Corte costituzionale

JUDGMENT NO. 331 OF 2010

Ugo DE SIERVO, President

Ugo DE SIERVO, Author of the Judgment

JUDGMENT NO. 331 YEAR 2010

In this case the Court considered an application from the President of the Council of Ministers alleging that certain regional legislation purporting to regulate matters relating to nuclear energy, insofar as it prohibited the construction of nuclear installations without the agreement of the region, was unconstitutional on the grounds that it involved the enactment of a general principle, a power reserved to the State. The Court struck down the legislation as unconstitutional holding that, even if there is any doubt as to the constitutionality of State legislation, this is to be resolved by reference to the Constitutional Court, and does not under any circumstances entitle the regions to enact their own legislation if the matter concerned falls under the exclusive legislative jurisdiction of the State.

(omitted)

JUDGMENT

in proceedings concerning the constitutionality of Article 1(2) of Puglia Regional Law no. 30 of 4 December 2009 (Provisions on nuclear energy), Article 8 of Basilicata Regional Law no. 1 of 19 January 2010 (Provisions on energy and the Regional Energy and Environmental Policy Plan, Legislative Decree no. 152 of 3 April 2006 – Regional Law no. 9 of 2007), and Article 1(2) of Campania Regional Law no. 2 of 21 January 2010 (Provisions governing the formation of the annual and long-term budget of Campania Region – Finance Law 2010), initiated pursuant to applications by the President of the Council of Ministers served on 5-11 February, 20-24 March and 22-24 March 2010, filed on 11 February and 30 March 2010 and respectively registered as nos. 19, 50 and 51 in the register of applications 2010.

Considering the entries of appearance by Puglia, Basilicata and Campania Regions as well as the interventions by the *Federazione Precari della Sanità Campana* [Campania Federation of Casual Healthcare Workers], *FP - CGIL Medici Campania* [Public Servants (Doctors) in Campania, Italian General Labour Confederation] and CIMO-ASMD (*Coordinamento italiano medici ospedalieri - Associazione sindacale*

medici dirigenti) [Italian Coordination of Hospital Doctors – Trade Union Association of Medical Managers] for Campania Region;

having heard the Judge Rapporteur Ugo De Siervo in the public hearing of 19 October 2010;

having heard the *Avvocato dello Stato* Antonio Palatiello for the President of the Council of Ministers and Counsel Maria Liberti and Leonilde Francesconi for Puglia Region and Vincenzo Cocozza for Campania Region.

(omitted)

Conclusions on points of law

1. – By separate applications, the President of the Council of Ministers, represented by the *Avvocatura Generale dello Stato*, contested Puglia Regional Law no. 30 of 4 December 2009 (Provisions on nuclear energy), and in particular Article 1(2) (application no. 19 of 2010); Article 8, *inter alia*, of Basilicata Regional Law no. 1 of 19 January 2010 (Provisions on energy and the Regional Energy and Environmental Policy Plan, Legislative Decree no. 152 of 3 April 2006 – Regional Law no. 9/2007 (application no. 50 of 2010); and, *inter alia*, Article 1(2) of Campania Regional Law no. 2 of 21 January 2010 (Provisions governing the formation of the annual and long-term budget of Campania Region – Finance Law 2010) (application no. 51 of 2010), with reference to Articles 41, 117(2)(d), (e), (h) and (s) and (3), 118 and 120 of the Constitution, and the principles of subsidiarity, reasonableness and loyal cooperation between the State and the Regions.

The applications concern provisions with analogous content, concerning a ban within the regional territory on the construction of nuclear installations and deposits: they therefore deserve to be joined for the purposes of joint decision.

2. – As a preliminary matter, the challenge by the *Avvocatura dello Stato* to Article 1(1) and (3) of Puglia Regional Law no. 30 of 2009 must be ruled inadmissible, since the resolution of the Council of Ministers fails to specify that provision, and therefore

there was no authorisation from the political body exclusively entitled to identify the object of the question of constitutionality (see *inter alia*, judgment no. 533 of 2002).

3. – The entry of appearance in the proceedings by Campania Region is also inadmissible, since it has not been resolved upon by the regional council in accordance with the provisions of Article 32(2) of Law no. 87 of 11 March 1953 (Provisions on the establishment and functioning of the Constitutional Court), which corresponds to Article 51 of the Statute (Law no. 6 on the Statute of Campania Region of 28 May 2009), but was decided by the coordinator of the Regional Counsel [*Avvocatura Regionale*] (order read out in the hearing of 25 May 2010, in the proceedings concluded by judgment no. 225 of 2010).

4. – Three private parties intervened in the proceedings initiated against Campania Regional Law no. 2 of 2010, the submissions of whom however relate exclusively to legislative provisions contained in that Law but different from Article 1(2), which is the sole provision at issue in these proceedings. These interventions must not therefore be deemed to relate to the part of the application to be decided in these proceedings and will hence be assessed, including with regard to the preliminary issue of their admissibility, when this Court is called upon to assess the challenges to which the interventions relate.

5. – By contrast, the objections of inadmissibility raised by Puglia Region based on the twofold argument that the State did not specify the fundamental principles applicable to energy which the Region is alleged to have violated, and that it took action prematurely, without taking steps to establish these principles through specific statutory provisions, must be rejected. On the contrary, the applicant adequately objected to the fact that the regional legislation enunciated a principle, namely the prohibition on the construction of nuclear installations without agreement, asserting that such legislation exceeded its jurisdiction to enact detailed legislation, and frustrated the goals pursued by Law no. 99 of 23 July 2009 (Provisions on the development and internationalisation of undertakings, as well as on energy); all of the above is sufficient in order to establish the admissibility of the challenge.

6. – The contested provisions prohibit, using analogous formulae, the construction on the regional territory of installations for the production of nuclear energy, the manufacture of nuclear fuel, the storage of spent nuclear fuel and radioactive waste, and

the despot of radioactive materials and waste, unless agreement is reached in advance with the State regarding their location.

They therefore reproduce in part the contents of analogous regional provisions intended to prohibit the presence on the relevant territory of nuclear materials, which have already been considered in judgments of this Court (no. 247 of 2006 and no. 62 of 2005). On the other hand however, they are different since, compared to the former, they add that the prohibition is not absolute in nature, but ceases to apply where agreement is reached between the State and the region concerned.

All of the contested laws were enacted after the parent statute, Law no. 99 of 23 July 2009 (Provisions on the development and internationalisation of undertakings, as well as on energy), which re-launched the use of nuclear energy in our country, and before Legislative Decree no. 31 of 15 February 2010 (Provisions on the location, construction and operation within the national territory of installations for the production of electricity from nuclear energy, installations for the manufacture of nuclear fuel, storage systems for spent nuclear fuel and radioactive waste, as well as compensation measures and information campaigns for the public, pursuant to Article 25 of Law no. 99 of 23 July 2009), which authorised implementation through secondary legislation.

Puglia and Basilicata Regions did not limit themselves to contesting Article 25(2) of Law no. 99 of 2009 before this Court, insofar as it allegedly permitted the construction of nuclear installations without agreement with the region concerned. These regions also sought to paralyse the effects of the State legislation by enacting their own legislation containing provisions that set forth rules governing relations with the State in this respect, which they considered to be the only arrangements compatible with the Constitution. Campania Region by contrast simply enacted legislation, without even challenging the parent statute.

The applicant considers that this resulted in the violation of Articles 117(3) and 118 of the Constitution, since the legislation on the location of installations, and in particular the introduction of the requirement for agreement on such matters, constitutes a fundamental principle applicable to energy production, a matter over which jurisdiction is shared.

Moreover, as far as nuclear installations are concerned, the legislation is claimed to have encroached upon the State's exclusive jurisdiction over State security, competition law, environmental protection and public order and security (Article 117(2)(d), (e), (h) and (s) of the Constitution), under which the applicant first and foremost classifies the legislation on nuclear energy, whilst with specific reference to sites for radioactive waste it invokes only Article 117(2)(s) of the Constitution.

Moreover, Article 120 of the Constitution is claimed to have been violated, with reference to the principles of subsidiarity, reasonableness and loyal cooperation, since the contested laws prevented the free movement of radioactive material throughout the national territory.

Finally, Article 41 of the Constitution is claimed to have been violated due to an unjustified restriction on the freedom of economic initiative of undertakings operating in the industry.

7. – The questions based on Articles 117(2)(s) and (3) of the Constitution are well founded.

In judgment no. 278 of 2010, this Court has already clarified under which heads of jurisdiction legislative provisions concerning the nuclear energy and radioactive waste industry are to be classified. With regard to the latter in particular, it reasserted in accordance with its previous case law (judgments no. 247 of 2006 and no. 62 of 2005) that such matters involve exclusive state jurisdiction over "protection of the environment and ecosystem" (Article 117(2)(s) of the Constitution), whilst with reference to production installations, the area of law concerning the "national production, transport and distribution of energy" falling under Article 117(3) of the Constitution (judgment no. 278 of 2010, section 12 of the Conclusions on points of law), over which jurisdiction is shared, was considered to be predominant.

Legislation governing the location of production and storage installations, as well as deposits for radioactive waste, is therefore in part by the State and in part by the regions in accordance with these criteria, without prejudice to the requirement for forms of cooperation in the exercise of the relative administrative functions which the Constitution reserves to the regional system, which must, for matters on a higher level, involve agreement between the State and the region concerned.

Legislative jurisdiction over these forms of cooperation and agreement is consequently vested in the legislature that is vested with legislative jurisdiction over the relevant matters. This is accordingly the State legislature, both in cases where it is called upon to enact comprehensive legislation on the protection of the environment, and also where the national law must be limited to fundamental principles, with reference to energy.

In fact, also in this last case the determination of the forms and manner of cooperation, as well as the procedures to be followed in order to resolve any deadlock created by ongoing dissent between the parties, characterises – as a fundamental principle – the legislative framework in force and the very opportunities to secure the actual achievement of priority objectives, and jurisdiction over such matters is vested by the Constitution in the State legislature.

Moreover, it cannot be asserted, as argued by the representative of Puglia Region, that the fact that agreement is required under constitutional law means that it is immaterial whether express provision is made for it under regional rather than national law.

This line of reasoning confuses two different operations, namely on the one hand the constitutional law requirements with which the legislature is required to comply, and on the other hand the legislative jurisdiction to regulate an area of law in accordance with these requirements.

Although as regards the former issue this Court has highlighted the need to guarantee adequate forms of involvement for the region concerned (judgment no. 278 of 2010, section 13 of the Conclusions on points of law), with regard to the latter question it is evident that this task must be attended to by the legislature in which jurisdiction is vested pursuant to Article 117(2)(s) of the Constitution, namely the State legislature. It also goes without saying that any choices made in this manner may be subject to constitutional review, which is a matter for this Court, if they are considered not to respect regional autonomy. However, under no circumstances may the region use "legislative power for the purpose of setting aside a State Law within its territory which it considers to be unconstitutional, or indeed harmful or inappropriate, instead of taking action before this Court pursuant to Article 127 of the Constitution" (judgment no. 198 of 2004).

In effect, after the decisions contested in these applications were enacted, the State legislature took the action referred to above by enacting Legislative Decree no. 31 of 2010 to which we must look – in relation to the parent statute no. 99 of 2009 – for the legislation applicable to the construction of installations and deposits, which may as appropriate be subject to scrutiny by this Court.

Besides, it is inconceivable that, when confronted with decisions that are evidently of a supra-regional nature and have been adopted in order to ensure effective development in the production of electricity from nuclear energy, each region may unilaterally avoid the sacrifice that may result for it, in evident breach of its inderogable duties of economic and social solidarity.

Therefore the contested provisions violate Article 117(2)(s) of the Constitution insofar as they regulate deposits for radioactive materials and waste, and Article 117(3) of the Constitution insofar as they relate to installations for the production, manufacture and storage of nuclear energy and fuel, and must therefore be struck down as unconstitutional, rendering all other challenges moot.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

hereby;

having reserved for separate judgments the decisions on the other questions of constitutionality initiated against Basilicata Regional Law no. 1 of 19 January 2010 (Provisions on energy and the Regional Energy and Environmental Policy Plan, Legislative Decree no. 152 of 3 April 2006 – Regional Law no. 9 of 2007) and Campania Regional Law no. 2 of 21 January 2010 (Provisions governing the formation of the annual and long-term budget of Campania Region – Finance Law 2010);

rules that the entry of appearance in the proceedings by Campania Region is inadmissible;

declares that Article 1(2) of Puglia Regional Law no. 30 of 4 December 2009 (Provisions on nuclear energy) is unconstitutional;

declares that Article 8 of Basilicata Regional Law no. 1 of 2010 is unconstitutional;

declares that Article 1(2) of Campania Regional Law no. 2 of 2010 is unconstitutional;

rules that the question concerning the constitutionality of Article 1(1) and (3) of Puglia Regional Law no. 30 of 2009 initiated by the President of the Council of Ministers by the application referred to in the headnote, with reference to Articles 41, 117(2)(d), (e), (h) and (s) and (3), 118 and 120 of the Constitution, and the principles of subsidiarity, reasonableness and loyal cooperation between the State and the Regions, is inadmissible.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 3 November 2010.

(omitted)