a post-electoral coalition reaching the majority of VVC is formed, additional mandates shall be distributed among coalition member parties (or alliances) "in proportion with the number of ballot papers with affirmative vote cast in favor of each of them".

If no party or coalition obtains the majority of seats, and no coalition able to reach it is formed within 6 days, then a second round of elections is held, pursuant to Article 98 of the Code. Only the two forces (either parties or alliances) gaining the highest share of votes are allowed to compete in the second round. However, where two political parties (or alliances), having received the maximum number of VVC (that is the two forces supposed to run in the second round), form an alliance together, the 'next' political party (or alliance)[27] competes against the newly formed alliance in the second round.

4. A CRITICAL ASSESSMENT OF THE NEW ELECTORAL CODE

The Minister of Justice of Armenia requested on February 2016 the Venice Commission and OSCE to issue an opinion on the draft Code. After reviewing the code, the Commission and the OSCE expressed certain concerns about the exportability of the Italian model, as mentioned above. The opinion also reiterates the bias of the European institutions for a proportional system as the only electoral system able to create a representative parliament. Therefore, "[a]ny modification to this goal should be implemented with care and out of clear needs".[28] Ultimately, the complex electoral system enacted by Armenia seems to deviate substantially from a purely proportional system in order to achieve a stable parliamentary majority, resulting, in the words of the Commission, in an "unusual system".

As to the specific provisions of the new Code, the criticism of the Commission and OSCE is three-fold. First, it is not clear that there should be a different and higher threshold for pre-election coalitions (7 percent in lieu of 5 percent), as pre-election alliances might prove more stable and cooperative (and in turn give its contribution to a stable government). However, the Electoral Code

27 The 'next' political party or alliance means "the next political party (alliance of political parties) with the maximum number of ballot papers with affirmative vote, having received the maximum number of ballot papers with affirmative vote and not included in the new alliance". *See*: Article 98, para. 3 of the Armenian Electoral Code.

28 Venice Commission, *Armenia: Preliminary Joint Opinion on the Draft Electoral Code*, *supra* note 23, para. 25, p. 8.

issued on 25 May confirms such a different threshold for parties and political alliances. It is worth noting that it is also not obvious that a coalition might contribute to forming a stable political majority. The Italian case is illustrative in this sense: where no qualitative restrictions are provided for a coalition to be formed, it is very likely that the alliance will turn out to be an obstacle rather than an asset in forming a coalitional government. A criticism which seems more appropriate is, instead, that no threshold for parties belonging to the coalition is provided (the 7 percent threshold applies to the sole coalition). That implies that any party, regardless of its popular support, can potentially gain access to the parliament, which is not a desirable outcome if the aim is to reduce the alleged fragmentation of the party-system.

Another criticism was that the three-days deadline (provided in the draft Electoral Code of 18 April 2016) for arranging new coalitions upon the first round is too short. Since a post-electoral coalition can contribute to forming a stable government, "[t]he … possibility must be given a reasonable chance".[29] The drafters seem to have accepted this recommendation, as the new deadline for submitting to the Electoral Commission a newly formed coalition is 6 days – instead of 3 days – from the announcement of electoral results.

Also, under Article 97, para. 1 of the Code, the post-electoral coalitions can be formed with two more parties or political alliances. Such a quantitative restriction on coalition building appears unreasonable to the Council of Europe in so much as it lacks a clear justification. However, this provision too has been confirmed. The quantitative restriction can also be criticized under another point of view: if a coalition can be formed both with parties and coalitions, it is rather unreasonable than one can make an alliance with two coalitions – if we assume that each coalition contains two parties, eventually it will have four allies – and, on the contrary, cannot enter into an alliance with three parties (running all alone).

The most difficult task is to comprehend why the ruling party decided to create this particular type of electoral system. The new system appears to strongly encourage coalitions. The statement is also supported by the Parliamentary Assembly of the Council of Europe (PACE), according to which the introduction of the new system could potentially reward parties willing to co-operate and form political coalitions.[30] In turn, this could counterbalance the "zero-sum mentality" characterizing the Armenia's political environment.

A tentative reason might then be found in the increasing isolation faced by the leading political party, the Republican Party of Armenia, over the last few years. Coalitions proved not stable, and often parties decided to withdraw their political support for the Republican Party and to abandon the government coalition (still, abandonment did not result in a lethal threat to the government majority).[31] Two major examples can be the withdrawal of ARF after the Sarkisian's rapprochement

29 *Ibidem*, para. 29, p. 9.

30 'Armenia monitors encourage all political forces to seek consensus on new election code', *Council of Europe*, 23 May 2016. Available at: <www.coe.int/en/web/yerevan/news> [accessed: 15 June 2016].

31 *See*: L. Fuller, 'Armenian Opposition Launches New Wave Of Protests', *Radio Free Europe/Radio Liberty*, 28 September 2014. Available at: <www.rferl.org/content/caucasus-report-armenia-opposition-protests/26610291.html> [accessed: 15 June 2016].

with Turkey and the normalization of bilateral relations in 2008 and 2009. Also, it is worth recalling the increasing disaffection of a traditional pro-government party, Prosperous Armenia, toward the policies of the Republican Party, which climaxed with the formation of the opposition Quartet (made up by ARF, Prosperous Armenia, ANC, and Heritage) in 2014.

This leads us to another issue, which is the declared goal of stability. The positive bias toward stability does not seem to fit the Armenian political context. To my knowledge, the current leading party, the Republican Party, has been in power since 1999, when it first won the election running within the Unity Bloc. Since then, governments proved rather stable with a few exceptions, including the previously noted formation of an opposition bloc in 2014 (so-called opposition Quartet), to which former members of the majority coalition took part. However, this case is not fully illustrative. The opposition Quartet was lately dissolved as a consequence of serious threats of executive actions against its members, made by the ruling elites. Stability, therefore, does not seem to be an urgent exigency in Armenia.

Another tentative answer might be, then, the international prestige deriving from the adoption of a proportional representation system. As the current political landscape pivots on a leading political party and a few satellites parties opting in and out the leading coalition, such a system is likely to guarantee a broader representation of opposition parties. Let me further clarify this. Regardless of the desired outcome, the new system is essentially proportional: the national share of votes for each party is the basis on which seats are granted. The district level is not relevant per se; it is at the national level that the share is calculated and then distributed throughout the districts. More importantly, districts, as a matter of electoral history in Armenia, were likely to favor big political parties.[32] The latest parliamentary elections are illustrative in this sense: the RP won 29 district seats, Prosperous Armenia 9 district seats and only one seat was allocated to Rule of Law (an opposition party). Inevitably, this will change. Transitioning from a mixed system to a mainly proportional one virtually means broader representation for smaller parties, as there is no such thing as the 'all or nothing' outcome typical of majoritarian systems. The second round and the 'stable parliamentary majority' requirement are major deviations from a pure proportional representation, and still the new system will presumably grant broader representation to parties, compared to the past. The crucial question is then whether the 'all or nothing' outcome will be resumed through the second round. Again, there are major reasons to doubt it. If one has to stick with the wording of the Code, there are reasons to believe that few second rounds are going to be held in Armenia. On the contrary, if one intends to emphasize the current political dynamics, one of the possible scenarios would be a further entrenchment of the political power of the leading party. The Republican Party has, in fact, sufficient electoral and political leverage to obtain an absolute majority of seats, at least at the end of the second round of elections. Under this perspective, the second round would be a tool in the hand of a party with a plurality vote to achieve a wide parliamentary majority and to govern all alone. However, our duty is to understand the law, not to make complex predictions.

32 Single member districts were likely to favor big parties because the regional or local parties are not deeply rooted or, at least, they have a fairly small chance to win against a nationwide strong political party (as opposite to what occurs in Spain).

5. THE ITALIAN ELECTORAL LAW[33]

In framing the new electoral system the legislature has drawn from the Italian Electoral Law no. 52 of 6 May 2015 (so-called *Italicum*). Information about the Italian system was spread to Armenia at a 2015 conference in Yerevan in 2015, where prominent scholars Stefano Ceccanti and Carlo Fusaro were invited with an aim to provide a deeper knowledge on the Italian substantive law, and by referencing multiple times the Italian model in the report on the electoral reform submitted to the Venice Commission.[34]

The Italian law aims to combine elements of the proportional system, in order to achieve a broader representation of parties, and elements of a majoritarian system, to foster stability in government. The option for a majoritarian system, according to Duverger's 'prophecy',[35] would yield both mechanical and psychological effects, which would, in turn, favor a trend towards a two-party system – and reduce the typical fragmentation stemming from a multi-party system.

The Italian law no. 52/2015 needs to be read within the context of the reform of the Italian parliamentary bicameralism. It does provide for an electoral law concerning the Chamber of Deputies, while it assumes that the Senate will no longer be an elective chamber.[36] The law has an "essentially proportional soul",[37] subsequently mitigated by the provision of a second-round, yielding majoritarian effects.

The basic features thereon are the following: a PR, with the provision of a majority bonus system (MBS) in favor of the winning party; a prohibition of coalitions among parties; a combination of a preferential list system with the closed list system, as far as the top candidate on the electoral list is concerned; finally, the allocation of seats within small-size local constituencies (from three to nine seats for each constituency).

There are three territorial levels with three different functions: national constituency; regional constituencies (20); territorial (intraregional) constituencies[38] (100).Parties present their list of can-

33 *See supra* notes 1 and 3.

34 M. Mazza - C. Filippini, 'Tendenze del costituzionalismo eurasiatico post-sovietico: il caso armeno', *DPCEonline*, no. 4, 2015, p. 17; *see also*: Venice Commission, *First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10), supra note* 21, para. 79, p. 14, <www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)037-e> [accessed: 22 Feb. 2016].

35 M. Duverger, *Political parties: Their organization and activity in the modern state,* John Wiley, New York, 1963 (Original work published 1954).

36 The accuracy of the assumption will be determined in October 2016, when the confirmatory popular referendum on the constitutional reform will be held. For a comment on the constitutional reform see F. Clementi, 'Italian constitutional reforms: Towards a stable and efficient government', *Constitutionnet*, 23 June 2016. Available at: <www.constitutionnet.org/news/italian-constitutional-reforms-towards-stable-and-efficient-government> [accessed: 25 June 2016].

37 E. Mostacci, 'Perseverare autem Italicum, Rappresentanza e sistema politico all'indomani della legge 52/2015', *Rivista AIC*, n. 4, 2015, p. 2.

38 Territorial constituencies are the so-called 'collegi plurinominali,' that can be transliterated as multi-member districts. Although 'collegio' (district) is usually associated with the notion of single-member district, it here refers to a multi-member constituency. *See*: Art. 1, para. 2, Presidential Decree no. 361/1957, as modified by Art. 2, para. 1 of Law no. 52/2015.

didates in the territorial constituencies, but the general allocation of mandates occurs at the national level. The first step is to calculate the share that each list attained at the national level through the Hare quota and the largest remainder method, provided that the party exceeds the minimum threshold of 3 percent of VVC. Then such share is disaggregated and distributed first at the regional level and then at the territorial level. The last step leads to identifying elected candidates, which will be first the top candidate on the electoral list and then the candidates with the highest number of votes.

There will be two roads left open, depending on whether the winning party reaches a 40 percent share of VVC:

i. In case it reaches the 40 percent share, the party will immediately benefit from the majority bonus system (MBS), obtaining 340 mandates (54 percent of the mandates); the remaining seats are then allocated to parties exceeding the 3 percent threshold (see *supra*);

ii. In case it does not reach the 40 percent share of VVC, a second round is held.

The two main innovations of the legislative reform are the provision for a minimum threshold to assign MBS, and a second round of elections in case the winning party does not reach the 40 percent share. Both requisites were introduced to comply with decision no. 1/2014 of the Constitutional Court.[39] This is a landmark decision in which the Court found the previous electoral Law (no. 270/2005) unconstitutional. Concerns expressed therein, through a composite reasoning which cannot be thoroughly analyzed here, rested on the ground that the previous law would unreasonably sacrifice the representativeness of the parliament. The minimum 40 percent threshold makes the MBS much more acceptable, as it waives the electoral results to a reasonable extent[40] – under the previous system, the winning party could have obtained the bonus with any percentage, *e.g.*, 20 percent of VVC.

As to the second round, the law identifies it as a run-off second ballot. Second rounds typically serve the purpose of enabling voters to adjust their preferences, by allowing a free 'vote of conscience' in the first round, and a strategic vote in the second ballot. Though the principal example of the second ballot in comparative perspective is to be found in France, there are major differences with the electoral law of the French National Assembly. There – for obvious reasons – the second round is open to candidates (not parties) reaching the 12.5 percent of voters on the electoral roll; furthermore, the candidates are allowed to enter into arrangements and alliances with other parties, or to stipulate a sort of a non-compete clause; the fundamental distinction is, however, the plurality nature of the second ballot, to which multiple candidates can potentially access. On the contrary, agreements and alliances of any kind are forbidden in Italy, and the two parties (not even coalitions) with the higher share of votes are requested to compete on their own.[41] This is congru-

39 E. Mostacci, 'Perseverare autem Italicum',*supra* note 34, p. 11.

40 T.E. Frosini, 'Rappresentanza + governabilità = Italicum', *confronticostituzionali.eu,* 12 May 2015.

41 Referring to parties in lieu of coalitions serves also a utilitarian purpose, if one considers that the bonus is not divisible. *See* E. Mostacci, 'Perseverare autem Italicum',*supra* note 34, p. 13.

ous with the run-off nature of the Italian second round, where only two parties can compete and whatever alliance can occur at a merely 'unofficial' level (*i.e.* open electoral support in favor of one of the running parties). As third parties are not allowed to play the game, their electoral behavior can politically – but not legally – affect the contest.

Finally – again for obvious reasons – votes cast in the first ballot are anything but lost in Italy: they will have a double significance, in that they will be the basis for allocating seats to the defeated parties and also for the territorial distribution of seats to the winning party. The foregoing system cannot apply to France, where candidates compete in single-member districts. In view of this fact, they can either win or lose.

Although a ballotage for parties (instead of candidates) is deemed by some scholars to be eccentric,[42] it is still true that examples in comparative perspective do exist. In particular, a second round for parties is in force in Mexico; South Korea; San Marino; at the municipal, departmental and regional level in France; and at the municipal level in Italy.[43] Nonetheless, a main criticism of the current system lies on the grounds that granting the bonus to a party in lieu of a coalition yields broader majoritarian effects.[44]

It also assumes that the party system is a fundamentally two-party system,[45] which is not the case in Italy – at least not at present. For example, unlike the United States – the quintessentially two-party system – over the course of 12 years (1993-2005) Italy s never had two parties reach 30 percent of votes.[46] The 2008 elections gave the illusory impression that the party system was slowly heading toward a two-party system – with the Democratic Party and the People for Liberty reaching respectively around 33 and 38 percent of VVC. A dramatic change occurred in the 2012 elections, where, again, no party went beyond the 30 percent share of votes (25 percent indeed).

Coalitions under the previous Electoral Law no. 270/2005 drew many criticisms for they could be formed without restrictions – *e.g.*, affinity between the ideologies of the political parties entering into it – but by means of a mere declaration.[47] That brought about three major problems. First, political alliances were often too fragile since political parties were induced to emphasize differences throughout the campaign in order to gather as many votes as they could, and to grasp the heterogeneous needs and interests of the voters. Votes gained by each party were simply summed up and then seats assigned proportionally. A viable alternative is, for example, the provision for common candidates within districts for each coalition, as was the case under the so-called *Mattarellum* system (Electoral Laws no. 276/1993 and 277/1993).

42 M. Volpi, 'Italicum: un sistema anomalo e antidemocratico', *costituzionalismo.it*, n. 1, 2015.

43 C. Fusaro, 'Del rifiuto di rafforzare la governabilità per via elettorale', *Quaderni costituzionali*, n. 3, 2015, p. 734.

44 On similar grounds, some scholars feared, under the previous system (Law no. 270/2005), that a referendum aimed to abrogate the rule granting the prize to coalitions would pass. The referendum would have had as a consequence that the prize be given to parties. Therefore, there would have been a higher deviation between the percentage of votes and the number of attained seats. *See*: M. Volpi, 'Considerazioni conclusive', in M. Oliviero - M. Volpi (Eds.), *Sistemi elettorali e democrazie*, Giappichelli, Torino, 2007, p. 413.

45 A. Rauti, 'L'italicum fra "liturgia" elettorale e prove di bipartitismo', *Rivista AIC*, n. 2, 2015, pp. 3-4.

46 M. Volpi, 'Considerazioni conclusive'*, supra* note 41, p. 412.

47 *See:* Article 14 *bis*, para. 1, Presidential Decree no. 361/1957, added by Article 1, para. 5, of Law no. 270/2005.

Also, they turned out to be deceptive of the voters' will in that a vote for a specific party was also meant to show a favor for the ruling coalition, which was composed of parties bearing no resemblance to each other.[48] Finally, the electoral success depended more upon political bargaining and political virtuosity in forming alliances than upon the actual exercise of suffrage.

6. READING THE CASE OF ITALY AND ARMENIA IN A COMPARATIVE PERSPECTIVE

Major differences exist between the two electoral systems. The first apparent difference is the positive bias toward coalitions in Armenia. Coalitions are allowed to be formed at any of the following three stages: prior to the elections; after the elections, in order to avoid a runoff; and during the runoff, should a runoff be necessary. Coalitions are a powerful tool to avoid the second round of elections, and the power to form coalitions is almost unfettered. There is no qualitative restriction in forming alliances, as they can even consist of the two parties gaining the highest share of affirmative votes in the first round. The sole restriction provided is a quantitative one: the post-electoral alliance formed to avoid the ballotage can consist of a maximum two additional political parties (or alliances) having passed the electoral thresholds. That basically means that one cannot avoid the second round if the political landscape is too fragmented (by unduly expanding the coalition). On the contrary, there is an explicit ban on forming coalitions in the second round in Italy.

Such a positive bias toward coalitions makes almost unlikely that a second round is held, either because the party/alliance reaches absolute majority, or due to bargaining. Even when the parties (or coalitions) are unable to reach the majority of seats and the second round is held, again, it seems that the electoral result will depend much more upon political bargaining than suffrage. Political actors are given so many opportunities to gather and make and break alliances that it is predictable that they will not miss such opportunities, exposing themselves to the risk of running on their own (either in the first o second round). There is not even an incentive to run at all in a second round: why gambling when the other fellows are using a loaded dice? It is against this backdrop than one has to read the Armenian context. This being the case, the Italian system, *i.e.* a multiparty system with the utmost chance of holding a second round, seems to differ enormously from the Armenian system both formally and substantially (as for its concrete functioning).

Also, a lower threshold is provided in Italy (3 percent), in order to mitigate the majoritarian effects of the MBS; the closed list systems applies only to the top candidate of the list, whereas other candidates are chosen through a preferential vote; no distinction between the national list and

48 E. Mostacci, 'Il proporzionale con premio di maggioranza, tra omissioni costituzionali e disfunzioni della rappresentanza politica', *Giurisprudenza costituzionale*, n. 6, 2014, p. 31 ff.

district list exist, as the Italian voter will not find a 'second page' with candidates other than the national list.

A comparison between the two systems seems to indicate that the Armenian electoral law has, either consciously or unconsciously, deviated from the Italian model. However, for a more accurate prediction on the implementation of the law, one has to take a look at the systemic, structural similarities and differences between the two countries.

With decision no. 1/2014 the Italian Constitutional Court has actively guided the transition to the new electoral system[49] by setting out principles to balance and criteria to meet in order to avoid a declaration of unconstitutionality. Such a decision came after a long dialogue with the parliament. Given the broad discretion that the legislature enjoys in framing the national electoral system, the dialogue took the shape of a weak-form of judicial scrutiny. Starting from 2008, the Court issued two formal warnings on the incompatibility of certain aspects of the new electoral system (Law no. 270/2005) with the Constitution.[50] Therefore, decision no. 1/2014 does not exist in a vacuum; it is rather to be read within the broader context of a long term discussion in which the two constitutional branches engaged – which merely reached its peak in 2014.

It is widespread knowledge among constitutional scholars that governability and speed in the law-making process as aims, within the logic of a proportional representation system, can be achieved only to the extent that there is the least possible sacrifice of other constitutionally protected values and interests.[51] The Italian electoral law is, therefore, constrained – both upstream and downstream – by judicial review, in the sense that such a decision has guided the drafting process of the electoral law and will eventually be a fundamental parameter in reviewing the constitutionality of the law.

The foregoing assertion does not apply to Armenia. The 'horizontal accountability' remains an issue in Armenia. Inter-institutional checks and balances, though enshrined in the post-independence constitutions, performed poorly, all things considered. The Armenian Constitutional Court and the judicial courts proved deferential[52] toward the legislative and executive power. This is probably a leitmotif in post-Soviet countries.[53] Particularly, the trend has been more apparent in times of institutional stability, where there was a reasonable expectation that the incumbent presidents would remain in office.[54]

49 For a general overview of the decision, *see* E. Longo, A. Pin, *Don't Waste Your Vote (Again!). The Italian Constitutional Court's Decision on Election Laws: An Episode of Strict Comparative Scrutiny*, ICON•S Working Paper – Conference Proceedings Series 1, no. 10/2015. Available at:<http://irpa-c02.kxcdn.com/wp-content/uploads/2015/02/ICON-S-WP-10-2015-Longo-and-Pin.pdf>[accessed: 14 June 2016].

50 F. Duranti, 'Constitutional Dialogues on Electoral Law', *Comparative Law Review*, Vol. 6, No. 1, 2015, p. 3 ff.

51 E. Rossi, 'Storia di un "falso"? L'Italicum e la "governabilità"', *Quaderni costituzionali*, n. 3, 2015, p. 749.

52 K.E. Bravo, 'Smoke, Mirrors and the Joker in the Pack: On Transitioning to Democracy and the Rule of Law in Post-Soviet Armenia', *Houston Journal of International Law*, Vol. 29, No. 3, 2007, pp. 489-580.

53 R. Di Quirico, *La democratizzazione tradita. Regimi ibridi e autoritarismi nei paesi ex-sovietici*, Il Mulino, Bologna, 2013, p. 170 ff.

54 A. Mazmanyan, 'Constrained, Pragmatic, Pro-democratic: Appraising Constitutional Review Courts in Post-Soviet Politics', *Communist & Post-Communist Stud.*, Vol. 43, No. 4, 2010, pp. 409-423.

According to a definition lately adopted by Russian authorities, Armenia, as many post-Soviet countries endowed with a seeming institutional pluralism, is a "managed democracy"[55] (*upravlyayemaya demokratiya*). The definition alludes to the fact that, notwithstanding a hint of *de jure* pluralism, institutions are manipulated by a central authority as a matter of fact. Similarly, under the regime classification adopted by Freedom House, Armenia is "Semi-Consolidated Authoritarian Regime".[56] The electoral law is thus likely to apply unfettered by a strong judicial scrutiny, the natural setting where governability and representation are balanced against each other.

7. FINAL REMARKS

By way of concluding this brief analysis, it can be said that a legal transplant from Italy to Armenia did not occur. The legislature seems to have found the Italian model, with its original mix of proportional representation and MBS, appealing. The reason why is not entirely clear and might need a leap of the imagination. It apparently lies on the need for stability, which, as shown, does not seem to be a pressing one. It can lie on the international prestige deriving from broadening the parties' representation. But, also, it can be found in the isolation that the leading party is currently facing. Regardless of the answer, the Italian model and its bias toward stability seems much more of a pretext than a model.

There are multiple reasons to doubt that a legal transplant occurred. Major differences exist at a structural level, such as the absence of a constitutional court strong enough to oppose government decisions. Also, the political system is dramatically far from the Italian one. The constitutional culture of the country, as feared by the Council of Europe, is too recent for such a transplant to be successful. But, first and foremost, the law itself presents significant differences with respect to the original model: the positive bias toward coalitions is absent in the Italian law, under which coalitions are indeed forbidden. On the contrary, under the Armenian Electoral Code, they can be formed at any stage of the electoral process, to such an extent that electoral victory is likely to depend much more on political bargaining than suffrage. This point stands at odds with both popular suffrage and the PR soul of the system. However, it is congruent with the constitutional culture and rooted custom of forming electoral blocs in Armenia and with the purpose of limiting the marginalization of the current leading party.

55 T. J. Colton - M. McFaul, *Popular Choice and Managed Democracy: The Russian Elections of 1999 and 2000*, Brookings Institution Press, Washington, DC, 2003.

56 A. Iskandaryan, *'Armenia', Nations in Transit*, Freedom House report, 2013. Available at the following URL: <www.freedomhouse.org/report/nations-transit/2013/armenia#.VaZpOk1OW72> [accessed: 15 Feb. 2016].

That being said, the law does not aim to break with the past but to further promote coalition building. This is another sharp difference compared to Italy, where coalition building was also promoted by electoral law no. 270/2005 and the previous laws no. 276/1993 and 277/1993 but is now forbidden.

As a tentative conclusion, it can be said that the 'legal transplant' from Italy appears much more nominal than real. There are specific reasons – not entirely clear at present, therefore needing further research – that led the legislature to adopt the very 'idea' of the Italian law and to deviate substantially from some of its cornerstones (as negative bias toward coalitions). A possible reason – needing further research as well – might be the desire to further entrench the political leverage of the leading party and its affiliates. Whatever the reason might be, what is unduly clear is that there is no political will to break with the past and that inertia will still be the most powerful engine of politics in Armenia.