



Corte costituzionale



JUDGMENT NO. 151 OF 2011

Paolo MADDALENA, President

Gaetano SILVESTRI, Author of the Judgment

JUDGMENT NO. 151 YEAR 2011

In this case the Court heard a challenge by the President of the Council of Ministers brought against legislation enacted by the Province of Bolzano relating to nature protection on the grounds that the legislation referred to concepts of environmental law which differed from those used under State legislation. The Court upheld the complaint, holding *inter alia* that since the legislation applied independently of the pursuit of hunting and the regulation of natural parks (under provincial jurisdiction), it amounted to full environmental legislation and was as such *ultra vires*. The Court also struck down provincial legislation purporting to allow the provincial authorities to establish a direct relationship with the European Commission on the grounds that such action was a matter exclusively for the State body designated under State legislation.

(omitted)

JUDGMENT

in proceedings concerning the constitutionality of Articles 4, 8(4), 11(1) and (2), 22(6) and 33(3) of Autonomous Province of Bolzano Law no. 6 of 12 May 2010 (Law on nature protection and other provisions), initiated by the President of the Council of Ministers by application served on 26 July 2010, filed in the Registry on 5 August 2010 and registered as no. 90 in the Register of Applications 2010.

Considering the entry of appearance by the Province of Bolzano;
having heard the Judge Rapporteur Gaetano Silvestri at the public hearing of 5 April 2011;

having heard the State Counsel [*Avvocato dello Stato*] Vittorio Russo for the President of the Council of Ministers and Counsel Giuseppe Franco Ferrari and Roland Riz for the Autonomous Province of Bolzano.

(omitted)

Conclusions on points of law

1. – The President of the Council of Ministers, represented by the State Counsel, raised certain questions regarding the constitutionality of Articles 4, 8(4), 11(1) and (2), 22(6) and 33(3) of Province of Bolzano Law no. 6 of 12 May 2010 (Law on nature protection and other provisions), due to violation of Articles 117(1), (2)(s), (3) and (5) of the Constitution and Article 8 of Presidential Decree no. 670 of 31 August 1972 (Approval of the consolidated text of constitutional laws concerning the Special Statute for Trentino-Alto Adige).

2. – As a preliminary matter, it is necessary to examine the objection raised by the respondent's representative concerning Article 4 of Province of Bolzano Law no. 6 of 2010 that the question is inadmissible on the grounds that the objection is generic.

According to the Province's representative, no reasons have been given relating to the alleged impact on the powers guaranteed under the Constitution to the State of the different terminology contained in the contested provision – in order to specify the degree of protection for certain animal and plant species – compared to the expressions contained in State and Community provisions.

2.1. – The objection is not well-founded.

The entire State application is based on the alleged violation of Article 117(2)(s) of the Constitution and Article 8(1) of the Special Statute for Trentino-Alto Adige/Südtirol. If the contested provisions fall entirely outwith the jurisdiction of the Autonomous Province of Bolzano, this will imply, if endorsed by this Court, that the measure under provincial legislation departing from the State provision will be irrelevant, since neither the State nor the regions – or in this case the autonomous provinces – may legislate entirely outwith their legislative powers as defined under the Constitution.

The above naturally does not prevent this Court from acknowledging when reviewing the merits of the questions raised – and independently of the manner in which the application has been framed – that the Province and the State share legislative powers and from assessing in such an eventuality whether the objections are well-founded or whether, on the contrary, the Autonomous Province has lawfully legislated for the protection of interests which are functionally connected with environmental law,

but which fall under matters within its jurisdiction, provided that it respect the uniform standards stipulated under State legislation (see *inter alia*, judgment no. 62 of 2008).

3. – On the merits, the questions are well-founded.

3.1. – The claimant challenges in its entirety Article 4 of Provincial Law no. 6 of 2010 on the grounds that it refers to the concept of “species which receive complete protection”, which does not coincide with the concepts used under the reference State and Community legislation. This choice of terminology – made in legislation in an area under exclusive State jurisdiction, namely “environmental protection” pursuant to Article 117(2)(s) of the Constitution – is moreover alleged to render the provisions protecting animal species “not unequivocally interpretable”.

In order to assess whether the question is well-founded, it is necessary to specify the material extent within which the contested legislation applies.

The Autonomous Province of Bolzano is vested with primary legislative jurisdiction over “hunting and fishing” and “parks to protect fauna and flora” (Article 8(8)(xv) and (xvi) of the Special Statute).

The contested provision does not govern hunting, and does not concern the establishment or regulation of natural parks, but seeks to protect fauna in itself, imposing prohibitions of a general nature, irrespective of the specific activities concerned or the particular spatial contexts. It therefore enacts genuine environmental protection legislation falling within the area of law of “environmental protection” under exclusive State jurisdiction, which is not included under the matters specifically listed in the Special Statute as falling under the primary jurisdiction of the autonomous provinces. Since the relevant matters fall outwith provincial jurisdiction, there is no need to examine the problem as to whether or not the contested provision has stipulated protection equal to or greater than that set under State legislation. Indeed, the regions and autonomous provinces are not permitted to legislate purely and simply in areas reserved by the Constitution to the exclusive jurisdiction of the State, and may only raise the standards of protection of constitutionally safeguarded interests, provided that they do so when exercising their own legislative powers where related to those stated under Article 117(2) of the Constitution (see *inter alia* judgment no. 378 of 2007). Such a situation does not obtain in this case, since the contested provision does not regulate the culling of animal species during the pursuit of hunting activity, but imposes

prohibitions – concerning in general the capture and killing of animals or the destruction or eggs or nesting and mating areas – which are directed at all parties without distinction, irrespective of the activities carried out. Furthermore, it cannot be asserted that the prohibitions in question are limited to territories located within natural parks, since this restriction is not in any way stated in the contested provision.

Ultimately, in regulating the protection of animal species in general terms, independently of the pursuit of hunting and the regulation of natural parks, Article 4 of Province of Bolzano Law no. 6 of 2010 encroaches upon the exclusive legislative jurisdiction of the State over the protection of the environment and the ecosystem pursuant to Article 117(2)(s) of the Constitution, which also applies to the regions governed by special statute and the autonomous provinces, since that area of law is not included under the provisions in the Statute on the primary or shared legislative jurisdiction of the region or the provinces.

Therefore, the problem does not arise as to whether the constitutional provision referred to stipulates for the regions and autonomous provinces “forms of autonomy which are broader than those already granted” (Article 10 of Constitutional Law no. 3 of 18 October 2001 – Amendments to Title V of Part II of the Constitution), precisely because – as clarified above – the area of law of “environmental protection” is not included under those which were already allocated to the autonomous provinces prior to the amendment of Title V of Part II of the Constitution.

3.2. – An objection was also raised against Article 8(4) of Provincial Law no. 6 of 2010, which permits owners, tenants, usufructuaries and cohabittees of such individuals to pick epigeal mushrooms without limitation on the properties under their possession, notwithstanding Article 4(1) of Law no. 352 of 23 August 1993 (Framework provisions on the picking and marketing of fresh and preserved epigeal mushrooms), which specifies a maximum daily limit of three kilograms total per person.

The State legislation referred to above, which falls under the area of environmental protection, grants the regions the power to regulate through regional laws the picking and marketing of epigeal spontaneous mushrooms, subject to compliance with the fundamental principles set forth in the Law. Provision is also made that the regions governed by special statute and the Autonomous Provinces of Trento and Bolzano may

take action on the basis of their exclusive powers subject to the limits specified in their respective Statutes (Article 1(1)).

The general limit of three kilograms per person per day specified in the aforementioned State provision evidently operates as a uniform standard for protection, as a guarantee for the environment and the ecosystem, and accordingly constitutes an insurmountable limit on any regional or provincial legislation, according to the settled case law of this Court.

Moreover, the Court cannot accept the argument mooted by the Province's representatives based on a supposed greater protection for mushrooms under the contested legislation on the grounds that it limits the parties entitled to pick mushrooms, rather than permitting it for all parties, subject to the quantitative limit. Indeed, the provision is limited to stipulating the lack of any limits for the categories mentioned above, but is not associated with a general prohibition on the picking of mushrooms, which is not contained in any provincial provision. In fact, this provision only applies to "plants which receive partial protection" (Article 8(3) of Provincial Law no. 6 of 2010), which are different from the mushrooms of the contested provision (Article 8(4)). According to the combined provisions of the two paragraphs referred to above, within the territory of the Province of Bolzano it is forbidden to remove plants which receive partial protection, other than by persons falling under the categories stated in paragraph 4 below, who may pick them without restriction; on the other hand, the same people may pick mushrooms without limitation, notwithstanding the limit under State legislation for all other individuals, which has not been departed from, even through more stringent regulations, by any provincial provision.

Moreover, it is not possible to accept the further argument raised by the respondent in its defence, based on the terms of Articles 42 and 44 of the Constitution, since this case does not concern the protection of property and its limits, but the protection of the environment as a shared resource, which is to be safeguarded by general rules mandatory for all, including both landowners and other parties. The conservation of particular plant species, on which the equilibrium of the ecosystem is based, cannot be subject to the satisfaction of particular interests.

For the reasons stated above, the uniform level of protection stipulated under the State legislation in order to protect the environment and the ecosystem has been violated.

3.3. – The applicant also challenges Article 11(1) and (2) of the Provincial Law, which vests the director of the Provincial Natural and Landscape Department with the power to grant exceptions to the prohibitions put in place in order to protect animal species which receive complete protection.

Paragraph 1 of the contested provision specifies that its scope covers “animal species not subject to provincial laws on hunting and fishing”. In this way it clearly highlights the fact that, by its very own assertion, the legislation in question reaches beyond the area of hunting and fishing allocated under the Special Statute to the autonomous provinces, and hence falls under the general area of “environmental protection”, under exclusive State jurisdiction. Therefore, the general jurisdiction of the Ministry of the Environment to grant the exceptions referred to above – provided for under Article 11 of Presidential Decree no. 357 of 8 September 1997 (Regulation implementing Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora) – extends throughout the national territory, and no special jurisdiction may be invoked for the Province of Bolzano.

This Court has moreover specified that the legislation on exceptions from the prohibitions imposed in order to safeguard protected species lays down uniform and mandatory standards for the protection of the environment and the ecosystem, which falls under the exclusive jurisdiction of the State (judgment no. 387 of 2008). The uniform nature of the standards logically implies that they be applied in a uniform manner, for the purpose of preventing different administrative practices from impinging upon the objective of conservation of fauna in a balanced manner throughout the territory of the Republic.

3.4. – The applicant also challenges Article 22(6) of the aforementioned provincial law, which provides for a direct relationship between the Autonomous Province of Bolzano and the European Commission, with regard to the intimation of the countervailing measures necessary in order to guarantee the global coherence of the Natura 2000 European ecological network established by Article 4 of the Habitats Directive. Article 13 of Presidential Decree no. 357 of 1997 designates the Minister of

the Environment as the party required to transmit information to the European Commission regarding the implementation of all of the objectives stipulated in the aforementioned Directive.

It should be recalled in this regard that this Court has asserted that, in the matter at issue in this case, the “power to engage in dialogue with the European Commission [...] is vested in the State pursuant to Article 1(5) of Law no. 349 of 1986 (which grants the Minister of the Environment the task of representing Italy with the bodies of the European Community in matters relating to the environment and cultural heritage), on the basis of the principle enshrined under Article 117(3) and (5) of the Constitution, which grant the State the power to regulate the relations of the regions and autonomous provinces with the European Union and to determine the procedures regulating their participation, in the matters within their jurisdiction, in the drafting of Community acts. Article 1(5) of Law no. 349 of 1986 – invoked in this case – was reiterated in full by Article 5 of Law no. 131 of 5 June 2003 [...], which confirms the principle of the unitary representation of Italian interests with the European Union (judgment no. 378 of 2007). This decision concluded that the Autonomous Province of Trento could not “ascribe directly to its jurisdiction the power to maintain ‘relations’ with the European Union, notwithstanding the laws of the State”. The same assertion must be repeated in this case in relation to the Province of Bolzano.

On this matter, it is not possible to endorse the respondent’s arguments which, referring to judgments no. 425 of 1999 and no. 378 of 2007, purport to assert provincial jurisdiction on the basis of the ‘retrogression’ [*cedevolezza*] of the State regulations implementing the Community directives in matters over which the autonomous provinces have primary jurisdiction. It must be specified that judgment no. 378 of 2007 referred to the general principles of the legal order, as did judgment no. 425 of 1999, and concluded that, without prejudice to the retrogression referred to above, the provision for the direct power to engage in dialogue granted to the Province violated these principles and the fundamental rules of socio-economic reform.

3.5. – Finally, a challenge was also raised against Article 33(3) of the same provincial Law, which introduced paragraph 1-bis into Article 9 of Autonomous Province of Bolzano Law no. 14 of 17 July 1987 (Provisions on the protection of game and the pursuit of hunting). The provision referred to has the objective of regulating

culling procedures, within protection reserves for “particular species falling under Article 4(1) and (2) on biological, hygienic and sanitary grounds and to prevent damage to agriculture and forestry and fishing stocks”.

The applicant complains that, under the terms of the procedure set forth in the contested provision, culling is authorised subject to an opinion of the Provincial Fauna Monitoring Centre, rather than the National Institute for Wild Fauna, which departs from the provisions contained in Articles 7 and 19 of Law no. 157 of 11 February 1992 (Provisions on the protection of homeothermic fauna and on hunting) enacted in order to protect wild fauna, including the species listed in Annex II to IV of the Habitats Directive.

On the supposition that the animal species to which the contested provision refers are also those indicated in the Habitats Directive – a fact acknowledged by the Province’s representatives themselves – it must be asserted that the Province cannot cull specimens belonging to these species without obtaining a prior opinion from the central consultative body, established by Article 7 of Law no. 157 of 1992. The provision contained in Article 19 of that Law, according to which the regions shall take action to control wild fauna, including in the areas in which hunting is prohibited, and such control shall be exercised after an opinion has been obtained from the National Institute for Wild Fauna, lays down a uniform standard of protection which is necessary in order to ensure the effectiveness of protection for fauna throughout the national territory, which the Italian State is required to guarantee as a matter of Community law.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

declares that Articles 4, 8(4), 11(1) and (2), 22(6) and 33(3) of Autonomous Province of Bolzano Law no. 6 of 12 May 2010 (Law on nature protection and other provisions) are unconstitutional.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 18 April 2011.

(omitted)