

## JUDGMENT NO. 23 YEAR 2013

In this case the Court heard a reference from a judge for preliminary investigations questioning the constitutionality of the rule that the time-barring period for proceedings against accused who are permanently incapacitated is suspended, potentially permanently, for the duration of their incapacitation. This has the result that such proceedings may potentially be reactivated many years after the offence was committed in the event that the accused regains consciousness. The Court dismissed the challenge as inadmissible on the grounds that there was no clear solution mandated under constitutional law, though subject to the reservation that, were Parliament to remain inactive for an excessively long time, it may regard such inertia as intolerable.

*[omitted]*

THE CONSTITUTIONAL COURT

*[omitted]*

gives the following

### JUDGMENT

in proceedings concerning the constitutionality of Article 159(1) of the Criminal Code, initiated by the judge for preliminary investigations at the *Tribunale di Alessandria* by the referral order filed on 27 February 2012, registered as no. 171 in the Register of Orders 2012 and published in the Official Journal of the Republic no. 36, first special series 2012.

Given the intervention by the President of the Council of Ministers;  
having heard the Judge Rapporteur Gaetano Silvestri in chambers on 16 January 2013.

*[omitted]*

#### *Conclusions on points of law*

1.– The judge for preliminary investigations at the *Tribunale di Alessandria* questions the constitutionality of Article 159(1) of the Criminal Code with reference to Articles 3, 24(2) and 111(2) of the Constitution “insofar as it provides for the suspension of the **operation of time barring**/period of limitations also where the prerequisites laid down by Articles 71 and 72 of the Code of Criminal Procedure are

met, if it has been ascertained that the accused is irreversibly incapable of participating consciously in the trial”.

2.– The question was raised during the preliminary hearing in relation to a person who had criminal capacity at the time the offence was committed, but whose condition subsequently became one of “permanent and total” incapacity as a result of injury suffered on that occasion, such as to render him incapable of participating consciously in the proceedings, his condition having been diagnosed as irreversible.

The referring judge, who suspended the proceedings pursuant to Article 71 of the Code of Criminal Procedure and ordered periodical examinations of the mental state of the accused by experts, should confirm the suspension order on the basis of the medical documentation obtained.

However, since the diagnosis that the accused’s condition is irreversible cannot be seriously challenged (taking account of current medical knowledge, the seriousness of the condition, and the period of time which has passed without any changes to his condition), the referring judge has submitted for review the substantive rule which provides for a suspension of the **operation of time barring/**period of limitations, as an effect of the mandatory suspension of the proceedings.

The application of this rule also in cases in which it is entirely unrealistic to suppose that the accused may recover his or her mental capacities, and hence that the proceedings may be resumed, is alleged at the same time to violate the principle of the reasonable duration of trials, the principle of reasonableness (as the contested provision assumes that the situation imposing a freeze in the proceedings is transitory in nature) and the principle of equality (due to the less favourable treatment of the person in the condition referred to above, who will be liable to be prosecuted indefinitely).

Finally, it is claimed to violate the accused’s right to a defence in the event that he or she recovers from the mental impairment, as the long period of time elapsed since the offence would make it difficult to prepare an effective defence.

3.– The question is inadmissible.

3.1.– The referring judge points to a genuine anomaly inherent within the related provisions on the suspension of the **time barring of offences/**period of limitations (Article 159(1) of the Criminal Code) and on the suspension of trials due to the incapacity of the accused (Articles 71 and 72 of the Code of Criminal Procedure).

Indeed, if – as in the present case – it has been ascertained (according to the procedures provided for under Article 70 of the Code of Criminal Procedure) that the mental incapacity arising after the offence is irreversible, thereby preventing the interested party from participating consciously in the proceedings, the offence will, to all intents and purposes, be ineligible for time barring. This incongruous situation cannot be remedied either by the judge or by the accused. The indefinite protraction of the suspension of the trial – with the consequence that the accused may potentially be liable to prosecution indefinitely, on the grounds that the period of limitations has been suspended – is unreasonable, as it conflicts with the rationale underlying, respectively, the time barring of offences and the suspension of trials. The rationale for the former is related *inter alia* both to the progressive reduction of the community’s interest in punishing criminal conduct, the relevant period of limitations for which have been assessed by Parliament in accordance with criminal law policy choices based on the seriousness of the offences; as well as the “right to be forgotten” of individuals when the offence is not so serious as to preclude such protection. The rationale for the suspension of trials is based on the right to a defence, which requires that it must be possible for the accused to participate consciously in the proceedings.

In the event that the aforementioned impairment is irreversible, both of the goals inherent in the substantive and procedural rules referred to above will be frustrated, with the result that the basis for the guarantees provided for thereunder will inevitably be undermined.

3.2.– However, the problem reported by the referring judge cannot be resolved by this Court, as there is no solution required under constitutional law for the anomaly described in the previous section. There is, indeed, scope to issue various rules governing the relevant procedural arrangements (to be put in place).

For example – out of the numerous potential solutions – it could be possible to introduce the extreme remedy whereby, once a diagnosis has been made that the mental impairment of the accused is irreversible, it is ruled that the action cannot be brought or pursued, subject to the possibility of revocation in the event that the diagnosis were contradicted by the facts prior to expiry of the period of limitations. A more nuanced solution would, instead, be to require that a specific number of examinations be carried out pursuant to Article 72 of the Code of Criminal Procedure, or the expiry of a specific

portion of the period of limitations, before a ruling could be issued pursuant to Article 129 of the Code of Criminal Procedure.

These choices are equivalent with regard to the final result, i.e. the resolution of the relative anomaly, yet different with regard to the procedure to be followed in order to define the substantive and procedural position of an accused person who has been declared to be irreversibly incapable of participating consciously in the proceedings. Each of these involves discretionary assessments regarding the relationship between means and ends, which do not fall to this Court but to Parliament.

4.– In ruling inadmissible the present question of constitutionality – due to the need to respect the priority status of Parliament’s assessment as to whether the means used to achieve a constitutionally necessary goal are appropriate – this Court must however assert that any excessive prolongation of legislative inertia in relation to the serious problem identified in this ruling would not be tolerable.

ON THOSE GROUNDS  
THE CONSTITUTIONAL COURT

rules that the question concerning the constitutionality of Article 159(1) of the Criminal Code, raised in relation to Articles 3, 24(2) and 111(2) of the Constitution by the judge for preliminary investigations at the *Tribunale di Alessandria* by the referral order mentioned in the headnote, is inadmissible.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 11 February 2013.