JUDGMENT NO. 230 YEAR 2012

In this case the Court heard a reference from a lower court questioning the constitutionality of a provision of the Code of Criminal Procedure which did not allow for the quashing of final sentences where the relevant conduct had been de facto decriminalised through a change in interpretation by the courts. Despite the various arguments by the referring court based on the ECHR, the Court refuted each individual argument based on the ECHR and upheld the legislation as constitutional. The Court held, inter alia, that the doctrine of stare decisis does not form part of Italian law, and that it would moreover be contradictory to subject the enforcement courts to the binding authority of the Court of Cassation, whilst leaving the trial courts free to disregard the latter court's judgments where justified by appropriate reasons.

(omitted)

THE CONSTITUTIONAL COURT

(omitted)

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 673 of the Code of Criminal Procedure, initiated by the *Tribunale di Torino* in the enforcement proceedings pending against D.M. by referral order filed on 21 July 2011, registered as no. 3 in the Register of Orders 2012 and published in the Official Journal of the Republic no. 5, first special series 2012.

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

Having heard the Judge Rapporteur Giuseppe Frigo in chambers on 23 May 2012.

(omitted)

Conclusions on points of law

1.– The *Tribunale di Torino* questions the constitutionality of Article 673 of the Code of Criminal Procedure insofar as it does not include as grounds for the quashing of a conviction (and of a summary conviction and a conviction imposed upon request by the parties) also a "change in case law" resulting from a decision of the Joint Divisions of the Court of Cassation, according to which the relevant conduct is no longer regarded under law as an offence.

In the opinion of the lower court, the contested provision violates Article 117(1) of the Constitution in this respect in that it breaches Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: "ECHR"), a provision which – according to its interpretation by the European Court of Human Rights – on the one hand implicitly enshrines also the principle of the retroactivity of more favourable criminal law provisions, whilst on the other hand drawing into the concept of "legality" under criminal law not only legislation but also case law, consequently also potentially violating also Articles 5 and 6 ECHR, which protect respectively the right to liberty and security and the right to a fair trial.

The contested provision is also claimed to violate Article 3 of the Constitution. In view of the explicit role vested by ordinary legislation in the Court of Cassation as guarantor of the uniform interpretation of the law (Article 65 of Royal Decree no. 12 of 30 January 1941 laying down the "Regulation of the Judicial System") and specifically that performed by the Joint Divisions of the Court (Articles 610(1) and 618(1) of the Code of Criminal Procedure; Article 172 of the provisions implementing the Code of

Criminal Procedure), the choice to continue to punish the author of an offence which, according to a "subsequent interpretation of the law ['living law']" laid down by a decision of the Joint Divisions, is no longer regarded by law as an offence, would be manifestly unreasonable and breach the principle of equality. In this way, any persons who have committed identical offences would risk being treated in a radically different manner on purely chance grounds, such as the simple order in which trials are scheduled.

The contested legislative solution is also alleged to breach "the principle of (the general) retroactivity of more favourable criminal law", which may be inferred from Articles 3 and 25(2) of the Constitution, whilst also violating Article 13 of the Constitution by granting preference to reasons pertaining to the "protection of the legal order" – such as legal certainty and the stability of decisions – over "precise requirements of individual freedom".

Finally, Article 27(3) of the Constitution is claimed to have been violated since, in the hypothesis under consideration, enforcement of the penalty would have no purpose: none of the retributive function, the function of general or special prevention or the goal of re-educating the convicted individual could be meaningful in relation to the commission of an act which, in the light of supervening case law, must be deemed to be irrelevant under the criminal law.

2.– It should be pointed out as a preliminary matter that the interpretative problem arising in the proceedings within which the question of constitutionality was referred concerns the designation of the individuals who fall within the scope of the infraction of the failure to present identity documents provided for under Article 6(3) of Italian Legislative Decree no. 286 of 25 July 1998 (Consolidated text of legislative provisions regulating immigration and rules governing the status of foreigners).

Under the original version of the provision, the Joint Divisions of the Court of Cassation – settling a dispute within the case law which had emerged in relation to this issue – held that the offence could also be committed by

foreign nationals illegally present within the territory of the State. In fact, the provision punished with the joint penalties of arrest and a fine any foreign national who "without justified reason" failed to present either of two classes of identity document upon request by public security officers: a passport or another identification document "or" a residence permit or card. The fact that, in the light of that legislative provision, presentation of any of the documents in question would be sufficient in order to avoid the offence demonstrated – according to the Joint Divisions – that the offence had been created exclusively with the intention of enabling foreign nationals to be identified with certainty, and not also of establishing that they are lawfully present within the country: within that perspective, the provision also appeared to cover those unlawfully present in the country, who were not prevented from presenting their passport or another identification document even though, owing to their illegal status, they did not hold a residence permit or card (Court of Cassation, Joint Divisions, judgment no. 45801 of 29 October 2003-27 November 2003).

However, the subsequent redrafting of the provision establishing the criminal offence by Law no. 94 of 15 July 2009 (Provisions on public security) threw up immediate doubts as to the ongoing validity of the conclusion referred to above: in several decisions adopted by the individual divisions (and in particular by the First Division), the Court of Cassation initially resolved this problem in the affirmative, on the grounds that the amendments made to the description of the incriminating conduct were "merely formal" in nature (Court of Cassation, First Division, judgment no. 37060 of 30 September 2010-18 October 2010; Court of Cassation, First Division, judgment no. 6343 of 20 January 2010-16 February 2010; Court of Cassation, First Division, judgment no. 44157 of 23 September 2009-18 November 2009).

However, the Joint Divisions, to which the First Division had referred the relative question of law by an order of 11 November 2010 “in order to avoid a contrast within the case law with the previous rulings of the same division”, reached the opposite conclusion. In fact, the Joint Divisions observed that, within the new description of the offence (which was now construed as the failure to comply with an order), the replacement of the exclusive “or” with the inclusive “and”, as regards the two categories of documents to be presented, makes it clear that, in order to comply with the rule, it is necessary that both identity documents and a residence document be presented: the rationale of the provision had thus changed, as it no longer regarded the identification of the foreign national, but rather a verification of his lawful presence within the country. When framed in these terms, the criminal offence would no longer apply to those unlawfully present who, precisely by virtue of that status, cannot hold a residence permit: this conclusion was also supported by the arguments based on a systematic approach taking account of further amendments to the consolidated text on immigration introduced also by Law no. 94 of 2009. Consequently, the 2009 legislative amendment resulted in the abolition, pursuant to Article 2(2) of the Criminal Code, of the pre-existing criminal offence insofar as it was directed against foreign nationals illegally present in the country (Court of Cassation, Joint Divisions, judgment no. 16453 of 24 February 2011-27 April 2011).

3.– In view of the above, the objection that the question is inadmissible on the grounds that it lacks relevance – raised by the State Counsel on the grounds that the present case involves the abolition of a criminal offence as a result of the enactment of subsequent legislation, which already falls within the scope of Article 673 of the Code of Criminal Procedure (the amendment of Article 6(3) of Legislative Decree no. 286 of 1998 by Law no. 94 of 2009) – is groundless.

The lower court has in actual fact been requested to rule on the petition for partial annulment of a conviction imposed upon request by the parties, filed by the public prosecutor on the basis of the principle laid down by the Joint Divisions in judgment no. 16453 of 2011. As is moreover stressed in the referral order, the offence at issue in the judgment, annulment of which is sought, was committed after the entry into force of Law no. 94 of 2009, and hence at a time when the criminal offence laid down by Article 6(3) of Legislative Decree no. 286 of 1998 was already formulated in its present terms: this means that the move from the old to the new text of the said norm cannot be considered as a mechanism liable to engage the principle laid down in Article 2(2) of the Code of Criminal Procedure, with which the procedural rule laid down in Article 673 of the Code of Criminal Procedure is related in this respect ("no person may be punished for conduct which, according to legislation subsequently enacted" – i.e. at the time the offence was committed – "is no longer a criminal offence and, if a conviction has been imposed, its enforcement and criminal effects shall be cancelled"). From the perspective of the lower court, the decisive problem is solely that of the manner in which the provision establishing the criminal offence in force at the time the offence was committed, and which is still in force, must be interpreted: that is, whether or not it is directed at foreign nationals who are illegally present in the country, irrespective of the arrangements applicable prior to the 2009 amendment.

It follows that the argument according to which the lower court considers the question raised to be relevant cannot be regarded as implausible: namely that the request for annulment brought before it is based not on the subsequent enactment of legislation but on the subsequent change in the interpretation by the courts of the same legal provision (the broader interpretation, as regards those liable to commit the offence, of the amended Article 6(3) of Legislative Decree no. 286 of 1998, initially adopted by the individual divisions of the

Court of Cassation – with which the judgment to be revoked complies – and the narrower interpretation, subsequently endorsed by the Joint Divisions).

4.– Furthermore, the question cannot be deemed to be inadmissible on the basis that the lower court did not take care to ascertain whether – once the applicability of the Article 6(3) of Legislative Decree no. 286 of 1998 to foreign nationals who are illegally present in the country had been precluded – the failure by such individuals to comply with an order to present identification documents should, rather than remaining criminally insignificant, fall under the more general criminal offence, which is still present within the legal order: in the present case, that resulting from the combined provisions of Article 294 of Royal Decree no. 635 of 6 May 1940 (Approval of the regulations on the implementation of consolidated text no. 773 of 18 June 1931 of the laws on public security) – according to which "an identity card or equivalent documents must be presented whenever requested by public security officers" – and Article 221 of Royal Decree no. 773 of 18 June 1931 (Approval of the consolidated text of the laws on public security), which punishes the violation of the above rules with the alternative penalties of arrest or a fine. Were this hypothesis to be valid, it would effectively negate the prerequisite for the applicability of Article 673 of the Code of Criminal Procedure, as the situation would involve not the abolition of a criminal offence, but rather an "*abrogatio sine abolitione*" by way of the subsequent enactment of legislative amendments, regarding which the application of the more favourable provision (such as that laid down by the legislation on public security referred to above) would not apply to final judgments under Article 2(4) of the Code of Criminal Procedure.

Moreover, the consideration that, by the question raised, the lower court seeks to extend the quashing mechanism governed by Article 673 of the Code of Criminal Procedure to changes in case law resulting from a decision of the Joint Divisions of the Court of Cassation according to which the conduct

which has already been successfully prosecuted is no longer regarded by the law as a criminal offence is all-embracing in this respect: and furthermore – as will be clarified below – this does not leave any potential scope for deviation by the courts when implementing the interpretative solution adopted by the body responsible for the uniform interpretation of the law.

In the present case, judgment no. 16543 of 2011 of the Joint Divisions – whilst not engaging with the problem highlighted above – nonetheless unequivocally asserted that the offence of the failure by a foreign national unlawfully present within the country to present documents has been abolished: in view of the manner in which the remedy sought has been framed, this is hence sufficient in order to render inoperative the question raised.

5.– Moreover, the interpretative premise on which the question of constitutionality is based, consisting in the view that the "change in case law" does not fall within the scope of the institution of the "quashing of the conviction due to the abolition of the offence", as currently provided for under Article 673 of the Code of Criminal Procedure, also appears to be correct – and in any case to comply with the current interpretation of the contested provision by the Court of Cassation.

As a consequence of the substantive provisions laid down by Article 2(2) of the Criminal Code and Article 30(4) of Law no. 87 of 11 March 1953 (Provisions on the establishment and functioning of the Constitutional Court), although through a provision which alters the manner of intervention – applying the "abrogatory" effect of the abolition of the criminal offence direct to the judgment of the trial court, rather than to its enforcement (judgment no. 96 of 1996) – Article 673(1) of the Code of Criminal Procedure in fact provides that, in the event that the provision establishing the criminal offence is repealed or ruled unconstitutional, the judge in enforcement proceedings shall quash the sentence or summary conviction (a formula which, according

to an interpretation which is now settled, also embraces a conviction imposed upon request by the parties), ruling that the conduct is no longer regarded by the law as a criminal offence and adopting the resulting measures. The contested provision thus takes two phenomena into consideration, both of which fall *lato sensu* under the general principle of the "abolition of the offence" referred to in the headnote: as a result of new legislation or following a ruling by this Court that it is unconstitutional, the provision establishing the criminal offence in relation to which sentence was passed, which has now become final, will in fact be expunged from the legal order.

The case law of the Court of Cassation has held that the rule also extends to cases in which a judgment is issued by the Court of Justice of the European Union holding that the national provision of criminal law is incompatible with EU law with direct effect in the Member States, given the substantive equivalence of such a ruling – which prevents the national courts from applying the provision concerned – with subsequently enacted legislation abolishing the offence (in the case law of this Court, on the capacity of the judgments of the Court of Justice to constitute constitute *ius superveniens*, see *inter alia* orders no. 311 of 2011, no. 241 of 2005 and no. 125 of 2004).

The case law of the Court of Cassation has conversely held that aspects relating to the simple interpretative dynamics of the provision establishing a criminal offence, such as a change in case law or the resolution of contrasting positions within the case law, cannot fall within the scope of Article 673 of the Code of Criminal Procedure, even if they result from decisions of the Joint Divisions of the Court of Cassation. It has in fact been pointed out that a case law ruling – as authoritative as it may be – does not have the same effect as the solutions provided for under the contested provision, given that the decision is not binding on courts addressing analogous circumstances: this means that a change in the case law cannot be considered in the same manner as a *ius novum*.

6.– However, the lower court considers that constitutional law does not require these arrangements to be altered, and specifically asks that this Court add to the range of grounds for quashing also a "change in case law – implemented by decision of the Joint Divisions of the Court of Cassation – according to which the conduct in question is no longer regarded by the criminal law as an offence".

7.– Whilst it is admissible for the reasons set out above, the question is however groundless on the merits.

The first fundamental objection raised by the referring court – asserting a breach of Article 117(1) of the Constitution due to a violation of Article 7 ECHR, as interpreted by the Strasbourg Court – is rooted in the position of this Court, which has been settled since judgments no. 348 and no. 349 of 2007, that the provisions of the ECHR, as interpreted by the European Court of Human Rights, which was specifically established in order to interpret and apply them, supplement as "interposed norms" the constitutional principle referred to in that they require national legislation to comply with obligations resulting from international law (see *inter alia*, most recently, judgments no. 78 of 2012, no. 303, no. 236 and no. 113 of 2011): this applies however subject to the proviso that the convention provision, as interpreted by the European Court – which nonetheless operates on a sub-constitutional level – does not conflict with other reference provisions of the Italian Constitution (judgments no. 303, no. 236 and no. 113 of 2011, no. 93 of 2010, no. 317 and no. 311 of 2009), and without prejudice moreover to the "margin of appreciation and adaptation" vested in this Court which – provided that it comply with the "essence" of the Strasbourg case law – nonetheless enables it to take account of the special characteristics of the legal order into which the interpretation of the European Court is to be integrated (judgments no. 303 and no. 236 of 2011, no. 311 of 2009).

In the present case, the referring court identifies the "interposed ECHR norm" – with which the contested national provision is alleged to contrast in a manner that cannot be resolved through interpretation – combining two distinct assertions of the European Court relating to Article 7(1) ECHR (i.e. which provides that "No one shall be held guilty of any criminal offence on accountof any act or omission which did not constitute a criminal offenceunder national or international law at the time when it was committed", and that "Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed").

The former assertion – which expresses a change in approach adopted only recently within the case law of the Strasbourg Court – is that by which Article 7(1), despite its literal provision (which refers only to the prohibition on the retroactive application of less favourable criminal law), implicitly enshrines – alongside the more general principle of legality in relation to offences and penalties (nullum crimen nulla poena sine lege), along with the corollaries of the requirement of that punishment be determinable and the prohibition on analogy *in malam partem* – also the principle of the retroactivity of more favourable criminal law (European Court of Human Rights, Grand Chamber, judgment of 17 September 2009, Scoppola v. Italy; followed by the judgments of 27 April 2010, Morabito v. Italy and of 7 June 2011, Agrati and others v. Italy).

The other assertion – which on the other hand reflects a position of the European Court which has been settled for some time – is that the concept of "law" used in the Convention must be deemed to include both legislation and case law. Even though this "substantive" rather than "formal" reading of the concept of "criminal legality" was stimulated by the need for states parties to take account of different legal systems – given that the reference solely to parliamentary legislation would have limited protection under the Convention in common law systems – it has also been endorsed by the European Court in

relation to civil law systems, in the light of the significant contribution to the determination of the precise scope and evolution of the criminal law which is provided by case law also in such systems (see *inter alia*, judgments of 8 December 2009, Previti v. Italy; Grand Chamber, 17 September 2009, Scoppola v. Italy; 20 January 2009, Sud Fondi s.r.l. and others v. Italy; Grand Chamber, 24 April 1990, Kruslin v. France).

Moreover, precisely this latter assertion demonstrates that the Convention principle of criminal legality, as interpreted by the Strasbourg Court, is less far-reaching than that endorsed within the Italian Constitution (and in general within continental legal systems). In fact, it does not embrace the principle – which is by contrast of central relevance under Italian law – of the principle of amendment exclusively by primary legislation, as incorporated into Article 25(2) of the Constitution; as has been repeatedly asserted by this Court, this principle vests legislative power over the criminal law – on the grounds that it impinges upon the fundamental rights of the individual, and specifically personal freedom – in the institution constituting the highest expression of political representation, i.e. Parliament which is elected by universal suffrage by the entire nation (see judgments no. 394 of 2006 and no. 487 of 1989), and which moreover adopts its decisions upon conclusion of a process – the legislative process – which involves debate from the outset between all political forces, including the minority, and, albeit indirectly, with public opinion.

However, leaving aside the gaps in protection referred to – which moreover precludes the mechanical transposition into national law of the equal status of written law and judge-made law – the fact that the European Court has to date not once asserted the corollary that the lower court seeks to infer from the combination of the two affirmations referred to above proves to be decisive for our present purposes: namely that, pursuant to Article 7(1) ECHR, a change in case law to the benefit of the guilty party will require final

convictions that contrast with the new approach to be quashed (a principle which – if valid – should moreover operate not only in relation to changes in case law which decriminalise the offence – as the referring court purports to conclude – but also those which are limited to mitigating punishment, by for instance declining to invoke aggravating circumstances or classifying the conduct as a less serious offence).

First and foremost, the Strasbourg Court has not to date expressly asserted the principle of the retroactivity of more favourable criminal law to changes in case law. The European Court has only considered changes in case law – having also considered such changes from the general perspective of a verification of the prerequisites of the "accessibility" and "predictability" of the criminal law, which have been held to be inherent within the wording of Article 7(1) ECHR – with reference to the different principle of the non-retroactivity of less favourable criminal law; specifically, it has held that the application within case law of a broad interpretation of the scope of a criminal offence to conduct committed previously, where the new interpretation does not constitute a reasonably foreseeable evolution of prior case law, runs contrary to the Convention (for opposing solutions based on that general rule, see European Court of Human Rights, the judgments of 10 October 2006, Pessino v. France and of 22 November 1995, S.W. v. United Kingdom, and also more recently the judgment of 10 July 2012, Del Rio Prada v. Spain, subject to the limits under which the interpretative principles are applicable to Italian law).

Moreover – contrary to the conclusion which the lower court purports to reach – it must be excluded that a "Convention" requirement mandating the quashing, in the name of the principle of the non-retroactivity of more favourable criminal law, of final sentences that are not aligned with the new case law which has been altered to the benefit of the accused cannot be inferred automatically from the conclusions reached in relation to the principle

of the non-retroactivity of less favourable criminal law. In fact, the two principles have different foundations. The non-retroactivity of less favourable criminal law provides a guarantee to individuals against arbitrary persecution and expresses the requirement that the legal consequences of one's conduct under criminal law be "calculable", as a necessary precondition for free individual self-determination: any subsequent "surprise" exacerbation of the consequences of the offence under criminal law will be at odds with this requirement. Conversely, the principle of the retroactivity of more favourable criminal law has no relationship with the aforementioned freedom, since the more favourable criminal law arose after the offence was committed, at which time the author freely and consciously decided to act on the basis of the framework of legislation (and case law) at that time; by contrast, the said principle is rooted in that of equality which requires, as a general principle, that changes in the criminal law that benefit the perpetrator, as an expression of a re-assessment of the social harm caused by the conduct, also be extended to those who committed such acts at an earlier point in time (see judgment no. 394 of 2006; see analogously judgments no. 236 of 2011 and no. 215 of 2008).

As regards the non-absolute status which the principle of the retroactivity of more favourable criminal law is liable to take on within this perspective, it must on the other hand be pointed out – as was already noted on another occasion (judgment no. 236 of 2011) – that the Strasbourg Court not only failed to exclude unequivocally the possibility that, under appropriate circumstances, the principle in question will be subject to exceptions, but rather imposed an express limit on its operation, in the opposite direction to that proposed by the lower court. In fact, according to the European Court, the principle of the retroactivity of more favourable criminal law, which may be inferred from Article 7(1) ECHR, "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" (European Court of Human Rights, Grand Chamber, judgment of 17 September 2009, Scoppola v. Italy, paragraph 109). With reference (solely) to "subsequent criminal laws enacted before a final judgment is rendered", the European Court thus held that the principle in question will not apply once the judgment has become final, in contrast to the position under Italian law set forth in Article 2(2) and (3) of the Criminal Code (see judgment no. 236 of 2011).

It is evident that the above limitation cannot also apply – within the perspective of the lower court – to changes in case law. The Strasbourg Court itself has moreover had the opportunity to hold in general terms that, following the settlement of a contrasting view within case law by a supreme national court, the requirement to ensure equal treatment cannot be validly invoked in order to overturn the principle of the intangibility of *res iudicata*: in fact, "to construe the principle of equality in the application of the law to the effect that the outcomes to later decisions will imply the review of all earlier final decisions that contradict with more recent decisions would run contrary to the principle of legal certainty" (European Court of Human Rights, judgment of 28 June 2007, Perez Arias v. Spain, again insofar as the principles of interpretation are applicable to Italian law).

Thus, irrespective of the examination of compatibility with the principle of amendment exclusively by primary legislation enshrined in Article 25(2) of the Constitution – a requirement stressed by the State Counsel in his submissions – it must be conclusively pointed out, as a prior issue, that the hypothetical "interposed Convention provision" which is drawn on as a basis for assessing the constitutionality of the contested provision in actual fact lacks any current backing within the case law of the European Court.

8.– Moreover, the parallel references by the lower court to Articles 5 and 6 ECHR prove to be inconclusive in the present case.

As regards the alleged violation of Article 5, it is asserted by the referring court by invoking – in the light of judgment no. 18288 of the Joint Divisions of the Court of Cassation of 21 January 2010-13 May 2010 on the "executive final decision" (where however the effect of the reference was different) – the ruling of the Strasbourg Court which held that the right to personal freedom and security of the person protected by Article 5 had been violated in a case involving the delay in granting remission of the sentence to a convicted individual due to interpretative doubts regarding the terms of operation of the clemency measure (European Court of Human Rights, judgment of 10 July 2003, Grava v. Italy). However, there is no analogy whatsoever – and the referring court in any case did not stress any such analogy – between the case examined by the European Court and that at issue in the national proceedings: confirmation of such an analogy is a necessary prerequisite for the "importation" of the principle laid down by the European Court into constitutional review proceedings (see judgment no. 239 of 2009).

Moreover, as regards the alleged violation of Article 6 ECHR, the lower court refers to the approach followed by the Strasbourg Court according to which the existence of profound and persistent differences within the case law of a national supreme court regarding the interpretation of a given legislative provision, which cannot be resolved either on the facts or have not been resolved through mechanisms enabling such contrasts to be resolved, is liable to result in a violation of the right to a fair trial, given the obstacles which may be caused by this to an effective defence within the trial (to this effect see, in addition to the judgment of 2 July 2009, Iordan Iordanov v. Bulgaria cited by the lower court, the judgments of 24 June 2009, Tudor Tudor v. Romania and of 2 December 2007, Beian v. Romania, again insofar as the interpretative principles are applicable to Italian law).

Moreover, this scenario too involves a situation that is not comparable with that at issue in the present review proceedings. The quashing of a conviction on the grounds that the offence has been abolished is a figure which is clearly distinct from the mechanisms for settling contrasting positions within the case law, which the Strasbourg Court has held to be necessary in order to give effect to the Convention guarantee in Article 6. On the other hand, according to the European Court, the right to a defence is liable to be impaired by "synchronic" contrasts within the case law that render the validity of the provision establishing a criminal offence uncertain at the time when the trial is celebrated, due to the parallel presence of multiple interpretations in conflict with one another; however, it is not liable to be impaired by "diachronic" contrasts, such as that targeted by the referring court, associated with the replacement of one interpretation by another after the trial has been concluded.

9.– The objections alleging that the principle of equality has been violated also with reference to the requirement of reasonableness (Article 3 of the Constitution) are also groundless.

Contrary to the arguments of the lower court, the fact that the legislature on the one hand respects – moreover in accordance with requirements of constitutional law – the function of the Court of Cassation, and in particular of the Joint Divisions, as the guarantor of the uniform interpretation of the law – thereby postulating the requirement that later case law must "tend" to comply with the decisions of the Court of Cassation – whilst on the other hand failing to make provision for the revocation of final judgments issued in relation to conduct which, under the terms of a subsequent different decision by the body charged with ensuring the uniform interpretation of the law, are no longer regarded as criminal offences under the law, thus enabling the authors of analogous actions to be treated in a radically different manner, cannot be deemed to be manifestly irrational.

The position asserted by the decision of the Joint Decisions undoubtedly "aspires" to acquire stability and general acceptance. However – as the referring court itself acknowledges – these are only "trends" in that their efficacy is non-binding but essentially "persuasive" in nature. The consequence of this is that, in contrast to a law repealing a criminal offence or a declaration of unconstitutionality, a new decision by the body charged with ensuring the uniform interpretation of the law is potentially liable to be set aside at any time and by any court, provided that sufficient reasons are given for such a move; on the other hand, the Joint Divisions themselves may review their position, including on the initiative of individual divisions, as has in fact occurred.

Therefore, against this backdrop, the failure to recognise an overruling within the case law is justified given its capacity to upset the principle of the intangibility of *res iudicata*, as an expression of the requirement of certainty with regard to concluded legal relations. Moreover – as the referring court itself acknowledges – the fundamental significance of this principle is amply recognised also on European Union level (see the judgments of the Court of Justice of 22 December 2010 in Case C-507/08, Commission v. Slovak Republic [2010] ECR I-13489; of 3 September 2009 in Case C-2/08, Fallimento Olimpiclub s.r.l. [2009] ECR I-7501; and of 16 March 2006 in Case C-234/04, Kapferer [2006] ECR I-2585). As a prerequisite for quashing a ruling which should in itself remain intangible – i.e. the final judgment – the law requires, not unreasonably, that some chance in circumstances occur which results in the lapse of the criminal significance of particular conduct and which has the characteristics of general binding force and inherent stability (subject, in situations involving a law repealing a criminal offence, to the enactment of new legislation restoring the offence): by contrast, the matter considered by the lower court does not display these characteristics.

Moreover, the reference to recent judgments of the Court of Cassation which have held certain changes in case law to be significant for the purposes of overturning an "executive final decision" and an "interim final decision" (respectively, judgment no. 18288 of 2010 of the Joint Divisions cited above – on which the lower court grounds most of its challenges – and judgment no. 19716 of 6 May 2010-25 May 2010 of the Second Decision) does not support the referring court's argument. In fact, these judgments did not fail to give adequate prominence to the clear gap which separates these figures from a genuine final judgment, as the former amount to simple procedural exclusions relating to decisions delivered *rebus sic stantibus* which are intended to avoid the wearying repetition of applications with the same object to the enforcement judge or the interim judge, in relation to which it is necessary to establish solely whether or not the reference to the changed approach within the case law may constitute a new argument in law.

Likewise, the reference by the referring court to the significance placed by this Court in the "living law" [i.e. the uniform and settled interpretation of the law] for the purposes of ascertaining the object of constitutional review proceedings, including those relating to criminal law provisions, is not persuasive. This solution meets with the requirement to respect the role reserved to the ordinary courts – and specifically of the judicial body charged with guaranteeing the uniform interpretation of the law – in relation to interpretation: in cases involving a settled position within case law, or otherwise a broadly shared position – especially if it has been endorsed by a decision of the Joint Divisions of the Court of Cassation – the Constitutional Court will assume that the contested provision "lives" in the meaning currently attributed to it by the courts. Nevertheless, this Court has nonetheless pointed out that, even where an approach followed in case law has acquired the status of "living law", the referring court is only granted the

right, and is not under an obligation, to follow it (see judgment no. 91 of 2004).

10.– Thus, far from being necessary in order to remove any supposed contradiction within the system, it would on the contrary be precisely the action requested by the lower court that would act as a herald for doubts and contradictions, taking account of the characteristics of the rule which would be established by the expansive ruling sought from this Court.

In fact, Article 673 of the Code of Criminal Procedure subjects the enforcement judge to a mandatory duty to intervene where a criminal offence has been abolished. If such relief is granted, this mandatory rule would apply also to the grounds for quashing proposed by the referring court (and as is moreover inherent within the logic of its challenges): the consequence of this would be that the enforcement judge would be undoubtedly required to quash any final conviction that contrasted with the findings of the body charged with guaranteeing the uniform interpretation of the law, even were it not to endorse such a view.

In this way however, the expansive ruling requested would entail a genuine "systemic" subversion, thereby establishing a general hierarchical relationship between the Joint Divisions and the enforcement judges, even outside of interlocutory referrals, which would however lead to decidedly unharmonious results, since the rule of *stare decisis* is not a general rule within the legal order. In fact, the judge in enforcement proceedings would be required to abide by the "favourable" decision of the Joint Divisions, and hence to revoke the final conviction. On the other hand, a trial court which was judging an analogous situation *ex novo* would not be under the same obligation, and could thus disregard – albeit provided that adequate reasons are given – the solution adopted by the body charged with guaranteeing the uniform interpretation of the law (thereby, as the case may be, leading to a further change in case law). However, it would be illogical for the requirement

to comply with the ruling of the Joint Divisions to apply in cases in which the opposite conclusion was reached (which may even be based on broad arguments focusing on the specific issue of the criminal relevance of the conduct), whilst it would not on the other hand apply in proceedings in which no final judgment has yet been reached. Not could it be objected that – adopting the perspective of the lower court – given the "legitimate expectation" generated in associates by the decision of the Joint Divisions, any trial court that departed from the decision could not under any circumstances convict the defendant in accordance with the supposed extension of the principle of non-retroactivity also to the new less favourable interpretation of the criminal law provision. This objection might – hypothetically – be appropriate were the proceedings to concern an act committed after the decision of the Joint Divisions, but not in relation to acts committed prior to that time in which the author did not have any grounds to assume that his actions, which were carried out when the opposite view prevailed within case law, were permitted under criminal law.

11.– The further objection alleging a violation of the "principle of the (general) retroactivity of more favourable criminal law" – which the referring court purports to infer from Articles 3 and 25(2) of the Constitution – is also groundless.

According to the settled case law of this Court, the principle of the retroactivity of criminal law that is more favourable to the accused is not in reality grounded in Article 25(2) of the Constitution – which is limited to endorsing the principle of the non-retroactivity of more severe criminal law – but, as mentioned above, exclusively in the principle of equality which requires, as a matter of principle, that identical situations be treated in the same manner where their classification as criminal offences has been altered through legislation, irrespective of whether they were committed before or after the entry into force of the provision which repealed the offence or which

provided for less severe punishment. Precisely as a consequence of the above, the principle in question is not therefore absolute in nature, and is open to exceptions through ordinary legislation, provided that there is sufficient justification (see *inter alia* judgments no. 236 of 2011, no. 215 of 2008, no. 394 and no. 393 of 2006).

However, leaving aside the possibility that the need to safeguard the intangible status of final judgments constitutes adequate justification for an exception, as has been repeatedly asserted in the past by this Court (judgments no. 74 of 1980 and no. 6 of 1978; order no. 330 of 1995), the fact that the principle in question relates – including under the relevant provisions of the Code (Article 2(2), (3) and (4) of the Code of Criminal Procedure) – only to the subsequent enactment of "legislation" is all-embracing. In order for it to be extended to changes in case law, it would therefore be necessary to demonstrate – and this is in effect the conceptual premise of the referring court – that the shift between contrasting interpretations in case law is tantamount to the enactment of legislation.

However, such a conflation is opposed not only by the consideration – raised by the case law of the Court of Cassation referred to above in relation to the identification of the scope of Article 673 of the Code of Criminal Procedure – relating to the non-binding status of a simple approach within case law, but is also supported by a ruling of the Joint Divisions. It is opposed also, and primarily – along with the principle of amendment exclusively by primary legislation in relation to criminal matters, cited at various points above, laid down by Article 25(2) of the Constitution – by the principle of the separation of powers, and specifically as a ramification of the principle (Article 101(1) of the Constitution) that the courts must be subject (only) to the law.

Moreover, this conclusion cannot be negated solely by the fact that the new decision by the body charged with guaranteeing the uniform

interpretation of the law is tantamount to the quashing of the offence. As is the case for the enactment of law, and of the criminal law in the present case, according to the constitutional architecture, so too their repeal – whether full or partial – cannot result from rules of case law, but only from an act of legislation (*eius est abrogare cuius est condere*).

12.– The residual challenges alleging the violation of Articles 13 and 27(3) of the Constitution lack independent status.

They likewise fail along with the conceptual premise upon which they are based: that is the claim that the succession of different positions within case law is equivalent to the creation of new (objective) law, thereby justifying the intervention requested to expand the perimeter of application of the rule laid down by Article 673 of the Code of Criminal Procedure.

Such an erroneous interpretation would entail the vesting of the courts – the body charged with exercising judicial powers – with a legislative function, in radical contrast with the fundamental principles of the constitutional order.

13.– The question must therefore be ruled groundless with regard to all of the principles invoked.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

rules that the question concerning the constitutionality of Article 673 of the Code of Criminal Procedure raised by the *Tribunale di Torino* by the referral order specified in the headnote with reference to Articles 3, 13, 25(2), 27(3) and 117(1) of the Constitution is groundless.

Decided in Rome at the seat of the Constitutional Court, Palazzo della Consulta, on 8 October 2012.

(omitted)