JUDGMENT No. 99 of 2019

In this case, the Court considered a referral order from the First Criminal Division of the Court of Cassation questioning the constitutionality of Article 47-*ter*(1-*ter*) of Law no. 354 of 26 July 1975 (Norms regulating the penitentiary system and the enforcement of measures involving deprivation and limitation of liberty – [hereafter "Prison Law"]), in the part in which it does not provide for the application of "derogating" house arrest even in the event of serious mental illness supervening during enforcement of the sentence. The Court first rejected the objection of inadmissibility advanced by the President of the Council of Ministers based on the alleged lack of a sole measure able to remedy the defects of constitutionality raised by the referring court, affirming that it is consolidated case law that in the event of the infringement of constitutional rights, the lack of a sole measure to bring the law into line with the constitution cannot be an obstacle to examining the question of constitutionality from the point of view of the merits. Thus, according to the Constitutional Court, the absence of any alternative to imprisonment for those who develop serious mental illness rather than a physical one while in detention creates a lack of effective protection of the fundamental right to health. When combined with the inevitable suffering arising from deprivation of liberty, this lack of an alternative manner of implementing a sentence handed down before the illness developed can be considered tantamount to an additional and inhumane punishment liable to further damage the health of the detainee.

The Court therefore accepted the question raised together with the "remedy" identified by the Court of Cassation, namely the application of the alternative measure of "humanitarian" or "derogating" house arrest, (Article 47-*ter*, (1-*ter*), of the Prison Law), which is able to satisfy all the interests and values at stake, reaffirming the responsibility of courts to assess on a case-by-case basis whether a detainee suffering from supervening serious mental illness can serve his or her sentence in prison or needs to be treated in secure accommodation elsewhere, all the while balancing the right of the detainee to humane treatment and health care with the safety requirements of the community at large.

[omitted]

THE CONSTITUTIONAL COURT

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 47-*ter*(1-*ter*) of Law no. 354 of 26 July 1975 (Provisions governing the law on incarceration and the implementation of measures which deprive of or limit freedom), initiated by the First Criminal Division of the Court of Cassation during criminal proceedings against N. M. with a referral order of 22 March 2018, registered as no. 101 in the 2018 Register of Referral Orders and published in the *Official Journal of the Republic* no. 28, first special series, of 2018.

Considering the intervention submitted by the President of the Council of Ministers;

Having heard Judge Rapporteur Marta Cartabia in chambers on 6 February 2019.

[omitted]

Conclusions on points of law

1.– The First Criminal Division of the Court of Cassation raised of its own motion the question of the constitutionality of Article 47-*ter*(1-*ter*) of Law no. 354 of 26 July 1975 (Provisions governing the law on incarceration and the implementation of measures

which deprive of or limit freedom– [hereafter "Prison Law"]), in the part in which it does not provide for the application of "derogating" house arrest even in the event of serious mental illness that occurred during enforcement of the sentence, contrasting with Articles 2, 3, 27, 32 and Article 117(1) of the Constitution, the latter article relating to Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, ratified and implemented by Law no. 848 of 4 August 1955.

The case in question concerns a detainee with over four years still to serve, suffering from a serious "supervening mental illness" according to Article 148 of the Criminal Code, meaning, in accordance with the established case law, a mental illness that, although chronic or existing prior to the offence, was not deemed at the criminal proceedings leading to the final judgment to have affected the accused's mental capacity the term also refers to a mental illness diagnosed or effectively emerging during detention.

According to the referring court, current legislation provides for no form of enforcement of the sentence other than incarceration for detainees in the applicant's circumstances, offering only the possibility of receiving assistance at one of the "mental health facilities" that may exist in the prison system pursuant to Article 65 of the Prison Law. The impossibility of ordering the relocation of detainees outside prison in cases such as this would lead to a treatment that, according to Italian constitutional provisions, would be inhumane and contrary to the inviolable right to health of the detainee (Articles 2, 27(3), and 32 of the Constitution) and, according to the Convention, inhumane and degrading treatment (Article 117(1) of the Constitution with regard to Article 3 ECHR, as interpreted by the case law of the European Court of Human Rights). Article 3 of the Constitution would also be infringed on the grounds of unequal treatment of persons whose mental illness was such as to affect their mental capacity at the time of the offence and where they pose a threat to society, for whom the law provides for rehabilitation treatment in residential facilities for the implementation of security measures [*residenze per l'esecuzione delle misure di sicurezza*] (hereafter REMS) set up outside prison. There would also be a difference in treatment in relation to convicted persons with a comparable remainder of sentence to serve who suffer, however, from serious *physical* illness; such persons may avail themselves of the optional deferral of the enforcement of the sentence under Article 147 of the Criminal Code as well as house arrest under the challenged provision.

2.– The objection of inadmissibility advanced by the President of the Council of Ministers based on the alleged lack of a sole measure able to remedy the defects of constitutionality raised by the referring court must be rejected at the outset.

2.1.– In its most recent case law, this Court has repeatedly stated that in the event of the infringement of constitutional rights, the lack of a single obligatory measure to bring the law into line with the Constitution cannot be an obstacle to examining the question of constitutionality from the point of view of the merits.

Precisely with regard to criminal matters especially, this Court has repeatedly examined the merits of the questions brought to its attention when the legal system provided for solutions that, albeit not constitutionally mandatory, were nevertheless able to "immediately remedy the ascertained violation [of the Constitution]" – all this without prejudice to the power of the legislator to intervene with different remedies (cf. Judgment no. 222 of 2018, but see also, similarly, in an area not far removed from the question at issue, Judgments no. 41 of 2018 and no. 236 of 2016). The admissibility of

questions of constitutionality is therefore determined not so much by the existence of a sole constitutionally mandatory solution as by the existence in law of one or more constitutionally adequate solutions that fit into the legal framework in such a way as to be consistent with the logic followed by the legislator (Judgments no. 40 of 2019 and no. 233 of 2018).

It is indeed necessary to ensure the absence of areas in the law that are immune from constitutional review, especially in fields such as criminal law, where the need to ensure the real protection of fundamental rights, affected by the choices of the legislator, is critical. All the more so in situations like the one before the Court at present, which place great emphasis on the effectiveness of the constitutional guarantees in respect of persons who not only find themselves deprived of their personal liberty but are also seriously ill and therefore doubly vulnerable.

2.2.– In the present case, the referring court considers that the law does not, at present, offer an alternative to incarceration for prisoners suffering from serious mental illness supervening after the crime was committed and who find themselves in the situation of the applicant detainee. This is because of a change in the law which has effectively deprived Article 148 of the Criminal Code of any content; the article in question specifically addresses cases of 'supervening [i]nfirmity of mind affecting convicted persons', as the heading of the article states. For the seriously mentally ill, incarceration may represent a form of enforcement of the sentence constituting inhumane treatment and therefore contrary to Articles 2, 27(3), and 32 of the Constitution, as well as Article 3 ECHR, which prohibits inhumane or degrading treatment, therefore violating Article 117(1) of the Constitution.

The referring court deems the house arrest measure, referred to in Article 47-*ter*(1-*ter*) of the Prison Law as a solution already existing in law regarding detainees suffering from serious physical illness, and, considering the manner in which it can be applied, it is constitutionally adequate and appropriate to provide a remedy for the alleged violations as it would also permit the mentally ill to serve their sentence outside prison in conditions that would allow a balance between health and security requirements. This is "humanitarian" or "derogating" house arrest, so called because it can also be made available to detainees who still have to serve a residual sentence exceeding four years (as in the case at hand), a limit set in Article 47-*ter*(1) of the Prison Law as a general requirement for detainees to be entitled to benefit from "ordinary" house arrest.

2.3.– The referring court asks to also extend "derogating" house arrest, provided for in the challenged Article 47-*ter*(1-*ter*) of the Prison Law, to detainees suffering from psychiatric disorders so serious that serving their sentence in prison would be inhumane, as well as contrary to the right to health, irrespectively of the duration of the remaining sentence to be served.

Framed in these terms, and in the light of the principles set out above, the criteria for admissibility are met.

3.– The question is well founded from the point of view of the merits.

The referral order is based on the premise that, at present, detainees suffering from supervening serious mental illness with over four years still to serve, like the party to the judgment at issue, have no access to an alternative manner of enforcing the sentence other than incarceration.

The summary of the current legal framework carried out by the Court of Cassation is certainly to be endorsed.

3.1.– In the first place, it is true that Article 148(1) of the Criminal Code, devoted

precisely to cases of "[s]upervening mental illness of the convicted person", has now become inapplicable, having been superseded by legislative reforms that, although not expressly providing for its repeal, have rendered it completely devoid of preceptive force. The aforementioned provision, in fact, establishes that a judge may order the suspension or deferral of the sentence and concurrent hospitalization in a secure psychiatric hospital, care and custody home or, in certain circumstances, a civil psychiatric hospital in cases of mental illness, supervening after conviction, that is of such gravity as to preclude enforcement of the sentence in prison.

Article 148 of the Criminal Code reflects the internment-based approach to mental illness typical of the time it was written. In such a cultural perspective, mentally ill detainees could be removed from prison because of the difficulties that living alongside other detainees in a restricted environment could (and can) cause, with the aim of being held elsewhere together with other similarly ill persons and without prospects of reintegration into society. This provision has never been formally repealed, but all the institutions to which it refers have disappeared as a result of legislative reforms that reflect a change in the cultural and scientific paradigm for the treatment of mental health, which can be summarized as a transition from mere custody to therapy (an example in this direction is the opinion of the National Bioethics Committee, *Salute mentale e assistenza psichiatrica in carcere* ["Mental health and psychiatric care in prison"], of 22 March 2019).

In response to the changing cultural premises underpinning mental health care, the civil psychiatric hospitals were closed down over forty years ago pursuant to the well-known Basaglia Law (Law no. 180 of 13 May 1978, on "Voluntary and compulsory health examinations and treatments"). Secure psychiatric hospitals ([*ospedali psichiatrici giudiziari*], hereafter OPGs) and care and custody homes, however, proved unable to ensure the mental health of those hospitalized there (Judgment no. 186 of 2015) and were therefore cancelled from the legal system as of 31 March, 2015, following a long legislative process that began [in 2008]. [omitted] Upon conclusion of the legislative process, the effective abolition of the last OPGs was carried out only thanks to the work of the Sole Commissioner appointed by the Government for this purpose, bringing about the definitive closure of these institutions in 2017.

With the closure of the civil and secure psychiatric hospitals, Article 148 of the Criminal Code, the only provision to address the state of detainees suffering from supervening serious mental illness, can no longer be a point of reference.

3.2.– In the meantime, the legislator has established residence facilities for the implementation of security measures (REMS) on a regional basis and under the exclusive control of the health service. However, these facilities are not intended to accommodate convicted persons whose mental illness emerges after sentencing. The law offers these persons no alternative to detention, the only option being to set up dedicated "special sections" in prisons for persons suffering from physical or mental illness or disabilities pursuant to the provisions of Article 65 of the Prison Law.

The long and arduous reform process that led to the major result represented by the closure of the OPGs was not carried out with adequate provision for the circumstances of detainees with supervening serious mental illness. The part of the powers delegated pursuant to Law no. 103 of 23 June 2017 (Amendments to the Criminal Code, the Code of Criminal Procedure, and the Prison Law) concerning mentally ill detainees, aiming to guarantee them adequate therapeutic and rehabilitative treatment also through measures alternative to detention, in addition to the establishment of new health facilities inside

prisons, remains, in fact, unfinished. Setting up the REMS, introduced by the reform, does not remedy the gap that has arisen from the closure of the OPGs. As the referring Court of Cassation correctly points out, REMS are not institutions designed to replace the old psychiatric hospitals under a different guise and name. While the old OPGs were intended to accommodate all patients with serious psychiatric illness who had come into contact with a criminal court in any regard, thus including convicted persons whose mental illness "supervened" subsequent to conviction, the REMS – as their name clearly indicates – accommodate only psychiatric patients who have been deemed non-indictable in criminal proceedings or who, having received a reduced sentence for a non-unintentional criminal offence on grounds of mental illness, have been subjected to a security measure.

[omitted]

3.3.– As the complex reform programme has remained incomplete, today's legislative fabric has serious shortcomings that affect, among other things, the situation of detainees suffering from supervening mental illness, who have no access to either REMS or other alternatives to prison if they have a period exceeding four years' detention to serve, as in the case of the applicant in question.

Detainees in circumstances similar to those of the party in the case before the referring court have no access to the "ordinary" house arrest envisaged in Article 47-*ter* (1)(c) of the Prison Law, available to all seriously ill detainees with under four years remaining to serve, regardless of the nature of their illness, be it physical or mental.

Nor are they eligible for mandatory deferral of the enforcement of the sentence pursuant to Article 146(1)(3), of the Criminal Code, because serious mental illness does not meet the criterion, established in the aforementioned article, of serious illness at such an advanced stage as to be unresponsive to treatment.

Moreover, the mentally ill cannot even benefit from optional postponement of the enforcement of the sentence under Article 147(1)(2) of the Criminal Code, because this provision concerns only cases of "serious physical illness".

The latter provision leaves no room for a different interpretation extending also to detainees suffering from mental illness. Such an interpretation would be contradicted by both the wording and the consolidated case law of the Court of Cassation whereby the only psychiatric illnesses for which the judge can order optional deferral of the enforcement of the sentence are those that may also give rise to serious physical repercussions (among the numerous rulings to this effect, Court of Cassation, First Criminal Division, Judgments no. 35826 of 11 May-30 August 2016, and no. 37615 of 28 January-16 September 2015).

In brief, since the mandatory or optional deferral envisaged in Articles 146 and 147 of the Criminal Code concerns only persons suffering from serious physical infirmity, as stated above, it follows that the mentally ill may not even benefit from the "humanitarian" or "derogating" house arrest provided for in the challenged Article 47-*ter*(1-*ter*) of the Prison Law, which refers to these provisions to define its scope of application.

4.– The lack of any alternative to detention for detainees suffering from supervening serious mental illness violates the constitutional principles invoked in the referral order.

4.1.– Mental illness is no less a source of suffering than physical illness, and it is hardly necessary to recall that the fundamental and universal right to health enshrined in Article 32 of the Constitution, of which all persons are bearers, must be understood to include not only physical but also mental health, which the law is required to safeguard

to the same degree of protection (among many, see Judgments no. 169 of 2017, no. 162 of 2014, no. 251 of 2008, no. 359 of 2003, no. 282 of 2002 and no. 167 of 1999), also employing adequate means to ensure its effectiveness.
Furthermore, it must be borne in mind that mental illnesses in particular can worsen and become more acute as a consequence of detention. The suffering that detention inevitably brings to any detainee is exacerbated and intensified among the sick, creating genuine incompatibility between incarceration and mental disorder in extreme cases.
It emerges from the case law of the European Court of Human Rights (among others, ECtHR, Second Chamber, Judgment of 17 November 2015, *Bamouhammad v Belgium*, para. 119, and ECtHR, Grand Chamber, Judgment of 26 April 2016, *Murray v Netherlands*, para. 105) that holding a person suffering from serious mental illness in detention in certain cases constitutes genuine inhumane or degrading treatment, in the words of Article 3 ECHR or inhumane treatment, in those of Article 27(3) of the Italian Constitution.
4.2.– If it is true that the protection of the mental health of detainees requires complex and cohesive measures, starting first of all from the improvement of health facilities in prison, it is also true that the law must, additionally, provide for additional external forms of treatment, at least in cases of proven incompatibility with the prison environment. In serious cases such as these, the law must provide for measures alternative to incarceration that courts can order on a case-by-case basis as and when necessary, modifying the detention regime in such a way as to consider and safeguard the health of the mentally ill, also taking into account the danger the convicted person represents, so that the safety of the community at large is not compromised.
For the reasons set out above, this Court considers that the absence of any alternative to imprisonment, which prevents courts ordering enforcement outside a detention institution, is contrary to the principles set out in Articles 2, 3, 27(3), 32 and 117(1) of the Constitution, including in cases where, after all due medical examination, a mental illness has been diagnosed that causes such grave suffering as to give rise to an additional, inhumane, punishment when added to the normal suffering arising from prison life.
4.3.– In a previous judgment, taking note of the unsatisfactory handling of serious mental illness supervening subsequent to conviction, this Court called on the legislator to "find a balanced solution" to guarantee that convicted persons suffering from mental disorders receive "mental health care – protected by Article 32 of the Constitution – without prejudice to enforcement of the sentence" (Judgment no. 111 of 1996). Several years later, this call has remained unheard.
Although this Court is aware that it is the duty of the legislator to carry out the already initiated legislative reform in the best possible manner, regulating the prison system in terms of mental health care, providing special structures within and outside prison facilities, this Court cannot fail to intervene in order to remedy the violation of constitutional principles censured by the referring court, such as to immediately restore an adequate balance between the security needs of the community and the need to ensure the right to health of detainees (Article 32 of the Constitution), as well as the necessity to guarantee that no convicted person, and still less a sick detainee, is ever forced to serve his or her sentence in inhumane conditions (Article 27(3) of the Constitution).
Therefore, the question of constitutionality raised by the referring court must be accepted and Article 47-*ter*(1-*ter*) of the Prison Law declared unconstitutional insofar as

it does not allow for "humanitarian" house arrest also in cases of supervening serious mental illness.

5.– The alternative measure of "humanitarian" or "derogating" house arrest, identified by the referring court, is currently well suited to filling the deficiencies identified above.

Courts can adapt house arrest in such a way as to safeguard the fundamental right to health of the detainee, if it is incompatible with prison detention and, at the same time, the security equirements of the community that must be protected from the danger potentially posed by those suffering from certain types of psychiatric illness.

5.1.– Since its introduction with Law no. 663 of 10 October 1986 (Amendments to the norms regulating the penitentiary system and the enforcement of measures involving deprivation and limitation of liberty), the scope of house arrest has been extended over time and its goals partially reworked, both through interventions by the legislator and through rulings given by this Court. However, in line with constitutional case law, it always responds to a "uniform and indivisible logic" (Judgment no. 211 of 2018 and no. 177 of 2009).

On the point at issue, this Court has found that house arrest does not constitute ""an alternative to punishment" but an "alternative to detention or, if one prefers, a method of implementing the sentence"", emphasizing that it is always accompanied by "conditions restricting freedom, under the control of the Supervisory Court and with the involvement of the social services" (Order no. 327 of 1989). For this reason, among other things, it is totally different from the mere release of the detainee following the deferral of a sentence, as provided for in Articles 146 and 147 of the Criminal Code.

The law, in fact, leaves no doubt in this regard.

According to Article 47-*ter*(4) of the Prison Law, "when ordering house arrest, the Supervisory Court shall establish the manner of enforcement in accordance with the provisions of Article 284 of the Code of Criminal Procedure", which states that, in "ordering home arrest, the court requires the accused not to leave his or her home or another place of private residence or a public place of care or assistance or, if any, a secure family home" (paragraph 1).

Therefore, house arrest does not reductively mean returning home or, still less, a return to freedom. Clearly, it involves leaving prison, but always with strict limitations to personal freedom, since the court, in ordering it, establishes the conditions and manner of enforcement, and specifies the place of detention, which may also not be the detainee's own home if this strikes a more appropriate balance between the needs pertaining to the protection of the sick person's health, those of security and those of the person harmed by the crime (Article 284, (1-*bis*) of the Code of Criminal Procedure). Of primary importance is the possibility of serving house arrest not only "in one's own home or in another place of private residence" but also in "public treatment, assistance or residential facilities", as provided for in Article 284 of the Code of Criminal Procedure and reiterated in paragraph 1 of Article 47-*ter* of the Prison Law itself.

In addition, it should be emphasised that detainees on house arrest may not leave the place to which they are assigned, unless specific authorization to this effect is granted by the court (Article 284(3) of the Code of Criminal Procedure), which may also limit or prohibit communication with persons other than those living with or assisting him or her (Article 284(2) of the Code of Criminal Procedure). In any case, the public prosecutor or the Criminal Investigation Department, also acting on their own initiative, may verify at any time that the conditions imposed are respected (Article 284(4) of the Code of Criminal Procedure). Article 47-*ter*(4) of the Prison Law adds that the

Supervisory Court "[d]etermines and also makes provision for the involvement of the social services. These conditions and provisions may be amended by the Supervisory Court with jurisdiction for the place of house arrest".
5.2.– The provision relating to "humanitarian" or "derogating" house arrest into the law governing the prison system, as laid down in the challenged Article 47-*ter*(1-*ter*) of the Prison Law, was introduced with the more recent Law no. 165 of 27 May 1998 (Amendments to Article 656 of the Code of Criminal Procedure and Law no. 354 of 26 July 1975 and subsequent modifications).
This provision states that when "the mandatory or optional deferral of the enforcement of the sentence may be ordered pursuant to Articles 146 and 147 of the Criminal Code", the Supervisory Court "may order house arrest" even if the sentence exceeds the limit of four years laid down in Article 47-*ter*(1) of the Prison Law. As already mentioned, by virtue of the references to Articles 146 and 147 of the Criminal Code, "derogating" house arrest is currently not available to mentally ill persons.

This Court has already clarified that the reason the legislator introduced "derogating" house arrest was to offer an "alternative to the deferral of the enforcement of the sentence", "with a view to creating an intermediate and more flexible measure lying between maintenance in custody of detainees and the full release of convicted persons (through deferral). This makes it possible to take into account any residual danger to society on the part of the latter and the associated need to balance the need for protection of the convicted person with that of upholding public safety" (Order no. 255 of 2005).
The case law of the Court of Cassation too emphasises that the law on "derogating" house arrest, the constitutionality of which is at issue seeks precisely "to fill a gap in the provisions previously in force", which "demanded a stark choice between detention and total freedom" on the one hand, respecting "the actual enforcement of the sentence and the necessary control to which dangerous individuals must be subjected" and, on the other hand, the enforcement of sentences "in humane forms" (see, among many, Court of Cassation, First Criminal Division, Judgment no. 38680 of 5 April-16 September 2016).
5.3.– Ultimately, house arrest is a measure that can provide relief to the most gravely ill, to whom detention causes such a degree of suffering as to constitute inhumane treatment; at the same time, it may take various forms, with a prudent dose of limitations, obligations and authorizations according to the needs of the case: care and protection can be arranged through careful selection of the place of detention, taking into account, at the same time, the needs of their families, as well as ensuring public safety.
The variety of clinical pictures and the social and family circumstances of detainees suffering from mental illnesses require courts to carefully assess each situation on a continuous case-by-case basis. Judges are responsible for ascertaining – also taking into account the treatment facilities and services available in prison, as well as the safety needs of other detainees and all the staff working in prisons – whether the convicted person suffering from serious mental illness is in a position to remain in prison or must be moved out, pursuant to Article 47-*ter*(1-*ter*) of the Prison Law, which will naturally be impossible if the court deems the risk to public security to be excessive in any given case.

In conclusion, it must be emphasised that, also in the light of the most recent case law of the Court of Cassation, "humanitarian" house arrest offers courts an option when circumstances allow, based on an overall evaluation that has to entail an "assessment of dangerousness that precludes extra-mural treatment, to be suitably repeated and updated in line with the development of the health and personal conditions" (Court of Cassation, First Criminal Division, Judgment no. 9410 of 28 November 2018-4 March 2019).

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares that Article 47-*ter*(1-*ter*) of Law no. 354 of 26 July 1975 (Norms regulating the penitentiary system and the enforcement of measures involving deprivation and limitation of liberty) is unconstitutional insofar as it fails to provide that, in the event of serious supervening mental illness, the Supervisory Court may sentence the convicted person to house arrest, also in derogation from the limits laid down in paragraph 1 of the same Article 47-*ter*.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta,* 20 February 2019.