JUDGMENT NO. 5 YEAR 2014

In this case the Court heard a referral order questioning the constitutionality of a decree-law amending a previous decree-law on the reorganisation and consolidation of legislation enacted prior to 1970. Whereas the latter decree-law stipulated the legislation that was to remain in force following the consolidation operation, the former decree-law amended that list, thus effectively repealing the criminal law prohibition on paramilitary associations. Whilst the Court was prevented from creating new offences by the principle of no punishment without law, it nonetheless distinguished this from the different scenario in which it could strike down secondary legislation that unlawfully decriminalised certain criminal acts. The Court struck down the legislation as unconstitutional, holding that: the legislative authority had already been exercised and could not be exercised a second time with contrary effect; the repeal was *ultra vires* on substantive grounds as it did not comply with the criteria specified in the parent statute, the legislation repealed was enacted to fulfil a requirement of constitutional law and the provision repealed did not fall under the area of law regulated by the parent statute.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 1 of Legislative Decree no. 213 of 13 December 2010 (Amendments and supplements to Legislative Decree no. 179 of 1 December 2009 stipulating the legislative provisions of state law enacted prior to 1 January 1970 that it is considered indispensable should remain in force); in the alternative of Article 14(14) and (18) of Law no. 246 of 28 November 2005 (Legislative simplification and rearrangement for 2005); consequently of Article 2268(1), no. 297 of Legislative Decree no. 66 of 15 March 2010 (Military Code), initiated by the *Tribunale di Verona* by the referral order of 25 February 2012 and the preliminary hearing judge at the *Tribunale di Treviso* by the referral order of 9 May 2012, registered as nos. 201 and 229 in the Register of Referral Orders 2012 and published in the Official Journal of the Republic nos. 39 and 42, first special series 2012.

Having heard the Judge Rapporteur Giorgio Lattanzi in chambers on 6 November 2013.

[omitted]

Conclusions on points of law

1.– The *Tribunale di Verona* has raised, with reference to Articles 76, 18 and 25(2) of the Constitution, questions concerning the constitutionality of: 1) Article 1 of Legislative Decree no. 213 of 13 December 2010 (Amendments and supplements to Legislative Decree no. 179 of 1 December 2009 stipulating the legislative provisions of state law enacted prior to 1 January 1970 that it is considered indispensable should remain in force), insofar as it amends Legislative Decree no. 179 of 1 December 2009 (Legislative provisions of state law enacted prior to 1 January 1970 that it is considered indispensable should remain in force, adopted pursuant to Article 14 of Law no. 246 of 28 November 2005), removing Legislative Decree no. 43 of 14 February 1948 (Prohibition on associations having military nature) from the provisions to remain in force; 2) "consequently" Article 2268(1), no. 297 of Legislative Decree no. 66 of 15 March 2010 (Military Code), insofar as, under no. 297 of paragraph 1, it repeals Legislative Decree no. 43 of 1948. In the alternative, and as a secondary argument, and with reference to Article 76 of the Constitution, the same court also questions the constitutionality of Article 14(14) and (18) of Law no. 246 of 28 November 2005, no. 246 (Legislative simplification and rearrangement for 2005).

According to the referring court, Article 1 of Legislative Decree no. 213 of 2010 violates Article 76 of the Constitution because it was adopted without a grant of power authorising the government to repeal laws or other measures already exempt under Legislative Decree no. 179 of 2009 from the repealing effect of Article 14(14-ter) of Law no. 246 of 2005.

However, the deadline applicable to the exercise of the grant of power under Article 14(14) of Law no. 246 of 2005 had already expired in December 2009 before the delegated legislation was adopted.

The power exercised by the government under the contested provision could also not be "inferred" from paragraph 18 of Article 14 of Law no. 246 of 2005 as the

delegation of power thereunder did not authorise it to intervene a second time in the choice already made in identifying the legislation that it was considered indispensable should remain in force and be exempt from the repeal, but only permitted interventions to supplement, rearrange or correct the legislation that remained in force.

According to the referring court, in the event of a ruling that Legislative Decree no. 213 of 2010 is unconstitutional insofar as it "repeals the provision maintaining in force the offence" at issue in the proceedings before the referring court, it would as a result be "necessary to consider the continuing validity of the further provision cancelling that offence, implemented by Legislative Decree no. 66 of 2010".

Also Article 2268(1), no. 297 of Legislative Decree no. 66 of 2010 is claimed to breach Article 76 of the Constitution because the Government did not have the power to repeal Legislative Decree no. 43 of 1948, which had moreover been expressly exempted from such repeal by Legislative Decree no. 179 of 2009.

Furthermore, Legislative Decree no. 43 of 1948 does not fall under the subject matter of military law covered by the delegated legislation and, in any case, was not obsolete as it constituted an expression of the constitutional prohibition on associations that pursue political goals through paramilitary organisations (Article 18 of the Constitution).

The referring court questions the constitutionality of the contested provision also in relation to Article 14(15) of Law no. 246 of 2005, as the grant of power was made not in order to reform the various areas indicated but only to draw up consolidated texts of the provisions enacted prior to 1 January 1970 that have remained in force, as the case may be harmonising them with subsequently enacted provisions.

Furthermore, the referring court considers that the question of constitutionality raised with reference to Article 18 of the Constitution is not manifestly unfounded since the repeal of the provision which specifically implements the constitutional prohibition on associations that pursue political goals through organisations having military nature enables such conduct to become "lawful as a matter of criminal law, as it is not sanctioned by other criminal law provisions", notwithstanding that it is prohibited by the Constitution.

Finally, Article 25(2) of the Constitution is claimed to have been violated on the grounds that, since the Government lacked of any power whatsoever to repeal, the

principle that the criminal law may only be amended by primary legislation was violated.

In the alternative and as a secondary argument, in the event that it is considered that the Government was indeed vested with a power of repeal by virtue of paragraphs 14 and 15 of Article 14 of Law no. 246 of 2005, those provisions would have to be ruled unconstitutional on the grounds that they violate Article 76 of the Constitution due to the generic nature of the principles and guiding criteria and the failure to state the specific objects of the legislation.

2.– Also with reference to Articles 76, 3, 18 and 25(2) of the Constitution, the preliminary hearing judge at the *Tribunale di Treviso* questions the constitutionality of Article 2268 of Legislative Decree no. 66 of 2010 insofar as no. 297 of paragraph 1 repeals Legislative Decree no. 43 of 1948, whilst also questioning the constitutionality of Article 1 of Legislative Decree no. 213 of 2010, insofar as it amends Legislative Decree no. 179 of 2009, removing Legislative Decree no. 43 of 1948 from the list of provisions to remain in force.

The referring judge has made challenges similar to those raised by the *Tribunale di Verona*, with reference to Articles 18, 25(2) and 76 of the Constitution.

In the opinion of the referring judge, the contested provisions also violate Article 3 of the Constitution in that the delegated legislator made choices "which are not supported or justified by any reason, thereby creating a difference in treatment".

By the same referral order, the referring judge also raised in the alternative a question concerning the constitutionality of Article 14(14), (14-ter) and (18) of Law no. 246 of 2005 with reference to Article 76 of the Constitution due to the generic nature of the principles and directive criteria and the failure to state the specific objects of the legislation.

3.– This Court considers it appropriate to provide an account of the circumstances that gave rise to these referral orders.

By Article 14(14) of Law no. 246 of 2005, the legislator authorised the Government, in the manner specified under Article 20 of Law no. 59 of 15 March 1997 (Delegation of power to the Government to apportion functions and tasks to the regions and local authorities, to reform the public administration and to achieve administrative simplification), as amended, to adopt "legislative decrees stipulating the legislative

provisions of state law enacted prior to 1 January 1970, even if subsequently amended, that it is considered indispensable should remain in force", going on to specify in paragraph 14-ter that, "upon expiry of the time limit provided for under paragraph 14, or if later of the time limit provided for in the last sentence of paragraph 22, all provisions of state law not specified in the legislative decrees adopted in accordance with paragraph 14, even if subsequently amended, shall be repealed". The delegated power to specify the provisions that were to remain in force thus had to be exercised before 16 December 2009.

By Legislative Decree no. 179 of 2009 the Government exercised the power delegated, specifying the legislative provisions that were to remain in force, which also included Legislative Decree no. 43 of 1948 on the prohibition of paramilitary associations pursuing political goals, even indirectly; however, this Legislative Decree was subsequently repealed by Article 2268 of Legislative Decree no. 66 of 2010 (Military Code).

The *Tribunale di Verona*, which was hearing a prosecution of persons charged with the offence provided for under Article 1 of Legislative Decree no. 43 of 1948 in relation to the actions of the association known as the "*Camicie verdi*" [Green Shirts], has raised a question of constitutionality in order to challenge that repeal. However, three days after it was filed, the Government issued Legislative Decree no. 213 of 2010 by which it replicated the repeal of Legislative Decree no. 43 of 1948, removing it from the list of provisions which it had previously specified should remain in force by Legislative Decree no. 179 of 2009.

Having regard to the *ius superveniens* which had reasserted the repeal, this Court ordered the remittal of the case file to the referring court, holding that it was for the latter court to assess the enduring relevance and non-manifest unfoundedness of the questions raised.

In turn, the preliminary investigations judge at the *Tribunale di Treviso*, who was investigating various persons in relation to the "formation of the paramilitary group known as 'Polisia Veneta' [i.e. "Venetian Police" in Venetian dialect]", had raised questions concerning the constitutionality of Article 2268 of Legislative Decree no. 66 of 2010 with reference to Articles 76, 18 and 25(2) of the Constitution, insofar as no. 297 of paragraph 1 repealed Legislative Decree no. 43 of 1948 and, in the alternative,

Article(14) and (14-ter) of Law no. 246 of 2005 with reference to Article 76 of the Constitution.

By Order no. 341 of 2011, this Court ruled that these questions were manifestly inadmissible because the referring judge had not considered the effects of Article 1 of Legislative Decree no. 213 of 2010, which was adopted prior to the referral order.

4.– The referral orders from the *Tribunale di Verona* and the preliminary investigations judge at the *Tribunale di Treviso* relate to the same provisions and raise analogous questions, and therefore the relative proceedings should be joined for resolution by a single decision. In fact, in addition to the questions set out above concerning Article 2268 of Legislative Decree no. 66 of 2010, both the referring court and the referring judge have also raised questions concerning the constitutionality of Article 1 of Legislative Decree no. 213 of 2010, insofar as it amended Legislative Decree no. 179 of 2009, removing Legislative Decree no. 43 of 1948 from the list of provisions to remain in force.

5.– On the day before the referral order was issued by the *Tribunale di Verona* on 25 February 2012, Legislative Decree no. 20 of 24 February 2012 was adopted (Amendments and supplements to Legislative Decree no. 66 of 15 March 2010 laying down the Military Code, adopted pursuant to Article 14(18) of Law no. 246 of 28 November 2005), which was published in Official Journal no. 60 of 12 March 2012 and entered into force on 27 March 2012, by which the legislator, implementing Article 14(14), (15) and (18) of Law no. 246 of 2005, reintroduced the offence provided for under Legislative Decree no. 43 of 1948; in fact, Article 9(1)(q) provided that "no. 297 of Article 2268(1) shall be repealed and, as a result, Legislative Decree no. 43 of 14 February 1948 shall come into force once again and shall not be subject to the effects provided for under Article 1(1)(b) of Legislative Decree no. 213 of 13 December 2010".

The *Tribunale di Verona* was not able to take account of this provision because the referral order was made before it was published in the Official Journal, whilst the preliminary hearing judge at the *Tribunale di Treviso* did take account of it, asserting that the restoration of the offence repealed is not sufficient in order to render irrelevant questions concerning the constitutionality of the repealing legislation "as the punitive arrangements apply retroactively the favourable effects of the *abolitio criminis* in

accordance with the principle of *lex mitior* laid down by Article 2(4) of the Criminal Code".

The assertion made by the referring judge is plausible as it may indeed be concluded that, in restoring the criminal offence previously repealed, the *ius superveniens* referred to cannot have the effect of reviving the criminal status of an offence previously annulled by virtue of a repeal. This view is also supported by the case law of the Court of Cassation which has held that, in cases in which criminal legislation has been enacted at different times, the provisions applied must be those stipulating the most favourable treatment for the guilty person, even if the most recent law restored previously enacted legislation, which had been amended by the more favourable law (see Judgments no. 35079 of 7 July 2009 and no. 38548 of 21 September 2007).

Therefore, the new legislation does not impinge upon the admissibility of the questions raised by the *Tribunale di Verona* and does not require the case file to be remitted to the preliminary investigations judge at the *Tribunale di Treviso*.

5.1.– On numerous occasions, this Court has ruled inadmissible questions concerning the constitutionality of criminal law provisions, the abrogation of which would have resulted in less favourable treatment for the accused.

The referring court and the referring judge do not disregard the reasons for those decisions, but consider that those reasons do not obtain in the case under examination. Indeed, they recall that, according to the case law of the Constitutional Court, the principle that the criminal law may only be regulated by means of primary legislation, a principle laid down by Article 25(2) of the Constitution prevents this court from adopting rulings *in malam partem*, which are reserved exclusively for the legislature, but argue that in the case under examination it is precisely that principle which justifies a ruling of unconstitutionality, because the contested provisions were adopted by the Government without the necessary delegation of powers and were thus introduced into the legal system in breach of the principle that the criminal law may only be regulated by primary legislation.

The view of the referring court and the referring judge concerning the admissibility of the questions raised may be endorsed, although several clarifications need to be made

in this regard as the case law of this Court in this area has evolved and been refined over time, and it is in the light of this evolution that these questions must now be considered.

It was originally argued that more favourable criminal legislation was ineligible for review on the grounds that a question seeking a ruling *in malam partem* would lack relevance, given the principle of the non-retroactivity of less favourable criminal law. In fact, it has been asserted that "the general principles applicable to the non-retroactivity of criminal law sanctions that are less favourable to the guilty person, which may be inferred from Article 25(2) of the Constitution and Article 2 of the Criminal Code, under all circumstances prevent any judgment, even a judgment of unconstitutionality, from having a detrimental effect on the defendant within the criminal proceedings pending before the referring court" (see Judgment no. 85 of 1976).

However, this Court subsequently held "that the retroactivity of more favourable legislation does not preclude the amenability of all rules of primary legislation to constitutional review: "The guarantee that the principles of criminal and constitutional law can offer to defendants, circumscribing the effect of rulings that more favourable criminal legislation is unconstitutional, is one thing; however, the review to which the provisions must nonetheless be subject, failing which free zones not contemplated at all under the Constitution would be established within which ordinary legislation would become immune from control, is quite another" (see Judgment no. 148 of 1983 and on this issue, essentially to the same effect, Judgment no. 394 of 2006)" (see Judgment no. 28 of 2010).

The change in position concerning the question of relevance has not had the result of rendering automatically admissible questions relating to more favourable criminal legislation, as it has been considered that a ruling by the Court *in malam partem* could in any case be precluded by the principle enshrined in Article 25(2) of the Constitution, which "reserves exclusively to the legislator the choice as to the conduct that is to be punished and the penalties applicable to it, preventing the Court from creating new criminal offences or from extending existing offences to situations not contemplated, or also from exacerbating punishment or aspects otherwise relating to liability to punishment (see *inter alia*, Judgment no. 394 of 2006; Orders no. 204, no. 66 and no. 5 of 2009)" (see Order no. 285 of 2012).

However, there have been numerous cases in which the Court has ruled that the admissibility of questions of constitutionality *in malam partem* is not precluded by the principle laid down in Article 25(2) of the Constitution. Judgment no. 394 of 2006 is particularly significant in this regard, recognising the amenability to review of "so-called more favourable criminal rules: i.e. of rules that provide in relation to particular persons or situations, for more favourable treatment under criminal law than that which would result from the application of general or ordinary rules". The case law of the Constitutional Court has subsequently referred on various occasions to the notion of "more favourable criminal rules" (see Judgments no. 273 of 2010, no. 57 of 2009 and no. 324 of 2008; Orders no. 103 and no. 3 of 2009); however, Judgment no. 394 of 2006 set out the characteristics and the related implications for the purposes of constitutional review. According to this Judgment, "the principle of no punishment without law undoubtedly prevents this Court from creating new criminal offences; however, it does not preclude decisions to annul provisions that exempt certain classes of persons or conduct from the scope of an ordinary or otherwise more general provision, granting them more favourable treatment (see Judgment no. 148 of 1983): this applies irrespective of the institute or of the technical arrangement by which the treatment is achieved […]. In such scenarios in fact, the reservation to the legislator of the choice over whether to render certain conduct a criminal offence is not affected: the effect *in malam partem* does not result from the introduction of new provisions or the manipulation of existing provisions by the Court, which limits itself to removing the provision deemed to violate principles of constitutional law; by contrast, it is a consequence of the automatic re-extension of the general or ordinary rule laid down by the legislator itself to the situation covered by unconstitutional exceptional arrangements".

Another significant decision is no. 28 of 2010, by which the Court ruled unconstitutional an intermediate law (more specifically an intermediate legislative decree) with reference to Articles 11 and 117(1) of the Constitution which, in breach of a Community directive, had exempted from punishment conduct regarded as an offence both previously and subsequently. According to this decision in fact, "were it to be held that the potential effect *in malam partem* of the judgment of this Court precludes a review of the compatibility of internal legislative provisions with Community law –

which are binding and ranked above ordinary legislation under Italian law, in accordance with Articles 11 and 117(1) of the Constitution – this would result not only in the conclusion that Community directives were not self-applying […], but would also deprive them of any binding effect on the Italian legislator".

This decision may represent a useful point of reference because, as in these proceedings, albeit for a different reason, the legislative decree was defective on the grounds that the Government that adopted the contested legislation lacked the power to do so.

5.2.– If the delegated legislation were indeed *ultra vires* as objected by the referring court and the referring judge, this would mean that the Government's exercise of legislative functions was unlawful. The repeal of the criminal offence by a Legislative Decree adopted notwithstanding the absence of or in excess of the powers granted would in fact violate Article 25(2) of the Constitution, which reserves exclusively to Parliament, as the representative body of the national community as a whole, the choice over the conduct that is to be subject to punishment and the penalties applicable to it, preventing the Government from making criminal policy choices in autonomy or at odds with those adopted under the parent statute. Were constitutional review to be precluded for legislative acts adopted by the Government also in cases involving a breach of Article 76 of the Constitution, this would enable the Government to alter Parliament's assessment of the criminal status of certain conduct.

It must therefore be concluded that when a question is raised concerning the constitutionality of a legislative provision adopted by the Government under the authority of Parliament, averring a violation of Article 76 of the Constitution, review by this Court cannot be excluded by invoking the principle that the criminal law may only be amended by primary legislation. This principle reserves to the legislator, specifically Parliament, the choice over the conduct that is to be subject to punishment and the penalties to be applied, and is violated whenever that choice is by contrast made by the Government in breach of or beyond the limits of a valid delegation of legislative power.

The verification of the exercise by the Government of legislative powers thus becomes an instrument guaranteeing compliance with the principle enshrined in Article 25(2) of the Constitution that the criminal law may only be amended by primary legislation, and cannot be limited in consideration of any effects that a judgment

accepting the question may have within the proceedings before the referring court. Otherwise, as has been held on various other occasions by this Court, there would be a risk of creating free zones within the legal system which were exempt from constitutional review, within which the Government would *de facto* be able to make criminal policy choices reserved by the Constitution to Parliament, having been released from the requirement to comply with the principles and directive criteria laid down in the parent statute, thereby circumventing the requirements of Article 25(2) of the Constitution.

In order to resolve the paradox and at the same time to avoid any improper effects of a judgment *in malam partem*, "it is thus necessary to distinguish between constitutional review, which cannot be subject to limitations if initiated in accordance with the applicable procedures and in line with applicable legislation, and the effects of judgments upholding questions of constitutionality within the main trial, which must be assessed by the referring court according to the general principles applicable to the enactment of criminal legislation at different points in time" (see Judgment no. 28 of 2010).

It should be added that, according to the settled position of this Court, "interlocutory questions of constitutionality are admissible 'when the contested provision is applicable in the original proceedings and, therefore, the Court's decision is capable of having effects within those proceedings, whilst the question of the 'direction' of the hypothetical effects that could result for the parties to the proceedings from a ruling on the constitutionality of the law is entirely immaterial for the issue of admissibility" (see Judgment no. 98 of 1997)" (see Judgment no. 294 of 2011). It is therefore for the referring court and the referring judge to assess the consequences in terms of application that could result from the acceptance of the question, and it must be concluded that there are no obstacles on the admissibility of the questions of constitutionality raised.

6.– Once the question has been deemed to be admissible, it is necessary to examine in the first place the question relating to Article 2268(1), no. 297 of Legislative Decree no. 66 of 2010, because were the contested provision not to be unconstitutional in any respect, and the repeal of Legislative Decree no. 43 of 1948 provided for thereunder to be valid, the further questions would lack relevance, including in particular that relating

to Article 1 of Legislative Decree no. 213 of 2010, which would amount to a repeated repeal of a provision no longer in force.

6.1.– The question concerning the constitutionality of Article 2268 of Legislative Decree no. 66 of 2010 insofar as no. 297 of paragraph 1 repeals Legislative Decree no. 43 of 1948 is well founded.

6.2.– As is expressly stated in its preamble, Legislative Decree no. 66 of 2010 was adopted on the basis of Article 14(14) and (15) of Law no. 246 of 2005 and, in the opinion of the referring court and the referring judge, these provisions did not give the Government the power to repeal Legislative Decree no. 43 of 1948 on the prohibition of paramilitary associations, which Legislative Decree no. 179 of 2009 had previously stipulated should remain in force.

In effect, paragraph 14 does not provide for any direct power of repeal, but only authorises the Government to identify the legislative acts that are to be exempt from the "guillotine" clause contained in Article 14(14-ter) of Law no. 246 of 2005 which, as mentioned above, was previously exercised by Legislative Decree no. 179 of 2009.

Therefore, the view of the referring courts that, at the time Legislative Decree no. 66 of 2010 was adopted, the Government had already exercised the legislative power vested in it by paragraph 14 in respect of Legislative Decree no. 43 of 1948, and that the new exercise of the authorisation to the opposite effect which, rather than exempting it from repeal, actually resulted in its express repeal, could not be permitted under the paragraph cited, is well founded.

Even if the Government were recognised as having a direct power of repeal under paragraph 14, it would still be necessary to conclude that the conditions for its exercise in respect of Legislative Decree no. 43 of 1948 were not met given that, according to the criteria specified in that paragraph, it amounted to legislation that it was indispensable should remain in force.

Paragraph 14 authorised the Government to identify the provisions that were to remain in force, that had not been tacitly or implicitly repealed (letter a) and that had not exhausted their function, lacked effective normative content or were otherwise obsolete (letter b), none of which conditions could apply to Legislative Decree no. 43 of 1948. In particular, it is certain that the decree had not exhausted its function, as it had given rise

to the criminal proceedings within which the current questions of constitutionality were raised.

Similarly, it cannot be concluded that this is a provision lacking effective legislative content or that is obsolete: in fact, Legislative Decree no. 43 of 1948 was enacted in parallel with the Constitution and represents the direct implementation of Article 18(2) of the Constitution. In line with the provisions laid down in the Constitution, the legislative act in question is aimed at preventing conduct liable to influence or impair the democratic formation of political convictions by the general public, even where such conduct does not involve the breach of ordinary criminal law, which implies that it has effective legislative content of constitutional significance and excludes the possibility that the legislation may be obsolete. Besides, the enduring relevance of Legislative Decree no. 43 of 1948 is confirmed, if there were any need, by the fact that it was reintroduced by Legislative Decree no. 20 of 2012.

It needs to be added that if, as is considered, the rationale of criminalising associations having military nature pursuing political goals, and that laid down by Article 18(2) of the Constitution, lies in the need to safeguard freedom within the political decision making process, then the contested provision proves to contrast clearly with the criterion laid down in letter c of paragraph 14, which is aimed at ensuring that "provisions the repeal of which would entail a breach of constitutional rights" remain in force.

6.3.– As mentioned above, the preamble to Legislative Decree no. 66 of 2010 states as sources for the authorisation not only paragraph 14 but also paragraph 15 of Law no. 246 of 2005, which provides that "The legislative decrees falling under paragraph 14 shall also make provision for the simplification or reorganisation of the areas of law to which they refer, in accordance with the principles and directive criteria laid down by Article 20 of Law no. 59 of 15 March 1997, as amended, *inter alia* for the purpose of harmonising the provisions remaining in force with those enacted after 1 January 1970".

However, this provision was also not capable of justifying the repeal of Legislative Decree no. 43 of 1948.

In fact, the authorisation contained in paragraph 15 was aimed at the simplification or reorganisation of the legislative provisions enacted prior to 1 January 1970 remaining in force after completion of the operation to "salvage" legislation that required

harmonisation, if at all, with subsequent legislation, and within this context the repeal provided for under Article 2268(1), no. 297 of Legislative Decree no. 66 of 2010 cannot have any legitimacy, amongst other things because Legislative Decree no. 43 of 1948 does not fall under the area of military law regulated by Legislative Decree no. 66 of 2010.

According to the wording of Article 1 of this Decree, it is in fact clear that associations having military nature and pursuing political goals do not fall under the matters subject to legislative reorganisation and therefore that, even if the express repeal of legislation, including that which it had already been stipulated should remain in force, were deemed to have been permitted by paragraph 15, it would still have to be concluded that it was not possible to repeal Legislative Decree no. 43 of 1948 on the grounds that the subject matter regulated thereunder was not the military law to which the reorganisation applied.

It is important to recall in this regard that, in a Ministry of Defence statement of 22 October 2010, the Minister announced that Legislative Decree no. 43 of 1948 had been included in error amongst the provisions to be repealed as listed in Article 2268 of Legislative Decree no. 66 of 2010. Consequently, the Legislative Office of the Ministry of Defence had "proposed its correction according to the procedures applicable to the correction of material errors by publication in the Official Journal"; however, this solution was not "endorsed by the Legislative Office of the Department for Legislative Simplification, which was the co-sponsor of the Code".

Therefore, the contested provision also breaches the scope of the authorisation granted under paragraph 15 since "the fundamental aim of simplification, which was the rationale of Law no. 246 of 2005, was to create coherent bodies of legislation, starting from a reorganisation of the scattered and uncoordinated provisions in force, making such changes as proved to be necessary by virtue of their unitary consolidation" (see Judgment no. 80 of 2012), whilst the repeal of provisions establishing criminal offences only apparently related with the area of law subject to reorganisation evidently occurs on another level and requires legislative policy choices to be made which, albeit in terms of their general scope, must originate from Parliament.

Thus, having clarified that the provision in question could not fall within the scope of a simplification or reorganisation of military law, it must also be concluded that

Article 14(15) of Law no. 246 of 2005 on the "legislative decrees falling under paragraph 14" of that Article could not under any circumstances justify the repeal of a law, which paragraph 14 should by contrast ensure remains in force.

6.4.– A third delegation is contained in Article 14(14-quater) of Law no. 246 of 2005, which provides that "Within the time limit provided for under paragraph 14-ter, the Government is also authorised to adopt one or more legislative decrees providing for the express repeal, with effect from the time specified by paragraph 14-ter, of legislative provisions of state law falling under paragraph 14(a) or (b), even if they were enacted after 1 January 1970".

The preamble to Legislative Decree no. 66 of 2010 does not refer to paragraph 14-quater; however, it is clear from the preparatory works that the delegated legislator intended to implement also the authorisation provided for under the latter paragraph, expressly identifying and repealing legislative provisions that were now meaningless; moreover, in the opinion presented on the draft version of the Legislative Decree under examination, when indicating the legislative basis the Council of State expressly referred also to paragraph 14-quater, in addition to paragraphs 14 and 15.

However, whilst it does expressly provide for a power of repeal, this provision of the parent statute is also incapable of justifying the repeal of Legislative Decree no. 43 of 1948, because paragraph 14-quater authorises the Government to repeal "legislative provisions of state law falling under paragraph 14(a) or (b)", namely those that had been "tacitly or implicitly repealed" and those that had "exhausted their function, lacked effective normative content or were otherwise obsolete" and, as mentioned above, these categories cannot in any way cover the Legislative Decree prohibiting associations having military nature and pursuing political goals.

6.5.– In the light of the considerations set out in the above paragraphs, it must be concluded that the question concerning the constitutionality of Article 2268 of Legislative Decree no. 66 of 2010 insofar as no. 297 of paragraph 1 repeals Legislative Decree no. 43 of 1948 is well founded on the grounds that the necessary legislative authorisation was lacking.

Consequently, the other grounds for unconstitutionality proposed by the referring court and the referring judge are moot.

7.– It is now necessary to examine the question relating to Article 1 of Legislative Decree no. 213 of 2010 insofar as it amends Legislative Decree no. 179 of 2009 by removing – through inclusion in Annex B – Legislative Decree no. 43 of 1948 from the list of provisions to remain in force in accordance with Annex 1 of Legislative Decree no. 179 of 2009.

Also in this case the objections raised by the referring court and the referring judge are focused first and foremost on the violation of Article 76 of the Constitution on the grounds that the repeated repeal of Legislative Decree no. 43 of 1948 lacked the authority of a parent statute.

Article 1 of Legislative Decree no. 213 of 2010 provides that, "For the purposes of Article 14(14),(14-ter) and (18) of Law no. 246 of 28 November 2005, as amended, Legislative Decree no. 179 of 1 December 2009 shall be amended as follows: a) Annex 1 shall be supplemented by the provisions of state law enacted prior to 1 January 1970 included in Annex A to this Decree; b) the provisions of state law included in Annex B to this Decree shall be removed from Annex 1; c) the items contained in Annex C to this Decree shall replace the corresponding items in Annex 1". This provision accordingly both introduced and repealed legislation, with Annex A adding certain legislative provisions to those to remain in force under Legislative Decree no. 179 of 2009, and Annex B removing others.

Legislative Decree no. 213 is dated 13 December 2010 and, since the deadline of 16 December 2009 for the expiry of the authorisation, provided for under Article 14(14) of Law no. 246 of 2005, had already passed, it is necessary to refer to paragraph 18 of that Article in order to identify the source of the power exercised on that occasion by the Government. This paragraph provides that, "Within two years of the entry into force of the legislative decrees falling under paragraph 14, provisions may be enacted by one or more legislative decrees to supplement, reorganise or correct legislation exclusively in accordance with the principles and guiding criteria specified in paragraph 15 and after obtaining the opinion of the Committee provided for under paragraph 19".

If Article 1 of Legislative Decree no. 213 of 2010 is considered with reference to this provision, it must be deemed to "supplement" letter a) and to "correct" letter b), and it is noted that the supplementation and correction could not have occurred without complying with the criteria applicable to the authorisation in paragraph 14.

In fact, paragraph 18, which is linked to the "legislative decrees falling under paragraph 14" and refers to the "principles and directive criteria specified in paragraph 15", amounts to a prolongation, subject to certain specific provisions, of the authorisations contained in the two aforementioned paragraphs. In particular, it is paragraph 14 which marks out the dividing line between the legislative provisions that were to remain in force and those that were to be repealed, which means that the Government could not derive even from paragraph 18 any power to repeal legislation such as Legislative Decree no. 43 of 1948 which, according to paragraph 14, was to remain in force.

It must therefore be concluded that the Government was not entitled to remove Legislative Decree no. 43 of 1948 on the prohibition of paramilitary associations pursuing political goals, which it had legitimately ordered should remain in force, from Legislative Decree no. 179 of 2009.

Having clarified this, it must be concluded that also the question concerning the constitutionality of Article 1 of Legislative Decree no. 213 of 2010 insofar as it amends Legislative Decree no. 179 of 2009 by removing – through inclusion in Annex B – Legislative Decree no. 43 of 1948 from the list of provisions to remain in force in accordance with Annex 1 of Legislative Decree no. 179 of 2009 is well founded on the grounds that it is *ultra vires*.

Consequently, the other grounds for unconstitutionality proposed by the referring court and the referring judge are moot.

8.– Article 2268 of Legislative Decree no. 66 of 2010 must therefore be declared unconstitutional insofar as no. 297 of paragraph 1 repeals Legislative Decree no. 43 of 1948, as must also Article 1 of Legislative Decree no. 213 of 2010 insofar as it amends Legislative Decree no. 179 of 2009, by removing – through inclusion in Annex B – Legislative Decree no. 43 of 1948 from the list of provisions to remain in force in accordance with Annex 1 of Legislative Decree no. 179 of 2009, due to violation of Article 76 of the Constitution.

The questions of constitutionality raised in the alternative are moot.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

hereby,

1) declares that Article 2268 of Legislative Decree no. 66 of 15 March 2010 (Military Code) is unconstitutional insofar as no. 297 of paragraph 1 repeals Legislative Decree no. 43 of 14 February 1948 (Prohibition on paramilitary associations);

2) declares that Article 1 of Legislative Decree no. 213 of 13 December 2010 (Amendments and supplements to Legislative Decree no. 179 of 1 December 2009 stipulating the legislative provisions of state law enacted prior to 1 January 1970 that it is considered indispensable should remain in force) is unconstitutional insofar as it amends Legislative Decree no. 179 of 1 December 2009 (Legislative provisions of state law enacted prior to 1 January 1970 that it is considered indispensable should remain in force, adopted pursuant to Article 14 of Law no. 246 of 28 November 2005), removing Legislative Decree no. 43 of 14 February 1948 (Prohibition on paramilitary associations) from the provisions to remain in force.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 15 January 2014.