Corte costituzionale

JUDGMENT NO. 113 OF 2011

Ugo DE SIERVO, President
Giuseppe FRIGO, Author of the Judgment

JUDGMENT NO. 113 YEAR 2011

In this case the Court considered a reference from the Bologna Court of Appeal concerning the constitutionality of the provision of the Code of Civil Procedure which did not provide for criminal proceedings to be reopened if the original judgment had been ruled unfair by a final judgment of the European Court of Human Rights. The Court ruled that the situation was unconstitutional, and that the relevant provision had to be read as granting the right to request that a criminal trial be reopened under those circumstances.

(omitted)

SENTENZA

in proceedings concerning the constitutionality of Article 630 of the Code of Criminal Procedure, initiated by the Bologna Court of Appeal in the criminal proceedings against D.P., by the referral order of 23 December 2008, registered as no. 303 in the Register of Orders 2010 and published in the *Official Journal of the Republic* no. 41, first special series 2010.

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

having heard the Judge Rapporteur Giuseppe Frigo in chambers on 9 February 2011.

(omitted)

Conclusions on points of law

1. – The Bologna Court of Appeal questions the constitutionality of Article 630 of the Code of Criminal Procedure, with reference to Article 117(1) of the Constitution and Article 46 of the Convention for the Protection of Human Rights and Fundamental Freedoms, "insofar as it does not provide for a trial to be reopened if the judgment or conviction contrasts with a final judgment of the [European] Court [of Human Rights] holding that the trial was not fair pursuant to Article 6 of the European Convention for the Protection of Human Rights".

The referring court has been requested to grant two joint applications for review concerning a conviction and sentence to a term of imprisonment, which had become

irrevocable. According to the lower court, the applications resulted from the finding by the European Court of Human Rights that the trial of the individual convicted was "unfair": this is because the conviction was issued on the basis of statements made during the course of preliminary investigations by three co-accused, who were not examined during the oral stage because they had exercised their right to silence (and hence in breach of the right of the accused to question the witnesses against him, or arrange for them to be questioned, which is guaranteed by Article 6(3)(d) ECHR).

Since the situation described cannot be accounted for as one of the cases of review contemplated under Article 630 of the Code of Criminal Procedure – specifically that (invoked in the first application) in which two or more judgments are irreconcilable, pursuant to paragraph 1(a) – the referring court argues that, precisely for this reason, the contested provision is irreconcilable with the provisions of Article 46 ECHR. In obliging the States parties to comply with the final judgments of the European Court, Article 46 in fact requires them to permit trials to be reopened, even where they have been concluded with a judgment or order that has become irrevocable, if the Strasbourg Court has ascertained that the trial was "unfair" pursuant to Article 6 ECHR.

Consequently, the contested Article 630 of the Code of Criminal Procedure contrasts, albeit indirectly, with Article 117(1) of the Constitution, insofar as it requires the legislature to respect international law obligations.

2. – As a preliminary matter, the Court holds that the question of constitutionality under examination is admissible since it is substantively different – notwithstanding the analogous nature of the goals pursued – from that previously raised by the Bologna Court of Appeal in the same proceedings which was ruled groundless by this Court by judgment no. 129 of 2008.

This difference subsists in respect of all three elements of which the question is comprised: the object is broader (since Article 630 Code of the Criminal Procedure is subject to review as a whole, and not solely the provisions contained in paragraph 1(a)), the principle of constitutional law invoked is new and the arguments made in support of the objection of unconstitutionality are new.

In this case therefore, there is no bar on the re-initiation of proceedings before this Court – a rule which is intended to avoid a *bis in idem* through a challenge to the Court's previous decision, which is inadmissible pursuant to the last paragraph of

Article 137 of the Constitution (in this regard, see *inter alia* judgments no. 477 of 2002, no. 225 of 1994 and no. 257 of 1991).

3. – On the merits, the question is well founded as specified below.

4. – Article 46 ECHR – which is invoked by the lower court as an "interposed provision" – requires the contracting States in paragraph 1 "to abide by the final judgment of the [European] Court [of Human Rights] in any case to which they are parties"; adding in paragraph 2 that "[t]he final judgment of the Court shall be transmitted to the Committee of Ministers which shall supervisee its execution".

These are provisions of central significance in the European system for the protection of fundamental rights, the mainstay of which is the Strasbourg Court. In fact, it is evident that the scope of the primary obligation on the contracting States resulting from the ECHR – to guarantee the rights and freedoms guaranteed by the Convention (Article 1) to all persons – ends up depending largely on the way in which the individual violations ascertained are "settled".

It must be noted in this regard that Article 46 ECHR was amended after the referral order through the entry into force (on 1 January 2010) of Protocol no. 14 to the Convention (ratified and implemented in Italy by Law no. 280 of 15 December 2005). However, the amendment does not change the requirements underlying the question of constitutionality, and if anything reinforces them. Through the addition of three additional paragraphs, it is in fact provided that the Committee of Ministers may request an interpretative ruling from the Strasbourg Court where there are doubts as to the content of a final judgment previously adopted that are liable to hinder the supervision of its execution (Article 46(3)), and above all that it may request a further ruling from the Court finding a violation of the contracting Party's obligation to comply with its judgments (paragraphs 4 and 5). A specific infringement procedure is thereby introduced, which is likely to amount to a more incisive form of pressure on the respondent State.

As far as the contents of the obligation are concerned, Article 46 must be read systematically in conjunction with Article 41 ECHR, pursuant to which, "[i]f the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party".

It is now a well established position in this regard within the most recent case law of the Strasbourg Court that, "a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction … but also to choose the general and/or, if appropriate, individual measures to be adopted" (see *inter alia*, Grand Chamber, judgment of 17 September 2009, *Scoppola v. Italy*, paragraph 147; Grand Chamber, judgment of 1 March 2006, *Sejdovic v. Italy*, paragraph 119; Grand Chamber, judgment of 8 April 2004; and *Assanidzé v. Georgia*, paragraph 198). This is because, in the light of Article 41 ECHR, the purpose of awarding sums by way of just satisfaction is "to provide reparation solely for damage suffered by those concerned to the extent that such events constitute a consequence of the violation that cannot otherwise be remedied" (judgment of 13 July 2000, *Scozzari and Giunta v. Italy*, paragraph 250).

The objective of the individual measures which the respondent State is required to carry out is identified more specifically by the European Court as *restitutio in integrum*, or full redress, in favour of the interested party. Accordingly, these measures must put "the applicant, as far as possible, in the position he would have been in had the requirements of the Convention not been disregarded" (see *inter alia*, Grand Chamber, judgment of 17 September 2009, *Scoppola v. Italy*, paragraph 151; judgment of 10 November 2004, *Sejdovic v. Italy*, paragraph 55; and judgment of 18 May 2004, *Somogyi v. Italy*, paragraph 86). Against this backdrop, the respondent State is also required to remove the impediments under national legislation which stand in the way of the achievement of the objective: in fact, "in ratifying the Convention the Contracting States undertake to ensure that their domestic legislation is compatible with it" and therefore also to "to remove any obstacles in its domestic legal system that might prevent the applicant's situation from being adequately redressed" (Grand Chamber, judgment of 17 September 2009, *Scoppola v. Italy*, paragraph 152; and Grand Chamber, judgment of 8 April 2004, *Assanidzé v. Georgia*, paragraph 198).

With particular reference to the breaches related to the conduct of a trial, and of a criminal trial in particular, the Strasbourg Court has stated – starting from the above premises – that the reopening of a trial is the most appropriate way of securing full redress, especially in cases in which the guarantees set forth under Article 6 of the Convention have been held to have been violated. This is consistent with the indications

also provided by the Committee of Ministers, in particular in Recommendation R(2000)2 of 19 January 2000, in which the contracting Parties were specifically invited "to examine their national legal systems with a view to ensuring that there exist adequate possibilities of re-examination of the case, including reopening of proceedings, in instances where the Court has found a violation of the Convention".

According to now settled case law, the Strasbourg Court has asserted in such cases that when a private individual has been convicted on conclusion of a trial which violated Article 6 of the Convention, the most appropriate way of remedying the violation found to have occurred involves, as a matter of principle, "a retrial or a reopening of the case, if requested" in accordance with all conditions characteristic of a fair trial (*inter alia*, judgment of 11 December 2007, *Cat Berro v. Italy*, paragraph 46; judgment of 8 February 2007, *Kollcaku v. Italy*, paragraph 81; judgment of 21 December 2006, *Zunic v. Italy*, paragraph 74; and Grand Chamber, judgment of 12 May 2005, *Öcalan v. Turkey*, paragraph 210). Whilst the respondent State's discretion in choosing the procedures to comply with its obligation must be acknowledged, this must occur under the supervision of the Committee of Ministers and insofar as compatible with the conclusions contained in the Court's judgment (*inter alia*, Grand Chamber, judgment of 17 September 2009, *Scoppola v. Italy*, paragraph 152; Grand Chamber, judgment of 1 March 2006, *Sejdovic v. Italy*, paragraphs 119 and 127; and Grand Chamber, judgment of 12 May 2005, *Öcalan v. Turkey*, paragraph 210).

5. – Moreover, in order to ensure full redress for the victim of the violation as required by the European Court, it is clear that it must be possible to challenge the final judgment in the case that has been censured. However, the exhaustion of national remedies amounts to an absolute prerequisite for the admissibility of applications to the Strasbourg Court (Article 35(1) ECHR). This means that, as a matter of principle, the European Court rules on disputes that have already been resolved on national level by an irrevocable decision.

From this perspective, the majority of the Member States of the Council of Europe – above all after Recommendation R(2000)2 – have adopted specific legislation aimed at enabling criminal trials which have been found to be "unfair" by the European Court to be reopened, whilst in other countries, notwithstanding the absence of specific legislative provision, the possibility of reopening trials is nonetheless guaranteed by a

broad application of the extraordinary right of appeal provided for under national legislation.

The situation is significantly different under Italian law. It is in fact generally recognised that it is impossible for these purposes to exercise the extraordinary right of appeal which has been a historic feature of the law of criminal procedure – namely, review – since the situation at issue here cannot be classified under any of the cases currently covered by Article 630 Code of Criminal Procedure. Besides, this body of cases reflects the traditional classification of the institution as an instrument aimed at resolving discrepancies between the "truth within the trial" endorsed by the court and the "historical truth" resulting from factual elements "external" to the trial. In other words, this amounts to a remedy for the court's incorrect assessment of the facts of the case, an error with may emerge out of a contrast with the facts held in different decisions from that contested (Article 630(a) and (b) of the Code of Criminal Procedure), insufficient knowledge of the evidence at the time the decision was made (letter c), or as a result of demonstrated criminal conduct (letter d). At the same time, review proceedings are structured with a view solely to securing the acquittal of the individual who has already been convicted – an objective which is most succinctly expressed through the requirement that a *prima facie* case based on the evidence supporting the application for review be made, which Article 631 of the Code of Criminal Procedure stipulates as a prerequisite for the admissibility of the application.

The situation is entirely different in cases in which the Strasbourg Court has ruled that Article 6 ECHR has been breached. In such cases it is necessary to remedy an internal "flaw" within the trial beyond the limits of the final sentence (traditionally considered to be the cut-off point for objections regarding *errores in procedendo*), by reopening the trial and putting the interested party in the situation in which he would have been had the violation not occurred. On the other hand, the redress of a lack of "fairness" in a trial will not necessarily entail an acquittal: anyone who has been convicted by for example a court which is – in the opinion of the European Court – not impartial or independent must be assured a new trial before a court which complies with the requirements specified under Article 6(1) ECHR, and such a right may not be rigidly subject to a particular type of prognosis as to the relative outcome (the new trial could indeed be concluded with a conviction, rather than an acquittal, notwithstanding

naturally the prohibition on *reformatio in peius*).

Therefore, given that it is not possible to apply the review procedures, the case law has experimented with various interpretative solutions aimed at safeguarding the rights recognised by the ECHR, setting aside the restrictions resulting from the final judgment. However, the common opinion is that these are partial solutions that are incapable of fully achieving the objective.

This observation applies first and foremost with regard to the solution based on the other extraordinary appeal procedure introduced more recently into Italian law, namely extraordinary appeals due to material or factual errors contained in the judgments of the Court of Cassation (Article 625-bis of the Code of Criminal Procedure). The case law of the Court of Cassation has held that this remedy may be used by analogy in order to implement judgments of the Strasbourg Court which have held that Convention guarantees have been breached, even though these did not depend upon mere errors of perception (Court of Cassation, judgment no. 45807 of 12 November 2008 – 11 December 2008; see also Court of Cassation, judgment no. 16507 of 11 February 2010 – 28 April 2010). Leaving aside all other considerations, the instrument provided for under Article 625-bis of the Code of Criminal Procedure cannot however provide an exhaustive answer to the problem, since it is structurally incapable of ensuring that criminal trials may be reopened in cases where the violations did not occur in proceedings before the Court of Cassation (such as that at issue in the case before the lower court).

An analogous conclusion must be reached with reference to the rule whereby the time limits for filing an appeal may be extended (Article 175(2) of the Code of Criminal Procedure). Due to the substantive content of that provision, this is a mechanism which may only be used – and in fact has only been used in the case law – in order to remedy ECHR violations associated with trials of persons celebrated *in absentia* (see *inter alia*, Court of Cassation, judgment no. 8784 of 12 February 2008 – 27 February 2008; and Court of Cassation, judgment no. 4395 of 15 November 2006 – 2 February 2007). However, this hypothesis likewise is not of significance in the proceedings before the lower court.

Moreover, the position does not change not even if consideration is given to the further interpretative solution applied, precisely with reference to the matters at issue in

these proceedings, during the enforcement stage and which focuses on the pre-enforcement control [*incidente di esecuzione*] governed by Article 670 of the Code of Criminal Procedure (see paragraph 1 of the Facts of the Case above). On that view, when the European Court has held that the conviction was issued in breach of the rules governing a fair trial, finding that the convicted individual has the right for the trial to be reopened, the enforcement judge will be required to rule that the sentence is unenforceable, even though Parliament has failed to introduce "appropriate procedures for initiating the new trial" (Court of Cassation, judgment no. 2800 of 1 December 2006 – 25 January 2007). Leaving aside any other possible consideration, the remedy in fact proves to be inadequate: it "freezes" the final judgment, preventing its enforcement, but does not quash it, leaving it indefinitely within a kind of "procedural limbo". Above all, a mere declaration of unenforceability will not satisfy the primary requirement, namely that the trial be reopened under conditions which permit the recovery of the guarantees assured under the Convention.

6. – The lack of a dedicated remedy with that purpose under Italian law has moreover been repeatedly criticised by the Council of Europe, above all in relation to cases involving the convicted individual in the proceedings before the lower court.

It should be pointed out as a preliminary matter in this regard that – correcting the assertion made in the referral order – the European Court of Human Rights has never in fact issued any judgment on this matter. The decision which the referring court states to be the "judgment of 9 September 1998" of the Strasbourg Court is in actual fact a report of that date by the European Commission of Human Rights (a body abolished by Protocol no. 11). That report was approved by the Committee of Ministers by decision of 15 April 1999 (Interim resolution DH(99)258). Pursuant to Article 32 ECHR, in the text valid prior to the entry into force of Protocol no. 11 (which occurred on 1 November 1998, Article 5 of which stated the transitory rule that the previous arrangements would apply to cases pending at that time), the Committee of Ministers was in fact competent to decide on cases brought before it for examination if a report had been drawn up by the European Commission which was not followed by the referral of the dispute to the Strasbourg Court within three months.

However, the fact highlighted above does not impinge upon the relevance of the question since, under the original Article 32(4) ECHR, the decisions of the Committee

of Ministers were binding on the contracting States in the same way as the final judgments of the European Court of Human Rights, and are therefore – then as now – fully equivalent to one another for our present purposes.

It was precisely in this perspective that both the Committee of Ministers (Interim resolutions ResDH(2000)30 of 19 February 2002, ResDH(2004)13 of 10 February 2004 and ResDH(2005)85 of 12 October 2005) as well as the Council of Europe Parliamentary Assembly (see *inter alia* Resolution no. 1516(2006) of 2 October 2006) objected in an increasingly forceful manner to Italy's failure to comply with the obligation to remove the consequences of the violation ascertained in the case under examination. This breach was the result of the absence under national law of a mechanism capable of permitting trials held to be "unfair" to be reopened.

The invitation to introduce such a mechanism "as quickly as possible" was again addressed to the Italian authorities by the Committee of Ministers, also in the decision to conclude the supervision procedure relating to that case. The decision was adopted by the Court of Cassation's judgment referred to above, which ruled that the sentence issued against the convicted individual was unenforceable and ordered that he be released (Final resolution CM/ResDH(2007)83 of 19 February 2007).

7. – When considering the previous question of constitutionality referred to above, raised by the Bologna Court of Appeal during the same proceedings (see paragraph 1 of the Facts of the Case above), this Court already had the opportunity to remark that, in the light of the matters summarised above, the enactment of adequate measures to create a remedy under procedural law for the consequences resulting from established violations of the right to a fair trial was an "evident, non-deferrable necessity" (judgment no. 129 of 2008).

However, this did not prevent the Court from ruling the question groundless due to the terms in which it was framed.

In fact, the question of constitutionality sought to extend the specific remedy of review provided for under Article 630(1)(a) of the Code of Criminal Procedure to the situation concerned, due to the alleged violation of Articles 3, 10 and 27 of the Constitution. The Court held in this regard that none of the principles invoked – the principle of equality, the presumption of innocence understood as a generally recognised rule of international law, and the rehabilitative goal of the penalty – was relevant. The

first question was irrelevant because the situation described under Article 630(1)(a) of the Code of Criminal Procedure did not obtain in that case. This was because the concept of irreconcilable irrevocable judgments referred to in Article 630 concerns the objective incompatibility between the "facts" (understood in the sense of 'historical fact') on which the decisions are based, and not any logical contradiction between the assessments made in the judgments. The second question was irrelevant since Article 10(1) of the Constitution does not cover treaty norms unless they restate principles or customary rules of international law. And this is without considering the fact that the "presumption of innocence" does not in itself have "anything to do with the extraordinary remedies intended to remove any errors, whether they be *in procedendo* or *in iudicando*", since that presumption no longer applies from the time when the trial arrives at its conclusion. Moreover, the third principle was also irrelevant, since the referring court's argument that the rules of a "fair trial" should be allocated a function conducive to the "rehabilitation" of the convicted individual would have resulted in "a paradoxical difference in the origin of goals which – here – would thwart the presumption of innocence itself" (judgment no. 129 of 2008).

In dismissing the question, this Court did not however fail to direct a "pressing invitation" to Parliament that it fill the legislative gap objected to with the measures considered most appropriate. However, in spite of the period of time that had passed, this call went unanswered.

8. – The conclusion must be different as regards the question of constitutionality currently under examination, which on the one hand concerns Article 630 of the Code of Criminal Procedure as a whole, whilst on the other hand is raised with reference to the different and more appropriate principle enunciated in Article 117(1) of the Constitution, taking Article 46 (in conjunction with Article 6) ECHR as an "interposed rule".

Starting from judgments no. 348 and no. 349 of 2007, the case law of this Court has been settled in ruling that the provisions of the ECHR – as interpreted by the European Court of Human Rights, specifically established in order to interpret and apply the Convention (Article 32(1) of the Convention) – supplement the constitutional principle laid down under Article 117(1) of the Constitution as "interposed rules" by requiring that national legislation comply with the requirements resulting from "international law

obligations" (judgments no. 1 of 2011, no. 196, no. 187 and no. 138 of 2010, no. 317 and no. 311 of 2009 and no. 39 of 2008; on the continuing validity of this position also after the entry into force of the Treaty of Lisbon of 13 December 2007, see judgment no. 80 of 2011). Within this perspective, where there is an issue as to a possible contrast between the national rule and a provision of the ECHR, the ordinary courts must verify first and foremost whether it is possible to interpret the former in accordance with the Convention, and may use all interpretative instruments available to them. If this exercise is unsuccessful – since it cannot remedy the situation simply by setting aside the national provision in breach – the court must issue a declaration of incompatibility and refer a question to the Constitutional Court with reference to the above principle of constitutional law. Once it has been seized with the reference, whilst it is not able to review the interpretation of the ECHR by the European Court, the Constitutional Court will in turn be entitled to verify whether the Convention provision – which still in any case has sub-constitutional status – conflicts with any other provisions of the Constitution. Should this be the case, the Court will be required to rule that the Convention provision is incapable of supplementing the principle of constitutional law concerned.

In this case, as noted above (see paragraph 4 of the Facts of the Case above), the Strasbourg Court considers, according to case law that is now settled, that the obligation to comply with its final judgments incumbent upon the contracting Parties under Article 46(1) ECHR also entails the commitment for the contracting States to allow trials to be reopened, if requested by the interested party, whenever this may appear necessary in order to grant full redress to that person in cases in which the guarantees recognised by the Convention have been violated, particularly the right to a fair trial.

This interpretation cannot be deemed to contrast with the relevant protections offered by the Constitution. In particular – without prejudice to the undoubted relevance of the values represented by the certainty and stability of a *res iudicata* – the provision for the setting aside of the related exclusionary effects in cases involving particularly serious infringements – such as those ascertained by the Strasbourg Court, having regard to the judicial proceedings as a whole – of the guarantees relating to fundamental human rights cannot be regarded as unconstitutional. With particular reference to the provisions of Article 6 of the Convention, these guarantees are moreover largely

confirmed under the current text of Article 111 of the Constitution.

On the other hand, the lower court specified Article 630 of the Code of Criminal Procedure – not unjustifiably – as the provision in respect of which the Court is requested to take action. Indeed, out of all the institutions currently available under the law of criminal procedure, review – which entails the reopening of the trial as an extraordinary ground for appeal of a general nature, implying a resumption of procedural activities addressing the merits of the case, including also the discovery of evidence – is that which most closely resembles the remedy which it appears necessary to introduce in order to guarantee that the national legal order complies with the principle invoked.

On the other hand, contrary to the assertions of the *Avvocatura dello Stato*, the acceptance of the question cannot be impeded by the fact – as the Court has had the opportunity to point out (see paragraph 5 of the Conclusions on Points of Law above) – that the reopening of the trial due to the obligation resulting from the ECHR would constitute a heterogeneous remedy compared to the other forms of review currently contemplated under the contested provision. This is claimed first to be because it would exceed the logic underlying these remedies of bridging the gap between the "truth within the trial" and the "historical truth" resulting from factual elements "external" to the trial already celebrated. Secondly, the inflexible alternative provided for under applicable legislation as regards the outcome of review proceedings as an acquittal or confirmation of the previous conviction would not be suited to such cases.

When confronted with a violation of the Constitution which cannot be resolved through interpretation – especially where it relates to fundamental rights – the Court is in any case required to provide a remedy, irrespective as to whether the violation depends on the provisions of the relevant rule or, on the contrary, on what the provision (or rather, the provision which is most relevant for the case under discussion) fails to specify. Moreover, it cannot be considered, according to the long-held position of this Court (judgment no. 59 of 1958), that the – real or apparent – absence of legislation which may result from this violation in relation to specific situations may preclude a ruling that legislation is unconstitutional. In fact, it will on the one hand be for the ordinary courts to infer the necessary corollaries from the decision in terms of its application by using the interpretative instruments available to them. On the other hand,

it will be for Parliament to make prompt and appropriate provision, if necessary, to govern any aspects that may appear to require specific regulation.

In this case, Article 630 of the Code of Criminal Procedure must be ruled unconstitutional precisely because (and insofar as) it does not contemplate a "different" ground for review compared to those currently available which is aimed specifically at permitting a trial to be reopened (for trials concluded by one of the judgments specified under Article 629 of the Code of Criminal Procedure) when it is necessary to reopen the case pursuant to Article 46(1) ECHR in order to comply with a final judgment of the European Court of Human Rights (which, for the reasons set out above, is to be considered equivalent to a decision adopted by the Committee of Ministers pursuant to Article 32 ECHR as previously in force). Moreover, the concept of "trial" here is to be understood in generic terms that are also conducive to the repetition of activities already carried out and, if appropriate, of the whole case.

The need for the case to be reopened must naturally be assessed taking account of the indications contained in the judgment to be enforced, as well as in any "interpretative" judgment that may be requested from the European Court by the Committee of Ministers pursuant to Article 46(3) ECHR, as well as with reference to the objective nature of the violation ascertained. (It is therefore entirely clear, for example, that the failure to comply with the requirement that trials be of a reasonable length pursuant to Article 6(1) ECHR will not under any circumstances result in the trial being reopened, since the re-initiation of procedural activities would only exacerbate the violation.)

The Court holds moreover that, should the situation considered above obtain, the court will be required to review the compatibility of the individual provisions relating to the review proceedings. Any provisions which appear to be irreconcilable in logical and legal terms with the objective pursued (that of placing the interested party in the situation in which he would have been had the violation ascertained not occurred, and not remedying an incorrect assessment by the trial court resulting from elements external to the trial) will have to be considered inapplicable, including first and foremost – as observed above – those which reflect the traditional position that review proceedings have the sole purpose of quashing the conviction. Thus for example, the prerequisite of admissibility based on a *prima facie* case in favour of acquittal specified

under Article 631 of the Code of Criminal Procedure will not apply. Moreover, in the appropriate cases, the provisions of Article 637(2) and (3) of the Code of Criminal Procedure (which provide, respectively, that the acceptance of the application will inevitably entail the acquittal of the interested party, and that the court may not reach its decision exclusively on the basis of a different assessment of the evidence heard in the previous proceedings) should also be considered inapplicable.

It is necessary to consider on the other hand that the form of review under consideration essentially amounts to an exception – imposed by the requirement to respect international law obligations – from the principle referred to above whereby procedural errors will be redeemed by a final judgment. Within this perspective, the review court will also have to assess how the grounds for the unfairness of the trial found by the European Court translate into flaws in procedural acts under national law, and shall adopt all consequent measures in the new proceedings in order to remove them.

9. – It is important to reiterate and emphasise that the impact of the declaration of unconstitutionality on Article 630 of the Code of Criminal Procedure does not imply that this Court has a preordained opinion in favour of the institution of review, since such proceedings are only justified by the lack of other more appropriate institution in relation to which a substantive intervention may be made. Therefore, Parliament remains at liberty to regulate the mechanism for compliance with the final judgments of the Strasbourg Court through different arrangements – including through the introduction of a distinct self-standing institution – and also to enact provisions relating to specific aspects thereof over which this Court cannot intervene since this would involve discretionary choices (such as for example the specification of a time limit for the submission of applications to reopen a trial after the final judgment of the European Court). In the same way, the choice as to the limits within which and procedures subject to which the indications contained in Recommendation R(2000)2 of the Committee of Ministers of the Council of Europe (referred to at various points above) may be taken into account, if at all, insofar as it proposes the possible introduction of conditions applicable to the reopening of the case which are dependent on the nature of the consequences generated by the national decision and its impact on the violation ascertained (paragraph II, points i and ii), falls within the discretion of Parliament.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

declares that Article 630 of the Code of Criminal Procedure is unconstitutional insofar as it does not provide for a different ground for the review of a judgment or conviction in order to enable a trial to be reopened when this is necessary, pursuant to Article 46(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms in order to comply with a final judgment of the European Court of Human Rights.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 4 April 2011.

(omitted)