JUDGMENT NO. 32 YEAR 2020

In this case, the Court heard a series of referral orders from a number of courts questioning the constitutionality of a provision set forth in a recently enacted anti-corruption law (No. 3 of 2019). The provision lays down more restrictive conditions under which a supervisory court can replace the term of imprisonment that a person convicted of a corruption offence has been sentenced to with a non-custodial measure.

According to established case law, any changes to the rules on the enforcement of sentences making them harsher can apply retroactively, since such rules have been considered so far not to be covered by Article 25(2) of the Constitution, which enshrines the principle that no person may be punished by a more severe penalty than that provided for at the time the offence was committed (*nulla poena sine lege praevia*). As a consequence, the 2019 amendments have been widely held as applicable also to persons convicted of offences committed before the enactment of the new law.

The referral orders essentially asked whether the retrospective application of the new detrimental rules was compatible with Article 25(2) of the Constitution, considered in light of the recent case law of the European Court of Human Rights (ECtHR) on Article 7 ECHR.

Departing from its own previous case law, the Court ruled that the enforcement of sentences is, in principle, governed by the law in force at the time of the execution of the sentence and not by the law in force at the time of the commission of the offence, unless the legislative amendments enacted after the commission of the offence are so significant as to transform the scope of the penalty and its actual impact on the convict's personal liberty. In this latter case, the application of the subsequent law would amount to an enforcement of a penalty that is essentially different from that provided for at the time of the commission of the offence, and would thereby infringe the *nulla poena* principle.

As a consequence, the Court declared that the challenged provision, as interpreted by established case law as applicable also to persons convicted of offences that have been committed before its entry into force, is unconstitutional.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 1(6)(b) of Law No. 3 of 9 January 2019 (Measures to combat offences against the public administration as well as on the statute of limitations for offences and on the transparency of political parties and movements), amending Article 4-*bis*(1) of Law No. 354 of 26 July 1975 (Provisions regulating the prison system and the execution of measures involving deprivation and limitation of liberty), initiated by the Venice Supervisory Court with referral order of 8 April 2019, by the Court of Appeal of Lecce with referral order of 4 April 2019, by the Judge for Preliminary Investigations of the Ordinary Court of Cagliari with referral order of 10 June 2019, by the Judge for Preliminary Investigations of the Court of Naples with referral order of 2 April 2019, by the Taranto Supervisory Court with referral order of 7 June 2019, by the Ordinary Court of Brindisi with two referral orders

of 30 April 2019, by the Judge for Preliminary Investigations of the Ordinary Court of Caltanissetta with two referral orders of 16 July 2019, by the Potenza Supervisory Court with referral order of 31 July 2019 and by the Salerno Supervisory Court with referral order of 12 June 2019, registered respectively as Nos. 114, 115, 118, 119, 157, 160, 161, 193, 194, 210 and 220 in the Register of Referral Orders 2019 and published in the Official Journal of the Republic Nos. 34, 35, 36, 41, 42, 46, 48 and 50, first special series, of the year 2019.

Having regard to the entries of appearance filed by A. B., R.B. L. and A. B., as well as the interventions filed by the President of the Council of Ministers;

after hearing Judge Rapporteur Francesco Viganò at the public hearing of 11 February 2020 and in chambers on 12 February 2020;

after hearing Counsel Tommaso Bortoluzzi and Vittorio Manes for A. B., Amilcare Tana and Gian Domenico Caiazza for R.B. L., Ladislao Massari for A. B. and State Counsel Massimo Giannuzzi for the President of the Council of Ministers;

after deliberation in chambers on 12 February 2020.

[omitted]

Conclusions on points of law

1. – The eleven referral orders indicated in the headnote, which it is expedient to join together for the purposes of the decision, all raise questions as to the constitutionality of Article 1(6)(b) of Law No. 3 of 9 January 2019 (Measures to combat offences against the public administration as well as on the statute of limitations for offences and on the transparency of political parties and movements).

According to the referring courts, this provision is unconstitutional insofar as it does not provide that its amendments to Article 4-*bis*(1) of Law No. 354 of 26 July 1975 (Provisions regulating the prison system and the execution of measures involving deprivation and limitation of liberty [hereafter, also "Prison Law"]) apply only to persons convicted of offences committed after the entry into force of Law No. 3 of 2019.

1.1. – More specifically, the referral orders registered as Nos. 114, 157, 210 and 220 in the Register of Referral Orders 2019 have been submitted by supervisory courts asked to hear applications for the granting of prison benefits or alternative measures to prison (bonus periods of short release, community service and home detention) by persons convicted of offences against the public administration committed before the entry into force of Law No. 3 of 2019.

These offences are now included – by the challenged Article 1(6)(b) of Law No. 3 of 2019 – in the list of offences set out in Article 4-*bis*(1) of the Prison Law. Consequently, those offences now entail much more stringent conditions for eligibility for prison benefits and alternative measures compared to those in force at the time of the commission of the offence.

1.2. – By contrast, the referral orders registered as Nos. 115, 118, 119, 160, 161, 193 and 194 in the Register of Referral Orders 2019 have been submitted by supervisory courts asked, pending the application for alternative measures, to stay orders for the enforcement of the custodial sentences issued against persons convicted of offences against the public administration committed before the entry into force of Law No. 3 of 2019.

Those enforcement orders have not been stayed as a result of the inclusion, of the offence for which the person concerned has been respectively convicted, in the list of offences referred to in Article 4-*bis* of the Prison Law, regarding which Article

656(9)(a) of the Code of Criminal Procedure forbids any staying of orders for the enforcement of sentences.

1.3. – According to the referring courts, the failure to limit the effects of Article 1(6)(b) of Law No. 3 of 2019 to persons convicted of offences committed after its entry into force is incompatible:

- with Articles 25(2) and 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 (ECHR), since the prohibition of retroactive application of legislative changes that aggravate the penalty envisaged for an offence should include legislative changes that restrict the conditions of eligibility for prison benefits and alternative measures to prison (referral orders registered as Nos. 114, 115, 118, 119, 160, 161, 193, 194, 210 and 220 in the Register of Referral Orders 2019);

- with the right of defence enshrined in Article 24(2) of the Constitution, since the legislative changes made by the challenged provision allegedly frustrated the trial strategies of defendants, who might, for example, have chosen simplified proceedings with the expectation of obtaining a custodial sentence that would have made them eligible for alternative measures to prison from the very outset of the execution of the penalty (referral orders registered as Nos. 160 and 161 in the Register of Referral Orders 2019);

- with Articles 3 and 27(3) of the Constitution (as well as, according to the referral order registered as No. 210 in the Register of Referral Orders 2019, with Article 27(2) of the Constitution), in relation to the principles of reasonableness and the rehabilitation function served by punishment, given the automatic impact on the process of rehabilitation of convicted persons caused by making them ineligible for prison benefits and alternative measures to prison, with the ensuing impossibility for the judicial authorities to make individual assessments when examining the applications for the granting of such benefits and measures (referral orders registered as Nos. 114, 210 and 220 in the Register of Referral Orders 2019);

- with Article 3 of the Constitution, in two respects: firstly, the unreasonable unequal treatment between persons convicted of the same offences committed before the entry into force of Article 1(6)(b) of Law No. 3 of 2019, who would be subject to rules as regards eligibility for prison benefits and alternative measures to prison that differ depending on when – before or after the provision was in force – the supervisory court examines the relevant application (referral orders registered as Nos. 114, 157, 210 and 220 in the Register of Referral Orders 2019); secondly, the unreasonable unequal treatment between perpetrators of the same offences committed respectively before or after the entry into force of the challenged provision, since only the former but not also the latter could serve their sentence outside of prison (referral orders registered as Nos. 115 and 118 in the Register of Referral Orders 2019).

2. – As a preliminary point, it is worth briefly summarising the legislative framework in which the questions raised by the referring courts must be considered.

As mentioned before, Article 1(6)(b) of Law No. 3 of 2019, challenged here, includes the offences against the public administration referred to in Articles 314(1), 317, 318, 319, 319-*bis*, 319-*ter*, 319-*quater*(1), 320, 321, 322 and 322-*bis* of the Criminal Code in the list of offences set out in Article 4-*bis*(1) of the Prison Law.

2.1. – As a result of that inclusion, those offences are now subject, first of all, to the same pre-conditions on bonus periods of short release, external work assignments,

and alternative measures to prison, with the exception of early release, which apply to the so-called 'first-tier' offences listed in Article 4-*bis*(1) of the Prison Law.

This means that the benefits and alternative measures in question can now be granted to persons convicted of most offences against public administration, as a rule, only if they "cooperate" with police and judicial authorities.

That cooperation may be lent either pursuant to Article 58-*ter* of the Prison Law, or – by virtue of a further amendment of the wording of Article 4-*bis* of the Prison Law made by Article 1(6)(a)of Law No. 3 of 2019 – pursuant to Article 323-*bis*(2) of the Criminal Code.

Article 58-*ter* of the Prison Law, in turn, describes cooperation with police and judicial authorities as that engaged in by "those who, including after conviction, take action to prevent the criminal activity from leading to further consequences or actually assist the police or judicial authorities in obtaining decisive elements for the reconstruction of the facts and for the identification or capture of the perpetrators of the offences".

Article 323-*bis*(2) of the Criminal Code, on the other hand, provides for a mitigating circumstance, applicable to various offences against the public administration, for the benefit of "those who, in order to prevent the offence from having further consequences, take effective action to secure evidence of the offences and to identify the other perpetrators or for the seizure of the sums or other benefits transferred". If the recognition of the mitigating circumstance is clearly limited to cooperation lent by the accused prior to a final judgment of conviction, the reference to this provision by Article 4-*bis*(1) of the Prison Law, as amended by Law No. 3 of 2019, probably means that the cooperation required of the convicted person for offences against the public administration can be lent including after conviction, in the forms specified in Article 323-*bis*(2) of the Criminal Code, where – unlike in the case of Article 58-*ter* of the Prison Law – explicit mention is made of steps aimed at ensuring the "seizure of the sums or other benefits transferred".

In the absence of cooperation, a person convicted of the offences against the public administration mentioned in the challenged provision – as well as any other person convicted of offences covered by Article 4-*bis*(1) of the Prison Law – will be eligible for prison benefits and alternative measures to prison other than early release only:

- when the conditions referred to in Article 4-*bis*(1-*bis*) of the Prison Law are met, i.e. "provided that information has been acquired that is such as to exclude any current links with organised crime, terrorism or subversion, also in cases in which the [convicted person's] limited participation in the offence, established in the judgment of conviction, or a full assessment of the facts and liability therefor, established in a final judgment, render useful cooperation with the judicial authorities impossible in any event, as well as in cases in which, although the cooperation offered by the convicted person proves to be objectively irrelevant, one of the mitigating circumstances referred to in Article 62, number 6, of the Criminal Code has been applied to the detainee or internee, even if compensation for the loss occurs after the judgment of conviction, in Article 114 or 116(2) of the Criminal Code"; or

- limited to the granting of bonus periods of short release, when information has been acquired that is such as to rule out both current links with organised crime, and the danger of the restoration of such links, in accordance with Judgment No. 253 of 2019 of this Court.

2.2. – Bringing persons convicted of offences against the public administration within the scope of application of Article 4-*bis*(1) of the Prison Law entails a series of effects laid down by other provisions of the prison law framework that refer to Article 4-*bis*, and in particular:

- an absolute preclusion – which cannot be overcome even in the event of cooperation or equivalent conditions – as regards the granting of alternative measures of 'ordinary' home detention for persons over the age of 70 (Article 47-*ter*(01) of the Prison Law) and so-called 'generic' home detention (Article 47-*ter*(1-*bis*) of the Prison Law);

- a greater length of sentence that must first be served for eligibility for external work assignments (Article 21(1) of the Prison Law), bonus periods of short release (Article 30-*ter* of the Prison Law) and day release (Article 50(2) of the Prison Law);

- stricter rules for withdrawal of prison benefits already granted, pursuant to Article 58-*quater*(5) of the Prison Law.

2.3. – The inclusion of the offences against the public administration referred to in the challenged provision in the list set out in Article 4-*bis*(1) of the Prison Law entails identical preclusions for conditional release, which – by virtue of Article 2 of Decree-Law No. 152 of 1991– may be granted to persons convicted of offences referred to in Article 4-*bis*(1) of the Prison Law, provided that the conditions laid down therein are met.

2.4. – Finally, the referral orders submitted by the supervisory courts relate to the further effect of the inclusion of offences against the public administration in the list in Article 4-*bis*(1) of the Prison Law, established by Article 656(9)(a) of the Code of Criminal Procedure and consisting of a ban on staying orders for the enforcement of custodial sentences.

As a general rule, in the event of a prison sentence of no more than four years, including where it is the residual portion of a longer sentence, the public prosecutor is required to stay the order enforcing the sentence so as to allow that person to apply to the competent supervisory court within the following thirty days for an alternative measure to prison (see Article 656(5) – as amended by Judgment No. 41 of 2018 of this Court – and Article 656(10) of the Code of Criminal Procedure).

However, Article 656(9)(a) of the Code of Criminal Procedure precludes the prosecutorial authorities from staying orders for the enforcement of custodial sentences relating to convictions for a number of offences, including those set out in Article 4-*bis* of the Prison Law.

It follows that while the application to the supervisory courts is pending, those sentenced to an unsuspended term of imprisonment for the majority of offences against the public administration will have to go to prison, even though the length of the sentence to be served may be such that it would allow the sentenced person to avail of an alternative measure to prison right from the outset of the sentence.

2.5. – The challenged provision contains no rules regarding its effectiveness in time.

According to established case law, more about which later (*infra*, 4.1.), all the referral orders assume that – in view of the legislator's silence – the amendments are immediately applicable also to those who were convicted of offences committed before the entry into force of Law No. 3 of 2019.

Precisely this is the key issue that this Court is now called upon to decide.

[omitted]

4. – On the merits, the questions raised by the referral orders registered as Nos. 114, 115, 118, 119, 160, 161, 193, 194 and 220 in the Register of Referral Orders 2019 are well founded on the basis of Article 25(2) of the Constitution.

The rules governing the enforcement of sentences are considered by established case law not to be covered by the prohibition on retroactive application stemming from the principle of the legality of punishments, laid down in Article 25(2) of the Constitution (*infra*, 4.1.).

However, the compatibility of this case law with constitutional principles must be carefully reconsidered (*infra*, 4.2.).

Following such a reconsideration, the Court has come to the conclusion that, as a general rule, custodial sentences must be enforced in accordance with the law in force at the time of their execution unless this law, compared with that in force at the time the offence was committed, entails a change that is so significant as to transform the scope of the penalty and its impact on the convict's personal liberty. In this case, the retroactive application of such a law is indeed incompatible with Article 25(2) of the Constitution (*infra*, 4.3.).

As regards a number of offences against the public administration, the challenged provision involves a radical change as to the nature of the punishment provided for at the time of the offence and to its impact on the convict's personal liberty, in relation to the conditions concerning (a) eligibility for alternative measures to prison and (b) eligibility for conditional release, as well as (c) the general ban on the staying of orders to enforce custodial sentences pending the application for an alternative measure. Consequently, the application of the challenged provision to persons convicted of offences committed before its entry into force, as regards the effects mentioned above, infringes the prohibition laid down in Article 25(2) of the Constitution (*infra*, 4.4.).

Given the legislator's silence on the scope of application, *ratione temporis*, of the amendments under consideration, the appropriate remedy in response to the questions raised by the referring courts is a declaration that the challenged provision, as interpreted by established case law as applicable also to persons convicted of offences that have been committed before its entry into force, is unconstitutional (*infra*, 4.5.).

4.1. – All of the referral orders are premised on the common assumption that, under the established case law, changes in the rules governing the enforcement of sentences to the detriment of convicted persons are not covered by the prohibition on retroactive application of criminal law enshrined in Article 25(2) of the Constitution.

4.1.1. – A careful examination of the constitutional case law on the subject – all of which, moreover, goes back quite a long way – gives actually a rather nuanced picture.

This Court was called upon almost thirty years ago to adjudicate on the constitutionality of the retroactivity of such detrimental changes in relation to the retroactive effects produced, in the aftermath of the Capaci massacre, by Article 15 of Decree-Law No. 306 of 1992. With reference to persons convicted of offences of organised crime and terrorism, that Decree-Law had made the granting of alternative measures to prison conditional on the convicted person's "cooperation" with police and judicial authorities, and had also provided for the revocation of the measures that had already been granted in respect of those who had not "cooperated".

Throughout the 1990s, this Court did not resolve the question that is now under examination, but it did rule that that provision was partially unconstitutional, albeit on different grounds.

In its seminal Judgment No. 306 of 1993, this Court – after hearing a number of questions as to the constitutionality of the revocation of alternative measures already granted – did not examine, for procedural reasons, the question as to the compatibility of the retrospective effect of Decree-Law No. 306 of 1992 with the *nulla poena* principle laid down in Article 25(2) of the Constitution, but did recognise that the point deserved "serious consideration". On the other hand, this Court ruled that the provision dictating the revocation of measures already granted, including when it had not been ascertained that the convicted person was currently linked to organised crime, infringed Articles 27(1) and 27(3) of the Constitution, since their revocation frustrated the expectation, legitimately harboured by inmates who had already obtained day release, to obtain recognition of their progress towards rehabilitation that had taken place until then, and that granted them "the right to serve the sentence in a manner apt to facilitate the completion of this process".

In its subsequent Judgment No. 504 of 1995, this Court ruled that Article 4-*bis*(1) of the Prison Law, as amended by Article 15 of Decree-Law No. 306 of 1992, was unconstitutional in so far as it precluded the granting of *further* bonus periods of short release to persons convicted of offences of organised crime and terrorism who had not cooperated with police and judicial authorities, even when they had previously benefited from them, and the existence of current links with organised crime had not been established. The grounds for unconstitutionality lay, again on this occasion, in the fact that the challenged provision infringed Articles 3 and 27 of the Constitution, in view of the fact that it involved a sort of "regression of treatment" linked to the prison benefits in question that was unreasonable and incompatible with the rehabilitative function served by punishment.

A similar rationale underpinned Judgments No. 445 of 1997 and No. 137 of 1999, whereby Article 4-*bis* of the Prison Law was declared unconstitutional insofar as it did not provide that day release and bonus periods of short release respectively could be granted to convicted persons who, before the date of entry into force of Article 15(1) of Decree-Law No. 306 of 1992, had achieved a degree of rehabilitation commensurate with the requested benefit, and with regard to whom no current links with organised crime had been established.

The same principle was later applied by this Court (in Judgments No. 79 of 2007 and No. 257 of 2006) also with reference to the detrimental changes introduced into the Prison Law for repeat offenders.

On other occasions, this Court declared that the questions raised by the entry into force of Article 15 of Decree-Law No. 306 of 1992, which were brought in light of Article 25(2) of the Constitution specifically, were unfounded. The Court, however, refrained from stating, in general terms, that all the changes in the rules governing the enforcement of sentences to the detriment of convicted persons are outside the scope of the protection afforded by the principle of the legality of punishment.

In the case decided by Judgment No. 273 of 2001, in particular, this Court was once again urged to clarify whether "the principle of non-retroactivity of criminal law is limited to rules that create new offences or change to the detriment of offenders the constituent elements of an offence as well as the type and duration of the minimum sentence, or should cover – as the referring court considered – also the rules governing the procedures for serving a custodial sentence". The referring court had raised a question as to the constitutionality of the rules that precluded eligibility for conditional release for persons convicted of offences under Article 4-*bis*(1) of the Prison Law,

committed before the entry into force of Decree-Law No. 306 of 1992, who had not cooperated with the judicial authorities. As stated above, the Court did not give a general answer to the question, noting that the challenged provisions, in requiring cooperation with police and judicial authorities as a condition of eligibility for conditional release, had not altered the constituent elements of that mechanism, and in particular the requirement that the offender must have behaved in such a way as to make his or her repentance certain. Rather, the challenged provision was limited to introducing a legal criterion for the evaluation of the requirement, consisting precisely of cooperation with police and judicial authorities, without thus modifying to the detriment of convicted persons the substantive rules on conditional release.

The same argument appears in two later Orders, No. 108 of 2004 and No. 280 of 2001, in which two questions relating to the transitional effects of amendments to Article 4-*bis*(1) of the Prison Law were also held to be unfounded.

4.1.2. – On the other hand, the Supreme Court of Cassation's case law is very clear in stating that the rules on the enforcement of sentences are not covered by Article 25(2) of the Constitution, and consequently legal changes to the detriment of convicted persons apply also to offenders who committed the offence prior to the entry into force of the amendments.

The traditional stance that the provisions in question are not substantive in nature and are thus subject – in the absence of specific transitional rules – to the *tempus regit actum* principle was affirmed, in particular, in 2006 (Supreme Court of Cassation, Joint Criminal Divisions, Judgment No. 24561 of 17 July 2006), and has since been followed by subsequent case law (amongst many, Supreme Court of Cassation, First Criminal Division, Judgment No. 30792 of 18 September 2006; First Criminal Division, Judgment No. 29155 of 15 July 2008; First Criminal Division, Judgment No. 46924 of 9 December 2009; Second Criminal Division, Judgment No. 6910 of 22 February 2012; First Criminal Division, Judgment No. 11580 of 12 March 2013; First Criminal Division, Judgment No. 52578 of 18 December 2014; and First Criminal Division, Judgment No. 37578 of 9 September 2016).

4.1.3. – After the entry into force of Law No. 3 of 2019, this established case law was called into question by a number of trial and appeal court judgments, which held that the challenged provision was inapplicable to past offences on the basis that it was "substantially criminal" in nature, in accordance with the well-known Engel criteria developed by the ECtHR, and hence subject to the *nulla poena* principle laid down both in Article 25(2) of the Constitution and Article 7 ECHR (Judge for Preliminary Investigations of the Criminal Court of Como, Order of 8 March 2019; Reggio Calabria Court of Appeal, Second Criminal Division, Order of 2 April 2019; Naples Court of Appeal, Second Criminal Division, Order of 2 April 2019).

However, the Supreme Court of Cassation has unanimously reiterated so far – except in only one case, more about which shortly (*infra*, 4.2.2.) – the previous line of precedents starting from the above-mentioned judgment of the Joint Criminal Divisions, concluding that the amendments made to Article 4-*bis*(1) of the Prison Law are also applicable to past offences in light of the *tempus regit actum* principle (Supreme Court of Cassation, First Criminal Division, Judgments No. 25212 of 6 June 2019, No. 39609 of 26 September 2019, No. 48499 of 28 November 2019 and No. 1799 of 17 January 2020, as well as Order No. 31853 of 18 July 2019, which, precisely on the basis of that interpretation, raised the questions as to constitutionality specified in Referral Order No.

141 of the Register of Referral Orders 2019, which this Court will examine in a separate judgment).

4.2. – There are, however, several reasons to call into question this established case law.

4.2.1. – First of all, it is somewhat telling that, on at least some occasions, the legislator itself decided to expressly limit the applicability of rules governing the system of the enforcement of sentences solely to convictions handed down for offences committed after the entry into force of those rules.

This happened, in particular, with Decree-Law No. 152 of 1991, to which we owe the introduction of Article 4-*bis* of the Prison Law, in its original version. In fact, Article 4(1) of that Decree-Law provided that the provisions which raised, for persons convicted of offences referred to in the new provision, the minimum length of sentence that had to have already been served in order to be eligible for prison benefits, were applicable only in relation to offences committed after the entry into force of the Decree-Law itself.

Decree-Law No. 306 of 1992, to which we owe the introduction in Article 4-*bis*(1) of the Prison Law of a preclusion based on a lack of cooperation, departed – as explained before – from this logic. And precisely its retrospective effect gave rise to the several constitutional challenges mentioned above (*supra*, 4.1.1.) decided by this Court on grounds other than Article 25(2) of the Constitution.

But, again in 2002, the legislator – in expanding the list in Article 4-*bis*(1) of the Prison Law to include new terrorist and modern slavery offences – took care to exclude the applicability of the legislative changes to persons convicted of those criminal offences who had committed the offence before the amendments entered into force (Article 4 of Law No. 279 of 2002).

4.2.2. – As has been the case on some more recent occasions, Law No. 3 of 2019 does not, however, provide for any transitional provision excluding its applicability to persons convicted of past offences.

It was precisely this silence on the part of the legislator in 2019 that caused widespread discomfort among trial and appeal courts as to the constitutionality and compatibility with the ECHR of the retroactive effect of the new provisions, which seemed to be a logical consequence of the principles set by the established case law. This discomfort has manifested itself in both decisions by trial and appeal courts (cited in 4.1.3. above), which have directly decided to depart from the established case law, and in the large number of referral orders which have launched, over a very short period of time, the constitutional challenges now under discussion, which basically urge this Court to declare the established case law unconstitutional.

Moreover, signs of that same discomfort can also be found in the case law of the Supreme Court of Cassation.

A judgment of the Sixth Criminal Division of the Supreme Court of Cassation, in particular, raised doubts as to the constitutionality of the lack of any transitional rule in the provision challenged here, although it considered that it could not raise the issue as it was not actually relevant to the case before it. In that decision, the Supreme Court of Cassation observed that its own well-established line of case law on the procedural nature of the rules governing the prison system should now be reconsidered, in the light of the indications coming from ECtHR case law, so as to ensure foreseeability of the consequences of a breach of the criminal rules […] (Supreme Court of Cassation, Sixth Criminal Division, Judgment No. 12541 of 14 March 2019).

4.2.3. – In fact, all the referral orders place value on recent developments in ECtHR case law on the extension of the guarantee enshrined in Article 7 ECHR, with reference at least to certain changes in the enforcement of sentences to the detriment of convicted persons; and the Italian legal system cannot but take these developments into careful consideration.

Until just over a decade ago, the ECtHR supported a view that overlapped with that of Italian case law, denying in particular that amendments to rules governing the enforcement of sentences called into question the protection afforded by Article 7 ECHR (ECtHR, judgment of 29 November 2005, *Uttley v United Kingdom*; in the same vein, Commission of Human Rights decision of 3 March 1986, *Hogben v United Kingdom*).

A first, significant course correction dates back to 2008, in relation to a case in which the applicant had committed the offence at a time when the sentence of life imprisonment, under the then-current national prison law framework, meant that the offender was eligible for conditional release in the event of good behaviour after twenty years in prison. Following the amendment of that legislation, the prospect of conditional release had essentially disappeared, with the result that life imprisonment was effectively converted into detention for life. The ECtHR found there was no violation of the prohibition of retroactivity of penalties, pointing out that the amendment had not changed the penalty – life imprisonment – imposed on the basis of the law in force at the time of the material facts. Nevertheless, it held that Article 7 ECHR had been infringed, stigmatising the lack of clarity of the criminal law at the time of the event, and therefore the unforeseeability of the consequences in terms of the penalty for breaking the law (ECtHR, Grand Chamber, Judgment of 12 February 2008, *Kafkaris v Cyprus*).

But the most significant judgment of the ECtHR – by no coincidence cited by all the referral orders – is, in this context, the judgment of the Grand Chamber in the *Del Rio Prada v. Spain* case, decided in 2013. The Grand Chamber – albeit with reference to a case that does not exactly overlap with those now at issue before this Court – reiterated that, in principle, amendments to the rules on the enforcement of a sentence are not subject to the prohibition of retroactive application set out in Article 7 ECHR, except – however – for those that "result in the redefinition or modification of the scope of the 'penalty' imposed by the trial court". The Court noted that "[o]therwise, States would be free – by amending the law or reinterpreting the established regulations, for example – to adopt measures which retroactively redefined the scope of the penalty imposed, to the convicted person's detriment". If the prohibition of retroactivity did not apply in such cases – concludes the Court – Article 7 ECHR would be deprived of any useful effect for convicted persons, the scope of whose sentences could be freely changed *ex post facto* to their disadvantage (ECtHR, Grand Chamber, Judgment of 21 October 2013, *Del Rio Prada v Spain*, paragraph 89).

4.2.4. – The conclusions reached recently by the ECtHR are significantly echoed in the case law of other courts and in the legislation of other countries.

According to the U.S. Supreme Court, the general prohibition of "*ex post facto* laws" enshrined in the U.S. Constitution also applies to changes to the rules on the enforcement of sentences that have the practical effect of prolonging the sentenced person's detention, modifying the quantum of the sentence and thus operating as an unfavourable retroactive law, as such not applicable to the convicted person (*Weaver v. Graham*, 450 U.S. 24, 33 (1981); *Lynce v. Mathis*, 519 U.S. 433 (1997). In the sense,

moreover, that the guarantee of non-retroactivity operates only when the applicant is able to demonstrate that the legislative change which has occurred creates a "sufficient risk" of increasing the duration of his detention in relation to the rules in force at the time of the commission of the offence, *California Department of Corrections v. Morales*, 514 U.S. 499 (1995); *Garner v. Jones*, 529 U.S. 244 (2000).

Similar principles are recognised in French law, at least in ordinary legislation, by Article 112-2 of the Criminal Code. This rule generally provides for immediate applicability, with a view also to punishing offences committed before their entry into force, of laws amending criminal procedural law and the limitation period for the offence or penalty, as well as laws relating to the "system of execution and application of penalties", with the exception, with regard to the latter, of "those which have the effect of making the penalties imposed by the judgment of conviction more severe", which are expressly declared to be "applicable only to convictions for offences committed after their entry into force".

4.2.5. – Some referral orders (in particular, those registered as No. 160 and No. 161 in the Register of Referral Orders 2019) and, above all, the defences of the private parties have also highlighted – as did the Supreme Court of Cassation in its Judgment No. 12541 of 2019 – how the changes in the legal framework on the enforcement of sentences could distort the defendants' defence strategies during the investigation and then at trial, giving rise to a possible infringement of Article 24 of the Constitution.

That point is indeed self-evident. A defendant could, for example, waive his or her 'right to defend himself or herself at trial' and instead opt for a plea bargain with the prosecution that entails a sentence within a threshold granting immediate eligibility for an alternative measure to prison, relying on the assurance of not having to 'go to prison' thanks to the stay of the imprisonment order available under Article 656(5) of the Code of Criminal Procedure. On the contrary, the defendant could decide to face trial, trusting in the prospect that the sentence that will be imposed on him or her, even if he or she is convicted, is unlikely to result in "real" prison time, thanks to an alternative measure that he or she has a reasonable expectation of obtaining under the legislation in force at the time the offence was committed.

A change, to the detriment of convicted persons and with retroactive effect on pending trials, in the law governing prison matters is likely to frustrate the (legitimate) expectations underlying such defence strategies, exposing the defendant to penalties that are unforeseen and unforeseeable at the time of exercising a choice regarding trial, the effects of which, moreover, are irrevocable (for similar observations, see also the aforementioned judgments of the United States Supreme Court, *Weaver v. Graham*, 32, and *Lynce v. Mathis*, 445, and Supreme Court of Canada, *R. v. K.R.J.*, [2016] 1 SCR 906, 926, paragraph 25, in a case concerning the retroactive application of disqualification measures in addition to imprisonment for those convicted of sexual abuse).

4.3. – In light of all the above considerations, the Court considers it necessary to thoroughly rethink the scope of the prohibition of retroactivity enshrined in Article 25(2) of the Constitution, in relation to the law governing the enforcement of sentences.

4.3.1. – As is well known, Article 25(2) of the Constitution is the basis for both the prohibition of the retroactive application of a law which *criminalises* an act that previously did not constitute a criminal offence, and the prohibition of the retroactive application of a law that imposes a *heavier penalty* for an act that already constituted a criminal offence (most recently, Judgment No. 223 of 2018). The latter prohibition is

expressly mentioned in the second sentence of Article 7(1) ECHR, the second sentence of Article 15(1) of the International Covenant on Civil and Political Rights and the second sentence of Article 49(1) of the Charter of Fundamental Rights of the European Union (CFREU).

The rationale for such a prohibition is at least twofold.

Firstly, the purpose of the prohibition in question is to afford addressees of the rule reasonable foreseeability as to the consequences that they can expect if they violate the criminal law. Such a prohibition grants them "free choices of action" (Judgment No. 364 of 1988) and, at the same time, allows them – in the event that criminal proceedings are brought against them – to prepare a defence strategy with the assistance of legal counsel on the basis of what they can reasonably expect in terms of punishment, if convicted (*supra*, 4.2.5.).

But a second reason, equally crucial, cannot be overlooked. As was powerfully stated by a famous decision of the U.S. Supreme Court just a few years after the proclamation of the "*ex post facto* laws" prohibition in the Federal Constitution, the ban in question erects a bulwark to protect the individual against possible abuses by the legislative branch, always tempted to establish or aggravate *ex post* penalties for offences already committed. That prohibition – wrote the Supreme Court in 1798 – stems in all likelihood from the awareness of the founding fathers that the Parliament of Great Britain had often claimed, and actually exercised, the power to establish, against those who had already engaged in certain conduct considered particularly dangerous for the safety of the kingdom, penalties that were not provided for at the time of the material facts, or were heavier than those set up to then. But those laws, the Court observed, in reality "were legislative judgments and an exercise of judicial power" by a parliament animated, in reality, by vindictive malice against its adversaries (Supreme Court of the United States, *Calder v. Bull*, 3 U.S. 386, 389 (1798)).

The ban on the retroactive application of penalties not provided for at the time of the offence, or heavier than those provided for at the time, ultimately operates as one of the limits on the legitimate exercise of political power, which lies at the very heart of the notion of the 'rule of law'. This notion is intimately linked to the subjection of power to a 'law' that is designed to regulate *future* cases, and is intended to provide everyone with a transparent warning about the consequences that breaching the law may entail.

4.3.2. – It is therefore necessary to ascertain whether, and to what extent, these fundamental rationales should also apply to rules which, while leaving the type and quantum of penalties for offences unchanged, nevertheless change the way they are actually enforced.

In this regard, there are admittedly solid reasons for the solution, to date enshrined in the current case law, according to which sentences must, *as a rule*, be served in accordance with the law in force *at the time of their enforcement*, and not in accordance with the law in force at the time the offence was committed.

Firstly, since the enforcement of prison sentences is an ongoing process, that often takes place at a considerable distance in time from the commission of the offence, one cannot fail to recognise that over time the context – both legal and factual – in which a sentence must be executed inevitably changes. From this consideration stems an obvious need for physiological adjustments of the rules adopted, which must respond continuously to such changes. If the rules governing the enforcement of prison sentences were to remain crystalized as per the regulatory framework in force at the

time of the commission of the offence, for example, the restrictions on the use of mobile phones or the Internet currently provided for in the legal framework governing the prison system could not be applied to those who committed a murder in the 1980s or 1990s.

Secondly, the (physiologically changing) rules on treatment are themselves based on a complex balancing of the delicate interests at stake (*inter alia*: the protection of the fundamental rights of convicted persons, but also the control of the criminal dangerousness of offenders inside and outside prison, bearing in mind the overall limited resources available), the results of which do not lend themselves to the binary logic of the 'more favourable' or 'detrimental' solution for the individual convict concerned, in which the prohibition of retroactive application of the criminal law must operate. Think of a reduction in 'the hours of outdoor recreation' linked, at the same time, to greater opportunities for work outside of prison. Would such a solution be more favourable, or detrimental, to the convicted person?

But above all, a strict and general prohibition on the retroactive application of any changes to the rules governing the enforcement of sentences that could be considered as detrimental to the convicted person would end up creating, within the same prison, a plurality of parallel implementation regimes, each linked to the date of the offence committed. This would give rise not only to serious management difficulties for the prison administration, but also to unequal treatment among prisoners; with all the predictable consequences in terms of maintaining order within the institution, which is also an essential condition for an effective deployment of the rehabilitative function played by sentences.

4.3.3. – However, an *exception* to the rule set out above must be recognised, where the subsequent legislation does not entail mere changes to the rules governing the execution of the sentence provided for by law at the time of the offence, but rather a transformation of the very nature of the sentence, and of its actual impact on the personal liberty of the convicted person.

In this case, in fact, the changes to the law give rise, for all practical effects, to the application of a penalty which is essentially different from that established at the time of the commission of the offence. Here all the rationales mentioned above, which underpin the prohibition of retroactive application of laws that lead to a heavier penalty for the offence, apply.

This paradigmatically occurs if – at the time of the commission of the offence – the law provides for a sentence that may be served 'outside' prison but – as a result of a change in the law – the sentence that will be eventually carried out, while not formally changing its *nomen iuris*, must normally be served 'inside' prison. Between 'outside' and 'inside' there is a radical difference: as to the quality, as well as to the quantity, of the penalty. The sentence to be served becomes *something different* than that provided for at the time of the offence. Here Article 25(2) of the Constitution cannot but prevent the new law from being applied.

The same logic applies where the difference between 'outside' and 'inside' can be appreciated as a result of *prognostic* assessments of, respectively, the type of penalty that one could reasonably expect at the time of the commission of the offence, on the basis of the law then in force, and of the penalty that one can reasonably expect on the basis of the changed regulatory framework. Precisely the US case law referred to above (*supra*, 4.2.4.) shows that – for the purposes of verifying whether the legislative amendment is detrimental to convicted persons – a prognostic assessment is essential

when the change in the law creates *a serious risk* that the convicted person may be subject to more severe treatment than was reasonably foreseeable at the time of the offence, in terms of lower probability of eligibility to serve the sentence outside prison (such as on parole in the United States, or alternative measures to prison in the Italian legal order).

4.4. – It is now necessary to examine the impact of the overall reconsideration made so far on the issues of constitutionality now under consideration.

The challenged provision includes most of the offences against the public administration listed in Article 4-*bis*(1) of the Prison Law, thus entailing adverse consequences on the serving of their sentences for the persons convicted of such offences, explained above (*supra*, 2.).

It is therefore necessary to determine whether, and to what extent, these adverse consequences can lawfully be applied – in accordance with the principles set out above – to those who were convicted of offences committed before the provision entered into force.

4.4.1. – This Court considers that Article 25(2) of the Constitution does not preclude the retroactive application of the amendments made by the challenged provision to the law governing *mere prison benefits* and, in particular, bonus periods of short release and external work assignments.

In fact, although the significant impact that those benefits have on the actual severity of the penalty imposed on individual offenders cannot be denied, this Court is of the opinion that legislative changes that merely tighten the conditions of eligibility for these benefits do not result in a transformation of the nature of the sentence to be served, compared to that provided for at the time of commission of the offence, so as to call into question the constitutional guarantee at issue.

An inmate who has been granted a bonus period of short release or who is allowed to engage in a work assignment outside prison continues to serve a sentence that remains basically characterised by a *custodial* dimension. He or she remains in principle 'inside' the prison, continuing to be subject to the detailed legal framework that characterises imprisonment, and which involves almost every aspect of a prisoner's life.

On the other hand, precisely because inmates who are periodically granted a bonus period of short release and/or external work assignments pursuant to Article 21 of the Prison Law remain prisoners who serve the prison sentence imposed on them by the trial judge, the previously mentioned need (*supra*, 4.3.2.) to avoid unequal treatment within the same prison depending solely on when the offence was committed cannot but apply to those inmates. Such disparities would be very problematic to deal with for the prison administration, and would as such be difficult for the general population of detainees to accept.

4.4.2. – However, the opposite conclusion must be drawn in relation to the effects produced by the challenged provision on the rules on eligibility for the *alternative measures to prison* governed by Title I, Chapter VI, of Law No. 354 of 1975, and in particular community service, home detention in its various forms and day release.

These are "measures of a substantive nature that affect the quality and quantity of the sentence [...] and which, for that very reason, alter the degree of deprivation of liberty imposed on the prisoner" (Judgment No. 349 of 1993). They even end up constituting genuine alternative penalties to prison (Order No. 327 of 1989) ordered by the supervisory court and characterised not only by a much more limited impact on the

convicted person's personal liberty, but also by a marked rehabilitation vocation, which takes a completely different form from that of detention.

This has also recently been reaffirmed by this Court with reference both to: community service for convicted adults, which is defined as "a means of serving a sentence, as an alternative to prison – not as harsh, certainly, as prison, but equally connoted by a sense of punishment for the offence committed, so that the positive outcome to the community service extinguishes the prison sentence and any other criminal effect (Article 47(12) of the Prison Law)" (Judgment No. 68 of 2019); and home detention, which is also "'not an *alternative to punishment'* but a *punishment that is an 'alternative to detention'*", characterised by conditions merely "restricting freedom, under the control of the Supervisory Court and with the involvement of the social services" (Judgment No. 99 of 2019, citing the aforementioned Order No. 327 of 1989).

These considerations also apply with respect to day release, where the obligation to spend part of the day – and at least night time – inside the prison (but, as a rule, in separate sections: Article 48(2) of the Prison Law) is accompanied by the enjoyment of a very significant amount of freedom without the detailed rules that normally accompany the granting of mere extramural benefits.

4.4.3. – The same conclusion must be drawn as far as *conditional release* is concerned. This measure is regulated by Articles 176 and 177 of the Criminal Code, but is similar to alternative measures to prison, inasmuch as it is also aimed at enabling a gradual reintegration of the inmate into society, through granting a reduced sentence to those who have, during their time in prison, "behaved in such a way as to show their repentance is genuine".

For persons convicted of offences against the public administration, making conditional release subject to the condition of cooperation with police or judicial authorities, or equivalent conditions, entails a clear risk that the time spent in prison will be significantly longer, compared to the prospects which he or she had on the basis of the law in force at the time of the commission of the offence. This leads to the conclusion that Article 25(2) of the Constitution is also incompatible with the retroactive application of the preclusion referred to in Article 4-*bis*(1) of the Prison Law with respect to conditional release.

4.4.4. – The same conclusion must be drawn, finally, with regard to the repercussions that the challenged provision has in relation to the *prohibition on staying the sentence enforcement order* referred to in Article 656(9)(a) of the Code of Criminal Procedure.

This conclusion is not precluded by the inclusion of the latter provision in the Code of Criminal Procedure, which has led the case law, unanimous to date (chief amongst which Supreme Court of Cassation (Joint Criminal Divisions) Judgment No. 24561 of 2006), to hold that the provision in question is subject to the general principle of *tempus regit actum*.

In fact, the *locus* of a provision can never be considered decisive when it comes to identifying the constitutional guarantees applicable to it. On several occasions, constitutional case law has already extended the guarantees under Article 25(2) of the Constitution to rules not formally classified as criminal by the legislator (Judgments No. 63 of 2019, No. 223 of 2018, No. 68 of 2017 and No. 196 of 2010, as well as Order No. 117 of 2019).

This principle must also apply in relation to the rules laid down in the Code of Criminal Procedure, which directly affect the quality and quantity of the sentence actually applicable to the convicted person.

In prohibiting any staying of orders for enforcement of custodial sentences in a number of cases, including in that of a sentence imposed for an offence referred to in Article 4-*bis* of the Prison Law (as in the present case), Article 656(9) of the Code of Criminal Procedure has the effect of triggering the execution of the custodial sentence in prison, pending the decision by the supervisory court on the convicted person's application for an alternative measure. This means that at least a part of the sentence will actually be served in prison rather than outside of prison, as would have likely occurred – for the entire duration of the sentence imposed – on the basis of the law in force at the time the offence was committed.

This is sufficient to recognise that the provision in question has a transformative effect on the sentence imposed and its actual impact on personal liberty, compared with the legal framework in force at the time the offence was committed. It follows that the said provision is inapplicable, under Article 25(2) of the Constitution, to convictions for offences committed before the entry into force of the amended legislation, which indirectly modified the scope of its application by including numerous offences against the public administration in the list in Article 4-*bis* of the Prison Law.

4.4.5. – For the reasons set out above (*supra*, 4.3.4.), the conclusions drawn so far are not invalidated by the argument that the prospect – for the convicted person – of an alternative measure being granted on the basis of the law in force at the time of the offence was merely *hypothetical*.

The assessment as to whether the new rules are detrimental to convicted persons can only be carried out according to criteria of likelihood, with reference both to the benefits that the convicted person was eligible for on the basis of the previous rules, and to the adverse consequences arising from the entry into force of the new rules.

Regarding the first aspect, it is clear that – in general, and without prejudice to the specifics of each individual case – it was considerably likely, on the basis of the previous law, that persons convicted of offences against the public administration would be eligible for alternative measures to prison if the relevant amount of the sentence still to be served, as well as his or her age (with regard to home detention referred to in Article 47-*ter*(1) of the Prison Law), so permitted. Such an assumption is, if nothing else, demonstrated by the high number of referral orders, which argue the relevance of the questions precisely on the basis of a judgment as to the worthiness of the individual offenders to receive benefits on the basis of the previous rules.

Regarding the second aspect, it cannot be denied, conversely, that the new law – in addition to absolutely ruling out eligibility for certain measures, such as home detention for prisoners over the age of 70 (which would be sufficient to demonstrate the necessarily adverse nature on the face of it) – makes it significantly less likely that the alternative measures will be granted. That also in view of the uncertainties – not yet tackled by case law – regarding the precise extent of the obligation to cooperate incumbent on persons convicted of offences against the public administration and, in particular, whether that is to be understood as being limited to the individual offence for which one has been convicted or whether it extends to all offences connected with it in any way, and which the judicial authorities consider that the convicted person is possibly aware of.

4.5. – As already pointed out, the challenged Article 1(6)(b) of Law No. 3 of 2019 makes no provision for its application over time, nor does it provide for its application to convictions for offences committed before the entry into force of the law. As regards the aspects complained of in the referral orders examined here, it is the rule derived from the established case law, to the effect that amendments introduced by the challenged provision also apply retroactively, that is contrary to Article 25(2) of the Constitution.

In order to remedy that infringement, State Counsel's suggestion at the hearing for an interpretative judgment dismissing the case through declaring the questions unfounded "in the terms set out in the reasoning" cannot be granted. The existence of an established case law in the opposite direction (*supra*, 4.1.) excludes the feasibility of such an option, and requires the Court to give a judgment ruling that the questions raised are well founded (*ex plurimis*, Judgment No. 299 of 2005).

Consequently, it must be declared that Article 1(6)(b) of Law No. 3 of 2019 is unconstitutional, on the grounds that it infringes Article 25(2) of the Constitution, insofar as it is interpreted as meaning that the amendments introduced to Article 4-*bis*(1) of Law No. 354 of 1975 also apply to convicted persons who committed the offence before the entry into force of Law No. 3 of 2019, with reference to the rules governing alternative measures to prison provided for in Title I, Chapter VI, of Law No. 354 of 1975, conditional release under Articles 176 and 177 of the Criminal Code and the staying of sentence enforcement orders under Article 656(9)(a) of the Code of Criminal Procedure.

Any other constitutional complaints raised by the referral orders are thereby absorbed.

5. – As previously clarified (*supra*, 4.4.1.), the Court does not consider that Article 25(2) of the Constitution prohibits the retroactive application of changes to the law that have a detrimental effect on the convicted person as regards the legal framework governing mere *prison benefits* like, in particular, bonus periods of short release and external work assignments.

This does not mean, of course, that the legislator is allowed to disregard the rehabilitation process actually undertaken by the convicted person who has already achieved a degree of rehabilitation appropriate to the granting of the benefit. This would conflict – if not with Article 25(2) of the Constitution – with the principle of equality of treatment and the rehabilitation function served by punishment (Articles 3 and 27(3) of the Constitution), in accordance with the principles developed by the case law of this Court since the 1990s (*supra*, 4.1.1.).

Such an infringement has in fact occurred in the case at issue in the main proceedings referenced in the Potenza Supervisory Court's referral order, registered as No. 210 in the Register of Referral Orders 2019, concerning the case of a convicted person who is serving his prison sentence and who – according to the information provided by the referring court – at the date of entry into force of Law No. 3 of 2019 had already fulfilled the requirements for the granting of a bonus period of short release on the basis of the previous legislation.

Denying the benefit concerned to those who are in the position of that convicted person would be tantamount to disregarding the pedagogical-propulsive function of the bonus period of short release (Judgment No. 253 of 2019) as a suitable instrument to enabling his or her initial reintegration into society, with a view to possibly granting later alternative measures to prison, in the absence of serious misconduct demonstrating

unworthiness for the benefit in the specific case (Judgment No. 504 of 1995; in the same vein, Judgments No. 137 of 1999 and No. 445 of 1997).

Article 1(6)(b) of Law No. 3 of 2019 must thus be declared unconstitutional, on grounds that it infringes Articles 3 and 27(3) of the Constitution, insofar as it does not provide that the prison benefit of a bonus period of short release may be granted to persons convicted of one of the offences listed therein who, prior to the entry into force of that law, have already achieved a degree of rehabilitation appropriate to obtaining the benefit. Any further complaints raised by the referring court are absorbed.

[…].

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

having joined the proceedings,

(1) *declares* that Article 1(6)(b) of Law No. 3 of 9 January 2019 (Measures to combat offences against the public administration as well as on the statute of limitations for offences and on the transparency of political parties and movements) is unconstitutional insofar as it is interpreted as meaning that the amendments introduced to Article 4-*bis*(1) of Law No. 354 of 26 July 1975 also apply to convicted persons who committed the offence before the entry into force of Law No. 3 of 2019, with reference to the rules governing alternative measures to prison provided for in Title I, Chapter VI, of Law No. 354 of 1975, conditional release under Articles 176 and 177 of the Criminal Code and the prohibition on the staying of sentence enforcement orders under Article 656(9)(a) of the Code of Criminal Procedure;

2) *declares* that Article 1(6)(b) of Law No. 3 of 2019 is unconstitutional insofar as it does not provide that the prison benefit consisting of a bonus period of short release may be granted to convicted persons who, prior to the entry into force of that law, have already achieved a degree of re-education appropriate to obtaining the benefit;

(3) *declares* the question as to the constitutionality of Article 1(6)(b) of Law No. 3 of 2019 raised, with reference to Article 3 of the Constitution, by the Taranto Supervisory Court with the referral order referred to in the headnote (Referral Order No. 157 of 2019) is inadmissible.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 12 February 2020.

Signed by: Marta CARTABIA, President

Francesco VIGANÒ, Author of the Judgment