Italian Constitutional Court's Selected Judgments of 2017

Judgment 7 December 2016 – 24 January 2017 no 20*

(Incidental Review of Constitutionality)

KEYWORDS: Prisoners' Rights – Written Correspondence – Confiscation and Inspection – Equality – Equality in Criminal Proceedings – Unfoundedness of Questions of Constitutionality.

1. The issue raised before the Constitutional Court concerned the constitutionality of Art 266 of the Code of Criminal Procedure, Art 18 (in the version in force preceding the amendments provided for by Art 3, paras 2 and 3, of Law 8 April 2004 no 95, titled 'New provisions concerning the inspection and stamping of the correspondence of prison inmates'), and Art 18-ter of Law 26 July 1975 no 354, establishing 'Rules for the prison system and the execution of measures that deny and limit freedom', with reference to Arts 3 and 112 of the Constitution.

2. Art 266 of the Code of Criminal Procedure provides for the possibility to intercept in-person conversations, telephone communications, and other forms of telecommunications. Arts 18 and 18-ter of Law no 354 of 1975 require, as the only form of monitoring of prisoners' written correspondence, inspection with the application of a stamp.

These provisions were challenged because they did not permit interception of the content of written correspondence, thus preventing authorities from being able to inspect the content of letters without the sender or the recipient being aware of the inspection, as they can instead do with other forms of communication.

The referring court maintained that the challenged provisions resulted in an infringement of the principle of equality on two grounds. On the one hand, they prescribed an unreasonable difference of treatment for telephone and electronic communications compared to written communications delivered by the postal service; on the other, they attached a privileged status to prisoners compared to defendants who were not detained.

Said difference could have curtailed authorities' powers in seeking evidence, compared to other forms of communication: the impossibility to access certain sources of evidence had a negative impact on the prosecution, thus affecting Art 112 of the Constitution, which establishes the principle of mandatory prosecution.

3. The Constitutional Court declared all the questions of constitutionality to be unfounded.

As the Court held in Judgement no 366 of 1991 and confirmed in Judgment no 81 of 1993, freedom of communication and the confidentiality of corre-

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spondence and each form of communication conflate into the inviolable right guaranteed by Art 15 of the Constitution, which is the 'vital space that surrounds the person and without which the person could not exist and grow in harmony with postulates of human dignity'.

Considering that a constitutionally protected right may be restricted by a reasonable decision delivered by judicial authorities within the scope of the law, the Court further underscored the dilemma arising with the unrestricted prevalence of one right over others, resulting in the 'tyrannization' of the various principles enshrined in the Constitution in accordance with the criteria of proportionality and reasonableness (Judgment no 85 of 2013). Thus, '(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'.

4. A comparison between confiscation and interception was made to assess the degree of influence on constitutional rights of the challenged rules. Confiscation is one of the possible ways through which the freedom and confidentiality of correspondence may be limited, to provide authorities with effective tools in investigations and in the administration of justice in respect of criminal conducts. In this regard, confiscation is not, per se, an unreasonable means of harmonizing conflicting constitutional principles. However, a confiscated item – whether a letter, parcel, package, or telegram – does not reach the expected destination, having been previously 'physically apprehended'; on the contrary, with mere interception, the communication flow is not suspended, even the interlocutors' awareness. The Joint Chambers of the Supreme Court of Cassation firmly rejected the application of the rules concerning confiscation to interception (Judgment no 28997 of 2012).

5. Although Art 15 of the Constitution relates to both 'correspondence' and 'other forms of communication', including telephone and electronic communications, in-person conversations and the like, the Court recognized that the right at issue does not provide an exhaustive catalogue of the available measures. A suitable solution for different needs and interests is required. The prevention and prosecution of crimes must be ensured as a paramount constitutional principle in itself, and as a goal for the common good of society. Then, providing for the possibility to adopt 'secretive methods' in criminal proceedings falls squarely within the powers of the legislature; no unreasonableness can be found if due respect is paid to the reservation of law and jurisdiction enshrined in Art 15 of the Constitution.

6. All of the above led the Court to find the alleged violation of Arts 3 and 112 of the Constitution unfounded.

The full text of the English translation of the Conclusions on points of law is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_20_2017.pdf.

Order 23 November 2016 – 26 January 2017 no 24*

(Incidental Review of Constitutionality)

KEYWORDS: Tax Offences – Limitation Periods – Case Law of the Court of Justice of the European Union – Disapplication of Na-

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tional Provisions – Refer-ence for a Preliminary Ruling.

The case originated from criminal proceedings regarding VAT-related tax fraud, in the context of which the Court of Justice of the European Union (CJEU), in its judgment delivered on 8 September 2015 in Case C-105/14, Taricco, had addressed the problem of the compatibility, with EU law, of Arts 160, para 3, and 161, para 2, of the Criminal Code, in so far as they established short limitation periods that also applied to cases of serious fraud that significantly affected the financial interests of the European Union (EU).

In particular, in cases of serious tax fraud, the national provisions at issue – in so far as they provide for an overall limitation period deemed excessively short – would prevent the actual imposition of penalties, as the trial often ends after the limitation period has expired. As a result, the financial interests of the EU would be damaged, in breach of Art 325, para 1, of the Treaty on the Functioning of the European Union (TFEU). According to this provision, Member States are required to take effective measures to counter fraud affecting the financial interests of the EU. Therefore, the CJEU held that national courts must disapply the provisions of Arts 160 and 161 of the Criminal Code when they are inconsistent with the protection of the financial interests of the EU.

On 15 September 2015, in a trial for tax fraud, the Third Chamber of the Court of Cassation endorsed the CJEU's reasoning, disapplying the limitation period rules laid down in Arts 160, para 3, and 161, para 2, of the Criminal Code and upholding a conviction.

Soon later, however, the Fourth Chamber of the Court of Cassation downsized the scope of the principles set out by the CJEU to deprive them of immediate effectiveness. The chamber deemed that there had not been a proper determination of the threshold of the gravity of tax fraud, threshold on the basis of which the national legislation could be disapplied; in any case, such a disapplication could not affect the limitation periods that had already expired, or the status of the offender would have been called into question.

In light of the above decisions, the Court of Appeal of Milan and the Third Chamber of the Court of Cassation raised the question of the constitutionality of the act ratifying the TFEU, in so far as it appeared to impinge upon Arts 3; 11; 25, para 2; 27, para 3; and 101, para 2, of the Constitution, by requiring the application of Art 325 as interpreted by the European Court of Justice in Taricco. In so doing, the referring courts invoked the existence of counter-limits to the application of EU law.

In particular, the referring courts considered the following principles had been breached: the rule of law, as limitation is a matter falling within the exclusive competence of the Italian legislature; the principle of non-retroactivity of unfavourable criminal law, as the disapplication of the limitation periods would have resulted in the retroactive application in malam partem of the national provisions, given the extension of the limitation period; the principle of nulla poena sine lege certa, because no precise criteria were laid down in Taricco to determine when tax fraud must be considered 'serious' or what was a 'significant' number of cases subject to time-barring effects .

The Constitutional Court ruled on the questions raised by both courts by making a new preliminary reference to the

CJEU, for a clarification on whether the interpretation of Art 325 TFEU given in Taricco was the only one possible or whether 'even a partially different interpretation, capable of precluding any violation of the principle of legality in criminal matters', could be given.

The request was raised because the rule set out by the CJEU in its judgment of 8 September 2015 afforded national courts a large margin of discretion in determining the minimum threshold of the gravity of tax fraud and thus infringed the principle of non-retroactivity of unfavourable criminal law.

The Constitutional Court, after declaring that the fundamental principles enshrined in the Constitution were incompatible with the disapplication of the national provisions on limitation periods, noted that the CJEU had held that national courts should engage in such disapplication only if they considered it compatible with the constitutional identity of their Member State, and not 'when the rule clashed with a core principle of the Italian legal system'.

The Constitutional Court thus decided to refer the following questions on the interpretation of Art 325, paras 1 and 2 TFEU to the CJEU, within the meaning and for the purposes of Art 267 TFEU:

– whether Art 325, paras 1 and 2 TFEU must be interpreted as requiring criminal courts to disapply national provisions on limitation that preclude, in a significant number of cases, the punishment of serious fraud affecting the EU's financial interests, or that establish shorter limitation periods for fraud affecting the EU's financial interests than those applying to fraud affecting the Member State's financial interests, even when are no sufficiently precise legal grounds for such disapplication and, in the legal system of the Member State, limitation forms part of substantive criminal law and is subject to the principle of legality;

– whether the CJEU's judgment in Taricco must be interpreted as requiring criminal courts to disapply national provisions on limitation that preclude, in a significant number of cases, the punishment of serious fraud affecting the EU's financial interests, or that provide shorter limitation periods for fraud affecting the EU's financial interests than those that apply to fraud affecting the Member State's financial interests, even when such disapplication is at odds with the overriding principles of the constitutional order of the Member State or with the inalienable rights of the individual recognized by the constitution of the Member State.

On 5 December 2017, the Grand Chamber of the CJEU delivered its judgment, in which it declared that the aforementioned Art 325, paras 1 and 2, TFEU must be interpreted 'as requiring the national court, in criminal proceedings for infringements relating to value added tax, to disapply national provisions on limitation, forming part of national substantive law, which prevent the application of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or which lay down shorter limitation periods for cases of serious fraud affecting those interests than for those affecting the financial interests of the Member State concerned, unless that disapplication entails a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in

force at the time the infringement was committed'.

The full text of the English translation of the Conclusions on points of law is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/O_24_2017.pdf.

Judgment 25 January 2017 – 15 February 2017 no 35*

(Incidental Review of Constitutionality)

KEYWORDS: Electoral Law – Equality of the Vote – Majority Bonus - Ballot - Governability.

1. A number of ordinary courts raised, before the Constitutional Court, questions of constitutionality concerning several provisions of Decree of the President of the Republic 3 March 1957 no 361 (the 'DPR') and of Law 6 May 2015 no 52 (the 'Law'), and also of Legislative Decree 20 December 1993 no 533.

The issues were related to the electoral law for the national Parliament, and in particular: (i) the attribution of the majority bonus; (ii) the compensatory mechanism among the various constituencies, whereby a seat of a specific constituency might be transferred to another one; (iii) the presentation of the lists of candidates and the proclamation of the elected candidates; (iv) the mechanism for the allocation of the seats in the Trentino-Alto Adige Region; and (v) the lack of uniformity between the electoral system of the Senate and that of the Chamber of the Deputies.

2. The first issue dealt with the majority bonus granted to the list obtaining forty percent of the votes: three hundred forty seats out of six hundred thirty of the Chamber of Deputies were granted to the list that, on the first round, gained forty percent of the votes at national level. This mechanism allegedly breached the principle of equality of the vote and the principle of representativeness of the Chambers of the Deputies.

The Constitutional Court declared such question of constitutionality unfounded. The legislator has wide discretion in the choice of the electoral system and the Court can intervene only if such system appears manifestly unreasonable. In this respect, the threshold provided is not unreasonable, because it aims to balance, on the one hand, the principles of equality of the vote and of representativeness of the Chamber of the Deputies and, on the other hand, the need to guarantee the stability of the Government and the governability of the country.

3. Another question concerned the provision according to which if, in the first round, two lists obtained more than forty percent of the votes, the majority bonus was granted to the list that gained the highest percentage. As a result of this majority bonus, the number of seats attributed to the second list would be unreasonably reduced.

The Constitutional Court also declared this question of constitutionality unfounded, on the basis of the grounds sub 2 above.

4. Among the challenged provisions, there was also one that required carrying out a second round, if in the first one a list obtained three hundred forty seats, but not forty percent of the votes.

The Constitutional Court rejected this interpretation of the law, and recognized that the second round would take place only if at the first one, none of the lists obtained three hundred forty seats.

5. Another issue dealt with the case in

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which, if no list passed the forty percent threshold, the first two lists that obtained at least three percent of the votes would participate in a second round (ie the run-off).

The Constitutional Court declared that, under the above provisions, the second round of elections was a continuation of the first round; therefore, a list could participate in the second round even if, in the first one, it obtained only a small percentage of votes. This mechanism created a conflict between the composition of one of the two chambers of Parliament and the will of the voters.

The challenged provisions were therefore held unconstitutional for breaching Art 3 of the Constitution.

The part of the legal provisions remaining in force was applicable and the Court did not have the power to make any further manipulative or additive interventions.

6. The provision according to which a seat of a specific constituency might be transferred to another constituency (so-called slipping) was also challenged.

The Constitutional Court declared the question unfounded. According to the Court, a systematic interpretation – taking into account the need to guarantee the equal representation of each part of the territory (Art 56) and to consider the consensus that each list obtained (Art 48) – suggested that the slipping effect had only a residual application, namely when, due to mathematic and casual reasons, it was impossible to determine any constituency where there were both a list in deficit and a list with dividers that were not used.

7. Among the issues of constitutionality, ordinary courts claimed that the lists were composed of a 'head of list' candidate and other candidates, among whom voters could pick up to two preferences for candidates of different sex.

The question was declared unfounded because only an electoral system with long closed lists of candidates and without the possibility for voters to pick any kind of consensus for any of the candidates would contrast with the principle of free vote. The legislator has wide discretion in regulating the composition of the lists and the expression of support for certain candidates. The Court also emphasized that the power to select candidates and to choose the 'head of list' candidates represents one of the prerogatives that political parties enjoy under the Italian constitutional system (Art 49 of the Constitution).

8. In addition, the ordinary courts challenged the provision according to which if a candidate was elected in more than one constituency, he had to declare to the President of the Chamber of the Deputies the constituency in which he/she wished to obtain a seat within eight days from the last proclamation.

The Court found said provisions to be inconsistent with Arts 3 and 48 of the Constitution, given the lack of any objective criteria to guide the choice of the 'head of list' candidates elected in various constituencies.

9. All other questions were declared inadmissible due to groundlessness? and indeterminacy of the petitum.

10. To overcome difficulties deriving from a possible application of the electoral system as resulting from the holding of unconstitutionality delivered in this Judgment, the Parliament passed Law 3 November 2017 no 165, that operated a far-reaching reform of electoral law. A mixed system was introduced, with approximately one third of seats allocated using a first-past-the-post method and

two thirds using a proportional method, with only one round of voting.

The full text of the English translation of the Conclusions on points of law, here partly summarized and in some passages reproduced, is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/2017_35_EN.pdf.

Judgment 21 –24 February 2017 no 42

(Incidental Review of Constitutionality)

KEYWORDS: University – Provisions Regulating Courses Taught in Foreign Languages – Interpretation – General Requirement of Study Programmes also Offered in Italian – Unfounded Question of Constitutionality.

For an analysis of this Judgment, please see C. Baldus and P.C. Müller-Graff, Suicide: Not in the Wrong Moment, Please!, in Volume 3, Issue no 2 (2017), at page 583.

The full text of the English translation of the Conclusions on points of law is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_42_2017.pdf.

Judgment 10 January – 24 February 2017 no 43*

(Incidental Review of Constitutionality)

KEYWORDS: Administrative Sanction – Final Judgment – Declaration of Unconstitutionality of the Legal Basis of the Sanction – Removal of Final Judgments Limited to Criminal Convictions – Unfounded Question of Constitutionality.

1. The case that gave rise to the question of constitutionality was brought against an entrepreneur by the Provincial Director of Labour of Como. Three injunctions were issued ordering the payment of fines imposed for having violated provisions concerning the working hours of employees, pursuant to Art 18-bis, para 4, of Legislative Decree 8 April 2003 no 66, implementing Directives 93/104/EC and 2000/34/EC concerning certain aspects of the organization of working time, as amended by Legislative Decree 19 July 2004 no 213. The Constitutional Court, in Judgment no 153 of 2014, intervened to declare the aforementioned Art 18-bis unconstitutional, on the grounds that said provision had been adopted in the absence of a delegation of legislative powers, thus invalidating the provisions underlying the calculation of the penalties that had been imposed. Therefore, the entrepreneur upon whom the administrative penalty had been imposed challenged the execution of the order for payment.

2. The Court of Como, after rejecting the claim filed, ruled that the compulsory relationship had, by this point, run out because the conviction was already a final judgment. Therefore, said Court raised a question of constitutionality, alleging the violation of Arts 3; 25, para 2; and Art 117, para 1, of the Constitution, in relation to Arts 6 and 7 of the European Convention on Human Rights (ECHR), according to Art 30, para 4, of the Law of 11 March 1953, no 87 ('Rules on the constitution and functioning of the Constitutional Court'). The last of these provisions establishes that 'when, as result of the application of a provision thereafter found to be unconstitutional, a final judgment of conviction has been delivered, the execution and all the penal effects thereof shall cease immediately'. According to the referring court, when a law providing for

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an administrative offence is declared unconstitutional, Art 30, para 4, of Law no 87 of 1953 does not extend the removal mechanism to irrevocable judgments for which the relevant sanction has been framed, by national law, as an administrative one, even though the same is qualified as criminal in nature under the ECHR in the light of the Engel criteria.

The sanction provided for by Art 18-bis, para 4, of Legislative Decree no 66 of 2003, despite being expressly categorized as administrative, was of criminal nature according to the Convention, in the opinion of the referring Court. Therefore, it was subject to the principle of legality set out in Art 7 ECHR, which essentially requires crimes and penalties to have a legal basis: removal of this basis would result in the annulment of the judgment pursuant to Art 30, para 4, of Law no 87 of 1953, although this provision refers only to formal national criminal sanctions.

3. The Constitutional Court declared the question to be unfounded. The Court, in fact, agreed with the classification of the fine as a criminal penalty under the ECHR, under the appearance of an administrative sanction. However, the combination of a formal administrative sanction and the national law in criminal matters entails the application, under the ECHR, of all guarantees provided for by the relevant provisions of said Convention, but nothing more. The Engel criteria, therefore, re-qualify as criminal penalties those sanctions that, in the Italian legal system, are considered administrative sanctions, for the sole purpose of ensuring that, despite the different label attributed to them by national law, they do not escape the guarantees provided by the ECHR for substantive penal sanctions. That does not imply the need to ensure that principles and provisions of national criminal law laid down in relation to criminal offences and sanctions must also apply to national administrative offences and sanctions, even if they can be classified as penalties according to the ECHR. In other words, the domestic legal system may provide certain guarantees for some penalties that are considered criminal, such as those set forth in Art 30, para 4, of Law no 87 of 1953, and that the same do not extend to other norms that lead to formal administrative sanctions, even if they are substantial criminal sanctions for the purposes of the ECHR.

The national legislator maintains its margin of appreciation when defining the scope of the guarantees applicable only to provisions and sanctions that in the domestic legal system are deemed to reflect the punitive power of the State. As a result, the Constitutional Court declared that Art 30, para 4, of Law no 87 of 1953 does not apply to judgments of unconstitutionality concerning provisions that are the legal basis of final judgments of conviction to sanctions ranked among administrative measures under national law.

4. Finally, the Constitutional Court observed that in the case law of the European Court of Human Rights (ECtHR), there is no rule corresponding to Art 30, para 4, of Law no 87 of 1953. Indeed, no rule was established to make an administrative sanction yield to a supervening declaration of unconstitutionality.

According to the Constitutional Court, the ECtHR also requires that Contracting States refrain from calling into question the principle of res judicata and the need for certainty in legal situations. The Constitutional Court, therefore, concluded that the interpretative assumption upon which the referral was based was erroneous in nature. Consequently, the question

of constitutionality raised on the basis of the alleged violation of international obligations by the national legal system was unfounded.

The full text of the English translation of the Conclusions on points of law is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/2017_43_EN.pdf.

Judgment 7 March – 7 April 2017 no 67*

(Incidental Review of Constitutionality)

KEYWORDS: Freedom of Religion – Establishment of New Places of Worship – Requirements – Regional Law – Partial Unconstitutionality.

1. The President of the Council of Ministers raised a question of constitutionality concerning Art 2 of Veneto's Regional Law 12 April 2016 no 12, which added Arts 31-bis and 31-ter to Veneto's Regional Law 23 April 2004 no 11 and established principles governing the planning of facilities for religious services. The claimant argued that the contested provisions infringed the right to freedom of religion, which is protected by the Constitution as well as by international and supranational law, and exceeded the Region's legislative competences.

2. Art 31-bis, para 1, reads as follows: 'The Region and the Municipalities of Veneto, in the exercise of their respective competences, identify the criteria and methods for the construction of facilities of common interest for religious services to be carried out by the entities which are institutionally competent in matters of worship with the Catholic Church or other religions – whose relations with the State are regulated in accordance to the third paragraph of Art 8 of the Constitution – and all the other ones'. This provision was challenged because it was considered too general and ambiguous, therefore allowing for an excessively discretionary application that could potentially result in a discriminatory interpretation, in breach of Arts 3, 8 and 19 of the Constitution.

On the other hand, Art 31-ter, para 3, provided that those who applied to construct a religious building were obliged to enter into an agreement with the relevant municipality to take, inter alia, 'the commitment to use the Italian language for all the activities carried out in the common interest facilities for religious services, which (we)re not strictly related to ritual practices of worship'. According to the claimant, the provision went beyond the town-planning purposes of the agreement, and affected the ways in which religious freedom is exercised – indeed, the freedom of religion consists of more than the exercise of merely ritual practices, as it also includes other activities, for example of a recreational, aggregative, cultural, social, and educational nature, in which religious freedom may reach its full expression. This regulation resulted in an infringement, by the Region, of the competence reserved to the State in the matters of 'relations between the Republic and religious confessions', as well as of 'public order and security', which fall within the exclusive legislative powers of the State (Art 117, para 2, letters c) and h), of the Constitution), thereby interfering with the exercise of religious freedom, which is protected by Arts 2, 3 and 19 of the Constitution.

3. The Constitutional Court declared the first question unfounded. The republican form of state is characterized by the

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principle of secularism, to be understood not as an attitude of indifference held by the State towards religious beliefs, but as a form of protection of pluralism, supporting the maximum expansion of the freedom of all, in an impartial manner (Judgments nos 63 of 2016, 508 of 2000, 329 of 1997, 440 of 1995).

The challenged Art 31-bis does not conflict with this principle. In fact, by devolving to the Region and the Municipalities the task of identifying the criteria and methods for the construction of religious facilities, it takes into consideration all possible forms of religious thought, without regard to the circumstance of whether an agreement with the State has been concluded (Judgment no 52 of 2016). The alleged violation of the abovementioned constitutional principles, therefore, did not derive from the content of the challenged provision in itself, but rather from its possible and concrete applications that may be discriminatory and thus to be addressed by the competent courts on a case-by-case basis.

4. On the contrary, the second question led to a declaration of unconstitutionality. The regional legislation concerning the construction of worship buildings finds its reasons and justifications – within the scope of the urban planning aspect – in the need to ensure a balanced and proper development of the residential centres and of the provision of services of public interest most broadly conceived, which therefore also includes religious services (Judgment no 195 of 2013). The Region certainly has the right to pass specific provisions for the design and construction of worship buildings and, in the exercise of these powers, it can impose requirements and limitations that are strictly necessary to guarantee the achievement of the goals related to the management of the territory. However, the Region exceeds a reasonable exercise of these powers if, while protecting urban interests, it introduces an obligation, such as that of the use of the Italian language, that is wholly unrelated to these interests. In fact, language is a strong element of individual and collective identity (Judgment no 42 of 2017), a vehicle for the transmission of culture and the expression of the relational dimension of the human personality. A limitation as to the language to be used, in the absence of a close relationship of instrumentality and proportionality with respect to other constitutionally relevant interests, including in the field of application of regional financing, proves to impinge upon fundamental human rights.

5. In this context, the provision that allows the administration to impose, among the requirements for the conclusion of the urban planning agreement, a commitment to use the Italian language for all activities carried out within the facilities of common interest for religious services was clearly unreasonable. Accordingly, the part of that provision related to the use of Italian language was declared unconstitutional.

Judgment 7 March 2017 – 13 April 2017 no 86*

(Incidental Review of Constitutionality)

KEYWORDS: Public Administration – Experimental Stations for the Preserved Foods Industry – Suppression – Tasks Transferred to the Chamber of Com-merce of Parma – Unfounded Questions of Constitutionality.

* By Marina Roma.

1. The Council of State raised before the Constitutional Court questions of constitutionality concerning Art 7, para 20, of Decree Law 31 May 2010 no 78, which suppressed the Experimental Station for the Preserved Foods Industry (Stazione Sperimentale per l'Industria delle Conserve Alimentari) and transferred its tasks to the Chamber of Commerce of Parma.

2. The provision was challenged because it allegedly infringed the principles of equality and rationality (Art 3 of the Constitution).

According to the Council of State, the fact that the provision was included in Part II of Decree-Law no 78 of 2010, providing for a reduction of the costs of political and administrative bodies, demonstrated that its ratio was to reduce public expenditure for certain non-strategic administrative bodies. However – as emphasized by the Council of State – the Experimental Station was funded mainly by contributions from private operators. Therefore, its suppression was inconsistent with the ratio of the Decree-Law.

The Court declared the question unfounded. The principle of rationality, derived from the principle of equality, requires the legal system to maintain logical, teleological and historical-chronological coherence (Judgement no 87 of 2012). Rationality would be breached in case of 'intra legem irrationality', meaning an inherent incoherence between the ratio pursued by the legislator and the provision itself (Judgement no 416 of 2000). Not every incoherence or imprecision must be held to contrast with the Constitution: rather, only those considered to be evident and obvious (Judgement no 46 of 1993).

Given these premises, the Court stated that the Council of State placed excessive emphasis on the 'spending review aspects' of Decree-Law no 78 of 2010. The Court highlighted that the Decree, entitled 'Urgent provisions regarding financial stabilization and economic competitiveness', aimed to foster national competitiveness also by means of a reduction in the number of certain public bodies.

The legislator enjoys broad discretion in choosing the most appropriate organizational measures to fulfil its objectives. In this respect, the choice to suppress the Experimental Stations was not manifestly unreasonable in light of their institutional competences and history.

3. Another question concerned the alleged violation of Arts 3, 97 and 118 of the Constitution.

The Court also declared this question unfounded.

Since their institution, the chambers of commerce had a twofold nature: on the one hand, they represented private operators; on the other, they were also considered as vehicles to achieve certain public purposes, and thus as a body of public law. The reforms carried out over the years have not changed these fundamental features; the chambers of commerce also acquired additional competences in relation to (i) the legal publicity of certain information regarding companies (eg conservation of the Companies' Register); (ii) consumer protection; and (iii) supervision of certain products, etc.

According to the Court, the granting of tasks to the chambers of commerce was never related to the local dimension of a specific public interest.

Given, on the one hand, the historical origin of Experimental Stations and their location in certain specific areas in relation to the activities to be carried out, and, on the other, the characters and the tasks

of the chambers of commerce, the choice of the legislator to grant the tasks once conferred upon the Experimental Stations for the Preserved Foods Industry to the Chamber of Commerce of Parma was not manifestly unreasonable or unjustified.

The same criterion was applied to all the other Experimental Stations.

4. The last question also related to Art 3 of the Constitution. The Council of State challenged the provision that referred, to an Interministerial Decree, the establishment of the timeframe and of the terms of the transfer of the tasks of the Experimental Stations.

To declare the question unfounded, the Court said that it was possible to give the provision an interpretation that was consistent with the Constitution, so that the Interministerial Decree had to grant equal representativeness to all private operators. In any case, a possible discrimination based on this decree was subject to appeal before the competent administrative tribunal.

5. The legal reasoning of this judgement, especially with regard to the history and the competences of the chambers of commerce, was recalled in Judgement no 261 of 2017, whereby the Constitutional Court declared unfounded all questions of constitutionality raised by various Regions with regard to Legislative Decree 25 November 2016 no 219, that reorganized the competences and the funding of the chambers of commerce.

Judgment 21 February – 11 May 2017 no 103*

(Direct Review of Constitutionality)

KEYWORDS: Civic Uses – Commons – Natural Heritage and Landscape – Regional Law – Unconstitutionality.

1. The Judgment concerns two different issues. The first deals with Art 1, para 12, of Sardinian Regional Law 11 April 2016 no 5, providing the application of certain exemptions from enforcement and bankruptcy laws to certain Sardinian public bodies. However, the most important issue is the second, which derives from a recent conflict between the Autonomous Region of Sardinia and the national Government with regard to the matters of 'civic uses' (usi civici) an of commons (as will be clear by reading section 5, below, of this comment).

From a theoretical point of view, the categories of 'civic uses' and 'collective-owned lands' (demani civici) are vital in Italian property law. These particular property rights are, at the same time, both individual and collective, as they are attributed to each and every person to the extent that he or she is a member of a certain local community (regardless of the criteria adopted to define the community as a legal entity, at this general level). Together with the category of 'goods in public use' (cose in uso pubblico), the functioning of civic uses entails a far-reaching dialectic within the proprietary paradigm established by the Western legal tradition in continental Europe. According to this concept, property – namely private property, ownership – is an individual, absolute and exclusive subjective right, an idiosyncratic entitlement covering any sort of use (and misuse) connected to the utilities generated by a thing (namely, the object of property).

During his long tenure as professor of law, the former President of the Constitutional Court, Paolo Grossi, has illustrated

* By Rocco Alessio Albanese.

the existence and relevance of different forms of property, such as civic uses and other collective legal relationships between subjects and objects. In particular, civic uses play a crucial role in Sardinia, a region where a large part of the territory – almost twenty percent – is classifiable as civic domain.

2. The legal framework that regulates civic uses is complex, because it consists of various sources of statutory law that have come into force alongside a basis of customary law. At a national level, it is important to take into account Law 16 June 1927 no 1766 and Royal Decree 26 February 1928 no 332. While the main policy pursued by the Fascist legislator concerned the transformation of collective domains into individual property rights, these two sources have assigned a precise rationale to civic uses as a legal institution, by connecting these forms of property to economic activities such as forestry, grazing and subsistence agriculture. In this regard, Law no 1766 provides civic uses with a peculiar legal regime: except for the case of transformation into individual property, they are not subject to statutory limitations and such feature is coupled with a general provision of inalienability. In 1985 the rationale of civic uses has been enriched by Law 8 August no 431 (the so called 'Calasso Law'), today part of Legislative Decree 22 January 2004 no 42 (Code of cultural heritage and of landscape: see Art 142, para 1, letter h). This legislation acknowledges the decreasing importance of traditional agricultural activities and considers civic uses as a means to protect the environment and the landscape, and thus to pursue goals characterized by national relevance and a crucial role of the State (see Constitutional Court, Judgment no 46 of 1995).

Civic uses can also be regulated under Regional Laws, and this is the case of Sardinia, which enjoys a special status within the Italian constitutional order. According to Art 3, para 1, letter n), of the Regional Statute, Sardinia has an exclusive legislative competence concerning civic uses. In this respect, Sardinian Regional Law 14 March 1994 no 12 has established a legal framework for Regional civic domains.

3. In the case at issue, the national Government called into question the constitutionality of several provisions of Regional Law 11 April 2016 no 5, providing – see, in particular, Art 4, paras 24, 25, 26 and 27 – wider room to declassify and privatize regional civic uses. The national Government assumed that the Region's regulation was inconsistent, on the one hand, with Art 117, para 2, letter s), of the Constitution (that gives the State exclusive legislative competence with regard to the 'protection of environment, ecosystem and cultural heritage') and, on the other hand, with Arts 135, 142 and 143 of the Code of cultural heritage, which assign a central role to the State with respect to any sort of sub-national planning that is likely to affect the landscape. Sardinia maintained that Regional provisions fell under the scope of Regional legislative competence.

4. The Constitutional Court stated that Regional Law no 5 was inconsistent with the Constitution, as it had the unlawful effect of 'depriv(ing) the collective heritage of large parts of the territory' (section 3.2 of the Judgment). Taking into account the power of the State to regulate the protection of the environment, the Court underlined that the current concept of civic uses is related to the environmental relevance of the same. As a consequence of this theoretical connec-

tion, the Court, referring to its precedents, established that (i) the provisions of Legislative Decree 22 January 2004 no 42 are 'norms of major socio-economic reform', and therefore Regional laws must comply with them; (ii) although Sardinia has an undisputed legislative power with regard to civic uses, such a competence must be exercised through co-planning in agreement with the national administrative bodies.

As a result, Sardinia could not declassify civic domains to legitimize unlawful occupations (Art 4, para 25, of the challenged Regional Law) and without assuring the guarantees provided by relevant administrative procedures (Art 4, paras 26 and 27). At the same time, the Court enhanced the role of the State as the main public body in charge of protecting the environment and planning and monitoring interventions affecting the landscape.

5. The Judgment at issue can be considered as a reiteration of well-established case law: in this respect, it appears important to mention Judgment no 210 of 2014, according to which Sardinian Regional Law 2 August 2013 no 19, providing for a regulation of civic uses similar to that discussed above, was declared incompatible with the Constitution on the same grounds as Judgment no 103. Indeed, the 2017 Judgment contains quotations drawn from the former. Moreover, Judgment no 210 is remarkable because of its reference to the case law concerning commons established in 2011 by the Joint Civil Sections of the Court of Cassation (see for instance Judgment 14 February 2011 no 3665).

6. In the aftermath of Judgment no 103, Sardinia passed Regional Law 3 July 2017 no 11. Although this law was welcomed as an appropriate intervention, aimed at better regulating and protecting Sardinian civic domains, with deliberation of 29 August 2017 the National Government decided to challenge the constitutionality of the Regional provisions before the Constitutional Court. Therefore, Sardinian civic uses are sub iudice once again, and for the third time in a few years.

Judgment 5 April – 12 May 2017 no 111*

(Incidental Review of Constitutionality)

KEYWORDS: Retirement Age – Equal Treatment Between Men and Women – National Law Incompatible with EU Law with Direct Effects – Disapplication of National Law – Inadmissible Questions of Constitutionality.

1. The question raised before the Constitutional Court concerned the combined provisions of Art 24, para 3, first sentence, of Decree-Law 6 December 2011 no 201 ('Emergency provisions on the growth, equity and consolidation of the public accounts') and Art 2, para 21, of Law of 8 August 1995 no 335 ('Reform of the compulsory and complementary pension system').

2. According to the referring court, the challenged provisions had discriminatory effects. Indeed, with regard to the prerequisites for eligibility for a pension relating to age for insurance purposes and contribution history purposes to be fulfilled, on the one hand, female public-sector workers who had reached the age of sixty-one prior to 31 December 2011, thereby accruing the right to an old-age pension, are mandatorily subject to the legislation applicable prior to the entry

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into force of Decree-Law no 201 of 2011. On the other hand, male public sector workers of the same age – who by that date have not yet reached the age threshold (of sixty-five) required for eligibility for the same right – are subject to the 'new' regulation provided by Art 24 of Decree-Law no 201 of 2011. Therefore, female public-sector employees are required to retire 'at the age of sixty-five', again in the view of the referring court, under the 'new' pension legislation, whereas male public-sector workers in a similar situation must by contrast retire at the age of sixty-six.

The challenged legislation is claimed to violate: Art 3 of the Constitution, which enshrines the principle of equality before the law without distinction on the grounds of sex; Art 37, para 1, of the Constitution, which establishes the principle of equal pay for equal work by men and women; Art 11 of the Constitution, in light of the possible contrast with both Art 157 of Treaty on the Functioning of the European Union (TFEU), according to which '(e)ach Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied' (para 1), and Art 21 of the EU Charter of Fundamental Rights, which prohibits 'any discrimination based on any ground such as sex'; Art 117, para 1, of the Constitution, in view of the violation of Art 2 of Directive no 2006/54/EC insofar as it defines 'direct discrimination' as a situation 'where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation' (para 1, letter a).

3. The Court declared the questions inadmissible on procedural grounds. The referring court raised issues related to the violation of Arts 11 and 117, para 1, of the Constitution, because of an infringement of provisions of EU law, without considering that part of the latter has direct effect in the national legal system. This is the case of the principle of equal pay for men and women, which is a core principle of the common market and one of the 'social objectives of the Community, which is not merely an economic union' (Court of Justice, Case C-43/75, Gabrielle Defrenne v Sabena, paras 7 to 15). This principle has been considered by the Court of Justice to be binding on public and private entities and to have direct effect (Defrenne, paras 4 and 40). This principle has been encapsulated by the other invoked provisions of both the Treaties (Art 3, para 3, of the Treaty of the European Union and Art 8 TFEU) and the Charter of Fundamental Rights of the European Union (Arts 21 and 23).

Thus, the Constitutional Court considered that, in finding that the contested legislation violates Art 157 TFEU, also in light of the abovementioned Court of Justice's case law recognizing direct effect to that provision, the referring court should have disapplied the provisions that were incompatible with the principle of equal treatment, subject as the case may be to a preliminary reference to the Court of Justice. This process would have made the reference to the Constitutional Court unnecessary.

4. The disapplication of provisions of national law is an obligation incumbent upon the national courts, which are required to comply with EU law and to guarantee the rights arising under it.

Alternatively, the complexity of the issue could have led the referring court to make a reference for a preliminary ruling to the Court of Justice, to ascertain whether the national legislation was incompatible with EU law preventing dis-

crimination between men and women in the employment relationships, as established in the CJEU cases (Court of Justice, Case C-262/84, Vera Mia Beets-Proper v F. Van Lanschot Bankiers NV, paras 34-35, and Case C-356/09, Pensionversicherungsanstalt v Christine Kleist, para 46) an in the Directive no 2006/54/EC.

The full text of the English translation of the Conclusions on points of law is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_111_2017.pdf.

Judgment 8 February – 26 May 2017 no 122*

(Incidental Review of Constitutionality)

KEYWORDS: Prisoner – Strict Regime Prison – Prohibition on Exchanging Printed Materials with External Parties – Alleged Infringement of Freedom of Communication and of Rights to Education – Unfounded Questions of Constitutionality.

1. The questions raised before the Constitutional Court by the Supervisory Judge of Spoleto concerned Art 41-bis, para 2-quater, letters a) and c), of Law 26 July 1975 no 354 ('Regulations concerning the prison system and the enforcement of measures that restrict or deprive of personal freedom'). The Supervisory Judge challenged the constitutionality of Art 41-bis in so far as, according to the most widely accepted interpretation (diritto vivente), it allowed prison administrations to prevent prisoners from receiving from outside, or sending outside, books or other printed materials: in particular, doubts were raised as to the power of the prison administration to adopt this measure towards prisoners subject to strict regime detention, in order to prevent them from having contact with criminal organizations.

2. First, the referring judge claimed that a violation of Art 15 of the Constitution had occurred, which reserves any restrictions on the freedom and confidentiality of correspondence, and on every form of communication, to statutory law and to the judiciary. Books and other printed materials may be means to express ideas, feelings, or news: for this reason, they serve as means of communication and should fall under the protection of Art 15 of the Constitution. Consequently, the restriction at stake might only be imposed by the judiciary, as also stated by the above-mentioned Art 18-ter.

Furthermore, the provision was alleged to be inconsistent with Art 21 of the Constitution, which protects freedom of expression (in all its breadth) and freedom of the press. According to constitutional case law, a broad construction of that provision extends its scope to the right to inform and to be informed, which is impaired when the prison administration prevents prisoners from exchanging books and other printed materials with external parties. Nor could such restriction increase the safeguarding of public order and safety, which would already be adequately protected by the more flexible mechanism provided for by Art 18-ter. Besides, the referring judge applied a similar reasoning with respect to Arts 33 and 34 of the Constitution, which provide for the right to education: the prohibition on receiving publications from outside, making them harder to obtain, would compromise prisoners' right to study.

Last, an infringement of Art 117, para 1, of the Constitution was claimed, with

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reference to Arts 3 and 8 of the European Convention on Human Rights (ECHR), which respectively forbid inhuman or degrading treatment and guarantee to every person the right to respect for private and family life and correspondence. The possibility to receive publications from outside, especially from one's relatives, and to send them such material was considered, for a prisoner subject to the restrictive regime prescribed by Art 41-bis of Law no 354 of 1975, as a precious way to maintain human relationships, the denial of which would be disproportionate to the purpose of the special regime itself.

3. The Constitutional Court declared unfounded all the questions of constitutionality.

As far as Arts 21, 33 and 34 of the Constitution are concerned, the measures that, according to the most widely accepted interpretation (diritto vivente) of the relevant provision, may be adopted by the prison administration on the basis of the latter do not restrict the right of prisoners to receive and send publications, but rather simply affects the means through which such publications may be acquired. Indeed, prisoners are not prevented from accessing their preferred readings, but are required to ask the prison administration to supply them. Therefore, adverse effects on the rights of the prisoner may derive not from the rule itself, but from the failure of the prison administration to properly enforce it: clearly, this problem falls outside the scope of constitutional review.

Besides, the Court found no violation of Art 15 of the Constitution. Even if it was possible to agree that the exchange of printed materials can have a specific communicative meaning, it would not be possible to call Art 15 of the Constitution into play. Not only publications, but any item could be in theory suitable to convey communications: as a paradoxical result, for the sake of freedom of correspondence, the prison administration could not impose any restriction on the exchange of items between inmates and outside parties.

Finally, the Constitutional Court rejected the argument based on international law, holding that the mere prohibition on exchanging materials with the outside world does not constitute an infringement of Art 3 ECHR; moreover, even if it did, the ban on inhuman or degrading treatment is absolute, and could not, in any way, be circumvented by a judicial order. With regard to Art 8 ECHR, the Court stated that restricting the channels for receiving printed materials by means of which prisoners can maintain familial relationships does not compromise the freedom and secrecy of correspondence. Even when such restriction does interfere with family life, this would be justified because the measure's aim falls within the category of goals provided for by Art 8, para 2, ECHR.

The full text of the English translation of the Conclusions on points of law is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_122_2017_EN.pdf.

Judgment 7 March – 26 May 2017 no 123

(Incidental Review of Constitutionality)

KEYWORDS: Administrative Jurisdiction – Res Judicata – Ruling Against Italy by the European Court of Human Rights – No Obligation to Reopen Trial – Unfounded Question of Constitutionality.

For an analysis of the Judgment,

please see C. Petta, *Res Iudicata* in Breach of the ECHR: The Italian Constitutional Court's Point of View, in this Issue, at page 225.

The full text of the English translation of the Conclusions on points of law is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_123_2017.pdf.

Judgment 3 April 2017 – 12 July 2017 no 164*

(Incidental Review of Constitutionality)

KEYWORDS: Judiciary – Action for Liability for Judicial Negligence – Required Admissibility Proceedings – Abolition – Unfounded Question of Constitutionality.

1. 1. The issues raised before the Constitutional Court concerned Arts 2, para 3; 7, para 1; 5; 8, para 3, of Law 13 April 1988 no 117, as amended by Law 27 February 2015, no 18 ('Provisions on liability for judicial negligence'). Several courts raised questions of constitutionality of the contested provisions, allegedly in breach of Arts 3; 101, para 2; 111; 24; 25 of the Constitution. The Constitutional Court declared three of the four questions of constitutionality inadmissible, for lack of connection between the original proceedings and the process in the Constitutional Court (on the basis of Arts 1 of Constitutional Law 9 February 1948 no 1, and 23 of Law 11 March 1953 no 23). The only question that was decided on the merits by the Constitutional Court concerned the constitutionality of the rewording of Art 5 of Law no 117 of 1988.

2. Art 5 of Law no 117 of 1988 provided that the action for damages against the State for judicial negligence was conditional upon the completion of proceedings to assess the requirements of the judge's liability. This Article was modified by Art 3, para 2, of Law no 18 of 2015. As a result of these legislative changes, the action for damages no longer needs a preliminary analysis before a judge other than the Court having jurisdiction for liability for judicial negligence.

The Constitutional Court considered the validity of Art 3, para 2, of Law no 18 of 2015 for the first time. In the past – before the introduction of Law no 18 of 2015 – the Court only ruled on the validity of Law no 117 of 1988; more particularly, the Constitutional Court (see Judgments nos 18 of 1989 and 468 of 1990) found that Arts 2 and 3 of Law no 117 of 1988 did not conflict with the Constitution, because those rules provided that the action for damages brought against the State for judicial negligence related to cases of intentional fault and serious misconduct.

3. The Constitutional Court declared the question of constitutionality to be unfounded, because Arts 101, para 2; 111, para 2; 25, para 1; and 3 of the Constitution were not infringed by the changes made by Art 5 of Law no 18 of 2015. In particular, the Court noted that the repeal of the so-called 'admissibility proceedings' did not raise the risk of impairing the independence of the judiciary. As a result, Arts 101, para 2 and 111, para 2, of the Constitution were not breached.

The Constitutional Court stated that judicial independence should be ensured by the provision regarding abuse of process, namely Art 96 of the Code of Civil Procedure, which regulates the liability of any person who decides to file suit despite being aware of the groundlessness of his/her claim. Bringing an action that is manifestly unfounded entails the liabil-

* By Fulvio Marone.

ity of the claimant (see Judgment of the Supreme Court of Cassation no 4090 of 2017).

Furthermore, the Court emphasized that the Court of Justice of the European Union requires Member States, in accordance with the principle of effectiveness, to prevent the introduction of unreasonable procedural obstacles (see Judgments nos 30 September 2003, C-224/01, and 24 November 2011, C-379/10).

The Court also excluded a breach of Art 25 of the Constitution: the commencement of a legal action for judicial liability does not imply the application of Art 51, para 1, no 3, of the Code of Civil Procedure, with regard to the abstention (see Judgment of the Supreme Court of Cassation no 1318 of 2015), since the party acting as defendant, in an action for liability for judicial negligence, is the State and not the judge, against whom the President of the Council of Ministers is entitled to take legal recourse.

Finally, the Constitutional Court ruled that the repeal of Art 5 of Law no 117 of 1988 did not constitute an infringement of Art 3 of the Constitution, because new forms of preliminary proceedings were introduced, although only for appellate- (Arts 348-bis and 348-ter of the Code of Civil Procedure) and supreme-court-level proceeding (Arts 360-bis and 375, para 1, nos 1 and 5, of the same Code), while the action for damages against the State for judicial negligence is to be addressed by a court of first instance.

The full text of the English translation of the Conclusions on points of law is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_164_2017_EN.pdf.

Judgment 20 June – 13 July 2017 no 180*

(Incidental Review of Constitutionality)

Keywords: Amendment of Gender Attribution – Modification of Sexual Characteristics – Sexual Identity – Individual Fundamental Rights – Unfounded Question of Constitutionality.

1. The question raised before the Constitutional Court concerned Art 1, para 1, of Law 19 April 1982 no 164 ('Provisions on amendment of gender attribution'), which provides that 'Amendment is made based on the final decision of a court attributing, to a person, a gender different from that written on their birth certificate, following prior modification of his or her sexual characteristics'.

2. The referring Court held that the literal content of Art 1, para 1, of Law no 164 of 1982 did not allow a person 'to amend his or her gender attribution in the absence of surgical modification of his or her primary sexual characteristics, that is to say genitalia, on the basis of which a person's sex is identified at the time of birth'. Pursuant to this provision, the exercise of a right (the right to one's own gender identity) was made contingent upon submitting to invasive and health-threatening procedures.

3. The provision was challenged on two different grounds.

First, Arts 2 and 117, para 1, of the Constitution, in relation to Art 8 of the European Convention on Human Rights (ECHR), were allegedly infringed because the challenged provision required the modification of one's sexual characteristics through highly invasive surgical treatments for purposes of amending the

* By Ippolito Barone.

attribution of gender in one's records, therefore undermining the exercise of the fundamental right to one's own gender identity.

Second, the infringement of Arts 3 and 32 of the Constitution would consist in the inherent unreasonableness of making the exercise of a fundamental right, such as that to sexual identity, contingent upon the requirement that a person undergoes medical treatments (surgical or hormonal) that are extremely invasive and dangerous for health.

4. The Constitutional Court held that a constitutionally oriented interpretation of the challenged provision, in accordance with the case law of the European Court of Human Rights (ECtHR), was possible; so that said provision could be considered compatible with the constitutional values of freedom and dignity of the human person, identified and validated by the case law of both ordinary courts and the Constitutional Court.

In particular, reference was made to Judgement no 15138 of 20 July 2015, in which the Court of Cassation held that, in order to obtain an amendment of gender attribution in civil state records, undergoing surgical procedures that destroy or modify the primary anatomical sexual characteristics is not a mandatory and necessary step.

The Court of Cassation recognized that acquiring a new gender identity may also come as result of a personal development that does not entail the need for such procedures, provided that the serious and unambiguous nature of the chosen path and the defined nature of the final outcome are subject to verification (including technical verification) by the courts.

With reference to constitutional case law, the Constitutional Court referred to Judgement no 221 of 2015, in which it recognized that the provision at stake constitutes the end point of an evolution in cultural attitudes and the legal system towards the recognition of the right to gender identity as a constitutive element of the right to personal identity; because the same falls squarely within the scope of the fundamental rights of the person, 'in the absence of a textual reference to the manner in which the modification is achieved (surgery, hormones or as a result of a congenital situation), it may be concluded that surgery, as only one of the possible techniques for modifying sexual characteristics, is not necessary for the purposes of access to the judicial process leading to correction in the civil registry'.

5. The Court provided further clarifications as to the constitutionally appropriate interpretation of Law no 164 of 1982. On one hand, it 'allows for the rejection of the requirement of a prior gender realignment surgery' for the purpose of amendment of gender attribution; on the other hand, 'this in no way implies that there is no need for a rigorous assessment – indeed, it confirms its necessity – not only of the serious and unambiguous nature of the person's intent, but also that a prior, objective transition in gender identity, revealed in the path followed by the person in question; a path that corroborates and reinforces the intent thus manifested'.

In any case, the simple will-based element cannot take priority or exclusive importance for purposes of making an assessment regarding the transition: the individual's will is a requirement, but it is not sufficient in itself.

6. The Court emphasized the need to strike a balance between the individual's right to recognition of one's gender identity (with the correspondence between

the gender attributed in official records at the moment of birth and the gender that the individual subjectively perceives and lives out) and the need to have certainty in legal relationships, as a fundamental principle of the legal system, and upon which the purpose of public records is based.

In conclusion, it is up to courts, on a case-by-case basis, to assess the nature and importance of the prior modifications to a person's sexual characteristics, which combine to determine one's personal and gender identity.

7. In light of this reasoning, the question concerning the constitutionality of Art 1, para 1, of Law 19 April 1982 no 164 was declared unfounded.

The full text of the English translation of the Conclusions on points of law is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_180_2017_EN.pdf.

Judgment 21 June – 14 July 2017 no 193*

(Incidental Review of Constitutionality)

KEYWORDS: Closed Farmstead in South Tyrol – Legal Succession – Preference of Men over Women – Alleged Infringement of the Principle of Equality – Unconstitutionality.

1. The question raised before the Constitutional Court by the Court of Bolzano concerned Art 5 of Law 25 July 1978 no 33 of the Province of Bolzano, regarding the regulation of closed farmstead ('maso chiuso'), as amended by Art 3 of Law 24 February 1993 no 5 of the Province of Bolzano, in so far as it stipulates that, among those called to succession in the same degree, men have preference over women (while, among the members of the same gender, the oldest one has priority).

According to the referring Court, the aforementioned Art 5 would be contrary to Art 3, para 1, of the Constitution, which establishes the principle of equal social dignity and equality of citizens before the law, without distinction of gender. For those called to take over the farmstead, the contested provision included a preference criterion based on gender, thus determining an unreasonable discrimination against women.

2. The referring Court observed that Law 28 November 2001 no 17 of the Province of Bolzano ('Law on closed farmsteads') repealed the challenged provision and the preference criterion at issue; however, the provision applied to the case at hand because the succession had opened on 12 August 2001, thus prior to the legislative reform.

3. The case concerned the review – based on the principles of equality and reasonableness – of the legal framework of an ancient legal institution (the closed farmstead), present in South Tyrol since the early centuries of the Middle Ages, in accordance with Germanic custom.

The Constitutional Court preliminarily engaged in a brief historical-normative overview of the institution of the closed farmstead and its origins in the Italian legal system.

In view of the normative analysis, the Constitutional Court recognized that the distinguishing characteristics of the institution justified its preservation through a particular regulation.

4. In assessing the compatibility of the challenged provision with Art 3, para 1, of

* By Patrizia Saccomanno.

the Constitution, the Constitutional Court recalled its own previous Judgment (no 40 of 1957), relating to similar matters, in which it held that the contested criterion of preference did not clash with the general principles of the legal system on intestate succession and division of inheritance, or with the principle of equality enshrined in Art 3 of the Constitution. Following the interpretation taken by the previous Judgment no 4 of 1956, the Constitutional Court then declared that the preference for the first-born male provided by the law at that time was justified at the time of the proceedings.

In the case at hand, the Constitutional Court stated that the conclusions regarding male preference had to be set aside to allow the legal system to conform to society and its evolution.

5. The compatibility of the closed farmstead with Italian civil law has been questioned on several occasions. The fact that this institution has always existed in a limited territorial context does not mean that its regulation cannot contain specific rules that acquire a different meaning over time through an evolutionary interpretation, which may lead to a different assessment of compatibility with the constitution.

The protection granted to particular institutions such as the closed farmstead does not justify a derogation from the principles of the legal system, but only from those that are functional to the preservation of the institution in its essential aims and peculiarities (see Judgments nos 173 of 2010, 340 of 1996, 40 and 5 of 1957, 4 of 1956) and that in any case do not involve the violation of fundamental constitutional principles, such as equality.

The principle of equality between men and women played a primary role in assessing the constitutional interests underlying the question under review. The social and legislative evolution – in the opinion of the Constitutional Court – has led to overcome the patriarchal vision of the family and the principle of birthright, as well as the hereditary preemption for male individuals in the assignment of the closed farmstead, which is therefore incompatible with Art 3 of the Constitution. Not surprisingly, these rules were repealed by Provincial Law no 17 of 2001 and, in the past, on minor matters, the Constitutional Court had declared certain rules that were part of the framework of the closed farmstead to no longer be compliant with the original rationale.

6. Hence, the Constitutional Court declared the unconstitutionality of Art 5 of Law no 33 of 1978 of the Province of Bolzano, insofar as it provided that among those called to succession in the same degree, men had preference over women.

Judgment 8 November – 7 December 2017 no 258*

(Incidental Review of Constitutionality)

KEYWORDS: Citizenship – Naturalization – Oath Requested for Individuals Lacking Mental Capacity – Discrimination – Unconstitutionality.

1. The question raised before the Constitutional Court concerned Art 10 of Law 5 February 1992 no 91 (Provisions on Citizenship), which provides that a naturalization decree becomes effective only once a new citizen has pledged allegiance to the Italian Republic, even if he/she is a mentally disabled person who lacks the capacity to take an oath.

* By Marco Rizzuti.

2. According to Law no 91 of 1992, a foreigner, even if born and grown up in Italy, can obtain Italian citizenship only through an administrative decree of naturalization, granted pursuant to a discretionary procedure. Then, the decree becomes effective and can be inserted into the Civil Status Register only if and when the new citizen solemnly pledges allegiance to the Italian Republic. Therefore, if the new citizen suffers from a severe mental disability, and thus lacks the capacity to take an oath, his/her new citizenship will apparently never become effective: this was the situation of the Indian woman suffering from a severe form of epilepsy and pachygyria, whose case led the Court of First Instance of Modena to raise the question of constitutionality.

Under the original provisions of the Civil Code, persons suffering from severe mental disabilities had to be interdicted, in order to be legally represented by a guardian in all their legal acts. When such a representation was impossible, eg when the act was of personal nature (eg marriage), the latter became impossible too. The problem was to ascertain whether the acts relating to citizenship, such as the request for naturalization or the oath of citizenship, fell within the acts of personal nature or acts compatible with legal representation. In this regard, the laws on citizenship never regulated the status of disabled persons.

The oath of citizenship has always been deemed an act of a personal nature, and thus incompatible with legal representation. However, the Council of State, in 1987, interpreted the law on citizenship as implying that an interdicted person was exonerated from the oath.

However, interdictions have become very rare after the entry into force of Law 9 January 2004 no 6, introducing the new legal institution of supporting administration with regard to any kind of mental or physical disability. The new rules are less rigid and aim to promote, to the greatest extent possible, the disabled person's autonomy: for instance, recent judgments have authorized disabled persons under supporting administration to perform legal acts of personal nature, such as marriage or writing a will, with the assistance of the supporting administrator, and have recognized the power of the supporting administrator to request naturalization for a disabled person (Regional Administrative Court of Lazio, Judgment 4 June 2013 no 5568). In other cases, courts have affirmed the exoneration from the oath of citizenship also for persons under supporting administration, because, according to the new Art 411 of the Civil Code, provisions referred to interdiction must also be applied to support administration in the interests of the disabled person (Court of First Instance of Bologna, Judgment 9 January 2009).

On the contrary, the Court of First Instance of Modena, called to decide on a similar case, held that Art 10 of Law no 91 of 1992 could not be interpreted as exonerating persons under supporting administration from the oath of citizenship, and so deemed the lack of an exoneration to be incompatible with the Constitution.

3. To decide on the merits, the Constitutional Court affirmed the referring court's interpretation, according to which Art 411 of the Civil Code cannot be applied in cases such as the one at hand.

The referring court challenged the violation of Art 2 of the Constitution, which protects inviolable human rights, and Art 3, para 2, which provides for the duty of the Republic to remove the social and economic obstacles impeding the full de-

velopment of each person. It also referred to Art 3, para 1, which prohibits discrimination on the ground of 'personal conditions', because also disability, which deserves special protection under Art 38 of the Constitution, must be included among these personal conditions.

The Constitutional Court endorsed these conclusions. Art 10 of Law no 91 of 1992 was thus considered discriminatory on the ground of disability, as it denied in effect naturalization to a person fulfilling all other requirements only because, being a mentally disable person, he/she could not take the oath. By excluding a disabled person from citizenship, it marginalized him/her from society and might marginalize him/her also in the family environment if the other family members were able to naturalize.

Therefore, all persons suffering from documented severe mental disabilities must always be exempted from the oath of citizenship, regardless of the legal classification of their conditions in terms of interdiction, support administration, mere natural incapacity, etc.

4. Art 10 of Law no 91 of 1992 was thus declared unconstitutional, insofar as it did not exempt mentally disabled persons from the oath of citizenship.

The Court of First Instance of Modena, on 13 February 2018, has already had an opportunity to implement the Constitutional Court's judgment, exempting a Moroccan-born mentally disabled person from the need to take the oath of citizenship for the purpose of naturalization.

The full text of the English translation of the Conclusions on points of law is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_258_2017_EN.pdf.

Judgment 26 September – 13 December 2017 no 262*

(Conflict of Attribution Between Branches of the State)

KEYWORDS: Constitutional Bodies – Internal Regulations – Self-Adjudication (Autodichia) – Labour Disputes – Compatibility with the Constitution.

1. The Constitutional Court was called to rule upon the constitutional dispute between the Court of Cassation, on one hand, and the Senate of the Republic and the President of the Republic, on the other, with regard to their internal regulations (Arts 72-84 of the Rules of the Administration concerning the staff of the Senate of the Republic and Arts 1 of Presidential Decree 24 July 1996 no 81, modified by Presidential Decree 30 December 2008 no 34) that established *ad hoc* internal dispute resolution bodies to settle disputes with their members of staff, reserving to the latter the power to adjudicate this type of dispute.

2. According to the case law of the Constitutional Court, the internal regulations of the constitutional bodies could not be subject to judicial review (Judgement no 154 of 1985), and thus could only be reviewed in the constitutional disputes between branches of State (Judgement no 120 of 2014). For this reason, the Court of Cassation brought two applications before the Constitutional Court, on the assumption that the abovementioned rules violated the staff members' rights to legal protection and to a fair trial conducted by an impartial judge (Arts 3, para 1; 24, para 1; 102, para 2; 108, para 2; 111, paras 1 and 2, of the Constitution), and resulted in an en-

* By Antonello Lo Calzo.

croachment upon its own sphere of competences, as it was prevented from engaging in the judicial review of such cases. In both applications, the referring court asked the Constitutional Court for a holding on the delimitation of the power of self-adjudication relating to the Senate of the Republic and the President of the Republic.

3. After confirming that the applications were admissible both from an objective and subjective point of view, the Constitutional Court focused on its functions in cases concerning jurisdictional disputes between branches of the State. The Court 'is not called upon to adjudicate individual questions concerning the constitutionality of regulations, raised in relation to specific constitutional parameters, but rather to ensure a constitutional distribution of competences among the conflicting bodies'; for these reasons, the violation of constitutional parameters concerning individuals rights could be asserted only if the applicant manages to substantiate the impact of the alleged violations on its sphere of constitutional competence.

4. On the merits, the Court held both applications to be unfounded. The Court declared that self-adjudication is a traditional expression of the autonomy of the constitutional bodies, 'one of the conditions (…) for the free and efficient execution of their functions'. Self-adjudication is closely linked to the rule-making autonomy of the constitutional bodies, which are allowed to regulate their functions, only to the extent that the same are not regulated by the Constitution, but also their modes of internal organization. Such rule-making autonomy, in the opinion of the Court (Judgement no 129 of 1981), has an implied constitutional ground that requires constitutional bodies to be able to carry out their functions independently of the other branches of the State. This autonomy, at the same time, is the foundation of the labour regulations applying to their staff members: in fact, 'good exercise of the high constitutional functions granted to the constitutional bodies in question depends to a crucial degree on how their personnel is selected, regulated, organized and managed'.

Therefore, self-adjudication is a direct consequence of rule-making autonomy. This concept cannot be limited to 'the creation of rules, but also includes (…) the application of those rules'. Once the Senate and the President of the Republic have provided for the regulation of their employment relationships with their staff members through their own sources of law, self-adjudication 'amounts to the logical fulfilment of the organizational autonomy of the constitutional bodies in question, in relation to their necessary bureaucracies, the organization and management of which is thus removed from any external interference'. Indeed, it would be unreasonable to vest, in certain organs, the power to adopt their own internal regulation while reserving to courts the power to enforce it.

For this reason, self-adjudication 'does not violate the constitutionally allotted competences of others inasmuch (…) as it concerns the employment relationships with staff members'.

5. The Court outlined, however, two limits.

First, the protection of employees must be in any case assured, through internal bodies that do not belong to the judiciary. These bodies are constitutionally justified only if they comply with the requirements of independence and impartiality, in accordance with the principles

enshrined in Arts 3, 24, 101 and 111 of the Constitution and with the Judgement delivered by the European Court of Human Rights in *Savino* v *Italy*, on 28 April 2009. In particular, internal regulations must provide rules on incompatibility, so as 'to prevent a situation in which the same person can contemporaneously take part in both the administrative body that oversees personnel (…) and the self-adjudicatory bodies', to ensure an adequate technical competence of the judges, and to respect procedural requirements aiming at 'guaranteeing the right of defence and an effective adversarial process'. Only in this way, does the limitation of the right to a judge not amount to a denial of such right. In the light of these principles, the Constitutional Court amended its internal Regulation on personnel disputes on 24 January 2018.

Second, self-adjudication is admissible only for employment relationships. For this reason, constitutional bodies are not entitled 'to regulate legal relationships with third parties or to reserve to their own self-adjudicatory bodies jurisdiction over potential disputes involving their rights and entitlements': these kinds of disputes must be reserved to the common jurisdiction.

6. In the light of these premises, the Constitutional Court declared that the Senate and the President of the Republic are entitled to adopt the challenged rules inasmuch as they refer to the adjudication of labour disputes brought by their own staff members before internal adjudicatory bodies.

The full text of the English translation of the Conclusions on points of law is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_262_2017_EN.pdf.

Judgment 22 November – 14 December 2017 no 268*

(Incidental Review of Constitutionality)

KEYWORDS: Vaccinations – Compensation for Irreversibly Injured Individuals Due to Mandatory Vaccinations – Recommended Vaccination – Lack of Indemnity – Unconstitutionality.

1. The Court of Appeal of Milan raised a question of constitutionality of Art 1, para 1, of Law 25 February 1992 no 210, which grants an indemnity to individuals in case of irreversible injuries due to mandatory vaccinations, transfusions and administration of blood products.

2. After undergoing the influenza vaccination, that was highly recommended by the Minister of Health and by the competent medical centre, a retired man developed Parsonage Turner Syndrome because of the vaccination. Both the Minister of Health and the medical centre denied the indemnity. The question was raised before the Court of First Instance of Milan, which recognized that the recommendation of the influenza vaccination was directed to the target category of people of the same age as the claimant. Therefore, the Court allowed the indemnity to be granted by interpreting Art 1 of the Law in accordance with the Constitution and with the Constitutional Court's case law. Indeed, the Constitutional Court's precedents already recognized the right to indemnity. As affirmed by Judgement no 107 of 2012 (see also judgements no 226 of 2000, no 118 of 1996, no 258 of 1994, and no 307 of 1990), indemnity is also due in cases in which 'the injury was derived from a non-

* By Giulia Terlizzi.

mandatory vaccine treatment, but rather recommended by the National Health Institution in order to protect public health, and precisely, from vaccination against measles, parotids and rubella.'

The Minister of Health seized the Court of Appeal to challenge this interpretation, because the provision only referred to mandatory (and not recommended) vaccinations. The Court of Appeal raised the question of constitutionality of this provision, assuming its incompatibility with Arts 2 (right to solidarity), 3 (right to equality) and 32 (right to health) of the Constitution. As stated by the Court of Appeal, Art 1, para 1, of the Law did not provide 'a right to an indemnity, established and regulated by the same law and under the conditions laid down therein, also for those who (had) suffered injuries and/or infirmities, from which irreversible damage to psychophysical integrity (had) been caused, for having been subjected to non-mandatory, but recommended, influenza vaccination.' With regard to Art 2 of the Constitution, in fact, if the patient was denied an indemnity, the negative effects of a disease derived from a treatment, promoted in the public interest, lay entirely on the patient who accepted the treatment. This situation might cause discrimination for those subjects who subscribed to health programmes recommended by a national campaign compared to those who underwent mandatory vaccination, in violation of Art 3 of the Constitution. Such a situation, moreover, posed a serious risk of violating the right to health (Art 32 of the Constitution), particularly for the old and weaker parts of the population.

3. The issues arising in the case before the Court were of the utmost importance. First, the interpretation of the meaning of 'recommended vaccination' and 'mandatory vaccination'. Second, the need to find a balance between the protection of the individuals' right to health and the protection of a collective right to health (both taken into account in Art 32 of the Constitution).

4. The Constitutional Court first explained that mandatory vaccinations differ from mere recommendations under the profile of the relationship between the individual and the health authority. For mandatory vaccinations, the freedom of self-determination is restricted by virtue of a statutory provision accompanied by a sanction. The treatment is thus aimed at improving health conditions not only for the patient, but also for the community, in order to protect a right, conceived as a societal interest. For that reason, this type of vaccinations is not incompatible with the right to health of Art 32 of the Constitution. For recommended vaccinations, on the contrary, health authorities act through a public campaign within a health policy programme. This type of vaccinations concerns the freedom of self-determination of the individual.

5. Despite these differences, the Constitutional Court resolutely affirmed that no distinction should be made, since both the obligation and the recommendation pursue the same goal, ie safeguarding health conceived as an interest, which also has a collective dimension. The Court stressed that recommended vaccinations in the context of broad advertising campaigns inevitably generate trust among the population. The influenza vaccine undoubtedly fell among the vaccinations recommended in the programmes disseminated by the Ministry of Health. In this view, the choice to follow the recommendation corresponded to conduct aimed at safeguarding the health of the

community, beyond the underlying personal motivation. Therefore, according to the interests protected by Arts 2, 3 and 32 of the Constitution, the Court legitimated the choice to place, upon the community, the burden of the negative effects derived from individual choices, in accordance with the preeminent right/duty of 'social solidarity'.

6. The reason to grant indemnity does not lie in the mandatory nature of the treatment, but rather with the 'duty of solidarity' imposed upon the entire community for the negative effects suffered by a person as a consequence of a health treatment (whether mandatory or recommended) undertaken also in the interest of the community.

7. The lack of a right to indemnity in cases of non-curable diseases deriving from specific recommended vaccinations, led the Constitutional Court to declare Art 1 of Law no 210 of 1992 unconstitutional insofar as it did not provide for the payment of an indemnity in relation to impairment caused by the influenza vaccination.

The text of the English translation of the Conclusions on points of law is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_268_2017_EN.pdf.

Judgment 7 November – 14 December 2017 no 269*

(Incidental Review of Constitutionality)

KEYWORDS: Competition and Market Authority – Financial Contributions in Favour of the Authority – Obligation Regarding High-Revenue Companies – Exclusion for Other Subjects – Unfounded and Inadmissible Questions of Constitutionality.

1. The issue brought before the Constitutional Court concerned the constitutionality of Art 10, paras 7-ter and 7-quater, Law 10 October 1990 no 287, providing rules on competition, the growth of infrastructure, and competitiveness. In particular, the challenged provision imposed a financial contribution in favour of the Competition and Market Authority only to companies having an annual revenue exceeding fifty million euros. The contribution was proportional to the revenue, but a maximum limit on this contribution was also imposed.

2. The Tax Commission of Rome, by means of two orders, raised the following questions. First, with regard to the exclusion of subjects other than private entrepreneurs, such as consumers and public administrations, from the obligation to pay the financial contribution, the referring court argued that an infringement of Arts 3 (principle of equality) and 53 (providing the general obligation to participate in the state expenditure in proportion to contributive capacity) of the Constitution had occurred. In fact, since the activity of the Competition and Market Authority also benefits the abovementioned categories, the exemption of these subjects from the obligation to pay the contribution would be unreasonable. Second, the limit imposed on the maximum contribution would violate the principle of progressivity of the tax system enshrined in Art 53, as it would result, in proportion, in lower pressure on entrepreneurs with a greater economic power. Third, annual revenue is an unfit parameter to determine contributive capacity, as it does not take into consideration losses, and thus the actual entrepre-

* By Sira Biagia Grosso.

neurs' wealth, with the consequent infringement of Art 53. Finally, according to the referring court, the challenged provisions would also violate Art 23 of the Constitution ('no taxation without representation'), insofar as they vested, in the Competition and Market Authority, the power to establish the specific amount of a financial contribution, while this would be a power reserved to the Parliament.

In a second order, the judge also alleged that a violation of Arts 49 and 56 of the Treaty on the Functioning of the European Union had occurred.

3. The Constitutional Court declared unfounded the questions concerning the alleged violation of Arts 3, 23 and 53 of the Constitution.

First, the Court excluded the violation of Arts 3 and 53. The Court considered that high-annual-revenue entrepreneurs are the main recipients of the Competition and Market Authority's activity. Therefore, as they determine most of the Authority's interventions, greatly affecting the Authority's expenses, the imposition of the financial contribution only on high-annual-revenue entrepreneurs would not be unreasonable.

Second, according to the Constitutional Court, the annual revenue represented a reasonable parameter for triggering the financial contribution at issue, inasmuch as – as said above – the business volume of the entrepreneurs is related to the functioning of the Authority, and thus its expenses.

The Constitutional Court also excluded the violation of Art 23, as the law, and not the Authority, establishes both the object of the contribution and the subjects from whom this contribution is due. The attribution to the Authority of the power to determine the sole amount of the contribution would not violate the principle of legality in the area of taxation.

4. Finally, the Constitutional Court declared inadmissible the referral order that alleged a violation of EU law. In accordance with its case-law (Judgment no 170 of 1984), the Court stated that the referring court had to assess whether the challenged provisions violated EU law, taking into account that, in case of conflict with a provision having direct effects, courts have to apply EU law without referring the issue to the Constitutional Court. Therefore, the principle according to which courts must automatically set aside provisions of national law conflicting with EU law was confirmed by this judgment. However – as obiter dictum – the Constitutional Court carved out an exception to the mentioned principle, stating that courts were obliged to raise a question of constitutionality before the Court whenever the violation concerns fundamental rights deriving from EU law.

The full text of the English translation of the Conclusions on points of law is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_269_2017_EN.pdf.

Judgment 6 December – 14 December 2017 no 271*

(Incidental Review of Constitutionality)

KEYWORDS: Mortgage – Judicial Reduction of Mortgage – Lack of Provisions Allowing Reduction by Interlocutory Injunction – Constitutionally-Oriented Interpretation – Unfounded Question of Constitutionality.

1. The issue raised before the Constitutional Court regards the validity of Arts

* By Shaira Thobani.

2877, para 2, and 2884 of the Civil Code, interpreted as not allowing the grantor to obtain the reduction of the mortgage in interlocutory proceedings initiated under Art 700 of the Code of Civil Procedure. According to the Court of First Instance of Padua, which raised the question of constitutionality, such norms would be inconsistent with Art 3 (principle of equal treatment) and Art 24 (right to defence) of the Constitution.

2. Italian law allows for the reduction of mortgages by reducing the sum of money for which the mortgage was registered, or by reducing the mortgage to only part of the goods. The debtor has the right to reduce the mortgage if the registered sum exceeds the value of the credit by one fifth, or if the value of the goods exceeds the value of the credit by one third. This disproportion can derive, for instance, from partial payments made by the debtor, or from the registration of an illiquid credit for an amount that is excessive compared to the presumed value of the credit.

If the creditor does not accept the reduction of the mortgage, the debtor, the grantor or other creditors can seize the court seeking an order of reduction. It is disputed, however, whether such an order can only be issued as a judgment following full contentious proceedings or also as an injunction following interlocutory proceedings initiated under Art 700 of the Code of Civil Procedure. Art 2877, para 2, of the Civil Code, regarding the burden of expenses for the reduction of mortgages, only refers to judgments. Art 2884 states that mortgages shall be canceled following a final judgment or other final court rulings.

Under a strict interpretation, Art 2884 should also apply to the reduction of mortgages, with the consequence that only final rulings, and not interlocutory injunctions, could bring about the reduction. According to this view, the reduction would indeed result in a partial cancellation of the mortgage and the creditor would risk serious impairment of his/her rights (ie losing the security) if the mortgage were to be reduced following summary proceedings.

A contrary interpretation underscores the difference between the cancellation and the reduction of mortgages: the reduction should not be conceived as a partial cancellation, but rather as a mere rectification of the mortgage. Indeed, cancellation is the product of radically different circumstances from those giving rise to reduction, as it derives from the extinction of the mortgage or from the fact that the creditor did not have the right to register the mortgage in the first place. Art 2884, requiring a final ruling for the cancellation of mortgages, should therefore not apply to the reduction of mortgages, which could also be ordered by means of interlocutory injunctions. Moreover, the reference to a 'judgment' provided for by 2877, para 2, is not circumscribed to final judgments and should be interpreted broadly as a 'court ruling'. To the same end, other scholars emphasize that even interlocutory injunctions should be included in the 'final judgments' mentioned in Art 2884. Following a reform of the Code of Civil Procedure in 2005, certain types of interlocutory injunctions remain valid and effective even in the event that a final ruling does not follow (Art 669-octies, para 6, of the Code of Civil Procedure). In these cases, interlocutory injunctions could be deemed 'final judgments' for the purposes of Art 2884.

3. The referring court adhered to the stricter interpretation, thus not allowing the judge to order the reduction of mort-

gages following interlocutory proceedings. The court argued this to be inconsistent with Art 3 of the Constitution, as it would not be coherent with other provisions allowing the judge to prevent creditors form seizing an excessive amount of their debtor's assets in enforcement proceedings. It also argued that requiring res iudicata to modify the registration of the mortgage would hardly be coherent with the fact that the registration of the mortgage is a mere act of the creditor. This would also impair the right of defence as enshrined in Art 24 of the Constitution, as the debtor would be deprived of a rapid and effective means to protect their assets against creditor.

4. The Constitutional Court implicitly recognized that this interpretation could be unconstitutional. However, it underlined that a different interpretation – adopted by both lower courts and legal scholars – is possible, allowing for the reduction of mortgages on the basis of interlocutory proceedings initiated under Art 700 of the Code of Civil Procedure. This interpretation grants full compliance with the principle of equality and the right to defence and is therefore consistent with the Constitution.

As is well established, a legal provision cannot be declared unconstitutional if it is possible to interpret it in a manner that is consistent with the Constitution. This result can be achieved if, as it was in the case at issue, the wording of the challenged provisions is not such as to prevent the judge from giving a constitutionally oriented interpretation. This approach is based, on the one hand, on the need to avoid legal gaps, which would result from the declaration of unconstitutionality, and, on the other, on the duty to interpret legal provisions in accordance with the Constitution.

5. The question of constitutionality was therefore declared unfounded, since Art 2877, para 2, and 2884 of the Civil Code could be interpreted in a way which respected the principle of equality and the right to defense, namely by allowing the judge to order the reduction of mortgages by means of an interlocutory injunction ordered under Art 700 of the Code of Civil Procedure.

Judgment 22 November – 14 December 2017 no 272*

(Incidental Review of Constitutionality)

KEYWORDS: Filiation – Recognition as a Biological Child – Challenge – Child's Best Interest as Essential Requirement – Unfounded Question of Constitutionality.

1. The issue raised by the Court of Appeal of Milan before the Constitutional Court concerned the constitutionality of Art 263 of the Civil Code with reference to Arts 2, 3, 30, 31 and 117 of the Constitution, the latter in relation to Art 8 of the European Convention on Human Rights and Fundamental Freedoms.

2. The proceedings before the Court of Appeal of Milan concerned an application challenging the recognition of a parent-child relationship with regard to a child born abroad through surrogacy.

The court challenged the provision to be applied, namely Art 263 of the Civil Code, insofar as it did not provide that a challenge to the recognition of an underage child on the grounds that he was not in actual fact the biological child might only be accepted where this reflected the child's best interests. According to the interpretation of the referring court, Art

* By Barbara Borrillo.

263 did not allow, within proceedings to challenge recognition as a biological child, specific consideration to be given to the child's interest 'in obtaining recognition for and the maintenance of his or her parent-child relationship as most closely reflect(ed) his or her life needs'.

3. The Constitutional Court declared the question unfounded, ss the interpretation of the challenged provision by the referring court could not be endorsed.

Whilst a marked preference was expressed by the legal order that the status of an individual should reflect the actual circumstances of his or her procreation, the Constitutional Court stated that it could not be asserted that the establishment of the biological and genetic parentage of an individual was a value of absolute constitutional significance, as such immune from any balance. Indeed, the current legislative and systemic framework, under both internal and international law, did not require, within actions seeking de-recognition of filiative status, that such a finding should have absolute priority over all other interests at stake. In all cases in which the genetic identity may differ from the legal one, the requirement to strike a balance between the need to establish the truth and the best interests of the child was apparent from the evolution of the law over time, as the challenged Art 263 itself, among other relevant provisions, could demonstrate. Indeed, the provision was challenged in the version that was applicable ratione temporis, that which was in force prior to the amendments introduced by Legislative Decree 28 December 2013 no 154, which limited the exclusion of time-barring exclusively to actions brought by the child, thus providing for limits on all other potential claimants.

4. In light of the principles underlying the legislative framework and the relevant case law at both national and supranational levels, the Constitutional Court recognized that he need to give specific consideration to the child's best interests in the context of all decisions affecting him or her was strongly rooted in the legal order, and the Court itself had long contributed to this degree of consolidation.

It was consequently not apparent why, when confronted with an action pursuant to Art 263 of the Civil Code, with the exception of those brought by the child him- or herself, the court should not assess, first, whether the applicant's interest in giving effect to the truth should prevail over that of the child; second, whether that action is genuinely capable of realizing that interest; third whether the interest in the truth also has public significance (for example, insofar as it relates to practices that are prohibited by law, such as surrogacy, which causes intolerable offence to the dignity of the woman and profoundly undermines human relations) and requires that the child's best interests be protected insofar as consistent with that truth.

The Constitutional Court highlighted that there are also cases in which a comparative assessment of the interests is carried out directly by the law, such as the prohibition on de-recognition following heterologous fertilization. In other cases, instead, the legislator imposes a mandatory requirement to acknowledge the truth by imposing prohibitions such as the ban on surrogacy. However, none of this entails the negation of the child's best interests. Also for actions seeking the de-recognition of filiation, the legislator has charged the specialist court with the task of assessing the child's interest in the initiation of such action even before the ac-

tion is brought, albeit subject to the limits resulting from the non-public status of the proceedings.

Thus, whilst it is not acceptable under constitutional law for the requirement of truth concerning parentage to prevail automatically over the child's best interests, it must also be asserted that the balancing of that requirement against that interest must not entail the automatic negation of one in favour of the other.

On the other hand, this balance entails a comparative assessment of the interests underlying the ruling concerning the true status, along with the consequences that such a finding may have for the legal status of the child.

It is therefore necessary to carry out a comparative assessment which, as the law is silent concerning this matter, necessarily involves a consideration of the high level of social harm that the Italian legal system associates with surrogacy, which is prohibited by a specific provision of criminal law.

5. The need to balance interests led the Constitutional Court to declare the question concerning the constitutionality of Art 263 of the Civil Code unfounded.

The full text of the English translation of the Conclusions on points of law is available at www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_272_2017_EN.pdf.

Judgment 8 November – 14 December 2017 no 275*

(Incidental Review of Constitutionality)

KEYWORDS: Immigration – Delayed Refoulement with Forced Escort to the Borders – Obiter Dictum on the Infringement of Personal Freedom – Lack of Impact on the Case – Inadmissible Question of Constitutionality.

* By Mimma Rospi.

1. The question raised before the Constitutional Court by the Court of First Instance of Palermo concerned Art 10, para 2, of Legislative Decree 25 July 1998 no 286 (Consolidated Law concerning regulations on immigration and rules on the condition of aliens), that was challenged for inconsistency with Arts 10, para 2; 13, paras 2 and 3; and 117, para 1, of the Constitution, the latter in the light of the alleged violation of Art 4, para 4, of Directive no 2008/115/EC of 16 December 2008.

2. Legislative Decree no 286 of 1998 establishes two different kinds of the so-called 'delayed' refoulement of an alien. The first one occurs when the alien is stopped by the border police while crossing the border or immediately afterwards, the second when the alien is undocumented but is temporarily admitted on the State's territory because of her/his need of public aid: the refoulement with forced escort to the border is ordered by the commander of the local police.

The party to the proceedings before the referring court was subject to 'delayed' refoulement, and challenged the provision. The same, however, was then subject to another order, based on Art 14, para 5-bis, of Legislative Decree no 286 of 1998, that obliged him to leave the national territory within seven days, so as to put an end to his irregular stay.

According to State Counsel, because of the second order, the first was deprived of effects: therefore the question raised before the Constitutional Court lacked concrete impact on the party's legal status.

3. The Constitutional Court upheld the State Counsel's exception of irrelevance. The Court established that the forced escort to the border embodies one

of the two executive forms of deportation or refoulement and does therefore constitute an alternative measure to the order to leave the territory. As a result, the first order became void because of the second one.

As a matter of fact, the order of forced escort to the border is an urgent measure and must thus be performed immediately. If this order was deferred, the police could restrict an alien's personal freedom (since the forced escort was considered in Judgment no 222 of 2004 a limitation of personal freedom) at any time, without judicial control.

4. While declaring the question of constitutionality inadmissible because of the lack of relevance, the Constitutional Court, in an obiter dictum, warned the legislator to modify the provisions concerning the 'delayed' refoulement with forced escort to the border, in order to take into account its impact on personal freedom, and therefore the need to comply with Art 13, para 3 of the Constitution, according to which 'in exceptional cases of necessity and urgency, strictly defined by the law, law enforcement authorities may adopt temporary measures that must be communicated to the judicial authorities within forty-eight hours. Should such measures not be confirmed by the judicial authorities within the following forty-eight hours, they shall be revoked and deemed null and void'.