JUDGMENT NO 110 YEAR 2023

Radically obscure laws violate the principle of reasonableness enshrined in Article 3 of the Constitution.

Following an application by the national government, the Constitutional Court declared a regional legislative provision on buildings unconstitutional on the ground of its unintelligibility. In particular, the Court stressed that the provision was full of vague and unclear terms, lacked any reference to other laws – which made a systemic interpretation of it impossible – and included an initialism ("V. A.") that the Region itself explained in two different ways.

The Court noted that the case law of other constitutional courts, like the French *Conseil constitutionnel* and the German *Bundesverfassungsgericht*, has constantly held that radically obscure laws are unconstitutional.

For the first time in its history, the Italian Constitutional Court came to the same conclusion. Having recalled several previous judgments requiring a minimum level of normative clarity and precision in criminal law and in closely related matters, the Court stated that also beyond these domains citizens have a natural expectation that the law will define *ex ante* and clearly the extent of their rights, so that they can make their choices on a reliable basis. By contrast, radically obscure laws do not give any guidance to administrative authorities as to their application, nor do they set any binding framework for the subsequent judicial review of administrative acts. Therefore, such laws infringe the principles of legality and separation of powers and pave the way for their arbitrary application, in violation of the principle of equal treatment.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Articles 4, 7(5)-(14), 7(18), and 11 of Molise Regional Law No 8 of 24 May 2022 (Regional Stability Law 2022), initiated by the President of the Council of Ministers with an application served on 25 July 2022, filed with the Court Registry on 28 July 2022, registered as No 51 in the 2022 Register of Applications and published in the *Official Journal of the Italian Republic*, number 39, first special series 2022.

Having regard to the entry of appearance filed by Molise Region;

after hearing Judge Rapporteur Francesco Viganò at the public hearing of 18 April 2023;

after hearing State Counsel Alfonso Peluso for the President of the Council of Ministers and Counsel Claudia Angiolini for Molise Region;

after deliberation in chambers on 18 April 2023.

[omitted]

Conclusions on points of law

[omitted]

4.– The applicant also challenges Article 7(18), which states verbatim: "[i]n the buffer strips of all zones and all plan areas, in the presence of works already carried out and located between the element to be protected and the construction works to be carried out, the latter are permissible subject to a V. A. for the topic which produced the buffer strip, as long as the said construction works do not exceed, in orthogonal projection, the dimensions of the pre-existing works or are included in an area circumscribed within a radius of 50 metres from the barycentre of pre-existing consolidated settlements".

4.1.– In the applicant's view, the provision infringes, first of all, the principle of reasonableness enshrined in Article 3 of the Constitution as well as Articles 9 and 117(2)(s) of the Constitution, the latter in relation to Articles 135, 143, and 145 of the Cultural Heritage and Landscape Code.

Article 3 of the Constitution is alleged to be violated due to how completely incomprehensible the challenged provision is, employing as it does vague expressions open to a variety of interpretations. A lack of intelligibility that the explanations put forward by the Region itself in response to the requests for clarification failed to resolve.

In the event that it were possible to interpret the provision as meaning that unspecified works can be undertaken within the buffer zones of the regional landscape plan, that would lead to an impermissible lowering of the level of protection of the landscape, derogating from the landscape plan itself with ensuing violation of both Articles 9 and 117(2)(s) of the Constitution, the latter in relation to the aforementioned provisions of the Cultural Heritage and Landscape Code.

4.2.– Legal counsel for the Region observed in its brief that the challenged provision refers to the "regional landscape plan", allowing the carrying out of works that would be located in areas already "'contaminated' by buildings" but "designed in such a way that their visual perception and impact are mitigated by the orthogonal projection of the construction". That is without prejudice to the "environmental assessment of the constraint existing on the lot, which gave rise to the application of the buffer zone". In any case, legal counsel maintains that "the supposed difficulty in interpreting the rule [...] would not constitute grounds for unconstitutionality but rather a prerequisite for the interpreter's task in applying the law".

At the hearing, legal counsel for the Region adduced further elements aimed at clarifying the scope of application of the provision, asserting that it is part of the regulatory framework governing "territorial landscape environmental plans of vast areas" established by Regional Law No 24 of 1 December 1989 (Rules on Territorial Landscape Environmental Plans), permitting new works in the buffer zones established by those plans subject to a "verification of admissibility" in relation to the specific "topic" that characterises the buffer zone, under the conditions laid down in detail by the provision itself.

4.3.– The question is well founded with reference to Article 3 of the Constitution.

4.3.1.– The challenged provision is contained in the last of the eighteen paragraphs of Article 7, generically headed "Amendments to Regional Laws". Paragraphs 1 to 4 and 15 to 17 in effect amend or repeal individual provisions of seven different regional laws, while paragraphs 5 to 14 concern activities for the promotion of the culture of civil protection and the establishment of the relevant school, which are the subject of the question examined earlier herein (paragraph 3 above). Paragraph 18, scrutinised here, does not amend or add to any pre-existing regional law, but it lays down rules that appear to allow new building works in derogation of existing plans.

As State Counsel accurately points out, the provision abounds with imprecise terms, or at any rate ones that are hard to understand, in the absence of any reference to the regulatory context into which the provision is intended to fit. Thus, the reference to "buffer strips of all zones and all plan areas" is totally ambiguous since it does not clarify which plans the provision refers to: whether, for example, to municipal urban plans or to regional plans for the protection of the landscape, including the future landscape plan provided for by Article 143 of Legislative Decree No 42/2004, which the Region is obliged to draw up jointly with the Ministry of Culture (Article 135 of Legislative Decree No 42/2004). Similarly imprecise are the notions of "works already carried out" and "construction works to be carried out", and likewise the expression "topic which produced

the buffer strip", which does not appear to be tied to the regulatory framework governing a specific type of plan.

Moreover, the provision uses the initialism "V. A." to indicate a procedure to establish whether or not the construction works can go ahead, without providing any prior definition of the meaning of the initialism itself.

The provision had been criticised during the debate that preceded its approval precisely because of how obscure it was (in this regard see in particular pages 13 to 15 of the full report of the Molise Regional Council meeting of 13 May 2022, 9.30 a.m.).

On the other hand, neither the explanations provided by the Region, which State Counsel notes in its application and which are reproduced verbatim by legal counsel for the Region in its brief, nor the more detailed ones furnished at the hearing managed to give a plausible interpretation of the preceptive content of the challenged provision. Indeed, the Region maintains that the challenged paragraph 18 is intended to refer to the "Regional Landscape Plan", and more precisely – as clarified for the first time at the hearing – to the rules governing the "territorial landscape and environmental plans of vast areas" established by Molise Regional Law No 24/1989, allowing the carrying out of new "works" with a reduced visual impact on the landscape. However, in its brief the Region had stated that the initialism "V. A." stands for *Valutazione Ambientale* [Environmental Assessment] – an ambiguous expression itself, as State Counsel rightly observes, since it could refer either to a *valutazione di impatto ambientale* (VIA) [environmental impact assessment (EIA)] or to a *valutazione ambientale strategica* (VAS) [strategic environmental assessment (SEA)], or to both. By contrast, at the hearing the Region's legal counsel argued that the initialism simply refers to a *verifica di ammissibilità* [verification of admissibility] of the works to be carried out within the buffer zones provided for by the aforementioned plans.

Without prejudice to the obvious principle that the preceptive content of a law must first of all be deduced from the "actual meaning of the words according to the connection between them", also in the light of the *travaux préparatoires*, insofar as they are useful for reconstructing the "intention of the legislature" (Article 12 of the Preliminary Provisions of the Civil Code), the explanations provided by the Region as to the meaning of the challenged provision, including through its legal counsel at the hearing, confirm the cryptic nature of the initialism used, as well as the vagueness of many expressions contained in the challenged provision: beginning with the noun "topic", the meaning of which can reasonably be grasped only if the provision is read in the light of the rules set out in Molise Regional Law No 24/1989, which was indeed cited at the hearing but is in no way referred to in the wording of the provision at issue.

4.3.2.– It is necessary at this point to determine whether a provision with such a radically unintelligible meaning is in itself incompatible with the principle of reasonableness under Article 3 of the Constitution, as argued by the applicant.

4.3.2.1.– In criminal matters, this Court has long scrutinised rules establishing criminal offences against minimum requirements of clarity and precision, derived – in particular – from the principle of legality enshrined in Article 25(2) of the Constitution.

As far back as Judgment No 96/1981 it was stated in this regard that when establishing criminal offences the legislature "has an obligation to formulate conceptually precise rules from the semantic point of view of clarity and intelligibility of the terms used" (point 2 of the *Conclusions on points of law*). On the basis of that criterion, the Court declared unconstitutional a criminal provision (Article 603 of the Criminal Code), which prohibited "subjugat[ing] another person to one's own power in a way that reduces them to a state of total subjugation". This Court considered such a situation to be completely obscure as regards its boundaries and for that reason "unverifiable in its

implementation and its result because the actions that could in concrete reduce a person to a state of total subjugation are neither identifiable nor ascertainable" (point 14 of the *Conclusions on points of law*).

On a subsequent occasion, in connection with an erroneous legislative reference contained in a provision establishing a criminal offence, this Court stated that "there are minimum requirements of recognisability and intelligibility of the precept with criminal content, which are also minimum requirements of rationality of legislative action. Failure to fulfil these requirements would jeopardise the freedom and legal security of citizens". "This is precisely the case", the Court continued, "of the provision at issue, in which the error in the drafting of the legislative text [...] amounts to a trap for citizens, preventing them from understanding the criminal precept, or, at the very least, misleading them. Additionally, the error itself introduces into the literal wording of the provision an element, albeit unintentional, of irrationality and contradiction with respect to the regulatory context into which the provision fits, and as such also entails a violation of that canon of consistency of the rules that is an expression of the principle of equality under Article 3 of the Constitution" (Judgment No 185/1992, point 2 of the *Conclusions on points of law*).

In another case, this Court declared that a provision criminalising the actions of a foreigner served with a deportation order "who fails to *take steps* to obtain from the competent diplomatic or consular authority the issue of the necessary travel document" was unconstitutional. In the judgment it was observed that the vagueness of the precept not only made it impossible for its addressee "to be aware of the conduct to be observed in order to avoid being subject to the consequences of non-compliance", but also did not allow "the interpreter to express a judgment of conformity supported by a verifiable basis when it came to interpreting and applying the rule to the case at issue" (Judgment No 34/1995, point 2 of the *Conclusions on points of law*. See also Judgment No 25/2019 for a further and more recent case in which the Court declared a criminal precept unconstitutional due to its absolute vagueness, and therefore its contrast with Article 7 ECHR and Article 2 of Protocol No 4 ECHR, both of which are relevant in the Italian legal system under Article 117(1) of the Constitution).

4.3.2.2.– In the field of preventive measures, similar criteria have led this Court to declare incompatible with various constitutional parameters provisions that set out excessively vague and imprecise elements, as such incapable of ensuring that addressees can recognise the duty incumbent on them and foresee its consequences (Judgment No 24/2019, in particular point 12.3 of the *Conclusions on points of law*), let alone capable of reasonably constraining the discretion of the authorities called upon to apply the provisions (Judgment No 177/1980, point 6 of the *Conclusions on points of law*).

4.3.2.3.– Lastly, with specific reference to regional laws, this Court has had occasion to hold well-founded a question relating to a legislative provision concerning the installation of wind farms, whereby the regional legislature sought to revive for a limited period of time a provision that had already been repealed. The Court held that the regulatory technique adopted, which made it difficult for the public authorities to reconstruct the rules actually in force, left much to be desired in the light of the principle of efficiency of public administration enshrined in Article 97 of the Constitution. It judged that such a technique is bound to produce legal uncertainty and 'may result in the poor exercise of the functions entrusted to public authorities' (Judgment No 364/2010)" (Judgment No 70/2013, point 4 of the *Conclusions on points of law*).

4.3.3.– Also in view of the precedents cited above, it must – more generally – be held that provisions that are irremediably obscure and cause intolerable uncertainty when

applied in concrete cases, are contrary to the principle of reasonableness of the law enshrined in Article 3 of the Constitution.

The requirement that legislative provisions meet minimum standards of intelligibility as regards their meaning, and hence of reasonable foreseeability as regards their application, must be strictly applied in criminal matters, where the personal freedom of citizens is at stake, as well as in cases in which the law empowers public authorities to limit citizens' fundamental rights, as is so with preventive measures. But this requirement should also apply with respect to all rules governing relations between public authorities and citizens or between citizens.

Firstly, even in those areas, each individual has a natural expectation that legal provisions define *ex ante*, and in a reasonably reliable manner, the limits within which their rights and legitimate interests are protected, so that they can make their free choices on that basis.

Secondly, a radically obscure rule only apparently binds the administrative and judicial branches of power, thus violating the principles of legality and the separation of powers.

Finally, such a law inevitably creates the conditions for unequal application of the law, in breach of the principle of equality, which is at the heart of the safeguard enshrined in Article 3 of the Constitution.

4.3.4.– Admittedly, every legislative provision entails some margins of uncertainty as to its scope of application, without this making it unconstitutional. The essential task of the courts is to gradually resolve, through the canons of statutory construction, the interpretative doubts that each provision inevitably raises, bearing in mind the actual cases in which it is likely to be applied. That contributes to making the law more uniform and predictable for citizens.

Nor could it be considered contrary to Article 3 of the Constitution for the law to resort to general clauses, which are purposefully open to "processes whereby the courts flesh out and give tangible form to them" (Judgment No 8/2023, point 12.1 of the *Conclusions on points of law*, with reference to the good faith clause in Article 1337 of the Civil Code).

Neither can it be held that laws are precluded from using technical terms or ones that are difficult to understand for those without special technical skills: the complexity of the matters that it falls to the legislature to regulate often requires a regulatory framework that is itself complex. Indeed, more and more frequently laws employ definitions, set out in general provisions, that allow the interpreter to ascribe precise meanings to technical expressions – sometimes far removed from everyday language – used in a given regulatory framework.

However, the situation is wholly different where the meaning of the expressions used in a provision – notwithstanding every effort at interpreting it on the basis of all the common canons of statutory construction – remains totally obscure, making it impossible for the interpreter to identify even a core of situations that can be considered, with reasonable certainty, to fall into the scope of application of the rule. Such a provision cannot but be held to be in contrast with those "minimum requirements of rationality of legislative action" that the aforementioned Judgment No 185/1992, in general terms, derived from the constitutional safeguard of the "freedom and security of citizens".

4.3.5.– Other constitutional courts in legal systems that share traditions and a culture similar to Italy's have, indeed, reached the same conclusions.

According to the settled case law of the French *Conseil constitutionnel*, the accessibility and intelligibility of the law are principles of constitutional rank, which require the legislature to adopt sufficiently precise provisions in order to protect

individuals from the risk of arbitrary application of the law and avoid entrusting the administrative and judicial authorities with the task of laying down rules that are instead a matter for the legislature (Decision No 2006-540 DC of 27 July 2006, recital 9). The principles in question are derived, *inter alia*, from the principle of equality before the law, proclaimed in Article 6 of the Declaration of the Rights of Man and of the Citizen. In the opinion of the *Conseil*, there can be no real equality unless citizens have "sufficient knowledge of the rules applicable to them" (Decision No 99-421 DC of 16 December 1999, recital 13; for a recent declaration of unconstitutionality of a statutory provision due to its unintelligibility see Decision No 2021-822 DC of 30 July 2021, paragraphs 29 and 30).

Similarly, the German *Bundesverfassungsgericht* has for many decades now recognised the existence of a constitutional mandate of "precision" and "regulatory clarity", further to which statutory provisions must be worded in such a way as to (a) enable their addressees to understand their meaning and to regulate their behaviour accordingly, (b) efficiently regulate and limit the activity of public authorities, and (c) enable the courts to exercise their power of review of authorities' actions on the basis of pre-determined legal criteria (Decision of 3 March 2004, BVerfGE 110, 33, pages 53 and 54, and further references therein). This mandate, in turn derived from the principle of the rule of law set forth in Article 20(3) of the Basic Law (Decision of 22 June 1977, BVerfGE 45, 400, page 420), does of course not preclude a rule from exhibiting ambiguities in its meaning intended to be resolved through traditional methods of interpretation (Decision of 27 November 1990, BVerfGE 83, 130, page 145). However, it does imply minimum standards of comprehensibility and non-contradictoriness of legislative provisions, non-observance of which results in their unconstitutionality (for recent applications of this principle see Decision of 28 September 2022, 1 BvR 2354/13, paragraphs 106 *et seq*., and Decision of 20 July 2021, BVerfGE 159, 40, pages 68 *et seq*., both with an extensive overview of the constitutional case law on the subject).

4.3.6.– The provision at issue here is a textbook example of a radically obscure legislative provision. On the one hand, it conditions the permissibility of unspecified "construction works" within equally vague "buffer strips" to a procedure identified with an incomprehensible initialism that is itself the subject of two different interpretations by the Region's own legal counsel. On the other hand, the provision is not connected to any pre-existing body of law and remains, so to speak, suspended in a vacuum, thus precluding any possibility of employing the canon of systemic interpretation, which presupposes that any provision fits into a coherent regulatory framework.

Such a provision, by reason of the vagueness of the prerequisites for its application, which cannot be remedied by means of interpretation, does not provide any reliable guiding criteria for the public authorities vested with the task of assessing whether or not to authorise a given application to carry out construction works submitted by a private individual. That is contrary to the principle of legality of administrative action and the minimum requirements of equal treatment of citizens. Moreover, such a provision makes it difficult for a private individual to exercise their right of defence in legal proceedings against any decision not to grant such an authorisation by the public authorities, precisely because of the vagueness of the requirements of the law which should protect them against the arbitrary use of administrative discretion.

4.4.– The challenged provision must thus be declared unconstitutional, being contrary to Article 3 of the Constitution.

[omitted]

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

[omitted]

3) *declares* that Article 7(18) of Molise Regional Law No 8/2022 is unconstitutional;

[omitted]

Decided in Rome, at the seat of the Constitutional Court, Palazzo della Consulta, on 18 April 2023.

Signed by:

Silvana SCIARRA, President

Francesco VIGANÒ, Author of the Judgment