

JUDGMENT NO 197 YEAR 2023

Three cases of homicide within the family context were brought to the Court's attention.

In the first incident, a 67-year-old man had fatally stabbed his wife, who had been suffering from severe borderline bipolar disorder combined with an alcohol problem for approximately a decade. The event took place during an altercation in which the victim had threatened the defendant.

In the second, an 18-year-old man had stabbed his father, who had repeatedly engaged in persecutory and intimidating behaviour towards his family over a period of several years. The homicide occurred after the father had insulted and threatened his wife yet again.

In the third case, a woman who had been subjected to repeated and violent abuse for many years had administered an entire bottle of sleeping draught to her husband. Fearing that he might react violently upon waking up, she strangled him with a shoelace.

In these cases, the referring courts were prohibited from applying the reductions of penalties typically allowed in the presence of specific mitigating factors such as provocation and so-called unspecified mitigating circumstances (*circostanze attenuanti generiche*). The prohibition stemmed from the recently amended rule on the aggravating circumstances of homicide (Article 577 of the Criminal Code) introduced by Law No 69/2019, which aimed to impose particularly harsh penalties for those committing homicide against a family member or a partner.

This provision has now been found unconstitutional by the Court for a number of reasons.

First of all, the amendment under consideration violates the principle of equality by subjecting to the same harsh penalty cases of voluntary homicide (*omicidio doloso*) that are significantly different in terms of wrongfulness.

Moreover, the amendment leads to practical outcomes contradicting the very purpose of the legislative reform, which sought to impose harsher penalties on individuals (typically male) who have already been perpetrators of abuse and misconduct against vulnerable persons. Indeed, in the cases at issue the challenged provision would force the courts to impose an especially harsh punishment on persons who have endured the victim's abusive behaviour for many years.

Lastly, the challenged provision violates the principle of proportionality of punishment, based on Articles 3 and 27(3) of the Constitution. In fact, by limiting the powers of criminal courts in the sentencing phase with regard to the mitigating factors, the provision results in the imposition of manifestly disproportionate punishments in cases such as those under consideration in the main proceedings.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 577(3) of the Criminal Code, introduced by Article 11(1)(c) of Law No 69 of 19 July 2019 (Amendments to the Criminal Code, the Code of Criminal Procedure and other provisions regarding the protection of victims of domestic and gender-based violence), initiated by the Cagliari Assize Court (*Corte d'assise di Cagliari*) with referral order of 16 November 2022 and

by the First Division of the Turin Assize Court of Appeal (*Corte d'assise d'appello di Torino, sezione prima*) with referral orders of 4 and 10 May 2023, registered, respectively, as Nos 151 of the 2022 Register of Referral Orders and Nos 87 and 88 of the 2023 Register of Referral Orders, published in *Official Journal of the Italian Republic* No 52, first special series of 2022, and No 27, first special series of 2023.

*Having regard to* the entry of appearance filed by P.R. and M.P., and the statements in intervention filed by the President of the Council of Ministers;

*after hearing* Judge Rapporteur Francesco Viganò at the public hearing of 10 October 2023;

*after hearing* Counsel Luca Salvatore Pennisi for P.R. and Federico Squartecchia for M.P., and State Counsel Salvatore Faraci for the President of the Council of Ministers;

*after deliberation* in chambers on 10 October 2023.

*The facts of the case*

1.– [...] The Cagliari Assize Court raised questions as to the constitutionality of Article 577(3) of the Criminal Code introduced by Law No 69 of 19 July 2019 [...] in relation to Articles 3 and 27 of the Constitution, challenging it “to the extent that, under Article 69 of the Criminal Code, it prevents courts from giving precedence to the mitigating factor of provocation over the aggravating factor envisaged for the crime of intentional homicide of a spouse pursuant to Article 577(1)(1) of the Criminal Code”.

1.1.– Before the referring Assize Court a trial is pending against P.R., accused of the offence referred to in Articles 575 and 577(1)(1) of the Criminal Code, for causing the death of his wife, A.S., by repeatedly stabbing her in the chest, arms and neck during a family quarrel.

According to the referring court, the investigations had, indeed, shown that P.R., who was 67 at the time of the offence, had killed his 60-year-old wife. Furthermore, he had immediately admitted his responsibility to the police, whom he himself had called. He had later reiterated his confession before the judge and, eventually, the Assize Court.

1.1.1.– The referring court lays particular emphasis on reconstructing the family context in which the crime occurred.

The victim, A.S., had been suffering from a severe bipolar borderline disorder for approximately ten years. In addition, in the months leading up to the crime, she had developed an alcohol problem. Despite being under the care of a mental health centre, A.S. frequently refused to take her prescribed medication, and attempted to take her own life several times over the years. The last police intervention to prevent her suicide had occurred just twenty days before the crime. Since then, family concerns for her physical and mental well-being had increased. A.S.’s state of health had, in fact, deteriorated since she had begun consuming alcohol and, following the unsuccessful suicide attempt, her constant state of anxiety, aggression, and tension had caused severe insomnia. As a consequence, her relatives – especially her husband, who took care of her the most – were unable to sleep properly due to concerns regarding further self-harming actions.

The couple’s children, the victim’s brother and sister, acquaintances, and neighbours unanimously described the defendant as a gentle person, dedicated to taking care of his wife despite the extremely difficult situation, which they often characterised as “unmanageable”.

On the day of the homicide, A.S. verbally attacked her husband, as well as her daughter and grandchildren, who were living with her, threatening once again to take her own life. The daughter went downstairs with her children and called various emergency numbers, alarmed by the sounds of overturned furniture and shattered household items

coming from the upper flat. Indeed, A.S. had begun throwing objects and striking the coffee table against the living room furniture. She had also ordered her husband to gather all her daughter's personal belongings into a bag and take them away. When her husband refused, she threw a plate at him and, turning towards the knife drawer, threatened to kill him.

According to the defendant's statements, at this point, he stood up trying to stop her. He claimed that he no longer remembered anything until the moment when – seeing his wife lying in a pool of blood – he phoned his daughter, confessing to the homicide and begging her not to go upstairs. He then himself called the police.

1.1.2.– The referring court considers that a number of mitigating factors should be considered in favour of the defendant: *inter alia*, his difficult living conditions as described by all the witnesses heard during the investigation, his clean record, his immediate admission of responsibility, his cooperative behaviour throughout the proceedings.

In particular, the referring court holds that the defendant had acted under provocation pursuant to Article 62(1)(2) of the Criminal Code, consisting in his wife's unjust conduct.

According to the referring court, the prolonged series of verbal aggressions and acts of violence carried out by A.S. had caused P.R. to experience a “tangible exasperation,” resulting in a complete loss of self-control [...]. The referring court also observes that the normative requirement of another person's unjust conduct “must be characterised as referring to the ‘objective injustice’ resulting from the breach of legal, moral, or social norms by the victim [...]”, irrespective of whether or not the victim herself has acted culpably. In this case, a “provocation ‘by accumulation’” ought to be acknowledged, as the defendant's reaction erupted after some time, “on the occasion of a triggering episode, as a consequence of his increasing resentment fuelled by the victim's repeated unjust behaviour”.

The referring court considers that the mitigating factor of provocation should be given precedence, in the case at issue, over the aggravating factor of the marital relationship. The other mitigating factors should be considered equivalent to this aggravating factor.

However, this outcome could not be achieved due to the provision of Article 577(3) of the Criminal Code.

[omitted]

2.– With a referral order of 4 May 2023, the First Division of the Turin Assize Court of Appeal raised questions as to the constitutionality of Article 577(3) of the Criminal Code in relation to Articles 3 and 27(1) and (3) of the Constitution. The referring court challenged it “to the extent that, under Article 69 of the Criminal Code, it prevents courts from giving precedence to the unspecified mitigating factors as well as provocation over the aggravating factor envisaged for the crime of intentional homicide of an ascendant under Article 577(1)(1) of the Criminal Code”.

2.1.– The referring court is the appeal court in proceedings against A.C., charged with an offence under Articles 575 and 577(1)(1) of the Criminal Code. He had inflicted repeated stab wounds on his father, G.P., striking vital areas of his body and causing his death.

At first instance, with a ruling of 24 November 2021, the Turin Assize Court had acquitted the defendant on grounds of self-defence. Having heard the appeal from the

public prosecutor, the referring court considered, on the contrary, that it should find A.C.'s guilty of voluntary homicide.

2.1.1.– [...] According to the referring court, the 18-year-old defendant was living with his father, mother, and brother. For years, the father had displayed persecutory and intimidating behaviour towards family members, especially his wife, leading the two children to act as their mother's "guardians". In fact, the defendant and his brother assumed responsibility for protecting the woman, trying to ensure she was never left alone and shielding her from the husband's most violent attacks.

According to the referral order, on the day of the homicide, G.P. – who was jealous of one of his wife's colleagues – waited for the woman to return home from work to verbally abuse her. He then continued to insult and threaten her also at dinner, while drinking enough wine to become intoxicated. He then retired to his room, from which he came out uttering new insults and threats towards his wife. He approached her aggressively but was stopped by his children, with whom a first fight broke out. At this point, G.P. invited his children to leave and headed towards the kitchen. The defendant claimed that he understood this gesture as an attempt to reach the knife drawer. He stated that he had followed him, then pushed him, and finally, having reached the drawer first, grabbed a knife and struck him several times to protect himself and his loved ones from imminent attack.

The crime scene was significantly altered by the arrival of the medical personnel who responded to the defendant's call. Signs of a struggle were visible, but it was impossible to determine whether both father and son had been armed. The victim had thirty-four stab wounds; furthermore, six different knives, at least five of which had actually been used, had been taken out from the kitchen drawer. The accounts provided by the mother and the brother supported the defendant, but were not considered wholly reliable by the judges of appeal.

The referring court does not believe – unlike the court of first instance – that the defendant acted in the reasonable belief that he had no other choice to prevent his father from killing his family. In fact, neither actual nor putative self-defence can be established, given the existence of a series of circumstances from which it may be inferred that the danger, as it was perceived by the defendant, was not imminent, and that the reaction was unnecessary and disproportionate. The referring court underlines, in this regard, that "the merely conjectural and abstract representation of the general possibility, in the immediate future, that the victim may have perpetrated some acts of violence is not compatible with [...] the normative requirements of Article 52 of the Criminal Code [nor with the case of putative self-defence] under the meaning of Article 59 of the Criminal Code".

2.1.2.– Having thus qualified the act as voluntary homicide, the referring court nevertheless holds that it is necessary to acknowledge "unspecified mitigating factors", within the meaning of Article 62-*bis* of the Criminal Code, in favour of the defendant – namely his very young age, his cooperation during the proceedings, his clean record, and the general context in which the act occurred.

The mitigating factor of partial mental incapacity (Article 89 of the Criminal Code) should also be considered in his favour. A psychiatric report conducted at first instance identified a "post-traumatic adjustment disorder" in the defendant, and specifically a "stress-response condition" entailing an "impaired perception of reality arising from an anxious-interpretative impulse" which stemmed from his family situation and significantly impaired his mental capacity.

Finally, there was also evidence of provocation “by accumulation”, as the defendant had acted in a state of loss of self-control in response to another person’s unjust conduct.

The referring court held that these three mitigating factors should take precedence over the aggravating circumstance specified in Article 577(1) of the Criminal Code.

Nevertheless, under the challenged provision only the mitigating factor of partial mental impairment under Article 89 of the Criminal Code can take precedence, while the other two factors cannot be considered in favour of the defendant. [...]

[omitted]

3.– With a referral order of 10 May 2023 (No 88 of the 2023 Register of Referral Orders), the First Division of the Turin Assize Court of Appeal raised questions as to the constitutionality of Article 577(3) of the Criminal Code in relation to Articles 3 and 27(1) and (3) of the Constitution. The referring court challenged it “to the extent that, under Article 69 of the Criminal Code, it prevents courts from giving precedence to the unspecified mitigating circumstances and the mitigating factor of provocation over the aggravating circumstances envisaged for the crime of intentional homicide under Article 577(1)(1) of the Criminal Code”.

3.1.– The referring court acts as the appeal court in the proceedings against A.B., charged with an offence under Articles 575 and 577(1)(1) and (2) of the Criminal Code for having caused her husband L.G.’s death by administering an entire bottle of sleeping draught to him and then strangling him with a shoelace.

3.1.1.– [...] The homicide occurred in a context of repeated and violent abuse perpetrated against his wife by her husband, consisting initially of occasional beatings, which then became more frequent starting from the spring of 2021. During that time, the husband, as stated by all the witnesses interviewed, had begun to show signs of psychological distress. His psychological problems had led L.G. to harass his neighbours and family members. Verbal, physical, and sexual abuse against his wife had also escalated, and she was constantly under threat.

In this fraught atmosphere, a quarrel occurred on the day of the homicide. Physical violence ensued: the father struck his son in the face with a plastic bottle filled with water, and the son pushed his father against a table, causing him injuries. The father called the police and was taken to hospital. His wife appeared visibly frightened and asked the police to take some action against him, describing the abuse she had endured. However, after being invited to go to the police station the following morning to file a report, she said: “I can’t report him. If I do, you’ll send him home, and then he’ll kill us all”.

That evening, the man returned home, accompanied by his brother-in-law. In the car, he said that he had a “Rambo knife” at home, which he intended to use to kill someone, and that he was also planning to buy a gun from a firearms shop in Genoa.

The brother-in-law then left, and the woman was left alone in the house with her husband. Shortly afterwards, the man showed his wife a text message he had sent to their son, stating that he intended to throw him out of the house because of what had happened. The defendant tried to reason with her husband, but he reacted angrily and threatened her again. (At the hearing after the arrest, the judge actually noted the presence of a bruise on the defendant’s left arm.)

At this point, the defendant prepared her husband a drink, into which she poured the contents of an entire bottle of sleeping pills. Once he was asleep, she strangled him with a shoelace. Eventually, she called the police and made a full confession.

3.1.2.– With a judgment of 4 July 2022, the Alessandria Assize Court sentenced the defendant to four years and ten months of imprisonment for the crime of involuntary

homicide under Articles 52 and 59(4) of the Criminal Code. The first-instance court, in fact, considered the partial defence of putative self-defence applicable in this case, holding that the defendant had culpably acted under the mistaken (and avoidable) belief that she was defending herself and her relatives from the real and present danger of an unjust aggression by her husband.

3.1.3.– Both the public prosecutor and the defendant’s lawyer appealed against the judgment. Before the Assize Court of Appeal, the parties declared their agreement to accept the public prosecutor’s grounds of appeal, waiving the defence grounds under Article 599-*bis*(1) of the Code of Criminal Procedure. They requested the Assize Court of Appeal hand down a new custodial sentence of six years, two months, and twenty days for the offence of voluntary homicide. The parties agreed on the application of the mitigating factors provided for in Articles 62(1)(1) (purpose of special moral significance, namely the defendant’s wish to protect her son), 62(1)(2) (provocation “by accumulation”), and 62-*bis* of the Criminal Code (unspecified mitigating factors), all of which taking precedence over the aggravating circumstance of the marital relationship.

3.1.4.– The referring court agrees in principle with the request.

However, it emphasises that it is obliged to assess the legality of the proposed sentence. An “unlawful sentence” is one that “falls outside the framework of penalties as outlined by the Criminal Code since it differs in type, kind, or quantity from the statutory provisions” (citing Joint Criminal Divisions of the Court of Cassation, Judgment No 877 of 14 July 2022–12 January 2023, and Sixth Criminal Division of the Court of Cassation, Judgment No 23614 of 18 May–16 June 2022). In the case at hand, the penalty agreed upon by the parties is indeed unlawful, being lower than the prescribed legal minimum term for the unlawful killing of a spouse according to the challenged provision. [...]

[omitted]

#### *Conclusions on points of law*

[omitted]

4.1.– The Italian Criminal Code envisages a wide-ranging criminal offence of voluntary homicide, punishable under Article 575 of the Criminal Code (CC) by a custodial sentence ranging from a minimum of 21 to a maximum of 24 years. The upper limit is established by the general rule referred to in Article 23 CC.

Articles 576 and 577 CC enumerate several aggravating circumstances, which, if present, lead to a life sentence, or – in the cases set out in Article 577(2) CC – a custodial sentence ranging from 24 to 30 years. Furthermore, for the crime of voluntary homicide, the common aggravating circumstances regulated by Article 61 CC are applicable. These circumstances can increase the minimum sentence, in the absence of the aggravating circumstances mentioned in Articles 576 and 577, up to a maximum of 30 years in prison (Article 64(2)).

All the mitigating circumstances provided for in Article 62 CC are applicable to voluntary homicide, as are the so-called unspecified mitigating circumstances (*circostanze attenuanti generiche*) under Article 62-*bis* CC. Each of these factors results in a reduction of the penalty established by Article 575 CC up to a maximum of one-third (Article 65 CC) of the penalty resulting from the previous reduction (Article 63(2) CC). This mechanism allows for significant sentence reductions, well below the minimum of 21 years set forth in Article 575 CC.

Should both mitigating and aggravating circumstances (including those specified in Articles 576 and 577 CC) be present at the same time, Article 69 CC stipulates that courts must balance them when reaching their decision. This essentially involves determining

which factors – aggravating or mitigating – carry more weight in assessing the offence. [...] If the aggravating circumstances take precedence, the court will apply only the harsher penalties envisaged for them, applying no reduction for the mitigating circumstances (Article 69(1) CC). On the contrary, where the mitigating circumstances take precedence, the court will apply only the corresponding reductions to the penalty (Article 69(2) CC). In situations where the aggravating and mitigating circumstances are deemed equivalent, the court will apply the penalty it would impose if no such factors were present (Article 69(3) CC), i.e. imprisonment from 21 to 24 years.

4.2.– The provision challenged in the three referral orders, introduced by Law No 69/2019, establishes a wholly different rule, with specific reference to homicides aggravated under Article 577(1)(1) and Article 577(2) of the Criminal Code.

In particular, Article 577(1)(1) CC prescribes life imprisonment when the offence is committed against an ascendant, a descendant, a spouse or a partner [...].

Where these specific aggravating circumstances exist, the challenged Article 577(3) of the Criminal Code prohibits courts from considering mitigating circumstances as taking precedence over them. Only four mitigating circumstances are exempt from this prohibition: purpose of special moral significance (Article 62(1)(1) CC); partial mental capacity (Article 89 CC); minority (Article 98 CC); minimal contribution to the commission of a criminal offence; being instigated by others to commit or cooperate in a criminal offence (Article 114 CC).

4.3.– The three referral orders challenge this prohibition [...].

5.– The questions are well founded.

The crime of homicide can be characterised in individual cases by significantly different degrees of wrongfulness (point 5.1 below). In accordance with the constitutional principles of proportionality and the duty to fit the penalty to the individual features of each case, the Italian Criminal Code provides that the penalty for homicide may be adapted to the gravity of the individual act, as occurs – and often to a more pronounced extent – in various legal systems sharing our legal traditions (point 5.2 below). Both the mitigating circumstance of provocation and unspecified mitigating circumstances are essential tools available to courts in order to adapt the severity of a sentence to the degree of wrongfulness of the individual homicide (point 5.3 below). The prohibition as established by the challenged provision of applying the reduction of the sentence prescribed for these two mitigating factors in cases of homicide committed in family or family-like contexts has no plausible justification (point 5.4 below). This prohibition must be considered to be incompatible with Article 3 and Article 27(1) and (3) of the Constitution (point 5.5 below). The declaration of partial unconstitutionality of the challenged provision is not incompatible with the overall aim pursued by the legislature in 2019 to ensure greater protection for victims of domestic and gender-based violence. Rather, it simply prevents Law No 69/2019 from producing a collateral effect that is at odds with its rationale (point 5.6 below).

5.1.– Every homicide is irreversibly detrimental to human life. And since each person has equal dignity in relation to all others, every homicide seems to be equally wrongful. Yet, with regard to punishable homicide, criminal law has always distinguished between acts of greater or lesser wrongfulness.

From an objective standpoint, some homicidal acts are especially heinous: for example, someone who kills their victim after inflicting prolonged suffering adds further pain to the wrongdoing inherent in the homicide. But it is when the homicidal act is viewed from the perspective of the perpetrator rather than that of the victim that it

becomes easy to understand why the wrongfulness of homicidal acts can be of different degrees.

First of all, the death of a person can be caused voluntarily or involuntarily. The material consequences of the action are identical, but the intensity of blame varies significantly in each of these scenarios.

Among the voluntary homicides falling under the criminal offence set out in Article 575 of the Criminal Code, acts committed intentionally are unquestionably more serious than those carried out with mere *dolus eventualis*. Furthermore, the motives of the act, as well as the external circumstances of the ideation and execution of the act, contribute to determining the degree of blame on the perpetrator and, consequently, the measure of their culpability.

As a consequence, the offence of voluntary homicide encompasses acts characterised by entirely different degrees of culpability: the assassination carried out by a hired killer or a member of a criminal organisation against a member of a rival faction, the brutal killing of a wife or partner, but also acts such as those described in the referral orders, which have arisen in contexts of intense suffering, caused by a lengthy series of abuses and mistreatment, committed – culpably or not – by the victims themselves. Under such extreme circumstances, it is hardly surprising that the proceeding courts wondered whether the homicides were justified by self-defence.

5.2.– The severity of the punishment for voluntary homicides must necessarily mirror such different degrees of culpability.

5.2.1.– This, first of all, for constitutional reasons.

This Court’s case law has repeatedly emphasised that the principle of proportionality of penalties, based on Articles 3 and 27(3) of the Constitution, requires that the punishment be adequately tailored not only to the degree of harm caused to the protected interests, but also to the degree of culpability of the offender. The offender’s culpability, in turn, “depends, in addition to the type of *mens rea* by which the offender has engaged in the criminal activity, on the possible presence of factors that have influenced the perpetrator’s decision to act” (Judgment No [73/2020](#), point 4.2 of the *Conclusions on points of law*; to the same effect, see Judgment No [94/2023](#), point 10.3 of the *Conclusions on points of law*, and Judgment No 55/2021, point 8 of the *Conclusions on points of law*).

The principle of the “personal nature” of criminal responsibility, established by Article 27(1) of the Constitution, also demands that the penalty imposed on each offender be a response that is not disproportionate and “individually tailored” to the degree of personal blameworthiness of the act (Judgment No [222/2018](#), point 7.1 of the *Conclusions on points of law*).

5.2.2.– The Italian criminal justice system has always provided mechanisms to adjust the penalty for the offence of homicide to individual degrees of wrongfulness of any single homicidal act.

As previously recalled (point 4.1 above), it is true that for the crime of intentional homicide in its basic form, the Criminal Code provides a particularly narrow range of custodial sentences, extending from a minimum of 21 to a maximum of 24 years. However, all the common aggravating circumstances (which, if present, can raise the maximum sentence to 30 years), and those specified in Articles 576 and 577 CC, can be applied in cases of homicide. The latter circumstances can entail a life sentence if no mitigating factor is present or if the aggravating factors take precedence over any mitigating factors.

However, the offence of homicide is generally subject to all common mitigating circumstances outlined in Article 62 CC, as well as the unspecified mitigating circumstances under Article 62-*bis* CC. Consequently, if the prevalence of the mitigating factors is acknowledged, the court has the discretionary power to hand down a sentence significantly lower than the statutory minimum of 21 years' imprisonment. More precisely, the custodial sentences can be lowered to a minimum of 14 years in the case of one mitigating factor, of 9 years and 4 months in the presence of two, of 6 years, 2 months and 20 days for three such factors, and so forth.

Through this legal mechanism, the Italian legal system allows courts to tailor calibrated penalties according to the degree of wrongfulness of any given act of homicide and takes into account additional factors – such as the offender's conduct after the offence – which, while not affecting the lower degree of objective or subjective harmfulness arising from the criminal act, nevertheless indicate less need to impose a penalty on the perpetrator.

In this manner, the law on homicide complies with the constitutional principles mentioned earlier. [...]

5.2.3.– Thanks to the set of mitigating circumstances applicable to voluntary homicide and their potential prevalence in balancing them with any aggravating factors, the penalties available to Italian courts partially align with those available in many other contemporary legal systems. Within these legal systems, categorising voluntary homicide into different forms along with their associated mitigating circumstances enables substantial tailoring of punishment, taking into account the varying degrees of wrongfulness of any single act of homicide.

For example, in Germany the most serious forms of intentional homicide are categorised as *Mord* and are punishable with life imprisonment (§ 211 StGB), while all other homicides are classified as *Totschlag*. The latter, in their basic form, are punishable by a prison term of not less than 5 years (§ 212 StGB). In the “less severe cases” described in § 213 StGB (including, in particular, provocation), the penalty ranges from 1 to 10 years' imprisonment.

In France, where the constitutional principle of individualisation of the penalty is in general opposed to the legislative provision of minimum sentences, the penalty for homicide can range from a minimum – exceptionally envisaged in this case – of 2 years' imprisonment to a maximum of a life sentence (Article 221-3 of the French Criminal Code). For ordinary cases of homicide, only a maximum of 30 years of imprisonment is prescribed (Article 221-1), leaving courts entirely free to determine the applicable penalty in the case at hand.

5.3.– The two mitigating factors at issue – provocation and unspecified mitigating circumstances – play an essential role in ensuring, also in the Italian legal system, that the penalty for intentional homicide can be appropriately reduced with respect to the general statutory minimum sentence of 21 years' imprisonment for less wrongful cases or when significant reasons anyway indicate a lesser need for a punishment.

5.3.1.– Regarding provocation, Article 62(1)(2) of the Criminal Code stipulates that the penalty for any offence must be reduced if the perpetrator has “acted in a state of loss of self-control induced by the unjust act of another”.

This provision is based on the assumption that someone who does not act with a calm and collected mind, but rather in a fit of rage that diminishes their self-control, is less blameworthy, provided that this emotional state has been caused by a prior “unjust act” committed by the victim. This also applies when someone acts not culpably, for

example when they are suffering from mental disorders (Court of Cassation, Judgment No 14270/2012). While the victim's prior unjust act does not justify the reaction on grounds of self-defence, it does nonetheless make the reaction less reprehensible.

Thus, provocation does not depend solely on the intensity of the emotion experienced by the perpetrator, but also on the underlying objective reason (the "psychological cause"). In this regard, the established case law demands an objectively sufficient relationship between the unjust act and the reaction (First Criminal Division of the Court of Cassation, Judgments No 19150 of 16 February–8 May 2023 and 21409 of 27 March–16 May 2019). This ensures that the initial act could not serve as a mere pretext for committing the crime, as in cases when the provocation appears entirely incongruent with the strength of the reaction (Fifth Criminal Division of the Court of Cassation, Judgment No 8945 of 19 January–16 March 2022; to the same effect, Judgment No 604 of 14 November 2013–9 January 2014).

Moreover, as correctly emphasised in the three referral orders, the recent case law of the Court of Cassation maintains that an unjust act is not solely constituted by a specific action of the victim immediately preceding the offender's reaction, but also by a sequence of wrongful actions occurring over time. When considered cumulatively, these actions may well explain the reaction. This holds true also when the triggering incident, taken in isolation, cannot be considered sufficient to justify the extent of the reaction (Court of Cassation, Judgment No 19150/2023; to the same effect: First Criminal Division of the Court of Cassation, Judgment No 28292, 9 May–7 June 2017; Fifth Criminal Division of the Court of Cassation, Judgment No 51237 of 4 July–10 December 2014; First Criminal Division of the Court of Cassation, Judgment No 51041 of 8 October–18 December 2013; First Criminal Division of the Court of Cassation, Judgment No 4695 of 13 January–9 February 2011).

This is particularly relevant in cases of homicide in domestic settings or within the context of romantic relationships. In these scenarios, the cause of the homicidal act is often to be found in the overall dynamics of the relationship between the perpetrator and the victim rather than in the final episode that triggers the reaction. In these cases, the homicide is often committed in the course of the latest abusive episode by the victim or immediately after it as a result of a long history of abuse and mistreatment. The reaction may then exceed the limits of legitimate self-defence, either due to a lack of necessity or proportionality in the response or because the aggression is over. However, the behaviour is less blameworthy than in the majority of voluntary homicides, on account of the distress caused by the victim's previous abusive behaviour.

5.3.2.– Equally important is the role played by the unspecified mitigating circumstances envisaged in Article 62-*bis* CC in relation to the offence of homicide, especially in the light of the current statutory minimum sentence.

Unspecified mitigating circumstances, too, are traditionally recognised by Italian criminal law. Initially established by the Zanardelli Code in 1889, they were temporarily abolished in 1930. After the fall of Fascism, they were reinstated through King's Lieutenant's Legislative Decree No 288 of 14 September 1944 (Measures concerning the reform of criminal legislation). This reintroduction aimed to alleviate the overall severity of the penalties prescribed by the Rocco Code in 1930. Contrary to the arguments brought by State Counsel during the hearing, these circumstances do not merely render the system more lenient, as if they were a benefit routinely granted to every offender. Instead, as noted in legal scholarship, unspecified mitigating circumstances essentially assign importance, in determining the penalty, to the specific and precise characteristics of the

individual crime or its perpetrator. These characteristics, which cannot be pre-defined by the legislature due to their extreme variety, differ from those already constituting the “specified” factors that can mitigate the sentence. They indicate a reduced degree of wrongfulness associated with the act, in contrast to what its conformity to the abstract paradigm of the crime might initially suggest.

Unspecified mitigating circumstances may, first of all, consist of factors indicating a lesser degree of harmfulness or blameworthiness of the act. The latter may be due to the particular intensity and comprehensibility of the motives that prompted the perpetrator to commit the crime, or the existence of unusual circumstances at the time likely to significantly restrict their freedom.

Secondly, Article 62-*bis* of the Criminal Code allows courts to assess all the additional sentencing factors indicated in Article 133 of the Criminal Code (Court of Cassation, Judgment No 20808/2019). These include circumstances that have arisen after the criminal act and might indicate a lower level of dangerousness of the perpetrator, thereby making them less deserving of punishment.

This Court drew attention to this aspect in Judgment No 183/2011, declaring that an amendment to Article 62-*bis* of the Criminal Code enacted in 2005 was unconstitutional. This amendment effectively prevented courts from taking into consideration the “conduct subsequent to the offence” of a repeat offender with a view to recognising unspecified mitigating circumstances. This provision was deemed on that occasion to be incompatible with the principles of reasonableness and the rehabilitative function of punishment outlined in Articles 3 and 27(3) of the Constitution. These articles require courts, in determining the penalty and especially when establishing the existence of unspecified mitigating circumstances, be able to “take into account [...] conduct subsequent to the offence indicative of a positive and ongoing development in the offender’s personality” (point 7 of the *Conclusions on points of law*).

More generally, as legal scholars have often remarked, unspecified mitigating circumstances provide the opportunity for the court to show human “compassion” towards the offender when determining the sentence, taking into account the individual circumstances in which the offender found themselves at the time of the offence or at the moment of sentencing. These factors range from immaturity associated with the offender’s young age, the natural decline of cognitive functions due to their advanced age, the presence of personality disorders falling short of the threshold for partial insanity, traumas suffered in the past, particularly disadvantaged economic or social conditions, or subsequent conduct, such as immediate and spontaneous confession, full collaboration during the proceedings, and educational or work pursuits undertaken while awaiting trial.

The careful and detailed consideration of all these and many other similar factors is particularly important in proceedings regarding voluntary homicide. In this context, it comes as no surprise that the Italian legislature established that the trial typically should take place before a mixed court, where lay judges are also called upon to assess and weigh the reasons that led the defendant to act, the circumstances in which they acted, and their overall personality. This assessment has its natural place in Article 62-*bis* of the Criminal Code, where the life experience of the judge matters more than the indications of the legislature in determining the sanctioning response. The legislature, indeed, admits its inability to pre-define all the possible facets of reality, directly entrusting judges with the task of discerning the signs of common humanity even in those who have committed a crime as serious as homicide.

5.4.— Now, the provision challenged here determines a drastic limitation of a court’s power to calibrate the sentence to the actual wrongfulness of the act committed, precluding it from considering both provocation and unspecified mitigating factors to take precedence over the aggravating factor of having committed the crime in a family context.

It is hard, however, to identify the rationale behind the imposition of such an absolute prohibition.

5.4.1.— The current third paragraph of Article 577 of the Criminal Code was introduced, as noted above (point 4.2), by Law No 69/2019 (commonly known as the “*Codice Rosso*” or “Red Code”). The overall aim of this law, as indicated by its official title, is to increase the “protection of victims of domestic and gender-based violence”, as defined by the relevant international conventions to which Italy is a signatory. The legislature intended to ensure compliance with these conventions, in particular with the Council of Europe Convention on preventing and combating violence against women and domestic violence (commonly known as the “Istanbul Convention”), ratified by Law No 77/2013.

Article 3 of this convention specifically defines “violence against women” as “a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”. It defines “domestic violence” as “all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim”.

Consistently with this overall protective goal, the “Red Code” further enriches the array of measures not only aiming to ensure harsh criminal sentences for perpetrators of violence against women or domestic violence – particularly by increasing the penalties for the crime of domestic abuse – but also at improving the resources for the effective and timely protection of victims by law enforcement agencies. For instance, it introduces the possibility of using electronic monitoring devices for individuals subject to a supervision measure prohibiting them from approaching places frequented by the victim under Article 282-ter of the Code of Criminal Procedure. It also includes a provision, in Article 387-bis of the Criminal Code, for the offence of violating orders to stay away from the family home and the prohibition from approaching places frequented by the victim. Additionally, it subordinates the conditional suspension of sentences for crimes of violence against women or domestic violence to participation in specific rehabilitation programmes offered by public and private organisations dedicated to prevention, psychological assistance, and the rehabilitation of individuals found guilty of such crimes (Article 165 of the Criminal Code). The law also mandates specialised training for professionals involved in combating domestic and gender-based violence (Article 5 of Law No 69/2019).

5.4.2.— With specific regard to Article 577(3) of the Criminal Code, which is challenged by the referring courts, its introduction is attributed to amendment No 6.104, which was approved in its new wording as No 01.04 in session at the Chamber of Deputies and subsequently endorsed unchanged by the Senate.

The intention of the proponents of the amendment does not emerge from the *travaux préparatoires*. However, it is evident that the legislature had intended, in general terms, to prescribe harsher sentences for homicides committed within family or romantic

relationships, especially those against women and vulnerable individuals in such contexts. This was achieved by restricting the courts' authority to imposing sentences for such homicides of less than the general minimum of twenty-one years in prison.

Some legal scholars have argued that the rationale for this provision lies in the concern that courts may be overly inclined to recognise mitigating circumstances, such as provocation, in cases where the perpetrator acts out of jealousy towards their partner, an inability to accept the end of a relationship, a distorted sense of ownership over the victim, or, in certain socio-cultural contexts, fear of personal or family "dishonour" arising from the victim's behaviour.

5.4.3.– The latter concerns, however, are not reflected in the case law of the Court of Cassation, which is instead consistent in rejecting claims by the defence seeking the recognition of provocation in cases like those mentioned. In such cases, an "unjust act" by the victim is fundamentally absent (Fifth Criminal Division of the Court of Cassation, Judgments No 38755 of 14 July–22 September 2023, 23031 of 3 March–10 June 2021, and 55741 of 25 September–13 December 2017), or there is a serious and glaring incongruity between the triggering event and the reaction (Fifth Criminal Division of the Court of Cassation, Judgment No 51237 of 4 July–10 December 2014). The tendency in the case law of the Court of Cassation is, if anything, to recognise the aggravating factor of futile motives in such cases (in this regard, First Criminal Division of the Court of Cassation, Judgment No 39323 of 9 June–3 November 2021; to the same effect, Judgment No 44319 of 21 May–30 October 2019).

On the other hand, it must be ruled out that the mere psychological aspect of intense emotional turmoil could be construed as indicating a lesser degree of culpability on the part of the perpetrator, thereby justifying the automatic recognition of unspecified mitigating factors (on this point, see First Criminal Division of the Court of Cassation, Judgment No 2962 of 8 November 2019–24 January 2020). The decisive factor for assessing lesser culpability is not the *intensity* of the psychological drive but the assessment in terms of *human understanding* of the motives that prompted the individual to act. This could certainly not be assumed, given current societal and legal sensibilities in cases such as those mentioned above.

5.5.– In the absence of any plausible justifying rationale beyond the general intent to ensure particularly harsh penalties for all cases of homicide committed in the context of family or romantic relationships, the challenged provision does not withstand the constitutional scrutiny requested by the referring courts.

It is indeed true that, as this Court has repeatedly affirmed in principle, the legislature cannot be considered precluded from introducing exceptions to the balancing of circumstances under Article 69 of the Criminal Code when exercising its discretion (Judgment No 143/2021, point 5 Of the *Conclusions on points of law*; Judgment No 205/2017, point 4 of the *Conclusions on points of law*).

However, any exceptions to the general criterion outlined in the first three paragraphs of Article 69 of the Criminal Code must not be in contrast with constitutional principles. The provision currently under scrutiny runs afoul of these principles on several fronts.

5.5.1.– Firstly, Article 577(3) of the Criminal Code is in breach of the principle of equality before the law under Article 3 of the Constitution. This principle not only prohibits unreasonable disparities in treatment between analogous situations but also guards against unwarranted similarities in treatment between dissimilar situations (in this sense, referring to criminal sanctions, see Judgment No 26/1979, point 1 of the

*Conclusions on points of law*). In terms of sentencing, this prohibition must also be construed in accordance with the principle of the “personal nature” of criminal responsibility as laid down by Article 27(1) of the Constitution, which requires sentences to be tailored as far as possible to the specific circumstances of each convicted offender (see point 5.2.1 above).

As highlighted by the defence counsel in the case referred to in referral order No 151/2022, the challenged provision obliges courts to pass a sentence, in the absence of any of the factors exempted from the prohibition to strike a balance, of not less than twenty-one years’ imprisonment for all homicides committed within family and romantic contexts. This applies regardless of the degree of culpability of the perpetrators and their level of dangerousness to society, thus preventing the differences among individual situations from being effectively reflected in the severity of the sentence applicable to each perpetrator.

5.5.2.– The foregoing consideration highlights, secondly, an unreasonable disparity in treatment between homicides committed within family and romantic contexts and the general category of voluntary homicides, to which the prohibition on giving mitigating circumstances precedence under the challenged provision does not apply. This amounts to an additional violation of Article 3 of the Constitution.

There is, in fact, no plausible reason to always and necessarily consider an act attributable to this specific type of homicide more serious than any other. The argument presented in written submissions and during the hearing by State Counsel, suggesting that the particular seriousness of homicides within the family essentially stems from a violation of the ancestral prohibition on shedding blood within one’s lineage, is not persuasive. [...] Indeed, it is precisely in family contexts that tensions, resentment, and frustrations often arise due to the aggressive behaviour of one of the parties to the relationship, provoking a reaction that might even lead, in extreme cases, to the homicide of the abusive party.

5.5.3.– Thirdly, the challenged provision is inherently unreasonable, again conflicting with Article 3 of the Constitution, as it stipulates that a single aggravating circumstance – albeit significant, such as the family or romantic relationship between the perpetrator and the victim – precludes courts from giving precedence to multiple mitigating factors.

And this is the case even in emblematic situations like those in the three cases at issue, where the homicidal act took place within family contexts characterised by severe distress and, indeed, acute suffering that the perpetrators had been experiencing for years due to the aggressive behaviour of their respective victims. Moreover, it would be difficult to invoke significant special preventive reasons justifying the perpetrators’ prolonged detention, as demonstrated by the fact that in at least two of the cases in the main proceedings no custodial precautionary measures have ever been taken against the respective defendants, based on the evident assumption that they are posing no danger to society.

All these factors, which courts are usually required to consider when deliberating the sentence, vanish as the result of the challenged provision [...].

5.5.4.– Fourthly, the challenged provision produces results – at least regarding a portion of the cases within its scope – inconsistent with its legislative aim. This represents an additional violation of Article 3 of the Constitution by the norm at issue from the point of view of its intrinsic irrationality (Judgments No 186/2020, point 4.1 of the *Conclusions on points of law*, and 166/2018, point 7 of the *Conclusions on points of law*).

As essentially all the referral orders point out, in the light of the overall framework of Law No 69/2019, it is plausible that the legislature intended, with the new last paragraph of Article 577 of the Criminal Code, to ensure harsher penalties for individuals who, having already engaged in mistreatment and abuses against vulnerable individuals within family and romantic relationships, ultimately resort to killing these same individuals at the culmination of a cycle of violence.

The cases under consideration in the lower court proceedings, however, involve situations where an individual who had *endured* years of mistreatment killed as a result of a sudden loss of self-control caused by the repeated abuse to which they had been subjected.

In situations like those considered in the lower court proceedings, this leads to an unintended consequence. The challenged provision, in such cases, actually enhances the punishment precisely for those who have endured years of aggressive and abusive behaviour. Consequently, it works to the detriment of the very individuals whom the overall framework of Law No 69/2019 was intended to protect more effectively.

5.5.5.– Lastly, as consistently pointed out in all the referral orders (and as previously noted in the *travaux préparatoires* and the opinion expressed by the Criminal Bar Association during the hearing held on 11 June 2019 before the Senate Justice Commission), the challenged provision breaches the principle of proportionality of punishment which can be inferred from the combined provisions of Articles 3 and 27(3) of the Constitution and which this Court has considered breached on numerous occasions by the inherently similar prohibition on giving precedence to mitigating circumstances over the aggravating factor of repeated recidivism laid down by Article 69(4) of the Criminal Code (for a recent extensive review of this case law, see Judgment No [94/2023](#), point 10 of the *Conclusions on points of law* as well as subsequent Judgments No 141/2023 and 188/2023).

It was specifically remarked in these judgments that the principle of proportionality of punishment is violated when the legislative prohibition on balancing circumstances prevents a court from giving sufficient weight, when determining the sentence, to mitigating factors that not only reflect a lower degree of harmfulness but also lesser blameworthiness on the part of the perpetrator, which is an essential component in assessing the overall wrongfulness of a criminal act (Judgment No [73/2020](#), point 4.2 of the *Conclusions on points of law*; also, concerning the mitigating factor referred to in Article 116 of the Criminal Code, Judgment No 55/2021, point 8 of the *Conclusions on points of law*).

[omitted]

Consistently with these precedents, also in this case the principle of proportionality of the punishment must be deemed violated. The mitigating factor of provocation is inherently indicative of a lower degree of blameworthiness on the part of the perpetrator (point 5.3.1 above), and unspecified mitigating circumstances can also involve additional elements – distinct from those already considered in relation to provocation. These too, in most cases, also indicate a lower degree of culpability, such as the young age of the victim and the potentially immature development of their emotional sphere, or personality disorders (possibly stemming from highly distressful family circumstances) but not yet qualifying as partial mental infirmity (point 5.3.2 above).

The barrier established by the challenged provision prevents defendants in such proceedings from benefiting from one, and sometimes even two, reductions to the sentence, each amounting to a third of the penalty. This, compared to a crime punished in

its basic form by a minimum sentence of twenty-one years' imprisonment – and not eligible for reduction as a result of recourse to a summary trial, currently precluded by Article 438(1-*bis*) of the Code of Criminal Procedure – is likely to result in several more years in prison than would be the case by applying the ordinary rules laid down in Article 69 of the Criminal Code.

5.6.– Today's declaration of unconstitutionality in no way contradicts the legitimate, and indeed certainly appreciable, protection sought by the legislature in passing the "Red Code", which it did with bipartisan support in 2019.

The annual statistics on femicides, emphasised by the State Counsel in written submissions and oral discussions, highlight the need for the legislature to implement effective preventive and punitive measures to successfully combat this alarming phenomenon, as well as the broader spectrum of violence and abuse in the context of family and romantic relationships.

What the referral orders have called into question, however, is the manifestly disproportionate response in the light of the introduction of Article 577(3) of the Constitution with regard to cases entirely different from those the legislature intended to tackle. These are instances where it is precisely the vulnerable person, victim of repeated abuse in their family, who ultimately commits homicide, driven by exasperation with a situation they no longer see as tolerable. Such a response constitutes an intended collateral effect stemming from a provision supported by a legitimate purpose [...] (for a similar case concerning the severity of punishment, see Judgment No 68/2012, point 3 of the *Conclusions on points of law*. In more general terms, concerning excesses in pursuit of legitimate ends on the part of the legislature, see Judgments No 184/2013, point 6.5 of the *Conclusions on points of law*, and 20/2019, point 5.4 of the *Conclusions on points of law*).

The remedy for this flaw can only be to restore the discretionary powers of the courts (similarly, Judgment No [102/2020](#), point 5.4 of the *Conclusions on points of law*). This will prevent the prohibition on prioritising mitigating circumstances from being applied in cases inconsistent with the rationale of the provision itself. More precisely, the natural solution is to permit the restoration of the ordinary powers of assize courts [...], which, following a 2019 reform, now have jurisdiction over all homicide cases punishable by life imprisonment (on the comprehensive framework of Law No 33 of 12 April 2019, containing the "Ineligibility of crimes punishable by life imprisonment for summary trial", Judgment No 260/2020, as well as – regarding more specific aspects of the law – Judgment No 207/2022 and Order No 214/2021).

5.7.– In conclusion, Article 577(3) of the Criminal Code must be declared unconstitutional, [...], to the extent that it prohibits courts from giving precedence to the mitigating factors of provocation under Article 62(1)(2) of the Criminal Code and unspecified mitigating circumstances under Article 62-*bis* of the Criminal Code.

ON THESE GROUNDS

#### THE CONSTITUTIONAL COURT

having joined the proceedings,

*declares* that Article 577(3) of the Criminal Code is unconstitutional to the extent that it prohibits courts from giving precedence to the mitigating circumstances stipulated in Articles 62(1)(2) and 62-*bis* of the Criminal Code.

Decided in Rome, at the seat of the Constitutional Court, Palazzo della Consulta, on 10 October 2023.

Signed: Silvana SCIARRA, President - Francesco VIGANÒ, Judge Rapporteur