JUDGMENT NO. 10 YEAR 2020

The Constitutional Court met to discuss the admissibility of the request for an electoral referendum entitled "Abolition of the proportional method in the allocation of seats in multi-nominal constituencies in the electoral system of the Chamber of Deputies and the Senate of the Republic", presented by eight Regional Councils (Veneto, Piedmont, Lombardy, Friuli Venezia Giulia, Sardinia, Abruzzo, Basilicata, Liguria).

The referendum request concerned, first and foremost, the two electoral laws regarding the Senate and the Chamber of Deputies, seeking to eliminate literal references to multi-nominal constituencies and therefore the proportional allocation of seats, thus transforming the electoral system into an entirely majority system with single-member constituencies.

If a referendum request regards the electoral law of a constitutional body, or one of constitutional relevance, it must in any case, according to constant constitutional case law, ensure that once the law in question has been repealed, a self-applicable law (the so-called "resulting legislation") remains in force, meaning that what survives is sufficient to allow elections to be held immediately. If this is not the case, the outcome of the referendum could paralyse the normal conduct of the activities of the bodies in question.

To this end, the promoters of the referendum also proposed the partial abrogation of the powers delegated to the Government by Law no. 51/2019, with the purpose of implementing the constitutional reform on the reduction of the number of parliamentarians.

In so doing, however, the referendum proposal "radically altered" the meaning and scope of this delegated power, transforming it into a tool to change the electoral system resulting from the referendum.

In fact, all the "somatic characteristics" of the original delegated powers (object, time, guiding principles and criteria) would have been changed, to the extent of giving rise to a new delegated power, potentially fulfilling a dual purpose (the implementation of the constitutional reform on the reduction of members of Parliament and the implementation of the electoral law resulting from the referendum).

For this reason, there would have been an excessive, and therefore inadmissible, manipulation of the original text of the delegating legislation.

For this reason, subsuming all others, the Court declared the referendum request inadmissible.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

[omitted]

Conclusions on points of law

1.– This judgment concerns the admissibility of a referendum request declared lawful by an order of 20 November 2019 by the Central Referendum Office of the Supreme Court of Cassation.

The referendum request, brought by the Regional Councils of the Abruzzo, Basilicata, Friuli-Venezia Giulia, Liguria, Lombardy, Piedmont, Sardinia and Veneto Regions, concerns the abrogation of certain provisions of Decree of the President of the Republic No. 361 of 30 March 1957 (Approval of the consolidated text of laws

containing provisions concerning the election of the Chamber of Deputies), Legislative Decree No. 533 of 20 December 1993 (Consolidated text of laws containing provisions concerning the election of the Senate of the Republic), Law No. 51 of 27 May 2019 (Provisions to ensure the application of the electoral laws irrespective of the number of members of Parliament) and Law No. 165 of 3 November 2017 (Changes to the system for the election of the Chamber of Deputies and the Senate of the Republic. Powers delegated to the Government for the determination of single-member and multi-member constituencies).

[omitted]

5.– Having thus outlined the regulatory context of reference and the set of provisions that the referendum question involved, this Court is called to pronounce judgment on the admissibility of the referendum question in the light of the criteria that can be inferred from Article 75 of the Constitution and the set of "constitutional values, referable to the structures or subjects of referendum requests, to be protected by excluding the relative referendums, regardless of the literal meaning of Article 75(2) of the Constitution" (Judgment No. 16 of 1978).

Hence, not only must a referendum request not affect any of the laws indicated in Article 75 of the Constitution or in any case related to them, but the question to be submitted to the opinion of the electorate must also allow a free and informed choice, thus requiring the question itself to be clear, consistent, and unequivocal, in addition to having a rationally unitary matrix. In this regard, the Court has had occasion to specify that the "freedom of the promoters of referendum requests and the freedom of the electorate called upon to evaluate them should not be confused with each other: it is true that the presentation of requests represents the necessary starting point in a procedure that will conclude with the consultation of the people, but it is no less true that the sovereignty of the people does not imply the sovereignty of the promoters, and that the people themselves must be ensured, in this case, the exercise of their sovereign power" (Judgment No. 16 of 1978). A consequence of this is the further affirmation that an abrogative referendum cannot be "transformed – unquestionably – into a distorted instrument of representative democracy, whereby plebiscites or popular votes of confidence are essentially proposed, in relation to overarching political choices that are inseparable from each other, made by the parties or organized groups that have taken and supported referendum initiatives" (Judgment No. 16 of 1978).

In general, this Court has allowed the trimming of fragments of laws and individual words, on condition, however, that the partial abrogation requested by means of the referendum question does not essentially become "a proposal submitted to the voter, through a trimming of words, with consequent distortion of the original rationale and structure of the provision" (Judgment No. 36 of 1997). In such cases, in fact, losing its abrogative nature, the referendum would betray the very purpose of the instrument, becoming a means of approving new principles and "surreptitiously propositive" (see, *inter alia*, Judgments Nos. 13 of 2012, 28 of 2011, 33 and 23 of 2000, and 13 of 1999; to the same effect, Judgments Nos. 43 of 2003, and 38 and 34 of 2000): the Constitution does not permit such a scenario because a referendum cannot "introduce a new prescription that cannot in itself be derived from the legal order" (Judgment No. 36 of 1997).

Further to the above-mentioned requirements, this Court has added others, on the basis of the specific nature of the subject of a referendum request, always in the perspective of fully implementing the aforementioned "constitutional values". And in this context, it has declared that constitutionally necessary laws, such as, in

particular, electoral laws pertaining to constitutional bodies or those of constitutional rank, whose absence would create a serious breach in the constitutional framework of the powers of the State, may not be totally abrogated by referendum.

In the same way, also the possible partial abrogation of constitutionally necessary laws, and, first and foremost, electoral laws, must in any case guarantee the "indefectibility of the electoral provisions in place" (Judgment No. 29 of 1987), with the necessity to avoid exposing the body whose electoral rules are under discussion "to the albeit only theoretical eventuality of functional paralysis" (Judgment No. 47 of 1991). It is therefore a condition for the admissibility of the question that the outcome of a possible repeal resulting from the referendum will lead to "a coherent residual legislation that is immediately applicable in order to ensure, even in the event of parliamentary inaction, the continued operation of the body" (Judgment No. 32 of 1993; in the same vein, Judgments Nos. 13 of 2012, 16 and 15 of 2008, 13 of 1999, 26 of 1997, and 5 of 1995); in particular, the so-called self-applicability of the resulting legislation is to be understood as "a legal framework capable of ensuring that consultation of the electorate is properly conducted at all stages, from the submission of the candidatures to the allocation of seats" (Judgments Nos. 16 and 15 of 2008). The same requirement also applies in the event of partial unconstitutionality of the electoral laws of the Chamber of Deputies and the Senate (Judgments Nos. 35 of 2017 and 1 of 2014).

It is hardly necessary to add that it is not for this Court, when ruling on the admissibility of an abrogative referendum, to "further the enhancement of the role of the voter in the choice of elected representatives" in order to "allow [Parliament] to flourish", as the promoters of the referendum ask, since in such proceedings, it is only called upon to verify compliance with the constitutional conditions and limitations concerning holding a referendum.

6.– In the case at hand, the referendum question referred to this Court for review is certainly unambiguous with regard to the goal that it seeks to pursue and it is endowed with a rationally unitary matrix. It is clear, in fact, that the aim of the Regional Councils promoting the referendum is to extend the electoral system currently in place for the allocation of three eighths of the seats to all seats in the Chamber of Deputies and the Senate. This plainly emerges from an examination of the fragments of legislation that the question seeks to have removed from Decree of the President of the Republic No. 361 of 1957 and Legislative Decree No. 533 of 1993. Moreover, it can immediately be observed that the proposed interventions regarding the 2019 delegating legislation and the 2017 provision are not extraneous to the same unitary matrix, given that the 2019 provision refers to the one of 2017 in the intentions of those promoting it, inclusion in the question of these provisions too is instrumental to achieving the same result, as will be seen in greater detail below.

With specific regard to the part of the question that concerns the texts of the two electoral laws, namely Decree of the President of the Republic No. 361 of 1957 and Legislative Decree No. 533 of 1993, it should be noted that the referendum proposal reveals some inconsistencies linked, on the one hand, to the continued existence of numerous references to a "list" and "lists" in the normative fabric of the two texts and, on the other hand, to a request to abrogate the Tables containing model ballot papers annexed to both decrees. These are, however, inconveniences that can be overcome through recourse to ordinary interpretative criteria or can in any case be resolved also through purely technical and applicative secondary legislation" (in these terms, for a similar ruling on ballot papers, see Judgment No. 1 of 2014). Faced with drawbacks of this type in referendum questions concerning electoral laws, this

Court has in fact considered that they may be considered irrelevant, provided that they have no effect on the operation of the electoral system and do not paralyse the proper functioning of the body (Judgment No. 32 of 1993). This is not the case here, where inconsistencies arising from the surviving legislative references can easily be overcome by applying ordinary tools of interpretation, and the lack of legal provision regarding the model for the ballot paper can be remedied almost automatically by requiring – including through secondary legislation – the mere conservation of the names of the candidates in the single-member constituencies together with the political groups that support them.

7.– As for the resulting legislation, the Regional Councils promoting the referendum, aware of the aforementioned case law of this Court, take upon themselves the need to ensure its immediate application by means of a twofold process. On the one hand, they call for the elimination of any reference to multi-nominal constituencies, so as to allow for "expansion" to all the seats in the electoral system, currently envisaged only for those assigned in single-member constituencies, thus creating an electoral system that is in itself complete and functional in abstract terms. On the other hand, as the resultant electoral system implies the need to redefine the electoral constituencies, they ask for the partial repeal of the delegation contained in Article 3 of Law No. 51 of 2019 in order to allow the necessary redefinition of the new single-member constituencies.

The requested abrogative referendum, which, as already seen, is not lacking in intrinsic coherence, is however inadmissible due to the absorbing reason that the intervention on the delegating provision is excessively manipulative.

7.1.– In this regard, it should be noted that on other occasions, this Court has already had occasion to address the issue of the need for electoral constituencies to be redefined following a possible abrogative referendum (Judgments Nos. 5 of 1995, 26 of 1997 and 13 of 1999) or the declaration that part of the electoral law is unconstitutional (Judgment No. 1 of 2014).

In particular, in the proceeding on the admissibility of the referendum decided by Judgment No. 5 of 1995, it noted that "[f]ollowing the expansion of the majority system for the allocation of the total number of seats [...], it would be necessary to proceed to a new definition of the single-member constituency in each district, remodelling them so as to obtain a number, across the country, equal to the total number of members of Parliament to be elected and no longer only seventy-five per cent of the total".

With the same decision, noting that the work of revision of the constituencies "is anyway bound to conclude, after a complex procedure, in the approval of a law, or a legislative decree issued by the Government on the basis of new delegating legislation, as occurred in 1993", this Court considered it "decisive to note that when faced with the inaction of the legislator, which is always a possibility, the legal order offers no effective remedy", with the risk of a "crisis in the system of representative democracy, with no possibility of remedying it". It therefore declared the referendum request inadmissible.

In the same way, in the proceeding on the admissibility of the referendum decided with Judgment No. 26 of 1997, the need to "draw up a new definition for the single-member constituencies in each district, reformulating it so as to obtain a number, across the country, equal to the total number of deputies to be elected and no longer [...] 75 percent", led this Court to note that "the electoral system would not allow the renewal of the body", as it could not "be said, at present, that the preparatory work carried out by the special technical commission referred to in

Article 7 of Law No. 276 of 1993 is sufficient, since it would still be necessary for the legislator to intervene, either in order to confer a new delegated power or one based on a different procedural format, in compliance with the principles laid down by law and guaranteed by the opinions of the Chambers". Hence, again, the inadmissibility of the referendum question in point.

With opposite results, but again using the same argumentation, this Court convened, in proceedings on the admissibility of the referendum in the case decided with Judgment No. 13 of 1999, where it found "full protection afforded to the immediate application of the resulting system, in that the single-member constituencies would remain unchanged, with no need for redefinition in relation to each district either in number or in terms of the resulting territorial area".

Lastly, in the proceedings concerning constitutionality that concluded in Judgment No. 1 of 2014, this Court declared incidentally that "the provision that remains in force establishes a mechanism for the transformation of votes into seats that allows the allocation of all the seats, with regard to districts that remain unchanged, both in the Chamber and the Senate".

7.2.- In today's judgment on admissibility, the problem of the determination of the electoral constituencies presents itself in partially different terms from those of the proceedings referred to in the previous paragraph, due to the inclusion in the referendum question of a delegating provision for the revision of the electoral constituencies. Also in this case, however, one cannot fail to observe that the inescapable need for the electoral districts to be redesigned and thus a legislative decree to be adopted for this purpose, i.e. an additional act in respect of the outcome of the referendum, would also end up undermining the prospects of admissibility of the referendum.

Despite being aware of the limits that the requirement of immediate application places on the admissibility of a referendum on electoral laws, this Court does not consider the demolition-reconstruction pathway identified by the promoters to overcome the obstacle of non-self-applicability of the resulting legal framework to be feasible. In fact, in order to prevent the referendum request concerning the texts of the electoral laws of the Chamber of Deputies and the Senate running into the same state of inadmissibility because the resulting law is not self-applying, as already noted in similar cases in constitutional case law, the Regional Councils promoting the referendum find a solution in an application for partial repeal of the delegating provision contained in Article 3 of Law No. 51 of 2019, with the purpose of making it possible to implement it also subsequent to a possibly positive outcome of the abrogative referendum.

In other words, seizing the opportunity given by the existence of a power delegated to the Government by Parliament in order to allow the application of the constitutional reform *in itinere*, aimed at changing the number of members sitting in Parliament – and thus imposing, albeit in an unchanged electoral system, a change to the existing single-member and multi-member constituencies – the Regional Councils promoting the referendum propose an intervention, aimed at conferring upon it the content of a delegation of power to redefine the single-member constituencies, applying the new electoral system hypothetically produced by the referendum.

The intervention regarding the delegation of power is essentially brought about via: a) the partial modification of its object, which is limited, both in the heading and in paragraph 1, of cited Article 3, to the "definition of the single-member constituencies" and no longer the multi-nominal ones; b) the elimination of the condition suspending the delegated power, which would allow it to be exercised even

in the event of failure to promulgate a constitutional law amending the number of members of Parliament within twenty-four months of the entry into force of Law No. 51 of 2019; c) the repeal of the *dies a quo* of the sixty-day deadline for the exercise of the delegated powers; d) the elimination of references to multi-nominal constituencies in the principles and criteria governing the delegation of the powers (both in Law No. 51 of 2019 and Law No. 165 of 2017).

It is clear, therefore, that the goal that the promoters aim to attain presupposes a modification of the delegation of powers affecting its object, the commencement of the time period within which it is to be exercised, the guiding principles and criteria, and the very condition of proper functioning.

The intervention requested in relation to Article 3 of Law No. 51 of 2019 is therefore only abrogating in appearance, and clearly translates into a manipulation of the provision delegating powers, with a view to creating a "new" delegating provision, with different characteristics from the original one.

As for the radical alteration of the original delegation of powers, it is sufficient to observe that all the "somatic characteristics" of the delegating legislation – identified by Article 76 of the Constitution as conditions for delegating the exercise of the legislative function by Parliament – would be completely different in the new provision.

Among other things, starting from the rubric of Article 3 that identifies it, it would have a different subject (no longer "Delegation of power to the Government to define single-member and multi-member constituencies", but "Delegation of authority to the Government to define single-member constituencies").

The guiding principles and criteria of the original delegation of authority would remain, albeit shorn of references to multi-nominal constituencies, with the consequence, however, of making the manipulation even more evident. The result would be, in fact, the provision of the same guiding principles and criteria for defining electoral colleges against a background of an electoral system radically different from the one for which they had been drawn up (the latter, introduced with Law No. 165 of 2017, with a strong proportional slant; that resulting from the outcome of the referendum being exclusively majoritarian). In other words, by changing the context of the electoral system in which the new delegated authority would operate, the guiding principles and criteria would therefore end up being the same in form alone and would instead acquire, in the light of the new and different mechanism for transforming votes into seats, a new scope, in turn inevitably new and different.

Again, the *dies a quo* of the deadline for exercising the delegated authority would be radically different; it is currently set at the time of entry into force of the constitutional law amending the number of members of Parliament, but would be subject to total abrogation by the referendum question. In this case, even if it were deemed that its abrogation by referendum makes it possible to find, by interpretation, a new *dies a quo* as soon as the abrogating effect of the referendum itself came into effect, it would still be a completely new time limit.

Lastly, the referendum question aims to abolish the suspensive condition of the delegation of authority referred to in Article 3 of Law No. 51 of 2019, thus eliminating its "genetic" link with the constitutional reform concerning the number of members of Parliament and in this way producing a "permanent" and certainly operational delegated authority, since it is no longer contingent on any particular eventuality. There would thus be an inadmissible amplifying effect on the original delegation of authority which, being conferred by Parliament *sub condicione*, would

become unconditional and result in a manipulation that would be incompatible, for that reason alone, with the limits and connotations peculiar to legislative delegation.

Further confirmation of the inadmissible degree of manipulation that characterizes the referendum question on this point is, then, the consideration that the delegated authority, even if partially abrogated, would have to remain usable – as declared by Counsel for the promoters themselves – even following the entry into force of the constitutional law reducing the number of members of Parliament which it was intended to bring about, and would thus be the object of a double and concurrent exercise of authority after the constitutional referendum and the abrogative one under examination had been held. To this is added the possibility that the two referendums take place at different times, as may happen, for example, if the abrogative referendum were postponed due to the early dissolution of the Chambers pursuant to the provisions of Article 34(2) of Law No. 352 of 1970. In this case, the delegated authority itself would be exhausted, and no longer usable, at the time of the abrogative referendum.

The unitary nature of the referendum question and its rationally unitary matrix prevent this Court from separating the assessment of the admissibility of the part of the question relating to the delegating provision from that relating to the other parts, with the result that a single opinion must be given on the question itself.

7.3.– For the above reasons, therefore, it must be considered that the excessive manipulation of the referendum question, insofar as it regards the delegation of authority under Article 3 of Law No. 51 of 2019, is incompatible with the abrogative nature of the instrument of the referendum provided for in Article 75 of the Constitution, which determines its inadmissibility.

[omitted]

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares the referendum request described in the headnote, declared lawful by order of 20 November 2019, issued by the Central Referendum Office of the Supreme Court of Cassation, inadmissible.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 16 January 2020.

Signed by: Marta CARTABIA, President

Daria de Pretis, Author of the Judgment