

Italian Constitutional Court

Legal summary

Judgment No 46/2024

ECLI:IT:COST:2024:46

THE MINIMUM TERM OF TWO YEARS' IMPRISONMENT FOR EMBEZZLEMENT IS EXCESSIVE

In Judgment No 46/2024, the Constitutional Court held that **the minimum term of two years' imprisonment for the crime of embezzlement is excessive** and replaced it with the general statutory minimum of 15 days.

Two years of imprisonment was found to be a disproportionate punishment for the embezzlement of small amounts and **could not be justified as a deterrent against corruption** since corruption typically involves the misappropriation of larger sums.

Moreover, this minimum term of imprisonment was **four times longer than the minimum term for crimes capable of causing comparable harm, such as theft and fraud**. This disparity resulted in unjustifiable disparity of treatment, providing an additional ground for declaring the term unconstitutional.

Main proceedings

F.F., a real estate agent, received €1,400 from a client to stipulate a rental contract in the client's name. The sum included €700 as a deposit and an equivalent amount as a commission fee. After failing to secure the rental contract, F.F. only returned €500 to the client, an amount that did not even cover the deposit. He was therefore charged with the crime of embezzlement (*appropriazione indebita*) under Article 646 of the Criminal Code (the "**challenged provision**") and was tried before the Florence Criminal Tribunal (the "**referring court**"). The charge included the aggravating circumstance under Article 61(11) of the Criminal Code for committing the crime by abusing a professional relationship with a client (*abuso di prestazione d'opera*). The partial reimbursement could serve as a mitigating circumstance, potentially cancelling out this aggravating factor.

The referring court verified that the misconduct qualified as embezzlement, at least concerning the deposit amount. However, it observed that the challenged provision imposed a mandatory minimum sentence of two years' imprisonment, which it considered excessively harsh for the offence committed – namely, the failure to return €200 from the deposit.

The minimum sentence was increased from the statutory minimum of 15 days to two years' imprisonment with the Law No 3/2019.¹ According to the referring court, this reform aimed to prevent and deter corruption among public officials. Ultimately, the challenged provision

¹ Law No 3/2019 on fighting offences against the State.

prevented courts from imposing proportionate sentences for misconduct that, while criminalised, causes only modest harm.

The referring court stayed the proceedings and referred the matter to the Constitutional Court (the “**Court**”), asserting that the challenged provisions violated the Italian Constitution (**IC**).

Complaints

The referring court argued that the challenged provision established a minimum punishment for embezzlement that was disproportionately harsh in the event of less serious forms of embezzlement. Moreover, compared with the minimum punishment for crimes of similar seriousness, such as theft and fraud (six months), the minimum punishment for embezzlement appeared unreasonable and resulted in disparate treatment.

For these reasons, the challenged provision was deemed to breach **Article 3 IC (Principle of equality and non-discrimination)** and **Article 27(3) IC (Proportionality of criminal punishment)**.

Decision of the Court

The Court ruled that **the challenged provision violated Articles 3 and 27(3) IC**. It held that the minimum sentence of two years’ imprisonment constituted a disproportionate punishment for crimes of lesser gravity. The Court therefore removed the statutory minimum sentence, **restoring the lower limit of 15 days**, which applies by default in the absence of specific provisions.

Reasons for the decision

The Court began by confirming that the legislature has broad discretion in setting criminal policy, including the determination of punishments. However, this discretion cannot result in arbitrariness. **Any legal restriction of fundamental rights must be rationally justified in light of the legislature’s goals, and the means used must not be disproportionate in relation to those legitimate goals**. It is the Court’s role to ensure the proportionality of such restrictions, particularly those arising under criminal law.

The challenged provision was significantly amended in 2019. Until then, it punished embezzlement with imprisonment of up to three years, without a specified minimum. The 2019 amendment changed the range to two to five years. The reasons for this increase were not explicitly stated when the amendment was passed, so the Court examined the parliamentary debates to assess the rationale.

The increase may have been motivated by the goal of combating corruption, as embezzlement can facilitate corruption by permitting the collection of illicit funds used for bribery. While it is reasonable that the legislature might impose **harsher penalties on serious cases of embezzlement to deter corruption, this rationale does not justify the same severity for minor cases**. Minor instances of embezzlement, such as the one for which F.F. was facing trial, cannot possibly have the aim of collecting illicit resources for corruption schemes.

The absence of a plausible justification alone was sufficient to **declare the provision unconstitutional for breaching Articles 3 and 27(3) IC.**

Additionally, the minimum sentence created a **stark disparity in treatment between minor cases of embezzlement and minor cases of theft and fraud.** For equivalent levels of harm (as in this case, involving €200), embezzlement would attract a two-year sentence – four times the minimum for theft or fraud. This discrepancy was particularly unreasonable given the similarity between the two crimes, which often makes it difficult to determine which one applies in a given scenario.

This disproportionality could not be justified by invoking the possibility of sentence reductions or exclusions in specific circumstances. While factors such as the modest harm caused might allow for mitigation or preclusion of liability, and summary trials usually entail a reduction of the applicable sentence, these scenarios apply only under specific conditions that may not always be present. Their potential application does not alter the assessment of disproportionality inherent in the statutory minimum term.

To remedy this, the Court recalled that, when the removal of unconstitutional provisions results in an unsustainable gap in the protection of fundamental rights, it should stipulate specific provisions. Here, **the Court considered it sufficient to eliminate the minimum term from the range of “two to five years,” converting it into “up to five years.”** Without a specified minimum, the general rule establishing a 15-day minimum imprisonment applies.² For this reason, the Court declined the referring court’s invitation to set a six-month minimum aligned with theft and fraud.

Type of proceedings	Constitutional review by referral order
President of the Court	Augusto Antonio Barbera
Judge rapporteur	Francesco Viganò
Composition of the Court	Augusto Antonio Barbera (President), Giulio Prosperetti, Giovanni Amoroso, Francesco Viganò, Luca Antonini, Stefano Petitti, Angelo Buscema, Emanuela Navarretta, Filippo Patroni Griffi, Marco D’Alberti, Giovanni Pitruzzella, Antonella Sciarrone Alibrandi
Delivery of the judgment	22 March 2024
Challenged provisions	Article 646(1) of the Criminal Code

² Criminal Code, Article 23.