JUDGMENT NO. 253 YEAR 2019

In this case, the Court heard referral orders from the Supreme Court of Cassation and the Perugia Supervisory Court questioning the constitutionality of Article 4-*bis*(1) of Law no. 345 of 26 July 1975 (Provisions regulating the prison system and the execution of measures involving deprivation and limitation of liberty) insofar as it precludes inmates serving a life sentence convicted of the mafia-related crimes specified in that article from eligibility for bonus periods of short release if they do not cooperate with the judicial authorities.

Under that provision only inmates who have severed their links with organised crime and are no longer a danger to society may avail of that prison benefit but the article in question establishes an absolute presumption that non-cooperation means that the said links still persist, absolute in the sense that it can only be rebutted by cooperation itself. Whether that was constitutional as regards bonus periods of short release was the matter for decision posed by the referral orders.

The Court did not find issue with the presumption itself but solely its absolute nature, which fell foul of Articles 3 (equality) and 27(3) (rehabilitation of offenders) of the Constitution for three distinct but related reasons. Firstly, although the absolute nature of the presumption serves investigative needs and furthers criminal policy, it does so through penalising uncooperative inmates for matters not directly related to the crime committed, effectively infringing the offender's freedom not to cooperate while serving his or her sentence. Secondly, precluding bonus periods of short release from the outset makes it impossible for supervisory courts to evaluate an inmate's progress and acts as a disincentive for inmates to make progress, thereby militating against the process of rehabilitation of offenders. Thirdly, the fact that the presumption still applies even though there are grounds for rebutting it based on the actual circumstances of the case makes it unreasonable.

Therefore, the Court held the challenged provision to be unconstitutional insofar as it did not provide that inmates convicted of the mafia-related crimes specified in that article may be granted bonus periods of short release, even in the absence of cooperation with the judicial authorities, when information had been acquired that was such as to rule out both current links with organised crime, terrorism or subversion and the danger of the restoration of such links. For the sake of consistency and having regard to Article 27 of Law no. 87 of 11 March 1953 (Provisions on the establishment and functioning of the Constitutional Court), the Court extended its ruling to cover all crimes covered by the challenged provision and not just those mentioned in the referral orders.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

issues the following

JUDGMENT

in proceedings concerning the constitutionality of Article 4-*bis*(1) of Law no. 354 of 26 July 1975 (Provisions regulating the prison system and the execution of measures involving deprivation and limitation of liberty), initiated by the Supreme Court of Cassation and the Perugia Supervisory Court by referral orders of 20 December 2018 and 28 May 2019, respectively registered as nos. 59 and 135 in the Register of Referral Orders

2019 and published in the Official Journal of the Republic, nos. 17 and 34, first special series, 2019.

Considering the entries of appearance filed by S. C. and P. P., the interventions *ad adiuvandum* of M. D., the Associazione Nessuno Tocchi Caino [Hands Off Cain Association], the Garante nazionale dei diritti delle persone detenute o private della libertà personale [National Ombudsman for the Rights of Persons Detained or Deprived of Personal Liberty] and the Unione camere penali italiane [Union of the Italian Criminal Chambers] as well as the intervention of the President of the Council of Ministers.

Having heard Judge Rapporteur Nicolò Zanon at the public hearing of 22 October 2019.

Having heard Counsel Ladislao Massari for M. D., Andrea Saccucci for the Associazione Nessuno Tocchi Caino, Emilia Rossi for the Garante nazionale dei diritti delle persone detenuti o private della libertà personale, Vittorio Manes for the Unione camere penali italiane, Valerio Vianello Accorretti for S. C., Mirna Raschi and Michele Passione for P. P. and State Counsel [*Avvocatura dello Stato*] Marco Corsini and Maurizio Greco for the President of the Council of Ministers.

[omitted]

Conclusions on points of law

1. – By order of 20 December 2018 (Referral Order no. 59 of 2019), the Supreme Court of Cassation has raised, with reference to Articles 3 and 27 of the Constitution, questions concerning the constitutionality of Article 4-*bis*(1) of Law no. 345 of 26 July 1975 (Provisions regulating the prison system and the execution of measures involving deprivation and limitation of liberty) as regards "the part thereof that precludes inmates serving a life sentence convicted of crimes committed under the circumstances provided for in Article 416-*bis* of the Criminal Code, i.e. for the purpose of facilitating the activities of the associations therein envisaged, who have not cooperated with the judicial authorities, from eligibility for bonus periods of short release".

Firstly, the referring Court maintains that Article 4-*bis*(1) of the Prison Law infringes Article 3 of the Constitution from the point of view of reasonableness. In fact, it lays down an "absolute preclusion" regarding eligibility for prison benefits, and in particular for bonus periods of short release for inmates – who have not cooperated with the judicial authorities – convicted of so-called 'mafia context' offences which do not presuppose membership of a mafia-type association. According to the referring Court, that preclusion prevents a supervisory court from making any actual assessment as to the danger posed by the inmate, determining *in limine* the inadmissibility of any request by the latter to avail of prison benefits.

The Supreme Court of Cassation makes a reference to this Court's case law on 'automatisms' in the application of personal pre-trial detention measures, according to which the presumption of dangerousness, which mandates remanding the defendant in custody, can be justified – on the basis of general experience embodied in the maxim *id quod plerumque accidit* – only for members of a mafia association. However, that same justification does not hold true for those convicted of offences that do not presuppose such membership.

Transposing this case law to the phase of the execution of the sentence, it maintains that the "absolute preclusion" contained in the challenged provision is, as aforesaid, unreasonable since it does not enable one to distinguish between, on the one hand, the members of a mafia organisation and, on the other hand, the perpetrators of

crimes committed under the circumstances provided for in Article 416-*bis* of the Criminal Code, i.e. for the purpose of facilitating the activities of the associations therein envisaged.

It is argued that Article 4-*bis*(1) of the Prison Law is not based in this respect on general experience embodied in the maxim *id quod plerumque accidit* and hence incongruously prevents a supervisory court from making any actual assessment as to the danger posed by the inmate applying for the bonus period of short release.

Secondly, the referring Court maintains that Article 27(3) of the Constitution has been infringed, since the challenged provision is said to frustrate the objectives of rehabilitation referred to in the constitutional provision in question, by preventing the inmate from gaining access to prison benefits, including by virtue of the principles of progressive evolution in treatment and flexibility of the sentence (this Court's Judgments no. 149 of 2018, no. 76 of 2017 and no 239 of 2014 are cited in particular).

Finally, further to its criticism of the importance attributed by the challenged provision to the decision to cooperate with judicial authorities as "exclusive legal proof of repentance" and above all of the absence of social dangerousness of the convicted person, the referring court considers that the doubts as to constitutionality raised increase "if one simply considers the peculiarities of the bonus periods of short release pursuant to Article 30-*ter* of the Prison Law", aimed at addressing family, cultural and employment interests, the granting of which bonus is linked to very specific assessments.

2. – By order of 28 May 2019 (Referral Order no. 135 of 2019), the Perugia Supervisory Court in turn raised, with reference to Articles 3 and 27 of the Constitution, questions concerning the constitutionality of Article 4-*bis*(1) of the Prison Law "insofar as it precludes inmates serving a life sentence and convicted of crimes committed for the purpose of facilitating the activities of a criminal association under Article 416-*bis* of the Criminal Code of which he or she was a member from eligibility for bonus periods of short release".

Called upon to decide on the complaint of an inmate sentenced to life imprisonment for the crime provided for under Article 416-*bis* of the Criminal Code and for various 'mafia context' crimes, to whom the supervisory court had refused to grant a bonus period of short release in the absence of cooperation with the judicial authorities, the referring court doubts that the obligation to cooperate with the judicial authorities in order to be eligible for prison benefits (and, in particular, bonus periods of short release) is compatible with Articles 3 and 27 of the Constitution, regardless of the type of offence committed by the inmate.

Having to address a situation involving an individual convicted not only of 'mafia context' crimes but also for the crime of membership of a mafia-type association, the referring court in question adopts a line of arguments that differs from that in the other referral order explained above.

In fact, the Perugia Supervisory Court considers that, also in the case of membership of a mafia-type association within the meaning of Article 416-*bis* of the Criminal Code, in the phase of the execution of the sentence, the absolute preclusion on eligibility for prison benefits in the absence of cooperation conflicts with the constitutional principles inferrable from Articles 3 and 27 of the Constitution, since it arguably prevents the scrutiny of elements which, in actual terms, could equally lead to a bespoke individual and up-to-date assessment that the inmate is no longer a danger to society.

It observes that it is unclear why the supervisory court, called upon to assess the inmate's development, is precluded from actually verifying "the reasons that led the person concerned not to cooperate, i.e. to keep silent", alluded to not as a mere attitude but in terms of the inviolable right not to incriminate oneself (this Court's Order no. 117 of 2019 is cited).

Similarly to the Supreme Court of Cassation's referral order, the Perugia Supervisory Court also points out that the re-educational purpose of the sentence would be thwarted by the impossibility to obtain bonus periods of short release, which are "a fundamental tool to enable the convicted person to progress in terms of responsibility and ability to manage themselves in a law abiding manner and to enable the supervisory court to assess the progress made in treatment and the ability of the inmate to reintegrate, albeit briefly, into the social fabric" (this Court's Judgments no. 149 of 2018 and no. 403 of 1997). Bonus periods of short release, the referring court adds, also allow for "the full exercise of rights", including "the maintenance or restoration, after even a long time, of relations with the family".

Therefore, the Perugia Supervisory Court underlines, with a further reference to Judgment no. 149 of 2018, that the challenged provision would clash with Article 27 of the Constitution also because the impossibility to obtain any bonus in the absence of cooperation would constitute a disincentive for convicted persons to participate in the re-education process connected to their term of imprisonment, with evident frustration of the objectives that the constitutional provision sets out.

Finally – also on this respect distinguishing itself from the Supreme Court of Cassation's referral order – the Perugia Supervisory Court underlines the special features of the execution of the sentence phase compared to the pre-trial phase: while in the latter there could well be leeway for some presumptions, the former, spanning a longer period of time, requires a constant evaluation of the inmate's personal development that takes into account the passage of time and the distance from the crime committed.

3. – Although they partially differ as regards the lines of argument adopted, the two referral orders question the same provision and cite the same constitutional provisions. Therefore, the relevant proceedings must be joined, so that they can be decided by a single judgment.

4. – As a preliminary step, the trial order attached to this Judgment must be confirmed, which declared all interventions by persons other than the parties to the main proceedings to be inadmissible.

5. – Again, preliminarily, the matter for decision and the terms of the questions of constitutionality brought to the attention of this Court in the abovementioned referral orders must be correctly defined.

First of all, in the proceedings that Referral Order no. 59 of 2019 concerns, in its entry of appearance S. C. also alleged a violation of Article 117(1) of the Constitution, in relation 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 executed with Law no. 848 of 4 August 1955.

However, it is a grievance that the referring court did not take up in its referral order. In accordance with this Court's well-settled case law, one cannot consider further aspects of constitutionality raised by the parties beyond the limits of what is stated in the referral order. This is so whether they were raised beforehand but not adopted by the referring court as its own or whether they are raised at a later stage and aimed at widening or modifying the matter for decision, once the parties have entered an appearance in the

incidental proceedings concerning constitutionality (amongst many, most recently, see Judgments nos. 226, 206, 141, 96 and 78 of 2019).

Therefore, the Court does not have to concern itself with that grievance.

5.2. – Secondly, the questions as to constitutionality raised do not concern the constitutionality of the law governing so-called 'irreducible' sentences of life imprisonment, the compatibility of which with the ECHR was recently examined by the European Court of Human Rights in its Judgment of 13 June 2019, *Viola v. Italy*.

That would have been the subject of the present questions if the Referral Orders had questioned – in addition to Article 4-*bis*(1) of the Prison Law – also Article 2(2) of Decree-Law no. 152 of 13 May 1991 (Urgent measures to combat organised crime and transparency and efficiency of administrative action), converted, with amendments, into Law no. 203 of 12 July 1991, which, recalling Article 176 of the Criminal Code, does not allow conditional release to be granted to persons sentenced to life imprisonment who do not cooperate with the judicial authorities and who have already spent twenty-six actual years in prison, thereby transforming perpetual punishment *de jure* into perpetual punishment also *de facto*.

By contrast, the questions of constitutionality under examination here concern not the condition of those who have been sentenced to a certain term of imprisonment but the condition of those who have been sentenced (to life imprisonment, in both the proceedings at issue) upon conviction for so-called 'preclusionary' offences, in this case the crime of membership of a mafia-type association under Article 416-*bis* of the Criminal Code and the crimes committed under the circumstances provided for in that same article, i.e. for the purpose of facilitating the activities of the associations therein envisaged.

Indeed, this Court's attention has been brought to Article 4-*bis*(1) of the Prison Law, further to which a conviction for any of the crimes that it lists – whether it be a perpetual punishment or a time-limited punishment – precludes eligibility for prison benefits, and especially bonus periods of short release, in the absence of cooperation with the judicial authorities under Article 58-*ter* of the Prison Law (in accordance with which valuable cooperation, including after conviction, consists of having taken steps to prevent the criminal activity from leading to further consequences or actually assisting the police or judicial authorities in obtaining decisive elements for the reconstruction of the facts and for the identification or capture of the perpetrators of the offences).

For their part, the referring courts have 'shaped' the questions of constitutionality based on the cases brought to their attention, in which the application to be granted a bonus period of short release concerned two criminals sentenced to life imprisonment for the crimes specified above. This Court must not resolve those specific proceedings but must rule on the challenged provision of law and decide the issues of constitutionality relevant to those proceedings.

Those questions concern Article 4-*bis*(1) of the Prison Law, since it lays down rules to be applied to all persons sentenced to perpetual or time-limited punishment for membership of a mafia-type association and commission of 'mafia context' offences. For all of them, in fact, the provision questioned by the referring courts requires cooperation with the judicial authorities as a condition for proceeding to make an actual assessment as to whether prison benefits can be granted.

5.3. – Finally, in the proceedings concerned, the only question that arises is whether or not inmates can be granted a bonus period of short release, not other benefits.

Consistent with this circumstance, the provisions of both referral orders specify that Article 4-*bis*(1) of the Prison Law is questioned only insofar as it precludes, from

eligibility for specific benefit envisaged by Article 30-*ter* of the Prison Law, those convicted of the offences concerned and who do not cooperate with the judicial authorities.

Article 4-*bis*(1) of the Prison Law lists separately the benefits that cannot be granted to inmates convicted of certain offences (as well as to internees, whose position is not in dispute in the present proceedings) who do not cooperate with the judicial authorities. However, the referring Courts as aforesaid limit their questions of constitutionality to the impossibility – stemming from Article 4-*bis*(1) of the Prison Law – to avail of a bonus period of short release, thereby excluding any reference to other prison benefits. Therefore, solely the bonus period of short release is in question here.

5.4. – Both referral orders, in light of Articles 3 and 27 of the Constitution, question Article 4-*bis*(1) of the Prison Law since that provision introduces an absolute presumption – for the specified offences – that convicted persons who do not cooperate with the judicial authorities under Article 58-*ter* of that same Prison Law have not severed their ties with organised crime.

Precisely because of that presumption, which is absolute since it can only be rebutted by cooperation itself, the provision as it currently stands means that requests by such inmates to be granted the specific benefit of a bonus period of short release must be declared *in limine* inadmissible without there being any room for actual scrutiny by the supervisory court (apart from cases of impossible or insignificant cooperation).

Whether all of this is in accordance with the constitutional provisions cited is, in the final analysis, the matter for decision posed by the present questions of constitutionality.

6. – Again, preliminarily, State Counsel's objection as to inadmissibility on grounds of irrelevance must be examined with specific reference to the proceedings instituted on foot of the Perugia Supervisory Court referral order (Referral Order no. 135 of 2019).

In particular, State Counsel complains that the referring court has not indicated the specific reasons for the inmate's decision not to cooperate with the judicial authorities.

Indeed, although acknowledging that cooperation constitutes a manifestation of the inmate's detachment from the relevant criminal group, the referring court considers that it cannot thereby be held that such conduct "is really the only 'exclusive legal proof of repentance' because there are many reasons that can lead a convicted person not to cooperate". Among those reasons the referring court lists, in abstract and purely hypothetical terms, "the risk for one's own safety and that of one's relatives, the moral refusal to make accusations against people to whom one is linked by bonds of affection or friendship or the repudiation of cooperation that risks appearing instrumental to obtaining a benefit".

State Counsel complains precisely about the hypothetical and abstract nature of these reasons, pointing out that the applicant in the proceedings concerned has never relied on any of these reasons to justify the lack of cooperation. That is specifically why the questions raised are irrelevant, since, even in the event of an affirmative decision by this Court, the latter would not have any bearing before the referring court.

That objection is groundless.

In fact, the referring court maintains that solely if this Court were to rule on the questions – 'dismantling' the absolute character of the presumption of dangerousness of the inmate who does not cooperate and thus allowing evidence of detachment from the criminal association to be provided otherwise – would the supervisory court, called upon

to adjudicate on the request to avail of the benefit, be able to actually verify the real reasons why the inmate chose not to cooperate.

This statement is, in effect, consistent with constitutional case law on the subject of relevance (see amongst many Judgments no. 20 of 2016, nos. 46 and 5 of 2014, and no. 294 of 2011), a feature of which is the recurring assertion that for the admissibility of incidentally raised questions of constitutionality it is sufficient that the challenged provision be applicable in the main proceedings, with no importance to be attached to the effects of a ruling of unconstitutionality, if any, for the litigants (most recently, Judgment no. 170 of 2019).

Moreover, even from the perspective of a broader scope for constitutional review (highlighted most recently in Judgment no. 77 of 2018) and a more effective guarantee of the constitutionality of legislation (an aspect stressed most recently in Judgment no. 174 of 2019), the prerequisite of relevance is not equated with the actual utility that the parties involved could gain from the decision (Judgment no. 20 of 2018).

Above all, with specific reference to the present questions, one must consider that pursuant to the challenged provision the court is called upon to apply a rule that predetermines the outcome of the process, i.e. inadmissibility of the uncooperative convicted person's request to avail of the benefit of a bonus period of short release. On the other hand, in the event that the questions of unconstitutionality raised were to be held to be well founded, the referring court would have to decide in accordance with a different rule, drawing it from the relevant legislative framework without the provision declared to be unconstitutional. And even if the outcome of the process were to end up being the same – denial of the bonus period of short release – the ruling of this Court would certainly influence the reasoning that the referring court would have to follow at that point to adjudicate on the inmate's request (amongst many, Judgment no. 28 of 2010, and, with regard to issues relating to so-called 'more favourable criminal law', Judgments no. 394 of 2006, no. 161 of 2004 and no. 148 of 1983).

7. – Turning now to the merits, this Court considers it appropriate to examine first and foremost the questions raised by the Perugia Supervisory Court because, in as much as they concern the position of a person convicted both for membership of the association referred to in Article 416-*bis* of the Criminal Code and for 'mafia context' offences, the decision on those questions could absorb those raised by the Supreme Court of Cassation exclusively in relation to persons convicted of the latter crimes.

The questions are well-founded, in the terms set out below.

7.1. – "The criminal policy reasons that led the legislator first to introduce and then gradually tighten Article 4-*bis* of Law no. 354 of 26 July 1975 are all too well known" (Judgment no. 68 of 1995), which reasons inform the prison system and the serving of sentences.

In its initial version – introduced by Article 1 of Decree-Law no. 152 of 1991, as converted – Article 4-*bis* of the Prison Law provided for two distinct 'tiers' of offenders, basically depending on whether or not the named offences could be linked to organised crime or subversion.

For 'first-tier' offences – including membership of a mafia-type association, connected 'satellite crimes', kidnapping of persons for the purpose of extortion and conspiracy for drug-trafficking purposes – eligibility for certain prison system benefits was possible, premised on an especially high standard of proof, only if information was available from which it could be "excluded that there was any current link with organised crime or subversion".

For ‘second tier’ offences (murder, robbery and aggravated extortion, as well as production and trafficking of major quantities of narcotics: “crimes for which links with organised crime were, in the assessment of the legislator, merely contingent”, as affirmed in Judgment no. 149 of 2018), it was required – in inverse terms from a probative standpoint – that there be a lack of any indications to suggest the existence of ongoing links with organised crime or subversion.

In addition to this basic distinction, individual provisions stipulated, as an additional requirement for eligibility for specific benefits (including a bonus period of short release), that offenders should have served a minimum sentence longer than the ordinary unless they were individuals who had cooperated with the judicial authorities, in accordance with the new provision of Article 58-*ter* of the Prison Law, which Decree-Law no. 152 of 1991, as converted, had introduced into the Prison Law of 1975.

At this early stage, therefore, the harsher treatment of those convicted of organised crime offences was achieved on two complementary levels. As Judgment no. 68 of 1995 explains: on the one hand, “as a general prerequisite for the applicability of certain benefits it was established that there was a need to ascertain (premised on a probative standard calibrated according to the ‘tier’ that the offender belonged to) the absence of links with organised crime or subversion; on the other hand, a specific requirement for eligibility for individual benefits was postulated through the introduction or raising of a minimum length of sentence already served, based on the need to verify for a more adequate period of time the effective rehabilitation of those who have committed crimes falling within the scope of organised crime or subversion. A requirement, in turn, that the legislator believed it could dispense with in all cases in which it was the convicted persons themselves who, through their cooperation, offer proof of their detachment in the meantime from the criminal world”.

Immediately after the Capaci attack of 23 May 1992, an evident change of perspective came about, clearly inspired “by aims of general prevention and protection of collective security” (Judgment no. 306 of 1993).

Article 15 of Decree-Law no. 306 of 8 June 1992 (Urgent amendments to the new Code of Criminal Procedure and measures to combat mafia-type crime), converted, with amendments, into Law no. 356 of 7 August 1992, makes decisive amendments to Article 4-*bis* of Law no. 354 of 1975. As regards what is more directly relevant here, for those convicted of offences belonging to the first ‘tier’ it is established that external work assignments, bonus periods of short release and alternative measures to detention, with the exception of early release, can be granted only in cases of cooperation with the judicial authorities (except for some cases in which the benefits are applicable even if the cooperation offered is objectively impossible or insignificant and provided that there are, in those cases, elements that definitely rule out current links with organised crime).

Relegated to the background are various probative parameters used for the purposes of assessing whether or not the convicted person who aspires to enjoying prison benefits, maintains links with organised crime. Instead, what becomes of exclusive importance is certain conduct, i.e. cooperation with the judicial authorities, deemed to be the sole factor apt to demonstrate, *per facta concludentia*, the severing of those links in the meantime. Again, to cite Judgment no. 68 of 1995: we pass from “a system based on a regime of strong evidence to establish the non-fulfilment of a negative condition (absence of links with organised crime) to a model that introduces a preclusion for certain convicted persons, which can be removed only through qualifying conduct (cooperation)”.

As Judgment no. 239 of 2014 highlights, the new rules are based on the legislative presumption that the commission of certain crimes demonstrates that the offender belongs to or has links with organised crime, and thus constitutes an indicator of social dangerousness incompatible with the convicted person's eligibility for extramural prison benefits. The decision to cooperate with the judicial authorities is correlatively assumed as the sole factor apt to remove the obstacle to the granting of the benefits in question, because of its value in terms of a 'severance' of links with the criminal world. It is tied – taking on paramount importance – to the objective of encouraging, for investigative reasons and for reasons of general criminal policy, cooperation with the judicial authorities by persons who are members of or are 'close' to criminal associations, which appears to be an essential instrument in the fight against organised crime.

On the other hand, lack of cooperation with the judicial authorities gives rise to the absolute presumption that links with the criminal organisation are maintained and current, from which one can infer that the convicted person is still dangerous and hence ineligible for the prison benefits normally available to other inmates.

Finally, taking on board the indications of this Court (Judgments no. 68 of 1995, no. 357 of 1994 and no. 306 of 1993), Article 4-bis(1-*bis*) of the Prison Law extends eligibility for benefits to cases where useful cooperation with the judicial authorities is unenforceable because of the convicted person's limited participation in the crime established in the judgment of conviction, or impossible because an irrevocable judgment has fully assessed of the facts and liability therefor. As well as the cases in which the cooperation offered by the convicted person proves to be "objectively insignificant", provided that, in this case, one of the mitigating circumstances referred to in Articles 62, number 6, 114 or 116 of the Criminal Code has been applied to the convicted person. In all of the above cases, it is necessary, moreover, that "information has been acquired that is such as to exclude any current links with organised crime, terrorism or subversion".

7.2. – The presumption that the links with organised crime are current, as introduced in Article 4-*bis*(1) of the Prison Law, is absolute in the sense that it cannot be rebutted by anything other than cooperation itself. The latter, for those convicted of the crimes mentioned above, is the only element that grants eligibility for the benefits provided by the prison system. In this way, separate treatment from that applicable to all other inmates is introduced.

It is in these specific terms that this Court's previous case law must be clarified, precedent that held that this regime could not be classified as a "'constraint' on delation", since it is up to the inmate to adopt or not that behaviour (Judgment no. 39 of 1994).

On closer analysis, ineligibility for prison benefits for an inmate who does not cooperate is not a real automatism since it is the inmate, by choosing to cooperate, who can avoid the consequence of the challenged provision. In short, ineligibility for prison benefits is a preclusion that does not derive automatically from Article 4-*bis*(1) of the Prison Law "but derives from the convicted person's decision not to cooperate even though in a position to do so" (Judgment no. 135 of 2003).

However, the presumption of failure to terminate links with organised crime, which the uncooperative inmate is subject to, is absolute because it cannot be rebutted by anything other than cooperation itself. And, as will be clarified, it is precisely this absolute character that infringes Articles 3 and 27(3) of the Constitution.

7.3. – Judgment no. 306 of 1993, which this Court pronounced shortly after the entry into force of the regime introduced by Decree-Law no. 306 of 1992, as converted, recognises that the prerequisite of cooperation, as a condition for eligibility for prison

benefits, "is essentially an expression of a criminal policy choice" adopted for the purposes of general prevention and collective security.

Emphasising that the legislative choice was a response to the need to combat "aggressive and widespread" organised crime, the Judgment does not endorse the view, espoused in the report accompanying the law of conversion of Decree-Law no. 306 of 1992, that the decision to cooperate is the only one that conveys with certainty the offender's "will to make amends", such that it would assume a value that is also 'penitentiary' in nature and not extraneous to the principle of the re-educational function served by the sentence ("it is solely the choice to cooperate that definitely conveys a will to make amends that the criminal system as a whole must strive to achieve": to quote from the report presented in the Senate at the time of conversion of Decree-Law no. 306 of 1992 – record no. 328).

In this respect, the Judgment stressed that Article 4-*bis*(1) of the Prison Law cannot be presented in the guise of a 'penitentiary' provision, since cooperation with the judicial authorities is not necessarily a symptom of credible repentance, just as its opposite (non-cooperation) cannot be deemed to be an unsurmountable legal indicator of a lack of repentance or 'amends', according to a 'correctionalist' reading of rehabilitation: "one cannot but agree with the court in question when it argues that cooperation could well be the result of mere utilitarian assessment in light of the advantages that the law associates with it, and not also a sign of effective rehabilitation".

These are arguments considered, albeit with reference to a different benefit, by the European Court of Human Rights in the previously mentioned *Viola* judgment, in the parts expressly dedicated to cooperation with the judicial authorities, where criticism is levelled at a provision that assumes *iuris et de iure* that the uncooperative convicted person maintains links with criminal associations and raises *a priori* cooperation to the rank of a strong symptom of abandonment of the original way of life when in reality it may be due to many other reasons, not always commendable.

More importantly, although declaring, *inter alia*, unfounded the questions then raised regarding Article 4-*bis*(1) of the Prison Law, in relation to Article 27(3) of the Constitution, Judgment no. 306 of 1993 noted that denying prison benefits to those convicted of certain serious offences who do not cooperate with the judicial authorities involves a "significant compression" of the re-educational purpose of the sentence: "generalisation by type of crime does not appear to be in line with the proportionality principle and the requirement that punishment be based on individual circumstances, a hallmark of prison treatment, while there is a worrying tendency towards the regulatory configuration of 'types of offenders', for which re-education would not be possible or could not be pursued" in the event of non-cooperation.

8. – These last points must be developed and lead today to a ruling that the questions raised are well founded, in the terms that will now be clarified.

It is not the presumption itself that is unconstitutional. In fact, it is not unreasonable to assume that convicted persons who do not cooperate will maintain links with the criminal organisation to which they originally belonged, provided that this presumption is envisaged as rebuttable and not absolute and can therefore be rebutted by evidence to the contrary.

While a regime based on the rebuttable nature of the presumption falls within the limits of a legislative choice that is constitutionally compatible with the objectives of special prevention and with the imperatives of rehabilitation inherent in the sentence, a regime based on an absolute presumption of current links with organised crime falls foul

of Articles 3 and 27(3) of the Constitution (for the specific and limited purposes of the case in question).

This is for three distinct but related reasons.

Firstly, because the absolute nature of the presumption is premised on underlying investigative needs, criminal policy and collective security that affect the ordinary course of the execution of a sentence, with additional penalising consequences for the uncooperative inmate.

Secondly, because such absoluteness prevents the evaluation of the progress made by the convicted person in prison, in contrast with the re-educational function of the sentence, understood as the rehabilitation of the offender in accordance with Article 27(3) of the Constitution.

Thirdly, because the absoluteness of the presumption is based on a generalisation, which could actually be contradicted, under certain and rigorous conditions, by the submission of allegations to the contrary that negate the underlying assumption and which must be open to specific and individualized evaluation by the supervisory courts.

8.1. – From the first point of view, the legislative provision inserted into Article 4-*bis*(1) of the Prison Law by Decree-Law no. 306 of 1992, as converted, is the expression of a transparent option of investigative and criminal policy. As such, it introduces into the prison pathway of the convicted person – through the decisive importance attributed to cooperation with the judicial authorities even after conviction – elements foreign to the typical characteristics of execution of a sentence.

The provision in question, in fact, prefigures a sort of exchange between information useful for investigative purposes and ensuing possibility for the inmate to benefit from eligibility for normal prison treatment.

For those convicted of the offences listed in the challenged provision, a special regime is envisaged (Judgment no. 239 of 2014) that is quite different from that applicable to other inmates in general.

They are eligible for the benefits provided for by the prison system only if they cooperate with the judicial authorities under Article 58-*ter* of the Prison Law. If such cooperation is not forthcoming, they will never be eligible for the benefits in question, even after serving the fractions of the sentence required as an ordinary precondition for eligibility for each individual benefit (envisaged for the bonus period of short release by Article 30-*ter*(4) of the Prison Law). If, by contrast, they cooperate in the manner contemplated by the said Article 58-*ter*, they will be eligible for those benefits without having to first serve the fraction of the sentence ordinarily required, on foot of the interpretation already given both by this Court (Judgments no. 174 of 2018 and no. 504 of 1995) and the Supreme Court of Cassation (First Criminal Division, Judgments no. 37578 of 3 February 2016 and no. 30434 of 12 July 2006).

Therefore, the regime in question, depending on the choice made by the individual, either aggravates the prison treatment of the non-cooperative convicted person compared to that applicable for inmates for non-preclusionary offences or, on the contrary, mitigates it because in the event of cooperation it introduces elements that favour the convicted person compared to what is provided for in the general rules.

However, in line with the principles of reasonableness, proportionality of the sentence and its general re-educational function, it is one thing to reward the behaviour of a person who, even after conviction, lends useful and effective cooperation; it is quite a different thing to penalise an uncooperative inmate, presumed *iuris et de iure* to be a person rooted in organised crime and therefore socially dangerous.

The ‘rewarding’ of cooperation – which grants immediate eligibility for all the benefits without the need to have served the minimum sentence normally provided for – is justified, both by virtue of considering it to be a reasonable indicator of the presumed abandonment of the original criminal association and by virtue of the significant assistance that it provides in terms of the fight against the mafia organisations.

After all, in the wider context of intramural behaviour, cooperation assumes importance not only as a demonstration of a break with the criminal world but also for the purposes of the overall evaluation of the re-educational process.

On the other hand, in light of Articles 3 and 27 of the Constitution, the absence of cooperation with the judicial authorities after conviction cannot result in a worsening of the conditions of execution of the sentence, as a result of the fact that the inmate exercises his or her right not to participate actively in a purpose pertaining to a criminal and investigative policy of the State.

As configured by Article 4-*bis*(1) of the Prison Law, non-cooperation inflicts further negative consequences, which are not directly related to the crime committed but derive solely from the relevant refusal of the inmate to cooperate, in essence aggravating the conditions of execution of the sentence already imposed on him or her at the end of the trial.

Apart from the point – on which the referring court insists – about the importance of the right to silence when serving a sentence (the constitutional case law has stated that it is an essential corollary of the inviolability of the right of defence recognised by Article 24 of the Constitution and “is expressed in every procedure according to the rules proper to this”: Judgment no. 165 of 2008 and Order no. 282 of 2008 and no. 33 of 2002), this Court cannot fail to note that the current wording of Article 4-*bis*(1) of the Prison Law, also in the name of overriding requirements of an investigative and criminal-policy nature, deforms the freedom not to cooperate under Article 58-*ter* of the Prison Law, which certainly the prison system cannot deny to any inmate.

Guaranteed at trial in the form of a veritable right, expression of the principle *nemo tenetur se detegere*, the freedom not to cooperate while serving one’s sentence is effectively transformed – as a condition for the inmate’s eligibility for the ordinary regime of prison benefits – into a heavy burden of cooperation that not only requires denunciation of third parties (*carceratus tenetur alios detegere*) but also risks giving rise to self-incrimination, including for matters not yet judged.

That is inconsistent with Articles 3 and 27(3) of the Constitution.

Secondly, the fact that the application for a bonus period of short release must *in limine* be declared inadmissible without the supervisory court being allowed to actually assess the inmate’s condition is contrary to Article 27(3) of the Constitution.

A bonus period of short release, at least for medium- to long-term sentences, is a special facet of the overall treatment programme. It allows “an inmate, for re-educational purposes, the first taste of freedom” (Judgment no. 188 of 1990), thus serving a ‘pedagogical-propulsive’ function” (Judgments no. 504 of 1995, no. 445 of 1997 and no. 257 of 2006), and allows prison staff to observe the effects on the convicted person of a temporary return to freedom (Judgment no. 227 of 1995).

This Court’s case law (in particular Judgment no. 149 of 2018) has indicated as a constitutionally binding criterion one that requires an individual and case-by-case assessment in the matter of prison benefits (in this regard see also Judgment no. 436 of 1999), underlining that it is particularly important where there is a presumption of greater danger based on the type of crime committed (Judgment no. 90 of 2017). Where the use

of individual criteria is not allowed, the punitive option ends up overshadowing the re-educational aspect (Judgment no. 257 of 2006), at odds with the proportionality principle and the requirement of punishment based on individual circumstances (Judgment no. 255 of 2006).

The absolute presumption in question prevents this very verification on foot of individual criteria, not even enabling one – as the Perugia Supervisory Court points out – to assess the reasons that led the inmate to remain silent.

Ultimately, the inadmissibility *in limine* of an application for a bonus period of short release can block at the outset the process of rehabilitation, frustrating the very willingness of the inmate to make progress in that regard.

That is inconsistent with Article 27(3) of the Constitution.

8.3. – Thirdly, this Court's case law stresses that "absolute presumptions, especially when they limit a fundamental human right, violate the principle of equality if they are arbitrary and irrational, i.e. if they do not respond to general experience, encapsulated in the maxim *id quod plerumque accidit*" (Judgment no. 268 of 2016; see also the previous Judgments no. 185 of 2015, nos. 232, 213 and 57 of 2013, nos. 291, 265 and 139 of 2010, no. 41 of 1999 and no. 139 of 1982).

In particular, the unreasonableness of an absolute presumption is evident whenever it is possible to point to real events contrary to the generalisation underlying the presumption itself.

In the present case, the generalisation that underpins the absolute presumption consists in this: if the person convicted of the crime of membership of a mafia-type association and/or for 'mafia context' crimes does not cooperate with the judicial authorities, that non-cooperation is an indicator (which cannot be rebutted if not by cooperation itself) of the circumstance that the offender has not cut the ties which keep him or her close to the criminal organisation in question.

The reasons for this generalisation are well known. Belonging to a mafia-type association implies stable membership of a criminal association, normally strongly rooted in the territory, characterised by a dense network of personal connections, endowed with particular intimidating force and capable of prolonging itself over time (regarding pre-trial measures, Judgments no. 48 of 2015, no. 213 of 2013, no. 57 of 2013, nos. 164 and 231 of 2011; and Order no. 136 of 2017).

These reasons are of the utmost importance and have not faded away at all over time.

Nevertheless, at the pre-trial phase, where there are strong indications of guilt with regard to the crime provided for under Article 416-*bis* of the Criminal Code, the presumption of the existence of precautionary needs is relative because it can be rebutted by elements showing that such needs do not exist (Article 275(3) of the Criminal Procedure Code).

If, however, such needs exist, it is presumed – with a presumption that this time is *iuris et de iure* – that they cannot be satisfied with measures other than remand in custody (Judgment no. 265 of 2010 and Order no. 136 of 2017), not only because of the peculiar connotations of a criminal association but also because the evaluation is carried out almost immediately after the act or, in any case, at a time not long after its supposed commission.

In the phase of execution of the sentence, on the other hand, the passage of time takes on a central role, which can involve significant transformations, both of the inmate's personality and of context outside prison. And it is this situation which dictates that the

presumption of dangerousness on which the prohibition of the granting of the bonus period of short release is based must be a rebuttable one.

It is certainly possible that the membership bond remains unaltered even after a long time, due to the aforementioned characteristics of the criminal association in question, until the person makes a radical decision to sever those ties, such as – in particular but not exclusively, according to the *ratio* of this judgment – that conveyed by cooperation with the judicial authorities. Moreover, for cases of proven persistent ties of the inmate with the original criminal association, the prison system has the appropriate regime referred to in Article 41-*bis*, which is obviously not under discussion here and whose application to individual inmates presupposes precisely the ongoing nature of their links with criminal organisations (Judgments no. 186 of 2018 and no. 122 of 2017).

But, aside from these events, the passage of the time inherent in serving a sentence requires an actual evaluation, which takes into account the development of the inmate's personality. This is because of Article 27 of the Constitution, which is the constitutional provision of reference as regards execution of the sentence (unlike what happens as regards pre-trial measures: Order no. 532 of 2002).

Furthermore, an individually tailored and up-to-date evaluation cannot but extend to the context outside prison, in which the possibility of an, albeit brief and temporary, reintegration of the inmate is envisaged. For example, it could well be that the criminal association of origin no longer exists because it has been completely dismantled or because of natural extinction.

By absorbing the questions as to constitutionality raised by the Supreme Court of Cassation (aimed at distinguishing between the position of a person belonging to a mafia-type association and that of a person convicted of 'mafia context' offences), it thus follows that, in violation of Article 3 of the Constitution, an absolute presumption of social dangerousness that, regardless of any actual evaluation, presupposes that both the convicted person's personality and the external circumstances outside prison do not change is unreasonable and moreover conflicts with the re-educational function of the sentence.

However, since this present case concerns the crime of membership of a mafia-type association (and related offences) characterised by the specific criminal connotations described above, the actual evaluation – by all the authorities involved and above all the supervisory court – of matters capable of rebutting the presumption that the links with organised crime are current must be particularly rigorous and proportionate to the strength of the ties imposed by the criminal association whose definitive severance is required.

This means that the presumption of social danger posed by an inmate who does not cooperate, even if no longer absolute, can be rebutted not certainly by virtue of good behaviour in prison, mere participation in the re-education process or a merely declared disassociation, but above all on foot of other appropriate and specific elements.

It is the very evolution of Article 4-*bis* of the Prison Law itself that clearly shows what those elements are.

As mentioned above (§7.1 of the *Conclusions on points of law*), before the introduction of the decisive requirement of cooperation with the judicial authorities, Article 1 of Decree-Law no. 152 of 1991, as converted, had already established for 'first tier' offences (including membership of a mafia-type association, connected 'satellite crimes', kidnapping of persons for the purpose of extortion and conspiracy for drug-trafficking purposes), that eligibility for certain prison system benefits was possible, premised on a very high standard of proof, that is only if information was available from

which it could be "excluded that there was any current link with organised crime or subversion".

For those offences, a system was put in place based on "a regime of strong evidence to establish the non-fulfilment of a negative condition" (Judgment no. 68 of 1995).

The wording of the current version of Article 4-*bis* of the Prison Law also maintains a reference to that regime, in paragraph 1-*bis*. Indeed, as mentioned above (§7.1 of the *Conclusions on points of law*), that paragraph extends eligibility for prison benefits to cases in which useful cooperation with the judicial authorities is unenforceable, impossible or "objectively insignificant", provided that in this case one of the mitigating circumstances referred to in Articles 62, number 6, 114 or 116 of the Criminal Code has been applied to the convicted person. But, again, for all the cases mentioned just now, it is necessary that information has been acquired that is such as to "exclude any current links with organised crime, terrorism or subversion".

The acquisition of such information exhibits, as can be seen, the same logic as Article 4-*bis* of the Prison Law and allows the supervisory court, through an effective link with all the relevant authorities, of its own motion to scrupulously verify not only the convicted person's behaviour in prison while serving his or her sentence but also the external social context that the offender would be authorised to re-enter, albeit temporarily and episodically (Order no. 271 of 1992).

In particular, paragraph 2 of Article 4-*bis* of the Prison Law provides that, for the purposes of granting the benefits referred to in paragraph 1 (and hence also a bonus period of short release), the supervisory courts must decide not only on the basis of reports from the relevant prison authority but also on the basis of detailed information obtained through the competent provincial committee for public order and public security.

It is essential to add that, under paragraph 3-*bis* of that same Article 4-*bis*, all the benefits in question, including a bonus period of short release, "may not be granted" (without prejudice to the supervisory court's independent evaluation: pursuant to, amongst many, Judgment no. 51878 of 5 December 2006 of the First Criminal Division of the Supreme Court of Cassation) when the National Anti-Mafia Prosecutor (now also anti-terrorism) or the District Prosecutor communicates, on their own initiative or on the recommendation of the competent provincial committee for public order and security, that the links with organised crime persist.

In this context, the acquisition of stringent information on the possible current nature of links with organised crime (starting from those of an economic-ownership nature) is not only a criterion that already exists in the legal system (Judgments no. 40 of 2019 and no. 222 of 2018) – in this case, in the very provision whose constitutionality is questioned (Judgment no. 236 of 2016) – but it is above all a criterion that is constitutionally necessary (Judgment no. 242 of 2019) to replace in part the absolute presumption that has been struck down, in line with the need to prevent the "commission of new offences" (Judgments no. 211 of 2018 and no. 177 of 2009) underlying any provision that limits the obtaining of prison benefits (Judgment no. 174 of 2018).

While the acquisition in question is an essential factor, it is not however sufficient.

The regime of strong evidence required here must also extend to the obtaining of information that rules out not only the persistence of links with organised crime but also the danger of their restoration, taking into account the actual personal and environmental circumstances. Moreover, it is an aspect logically connected to the previous one, with which it shares the requirement of necessity in the light of the Constitution, in order to

avoid a situation whereby the already mentioned interest in the prevention of the commission of new offences, protected by the same Article 4-*bis* of the Prison Law, ends up being frustrated.

Raising both these elements – exclusion of the current nature of links with organised crime and the danger of their restoration – is a matter for the convicted person seeking the benefit, who bears the burden of making a specific allegation in that regard (as established by the well-settled case law of the Supreme Court of Cassation on Article 4-*bis*(1-*bis*) of the Prison Law, on the subject of impossible or unenforceable cooperation: see, amongst many, Judgments no. 36057 of 13 August 2019, no. 29869 of 8 July 2019 and no. 47044 of 12 October 2017 of the First Criminal Division of the Supreme Court of Cassation).

The supervisory courts will decide both on the basis of these elements and on the basis of the specific information necessarily received on the matter from the relevant authorities mentioned above. With the clarification that – without prejudice to the essential importance of the detailed and reasoned report of the National Anti-Mafia Prosecutor or of the District Prosecutor (Article 4-*bis*(3-*bis*) of the Prison Law) – if the information received by the Provincial Committee for Public Order and Security testifies in a negative sense, the onus will be on the inmate not only to allege elements in his or her favour but also to provide real evidence in support thereof (in this vein see Judgment no. 1639 of 12 May 1992 of the First Criminal Division of the Supreme Court of Cassation).

10. – Therefore, Article 4-*bis*(1) of the Prison Law must be declared unconstitutional for breach of Articles 3 and 27(3) of the Constitution insofar as it does not provide – for inmates convicted of the crimes provided for under Article 416-*bis* of the Criminal Code and of those committed under the circumstances provided for in that same article, i.e. for the purpose of facilitating the activities of the associations therein envisaged – that bonus periods of short release may be granted even in the absence of cooperation with the judicial authorities under Article 58-*ter* of that same Prison Law, when information has been acquired that is such as to rule out both current links with organised crime and the danger of the restoration of such links.

11. – With this present Judgment, in relation to the offences indicated, the rules relating to the granting of bonus periods of short release as set out in Article 30-*ter* of the Prison Law thus do not fall within the scope of application of the ‘preclusionary’ rule provided for under Article 4-*bis*(1) of the Prison Law.

This is in line with the scope of the questions as to constitutionality raised by the referring courts as well as with the specific connotation of the bonus period of short release, which distinguishes it from the other benefits also listed in the challenged provision.

12. – As specified before, the two referral orders have brought this Court’s attention to offences in connection with mafia-type organised crime, i.e. those that constituted part of the original core of the challenged provision.

But, as also mentioned above (§7.1 of the *Conclusions on points of law*), the structure that the provision had established in the early 1990s has been progressively modified over time by a series of reforms that, on the one hand, have changed the overall architecture of Article 4-*bis* of the Prison Law and, on the other hand, have gradually expanded its scope of application, with the addition of numerous other criminal acts to the list of ‘preclusionary’ offences.

By virtue of various criminal policy choices, not always coordinated with each other, united by aims of general prevention and by a desire to tighten prison treatment, in response to the criminal phenomena arising from time to time, Article 4-*bis* of the Prison Law has thus increasingly expanded its boundaries to the point that it has ended up currently containing a special regime relating to what is by now a "complex, heterogeneous and stratified list of offences" (Judgments no. 188 of 2019, no. 32 of 2016 and no. 239 of 2014). And paragraph 1 of the provision, in particular, presumes ongoing links with organised crime of those convicted of any of this broad list of offences, designating for all of them a particular prison regime that precludes at its root eligibility for prison benefits in the absence of cooperation with the judicial authorities.

Moreover, in addition to the offences typically expressive of forms of organised crime, the provision in question now contains *inter alia* offences that do not necessarily have anything do with that sort of crime or that entail an offender acting alone: in fact, paragraph 1 of Article 4-*bis* includes the offences of child prostitution and child pornography, group sexual violence (Article 3 of Decree-Law no. 11 of 23 February 2009 on 'Urgent measures on public security, to combat sexual violence and to address persecution', converted, with amendments, into Law No 38 of 23 April 2009), on the facilitation of illegal immigration (Decree-Law no. 7 of 18 February 2015 on "Urgent measures to combat terrorism, including of an international nature, as well as extension of the international missions of the armed forces and the police, development cooperation initiatives and support for reconstruction processes and participation in initiatives of international organisations for the consolidation of peace and stabilisation processes", converted, with amendments, in Law no. 43 of 17 April 2015) and, finally, also almost all offences against the public administration (Law no. 3 of 9 January 2019, on "Measures on combatting offences against the public administration, as well as on the statute of limitations in criminal matters and on the transparency of political parties and movements").

In this context, the action taken in relation to offences in connection with mafia-type organised crime must reflect on the conditions provided by the first paragraph of the challenged provision, in view of the eligibility for bonus periods of short release of those convicted of any of the other offences on the list.

If this were not the case, the present judgment would give rise to the creation of a paradoxical disparity, to the complete detriment of inmates convicted of crimes in respect of which there could well be no justification for both the requirement (for the purposes of eligibility for prison benefits) of cooperation with the judicial authorities and the demonstration of the absence of links with a non-existent criminal association.

Indeed, the failure to extend the effects of this Judgment regarding membership of a mafia-type association and 'mafia context' offences to all the offences listed in the first paragraph of Article 4-*bis* of the Prison Law would end up compromising the very intrinsic coherence of the entire resulting rules.

Ultimately, the unconstitutional aspects of the absolute nature of the presumption affect both the set of rules, challenged here, applicable to inmates convicted of the crimes provided for under Article 416-*bis* of the Criminal Code and for those committed under the circumstances provided for in that same article, i.e. for the purpose of facilitating the activities of the associations therein envisaged, and the identical set of rules laid down by the same Article 4-*bis*(1) of the Prison Law for inmates convicted of the other crimes covered by it.

Having regard to Article 27 of Law no. 87 of 11 March 1953 (Provisions on the establishment and functioning of the Constitutional Court), Article 4-*bis*(1) of Law no.

354 of 1975 must consequently be declared to be unconstitutional insofar as it does not provide that inmates convicted of the crimes contemplated therein, other than those provided for under Article 416-*bis* of the Criminal Code and those committed under the circumstances provided for in that same article, i.e. for the purpose of facilitating the activities of the associations therein envisaged, may be granted bonus periods of short release even in the absence of cooperation with the judicial authorities under Article 58-*ter* of that same Prison Law, when information has been acquired that is such as to rule out both current links with organised crime, terrorism or subversion and the danger of the restoration of such links.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

having joined the proceedings,

1. *declares* that Article 4-*bis*(1) of Law no. 354 of 26 July 1975 (Provisions regulating the prison system and the execution of measures involving deprivation and limitation of liberty) to be unconstitutional insofar as it does not provide that inmates convicted of the crimes provided for under Article 416-*bis* of the Criminal Code and those committed under the circumstances provided for in that same article, i.e. for the purpose of facilitating the activities of the associations therein envisaged, may be granted bonus periods of short release, even in the absence of cooperation with the judicial authorities under Article 58-*ter* of that same Prison Law, when information has been acquired that is such as to rule out both current links with organised crime and the danger of the restoration of such links;

2. *declares*, in consequence, pursuant to Article 27 of Law no. 87 of 11 March 1953 (Provisions on the establishment and functioning of the Constitutional Court), that Article 4-*bis*(1) of Law no. 354 of 1975 is unconstitutional insofar as it does not provide that inmates convicted of the crimes contemplated therein, other than those provided for under Article 416-*bis* of the Criminal Code and those committed under the circumstances provided for in that same article, i.e. for the purpose of facilitating the activities of the associations therein envisaged, may be granted bonus periods of short release, even in the absence of cooperation with the judicial authorities under Article 58-*ter* of that same Prison Law, when information has been acquired that is such as to exclude both current links with organised crime, terrorism or subversion and the danger of the restoration of such links.

So decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 23 October 2019.