Press Office of the Constitutional Court

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THE RETROACTIVE APPLICATION OF PROVISIONS THAT TRANSFORM A SENTENCE TO BE SERVED "OUTSIDE" PRISON INTO A SENTENCE TO BE SERVED "INSIDE" PRISON IS UNCONSTITUTIONAL

If a sentence that can be served "outside" prison is provided for at the time an offence is committed but subsequently enacted legislation transforms it into a sentence that is to be served "inside" prison, that legislation cannot have retroactive effect. There is in fact a radical difference between "outside" and "inside", which is primarily qualitative, in addition to being quantitative, as the impact of the sentence on personal freedom is profoundly different.

This was the core reasoning on the basis of which, by Judgment no. 32/2020 filed today (author of the judgment Francesco Viganò), the Constitutional Court ruled unconstitutional the retrospective application of Law no. 3/2019 (the so-called "sweep out the corrupt law") insofar as it extends the grounds for ineligibility for alternative measures to incarceration already laid down by Article 4-bis of the Provisions on Prison Law for organised crime offences (see the press release of 12 February 2020) to most types of offence against the public administration. The decision involved a reconsideration of the traditional position, which had previously been followed consistently by the Court of Cassation and the Constitutional Court itself, that sentences are to be enforced in accordance with the law in force *at the time of enforcement of the sentence*, rather than the law in force *at the time the offence was committed*.

The Judgment states that the principle enshrined in Article 25 of the Constitution that no person may be punished by a penalty not provided for at the time the offence was committed or by a more severe penalty than that provided for at the relevant time operates as "one of the limits on the legitimate exercise of political power, which lie at the very heart of the notion of the rule of law".

Therefore, whilst it is generally speaking lawful for the arrangements applicable to the enforcement of the penalty to be governed by the law in force at the time of enforcement and not the law in force at the time the offence was committed (*inter alia* in order to ensure uniform treatment for prisoners), this cannot be the case – the Judgment stresses – "where the later legislation does not entail mere changes to the arrangements applicable to the enforcement of the sentence provided for by law at the time of the offence, but rather a transformation of the nature of the sentence and its specific interference with the individual freedom of the convicted person".

The "sweep out the corrupt law" has rendered the prerequisites for eligibility for alternative measures to incarceration and conditional release much more burdensome, and as a result cannot be applied retrospectively by the courts.

The same considerations apply in relation to the procedural mechanism whereby the sentence enforcement order is suspended in the event of conviction to a custodial sentence not exceeding four years for the purpose of requesting the supervisory court to grant eligibility for an alternative measure to incarceration.

Therefore, having found that Law no. 3/2019 does not contain any transitory provisions, the Court declared the "sweep out the corrupt law" unconstitutional "insofar as it may be interpreted" to the effect that the changes introduced by it are to apply also to persons convicted of offences committed prior to its entry into force as regards alternative measures to

incarceration, conditional release and the prohibition on the suspension of the sentence enforcement order.

The principles thereby enshrined do not apply to bonus periods of short release and external work, which will therefore continue to be governed by the law in force at the time the sentence is being enforced. However, the Court clarified that these benefits cannot be withheld from prisoners who have already undergone a fruitful process of rehabilitation.

Rome, 26 February 2020