Corte costituzionale

JUDGMENT NO. 153 OF 2011

Ugo DE SIERVO, President

Luigi MAZZELLA, Author of the Judgment

JUDGMENT NO. 153 YEAR 2011

In this case the Court considered an application from Tuscany Region challenging the constitutionality of a decree-law authorising the government to issue secondary legislation to regulate the operatic and philharmonic sector on the grounds *inter alia* that it was not for the State to enact detailed legislation in an area over which jurisdiction was shared, namely the promotion and organisation of cultural activities. By contrast, the State representative took the view that the relevant area of law concerned "the regulation and administrative organisation of the State and national public bodies", under exclusive State jurisdiction. The Court endorsed the State's view, holding that by virtue of the general principle contained in ordinary legislation that operatic and philharmonic activity was "of significant general interest... insofar as it promoted the musical, cultural and social formation of the nation", such matters fell under the exclusive jurisdiction of the State. It also ruled that the State had exclusive jurisdiction in any case due to the private law status of the foundations.

(omitted)

JUDGMENT

In proceedings concerning the constitutionality of Articles 1 and 4 of Decree-Law no. 42 of 30 April 2010 (Urgent provisions on performances and cultural activities), initiated by Tuscany Region by application served on 28 June 2010, filed with the Registry on 1 July 2010 and registered as no. 84 in the Register of Applications 2010.

Considering the entry of appearance by the President of the Council of Ministers;

having heard the Judge Rapporteur Luigi Mazzella in the public hearing of 22 March 2011;

having heard Counsel Marcello Cecchetti for Tuscany Region and the State Counsel [*Avvocato dello Stato*] Giuseppe Albenzio for the President of the Council of Ministers.

(omitted)

Conclusions on points of law

1. – By application served on 28 June 2010, Tuscany Region raised questions concerning the constitutionality of Articles 1 and 4 of Decree-Law no. 42 of 30 April 2010 (Urgent provisions on performances and cultural activities).

1.1. – Article 1 provides first and foremost that the Government shall adopt one or more regulations pursuant to Article 17(2) of Law no. 400 of 23 August 1988, acting on a proposal by the Minister for Cultural Heritage and Activities, revising the current regulatory and organisational framework applicable to opera and philharmonic foundations set forth in Legislative Decree no. 367 of 29 June 1996 (Provisions on the transformation of the bodies operating within the music sector into private law foundations), as amended, and in Law no. 310 of 11 November 2003 (Establishment of the "Petruzzelli and Bari Theatres Opera and Philharmonic Foundation", based in Bari, and provisions on public performances, opera and philharmonic foundations and cultural activities), including by amendment of applicable legislative provisions in accordance with a range of precise guidelines.

The contested provision further provides that, pursuant to Article 8 of Law no. 281 of 28 August 1997 (Specification and extension of the competences of the permanent Assembly for relations between the state, the regions and the autonomous provinces of Trento and Bolzano and unification, for matters and tasks of common interest to the regions, provinces and municipalities, with the State, Cities and Local Autonomous Bodies Assembly), an opinion was to be obtained regarding the framework of regulations falling under paragraph 1 from the Joint Assembly, the Council of State and the competent parliamentary committees, that those opinions be delivered within thirty days of receipt, and that upon expiry of that time limit the regulation would under all circumstances be adopted.

In the opinion of the applicant, the provisions set forth under Article 1 predominantly relate to the issue of performances, and hence it argues in the first place that they breach Article 117(3) of the Constitution on the grounds that in enacting the contested provision the State legislature took action – entirely unlawfully – adopting specific, detailed and comprehensive legislation, without leaving any space to the regional legislature.

Article 117(6) of the Constitution, pursuant to which State regulations may be adopted exclusively in those areas in which the State have exclusive legislative powers,

is also alleged to have been violated. By contrast, the case under examination concerns the "promotion and organisation of cultural activities", jurisdiction over which is shared with the regions.

In any case, the provision is claimed to violate Article 118 of the Constitution and the principle of loyal cooperation between the State and the region, in providing that the regulation was to be adopted only subject to the prior opinion of the Joint Assembly and that this requirement could be set aside if no response was received within thirty days of receipt of the draft regulation. Since this matter pertains to an area over which jurisdiction is shared, it should by contrast have been necessary to reach agreement with the Assembly.

1.2. – According to the provisions of Article 4 of Decree-Law no. 64 of 2010, the Minister for Cultural Heritage and Activities shall re-determine with effect from 1 January 2011 the criteria applicable to the payment and liquidation of subsidies for live performances, in accordance with the procedures provided for under Article 1(3) of Law no. 239 of 15 November 2005 (Provisions on performances). In the light of this last Article, the ministerial decrees governing the criteria and procedures applicable to the payment of subsidies for live performances must be adopted in agreement with the Joint Assembly although, if agreement is not reached within the pre-set time limit of sixty days, these may be adopted regardless.

Tuscany Region argues that this provision also breaches Articles 117(3), 118 and 120 of the Constitution as well as the principle of loyal cooperation.

In particular, the requirement for consultation contemplated thereunder could not be regarded as effective since it could be set aside if no agreement were reached within sixty days, and hence without even drawing a distinction between a situation in which the Joint Assembly failed to take action and one in which it expressly dissented.

3. – As a preliminary matter, it must be ruled that there is no longer any matter in dispute with regard to the questions relating to Article 4 of Decree-Law no. 64 of 2010.

In fact, when that decree was converted into Law no. 100 of 29 June 2010, the contested provision was removed from the text of Article 4, which is now the same as the second sentence of the original provision: "As of 2010, the Ministry for Cultural Heritage and Activities may liquidate advances on subsidies still to be disbursed up to

the level of 80 percent of the last contribution allocated in accordance with the criteria and procedures provided for under the ministerial decrees applicable to such matters".

This means that the determination of the criteria applicable to the payment of State subsidies by the Minister for Cultural Heritage and Activities was removed and that, exactly as asserted by the State representative, "[…] the criteria applicable to the payment of subsidies to bodies operating within the live performance sector continue to be those specified and regulated under the ministerial decrees currently in force (dating back to 2007) which were adopted with the agreement of the Joint Assembly".

Absent any implementation over the medium term of the provision contained in the Decree-Law (which was to take effect only as of 1 January 2011), the amendment made upon conversion thus fully meets with the applicant's requirements.

It follows that there is no longer any matter in dispute regarding this issue, on which moreover the representative of Tuscany Region expressly agreed during the oral discussion.

4. – The same cannot be said in relation to the questions concerning the constitutionality of Article 1 of Decree-Law no. 64 of 2010.

The conversion Law no. 100 of 2010 did indeed significantly amend the tone of the aforementioned Article. In the first place, it introduced paragraph 1-bis, according to which the regulations to be issued to reorganise and review foundations should: "a) make provision for the activation of a process involving all interested parties, such as the regions, the municipalities, the superintendant's of the foundations, and the trade unions with greatest representation […]". Secondly, it increased the time limit within which the Joint Assembly was to issue an opinion from thirty to sixty days.

However – as was noted by the region's representative in the oral discussion – these amendments did not fully meet with the requirements of the applicant given that, contrary to the assertions of the State Council, the Region did not challenge solely the failure to require the agreement of the Joint Assembly, but also the detailed nature of the contested provision, over which legislative jurisdiction was shared (the "promotion and organisation of cultural activities"), as well as the adoption by the Government of broad regulatory powers in that area.

Accordingly, the questions raised against the original text of Article 1 of Decree-Law no. 64 of 2010 may be easily transferred to the corresponding text resulting from

the conversion law (judgment no. 298 of 2009), and there cannot be regarded as no longer being any matter in dispute, since the amendments introduced are not capable of resolving all points of interest (judgment no. 430 of 2007).

4.1. – The objection of inadmissibility raised by the State representative must also be rejected, since the Region does not contest solely Article 1(2) (which requires an opinion – moreover non-binding – rather than agreement), but also paragraph 1 both because the review of the regulatory and organisational framework of opera and philharmonic foundations did not leave any space for regional legislative powers in an area over which jurisdiction was shared, and also because the State allegedly "abused" its regulatory powers by using these regulations outwith the area of its exclusive competence. Accordingly, even assuming that the new formulation of the contested provision could ensure compliance with the calls for participation made by Tuscany Region, the issues underlying the encroachment on regional powers objected to by the applicant – consisting moreover in detailed provisions – would remain unresolved.

5. – On the merits, the questions are groundless.

It is necessary first and foremost to identify the substantive area to which Article 1 of Decree-Law no. 64 of 2010 applied, against the backdrop of the division of powers provided for under Title V of Part II of the Constitution. According to the applicant, the legislation set forth by the provision under examination related predominantly to performances, and should therefore have been classed under the "promotion and organisation of cultural activities", over which jurisdiction was shared with the regions pursuant to Article 117(3) of the Constitution. According to the State representative on the other hand, the legislation under examination should be classed under the grounds establishing State legislative jurisdiction set forth in Article 117(2)(g) of the Constitution ("the regulation and administrative organisation of the State and national public bodies").

5.1. – A very brief excursus regarding the history of the provisions applicable to autonomous operatic bodies (and equivalent concert institutions) is indispensable.

These bodies were first regulated under Law no. 800 of 14 August 1967 (New framework regulations applicable to operatic bodies and musical activities), which granted legal personality under public law to the bodies specified in Article 6 and subjected them to oversight by the competent governmental authorities (at the time the

Ministry of Tourism and Performances). It further declared that opera and philharmonic activity was "of significant general interest... insofar as it promoted the musical, cultural and social formation of the nation" (Article 1). The conferral of legal personality under public law and the subjection to ministerial oversight were considered necessary requirements under the original legislation not only to achieve high quality performances, but also to disseminate musical art, to promote the professional training of artists and to develop the musical education of the general public (Article 5).

The 1967 legislation subdivided the bodies (included in a closed list) identified above into "traditional theatres" and concert and orchestral institutions, which were charged with "promoting, facilitating and coordinating musical activities […] within the territory of the respective Provinces", and with promoting local artistic and musical traditions, which was accompanied by the recognition of broad organisational autonomy (Article 28).

In accordance with the distinction referred to above, the subsequent State legislation addressed exclusively the organisational structure and the rules applicable to the functioning of the operatic and concert bodies considered to be "national".

Legislative Decree no. 367 of 1996 provided that these bodies, which were classified as "of priority national interest […] within the music sector" (Article 2), were to be transformed into private law foundations. This was with the stated aim of eliminating organisational rigidities and consequently attracting private sector investment. In the text resulting from the numerous amendments made over time, Legislative Decree no. 367 of 1996: a) identifies the goals of the foundations in the not-for-profit pursuit of the dissemination of musical art, the professional training of artists and the musical education of the general public (Article 3); b) provides that the foundations shall have legal personality under private law and, unless expressly provided otherwise under the Legislative Decree, shall be governed by the Civil Code and the relative implementing legislation (Article 4); c) lays down general provisions setting forth the mandatory contents of the charters, stipulating that the overall contribution to equity by private parties must constitute a minority and subjecting the possible appointment by private parties of directors to a board of directors to payment of an annual contribution not lower than 8% of the total level of State funding (Article 10); d) regulates the management bodies and their functions, including the chairman-

statutory auditor, the board of directors, the superintendant and the board of auditors, specifying the number of members of collegial bodies and requiring the presence of members representing the governmental authority and region concerned, the former constituting a majority on the board of auditors (Articles 11-14); e) provides that opera and philharmonic foundations will continue to be subject to control by the Court of Accounts with regard to their financial management and oversight by the governmental authority with powers over performances; and f) delegates the power to set the criteria applicable to the division of the quota of the Single Fund for Performances to be allocated to the foundations to a decree by the Minister for Cultural Heritage and Activities having regard to the quantity and quality of the performances offered and the action carried out in order to reduce costs (Article 24).

The transformation procedure, which was only set out in broad terms under Articles 5 *et seq* of Legislative Decree no. 367 of 1996, was subsequently implemented by Legislative Decree no. 134 of 23 April 1998 (Transformation into foundations of operatic bodies and equivalent concert institutions, pursuant to Article 11(1)(b) of Law no. 59 of 15 March 1997). In enacting this provision, the Government repealed the previous legislative provision and ordered the transformation concerned by way of a law, asserting that private law status would permit the above bodies to carry out their activities in a more fruitful manner. However, the Constitutional Court ruled that the Legislative Decree cited above was unconstitutional on the grounds that the powers delegated were excessively broad (judgment no. 503 of 2008). Subsequently nevertheless, Article 1 of Decree-Law no. 345 of 24 November 2000 (Urgent provisions on opera and philharmonic foundations), converted into law with amendments by Article 1 of Law no. 6 of 26 January 2001, once again provided for the transformation of operatic bodies into private law foundations with effect from 23 May 1998. The purpose of this was to safeguard with effect *ex tunc* the uniform nature and continuity of the institutional frameworks already reformed by Legislative Decree no. 134 of 1998.

It was within this context that Decree-Law no. 64 of 2010 was enacted, with the primary objective of regulating the organisation and functioning of opera and philharmonic foundations with "an initial, immediate and urgent initiative intended to reform the fundamental structure of a sector in deep crisis, as the […] opera and philharmonic sector is […] with the purpose of rationalising the costs of operatic bodies

[solely where staff costs exceeded the economic value of the State subsidy] whilst at the same time implementing [sic., should read "increasing"] not only sectoral productivity but also the quality of the performances offered" (according to the report on the draft bill of the conversion law presented to the Senate of the Republic on 30 April 2010).

Article 1, which has been specifically contested in these proceedings, introduces a range of provisions, authorising the Government to enact detailed provisions "through one or more regulations" providing for a systematic reorganisation of the opera and philharmonic sector, in accordance with the principles of efficiency, correctness, value for money and business efficiency, acting with autonomy subject to the limits specified in the guidelines regulating the ministerial authority, culminating in the power to approve the charter, the power to exercise adequate oversight over economic and financial management, to make basic arrangements applicable to collective bargaining, and to make any provision for special organisational arrangements applicable to operatic foundations having regard "to their special features, their absolute international significance and their exceptional capacities".

5.2. – Having thus provided an account of the legislative framework within which the State legislature has now taken action through the contested Decree-Law, the Court considers that since the contested provision, which was intended to introduce a comprehensive review of the opera and philharmonic sector, was enacted with a view to reorganising the foundations dedicated to such activities, it relates to the "the regulation and administrative organisation of the State and national public bodies" contemplated under Article 117(2)(g) of the Constitution.

As regards the classification of operatic bodies as public law bodies, albeit privatised, the parties are in substantial agreement, in accordance moreover with the prevalent view within the case law (Court of Cassation, Joint Civil Divisions, judgment no. 2637 of 2006; Liguria Regional Administrative Court, 2nd Division, judgment no. 230 of 2009; and Sardinia Regional Administrative Court, 2nd Division, judgment no. 1051 of 2008). It is common ground in fact that, in spite of the fact that these bodies have acquired the formal legal status of "private law foundations", they retain marked public features, even after their transformation. In another case in which – analogously – the activities of a body went beyond the regional or local sphere, this Court also held – albeit on the basis of Article 117 of the Constitution as previously in force – that

following its privatisation, the "*Società di cultura La Biennale di Venezia*" had maintained "the function of promoting permanent activities and organising international performances relating to documentation in the field of the arts" and continued to carry out tasks of national interest, albeit in the new private law form adopted (judgment no. 59 of 2000).

Moreover, there are multiple indicators of the public interest in operatic bodies, consisting in the predominant role of the State in funding, the resulting subjection to control by the Court of Accounts pursuant to Article 15(5) of Legislative Decree no. 367 of 1996, the assistance of the State counsel confirmed by Article 1(3) of Decree-Law no. 345 of 2000, and inclusion within the class of bodies governed by public law subject to Legislative Decree no. 163 of 12 April 2006 (Code of public works contracts, public supply contracts and public service contracts implementing directives 2004/17/EC and 2004/18/EC). In particular, the tone of the legislation referred to above applicable to public contracts, enacted as implementation of Community law, appears to be very eloquent in that it provides legislative recognition to the compatibility of the concept of a body under public law with legal form under private law ("including in corporate form"), provided that – as in this case – the body was established in order to satisfy requirements of general interest, is vested with legal personality and is majority funded by the State or other public bodies (Article 3(26) of Legislative Decree no. 163 of 2006).

The Court finds that the – undisputed – public nature of these bodies goes hand in hand with their national character. This is not so much because it is suggested by the indication of their national significance which is a constant feature throughout the reference legislation as one of their qualifying attributes, but above all because the goals of the aforementioned foundations – namely the dissemination of musical art, the professional training of artists and the musical education of the general public (Article 3 of Legislative Decree no. 367 of 1996, which restates the formula contained in Article 5 of Law no. 800 of 1967) – reach far beyond regional borders and are projected on a scale covering the whole country. Moreover, the considerable sums of money with which the State has subsidised and continues to subsidise these bodies are indicative of the fact that the activities concerned do not relate to performances of local interest.

The comparison with traditional theatres and other concert and orchestral institutions, which themselves are involved in the programming of musical activity within a well defined arena (Article 28 of Law no. 800 of 1967), also clearly highlights the strictly national vocation of that group of operatic bodies striving at excellence (which it has been considered possible, not by chance, to expand through State legislation by including within that class the "Petruzzelli and Bari Theatres Opera and Philharmonic Foundation" established pursuant to Article 1 of Law no. 310 of 2003), as well as the general significance of the goals pursued and the breadth of the activity carried out.

It is clear from the above that, since initiatives to restructure the regulatory and organisational framework of such a type as that provided for under the contested Article 1 have a far-reaching impact on a sector dominated by bodies which further the goals of the State, these must be classified under the area of law relating to "the regulation and administrative organisation […] of the State and national public bodies", which falls under the exclusive jurisdiction of the State pursuant to Article 117(2)(g) of the Constitution.

On the other hand, the subjection – "insofar as not expressly provided for under this Decree" (Article 4 of Legislative Decree no. 367 of 1996) – to the Civil Code and the provisions implementing the Code, with regard to this residual aspect, places the foundations under examination which are vested with legal personality under private law, notwithstanding that they carry out functions of certain public significance, within the reach of private law, an area which also falls within the exclusive legislative jurisdiction of the State pursuant to Article 117(2)(l) of the Constitution.

5.3. – The State's legitimation on two counts (Article 117(2)(g) and (l) of the Constitution) to regulate the reorganisation of the opera and philharmonic sector and the restructuring of the public bodies operating in those areas is consistent not only with the requirement noted above of providing direct and effective protection for the unitary and founding values of the dissemination of musical art, the training of artists and the musical education of the general public (Article 3 of Legislative Decree no. 367 of 1996), including specifically young people, but also with the Law's stated purpose of transmitting the fundamental civic values traditionally cultivated by the most noble

theatrical and cultural institutions of the Nation (Article 1(1a)(g) of Decree-Law no. 64 of 2010, added by the conversion Law no. 100 of 2010).

Indeed, these objectives are an expression of the fundamental principles of the development of the culture and the protection of the historical and artistic heritage of the Nation pursuant to Article 9(1) and (2) of the Constitution, and only a systemic regulation by the State of the bodies intended to achieve these objectives can ensure that they are adequately achieved. Moreover, from this viewpoint, it is not inappropriate to refer also to the model of the leading cultural institutions which authorises the State to enact legislation limiting the organisational autonomy granted to them (Article 33(6) of the Constitution).

From this last perspective, this Court has already asserted that the development of culture (Article 9 of the Constitution) justified an intervention by the State "also beyond the substantive division of powers between the State and the regions pursuant to Article 117 of the Constitution" (judgment no. 307 of 2004) and that in relation to a constitutionally protected value such as scientific research (Articles 9 and 33 of the Constitution) "which may as such be of significance notwithstanding the rigorously defined spheres of competence", "autonomous" State action may be admissible not only in relation to the regulation of "leading cultural institutions, universities and academies", but also if the focus is directed, outwith that sphere on an area over which jurisdiction is shared such as scientific research (judgment no. 31 of 2005).

The above is without notwithstanding any – hypothetically possible – reference to the issue of the "conservationist" protection of cultural heritage, which also falls under the legislative jurisdiction of the State (Article 117(2)(s) of the Constitution).

5.4. – In conclusion, the unitary nature of the public interest pursued, as well as the recognition of the "mission" of furthering the constitutionally protected values of the development of culture and the safeguarding of Italy's historical and cultural heritage confirm – in operational terms – that the activities carried out by the opera and philharmonic foundations fall under the jurisdiction of the State and therefore require that it fall to the State legislature – legitimated under Article 117(2)(g) of the Constitution – to reform the regulatory framework and organisational structure.

The prerequisites required under the case law of this Court in order to establish the exclusive jurisdiction of the State have therefore all been met (judgments no. 405 and no. 270 of 2005).

5.5. – The classification of the matters regulated by the contested provision under the exclusive jurisdiction of the State also leaves without foundation the further grounds of challenge raised by the applicant.

With regard to the matters falling under Article 117(2) of the Constitution, regulatory powers are vested in the State, unless delegated (Article 117(6) of the Constitution).

Moreover, the failure to require the agreement of the Joint Assembly was of no consequence because in relation to matters under the exclusive jurisdiction of the State it is sufficient that an opinion be obtained (judgments no. 142 and no. 133 of 2008), and furthermore even cases in which the State's legislation has an impact on multiple related powers have been endorsed (judgment no. 51 of 2005). And it is also important to note that the State legislator took care to include – in Article 1(1a), added by the conversion Law no. 100 of 2010 – the further directional criterion that it should "a) make provision for the activation of a process involving all interested parties, such as the regions, the municipalities, the superintendant's of the foundations, and the trade unions with greatest representation", which fully satisfies the requirement that all parties involved on various grounds in the process of reforming the opera and philharmonic sector be able to participate, and also granted the regions the power to make representations in relation to these matters.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

rules that there is no longer any matter in dispute with regard to the questions concerning the constitutionality of Article 4 of Decree-Law no. 42 of 30 April 2010 (Urgent provisions on performances and cultural activities), as converted with amendments into Law no. 100 of 29 June 2010, initiated by Tuscany Region with

reference to Articles 117(3) 118 and 120 of the Constitution and the principle of loyal cooperation by the application referred to in the headnote;

rules that the questions concerning the constitutionality of Article 1 of Decree-Law no. 64 of 2010, converted with amendments into Law no. 100 of 2010, initiated by Tuscany Region with reference to Articles 117(3) and (6) and 118 of the Constitution and the principle of loyal cooperation by the application referred to in the headnote, are groundless.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 18 April 2011.

(omitted)