Corte costituzionale

# JUDGMENT NO. 49 OF 2011

*Ugo DE SIERVO, President*
*Paolo Maria NAPOLITANO, Author of the Judgment*

# JUDGMENT NO. 49 YEAR 2011

**In this case the Court considered a reference from the Regional Administrative Court for Lazio questioning the constitutionality of a provision which stipulated that sports regulatory bodies had exclusive jurisdiction over sporting disputes concerning non-technical disciplinary penalties, even where the effects of such decisions extended beyond the confines of sporting justice and had an effect on individual rights and legitimate interests. The Court dismissed the question as groundless, holding however that "the express exclusion of direct jurisdiction over decisions imposing disciplinary penalties – which was established in order to protect the autonomy of the sports regulatory system – does not make it possible to preclude the right to initiate court action in order to obtain compensation for the resulting damage for those who aver the violation of a legally significant individual interest."**

(omitted)

JUDGMENT

in proceedings concerning the constitutionality of Article 2(1)(b) and (2) of Decree-Law no. 220 of 19 August 2003 (Urgent provisions on justice in relation to sport), converted with amendments into Law no. 280 of 17 October 2003, initiated by the Regional Administrative Court for Lazio in the proceedings pending between Andrea Cirelli and the Italian Basketball Federation (*Federazione Italiana Pallacanestro*, FIP) and others pursuant to the referral order of 11 February 2010, registered as no. 194 in the Register of Orders 2010 and published in the Official Journal of the Republic no. 26, first special series 2010.

Considering the entry of appearance by the FIP, the Italian National Olympic Committee (*Comitato Olimpico Nazionale Italiano*, CONI) as well as the interventions by the Agorà Sporting Association (*Associazione Sportiva Agorà*) and the President of the Council of Ministers;

having heard the Judge Rapporteur Paolo Maria Napolitano in the public hearing of 14 December 2010;

having heard Counsel Luciano de Luca for the Agorà Sporting Association, Guido

Valori for the FIP, Alberto Angeletti and Luigi Medugno for the CONI and the *Avvocato dello Stato* Carlo Sica for the President of the Council of Ministers.

(omitted)

*Conclusions on points of law*

1. – The Regional Administrative Court for Lazio questions the constitutionality of Article 2(1)(b) and (2) of Decree-Law no. 220 of 19 August 2003 (Urgent provisions on justice in relation to sport), converted with amendments into Law no. 280 of 17 October 2003, with reference to Articles 24, 103 and 113 of the Constitution, insofar as it reserves solely to sports judicial organs jurisdiction to rule on disputes relating to disciplinary penalties other than technical penalties imposed on athletes, members, associations and sporting societies, thereby rendering them ineligible for review by the administrative courts, even where their effects apply beyond the confines of the system of sporting regulations and impinge upon individual rights and legitimate interests.

1.1. – Prior to any other consideration it must be noted at the outset that Decree-Law no. 220 of 2003 has been subject to some amendments, albeit not relating to the contested provisions, following the entry into force of Legislative Decree no. 104 of 2 July 2010 (Implementation of Article 44 of Law no. 69 of 18 June 2009, authorising the Government to reform the law governing proceedings before the administrative courts).

In particular, in Article 3(1) the words "shall be reserved to the exclusive jurisdiction of the administrative courts" were replaced pursuant to Article 3(13) of Annex 4 to Legislative Decree no. 104 of 2010 by the words "shall be governed by the Administrative Procedure Code", whilst paragraphs 2, 3 and 4 were repealed by Article 4(1)(xxix) of Annex 4 to Legislative Decree no. 104 of 2010.

These provisions have not in reality amended the legislative provisions concerned, since the Administrative Procedure Code contains provisions which in actual fact reiterate those amended or repealed, thereby leaving the overall legislative framework

essentially unchanged.

Therefore, they are of no consequence for these constitutionality proceedings.

2. – It is necessary to examine as a matter of priority the admissibility of the intervention in the proceedings by the Agorà Sporting Association. In accordance with the settled case law of this Court, it must be ruled inadmissible.

The Sporting Association claims that it has standing to intervene in the proceedings on the basis of the fact that, since it is also subject to a disciplinary measure issued by the Sports Conciliation and Arbitration Chamber, which is currently under appeal before the Regional Administrative Court for Lazio, it is a party to administrative proceedings – which have been stayed until a date to be determined pending the resolution of these interlocutory constitutionality proceedings – the outcome of which depends upon today's decision. This Court reiterates that the position under its settled case law is that only the parties to the main proceedings and third parties may participate in proceedings before the Constitutional Court, the latter only if they have a qualified interest pertaining directly and specifically to the substantive relationship at issue in the case, and not one which is simply regulated on the same footing as any other by the contested provision. The inadmissibility of interventions by parties different from those listed above is not affected by the fact that proceedings analogous to the main proceedings are pending, even if they have actually been suspended pending the judgment of this Court, since any other solution would run counter to the interlocutory nature of proceedings before the Constitutional Court, implying access for parties before the issues of relevance and non manifest groundlessness have been verified in relation to the relevant dispute (see most recently, judgment no. 288 of 2010 and previously, *inter alia*, the bench's order annexed to judgment no. 245 of 2007).

3. – Given its preliminary nature, it is necessary at this stage to examine the objection that the question is inadmissible, due to the failure to give reasons as to its relevance, raised by the representative of CONI with reference to the failure by the referring court to assess the nature of the measure issued by the Sports Conciliation and Arbitration Chamber. If in fact this were considered as an arbitral award, since these decisions may only be appealed against in specific circumstances according to the provisions laid down to that effect by the Code of Civil Procedure, an appeal to the lower court would be inadmissible and since, according to the referring court, none of

the circumstances concerned obtains, the question of constitutionality raised would also prove to be irrelevant.

3.1. – The objection is groundless.

It is in fact evident that the referring court complied, albeit implicitly, with the entirely consolidated view within administrative case law at first and second instance, as is witnessed by the sheaves of precedents within the case law concerning this matter according to which, even though they are adopted within proceedings in which the parties have the right to make representations, the decisions of the Sports Conciliation and Arbitration Chamber (a body which has moreover now been abolished and replaced within the CONI by the newly created National Sports Arbitration Tribunal) have the nature of administrative measures, such that as a matter of principle it is not implausible for the administrative court to assert its jurisdiction (which is exclusive in nature) over any type of decision of the Conciliation and Arbitration Chamber. It must be emphasised in this regard that this Court has asserted on various occasions that, in order to be relevant, the lack of jurisdiction must be macroscopic (see most recently judgment no. 34 of 2010).

3.2. – The Court must also dismiss the objection that the question is inadmissible on the basis of the argument that, rather than setting out a real doubt regarding constitutional law, the referring court is seeking from this Court an improper confirmation of the interpretation followed by it in the past, which has now been rejected by the appeal court.

Indeed, whist setting out the contours of its previous position, the Regional Administrative Tribunal for Lazio acknowledges the fact that it has been rejected, supported by reasons, both by the Council of Administrative Justice of Sicily Region (judgment no. 1048 of 2007) as well as the Council of State itself (judgment no. 5782 of 2008) which, whilst holding that the interpretation was the only one possible, nonetheless expressed doubts as to its compatibility with the Constitution. Therefore, when confronted with the opposite view established through argumentation by the appeal court, which is also the last merits court with regard to such matters (the decision of which can no longer be set aside even following an appeal pursuant to the last paragraph of Article 111 of the Constitution in cases involving an absolute lack of jurisdiction), there was no option for the referring court – precisely because it had

followed the interpretation of the Council of State – than to raise this question of constitutionality, thereby completing the line of argumentation highlighted by the Council of State.

4. – Turning to the merits of the question, it must be ruled groundless for the reasons set out below.

4.1. – It must be recalled first and foremost that Decree-Law no. 220 of 2003 was issued in circumstances that were expressly defined by its rapporteur during the Parliamentary debate which resulted in the approval of the conversion law as a "full blown disaster hanging over the world of football". The legislation confronted a particularly delicate question, namely the relationship between the State legal system and one of the most significant autonomous regulatory systems that come into contact with the legal system, namely the sports regulatory system.

The singular nature of the situation and the related difficulty of an *actio finium regundorum* [i.e. a regulation of boundaries] between these two systems may be discerned from the manner in which the Decree-Law was initially framed which, in asserting that the law recognises and promotes "the autonomy of the national sports regulatory system", clarified that it is an "emanation of the international sports regulatory system controlled by the International Olympic Committee". It accordingly asserts, restating concepts already expressed in other legislative texts (such as Articles 2 and 15 of Legislative Decree no. 242 of 23 July 1999 on the "Reorganisation of the Italian National Olympic Committee – C.O.N.I., pursuant to Article 11 of Law no. 59 of 15 March 1997"), that this regulatory system is the emanation within Italy of a broader autonomous regulatory system with an international dimension and that it is answerable to an organisational structure outwith the State which is recognised under the legal order of the Republic.

Even leaving aside the international dimension to the issue, it must be stressed that the autonomy of the sports regulatory system is broadly protected under Articles 2 and 18 of the Constitution, since it cannot be doubted that sports associations are the most widespread "social formations where [man] expresses his personality" and that all people must be guaranteed the right to associate freely for the purposes of sport.

4.2. – As regards the specific examination of the provisions on which the question of constitutionality raised by the referring Regional Administrative Court turns, it is

observed that Article 2(1) of the Decree-Law reserves to the sports regulatory system, moreover giving legislative form to what is already a settled position within case law, competence to regulate questions concerning "relevant conduct in disciplinary terms and the imposition and enforcement of the relative disciplinary sanctions", as well as to oversee compliance with and the application of, regulatory, organisational and charter provisions aimed at guaranteeing the correct conduct of sporting activities – namely those which are commonly known as the "technical rules". It is also specified in paragraph 2 that in such matters the individuals subject to the sports regulatory system (societies, associations, affiliates and members) are under an obligation to apply to "the adjudicatory bodies of the sports regulatory system" (assuming that they wish to challenge the imposition of the aforementioned penalties), in accordance with the provisions of the regulations governing their sector of origin.

This provision is referred to by the subsequently enacted Article 3 of Decree-Law no. 220 which, in the text as in force at the time the question of constitutionality was raised, essentially identifies a tripartite form of judicial and quasi judicial protection. The first form, which is limited to relations of a pecuniary nature between sporting societies, sporting associations, athletes (and members), is reserved to the jurisdiction of the ordinary courts. Under the second form, relating to some of the questions concerning the matters falling under Article 2, given the irrelevance for the general legal system of the interests hypothetically violated and the rights that may arise out of these, protection is as a matter of principle not provided by the organs of the State but by internal bodies within the regulatory systems in which the relevant rules were issued (and which are only relevant within the ambit of the latter), according to a framework that is peculiar to "associative justice".

4.2.1. – Before assessing the scope of the third form of protection of a residual nature which is reserved to the administrative courts, it is appropriate to consider further the second form, which operates within the sports regulatory system, because this touches upon the question of constitutionality raised by the referring court. That court observes that "sporting justice constitutes a [definitive] instrument of protection in cases involving the application of sporting rules".

It is asserted later in the referral order that "that are indisputably merely technical rules, and certainly include those which the sports regulatory system has elaborated and

may hereafter elaborate in order to determine the results of sporting competitions".

Moreover, it cannot be asserted in these cases – in which it is not possible for the State courts to intervene in order to protect the interest allegedly infringed – that Article 24 of the Constitution has been violated, since precisely the interest which has allegedly been infringed does not have the nature of an individual right or a legitimate interest. In fact, the referring court observes that "The technical rules that come into play cannot be classified as provisions establishing individual rights […]. However, they cannot even be classified as situations involving a legitimate interest".

These conclusions are consistent with those reached by the Court of Cassation in two judgments, both of which were adopted by the Joint Divisions since they involved questions of jurisdiction, the first prior to the Law under examination (judgment no. 4399 of 1989) and the second after its entry into force (judgment no. 5775 of 2004). In the latter judgment, the argumentative structure of which is analogous to the former, it is asserted that these questions "are not of relevance within the general legal order and the decisions adopted on the basis [of the rules issued by sporting associations] pertain to matters that are not relevant for the State legal system, and cannot be regarded as manifestations of public powers, and hence be considered on the same basis as administrative decisions. Given the general irrelevance of these rules for the State legal order and their violation, they are not protected under the State judicial system".

Whilst these were the conclusions reached by the Court of Cassation when ruling on the issue of jurisdiction after examining the question in substantive terms, that is considering the degree of objective consistency which these interests have if assessed in relation to the legal system in general, the same court reached analogous conclusions when considering the question in procedural terms with reference to the right to take court action in order to protect those interests. In the recent order no. 18052 of August 2010, the Joint Divisions ruled inadmissible jurisdictional regulations providing for the possibility to bring before the State courts a dispute relating to the streamlining of the persons included in the registers of match referees, which would otherwise have been reserved to the autonomous decision of the sports regulatory system, on the grounds that "the fact as to whether or not a situation is legally significant for the State legal system, and as such eligible for protection, is a […] decision that it is for the merits court to make".

In other words, the decision as to what is legally irrelevant (and which hence does not give rise to State jurisdiction), and that which is by contrast relevant for the latter must be reserved to the merits court, which will adopt its decisions in accordance with the provisions of positive law.

This is moreover compatible with a long-held position of this Court which asserted as early as judgment no. 87 of 1979, ruling on a question relating to Article 2059 of the Civil Code, that the right of action was logically subordinate to the albeit theoretical existence of a legally relevant substantive individual interest.

4.3. – The further form of judicial protection has a tendency to be residual in nature since it relates to all matters which, on the one hand, do not concern pecuniary relations between societies, sporting associations, athletes (and members) – which as mentioned above are reserved to the ordinary courts – whilst, on the other hand, it does not fall under the matters which are reserved to the exclusive jurisdiction of the sporting justice bodies pursuant to Article 2 of Decree-Law no. 220 of 2003 – since, as mentioned above, they are not capable of establishing individual rights that are significant for the legal system in general, and are rather of significance only sectorally – notwithstanding the fact that they result from decisions by the CONI and the Sporting Federations. Therefore (to restate the original legislative formulation), this amounts to "any other dispute" which is "reserved to the exclusive jurisdiction of the administrative courts".

If the parliamentary history of Decree-Law no. 220 of 2003 is followed, it will be noted that Parliament itself indicated some of the "individual legal interests associated with the sports regulatory system" in respect of which it considered the case to be of "relevance for the legal order of the Republic".

It is sufficient to observe in this regard that, according to the original version of Decree-Law no. 220 of 2003, the matters which could be deemed not to fall under the jurisdiction of the State courts due to their inclusion in Article 2(1) also involved questions concerning the admission and affiliation of societies, associations or individual members to the federations as well as those relating to the organisation and conduct of competitive activities and the admission to these of teams and athletes. The fact that Parliament repealed letters c) and d) of Article 2(1) when converting the Decree-Law, which specified the matters referred to above, means that it is possible to conclude that the administrative courts have exclusive jurisdiction over these whenever

individual rights or legitimate interests are infringed.

It is clear, also from an examination of the *travaux preparatoires* referred to above for Law no. 280 of 2003 converting Decree-Law no. 220, that this removal of provisions from the original legislative text is justified by the consideration that the possibility (or absence thereof) to be affiliated to a sporting federation or to be a member of one and the possibility (or absence thereof) to be eligible to carry out competitive activity and to participate in the competitions and championships organised by the sporting federations falling under the CONI – which is in turn a member, as the sole national representative of the International Olympic Committee – is not an interest that can be stated to be irrelevant for the general legal order, and which as such does not deserve protection from it. This is because it is through the above possibility that both fundamental freedom rights – including first and foremost the right to express one's own personality and the right of association – as well as the no less significant rights associated with pecuniary relations – where account is taken of the economic significance which sport has taken on, often being practised professionally and organised as a business – are implemented, all of which are of significance also on constitutional level.

Accordingly, the conversion appeared to be consistent with the provisions of Article 1(2) of Decree-Law no. 220 of 2003, the final part of which expressly specified that the autonomy of the sports regulatory system will be set aside whenever individual legal interests are at issue which, notwithstanding their relationship with that system, are of significance for the legal order of the Republic.

4.4. – It is now possible to move on to consider the question of constitutionality raised by the Regional Administrative Court for Lazio.

The court questions the legislative provision cited at various points above insofar as it reserves jurisdiction to resolve disputes concerning disciplinary penalties other than technical penalties imposed on athletes, members, associations and sporting societies to the sporting adjudicatory bodies alone, shielding them from review by the administrative courts. It clarifies that the doubts over its constitutionality "do not relate to the provision for 'prior sporting adjudication'", since it considers that it is a "correct and logical consequence of the recognised autonomy of the sports regulatory system", but "to the general exclusion […] of the right to apply to the State courts once all

instance of sporting justice have been completed".

It also asserts that the provision suspected to be unconstitutional could be (and indeed in the past has been) interpreted differently, but that a recent decision of the Council of State (6th Division, judgment no. 5782 of 25 November 2008), following an analogous decision of the Council of Administrative Justice for Sicily Region (decision no. 1048 of 8 November 2007), requires it to set aside the previous interpretation and to follow that endorsed by the Council of State even though, in its view, it contrasts with Articles 24, 103 and 113 of the Constitution.

It must be considered in this regard that even if, as noted above, the referring court extends proceedings to Articles 103 and 113 of the Constitution, in reality the challenge does not relate to specific aspects relating to the aforementioned constitutional provisions, since it is focused on one single issue. It is clearly defined where the referring court asserts that it is evident from the constitutional principles which it is seeking to apply "that no person may be denied protection of his own legal rights before a State court, whether an ordinary or an administrative court".

It is also emphasised later in the referral order that the question of constitutionality arises where the contested legislation permits an "exception to the constitutional principle of the right to obtain protection for one's own legal position involving an individual right or a legitimate interest before a State court" and that the "limit of the requirement to respect the right to a defence […] ends up being irredeemably breached through the exclusion of a right of appeal to the State courts".

Therefore, even though the order refers to the three articles of the Constitution mentioned above, the challenge is unitary in nature, and may be classified as a doubt over whether the contested legislation prevents "the State courts" (an expression used on various occasions) from cognising questions concerning individual rights or legitimate interests. The argument that Articles 103 and 113 of the Constitution are also violated is formulated since, in the opinion of the lower court, they represent the constitutional foundation for the judicial functions of the administrative courts which the referring court identifies as the "natural court" for the said disputes, in accordance with the provisions which it is required to apply. Therefore, in invoking these Articles, no ground for unconstitutionality different from those formulated with reference to Article 24 of the Constitution is proposed.

4.5. – It is necessary as a preliminary matter to endorse the referring court's argument, which refers to the settled case law of this Court, according to which "laws are not ruled unconstitutional because it is possible to interpret them in a manner contrary to the Constitution, but because it is possible to interpret them in a manner compatible with the Constitution" (see *inter alia* judgment no. 403 of 2007, judgment no. 356 of 1996, and order no. 85 of 2007).

It is observed, precisely in accordance with this principle, that the Council of State's decision itself, which is considered by the referring court to form part of the "living law" [i.e. uniform and consolidated case law], provides an interpretation which dispels the doubts as to its constitutionality within the line of argumentation followed (and notwithstanding that previously asserted in the same decision).

In fact, it is asserted in the judgment, precisely with reference to Article 1 of Decree-Law no. 220 of 2003 that "these provisions must be interpreted, from a constitutionally informed perspective, as specifying that where the measure adopted by the sporting federations or by the C.O.N.I. also impinges upon individual legal interests of significance for the State legal order, any claim seeking to obtain not the reversal of the decision, but rather the resulting compensation of damages, must be filed before the administrative courts, which have exclusive jurisdiction, as no reservation applies in favour of sporting adjudicatory bodies, before which a damages claim cannot even be brought". It is also specified that "[t]he administrative courts may therefore consider disciplinary penalties imposed on societies, associations and athletes on an interlocutory and indirect basis, in spite of the reservation in favour of 'sporting adjudicatory bodies', in order to rule on the damages claim filed by the recipient of the penalty".

Therefore, should the individual interest have such a consistency as to be classified as an individual right or legitimate interest under the State legal order, in accordance with the "living law" ascertained by the court which, according to the aforementioned law, has exclusive jurisdiction over such matters, a remedy of damages will be available.

In such cases it must therefore be concluded that the express exclusion of direct jurisdiction over decisions imposing disciplinary penalties – which was established in order to protect the autonomy of the sports regulatory system – does not make it possible to preclude the right to initiate court action in order to obtain compensation for

the resulting damage for those who aver the violation of a legally significant individual interest.

This is certainly a form of protection – *per equivalentem* – which is different from that generally vested in the administrative courts (and indeed such cases involve matters falling under exclusive jurisdiction). However, it can certainly not be asserted that the lack of annulment proceedings (which would moreover encounter difficulty in achieving restorative effects, since they are in any case concluded after all internal remedies of sporting justice have been exhausted, and would in any event amount to in a form of interference in these cases, which would be at odds with the stated intention to protect the sports regulatory system) would violate the provisions of Article 24 of the Constitution. A diversified form of judicial protection is therefore identified on the basis of an interpretation established through argument of the legislation governing the area, within the ambit of that form of protection which may be defined as residual.

It is useful to emphasise this Court's findings in judgment no. 254 of 2002 in this regard, when it examined a question relating to the exemption from liability which the legislation in force at the time granted to the operators of the telegraph service, namely that it "falls within the sphere of legislative discretion to establish an exception to the ordinary law of tort which strikes a reasonable balance between the needs" of the two bearers of countervailing interests.

Besides, the possibility of exclusively compensatory protection *per equivalentem* are certainly not unknown within the legal order. In fact – and the reference is relevant since this matter turns on the issue of exclusive jurisdiction – it is precisely a provision of the Civil Code, that is Article 2058, referred to by Article 30 of the recent Legislative Decree no. 104 of 2 July 2010 (Implementation of Article 44 of Law no. 69 of 18 June 2009 authorising the government to reform the law governing proceedings before the administrative courts), which provides for damages in the form of specific restitutive measures as a contingent option ("if possible in full or in part"), though this is nonetheless again subject to the discretionary power of the court ("however, the court may order that the damages only be made good by way of equivalent measures if a remedy of specific restitutive measures would be excessively onerous for the obligor").

In this case, according to the "living law" to which the referring court refers, Parliament has struck a balance, which is not unreasonable, and which, for the reasons

set out above, led it to exclude the possibility of action by the courts that have a greater impact on the autonomy of the sports regulatory system.

ON THOSE GROUNDS

## THE CONSTITUTIONAL COURT

*rules* that the question concerning the constitutionality of Article 2(1)(b) and (2) of Decree-Law no. 220 of 19 August 2003 (Urgent provisions on justice in relation to sport), converted with amendments into Law no. 280 of 17 October 2003, raised by the Regional Administrative Court for Lazio with reference to Articles 24, 103 and 113 of the Constitution by the referral order mentioned in the headnote, is groundless for the reasons specified above.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 7 February 2011.

(omitted)