Corte costituzionale

JUDGMENT NO. 322 OF 2007

Franco BILE, President

Giovanni Maria FLICK, Author of the Judgment

JUDGMENT No. 322 YEAR 2007

In this case the Court considered a reference from an investigating judge concerning a criminal law regulating concerning the statutory rape of minors under the age of 14. Since the fact that the minor in question had claimed to be older than 14, the provision effectively created strict liability under criminal law. There was a question of constitutionality because the *de iure* and *de facto* presumption that the accused was aware of the age of the minor disregarded the usual requirement that the prosecution establish the *mens rea* of the relevant offence. The state authorities on the other hand argued that the constitutional interest in guaranteeing special protection to minors outweighed the principle that blame was a necessary prerequisite for criminal responsibility. The Court held that the provision reflected Parliament's intention to provide "particularly robust protection" to minors under 14, and that negligence may be sufficient to establish criminal responsibility, but that consideration should be given to the questions of excusable ignorance and unavoidable mistake regarding the minor's age. However, the referring judge did not consider the possibility of a constitutionally informed interpretation of the provision, especially since the "principle of blame" counts as a canon of interpretation, and therefore ruled the question inadmissible. The Court noted *obiter* that a nuanced approach should be adopted in relation to the issue of unavoidable ignorance or mistake, since any space left for this excuse must take into account the fact that "a 'duty' of awareness [is imposed] that is proportional to the importance of the values in play, which may certainly not be exhausted through the mere reliance on statements by the minor".

THE CONSTITUTIONAL COURT

composed of: President: Franco BILE; Judges: Giovanni Maria FLICK, Francesco AMIRANTE, Ugo DE SIERVO, Paolo MADDALENA, Alfio FINOCCHIARO, Franco GALLO, Luigi MAZZELLA, Gaetano SILVESTRI, Sabino CASSESE, Maria Rita SAULLE, Giuseppe TESAURO, Paolo Maria NAPOLITANO,

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 609-*sexies* of the Criminal Code, introduced by Article 7 of law No. 66 of 15 February 1996 No. 66 (Provisions to combat sexual assault), commenced pursuant to the referral order of 23 May 2005 of the investigating judge [*Giudice dell'udienza preliminare – GUP*] at the *Tribunale di Modena* in criminal proceedings against P. T., registered as No. 471 in the Register of Orders 2005 and published in the *Official Journal of the Republic*, first special series 2005.

Considering the entry of appearance by P. T. as well as the intervention by the President of the Council of Ministers;

having heard in the public hearing of 19 June 2007 the Judge Rapporteur Giovanni Maria Flick;

having heard Mario Marchiò, barrister, for P. T., and the *Avvocato dello Stato* Giovanni Lancia for the President of the Council of Ministers.

The facts of the case

1. - By the referral order indicated in the headnote – issued during the course of criminal proceedings against a person charged with the offence contained in Article 609-*quater* of the Criminal Code (performance of sexual acts with a minor) – the investigating judge at the *Tribunale di Modena* raised, with reference to Article 27(1) and (3) of the Constitution, the question of the constitutionality of Article 609-*sexies* of the Criminal Code, introduced by Article 7 of law No. 66 of 15 February 1996 (Provisions to combat sexual assault), which provides that "where the offences provided for under Articles 609-*bis*, 609-*ter*, 609-*quater* and 609-*octies* are committed against a minor under the age of fourteen, or for offences falling under Article 609-*quinquies*, the guilty party may not invoke ignorance of the age of the injured party in his defence".

The investigating judge states that during the course of the preliminary hearing, council for the accused submitted that the provision in question was unconstitutional, arguing that in the case before the court the accused had been misled by the injured party, who had falsely stated that he was older than fourteen at the material time: this fact was confirmed by the minor himself in his witness statement.

On this point, the referring judge notes that – by reproducing "almost verbatim" the version of Article 539 of the Criminal Code previously in force – the contested

provision introduces, with a view to creating more robust protection for minors, a clear derogation from the general principles governing blameworthy conduct. It in fact introduces a kind of *de facto* and *de iure* presumption that the accused is aware of the age of the injured party, thus preventing the former from averring his excusable ignorance of the said age or his mistaken conviction that the victim was older.

The investigating judge in addition recalls that this court has on various occasions been called upon to examine the constitutionality of Article 539 of the Criminal Code, finding however that the challenges made were groundless. In particular, judgment No. 107 of 1957 – upheld by order No. 22 of 1962 and judgment No. 20 of 1973 (*sic*: No. 20 of 1971) – found that the provision did not infringe the principle of individual criminal responsibility enshrined in Article 27(1) of the Constitution: this was based on the dual finding that the said principle only outlaws the imposition of responsibility for the actions of others, which is not relevant in the case before the court, since a causal link between the conduct in question and the event is necessary in order for the accused to be punished; in any case, even if a corresponding psychological link were found to be necessary, the conclusion would not be different since the age of the victim would not be relevant for the occurrence of the offence – consisting of "unlawful sexual intercourse", which must be accompanied "by intentional awareness and volition" – but rather constitutes "a prerequisite for the offence and more specifically a (non objective) condition for liability to punishment, any awareness of which is immaterial for the link between action and event".

The referring judge goes on to note that, in addition to reiterating the previous interpretation of Article 27(1) of the Constitution, judgment No. 209 of 1983 (the most recent in this area), also found that there was no violation of the principle of equality contained in Article 3 of the Constitution (invoked on various grounds), pointing out that Article 539 of the Criminal Code aimed to offer "heightened protection to minors under the age of fourteen, considered to be incapable of expressing valid consent to sexual intercourse".

Following these decisions – the investigating judge continues – a different understanding of the principle of criminal responsibility was adopted in the settled case law of the Constitutional Court. In fact, in the light of the "foundational" judgment No. 364 of 1988, "one's own actions" – the only actions for which a person may be held

liable – "are not understood as conduct linked to the accused as the author of the action by a mere nexus of material causality [...] but also and above all by the *mens rea* which must characterise – at least in the form of negligence – the most significant elements of the typical *actus reus*".

Furthermore, the court's *dictum* in the subsequent judgment No. 1085 of 1988 is even more explicit, stating that "in order for Article 27(1) of the Constitution to be complied with fully and for criminal responsibility to remain strictly personal, it is indispensable that each and every element which forms part of the *actus reus* be psychologically linked to the accused (i.e. that they have been committed negligently or intentionally); it is also indispensable that all of the above elements be criminally imputable to the same person and that they also be subjectively unlawful". The "rule of criminal imputability" does not apply "only to those elements which do not form part of the core of the prohibition (such as the extrinsic conditions for liability to punishment which, limiting the extent of the prohibition, condition the latter or the penalty in the presence of particular objective situations)".

In essence, in the light of these judgments, the principle of personal responsibility under criminal law may be considered as having been complied with only when the criminal prohibition is formulated in terms which guarantee the psychological link between the accused and the "significant or underlying core of the *actus reus*" which encapsulates the unlawful status of the criminal conduct, thereby justifying the resulting rehabilitative goal of punishment.

Within this new perspective, it is however beyond question – in relation to crimes against the sexual freedom of minors, and in particular to those contained in Article 609-*quater* of the Criminal Code which punish the performance of sexual acts with a minor younger than fourteen – that the age of the victim cannot be imputed in an objective sense to the accused without undermining the constitutional principle mentioned above.

On this point, it is not possible to share the solution presented in the remote judgment No. 107 of 1957, according to which the age of the victim constituted a "non objective condition for liability to punishment": this institution, unknown under Italian criminal law, contemplates only objective conditions for liability to punishment (Article 44 of the Criminal Code), which – referring to a typical *actus reus* accompanied by *all* of its

constituent elements – delineate the class of punishable conduct whilst remaining subject, precisely from the same viewpoint, to the rule of objective imputation.

In the eventuality provided for under Article 609-*quater* of the Criminal Code on the other hand, the age of the victim is decisive in order to give criminal relevance to a class of acts – sexual acts – which is otherwise lawful: thus the above information must be classified as a prerequisite for the conduct, or even – in accordance with the indications contained in the Justice Minister's report on the definitive draft of the Criminal Code – as a constitutive element of the offence which encapsulates "the *raison d'être* of its status as a criminal offence". This has the additional consequence that, in order to comply with Article 27(1) of the Constitution, the age of the victim must be psychologically imputable to the accused, "at least as far as appearance of the minor considered objectively is concerned".

It is of court true on the other hand – the referring judge adds – that the provision under examination is intended to guarantee more rigorous protection to individuals, i.e. minors younger than fourteen, who are not only considered to be incapable of expressing valid consent to sexual acts, but are also increasingly exposed to abuse: it therefore has a "solid rooting in constitutionally protected interests". The balance between the interests potentially in conflict must not however necessarily be resolved through the sacrifice of the principle of blame. The need to reinforce protection for minors cannot in fact *per se* justify any departure from this principle: this is because, by contrast, the more serious the offence in the eyes of Parliament and the more severe the relative sanctions are, the more effective the judgment of the "criminal liability of the accused must be; and this judgment implies proof that he was fully aware of all the elements of the offence.

Moreover, Parliament has also – according to the referring judge – provided a clear demonstration of how a criminal law policy inspired by the rigorous protection of children against all forms of abuse may follow paths which "respect established principles in the area of psychological imputation". In fact, law No. 269 of 3 August 1998 (Provisions to combat the exploitation of prostitution, pornography and sexual tourism to the detriment of minors as new forms of enslavement) does not contain any provision similar to that contested: yet even so this law legislates in an area in many

ways similar to that governed by law No. 66 of 1996, introducing punishments which are even more severe than those contained in Article 609-*quater* of the Criminal Code.

This means that compared to the offences set out in Articles 600-*bis*(1) and 600-*ter*(1) of the Criminal Code (introduced by Articles 2 and 3 of the aforementioned law No. 269 of 1998) – which punish with imprisonment of between six and twelve years (in addition to a fine) respectively the incitement or aiding and abetting of under-age prostitution and the use of minors for pornographic exhibitions or to produce pornographic material – according to the referring judge the under-age status of the victim must necessarily fall within "the spectrum of blame": this means that the accused may not be punished where he can establish that he was unaware of this factor, even where this was due to negligence (since punishment is not provided for in relation to these offences on the grounds of negligence). An excusable error concerning the age of the victim could on the other hand – in accordance with the general rule concerning the psychological imputability of the relevant fact contained in Article 59(2) of the Criminal Code – exists also in cases falling under Article 600-*sexies* of the Criminal Code (introduced by Article 6 of the same law), which provides that the sentence be increased by between one third and one half where the offences under Articles 600-*bis*(1) 600-*ter*(1) and 600-*quinquies* of the Criminal Code are committed against minors younger than fourteen.

Finally, the question is relevant in the proceedings before the investigating judge since – once the *de facto* and *de iure* presumption of awareness of the age of the victim has been removed – the accused "may attempt to prove that he was unaware of the under-age status, even using statements made by the injured party where the latter admits having stated to the partner that he was older than fourteen".

2. - The President of the Council of Ministers intervened in the constitutionality proceedings, represented and advised by the *Avvocatura Generale dello Stato*, requesting that the question be declared inadmissible or groundless.

Pointing out that a similar question of constitutional legitimacy concerning the version of Article 539 of the Criminal Code previously in force had been declared groundless or manifestly groundless on various occasions both by this court and by the Supreme Court, and going on the emphasise that – in line with the findings of this court – Article 27 of the Constitution does not contain "a mandatory prohibition on strict

liability" (judgment No. 364 of 1988), the government representative argued that Article 609-*sexies* of the Criminal Code contemplates a constitutionally legitimate case of strict liability.

On this point, it is sufficient to note that, for the purposes of the offence contained in Article 609-*quater* of the Criminal Code, the central core of the relevant conduct – i.e. the sexual act – must be carried out voluntarily: according to this court's findings in judgment No. 364 of 1988, this fact means that the actions must be imputable to the accused.

On the other hand, the irrelevance of ignorance of or mistakes concerning the age of the victim satisfy the requirement – firmly rooted in Italian legal culture – of assuring more rigorous protection to people who are particularly immature when confronted with the dangers related to unlawful sexual relations: at the same time, it prevents the introduction into criminal trials of investigative issues which may cause further harm to the dignity of minors or traumatise them yet further (such as for example those concerning their conduct which is too sexually explicit).

In addition, it must not be forgotten that the fact that a minor is younger than fourteen is in most cases readily apparent to – or at least gives rise to doubts for – third parties; in any case, the accused may incur criminal liability for having carried out a sexual act without the absolute certainty that the other individual was older than fourteen.

The fact that the assessment of the *mens rea* is more severe than normal is moreover easily justifiable – in the opinion of the *Avvocatura Generale dello Stato* – by the particular importance of the value protected by the provision, which flows from the requirement of protection for infants and young persons incumbent on the Republic pursuant to Article 22 (*sic*: Article 31(2)) of the Constitution. Nor does the investigating judge's assumption that the requirement of protection in question could be satisfied without sacrificing the principle of blame have any merit: this is because first of all the principle of blame would not be sacrificed in the case before the court, but at most only toned down; secondly, Parliament may well in any case sacrifice – "on justified grounds" – a particular constitutional value in favour of another value of equal status: within this context, the investigating judge's observation amounts not to a challenge to the provision's constitutionality, but rather a mere critique of the discretion exercised by Parliament.

Neither finally is the argument by which the referring judge attempts to support its own conclusion convincing: i.e. that law No. 269 of 1998 to combat the exploitation of prostitution, pornography and sexual tourism to the detriment of minors does not contain any measure corresponding to the contested provision. The offences relating to paedophilia introduced by that law in fact protect the sexual freedom of minors at an earlier stage, punishing behaviour which is different from and occurs prior to that outlawed under Articles 609-*bis*, 609-*ter*, 609-*quater* and 609-*octies* of the Criminal Code: it therefore makes sense that the elements pertaining to the *mens rea* should be regulated by Parliament in a less severe manner compared to "less direct" violations of the above value (even though the offence itself is on occasion punished with more severe sentences due to the particular social alarm and opprobrium to which it gives rise).

3. - An appearance was also entered by T. P., the accused in proceedings before the investigating judge, who – referring in its entirety to the the defence submission by which the challenge to the provision's constitutionality as made by the referring judge had been raised – argued that the question should be accepted.

In the above statement, reproduced in the entry of appearance, the defence pointed out as a preliminary matter, concerning the issue of relevance, the factual basis – assumed to be unequivocal – for the conclusion that, following the mistaken representations by the injured party, the accused had believed that he was carrying out sexual acts with a consenting individual older than fourteen and had been certain that such conduct was criminally irrelevant.

On this basis, the defence then submitted that it was possible to interpret the provision of non-excusability contained in Article 609-*sexies* of the Criminal Code as referring – in accordance with a literal interpretation – exclusively to the mere ignorance of the age of the injured party, and not also the mistaken belief about the latter's age (which would therefore be governed by the general provision contained in Article 47 of the Criminal Code): this solution was argued to reflect the alleged greater "objectionability" of ignorance compared to error as an indication – in contrast with the latter – "of absolute indifference to the values protected by the legal order".

Should this argument be rejected, the defence claimed that the decisions of this court rejecting the doubt over the constitutionality of the version of Article 539 of the

Criminal Code previously in force should be considered as superseded in the light of the subsequent change in constitutional case law which occurred with judgment No. 364 of 1988. This judgment found that Article 27(1) of the Constitution is not limited to asserting the prohibition on the attribution of responsibility for the actions of others, but gives constitutional standing to the principle of blame understood as the criminal liability of the author of the relevant act: this "criminal liability" presupposes that all the significant elements of the offence in the abstract be at least blameworthy acts. Therefore, this condition must certainly apply to the age of the victim of the offence of performance of sexual acts with a minor, since it is an element which – far from being extraneous to the crime – encapsulates "the whole harmful dimension of the act", thus rendering punishable otherwise lawful conduct. Nor on the other hand is Parliament entitled to privilege – over and above "principles of constitutional standing" such as the principle of blame – "criminal policy pressures" associated with the albeit marked social opprobrium for the phenomenon of paedophilia.

Conclusions on points of law

1. - The investigating judge at the *Tribunale di Modena* questions, with reference to Article 27(1) and (3) of the Constitution, the constitutionality of Article 609-*sexies* of the Criminal Code – introduced by Article 7 of law no. 66 of 15 February 1996 (Provisions to combat sexual assault) – which provides that "where the offences provided for under Articles 609-*bis*, 609-*ter*, 609-*quater* and 609-*octies* are committed against a minor under the age of fourteen, or for offences falling under Article 609-*quinquies*, the guilty party may not invoke ignorance of the age of the injured party in his defence".

The referring judge points out that the contested provision introduces – as a derogation from the general principles governing blame – a kind of *de facto* and *de iure* presumption of awareness of the age of the injured party by the accused, thus preventing the latter from establishing his excusable ignorance of the said age or his mistaken conviction that the victim was older.

This presumption is stated to stand in unreconcilable contrast with the principle of individual criminal responsibility enshrined in Article 27(1) of the Constitution. As found by this court in judgments No. 364 and No. 1085 of 1988, this principle is not

limited to asserting the prohibition on the attribution of responsibility for the actions of others, but in addition requires a psychological connection – at least in the form of blame – between the agent and the "significant or underlying core of the offence" which encapsulates the unlawful status of the criminal conduct, thereby justifying the resulting rehabilitative goal of punishment.

As regards offences against the sexual freedom of minors – and in particular that contained in Article 609-*quater* of the Criminal Code, at issue in proceedings before the investigating judge, which punishes the performance of sexual acts with minors under the age of fourteen – it is in consequence beyond doubt that, in order to comply with the constitutional principle in question, the age of the injured party must be psychologically linked with the author of the conduct, "at least as far as appearance of the minor considered objectively is concerned": this is because the element in question encapsulates the unlawful status of the offence, marking the borderline between criminal conduct and lawful sexual relations between consenting individuals.

Similarly, the pressing requirements to protect minors under the age of fourteen from all forms of abuse which the contested provision aims to further – requirements also associated with constitutionally protected interests – may justify derogations from the principle of blame: this is by contrast because the greater the gravity of the conduct in the opinion of Parliament, the more serious the criminal liability of the accused must be. However, the "sacrifice" of the principle of blame is not at all a corollary to compliance with the above requirements for protection, as is clearly demonstrated by the fact that law No. 269 of 3 August 1998 – governing matters highly similar to those regulated under law No. 66 of 1966 (that is the fight against the exploitation of prostitution, pornography and sexual tourism to the detriment of minors) and making provision for sentences even more robust than under Article 609-*quater* of the Criminal Code – does not contain any measure corresponding to the contested provision.

2. - The question is inadmissible.

2.1. - The referring judge acts on the assumption that the arguments on the basis of which this court found the version of Article 539 of the Criminal Code previously in force to comply with the principle of individual criminal responsibility (judgments No. 209 of 1983, No. 20 of 1971 and No. 107 of 1957; orders No. 70 of 1973 and No. 22 of

1962) must of necessity be reconsidered in the light of the subsequent development of constitutional case law addressing the weight of the principle in question.

This is a premise which is *per se* correct. The decisions cited above concerning Article 539 of the Criminal Code – the legislation in force immediately prior to the provision contested before this court – are in fact based on a dual assumption: first, Article 27(1) of the Constitution is limited to prohibiting the attribution of responsibility for the actions of others, thus requiring only a material causal link between the conduct of the accused and the event; secondly, even had a corresponding psychological link been necessary, the conclusion would not be different since the age of the injured party is not relevant for the commission of the offence (in the present case, sexual intercourse, which in any case must be consensual), but constitutes a factual prerequisite therefor or, more specifically, "a (non objective) condition for liability to punishment" (see in particular judgment No. 107 of 1957).

By judgment No. 364 of 1988 – issued before all the other judgments discussed above – this court changed the interpretative approach followed until then, nonetheless recognising that the principle of individual criminal responsibility, enshrined in Article 27(1) of the Constitution, does not simply extend to the mere prohibition on the attribution of responsibility for the actions of others, but must be understood in a broader sense as a principle of responsibility for one's own blameworthy acts: the court thereby postulated a "coefficient of psychological participation" of the accused, consisting at the very least of blame "in relation to the most significant elements of the offence".

This finding was further elaborated in judgment No. 1085 of 1988 in which the court found that, in order to ensure compliance with Article 27(1) of the Constitution, "it is indispensable that each and every element which runs together to characterise the unlawful status of the offence be psychologically imputed to the accused (i.e. that they be accompanied by malice or or negligence), and it is also indispensable that each and every of the above elements be imputable to the accused and hence also deplored on a psychological level". This must occur irrespective of whether the element in question coincides with the commission of the offence or not: thus only "elements which are extraneous to the core of the offence (such as the extrinsic conditions for liability to punishment which, by limiting the extent of the prohibition, condition it or the sentence

in the presence of particular objective elements)" are not subject to the requirement of criminal liability.

2.2. - The following finding in the referral order also appears to be correct, which means that for the purposes of the offence of performance of sexual acts with a minor (Article 609-*quater* of the Criminal Code) – at issue in the proceedings before the investigating judge – the fact that the victim was younger than fourteen represents the element on which the typical *actus reus* as a whole is centred. In effect, it is precisely and exclusively the victim's age which – by activating the *de facto* and *de iure* presumption that the victim is incapable of expressing valid consent to sexual acts – marks the boundary between the criminal act and lawful sexual relations between consenting individuals. The necessary consequence of this is that, in order to comply with Article 27(1) of the Constitution, the age factor – irrespective of its role in the overall structure of the offence (constituent element, factual prerequisite, "non-objective condition for liability to punishment") – must be capable of being linked with the agent also from the psychological point of view, thereby rendering his conduct a manifestation of a "criminally imputable" breach of or indifference to the values encapsulated in the contested provision in the light of the guidelines contained in judgment No. 364 of 1988.

2.3. - Finally, the investigating judge's additional argument that – in contrast to the arguments submitted by the *Avvocatura dello Stato* – the principle of blame may not be "sacrificed" by Parliament in the name of a more effective criminal law protection of other values, even where the latter too have constitutional status, also appears to be reasonable.

In fact, the characteristic of the fundamental principles underlying criminal law guarantees is that they are "resistant" to all countervailing pressures (see, with reference to the principle of non-retroactivity of criminal law legislation to the detriment of the accused, judgment No. 394 of 2006). In such cases, the principle of blame fulfils a purpose shared with the principle of the rule of law and the non-retroactivity of criminal law (Article 25(2) of the Constitution): it aims to guarantee to those subject to the criminal law the freedom to choose (judgment No. 364 of 1988) on the basis of assessments made in advance ("calculability") of the legal consequences of their own conduct; this "calculability" would be undermined were the agent to be held liable for

occurrences falling outwith the sphere of his conscious control, since they were not only undesired and not specifically envisaged, but not even foreseeable and avoidable. At the same time, the principle of blame carries out a "foundational" role compared to the rehabilitational goal of punishment (Article 27(3) of the Constitution): indeed, it would not make sense to "rehabilitate" people who have no need for "rehabilitation" in that they are not to blame for the actions committed (judgment No. 364 of 1988). On the other hand, the rehabilitational goal may not be overridden by Parliament in favour of other different objectives of the sentence which may be pursued on a theoretical level, at least in part, irrespective of the criminal liability of the accused (on this point, see judgments No. 78 of 2007, No. 257 of 2006, No. 306 of 1993 and No. 313 of 1990). Punishment in the absence of blame with a view to "dissuading" people from carrying out prohibited conduct ("negative" general prevention) or of "neutralising" the guilty party ("negative" special prevention), would in fact imply the exploitation of human beings for contingent criminal policy goals (judgment No. 364 of 1988) at odds with the principle of human dignity asserted in Article 2 of the Constitution.

Within this context therefore, Parliament may – against the backdrop of the different forms of guilt – "tailor" the psychological element of the author's participation in the offence to the nature of the offence and the interests which must be protected: this may require people to make a particular "undertaking" to avoid causing harm to values exposed to risks from particular activities. However, in no case may Parliament disregard entirely the above contributory factor; otherwise, the decision as to when there is a need to provide for punishment capable of justifying a departure from the requirement of blame – with a view to protecting other interests with constitutional status including, as a rule, those protected under criminal law – would be left to Parliament's discretion, with the resulting encroachment on the presumption of innocence and "underlying" goals of the principle of blame mentioned above.

3. - Although the basis for the referring judge's argument is according correct, the claim submitted by it does not however necessary follow from this either legally or logically.

3.1. - The investigating judge claims that Article 609-*sexies* of the Criminal Code considered overall is unconstitutional, thus requesting its removal. Such a ruling – concerning the offence of performance of sexual acts with a minor (as well as that of

corruption of minors pursuant to Article 609-*quinquies* of the Criminal Code) – would have the effect of rendering the general provisions concerning the imputation of malice and mistake contained in Articles 43 and 47 of the Criminal Code applicable to the fact that the victim was younger than fourteen; this would mean that the victim's age would fall under those elements for which malice is required, whilst a mistake on this point would be pardonable even if negligent, since punishment on the grounds of negligence is not provided for in relation to the sexual offences mentioned above.

However, this request is logically and legally at odds both with the general statement – contained in judgments No. 364 and No. 1085 of 1988, referred to also by the referring judge – that malice is not indispensable in order to ensure compliance with Article 27(1) of the Constitution but that negligence is sufficient, as well as with the particular *ratio* of the said judgments and of subsequent rulings by this court on the same question.

In its examination of Article 5 of the Criminal Code, providing that ignorance of the criminal law is not a valid excuse, judgment No. 364 of 1988 did not in fact strike down the contested provision as a whole; on the contrary – recognising moreover that it had a rational foundation – it declared it to be unconstitutional only insofar as it "exclude(d) unavoidable ignorance from the grounds for non-excusability" The reason for this was that, as far as representational elements are concerned (such as, in the case before the court, the awareness of the prohibition), the minimum threshold for compatibility with Article 27(1) of the Constitution – with which ordinary legislation in contrast with the principle asserted therein must comply – is constituted by the attribution of pardonable effect to ignorance (or mistake) that is characterised by inevitability: this means that it must at least be possible to call the accused to account for not having avoided the subjective situation of lacking or defective awareness of the relevant information, even through he was in a position to do so. This solution was subsequently also extended by judgment No. 61 of 1995 – declaring partially unconstitutional Article 39 of the peacetime military Criminal Code, concerning the non-excusability of ignorance of duties flowing from a person's status as a member of the armed services – to cases in which the ignorance concerned the legal prerequisite of the offence in question (in that particular case, the regulation requiring recruits to attend on the dates specified in the call up papers).

Similarly – as far as the volitional-type elements of offences are concerned – judgment No. 1085 of 1988 declared unconstitutional the contested provision governing so-called unauthorised borrowing (Article 626(1)(i) of the Criminal Code), insofar as it held the accused responsible for the failure to return the object removed even where such failure was a result of unforeseeable circumstances or *force majeure*: by contrast – in relation to the corresponding offence provided for under the military Criminal Code (Article 233(1)(i) – the court found that the principle of blame required a finding in favour of the accused also in cases in which the failure to return was a result of negligence as opposed to an intentional decision by the accused (judgment No. 179 of 1991).

3.2. - Article 609-*sexies* of the Criminal Code, contested before the court today, in effect expresses a specific choice made by Parliament: i.e. of giving particularly robust protection – as a derogation from the general principles governing psychological imputation – to a value of uncontested importance, also within the framework of constitutional guarantees (Article 31(2) of the Constitution) and guarantees provided for under international law (including in particular the Declaration on the Rights of the Child, adopted by United Nations General Assembly resolution of 20 November 1959; the Convention on the Rights of the Child, done in New York on 20 December 1989, and more recently, with specific reference to the fight against the sexual exploitation of children, framework decision 2004/68/JHA of the Council of the European Union of 22 December 2003). The "sexual intangibility" of individuals – such as minors younger than fourteen – is to great in such cases that, due to their physical and metal immaturity, they are on the one hand considered incapable of exercising a conscious freedom of choice in relation to sexual acts (on the constitutional legitimacy of the presumption in question, see judgment No. 151 of 1973), whilst on the other hand they are particularly vulnerable to abuse (with reference to the version of Article 539 of the Criminal Code previously in force, see judgments No. 209 of 1983 and No. 107 of 1957).

The decision to make this derogation takes particular account of the ease with which the accused may aver true or supposed ignorance or mistake, even where it results from negligence, over the age of the minor – since in many cases the fact that the victim is younger than fourteen is not unequivocally reflected in his external appearance: this gives rise to the fear that the application of common rules may create areas of impunity

considered to be detrimental for an effective safeguarding of the interests in question. This *ratio legis* also applies, incidentally, to demonstrations of the impracticability of the "corrective" interpretation suggested by the private party in its submissions – an interpretation which however goes against the settled case law of the Court of Cassation concerning the original version of Article 539 of the Criminal Code and already substantively rejected by this court with reference to the same provision (judgment No. 209 of 1983) – according to which the contested provision should be understood as referring only to ignorance *stricto sensu* (lack of awareness), and not also to mistakes (mistaken awareness).

In the light of the above – since the criminal policy choice discussed is *per se* entirely rational – the contested provision may be considered to violate the principle of blame, certainly not due to the mere fact that it departs from the ordinary criteria applicable to the imputation of malice, but, if anything, exclusively insofar as it denies any relevance to ignorance or unavoidable mistake concerning the victim's age.

4. - The logical jump between the premises and the claim, as set out above, which the referral order makes has negative ramifications for the detail of its arguments in two senses.

4.1. - In the first place, the referring judge does not even consider the problem of verifying the practicability of a constitutionally informed interpretation of the contested provision, clarifying, in this case, whether or not it is possible to conclude that cases of unavoidable ignorance fall outwith the ambit of the rule of non-excusability enshrined in that provision. This is because the principle of blame – as set out in judgments No. 364 and No. 1085 of 1988 of this court – not only places restrictions on Parliament with regard to its formulation of criminal law institutes and individual criminal offences, but also counts as a canon of interpretation for the courts when reading and applying the law in force. This latter aspect is particularly significant in the case before the court in that it concerns a provision reiterated, in the passage from Article 539 of the Criminal Code to Article 609-*sexies* of the Criminal Code, after in the judgments mentioned above this court had already affirmed – with reference to the principle of individual criminal responsibility contained in Article 27(1) of the Constitution – the presence within the pantheon of constitutional values of a principle of necessary blame, set at the very least at a minimum level of unavoidable ignorance or mistake: it impinges upon

the provision or on the factual prerequisites for the offence, as in the cases considered in judgments No. 364 of 1988 and No. 61 of 1995, or on the elements of the offence itself, as in the case before the court.

4.2. - On the other hand in any case, the incorrect formulation of the claim also renders the grounds given for the relevance of the question in proceedings before the investigating judge inadequate.

On this point in fact – after having stated that the accused had asserted in his defence the claim that he had been misled by the victim who at the material time had stated that he was older than fourteen (a fact also confirmed by the minor) – the referring judge assumes that the question is relevant since, once Article 609-*sexies* of the Criminal Code has been removed, the accused "could be allowed to establish his ignorance (of the age), arguing on the basis of the statements made by the victim himself".

This reasoning clearly appears to be based on the prospective of a judgment finding the contested provision to be unconstitutional in its entirety, thereby attributing pardonable effect also to malicious error. However, in the terms in which it has been formulated, it is entirely unsuitable for supporting an assertion of the inevitability of the ignorance of or mistake over the age: this is the only situation in which, as noted above, the latter could have any pardonable effect.

Unavoidable ignorance or mistake – as evoked in judgment No. 364 of 1988 as the minimum indispensable contributory factor and outer limit of criminal liability, and hence also of compatibility with the principle of individual criminal responsibility contained in Article 27(1) of the Constitution – may not be based exclusively, or essentially, on statements by the victim that he was older than he actually was.

The judgment of inevitability in fact imposes on those who carry out sexual acts with an individual who appears to be under-age a "duty" of awareness that is proportional to the importance of the values in play, which may certainly not be exhausted through the mere reliance on statements by the minor: such statements, according to common experience, may well be deceptive, in particular within the specific context in question. Moreover, this is clearly without prejudice to the fact that where the instruments of perception and evaluation available to the other party leave doubts over the partner's real age – i.e. whether older or younger than fourteen – that person must of necessity refrain from sexual relations in order to avoid incurring criminal liability: this means

that persistence in cases where there are doubts over a constitutive element of the offence (or a prerequisite therefore) – far from giving rise to a situation of unavoidable ignorance – amounts to negligent conduct, or even so-called recklessness.

5. - In conclusion, the inconsistencies and deficiencies contained in the referral order highlighted above require the court to rule that the question is inadmissible.

on those grounds

THE CONSTITUTIONAL COURT

declares that the question of the constitutionality of Article 609-*sexies* of the Criminal Code, introduced by Article 7 of law No. 66 of 15 February 1996 (Provisions to combat sexual assault), raised with reference to Article 27(1) and (3) of the Constitution by the investigating judge at the *Tribunale di Modena* by the referral order mentioned in the headnote, is inadmissible.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 11 July 2007.

Signed:

Franco BILE, President

Giovanni Maria FLICK, Author of the Judgment

Giuseppe DI PAOLA, Registrar

Deposited in the Court Registry on 24 July 2007.

The Director of the Registry

Signed: DI PAOLA