JUDGMENT NO. 222 YEAR 2018

In this case, the Court heard a referral order from the Court of Cassation (Criminal Division) concerning a rule providing for automatic disqualification of a fixed ten-year duration as an ancillary penalty to any custodial sentence imposed for a bankruptcy offence. The Court accepted that the legislation was unconstitutional as it stood since the lack of flexibility resulted in a risk that the punishment imposed would be disproportionate. The Court took note of the legislator's failure to act on its invitation addressed to the legislator in 2012 to reform the system of ancillary penalties in line with constitutional requirements. The Court pointed out that the simple repeal of the provision would result in a different kind of automaticity, as in such an eventuality the ancillary penalty would have the same duration as the custodial sentence, but that custodial sentences and disqualifications pursued different goals. However, it noted that, under a similar provision of criminal law, certain other ancillary penalties could be imposed for a period of "up to" ten years. The Court held that the contested legislation should be read in this manner, as allowing for a penalty of "up to" rather than "of" ten years, as this solution enabled both the individual circumstances of the case to be considered whilst also allowing for principal and ancillary penalties with different durations to be imposed.

[omitted]

THE CONSTITUTIONAL COURT

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Articles 216, last paragraph, and 223, last paragraph, of Royal Decree no. 267 of 16 March 1942 (Provisions on bankruptcy, compositions with creditors, controlled administration and mandatory administrative liquidation), initiated by the First Criminal Division of the Court of Cassation within the criminal proceedings pending against C. G. and others by the referral order of 17 November 2017, registered as no. 37 in the Register of Referral Orders 2018 and published in the *Official Journal* of the Republic no. 9, first special series 2018.

Considering the entries of appearance by C. G., R. M., R. T., A. M., E. F., M. A. along with that, filed after expiry of the applicable time limit, by A. M., the civil claimant within proceedings before the referring court, and the intervention by the President of the Council of Ministers;

having heard the judge rapporteur Francesco Viganò at the public hearing of 25 September 2018;

having heard Counsel Valerio Onida, Counsel Barbara Randazzo and Counsel Andrea Manzi for M. A., Counsel Ennio Amodio for C. G., Counsel Alessandro Diddi for A. M. and E. F., Counsel Gianluca De Fazio for A. M., Counsel Nicola Apa for R. M., Counsel Marcello Bana and Counsel Elisabetta Busuito for R. T. and State Counsel [*Avvocato dello Stato*] Maurizio Greco for the President of the Council of Ministers.

[omitted]

Conclusions on points of law

1.– The First Criminal Division of the Court of Cassation has raised, with reference to Articles 3, 4, 41, 27 and 117(1) of the Constitution, the last mentioned in relation to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, and Article

1 of the Additional Protocol to the Convention, done at Paris on 20 March 1952, both ratified and implemented by Law no. 848 of 4 August 1955, questions concerning the constitutionality of Articles 216, last paragraph, and 223, last paragraph, of Royal Decree no. 267 of 16 March 1942, laying down "Provisions on bankruptcy, compositions with creditors, controlled administration and mandatory administrative liquidation" (hereafter also the Law on Bankruptcy), "insofar as they provide that a conviction for any of the offences provided for under those Articles is associated automatically, for a period of ten years, with the ancillary penalties of disqualification from the conduct of a commercial enterprise and ineligibility for any management position within any enterprise".

The questions were raised within proceedings before the Court of Cassation concerning a judgment by which the Bologna Court of Appeal, hearing proceedings that had been remitted following a previous annulment by the Fifth Criminal Division of the Court of Cassation, had upheld the convictions of numerous persons accused of a variety of offences, including fraudulent and ordinary third-party bankruptcy, related on various grounds to issues surrounding the collapse of the Parmalat Group and restated – in particular – the conviction of all accused to the above-mentioned ancillary penalties for the statutory period of ten years as already ordered at the previous instances of the proceedings.

2.– It is necessary, as a preliminary matter, to rule inadmissible the entry of an appearance within the proceedings by the civil claimant A. M., as that occurred after expiry of the mandatory time limit – provided for under Article 25 of Law no. 87 of 11 March 1953 (Provisions on the establishment and functioning of the Constitutional Court) and Article 3 of the Supplementary Rules on Proceedings before the Constitutional Court – of twenty days after the publication in the *Official Journal* of the referral order or application that resulted in the commencement of proceedings.

3.– State Counsel asserts first and foremost that, by virtue of its own previous annulment judgment of the Fifth Criminal Division, the Court of Cassation is "self-bound" by a principle of law that is incompatible with the questions now raised by the First Division, which are for this reason inadmissible.

The objection is unfounded.

It is in fact a settled principle that the previous ruling by another adjudicatory body concerning the irrelevance or manifest unfoundedness of a question raised by the parties does not prevent a court that is subsequently apprised of the same case from reaching the opposite conclusion, finding the same question to be relevant and not manifestly unfounded. This applies, as this Court has asserted on various occasions, also in relation to a court hearing remitted proceedings. Whilst such a court is certainly bound by the principles of law as formulated in the annulment judgment, it nonetheless retains the power to refer to this Court any doubts that it may have concerning the constitutionality of the provisions that it is required to apply within the remitted proceedings, in accordance with the indications provided in the annulment judgment (*ex plurimis*, Judgments no. 270 of 2014, no. 293 of 2013, no. 305 of 2008; Order no. 118 of 2016); this principle cannot fail to apply also for a division of the Court of Cassation that is in turn called upon to review the legality of the judgment issued within the remitted proceedings.

On the other hand, the provisions contested in these proceedings were to apply within the remitted proceedings since – according to the position stated in the referral order – having annulled in part the convictions of the accused at first and second

instance, the judgment of the Fifth Criminal Division had expressly charged the court hearing the remitted proceedings with the task of redetermining the punishment, where necessary, as a consequence of the annulment of certain counts of the previous convictions. The Bologna Court of Appeal then duly recalculated the sentence within the remitted proceedings, setting once again the overall sentences for each accused person, and confirming for each of them, the ancillary penalties provided for under the contested provisions: in doing so, it once again applied those provisions within the remitted proceedings.

The referring court – having been apprised of the appeals filed by the accused against, inter alia, the imposition of the ancillary penalties – thus correctly takes the view that the questions of constitutionality now raised are still relevant within the proceedings before it.

4.– State Counsel asserts, secondly, that the questions raised have become irrelevant following the entry into force of Law no. 103 of 23 June 2017 (Amendments to the Criminal Code, the Code of Criminal Procedure and the provisions governing the law on incarceration), which authorised the legislator to implement a comprehensive reform of the system of ancillary penalties based on the "principle of the removal of obstacles to the reintegration into society of the convicted person" and the "rule that they should not last for longer than the principal penalty".

The objection – which in actual fact seeks the potential remittal of the case file for an examination of the legislation enacted in the meantime, rather than strictly speaking a ruling of inadmissibility – is also unfounded as the Government has not exercised the delegated authority with regard to this issue; thus, the legislation contested in these proceedings has remained unchanged and is still in force.

5.– Finally, State Counsel asserts that these questions should be considered inadmissible for the same reasons that led the Court to rule inadmissible in Judgment no. 134 of 2012 a similar question formulated in relation to the provisions contested in these proceedings.

The objection relates more specifically to the limits on the powers of this Court, in the event that it should find that the contested provision violates principles contained in the Constitution; however, there is not one single solution mandated under constitutional law that would necessarily apply in the event that the provision were to be declared unconstitutional.

For presentational reasons, this objection will be considered after having assessed whether the questions raised are well founded on the merits.

6.– Before examining the objections raised on the merits, it is necessary to delineate with precision the remedy sought by the questions, as filed before this Court by the referring court.

In fact, Counsel for M. A. developed arguments, within submissions and in the hearing, setting out three distinct reasons why the contested provisions are unconstitutional, which should be considered to be implicit within the questions placed before this Court by the referring Division. The first question concerns the automatic nature and inevitability of the ancillary penalties provided for under the contested provisions, and thus – so to speak – whether they should be applied at all in the specific case; the second question focuses on the extent of the restrictions on the rights of the convicted person that result from the ancillary penalties, and hence the manner of application of those sanctions; finally, the third question concerns the rigid nature of the duration of the penalties, of ten years, and hence their *quantum*.

A literal interpretation of the operative part of the referral order – which challenges the two provisions "insofar as they stipulate that a conviction for one of the offences provided for under those articles results mandatorily in ancillary penalties for a period of ten years" mentioned under the provisions – would appear to support the reading suggested by M. A., at least with regard to the first and third questions; as a result, this Court should also verify not only whether the fixed ten-year duration of the ancillary penalties in question is compatible with the provisions of the Constitution invoked, but also whether they should be applicable on a mandatory basis in all cases in which a person is convicted of fraudulent bankruptcy as an individual or of fraudulent corporate bankruptcy.

However, an examination of the close reasoning contained in the referral order shows that the attention of the referring division was almost exclusively focused on the fixed ten-year duration of the ancillary penalties, which would prevent the courts from setting them at a level commensurate with the particular circumstances of the individual case. The separate issue of their automaticity as a consequence of conviction (which was by contrast considered in Judgments no. 7 of 2013 and no. 31 of 2012, as well as in the very recent Judgment no. 22 of 2018, all of which were invoked by M. A.) is in fact briefly mentioned in the concluding part of the reasons contained in the referral order, which refers to a potential contrast between that automaticity and the relevant case law of the European Court of Human Rights; however, it is not subjected to any specific critical review within the general context of the argument, which does not even consider the potentially excessive increase in restrictions on the rights of the convicted person resulting from the enforcement of those ancillary penalties.

A similar point is moreover made in the part of the argument in which the referring Division observes that the requirement for the law to establish a nuanced system of sanctions, which should render possible the "individually tailored and proportional adjustment of the penalties imposed within sentences, could […] be largely satisfied if the reference to a fixed period of ten years were removed, thereby reactivating the general rule laid down by Article 37 of the Criminal Code. This would enable the courts to set the duration of the ancillary penalty having regard to the principal penalty imposed, and thus based on an assessment of the seriousness of the specific offence". It is in fact evident that the remedy suggested by the referring court would leave intact the automaticity inherent within the application of the ancillary penalties under examination as a consequence of the conviction of the accused for fraudulent bankruptcy as an individual or fraudulent corporate bankruptcy; moreover, it would in any case not impinge in any way on the content of the ancillary penalties themselves.

In the light of the overall structure of the reasoning contained in the referral order, the reference in the operative part of the referral order to the mandatory nature of ancillary penalties can only be construed as a reference exclusively to the mandatory nature of their ten-year duration, and not their mandatory application within the specific case.

Since the scope of the question of constitutionality is defined pursuant to Article 27 of Law no. 87 of 1953 exclusively by the referral order (*ex multis*, Judgment no. 327 of 2010), the Court's examination must therefore be limited only to the aspect concerning the fixed ten-year duration of the ancillary penalties provided for under the contested provisions.

7.– The fixed duration of the ancillary penalties provided for under Article 216, last paragraph, of the Law on Bankruptcy does not in principle appear to be compatible with the constitutional principles applicable to punishment, including specifically the principles that punishment must be proportionate and necessarily tailored to the individual circumstances.

7.1.– According to the settled case law of this Court, the task of determining the specific sanctions for conduct classified as a criminal offence falls within the discretion of the legislator, in accordance with Article 25(2) of the Constitution; however, that discretion is subject to the requirement that the legislative choices must not be manifestly unreasonable. This limit is breached – in the area under examination – where the penalties imposed appear to be manifestly disproportionate with the gravity of the conduct classified as an offence. If this is the case, both Articles 3 and 27 of the Constitution will be violated, since a penalty that is not commensurate with the seriousness of the conduct (and that is not perceived as such by the convicted person) will constitute an impediment to the rehabilitative goal of punishment (*ex multis*, Judgments no. 236 of 2016, no. 68 of 2012 and no. 341 of 1994).

In order to ensure that the penalty imposed on the convicted person is not disproportionate with the specific objective and subjective seriousness of his or her conduct, the legislator normally stipulates that the penalty must be set by the courts between certain minimum and a maximum levels, taking account in particular of the vast range of circumstances mentioned in Articles 133 and 133-*bis* of the Criminal Code, in order also to ensure that the penalty appears as a response that is – not only not disproportionate but also – as "individually tailored" as possible, and thus set according to the circumstances of the individual convicted person, thus giving effect to the constitutional requirement of the "personal nature" of criminal responsibility pursuant to Article 27(1) of the Constitution.

According to this Court, the requirement for the "mobility" (Judgment no. 67 of 1963), or the "individual determination" (Judgment no. 104 of 1968) of punishment – and the resulting vesting in the courts of a certain level of discretion when specifically setting the penalty between a minimum and a maximum level prescribed by law – amounts to the "natural implementation and development of constitutional principles, including both general principles (principle of equality) and principles relating specifically to criminal law" (Judgment no. 50 of 1980), in the light of which "the implementation of a restorative distributive justice calls for differentiation more than uniformity" (see again Judgment no. 104 of 1968). This has the significant consequence, which is expressly considered by Judgment no. 50 of 1980, that "[a]s a matter of principle, the provision for inflexible sanctions does not appear to be consistent with the 'constitutional face' of the system of criminal law; the doubt as to the constitutionality of the legislation may be resolved on a case-by-case basis, provided that, taking account of the nature of the offence punished and the level of the sanction imposed, the sanction appears to be reasonably 'proportionate' with the overall range of conduct that can be classified under the specific type of offence".

As has been observed in commentary on Judgment no. 50 of 1980, if the "rule" is "discretion", any offence punished by a fixed penalty (whatever its type) is *ipso facto* unconstitutional *prima facie*; that *prima facie* presumption may only be rebutted following a structural review of the offence in question involving a precise demonstration that the specific structure of the offence renders it "proportionate" with

the overall range of conduct typified. This is moreover what occurred under the provision reviewed within Judgment no. 50 of 1980.

7.2.– It is in the light of these clear principles that the question concerning the constitutionality of Article 216, last paragraph, of the Law on Bankruptcy must be assessed.

As both the referral order and all of the parties that filed an entry of appearance within the applicable time limits rightly state, the temporary ancillary penalties provided for under the contested provision significantly impinge upon a vast range of fundamental rights of the convicted person, and drastically reduce his or her ability to work over a period of ten years, which – pursuant to Article 139 of the Criminal Code – only starts to run after the custodial sentence has been served in full (which could in turn occur many years after the offence was committed).

In fact, since enforcement of a custodial sentence of up to four years may be replaced in full, upon request by the convicted person, by his or her release on probation under the aegis of the social services, for many persons convicted of fraudulent bankruptcy the ancillary penalties provided for under the contested provision end up being the most punitive sanctions imposed on them as a result of the conviction.

Such severe sanctions may indeed be justified, in line with the principle that punishment must be proportional, in the most serious cases of fraudulent bankruptcy as an individual or fraudulent corporate bankruptcy, offences punishable – not by chance – by imprisonment of up to ten years, which may be increased by one third or even one half in the circumstances provided for under Article 219(1) and (2) of the Law on Bankruptcy.

However, a fixed ten-year duration of the ancillary penalties in question cannot be considered to be "reasonably 'proportionate' with the overall range of conduct that can be classified under the specific type of offence", based on the test set out in Judgment no. 50 of 1980 mentioned above.

First and foremost, Article 216 of the Law on Bankruptcy (the substantive content of which is referred to by Article 223(1) of the Law) groups together a variety of offences which, in abstract terms, are characterised by quite different types of social harm, as is demonstrated by the respective sanctions frameworks put in place by the legislator: imprisonment of between three and ten years for the offences provided for under paragraphs one and two; imprisonment of between one and five years for the much less serious offences (of so-called preferential bankruptcy) provided for under paragraph three.

However, even within the individual types of offence provided for in abstract terms under each paragraph, as well as those provided for under Article 223(2) of the Law on Bankruptcy, the seriousness of the specific conduct covered by them may be markedly different, at least in terms of the seriousness of the risk of frustrating the interests of creditors (consisting both in the likelihood of the occurrence of harm as well as the scope of that harm, including also in terms of the number of people harmed) brought about by the conduct classified as an offence.

The duration of the temporary ancillary penalties imposed by Article 216, last paragraph, of the Law on Bankruptcy is however set inflexibly at ten years, irrespective of the theoretical classification of the offence committed by the accused (according to the first, second or third paragraph of Article 216), and irrespective of the specific seriousness of the *actus reus* of the offence. It is also insensitive to the existence of any aggravating or mitigating circumstances pursuant to Article 219 of the Law, which also

result in significant variations in the statutory sentence. These variations may result in a reduction of the minimum sentence by up to two years (which may be reduced further in the event that alternative procedures are chosen by the accused), or an increase in the maximum sentence to fifteen years' imprisonment.

A rigidity within application of this type inevitably entails the possibility that sanctions may be disproportionately high – thereby violating Articles 3 and 27 of the Constitution – for less serious cases of fraudulent bankruptcy, and in any case appears to be out of keeping with the principle that punishment must necessarily be tailored to the individual circumstances.

That conclusion is not on the other hand undermined by the rulings of this Court that have, in some cases, upheld as constitutional certain pecuniary penalties set in a proportional manner and that are imposed in parallel with imprisonment or arrest, arguing that the necessarily flexibility within punishment was ensured in such cases by the fact that the custodial sentence is set by the court within the minimum and maximum limits set by the legislator (Judgment no. 188 of 1982; Order no. 475 of 2002). As has been recently stressed by this Court, in fact, a proportionate penalty can be differentiated from a fixed penalty (Judgment no. 142 of 2017) precisely as it requires the courts to tailor it, an endeavour which by definition takes account of the different level of seriousness of the specific offence (in general through the multiplication of the number of objects or persons specifically affected by the unlawful conduct by a fixed punitive coefficient). By contrast, the provision under examination in this case stipulates that a custodial sentence, which may be set between a statutory minimum and a statutory maximum, is to be accompanied by ancillary penalties at a fixed level, which as such are entirely insensitive to the specific seriousness of the offences committed by the accused, and which moreover prove – as mentioned above – to be manifestly disproportionate where they are applied to less serious offences falling under the abstract paradigm of fraudulent bankruptcy as an individual or fraudulent corporate bankruptcy.

8.– At this stage, it is necessary however to ask whether this Court can remedy that violation of constitutional principles, which it must do in the light of Article 25(2) of the Constitution, a provision which reserves choices over the punishment of criminal offences to the legislator alone.

As mentioned in paragraph 5. above, State Counsel has – in effect – asserted that the question of constitutionality raised in these proceedings is inadmissible on the basis of the same argument that led this Court to rule a similar question previously raised by the Court of Cassation inadmissible, in Judgment no. 134 of 2012 (and then, in identical terms, in Order no. 208 of 2012), due to the lack of a solution mandated by the Constitution that would be capable of replacing the provision to be ruled unconstitutional.

The objection must however be rejected, within the context of an overall reconsideration of the terms of the question. First, this reconsideration cannot fail to take account of the fact that the legislator has – still – failed to make provision to "reform the system of ancillary penalties so as to render it fully compatible with the principles laid down in the Constitution, and in particular in Article 27(3)", as called for by this Court in Judgment no. 134 of 2012; secondly, it cannot fail to consider the evolution under way within the case law of the Constitutional Court itself regarding the review of the level of punishment.

8.1.– This Court has recently had the opportunity to rule that, where the punishment provided for by law for a particular manifestation of an offence proves to be manifestly unreasonable, being evidently disproportionate with the severity of the conduct, the Constitutional Court may take corrective action, provided that the punishment may be replaced on the basis of "precise points of reference, already traceable in the legislative system", which are construed as "existing [punitive] solutions that are suitable to eliminate or mitigate the alleged manifest unreasonableness" (Judgment no. 236 of 2016).

That principle must be confirmed, and further clarified, in the sense that – in order for this Court to be able to intervene in a case involving an established violation of the principles of proportionality and the principle that punishment must necessarily be tailored to the individual circumstances – it is not necessary for there to be one single constitutionally mandated solution within the system that is capable of replacing that ruled unconstitutional, such as one provided for under a provision with an identical structure and rationale, which is capable of being used as a comparator. In order for the Court to review the suitability of the punishment provided for in relation to a given offence, it is essential – and sufficient – that the system overall offers the Court "precise points of reference" and "already traceable" solutions (Judgment no. 236 of 2016) – which are themselves constitutionally sound, even if not "mandated by the Constitution" – which may replace the punishment declared unconstitutional, so as to enable this Court to provide an immediate remedy for the violation ascertained, without creating any unsustainable unregulated areas in terms of the protection of interests from time to time protected by the incriminating provision considered in its ruling. This is without prejudice, on the other hand, to the possibility for the legislator to take action at any time, exercising its own discretion, to identify any other – presumably more suitable – punishment, provided that it complies with constitutional principles.

The aim of all of the above is to achieve effective protection for the fundamental principles and rights affected by the choices regarding punishment made by the legislator, which would risk remaining without any practical possibility of protection were the involvement of this Court to be restricted – as it was for a long time in the past – to an inflexible requirement of the "constitutionally mandatory solution" ["*rime obbligate*"] when identifying the sanction to be applied in place of that ruled unconstitutional.

8.2.– Applying these criteria, it is thus necessary to assess whether the system of bankruptcy offences, as delineated by Royal Decree no. 267 of 1942, is capable of offering this Court precise points of reference in identifying a punishment that could immediately replace that ruled unconstitutional; and this punishment will apply until the legislator makes provision, exercising its discretion, to identify alternative solutions considered preferable.

As noted above, the referring Court observes that, should this Court eliminate the phrase "for a period of ten years" from Article 216, last paragraph, of the Law on Bankruptcy, this would result in the application of the residual rule laid down by Article 37 of the Criminal Code, which provides – insofar as relevant here – that "[w]here the law provides that the sentence shall be accompanied by a temporary ancillary penalty, and the duration of that ancillary penalty is not expressly determined, the ancillary penalty shall have a duration equal to that of the principal penalty imposed".

Within this perspective – whilst it may only be "one of the many theoretically possible in the event that the question of constitutionality were accepted", as previously

found by Judgment no. 134 of 2012 – the residual rule laid down by Article 37 of the Criminal Code is still nonetheless a solution already existing within the system, which is capable of automatically filling the void created by the annulment, by virtue of the ruling that it is unconstitutional, of the phrase concerning the legal duration of the ancillary penalties provided for under the contested provision.

8.3.– The solution proposed by the referral order is stated to tie the specific duration of the ancillary penalties with that of the custodial sentence actually imposed, which – in turn – depends upon all of the factors referred to in Article 133 of the Criminal Code. It is argued that this ensures, albeit indirectly, a certain level of respect for the principle that ancillary penalties should be based on individual circumstances.

However, that solution would end up replacing the original legal automaticity with a different kind of automaticity, which would also risk being out of keeping with the legitimate intention of legislation enacted in the past of severely punishing the perpetrators of fraudulent bankruptcy offences, which are rightly considered to cause serious harm to individual and collective interests that are vital to the proper operation of the economic system.

Article 861 of the 1882 Commercial Code already provided for the penalty of permanent disqualification from the exercise of the profession of the merchant for any person convicted of a bankruptcy offence. That stipulation was mitigated by Law no. 995 of 10 July 1930 (Provisions on bankruptcy, compositions with creditors and minor insolvencies), Article 20 of which vested the courts with the task of specifying, within the sentence, the duration of that disqualification, between a minimum of five and a maximum of ten years. However, a few years later, the 1942 Law on Bankruptcy once again tightened up the punishment for persons convicted of fraudulent bankruptcy by providing for two distinct ancillary penalties, which were self-standing and complementary, with the aim of barring such persons from business activity for a long period after the enforcement of the custodial sentence. The purpose of this was evidently to extend in time the negative special prevention effect already achieved through the enforcement of the custodial sentence, as well as vesting punishment with a greater deterrent capacity.

The choice made by the legislator in 1942 implies the notion that the function of these ancillary penalties is at least in part different from the functions of incarceration: from the viewpoint of the 1942 legislator, this justifies – intentionally departing from the residual rule laid down by Article 37 of the Criminal Code, which already existed in 1942 – a duration which is as a rule longer than that of the specific custodial sentence imposed.

This perspective, which ascribes to ancillary penalties a function that is at least in part distinct from that of custodial sentences, and clearly focused on negative special prevention – involving the disqualification of the convicted individual from the activities that gave him or her the opportunity to commit serious offences – is in itself constitutionally sound.

In fact, in order to ensure that ancillary penalties involving disqualification are compatible with the "constitutional face" of the criminal penalty, it is essential that they are not manifestly disproportionate in being so excessive compared to the specific social harm embodied in the offence as to thwart the objective of "rehabilitating" the perpetrator, as required under Article 27(3) of the Constitution. Notwithstanding that limit, no constitutional principle prevents the legislator from developing strategies for preventing serious offences through providing for disqualifying penalties, the duration

of which is to be determined independently of the duration of the custodial sentence. This is due to the different purpose of the two types of sanction, along with their different level of interference with the fundamental rights of the individual. In fact, in terms of discussions regarding potential future law, such strategies may indeed prove to be conducive to reducing the current focus of the system of punishment on custodial sentences, without thereby undermining the deterrent capacity of the criminal provision, or the suitability of the overall punishment vis-à-vis the equally legitimate objective of negative special prevention. Both purposes could theoretically be pursued in the specific case even without a custodial sentence or by imposing much shorter custodial sentences than normally occurs at present wherever provision is made for a robust and effective complement of disqualification penalties, regulated as the case may be also as self-standing principal penalties, as has been suggested by various reform projects (such as the "Framework for draft legislation delegating legislative authority to the Government of the Republic to enact the general part of a new Criminal Code", presented in May 2007 by the "Pisapia" Committee, as well as the "Framework for the redrafting of principles and directional criteria for the delegation of legislative authority to reform the system of criminal sanctions" drawn up in December 2013 by the "Palazzo" Committee).

The solution envisaged in this case by the referring division – of mechanically anchoring the duration of the ancillary penalties under examination to that of the custodial sentence actually imposed – would unduly frustrate the legitimate aim pursued by the contested provision. Moreover, the provision is defective not in general terms, in that the ten-year duration of the ancillary penalties provided for under it for all instances of fraudulent bankruptcy is disproportionate, but rather in that it provides for one single and undifferentiated legal duration for such penalties. In preventing the courts from making any discretionary assessment concerning the severity of the offence and the individual circumstances of the convicted person, this is liable to result in the imposition of ancillary penalties that are manifestly disproportionate in cases involving fraudulent bankruptcy in which the level of social harm is comparatively minor.

8.4.– However, the prevailing system of bankruptcy law offers a different solution, which is capable of operating in place of that stipulated under the provision objected to in these proceedings, whilst at the same time harmoniously incorporating itself into the logic already pursued by the legislator, after remedying the unconstitutional aspect.

The two provisions that immediately follow Article 216 of the Law on Bankruptcy – Article 217, entitled "Ordinary bankruptcy", and Article 218, entitled "Misuse of credit" – provide for the same ancillary penalties as those mentioned in the last paragraph of Article 216; however, they stipulate that their duration is to be set at the discretion of the courts "up to" a maximum specified by law (two years for ordinary bankruptcy, and three years for misuse of credit).

The same logic, which is already present and operative within the system, may be easily transported to Article 216 of the Law on Bankruptcy by replacing the current provision stipulating that the ancillary penalties under examination shall have a fixed duration of ten years with a provision, modelled on that already provided for under Articles 217 and 218 of the same Law, that they shall last for "up to ten years".

Therefore, the contested provision must be ruled unconstitutional insofar as it provides that: "a conviction for any of the offences provided for under this Article shall result, for a period of ten years, in disqualification from the conduct of a commercial

enterprise and ineligibility, for the same period, for any management position within any enterprise", rather than: "a conviction for any of the offences provided for under this Article shall result in disqualification from the conduct of a commercial enterprise and ineligibility for any management position within any enterprise for a period of up to ten years".

That solution – which is obviously subject to reconsideration by the legislator, although under all circumstances in accordance with the proportionality principle – will enable the courts to specify the duration of the ancillary penalties provided for under the contested legislation on the basis of the criteria laid down by Article 133 of the Criminal Code according to an assessment based on the individual case and separately from the imposition of the custodial sentence; that duration could specifically be longer than the duration of the custodial sentence imposed in parallel, subject however to the maximum limit of ten years. This must be done taking account both of the different level of severity as well as of the different goals pursued by the ancillary penalties in question vis-à-vis the custodial sentence: these differences in severity and purposes suggest, within the context of the full implementation of the constitutional principles applicable to the setting of punishment, that the two types of penalty must be set separately by the courts within each individual case.

This does not alter the fact that "the determination of the way in which the legal system reacts to a judgment of the Constitutional Court declaring legislation unconstitutional […] falls to the court in the main proceedings, which is the only body competent to resolve the proceedings within which an interlocutory reference to the Constitutional Court was made" (Judgment no. 28 of 2010). In the opinion of this Court, the residual rule provided for under Article 37 of the Criminal Code will still, thus, not apply in relation to Article 216, last paragraph, of the Law on Bankruptcy – as in force following this Judgment – since the prerequisite for the application of that rule is that the duration of the temporary ancillary penalty is not expressly specified by law. In effect, the existence of a *lex specialis* precludes the applicability of the residual criterion laid down by Article 37 of the Criminal Code, the final phrase of which (the ancillary penalty "may not under any circumstances be lower than the minimum limit or higher than the maximum limit specified for each type of ancillary penalty") appears to refer not to limits on the duration of the ancillary penalties provided for under individual incriminating provisions – such as Article 216 of the Law on Bankruptcy – but rather to the minimum and maximum limits identified in Book I of the Criminal Code – in particular by Articles 28(3), 30(2), 32-*ter*(2), 35(2) and 35-*bis*(2) of the Criminal Code – that set out the individual "types" of ancillary penalties.

8.5.– In conclusion, the question concerning the constitutionality of Article 216, last paragraph, of the Law on Bankruptcy must be considered to be admissible and well-founded, as specified above, with reference to Articles 3 and 27(1) and (3) of the Constitution. All other grounds for challenge are moot.

9.– As a result of the acceptance, as set out above, of the question concerning Article 216, last paragraph, of the Law on Bankruptcy, the second question concerning Article 223, last paragraph, of the same Law is inadmissible as the question no longer has an object. This is because the content of this provision – which in structural terms contains a dynamic reference to the provision to which this ruling relates – will be automatically modified as a consequence of this ruling that Article 216, last paragraph, of Royal Decree no. 267 of 16 March 1942 is unconstitutional.

ON THESE GROUNDS

1) *rules* inadmissible the entry of appearance in the proceedings by A. M., the civil claimant in proceedings before the referring court;

2) *declares* unconstitutional Article 216, last paragraph, of Royal Decree no. 267 of 16 March 1942 (Provisions on bankruptcy, compositions with creditors, controlled administration and mandatory administrative liquidation), insofar as it provides that: "a conviction for any of the offences provided for under this Article shall result, for a period of ten years, in disqualification from the conduct of a commercial enterprise and ineligibility, for the same period, for any management position within any enterprise", rather than: "a conviction for any of the offences provided for under this Article shall result in disqualification from the conduct of a commercial enterprise and ineligibility for any management position within any enterprise for a period of up to ten years";

3) *rules* inadmissible the question concerning the constitutionality of Article 223, last paragraph, of the Law on Bankruptcy, raised by the First Criminal Division of the Court of Cassation by the referral order mentioned in the headnote with reference to Articles 3, 4, 41, 27 and 117(1) of the Constitution, the last mentioned in relation to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, and Article 1 of the Additional Protocol to the Convention, done at Paris on 20 March 1952, both ratified and implemented by Law no. 848 of 4 August 1955.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 25 September 2018.