JUDGMENT NO. 170 YEAR 2018

In this case, the Court considered a referral order from the Disciplinary Division of the magistracy, which questioned the constitutionality of a legislative provision making it a disciplinary infraction for magistrates (even those not listed among the judicial staff) to enroll in political parties, or participate in their activities in an "ongoing and systematic" way. The Court acknowledged the magistrates' fundamental right under the constitution to political association and to associate more broadly – a right that may be limited but not eliminated. Then the Court held that the question was unfounded, holding that the legislature had effected a reasonable balancing between the fundamental rights of magistrates and the important value of ensuring the independence and impartiality (and even the appearance thereof) of the magistracy. The Court saw no unreasonable inconsistency between the legislator's choice to make enrollment in political parties, and systematic and ongoing participation in their activities, punishable offenses, while simultaneously permitting magistrates to stand for election and accept political appointments, since enrollment in and consistent participation in the activities of a party may be legitimate indicators of an alliance with a given party sufficient to raise doubts as to the impartiality of a magistrate.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 3(1)(*h*), of Legislative Decree no. 109 of 23 February 2006, entitled "Provisions regulating disciplinary infractions by magistrates, the related sanctions, and the procedure for applying them, as well as modifications to the provisions on incompatibility, discharge from service, and transfer of magistrates *ex officio*, in compliance with Article 1(1)(f) of Law no. 150 of 25 July 2005," as substituted by Article 1(3)(*d*)(2), by Law no. 269 of 24 October 2006 (Suspension of the effectiveness and modification of the provisions on the judicial system), initiated by the Disciplinary Division of the Superior Council of the Magistracy, in proceedings concerning M.E., with a Referral Order of 28 July 2017, registered as no. 155 of the 2017 Registry of Referral Orders and published in the Official Journal of the Republic no. 45, first special series of 2017.

Considering the appearance of M.E., as well as the intervention of the President of the Council of Ministers;

having heard from Judge Rapporteur Nicolò Zanon during the public hearing of 3 July 2018;

having heard from counsel Aldo Loiodice on behalf of M.E. and State Counsel Gabriella Palmieri on behalf of the President of the Council of Ministers.

[omitted]

Conclusions on points of law

1.– The Disciplinary Division of the Superior Council of the Magistracy has raised questions of constitutionality, in reference to Articles 2, 3, 18, 49, and 98 of the Constitution, relating to Article 3(1)(*h*) of Legislative Decree no. 109 of 23 February 2006, entitled "Provisions on disciplinary infractions by magistrates, the related sanctions, and the procedure for applying them, as well as modifications to the provisions on incompatibility, discharge from service, and transfer of magistrates *ex*

officio, in compliance with Article 1(1)(f) of Law no. 150 of 25 July 2005," in the text substituted by Article 1(3)(*d*)(2) of Law no. 269 of 24 October 2006 (Suspension of the effectiveness of and modifications to provisions on the judicial system), in the part in which it makes it a disciplinary infraction for magistrates to enroll in a political party or to carry on systematic and ongoing participation in political parties even for magistrates not listed among the staff of the judiciary because they are on leave "for election-related reasons."

The referring court claims that Judgment no. 224 of 2009 of this Court is not decisive to resolve the present questions. That judgment held that questions of constitutionality, raised in relation to the same provision challenged in this case, and with reference to the same constitutional parameters referred to here, were unfounded. On that occasion, according to the referring court, the convicted magistrate had been removed from the judiciary staff in order to carry out a technical job, not to exercise his right to stand for election, and the case cannot, therefore, be invoked as precedent. That said, the Disciplinary Division of the Superior Council of the Magistracy alleges that it would be unreasonable and incongruous, thus amounting to a violation of Article 3 of the Constitution, to allow magistrates to be elected or to assume political appointments, while simultaneously forbidding, on pain of disciplinary measures, certain activities connected with participation in political parties, which is considered to be "a symptom of organic party alignment," particularly when the activities in question are closely connected to the nature of the tasks taken on.

The referring court also observes that freedom of political association, which is guaranteed to every citizen under Article 49 of the Constitution, is an expression of the broader freedom of association under Article 18 of the Constitution and, together with the freedoms enshrined in Article 2 of the Constitution, constitutes an essential pillar of the democratic system. Therefore, in balancing it with the need to ensure the independence of the judiciary, it may be limited, but not completely eliminated, in particular in cases where the judge has been placed on leave for election purposes. For this reason, the referring court alleges that the disciplinary prohibition contradicts Articles 2, 18, 49, and 98 of the Constitution in these cases as well.

2.– As a preliminary matter, the objection of inadmissibility for irrelevance raised by the defense for M.E. must be overruled. Counsel claimed that the principal action should have been dismissed for failure to comply with the time limits for exercising disciplinary action established by Article 15(1) and (7) of Legislative Decree no. 109 of 2006. Thus, "one of the procedural prerequisites that impact the legitimate instigation of principal proceedings" is allegedly not met.

According to well established case law, confirming the validity of the prerequisites for the existence of the principal action is the prerogative of the referring court (Judgment no. 61 of 2012), while it falls to this Court only to verify that the court in the pending proceedings has reached a conclusion supported by "not implausible reasons"(Judgment no. 270 of 2010; see also Judgment no. 34 of 2010), and that the prerequisites for the existence of the action "do not turn out to be manifestly and indisputably lacking" at the time when the question was brought (Judgments no. 262 of 2015 and 62 of 1992).

Therefore, since, in the underlying case, the Disciplinary Division overruled – with not-implausible reasoning – the objection by M.E.'s defense that the disciplinary action was untimely it follows that the objection must be overruled here.

3.– The questions are unfounded.

4.– This Court has already stated that, as a general matter, magistrates must enjoy the

same rights and freedoms assured to all other citizens, but has, at the same time, specified that the roles and positions taken on by magistrates are neither neutral nor devoid of effects for the constitutional system, in establishing limits to curtail the exercise of these rights (Judgments no. 224 of 2009 and 100 of 1981). These limits are justified both by the particular quality and sensitive nature of the judicial role, and by the constitutional principles of independence and impartiality that define it (Articles 101(2), 104(2), and 108(2) of the Constitution).

These constitutional principles, moreover, are to be protected not only with regard specifically to the exercise of judicial functions, but also as the criteria which define the deontological rules to which all publicly relevant acts must conform, so that citizens have no reason to doubt the independence and impartiality of their magistrates.

The relationship between an entitlement, on the one hand, and the extent of and justifications for the limits on magistrates' ability to exercise their fundamental rights, on the other, has particular implications when it comes to fundamental rights of a political nature. These are the rights at issue in the pending proceedings. The Constitution addresses this area in Article 98(3), granting the legislator the power to balance the freedom to affiliate with parties, protected by Article 49 of the Constitution, against the need to ensure the independence of magistrates (and certain other categories of public functionaries). If this power is used (as, indeed, it has been), the balancing must be carried out according to a precise objective: that of preventing the kind of influence on judicial activity that could result when magistrates form solid ties with a party or participate significantly in its activity. This is the purpose underlying the power to establish limitations, by law, on the right of magistrates to join political parties.

The Constitution, in this way, demonstrates its disapproval of activities or behavior likely to create stable bonds between magistrates and political actors, which are visible to the public eye, and which, therefore, compromise not only independence and impartiality, but even the appearance of the same. That is, they compromise the substance and the appearance of principles that form the basis of the trust the judiciary must enjoy in a democratic society.

The challenged provision, the outcome of the legislator's exercise of the power given to it under Article 98(3) of the Constitution, thus makes it a disciplinary offense for magistrates to join or to carry out ongoing and systematic participation in political parties.

However, this specific legislative choice, at the outcome of the constitutionally imposed balancing between the magistrates' entitlement to all fundamental rights, on the one hand, and the protection of the principles of independence and impartiality, on the other, in no way diminishes (Judgment no. 224 of 2009) the fact that citizen-magistrates certainly enjoy the fundamental rights guaranteed them under Articles 17, 18, and 21 of the Constitution. The exercise of these rights allow them to legitimately present their ideas, including political ideas, on the condition that this happens with the balance and measure that are necessary characteristics of all their publicly relevant actions.

5.– The question brought before this Court is whether the specific disciplinary offense mentioned above, which punishes enrollment, or systematic and ongoing participation in political parties, also applies to magistrates who, in the exercise of their right to stand for election, remove themselves from the staff lists of the magistracy in order to take a leave of absence, as the referring Disciplinary Division puts it, "for election purposes."

Thus, the referring court builds a request for a finding of unconstitutionality that is limited to one specific scenario: a magistrate who requests leave, stands for election, or

is elected. But in reality the question more broadly concerns the issue of magistrates not listed among the judiciary staff taking on political roles, even if not through elections (as, for example, Ministers of the Government of the Republic or members of Regional and local councils).

This Court has already held that the challenged provision legitimately applies to magistrates whose names have been removed from the staff list of the judiciary while they perform technical roles (Judgment no. 224 of 2009), an expression used to refer not to magistrates on leave to exercise the fundamental right of standing for election or having access to public, political office (Article 51 of the Constitution), but rather to those not listed among the judiciary staff in order to carry out a function or task that is not compatible (for reasons different from those in the present case) with contemporaneously acting as a judge.

Now this Court must determine whether, as the Disciplinary Division asks, the exercise of the right to stand for election, or the right of access to public political office amounts to exoneration with respect to applying the disciplinary ban at issue, making the challenged provision unconstitutional in the part in which it fails to recognize this exoneration.

Article 3(1)(*h*) of Legislative Decree no. 109 of 2006 first of all prohibits enrollment in political parties by magistrates. This initial scenario with disciplinary implications amounts to an objective factor that indicates stable and ongoing commitment to a certain political party. Possible though it may be for someone to enroll in a party without carrying on concomitant assiduous and persistent participation in party activities, enrollment (which is, moreover, ordinarily renewed at fixed intervals) nevertheless remains a solemn and formal act, with a precise meaning. Not by chance, the legislator connects it with a second offense, considering the two to be equivalent: participation in party activities that is not merely intermittent, but systematic and ongoing. By adding these two adjectives to the original version of the provision for the disciplinary offense (which punished "enrollment or participation in political parties"), the legislator (with Article 1(3)(*d*)(2) of Law no. 269 of 2006) intended to limit what amounted to disciplinary misconduct to only those scenarios where involvement in a party was not intermittent, but rather revealed a stable and organic alignment between the magistrate and one of the political parties in play.

This Court holds that there is no irrational discrepancy, in alleged violation of Article 3 of the Constitution, nor any violation of the fundamental political rights enshrined in Articles 2, 18, and 49 of the Constitution, nor any abuse of the power granted to the legislator by Article 98(3) of the Constitution, when the ban is applied to magistrates taking a leave of absence in order to carry out an electoral mandate or political appointment.

Indeed, for magistrates, enrollment or systematic and ongoing participation in the activities of a political party, which is forbidden by the disciplinary offense, is one thing; having access to elected positions and public political office is another, and the law in force allows for this under certain conditions (Judgment no. 172 of 1982). It is not unreasonable, as the referring Disciplinary Division claims, to draw a distinction between these two scenarios, considering the latter to be not only permissible, but the exercise of a fundamental right, while at the same time judging the former to be a disciplinary infraction. Particularly in a regulatory context that allows magistrates to return to their judicial role in the event they lose the election or when their time in office or political assignment is over, the meaning of the principles of independence and

impartiality must be preserved, as well as their appearance, as necessary characteristics of the figure of the magistrate, in every aspect of his or her public life. The prohibition in question provides a staunch defense of these principles, and thus must be applied to each and every magistrate, regardless of his or her position.

6.– Given all of the above, this Court does not overlook the fact that political representation, under the Constitution of the Republic, is, in principle, representation through the political parties, which, under Article 49 of the Constitution, are the associations which allow citizens to contribute to setting national policies following the democratic method, including by means of participation in elections (Judgment no. 35 of 2017).

This Court is also aware of the fact that, regardless of the characteristics of the electoral system in force, no citizen, not even a citizen-magistrate, runs for office "alone." Therefore, just like running in political, administrative, or European elections, taking on duties in executive bodies at various levels necessarily presupposes a link between the nominee and the political parties.

Although the authority and reputation of a magistrate may favor so-called "independent" candidacy, even independent candidates must find a place within the party lists, and, by the same token, the nomination of magistrates for positions like minister or council member are anything but removed from party choices.

Similarly, it should not go overlooked that anyone who exercises an elective mandate or performs a political task, whether elected or appointed, ordinarily does so in the context of debates dominated by the confrontation between political parties, according to the internal logic of the overall constitutional design.

Therefore, the initial acceptance of one's candidacy or of an appointment, participation in an electoral campaign, and other activities typically asked of those who run for political mandates and positions, very often presuppose contacts of various kinds with the activities of parties and political movements, and with the initiatives these take on. And these contacts, quite obviously, proceed throughout the course of the exercise of the mandate or carrying out of the duty.

These fitting observations do not, however, alter the terms of the question and do not support acceptance of the challenges raised by the referring Disciplinary Division. On the contrary, it must remain the case, when it comes to magistrates, that recognizing the particular nature of political competition and activity, which they are permitted to participate in under certain conditions, does not translate to full lawfulness, either when it comes to enrollment or when it comes to stable and ongoing participation in the activities of a given party. These actions would lead to acceptance of the questions of constitutionality raised here.

Like any other citizen (and, indeed, all the more so) magistrates may very well carry out electoral campaigns, for example, or acts that go along with political mandates or positions, without necessarily simultaneously taking on all the ties (starting with the kind of stable alliance indicated by enrollment), which ordinarily flow from organic participation in the life of a political party. In light of this, it is not insignificant that the disciplinary ban at issue is found within a provision that draws other behaviors (like "involvement in the activities of subjects working in the economic or finance sectors") into the area considered to relevant for disciplining conduct. Just like the violation at issue here, these actions could entail the formation of ties likely to influence (even at some future date) the exercise of the magistrate's duties, as well as casting shade on the image of the magistrate in the public eye.

There is yet another reason that supports the conclusion that there is no contradiction between, on the one hand, being allowed to participate in active political life in a reality dominated by inter-party competition, and, on the other, being subjected to the challenged disciplinary ban.

From the points laid out above it becomes clear that, for all magistrates, not all forms of participation in political events or party initiatives have a weight that is relevant for disciplinary purposes. The very tenor of the challenged provision avoids unconstitutionality precisely because it allows the disciplinary judge to draw the reasonable distinctions required by the varied nature of the situations that political-institutional life entails. Apart from enrollment in a political party (an eventuality that reveals, as mentioned above, that the magistrate has a stable and ongoing dedication to a certain political party, and of which the objective negativity cannot be attenuated) the evaluation of the requirements that the magistrate's participation in party activities be systematic and ongoing rules out any automatic administration of sanctions, and, on the contrary, allows for solutions that are tailored to the specific circumstances of the individual cases.

While this is true, in general, for all magistrates, it applies particularly to those magistrates who have taken leave in order to exercise their fundamental rights guaranteed by Article 51 of the Constitution.

Obviously, it falls to the disciplinary court to determine, through a careful evaluation of the concrete case, whether the conduct of the magistrate taking a leave of absence may legitimately include involvement in party activities, or if this amounts to a disciplinary infraction, therefore incurring appropriate sanctions.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares that the questions of constitutionality of Article 3(1)(*h*) of Legislative Decree no. 109 of 23 February 2006, entitled "Provisions on disciplinary infractions by magistrates, the related sanctions, and the procedure for applying them, as well as modifications to the provisions on incompatibility, discharge from service, and transfer of magistrates *ex officio*, in compliance with Article 1(1)(f) of Law no. 150 of 25 July 2005," in the text replaced by Article 1(3)(*d*)(2) of Law no. 269 of 24 October 2006 (Suspension of effectiveness and modifications of the provisions on the judicial system), raised by the disciplinary division of the Superior Council of the Magistracy, with the referral order indicated in the Headnote, in reference to Articles 2, 3, 18, 49, and 98 of the Constitution, are unfounded.

Decided in Rome, at the seat of the Constitutional Court, Palazzo della Consulta, on 4 July 2018.