Corte costituzionale

JUDGMENT NO. 13 OF 2012

Alfonso QUARANTA, President

Sabino CASSESE, Author of the Judgment

JUDGMENT NO. 13 YEAR 2012

In this case the Court considered the admissibility of referenda proposing either the full or partial repeal of the legislation governing elections to the two Houses of Parliament, following a ruling by the Central Office for Referenda at the Court of Cassation that the requests were admissible. The Court held that any referendum seeking the entire repeal of an electoral law would be inadmissible since, "should the referendum result in a yes vote, [it] would result in the absence of any 'operative' legislation, which is a constitutional requirement". The Court reached this conclusion on the basis of the principle (contained both in Italian law and certain foreign legal systems) that, once legislation has been repealed, it is expunged from the legal system and does not lie dormant pending potential re-enactment in future following the repeal of the later legislation by referendum. It also ruled that the purpose of the referendum was proactive, in seeking implicitly to impose what would essentially be a new electoral law. With regard to the issue of partial appeal, the Court held that since "any repeal of legislation containing 'provisions replacing other legislation' will not also imply the repeal of the provisions replacing or amending those repealed ", the question was contradictory.

(omitted)

JUDGMENT

in proceedings initiated pursuant to Article 2(1) of Constitutional Law no. 1 of 11 March 1953 concerning the admissibility of the requests for popular referenda seeking the full repeal of Law no. 270 of 21 December 2005 (Amendments to the law governing elections to the Chamber of Deputies and the Senate of the Republic) – registered as no. 156 in the register of referenda – and seeking the repeal of the following provisions of the same Law:

Article 1(1) with respect to the phrase: "1. Article 1 of the consolidated text of laws governing elections to the Chamber of Deputies laid down by Presidential Decree no.

361 of 30 March 1957, as amended, hereafter referred to as 'Presidential Decree no. 361 of 1957', shall be replaced with the following:";

Article 1(2) with respect to the phrase: "2. Article 4 of Presidential Decree no. 361 of 1957 shall be replaced with the following:";

Article 1(3) with respect to the phrase: "3. The phrase 'In the event of the advance dissolution of the Chamber of Deputies' in Article 7(7) of Presidential Decree no. 361 of 1957 shall be replaced with the following:";

Article 1(4) with respect to the phrase: "4. The following amendments shall be made to Article 14 of Presidential Decree no. 361 of 1957:";

Article 1(5) with respect to the phrase: "5. The following shall be inserted after Article 14 of Presidential Decree no. 361 of 1957:";

Article 1(6) with respect to the phrase: "6. Article 18-bis of Presidential Decree no. 361 of 1957 shall be replaced with the following:";

Article 1(7) with respect to the phrase: "7. The second sentence of Article 19(1) of Presidential Decree no. 361 of 1957 shall be replaced with the following:";

Article 1(8) with respect to the phrase: "8. Article 31 of Presidential Decree no. 361 of 1957 shall be replaced with the following:";

Article 1(9) with respect to the phrase: "9. Tables A-bis and A-ter set forth in Annex 1 to this Law shall be inserted into Presidential Decree no. 361 of 1957 after Table A.";

Article 1(10) with respect to the phrase: "10. Article 58 of Presidential Decree no. 361 of 1957 shall be amended as follows:";

Article 1(11) with respect to the phrase: "11. Article 77 of Presidential Decree no. 361 of 1957 shall be replaced with the following:";

Article 1(12) with respect to the phrase: "12. Article 83 of Presidential Decree no. 361 of 1957 shall be replaced with the following:";

Article 1(13) with respect to the phrase: "13. Article 84 of Presidential Decree no. 361 of 1957 shall be replaced with the following:";

Article 1(14) with respect to the phrase: "14. Article 86 of Presidential Decree no. 361 of 1957 shall be replaced with the following:";

Article 2;

Article 4(1) with respect to the phrase: “1. Article 1 of the consolidated text of laws governing elections to the Senate of the Republic laid down by Legislative Decree no. 533 of 20 December 1993, as amended, hereafter referred to as ‘Legislative Decree no. 533 of 1993’, shall be replaced with the following:”;

Article 4(2) with respect to the phrase: “2. Article 8 of Legislative Decree no. 533 of 1993 shall be replaced with the following:”;

Article 4(3) with respect to the phrase: “3. Article 9 of Legislative Decree no. 533 of 1993 shall be replaced with the following:”;

Article 4(4) with respect to the phrase: “4. Article 11 of Legislative Decree no. 533 of 1993 shall be amended as follows:”;

Article 4(5): “5. Tables A and B annexed to Legislative Decree no. 533 of 1993 shall be replaced with Tables A and B in Annex 2 to this Law.”;

Article 4(6) with respect to the phrase: “6. Article 14 of Legislative Decree no. 533 of 1993 shall be replaced with the following:”;

Article 4(7) with respect to the phrase: “7. Article 16 of Legislative Decree no. 533 of 1993 shall be replaced with the following:”;

Article 4(8) with respect to the phrase: “8. Article 17 of Legislative Decree no. 533 of 1993 shall be replaced with the following:”;

Article 4(9) with respect to the phrase: “9. The following shall be inserted after Article 17 of Legislative Decree no. 533 of 1993:”;

Article 4(10) with respect to the phrase: “10. Article 19 of Legislative Decree no. 533 of 1993 shall be replaced with the following:”;

Article 5(1) with respect to the phrase: “1. Title VII of Legislative Decree no. 533 of 20 December 1993 shall be replaced with the following:”;

Article 6(1) with respect to the phrase: “1. The phrase ‘pursuant to the previous Article’ in Article 15(1) of Presidential Decree no. 361 of 1957 shall be replaced with the following:”;

Article 6(2): “2. The phrase ‘of candidacies and’ wherever they recur in Article 16(4) of Presidential Decree no. 361 of 1957 is deleted.”;

Article 6(3): “3. The phrase ‘of candidacies in single-member constituencies and’ in Article 17(1) of Presidential Decree no. 361 of 1957 is deleted.”;

Article 6(4): “4. Article 18 of Presidential Decree no. 361 of 1957 is repealed.”;

Article 6(5) with respect to the phrase: “5. Article 20 of Presidential Decree no. 361 of 1957 shall be amended as follows:”;

Article 6(6): “6. The phrases ‘of candidacies in single-member constituencies and’ and ‘to each candidacy in a single-member constituency and’ in Article 21(2) of Presidential Decree no. 361 of 1957 are deleted.”;

Article 6(7) with respect to the phrase: “7. Article 22 of Presidential Decree no. 361 of 1957 shall be amended as follows:”;

Article 6(8): “8. The phrase ‘of candidates in single-member constituencies and’ in Article 23(1) and (2) of Presidential Decree no. 361 of 1957 is deleted.”;

Article 6(9) with respect to the phrase: “9. Article 24(1) of Presidential Decree no. 361 of 1957 shall be amended as follows:”;

Article 6(10) with respect to the phrase: “10. Article 25 of Presidential Decree no. 361 of 1957 shall be amended as follows:”;

Article 6(11): “11. The phrase ‘of each candidate in a single-member constituency and’ in Article 26(1) of Presidential Decree no. 361 of 1957 is deleted.”;

Article 6(12) with respect to the phrase: “12. Article 30(1) of Presidential Decree no. 361 of 1957 shall be amended as follows:”;

Article 6(13): “13. The phrase ‘of candidates in single-member constituencies and’ in Article 40(3) of Presidential Decree no. 361 of 1957 is deleted.”;

Article 6(14): “14. The phrase ‘of candidates in single-member constituencies and’ in Article 41(1) of Presidential Decree no. 361 of 1957 is deleted.”;

Article 6(15) with respect to the phrase: “15. Article 42 of Presidential Decree no. 361 of 1957 shall be amended as follows:”;

Article 6(16) with respect to the phrase: “16. Article 45(8) of Presidential Decree no. 361 of 1957 is repealed.”;

Article 6(17) with respect to the phrase: “17. The phrases ‘and of candidates in single-member constituencies’ and ‘of the single-member constituency or’ in Article 48(1) of Presidential Decree no. 361 of 1957 are deleted; the phrase ‘of the constituency’ shall be replaced with the following:”;

Article 6(18): “18. The phrase ‘and of candidates’ in Article 53(1) of Presidential Decree no. 361 of 1957 is deleted.”;

Article 6(19): “19. The second sentence in Article 59 of Presidential Decree no. 361 of 1957 is deleted.”;

Article 6(20) with respect to the phrase: “20. The phrase ‘the ballot papers’ in Article 62 of Presidential Decree no. 361 of 1957 shall be replaced with the following:”;

Article 6(21) with respect to the phrase: “21. The phrase ‘a ballot paper’ in Article 63(1) of Presidential Decree no. 361 of 1957 shall be replaced with the following:”;

Article 6(22) with respect to the phrase: “22. The phrase ‘the ballot boxes and boxes’ in Article 64(2) of Presidential Decree no. 361 of 1957 shall be replaced with the following:”;

Article 6(23) with respect to the phrase: “23. The phrase ‘of the ballot boxes’ in Article 64-bis(1) of Presidential Decree no. 361 of 1957 shall be replaced with the following:”;

Article 6(24) with respect to the phrase: “24. Article 67(1) of Presidential Decree no. 361 of 1957, shall be amended as follows:”;

Article 6(25) with respect to the phrase: “25. Article 68 of Presidential Decree no. 361 of 1957 shall be amended as follows:”;

Article 6(26) with respect to the phrase: “26. Article 71 of Presidential Decree no. 361 of 1957 shall be amended as follows:”;

Article 6(27) with respect to the phrase: “27. Article 72 of Presidential Decree no. 361 of 1957 shall be amended as follows:”;

Article 6(28) with respect to the phrase: “28. The phrase ‘of the Constituency’ in Article 73(3) of Presidential Decree no. 361 of 1957 shall be replaced with the following:”, and the phrase “and the phrase ‘of candidates in single-member constituencies and’ is deleted.”;

Article 6(29) with respect to the phrase: “29. Article 74 of Presidential Decree no. 361 of 1957 shall be amended as follows:”;

Article 6(30) with respect to the phrase: “30. Article 75 of Presidential Decree no. 361 of 1957 shall be amended as follows:”;

Article 6(31) with respect to the phrase: “31. Article 79 of Presidential Decree no. 361 of 1957 shall be amended as follows:”;

Article 6(32) with respect to the phrase: “32. The phrase ‘of candidates in single-member constituencies and’ in Article 81(1) of Presidential Decree no. 361 of 1957 is deleted.”;

Article 6(33) with respect to the phrase: “33. The phrase ‘of candidates in single-member constituencies and’ in Article 104(6) of Presidential Decree no. 361 of 1957 is deleted.”;

Article 6(34) with respect to the phrase: “34. The phrase ‘of candidates in single-member constituencies and’ in Article 112(1) of Presidential Decree no. 361 of 1957 is deleted.”;

Article 6(35) with respect to the phrase: “35. Legislative Decree no. 536 of 20 December 1993 laying down the ‘Determination of single-member constituencies for the Chamber of Deputies’ is repealed.”;

Article 8(1) with respect to the phrase: “1. Article 2 of Legislative Decree no. 533 of 1993 shall be amended as follows:”;

Article 8(2): “2. The phrase ‘constituencies and’ in the headnote to Title II of Legislative Decree no. 533 of 1993 is deleted.”;

Article 8(3): “3. Article 6 of Legislative Decree no. 533 of 1993 is repealed.”;

Article 8(4) with respect to the phrase: “4. The headnote of Title III of Legislative Decree no. 533 of 1993 shall be replaced with the following:”;

Article 8(5) with respect to the phrase: “5. Article 10 of Legislative Decree no. 533 of 1993 shall be amended as follows:”;

Article 8(6) with respect to the phrase: “6. Article 12 of Legislative Decree no. 533 of 1993 shall be amended as follows:”;

Article 8(7) with respect to the phrase: “7. Article 13 of Legislative Decree no. 533 of 1993 shall be amended as follows:”;

Article 8(8): “8. Article 15 of Legislative Decree no. 533 of 1993 is repealed”;

Article 8(9): “9. Article 16 of Legislative Decree no. 533 of 1993, as replaced by Article 4(7) of this Law, shall be incorporated into Title VI and Title V is consequently repealed”;

Article 8(10) with respect to the phrase: “10. The following shall be inserted at the start of paragraph 1 of Article 18 of Legislative Decree no. 533 of 1993:”;

Article 8(11): “11. Legislative Decree no. 535 of 20 December 1993 laying down the ‘Determination of single-member constituencies for the Senate of the Republic’ is repealed.” (proceedings registered as no. 157 in the register of referenda).

Considering the order of 2 December 2011 by which the Central Office for Referenda at the Court of Cassation ruled that the requests complied with the law;

having heard the Judge Rapporteur Sabino Cassese in chambers on 11 January 2012;

having heard Counsel Pietro Adami for the *Associazione Nazionale Giuristi Democratici* [National Association of Democratic Lawyers], Counsel Nicolò Lipari, Counsel Federico Sorrentino, Counsel Alessandro Pace and Counsel Vincenzo Palumbo for the *Comitato Referendario per i collegi uninominali – Co.Re.C.u.* [Referendum for Single-Member Constituencies Committee]

(omitted)

Conclusions on points of law

1. – The two requests for referenda to repeal legislation, which were found to be compatible with statutory provisions by the Central Office for Referenda by order of 2 December 2011, relate to the electoral legislation contained in Law no. 270 of 21 December 2005 (Amendments to the law governing elections to the Chamber of Deputies and the Senate of the Republic). Since the two requests concern the same Law, pursue an identical goal and have the same subject matter, it is appropriate to join the relative admissibility proceedings for decision in a single judgment.

2. – As a preliminary matter, according to the case law of this Court, the pleadings filed 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 popular legislative initiative) which will be affected by the decision on the admissibility of the referendum must be ruled admissible (judgments nos. 28 and 24 of 2011, nos. 16 and 15 of 2008 and nos. 49, 48, 47, 46 and 45 of 2005).

3. – Both of the questions concern Law no. 270 of 2005, which amended the system governing elections to the Chamber of Deputies and the Senate of the Republic.

The provisions of this Law affected four distinct earlier pieces of legislation. As regards the Chamber of Deputies, it amended Presidential Decree no. 361 of 30 March 1957 (Approval of the consolidated text of laws governing elections to the Chamber of Deputies) and repealed Legislative Decree no. 536 of 20 December 1993 (Determination of single-member constituencies for the Chamber of Deputies). For the Senate of the Republic, Law no. 270 of 2005 amended Legislative Decree no. 533 of 20 December 1993 (Consolidated text of laws governing elections to the Senate of the Republic) and repealed Legislative Decree no. 535 of 20 December 1993 (Determination of single-member constituencies for the Senate of the Republic). The amendments were achieved in different ways: the replacement of entire Articles, paragraphs, individual phrases and/or words; the enactment of new Articles or paragraphs and new phrases and/or words; the express repeal of entire legislative acts (Legislative Decrees nos. 535 and 536 of 1993); and the deletion of individual phrases and/or words.

Law no. 270 of 2005 thus introduced a new electoral formula for the Chamber of Deputies and for the Senate of the Republic based on a proportional criterion for dividing seats between lists ranked in advance of the election,[*] corrected by various minimum thresholds, and the automatic allocation of a national majority (for the Chamber of Deputies) and a regional majority (for the Senate) to the coalition of lists or the list with the highest number of votes, irrespective of the actual percentage of the votes obtained. This formula replaced that which had previously been in force since 1993, which was by contrast based on a mixed seat allocation mechanism: three quarters on a first-past-the-post basis with single round single-member constituencies, and the remaining quarter on a proportional basis.

The Committee's representative highlighted what were regarded as the problematic issues and the "irrationality" characterising Law no. 270 of 2005: the allocation of an automatic majority without the provision for any minimum number of votes and/or seats; the exclusion of votes from the Valle d'Aosta/Vallée d'Aoste region and voters from the "foreign constituency" from the calculation of the majority for the purposes of

[*] Translator's note: commonly referred to in Italian as "*liste bloccate*" (i.e. "blocked lists).

awarding the automatic majority; the system of lists ranked in advance of the election; the differences between the criteria for allocating automatic majorities for the Chamber of Deputies and for the Senate of the Republic; and the ability to stand as a candidate in more than one constituency.

As was also pointed out by the representatives of the promoters, it is not for this Court – outside constitutionality proceedings – to express its views on these matters (judgments nos. 16 and 15 of 2008 and nos. 48, 47, 46 and 45 of 2005). When ruling in 2008 on the admissibility of two requests for referenda concerning provisions amended and/or introduced by Law no. 270 of 2005 it ruled – in accordance with settled case law – that questions concerning the constitutionality of the Law affected by the request for a referendum or of the resulting legislation cannot be considered during proceedings to review the admissibility of referenda (a principle which also applies in the event that the question concerns an entire electoral law). Moreover, since in that case it was "impossible to give […] an advance judgment on constitutionality", the need was stressed to Parliament "to dedicate attention to the problematic aspects" of the 2005 legislation, with particular regard to the allocation of an automatic majority, both in the Chamber of Deputies and the Senate of the Republic, irrespective of the achievement of any minimum number of votes and/or seats (judgments nos. 16 and 15 of 2008).

Irrespective of the assessment as to their non-manifest groundlessness, any questions concerning the constitutionality of Law no. 270 of 2005 are not preliminary to the resolution of the present proceedings, which concern a review of the admissibility of two requests for referenda. In these proceedings the Court must ascertain, in strict accord with it own function, that the request complies with the prerequisites laid down in this area under Article 75 of the Constitution and in its case law, and may pursue the issue only "through to an assessment of entirely objective facts, such as the continuing validity of applicable electoral legislation, as guarantee for popular sovereignty, requiring the regular renewal of the representative bodies", and "any further consideration" is therefore precluded to it (judgments nos. 16 and 15 of 2008; see also judgment no. 25 of 2004).

4. – The two requests for referenda have the same goal: the repeal of Law no. 270 of 2005, with the purpose of bringing back into force the previously applicable electoral legislation enacted in 1993. This objective – which is not expressly stated in the

questions, which do not make any reference to the legislation they seek to restore – is pursued using different techniques: the first question proposes the total repeal of Law no. 270 of 2005, whilst the second question on the other hand proposes the repeal of the most significant provisions of that Law, thus substantially amounting to total repeal.

The two requests do not meet the prerequisites for referenda relating to electoral law under the settled case law of this Court, and are hence inadmissible.

In the first place electoral laws, which may be subject to referendum seeking their repeal, fall within the class of laws which, according to the case law of the Court, are deemed to be constitutionally necessary, the existence and validity of which are indispensable in order to guarantee the functioning and continuity of organs established under constitutional law or with constitutional significance for the Republic (see most recently judgments nos. 16 and 15 of 2008). The admissibility of a referendum relating to the provisions of an electoral law is therefore subject "to the twofold condition that the questions" to be placed before voters "are homogeneous and attributable to a framework which is rationally unitary in nature" and that "it should result in consistent residual legislation which is immediately applicable, such as to guarantee – even in the event that no further legislation is enacted – the continuing operational status of the organ" (judgment no. 32 of 1993 and, most recently, judgments nos. 16 and 15 of 2008).

Secondly, referendum questions relating to electoral law "may not concern an electoral law in its entirety, but must necessarily relate to parts thereof, the repeal of which will leave in force legislation which, considered overall, is capable of guaranteeing the reconstitution of the elected constitutional organ at any time", and must therefore be "necessarily partial" and intended "to remove from the body of electoral law only certain provisions which are related to one another and not indispensable for the enduring operational status of the system as a whole" (judgments nos. 16 and 15 of 2008).

5. – Question no. 1, entitled "Parliamentary Elections – Repeal of Law no. 270 of 21 December 2005 containing Amendments to the law governing elections to the Chamber of Deputies and the Senate of the Republic", is inadmissible because it relates to an electoral law in its entirety and, should the referendum result in a yes vote, would

result in the absence of any "operative" legislation, which is a constitutional requirement.

5.1. – The request seeks to repeal Law no. 270 of 2005 in its entirety. As has already been pointed out, by enacting a significant number of legislative amendments, this law introduced a new electoral system for the Chamber of Deputies and the Senate of the Republic. The full repeal of Law no. 270 of 2005 would affect the current procedure for choosing the members of the said constitutional organs considered overall.

Consequently, were it to produce a vote in favour of repeal, the referendum would result in the lack of legislation required under constitutional law which must at all times be operative and self-applying in all respects (judgments nos. 16 and 15 of 2008). The organs established under constitutional law or with constitutional significance cannot be exposed, even temporarily, to the possibility that their operation may be paralysed, "even only theoretically" (judgment no. 29 of 1987). This principle "postulates, as a prerequisite for its effective implementation, the ongoing operational status of the electoral laws governing those organs" (judgment no. 5 of 1995). It follows that the question concerning the constitutionality of Article 37(3) of Law no. 352 of 1970 raised by the Committee's representative, insofar as it provides that the President of the Republic may delay the entry into force of the repeal once only, cannot pass preliminary muster as to is non-manifest groundlessness: any ruling that the provisions are unconstitutional which permitted the deferral to be repeated would not only leave the determination of the time when the effects of the referendum would be implemented – were it to result in a yes vote – to the mere discretion of the members of Parliament in office, but could also lead to serious uncertainty in the event that Parliament failed to take action and of repeated deferrals, which would expose the constitutional organs to functional paralysis, albeit only theoretical and temporary, a scenario which is precluded according to the settled case law of this Court (see most recently judgments nos. 16 and 15 of 2008). Therefore, "one of the prerequisites in order for the Court to be able to accept the proposed application for self-referral of the relative question of constitutionality" is no longer met (judgment no. 304 of 2007).

A prerequisite for the admissibility of a referendum regarding electoral law is "the 'self-applicability' of the resulting legislation, in order to enable representative

assemblies to be renewed at any time" (judgments nos. 16 and 15 of 2008 and no. 13 of 1999). In proposing the total repeal of Law no. 270 of 2005, question no. 1 does not comply with this condition.

5.2. – It cannot therefore be asserted, as argued by the promoters, that were the result of the referendum to be in favour of repeal, the previous electoral law would automatically return back into force. Were this to be the case, repeal through the referendum would result in the entry into force once again of the legislation amended and repealed by Law no. 270 of 2005, as in force prior to the approval of the Law: Presidential Decree no. 361 of 1957, as in force prior to the approval of Law no. 270 of 2005, and Legislative Decree no. 536 of 1993, for the Chamber of Deputies; Legislative Decrees no. 533 – as in force prior to the approval of Law no. 270 of 2005 – and no. 535 of 1993, for the Senate of the Republic.

The argument that previous legislation will come back in to force following the repeal by referendum cannot be accepted because it is based on a "stratified" view of the legal system, under which the provisions in each layer are to be deemed to be dormant and ready at all times to return into force, even when they have been repealed. Were this argument to be pursued, repeal would have the effect – and not only in this case – of bringing back into force provisions which have been long repealed, which would have unforeseeable consequences for the legislature – whether the representative assemblies or referendum votes – and for the authorities called upon to interpret and apply these provisions, and would thus have negative ramifications in terms of legal certainty; this principle is essential for the system of sources and, in relation to electoral matters, is "of fundamental importance for the functioning of the democratic State" (judgment no. 422 of 1995).

Whilst it may be the case that referenda concerning electoral law are "inherently and inevitably 'manipulative', in the sense that by removing individual provisions or groups of provisions from complex and inter-related legislation, their natural and spontaneous effect is to reconstitute the remaining legislative framework, thereby rendering the electoral law after repeal by the referendum different from that which previously applied" (judgments nos. 16 and 15 of 2008). In the case under examination however, were the outcome of the referendum to be favourable to repeal, there would be no "reconstitution" of the resulting legislation, because the legislative lacuna would

have to be filled by recourse to legislation which was neither co-present nor applicable in parallel with that covered by the referendum: repeal following the referendum would not have the effect – which question no. 1 presupposes – of automatically restoring legislation which is no longer in force, the effects of which have already definitively ceased.

5.3. – This Court has also recently asserted that "repeal following the acceptance, if at all, of a referendum proposal to repeal legislation is […] not capable of bringing back into force legislation which was removed from the legal order in accordance with that legislation" (judgment no. 28 of 2011), and specified that a repeal by referendum "cannot result in the revival of legislation repealed" by the Law at issue in the referendum, whereby, according to the settled case law of the Constitutional Court, such "revival […] has excluded in similar situations" (judgments no. 24 of 2011, no. 31 of 2000 and no. 40 of 1997). Moreover, the possibility that legislation may be revived following repeal by referendum was precluded by this Court with specific reference to electoral law: when it stipulated that a request for a referendum concerning electoral legislation considered overall cannot be accepted because a yes vote in the referendum would result in the absence of legislation deemed to be necessary under the Constitution, it implicitly ruled that the electoral law previously in force could not be "revived" as a result of repeal by referendum (see most recently, judgments nos. 16 and 15 of 2008).

Therefore, the phenomenon of the revival of repealed legislation does not apply automatically on a general scale, and may only be accepted in closely defined and very limited situations, and in any case in situations different from that involving the repeal by referendum under examination. An example is to be found in cases involving the annulment by the Constitutional Court of provisions repealing other legislation, which is identified as a special category of case not only in the case law of this Court (and which in some judgments have been found to be of "questionable admissibility": judgments no. 294 of 2011, no. 74 of 1996 and no. 310 of 1993; order no. 306 of 2000) but also of the ordinary and administrative courts, as well as those of other legal systems (such as Austria and Spain). Moreover, this annulment has "different effects" compared to repeal – through legislation or referendum – the scope of which "is more limited, compared to the scope of constitutional review" (judgment no. 1 of 1956).

Moreover, the revival argument underlying the request for a referendum under examination cannot be classified as equivalent to the restoration of legislation following repeal by Parliament, which may take on *per relationem* the legislative content of the legislation which was previously repealed. This may occur in situations involving legislation intended to remove provisions with merely repealing effect, because the sole purpose of those provisions would consist in the removal of the previous repealing effect: the situation is different in this case, since Law no. 270 of 2005 did not have the sole purpose of repealing the previous electoral legislation, but introduced new and different legislation in that area. Moreover, both the case law of the Court of Cassation and the Council of State as well as the academic literature only accept the restoration of repealed legislation through further legislation in exceptional cases when this is expressly ordered. For this reason, the "Rules and recommendations on the technical formulation of legislative texts" of the Chamber of Deputies and the Senate of the Republic stipulate that "if it is intended to restore legislation which has been repealed or amended, it is necessary to specify expressly that intention" (point 15(d) of the circulars of the President of the Chamber of Deputies and the President of the Senate of the Republic, both of 20 April 2001; similar provisions are laid down in the "Guide on the drafting of legislative texts" issued by the President of the Council of Ministers in Circular no. 1/1.1.26/10888/9.92 of 2 May 2001). Furthermore, also in other legal systems (such as the United Kingdom, France, Spain, the USA and Germany), legislation may not as a rule be restored through the repeal of other legislation, unless express provision to this effect is made: this is because repeal is not limited to the suspension of the effects of a law, but expunges it *sine die*.

Finally, were the referendum to result in a yes vote in the case under examination, it could not lead to "re-expansion", which occurs for example in cases involving two provisions, one of general scope and the other special, according to which the general provision will apply to cases which were previously governed by the special provision, following the repeal of the latter. Law no. 270 of 2005 introduced new electoral legislation, as an alternative to that previously in force, and neither created an exception to it nor established a special rule in opposition to its general effect.

5.4. – Furthermore, no intention to "revive" legislation which has previously been repealed can be allocated – not even *prima facie* – to a referendum with exclusively

repealing effect, as a "free and sovereign act of popular repealing legislation" (judgment no. 29 of 1987), and cannot "directly constitute" (new or old) legislation (judgments nos. 34 and 33 of 2000). Therefore, the goal incorporated into a request for a referendum cannot extend beyond the limit of the possible effects of the act. Otherwise, the previously repealed provisions of the law for which repeal through referendum is sought would be revived as a result of an intention presumed to have been expressed by the electorate. In this way however, in losing its repealing effect, the referendum would turn into one for approving new principles, and hence a vehicle for "surreptitiously introducing new legislation" (judgments no. 28 of 2011, no. 23 of 2000 and no. 13 of 1999): this eventuality is not allowed under the Constitution, since a referendum cannot "introduce new legislation which cannot be discerned in itself on the basis of the legal order" (judgment no. 36 of 1997).

Due to the effect which it seeks to achieve, question no. 1 is legislative in its intention: it does not seek merely to repeal legislation, but to replace one electoral law with another. The request for a referendum has the goal of introducing – without moreover indicating it expressly – one particular electoral system, out of the many which are possible, which is moreover complex and a hybrid between different systems. The question does not therefore allow voters to choose between the survival of one system and its elimination, and conceals different intentions: this calls into question the clarity of the question. Moreover, the electoral rules governing organs established under constitutional law or with constitutional significance may "be repealed as a whole exclusively through new legislation, a task which only Parliament is able to perform. In the present case, a popular referendum with repealing effect proves to be an inadequate instrument, since it is liable to generate a merely repealing effect *sine ratione*" (judgment no. 29 of 1987).

5.5. – Finally, it is not possible to endorse the view that, in electoral matters, the revival of previous legislation following repeal by referendum is required precisely due to the fact that an electoral law is required under constitution law. This reasoning transforms a limit on the admissibility of a request for a referendum into a foundation for that very admissibility: in the event that an electoral law repealing previous legislation is itself repealed, the law previously in force is not revived on the grounds that it is constitutionally necessary; it is by contrast the most recent electoral law which

is constitutionally necessary, which therefore cannot be removed from the legal order by referendum.

It is not possible in this regard to postulate the applicability of a principle of continuity of electoral legislation capable of guaranteeing at all times the existence of a functioning electoral system through the implicit continuing validity of the repealed law until the new legislation reaches full operational status. It cannot be inferred from the principle of the functional continuity of constitutional organs underlying institutes such as the deferral of effects [*proroga*] and temporary substitution [*supplenza*] that "the electoral law of constitutional organs has continuing validity, notwithstanding the principles regulating the enactment of new legislation to replace earlier legislation; […] 'this cannot apply also to the relationship between repeal by referendum and legislation which is subject to referendum'" (judgments no. 26 of 1997 and no. 5 of 1995).

5.6. – Having concluded therefore that the repeal proposed may have the effect of restoring or re-expanding the previously applicable electoral law, it may be concluded that question no. 1 is inadmissible because, where there to be a yes vote, this would result in the elimination of legislation required under constitutional law, which must at all times be operative and self-applying in all respects.

6. – Question no. 2, entitled "Parliamentary Elections – Repeal of provisions specifically indicated of Law no. 270 of 21 December 2005 containing Amendments to the law governing elections to the Chamber of Deputies and the Senate of the Republic", is inadmissible first for the same reasons set out in relation to question no. 1, and secondly on the grounds that it is contradictory and lacks clarity.

This request too regards the current electoral system, although does not concern Law no. 270 of 2005 in its entirety, but only individual provisions thereof. The question proposes the repeal of Article 2 of Law no. 270 of 2005 and of 71 indents – that is the initial phrases of each of the paragraphs covered by the request, which provide for the repeal or replacement of the electoral law previously in force – contained in Articles 1, 4, 5, 6 and 8 of the Law.

The indents contain four different formulae: "shall be replaced"; "shall be amended as follows"; "is deleted" and "is repealed". All of these expressions have repealing effect, although in some cases they also provide for replacements or amendments.

The question only concerns the legislation providing for replacement, and not also the "underlying texts", that is the provisions enacted in place of those repealed. The request therefore only concerns provisions which stipulate or order the replacement of previous legislation, and not those which replace the former. However, in the event of a yes vote, a referendum entails the repeal of legislative provisions, and not of rules: it does not terminate not effect of the rule *pro futuro*, but rather the validity of the provision. In such cases, any repeal of legislation containing "provisions replacing other legislation" will not also imply the repeal of the provisions replacing or amending those repealed, whilst Parliament's intention was expressed not only through the former (i.e. the indents), but also – and principally – through the latter (i.e. the "underlying texts"); and it is not by chance that the debate in Parliament focused on the latter. Therefore question no. 2 is not capable of achieving the effect which it purports to secure because – in a contradictory manner – it does not seek to secure the repeal precisely of the provisions replacing the previous electoral legislation.

In many cases, the "underlying texts" not removed from the legal system would themselves – due to their objective content incompatible with the previous legislation – have repealing effect whilst, in the remaining cases, they would become difficult to interpret, and thereby be liable to generate effects which cannot be reconciled with the intention behind the referendum. It follows that the question lacks clarity not only because it is not evident which rules voters will actually be called upon to repeal through the referendum, but also because the repealing effect generated by the elimination of the indents will be difficult to interpret. This cannot be allowed in a matter such as that relating to the sources of law which is regulated by *leges strictae*, in which there is no, or at most minimal, space for intervention through interpretation to infer a rule from the provision. Moreover, the interpretative doubts regarding the applicability of the provisions contained in the "underlying texts" would expose the constitutional organs of the Republic to the possibility, albeit only temporary, that their operation may be paralysed. Moreover, even if it were considered that both the indents and the "underlying texts" may be repealed by the referendum, the question presupposes the revival of the electoral law in force prior to Law no. 270 of 2005, and is hence inadmissible for the same reasons as specified in relation to the first question.

In conclusion, the second request for a popular referendum is inadmissible on the grounds that it is contradictory and lacks clarity, and furthermore on the same grounds for inadmissibility set out in relation to question no. 1.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

hereby,

rules that the requests for popular referenda seeking the repeal, as specified in the headnote, of Law no. 270 of 21 December 2005 (Amendments to the law governing elections to the Chamber of Deputies and the Senate of the Republic), which were held to be lawful by order of 2 December 2011 by the Central Office for Referenda at the Court of Cassation, are inadmissible.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 12 January 2012.

(omitted)