Corte costituzionale

JUDGMENT NO. 317 OF 2009

FRANCESC O AMIRANTE, President
GAETANO SILVESTRI, Author of the Judgment

JUDGMENT NO. 317 YEAR 2009

In this case the Court considered a referral from the Court of Cassation which was considering an appeal against a ruling that an accused who failed to appear in court and was unaware of the proceedings against him could not be granted leave to appeal out of time where his representative had already filed an appeal on his behalf. Following a discussion of the history of this rule and the relevant case law of the European Court of Human Rights, the Court noted that although the interpretation of the Convention was a matter for the European Court, it was for the Constitutional Court to evaluate the impact of the Strasbourg Court's interpretations on Italian law. The Court adopted an overall view of the fairness of the trial with reference to the right to a defence and the principal of reasonable duration, and held that it is not fair to deny a fundamental right to a person on the basis of actions carried out by a third party, and therefore declared the contested provision unconstitutional. The Court ruled inadmissible an ancillary question relating to the accused's right to submit evidence due to its "abstract and premature nature".

THE CONSTITUTIONAL COURT

composed of: President: Francesco AMIRANTE; Judges: Ugo DE SIERVO, Paolo MADDALENA, Alfio FINOCCHIARO, Alfonso QUARANTA, Franco GALLO, 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 175(2) of the Code of Criminal Procedure, commenced by the Court of Cassation in the criminal proceedings against F.V., by the referral order of 17 September 2008, registered as No. 428 in the Register of Orders 2008 and published in the *Official Journal of the Republic* No. 1, first special series 2009.

Considering the entry of appearance by F. V. as well as the intervention by the President of the Council of Ministers;

heaving heard the Judge Rapporteur Gaetano Silvestri in the public hearing of 3 November 2009;

having heard Counsel Savino Lupo for F. V. and the *Avvocato dello Stato* Maurizio Greco for the President of the Council of Ministers.

The facts of the case

1. – By the referral order of 17 September 2008, the first criminal division of the Court of Cassation raised – with reference to Articles 24, 111(1) and 117(1) of the Constitution – a question concerning the constitutionality of Article 175(2) of the Code of Criminal Procedure, as replaced by Article 1 of decree-law No. 17 of 21 February 2005 (Urgent provisions concerning appeals against default judgments and convictions), converted into law, with amendments, by law No. 60 of 22 April 2005, insofar as it precludes an accused who failed to appear the right to appeal out of time when an appeal has already been filed by the public defender and "insofar as it does not permit an accused person who has been granted the leave to appeal out of time to exercise the right to submit evidence".

As a preliminary matter, the referring court clarifies that in the main proceedings it is evaluating an appeal to the Court of Cassation against a measure of the Bologna Assize Court of Appeal, ordering the transfer to the Court of Cassation of an application for leave to appeal out of time pursuant to Article 175(2) of the Code of Criminal Procedure on the grounds of jurisdiction *ratione materiae*.

The application concerned was filed on behalf of an individual convicted *in absentia* of very serious offences by judgment of the Assize Court of Piacenza subsequently upheld, following an appeal filed by the public defender, by judgment of the competent appeal court, which became irrevocable in the absence of further appeals.

According to the Bologna court, when a judgment becomes irrevocable without all the stages of judgment having been concluded, the accused may be granted leave to appeal out of time, where the further requirements specified by Article 175 of the Code of Criminal Procedure are also met, with exclusive regard to forms of appeal not yet exercised. In cases where the appeal proceedings had in the meantime been celebrated, such as that before the court, the interested party would therefore only be entitled to appeal the case against him to the Court of Cassation, albeit beyond the relevant time limits. Thus the case file was transmitted to the Supreme Court, which was identified in this case as the competent court to assess the application to appeal out of time.

The defence counsel appointed by the accused challenged the measure described above on the grounds that it consists in a declaration that the application for leave to appeal out of time against the default conviction was inadmissible. This reading was accepted by the Court of Cassation, which thus ruled the appeal admissible.

The objections raised by the accused focused – according to the statement of the referring court – on the claim that the exercise of the right by the public defender "consumes" the analogous right granted to the accused, with the result that the granting of leave to appeal out of time may not in any case be ordered. This was countered with the argument that the principle that the right of appeal may only be exercised once would be compromised in cases involving a person who was not aware of the proceedings against him. In particular, the "special" rule contained in Article 175(2) of the Code of Criminal Procedure, following the amendments introduced by decree-law No. 17 of 2005 and the relative conversion law, would apply here. In fact, the sub-paragraph which until the amendment had precluded the granting of leave to appeal out of time in cases in which appeals had already been filed by the defence representative of the interested party was removed from the text of the provision. Therefore, according to the appellant, an accused who failed to appear and was unaware of the proceedings now had the right to file an appeal even where, as a result of the previous appeal, it would result in a duplication of appeal proceedings.

For the reasons added in support of the appeal, the defence representative of the person convicted *in absentia* then averred the unconstitutionality of Article 175 of the Code of Criminal Procedure insofar as it does not allow for "the possibility of granting leave to appeal out of time in order to exercise all those defence rights that are no longer available to the accused who failed to appear as a result of his complete or partial ignorance of the proceedings".

Again on a preliminary basis, the referring court specifies that, following targeted inquiries, it has ascertained that the appellant had never been located during the course of proceedings against him, not even in order to enforce the coercive measures adopted over time against him, first of a precautionary and then of an executive nature.

In view of the above, the lower court recalls that the question raised by the appellant's representative was considered by the Joint Divisions of the Court of Cassation in a recent judgment (No. 6026 of 31 January 2008), in which it was held that a person convicted of an offence *in absentia* is precluded from be granted leave to appeal out of time when the said appeal has already been filed by the defence representative and the relative procedure has already been concluded.

The referring court refers to the arguments underlying the decision. It has traditionally been found in case law that, even when the law grants more than one individual a right of appeal, the rule that the right of appeal may only be exercised once applies, and that the exercise of the right "consumes" the corresponding power of the other individuals entitled to appeal. In particular, an appeal filed by a defence representative is nonetheless the expression of a prerogative of the accused (as may be inferred, *inter alia*, from the title to Article 571 of the Code of Criminal Procedure). On the other hand, the duplication of the appeal proceedings, which is in itself incompatible with the general principles of Italian law, could not be justified by the lack of a formal preclusion in the amended text of Article 175 of the Code of Criminal Procedure. The examination of the parliamentary *travaux preparatoires* relating to law No. 60 of 2005 (converting decree-law No. 17 of 2005) are not in fact sufficient to establish unequivocally the intention underlying the repeal of the sub-paragraph regarding appeals that have already been filed. Besides, it is added, had

Parliament indeed intended to permit the celebration of new appeal proceedings, it would not have failed to regulate the consequences for the judgment already issued upon conclusion of the previous appeal proceedings and the acts on which the judgment was based. Therefore, the repeal of the provision with preclusive effect was stated to have been a result of its superfluous nature, since the prohibition of *ne bis in idem* could already be inferred form the general provisions applicable to appeals.

The referring court asserts that it endorses the solution adopted by the Joint Divisions, with the result that the appeal placed before it for decision should be dismissed, in spite of the fact that the application to appeal out of time was made on time and that the applicant was actually unaware of the proceedings being celebrated against him.

It is precisely on the basis of these conclusions that, again according to the lower court, the question of constitutionality described at the outset is relevant.

On the merits, the referring court points out that, according to the settled interpretation by the European Court of Human Rights, Article 6 of the European Convention for the Protection of Human Rights guarantees the accused the right to appear in criminal proceedings which concern him and also the right, when proceedings are celebrated without the interested party being aware of them, to restorative measures which make it possible to conduct the defence in person. According to the provisions of Article 117(1) of the Constitution, the Convention provision has the status as an interposed source with which national law must comply, provided that the Convention source lays down a rule that is compatible with the requirements of the Constitution and ensures a correct balancing between the need to ensure compliance with the obligations assumed under international law and the protection of other interests of adequate constitutional significance (referring to Constitutional Court judgments Nos. 348 and 349 of 2007).

Despite the contrary view expressed on this matter by the Joint Divisions of the very same Court of Cassation, the referring court considers that the question regarding a violation of Article 6 of the European Convention contrast by the contested provision, and a related violation of the constitutional principles referred to above, is not manifestly groundless. In particular, it is stated that the preclusion applied against the accused who

failed to appear cannot be justified by the necessary balancing of his right to a defence against the constitutionally protected interest in the reasonable length of trials (for which the principle of the "consumption" of the right of appeal constitutes a safeguard). On the one hand in fact, the procedural rules which seek to guarantee that appeals may only be brought once do not receive any direct constitutional protection from the principle of the reasonable length of trials, which is argued to apply only as a bar on the unreasonable proliferation of procedural requirements. On the other hand, a balancing of interests that is resolved to the detriment of the defence of individuals who have been convicted without being aware of the proceedings celebrated against them, including in relation to the appeal stage, could not be considered "rational".

The negative effects of the maxim *ne bis in idem* could not, according to the referring court, be applied against a person who through no fault of his own did not appear at the trial, since it is always necessary to guarantee, including from the perspective of maximum simplification, that the procedure followed leads to a "fair" result, which in this case should be taken to mean a result obtained without infringing the inviolable right to a defence.

Ultimately, the "result of the interpretation" made by the Joint Divisions of the Supreme Court, and endorsed by the referring court, would confer on the contested provision a normative content incompatible with Article 117(1) of the Constitution (supplemented by the Convention provision referred to at various points), with Article 111(1) of the Constitution, which imposes the obligation to ensure a fair trial directly on the legislature, and with Article 24 of the Constitution. On the other hand, it is argued that "an interpretation in the light of the Convention or in accordance with the constitution through the use of the ordinary canons of interpretation indicated under Article 12 of the 'Provisions on the law in general'" is not possible.

2. – The President of the Council of Ministers, represented and advised by the *Avvocatura Generale dello Stato*, intervened in the proceedings by writ filed on 20 January 2009, requesting that the question be ruled inadmissible.

The referring court is stated not to have complied with the obligation to experiment "constitutionally informed" interpretative solutions, thereby granting the accused who

failed to appear the right to appeal out of time even where an appeal has already been filed by his defence representative. Space for such an interpretation is claimed to remain notwithstanding the adoption of the contrary position by the Joint Divisions of the Supreme Court, following decisions with opposite effect (judgments No. 34468 of 21 June 2006 and No. 41771 of 7 December 2006), and which was not subsequently confirmed by judgments making similar findings. It cannot therefore be said that the Joint Divisions have consolidated a position unfavourable to the interests of those convicted *in absentia*.

On the other hand, the activity of the interpreting body cannot disregard the principles laid down in Article 6 of the European Convention on Human Rights, as interpreted by the European Court. Moreover, in contrast to the original version, the new text of Article 175(2) of the Code of Criminal Procedure does not contain any preclusion based on any previous appeal by the defence representative. It would therefore be arbitrary to infer a rule that applications for appeals out of time that are made following previous appeal proceedings are inadmissible. Were it found to exist, this rule could in effect "violate the principles contained in Articles 24 and 111 of the Constitution".

The arguments based on a supposed "consumption" of the right of appeal disregard, in the opinion of the state representative, the fact that Article 175 of the Code of Criminal Procedure not only has the function of guaranteeing a second stage of proceedings on the facts of the case, albeit beyond the applicable time limits, but provides a means of counteracting the failure by the accused to appear in proceedings which concern him. On the contrary, and "strictly speaking", the mechanism is stated to provide a remedy that is not "fully satisfactory", since it does not comply with the expectation of a person convicted *in absentia* to full proceedings in his presence.

Finally, the interpretation adopted by the referring court is claimed to violate the interests guaranteed also by Article 6 of the European Convention on Human Rights. The *Avvocatura Generale* points out in this regard that the European Court of Human Rights has not yet issued any judgment confirming the compatibility of the amended Article 175 of the Code of Criminal Procedure with the Convention principles, and has on the other hand repeatedly asserted that the granting of leave to appeal out of time to accused who failed to

appear and were unaware of the proceedings must be assured “without further requirements or filters”.

3. – By writ filed on 23 January 2009, the appellant F.V. entered an appearance as a party to the main proceedings, on whose behalf the application was made for leave to appeal out of time, which was ruled inadmissible by the Bologna Assize Court of Appeal.

The private party points out that the proceedings which resulted in the conviction had been celebrated unbeknown to the interested party, and restates – and endorses – the arguments submitted by the referring court. In particular, it is argued that Article 6 of the European Convention on Human Rights cannot result in a violation of the principle of the reasonable length of trials, since it is evident that the simplification of the procedure can never go so far as to result in absolute disregard for the accused's right to a defence, including the prospect of submitting new evidence which may contrast with the facts already assessed when passing the guilty verdict.

It is also pointed out in the entry of appearance that the European Court of Human Rights has held that when it is not possible to establish that a person convicted *in absentia* voluntarily waived his right to appear, he “must in all cases be able to obtain a fresh ruling by a court of the merits of the charges” (referring to the judgment *Sejdovic v. Italy* of 10 November 2004).

Finally, the party observes that the very celebration of appeal proceedings could prove to be incapable of guaranteeing the right to a defence of the interested party unless accompanied “by the automatic recognition to him of the right to submit evidence”. Otherwise, “the proceedings would remain an inevitably unfair trial, and the appeal stage, even though celebrated *ex novo*, would be limited to an analysis of evidence resulting from incomplete oral proceedings”.

Conclusions on points of law

1. – The Court of Cassation questions – with reference to Articles 24, 111(1) and 117(1) of the Constitution – the constitutionality of Article 175(2) of the Code of Criminal Procedure, as replaced by Article 1 of decree-law No. 17 of 21 February 2005 (Urgent provisions concerning appeals against default judgments and convictions), converted into law, with amendments, by law No. 60 of 22 April 2005, insofar as it precludes an accused who failed to appear the right to appeal out of time when an appeal has already been filed by the public defender, and "insofar as it does not permit an accused person who has been granted the right to appeal out of time to exercise the right to submit evidence".

2. – The question is in part well founded.

2.1. – The question raised in these proceedings concerns the broader issue of the guarantee of the right to a defence and the right to oral proceedings of accused persons who failed to appear. This case involves in particular an accused tried *in absentia* who was not aware of the proceedings and for this reason was not able to participate in them, thereby being precluded the ability to exercise his own right to a defend himself, including through the submission of new evidence different to that submitted by the prosecution.

3. – The right of the accused to participate personally in a trial concerning him is enshrined by the International Covenant on Civil and Political Rights, signed in New York on 16 December 1966, and ratified and implemented in Italy by law No. 881 of 25 October 1977 (Ratification and implementation of the International Covenant on Economic, Social and Cultural Rights, as well as the International Covenant on Civil and Political Rights, along with the optional protocol, adopted and opened for signature in New York respectively on 16 and 19 December 1966), which grants the accused the right "to be tried in his presence" (Article 14(3)(d)).

Within the European context, the same right is guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and ratified and implemented in Italy by law No. 848 of 4 August 1955 (Ratification and implementation of the Convention on the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and the

Additional Protocol to the Convention, signed in Paris on 20 March 1952), as interpreted by the European Court of Human Rights in the terms specified above.

By resolution No. 11 of 21 May 1975, the Committee of Ministers of the Council of Europe laid down the criteria to be followed in proceedings where the accused is absent, specifying as one of the "minimal rules" that "any person tried in his absence must be able to appeal against the judgment by whatever means of recourse which would have been open to him, had he been present" (recommendation No. 7).

Article 3 of the Second Additional Protocol to the European Convention on Extradition, adopted in Strasbourg on 17 March 1978, ratified and implemented in Italy by law No. 755 of 18 October 1984 (Ratification and implementation of the Second Additional Protocol to the European Convention on Extradition, adopted in Strasbourg on 17 March 1978), provides that the extradition of a person for the purpose of carrying out a sentence imposed by a decision rendered against him *in absentia* may be subject to the requirement that the requesting Party "gives an assurance considered sufficient to guarantee to the person [whose extradition is] claimed the right to a retrial which safeguards the rights of defence".

Article 5(1) of the Framework Decision of 13 June 2002 of the Council of the European Union (2002/584/JHA) on the European arrest warrant and the surrender procedures between Members States provides that: "where the European arrest warrant has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered *in absentia* and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered *in absentia*, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment".

4. – The European Court of Human Rights has interpreted Article 6 ECHR in a series of judgments (*Colozza v. Italy*, 12 February 1985; *F.C.B. v. Italy*, 28 August 1991; *T. v. Italy*, 12 October 1992; *Somogyi v. Italy*, 18 May 2004; *Sejdovic v. Italy*, 10 November 2004 and *idem*, Grand Chamber, 1 March 2006), in which it inferred from that Convention

provision – and in particular from sub-section 3 – a group of procedural guarantee rules that are of significance for the present question: a) the accused has the right to be present at the trial against him; b) the accused may voluntary waive the exercise of that right; c) the accused must be aware of the fact that he or she is on trial; d) preventive or restorative remedies must be available in order to avoid trials against accused who fail to appear and are unaware of the proceedings, or to ensure within a retrial, including through the submission of new evidence, the right to a defence which it was not possible to exercise in person in the default trial already concluded.

5. – The Italian legislature chose the remedy of restorative measures in order to guarantee in any case that the accused who failed to appear be able to exercise adequately his or her right to a defence in the proceedings. The current arrangements – part of which have been challenged in these proceedings – are the result of a gradual evolution, which it is important to summarise in order better to focus the question currently placed before this Court for review.

The 1930 Code of Criminal Procedure, as originally enacted, permitted the celebration of a default trial, with the only guarantee consisting in the requirement that the extract of the judgment be served on the accused who failed to appear, for whom the relevant term for filing an appeal started from the date of service (Articles 199 and 500). With the 1955 reform, and the resulting introduction into the Code of Article 183-bis, the accused who failed to appear was also granted leave to appeal out of time in the event that he had not previously been able to do so due to "unforeseeable circumstances" or "*force majeure*".

Whilst the 1955 arrangements were still in force, the first judgment of the European Court of Human Rights was issued (*Colozza v. Italy*, 1985), in the Court held that, in order to guarantee the right to a defence of the accused who failed to appear, it was necessary that he be assured a new assessment by the court in proceedings within which the accused could be "heard" on the merits of he charge.

The 1988 Code of Criminal Procedure laid down certain new rules governing trials where the accused fails to appear (rules "applied in advance" a few months earlier through

the amendment of certain provisions from the 1930 Code by law No. 24 of 23 January 1989 containing "New provisions on default trials").

The possibility for the defence representative to challenge the conviction of a person who failed to appear was granted only on condition that the representative have been issued specific instructions to do so (Article 571(3)). This Court inferred from this provision the rationale that "the right to defend oneself [had been] granted privileged status over a technical defence" (judgment No. 315 of 1990). The granting of leave to appeal out of time in order to submit evidence was subject to the requirement that the convicted person had been unaware of the measure through no fault of his own (Article 175(2)). A time limit of ten days was set from the time when the person because aware of the sentence and the granting to the accused of leave to appeal out of time was precluded where the defence representative had already appealed the judgment. Finally, Article 603, which is still in force, granted the right to re-open the evidentiary stage, subject to the same conditions provided for late appeals in the original text of Article 175(2) of the Code of Criminal Procedure.

Intervening again by law No. 479 of 16 December 1999 (Amendments to the provisions governing procedures before courts presided by a single judge and other amendments to the Code of Criminal Procedure. Amendments to the Code of Criminal Procedure and the organisation of the judicial system. Provisions governing pending civil litigation, allowances due to justices of the peace and the practice of the legal profession), Parliament removed the requirement that the defence representative receive specific instructions to appeal against a judgment issued against a person who failed to appear, but did not remove the preclusion against the latter being granted leave to appeal out of time in the event that an appeal had already been filed by the defence representative.

This was then followed by a further two significant judgments of the Strasbourg Court (in particular, the decision of 11 September 2003 in the case *Sejdovic v. Italy*, and the subsequent judgment, in the same case, of 10 November 2004). In these judgments the Court censured Italian legislation due to the excessive difficulty in showing that the accused had not been aware of the proceedings and due to the extremely short period of

time (ten days) during which an application could be made for leave to appeal out of time against the default judgment. In the second of the judgments cited above, the Court pointed to a "structural problem related to a defect in the domestic legal system".

Taking into account this case law of the European Court of Human Rights, Parliament once again took action in this area, enacting a new version of Article 175 of the Code of Criminal Procedure, introduced by decree-law No. 17 of 2005 and the relative conversion law, which laid down certain new rules: a) the person who failed to appeal need no longer prove that he was unaware of the proceedings or measure against which he seeks leave to appeal out of time, with the result that the burden of proof falls on the whoever by contrast argues that he was indeed aware of them; b) the time limit for filing the application was increased to thirty days after the person became aware of the decision; and c) the express preclusion on leave for the accused to appeal out of time in the event that an appeal has already been filed by the defence representative was not repeated.

6. – After the 2005 reform, the Court of Cassation held in two judgments (1st Division, judgment No. 34468 of 21 June 2006; and 1st Division, judgment No. 41711 of 7 December 2006) that, according to the new version of Article 175 of the Code of Criminal Procedure, the granting to the accused of leave to appeal out of time was possible even after an appeal had been filed by the defence representative. In the second of the judgments cited above, the Court of Cassation held that Article 669 of the Code of Criminal Procedure lays down specific remedies in order to remove any discrepancies between judgments, in the event that multiple judgments are issued relating to the same facts and against the same person.

However, a later judgment of the Joint Divisions of the Court of Cassation (No. 6026 of 31 January 2008) overturned the previous interpretation and set out a series of arguments which may be considered to have resulted in these constitutionality proceedings. It is asserted that the Code of Criminal Procedure in force is characterised by the principle that the right of appeal may only be exercised once, associated with the principle of *ne bis in idem*, which is to be regarded as fundamental within our procedural order. It should be added to this that the Constitutional Court did not as a matter of principle deny the validity of the restorative measures for the defence of the accused who failed to appear and was

unaware of the proceedings, and also that Article 6 ECHR does not grant the latter protection greater than that offered under Article 111 of the Constitution. It must be remembered – again according to the Joint Divisions – that, in amending Article 571 of the Code of Criminal Procedure, Parliament permitted appeals by the defence representative without specific instructions, thereby asserting the primacy of a technical defence over a personal defence. The court went on to refer to judgments Nos. 348 and 349 of 2007 of this Court, from which it inferred the need to balance the defence of the accused who did not appear against the principle of the reasonable length of trials, of which the principle that the appeal may only be exercised once is stated to be a direct emanation. The dual exercise of the right to appeal would conflict with that principle and could not therefore be introduced into Italian procedural law.

As regards the recent amendment of Article 175 of the Code of Criminal Procedure, and in particular the removal of the sub-paragraph which precluded the granting of leave to appeal out of time in the event that an appeal had already been filed by the defence representative, the *travaux preparatoires* are argued not to offer any basis for an unequivocal interpretation of Parliament's intention.

Finally, it is important not to lose sight of the fact that in the event that a dual appeal were found to be admissible, it would be possible for accused persons who failed to appear to render judgments issued against them provisional in all cases.

After the aforementioned judgment of the Joint Divisions, the Court of Cassation accepted the new interpretative position in three judgments, the last of which was that which raised the current question (the referral order was preceded by judgment No. 33 of 2009 of the 1st Division of 11 November 2008, and judgment no. 8429 of 2009 of the 1st Division of 10 December 2008). There have been no decisions departing from these. It may therefore be concluded that a genuine “living law” (i.e. uniform and consolidated case law) has formed on this point, which requires this Court to focus its attention on the contested provision under the predominant interpretation adopted by the lower court.

Accordingly, where his defence representative has already filed an appeal, an accused who is tried *in absentia* is deprived of the ability to apply for leave to appeal out of time and, in consequence, of the efficacy of the right to appear in the trial against him.

The existence of "living law" in the terms indicated above means that it is not possible to accept the request of the *Avvocatura dello Stato* to rule the question inadmissible on the grounds that the referring court did not consider the possibility of interpreting the contested provision in accordance with the Constitution, on the basis of the judgments of the Court of Cassation prior to judgment No. 6026 of 2008 of the Joint Sections. On the contrary, that court has expressly held that it is not able to make an interpretation different from that of the Joint Divisions through the use of ordinary canons of interpretation.

7. – Having identified the subject matter of these proceedings as set out above, the assessment of the question concerning the constitutionality of Article 175(2) of the Code of Criminal Procedure must be carried out with joint reference to the principles laid down by Articles 117(1) – with reference to Article 6 ECHR, as interpreted by the Strasbourg Court – 24 and 111(1) of the Constitution. It is in fact necessary to highlight the mutual pervasiveness of the protection offered by these three provisions for the purposes of guaranteeing an adequate exercise of the right to a defence. This Court has already clarified that the supplementary effect on constitutional law of Article 117(1) of the Constitution must not be regarded as a hierarchical subordination to the ECHR provisions – considered in themselves, and hence irrespective of their function as interposed sources – on the part of ordinary legislation and, no less, the Constitution. Where a fundamental right is at issue, the need to comply with international law obligations can never constitute grounds for a reduction in protection compared to that available under internal law, whilst it can and must vice versa constitute an effective instrument for the broadening of that protection. If this starting point is adopted when considering the legislative inter-relations between the various levels of guarantee, one easily arrives at the conclusion that the final assessment on the actual extent of protection in individual cases is the result of a virtuous combination between the obligation that is incumbent upon the national legislature to comply with the principles laid down by the ECHR – as interpreted by the courts, which is a matter for the

European Court pursuant to Article 32 of the Convention – [secondly] the obligation on the ordinary courts to interpret national law in a manner compatible with the convention provisions, and finally the obligation on the Constitutional Court – in the event that an interpretation in the light of the Convention is not possible – not to permit a provision that has been found to result in an inadequate level of protection for a fundamental right to continue to be enforceable within Italian law. Besides, Article 53 of the Convention provides that the interpretation of the ECHR provisions cannot imply levels of protection lower than those guaranteed under national law.

The determination as to whether there is an inadequate level of protection must therefore be carried out through comparison with a higher level already existing and legally available on the basis of the ongoing and dynamic supplementation of the principal set out in Article 117(1) of the Constitution, consisting in the requirement to respect international law obligations.

It is evident that this Court not only cannot permit Article 117(1) of the Constitution applying to determine a lower level of protection compared to that already existing under internal law, but neither can it be accepted that a higher level of protection which it is possible to introduce through the same mechanism should be denied to the holders of a fundamental right. The consequence of this reasoning is that the comparison between the Convention protection and constitutional protection of fundamental rights must be carried out seeking to obtain the greatest expansion of guarantees, including through the development of the potential inherent in the constitutional norms which concern the same rights.

The concept of the greatest expansion of protection must include, as already clarified in judgments Nos. 348 and 349 of 2007, a requirement to weigh up the right against other constitutionally protected interests, that is with other constitutional rules which in turn guarantee the fundamental rights which may be affected by the expansion of one individual protection. This balancing is to be carried out primarily by the legislature, but it is also a matter for this Court when interpreting constitutional law.

The reference to the national "margin of appreciation" – elaborated by the Strasbourg Court in order to temper the rigidity of the principles formulated on European level – is primarily manifested through the legislative function of Parliament, though it must always be present in the assessments of this Court, which is not unaware that the protection of fundamental rights must be systematic and not broken down into a series of provisions that are uncoordinated and potentially in conflict with one another. Naturally, it is for the European Court to decide on the individual case and the individual fundamental right, whilst the national authorities have a duty to prevent the protection of certain fundamental rights – including from the general and unitary perspective of Article 2 of the Constitution – from developing in an unbalanced manner to the detriment of other rights also protected by the Constitution and by the European Convention.

The overall result of the supplementation of the guarantees under national law must be positive, in the sense that the impact of individual ECHR rules on Italian law must result in an increase in protection for the entire system of fundamental rights.

This Court cannot substitute its own interpretation of a provision of the ECHR for that of the Strasbourg Court, thereby exceeding the bounds of its own powers, and violating a precise commitment made by the Italian state through signature and ratification of the Convention without any derogations (judgment No. 311 of 2009); however, it may assess how and to what extent the results of the interpretation of the European Court interact with the Italian constitutional order. Since an ECHR provision effectively supplements Article 117(1) of the Constitution, it receives from the latter its status within the system of sources, with all implications in terms of interpretation and balancing, which are the ordinary operations that this Court is required to carry out in proceedings falling within its jurisdiction.

In summary, the national "margin of appreciation" can be determined having regard above all to the overall body of fundamental rights, the detailed and overall consideration of which is a matter for the legislature, the Constitutional Court and the ordinary courts, each within the ambit of its own jurisdiction.

8. – In the light of the above considerations, it is necessary to examine the situation in which – as asserted by the Joint Divisions of the Court of Cassation in judgment No. 6026 of 2008 – the right to a defence of the accused who failed to appear and was unaware of the proceedings must be balanced against the principle of the reasonable length of trials, laid down by Article 111 of the Constitution.

This eventuality must be precluded, since the right to a defence and the principle of the reasonable length of trials cannot be compared, for the purposes of the balancing of rights, in isolation from the system of guarantees as a whole. What is of significance is exclusively the duration of a "fair" trial, as set out by the very same constitutional rule invoked as justification for the limitation on the defence rights of accused persons who failed to appear. Any different solution would introduce a logical and legal contradiction into Article 111 of the Constitution itself, which on the one hand would require full protection for the right to oral proceedings whilst on the other would authorise all exceptions considered useful that had the purpose of shortening the length of proceedings. A trial that is "unfair" due to its inadequate provision of guarantees is not compatible with the constitutional model, irrespective of its duration.

In reality, this would not amount to a genuine balancing operation, but a pure and simple sacrifice both of the right to oral proceedings enshrined under Article 111 of the Constitution as well as the right to a defence recognised under Article 24(2) of the Constitution: these rights are guaranteed by constitutional rules, both of which feel the expansive effects of Article 6 ECHR and the corresponding case law of the Strasbourg Court.

It is important to clarify in this regard that an increase in protection brought about by the diffusion of the effects of ECHR provisions certainly does not violate the Articles of the Constitution laid down in order to guarantee the same rights, but on the other hand renders explicit and enriches their content, raising the level of the overall development of the national legal order in the area of fundamental rights.

9. – *A fortiori*, the principles that the right of appeal may only be exercised once and the prohibition of *ne bis in idem*, from which it is not possible to draw conclusions that

limit a fundamental right, cannot be relied upon in order to establish the constitutionality of the contested provision. On the other hand, these principles must be taken into account both when searching for remedies to contradicting judgments, if any, that are already present within positive law, as well as by the legislature when preparing detailed technical provisions that seek to give greater operational efficacy on a procedural level to the guarantee consisting in the right of an accused who failed to appear and was unaware of the proceedings to benefit from a restorative measure. In order for the latter to be effective, it cannot be "consumed" by the action of a subject, the defence representative (normally appointed *ex officio* in these cases, given the absence of the accused whose whereabouts are unknown), who has not received a mandate *ad hoc* and who acts exclusively on his own initiative. The exercise of a fundamental right cannot be denied to its holder, who may only be replaced insofar as strictly necessary in order to counteract his inability to exercise it and cannot be confronted with the irreparable effect of the undesired and non-agreed choice of another, which may be potentially detrimental for him.

It need hardly be added that this Court may intervene in these matters within the limits of its jurisdiction and may not impinge upon the organisation of the default trial, which is a matter for Parliament. It must only be pointed out that, in partially accepting the question raised by the referring court, a specific violation of the right to a defence and to oral proceedings of the accused who failed to appear and was unaware of the proceedings is eliminated, with the purpose of giving effect precisely to the restorative measure chosen by Parliament – the granting of leave to appeal out of time – without establishing a new model for default trials.

Any decision to accept the question will have systemic effects; this Court cannot however refrain from intervening in order to protect fundamental rights out of considerations of abstract formal consistency.

For the reasons set out above, Article 175(2) of the Code of Criminal Procedure must be declared unconstitutional insofar as it does not grant an accused who failed to appear and was not aware of the trial leave to appeal out of time when an appeal has already been filed by the defence representative. It is clear that this decision relates only to the formal

preclusion identified within the "living law" (namely where a previous appeal has been filed), and does not affect the requirements laid down by the law governing access to the guarantee mechanism by the accused who failed to appear and was unaware of the proceedings.

10. – The remedy sought by the referring court also includes a declaration that the contested provision is unconstitutional insofar as it does not permit an accused person who has been granted the right to appeal out of time to exercise the right to submit evidence.

The question is manifestly inadmissible.

This is a question which, having regard to the main proceedings pending before the Court of Cassation, is of an abstract and premature nature, and is therefore irrelevant in order to resolve the proceedings. If granted leave to appeal out of time, the accused may request the discovery of new evidence in the merits proceedings, and in that forum he may, if appropriate, raise the problem of the exercise of his right to file evidence, which is allegedly violated by the contested provision. In the proceedings before the lower court, the Court of Cassation has been called to rule only on the lawfulness of the refusal of leave to appeal by the Bologna Assize Court of Appeal, which will be without prejudice to the subsequent procedural activity, which will be conducted in the event that appeal proceedings, hitherto denied to the appellant, are initiated.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

declares that Article 175(2) of the Code of Criminal Procedure is unconstitutional insofar as it does not grant an accused person who was not actually aware of proceedings or a measure leave to appeal out of time against a default judgment, where the further requirements specified by law have also been met, when a similar appeal has been previously filed by the defence representative of the accused;

rules that the question concerning the constitutionality of Article 175(2) of the Code of Criminal Procedure insofar as it does not permit an accused person who has been granted leave to appeal out of time to exercise the right to submit evidence, raised with reference to Articles 24, 111(1) and 117(1) of the Constitution by the Court of Cassation in the referral order indicated in the headnote, is manifestly inadmissible.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 30 November 2009.

Signed:

Francesco AMIRANTE, President

Gaetano SILVESTRI, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Filed in the Court Registry on 4 December 2009.

The Director of the Registry

Signed: DI PAOLA