JUDGMENT NO. 88 YEAR 2018

In this case, the Court heard various referral orders from the Court of Cassation challenging legislation which provided that compensation for judicial proceedings of unreasonable length can only be sought after the conclusion of the offending proceedings. Specifically, it was noted that the request directed by the Court to the legislator in Judgment no. 30 of 2014 to rectify the situation by new legislation had been acted upon in a manner that was inadequate. Referring to ECHR case law, the Court ruled the legislation unconstitutional "as the remedies introduced do not apply in all circumstances". The Court thus ruled that the legislation had to be read as permitting actions for compensation to be brought whilst the proceedings in question were still pending.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 4 of Law no. 89 of 24 March 2001 (Provisions on fair compensation in the event of a violation of the right to conclude litigation within a reasonable time and amendment of Article 375 of the Code of Civil Procedure) – as replaced by Article 55(1)(d) of Decree-Law no. 83 of 22 June 2012 (Urgent measures to promote the growth of the country), converted with amendments into Law no. 134 of 7 August 2012 – initiated by the Sixth Civil Division of the Court of Cassation by two referral orders of 20 December 2016 and by referral orders of 16 February and 23 January 2017, registered respectively as nos. 68, 69, 73 and 148 in the Register of Referral Orders 2017 and published in the *Official Journal* of the Republic nos. 20, 21 and 43, first special series 2017.

[omitted]

Conclusions on point of law

1.– By four referral orders with similar content, the Sixth Civil Division of the Court of Cassation raised questions concerning the constitutionality of Article 4 of Law no. 89 of 24 March 2001 (Provisions on fair compensation in the event of a violation of the right to conclude litigation within a reasonable time and amendment of Article 375 of the Code of Civil Procedure) – as replaced by Article 55(1)(d) of Decree-Law no. 83 of 22 June 2012 (Urgent measures to promote the growth of the country), converted with amendments into Law no. 134 of 7 August 2012 – with reference to Articles 3, 24, 111(2) and 117(1) of the Constitution, the last provision in relation to Articles 6(1) and 13 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 contested provision, according to the meaning now established as the "living law" [i.e. the uniform and settled interpretation of the law as given by the Court of Cassation], prevents a claim for fair compensation from being filed whilst the proceedings in relation to which the violation of the provisions requiring a reasonable length of trials is alleged to have occurred are pending (Judgment no. 30 of 2014; Court of Cassation, Sixth Civil Division, judgments no. 13556 of 1 July 2016, no. 20463 of 12 October 2015, no. 18539 of 2 September 2014; and Second Civil Division, judgment no. 19479 of 16 September 2014).

In essence, the Court of Cassation objects to the provision precisely insofar as it renders the availability of the claim to fair compensation conditional upon the prior conclusion of the underlying proceedings.

The referring court points out that, when considering an analogous question of constitutionality, Judgment no. 30 of 2014 of this Court held that the deferral of the availability of the remedy was detrimental to its efficacy, and called for the enactment of corrective legislation by the legislator. However, it is argued that the violation of the Constitution ascertained has not been rectified by the preventive remedies introduced in the meantime by Article 1(777) of Law no. 208 of 28 December 2015 laying down "Provisions on the formation of the annual and multi-year budget of the State (Stability Law 2016)", which are aimed at preventing unreasonably long trials, but do not alter the efficacy of the compensatory relief once such an entitlement has arisen; accordingly, it is claimed that the warning issued in the previous Judgment has been disregarded, and that the deferral remains unconstitutional, a situation which is aggravated by the fact that any claim for fair compensation that is brought at too early a stage is definitively inadmissible.

2.– The proceedings must be joined for resolution in a single ruling, as they concern questions relating to the same provision, which has been contested with reference to the same provisions of constitutional law.

3.– Before considering the merits of the questions referred, it is necessary to examine the objections raised by the State Counsel [*Avvocatura Generale dello Stato*] that the questions are inadmissible.

3.1.– State Counsel argues that the referring court limited itself to indicating the parameters that have allegedly been violated, but did not indicate the reasons why they breach the Constitution, other than *per relationem*.

The objection is well-founded with regard solely to Article 24 of the Constitution, the violation of which is not supported by argument.

Conversely, as regards the residual constitutional provisions, that is, those with reference to which the provision was previously reviewed by this Court, the referral orders reiterate in summary, and also cite at length, Judgment no. 30 of 2014, thereby demonstrating their endorsement of its content. In addition, when considering the subsequently enacted legislation and finding that it is not capable of rectifying the violation previously ascertained, and thus of complying with the warning issued in the previous Judgment, the referring court has identified sufficiently clearly and adequately the reasons that led it to question the constitutionality of the provision at issue in these proceedings.

In view of the above considerations, it must be concluded that the grounds for challenge have not been provided *per relationem* in this case, "as the obligation which this Court considers to apply to the referring body to 'render explicit and endorse the reasons why it is not manifestly unfounded' has been complied with in full (see *inter alia*, Judgments no. 7 of 2014, no. 234 of 2011 and no. 143 of 2010; Orders no. 175 of 2013, no. 239 and no. 65 of 2012)" (Judgment no. 10 of 2015).

3.2.– The President of the Council of Ministers also objects that the referring court has mistakenly identified only Article 4 of Law no. 89 of 2001 as a contested provision, considering that the prohibition on filing a second time a claim that has already been rejected – which is asserted to preclude it definitively – is laid down by Article 3(6) of the same Law, which could moreover be subjected to an adaptive

interpretation so as to limit the exclusion only to the repetition of a claim on the merits and not due to procedural reasons.

However, in this case, in the light of the circumstances described by the referral orders, the Court of Cassation has been called upon to apply exclusively the contested provision, as it asserts that it would have to confirm the rejection of the claims seeking fair compensation which cannot be filed due to the fact that the underlying proceedings are pending, and not because they have been repeated notwithstanding their rejection in full or in part, in breach of the prohibition laid down by Article 3(6) of Law no. 89 of 2001.

The referring court has thus correctly excluded from the scope of the question of constitutionality a provision that it was not required to apply, not even in conjunction with the provision that is considered unconstitutional.

3.3.– The State Counsel objects that the referring court did not consider the possibility that, if the underlying proceedings are concluded whilst the case is pending – as in the proceedings before the referring court – this fact will enable the merits of the compensation claim to be considered, as the fulfilment of this prerequisite must be assessed at the time of the decision. It is asserted that the questions proposed are thus irrelevant.

The objection is unfounded.

The position adopted by the referring courts is supported both under the living law – considering that, as construed, the provision precludes "the filing of the claim" (Judgment no. 30 of 2014) for fair compensation – and by the literal wording of the law which refers, both in the headnote and in the substantive provision of Article 4 of Law no. 89 of 2001, to its "eligibility to be brought" ["*proponibilità*"].

In addition, the resolution of the underlying proceedings does not pertain to the inherent content of the question, but is external to it, and hence it must be concluded that it does not constitute a prerequisite for the action.

Moreover, according to the case law of this Court, the referring court is not required to state reasons as to why the adaptive interpretation proposed by the State Counsel is impracticable due to incompatibility with the living law (Judgment no. 203 of 2016).

4.– On the merits, the question concerning the constitutionality of Article 4 of Law no. 89 of 2011, with reference to Articles 3, 111(2) and 117(1) of the Constitution, the last mentioned in relation to Articles 6(1) and 13 ECHR, is well-founded.

When considering the same question of constitutionality, this Court has previously concluded that the constitutional provisions cited above have been violated, stressing "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, […] the 'priority status of the legislator's assessment as to whether the means used to achieve a goal necessary under constitutional law are appropriate' […and the fact] that any excessive prolongation of legislative inaction in relation to the problem identified in this ruling would not be tolerable" (Judgment no. 30 of 2014).

Article 1(777), (781) and (782) of Law no. 208 of 2015 amended Law no. 89 of 2001, *inter alia* introducing a series of preventive remedies, the failure to invoke which results in the inadmissibility of the action for fair compensation (Article 2(1) of the Pinto Law, as amended) – for trials not yet considered to be unreasonable in length on 31 October 2016 and that have not yet been resolved by decision (Article 6(2-*bis*) of the Pinto Law, as amended) – which, in relation to the different procedural types, involve

either the application of simplified procedures already provided for by law (Article 1-*ter*(1) of the Pinto Law, as amended) or applications for expedited actions (Article 1-*ter*(2), (3), (4), (5) and (6) of the Pinto Law, as amended).

According to the settled case law of the ECtHR, preventive remedies are not only admissible, as the case may be in conjunction with compensatory remedies, but are even preferable, as they seek to avoid the proceedings becoming excessively long; however, they may prove to be inadequate in countries where violations in terms of length of trial have already been committed, as much as they may be desirable for the future (European Court of Human Rights, Grand Chamber, judgment of 29 March 2006 in *Scordino v. Italy*).

This finding itself already fundamentally undermines the capacity of the legislation adopted to rectify the lack of efficacy previously ascertained, as the remedies introduced do not apply in all circumstances – including those considered within the referred proceedings – in which the length of the proceedings on 31 October 2016 had exceeded the threshold of reasonableness.

It must be added that the ECtHR "has on many occasions acknowledged that this type of remedy is 'effective' in so far as it hastens the decision by the court concerned" (European Court of Human Rights, Grand Chamber, judgment of 29 March 2006 in *Scordino v. Italy*).

In this case, in view of their procedural nature, none of the preventive remedies introduced obliges the courts to take the action requested of them; moreover, it is expressly stated that the legislation is "[w]ithout prejudice to the provisions establishing the order of priority in the management of the proceedings" (Article 1-*ter*(7) of the Pinto Law, as amended).

It is evident that these aspects are detrimental to the actual expeditive effect.

This conclusion is supported by the recent finding of the ECtHR (judgment of 22 February 2016 in *Olivieri and others v. Italy*), which was issued in relation to an application for the urgent scheduling of a hearing [*istanza di prelievo*], the filing of which Article 54 of Decree-Law no. 112 of 25 June 2008 (Urgent provisions on economic development, simplification, competitiveness, stabilisation of the public finances and tax equalisation), converted with amendments into Law no. 133 of 6 August 2008, stipulated as a prerequisite for the availability of a claim for fair compensation due to the unreasonable length of administrative trials. That application, which constitutes the model for most of the newly introduced preventive remedies, was held by the ECtHR to be ineffective.

In view of the considerations set out above, it must be concluded that, notwithstanding the invitation made by this Court in Judgment no. 30 of 2014, the legislator has not rectified the constitutional breach previously ascertained. Therefore, Article 4 of Law no. 89 of 2001 must be declared unconstitutional insofar as it does not provide that a claim seeking fair compensation may be brought whilst the underlying proceedings are still pending, once a delay has occurred (by analogy, Judgment no. 3 of 1997).

Besides, if the parameters invoked protect the interest in the resolution of court action within a reasonable period of time, the deferral until the conclusion of the underlying proceedings of the activation of the instrument – the only instrument available until the introduction of the preventive instruments mentioned above – that is intended to rectify its breach (albeit *a posteriori* and in equivalent terms) inevitably

entails undermining the rationale for which it was conceived; as a result, the legislation in question is unreasonable.

The "additive" ruling invoked cannot be precluded by the special way in which the Pinto Law structured the right to fair compensation in linking it to the outcome to the excessively delayed proceedings, both in terms of the availability of the claim as well as the quantum of damages (Judgment no. 30 of 2014).

In fact, "[w]hen confronted with a violation of the Constitution which cannot be resolved through interpretation – especially where it relates to fundamental rights – the Court is in any case required to provide a remedy, irrespective as to whether the violation depends on the provisions of the relevant rule or, on the contrary, on what the provision […] fails to specify. […] In fact, it will on the one hand be for the ordinary courts to infer the necessary corollaries from the decision in terms of its application by using the interpretative instruments available to them. On the other hand it will be for Parliament to make prompt and appropriate provision, if necessary, to govern any aspects that may appear to require specific regulation" (Judgment no. 113 of 2011).

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

having joined the proceedings,

declares that Article 4 of Law no. 89 of 24 March 2001 (Provisions on fair compensation in the event of a violation of the right to conclude litigation within a reasonable time and amendment of Article 375 of the Code of Civil Procedure) – as replaced by Article 55(1)(d) of Decree-Law no. 83 of 22 June 2012 (Urgent measures to promote the growth of the country), converted with amendments into Law no. 134 of 7 August 2012 – is unconstitutional insofar as it does not provide that a claim seeking fair compensation may be brought whilst the underlying proceedings are still pending.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 21 March 2018.