No 1

JUDGMENT OF 5 JUNE 1956*

Filed in the Registry: 14 June 1956.
Published in the "Official Journal" No 146 of 14 June 1956.

President DE NICOLA - Rapporteur AZZARITI

Conclusions on points of law:

Since, as mentioned, the question of constitutionality at issue in the thirty cases in which thirty referral orders have been made is the same, the Court considers it appropriate that the decision on the joined cases be made in a single judgment.

It is superfluous to dwell on the arguments made during the oral discussion against the intervention by the President of the Council of Ministers. The provisions of law No 87 of 11 March 1953 very clearly state that constitutionality proceedings commenced pursuant to referral orders are to be conducted in the presence not only of those who were are parties in the proceedings that gave rise to the question of constitutionality, but also – irrespective of the content of the contested law, and even if relating to matters under the competence of individual ministers – of the President of the Council of Ministers, given the twofold effect that judgments of the Constitutional Court are destined to have, both specifically on the proceedings in progress, as well as generally *erga omnes*. It is precisely for this reason that Article 23 of that Law requires that notice of the referral order commencing proceedings be given to the said parties as well as to the President of the Council of Ministers and Articles 20 and 25 regulate, alongside matters relating to the representation of and entries of appearance by the parties, also the representation of and interventions by the President of the Council of Ministers. This intervention therefore has its own specific nature, as a means of supplementing the oral proceedings required by law, and may be clearly be distinguished from the right to

* Translated for the *Corte Costituzionale* by Dr Thomas Roberts.

intervene regulated under the code of procedure and the procedural rules governing administrative justice. It is not therefore possible to infer either from the former or from the latter any element that may apply to interventions by the President of the Council of Ministers before the Constitutional Court and any attempts to argue otherwise are destined to fail.

With regard to the question of competence raised by the State Counsel [*Avvocatura dello Stato*], first and foremost the exclusive competence of the Constitutional Court to rule on disputes relating to the constitutionality of laws and other instruments with the force of law, as provided for under Article 134 of the Constitution, cannot be called into question. A law may only be declared unconstitutional by the Constitutional Court in accordance with Article 136 of the Constitution.

The argument that the new institution of "unconstitutionality" refers only to laws enacted after the Constitution (and not also to those enacted previously) cannot be accepted both because, according to their literal textual provision, both Article 134 of the Constitution as well as Article 1 of Constitutional Law No 1 of 9 February 1948 refer to questions concerning the constitutionality of laws without drawing any distinction, and also because, from a logical point of view, it is undeniable that the relationship between ordinary laws and constitutional laws and the status they are respectively vested with the hierarchy of sources does not differ depending upon whether the ordinary laws were enacted before or after the constitutional laws. In both the former case as well as the latter case the constitutional law must prevail over the ordinary law due to its inherent nature within the entrenched constitutional system.

It is not necessary to pause to consider whether, and in which cases, the supervening breach of the Constitution by earlier laws may raise a problem of repeal to be resolved in accordance with the general principles laid down under Article 15 of the Provisions on the Law in General [*preleggi*, enacted at the same time as the Civil Code]. The two legal institutions of repeal and the unconstitutionality of laws are not identical; they operate on different levels, have different effects and engage different competences. Moreover, the extent of the notion of a repeal is more limited than that of unconstitutionality, and the prerequisites necessary for a repeal on the grounds of incompatibility in accordance with general principles are much more limited than those that may permit a declaration that a law is unconstitutional.

Having asserted the competence of this Court, it is now possible to examine the question of constitutionality raised in the referral orders mentioned above.

Whether the provisions of Article 113 of the Law on Public Security can coexist with the provisions laid down by Article 21 of the Constitution is a question that has already been the object of many judgments by the ordinary courts and numerous academic articles.

However, the question has been raised almost exclusively in terms of the repeal of Article 113 due to incompatibility with Article 21 of the Constitution, whereas the discussions conducted have mainly concerned the issue as to whether the provisions laid down in Article 21 may be regarded as mandatory and self-executing or have merely policy status.

These discussions have been pursued by the parties also in this case. However, it is not necessary to dwell on them nor to recall the case law that has been established on this point because the distinction between self-executing provisions and policy provisions may be decisive when deciding whether or not to repeal a law. However, it is not decisive in questions of constitutionality, since the unconstitutionality of a law may also result, in specific cases, from its incompatibility with the policy provisions, especially since this category normally includes constitutional provisions of various types: from those limited to setting out generic policies to be implemented at some uncertain point in the future, being contingent on the occurrence of situations that will enable this to occur, to those where the policy, if it can be called a policy, is so specific that it must be immediately binding on Parliament, with repercussions on the interpretation of pre-existing legislation and the enduring efficacy of certain parts thereof; there are also provisions that lay down fundamental principles, which also have effects on all legislation.

Accordingly, it is the specific content of the provisions contained in Article 21 of the Constitution and their relationship with the provisions of Article 113 of the Law on Public Security that must be examined directly in order to ascertain whether there is any incompatibility between them so as to render the latter unconstitutional.

In order to exclude the possibility of any such incompatibility, it has been asserted by one individual that a distinction must be drawn between speech, which must be free, and the dissemination of previous speech, of which there is no mention in the Constitution. However, this distinction is not permitted by any constitutional provision.

However, it must be pointed out, as a general matter, that the fact that a provision confers a right does not mean that legislation cannot be enacted to regulate its exercise.

Therefore, the enactment of legislation setting out procedures for the exercise of a right, such that the activity of an individual directed at the pursuit of his own goals can be reconciled with the pursuit by others of their respective goals, cannot be regarded *per se* as the violation or negotiation of that right. And even were it to be considered that the legislation regulating the exercise of a right may also indirectly place a certain limit on the right itself, it must be remembered that the concept of limit is inherent in the concept of law and that, within the context of a legal system, the various legal spheres must necessary limit one another, in order to be able to coexist within an ordered system of civil cohabitation.

It cannot evidently be the case that, by declaring the right to freedom of speech the Constitution intended to permit activities that disrupt public order or thereby deprived the law enforcement authorities of the function of preventing crime.

From this point of view, the constitutionality of Article 113 cannot be called into question if the conferral of the power indicated therein on public law enforcement authorities is considered to be related to the goal of preventing the commission of crime or conduct reasonably likely to result in the commission of crime.

However, it is undeniable that no provision of this kind is contained in Article 113 which, by stipulating the requirement for authorisation, appears to render the right, which Article 21 of the Constitution guarantees to all, dependent almost on a concession by the public law enforcement authorities, thereby granting unlimited discretionary powers to those authorities with the result that, irrespective of the specific goal of maintaining public order and preventing the commission of crime, the granting or denial of authorisation may in practical terms be tantamount to allowing or prohibiting the speech.

It is true that the scope of these discretionary powers was significantly reduced by the later Legislative Decree No 1382 of 8 November 1947, which allows for an appeal to the Office of the Public Prosecutor against decisions taken by the law enforcement authorities to deny authorisation, stipulating that the decision by the Public Prosecutor shall replace in its entirety the aforementioned authorisation.

However, in spite of this, the original indeterminacy remains and therefore there continues to be an excessive extension of discretionary powers both for the public law

enforcement authorities as well as for the body called upon to review the activities of the former on appeal, since the bounds within which the activities of the police and the exercise of powers by it must be contained are not in any way defined.

The Constitutional Court therefore finds that Article 113 of the Consolidated Act of Laws on Public Security is unconstitutional, with the exception of sub-section 5, which provides that "the affixing of placards is prohibited outwith the areas designated by the competent authority", since this provision does not in any way violate any constitutional rule and may remain in force.

As far as the other provisions laid down in Article 113 are concerned, the declaration of unconstitutionality does not imply that they may not be replaced by other more appropriate provisions that, without infringing the right to freedom of speech enshrined in Article 21 of the Constitution, regulate its exercise in such a way as to prevent abuses, also in relation to the express provision laid down in the last sub-section of Article 21, and in general for the purpose of preventing crime. It has already been observed that stipulation of arrangements to govern the exercise of a right do not per se entail a violation of that right. Moreover, on account of the scant regard within certain provisions of the Law on Public Security for the principles and rules laid down by the subsequently enacted Constitution, the competent bodies some time ago started to consider an appropriate amendment to the Law on Public Security. Indeed, a number of draft bills have been tabled in the Chamber of Deputies and in the Senate for this purpose, the last of which has moreover recently been examined by the competent Senate Committee. It is therefore desirable that such a delicate matter be regulated promptly in a satisfactory manner by legislation that is compatible with the new provisions contained in the Constitution.

The declaration that Article 113 of the Law on Public Security is unconstitutional naturally extends to Article 1 of Legislative Decree No 1382 of 8 November 1947 which is closely related to it. However, the Court cannot also declare unconstitutional Article 663 of the Criminal Code and Article 2 of Legislative Decree No 1382 of 8 November 1947, which amended it, because the penalties laid down under Article 663 of the Criminal Code do not exclusively refer to cases in which conduct occurs without the authorisation required under Article 113 of the Law on Public Security, but in general to the failure to comply with the various laws that expressly refer to such authorisation.

It is moreover clear that the provisions of Article 663 of the Criminal Code, insofar as applicable to Article 113 of the Law on Public Security, will not only become inoperative, but must also be regarded as having been struck down by the declaration that the provisions of Article 113 are unconstitutional, also for the specific effects mentioned in the last sub-section of Article 30 of law No 87 of 11 March 1931.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

ruling by a single judgment on the cases referred to in the caption:

1. - Asserts that it has competence to rule on disputes concerning the constitutionality of laws and other acts with the force of law, even if they were adopted prior to the entry into force of the Constitution;

2. - Declares that the provisions contained in Article 113(1), (2), (3), (4), (6) and (7) of the Consolidated Act of Laws on Public Security, approved by Decree No 773 of 18 June 1931 – for the violation of which a criminal penalty is provided for under Article 663 of the Criminal Code, as amended by Article 2 of Legislative Decree No 1382 of 8 November 1947 – and as a result Article 1 of Legislative Decree No 1382 of 8 November 1947, are unconstitutional, without prejudice to the further provisions regulating the exercise of the right recognised by Article 21 of the Constitution.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 5 June 1956.

ENRICO DE NICOLA - GAETANO AZZARITI - GIUSEPPE CAPPI - TOMASO PERASSI - GASPARE AMBROSINI - FRANCESCO PANTALEO GABRIELI - ERNESTO BATTAGLINI - MARIO COSATTI - GIUSEPPE CASTELLI AVOLIO - ANTONINO PAPALDO - MARIO BRACCI - NICOLA JAEGER - GIOVANNI CASSANDRO.