JUDGMENT NO. 40 YEAR 2019

In this case, the Court considered a referral order challenging a criminal law provision concerning serious drug offenses. The referring Court alleged that the gap between the maximum allowable punishment for minor offenses (four years incarceration) and the minimum allowable punishment for serious offenses (eight years) was too large, and suggested that the provision should make six years the minimum for serious offenses. The Court agreed, and struck down the provision, in the part in which it provided for a minimum punishment of eight, rather than six, years. The Court first reviewed its own authority to hear the case, rejecting one of the claims of the referring Court, which took issue with a previous decision of the Court, in what the Court deemed an unconstitutional attempt to appeal a previous Constitutional Court decision. The Court also rejected the referring Court's underlying assumption that the Constitutional Court may not pronounce on criminal matters with potentially negative effects, as well as State Counsel's objection that the criminal law is reserved to the exclusive action of the legislator, and reaffirmed its authority to strike down unconstitutional criminal provisions where they are patently unreasonable and disproportionate. It also pointed out that it may take action not only where there is one, constitutionally mandated solution to an unconstitutional measure of punishment, but also where the overall criminal system provides punishments in analogous situations that permit the Court to insert a punishment that is consistent with the legislator's overall punishment scheme. The Court then traced the history of the gap in the two sentencing ranges, which had resulted from a complex layering of judicial and legislative action in the area of drug regulation. The Court also revisited the many occasions it has had to examine this same, and related, provisions and pointed out that its urgent requests for legislative action to remedy this sentencing discrepancy had gone unheeded. Citing the seriousness of the fundamental rights involved, the fact that disproportionate punishments undermine the constitutionally mandated rehabilitative purpose of criminal punishment, and the fact that a great deal of conduct falls into a grey area on the borderline between serious and minor offenses (rendering the four-year gap between the minimum punishment for one and the maximum punishment for the other manifestly unreasonable and open to causing undue influence on finders of fact in criminal proceedings as well as resulting in unjust sentencing), the Court refused to allow the provision to remain in force any longer. As for the referring Court's suggestion of six years as an appropriate substitute provision for the minimum punishment for serious crimes, the Court found that this was consistent with the legislator's overall scheme and traceable in pre-existing legislation, and took care to specify that, as a non-mandatory solution, the legislator remained free to alter the six-year provision.

[omitted]

THE CONSTITUTIONAL COURT

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 73(1) of 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 Court of Appeals of Trieste, during criminal proceedings against J.F. C.M., with a referral order

of 17 March 2017, registered as no. 113 of the 2017 Register of Referral Orders and published in the *Official Journal* of the Republic no. 36, first special series, of 2017.
Considering the intervention of the President of the Council of Ministers;
having heard from Judge Rapporteur Marta Cartabia in chambers on 23 January 2019.

[omitted]

Conclusions on points of law

1.– With a referral order registered as no. 113 of the 2017 Register of Referral Orders, the Court of Appeals of Trieste has raised questions concerning 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), alleging that it clashes with Articles 3, 25, and 27 of the Constitution, in the part in which, by effect of Judgment no. 32 of 2014 of this Court, it provides a mandatory minimum sentence of eight years, rather than that of six years introduced by Article 4-*bis* of Decree Law [hereafter d.l.] no. 272 of 30 December 2005 (Urgent measures to ensure the safety and financing for the next Winter Olympics, as well as the functionality 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, found in Decree of the President of the Republic no. 309 of 9 October 1990), converted, with modifications, into Law no. 49 of 21 February 2006.

The challenged provision applies a minimum mandatory sentence of eight years of incarceration for "serious" cases of cultivation, production, fabrication, extraction, refinement, sale, offering or providing for sale, transmitting or receiving, howsoever obtained , 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, without authorization pursuant to Article 17 and falling outside 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).

1.1.– The Court of Appeals of Trieste claims that the provision of a minimum sentence of eight years of incarceration, in place of the six years introduced in Article 4-*bis* of d.l. no. 272 of 2005, as modified, violates, first of all, Article 25 of the Constitution, given that the current penalty scheme was allegedly introduced into the system as the result of this Court's Judgment no. 32 of 2014, in violation of the principle of the reservation of criminal law to the legislator, on the basis of which any steps to make punishments more stringent fall within the exclusive purview of the legislator, leaving no margin of intervention for "manipulative" rulings by this Court.

Second, the referral order alleges that Article 3 of the Constitution has been violated, on the supposition that the challenged provision establishes a sentencing scheme that is unreasonable in light of the consideration that, while the "naturalistic" distinction between the "ordinary" offense, under the challenged provision, and the "minor" one under Article 73(5) of d.P.R. no. 309 of 1990, is not always clear, the "punitive boundaries" of the two crimes are excessively (and, thus, unreasonably) distant (indeed, the minimum sentence for the one is four years longer than the maximum sentence for the other).

Finally, the referring Court claims that this unreasonableness clashes with Articles 3 and

27 of the Constitution, since prescribing a punishment that is unjustifiably harsh and disproportionate to the seriousness of the act undermines the rehabilitative function of punishment.

2.– The question raised in reference to Article 25(2) of the Constitution is not admissible.

The order claims that the harsher punishment imposed as a response to this Court's Judgment no. 32 of 2014, in reference to ordinary (serious) offenses of trafficking stupefacient drugs, regulated by Article 73(1) of d.P.R. no. 309 of 1990, is impermissible. The referring Court alleges that this Court, in pronouncing *in malam partem* in the area of the criminal law, violated the reservation to the legislator established by Article 25 of the Constitution.

The question, framed in this way, amounts to a challenge of the effects of Judgment no. 32 of 2014 of this Court, and constitutes an unconstitutional attempt to appeal that decision. As such, the question is inadmissible, given that "[a]gainst the decision of the Constitutional Court no appeals are allowed" (Article 137(3) of the Constitution; see, among many, Judgment no. 29 of 1998, and Orders no. 184 of 2017, 261 of 2016, 108 of 2001, 461 of 1999, 220 of 1998, 7 of 1991, 203, 93, and 27 of 1990, and 77 of 1981).

At the same time, it bears underscoring that constitutional case law does not support the referring Court's underlying assumption that the reservation to the legislator under Article 25 of the Constitution would fundamentally preclude this Court from any possibility of intervening in the area of criminal law, with less favorable effects. Indeed, the case law of this Court, as it has recently reiterated (Judgments no. 236 of 2018 and 143 of 2018) allows for interventions in the area of criminal law, with possible effects *in malam partem*, in particular situations (Judgments no. 32 and 5 of 2014, 28 of 2010, and 394 of 2006). What remains, if anything, is to ascertain the scope and the limits of the admissibility of these interventions in the specific individual case. Naturally, the principle of the reservation to the legislator under Article 25 of the Constitution grants "the choice as to the conduct that is to be punished and the penalties applicable to it" to the legislator (Judgment no. 5 of 2014), but this does not prevent this Court from adopting rulings the *in malam partem* effect of which derives not from the introduction of new provisions or the manipulation of existing ones, but from the elimination of unconstitutional provisions. In this case, the *in malam partem* effect is admissible in that it is a mere, indirect consequence of the *reductio ad legitimitatem* of an unconstitutional provision, the elimination of which effects the automatic expansion of another provision laid down by the legislator itself (Judgment no. 236 of 2018).

Analogously, this Court, with Judgment no. 32 of 2014, declared Articles 4-*bis* and 4-*vicies ter* of d.l. no. 272 of 2005, as converted, unconstitutional for procedural defects relating to Article 77(2) of the Constitution. When that decree-law was ruled unconstitutional, Article 73 of d.P.R. 309 of 1990 regained force of law, with effects that were, in part, milder, and, in part, more severe. Thus, this Court acted only to remove from the legal system the unconstitutional provisions referred for its scrutiny, carrying out the role assigned to it by Article 134 of the Constitution, while the resulting configuration of the punishment scheme for drug crimes is the result of earlier choices by the legislator, which came back into force after the rulings of unconstitutionality in Judgment no. 32 of 2014, and which were later modified by decree law no. 36 of 20 March 2014 (Unified text of the laws regulating stupefacient and psychotropic substances and the prevention, treatment, and rehabilitation of the related states of addiction, described in Decree of the President of the Republic no. 309 of 9 October

1990, as well as the use of medicinal drugs), converted, with modifications, into Law no. 79 of 16 May 2014, which reduced the maximum sentence for minor crimes and brought about numerous other changes to the regulatory scheme, following aforementioned Judgment no. 32 of 2014.

3.– The other challenges, which involve the unreasonableness and disproportionateness of the punishment, raised in reference to Articles 3 and 27 of the Constitution, must be examined together, since they are tightly interconnected.

The General Counsel for the State objects that these questions are inadmissible, in consideration of the fact that the alleged regulatory incongruity can be resolved by means of several different constitutionally permissible solutions, and, therefore, it should fall only to the legislator, and not to this Court, to repair the defects of the challenged provision.

4.1.– It is true that this Court has, until now, always held that the questions repeatedly brought before it in reference to Article 73(1) of d.P.R. no. 309 of 1990 were inadmissible (Judgments no. 179 of 2017 and 148 and 23 of 2016; Order no. 184 of 2017). However, the elements that previously prevented an examination on the merits are not present in the case under review today.

In Judgments no. 148 and 23 of 2016, the questions were declared inadmissible on the basis of numerous defects in the referral orders, including the vagueness of the question and the failure to identify an alternative punishment to the one in force, which would allow this Court to remedy the alleged constitutional violations. In Order no. 184 of 2017, likewise, the Court identified multiple causes for inadmissibility in the complaint, connected with defects of relevance, an incomplete reconstruction of the regulatory framework, contradictory aspects of the reasoning section, the attempt to appeal a ruling of this Court, in violation of Article 137(3) of the Constitution, and the resulting request to revive the punishment scheme contained in a provision declared unconstitutional, for defects of legislative procedure under Article 77 of the Constitution.

The reasons for inadmissibility given in Judgment no. 179 of 2017 are different, and, in some regards, more similar to the ones raised by State Counsel in the present case. In that decision, this Court held that it could not examine the questions of constitutionality brought before it on the merits because the referring courts had not identified "constitutionally required solutions" that were suitable to remedy the alleged constitutional violation. In that case, the Constitutional Court was asked to fill the punishment gap between the two offenses described in paragraphs 1 and 5 of Article 73, equating the minimum punishment prescribed for the serious offense to the maximum one prescribed for the minor offense. This Court denied that it must, "from the constitutional point of view, […] conclude that continuity of an offense must necessarily correspond to a continuity in the punishment" (Judgment no. 179 of 2017), since "spaces of discontinuous discretion" may well exist in the punishment scheme. Thus, the request of *reductio ad legitimitatem* of challenged paragraph 1 of Article 73 of d.P.R. no. 309 of 1990 by means of equating the minimum sentence it provides for the serious offense with the maximum sentence imposed for the minor offense under later paragraph 5 (four years of incarceration plus a fine of 10329.00 euros), could not be held to be constitutionally mandatory.

4.2.– In this case, too, the objection of inadmissibility is based on reasons linked to the absence of constitutionally required solutions. However, it is unfounded in light of the most recent conclusions reached by constitutional case law with regard to the breadth and limits of this Court's ability to take action concerning the measure of criminal

punishments established by the legislator, particularly as it has developed starting from Judgment no. 236 of 2016.
In particular, with recent Judgment no. 233 of 2018, after reiterating that discretionary decisions concerning the measure of punishments fall, above all, to the legislator, this Court explained that nothing impedes it from taking action when legislative choices concerning punishments are manifestly unreasonable or arbitrary, and the legislative system allows for solutions to be identified (even in the form of solutions that are alternative one to the other), that are able to "render consistent once again the choices already laid down to protect a certain legal good, proceeding in a timely manner, whenever possible, to eliminate unjustifiable inconsistencies" (referring, in this regard, to Judgment no. 236 of 2016).
Similarly, Judgment no. 222 of 2018 had, a short time before, already held that it is not necessary for there to be only one, constitutionally required solution in the system, able to replace the one that is struck down, in order for this Court to take corrective action, like the one provided for a provision that has an identical structure and purpose, suitable to be taken as a *tertium comparationis*. "It is enough that the system overall offers the Court 'precise points of reference' and 'already traceable' solutions (Judgment no. 236 of 2016)" which, although not "mandated by the Constitution," "may replace the punishment declared unconstitutional."
In conclusion, while it remains true that it does not fall to this Court to autonomously determine the measure of punishments (Judgment no. 148 of 2016), the admissibility of the questions of constitutionality that concern the extent of punishment depend not on the presence of a single constitutionally mandatory solution, but on the presence within the system of punishment provisions that, transposed within the challenged provision, may ensure the consistency of the logic pursued by the legislator (Judgment no. 233 of 2018). In keeping with the punishment policy choices outlined by the legislator and reserved to it, it is, indeed, necessary to avoid having areas of the system that are immune to constitutional review, precisely in areas in which there is a supremely urgent need to ensure the effective protection of fundamental rights, especially personal freedom, which is impacted by legislative choices concerning penalties.
In light of these principles, the questions raised by the Court of Appeals of Trieste meet the requirements for admissibility, since they identify, within the system, as a suitable, albeit not mandatory, solution, the reduction of the minimum sentence for the offense provided for in paragraph 1 of Article 73 of d.P.R. no. 309 of 1990 from eight years to six, an amount provided for in Article 4-*bis* of d.l. no. 272 of 2005 and still in force, as the maximum punishment, pursuant to paragraph 4 of Article 73 of d.P.R. no. 309 of 1990 for the ordinary crime of "light" drugs listed in Tables II and IV provided in Article 14 of d.P.R. no. 309 of 1990, as substituted by Article 1(3) of aforementioned d.l. no. 36 of 2014, as converted.
4.3.– Moreover, this Court can no longer delay taking action, given that its pressing request 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 paragraph 5 and 1 of d.P.R. no. 309 of 1990," in consideration of factors including "the high number of judgments, both pending and final, concerning offenses involving stupefacient drugs" (Judgment no. 179 of 2017) has gone unheeded.
Last, but not least in terms of importance, it bears adding that the question under review deals with fundamental rights, which cannot tolerate being further compromised, and

which is the reason that there have been repeated requests for this Court to take action coming from trial and appellate courts.

5.– On the merits, the questions are well founded.

This Court has already had occasion to underscore that the broad, four-year disparity that has been created between the minimum punishment envisaged by paragraph 1 of Article 73 of d.P.R. no. 309 of 1990 and the maximum punishment imposed by paragraph 5 of the same article "has reached so great a breadth as to effect an anomaly in the punishment scheme" (Judgment no. 179 of 2017) after a complex legislative and case law evolution that bears revisiting in broad terms.

5.1.– The original Article 73 of d.P.R. no. 309 of 1990 provided a different punishment scheme for crimes involving "heavy" drugs (punished under paragraph 1 with eight to twenty years of incarceration and a fine) than for crimes involving "light" drugs (punished under paragraph 4 with two to six years of incarceration and a fine). This same distinction between "heavy" and "light" drugs was brought up again in the context of minor incidents, with respect to which paragraph 5 of Article 73 provided a mitigating factor, with special, so-called autonomous or independent effect, which punished incidents involving "heavy" drugs with one to six years of incarceration, and those involving "light" drugs with six months to four years of incarceration, in addition to the respective fines.

In d.l. no. 272 of 2005, Article 4-*bis* (later declared unconstitutional by Judgment no. 32 of 2014) eliminated the distinction based on the type of stupefacient substance, establishing a punishment of six to twenty years of incarceration and a fine for serious offenses, and a punishment of one to six years of incarceration and a fine for cases in which the fact that the incident was a minor one could act as a attenuating factor.

With Article 2(1)(*a*) of the next decree-law no. 146 of 23 December 2013 (Urgent measures for the protection of the fundamental rights of prisoners and the controlled reduction of the prison population), converted, with modifications, into Law no. 10 of 21 February 2014, paragraph 5 of Article 73 was replaced, transforming the attenuating circumstance of the minor incident into a separate criminal offense, and reducing the maximum sentencing cap for incarceration from six to five years. This modification was not affected by Judgment no. 32 of 2014, following which the provisions of Article 73 regained effect, in their original formulation.

Lastly, the legislator returned to this topic with its adoption of d.l. no. 36 of 2014, converted, with modifications, into Law no. 79 of 2014. Among other things, Article 1(24-*ter*)(*a*) further decreased the maximum sentence of the punishment provided for minor incidents, setting it at four years of incarceration and a fine.

The wide gap at the basis of the complaint, which separates the punishment for serious offenses from that of minor ones, was carved out gradually, by these layers of judicial and legislative action, and the legislator has not taken steps to fill it, despite the serious problems it may cause in application, and which this Court has pointed out in its earlier rulings in this area.

5.2.– Although the Supreme Court of Cassation has consistently held that the minor offenses described in Article 73(5) may be recognized only in scenarios where the criminal value of the conduct is minimal, determined on the basis of its quantity, quality, and the other parameters established by the provision (see, among many, most recently, Supreme Court of Cassation, Seventh Criminal Division, Order no. 6621 of 24 January-12 February 2019; Supreme Court of Cassation, Seventh Criminal Division, Order no. 3350 of 20 December 2018-24 January 2019; Supreme Court of Cassation,

Fourth Criminal Division, Judgment no. 2312 of 13 December 2018-18 January 2019), many cases doubtlessly fall into a "grey area," at the borderline between the two criminal offenses. Because of this, it would be unjustifiable to continue to maintain such an extensive discrepancy in the punishments, the disproportionate nature of which is clear even considering only the fact that the minimum punishment for the serious offense is equal to double the maximum punishment for the minor offense. The breadth of this discrepancy in the punishments has an inevitable influence on the overall evaluation that the trial court must carry out in order to ascertain the minor nature of a given incident (as the Supreme Court of Cassation, Joint Criminal Divisions, held in Judgment no. 51063 of 27 September-9 November 2018). This runs the risk of generating inequalities in how people are punished, potentially resulting in both overly harsh and overly mild punishments, as well as unreasonable discrepancies in application in a significant number of concrete cases.

Thus, there is a violation of the principles of equality, proportionality, and reasonableness under Article 3 of the Constitution, as well as of the principle of the rehabilitative purpose of punishment under Article 27 of the Constitution.

Indeed, as this Court stated clearly in its recent Judgment no. 222 of 2018, as long as the punishments provided are manifestly disproportionate with respect to the seriousness of the criminalized conduct, they are bound to clash with Articles 3 and 27 of the Constitution, since a punishment that is disproportionate to the seriousness of the conduct will hinder its rehabilitative function (see, among many, Judgments no. 236 of 2016, 68 of 2012, and 341 of 1994). The principles enshrined in Articles 3 and 27 of the Constitution require 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" (Judgment no. 179 of 2017), in view of the "progressive and harmonious reintegration of the individual into society, which constitutes the essence of the re-educative goal" (see, most recently, Judgment no. 149 of 2018). This demanding objective laid down by constitutional principles is undermined when a person is subjected to a punishment that is objectively disproportionate to the seriousness of his or her conduct and is, therefore, subjectively perceived as unjust and needlessly oppressive, and thus fails to achieve the rehabilitative aim toward which it must necessarily work.

5.3.– In keeping with the considerations above, this Court can no longer defer taking action intended to remedy the violations of the aforementioned constitutional principles, and, therefore, it must receive the questions of constitutionality concerning Article 73(1) of d.P.R. no. 309 of 1990, as they have been raised by the referring court, which asks that the provision be declared unconstitutional, in the part in which it provides a minimum sentence of eight years of incarceration, rather than six.

The [six-year] punishment suggested by the referring Court, while not constitutionally mandatory, is, nevertheless, not arbitrary: it can be found in provisions already traceable within the system, specifically in the area of punishments connected with drug crimes, and it fits into this area in a way that is consistent with the overall logic followed by the legislator.

Indeed, the referring Court drew the indication of the extent of the minimum punishment for serious offenses primarily from the provision that Article 4-*bis* of d.l. no. 272 of 2005 laid down for the same conduct, a provision which still has some applicative effect in the system, given the non-retroactive effect of Judgment no. 32 of

2014. In addition, six years is also the maximum punishment (also mentioned by the referral order) provided by the current paragraph 4 of Article 73 of d.P.R. no. 309 of 1990 for serious crimes involving the substances listed in Tables II and IV, provided by Article 14 of d.P.R. no. 309 of 1990. The legislator had also set the maximum punishment for minor offenses involving "heavy" drugs at six years in the original text of d.P.R. no. 309 of 1990, a measure which was preserved as the maximum limit for the punishment of minor incidents in later d.l. no. 272 of 2005, even though the later decree-law did away with the distinction between "heavy" and "light" drugs in paragraph 5.

In a word, the six-year punishment has been repeatedly chosen by the legislator as an appropriate length of time for "borderline" offenses, which, in the complex and multi-faceted punishment system for crimes involving trafficking of stupefacient substances, fall into the lower end of the category of more serious crimes or into the higher end of the category of less serious crimes. In this context, the request to reduce the minimum sentence for serious offenses under paragraph 1 of Article 73 of d.P.R. no. 309 of 1990 to six years of incarceration, in order to remedy the constitutional defects complained of, is appropriate. Indeed, the referring Court has suggested, in accordance with the criteria provided in the most recent constitutional case law, a punitive provision that is already traceable within the criminal system and which, when transposed within the challenged provision, fits in consistently with the punishment scheme provided by the various paragraphs of Article 73 of d.P.R. no. 309 of 1990 and respects the logic of the scheme the legislator intended to design (Judgment no. 233 of 2018).

It need scarcely be said that the indicated punishment measure, since it is not a choice mandated by the Constitution, remains open to a different evaluation on the part of the legislator, in keeping with the principle of proportionality (Judgment no. 222 of 2018).

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares that Article 73(1) of Decree of the President of the Republic 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) is unconstitutional, in the part in which it provides a minimum punishment of eight years of incarceration, rather than six years.

Decided in Rome, at the seat of the Constitutional Court, Palazzo della Consulta, 23 January 2019.