

Italian Constitutional Court

Legal summary

Judgment No 41/2024

ECLI:IT:COST:2024:41

**DURING PRE-TRIAL INVESTIGATION SUSPECTS HAVE NO RIGHT TO WAIVE A TIME-BAR IN ORDER TO SEEK FULL ACQUITTAL IN CRIMINAL TRIALS**

In Judgment No 41/2024, the Constitutional Court ruled that suspects under criminal investigation have no right to be informed of the termination of the proceedings due to a time-bar, even if this prevents them from waiving the time-bar in order to seek full acquittal at trial. The absence of this right does not violate the suspect's rights to defence and adversarial proceedings, guaranteed under **Articles 24 and 111 IC**.

The Court noted that the right to waive a time-bar must be ensured to individuals seeking to have their innocence formally declared by judgment. However, the termination of proceedings due to a time-bar is a neutral act that does not imply that the suspect has been found guilty and, therefore, does not affect their reputation.

The right to be informed is granted to suspects when proceedings are terminated during the investigation due to the triviality of the offence because the termination order implicitly finds that a crime has been committed. In these instances, the suspect must have the opportunity to waive the time-bar and defend themselves in trial. Similarly, at the trial stage, defendants may waive a time-bar to seek full acquittal. However, the situation differs for investigations terminated due to time-bar, as these cases involve no finding of guilt and end before the trial begins. Therefore, no discrimination in violation of **Article 3 IC** occurs.

However, when prosecutors, in their request for termination due to a time-bar, include undue remarks on the merits of the charges, the request ceases to be a neutral act and violates the presumption of innocence. In such cases, the suspects must be provided with an effective remedy for this violation.

**Main proceedings**

A businessman released a statement to the press alleging that D.A.R.S., a judge on the tax tribunal, had accepted bribes to rule in his favour in certain disputes with the tax authorities. As a result of these allegations, D.A.R.S. was investigated on charges of corruption and trading in influence. In response, he filed libel charges against the businessman. Criminal proceedings for the cross charges were initiated before the Criminal Court of Lecce (the “referring court”).

In September 2021, the prosecutor investigating D.A.R.S.'s conduct requested that the proceedings be terminated and not proceed to trial. The corruption charges pertained to acts committed in 2010–2011 and were therefore time-barred. Regarding other allegations that were not yet time-barred, the prosecutor concluded that there was insufficient evidence to bring the case to trial. The judge for preliminary investigations confirmed these findings and

terminated the criminal proceedings, without D.A.R.S. being informed of the prosecutor's request or the judge's termination decree.

A month later, the prosecutor handling the libel case – where D.A.R.S. was the victim – also requested the termination of the proceedings. This time, D.A.R.S. was notified of the request in his capacity as victim and, in that context, learned about the earlier termination of the case against him. He then declared his intention to waive the right to benefit from the time-barred status of the corruption charges, requesting that the proceedings continue so he could obtain acquittal in trial through a formal judgment. To this end, D.A.R.S. challenged the termination decree, arguing that it was null and void for violating the principle of adversarial proceedings, as he had not been given the opportunity to waive the time-bar.

The referring court noted that the applicable law does not require that the suspect be informed that the prosecution of the offence is time-barred. Specifically, Article 411(1-*bis*) of the Code of Criminal Procedure (the “**challenged provision**”) mandates, under penalty of nullity, that the prosecutor's request for termination be notified to the suspect only when discontinuation is requested due to the triviality of the offence (*tenuità del fatto*). Since no analogous requirement applies to termination due to a time-barred offence, both the prosecutor's request and the judge's decree were deemed valid.

However, the referring court considered that the applicant's interest in having the charges against him dismissed on the merits rather than due to the time-bar was worthy of protection. It observed that the law treated similar situations differently and, for these reasons, it stayed the proceedings and referred the matter to the Constitutional Court (the “**Court**”), arguing that the challenged provision violated the Italian Constitution (**IC**).

## Complaints

The referring court argued that **the absence of a duty to inform suspects of the termination of criminal proceedings due to a time-bar hinders their ability to seek full acquittal**. The challenged provision restricts the suspect's right to waive the time-bar, which is an expression of the rights guaranteed under **Article 24 (Right to defence)** and **Article 111, second and third paragraph (Adversarial proceedings and right to be informed of the charges)**.

Suspects have the right to be informed of the request for pre-trial termination of the proceedings when such termination is due to the triviality of the offence. Furthermore, under Article 157 of the Criminal Code, defendants who stand trial after investigations are concluded<sup>1</sup> can always waive a time-bar. As a result, the challenged provision creates an unjustified disparity in treatment between comparable situations, violating **Article 3 (Principles of equality and non-discrimination) IC**.

## Decision of the Court

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<sup>1</sup> Anyone subject to pre-trial investigations is considered a suspect (*persona sottoposta alle indagini preliminari*). If the judge for preliminary investigations upholds the prosecutor's request to formalise the charge and initiate the trial, Article 60 of the Code of Criminal Procedure stipulates that the suspect becomes a defendant (*imputato*).

The Court determined that **the challenged provision does not violate Articles 3, 24 and 11(2) and (3) IC.**

### Reasons for the decision

The Court framed its ruling around the question of **whether suspects must be entitled to waive the time-bar during the investigation by analogy with the comparable right recognised by the Court to defendants in criminal trials.**

Specifically, in Judgment No 275/1990, the Court held that the right to defence under Article 24(2) IC (and, more precisely, the right to adversarial proceedings under Article 111, second and third paragraph IC) includes a defendant's right to waive the time-bar and obtain a judgment on the merits of the charges brought against them. Termination of criminal proceedings due to a time-bar does not establish a defendant's innocence and may therefore undermine their right to honour and reputation.

However, when the Court established this principle – which also applies to the waiver of amnesty<sup>2</sup> – **it explicitly referred to the trial stage**, as evidenced by its use of terms such as “defendants” (*imputati*), “charge” (*accusa*) and “exculpatory evidence submitted by the defendant” (*prove in giudizio presentate a proprio discarico*), all of which are relevant only after the conclusion of investigations. For these reasons, in 2005, the legislature amended Article 157 of the Criminal Code to expressly provide for a defendant's right to waive a time-bar.

Normally, all procedural rights granted to defendants at trial also apply to suspects.<sup>3</sup> However, this is not the case when time-bars are at stake, as **time-bars have substantive rather than procedural effects**: they do not merely preclude the ability to prosecute a criminal offence, but extinguish the offence altogether. **Therefore, a direct analogy between defendants and suspects regarding time-bars cannot be drawn.**

The Court analysed the case law of the Court of Cassation and found it inconclusive on this point. In certain instances, it had suggested that suspects subjected to preventive measures (e.g. pre-trial detention) during the investigation may have a right to waive the time-bar, given their interest in seeking compensation following full acquittal. However, the case law had not addressed the broader question of whether all suspects, regardless of their circumstances, have the right to waive time-bars.

The question, therefore, had to be decided by the Court for the first time.

In the Court's opinion, the defendants' right to waive time-bars and amnesty stems from the **right to defend their honour and reputation against a formal charge**, particularly through an evidence-based defence. By contrast, **it is unnecessary to extend this right to the pre-trial stage of criminal proceedings**, specifically the investigation.

The formal opening of a criminal investigation (typically triggered by a report to the police or the prosecutor) does not indicate or imply that the prosecutor has conducted even a

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<sup>2</sup> Constitutional Court, Judgment No 175/1971.

<sup>3</sup> Article 61 of the Code of Criminal Procedure.

preliminary assessment of the merits of the charges. **The opening of an investigation is a neutral act that does not negatively affect the suspect's reputation and cannot be equated with an indictment.** Likewise, the decree by which the judge for preliminary investigations terminates the proceedings upon the prosecutor's request is equally neutral since it merely closes the case.

The Court acknowledged that, when an investigation is unduly publicised through the press, the internet or social media, the suspect's personal, social and professional reputation can be compromised. However, this risk does not alter the conclusion that suspects do not have a constitutionally granted right to waive time-bars. Instead, they have access to other remedies, such as seeking compensation or bringing libel claims against those who wrongfully accuse them of a crime, as well as against media outlets and social media users publishing unlawfully materials linked to the investigation or extracted from the decree terminating the case.

Moreover, the right to waive a time-bar is intended to allow defendants to present an evidence-based defence against a formal charge. However, **pre-trial investigations are not suited to this type of evidentiary submission, as suspects cannot compel the prosecution to carry out the investigative activity required by the suspects themselves.** This right, by contrast, is meant to operate at the trial stage, where defendants fully benefit from all defence rights afforded by the legal system.

Moreover, the Court underlined that proceedings are costly and impose significant financial and existential burdens on the parties involved, including public authorities. They are a limited resource that must be used judiciously. For this reason, the legislature does not grant the power to force the commencement of criminal trials to both the suspect and the victim. It is ultimately up to the prosecutor – acting under the supervision of the judge for preliminary investigations – to determine whether the case should proceed to trial, based on a reasonable assessment of the likelihood of successful prosecution given the evidence collected.<sup>4</sup> **Suspects cannot force the initiation of a trial for the sole purpose of introducing exculpatory evidence within it.**

The different regime applicable to pre-trial termination due to the triviality of the offence is justified. Unlike termination due to a time-bar, termination for triviality is only partially exculpatory, as it implicitly acknowledges that an offence has been committed but grants acquittal based on the minor harm or risk caused. In contrast, termination for time-bar simply recognises the expiration of the limitation period and is a neutral act.

In conclusion, **the right to waive a time-bar must be correctly understood as a right to defend oneself *in trial (nel giudizio)* and cannot give rise to a broader right to a trial (*diritto al giudizio*).**

**This conclusion aligns with the case law of the European Court of Human Rights (ECtHR).** The ECtHR found no violation of Article 6 of the European Convention of Human Rights (ECHR), which guarantees the right to defence and the presumption of innocence, in cases where Turkish law prevented a member of parliament from waiving parliamentary

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<sup>4</sup> The applicable standard was modified in 2022. Previously, instead of requiring “a reasonable prospect of conviction,” the prosecutor only needed to establish “elements capable of supporting the charge during the trial”.

immunity to seek full acquittal of criminal charges.<sup>5</sup> Similarly, no violation was found in a case where Hungarian courts rejected the challenge by several suspects against an amnesty law that terminated the criminal proceedings against them, but was worded in a way that implied the commission of an offence.<sup>6</sup> According to the ECtHR, “the right to obtain a judgment in respect of criminal accusations is not absolute, in particular when there is no fundamental irreversible detrimental effect on the parties”.<sup>7</sup>

A special rule should apply, according to the Court, only to anyone who, during the pre-trial stage, was subjected to court-ordered preventive measures (e.g. pre-trial detention) based on a preliminary assessment of the charges. In these instances, the Court recognised that these individuals have the right to obtain full acquittal through a formal judgment – including, if necessary, by waiving a time-bar. However, in these cases, there is no need to envisage an obligation to notify suspects of the termination of proceedings: since suspects are necessarily aware of the investigation from the moment a preventive measure is imposed, they are already in a position to waive any applicable time-bar.

Finally, the Court commented on the circumstances of the main proceedings, noting that **the request for termination** – subsequently confirmed by the judge for preliminary investigations – **contained several remarks by the prosecutor on the merits of the charges**, suggesting that the individual under investigation was the author of the offence that had become time-barred. **Such remarks seriously undermined the fundamental rights of suspects**, namely the presumption of innocence and the right to defend oneself in adversarial proceedings. Requests of this kind lose their inherent neutral character and must be remedied appropriately.

In such scenarios, individuals may invoke the personal responsibility of the prosecutor for damages or professional misconduct. Additionally, EU Directive 2016/343 requires Member States to provide individuals with an effective remedy against any breach of the obligation “not to refer to suspects or accused persons as being guilty”.<sup>8</sup> Since 2021, Italian law has granted suspects the right to request a rectification of any acts violating this obligation.<sup>9</sup> However, a remedy has been available since April 2018, when the deadline for transposing Directive 2016/343 expired, making its provisions directly applicable in the Italian system even in the absence of specific domestic legislation.

The Court deferred to the Court of Cassation the identification of the appropriate remedy for such inappropriate termination decrees and emphasised the risk they pose to the delicate balance of the Italian criminal procedural system if left unchallenged. **The non-existence of the right for suspects to demand full acquittal in criminal proceedings is constitutionally permissible only if an effective remedy is available against breaches of the right not to be referred to as guilty without the opportunity to defend themselves.** This right is autonomous and cannot be made conditional on the suspect’s

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<sup>5</sup> ECtHR, judgment of 3 December 2009, *Kart v. Turkey* (Application No 8917/05).

<sup>6</sup> ECtHR, judgment of 27 January 2017, *Béres and Others v. Hungary* (Applications Nos 59588/12, 59632/12 and 59865/12).

<sup>7</sup> ECtHR, *Kart* cit., para. 113; *Béres and Others* cit., para. 33.

<sup>8</sup> Article 4(2) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

<sup>9</sup> Article 115-*bis* of the Code of Criminal Procedure.

waiver to a time-bar. Suspects have the full right to invoke time-bars and cannot, by doing so, be deprived of their fundamental right not to be publicly referred to as guilty in the absence of a court ruling.

Type of proceedings	Constitutional review by referral order
President of the Court	Augusto Antonio Barbera
Judge rapporteur	Francesco Viganò
Composition of the Court	Augusto Antonio Barbera (President), Franco Modugno, Giulio Prosperetti, Giovanni Amoroso, Francesco Viganò, Luca Antonini, Stefano Petitti, Angelo Buscema, Emanuela Navarretta, Maria Rosaria San Giorgio, Filippo Patroni Griffi, Marco D'Alberti, Giovanni Pitruzzella, Antonella Sciarrone Alibrandi
Delivery of the judgment	1 March 2024
Challenged measures	Article 411, paragraph 1- <i>bis</i> , of the Code of Criminal Procedure