Corte costituzionale

JUDGMENT NO. 239 OF 2009

FRANCESCO AMIRANTE, President
UGO DE SIERVO, Author of the Judgment

JUDGMENT NO. 239 YEAR 2009

In this case the Court considered the constitutionality of a provision which stipulated that land and buildings developed unlawfully were to be confiscated following criminal proceedings for the offence of unlawful development "including in the event that the accused are acquitted on grounds other than the conclusion that there was no case to answer, and including for property belonging to persons not involved in the criminal trial". The contested provision was stated to have introduced a criminal law penalty (on the basis also of the ECHR ruling on admissibility in the *Sud Fondi* case), thereby violating the constitutional law principles of "equality, the requirement that offences be regulated by statute and the personal nature of criminal law responsibility". The Court ruled the question inadmissible on the grounds that: (i) the description of the facts of the case was insufficient; (ii) it is not clear whether the measure would be applied against the accused who had been acquitted or against third parties not involved in the proceedings; (iii) the referring court did not establish that the ECHR ruling cited was in point; and (iv) the referring Court had not attempted to resolve the issue through interpretation.

THE CONSTITUTIONAL COURT

composed of: President: Francesco AMIRANTE; Judges: 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, Giuseppe FRIGO, Alessandro CRISCUOLO, Paolo GROSSI,

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 44(2) of decree of the President of the Republic No. 380 of 6 June 2001 (Consolidated text of legislative and regulatory provisions on building), raised by the Bari Court of Appeal in the criminal proceedings against Maria Rosaria Volpe and others, by the referral order of 9 April 2008

registered as No. 272 in the Register of Orders 2008 and published in the *Official Journal of the Republic* No. 38, first special series 2008.

Considering the entries of appearance by Vito Chiarappa and others, Nunzio Rocco Parente and others, Antonio Caputo and others as well as the intervention by the President of the Council of Ministers;

having heard the Judge Rapporteur Ugo De Siervo in the public hearing of 23 June 2009;

having heard the barristers Massimo Luciani, Pasquale Medina and Aurelio Gironda for Nunzio Rocco Parente and others, Franco Coppi and Aurelio Gironda for Vito Chiarappa and others, Pasquale Medina and Aurelio Gironda for Antonio Caputo and others and the *Avvocato dello Stato* Giuseppe Albenzio for the President of the Council of Ministers.

The facts of the case

1 – By referral order of 9 April 2008, received by this Court on 21 July 2008, the Bari Court of Appeal, first criminal division, raised a question concerning the constitutionality of Article 44(2) of decree of the President of the Republic No. 380 of 6 June 2001 (Consolidated text of legislative and regulatory provisions on building), with reference to Articles 3, 25(2) and 27(1) of the Constitution, "insofar as it requires the criminal courts, when confronted with a certified unlawful development, to order the confiscation of the land and buildings unlawfully constructed, notwithstanding the judgment on responsibility, also against persons not under investigation or on trial".

The contested provision stipulates that the confiscation of land unlawfully developed and buildings unlawfully constructed be ordered, by definitive judgment of the criminal court which finds that there has been an unlawful development. The lower court points out that, in accordance with the now settled case law of the Court of Cassation, the confiscation must be ordered where it has been ascertained that there has been unlawful development,

"including in the event that the accused are acquitted on grounds other than the conclusion that there is no case to answer, and including for property belonging to persons not under investigation or on trial".

The proceedings before the lower court involve a prosecution, *inter alia*, for the offence of unlawful development: as regards the relevance of the question, the referring court asserts that "the time when the offences were committed and the fact that almost all of the accused have not waived their right to benefit from the operation of time barring means that on conclusion of the proceedings – without thereby wishing to pre-empt the solution on the merits, which should duly not be offered at this stage – a ruling that the prosecution cannot be continued on the grounds that the offence has been classified as no longer punishable will be highly likely".

On the basis of the rule mentioned above, this should be followed by the application of the confiscation measure.

As regards its non manifest groundlessness, the referring court questions in the first instance the nature of the confiscation, which the most recent case law of the Court of Cassation is argued to have classified as as an administrative penalty, rather than a "criminal law penalty/public safety measure". This classification appears to the lower court to be mistaken, on the basis of certain indicative features.

First and foremost, the criminal court would find itself exercising a "supplementary role" compared to the public administration, in the absence of any "express and detailed statutory provision" endowing it with that function; moreover, that function would cover, in the opinion of the referring Court, an area broader than situations involving the acquisition of rights over the common property of the developed areas, provided for pursuant to Article 30(7) and (8) of decree of the President of the Republic No. 380 of 2001, which would not appear to be compatible with the merely administrative nature of the penalty. Secondly, the referring court also finds it significant that the confiscation is regulated by Article 44 of decree of the President of the Republic No. 380 of 2001, entitled "criminal penalties": it should be inferred that the secondary legislator endowed the confiscation with "criminal law status", not thereby overstepping the limits of the authorisation.

Finally, as confirmation of this conclusion, the lower court refers to the decision on admissibility by the European Court of Human Rights in the case *Sud Fondi s.r.l. and others v. Italy*, application No. 75909/01, where it was found that the confiscation provided for under the contested provision amounted to a penalty within the meaning of Article 7 of the Convention. On the basis of these elements, the lower court finds that the confiscation concerned is a "criminal law penalty", a conclusion which, it adds, is imposed on the interpreting body in accordance with the aforementioned ruling of the Strasbourg Court.

Accordingly, once the criminal law nature of the confiscation has been confirmed, it appears to the referring court to be questionable under constitutional law for it to be ordered "notwithstanding the judgment on responsibility, also against persons not under investigation or on trial", in contrast with the principles of "equality, the requirement that offences be regulated by statute and the personal nature of criminal law responsibility", laid down by Articles 3, 25(2) and 27(1) of the Constitution.

2. – The President of the Council of Ministers intervened in the proceedings, represented and advised by the *Avvocatura Generale dello Stato*, requesting that the question be ruled groundless.

After having paused to consider the historical origins and the nature of the offence of unlawful development, the *Avvocatura Generale* emphasises that both the literal wording of the contested Article 44, as well as the case law of the Court of Cassation that has been established regarding it unequivocally point to the administrative nature of the penalty of confiscation: it is in fact claimed not to be of a punitive nature, but is intended "to bring the territory into line with the established town planning scheme, preventing land that has been unlawfully developed from being subject to further exploitation". This objective and tangible goal is claimed to justify the application of the penalty also to the detriment of good faith third party purchasers of the buildings developed, who may pursue an action for damages before the civil courts: the object of the confiscation is in fact dangerous property, insofar as they are liable to lead to exploitation resulting from the unlawful act. On the other hand, the reference to the decision of the Strasbourg Court is claimed to be

immaterial, since it is not a "judgment" with which Italy must comply, but a mere decision on admissibility that is still "subject to variation".

3. – By three separate but similar acts, some of the accused in the proceedings before the lower court entered appearances, requesting that the question be accepted.

The parties state that they were convicted by the trial court and filed an appeal, seeking an acquittal on the grounds that there is no case to answer; in the alternative, they requested an acquittal on the grounds that the relevant conduct is not an offence.

In this latter situation, namely in the event that the offence is time barred, the resulting confiscation appears to the parties to run contrary to the case law of the Strasbourg Court already mentioned by the referring court: this means that there has been a violation not only of Articles 3, 25 and 27 of the Constitution, but also Article 117(1) of the Constitution, with reference to Article 7 ECHR and Article 1 of the relative First Additional Protocol.

4. – Shortly before the public hearing, the President of the Council of Ministers filed a written statement, averring that the question was inadmissible and reasserting that it was groundless on the merits.

In the first place, the question is argued to be inadmissible because the referring court did not indicate as a constitutional principle Article 117(1) of the Constitution, which however, on the basis of the case law of this Court, is the only one capable of "creating a bridge [..] between national legislation and international treaty law".

A further ground for inadmissibility is stated to be found in the fact that the lower court submitted "a merely interpretative problem" to the Court.

On the merits, the *Avvocatura dello Stato* provides an account of the development of the institution of confiscation following unlawful development, originally provided for under Article 19 of law No. 47 of 28 February 1985 (Provisions to regulate town planning and construction activities, penalties, recovery and the regularisation of building works), observing that it would have applied irrespective of any finding of criminal responsibility of the accused, since the case law was minded to consider it a "measure of a criminal law nature". Thereafter, the legal classification of confiscation as an administrative measure, applicable also to the detriment of third parties in good faith, was definitively established:

this interpretation is claimed to be compatible with Article 7 ECHR, since it is "consistent with the essence of the violation and reasonably foreseeable". Most recently, according to the *Avvocatura Generale*, in judgment No. 42741 of 2008, the Court of Cassation created "a kind of 'half-way-house' between the position under national case law and that expressed in Strasbourg", reasserting the administrative nature of confiscation, now regulated by the provision under consideration, whilst however at the same time precluding its applicability against third parties in good faith.

However, according to the *Avvocatura Generale*, the enduring administrative nature of confiscation means that it is possible to exclude the requirement that it may only be applied to the detriment of the person who has been found to be criminally responsible, since the law governing administrative violations, enacted in order to protect "general interests", is not subject to the constitutional principles relating to criminal offences. The *Avvocatura Generale* adds that other judgments of the Court of Cassation have confirmed the traditional view regarding the applicability of confiscation to the detriment of third parties in good faith.

Finally, the *Avvocatura Generale* recognises that in the judgment of 20 January 2009 issued in the case *Sud Fondi s.r.l. and others v. Italy*, the European Court of Human Rights asserted that confiscation amounts to a criminal law penalty within the meaning of Article 7 ECHR requiring, as a prerequisite for application, "a psychological link" between the development and its author, going on to find that in the case before it Article 1 of the First Protocol had also been violated since, rather than confiscating the land, "it would have been sufficient to demolish the buildings and declare the development plan invalid": in the opinion of the *Avvocatura Generale*, this assertion is contradictory and demonstrates that "legislation and case law inevitably operate on different levels under national law and under European law", with the result that "the ruling of the European Court of Human Rights cannot be uncritically adopted as the basis for a ruling of unconstitutionality".

5. – Some of the private parties which entered appearances in the interlocutory proceedings in turn filed a written statement, arguing that the question should be accepted.

They observe, in the first place, that this question should be ruled admissible, since the referring court adequately described the facts of the case: the fact that the lower court considered it “highly likely” that an acquittal would be made on the grounds of time barring did not render it hypothetical since, in doing so, it was seeking to avoid pre-empting the definitive judgment, albeit identifying the “objective elements” necessary in order to assess its relevance.

On the merits, the parties observe that the confiscation amounts to a criminal law penalty, as is clear both from the title of the contested Article 44, as well as the case law of the European Court of Human Rights, according to which Article 7 of the Convention applies to it; the opposing view of the Court of Cassation should therefore be considered to have been superseded.

On this point, the private parties go on to argue that the provision under consideration defines “a typical case of a penalty dissociated from the responsibility established through a conviction”. The principle of the personal nature of criminal penalties enshrined in Article 27 of the Constitution stands in the way of this consequence, as has been found also in the case law of this Court concerning other cases of compulsory confiscation.

This conclusion is claimed to be reinforced in the light of the case law of the Strasbourg Court, according to which the confiscation provided for under the contested provision violates both Article 7 of the Convention as well as the First Protocol. Even though the referring court did not rely on Article 117(1) of the Constitution as a parameter, due to a “mere material error”, this provision should be considered to have been referred to all the same.

Article 3 of the Constitution is also claimed to have been violated since, by creating an exception to Article 240 of the Criminal Code, the provision concerned constitutes a “special case which entails a treatment of the facts of the case that is totally different from that applied to the majority of the situations that come before the criminal courts”: it is also claimed to be unreasonable to subject the property of “third parties not under investigation or on trial” to confiscation. Finally, the the absolute requirement that criminal law matters be regulated by statute is claimed to have been violated, since the provision was not

contained in the text of the law, but resulted from a non-literal, expansive and therefore unpredictable interpretation.

The parties conclude by proposing, in the alternative, a ruling dismissing the question by way of an interpretative judgment.

Conclusions on points of law

1. – The Bari Court of Appeal, first criminal division, has raised the question of the constitutionality of Article 44(2) of decree of the President of the Republic No. 380 of 6 June 2001 (Consolidated text of legislative and regulatory provisions on building), with reference to Articles 3, 25(2) and 27(1) of the Constitution, "insofar as it requires the criminal courts, when confronted with a certified unlawful development, to order the confiscation of the land and buildings unlawfully constructed, notwithstanding the judgment on responsibility, also against persons not under investigation or on trial".

The referring court is prosecuting various persons accused, *inter alia*, of unlawful development and, in the "highly likely" event that, taking into account the "time when the offences were committed", the court were to make a ruling discontinuing proceedings on the grounds that the offence has been extinguished due to the operation of time barring with regard to some of the accused, questions the constitutionality of the contested provision which, in such an eventuality, requires the court to order the confiscation of the land unlawfully developed and the buildings which have been unlawfully constructed there.

In fact, the consolidated view within the case law of the Court of Cassation, on which the referring court bases its position, is that this confiscation has the status of an administrative penalty and must be applied by the criminal courts, other than in the event of an acquittal on the grounds that there is no case to answer, whenever it has found there to have been an unlawful development, both against the accused acquitted on other grounds as well against any third parties not involved in the proceedings. In the case before the Court accordingly, the acquittal of the accused following the time barring of the offence would

entail the application of the measure of confiscation to the detriment of the latter, "irrespective of any finding of criminal responsibility", and also "against persons not under investigation or on trial".

The referring court considers that this effect is the consequence of the administrative status which the legislation intends to confer on the confiscation and, at the same time, that this premise can no longer be accepted. The measure concerned should by contrast be considered as a "criminal law penalty/security measure", in the light both of the title of the contested Article 44 ("criminal penalties"), as well as reasons of a systematic nature, and also, and above all, the subsequent decision of the European Court of Human Rights on application No. 75909/01, *Sud Fondi s.r.l. and others v. Italy*, in which, ruling on the question of admissibility, it held that the confiscation resulting from unlawful development is a "*peine*" within the meaning of Article 7 ECHR (after the referral order this assertion was definitively reiterated in the judgment, issued on 20 January 2009, which ruled on the merits of the appeal in the so-called *Punta Perotti* case).

Once the criminal law nature of the confiscation has been asserted, it appears to the referring court that the possibility that it may be ordered "notwithstanding the judgment on responsibility, also against persons not under investigation or on trial" is of questionable constitutionality, since this would contrast with the principles of "equality, the requirement that offences be regulated by statute and the personal nature of criminal responsibility" laid down by Articles 3, 25(2) and 27(1) of the Constitution.

2. – As a preliminary matter, the Court rejects the objection that the entire question is inadmissible presented by the *Avvocatura dello Stato* on the basis that the referral order had failed to mention Article 117(1) of the Constitution as one of the provisions relied on in the constitutionality proceedings, defined as the "only interposed provision which makes it possible to create a bridge, through the so-called reference to a foreign source of law, between national legislation and international treaty law".

It is evident first and foremost that any failure to aver a constitutional principle by the lower court only has the effect of preventing the judgment of this Court from being based

on it, and can certainly not result in the inadmissibility of the challenges which have been formulated in full with regard to other provisions of the Constitution.

For the purposes of the admissibility of the question it is sufficient to observe that the challenges based on Articles 3, 25(2) and 27(1) of the Constitution, upon which there is no doubt that the Court is required to decide, have been raised in the appropriate manner.

On the other hand, the referral order clearly mentions the contents of Article 117(1) of the Constitution at various points in the argument, requesting a ruling that Article 44(2) of decree of the President of the Republic No. 380 of 2001 is unconstitutional because, referring to the decision of the ECHR of 30 August 2007 (decision on admissibility of application No. 75909/01), it considers that the confiscation regulated by the contested provision is of a criminal law and not administrative nature, and that this therefore violates the aforementioned constitutional principles relating to criminal responsibility.

3. – The referral is however inadmissible for a range of other reasons.

In the first case, the referring court has failed to provide a sufficient description of the facts of the case before it, thereby preventing this Court from verifying the relevant of the question of constitutionality: in fact, the contested provision can apply on condition that the material fact of the unlawful development has been ascertained by the court; it would therefore have been necessary, notwithstanding the outcome of the proceedings concerning the criminal responsibility of the accused, for the referring court to take account of that factual element, in the absence of which confiscation could not in any case be ordered.

Secondly, the question of constitutionality is explicitly formulated, both in the reasoned part of the referral order as well in the operative part, with reference to the position of the accused for whom there has been no finding of criminal responsibility, in this particular case due to the operation of time barring rules, and of the “persons not under investigation or on trial”: individuals which the referring court takes care to distinguish from the former.

Indeed, it cannot be considered that this distinction is of an arbitrary nature, since it is to say the least questionable that, for the purposes of expressing a judgment of personal responsibility capable of justifying, according to the reasoning of the referring court itself, the application of the confiscation, third parties not under investigation or on trial may be

considered equivalent to the accused who, notwithstanding their objective involvement in the unlawful development, have nonetheless been acquitted since the prerequisites for their conviction have not been satisfied. In fact, as this Court has already had the opportunity to assert, judgments of acquittal include some forms which "whilst they do not apply a penalty entail, in differing forms and to differing extents, a substantive recognition of the responsibility of the accused or otherwise the attribution of the *actus reus* to the accused" (judgment No. 85 of 2008). In particular, as far as the case before the lower court is concerned, it cannot be asserted that this "substantive recognition", notwithstanding the absence of any effects with regard to criminal responsibility, is in any case precluded by an acquittal on the grounds that the proceedings are time barred, whereas on the other hand the legal order requires that this issue be assessed for purposes other than the finding under criminal law that an offence has been committed.

However, although it is aware of the distinction set out above, the referring court fails to specify whether, in the main proceedings, the confiscation would be ordered against the accused acquitted or against third parties not under investigation or on trial. In this way, by indiscriminately considering together two categories of individual which are not necessarily homogeneous for the purposes of the resolution of the question of constitutionality, and by failing to indicate which of them is affected by the confiscation in the specific case, the lower court again commits the error of providing an insufficient description of the facts of the case, which means that the question is inadmissible due to the lack of motivation with regard to its relevance.

It should be added to the above findings that, when finding that confiscation pursuant to Article 44(2) of decree of the President of the Republic No. 380 of 2001 is a measure of a criminal law nature, in contrast with the predominant case law of the Court of Cassation, the referring court used as a fundamental element for interpretation the contents of the decision of the European Court of Human Rights of 30 August 2007, already referred to above, and in particular the classification made thereunder of the confiscation concerned as a "penalty", pursuant to Article 7 of the Convention. Even disregarding the self-standing nature of the classificatory criteria used by the Strasbourg Court compared to those of

national legal systems, it must be noted that the specific decision to which the lower court refers was adopted in relation to a case in which not only had the accused not been convicted, but it had not even been possible for the courts to determine whether their actions were intentional or blameworthy; therefore, in order to justify the extrapolation from the specific precedent of the Strasbourg Court of a principle of law which could constitute the basis for the question of constitutionality, the referring court should have established through argument in a plausible manner the analogy between that specific case and that, not necessarily identical, on which it had been called to pass judgment.

Finally, it should be pointed out that, even assuming that the interpretation of Article 44(2) of decree of the President of the Republic No. 380 of 2001 must change following the subsequent case law of the European Court of Human Rights, the referring court does not infer any consequence from this for the exercise of its own interpretative powers, notwithstanding that it was confronted with a literal formulation of the contested provision which, in itself, does not appear to preclude such an attempt.

This Court has expressly asserted that, when confronted with an apparent contrast between internal legislative provisions and a provision of the ECHR, including as interpreted by the Strasbourg Court, it may raise a question of constitutionality pursuant to Article 117(1) of the Constitution only if it is not possible first and foremost to resolve the question through interpretation.

In fact, "the ordinary courts are charged with interpreting national law in a manner that is compatible with international law, subject to the limits within which this is permitted by the texts of the provisions" and where this is not possible, or where it questions the compatibility of the national rule with the "interposed" provisions of the Convention, it must seize this Court with the relative questions of constitutionality with reference to Article 117(1)" of the Constitution (judgment No. 349 of 2007, paragraph 6 of the *Conclusions on points of law*; by analogy, judgment No. 348 of 2007, paragraph 5 of the *Conclusions on points of law*).

It is therefore a matter for the ordinary courts to interpret Article 44(2) of decree of the President of the Republic No. 380 of 2001, if it has indeed been made effectively necessary

by the decisions of the European Court of Human Rights; in fact, the case law of the Court of Cassation has already addressed this issue, the evaluation of the results of which are not now placed before this Court for review. Only where the adaptation through interpretation, which appears to be necessary, proves to be impossible or the "living law" (i.e. uniform and consolidated case law), if any, in the area concerned raises doubts concerning its constitutionality may this Court be called upon to address the problem of the alleged unconstitutionality of the statutory provision.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

rules that the question concerning the constitutionality of Article 44(2) of decree of the President of the Republic No. 380 of 6 June 2001 (Consolidated text of legislative and regulatory provisions on building), raised with reference to Articles 3, 25(2) and 27(1) of the Constitution by the Bari Court of Appeal by the order mentioned in the headnote, is inadmissible.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 16 July 2009.

Signed:

Francesco AMIRANTE, President

Ugo DE SIERVO, Author of the Judgment

Roberto MILANA, Registrar

Filed in the Court Registry on 24 July 2009.

The Registrar

Signed: MILANA