

JUDGMENT NO 94 YEAR 2023

In this case the Court considered a question referred by the Turin Assize Court within a case concerning prosecution for the offence of indiscriminate killing, in relation to which a statutory prohibition had been enacted, which prevented the referral court from taking into account any mitigating circumstances when sentencing. In situations in which any certain specific types of aggravating circumstance subsisted in relation to the offence (in this case, the fact that the perpetrator was a repeat reoffender), the law imposed a prohibition on any consideration of potential mitigating circumstances. As a result, the only sentence available to the court was a mandatory life sentence. On the contrary, were it allowed to consider the ordinary provisions on the consideration of mitigating and aggravating circumstances, and were it to conclude that any mitigating circumstances prevailed over the aggravating circumstance, a lower sentence of between twenty and twenty-four years' imprisonment could be imposed. The referring court argued that, as a result, the contested provision violated the constitutional principle of equality, the principle of harmfulness, and the principle that the punishment must be commensurate with the severity of the offence.

Following a detailed discussion of previous rulings in which the court had declared unconstitutional other legislation that sought to preclude the consideration of mitigating circumstances, the Court held that the contested legislation was unconstitutional. In doing so, the Court identified three broad reasons as to why legislation purporting to preclude the relevance of mitigating circumstances may be unconstitutional: (1) there must not be an excessive difference between the sentences applicable to undifferentiated offences and offences to which mitigating circumstances apply; (2) where the scope of the undifferentiated offence is very broad, the ability to consider mitigating circumstances enables the courts to tailor the sentence to the seriousness of the offence; and (3) the ability to consider mitigating circumstances enables the sentence to take account of any subjective characteristics of the offender that reduce their blameworthiness.

The Court went on to hold that all of these *rationes decidendi* apply *a fortiori* in cases in which, owing to the prohibition on finding that mitigating circumstances prevail over aggravating circumstances, the only sentence that can be imposed is a life sentence. This conclusion was further supported by the Court's case law according to which a fixed sentence is *prima facie* unconstitutional by virtue of this fact alone. It also noted that the need for flexibility in sentencing is even more keenly felt for the offence of "indiscriminate killing" as it is an endangerment offence committed irrespective of any tangible outcomes, whereas the sentence must also take account of the consequences of the offence. Owing to the specific nature of a life sentence, the Court extended its ruling to any offence punishable by a life sentence for which the law purports to preclude the relevance of any mitigating circumstance for the purposes of sentencing.

[omitted]THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 69(4) of the Criminal Code, as replaced by Article 3 of Law No 251 of 5 December 2005 (Amendments to the Criminal Code and to Law No 354 of 26 July 1975 on generic mitigating circumstances, re-

offending, assessment of the subsistence of constituent elements of the offence for re-offenders, usury and limitation periods), initiated by the Second Division of the Turin Assize Court of Appeal (*Corte d'assise d'appello di Torino, sezione seconda*) within the criminal proceedings pending against A.C. and another, by referral order of 19 December 2022, registered as No 14 in the 2023 Register of Referral Orders and published in *Official Journal of the Italian Republic* No 7, first special series of 2023.

Having regard to the entry of appearance by A.C. and the intervention by the President of the Council of Ministers;

after hearing Judge Rapporteur Giovanni Amoroso at the public hearing of 18 April 2023;

after hearing Counsel Flavio Rossi Albertini Tiranni for A.C. and State Counsel Paola Maria Zerman and Ettore Figliolia for the President of the Council of Ministers;

after deliberation in chambers on 18 April 2023.

[omitted]

Conclusions on points of law

1.– By referral order of 19 December 2022, the Second Division of the Turin Assize Court of Appeal raised questions concerning the constitutionality of Article 69(4) of the Criminal Code, as amended by Article 3 of Law No 251/2005, with reference to Articles 3(1), 25(2) and 27(3) of the Constitution, to the extent that, with regard to the offence provided for under Article 285 of the Criminal Code (Indiscriminate destruction of property, looting and indiscriminate killing), it does not allow courts to rule that any mitigating circumstances provided for under Article 311 of the Criminal Code (Mitigating circumstance: minor scale of the conduct) prevail over reoffending pursuant to Article 99(4) of the Code.

The questions were raised during remitted proceedings within the criminal prosecution of A.C. and another defendant following Judgment No 38184 of the Court of Cassation of 6 July-11 October 2022, which partially annulled the previous judgment of the First Division of the Turin Assize Court of Appeal, as regards solely the classification of the offence covered by count F) of the charge. It was held that this offence must pertain to the violation not of Article 422 of the Criminal Code (the basic offence of “indiscriminate killing”), as had been held in the contested judgment, but rather of Article 285 of the Criminal Code (the offence of “indiscriminate killing for the purpose of undermining State security”).

The court to which proceedings were remitted was requested to recompute the sentence to be imposed on the defendants.

1.1.– The referring court asserts in particular that the contested provision violates Article 3(1) of the Constitution, specifically the principle of equality, as it results in the application of the same penalty of life imprisonment for offences with differing degrees of criminal severity. This is because it stipulates identical sentences for offences that, despite harming the same legal interests, are absolutely different in terms of the parameters laid down by Article 311 of the Criminal Code on account of the particularly low degree of harm or danger.

It is also argued that the contested provision infringes Article 25(2) of the Constitution due to the violation of the “principle of harmfulness”. In preventing courts from reducing the sentence on account of the predominance of the mitigating circumstance provided for under Article 311 of the Criminal Code, which performs a clear rebalancing function, the contested provision does not allegedly enable the sentence imposed to be tailored to the specific harmfulness of the criminal conduct

where that conduct is minor in scale in terms of its nature and type, the means used, the manner or circumstances of the conduct, or the particularly slight degree of harm or danger. As such, it ends up affording exclusive significance to the dangerousness of the perpetrator, as an inherent consequence of the application of the aggravating circumstance of repeated reoffending.

This violation of the Constitution is claimed to be even more evident with reference to the specific facts under examination, as the offence provided for under Article 285 of the Criminal Code is punished exclusively by a life sentence. This means that, owing to the fixed nature of that penalty, no adjustment may be applied to the penalty in line with the circumstances of the specific individual case which, on account of the contested prohibition on finding that any mitigating circumstances prevail over aggravating circumstances, is punished exclusively by a life sentence.

Thirdly, the contested provision is also claimed to violate Article 27(3) of the Constitution insofar as the stipulation of a fixed penalty of a life sentence does not enable a penalty to be imposed that is commensurate with the offender's specific actions. This precludes any scope for ensuring that the sentence will pursue the goal of rehabilitating the offender.

2.– As a preliminary matter, the multiple objections raised by State Counsel that the questions referred are inadmissible must be examined. It is argued that the referral order does not contain sufficient argumentation to establish the relevance of the questions, which are purportedly raised as incontrovertible assertions, which are in any case insufficient. These objections are disputed by the party that has entered an appearance in the proceedings.

Specifically, State Counsel argues, first of all, that the assertion concerning the applicability of the mitigating circumstance provided for under Article 311 of the Criminal Code is patently contradictory and also tautological; that the fact that this mitigating circumstance prevails over reoffending pursuant to Article 99(4) of the Criminal Code is merely asserted within the referring court's argumentation; and that no reasons whatsoever are provided as to why the mitigating circumstance in question should prevail also over the aggravating circumstance provided for under Article 61(1)(10) of the Criminal Code, as the accused person is also alleged to have committed the offence against a public official or a person charged with providing a public service.

Secondly, it is argued that the mitigating circumstance provided for under Article 311 of the Criminal Code is structurally inapplicable to the offence of indiscriminate killing under Article 285 of the Criminal Code on account of the inherent seriousness of the offence.

2.1.– This last-mentioned objection – which has *ex ante* status and must therefore be considered first – cannot be accepted.

In view of the unequivocal wording of the legislation – which provides that the mitigating circumstance provided for under Article 311 of the Criminal Code applies to all offences laid down in Title I of Book II of the Criminal Code (Articles 241 to 300), i.e. to all offences against the personality of the State – no grounds can be identified, within either legislation or case law, in support of the argument that the mitigating circumstance should not apply to the offence provided for under Article 285 of the Criminal Code.

It is difficult to read beyond the literal wording of the provision – the scope of which is moreover only relevant for the purposes of determining the admissibility of the questions of constitutionality in establishing that the interpretation of the referring court

is not implausible – especially as State Counsel discerns within it a distinction that is not substantiated by any basis in the text of the provision. According to State Counsel, the mitigating circumstance provided for under Article 311 of the Criminal Code is only partially inapplicable to the offence laid down by Article 285 of the Criminal Code as it relates exclusively to the offence of indiscriminate killing and not also to the offences of indiscriminate destruction of property and looting in view of the fact that the first-mentioned offence is the most serious.

The offence of indiscriminate killing for the purpose of undermining State security (Article 285 of the Criminal Code) is certainly an extremely serious offence, even when it does not actually end up causing the death of any person. Even if there are no victims and no tangible harm is caused, the fact that the conduct is liable to jeopardise the safety of more than one person, and specifically that the conduct entails “an act aimed at causing [...] indiscriminate killing within the territory of the State”, is nonetheless sufficient in order for the offence of “indiscriminate killing” to be committed – as a matter of law, even though this does not reflect the meaning in everyday language, which only uses the term where more than one person has been killed.

However, the offence of indiscriminate killing under Article 422 of the Criminal Code is also extremely serious. The only difference between this offence and indiscriminate killing under Article 285 of the Criminal Code is that the purpose of undermining State security is lacking, or has not been proven.

Both offences are punished by a life sentence.

Similarly, the Criminal Code also treats the offence of indiscriminate killing under Article 422 of the Code differently where it does not result in death and where at least one person is killed: it imposes a life sentence in the latter case and a term of imprisonment not shorter than fifteen years in the former case.

The extremely serious nature of the offence of indiscriminate killing has not prevented Article 422 of the Criminal Code from imposing a different penalty in situations in which no person has been killed.

It cannot therefore be asserted that the extremely serious nature of the offence of indiscriminate killing under Article 285 of the Criminal Code in itself renders irrelevant the fact no person has been killed; there is no support for this in the literal wording of the provision, and this view in fact contrasts openly with the literal provision of Article 311 of the Criminal Code.

Its nature as an endangerment offence that is committed in advance of any tangible harm does not in fact preclude the possibility that the specific violation resulting from the conduct constituting the offence in the abstract can be graded depending upon whether or not the offender’s actions resulted in harmful consequences, and specifically whether they caused the death of any person or persons, or whether those actions entailed simply the endangerment of the lives of other persons.

The legislation enacted in 1930 provided for the mitigating circumstance laid down by Article 311 of the Criminal Code, which is applicable across the board to all such offences (and hence also to indiscriminate killing under Article 285 of the Code) also in relation to – albeit extremely serious – offences such as offences against the personality of the State precisely so as to enable the penalty to reflect the tangible harm caused by the offence.

The application of that circumstance to the offence in question enables the court to refrain from imposing a life sentence in those cases that are classified as being less

serious in terms of the conduct falling within the abstract scope of the offence, in particular due to the fact that it did not result in the death of any person. However, conduct of this nature is still punished extremely severely since, if the mitigating circumstance is deemed to be applicable, Article 65 of the Criminal Code provides for a term of imprisonment of between twenty and twenty-four years, which is significantly longer than the penalty (a term of imprisonment not shorter than fifteen years) provided for in relation to indiscriminate killing under Article 422 of the Criminal Code that has not resulted in the death of any person.

Accordingly, the referring court's interpretation must certainly be deemed to be not implausible.

Moreover, as far as the objective scope of the mitigating circumstance is concerned, the Court of Cassation has held that "the relevant consideration for the purposes of the application of the mitigating circumstance under Article 311 of the Criminal Code is the actual severity of the conduct constituting the offence with reference to the objective characteristics of that conduct" (Court of Cassation, Fifth Criminal Division, Judgment No 18981 of 22 February-20 April 2017; see also Court of Cassation, First Criminal Division, Judgment No 14724 of 20 October-23 December 1986).

2.2.– As far as the first group of objections are concerned, it must be pointed out that, in describing the conduct constituting the offence (as was held by the trial court and the court of appeal, and as has now been confirmed by a final judgment), the referring court emphasises the factual consideration that the conduct with which the accused was charged did not cause any personal injury and caused only limited damage to property. In its view, when carrying out those assessments that fall to it as the referring court, this means that the mitigating circumstance provided for under Article 311 of the Criminal Code was applicable, moreover with predominant effect, over the fact of repeated reoffending. As such, it has complied with the requirement of providing reasons as to the relevance of the questions of constitutionality.

The referring court was not required to pre-empt its own decision regarding the application of the mitigating circumstance and the issue as to whether it prevailed over the fact of repeated reoffending. On the contrary, it only had to establish, through argumentation that is not implausible, that the prerequisites for the application of the mitigating circumstance are met, with the result that a comparison with the aggravating circumstance of repeated reoffending is required under Article 69 of the Criminal Code, and hence that the contested provision must be applied. It has done so, moreover providing sufficient reasons, by asserting that "having regard to the manner in which the offence was committed and the tangible consequences of the offence, which must be assessed taking account of the scale of the harm caused to the interests protected by the provision violated, the conduct [...] appears to fulfil the criteria laid down by Article 311 of the Criminal Code".

Indeed, according to the settled case law of this Court, a question of constitutionality is admissible when the referral order is supported by argument such as to enable an "external" review of the relevance of the question with reference to a substantiated explanation that is not implausible of the logical reasoning followed as well as the grounds upon which the referring court asserts that the contested provision must be applied within the main proceedings (amongst many, Judgments No 237 and No 149/2022, No 259/2021).

It does not fall to this Court to reach so far within these proceedings as to carry out a self-standing examination of the constituent elements of the above-mentioned mitigating circumstance. Once the possibility of its application has been established – as the referring court has concluded, not implausibly, due to the absence of victims and the limited scale of damage to property – the relevance of the contested provision is engaged. The contested provision precludes any scope for assessing whether that mitigating circumstance prevails over the fact of repeated reoffending. This has evident consequences in terms of the computation of the sentence, which has been left to the referring court following the ruling by the Court of Cassation, which partially annulled its previous judgment. If the prohibition remains in place, such an assessment is currently precluded as a matter of law by the contested provision establishing an exception from the ordinary rules. On the contrary, it would be permitted, according to the ordinary rule on the balancing of mitigating and aggravating circumstances, were the prohibition to be removed by the ruling of unconstitutionality sought by the referring court.

In any case, it will have a clear and evident impact on the reasons provided in support of the decision that the referring court will adopt when weighting up the respective mitigating and aggravating circumstances.

This Court has indeed held that “the issue of relevance does not overlap with the tangible utility – for a party to the proceedings before the referring court – of a ruling accepting the question of constitutionality, and it is by contrast sufficient that the ruling exert an influence over the argumentation followed by the referring court (amongst many, Judgments No 202 and No 157/2021)” (Judgment No 19/2022).

This also applies with regard to the alleged failure to state reasons as to why the mitigating circumstance should prevail over the aggravating circumstance laid down by Article 61(1)(10) of the Criminal Code. Were the mitigating circumstance provided for under Article 311 of the Criminal Code to be deemed (by the referring court) to prevail over the fact of repeated reoffending, this would result in the application of the rule developed within case law that the two circumstances must be assessed in a unitary and inseparable manner, in the sense that the assessment must cover all circumstances identified in relation to the offence, both aggravating and mitigating (amongst many, Court of Cassation, Sixth Criminal Division, Judgment No 39456 of 9-20 October 2003). As a result, the referring court would in any case have to apply the contested provision.

2.3.– Accordingly, none of the objections of inadmissibility referred to above, which have been raised in order to dispute the relevance of the questions, can be accepted.

Moreover, since the referral order provides detailed and broad reasons in relation to the requirement that the questions must not be manifestly unfounded, they must be held to be admissible.

3.– Turning to the merits, it must be considered first and foremost – as regards the legislative framework within which the questions of constitutionality raised by the Turin Assize Court of Appeal are situated – that the offence of “[i]ndiscriminate destruction of property, looting and indiscriminate killing” laid down by Article 285 of the Criminal Code and the mitigating circumstance of the “fact that the offence was minor in scale” provided for under Article 311 of the Criminal Code were incorporated into the Code of 1930 with wording that has always remained unchanged, even following the amendments introduced by Law No 1317 of 11 November 1947 (Amendments to the

Criminal Code with regard to offences against the constitutional institutions of the State) to Book II of Title I, Chapters II, IV and V of the Code.

More specifically, the offence provided for under Article 285 of the Criminal Code punishes “[w]hoever, for the purpose of undermining State security, commits an offence aimed at causing indiscriminate destruction of property, looting or indiscriminate killing within the territory of the State or within any part thereof” and associates it with the statutory sentence of life imprisonment, which as such is fixed in the sense that its nature or duration cannot be altered. This penalty was introduced as a replacement for the death sentence, which was abolished for all offences provided for under the Criminal Code by Article 1 of Legislative Decree of the Lieutenant General No 224/1944.

Alongside the offence under examination, Title I also punishes other offences with a fixed statutory sentence of life imprisonment, including in particular those provided for under Article 242 (Citizen who bears arms against the Italian State), Article 276 (Attack on the President of the Republic), Article 284 (Armed insurrection against the branches of State) and Article 286 (Civil war). In addition, the fixed statutory sentence of life imprisonment is also provided for in relation to the offence of “Causing an outbreak of disease” provided for under Article 438.

As regards specifically and exclusively offences against the personality of the State, as recalled above the Criminal Code establishes the mitigating circumstance of the fact that the offence was minor in scale. According to Article 311, this circumstance obtains when “due to its nature and type, the means used, the manner or circumstances of the conduct, or the particularly slight degree of harm or danger, the offence is minor in scale”; in such cases, the sentences imposed for the offences in question are reduced.

Although this is not expressly provided for in the provision establishing the mechanism, any reduction in sentence must comply with the criterion laid down by Article 65 of the Criminal Code. Accordingly, the “sentence of life imprisonment shall be replaced by a term of imprisonment of between twenty and twenty-four years”.

4.– The contested provision is contained in Article 69 of the Criminal Code, which sets out the rules applicable in situations involving both aggravating and mitigating circumstances, and considers various scenarios: a) where there are both aggravating and mitigating circumstances, and the former are considered by the court to prevail over the latter, the provisions on the reduction of sentences on account of mitigating circumstances are disregarded, and exclusively the increases in the sentence stipulated in relation to aggravating circumstances are applied (first paragraph); b) if the mitigating circumstances are considered to prevail over the aggravating circumstances, the increases in the sentence stipulated in relation to the latter are disregarded, and exclusively the reductions in the sentence stipulated in relation to mitigating circumstances are applied (second paragraph); c) if the court considers that the aggravating circumstances are equivalent to the mitigating circumstances, the court applies the penalty that would have been imposed had no such circumstances arisen (third paragraph).

This is the typical balancing of circumstances that is left to the assessment of the court, which must compute the sentence, tailoring it to the specific circumstances of the individual case. Within this balancing, generic mitigating circumstances play a special role as they cannot be brought under one specific classification. In fact, having been introduced in the immediate post-war period by Article 2 of Legislative Decree of the Lieutenant General No 288 of 14 September 1944 (Measures on the reform of criminal

law) in order to attenuate across the board the rigour of the 1930 Criminal Code, they are only relevant subject to the – highly discretionary – prerequisite of having been considered by the court to be “such as to justify a reduction of the sentence”.

The general rule on the balancing of the circumstances to the offence was amended, insofar as relevant for the purposes of the questions raised, by Law No 251/2005, Article 3 of which replaced Article 69(4) of the Criminal Code as follows: “The provisions of this Article shall also apply to circumstances pertaining to the individual status of the convicted person, subject to an exclusion for those cases provided for under Article 99(4) and Articles 111 and 112(1)(4) for which mitigating circumstances may not be deemed to prevail over aggravating circumstances, and to any other circumstances for which the law provides a penalty of a different type or computes a different penalty from the penalty ordinarily applicable to the offence”.

This introduced the contested prohibition on finding that the mitigating circumstances prevail in situations involving the aggravating circumstance of repeated reoffending.

Law No 251/2005 also enacted various amendments to the Criminal Code, specifically with reference to the provisions on reoffending and the circumstances of the offence. In particular, Article 4 replaced Article 99 of the Code, providing for stricter punishment for the various forms of reoffending. This reversed the trend established by Decree-Law No 99 of 11 April 1974 (Urgent provisions on criminal justice), converted by parliament, with amendments, into Law No 220 of 7 June 1974, which had replaced that provision within the 1930 Code with the aim of lessening its rigour.

The 1974 reform had not only lowered the increases in the sentence for the various forms of reoffending but had also made them optional in providing that the court “may” increase the sentence in any case involving a form of reoffending, ranging from ordinary reoffending (up to one sixth) to repeated “specific” reoffending involving the same offence (up to two thirds). In keeping with the above, the provision of the Code that allowed discretion in situations involving reoffending (Article 100) was repealed in view of the mandatory consideration of reoffending under Article 99.

Law No 251/2005 significantly raised the increases in sentences applicable in all situations involving reoffending to even higher levels than those provided for under the original Article 99 of the 1930 Code: from ordinary reoffending (increase by one third) to reoffending involving the same offence (increase by two thirds).

In particular, sentences were increased by a greater amount both for ordinary reoffending (an offender who commits another wilful offence) as well as for “specific” reoffending (an offender who commits another offence of the same type, or who does so within five years of the previous conviction, during or after enforcement of the sentence, or during any period of time in which they are voluntarily avoiding enforcement of the sentence), respectively by one half and by two thirds (whereas the extension had previously been “up to” one half and “up to” two thirds).

5.– After numerous questions of constitutionality were referred to it, this Court (Judgment No 192/2007) declared them inadmissible due to the failure by the referring courts to consider an adaptive interpretation.

This Court has observed that the questions raised are based on the implicit prerequisite that, following the enactment of Law No 251/2005, consideration of repeated reoffending had become mandatory and could no longer be dispensed with by the court on a discretionary basis – at least for the purposes of computing the sentence – having regard to the specific facts of the individual case.

However, this was not the only reading theoretically possible: “the new legislative provision could also be construed differently to the effect that the present indicative ‘is’ refers, in terms of its binding effect, exclusively to the extent to which the sentence is increased as a result of repeated, multiple aggravated reoffending – an increase which, in contrast to that applicable in the event of aggravated reoffending under Article 99(2) of the Criminal Code, the 2005 legislation sought to fix, rather than allowing variation between a minimum and a maximum – conversely leaving unchanged the court’s discretionary power over whether or not to apply the increase”. The Court went on to state that, “where repeated reoffending subsists alongside one or more mitigating circumstances, it could be argued that the court needs only strike a balance – subject to the constraints laid down by Article 69(4) of the Criminal Code – where, based on the criteria referred to above, it takes the view that the repeated reoffending is actually liable, in itself, to have an effect on the sentence imposed for the offence being prosecuted; otherwise, there will be no basis for any comparison, and the contested automatic disregarding of mitigating circumstances will not occur”.

Accordingly, Article 99(4) of the Criminal Code could be interpreted to the effect that consideration of repeated reoffending, which became optional following the adoption of Decree-Law No 99/1974, as converted into law, remained optional also after the enactment of Law No 251/2005; that Law expressly stipulated as mandatory only a consideration of repeated reoffending in the special (and more specific) case provided for in Article 99(5) of the Criminal Code.

This has also been the approach followed within the subsequent case law of the Court of Cassation: the court is allowed to hold that the aggravating circumstance is not significant and to disregard it by not applying the respective increase in the sentence (Court of Cassation, Joint Criminal Divisions, Judgments No 20798 of 24 February-24 May 2011 and No 35738 of 27 May-5 October 2010).

The only scenario not covered by this interpretation was repeated reoffending falling under Article 99(5) of the Criminal Code where it involved one of the offences referred to in Article 407(2)(a) of the Code of Criminal Procedure, which – in addition to entailing an even larger increase in the sentence – was stipulated by the law as being mandatory. However, this specific variant too was abolished when this Court declared that the provision was unconstitutional, with regard solely to the words “is mandatory and,” (Judgment No 185/2015). In particular, it has been stressed that the automatic mechanism applicable to sentencing introduced by the contested provision – namely the mandatory increase in the sentence for repeated “specific” reoffending involving the same offence under Article 99(5) of the Criminal Code – was not justified. This is because it was at odds with the principle of reasonableness as it treated different personal circumstances and different forms of reoffending as being equivalent, thereby violating Article 3 of the Constitution. In addition, “[t]he fact of preventing any consideration as to whether the specific case features any conditions that should legitimise the application of the rules on reoffending could result in patently disproportionate sentences, which may thus be perceived of as being unfair by the offender, frustrating the rehabilitative goal provided for under Article 27(3) of the Constitution”.

This accordingly also consolidated the interpretation arrived at within the case law of the Court of Cassation: if consideration of the most serious form of reoffending (that provided for under Article 99(5) of the Criminal Code) is not mandatory, then *a fortiori* consideration of the other forms provided for under the previous paragraphs is also not

mandatory. This means that the court is always able “to negate the aggravating significance of reoffending and to exclude that circumstance by declining to apply the respective increase in the sentence” (again, Judgment No 185/2015).

6.– Accordingly, the special characteristic of the aggravating circumstance of repeated reoffending, as amended by Law No 251/2005, lies in the strictly automatic operation of the outright prohibition on finding that any mitigating circumstance prevails over any aggravating circumstance, coupled with the continuing absence of any obligation to apply it.

Indeed, despite consideration of any form of reoffending not being mandatory, Law No 251/2005 left one unequivocally automatic effect, which has been challenged in these proceedings by the referring court. On the one hand, repeated reoffending under Article 99(4) of the Criminal Code may (although not necessarily must) result in an increase in sentence by more than in the past. On the other hand, however, by virtue of an automatic mechanism it gives rise to a prohibition on the consideration of mitigating circumstances.

Indeed, as recalled above, Article 3 of Law No 251/2005 replaced Article 69(4) of the Criminal Code (contested provision) by providing that “mitigating circumstances may not be deemed to prevail over aggravating circumstances” in cases involving certain specific aggravating circumstances (repeated reoffending under Article 99(4) or having induced to commit the offence a person with immunity from prosecution or punishment, a person under the age of eighteen or a person with a mental infirmity or psychological disability).

By contrast, the ordinary provisions governing the consideration of aggravating circumstances and mitigating circumstances laid down in Article 69(1)-(3) apply to all other circumstances, including those for which the law stipulates a sentence of a different type or computes a different sentence to that ordinarily applicable to the offence.

The prohibition on finding that mitigating circumstances prevail over aggravating circumstances in cases involving repeated reoffending establishes repeated reoffending as an aggravating circumstance with greater force, thereby establishing it as a “privileged” type of aggravating circumstance.

The system of criminal law recognises various types of aggravating circumstances over which any mitigating circumstances may not prevail, or more fundamentally in relation to which a balancing of circumstances cannot be considered.

As far as the prohibition on finding that mitigating circumstances prevail over aggravating circumstances or the prohibition on the balancing of circumstances laid down by Article 69 of the Criminal Code is concerned (which circumstances are referred to as “privileged” circumstances), “[t]his Court has held (Judgment No 38/1985) that ‘[t]he rationale within Article 69 of the Criminal Code [...] for the requirement of balancing lies in the very essence of that assessment, which consists in an overall consideration of the facts’. However, the legislature may enact legislation to disapply Article 69 of the Code by depriving the court of the discretionary power to strike a balance to the effect that aggravating circumstances are disregarded or mitigating circumstances are taken into account, with the aim of imposing harsher sentences. This is a ‘serious limitation’, which is not illegitimate in itself. However, it cannot be accompanied by a rule stipulating that any mitigating circumstances are irrelevant as a matter of law. Subject to this limitation, it has therefore been held that the legislature has discretion over whether to establish special types of aggravating

circumstances that are privileged and hence exempt from the balancing operation provided for under Article 69 of the Code” (see Judgment No 88/2019).

A rule providing for the exclusion of such a balancing operation has been laid down by Article 416-*bis*.1 of the Criminal Code (Aggravating and mitigating circumstances for offences related to activities of mafia-type organisations).

Similarly, the law provides that mitigating circumstances cannot be deemed to be equivalent to or prevail over aggravating circumstances also in relation to the aggravating circumstances of terrorism or subversion of the democratic order, as provided for under Article 270-*bis*.1 of the Criminal Code.

A prohibition on balancing has been laid down by Article 590-*quater* of the Criminal Code in relation to the “new” offence of vehicular homicide and serious and extremely serious harm caused by a motor vehicle where the aggravating circumstances provided for under Articles 589-*bis*(2), (3), (4), (5) and (6), 589-*ter*, 590-*bis*(2), (3), (4), (5) and (6) and 590-*ter* of the Code obtain.

More recently, Article 5(1)(b) of Legislative Decree No 21 of 1 March 2018 (“Provisions on the implementation of the principle of delegated authority in respect of the stipulation that criminal law may only be amended by way of an amendment of the Criminal Code, adopted pursuant to Article 1(85)(q) of Law No 103 of 23 June 2017”) introduced Article 69-*bis* of the Criminal Code. This article establishes a prohibition on the balancing of aggravating and mitigating circumstances for the offences provided for under Article 407(2)(a)(1)-(6) of the Code of Criminal Procedure in situations in which a person who has induced other persons to commit an offence, or who has availed themselves of other persons when committing the offence, is the parent with parental responsibility or the brother or sister of that person, and adds that any reductions in sentence are to be applied to the sentence as resulting from the increase on account of the above-mentioned aggravating circumstances.

Accordingly, there are various “privileged” circumstances for which the law has put in place exceptional arrangements that depart from the ordinary balancing provided for under Article 69 of the Criminal Code.

7.– Against this backdrop of “privileged” aggravating circumstances, the prohibition on finding that any mitigating circumstances prevail over the aggravating circumstance of repeated reoffending represents a special case as the automatic nature of that exclusion subsists in parallel with the lack of any automatic mechanism for the imposition of a longer sentence.

The court must first and foremost establish, by a discretionary assessment, whether the prerequisites for the application of an increase in the sentence for repeated reoffending are met, verifying specifically whether the previous convictions have made the individual more inclined to reoffend.

This is a different assessment from the (logically subsequent) assessment as to whether the sentence to be imposed is proportional, where an increase on the grounds of reoffending is specifically applicable. In particular, in cases involving repeated reoffending, the automatic exclusion of the possibility of any (potentially) concurrent mitigating circumstance prevailing is only engaged if the court concludes that the sentence must be increased in the specific case due to that aggravating circumstance.

Whilst being discretionary, this preliminary assessment is quite different from that which the court is subsequently required to carry out, in the event that the accused is convicted, in order to ensure that the sentence is proportionate to the offence found to have been committed.

In contrast – as the referring court points out – following the partial annulment by the Court of Cassation, the legal classification of the offences charged (including first and foremost the more serious offence provided for under Article 285 of the Criminal Code), the finding concerning the criminal responsibility in particular of the accused or their status as a repeat reoffender pursuant to Article 99(4) of the Criminal Code are not at issue in this case.

A final judgment has been reached within the proceedings concerning the application of the aggravating circumstance of repeated reoffending, which triggers the automatic exclusion of a consideration as to whether any mitigating circumstances prevail over the aggravating circumstance. Moreover, the fact that this finding was not originally mandatory is immaterial.

The automatic mechanism established by the contested provision must accordingly apply on account of the reclassification of the offence by the Court of Cassation from “ordinary” indiscriminate killing under Article 422 of the Criminal Code not resulting in the death of any people (punished by a term of imprisonment not shorter than fifteen years) to “political” indiscriminate killing under Article 285 of the Criminal Code (punished by a life sentence). Thus, even in the event that more than one mitigating circumstance applies, the court is obliged to impose the fixed statutory sentence of life imprisonment.

8.– The constitutionality of this automatic mechanism, which is inherent within the prohibition on finding that mitigating circumstances may prevail over aggravating circumstances, must be measured against the principle of equality (Article 3(1) of the Constitution), the principle of the harmfulness of the actions of the offender (Article 25(2) of the Constitution) and the requirement that the sentence must be proportionate and pursue the goal of the rehabilitation of the offender (Article 27(3) of the Constitution), albeit against the backdrop of the fact that a consideration of the aggravating circumstance of reoffending is not mandatory, which does not mitigate the scope of the prohibition, but on the contrary – by virtue of this fact alone – makes it appear excessive if not entirely contradictory.

This Court has carried out constitutional review of this type on a number of occasions in relation to individual offences and specific mitigating circumstances. Moreover, the prohibition on finding that mitigating circumstances prevail over the aggravating circumstance of repeated reoffending has already been declared unconstitutional on several occasions in relation to specific mitigating circumstances and specific individual offences.

8.1.– By Judgment No 143/2021 concerning the prohibition introduced by the contested provision specifically with reference to the mitigating circumstance provided for under Article 311 of the Criminal Code, this Court declared Article 69(4) of the Code unconstitutional to the extent that it imposed a prohibition on finding that the mitigating circumstance of the fact that the offence was minor in scale – introduced by Judgment No 68/2012 of this Court in relation to the offence of kidnapping for the purpose of extortion provided for under Article 630 of the Code – prevailed over the aggravating circumstance of reoffending provided for under Article 99(4) of the Code.

The “function of applying necessary rebalancing in terms of the length of the sentence” that the mitigating circumstance consisting in the “fact that the offence was minor in scale” was found to have was held to be essential in order to enable the court to compute a sentence that was proportionate also in relation to conduct less serious than that targeted by the legislature which, in enacting Law No 894 of 30 December 1980

(Amendments to Article 630 of the Criminal Code), changed the sentence applicable to the offence of kidnapping for the purpose of extortion, providing for a term of imprisonment of between twenty-five and thirty years.

It is also necessary to recall this Court's previous Judgment No 68/2012, which declared that Article 630 of the Criminal Code was unconstitutional insofar as it did not provide "that the sentence provided for thereunder is to be reduced when, due to its nature and type, the means used, the manner or circumstances of the conduct, or the particularly slight degree of harm or danger, the offence is minor in scale". In that Judgment, the Court held with reference to Article 311 of the Criminal Code that the specific function of this mitigating circumstance, "which falls within the range of circumstances deemed to be undefined or discretionary (as the legislation has not clarified the concept of "minor scale" in any greater detail) [...], is precisely to mitigate – having regard solely to objective factual aspects (characteristics of the criminal conduct, scale of the harm or danger) – a punitive response characterised by its exceptional harshness that, precisely for this reason, risks being incapable of adapting to the variety of specific circumstances that can fall under the legal model".

8.2.– Judgment No 143/2021 was preceded by numerous other judgments, all of which declared, according to a continuity approach, that the provision that is currently contested by the referring court (Article 69(4) of the Criminal Code) was partially unconstitutional.

Judgment No 251/2012 declared that provision unconstitutional insofar as it imposed a prohibition on finding that the mitigating circumstance provided for under Article 73(5) of Decree of the President of the Republic No 309 of 9 October 1990 (Consolidated law of provisions governing narcotic and psychotropic substances, and the prevention, treatment and rehabilitation of the relative states of drug addiction) prevailed. In that judgment, this Court held *inter alia* that the quantitative differences in the statutory penalties laid down by Article 73(1) to (5) reflected the different objective characteristics of the two offences in terms of their harmfulness. In particular, the markedly less harsh punishment provided for in relation to offences that are "minor in scale" reflects a dimension of harmfulness the effective scope of which is disregarded by the contested provision, which "leads the process of computing the specific sentence to place an abnormal focus on subjective characteristics relating to repeated reoffending, to the detriment of the objective circumstances of the offence".

It went on to state that "[t]wo offences, namely those provided for under the first and under the fifth paragraph of Article 73, which the very same legislative framework recognises as being profoundly different in terms of the harm caused, are treated together within the same legislative framework, with the 'result that the contested provision violates Article 25(2) of the Constitution, which provides that criminal responsibility must be established on a factual basis' (Judgment No 249/2010)".

Similarly, again in relation to the law on narcotics, in Judgment No 74/2016 this Court declared the same provision unconstitutional insofar as it imposed a prohibition on finding that the mitigating circumstance provided for under Article 73(7) prevails. The rigid presumption inferred from the fact of repeated reoffending that an offender is inclined to commit offences "is incapable of rendering moot and neutralising any contrary indications that may be inferred for the benefit of the offender from subsequent conduct that does not have any necessary connection with repeated reoffending", where such actions are carried out in order to prevent the criminal activity from resulting in further consequences.

Similarly, this Court held in Judgment No 105/2014 that, in stipulating that the mitigating circumstance that the offence is “particularly slight in nature” cannot prevail over the aggravating circumstance of repeated reoffending in relation to the offence of handling stolen goods, the contested provision results in consequences that are manifestly unreasonable in terms of the sanction imposed. This is because two offences that the law recognises as being profoundly different in terms of the harm caused – in that “[t]he different statutory penalties laid down by Article 648(1) and (2) of the Criminal Code reflect the objective characteristics of the two offences in terms of their harmfulness” – are treated together within the same legislative framework.

Similar principles underlie Judgment No 106/2014 in relation to the prohibition that mitigating circumstances can prevail over aggravating circumstances in cases involving sexual assault “of low seriousness” pursuant to Article 609-*bis*(3) of the Criminal Code. That mitigating circumstance serves to “temper the effects of the concentration within one single offence of acts that, whilst differing considerably from each other, in any case impinge upon the sexual freedom of the victim, with each offence resulting in a different degree of violation of objective legal interests”.

In Judgment No 205/2017, the declaration of unconstitutionality concerned the mitigating circumstance provided for under Article 219(3) of Royal Decree No 267 of 16 March 1942 (Provisions on bankruptcy, compositions with creditors, controlled administration and mandatory administrative liquidation) consisting in “especially slight pecuniary loss” caused to the creditors in bankruptcy by the offences of fraudulent bankruptcy, ordinary bankruptcy and fraudulent borrowing. It was held that the significantly less harsh punishment provided for in relation to bankruptcy offences that resulted in especially slight pecuniary loss “reflects a dimension of harmfulness the effective scope of which is disregarded by the contested provision, which leads the process of computing the specific sentence to place an abnormal focus on subjective characteristics relating to repeated reoffending, to the detriment of the objective circumstances of the offence”.

Moreover, Judgment No 73/2020 concerned the prohibition on finding that the mitigating circumstance of partial mental infirmity provided for under Article 89 of the Criminal Code can prevail over aggravating circumstances. In that judgment, the Court held that it prevents the court from computing a sentence that is proportionate to the tangible objective and subjective severity of the offence, and that is therefore commensurate with the degree of “personal” responsibility and fault of the offender. This is because “it does not allow adequate consideration to be given [...] to the reduced capacity to be motivated by criminal law of persons who suffer from personality illnesses or disorders that, whilst not entirely excluding their sound judgment, nonetheless seriously impair it”, as is by contrast provided for by the mitigating circumstance referred to, “which can be attributed to a systemic feature of a ‘constitutionally informed’ system of criminal law”.

In Judgment No 55/2021 this Court examined a scenario involving “anomalous aiding and abetting” provided for under Article 116(1) of the Criminal Code, which imposes the same responsibility for an offence committed by another fellow offender that differs from that agreed upon, thereby treating the former, who did not intend the offence to be committed, in the same manner as the latter. The Court held that the mitigating circumstance provided for under Article 116(2) of the Code applies precisely in order to ensure the necessary nuancing in terms of the computation of the sentence since “[t]he sentence cannot be entirely identical where the offence committed is more

serious than that intended”; accordingly, “the sentence imposed on a fellow offender who has been found guilty by virtue of negligence for a more serious wilful offence than that intended must necessarily be adjusted by applying the mitigating circumstance”.

9.– In view of the above, the questions of constitutionality raised, as framed within this legislative (sections 3 to 7) and case law context (section 8 et seq), are well-founded with regard to all of the provisions invoked by the referring court.

10.– As recalled above, the prohibition laid down by the contested provision on finding that mitigating circumstances prevail over aggravating circumstances in cases involving repeated reoffending has already been declared unconstitutional on several occasions. All of these judgments have concerned distinct offences and specific mitigating circumstances (summarised in section 8). However, they are based on *rationes decidendi* resulting from common principles that can be classified under three groups which – as will be noted below – are decisive for the purposes of assessing whether the questions are well-founded, in keeping with those precedents.

10.1.– The first common *ratio decidendi* concerns the particular size of the gap between the basic penalty stipulated for the undifferentiated offence and that resulting from a consideration of the mitigating circumstance. In order for that gap to comply with the principle of equality (Article 3(1) of the Constitution), the principle of the harmfulness of the actions of the offender (Article 25(2) of the Constitution) and the requirement that the sentence must be proportionate and pursue the goal of the rehabilitation of the offender (Article 27(3) of the Constitution), the court must of necessity be able to strike an ordinary balance between the various circumstances (Article 69 of the Criminal Code), without any prohibition on assessing whether the mitigating circumstance prevails over the aggravating circumstance of repeated reoffending.

The establishment of an exception from the requirement to strike a balance between heterogeneous circumstances, which is inherent within the prohibition laid down by the contested provision, results in such cases in “interference with the equilibria required by constitutional law in terms of the structuring of criminal responsibility” (Judgment No 251/2012) as it ends up resulting in the application of identical penalties for violations of markedly different criminal significance.

That principle is asserted within the judgment referred to above concerning violations “of minor scale” of the law on narcotics, with regard to which Article 73(5) of Decree of the President of the Republic No 309/1990, which established the mitigating circumstance in question, provided for a term of imprisonment of between one and six years (in addition to a fine) as against a statutory sentence for the undifferentiated offence of a term of imprisonment of between six and twenty years (in addition to a fine). This Court has highlighted the “enormous difference in legislative frameworks” laid down by law between the offence characterised by the mitigating circumstances and the basic offence provided for under paragraph 1 of the relevant provision, resulting in “an abnormal focus on subjective characteristics relating to repeated reoffending, to the detriment of the objective circumstances of the offence”.

Similar considerations have been made with regard to the same offence by this Court (Judgment No 74/2016) in relation to the mitigating circumstance with special effect provided for under Article 73(7) of Decree of the President of the Republic No 309/1990, which entails a marked reduction in the sentence (by between one half and

two thirds) for whomever takes action to prevent the criminal conduct from resulting in further consequences.

Judgment No 105/2014 concerning a “particularly slight” instance of handling stolen goods (Article 648(2) of the Criminal Code) is also based on the same *ratio decidendi*. The minimum term of imprisonment stipulated for offences of particularly slight seriousness (15 days) was increased to two years, thereby resulting in an “unreasonably severe” sentence on account of the prohibition laid down by the contested prohibition on finding that mitigating circumstances prevail over aggravating circumstances.

Judgment No 106/2014, which was issued on the same day, concerned cases involving sexual violence of “low seriousness” in relation to which Article 609-*bis*(3) of the Criminal Code provides for a term of imprisonment (from one year and eight months to three years and four months) significantly lower than that applicable to the undifferentiated offence (five to ten years).

The prohibition on finding that mitigating circumstances prevail over aggravating circumstances ended up rendering the sentence “patently disproportionate”, with the result that it would thus be “inevitably perceived by the offender as unjust”.

A similar disproportionate imbalance was identified (Judgment No 205/2017) in relation to the offence of fraudulent bankruptcy punished by a statutory sentence of between three and ten years’ imprisonment, which may be reduced to a minimum sentence of one year on account of the mitigating circumstance of “particularly slight pecuniary loss”.

A particularly significant decision for the questions at issue in this case is – as noted above – Judgment No 143/2021 which, with regard specifically to the mitigating circumstance provided for under Article 311 of the Criminal Code, highlighted that the function of that mitigating circumstance, as an ordinary mitigating circumstance and not one with specific effect provided for by law, “is precisely to mitigate – having regard solely to objective factual aspects (characteristics of the criminal conduct, scale of the harm or danger) – a punitive response characterised by its exceptional harshness that, precisely for this reason, risks being incapable of adapting to the variety of specific circumstances that can fall under the legal model”.

Ultimately, in all such cases individual mitigating circumstances (including mitigating circumstances other than those with specific effect provided for by law) have been found to perform a necessary rebalancing function in relation to the imbalance between a particularly stringent sentence for the basic offence and the sentence that would otherwise result from the application of the mitigating circumstance. In order to ensure compliance with the principle of equality (Article 3(1) of the Constitution), the principle of the harmfulness of the actions of the offender (Article 25(2) of the Constitution) and the requirement that the sentence must be proportionate and pursue the goal of the rehabilitation of the offender (Article 27(3) of the Constitution), that function cannot be compromised by the prohibition laid down by the contested provision on finding that any mitigating circumstance prevails over the aggravating circumstance of repeated reoffending.

10.2.– Again in objective terms, another relevant consideration for the *ratio decidendi* in the judgments referred to has been the consideration that certain mitigating circumstances share the common feature of balancing out the particularly wide scope of the undifferentiated offence, which applies broadly to markedly different conduct,

where a distinction must be drawn among these forms of conduct for the purpose of sentencing.

Dealing of drugs on a minor scale (Article 73(5) of Decree of the President of the Republic No 309/1990) is certainly less serious than drug trafficking, as the typical manifestation of the undifferentiated offence provided for in Article 73(1). Indeed, it has now been established as a self-standing offence.

Also the offence of sexual acts of “low seriousness” – which in the past was prosecuted as violent lewd acts or harassment, but following the 1996 reform (Law No 66 of 15 February 1996 laying down “Provisions to combat sexual assault”) fell under the broad-brush offence of sexual assault – needs to be rebalanced by the mitigating circumstance with special effect provided for under Article 609-*bis*(3) of the Criminal Code.

10.3.– Finally, with regard to a subjective aspect, a further *ratio decidendi* may be found in judgments concerning mitigating circumstances that focus closely on the personal nature of criminal responsibility.

These mitigating circumstances do not reflect any reduced harmfulness of the conduct in objective terms vis-a-vis the interests protected by the criminal provision, nor any kind of reward for actions carried out after the offence was committed, but rather focus on the reduced subjective blameworthiness of the offender.

The mitigating circumstance of partial mental infirmity provided for under Article 89 of the Criminal Code is premised on the reduced ability of the perpetrator to perceive the adverse effects of their actions as well as an impaired ability to control their impulses owing to a particular disease or disorder. This accordingly establishes reduced subjective blameworthiness. This Court has held in relation to this mitigating circumstance that the “principle, based on Articles 3 and 27(3) of the Constitution, that punishment must fit the crime requires, as a general rule, that the lower degree of subjective fault should be matched by a more lenient sentence than that which would be appropriate for equally serious conduct in objective terms” (Judgment No 73/2020).

Moreover, the mitigating circumstance provided for under Article 116(2) of the Criminal Code, which applies in situations in which the offence committed was different from that actually intended by one of the fellow offenders, and provides that such a person is responsible if the outcome is a consequence of their acts or omissions, performs the “function of applying necessary rebalancing in terms of the length of the sentence” (Judgment No 55/2021). The sentence imposed on a fellow offender who has been found guilty by virtue of negligence for a more serious wilful offence than that intended is of necessity rebalanced by applying that mitigating circumstance, which “helps to support the constitutional soundness of this exceptional form of criminal responsibility”. This rebalancing cannot be compromised by the prohibition provided for under the contested provision on finding that mitigating circumstances prevail over aggravating circumstances.

11.– These *rationes decidendi* (discussed in sections 10.1. to 10.3.), which require that the sentence take account of any mitigating circumstances even in cases involving repeated reoffending, all apply *a fortiori* in cases in which, owing to the prohibition on finding that mitigating circumstances prevail over aggravating circumstances, the only sentence that can be imposed is a life sentence, irrespective of the conduct of the accused where the offence of indiscriminate killing provided for under Article 285 of the Criminal Code has been committed (however, it should be clear that this also applies

where the prohibition applies in relation to the offences of indiscriminate destruction of property or looting, which are also provided for under that article).

The mismatch between the statutory sentence and the sentence that would have been imposed were it not for the contested prohibition, where a mitigating circumstance has been found by the court to prevail over the aggravating circumstance of repeated reoffending, is particularly large here. Assuming that the court were to find that the mitigating circumstance prevailed over the aggravating circumstance, a sentence of between twenty and twenty-four year's imprisonment (Article 65 of the Criminal Code) could have been applied instead of a life sentence.

Such a sentence would be based on the facts and the specific circumstances of the offence, as well as the personal situation of the accused person pursuant to Article 133 of the Criminal Code, albeit subject to the constraints now laid down by Article 62-*bis*(2) of the Code, as amended by Law No 251/2005.

On the contrary, the statutory sentence (a life sentence) cannot be tailored in terms of its length, precisely because it is a life sentence, and becomes such at the time it is imposed by a final judgment: from that moment onward the perspective for the convicted offender is a sentence without end.

It is indeed the case that this Court has identified within the law applicable to the enforcement of sentences certain mechanisms that enable the irredeemably endless nature of the sentence, as a constraint "without hope", to be set aside whilst the sentence is being served, stressing that these are "mechanisms that are characterised as being conceptually opposed to the endless nature of the sentence" (Judgment No 168/1994).

In this regard, Judgment No 264/1974 held that a person serving a life sentence is not precluded the possibility of reintegration into society through conditional release. In fact, the benefit may be granted – by a court, and no longer following approval by the Ministry of Justice (Judgment No 204/1974) – also to offenders serving a life sentence where they have served at least twenty-six years of their term. The benefit is under all circumstances subject to the obligations associated with conditional release for a period of five years, following which the life sentence may finally be extinguished, with the result that it is – under the specific circumstances and on an ex-post basis – no longer perpetual.

Also in recent rulings (Judgment No 66/2023 and Order No 97/2021), this Court has reiterated the role performed by the mechanism of conditional release as a guarantee that a life sentence as provided for under Article 22 of the Criminal Code is compatible with the principle of re-socialisation enshrined in Article 27 of the Constitution. In doing so it has stressed that conditional release is the only mechanism that, by virtue of its existence within the legal system, enables life sentences to be compliant with the principle of rehabilitation, and hence with the Constitution.

Other judgments have made similar findings, enhancing the relevance of conditional release (Judgments No 253/2019, No 161/1997 and No 274/1983).

However, it must be considered that, even though these safeguards are recognised – the purpose of which is to reinforce the rehabilitative process aimed at achieving "genuine remorse" as a prerequisite for the conditional release of a person who has received a life sentence after at least twenty-six years of imprisonment have been served (Article 176 of the Criminal Code) – the chasm in terms of duration that exists between a life sentence, at the time it is imposed, and a fixed term is massively broader than any imbalance considered by the case law in declaring unconstitutional the contested

prohibition on finding that mitigating circumstances prevail over aggravating circumstances within the multiple cases recalled (in sections 10 et seq).

12.– Alongside this particularly strict penalty, there is another parallel need for “rebalancing”. This is because a life sentence as provided for under Article 285 of the Criminal Code is not only more punitive than any fixed sentence, but is also imposed in respect of conduct occupying a broad spectrum – namely the commission of “an act aimed at causing [...] indiscriminate killing within the territory of the State” – where, as an exception to the general rule, the offence is committed in advance of its effects. This is because the offence is committed at the time when the relevant acts are carried out, with no requirement for any interference with the physical integrity of other persons. As such, in contrast to other offences, there can be no such thing as attempted indiscriminate killing because any “attempted” indiscriminate killing already constitutes the completed offence of indiscriminate killing.

13.– Above all moreover, where the aggravating circumstance of repeated reoffending also obtains, the statutory sentence of life imprisonment is not only “fixed” but is also “mandatory” precisely due to the prohibition laid down by the contested provision on finding that mitigating circumstances prevail over aggravating circumstances.

On the other hand, were that prohibition not to apply, assuming that the court were to find the mitigating circumstances to prevail, the penalty could be set within a range extending from a minimum (twenty years’ imprisonment) to a maximum (twenty-four years) pursuant to Article 65 of the Criminal Code, and could thus be calibrated.

As has been held on various occasions in the case law of the Constitutional Court, a fixed sentence is *prima facie* unconstitutional by virtue of this fact alone (Judgments No 222/2018, No 50/1980, No 104/1968 and No 67/1963 and, in relation to incidental administrative sanctions, Judgments No 246/2022 and No 88/2019). This cannot fail to be the case, *a fortiori*, where the court is required to impose a life sentence as a “fixed” and “mandatory” sentence.

In particular, this Court stressed in Judgment No 185/2021 – after reiterating that the fixed nature of the sentence prevents any difference in the actual seriousness of the individual offences from being taken into account – that “this Court for some time has noted how the ‘mobility’ (Judgment No 67/1963) or ‘individual determination’ (Judgment No 104/1968) of punishment – by vesting the court with a margin of appreciation in setting the sentence, within a range specified by law, thereby adapting it to the particular circumstances of the specific individual case – amounts to the ‘natural implementation and development of constitutional principles, including both general principles (principle of equality) and principles relating specifically to criminal law’ (Judgment No 50/1980), in the light of which ‘the implementation of a restorative distributive justice calls for differentiation more than uniformity’ (see again Judgment No 104/1968)”.

This implies that, as a matter of principle, the provision for inflexible sentences does not appear to be consistent with the “constitutional face” of the system of criminal law. Such sentences can only be justified on condition that, “taking account of the nature of the offence punished and the level of the sanction imposed, the sanction appears to be reasonably ‘proportionate’ with the overall range of conduct that can be classified under the specific type of offence” (Judgments No 222/2018 and No 50/1980).

It cannot be said that a sentence commensurate with the criminal conduct has been assured, in terms of the “mobility of the sentence” (Judgment No 50/1980), if the same identical sentence is imposed in relation to acts that, whilst constituting a completed offence, differ on an objective level in the sense that the criminal activity progressed to a different stage.

This requirement is even more compelling in offences involving attacks, which qualify as offences committed in advance of their effects. These offences punish conduct aimed at achieving a particular outcome, although it is not necessary for that outcome to be achieved in order for the offence to be punishable.

In this regard, it may also be recalled that this Court has previously held (Judgment No 26/1979) with reference to the statutory sentence of life imprisonment, which was provided for in the past for the offence of assault resulting in the attempted or actual murder of a superior (Article 186(1) of Royal Decree No 303 of 20 February 1941 laying down “Military peacetime and wartime military codes”, as in force at the relevant time), that “the provisions that subject the attempted offence and the completed offence to the same criminal penalty still constitute something of an exception from the principles that inspire Italian law”. The Court accordingly declared that provision unconstitutional with regard solely to the phrase “attempted or”, which thus resulted in the application of the ordinary criminal rules on the offence of attempted murder.

Ultimately, where the aggravating circumstance of repeated reoffending also obtains in relation to offences punished by the statutory sentence of life imprisonment, and where the contested prohibition on finding that mitigating circumstances prevail over aggravating circumstances applies, the sentence of life imprisonment becomes the only available sentence, and thus “fixed” and “mandatory”.

14.– As a result of the prohibition on finding that mitigating circumstances prevail over the aggravating circumstance of repeated reoffending, the fixed nature of a life sentence also gives rise to unjustifiably less favourable treatment for the offender.

As a general rule, if they are deemed to be equivalent to the aggravating circumstance of repeated reoffending (a finding which it is open to the court to make even where the contested prohibition on finding that mitigating circumstances prevail over aggravating circumstances applies), mitigating circumstances at the very least have the effect of precluding any increase in the sentence on account of the reoffending. However, this effect cannot be achieved for a life sentence, which cannot be rendered more severe on account of repeated reoffending as it is already perpetual in duration.

Where the rules governing “privileged circumstances” apply – whether they are “weakly privileged” (prohibition on finding that mitigating circumstances prevail over aggravating circumstances) or “strongly privileged” (prohibition on balancing) – mitigating circumstances nonetheless affect the sentence (Court of Cassation, Joint Criminal Divisions, Judgment No 42414 of 29 April-18 November 2021). Indeed, even in the event that a prohibition on balancing applies, Article 69-*bis* of the Criminal Code provides that “any reductions in sentence shall be applied to the sentence as resulting from the increase on account of the above-mentioned aggravating circumstances”, i.e. “privileged” aggravating circumstances.

On the contrary, in the event that a fixed statutory sentence of life imprisonment applies, all mitigating circumstances are *de facto* “sterilised” by the parallel subsistence of repeated reoffending precisely as a result of the contested prohibition on finding that mitigating circumstances prevail over aggravating circumstances. As such, they do not even have the effect of offsetting any increase in the sentence on account of the

aggravating circumstance of repeated reoffending, which in itself cannot occur on account of the perpetual nature of the life sentence. This amounts to less favourable treatment, which violates the principle of equality.

Moreover, *mutatis mutandis*, the “privileged” regime involving the circumstances provided for under Article 270-*bis*.1 of the Criminal Code, paragraph 2 of which lays down a prohibition on finding that mitigating circumstances prevail over aggravating circumstances, which is not dissimilar to that challenged in these proceedings, in relation to offences committed for the purpose of terrorism or subverting the democratic order, refers expressly, in the first paragraph, to offences punishable by sentence other than a life sentence.

15.– In conclusion – in order to ensure that the sentence is constitutional with reference to all of the parameters invoked (Articles 3(1), 25(2) and 27(3) of the Constitution) – on account of the fixed nature of the statutory sentence of life imprisonment, which is aggravated in terms of its severity in that it is the strictest sentence in absolute terms, being perpetual at the time it is imposed and markedly more severe than the sentence that could be imposed for the same offence if characterised by a mitigating circumstances, there cannot be any prohibition, in any case involving repeated reoffending, on the ordinary balancing of any mitigating circumstances. If there are no aggravating circumstances or if these mitigating circumstances are deemed by the court to prevail over any aggravating circumstances, the life sentence must be replaced by a term of imprisonment of between twenty and twenty-four years (Article 65 of the Criminal Code).

16.– The Court finds that the violation by the contested provision of all of the constitutional provisions invoked by the referring court covers not only the offence provided for under Article 285 of the Criminal Code, which is punished by a statutory life sentence, considered in relation to the mitigating circumstance provided for under Article 311 of the Code, which the referring court considers there are grounds to apply, but also applies in relation to any other mitigating circumstance, including the generic mitigating circumstances provided for under Article 62-*bis* of the Criminal Code, and in relation to all other offences punished in the same manner, namely by a statutory, fixed life sentence (such as those referred to above in section 3) where the prohibition on finding that mitigating circumstances prevail over aggravating circumstances also applies.

The contested provision and the violations identified of the above-mentioned provisions are in fact the same (see, by analogy, Judgment No 156/2020).

Article 69(4) of the Criminal Code must therefore be declared unconstitutional to the extent that it imposes a prohibition on finding that mitigating circumstances prevail over the aggravating circumstance of repeated reoffending provided for under Article 99(4) of the Criminal Code, in respect of offences punished by the statutory sentence of life imprisonment.

As a result of this declaration of unconstitutionality, when computing the sentence in the event of the conviction of a reoffender pursuant to Article 99(4) of the Criminal Code who has been charged with one of the above-mentioned offences, the court may carry out the ordinary balancing operation provided for under Article 69 of the Criminal Code applicable in cases involving both mitigating and aggravating circumstances, and may therefore conclude that the mitigating circumstances prevail over the aggravating circumstance of repeated reoffending (second paragraph), or that the respective

circumstances have equivalent effect (third paragraph), or even that the latter prevail over the former (first paragraph).

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares that Article 69(4) of the Criminal Code, as amended by Article 3 of Law No 251 of 5 December 2005 (Amendments to the Criminal Code and to Law No 354 of 26 July 1975 on generic mitigating circumstances, re-offending, assessment of the subsistence of constituent elements of the offence for re-offenders, usury and limitation periods) is unconstitutional to the extent that it imposes a prohibition on finding that mitigating circumstances prevail over the aggravating circumstance of repeated reoffending provided for under Article 99(4) of the Criminal Code in respect of offences punished by the statutory sentence of life imprisonment.

Decided in Rome at the seat of the Constitutional Court, Palazzo della Consulta, on 18 April 2023.

Signed:

Silvana SCIARRA, President

Giovanni AMOROSO, Judge Rapporteur