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THE ITALIAN CONSTITUTIONAL COURT
HAS CHANGED ITS MIND
(AND IS NOT AFRAID TO SAY SO)

How a ‘transnational’ dialogue between Courts
can benefit the protection of criminal convicts

Notes to judgment 32/2020 of the Italian Constitutional Court

ABSTRACT. In judgment 32/2020 the Italian Constitutional Court has proclaimed, for the first time, the prohibition of ex post facto law applicable to the norms governing the execution of criminal sanctions, and especially to the norms concerning the so called ‘alternative measures to detention’. The present paper offers an overview of the Italian legal framework and previous case law regarding the prohibition of ex post facto law and alternative measures. It also analyzes the innovative conclusions expressed by judgment 32/2020. Finally, it stresses the most remarkable aspect of the judgment, which is the use that the Constitutional Court makes of the U.S. Supreme Court’s case law to re-interpret Article 25 (2) of the Italian Constitution.

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1. Introduction

There are some principles, in the criminal law field, that are so obvious for modern jurists that there seems to be no actual need to discuss them anymore. One of them is the prohibition of *ex post facto* law,¹ meaning that no one should be punished for a conduct that did not constitute a criminal offence when it was committed, or punished with a penalty that is harsher than the one originally provided by the law.

Some consequences of this uncontested principle, however, despite how intuitive and logical they might seem, sometimes struggle to make their way into judicial decisions, mainly due to ‘formalistic’ reasons.

Among the corollaries of the prohibition of *ex post facto* law stands (*recte*, should stand) the prohibition of retro-actively applying a norm that modifies, *in malam partem*, the effective nature of a criminal sanction, regardless of the ‘substantial’ or ‘procedural’ appearance of such a norm.

Behind this application of the prohibition of *ex post facto* law lies the idea that there is a radical and substantial difference between serving a sentence in prison and serving a sentence outside prison. Therefore, if the legislator modifies the sanction – even if by virtue of a formally ‘procedural’ norm – passing from a sentence to be served outside prison to a sentence to be served inside prison, such a modification should only apply to the crimes that are committed after the entry into force of the new provision.

Virtually no one would argue against the proposition that “*between ‘outside’ and ‘inside’ [jail] the difference is radical: qualitative rather than quantitative.*” Yet, it took almost thirty years for the Italian Constitutional Court to say it out loud, in its judgment n. 32/2020, finally dismantling what appeared to be a previously rock-solid case law stating otherwise.

Indeed, the Italian Court of Cassation had been prompting for decades the idea that the prohibition of *ex post facto* law does not apply either to procedural norms or to those norms that concern the execution of sentences; the time regime of such norms, instead, is governed by the ‘*tempus regit actum*’ principle, meaning they are (*recte*, were)

1 Albeit this expression is traditionally used in common law systems, for the sake of simplicity in this paper it will be used as an equivalent to the ‘continental’ prohibition of retro-active application of criminal law.

immediately applicable to anyone as soon as they enter into force, no matter the moment in which the crime was committed.²

The perverse effect of the above-mentioned principle can be perceived in all its seriousness if one just considers that “hidden” among the norms that concern the execution of sentences there are the provisions that envisage the measures alternative to detention – *i.e.*, norms that effectively ‘transform’ a sentence to be served in jail into one that is, totally or partially, served outside of the jail.

Applying the *tempus regit actum* principle to such norms entails that the legislator is given *carte blanche* to change the substantial impact that a criminal sanction has upon personal freedom, even after the crime has been committed (and even after the judgment has already become final).

Luckily enough, the last attempt of the Italian legislator to retro-actively change the effective nature of criminal sanctions has been met with concern within the academic³ and legal community,⁴ a concern that eventually culminated in the historic decision⁵ of the Italian Constitutional Court hereby addressed.

2. The relevant legal framework and case law

Before addressing the innovative approach that underpins the judgment, a few remarks concerning the Italian legal framework are needed.

First, Article 25, paragraph 2 of the Italian Constitution contains the prohibition of *ex post facto* law: no one shall be punished for a conduct that, at the time in which it was committed, did not constitute a criminal offence according to the law.

Second, the Italian law on the penitentiary system (L. 374/1975, hereinafter

2 A famous judgment issued by the Italian Court of Cassation and upholding the formalistic approach is Cass., Sez. Un., 17 July 2006, n. 24561.

3 See, among others, T. PADOVANI, *La spazzacorrotti. Riforma delle illusioni e illusioni della riforma*, Arch. pen. online, 2018, fasc. 3; N. PISANI, *Il disegno di legge ‘spazzacorrotti’: solo ombre*, Cass. pen., 2018, fasc. 11, p. 3589 et seq.; V. MANES, *L’estensione dell’art. 4-bis ord. pen. ai delitti contro la p.a.: profili di illegittimità costituzionale*, Dir. pen. cont., n. 2/2019.

4 L. BARON, ‘Spazzacorrotti’, art. 4-bis ord. pen. e regime intertemporale, Dir. Pen. Cont., fasc. 5/2019, p. 154.

5 V. MANES-N. MAZZACUVA, *Irretroattività e libertà personale: L’art. 25, secondo comma, Cost., rompe gli argini dell’esecuzione penale. Nota a Corte Cost., Sent. 12 Febbraio 2020, n. 32, Sistema Penale, 2020.*

“o.p.”) sets out a wide range of measures ‘alternative to detention’, which a special Surveillance Tribunal can grant, upon request, to individuals who have been convicted of a criminal offence and whose judgment has become final, in order for them to serve their sentence partially or totally outside jail.

Examples of such measures are day release, home detention, probation or liberty on parole.⁶ Their grant is generally subject to a positive appreciation, by the Tribunal, that the individual will not commit any further offence; the function of such measures is to ensure that the criminal sanction leads to the effective rehabilitation of the convict, a goal that – where possible – is better achieved outside jail.

Depending upon the length of the sentence imposed upon the individual, such measures can either be applied immediately after the judgment has become final, or after the convict has served a certain amount of his/her sentence in jail.

For example, if the final judgment is no longer than four years of imprisonment, probation (*affidamento in prova*) can be granted immediately after the judgment becomes final (provided that some ‘subjective’ requisites are met). To avoid going to prison unnecessarily before filing the request (*e.g.*, for probation), Article 656 of the Italian code of criminal procedure (hereinafter c.p.p.) states that when the sentence is no longer than four years, the Public Prosecutor shall suspend the execution order and inform the convict that he/she can ask for alternative measures within 30 days.⁷

It will be then up to the Surveillance Tribunal to decide whether to grant the measure or not, based on a ‘prognostic’ evaluation of the convict’s future behavior.

If such an evaluation is positive, the Tribunal will grant the alternative measure immediately after the conviction, and therefore the individual will serve his/her judgment entirely outside jail, despite having been sentenced to imprisonment.

Having made this clear, it is self-evident that lowering or raising the ‘bar’ for

6 Those terms represent non-literal translations of the Italian alternative measures’ *nomen iuris*. Here ‘day release’ stands for ‘*semilibertà*’, ‘home detention’ stands for ‘*detenzione domiciliare*’, ‘probation’ stands for ‘*affidamento in prova*’, ‘liberty on parole’ stands for ‘*liberazione condizionale*’.

7 The *ratio* of this mechanism lies in the ‘crime-fostering’ effect of short prison sentences; as such, it is more compatible with the rehabilitative function of criminal law that those who are eligible for alternative measures do not go to prison and are given the possibility of filing their request while being at liberty.

accessing such alternative measures has an enormous impact upon the effective nature of the sentence to be served, and therefore upon personal liberty.

Indeed, an individual knows in advance that if he/she is sentenced to no more than four years of imprisonment, he/she has a realistic possibility of serving his/her entire sentence outside jail.

If instead, after the crime has been committed and perhaps the trial is already at its final stage, the legislator passes a new law that prevents that individual from accessing the alternative measures, his/her legitimate expectations of serving the sanction outside prison will be frustrated.

Such laws, in fact, were traditionally considered not to fall within the scope of application of the prohibition of *ex post facto* law, thus being applicable to everyone as soon as they entered into force.

How is it so? In other terms, how is it possible that a norm significantly impacting upon personal liberty is immediately applicable as soon as it enters into force, regardless of when the crime was committed? Shouldn't the prohibition of *ex post facto* law prevent such an outcome?

The reason is entirely formalistic, and extremely difficult to uphold if one looks behind the veil to grasp the substance of the said norms.

For decades, the Italian jurisprudence has claimed that the prohibition of *ex post facto* law, as embedded in Article 25(2) of the Constitution, was not applicable to the norms governing the execution of sentences; such norms, according to the above-mentioned case law, are procedural in nature, and therefore subject to the *tempus regit actum* principle, as they neither introduce new criminal offences nor increase the abstract sanctions provided by the law.⁸

In fact, if one accepts to look at the phenomenon from a formal perspective, alternative measures do not modify the abstract sanction that each crime carries with it according to the law. They are 'simply' measures that can be applied after the conviction has become final, during the execution stage, provided that certain requirements are met, in order to facilitate the convict's return to society.

8 L. BARON, 'Spazzacorrotti', *art. 4-bis ord. pen. e regime intertemporale*, *Dir. Pen. Cont.*, fasc. 5/2019, p. 155.

Of course, this line of reasoning stands no chance of being upheld if one abandons the formalistic perspective and decides to look at the substance of the phenomenon, which is exactly what the Constitutional Court has decided to do.⁹

One might well wonder why such a *révirement*.

During the past decades, the Italian legislator has frequently amended the law on the penitentiary system to decrease – or annul – the possibility for certain types of convicts of being granted alternative measures.

Since 1992, indeed, Article 4-bis of the o.p. states that those who have been convicted for a list of serious offences – mainly mafia organizations and terrorism related offences – cannot access alternative measures unless they cooperate with the authorities.¹⁰ Consequently, once their conviction has become final – if they did not cooperate – they will necessarily have to go to prison and serve the entirety of the sentence ‘behind bars’. This is also due to the fact that, when it comes to ‘Article 4-bis o.p. crimes’, the execution order can never be suspended.

Albeit both scholars and practitioners have expressed their concerns about the legitimacy of such mechanism (that, according to some, could even implicate ‘blackmailing’ the defendant), the legislator has kept increasing the number of crimes that fit within the scope of Article 4-bis o.p., and therefore the number of cases in which convicts are not eligible for alternative measures.¹¹

9 It is noteworthy to mention that Italian scholars had for a very long time expressed their concerns on the formalistic approach; see F. BRICOLA, *Legalità e crisi: l'art. 25, commi 2° e 3°, della Costituzione rivisitato alla fine degli anni '70. Scritti di diritto penale*, vol. I, tomo II, Milano, 1997, pp. 1273 et seq.; M. GAMBARDELLA, *Il grande assente nella nuova “legge spazzacorrotti”: il microsistema delle fattispecie di corruzione*, *Cass. Pen.* Fasc 1/2019, p. 52; MANES-MAZZACUVA, *Irretroattività e libertà personale: L'art. 25, secondo comma, Cost., rompe gli argini dell'esecuzione penale. Nota a Corte Cost., Sent. 12 febbraio 2020, n. 32, Sistema Penale*, 2020.

10 Cooperation with the judiciary in mafia-type cases has given birth to the so called ‘*pentiti*’ phenomenon. Alternative measures, however, can still be granted if cooperation is neither possible nor useful, and provided that there are no connections anymore between the convict and organized crime. It is up to the Surveillance Tribunal to verify whether such conditions are met.

11 More recently, however, such a system has been stigmatized by the European Court of Human Rights, in the famous judgment *Viola v. Italy*, App. n. 77633/16; subsequently, the Italian Constitutional Court, in its judgment n. 253/2019, has partly declared Art. 4-bis o.p. incompatible with the Italian Constitution, as it forbids a case-by-case evaluation of the convict’s dangerousness and of the persistence of his/her connection with the criminal organization.

The last instance of such a trend was Law n. 3/2019, known as the ‘*wipe away the corrupt*’ law; its Article 6 includes in the list of Article 4-bis o.p. all the main offences related to corruption.¹²

Therefore, everyone who is convicted of those crimes is currently unable to access alternative measures unless he or she cooperates with the authorities. As a consequence, the execution order cannot be suspended and the convict will immediately go to prison after the judgment has become final.

Since Article 4-bis o.p. has always been considered to be procedural in nature, as is every norm related to alternative measures, its amendments do (*recte*, did) not fall within the scope of the prohibition of *ex post facto* law. Consequently, the ‘ban’ on alternative measures for those who have been convicted of corruption was immediately applicable to everyone undergoing trial or convicted for such crimes, regardless of the moment in which the crime was committed and unless they decided to cooperate with the authorities.¹³

Thus, individuals who had decided to plead guilty or to waive some procedural rights,¹⁴ knowing that if their sentence was shorter than four years of imprisonment they would most certainly never go to prison, were put in front of the alternative: either they decided to cooperate, or they would have to serve the entirety of the sentence behind bars.

Either way, their execution order could not be suspended, thus making it necessary for them to go to prison as soon as the judgment became final; only afterwards, and provided that they proved their cooperation (or its impossibility), they could ask for alternative measures.

12 V. MANES, *L'estensione dell'art. 4-bis ord. pen. ai delitti contro la p.a.: profili di illegittimità costituzionale*, *Dir. pen. cont.*, n. 2/2019, p. 107; D. PULITANÒ, *Tempeste sul diritto penale. Spazzacorrotti e altro*, in *Dir. pen. cont.*, 3, 2019, p. 237.

13 PULITANÒ, *Tempeste sul diritto penale. Spazzacorrotti e altro*, in *Dir. pen. cont.*, 3, 2019, p. 239 *et seq.*

14 The Italian c.p.p. allows the defendant to plead guilty (*patteggiamento*) or ask for a ‘summary’ proceeding (*rito abbreviato*) in exchange for a reduction of his/her sentence (up to one third); as such, many defendants decide to undertake this ‘special’ proceedings, that provide the defendant with less guarantees, in order to obtain a more favorable sentence. This frequently happens when the defendant knows that, because of the reduction, he or she will be eligible for the immediate application of alternative measures.

Needless to say, this alternative did not exist at the moment in which they committed the crime, as the legislator subsequently amended the law.¹⁵

The energy and pride with which the Government proudly publicized such an amendment sparked a huge academic debate; *re melius reperienda*, it was not actually a ‘debate’, as almost every scholar stood firmly against the retro-active application of the new ‘ban’ on alternative measures for corrupts.

Such an outrage has reached criminal judges, who indeed showed ‘unease’ when asked to retroactively apply the new Article 4-bis o.p.;¹⁶ their unease then turned into open doubts about the constitutional legitimacy of the amendment, thus provoking the intervention of the Constitutional Court.¹⁷

3. The Court’s decision

As expected, it was not the first time that the Constitutional Court was called to scrutinize the legitimacy of the retroactive application of the amendments to Article 4-bis o.p., in light of the prohibition of *ex post facto* law. Indeed, adding new offences to the ‘black-list’ of crimes for which no alternative measure can be granted (unless the defendant cooperates) seems to be a *leitmotiv* of the past years’ criminal policy, and almost every time this has happened in the past the Constitutional Court was asked to verify the legitimacy of such amendments.

However, never in the past had the Constitutional Court applied Article 25(2) Cost., prohibiting the retro-active application of criminal law, to the norms regulating

15 MANES-MAZZACUVA, *Irretroattività e libertà personale: L’art. 25, secondo comma, Cost., rompe gli argini dell’esecuzione penale. Nota a Corte Cost., Sent. 12 febbraio 2020, n. 32, Sistema Penale*, 2020, para. 3.

16 L. MASERA, *Le prime decisioni di merito in ordine alla disciplina intertemporale applicabile alle norme in materia di esecuzione della pena nella cd. legge spazzacorrotti*, *Dir. pen. Cont.*, marzo 2019; G.L. GATTA, *Estensione del regime ostativo ex art. 4-bis ord. penit. ai delitti contro la p.a.: la Cassazione apre una breccia nell’orientamento consolidato, favorevole all’applicazione retroattiva* *Dir. pen. Cont.*, marzo 2019; BARON, ‘Spazzacorrotti’, *art. 4-bis ord. pen. e regime intertemporale*, *Dir. Pen. Cont.*, fasc. 5/2019; PULITANÒ, *Tempeste sul diritto penale. Spazzacorrotti e altro*, in *Dir. pen. cont.*, 3, 2019, p. 242; MANES-MAZZACUVA, *Irretroattività e libertà personale: L’art. 25, secondo comma, Cost., rompe gli argini dell’esecuzione penale. Nota a Corte Cost., Sent. 12 Febbraio 2020, n. 32, Sistema Penale*, 2020, para. 5.

17 In the Italian system, every judge can ask the Constitutional Court to assess the constitutional legitimacy of a given norm; if the Court decides that the norm contravenes with some Constitutional principles, it will declare the norm un-constitutional, thus retroactively eliminating it from the system.

the execution of sentences and alternative measures.

Every time Article 4-bis o.p. or its retroactive application have been partly declared un-constitutional (and, indeed, there are many cases), they always contravened Arts. 3 and 27 of the Constitution; those norms, however, do not concern the principle of legality or the prohibition of *ex post facto* laws, but prescribe that criminal laws need to be founded upon reasonable justifications and have to ensure the rehabilitation of the convict.¹⁸

In judgment 32/2020 instead, the Court has radically changed its approach and – almost ignoring the criticism that the referring judges raised by invoking the rehabilitation principle – has finally proclaimed the application of the prohibition of *ex post facto* law to (some of) the norms concerning the execution of sentences.

As stated in the judgment, indeed, nothing forbids the Court from reconsidering its previous case law when multiple and concurring reasons cast doubts on the current approach's compatibility with the constitutional principles.¹⁹

The path that the Court undertakes to reach such an innovative conclusion is mainly founded upon three arguments.

First, the judgment recalls the evolution of the European Court of Human Rights' (ECtHR) jurisprudence on the scope of application of Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).²⁰

Second, the Court reconsiders and reinterprets the *rationes* underlining the prohibition of *ex post facto* law.

Third, it finally abandons the formalistic perspective to embrace a substantial point of view, and admits that the norms concerning alternative measures have (or better, in some cases have) such a substantial impact upon personal liberty that they need to fall within the scope of application of Article 25(2) Cost.

As per the evolution in the ECtHR's jurisprudence, the Court notices that at the beginning the Strasbourg Court had embraced the same formalistic approach followed by the Italian judges; in 2013, however, the same ECtHR reconsidered its

18 PULITANÒ, *Tempeste sul diritto penale. Spazzacorrotti e altro*, in *Dir. pen. cont.*, 3, 2019, p. 240.

19 § 3.6.

20 The ECHR as interpreted by the Strasbourg Court is binding upon the Italian legislature, as per Art. 117 of the Constitution.

approach in the famous judgment *Del Rio Prada v. Spain*.²¹

In particular, the ECtHR stated that when the measures taken by the legislature «result in the redefinition or modification of the scope of the “penalty” imposed by the trial court [...] the measures concerned should fall within the scope of the prohibition of the retroactive application of penalties enshrined in Article 7 § 1 in fine of the Convention. Otherwise, States would be free – by amending the law or reinterpreting the established regulations, for example – to adopt measures which retroactively redefined the scope of the penalty imposed, to the convicted person’s detriment, when the latter could not have imagined such a development at the time when the offence was committed or the sentence was imposed».²²

The Constitutional Court then recalls how the (innovative) conclusions of the ECtHR are coherent with other States’ legislation and jurisprudence. Indeed, according to the U.S. Supreme Court, the prohibition of *ex post facto* law also applies to the amendments of those norms regulating the execution of sentences that have the practical effect of prolonging the convict’s detention, thereby modifying the *quantum* of the sanction. The same solution is also enshrined in Article 112-2 of the French penal code.²³

Taking into account the abovementioned evolution and the approach embraced by other States, the Court considers it necessary to “re-assess the scope of application of the prohibition of *ex post facto* law with respect to the discipline of the execution of sentences”.²⁴

In doing so, the Court takes a step back to analyze what *rationes* stand behind the prohibition of the retroactive application of new incriminations or harsher sanctions, as embedded in Article 25(2) Cost.

The reason appears to be twofold.

First, as clearly stated by the Constitutional Court in the famous judgment n. 364/1988, the prohibition of *ex post facto* law guarantees the ‘reasonable foreseeability’

21 § 4.2.3. ECtHR *Del Rio Prada v. Spain*, App. n. 42750/09.

22 ECtHR *Del Rio Prada v. Spain*, App. n. 42750/09 para. 89.

23 § 4.2.4.

24 § 4.3.

of the legal consequences that an individual faces when he or she contravenes the law. As such, the prohibition protects freedom of action and enables conscious defense strategies.²⁵

However, the main innovative aspect of the judgment hereby discussed relies in the path that the Court follows to isolate the second *ratio* underlining the prohibition of *ex post facto* law. Indeed, the Court abandons its previous jurisprudence to look overseas, at the U.S. Supreme Court's case-law (hereinafter U.S. S.C.).

Since the 18th century, in fact, the U.S. S.C. has affirmed that the prohibition of *ex post facto* law serves to protect the individual against possible abuses perpetrated by the legislative power, which has always been tempted to aggravate – *ex post* – the sanctions to be applied for crimes that have already been committed. The Constitutional Court goes even further, and recalls a U.S. S.C. judgment (*Calder v. Bull*) in which the prohibition is traced back to the fact that the English Parliament had, in the past, frequently aggravated, *ex post facto*, the penalties for those who were considered 'enemies' or 'traitors' of the country. «But those laws were, in reality, judgments masked by law: nothing more, indeed, than the exercise of judicial power by a Parliament moved by spirit of revenge towards its enemies».²⁶

Therefore, the prohibition of *ex post facto* law does not simply ensure the reasonable foreseeability of criminal consequences, but more importantly stands at the heart of the 'rule of law' concept.

After having recalled the *rationes* underpinning Article 25 (2) Cost., the Court proceeds to verify whether the prohibition of retroactive application needs to be extended also to those norms that modify the execution of sanctions.²⁷

In the Court's opinion it is clear that when the amendment entails – from a practical perspective – the application of a sanction that is 'other' (an '*aliud*') if compared to the one that was foreseeable when the crime was committed, then the prohibition of *ex post facto* law is fully applicable.

25 § 4.3.1.

26 Here the Constitutional Court paraphrases a passage of *Calder vs Bull*, 3 U.S. 386/1768, p. 389, available at <<https://supreme.justia.com/cases/federal/us/3/386/>>.

27 § 4.3.2.

In particular, this happens when, at the moment in which the offence was committed, the individual could reasonably expect a sanction to be served outside jail, yet the legislator subsequently transforms it into a sentence that needs to be served inside jail (and even if this occurs without formally modifying the *nomen iuris* of the sanction).

Indeed, «between ‘outside’ and ‘inside’ the difference is radical: qualitative rather than quantitative».²⁸ In such cases, the sanction that the individual will effectively serve is an ‘*aliud*’ if compared to the one that was foreseeable at the moment of the crime.

In the Court’s opinion, measures such as liberty on parole, probation or home detention are not simply ‘executive aspects’ of imprisonment; rather they are truly alternative sanctions, as they impact on the quality and quantity of the penalty and they modify the degree of deprivation of personal liberty.

The same conclusion is also true when it comes to the above-mentioned mechanism of the suspension of the execution order;²⁹ albeit being disciplined in the code of criminal procedure (Art. 656), this mechanism has a huge impact upon personal liberty. In fact, when the legislator forbids such a suspension, it means that the convict will necessarily begin to serve its sentence in prison; this entails that, in turn, at least part of the sanction will be ‘effectively’ imprisonment, whereas at the moment of the commission of the crime the individual could expect to benefit from the suspension and therefore to serve the entirety of its sentence outside jail (provided that the alternative measure was granted, of course).

This suffices to recognize that Article 656 c.p.p. effectively transforms the sanction and its impact upon personal liberty, thus falling within the scope of application of the prohibition of *ex post facto* law.

In addition, the Court also considers the retroactive application of the amendments hereby addressed as infringing upon the right to an effective defense as embedded in Article 24 Cost., since the individual is ‘surprised’ with the application of a different sanction that he or she could have not foreseen when developing his/her

28 § 4.3.3.

29 § 4.4.4.

defense strategy.

Consequently, the amendments to Article 4-bis o.p., *i.e.*, the ‘ban’ on alternative measures for those who have been convicted of corruption and did not cooperate with the authorities, will only be applicable to the crimes committed after Law n. 3/2019 has entered into force.³⁰

4. Conclusive remarks

The conclusion that the Court embraces, *i.e.*, that between ‘outside’ and ‘inside’ jail there is a radical difference and that such a difference necessarily brings with it the prohibition of *ex post facto* law, represents ‘a positive earthquake’ for the Italian criminal law system and is to be totally endorsed.

However, special attention is not to be given solely to the conclusion in itself, as this paper starts by implying that such a conclusion is logic, intuitive and should have been embraced years ago.

The most valuable part of the judgment hereby addressed is the way in which the Court arrives to that conclusion. Albeit the solution hereby embraced had long been envisaged by the Italian doctrine and legal community, indeed, none of them could have ‘reasonably foreseen’ the original way in which the Court has reached it.

First of all, the Court abandons the traditional dichotomy between substantial and procedural criminal norms, the ones falling within the scope of application of Article 25(2) Cost., the other ones following the ‘*tempus regit actum*’ principle.³¹ What seems to matter, in the Court’s reasoning, is not the formal qualification of a given norm, its package, but substantially the fact that it modifies the nature of the sanction

30 For the sake of clarity it is necessary to add that the Court distinguishes between different kinds of alternative measures and between alternative measures and the so called ‘penitentiary benefits’; in the Court’s opinion, indeed, the prohibition of *ex post facto* law is only applicable to the alternative measures that truly modify the nature of the sanction, such as home detention, probation, day-release and liberty on parole. Contrariwise, the *tempus regit actum* principle shall continue to apply to the other alternative measures – such as the possibility of working outside jail – and to the penitentiary benefits, such as the so called ‘*permessi premio*’. See MANES-MAZZACUVA, *Irretroattività e libertà personale: L’art. 25, secondo comma, Cost., rompe gli argini dell’esecuzione penale. Nota a Corte Cost., Sent. 12 febbraio 2020, n. 32, Sistema Penale*, 2020, para. 12 et seq.

31 As clarified by the Court, the mere fact that a norm is to be found within the code of criminal procedure is not sufficient so as to exclude it from the scope of application of the prohibition of *ex post facto* law.

and has an effective impact upon personal liberty. Provided that such conditions are met, the amendment to that norm entails the application of a sanction which is ‘other’ from the one originally foreseeable, hence the application of the prohibition of *ex post facto* law.³²

Judgment n. 32/2020, therefore, leaves the Italian judiciary with a new ‘test’ to be applied when amendments to the laws concerning the execution of sentences come into play.

Secondly, and perhaps more importantly, the Court has decided to avoid ‘the easy path’ towards the abovementioned conclusion. Indeed, it would have been perfectly sufficient to simply recall the ECtHR jurisprudence, in particular judgment *Del Rio Prada v. Spain*, to reach the same solution.³³ In fact, Italy is bound by the ECHR and by the interpretation that the Strasbourg Court gives of its provisions. Recalling the evolution in the conventional case-law would have been enough to justify the application of the prohibition of *ex post facto* law to the norms hereby involved.

The Constitutional Court, instead, goes well beyond. The judgment proceeds to reconsider one of the most fundamental norms of the Italian Constitution (Art. 25 para. 2), possibly the most important one when it comes to criminal law, by using, as an interpretative tool, the U.S. S.C.’s jurisprudence.

When faced with the urge to fill a ‘gap’ in the protection of criminal defendants from the arbitrary application of criminal law, the Court does not seem afraid to (implicitly) admit that its previous case law is not apt to fill such a gap, and to resort to the principles proclaimed by other Supreme Courts.³⁴

This technique is not just a matter of style or some sort of temporary trend, but shows an attitude of sincere modesty (which is very much different from deference)

32 Such a conclusion had long been anticipated by Italian scholars; see F. VIGANÒ, *Il nullum crimen conteso: legalità costituzionale vs. legalità convenzionale?*, *Dir. pen. cont.*, aprile 2017; PULITANÒ, *Tempeste sul diritto penale. Spazzacorrotti e altro*, in *Dir. pen. cont.*, 3, 2019.

33 As noted, it would have been enough – and easier – to invoke Art. 117 Cost., which obliges the legislator to abide by (*inter alia*) the ECHR; contrariwise, the Constitutional Court has decided to reinterpret Art. 25 Cost. See MANES-MAZZACUVA, *Irretroattività e libertà personale: L’art. 25, secondo comma, Cost., rompe gli argini dell’esecuzione penale. Nota a Corte Cost., Sent. 12 febbraio 2020, n. 32, Sistema Penale*, 2020, para. 6.

34 G. ZAGREBELSKY, *Corti costituzionali e diritti universali*, *Riv. trim. dir. pubbl.*, 2006, p. 297 et seq.

towards other countries' experiences. By resorting to the Supreme Court's case law, the Constitutional Court seems to uphold the view that Constitutional norms – especially when they concern fundamental rights – 'aspire to universality', and thus their interpretation is not merely the interpretation of 'ordinary laws' that needs to abide by the contingent political will.³⁵

This dialogue³⁶ between Constitutional and Supreme Courts is to be welcomed, inasmuch as it goes to the benefit of the principle of legality and ensures criminal defendants a stronger protection of their legitimate expectations in the overall fairness of the system.

Judgment 32/2020 is therefore to be read as another step towards the acknowledgment that no matter how serious the crime, how heinous the 'enemy', how strongly the public opinion supports the Government, the principle of legality still stands above it all.

35 ZAGREBELSKY, *Corti costituzionali e diritti universali*, *Riv. trim. dir. pubbl.*, 2006, p. 301.

36 Some authors have spoken of a '*ius commune* of fundamental rights'; see MANES-MAZZACUVA, *Irretroattività e libertà personale: L'art. 25, secondo comma, Cost., rompe gli argini dell'esecuzione penale. Nota a Corte Cost., Sent. 12 febbraio 2020, n. 32, Sistema Penale*, 2020.
