Corte costituzionale

JUDGMENT NO. 271 OF 2010

Francesco AMIRANTE, President

Sabino CASSESE, Author of the Judgment

JUDGMENT NO. 271 YEAR 2010

In this case the Court considered a challenge from a Regional Administrative Court objecting to the constitutionality of the law governing the election of Italian MEPs on the grounds that it did not permit the votes of parties that did not meet the 4% cut-off threshold for the allocation of seats on a proportional basis to be taken into account for the purposes of the allocation of additional seats on the basis of "remainder votes". Following a discussion of the mechanics of Italian electoral law in European elections, the Court pointed out the lower court's contradictory stance in approving of the 4% threshold, whilst arguing that the exclusion of remainder votes from parties that had not reached that threshold was unconstitutional. Moreover, the lower court was requesting the Constitutional Court to engage in judicial activism in spite of the fact that it was not required under constitutional law. The Court noted that electoral law was guided by two principles in tension with one another – proportional representation and geographical representation on the basis of population – which cannot be perfectly reconciled with one another. Since "the legislation amounts to only one of the possible mechanisms that is capable of reducing the shifting effect of seats from one constituency to another" and given that "it can only be for Parliament to determine, with specific reference to the representative body concerned, the most appropriate solution in order to remedy the alleged inconsistency within the contested legislation", the Court accordingly dismissed the question as inadmissible.

THE CONSTITUTIONAL COURT

composed of: President: Francesco AMIRANTE; Judges: 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, Giuseppe FRIGO, Paolo GROSSI,

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 21(1)(ii) and (iii) of Law no. 18 of 24 January 1979 (Election of the Members of the European Parliament allocated to Italy), initiated by the Lazio Regional Administrative Court by referral orders of 11 (3 orders), 14 and 15 December 2009, and 11 (2 orders) and 14 December 2009, respectively registered as nos. 22, 23, 28, 29, 30, 31, 32 and 33 in the Register of Orders 2010 and published in the *Official Journal of the Republic* nos. 6 and 7, first special series 2010.

Considering the entries of an appearance by Giuseppe Gargani, Pasquale Sommese, Maddalena Calia, Nicola Vendola and others, Oliviero Diliberto and others, Felice Carlo Besostri and others, Salvatore Caronna and another, Roberto Gualtieri, Giovanni Collino, Oreste Rossi, Iva Zanicchi, Sonia Viale, the *PD – Partito Democratico*, Sardinia Region, Sebastiano Sanzarello, Sicily Region, Gino Trematerra, Giommaria Uggias, *IDV – Italia dei Valori*, Giuseppe Arlacchi and another, as well as the intervention by the President of the Council of Ministers;

having heard the Judge Rapporteur Sabino Cassese in the public hearing of 6 July 2010;

having heard Counsels Mario Sanino and Lorenzo Lentini for Giuseppe Gargani and Pasquale Sommese, Federico Sorrentino and Antonello Rossi for Maddalena Calia, Oreste Morcavallo for Gino Trematerra, Giampaolo Parodi and Luigi Manzi for Sonia Viale, Vincenzo Cerulli Irelli for the *PD – Partito Democratico* and Roberto Gualtieri, Stelio Mangiameli for Giovanni Collino, Oreste Rossi and Iva Zanicchi, Giuseppe Morbidelli and Paolo Trombetti for Salvatore Caronna, Alessandra Camba for Sardinia Region, Giovanni Pitruzzella for Sicily Region, Luca Di Raimondo for Nicola Vendola and others, Silvio Crapolicchio for Oliviero Diliberto and others, Felice Carlo Besostri for Felice Carlo Besostri, Sergio Scicchitano and Giommaria Uggias for Giommaria Uggias, Sergio Scicchitano for *IDV – Italia dei Valori* and Giuseppe Arlacchi and another and the *Avvocato dello Stato* Sergio Fiorentino for the President of the Council of Ministers.

The facts of the case

1. – By three identical orders of 11 December 2009 (nos. 29 and 30 of 2010) and 14 December 2009 (no. 31 of 2010), division IIa of the Lazio Regional Administrative Court raised a question concerning the constitutionality of Article 21(1)(ii) of Law no. 18 of 24 January 1979 (Election of the Members of the European Parliament allocated to Italy), with reference to Articles 1, 3, 48, 49, 51 and 97 of the Constitution, and Article 11 of the Constitution in the light of Article 10 of the Treaty on European Union, as amended by the Treaty of Lisbon, and Articles 10, 11, 39 and 40 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, ratified and implemented by Italian law no. 848 of 4 August 1955 (hereafter, the "ECHR").

In the opinion of the referring court, the contested provision is unlawful insofar as it specifies "the national minimum threshold […] without providing for any corrective mechanism, including during the distribution of remainder votes", in particular "by not permitting the lists that did not reach the minimum threshold to be eligible to receive the seats awarded according to the remainder vote mechanism", thereby depriving them of the "right of minimum representation" [in Italian, "*diritto di tribuna*"].

1.1. – The lower court states that the applicants in the main proceedings have contested the report of the operations of the National Central Electoral Office at the Court of Cassation adopting the decision proclaiming the candidates elected to the European Parliament following the elections held on 6 and 7 June 2009, as well as the underlying, related and consequential actions, requesting that they be annulled insofar as seats were not allocated to the following lists: "*Sinistra e Libertà – Federazione dei Verdi*" (nos. 29 and 31 of 2010); "*Partito della Rifondazione Comunista – Sinistra Europea – Partito dei Comunisti italiani*" (nos. 30 and 31 of 2010); "*Associazione politica nazionale Lista Pannella*"; "*La Destra*"; "*Movimento per le Autonomie*"; "*Partito Pensionati*"; and "*Alleanza di Centro per la Libertà*" (no. 31 of 2010). According to the referring court, the applicants in the main proceedings also requested the consequent proclamation of the candidate Nicola Vendola from the list "*Sinistra e Libertà – Federazione dei Verdi*" (no. 29 of 2010) and the candidate Oliviero Diliberto from the list "*Partito della Rifondazione Comunista – Sinistra Europea – Partito dei Comunisti italiani*" (no. 30 of 2010), as replacement for the candidates that were elected from the "*Lega Nord*", or the candidate from the list "*Italia dei Valori – Lista Di Pietro*".

As stated by the referring court, the applicants in the main proceedings complained that, due to their failure to reach the minimum threshold, the aforementioned lists "*Sinistra e Libertà – Federazione dei Verdi*" and "*Partito della Rifondazione Comunista – Sinistra Europea – Partito dei Comunisti italiani*" were not allocated any seats, even though some candidates from those lists had obtained a greater number of votes compared to the "remainder votes" which had enabled the candidates from the other lists that had reached the minimum threshold to benefit "from the two residual seats after the allocation of the seats according to the full electoral quotient". In particular, the referring court states that the applicants in the main proceedings averred the incorrect application of the provision contained in the last sentence of Article 21(1)(ii) of Law no. 18 of 1979 ("the national electoral results of the lists that have not reached the national electoral quotient shall also be deemed to be remainder votes"). In their opinion, this provision requires that, for the purposes of the award of seats not allocated according to the full quotient, the national electoral result of the lists that have not reached the minimum threshold of 4% specified under Article 21(1)(i-bis) of Law no. 18 of 1979 should also be treated as remainder votes, thereby granting them a "right of minimum representation". Should this interpretation not be accepted, the applicants aver in the alternative that the contested provision is unconstitutional.

The following parties entered an appearance or intervened in the main proceedings: the Interior Ministry – National Central Electoral Office and *Italia dei Valori* (no. 30 of 2010); Giommaria Uggias, Sonia Viale and *Lega Nord per l'Indipendenza della Padania* (nos. 29 and 30 of 2010), Salvatore Caronna, Roberto Gualtieri, Oreste Rossi and Luigi De Magistris (no. 31 of 2010).

1.2. – First and foremost, the lower court considers that it is not able to accept the application on the basis of the proposed interpretation of the last sentence of Article 21(1)(ii) of Law no. 18 of 1979, whereby that legislative provision "also permitted the lists that did not reach the minimum threshold to be eligible to receive the seats awarded according to the remainder vote mechanism". In fact, the referring court clarifies that this interpretation is based on an improper conflation between the concept of "national electoral result", which is the "minimum prerequisite of 4% specified for eligibility to be allocated seats" and "that of the national electoral quotient", which is on the other hand the "result of a mathematical calculation for the actual allocation of seats".

The fact that it is impossible to accept the interpretation proposed by the applicants means that the referring court must examine the objections under constitutional law raised by them in the alternative. However, the referring court also finds that the provision for a minimum threshold of 4%, considered in itself, does not breach constitutional law or Community law. Nonetheless, the lower court considers that the question concerning the constitutionality of the contested legislation is relevant and not manifestly groundless, insofar as it relates to the "mechanism precluding the so-called right of minimum representation, by not permitting the lists that did not reach the minimum threshold to be eligible to receive the seats awarded according to the remainder vote mechanism".

As regards the question of relevance, the referring court observes that the contested provision precludes acceptance of the claim by the applicants in the main proceedings, as candidates in a list that did not achieve the minimum threshold, to be eligible for allocation of the remainder vote seats with their own votes.

With regard to the question of non manifest groundlessness, according to the referring court the provision violates first and foremost Article 3 of the Constitution on various counts. It is claimed to be manifestly irrational on the grounds that, "when calculating the remainder votes in excess of the full electoral quorum", it permits the lists that have reached the minimum threshold to obtain additional seats "on the basis of irrationally more modest electoral results […] compared to those achieved by the lists that did not reach the minimum threshold of 4% and which are excluded from the provision under examination also by the aforementioned distribution of remainder votes". The provision is also claimed not to be in keeping with the goal of favouring political coalitions, which is already sufficiently assured by the exclusion of smaller lists by the 4% threshold rule. Finally, an "additional ground for irrationality" is stated to lie in the "denial of eligibility for reimbursement of expenses incurred by the parties that participated through their lists in the election, but did not reach the quorum, since this appears liable to result in unequal treatment between different political subjects".

Secondly, in the opinion of the lower court, the contested legislation is unlawful on the grounds that it "fundamentally disregards the popular will of a more or less broad range of electors", breaking in their regard the "democratic bond" that links up the various aspects of which the exercise of popular sovereignty is comprised (Article 1 of

the Constitution): the right to association within political parties with the goal of participating in the determination of national politics (Article 49 of the Constitution); the right to stand as a candidate in parliamentary elections (Article 48 of the Constitution); and the principle according to which each member of Parliament exercises his or her powers as a representative of the entire Nation and not a limited circle of voters (Article 67 of the Constitution).

Thirdly, the contested provision is claimed to violate Article 11 of the Constitution, with reference both to Article 10 of the Treaty on European Union, as amended by the Treaty of Lisbon, according to which "the functioning of the Union shall be founded on representative democracy" and "every citizen shall have the right to participate in the democratic life of the Union", as well as Articles 10, 11, 39 and 40 ECHR [more correctly: the Charter of Fundamental Rights of the European Union] which enshrine "the right of every citizen to express his own convictions and to stand as a candidate at elections to the European Parliament" and "cannot also fail to operate as a basis for the requirement of the representation of Community voters in the European Parliament".

1.4. – The President of the Council of Ministers intervened in all of the proceedings, represented by the *Avvocatura Generale dello Stato*, requesting that the questions be ruled manifestly inadmissible, or in any case manifestly groundless.

According to the State representative, the question is inadmissible first and foremost due to the "evident uncertain and contradictory nature of the challenges" made by the referring court which, on the one hand, "acknowledges that the threshold clause is compatible with the Constitution" whilst on the other hand "raises questions relating to the lawfulness of the system for allocating seats that could not be accepted without calling into question the stability of that legislative choice", since the threshold clause "would be inevitably circumvented" if the lists that had not reached it were also entitled to be eligible for the award of seats not allocated on the basis of full quotients. In the opinion of the *Avvocatura Generale dello Stato*, the "manifest unreasonableness of the substantive intervention[*]" requested constitutes a further ground for inadmissibility. The granting of a right of minimum representation to the lists that have not reached the threshold would in fact, according to the stance adopted by the lower court, be

[*] Translator's note: "*intervento additivo*", i.e. a judgment by which the Court develops a substantive quasi-legislative solution, rather than simply striking legislation down or ruling that it is constitutional.

dependent upon chance circumstances: according to the State representative, it would depend on the dual fact of seats remaining to be allocated after the actual division on the basis of full quotients and a situation in which the votes obtained by the list that did not reach the minimum threshold are greater than the remainder votes available to the list that did reach the threshold.

On the merits, the State representative refers to the case law of this Court according to which the principle of equality in voting is not compromised if, according to the electoral system established by Parliament, "the votes expressed by certain voters do not actually count towards the allocation of seats" and adds that the provision for a quorum in order to determine the allocation of seats does not mean that those who voted for lists that do not reach the quorum remain without political representation, but only means that this representation "is established […] on the basis of the prevailing aggregation of the political opinion of the electorate".

1.5. – The applicants in the main proceedings entered an appearance in the proceedings, requesting that this Court rule the contested provision unconstitutional. Shortly before the public hearing, the applicants filed written statements in which they repeated and developed the assertions made in their respective entries of appearance and insisted that the question of constitutionality should be accepted.

1.6. – Certain co-interested individuals in the main proceedings (Giommaria Uggias, Oreste Rossi, Roberto Gualtieri, Luigi De Magistris, Salvatore Caronna and Francesca Balzani, Sonia Viale, *Italia dei Valori* and Giuseppe Arlacchi) also entered an appearance in the proceedings, requesting that the question of constitutionality be ruled inadmissible or groundless. Shortly before the hearing, some of them (Roberto Gualtieri, Salvatore Caronna and Francesca Balzani and Sonia Viale) filed written statements in which they repeated the assertions made in their respective entries of appearance and insisting that the question be ruled inadmissible or groundless.

2. – By five identical orders of 11 December 2009 (nos. 22, 23 and 28 of 2010), 14 December 2009 (no. 32 of 2010) and 15 December 2009 (no. 33 of 2010), division IIa of the Lazio Regional Administrative Court raised a question concerning the constitutionality of Article 21(1)(iii) of Law no. 18 of 1979, with reference to Articles 1, 3, 48, 49, 51, 56, 57 and 97 of the Constitution, as well as Articles 10, 11 and 117 of the Constitution, in the light of Articles 1, 2 and 7 of the Act concerning the election of the

representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom, as amended by Council Decision no. 2002/772/CE/Euratom of 25 June 2002 (hereafter, the "Brussels Act") and Articles 10, 11, 39 and 40 ECHR.

According to the referring court, this provision is unlawful on the grounds that it provides as follows, "without consideration for the number of seats allocated on a preliminary basis to the individual constituencies on the basis of resident population pursuant to Article 2 of Law no. 18 of 1979": "[the Electoral Office] then allocates to the list, which may either be a single list or comprised of related lists pursuant to Article 12, a number of seats in the various constituencies that is equal to the electoral result of the list in the constituency divided by the relevant electoral quotient for the list. The remaining seats still to be allocated shall be awarded respectively in the constituencies in which the above divisions resulted in the greatest number of remainder votes and, in the event of a tie, in those constituencies in which the greater constituency electoral result was achieved".

2.1. – The referring court states that the applicants in the main proceedings contested the report of the operations of the National Central Electoral Office of 26 June 2009 on the grounds that it "allocated the seats in the election to renew the representatives in the European Parliament of 6 and 7 June 2009", objecting in particular to the "contraction" effect on the number of seats allocated on a preliminary basis pursuant to Article 2 of Law no. 18 of 1979 to the regional constituencies of South Italy and the Islands, allegedly caused by the application of the contested provision. In fact, the latter provides for a system whereby seats are allocated to the lists on the basis of the number of voters in the individual constituencies which, in the opinion of the applicants in the main proceedings, contrasts with the different criterion governing the allocation of seats on the basis of population determined under Article 2 of Law no. 18 of 1979 in accordance with European law (Article 189 of the EC Treaty and the Brussels Act). The lower court states that, in the light of these considerations, the applicants in the main proceedings requested: that the report of the National Central Electoral Office and those of the constituency offices be corrected, with the resulting election of the applicants as members of the European Parliament, setting aside Article 21 of Law no. 18 of 1979; in the alternative, that the court refer the case to the

Constitutional Court seeking a declaration that Articles 21 and 22 of Law no. 18 of 1979 are unconstitutional.

The referring Regional Administrative Court states that the following parties entered an appearance or intervened in the main proceedings: the Interior Ministry and the National Central Electoral Office at the Court of Cassation (nos. 22, 28, 32 and 33 of 2010); Roberto Gualtieri (nos. 22, 23, 28, 32 and 33 of 2010); Salvatore Caronna (nos. 22, 28 and 33 of 2010); Sonia Viale (no. 22 of 2010); *Lega Nord per l'Indipendenza della Padania* (no. 22 of 2010); the *Partito Democratico* (no. 22 of 2010); Sardinia Region (nos. 28, 32 of 2010); and Sicily Region (no. 32 of 2010).

2.2. – In view of the above, after providing an account of the content of national and supranational legislation governing elections to the European Parliament, the lower court observes that the application of the contested provision "*de facto*" has a distorting effect, consisting in the allocation to each constituency of a number of seats that is "directly proportional with turnout", rather than in proportion with the resident population, as provided for under Article 2 of Law no. 18 of 1979, as well as under Community law which establishes the principles of "territorial representation" and "degressive proportionality", under which "the number of candidates elected in each territorial constituency must guarantee an adequate representation of the population in the relevant constituency". In particular, compared to the distribution of seats made in accordance with Article 2 of Law no. 18 of 1979 (which provides for 18 for the South Italian constituency and 8 seats for the Islands), the electoral results from 2009 would according to the lower court have resulted in "a deficit of representation […] for voters from the South and Islands constituencies, which were subject to a reduction of 3 and 2 representatives respectively (with the resulting failure to elect the applicant[s]) due to the distribution of votes on the basis of a different incompatible criterion (provided for under Article 21) relating to the number of citizens who exercised the right to vote".

Due to the distorting effect described, the referring court raised a question concerning the constitutionality of the contested provision observing, with regard to its relevance, that "any ruling of unconstitutionality by the Constitutional Court would make it necessary to establish the positions of the applicant[s] […] in the light of the new resulting legislation".

As regards the question of non manifest groundlessness, the referring Administrative Court questions the constitutionality of the contested provision with reference to various principles of constitutional law.

In the first place, it is claimed to violate Article 3 of the Constitution, with reference both to the principle of reasonableness and equality: the "inherent unreasonableness" results from the "alleged contradiction […] with Parliament's intention, as resulting from the *travaux preparatoires* and the tone of Article 2" of Law no. 18 of 1979, according to which seats must be distributed in proportion with the population resident in each constituency; the principle of equality would be violated with reference both to the right to vote, due to the violation of the principle of the equality of votes, as well as the right to stand as a candidate, since it would permit "one or more lists within constituencies in which there has been a greater turnout to obtain more seats, altering the number of those allocated to the same constituencies, to the detriment of those of candidates standing in constituents with a lower turnout".

Secondly, the principles of proper conduct and impartiality specified under Article 97 of the Constitution are claimed to have been violated since, whilst Article 2 of Law no. 18 of 1979 correctly implemented the indication under Community legislation relating to the right of States "to bind themselves to a system for the territorial distribution of seats, according to constituency", on the contrary the contested provision "grounds the electoral result […] on a system that rewards constituencies in which the population […] has demonstrated that it is more mature in political and civil terms", even though there is no "rationale [for that different criterion] within the legal order".

Thirdly, Article 1 of the Constitution, according to which "the conduct of national procedures relating to the allocation of aspects of sovereignty to the European Union, such as elections of members of the European Parliament", must also occur "in accordance with democratic principles, is also claimed to have been violated".

Fourthly, Articles 10 and 11 of the Constitution, with reference to Articles 1, 2 and 7 of the Brussels Act, are claimed to have been violated, since although the "system for the territorial distribution" of seats is not mandatory under Community law, "it meets the requirements of proportionality and adequate representation of the population", with the result that the national Parliament could not have provided for a "mechanism in

contrast" with that system, but at most an equivalent alternative in the pursuit of that purpose.

Fifthly, Articles 48, 49 and 51 of the Constitution, considered also in conjunction with Articles 2, 18, 21, 39, 64, 67, 82 and 118 of the Constitution, which "assert the criterion of adequate representation of the population as a derivative of the higher democratic principle", are claimed to have been violated.

Sixthly, the contested provision is claimed to violate Articles 10 and 117(1) of the Constitution, in the light of Articles 10, 11, 39 and 40 ECHR [more correctly: the Charter of Fundamental Rights of the European Union], which enshrine "the right of every citizen to express his own convictions and to stand as a candidate at elections to the European Parliament" and are in turn "closely related to those protected by the Articles of the Constitution that assert the democratic principle, according to the principle of equality set out under Article 3 of the Constitution". In the opinion of the referring court, which refers in this regard to judgments no. 348 and no. 349 of 2007 of this Court, the contested provision is incompatible with the aforementioned provisions of the ECHR, and therefore with the international obligations referred to under Articles 10 and 117 of the Constitution.

Finally, the lower court considers that the contested provision also violates Articles 56 and 57 of the Constitution, which enshrine the principle of "adequate representation of the citizen in the institutions", of which "the principle of proportional territorial representation" is a manifestation.

2.3. – The President of the Council of Ministers intervened in all of the proceedings, represented by the *Avvocatura Generale dello Stato*, requesting that the questions raised by ruled manifestly groundless.

The *Avvocatura Generale* observes as a preliminary matter that Law no. 18 of 1979 provides for a "so-called perfect" proportional electoral system, which therefore "guarantees the highest degree of political representation to the electorate, to the partial detriment of territorial representation". In view of this, the State representative asserts that, according to the Community law cited by the referring court, the criterion of the territorial representativity of the European Parliament (so-called degressive proportionality) relates solely to "national representation" and not also to the representation of territorial realities within the Members States. In particular, in the

opinion of the *Avvocatura Generale dello Stato*, in contrast to the view of the referring court, the Brussels Act contains "a decisive choice in favour of political representation in proportional terms and on a national level of members elected to the European Parliament", since it permits the "creation of constituencies or other internal divisions […] solely as a function of national circumstances and provided that the proportional nature of the vote is not compromised, that is the representative nature of the vote compared to the political composition of the electorate within the Member State". According to the State representative, the national legislature did not intend to exercise that right, given that the constituencies provided for under Law no. 18 of 1979 did not pursue the purpose of "allocating significance to homogeneous territorial units in institutional terms", but met mere administrative purposes "aimed at favouring the orderly conduct of electoral operations in addition to permitting an effective election campaign, maintaining the relationship between voters and candidates at structurally-determined levels".

On the basis of these considerations, the *Avvocatura Generale dello Stato* argues that there had been no violation of supranational sources as alleged. Nor according to the State representative had there been any violation of Article 3 of the Constitution as alleged. In fact, the principle of equality in voting would if anything have been "breached" by the choice of the opposing criterion involving the allocation of a fixed number of seats to the various constituencies, whereby "the candidates elected in constituencies with lower turnout would end up representing a lower number of voters". Moreover, as far as the inherent unreasonableness of the contested provision is concerned, due to its alleged contradiction with Article 2 of Law no. 18 of 1979, the *Avvocatura Generale dello Stato* observes that in reality, the two provisions "must be read in conjunction with one another", "because the distribution of seats between constituencies cannot occur in isolation from the determination of the procedure for allocating the seats themselves, which the electoral law under examination has provided should occur in such a manner as to provide the greatest guarantee of proportional representation, as required according to the fundamental principle contained in Article 1(2) of the Law, according to which "the allocation of seats between the competing lists shall occur on a proportional basis" (and not therefore on a constituency basis)".

2.4. – All of the applicants in the main proceedings entered an appearance, requesting that the Court rule the contested provision unconstitutional. Sardinia and Sicily Regions, which had intervened in some of the main proceedings, also entered an appearance, arguing that the question of constitutionality raised should be accepted. Shortly before the hearing, some of the applicants the main proceedings who had entered an appearance in the proceedings before the Constitutional Court (Giuseppe Gargani, Pasquale Sommese, Maddalena Calia and Sebastiano Sanzarello) filed written statements, repeating and expanding the arguments made in their respective entries of appearance and arguing that the Court should rule the contested legislation unconstitutional. Sicily and Sardinia Regions so filed written statements shortly before the hearing, confirming the arguments made in their respective entries of appearance and arguing that the question of constitutionality should be accepted.

2.5. – Some of the counter-interested parties in the main proceedings (Salvatore Caronna, Roberto Gualtieri, Sonia Viale, Iva Zanicchi, Giovanni Collino, Oreste Rossi and the *Partito Democratico*) entered an appearance in the proceedings, requesting that the Court rule the question inadmissible or groundless. Shortly before the hearing, some of these parties (Salvatore Caronna, Roberto Gualtieri, Sonia Viale and the *Partito Democratico*) filed written statements, expanding the arguments made in their respective entries of appearance and arguing that the Court should rule the question inadmissible or in any case groundless.

Considerato in diritto

1. – By eight referral orders, the Lazio Regional Administrative Court has raised a question concerning the constitutionality of Article 21(1)(ii) and (iii) of Law no. 18 of 24 January 1979 (Election of the Members of the European Parliament allocated to Italy), with reference to Articles 1, 3, 48, 49, 51, 56, 57 and 97 of the Constitution, as well as to Articles 10, 11 e 117 of the Constitution, in the light of Article 10 of the Treaty on European Union, Articles 1, 2 and 7 of the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom, as amended by Council Decision no.

2002/772/CE/Euratom of 25 June 2002 (hereafter, the "Brussels Act") and Articles 10, 11, 39 and 40 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, ratified and implemented by Law no. 848 of 4 August 1955 (hereafter, the "ECHR") [more correctly: the Charter of Fundamental Rights of the European Union].

Article 21(1)(ii) of Law no. 18 of 1979 is targeted in particular by the objections contained in the three referral orders from the Lazio Regional Administrative Court (nos. 29, 30 and 31 of 2010), of identical content, regarding the eligibility of the lists that did not reach the minimum threshold del 4% to receive seats on the basis of the remainder votes.

On the other hand, Article 21(1)(iii) is targeted by the challenges made by the Lazio Regional Administrative Court in five referral orders (nos. 22, 23, 28, 32 and 33 of 2010), also of identical content, relating to the procedures according to which seats are divided between the different electoral constituencies.

2. – Due to their objective connection, the proceedings may be joined for decision by one single judgment.

3. – As a preliminary matter, it is necessary to illustrate the principal characteristics of the legislation governing the election of the Members of the European Parliament allocated to Italy, against the backdrop of which the contested provisions have been enacted.

3.1. – Pending the introduction of a uniform procedure governing the election of representatives to the European Parliament, Community law has reserved to the Member States the ability to regulate such matters, though has laid down certain common principles. These principles are contained in the Brussels Act, which makes a basic choice in favour of electoral systems of a proportional type. In fact, it provides that "[i]n each Member State, members of the European Parliament shall be elected on the basis of proportional representation, using the list system or the single transferable vote" (Article 1), according to national provisions which "shall not affect the essentially proportional nature of the voting system" (Article 7); it permits the Member States to establish electoral constituencies, but "without generally affecting the proportional nature of the voting system" (Article 2); and it permits national legislatures to specify a minimum threshold for the allocation of seats, although this "may not exceed 5 per cent

of votes cast" on national level (Article 2-bis). Therefore, European law is inspired by the principle of political proportionality: it permits the establishment of internal constituencies, provided that they do not violate this principle.

3.2. – When implementing the European legislation by Law no. 18 of 1979, Italy chose a so-called "pure" proportional electoral system, allocating seats under a single national college. However, the college is comprised of five electoral constituencies (North West Italy; North East Italy; Central Italy; South Italy; and Islands) in which lists must be presented and to which a preliminary number of seats is allocated in proportion with the resident population, in accordance with a rule introduced by Law no. 61 of 9 April 1984 (Technical provisions concerning the election of representatives of Italy to the European Parliament). Moreover, by Law no. 10 of 20 February 2009 (Amendments to Law no. 18 of 24 January 1979 on the election of the Members of the European Parliament allocated to Italy), a minimum threshold of 4% of the valid votes cast was introduced.

3.3. – The procedures for allocating seats are specified under Article 21 of Law no. 18 of 1979, which provides for the following stages.

First of all, the "national electoral result" of each list is determined, resulting from the "sum of the votes obtained in the individual constituencies by the lists bearing the same symbol" (Article 21(1)(i)), and "the lists that have received at least 4 percent of the valid votes cast on national level" are identified (Article 21(1)(i-bis)).

Next, the seats are divided on a proportional basis between the various lists that exceeded the minimum threshold, on the basis of the national electoral result of each list, according to the formula of full quotients followed by the highest number of remainder votes. In particular, the national electoral result of each list is divided by the "national electoral quotient" (obtained from the total of the national electoral results of the lists eligible for the allocation of seats, divided by the number of seats available for allocation) and each list is allocated a number of seats that is equal to the relevant national electoral result divided by the national electoral quotient. The residual seats are then allocated to the lists for which the above divisions have resulted in the greatest number of remainder votes, whereby "the national electoral results of the lists that have not reached the national electoral quotient" are also deemed to be remainder votes (Article 21(1)(ii)).

Finally, the seats allocated to the various lists are distributed within the individual constituencies. To this effect, the constituency electoral result of each list is divided by the "list electoral quotient" (which is the result of the national electoral result for the list divided by the number of seats allocated to that list). Within the various constituencies, each list is then allocated a number of seats that is equal to the list's constituency electoral result divided by the list's relevant electoral quotient. The remaining seats that are still to be distributed are allocated in the constituencies in which the above divisions result in the greatest number of remainder votes (Article 21(1)(iii)).

4. – By referral orders nos. 29, 30 and 31, the Lazio Regional Administrative Court raised a question concerning the constitutionality of Article 21(1)(ii) of Law no. 18 of 1979, with reference to Articles 1, 3, 48, 49, 51 and 97 of the Constitution, as well as Article 11 of the Constitution, in the light of Article 10 of the Treaty on European Union and Articles 10, 11, 39 and 40 ECHR [more correctly: the Charter of Fundamental Rights of the European Union]. The provision is contested insofar as it specifies "the national threshold […] without providing for any corrective mechanism, including during the distribution of remainder votes", in particular "by not permitting the lists that did not reach the minimum threshold to be eligible to receive the seats awarded according to the remainder vote mechanism".

4.1. – Whilst it does consider that the minimum threshold considered in itself is constitutional, the referring court does observe that, according to the contested provision, when apportioning the seats not allocated on the basis of full quotients, "the national electoral results of the lists that have not reached the national electoral quotient shall also be deemed to be remainder votes". In the opinion of the referring court, this legislation is unlawful insofar as it does not specify that the national electoral results of the lists that have not reached the minimum threshold del 4% should also be deemed to be remainder votes, thereby depriving those lists of the "right of minimum representation".

According to the referring court, the contested provision violates first of all Article 3 of the Constitution on various grounds: it unreasonably permits the lists that have reached the threshold to obtain seats, when calculating remainder votes, on the basis of electoral results that are more modest than those of the lists which are by contrast excluded from the allocation of seats on the basis of remainder votes since they have not

reached the threshold; the contested provision is then claimed not to be proportionate with the goal of favouring political coalitions, which is already sufficiently assured by the exclusion of the minor lists from the allocation of seats on the basis of the full quotient; finally, a further ground for unreasonableness is identified by the referring court in the fact that the lists which do not obtain any seats due to the failure to reach the threshold are not eligible (on the basis however of legislation that is not contested by the referring court) for reimbursement of electoral expenses. Secondly, the Administrative Court complains of the violation of Articles 1, 48, 49, 51 and 97 of the Constitution, since the contested provision "fundamentally disregards the popular will of a more or less broad range of electors". Finally, the referring court argues that Article 11 of the Constitution has been violated, in the light both of Article 10 of the Treaty on European Union, as amended by the Treaty of Lisbon, according to which "the functioning of the Union shall be founded on representative democracy" and "every citizen shall have the right to participate in the democratic life of the Union", as well as Articles 10, 11, 39 and 40 ECHR [more correctly: the Charter of Fundamental Rights of the European Union] which enshrine "the right of every citizen to express his own convictions and to stand as a candidate at elections to the European Parliament".

4.2. – The question is inadmissible.

In the first place, it is posed in a contradictory manner. In fact, the referring court on the one hand regards as manifestly groundless a hypothetical question of constitutionality concerning the introduction of the minimum threshold, whereby the lists that do not reach 4% of the valid votes are excluded from the allocation of seats; on the other hand, it challenges the legislation relating to the allocation of seats on the basis of remainder votes since, applying the provisions on the minimum threshold, it excludes the lists that have not reached it from that operation. This however is contradictory: if the minimum threshold is lawful – as the referring court acknowledges – then it cannot challenge Parliament's resulting choice to exclude the lists that have not reached it from the allocation of seats on the basis of remainder votes; if on the other hand the legislation governing the allocation of seats on the basis of remainder votes is unlawful on the grounds that it excludes the lists that have not reached the minimum threshold – as the referring court complains – then it cannot argue that Parliament can lawfully introduce that threshold.

In any case, even were it accepted that a threshold rule that entirely precludes lists that have received less than 4% of the vote from the allocation of seats, without any corrective mechanism, breached the constitutional principles indicated by the referring court, it should be observed that the court is requesting a substantive judgment. In fact, the lower court is requesting this Court to introduce a mechanism directed at mitigating the effects of the minimum threshold by granting the lists that have not reached it eligibility for the award of the seats distributed on the basis of remainder votes on the strength of their respective electoral results. However, such mitigation is not mandatory under constitutional law, and numerous corrective mechanisms aimed at mitigating the effects of the minimum threshold can be imagined, starting from the reduction of the threshold.

According to the settled case law of this Court, it follows that since the question raised requests a substantive judgment in the absence of any solution that is mandatory under constitutional law, it must be deemed to be inadmissible (see, most recently, judgment no. 58 of 2010 and orders no. 59 and no. 22 of 2010).

5. – By referral orders nos. 22, 23, 28, 32 and 33 of 2010, the Lazio Regional Administrative Court raised a question concerning the constitutionality of Article 21(1)(iii) of Law no. 18 of 1979, with reference to Articles 1, 3, 48, 49, 51, 56, 57 and 97 of the Constitution, and with reference to Articles 10, 11 and 117 of the Constitution, in the light of Articles 1, 2 and 7 of the Brussels Act and Articles 10, 11, 39 and 40 ECHR [more correctly: the Charter of Fundamental Rights of the European Union]. The provision is contested on the grounds that is regulates the distribution of the seats allocated to each list on national level in the various constituencies, "without consideration for the number of seats allocated on a preliminary basis to the individual constituencies on the basis of resident population pursuant to Article 2 of Law no. 18 of 1979".

5.1. – In the opinion of the referring court, the application of the contested provision would give rise to a distortive effect, consisting in the "transfer" of seats from one constituency to another: some seats, which were allocated to a particular constituency on the basis of the population criterion pursuant to Article 2 of Law no. 18 of 1979, would by contrast be transferred to another constituency by virtue of the different distribution criterion provided for under the contested provision, which is based on the

number of valid votes cast. More precisely, since that "transfer" is a consequence of the different relationship within the various constituencies between the number of inhabitants and the number of valid votes cast, it would penalise the constituencies in which turnout is lower. In particular, the referring court notes that the electoral results from 2009 allegedly resulted in "deficit of representation […] for voters from the South and Islands constituencies, which were subject to a reduction of 3 and 2 representatives respectively , with the resulting failure to elect the applicants in the main proceedings".

In this regard, according to the lower court, the contested provision violates various constitutional principles. First and foremost, it violates Article 3 of the Constitution, both in terms of the requirement of equality, with reference to the right to vote and the right to stand as a candidate, as well as with reference to the "inherent unreasonableness" of the contested provision, which is claimed to contradict with "Parliament's intention, as resulting from the *travaux preparatoires* and the tone of Article 2" of Law no. 18 of 1979, according to which seats must be distributed in proportion with the population resident in each constituency. Finally, there is claimed to be a violation of the "principle of territorial representation", which the referring court considers is imposed both by the principles of the Italian Constitution (Articles 1, 48, 49, 51, 56 and 57 of the Constitution), on the assumption that they also apply to the procedures governing the election of the Members of the European Parliament allocated to Italy, as well as, through Articles 10, 11 and 117 of the Constitution, by European law, and specifically by Articles 1, 2 and 7 of the Brussels Act, and Articles 10, 11, 39 40 ECHR [more correctly: the Charter of Fundamental Rights of the European Union].

5.2. – The question is inadmissible.

The Italian Parliament, which as clarified above has jurisdiction in this area pending the introduction of a uniform procedure by the European Community, chose a proportional electoral system with a single national college, subdivided into constituencies within which lists must be presented. However, Law no. 18 of 1979, as originally enacted, did not allocate a specific number of seats to each constituency on the basis of resident population, but rather limited itself to specifying the minimum and maximum number of candidates per list. In the 1979 elections therefore, the seats were distributed between the constituencies on the basis of the votes cast in each of them, according to the legislation now contested. Due also to the lower turnout, the lists

presented in the South and Islands constituencies obtained a lower number of seats compared to what they would have received in proportion with the resident population in those constituencies. In an attempt to remedy this drawback, by Law no. 61 of 1984 Parliament amended Article 2 of Law no. 18 of 1979, expressly providing that each constituency be allocated a number of seats in proportion with the population resident in it. However, Law no. 61 of 1984 did not draw all of the consequences of the allocation of seats to constituencies on the basis of population. In fact, it left the contested legislation unchanged where, for the purposes of distributing seats between the constituencies, it considers the relationship between the list's electoral result in the constituency and the list's national electoral quotient, rather than the constituency quotient.

From 1984 onwards therefore, Italian electoral legislation for the European Parliament was informed by two requirements: on the one hand, the allocation of seats in the single national college in proportion with the votes validly cast, and on the other the distribution of seats between the constituencies in proportion with population. The former reflects the criterion of political proportionality and rewards participation in elections and the exercise of the right to vote. The latter is a manifestation of the principle of territorial representation, determined on the basis of population (but also theoretically determinable on the basis of citizens, or voters, or a combination of those factors).

However, it is difficult to harmonise these requirements, and indeed they cannot be perfectly reconciled with one another. Nonetheless, various possible corrective mechanisms exist which, whilst they do not change the proportional distribution of seats within the single national college, reduce the transfer effect companied of by the referring court, namely the disparity between the seats obtained in the constituencies on the basis of the votes validly cast and the seats corresponding to them on the basis of population. However, these mechanisms achieve that objective at the price of altering to a greater or lesser extent the proportional relationship between the votes obtained and the seats awarded to each list within each individual constituency. However, both in 1984 as well as the subsequent occasions when it examined the electoral legislation concerned, Parliament has not introduced a corrective mechanism, with the consequence that, notwithstanding the provisions of Article 2 of Law no. 18 of 1979, as

amended in 1984, seats have continued to be allocated between the constituencies, as occurred before, in proportion with valid votes, irrespective of the preliminary allocation on the basis of population. It is also clear from the *travaux preparatoires* to Law no. 61 of 1984 that Parliament was aware that the goal of respecting the prior allocation of seats in proportion with population would have required a more far-reaching amendment of the legislation contained in Articles 21 and 22 of Law no. 18 of 1979. However, this did not occur, neither at the time nor subsequently when, with the enactment of Law no. 10 of 2009, Parliament limited itself to introducing the minimum threshold, moreover calculating it "on national level".

In view of the above, it must be noted that the referring court has requested a judgment by which this Court introduces a system for the distribution of seats between constituencies which, in contrast to that provided for under the contested provision, complies with the distribution previously made on the basis of population pursuant to Article 2 of Law no. 18 of 1979. However, the lower court does not specify which of the possible systems should be introduced in order to reconcile the principle of political proportionality with that of territorial representation. In reality, the referring court makes only a brief reference to the legislation enacted by the Chamber of Deputies in Article 83(1)(viii) of Presidential Decree no. 361 of 30 March 1957 (Approval of the consolidated text of laws regulating the election of the Chamber of Deputies) – which according to some of the private parties that intervened in the proceedings before the Constitutional Court, could apply by virtue of the reference contained in Article 51 of Law no. 18 of 1979 – in the part of the referral order in which it sets out the arguments of the applicants in the main proceedings. In any case, it should be stated that the legislation amounts to only one of the possible mechanisms that is capable of reducing the shifting effect of seats from one constituency to another. However, it can only be for Parliament to determine, with specific reference to the representative body concerned, the most appropriate solution in order to remedy the alleged inconsistency within the contested legislation. Given the existence of a range of solutions, none of which is mandatory under constitutional law, this Court cannot take the place of Parliament in making a choice reserved to the latter (see, most recently, judgment no. 58 of 2010 and orders no. 59 and no. 22 of 2010).

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

hereby,

rules that the questions concerning the constitutionality of Article 21(1)(ii) and (iii) of Law no. 18 of 24 January 1979 (Election of the Members of the European Parliament allocated to Italy), raised with reference to Articles 1, 3, 48, 49, 51, 56, 57 and 97 of the Constitution, Articles 10, 11 e 117 of the Constitution, in the light of Article 10 of the Treaty on European Union, Articles 1, 2 and 7 of the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom, as amended by Council Decision no. 2002/772/CE/Euratom of 25 June 2002 and Articles 10, 11, 39 and 40 by the Charter of Fundamental Rights of the European Union, by the Lazio Regional Administrative Court by the referral orders mentioned in the headnote, are inadmissible.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 8 July 2010.

Signed:

Francesco AMIRANTE, President

Sabino CASSESE, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 22 July 2010.

The Director of the Registry

Signed: DI PAOLA