

JUDGMENT NO. 275 YEAR 2016

**In this case the Court heard a reference concerning regional legislation which provided that the obligation incumbent upon the region to contribute 50% of the costs of additional services for disabled pupils provided by the provinces was conditional upon the allocation of appropriate financial resources in the regional budget. The Court held that this discretionary financial constraint on the exercise of the right was unconstitutional and that “once identified through legislation, the absolute core of minimum guarantees for giving effect to the right to study and education of disabled pupils cannot be subject to absolute and general financial constraints”.**

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 6(2-bis) of Abruzzo Regional Law no. 78 of 15 December 1978 (Action to implement the right to education), introduced by Article 88(4) of Abruzzo Regional Law no. 15 of 26 April 2004 laying down “Financial provisions on the drafting of the 2004 annual budget and the 2004-2006 multi-year budget of Abruzzo Region (Regional Finance Law 2004)”, initiated by the Regional Administrative Court for Abruzzo within the proceedings pending between the Province of Pescara and Abruzzo Region by the referral order of 19 March 2014, registered as no. 123 in the Register of Orders 2014 and published in the Official Journal of the Republic no. 30, first special series 2014.

Considering the entry of appearance by Abruzzo Region;

having heard the judge rapporteur Giulio Prosperetti at the public hearing of 19 October 2016;

having heard Counsel Fabio Francesco Franco for Abruzzo Region.

[omitted]

*Conclusions on points of law*

1.– By the referral order mentioned in the headnote, the Regional Administrative Court for Abruzzo, questions, with reference to Article 10 – in relation to Article 24 of the United Nations Convention on the Rights of Persons with Disabilities, adopted by the General Assembly of the United Nations on 13 December 2006, ratified and implemented by Law no. 18 of 3 March 2009 – and Article 38 of the Constitution, the constitutionality of Article 6(2-bis) of Abruzzo Regional Law no. 78 of 15 December 1978 (Action to implement the right to education), introduced by Article 88(4) of Abruzzo Regional Law no. 15 of 26 April 2004 laying down “Financial provisions on the drafting of the 2004 annual budget and the 2004-2006 multi-year budget of Abruzzo Region (Regional Finance Law 2004)”, insofar as it provides, with regard to the action provided for under Article 5-bis of the Law, and in particular in relation to the provision of transportation services for disabled or disadvantaged students, that the Regional Executive shall cover 50% of necessary and documented expenditure incurred by the provinces only “subject to the financial resources allocated within annual budgetary laws and registered under the relevant expenditure item”.

2.– The referring court considers that the fact of rendering payment of the contribution dependent upon the financial resources determined from time to time under budgetary laws transforms the obligation incumbent upon the Region into an aleatory and

uncertain item, entirely dependent upon the financial choices made by the body, which may risk becoming arbitrary in the absence of any limits predetermined by law, resulting in the unlawful restriction of the right to education of the disabled, the efficacy of which cannot be conditional upon financial constraints.

3.– As a preliminary matter, it must be pointed out that the transfer to the municipalities of the administrative functions previously allocated to, vested in or otherwise exercised by the provinces (including those on school assistance and the right to education) as a result of the subsequent enactment of Abruzzo Regional Law no. 32 of 20 October 2015 (Provisions to reform the administrative functions of the provinces, implementing Law no. 56 of 2014), implementing Law no. 56 of 7 April 2014 (Provisions on the metropolitan cities, the provinces, and unions and mergers between municipalities), is of no consequence for the relevance of the question raised.

3.1.– It must in fact be pointed out in this regard that, within the proceedings before the referring court, the Province of Pescara sought to enforce payment of the 50% contribution to the transportation service for disabled persons provided between 2006 and 2012, which continues to be regulated by the legislation in force prior to the reform implemented by Abruzzo Regional Law no. 32 of 2015.

3.2.– Accordingly, as the Region did not dispute the expenses incurred by the Province, but rather set the actual level of its own contribution at a figure lower than 50% thereof, applying Article 6(2-bis) of Abruzzo Regional Law no. 78 of 1978, which fulfils the prerequisite for the authorisation of expenditure registered in the budget, the question concerning the constitutionality of that provision must be resolved before a decision can be adopted in the proceedings before the referring court.

4.– On the merits, the question is well founded.

The right of the disabled to education is enshrined in Article 38 of the Constitution and it falls to the legislator to put in place suitable instruments to enable it to be realised and implemented in order to ensure that its assertion is not transformed into a mere policy rule, but is vested with concrete and real content.

5.– The fundamental status of the right, which is protected also at the international level by Article 24 of the United Nations Convention on the Rights of Persons with Disabilities, adopted by the General Assembly of the United Nations on 13 December 2006, ratified and implemented by Law no. 18 of 3 March 2009, subjects the discretion of the legislator to an absolute limit consisting in “respect for an essential core of guarantees for the individuals affected” (Judgment no. 80 of 2010), which includes school transportation and assistance service, as this is an essential element in ensuring the efficacy of that very right for disabled students.

6.– In this case, the regional legislator has taken on the burden of contributing to the relative expenditure in order to guarantee the implementation of the right. However, a provision that leaves uncertain the existence and amount of the contribution renders it aleatory, thus has a detrimental effect on the ability to plan the service and to guarantee its efficacy on the basis of the requirements throughout the territory.

7.– It must be concluded that the indeterminate nature and inadequacy of the financing will affect, and has already affected, the effective provision of the assistance and transportation service as arranged by the regional legislator, thereby violating the principle laid down in Article 38(3) and (4) of the Constitution.

Such efficacy can only be assured if the financial resources needed in order to satisfy that right are secured, within the context of the composite administrative and financial relations between the local government bodies involved. In fact, the legitimate

expectation generated by the provision for the regional contribution conditions the level of financial resources of the Province and the other bodies involved in providing the service in question.

Within this context, it is also not possible to accept the argument formulated by the Region according to which every right, including the inalienable ones in the situation under examination, must always and in any case be subject to a review as to their sustainability within the overall context of available resources.

First and foremost, sustainability cannot be verified with reference to the overall resources allocated on various grounds through aggregate numerical considerations. Whilst this may be permitted in relation to current discretionary spending, the position is different for services that have a direct impact on the legal status of disabled persons who wish to attend and receive support within school.

Secondly, it is precisely the Law in which the contested provision is contained that specifically identifies the individual circumstances in which assistance is provided (however, without then allocating the necessary funding as a result of the phrase referred to, which limits its scope).

This Court has already taken the opportunity to assert that “in accordance with Article 38(3) of the Constitution, the right to education of the disabled along with their integration into schools have been provided for in particular by Law no. 104 of 5 February 1992 (Framework law on assistance to, the social integration of and the rights of the disabled)”, which “grants to the disabled the individual right to education and instruction from preschool through to university”; and that “participation by the disabled ‘in the educational process with able-bodied teachers and fellow students is [...] a significant factor for socialisation and can provide a decisive contribution to stimulating the potential of the disabled individual (Judgment no. 215 of 1987)’” (Judgment no. 80 of 2010).

8.– Moreover, the contested provision is incoherent also within the context of the overall legislative framework of the financing allocated to services of social significance as resulting from the budgetary law, to which it allocated reduced financing. This has the effect of rendering generic and undefined the financing of services relating to rights that deserve particular protection, establishing the possibility – as was specifically asserted by the referring court – that the available resources may be allocated to non-mandatory expenditure rather than to guaranteeing the implementation of those rights. Therefore, whilst the provision in question was enacted within a context different from that of a budgetary law, its impact on the budget has the effect of rendering the legislation unconstitutional.

9.– The guarantee of 50% of financing for the assistance service for disabled persons relates to the arrangement of the structure and organisation of that very service. Therefore, the indeterminate nature of the financing has impaired the efficacy of the assistance and transportation service, as established by the regional legislature, resulting in a violation of Articles 38(3) and (4) of the Constitution.

10.– On the other hand, it must be considered that, whilst the legislator has discretion in identifying the measures for protecting the rights of disabled persons, that discretionary power is subject to the absolute limit of the need for coherence inherent within the Regional Law containing the contested provision, which specifies the inderogable core of guarantees for the interested parties. Therefore, whilst the level of service due appears to have been safeguarded by the regional law as a whole and in particular insofar as it provides for planning for the need for intervention, along with a precise

account of the charges borne, it is then thwarted by the contradictory requirement which subjects the financing (by the region) of action to the policies and ordinary management of the body's budget.

11.– It is also not possible to accept the argument that, were the contested provision not to state the limit of the amounts allocated in the budget, the provision would violate Article 81 of the Constitution due to a lack of financial coverage. Leaving aside the fact that, once identified through legislation, the absolute core of minimum guarantees for giving effect to the right to study and education of disabled pupils cannot be subject to absolute and general financial constraints, it is entirely evident that the supposed violation of Article 81 of the Constitution is the result of an incorrect conception of the concept of budgetary equilibrium, having regard both to the Region and to the co-funding Province. It is the guarantee of inviolable rights that must condition the budget, whilst conversely the need for budgetary equilibrium cannot condition the requirement to provide such services.

12.– As far as the Region is concerned, it must be stressed that the framework of Abruzzo Regional Law no. 78 of 1978 follows a policy-based methodology, according to which both initiatives and the relevant financial charges are determined during the previous year in order to enable them to be registered correctly in the budget, above all where they relate to the inviolable core of the right to services that can be ascribed to fundamental rights. In this way, contrary to the concerns expressed by the Region, it is not possible to discern any risk to the Region's budgetary equilibrium, in relation to the allocation of the percentage financing provided for by law. Precisely the fact that assistance plans are prepared in advance is testament to the implausibility of the hypothesis of a budgetary imbalance, which by contrast directly results from the diffuse usage of resources, which the referring court identifies as the genuine cause of the lack of financial coverage for the service.

13.– Within the case under examination, the causal relationship between the budgetary allocation and the adverse impact on the exercise of inviolable rights results from the combination of the contested provision and the generic nature of the financial item in the budget, which embraces indiscriminately various types of charge, coverage for which is left to the pure discretion of the author of the budget and of the spending authorisations granted during the year. It essentially reiterates, on a substantive level, the financial framework already objected to by this Court according to which, when drawing up and managing the budget, allocative choices concerning resources are made, including through simple numerical data contained in budgetary laws and the related annexes, which are “amenable to review as they fall ‘under the overall schedule of constitutional values, the striking of a balance between which and the reasonable assessment of which are left to the prudent assessment of this Court (Judgment no. 260 of 1990)’” (Judgment no. 10 of 2016).

14.– Ultimately, within the context of finance, there is no “absolute limit on the power of review of legislation by the Constitutional Court”. By contrast, to conclude that a power of review in this area is recognised under the Constitution “cannot have any meaning other than to assert that it falls within the overall schedule of constitutional values”, with the result that “it cannot be hypothesised that the law approving the budget or any other law impinging upon it establishes a free zone falling outside any power of review by the Constitutional Court, as no constitutional value can be considered to be exempt from the inviolable guarantee represented by constitutional review proceedings with regard to its implementation” (Judgment no. 260 of 1990). In

relation to this matter, it is also important to recall “that the issue of the legal status of the disabled involves the confluence of several values pertaining to the fundamental values inspiring the Constitution, and that consequently, the canon of interpretation to be used in this area essentially results from the interaction and integration between the principles through which those values are expressed and protected” (Judgment no. 215 of 1987).

15.– It is equally unfounded to assert that the provision takes account of the duty to contribute of those with the ability to pay tax. There is no trace of such a contribution at any point throughout Abruzzo Regional Law no. 78 of 1978; above all, moreover, the literal wording of that law relates to a guarantee of necessary and documented expenditure without evoking other sources of financing.

16.– Finally, it is not possible to endorse the argument that the choices contained within the budget are not made in a generic manner, but rather with reference to a specific inquiry based on the acquisition of preventive intervention plans drawn up by the Provinces on the basis of the needs identified during the current school year along with those declared by the parents of the student registering for the first time in upper secondary education. The “genetic” flaw within the contested provision is precisely the disregard for the results of the plan, which enables it to be set aside, beyond any reasonable argumentation: to render 50% of financing for expenditure that has already been quantified by the Provinces (in accordance with the planning regulated by the regional legislator) conditional upon generic and undefined budgetary allocations gives rise to a situation characterised by unpredictability and uncertainty, resulting from financial choices which the Region may make by means of simple numerical operations, without any requirement to provide reasons in relation to the scale of values which the budgetary resources are intended to support.

17.– In this regard, past data relating to the regional contributions in both absolute and percentage terms appear to be significant: it is stated in the referral order – and the figures are not disputed by the parties – that “for financial year 2008, 1,400,000.00 were allocated in the budget in order to implement Article 6(2-bis) of Regional Law no. 78 of 1978, with the result that the provinces obtained joint financing of 39% (rather than 50%) of the amounts spent; for the following financial year 2009 only 700,000.00 were allocated in the budget, and hence the provinces obtained joint financing of just under 18%; in 2011, the percentage was around 26%; in 2012, it was around 22%”. The efficacy of the service has been clearly undermined not only in quantitative terms but also as a result of the absolute discontinuity between the percentages of cover eligible for financing.

18.– This confirms the referring court’s argument that “as discretionary spending, or at least not mandatory in a fixed amount, the regional contributions for the transportation of disabled persons may already be reduced during the administrative stage in which the basic budgetary items are determined, even though there is no indication of this or any limit capable of giving effect to the rights provided for under the Constitution, on which this transportation service is based”.

19.– As a result of these arguments, Article 6(2-bis) of Abruzzo Region Law no. 78 of 1978 must be declared unconstitutional with regard to the phrase “, subject to the financial resources allocated within annual budgetary laws and registered under the relevant expenditure item”.

20.– The further objections raised with reference to Article 10 of the Constitution in relation to Article 24 of the United Nations Convention on the Rights of Persons with Disabilities are moot.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares that Article 6(2-bis) of Abruzzo Region Law no. 78 of 15 December 1978 (Action to implement the right to education), introduced by Article 88(4) of Abruzzo Region Law no. 15 of 26 April 2004 laying down “Financial provisions on the drafting of the 2004 annual budget and the 2004-2006 multi-year budget of Abruzzo Region (Regional Finance Law 2004)” is unconstitutional with regard to the phrase “, subject to the financial resources allocated within annual budgetary laws and registered under the relevant expenditure item,”.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 19 October 2016.