Corte costituzionale

JUDGMENT NO. 171 OF 2007

Franco BILE, President

Francesco AMIRANTE, Author of the Judgment

JUDGMENT No. 171 YEAR 2007

In this case the Court considered a reference from the Court of Cassation in proceedings in which the Messina Court of Appeal ordered, pursuant to the provisions of a decree-law, that the mayor of that city be removed from office following his definitive conviction for the offence of the improper use of state assets. The Court reiterated its view that the prerequisites for the issue of a decree-law are urgency and necessity. Moreover, the conversion law cannot be considered in isolation from the decree-law, as if it were an ordinary piece of legislation, and therefore "the failure to comply with the requirement of 'extraordinary circumstances of necessity and urgency' translates into a procedural defect in the law in question". However, the recourse to a decree-law "cannot be supported by a blanket assertion of the necessity and urgency of the measure, nor it is sufficient to assert that the legislation introduced is reasonable", and it is also not possible to insert into a decree-law provisions which are extraneous to the subject matter treated by the decree (in this case provisions regulating budgetary and financial issues relating to the local authorities). The Court therefore struck down the converted decree-law.

THE CONSTITUTIONAL COURT

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

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 7(1)(a) of decree-law No. 80 of 29 March 2004 No. 80 (Urgent provisions governing local authorities), converted into law, with amendments, by law No. 140 of 28 May 2004, commenced by the Court of Cassation pursuant to an appeal by G. B. and others v. R. A. P. and others by order of

6 April 2005, registered as No. 321 in the Register of Orders 2005 and published in the *Official Journal of the Republic* No. 26, first special series 2005.

Considering the entries of appearance by R. A. P. and others, and by A. B., G. R., A. N. and others, as well as the intervention by the President of the Council of Ministers;

having heard in the public hearing of 6 February 2007 the Judge Rapporteur Francesco Amirante;

having heard Graziella Colaiacomo, barrister, for A. B., Carmelo Matafù, barrister, for A. N. and others and the *Avvocato dello Stato* Giuseppe Fiengo for the President of the Council of Ministers.

The facts of the case

1.- By referral order of 6 April 2005, the first civil section of the Court of Cassation raised, with reference to Article 77(2) of the Constitution, the question of the constitutionality of Article 7(1)(a) of decree-law No. 80 of 29 March 2004 (Urgent provisions governing local authorities), converted into law, with amendments, by law No. 140 of 28 May 2004.

The lower court notes in its judgment of 13 December 2002 that the appellant had been sentenced by the Messina Court of Appeal to six months imprisonment and the temporary prohibition on holding public office, taking advantage of the benefits conferred by law in relation to the offences contained in Articles 81, 314(2) and 323 of the Criminal Code, and that in its judgment of 5 June 2003 the Court of Cassation had dismissed the appeal by the accused against the said conviction. The appellant had in the meantime participated as a candidate in the elections held on 25-26 May 2003 and was proclaimed mayor of the city of Messina on 29 May. Various actions were thereafter commenced by the general public seeking to obtain a declaration removing the candidate from the office of mayor following the definitive confirmation of the above conviction. The joint actions in question were rejected by the *Tribunale di Messina* by judgment of 21 July 2003 on the grounds that the provisions contained in Articles 58, 59, 68 and 70 of legislative decree No. 267 of 18 August 2000 (Consolidated law governing local authorities) did not permit it to find that the

definitive conviction for the offence of improper use of state assets* – which became irrevocable after the candidate's proclamation as mayor – constituted grounds for the removal from office of the mayor and that, correspondingly, such removal could not result from the prohibition on holding public office in cases in which the sentence was suspended.

This decision was however modified by the Messina Court of Appeal which ordered that the respondent be removed from the office of mayor, by judgment of 3 December 2003.

An appeal was lodged against this judgment to the Court of Cassation but, prior to the main hearing, decree-law No. 80 of 2004 was published in the *Official Journal* on 30 March 2004, Article 7(1)(a) and (b) of which amended Article 58(1)(b) of legislative decree No. 267 of 2000 (inserting the words "sub-section one" after the number "314") and Article 59(6) of the same legislative decree (inserting the words "for one of the offences provided for the same sub-section" after the word "conviction"). The decree-law therefore provided that convictions for improper use of state assets did not constitute grounds for the non-eligibility for the office of mayor, or subsequently for the removal from the same.

By order of 17 April 2004, the Court of Cassation raised, with reference to Article 77(2) of the Constitution, the question of the constitutionality of the aforementioned Article 7, due to the manifest failure to satisfy the requirement of "extraordinary circumstances of necessity and urgency".

By order No. 2 of 2005, this court ordered the remittal of the case file to the lower court, since in the meantime the conversion law No. 140 of 2004 had been passed which amended by text of the decree-law and set out the reasons for the enactment of the contested provision.

The Court of Cassation considers that it is necessary to raise the question as formulated above a second time, acting on the assumption that the defect averred was transposed into the law which, notwithstanding the manifest failure to satisfy the

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* Translator's note: Although Italian law provides for one single offence of "embezzlement of state assets" (Article 314 of the Criminal Code), a distinction is drawn for the purposes of determining the applicable sentence between cases in which the appropriation of property is permanent and cases in which it is only temporary (i.e. improper use). In legal jargon, the latter is referred to as "*peculato d'uso*", and the former simply "*peculato*".

requirement mentioned above, all the same provided for the conversion into law of the decree-law.

Regarding the question of relevance, after having asserted the applicability to Sicily Region of Articles 58 and 59 of legislative decree No. 267 of 2000 and recalling its own previous order, the referring court notes that the second, third and fourth ground for appeal to the Court of Cassation render all other arguments moot as regards the principal appeal and that the above provisions must be applied for the decision on the grounds of appeal. In particular, the second ground questions the breadth of the exclusionary effect of Article 314 of the Criminal Code contained in the aforementioned Article 58(1)(b), arguing – in contrast to the decision by the Sicilian court – that the improper use of state assets does not fall within the exclusionary ambit of embezzlement proper. Taking for granted that the prohibition covers the offence of improper use of state assets, the third and fourth grounds challenge the Messina Court of Appeal's interpretation, according to which there is a perfect overlap between prohibitions (i.e. those which prevent eligibility for office and provide for the invalidity of the election) and supervening impairments (i.e. those providing for the removal of the mayor elect due to the subsequent making of a declaration of impediment).

The result of this, in the opinion of the referring court, is the necessary and inevitable application of the intervening provisions in the judgment in question, since Article 7(a) of decree-law No. 80 of 2004 amended Article 58(1)(b), thereby excluding from the list of grounds for the refusal of a candidacy definitive convictions for the offence of improper use of state assets (other than in cases falling under Article 58(1)(c), which was not amended, in which the sentence passed is longer than six months), whilst Article 7(b) itself – amending Article 59(6) of the consolidated law by expressly stipulating that the removal from the offices listed in Article 58(1) due to a definitive conviction may occur only where the conviction concerned “one of the offences provided for in the same sub-section” – provided that an intervening definitive conviction accompanied by a custodial sentence for no more than six months for the offence of improper use of state assets did not constitute grounds for removal from the office. In consequence, the contested Article 7 provided that the type of definitive conviction indicated – which corresponded to that handed down in the case before the

court – could not apply either as grounds for refusing the candidacy or as grounds for the termination of the same.

After having found that the provision in question does not have a mandatory interpretation – given that it does not contain either references to previous alternative interpretations or a mandatory choice in favour of one of them, but only the desire (expressed both in the headnote and in the text) to amend the provisions previously in force – the referring court notes that the applicability of the contested legislation to the case before the court as a *ius superveniens* stems from the fact that it has an effect on the legal prerequisites for the continuing occupancy of a public elected office "and therefore on the suitability to change it with immediate effect either *contra reum* or, as in the case before the court, *pro reo*".

In support of this argument, the lower court recalled the case law of the Court of Cassation on intervening conditions (definitive convictions) constituting "impediments" to the election to or proclamation of an elected office, according to which the new provisions must also be applied where the relevant situations occurred before the entry into force of the intervening law. The principle developed in this case law appears to the referring court to be fully acceptable insofar as it emphasises the rationality of the immediate application of the new legislation as it concerns the conditions for remaining in office: it follows from this that the above principle must be applied also in relation to intervening provisions which – as is the case for those at issue before the court – reclassify a situation previously regarded as inappropriate, relegating to "legal irrelevance" a criminal conviction which gave rise to a prohibition under the terms of the law previously in force.

According to the lower court, the observations made in relation to the legislation introduced by decree-law also apply to the text of the conversion law, since the amendment made to Article 58(1)(b) of legislative decree No. 267 of 2000 was reproduced, whilst the removal of the amendment to Article 59(6) of the legislative decree is entirely irrelevant for the matter before the court.

In the light of the above, it appears to the referring court that the contested provision clearly lacks the prerequisites for its adoption by decree-law – the existence of "extraordinary circumstances of necessity and urgency" – and that the breach of Article 77(2) of the Constitution by decree No. 80 of 2004 "must extend – as a procedural

defect – also to the conversion law which confirmed the provision despite the absence of the [...] prerequisite" (as held by this court in judgment No. 29 of 1995).

As was pointed out in the previous constitutionality proceedings, this prerequisite was not satisfied in the first place because the decree was adopted not to regulate the conditions constituting a bar on candidacies with the (indisputable) goal of adjusting the provisions to changes in political conditions – the choice of instrument being imposed by the proximity of the next elections – but only in order to exclude from the list of the grounds for prohibition set out in Article 58(1)(a) of legislative decree No. 267 of 2000 convictions for the improper use of state assets, without any indication in the text of the measure of the reason why the urgency of the legislation related only to the case in question.

Moreover, the preamble to the decree is also instructive in that it expressly links the adoption of the urgent provisions governing local authorities "with the goal of ensuring their proper functioning, with particular reference to the approval procedures for budgets, the financial difficulties of municipalities with smaller populations and the recovery of particular situations of financial instability", without making any statement in relation to the extraordinary need and urgency to amend only Articles 58(1)(b) and 59(6) and to remove cases falling under Article 314(2) of the Criminal Code from the list of offences which *per se* constitute a bar on candidacies.

Finally, the measure's silence in relation to the derogation which Article 7 of the decree-law in question made to Article 15(2)(b) of law No. 400 of 23 August 1988 is stated to be equally revealing, given that the latter prevents the government from using decree-laws to pass legislation in the matters indicated in Article 72(4) of the Constitution (which include electoral law, and for which the above constitutional provision requires a parliamentary vote). Moreover, whilst the government in this case considered it necessary to abide by the requirement to indicate in the preamble to the decree the extraordinary circumstances of necessity and urgency justifying its adoption (Article 15(1), cited above), yet remained entirely silent on the circumstances required for the adoption of a decree in an area in which the very same law prohibited the recourse to decrees, there are clear grounds for "doubts that the said circumstances could not have been brought to light, since they fell entirely outwith the ambit of the legitimate exercise of the government's legislative powers".

An overview of the legislative text and the *travaux preparatoires* of the conversion law clearly shows that Parliament was aware of the contested measure's fundamental failure to comply with the constitutional requirements for urgent decrees. Indeed, the definitive legislation adopted in relation to the amendments made to Articles 59(3), 61, 64, 254 and 256 of legislative decree No. 267 of 2000 is not at all consistent with that at issue before the court. Moreover, the inclusion of justifications for the decree which expressly refer to public order and security is testament not to the awareness of the presence of serious and non-deferrable urgent requirements, but rather the choice to place the measure beyond the prohibition contained in Articles 15(2)(b) of law No. 400 of 1988 and Article 72(4) of the Constitution. Furthermore, during the course of the measure's progress through Parliament, the failure to comply with the requirements in question was brought up at various junctures, which means that it cannot be concluded that the conversion law remedied the original defect, as found by this court in judgment No. 341 of 2003.

2.- The President of the Council of Ministers intervened in proceedings, represented and advised by the *Avvocatura Generale dello Stato*, arguing that the question is inadmissible, or in the alternative unfounded.

The *Avvocatura Generale dello Stato* argues that the contested provision is intended to overcome certain interpretative and applicational difficulties concerning Article 58 of legislative decree No. 267 of 2000 deriving from the absence of a perfect overlap between the offences which constitute a bar on candidacies (Article 58) and those preventing continuation in office with local authority bodies (Article 59). These were on the other hand consistent prior to the amendment made by law No. 475 of 13 December 1999 to Article 15 of law No. 55 of 19 March 1990, which were subsequently transposed into Articles 58 and 59 of the consolidated law of 2000. The amendment accordingly complied with the requirement to bring the provision concerning ineligibility into line with that already provided for in relation to the same criminal offence of embezzlement of state assets by the rule on the removal from office (Article 59 of the consolidated law), which only provides for the removal from office of the candidate in cases of conviction for the offence of embezzlement proper, provided for in Article 314(1) of the Criminal Code. Accordingly, the ground for ineligibility based on a definitive conviction for the offence of embezzlement of state assets has also been

limited to cases of embezzlement proper, and therefore does not apply to convictions for improper use falling under Article 314(2) of of the Criminal Code.

In the same way the second amendment – not however included in the conversion law – proposed the elimination of certain "anomalies" and the clarification of interpretative doubts arising, in relation to removal from office, from the claim that Article 59(1) of the consolidated law does not provide for the suspension of administrators in cases of non-definitive convictions for one of the offences set out in Article 58(1)(c) (and therefore also for improper use of state assets, in the event of a custodial sentence greater than six months).

After having argued, also in the light of the constitutional case law on this point, that in the case before the court there has been no "manifest failure" to comply with the prerequisites contained in Article 77(2) of the Constitution, the *Avvocatura Generale dello Stato* asserts that the reasons underlying the decree-law, which were specifically set out in the government report accompanying the draft conversion law, give plausibility to the government assessment underpinning its decision to use an urgent decree (or rather shows that it is "not manifestly implausible"). This was necessary on account of the need to prepare a systematic legislative intervention aiming to ensure the indispensable conditions for the proper functioning of all local authorities "through the solution of certain significant problems which had emerged at the start of 2004, partly due to the as yet unfinished implementation of the reform of Title V, Part Two of the Constitution". In this context, although the failure to approve the budget was the clearest indication of the serious operational problems in the local authorities, the urgent decree in this area nonetheless also aimed to render the provisions governing the grounds for preventing candidates from taking up elected offices with local authorities consistent with those concerning removal from the same offices.

Nor, was it argued, did the additions made to Article 7(1) in the conversion law make any provision to the contrary. Indeed, in making these additions, Parliament simply set out the goals pursued by the provisions (precluding their relevance in electoral matters, and therefore for the purposes of Article 15(2)(b) of law No. 400 of 1988) and the arguments of necessity and urgency which required its adoption by decree-law.

Moreover, whilst the institution of prohibitions on candidacies and the grounds for removal from office with the local authorities are related to electoral matters in the

sense that they are functionally linked, they are substantively different from such matters which concern elections and procedures for referenda.

The excerpts from the *travaux preparatoires* cited in the referral order show that the referring court had already noted the pertinence of the provisions for law and order and public safety, and the different opinions expressed on this point only prove that the question was subject to a broad debate, but have no impact on the constitutionality of the choice to pass an urgent decree, the adoption of which does not require unanimous consent.

3.-- Several of the parties to the principal proceedings entered appearances before the court by various writs, submitting similar requests.

In particular, several appellants argued that the question was inadmissible on the grounds of irrelevance or, in the alternative, that the contested provision should be declared unconstitutional due to violation of Articles 77(2) and 72(4) of the Constitution.

The question was argued to be irrelevant on the following grounds: a) the inapplicability of the contested provision in Sicily Region; b) the fact that the provision cannot be classified as a *ius superveniens* applicable *ipso facto* in the case before the court.

As far as the merits of the question are concerned, the private parties essentially accept the arguments made by the referring court, emphasising the fact the contested provision not only clearly fails to satisfy the requirements of extraordinary circumstances and urgency but also, through its effects on the right to stand as a candidate, makes unequivocal provision in electoral matters, in which it is not possible to use legislative instruments other than normal laws, including in particular decree-laws (citing this court's judgment No. 161 of 1995) pursuant to Article 72(4), of the Constitution.

4.-- The other appellants in the principal proceedings reach the same conclusions.

Regarding the issue of the inadmissibility of the question on the grounds of irrelevance, the entry of appearance places particular emphasis on the referring court's rejection – and finding that the contested provision was applicable in the case before its as a *ius superveniens* – of the theory of the *fait accompli* which, according to the settled case law of the Court of Cassation itself, must govern examinations of the applicability

to proceedings in progress of intervening legislative amendments which do not have retroactive effects. In fact, in the case before the court, at the time of entry into force of decree-law No. 80 of 2004, the person had already been removed from office and the criminal sentence had been definitively confirmed in June 2003. This means that the contested provision is not certainly applicable, since it cannot have any effect on a situation which occurred and produced its effects exclusively under the terms of previous legislation.

As far as the merits of the question are concerned, the private parties consider the arguments contained in the referral order to be comprehensive, submitting that the contested provision is affected by the failure to comply with the requirements of urgency which is so clear as to impinge upon the subsequent conversion law in the form of a procedural defect.

5.-- The other appellants reached the same conclusions using similar arguments in their respective entries of appearance before the court.

Conclusions on points of law

1.- The Court of Cassation raised, with reference to Article 77(2) of the Constitution, the question of the constitutionality of Article 7(1)(a) of decree-law No. 80 of 29 March 2004 (Urgent provisions governing local authorities), converted into law, with amendments, by law No. 140 of 28 May 2004, containing amendments to Article 58(1)(b) of legislative decree No. 267 of 18 August 2000 (Consolidated law on local authorities), due to the "clear absence of the extraordinary circumstances of necessity and urgency".

The contested provision is formulated as follows: "The following amendments are made to the consolidated law on local authorities contained in legislative decree No. 267 of 18 August 2000, in order to clarify and specify the prerequisites and relevant conditions for the maintenance of public offices in the light of law and order and public safety considerations: a) the following words are inserted after the number "314" into Article 58(1)(b): "sub-section one".

The question arose during the course of appeal proceedings against a judgment of the Messina Court of Appeal, ruling on appeals lodged by certain citizens, which ordered that the mayor of that city be removed from office after his conviction for the offence

provided for under Article 314(2) of the Criminal Code (improper use of state assets) had become definitive.

Regarding the question of relevance, the Court of Cassation notes in the first place that the reference to the national law governing electoral matters by Article 36 of Sicily Region law No. 26 of 1 September 1993 (sic.: by Article 6 of Sicily Region law No. 7 of 26 August 1992, as replaced by the aforementioned Article 36) was open in nature, thus applying also to past elections in the said region the provisions of the consolidated law which in any case has merely recognitional and collative status. Secondly, the referring court notes that the principle of the immediate applicability of new legislation governing the grounds for ineligibility and incompatibility, which has been consistently upheld in case law *contra reum*, that is in the event of the introduction of new situations with the aforementioned consequences, must also be applied *pro reo*, where as in the case before the court a ground for ineligibility is removed.

As far as the merits of the question are concerned, the referring court finds that the contested provision was inserted into a decree which dealt with different matters including, in particular, aspects of the regulation of local finance and that the assessment of the necessity and urgent nature of the measure contained in the preamble to the decree referred to that legislation and not also to the contested sub-section and sentence of Article 7.

The question had already been raised in relation to the decree's provisions prior to its conversion. However, since law no. 140 of 2004, which it was expected would also explain the reasons for the amendments made to Article 58(1)(b) of legislative decree No. 267 of 2000, was passed whilst the judgment on constitutionality was pending, this court remitted the case file to the lower court for a new assessment of the provision and thus also the continuing presence of any grounds for unconstitutionality previously raised (order No. 2 of 2005).

According to the referring court, such grounds for unconstitutionality persist because neither the amendment made to the contested provision in the conversion law, nor the report accompanying the draft conversion bill dedicate sufficient attention to the existence of the extraordinary circumstances of necessity and urgency.

2.- The question is admissible, since the arguments made concerning the relevance of the proceedings by the referring court are not implausible.

3.-- The question is well founded on the merits.

There is a broad consensus that the framework establishing the sources of law is one of the principle elements which characterise the form of government within constitutional systems. It is an integral part of the system for the protection of fundamental values and rights. In the states which draw inspiration from the separation of powers and the subjection of the courts and the administrative apparatus to the law, the adoption of primary legislation is reserved to the bodies, or single body, on which power is conferred directly by the people.

The Italian Constitution adheres to these principles where it provides that "legislative power is exercised collectively by the two Houses of Parliament" (Article 70).

In certain situations or in specific subject matters, given the technical time-scale for the normal passage of legislation through Parliament, or as a result of the complexity of legislation in certain sectors, parliamentary regulation may either be delayed or brought forward through the delegation of powers to the government, which is characterised by objective and temporal limits and by the requirement of compliance with the principles and directional criteria indicated in the parent statute.

Leaving aside this last case, which is not of interest here, it is significant that Article 77(1) of the Constitution provides that "the government may not pass decrees which have the force of ordinary law without authorisation by the Houses or Parliament".

Given the tone of Article 70 of the Constitution, the above provision might appear to be superfluous, unless it is considered to fulfil the purpose of emphasising that – in providing for and regulating cases in which the government, in extraordinary cases of necessity and urgency adopts under its own responsibility provisional measures with the force of law become ineffective unless converted into law within sixty days – the provisions of the following sub-sections amount to a derogation from the fundamental attribution to Parliament of the role of passing primary legislation within the context of the competences of the central state.

4.-- It is on the basis of the above premises that the settled case law of this court has since 1995 (judgment No. 29 of 1995) asserted that the compliance with the requirements of the extraordinary circumstances of necessity and urgency may be subject to constitutional review.

However, in affirming the existence of its task as mentioned above, the court has been and continues to be aware that its role cannot be a substitute for and does not overlap with the government's initial role and the subsequent action by Parliament when converting the decree – in which political considerations may prevail – but must be carried on in a different manner, with a view to upholding the framework establishing the sources of legislation and, by extension, the respect for the values which are to be defended by the court.

Whilst the expression used in the Constitution to indicate the prerequisites for the government's power to issue primary, albeit provisional, legislation – i.e. the extraordinary circumstances of necessity and urgency – on the one hand, as mentioned above, highlights the special nature of the said power compared to the normal regulation of the sources of law within a parliamentary republic, it on the other hand however has the inevitable consequence of giving the instrument a broad degree of flexibility. In fact, the extraordinary nature of the case, which is such as to require the need for the passing of urgent legislation in the given area, may result from a range of situations (acts of God, human behaviour and even the acts and measures of public authorities) which cannot be classified by rigid criteria applicable to all situations.

This explains why this court has found that the failure to comply with the requirements for urgent decrees must be clear in examinations of the constitutionality of a measure and why it has taken action only once the specific phenomenon of the repetition of unconverted decree-laws has emerged and become chronic (judgment No. 360 of 1996).

5.-- Before moving on to an examination of the merits of the case it is necessary to resolve the question, which logically comes before this, of the eventual remedying effect of the conversion law since, as mentioned above, after the question of the constitutionality of Article 7(1)(a) of decree-law No. 80 of 2004 had been referred to this court, the decree-law was converted, with amendments – which did not however concern the contested provision – by law No. 140 of 2004.

On this point, the court asserted in judgment No. 29 of 1995 the principle that after the relevant decree-law has been converted into law, the failure to comply with the requirement of “extraordinary circumstances of necessity and urgency” translates into a procedural defect in the law in question.

The above principle was again affirmed in judgment No. 341 of 2003, whilst in other judgments the court considered that it did not have to address the question because the requirements in question had clearly not been complied with (judgments No. 196 of 2004 and No. 178 of 2004).

A different approach was on the other hand adopted, without any specific reasons being given in favour, in judgments No. 330 of 1996, No. 419 of 2000 and No. 29 of 2002 and, on one specific ground, by judgment No. 360 of 1996.

The court finds that it must reiterate the first principle pointed out.

There are various arguments which support this conclusion.

First, whilst the constitutional provision which governs the enactment of primary legislation (laws and other measures with the force of law) places particular emphasis on the relationship between organs of state – which might suggest that there is no margin for further control following parliamentary approval and the conversion into law of the decree – it must not be forgotten that such provisions also serve the purpose of protecting rights and are characteristic of the structure of the constitutional system as a whole. The assertion that the conversion law in any case remedies any defects in the decree would imply the concrete attribution to ordinary legislation of the power to modify the constitutional division of competences between Parliament and the government as regards the production of primary legislation.

In addition, where consideration is given to the fact that in a parliamentary republic, such as Italy, the government must enjoy the confidence of the houses of Parliament and it is considered that the decree-law involves a particular acceptance of responsibility, it must be concluded that the constitutionality of the provisions of the conversion law cannot be assessed as such – i.e. insofar as they to not have a substantive effect on the normative content of the provisions of the decree, as in the case before the court – in isolation from those of the decree itself. In fact, the decree's immediate effectiveness, which makes it capable of creating even irreversible changes to society and to the legal order, places particular conditions on Parliament's activities when converting the decree into law compared to the constraints on ordinary legislative activity, thus also making clear the rationale for the constitutional provision which confers on the government the responsibility for the issue of the decree. Parliament thus ends up making its own assessments and debating with reference to a situation which has been changed by

legislation introduced by a body which as a rule, as the holder of executive power, is not entitled to enact legislation with the force of law.

Moreover, this is confirmed by the fact that the conversion law was characterised in its passage through Parliament by a wholly unusual situation, so much so that the presentation of the decree for conversion involves the reconvening of the Houses where they are still in recess (Article 77(2) of the Constitution), and its passage through Parliament is regulated by rules different from those governing the procedure for draft bills proposed by the government (Article 96-*bis* of the Chamber of Deputies Rules and Article 78(4) of the Senate Rules). The text of the latter reads as follows: "Where the Assembly resolves that the prerequisites laid down by Article 77(2) of the Constitution or the requirements provided for by the law in force have not been satisfied, the draft conversion bill is considered to be rejected. Where such a resolution concerns only part of or individual provisions of the decree-law or of the draft conversion bill, its effects apply exclusively to those parts or provisions which are considered repealed".

6.-- In the light of the above, it is necessary to assess in the light of both the inherent and external features of the contested provision whether or not it is clear that the requirement of extraordinary need for and urgency of the provisions has been satisfied.

On this point, it should in the first place be pointed out that the determination of the grounds for ineligibility and incompatibility is a matter for electoral law and not for provisions governing local authorities (see judgments No. 104 of 1973, No. 118 and No. 295 of 1994, No. 161 of 1995, No. 141 of 1996, No. 132 of 2001 and No. 25 of 2002).

Whereas the headnote of the decree contains the title "Urgent provisions governing local authorities", the preamble reads as follows: "Considering the extraordinary need and urgency to make provisions concerning local authorities, with the goal of ensuring their proper functioning, with particular reference to the approval procedures for budgets, the financial difficulties of municipalities with smaller populations and the recovery of particular situations of financial instability".

In fact Articles 1, 4, 5 and 6 concern budgets and municipal finances in general, Article 2 concerns the consequences of the failure to draw up general town planning instruments and Article 3 governs the procedures for the resignation of municipal and provincial councillors. There is therefore nothing, either in the preamble or in the

contents of the articles, which has any relevance for the requirements to stand as a candidate for the office of mayor.

The contested provision is therefore characterised by its clearly extraneous nature to the matters governed by the other provisions of the decree-law in which it was contained.

In turn, the report on the draft conversion law for decree No. 80 of 2004 states, in the part concerning Article 7, that the reason for the amendment made to Articles 58 and 59 of legislative decree No. 267 of 2000 is the elimination of the anomalies which existed between the grounds for suspension provided for in Article 58 and those for removal from office provided for in Article 59 – an anomaly which had moreover existed since 1999.

This assertion justifies the amendment, but does not confirm the existence of a necessary and urgent need to amend the provision.

The recourse to a decree-law – and the government's resulting acceptance of responsibility according to Article 77 of the Constitution – cannot be supported by a blanket assertion of the necessity and urgency of the measure, not it is not sufficient to assert that the legislation introduced is reasonable.

In addition to the incompatibility with its statutory context of the removal of a ground for ineligibility for the office of mayor, it is not clear how this measure pertains to public order and security. On this point therefore, the reference – made by the *Avvocatura dello Stato* when discussing the *travaux preparatoires* – to judgments of this court which asserted the relevance for public order and security of legislation providing for new grounds for ineligibility or incompatibility in the context of the fight against organised crime is not relevant (judgments No. 118 and No. 295 of 1994, No. 141 of 1996, No. 132 of 2001 and No. 25 of 2002, cited above).

Accordingly, the court finds that of Article 7(1)(a) of decree-law No. 80 of 2004, converted into law, with amendments, by law No. 140 of 2004, is unconstitutional.

on those grounds

THE CONSTITUTIONAL COURT

declares that Article 7(1)(a) of decree-law No. 80 of 29 March 2004 (Urgent provisions governing local authorities), converted into law, with amendments, by law No. 140 of 28 May 2004, is unconstitutional.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 9 May 2007.

Signed:

Franco BILE, President

Francesco AMIRANTE, Author of the Judgment

Maria Rosaria FRUSCELLA, Registrar

Deposited in the Court Registry on 23 May 2007.

The Registrar

Signed: FRUSCELLA