JUDGMENT NO. 180 YEAR 2018

In this case, the Court heard a referral order challenging an article of a law relating to the right to strike in relation to essential public services. The concrete case had to do with lawyers striking as part of a collective work stoppage, and missing court hearings pertaining to accused persons being held in preventive custody, prior to a conviction. The Court struck down the law, which asked professional associations to write self-regulatory codes that provided definitions for "indispensible" services and regulated respect for constitutionally protected rights in connection with such services. The Court held that these self-regulatory codes, because they were adopted and approved by a public Commission, amounted to secondary legislation. Since the code in question specified that accused persons being held in preventive custody could consent to continuing with proceedings in the absence of counsel during a work stoppage by their defense attorneys, with a direct impact on the prisoner's personal freedom, the Court held that this violated the broad constitutional reservation to primary legislation to adopt laws intended to protect personal freedom.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 2-*bis* of Law no. 146 of 13 June 1990 (Rules for the exercise of the right to strike in essential public services and on safeguarding the constitutionally protected rights of the person. Institution of the Surveillance Commission for Implementation of the Law), initiated by the Ordinary Tribunal of Reggio Emilia, with referral orders of 23 May and 13 June 2017, respectively registered as no. 75 and 76 of the 2018 Register of Referral Orders and published in the *Official Journal of the Republic*, no. 20, first special series of 2018.

Considering the appearances of P.R., P.V., G.B., and M.V., as well as the intervention of the President of the Council of Ministers and of the *Unione delle Camere Penali Italiane* [Union of the Italian Criminal Chambers];

having heard from Judge Rapporteur Giovanni Amoroso during the public hearing of 4 July 2018;

having heard from Counsel Gaetano Pecorella on behalf of P.V., M.V., and the *Unione delle Camere Penali Italiane*, Luca Andrea Brezigar on behalf of P.R., Beniamino Migliucci on behalf of G.B. and State Counsel Paolo Gentili on behalf of the President of the Council of Ministers.

[omitted]

Conclusions on points of law

[omitted]

13.– Turning now to the merits, the two referral orders, read together on account of their substantially overlapping contents, indicate numerous parameters and raise multiple questions. The challenges may, however, be distilled into three basic claims. The first concerns the right to freedom of defendants in preventive custody (Article 13 of the Constitution). The second pertains to the canon of the reasonable duration of trials, a rule that is applied most strictly in cases of incarcerated defendants (Article 111 of the Constitution). The third concerns the intrinsic reasonableness of the challenged

regulation and its compliance with the principle of equality, in reference to other scenarios used as points of comparison (Article 3 of the Constitution).

It bears specifying that the challenges are limited to criminal trials where the defendant is being held in preventive custody. Indeed, the entire trajectory of the reasoning of the referral orders and the matter before the referring court, concerning which that court must give a ruling (the lawfulness or unlawfulness of the defendant's declared option to strike, in keeping with a collective work stoppage), clearly shows that the constitutional challenges specifically concern cases of defendants placed in preventive custody as part of ongoing proceedings, and not to all defendant detainees in general, who may be detained for other reasons, separate and apart from the ongoing trial.

The question raised in reference to Article 13(5) of the Constitution is well founded within the confines and in the ways described below, and with the effect that it absorbs the other grounds of alleged unconstitutionality.

14.– It is necessary to start from Judgment no. 171 of 1996 of this Court, which recognized that "lawyers and prosecutors being able to strike during court hearings is an important manifestation of the associational dynamic which intends to protect this form of self-employment," pointing to more than a mere constitutionally significant ability, but to a true freedom. It is necessary, however, to effect a balancing with other constitutional values worthy of protection, considering that Article 1(2)(*a*) of Law no. 146 of 1990 lists among the essential public services, "the administration of justice, with particular reference to measures that restrict personal freedom and to preventive and urgent measures, as well as to criminal proceedings in which defendants are held in detention."

When these values are balanced against the right of defense attorneys to participate in a collective work stoppage, the values have a "prevailing power." In the judgment mentioned above, this Court warned that, "[w]hen the freedom of lawyers and prosecutors comes into conflict with the table of values above, it must necessarily yield before their prevailing power." Thus, the constitutionally grounded interpretation that grants "the judge the power to balance the conflicting values and, consequently, to make 'union freedoms' yield before primary constitutional values" is the preferred interpretation. In criminal proceedings, this balancing cannot be considered to be fulfilled by the appointment of a public defender. Law no. 146 of 1990, which did not carry out this balancing because it did not make any provision for collective strikes by professionals, proved (at the time) to be inadequate, in that it failed to provide a rational and consistent regulatory scheme that included all the other forms of collective demonstration capable of undermining those primary values. Judgment no. 171 of 1996, therefore, declared Article 2(1) and (5) of Law no. 146 of 1990 declared unconstitutional, in the part in which it failed to provide for the duty to give appropriate advance notice and for reasonable time limits, in the case of a collective strike of lawyers and solicitors involved in defense work, as well as in the part in which it failed to provide adequate tools for identifying and guaranteeing that essential services would be provided during the stoppage, or the procedures and measures that should be triggered in the event of a failure to comply.

15.– After the provisions were struck down, the Legislator should have introduced "appropriate measures to avoid jeopardizing the primary goods of civil coexistence, which does not tolerate the immobilization of the judicial function and, therefore, demands regulations that will ensure that essential services are provided during work stoppages affecting judicial activities" (Judgment no. 171 of 1996).

To this end, the Government initially presented a draft law (A.S. 1268), which listed a series of "indispensible services" to be guaranteed in the case of a collective work stoppage by lawyers. The draft provided, in particular, that they were not permitted to cease work on trials of defendants being kept in preventive custody. Thus, the proposed regulatory scheme was entirely provided for by law.

The legislator only decided to act some years later, however, with the adoption of Law no. 83 of 11 April 2000 (Modifications and supplementary provisions to Law no. 146 of 12 June 1990, on the exercise of the right to strike in essential public services and on safeguarding the constitutionally protected rights of the person), which added challenged Article 2-*bis* to Law no. 146 of 1990. The underlying choice, which fell under the discretion of the legislator, was different: no longer to directly regulate the situations that required the provision of "indispensible services" by law, but to involve the relevant professional associations by means of referring to the "self-regulatory code" with an eye toward a more sophisticated, participatory framework for the means of settling a conflict, as a part of an association's announcement of a collective strike. The legislator, first, granted that self-employed workers, professionals, and small business owners did have the right to collective strikes, in keeping with aforementioned Judgment no. 171 of 1996, but then it put the onus on their representative associations to identify the "indispensible services," which must be guaranteed at all times, on pain of violating the constitutionally protected rights of the person, indicated in Article 1 of Law no. 146 of 1990. Notable among these, for present purposes, is "the administration of justice, with particular reference to measures that restrict personal freedom and to preventive and urgent measures, as well as to criminal proceedings in which defendants are being held in detention." The regulatory scheme provided by law is, therefore, intended to be taken together with the one produced by the self-regulatory code.

16.– Under this new view, the primary provision (Article 2-*bis*) is limited to merely designing the basic outline of references: it acknowledges the (union) right to carry out a "collective strike from providing services, in order for an association to protest or to assert claims" and, at the same time, establishes the principle of the necessary "harmonization with the constitutionally protected rights of the person." Then, however, it involves the very targets of this balancing themselves, and requires that "the associations or representative bodies of the interested professional associations" adopt "self-regulatory codes." In particular – in addition to laying down a highly specific requirement, since it provides that the code must necessarily require advance notice to be provided no later than indicated in Article 2(5) (ten days), as well as an indication of the length of and reasons for the collective work stoppage – Article 2-*bis* elsewhere establishes the code's mission in broad terms: to ensure that, in all cases, a level of services is provided that is compatible with the purposes found under Article 1(2) of that law.

This reference mechanism is formal, since it defers the task of completing the regulatory scheme, that is, to identify the "indispensible services," to secondary legislation, and not substantive, which would instead require that "the reference was made to rules that are determinate and precisely identified by the same rule that makes it" (Judgment no. 311 of 1993; Order no. 484 of 1993). The mechanism consists in the Surveillance Commission's promotion of the self-regulatory codes of the associations or representative bodies of the relevant professional categories and in the later determination by the same Commission that the codes are qualified for the purpose. When the Commission, which is tasked with carrying out a function that is eminently

one of public enforcement, makes the decision that a code is qualified, it brings the code, an otherwise typical act of the private sphere, into the realm of the (secondary) sources of law.

17.– Therefore, a self-regulatory code, when it is considered to be "qualified" by the Surveillance Commission, is truly secondary legislation, and not a mere act of private autonomy on the part of the professional associations, which group together lawyers in the exercise of their right of association (Article 18 of the Constitution). Accordingly, the interpretation given in the case law of the Supreme Court of Cassation, in its highest nomophylactic expression, that is, its Joint Chambers, in this case Joint Criminal Chambers (Supreme Court of Cassation, Joint Chambers, Judgment no. 26711 of 30 May 2013-19 June 2013, and, above all, Supreme Court of Cassation, Joint Chambers, no. 40187 of 27 March 2014-29 September 2014), is univocal. It has specifically underscored the need for uniformity (*i.e. erga omnes* applicability) among the regulations concerning which services are indispensible of the essential public services – a need that is equally pressing in the event of an actual strike in the private and public sectors (Judgment no. 344 of 1996).

This is consistent with the system of the sources of law. A primary rule may authorize another source, which is, as such, subordinate and, therefore, secondary, to lay down further regulations that are general and abstract in character. This source may even originate in the private sphere, if it is mediated by an act of reception, emanation, or validation of a public nature. Case law has held that acts typical of private law, such as the national, collective, contractual agreements for healthcare personnel acquired the status of secondary regulation due to the declaration of executability, adopted by Decree of the President of the Republic (under Article 48 of Law no. 833 of 23 December 1978, entitled "Institution of the National Health Service)" (Supreme Court of Cassation, Joint Civil Divisions, Judgment no. 12595 of 20 December 1993).

In the case under review, the challenged provision (Article 2-*bis* of Law no. 146 of 1990) also grants the Surveillance Commission, as an independent administrative authority, power to verify the "qualification" of the self-regulatory codes for the professional associations provided for in the same provision (self-employed workers, professionals, and small business owners). In the event that the code for a given professional association is found to be unqualified, or that an interested association has failed to present a code, it also grants the Commission the power to approve "interim regulations." This assessment of whether the self-regulatory code for a collective strike by a certain category of workers from the provision of services (professionals called to the bar, in this case), brings the code, which would otherwise be an act typical of private autonomy (as, for example, the Counsel Code of Conduct has been held to be; see Supreme Court of Cassation, Joint Civil Divisions, Judgment no. 15873 of 25 June 2013), to the level of secondary legislation.

Thus, it is clear that, since the self-regulatory code, which was deemed to be qualified by the Surveillance Commission, amounts to secondary legislation that applies *erga omnes*, the judge is obliged to apply its provisions to the extent that they comply with the law (Article 101(2) of the Constitution), and it is to the law, as mentioned above, that the constitutional question pertains.

What the referring Tribunal is called upon to apply, in order to determine whether the defense attorney's request for a postponement in order to participate in a collective work stoppage is legal or not, is, therefore, a provision of law.

First, Article 2-*bis* of Law no. 146 of 1990 provides that, in the event of a collective work stoppage affecting the provision of services, for purposes of category-wide protest or assertion of claims by self-employed workers, professionals, or small business owners, compliance with measures intended to allow for the provision of indispensible services is necessary to ensure the functioning of essential public services, such as the administration of justice, "with particular reference to measures that restrict personal freedom and to preventive and urgent measures, as well as to criminal proceedings in which defendants are being held in detention."

In addition, Article 4(1)(*b*) of the self-regulatory code provides that work stoppages are not permitted to affect criminal matters in reference to "proceedings and trials where the defendant is in preventive custody or detention, where the defendant expressly requests that proceedings continue despite defense counsel's stoppage, analogously to what is provided by Article 420-*ter*(5) (introduced by Law no. 479/1999) of the Code of Criminal Procedure." In this event, private or public defense attorneys may not legally stop work and have the duty to guarantee the provision of their professional services.

18.– The provision of the self-regulatory code (Article 4(1)(*b*)) makes specific reference to Article 420-*ter*(5) of the Code of Criminal Procedure, which provides that the judge, in compliance with paragraph 1, shall set a new date for a hearing in the case of defense counsel's absence, in the event that the absence is caused by the absolute impossibility to appear due to a legitimate impediment, suspending, in consequence, the end-date of the maximum time period permitted for preventive custody under Article 304 of the Code of Criminal Procedure, unless the defendant asks to go forward in the absence of defense counsel.

Thus, the provision of the self-regulatory code expressly intends to introduce – and does, in fact, introduce – a scenario analogous and parallel to the legal one, which, by assigning importance to the defendant's assent, also has a bearing on whether or not the maximum time limits of preventive custody may be extended, and ends up touching upon the legal regulation of those limits itself.

Article 4(1), at letter (*a*), merely provides that a work stoppage by defense counsel is not permitted in a series of scenarios related to preventive measures, among other things, and, thus, also to proceedings and trials dealing directly with the preventive custody itself, while the maximum time limits and their suspension remain regulated by law. Differently, however, the scenario at letter *b*), which concerns proceedings and trials in connection with which a defendant is being held in preventive custody or detention, the regulation does not simply balance the defense attorney's right to participate in a collective work stoppage with the constitutionally protected rights of the person, but rather introduces a legal framework regarding the assent of the defendant who is being held in preventive custody that results in direct impact on the defendant's freedom.

19.– With reference to the first of the three grounds for unconstitutionality relied upon by the referring Tribunal, the provision which establishes, in absolute terms, the reservation to the legislature found in Article 13(5) of the Constitution is determinative. It is the law that establishes the maximum time limits of precautionary incarceration, today called preventive custody (Judgment no. 293 of 2013).

Personal freedom, a fundamental right that is expressly termed inviolable (Article 13(1) of the Constitution), is protected by a broad reservation of power to the legislature to regulate by primary legislation, first and foremost, all the instances and scenarios in which detention is permitted either by a reasoned measure issued by a judicial authority

(Article 13(2) of the Constitution) or with a temporary measure adopted by law enforcement authorities (Article 13(3) of the Constitution), and then, in particular, the maximum period of preventive custody (Article 13(5) of the Constitution).

The protection of personal freedom offered by the maximum time limits placed on preventive custody, which Article 13(5) says must be established by law, is "a unitary and indivisible value, which may not be subject to exceptions or exemptions related to particular and contingent matters connected with proceedings" (Judgment no. 299 of 2005).

The code of procedure provides a comprehensive regulatory scheme of the time periods, establishing overall final time limits, as an insuperable maximum limit, intended to cover the entire duration of proceedings, guaranteeing that there will be reasonable limits on the duration of preventive custody, and also giving courts limited discretion to verify that the prerequisites to suspend said limits under Article 304 of the Code of Criminal Procedure have been met (Judgment no. 204 of 2012).

This Court has explained that the "limits which must apply to the duration of pre-trial detention result directly from the ancillary role which the Constitution assigns to preventive custody with regard, on the one hand, to the prosecution of the trial and, on the other hand, to the protection requirements of the public at large. In balancing the interests which deserve protection, this justifies the temporary sacrifice of the personal freedom of those who have not yet been found guilty on a definitive basis" (Judgment no. 219 of 2008 and 229 of 2005).

20.– The reservation to the legislature under Article 13(5) of the Constitution is unequivocally intended only to design the regulation to protect personal freedom, placing it at the level of primary law.

The minimal sacrifice of personal freedom must be guaranteed only by law, as this Court has consistently reiterated starting with its pivotal Judgment no. 64 of 1970, which, paving the way for the current regulations on maximum time limits (for each stage, overall, and final) of preventive custody, underscored that Article 13(5) of the Constitution was intended to prevent the sacrifice of freedom caused by preventive detention from becoming "entirely subordinate to procedural matters; and was also intended to mandate that ordinary legislation establish the maximum time limits of preventive detention, beyond which limits the good of personal freedom, which […] is one of the bases of civic co-existence, would be undermined."

21.– In conclusion, the challenged provision violates the reservation to the legislature in Article 13(5) of the Constitution, in the part in which it allows the self-regulatory code to interfere with the regulation of personal freedom. This interference takes the form of the provision stating that defendants in preventive custody may, or may not, explicitly request the suspension – and, therefore, the extension – of the maximum time limits (of the stage) of their preventive custody.

22.– This, however, does not mean – as State Counsel claims – that the ordinary courts, thus including the referring *Tribunal*, are bound not to apply the secondary provision.

The self-regulatory code's provision acts within the broad bounds assigned to it by the primary law, which delegated, as mentioned above, the task of guaranteeing the constant availability of a level of services compatible with the purpose of safeguarding the constitutionally protected rights of the person.

The rule concerning the "indispensible services" to be guaranteed in the case of proceedings or trials concerning a defendant being held in preventive custody, a rule which ultimately interferes with the regulation of personal freedom, is established by

the secondary provision (Article 4(1)(*b*), cited above), which operates within the perimeters drawn by the primary rule, which is the source of its legitimacy. However, in the part in which the primary rule allowed for this to occur, it itself violates Article 13(5) of the Constitution, which states that the maximum time limits of preventive custody must be established by law.

In the present case, Article 2-*bis* of Law no. 146 of 1990 is unconstitutional precisely because it permits (in that it does not prohibit) the self-regulatory code to have a bearing on the legal regulation of the limits on the restriction of personal freedom, granting defendants the ability to decide whether or not to request that proceedings go forward despite their defense counsel's notice of absence due to participation in a collective work stoppage – directly affecting the limits on the duration of preventive custody. Thus, it is not (for the time being) a matter of non-application of the secondary provision, which is theoretically unconstitutional for violating the limits imposed by the primary rule. Instead, it is, above all, a matter of the constitutionality of the primary rule in the part in which it allows the secondary rule to impact the length of preventive custody by providing the detainee with the choice described above.

23.– The unconstitutionality of the challenged provision due to its violation of Article 13(5) of the Constitution means, as stated above, that the other grounds relied upon by the referring tribunal in the two referral orders by which it initiated constitutional proceedings are absorbed by the present one.

24.– Therefore, Article 2-*bis* of Law no. 146 of 1990 must be declared unconstitutional, in the part in which it allows the self-regulatory code of attorney work stoppages affecting court hearings – adopted on 4 April 2007 by the OUA and other professional associations (UCPI, ANF, AIGA, UNCC), determined by the Surveillance Commission to be qualified for strikes affecting essential public services with Decision no. 07/749 of 13 December 2007, published in the *Official Journal of the Republic* no. 3 of 2008 – in its regulation, found in Article 4(1)(*b*), of lawyers striking during trials and proceedings in which the defendant is being held in preventive custody, to interfere in the regulation of the personal freedom of defendants.

As for the past, this decision does not prejudice measures suspending the time limits of preventive custody based on the postponement of proceedings upon request by defense counsel or due to his or her failure to appear or participate.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

[omitted]

declares that Article 2-*bis* of Law no. 146 of 13 June 1990 (Rules on the exercise of the right to strike in the essential public services and on safeguarding the constitutionally protected rights of the person. Institution of the Surveillance Commission for Implementation of the Law), in the part in which it permits the self-regulatory code on attorney strikes during hearings, adopted on 4 April 2007 by the *Organismo Unitario dell'Avvocatura* [United Association of Lawyers] (OUA) and by other professional associations (UCPI, ANF, AIGA, UNCC), deemed qualified by the Guarantee Commission for strikes affecting essential public services with Decision no. 07/749 of 13 December 2007 and published in the *Official Journal of the Republic* no. 3 of 2008 – in regulating, at Article 4(1)(*b*) striking by lawyers during trials and proceedings in which the defendant is being held in preventive detention, interfere with the regulation of the defendant's personal freedom. Decided in Rome, at the seat of the Constitutional Court, Palazzo della Consulta, on 10 July 2018.