JUDGMENT NO. 179 YEAR 2017

In this case the Court considered two referral orders questioning a sentencing law for serious drug offenses involving so-called heavy drugs, which placed the minimum sentence at eight years of incarceration plus a fine. The referring judges questioned the significant gap between this minimum sentence and the maximum sentence provided in a separate provision of the same law for minor offenses involving illicit drugs of a non-specified character (four years of incarceration plus a fine). The referring judges alleged that the two types of offenses were similar, and that the difference in the negative social values of the two offenses was minimal, making the difference in the two punishments disproportionate and undermining the rehabilitative aim of criminal punishment. They also alleged violations of European law concerning drug sentencing and that the punishment was inhumane on account of its long duration and contribution to prison overcrowding. The Court first reviewed its own authority to review criminal sentencing laws, over which the Parliament has broad discretion. The Court stated that it has oversight, and may enforce constitutional boundaries, in cases where legislative decisions are patently arbitrary or manifestly unreasonable or arbitrary. The principle of proportionality of punishment, and the constitutional mandate that the aim of punishment be the rehabilitation of the convicted person, also allow for Court intervention to ensure that the quality and quantity of the punishment, on the one hand, and the offense, on the other, are proportional. Nevertheless, the Court cannot intervene by imposing a punishment chosen by its own discretion, but must rather resolve the constitutional defect with a punishment drawn from pre-existing laws. After reviewing its own role, the Court retraced the legislative and judicial history of the provisions in question, which involved various iterations that eventually resulted in dropping the distinction between "heavy" and "light" drugs in the offense for minor incidents, while maintaining the "heavy" drugs prerequisite in the provision involving serious incidents. After reviewing this history, the Court ruled the questions inadmissible. Contrary to allegations, the Court found that the offenses different significantly and that, although the difference was not so broad as to justify the four year gap between the maximum sentence for the lesser offense and the minimum sentence for the greater offense, a variety of constitutionally acceptable legislative solutions were available, and eliminating the gap by judicial decision was not the only acceptable one. The Court concluded by rejecting the questions and calling upon the Parliament to rapidly proceed to remedy the split through legislative intervention.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 73(1) of the Decree of the President of the Republic [hereafter, d.P.R.] no. 309 of 9 October 1990 (Unified text of the laws regulating stupefacient and psychotropic substances and the prevention, treatment, and rehabilitation of the related states of addiction), initiated by the criminal section of the Ordinary Tribunal of Ferrara with a referral order of 18 November 2015 and by the Judge who heard the preliminary audience before the Ordinary Tribunal of

Rovereto with a referral order of 9 March 2016, registered as no. 89 and 100 of the 2016 Register of Referral Orders and published in the Official Journal of the Republic no. 18 and 21, first special series, of 2016.

Considering the entry in appearance of the President of the Council of Ministers;

having heard from Judge Rapporteur Marta Cartabia in chambers on 7 June 2017.

[omitted]

Conclusions on points of law

1.– With referral orders registered, respectively, as no. 89 and 100 of the 2016 Register of Referral Orders, the criminal section of the Ordinary Tribunal of Ferrara and the judge who heard the preliminary audience before the Ordinary Tribunal of Rovereto have questioned the constitutionality of Article 73(1) of d.P.R. no. 309 of 9 October 1990 (Unified text of the laws regulating stupefacient and psychotropic substances and the prevention, treatment, and rehabilitation of the related states of addiction), in the part in which it provides for a minimum sentence of eight years of incarceration and a 25,822 euro fine instead of four years of incarceration and a 10,329 euro fine (the Ordinary Tribunal of Ferrara, concerning only those facts which occurred on or after 21 May 2014).

The challenged provision attaches the minimum punishment described above to "serious" cases of cultivation, production, fabrication, extraction, refinement, sale, offering or providing for sale, transmitting or receiving, for whatever reason, distribution, trading, acquiring, transporting, exporting, importing, procuring for others, sending, passage or shipment in transit, delivering for any purpose or in any case of illegal possession, outside of the scenarios provided for by Article 75 (that is to say, other than cases of intended personal use), of stupefacient or psychotropic substances listed in tables I and III of Article 14 (so-called "heavy" drugs) of d.P.R. no. 309 of 1990 (hereinafter referred to as Unified Text on stupefacient drugs).

Both referral orders allege multiple violations of the Constitution caused by the significant gap in the prescribed punishment created by the minimum sentence for serious incidents concerning "heavy" drugs under Article 73(1) of d.P.R. no. 309 of 1990 (eight years of incarceration and a fine of 25,822 euros) and the maximum sentence for minor incidents concerning both "heavy" and "light" drugs under Article 73(5) of the same decree (four years of incarceration and a fine of 10,329 euros).

1.1.– More specifically, the Ordinary Tribunal of Ferrara holds that the challenged provision violates Article 3 of the Constitution, in that it establishes an unreasonable sentencing scheme, characterized by a disproportionate difference in the punishments associated with the scenarios regulated by sections 1 and 5 respectively of Article 73 of d.P.R. no. 309 of 1990, compared with the minimal nature of the difference in the negative social values of the two criminal offenses in question.

Secondly, it alleges that the provision violates Article 25 of the Constitution in relation to the "principle of offensiveness," in that the challenged Article 73 subjects offenses that are "only mildly different" to a marked difference in punishment.

Finally, it alleges that Article 27, third paragraph, of the Constitution is violated to the extent that the disproportionate measure of the punishment compared with the seriousness of the crime undermines the rehabilitative function of punishment.

1.2.– For his part, the Judge who heard the preliminary audience for the Ordinary Tribunal of Rovereto holds that Article 3 of the Constitution has been violated in relation to the "principle of reasonableness-equality," to the extent that the abnormal distance between the weightiness expressed by the maximum sentence for the minor

incident and the minimum sentence for the more serious crime prohibits the judge in the concrete case from carrying out his or her role to adjust the sentence to suit the concrete case, imposing serious inequalities of punishment.
Secondly, the violation of Article 27, paragraph 3, of the Constitution is alleged, in that the challenged Article 73 fails to respect the principle of proportionality of a punishment with respect to the seriousness of a crime, as derived from the rank of the legal good being protected, the ways in which the aggression was carried out, and the intensity of guilt, and imposes inhuman and degrading punishments.
The referring Judge also alleges the violation of Articles 11 and 117(1) of the Constitution, in reference to Article 49(3) of the Charter of Fundamental Rights of the European Union, which protects the principle of the proportionality of punishment, in that the provision of periods of incarceration that are higher, to a disproportionate degree, than the minimum threshold established by Framework Decision no. 2004/757/JHA of 25 October 2004 of the European Union Council (Council Framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking) results in a violation of the obligations coming from the European Union legal system.
Finally, the Judge alleges that Article 117, first paragraph, of the Constitution is violated in reference to Article 3 of the European Convention on Human Rights (ECHR), signed in Rome on 4 November 1950, ratified and executed with Law no. 848 of 4 August 1955, and to Article 4 of the Charter of Fundamental Rights of the European Union, in that the minimum sentence of eight years of incarceration, in addition to being inhumane on account of the long duration, contributes to the creation of serious forms of overcrowding in prisons.
2.– The judgments must be joined given the overlapping objects of the questions raised and the analogous reasons for unconstitutionality indicated in the orders submitted by the Ordinary Tribunal of Ferrara and the Judge who heard the preliminary audience before the Ordinary Tribunal of Rovereto.
3.– As a preliminary matter, it is necessary to observe that the matter as it has been raised by the referring judges presents novel aspects with regard to the questions that were declared inadmissible in Judgments no. 148 and 23 of 2016. Those matters were inadmissible due to a multitude of defects in the referral orders, including the vagueness of the request and the failure to identify an alternative punishment to the one in force, which would allow this Court to cure the alleged constitutional flaws. Thus, “accepting the question raised would result in depriving serious incidents under Article 73(1) of d.P.R. no. 309 of 1990 of a punishment, leaving only the minor incidents under Article 73(5) punishable, with the effect of aggravating, rather than eliminating, the unreasonableness of the punishment scheme of which the referral complains” (Judgment no. 148 of 2016).
These defects are not present in the referral orders from the Tribunal of Ferrara and the Judge overseeing preliminary investigations for Rovereto. Indeed, both referrants take issue with the unreasonableness and disproportionateness of the split that separates the minimum punishment for incidents that are serious concerning so-called “heavy” drugs (Article 73(1) of d.P.R. no. 309 of 1990) and the maximum punishment provided by the legislator for the minor incidents concerning all stupefacient substances (Article 73(5)). The former are hit with a minimum punishment of eight years of incarceration, while the later receive a maximum punishment of four years of incarceration. Constitutional violation is, therefore, alleged not in regard to the entity of the punishment in and of

itself, but rather in the excessive divergence that has come to be created, as described below, as the result of a series of legislative interventions, made both before and after this Court's Judgment no. 32 of 2014.

Framing the issue in this way, both referral orders formulate specific requests, and suggest making the minimum sentence for serious incidents and the maximum sentence provided for minor incidents the same as a constitutionally sufficient solution, thus overcoming the observations made in Judgment no. 148 and 23 of 2016.

4.– In order to adequately address the question as articulated in the present judgment, it is necessary, first of all, to revisit the principal passages in the development of this Court's case law on the extent and limits of judicial review of constitutionality in the area of criminal law, with reference to sentencing provisions.

4.1.– The lynchpin of the constitutional frame of reference is the principle of legality enshrined in Article 25 of the Constitution, according to which the choices of the measures of punishment are entrusted to the political discretion of the legislator. Nevertheless, this discretion cannot be absolute, since it must be measured with other constitutional principles, including the fundamental principle of equality contained in Article 3 of the Constitution, which requires that criminal law not be arbitrary, unreasonable, or disproportionate, as well as the principles enshrined in Article 27 of the Constitution, according to which punishments may not consist in treatments that go against the sense of humanity and must take as their aim the rehabilitation of the convicted person. Thus, constitutional case law concerning criminal law has followed a trajectory between two poles that are in constant tension: on the one hand, due deference to political choices, a necessary component of the principle of legality; on the other, unfailing protection of the other constitutional principles and rights, which are also binding on the legislators who make punishments. It is the role of the judge of laws to preserve harmony between these two levels of legality – ordinary and constitutional – in every sector of the legal order and in regard to any illegitimate exercise of legislative power.

4.2. – This Court's case law has always taken care to safeguard the spaces reserved to the legislator's criminal policy evaluations relating to the congruence between crimes and punishments (see, among many, Judgments no. 167 of 1982, 22 of 1971, and 109 of 1968), limiting itself to interventions only in the case of legislative decisions that are patently arbitrary, that is, in the case of punitive inequalities that are so grave as to be radically lacking in justification (see, among many, Judgments no. 282 of 2010, 22 of 2007, 325 of 2005, and 364 of 2004), including in light of the canons of rationality (Judgment no. 218 of 1974) and reasonableness (Judgment no. 22 of 2007). This Court has also intervened in the past in important ways in order to censure sentencing choices that are manifestly unreasonable and arbitrary. Thus, the Court has struck down: provisions of law that led to an unjustified equality of punishments (for example, with Judgments no. 176 of 1976 and 218 of 1974 in the area of hunting), particularly when such an equalization of punishments translated into an unacceptable compromise of the values at stake (Judgment no. 26 of 1976 in the area of military crimes); rules that effected an unjustified discrimination, subjecting offenses that were similar due to the overlap of the protected good to different punishments (Judgment no. 409 of 1989 dealing with sanctions for refusing to perform military service); and rules characterized by excessive breadth in the prescribed maximum and minimum sentences, which failed to impose sufficient limits on the discretion of the judge imposing the sentence, in violation of the principle of legality (Judgment no. 299 of 1992 dealing with the military

offense of disobeying orders). Among this Court's most important decisions in the area of the measure of punishment is Judgment no. 341 of 1994, which dealt with the punishments prescribed for the crime of contempt. In that case, the Court held that the minimum sentence was unconstitutional to the extent that it was disproportionate to the offensiveness of the entire spectrum of scenarios encompassed within the abstract offense.

4.3– These decisions have brought to the fore the issue of the punishment that remains after a provision is declared unconstitutional, since this Court cannot replace legislative choices that are struck down as unconstitutional with its own and independent punitive quantifications, without invading an area that has been entrusted in the first place to the legislator. With respect for the limits of the powers it wields, the Court has held that it may have a bearing on the measure of a punishment only by tracing a suitable punitive provision within the existing legal order that may be substituted for the one that has been struck down (on this, see Judgment no. 22 of 2007), such that no legislative gaps are left and, at the same time, the reservation to the legislator under Article 25 of the Constitution is respected. In some cases, the Court has held that a more general criminal punishment regulation would expand to fill the gap (for example in Judgment no. 26 of 1979, dealing with military offenses); in others it has referred to a punishment prescribed by the legislator for the offense with respect to which an illegitimate divergence was recognized (for example in Judgments no. 78 of 1997 and 409 of 1989, which dealt, respectively, with violations of regulations of the market for medicinal drugs and with the refusal to perform military service). Finally, in truly exceptional situations, the Court has held that the minimum punishment provided for by the general provisions of the Criminal Code apply, when said minimum does not, in turn, effect unreasonable outcomes or excessive expansions of sentencing ranges such that sufficient margins are preserved for the discretion of the judge (for example in aforementioned Judgment no. 341 of 1994 dealing with contempt).

4.4.– In more recent constitutional cases, this Court's decisions concerning punishment provisions have become more frequent, with a series of decisions inspired by an ever greater guaranteeing of personal freedom and of the constitutional principles that delineate "the constitutional face of the criminal justice system" (according to the expression coined in Judgment no. 50 of 1980). On the fertile ground of the principles under Articles 3 and 27 of the Constitution, which mandate that the deprivation of freedom and the suffering inflicted on a human person must be contained within the minimum necessary measure and always for the purpose of favoring a journey of recovery, reparation, reconciliation, and reinsertion into society, the principle of proportionality of punishment has been added. The principle is well known in many European legal systems and has been codified in Article 49(3) of the Charter of Fundamental Rights of the European Union, to which the referring judges in the present case have made references. Rooted in Article 3 of the Constitution and in the principles of equality and reasonableness of which it constitutes one of the possible derivations, the principle of the proportionality of punishment is also presumed by Article 27 of the Constitution, as this Court has highlighted since Judgment no. 313 of 1990. In its holding, the Court observed that the rehabilitative aim, to which the punishment must tend "from its inception in the abstract legal provision until the moment it is completed in the concrete," is a principle that "although outlined in various ways, has been for some time part of the heritage of European legal culture, particularly because of its connection with the 'principle of proportion' between the quality and the quantity of the

punishment, on the one hand, and the offense, on the other" (Judgment no. 313 of 1990).
In particular, the Constitutional Court has intervened not only with decisions that are merely abrogative, to eliminate the legal barriers to the balancing of the circumstances that prevented the judge from adjusting the punishment to the crime (Judgments no. 106 and 105 of 2014 and 251 of 2012), but also with additive judgments to censure the absence of any provision of an extenuation present in comparable offenses (Judgment no. 68 of 2012 concerning an extenuation for particularly minor incidents involving abduction of a person for purposes of extortion), or to align an unreasonably lower punishment established by the legislator (for neglecting to deposit IVA) with a higher punishment threshold (provided for the crime of fallacious income reporting; Judgment no. 80 of 2014). More recently, in Judgment no. 56 of 2016, the Court struck down "inconsistent legislation," which differentiated the punitive response according to whether the violation concerned environmental restrictions that were imposed by law or by administrative measures, thus holding that there was no justification for not putting the two scenarios on the same level.
4.5.– In Judgment no. 236 of 2016, this Court, in a decision based on the principles of reasonableness and proportionality, declared Article 567(2) of the Criminal Code to be unconstitutional in the part in which it punishes the crime of alteration of status through a falsehood with the punishment of five to fifteen years of incarceration rather than the punishment of three to ten years that is provided by the first paragraph of the same Article with respect to alteration of status through substitution of a newborn. It bears noting that the Court reached its determination of unconstitutionality following "a test of proportionality to scrutinize the sentencing range established by the challenged provision" and "not [on the basis of] a verification of the alleged diversity of punitive treatment of similar or identical conduct." The Court identified the defect that nullified the provision as lying in a lack of proportion between the sentencing range and the actual negative social value of the offense. Nevertheless, as the Court went on, "[e]ven in a judgment of the 'inherent reasonableness' of a criminal sanction, based upon the principle of proportionality, it is crucial to identify existing solutions, that are suitable to eliminate or mitigate the alleged manifest unreasonableness (Judgment no. 23 of 2016)." In light of this, making the punishment for the crime found in Article 567(1) the same was held to be "the only practicable solution." Moreover, the Court is permitted to rectify legislative choices only "'with reference to criteria already traceable within the legal order (Judgments no. 148 of 2016 and 22 of 2007)," without "the imposition, from the outside, of a heterogeneous dosimetry of punishments with respect to legislative choices" (Judgment no. 236 of 2016).
4.6.– This Court holds that, in the present case as well, it must follow the developmental trajectory of the case law described in the preceding paragraphs in all its articulations. It bears reiterating on the one hand that it falls to this Court to review the proportionality and reasonableness inherent to the measure of the punishment provided for by the legislator with Article 73 of d.P.R. no. 309 of 1990, since it can in no way forgo its essential function of reviewing the constitutionality of legislative choices that bear upon the freedom and rights of the person. On the other hand, it is equally important to insist upon the fact that, when striking down would not help to repair the constitutional wrong, the Constitutional Court cannot decide the measure of the punishment autonomously and according to its own discretion. In the absence of an unambiguous legislative indication already available within the legal system, this Court holds that it is

necessary, with respect for reciprocal institutional competences, to first recall the legislator to its proper responsibility, so that the measure of the punishment may be redirected into harmony with constitutional principles by legislative means, in which one of the many punitive options, all of which are equally legitimate alternatives to the challenged one, is chosen. In the absence of a legislative intervention, however, the Court becomes obliged to intervene, never *in malam partem*, and in any case within the limits already outlined in its case law.

4.7.– To this end, it is useful to recall certain precedents that exemplify the relationship between the Court and the legislator in the area of criminal law.

In Judgment no. 279 of 2013, in the presence of extremely grave violations of the fundamental rights of persons consisting in prison conditions that violated the sense of humanity, which were the object of a judgment against Italy by the European Court of Human Rights [ECtHR] for violating the ban on torture and inhuman and degrading treatment (Judgment of 8 January 2013, *Torreggiani et al. v. Italy*), this Court recognized that "the breach objected to by the referring courts does in fact exist and that it is necessary for the legal system to adopt a[n appropriate] remedy." It held, however, that the questions raised were inadmissible "due to the range of legislative solutions that may be adopted." More precisely, this Court acknowledged the "range of possible legislative arrangements that are necessary in order to ensure that incarceration in a manner contrary to human dignity does not continue, in breach of Articles 27(3) and 117(1) of the Constitution, the latter in relation to Article 3 ECHR." In light of this range, it reiterated that due to respect for "'Parliament's prerogative in assessing whether the means adopted in order to ensure compliance with a requirement of constitutional law are appropriate' (see judgment no. 23 of 2013), the questions must be ruled inadmissible." Nonetheless, in declaring the inadmissibility of the question, the Court once again underscored that, "'an excessive prolongation of legislative inertia would not be tolerable, having regard to the serious problem identified in this ruling" (see judgment no. 23 of 2013)."

In an even earlier case, dealing with "European revision," only after extended inertia on the part of the legislator, and despite the "pressing invitation" addressed to it by means of the previous Judgment no. 129 of 2008, did the Court hold, in Judgment no. 113 of 2011, that it was crucial, in order to rectify the constitutional breach, to introduce the possibility to reopen a trial "when it is necessary […] pursuant to Article 46(1) ECHR in order to comply with a final judgment of the European Court of Human Rights." In that case, having waited in vain for a legislative intervention, the Constitutional Court held that it could refer, "out of all the institutions currently available under the law of criminal procedure, [to] that which most closely resembles the remedy which it appears necessary to introduce in order to guarantee that the national legal order complies with the principle invoked." The Court specified that the selected solution "does not imply that this Court has a preordained opinion in favour of the institution of review, since such proceedings are only justified by the lack of other more appropriate institution in relation to which a substantive intervention may be made" and that, "Parliament remains at liberty to regulate the mechanism for compliance with the final judgments of the Strasbourg Court through different arrangements – including through the introduction of a distinct self-standing institution – and also to enact provisions relating to specific aspects thereof over which this Court cannot intervene since this would involve discretionary choices."

5.– With this explanation of the principles laid out in this Court's case law, the examination of the case at bar first requires a reconstruction of the complex legislative and judicial evolution that led to the punishment structure that has been challenged by the referring judges.

The original text of Article 73 of d.P.R. no. 309 of 1990 (the so-called Iervolino-Vassalli law) distinguished the punishment of crimes the object of which were "heavy" drugs (punishable under section 1 with eight to twenty years of incarceration plus a fine) from that associated with crimes the object of which were "light" drugs (punishable under section 4 with two to six years of incarceration and a fine). The same distinction between "heavy" and "light" drugs was then also applied for minor incidents, concerning which Article 73(5) established a so-called autonomous or independent extenuation with special effects, with a resulting redetermination of the sentencing range in the measure: from one to six years of incarceration for conduct involving "heavy" drugs, and from six months to four years of incarceration for that involving "light" drugs, in addition to the respective monetary sanctions.

In 2006, the Parliament unified the punishment scheme related to the forms of conduct covered by Article 73, abolishing the distinction based on the type of stupefacient substance. This was carried out via Article 4-*bis* of Decree-law no. 272 of 30 December 2005 (Urgent measures to guarantee the safety and funding for the upcoming Winter Olympics, as well as the workings of the Administration of the Interior. Provisions to foster the recovery of recidivist drug addicts and modifications to the unified text of the laws regulating stupefacient and psychotropic substances and the prevention, treatment, and rehabilitation of the related states of addiction, under d.P.R. no. 309 of 9 October 1990), converted, with modifications, by Law no. 49 of 21 February 2006 (the so-called Fini-Giovanardi law). In particular, the new dispositions (which were later struck down as unconstitutional in Judgment no. 32 of 2014 for procedural flaws in the conversion law) had provided, in relation to any type of stupefacient substance, for the punishment of six to twenty years of incarceration and a fine, for serious incidents, and the punishment of incarceration for one to six years and a fine for cases in which the extenuation of minor incidents applied.

With its later Decree-law no. 146 of 23 December 2013 (Urgent measures for the protection of fundamental rights of prisoners and the controlled reduction of the prison population), converted, with modifications, by Law no. 10 of 21 February 2013, section 5 of Article 73 was modified, transforming the extenuating circumstance of minor incidents into an independent criminal offense and reducing the maximum prison sentence from six to five years of incarceration.

This modification was left intact by the Constitutional Court's Judgment no. 32 of 2014, which struck down Articles 4-*bis* and 4-*vicies ter* of Decree-law no. 272 of 2005 as unconstitutional for violation of Article 77, second paragraph, of the Constitution, particularly because the two articles were introduced with amendments during their conversion, despite failing to meet the requirement of homogeneity and include the necessary functional link between the proposed amendments and the contents of the decree-law. As a result of the procedural unconstitutionality during the process of their formation, this Court held that the unconstitutional provisions were incapable "of changing the legal order, and thus also of repealing the previous legislation." As a result, the original formulation of Article 73 of the 1990 text regained the force of law, having never been legitimately repealed: therefore, in reference only to serious incidents, the distinction based on the type of stupefacient substance involved in the

conduct was restored, such that the punishment for violations relative to serious offenses involving "heavy" drugs ended up being eight to twenty years of incarceration in addition to a fine, while that for serious offenses concerning "light" drugs ended up being two to six years of incarceration in addition to a fine. Judgment no. 32 of 2014 did not, however, alter the punishments connected with minor incidents, as modified by Decree-law no. 146 of 2013, after the passage of the provisions of Decree-law no. 272 of 2005 that were declared unconstitutional.

Finally, the Parliament returned to the matter once again, in the area of measures adopted to address prison overcrowding, in the wake of the *Torreggiani* judgment of 8 January 2013 in which the ECtHR found Italy guilty of violating Article 3 of the ECHR (forbidding torture and inhuman and degrading treatment). Decree-law no. 36 of 20 March 2014 (Urgent provisions regulating stupefacient and psychotropic substances and the prevention, treatment, and rehabilitation of the related states of addiction, under decree of the President of the Republic no. 309 of 9 October 1990), converted, with modifications, by Law no. 79 of 16 May 2014, further lowered the maximum sentence provided for minor incidents for all drugs (including, therefore, so-called "heavy" drugs), fixing it within the measure of four years of incarceration in addition to a fine. In addition, the same decree-law completely redesigned the legal frame of reference: for the interests of the present case, the modifications to Articles 13 and 14 of the Unified text on stupefacient drugs are worthy of attention, concerning the tables containing the various substances that are the object of incrimination in Article 73 (Article 1(2) and (3), of the cited decree-law); the modifications to Article 73(5-*bis*), dealing with the substitutive punishment of work of public utility (Article 1(24-*ter*)(b) of the cited decree-law); and those to Article 75 of the unified text, dealing with personal use of stupefacient substances (Article 1(24-*quater*) of the cited decree-law).

6.– After the complex legislative and judicial evolution reconstructed above, a deep split developed in the punishment concerning "heavy" drugs, between the minimum sentence for serious incidents (eight years) and the maximum sentence for minor incidents (four years), held by the referring judges to contradict with the principles of reasonableness and proportionality guaranteed by Articles 3 and 27 of the Constitution, in addition to Article 49(3) of the Charter of Fundamental Rights of the European Union and Article 3 of the ECHR.

The referring judges' complaints allege that there is a risk of punitive inequalities owing to the challenged discontinuity of punishments, which obliges a judge to apply radically different punishments in cases involving offenses that do not differ greatly, that is, imposing disproportionate punishments, either excessive or deficient, in a significant number of cases. In order to remedy this violation of constitutional, EU, and conventional principles, the referring judges ask this Court to reinstitute the sentencing continuity between the two offenses.

The procedure followed in the referral order from the Judge who heard the preliminary audience for the Tribunal of Rovereto is significant in this regard. He points out, first of all, an overlap in the structures of the crimes established in sections 1 and 5 of Article 73, which differ only according to the "minor" or "serious" character of the incident, but are identified with the same conduct and the same material object (so-called "heavy" drugs). This structural overlap, he argues, denotes that the two abstract offenses share an analogous configuration and "an uninterrupted progression of the offense (from minor incidents to serious incidents)." But the gradual progression of the offense does not, he alleges, correspond to a similarly gradual progression in the punitive response which is,

instead, characterized by a conspicuous leap, given that the minimum prison sentence for serious incidents is equal to double the maximum sentence provided for minor incidents. This gives rise to the question of constitutionality and the request that this Court modify the punishment so as to assure punitive continuity between sections 5 and 1 of Article 73.

7.– The questions are inadmissible.

The two criminal scenarios described respectively by section 1 and section 5 of Article 73 are two distinct offenses, as the Court of Cassation has recognized in the exercise of its institutional task of interpreting and applying the law in the nomophylactic sense (see, among many, Court of Cassation, Sixth Criminal Section, Judgment no. 5812 of 24 November 2016-8 February 2017; Court of Cassation, Third Criminal Section, Judgment no. 23882 of 23 February 2016-9 June 2016; Court of Cassation, Joint Criminal Sections, Judgment no. 22471 of 26 February 2015-28 May 2015; and Court of Cassation, Fourth Criminal Section, Judgment no. 49754 of 24 October 2014-28 November 2014). It bears noting, however, that, contrary to the allegations of the Judge from Rovereto, this is not a matter of two altogether similar offenses. Although the two provisions describe the conduct involved in similar terms and there is partial overlap concerning the material objects of the offenses, it is significant that the serious incident found in Article 73(1) involves only "heavy" drugs, while the minor incident under Article 73(5) is characterized by its lack of distinction between the various types of drugs.

It is true that the differences described between the two offenses do not justify so marked a leap in sentencing as the one currently found in the various sections of Article 73. Nevertheless, contrary to the conclusions drawn by the referring judges, this incongruence may be remedied through a variety of constitutionally valid solutions. The establishment of the minimum sentence for serious incidents under Article 73(1) of d.P.R. no. 309 of 1990, in a measure equal to the maximum sentence for minor incidents under Article 73(5) of the same decree, is not, therefore, the only solution that complies with the Constitution.

Nor is it correct, from the constitutional point of view, to conclude that continuity of an offense must necessarily correspond to a continuity in the punishment. In particular, it bears noting that the tenuity or the lightness of the factors may be (and are) taken into consideration by the legislator for a variety of reasons and with effects that can bring about "spaces of discontinuous discretion" in the punishment scheme. More precisely, such discontinuities may correspond to the reasonable demands of criminal law policy, which aim to express, by means of milder sentencing, greater tolerance for less damaging behaviors and, on the contrary, demonstrate a more staunch severity toward particularly damaging behaviors by means of unrelated and more rigorous punishments.

8.– This Court holds, therefore, that the variance between the minimum sentence provided for by Article 73(1) of d.P.R. no. 309 of 1990 and the maximum sentence provided for by section 5 of the same Article – arising following Decree-law no. 36 of 2014, as modified by the conversion law – has reached so great a breadth as to effect an anomaly in the punishment scheme that may be redressed through a variety of legislative options. As a result, "'owing to Parliament's prerogative in assessing whether the means adopted in order to ensure compliance with a requirement of constitutional law are appropriate' (see judgment no. 23 of 2013), the questions must be ruled inadmissible" (Judgment no. 279 of 2013).

Considering the high number of judgments, both pending and final, concerning offenses involving stupefacient drugs, it is imperative that this Court express its urgent wishes that the legislator proceed rapidly to satisfy the principle of necessary proportionality of punishments, resolving the split that divides the sentences provided for minor and serious incidents by sections 5 and 1 of d.P.R. no. 309 of 1990.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

1) declares the questions of constitutionality concerning Article 73(1) of d.P.R. no. 309 of 9 October 1990 (Unified text of the laws regulating stupefacient and psychotropic substances and the prevention, treatment, and rehabilitation of the related states of addiction), raised with reference to Articles 3, 25, and 27, third paragraph, of the Constitution, by the Criminal Section of the Ordinary Tribunal of Ferrara with the referral order indicated in the headnote, to be inadmissible;

2) declares the questions of constitutionality concerning Article 73(1) of d.P.R. no. 309 of 1990, raised with reference to Articles 3, 11, 27, third paragraph, and 117, first paragraph (in relation to Articles 4 and 49, paragraph 3, of the Charter of Fundamental Rights of the European Union and in relation to Article 3 of the ECHR), by the Judge who heard the preliminary audience for the Ordinary Tribunal of Rovereto, with the referral order indicated in the headnote, to be inadmissible.

Decided in Rome at the seat of the Constitutional Court, Palazzo della Consulta, on 7 June 2017.