JUDGMENT NO. 30 YEAR 2014

In this case the Court heard a referral questioning a provision which stipulated that fair compensation for excessively long trials was only available after the trial in question had been concluded, and not whilst proceedings were still ongoing, even if the trial was already unreasonably long. The Court rejected the question as unfounded, referring to the fact that previous legislation allowing for this possibility had been amended, whilst also interpreting the existing legislation with reference to legislative intention and the consistency of this solution with other applicable legislation. It also noted, referring also the case law of the ECHR, that, whilst the state was under an obligation to provide a remedy, there was no specific mandatory form of redress and the choice between the available options fell to the legislator, acting within the margin of appreciation allowed to it.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 55(1)(d) of Decree-Law no. 83 of 22 June 2012 (Urgent measures to stimulate the growth of the country), converted with amendments into Article 1(1) of Law no. 134 of 7 August 2012, replacing Article 4 of Law no. 89 of 24 March 2001, initiated by the First Civil Division of the Bari Court of Appeal in the proceedings ongoing between Concettina D'Aversa and the Ministry of Justice by the referral order of 18 March 2013, registered as no. 151 in the Register of Orders 2013 and published in the Official Journal of the Republic no. 26, first special series 2013.

Considering the intervention by the President of the Council of Ministers;

having heard the Judge Rapporteur Aldo Carosi in chambers on 15 January 2014.

[omitted]

Conclusions on points of law

1.– By a referral order of 18 March 2013, the First Civil Division of the Bari Court of Appeal raised a question concerning the constitutionality of Article 55(1)(d) of Decree-Law no. 83 of 22 June 2012 (Urgent measures to stimulate the growth of the country), converted with amendments into Article 1(1) of Law no. 134 of 7 August 2012, with reference to Articles 3, 111(2) and 117(1) of the Constitution, the last provision in relation to Article of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, ratified and implemented by Law no. 848 of 4 August 1955.

The referring court states that the applicant in the main proceedings, an employee of a sole proprietorship, had launched a court action against her employer in 1993 with the aim of securing payment of certain salary differentials. Following a suspension of the proceedings due to the bankruptcy of the defendant, on 27 March 1997 she filed a request seeking inclusion in the statement of liabilities in bankruptcy, which was granted. After receiving partial payment, whilst still being owed a residual amount, on 19 December 2012 she applied to the referring Court of Appeal pursuant to Law no. 89 of 24 March 2001 (Provision for fair compensation in cases involving a violation of the right to conclude the trial within a reasonable period and amendment of Article 375 of the Code of Civil Procedure) – known as the "Pinto Law" – seeking redress for the non-pecuniary harm resulting from the excessive length of the bankruptcy procedure notwithstanding the fact that, according to the attestation issued by the registry of the bankruptcy court, it was still ongoing.

In the opinion of the referring court, Article 4 of the Pinto Law – as replaced by Article 55(1)(d) of Decree-Law no. 83 of 2012 – prevents a claim for fair compensation from being filed whilst the bankruptcy proceedings in relation to which the violation is alleged to have occurred are still ongoing.

This provision is claimed to contrast first and foremost with Article 3 of the Constitution in that it allows any person who complains of the excessive length of a trial that has been concluded to take action, but not a person complaining of the excessive length of a trial that has not yet been concluded – in spite of the fact that the breach would appear to be more serious in the latter case – even where a significant delay has already accumulated and the proceedings relate to a primary right such as the right to remuneration from employment.

In the opinion of the referring court, moreover, the contested provision violates Article 111(2) of the Constitution as the right to launch a court action to obtain fair compensation now constitutes a form of indirect enforcement of the underlying right that the length of the trial must be reasonable.

Finally, the referring court considers that the version of Article 4 of the Pinto Law that is applicable to the facts at issue in the main proceedings violates Article 117(1) of the Constitution, in relation to Article 6(1) ECHR. The internal remedy provided for under the Pinto Law should be guaranteed effectiveness and enable the utmost possible compliance by the national courts with the ECHR as interpreted by the Strasbourg court. It is claimed that such a result is not achieved by the contested provision, which only superficially complies with the Convention requirement as it precludes the availability of the remedy for underlying trials that have not yet been concluded but that have already been unreasonably long.

The President of the Council of Ministers intervened in the proceedings, arguing that the question was inadmissible on the grounds that it provided an insufficient description of the facts brought before the referring court, which did not provide any specific indication regarding the current status of the bankruptcy procedure, thus making it impossible to conclude that the contested provision was applicable with certainty.

Moreover, in the opinion of the President of the Council of Ministers, the compensation claim brought by the applicant in the main proceedings, which was quantified at EUR 8,000.00 as against an amount included in a statement of liabilities in bankruptcy of EUR 6,878.47, could not be accepted pursuant to Article 2-bis(3) of the Pinto Law, according to which the level of compensation cannot ever be higher than the value of the claim or, if lower, than the value of the right upheld by the court, which has implications for the relevance of the question raised.

On the merits, according to the President of the Council of Ministers, the question is unfounded.

In fact, the contested provision must be contextualised against the backdrop of the broader legislation enacted with the aim of speeding up the procedure for obtaining compensation due for excessively long trials, with the intention of giving effect to the principles laid down in Articles 24 and 111 of the Constitution in relation to the

protection of the rights and interests and to the reasonable length of trials. Moreover, this legislation is intended to reduce the volume of litigation before the European Court of Human Rights concerning the excessive length of trials and the delays in payment of compensation agreed upon.

According to the intervener, in permitting claims for fair compensation to be brought whilst the underlying proceedings were still ongoing, Article 4 of the Pinto Law, as originally worded, was associated with the practical difficulty of establishing the time from which the claim arose and the sub-division of the claim into its constituent elements, the consequences of which imposed a burden on the state finances. Its replacement by Article 55(1)(d) of Decree-Law no. 83 of 2012, along with the adoption of the form of summary procedure and the provision for criteria corresponding to those laid down in national case law and the jurisprudence of the European Court of Human Rights regarding the reasonable length of trials and the level of compensation, is argued not to preclude satisfaction of the right, but simply to provide for its deferral, which is justified in line with the requirements referred to, thereby avoiding a meaningless waste of public resources through a reduction in the volume of litigation whilst at the same time ensuring the proper conduct of the administration of justice.

2.– Before examining the question referred and the objections raised by the government counsel, it is appropriate to provide an account – albeit in summary form – of the origins of the Pinto Law, which was enacted against the backdrop of the recognition of the value that the Constitution places upon the reasonable length of trials, "which, already implicit within Article 24 of the Constitution, is now specifically set forth in the new version of Article 111 of the Constitution, in the wake of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms" (see Order no. 305 of 2001).

Law no. 89 of 2001 was approved on account of the need to provide an internal judicial remedy for violations of the principle that trials should not be excessively long, thereby giving effect to the requirement that the Strasbourg Court only becomes involved on a subsidiary basis, as enshrined expressly under Article 35 ECHR – according to which: "The Court may only deal with the matter after all domestic remedies have been exhausted […]" – on which the European system for human rights

protection is based. The said requirement of subsidiarity results in a duty for the countries that have ratified the Convention to guarantee "effective" protection to individuals of the rights recognised under it (pursuant to Article 13 ECHR), which are thus capable of providing relief in respect of any complaint, without any need to seize the European Court. Prior to the enactment of Law no. 89 of 2001 there was no internal remedy under Italian law, with the result that appeals against Italy alleging the violation of Article 6 ECHR were submitted directly to the Strasbourg Court, thus over-burdening it. In view of that situation, the European Court ruled that the breaches committed by Italy reflected "a continuing situation that has not yet been remedied and in respect of which litigants have no domestic remedy. This accumulation of breaches accordingly constitutes a practice that is incompatible with the Convention" (see the Judgment of 28 July 1999 in *Bottazzi v. Italy*, *Di Mauro v. Italy*, *Ferrari v. Italy* and *A.P. v. Italy*).

The original legislative framework of Law no. 89 of 2001 was changed significantly – as will be specified in greater detail below – by Article 55 of Decree-Law no. 83 of 2012.

In particular, Article 4 of the Pinto Law was replaced by the contested provision.

The original provision stipulated that: "A claim seeking compensation may be filed whilst the proceedings in which the violation is alleged to have occurred are ongoing or within six months of the time when the decision concluding those proceedings became definitive, failing which such entitlement shall lapse".

Following its replacement, Article 4 of the Pinto Law provides that: "A claim seeking compensation may be filed within six months of the time when the decision concluding those proceedings became definitive, failing which such entitlement shall lapse".

In purely literal terms, the new text does not expressly preclude the possibility of submitting a claim for fair compensation whilst the underlying trial is ongoing.

However, this possibility is excluded according to an interpretation based on the systematic approach and on legislative intent, as is clear: a) from the fact that the new version differs from that previously in force solely by the removal of the segment stipulating that claims were admissible whilst the trial is "ongoing", which would otherwise be inexplicable; b) from the wording of the provision in parallel with Article 3 of the Pinto Law, which provides in paragraph 1 that "A claim for fair compensation

may be filed by application with the president of the court of appeal of the district in which the court is based that has jurisdiction, pursuant to Article 11 of the Code of Criminal Procedure, to rule in proceedings concerning judges and prosecutors within the district of whom the proceedings in which the violation is alleged to have occurred were concluded either definitively or with regard to the merits stage. […]" whilst paragraph 3(c) provides that: "A certified copy of the following documents must be filed along with the appeal: […] the order concluding the proceedings, if they were concluded by an irrevocable judgment or order" – which provisions would be meaningless were it still possible to submit the claim whilst the underlying trial was ongoing; c) from the fact that the availability of the right to compensation and the quantum of damages (as classified by the law) are conditional upon the conclusion of the proceedings, as will be specified in greater detail below; d) from the objective stated in the report on the bill on the conversion of Decree-Law no. 83 of 2012 of reducing the burden on the courts of appeal resulting from applications for fair compensation; and e) from the preparatory works relating to the conversion law.

In the light of the above considerations, it is considered that the contested provision prevents claims for fair compensation from being filed whilst the proceedings in relation to which the violation of the requirement of reasonable length is alleged to have occurred are still ongoing.

3.– In view of the above, the objections raised by the government representative asserting that the question is inadmissible are unfounded.

In the first place, the government representative argues that an insufficient description of the facts of the case was provided by the referring court, which did not provide any specific indication regarding the current status of the bankruptcy procedure, thus making it impossible to conclude that the contested provision was applicable without doubt.

This assertion is clearly contradicted by the referral order, in which the referring court expressly states that the claim for fair compensation – to which the contested provision must be applied *ratione temporis* – was filed when the bankruptcy procedure was still ongoing, as was certified by the registry of the bankruptcy court.

Secondly, the President of the Council of Ministers argues that the claim raised in the main proceedings could not be accepted by virtue of Article 2-bis(3) of the Pinto

Law, according to which the level of compensation cannot under any circumstances be higher than the value of the claim or, if lower, than the value of the right upheld by the court. This is because the applicant quantified the compensation at EUR 8,000.00, as against a debt included in a statement of liabilities in bankruptcy of only EUR 6,878.47.

The objection must be rejected because the application could in any case be accepted in respect of an amount lower than that claimed, as is moreover implicitly provided for under Article 3(6) of the Pinto Law insofar as it allows for opposition in the event that a claim is partially successful.

4.– Nevertheless, the question concerning the constitutionality of Article 55(1)(d) of Decree-Law no. 83 of 2012, with reference to Articles 3, 111(2) and 117(1) of the Constitution – the last provision in relation to Article 6(1) ECHR – is inadmissible for two reasons, which are intimately related to each other. In fact, the expansive ruling sought by the referring court – involving essentially an extension of the remedy of compensation owing to the late conclusion of a trial to compensation whilst the trial is still ongoing – cannot be adopted, first because any extension granted would be incapable of guaranteeing compensation for violations occurring in cases in which there has been no irrevocable ruling, and secondly because the manner of compensation could not be stipulated "as a mandatory solution" [*a rime obbligate*] due to the wide range of legislative solutions theoretically possible in order to uphold the principle of the reasonable length of trials.

4.1.– Before substantiating these grounds for inadmissibility it is necessary to describe, albeit in summary form, the overall changes introduced by Article 55 of Decree-Law no. 83 of 2012 to Law no. 89 of 2001.

Some of them related to the procedures governing the award of fair compensation due to unreasonably long trials and, whilst retaining the jurisdiction of the court of appeal over the single merits stage (now involving a judge sitting alone), provide that the claim must be filed and treated on the basis of documentary evidence, according to a mechanism similar to that applicable to proceedings seeking the issue of a payment order (see Article 3 of the Pinto Law, as replaced by Article 55(1)(c) of Decree-Law no. 83 of 2012). Oral proceedings are deferred until the subsequent opposition stage [of the same proceedings], if such a stage is raised by the authorities or if the applicant is dissatisfied with (all or part of) the ruling, which is held before the court of appeal

sitting as a bench in accordance with the simplified rules applicable to procedures in chambers (Article 5-ter of the Pinto Law, as introduced by Article 55(1)(f) of Decree-Law no. 83 of 2012). It is possible to launch procedures of a summary type as the new legislation, which largely draws on the findings in the case law of the European Court and the Court of Cassation, also states the time limits up to which the length of a trial may not be ruled unreasonable (Article 2(2-bis) to (2-quater) of the Pinto Law, as introduced by Article 55(1)(a) no. 2 of Decree-Law no. 83 of 2012) and the level of compensation for each year or part thereof in excess of six months after expiry of the time limit of reasonable length (Article 2-bis(1) of the Pinto Law, as introduced by Article 55(1)(b) of Decree-Law no. 83 of 2012).

Further amendments made by Article 55 of Decree-Law no. 83 of 2012 to Law no. 89 of 2001 placed on legislative footing a range of circumstances which affect the availability of the claim (Article 2) and the quantum (Article 2-bis) of compensation.

Specifically, Article 2(2-ter) of the Pinto Law provides that the length will under all circumstances be deemed to be reasonable if the proceedings are irrevocably concluded within six years. It is evident that the provision in question presupposes that the trial has been concluded, as its overall length can only be objected to after this time.

Similarly, the grounds for excluding compensation contemplated under Article 2(2-quinquies) a) (in favour of the unsuccessful defendant on the grounds of "vexatious litigation" pursuant to Article 96 of the Code of Civil Procedure), b) (in the event that the claim is accepted in an amount not exceeding the conciliation proposal, if presented: Article 91(2), second sentence of the Code of Civil Procedure), c) (in the event that the measure concluding the proceedings adopts in its entirety the contents of the mediation proposal aimed at the conciliation of civil and commercial disputes: Article 13(1), first sentence, of Legislative Decree no. 28 of 4 March 2010 on the "Implementation of Article 60 of Law no. 69 of 18 June 2009 on mediation aimed at the conciliation of civil and commercial disputes") and d) (if the offence is no longer punishable on the grounds of time-barring as a result of delaying tactics by one of the parties) are likewise premised on the fact that the proceedings have been concluded.

Finally, as regards the determination of the level of compensation, Article 2-bis(2)(a) of the Pinto Law requires that the outcome of the trial be taken into account, whilst paragraph 3 provides that compensation may not exceed the value of the claim or,

if lower, the value of the right upheld by the court. It is evident that these criteria can only apply after the underlying proceedings have been concluded.

In regulating the availability of the claim and the quantum of damages, Article 2 and Article 2-bis of the Pinto Law – respectively amended and introduced by Article 55 of Decree-Law no. 83 of 2012 – end up structuring in a peculiar manner the right to fair compensation, recognising it only after the underlying trial has been concluded and not also whilst it is still ongoing.

Within the legislative context described, the compensatory mechanisms introduced by Article 55 of Decree-Law no. 83 of 2012 lay down conditions that cannot be fulfilled in these particular circumstances, to which the application of the same rules is sought.

The above considerations preclude the expansive ruling requested.

In any case, moreover, the ruling would not be "a mandatory solution" due to the wide range of legislative solutions that are theoretically possible in order to protect the principle of the reasonable length of trials.

It must be recalled that, "starting from judgments no. 348 and no. 349 of 2007, the case law of this Court has been settled in concluding that 'the provisions of the ECHR – as interpreted by the European Court of Human Rights, specifically established in order to interpret and apply the Convention (Article 32(1) of the Convention) – supplement the constitutional principle laid down under Article 117(1) of the Constitution as interposed rules by requiring that national legislation comply with the requirements resulting from international law obligations'" (see Judgment no. 264 of 2012).

The European Court has clarified that "Article 6 § 1 imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time […]. Where the judicial system is deficient in this respect, a remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy is the most effective solution. Such a remedy offers an undeniable advantage over a remedy affording only compensation since it also prevents a finding of successive violations in respect of the same set of proceedings and does not merely repair the breach *a posteriori*, as does a compensatory remedy of the type provided for under Italian law for example. […] It is also clear that for countries where length-of-

proceedings violations already exist, a remedy designed to expedite the proceedings – although desirable for the future – may not be adequate to redress a situation in which the proceedings have clearly already been excessively long. […] Different types of remedy may redress the violation appropriately. […] Moreover, some States […] have understood the situation perfectly by choosing to combine two types of remedy, one designed to expedite the proceedings and the other to afford compensation […]. However, States can also choose to introduce only a compensatory remedy, as Italy has done, without that remedy being regarded as ineffective" (see Grand Chamber, Judgment of 29 March 2006, *Scordino v. Italy*).

Again according to the European Court, "Where a State has taken a significant step by introducing a compensatory remedy, the Court must leave a wider margin of appreciation to the State to allow it to organise the remedy in a manner consistent with its own legal system […]" and "[…] it may well be that the procedural rules are not exactly the same as for ordinary applications for damages. It is for each State to determine, on the basis of the rules applicable in its judicial system, which procedure will best meet the compulsory criterion of 'effectiveness' […]" (see Grand Chamber, Judgment of 29 March 2006, *Scordino v. Italy*).

Thus, the Convention affords the Contracting States broad discretion in choosing the type of internal remedy out of the variety of potential choices. However, if it chooses compensation, that discretion is subject to the limit of effectiveness, which results from the mandatory status of Article 13 ECHR (see Grand Chamber, Judgment of 29 March 2006, *Cocchiarella v. Italy*), according to which: "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority […]".

It is specifically with regard to that aspect – which is moreover contested by the referring court – that the internal remedy, as currently governed by the Pinto Law, is inadequate. In fact, the European Court has held that the deferral of the availability of relief until after the conclusion of the proceedings in which the delay occurred will not prejudice the efficacy or render it incompatible with the prerequisites in this area laid down by the Convention (see Judgment of 21 July 2009, *Lesjak v. Slovenia*).

Whilst – for the reasons set out above – the breach ascertained and the need for the legal system to offer an effective remedy in view of the violation of the principle that

trials must have a reasonable length have no bearing on the inadmissibility of the question and do not call into question the "priority status of Parliament's assessment as to whether the means used to achieve a goal necessary under constitutional law are appropriate" (see Judgment no. 23 of 2013), they nonetheless require this Court to assert that any excessive prolongation of legislative inertia in relation to the problem identified in this ruling would not be tolerable (see Judgment no. 279 of 2013).

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

rules that the question concerning the constitutionality of Article 55(1)(d) of Decree-Law no. 83 of 22 June 2012 (Urgent measures to stimulate the growth of the country), converted with amendments into Article 1(1) of Law no. 134 of 7 August 2012, with reference to Articles 3, 111(2) and 117(1) of the Constitution, the last provision in relation to Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, ratified and implemented by Law no. 848 of 4 August 1955, raised by the Bari Court of Appeal by the referral order mentioned in the headnote, is inadmissible.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 24 February 2014.