JUDGMENT NO. 20 YEAR 2017

In this case, the Constitutional Court considered a referral order challenging three legal provisions regulating the collection of evidence from the contents of written mail correspondence. The judge in the pending proceedings, in which secretly-made copies of a criminal defendant's correspondence were held to be inadmissible because the copies did not comply with the challenged provisions, alleged that the provisions were unconstitutional in that they provided only two permissible procedures for collecting evidence from written mail correspondence: confiscation for general mail, and inspection with the application of a stamp for prisoners' mail, both of which interrupt the flow of communication. The Referral Order claimed that this violated the principle of equality found in Article 3 of the Constitution both by differing from rules that, on the contrary, allowed for secretive interception of telecommunications and in-person conversations and by giving prisoners privileged status over unincarcerated defendants. It also alleged that they violated Article 112 of the Constitution by hindering the ability of prosecutors to proceed with criminal actions, as they are constitutionally bound to do. The Constitutional Court first dismissed an objection by the President of the Council of Ministers alleging that the Referral Order provided inadequate facts and argumentation, on the grounds that the Order did not need to provide detailed accounts of irrelevant aspects of the case and the particulars of the inadmissible evidence in order for the Court to form a judgment on the merits. The Court then declared the constitutional challenge to be unfounded. Citing the interrelated nature of constitutional rights, which may be curtailed in balance with other constitutional principles and constitutionally protected rights and interests, and the absolute reservation of law to the legislator found in Article 15 of the Constitution, the Court outlined its limited role as ensuring that the legislator had performed a balancing of constitutional rights and interests in a way consistent with the principles of appropriateness, necessity, and proportionality. The Court found that society had a paramount and constitutionally-protected interest in the prevention and prosecution of crimes, which the legislator could legitimately balance against the right of free and confidential communications, resulting in a limitation of that right. The Court then held that it was neither unreasonable nor arbitrary to provide different regulatory schemes for different forms of communication, even though this did not allow for the same secrecy in monitoring the contents of written correspondence that it did for other forms of communication, uniformity in regulation not being required by the equality principle. The Court specified, however, that its judgment did not imply that the legislator would be prevented from making future laws allowing for secret "interception" even of written mail correspondence.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 266 of the Code of Criminal Procedure and of Articles 18 (in the version predating the modifications introduced by Article 3, paragraphs 2 and 3, of Law no. 95 of 8 April 2004, "New provisions concerning the inspection of the correspondence of prison inmates") and 18-

ter of Law no. 354 of 26 July 1975 (Rules for the prison system and the execution of measures that deny and limit freedom), initiated by the Appeals Court of Assizes [*Corte di assise d'appello*] of Reggio Calabria in criminal proceedings against C.T., with a referral order of 8 February 2016, registered as no. 67 in the 2016 Registry of Referral Orders and published in the Official Journal of the Republic no. 14, first special series of 2016.

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

having heard from Judge rapporteur Marta Cartabia in chambers on 7 December 2016.

[omitted]

Conclusions on points of law

1.– With its referral order of 8 February 2016 the Appeals Court of Assizes of Reggio Calabria questions the constitutionality of Article 266 of the Code of Criminal Procedure and of Articles 18 (in the text predating the modifications introduced by Article 3, paragraphs 2 and 3, of Law no. 95 of 8 April 2004, "New provisions concerning the inspection and stamping of the correspondence of prison inmates") and 18-*ter* of Law no. 354 of 26 July 1975 (Rules for the prison system and the execution of measures that deny and limit freedom), with reference to Articles 3 and 112 of the Constitution.

Article 266 of the Code of Criminal Procedure provides, for proceedings relative to the crimes listed therein, for the possibility to intercept in-person conversations, telephone communications, and other forms of telecommunications, while the challenged Articles 18 (in the text prior to the modifications effected by Law no. 95 of 2004) and 18-*ter* of Law no. 354 of 1975 provide, as the only form of monitoring of prisoners' written mail correspondence, for inspection with the application of a stamp. The referring court maintains that the quoted provisions are unconstitutional to the extent that they do not allow for interception of the contents of mail correspondence, thus preventing authorities from being able to inspect the contents of letters without the sender or the recipient being aware of the fact, as, on the contrary, they are able to do with other forms of communication.

1.1.– In particular, the referring judge claims as an initial matter that he is charged with the judgment concerning the liability of the accused C.T., limited to the weapons and voluntary homicide charges, following the judgment of annulment with remand by the Supreme Court of Cassation.

The referral order, therefore, claims that, in order to make an adequate evaluation of the liability of the accused, a full examination of the contents of the correspondence sent and received by the accused while in prison is necessary.

Copies of said correspondence were made, unbeknownst to the sender and recipients, pursuant to an order of authorization issued by the judge overseeing the case. The copied correspondence was neither confiscated, as Article 254 of the Code of Criminal Procedure provides, nor stamped as inspected, as Articles 18 and 18-*ter* of the law of the prison system provides.

The final judgment refers only to declarations made by fellow inmates concerning the contents of some of these letters, which were read during the oral arguments phase in order to introduce them into the trial.

The referral order alleges that the written correspondence is, nevertheless, unusable, directly and in its entirety, under Article 191 of the Code of Criminal Procedure, since it

was obtained through a form of interception that must be considered forbidden under the law.

Indeed, as the Joint Chambers of the Supreme Court of Cassation have held (Judgment no. 28997 of 19 April-18 July 2012), written correspondence is not regulated by the rules on intercepting conversations or communications, but may only be investigated, under the rules particular to that form of communication, according either to the rules of confiscation or, in the case of prisoners, the rules concerning inspection with the application of a stamp. This interpretive conclusion is unavoidable, since all matters of investigative intrusions into mail correspondence are regulated by Article 254 of the Code of Criminal Procedure (the object of which is the confiscation of correspondence from operators of the postal service or in affiliated spaces) and, in the case of prisoners, by the aforementioned Articles 18 (in the version of the text predating the modifications introduced by Article 3, paragraphs 2 and 3, of Law no. 95 of 2004) and 18-*ter* of the law of the prison system, which provide for a procedure involving the application of an inspection stamp. Confiscation and inspection with stamp qualify, therefore, as a special regulation of protected aspects proper to the reservation of law under Article 15 of the Constitution, and, as such, they impede the application by analogy of the provisions of Article 266 of the Code of Criminal Procedure that deal with interception of communications, or the application of Article 189 of the same Code regulating atypical forms of evidence.

1.2.– The referring court alleges that the regulatory scheme described above, resulting from Article 266 of the Code of Criminal Procedure and from the aforementioned Articles 18 (in the version of the text predating the modifications introduced by Article 3, paragraph 2 and 3, of Law no. 95 of 2004) and 18-*ter* of the law of the prison system, is unconstitutional insofar as it does not allow for the interception of mail correspondence in general and, in particular, that of the accused.

It first alleges that this violates the principle of equality, enshrined in Article 3 of the Constitution, on two grounds: first, because it prescribes an unreasonable disparity of treatment for telephonic, informatic, and telematic communications compared with written communications transmitted by the postal service; and second, because it ascribes a privileged status to prisoners compared with defendants who are not detained.

Moreover, the referring court alleges that Article 112 of the Constitution has been violated, since investigatory activity is hindered and rendered ineffective by the impossibility to access certain sources of evidence – access which, according to the referring court, falls within the "natural consequences" of the obligatory nature of criminal actions.

2.– The President of the Council of Ministers, represented and defended by the *Avvocatura generale dello Stato* [State Counsel's Office], objects that the questions raised are inadmissible, alleging that the referral order fails to provide any support for the claimed relevance of the questions and is missing even a minimal description of both the concrete facts of the case and of the documentary evidence it considers to be unusable. The objection argues that the absence of any such statement precludes the Constitutional Court from making any assessment of the relevance of the questions, rendering them inadmissible.

2.1.– The objection is unfounded.

The referring court has described the facts of the case in sufficient terms to allow the Court to perform the necessary evaluation of whether the questioned Articles 266 of the Code of Criminal Law and 18 (in the version of the text predating the modifications

introduced by Article 3, paragraph 2 and 3, of Law no. 95 of 2004) and 18-*ter* of the law of the prison system apply to the pending proceedings, as those provisions result from the modification this Court is requested to make with the constitutional questions raised. Indeed, the referral order reports upon the complex proceedings, the outcome of which was that the referring court was charged, in its appellate capacity, with carrying out the judgment concerning C.T. only with regard to the crime of voluntary homicide and certain weapons charges. The referring court then provides a complete account concerning the inadmissibility of the evidence collected via "interception" of the defendant's written correspondence as well as of the reasons why the challenged provisions constitute an obstacle to admissibility unless the requested additions are made.

On the other hand, it is not necessary, for purposes of establishing relevance, for the court in the pending proceedings to give a specific and detailed account of the contents of the illegally intercepted written communications, since it has in any case explained that the elements of the crime of *omicidiaria sub iudice* are present, along with those of the related weapons charges. Moreover, the referral order lays out the logical and legal reasons for which the judge must be able to proceed to make a thorough evaluation of the aforementioned written communications for the purposes of deciding on the merits in the remanded case, and describes the reasons for which the current structure of the rules does not permit him to do so.

2.2.– Concerning the rules that prevent the admission of the contents of mailed letters that have been neither confiscated under Article 254 of the Code of Criminal Procedure, nor subjected to the inspection stamp procedure under Article 18-*ter* of Law no. 354 of 1975 (and, prior to the modifications introduced by Law no. 95 of 2004, under Article 18), the referring court cannot be accused of failing to attempt to provide an interpretation of the challenged provisions that would render them constitutional.

In fact, the Appeals Court of Assizes articulated the textual, systematic, and constitutional reasons that lead to such a conclusion, in line with the "living law" coming from the judgment of the Joint Chambers of the Supreme Court of Cassation no. 28997 of 19 April – 18 July 2012.

Indeed, the matter of investigatory intrusions into written correspondence is regulated by Article 254 of the Code of Criminal Procedure, which deals with confiscation from postal service operators or in spaces affiliated with the postal service, and which, concerning the general legal framework concerning confiscations (Article 253 of the Code of Criminal Procedure), qualifies as a special set of rules, since it touches upon areas protected by Article 15 of the Constitution. Moreover, concerning the mail correspondence of prisoners, the prison system provides a special procedure in the form of inspection and stamping, under Article 18-*ter* of the law on the prison system (and, before the modifications introduced by Law no. 95 of 2004, Article 18).

Because this case falls under this specific set of regulations and touches on matters placed within the reservation of law and jurisdiction found in Article 15 of the Constitution, the regulatory scheme on interceptions established by Articles 266 and following of the procedural code cannot be applied by way of analogy to written correspondence.

Therefore, the referring court has argued in a not implausible way – and, indeed, in a way that conforms to the interpretive criteria of constitutional rank as well – that, since the area is fully regulated, the possibility to use forms of seizing mail correspondence different from confiscation or, for prisoners, the inspection stamp

procedure, does not stand up to scrutiny, on the basis of the current regulatory framework and the "living law." This would be impossible even under the special rules for atypical evidence, which presuppose that evidence was collected legally, as the "living law" on this matter clearly states in additional judgments by the Joint Chambers of the Supreme Court of Cassation (Judgment no. 26795 of 28 March – 28 July 2006) on the topic of video recordings. Indeed, the acquisition of copies of the correspondence must be considered illegal whenever it does not comply with the procedures established by the prison system for the application of inspection stamps to prisoners' correspondence or with the confiscation procedures under Article 254 of the Code of Criminal Procedure for mail correspondence in general.

3.– The questions are unfounded.

3.1.– The "freedom" and "confidentiality" of "correspondence and every other form of communication" are objects of the "inviolable" right protected by Article 15 of the Constitution, which guarantees "that vital space that surrounds the person and without which the person could not exist and grow in harmony with postulates of human dignity" (Judgment no. 366 of 1991, reiterated in Judgment no. 81 of 1993).

Nevertheless, like every other constitutionally protected right, the right to the freedom and confidentiality of correspondence is also subject to limitations, provided that these are put in place "by a reasoned decision by the judicial authorities" with the guarantees established by law. If this were not the case, "the result would be an unlimited expansion of one of the rights, which would 'tyrannise' other legal interests recognised and protected under constitutional law" (Judgment no. 85 of 2013). For this reason, "[a]s is the case under other contemporary democratic and pluralist constitutions, the Italian Constitution requires that an ongoing reciprocal balance be struck between fundamental principles and rights, and that none of them may claim absolute status," with respect for the criteria of proportionality and reasonableness (Judgment no. 85 of 2013). Therefore, even the inviolable right protected by Article 15 of the Constitution may be subject to restrictions or limitations "due to the mandatory nature of fulfilling a constitutionally relevant paramount public interest, provided that the limitation it establishes is strictly necessary for the protection of that interest and that the double safeguard is respected" of the absolute reservation of law and of the reservation of jurisdiction (Judgment no. 366 of 1991).

3.2. –There is no doubt that the administration of justice and the prosecution of crimes constitute paramount and constitutionally relevant interests capable of justifying a rule limiting the right to the freedom and confidentiality of correspondence and communications. This is precisely what happens through the legislative provision of means of collecting evidence, governed by Book III, Title III, Heading III of the Code of Criminal Procedure, which allow judicial authorities to consider the contents of relevant interpersonal communications for purposes of investigating crimes and to use them as evidence during proceedings.

The existing rules governing the collection of evidence distinguish the tools that apply to written correspondence from those that may be used when it comes to telephonic, electronic, and informatic communications. In the former case, it is possible to proceed with confiscation (Article 254 of the Code of Criminal Procedure), while in the latter case interception may be used to collect evidence (Articles 266 and 266-*bis* of the Code of Criminal Procedure); interception may also be used for in-person communications.

Indeed, these tools differ in both method and impact. The object of confiscation is the item (the letter, parcel, package, or telegram), which is materially apprehended, with the result that it does not reach its destination. In the case of interception, which may occur even unbeknownst to the interlocutors, the object is the communication itself, the flow of which is not interrupted. Interception may require sometimes complex operations of recording and transcribing so that the information can be used during proceedings, according to the ways precisely provided for by law (Articles 268 *et seq.* of the Code of Criminal Procedure).

The referring court points to an unjustified imbalance in the current law between the rules governing written communications (particularly those sent by mail) and those that apply to other forms of communication (conversations and telephonic, electronic, and informatic conversations, or those that use gestures), since interception is not possible in the case of the former, but only confiscation. Such an imbalance allegedly violates the principle of equality enshrined in Article 3 of the Constitution.

3.3.– It is true that the right protected by Article 15 of the Constitution includes both "correspondence" and the "other forms of communication," including telephonic, electronic, and informatic communications, in-person conversations, and those carried out by other means made possible through technological advancements.

It is, nevertheless, also true that the protection of this right – in this case, to communicate freely and confidentially – does not necessarily require uniform regulation of the restrictive measures that apply to them. On the contrary, the need to protect the freedom and confidentiality of interpersonal communications may well tolerate, or even require, that the limitation of the right be appropriately adapted on the basis of the different characteristics of the means by which communication is expressed. What matters for purposes of this Court's review is that the provisions limiting the freedom of communication be respectful of the absolute reservation of law and jurisdiction, and that they be designed to protect another right or to pursue another constitutionally relevant interest, pursuant to the principles of appropriateness, necessity, and proportionality.

In other words, what this Court must verify, in this case, is that the legislator performed a concrete balancing between the constitutional principle of the protection of the confidentiality of communications and the interests of the collective, which are likewise constitutionally protected, in the prosecution of crimes, without imposing unreasonable or disproportionate limitations on one or the other (Judgment no. 372 of 2006).

3.4.– Under the existing legal rules, the freedom and confidentiality of written (mail) correspondence are not exempt from the sacrifices necessary to ensure the effective execution of investigations and the administration of justice. Indeed, confiscation, as described in Article 254 of the Code of Criminal Procedure, allows judicial authorities to consider the contents of prisoners' correspondence that are relevant to the investigation of crimes, by means of direct acquisition by force of the *res* in which the act of communication is manifested, represented by the missive written on paper. Confiscation thus effects an interruption in the flow of information, preventing the written communication from reaching its intended recipient, thereby creating preventative effects as well, particularly when the written correspondence in question contains criminal instructions or orders.

Confiscation, which the legislator has identified as an appropriate instrument for providing the authorities with investigatory tools useful for prosecuting criminal activity, is one of the possible forms for restricting the freedom and confidentiality of

correspondence that are suitable for harmonizing opposing constitutional interests in a not-unreasonable way, with due consideration for the particular characteristics of the means of communication in question.

3.5.– At the same time, the specific regulations applicable to correspondence cannot be considered an unreasonable legal distinction and, therefore, one that violates the principle of equality, on the basis of a mere comparison with the rules that apply to structurally heterogeneous means of communication, as are telephonic, informatic, and electronic communications. Moreover, the specificity of the regulation of confiscation of written correspondence and the inapplicability to it of the rules on interception come from the same decision of the Joint Chambers of the Supreme Court of Cassation (Judgment no. 28997 of 19 April – 18 July 2012).

The difference in the means of communication employed – in particular its different level of materialization – oriented the legislator toward different ways of collecting evidence, according to choices that are not unreasonable, on the basis of which it provided for confiscation in the case of communications carried out through writing on paper – in line with the traditional tools for the acquisition of objects pertaining to a crime (Article 253 of the Code of Criminal Procedure, and, with specific regard for correspondence by mail, Article 254 of the Code of Criminal Procedure) – and interception for communications carried out through visual, acoustic, and electronic means.

Therefore, it is not unreasonable *per se* that the restriction of the right to confidential communications, justified by needs relating to the prevention and prosecution of crimes, may lead to the indication of different means of collecting evidence that are technically well-suited to the different natures of the form of communication to which they apply.

4.– With specific regard for the mail correspondence of prisoners, it also bears recalling that the regulations established by Article 18-*ter* of Law no. 354 of 1975, as modified by Law no. 95 of 2004, represent a delicate balancing effected by the legislator, carried out, moreover, in light of several judgments by the European Court of Human Rights, which ruled repeatedly that Italy had violated Articles 8 and 13 of the European Convention on Human Rights (ECHR) (see, among many, *Calogero Diana v. Italy* [21 October 1996], *Domenichini v. Italy* [15 November 1996], *Labita v. Italy* [6 April 2000], *Di Giovine v. Italy* [26 July 2001], and *Ospina Vargas v. Italy* [14 October 2004]).

4.1.– It is also significant to reiterate the consistent direction taken by the case law of this Court, according to which constitutional protection of fundamental rights continues to operate even in the case of persons whose personal freedom has been legitimately restricted, albeit within the limitations imposed by the particular conditions involved: "People in a state of detention, despite being deprived of most of their freedom, nevertheless always conserve its residue, which is all the more precious because it constitutes the last area in which their individual personality may grow" (Judgment no. 349 of 1993, as well as no. 26 of 1999 and no. 212 of 1997).

In relation to freedom of correspondence, it bears noting that the personal conversations of prisoners and, if authorized, their telephone communications may be subject to quotas and monitoring by the prison authorities (Article 18 of Law no. 354 of 1975). With specific regard for written correspondence, the law requires that prisoners be given access to the necessary tools to engage in it, but because of the nature of their

condition, they are in any case forced to rely upon the prison authorities, who sort the mail received or sent by prisoners.

Article 18-*ter*, introduced with Law no. 95 of 2004, fits into this context, which *per se* places limits on the freedom to communicate confidentially and provides for potential further restrictions: "For exigencies pertaining to the investigation or prevention of crimes, or for reasons pertaining to the security and good order of the institution, the following may be applied, to individual prisoners or inmates and for a period not longer than six months, extensible for periods not longer than three months: a) limitations on written and telegraph correspondence and on access to news sources; b) submission of all correspondence to inspection and stamp; c) inspection of the contents of envelopes containing correspondence, without reading said correspondence."

4.2. – The inspection stamp procedure for prisoners' mail correspondence described in Article 18-*ter* of the prison law therefore falls alongside additional restrictions and quotas imposed upon prisoners' communications with persons outside. In unity with the other tools provided for by Article 18-*ter*, the application of an inspection stamp effects, within the specific realm of prison detention, a balancing among the investigation-related needs connected with the prevention and prosecution of crimes and prisoners' rights, among which the possibility to maintain relationships with people outside the prison takes on particular importance so that the way of executing sentences remains respectful of the constitutional principles and, in particular, Article 27 of the Constitution.

5.– In addition, the challenged provisions comply with procedural rules and, in particular, with the allowable means of collecting evidence, an area in which adequate margins of legislative discretion must be preserved, subject only to review by this Court for manifest unreasonableness and arbitrariness (most recently see, among many, Judgments no. 152 of 2016, 138 of 2012, and 141 of 2011).

In light of the foregoing considerations relative to the characteristics of the means of communication used and the unique status of prisoners, there is no manifest unreasonableness or arbitrariness in the discretional choices of the legislator in regulating the means of collecting evidence that may be used regarding mail correspondence in general (through the confiscation procedure found in Article 254 of the Code of Criminal Procedure), and that of prisoners in particular (through the inspection stamp procedure prescribed by the prison laws).

This does not mean that the legislator cannot prescribe, with respect for the reservation of law and jurisdiction found in Article 15 of the Constitution and observing the principles of reasonableness and proportionality, secretive methods for seizing the contents of the communications that do not interrupt their flow, as it has already done in the case of electronic and informatic communications in Articles 11 and 12 of Law no. 574 of 23 December 1993 (Modifications and supplementations to the rules of the Criminal Code and the Code of Criminal Procedure with respect to information technology crimes).

This is a matter of sensitive discretionary choices which are not constitutionally required and which, as such, fall squarely within the competences and responsibility of the legislator and not those of this Court, the chief task of which is to ensure that the balancing between contrasting constitutional rights and interests required by the law responds to the principles of reasonableness and proportionality.

6.– The observations above lead to a conclusion that the challenges based on the alleged violation of Articles 3 and 112 of the Constitution are unfounded.

Indeed, aside from any consideration of the referring court's allegations concerning investigatory completeness as a "natural consequence" of the principle of the obligatory nature of criminal prosecution, once placing restrictions on means of collecting evidence has been established as not illegitimate in the case of written correspondence, it follows that the resulting limits on what evidentiary material may be used in proceedings are likewise not illegitimate.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

1) *declares* that the questions alleging the unconstitutionality of Article 266 of the Code of Criminal Procedure and of Articles 18 (in the version that predated the modifications introduced by Article 3, paragraphs 2 and 3, of Law no. 95 of 8 April 2004, "New regulations concerning the inspection of the correspondence of prison inmates") and 18-*ter* of Law no. 354 of 26 July 1975 (Rules for the prison system and the execution of measures that deny and limit freedom), raised by the Appeals Court of Assizes of Reggio Calabria, with reference to Articles 3 and 112 of the Constitution, with the referral order cited in the headnote, are unfounded.

Decided in Rome, at the seat of the Constitutional Court, Palazzo della Consulta, on 7 December 2016.