JUDGMENT NO. 43 YEAR 2017

In this case the Court considered a referral order from the Ordinary Tribunal of Como questioning a provision that created an exception to the finality of judgments in cases where a criminal sentence was imposed on the basis of a law later declared unconstitutional (in such cases, the provision provides, the execution of the sentence and all criminal law effects thereof must cease). The referring court alleged that this provision was unconstitutional in that the exception did not include cases in which administrative sanctions (rather than a criminal sentence) had been imposed in the application of a law that was later declared unconstitutional, particularly where the administrative sanctions were primarily punitive in effect (the case at issue involved an extremely high administrative fine for labor law violations). The referring court based its question on the law of the European Convention on Human Rights (ECHR), as interpreted by the European Court of Human Rights, which applied a test to determine if penalties were criminal in character before classifying them as criminal for purposes of applying the protections found in the convention. After overruling an objection on relevance grounds by the State Counsel by holding that the referring judge had properly refrained from attempting to interpret the provision in such a way as to extend it to the situation in the present case, the Court ruled that the constitutional question was unfounded. The Court held that the case law of the European Court contained no statement that would directly or indirectly support an interpretation of Article 7 of the ECHR that would require Member States to create an exception to the finality of judgments for administrative sanctions such as fines that were imposed on the basis of provisions later declared unconstitutional. The Court further held that the referring judge's assumption that the same national legal guarantees that apply to criminal sentencing must also apply in the case of administrative sanctions, was incorrect. The national legal system, the Court pointed out, was free to establish guarantees in addition to the minimums found in conventional law, and to reserve these only to criminal penalties, as that category was understood under domestic law. The Court found no similarities between the present case and previous cases that had extended the scope of the questioned provision to include some administrative sanctions, due to the fact that the sanctions at issue did not impact fundamental freedoms or citizens' political rights, and were not to be carried out over an extended time period during which the appointed judge was charged with ensuring the legality of the basis for the ongoing sentence.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 30(4) of Law no. 87 of 11 March 1953 (Provisions on the establishment and functioning of the Constitutional Court), initiated by the Tribunal of Como in pending proceedings between M.G. et al. and the *Direzione territoriale del lavoro di Como* [Territorial Labor Directorate of Como] et al. with a referral order of 4 February 2015, registered as no. 106 of the Register of Referral Orders 2015 and published in the Official Journal of the Republic, first special series of 2015.

Considering the entry of appearance of M.G. et al., as well as the entry of appearance of the President of the Council of Ministers;

having heard from Judge Rapporteur Marta Cartabia during the public hearing of 10 January 2017;

having heard from Counsel Giorgio Albe' on behalf of M.G. et al. and from State Counsel [*Avvocato dello Stato*] Filippo Bucalo on behalf of the President of the Council of Ministers.

[omitted]

Conclusions on points of law

1.– The Ordinary Tribunal of Como questions the constitutionality of Article 30(4) of Law no. 87 of 11 March 1953 (Provisions concerning the constitution and functioning of the Constitutional Court), which provides that, "[w]hen a final and irrevocable sentence has been imposed in accordance with a provision ruled unconstitutional, its enforcement and all criminal law effects shall cease." The referral order alleges that the questioned provision is unconstitutional to the extent that it does not provide for its application to the irrevocable judgments that inflict administrative sanctions that may be qualified as "criminal" under the law of international conventions (conventional law). This would amount to a violation of Article 117(1) of the Constitution, in relation to Articles 6 and 7 of the European Convention on Human Rights (hereinafter ECHR), as well as Articles 25, second paragraph, and 3 of the Constitution.

In this case, the administrative sanctions at issue in the pending proceedings are those provided by Article 18-*bis*(4) of Legislative Decree no. 66 of 8 April 2003 (Enactment of directives 93/104/CE and 2000/34/CE concerning aspects of the organization of the work schedule), in the text introduced by Article 1, paragraph 1, letter f) of Legislative Decree no. 213 of 19 July 2004 (Modifications and supplements to Legislative Decree no. 66 of 8 April 2003 concerning sanctions related to working time). Under this provision, an employer who violates the prescribed duration of work hours and daily and weekly rest periods of employees found in Articles 7 and 9 of the same Legislative Decree no. 66 of 2003, "will be penalized with an administrative penalty of between 105 and 630 euros." The cited Article 18-*bis* was already declared unconstitutional by this Court, for exceeding the limits upon the delegation established by the Parliament, in Judgment no. 153 of 2014, after the judgment affirming the presence of a violation became final, the execution of which was challenged with the appeal in opposition that the referring judge is called upon to decide in the pending proceedings.

In consideration of the high administrative sanction in question – about 177,000 euros, due to the number of days of violations – and the resulting hardship associated with it, as well as its intended purposes, which are not merely reparatory, but also intended to prevent and punish labor exploitation, the referring judge holds that the penalty must be recognized as substantially criminal in nature, according to the criteria provided by the case law of the European Court of Human Rights [hereinafter referred to as the ECtHR, or the Strasbourg or European Court] (the so-called "Engel criteria").

On this basis, the referral order questions the constitutionality of the challenged Article 30(4) to the extent to which it does not allow for its application to sanctions with these characteristics.

2.– The first thing that must be considered is the preliminary objection raised by State Counsel. It alleges that the question is irrelevant, and therefore inadmissible, because the referring judge could have interpreted the questioned Article 30(4) in a manner compatible with the Constitution and the ECHR, expanding the exception to the certainty of final judgments, enshrined therein, to include cases where the provisions that provide administrative sanctions that qualify as substantially criminal under Articles 6 and 7 of the ECHR have been declared unconstitutional. Such an interpretation of the challenged Article 30(4) would be, according to State Counsel, a natural development of the line of reasoning coming from the Joint Chambers of the Criminal Court of Cassation, according to which said provision is applied in cases declaring the unconstitutionality both of criminal provisions concerning charges and criminal provisions concerning punishments (Judgment no. 18821 of 24 October 2013; Judgment no. 2858 of 29 May 2014). Moreover, the state defense continues, the Court of Cassation has already pronounced, albeit incidentally, that Article 30, section four, is applicable to administrative sanctions that are substantially criminal, like the ones at issue here, in its Order no. 1782 of 2015 (Fifth Criminal Section, 10 November 2014, 2015).

The objection must be overruled.

Indeed, the referring judge performs a sweeping attempt to interpret the challenged provision in a way conforming to the Constitution and the ECHR, concluding that such an interpretation is impracticable at the end of a thorough reasoning.

After having examined the decisions of the Criminal Court of Cassation, to which the State Counsel also refers, the referring judge observes that the idea of applying the challenged Article 30, section four, of Law no. 87 of 1953 to administrative sanctions was first advanced by the Court of Cassation itself in the aforementioned Order no. 1782 of 2015, in a merely hypothetical way and for the exclusive purpose of highlighting the relevance of the question of constitutionality thereby raised.

On the other hand, the judge in the underlying proceedings continues, while there are no other pronouncements that conform to it, there is precedent for the opposite conclusion, albeit from a much earlier case (Supreme Court of Cassation, Third Civil Section, 20 January 1994, no. 458), which leads to a conclusion that that the cited 2015 Order does not contain the characteristics of stability and consolidation, which are necessary to qualify it as "living law."

Furthermore, both the clear literal meaning of the challenged provision, which describes an "irrevocable conviction" and "criminal law effects," and the intention of the legislator prevent an interpretation based on the convention.

It must be added that, with Judgment no. 102 of 2016, which responded to the cited Order of the Supreme Court of Cassation no. 1782 of 2015 and, later, to the Order with which the present judgment was initiated, this Court left the issue entirely out of its holding, stating that it did not "have any reason, in this regard, to analyze the plausibility of the referring court's argument concerning the applicability of Article 30(4) of Law no. 87 of 1953 to the case in which what has been declared unconstitutional is not a crime but an administrative offense that takes on a 'criminal' function for mere purposes of adhering to the guarantees found in the ECHR."

These considerations lead to the conclusion that the referring judge was correct in refraining from carrying out an interpretation compatible with the ECHR, which would have led him to expand the scope of the challenged provision's applicability without first involving this Court. Indeed, according to a well-established trend in constitutional case law on the matter, "it follows that it is a matter for ordinary courts to interpret national law in accordance with the international law in question, subject to the limits imposed by the literal wording of the provisions. Where this is not possible, or where the court doubts the compatibility of the national law with the 'interposed' Convention provision, it must seize this court with a corresponding question concerning its constitutionality in the light of Article 117(1)," (for all, Judgment no. 349 of 2007).

3.– On the merits, the question raised in reference to Article 117(1) of the Constitution, for incompatibility with Articles 6 and 7 of the ECHR, as interpreted by the Strasbourg Court, is not founded.

3.1.– Challenged Article 30(4) of Law no. 87 of 1953 provides for an exception to the finality of judgments for cases in which a conviction has been pronounced in the application of a provision later struck down as unconstitutional. The principle that judgments of unconstitutionality have retroactive effect, established in section three of the same Article – which, as this Court has reiterated many times, "is a general principle valid in proceedings before this Court (and cannot be otherwise)" (most recently, Judgment no. 10 of 2015) – extends beyond the limits of those relationships contained only within the ambit of the criminal law, considering the severity with which punishments affect liberty and other fundamental interests of the person.

Based on these reasons, the Supreme Criminal Court of Cassation has recently adopted a broad interpretation of Article 30(4), under discussion here, explaining that it concerns both situations where provisions containing criminal charges are declared unconstitutional – thus effecting a true and proper *abolito criminis* [abolition of the crime] – as well as those where what is declared unconstitutional are criminal provisions that govern the amount of the sanctions. Putting an end to diverging interpretations of the matter, the Supreme Court of Cassation, beginning with a number of judgments handed down by the Joint Chambers in 2014 (Judgment no. 18821 of 24 October 2013 and 42858 of 29 May 2014), has held that the rationale for Article 30(4) is to avoid subjecting an individual to an unjust criminal penalty that, although it has been imposed by a final judgment, is based on law that is later declared unconstitutional, in virtue of the principle that a punishment's

conformity to the law must be guaranteed on a constant basis, from the moment it is imposed until the termination of its execution.
This provided the reasons for moving beyond the previous set of cases – recently reiterated (by, among others, Supreme Court of Cassation, First Criminal Section, Judgment no. 27640 of 19 January 2012) – which limited the scope of Article 30(4)'s application only to provisions containing criminal charges.
3.2.– This Court has also, on several occasions, observed that within the national legal order there exist situations in which there is some flexibility to the principle of the certainty of final judgments (Judgment no. 210 of 2013), necessary to guarantee the protection of values of constitutional rank, particularly in connection with the fundamental rights of the convicted person.
In the wake of this recognition, this Court has held that the Court of Cassation's interpretation extending the applicability of Article 30(4) of Law no. 87 of 1953 to criminal provisions involving punishments is not implausible (Judgment no. 57 of 2016 and 210 of 2013).
Conversely, it left the issue raised by the referring judge, of a further expansion of the scope of Article 30(4)'s application to include provisions that provide for administrative sanctions considered to be substantially criminal, according to the criteria laid out by the Strasbourg Court, completely unsettled (as Judgment no. 102 of 2016 makes clear).
3.3.– This Court observes that the reasons adduced to support the question at issue are drawn from the referring judge's adoption of the broader meaning of the notion of "criminal sanction" found in the case law of the ECtHR rather than the one currently found under Italian law.
The legal qualification that is formally applied to a sanction under national law is, for the European Court, just one of the indicators that must be taken into account to establish the scope and limits of the criminal law. What, under domestic law, is not a penalty, may, on the contrary, be one according to supranational case law. For purposes of the application of the guarantees provided for in the Convention (according to the holdings of the ECtHR, beginning with the decision of its Grand Chamber in the case of Engel and Others v. The Netherlands, 8 June 1976, paragraph 82), charges may indeed be considered as part of the criminal sphere if they affect the population at large, even if they are not qualified as criminal by a national legal order; they pursue aims that are not merely reparatory, but also punitive and preventative; they have punitive character, being able to reach a significant level of severity.
In light of these criteria, which are alternative and not cumulative (as the European Court recently reiterated in its decision in the case of Grande Stevens v. Italy, 7 July 2014, paragraph 94), the referring judge contends that the administrative sanctions found in Article 18-*bis*(4) of Decree Law no. 66 of 2003 must be recognized as substantially criminal in nature, although no pronouncement by the European Court had said so with specific reference to the aforementioned sanctions.
Indeed, the judge in the pending proceedings points out that this latter provision, which applies to the population at large, intends to prevent and punish workplace exploitation, to protect the interests of workers, a purpose with sure constitutional stature, and to that end recalls Articles 1, 4, and 36 of the Constitution. Moreover, the referring judge underscores that the administrative sanction which may be inflicted for every violation, in and of itself a high amount, may reach, as has happened in the present case, a considerable sum, as a result of the multiplication of the amount prescribed on the basis of the number of days amounting to violations.
According to the referring judge, this gives rise to the "criminal" character, under the ECHR, of the sanctions provided for by Article 18-*bis* (4) of Legislative Decree no. 66 of 2003 and, therefore, the question of constitutionality that is the object of the present judgment.
3.4.– The notion of "criminal sanction" belongs to the category of concepts that have been elaborated by the Strasbourg Court, independently from the national systems, for purposes of interpreting and applying the ECHR.
It is well known that the case law on the so-called "Engel criteria" was developed "in order to ensure that the wide-scale processes of decriminalisation which have been launched by the member states since the 1960s do not have the effect of depriving offences of the substantive guarantees

assured by Articles 6 and 7 ECHR after decriminalisation (see Judgment 21 February 1984, Öztürk v. Germany)" (Judgment no. 49 of 2015).
Drawing an administrative sanction into the criminal law realm in light of the aforementioned criteria, therefore, draws along with it all and exclusively the guarantees found in the relevant provisions of the Convention, as elaborated upon by the Strasbourg Court. However, the definition of the extent of the application of the added protections provided for by national law remains within the margin of appreciation that each Member State enjoys, protections which are in and of themselves valid only for those precepts and only for those sanctions that the domestic system considers to be an expression of the punitive power of the State, according to its own criteria. Moreover, this corresponds to the nature of the ECHR and to the system of guarantees it provides, which is intended to guarantee a minimum threshold of common protection, in a subsidiarian relationship to the guarantees assured by the national Constitutions.
In other words, what, for European case law has a "criminal" character must be accompanied by the guarantees that it has elaborated for the "criminal sphere," while only that which is criminal for the national system benefits from the additional protections found in domestic legislation.
3.5.– It is, first of all, necessary to verify whether a principle analogous to the one provided for in Article 30(4) of Law no. 87 of 1953 can be found in the case law of the ECtHR, which is intended to forbid the carrying out of a substantially penal sanction, even if imposed by an irrevocable judgment, in the instance that the provision providing for it has been declared unconstitutional or otherwise invalid *ex tunc*.
The referring judge holds that the "principle of legal punishment" enshrined in Article 7 of the ECHR does not permit sanctions based on illegal provisions; thus, "the declaration of unconstitutionality of the provision containing the sanction entails the failure of the legal basis of the sanction imposed and its illegality under Article 7 of the ECHR."
In reality, no such statement is found in the current case law of the European Court.
Indeed, the concept of conventional legal basis, defined by the Strasbourg Court in a way independent of the legal systems of the Member States, has chiefly been understood in connection with the requirements of accessibility and foreseeability that must characterize criminal law (ECtHR, *Del Rio Prada v. Spain*, 21 October 2013; and, in the same sense, *Rohlena v. The Czech Republic*, 27 January 2015 and *Contrada v. Italy*, 14 April 2015), both in the case of the written law and judicial case law (ECtHR, *Huhtamäki v. Finland*, 6 March 2012).
The cases cited by the judge in the pending proceedings – EctHR, *Streletz, Kessler, and Krenz v. Germany*, 22 March 2001; *K.-H.W. v. Germany*, 22 March 2001; *Custers, Deveaux and Turk v. Denmark*, 3 May 2007 – do not appear to provide, or to be suitable to provide, adverse conclusions. The first two are not relevant, since what were expressly found to be without legal basis were not in and of themselves provisions containing sanctions, of constitutional rank and order, in force at the time that the facts of the case occurred, but rather a state practice, which the plaintiffs invoked as a justification of violations of certain prohibitions found in the Criminal Code of the Constitution of what was then the German Democratic Republic (East Germany, or GDR), as well as provisions from international human rights treaties also ratified by the former GDR (the reference was to the practice of protecting the border "at all cost," widely accepted among the border guards of the former GDR, and applied to people who attempted to illegally cross the border at the time of the Berlin Wall). Nor is the last decision suitable for drawing support to the contrary, since the case did not in any way concern sanctions imposed on the basis of unconstitutional provisions. The Strasbourg Court, rejecting the arguments put forward by the plaintiffs (activists from an environmentalist association), held that the provisions on the basis of which they had been convicted for illegal trespassing on areas reserved for the military, were not without legal basis and satisfied the requirements of accessibility and foreseeability enshrined in Article 7 of the ECHR. The dissimilarity between the situations they addressed and that of the present case, therefore, highlights the inappropriateness of the case law relied upon to support the question of constitutionality brought before this Court.

3.6.– With regard to the temporal dimension of the principle of legality in Article 7 of the ECHR, European case law has only intervened on the topic of the succession of laws in time.
Until recently, the European Court has held that the guarantee only prohibited the retroactivity of criminal charges and more severe sanctions. Beginning with its decision in *Scoppola v. Italy* (ECtHR, 17 September 2009), the Grand Chamber, employing an evolutive interpretation, then expanded the sphere of the guarantees covered by Article 7, holding that they also, implicitly, include the principle of retroactivity of less severe criminal laws, as long as this does not diminish the value of the judgment. In the wake of this case law, this Court, too, has applied and reiterated the same principle, in Judgments no. 230 of 2012 and 236 of 2011.
In more recent cases, as well (ECtHR, *Gouarré Patte v. Andorra*, 12 January 2016, and *Ruban v. Ucraina*, 12 July 2016), in which the Strasbourg Court faced the issue of the retroactive applicability of a more favorable criminal provision to an already definitive sentence, it held that the potential softening of the judgment with respect to the *lex mitior* [milder law] is permitted to the extent that such a possibility is envisaged by the national legal system, and not to the extent dictated by Article 7 of the ECHR.
3.7.– Moreover, not even European case law on the complex distinction between sentencing provisions, which fall within the scope of Article 7 ECHR, and provisions concerning the execution and application of sentences, which fall outside of it (ECtHR, *Grava v. Italy*, 10 July 2003, paragraph 51; *Hogben v. United Kingdom*, 3 March 1986, paragraph 4, recalled in *Uttley v. United Kingdom*, 29 November 2005; and, most recently, *Del Rio Prada v. Spain*, 21 October 2013), provide guidance concerning the limits on the effectiveness of the judgment in the terms in which the question has been brought to this Court's attention.
3.8.– In short, the case law of the European Court does not presently provide any statement that may implicitly or explicitly corroborate the interpretation of Article 7 of the ECHR in the meaning outlined by the referring judge, which would require the Member States to sacrifice the principle of the certainty of a final judgment in the case of administrative sanctions imposed on the basis of provisions that were later declared unconstitutional. It follows that the alleged violation of the international obligations enshrined in Article 117(1) of the Constitution is not founded.
4.– The question also lacks foundation in reference to Articles 25(2) and 3 of the Constitution.
4.1.– The additive intervention requested by the referring judge, to extend the applicational scope of the questioned provision to include sanctions which, although classified as administrative by domestic law, take on a criminal character under conventional law, is based on an erroneous premise: namely, that the guarantees provided by domestic law for sentences – including Article 30(4) of Law no. 87 of 1953 in the interpretation established in the living law – must also apply to administrative sanctions, whenever these may be qualified as being of substantially penal for the (exclusive) purposes of conventional law.
Conversely, as stated above, the national system may establish further guarantees in addition to those found in conventional law, reserving them only for criminal sanctions, as these are categorized under domestic law.
The unusual protection found in Article 30(4) of Law no. 87 of 1953 is found within this context of coexistence, rather than assimilation, among domestic and conventional guarantees, as well as its applicability only to situations where criminal provisions are later declared unconstitutional, not administrative provisions.
4.2.– The scope of Article 30(4) of Law no. 87 of 1953 has been expanded by well-established case law of legitimacy to include criminal provisions containing punishments, in situations that entail a time period over which the sentence is carried out, and where said time period is still ongoing when the provision is declared unconstitutional. In this context, the judge appointed to oversee the execution of the sentence has the duty to guarantee its legality by drawing a connection between the sentence imposed and the law establishing it (Supreme Court of Cassation, Joint Criminal Sections, Judgment no. 42858 of 29 May 2014). There is a clear difference here with regard to the

administrative sanctions at issue, for which both their imposition and the period of their execution follow radically different principles, in which the appointed judge is asked merely to confirm the enforceability of the decision. The incomparability of the situations not only leads to the conclusion that the question is unfounded as to Article 3 of the Constitution, but also highlights the reasons why it is unfounded in reference to Article 25(2) of the Constitution.

4.3.– It is true that this Court has, on occasion (Judgment no. 104 of 2014, and 196 of 2010, recalled more recently by no. 276 of 2016), referred the parameter found in Article 25(2) of the Constitution to sanctions that are not punishments in the strict sense. But it has done so in a limited way, referring to the essential content of the constitutional rule, according to which a measure "may only be applied if the law providing for it was already in force at the time of the commission of the act for which sanctions are imposed" (Judgment no. 276 of 2016), and in reference to administrative measures that impact fundamental freedoms that also involve citizens' political rights.

The issue raised by the referral order under review, of whether administrative sanctions are subject to all the guarantees provided by law for criminal sanctions, is a different matter.

Nothing prevents the legislator from reserving certain guaranties, like those found in Article 30(4) of Law no. 87 of 1953, for the must impactful nucleus of the law of sanctions, represented by the criminal law, as it is categorized by the domestic legal system. In this regard it must be remembered that this Court has, even recently, reiterated "the self-standing nature of the administrative offense from criminal law" (Judgment 49 of 2015), holding that the failure to extend criminal law principles to administrative offenses was legitimate, upon consideration that, "such choices constitute the expression of the legislator's discretion in configuring the sanctions for administrative offenses" (Judgment no. 193 of 2016). The qualification of offenses and the consequent sphere of guarantees, limited to certain sectors of the legal system and excluded from others, therefore responds to "choices of legislative politics with regard to the dissuasive effectiveness of sanctions, modulated according to the nature of the protected interests" (Judgment no. 93 of 2016), reviewable by this Court only in the case that they enter into manifest unreasonableness or arbitrariness.

5.– For the reasons laid out above the questions of the constitutionality of Article 30(4) of Law no. 87 of 1953, raised in reference to Articles 3, 25(2), and 117(1) of the Constitution, must be declared unfounded.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

Declares that the questions concerning the constitutionality of Article 30(4) of Law no. 87 of 11 March 1953 (Provisions on the establishment and functioning of the Constitutional Court), raised by the Ordinary Tribunal of Como with the referral order indicated in the headnote, in reference to Articles 3, 25(2), and 117(1) of the Constitution are not founded.

Decided in Rome, at the seat of the Constitutional Court, Palazzo della Consulta, on 10 January 2017.