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Execution of judgments of the European Court of Human Rights – Financial liability for the payment of the just satisfaction afforded by the ECtHR to the injured party – Right of redress of the State against the local authority liable for breaches of the European Convention on Human Rights – Law No. 11/2005 – Attribution of the breach to the local authority – Scope and exercise of the right of redress

Corte Costituzionale, 21 September 2016, No. 219
Comune di San Ferdinando di Puglia v. Presidenza del Consiglio dei ministri and Ministero dell'economia e delle finanze

Decision No. 219/2016 of the *Corte Costituzionale* provides public authorities and commentators with a precious interpretive guidance on the scope and exercise of the right of redress granted to the central authority against local authorities responsible for a breach of the European Convention on Human Rights involving the financial liability of the State. While appreciating the admissibility of the referral and ruling on the merits, the Court also took the chance to give incidentally useful indications on the motivation of the referral, the principle of consistent interpretation and the right of defence.

The decision, which partly declares the referral inadmissible and partly dismisses it on the merits, stems from the order of the *Tribunale di Bari*, asking the *Corte Costituzionale* to assess the compatibility of Article 16-*bis*(5) of Law No. 11/2005 with several constitutional provisions, namely Articles 3, 24, 97, 117(1), 114, 118 and 119(4) of the Italian Constitution. The norm in question, now merged into Article 43 of Law No. 234/2012, governs the right and procedures of redress of the State in case of violations of European Law, to be intended as including both EU Law and the European Convention on Human Rights. Paragraph 5 (now Article 43(10) Law No. 234/2012), indeed, extends such prerogative to the case of conviction by the European Court of Human Rights:

> "The State has […] the right of redress also against the regions, autonomous provinces, local authorities, other public authorities and similar bodies who are responsible for breaches of the European Convention on Human Rights and Fundamental Freedoms […] for the financial charges borne to give execution to the convictions delivered by the European Court of Human Rights against the State as a result of the aforementioned breaches".

The norm shall not be interpreted as a mere sanction on the local

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authority responsible for the breach; on the contrary, it seems to fulfil a pre-eminently preventive scope, as recognised by both the judge *a quo* and the Court (para. 5 of the conclusions on points of law). Indeed, according to Article 41 of the ECHR, the European Court of Human Rights "shall, if necessary, afford just satisfaction to the injured party" when it finds that there has been a violation of the Convention or the Protocols: Article 16-*bis*(5) aims to prevent such violations and to promote a virtuous behaviour by local authorities.

The facts of the case can be described as follows. In the case *Pasculli v. Italy*, the ECtHR found Italy responsible for the violation of the right to the peaceful enjoyment of property as protected by Article 1 of Protocol No. I to the ECHR, in relation to an expropriation carried out by the city of San Ferdinando (*Pasculli v. Italy*, Application No. 36818/97, Judgment of 17 May 2005, paras. 97-98). As a consequence of its decision on the merits, two years later the ECtHR convicted Italy to the payment of a just satisfaction amounting to Euros 903,100 (*Pasculli v. Italy*, Application No. 36818/97, Judgment 4 December 2007). Such conviction resulted, on 15 March 2012, on the exercise of the right of redress by the Italian Ministry of Finance against the local authority of the city of San Ferdinando. The latter then requested the *Tribunale di Bari* to declare that the central government had no right of redress against it.

Seized of the matter, the *Tribunale* questioned the constitutionality of the right of redress under Article 16-bis(5) of Law No. 11/2005. The nature of the responsibility – and, in conjunction with that, the scope of the right of redress – stands out as the focal point of the motivation in the referral order: in the perspective of the judge *a quo*, the norm in question "sets out the responsibility of the local authority not for an activity of its own (meaning an activity attributable to it), but rather for activities realised by local authorities with the sole purpose of guaranteeing the correct fulfilment of an obligation provided for by national law". In other words, the norm would introduce a sanction regardless of proof of the effective responsibility of the body and of any element of guilt in the conduct of the local authority that could justify its accountability, thereby infringing the principle of reasonableness enshrined in Articles 3 and 97 of the Italian Constitution. In any event, any effort to outline a possible consistent interpretation of the provision at stake was, according to the referring judge, prevented by its unambiguous literal purpose, leaving no other solution than the referral.

It is worth noting that, although the motivation of the referral order appears to be substantiated by additional reasons, the one just mentioned

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clearly plays a pivotal role in the judge's challenge of the constitutionality of the norm: if the right of redress was to be grounded in a form of objective responsibility, its exercise would deny in principle the preventive purpose of the regulation, by automatically sanctioning the local authority for activities performed in total compliance with the national law and which would trigger an obligation to pay compensation only following a judgment of the European Court of Human Rights penalising not the activity but the national norm. By this way, it is also disclosed the nexus between this argument and the alleged violation of Article 24 of the Italian Constitution. In the judge's perspective, the right of defence of the claimant is violated in the present case for the lack of standing of a local authority before the European Court of Human Rights: an observation which can only be understood by assuming that the right of redress (and the obligation to compensate) directly originates from the judgment of the ECtHR and is automatically turned onto the local authority by the national provision of Article 16-*bis*(5) of Law No. 11/2005. It is no coincidence that both the *Avvocatura generale dello Stato* in its reply and the Court in its conclusions on points of law decide to focus on the two arguments just mentioned.

As anticipated, the *Corte Costituzionale* rejects the claim of unconstitutionality, by partly declaring the inadmissibility of the referral and partly dismissing it on the merits.

The two crucial arguments of the referral order are addressed and rejected in turn on the merits. Foremost, the Court dismisses the claim of unreasonableness of the provision and its alleged contrast with Article 3 of the Italian Constitution for lack of guilt in the activity of the local authority that originated the application of the sanction. On this point, the *Corte Costituzionale* takes the opportunity to reconstruct and define the correct purport of Article 16-*bis*(5) of Law 11/2005. In fact, it must be stressed, as the Court does, that the provision recognises the right of redress of the State only against local authorities "*who are responsible* for breaches of the European Convention on Human Rights and Fundamental Freedoms" (emphasis added), this meaning, in the words of the Court, that "the ground of the right of redress of the State against local authorities is explicitly identified in the responsibility for conducts attributable to the same authorities" (paragraph 5 of the conclusions on points of law). If such reconstruction is correct, there is no automatism in the rise of the obligation to compensate and no derogation to the principle of guiltiness: the Court agrees with the *Avvocatura dello Stato* in concluding that the norm expressly requires an assessment of the causal bearing of the conduct of the local authority, thus confirming its *ratio* of prevention rather than mere

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sanction of violations.

Once dismissed the crucial claim, the *Corte Costituzionale* can separately address the alleged violation of the right of defence. Indeed, if one agrees that the exercise of the right and the application of the sanction can only originate in a careful assessment of the guilt of the local authority and that such assessment takes place at the national level, the right of defence is deprived of any connection with the proceedings before the European Court of Human Rights and can only be relevant for the procedure by means of which the right of redress of the State is exercised in the domestic legal system. As a result, the constitutional standard invoked by the judge *a quo* is irrelevant.

In light of the above, it can be of help to further investigate the reasons behind the decision of the Court before concluding. Two observations are worth to be recalled. First, while the Court reaches the same conclusion of the *Avvocatura dello Stato* on the point of law, it rests on a partially different argumentation. The respondent in the proceedings *a quo* had argued that the conviction delivered by the European Court of Human Rights in the case at stake originated from the illegitimate exercise of the expropriation procedure by the city of San Ferdinando, thus allowing to ground the right of redress in an activity the city was responsible for. The *Corte Costituzionale* goes further: it does not limit itself to show that in the present case the guiltiness requirement was indeed fulfilled, but addresses *in abstracto* the structure of the responsibility giving rise to the right of redress, pointing out that it is the same literal purport of Article 16-*bis*(5) of Law No. 11/205 that always requires the liability of the local authority for the breach of the ECHR as a condition for recognising the right of redress to the State.

Secondly, the wider perspective thus adopted allows the Court to provide a more in-depth reflection on the scope and modalities of exercise of the right of redress by the State. As for the scope, while the *Avvocatura dello Stato* had argued that Article 16-*bis*(5) of Law No. 11/205 was not to be interpreted as introducing a sanction, the *Corte Costituzionale* takes the chance to clarify the purpose of the norm, by not denying its sanctioning character but linking it to the aim of preventing violations by local authorities: since the requirement of guiltiness is inherent to the same notion of responsibility, the *ratio* of the regulation is to foster the accountability of all public authorities responsible for the implementation of ECHR. In addition, the Court endorses the reconstruction provided by the *Avvocatura dello Stato* on the modalities of exercise of the right of redress, clearly indicating the conditions and procedures to follow in order

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to prevent any automatism in the decision. Indeed, once excluded that the obligation to compensate could imply a derogation to the principle of attribution of conducts, the *Corte Costituzionale* expressly requires the assessment of the causal bearing of the conduct of the local authority and identifies two authorities competent to that end: the *Presidenza del Consiglio dei Ministri*, while adopting the decree containing the enforcement order, and the judge seized of the judicial objection thereto.

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