Corte costituzionale

JUDGMENT NO. 215 OF 2008

FRANCO BILE, PRESIDENT
GIUSEPPE TESAURO, AUTHOR OF THE JUDGMENT

JUDGMENT No. 215 YEAR 2008

In this case the Court considered legislation de-criminalising certain gaming offences, which however provided that for offences committed before the entry into force of the new legislation, the old penalties would apply. The Court recalled its jurisprudence according to which, although exceptions to the principle that the lex mitior should apply were permissible, "such limitations and exceptions must be justified with reference to the need to uphold countervailing interests of similar importance". Since the Court found that no such countervailing interests could be identified as underpinning the indiscriminate exception to the general principle, it ruled that the legislation was unconstitutional.

THE CONSTITUTIONAL COURT

Composed of: President: Franco BILE; Judges: Giovanni Maria FLICK, Francesco AMIRANTE, Ugo DE SIERVO, Paolo MADDALENA, Alfio FINOCCHIARO, Alfonso QUARANTA, Franco GALLO, Luigi MAZZELLA, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO, Paolo Maria NAPOLITANO,

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 1(547) of law No. 266 of 23 December 2005 (Provisions governing the formulation of the annual and long-term budget of the state – Finance law 2006), commenced pursuant to the referral orders of 14 June 2007 from the *Tribunale di Pinerolo*, of 11 October 2007 from the *Tribunale di Varese* and of 19 June 2007 from the *Tribunale di Pescara*, registered respectively as Nos. 805, 847 and 852 in the Register of Orders 2007 and published in the *Official Journal of the Republic* No. 49, first special series 2007 and No. 5, first special series 2008.

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

having heard the judge rapporteur Giuseppe Tesauro in chambers on 7 May 2008.

The facts of the case

1. – By referral order of 14 June 2007, the *Tribunale di Pinerolo* raised, with reference to Article 3 of the Constitution, the question of the constitutionality of Article 1(547) of law No. 266 of 23 December 2005 (Provisions governing the formulation of the annual and long-term budget of the state – Finance law 2006), which provides that in cases involving a violation of Article 110(9) of royal decree No. 773 of 18 June 1931 (Approval of the consolidated law on public order), as subsequently amended, committed prior to the entry into force of law No. 266, the criminal sanctions provided for at the time of the violation shall be applied.

1.1. – The referring court was seized of proceedings in which several persons were charged with the offence contained in Article 110(9) of royal decree No. 773 of 1931, on the grounds that they installed and consented to the use, in an area open to the public, of apparatus capable of being used for gambling "or [...] which did otherwise not comply with the characteristics and requirements mentioned in Article 110(6) and (7) of the consolidated law on public order [TULPS]", prior to the entry into force of law No. 266 of 2005.

The lower court complains that, under the terms of the contested provision, this conduct retains its criminal status, despite the fact that Article 1(543) of the same law decriminalised the conduct formerly regarded as an offence pursuant to Article 110(9) of royal decree No. 773 of 1931.

According to the court, by preventing "the retroactive application of the new legislation containing the *abolitio criminis*", Article 1(547) of law No. 266 of 2005 violates Article 3 of the Constitution since it introduces, without any sufficient justification, an exception from the principle that the criminal law should not continue to apply after an offence has been decriminalised, enshrined in Article 2(2) of the Criminal Code, which guarantees citizens equal treatment in the application of the criminal law.

According to the case law of the Constitutional Court in fact, the principle of retroactivity *in mitius* is justified under constitutional law by the principle of equality, which requires, in principle, that the same conduct be punished in the same manner, regardless of when it occurred. Therefore, the principle of the retroactivity of the *lex*

mitior, in contrast to the principle of the non-retroactivity of a less favourable criminal law rule, "may lawfully be subject to exceptions under constitutional law", but only where founded on objectively reasonable justifications (citing judgments No. 394 of 2006, No. 80 of 1995, No. 6 of 1978 and No. 164 of 1974, as well as order No. 330 of 1995).

The lower court points out that more recent legislation has reinforced the principle of the retroactivity of more favourable criminal law provisions, extending it also to the sector of financial offences to which – under the terms of Article 20 of law No. 4 of 7 January 1929 (General provisions governing the punishment of financial crimes), repealed by Article 24(1) of legislative decree No. 507 of 30 December 1999 – it did not apply. Moreover, the infractions punishable under Article 110(9) of royal decree No. 773 of 1931, previously in force, did not fall within the concept of financial offence.

In the opinion of the referring court, the relevance of the question is not affected by the fact that Article 110(9) has recently been replaced by Article 1(86) of law No. 296 of 27 December 2006 (Provisions governing the formulation of the annual and long-term budget of the state – Finance law 2007), given that, pursuant to Article 1(547) of law No. 266 of 2005, the criminal law provisions repealed in any case continue to apply to prior conduct.

1.2. – The President of the Council of Ministers intervened, represented and advised by the *Avvocatura Generale dello Stato*, requesting the Court to rule the question inadmissible, since Article 1(547) of law No. 266 of 2005 "should not apply" to the facts at issue in the principal proceedings.

In fact, the state representative continues, Article 110(9) of royal decree No. 773 of 1931, as amended, no longer punishes the installation and use of gambling apparatus and devices, providing instead for punishment only in relation to "recreational apparatus and devices falling under sub-sections 6 and 7" (Article 1(86) of law No. 296 of 2006) . Therefore, in referring to the violations falling under Article 110(9) of royal decree No. 773 of 1931, the contested provision did not apply to the conduct relating to the gambling apparatus at issue in the proceedings before the lower court.

2. – The *Tribunale di Varese* also raised the question of the constitutionality of Article 1(547) of law No. 266 of 2005, by order issued on 11 October 2007 within the

context of criminal proceedings concerning the offences contained in Article 110 of royal decree No. 773 of 1931 and Article 718 of the Criminal Code.

2.1. – The referring court argues that – insofar as it provides that in cases involving a violation of Article 110(9) of royal decree No. 773 of 1931 committed prior to 1 January 2006, the penalties in force at the time of the conduct continue to apply, whilst in other cases new administrative sanctions may be applied – this provision results in a difference in treatment between individuals convicted of identical offences "solely on the basis of when the offence was committed", which violates not only Article 3 but also Article 25 of the Constitution.

The lower court, referring to the case law of the Constitutional Court, accepts that the principle of the retroactivity of criminal law provisions that are more favourable *pro reo* may be subject to restrictions under ordinary legislation but, as far as the exception contained in Article 1(547) of law No. 266 of 2005 is concerned, it claims that there is no reasonable justification therefor (citing judgment No. 74 of 1980).

2.2. – The President of the Council of Ministers intervened, represented and advised by the *Avvocatura Generale dello Stato*, requesting that the question be ruled inadmissible, on the grounds that the description of the facts at issue in the principal proceedings was insufficient.

3. – A similar question concerning the constitutionality of Article 1(547) of law No. 266 of 2005 was raised by the *Tribunale di Pescara*, by referral order of 19 June 2007, with reference to Article 3 of the Constitution.

3.1. – As far as the issue of relevance is concerned, the lower court states that, under the terms of the contested provision, the accused in the principal proceedings would be liable to punishment under the criminal law, in spite of the fact that the offence with which they were charged was no longer regarded as an offence, since Article 1(543) of law No. 266 of 2005 decriminalised the act of distributing, installing or consenting to the use in an area open to the public of apparatus which does not comply with the requirements set out in Article 110(6) and (7) of royal decree No. 773 of 1931.

The *Tribunale di Pescara* also argues that the exception from the principle of the non retroactivity of the criminal law, provided for under Article 1(547) of law No. 266 of 2005, is supported by a rational justification (citing judgment No. 74 of 1980), finding

Parliament's choice to be based "only [on] an assessment that the social and criminal harm of the action varies at different points in time".

3.2. – The President of the Council of Ministers intervened, represented and advised by the *Avvocatura Generale dello Stato*, requesting the Court to rule the question inadmissible on the grounds that the referring court did not take into account the fact that Article 110(9) of royal decree No. 773 of 1931 was replaced by Article 1(86) of law No. 296 of 2006.

Findings on points of law

1. – In the referral orders mentioned in the headnote, the *Tribunale di Pinerolo*, the *Tribunale di Varese* and the *Tribunale di Pescara* submit for review by this court the transitional arrangements contemplated under Article 1(547) of law No. 266 of 23 December 2005 (Provisions governing the formulation of the annual and long-term budget of the state – Finance law 2006), regarding the decriminalisation by the same law of the offences concerning automatic, semi-automatic and electronic apparatus and gaming devices.

In particular, the contested provision stipulates that in cases involving a violation of Article 110(9) of royal decree No. 773 of 18 June 1931 (Approval of the consolidated law on public order), as subsequently amended, committed prior to the entry into force of law No. 266, the criminal sanctions provided for at the time of the violation shall be applied, thereby creating an exception from the principle of the non retroactivity of the criminal law set out in Article 2(2) of the Criminal Code.

According to the referring court, this exception breaches Article 3 of the Constitution, since it provides, without any sufficient justification, for a difference in treatment between individuals who, at different moments in time, commit offences against Article 110 of royal decree No. 773 of 1931 (citing the following judgments of this Court: No. 394 of 2006, No. 80 of 1995, No. 6 of 1978, No. 164 of 1974, as well as order No. 330 of 1995).

The *Tribunale di Varese* also argues that Article 25 of the Constitution has been violated.

2. – Since the cases concern similar, if not identical, questions, they must be for decision in a single judgment.

3. – The questions of constitutionality raised by the *Tribunale di Varese* and by the *Tribunale di Pescara* are manifestly inadmissible.

The *Tribunale di Varese* failed to give details of the specific facts of the case before it, limiting itself to stating that the accused was charged, amongst other things, with violation of Article 110 of royal decree No. 773 of 1931, and did not even give any indications with regard to the time when the offence was committed (order No. 55 of 2008).

In formulating its opinion on the relevance of the question, the *Tribunale di Pescara* did not comprehensively present the reference legislative framework, and failed to discuss, even simply in order to preclude its relevance, the recent replacement of Article 110(9) of royal decree No. 773 of 1931 by Article 1(86) of law no. 296 of 27 December 2006 (Provisions governing the formulation of the annual and long-term budget of the state – Finance law 2007) (order No. 55 of 2008).

4. – The Court on the other hand cannot accept the challenge made by the *Avvocatura dello Stato* that the constitutional proceedings commenced by the *Tribunale di Pinerolo* are inadmissible on the grounds that the proceedings before the lower court concerned violations pertaining to gambling apparatus, as defined under Article 110(5) of royal decree No. 773 of 1931, whereas, in relation to such offences, Article 1(547) of law No. 266 of 2005 does not apply, and the new version or Article 110(9) applies exclusively "with regard to recreational apparatus and devices falling under sub-sections 6 and 7" (phrase introduced by Article 1(86) of law No. 296 of 2006).

Indeed, it is clear from the referral order that the conduct at issue in the principal proceedings related to apparatus which did "otherwise" not comply with the characteristics and requirements contained in Article 110(6) and (7) of royal decree No. 773 of 1931.

On the other hand, in providing for the continuing applicability of the provisions previously contained in Article 110(9) of royal decree No. 773 of 1931, Article 1(547) also applies to violations relating to apparatus and gaming devices committed when

they were punishable under the terms of that provision (*inter alia*, Court of Cassation, judgments No. 16599 of 2 May 2007 and No. 15297 of 17 April 2007).

5. – The question raised by the *Tribunale di Pinerolo* is well founded on the merits.

6. – Law No. 266 of 2005, which replaced Article 110(9) of royal decree No. 773 of 1931, on the one hand transformed the offence consisting in the interference in the normal mechanisms of the game through the use of apparatus and devices which do not comply with the characteristics and requirements specified in sub-section 6 (also amended) and sub-section 7 of the same article into an administrative infraction; at the same time, it provided that the punishability of conduct related to gambling be regulated solely according to the provisions of the Criminal Code, whereas such conduct had previously, on a formal level, been regarded as an offence on two counts.

This change in the law would have caused the criminal relevance of breaches of Article 110(9) previously committed to lapse, had Article 1(547) of law No. 266 of 2005 not provided that the law in force at the relevant time continue to apply.

7. – The review of the constitutionality of Article 1(547) must be carried out with reference to the extent to which this provision departs from the general principle laid down in Article 2(2) of the Criminal Code, according to which no person may be punished for conduct which, under the terms of a later law, is no longer an offence.

According to the case law of this court, although the rule of the retroactivity of the *lex mitior* has a different status compared to the principle of the non retroactivity of provisions which introduce an offence, contained in Article 25(2) of the Constitution, it does not lack its own basis in the Constitution. Indeed, in accordance with the principle of equality, amendments to the criminal law which are more favourable to the accused and, even more so, the *abolitio criminis* ordered by Parliament in the light of a changed assessment of the social harm of the relevant conduct must also operate in favour of those who carried out the conduct at an earlier moment in time, unless there is sufficient justification for the contrary to apply (judgments No. 394 and No. 393 of 2006, No. 80 of 1995, No. 74 of 1980, No. 6 of 1978 and No. 164 of 1974).

The principle of the retroactivity of more favourable criminal law provisions may therefore be subject to limitations and exceptions, but – on account of the particular importance of the interest protected thereby, as demonstrated by the degree of

protection granted under internal law, as also by the fact that it forms part of the constitutional traditions common to the Member States of the European Union (European Court of Justice, judgment of 3 May 2005 in Joined Cases C-387/02, C-391/02 and C-403/02) and international law (Article 15(1) of the International Covenant on Civil and Political Rights, adopted in New York on 16 December 1966, ratified and implemented by law No. 881 of 25 October 1977) – such limitations and exceptions must be justified with reference to the need to uphold countervailing interests of similar importance (judgments No. 72 of 2008, No. 394 and No. 393 of 2006).

In view of the above criteria, it is necessary to assess whether the transitional arrangements contained in the contested provision satisfy requirements capable of prevailing over a principle of the type mentioned above.

8. – The indiscriminate exception contained in Article 1(547) of law No. 266 of 2005 is not related to constitutional interests similar to the interest of the individual in not being exposed to the criminal law consequences of conduct now punished as a simple administrative infraction, or of conduct no longer punished pursuant to Article 110(9) of royal decree No. 773 of 1931, but rather simply according to the provisions of the Criminal Code which relate to gambling.

On the contrary, the existence of such an exception runs against the objectives of the decriminalisation, consisting – according to the report on the draft bill, enacted as law No. 266 of 2005 – in the need to ensure a more rapid conclusion to proceedings and to delegate the imposition of sanctions to the body with the greatest technical expertise in the sector, namely the regional office of the Autonomous Administration of State Monopolies.

On the other hand, the non retroactivity of the *abolitio criminis* is not sufficiently justified by the reasons generically mentioned in the report mentioned above, which states that it seeks “to ensure clarity in relation to the application of the new scheme of sanctions”, because, had the transitional provision not been enacted, the general principles set out in Article 2 of the Criminal Code would in any case have applied.

Although the contested provision is contained in a budgetary law, the Court finds that it is not based on any primary interest of the state in the collection of taxes (judgments No. 80 of 1995, No. 6 of 1978, No. 164 of 1974), since the offences abolished by no

means pursued such an interest, rather having a legal objective pertaining to public order (judgment No. 237 of 2006).

9. – The Court therefore finds that Article 1(547) of law No. 266 of 2005 is unconstitutional due to violation of Article 3 of the Constitution, insofar as it permits the application, in cases involving a violation of Article 110(9) of royal decree No. 773 of 1931, as subsequently amended, committed prior to the entry into force of law No. 266 of 2005, of the criminal sanctions provided for at the time of the offences.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

hereby,

declares that Article 1(547) of law No. 266 of 23 December 2005 (Provisions governing the formulation of the annual and long-term budget of the state – Finance law 2006) is unconstitutional, insofar as it provides that, in cases involving a violation of Article 110(9) of royal decree No. 773 of 18 June 1931 (Approval of the consolidated law on public order), as subsequently amended, committed prior to the entry into force of law No. 266, the criminal sanctions provided for at the time of the offences shall be applied;

rules that the questions concerning the constitutionality of Article 1(457) of law No. 266 of 23 December 2005 (Provisions governing the formulation of the annual and long-term budget of the state – Finance law 2006) raised by the *Tribunale di Pescara*, with reference to Article 3 of the Constitution, and by the *Tribunale di Varese*, with reference to Articles 3 and 25 of the Constitution, in the referral orders mentioned in the headnote, are manifestly groundless.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 9 June 2008.

Signed:

Franco BILE, President

Giuseppe TESAURO, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 18 June 2008.

The Director of the Registry

Signed: DI PAOLA