

JUDGMENT NO. 172 YEAR 2014

In this case the Court heard a reference objecting that the definition of stalking under the Criminal Code was not sufficiently precise in order to render the offence determinable. The Court rejected the question, holding that “the fact that ... the legislator used a synthetic formulation of the provision creating the offence ... and did not by contrast adopt an analytical technique for specifying the conduct sanctioned, does not in itself entail a deficiency consisting in indeterminacy, provided that a clear, intelligible and precise meaning of the provision can be ascertained through an integrated, systematic and teleological interpretation”.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 612-bis of the Criminal Code, initiated by the Alcamo local division of the *Tribunale di Trapani* in criminal proceedings pending against M.S. by the referral order filed on 24 June 2013, registered as no. 284 in the Register of Referral Orders 2013 and published in the Official Journal of the Republic no. 3, first special series 2014.

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

Having heard the Judge Rapporteur Marta Cartabia in chambers on 7 May 2014.

[omitted]

Conclusions on points of law

1.– By the referral order filed on 24 June 2013 (no. 284 of 2013), the Alcamo local division of the *Tribunale di Trapani* raised a question concerning the constitutionality of Article 612-bis of the Criminal Code due to a violation of the principle enshrined in Article 25(2) of the Constitution that criminal offences must be determinable.

In particular, the referring court complains that the legislator did not state with sufficient precision the minimum duration of intrusive conduct which is necessary and sufficient in order for the harassment to be deemed relevant under criminal law.

In addition, the concept of an “enduring and serious state of anxiety or fear” defining one of the alternative constituent events of the offence is claimed to be excessively vague.

Furthermore, the criteria necessary in order to establish when the fear engendered in the victim must be deemed to be “substantiated” for the purposes of the offence is likewise claimed to be indefinite.

Finally, the concept of “lifestyle habits”, the alteration of which is required in order for the offence to be committed, is asserted to be excessively broad and elastic.

2.– As a preliminary matter, it must be pointed out that, after the referral order was filed, the contested Article 612-bis of the Criminal Code was amended by Article 1-bis(1) of Decree-Law no. 78 of 1 July 2013 (Urgent provisions concerning the enforcement of sentences), converted with amendments into Article 1(1) of Law no. 94 of 9 August 2013, which increased the maximum sentence from four years’ imprisonment to five years’ imprisonment. Furthermore, Article 1(3)(a) of Decree-Law no. 93 of 14 August 2013 (Urgent provisions concerning public safety and to combat gender-based violence and concerning civil protection and the administration of provinces by special commissioners), converted with amendments into Article 1(1) of Law no. 119 of 15 October 2013, amended the aggravating circumstance provided for under Article 612-bis(2) of the Criminal Code, providing that the penalty was to be increased also in situations in which the offence was committed using computers or electronic devices, clarifying that the aggravating circumstance would also subsist in the event that the person concerned is currently associated with the victim by a sentimental relationship (whilst the text previously in force referred to acts committed by a person who “has been” associated with the victim). Finally, Article 1(3)(b) of Decree-Law no. 93 of 2013, converted with amendments into Article 1(1) of Law no. 119 of 2013, amended Article 612-bis(4) of the Criminal Code, which governs the procedural prerequisites for the prosecution of the offence, stipulating that in the event that the offence may be prosecuted only if charges are pressed, the withdrawal of a complaint will only have procedural effect and that a complaint cannot be withdrawn when the offence committed involved the repetition of aggravated threats.

It must moreover be observed that the aforementioned *ius superveniens* had an effect on parts of Article 612-bis of the Criminal Code concerning sentencing,

aggravating circumstances and the rule that the offence may only be prosecuted if charges are pressed, without in the slightest altering the description of the underlying offence - which alone the referring court considers to be indeterminate, complaining solely that it violates Article 25(2) of the Constitution, which is relevant in the proceedings before the referring court.

Accordingly, these amendments do not relate to the aspects of the contested provision that the referring court has objected to as indeterminate. Consequently, it must be concluded that there is no need to remit the case file in these proceedings because, amongst other things, as this Court has already held, “unless it is justified by the need to assess once again the continuing relevance of the proceedings before the lower court and to establish that the question previously raised is still not manifestly unfounded, any remittal of the case file to the referring court could lead - in clear breach of the principle of the efficacy of judicial relief, which cannot be detached from its timely operation - to a needless prolongation of the duration of the proceedings before the referring court, which have been stayed on two occasions following the reference of an interlocutory question to the Constitutional Court, as well as duplicated proceedings before the Constitutional Court, entailing a risk of the violation of the principle of the reasonable duration of trials enshrined in Article 111 of the Constitution” (see judgment no. 186 of 2013).

3 – On the merits, this Court is required to consider whether Article 612-bis of the Criminal Code – which punishes “any person who, through repeated actions, threatens or harasses another person in such a manner as to cause an enduring and serious state of anxiety or fear or to create a well-founded concern for his or her personal safety or that of a close relative or of a person associated with the victim by a sentimental relationship or as to force the latter to alter his or her lifestyle habits” – complies with the principle that criminal offences must be determinate, which is guaranteed under Article 25(2) of the Constitution.

The question is unfounded.

Indeed, the case law of the Constitutional Court has clarified that, when verifying compliance with the principle that criminal offences must be determinate, “it is necessary not only to assess in isolation the individual description of the offence, but rather to link it with other constituent elements of the offence and with the legislation

against the backdrop of which it is enacted” (see most recently Judgment no. 282 of 2010).

Therefore, the assessment must be carried out according to an integrated and systematic method of interpretation and must be aimed at establishing, on the one hand, that the offence can be understood with reference to its linguistic formulation, and on the other hand that the conduct described by the provision creating the offence can be verified within the reality of social behaviour. In fact, as noted above, since Judgment no. 96 of 1981 was adopted, “the wording of Article 25 of the Constitution, which expressly requires the legislator to formulate provisions that are conceptually precise in terms of their semantic clarity and the intelligibility of the terms used, must logically include also an implicit requirement to formulate scenarios that express situations corresponding to reality”.

4.– In view of the above considerations concerning the scope of the parameter of constitutional law invoked by the referring court and the method which must be followed in order to establish compliance with it, it must be noted that the offence provided for under Article 612-bis of the Criminal Code amounts to a more specific formulation of threatening conduct or harassment, which has already been covered by Articles 612 and 660 of the Criminal Code since its enactment. The long tradition of application of those offences in the courts on the one hand facilitates the interpretation of the provision submitted for review and on the other hand is testimony to the fact that the legislative description reflects behaviour which may effectively be encountered (and is in fact encountered) within everyday social reality.

In fact, threatening conduct not only constitutes a criminal offence on various grounds – consider for example “private violence” [assault with the aim of achieving an act or omission on the part of the victim] under Article 610 of the Criminal Code, robbery under Article 628 of the Criminal Code or extortion under Article 629 of the Criminal Code – but is also specifically punished by Article 612 of the Criminal Code and, according to the traditional and consolidated interpretation of that provision, which fully reflects the term’s meaning in ordinary language, consists in the suggestion of future harm. On the other hand, again according to a common sense view, harassment means altering in an annoying or inappropriate manner the psychological equilibrium of

a normal person. This is essentially the meaning evoked by Article 660 of the Criminal Code, which refers to harassment in order to define the result of a form of conduct.

4.1.– More recently – in enacting Article 7 of Decree-Law no. 11 of 23 February 2009 (Urgent provisions concerning public safety, the combating of gender-based violence and harassment), converted with amendments into Article 1(1) of Law no. 38 of 23 April 2009 – with the aim of filling a gap in the protection provided for acts of harassment with molesting and invasive effects on the lives of other persons, the victims of which are predominantly but not exclusively women, Article 612-bis was introduced into the Criminal Code, which provides for a self-standing and more serious offence, in line with the provisions of numerous foreign legal systems and the requirement now imposed on the Italian state under international law, including specifically Article 34 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), ratified and implemented in Italy by Articles 1 and 2 of Law no. 77 of 27 June 2013 (Ratification and implementation of the Council of Europe Convention on preventing and combating violence against women and domestic violence, done in Istanbul on 11 May 2011). In creating the specific offence provided for under Article 612-bis of the Criminal Code, the legislator further specified the threatening conduct or harassment, stipulating that it must be repeated and liable to cause at least one of the events specified in the text of the law (state of anxiety or fear, concern for personal safety and change in lifestyle habits). This further specification is intended to identify specific forms of molestation characterised by a predatory stance towards the victim, which is powerfully expressed by the English term “stalking” usually employed to describe this criminal conduct. The distinctive features which distinguish the threats and harassment in these cases expose the victim to consequences in his or her emotional life (state of anxiety and fear or concern for personal safety) as well as in everyday life (change in lifestyle habits), which constitute events designated by the legislator precisely with the aim of better circumscribing the new area of unlawful conduct, which is characterised by harm greater than that resulting from generic threats and harassment, thereby justifying a more severe response by the criminal law.

Once again, it must be remembered that “living law” (i.e. uniform and settled case law) has now become established which classifies the offence provided for under

Article 612-bis of the Criminal Code as an event-based offence based on habitual conduct, the commission of which requires repeated conduct that is likely to cause one of the consequences described for the victim and, as far as the psychological element is concerned, requires only generic wilful wrongdoing, in addition to the intention to engage in threats and harassment notwithstanding the awareness that they are likely to bring about at least one of the events specified under the provision creating the offence (see *inter alia*, Court of Cassation, fifth criminal division, judgments no. 20993 and no. 7544 of 2012).

This confirms what is already evident from the wording of the legislation creating the offence, i.e. that the offence provided for under Article 612-bis of the Criminal Code does not in any way reduce the precision of the offence with regard to harassment or threats, of which it constitutes a specific expression.

4.2.– The fact that, in defining the conduct and events, the legislator used a synthetic formulation of the provision creating the offence – as occurs moreover in most of the countries that have adopted so-called “anti-stalking” legislation – and did not by contrast adopt an analytical technique for specifying the conduct sanctioned, does not in itself entail a deficiency consisting in indeterminacy, provided that a clear, intelligible and precise meaning of the provision can be ascertained through an integrated, systematic and purposive interpretation. Besides, even within a legal system such as the German legal system, in which a choice has been made to enumerate the instances of persecutory behaviour that may be classed as “stalking” (“*Nachstellung*”), the list is not a closed list, but includes a catch-all clause “by way of explicit analogy”, which brings within the parameter of criminal relevance not only the conduct typified in detail but also any “other equivalent conduct” (“*eine andere vergleichbare Handlung*”, see § 238(1) of the German Criminal Code).

However, as has already been asserted by this Court, the constitutional requirement that criminal offences must be determinate laid down by Article 25(2) of the Constitution does not necessarily coincide with the fact as to whether it is more or less descriptive, as the provision creating the offence may indeed use a technique involving the provision of examples (see Judgments no. 79 of 1982, no. 120 of 1963 and no. 27 of 1961), or refer to commonplace extra-judicial concepts (see Judgments no. 42 of 1972, no. 191 of 1970), or yet again to facts of common or specialist experience (see

Judgment no. 126 of 1971). The principle that criminal offences must be determinate does not in fact preclude the admissibility of elastic formulations, which the legislator must not infrequently adopt given the “practical impossibility in listing in detail all situations theoretically capable of ‘justifying’ the failure to comply with the rule, the validity of which is adequately established by the aim of the criminal offence and the legislative framework within which it was enacted” (see Judgments no. 302 and no. 5 of 2004).

5.– As regards the various elements, the combination of which constitute the offence provided for under Article 612-bis of the Criminal Code, which has now been brought before the Court for examination, the first significant element is the repetition of threatening conduct or harassment that is liable either to cause an “enduring and serious state of anxiety or fear” or alternatively to engender a “well-founded concern for his or her personal safety or that of a close relative or of a person associated with the victim” or to force the victim to alter “his or her lifestyle habits”.

The concept of “repetition” used by the provision creating the criminal offence clarifies succinctly that at least two episodes involving threats or harassment are necessary. However, this is not sufficient as they must also be capable of causing one of the three alternative events specified by the provision creating the criminal offence. Such an evaluation must be carried out on the facts by the court examining the specific individual case brought before it and taking account of the fact that, as has been repeatedly held in the case law of the Court of Cassation (see *inter alia*, Court of Cassation, fifth criminal division, judgments no. 46331 of 2013 and no. 6417 of 2010), it is not sufficient simply that one of the events provided for under the criminal law provision occur, or that the conduct is theoretically capable of causing it, but it is rather necessary to demonstrate the causal link between the perpetrator’s conduct and the disruptions caused to the victim’s private life.

As regards the “enduring and serious state of anxiety or fear” and the “well-founded concern for ... personal safety”, since these are events that relate to the emotional and psychological sphere, they must be ascertained through a close observation of behavioural signs and indications, which may be inferred from a comparison between the previous circumstances and those resulting from the conduct of the perpetrator, which are indicative of an appreciable destabilisation of the peace of mind and

psychological equilibrium of the victim. In this regard moreover, the case law of the Court of Cassation (see *inter alia*, Court of Cassation, fifth criminal division, judgment no. 14391 of 2012) has specified that evidence of the state of anxiety and fear may and must be anchored in symptomatic elements that point to genuine psychological disruption, which may be inferred from the declarations made by the victim of the offence him- or herself, his or her behaviour resulting from the conduct of the perpetrator, as well as the individual circumstances of the victim, provided that these are known to the perpetrator, as such necessarily falling within the object of wilful wrongdoing. Therefore, it has also been demonstrated in this sense that, whilst the text of the legislation contained in Article 612-bis of the Criminal Code requires a careful consideration of the information relating to behaviour and experience, it permits the court to ascertain with reasonable certainty whether the phenomena described thereunder have occurred, and accordingly is not flawed by indeterminacy within the meaning of Article 25(2) of the Constitution.

Moreover, the use of the adjectives “serious and enduring” with reference to the state of anxiety or fear and “well-founded” with reference to concerns for personal safety has the effect of further circumscribing the scope of the criminal offence, such that episodes of anxiety of minor importance both in terms of their duration and of their impact on the victim, as well as imaginary or entirely fanciful fears on the part of the victim, must be regarded as irrelevant. In this last regard, it must be recalled that it is for the courts to reconstruct and delineate the typical scope of conduct relevant under the criminal law on the basis of ordinary canons of interpretation, in particular in the light of the principle of harm which, according to the settled case law of this Court, is the only accepted canon of interpretation (see *inter alia*, Judgments no. 139 of 2014 and no. 62 of 1986).

Finally, the reference contained in the legislation to lifestyle habits amounts to a clear and verifiable reference to the overall behaviour which a person usually pursues within the family, social and working environment, which the victim is forced to change following the intrusion caused by the persecutory activity, of which change the perpetrator must have been aware and have taken into account, as the offence is only punishable in cases involving wilful wrongdoing.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

rules that the question concerning the constitutionality of Article 612-bis of the Criminal Code, raised with reference to Article 25(2) of the Constitution by the Alcamo local division of the *Tribunale di Trapani* by the referral order mentioned in the headnote, is unfounded.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 11 June 2014.