



Corte costituzionale



JUDGMENT NO. 28 OF 2011

Ugo DE SIERVO, President

Giuseppe TESAURO, Author of the Judgment

JUDGMENT NO. 28 YEAR 2011

In this case the Court considered an application for a referendum to repeal various legislation concerning the re-introduction of nuclear power in Italy. The Court ruled that the application was admissible, holding that since international law did not contain any “precise obligation to construct or maintain in service installations for the production of nuclear energy”, the application for a referendum could not breach any obligations under international or Community law. In addition, the question also meet the prerequisites of homogeneity, clarity and unequivocalness.

(omitted)

JUDGMENT

in proceedings pursuant to Article 2(1) of Constitutional Law no. 1 of 11 March 1953 concerning the admissibility of the request for a referendum to repeal Decree-Law no. 112 of 25 June 2008, converted with amendments into Law no. 133 of 6 August 2008, in the text as in force pursuant to subsequent amendments and supplements, concerning “Urgent measures for economic development, simplification, competitiveness, the stabilisation of public finances and equality and fairness in taxation”, in respect of the following parts:

Article 7(1)(d): “d) construction throughout the national territory of installations for the production of nuclear energy;”;

as well as Law no. 99 of 23 July 2009, in the text as in force pursuant to subsequent amendments and supplements, concerning “Provisions for the development and internationalisation of undertakings, and on energy”, in respect of the following parts:

Article 25(1) in respect of the words: “of the location within the national territory of installations for the production of electricity from nuclear energy, installations for the manufacture of nuclear fuel,”;

Article 25(1) in respect of the words: “The same decrees shall also determine the authorisation procedures and individual prerequisites applicable to the construction, operation and decommissioning of the installations falling under the first sentence.”;

Article 25(2)(c) in respect of the words: “, the charges of which shall be borne by the undertakings involved in the construction or operation of the installations and facilities, which shall be prohibited from transferring these charges to the end users”;

Article 25(2)(d) in respect of the words: “which the holders of authorisations for the operations must adopt”;

Article 25(2)(g) in respect of the words: “the construction and operation of installations for the production of electricity from nuclear energy and installations for”;

Article 25(2)(g) in respect of the word “for” following the words “of radioactive waste or”;

Article 25(2)(i): “i) provision that the approvals relating to the prerequisites and technical specifications for nuclear installations already granted during the last ten years by the competent Authorities of the Member States of the Nuclear Energy Agency of the Organisation for Economic Cooperation and Development (NEA OECD) or the competent authorities of countries with which bilateral agreements on technological and industrial cooperation in the nuclear industry have been concluded shall be deemed to be valid in Italy, subject to approval by the Nuclear Safety Agency;”;

Article 25(2)(l) in respect of the words: “the charges relating to the”;

Article 25(2)(l) in respect of the words: “for consideration by the operators of nuclear activities and may be”;

Article 25(2)(n): “n) provision for the procedures according to which the producers of nuclear energy may arrange for the establishment of a ‘decommissioning’ fund;”;

Article 25(2)(o) in respect of the comma following the words “for the general public”;

Article 25(2)(o) in respect of the words: “, in order to create the appropriate conditions for the implementation of intervention work and the management of installations”;

Article 25(2)(q): “q) provision, within the ambit of the budgetary resources available for that purpose, for an appropriate campaign to provide the Italian public with information on nuclear energy, with particular reference to its safety and value for money.”;

Article 25(3): “In proceedings before the administrative courts relating in any way to the procedures applicable to the design, approval and construction of works,

infrastructure and industrial installations concerning the nuclear energy industry and relating to expropriations, occupations and the creation of easements, the provisions set forth under Article 246 of the Code of public works contracts, public supply contracts and public service contracts enacted by Legislative Decree no. 163 of 12 April 2006 shall apply”;

Article 25(4): “4. The words ‘, nuclear energy produced on the national territory’ shall be inserted into Article 11(4) of Legislative Decree no. 79 of 16 March 1999 after the words ‘renewable energy sources’.”;

Article 26;

Article 29(1) in respect of the words: “the peaceful uses of nuclear energy,”;

Article 29(1) in respect of the words: “either from installations for the production of electricity or”;

Article 29(1) in respect of the words: “construction, the operation and the”;

Article 29(4) in respect of the words: “in relation to the national energy policy priorities and guidelines and”;

Article 29(5)(c) in respect of the words: “on national nuclear installations and their infrastructure,”;

Article 29(5)(e) in respect of the words: “of the design, construction and operation of nuclear installations and attached infrastructure,”;

Article 29(5)(g) in respect of the words: “, serve notice to comply on the holders of authorisations”;

Article 29(5)(g) in respect of the words: “by the same individuals”;

Article 29(5)(g) in respect of the words: “falling under the authorisations”;

Article 29(5)(g) in respect of the word: “same”;

Article 29(5)(h): “h) the Agency shall inform the public in a transparent fashion regarding the effects on the general public and the environment of ionising radiation due to the operations of nuclear installations and to the use of nuclear technologies in both ordinary and extraordinary circumstances,”;

Article 29(5)(i) in respect of the words: “to the operation or”;

Article 133(1)(o) of Legislative Decree no. 104 of 2 July 2010 in respect of the words “including those relating to energy from nuclear power”;

as well as Legislative Decree no. 31 of 15 February 2010, in the text as in force pursuant to subsequent amendments and supplements, concerning “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”, in respect of the following parts:

the title of the Legislative Decree, in respect of the words: “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,”;

the title of the Legislative Decree, in respect of the words: “and information campaigns for the public”;

Article 1(1) in respect of the words: “of the legislation governing the location within the national territory of installations for the production of electricity from nuclear energy, installations for the manufacture of nuclear fuel,”;

Article 1(1)(a): “a) the authorisation procedures and the individual prerequisites applicable to operators in relation to the construction, operation and decommissioning within the national territory of the installations falling under Article 2(1)(e), as well as the operation of storage facilities for spent nuclear fuel and radioactive waste located on the same site as the aforementioned installations that are directly connected to them,”;

Article 1(1)(b): “b) the decommissioning Fund for nuclear installations,”;

Article 1(1)(c): “c) the compensation in respect of the construction and operation of the installations falling under letter a, to be paid to residents, undertakings operating within the territory surrounding the site and the local authorities affected,”;

Article 1(1)(d), in respect of the words: “and future”;

Article 1(1)(g): “g) a programme for the definition and implementation of an ‘National information campaign regarding the production of electricity from nuclear power’,”;

Article 1(1)(h): “h) the penalties that may be imposed in the event that the requirements set forth under this Decree are not complied with.”;

Article 2(1)(b): “b) ‘suitable area’ means the portion of the national territory that complies with the environmental and technical characteristics and the relative reference parameters in order to classify it as a suitable location for the construction of nuclear installations;”;

Article 2(1)(c): “c) ‘site’ means the portion of the suitable area that is certified for the construction of one or more nuclear installations;”;

Article 2(1)(e): “e) “nuclear installations” are installations for the production of electricity from nuclear power and installations for the manufacture of nuclear fuel constructed on the sites, along with connected works and their relative appurtenances, including facilities located on the same site for the storage of spent fuel and radioactive waste directly connected to the nuclear installation, the infrastructure indispensable for its operation, work to develop and adapt the national electricity grid necessary for the feed-in of the energy produced, any specific access routes;”;

Article 2(1)(f): “f) ‘operator’ means the natural or legal person or the consortium of natural or legal persons that expresses an interest in operating or is the holder of authorisation to operate a nuclear installation;”;

Article 2(1)(i) in respect of the words: “from the operation of nuclear installations, including the resulting waste”;

Article 3(1) in respect of the words: “, by which the strategic objectives in matters relating to nuclear power are set forth including, on a priority basis, protection against ionising radiation and nuclear safety”;

Article 3(1) in respect of the words: “the overall power and the expected time-scale for the construction and placing into service of the nuclear installations to be built,”;

Article 3(1) in respect of the words: “shall assess the contribution of nuclear energy in terms of safety and energy diversification,”;

Article 3(1) in respect of the words: “, economic and social benefits and shall set out the guidelines for the rationalisation process”;

Article 3(2): “2. The nuclear Strategy constitutes an integral part of the national energy strategy provided for under Article 7 of Decree-Law no. 112 of 25 June 2008, converted with amendments, into Law no. 133 of 6 August 2008.”;

Article 3(1)(a): “a) the reliability of nuclear energy in terms of environmental nuclear safety and the safety of installations, the impact if any on the protection of the general public against radiation and the risks of proliferation;”;

Article 3(3)(b): “b) the benefits, in terms of security of supply, resulting from the introduction of a significant share of nuclear energy into the national energy context;”;

Article 3(3)(c): “c) the capacity objectives for the electricity power which is to be installed as a proportion of national energy needs and the relative time-scales;”;

Article 3(3)(d): “d) the contribution which it is intended to make, through the use of nuclear energy as a low-carbon technology, to the achievement of the environmental objectives set on European level in relation to the energy climate package as well as to the reduction of chemical and physical pollutants;”;

Article 3(3)(e): “e) the system of international alliances and cooperation and the capacity of national and international industry to satisfy the objectives of the programme;”;

Article 3(3)(f): “f) the guidelines on the procedures for achieving the efficiency objectives on time and on budget and for providing guarantee instruments, including through the formulation or provision for the issue of specific guidelines;”;

Article 3(3)(g), in respect of the words: “end of life installations, for new facilities and for”;

Article 3(3)(h): “h) the benefits expected for the Italian industrial system and the principles governing compensation for the public and businesses;”;

Article 3(3)(i): “i) the transmission capacity of the national electricity grid and the proposal, if appropriate, to update the grid in order to satisfy the pre-determined objective of the power to be installed;”;

Article 3(3)(l): “l) the objectives relating to the supply, processing and enrichment of nuclear fuel.”;

the whole of Title II, entitled “Single procedure for the location, construction and operation of nuclear installations; provisions on economic benefits for residents, local authorities and businesses; provisions on the decommissioning of installations”, containing Articles 4 to 24;

Article 26(1) in respect of the words: “of the decommissioning”;

Article 26(1)(d) in respect of the words: “shall receive the fee for the activities falling under Article 27 from the operators involved in the processing and disposal of radioactive waste, according to procedures and tariffs determined by decree of the Ministry of Economic Development acting in concert with the Ministry for the Economy and Finance, and”;

Article 26(1)(d) in respect of the words: “, calculated pursuant to Article 29 of this Legislative Decree”;

Article 26(1)(e) in respect of the words: “, in order to create suitable conditions for the implementation of the work and the management of the installations”;

Article 27(1) in respect of the words: “and on the basis of the assessments resulting from the Strategic Environmental Assessment procedure pursuant to Article 9”;

Article 27(4) in respect of the words: “, paragraph 2”;

Article 27(10) in respect of the words: “The provisions of Article 12 shall apply.”;
Article 29;

Article 30(1) in respect of the words: “relating to radioactive waste resulting from the operations governed by Title II of this Legislative Decree and one relating to radioactive waste resulting from operations governed by the previous rules”;

Article 30(2): “2. With regard to radioactive waste resulting from the operations governed by Title II of this Legislative Decree, the contribution referred to under paragraph 1 shall be paid by Sogin S.p.A. in accordance with criteria to be determined by decree of the Ministry of Economic Development, acting in concert with the Ministry of the Environment and the Protection of the Territory and the Sea and the Ministry for the Economy and Finance, which shall take account of the overall volume and radioactivity level. This fee shall be allocated in accordance with the provisions of Article 23(4).”;

Article 30(3): “3. The provisions of paragraph 2 shall not apply to radioactive waste resulting from operations which have already been concluded at the time this Decree enters into force, in respect of which the provisions contained in Article 4 of Decree-Law no. 314 of 14 November 2003, converted with amendments into Law no. 368 of 24 December 2003, as amended by Article 7-ter of Decree-Law no. 208 of 30 December 2008, converted with amendments into Law no. 13 of 27 February 2009, shall continue to apply”;

the whole of Title IV, entitled “Information campaign”, containing Articles 31 and 32;

Article 33;

Article 34;

Article 35(1): “1. The following statutory provisions are repealed: a) Article 10 of Law no. 1860 of 31 December 1962; b) Articles 1, 2, 3, 4, 5, 6, 7, 20, 22 and 23 of Law no. 393 of 2 August 1975.”, proceedings registered as no. 153 in the register of referenda.

Considering the order of 6-7 December 2010 by which the Central Office for Referenda at the Court of Cassation ruled that the application complied with the legal requirements;

Having heard the Judge Rapporteur Giuseppe Tesauo in chambers on 12 January 2011;

having heard Counsel Alessandro Pace for the promoters Antonio Di Pietro, Gianluca De Filio, Vincenzo Maruccio and Benedetta Parenti, Carlo Malinconico for the *Movimento Fare Ambiente MED – ONLUS* [Make Environment Movement – Non-profit social utility organisation] and the Italian Nuclear Association AIN, and the *Avvocato dello Stato* Maurizio Fiorilli for the President of the Council of Ministers.

(omitted)

Conclusions on points of law

1. – The application for a referendum to repeal legislation, as amended by the Central Office for Referenda and transcribed above, on the admissibility of which this Court has been called to rule, concerns a variety of provisions and fragments of provisions governing the construction and operation of new nuclear power stations for the production of electricity contained: in Decree-Law no. 112 of 25 June 2008 (Urgent measures for economic development, simplification, competitiveness, the stabilisation of public finances and equality and fairness in taxation), converted into Law with amendments by Article 1(1) of Law no. 133 of 6 August 2008; in Law no. 99 of 23 July

2009 (Provisions for the development and internationalisation of undertakings, and on energy); in Legislative Decree no. 104 of 2 July 2010 (Implementation of Article 44 of Law no. 69 of 18 June 2009 authorising the government to reform the rules governing administrative trials); in 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).

2. – As a preliminary matter, continuing the settled case law of this Court, the submissions presented by parties other than those contemplated under Article 33 of Law no. 352 of 25 May 1970 (Provisions on referenda provided for under the Constitution and on the legislative initiative of the general public) who are affected by the decision on the admissibility of the referendum (judgments no. 15 of 2008 and no. 49, no. 48, no. 47, no. 46 and no. 45 of 2005) must be ruled admissible.

3. – The request is admissible.

3.1. – First and foremost, the application for a referendum does not breach the limits specified by Article 75(2) of the Constitution and those that can be inferred from a logical and systematic interpretation of the Constitution, since the laws specified in the headnote of which the repeal is sought do not fall within the class of legislation which that provision excludes from referendum procedures. In particular, it does not contrast with international obligations, and specifically with the Treaty establishing the European Atomic Energy Community (EURATOM), signed in Rome on 25 March 1957, and ratified on the basis of Law no. 1203 of 14 October 1957.

It must be observed in this regard that, in relation to applications for referenda concerning aspects of the legislation on nuclear energy, this Court held in its first long-standing judgment that the EURATOM Treaty sought to facilitate investments and to encourage initiatives capable of “ensur[ing] the establishment of the basic installations necessary for the development of nuclear energy in the Community” (Article 2(c) and “progress in the peaceful use of nuclear energy”. The judgment inferred from that premise that, since it is “closely related to matters within the scope of the Treaty of Rome referred to, the purpose of which is progress in the peaceful use of nuclear energy,

which the Italian State has endorsed”, the repeal of the legislation covered by the referendum would have entailed the “violation of a fundamental commitment made by the Italian State in signing the Treaty of Rome”, thereby thwarting the duty of cooperation imposed by Article 192 of the Treaty (judgment no. 31 of 1981).

Subsequently, this premise was not substantially set aside in judgment no. 25 of 1987, which also ruled admissible three requests for referenda concerning certain provisions governing nuclear power stations, and the Court took care to stress, significantly, that they had “an object different from that which resulted in judgment no. 31 of 1981”, since they related exclusively to internal political issues concerning the economic relations between bodies operating under national law, the distribution of powers between the various national bodies for the purpose of determining the location of nuclear power stations, as well as the right of Enel to promote the incorporation of companies with undertakings or foreign bodies and to assume equity interests in these where their purpose was the construction or operation of nuclear power stations.

Finally, judgment no. 278 of 2010 concerned the interpretation of the provisions of the EURATOM Treaty. In this case the Constitutional Court was seized directly and by contrast asserted that the provisions of that Treaty, those of Directive no. 2009/71/EURATOM of 25 June 2009 (Council Directive establishing a Community framework for the nuclear safety of nuclear installations) and those contained in Law no. 10 of 19 January 1998 (Ratification and implementation of the Convention on the nuclear safety of nuclear installations, done in Vienna on 20 September 1994) are without prejudice to “the discretion of the Italian State to ‘decide on its energy mix in accordance with relevant national policies’ (recital 9 of the preamble to Directive no. 2009/71/EURATOM)”, but require “only guarantee measures and standards ‘in order to protect the population and the environment against risks of nuclear contamination’ to the extent considered appropriate once the national legislature has made a choice in favour of atomic energy (recital 5 of the preamble cited above)”.

This recent position within case law is to be continued, in consideration both of the legislative evolution that has characterised the legislation under examination as well as the clarification provided by this Court, according to which, in order for the limit in question to apply, “it is not sufficient that the application for a referendum refer to an area that had already been covered by international conventions, but it is necessary that

it contrast with a specific obligation resulting from international treaty law such that, in the event that the provision implementing the aforementioned obligation is repealed – albeit through the instrument of direct democracy – the State may incur responsibility” (judgment no. 63 of 1990).

Although Article 2(c) of the aforementioned Treaty specifies that the goals of EURATOM include that of “the establishment of the basic installations necessary for the development of nuclear energy in the Community”, it also provides that it must be implemented “as provided in this Treaty”. However, the Treaty does not contain specific provisions that oblige the States to construct nuclear power stations, or not to prohibit them, not even in relation to cooperation within the framework of the Treaties’ objectives, but contrast, sets forth specific obligations relating to research and security. The exact identification of the duty of cooperation referred to under Article 192 of the Treaty moreover requires that account be taken of the development of the legislation concerned, which should also be examined within the context of the more general legislation enacted by the European Union in matters relating to energy.

The Commission Communication to the Council and the European Parliament of 10 January 2007 entitled “An Energy Policy for Europe” is of significance in this regard. It expressly states in paragraph 3.8, dedicated to the “[i]t is for each Member State to decide whether or not to rely on nuclear electricity”, whilst specifying that “in the event that the level of nuclear energy reduces in the EU, it is essential that this reduction is phased in with the introduction of other supplementary low-carbon energy sources for electricity production”.

Moreover, as regards the more general context, the Treaty of Lisbon, which entered into force on 1 December 2009, inserted Title XXI into the Treaty on the Functioning of the European Union (TFEU), dedicated to “Energy”, Article 194(2) of which grants the European Parliament and the Council the power to adopt the measures necessary in order to achieve the objective stated in paragraph 1, but provides that “[s]uch measures shall not affect a Member State’s right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c)” (Article 194(2)). Article 192(2)(c) TFEU in turn provides that “the Council acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, the

Economic and Social Committee and the Committee of the Regions” may adopt “measures significantly affecting a Member State’s choice between different energy sources and the general structure of its energy supply” which however have not as yet been adopted, with the result that each Member State of the European Union retains full discretion regarding the choice as to whether or not to build installations for the production of electricity powered nuclear fuel.

Ultimately, due to the absence of a precise obligation to construct or maintain in service installations for the production of nuclear energy, it may be concluded that the application for a referendum does not breach any specific obligation resulting from international law conventions or Community law.

3.2. – The Court must likewise rule that the question satisfies the requirements or homogeneity and clarity and is unequivocal in nature.

Although the provisions of which the repeal is sought are contained in a variety of legislative instruments, they are in fact closely related to one another since they all share the common rationale of being conducive to permitting the construction or operation of new nuclear power stations in order to produce electricity. The rationally unitary configuration of the said provisions means that the question under examination manifests the goal inherent in the repeal, consisting in the intention to prevent the construction and operation of these power stations by repealing all legislation that makes this result possible. Therefore, voters will be put in a position to express their opinion, with one single affirmative or negative response, on an issue which is well-framed in terms of its content and goals and the question, as amended by the Central Office for Referenda at the Court of Cassation, is capable of achieving that purpose. The need to ensure that it is unequivocal and homogeneous means that it is justified for it to contain in some circumstances individual words or individual phrases from some of the provisions targeted by it even though, considered in isolation, these have no self-standing legislative meaning (judgment no. 17 of 2008).

In spite of the fact that it is characterised by the selective repeal of excerpts of the legislation [*tecnica del ritaglio*], the question moreover aims to achieve the effect of the pure and simple removal of the legislation on the construction and operation of new nuclear power stations, and therefore does not have any manipulative characteristics. Indeed, in this case such a technique is justified by the requirement not to impinge upon

the regulation of waste disposal installations and nuclear installations that are not in service, which patently fall outwith the purpose targeted by the promoters of the referendum.

Finally, the fact that one of the provisions covered by the question (Article 35 of Legislative Decree no. 31 of 2010) expressly repealed certain legislation previously in force applicable to the matters under examination does not impinge upon the requirements of clarity and unequivocalness. Irrespective of any consideration as to the ability of these provisions to permit the construction and operation of nuclear power stations, the repeal – in the event that the referendum proposal is accepted – of legislation repealing other legislation is in fact incapable of bring back into force provisions which, in accordance with the repealed legislation, have already been erased from the legal order (judgment no. 31 of 2000).

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

rules that the application for a popular referendum, as amended pursuant to the order of the Central Office for Referenda of 6-7 December 2010, concerning “New power stations for the production of nuclear energy. Partial repeal of legislation” is admissible.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 12 January 2011.

(omitted)