



Corte costituzionale



JUDGMENT NO. 224 OF 2009

FRANCESCO AMIRANTE, President

PAOLO MADDALENA, Author of the Judgment

JUDGMENT NO. 224 YEAR 2009

In this case the Court considered a provision which imposed a disciplinary penalty on a magistrate who took up an appointment in a political party as president of its provincial federation on the grounds that it violated the equality of political rights and the judge's right of association. The Court ruled the question groundless, finding that the requirement for the judiciary to be, and to appear, impartial was sufficiently significant to justify a restriction on the judge's political rights. "the introduction of the prohibition is the corollary of a duty of impartiality which applies to the magistrate, extending also to his conduct as an ordinary member of the public, at all times of his working life."

THE CONSTITUTIONAL COURT

composed of: President: Francesco AMIRANTE; Judges: Ugo DE SIERVO, Paolo MADDALENA, Alfonso QUARANTA, Franco GALLO, Luigi MAZZELLA, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO, Paolo Maria NAPOLITANO, Giuseppe FRIGO, Alessandro CRISCUOLO, Paolo GROSSI,

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 3(1)(h) of legislative decree No. 109 of 25 February 2006 (Provisions to regulate breaches of discipline by magistrates, the relative sanctions and the procedures for their application, as well as amendments to the arrangements governing the exemption from service and transfer between offices of magistrates, pursuant to Article 1(1)(f) of law No. 150 of 25 July 2005), as amended by Article 1(3)(d)(ii) of law No. 269 of 24 October 2006 (Suspension of the effectiveness of and amendments to the provisions governing the organisation of the judiciary), commenced by the Disciplinary Section of the *Consiglio superiore della magistratura* [Supreme Council of the Judiciary] in proceedings concerning L.B. by the referral order of 11

November 2008, registered as No. 23 in the register of orders 2009 and published in the *Official Journal of the Republic* No. 6, first special series 2009.

Heaving heard the Judge Rapporteur Paolo Maddalena in chambers on 10 June 2009.

The facts of the case

By referral order of 11 November 2008, the Disciplinary Section of Supreme Council of the Judiciary raised, with reference to Articles 2, 3, 18, 49 and 98 of the Constitution, a question concerning the constitutionality of Article 3(1)(h) of legislative decree No. 109 of 25 February 2006 (Provisions to regulate breaches of discipline by magistrates, the relative sanctions and the procedures for their application, as well as amendments to the arrangements governing the exemption from service and transfer between offices of magistrates, pursuant to Article 1(1)(f) of law No. 150 of 25 July 2005), as amended by Article 1(3)(d)(ii) of law No. 269 of 24 October 2006 (Suspension of the effectiveness of and amendments to the provisions governing the organisation of the judiciary).

The referring disciplinary section states that the *Procuratore Generale* [representative of the Attorney General's office] with the Court of Cassation initiated disciplinary proceedings against Mr Luigi Bobbio, a magistrate currently not included on the staff register of the judiciary on the grounds that he is employed on a consultancy basis by Parliament, having formerly also been a Member of Parliament, charging him with having violated Articles 1 and 3(1)(h) of legislative decree No. 109 of 2006, as amended by law No. 269 of 2006, as well as the code of ethics of the judiciary, on the grounds that on 5 May 2007 he had accepted and taken up the position of president of the provincial federation for Naples of the party *Alleanza Nazionale* [National Alliance].

The contested provision stipulates that the joining of or systematic and ongoing participation in political parties or the involvement in the activities of subjects operating in the business and financial sector which may condition the exercise of his functions or

otherwise compromise the image of a magistrate amounts to a breach of the disciplinary code.

The referring body points out that, according to the letter and the rationale of the law, a political appointment – namely the act of joining a political party and even more so the acceptance of an important position within a political party, acts which represent and presuppose a consistent political activity – are not in any way treated differently depending on whether or not they relate to political parties that are certainly “legitimate” and as such represented in Parliament.

According to the referring body, Article 49 of the Constitution establishes the right for every citizen, without distinctions of any kind, to associate themselves freely, that is without formal or substantive conditioning, into parties in order to contribute to the fundamental objective that is the democratic determination of national politics.

The Disciplinary Section goes on to observe that Article 98, last sub-section, of the Constitution provides that the law may lay down limitations on the exercise of the right to stand as a candidate in an election of, *inter alia*, magistrates. Ordinary legislation expressly governs the exercise of that right by imposing the specific limitation consisting in the precautionary removal from the register (Article 8 of presidential decree No. 361 of 30 March 1957 – “Approval of the consolidated text of laws laying down provisions governing elections to the Chamber of Deputies”, as amended by law No. 13 of 3 February 1997). The fact that a magistrate is clearly entitled to stand as a candidate for election means that Parliament was not unaware of the inherently political nature of the candidacy and the fact that it is organised within a party, and accordingly, whilst this may justify the limit of the provision for the above precaution, it does not mean that it may be rejected.

The contested provision by contrast – the referring body specifies – introduces “a genuine formal and absolute prohibition” on magistrates joining political parties, “reinforced by a sanction for its violation”.

In the opinion of the Disciplinary Section, “for the purposes of the ruling of non manifest groundlessness”, that absolute prohibition goes “beyond the legal notion of a mere

limitation, namely a regulation which reconciles the political right of the individual with the requirement of impartiality of the judge, including the need that he appear to be impartial”.

It was not within the intention of the Constituent Assembly to consider political parties as such to be equivalent to centres of business or economic power, which the contested provision however mentions, when imposing a penalty, within the same context and as alternative situations, almost as if the judgment of the negative value of all the above possible affiliations that are intended to be prohibited for judges must of necessity be the same.

According to the referring body, “as regards the participation or involvement of the magistrate in centres of business or power, including those with a political orientation”, no “problem [arises] of respect for the constitutional principle of the equality of political rights, starting from the right of association pursuant to Article 2 of the Constitution which is conferred on all citizens”, whilst such a problem does present itself for the threatened punishment for the joining of and systematic participation in the life of a “legitimate party”.

Ultimately, the contested provision is stated to contain a kind of contradiction – which cannot be resolved through interpretation – with the legislation which legitimises, by regulating it, the participation of magistrates in elections.

There is moreover an evident contrast between the prohibition and punishment concerned and the complex and detailed constitutional arrangements, founded on Article 18 of the Constitution, which consider political parties which respect the methods of the basic law, and therefore which are not organised along military lines, as an essential forum for democracy and specifies the participation in such parties also as an individual right, as well as an inalienable instrument of democracy and, therefore, an extension of the principle laid down by Article 3 of the Constitution.

Conclusions on points of law

1. – The question concerning the constitutionality raised by the referral order mentioned in the headnote concerns Article 3(1)(h) of legislative decree No. 109 of 25 February 2006 (Provisions to regulate breaches of discipline by magistrates, the relative sanctions and the procedures for their application, as well as amendments to the arrangements governing the exemption from service and transfer between offices of magistrates, pursuant to Article 1(1)(f) of law No. 150 of 25 July 2005), as amended by Article 1(3)(d)(ii) of law No. 269 of 24 October 2006 (Suspension of the effectiveness of and amendments to the provisions governing the organisation of the judiciary), which provides that – alongside involvement in the activities of subjects operating in the business and financial sector which may condition the exercise of the functions or otherwise compromise the image of the magistrate – the joining or systematic and ongoing participation in political parties by magistrates amounts to a breach of the disciplinary code.

In the opinion of the Disciplinary Section of the Supreme Council of the Judiciary, which raised the question of constitutionality with reference to Articles 2, 3, 18, 49 and 98 of the Constitution, the formal and absolute prohibition on the joining of political parties by magistrates, reinforced by a sanction for its violation, goes beyond the legal notion of a mere limitation, namely a regulation which reconciles the political right of the individual with the requirement of impartiality of the judge, including the need that he appear to be impartial, and unreasonably treats membership of political parties and centres of business or business power as equivalent for the purposes of the same judgment of censure.

Moreover, the contested provision conflicts with the constitutional principle of the equality of political rights, starting from the right of association conferred on all citizens by Article 2 of the Constitution, and contradicts with the legislation (Article 8 of presidential decree No. 361 of 30 March 1957 – “Approval of the consolidated text of laws laying down provisions governing elections to the Chamber of Deputies”, as amended by law No. 13 of 3 February 1997) which legitimises, by regulating it through the institute of precautionary removal from the register, the participation of magistrates in elections.

More generally, the prohibition and punishment under examination are claimed to contrast with the complex and detailed constitutional arrangements, grounded on Article 18

of the Constitution, which consider political parties which respect the methods of the basic law, and therefore which are not organised along military lines, as an essential forum for democracy and specifies the participation in such parties also as an individual right, as well as an inalienable instrument of democracy and, therefore, an extension of the principle laid down by Article 3 of the Constitution.

2. – The question is groundless.

It must be recognised – and there can be no doubts on this matter – that magistrates must enjoy the same freedoms guaranteed to all other citizens and that they may therefore, obviously, not only share a political idea, but also expressly manifest their own opinions in that regard.

But it must at the same time be accepted that the functions exercised and the role occupied by magistrates are not indifferent and without effects for the constitutional order (judgment No. 100 of 1981).

Due to the nature of their role, the Constitution sets out highly specific arrangements for magistrates, contained in Title IV of Part II (Articles 101 *et seq*): these arrangements on the one hand assure a special position, whilst on the other hand as a corollary entail the imposition of special duties.

Under the terms of the Constitution (Articles 101(2) and 104(1) of the Constitution), magistrates must be impartial and independent and these values must be protected not only with specific reference to the concrete exercise of their judicial functions, but also as a rule of professional conduct to be observed for all conduct in order to prevent the emergence of any well-founded questions as to their independence and impartiality.

Precisely from this perspective, when weighing up the freedom to associate oneself within a party, protected by Article 49 of the Constitution, against the requirement to guarantee the impartiality of magistrates and also the appearance of independence from the interests of the parties which contend for power, Article 98(3) of the Constitution delegates to ordinary legislation the ability to establish “limits on the right of magistrates to join political parties” (as well as for the other categories of public officials contemplated

thereunder: “career soldiers on active service, police officers and agents, diplomatic and consular representatives abroad”).

Although it is not mandatory, the Constitution however makes it possible to introduce through ordinary legislation, in order to protect and safeguard the impartiality and independence of the judiciary, a prohibition on joining political parties for magistrates: the purpose of this is therefore to reinforce the guarantee that they are subject only to the Constitution and the law and in order to prevent the exercise of their delicate functions from being overshadowed by the fact that they are associated with a party structure which also entails internal hierarchical constraints.

The contested provision has implemented the constitutional provision, stipulating that not only the fact of being a member, but also “the systematic and ongoing participation in political parties” amounts to a breach of the disciplinary code: therefore, alongside the formal fact of membership, the systematic alignment with one of the political parties in contention for power is of significance and also precluded for magistrates since, as is the case for membership, it is also liable to condition the independent and impartial exercise of their functions and to compromise their image.

The Court therefore finds that there has been no violation of the constitutional principles invoked by the referring court because, under the constitutional architecture, the independence of the judiciary from political parties and their methods is a value of particular significance and seeks to safeguard the independent and impartial exercise of the judge's functions, since the citizen must be reassured as to the fact that the activity of magistrates, whether as judges or public prosecutors, is not guided by the desire to favour one particular political party.

In particular, the absolute nature of the prohibition, namely the fact that it applies to all magistrates without exceptions – and therefore also those who, as in the case before the referring disciplinary section, do not currently exercise judicial functions – is not at odds with those principles. In fact, the introduction of the prohibition is the corollary of a duty of impartiality which applies to the magistrate, extending also to his conduct as an ordinary

member of the public, at all times of his working life, including also when he has been temporarily removed from the register in order to carry out a technical function.

Nor is there any violation of the right of magistrates to stand as candidates for election, both due to the different nature of the situations under comparison (it is one thing to join or otherwise participate in a political party systematically and on an ongoing basis, whereas access to elected office is entirely another), as well as because that right is not unlimited.

Finally, the fact that the according to the contested provision, alongside the membership or systematic and ongoing participation in political parties, the involvement in the activities of subjects operating in the business or financial sector which may condition the exercise of their functions or otherwise compromise the image of the magistrate is considered to be a breach of the disciplinary code also pursuant to letter h is not a ground for unconstitutionality. It is not inappropriate to treat as equivalent for the purposes of the same judgment of negative value two situations of an entirely different nature and extent. Parliament was by contrast driven by the requirement to provide reinforced protection to the image of the independence of the judge, which may be jeopardised both by the fact that the magistrate is politically active and constrained by a party structure as well as the conditioning, including the appearance of conditioning, resulting from the involvement in the activities of subjects operating in the business or financial sector.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

rules that the question concerning the constitutionality of Article 3(1)(h) of legislative decree No. 109 of 25 February 2006 (Provisions to regulate breaches of discipline by magistrates, the relative sanctions and the procedures for their application, as well as amendments to the arrangements governing the exemption from service and transfer between offices of magistrates, pursuant to Article 1(1)(f) of law No. 150 of 25 July 2005), as amended by Article 1(3)(d)(ii) of law No. 269 of 24 October 2006 (Suspension of the

effectiveness of and amendments to the provisions governing the organisation of the judiciary), raised with reference to Articles 2, 3, 18, 49 and 98 of the Constitution by the Disciplinary Section of the Supreme Council of the Judiciary by the referral order mentioned in the headnote, is groundless.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 8 July 2009.

Signed:

Francesco AMIRANTE, President

Paolo MADDALENA, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 17 July 2009.

The Director of the Registry

Signed: DI PAOLA