

JUDGMENT NO 52 YEAR 2025
[omitted]
THE CONSTITUTIONAL COURT
[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 47-*quinquies*(7) of Law No 354 of 26 July 1975 (Provisions on the prison system and the enforcement of measures involving deprivation and restriction of freedom), initiated by the Bologna Supervisory Court (*Tribunale di sorveglianza di Bologna*) with referral order of 10 April 2024 and by the Venice Supervisory Court (*Tribunale di sorveglianza di Venezia*) with referral order of 26 September 2024, in supervisory proceedings against M.C. and D.M.G., registered, respectively, as Nos 174 and 197 in the 2024 Register of Referral Orders and published in the *Official Journal of the Italian Republic* Nos 40 and 44, first special series of 2024.

Having regard to the statement in intervention filed by the President of the Council of Ministers;

after hearing Judge Rapporteur Francesco Viganò in chambers on 10 March 2025;
after deliberation in chambers on 10 March 2025.

The facts of the case

1.– By referral order of 10 April 2024 (registered as No 174 in the 2024 Register of Referral Orders), the Bologna Supervisory Court raised, by direct application, questions regarding the constitutionality of Article 47-*quinquies*(7) of Law No 354 of 26 July 1975 (Provisions on the prison system and the enforcement of measures involving deprivation or restriction of freedom) in relation to Articles 2, 3, 29, 30, 31(2) and 117(1) of the Constitution, the latter concerning Articles 8 and 14 of the European Convention on Human Rights, insofar as it provides that home detention may be granted to a father serving a custodial sentence “if the mother is deceased or unable to care for the children, and there is no way of entrusting them to anyone other than the father”.

Secondly, the provision is challenged with reference to the same constitutional provisions, insofar as it states that home detention may be granted to fathers serving a custodial sentence only if “there is no way of entrusting them to anyone other than the father”.

1.1.– The referring court must rule on the request submitted by M.C., who has been an inmate in the Ferrara prison (*Casa circondariale di Ferrara*) since 10 September 2023, serving a sentence of four years, eleven months and twelve days. He seeks special home detention under Article 47-*quinquies*, paragraphs 7 and 1-*bis*, of the Prisons Law in order to care for and assist his minor children.

The referring court states that the applicant’s children, who are minors placed in his care by the Family Court, are presently being cared for by their older sister.

The inmate’s application should therefore be rejected. On one hand, the mother has in any event the right to see her children and to maintain a relationship with them, albeit not on a continuous basis; on the other, the children are currently living with their sister’s family, and there is no indication that they are lacking care or assistance.

1.2.– However, the referring court questions whether the provision at issue is compatible with the constitutional principles mentioned above.

[omitted]

2.– The President of the Council of Ministers, represented and defended by the State Counsel, filed an intervention in the proceedings, requesting that the questions be declared inadmissible or, in any case, unfounded.

[omitted]

3.– In accordance with Article 6 of the Rules of procedure of the Constitutional Court, the Italian Association of Professors of Criminal Law (*Associazione italiana dei professori di diritto penale* – AIPDP) filed a written opinion as *amicus curiae*, which was admitted by presidential decree on 17 January 2025.

The AIPDP fully shares the concerns expressed by the referring court regarding the constitutionality of the provision in question as it creates an unjustifiable distinction between parental roles solely on the basis of gender.

[omitted]

4.– By referral order of 26 September 2024 (registered as No 197 in the 2024 Register of Referral Orders), the Venice Supervisory Court raised questions of constitutionality regarding Article 47-*quinquies*(7) of the Prisons Law, in relation to Articles 2, 3, 27(3), 29, 30, 31 and 117(1) of the Constitution, the latter in relation to Articles 8 and 14 of the ECHR, “insofar as it provides that fathers serving custodial sentences may be granted special home detention only ‘if the mother is deceased or unable to care for the children, and there is no way of entrusting them to anyone other than the father’”.

4.1.– The referring court is called upon to rule on the request for special home detention under Article 47-*quinquies* (7)(1-*bis*) of the Prisons Law made by D.M.G., an inmate at the Vicenza prison (*Casa circondariale di Vicenza*), serving a custodial sentence of eleven years, one month and fifteen days, after two separate convictions for various offences, including criminal association, theft, robbery and receiving stolen goods.

The applicant, who has previously been granted leave on grounds of necessity under Article 30 of the Prisons Law and leave to visit his sick child pursuant to Article 21-*ter*(1) of the same law, is the father of a minor with a serious disability requiring constant care following a concussion sustained in an accident. The child is “fed via a PEG tube, communicates through facial expressions and crying, uses leg and foot braces and a spinal support and undergoes regular hospital admissions and specialist consultations. Medical professionals currently describe his condition as chronic, irreversible and progressively degenerative”. The social and family assessment conducted by the Office for Non-custodial Criminal Enforcement (*Ufficio di esecuzione penale esterna – UEPE*) also indicates that the child’s mother is currently caring for him on her own, with no significant support from either her own family or that of her husband. The mother also reports that the recent deterioration of the child’s condition is making it increasingly difficult to care for him, not least because of his frequent respiratory attacks. She emphasises that during previous periods of reward-based rehabilitation, the father “demonstrated his ability to manage his parental responsibilities, which allowed her to rest, albeit for only a few hours at a time”. The medical documentation acquired confirms a recent overall deterioration in the child’s health, which calls for more aggressive pain relief therapy to which the mother has expressed objections, whereas the father appears to understand the need for it.

The referring court further notes that the applicant’s conduct in prison has generally been appropriate, marked by active participation in rehabilitation activities and work in

the prison kitchen. His behaviour during the periods of special leave granted thus far has also been deemed satisfactory.

[omitted]

However, the requested privilege cannot be granted due to the condition laid down in Article 47-*quinquies*(7) of the Prisons Law for sentenced fathers, specifically that the mother must be deceased or unable to care for the children, and there is no way of entrusting them to anyone other than the father.

[omitted]

5.– The President of the Council of Ministers, represented and defended by the State Counsel, filed an intervention in the proceedings, requesting that the questions be declared inadmissible or, in any event, unfounded.

[omitted]

Conclusions on points of law

[omitted]

3.– The two cases concern largely overlapping issues and should therefore be joined for the purposes of the decision.

Essentially, both referring courts contest the differential treatment of sentenced fathers and mothers with regard to the conditions for access to the home detention measure. The measure is provided for in Article 47-*quinquies* of the Prisons Law, which is reserved for sentenced parents who are not eligible for ‘ordinary’ home detention under Article 47-*ter*(1)(a) and (b) of the Prisons Law, which is, instead, reserved for persons serving a custodial sentence not exceeding four years, including where it forms part of a longer sentence.

Sentenced mothers with children aged ten or under, or minors with serious disabilities, may be eligible for this measure once they have served at least one third of their sentence, or fifteen years in the case of a life sentence, “if there is no real danger of further offences being committed” (paragraph 1), or even before that term “if there is no real danger of further crimes being committed or of flight” (paragraph 1-*bis*).

Sentenced fathers may, however, be permitted to benefit from the measure under the challenged paragraph 7, where the conditions set out in paragraphs 1 and 1-*bis* (also applicable to sentenced mothers) are met, only “if the mother is deceased or unable to care for the children, and there is no way of entrusting them to anyone other than the father”.

The two referring courts requested that this Court remove the last clause, thereby placing fathers and mothers in prison in the same position vis-à-vis the conditions for access to the measure.

According to the referring courts, the current provisions breach:

- the principle of equal dignity and equality before the law without distinction of sex (Article 3(1) of the Constitution), the prohibition of sexual discrimination in the enjoyment of the right to family life (Articles 8 and 14 of the ECHR through Article 117(1) of the Constitution), the principle of moral and legal equality between spouses (Article 29(2) of the Constitution) and the principle of equal treatment for parties to forms of social life other than marriage, which is grounded in Article 2 of the Constitution;

- the principle of the best interests of the child, as inferred from Articles 30 and 31 of the Constitution, and, in particular – according to the Bologna Supervisory Court – the right of the child to be cared for by two parents, as a corollary of the duty of both parents to ensure the care and education of their children;

– only in the case of the Venice Supervisory Court, the necessary rehabilitative function of sentencing, as laid down in Article 27(3) of the Constitution.

The Bologna Supervisory Court called, in the alternative, for the removal of at least the portion of the provision which reads, “there is no way of entrusting them to anyone other than the father”. This would allow sentenced fathers to have access to the measure when the mother is deceased or unable to look after the child, regardless of whether other persons are able to care for the children.

[omitted]

5.– On the merits, it is necessary first of all to examine the issues regarding the total removal from Article 47-*quinquies*(7) of the Prisons Law of the wording “if the mother is deceased or unable to care for the children, and there is no way of entrusting them to anyone other than the father”, and therefore the claim to equal treatment of the father as regards the conditions for access to special home detention.

5.1.– In its recent Judgment No 219/2023, this Court examined questions regarding the constitutionality of the parallel rules and procedures governing ‘ordinary’ home detention referred to in Article 47-*ter*(1)(a) and (b) of the Prisons Law, which also establishes more restrictive rules and procedures for sentenced fathers compared with sentenced mothers. At the time, these questions were raised solely from the perspective of the alleged inconsistency with the child’s interests in maintaining a continuous relationship with both parents. On that occasion, the referring court invoked these interests by referencing Articles 3 (from the point of view of the principle of reasonableness) and 31(2) of the Constitution, while the referring courts now invoke them by jointly referencing Articles 30 and 31 of the Constitution.

Judgment No 219/2023 first of all acknowledged that the constitutional safeguards concerning minors, read in the light of the numerous international and European Union instruments by which Italy is bound, imply “the right of each parent and of the minor to enjoy a mutual relationship”, a right that can be inferred from the wide-ranging principle of the “best interests of the child” (point 4.2 of the *Conclusions on points of law*).

However, the judgment went on to state that “the principle in question does require that the interests of the child be given particularly careful consideration in every decision, whether judicial, administrative or legislative, concerning them, but it does not guarantee their automatic prevalence over all individual or collective interests”. Accordingly, this principle may well be weighed against the set of interests underlying the enforcement of the sentence. It must, in fact, be recognised that, at least in certain circumstances, the restriction of the child’s interest in maintaining a relationship with a detained or interned parent constitutes an unavoidable and constitutionally acceptable consequence of the enforcement of the judgment (point 4.3 of the *Conclusions on points of law*).

The constitutionally sustainable balance between the conflicting interests – Judgment No 219/2023 further specified – was identified by this Court as residing in the view that “the interests, albeit significant, underlying the enforcement of the judgment [must], as a rule, give way to the need to ensure that young children can enjoy a direct relationship *with at least one* of their parents”. This applies provided that the sentenced parent who meets the statutory conditions for access to the measure does not pose a danger to society – in which case the interests of the child must necessarily be safeguarded through means other than placement with one of the parents (point 4.4 of the *Conclusions on points of law*).

In this context, the legislature’s decision to prioritise safeguarding the child’s relationship with the mother, assigning to the father serving a custodial sentence the

obligation to care for the child only when the mother is unable to do so, was deemed unobjectionable with regard to its ability to protect the child's relationship with at least one of the parents (point 4.5 of the *Conclusions on points of law*).

The same reasoning must be applied to the provisions at issue in the present case, which are substantially analogous to those previously examined under Article 47-ter(1)(a) and (b) of the Prisons Law.

Hence, the questions raised by the referring courts with regard to Articles 30 and 31 of the Constitution, in relation to the entire clause, "if the mother is deceased or unable to care for the children, and there is no way of entrusting them to anyone other than the father", are unfounded.

5.2.– Judgment No 219/2023 expressly noted that this Court had not been called upon, through the referral order, to rule on the constitutionality of the provisions "in relation to the different consideration of the rights and duties of fathers compared to those of mothers", nor on any possible "sex-based discrimination between the two parents regarding access to alternatives to imprisonment" (point 4.1 of the *Conclusions on points of law*).

These are precisely the aspects that the two referring courts emphasise when invoking the principle of equal dignity and equality before the law without distinction of sex, in accordance with Article 3(1) of the Constitution, the prohibition of sexual discrimination in the enjoyment of the right to family life (Articles 8 and 14 of the ECHR through Article 117(1) of the Constitution) and the principle of the moral and legal equality between spouses (Article 29(2) of the Constitution).

The challenged provision, the referring courts argue, breaches those principles since it establishes more favourable conditions for mothers' access to the alternative measure of special home detention than for fathers. Thus, they claim, this (a) constitutes unlawful discrimination based on the sex of the sentenced persons and (b) violates the principle of the moral and legal equality of spouses, particularly concerning the care and education of their children.

The standpoint from which all these criticisms are raised is therefore different from that considered in Judgment No 219/2023. Whereas the earlier arguments were framed from the perspective of the *child* and their best interests, the present concerns focus instead on the duties and rights of each *parent*, which, it is argued, are regulated in an unjustifiably different manner by the provision under review.

5.2.1.– In this regard, it must be acknowledged that there is, to some extent, a discrepancy between the provision under review and current legislation, which – partly as a result of changing social sensibilities – now tends to recognise the equal responsibility of both parents for the care, maintenance and education of their children. This is particularly evident in employment and social security law, where – partly in response to the rulings of this Court (see, for example, Judgments Nos 179/1993, 341/1991 and 1/1987) – the father's role in such responsibilities, viewed as both duties and rights of each parent (Article 30(1) of the Constitution), has gained broader recognition.

The provisions regarding incarceration – which now include numerous measures to facilitate the maintenance of a stable relationship between sentenced mothers and their young children – continue, however, as noted by the referring courts and the *amicus curiae*, to grant sentenced fathers access to those measures only where there is no maternal figure capable of providing care and raising the children.

5.2.2.– However, it must also be considered that the measures in favour of sentenced mothers currently laid down in the Prisons Law are the result of a gradual legislative evolution, whose essential features have been described in previous rulings of this Court (in particular, in Judgment No 239/2014, points 4-6 of the *Conclusions on points of law*, referred to in the same Judgment No 219/2023, cited several times, point 4.5 of the *Conclusions on points of law*). A characteristic feature of this evolution has been the aim “to protect, as a matter of priority, the relationship between children and their mothers” (Judgment No 17/2017, point 5 of the *Conclusions on points of law*).

The result is currently a prison system which [...] offers particularly advanced protection of the interests of minors whose *mothers* have been sentenced. As a rule, it ensures that children under the age of ten may continue to be cared for directly by their mothers, either at home or in other appropriate settings, unless the mother has been found to pose a danger to society or – in the cases referred to in Article 47-*quinquies*(1-*bis*) of the Prisons Law – there is a genuine risk of her absconding.

At the same time, such a system provides a particularly tangible expression of the principles underlying the rehabilitative purpose of sentencing and the requirement that personal liberty be restricted only to the minimum extent necessary – principles which, under Articles 27(3) and 13 of the Constitution respectively, must guide the actions of the legislature, the prison administration and the judiciary in matters relating to the enforcement of sentences (see, most recently, Judgments No 30/2025, point 6.4 of the *Conclusions on points of law*; No 24/2025, point 5 et seq.; No 84/2024, point 3.2 of the *Conclusions on points of law*; and No 22/2022, point 5.2 of the *Conclusions on points of law*). In particular, the existing law supports the social reintegration of sentenced mothers by maintaining and strengthening their ties with the community, beginning with the micro-community represented by the family unit, in which the sentenced person is called upon to fulfil her duties and responsibilities in the interests of the children entrusted to her – thereby initiating a meaningful process of rehabilitation and reintegration into society.

As already observed in Judgment No 219/2023 (point 4.5 of the *Conclusions on points of law*), it is likely that the legislature, in exercising its discretion, considered it appropriate to take significant steps towards a fuller implementation of the constitutional principles concerning the best interests of minors, the rehabilitative purpose of sentencing and the requirement that personal freedom be restricted only to the extent strictly necessary, in view of the limited overall impact of the measures at issue on the competing interests in the effective enforcement of lengthy custodial sentences imposed for serious offences. That conclusion is further supported by the fact that the proportion of women among the total prison population is particularly small: 2,729 out of 62,165 inmates, i.e. approximately four per cent, according to Ministry of Justice statistics as of 28 February 2025.

5.2.3.– It remains to be considered whether the legislature’s decision to apply the principles in such an advanced form solely in relation to sentenced mothers results, under the Constitution and the ECHR, in unconstitutional discrimination against sentenced fathers and, at the same time, a breach of the principle of moral and legal equality between spouses.

This Court holds that it does not.

It is important first to consider that Article 31(2) of the Constitution obliges the Republic to protect “motherhood”, requiring the introduction of specific provisions to promote the assumption and practical exercise of maternal responsibility towards one’s

children. This necessarily entails adopting measures tailored to the figure of the mother rather than that of the father. These measures do not call into question the principle of moral and legal equality between “spouses” as laid down by Article 29(2) of the Constitution, for the simple reason that they operate on a different plane: not that of the relationship between spouses, but that of the relationship between parents – who need not necessarily be married – and their children.

In the same vein, it is worth mentioning Article 4(2) of the Convention on the Elimination of All Forms of Discrimination against Women, which is relevant to the national constitutional order pursuant to Article 117(1) of the Constitution. This provision states that the “[a]doption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory”.

These legislative provisions must be taken into account as significant points of reference in assessing the constitutionality of legal measures adopted specifically in favour of mothers, including, as in the present case, within the prison system.

5.2.4.– In the opinion of this Court, the conclusion remains unchanged with regard to the prohibition of discrimination between the sexes in the enjoyment of the right to family life, protected by Articles 8 and 14 ECHR.

It is true, as the referring courts note, that the ECtHR has repeatedly held that, as a rule, only “very weighty reasons” can justify differences in treatment based on sex in the enjoyment of rights falling within the scope of a provision of the Convention or its Protocols, and that, in this context, general assumptions about the role of women or prevailing social attitudes in a given country cannot, in themselves, be regarded as sufficient justification for differential treatment (ECtHR, *Beeler v. Switzerland*, paragraph 95). This also applies where the differential treatment concerns rights which, although falling in principle within the scope of a Convention provision or one of its Protocols, are of an “additional” nature, namely where their recognition in the individual case does not entail a binding obligation upon the Contracting State (ECtHR, *Khamtokhu and Aksenchik v. Russia*, paragraph 58).

Based on these principles, the ECtHR has frequently found national provisions granting more favourable treatment for women than for men to be incompatible with Articles 8 and 14 of the ECHR (see again *Beeler v. Switzerland*, paragraph 95, and, specifically regarding prison benefits, *Ēcis v. Latvia*, paragraphs 90-93, which also states – however – that, in principle, “certain divergences in the approaches towards male and female prisoners may be justified”); or those which, in employment law, favour mothers over fathers (see *Konstantin Markin v. Russia*).

However, in a particularly significant case concerning the life sentence in the Russian Federation, which is applicable solely to males aged between eighteen and sixty-five, the Grand Chamber of the ECtHR – recognising the broad margin of appreciation afforded to each State in defining its own criminal law policy – deemed the resulting disparity in treatment between male and female sentenced persons to be justified.

The ECtHR noted, *inter alia*, the existence of various international legal instruments recognising the special need for protection of female prisoners in relation to pregnancy and motherhood (*Khamtokhu and Aksenchik v. Russia*, paragraph 82); statistical data indicating that, also in the Russian Federation, female inmates constituted only a small proportion of the total prison population (paragraph 82); the lack of an obligation under the Convention to entirely abolish life imprisonment (paragraph 86). In the view of the ECtHR, this made it “difficult to criticise the Russian legislature for

having established [...] the exemption of certain groups of offenders” within the context of a still “transitional” stage in criminal legislation (paragraph 85), which, however, was moving towards a certain “progress” in the fuller implementation of Convention guarantees (paragraph 86).

Several concurring opinions in that decision noted that the expansion of rights often proceeds in a gradual manner. This necessitates tolerating the (transitory) unequal distribution of new entitlements, provided that no group is denied the minimum level of protection guaranteed under the Convention. In any event, a State cannot be reproached for not immediately ensuring the new and higher levels of protection for all members of the community (see, in particular, the concurring opinions of Judges Nußberger and Turković).

Similar considerations can be made, with the necessary adjustments, regarding the questions currently before the Court. As mentioned earlier, the minimum level of protection required by the Constitution for the interests of the child, as explained in detail by this Court’s case law, is that which safeguards the child’s possibility, in principle, of having at least one parent present. The legislature’s decision to guarantee the presence of the mother serving a custodial sentence, even when the father could assume the responsibility of caring for and raising the child, reflects a reasonable balance between the State’s interest in enforcing the custodial sentence and the child’s interest in maintaining a relationship with the parent.

From the perspective of safeguarding the interests of the child, the legislature not only ensures the presence of at least one parent, but also grants the child an additional level of protection which, although not constitutionally mandated, certainly serves to implement constitutional principles.

The decision undeniably has implications for the uniform treatment of parents, but not to the extent of constituting unjustified discrimination. It cannot be considered unreasonable to proceed gradually towards fuller implementation of the aforementioned constitutional principles by selecting a limited group of offenders who are subject to specific protective measures established by the Constitution itself and by numerous international sources of both hard and soft law (see, among others, Rules 2, 58 and 64 of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, adopted by the UN General Assembly on 21 December 2010, which were expressly referred to in Judgment No 219/2023, paragraph 4.5. of the *Conclusions on points of law*, demonstrating a general preference for granting non-custodial measures to mothers serving custodial sentences).

5.2.5.– The referring courts, and with them the *amicus curiae*, argue that the provision at issue also discriminates not only against fathers but also against the mothers, wives or partners of the sentenced fathers. The former are forced to sacrifice their careers in order to care for their children, whereas the husbands or partners of sentenced mothers, thanks to the alternative measure under consideration, would be able to rely on the latter’s contribution to family responsibilities and thus freely pursue their professional activities.

In this regard, it is important to note that once the legislative choice to provide special protection for maintaining the mother-child relationship in the best interest of the child is considered not unreasonable, the situation described above constitutes merely one of the collateral consequences borne by innocent third parties who are necessarily affected by the execution of the custodial sentence. Imprisonment has immediate consequences for the offender, but it also produces indirect adverse effects on others, primarily members of their family, who are deprived of the sentenced person’s emotional, financial and

organisational contributions to managing family responsibilities. These are, unfortunately, unavoidable consequences of the determination to deprive an offender of their personal liberty in order to achieve the legitimate aims of the sentence.

5.2.6.– Naturally, this does not prevent the legislature from considering the possibility of extending the measure to all detainees – both fathers and mothers – who do not pose a threat to society, in an effort to balance all individual and collective interests involved. Such a choice could, in fact, further reinforce the constitutional principle of the minimum necessary sacrifice of personal freedom.

However, in the opinion of this Court, such a decision remains, at present, within the discretion of the legislature, as it cannot be regarded as a duty imposed either by the constitutional provisions or by the Convention provisions invoked by the referring courts.

It follows that the questions raised regarding Articles 3, 29, 30, 31 and 117(1) of the Constitution, the latter in relation to Articles 8 and 14 ECHR, are also unfounded.

5.3.– Nor is the question raised solely by the Venice Supervisory Court with respect to Article 27(3) of the Constitution well founded.

The referring court takes the view that the differing rules governing access to the measure for sentenced fathers and mothers would prejudice the rehabilitative function of the sentence in respect of the prisoner, by “perpetuating a view of social and family roles that is no longer acceptable – or reflective of – reality”.

This argument is, in truth, merely ancillary to those put forward in support of the questions just examined, which have been deemed unfounded for the reasons set out above. At most, it may be considered deserving of the legislature’s attention, but it is certainly not of such weight as to justify a finding of incompatibility with the rehabilitative purpose of punishment concerning a set of rules which – for reasons not deemed constitutionally unsustainable by this Court – still distinguish between the roles of mother and father in granting alternative measures to imprisonment.

5.4.– In conclusion, none of the questions raised regarding the wording “if the mother is deceased or unable to care for the children, and there is no way of entrusting them to anyone other than the father” are well founded.

It will be for the prudent judgment of the Supervisory Court to assess whether, and to what extent, the concept of the mother’s “inability to care for the child” may, through interpretation, be extended to cover situations beyond the mere fact that she is in employment and has access to family or social support capable of ensuring adequate care for the children during working hours. This assessment becomes particularly relevant in cases where the exceptional burden of caregiving duties renders it unreasonable to expect that the mother alone can effectively meet such needs – especially where the child suffers from serious health conditions and requires continuous assistance (on this point, see also Judgment No 4796/2021 of the Court of Cassation).

6._ Lastly, the questions raised as a secondary issue by the Bologna Supervisory Court remain to be examined. These solely concern the fragment of the provision “and there is no way of entrusting them to anyone other than the father”, intended to allow fathers serving a custodial sentence access to special home detention, at least where the mother is deceased or, in any event, unable to care for and raise the child.

The questions are well founded in relation to Articles 3, 30 and 31(2) of the Constitution, in accordance with the principles already set out in Judgment No 219/2023, and the other constitutional provisions invoked require no further examination.

6.1.– As previously mentioned, that judgment determined that the principle of the best interests of the child – derived from the previously cited constitutional provisions

and interpreted in accordance with relevant international and European Union law (see, broadly, Judgment No [102/2020](#), point 4.1 of the *Conclusions on points of law*) – requires that, as a general rule, the interests of the execution of a custodial sentence within a prison facility must give way to the need to ensure that young children can maintain a direct relationship *with at least one parent*.

Parliament has addressed this need in numerous areas, including the two mentioned by the referring court as a *tertia comparationis*:

- Article 47-ter(1)(b) of the Prisons Law, which grants fathers serving custodial sentences access to a measure structurally akin to ordinary home detention in the event of the death or inability of the mother to fulfil her parental responsibilities, without requiring the additional condition of the absence of other individuals capable of caring for the children; and

- Article 275(4) of the Code of Criminal Procedure, which, *inter alia*, prohibits ordering pre-trial detention for fathers of a child under six years of age, unless there are custodial requirements of exceptional weight, where the conditions provided for in Article 47-ter(1)(b) of the Prisons Law apply.

In particular, the first *tertium* may well be compared with the provision under scrutiny here, as this Court has repeatedly observed, noting the identical rationale behind ordinary and special home detention when prescribed with the aim of caring for minors or disabled children (*inter alia*, Judgment No 30/2022, point 5.2 of the *Conclusions on points of law*; No 18/2020, point 3.3 of the *Conclusions on points of law*).

Unlike the State Counsel, this Court does not consider that the mere fact that sentenced persons for whom special home detention may be accessible must serve a longer custodial sentence than those for whom ordinary home detention may be accessible, justifies the additional sacrifice imposed on individuals who are extraneous to the offence (the minor children of the sentenced persons). As a result of the provision under review, minors are currently deprived of any possibility of maintaining a continuous relationship with the only surviving parent or the only parent in a position to fulfil his responsibilities as caregiver.

What remains essential, rather, is that the supervisory court – with the necessary support of social services – carefully assess not only that the sentenced father does not pose “a concrete risk of committing further offences” (or of flight, in the cases covered by paragraph 1-*bis*), but also that restoring cohabitation with the minor children, as an alternative to placing them with third parties able to care for them, genuinely serves their interests, which the alternative measure in question is intended to protect. Furthermore, this condition must be effectively verified during the execution of the measure through the procedures established by Article 284(4) of the Code of Criminal Procedure (referred to in paragraph 3 of Article 47-*quinquies* of the Prison Law), as well as paragraph 5 of the same Article 47-*quinquies* of the Prison Law, so as to avoid the improper exploitation of minors for the sole purpose of enabling a father, who is unfit to care for them, to benefit from the measure.

6.2.– Therefore, Article 47-*quinquies*(7) must be declared unconstitutional, insofar as it includes the wording “and there is no way of entrusting them to anyone other than the father”.

[omitted]

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

having joined the proceedings,

1) *declares* that Article 47-*quinquies*(7) of Law No 354 of 26 July 1975 (Provisions on the prison system and the enforcement of measures involving deprivation or restriction of freedom) is unconstitutional with sole regard to the wording “and there is no way of entrusting them to anyone other than the father”.

[...]

3) *declares* unfounded the questions raised regarding the constitutionality of Article 47-*quinquies*(7) of the Prisons Law in relation to Articles 3(1), 27(3), 29, 30, 31(2) and 117(1) of the Constitution – the latter in reference to Articles 8 and 14 of the European Convention on Human Rights – in the constitutional proceedings brought by direct application by the Bologna Supervisory Court and the Venice Supervisory Court with the relevant referral orders.

Decided in Rome, at the seat of the Constitutional Court, Palazzo della Consulta, on 10 March 2025.

Signed:

Giovanni Amoroso, President

Francesco Viganò, Judge Rapporteur