Press Office of the Constitutional Court

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# OFFENCES PRECLUDING ENJOYMENT OF PRISON PRIVILEGES AND RELEASE ON TEMPORARY LICENCE: IT IS RIGHT TO "REWARD" PRISONERS WHO COOPERATE WITH JUSTICE; FURTHER "PUNISHMENT" FOR FAILURE TO COOPERATE IS UNACCEPTABLE

Individuals imprisoned for having committed offences of mafia association and/or offences related to mafia activity can be "rewarded" for cooperating with judicial authorities. However, if they choose not to cooperate, they cannot be further "punished" – namely by denying them privileges recognised to all prisoners. In the latter case, they are still presumed to be dangerous. However, this presumption is no longer an absolute one, because it can be rebutted if the sentence supervisory court has proof that the prisoners no longer have ties to the criminal organisation or that there is no danger of these ties being re-established. Therefore, it is not enough to engage in ordinary behaviour in prison (so-called "good behaviour") or merely to participate in the rehabilitation process. Nor does it suffice to simply declare that one no longer has ties with the criminal organisation. The presumption of dangerousness – which is now relative, and no longer absolute – may be rebutted only by evidence that the criminal partnership no longer exists.

This was held by the Constitutional Court in Judgment no. 253, filed today (Judge Rapporteur: Nicolò Zanon), in which it declared the unconstitutionality of Article 4-*bis*(1) of the Prison Law insofar as it does not allow judges to assign releases on temporary licence where the indicated conditions are met. The unconstitutionality of the provision – which arises due to its contrast with the principles of reasonableness and the rehabilitative function of punishment (Articles 3 and 27 of the Constitution) – was extended to all offences listed in Article 4-*bis*(1) in addition to those of mafia association and/or offences related to mafia activity, including offences not punished by life imprisonment.

Indeed, the Court specifies, as a preliminary matter, that the questions of constitutionality before it do not concern so-called "whole-life" imprisonment, on which the European Court of Human Rights recently issued judgment (13 June 2019, *Viola v. Italy*). This is because other than Article 4-*bis*(1) of the Prison Law, the questions do not also challenge Article 2(2) of Decree-Law no. 152 of 13 May 1991, converted into Law no. 203 of 1991. According to said Article 2(2), individuals who are sentenced to life imprisonment, who do not cooperate with judicial authorities and who have already served 26 years of their sentence cannot be granted release on licence. The questions raised before the Court do not concern individuals sentenced to a specific punishment, but rather those sentenced (in this case, to life imprisonment) for offences that preclude enjoyment of prison privileges, and, within this category, particularly mafia-type offences.

Prior to the declaration of unconstitutionality, the challenged provision presumed that failure to cooperate with judicial authorities after being sentenced for certain offences unequivocally proved that links to organised crime persisted. This presumption was absolute in nature, in the sense that it could be rebutted only if the prisoner actually decided to cooperate. On the basis of this legal framework, applications for privileges (in this case, release on temporary licence) envisaged in the Prison Law, made by prisoners who did not cooperate with judicial authorities, could never be concretely assessed by sentence supervision courts; rather, these were required to declare these applications inadmissible.

The Judgment emphasises that it is not the presumption in itself, but rather its absolute nature, to contrast with the Constitution (see also the Court's press release of 23 October 2019, available in Italian).

While it is not unreasonable to presume that non-cooperating prisoners have not severed ties to their criminal organisation, it is unreasonable to prevent that presumption from being rebutted by elements other than cooperation itself.

This is for three different but complementary reasons.

First, the investigative, criminal policy and collective safety needs implied in the absolute nature of the presumption end up affecting the ordinary enforcement sentence, with adverse consequences for non-cooperating prisoners over and beyond the sentence already received. While it is right to "reward" cooperation with judicial authorities that is engaged in after the sentence has been imposed – by recognising benefits in the prison treatment given – it is unconstitutional to

"punish" non-cooperation by preventing non-cooperating prisoners from accessing prison privileges that are normally available to other prisoners.

Second, the absolute nature of the presumption prevents sentence supervisory courts from concretely assessing individual prison experiences. This contrasts with the rehabilitative function of punishment, which is understood as rehabilitating the offender's return to society.

Finally, the absolute presumption was founded on a statistics-based generalization, that is, on the likelihood that prisoners' non-cooperation indicated enduring links to the criminal organisations to which they belonged. However, to avoid being unreasonable, it must be possible to contradict this generalisation in individual cases – even more so as more time is served – if there is evidence to refute it. Detention can change prisoners and the outside context to which they could be returned, albeit briefly and temporarily, on temporary release on licence. And sentence supervisory courts must be able to evaluate these changes in a specific and personalised manner.

However, because the case at hand involves the offence of affiliation to a mafia association (and related offences), which is notoriously characterized by a particularly strong bond with the criminal organisation, these changes must be concretely assessed on the basis of especially strict criteria, which are proportional to the strength of the criminal bond that the prisoners are required to conclusively sever.

Sentence supervisory courts are not to make these assessments in isolation, but rather on the basis of prison authorities' reports and of the information acquired by the relevant provincial committee for order and public safety.

It is crucial to note that according to Article 4-*bis*(3) of the same law, prison privileges, including temporary release on licence, "cannot be granted" at all (notwithstanding the autonomy each sentence supervisory court enjoys in making its assessments) when the National Anti-Mafia (and today, Anti-Terrorism) Prosecutor or the District Prosecutor states that the prisoners in question continue to have links to organised crime. The prosecutors may provide such information on their own initiative or pursuant to notifications by the relevant provincial commission for order and public safety.

Basically, the Judgment removes only releases on temporary licence (and no other privileges) from the "preclusive" category established by Article 4-*bis* for prisoners who do not cooperate with judicial authorities.

Finally, the Court explained why the declaration of unconstitutionality must extend to all offences listed in Article 4-*bis*(1).

By virtue of several criminal policy choices – which were not always coordinated with one another and the only common element of which is the will to make prison regimes harsher – that responded to the criminal phenomena emerging from time to time, the provision at issue gradually expanded its limits, eventually including special provisions on a varied and layered list of offences, not necessarily only association offences.

Against this backdrop, if the declaration of unconstitutionality did not extend to all these offences, there would arise a paradoxical disparity of treatment, to the detriment of prisoners to whom the requirement of cooperating with judicial authorities or of proving the absence of links to organised crime cannot justifiably apply.

In conclusion, failing to extend the ruling made through the Judgment to all offences listed under Article 4-*bis* of the Prison Law (thus going beyond offences of mafia association and/or offences related to mafia activity) would compromise the inherent coherence of the entire legal framework.

Rome, 4 December 2019