



Corte costituzionale



JUDGMENT NO. 200 OF 2008

FRANCO BILE, PRESIDENT
GAETANO SILVESTRI, AUTHOR OF THE JUDGMENT



JUDGMENT No. 200 YEAR 2008

In this case the Court examined the provisions of the law on bankruptcies governing applications by the insolvent debtor for discharge during the year following the order terminating bankruptcy proceedings, according to which the law did not provide for the notification of the creditors that such an application was pending. The Court recalled its prior case law that in discharge proceedings the minimum guarantees of a fair hearing must be respected, including the right to participate. Since the arrangements did not contain any provision enacted in order to ensure the said participation, the Court found that the legislation breached Article 24 of the Constitution and accordingly declared it unconstitutional.

THE CONSTITUTIONAL COURT

Composed of: President: Franco BILE; Judges: Giovanni Maria FLICK, Francesco AMIRANTE, Ugo DE SIERVO, Paolo MADDALENA, Alfio FINOCCHIARO, Alfonso QUARANTA, Franco GALLO, Luigi MAZZELLA, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO, Paolo Maria NAPOLITANO,

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Articles 3(1), (6), (7) and (8) of Calabria Region law No. 2 of 5 January 2007 (Establishment and regulation of the Regional Board of Appeal [*Consulta Statutaria*]), commenced pursuant to an application by the President of the Council of Ministers served on 12 March 2007, filed in the Court Registry on 20 March 2007 and registered as No. 16 in the Register of Appeals 2007.

Considering the entry of appearance by Calabria Region;

having heard the judge rapporteur Gaetano Silvestri in the public hearing of 15 April 2008;

having heard the *Avvocato dello Stato* Gianna Maria De Socio for the President of the Council of Ministers Raffaele Silipo, barrister, for Calabria Region.

The facts of the case

1. – By application served on 12 March 2007 and filed on 20 March, the President of the Council of Ministers raised questions concerning the constitutionality of Articles 3 (1), (6), (7) and (8) of Calabria Region law No. 2 of 5 January 2007 (Establishment and regulation of the Regional Board of Appeal), due to violation of Articles 102, 103, 117(2)(1) and 123(4) of the Constitution.

1.1. – In particular, the applicant considers that insofar as it provides that “For the duration of their mandate of six years, the members of the Board of Appeal may not be prosecuted before the criminal, civil or administrative courts exclusively on account of the opinions expressed (whether dissenting or assenting) and their votes cast strictly within the ambit of their functions”, Article 3(1) of Calabria Region law No. 2 of 2007 violates Article 117(2)(1) of the Constitution, “since the regions may in no case make any autonomous provision for excuses providing grounds for exemption from criminal, civil and administrative liability that have not already been provided for under state legislation”.

1.2. – With regard to the challenges to Articles 6, 7 and 8 of Calabria Region law No. 2 of 2007, the President of the Council of Ministers notes that these provisions confer upon the Regional Board of Appeal “additional powers” that go beyond the issue of simply consultative opinions, “providing that the Board may adopt decisions and opinions with binding effect on the interested parties and on all regional bodies and authorities, a feature which is characteristic of court rulings”.

According to the state representative, this results in a breach of Article 123 of the Constitution, insofar as it provides that “the statute of every region shall make provision for a Council of Local Government Bodies, which shall operate as a forum for consultation between the region and the local authorities”.

Moreover, the provisions are also argued to overstep the limits put in place by the Constitutional Court in judgment No. 378 of 2004, with the Calabria Regional Board of Appeal taking on a “hybrid character” as a consultative body and, at the same time, an authority “endowed with decision making powers that are binding on all regional bodies and authorities”.

The applicant therefore argues that the provisions contained in Articles 6, 7 and 8 violate Articles 102, 103 and 117(2)(1) of the Constitution in that they confer upon the Regional Board of Appeal the power to “make decisions concerning the interpretation of the provisions which specify the competences of the public administrations, a matter reserved, pursuant to Articles 102 and 103 of the Constitution, to the ordinary and administrative courts”. Through the contested provisions therefore, Calabria Region exceeded the bounds of regional competence, provided for under Article 117(2)(1) of the Constitution over matters concerning “judicial and procedural regulations” as well as Articles 102, 103 and 123 of the Constitution.

2. – By writ filed on 10 April 2007, Calabria Region entered an appearance, requesting that the application be rejected.

2.1. – Regarding the question of the constitutionality of Article 3(1) of Calabria Region law No. 2 of 2007, the respondent claims that the provision amounts to a “simple 'extension' to the members of the Board of Appeal of the familiar *immunity* already provided for in relation to the councillors of all regions pursuant to Article 122(4) of the Constitution, with the addition of an adverb (*exclusively*) and an adjective (*strictly*) which in fact aim further to restrict the immunity provided for”.

The region argues that the rationale for the contested provision is to “place the members of the Board of Appeal in such a position that they need not suffer conditioning of any nature during the exercise of their mandate as Guardians of the Statute”, with a view to guaranteeing “the autonomy of the Board of Appeal” in accordance with Article 57(6) of Calabria Region law No. 25 of 19 October 2004 (Statute of Calabria Region). On this point, having recalled that the competences of the Board of Appeal include the assessment of the compatibility with the Statute of the (legislative and regulatory) acts of the Regional Council, the respondent argues that the extension of the immunity to the members of the Board of Appeal satisfies the requirement of guaranteeing “some form of 'equality of arms'” between the latter and the Regional Council.

Therefore, the provision contained in Article 3(1) of Calabria Region law No. 2 of 2007 does not place the members of the Board of Appeal in a “privileged position”, nor

does it result in “any unlawful interference in the sphere of powers exclusively reserved to the state authorities”.

The same rationale also underlies Article 6(2) of Calabria region law No. 2 of 2007; indeed, the right of the members of the Board of Appeal to submit “signed additional reasons that are different from (alternative opinions) or contrast with (dissenting opinions)” those adopted collectively, is intended to safeguard the “decision making autonomy of the Board of Appeal”.

2.1.1. – According to Calabria Region moreover, “whilst on the one hand it would appear that the Court's case law in this area has been consistent in finding that the regions do not have competence over the situations in dispute, including exemptions from liability, it is nonetheless true that many aspect of the question are still in dispute within the academic literature”. On this matter, the respondent points out that there have been no lack of “attempts to mitigate the rigidity of the reservation to the state of competence” over criminal law following the reform of Title V of Part II of the Constitution.

For the above reasons, Calabria Region considers that, in the case before the court, it is “excessive” to invoke “the general principle of the *state monopoly over judicial matters* and the court system”, arguing that “the logical and theoretical weakness of the preclusion of any regional powers in this area” is “well known”. The region therefore requests that the question concerning the constitutionality of Article 3(1) of Calabria Region law No. 2 of 2007 be ruled groundless.

2.2. – As far as the other challenges are concerned, the respondent argues that the applicant mistakenly specified Article 123 of the Constitution, insofar as it concerns the Council of Local Government Bodies, as one of the constitutional principles which has been violated, pointing to the fact that its nature and functions are different from those of the Regional Board of Appeal.

In the alternative, the regional authorities argue that, by invoking the above principle, the *Avvocatura dello Stato* was seeking to establish that it is impossible for the two organs to cohabit within the regional body, since the existence of the Council of Local Government Bodies would render “any competence vested in the Board of Appeal to settle disputes between the region and smaller local authorities useless or unlawful”.

On the strength of this reading of Article 123 of the Constitution, Calabria Region points out the contradiction between the applicant's view, “positive law, and the reality of the majority of regional statutes”, which, amongst other things, often contemplate the Council of Local Government Bodies as bodies which provide the impetus for the assessment made by the authority charged with upholding the Statute.

2.2.1. – Again with regard to the question of the constitutionality of Articles 6, 7 and 8 of Calabria Region law No. 2 of 2007, the regional representative disputes the “rigid approach” pursued by the *Avvocatura Generale dello Stato* and notes that the Constitutional Court has “expressly acknowledged the legitimacy of the regional Boards of Appeal which review the compatibility of regional public acts with the relevant statute, thereby confirming that their existence – provided that it does not entail the annulment of laws, an exclusive prerogative of the Court [...] – does not violate the principle of the *exclusivity of the jurisdiction of the Constitutional Court* [...], a principle which besides has already in part been moderated under Italian law through the mechanisms of constitutional redress which are 'diffuse' in nature”.

2.2.2. – The respondent also argues that the government has not previously challenged the regional statutes which make provision for such regional statute guarantee bodies, stressing that the very same statutes established the regional Boards of Appeal, “in an entirely legitimate manner, as 'hybrid' bodies, performing not only a consultative role, but also endowed with decision making powers, the binding force of which is guaranteed under the various statutes”. Moreover – the region adds – it would be “wholly simplistic [...] to argue that the Boards of Appeal only carry out merely *auxiliary* and *consultative* functions (e.g. 'legislative consultancy') and not also overarching *reviews of the legality of regional legislation* (as the 'Guardians of the Statute’)”.

The region argues on this point that the challenges raised by the President of the Council of Ministers against Articles 6, 7 and 8 of Calabria Region law No. 2 of 2007 are directed “superficially and indiscriminately both against the decision making arrangements as well as the consultative role, arrangements which are however clearly 'distinct' in the law in question”. In particular, the difference between decisions and opinions is grounded “in the different status of the applicant bodies” and falls “within

the ambit of the competences vested in the regional legislature by rules implementing or supplementing the provisions of the statute”, subject to “the only constitutional (and regional statutory) limit” that the body may not “*annul or invalidate acts (presumed to be) lawful*”.

For the above reasons – the respondent adds – Article 8(3) and (4) of Calabria Region law No. 2 of 2007 provide that “*decisions* are 'not' binding where they relate to draft laws or regulations (preventive appeal) or actual laws or regulations of the Council (*ex post* appeal), precisely because *the regional Board of Appeal takes care not to give even simply the impression of 'repealing' regional acts*, and in any case limits itself only to expressing opinions or taking decisions, which the interested bodies must *take into account*, at least 'by correctly and explicitly referring to them when adopting the relevant acts’”.

2.2.3. – Calabria Region also argues that the applicant's complaint that the decisions of the Regional Board of Appeal are of “judicial nature” is absolutely groundless; in particular, the applicant's argument is without foundation with regard to the form provided for (“decision”), since other regional statutes – which have not been contested by the government – speak of “rulings” and “judgments” when referring to the regional boards of appeal. As far as the substance of the decisions of the Regional Board of Appeal are concerned, the respondent points out that there is also a “part containing reasons” in administrative decisions, as well as in court judgments

The region therefore considers that the applicant “automatically and indiscriminately” considers “the adoption, within the limited number of cases provided for, of [...] partially binding decisions (but which do not annul or invalidate!) to contain the core element which is 'typical' of 'court rulings', whilst this feature is in actual fact a characteristic of all acts involving the exercise of power, hence including both legislative and administrative acts”.

2.2.4. – The appellant goes on to claim that the argument submitted by the *Avvocatura Generale dello Stato* concerning the alleged violation of Articles 102 and 103 of the Constitution is also groundless. First, the region points out that the requirement contained in the contested law, in the event of an opinion or ruling that an act does not comply with the Statute, for a second resolution approved by a majority of

the members of the regional council is already provided for under Article 57 of Calabria Region law No. 25 of 2004. Secondly, “nothing and no-one” may in any case prevent “any body or authority which considers that its prerogatives have been infringed by an opinion or decision of the Board of Appeal from appealing to any court which it regards as competent”.

2.2.5. – The region then disputes the reference in the government's application to Constitutional Court judgment No. 378 of 2004, with regard to the unconstitutional status of any provision requiring a specific majority for a subsequent ruling by the regional council pursuant to a negative opinion from the body charged with upholding the statute. In particular, the respondent recalls that, in judgment No. 12 of 2006, the Constitutional Court expressly held that “the issue of legislative procedures falls entirely within the jurisdiction of the Statute pursuant to Article 123 of the Constitution”.

It follows from the above that the provisions contained in certain regional statutes [the respondent refers to Article 57(7) of Calabria Region law No. 25 of 2004, Article 68(8) of Lazio Region law No. 1 of 11 November 2004 (New Statute of Lazio Region) and Article 80(2) of the Statute of 28 December 2006 (Statute of Abruzzo Region)] which “render procedures for the enactment of regional legislation 'more cumbersome' (following a negative opinion of the Board of Appeal)” are compatible with the Constitution.

2.2.6. – In conclusion, Calabria Region claims that the challenges raised by the state representative do not take into account to rationale lying behind the establishment of the bodies charged with upholding the statute, namely the need to ensure that the latter “be *effectively* able to function as a guarantor or protector of the Statute when confronted with cases in which it is violated or disregarded within the Region, including through acts which fall beyond the purview of ordinary controls or which are even not easy to sanction”.

Findings on points of law

1. – The President of the Council of Ministers raised the questions of the constitutionality of Articles 3(1), (6), (7) and (8) of Calabria Region law No. 2 of 5

January 2007 (Establishment and regulation of the Regional Board of Appeal), due to violation of Articles 102, 103, 117(2)(1) and 123(4) of the Constitution.

2. – As a preliminary matter, the Court finds that the questions concerning the constitutionality of Articles 6, 7 and 8 of Calabria Region law No. 2 of 2007, commenced with reference to Article 123(4) of the Constitution, are inadmissible.

Article 123(4) provides for the establishment with each region of a “Council of Local Government Bodies, which shall operate as a forum for consultation between the region and the local authorities”. The Regional Board of Appeal established and regulated by the Calabria Region law at issue in these proceedings is a body that is clearly different from that provided for under Article 123 of the Constitution, since it does not perform an intermediary and consultative role for the Region and the local authorities but, in Calabria as in other regions, performs the role of guarantor and consultant on the application and interpretation of the provisions contained in the statute. The constitutional provision invoked by the applicant therefore relates to a body different to that covered by Calabria Region law No. 2 of 2007, which therefore means that the related challenge to the constitutionality of that provision is inadmissible.

3. – The question concerning the constitutionality of Article 3(1) of Calabria Region law No. 2 of 2007 is well founded.

The special guarantee contained in Article 122(4) of the Constitution, related to that provided for under Article 68(1) of the Constitution, grants immunity to regional councillors in relation to the votes cast and their opinions expressed when exercising their duties. This Court has identified the rationale for this constitutional guarantee in the “analogy with the guarantees granted to Members of Parliament [...] relating to the essential common core which is characteristic of the functions of the 'representative' organs of the state and the regions”, and has the goal of “protecting the highest functions of political representation, including *in primis* the legislature, seeking to guarantee the free process of the formation of a political consensus from any interference by other powers” (judgment No. 69 of 1985).

The constitutional law requirement underlying the guarantee in question allows for “exceptional derogations from the prosecution by the courts of their functions”. As far as the regions are concerned, the extension of this type of immunity to individuals other

than regional councillors “contrasts both with a literal reading of Article 122 of the Constitution as well as the rationale behind the institution” (judgment No. 81 of 1975: the case before the court concerned the extension of the guarantee of immunity to the members of the Regional Council). The exception allowed under the Constitution, which remained unchanged following the reform of Title V of Part II of the Constitution, must therefore be interpreted narrowly. Any extension beyond the precise limits set under the Constitution amounts to a violation of the integrity of the role of the courts, charged with overseeing the equality of citizens before the law.

The introduction of new grounds for exemption from criminal, civil or administrative liability would also clearly exceed the legislative remit granted under the Constitution to the regions, since they fall under matters reserved to the exclusive legislative competence of the state pursuant to Article 117(2)(1) of the Constitution.

4. – The question concerning the constitutionality of Article 6 of Calabria Region law No. 2 of 2007, raised with reference to Articles 102, 103 and 117(2)(1) of the Constitution, is groundless.

The applicant avers, in support of its argument that the contested provision is unconstitutional, that the ability of the members of the Regional Board of Appeal for Calabria Region to submit, in relation to decisions alone and not also opinions, “signed additional reasons that are different from (alternative opinions) or contrast with (dissenting opinions) those adopted collectively by the Board of Appeal in support of the measure adopted” (sub-section 2) is an indication of the alleged judicial nature of the body, which means that its creation under regional law was unlawful.

Without prejudice to the comments which will be made below concerning the judicial nature of the Regional Board of Appeal concerned, with regard to the functions conferred upon the Board by Calabria Region law No. 2 of 2007, the Court finds that the simple provision for the possibility for members to register in an official manner the grounds for their assent to or disagreement with a ruling adopted does not mean that the body in question is a court, since such a right is granted to the members of all administrative boards, albeit with different procedures for its exercise and registration. In the case before the court, since the relevant body is a regional body, the regulation of

the procedures for the exercise of this right fall within the autonomous organisational powers endowed upon the region under the terms of Article 117 of the Constitution.

It would also be contradictory to find that a body is judicial in nature on the basis of a right generally guaranteed by the law to the members of administrative boards and that is by contrast granted to members of judicial bodies only in limited cases and for specific goals.

5. – The questions concerning the constitutionality of Articles 7 and 8 of Calabria Region law No. 2 of 2007 are well founded within the limits indicated below.

5.1. – This Court has already stated that “the introduction of guarantee body within the regional legal system does not as such infringe the Constitution, provided that the compatibility of the provisions conferring specific competences on the same be assessed on a case by case basis” (judgment No. 12 of 2006).

There is no doubt that these guarantee bodies may be endowed with consultation rights, even where a negative opinion gives rise to an obligation to review the act (judgment No. 378 of 2004). In the case before the court, it is necessary to establish whether the provision contained in the contested legislation allowing for “decisions” on matters determined therein may be regarded as compatible with the administrative nature of the body or whether, by contrast, the binding nature of these acts qualifies them as substantively judicial and therefore as falling outwith the regional legislature's sphere of competence.

In the light of the common principles which underlie the classification of the acts of public authorities, the court finds that the competence to take decisions is not reserved to judicial bodies, since Italian law has for a long time recognised various types of act as falling within the category of administrative decisions. Such decisions are characterised by the fact that they are administrative checks, aimed at resolving disputes, and deciding, in specific cases, on the applicability of a provision or on the manner in which a provision is to be applied.

If the decision making powers of the Regional Board of Appeal listed in Article 7(2) of Calabria Region law No. 2 of 2007 are specifically examined, it is clear that they concern: *a*) conflicts between regional bodies; *b*) conflicts between regional bodies and

local authorities; *c*) the compatibility of draft laws or regulations with the Statute; *d*) the procedural and substantive admissibility of applications for *referenda*.

As Article 8(1) goes on to specify, the “decisions” have binding force on regional bodies and on “the other interested institutional bodies”.

The decisions concerned are therefore administrative decisions intended to eliminate doubts and disputes over the interpretation of the provisions of the Statute and of regional laws concerning the relations between the Region and the other bodies which operate inside the region. It is hardly necessary to point out that such decisions may neither preclude nor in any way limit the competence of the courts – whether ordinary or administrative – which may be called upon, according to established procedures, to rule on the same acts which have already been assessed by the Regional Board of Appeal. The legality of these “decisions” of the Board of Appeal may obviously be reviewed before the competent courts.

It must also be added that the list of the competences of the Regional Board of Appeal mirrors that contained in Article 57(5) of the Statute of Calabria Region, and also that the binding nature of the rulings of the guarantee body is compatible with Article 57(7), which provides that: “The regional bodies shall comply with the decisions of the Board of Appeal. The Regional Council may nevertheless pass resolutions by a majority of its members, supported by reasons, which reject individual rulings”. In accordance with the provision of the Statute cited above, Article 8(3) of Calabria Region law No. 2 of 2007 provides in fact that: “Where the Board of Appeal considers that the Statute has been violated by a simple draft law or regulation of the Regional Council, the latter may in any case pass resolutions by a majority of its members, supported by reasons, which reject decisions of the Board of Appeal”.

It must be concluded from the above that the aforementioned competences of the Regional Board of Appeal, as provided for under the contested provisions, are not of a judicial nature and are compatible, within the limits set out above, with the Statute.

If the contested provisions are interpreted as being compatible with the Statute, it necessarily follows that the binding nature of the “decisions” of the Regional Board of Appeal must be maintained with regard to regional organisation, which covers “all regional bodies and authorities”; accordingly, the other “interested bodies” mentioned in

Article 8(2) cannot include the local authorities, the autonomy of which is guaranteed under Article 114(1) and (2) of the Constitution.

5.2. – The Court finds on the other hand that Article 8(4) of Calabria Region law No. 2 of 2007 is unconstitutional, since any evaluation of regional laws enacted or regulations issued exclusively falls within the exclusive competence respectively of the Constitutional Court and the ordinary or administrative courts. In order not to infringe the sphere of competence of the Constitutional Court or of the ordinary courts, the competence of the Regional Board of Appeal may only be preventive in nature, and may hence only be exercised during the course of decision making procedures. Any review of the legality of legislative or administrative acts carried out after their promulgation or issue does not fall within the ambit of regional powers.

5.3. – In addition to Article 8(4), the Court finds that Article 7(3) is unconstitutional in respect of the phrase “Except cases involving disputes between regional bodies or between the region and local authorities resulting from a law or regulation and in which the subjects with standing to take action must appeal to the Board of Appeal within 30 days of the promulgation of the law”.

The grounds for the declaration of the unconstitutionality of this provision are similar to those stated in relation to Article 8(4), since the Regional Board of Appeal may not be called upon to review the legality of regional laws already promulgated or regulations already issued. No appeal to this body is therefore admissible after the promulgation of a law or the issue of a regulation, since any review of the legality thereof is reserved to the Constitutional Court and the ordinary and administrative courts, subject to the time limits, within the substantive limits and according to the procedures provided for under the Constitution and the law in force.

on those grounds

THE CONSTITUTIONAL COURT

declares that Article 3(1) of Calabria Region law No. 2 of 5 January 2007 (Establishment and regulation of the Regional Board of Appeal) is unconstitutional;

declares that Article 7(3) of Calabria Region law No. 2 of 2007 is unconstitutional in respect of the following words: “Except cases involving disputes between regional bodies or between the region and local authorities resulting from a law or regulation and

in which the subjects with standing to take action must appeal to the Board of Appeal within 30 days of the promulgation of the law,”;

declares that Article 8(4) of Calabria Region law no. 2 of 2007 is unconstitutional;

rules that the questions concerning the constitutionality of Articles 6, 7 and 8 of Calabria Region law No. 2 of 2007 raised, with reference to Article 123(4) of the Constitution, by the President of the Council of Ministers in the application mentioned in the headnote, are inadmissible;

rules that the question of the constitutionality of Article 6 of Calabria Region law No. 2 of 2007 raised, with reference to Articles 102, 103 and 117(2)(1) of the Constitution, by the President of the Council of Ministers in the application mentioned in the headnote, is groundless;

rules that the questions concerning the constitutionality of Article 7(1), (2), (4), (5), (6), (7) and (8) of Calabria Region law No. 2 of 2007 raised, with reference to Articles 102, 103 and 117(2)(1) of the Constitution, by the President of the Council of Ministers in the application mentioned in the headnote, are groundless;

rules that the questions concerning the constitutionality of Article 8(1), (2) and (3) of Calabria Region law No. 2 of 2007 raised, with reference to Articles 102, 103 and 117(2)(1) of the Constitution, by the President of the Council of Ministers in the application mentioned in the headnote, are groundless.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 9 June 2008.

Signed:

Franco BILE, President

Gaetano SILVESTRI, Author of the Judgment

Gabriella MELATTI, Registrar

Filed in the Court Registry on 13 June 2008.

The Director of the Registry

Signed: MELATTI