JUDGMENT NO. 28 OF 2022

The referring court challenged a provision establishing that the amount of the fine replacing short custodial sentences cannot be below 250 € per day, arguing that such a provision could lead to the imposition of disproportionately harsh penalties for offenders of limited financial means.

The Constitutional Court struck down the provision, holding it to be incompatible with the principle of equality enshrined in Article 3 of the Constitution, as well as the principle of proportionality of penalty based on Articles 3 and 27(3) of the Constitution, which the Court considered applicable also to financial penalties. In this respect, the Court underlined that the offender's financial means are an important factor to consider when assessing the severity of a fine and its proportionality to the seriousness of the offence.

The Court held that applying the impugned provision led to the imposition of fines that are much higher than what most people in Italy today can afford to pay based on their income and assets. This ends up "transforming the fine in lieu of prison into a privilege for wealthy offenders alone", in clear breach not only of the principle of the proportionality of penalties but also of the equality principle.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 53(2) of Law No. 689 of 24 November 1981 (Amendments to the Criminal System), initiated by […] the Judge for Preliminary Investigations of the Ordinary Court of Taranto with the referral order of 14 April 2021, registered as Case […] No. 129 of the 2021 Register of Referral Orders respectively, published in *Official Journal* of the Republic No. 51, first special series, 2020, and No. 37, first special series, 2021.

having regard to the entry of appearance filed by the President of the Council of Ministers;

after hearing Judge-Rapporteur Francesco Viganò at the public hearing of 12 January 2022;

after deliberation in chambers on 12 January 2022.

The facts of the case

[omitted]

Conclusions on points of law

[…]

2.– With the referral order of 14 April 2021, registered as No. 129 in the 2021 Register of Referral Orders, the Judge for Preliminary Investigations of the Ordinary Court of Taranto [...] raised questions as to the constitutionality of Art. 53(2) of Law No. 689 of 1981, "insofar as the provision states that, in determining the amount of the pecuniary penalty in lieu of a custodial sentence under six months, the Court shall fix the minimum daily equivalent value of one day in prison at the figure established in Article 135 of the Criminal Code, namely EUR 250.00, rather than the lower figure of EUR 75.00 laid down in Article 459(l-bis) of the Code of Criminal Procedure". According to the referral order, the provision conflicts with Articles 3(2), 27(3), and Article 117(1) of the Constitution, relating to Article 49(3) of the Charter of Fundamental Rights of the European Union (CFR).

In the alternative solution, the Article is disputed with regard to the same Constitutional provisions insofar as "it does not allow a Court [...] to adjust the minimum pecuniary penalty as provided for under Article 133-bis of the Criminal Code when determining the amount of the pecuniary penalty in lieu of a custodial sentence of less than six months".

[…]

6.– With reference to Articles 3(2) and 27(3) of the Constitution, the questions raised by the referring court concerning the excessive amount of this minimum figure are well-founded.

6.1.– According to the established case law of this Court (for a more complete summary, see Judgment No. 112, 2019) concerning Article 3, read in conjunction with Article 27(3) of the Constitution, the legislator enjoys a broad margin of discretion when determining the penalties for criminal offences. However, this margin is overstepped when the severity of the penalty is manifestly disproportionate, both in comparison with those envisaged for other types of offences (Judgments No. 88 of 2019, No. 68 of 2012, No. 409 of 1989, No. 218 of 1974) and with regard to the intrinsic seriousness of the conduct constituting a specific crime (Judgments No. 136 and 73 of 2020, No. 284 and 40 of 2019, No. 222 of 2018, No. 236 of 2016, and No. 341 of 1994). This implies, more specifically, that the severity of the penalty imposed by the legislator must not be manifestly disproportionate to the objective and subjective seriousness of the offence. This happens, in particular, when the legislator sets too high a limit for the minimum penalty, thus obliging judges to impose punishment that may, in some cases, be manifestly excessive in relation to the seriousness of the offence.

6.2.– The same principle must apply to criminal fines, which are, to all intents and purposes, criminal penalties.

A caveat is, however, necessary in this respect.

As this Court has already observed in its Judgment No. 131 of 1979, custodial sentences impinge on personal freedom, which is "the primary good possessed by every human being". By contrast, pecuniary penalties affect property, a good that is "not naturally inherent to the human person". A fine "entails the problem of unequal suffering or the impossibility of applying it, depending on the different financial situations of the individuals concerned". Thus, while the impact of prison sentences of equal duration may, in principle, be assumed to be the same for all sentenced persons, this is not true of pecuniary penalties: the same fine may have a greater or lesser impact, depending on the income and assets of the sentenced person in question. Hence, the Court went on, many contemporary legislators had sought "remedies to safeguard the efficacy and equivalent effects of pecuniary penalties by taking into consideration the diversity of offenders' financial situations".

As the referring court today points out, this adjustment necessarily stems from the principle of equality, which requires the State to remove the financial and social obstacles that *de facto* limit the freedom and equality of citizens (Art. 3(2) of the Constitution). From the point of view of "substantial" rather than merely "formal" equality, the assessment that this Court is called upon to carry out on the manifestly disproportionate nature of pecuniary penalties must consider the real impact that the same fine would have on different people. This varying impact must be "compensated for" by applying one of the remedies referred to in Judgment No. 131 of 1979. Thus, when establishing the amount of a fine, courts must consider the offender's financial means in addition to the objective and subjective seriousness of the offence (from a comparative point of view,

see Supreme Court of Canada, Judgment of 14 December 2018, *Regina v. Boudreault*, 3 SCR 599 on the constitutionality of pecuniary penalties that may be grossly disproportionate to the actual financial situation of individual offenders).

This requirement underpins Art. 133-bis of the Criminal Code in the Italian legal system. The first paragraph requires courts to consider the offender's financial situation when determining the fine to be imposed. The second paragraph allows the court to increase the penalty by up to three times the statutory maximum and to reduce the minimum by up to a third when it deems "the maximum to be ineffective or the minimum to be excessively burdensome". Similarly, concerning administrative pecuniary sanctions, Art. 11 of Law No. 689 of 1981 provides that, when setting penalties, courts must take into account not only the seriousness of the infraction and anything the offender has done to eliminate or lessen its consequences, but also the offender's character and financial means. On the other hand, for crimes against the financial markets – subject to possibly substantial punitive pecuniary sanctions – Article 194-bis of Legislative Decree No. 58 of 24 February 1998 (Consolidated Law on Financial Intermediation, under Articles 8 and 21 of Law No. 52 of 6 February 1996) likewise provides that the fine must take into account, among other things, the "financial situation of the person responsible for the unlawful act".

As previously observed in Judgment No. 131 of 1979, many foreign jurisdictions – seeking to ensure greater "substantial" equality – have largely adopted the so-called day-fine system, in which the process of establishing a fine takes place in two steps. In the first step, based on the objective and subjective seriousness of the offence, the court establishes the number of day-fines the offender has to pay. In the second step, the court sets the amount of each day-fine based on the offender's financial situation, in particular the portion of daily income that he or she is presumed to be reasonably able to pay, also taking into account the value of his or her assets (e.g., Art. 131-5 of the French Criminal Code, para 40 of the German Criminal Code, para 19 of the Austrian Criminal Code, Art. 50 of the Spanish Criminal Code, Art. 47 of the Portuguese Criminal Code).

6.3.– The provision under examination is also inspired by the day-fine model. It states that the court must identify the "daily amount the defendant may be expected to pay for each day in lieu of a custodial sentence", taking into account "the overall financial situation of the defendant and his or her household". However, it also lays down that this daily amount cannot be less than the figure indicated in Article 135 of the Criminal Code, which, after the amendments introduced by Law No. 94 of 2009, stands at 250 euros. This minimum is currently understood as mandatory since it may no longer be reduced by up to a third as was previously possible under Article 133-bis of the Criminal Code. The latter option was removed from the wording of the disputed provision as a consequence of the amendments introduced by Law No. 134 of 2003.

Now, a daily rate of 250 euros is clearly much higher than what most people in this country today can afford to pay based on their income and assets. When multiplied by the number of days of detention to be accounted for, this rate proves highly burdensome for many people. Suffice it to consider, for example – as previously observed in Judgment No. 15 of 2020 – that "the statutory minimum term of jail time, set by Article 23 of the Criminal Code at fifteen days, would currently be replaced by a fine of at least 3,750 euros, while the equivalent of six months in prison (the maximum limit for which Article 53(2) of Law No. 689 of 1981 may be applied) would give rise to a fine of not less than 45,000 euros".

The case under consideration in the main proceedings clearly demonstrates how harsh the punishment imposed by the disputed provision is. For a modest offence, such as parking a vehicle close to the entrance to the injured party's home, thus preventing them from using their car, replacing the sentence of three months' imprisonment – a sentence agreed by the parties and deemed appropriate by the court – would lead to the imposition of a substitute fine of no less than 22,500 euros. Such a sum, as the referring judge remarks, based on the documentation produced by the defendant, is substantially equal to their entire declared income for 2020.

As already observed in Judgment No. 15 of 2020, such a high daily equivalent rate "has brought about, in practice, a drastic reduction in recourse to substitutive fines, which, in 1981, the legislator – wholly in line with the logic of Art. 27(3) of the Constitution – conceived as a valuable tool to prevent those sentenced for moderate offences from serving prison sentences that are too short to set up a real rehabilitation programme but have serious consequences for the offender's familiar, social, and working conditions". At the same time, the challenged provision ended up "transforming the fine in lieu of prison into a privilege for wealthy offenders alone", which is incompatible with Article 3 of the Constitution.

6.4.– Similar considerations underlie the criterion established by Article 1(17)(l) of Law No. 134 of 27 September 2021, which requires the Government to establish that the minimum daily sum that the sentenced person will have to pay in lieu of serving a prison sentence must be "independent of the figure stated in Article 135 of the Criminal Code". This would "prevent the substitute penalty bearing excessively on the finances of the sentenced person and his or her household, enabling the court to adapt the substitute penalty to the financial and living conditions of the sentenced person".

7.– Two years on from Judgement No. 15 of 2020, referred to several times here, this Court is now called upon to remedy the constitutional violations that have emerged. The mere annulment of the challenged provision would make it impossible to replace prison sentences with pecuniary penalties. This would undermine the ability of an important instrument – albeit currently underused precisely because of the inadequacy of the challenged rule – to "keep the deprivation of liberty and the suffering inflicted on a human being to the 'minimum necessary'" (Judgment No. 179 of 2017). The elimination of the provision would thus lead to an "unsustainable lack of protection" of important constitutional interests (Judgment No. 185 of 2021 and Judgment No. 222 of 2018).

It is therefore necessary to find already existing rules, which would make it possible to remedy, at least provisionally, the breaches of constitutionality while ensuring the ongoing availability of fines in lieu of a prison sentence.

In this regard, the Court can only resort to the solution – suggested in the referral – of replacing the 250 euros minimum fine with a new one of 75 euros for each day substituting the custodial sentence, as established in Article 459(1-bis), of the Code of Criminal Procedure with regard to orders of summary punishments (*decreto penale di condanna*). In practical terms, the outcome would differ little from that – proposed as a possible alternative in the referral order – of restoring the possibility for a judge to reduce the minimum fine by up to one third, as envisaged in general terms in Article 133-bis(2) of the Criminal Code (which would result in setting the minimum daily figure at approximately 83 euros).

On the other hand, there is no need – and the referring court makes no such request – for any amendment to the maximum daily figure, which must continue – as established by Parliament – to be ten times the figure set in Article 135 of the Criminal Code, which

today amounts to 2,500 euros. This would make it possible to maintain a difference between the ordinary substitution of a custodial sentence with a fine, as regulated by the challenged provision, and the special penalty envisaged in Article 459(1-bis) of the Code of Criminal Proceedings on the subject of the order of summary judgment, which establishes a maximum daily value equal to three times the sum of 75 euros (i.e., 225 euros).

In conclusion, the challenged provision must be declared unconstitutional insofar as, in the fourth sentence, it states that "[t]he daily figure cannot be less than the sum indicated in Art. 135 of the Criminal Code and may not exceed ten times that amount", instead of "[t]he daily figure cannot be less than EUR 75 and may not exceed ten times the sum indicated in Art. 135 of the Criminal Code".

8.– Clearly, it is always possible that, in exercising the above-mentioned delegated power set forth in Law No. 134 of 2021, other solutions may be found. These may even be better suited to ensuring that the substitution of a custodial sentence by a pecuniary penalty is regulated in accordance with the constitutional principles mentioned above.

And, in a more general sense, there is still a pressing need – repeatedly remarked on by this Court – for legislative intervention to restore the effectiveness of the pecuniary penalty, in particular by reforming the current mechanisms of compulsory execution and conversion into punishments limiting personal freedom (Judgment No. 279 of 2019). This must be carried out "in the awareness that only a regulation of the pecuniary penalty to make sure that it fits the seriousness of the offence and the financial situation of the offender, while at the same time ensuring its payment, can constitute a serious alternative to a custodial sentence, as is the case in many other legal systems today" (Judgment No. 15 of 2020).

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

[…]

1) *Declares* Article 53(2) of Law No. 689 of 24 November 1981 (Amendments to the Criminal System) unconstitutional insofar as it provides that "[t]he daily figure cannot be less than the sum indicated in Art. 135 of the Criminal Code and may not exceed ten times that amount" instead of "[t]he daily figure cannot be less than EUR 75 and may not exceed ten times the sum indicated in Art. 135 of the Criminal Code" [...].

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 12 January 2022.

Signed: Giuliano AMATO, President

Francesco VIGANÒ, Author of the Judgment