Corte costituzionale

# JUDGMENT NO. 311 OF 2009

*Francesco AMIRANTE, President*

*Giuseppe TESAURO, Author of the Judgment*

# JUDGMENT NO. 311 YEAR 2009

**In this case the Court considered various appeals from lower courts in which staff transferred from local authority to state employment complained that legal action taken by them seeking recognition of certain employment rights had been interfered with by the enactment of an "interpretative law" which had a direct bearing on their cases, which thus amounted to a violation of the ECHR. The Court dismissed the case as groundless. In doing so it referred to the case law of the ECtHR, according to which the enactment by the legislature of provisions which affect ongoing proceedings does not amount to an automatic violation of Article 6, and could be justified where there were "compelling grounds of the general interest". The identification of those grounds lies, at least in part, within the margin of appreciation of the states..**

THE CONSTITUTIONAL COURT

composed of: President: Francesco AMIRANTE; Judges: Ugo DE SIERVO, Paolo MADDALENA, Alfio FINOCCHIARO, Alfonso QUARANTA, Franco GALLO, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO, Paolo Maria NAPOLITANO, Giuseppe FRIGO, Alessandro CRISCUOLO, Paolo GROSSI,

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 1(218) of law No. 266 of 23 December 2005 (Provisions governing the formation of the annual and long-term budget of the state - Finance Law 2006), commenced by the Court of Cassation by the referral order of 4 September 2008 and the Ancona Court of Appeal by 5 referral orders of 26 September 2008, registered respectively as numbers 400 in the Register of Orders 2008, and numbers 15, 16, 17, 18 and 19 in the Register of Orders 2009 and published in the *Official Journal of the Republic* numbers 52, first special series 2008, and 5, first special series 2009.

*Considering* the entry of appearance by N. P. as well as the intervention by the President of the Council of Ministers;

*having heard* the judge rapporteur Giuseppe Tesauro in the public hearing of 3 November 2009 and in chambers on 4 November 2009;

*having heard* Counsel Isacco Sullam, Nicola Zampieri and Arturo Salerni for N. P. and the *Avvocato dello Stato* Giuseppe Fiengo for the President of the Council of Ministers.

*The facts of the case*

1. – By referral order of 4 September 2008 (order No. 400 of 2008), the Court of Cassation raised, with reference to Article 117(1) of the Constitution and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (below also ECHR or the European Convention), implemented by law No. 848 of 4 August 1955, a question concerning the constitutionality of Article 1(218) of law No. 266 of 23 December 2005 (Provisions governing the formation of the annual and long-term budget of the state - Finance Law 2006) which provided, *inter alia*, that Article 8(2) of law No. 124 of 3 May 1999 (Urgent provisions concerning school staff) be interpreted as requiring that local authority staff transferred to positions as administrative, technical and auxiliary staff (called ATA and referred to hereafter thereas) for the state be engaged in the functional roles and job profiles of the corresponding state positions on the basis of the overall remuneration received at the time of transfer.

2. – The referring court states with regard to the facts of the case that the appellant, a member of the ATA staff and formerly a local authority employee who had been transferred to the state school administration pursuant to Article 8 of law No. 124 of 1999, had requested by application to the *Tribunale di Venezia* of 27 March 2003 against the Minister for Education, Universities and Research acknowledgement of his own right to full recognition of his seniority accrued at the time when the employment relationship was

transferred, ordering the state administration to pay the resulting salary differences from 1 January 2000, plus interest and monetary adjustment.

By judgment subsequently appealed to the Court of Cassation, the court held that the provision contained in Article 3(1) of the agreement between the *Agenzia per la rappresentanza negoziale delle pubbliche amministrazioni* [Public Sector Bargaining Relations Agency] (hereafter ARAN) and the representatives of the trade union organisations and confederations of 20 July 2000, implemented by ministerial decree of 5 April 2001, was "invalid and accordingly unenforceable" due to violation of the combined provisions of Article 8(2) and (3) of law No. 124 of 1999.

The Court of Cassation states that, shortly before the hearing, the administration relied on the supervening authentic interpretation of the aforementioned Article 8 by Article 1(218) of law No. 266 of 23 December 2005.

2.1. – In the opinion of the referring court, this provision meets the essential prerequisites of interpretative provisions, since it rewrites a rule intended to apply in general terms to disputes in progress as well as future disputes. Sub-section 218 is stated to have the express intent of specifying and clarifying the scope of the provision interpreted, limiting itself to applying with retroactive effects only to those aspects of its implementation which had resulted in litigation. The normative content of the provision is stated to correspond to one of the possible meanings attributable to the interpreted provision, since Parliament had opted for a narrow reading of the couplet "legal and financial seniority" pursuant to Article 8(2) of law No. 124 of 1999.

However, regarding the question of relevance, the referring court emphasises the need to apply the *ius superveniens* in the proceedings before it, allowing the appeal, with the result that it must change its position compared to the conclusions which it had reached with regard to the meaning to be conferred on the provision contained in Article 8(2) of law No. 124 of 1999. In fact, albeit on the basis of different argumentation, the Court of Cassation had asserted "that since the guarantee provided to the staff affected by the transfer from positions in these bodies to positions as state employees that the the seniority accrued with the local authorities would be recognised for legal as well as financial

purposes had been provided by law, it could not be reduced, in accordance with a provision with lower status, to the mere guarantee of the financial recognition of seniority and result in the award to the employee of the so-called "actual level of salary" [*maturato economico*], as provided for under the ministerial decree of 5 April 2001 in accordance with the contents of the Agreement of 20 July 2000 between the ARAN and the trade union organisations".

Again, in the opinion of the Court, the questions concerning the constitutionality of the interpretative provision – moreover raised by the cross-appellant – relating to the violation of Article 6(1) of the European Convention for the Protection of Human Rights relate to the statutory provision which must be applied in order to reach a decision on the appeal.

On the other hand, there are no grounds for making a preliminary reference pursuant to Article 234 of the EC Treaty in order to establish whether or not the case before the Court falls under Directive 77/187/EEC (as amended by Directive 98/50/EC), since the transfer provided for by law No. 124 of 1999 fell outwith the scope of Community directives on the transfer of undertakings.

2.2. – Having found the question to be relevant in the proceedings before it, the referring court subjects its question of constitutionality to scrutiny for non-manifest groundlessness.

The Court of Cassation recalls in this regard that although it had already ruled the question to be manifestly groundless in the past, by judgment No. 677 of 16 January 2008, new arguments, including those submitted by the party, require it to confront the question again since its role as the guarantor of the uniform interpretation of the law operates differently depending on whether the Court is called upon to rule on the exact compliance with the law, or to assess the manifest groundlessness of a question of constitutionality regarding the same law. This is because the latter case involves making a ruling only as to whether or not it considers "a doubt" to be manifestly groundless, a formula which requires the Court to refer a question of constitutionality in all cases in which, having excluded a constitutionally informed interpretation, a "not implausible argument" remains in favour of its unconstitutionality.

That being so, the Court accordingly moves to an assessment over whether Article 1(218) of law No. 266 of 2005 violates Article 117(1) of the Constitution, due to violation of the international law obligation taken on by Italy through signature of the ECHR, Article 6(1) of which, in laying down the right to a fair trial by an independent and impartial tribunal, requires the legislature not to interfere with the administration of justice with the purpose of influencing individual cases or a specific category of disputes.

In the opinion of the referring court, it is necessary to verify whether the provision under examination violates the Italian state's obligation to comply with Article 6(1) ECHR, as interpreted by the Strasbourg Court, which provides concrete form and substantive content to the constitutional requirement of respect for international law obligations relied upon.

The Court of Cassation points out that judgment No. 677 of 2008 had previously held that Article 1(218) of law No. 266 of 2005 did not violate the obligation imposed by Article 6(1) of the Convention, since there was no indication which could lead it to consider the national provision to be intended exclusively to influence disputes in progress. On the contrary, Parliament in actual fact carried out a complex organisational rearrangement within the ambit of which "compelling grounds of the general interest" were to be considered to subsist, which therefore legitimised the retroactive action.

However, in the referral order currently before this Court, the Court of Cassation observes that, which it may be true that the judgment in case No. 36813/1997, *Scordino v. Italy* and the precedents referred to in it assert that the prohibition on retroactive legislation concern the interference by the legislature in the administration of justice, with the intention of achieving a different solution to disputes in progress, it is also the case that this jurisprudence does not also require that the retroactive provision be "exclusively intended to have an impact on disputes in progress", nor that this purpose otherwise be stated. This may be inferred in particular from the fact that in these precedents, "the conclusion that the legislative action from time to time examined constitutes an unlawful interference by the legislature in the administration of justice is reached on the one hand on the basis of the examination of the result which the application of the contested provision has had in the

proceedings in relation to which such interference is averred, and on the other hand of the consideration that the legislating state was at the same time a party to those proceedings and the interpretative provision conferred on the interpreted provision a meaning which was beneficial for the state-party", as moreover was made clear in the most recent case law of the European Court (judgment in *SCM Scanner de l'Ouest Lyonnais and others v. France* of 21 June 2007 in application No. 12106/03).

In the opinion of the referring court, precisely these requirements are met in the case under examination, since the significant dispute underway concerning the rule of authentic interpretation – in relation to which the Court has had the opportunity to rule on several occasions – along with the significant number of appeals pending concerning precisely the interpretation of the said legislation mean that it is reasonable to conclude that the resolution of such litigation "in terms favourable to the state administration, imposed by the interpretative provision, certainly fell under the goals pursued by Parliament through the introduction of this provision".

Moreover, the requirement to "regulate the performance of an organisational restructuring" could not in any case constitute the "compelling grounds of the general interest" required under Strasbourg case law as a prerequisite for any exception to the prohibition on interference. Besides, there was no trace of this requirement or of any other reasons – "imperative or not" – within the legislative procedure, as was demonstrated by the fact that this sub-section, which was not contained in the original draft government bill, was inserted by the rapporteur in the sitting of the 5th Committee and voted through subsequent stages associated with a confidence motion.

This conclusion could not be precluded even by the consideration that Parliament is in any case free to enact interpretative provisions which, with regard to private law matters, impinge upon rights conferred by laws in force, since the case under examination does not involve this but rather the intervention, by way of retroactive legislation, on proceedings in progress to which the state-administration is a party. In fact, the *ratio* of the case law of the European Court is that "the equality of the parties before the court implies the requirement that the legislature not interfere with the administration of justice with the goal of

influencing the resolution of the dispute or of a specific category of dispute", a purpose inferred "from the objective impact which the contested provision has on the outcome of disputes in progress and the capacity of the state-administration as a party to those disputes".

Moreover, in the opinion of the referring court, the fact that the retroactive nature is an essential corollary to the provisions stipulating an authentic interpretation is stated not to stand in the way of compliance with the restriction concerned, since this restriction requires only that "Parliament exclude proceedings in progress at the time of entry into force of the provision from the scope of application of the interpretative provision or, more generally, from the provision granted retroactive effect, according to arrangements which the state legislature knows well and has applied on several occasions".

The potential objection that a similar legislative technique would spark off a proliferation of legal initiatives aimed at rendering a beneficial situation immutable is of no consequence, since this would appear to postulate "a state-legislature which, with regard to relations to which it is a party as state-administration, creates a beneficial situation in order not to have to comply with the obligation which results for it as state-administration, reserving itself the right to take action by enacting an interpretative law".

Finally, the Court of Cassation points out that the manifest groundlessness of the question could not in any case have been established on the basis of judgment No. 234 of 2007 of the Constitutional court which ruled the question groundless, since it concerned principles of constitutional law different from those invoked in these proceedings.

3. – By writ filed on 30 December 2008, the private party N. P. entered an appearance, requesting that the provision be ruled unconstitutional. In his/her opinion in fact, the provision under examination must be considered unconstitutional on the grounds that it is incompatible with the provisions of the ECHR – as interposed rules capable of supplementing the constitutional principle – as interpreted by the European Court, and therefore to violate Articles 10, 117 and 111 of the Constitution.

The provision is claimed to be unconstitutional due to violation of the principles of "equality of arms", legal certainty and the independence of the judiciary, inferred from the

interpretation provided by the Strasbourg Court of the right to a fair trial contained in Article 6 ECHR.

In fact, the Strasbourg Court is stated to have emphasised on several occasions its view that the state may not unfairly introduce a legislative interpretation in its favour relating to a provision *sub iudice* in proceedings that have already been commenced and framed according to different legislative or case law principles. The application of the *ius superveniens* could be considered to be lawful only in the presence of "*impérieux motifs d'intérét général*", which cannot consist in "mere requirements of a financial nature related to the risk resulting from an unsuccessful outcome in proceedings commenced against the state administration".

The private party went on to specify that this position cannot be rebutted by the fact that the principle of the "actual level of salary" was already contained in the agreement of 20 July 2001, since that agreement had "been reached within the ambit of the legislative framework traced out by Article 47(1) to (4) of law No. 428 of 29 December 1990 (Provisions governing the implementation of obligations resulting from Italy's membership of the European Communities – law on the implementation of Community Law 1990) which contemplates exclusively obligations to provide information and of consultation", and also because it was understood by the Minister for Education, Universities and Research as an agreement constituting an exception to Article 8 of law No. 124 of 1999, considered to be admissible due to the fact that the situation under examination was claimed to fall under Article 2 of legislative decree No. 29 of 3 February 1993 (Rationalisation of the organisation of the public administrations and amendments to the legislation governing public sector employment, pursuant to Article 2 of law No. 421 of 23 October 1992).

Any interpretative law which interferes with legal proceedings commenced against the state is therefore argued to violate the independence of the judiciary and the role of the Court of Cassation as the guarantor of the uniform interpretation of the law because, even in the event that there were uncertainty in the application of the law or that differences had

emerged in case law, it would be a matter exclusively for that court to resolve such contrasts.

It should also be added that the relationship between national legislation and that of the European Convention, as interpreted in the case law of the [Strasbourg] Court, is governed by the principle of subsidiarity with regard to action by the Strasbourg Court, which may be inferred from Articles 1 and 13, as well as Articles 19, 34 and 35 of the Convention itself, which reserve the role of the primary protector of human rights to the jurisdiction on the national courts, with the resulting obligation to set aside incompatible national legislation.

In the case before the Court, the Finance Law 2006 certainly violated Article 6 of the European Convention, since not only was the provision contained in a law normally deputised with "bringing in cash", but was also introduced by a "mass amendment" tabled by the government and approved by confidence vote.

Moreover, since this interpretative solution was implemented after almost six years after the entry into force of the provision subject to interpretation, it is claimed to have impinged upon the "living law" (i.e. uniform and consolidated case law) established in relation to the calculation of seniority accrued in the field of local authority employment.

In the opinion of the private party, this cannot be set aside by relying on Constitutional Court judgment No. 234 of 2007 since in this decision it was in any case acknowledged that "the provision laid down by Article 8(2) of law No. 124 of 1999 constituted an exception from the general principles applicable at the time of its entry into force, regarding which the provision now challenged purports to restore the general rule". The Constitutional Court is therefore claimed to have acknowledged, in an "bitterly criticised" judgment, that the authentic interpretation provided by the finance law was of an innovative nature, whilst however going on to hold that the retroactive effect of the interpretation was constitutional on the grounds that it complied with the principle of the "actual level of salary" introduced with general effect by law No. 312 of 11 July 1980. This provision is stated not to have anything to do with the case involving the transfer of ATA staff, as a provision regulating only departmental mobility and which was not even in force at the time when law No. 124 of 1999 was enacted.

The private party goes on to point out that the situation by no means involves the requirement to regulate an organisational restructuring operation with a broad scope, not only because the transfer of staff dates back to 1 January 2000, but also because in this case there was not even any "reorganisation", since the janitors transferred to positions in the Ministry were already working in state schools and continued to carry out the same duties.

It is then asserted that also the supposed financial damage quantified by the *Avvocatura dello Stato* at several million Euros could not constitute "*impérieux motifs d'intérét général*", since the Strasbourg Court had clearly specified that a financial ground does not on its own permit the justification of a legislative initiative of this nature.

As regards the violation of Article 117(1) of the Constitution, it is acknowledged that the Constitutional Court has already had the opportunity to hold that "since the provisions of the European Convention for the Protection of Human Rights, as interpreted by the European Court of Human Rights, constitute one of the international law obligations to which the constitutional principle refers, they may take on the status of a source supplementing the principle of constitutionality laid down by Article 117(1) of the Constitution, resulting in the unconstitutionality of ordinary laws in contrast with it". However, as acknowledged by the Government in its report on the status of the implementation of judgments of the European Court of Human Rights against the Italian State for 2007, the case law of the Court has not definitively resolved the problem of the relationship between the provisions of the ECHR and constitutional law and ordinary legislation, since the position adopted by the Constitutional Court does not "appear to be consistent with that taken by the European Court itself in its judgments and the statements by its President".

It is moreover clear from the comparison between the two sets of contractual arrangements that, as a result of the incorporation into its own workforce of ATA staff previously employed by the local authorities, the Ministry was able to make considerable savings in the overall salary bill, due to the fact that it could avoid paying all ancillary individual remuneration provided for only under collective labour agreements for local authority employment and covered only in part by the higher basic rate of pay.

Finally, the private party argues that the question raises constitutional questions relating to the compatibility of Italian law with EC law, since the rights guaranteed under Article 6 of the European Convention have been "communitarised" by Article 6(2) of the Treaty on European Union (to which Article 46 of the same Treaty refers), as well as the Treaty of Lisbon, ratified by Italy by law No. 130 of 2 August 2008, making provision for the transposition of the ECHR as a fundamental source of Community law.

Besides, the European Court of Justice itself has ruled that the right to a fair trial, as inferred in particular from Article 6 ECHR, constitutes a fundamental right which the European Union respects as a general principle pursuant to Article 6(2) TEU. Accordingly the failure to rule the provision under examination unconstitutional is stated to amount to a violation of Article 6 of the Treaty and Article 6(1) of the Convention.

4. – The President of the Council of Ministers, represented and advised by the *Avvocatura Generale dello Stato*, intervened in the proceedings by writ filed on 5 January 2009 and requested that the question be ruled inadmissible or groundless.

Referring to the judgment handed down by the European Court of Human Rights in case No. 36813/1997 *Scordino v. Italy*, the state representative considers that the interpretation of that decision proposed in the referral order is contrived and recalls that in judgment No. 677 of 2008, the Court of Cassation ruled the same question manifestly groundless. In this last decision, the President of the Council of Ministers continues, the Court held that "it is clear that the national legislature remained within the limits permitted to it under the European Convention", since there were no grounds to consider that the national provision was exclusively intended to influence the resolution of disputes in progress; on the contrary, it was rather informed by the need to "harmonise employment situations originally treated differently but which require uniform regulation, once the convergence of employees within a single sector has been achieved, in accordance moreover with the principle of equal treatment of analogous situations in the regulation of public sector employment, where this principle is of significant theoretical and practical significance". In other words, according to the Court of Cassation, through the provision under examination Parliament intended to "regulate a broad-sweeping organisational

restructuring operation" which meant that "in this case, the compelling grounds of the general interest which, according to the European Court, also permit retroactive effects were clearly identifiable, especially since these effects would not entail the practically complete negation of rights already created but might imply a reformulation of the right in one of the forms which was also theoretically plausible under the previous law".

On the basis of these indications, the state representative specifies that, in the case under examination, the prohibition on interference by the legislature in the administration of justice with the purpose of influencing the ruling by the courts over a dispute which may be inferred from the so-called *Scordino* judgment cannot be considered to have been violated since the "primary purpose of the legislation was by no means […] that of influencing the outcome of a dispute, but rather that […] of regulating once and for all a complex matter involving the transfer of staff from the local authorities to the state, expressing the original and authentic intention of the legislature". This purpose was pursued – in the opinion of the *Avvocatura Generale dello Stato* – through an interpretative law specifying the real meaning to be attributed to Article 8(2) of law No. 124 of 1999, in line with the position expressed by the social partners in the agreement of 20 July 2000 as well as part of the case law. The state representative also emphasises that this case involves reasons relating to the general interest concerning the need to ensure that the transfer of ATA staff employed by the local authorities to state positions may permit the maintenance of the legal entitlements of staff within the ambit of the local authority structures, safeguarding the salary level of employees, whilst also occurring without additional burdens for the finances of the state. In fact, precisely in consideration of the different structure of remuneration – with pay under the original employer being calculated on the basis of the duties and tasks actually carried out, whilst under the latter employer being associated with seniority in the position – it was necessary to lay down precise regulations capable of guaranteeing equal treatment without imposing greater commitments on the state.

5. – Shortly before the public hearing, both the private party as well as the *Avvocatura dello Stato* filed written statements, respectively on 12 October 2009 and 13 October 2009,

confirming the conclusions already formulated, and reiterating the arguments provided in support of their claims.

6. – Analogous questions concerning the constitutionality of Article 1(218) of law No. 266 of 2005 were raised, by five different referral orders (Nos. 15, 16, 17, 18 and 19 of 2009), of identical content, made on 26 September 2008 by the Ancona Court of Appeal, for the discussion of which the Court met in chambers.

The referring court states, with regard to the facts of the case, that the *Tribunale di Ascoli Piceno* had rejected the claim made by certain local authority employees, who had been transferred to positions in the state administration pursuant to Article 8 of law No. 124 of 1999, seeking recognition of the right to acknowledgement of the length of service with the body of origin for the purposes of the financial and salary advancement within the schools sector, and payment of the financial differences concerned. The employees appealed against this judgment to the referring court, challenging the first instance court's interpretation of Article 8 as well as the trade union agreements and the ministerial decrees which had subsequently dealt with such matters, and requesting that their claims be accepted. The respondent administration invoked Article 1(218) of law No. 266 of 2005, providing an authentic interpretation of Article 8 of law No. 124 of 1999, and referred to Constitutional Court judgment No. 234 of 2007 which had rejected the objection that Article 1(218) was unconstitutional, whilst the appellants raised the question of the constitutionality of Article 1(218) of law No. 266 of 2005 due to violation of Article 6 ECHR.

When ruling on the question raised and establishing its relevance, the referring court observed that the doubt over the contested provision's compatibility with the Constitution results from the finding that Article 117(1) of the Constitution requires that, when enacting legislation, the state comply with the international law obligations taken on through signature and ratification of the ECHR, Article 6(1) of which establishes the right of every person to a fair trial before an independent and impartial tribunal, with the resulting obligation on the legislature not to interfere with the administration of justice in order to influence the outcome of a dispute or a category of disputes.

The referring court recalls that, whilst Article 6(1) ECHR, as interpreted by the European Court of Human Rights in case No. 36813/1997 *Scordino v. Italy*, in laying down the right to a fair trial on the one hand does not require that the provision to be applied in civil disputes be immune from change with regard to all proceedings in progress, on the other hand it obliges the state not to interfere through the enactment of legislation with the intention of achieving a given solution to disputes in progress, unless the retroactive initiative is justified by "compelling grounds of the general interest".

7. – The President of the Council of Ministers, represented and advised by the *Avvocatura Generale dello Stato*, also intervened in in these proceedings by writ filed on 23 February 2009, requesting that the question be ruled groundless

Recalling that a similar question was raised by the Court of Cassation, the state representative refers in full to the arguments made in the writ of intervention already filed in these proceedings, which are capable of rebutting the view that the question of constitutionality is well founded also in the case under examination. He goes on to add that the same statutory provision has already been subject to constitutional review on different but related grounds (judgment No. 234 of 2007 and order No. 400 of 2007) and that by judgment No. 677 of 2008, the Court of Cassation itself ruled the same question manifestly groundless. In this judgment, the President of the Council of Ministers reiterates, the Court held that there were no grounds to conclude that the national provision was exclusively intended to influence the outcome of disputes in progress, as it was rather justified by the need to harmonise employment situations originally treated differently but which require uniform regulation.

*Conclusions on points of law*

1. – Several referral orders have been placed before the Court for examination – the first discussed in the public hearing of 3 November 2009 and the others in chambers on 4 November – by which the Court of Cassation (referral order No. 400 of 2008) and the

Ancona Court of Appeal (referral orders, Nos. 15, 16, 17, 18 and 19 of 2009) raised questions concerning the constitutionality of Article 1(218) of law No. 266 of 23 December 2005 (Provisions governing the formation of the annual and long-term budget of the state - Finance Law 2006).

1.1. – Due to the identical nature of the questions raised the Court orders that the proceedings be joined for treatment in a single judgment.

2. – The contested provision interprets Article 8(2) of law No. 124 of 3 May 1999 (Urgent provisions concerning school staff) which, in regulating the transfer of local authority staff to state positions as administrative, technical and auxiliary (ATA) staff in the schools sector, provided for their engagement in the corresponding functional roles and job profiles, granting a right of option for the body for which they worked in the event that there were no equivalent roles and profiles. The provision had stipulated – and this is the disputed point – that the said staff be recognised "for legal and financial purposes the seniority accrued with the local authority body of origin". Subsequently, an agreement between the ARAN and the trade union organisations, transposed by one of the ministerial decrees implementing law No. 124 of 1999 (decree of the Minister for Public Education, acting together with the Ministers for the Interior, the Budget and the Civil Service of 5 April 2001), had taken into account for the purposes of the initial appointment the principle of the "actual level of salary" rather than that of the overall seniority accrued. A broad dispute had broken out on this issue and the Court of Cassation itself had on various occasions ruled that the right to recognition of seniority "for legal and financial purposes" conferred by law No. 124 of 1999 could not be reduced to the right to recognition of the "actual level of salary" by provisions of lower status.

It is within this specific legislative and case law context that Parliament sought to take action by enacting the interpretative provision contested before this Court. In fact, with the purpose of reiterating through ordinary legislation the arrangements already laid down by the ministerial decree on the basis of the position expressed by the trade union organisations, this provision stipulates that: "Article 8(2) of law No. 124 of 3 May 1999 shall be interpreted as providing that the local authority staff transferred to positions as state

administrative, technical and auxiliary (ATA) staff shall be appointed to the functional roles and job profiles of the corresponding state roles on the basis of the overall salary received at the time of transfer, with salary being set at the point on the salary scale at the amount equal to or immediately lower than the annual remuneration earned to 31 December 1999 comprised of the salary, individual seniority remuneration as well as any allowances, where due, provided for under the national collective labour agreements for local authority employment applicable at the time of appointment. The difference, if any, between the amount of salary on appointment and the annual salary earned on 31 December 1999 shall, as indicated above, be paid *ad personam* and shall be taken into account by way of a calculation that ensures at least equivalent salary treatment [*temporizzazione*] for the purposes of awarding the next salary increment. This shall be without prejudice to the enforcement of court rulings issued prior to the date of entry into force of this law".

3. – The Court of Cassation and the other referring court question the constitutionality of the provision of the interpretative law, due to violation of Article 117(1) of the Constitution, with reference to Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, ratified and implemented by law No. 848 of 4 August 1955 (below also ECHR or the European Convention).

This international law provision which enshrines the principle of the right to a fair trial before an independent and impartial tribunal, as interpreted by the European Court of Human Rights, is stated to require the legislature of a contracting state not to interfere with the administration of justice with the purpose of influencing an individual trial or a specific category of disputes through interpretative provisions which attribute to the provision interpreted a meaning beneficial for the state which is also a party to the proceedings, except where there are "compelling grounds of the general interest".

In the opinion of the referring courts, the national legislature issued an interpretative provision notwithstanding the existence of a significant dispute and a judgment of the Court of Cassation that was unfavourable for the State, thereby violating the principle of "equality of arms", since it did not rely on the requirement to "regulate an organisational restructuring operation" in the relevant sector of the public administration that was

sufficient to constitute those "compelling grounds of the general interest" which would make it possible to preclude any violation of the prohibition on interference.

4. – The questions are to be examined within the limits of the *thema decidendum* identified in the referral orders and, according to the case law of this Court, it is not possible to take into account the challenges raised only by the parties to the main proceedings (on all points, judgments No. 310 and No. 234 of 2006 and No. 349 of 2007).

Therefore, the questions raised by the private party which entered an appearance in the proceedings referred to by order No. 400 of 2008 with reference to Articles 10 and 111 of the Constitution, principles which were not invoked by the referring courts, are inadmissible.

5. – The question is groundless on the merits.

6. – Given the content of the challenges it is necessary as a preliminary matter to recall what, according to the case law of this Court, the role and efficacy of the provisions of the ECHR are as well as the role, respectively, of the national courts and the Strasbourg Court when interpreting and applying the European Convention.

This question has recently been discussed and ruled on in judgments No. 348 and No. 349 of 2007, which held that Article 117(1) of the Constitution, and in particular the expression "international law obligations" contained in it refer to international treaty rules which may also be different from those covered by Articles 10 and 11 of the Constitution. Interpreted in this manner, Article 117(1) of the Constitution filled the gap which previously existed *vis-a-vis* provisions which guarantee compliance with international treaty law on constitutional level. This means that any national provision which contrasts with a treaty provision, and in particular with the ECHR, will thereby violate Article 117(1) of the Constitution.

This Court moreover held in the aforementioned judgments that it is a matter for the national court, as the ordinary court applying the Convention, to apply the relevant provisions, as interpreted by the Strasbourg Court, which has been expressly charged with this task by the contracting states.

In the event that an internal provision is found to violate a provision of the European Convention, the national ordinary court must therefore interpret the former in a manner compatible with the Convention, insofar as permitted by the text of the provisions under comparison and using all normal instruments of legal interpretation. It goes without saying that the assessment of the European case law established regarding the relevant Convention provision must be carried out in a manner that respects the essence of that case law, according to a criterion already adopted both by the ordinary courts and the European Court (Court of Cassation, judgment No. 10415 of 20 May 2009; European Court of Human Rights, judgment of 31 March 2009 in *Simaldone v. Italy*, application No. 22644/03).

Only when it considers that it is not possible to resolve the contrast through interpretation must the ordinary courts – which cannot proceed to apply the ECHR provision (at present, in contrast to Community law which is endowed with direct effect) in place of the contrasting internal provision, and no less may apply an internal provision that it has found to breach the ECHR, and therefore the Constitution – raise a question of constitutionality (also judgment No. 239 of 2009), with reference to the principle laid down by Article 117(1) of the Constitution, or also Article 10(1) of the Constitution where it concerns a treaty provision recognising a generally recognised rule of international law. The clause setting out the requirement to respect the requirements imposed by international law obligations, laid down by Article 117(1) of the Constitution by way of a dynamic reference under internal law to the international treaty norms that are from time to time relevant, in fact requires constitutional review where the ordinary court considers that the instrument of interpretation is not sufficient in order to remove the contrast.

After a question of constitutionality has been raised, it is a matter for this Court first and foremost to verify whether the contrast exists and whether it cannot actually be resolved through a plausible interpretation, including a systematic interpretation, of the internal provision in the light of the Convention provision, as interpreted by the Strasbourg Court. The Court must also obviously verify whether the contrast was caused by a level of protection under the national provision that is lower than that guaranteed under the ECHR,

since the opposite situation is considered to be expressly compatible with the European Convention under Article 53.

Where the provisions contrast with one another, the Court must declare the internal provision unconstitutional due to violation of Article 117(1) of the Constitution, with reference to the ECHR provision invoked.

This Court has also asserted, and here intends to reiterate it, that it is precluded from reviewing the interpretation of the European Convention provided by the Strasbourg Court, upon which this role has been conferred by our country without reservations; however, it is indeed a matter for the Constitutional Court to verify whether or not the ECHR provision, as interpreted by the Strasbourg Court, conflicts with other reference provisions of our Constitution. Where this is the case, although it is exceptional, this precludes the applicability of the reference to the international law rule, and therefore its capacity to supplement the principle laid down by Article 117(1) of the Constitution; moreover, since this evidently cannot impinge upon its constitutionality, it entails – as things stand – the unconstitutionality, *mutatis mutandis*, of the implementing law (judgments No. 348 and No. 349 of 2007).

7. – Having made this premise, it is necessary to identify the nature, scope and objective pursued by the contested provision, taking into account the fact that the legislation governing the transfer of ATA staff laid down by law No. 124 of 1999 and the rule interpreting the provision relevant here have already been subject to review by this Court, albeit with reference to constitutional principles other than Article 117(1), which has been relied on here. Judgment No. 234 of 2007 and orders No. 400 of 2007 and No. 212 of 2008 respectively ruled groundless and manifestly groundless the questions concerning the constitutionality of the aforementioned interpretative provision raised with reference to Articles 3, 24, 36, 42, 97, 101, 102, 103, 104 and 113 of the Constitution.

Insofar as is of interest here, the legislation laid down by Article 8(2) of law No. 124 of 1999 was based on the need to harmonise under transition legislation governing the first appointment "the transfer of the staff concerned from a system of remuneration governed by established arrangements and another system of remuneration also governed by

established arrangements, safeguarding specifically with regard to the economic aspect the salary levels accrued and granting the interested parties, starting from the new appointment, the rights guaranteed to state ATA staff. All had has the goal of harmonising, at least in broad terms, the salary system for all ATA employees, irrespective of their respective origins and in any case safeguarding the right of option for the body for which they worked in the event that there was no correspondence between roles and job profiles" (judgment No. 234 of 2007).

In this context, according to this Court, the salary level in state positions of ATA staff determined only from the so-called "actual level of salary" constituted one of the possible and plausible various ways of reading the provision, endorsed amongst other things in the agreements signed between the *Agenzia per la rappresentanza negoziale delle pubbliche amministrazioni* (ARAN) and the representatives of employee organisations and confederations. This is in particular the case, considering that this principle was already introduced, with general applicability, by law No. 312 of 11 July 1980 laying down a "New remunerative and functional framework for civil and military state employees".

The judgments referred to above held that there was no legitimate expectation to remuneration based on the evaluation, for legal and economic purposes, of the entire period of seniority accrued with the bodies of origin, in consideration both of the type of interpretation adopted in the collective bargaining – practically at the same time as the entry into force of the law cited – as well as the express reference to the principle of public expenditure neutrality for the first appointment of staff originating from the local authorities.

This Court therefore held, as it had also done in more distant precedents (judgments No. 618 of 1987 and No. 296 of 1984), that any transitional regulation which was not limited "to the conservation of the previous remuneration 'for its natural duration' or the pure and simple unlimited retroactive application of the new conditions" could not be considered unconstitutional: "these solutions were certainly possible, but they were not required under the constitutional principle at issue".

Finally, judgment No. 234 of 2007 also held that the interpretative provision in dispute could not result in a difference in treatment between those who had already obtained a favourable judgment with regard to the applicable legislation at the time when the provision entered into force and those who were only awaiting the passing of a judgment over their claim.

8. – It is now necessary to verify in what way the European Court has applied Article 6 of the ECHR with reference to national interpretative provisions concerning legislation at issue in proceedings to which the state is a party.

The referring courts recall, amongst other things, the decision in the case *Scanner de L'Ouest Lyonnais and others v. France* of 21 June 2007. In this case the European Court restated its view that, whilst as a matter of principle the legislature is not prevented from enacting new retroactive legislation impinging in private law matters upon rights which arose under the the terms of previously applicable laws, the principle of the rule of law and the notion of a fair trial enshrined in Article 6 ECHR prohibit the legislature from interfering in the administration of justice aimed at influencing the outcome of a dispute, other than for compelling grounds of the general interest ("*impérieux motifs d'intérét général*"). The European Court also went on to recall that the requirement of equality of arms entails the obligation to give the parties a reasonable possibility of pursuing their own legal actions without being placed in conditions of substantial disadvantage compared to their opponents.

This view, which has precedents in the cases *Stran Greek Refineries and Stratis Andreadis v. Greece* of 9 December 1994 and *Zielinski and others v. France* of 28 October 1999, censures the practice of supervening legislative initiatives which retroactively amend in a manner detrimental to the interested parties statutory provisions conferring rights, the violation of which gave rise to legal actions that were still pending at the time of the amendment.

This practice may be liable to result in a violation of Article 6 ECHR, amounting to an undue interference by the legislature in the administration of justice. The case *Zielinski and others v. France* in particular (as previously in the case *Papageorgiou v. Greece*, judgment

of 22 October 1997) reasserted the principle which precludes all undue interference by the legislature, unless there are "compelling grounds of the general interest". However, the European Court specified that there were no such grounds in the case before it, since the mere financial risk reported by the Government and expressly indicated by the Constitutional Court did not in itself permit the legislature to act in place of the social partners to the collective agreement in dispute. Therefore, having verified the existence of case law favourable to the applicants, the Court struck down the interpretative rule subsequently enacted with retroactive effect, notwithstanding the collective agreements concluded with the contrary effect.

Nevertheless, it is important to point out that the Strasbourg Court did not intend to assert an absolute prohibition on interference by the legislature, since on various occasions it has ruled special retroactive initiatives by national legislatures not to be contrary to Article 6 of the European Convention.

The legitimacy of such initiatives was recognised in the first place where there were historical reasons, such as in the case of German reunification (*Forrer-Niedenthal v. Germany*, judgment of 20 February 2003).

In this case, involving a provision which upheld with retroactive effect certain transfers of property without compensation to the "people's property" of the former GDR, the European Court ruled that the initiative was compatible with the Convention; this was not only due to the "historical" nature of the new reorganisation of property disputes resulting from reunification, but also in consideration of the actual existence of a system which had guaranteed the parties contesting the procedures for the rearrangement access to and the celebration of a fair and guaranteed trial. In particular, following a complaint that the provision was unconstitutional, the German Constitutional Court had ruled that the provision concerned was compatible with the Basic Law. This specific occurrence, which bears an undeniable similarity to the case currently under examination, was regarded as a "key point of the dispute". The European Court recognised that the applicant had had access to independent courts which had dealt with the various stages of the dispute, and above all to the Constitutional Court, and thus observed that "overall", the proceedings

concerned had been characterised by fairness, in accordance with the requirements of Article 6(1) ECHR.

In other cases, when defining and verifying whether of not there were compelling grounds of the general interest, the Strasbourg Court upheld legislation enacted which, in order to remedy a technical imperfection in the law being, had sought to re-establish an interpretation closer to the original intention of the legislature by retroactive legislation.

The first such case is the judgment of 23 October 1997 in the case *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. United Kingdom* (applied *mutatis mutandis* also in the judgment *Forrer-Niedenthal v. Germany* cited above), in which it was held that the adoption of an interpretative provision can be justified when the state, acting according to the requirements relating to the general interest in securing the payment of taxes, sought to remedy the risk of the original intention of the legislature from being, in this case, subverted by provisions set out in circulars.

The judgment of 27 May 2004 in the case *Ogis-institut Stanislas, Ogec St. Pie X and Blanche De Castille and others v. France* moved along similar lines, although the circumstances of this case were not identical to those of the *Zielinski* case of 1999. The judgment asserted that the legislation enacted by Parliament was not intended to support the position adopted by the administration before the courts, but to resolve a technical legal error in order to guarantee compliance with the original intention of Parliament and out of respect for the principle of equalisation.

This case was therefore treated as equivalent to *National & Provincial Building Society* from 1997, in which the legislative initiative was justified by the goal of "restoring Parliament's original intention". The Court held that the goal of the legislative initiative was therefore that of guaranteeing compliance with Parliament's original intention in support of the principle of equalisation, adding that the applicants could not validly rely on a "right" that was technically mistaken or inadequate, and thus object to Parliament's initiative seeking to clarify the prerequisites and limits contemplated under the interpretative law.

9. – In consideration of the principles laid down by the European Court, as well as the analysis of the scope and objectives of the provision challenged in this case already carried out by this Court in judgment No. 234 of 2007, the contrast objected to by the Court of Cassation and the other referring courts does not subsist.

The Court in fact finds that there is no principle by which the necessary impact of retroactive legislation on proceedings in progress automatically violates the European Convention, as has moreover been recognised by part of the case law of the Court of Cassation (judgment No. 677 of 16 January 2008). It is clear from a comparison between the principles expressed by the European Court and the conditions and goals of Article 1(218) of law No. 266 of 2005 that the national legislature did not exceed the limits set by the European Convention. The legislation under examination not only does not result in a *reformatio in malam partem* of previously acquired rights, since the salary levels already reached are objectively safeguarded, but proves to be consistent with the need to harmonise employment situations originally treated differently, in accordance with the principle of the equal treatment of analogous situations under legislation governing public sector employment.

It must therefore be reiterated that law No. 124 of 1999 sought to regulate a particular organisational restructuring operation concerning a large number of individuals. The contested statutory provision contributed to satisfying the unquestionable general interest in rendering the salary system broadly homogeneous for all state employees, irrespective of their individual origins, preventing any different interpretation from resulting not only in a rejection of the original principle of "public expenditure neutrality", but also and above all an arrangement which risked – moreover unreasonably – creating a potential violation of the principle of equal treatment which the public administrations must guarantee. In this way, this case involves more than one of those "compelling grounds of the general interest" which, under the terms of Article 6 of the European Convention and the limits highlighted by the Strasbourg Court, permit retroactive interpretative legislation.

In the first place, it is clear from the contested provision that there was a requirement to "re-establish" one of the possible elements of Parliament's original intention. This element

had resulted in the interpretation of the social partners that was compatible with it in the agreements concluded for the first appointment (in contrast to what occurred in the *Zielinski* case), which was subsequently incorporated into the implementing legislation from that stage onwards, albeit in the form of a ministerial decree which was then found to be inadequate in part of the case law.

Secondly, it may be recalled that the legislation did not entirely eliminate the rights created and acquired on the basis of the interpreted law, since the rights to more favourable conditions acquired after appointment in the new role remained untouched, through the maintenance of an *ad personam* salary element.

Moreover, above all the compliance of this interpretation with the goal of guaranteeing a general equalisation of all workers in the schools sector is evident, as already held by this Court in judgment No. 234 of 2007 referred to at several points, since it guarantees that all employees in that position will be granted the same salary progression, irrespective of their respective origins.

Therefore, the existence of a technical "imperfection" within the original legislation, consisting in the view that the setting of a criterion that complied with the principle of public expenditure neutrality could in any case be delegated to the discretion of the parties and to regulatory provisions, pursuant to Art. 2(2) of legislative decree No. 165 of 30 March 2001 (General provisions on the organisation of public sector employment) is of significance, an authorisation which was then ruled non-existent by the Court of Cassation.

Not only, but as confirmation of the unresolved debate within the case law that was found to exist, in 2005 no "living law" [or settled case law] could be considered to have been established on this point, since the question saw on the one side certain judgments of the Court of Cassation adopted by the ordinary divisions which had conceptualised the situation in terms of the requirement for appointments that complied with the principles laid down by Art. 2112 of the Civil Code, as against other judgments which resolved the question with reference to the legislative efficacy (or not) of the agreement of 20 July 2000, implemented in the subsequent ministerial decree of 5 April 2001, cited above.

Finally, and fully consistently with the European jurisprudence referred to above (*Forrer-Niedenthal v. Germany*), the fact that the proceedings relating to the issue of the transfer of ATA staff were covered by the guarantee of a fair trial – including through the reference to the Constitutional Court which was concluded with a ruling that the question was groundless with regard to constitutional principles consistent with the Convention provision which, interpreted in this manner, was fully compatible with the Italian constitutional framework – is decisive.

Ultimately, adopting the view of the legislation already adopted by this Court on other occasions, the contested interpretative provision is clearly compatible with the case law of the Strasbourg Court that is relevant here, in particular from the cases *Forrer-Niedenthal v. Germany*, *Ogis-institut Stanislas, Ogec St. Pie X and Blanche De Castille and others v. France* and *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. United Kingdom*.

In fact, the retroactive legislation concerned does not display the factors highlighted by the European Court when ruling the interpretative provisions admissible, having taken account of the fact that the principles in this area referred to in the case law of the latter amount to an expression of the same principles of equality – in particular with regard to the issue of the equality of the parties before the court, reasonableness, protection of legitimate expectations and legal certainty – which this Court held had not been violated by the provision contested here.

Moreover, to uphold the "compelling grounds of the general interest" which suggest interpretative initiatives to the national legislature in the situations at issue here cannot fail to leave to the individual contracting states at least part of the task and duty of identifying them, as the body in the best position to carry out this task, since moreover the case concerns interests at the root of the exercise of legislative powers. In fact, the decisions in this field imply a systematic evaluation of constitutional, political, economic, administrative and social issues which the European Convention leaves to the competence of the contracting states, as is for example recognised through the doctrine of the margin of appreciation for the elaboration of policies relating to fiscal matters, subject to the

requirement of reasonableness of the legislative solutions adopted (as in the judgment *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. United Kingdom* of 23 October 1997).

10.– In conclusion, there is no contrast as alleged between the contested provision and Article 6 ECHR, and thus no violation Article 117(1) of the Constitution.

ON THOSE GROUNDS

## THE CONSTITUTIONAL COURT

hereby,

*rules* that the questions concerning the constitutionality of Article 1(218) of law No. 266 of 23 December 2005 (Provisions governing the formation of the annual and long-term budget of the state - Finance Law 2006) raised, with reference to Article 117(1) of the Constitution, and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, implemented by law No. 848 of 4 August 1955, by the Court of Cassation and the Ancona Court of Appeal by the referral orders mentioned in the headnote, are groundless.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 16 November 2009.

Signed:

Francesco AMIRANTE, President

Giuseppe TESAURO, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 26 November 2009.

The Director of the Registry

Signed: DI PAOLA