Corte costituzionale

JUDGMENT NO. 236 OF 2011

Alfonso QUARANTA, President

Giorgio LATTANZI, Author of the Judgment

JUDGMENT NO. 236 YEAR 2011

In this case the Court considered a challenge to legislation which provided that a reduction in time-barring limits for certain offences would not apply retroactively to the benefit of the accused to proceedings which were already pending before the court of appeal or before the Court of Cassation. The Court ruled the question groundless, drawing heavily in its judgment from the case law of the European Court of Human Rights, and concluding that a distinction should be drawn between subsequently enacted legislation which altered the criminal law status of conduct or the severity of the penalty, and legislation impinging upon ancillary matters in relation to the offence, such as the relevant periods for time-barring.

(omitted)

JUDGMENT

in proceedings concerning the constitutionality of Article 10(3) of Law no. 251 of 5 December 2005 (Amendments to the Criminal Code and to Law no. 354 of 26 July 1975 on generic mitigating circumstances, reoffending, the comparison of the circumstances of the offence for reoffenders, usury and time-barring), initiated pursuant to the referral orders of 11 June 2010 from the Court of Cassation, of 4 November 2010 from the Venice Court of Appeal and of 17 December 2010 from the Bari Court of Appeal, respectively registered as no. 344 in the Register of Orders 2010 and no. 1 and no. 47 in the Register of Orders 2011 and published in the Official Journal of the Republic no. 45, first special series 2010 and no. 3 and no. 13, first special series 2011.

Considering the entries of appearance Fabrizio De Giovanni, Giovanni Micciché, Fatos Deliu and the intervention by the President of the Council of Ministers;

having heard the Judge Rapporteur Giorgio Lattanzi at the public hearing of 21 June 2011 and in chambers on 22 June 2011;

having heard Counsel Emanuele Fragasso for Fatos Deliu, Franco Coppi and Francesco Bertorotta for Giovanni Micciché, Plastina Pilerio for Fabrizio De Giovanni and the State Counsel [*Avvocato dello Stato*] Massimo Giannuzzi for the President of the Council of Ministers.

(omitted)

Conclusions on points of law

1. – The Second Criminal Division of the Court of Cassation questions the constitutionality of Article 10(3) of Law no. 251 of 5 December 2005 (Amendments to the Criminal Code and to Law no. 354 of 26 July 1975 on generic mitigating circumstances, reoffending, the comparison of the circumstances of the offence for reoffenders, usury and time-barring) with reference to Article 117(1) of the Constitution and Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, ratified and implemented by Law no. 848 of 4 August 1955, on the grounds that it precludes the application of the new time-barring limits, if these are shorter, to "trials which were already pending on appeal or before the Court of Cassation".

After finding that, according to the most recent case law of the Constitutional Court, the provisions of the ECHR, as interpreted by the European Court of Human Rights, amount to interposed rules for the purposes of compliance with Article 117(1) of the Constitution, the referring court bases its challenge on the assertion contained in the judgment of the Grand Chamber of the Strasbourg Court of 17 September 2009 (*Scoppola v. Italy*), according to which "Article 7 of the Convention, which lays down the prohibition on the retroactive application of the criminal law, also incorporates the corollary of the right of the accused to the less severe treatment".

According to the lower court, in preventing the application of shorter time-barring limits for offences to trials which are pending before the appeal courts or the Court of Cassation, the transitory provision contested breaches Article 7 ECHR which, as interpreted by the European Court of Human Rights, enshrines not only the principle that more severe provisions of the criminal law cannot have retroactive effect, but also implicitly the principle of retroactivity of the criminal law *pro reo*.

2. – The Venice Court of Appeal also questions the constitutionality of Article 10(3) of Law no. 251 of 2005, due to violation of Articles 111 and 117(1) of the Constitution, in the light of Article 7 ECHR, as interpreted by the European Court of Human Rights.

After mentioning the referral order by which the Court of Cassation raised an analogous question of constitutionality, and concluding that the arguments set out

therein relating to Article 117(1) of the Constitution are valid, the lower court asserts that the contested provision also breaches Article 111(2) of the Constitution, on the grounds that the reduction in time-barring periods is required in order to guarantee greater equilibrium in procedural time-scales, such that "to continue to apply time-barring periods which are much longer than the current periods would amount to a breach of constitutional rules" and in particular the principle of the reasonable length of trials.

3. – The Bari Court of Appeal also raises similar challenges against Article 10(3) of Law no. 251 of 2005 with reference to Article 117 of the Constitution, invoking the "grounds and arguments, which are endorsed, stated by the Court of Cassation" in the referral order of 11 June 2010 in which the same question of constitutionality was raised.

4. – The referral orders raise questions which are identical or analogous, and hence the relative proceedings should be joined for resolution in a single judgment.

5. – The State Counsel averred that the question raised by the Bari Court of Appeal is inadmissible for two reasons: first because the referring court failed to provide an account of the facts brought before it and secondly because it did not state the reasons why the question was not manifestly groundless, but rather limited itself to a mere reference to the order by which the Court of Cassation had raised an analogous question of constitutionality.

The objection is well founded.

First and foremost, the referral order lacks a description of the actual facts of the case and reasons as to its relevance, and fails to specify the title of the offence being prosecuted, the date on which it was committed, and whether the appeal was pending at the time Law no. 251 of 2005 entered into force: this Court is thus unable to ascertain whether the question is relevant (see *inter alia*, judgment no. 72 of 2008; order no. 64 of 2011).

Secondly, the lower court does not state any reasons for its claim that the parameter invoked has been violated, but rather limits itself to referring – in purely generic and incontrovertible terms – to the order by which the Court of Cassation raised an analogous question of constitutionality, without specifying the reasons why it considers it necessary to endorse the arguments underpinning the decision referred to. According

to the settled case law of this Court, the failure to give reasons as to the non-manifest groundlessness of a question may not be remedied by reference to the contents of another referral order from the same court or a different court, since the referring court must explicitly state the reasons why it considers that the question raised is relevant and not manifestly groundless, providing autonomous and self-standing reasons (see *inter alia*, judgments no. 103 of 2007 and no. 266 of 2006; orders no. 321 of 2010 and no. 75 of 2007).

6. – The question raised by the Venice Court of Appeal is also inadmissible on the grounds that it fails to describe the actual facts of the case and is not relevant.

In fact, the lower court limits itself to stating that it was seized of an appeal against the judgment at first instance, issued on 15 January 2001, "ruling on the offence provided for under Article 110 of the Code of Criminal Procedure, and Articles 3(8) and 4(1) and (7) of Law no. 75 of 1958, and another", "committed over the course of several months (most recently, December) in 1995", specifying that, were the more favourable provisions set forth under the new legislation to be applied, the offences of aiding and abetting and the exploitation of prostitution would be close to the limits for time-barring and the other offences would already be time-barred.

Therefore, the question of constitutionality is in part irrelevant since, with regard to the charges of aiding and abetting and the exploitation of prostitution, even were the contested provision to be declared unconstitutional, the application of more favourable legislation would not entail a ruling that the offence can no longer be prosecuted since – as is acknowledged by the referring court itself – the shorter time-barring period introduced by Law no. 251 of 2005 has not yet elapsed. Moreover, with regard to the other charges – for which, according to the lower court, the application of the more favourable provision of criminal law would mean that the time-barring periods would have passed – the referral order does not provide a complete description of the facts at issue in the proceedings, since it fails to provide any indication of the title and nature of the "other offences" being prosecuted, with the result that it is impossible for this Court to ascertain whether the question is relevant.

7. – On the other hand, the question raised by the Court of Cassation is admissible, but is groundless on the merits.

8. – Article 10(3) of Law no. 251 of 2005 originally provided as follows: "If, as a result of the new provisions, the time-barring periods prove to be shorter, these periods shall apply to proceedings and trials pending on the date of entry into force of this law, except trials pending at first instance in which the oral stage has already been officially initiated, and trials which were already pending on appeal or before the Court of Cassation".

In judgment no. 393 of 2006, this Court ruled the provision unconstitutional on the grounds that it stipulated that the relevant time after which the new provisions on time-barring were to apply was, if these were more favourable to the accused, the official initiation of the oral stage at first instance, concluding that this legislative choice was not "reasonable" and hence violated Article 3 of the Constitution.

As a result of the ruling, the new more favourable time-barring limits did not apply only in trials which were already pending on appeal or before the Court of Cassation. A question concerning the constitutionality of the provision was once again raised on this basis, which was ruled groundless by this Court in judgment no. 72 of 2008, in which it was held that the residual limit imposed on the retroactivity of the more favourable time-barring regime was reasonable.

The new question concerning the constitutionality of Article 10(3) of Law no. 251 of 2005, as in force following judgment no. 393 of 2006, proposed by the Court of Cassation does not refer to Article 3 of the Constitution, but invokes the different parameter set forth in Article 117(1) of the Constitution, taking as an interposed rule Article 7 ECHR, as interpreted by the Strasbourg Court in the judgment of the Grand Chamber of 17 September 2009 (*Scoppola v. Italy*).

9. – Due to the contents of the new challenge made against the contested provision, regarding its compatibility with Article 7 ECHR, it is necessary as a preliminary matter to recall the case law of this Court on the status of the provisions of the ECHR within Italian law and their effect, as interposed rules, under Article 117(1) of the Constitution.

Starting from judgments no. 348 and no. 349 of 2007, the case law of the Constitutional Court has been settled in concluding 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. 113 and 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 following the entry into force of the Treaty of Lisbon of 13 December 2007, see judgment no. 80 of 2011).

This Court has clarified that "Article 117(1) of the Constitution, and in particular the expression 'international law obligations' contained in it, refers to international treaty rules which may also be different from those covered by Articles 10 and 11 of the Constitution. Interpreted in this manner, Article 117(1) of the Constitution filled the gap which previously existed *vis-a-vis* provisions which guarantee compliance with international treaty law on constitutional level. This means that any national provision which contrasts with a treaty provision, and in particular with the ECHR, will thereby violate Article 117(1) of the Constitution" (judgment no. 311 of 2009).

Therefore, if a provision of national law is alleged to breach a provision of the ECHR, "the national ordinary court must as a preliminary matter ascertain whether it is practicable to interpret the former in a manner compatible with the Convention provision, using all normal instruments of legal interpretation" (judgments no. 93 of 2010, no. 113 of 2011, no. 311 and no. 239 of 2009). If this proves to be impossible and the contrast cannot be resolved through interpretation, the ordinary courts, which cannot set aside the national provision and cannot apply it, yet have held it to contrast with the ECHR, and hence with the Constitution, must make a declaration of incompatibility and raise a question of constitutionality with reference to Article 117(1) of the Constitution, or to Article 10(1) of the Constitution where it concerns a treaty provision recognising a generally recognised rule of international law (judgments no. 113 of 2011, no. 93 of 2010 and no. 311 of 2009).

After a question of constitutionality has been raised, it is a matter for this Court first and foremost to verify whether the contrast alleged between the national provision and the ECHR exists and whether it cannot actually be resolved through interpretation. The Court must then verify whether the Convention provision – which nonetheless is still subordinate to the Constitution within the hierarchy of norms – conflicts as the case may be with any other provisions of the Constitution. In this albeit exceptional case, the Convention provision cannot be considered capable of supplementing the constitutional

parameter considered (judgments no. 113 of 2011, no. 93 of 2010, no. 311 of 2009, no. 349 and no. 348 of 2007).

This Court has moreover repeatedly asserted that it is not able to review the interpretation of the Convention by the Strasbourg Court: therefore, the provisions of the ECHR must be applied with the meaning allocated to them by the European Court of Human Rights (judgments no. 113 and no. 1 of 2011, no. 93 of 2010, no. 311 and no. 239 of 2009, no. 39 of 2008, no. 349 and no. 348 of 2007).

However, whilst this Court can certainly not replace its own interpretation of the ECHR for that of the Strasbourg Court, it may however "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" (judgment no. 317 of 2009).

It is therefore for this Court to assess the European case law on the interposed rule in a manner which respects its substantive content, but with a margin of appreciation and adaptation which enables it to take account of the special features of the legal order within which the Convention provision is destined to be applied (judgment no. 311 of 2009).

10. – Since as has been seen above the contested provision has been challenged insofar as it introduced a limit on the retroactive applicability of the new legislation on time-barring, where this is more favourable to the accused, it is also necessary to provide a brief account of the case law of the Constitutional Court on retroactivity *in mitius*.

This court has repeatedly asserted that of the retroactivity of criminal law provisions which are favourable to the accused – provided for in ordinary legislation under Article 2(2), (3) and (4) of the Criminal Code – was not vested with constitutional standing under Article 25(2) of the Constitution, which is limited to precluding the retroactivity of provisions establishing criminal offences and, more generally, more severe penalties. Therefore, exceptions may be created to the rule under ordinary legislation, where

justified by a sufficiently valid reason (see, *inter alia*, judgments no. 215 of 2008, no. 393 of 2006, no. 80 of 1995, no. 74 of 1980, no. 6 of 1978; and order no. 330 of 1995).

In fact, according to the case law of the Constitutional Court, "the principle of the retroactivity of more favourable legislation has an entirely different status to the principle of non-retroactivity of more unfavourable criminal legislation. The latter constitutes an essential instrument for safeguarding private individuals against arbitrary legislation, expressing the requirement that the criminal law consequences of one's own conduct must be 'calculable', as a necessary prerequisite for freedom in individual self-determination. (…) Within this perspective, it is therefore undisputed that the principle concerned is directly recognised under Article 25(2) of the Constitution in all of its manifestations: that is, not only with reference to situations involving the creation of new offences, at which the wording of the constitutional provision appears to be directed, but also with reference to changes *in peius* of criminal punishment for conduct which was already a criminal offence. In these terms, the principle in question also has absolute value and cannot be balanced against other constitutional values. (…) On the other hand, the principle that more favourable legislation should be retroactive does not have any relationship with the freedom of individual self-determination, for the obvious reason that, within that particular case, more favourable legislation is enacted after the offence was committed, in relation to which the perpetrator made his free decision on the basis of the prior legislative framework (which was less favourable to him). Within this perspective, the Court has therefore repeatedly held that the principle of retroactivity *in mitius* is not covered by Article 25(2) of the Constitution" (judgment no. 394 of 2006).

The extent of the principle of retroactivity *in mitius* must not be limited solely to provisions governing the severity of the penalty, but must be extended to all substantive provisions which, notwithstanding that they relate to issues different from the penalty *stricto sensu*, impinge upon the overall treatment reserved to the guilty party. As was clarified by judgment no. 393 of 2006 in fact, "the provision of the criminal code [laying down the general rule of the retroactivity of more favourable legislation] must be interpreted, and has been constantly interpreted within the case law of this Court (and that of the Court of Cassation) to the effect that the phrase "provisions more favourable to the guilty party" should relate to all provisions which introduce changes *in melius* to

the legislation governing a criminal act, including those relating to the time-barring of the offence".

In view of the situation described above relating to the scope of the principle of retroactivity *in bonam partem*, it is important to recall that, according to the Court, "although the rule of the retroactivity of the *lex mitior* has a different status compared to the principle of the non retroactivity of provisions which introduce an offence, contained in Article 25(2) of the Constitution, it does not lack its own basis in the Constitution" (judgment no. 215 of 2008). This basis was identified in the "principle of equality, which requires as a general principle that the same conduct be punished in the same manner, irrespective of whether it was committed before or after the entry into force of legislation providing for the abolition of the offence or less severe punishment" (judgment no. 394 of 2006).

It would not be reasonable to punish (or to continue to punish more severely) an individual for conduct which, according to the later legislation, any other person may commit with impunity (or for which a less severe punishment is stipulated). Indeed, in accordance with the principle of equality, amendments to the criminal law which are more favourable to the accused and, even more so, the *abolitio criminis* ordered by Parliament in the light of a changed assessment of the social harm of the relevant conduct must also operate in favour of those who engaged in the conduct at an earlier moment in time, unless there is sufficient justification for the contrary to apply (judgments no. 215 of 2008, no. 394 and no. 393 of 2006, no. 80 of 1995, no. 74 of 1980, no. 6 of 1978 and no. 164 of 1974).

However, as has been clarified by this Court, the principle of equality constitutes not only the basis for but also the limit on the retroactive applicability of more favourable legislation. Indeed, whilst the principle of the non-retroactivity of a less favourable criminal law rule is an absolute and inderogable precept, that of the retroactivity of more favourable legislation may lawfully be subject to limitations and exceptions under constitutional law, provided that these are founded on objectively reasonable justifications and, in particular, the need to preserve countervailing interests of analogous significance (see, *inter alia*, judgments no. 215 of 2008, no. 394 of 2006, no. 74 of 1980 and no. 6 of 1978).

11. – Although judgment no. 393 of 2006 acknowledged that "any exceptions from the principle of the retroactivity of more favourable legislation pursuant to Article 3 of the Constitution may be established by ordinary legislation, where justified by a sufficiently valid reason", thereby demonstrating its endorsement of the settled case law of the Constitutional Court on the "legal regime governing more favourable legislation, and specifically its retroactivity", it did not solely associate the aforementioned principle with the principle of equality, but also acknowledged its self-standing validity, including through reference to international and Community legislation. In that judgment, this Court held that the principle of the retroactivity of more favourable criminal legislation is not asserted solely – albeit as a general principle – by a provision of the Criminal Code (Article 2), but is also recognised under international and Community law, including in particular by Article 15(1) of the International Covenant on Civil and Political Rights, adopted in New York on 16 December 1966, ratified and implemented by Law no. 881 of 25 October 1977, and Article 49(1) of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 and subsequently adopted by the Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community, which entered into force on 1 December 2009, and which vested it with the same legal status as the treaties. Moreover, the Court of Justice of the European Union had already held prior to the entry into force of the Treaty of Lisbon that the principle of the retroactivity of more favourable legislation formed part of the common constitutional traditions of the Member States and, as such, should be considered as an integral part of the general principles of Community law, compliance with which is guaranteed by the Court of Justice itself and which the national courts must observe when applying national law adopted in order to implement Community law (see the judgment of 3 May 2005 in joined cases C-387/02, C-391/02 and C-403/02 [2005] ECR I-3565, *Berlusconi and others*; this principle was subsequently reasserted in the judgments of 11 March 2008 in C-420/06, *Jager*, and of 28 April 2011 in C-61/11, *El Dridi*).

Although international law was not invoked in judgment no. 393 of 2006 as interposed rules within the proceedings before the Constitutional Court, but only as legislation from which the significance of the interest protected by the principle of the retroactivity of more favourable legislation may be inferred, in referring to it this Court

granted self-standing status to the principle of the retroactivity of more favourable legislation, which has now, through Article 117(1) of the Constitution, acquired a new basis in the interposed rule of Article 7 ECHR, as interpreted by the Strasbourg Court.

However, it is now necessary to establish whether the recognition of the principle of the retroactivity of more favourable legislation within European case law and its inclusion under the guarantees laid down by the Convention provision has not only established self-standing status for it but also altered its nature and characteristics: namely whether it is absolute and inderogable such as the principle of the non-retroactivity of less favourable criminal legislation or whether, due to its different status compared to the fundamental guarantee which it represents, it is possible – where justified by sufficiently valid reasons – to apply the less favourable provision which was in force at the time when the offence was committed, or otherwise to place limits on the rule of the retroactivity of more favourable legislation. Secondly, it is necessary to identify the scope of this rule, that is whether it applies solely to provisions establishing the offence and the penalty, or also to any other provision which affects its regulation under the criminal law, such as in particular those governing time-barring.

12. – Article 7(1) ECHR enshrines the prohibition on the retroactive application of provisions establishing criminal offences and, in general, those providing for more severe punishment, in order to ensure that, "at the time when an accused person performed the act which led to his being prosecuted and convicted, there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision" (see the judgment of 22 June 2000, *Coëme and others v. Belgium* and the judgment of 17 September 2009 in *Scoppola v. Italy*).

The Strasbourg Court has constantly held that Article 7 of the Convention does not also enshrine "the right to benefit from the application of less severe punishment provided for under a law enacted after the offence" (decision of the Commission of 6 March 1978 in *X. v. Germany*; decision of 5 December 2000 in *Le Petit v. United Kingdom*; decision of 6 March 2003 in *Zaprianov v. Bulgaria*, all involving situations in which the offence for which the applicant had been convicted had subsequently been decriminalised), whilst accepting that the retroactive application by the national courts of more favourable criminal law provisions does not breach this Convention provision (see the judgment of 27 September 1995 in *G. v. France*; decision of 9 February 2006 in

Karmo v. Bulgaria). Recently however, in its judgment of 17 September 2009 (*Scoppola v. Italy*) the Grand Chamber departed from its previous consolidated approach and accepted that "Article 7 § 1 of the Convention guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law", since that principle is "embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant".

The European Court arrived at this conclusion taking account of the "changing conditions in the respondent State and in the Contracting States in general" and acknowledging the need to adopt a "dynamic and evolutive approach" to interpretation of the Convention which may render "its rights practical and effective not theoretical and illusory": it thus took note of a consensus "in Europe and internationally around the view that application of a criminal law providing for a more lenient penalty, even one enacted after the commission of the offence, has become a fundamental principle of criminal law".

The new approach was confirmed in a later judgment (decision of 27 April 2010, *Morabito v. Italy*) in which the European Court reiterated that "the provisions which establish offences and punishment are subject to particular rules in relation to retroactivity, including the principle of the retroactivity of criminal law which is more favourable to the accused", although it stressed that Article 7 applies only to substantive criminal law provisions, including in particular the provisions on the severity of the punishment which is to be imposed.

Although it is inclined to assert a position of general principle, the Strasbourg Court's judgment in the *Scoppola* case nonetheless remains rooted to the particular circumstances which give rise to it: the fact that proceedings before the European Court relate to a specific case and, above all, the particular facts of each individual case in relation to which it has passed judgment must be assessed and taken into account by this Court when it is called upon to transpose the principle asserted by the Strasbourg Court into national law and to examine the constitutionality of a provision due to the supposed violation of the very same principle.

13. – Were the Court to conclude that the principle of the retroactivity of more favourable criminal legislation, as asserted by the Strasbourg Court, were to be held to be more rigid than that already recognised in the case law of this Court, in the sense that the principle could not be subject to exceptions or restrictions justified by special circumstances, its genuinely innovative aspects would necessarily lie in this characteristic, although without prejudice in any case to the fact that, given that the ECHR provision supplements Article 117(1) of the Constitution, its status within the hierarchy of norms is determined by the latter, 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 (judgment no. 317 of 2009).

However, no such novel characteristic is apparent from the judgment of the European Court of 17 September 2009 (*Scoppola v. Italy*). There is nothing in the Court's judgment which can preclude the possibility that, in special circumstances, the principle of retroactivity *in mitius* may be subject to exceptions or restrictions: this is an aspect which the Court did not consider, and which it had no reason to consider, given the characteristics of the case upon which it was deciding. It is however significant that the Court expressly imposed a limit, holding that the principle in question could not overturn a final judgment (the judgment refers exclusively to "subsequent criminal laws enacted before a final judgment is rendered"), contrary to the provisions of Italian law set forth in Article 2(2) and (3) of the Criminal Code. It should be added that the *Scoppola* judgment suggests, albeit not unequivocally, that the principle of the retroactivity of the more favourable provision is naturally linked by the European Court to the absence of objective justifications for exceptions or restrictions. Indeed, the Court held in the judgment that "inflicting a heavier penalty for the sole reason that it was prescribed at the time of the commission of the offence would mean applying to the defendant's detriment the rules governing the succession of criminal laws in time" and that this "would amount to disregarding any legislative change favourable to the accused which might have come in before the conviction and continuing to impose penalties which the State – and the community it represents – now consider excessive". However, whilst retroactivity cannot be precluded "for the sole reason" that the less heavy penalty was not prescribed at the time of the commission of the offence, it is

legitimate to conclude that the solution may be different when there are other significant grounds for excluding it.

Thus, according to the European Court, the fact that particular conduct was prescribed as an offence under the law in force at the time it was committed and was punished with a certain penalty cannot in itself constitute valid grounds to justify the application of that law, even where it has subsequently been repealed or amended to the benefit of the accused, thereby continuing to "to impose penalties which the State – and the community it represents – now consider excessive". Therefore, where objectively justified by the circumstances of the case, any exception to the applicability of subsequently enacted legislation which is more favourable to the accused should be considered admissible also under the case law of the Strasbourg Court, especially when – as occurred in the case under examination – the offence and the penalty remained unchanged.

In the light of the considerations set out above, it is not arbitrary to conclude that the recognition by the European Court of the principle of retroactivity *in mitius* – which already applied under Italian law pursuant to Article 2(2), (3) and (4) of the Criminal code and had been granted constitutional standing in the case law of this Court – did not preclude the ability to introduce exceptions or restrictions on its applicability when supported by a valid justification.

Indeed, the principle of the retroactivity of more favourable legislation is premised on the assumption that the relevant facts and legislative contexts to which the provisions in force over time apply are identical given that, as was clarified by this Court, the principle of equality not only constitutes the foundation for but also may represent a limit on the retroactive applicability of more favourable criminal legislation (judgment no. 394 of 2006). For example, it is precisely the difference in context which can justify the exception laid down by Article 2(5) of the Criminal Code which provides that "The provisions of the previous sub-paragraphs shall not apply to laws of exceptional status or with temporary validity"; thus, in such cases it will be necessary to continue to apply the provisions in force at the time the offence was committed, even if legislation subsequently enters into force providing for more favourable treatment, or even abolishing its status as a criminal offence. The exceptional nature of the situation at the time the offence was committed (which also justified the enactment of temporary

legislation) must result in the treatment which Parliament deems to be appropriate for it, and not the different treatment subsequently provided for in relation to a situation of normality.

It is therefore clear that, in contrast to the principle of the non-retroactivity of less favourable criminal legislation, the principle of the retroactivity of more favourable criminal legislation may be subjected to exceptions.

Firstly differences in the facts of the case and secondly differences in the legislative framework may justify or even require the imposition of transitory arrangements aimed at limiting the retroactive effects of beneficial changes in the law. This occurred for example in the situation where the rule that prosecution be initiated on the initiative of the authorities was replaced by the requirement that the victim press charges, in relation to which a transitory rule provided for the possibility of requesting punishment before expiry of a time limit which was different form the ordinary time limit (Article 124 of the Criminal Code), commencing from the date of entry into force of the new law or, if proceedings were already pending, from the date on which the judge informed the victim of his or her right to press charges (Article 99 of Law no. 689 of 24 November 1981; Article 19 of Law no. 205 of 25 June 1999; see also Article 5 of Legislative Decree no. 61 of 11 April 2002).

Similarly, in precluding the retroactive application of the new time-barring limits, if more favourable to the accused, to trials pending at the appeal stage or before the Court of Cassation, the contested provision also refers to two situations which are different in procedural terms: on the one hand trials pending at first instance in which a judgment has not yet been issued and which, by virtue of a reorganisation of procedural time-scales and activities, are liable to be concluded before the new shorter time-barring limit elapses; and on the other hand trials pending before the appeal courts or the Court of Cassation, in which this is less likely or even is no longer possible, with the consequence that, as a result of the entry into force of Law no. 251 of 2005, the court should rule that the offence is not eligible for punishment on the grounds of time-barring.

It is for this reason that in judgment no. 393 of 2006, applying the principle of retroactivity *in mitius*, this Court ruled partially unconstitutional Article 10(3) of Law no. 251 of 2005, whilst in the later judgment no. 72 of 2008, it ruled groundless a

question relating to the residual part of the same Article, in which the application of the new time-barring limits to "trials which were already pending on appeal or before the Court of Cassation" was precluded. As it held in judgment no. 72 of 2008, the reasonableness of this solution "is also further proven by the fact that – since within the proceedings under examination the evidence has generally speaking already been acquired – it seeks to avoid rendering invalid any procedural activity already carried out prior to the entry into force of Law no. 251 of 2005, according to time-scales calculated on the basis of the longer time-barring periods applicable at the time they were carried out, thereby protecting the interests of constitutional standing underpinning the trial (such as judicial efficiency and the requirement to safeguard the rights of the beneficiaries of judicial action", alongside – it may be added – the principle of the efficacy of the criminal law).

14. – As mentioned above, this Court must also consider which provisions of the criminal law are covered by the principle of retroactivity *in mitius* recognised within the case law of the European Court; in other words it must verify whether it applies solely to the provisions establishing offences and punishment or also to any other provision which is relevant for the treatment of the offence under criminal law, such as in particular the provisions on time-barring.

In concluding that the principle under examination is a corollary of the principle of legality enshrined in Article 7 ECHR, the European Court of Human Rights imposed limits on the extent of its application, which it inferred from the wording of the Convention itself. According to the Court, the principle of the retroactivity of more favourable legislation, as in general "the rules on retrospectiveness set out in Article 7 of the Convention", apply "only to provisions defining offences and the penalties for them" (see the decision of 27 April 2010 in *Morabito v. Italy*; and to the same effect, the judgment of 17 September 2009 in *Scoppola v. Italy*).

Therefore, the principle recognised by the ECHR does not coincide with that applicable under Italian law, governed by Article 2(4) of the Criminal Code. Indeed, the latter covers any criminal law provision enacted after the commission of the offence providing for amendments *in melius* of any kind to the legislation applicable to a criminal offence which has an effect on the overall treatment of the author of the

offence, whilst the scope of the former is more limited, in that it applies only to provisions defining offences and the penalties for them.

The different more limited scope of the Convention principle is confirmed by the reference within ECHR case law to international law and Community law, along with the judgments of the Court of Justice of the European Union. Indeed, both Article 15 of the International Covenant on Civil and Political Rights and Article 49 of the Nice Charter do not refer to any criminal law provision whatsoever, but only to "law provid[ing] for a lighter penalty".

Moreover, the *Scoppola* judgment concerned precisely a question relating to a penalty, and it is not insignificant that, in referring to the previous settled case law on Article 7 ECHR and its scope, the European Court felt the need to clarify the concept of penalty to which the Convention provision cited refers to, specifying that it amounts to a measure which is "imposed following conviction for a criminal offence", and not any element whatsoever which has an effect on its treatment under the criminal law. Therefore, it should be concluded that the principle of the retroactivity of more favourable legislation recognised by the Strasbourg Court applies exclusively to the actual offence and its punishment, whilst the scope of that principle, thus delineated, does not cover situations in which there has been no change, favourable to the accused, in the social assessment of the conduct with the effect that such conduct is either deemed to be permissible or otherwise a less serious offence.

15. – Once the objective limits of the principle of retroactivity *in mitius* as recognised by the European Court in accordance with Article 7 ECHR have been ascertained, it follows straightforwardly that it cannot apply to subsequently enacted legislation which amends, to the benefit of the accused, the legislation on time-barring by reducing the period of time required in order for the offence to be ineligible for punishment.

Moreover, according to the case law of the European Court, irrespective of whether it is granted substantive or procedural status under the various national legal systems, the institute of time-barring is not eligible for protection under Article 7 of the Convention, as may be inferred from the judgment of 22 June 2000 (*Coëme and others v. Belgium*) in which the Strasbourg Court held that a Belgian law extending the time-

barring periods for offences with retroactive effect did not breach Article 7 of the Convention.

16. – In conclusion, it must be held that – insofar as it precludes the application of new time-barring limits, if shorter, to proceedings pending on appeal or before the Court of Cassation – Article 10(3) of Law no. 251 of 2005 does not breach Article 7 ECHR, as interpreted by the Strasbourg Court, and hence does not violate Article 117(1) of the Constitution.

The question raised by the Second Criminal Division of the Court of Cassation must therefore be ruled groundless.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

hereby,

1) *rules* that the questions concerning the constitutionality of Article 10(3) of Law no. 251 of 5 December 2005 (Amendments to the Criminal Code and to Law no. 354 of 26 July 1975 on generic mitigating circumstances, reoffending, the comparison of the circumstances of the offence for reoffenders, usury and time-barring), raised with reference to Articles 111(2) and 117(1) of the Constitution by the Venice Court of Appeal and the Bari Court of Appeal by the referral orders mentioned in the headnote, are inadmissible;

2) *rules* that the question concerning the constitutionality of Article 10(3) of Law no. 251 of 2005, raised with reference to Article 117(1) of the Constitution by the Court of Cassation by the referral order mentioned in the headnote, is groundless.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 19 July 2011.

(omitted)