JUDGMENT NO. 49 YEAR 2015

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 44(2) of Presidential Decree no. 380 of 6 June 2001 (Consolidated text of legislative and regulatory provisions in the area of construction – Text A), initiated by the *Tribunale di Teramo*, sitting as a single judge, by the referral order of 17 January 2014 and the third criminal division of the Court of Cassation by the referral order of 20 May 2014, registered respectively as no. 101 and no. 209 in the Register of Referral Orders 2014 and published in the Official Journal of the Republic no. 26 and no. 48, first special series 2014.

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

having heard the Judge Rapporteur Giorgio Lattanzi in chambers on 14 January 2015.

[omitted]

Conclusions on points of law

1.– By the referral order of 20 May 2014 (Register of Referral Orders no. 209 of 2014), the third criminal division of the Court of Cassation raised with reference to Articles 2, 9, 32, 41, 42 and 117(1) of the Constitution a question concerning the constitutionality of Article 44(2) of Presidential Decree no. 380 of 6 June 2001 (Consolidated text of legislative and regulatory provisions in the area of construction – Text A) insofar as it prohibits confiscation in accordance with spatial planning provisions “in the event that the offence has been declared time-barred, even if criminal responsibility has been established in all respects”.

The contested provision stipulates that “A final judgment of a criminal court that establishes that unlawful parcelling has occurred shall order the confiscation of the land unlawfully parcelled and of the works unlawfully built”.

The referring court has been seized with an appeal filed by various parties against a judgment of the Rome Court of Appeal which, having held that the time-barring period for the offence had elapsed, nonetheless ordered the confiscation of the properties unlawfully parcelled in accordance with spatial planning provisions, including against third party buyers of those properties. Having found that it was unable to acquit the accused pursuant to Article 129 of the Code of Criminal Procedure, the referring court observed that the head of the merits judgment concerning confiscation was to be confirmed as the case file did not contain any "incontrovertible indications capable of excluding the possibility" that the buyers "could be classified as third parties acting in good faith", as the court at first instance had duly illustrated. Thus, according to its traditional interpretation by the Court of Cassation, Article 44(2) of Presidential Decree no. 380 of 2001 should have resulted in the confiscation of the plots in parallel with the criminal judgment ruling that the offence was time-barred.

However, the Court of Cassation considered that, on account of the judgment by the European Court of Human Rights of 29 October 2013 in *Varvara v. Italy* (application no. 17475 of 2009), the contested provision has now taken on a meaning such as to preclude the confiscation of property unless a conviction for the offence of unlawful parcelling is imposed.

This meant that the measure can no longer be adopted once the offence has become time-barred, even if the individual responsibility of the person subject to confiscation has been or may be established as an incidental matter.

This aspect appears to the referring court to contrast with Articles 2, 9, 32, 41, 42 and 117(1) of the Constitution insofar as it results in a form of hyper-protection for the right of property, notwithstanding that the unlawful property does not perform any function of social utility (Articles 41 and 42 of the Constitution), resulting in the sacrifice of higher-ranked constitutional principles, namely the right to develop the human personality within a healthy environment (Articles 2, 9 and 32 of the Constitution).

2.– By the referral order of 17 January 2014 (Register of Referral Orders no. 101 of 2014), the *Tribunale di Teramo*, sitting as a single judge, raised a question concerning the constitutionality of Article 44(2) of Presidential Decree no. 380 of 2001, with reference to Article 117(1) of the Constitution, the latter in relation to Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

(hereafter ECHR), signed in Rome on 4 November 1950 and ratified and implemented by Law no. 848 of 4 August 1955, insofar as it allows confiscation in accordance with spatial planning provisions of land unlawfully parcelled and of the works built thereupon to be ordered "also in a judgment ruling that the offence is no longer punishable on the grounds of time-barring".

The referring court states that the proceedings pending before it involve a prosecution for the offence of unlawful parcelling of an accused person whose responsibility had been established in the oral stage. However, it adds, the offence has become time-barred, with the consequence that it is necessary to issue a judgment of *nolle prosequi*. On the basis of the uniform and settled case law [*diritto vivente*] relating to the provision in question, it would also be necessary to order the confiscation of the properties parcelled, given that for this purpose it is sufficient that the responsibility of the expropriated person be established, a criminal conviction not being required. In fact, the wording of the contested provision does not mention such a conviction, but only a finding of unlawful parcelling.

However, the referring court considers that this rule, which had previously been well established, conflicts with Article 7 ECHR, according to the interpretation most recently adopted in the judgment *Varvara v. Italy*. In this decision, the Strasbourg Court is asserted to have held that confiscation in accordance with spatial planning provisions ordered at the same time as a judgment ruling that the offence is no longer punishable on the grounds of time-barring, and thus in which no conviction is imposed, does not comply with the principle of no punishment without law.

This contrast has given rise to the question of constitutionality currently before this Court, as the referring court has concluded that it is not possible to resolve the issue through interpretation.

3.– The questions are related as they relate to the same provision and raise similar problems. It is therefore appropriate to order that the cases be joined for decision in a single judgment.

4.– The question of constitutionality raised by the Court of Cassation is inadmissible, first and foremost because it mistakenly refers to Article 44(2) of Presidential Decree no. 380 of 2001 rather than Law no. 848 of 4 August 1955 (Ratification and implementation of the European Convention for the Protection of Human Rights and

Fundamental Freedoms, signed in Rome on 4 November 1950, and the Additional Protocol to the Convention, signed in Paris on 20 March 1952), insofar as it implemented a provision the constitutionality of which is questioned, namely the prohibition on imposing confiscation in accordance with spatial planning provisions unless it is accompanied by a criminal conviction.

In fact, this Court has already clarified that the sub-constitutional status of the ECHR demands that the rules derived from it be compared with the Constitution and that since any resulting doubt regarding constitutionality cannot relate to the legitimacy of the Convention, it must be raised with reference to the national law implementing it (see Judgments no. 349 and no. 348 of 2007; followed by Judgment no. 311 of 2009).

The referring court is convinced that, following the adoption of the judgment in *Varvara v. Italy*, Article 44(2) of Presidential Decree no. 380 of 2001 must be ascribed – through interpretation – the meaning which the Strasbourg Court is claimed to have given to it and that, precisely as a result of such a process of adaptation, that meaning attracts doubts as to its constitutionality.

This manner of argumentation is mistaken in two senses.

In the first place, it presupposes that it is for the Strasbourg Court to determine the meaning of the national law whereas, on the contrary, the European Court must assess whether the national law, as defined and applied by the national authorities, has led to violations of the higher provisions of the ECHR in the cases brought before it for examination. This means that it is the ECHR, and not the national law, which is open to interpretation by the European Court on a constant and settled basis.

Naturally, it is not a matter for discussion that, once it has taken on this dimension, it falls to the courts to ascribe a meaning to the provision of national law that comes as close as possible to that endorsed by the European Court (see Judgment no. 239 of 2009), provided that it is not entirely incompatible with the wording of the law (see Judgments no. 1 of 2013 and no. 219 of 2008).

However, and secondly, the referring court fails to consider that the duty of the ordinary courts to interpret national law in a manner compatible with the ECHR, as noted above, is obviously subordinate to the priority task of reading the law in a manner compatible with the Constitution, as this manner of proceeding reflects the axiological

predominance of the Constitution over the ECHR (see Judgments no. 349 and no. 348 of 2007).

On most occasions, the convergence sought by legal practitioners and constitutional and international courts around shared approaches regarding the protection of inviolable human rights will offer a solution to the specific case which is capable of reconciling the principles flowing from both of these sources of law. However, in the highly unlikely event that such a route is blocked, it is beyond doubt that the courts will be required to abide first and foremost by the Constitution.

Thus, in the case brought before this Court for examination, the referring court could not have ascribed Article 44(2) of Presidential Decree no. 380 of 2001 through interpretation with a meaning which the Court of Cassation itself deems to be unconstitutional. The inconsistency which is alleged to have arisen between national law interpreted in line with the Constitution – which is thus settled in holding that confiscation in accordance with spatial planning provisions does not require a criminal conviction – and the ECHR – which in the opinion of the referring court sets forth the opposite rule – should thus have been resolved by questioning the constitutionality of the implementing law as it is that law which permits the incorporation of such a rule into Italian law.

5.– The question of constitutionality raised by the Court of Cassation is inadmissible also due to a failure to state reasons as to its relevance.

As noted above, the referring court considers that, solely as a result of the *Varvara* judgment, it is now not possible to impose confiscation in accordance with spatial planning provisions against the third party buyers of the properties parcelled. On the other hand, had this judgment not been adopted, it would have been required to confirm the head of the merits court judgment ordering the appropriation of the property, notwithstanding that the offence had become time-barred. The reason given for the applicability of the legal rule inferred from the case law of the European Court to which the question of constitutionality pertains thus relates to the argument that, in the present case, the rule precludes a legal consequence in the main trial which would otherwise have arisen. However, it is precisely this reason which proves to be inadequate, as will be explained below.

As is known, confiscation in accordance with spatial planning provisions as provided for under the contested provision is an administrative penalty (see Order no. 187 of 1998), which national case law for a long time considered could be imposed solely on the basis of the fact that the work was objectively unlawful, and that it was thus not subject to any requirement to establish the responsibility of the person suffering the effects of the measure.

This Court has already held (see Judgment no. 239 of 2009) that the situation has changed following the Strasbourg Court's judgment of 20 January 2009 in *Sud Fondi srl and others v. Italy*, in which it was ruled that confiscation in accordance with spatial planning provisions amounts to a criminal penalty pursuant to Article 7 ECHR and may therefore only be imposed on a person whose responsibility has been established by virtue of a mental link (awareness and intention) with the offence.

It has also been held under Italian law that the finding may in fact be contained in an acquittal on the grounds that the offence is time-barred which, whilst not convicting the accused person, nonetheless provides adequate grounds to establish the personal responsibility of the person subject to the deprivation of ownership, whether as the perpetrator of the conduct or as the bad faith third-party buyer of the property (see Judgments no. 239 of 2009 and no. 85 of 2008).

Naturally, it is not for this Court to focus on the procedural limits which the law of procedure may from time to time impose on the criminal courts throughout the various stages of the trial with regard to the actions which must be taken prior to a finding that the accused person is responsible, even though a tendency to expand those limits may be discerned within the case law (see for example, judgment no. 38834 of the joint criminal divisions of the Court of Cassation of 10 July 2008). The fact remains that it is not in itself impossible that an acquittal on the grounds of time-barring may be accompanied by a statement of more detailed grounds for responsibility for the sole purpose of the confiscation of the property parcelled (and a confiscation order must be imposed by the criminal court in a final judgment establishing that unlawful parcelling has occurred pursuant to Article 44(2) of Presidential Decree no. 380 of 2001).

It is clear that, once the principle set forth in the judgment in *Sud Fondi srl and others v. Italy* has been incorporated into Italian law and once Article 44(2) of Presidential Decree no. 380 of 2001 has been interpreted in the light of that principle, the provision

of such reasons will not be a right available to the court, but a duty upon compliance with which the lawful nature of the confiscation will be dependent.

Irrespective of whether the measure affects the accused person or a third-party buyer in bad faith who was not involved in the commission of the offence, the criminal court will thus be required to establish the responsibility of the persons against whom the measure is imposed, and must comply with adequate standards of proof and refrain from relying on formal clauses that are not capable of accounting for the assessment actually made.

These considerations clarify that a third party good faith buyer who assumed with good reason that the property was compliant with town planning legislation cannot under any circumstances suffer confiscation. Moreover, it goes without saying that the burden of establishing the bad faith of the third party falls upon the prosecution in criminal trials, given that a "punishment" pursuant to Article 7 ECHR may only be imposed if the presumption of innocence under Article 6(2) ECHR has been rebutted (see *inter alia*, European Court of Human Rights, judgment of 1 March 2007 in *Geerings v. Netherlands*).

Returning to the case at issue in these proceedings, it has already been noted that the Court of Cassation concluded that confiscation may be ordered against the third party buyer (which is prevented by the supervening prohibition supposedly imposed in the *Varvara* judgment), observing that the case file did not contain any incontrovertible indications enabling it to be excluded that the third-party buyers were acting in good faith, referring on this point to the findings of the Court of Appeal in the merits judgment.

Without prejudice to the clear prohibition on supplementing the reasons contained in the referral order *per relationem* (see *inter alia*, Order no. 33 of 2014), it is evident that, in using those expressions, the referring court did not by any means take account of the need to rebut the presumption of innocence of the third party, but rather adopted a diametrically opposite criterion for assessment, which was thus unsuitable as a basis for the confiscation. By contrast, as regards the reasons in support of the relevance of the question it would have been necessary to argue that evidence of responsibility on the part of the third party buyer was obtained because, following the reasoning of the referring court, it would only have been possible to apply the contested legal rule taken from the *Varvara* case in such an eventuality.

On the other hand, in the event that the opposite were the case, confiscation could not have been ordered even in accordance with the "*diritto vivente*" preceding this last judgment by the Strasbourg Court.

6.– The question raised by the Court of Cassation along with that raised by the *Tribunale di Teramo* is also inadmissible on the grounds that both are based on an interpretative assumption which is mistaken on two counts.

Whilst differing as regards the effects which the *Varvara* judgment supposedly generates within the national legal order, both referring courts are convinced that in making this judgment the Strasbourg Court laid down a principle of law which was both innovative and binding on the courts required to apply it by adopting a new approach to the interpretation of Article 7 ECHR.

The first misunderstanding attributable to the referring courts relates to the meaning which they have inferred from the judgment of the Strasbourg Court.

Although the questions were raised, in accordance with the cases at issue in the main proceedings, with specific reference to the prohibition on the adoption of a measure falling under Article 7 ECHR at the same time as a judgment ruling the offence time-barred, it is clear that the principle of law selected by the referring courts is much broader in scope. Ultimately, the European Court is alleged to have asserted that, once a sanction has been classified under Article 7 ECHR, and thus once a "penalty" has been deemed to fall within its scope, it can only be imposed by a criminal court at the same time as a conviction for an offence. As a result, confiscation in accordance with spatial planning provisions – which until now has continued to operate as an administrative penalty under national law, which may be imposed first and foremost by the public administration, albeit buttressed by the guarantees provided by Article 7 ECHR – is claimed to have been incorporated in full into the area of criminal law or, to put it differently, the substantive protection guaranteed by Article 7 is claimed to have been supplemented by a further formal safeguard consisting in the reservation of competence over the application of the measure comprising a "penalty" to the criminal courts, thus meaning that they can only be imposed at the same time as a conviction.

This is claimed to result in a corollary: as soon as the administrative offence, which the legislator distinguishes with broad discretion from a criminal offence (see Order no. 159 of 1994; followed by Judgments no. 273 of 2010, no. 364 of 2004 and no. 317 of 1996;

and Orders no. 212 of 2004 and no. 177 of 2003), was capable of providing self-standing criteria for classifying the "offence" under the ECHR, it would be attracted into the scope of the criminal law of the contracting state. This accordingly supposedly results in a merger between the concept of criminal sanction on national level and that on European level. As a result, the area of criminal law is claimed to have expanded beyond the discretionary evaluations of legislators, even in cases involving sanctions that, whilst minor, would still constitute "penalties" for the purposes of Article 7 ECHR on other grounds (Grand Chamber, judgment of 23 November 2006 in *Jussila v. Finland*).

In asserting this argument, the referring courts do not appreciate that its compatibility both with the Constitution and with the ECHR itself, as interpreted in the rulings of the Strasbourg Court, would be questionable.

6.1.– It cannot pass unnoticed in this regard that the self-standing nature of the administrative offence from criminal law not only impinges upon the broader discretion available to the legislator when putting in place the most effective instruments to ensure that "obligations and duties are effectively imposed" (see Judgment no. 317 of 1996) but also, as far as the scheme of constitutional guarantees is concerned, furthers the "principle of subsidiarity according to which criminalisation, as the last resort, must only occur when adequate protection for the legal interests which need to be guaranteed is not provided by the other branches of the legal order" (see Judgment no. 487 of 1989; followed in Judgment no. 447 of 1998 and no. 317 of 1996). In fact, "[t]he constitutional requirements of protection are not fully complied with […] by (any) criminal protection, and may indeed be satisfied through different forms of orders and penalties" (see Judgment no. 447 of 1998).

This principle, which underlies the criminal policy choices made by the legislator, is moreover in keeping with the development of European case law on the self-standing status of the criteria for assessing the criminal nature of a penalty for the purposes of extending the guarantees offered by Article 7 ECHR beyond the confines imposed by the classification of the sanction under the national legal order.

As is known, since its judgments of 8 June 1976 in *Engel v. Netherlands* and of 21 February 1984 in *Öztürk v. Germany*, the Strasbourg Court has developed specific criteria for establishing when a sanction can be classified as a "penalty" within the

meaning of Article 7 ECHR precisely in order to ensure that the wide-scale processes of decriminalisation which have been launched by the member states since the 1960s do not have the effect of depriving offences of the substantive guarantees assured by Articles 6 and 7 ECHR after decriminalisation (see Judgment 21 February 1984, *Öztürk v. Germany*).

Thus, the discretion of national legislators to stem the proliferation of the criminal law through the recourse to regimes of sanctions considered to be more appropriate, with reference both to the nature of the sanction imposed and the simplified procedures applicable during the initial administrative stage in which the sanction is imposed, has not been called into question. The aim has rather been to avoid this route from resulting in the dissipation of the bundle of protection which had historically been associated with the development of criminal law, the protection of which ECHR is intended to further.

It is within this twin-track approach – under which on the one hand the state's criminal policy choices are not opposed but where on the other hand the detrimental effects of those policies on individual guarantees are kept in check – that the nature of the ECHR is vividly demonstrated as an instrument charged with looking beyond the aspects related to the formal classification of an offence, without however impinging upon the legislative discretion of the states but rather assessing the substance of the human rights in play and safeguarding their efficacy.

It is in fact a consolidated principle that the "penalty" may also be applied by an administrative authority, albeit upon condition that an appeal may be lodged against the decision before a court of law offering the guarantees provided for under Article 6 ECHR, even if it does not necessarily exercise criminal jurisdiction (see most recently the judgment of 4 March 2014 in *Grande Stevens and others v. Italy*, with reference to a sanction considered to be serious). It has been added that the "penalty" may result from the completion of an administrative procedure even without any formal declaration of guilt by a criminal court (see the judgment of 11 January 2007 in *Mamidakis v. Greece*).

It is thus doubtful that the *Varvara* judgment did indeed pursue the path indicated by both of the referring courts by introducing an element of disharmony into the broader ECHR context; moreover, the referring courts did not take any steps to resolve this doubt by using the instruments available to them for that purpose.

The canons of interpretation in accordance with constitutional law and the ECHR must in fact be applied also to the judgments of the Strasbourg Court when it is not possible to infer directly from them – *inter alia* for the reasons set out below – the effective principle of law which the Strasbourg court sought to assert in order to resolve the specific case (see Judgment no. 236 of 2011).

In such situations, which are not common but are nonetheless possible, when confronted with a range of meanings potentially compatible with the signifier, the interpreting body is required to situate the individual ruling within the continuous flow of case law from the European Court in order to infer a meaning from the ruling that can be reconciled with that case law, and which does not under any circumstances violate the Constitution.

In the circumstances described in the *Varvara* judgment, this Court considers that the referring courts were under a duty to engage in such an endeavour and that the failure to do so led them to ascribe a scope to this ruling which by contrast was entirely uncertain, also in the light of the specific individual case.

6.2.– This Court has already held that "Even though it will tend to take on a general value as a statement of principle, a judgment issued by the Strasbourg Court […] will always remain conditional upon the specific circumstances which gave rise to it" (see Judgment no. 236 of 2011).

In the Varvara case, after acknowledging that confiscation had been ordered on the grounds that the parcelling plan was objectively incompatible with spatial planning provisions (paragraph 22), and in spite of the fact that the offence had been time-barred, the Strasbourg Court concluded that the imposition of a "criminal sanction" on the applicant before the offence had become time-barred and his responsibility had been established by a conviction breached the principle of no punishment without law enshrined in Article 7 ECHR (paragraph 72). In fact, this provision is not reconcilable with the punishment of an accused person whose trial has not been concluded with a conviction (paragraph 61).

The question which must be resolved according to the criteria set forth above of interpretation in line with the Constitution and the ECHR thus involves a decision as to whether, when reasoning expressly in terms of a "conviction", the European court had in mind the form of the ruling by the court or the substance which necessarily

accompanies such a ruling where it imposes a criminal punishment pursuant to Article 7 ECHR, that is, a finding of responsibility.

Had the second alternative been the case, there would have been no reason to doubt that it reflects a rule already established within the national legal order (see Judgment no. 239 of 2009), compliance with which is thus dependent not on applicable legislation providing for it but on the way in which it is applied from time to time.

Similarly, it would be anything but innovative as a principle and entirely consistent with the more traditional line of thinking within European case law which, on the basis of the presumption of innocence, does not allow a penalty to be imposed when the responsibility of the person suffering it has not been lawfully ascertained (see *inter alia* the judgment of 1 March 2007 in *Geerings v. Netherlands* on confiscation). Moreover, the lack of any significant innovative features would explain well why the request by the Italian government to submit the Varvara case to the Grand Chamber was rejected.

It can be argued that it is precisely the finding of responsibility which impressed itself on the European Court with reference both to the text and to the logical tone of the reasons provided in the Varvara judgment. In fact, here it is stressed that Article 7 ECHR requires a declaration of responsibility by the national courts so as to enable a conviction for the offence (paragraph 71), as no penalty can be imposed without a finding of personal responsibility (paragraph 69). It is ultimately not possible to conceive of a system that punishes persons who are not responsible (paragraph 66) insofar as they have not been held responsible in a judgment convicting them of the offence (paragraph 67).

Expressions of this type, which are linguistically open to an interpretation that does not require a finding of responsibility exclusively in the form of a criminal conviction, are entirely consistent in logical terms with the Strasbourg Court's function of perceiving the violation of the human right in its tangible dimension, irrespective of the abstract formula used by the national legislator to classify the conduct.

As noted above, under Italian law a judgment finding that an offence is time-barred is not logically or legally incompatible with a full finding of responsibility. Such a finding is in fact necessary in cases involving confiscation in accordance with spatial planning provisions. The decision as to whether or not a finding was made is a question of fact, the resolution of which depends upon whether the confiscation is compliant with the

ECHR (in addition to with national law). This is the task – which is ultimately institutionally vested in it – which the Strasbourg Court performed in this case in finding that a violation of the law had occurred, given that no appropriate finding of responsibility had been made.

Moreover, it must not be neglected that the European Court must be put in a position to make an informed assessment of the judgment ruling the offence time-barred in order to cast light on the content of the ruling which it may make (and which it may already have made in the case before it) in the event that the legislator stipulates this as a prerequisite for the parallel imposition of an administrative sanction.

The important point is thus not the form of the ruling but rather the essence of the finding. When ruling in another case on the compatibility with the presumption of innocence of an order to pay costs notwithstanding the fact that the offence had been time-barred, the Strasbourg Court in fact ruled that it was not able to reach a decision on the dispute on the sole basis of the procedural nature of the judgment adopted by the national court, without assessing the specific reasons given by it (see the judgment of 25 March 1983 in *Minelli v. Switzerland*).

This Court must conclude that the referring courts were not only not required to infer the principle of law on which the current interlocutory questions of constitutionality are based from the Varvara judgment but should also have read the judgment as having the opposite effect. In fact, this judgment is compatible with the text of the decision and the facts of the case ruled upon, which is more in keeping with the traditional logic underpinning the case law of the European Court, and in any case respects the constitutional principle of subsidiarity in the area of criminal law, as well as the legislative discretion over the policy on the punishment of offences, as the case may be opting to classify the sanction as administrative in nature (for internal purposes).

Within the perspective of the Strasbourg Court, the guarantees which Article 7 ECHR offers in relation to confiscation in accordance with spatial planning provisions are certainly mandated by the excessive result which such a measure may lead to beyond the restoration of the breach of the law (see the judgment of 20 January 2009 in *Sud Fondi srl and others v. Italy*), which in turn results from the manner in which that institute is configured under Italian law.

However, they do not detract from the possibility that the power to impose administrative sanctions, which is the task of such a measure prior to any involvement by the criminal courts, may indeed be linked to the public interest in the "construction planning of the territory" (see Judgment no. 148 of 1994), the furtherance of which is a task for the public administration. It is important to add that this interest is by no means foreign to the ECHR perspective (see the judgment of 8 November 2005 in *Saliba v. Malta*).

As things currently stand, unless there are any further developments in the case law of the European court (following the referral to the Grand Chamber of disputes relating to national confiscations based on spatial planning provisions in applications no. 19029/11, no. 34163/07 and no. 1828/06), the argument proposed by the referring courts as a starting point for their doubts concerning the constitutionality of the contested provisions that the Varvara judgment may be unequivocally interpreted to the effect that confiscation in accordance with spatial planning provisions may only be ordered in parallel with a conviction by the courts for the offence of unlawful parcelling must accordingly be concluded to be mistaken.

7.– Moreover, both questions are inadmissible as the referring courts mistakenly considered that they were obliged to implement the principle of law which they had inferred from the Varvara judgment. In this way they attributed a meaning to Article 7 ECHR which could not be directly inferred from that provision, even though the judgment cited above was evidently not an expression of a consolidated interpretation within European case law.

This Court can only reiterate the position stated since judgments no. 348 and no. 349 of 2007, namely that the Strasbourg Court has the "last word" (see Judgment no. 349 of 2007) over all questions concerning the interpretation and application of the Convention and its protocols, as stipulated by the contracting parties in Article 32 ECHR. This amounts to an "eminently interpretative function" (see Judgment no. 348 of 2007) which ensures that, after completing an interpretative comparison involving the community of interpreting bodies in as broad a manner as possible, a rule may be inferred from the Convention provision which is capable of guaranteeing legal certainty and uniformity amongst the states offering a minimum level of human rights protection.

However, it would be mistaken and even at odds with these premises to conclude that the ECHR has turned national legal operators, including first and foremost the ordinary courts, into passive recipients of an interpretative command issued elsewhere in the form of a court ruling, irrespective of the conditions that gave rise to it.

The national court cannot deprive itself of the function assigned to it under Article 101(2) of the Constitution which "expresses the requirement that the courts infer exclusively from the law indications concerning the rules to be applied in proceedings and that no other authority is thus able to issue instructions or provide suggestions to the courts regarding the manner in which they are to rule in specific cases" (see Judgment no. 40 of 1964; followed by Judgment no. 234 of 1976), which also applies to the provisions of the ECHR, which were incorporated into internal law by an ordinary implementing law.

There is no doubt that the ordinary courts cannot refuse to act on a decision by the Strasbourg Court concerning proceedings of which that court is subsequently apprised, where necessary, provided that they put an end, as is their duty, to the harmful effects of the violation found to have occurred (see Judgment no. 210 of 2013). In such an eventuality "the court ruling will remain subject to the law, even if the latter provides that the court must reach its decision having regard to a decision taken in another judgment issued in relation to the same case" (see Judgment no. 50 of 1970).

On the other hand, when it is necessary to set aside such a premise, the fact remains that "The application and interpretation of the system of rules is evidently a matter in the first instance for the member state courts" (see Judgment no. 349 of 2007).

However, this does not mean that the courts can disregard the interpretation made by the Strasbourg Court, once it has become consolidated with a certain effect. In fact, it is a primary requirement of constitutional law that a stable interpretative equilibrium be reached in relation to fundamental rights which is facilitated, as far as the ECHR is concerned, by the role of ultimate arbiter vested in the Strasbourg Court.

This interpretative equilibrium, which is based on Article 117(1) of the Constitution and in any case the interest of constitutional dignity referred to above, must be coordinated with Article 101(2) of the Constitution within the synthesis between the interpretative autonomy of the ordinary courts and their duty to cooperate in ensuring that the meaning of the fundamental rights ceases to be a matter of dispute. It is within this

perspective that the role of the Strasbourg Court may be explained in enabling the objective of legal certainty and stability to be satisfied.

This Court has already clarified, and reiterates here, that the ordinary courts are required to comply with the "consolidated European case law concerning the relevant Convention provision" (see Judgments no. 236 of 2011 and no. 311 of 2009), "in a manner that respects the essence of that case law" (see Judgment no. 311 of 2009; see also Judgment no. 303 of 2011), without prejudice to the margin of appreciation vested in the member state (see Judgments no. 15 of 2012 and no. 317 of 2009).

It is thus only "consolidated law" resulting from the case law of the European Court on which the national courts are required to base their interpretation, whilst there is no obligation to do so in cases involving rulings that do not express a position that has not become final.

Besides, this assertion is not only consistent with constitutional principles, paving the way for constructive dialogue between the national courts and the European Court concerning the meaning to be given to human rights, but is also suited to the organisation of the Strasbourg Court. It is in fact structured into sections, allows dissenting opinions and operates a mechanism capable of resolving contrasts within ECHR case law by referral to the Grand Chamber.

It is thus the ECHR itself that postulates the progressive nature of the formation of case law, incentivising dialogue until the force of argument has resulted in a definitive choice in favour of one approach as opposed to another. Moreover, that perspective does not involve solely a dialectical relationship between the members of the Strasbourg Court, but by contrast – at least ideally – involves all courts required to apply the ECHR, including the Constitutional Court. This is an approach which may in future become even more fruitful in the light of Additional Protocol no. 16 to the Convention, in which the advisory opinion which the European Court may provide, upon request, to the highest national courts is expressly defined as non-binding (Article 5). This feature confirms an option that favours an initial engagement based on argumentation within a perspective of cooperation and dialogue between the courts rather than the hierarchical imposition of a particular interpretation concerning questions of principle which have not yet become established within case law and thus have questionable resolutive status for the national courts.

The very notion of consolidated case law is recognised in Article 28 ECHR which demonstrates that, even under the Convention, it is accepted that the persuasive density of rulings is liable to fluctuate until "well-established case-law" emerges, which "normally means case-law which has been consistently applied by a Chamber", other than in exceptional cases involving questions of principle "particularly when the Grand Chamber has rendered it" (see the explanatory report to Article 8 of Protocol no. 14, which amended Article 28 ECHR).

It is not always immediately clear whether a certain interpretation of the provisions of the ECHR has become sufficiently consolidated at Strasbourg, especially in cases involving rulings intended to resolve cases that turn on highly specific facts, which have moreover been adopted with reference to the impact of the ECHR on legal systems different from that of Italy. In spite of this, there are without doubt signs that are capable of directing the national courts during their examination: the creativity of the principle asserted compared to the traditional approach of European case law; the potential for points of distinction or even contrast from other rulings of the Strasbourg Court; the existence of dissenting opinions, especially if fuelled by robust arguments; the fact that the decision made originates from an ordinary division and has not been endorsed by the Grand Chamber; the fact that, in the case before it, the European court has not been able to assess the particular characteristics of the national legal system, and has extended to it criteria for assessment devised with reference to other member states which, in terms of those characteristics, by contrast prove to be little suited to Italy.

When all or some of these signs are apparent, as established in a judgment which cannot disregard the specific features of each individual case, there is no reason to require the ordinary courts to use the interpretation chosen by the Strasbourg Court in order to resolve a particular dispute, unless it relates to a "pilot judgment" in a strict sense.

The Italian courts will only be obliged to implement the provision identified at Strasbourg in cases involving "consolidated law" or a "pilot judgment" by adjusting their criteria for assessment in line with it in order to resolve any contrast with national law, primarily using "any interpretative instrument available" or, if this is not possible, by referring an interlocutory question of constitutionality (see Judgment no. 80 of 2011). Consequently, and as a general matter, this consolidated law, as an interposed rule, will take on the meaning already established within European case law, which this

Court has in fact repeatedly asserted it cannot "set aside" (see *inter alia* Judgment no. 303 of 2011) save in the exceptional eventuality that it, and thus also the implementing law, is found to violate the Constitution (see *inter alia* Judgment no. 264 of 2012), which is strictly a matter for this Court.

On the other hand, in the event that the ordinary court questions the compatibility of an ECHR provision with the Constitution, it goes without saying that, absent any "consolidated law", this doubt alone will be sufficient to exclude that rule from the potential content which can be assigned through interpretation to the ECHR provision, thereby avoiding the need to refer a question of constitutionality by interpreting the provision in a manner compatible with the Constitution.

7.1.– The referring courts are aware that, according to their reading of the Varvara judgment, it does not reflect any consolidated position within the case law of the European Court. In fact, they openly endorse the innovative force of the supposed incompatibility with Article 7 ECHR of a confiscation order adopted in a judgment which at the same time made a finding of criminal responsibility, but did not impose a criminal conviction.

Within this context, both of the referring courts should have assessed the aspects of constitutional law at issue in the case, starting from the assumption that the Varvara judgment did not require them to construe Article 7 ECHR as having the meaning which they by contrast inferred from it. Furthermore, the Court of Cassation should not in any case have endorsed an interpretation which that court itself considered to be of questionable constitutionality.

The questions are also inadmissible since the interpretative premise concerning the binding force of the Varvara judgment is mistaken.

On these grounds

THE CONSTITUTIONAL COURT

hereby,

1) rules that the question concerning the constitutionality of Article 44(2) of Presidential Decree no. 380 of 6 June 2001 (Consolidated text of legislative and regulatory provisions in the area of construction – Text A), raised with reference to Articles 2, 9, 32, 41, 42 and 117(1) of the Constitution by the third criminal division of the Court of Cassation by the referral order mentioned in the headnote, is inadmissible;

2) rules that the question concerning the constitutionality of Article 44(2) of Presidential Decree no. 380 of 2001, raised with reference to Article 117(1) of the Constitution by the *Tribunale di Teramo*, sitting as a single judge, by the order mentioned in the headnote, is inadmissible.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 14 January 2015.