JUDGMENT NO. 210 YEAR 2013

In this case the Court heard a referral from the Court of Cassation questioning the constitutionality of legislation which, with retroactive effect, changed the beneficial consequences of the presentation of a request by a defendant to be tried according to summary procedures for offences with a maximum tariff of life imprisonment. The Court held that, whilst the Scoppola judgment of the ECtHR (the material facts of which were essentially the same) was not a pilot judgment and did not specify the general measures required under Italian law to rectify the position, this did not mean that general measures in some form were not necessary. Since Parliament had not acted to remedy the breach, it was necessary to establish "how to eliminate effects that have already definitively arisen in cases identical to those in which the Convention was found to have been breached, but which were not appealed to the ECtHR, and have thus become ineligible for appeal". Whilst the Scoppola case could be resolved under Italian law on the strength of the ECtHR ruling, this was not possible in this case, in which the ECtHR had not been involved. Therefore, since the action taken by the Italian state had not been sufficient, it was necessary to declare the incriminating provision unconstitutional.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Articles 7(1) and 8 of Decree-Law no. 341 of 24 November 2000 (Urgent provisions on the efficacy and efficiency of the administration of justice), converted with amendments into Law no. 4 of 19 January 2001, initiated by the Joint Criminal Divisions of the Court of Cassation in the criminal proceedings pending against E.S. by the referral order of 10 September 2012, registered as no. 268 in the Register of Referral Orders 2012 and published in the Official Journal of the Republic no. 48, first special series 2012.

Considering the intervention by the President of the Council of Ministers;

having heard the Judge Rapporteur Giorgio Lattanzi in chambers on 24 April 2013.

[omitted]

Conclusions on points of law

1.– By the referral order filed on 10 September 2012, which was submitted to this Court on 6 November 2012, the Joint Criminal Divisions of the Court of Cassation

raised – arguing with reference to Articles 3 and 117(1) of the Constitution, the latter in relation to Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: "ECHR"), signed in Rome on 4 November 1950 (ratified and implemented by Law no. 848 of 4 August 1955) – questions concerning the constitutionality of Articles 7 and 8 of Decree-Law no. 341 of 24 November 2000 (Urgent provisions on the efficacy and efficiency of the administration of justice), converted with amendments into Law no. 4 of 19 January 2001, insofar as those provisions apply retroactively, more specifically in relation to persons who, notwithstanding their submission of a request for summary proceedings in accordance solely with Law no. 479 of 16 December 1999 (Amendments to the provisions on proceedings before courts comprised of a single judge and other amendments to the Code of Criminal Procedure. Amendments to the Criminal Code and the Regulations governing the judicial system. Provisions on pending civil litigation, the allowances due to justices of the peace and the practice of the legal profession), were tried subsequently – i.e. after the afternoon of 24 November 2000 (publication in the Official Journal) – when the Decree-Law had entered into force, with the result that the less favourable sanctions regime provided for under that Decree was applied.

The Court of Cassation was seized of an appeal against a measure adopted by the *Tribunale di Spoleto* during the enforcement stage rejecting a petition by a convicted individual seeking to replace the life sentence imposed during summary proceedings with the penalty of thirty years' imprisonment which, according to the appeal, should have been ordered because the circumstances of the convicted individual were analogous to those that obtained in *Scoppola v. Italy*, which had been ruled upon by the Grand Chamber of the European Court of Human Rights (hereafter: "ECtHR") by judgment of 17 September 2009.

In that judgment the ECtHR held that the Italian state had violated Article 7(1) ECHR due to the application of Article 7 of Decree-Law no. 341 of 2000 and ruled that the Italian state was required to ensure that the penalty of life imprisonment imposed on the applicant be replaced by a penalty not exceeding a term of imprisonment of thirty years.

The *Tribunale di Spoleto*, to which the convicted individual had applied with a petition seeking the replacement of the sentence, had rejected the petition, holding that

no violation of Article 7 ECHR had been ascertained by the ECtHR in the applicant's case.

The Joint Divisions of the Court of Cassation, which do not accept the reasons for the rejection, have filed questions concerning the constitutionality of Articles 7 and 8 of Decree-Law no. 341 of 2000, arguing that these provisions prevent the petition for an alternative penalty from being accepted, notwithstanding that it is mandatory.

2.– According to the Joint Divisions, the judgment of the ECtHR identified a structural problem within the Italian legal system and any enduring effects of the violation must be eliminated, as it lays down a "general rule, which as such is theoretically applicable to cases identical to that examined".

Exercising its power of assessment and of classification of the case brought before it, the lower court states that the appellant's circumstances are identical to those at issue in the *Scoppola* case, and thus considers that the penalty of life imprisonment, which was imposed on him by the provision held to breach the ECHR, must be replaced by the penalty of thirty years' imprisonment. "In cases involving clear violations of the Convention of an objective and general nature, which have already been held to be such by the European Court – the lower court adds – the failure to exercise the remedy provided for under Article 34 ECHR (individual appeal) and the resulting absence in this specific case of an enforceable judgment of the ECtHR cannot preclude judicial intervention within the Italian legal system in order to eliminate a breach of the Convention, even if this sacrifices the general principle of the certainty of final judgments, which must be set aside in cases involving evident and far-reaching violations of fundamental human rights. The exclusion, which is an effect of the final judgment, cannot apply in cases in which a fundamental human right is violated with enduring effects, which is certainly the case where the judgment impinges upon personal freedom: therefore, in such cases it is necessary to correct that situation 'from the stigma of injustice'". According to the referral order, the case is not dissimilar to that involving a conviction under a law that has subsequently been ruled unconstitutional with regard to its substantive element or the penalty imposed.

In the opinion of the Joint Divisions however, the rule laid down in the *Scoppola* judgment cannot be applied by virtue of Article 7 of Decree-Law no. 341 of 2000, which appears to be unconstitutional for the reasons stated in the judgment of the

ECtHR and, pursuant to Article 30(4) of Law no. 87 of 11 March 1953 laying down "Provisions on the establishment and functioning of the Constitutional Court" (which provides that when an irrevocable conviction has been imposed in accordance with a provision ruled unconstitutional, its enforcement and all criminal law effects are to cease), a declaration that Article 7 was unconstitutional would enable Article 442(2) of the Code of Criminal Procedure to be applied as in force prior to the amendment introduced by Decree-Law no. 341 of 2000, thus entailing the replacement of the sentence requested. Indeed, according to the Joint Divisions, Article 30(4) of Law no. 87 of 1953 should apply with a twofold effect, setting aside both the exclusion on the amendment of final judgments as well as that laid down by Article 2(4) of the Criminal Code, which precludes the applicability of subsequently enacted provisions which are "more favourable to the accused", where "an irrevocable judgment has been issued".

3.– The legislative framework under national law within which the question arises includes legislation enacted at various points in time.

Article 442(2) of the Code of Criminal Procedure as originally in force provided that, in cases involving summary proceedings, the penalty of life imprisonment was to be replaced with a sentence of thirty years' imprisonment. However, this provision was ruled unconstitutional on the grounds that it was *ultra vires* vis-a-vis the parent statute (see judgment no. 176 of 1991), and consequently, between 1991 and 1999, access to summary proceedings under Articles 438 and 442 of the Code of Criminal Procedure, as in force at the time, was precluded for persons accused of offences punishable by life imprisonment.

Article 30(1)(b) of Law no. 479 of 1999, which entered into force on 2 January 2000, amended Article 442(2) of the Code of Criminal Procedure, reintroducing the possibility of summary proceedings for offences punishable by life imprisonment, and providing that this penalty was to be replaced with thirty years' imprisonment.

Article 7 of Decree-Law no. 341 of 24 November 2000, which entered into force also on 24 November 2000 and was converted into Law no. 4 of 19 January 2001, amended once again Article 442 of the Code of Criminal Procedure, stipulating the interpretation of the previous amendment that "the expression 'life imprisonment' in Article 442(2) of the Code of Criminal Procedure shall refer to life imprisonment without daytime isolation" (Article 7(1)), and adding at the end of Article 442(2) of the

Code of Criminal Procedure the provision that: "In cases involving multiple offences and ongoing offences, the penalty of life imprisonment with daytime isolation shall be replaced by a life sentence" (Article 7(2)). On a transitory basis, Article 8 of the Decree-Law allowed any person who had requested summary proceedings whilst Law no. 479 of 1999 was in force to withdraw such a request within thirty days of the entry into force of the Decree-Law, in which case the trial would continue according to the ordinary procedure.

Following this legislative amendment, summary proceedings – which were confirmed as being applicable to all offences punishable by life imprisonment – enabled the convicted person to benefit from the replacement of a sentence of life imprisonment without daytime isolation by a sentence of thirty years' imprisonment, or the replacement of life imprisonment with daytime isolation by an ordinary life sentence.

4.– By the Judgment of 17 September 2009 in *Scoppola v. Italy*, the Grand Chamber of the ECtHR considered the legislative framework set out above, including in particular the issue of the successive enactment of Law no. 479 of 1999 and Decree-Law no. 341 of 2000, and held that Articles 6 and 7 ECHR had been violated.

In particular, the ECtHR held that Article 442(2) of the Code of Criminal Procedure was, notwithstanding its inclusion within a procedural law, a substantive rule of criminal law in that "although it is true that Articles 438 and 441 to 443 of the CCP describe the scope and procedural stages of the summary procedure, paragraph 2 of Article 442 is entirely concerned with the length of the sentence to be imposed when the trial is conducted in accordance with that simplified process". It is therefore a rule that falls within the scope of Article 7(1) of the Convention which, according to an innovative interpretation by the Strasbourg Court, also embraces the right of the accused to benefit from criminal law enacted after the offence was committed providing for a less severe penalty than that previously applicable – in the present case, the penalty of thirty years' imprisonment, including for offences punished by life imprisonment with daytime isolation, which was subsequently retroactively replaced by simple life imprisonment.

5.– Having established the legislative framework within which the question under examination is to be placed, it is necessary to consider the State Counsel's objection that it is inadmissible on the grounds that the relationship between the ECHR and national

law has been reconfigured following the entry into force on 1 December 2009 of the Lisbon Treaty concluded on 13 December 2007, ratified and implemented by Law no. 130 of 2 August 2008. According to Article 6 of the Treaty, irrespective of whether the ECHR has been formally adhered to by the European Union, the rights listed in the Convention are incorporated into Union law, both directly and immediately through their recognition as "general principles of Union law" and also indirectly as a consequence of the recognition that the Charter of Fundamental Rights of the European Union has the same legal status as the treaties.

According to the State Counsel, pursuant to Article 49(1) of the Charter of Fundamental Rights, if a law providing for less severe punishment is enacted after an offence is committed, this [latter] law shall apply. Pursuant to Article 52 of the Charter, moreover, all rights provided for under the ECHR that correspond to the Charter must be deemed to be protected also under Community law. Consequently, the ordinary courts should set aside any national provision "that breaches the fundamental rights enshrined in the ECHR on the basis of the principle, grounded on Article 11 of the Constitution, that the provisions of Community law have direct effect within internal law".

The objection that the question is inadmissible is groundless.

As has already been held, the European Union has not yet adhered to the ECHR, "which as things stand means that the provisions of Article 6(2) of the Treaty of European Union, as amended by the Treaty of Lisbon, are do not produce effects" (see Judgments no. 303 and no. 80 of 2011).

In addition, this Court has already had the opportunity to clarify that "as a matter of principle, it cannot be inferred from the classification of the fundamental rights laid down by the ECHR as general principles of Community law that Article 11 of the Constitution refers to the ECHR, nor by the same token that the ordinary courts have the power or duty to set aside national rules that are at odds with the Convention" (see Judgments no. 303 of 2011 and no. 349 of 2007). It should be added that "the principles in question are relevant solely in relation to situations to which Community law (now Union law) is applicable" (see Judgments no. 303 and no. 80 of 2011), and since the present case does not involve a situation to which Community law applies, there is no scope for the ordinary courts to set aside the law.

Besides, the Court of Justice of the European Union has held that the reference contained in Article 6(3) of the Treaty on European Union to the ECHR does not regulate relations between national legal systems and the ECHR and does not require national courts to apply directly the provisions of the ECHR in the event of any conflict between a provision of national law and the ECHR, setting aside the provision of national law that breaches the Convention (see the judgment of 24 April 2012 in Case C-571/10, *Kamberaj*).

6.– On the other hand, there are grounds to rule inadmissible the question concerning Article 8 of Decree-Law no. 341 of 2000, which lays down transitory rules on the power of the defendant to withdraw a request for summary proceedings within thirty days of the entry into force of the Decree in question. In fact, whilst the objections of unconstitutionality relate both to Article 7 and Article 8 of Decree-Law no. 341 of 2000, the referral order does not contain any reasons as to why the question is relevant in relation to the latter provision, of which the scope of applicability to the referred proceedings is not indicated.

It follows that the question relating to Article 8 is inadmissible.

7.– According to the overall tone of the referral order, it is clear that, whilst the question of constitutionality formally relates to Article 7 of Decree-Law no. 341 of 2000 as a whole, it must be deemed to be limited solely to paragraph 1 of that Article which, owing to its supposed interpretative effect, provides for its retroactive application. In amending Article 442(2) of the Code of Criminal Procedure, Article 7(2) of the Decree-Law is limited to laying down the new rules applicable to summary procedures for offences punished by life imprisonment, which are to be applied "in a fully operational manner", and thus in cases arising after its entry into force, which do not include the case at issue in the proceedings before the lower court.

7.1.– Having limited the scope of the challenges solely to Article 7(1) of Decree-Law no. 341 of 2000, it is necessary to examine certain other problematic aspects, which may have potential knock-on effects for the question of constitutionality.

The Court of Cassation's referral order is based on the assumption that the ECtHR's judgment in the *Scoppola* case must also be applied in cases, such as the present case, involving the same salient elements without any requirement for a specific ruling by the ECtHR.

The fundamental rule governing the enforcement of the judgments of the ECtHR is laid down in Article 46(1) ECHR, which requires the contracting parties "to abide by the final judgment of the Court in any case to which they are parties". The other paragraphs of Article 46 (paragraphs 2 to 5) regulate the powers of the Committee of Ministers and of the Court itself when supervising the execution of judgments by states that have violated the ECHR.

Article 46 must be read in conjunction with Article 41 ECHR, which states that "if the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party" (see Judgment no. 113 of 2011).

When applying the Convention provisions referred to above, the ECtHR has for a long time adopted an approach characterised by self-restraint, stressing the "essentially declaratory" nature of its judgments and the freedom of the states to choose how to comply with them. However, this approach has been decisively departed from in the more recent case law.

Starting from the judgment of the ECtHR of 13 July 2000 in *Scozzari and Giunta v. Italy*, the principle has been asserted – which has now become settled – that "a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to choose the general and/or, if appropriate, individual measures to be adopted" (ECtHR, Grand Chamber, judgment of 17 September 2009, *Scoppola v. Italy*; ECtHR, Grand Chamber, judgment of 1 March 2006, *Sejdovic v. Italy*; ECtHR, Grand Chamber, judgment of 8 April 2004, *Assanidze v. Georgia*). This is because "under Article 41 of the Convention the purpose of awarding sums by way of just satisfaction is to provide reparation solely for damage suffered by those concerned to the extent that such events constitute a consequence of the violation that cannot otherwise be remedied" (ECtHR, Grand Chamber, judgment of 13 July 2000, *Scozzari and Giunta v. Italy*).

The aims of the individual measures which the respondent state is required to adopt have been specifically identified by the Strasbourg Court as the *restitutio in integrum* of the victim's circumstances prior to the breach. "The aim of individual measures should

be to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded", and hence "a judgment in which the Court finds a violation imposes on the respondent State a legal obligation under Article 46 of the Convention to put an end to the violation found and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach" (see *inter alia* ECtHR, Grand Chamber, judgment of 17 September 2009, *Scoppola v. Italy*; ECtHR, judgment of 8 February 2007, *Kollcaku v. Italy*; ECtHR, judgment of 10 November 2004, *Sejdovic v. Italy*; ECtHR, judgment of 18 May 2004, *Somogyi v. Italy*; ECtHR, Grand Chamber, judgment of 8 April 2004, *Assanidze v. Georgia*).

From a broader perspective, the respondent state is also required to remove any obstacles under national law that might prevent the objective from being achieved: indeed, "in ratifying the Convention the Contracting States undertake to ensure that their domestic legislation is compatible with it, so that it is for the respondent State to remove any obstacles in its domestic legal system that might prevent the applicant's situation from being adequately redressed" (ECtHR, Grand Chamber, judgment of 17 September 2009, Scoppola v. Italy; ECtHR, Grand Chamber, judgment of 8 April 2004, *Assanidze v. Georgia*).

7.2.– Specific obligations to comply with the rulings of the ECtHR have been laid down in the so-called "pilot judgments", which originate from the fact that numerous appeals are often submitted to the Court concerning the same legal situation under the law of the respondent state. Such appeals normally result from a general internal rule (affecting several persons) which breaches the ECHR, and highlight a structural problem within the legal system of the respondent state. In these judgments the Court does not limit itself to identifying the problem posed by the case, but goes further and indicates the most appropriate measures for resolving it. If the state responsible for a structural violation ascertained in a pilot judgment adopts the necessary general measures, the Court will remove the other appeals relating to the same question from the register of proceedings pending; otherwise, it will resume the examination of such appeals. Examples of pilot judgment cases include *Broniowski v. Poland* of 22 June 2004, *Hutten Czapska v. Poland* of 19 June 2006 and more recently *Torreggiani and*

others v. Italy of 8 January 2013. The practice is regulated by the new Article 61 of the Rules of Court, in force since 31 March 2010.

According to the Joint Divisions of the Court of Cassation, the judgment of the ECtHR Grand Chamber of 17 September 2009 in *Scoppola v. Italy*, "which is relevant in the case under examination, displays the substantive characteristics of a 'pilot judgment' in that, whilst it does not provide specific indications regarding the general measures to be adopted, it nonetheless stresses the existence within Italian law of a structural problem due to the non-compliance with the ECHR of Article 7 of Decree-Law no. 341 of 2000, as interpreted under national case law".

However, there is no specific reference to the "pilot judgments" in the case under examination, since the wording itself of the *Scoppola* judgment departs from that model when stating that, "in the present case, the Court does not consider it necessary to indicate general measures required at national level for the execution of its judgment". The judgment goes on to focus on the individual measures, the aim of which "should be to put the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded", and adds more generally that "a judgment in which the Court finds a violation imposes on the respondent State a legal obligation under Article 46 of the Convention to put an end to the violation found and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach".

In view of the above, it must be concluded that the manner in which the member state adopts structural measures to comply with the judgments of the Strasbourg Court is not always specified in substantive form in those judgments, and may in fact be established with a reasonable margin of appreciation. Therefore, it is not necessary for the judgments of the ECtHR to specify which "general measures" are to be adopted in order to conclude that, notwithstanding their discretionary configuration, they nonetheless represent a necessary consequence of the structural violation of the ECHR by national law.

When this happens, the branches of state are obliged to take action in order to ensure that the legislative effects that breach the ECHR cease, each acting strictly in accordance with its own powers. It must therefore be concluded that the core content of the *Scoppola* judgment – that is the part of it to which the obligation laid down under

Article 46(1) ECHR applies, and more generally with reference to which the aspects which the state responsible for the violation must take into account when establishing the measures to be adopted in order to comply with it are determined – is broader in scope than that stated in the operative part, with specific reference to the violation ascertained, in which the ECtHR limits itself to declaring that "the respondent State is responsible for ensuring that the sentence of life imprisonment imposed on the applicant is replaced by a penalty consistent with the principles set out in the present judgment", that is the penalty of thirty years' imprisonment.

It must be recalled in this regard that, in the wake of the *Scoppola* judgment, the Italian state informed the Committee of Ministers of the Council of Europe, as the body responsible for supervising the execution of the judgments of the ECtHR, that, as regards individual measures, it had made provision for an enforcement review in order to replace the penalty of life imprisonment with a sentence of thirty years' imprisonment. In particular, it is acknowledged in the sheet annexed to the Resolution of the Committee of Ministers CM/ResDH(2011)66 that the Prosecutor General at the Court of Cassation has transmitted the judgment concerned to the Prosecutor General at the Rome Court of Appeal, as the judicial authority with competence to enforce Scoppola's conviction, and that the Prosecutor General at the Rome Court of Appeal in turn apprised the local court of appeal as the enforcement judge.

It is also stated in the annexed sheet that on 11 February 2010, the Court of Cassation accepted the request filed by the Prosecutor General and hence that the penalty of life imprisonment was replaced with a sentence of thirty years' imprisonment. Moreover, as regards the general measures, the Italian state announced that in the light of the "direct effect" granted by the Italian courts to the judgments of the European Court, and in view of the possibilities offered by the enforcement review procedure to persons whose circumstances are similar to those of the claimant in this case, the Italian authorities consider that the publication and distribution of the judgment of the European Court to the competent courts will be sufficient to prevent similar violations.

In that resolution, which was adopted on 8 June 2011, the Committee first examined the individual and general measures adopted by the Italian state (indicated in the

annexed sheet), and then declared that it had complied with the obligations laid down under Article 46(2) of the Convention, and decided to close the file.

All of the reasons considered above point to the conclusion that the Court of Cassation rightly considered that the *Scoppola* judgment does not enable Italy to limit itself to replacing the penalty of life imprisonment applied in that case, but obliges it to resolve the violation on a legislative level and to remove its effects in respect of all convicted persons whose circumstances are the same as those of Scoppola.

7.3.– It falls first and foremost to the legislator to acknowledge the conflict that has arisen between national law and the Convention system and to remove the provisions that gave rise to it, ensuring that they have no further effect; however, if the legislator does not take action, the problem arises as to how to eliminate effects that have already definitively arisen in cases identical to those in which the Convention was found to have been breached, but which were not appealed to the ECtHR, and have thus become ineligible for appeal. Indeed, there is a fundamental difference between persons who have appealed to the ECtHR after exhausting internal remedies, and those who by contrast have not exercised that right, with the result that their convictions, which have now become final, are no longer eligible for relief under the Convention.

The value of a final judgment through which compelling requirements of legal certainty and stability within legal relations are expressed is not moreover extraneous to the Convention system, so much so that the *Scoppola* judgment itself identified it as a limit on the extension of the *lex mitior* principle, as this Court has already stressed (judgment no. 236 of 2011). It must therefore be concluded that, as a matter of principle, the obligation to comply with Convention requirements, in the meaning stipulated by the Strasbourg Court, does not apply to cases – different from that to which this judgment relates – in which the judgment has become final for the purposes of internal law, and that any exceptions to that limit must be inferred not from the ECHR (which does not require it) but from national law.

In fact, Italian law does allow situations in which the intangible status of a final judgment may be set aside where the law provides that opposing values – with equal constitutional standing, but to which the legislator has intended to afford priority status – may be deemed to prevail over the constitutional value inherent within that principle.

There is no doubt that these include the protection of personal freedom where it is restricted on the basis of a criminal law rule which has subsequently been appealed or amended in favour of the guilty party: "indeed, in accordance with the principle of equality, amendments to the criminal law which are more favourable to the accused and, even more so, the *abolitio criminis* ordered by the legislator in the light of a changed assessment of the social harm of the relevant conduct must also operate in favour of those who engaged in the conduct at an earlier moment in time, unless there is sufficient justification for the contrary to apply" (judgment no. 236 of 2011).

The legislator considers that this justification does not obtain in cases involving the *abolitio criminis* and has thus stipulated that the judgment establishing the sentence is to be revoked (Article 673 of the Code of Criminal Procedure), providing that the enforcement of the sentence and its criminal effects must cease (Article 2(2) of the Criminal Code); similarly, it has provided that "If a person has been sentenced to a period of incarceration but a subsequently enacted law provides exclusively for a fine, the custodial sentence shall be converted immediately into payment of the fine pursuant to Article 135" (Article 2(3) of the Criminal Code).

It thus falls to this Court to conclude that, as a matter of substantive criminal law, it is precisely national law which considers that a final judgment must be set aside in any case involving certain supervening events relating to liability to punishment and the sentencing of the convicted person.

On the other hand, it falls to the ordinary courts, and in particular to the referring court as the body charged with ensuring the uniform interpretation of the law, to establish the exact scope of the effects of such supervening circumstances during the enforcement stage, i.e. of a declaration that the relevant criminal law provision is unconstitutional (Article 30(4) of Law no. 87 of 11 March 1953) and, in the event that such a decision is relevant for the purposes of raising a question of constitutionality, to explain the reasons for this in a manner that is not implausible.

In the case under examination, the referring court argues, in a manner that satisfies this last requirement, that pursuant to Article 30(4) of Law no. 87 of 1953, a final judgment in criminal proceedings does not prevent the courts from intervening during the enforcement stage in order to modify the sentence when its level is stipulated under a provision that has been ruled unconstitutional and when that ruling of

unconstitutionality supports a conclusion with a high likelihood that the provision is unconstitutional on the grounds that it violates Article 117(1) of the Constitution.

Within these interlocutory constitutional review proceedings, this finding provides a sufficient basis to conclude that, for the purposes of bringing national law into line with the ECHR as a result of the judgment of the Grand Chamber of the ECtHR in the *Scoppola* case, a final judgment does not represent an insuperable obstacle which, as by contrast generally occurs, limits the effects of the obligation to comply only to cases that are still *sub judice*.

According to the stance adopted by the referring court, there is thus no bar on the extension of the effects of the Convention to cases identical to that relating to Scoppola in which a final judgment has already been adopted.

8.– It is now necessary to consider which procedure is to be followed in order to comply with the judgment of the ECtHR and, in particular, whether the enforcement judge has "competence" over such matters. It needs to be pointed out in this regard that the review procedure provided for under Article 630 of the Code of Criminal Procedure, as resulting from the declaration of unconstitutionality in Judgment no. 113 of 2011 of this Court, is not adequate for the present case in which it is not necessary to "reopen the trial" on the merits, but is rather necessary simply to alter the enforcement of the sentence in such a manner as to replace the sentence imposed with one that is compatible with the ECHR, and which is already determined in a precise manner by law.

It is sufficient that such a procedural result is achieved by the enforcement judge (which was in fact apprised of the case at issue in the referred proceedings), especially if the scope of the powers already granted to that judge under procedural law is considered in that he or she is not limited to hearing questions relating to the validity and enforceability of the sentence but is also empowered, in various cases, to alter it (Articles 669, 670(3), 671, 672 and 673 of the Code of Criminal Procedure).

Moreover, it is not insignificant that, as was noted above, Italy emphasised precisely the enforcement procedure in the wake of the *Scoppola* judgment when, *inter alia*, it informed the Committee of Ministers of the Council of Europe that, having regard to the possibilities offered by the enforcement review for persons whose circumstances are similar to those of the appellant in the present case, the Italian

authorities consider that the publication and distribution of the judgment of the European court to the competent courts will be sufficient in order to prevent similar violations.

If the judgment of the ECtHR which must be complied with implies that a national provision is unconstitutional, it is also necessary to ask whether or not its enforcement by the national court must be conditional upon a ruling that it is unconstitutional.

In Scoppola's case the judgment of the European Court was enforced direct by the Court of Cassation according to the extraordinary appeal procedure under Article 625-bis of the Code of Criminal Procedure. However, in the case under examination, in which there is no specific ruling of the ECtHR relating to the appellant, it must be concluded that it is necessary to refer a question concerning the constitutionality of the provision that violates the Convention, as the Joint Divisions of the Court of Cassation have done.

Once this issue has been considered, it is clear that the question of constitutionality raised by the Joint Divisions of the Court of Cassation with regard to Article 7(1) of Decree-Law no. 341 of 2000 is relevant in that it prevents the procedure from being resolved in accordance with the constitutional requirement to comply with the judgment of the ECtHR, which found that provision to breach Article 7(1) ECHR.

It is evident that this conclusion applies exclusively to scenarios in which a decision of the European Court is to be applied in relation to a substantive matter identical to that decided upon that does not require the trial to be reopened, but can be remedied in the enforcement stage. The Joint Divisions themselves have noted that "the position is different for a penalty that has been held to be unlawful exclusively on the grounds that it was imposed upon conclusion of proceedings regarded as unfair by the ECtHR pursuant to Article 6 ECHR: in such an eventuality, since the assessment relates to potential *errores in procedendo* and involves considerations strictly related to the specific individual case, decisions must be made on a case by case basis, with the result that any final judgment within the trial can only be called into question in the event that a binding *dictum* has been issued by the Strasbourg Court in relation to the same facts".

Consequently, it must be concluded that the question concerning the constitutionality of Article 7(1) of Decree-Law no. 341 of 2000 raised with reference to Article 117(1) of the Constitution in relation to Article 7 ECHR is relevant.

The question of constitutionality raised with reference to Article 3 of the Constitution is however inadmissible since it does not relate to the need to comply with a judgment of the ECtHR, which as noted above is the only scenario which may justify interlocutory constitutional review raised during enforcement proceedings against a provision applied during the merits stage.

9.– On the merits, the question concerning the constitutionality of Article 7(1) of Decree-Law no. 341 of 2000 raised with reference to Article 117(1) of the Constitution in relation to Article 7 ECHR, is well founded.

The contested provision was the last of a succession of three schemes of rules to be adopted. The first scheme was that laid down by Article 442(2) of the Code of Criminal Procedure, as in force following the declaration of unconstitutionality issued by this Court in judgment no. 176 of 1991, which precluded the possibility of summary proceedings (and hence the relative reduction of the sentence) for proceedings relating to offences punishable by life imprisonment. The second scheme was introduced by Law no. 479 of 1999, Article 30(1)(b) of which once again permitted summary proceedings for offences punished by life imprisonment by introducing the following sentence at the end of paragraph 2 of Article 442 of the Code of Criminal Procedure: "The penalty of life imprisonment shall be replaced by thirty years' imprisonment". The third scheme was laid down by Decree-Law no. 341 of 2000, Article 7 of which, with the stated intention of providing an authentic interpretation of Article 442(2) of the Code of Criminal Procedure, had provided that the expression "penalty of life imprisonment" contained therein was to be "deemed to relate to life imprisonment without daytime isolation", and had added a third sentence at the end of paragraph 2, which was formulated as follows: "In cases involving multiple offences and ongoing offences, the penalty of life imprisonment with daytime isolation shall be replaced by a life sentence".

The ECtHR judgment of 17 September 2009 in *Scoppola v. Italy* asserted that Article 442(2) of the Code of Criminal Procedure amounts to "a provision of substantive criminal law concerning the length of the sentence to be imposed in the event of conviction following trial under the summary procedure" and that, notwithstanding its wording, Article 7(1) of Decree-Law no. 341 of 2000 is not in actual fact an interpretative provision because "Article 442(2) CPP did not contain any

particular ambiguity; it clearly stated that life imprisonment was to be replaced by thirty years' imprisonment, and made no distinction between life imprisonment with and life imprisonment without daytime isolation". The *Scoppola* judgment goes on to add that "the Government have not produced any examples of judicial decisions which could be alleged to have been based on conflicting interpretations of Article 442".

These assessments are incontestable also under national law.

The substantive status of Article 442(2) of the Code of Criminal Procedure was already clearly asserted by the Joint Divisions of the Court of Cassation in Judgment no. 2977 of 6 March 1992. That case involved a situation diametrically opposed to the present case. By judgment no. 176 of 1991, the Constitutional Court declared unconstitutional the second sentence of Article 442 of the Code of Criminal Procedure, which was identical to that previously in force, on the grounds that it was *ultra vires*. It was thus necessary to decide how to treat convictions previously imposed under the provision declared unconstitutional. The Joint Divisions concluded that it was not necessary "to establish the nature of the reduction or substitution of the penalty", but "on the contrary to establish that it unquestionably amounts to more favourable treatment under the criminal law", and asserted that the ruling of the Constitutional Court "cannot result in detrimental effects for persons accused of offences punishable by life imprisonment who requested summary proceedings before Article 442(2) of the Code of Criminal Procedure was declared unconstitutional. For these defendants, the more favourable treatment under the criminal law available in relation to the special procedures must remain", and decisions made as a consequence of this cannot be annulled.

It is also the case that Article 7(1) of Decree-Law no. 341 of 2000 is only formally speaking an interpretative provision: this classification does not reflect the actual position, and was used in order to ensure that it had retroactive effect, which would not otherwise have been permitted. In fact, as this Court has clarified, "an interpretative law has the purpose of clarifying 'situations of objective uncertainty within the wording of the law' owing to 'unresolved debate within the case law' (see judgment no. 311 of 2009), or to 're-establish an interpretation that more closely reflects the original intention of the legislator' (again judgment no. 311 of 2009) in order to uphold legal

certainty and equality between private individuals" (see judgments no. 103 of 2013 and no. 78 of 2012).

None of these reasons underlies the contested provision given that, as noted in the *Scoppola* judgment, Article 442(2) of the Code of Criminal Procedure, i.e. the object of the supposed legislative interpretation, was clear, did not contain any ambiguity and had not given rise to any contrasting views concerning the legislation on life imprisonment, because there was no doubt that it referred both to "simple" life imprisonment and to that with daytime isolation.

Essentially, by its retroactive effect, Article 7(1) of Decree-Law no. 341 of 2000 resulted in the passing of life sentences against defendants to whom the previous version of Article 442(2) of the Code of Criminal Procedure had applied, according to which they should have been sentenced to thirty years' imprisonment.

By the *Scoppola* judgment of 17 September 2009, the ECtHR held, departing from its previous settled case law, that "Article 7 § 1 of the Convention guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law", which is embodied "in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant".

Within the context of Article 7(1) ECHR, this principle is analogous to that contained in Article 2(4) of the Criminal Code, which has been elevated by the Strasbourg Court to the status of a Convention principle.

In view of this principle, the Court held that "section 30 of Law no. 479 of 1999 is a subsequent criminal-law provision prescribing a more lenient penalty" and that "Article 7 of the Convention ... therefore required the applicant to be granted the benefit thereof". Consequently, according to the Court, "in this case there has been a violation of Article 7 § 1 of the Convention".

As is known, starting from judgments no. 348 and no. 349 of 2007, the case law of this Court has been settled in concluding that "the provisions of the ECHR – as interpreted by the European Court of Human Rights, specifically established in order to interpret and apply the Convention (Article 32(1) of the Convention) – supplement the

constitutional principle laid down under Article 117(1) of the Constitution as interposed rules by requiring that national legislation comply with the requirements resulting from international law obligations" (see judgments no. 236, no. 113 and no. 80 – which confirm the validity of that position following the entry into force of the Lisbon Treaty of 13 December 2007 – and no. 1 of 2011; no. 196 of 2010; no. 311 of 2009), and it must therefore be concluded that, given that Article 7 of the European Convention on Human Rights represents an interposed rule for the purposes of Article 117(1) of the Constitution, since it was held to have been violated by the European Court of Human Rights in the judgment of the Grand Chamber of 17 September 2009 in *Scoppola v. Italy*, the contested provision is unconstitutional.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

1) declares that Article 7(1) of Decree-Law no. 341 of 24 November 2000 (Urgent provisions on the efficacy and efficiency of the administration of justice), converted with amendments into Law no. 4 of 19 January 2001, is unconstitutional;

2) rules that the question concerning the constitutionality of Article 7(1) of Decree-Law no. 341 of 24 November 2000 (Urgent provisions on the efficacy and efficiency of the administration of justice), converted with amendments into Law no. 4 of 19 January 2001, raised with reference to Article 3 of the Constitution by the Joint Criminal Divisions of the Court of Cassation by the referral order mentioned in the headnote, is inadmissible;

3) rules that the question concerning the constitutionality of Article 8 of Decree-Law no. 341 of 24 November 2000 (Urgent provisions on the efficacy and efficiency of the administration of justice), converted with amendments into Law no. 4 of 19 January 2001, raised with reference to Articles 3 and 117(1) of the Constitution, the latter in relation to Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, ratified and implemented by Law no 848 of 4 August 1955, by the Joint Criminal Divisions of the Court of Cassation by the referral order mentioned in the headnote, is inadmissible.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 3 July 2013.