LUISS

Dipartimento
Di Giurisprudenza

Cattedra di European Criminal Law

Life Imprisonment and Inhuman treatment in the European context: from the Breivik case to the Viola case

Chiar.mo Prof. Maurizio Bellacosa
RELATORE

Chiar.mo Prof. Antonino Gullo
CORRELATORE

Federica Petrillo
Matr. 135943
CANDIDATO

Anno Accademico 2019/2020

TABLE OF CONTENTS

INTRODUCTION

The abolition of the death penalty at European level[1] has led to an intense debate on certain harsh forms of punishment, in particular on life imprisonment, and the compatibility with human rights principles.

Life imprisonment historically replaced the death penalty, a punishment that for centuries had responded to the need for security from criminal assaults following the perspective of the famous *lex talionis*. The basis of the death penalty was an idea of absolute justice for which the deprivation of life was the only sanction proportionate to certain faults, that was considered too serious to be atoned for in earthly life[2]. The idea that a deserved punishment should be proportionate to the seriousness of the offense goes back to the long-established penal theory of retribution[3]. Life imprisonment follows the same logic: those who have suppressed the life of others (or an asset of equal value) must renounce at least their civil life[4]. The latter responds to the need not only to act as a deterrent to the generality of society, «there is no one who can choose the perpetual loss of their freedom, however advantageous a crime may be»[5], but also to incapacitate the offender, by excluding him permanently from the society. These reflections are linked to the traditional vision of life imprisonment, which conceived this punishment as a truly perpetual imprisonment, without giving the offender any possibility of redemption and therefore liberation.

Among the human rights principles that have led to the abolition of the death penalty there is one of human dignity, recognized to all persons, even those who have committed the most heinous offences. Human dignity coincides with the very essence of the person, it is not acquired through merit and not lost through demerits. This has meant not only that life imprisonment has become increasingly more prominent as a mandatory alternative to the death penalty, but also that the debate

[1] In 1989, the abolition of the death penalty became a mandatory condition for every Council of Europe candidate country. With the adoption of Protocol, no 13, in 2002, the use of the death penalty is prohibited in all circumstances.
[2] CANTARELLA, *I supplizi capitali. Origini e funzioni delle pene di morte in Grecia e a Roma*, Milano, 2005, pp. 311-312.
[3] VAN ZYL SMIT, APPLETON, *Life imprisonment: A Global Human Rights Analysis*, Harvard University Press, 2019, p. 16.
[4] DOLCINI, *La pena detentiva perpetua nell'ordinamento italiano. Appunti e riflessioni*, in *Dir. Pen. Cont. Riv. Trim.*, 3/2018, p. 33.
[5] BECCARIA, *Dei delitti e delle pene*, cap. XXVIII, p. 64.

has shifted to whether life sentences also infringe the human dignity of those subject to them. Whoever is responsible for a crime can be deprived of personal freedom as a punishment, since that person has broken the rules of the community, and therefore can be ousted from the society in order to be reinstated once he has understood the mistake. The loss of hope in a future recovery of one's sociality negatively affects one's dignity[6].

The unrestricted authority to exclude offenders from society for the rest of their lives remains an attractive option for modern States, that are concerned with having some absolute power as an effective means of maintaining order. Even at European level, perpetual punishment is present in the majority of countries but the human rights law challenges States to rid themselves of this power.

In recent years, the case law developed by the European Court of Human Rights (ECtHR or Strasburg Court) has created a system of rights which constitutes a common legal heritage of the Council of Europe member countries, enshrined in the European Convention of Human Rights (ECHR). The Convention system has generated a process of participation between (state and supranational) entities in the protection of fundamental rights, leading to an erosion of the principle that the state legal system has a monopoly on the protection of rights. This system gives each contracting State a mandate to ensure that the rights guaranteed by the Convention are respected. In this context, the role of the Strasburg Court is supplementary. If the national States do not ensure the protection of the rights guaranteed, then the Court intervenes by indicating any shortcomings in the national provisions and remedying them in order to ensure a minimum level of protection[7]. The legislator, the government and the national courts must take into account, in the application of the individual provisions, the evolutionary lines drawn by the Strasbourg bodies, thereby realizing a push towards national "human rights friendly" legislation. This mechanism for the protection of human rights has ensured that these become limits to the exercise of criminal law[8]. Human rights, from principles that must be

[6] SILVESTRI, *Prefazione, in Gli ergastolani senza scampo*, MUSUMECI, PUGIOTTO (a cura di), Napoli, 2016, XI.
[7] ESPOSITO, *Il diritto penale flessibile. Quando i diritti umani incontrano i sistemi penali*, Torino, 2008, p. 16.
[8] See PULITANÒ, *Diritti umani e diritto penale,* in *Il lato oscuro dei diritti umani*, MECCARELLI, PALCHETTI, SOTIS (a cura di), Madrid, 2014, p. 81.

affirmed by law, have rather become principles that are imposed even against the law. The criminal policy choices of individual countries are therefore subject to verification of compliance with the Convention by the ECtHR[9].

In the first chapter of this work, it will be reviewed the path traced by the Strasbourg Court in relation to lifelong prison sentences. First of all, a specific provision in the Convention, namely the prohibition of inhuman or degrading treatment or punishment stipulated in Art. 3 of ECHR will be examined. Then a review of the jurisprudence of the Court will be made, by looking at how the Court has configured hopeless punishment as inhumane treatment, taking into account the core principle of human dignity and the concept of the right to personal development (rehabilitation purpose). This has led to increasing worldwide recognition of a right of all prisoners to be provided with an opportunity to rehabilitate themselves[10]. Specifically, it was questioned whether and how the systems of States parties to the Convention take into account possible changes in the years of a person serving a long-term prison sentence, when assessing the penological grounds for continued enforcement of that sentence[11]. Where the Court found that there was no mechanism to review the sentence of life imprisonment, it ruled that the treatment was inhuman using the expression "life sentence without hope". This position was expressed in the well-known case of *Vinter and Others v. the United Kingdom*, where the Grand Chamber of the European Court of Human Rights concluded that there is now clear support in European and International law for the principle that all detainees, including those serving life imprisonment, should be offered the possibility of rehabilitation and the prospect of release if such rehabilitation is achieved[12].

In this, as in other cases, the Court does not contest the legitimacy of life imprisonment per se, but the risk that the perpetual punishment will deprive the detainee from looking at the future and from any prospect other than the expectation of death during the execution of the sentence. The recognition of hope as a key element in determining whether or not there has been a violation of Article 3 of the

[9] ESPOSITO, *Il diritto penale flessibile,* cit., p. 17.
[10] VAN ZYL SMIT, APPLETON, *Life imprisonment,* cit., p. 298.
[11] PALMA, *Prefazione*, in *Il diritto alla Speranza*, *l'ergastolo nel diritto penale costituzionale,* Torino, 2019, XIII.
[12] ECtHR, GC, *Vinter and Others v. the United Kingdom*, 9 July 2013, para 118-119.

Convention, implies a negative obligation for States, they must not establish regulatory provisions completely preclusive of any form of revision. But also, a positive obligation, i.e. to consider human dignity as a prevailing principle to which any need for justice must be commensurate, to be recognized also to the prisoner sentenced to life imprisonment.

In the second chapter it will be examined the effects that the judgment *Viola v. Italy* n. 2, ruled by the ECtHR on June 2019, had on the Italian legal system, where in addition to the common sentence of life imprisonment, there is a hypothesis of truly perpetual punishment (*ergastolo ostativo*). The question submitted to the Court was the preclusion of access to the institution of conditional release, the only instrument legitimising perpetual punishment in the face of the re-educational purpose of the sentence, for those who have been convicted of a series of crimes considered to be of such particular social alarm as to justify an absolute presumption of dangerousness. First, there will be a reconstruction of the various stages that led to the legitimation of life imprisonment in the Italian legal system and the constant tension with the re-educational purpose, starting from the sentence of the united sections of the Court of Cassation in June 1956 up to Constitutional Court sentence no. 313 in 1990, which paradoxically ruled the legitimacy of the perpetual penalty as long as it cannot be perpetual. Finally, the *Viola* case has brought the spotlight back on a national problem that affects the majority of prisoners sentenced to life imprisonment in Italy, where more than 70% have no right to be paroled since they do not cooperate with justice. Lastly, also the Constitutional Court has ruled on the path traced by the European judge. It is clear from an examination of conventional and constitutional guidelines that the Italian regulatory mechanism contravenes the procedural requirements arising from the prohibition of inhuman and degrading punishment because it generates an endless penalty[13].

The third chapter will examine one of the eight States which are members of the Council of Europe and has abolished the life sentence since 1981: Norway. In particular, it will be dealt with the case of Anders Behring Breivik, who in July 2011 massacred 77 people and was sentenced to the maximum penalty: a prison

[13] MUSUMECI, PUGIOTTO, *Gli Ergastolani senza scampo*, Napoli, 2016, p.123.

sentence of twenty-one years. The latter, like Viola, appealed to the European Court of Human Rights by asserting that his dignity was violated because he was subjected to inhuman treatment during his detention. The Norwegian model can be useful to understand how, even in the case of a such heinous offense, as a terrorist attack can be, the endless punishment (punishment deadline: 31/12/9999)[14] can only be justified from the point of view of a vindictive-justice that uses the endless penalty as a means to ensure exclusively public safety. Security protection that in a context of serious economic hardship and lack of confidence in politics, such as the one we have today, means that criminal law is conceived as an «instrument of order»[15]. The latter is characterized by the pursuit of the most severe penalty, of the most indeterminate incriminating norm in order to restore society.

The examination of the Strasburg Court's case law shows that, despite the wide margin of appreciation of States in criminal matters, the Convention is a limitation of the sovereignty of States in criminal matters. Respect for human rights, guaranteed by the European text, and in particular respect for human dignity, means that any form of punishment that fundamentally infringes human dignity is unacceptable.

[14] On the record of those sentenced to Italian perpetual life imprisonment there was the indication of endless punishment, the technology translated into numerical figures this proposition. The time limit is so far away that it does not exist, translating the perpetuity of this type of life imprisonment. (FASSONE, *Fine pena: ora.,* Palermo, 2015, p. 10.)

[15] In this sense VIOLANTE, *L'infausto emergere del tipo di autore*, in *Questione Giustizia*, n. 1/2019, p. 101.

CHAPTER I

TORTURE, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT: AN INTERNATIONAL OVERVIEW

1. The web of Prohibition: general remarks

In order to better understand how the *sine die* penalty of life imprisonment has been qualified as inhuman and degrading treatment it is necessary to discuss the impact of the human rights movement on debates about punishment in general, before considering life imprisonment in particular.

By the end of the Second World War there has been a growing attention to human rights standards. Increasingly, they have been enshrined in binding international and national legal instruments to be applied to all state actions, including the imposition and enforcement of sanctions[1]. Civil and political rights have thus been crystallised in a number of international instruments with clear punitive implications, to which they tended to make direct reference[2]. Respect for human rights, on one hand, sets limits and conditions to the use of criminal sanctions, which cannot be used when they cause unjustified interference in the exercise of fundamental rights and freedoms, and on the other hand requires that they should be used instead to ensure the effective protection of the fundamental rights[3].

Among the rights recognised by international instruments the prohibition of torture and inhuman or degrading treatment or punishment has become a central tenet of international human rights law[4]. Article 5 of the Universal Declaration of Human Rights (UDHR)[5] proclaims «no one shall be subjected to torture or to cruel,

---

[1] VAN ZYL SMIT, APPLETON, *Life imprisonment: A Global Human Rights Analysis*, Harvard University Press, 2019, p. 11.
[2] Ibidem p. 12.
[3] ZAGREBELSKY, *La pena detentiva fino alla fine e la Convenzione Europea dei diritti umani e delle libertà fondamentali*, in *Per sempre dietro le sbarre? L'ergastolo ostativo nel dialogo tra le Corti,* BRUNELLI, PUGIOTTO, VERONESI (a cura di), Forum di quaderni costituzionali rassegna, n 10/2019, p. 15.
[4] BOULOS, *Towards reconstructing the meaning of inhuman treatment or punishment: a human capability approach,* in *The Age of Human Rights Journal*, 12, 35-61, 2019.
[5] The Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General assembly resolution 217 A) as a common standard of achievements for all peoples and all nations. It sets out, for the first time, fundamental human rights to be universally protected.

inhuman or degrading treatment or punishment». Although the UDHR is not a legally binding treaty[6], the UN Commission on Human Rights used this wording when drafting what become Article 7 of UN International Covenant on Civil and Political Rights (ICCPR)[7] which is a multilateral treaty ratified by 173 states[8]. On a regional level, the prohibition is found in Article 3 of the European Convention on Human Rights (ECHR)[9], Article 5.2 of the American Convention[10], and Article 5 of the African Charter on Human and People's Rights[11].

The wide variety of Conventions dealing with the subject of torture and other forms of ill-treatment has been dealt with, either generically or specifically[12], demonstrates the importance it has assumed for long-time at the supranational level. As a consequence, it is generally accepted that the prohibition forms a part of customary international law[13] and, as a consequence, it is implemented in all states irrespective of whether they have become a party to a particular international instrument. Indeed, the customary and imperative nature of this prohibition has been recognised by the treaties establishing the various international criminal tribunals[14].

---

[6] Some legal scholars have argued that as far as countries have constantly invoked the Declaration for more than 50 years, it has become binding as a part of customary international law. See HANNUM, *The universal declaration of human rights in National and International law*, in *Health & Human Rights,* vol. 3, n. 2/1998, p. 145.

[7] International Covenant on Civil and Political Rights, Dec.16, 1966.

[8] As at February 2020.

[9] Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1956.

[10] American Convention on Human Rights, Nov. 22, 1969.

[11] Banjul Charter on Human and Peoples Rights adopted June 27, 1981.

[12] Other standard-setting documents promulgated by the UN presuppose the prohibition of torture: UN Standard Minimum Rules for the Treatment of Prisoners (Res 663 C, 31 July1957 and Res 2076, 13 May 1977); the Principles of Medical Ethics Relevant to the Role of Health personnel Particularly Physicians, in the Protection of prisoners and detainees against Torture and other Cruel, Inhuman or Degrading treatment or punishment (Res 37/194, 1982) and the Body of Principles for the Protection of All Persons Under any form of detention or imprisonment (Res 43/173, 1988).

[13] ADDO AND GRIEF, *Does article 3 of the European Convention on Human Rights enshrine absolute rights?'* in *European Law Review*, 1998, vol. 9; MERON, *Human rights and Humanitarian Norms as Customary International law,* Oxford, 1989, p.94; ARAI–YOKOI, *Grading scale of degradation identifying the threshold of degrading treatment or punishment under article 3 ECHR*, in *Netherlands Quarterly of human rights*, 2003, Vol. 21/3, p.386; This view has been endorsed by decisions in a number of domestic jurisdictions: *Filartiga v. Peña Irala*, Second District Court of Appeals of U.S.1980; *Kadic v. Karadzic,* 1995; ECHR, *Soering v. The United Kingdom*, 1989, para (88); ECtHR, *Al-Adsani v. United Kingdom, 2001.*

[14] Rome Statute of the International Criminal Court, articles 7(1)(f) and (k), and 8(2)(a)(ii), (b)(xxi) and (c); Statute of the International Criminal Tribunal for the Former Yugoslavia, articles 2(b) and (c), and 5(f) and (i); Statute of the International Tribunal for Rwanda, articles 3(f) and (i), 4(a) and (e).

1.1. International framework: brief reference from the Universal Declaration of human rights to the Convention Against Torture of 1984

Alongside a growing interest in the establishment of principles and guidelines to be respected, by States, the subject of criminal enforcement has also been influenced by the international movement that has been dealing with torture since the 1970s. In this respect, a milestone has been achieved with the adoption of UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) of 1984, a universal and regulatory act binding on the States that have ratified it[15].

Article 1 of the Convention is widely referenced by international bodies and has been deemed the *de facto* "first port of call" for those seeking a definition of torture[16]: «for the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions».

CAT's definition of torture has been used as a reference point in sketching the differences between torture and other forms of ill-treatment. According to what could be called as the "distinguishing approach," the term cruel, inhuman and degrading (CIDT) should not treated as conceptually independent prohibition, instead they are defined in relation to torture[17]. The "distinguishing approach" is reflected in the formulation of Article 16 of the Torture Convention: «Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation

[15] As at February 2020: 169 parties.
[16] WEISSBRODT AND HEILMAN, *Defining torture and cruel, inhuman, and degrading treatment*, 29, in *Law and Inequality*, 343 (2011).
[17] BOULOS, *Towards reconstructing the meaning of inhuman treatment or punishment: a human capability approach,* in *The Age of Human Rights Journal*, 12, 35-61, 2019.

of or with the consent or acquiescence of a public official or other person acting in an official capacity». According to this view, any attempt to understand CIDT requires a prior understanding of torture.

The terms cruel, inhuman and degrading are treated as ancillary to the torture prohibition[18]. Article 1 encompasses two elements that have been used to distinguish torture from CIDT. Those elements are "severity of pain"[19] and "purpose"[20]. The first international bodies to analyse whether conduct constituted torture, or inhuman or degrading treatment were the European Commission on Human Rights and the European Court of Human Rights. Distinguishing between acts prohibited by Article 3 of the European Convention and what could be characterized as "a certain roughness of treatment,"[21] the European Commission has observed that whether an interrogation technique or a combination of techniques constituted torture or inhuman treatment "depend[s] on the circumstances and the purpose and [is] largely ... a question of degree"[22].

1.1.1 Obligations imposed on States parties

Article 2 of CAT imposes to all contracting parties to adopt effective measures in order to prevent acts of torture in any territory under its jurisdiction and establishes that the State cannot evoke the state of war or any other type of public emergency as a justification of torture. To this prohibition it is added the one established in Article 3, which enshrines for the State the prohibition of extradition to a country where there are strong reasons for believing that the individual will be

[18] WALDRON, *Torture, terror, and trade-offs: Philosophy for the White House*, Oxford University Press, 2010, p. 279: "a fence around the wall, designed to keep States not just from crossing the torture threshold, but to keep them from even approaching it".

[19] This view was incorporated in the 1975 United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. G.A. Res. 3452 (XXX) (Dec. 9, 1975). According to article 1(2) of the declaration, "*Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment*." Id. annex, art. 1(2).

[20] The Article includes the following prohibited purposes: extracting a confession; obtaining information from the victim or a third person; punishing the victim; intimidating or coercing the victim; and any other purpose of a discriminatory nature.

[21] ECHR, *Greek Case*, App. Nos. 3321/67, 3322/67, 3323/67 & 3344/67, 1969. In this case the Commission observed that "all torture must be inhuman and degrading treatment," but the term torture was generally reserved for aggravated forms of "inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment." (186)

[22] ECtHR, *Ireland v. United Kingdom*, App. No. 5310/71, 1978.

subject to torture. These are, of course, provisions which have very significant implications in criminal matters, since they prevent exemptions designed in this way from excluding the criminal relevance of torture acts, and thus reaffirm in negative terms the obligation to criminalise the latter[23].

The core of the Convention lies in Article 4 that expressly obliges States Parties to punish all acts of torture as crimes within their penal system. Moreover, the penalty must also extend to attempt, aiding and abetting and cooperation. The provision analysed then goes even further, requiring that the sanction to be appropriate to the severity of the nature of such conduct[24]. From a strictly procedural point of view, Articles 5, 7(1) and 8 outline a system of «universal jurisdiction»[25] which is an exceptional rule for national criminal justice systems, that are traditionally based on the principle of territorial jurisdiction[26] and imply that each State Party must punish those who have committed torture within its jurisdiction, not only its own citizen, but also where, in the absence of any connecting factor, the alleged offender is on the territory of the State itself, unless extradition to the requesting State is ordered.

In the second part of the Convention, Article 17 establishes the institution of a Committee Against Torture[27] which is the body that monitors implementation of the Convention by its State parties. Recently, a decisive step forward in the Committee's effectiveness has been taken with the conclusion of an "Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading

---

[23] COLELLA, *La repressione penale della tortura: riflessioni de iure condendo*, in *www.penalecontemporaneo.it*, 22 July 2014, p. 14.

[24] Art. 4 CAT: «1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature».

[25] RYNGAERT, *Universal criminal jurisdiction over torture: a state of affairs after 20 years UN Torture Convention,* in *Netherlands Quarterly of human rights*, 2005, Vol. 23/4, pp. 571 – 611.

[26] COLELLA, *La repressione penale della tortura: riflessioni de iure condendo*, in *www.penalecontemporaneo.it,* 2014, p. 14-15.

[27] The Committee Against Torture is a treaty-body made up of ten human rights experts and all States parties are obliged to submit regular reports to the Committee on how the rights are being implemented. The Committee examines each report and addresses its concerns and recommendations to the State. For a review of the functions of the Committee against Torture see BOULESBAA, *The U.N. Convention on torture and the prospects for enforcement*, The Hague-Boston-London, 1999, p. 252 ss.

Treatment or Punishment" (OPCAT)[28]. This is a new international treaty against torture, which has established a "double pillar" for prevention: at international level by establishing a new body, the United Nations Sub-Committee on the Prevention of Torture; at national level, by obliging States to create or designate independent bodies for this purpose: National Prevention Mechanisms. Both the Subcommittee and internal bodies are mandated to conduct regular visits to places of detention[29] and to make recommendations and observations to Governments and competent authorities to improve the situation of persons deprived of their liberty[30].

2. Regional level: Understanding art 3 of the ECHR: "Three in One" or "One in three"?[31]

While the United Nations Organisation has played a central role internationally, the Council of Europe[32] has a leading role on the continental scene, which is the perspective, that will be investigated in this section. The key text on regional protection of human rights is the "European Convention for the Protection of Human Rights and Fundamental Freedoms" (ECHR), drawn up and adopted in Rome in 1950, and entered into force in 1953. Unlike the Universal Declaration developed by the UN and its predecessor, the ECHR is a legally binding treaty i.e. it follows that the States Parties are obliged to comply with its provisions. The Convention is enforced by the European Court of Human Rights (Court or ECtHR), which is authorized to resolve claims by States parties against other States parties or by individuals against States parties.

The Strasbourg Court with its case law has guaranteed the essence of fundamental human rights in the past fifty years. It is possible to identify the need

[28] Protocol adopted by the General Assembly of the United Nations by Resolution No 57/199/199 of 9 January 2003, entered into force on 22 June 2006.
[29] Such are defined in art 4: «to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence».
[30] See PERSANO, *L'adesione dell'Italia al Protocollo opzionale del 18 Dicembre 2002 alla Convenzione delle Nazioni Unite contro la tortura e altri trattamenti o pene crudeli, inumane o degradanti,* in *Responsabilità civile e previdenza*, n. 2/2013; Also SCAROINA, *Il delitto di tortura: l'attualità di un crimine antico,* Bari, 2018, p.55.
[31] EVANS AND MORGAN, *Preventing Torture, a study of the european convention for the preventing of torture and inhuman or degrading treatment or punishment,* oxford, 1998, p 73.
[32] The Council is an international organization, created in 1949, to protect democracy and human rights in postwar Europe. There are forty-seven States parties to the European Convention.

to make the rights guaranteed by the Convention effective as a guiding thread for the interpretative choices made by the Court. So, the achievement of practical and effective[33] protection of rights has led the Court to attribute an autonomous meaning to the terms of the Convention, which does not depend on the meaning they have in the domestic law of the States parties, in order to prevent individual States from interpreting them in such a way as to restrict the scope of the Convention's rights[34]. Today «decisions of the Court have a significant influence in shaping international norms»[35] so as to standardize the content of terms with different meanings in the legal systems of the States Parties. In other words, the Court does not create new rights but shows States the correct interpretation of the rights they already grant to their citizens[36]. The guiding rule of the Court's reasoning is stated in Article 3: «no one shall be subjected to torture or to inhuman or degrading treatment or punishment» which is frequently cited as one of the most absolute and sacred of fundamental human rights[37] and it is not subject to any form of limitation, specific or general[38].

The Strasbourg Court itself, in numerous rulings, has recognised the absolute nature of Article 3 by stating that it represents the core[39] of the Convention

[33] *Soering v. United Kingdom*, 7 July 1989, para 87: "the object and purpose of the Convention as an instrument for the protection of individual human beings, require that its provisions be interpreted and applied so as to make its safeguards *practical* and *effective*".
[34] ESPOSITO, *il diritto penale flessibile. Quando i diritti umani incontrano I sistemi penali,* Torino, 2008, p. 124-125.
[35] WEISSBRODT AND HEILMAN, *Defining torture and cruel, inhuman, and degrading treatment*, 29, in *Law and Inequality*, 343 (2011).
[36] BILANCIA, *"Prefezione" I diritti umani in una prospettiva europea*, ALBUQUERQUE (a cura di), Torino, 2016.
[37] MANES- ZAGREBELSKY, *La convenzione europea dei diritti dell'uomo nell'ordinamento penale italiano*, Milano, 2011, p. 46; SCHABAS, *The European convention on human rights: a commentary,* oxford, 2017, p 164; COLELLA, *La giurisprudenza di Strasburgo 2011: il divieto di tortura e di trattamenti inumani o degradanti (art. 3 Cedu*), in *Dir. Pen. Cont. Riv. Trim.*, 4/2012, p 214; VERMEULEN AND BATTJES, in *Theory and Practice of the European Convention on Human Rights*, (a cura di) VAN DIJK, VAN HOOF, VAN RIJN, ZWAAK, 5th ed, Intersentia, 2018, p.383.
[38] ADDO and GRIEF, *Does article 3,* cit., p. 513: The combined reading of Articles 3 and 15(2) suggests the willingness of authors to understand the right prescribed in Article 3 «*to be superior*»; ARAI – YOKOI, *Grading scale of degradation*, cit., p. 386, states that an infringement of the rights protected by Article 3 constitutes «a*n assault not only on the dignity of an individual person but also on the public order of Europe*»; Also EVANS and MORGAN, *Preventing Torture, cit.,* p.72 says: "Art. 3 is expressly excluded from the scope of Article 15, which permits derogations in times of war or national emergency threatening the life of the nation and contains no equivalent to the second subsections of Articles 8-11 which place certain bounds upon the enjoyment of the rights they contain."
[39] COLELLA, *C'è un giudice a Strasburgo. In margine alle sentenze sui fatti della Diaz e di Bolzaneto,* in *Riv.it.dir.proc.pen,* 2009, p.1813.

as "enshrining one of the fundamental rights of democratic societies"[40]. It is precisely the application of this provision that Strasbourg case-law has created the *par ricochet* protection technique, that is the technique that has enabled it to assess the conformity with the Convention even of those establishments or practices that did not fall directly within its scope[41]. In doing so, it has been possible to fill certain gaps in the Convention, particularly numerous cases involving torture and ill-treatment in detention which were initially considered outside the scope of conventional law.

2.1. Greater intensity of suffering: the torture

Apart from the prohibition statement, the ECHR does not provide a precise definition of the individual elements of the legal provision. The reason for this shortcoming may be found in the preparatory work of the provision, where the French representative Teigen stated that a possible list of torture cases would have risked excluding other possible forms from the scope of article 3[42]. This statement has proved to be visionary and has enabled the Court to interpret the above-mentioned rule extensively[43].

It is well established that the Convention is a living text[44], to be interpreted in accordance with the current understanding within the European society at the time of the alleged violation[45]. Therefore, the Strasburg jurisprudence may, at any

[40] ECtHR *Soering v. UK,* 1989; *M and Others v. Italy and Bulgaria*, 2012; *Tyrer v. UK*, 1978 (30); *Selmouni v. France* 1999, (95). On the relevance of the principle see PUSTORINO, *Commento all'art.3*, in BARTOLE, DE SENA, ZAGREBELSKY, *Commentario breve alla convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali*, Padova, 2012, p.63; ESPOSITO, *il diritto penale flessibile*, p. 222.

[41] ESPOSITO, *Proibizione della tortura*, in BARTOLE -CONFORTI- RAIMONDI, *Commentario alla convenzione europea per i diritti dell'uomo e delle libertà fondamentali*, Cedam, 2001, p. 55.

[42] Council of Europe, Preparatory work of Art. 3 of the ECHR, Memorandum prepared by Secretariat of the Commission DH (56), 5, 8)

[43] BARTOLE, DE SENA, ZAGREBELSKY, *Commentario breve alla convenzione,* cit., p. 68.

[44] As it is defined in *Selmouni v. France*, 1999, (101). For further information see: LETSAS, *The ECHR as a living instrument: its meaning and legitimacy*, in *Constituting Europe* (a cura di) FOLLESDAL, PETERS, ULFSTEIN, Cambridge university press, 2013, p. 106.

[45] EVANS and MORGAN, *Preventing Torture, cit.* See SCAROINA, *il delitto di tortura*, Bari, 2018, p. 76.

time, reveal the current understanding of the key terms in Article 3, but it cannot point to their limits[46].

That being said, Article 3 is normally broken down into three components parts which are “torture”, “inhuman”, and “degrading”. Each of them is invested with their own significance[47]. A complex jurisprudence has emerged around each of these terms. The origins of this approach lie in the opinion adopted by the European Commission on Human Rights in the *Greek Case* in 1969[48].

The Commission observed that «all torture must be inhuman and degrading treatment», but the term «torture was generally reserved for aggravated forms of inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment». The Commission further observed that “inhuman treatment” covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable, while "degrading" treatment «grossly humiliates [an individual] before others or drives [the individual] to act against [the individual's] will or conscience»[49].

The Commission's approach in the *Greek Case* has been interpreted as establishing a hierarchy of conducts[50]. The hierarchy begins with degrading treatment; the next step is inhuman treatment; and the final step is torture. Under this framework, torture is an aggravated form of inhuman treatment, inflicted for certain purposes consisting of the desire to obtain information or a confession or to punish[51].

---

[46] The ECtHR recognizes the right and duty to update the extension of the catalogue of rights in order to adapt them to the changing needs of society: cfr. *Tyrer v. UK*, 1978.

[47] EVANS and MORGAN, *Preventing Torture, cit.*

[48] European Commission of Human Rights, The *Greek Case*: Report of the Commission: Application No. 3321/67-*Denmark v. Greece,* Application No. 3322/67-*Norway v. Greece*, Application No. 3323/67-*Sweden v. Greece*, Application No. 3344/67-*Netherlands v. Greece*., Nov. 1969.

[49] *Greek* case, 1969, ECHR at 186.

[50] See EVANS AND MORGAN, *Preventing torture, cit.* p.77: “the prevailing view is that there is an hierarchical progression between three separate categories of ill-treatment”; ARAI-YOKOI*, Grading scale of degradation: identifying the threshold of degrading treatment or punishment under article 3 echr,* in *Netherlands Quarterly of Human Rights*, Vol. 21/3, 2003*,* p. 386; ESPOSITO, *Il diritto penale flessibile*, cit., p. 229.

[51] See EVANS AND MORGAN, *Preventing torture, cit.* p.77*,* the author says that what differentiates torture from inhuman treatment was not the degree of suffering involved but the fact that it was inflicted in order to achieve a purpose. Also, SCHABAS, *The European convention on human rights*, cit. p. 174; SCAROINA, *il delitto di tortura, cit.* p.79.

For the assessment of the particular level of severity inherent in the notion of torture, the Court addresses the same aspects as it does in the minimum level of severity test implied in an Article 3 violation: the duration, the physical and mental effects of the treatment, and occasionally the sex and health of the applicant[52].

In the seminal case on the subject, *Ireland v. United Kingdom*[53], the Court considered the nature and effects of five interrogation techniques used in combination by British officials to interrogate detainees from Northern Ireland who were suspected terrorists[54]. Despite the harshness of such practices, the Court has denied the existence of the torture, recognising an inhuman or degrading treatment[55] and reiterated the proposition that "torture constitutes an aggravated and deliberate form of cruel, inhuman, or degrading treatment or punishment"[56]. In the context of the same decision the Court affirmed that the European Convention is a «living document» and has expressly stated that «certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in the future»[57]. This statement helps to better understand how the jurisprudence of the Court is constantly developing as society evolves.

In the subsequent decisions the Court has attempted to trace the parameters of torture by using severity as the central criterion. In *Askoy v. Turkey*[58], the applicant had been subjected to 'Palestinian hanging' which consist of tying the victim's hands behind his back and lifting them up, while he was stripped naked. It said «this treatment was of such serious and cruel nature that can only be described as torture»[59]. The practice, by which agents extort information by repeatedly

---

[52] VERMEULEN AND BATTJES, in *Theory and Practice of the European Convention,* cit., p.387.
[53] *Ireland v. United Kingdom*, ECtHR (GC) 18 Jan. 1978.
[54] The Commission found that the detainees suffered weight loss, physical pain, and feelings of anxiety and fear as a result of being subjected to four or possibly five days of the following treatment: (1) prolonged periods of wall-standing; (2) hooding during periods of detention except during interrogation; (3) being held in a room pending interrogation where there was a continuous loud and hissing noise; (4) deprivation of sleep for an unspecified period of time; and (5) deprivation of food and drink, although it was not possible to establish to what extent detainees were deprived of nourishment. *Ireland v. United Kingdom*, App. No. 5310/71, 1978 Y.B. Eur. Conv. on H.R. 512, 784-88.
[55] *Ireland v. United Kingdom*, 1978, (167): "The five techniques (…) did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood".
[56] See *Ireland v. United Kingdom*, 1978, (167), Series A no.25. This understanding was reflected in Article 1 of the UN Declaration 1975.
[57] Id. *Ireland v. United Kingdom*, 1978; *Selmouni v. France,* no. 25803/94, (101), ECHR 1999.
[58] *Askoy v. Turkey*, ECtHR 18 Dec 1996.
[59] *Askoy v. Turkey*, 1996, (64), Report of judgments and Decisions 1996-VI.

striking the sole of the prisoner's foot, or by using electric shocks[60], multiple beatings[61], forced standing, death threats[62], as well as the rape aimed at obtaining information[63], still have been qualified as torture [64]. In cases where the European Court has declined to characterize interrogation methods or conditions of confinement as torture, the Court has often found detainees suffered inhuman or degrading treatment.

The fact that the intent of the perpetrator is decisive for qualifying acts as torture is illustrated by the case of *Krastanov*[65], in which the Court cannot qualify the treatment as torture because it did not appear to be inflicted intentionally for the purpose of making him confess. It should be stressed, however, that these conclusions are far from being definitive, for the same recognition of the Court: the boundaries between the notions of torture and inhuman and degrading treatment are mobile and constantly evolving[66]. To sum up the Court's position on the subject, it is possible to refer to torture when the physical and moral violence is particularly serious, deliberately inflicted and characterized by a specific purpose[67].

2.2. Inhuman or degrading treatment

Deeply analysing the ruling *Ireland v. UK,* it should be noted that the Court did not seek to draw any distinctions between inhuman and degrading treatment but saw them as a single notion. It is now generally accepted that 'inhuman' and 'degrading' represent different categories of ill-treatment and they are

[60] *Polonskiy v. Russia*, App. No. 30033/05, 2009.
[61] *Chitayev v. Russia*, App. No. 59334/00, (2007); *Ilascu and Others v. Moldova & Russia*, App. No. 48787/99, (2004).
[62] *Tomasi v. France*, App. No. 12850/87, 1992.
[63] *Aydin v. Turkey*, App. No. 23178/94, (1997) describing a female detainee being sprayed with cold water from high-pressured jets, beaten, and brutally raped.
[64] *Corsacov v. Moldavia,* 2006 and *Atesoglu v. Turkey*, 2015.
[65] *Krastanov v. Bulgaria*, ECtHR 30 Sep. 2004, para 53.
[66] COLELLA, *La giurisprudenza di Strasburgo 2008-2010*, *il divieto di tortura e trattamenti inumani o degradanti (art. 3 CEDU*), in *Dir. Pen. Cont. Riv. Trim.*, 1/2011, p. 224, the author observes that the distinction between torture and inhuman and degrading treatment may be relevant in three distinct respects: the reputation of the sentenced State, the quantification of the compensation under Article 41, the penalty of non-use which affects only the evidence acquired in violation of the prohibition of torture; SCAROINA, *il delitto di tortura, cit.* p.83.
[67] *Ireland v. United Kingdom*, 1978; *Tyrer v. United Kingdom* 1978; *Kauldla v. Poland*, 2000*; Cirino e Renne v. Italy*, 2017.

differentiated by a threshold of severity[68]. In assessing the application of the term 'degrading', the Court will consider if the treatment or punishment shows a lack of respect of human dignity of the victim[69]. It was argued in the *East African Asians* case that the treatment was 'degrading' for the purpose of the Article 3 «if it lowers [the victim] in rank, position, reputation or character, whether in his own eyes or in the eyes of other people» and it has to reach a certain level of severity[70]. It also deemed treatment to be 'degrading' «because it was such as to arouse in the victim's feelings of fear, anguish and inferiority capable of humiliating and debasing them»[71]. The threshold had to be assessed in the light of the circumstances of the case, in particular, on the nature and context of the punishment itself[72].

The notion of 'inhuman' treatment or punishment is the least well-developed of the three categories, it stands as a residual category into which acts not crossing the threshold and amounting to torture will fall[73]. Also, with respect to degrading treatments acts as a point of reference, when they do not reach the threshold to be considered inhumane[74].

What, then, is meant by inhuman treatment? A treatment is considered in the latest sense when caused either bodily injury or intense physical and mental suffering[75]. Prison conditions characterised by structural deficiencies or peculiar disciplines are brought back to this category. Conduct deemed inhuman under the European Convention has included interrogation methods such as: wall-standing, hooding, subjection to noise, deprivation of sleep and food, beatings, sensory

[68] See EVANS AND MORGAN, *Preventing torture,* cit., p. 87.
[69] *East African Asians v. UK,* 1973, para 189.
[70] Id note 61.
[71] *Kudla v. Poland* [GC], no. 30210/96, § 92, ECHR 2000; *Pretty v. UK,* 2002, para 52; *Ocalan v. Turkey (no. 2),* 2014, para 100.
[72] *Tyrer v. UK*, 1978, para 30. Also, *Campbell and Cosans v. UK,* 1982, para 29.
[73] EVANS AND MORGAN, *Preventing torture,* cit., p.93. In the same sense: SCHABAS, *The European convention on human rights, cit.,* p. 180, the author says that when the torture is threatened but not imposed, as a means of obtaining information, the Gran Chamber has described such method of interrogation as inhuman treatment.
[74] If a practice is not sufficiently serious to meet the threshold of 'inhuman', the it may be examined to see if it represents a form of degrading treatment.
[75] *Labita v. Italy,* 2000, para 120; *A and Others v. UK*, 2009, para 127; *Ocalan v. Turkey,* 2014, para 100.

isolation or solitary confinement, denial of access to appropriate medical care, the disproportionate use of restraints, and the threat of severe physical pain[76].

From this point of view, it seems legitimate to consider that the notion of inhuman treatment is based simultaneously on the verification of the physical and mental effects caused to the victim, whereas the notion of degrading treatment mainly concerns the mental and psychological consequences produced to the detriment of an individual[77].

It should however be remembered that even if Art. 3 is understood in embracing three separate concepts – three in one, not one in three – it still prohibits them all in singles measure: Article 3 is violated once the first threshold is crossed[78]. Indeed, finding the treatment is incompatible with Art.3, the Court does not always specify whether this is because it is inhuman or because is degrading[79], it just says that there is a violation of the provision without further details[80].

2.3. Threshold of application of Art. 3

The seriousness of the conduct suffered by the applicant is assessed by the Strasbourg Court from two points of view: as an external limit according to which the attainment of a minimum threshold of seriousness is necessary for the act to be prohibited under Article 3 ECHR; as an internal limit which makes it possible to classify the various types of prohibited conduct[81]. It is clear, therefore, that the identification of the conduct included in Article 3 is closely linked to the search for the "minimum level of severity", which is an highly debated point when it comes to its interpretation, the overcoming of which is necessary in order for the ill-treatment to qualify as violations of the Convention[82].

---

[76] WEISSBRODT AND HEILMAN, *Defining torture,* cit., p. 379. See *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 66 (1978); *Gifgen v. Germany*, App. No. 22978/05, 2010.
[77] BARTOLE, DE SENA, ZAGREBELSKY, *Commentario breve alla convenzione,* cit. p. 68.
[78] EVANS AND MORGAN, *Preventing torture,* cit., p.79; SCHABAS, *The European convention on human rights, cit.,* p.169.
[79] SCHABAS, *The European convention on human rights, cit.,* p. 181. Also, COLELLA, *La giurisprudenza di Strasburgo 2008-2010 cit.,* p. 224: "the boundary between inhuman and degrading treatment is shown to be rather uncertain in practical application, and the Court frequently uses the expression 'inhuman and degrading treatment' as if it were the same".
[80] *Branduse v. Romania*, para 45-50, 2009.
[81] ESPOSITO, *il diritto penale flessibile*, cit., p.230; SCAROINA, *il delitto di tortura, cit.* p.78.
[82] *Ireland v. UK*, 1978, para 167. ARAI–YOKOI, *Grading scale*, cit., p. 386; ESPOSITO, *il diritto penale flessibile,* cit., p.229.

The assessment of the minimum level is relative and depends on the circumstances: objective as the duration of the treatment, its physical effects, and subjective as the sex, the age and state of health of the victim[83]. It follows from this that the prohibition contained in this article is not static, but receives a living interpretation, made in the light of the circumstances of the individual case[84].

In order to make a punishment or treatment associated with it, 'inhuman' or 'degrading', or to amount to 'torture', the suffering or humiliation involved must go beyond what is inevitably connected with a given form of legitimate treatment or punishment[85]. In recent years, part of the doctrine[86] has argued that the Court has now overruled its own preliminary assessment as to whether there is a threshold of gravity sufficient to supplement what is prohibited by Article 3 ECHR. This reasoning was based on a series of cases from the 1990s[87], in which the failure to analyse this requirement seemed to imply that any kind of violence committed against an individual deprived of his or her personal freedom was sufficient to fall within the scope of Article 3.

This approach was entirely rejected by another doctrine[88], which argued that the failure to mention this requirement was due to a superficiality in the Court's drafting of the reasoning, and not to the fact that the threshold of seriousness of the injuries caused had disappeared. But on closer look, however, in the cases considered by those who had supported the opposite theory, the applicants had been deprived of their personal freedom and had suffered serious ill-treatment, which

---

[83] ADDO AND GRIEF, *Is There a Policy Behind the Decision and Judgement relating to Article 3 of the European Convention on Human Rights*?, in *European Law Review*, 1995, 178; DEFILIPPI, BOSI, *Il sistema europeo di tutela del detenuto*, Milano, Giuffrè, 2001, p. 22. For the jurisprudence see: *Ireland v. the United Kingdom*, 18 January 1978, § 162; *Price v. UK,* 2001, para 24; *Enea v. Italy*, 2009, para 55; *Arutyunyan v. Russia*, 2012, para 68; *Ocalan v. Turkey* (n.2), 2014, para 99.

[84] ESPOSITO, *il diritto penale flessibile*, cit., p. 230; BARTOLE, DE SENA, ZAGREBELSKY, *Commentario breve alla convenzione,* cit., speaks of a "cumulative effect" of the various factors developed by the Court, which should not only be examined in isolation but also as regards their overall impact on a given individual situation.

[85] *Tyer v. Uk*, 1978, para 30; *Arutyunyan v. Russia*, 2012, para 69; SCHABAS, *The European convention on human rights, cit.,* p.172.

[86] RENUCCI, *Droit européen des droits de l'homme*, Paris, 1999, 72-74

[87] *Tomasi v France*, ECtHR, Judgement, 27.08.1992, n. 12850/87 and *Ribitsch v Austria*, ECtHR, Judgement, 04.12.1995, n. 18896/91. Also, EVANS AND MORGAN, *Preventing torture,* cit., p.79: "Although the Court continue to endorse the severity of suffering approach it is not fully reflected in their practice".

[88] BARTOLE - CONFORTI - RAIMONDI, *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, op. cit., p. 58.

may suggest that the Court refrained from highlighting the logical overcoming of the threshold of gravity only because it is implied in the facts of the cases in question[89].

In the end, the European Court acknowledged that there is an element of relativity in the assessment of the threshold[90] «while it is true that the severity of suffering, physical or mental, attributable to a particular measure has been a significant consideration in many of the cases decided by the Court under Article 3, there are [other] circumstances where proof of the actual effect on the person may not be a major factor»[91]. In summary, in identifying whether or not the severity threshold has been exceeded in a given case, the Court has never set out general reference criteria, there is usually a statement of facts from which a conclusion is then drawn[92].

2.4. The victim of the unlawful conduct

Article 3 begins with the words "No one", this was clearly intended to provide the highest degree of protection to all individuals. Personal characteristics play a role in determining whether or not an individual may be considered a victim of torture or ill-treatment[93]. There are several examples in the case law of age being considered relevant in this aspect. In *Soering v. UK*, for example, the Court concluded that there was a real risk of ill-treatment taking into account the applicant's age and the mental state[94]. Also, the tender age of an eight-year-old girl,

[89] In *Ribitsch* para 38: "The Court emphasises that, in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 (art. 3) of the Convention".

[90] PALMER, *A wrong turning: article 3 echr and proportionality,* in *Cambridge law journal*, vo. 65(2), 2006, p.439.

[91] *Keen v. UK,* 2001, para 113.

[92] ESPOSITO, *il diritto penale flessibile*, cit., p.236. Also, PALMER, *A wrong turning: article 3, cit.,* p.439, says: "Circumstances which may give rise to a breach of Article 3 are not limited. In *Pretty v. United Kingdom*, the Court commented that: in light of the fundamental importance of article 3, the Court has reserved to itself sufficient flexibility to address the application of that article in other situations that might arise".

[93] BARTOLE, DE SENA, ZAGREBELSKY, *Commentario breve alla convenzione,* cit. p.69: "In particular, the Court values a number of elements, such as: the public or private nature of the punishment, the specific conditions of detention, the age and health of the convicted person, the length of the sentence and subjective perception".

[94] *Soering v The United Kingdom*, ECtHR, Judgement, 07.06.1989, n. 1/19891/161/217, §108-109.The fact that the plaintiff was only nineteen years old allowed the Court to rule that extradition

who was a victim of physical violence by her father, and who also witnessed her mother being abused, was significant in finding that Article 3 applied.[95] Not only young age can be a determining factor in determining the violation of the Convention. Sometimes the advanced age of the applicants has also been taken into account by the Court, for example for the enforcement of a custodial sentence[96]. It can be inferred from the Court's examination of cases that its jurisprudence goes in the direction of taking age into account together with other elements, such as the state of health, of the sentenced person in order to verify the applicability of Article 3. For example, if a serious illness is added to age, imprisonment may lead to problems of compatibility with that article[97]. Among the compatibility indexes taken into account by the Court are the condition of the prisoner, the quality of the care received, the opportunity to continue detention given his state of health.

The Court has furthermore labelled groups as "vulnerable" such as asylum seekers[98] or person under police custody. This circumstance is a relevant factor, although an inevitable element of humiliation and suffering is involved in custodial measures[99], if the recourse to physical force has not been made strictly necessary by the conduct of the deprived person it could be an infringement of Art. 3[100]. In addition, recent developments in international law show increased protection for victims of sexual violence[101]. The international relevance of sexual violence has been achieved with the Statutes of the International Criminal Tribunals for the ex-Yugoslavia and Rwanda which, while not containing a definition of rape or sexual violence, include such acts in the list of crimes against humanity. The European Court of Human Rights in its judgment *M.C. v. Bulgaria* also imposed an obligation on States to protect women's sexual freedom against attacks on physical and sexual

---

to the United States, where he could have suffered the death penalty for the crime committed, was prohibited.

[95] *T.M. and C.M. v. Moldova*, no. 26608/11, para 41, 2014.

[96] ESPOSITO, *il diritto penale flessibile*, cit., p. 263.

[97] In *Farbthus v. Latvia* (2 December 2004) the detention suffered by the applicant on account of his age, health and disability constituted degrading treatment in breach of Article 3 ECHR.

[98] *Z and Others v. United Kingdom*, ECtHR (GC) 10 May 2001, para 73.

[99] Detention conditions will be discussed in more detail *infra* paragraph 2.6.

[100] *Ribitsch v. Austria*, ECtHR, 4 Dec 1995, appl. No. 18896/91, para 38.

[101] For a reconstruction of the international significance of rape events see BLATT, *Recognizing Rape as a Method of Torture*, in *New York University Review of Law and Social Change*, Vol XIX, 1992, p. 821 ss.

integrity by third parties[102]. This judgement is the culmination of the legal research aimed at extending conventional protection also to acts of sexual violence committed by private individuals. Previously it was necessary for rape to be classified as a violation of Article 3 to be perpetrated by public officials[103].

2.4.1. Emotional distress to relatives of a victim as human rights violation

Family members of victims of violation of human rights can be considered as victims too. In order to state that there has been a separate violation of article 3 with respect to relatives, the Gran Chamber has insisted upon special factors to «give their suffering a dimension and character distinct from the emotional distress inevitably stemming from the initial violation»[104]. Elements to be taken into consideration in assessing these situations are the proximity of the family bond; the circumstances of the relationship; the extent to which the family member was part of the crime event. Such cases may particularly occur in situations where the family member is forced to witness the direct victim's abuse or death as a result of torture[105]. The issue of collateral consequences for family members is especially relevant in the case of forced disappearances as the act itself is often followed by a long period of uncertainty. The Grand Chamber says: «the essence of the issue under Article 3 in this type of case lies not so much in a serious violation of the missing person's human rights but rather in the authorities' dismissive reactions and attitudes in respect of that situation when it was brought to their attention»[106]. A violation may be found, when the State's failure to respond to a quest for information by relatives may be considered as a demonstration of a continuous and

[102] *M.C. v. Bulgaria*, 4 nov. 2004. See, PITEA, *Rape as a Human Rights Violation and a Criminal Offence: The European Court's Judgment in M.C. v. Bulgaria,* in *Journal of International Criminal Justice*, 2005, p. 447 ss.
[103] ESPOSITO, *il diritto penale flessibile*, cit., p. 283.
[104] *Janowiec and Others v. Russia*, ECtHR, Grand Chamber Judgement, 21.10.2013, n. 55508/07, §177.
[105] Ibid, para 181.
[106] Ibid, para 178.

insensitive disregard for the fate of a disappeared person[107]. In this case the breach of the procedural obligation amount to substantive act of ill-treatment or torture[108].

2.5. Positive obligations

According to the wording of Article 3 ECHR, it imposes a "primarily negative obligation"[109] on the State to refrain from inflicting serious harm[110].

Nevertheless, there is a positive dimension to the right requiring the State to take action to prevent torture and inhuman or degrading treatment as a guarantee of the physical integrity[111]. This obligation is linked with a legislative duty: member State is required to incorporate into its legal system a set of laws enabling its officials to investigate, detect and prosecute the perpetrators of the acts under examination[112]. This is the obligation of criminal protection and has its origin in the 1985 landmark decision *X and Y v. The Netherlands*[113]. This is the first time that the European Court has found in the domestic law of a State (in this case, in the Netherlands Criminal Code) that there is no incriminating rule capable of penalising the infringement of the European Convention[114]. In a second case, *A v. United Kingdom*, the defendant State was condemned on account of the excessive breadth assigned in its legal system to a rule which made acts detrimental to physical integrity not punishable, in breach of the positive obligations of effective prevention under Article 3[115].

---

[107] VERMEULEN AND BATTJES, in *Theory and Practice of the European Convention,* cit., p. 393.
[108] SCHABAS, *The European Convention on Human Rights*, op. cit., p.171.
[109] NICOSIA, *Convenzione europea dei diritti dell'uomo e diritto penale*, Torino, 2006, p.256: "This is in line with the primary purpose of the ECHR, which is precisely to protect the individual from violations of his fundamental rights resulting from the action of the state authorities, by imposing negative obligations or prohibitions of interference on them."
[110] *Hristozov and Others v. Bulgaria,* 2012, para 111.
[111] ESPOSITO, Il diritto penale flessibile, cit., p. 223. In jurisprudence: *A v. United Kingdom*, 1998, para 22; *Z and Others v. UK,* 2001, para 73-75, in this sentence the the Court censured the conduct of the British authorities who, although informed, had not been able to intervene effectively to prevent the four applicant children from being abused by their parents for years.
[112] *Gäfgen v Germany*, Grand Chamber Judgement, ivi §117; *Opuz v Turkey*, ECtHR, Judgement, 09.06.2009, n. 33401/02, §168.
[113] *X and Y v. The Netherlands*, 1985; VIGANÒ, *Diritto penale sostanziale* e *convenzione europea dei diritti dell'uomo*, in *Riv. It. Dir. Proc. Pen.*, n. 1/2007, p. 61; ARAI – YOKOI, *Grading scale*, cit., p. 400; NICOSIA, *Convenzione europea,* cit., p. 257.
[114] COLELLA, *C'è un giudice a Strasburgo*, cit., p. 1827.
[115] VIGANÒ, *Diritto penale sostanziale,* cit., p. 62.

The Court has also, developed a procedural obligation contained within article 3, assisted by article 1[116], by which the State is required to investigate and prosecute cases of torture and inhuman or degrading treatment, regardless of the qualification of the agent[117]. The Court derives, from these rules, the obligation for States to carry out prompt, thorough and effective investigations aimed at the identification of offenders[118].

In order to be a violation of the Convention "it must, in the view of the Court, be shown that the domestic legal system fails to provide practical and effective protection of the rights guaranteed by Art. 3"[119]. In its subsequent jurisprudence, the Court has enriched this procedural requirement, as well as reaffirming the need of an impartial and effective investigation, the Court added the requirement for a swift trial[120]. It emerges from what has been said so far that European case law has derived from Article 3 of the Convention an obligation on States to carry out an official, rapid and effective investigation, and if the investigation is successful there must be a trial leading to the conviction of the guilty parties[121].

2.6. Ill-treatment in detention

A particularly sensitive issue is that of the possibility of qualifying as relevant ill-treatment, within the meaning of Article 3, the law enforcement of prison sentences which, by nature, are characterised by a more or less high degree of affliction[122].

---

[116] Art 1 ECHR: «The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention».

[117] *V.C v. Slovakia*, 2011, para 123; ESPOSITO, Il diritto penale flessibile, cit p.226; COLELLA, *C'è un giudice a Strasburgo*, cit., p. 1823; ARAI – YOKOI, Grading scale, cit., p.398, «to conduct prompt and effective investigation even where it is a private person that infringes human rights [...] this duty is intertwined with the right to an effective remedy».

[118] NICOSIA, *Convenzione europea*, cit., p. 278; COLELLA, *C'è un giudice a Strasburgo*, cit., pp. 1825 – 1826; These principles were applied in the *Labita* case where the court reaffirmed the obligation to conduct an official investigation in cases of police ill-treatment of the prisoner. And in the absence of conclusive evidence, it found a procedural violation of Article 3 in terms of the lack of effectiveness of the investigation.

[119] *Beganovic v. Croatia*, june 2009, para 71.

[120] *Selmouni v. France* 1999; *Caloc v. France,* 2000, para 120; *Slimani v. France*, 2004, para 27-32.

[121] ESPOSITO, Il diritto penale flessibile, cit., p. 224.

[122] SCAROINA, *il delitto di tortura*, cit., p.83. In the same sense SCHABAS, *The European Convention on Human Rights*, op. cit., p.184; *Kotalla v. Netherlands,* 1978.

The State must ensure that prisoners are detained «in conditions that are compatible with respect for their human dignity, that the manner and method of the execution of the measure do not subject them to distress […] and that their health and well-being are adequately secured»[123]. Because of his vulnerability, the detained person needs greater protection and the State has a positive obligation to ensure that every person is detained in conditions compatible with respect for human dignity[124]. Prison regimes and practices that exceed the minimum threshold of intrinsic suffering inherent in any punitive treatment are incompatible with the ECHR[125].

A minimum sense of degradation is present in any punishment or punitive treatment[126] . For this reason the Court has stated that: «in order for punishment to be "degrading" and in breach of Article 3, the humiliation or debasement involved must attain a particular level of severity and must in any event be other than that usual element of humiliation inherent in any punishment»[127].

The Court's rulings on this matter can ideally be divided into two groups: those in which the Strasbourg judges found the infringement connected to objective situations (such as prison overcrowding, special detention regimes, etc.); those in which, the infringement of Article 3 of the ECHR was alleged because of the problematic compatibility of the 'common' detention regime with the health conditions of the applicant, who suffers from serious physical or mental disorders[128].

Regarding this latter, the well-established principle that the Member States owe a “positive obligation” to protect the physical well-being of persons deprived

[123] *Ramirez Sanchez v. France,* para 119, 2006*; Kudla v. Poland*, para 94, 2000.
[124] ROMOLI, *Il sovraffollamento carcerario in Italia quale violazione del divieto di trattamenti inumani o degradanti. A prima lettura della sentenza-pilota Torreggiani*, in *Archivio penale*, 1/2013, p. 1189.
[125] NICOSIA, *Convenzione europea dei diritti dell’uomo*, cit., p.132. CASSIBBA - COLELLA, *Art. 3 - Proibizione della tortura*, in UBERTIS - VIGANÒ (a cura di), *Corte di Strasburgo e giustizia penale,* Giappichelli, 2016, p.71.
[126] *Tyrer v. UK,* 1978, para 30.
[127] *Costello – Roberts v. United Kingdom*, 1993, para 30.
[128] COLELLA, *La giurisprudenza di Strasburgo 2008-2010***,** cit., p. 236; In the same sense: ESPOSITO, *il diritto penale flessibile,* cit., p. 267.

of their liberty, means that failure to provide adequate medical treatment and psychiatric care may give rise to a breach of Article 3[129].

It is possible to outline an evolutionary path in the case law of the European Court. In the beginning, Strasbourg bodies were reluctant to find an infringement of Article 3 in this field[130], but subsequently the Court found that the lack of adequate health care was contrary to the legislative provision.

In the judgment in *Kudla v. Poland*, that is halfway between the two guidelines, the appellant's argument was rejected, which complained of a lack of adequate psychiatric care, which had led to three suicide attempts during the period of detention. However, the judgment pointed out that, on the basis of Article 3, States must avoid subjecting restricted persons to a level of suffering beyond the limits of what is bearable and ensure appropriate health treatment[131].

This obligation, relating to the treatment of sick prisoners, found a more analytical declination in an important 2010 judgment, in which the Court clarified that it is specified in three «obligations particulières»: verifying that the prisoner is in a state of health capable of serving his sentence, giving him the necessary medical treatment and adapting, where necessary, the general conditions of detention to his particular state of health[132].

Considering the specific health conditions of the detainee, it is of particular interest the sentences *Scoppola v. Italy*[133], concerning a disabled person who has been forced for structural deficiencies to serve his sentence in ordinary prison, despite the opposite opinion of the supervisory judiciary. The European Court found an infringement of Article 3 ECHR, in that the applicant «continued to be detained in the Rome penitentiary [...] with the effect of creating a situation likely

---

[129] CECCHINI, *La tutela del diritto alla salute in carcere nella giurisprudenza della Corte europea dei diritti dell'uomo*, in *www.penalecontemporaneo.it,* 2017, p. 21; ARAI – YOKOI, Grading scale, cit., p.401*;* Also, SCHABAS, *The European convention on human rights,* cit., p.185. *Herczegfalvy vs Austria*, A 244, Commission's Report of 1 March 1991, No. 10533/83, para. 242; and *Hurtado vs Switzerland*, A 280, Commission's Report of 8 July 1993, para. 79.

[130] For example, the Court found in *the Priebke* case that the detention in prison of an individual over the age of 80 did not reach the minimum level of severity required by Article 3. Similarly, in the *Grice* case, the inhuman character of the prolonged detention of an AIDS patient was denied, in the absence of proof that the detention would have adversely affected his health.

[131] *Kudla v. Poland,* 2000, para 82.

[132] CASSIBBA - COLELLA, *Art. 3*, cit., p.74-75; *Xiros v. Greece*, 2010, ric. n. 1033/07, § 73-76;

[133] Respectively: on 10 June 2008, 17 September 2009, 18 January 2011, 22 May 2012 and 17 July 2012.

to cause him sufficient distress, inferiority and humiliation to constitute inhuman or degrading treatment» [134]. On the other hand, it appears that the Court gives far less weight to the applicant's health where he is a "socially dangerous person", in particular if he is subject to a stricter prison regime than ordinary[135].

In the *Enea v. Italy* case, the Court has not found a violation of Article 3, neither in relation to the detention regime of 41-*bis*, nor in relation to the regime reserved for prisoners with a high security index (EIV), despite the very serious health conditions of the quadriplegic applicant[136]. Safety reasons would appear to have a decisive impact on the protection of the right to health[137].

2.6.1. Solitary confinement

A prisoner subject to solitary confinement is ordered to be held separately from other prisoners and is restricted in his already highly limited rights. The guiding factors in the Court's judgements in finding whether it constitutes an inhuman treatment, are linked to the duration of the solitary confinement together with the conditions of detention[138].

In this regard, it is said that such a measure should only be taken in exceptional cases and should preferably be avoided, as sensory isolation combined with social isolation can lead to the destruction of the individual's personality[139]. Moreover, isolation should only take place after an assessment of the balance between fundamental rights and security needs, taking into account, first the duration of the measure, the objective pursued, and ensuring a minimum of human contact with the detainee[140].

---

[134] ECtHR, 2008*, Scoppola v. Italy*, cit., § 51.
[135] CASSIBBA - COLELLA, *Art. 3*, cit., p.77.
[136] *Enea v. Italy*, ric. n. 74912/01,2009, § 61-65.
[137] CECCHINI, *La tutela del diritto alla salute in carcere,* cit., p.28.
[138] COLELLA, *La giurisprudenza di Strasburgo,* cit., p.243; VERMEULEN AND BATTJES, in *Theory and Practice of the European Convention,* cit., p. 415: "Regard must be had to the surrounding circumstances, including the particular conditions, the stringency of the measure, its duration, its effects on the person concerned, and also the question whether a given minimum of possibilities for human contact has been left to the person in question".
[139] *Ramirez Sanchez v. France*, para 100; *Ilascu and Others v. Moldovia and Russia*, para 432.
[140] NICOSIA, *Convenzione europea dei diritti dell'uomo*, cit., p.134. In this sense: *Van der Ven v. Netherlands*, 2003, para 51; *Radev v. Bulgaria*, 2015, para 42; *Dimitrov v. Bulgaria*, 2015, para 35-39.

In 2010 in the *Onoufriou v. Cyprus*, the Court indicated in paragraph 70 a number of conditions that isolation must meet in order not to infringe Article 3. Firstly, the decision must be accompanied by procedural guarantees. Secondly, solitary confinement should always be of an exceptional nature. Thirdly, the reasons for solitary confinement must always exist, both *ab initio* and at the time of each extension. Fourthly, the decision to subject a prisoner to isolation must be subject to an autonomous judicial review, and in particular all the considerations that the authorities have taken in making this decision must be reassessed from time to time. Fifthly, there must always be a system for monitoring the prisoner's psychophysical condition.

In the light of this general approach, it will then be necessary to assess in the specific case whether the treatment adopted can be considered inhuman or degrading, in particular, a very relevant indicator is that of the duration of the measure[141].

2.7. Extreme punishments

Corporal punishment[142] should be included among the criminal penalties which cannot be legitimately enshrined in a European criminal law which is in compliance with human rights law. Although they have disappeared from the European criminal codes, several appeals have been submitted in Strasbourg, as infringement of Article 3, for the imposition of a corporal punishment.

One of the first Article 3 cases to come before the Court, concerning the use of corporal punishment, was the juvenile justice system of the Isle of Man, which is a self-governing dependency of the United Kingdom. In *Tyrer* case, the Court, in order to assess whether the penalty of whipping for juveniles, found guilty of assault, was to be considered inhuman treatment, considered to qualify it as degrading treatment because it was institutionalized violence that could harm the

[141] NICOSIA, *Il c.d. 41-bis è una forma di tortura o trattamento crudele, inumano o degradante?*, in Riv. *It. Dir. Proc. Pen*., 2009, pag. 1258 – 1259.
[142] Corporal punishment is taken into account as a legally prescribed penalty, another matter is that of the physical abuse by representatives of public authorities against persons subject to restrictions on freedom.

dignity and physical integrity of the applicant[143]. Otherwise, the mere threat of corporal punishment on students was judged not to be a violation of Article 3, as it had not been proven that the simple threat had produced such negative psychological consequences as to be considered a degrading treatment[144].

Another case notable, still relating to the application of corporal punishment in British schools, is the *Costello-Roberts* case. In this case involving discipline of a seven-year-old by slippering (three whacks on the bottom through his shorts with rubber-soled gym shoe), the Court considered that the level of ill-treatment was far less than that in the *Tyrer* case and concluded that there was no violation of Article 3[145]. In this case the Court affirmed an important principle: the possibility of applying conventional predictions also horizontally, that is even when the violent conduct is carried out by a private individual[146]. And therefore, in the case of injuries caused by private individuals, the State has an obligation to prevent them. This clearly means recognising an indirect application of the Convention in relations between private individuals, on the assumption that the only one responsible at international level is the contracting State[147].

On the other hand, with regard to the death penalty, in addition to Article 3, Article 2 must also be taken into account. This latter authorizes the State to impose such sanction «in in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law». Until very recently, the Court took the view that the death penalty cannot be considered per se contrary to Article

[143] *Tyrer v. UK*, 1978, para 33: "The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State. Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment - whereby he was treated as an object in the power of the authorities - constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity".

[144] *Campbell and Cosans v. United Kingdom*, 1982, para 24-31 (in the same sentence was found the violation of the right to education recognised in art 2, protocol 1, ECHR).

[145] *Costello-Roberts v. United Kingdom*, 1993, para 28.

[146] *Costello-Roberts,* cit., para 28: "in the present case, which relates to the particular domain of school discipline, the treatment complained of although it was the act of a headmaster of an independent school, is none the less such as may engage the responsibility of the United Kingdom under the Convention if it proves to be incompatible with Article 3".

[147] ESPOSITO, Il diritto penale flessibile, cit., p. 242.

3. An abolitionist choice has been made with the adoption of Protocol No. 6[148], concerning the abolition in peacetime of the death penalty. And then the Additional Protocol No.13 of May 2002 abolished the death penalty in all circumstances, even in wartime[149].

Although the Protocols only bind the ratifying States, the case-law of the Strasbourg bodies seems to indicate a tendency to consider that the death sentence may give rise to a violation of Article 3, if not as such, at least in relation to the method and circumstances in which it is commonly imposed and executed[150]. The Court ruled that the "death row phenomenon" constituted a breach of article 3 because of the suffering and the anguish of the condemned person while awaiting execution[151].

In the light of this case law, the principle that the prohibition of the application of the death penalty (directly derived from Protocols 6 and 13, for ratifying States; indirectly inferred from the inhuman nature of the prison treatment prior to execution, for non-ratifying States) includes not only the abolition of death penalty from its domestic law[152], but also the prohibition to extradite to a country applying the capital punishment[153].

Confirming this abolitionist tendency, in *Al-Saadoon and Mufdhi v. UK*, the Court states that there is a change in the practice of Article 2 so that the death penalty is prohibited in all circumstances. The Court's position is particularly relevant because it demonstrates the opening of the ECHR system to accept limited regulatory changes outside the Additional Protocols, based on the States' practice[154].

---

[148] Prot. 6 was opened for the signature on 28 April 1983 and was the first international document, concerning the European area, to express an abolitionist choice.
[149] Status as of February 2020, 44 ratifications.
[150] See *Soering v. United Kingdom*, 1989, para 100 ss., the Court examined data such as Soering's state of health, his age, the conditions of the surveillance regime in the death row, the length of his stay and the possibility of extraditing Soering to Germany, concluding that all of these elements result in the severity threshold being exceeded and thus in a breach of 3.
[151] *Soering* cit., para 104; *Poltoratskiy v. Ukraine*, 2003, para 133; *Ilascu and Others v. Moldova and Russia*, 2004, para 429.
[152] It is worth noting the *Ocalan v. Turkey* judgment, where the Court values the fact that the admission of a new member to the Council of Europe is subject to the cancellation of the death penalty from its own system.
[153] NICOSIA, *Convenzione europea dei diritti dell'uomo,* cit., p. 121.
[154] BARTOLE, DE SENA, ZAGREBELSKY, *Commentario breve alla convenzione,* cit., p.70.

Now it comes to the core issue. That imprisonment is a criminal sanction in itself not incompatible with respect for human rights is of course not in question; it constitutes an exception to the right to personal freedom expressly provided for in Article 5.1(a) of the ECHR[155].

Problems of compatibility of the imprisonment penalty could arise from its duration. For a long time, the Strasbourg Court has rejected the contrast between the perpetual imprisonment and Art. 3 of the ECHR, where the possibility of early release was at least abstractly guaranteed[156].

What could make such an inhumane punishment a concrete reality is the absolute character of perpetuity: according to the well-established approach of European judges, the hope of being able to enjoy benefits such as conditional release, premium permits, for example, makes not only the execution of the sentence bearable, but also in accordance with the Convention. More recently, however, as it shall be seen below, the Court has expressed itself in more peremptory terms, stating that imprisonment is unlawful where it leaves no real prospect of release[157].

3. Life sentences as a possible "inhuman or degrading punishment"

Having thus defined the boundaries of the scope of application of Article 3 ECHR, it is now necessary to analyse how the never-ending penalty falls within this provision.

The concept of life imprisonment was introduced in the 1990s in many members States of the Council of Europe, following the ratification of Protocol 6 and Protocol 13 to the European Convention on Human Rights abolishing the death penalty, as an alternative punishment to this latter. The capital punishment has been abolished on the basis that death penalty was contrary to human dignity. Underpinning principle is the idea that all persons have dignity which must be

[155] Art 5.1 ECHR: «Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; […] ».
[156] *Léger v. France*, 2006, para 90; *Kafkaris v. Cipro*,2008, para 100-107; *Iorgov v. Bulgaria* (n. 2), 2010, para 50-60.
[157] *Matiosaitis and Others v. Lithuania*, 2017; *Viola v. Italy* (n 2), 2019.

protected. The connection between the protection of the human dignity of all persons and the prohibition of certain forms of punishment is close[158].

The term "life imprisonment" has different meanings in different jurisdictions. In some countries, it means that life-sentenced prisoners have no right to be considered for release (LWOP) [159]. In others, life-sentenced prisoners are routinely considered for release after a certain period (LWP life with the possibility of parole). There are also other sentences that are not formally identified as life imprisonment, but which have the power to detain a person in prison until death (informal life sentences)[160]. Life imprisonment without parole (LWOP) is the most common type of life imprisonment in the world[161]. Second to the death penalty, it is often regarded as the severest sanction a court can pass. Public protection, retribution and deterrence have been commonly identified among abolitionists of the death penalty as the foremost benefits of LWOP.

It should be reiterated that Article 3 of the ECHR expressly prohibits not only inhuman and degrading treatment, but also inhuman and degrading punishment, in other words, punishment that exceeds the threshold of innate suffering in the deprivation of liberty of the convicted person.

Criminal policy issues are traditionally left to the Member States, and detention is certainly considered a legitimate tool in the fight against and prevention of crime. But subjection to the punitive power of the State cannot go so far as to deny the prisoner's condition as a human being who, regardless of the crime committed, is entitled to dignified treatment by the institutions[162]. Life sentences

---

[158] As the US Supreme Court recognized in 2011: "Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment". VAN ZYL SMIT, APPLETON, *Life imprisonment,* cit., p. 16.

[159] LWOP has been defined in line with the language of Article 37(a) of the 1989 United Nations (UN) Convention on the Rights of the Child: "No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age".

[160] Such as in countries that have a dual-track system, as Norway, which have no provision of formal sentence of life imprisonment but in practice the punishment may result in indefinite detention. See Chapter III.

[161] Penal Reform International and University of Nottingham: *A policy briefing on life imprisonment.* LWOP is a widely distributed type of life sentence, which we found in sixty-five countries, and in every continent.

[162] In *Tyrer* case the Court has recognised the human dignity as a fundamental and guiding principle of the whole conventional system, making it derive precisely from Article 3. Consequently, treatment and punishment can never be in violation of human dignity "whatever their deterrent effect

are often criticized for not providing the prisoners serving them with the hope of returning to society, which is the requirement for a penalty to be deemed human.

The widespread recognition of a general right to human dignity has also informed the growing emphasis on the rights of prisoners[163]. Prisoners' rights specifically relating to life imprisonment are set out in a growing number of national and regional instruments such as a 1994 United Nation report entitled "Life Imprisonment" which enshrines the duty of States to ensure that the actual conditions of life-sentence prisoners are compatible with human dignity[164].

For this reason, States are called upon to give form and content to the rehabilitation principle which, as has often been stressed, is rooted precisely in human dignity[165]. The choice to base the prison system on the ability of man to change is the one that ensures that prisoners are treated with dignity. The question under analysis is whether the perpetual punishment, which *ex ante* precludes rehabilitation of the condemned person and «sacrifices the re-educative function of the punishment on the table of deterrence or retribution tout court, still manages to maintain a face that is neither inhuman nor degrading»[166].

3.1. The applicability of Article 3 ECHR to life imprisonment without parole: ECtHR case law

It has been stated in the doctrine that «the most important penological issue on the European agenda today is life imprisonment»[167]. Over the last ten years, in what has been described by one judge as a "breathtakingly fast process"[168]. The

may be" (para 31). On the importance of the principle of human dignity, BALSAMO E TRIZZINO, *La Corte europea, l'ergastolo e il diritto alla speranza,* in *Cass pen*, n 12/2013, p.4672.

[163] One of the first international instruments was 1955 United Nations Standard Minimum Rules for Treatment of Prisoners (UNSMR) renamed in 2015 as the Nelson Mandela Rules. They are regarded as being the primary source of standards relating to treatment in detention.

[164] VAN ZYL SMIT, APPLETON, *Life imprisonment,* cit., p. 19.

[165] UN Human Rights Committee (HRC), *CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 10 April 1992: "*No penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner"*. On the same principle Art 10 of UN Basic Principles for the Treatment of Prisoners 1990 and Art 6 of the Committee of Ministers (Rec (2006)2).

[166] FALCINELLI, *L'umanesimo della pena dell'ergastolo. Ideologia e tecnica del diritto dell'uomo ad una pena proporzionalmente rieducativa*, in *Federalismi.it*, 2013, n. 1, p.3.

[167] ALBUQUERQUE, *Life Imprisonment and the European Right to Hope*, in *Riv. AIC*, 2015, n 2, p.1.

[168] *Matiošaitis and Others v Lithuania* (App Nos.22662/13, 51059/13, 58823/13, 59692/13, 57900/13, 60115/13, 69425/13 and 72824/13), judgment of 23 May 2017, concurring opinion of Judge Kūris at [3].

European Court of Human Rights has handed down a series of rulings on whether so-called 'life sentences' – imprisonment for an indefinite term without any formal opportunity for parole, release or reduction – are compatible with the European Convention on Human Rights. The relevant right engaged in such cases is Article 3, which prohibits the infliction of torture, inhuman or degrading treatment or punishment in absolute terms[169].

The violation of article 3 ECHR by life imprisonment was therefore initially excluded, on the triple condition that: the perpetual punishment is not "grossly disproportionate" with respect to the crime committed; the continuation of its execution is still instrumental to one of the "legitimate penological purposes"[170], indicated by the Court in the functions of retribution, general prevention (deterrence), negative special prevention (incapacitation of the offender) and positive special prevention (resocialization) of the offender; and the possibility for the sentenced person to be released early[171]. So, the Strasbourg Court, paradoxically, legitimises the perpetual penalty, as it "tends not to be perpetual" during execution[172].

What the Court found to be inhuman and degrading punishment was the *de jure* and *de facto* irreducibility of life imprisonment. «A human life involves not just existence and survival, but the unique development of a personality, creativity and liberty» when these are negated, it implicates the denial of dignity[173].

However, the case law of the ECtHR shows a number of uncertainties in identifying the scope and application of these principles in internal legal systems. The Court is forced to balance the State's margin of appreciation in criminal matters with the need for absolute protection of human dignity.

The Court, in the awareness of the lack of a clear regime shared between European States, through the various rulings that will be analysed below, tries to

---

[169] GRAHAM, *From Vinter to Hutchinson and back again? The story of life imprisonment cases at the ECtHR,* in European human rights review, 2018 (3), p. 298.
[170] VAN ZYL SMIT, APPLETON, *Life imprisonment,* cit., p. 3-11.
[171] *Kafkaris v. Cyprus*, 2008, n.21906/04, para 98.
[172] RANALLI, *L'ergastolo e la giurisprudenza della Corte Europea dei diritti dell'uomo*, in *Rassegna pen. e crim.,* n 1 /2015, p.289. Also, DOLCINI, *la pena perpetua detentiva nell'ordinamento italiano. Appunti e riflessioni,* in *Dir. Pen. Cont. Riv. Trim.*, 3/2018, p. 1-46: "*The red thread of Strasbourg case law is the idea of a reducible perpetual punishment*".
[173] APPLETON AND GRØVER, *The pros and cons of life without parole,* in *British Journal of criminology,* 2007, p. 597-615.

give an answer to the question of the legitimacy of life imprisonment, taking into account the progressive changes in sensitivity that are taking place: it is possible to observe an «evolutionary interpretation capable of progressively raising the standards of protection of the fundamental rights of the convicted person»[174].

3.1.1. The leading case: *Kafkaris v. Cyprus*

The first ruling of the Strasbourg Court on the relationship between Article 3 of the European Convention on Human Rights and life imprisonment without parole is *Kafkaris v. Cyprus* case[175].

The case involved a Cypriot citizen who was sentenced in 1989 to three mandatory life sentences because he was found guilty of three premeditated murders committed two years earlier. The prison regulations in force at the time of conviction provided that the sentence of life imprisonment was effectively equivalent to perpetual imprisonment, with no possibility for the convicted person to have access to forms of early and/or conditional release, except for to the possibility of benefiting from a (discretionary) clemency by the Head of the State[176].

The European Court had first of all made it clear that perpetual punishment does not in itself constitute inhuman or degrading treatment, at least as long as it is *de jure* and *de facto* reducible: «where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy Article 3»[177]. In this case, the instrument was the Head of State's power of grace. Since the Head of State had in the past used this power in favour of several life-sentenced, the Court

[174] BALSAMO E TRIZZINO, *La Corte europea,* in *Cass pen* cit., p. 4673.
[175] European Court of Human Rights, judgement 12 February 2008, *Kafkaris v. Cyprus.*
[176] *Kafkaris v. Cyprus,* para 80: "The procedure currently in place granted unfettered discretion to the President and was arbitrary in its nature".
[177] *Kafkaris v. Cyprus*, cit., para 97 and 98: «The imposition of a sentence of life imprisonment (…) is not in itself prohibited by or incompatible with Article 3 or any other Article of the Convention. At the same time, however, the Court has also held that the imposition of an irreducible life sentence may raise an issue under Article 3. In determining whether a life sentence in a given case can be regarded as irreducible, the Court has sought to ascertain whether a life prisoner can be said to have any prospect of release».

could not rule out the possibility that the same could happen in respect of the life imprisonment of the applicant *Kafkaris*[178].

Therefore, the Court found that the existence of «a system providing for consideration of the possibility of release» was enough to satisfy the requirements Article 3 without further scrutiny[179].

Despite this, there were many dissenting opinions (10 against 7) which highlighted the purely discretionary nature of the President's clemency and the arbitrariness that lies behind systems in which it is the political power that decides, without the duty to states reasons, and not a judge[180]. For dissenting judges, the penalty, even in the case of life imprisonment, should always aim at the social rehabilitation of those convicted, and this principle, although without a textual anchorage in the ECHR, should have been recognised by the Court through the declaration of incompatibility with Article 3.

Among the dissenters the most incisive was the Spanish judge Borrego, who accused the majority of being locked in an ivory tower. And he also claimed that «the applicant's imprisonment has amounted to torture» that's because he was promised release, by the President himself, if he'd named the person who ordered him the killing[181].

The Court in this case adopts a very restrictive interpretation of the principle set out in Article 3 ECHR, since the remote possibility of early release is considered to be in accordance with the Convention and a legal mechanism for reviewing the situation of the lifer is not necessarily required.

---

[178] In fact, Mr Kafkaris was, in 2008, the last life imprisonment in Cypriot prisons, having all been released by the Head of State. For further details on the *de facto* reducible nature of the Cypriot life sentence see GALLIANI, *Il diritto di sperare. La pena dell'ergastolo dinanzi alla Corte di Strasburgo*, in *costituzionalismo.it*, n 3/2013.

[179] *Kafkaris v. Cyprus*, cit., para 99.

[180] GALLIANI E PUGIOTTO, *Eppure qualcosa si muove, verso il superamento dell'ostatività dei benfici penitenziari*, in *Il diritto alla speranza: l'ergastolo nel diritto penale costituzionale* (a cura di) DOLCINI-FASSONE-GALLIANI-ALBUQUERQUE-PUGIOTTO, Giappichelli, 2019, p.170; GALLIANI, *The Reducible Life Imprisonment Standard from a Worldwide and European Perspective,* in *Global Jurist*, 2016, n.1: "Basically the power of pardon is judicial review free. Probably the most relevant demonstration of this conclusion is that granting pardon, as well as its refusal, does not need any reason or motivation".

[181] To the extent that, said the judge, the majority's reflections "display a lack of sensitivity that is unworthy of a court of human rights".

3.1.2. A first step toward a different sensibility: *Vinter and Others v. UK*

Subsequently, the ECtHR, in relation to the compatibility of life imprisonment without parole with Article 3 ECHR, examines the case of *Vinter and others v. The United Kingdom*[182]. Before setting out the Court's legal reasoning, it is suitable to have look at the legal background of the British life imprisonment.

The law in England and Wales imposes the mandatory sentence of life imprisonment on those convicted of murder. Upon an individual's conviction for murder, which automatically triggers the mandatory sentence of life imprisonment, the trial judge is required to set a minimum term of imprisonment, which must be served by the individual convicted for the purposes of punishment and retribution before consideration for parole[183].

A 'whole life order' (without the possibility of parole) may be imposed by the trial judge instead of a finite minimum term, if the judge considers the seriousness of the offence to be exceptionally high. In this type of hypothesis, the only possibility of release is entrusted to the discretionary power of the Minister of Justice, who may grant compassionate release on medical grounds. The system in the United Kingdom, in certain aspects, did not differ much from that in Cyprus[184]: in both cases, once the sentenced person had been sentenced to life imprisonment, the only way available for the condemned person was to turn to the political power for release, which had the discretionary power to take the final decision[185].

The three applicants in *Vinter* had all received mandatory life sentences upon conviction for murder and had whole life orders imposed upon them[186]. The Chamber (Fourth Section) of the ECtHR, in a judgment on 17 January 2012 found

---

[182] *Vinter and others v. The United Kingdom* App Nos 66069/09, 130/10 and 3896/10, Grand Chamber Judgment of 9 July 2013.

[183] MANVRONICOLA, *Inhuman and degrading punishement, dignity, and the limits of retribution*, in *Modern law review*, Vol. 77, n. 2/2014, p. 293. Also, RANALLI, *L'ergastolo e la giurisprudenza della Corte Europea*, cit., p. 297; VIGANÒ, *Ergastolo senza speranza di liberazione condizionale e art.3 Cedu (poche)luci e (molte) ombre in due recenti sentenze della Corte di Strasburgo,* op.cit., p 4; GALLIANI E PUGIOTTO, *Eppure qualcosa si muove, cit.,* p. 171.

[184] While a substantial difference from the Cypriot regime is that no one convicted to whole life imprisonment so far had been granted the discretionary early release.

[185] GALLIANI, *Il diritto di sperare. La pena dell'ergastolo dinanzi alla Corte, cit.,*

[186] The three applicants (Vinter, Bamber, Moore) had committed particularly serious crimes of homicide (the first to the detriment of his wife, the second to the detriment of his adopted sister and her two young children, the third to the detriment of four homosexual persons).

that an Article 3 issue would only arise if the applicants could show both that their sentences of life imprisonment were irreducible *de facto* and *de jure* and that their continued imprisonment could no longer be justified on legitimate penological grounds[187]. According to the Chamber, none of the applicants could show these two cumulative conditions. Noteworthy are the opinions of dissenting judges who seem to anticipate future developments in the Court's case law: they argue that it is necessary to provide for a review mechanism as soon as a conviction is imposed, because «the Article 3 problem does not consist merely in keeping the prisoner in detention longer than would be justified [...]. *Kafkaris* shows that it consists, equally importantly, of depriving him of any hope for the future, however tenuous that hope may be»[188].

At the request of the applicants under Article 43 ECHR, the matter was referred back to the Grand Chamber[189]. They complained that their prison sentences were in breach of Article 3 because of the non- reviewability and this would have meant that «a prisoner would remain incarcerated until death irrespective of whatever changes»[190]. Indeed, the whole life order was the only sentence that permanently excluded the prisoner form the society and ran counter to the principle of rehabilitation. This kind of penalty has been censored also at the European level[191] as it would openly conflict with human dignity[192].

For its part, the United Kingdom Government argued that there was no consensus among the Member States of the Council of Europe on life sentences and according to a well-established penal policy of England «there were some crimes

[187] The legitimate purposes of the sentence, referring to the *Bieber* case, are identified by the Court as retribution, deterrence, public protection and rehabilitation; therefore, if, after years of atonement, only retribution alone was present, (in the view that the convicted person would have committed a crime so serious that he would never deserve to obtain freedom again), life imprisonment would continue to represent a legitimate penalty.
[188] *Vinter and Others v. The United Kingdom*, IV Sec, 2012, joint partly dissenting opinion of judges Garlicki, David Thór Björgvinsson and Nicolaou.
[189] Chaired by Dan Spielmann, dissenting judge in the case *Kafkaris v. Cyprus.*
[190] *Vinter and Others,* Grand Chamber, judgment 9 July 2013, para 99.
[191] The applicants follow the example of Scotland, where the Court was required by law, precisely because of questions of compatibility with the ECHR, to always set minimum periods of imprisonment after which they could apply for release.
[192] *Vinter and Others,* cit., para 99. As the U.S. Supreme Court (*Graham v. Florida* 50 U.S. 48 (2010)) has argued: "if one looks at the rehabilitation purpose, the sentence of life imprisonment without parole can find no justification. This type of punishment renounces entirely the pursuit of the re-educational ideal".

so grave that they were deserving of lifelong incarceration for the purposes of pure punishment»[193]. It therefore argued that a review mechanism would only offer "a tenuous hope of release", given that «a whole life order was imposed to punish the offender for the exceptional gravity of his or her crime, and the gravity of that crime remained constant over time»[194]. The government further submitted that a whole life order was not an irreducible life sentence, as the Minister has power to order release and if the applicants ever sought to contend that their continued detention was not justified on any penological grounds, the decision could be challenged before an independent court[195].

Reversing the verdict handed down by the Fourth Chamber of the same Court on 17 January 2012, the Grand Chamber (with a majority of sixteen judges against one) stated that life imprisonment without the possibility of a review of the sentence was a violation of Article 3.

One of the principles on which the Court has relied on its reasoning was the principle of rehabilitation, rejecting the purely retributive function of the whole life sentences[196]. Endorsing the position expressed by the German Constitutional Court, the Court says «in any community that established human dignity as its centrepiece»[197] the prison authorities must make an effort to ensure the implementation of the prisoner's rehabilitation: they cannot deprive a man of his freedom without giving him the opportunity to recover it.

Similar emphasis on the importance of rehabilitation is found in numerous and varied national legal instruments of all kinds. The Grand Chamber in *Vinter* relied upon a wide range of comparative law and jurisprudence, both European[198] and non-European[199], to underline the importance of a rehabilitative objective of imprisonment: «while punishment remains one of the aims of imprisonment, the

[193] *Vinter and Others,* cit., para 92.
[194] *Vinter and Others,* cit., para 93.
[195] *Vinter and Others,* cit., para 94.
[196] *Vinter and Others,* cit., para 112.
[197] Ibid. para 113.
[198] In particular, the Italian case law on social reintegration and perpetual punishment is also cited. The sentences 204/1974, 264/1974 and 274/1983 of the Constitutional Court are examined, which in a very short summary state that the re-educational component of the sentence, and in particular the rehabilitation of the convicted person, can never be removed even in the presence of life imprisonment.
[199] International Covenant on Civil and Political Rights article 10 para 3.

emphasis in European penal policy is now on the rehabilitative aim of imprisonment»[200]. The objective pursued by the Grand Chamber was to give equal importance, (at least) as the other purposes of the sentence, to the function of rehabilitation, which was excluded from the English system, where the only possibility of getting out of prison was linked to humanitarian grounds. The Court - focusing on the other value erected as a trial hinge, dignity - considered that it would be unacceptably damaged if the only hope that the prisoners had of regaining their lost freedom was confined to pietistic-compassionate reasons.

The Court therefore attributes a central role to the institute of review,[201] a mechanism that would determine whether there was still sufficient penological justification for the continued detention of the person on whom a whole life order had been imposed[202]. After having recognised the margin of appreciation given to States in matters of criminal justice and the fact that the Court cannot prescribe the method and timing of review, the Strasbourg judges outlined a new test to measure the adequacy and reducibility of life imprisonment[203]. The basic requirement remains the reducibility of the sentence, the possibility of access to a review that can lead to release, but the control becomes stricter: the review must be based on the progress of the convicted person, and the *de facto* reducibility is examined with greater attention. From this point of view, the problem arose because of the absence of a review of the sanction imposed since it materialized «in something similar to an inhuman treatment, since it is dissocializing and dehumanizing in the long term»[204].

The Court also explained, for the first time, that the whole life prisoner has the right to know, "at the outset of his sentence", what to do in order to be released and under which conditions he could request a review of the sentence. If this were not the case - points out the Court - it would "be capricious" to imagine that a person

[200] Ibid. para 115.
[201] *Vinter and Others,* cit., para 119: "Article 3 must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner […] and progress towards rehabilitation has been made in the course of the sentence".
[202] VAN ZYL SMIT, WEATHERBY, CREIGHTON, *Whole Life Sentences and the Tide of European Human Rights Jurisprudence: What Is to Be Done?,* in *Human Rights Law Review,* 2014, 14, p. 62.
[203] PUGIOTTO E MUSUMECI, *Gli ergastolani senza scampo*, ed. scientifica, Napoli, 2016, p.110.
[204] ALBUQUERQUE, *Life Imprisonment and the European Right,* cit., p. 222.

sentenced to perpetual punishment commits himself to his reintegration into the community. Consequently, «the incompatibility with Article 3 arises (…) at the moment of the imposition of the whole life sentence and not at the later stage of incarceration»[205]. Therefore, the key point of the reasoning is the lack of clarity of the legislation governing the possibilities of release for those sentenced to life imprisonment[206].

Even if the detainee were to succeed in meeting the extremely restrictive conditions for access to conditional release on humanitarian grounds, the Court is not convinced that it can be considered a "prospect of release", as it was meant in *Kafkaris',* «if all it meant was that a prisoner died at home or in a hospice rather behind prison walls»[207]. Moreover, the Prison Ordinance did not provide for an assessment of the lack of the legitimate purpose of the sentence among the possible grounds for release. For all these reasons, the English system lacked in clarity.

Given the lack of a real, clear, prospect of release and the absence of a «dedicated review mechanism», the Court is not persuaded that applicant's life sentences can be regarded as reducible for the purpose of article 3 of the Convention[208].

What is infringed, as the Irish judge, Ann Power-Forde in her concurring opinion, maintains, is the right to hope, the source of which is Article 3. For the first time, there is mention of such a right, recognized to every human being even «who commits the most abhorrent of acts [but] retains his fundamental humanity and carry within himself the capacity to change». To deny the experience of hope is to deny a fundamental aspect of every human being[209].

With *Vinter and Others v. United Kingdom* the Court has made a decisive change (a real overrule) in its case law on life imprisonment without parole. Before

---

[205] *Vinter and Others,* cit., para 122.
[206] GALLIANI, *Il diritto di sperare. La pena dell'ergastolo dinanzi alla Corte,* cit., p. 13: *"*Strasburg's judges address the key issue: how should the only remaining possibility of release for prisoners to life imprisonment be assessed, namely the early release ordered by the Minister?*".*
[207] *Vinter and Others,* cit., para 127.
[208] Ibid. para 130.
[209] GALLIANI, *Il diritto alla speranza*, cit., p. 130. Also, the Pope Francis has given its contribution to the issue: in his speech said that the protection of human dignity can provide the legal basis for complete abolition of life imprisonment. For more details see: ALMENARA AND VAN ZYL SMIT. "*Human Dignity and Life Imprisonment: The Pope Enters the Debate,*" in *Human Rights Law Review*, vol. 15, no. 2, 2015, p. 369-376.

Vinter, the Strasbourg judge was satisfied with the *de jure* and *de facto* reducibility of the perpetual penalty thanks to even by the graceful power of the Head of State alone. With *Vinter*, it radically changes the perspective. The person must know, from the moment of the conviction, what he have to do as a prisoner in order to hope, one day, that a body will be able to review its dangerousness and rehabilitation and, consequently, decides whether the sentence is still legitimate or whether his purposes have ceased[210].

It should be noted that «the significance of the decision in *Vinter* goes far beyond the procedural reform required in considering the justifications for the continued detention of a small group of offenders sentenced to life imprisonment». The Grand Chamber considered that the limits of a State's power to punish are inherent in the prohibition of inhuman or degrading treatment and punishment. At the heart of his reasoning is the recognition of the human dignity of all transgressors. «No matter what they have done, they should be given the opportunity to rehabilitate themselves while serving their sentences, with the prospect of eventually functioning as responsible members of free society again»[211].

3.1.3. Confirmation of the new legal guideline in *Öcalan v. Turkey (n. 2)*

Following the resolution of the *Vinter* case, the European Court once again ruled on the compatibility of life imprisonment without parole in relation to Article 3 ECHR[212]. The case in question involves a Turkish citizen who was initially sentenced to the death penalty. After its annulment, the sentence has turned into life imprisonment without the possibility of parole[213]. In Turkey the only possibility left, to life sentence person, is limited to the pardon obtainable by the President of

[210] GALLIANI, *Murray c. Paesi Bassi: progressi in materia di pena perpertua*, in *Riv. Quaderni costituzionali,* n. 3/2016, p. 604.
[211] VAN ZYL SMIT, WEATHERBY, CREIGHTON, *Whole Life Sentences and the Tide of European Human Rights Jurisprudence,* cit., p. 65.
[212] *Öcalan v. Turkey* (No 2) n. 24069/03, 197/03, 6201/06 and 10464/07, 18 of March 2014.
[213] Moreover, the applicant was subject to a restrictive detention regime similar to solitary confinement of 41 bis of the Italian penitentiary regulation. For a description of the characteristics of the scheme see *Öcalan v. Turkey* (No 2), §§ 26-34 and 176-196.

the Republic in exceptional circumstances (e.g. serious illness) or amnesty. There are two novelties in this case in comparison to the *Vinter* judgment. This time the point at issue is the sentence applied to the convicted leader of a terrorist organisation, and the scope of the case also includes the very strict prison regime applied to the applicant.

The Court reaffirms the principles it had expressed in the *Vinter* case, Turkey is condemned for violation of Article 3 ECHR since Turkish law does not provide for any type of review[214] of the life imprisonment penalty after a certain period of imprisonment, in order to verify whether there are legitimate reasons to keep the person in prison. The Court considers that release on humanitarian grounds does not correspond to the concept of "prospect of release" on legitimate penological grounds[215].

The Grand Chamber then drew attention to the absolute and mandatory scope of Article 3 of the Convention, stressing that reasons relating to the seriousness of the offence committed, can never justify inhuman or degrading treatment. The perpetual penalty imposed on the applicant in the present case should therefore be regarded as contrary to European law, despite the fact that he has been convicted of terrible crimes such as terrorism[216]. Particularly significant is the partially dissenting opinion of Judge Pinto de Albuquerque, who affirms that: «prisoners have a vested and enforceable right to be paroled» and «prisons should not be like the gates of Hell, where the words of Dante come true*: Lasciate ogne speranza, voi ch'intrate* »[217]. Albuquerque using pioneering arguments, not only affirmed the right to be paroled, but even advocated the need to eliminate life

[214] *Öcalan v. Turkey,* cit., para 195-196: "A life sentence does not become irreducible by the mere fact that in practice it may be served in full. As the Court pointed out in its Vinter and Others judgment. In fact, in determining whether a life sentence in a given case can be regarded as irreducible, the Court has sought to ascertain whether a life prisoner can be said to have any prospect of release".

[215] *Öcalan v. Turkey,* cit., para 203.

[216] *Öcalan v. Turkey,* cit., para. 97-98: "Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned".

[217] The partial dissenting opinion is reported in ALBUQUERQUE, *I diritti umani in una prospettiva europea*, *Opinioni concorrenti e dissenzienti,* (a cura di) GALLIANI, Torino, 2016, p.182-196.

imprisonment as an unrestrained, unnecessary and disproportionate State reaction to crime, not tolerable in a democratic society[218].

3.1.4. A step back: *Murray v. The Netherlands* and *Hutchinson v. United Kingdom*

The evolution of the jurisprudence of the European Court of Human Rights has shown particular care for the issue of life imprisonment and it is characterized by a progressive inflexibility of the Court with respect to choices made by States that are detrimental to the dignity of the person and a progressive lowering of the threshold of severity required for the applicability of the Article 3, so as to include within its scope situations excluded in the past[219].

In *Murray v. The Netherlands* (Third Chamber), the applicant was initially sentenced to life imprisonment without parole[220], with the only possibility of applying for a presidential grace. More than ten times, the plaintiff had actually asked for a pardon but had always been refused. Subsequently in 2011, the system on the island of Curaçao (one of the Netherlands Antilles dependent on the Netherlands) enacted a reform, introducing the possibility of a periodic review of the sentence of life imprisonment: following the re-evaluation of the applicant's sentence, however, the competent authorities considered that the continuation of his imprisonment was legitimate and justified[221]. Succeeding the applicant's appeal to the Strasbourg Court, the Chamber, recalling the *Vinter's* criteria, concluded that Article 3 of the Convention had not been infringed. In particular, the Court considered that, at the time of the appeal, there was a mechanism in national law for reviewing the sentence which offered a real possibility of release.

In this way, taking up the "restrictive" approach of the first *Vinte*r judgment, the Court took a step back from what the Grand Chamber subsequently stated, that

---

[218] VAN ZYL SMIT, APPLETON, *Life imprisonment,* cit., p. 313.

[219] RANALLI, *L'ergastolo e la giurisprudenza,* cit., p. 308. After *Vinter* all life imprisonment without parole were declared contrary to Article 3 of the Convention: *Ocalan v. Turkey,* 13.10.2014; *Laszlo magyar v. Hungary,* 13.10.2014; *Harakchiev and Tolumov v. Bulgaria,* 8.10.2014; *Trabelsi v. Belgium*, 16.02.2015*; Kaytan v. Turkey,* 15.12.2015.

[220] *Murray v. The Netherlands*, III Sec., 10 dec. 2013. Murray was sentenced in 1980 for the murder of a six-year-old child to perpetual punishment on the island of Curaçao, one of the Netherlands Antilles.

[221] Because of the high risk of recidivism, not having been treated for mental illness was considered still dangerous.

it did not assess the existence of a prospect of release and of a mechanism for reviewing the sentence at the time it was imposed, but at a later time after the sentence was handed down. The principle that the condemned person must be able to know what he has to do in order to obtain release as soon as the sentence is pronounced has been dropped.

A year after the pronouncement of the Chamber, Murray received a presidential pardon because he suffered from a serious terminal illness but died a few weeks later. The applicant's family then filed a petition for referral to the Grand Chamber, complaining about the perpetual nature of the sanction imposed on Murray, but also about the inhumane conditions of detention marked by the absence of proper psychiatric treatment.

The Grand Chamber in its judgment[222] acknowledged the merits of the applicants' position, pointing out that the penalty imposed on Murray had taken on a *de facto* perpetual character. Overruling what had been said by the Chamber, it noted that the refusal to include the prisoner in the prison regime appropriate to his mental situation had in fact cancelled any hope of being able to meet the requirements for a review of the sentence.

This ruling makes it clear that, from the point of view of the rehabilitation principle of the penalty, it is not only the time of imprisonment that is relevant, but also the manner and content of prison treatment[223]. The signal the Court wants to send out is very clear: States must make every effort possible to allow the rehabilitation to take its course. In a word, the Grand Chamber has consolidated the *Vinter*'s criteria and restored fair justice[224].

In this consolidated jurisprudential journey of convergent and almost all unanimous decisions*, Hutchinson v. United Kingdom*[225] arrived as an unexpected setback[226]. The Strasbourg Court addressed again the English legislation, after

[222] *Murray v. The Netherlands*, G.C., 26 of April 2016.
[223] In the present case, the detention should have taken place in a prison equipped for cases of mental problems, while it took place for almost thirty years in a normal penitentiary.
[224] GALLIANI, *Murray c. Paesi Bassi*, cit., p. 606.
[225] *Hutchinson v. United Kingdom*, IV Sec 3 Feb. 2015, confirmed by GC, 17 Jan. 2017.
[226] GALLIANI, *Il problema della pena perpetua dopo la sentenza Hutchinson della corte Edu,* in *Il diritto alla speranza*, cit., p.132.

Vinter v. United Kingdom judgment, in which the Strasbourg Court had declared to be in breach of the Convention because of the lack of clarity of the law[227].

Mr. Hutchinson, guilty of triple homicide, sexual assault and grand larceny, was condemned to life imprisonment with a whole life order and his legal position was very similar to that already examined in Strasbourg in the previous *Vinter* case. The only difference was that there was a new internal case law on the compatibility between the English system and Article 3. After the Grand Chamber's ruling in *Vinter*, the English Court of Appeal handed down its ruling in *McLoughlin*[228].

The Court of Appeal had to answer the question whether or not the English system violated the Convention as interpreted in *Vinter* by the Strasbourg Court. In its ruling, the Court of Appeal specifically rejected the view of the Grand Chamber that section 30 of the Crime (Sentences) Act 1997 was unclear and therefore did not provide an adequate means for a prisoner to demonstrate that his or her continued imprisonment was no longer justified[229]. It clarified the operation of the Home Secretary's statutory power of compassionate release, describing it as having a "wide meaning[230]" beyond its literal wording, allowing (and requiring) the evaluation of penological grounds for incarceration[231] and must be exercised in accordance with the Convention[232].

---

[227] See *Vinter v. United Kingdom*, para 129. In particular the powers of release granted to the Minister of Justice. It has been seen that the United Kingdom's conviction in the *Vinter* case results from the lack of clarity in section 30(1) of the Crime (Sentences) Act 1997, which governs early release where there are exceptional circumstances justifying release on humanitarian grounds.

[228] *R v. McLoughlin*, [2014] EWCA Crim 188.

[229] PETTIGREW, *A Vinter retreat in Europe: Returning to the issue of whole life sentences in Strasbourg*, in *New Journal of European Criminal Law* 2017, Vol. 8(2) p. 130.

[230] "We find it difficult to specify in advance what such circumstances might be, given that the heinous nature of the original crime justly required punishment by imprisonment for life. But circumstances can and do change in exceptional cases. The interpretation of s.30 we have set out provides for that possibility and hence gives to each such prisoner the possibility of exceptional release". (Lord Thomas, *R v. McLoughlin*, at para 36)

[231] GRAHAM, *From Vinter to Hutchinson and Back Again? The Story of Life Imprisonment Cases in the European Court of Human Rights,* in *European Human Rights Law Review,* 2018, 258.

[232] English law transposed the ECHR with the adoption of the Human Rights Act in 1998 which states in Section 2 that: "A Court or tribunal determining a question which has arisen in connection with a Convention right must take into account any judgment (…) of the European Court of Human Rights". In addition, Section 3 obliges the application and interpretation of the internal provisions to comply with the Convention.

The Court of Appeal stated that the incompatibility declared by the Grand Chamber between English law and Article 3 would be the result of a misunderstanding of English law by European judges[233].

One understands, at this point, the complicated situation in which the European judges found themselves in deciding the appeal brought by Mr. Hutchinson. The legal and factual situation was in fact quite similar to the one already dealt with in *Vinter*; but in the meantime, the English courts had intervened and reaffirmed the conformity of domestic law with the Convention[234].

In that case*, Hutchinson v. UK*, the Court essentially accepted the Court of Appeal's argument, and found that the UK's life sentences framework did not breach Article 3. The Court arrived at that decision, considering that the new, conventionally orientated interpretation of internal case-law was sufficient to remedy (ex post) the lack of clarity which had been censured in *Vinter*. This assertion was supported by the principle, consistently stated in the case law of the ECtHR, that the task of interpreting legislation and domestic case law is primarily a matter for the national courts of the State in question[235].

The Court is satisfied with the assurances provided by the *McLoughlin* judgment. On one hand, it welcomes the obligation for the Secretary of State to rely on Strasbourg case-law in making his assessments, an obligation expressly indicated by the Court of Appeal, which would be a source of clarity for those sentenced under perpetual penalty; on the other hand, as regards the time parameter, although the Secretary of State is not obliged to initiate the review procedure *ex officio*, the possibility for the detainee to refer to him at any time on the basis of Section 30 guarantees the compatibility of the system with Article 3 ECHR[236].

---

[233] BERNARDONI, *I molteplici volti della compassione: la Grande Camera della corte di Strasburgo accetta le spiegazioni dei giudici inglesi in materia di ergastolo senza possibilità di liberazione anticipata*, *in www.penalecontemporaneo.it,* 11 aprile 2017, p.338.
[234] BERNARDONI, *I molteplici volti della compassione,* cit., p. 339.
[235] RANALLI, *L'ergastolo e la giurisprudenza,* cit., p. 311. Also, GRAHAM, *From Vinter to Hutchinson and Back Again,* cit.: "The Court accepted and upheld the Court of Appeal's statement of the law, accepting that it had clarified the UK position and, by implication, admitted it had previously misunderstood it in Vinter".
[236] BERNARDONI, *I molteplici volti della compassione,* cit., p. 340.

The judgment of the Grand Chamber has the taste of a decision that is not very juridical but on contrary it is political[237]. The main question is: «has anything really changed in the United Kingdom since *Vinter* onwards? »[238]. It is undeniable that, after *Vinter*, nothing has changed in legislation[239]. It remains the right of the prisoner to ask whether the purpose of the sentence is still current, which includes that of receiving an assessment that is not linked to health conditions, nor to compassionate reasons, nor to discretionary considerations of the executive. This is where the main problem lies: nothing has changed since *Vinter*[240]. Now as then, the prisoner is in no way able to understand what to do in order to hope for a possible release[241].

Among the dissenting opinions, the Judge Pinto de Albuquerque has prompted reflection on the role of the Court: complaining that the Strasbourg judges have bowed to the English Court of Appeal, making decisions into mere non-binding recommendations and ends up turning into a mere auxiliary organ compared to the States[242].

In his dissent, Judge Pinto De Albuquerque recalled the Grand Chamber's judgement of *Murray v. the Netherlands*. It was held that a parole mechanism must comply with five binding principles: the principle of legality, i.e. there must be a sufficient degree of clarity and certainty; the principle of the assessment of the penological grounds for continued incarceration based on objective and

---

[237] PETTIGREW, *A Vinter retreat in Europe,* cit., "The reversal of the Grand Chamber, with no action taken by England and Wales in response to the concerns raised in Vinter other than the Court of Appeal's proclamation that the domestic law was good law, raises questions regarding the extent to which the ECHR is influenced by political pressure both directly, in this case, and that found within the wider climate of growing Euro scepticism". Also, BOCCHI, *I casi Hutchinson e Paradiso Campanelli: la Grande camera riscrive il diritto della Convenzione europea*, in *Quaderni Costituzionali*, 2/2017, p. 445.

[238] GALLIANI, *Il problema della pena perpetua*, cit., p. 133.

[239] GRAHAM, *From Vinter to Hutchinson and Back Again,* cit.

[240] Lack of change was a key point in the dissenting opinion of Judge *Kalaydjieva* in Hutchinson: «the majority in the present case failed to express any view as to whether the interpretation of the domestic law established in […] R v. McLoughlin changed, ceased to apply or made the applicant's situation more compatible with the principles laid down by the Grand Chamber in examining the situation of the applicants in Vinter».

[241] "The violation in *Vinter* rests on two grounds, the first one being the lack of certainty and the second one being the absence of a dedicated review mechanism. They remain untouched." (Hutchinson v. the United Kingdom, dissenting opinion of PINTO DE ALBUQUERQUE, at para 16)

[242] The Court is in an existential crisis and there is a risk of becoming: «non-judicial commission which does not deliver binding judgments […] but pronounces mere recommendations […] acting in an mere auxiliary capacity, in order to "aid" them in fulfilling their statutory and international obligations» (para V of Dissenting opinion of *P.P. de Albequerque*)

preestablished criteria; the principle of assessment within a specified time frame; the principle of fair procedural guarantees, including the obligation to give reasons for the decision not to order the release and the principle of judicial review[243]. For Judge Pinto De Albuquerque those principles have now been disregarded[244].

In fact, he pointed out that the interpretation offered by the English courts is at odds with the letter of the law, since it finds the concept of exceptional case on "compassionate grounds" incompatible with that of systematic and structural need to verify the persistence of legitimate functions of the penalty[245]. In confirmation of his position, he proposed some quotes from English decisions, following the *McLoughlin* judgment, to highlight the hostile attitude of the judiciary in granting release to a condemned person to perpetual punishment. He also listed a number of judgements in which the English judiciary had generally been reluctant to open up to the entry of ECHR jurisprudence and concluded that in such a climate, such a contrast between law and interpretation could certainly not create clarity.

What is to be made of *Hutchinson*? On its face, the case seems to show a "setback[246]" or "retreat[247]" from *Vinter*, either by applying an unusually lenient standard of assessment or declining to assess some parts of the post-Vinter framework altogether. It is unclear from the judgment alone whether *Hutchinson* should be seen as the Court pulling back from *Vinter* and adopting a new, weaker standard of review, or whether the Court is continuing to follow to the Vinter standard, but just applying it sloppily to the facts of this case, perhaps aware of the particular political implications behind its judgment[248].

3.1.5. Post-*Hutchinson* case law

It is widely held that the *Hutchinson* judgment is a note out of tune[249] in the converging landscape of convention breach versus life imprisonment without

[243] PETTIGREW, *A Vinter retreat in Europe,* cit., p. 135.
[244] *Hutchinson v. the United Kingdom*, dissenting opinion of Judge Pinto De Albuquerque, at para 10.
[245] VAN ZYL SMIT, APPLETON, *Life imprisonment,* cit., p. 47.
[246] BERNARDONI, *I molteplici volti della compassione,* cit.
[247] PETTIGREW, *A Vinter retreat in Europe,* cit., p. 135.
[248] GRAHAM, *From Vinter to Hutchinson and Back Again,* cit.
[249] GALLIANI E PUGIOTTO, *Eppure qualcosa si muove: verso il superamento dell'ostatività ai benefici penitenziari?*, in *Il diritto alla speranza*, cit., p.175.

parole decisions. In the next ruling, *T.P. and A.T. v. Hungary*[250], the Court seems to take courage and adds an additional piece to determine the compatibility of the perpetual penalty. In *Vinter*, the Court had left a wide margin of appreciation to the States in determining the duration and the modalities of the review of life sentences, although it recalled the Statute of the International Criminal Court, which provided for a period of 25 years, after which the review must take place. But it was a kind of auspice, the states remained free to make their own discretionary decisions[251].

In *T.P. and A.T.* the ECtHR declared contrary to Article 3 the period of 40 years provided by Hungarian law to request for a review, since no *de facto* prospective for considering life imprisonment to be reducible is offered. In other words, the quantum must be reasonable and does not depend on the age of the claimants but, is in itself measurable in relation to the right to hope. In fact, at the time of their conviction, T.P. and A.T. were 25 years old.

In *Matiošaitis and Others v. Lithuania*[252], the ECtHR has further muddied the clarity of Strasbourg thinking by contradicting the judgement rendered earlier in the year by the Grand Chamber in *Hutchinson v. United Kingdom*[253].

The second section of the ECtHR unanimously upheld the claims of six applicants that their life sentences were in violation of Article 3 of the European Convention on Human Rights. It was found to have been violated on the basis that the applicant's life sentences were not *de jure* or *de facto* reducible. In Lithuania, as a matter of law, those subject to a life sentence are not eligible for parole (Article 158 § 1 (3) of the Criminal Code). The only possibility of release is represented by the presidential pardon. After the first ten years of the sentence, served in special penitentiaries, the prisoner can submit a request for pardon and, in the case of rejection, given with an unjustified decree, propose it again after six months.

Pardon pleas are first assessed by the *Pardon Commission*, comprised of high-ranking state officials, but whose recommendations are not binding upon the President. In granting the pardon they will take into account: the seriousness of the

[250] *T.P. and A.T. v. Hungary,* IV Sec, 4 October 2016, def. 6 March 2017.
[251] GALLIANI, *Il problema della pena perpetua*, cit., p. 131.
[252] *Matiošaitis and Others v. Lithuania,* II Sec, 23 May 2017, final 23/08/2017.
[253] PETTIGREW, *Politics, power and parole in strasbourg: dissociative judgement and differential treatment at the european court of human rights*, in *International Comparative Jurisprudence*, 2018 Volume 4 Issue 1, p. 16.

crime, the behaviour of the convict, how much of the sentence has already been served, whether compensation for pecuniary damage caused by the crime has been paid, the opinions of the administration of the correctional institution and other circumstances[254]. The Court in the present case, re-emphasised that there must exist a review mechanism allowing for the prospect of release consisting in «an actual assessment of the relevant information [of] whether his or her continued imprisonment is justified on legitimate penological grounds»[255]. It also highlighted that the conditions of incarceration need to «give a genuine opportunity to reform» to the life prisoners in order to achieve the rehabilitation and gain the pardon[256]. It recognised the duty for the authorities to «give life prisoners a chance, however remote, to someday regain their freedom»[257], respecting the "right to hope" as recognised in *Vinter,* which has been the bedrock upon which a corpus of jurisprudence has been built[258]. The Court found that the system did not meet Convention standards. The review mechanism, despite the merit of the pre-established criteria, was nevertheless found to be inadequate for prisoners in order «to know what [they] must do to be considered for release and under what conditions» especially due to the lack of specific reasons given alongside rejections of review applications[259]. Precisely because of this last deficiency, according to the Court a life prisoner «is left with a riddle as to what he or she must do to prove to the President his or her rehabilitation»[260]. This coupled with the fact that applications for release were very rarely successful in practice[261], caused the Court to look at the pardon system as a royal prerogative of mercy, rather than the type of sophisticated review mechanism necessary for Article 3[262]. Finally, after reaffirming the freedom for States to entrust the review to the power of a judge or

[254] *Matiošaitis and Others v. Lithuania* (2017) at 78.
[255] Matiošaitis and Others v. Lithuania (2017) at 174.
[256] The Court found that the poor living conditions within the prison, particularly the number of hours life prisoners spend in total isolation, mitigated the effectiveness of any reform program: the "deleterious effects of such life prisoners' regime must have seriously weakened the possibility of the applicants reforming". Para 179.
[257] *Matiošaitis and Others v. Lithuania* (2017) at 177.
[258] PETTIGREW, *Politics, power and parole,* cit., p. 16.
[259] *Matiošaitis and Others v. Lithuania* (2017) at 181.
[260] *Matiošaitis and Others v. Lithuania* (2017) at 176.
[261] *Matiošaitis and Others v. Lithuania* (2017) at 172. According to the statistical information provided by the Government, only one out of thirty-five life prisoners who have asked for pardon has received a positive response.
[262] *Matiošaitis and Others v. Lithuania* (2017) at 173.

the executive (the important thing is that it is motivated), the Court pointed out that having one of the plaintiffs served only 7 years and, therefore not yet having reached 10 years to apply for pardon, in this case too there was an infringement of the Convention. For the judges, what is striking is the absence of an effective review which arises «at the moment of the imposition of the life sentence and not at a later stage of incarceration»[263].

It is clear that the Court of *Matiošaitis* has used a more in-depth analysis of the Lithuanian prison system than in *Hutchinson* as regards the United Kingdom. It underlined the *de facto* reducibility of the judgment and the clarity of the criteria associated with it; it stated a higher standard of proof and, crucially, it seemed to reassert the line of case law that the requirements of Article 3 must be present from the outset of the judgment, an aspect so seriously ignored in *Hutchinson*[264].

The reason for a contradictory finding between *Hutchinson* and *Matiošaitis* lies in «the standing of the answering jurisdictions at the court»[265]. In the UK, the Prime Minister has often stated the intention to abrogate the Human Right Act, which obliges the UK to act in accordance with the Convention. If a founding member leave the remit of the Court, then human rights' protection could be jeopardized. The development of differential treatment may have temporarily secured the remit of the Court by appeasing Britain but, if it continues along this path, the long-term future of the Court cannot be so easily assured[266].

3.1.6. Human dignity challenged by the Italian legislation: *Viola v. Italy* (No 2)

In one of the latest judgments the ECtHR ruled on the regulation of "perpetual life imprisonment[267]" (practically irreducible LWOP)[268] in Italy. On 12 December 2016 *Viola v. Italy* (No 7763/16) was submitted[269].

---

[263] *Matiošaitis and Others v. Lithuania* (2017) at 182.
[264] GRAHAM, *From Vinter to Hutchinson and Back Again,* cit.
[265] PETTIGREW, *Politics, power and parole,* cit., p. 25.
[266] Ibidem.
[267] For more information on the regime of perpetual life imprisonment, see the next Chapter II.
[268] There is the possibility that the legal powers of release applicable to LWOP prisoners may be so restrictive that, even when they are exercised, the sentences will still be irreducible because the best that the head of state or executive branch is empowered in law to do for these prisoners does not amount to "release." VAN ZYL SMIT, APPLETON, *Life imprisonment,* cit., p. 45.
[269] *Marcello viola v. Italy (n. 2),* I Sec., N. 77633/16, 13 June 2019, which became final the 7 October 2019, (following the decision of the panel of five judges of the Grand Chamber rejecting the request

The applicant was sentenced to life imprisonment to be served under the regime provided for in Article 4-*bis* of penitentiary Regulation, which involves a particular kind of life imprisonment with greater restrictions[270]. In 1999 and in 2002 (on appeal) Marcello Viola was sentenced to life imprisonment for membership of a Mafia-type criminal organisation[271]. The fact that he was the organisation's leader was considered as an aggravating factor. The regime applicable by default was the one of "whole-life" imprisonment. Under domestic law, any prospect of release for such prisoners was conditional on their cooperation with the police, which means that the person concerned had to provide the authorities with decisive information for the purposes of preventing further consequences of the offence or helping to establish the facts and identify the perpetrators of criminal offences (except where such cooperation was impossible or unenforceable and the person concerned could prove that he or she had severed all ongoing links with the Mafia-type group). So, the Italian system of life imprisonment allows *de jure* a reduction of the perpetual penalty.

The applicant refused to cooperate in this way and has always proclaimed himself innocent. In 2011 and 2013, he applied for a prison permit, but it was rejected because he refused to cooperate with justice. In March 2015, once 26 years of imprisonment have passed, he could have applied for conditional release, but Court noted his lack of cooperation with the judicial authorities and denied it, even

for referral made by the Italian Government under Article 43 ECHR). For comments on the judgment: SANTINI, *Anche gli ergastolani ostativi hanno diritto a una concreta "via di scampo": dalla Corte di Strasburgo un monito al rispetto della dignità umana*, in *www.penalecontemporaneo.it.*, 1 luglio 2019; MANCA, *Le declinazioni della tutela dei diritti fondamentali dei detenuti nel dialogo tra le Corti: da Viola c. Italia all'attesa della Corte costituzionale,* in *Archivio penale*, n 2/2019; SCARCELLA, *La normativa italiana sul c.d. ergastolo ostativo è contraria alla Convenzione EDU*, in *il Quotidiano Giuridico*, 17 giugno 2019; MENGOZZI, *Il dialogo tra le corti sull'ergastolo ostativo: un'opportunità per il giudice delle leggi,* in *Per sempre dietro le sbarre?* cit., Forum di quaderni costituzionali, n 10/2019; SANTANGELO, L*a rivoluzione dolce del principio rieducativo tra Roma e Strasburgo,* in *Riv. Cass. Pen,* 10/2019, p. 3769; DOLCINI, *Dalla Corte Edu una nuova condanna per l'Italia: l'ergastolo ostativo contraddice il principio di umanità della pena,* in *Riv. It. Dir. Proc. Pen*., 2/2019, p. 926.

[270] This is the main form of life imprisonment, in practice involving 70% of those sentenced to perpetual punishment. For further statistical data on italy and other member countries: DOLCINI, *La pena detentiva perpetua nell'ordinamento italiano appunti e riflessioni*, in *Dir. Pen. Cont. Riv. Trim*, 3/2018, p. 1- 46.

[271] In a first trial he was sentenced to 15 years of imprisonment for being considered one of the promoters of the local criminal association, involved in the "Taurianova fight". In a second trial, Viola's position as the leader of the criminal organization was confirmed in relation to further serious *mafia* crimes and he was sentenced to life imprisonment.

if it did not conduct any assessment of the progress that the applicant claimed to have made since being convicted.

Once he has exhausted all domestic remedies without success[272], he decided to submit his appeal to the ECtHR. The applicant complained of a breach of Article 3 of the Convention because perpetual life imprisonment, in the Italian system, would be an irreducible penalty *de facto*, contrary to the principle of proportionality and the principle of rehabilitation; it was also a breach of Art. 3 from a procedural point of view, since the mere declaration that the application for conditional release was inadmissible prevented a real assessment of its merits.

The defences of the Italian government were mainly based on the specific characteristics of the case concerning a very peculiar Italian phenomenon i.e. the *mafia* organization[273]. In addition, the Government considered that life imprisonment would not be an irreducible sentence, since the prisoner could be released on parole, in particular through the institutions of "impossible and unenforceable" collaboration, and that the choice of collaboration would not result from a legal automatism, but by an independent evaluation of the person concerned. In addition, the Government pointed out two further alternatives: presidential pardon and the possibility of suspending the execution on health grounds.

The Court of Strasbourg started from the assumption of the seriousness of the *mafia* phenomenon and the legislative choice to give priority to general prevention purposes and, as can be expected, pointed out that the choices of the State in matters of criminal justice do not fall within the competence of the Court. Against this background, one might have expected a decision that would give a large room for state appreciation, and that it would be satisfied with the government's assurances[274]. However, in the present case, the nature of the offences for which the applicant has been convicted was not relevant to the examination, in

[272] By decision of 22 March 2016 n 1153, the Court of Cassation rejected the detainee's appeal, reiterating the absolute presumption of social dangerousness established *ex lege* in the case of non-cooperation. This dangerousness is to be understood in relation to the particular seriousness of the crimes committed and not in relation to the person concerned.

[273] In the past, the European Court had rejected the complaints against the differentiated regime based precisely on the specificity of the *mafia* phenomenon. (*Enea v. Italy*, [GC] 17.9.2009, n. 74912/01)

[274] As it happened in the judgment *Hutchinson v. United Kingdom*, [GC], 17.1.2017, n. 57592/08.

view of the mandatory nature of the prohibition in Article 3, one of the few conventional rules which do not allow exceptions even in a state of war[275].

While it was true that the domestic regime offered convicted prisoners a choice as to whether to cooperate with the judicial authorities, the Court had doubts as to the free nature of that choice and the appropriateness of equating a lack of cooperation with the prisoner's dangerousness to society. Failure to cooperate was not always the result of a free and deliberate choice, nor did it necessarily reflect continuing adherence to "criminal values" or ongoing links with the organisation in question[276].

A refusal to cooperate may be due to other circumstances or considerations (such as the fear of reprisals against the person concerned or his or her family)[277]; conversely, the decision to cooperate might be based on purely opportunistic reasons[278]. In such scenario, equating a lack of cooperation with an absolute presumption of dangerousness to society, the Italian perpetual punishment seems to be unbalanced in protecting needs of social defence and special prevention, while failed ultimately to reflect the individual's actual progress towards rehabilitation[279].

According to the Court, in the present case, the lack of cooperation with the judicial authorities has given rise to an irrebuttable presumption of dangerousness which has deprived the applicant of any realistic prospect of release. It was therefore impossible for the applicant to prove that his detention was no longer justified on legitimate penitential grounds[280]; by continuing to consider the lack of cooperation as an absolute presumption of dangerousness for society, the current regime effectively assessed the dangerousness of the person with reference to the time the crime was committed, instead of taking into account the reintegration

[275] GALLIANI E PUGIOTTO, *L'ergastolo ostativo non supera l'esame a Strasburgo (A proposito della sentenza Viola v. Italia n.2)*, in *osservatorio AIC*, n 4/2019, p. 202.
[276] *Viola v. Italy* para 116.
[277] *Viola v. Italy* para 117.
[278] *Viola v. Italy* para 120. On the contradictory relationship between non-cooperation and the current link with the criminal organization: FLICK, *I diritti dei detenuti nel sistema costituzionale fra speranza e deluzione*, in *Riv. AIC*, 1/2018, p. 3.
[279] FIORENTIN, *La Corte di Strasburgo conferma: la pena perpetua non riducibile è sempre contraria alla convenzione europea,* in *Riv. Cass. Pen*., n. 8/2019, p. 3066.
[280] The observation reports on the applicant showed a positive development of personality; the applicant was never subject to disciplinary sanctions; participation in the reintegration programme had resulted in the granting of approximately five years' early release.

process and any progress made since the conviction[281]. Perpetual life imprisonment is therefore based on an absolute presumption and is in collision with the rehabilitation function of the punishment, which requires flexibility of the penalty and progressive treatment[282].

At a time when the human dignity is recognized as the cornerstone around which the Convention revolves, it does not seem logical to agree that inhuman and degrading treatment should deprive the detainee, even if convicted of serious crimes, of the hope of regaining his freedom[283]. Indeed, this irrebuttable presumption effectively prevented the competent Court from ascertaining whether the person concerned had changed and made progress towards rehabilitation, during the time of conviction[284].

The Court reiterated that the principle of rehabilitation is recognised in the case-law[285] of the Court as one of the purposes of the penalty, which must also be adopted with regard to those condemned to life imprisonment[286]. This is in the light of respect for human dignity which «lies at heart of the conventional system» and «prevents a person from being deprived of his or her freedom by constraint without, at the same time, working towards his or her rehabilitation and without giving him or her a chance to regain that freedom one day»[287]. Furthermore, the Court recalled what it had already expressed in *Murray:* the function of resocialization aims to protect society and avoid reoffending, taking away the offender's chance of redemption, prison becomes meaningless[288].

---

[281] *Viola v. Italy* para 128.
[282] DOLCINI, *Dalla Corte Edu una nuova condanna per l'Italia: l'ergastolo ostativo contraddice il principio di umanità della pena*, in *Riv. It. Dir. Proc. Pen*., n 2/2019, p. 412; GALLIANI E PUGIOTTO, *L'ergastolo ostativo non supera l'esame a Strasburgo,* p. 198: "It's a legal presumption that petrifies the life of the offender by locking him forever to what he has been".
[283] SANTANGELO, *La rivoluzione dolce*, cit., p. 3755.
[284] *Viola v. Italy* para 129.
[285] See *Murray* para 58-65 e 70-76.
[286] *Viola v. Italy* para 108. For further information on the relationship between the humanity of punishment and the rehabilitation of the condemned person see: DOLCINI, *Dalla Corte Edu una nuova condanna per l'Italia,* cit., para 928; GALLIANI E PUGIOTTO, *L'ergastolo ostativo non supera l'esame a Strasburgo,* cit., p. 199.
[287] *Viola v. Italy* para 113 and 136.
[288] *Murray v. The Netherlands*, para 102. GALLIANI E PUGIOTTO, *L'ergastolo ostativo non supera l'esame a Strasburgo,* cit., p. 201.

In the light of these principles, the Court considered the penalty of "perpetual life imprisonment" to be restrictive of the prospect of release of the applicant and therefore was contrary to Article 3, which does not allow irreducible perpetual punishment[289]. This form of punishment excludes prisoners from being considered for parole or any other form of conditional or unconditional release against the so-called "right to hope": the life imprisoned person retains the right to know, from the outset of the sentence, the conditions under which his or her position may be re-examined[290].

Concerning the other internal remedies, the possibility of presidential pardon or release on compassionate grounds, the Court had previously held that this type of remedy was not what was meant by "prospect of release", as the term had been used since the *Kafkaris v. Cyprus* judgment. Moreover, the Government had not produced any examples of convicted prisoners in a similar situation who had obtained a presidential amnesty[291]. The Strasbourg judges were right in excluding this remedy as suitable to obtain a re-examination of the sentence. Individual clemency and deferral of punishment are eminently humanitarian and equitable measures, by their nature unpredictable and independent of the prisoner's conduct behind bars[292].

Therefore, the Court requested Italy to adopt legislative reforms that could ensure the review of the sentence and allow to assess the progress made by the prisoners in order to protect the "person's dignity" which is one of the primary functions of Article 3[293]. The European Court was aware that the matter was highly political, pointed out that the finding of a breach of Art. 3 ECHR does not entail the

[289] *Viola v. Italy* para 137.
[290] MANCA, *Le declinazioni della tutela dei diritti fondamentali dei diritti fondamentali dei detenuti*, cit., p. 23.
[291] *Viola v. Italy* para 133-135.
[292] GALLIANI E PUGIOTTO, *L'ergastolo ostativo non supera l'esame a Strasburgo,*cit., p. 199.
[293] *Tyrer v. the United Kingdom*, para 33. See GALLIANI E PUGIOTTO, *L'ergastolo ostativo non supera l'esame a Strasburgo,* cit., p. 199: "The conventional system is based on human dignity, which the Court has derived from Article 3 of the ECHR. The conventional text does not explicitly mention this, but the prohibition of torture, inhuman and degrading treatment and punishment means, for the judges in Strasbourg, that the human dignity of a person cannot be violated".

immediate release of the convicted person, but only, as regards Viola, financial compensation to cover the costs incurred[294].

The Court, even if it admits that the State can demand the evidence of "dissociation" from the *mafia*, considered that the breaking of ties with *mafia* organizations could be expressed in other ways than cooperation with the judicial authorities and the legislative automatism provided for under the current legislation[295]. Otherwise, this would be as if there were, in Europe, a penalty until death, in many ways similar to the death penalty, which is based on the judgment that the detainee will always be dangerous[296].

Viola is not only *Viola*. The situation of life imprisonment is a "structural problem", also in relation to the number of cases pending before the Court[297]. It will be seen in the next chapter what impact the judgment has had on the Italian legal system[298].

4. The principles under consideration applied to extradition procedures: *Harkins* and *Edwards v. United Kingdom*

The narrow wording of Article 3 has made possible a broad interpretation of its scope and content by Strasbourg case-law. From this provision the Court has created the *par ricochet* protection technique, that is a form of indirect protection which makes it possible to assess the conformity with the Convention even of establishments not directly falling within its scope[299]. Since *Soering v. United*

[294] The aftermath of the Viola ruling, a lively debate arose in Italy among those who claimed that a dangerous breach had been opened for the exit of the criminals from prison. (GUASCO, *Il messaggero.*it, 7 Oct. 2019).
[295] *Viola v. Italy* para 143. What is asked is the overcoming of the absolute preclusion of social dangerousness, inserted as the only legal criterion within Art. 4-bis of the Penitentiary Regulation for access to prison benefits, and that returns, to the judge of the "re-education" his (institutional) power of control and ratification of the individual path.
[296] AMICUS CURIAE, Application No. 77633/16, Viola v. Italy, 15 sep. 2017.
[297] MORI E ALBERTA, *Prime osservazioni sulla sentenza Marcello Viola c. Italia (n. 2) in materia di ergastolo ostativo,* in *Giurisprudenza penale*, 6/2019, p. 8.
[298] Parallel to the appeal before the Court of Strasbourg, the Court of Cassation, first criminal section, and the Court of Surveillance of Perugia raised - separately - the question of constitutional legitimacy, with respect to Articles 3 and 27, third paragraph, of the same provision, in the part in which it excludes the condemned person sentenced to life imprisonment who did not cooperate with the authorities, from the use of the premium permits.
[299] ESPOSITO, il diritto penale flessibile, cit., p. 222.

Kingdom[300], the Court has included in this extensive protection mechanism individuals who are in danger of extradition or expulsion to a country, even if the country of destination is not bound by the Convention, that may subject them to inhuman and degrading treatment, establishing the principle of *non-refoulment*[301]. With regard to the subject dealt with in this paper, it is interesting to see how the Court ruled in the case of a prisoner, who should be extradited to a State, not party to the Convention, where he would be at risk of being sentenced to life imprisonment without possibility of parole.

The leading case in the matter is *Harkins and Edwards*[302], in which, the plaintiffs complained that an extradition to the United States of America would expose them to the real risk of infliction of a perpetual penalty sentence, with no possibility of release. The only possibility was in fact the power of grace in the hands of the Governor of the State or the President of the United States. In order to give their opinion on this case, the Strasbourg judges started from analysing the previous judgment on the same matter: "*Wellington*" addressed by the House of Lords (in 2008)[303]. The Court, unlike the House of Lords, maintained that there

---

[300] *Soering v. United Kingdom,* 7 july 1989. The Court ruled that the extradition of the German citizen to the United States, entailing the serious risk of inhuman and degrading treatment for the pain that the applicant would suffer during his stay in the death row, was incompatible with Article 3.

[301] The principle of "*non-refoulement*" was officially enshrined in Article 33 of the 1951 Convention Relating to the Status of Refugees. Article 33: "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". For further details see COLEMAN, *Non-Refoulement Revised Renewed Review of the Status of the principle of Non-Refoulment as Customary International Law*, in *Eur. Jour. Migr. Law*, 2003, n. 1, p. 23 ss; ALLAIN, *The Jus Cogens Nature of Non-Refoulment,* in *International Journal of Refugee Law*, 2001, n. 4, p. 533 ss.

[302] *Harkins and Edward v. United Kingdom,* 17 Jan. 2012. Both applicants faced extradition from the United Kingdom to the United States where, they alleged, they risked the death penalty or life imprisonment without parole. The first applicant, Mr Harkins, was accused of killing a man during an attempted armed robbery, while the second applicant, Mr Edwards, was accused of intentionally shooting two people, killing one and injuring the other, after they had allegedly made fun of him. The US authorities provided assurances that the death penalty would not be applied in their cases and that the maximum sentence they risked was life imprisonment.

[303] *Wellington v. Secretary of State for the Home Department* [2008] UKHL 72.
In that ruling the House of Lords questioned the relationship between extradition and Article 3 of the Convention, having been called upon to decide whether the applicant's extradition to the US State of Missouri, where he was facing a life sentence without possibility of release, was in breach of the prohibition of torture and ill-treatment. The highest British courts ruled in that case that the imposition of the sentence of life imprisonment without possibility of parole did not in itself violate Article 3 ECHR, unless the penalty was considered to be grossly or clearly disproportionate to the seriousness of the fact, and there was (in line here with the European Court's ruling in *Kafkaris*) a possibility of release, de jure or de facto.

were no different standards of protection and that in the presence of a real risk of treatment contrary to Article 3, both extradition and exclusion are precluded. Secondly, while the House of Lords had considered that it could be a different treatment between the hypothesis in which the subject is exposed, in the country of destination, to the risk of treatment that can properly be qualified as "torture", or of mere "inhuman and degrading treatment": in the first case the protection offered by Article 3 should indeed be understood as absolute, in the second case balances with other values would be admissible. Although the Court acknowledged some contrast in previous judgments, it reaffirmed the absoluteness of the protection offered by Article 3 ECHR[304]. The Court quoted its leading cases on the matter - from *Chahal*[305] to the more recent *Saadi*[306]- in which a potential violation of Article 3 was identified in relation to the expulsion of terrorist suspects to countries where they were exposed to a real risk of being subjected to treatment generically indicated as contrary to Article 3.

The Court, however, added that «that the Convention does not purport to be a means of requiring the Contracting States to impose Convention standards on other States», this means that the minimum level of gravity changes with respect to whether a State is part of the convention or not[307]. The Court thus provides two different standards of protection (a differentiated test) against potential breaches of the article in question[308]. On the basis of these considerations, and the cautious attitude in judging situations involving countries such as U.S. which respect human rights, the Court concludes that the extradition of the two applicants to the United States cannot be considered precluded by Article 3 ECHR.

In the case of the first plaintiff, if he was extradited, according to Florida criminal law, he would have been convicted to life imprisonment without parole for committing felony murder. The second plaintiff, on the other hand, he would be charged with voluntary manslaughter and sentenced to life imprisonment with the

[304] *Harkins and Edward v. United Kingdom,* para 122-128.
[305] *Chahal v. United Kingdom*, 15 Nov.1996, ric. n. 22414/93. In this judgment, in fact, the possibility of balancing with requests opposing extradition is explicitly ruled out.
[306] *Saadi v. Italy*, 28 Feb. 2008, ric. n. 37201/06.
[307] *Harkins and Edward v. United Kingdom,* para 129-130.
[308] FALCINELLI, *L'umanesimo della pena*, cit., p. 6: "*Thus, with regard to the evaluation of the minimum level of severity of prison treatment, a differentiated path is inaugurated*".

right of the judge to exclude parole. The Court recognises that, if they were prosecuted in England, none of the applicants would have been sentenced to such a severe penalty, but it specifically rules out a disproportionate penalty, because both applicants have been accused of very serious offences. Once it has been excluded that the punishment is grossly disproportionate to the crime, the applicant would have to prove, as in *Vinter*, that the continued enforcement of the sentence no longer serves any of the legitimate purposes of the sentence and that there is no de *facto* or de *jure* possibility of early release. In both cases, the Court maintains that the applicants have not been able to prove that the penalty may one day be not based on legitimate penological grounds and that the President does not make use of the pardon, therefore the appeals are rejected[309].

4.1. A new attitude: *Trabelsi v. Belgium*

In the light of the new principles expressed by the Grand Chamber in 2013 by the *Vinter and others v. United Kingdom* judgment[310], the ECtHR, more than a year later, returns to the relationship between extradition and life imprisonment without parole with *Trabelsi v. Belgium*[311] ruling. It changed its orientation compared to the *Harkins* judgment of 2012.

The applicant was a Tunisian national arrested in Belgium in September 2001 on suspicion of terrorist activity and sentenced there in 2003 to ten years' imprisonment for planning to blow up a Belgian military base. In 2008 the United States sent the Belgian authorities a request for his extradition to be prosecuted, since a detailed map of the US embassy in Paris was found during the search of his

[309] VIGANÒ, *Ergastolo senza speranza di liberazione condizionale e art. 3 cedu: (poche) luci e (molte) ombre in due recenti sentenze della corte di Strasburgo,* in *Riv AIC, n.2/2012*, p.7; PARODI, *Ergastolo senza liberazione anticipata, estradizione e art. 3 CEDU*, in *www.penalecontemporaneo.it,* Nov. 2014: "However, since this is an eventuality to be taken into account during the execution of the sentence, the fourth section excluded in the cases then under consideration is the current state of infringement of Article 3 ECHR: (…) against the applicants in the Harkins case, for whom extradition proceedings were simply pending with a view to a future and possible sentence, in the United States, to life imprisonment whose execution had not even begun".

[310] The Grand Chamber established the principle that life sentenced person cannot be left in a situation of vague uncertainty; this would be contrary to the principle of legal certainty and counterproductive to the rehabilitation of the sentence. He has the right to know already, at the very moment when his sentence is pronounced, what he will have to do in order to be released and under what conditions this can happen.

[311] *Trabelsi v. Belgium*, Sec. V, 4 Sep. 2014.

house at the time of his arrest, together with a large quantity of explosives. The Belgian authorities decide to grant extradition, but the person concerned lodges an appeal, fearing the risk of being sentenced to life imprisonment on American soil without the possibility of early release, which constitutes a violation of Article 3 ECHR.

In 2011, *Trabelsi* appealed to the ECtHR asking to adopt a provisional measure under Article 39 ECHR to suspend extradition proceeding. In October 2013, he is extradited in contravention of the Court's interim measure and the Strasbourg judges will have to judge Belgium's behaviour after the extradition.

The Strasbourg judges, after extradition, must ascertain whether the sentence appears grossly disproportionate to the crime committed, and in the specific case, in relation to the seriousness of the terrorist acts, the sentence of life imprisonment was considered justified, and whether there is a mechanism for reviewing the conditions of the sentence which suggests the possibility of early release of the prisoner[312].

In this case, the Court found that the extradition of the applicant to the United States was in breach of Article 3 ECHR, since the possibilities for parole in the United States were too vague and general[313], and did not allow the applicant to be aware in advance of the timing and modalities of the early release itself.

The judges then focused on the conduct of Belgium which deliberately and expressly failed to comply with the Court's interim measures laid down in Article 39 of the ECHR, which prohibited the extradition of *Trabelsi* until the Court had taken a final decision. The Court noted that Belgium «irreversibly lowered the level of protection of the rights set out in Article 3 of the Convention […] the extradition has, at the very least, rendered any finding of a violation of the Convention otiose, as the applicant has been removed to a country which is not a Party to that instrument, where he alleged that he would be exposed to treatment contrary to the Convention»[314].

---

[312] PARODI, *Ergastolo senza liberazione anticipata, estradizione,* cit.

[313] *Trabelsi v. Belgium*, para 133: "The applicant submitted that his only "hope of release" lay in the prospects of success (…) of an application for a Presidential pardon or commutation of sentence. This possibility, which was completely at the discretion of the executive, was no guarantee and was based on no predefined criterion".

[314] *Trabelsi v. Belgium*, para 150.

The *Trabelsi v. Belgium* case is very meaningful because finally, in contrast to its previous resolutions, the Court seems to have taken the same position both in Europe and for States not party to the convention. The Court did not accept a double standard of assessment, one for life imprisonment in Europe and another for people who could be extradited outside Europe, with the possibility of being sentenced to an irreducible life sentence. It is true that the Court cannot impose its standards on non-European countries, but it is also true that in *Trabelsi* the Court has imposed its standards on European countries. In other words, what the Court has asked European States to do is not to extradite people who might have been convicted to life imprisonment without parole[315]. It should be noted that LWOP which does not meet the requirements set out by the Court must be qualified as inhuman and degrading treatment even where it is imposed by a State which is not a signatory to the Convention.

5. Conclusions

The question under evaluation in this chapter is if the *sine die* punishment could be deemed as inhuman treatment according to Article 3 in the ECHR.

As seen in the Convention there is not an explicit reference to the function of the penalty. The teleological reference of the Court's case law has therefore been identified in the prohibition of inhuman and degrading treatment (Art. 3 ECHR)[316]. Regarding life imprisonment, the ECtHR has found it inhumane the maintenance in detention when this, over time, becomes unjustified in relation to the re-educational purpose of the sentence and the punitive and preventive purposes of the sentence are fulfilled[317]. States are then required to provide for a mechanism for reviewing the judgment in order to check whether the convicted person has made progress in determining whether there are still grounds for believing that detention is justified. Therefore, seen from Strasbourg's perspective only a non-reducible sentence is incompatible with Article 3, since it prevents the offender from

[315] ALBUQUERQUE, *L'ergastolo e il diritto europeo alla speranza,* in *Il diritto alla speranza*, cit., p.226.
[316] MUSUMECI E PUGIOTTO, *Gli ergastolani senza scampo*, cit., p.109.
[317] ZAGREBELSKY, *La pena detentiva fino alla fine e la Convenzione Europea dei diritti umani e delle libertà fondamentali*, in *Per sempre dietro le sbarre?,* cit., p. 17.

redeeming himself and violates human dignity[318]. In the European context thus have been affirmed the prisoners' right to opportunities to rehabilitate, which is generally described as a right to social rehabilitation, resocialisation, or even re-education, this must be the primary objective of all sentences, including life imprisonment[319]. Coupled with this was the "right to hope", which was closely related to an inherent capacity to change, to develop and thus to rehabilitate[320]. Thus, "life imprisonment without hope" is deemed to be an inhuman and degrading treatment.

Lastly, the Court ruled in the *Viola* case on Italian "perpetual life imprisonment", where it stated that the principle of human dignity prohibits the deprivation of a person's freedom without at the same time working for his or her reintegration and without offering him or her the possibility of one day recovering his or her freedom, condemning Italy for breaching Art. 3 of the Convention. The fundamental point of departure is the proposition that a democratic society cannot write off a human being as irredeemable, neither impose an LWOP sentence with the aim to keep someone in prison until death[321]. The issue concerned access to conditional release, an institution which ensures that life imprisonment is not absolute. The Italian legislative system denies access to this measure to anyone convicted for a series of serious crimes who does not offer useful cooperation. Therefore, the periodic assessment of dangerousness is excluded on the basis of an almost insuperable legal presumption that deprives the life sentenced of all hope. Following the judgment, it will be seen whether Italy will be the new *Hutchison* or will conform to the European orientation, towards overcoming penalties contrary to the sense of humanity. The evolution of the European Court of Human Rights has thus been traced, and the criteria that should guide the interpreter in the evaluation of his or her own internal system have been identified, so as to verify whether it can be considered to comply with conventional parameters[322].

[318] *Kafkaris v. Cyprus*, cit., para 95-108; *Vinter v. UK*, cit., §§ 103-118; *Öcalan v. Turkey*, cit., §§ 193-207; *László Magyar v. Hungary*, 20 May 2014, §§ 46-59; *Trabelsi v. Belgium*, cit., § 115; *Bodein v. France*, 13 nov. 2014, §§ 53-61; *Murray v. The Netherlands*, cit., §§ 99-104.
[319] VAN ZYL SMIT, APPLETON, *Life imprisonment,* cit., p. 298.
[320] Ibidem p. 299.
[321] VAN ZYL SMIT, APPLETON, *Life imprisonment,* cit., p. 300.
[322] As will be seen in Chapter II.

«The simplest way to prevent human rights abuse by LWOP sentences is not to allow them to be imposed»[323]. Yet this step has not been taken; not even by the ECtHR. The Strasbourg Court's proposal was to provide for a minimum period of time (not exceeding 25 years) in each legal system after which the possibility of a review of the sentence would be guaranteed, so that the sentenced person could work towards his rehabilitation from the outset of his sentence. However, the possibility of release must be made real. Life sentenced prisoners can be put in a position that no matter what they do, or how much they change for the better, they will never be considered fairly for release. This may be due to the fact that those who make release decisions are never willing to consider life prisoners as if they had been punished enough, as is the case for those convicted of *mafia* offences[324]. On this last point, Judge Wojtyczek has drawn attention in his dissenting opinion on the *Viola* case. In fact, in the judge's view, the choice of the Italian legislator to prevent access to any prison benefits to those who do not cooperate is justified in the first place in the light of the type of crime under consideration. Namely, the seriousness and dangerousness of the crimes connected to the mafia-type association require greater protection by the State, whose objective, i.e. to glaze these organizations, would justify even perpetual life imprisonment[325].

Certainly, the Strasbourg Court's contribution has been in bringing the purpose of punishment and the rights of prisoners back to the centre of European debate. It consolidated the minimum standard, binding at supranational level, which ensures that «even those responsible for the most heinous crimes have the hope of regaining their freedom, averting the risk of being "branded forever" as social germs in Europe»[326].

---

[323] VAN ZYL SMIT, APPLETON, *Life imprisonment,* cit., p. 307.

[324] The day after the Strasbourg verdict on the Viola case, many anti-mafia prosecutors (Nicola Gratteri chief prosecutor of Catanzaro, Nino Di Matteo member of CSM, Nicola Morra president of the anti-mafia), aware of the peculiarities of the *mafia* phenomenon, harshly criticized the sentence because it opened a dangerous breach in the discipline in favour of those considered irrecoverable. If he has never regretted it, the member remains bound for life by the blood oath he took when he joined the "family". And therefore, there is no possibility of "change" or "redemption", on the contrary, history teaches us that he will use every concession of the State to facilitate the criminal organization.

[325] SANTANGELO, *La rivoluzione dolce*, cit., p. 3744.

[326] Ibid. p. 3777.

CHAPTER II

FUNCTIONS AND PURPOSE OF THE PUNISHMENT: LIFE IMPRISONMENT IN THE ITALIAN CONTEXT

1. Historical framework: life imprisonment before the Constitution

In order to understand how the institution of life imprisonment was introduced into the Italian penal system and if it is still an endless sentence, is necessary to make a short historical excursus.

The word "*ergastolo*" (life imprisonment) has a very ancient origin[1]. The term dates back to ancient Greece and was the place where slaves could rest after a day spent working in the fields, or where those who did not pay their debts were confined. It hadn't any function of punishment but described the simple extension of the condition of subjection in which the slaves were held.

It was in ancient Rome that the term was used with a punitive meaning: the *pater familias* locked up the slaves deemed irredeemable within a space called "*ergastolum"* with obligation to work[2]. It should be noted that no free man could be sent to life imprisonment, but it was a treatment to whom only slaves were destined. Particularly in the Middle-Ages, the Church made extensive use of it for punitive purposes. The Church conceived life imprisonment as perpetual segregation, to which sinners were destined in the hope of their redemption[3]. Namely, a penalty over which the ecclesiastical authority had full autonomy in setting time and conditions for the execution of the sentence. Imprisonment in the secular world played a marginal role compared to other punishments such as corporal, pecuniary and capital punishment[4].

---

[1] From Greek "ἐργάζομαι", means "work".

[2] See FIORELLI, *Ergastolo (premessa storica*) in *Enc. dir*., Vol. XV, Giuffrè, 1966; ASCHIERI, voce *Ergastolo*, in *"Il digesto italiano*", volume X, Utet, Torino 1895-1898.

[3] MEREU, *Note sulle origini della pena dell'ergastolo,* in *Dei delitti e delle pene*, 2/1992, p. 95.; FASSONE, *Ergastolo e il diritto alla speranza*, in *Questione giustizia*, 24 Feb. 2020; DI CARO, *Ergastolo "ostativo": la "presunta" legittimità costituzionale del "fine pena mai" tra spinte riformatrici nazionali e sovranazionali*, in *Giurisprudenza Penale*, n. 5/2017, 2.

[4] Giulio Chiari, a Lombard judge who lived in the 16th century, wrote in his work *Pratica criminalis*: "the penalty of perpetual imprisonment is not used by lay people, they had more rapid means: the cleaver, the gallows, the gash [...]. Life imprisonment instead, as perpetual segregation, on bread

The desire to abolish the death penalty and to replace it with life imprisonment made its way among the Lombard encyclopaedists and led to the writing of *Dei delitti e delle pene*[5]. Cesare Beccaria in this work advocated the replacement of the death penalty with life imprisonment in terms of political and social utility, from his perspective executing murderers would stimulate cruelty among the public, while life imprisonment would have a deterrent effect[6]. The author stated that life imprisonment was harsher than capital punishment: it was painful for those who experienced it and it was exemplary for those who watched. «A great many men look upon death with a calm and steady gaze, some out of fanaticism, some out of vanity…But neither fanaticism nor vanity survives in fetters or chains, under cudgel and the yoke, or in an iron cage, where the desperate man finds that his woes are beginning rather than ending»[7]. Life imprisonment has more deterrent effects of the death sentence because a long-term suffering without any ending terrifies much more those who watch. It was precisely in the perpetuity that it gained its deterrent and exemplary force[8]. Other early utilitarians reasoned in the same way. Benjamin Constant even considered life imprisonment worse than the death penalty[9]. He saw perpetual punishment as the return to the most primitive eras where «a consecration to slavery, a degrading of the human condition»[10] was present.

Life imprisonment, on the basis of these theories, was adopted as an ordinary punitive instrument by "enlightened monarchs"[11]. During the 19th century most of the pre-unification Codes provided for perpetual punishment, not as a

---

and water, in some lost convent, was a specialty that the church used when it did not consider necessary to condemn a heretic to the stake".

[5] GARLATI, *La proposta abolizionista di Beccaria nel dibattito italiano di fine Settecento tra tiepidi entusiasmi e tenaci opposizion*i, in *Un uomo, un libro. Pena di morte e processo penale nel Dei delitti e delle pene di Cesare Beccaria*, a cura di GARLATI E CHIODI, Milano, 2014, XX-XXI.

[6] VAN ZYL SMIT, APPLETON, *Life imprisonment: A Global Human Rights Analysis*, Harvard University Press, 2019, p. 3.

[7] BECCARIA, *Dei delitti e delle pene,* Milano, § XXVIII, *Della pena di morte.*

[8] Ibidem.

[9] BENTHAM, *Theorie des peines*, in *Oeuvres*, (a cura di) DUMONT, Bruxelles 1841, Libro II, p. 73.

[10] See FERRAJOLI, *Ergastolo e diritti fondamentali*, in Antigone, 1/2011, p. 15-24.

[11] DANUSSO, *Patibolo e ergastolo dall'Italia liberale al fascismo*, in *Dir. Pen. Cont Riv. Trim.,* 4/2017, p. 52. The enlightened monarch who fully accepts Beccaria's idea is Pietro Leopoldo, Grand Duke of Tuscany, who, having abolished the forks altogether, in his *Leopoldina* of 1786, places the penalty of public works for life for men and life imprisonment for women. Among others, Joseph II, Emperor of Austria, abolished the death penalty and replaced it with even more cruel punishments: towing boats against the current on the river Danube or chaining them for life.

substitute for the death penalty, but as an intermediate hypothesis between the death penalty and temporary punishment[12]. Those sentenced for life, who had behaved well, could abstractly gain back their freedom through the institution of pardon, a form of clemency dependent on the discretionary power of the executive authority[13]. Given its origins, it can be said that the life sentence is closely related to the perpetual dimension of forced labour. Its purpose is to punish with the maximum severity those who are considered incorrigible.

In conclusion, life imprisonment can be considered a penalty not quantitatively, but qualitatively different from other forms of imprisonment. «The perpetuity of the imprisonment penalty, its being destined to never end, changes radically the existential condition of the prisoner, his relationship with himself and others, his perception of the world, his depiction of the future»[14]. As such, life imprisonment is not comparable neither to temporary detention nor to the death penalty.

1.1. The Zanardelli Criminal Code

In the 19th century in our Country it raised a debate about [15] the abolition of the death penalty: some scholars assumed that life imprisonment was perfectly capable of replacing and even tightening the capital punishment[16]. In order to achieve this objective, which was hampered by many, legislators had to give the penalty the maximum deterrent effect and ensure the elimination of the convicted person from society. It is indicative that the various draft penal codes always

[12] The perpetual punishment was provided by the Code of the Reign of the two Sicilies, by the Tuscan Code, according to which life imprisonment was characterised by twenty years of absolute segregation, after which the convicted person was assigned to community service with the obligation of silence; by the Estense Code, after the death penalty on the gallows; by the Reign of Sardinia where it indicates forced labour for life. See BETTIOL, *Sulle massime pene: morte ed ergastolo*, in *Scritti giuridici*, II, Padova, 1966, 888.
[13] SALVATI, *Profilo giuridico dell'ergastolo in Italia*, in *Amministrazione in cammino*, 4 May 2010, p. 4.
[14] FERRAJOLI, *Ergastolo e diritti fondamentali*, cit., p. 17.
[15] While in the Kingdom of Tuscany the death penalty had been abolished, in the rest of Italy it was still present in the Codes. This situation of double force fostered the debate between those who wanted abolition and those who supported the death penalty. Among the abolitionists an important role was played by the scholar Francesco Carrara. For insights: CARRARA, *Programma del corso di diritto criminale,* Parte generale, vol. II, Lucca, 1877, p. 661.
[16] FERRAJOLI, *Ergastolo e diritti fondamentali,* cit. "Because it is an eliminatory punishment, albeit not in the physical sense, which forever excludes one person from the human consortium".

excluded conditional release[17] for those sentenced to life imprisonment because «the abolition of the death penalty required a strict and severe sanction, capable of performing a deterrent function»[18].

A legal-criminal unification was achieved only at the end of the century, when the new Zanardelli penal Code[19] was approved in 1889. After a long and tormented path[20], the death penalty was abolished. This was possible by introducing a penalty, life imprisonment, with a strong intimidating effect, which guaranteed definitive exclusion from the social context and calmed fears of a revival of crime. According to art. 12 of the new Code, the sentence of life imprisonment was carried out in a special establishment, where the convicted person remained in a cell for seven years with obligation to work. After that period, the convicted person was admitted working together with other convicts but with obligation of silence[21]. The severity of this discipline has made life imprisonment as a «suitable substitute» for the death penalty[22].

Life imprisonment entailed a series of accessory penalties including: the publication of the sentence, perpetual disqualification from public office, legal disqualification, the nullity of the will made before the sentence as well as the loss of parental authority and marital authority. Because of these accessory punishments at the end of the 19th century, some have spoken of "civil death"[23]. Already at that time there was a debate on the legitimacy of the perpetual punishment, a sanction capable of consuming the life of the condemned in the same way as the death penalty[24].

---

[17] The conditional release, authoritatively defined, after the entry into force of the Zanardelli Code, "useful tool to bring about the amendment of the guilty party and to combat recidivism" was granted, by virtue of the provisions of Articles 16 and 17, when precise, objective and subjective conditions were met. PESSINA, *Il nuovo codice penale italiano*, Milano, 1890, p. 64.

[18] SALVATI, *Profilo giuridico dell'ergastolo in Italia,* cit.

[19] From the name of the Minister of Justice, Giuseppe Zanardelli, who lobbied for the code's approval. It unified the penal legislation in Italy, abolished capital punishment and recognised the right to strike.

[20] Whose steps are summarized by DANUSSO, *Patibolo e ergastolo dall'italia liberale,* cit., p. 60-62.

[21] ASCHIERI, voce *Ergastolo* in *Il digesto italiano*, vol. X, Torino, 1898, p. 518.

[22] This is how Minister Zanardelli expressed himself in his report on the draft Penal Code presented to the Chamber of Deputies on 22 November 1887 (in *Riv. Pen.,* 1888 p. 179).

[23] As defined by Article 18 of the French Code Penal of 1810 : "*Les condamnations aux travaux forcés à perpétuité et à la déportation, emporteront mort civile*".

[24] Giuseppe Orano, lawyer and professor of Law and Criminal Procedure at the Regia University of Rome addresses the problem in several writings to demonstrate that, while the abolition of the death

1.2. The "Rocco" Penal Code, from the named of the Minister of Justice

In 1926 following the four attacks directed against Mussolini[25] the death penalty was re-established within the framework of the strict measures for the defence of the State[26], provisionally in force for five years, but then repeatedly extended. In 1930 the death penalty itself was permanently reconfirmed by the new penal code[27] and extended by the crimes of a political nature «to those common ones of a certain brutality and ferocity»[28].

On the other hand, by reintroducing the death penalty on a permanent basis, the legislator narrowed down the number of crimes punishable by life imprisonment and mitigated the inhumane ways in which it occurred. Life imprisonment has been «stripped of all unnecessary distress and painful intensity»[29]. Article 22 disciplined life imprisonment and provides that the perpetual penalty must be served in one of the appropriate establishments in night isolation and duty to work (daytime isolation has been removed[30]).

As far as the penitentiary Regulation was concerned, it provided for the possibility of talks once a month[31] and life sentenced prisoners could have access to outdoor work after only three years of detention (no longer seven as at the time

---

penalty has been a considerable progress in moral, legislative and political terms, its replacement with life imprisonment was a decidedly humanitarian setback. He noted that the question of the proportionality of punishment has not been resolved, because life imprisonment, like the death penalty, is also imposed for crimes of various kinds, which do not necessarily assume the same degree of evil, nor do they raise the same social alarm. See ORANO, *Saggio di uno studio sulla pena dell'ergastolo*, in *La Giustizia Penale*, III (1897), 1057-1065.

[25] Benito Mussolini was an Italian political leader who became the fascist dictator of Italy from 1925 to 1945. He created the paramilitary fascist movement in 1919 and became Prime Minister in 1922. He allied himself with Adolf Hitler during World War II, relying on the German dictator to boost its leadership. He was executed by firing squad shortly after the German surrender in Italy in 1945.

[26] ROCCO, *Relazione al Re*, in *Lavori preparatori del codice penale e del codice di procedura penale*, VII, Testo del nuovo codice penale, Roma, 1930, 21: "when it is necessary, for the supreme reasons of the defence of society and the State, to set a solemn warning example and appease the just indignation of the popular conscience, (…) it is perfectly legitimate, applying the death penalty, to inflict on the individual the supreme sacrifice".

[27] Rocco Code, R.d. n. 1398/1930. See MAZZACUVA, *Da Zanardelli a Rocco: l'ergastolo e la pena di morte,* Reggio Calabria, 1937.

[28] DANUSSO, *Patibolo e ergastolo dall'italia liberale al fascismo,* cit., p. 64. For an in-depth examination: PISANI, *La pena di morte in Italia*, in *Riv. It. Dir. Proc. Pen*., 1/2015, p. 1ss.

[29] ROCCO, *Sul ripristino della pena di morte in Italia,* Opere giuridiche, III, Scritti giuridici vari, Roma, 1933, 545-552; PISANI, *La pena dell'ergastolo*, in *Riv. It. Dir. Proc. Pen*., 2/2016, p. 577.

[30] Daytime isolation was maintained for some more serious cases, such as the participation in crimes involving life imprisonment and crimes involving temporary custodial sentences.

[31] Instead of every fifteen days or every week, as for other prison sentences (Articles 101 and 104).

of the Zanardelli's Code). The only way out of prison was to obtain a pardon from the sovereign, to whom the application could be made once twenty years had passed. There was no possibility of conditional release.

1.3. From death penalty to life imprisonment

After the fall of the fascist regime, the death penalty was abolished from the Criminal Code and life imprisonment assumed the role of maximum penalty[32]. Since the text of the law only abolished the death penalty in the "Criminal Code", this provision gave rise to many difficulties in interpretation: it was not clear whether the abolishment should be extended to other legal texts or whether it should be limited to code-based norms only[33]. After a year, the death penalty was partially reinstated in some cases where someone had committed crimes against the «loyalty and military defence of the State»[34]. It should be pointed out that life imprisonment was established as an alternative to the death penalty.

A few years later, works began in the Constituent Assembly and discussions started again on whether the death penalty should be definitively abolished from the highest normative source of law. At the session of 15 April 1947, the text that was approved stated: «the death penalty is not allowed, except in cases provided for by military and war laws»[35]. With the recognition of abolition at constitutional level, an important milestone had been reached for the affirmation of the abolitionist thesis[36].

In the course of the preparatory work for the Constitution, the issue of "life imprisonment" was also addressed. The first to express his opinion was Mr. Togliatti[37], who began by saying that life imprisonment "as well as the death

[32] D.lgs. 10 of August 1944 n. 224.
[33] PISANI, *La pena dell'ergastolo*, cit., p. 581. The death penalty remained in the special laws: military penal Code, Law of repression of fascist crimes.
[34] D.lgs. 10 of May 1945, n. 216.
[35] Art 27(4) of Italian Constitution. The last clause ("except in cases provided for by military laws") has been repealed by the l. cost. 2 October 2007, no. 1, which marked the definitive disappearance of the death penalty from Italian law.
[36] PISANI, *La pena di morte in Italia,* cit., p. 27.
[37] Palmiro Togliatti was an Italian politician, secretary of the Italian Communist Party. Also, Aldo Moro, member of the Cristian Democracy, shared the same ideas: "a negative judgement, in principle, must be given not only for capital punishment, which instantly, punctually, eliminates the figure of the offender from the social consortium, but also for perpetual punishment". MORO (1976*),*

penalty" should be abolished as an inhuman punishment[38]. The chairman of the subcommittee Mr Tupini, who feared that abolition «might be an incentive to commit heinous crimes», took the opposite view. Finally, others thought that the most appropriate place to deal with the problem was in the reform of the penal Code.

This last thought prevailed and at the meeting of 25 January 1947, the debate was held on the purpose of the penalty and more specifically on how to understand the concept of rehabilitation. Trying to balance the perpetuity of the sentence with the concept of re-education, had led some to believe that prison sentences should be of limited duration and therefore, indirectly, that life imprisonment had no reason to exist. On one hand there were those who supported the aim of re-education as the primary purpose of the sentence and therefore demanded a maximum of 15 years for the sentence[39] and, at the opposite, there were those who claimed that re-education was not the only and not the primary purpose[40].

The Constituents reached an agreement on the wording of Art 27 para 3 as it is seen today: «penalties cannot consist of treatment contrary to the sense of humanity and must aim at the rehabilitation of the condemned»[41]. What emerges from the constitutional preparatory works is that an express abolition of life imprisonment was avoided, and it was considered preferable to refer the matter to another place.

La funzione della pena, in ANASTASIA, CORLEONE, (a cura di), 2009, *Contro l'ergastolo. Il carcere a vita, la rieducazione e la dignità della persona,* Roma, p. 125-139.

[38] Constituent Assembly. Commission for the Constitution. First subcommittee. Meeting December 10, 1946.

[39] The Constituent Fathers, Umberto Nobile and Umberto Terracini, who were part of the Communist group, said: "if the prison sentences exceed a certain limit (...) they are the source of a process of progressive brutalization".

[40] The 'classical' orientation, which, relying on free will and moral responsibility, did not detach itself from the traditional concept of the penalty as punishment and retribution, the re-educational purpose had to be relegated to a secondary, if not even possible, role.

[41] The proposal of Giovanni Leone and Giuseppe Bettiol, members of the Christian Democracy ,to which also Aldo Moro was added, was: "Penalties cannot consist of treatments that are contrary to the sense of humanity or that hinder the *moral* re-education of the condemned person". Thus, even a semblance of definition of the function of the penalty was avoided, avoiding any reference to scientific theories. Mr. Umberto Tupini, member of the Christian Democracy, opposed the amendment, however, arguing that the text presented by the Commission better reflected the intention of the State, desired by all, to use every means to offer the condemned person the possibility of re-education.

2. Life imprisonment with the entry into force of the Constitution

On the 1st of January 1948, seventeen years after the enactment of the Penal Code, the new Constitution of the Italian Republic formally entered into force. Therefore, the principle of the re-educational purpose of the penalty, proclaimed in Article 27, paragraph 3, has shaped the Italian legislative system. In addition to the rehabilitation function, the principle of the humanization of punishment is established ("penalties cannot consist of treatment contrary to the sense of humanity"), which becomes a prerequisite for educational action[42]. Humanizing the punishment means creating a system of sanctions that has the person at its core and therefore never loses sight of the man behind the prisoner. This means that the punishment cannot consist of torture or inhuman treatment, in order to avoid the process of "progressive brutalization"[43] already denounced in the drafting of the Constitution.

The maximum penalty of life imprisonment, albeit with some perplexity, remained almost unchanged, after the adoption of the Constitution. It is disciplined within book II of the Penal Code and it is provided for certain crimes against the personality of the State, against public safety, against life and against moral freedom[44]. The characteristic elements of the penalty are indicated in Article 22 of the Italian Criminal Code (c.p.): «the penalty of life imprisonment is perpetual and is served in one of the institutions designated for this purpose, with the obligation to work and isolation at night[45]. The person sentenced to life imprisonment may be admitted to outdoor work[46]».

One of the most distinctive features, is the "obligation to work" which has taken on a role, not only as an antidote to the dissocializing effects of prison, but also as a positive tool for social reintegration[47]. Daytime isolation is applied as an

[42] Cost. Court n. 12 of 1966, it affirms: "on one hand, criminal treatment inspired by criteria of humanity is a necessary prerequisite for a re-educational action of the condemned person; on the other hand, it is precisely in a re-educational action that human and civil treatment must be resolved".
[43] See *supra* footnote 39.
[44] For a more detailed examination of the figures of crime punishable by life imprisonment see: DOLCINI, *La pena detentiva perpetua nell'ordinamento italiano, cit.*, p. 13.
[45] The provision contained in Article 22 of the Italian Criminal Code concerning night isolation must be considered implicitly repealed by Article 6, paragraph 2 of Law 354/1975, which provides for prisoners to stay overnight in rooms with one or more seats.
[46] As a result of Law no. 1634 of 1962, the condition of having served at least three years of a sentence has disappeared.
[47] DOLCINI, *La pena detentiva perpetua nell'ordinamento italiano*, cit., p. 15.

accessory punishment in certain cases of in the case of aggravated or multiple offences (art. 72 c.p.) and no longer as a way of executing the sentence[48].

The perpetuity of the deprivation of liberty is the aspect that ontologically characterizes life imprisonment, differentiating it from other prison sentences provided for in the penal system. However, it is not excluded that the judge may be able to apply a temporary imprisonment: this may occur in two different situations. A first group of hypotheses occurs due to the presence of one or more mitigating circumstances[49]: the penalty of life imprisonment is replaced with imprisonment from 20 to 24 years, if there is only one mitigating circumstance (art. 65 c.p.) and with imprisonment of not less than 10 years in the case of several mitigating circumstances. A further hypothesis is provided for in the case of a simplified and shortened proceeding, where the accused, in the event of conviction, obtains the replacement of life imprisonment with imprisonment for 30 years.

2.1. The initial doubts of constitutionality

The first doubts as to the compatibility of the perpetual penalty with Article 27, paragraph 3 of the Constitution were raised by the ordinance of 16 June 1956 before the Joint Sections of the Court of Cassation[50]. It was the first time that this issue, already widely debated in doctrinal circles[51], was brought before the judicial

[48] MARTINI, *L'ergastolo ed isolamento continuo*: *l'art. 72 c.p. fra abrogazione ed incostituzionalità*, in Riv.*Cass Pen*., 2/1982, p. 217.

[49] Already in the Zanardelli Code, the recognition of mitigating circumstances led to the replacement of life imprisonment with imprisonment for thirty years.

[50] In the same year (1956) there was an event of historical importance: eight years after the Republican Constitution came into force, the Constitutional Court was created. Already provided for in the constitutional dictation of 1948 in Article 134, it was implemented only in 1955 following constitutional law no. 1/1953 and ordinary law no. 87/1953 and held its first hearing in 1956, the first sentence was issued on 14 June. In the preceding period, the assessment of the possible conflict between the rules in force and the Fundamental Charter could only be entrusted to the ordinary judge. The question was whether judges of all levels had to limit themselves to examining only the regularity of the rules, or whether they also had to take into account the contents, in order to verify possible contrasts with the precepts of the Fundamental Charter. The Court of Cassation, with the endorsement of a good part of the doctrine and jurisprudence, had concluded for the extensive interpretation, also to allow the immediate operation of at least the norms of the Constitution which were not purely programmatic. See PIERANDREI, '*Corte costituzionale'*, in *Enciclopedia del diritto*, X, Milano 1962, p. 883.

[51] Professor Francesco Carnelutti had published an essay against life imprisonment in which he demonstrated its irremediable contradiction with Article 27 paragraph 3 of the Constitution. See CARNELUTTI, *La pena dell'ergastolo è costituzionale?,* in "*Rivista di diritto processuale*", XI, pt. I (1956), pp. 1-6.

authorities[52]. In its argument the Court excluded the incompatibility of the penal system, which contained life imprisonment, and the principles set out in the Constitution.

The Court held that the constitutional reference to the humanisation of the sanctioning treatment, which concerned not the penalty itself but the execution, was intended to exclude «treatments abhorrent to a civil conscience or, in any case, incompatible with human dignity». And that wasn't the case with life imprisonment.

With regard to the second part of the constitutional text, the "tendency of sentences towards rehabilitation", on the basis of the literal wording, the Court of Cassation explicitly excluded the death penalty and in the meantime has not mentioned at all life imprisonment, leading to think that the Constituents did not consider the perpetual penalty incompatible with the aims of amendment and rehabilitation. In confirmation of this, it was emphasized that the concept of rehabilitation included not only the purpose of "social rehabilitation" but also the "moralising function" which had as its objective the regret and redemption of the condemned, and which could also be achieved through life imprisonment.

The Cassation then evoked a further argument against the question of unconstitutionality: the consideration that life imprisonment cannot be considered a perpetual punishment as there is a possibility for the condemned man to life imprisonment to be readmitted back into society through presidential pardon[53].

These were the main arguments on which the Court based its rejection of the appeal; at the end of the ruling, it did not rule out a possible intervention by the legislator that would support the «doctrinal and human tendency towards a mitigation of the perpetual penalty»[54].

There was no lack of criticism towards this pronouncement, particularly on the aspect of the moral redemption of the condemned person, which was seen as an issue entirely unconnected to the legal sphere. The decision of the Court of Cassation almost seems to become religious rather than legal. «But the law should

[52] For an in-depth analysis: DANUSSO, *Ergastolo e Costituzione: il dibattito del 1956*, in *Historia e ius, rivista di storia giuridica dell'età medievale e moderna,* n. 14/2018.
[53] DANUSSO, *Ergastolo e Costituzione: il dibattito del 1956,* cit., p. 12.
[54] Ordinance 16 June 1956, in *Il Foro Italiano*, Vol. 79, parte seconda: giurisprudenza penale (1956), pp 145/146-151/152.

be concerned with the effective recovery to social life, not so much with this idealistic, not to say utopian, catharsis of the condemned person»[55]. In spite of this, there was no doubt about the need for perpetual punishment because of its intimidating force and its retributive nature, suitable for protecting the social body from the worst crimes and for the maintenance of order[56].

In this period proposals have begun to make their way to mitigate the rigidity of life imprisonment, such as the possibility of granting conditional release to those sentenced to perpetual punishment[57].

2.2. The first step towards reformation: access to conditional release

A first derogation from perpetuity was introduced by Law no. 1634 of 1962. Among the various amendments, it is worth mentioning the revision of Art. 22 of the Penal Code, establishing that the convicted person could be admitted working outdoors without the condition of having served at least 3 years of the sentence and the repeal of the provisions relating the serving of life imprisonment in colony or other possession abroad.

The most important modification concerns the conditional release institute[58] that can also be granted to those sentenced to life imprisonment once they have served 28 years[59] (Art. 176 para. 3 of the Criminal Code). It provided that the detainee had to «behave in such a way that his redemption is certain»[60] and must

[55] These are the words of DALL'ORA, *L'ergastolo e la Costituzione, nota all'ordinanza della Cassazione*, in *Riv. Ita. di diritto penale*, a. IX (1956), p. 488; Even the Professor Pietro Nuvolone excluded that the term "re-education" had implications with morality, that is, with the intimate sphere of the individual.

[56] In this sense the Venetian lawyer Italo Virotta and the Attorney General of the Court of Appeal of Naples Francesco Cigolini. Both of them wanted to underline an aspect neglected by others, namely that criminal repression finds its justification not only in the person who has voluntarily committed a crime, but also in the victim of that same crime and "of all other potential victims, in other words of the entire society beaten by the crime which demands that its offender be properly punished to prevent citizens from losing faith in justice" CIGOLINI, *Sull'abolizione della pena dell'ergastolo*, in riv. Pen., LXXXIII, 3a serie (1958), p. 301.

[57] There were those who looked to the example of Switzerland where the possibility of conditional release was allowed after 15 years, those who proposed 20 years but with evidence of certain repentance. DANUSSO, *Ergastolo e Costituzione: il dibattito del 1956,* cit., p. 15.

[58] The institution in question had appeared in Italy with the 1889 code and was granted as a reward for accepting the sanction, after having manifested the compliance with the rules of the prison, by the discretionary power of the Minister.

[59] Which were then reduced to twenty-six years with the Gozzini Law (l. 663/1986).

[60] This is not a subjective investigation aimed at investigating a change in the personality of the offender, but it implies positive behaviours from which we can infer the abandonment of criminal

perform the civil obligations arising out of a criminal offence[61], in order to get parole. In addition, after five years of conditional release without any grounds for revocation, the penalty is extinguished, and the personal security measures are also revoked (Art. 177 para. 2).

In this way, the institute begins to transform itself into an instrument of resocialization of the detainee, whose success depends on the convicted person's ability to be reintegrated into society[62]. This rule contributed to making the sentence of life imprisonment compatible with the provisions of Article 27, paragraph 3, of the Constitution, introducing into the legal system a «life imprisonment no longer perpetual» and therefore tending towards the rehabilitation of the offender[63]. The idea of progressive treatment begins to make its way.

The reform, apparently, is very cautious, but shows early signs of a shift towards a different concept of the prison sentence in the light of constitutional dictates, since a re-education perspective is unacceptable if it cannot be expressed in an associated life, and the effort to change is illogical, if not supported by some concrete perspective of release.

2.3. The theory of the multifunctionality of punishment

Almost twenty years after the Court of Cassation's ruling of 1956, the question of the legitimacy of life imprisonment was proposed before the Constitutional Court[64], again highlighting the contrast with the rehabilitation function of the sentence.

Even this time, the Court rejected the question of constitutional legitimacy. It has done so by denying that the function of the penalty is merely the rehabilitation of offenders and, above all, by recognizing in the conditional release - and its

choices (Court of Cassation no. 486/2015). See CESARIS*, Sulla valutazione del sicuro ravvedimento ai fini della liberazione condizionale,* in *Riv. It. Dir. Proc. Pen*., 1979, p. 291.

[61] Unless the convicted person proves that he is unable to comply with them (Art. 176 para 4)

[62] PEYRON, voce *Liberazione condizionale*, in *Enc. Dir*. XXIV, Milano, 1974; BELTRANI, in *codice penale commentato*, Giuffrè, 2019, art. 176.

[63] DI CARO, *Ergastolo "ostativo",* cit., p. 4.

[64] Constitutional Court no. 264/1974.

granting through a now jurisdictional trial[65] - the « door » that also allows life sentenced to be reintegrated into the civil consortium[66].

With respect to the first point, the Court affirmed the existence of a plurality of purposes of the penalty, including repression and deterrence, to which it ended up recognising equivalence and equality of rank to the re-educational purpose[67]. On one hand according to retributivists, the ultimate purpose of life imprisonment was to pay back the offender for the harm committed and the only way to do it was to deprive him of liberty for the rest of his life. Others saw life imprisonment as an exemplary punishment, whose purpose was to act as a threat to the rest of the citizens. In other words, for a punishment to be justified, it was sufficient that one of the multiple aims, for which the sentence was imposed, it was fulfilled. Therefore, the judges reaffirmed the legitimacy of life imprisonment in as much «an indispensable instrument of intimidation». In addition, the institution of parole, as amended by the law of 1962, it has made the life sentence not perpetual and not in conflict with the Constitution, in a few words the judge of laws has told us that life imprisonment exists "as it tends not to exist"[68].

2.4. The law reforming the penitentiary system

The following year the legislator implemented the reform of the penitentiary system (Law no. 354 of 1975). The legislator of 1975 built «the entire discipline of treatment in prisons around the figure of the detainee: as an active character and, at the same time, as the ultimate goal of prison execution, with a view to rehabilitation»[69].

---

[65] Thanks to Constitutional Court ruling 204 of 1974, it was declared illegitimate the rule that gave to the Minister of Justice, rather than the judicial authority, the power to grant conditional release.
[66] PUGIOTTO, *Una quaestio sulla pena dell'ergastolo*, in *www.penalecontemporaneo.it*., 5 March 2013, p. 1-25.
[67] TRONCONE, *Manuale di diritto penitenziario*, Torino, 2015, p. 39.
[68] PUGIOTTO, *Una quaestio sulla pena dell'ergastolo cit;* FERRAJOLI, *Ergastolo e diritti fondamentali,* p. 20: "Thus we have the paradox that perpetual punishment has been declared legitimate insofar as it is in fact non-perpetual: therefore life imprisonment (…) would not exist in reality, but only in the rules - not as a served sentence but as a threatened sentence - and precisely for this reason it would not be necessary to remove it from the rules".
[69] GREVI as mentioned in DOLCINI, *La rieducazione del condannato, un'irrinunciabile utopia*?, in *www.penalecontemporaneo.it.,* 7 Dicembre 2011, p. 1.

The principles set out in the first articles on prison's treatment refer to constitutional values (above all, Article 27, paragraph 3): «prison treatment must be in accordance with humanity and must ensure respect for the dignity of the person» (art. 1 o.p. para. 1) and «rehabilitation treatment of convicts and inmates must be implemented with a view to their social reintegration» (para. 6). The principle of resocialization was outlined as follows: re-education means changing the prisoner's social attitudes, acting on criminal factors so that he no longer constitutes a danger to the community.

As far as this is concerned, the new prison system no longer mentions prison institutions (*ergastoli*) exclusively for prisoners sentenced to perpetual punishment, which appeared particularly dissocializing, and with the subsequent provisions life imprisoners will be assigned to "normal" prison institutions. The work, which is historically one of the characteristics of life imprisonment, is extended to all those sentenced to imprisonment. Art. 20 para. 2 of the reform of the penitentiary system excludes prison work from being afflictive in nature[70].

The "penalty surplus" foreseen for life imprisonment and other convicts is eliminated[71]. The new rules, in compliance with the principle of equality «for living conditions» (art. 3 o.p.) and «in the exercise of rights» (art. 4 o.p.), provide for the possibility for life prisoners of having talks once a week, equal freedom of correspondence as other prisoners and equal pay for work. The legislator, with the reform of the prison system, has therefore pursued the objective of making the punishment humane and re-educative for all prisoners, without making distinctions based on the crime committed or the penalty imposed. In order to achieve these objectives, the new reform has established particular professional figures, the educators (art 82 o.p.), who are in charge of the inmates' social reintegration[72]. The new logic of the treatment is based on the choice to take into account, not so much the criminal past of the culprit, as much as of his present and future. The educator's

[70] In accordance with the so-called "Minimum Rules for the Treatment of Prisoners" contained in the UN Resolution of 30 August 1955 and the so-called "Minimum Rules of the Council of Europe for the Treatment of Prisoners" contained in the Resolution of the European Council of 19 January 1973.

[71] PISANI, *La pena dell'ergastolo,* cit., p. 599.

[72] *Ex multis* see MAUCERI, *Pedagogia e contesto penitenziairio, alcune riflessioni sul significato e il ruolo dell'educazione in prigione*, in *Rassegna penitenziaria e criminologica, 1/2001, p.* 297ss.

role is to guide the prisoner through a process of treatment, which leads him to "rethink", namely, to become aware of his past actions[73]. The innovations introduced by the reform gave rise to immediate reactions of hostility because they postulated conditions of trust, freedom and autonomy that seemed incompatible with the punitive requirements[74]. Indeed, the prison system was considered suitable only to train a "good prisoner" contrary to what was the objective of the reform, which was to offer an opportunity to become a "good citizen"[75].

Always with a view «to encouraging and rewarding the conduct of adherence to the re-educational logic»[76], alternative measures to detention are envisaged: probation (art. 47 o.p.), home detention (art. 47-*ter* o.p.), work release (art. 48 o.p.), early release (art. 54 o.p.). It seems to be a «first opening of the prison walls to the outside world» and the perpetrator is allowed to actively participate in the achievement of these benefits which depend on his conduct and will[77]. Again, it is up to the prison educator to act as a «bridge to external reality»[78] for the prisoner when he is admitted to alternative measures to detention.

It's a long way from the pre-unification static conception of prison treatment. Nonetheless the fact that such benefits are still not yet available to life sentenced.

2.5. The judgment No. 274/1983 of the Constitutional Court

With a view to progressively favouring the life sentenced, is placed the Constitutional Court's ruling no. 274/1983. Correcting the approach of the previous

---

[73] On the role of the educator in the penitentiary context MANCANIELLO, *La professionalità educative in ambito penitenziario: l'Educatore e il suo ruolo pedagogico,* in *Studi sulla formazione*, 20, 365-374, 2/2017; Also SARTARELLI, *Riflessioni sulla formazione e sul ruolo dell'educatore penitenziario*, in *Rassegna penitenziaria e criminologica*, 3/1998, p. 222, the author thinks that the educator's task is to help the prisoner in the complex psychological-ethical transition from guilt to responsibility.

[74] For this reason the choice to privilege the presence of policemen in the system rather than increasing the number of other operators (including educators), is the result of a choice of prison policy that sees the real purpose of punishment linked to the containment of the person rather than his resocialization.MACULAN, *"Sotto organico", il personale degli istituti penitenziari,* in Riv. *Antigone*, Maggio 2017.

[75] GIOSTRA, *Ragioni e obiettivi di una scelta metodologicamente inedita*, in *Riv. It. Dir Proc. pen.,* 1/2016, p. 500.

[76] PICCIANI, *La premialità nel sistema penale,* in ARMELLINI E DI GIANDOMENICO (a cura di), *Ripensare la premialità. Le prospettive giuridiche, politiche e filosofiche della problematica*, Giappichelli, Torino, 2002, p. 310.

[77] FASSONE, *L'ergastolo e il diritto alla speranza*, cit., p. 10.

[78] SARTARELLI, *Riflessioni sulla formazione,* cit., p. 217.

sentence no. 264/1974, the Court declared the constitutional illegitimacy of Art. 54[79] of the new penitentiary system (o.p.), in so far as they did not provide that the benefit of the reduced sentence could also be granted to life imprisonment, in order to shorten the minimum period required for admission to parole.

"Early release" (art. 54 o.p.) was not originally envisaged for those sentenced to life imprisonment, who could therefore not benefit from the penalty deductions necessary for the minimum time limit for parole. The reason for this preclusion did not come from the positive law, which had nothing on the point but, it was found in the constant jurisprudence of legitimacy. The Court of Cassation, in fact, interpreting literally Art. 176 third paragraph, of the Criminal Code, which required the sentenced person to have "effectively" atoned for at least twenty-eight years, did not recognise, for the purposes of conditional release, the possibility for the prisoner to benefit from the deductions of early release because it would be a "not effectively" served sentence[80].

The Court considers the question of constitutional legitimacy to meet the criteria, as much as the exclusion of the sentenced to life imprisonment from this benefit would violate the purpose of re-education provided for in the third paragraph of Article 27 of the Constitution and would lead to an irrational and unjustified difference in treatment between the sentenced to life imprisonment and the sentenced to temporary imprisonment, in violation of Article 3 Cost.

The reasoning behind the decision was rather straightforward: early release «encourages and stimulates» in the prisoner «his active collaboration» towards re-education which constitutes, together with the individualisation of treatment, one of the fundamental principles of the penitentiary system. This collaboration «is connected on a teleological level with the assumption that conditional release (…) stimulates the remorse of the convicted person and his consequent reintegration into society»[81]. If it is conditional release that makes life imprisonment compatible with

[79] Art. 54 original penal order: "The sentenced prisoner who has shown proof of participation in the re-education work may be granted, for the purpose of his or her most effective reintegration into society, a reduction of twenty days for each six-month period of imprisonment served. (...)In calculating the amount of the sentence served for admission to conditional release, the portion of the sentence deducted under this article shall be deemed to have been served".
[80] Court of Cassation, 3 of March 1978.
[81] Constitutional Court's sentence no. 274/1983.

the Constitution, then early release must also be extended to the convicted person, which speeds up the time needed for his release.

Thus, giving regulatory recognition to the provisions of Constitutional Court ruling no. 274 of 1983 on "early release", Article 54 of the 1975 law was amended by the legislator, with law no. 663 of 1986, so-called "*Gozzini*"[82], and even for those sentenced to life imprisonment, the applicability of this discount was also provided[83]. At the same time, by amending Article 176 of the Criminal Code, the sentence to be served for conditional release was lowered from twenty-eight to twenty-six[84].

In addition, the prohibitions on access to "alternative measures to detention" and "penitentiary benefits" laid down for life sentenced have been removed, in accordance with the principle of progression of prison treatment[85]. It is offered the possibility to leave prison temporarily, in relation to the progress made by the convicted: after 10 years of imprisonment, he can be admitted to "work outside" (art. 21 o.p.) and to the "prison permits" (art. 30-*ter* o.p.)[86]; after 20 years he can be admitted to "work release" (art. 48 o.p.)[87].

As a result of the reforms of 1962 and 1986, it can be said that «life imprisonment has lost the connotations of "perpetual imprisonment" as conceived by the legislator in 1930»[88]. Every day of imprisonment, starting from the first one, can be usefully spent by the prisoner in function of an achievement of possible freedom, and therefore of a concrete hope towards a return to society.

---

[82] Named after its promoter Mario Gozzini, a member of the Italian Communist Party. It was approved in Parliament, with a broad consensus, with the intention of enhancing the re-educational aspect of detention compared to the punitive aspect.

[83] The *Gozzini* law also raised the *quantum* of early release from twenty to forty-five days per semester, also regulating the "fractioned" calculation method.

[84] In addition, the adverb "effectively" disappeared from the text of the provision, which also makes it possible to count imprisonment resulting from other convictions cumulated with life imprisonment and partially expiated autonomously.

[85] DELLA CASA, *Quarant'anni dopo la riforma del 1975*, in *Riv. It. Dir. Proc. Pen.*, 3/2015, p.1168.

[86] CORTESI, FILIPPI, SPANGHER, *Manuale di diritto penitenziario*, Giuffrè, 2019, p.148. Prison permits consist of the possibility for prisoners, who have had regular and not socially dangerous conduct, to leave the institution for a predetermined period of time (max. 45 days per year) in order to pursue emotional, cultural or work interests.

[87] CORTESI, FILIPPI, SPANGHER, *Manuale di diritto penitenziario*, p. 112. The work release regime consists of the possibility for the prisoner "to spend part of the day outside the institution to participate in work, educational or otherwise useful activities for social reintegration".

[88] DOLCINI, *La pena detentiva perpetua nell'ordinamento italiano,* cit., p. 17.

The evolution of the discipline of life imprisonment, towards the direction indicated by Article 27 para. 3 of the Constitution, will suffer a setback as it will be seen with emergency legislation in the 90s.

2.6. From the multifunctionality of punishment to recognition of the rehabilitation purpose

The Constitutional Court had until that moment motivated the rejection of the question of the legitimacy of the life imprisonment penalty with the constitutional prescription of Article 27, paragraph 3, by relying on the multifunctional concept of the penalty. It has denied that the aim was only the rehabilitation of offenders because it was not always attainable in its opinion. In this way of thinking, the penalty must fulfil «other purposes, including deterrence, prevention and social defence»[89] so, it was enough that a punishment could be encapsulated in any of the purposes of the punishment, to frustrate the constitutional principle[90].

This jurisprudential orientation remained constant and uniform until 1990, when the Constitutional Court itself intervened with the sentence no. 313, radically changing its opinion on the function of the penalty: the multifunctionality of the penalty was definitively overcome in favour, instead, of the rehabilitation principle[91].

Let's take a step back. Traditionally, the "theories of punishment" are distinguished in absolutes, as ends in themselves, and relatives, as they give the penalty a purpose. Among the former there is the retribution theory according to which the punishment is justified because it is deserved[92]. Once society has decided

[89] Constitutional Court no. 264/1974.
[90] PUGIOTTO, *Il volto costituzionale della pena (e i suoi sfregi)*, in *www.penalecontemporaneo.it.*, 10 June 2014. The author compares the multi-functional theory of punishment to a "road roundabout": by orienting in all possible directions, it disorients, thus making the sense indicated by the constitutional signs lose its meaning.
[91] Constitutional Court no. 313/1990: "If the finalisation were oriented towards those different characters, instead of the rehabilitation principle, there would be the risk of manipulating the individual for general criminal policy purposes (general prevention) or of favouring the collective needs of stability and security (social defence), sacrificing the individual through the exemplary nature of the sanctions".
[92] Systems of retribution for crime have long existed, with the best known being the *lex talionis* of Biblical times, calling for "an eye for an eye, a tooth for a tooth, and a life for a life".

upon a set of legal rules, the retributivist sees those rules as representing and reflecting the moral order, it follows that the retributivist position makes no allowance for social change or social conditions. On the other hand, utilitarian theories understand punishment only as a means to an end, and not as an end in itself[93]. Those supporting the theory of punishment as deterrence distinguish between "individual deterrence" and "general deterrence"[94]. Individual deterrence involves deterring someone who has already offended from reoffending; general deterrence involves dissuading potential offenders from offending at all, it takes the form of legislation imposing penalties for specific offenses in the belief that those penalties will deter or prevent persons from committing those offenses[95]. Finally, among the relative theories, there is one that argues that punishment should have reformative or rehabilitative effects on the offender. According to the proponents of rehabilitation theory the offender is considered reformed because the result of punishment is a change in the offender's values, so that he or she will refrain from committing further offenses, now believing such conduct to be wrong. This change can be distinguished from simply abstaining from criminal acts due to the fear of being caught and punished again, this amounts to deterrence. The idea that imprisonment could be used positively, not only to deter prisoners and others who were aware of their suffering in prison, but also to rehabilitate offenders by improving their skills and their morals, has strong American roots[96].

With ruling no. 313 of 1990, the Court founded a real theory of punishment by valuing the ontological character of the re-educational purpose: it stated that this purpose, which is the only one explicitly recalled in the text of the Constitution, is an essential quality of the punishment and «can never be sacrificed on the altar of other hypothetical purposes»[97].

---

[93] According to the utilitarian philosopher Bentham: "punishment can be justified only if the harm that it prevents is greater than the harm inflicted on the offender through punishing him or her".

[94] GARDINER, *The purposes of criminal punishment,* in *Modern law review*, Vol. 21, March 1958, no. 2: "Deterrence is aimed at the protection of society. By making a certain action a punishable offence, we expect that people will refrain from committing the offence through fear of punishment".

[95] See MARINUCCI- DOLCINI, *Manuale di diritto penale, parte generale*, Milano, 2017, p. 4.

[96] "The idea first developed in the tightly ordered prisons of Pennsylvania and New York, which, in the 1830s, became models for the rest of the world. […] Their regimes were credited with the power of changing inmates into law-abiding citizens". VAN ZYL SMIT, APPLETON, *Life imprisonment,* cit., p. 8.

[97] PUGIOTTO, *Il volto costituzionale della pena,* cit., p.2.

The rehabilitation aim cannot be limited to the executive phase, but «accompanies the penalty from the moment it is born, from the abstract normative provision, until it is actually extinguished»[98] and therefore binds both the legislator and the judges, of cognition, execution and surveillance, as well as the prison authorities. Therefore, it follows that, in order to evaluate the constitutional legitimacy of a sanction, a global consideration of the re-educational needs of the subject is necessary[99]. It should be pointed out that this ruling gives stability and universality to the rehabilitation purpose, defined as the «heritage of European legal culture», but it does so by endorsing a «secularised»[100] view. Indeed, the Court specifies that re-education is seen as an opportunity for the offender, and in practice there may be a gap between that rehabilitative purpose and the *de facto* adherence to the process of re-education of the perpetrator[101]. This explains the meaning of the expression "must aim at the rehabilitation" in the constitutional dictation. However, the duty to set the penitentiary system is in the sense of «encouraging the re-education process, without imposing it on the free self-determination of the prisoner»[102], remains unchanged. This implies that the beneficiary of the prison treatment is a person who is truly in a position in order to make responsible choices. The "dynamic security" regime, advocated by European prison rules, is moving in this direction, where the way of life in prison is as close as possible to that of the outside world[103].

Part of the doctrine has pointed out the problematic situation of life imprisoners who are not free to choose whether or not to join the re-educational treatment, as it represents the only possibility to obtain conditional release and the only way to access freedom[104].

---

[98] Constitutional Court no. 313/1990.
[99] PUGIOTTO, *Il volto costituzionale della pena,* cit., 3.
[100] *Ibidem.*
[101] The rehabilitation process cannot be carried out "coercively" and this seems to be another limit to the function of the penalty since, according to the principle of equality, there must be a willingness on the part of the offender to accept the help offered to him by the law and not an imposition. It will be seen better than the following paragraphs in the case of perpetual life imprisonment. MARINUCCI-DOLCINI, *Manuale di diritto penale,* p.18.
[102] PUGIOTTO, *Il volto costituzionale della pena,* cit., p. 4.
[103] See Chapter III on "dynamic security" model.
[104] CHINNICI, *I "buchi neri" nella galassia della pena in carcere: ergastolo ostativo e condizioni detentive disumane,* in *Arch. Pen*, n. 1/2015, p. 2.

3. The compatibility between the never-ending penalty and the re-educational aim

Penalties must aim at re-education, but life imprisonment as a penalty *usque ad mortem*, at least in its abstractness, seems to be incompatible with the rehabilitation purpose[105]. This sanction *a priori* precludes the possibility of re-education, understood as the possibility of re-entering into society. The jurisprudence itself is aware of this incompatibility. It is not by chance that it has declared the sentence of life imprisonment for minors unconstitutional[106], on the basis of the combined provisions of Articles 27 para. 3, and 31, para. 2, Cost., since for minor «the re-educational function is to be considered, if not exclusive, certainly preeminent».

Despite, the numerous corrective measures issued in recent years by the legislator, the perpetual nature would remain unchanged, since conditional release, pardon, reduction of sentence and other benefits are «rewarding measures» that the life imprisoner must deserve and therefore only potential[107].

The Court stands by its precedent, and in the judgment, no. 161/1997 again expresses itself on conditional release as the "only institution" that by virtue of its existence in the system makes life imprisonment compatible with the re-educational principle. *A contrario* it declares unconstitutional the absolute preclusion of access to parole again, once the revocation has taken place, if the required conditions were met[108].

In conclusion, it can be argued that the derogation mechanisms developed over the last thirty years have made execution of life sentence less cruel, but the «inherent inhumanity» of the endless punishment remains[109]. And this is precisely the «constitutional paradox» of legitimising life imprisonment by means of its possible non perpetuity, leaving open the abstract probability that the condemned

---

[105] For an analysis of the contradictions of life imprisonment: FLICK, *Ergastolo ostativo: contraddizioni e acrobazie,* in *Riv. It. Dir. Proc. Pen*., 4/2017, p. 1505.
[106] Constitutional Court no. 168/1994.
[107] SARTARELLI, *La corte costituzionale tra valorizzazione della pena nella disciplina della liberazione condizionale e mantenimento dell'ergastolo: una contradictio in terminis ancora irrisolta*, in *Riv. Cass. Pen*., 4/2001, p. 1367.
[108] Constitutional Court no. 161/1997 declares that Article 177(1) c.p. is unlawful by contrast with Article 27(3) of the Constitution.
[109] FERRAJOLI, *Ergastolo e diritti fondamentali,* p.18.

person will remain in prison for life[110]. And today, for some types of crime (concerning organized crime) this perspective is concrete due to the absolute exclusion from prison benefits[111].

4. The "reformed" life imprisonment

After various legislative and jurisprudential interventions, it has come to, what could be called, a "reformed" life imprisonment[112]. The term "reformed" is understood both in the meaning of quantity, i.e. of possible duration, and in meaning of quality, i.e. his concrete execution. This was a path that developed along a less repressive intensity and towards achieving constitutional rationality.

Law No. 479 of 1999 introduced the possibility for the sentenced person to life imprisonment, who gives his consent to be judged by "simplified and shortened proceeding", to have converted into 30-year prison sentence its penalty (article 442, paragraph 2, code of criminal procedure). The inspiring reason for this institution was the principle of procedural economy[113]. Problems of interpretation arose because the text of the law referred to life imprisonment without distinction. This undifferentiated and unequal comparison was contrary to the constitutional principle of equality (which requires unequal situations to be treated differently). Thus, with Law No. 4 of 2001, paragraph 2 was amended. It was established that the undifferentiated expression of life imprisonment, i.e. the sentence that in the shortened proceeding was commuted to 30 years, should be understood as referring only "to life imprisonment without daytime isolation". And a third period was added: "the sentence of life imprisonment with daytime isolation, in cases of complicity in crimes (art. 72 and art. 73 of the Italian Criminal Code) and continued crime (art. 81 of the Italian Criminal Code) was replaced by life imprisonment". This choice was made to get the punishment more effective and to be able to

---

[110] SARTARELLI, *La corte costituzionale,* cit., p. 1369; MUSUMECI-PUGIOTTO, *Ergastolani senza scampo, fenomenologia e criticità costituzionali dell'ergastolo ostativo,* Ed. scientifica, Napoli, 2016, p. 104.

[111] It is the peculiar hypothesis of the "perpetual life imprisonment" provided by art 4-*bis* o.p.

[112] PISANI, *La pena dell'ergastolo,* cit., p. 610.

[113] TRABACE, *Abbreviato riformato e successione di norme nel tempo,* in *Riv. It. Dir. Proc. Pen*., 1/2019, p. 283; NEGRI, *Il nuovo giudizio abbreviato*: *un diritto dell'imputato tra nostalgie inquisitorie e finalità di economia processuale,* in AA.VV*., Il processo penale dopo la riforma del giudice unico,* a cura di Peroni, Cedam, 2000, p. 443 (nota 6).

continue to use life imprisonment towards those who commit multiple murders or crimes committed within criminal organizations.

At the same time, a series of draft have been proposed to rewrite the discipline of life imprisonment, although they remained unresolved.

The first was the *Gonella* proposal[114], presented in 1968, which maintained the penalty of life imprisonment by providing for the possibility of the convicted person to be admitted to outdoor work, as long as he demonstrated active participation in the re-educational program[115]. The Senate approved the *Gonella* draft, but with a few changes: first of all, life imprisonment was removed from the list of main sentences and a prison sentence of between 30 and 40 years was established in its place. Then, it passed to the Chamber of Deputies in 1973 and could not be examined because of the end of the legislature.

After a few years, in 1988 Minister Vassalli appointed a Commission chaired by Antonio Pagliaro to carry out the reform of the Penal Code. In the Commission's proposal, life imprisonment was kept among the main penalties[116]. Among the reasons for maintaining it: the penalty of life imprisonment was seen as adequate by citizens for the most heinous crimes[117].

On 2 August 1995, the *Riz* draft of law was proposed for a reform of the Penal Code limited to Book I. Changing the line with the "Pagliaro scheme", the penalty of life imprisonment was again excluded, and the penalty of imprisonment was reinstated at thirty years. Once this initiative was over, in 1998, Minister Flick appointed a new Commission of experts chaired by Carlo Grosso[118] with the same goal of reforming the Penal Code. The Commission's work took place in three different phases. The first phase ended with the presentation on 15 July 1999 of a report in which it was noted that the Commission had not considered taking a position on the problem of the abolition of the life sentence, which was already on

[114] From the name of the Minister of Justice Guido Gonella.
[115] GONELLA, *Riforme dei codici e nuovi ordinamenti giuridici,* in *Riv. It. Dir. Proc. Pen*., 1969, p. 303 ss.
[116] PISANI, *Per un nuovo codice penale. Schema di disegno di legge-delega al Governo*, Quaderni n. 9 dell'Indice penale, 1993.
[117] Confirming what had been the outcome of the *referendum* for the abolition of life imprisonment in 1981, where only 22.6% of voters voted for abolition.
[118] He was a lawyer, a jurist and professor of criminal law at the University of Turin.

the Parliament's agenda[119], but it was considered fully compatible with the new penal system[120]. A "preliminary draft reform of the penal Code" was then elaborated in which life imprisonment was abolished. But this prediction had aroused some criticisms, mainly from the political world[121]. Despite the effort made by the Commission and the political will that appeared to be persuaded to conclude the reform project, following the 2001 general elections, the reform process ran aground, failing to meet the expectations that had accompanied the work for years.

The main obstacles to the removal of life imprisonment from the Italian legal system are due not only to the historical moments in which this debate was opened, but also to strong opposition from public opinion[122]. There is a feeling of revenge inherent in the human being that demands a proportionate reaction to the commission of the most serious crimes[123]. It is therefore difficult to ask to empathize, rather than with the victims of crimes, with those who commit them. Attention should be turned to the subjective profile of the offender, to his re-educational path (possibly) done. This is what is provided for in our legal system: to establish a severe penalty, appropriate to the gravity of the crime committed and then take into account the path of the convicted person towards social reintegration, with measures that make it easier to carry out the sentence (such as conditional release)[124].

5. The emergency legislation: Perpetual life imprisonment was born

The argument used by both the Constitutional Court and the European Court of Human Rights to legitimise the presence of a perpetual penalty in today's legal systems consists in providing a mechanism - such as conditional release - which

[119] In the XIII legislature, a 1997 legislative draft proposed the abolition of life imprisonment, replaced by a sentence of at least 30 years.
[120] From *Relazione della Commissione*, in *Per un nuovo Codice penale*, II, Quad. n. 12 dell'Ind. Pen., 2000, p. 69.
[121] STILE (a cura di) La riforma della parte generale del codice penale – la posizione della dottrina sul progetto Grosso, 2008, le osservazioni di Moccia, sul sistema sanzionatorio nel Progetto preliminare di un nuovo codice penale, p. 475 ss. On contrary DOLCINI, *Riforma della parte generale del codice penale approvata dalla Commissione ministeriale per la riforma del Codice Penale e rifondazione del sistema sanzionatorio penale,* in *Riv. Dir ita. e proc pen*., 2001, p. 825. He indicated that the abolitionist choice was entirely acceptable.
[122] The 1981 referendum for the abolition of life imprisonment counted 77.4 % of the votes against.
[123] FASSONE*, Fine pena: ora*, Sellerio, Palermo, 2015, p. 182.
[124] With the exception of convicted to Perpetual life imprisonment, see *infra* para 5.

offers the condemned man a chance to return to the community[125]. All these arguments as a «boomerang» have become as many reasons to question the "perpetual" variant of life imprisonment (*ergastolo ostativo*)[126] that exists in the Italian legislation, according to which the possibility of parole is precluded in the case of non-cooperation with justice, restoring *de jure* and *de facto* the perpetual penalty[127].

This discipline is the result of legislation characterised by a state of «perpetual emergency»[128]. In the decades following the introduction of the law on the penitentiary system, there is a sort of «commuter movement»[129] between permissive and restrictive reforms, where the phases of greater rigour coincide with periods in which the public security appears to be at serious risk, between the second half of the 70's and the early 80's, with the "terrorism emergency"[130] and at the beginning of the 90's, with the "organized crime emergency"[131].

It was in particular with the "anti-mafia legislation"[132] - on the wave of growing social alarm fuelled by the terrible massacres of the *mafia* which took

---

[125] PELISSERO, *Ospedali psichiatrici giudiziari in proroga e prove maldestre di riforma della disciplina delle misure di sicurezz*a, in *Dir. Pen e proc*., 2014, p. 926: "The case law of the ECtHR is not in itself contrary to sanctions of indefinite duration, as long as the indefiniteness is not translated into absolute perpetuity".

[126] Term used by the doctrine to indicate the effect of the combined provisions of Article 22 of the Criminal Code and Article 4-*bis* o.p.

[127] MUSUMECI-PUGIOTTO, *Ergastolani senza scampo,* cit., p. 105.

[128] The expression belongs to MOCCIA, *La perenne emergenza. Tendenze autoritarie nel Sistema penale*, Napoli, 2000, p. IV.

[129] The term is used by BRESCI, *Le novità in materia di esecuzione penale*, in *riv. ADIR- l'altro diritto*, 2006.

[130] On the emergency "Lead years" (*anni di piombo*) legislation, BRICOLA, *Politica criminale e politica penale dell'ordine pubblico (a proposito della legge 22 maggio 1975, no. 152),* in *La questione criminale,* 1975, I, 2, p. 104 ss. It points to a period of social and political riots in Italy, marked by a wave of political terrorism. The "Lead Years" are often considered to have begun with the Hot Autumn strikes starting in 1969; the death of the policeman Antonio Annarumma in November 1969; the Piazza Fontana bombing in December of that year, which killed 17 and was perpetrated by right-wing terrorists in Milan; and the subsequent death that same month of leftist anarchist worker Giuseppe Pinelli while in police custody under suspicion of a crime he did not commit.

[131] See MANTOVANI, *Mafia: la criminalità più pericolosa*, in *Riv. It. Dir. Proc. Pen.*, 2013, pag. 9;

[132] After the murder of Pio la Torre, deputy of the Italian Communist Party and of the General Alberto Dalla Chiesa, Law no. 646 of 1982 (known as *Rognoni-La Torre*) was passed. The law introduces into our system the crime of mafia-type organization (Article 416 bis of the Criminal Code). Furthermore, measures of patrimonial prevention are introduced (seizure and confiscation of the goods and properties) which are placed side by side with the personal ones, made even more stringent. Furthermore, tax assessments on the persons affected by measures of prevention are provided for. Finally, a Parliamentary Commission of inquiry on the mafia is instituted for the first time. MUSCO, *Luci ed ombre della legge Rognoni-La Torre,* in *Legisl. Pen*., 1986, p. 560.

place during the entire previous decade[133] - which definitively affirmed the idea that such criminal phenomena, due to their exceptional gravity, required a specific and differentiated response from the State, also in terms of prison treatment[134].

A kind of «prison counter-reform»[135] was carried out with a series of decrees of law[136], which followed without interruption, in light of the serious bloodshed that struck our country, and which reached their dramatic *climax* with the massacres of the judges Falcone and Borsellino[137]. In response to mafia-type crimes, the legislator intervened with the introduction of an emergency regulation which was defined as an «trend reversal»[138] with respect to the 1986 reform (*Gozzini* law)[139] and it was aimed at differentiating the prison treatment for perpetrators of crimes linked to organized crime, by creating «a prison double track»[140].

In this context art. 4-*bis* o.p. was introduced by the legislator, which tightens the executive regime of penalties by intervening on the terms of access to prison benefits and it was added a second paragraph to art 41-*bis* o.p. creating a "special regime" [141] for those who are linked to criminal associations - especially mafia-type ones - and express a higher index of dangerousness.

---

[133] It is a response to the events that took place during the so-called "Lead years" (*anni di piombo*) and to the massacres that the bosses of organized crime were responsible for, including the attacks on judges, the murders of businessmen and internal strife between the clans.

[134] DOLCINI, *La "questione penitenziaria", nella prospettiva del penalista: un provvisorio bilancio*, in *Riv. It. Dir. Proc. Pen*., 2015, 1659.

[135] The expression is by MOSCONI, *La controriforma carceraria*, in *Dei delitti e delle pene*, 1991, II, p. 141.

[136] Decree-Laws No 8/1991 (converted by Law 82/1991), no. 152/1991 (converted by Law 203/1991) and 306/1992 (converted by Law 356/1992). On the choice to use the instrument of decree of law as a response to the bloody events that occurred in the 90s see TRONCONE, *La legislazione penale dell'emergenza in Italia: tecniche normative di incriminazione e politica giudiziaria dallo stato liberale allo stato democratico di diritto*, Napoli, 2001, p. 170.

[137] Giovanni Falcone and Paolo Borsellino were two prosecutors, leaders of the struggle against the Sicilian Mafia (known as *Cosa Nostra*). They were both murdered in 1992 by savage *mafia* bombs.

[138] DELLA CASA, *Quarant'anni dopo la riforma del 1975,* p. 1169.

[139] See *supra* para 2.5. The *Gozzini* law, by introducing alternative measures to detention, had opened the doors of the prison even to life sentenced.

[140] The expression, now rooted in doctrinal analysis, is due to CANEPA- MERLO, *Manuale di diritto penitenziario*, Milano, 2010, p.486.

[141] This regime entails the suspension of the normal rules of treatment (delimitation of talks to one per month, only with family members; imprisonment in special institutions; restrictions on correspondence) for more details on the restrictions of the 41-*bis* regime see FILIPPI, CORTESI, SPANGHER, *Manuale di diritto penitenziario*, cit., p. 169 ss; TRONCONE, *Manuale di diritto penitenziario*, cit., p. 232 ss.

In this way, the intention to humanize the punishment that had pushed the legislator to reform prison legislation in 1975, through the introduction of alternative measures to imprisonment, has given way to a discipline that tends to neutralize[142] the person who is supposed to be unable to be re-educated. The reintegration of the condemned person becomes ancillary to the other purposes traditionally pursued by the punishment, such as incapacitation and the exemplary nature of the punishment[143].

5.1. Legislative developments of Art 4-*bis*

Article 4-*bis,* introduced in the context of "Urgent measures to combat organised crime"[144], has been structured in two bands according to the degree of dangerousness of the persons to whom it refers. Initially, the legislative *ratio* was to neutralize the inmates more dangerous by seeking to break the associative bond, and the differentiation was based on the type of offence according to the title of the sentence[145].

In the case of the so-called "first band"[146] of convicts, identified by organised crime offences, the magistracy of surveillance could grant prison benefits not before the prisoner had shown «evidence that there are no links with organised or subversive crime». On the other hand, for those convicted of the so-called "second band"[147], characterised by crimes not immediately referable to the area of organised crime, access to those benefits was conditional on the absence of

[142] On the concept of "neutralization" VIGANÒ, *La neutralizzazione del delinquente pericoloso nell'ordinamento italiano,* in *Riv. It. Dir. Proc. Pen*., 2012, p. 1343-1345.
[143] EUSEBI*, Ostativo del fine pena. Ostativo della prevenzione, aporie dell'ergastolo senza speranza per il non collaborante,* in *Riv. It. Dir. Proc Pen*., 4/2017, p. 1515.
[144] Art. 4-*bis* was introduced by d.l. 13 Nov. 1990 no. 324 and then modified by d.l. 13 May 1991 no. 152.
[145] See VIOLANTE, *L'infausto riemergere del tipo di autore,* in *Questione Giustizia*, 1/2019, 101 ss.
[146] The crimes of the first band were: crimes committed for the purposes of terrorism or subversion of the constitutional system, the crimes referred to in Article 416-*bis* c.p. and those committed using the conditions or in order to facilitate the associations provided for by Article 416-*bis* c.p, the crimes referred to in Article 630 c.p. and the crimes referred to in Article 74 of Presidential Decree 309/1990.
[147] The crimes in the second category were: the crimes referred to in Articles 575 c.p, 628 para. 3 c.p. and Article 73, limited to the aggravated cases referred to in Article 80 paragraph 2 of Presidential Decree 309/1990.

«elements such as to make one believe the existence of links with organised or subversive crime», the proof of which in this case was up to the Administration[148].

Subsequently, the regulatory framework of Article 4-*bis* was amended again by d.l. 306 of 1992, in the aftermath of the Capaci bombing[149], and the requirement of "collaboration with justice"[150] (art. 58-*ter* o.p.) was introduced. The legislative rationale undergoes a change, it becomes a rule of incentive to cooperation and a procedural tool, useful to acquire elements for investigations[151].

A convicted person sentenced of one of the crimes of the "first band" could have access to prison benefits or alternative measures only if he cooperated with the justice system, the latter is an indication of the breaking of ties with the organization he belongs to[152]. In this way, a strict *ex lege* presumption of social dangerousness of these subjects has been provided for and the breaking of links with organised crime can only be demonstrated through an explicit choice of collaboration with the judiciary. As the Constitutional Court has had occasion to clarify, there has been a shift «from a system based on a reinforced evidence regime to ascertain the non-existence of a negative condition (absence of links with organised crime), to a model introducing a ban for certain convicted persons, which can only be removed through qualified conduct»[153].

A metamorphosis of alternative measures has begun, since the aim is completely unrelated to the re-education of the convicted person, while they are used for "investigative purposes" and to encourage cooperation in the fight against

---

[148] GREVI-GIOSTRA-DELLA CASA, *Ordinamento penitenziario commentato*, Padova, 2019, p. 45; PACE, *L'art. 4-bis dell'ordinamento penitenziario tra presunzioni di pericolosità e "governo dell'insicurezza sociale*", in *Costituzionalismo.it*, 2/2015, p.4.

[149] The Capaci bombing (*Strage di Capaci*) was a terror attack by the Sicialian Mafia which toolk place on the 23rd of May 1992, on Highway A29. The explosion was so powerful that it registered on local earthquake monitors. It killed magistrate Giovanni Falcone, his wife Francesca Morvillo, and three police escort agents, Vito Schifani, Rocco Dicillo and Antonio Montinaro. Falcone's death marked a symbolic turning point in public opinion about the criminal organization, according to Carina Gunnarson, a researcher of modern mafia influence in Sicily.

[150] The conduct of cooperation is considered to exist with regard to those who take action "to prevent the criminal activity from leading to further consequences" or "help concretely the police or judicial authority in the collection of decisive elements for the reconstruction of the facts and for the identification or capture of the perpetrators".

[151] PAVARINI, *Lo scambio penitenziario*, Bologna, 1996, p. 253.

[152] The rigidity of the presumption was then mitigated at the time of conversion by Law No 356 of 7 August 1992, where it was established that the prohibition on access to benefits may be overcome in cases where cooperation is objectively irrelevant.

[153] Constitutional Court sent. n. 68 del 1995.

organised crime[154]. The promotional value of the alternative measures is exploited «instrumentalizing it to the specific intentions of the new criminal policy».[155] Since the most "effective weapon" to combat organised crime is seen in the collaboration and it is in this direction that prison reform is justified[156]. The significant restriction of access to alternative measures and prison benefits, introduced for those convicted of one of the organised crime offences, was conceived to reduce the possibility of having contact with the social and family environment of origin. The purpose of this mechanism of segregation and neutralization of the convicted person was to exert strong psychological pressure on the inmate to cooperate with justice[157].

Over time, a series of interventions have been carried out that have radically changed the structure of the article with respect to the original *ratio*. Firstly, there has been a series of rulings by the Constitutional Court, aimed at mitigating the discipline by eliminating elements of irrationality (see *infra* para 6.2). On the other hand, the legislator has broadened the scope of application of Article 4-*bis*, widening the range of offences that are precluded from access to prison benefits.

5.2. Current framework

Following the rulings of the Constitutional Court, a series of legislative interventions, starting from the early years of 2000, have once again extended the scope of the rule of art. 4-*bis*.

Among the most significant changes there is the one made by law No. 279 of 2002, which brought terrorist offences from the second to the first band. The more restrictive nature of discipline is due to the terrorist attacks that characterized those years[158].

---

[154] PACE, *L'art. 4-bis dell'ordinamento penitenziario,* p.5; DELLA CASA, *Quarant'anni dopo la riforma del 1975,* p. 1170; GREVI – GIOSTRA - DELLA CASA*, Ordinamento penitenziario,* cit., p.48. For these authors the execution of the sentence is used as an instrument of pressure to obtain collaboration, transforming the prison system into an "active mechanism of investigative action".

[155] PRESUTTI, *Alternative al carcere e regime delle preclusioni e sistema della pena costituzionale*, in PRESUTTI (a cura di), *Criminalità organizzata e politiche penitenziarie*, Giuffrè, Milano, 1994, 83-84.

[156] Corte Costituzionale, 1993 n. 306, in *Giustizia Costituzionale*, 1993, p. 2466 ss.

[157] PACE, *L'art. 4-bis dell'ordinamento penitenziario,* cit., p. 5.

[158] In addition to international terrorism, with the attack of 11 September, account must be taken also at national level, such as the murders of Massimo D'Antona and Marco Biagi, legal experts and committed to labour reform, assassinated by *Brigate Rosse,* which was a far-left organization

Subsequently, the list of offences in the second band has been further expanded with the addition of criminal offences against sexual freedom and other against individual freedom[159]. The law converting Legislative Decree no. 11 of 2009 provided for a different path for perpetrators of crimes against sexual freedom in paragraph 1-*quarter* and the collaborative element has been removed.

The discipline, established by law 172/2012 by which the "Lanzarote Convention for the Protection of Children against Sexual Exploitation and Sexual Abuse" has been ratified, has introduced new hypotheses of crime, intended for the protection of child victims, and has entered the new paragraph 1-*quinquies* in art. 4-*bis* according to which the person who has committed one of the crimes against the child must participate positively in the rehabilitation program referred to in Article 13-*bis* o.p.

The process of "stratification" of Article 4-*bis* started with Law Decree 152 of 1991, has continued and, lastly, Law no. 3 of 2019 - named *Spazzacorrotti* - has once again intervened in widening the range of first band offences[160]. It has included a number of offences against the Public Administration[161] raising constitutionally doubts[162], since these types of crime are of an individual nature. In any case they are not immediately connected to organised crime, with the result that collaboration loses its central role in the system and moves away from the original *ratio*. It is evident here the facility with which the regime of preclusion is extended to any new criminal hypothesis depending on what «the legislator believes to give birth in his bulimia»[163].

---

responsible for numerous violent attacks in Italy. PACE, *L'art. 4-bis dell'ordinamento penitenziario,* p.8; On the new "terrorist emergency" CUPELLI, *Il nuovo art. 270-bis c.p. Emergenze di tutela e deficit di determinatezza*?, in Riv. *Cass. Pen*, 2002, p. 897 ss.

[159] The following hypothesis have been added: Articles 600 bis (1), 600 ter (1) and (2), 600 quinquies and 609 bis; 609 ter; 609 quater; 609 octies c.p.

[160] ALBERTA*, L'introduzione dei reati contro la pubblica amministrazione nell'art. 4 bis, co. 1, OP: questioni di diritto intertemporale,* in *Giurisprudenza penale*, 2/2019.

[161] Artt. 314 para. 1, 317, 318, 319, 319- *bis*, 319 -*ter*, 319 -*quater* para. 1, 320, 321, 322, 322- *bis* c.p.

[162] «By law 3/2019 occurs the final regulatory alignment of "white collar crime" to "black crime", i.e. political-economic crime to organized crime, ignoring the deep differences that characterize the two phenomena». MANES, *L'estensione dell'art.4-bis o.p. ai delitti contro la p.a: profili di illegittimità costituzionale,* in*. Dir. Pen. Cont. Riv. Trim.*, 2/2019, p. 105 ss.

[163] PALAZZO, *L'ergastolo ostativo, nel fuoco della questio legitimitatis*, in *Per sempre dietro le sbarre? L'ergastolo ostativo nel dialogo tra le corti*, BRUNELLI, PUGIOTTO, VERONESI (a cura di), in *Forum di Quad. Cost*., Rassegna, 10/2019, p. 5.

It is configured a "multi-level treatment system" according to the specific crime committed, since each one is inserted into a different executive circuit, characterized by specific conditions of access to prison benefits[164].

The first circuit, paragraphs 1 and 1-*bis,* concerns the perpetrators of organized crime, of greater social alarm (such as crimes committed for terrorist purposes, for subversion of the democratic order, *mafia* association, crimes of reduction or maintenance in slavery) and, lastly, also those against the public administration. The convicted person who wants to be admitted working outside, to the prison permits and to the alternative measures to imprisonment provided for by Chapter VI of Law no. 354 of 1975 (excluding early release) must cooperate in accordance with Article 58-*ter* o.p[165]. The same people, according to the provisions of paragraph 1-*bis*, may be admitted to prison benefits if their collaboration is impossible or irrelevant, without prejudice of the exclusion of current links with the criminal association and in the presence of particular mitigating factors.

The second circuit, in paragraph 1-*ter,* includes crimes of serious social alarm (among which voluntary manslaughter, aggravated robbery, drug trafficking). In such cases, the benefits referred to in paragraph 1 may be granted provided that there are no indications of links with organised, terrorist or subversive crime. The burden of proof, as is generally laid down in our system, lies with the public prosecutor, who is not, however, required to provide full evidence, even if only clues from which the existence of the connections can logically be deduced are sufficient. Despite that it is required the absence of such link, it is interesting to note that actually not all of the offences in this paragraph constitute form of organised crime; for examples voluntary murder, child prostitution and sexual violence[166].

---

[164] GREVI- GIOSTRA - DELLA CASA, *Ordinamento penitenziario,* cit., p. 47; FIORENTIN, *Questioni aperte in materie di benefici penitenziari a condannati per i delitti dell'art 4-bis l. n. 345 del 1975*, in *Giurisprudenza di merito*, 2/2012, p. 504.

[165] Following Law no. 3/2019, in accordance with art. 323-*bis*, paragraph 2 of the Italian Criminal Code for the crimes provided for by articles 318, 319, 319-*ter*, 319-*quater*, 320, 321, 322 and 322-*bis* of the Italian Criminal Code (Crimes against P.A), it is required to have effectively worked to prevent the criminal activity from leading to further consequences, to ensure evidence of the crimes and to identify the other responsible parties or to secure the amounts or other benefits transferred.

[166] FILIPPI, CORTESI, SPANGHER, *Manuale di diritto penitenziario*, cit., p. 204.

The third circuit in paragraph 1-*quater* and 1-*quinquies* includes sexual offenders for whom access to the measures shall be subject to scientific observation of the personality for at least one year[167].

A remarkable discipline is also contained in art. 4-*bis* paragraph 3-*bis,* where it provides that the assignment to work outside, prison permits and alternative measures to imprisonment may not be granted to prisoners for intentional crimes, when the National anti-Mafia and anti-Terrorism Prosecutor communicates, on his own initiative or on the recommendation of the provincial committee, the actuality of links with organized crime. It is therefore a further hypothesis in which the prohibitions of 4-*bis* operate[168], to the extent that someone has been talking about an anti-Mafia Prosecutor's «veto power»[169].

As a result of the numerous regulatory interventions, Article 4-*bis* is a provision that today is extremely varied, ending up containing a special discipline relating to a «complex, heterogeneous and stratified list of crimes» who share a presumption of dangerousness[170]. As a consequence of this, the original function of the provision, which was designed to encourage cooperation as a strategy to combat organized crime, has been «trivialised»[171]. The collaboration, on which the entire regulatory system was founded by d.l. no. 306 of 1992, has, time after time, lost its centrality and Article 4-*bis*, from a norm created to face organized crime, has become a norm which has the main function of «creating more rigorous executive paths»[172] for all those series of crimes which, from time to time, generate social alarm.

In conclusion, the overview has shown that any regulatory intervention was justified for the needs of combating the various criminal emergencies. But now, there has been a «normalisation of the emergency». It has become a "label" behind

[167] On this see COPPI, BARTOLO*, I reati sessuali, i reati di sfruttamento dei minori e di riduzione in schiavitù per fini sessuali,* Torino, 2007.
[168] FILIPPI, CORTESI, SPANGHER, *Manuale di diritto penitenziario*, cit., p. 209.
[169] FIORIO, *Il "doppio binario" penitenziario,* in Arch. Pen. n. 1/2018, p. 18.
[170] Const. Court. No. 239/2014; no. 32/2016; no. 188/2019.
[171] This term is used by GALLIANI, *In attesa di Strasburgo*, in Riv. *It. Dir. Proc. Pen*., 3/2018, p.1160.
[172] PACE, *L'art. 4-bis dell'ordinamento penitenziario,* p. 20.

which there are no longer exceptional measures, but «a sort of endless legislative prevention»[173].

6. Cooperation with justice

The provision of reward benefits for collaboration in relation to organized crime was born as a response to the need to overcome the difficulties encountered in the repression of certain criminal associations, whose characteristics have put a strain on traditional investigative tools. The issue of "reward"[174] has taken on great practical importance in our system, especially in the light of the criminal emergencies of the last 40 years when, first the threat of terrorism[175] and then *mafia* crime, made it necessary to seek new ways of intervention by the State[176]. It is precisely in this context that a set of provisions is inserted, in the criminal system, aimed at encouraging the collaboration of the member of the criminal organization[177]. Giovanni Falcone was one of the greatest supporters of the judicial convenience of collaborators. The contribution of the so-called "criminal informant" (*pentito*), starting from the statements made by Buscetta[178] in 1984,

---

[173] FLICK, *Dei diritti e delle paure*, in MOCCIA (a cura di*), I diritti fondamentali della persona alla prova dell'emergenza,* ESI, Napoli 2009, 76. On the concept of "emergency culture" see LUCIANI, *Le decisioni processuali e la logica del giudizio costituzionale incidentale*, CEDAM, Padova 1984, 191.

[174] According to the general theory of law, when we talk about "reward", we refer to cases that provide, under certain conditions, a favourable sanction or penitentiary treatment for the perpetrator of the crime that may result in the non-punishability or the reduction of the penalty or the recovery of even partial personal freedom. For further information on the subject MUSCO, *La premialità nel diritto penale, in* AA.VV, *La legislazione premiale,* Milano, 1987, p. 115; PULITANÒ, *Tecniche premiali fra diritto e processo penale,* in *Riv. It. Dir. Proc. Pen*. 1986, p. 1005 ss.

[175] Initially, the legislative intervention was based on a stricter line of repression, with the introduction of new offences and the increase in penalties for the possession and carrying of weapons. Subsequently, in the face of the rise of the terrorist offensive and the limited usefulness of the legislative innovations outlined above, a "rewarding regulation" was adopted towards the defendants who had demonstrated, through judicially appreciable behaviour, that they wanted to sever the ties with their own organization. The first example of a regulation of the collaboration with the justice dates back to 1974, when Law No. 497 modified Article 630 c.p, the criminal regulations on the subject of kidnapping for extortion. It was provided that the penalty provided for the crime of kidnapping (Art. 605 c.p.) should be applied to the agent who had taken steps to allow the victim to regain his freedom, without payment of the ransom.

[176] See PARRINI, *L'evoluzione normativa premiale: decretazione d'urgenza antiterroristica e antimafia,* in *riv. ADIR- l'altro diritto,* 2007.

[177] BERNASCONI, *La riforma della legge sui collaboratori di giustizia: profili generali e intersezione con le tematiche del "giusto processo",* in *Legislazione penale*, 2002, p. 75.

[178] Tommaso Buscetta was a member of the Sicilian Mafia, who became one of the first members to turn informant and explain the inner workings of the organization. He pulled away from the

allowed to «look inside the *mafia* phenomenon»[179]. Thanks to these declarations, in February 1986, the maxi trial[180] of Palermo was instituted. Falcone has in fact contributed to the creation of the reward regulation for the disassociated members from *mafia* organizations (d.l. 152/1991), having been appointed general director of criminal affairs at the Ministry of Grace and Justice.

In a different opinion, part of the doctrine was against the extension of reward legislation to collaborators for organised crime offences. Firstly, the mechanism for the application of the benefit was considered contrary to the typical functions of the penalty. In particular, it was considered contrary to the principle of proportionality of the penalty in relation to the seriousness of the crime and the degree of personal responsibility, since it was believed that the leaders of criminal organizations, as they were capable of greater revelation because of their prominent role within them, would benefit from greater penalty discounts than their subordinates. Secondly, the reward legislation was not even justified by the special prevention function, since it was observed that the reductions of penalties did not lead to a favourable prognosis of the less dangerous nature of the offender, but only to the verification of the relevance of the declarations made by the collaborator[181].

As abovementioned, it is only with the d.l. no. 152 of 1991, that a rewarding regulation for those who had collaborated with the justice was introduced, borrowing from the previous legislative experience of terrorism[182]. The parallelism between *mafia* crime and terrorist crime clearly emerges from the preparatory work

criminal organization after the murder of some of his family and in 1984, he decided to cooperate with the authorities.

[179] FALCONE, *Cose di Cosa Nostra*, 1993, Fabbri, p. 41.

[180] The Maxi Trial (*Maxiprocesso*) was a criminal trial against the Sicilian Mafia that took place in Palermo, Siciliy. The trial lasted from 10 February 1986 to 30 January 1992, and was held in a special bunker courthouse, inside the walls of the Ucciardone prison. The Sicilian prosecutors have indicted 475 mafia-members for a multitude of crimes connected to mafia activities, relying mainly on the testimony provided as evidence by former mafia bosses who became informers. It is considered the most significant trial against the Sicilian Mafia, it provided that the *Mafia* was an actual organization.

[181] MUSCO, *La premialità nel diritto penale,* cit., p. 124

[182] See SALVINI, *Un primo bilancio della legge sui terroristi "pentiti" fra importanza e difficoltà nella sua applicazione*, in *Cassazione penale*, 1983, p. 1257ss. The Law No. 304 of 1982 (so-called *legge sui pentiti*), provides for the encouragement of behaviours of collaboration with the justice system, both through certain hypotheses of non-punishability in certain cases of associative crimes and in mitigating circumstances. The provision also provides for the possibility of granting bail for defendants who are granted a contribution of significant collaboration.

of the decree[183] and it is on the basis of this analogy that the substantially identical legislative response is justified[184].

Although part of public opinion has looked with mistrust at the contribution of the repentant and the use made of them by the judiciary[185], it should be stressed that it is essential to carry out certain investigations. Since the *mafia* organization was found to be «impermeable from the outside»[186], is, therefore, fundamental an input regarding the direction that the investigations must take, from the inside.

The regulatory framework becomes more complex as a result of d.l. no. 306 of 8 June 1992, and its conversion Law no. 356 of 7 August 1992, following the assassination of judges Falcone and Borsellino. Under Law No. 356, those sentenced to life imprisonment for mafia-type crimes can no longer have access to prison benefits, unless they cooperate with the justice system in accordance with Article 58-*ter* o.p. Thus, the function assumed by the cooperation has changed: from a tool to derogate rules that tighten the terms of access to prison benefits[187], to a «productive behaviour of advantages otherwise not achievable»[188].

The first paragraph of Art. 58-*ter* o.p. provides that, the provisions concerning the persons convicted for any of the crimes referred to in paragraph 1 of Art. 4- *bis* o.p, do not apply to those who, even after conviction, have worked to avoid that the criminal activity is brought to further consequences or have concretely helped the police or judicial authorities in the collection of decisive elements for the reconstruction of the facts and for the identification or capture of the authors of the crimes.

Therefore, from a rewarding point of view, a useful collaboration succeeds in breaking the connections of the offender with the criminal organization because

---

[183] "The level of offensive potential reached by the mafia-type organizations is such as to have generated an emergency situation which presents, in many ways, a marked analogy with that resulting from the subversive terrorist phenomenon". (Report on bill no. 208 of May 13, 1991, no. 152, in Parliamentary Acts - Senate of the Republic).

[184] See RUGA RIVA, *Il premio per la collaborazione processuale*, Milano, 2002.

[185] About the feeling of rejection by public opinion see VIGNA-R. ALFONSO, *Lineamenti della legge sui collaboratori di giustizia* in AA. VV., *Giusto processo: nuove norme sulla formazione e valutazione della prova,* a cura di TONINI, Padova, 2001, p. 108ss.

[186] DI MARTINO, I*l difficile connubio tra funzione rieducativa della pena e benefici penitenziari a favore dei pentiti,* in *rassegna penitenziaria e criminologica*, 2003, p. 228

[187] Initially in 1991, the legislator had provided for a longer time limit, for prisoners convicted of the offences mentioned in Article 4-*bis,* to have access to prison benefits, unless they cooperated with the judicial authority.

[188] GREVI-GIOSTRA-DELLA CASA, *Ordinamento penitenziario,* cit., p. 48.

the presumption of “absolute dangerousness”, that characterizes the prisoners for the crimes referred to in paragraph 1, is no longer present[189]. More than an absolute presumption of social dangerousness, it seems to be a precise choice of criminal policy to inhibit the access to the prison benefits, as long as there is no collaboration with justice (Art. 58-*ter* o.p.); a sort of "punishment" on the part of the State for not having collaborated, already during the trial[190].

For the first band of convicted offenders, cooperation with justice, pursuant to article 58-*ter*, is the only requirement for admission to prison benefits and grants such benefits to those who have joined the special protection programme (art. 16-*nonies* of d.l. 8/1991[191]). The failure of this fundamental requirement leads to the inadmissibility of the application for the granting of alternative measures or prison permits.

The public interest of the fight against mafia-type organized crime makes it important that the State requires a form of collaboration with the investigating authorities, even after years, for all those who have been affiliated in *mafia* circles. Not only *post-delictum*, but *post-iudicium*, the convicted person is asked to provide information to the investigating authorities on elements and persons who are not individually responsible for the fact established in the conviction, in clear contrast to the primary principles of due process, the right of defence and the legality of the crime and the penalty[192]. In this way, however, scholars agree that the rule of the *nemo tenetur se detergere*[193] remains unknown for the crimes referred to in Article 4-*bis* during the execution phase, where it applies the rule that the prisoner who wants to have access to outside work, alternative measures and prison permits is

[189] Ibid p. 65.
[190] MANCA, *Le declinazioni della tutela dei diritti fondamentali dei detenuti nel dialogo tra le Corti*: *da Viola c. Italia all'attesa della Corte costituzionale*, in *Archivio Pen,* n. 2/2019, p. 17.
[191] D.L. 15 January 1991, n. 8, *New rules on kidnapping for the purpose of extortion and for the protection of witnesses of justice, and for the protection and sanctioning of those who cooperate with justice.* The new Article 16-*nonies* (amended by Law 45/2001), provides that "4-*bis* offenders" who have cooperated significantly may be granted a prison permit, conditional release and home detention, after they have served at least a quarter of their sentence and, in the case of those sentenced to life imprisonment after having served at least 10 years, on the proposal or after hearing the Attorneys General at the courts of appeal or the National Anti-Mafia Prosecutor.
[192] MANCA, *Le declinazioni della tutela dei diritti fondamentali,* cit., p. 19.
[193] Principle of criminal procedural law under which no one can be forced to assert criminal liability (self-incrimination).

subjected to the burden of procedural cooperation, enclosed in the opposite rule *carceratus tenetur alios detegere*[194].

6.1. Useful cooperation

Art. 58-*ter* describes two forms of conduct, which are prerequisites for access to alternative measures and benefits for offenders belonging to the first band.

The former of which is part of the *post delitctum* reparative conduct, which is the effort «to prevent the criminal activity from leading to further consequences». It is a conduct with indefinite boundaries, different from the active withdrawal art. 56 of the Italian Criminal Code (it does not require conduct aimed at preventing the occurrence of the offence). It is a form of collaboration that does not require any «concrete aid to justice» and should be related to any effect of the criminal activity that is likely to develop further to it[195].

The second conduct is to have «concretely assisted the police or judicial authority in the collection of decisive elements for the reconstruction of facts and for the identification or the capture of offenders». In order to understand the scope of this second part, it is necessary to read it in conjunction with Article 4-*bis* where it speaks of irrelevant cooperation, so it could be argued that the "concrete aid" would be a contribution that is not objectively irrelevant and therefore has real effectiveness[196].

In order to be useful, collaboration must have a factual impact on the organization, this implies that the collaborator's statements or activities are translated into evidence supporting the accusation. It cannot be generic but must always refer to the facts and crimes that are the subject of the conviction, since our

[194] FILIPPI, *La novella penitenziaria del 2002: la proposta dell'Unione delle Camere Penali e una controriforma che urta con la Costituzione e la Convenzione Europea,* in Riv. *Cass. Pen.*, 2003, p. 30; FILIPPI, CORTESI, SPANGHER, *Manuale di diritto penitenziario*, cit., p. 202. In the opposite direction CHIAVARIO, *Un'esigenza di civiltà… senza dimenticare le vittime*, in *Riv. It. Dir. Proc. Pen*., 4/2017, p. 1512. According to which the right to silence is absolutely protected only when it comes to making statements regarding personal liability and can be balanced with other interests such as ascertaining the criminal liability of persons other than those whose silence is in question.
[195] GREVI-GIOSTRA--DELLA CASA, *Ordinamento penitenziario,* cit., p. 843.
[196] SAMMARCO*, La collaborazione con la giustizia nella legge penitenziaria*, in *Riv. it. dir. proc. pen.*, vol. II, 1994, p. 871.

system does not provide for the figure of the "total collaborator", person who makes his contribution without a correlation with the fact[197].

The conduct assessment is reserved to the competence of the supervisory court which, in accordance with paragraph 2 of Article 4-*bis*, decides once the necessary information has been provided and the Public Prosecutor has been heard by the judge competent for the offences in respect of which cooperation has been give. The procedure, taking place in the same context as the procedure for granting the alternative measure, is alleged to be of incidental nature. Therefore, the decree establishing cooperation cannot be challenged independently, but only in conjunction with the order deciding the merits of the application to grant the benefit[198]. Collaboration is a simple «historical fact, therefore extraneous to the surveillance procedure, so in order to decide on the request to obtain benefits, the court must not test the willingness of the convicted person to collaborate, having to limit itself to ascertaining whether or not the convicted person has collaborated with justice»[199].

In the Italian legal system, the assessment of collaboration is an essential condition for the evaluation of the path taken by the convicted person for one of the crimes referred to in art. 4-*bis* paragraph 1. Today, therefore, collaboration is not, as the legislator had originally outlined it, an index of the rehabilitation path of the prisoner, but a necessary condition for establishing the disappearance of the social dangerousness and taking into account the results of the re-education path[200]. So, it is something prior to the evaluation of the prisoner's path, the lack of which prevents the evaluation itself[201].

---

[197] CANEPA – MERLO, *Manuale di diritto penitenziario,* cit., p. 505.
[198] GREVI-GIOSTRA-DELLA CASA, *Ordinamento penitenziario,* cit. p. 849.
[199] Court of Cassation, Sec I, 20 September 1993, no. 1768; Court of Cassation Sec I, 13 May 1994, no. 1630.
[200] SIRACUSANO, *Contributo*, in G.GIOSTRA, (a cura di), *Carceri: materiali per la riforma,* in *www.penalecontemporaneo.it.*, 17 giugno 2015, p. 189. For the author, "it is unsustainable that the failure to achieve the progress in re-education considered relevant by law for the purposes of prison benefits, may result from an absolute presumption connected to the mere non-existence of a collaborative conduct pursuant to Article 58-ter of the Italian Penal Code".
[201] SANTORO, *Amicus Curiae- L'altro diritto onlus Corte Edu, I Sezione, Viola v. Italia* n. 2, in *www.penalecontemporaneo.it.* 14 Marzo 2018. (On the absolute presumption between cooperation and personal redemption see *infra* paragraph 7.1).

6.2. The irrelevant and impossible cooperation

The "irrelevant" or "impossible" cooperation constitute those conditions initially identified by constitutional jurisprudence[202] as equivalent to the effective collaboration, for the purposes of removing the ban on access to benefits provided for by Article 4-*bis*, and now transposed by paragraph 1-*bis*[203].

In some cases, cooperation is *de facto* impracticable because the offender «knows nothing or little», due to limited participation in the crime or the full investigation of the facts in the courts, make the offender's contribution to the investigation superfluous in itself. Without a corrective measure, the impossibility of his contribution would lead to an insurmountable obstacle to access to benefits[204]. This led to the ruling of the Constitutional Court no. 306 of 1993 which produced to the regulatory changes in paragraph 1-*bis* and the first doubts of constitutionality about the absoluteness of the presumption have emerged[205].

Pursuant to art. 4-*bis* para. 1-*bis*, prison benefits may also be granted to first band offenders whose collaboration is "objectively irrelevant". The crime committed, despite being among those of high social alarm, may be of minor seriousness and the convicted person may offer a collaboration, but useless. A condition for the applicability of this provision is that the mitigating circumstance of the compensation for damages referred to in Article 62 no. 6 of the Italian Criminal Code has been recognised[206], or when one of the cases referred to in Article 114 (minimum involvement) or 116 paragraph 2 (offence other than that wanted by some of the competitors) of the Italian Criminal Code can be identified[207].

---

[202] Constitutional Court no. 306/1993, no. 361/1994, no. 68/1995.

[203] The decisions referred to above were then faithfully transposed in paragraph 1-*bis* of Article 4-*bis* by Law no. 279 of 23 December 2002, *Amendment of Articles 4-bis and 41-bis of Law no. 354 of 26 July 1975 on prison treatment* (G.U. no. 300 of 23 December 2002).

[204] MUSUMECI-PUGIOTTO, *Gli ergastolani senza scampo*, cit., p. 150.

[205] In fact, the sentence states that the decision to inhibit access to alternative measures to imprisonment to 4-*bis* offenders has "led to a significant compression of the re-educational purpose of the sentence" and that the requirement of collaboration cannot be a unique symptom of a convicted offender's redemption.

[206] The compensation cannot constitute the fulfilment of an order issued in the sentence but must represent a spontaneous initiative of the convicted person; even though it is independent from the subjective motivations of the detainee, since no real repentance is required. (CORVI, *Trattamento penitenziario e criminalità organizzata*, Padova, 2010, p. 56.)

[207] Art. 114 of the Italian Criminal Code "If the judge considers that the action taken by some of the persons involved in the offence pursuant to articles 110 and 113 has had minimal importance in the

The Constitutional Court has extensively interpreted the concept of irrelevant collaboration to include that for which a useful collaboration is not possible (impossible cooperation) "because of the marginal position in the organisation does not allow to know facts"[208] or because facts and responsibilities "have already been fully ascertained"[209]. In fact, the Court, in order to avoid an unreasonable discrimination among the convicts who have had a marginal role in the criminal activity, which does not allow a concrete possibility of useful collaboration with the Justice, accepts the question of constitutional legitimacy and equates to the irrelevant collaboration the collaboration made impossible by the limited participation in the criminal act, even though he hasn't been given the mitigating circumstances (art. 62 no. 6, 114 and 116 para. 2 c.p.)[210].

Likewise, cooperation is not possible if there is no further information to be provided to the investigators as the facts have been fully established. In the end «irrelevant collaboration and impossible collaboration, therefore, end up fitting into a unitary framework of collaboration that is objectively non payable»[211].

6.3. The proof of absence of links with the criminal organization

Both in the case of impossible cooperation and in the case of irrelevant cooperation, the assessments carried out in the court and the recognition of the mitigating factors are not sufficient to grant of prison benefits. To these conditions

---

preparation or execution of the offence, he may reduce the penalty. This provision does not apply in the cases referred to in Article 112. The penalty may also be reduced for those who have been determined to commit the offence or to co-operate in the offence, when the conditions set out in numbers 3 and 4 of the first paragraph and in the third paragraph of article 112 are met"; Art. 116 of the Italian Criminal Code "If the offence committed is different from that intended by some of the competitors, they are also liable if the event is a consequence of their action or omission. If the offence committed is more serious than the one wanted, the penalty is reduced with regard to the person who wanted the less serious offence".

[208] Constitutional Court no. 357/1994

[209] The grounds of the judgment No 68, 22 February 1995, state that "since the re-educational function of the penalty is value that permeates the entire prison treatment, meanwhile it is possible to make the application of institutions, which are party to that treatment, subordinate to a certain conduct, in as much as the conduct that is identified as a normative presupposition is objectively enforceable. To introduce, therefore, as a prerequisite for the application of institutions functional to the re-education of the condemned, a behaviour that objectively cannot be provided because nothing would add to what has already been established by the irrevocable judgment, is similar to exclude arbitrarily an important set of treatment opportunities with clear frustration of the precept enshrined in Article 27 of the Constitution".

[210] Constitutional Court no. 357/1994.

[211] Constitutional Court no. 68/1995.

is added, to the burden of proof on the prisoner, to exclude «current links with organised, terrorist or subversive crime» (art. 4-*bis* para. 1-*bis*).

The burden of allegation, incumbent on the sentenced person, must be discharged from the original request for a benefit, with the consequence that any additional activity could not be usefully carried out for the first time when the claim against the declaration of inadmissibility for a benefit is made[212].

The rationale of this normative provision consists in the fact that, in the case of a collaborator, in the very sense of the term, the disappearance of the link with the criminal organization is in *re ipsa*, while in the hypothesis of the non-collaborator, proof of the break with the criminal association is required. Many authors have spoken of *probatio diabolica* because providing proof of the non-existence of a fact is a problematic operation[213].

The problem of such an investigation relates in particular to those offences whose commission is not dependent on the existence of an organised criminal structure. For instance, in the case of the crimes against the public administration recently introduced. In these cases, the risk is to subordinate access to benefits to the impossible demonstration of the disappearance of circumstances which have never existed[214].

Article 4 -*bis* para 1-*bis* requires the assumption of evidence that there are no links with organized crime, but there is a risk that such links are deemed to exist even in the presence of simple suspicions as not susceptible to evidence to the contrary[215].

In conclusion, if there is no evidence of a lack of connection with the criminal organisation, the presumption of dangerousness of the convicted person remains and the benefits are denied. Clearly the friction points seem to be with the constitutional regulations, in particular with Articles 24 paragraph 2 and 27

---

[212] FIORENTIN, *Questioni aperte in materie di benefici penitenziari,* cit., p. 510. According to another guideline now dating back, the supervisory court instead should verify *ex officio*, where there has been no formal verification of the cooperation in order to grant the above-mentioned request, regardless of any defensive views.

[213] GREVI-GIOSTRA-DELLA CASA, *Ordinamento penitenziario,* cit. p. 73; MUSUMECI-PUGIOTTO, *Ergastolani senza scampo*, cit., p. 100.

[214] PAPAGNO, in *La nuova disciplina dei delitti di corruzione, profili penali e processuali* (a cura di) FLORA E MARANDOLA, Pacini Giuridica, 2019, p. 143.

[215] GREVI-GIOSTRA- DELLA CASA, *Ordinamento penitenziario,* cit. p. 73.

paragraph 3 of the Constitution. The assessment of the irrelevance and the impossibility of collaboration, while allowing, if positive, the evaluation that enables access to alternative measures, putting an end to the impossibility of release, does not depend in any way on the conduct of the detainee during the execution phase, but on events completely independent of his will (the fact that the investigations have made it possible to ascertain all the elements of the offence) or on his behaviour during the course of the offence (the marginality of the conduct in carrying it out) that makes his collaboration irrelevant[216]. So, the judge cannot make any assessment of the prisoner's progress in treatment to the detriment of the re-educational function of the sentence. This also damages the right of defence, both because the condemned person has the only chance to base his defensive line on cooperation and because he would bear the burden of proof. The judge seems to be «usurped of his job by the legislator»[217].

6.4. The Exclusion from alternative measures and prison benefits

A person convicted of one of the offences referred to in article 4-*bis* paragraph 1, who does not cooperate, cannot have access to prison benefits and alternative measures to imprisonment, except for early release. They are also precluded in the case of impossible or irrelevant collaboration if there is no evidence of the absence of links with the criminal organisation to which they belong[218].

The first of the prison benefits precluded by Article 4-*bis* is the "allocation of work outside". The work is one of the elements of the re-educational treatment, since, by promoting contact with the outside world, it allows to pursue the aims of the recovery and social reintegration of the prisoner. Following the introduction of "work for public benefit" (art. 20-*ter* o.p.)[219] as an autonomous form of prison work, the rules on access to the above-mentioned benefit for prisoners in 4-*bis* have been

[216] SANTORO, *Amicus Curiae,* cit.
[217] GALLIANI, *Ponti non muri. In attesa di Strasburgo, qualche ulteriore riflessione sull'ergastolo ostativo*, in *Riv. It.. Dir. Proc. Pen*, 3/2018, p. 1157.
[218] For in-depth analysis see EUSEBI, *L'ergastolano non collaborante ai sensi dell'art 4bis, comma 1, e I benefici penitenziari: l'unica ipotesi di detenzione ininterrotta, immodificabile e senza prospettabilità di un fine?,* in Riv. *Cass Pen*., n. 4/2012, p. 1120 ss; TRONCONE, *Manuale di diritto penitenziario*, cit., p. 181.
[219] Art 20-*ter* is introduced by Legislative Decree no. 124 of 2 October 2018.

changed. In fact, the new regulation allows access to work to those convicted of art. 4-*bis* para 1*,* upon authorisation of the judiciary authority[220]. The second prison benefit precluded by Article 4-*bis* is that of the "prison permit" (art. 30-*ter* and *quater*)[221]. It allows the detainee, who has maintained good conduct and who is not socially dangerous, to leave prison for a period not exceeding 15 days.

On the other hand, from the list of measures to which the limitations of art. 4-*bis* apply, the "permits of necessity" (art. 30 o.p.) are excluded because the legal reason behind is different: at the basis of this type of permit, in fact, there are purely humanitarian considerations, which can well be satisfied in the presence of social dangerousness[222]. The article provides two hypotheses: the prisoner can leave for a maximum of five days, with all the precautions, in case of danger to the life of a family member or cohabitant, or for particularly serious family events.

The exclusion of "early release" (art. 54 o.p.) from the 4-*bis* discipline and the consequent accessibility for the convicts referred to in paragraph 1, actually has no real influence on the possibility of release for the person sentenced to permanent life imprisonment. Since the utility of early release consists in the possibility of shortening the time for access to alternative measures. But for the life imprisoner who cannot access them in any case, the granting of this benefit has only a formal value[223].

The alternative measures "probationary" (art. 47 o.p.)[224] and "work release" (art. 48 o.p.) are also not available for those condemned to life imprisonment for one of the crimes of art. 4-*bis* para. 1. Numerous interventions in jurisprudence[225] have recently led to a reduction in the scope of the prohibition to access "home

[220] It should be noted that in any case, those detained under Article 416-*bis* of the Italian Criminal Code and those for crimes committed using the conditions provided for in the same article or in order to facilitate the activities of the associations provided for by it, remain excluded from the benefit (20-*ter* paragraph 6).
[221] See *infra* para. 10.3 and the pronunciation of unconstitutionality.
[222] According to GALLIANI, *Riflettere, insieme, sull'ergastolo ostativo*, in *Riv di studi e ricerche sulla criminalità organizzata*, vol. 5, n. 1/2019, p. 139 "*you don't need to earn permits of necessity, you're entitled as a human being, unless the judge finds totally unsatisfactory the precautions he can take to avoid the danger of escape and the commission of new offences*".
[223] SANTORO, *Amicus Curiae,* cit; MUSUMECI-PUGIOTTO, *Ergastolani senza scampo*, cit., p. 81;
[224] Excluded from the prohibitions of art. 4-*bis* are the measures of "therapeutic probation" (art. 94 t.u. 309/90) and the regulation of alternative measures to imprisonment of persons suffering from AIDS (47-*quater* o.p.).
[225] Constitutional Court no. 239/2014; no. 76/2017; no. 174/2018.

detention" (Article 47-ter)[226] for first band's convicted. Since a balance between the need to neutralize the social dangerousness of the perpetrators of the crimes provided for therein and other values of constitutional rank was not allowed. Among these is the right of children to grow up with their parents at their side. The reference is to two statements of constitutional illegitimacy which have invested Articles 47-*quinquies*, paragraph 1-*bis* and article 21-*bis* o.p. in the parts in which they exclude access to the relative benefits (special home detention and outside assistance to minor children) for mothers convicted of a crime under paragraph 1 of art. 4-*bis*[227].

On the other hand, the measure of "conditional release" (art. 176 c.p.)[228], which guarantees the compatibility of life imprisonment both with the re-educational principle at national and European level, is strictly excluded for non-co-operators.

6.5. Perpetual life imprisonment and conditional release

«None of us knows where and when he will die, the condemned to perpetual life imprisonment knows where: in jail»[229].

Perpetual life imprisonment (*ergastolo ostativo*) is when a person sentenced to life imprisonment for one of the crimes of the first band (art. 4-*bis* para. 1) asks to be admitted to parole, which he is automatically denied unless he offers useful

[226] The alternative measure of home detention was introduced by Law no. 663 of 1986 (*Gozzini* Law). This benefit was intended to widen the opportunity of alternative measures, allowing the continuation, as far as possible, of the activities of care, family assistance, professional education, already underway in the phase of pre-trial detention in one's own home (house arrest) even after the sentence has become final, thus avoiding detention and its negative consequences. Art. 47-*ter* o.p. was amended by Law no. 165 of 1998 (*Simeone* Law), which extended the possibility of enjoying this benefit. The measure consists in executing the sentence in one's own home, or in another place of private residence, or in a public place of care, assistance and reception.

[227] GREVI-GIOSTRA-DELLA CASA, *Ordinamento penitenziario,* cit., p. 52. The same *ratio* was also applied to extend the declaration of unconstitutionality of Article 4-*bis*, paragraph 1, to the part which does not exclude from the preclusive automatism "home detention" referred to in Article 47-*ter*, paragraph 1, letters *a* and *b*.

[228] Although the provision of Art. 4-*bis* literally makes no mention of conditional release, it can be said with certainty that the granting of conditional release is in any case subject to the cooperation referred to in Article 58-*ter*. In support of this statement there is Decree Law no. 152 of 1991 which, in article 2, states that admission to conditional release for persons convicted of one of the offences provided for in the first paragraph of article 4-*bis* is subject to the same requirements "provided for in the same paragraph for the granting of the benefits referred to therein".

[229] Phrase by Adriano Sofri reported by FASSONE, *Fine pena: ora,* cit., p. 179.

cooperation. The lack of cooperation "hinders" the granting of alternative measures to imprisonment and prison benefits, except that it's irrelevant or impossible.

The certainty of redemption, required by Article 176 of the Criminal Code for the granting of conditional release, provided for a positive prognosis regarding the future behaviour of the sentenced person, in this assessment some external indicators such as general behaviour and participation in work and study activities play a significant role[230]. In the case of the sentenced to perpetual life imprisonment, on the contrary, the only factor taken into account is the breaking of ties with the criminal organisation through collaboration with justice (art. 58-*ter* o.p.)

In this situation the same re-educational aim of the art. 27 paragraph 3 of the Constitution is questioned, which is always intended to be subordinate to the absolute presumption that, the requirements for access to conditional release against non-cooperative convicts do not exist, without taking into account either the reasons that led to a non-cooperative conduct or the progress in treatment made[231]. The re-educational purpose implies the evaluation of the results and progress made during prison treatment. Conversely, Article 4-*bis a priori* assumes a persistent social dangerousness from external evidences. As a consequence, life imprisonment is always the same in terms of duration and method, *usque ad mortem*.

It has been observed in para 3.1 how constitutional jurisprudence has rejected the hypothesis of a contrast between the re-educational principle and life imprisonment. The arguments of the Constitutional Court[232] were based on the possibility for the life imprisonment offender to be released on parole, after twenty-six year, if he has demonstrated certain redemption. Therefore, thanks to the institution referred to in art. 176 of the Criminal Code, the perpetual penalty must be considered compatible with art. 27, para. 3 of the Constitution, since the life sentenced can be reinstated in the civil consortium.

Consequently, if the granting of conditional release is dependent on cooperation with justice for this particular category of detainees (art 4-*bis* para 1), and if life imprisonment is constitutional because there is conditional release, will

[230] CORTESI, FILIPPI, SPANGHER, *Manuale di diritto penitenziario,* cit., p. 121.
[231] MUSUMECI-PUGIOTTO, *Ergastolani senza scampo*, cit., p. 78.
[232] See Court cost. 22 November 1974, No 264.

perpetual life imprisonment be unconstitutional in the absence of cooperation? The Constitutional Court tried to answer these questions with ruling no. 135 of 2003[233].

7. Art 4-*bis* before the Constitutional Court

At the heart of the Court's ruling no. 135 of 2003, the question was whether Article 4-*bis,* making the sentence effectively perpetual - irreducible according to the terminology of the European Court of Human Right - against the non-cooperative offender, excluding him permanently and definitively from the re-education process, was contrary to Article 27. paragraph 3 of Constitution[234].

According to the referring court, «the contested rules would lead to a situation entirely similar to that examined by the Court in judgment No. 161 of 1997, which declared that Article 177(1) c.p. was constitutionally unlawful, in the part in which it does not provide that the person sentenced to life imprisonment, whose conditional release has been revoked, may be may be admitted again to the benefit if the relevant conditions exist, because such discipline determined a permanent and absolute exclusion from the re-education process, in violation of Article 27, third paragraph, of the Constitution»[235].

The arguments used by the Constitutional Court to declare the question groundless are many. First, contrary to what the referring court stated, there is no common ground with the previous ruling of 1997. The preclusion imposed by Article 177 c.p. was absolute, whereas in the present case the judge considers that the preclusion provided for by Article 4-*bis* o.p. depends on the free choice of the convicted person not to cooperate.

And it is precisely on the freedom of choice of the convicted person, where cooperation is "objectively due", that the Court's ruling is based.

---

[233] See *infra* para 7.

[234] DOLCINI, *Pena detentiva perpetua*, cit., p. 23.

[235] Const. Court no. 135/2003. The judge had been invested with a request for access to conditional release by a person who was serving life imprisonment as a result of two convictions, both for kidnapping and for extortion but, deciding not to adopt a "qualified conduct" within the meaning of Article 58-*ter* o.p.and not being in a situation of inexcusable collaboration, he was precluded from being released on parole.

The reasoning is the same as that used in previous rulings[236] where the Court had reduced the obligation for the offender to behave collaboratively: the Court had excluded the preclusion if the collaboration was irrelevant or impossible (and the legislator took note of this by adding to Article 4-*bis* the paragraph 1-*bis*).

Therefore, the censored discipline, according to the constitutional judges, does not «totally prevent the admission to conditional release», but it is the choice of the convicted person on which the prohibition depends. As long as the option is objectively possible. This choice is taken as a «legal criterion for the evaluation of the convicted person's behaviour» in order to ascertain the requirement of certain redemption of the offender to obtain conditional release. Therefore, the provisions of 4-*bis* para. 1 do not absolutely preclude access to the benefit since it is left to the free choice of the sentenced person to cooperate, and therefore does not conflict with the re-educational principle set out in Article 27 paragraph 3 of the Constitution.

According to constitutional judges, "perpetual life imprisonment" is not *de jure* an eternal punishment. And if *de facto* it turns out to be so, this would be attributable to the life sentenced that prefers life imprisonment to collaboration[237].

The reasoning carried out by the Court ignores the fact that the choice to cooperate may not be free, there is a lack of an effective investigation on the reasons for not cooperating, there is a lack of an investigation on the effective termination of the association tie. While the lack of cooperation becomes an absolute legal presumption, precluding the granting of the benefit.

7.1. Absolute legal presumption

A legal presumption arises when a certain legal consequence becomes mandatory and automatic by the legislator, «regardless of any other consideration and any further investigation»[238].

There is a constant censorship by the Constitutional Court of the legislative provisions containing such presumptions, which do not allow the judge to modulate

[236] Const. Court no. 306/1993; no. 357/1994; no. 68/1995.
[237] MUSUMECI-PUGIOTTO, *Ergastolani senza scampo*, cit., p. 69.
[238] Court Cost. no 139/1982. Also, SPRICIGO, *La riflessione critica sul reato e l'automatismo ostativo dell'art. 4-bis o.p.*, in *Criminalia*, 2014, 619 ss.

the effects of the rule in relation to the peculiarities of the specific situation[239]. The punitive automatisms, and the related legal presumptions, «usually set an instant». Both do not open up to «the evolution of the personality of the condemned person and do not allow the actual progress to be tested»[240].

In the field of penitentiary matters, in fact, in addition to the principle of the re-educational purpose of the penalty, the principle of personal criminal responsibility also applies, which rejects absolute presumption of social dangerousness and it takes into account the possible transformation/evolution of individuals. What is at stake is human dignity itself, «which is expressed in the need to consider the individual case in its peculiarities. This means that the person must be assessed for what he is and for the facts he has actually committed»[241].

Article 4-*bis*, on the other hand, is based on a number of legal presumptions. For those who commits a crime included in the so-called first band (Article 4-*bis*, paragraph 1), a double legal presumption arises: of "social dangerousness" and of "permanence of membership in the criminal association", which are an obstacle to the granting of prison benefits and alternative measures to punishment. The latter can be overcome by means of a useful collaboration, which is in turn a legal presumption of "certain redemption" of the convicted person[242].

The reason for this regulatory construction should be sought in the associative nature[243] of the crimes in Article 4-*bis* paragraph 1, which distinguishes them from the other offences covered by the same article. The stability of the associative bond is, therefore, linked to the presumption of dangerousness which

---

[239] CESARIS, *Un ulteriore passo verso l'eliminazione dei divieti aprioristici di concessione di benefici penitenziari,* in *Giur. Cost*., 4/2010, p. 2250. The reference is to rulings no. 249/1983, 139/1982 (on security measures), no. 164/2011, 231/2011, 331/2011, 57/2013, 232/2013 (on obligatory pre-trial detention in prison), no. 234/2014 (on the prohibition to grant the benefits of home detention sentenced mothers for first band offences) and no. 185/2015 (on the obligatory application of Article 99, paragraph 5 of the Criminal Code).

[240] VERONESI, *Se la pena è davvero "a oltranza": i seri dubbi di costituzionalità dell'ergastolo e le sue preclusioni ostative*, in BRUNELLI, PUGIOTTO, VERONESI (a cura di), *Per sempre dietro le sbarre*, cit. p. 203.

[241] SILVESTRI, *La dignità umana dentro le mura del carcere*, in Riv. *AIC*, 2/2014.

[242] MUSUMECI-PUGIOTTO, *Ergastolani senza scampo*, cit., p. 90.

[243] See sentence no. 273 of 2001 in which the Court affirms that the crimes listed in the first paragraph of article 4-bis "are [...] or can be considered a typical expression of a crime characterized by particularly high levels of dangerousness, since their realization normally presupposes, that is, due to the common criminological experience, a criminal structure and organization such as to involve particularly strong bonds of silence and secrecy among the associates or competitors in the crime", in the same sense, lastly, Court sentence no. 239 of 2014.

does not disappear once the subject is locked up in jail. This presumption is based on what generally happens (*id quod plerumque accidit*) according to which «belonging to the criminal association is permanent, when it is strongly present on the territory and endowed with intimidating force»[244].

It does not take account into the fact that there are a number of behaviours, other than cooperation with justice[245], which are capable of demonstrating the detachment of the convicted person from criminal associations. As well as multiple reasons that may lead the condemned person not to offer his or her cooperation without this being a sign of his continued membership into the criminal association[246]. This «sterilises» the judicial function of the supervisory judge, who can only verify whether or not there is cooperation.

This in turn stems from another legal presumption that cooperation is equivalent to the personal redemption required by the rules for the granting of alternative measures. The latter is also based on a *fictio iuris* (assumption of law) between collaboration and re-education, which are two distinct phenomena[247]. In fact, the decision to cooperate may be driven by «utilitarian reasons»[248] in order to achieve the benefits regardless of redemption.

The conclusion is that such system is unconstitutional and specifically that it is absolutely incompatible with Article 27(3) of the Constitution. In fact, not only it gives the penalty a function that it does not belong to, i.e. of an instrument of the fight against organized crime, but, thus strongly limiting access to benefits and alternative measures, it does not even allow the penalty, when it is imposed on

[244] PACE, *L'art. 4-bis dell'ordinamento penitenziario,* cit., p. 13.
[245] SARACENO, *Contributo*, cit., p. 190. "I think of the explicit dissociation, the public stance against the criminal association or the ideology that inspires it, the clear adherence to models of legality that are antithetical to the associative ones, the manifest interest in the victims of crimes, the commitment to the fulfilment of civil obligations deriving from the crime".
[246] *Ibidem*. The reference is to possible concerns: about the safety of family members, to the moral refusal to make accusatory statements against relatives or persons linked by emotional ties.
[247] MUSUMECI-PUGIOTTO, *Ergastolani senza scampo*, cit., p. 83; SPRICIGO, *La riflessione critica sul reato,* cit., p. 630. For the author, collaboration does not constitute necessarily a proof of the initiation of a re-educational path.
[248] Cost. Court no. 306/2003. This is what happens in the circumstances highlighted also in the above-mentioned judgment *Viola v. Italy* n. 2 of the ECtHR, in which it is stated that the choice of the convicted person not to cooperate with the justice may not be free at all, being instead conditioned also by the fear of retaliation for himself and for the members of his family.

certain categories of perpetrators, to fulfil its own function: to tend towards the resocialization of the condemned person[249].

In the light of these considerations, it would be desirable to "decontaminate" paragraph 1 of Article 4-bis and restore the powers of assessment of the re-education path by the tribunal of surveillance[250].

7.2. A progressive erosion of legislative automatisms

The «structural fragility»[251] of the preclusion system, of prison benefits, comes up above all during the application, where the real cases «challenge the rigid geometry of the preclusive automatisms»[252]. This creates the conditions for a constitutional judgment of legitimacy.

The Constitutional Court, while excluding that the prohibition prescribed by Article 4-*bis* can be considered «in itself»[253] in contrast with Article 27 paragraph 3 of Constitution, has censored certain aspects of the legal framework.

In rulings no. 239/2014 and 76/2017 it declared that Article 4-*bis* was unlawful in so far as it prevented the mother in prison from having access to ordinary and special home detention[254]. The exclusion of these types of prisoners from the benefits provided for by the same provision was considered contrary to Article 31 of the Constitution, which expresses, together with international standards, the child's overriding interest in a parental relationship aimed at his or

[249] PACE, *L'art. 4-bis dell'ordinamento penitenziario,* cit., p. 14; MUSUMECI-PUGIOTTO, *Ergastolani senza scampo*, cit. p. 84. The author claims that the re-educational purpose of punishment has been set aside, which must exist from the moment it is born in the abstract normative provision to the moment it is extinguished, as stated in sentence no. 313/1990 of the Constitutional Court.
[250] SARACENO, *Contributo*, cit., p. 189. The need for intervention will be taken on board by the Commission Palazzo in the "*Proposal of revision of the rules prohibiting the granting of benefits to non-cooperative detainees or internees*".
[251] PACE, *L'art. 4-bis dell'ordinamento penitenziario,* cit., p. 12.
[252] GALLIANI E PUGIOTTO, *Eppure qualcosa si muove: verso il superamento dell'ostatività ai benefici penitenziari*, in Riv. *AIC*, 4/2017, p. 1-56.
[253] Const. Court no. 239/2014.
[254] FIORENTIN, *La Consulta dichiara incostituzionale l'art. 4 bis ord. penit. laddove non esclude dal divieto di concessione dei benefici la detenzione domiciliare speciale e ordinaria in favore delle detenute madri,* in *www.penalecontemporaneo.it,* 27 ottobre 2014; PACE, *La "scure della flessibilità" colpisce un'altra ipotesi di automatismo legislativo. La Corte dichiara incostituzionale il divieto di concessione della detenzione domiciliare in favore delle detenute madri di cui all'art. 4 bis dell'ordinamento penitenziario,* in *Giurisprudenza costituzionale,* 2014, 3948 ss.

her balanced physical and psychological development[255]. In this way the Court has affirmed that the preclusive automatism, suffered by the prisoners under Article 4-*bis*, introduced a discipline unbalanced on the punitive needs of the State, which unduly compressed the interest of the child to restore the natural cohabitation relationship with the mother.

The provision of law, therefore, by promoting the instances of public security, involves the transfer of the "cost" of the strategy of the fight against organized crime to a third party, extraneous both to the criminal activities, which determined the conviction[256].

On this basis, however, the judge of the laws specified that the declaration of unconstitutionality does not affirm the unconditional primacy of the child's interest over the needs of social defence, but rather the constitutional necessity of balancing these two interests in practice. «The Court has given back to the judge what the legislature took away from him, that is, the appreciation on a case-by-case basis»[257].

When, the legislator, by means of insuperable presumptions, prevents the judge from assessing the concrete existence of the needs of social defence, since the latter are assumed to be *a priori* predominant with respect to the opposing interest (in this case that of the minor), «there is not a reasonable balance but an automatism based on presumptive indexes»[258]. In this way, one of the arguments that had protected Article 4-*bis* from any revision is denied, i.e. that the questioning of the automatism prescribed by the legislator could affect the punitive response of the State. Instead it only means allowing the judge to apply the rules to the real case[259] and not frustrate the judicial function[260].

In the light of these rulings, the judge recently declared himself once again against the presence in the system of rigid automatisms that do not allow for an individualized evaluation, completely deleting the implementation of the re-

[255] For an examination of constitutionality decisions in favour of the child see PACE, *Preminente interesse del minore e automatismi preclusive alla luce della sentenza costituzionale n. 76/ 2017*, in *Studium Iuris*, 12/2017.
[256] PACE, *L'art. 4-bis dell'ordinamento penitenziario,* cit., p. 10.
[257] GALLIANI E PUGIOTTO, *Eppure qualcosa si muove,* cit.
[258] Const. Court no. 76/2017.
[259] PACE, *Preminente interesse del minore,* cit., p. 10.
[260] GALLIANI E PUGIOTTO, *Eppure qualcosa si muove,* cit.

educational purpose of the sentence[261]. The Constitutional Court ruled that Article 58-*quater*, paragraph 4[262] o.p. in conjunction with Article 4-*bis*, is illegitimate and that it entails even worse prison treatment than the already special regime provided for[263]. This provision, in fact, imposes a strict prohibition on the granting of alternative measures to imprisonment, as well as the prison benefits of the prison permit and the assignment to work outside the prison, with reference to certain types of convicts.

In particular, paragraph 4 of the provision in question covers the perpetrators for the crimes referred to in Articles 289-*bis* and 630 of the Criminal Code that caused the death of the kidnapped person. Well, these subjects can access the alternative measures and other benefits only after having actually expiated at least two thirds of the sentence or, for life imprisonment, twenty-six years of imprisonment. Models based on absolute presumption of dangerousness depending on the title of the crime committed, extended over a wide time frame, should be considered unconstitutional, since they automatically prevent access to penitentiary benefits, even in case of relevant signs of participation in the re-educational treatment and in the absence of elements likely to indicate the current dangerousness[264].

The discipline of 58-*quater* paragraph 4 has several similarities with that of perpetual life imprisonment, so much so that part of doctrine has spoken of life imprisonment of "third type"[265], starting from its considerably punitive character,

---

[261] SIRACUSANO, *Dalla Corte Costituzionale un colpo "ben assestato" agli automatismi incompatibili con il finalismo rieducativo della pena,* in *Riv. It. Dir. Proc. Pen.,* 3/2018, p. 1787 ss; BARBERO, *La (seconda) audace sentenza in tema di concessione di benefici penitenziari: dalla Consulta un forte richiamo alla finalità rieducativa della pena,* in *Giurisprudenza Penale*, 11/2019, p.5.

[262] The first ablative intervention took place with sentence no. 149/2018 which declared the illegitimacy of article 58-*quater*, paragraph 4 in the part in which it prevented those sentenced to life imprisonment for the crime referred to in article 630 of the Italian Criminal Code, who had caused the death of the kidnapped person, from having access to any of the benefits listed in article 4-*bis*, paragraph 1, if they had not actually served at least twenty-six years of the sentence. See PELISSERO*, Ergastolo e preclusioni: la fragilità di un automatismo dimenticato e la forza espansiva della funzione rieducativa*, in *Riv. It. Dir. Proc. Pen*., 3/2018, p. 1359 ss. Subsequently, with sentence no. 229/2019 sanctioned the illegitimacy of the rule also in the part in which it provided that those sentenced to temporary imprisonment for the crime of kidnapping for extortion, who caused the death of the kidnapped person, are not admitted to any of the prison benefits listed in art. 4-*bis*, para. 1, if they have not actually at least two thirds of the sentence imposed.

[263] GALLIANI E PUGIOTTO, *Eppure qualcosa si muove,* cit.

[264] SIRACUSANO, *Dalla Corte costituzionale un colpo "ben assestato" agli automatismi,* cit., p.1795.

[265] DOLCINI, *La pena detentiva perpetua nell'ordinamento italiano*, cit., p. 7.

its rigidity in excluding possible evolutions in the personality of the convicted person, its afflictive value related to the social alarm that some crimes cause. So, it seems to be opening a breach to start its modification as well. Life imprisonment and regulation on the limits of access to alternative measures have become a "mirror" reflecting the continuous tension between the criminal policy instances of deterrence and neutralization, of which preclusions are the result, and respect for the fundamental rights of the person[266].

The Court's arguments go beyond mere declaratory unconstitutionality to sound as a warning to the legislator. It follows from the principles set out in the case-law that the legislator is obliged to provide for institutions which encourage the sentenced person to undertake the re-education process and which at the same time allow the judge to verify the progress made by the sentenced person on that path[267]. Therefore, from these pronouncements come out a progressive erosion of legislative automatisms and a «positive signal is sent out for Italian criminal law, according to which even the author of the most serious offence must be, first of all, considered as an human being, worthy of being able to undertake a path of change»[268].

8. Attempts to reform Art. 4-*bis*

At the same time, the Government has also become aware of the «precarious constitutional balance»[269] of the automatic benefit ban mechanisms and has begun to propose projects for reform the prison system.

In October 2013, the Ministerial Commission chaired by Prof. Francesco Palazzo, drew up a proposal aimed at revising the absolute exclusion of access to prison benefits by perpetrators of the offences referred to in Article 4-*bis*. In fact, it is proposed to add to the hypotheses therein that the benefits can be granted even when it appears that the lack of collaboration does not make it impossible to meet the requirements, other than collaboration itself, that those benefits can be granted.

[266] PELISSERO, *Ergastolo e preclusioni,* cit., p. 1360.
[267] SIRACUSANO, *Dalla Corte costituzionale un colpo "ben assestato" agli automatismi,* cit., p.1796.
[268] BARBERO, *La (seconda) audace sentenza,* cit., p. 8.
[269] GALLIANI E PUGIOTTO, *Eppure qualcosa si muove,* cit.

The proposal under examination, therefore, does not repeal the provision contained in paragraph 1 of Article 4-*bis* which, for certain types of crime, ordinarily subordinates the applicability of the benefits provided for therein to the collaboration of justice, but intends to eliminate the current existence of cases in which this provision is impossible to overcome. The project of reform, rather, transforms the current provision of non-cooperation as an absolute presumption into a relative presumption, as such, «which can be overcome, with adequate justification, by the judge», however it is still need to provide that elements have been acquired to rule out the actuality of links with organised crime[270].

The main reason, for the above proposal, is the unsustainability of the absolute presumption that the failure to succeed the re-educational purpose of the penalty, or of the progress in re-education considered relevant by law for the purposes of prison benefits, is related to the mere existence of non-cooperative conduct pursuant to art. 58-*ter*. In this regard, it should be pointed out that the reasons that may lead the prisoner not to make a collaborative choice might not match the desire or the need to remain linked to the criminal group to which it belongs but derive from other considerations (explicit disassociation, public statements, adherence to models of legality, interest in crime victims, rootedness of the organization in a different territorial context)[271].

The *Palazzo*'s Commission says that account must also be taken to the recent ruling of the European Court of Human Rights (*Vinter and Others v. United Kingdom*), relating to the conflict with Article 3 ECHR[272]. It is affirmed the principle that all prisoners, including those who are life sentenced, must be offered the possibility of rehabilitation and the prospect of a release, in the event that a re-educational path is realized. So it is clear that a discipline such as the Italian one, which allows to a life imprisonment without hope of an end, which prevents the Court from carrying out a concrete assessment of the relevant factors to assess the

[270] See *Superamento dell'ergastolo ostativo: la proposta della Commissione Palazzo,* in *www.penalecontemporaneo.it,* 19 febbraio 2014, para 1; PALAZZO, *Fatti e buone intenzioni. A proposito della riforma delle sanzioni penali,* in *www.penalecontemporaneo.it.,* 10 febbraio 2014, para 2; SPRICIGO, *La riflessione critica sul reato,* cit., p. 636-641.
[271] EUSEBI*, Ostativo del fine pena.* cit., p. 1517. "On the basis of the assumption recognized both in doctrine and in jurisprudence that the cooperation of justice does not allow the presumption of re-education, since it can have completely autonomous motivations".
[272] See Chapter I, para 3.1.2.

re-educational path done, stands in contrast with the Convention, according to the interpretation recently given by the Strasburg Court.

The reform proposed by the *Palazzo*'s Commission was not followed up due to the resignation of the executive in February 2014.

The second proposal came from the "States-General for Criminal Enforcement" in 2016, where a group of experts at the end of six months developed a «constitutionally oriented model» for the enforcement of sentences[273]. The States-General (Table 16) also focused on the issue of «overcoming bans and regulatory automatisms», emphasising the figure of subjects who are denied access to alternative measures without taking the slightest account of participation in re-educational treatment. The re-educational principle implies the offer of an individualized project of resocialization: the time of punishment should never be an hourglass without sand. No subjective situation, no crime committed should in itself constitute exclusion from the possibility of social rehabilitation. Therefore, legal presumptions of social non-recoverability are not allowed[274]. With regard to the discipline referred to in Article 4-*bis* and in particular that of the first paragraph for which the collaboration of Article 58-*ter* is required, the proposal formulated is almost identical to that which has been proposed by the *Palazzo'*s Commission for which, it would be desirable to replace absolute preclusion with the relative one. In addition, a reformulation of Article 4-*bis* paragraph 1 was envisaged, restricting it to crimes of *mafia* or terrorism[275].

However, this proposal has not been transposed by the Delegated Law No. 103 of 2017 (*Orlando Law*), "Amendments to the Criminal Code, the Code of Criminal Procedure and the prison system"[276].

---

[273] Stati Generali dell'Esecuzione Penale – Documento finale, in *Giustizia.it*, Parte prima, para. 3: "In fact, it is believed that, also on the basis of the case law of the Constitutional Court and the European Court of Human Rights, it is possible to identify certain connotations which must always shape the execution phase. In order that the resocialising finalism which must inspire this phase does not remain a rhetorical declamation (…). The punishment must never consist, whatever it is and for whatever crime is inflicted, in treatment contrary to the sense of humanity (art. 27, par. 3, first part, Const.). During the execution of the sentence: "No one may be subjected to torture or inhuman or degrading treatment or punishment" (Art. 3 ECHR)".

[274] GIOSTRA, *Ragioni e obiettivi di una scelta metodologicamnete inedita*, cit., p. 502.

[275] DOLCINI, *La pena detentiva perpetua nell'ordinamento italiano*, cit., p. 27.

[276] Part of the doctrine was of a different hope, GIOSTRA, *Che fine hanno fatto gli Stati Generali?,* in *www.penalecontemporaneo.it.*, 20 April 2017.

The prison reform promoted, by the *Orlando Law* «has its roots in the jurisprudence of the European Court of Human Rights: in particular in the *Torreggiani* ruling[277], which abruptly called on the Italian legislator not only to solve the problem of prison overcrowding, but also to reshape the entire criminal sanction system according to the demands of the principle of the humanity of punishment»[278]. The guiding principles and criteria therefore go in the direction of the «elimination of automatisms and preclusions» as they prevent the individualisation of re-educational treatment and the differentiation of prison routes[279].

Although Law no. 103 called on the delegated legislator «to review the discipline of preclusion of prison benefits for those sentenced to life imprisonment», it was without prejudice to the possibility of convictions for *mafia* and terrorism[280]. The contents of the Delegated Law has imposed, on the Legislative Commission chaired by Prof. Giostra, the obligatory choice to operate assuming that the safety clause indicated therein was to be understood in the sense that, with regard to the sentenced person to life imprisonment, a mere "review" of the automatisms and preclusions was allowed, with the exclusion of the provisions connected to the sentences for «cases of exceptional gravity and danger specifically identified and, in any case, for the crimes of *mafia* and terrorism»[281]. Also, the 2018 reform, in other words, leaves the subject of perpetual life imprisonment out of the reach.

In the end, the Government has left the bans for those convicted of first-band crimes unchanged, while has attempted to redefine the range of crimes by directing it towards crimes of association[282], alongside which remain some one-

[277] *Torreggiani and Others v. Italy*, ECtHR Sec II, 8 Jan. 2013. For a comment see CORLEONE AND PUGIOTTO, *Non solo sovraffollamento carcerario*, in *Aa. Vv., Volti e maschere della pena*, CORLEONE AND PUGIOTTO (a cura di), Roma, 2013, 15.
[278] DOLCINI, *La riforma penitenziaria Orlando: cautamente, nella giusta direzione*, in *Riv. Dir. Pen. Cont.*, 2/2018.
[279] Law no. 103/2017 para 85.
[280] To see the various amendments to the 4-*bis* proposed see BORTOLATO (p. 155), FIORENTIN (161), FIORIO (170), SIRACUSANO (189), in GIOSTRA, BRONZO (a cura di*), Proposte per l'attuazione della delega penitenziaria*, in *www.penalecontemporaneo.*, 15 July 2017.
[281] FIORENTIN, *L'ergastolo ostativo ancora davanti al giudice di Strasburgo*, in *Dir. Pen. Cont. Riv. Trim.*, 3/2018, p.7.
[282] As far as association crimes are concerned, these are: *a)* mafia association (and in general crimes of mafia and terrorism: crimes committed for the purposes of terrorism or subversion, political-mafia electoral exchange, crimes committed by making use of the conditions provided for by Article

sided crimes but committed within groups (group sexual assault 609-*octies*). Some one-sided offences have been moved from the provisions of Article 4-*bis* para. 1[283], if they are not committed within the framework of a criminal association, to art. 4-*bis* para. 3, which allows access to prison benefits «unless elements have been acquired which reveal the existence of links with criminal organizations»[284].

Ultimately, the reduction in the area of application of the life imprisonment offence envisaged by the Legislative Decrees[285], relating to art. 4-*bis* para 1, seems modest, also taking into account the recent Law 3/2019 (*Spazzacorrotti*), which introduced a series of one-sided crimes against the Public Administration in first-band offences. However, the intervention of the delegated legislator has left almost unchanged the number of crimes that prevent the enjoyment of prison benefits because they represent the "untouchable symbol" of the severity of the repressive model desired by the political majority[286].

9. Perpetual life imprisonment and prohibition of torture

As mentioned at the beginning of this thesis, the prohibition of torture is a customary rule that binds the entire international community[287]. In Italy, it was only foreseen as an autonomous crime with law no. 110/2017[288], after long debates, and with many disputes[289]. This introduced Article 613-*bis* c.p., which punishes the

416-*bis* c.p. or in order to facilitate the activity of the mafia associations); *b)* conspiracy for common crime aimed at enslavement, trafficking of persons, juvenile prostitution, kidnapping for extortion (art. 630 c.p.), crimes related to illegal immigration (art. 12 t.u. immigration); *c)* associations aimed at customs smuggling (art. 291-*quater* para. 1 t.u. customs) or drug trafficking (art. 74 t.u. stup.).

[283] The kidnapping for the purpose of extortion, the purchase and sale of slaves (art. 602 c.p.) and the crimes referred to in art. 12 t.u. immigration.

[284] DOLCINI, *La riforma penitenziaria Orlando,* p. 177.

[285] D.lgs no. 121, 123, 124 of October 2018.

[286] SANTANGELO, *La rivoluzione dolce del principio rieducativo tra Roma e Strasburgo*, in Riv. *Cass. Pen.,* 10/2019, p. 3782.

[287] See Chapter I, para 1

[288] Previously, the prohibition of torture was based on Articles 13(4), 117(1) and 10(1) of the Constitution.

[289] For further investigation into the crime of torture in Italy: LANZA, *Verso l'introduzione del delitto di tortura nel codice penale italiano: una fatica di Sisifo. Un'analisi dei "lavori in corso" anche alla luce della pronuncia della Corte EDU sul caso Cestaro c. Italia*, in *www.penalecontemporaneo.it.*, 28 feb. 2016; TUNESI, *Il delitto di tortura. Un'analisi critica*, in *Giurisprudenza Penale*, 11/2017; PUGIOTTO, *Una legge "sulla" tortura, non "contro" la tortura (Riflessioni costituzionali suggerite dalla l. n. 110 del 2017)*, in *Quaderni costituzionali*, fasc. 2, 2018; AMATO E PASSIONE, *Il reato di tortura*, in *www.penalecontemporaneo.it.*, 15 Jan. 2019: "A law that has left everyone or almost everyone dissatisfied".

crime of torture, and Article 613-*ter* c.p., which provides for the instigation of a public official or a public service appointee to commit torture.

The wording proposed by the Italian legislator was deeply divergent from that adopted by CAT (see *supra* Chapter I para 1.1). The crime, instead of being a public official's crime, is configured as a common one ("everyone ... causes")[290]. It also provides for not a "free-form" offence, which covers (and punishes) any effective torment technique, as conventionally provided for, but an abnormally bound form, ("with violence and serious threats, or acting cruelly")[291].

The event caused by such conducts consists of acute suffering in body[292] and a psychic trauma in soul[293]. But the point that aroused the most perplexity was the use of generic intent and the suppression of the "purposes" indicated by the UN Convention[294]. The provision of the "specific intent" would therefore have made it possible to give emphasis to the aims typically pursued by torture, in accordance with international guidelines.

The second paragraph of Article 613-*bis* c.p. provides for a more serious penalty (from five to twelve years) «if the acts referred to in the first paragraph are

---

[290] However, the identification elements of the victim may operate as a 'selective criteria' with respect to the status of the perpetrator. The reference to the injured party as the person under custody, power, supervision, control, care or assistance of the latter requires the verification of the existence of a qualified relationship capable of imposing certain obligations of protection on the offender towards the victim.

[291] Art. 613-*bis*, para 1, (Torture) "Anyone with violence or serious threats, or by acting cruelly, it causes acute physical suffering or a verifiable psychic trauma to a person deprived of liberty personal or in your custody, power, vigilance, control, care or assistance, or that he is in a condition of is punishable by imprisonment from four to five years from the date of the murder, ten years if the deed is committed by multiple conducts or if involves inhumane and degrading treatment for the dignity of person".

[292] TUNESI, *Il delitto di tortura,* cit., p. 8. «The concept of 'acute physical suffering' gives rise to some perplexity in relation to the principle of the determination of the case: it can introduce markedly emotional contents into the process».

[293] Ibidem. «However, the real problematic point of the case is constituted by the concept of 'verifiable psychic trauma'. A twofold interpretative horizon has been outlined: if the 'verifiable psychic trauma' is understood to be free from an objective confirmation of the trauma suffered, in terms at least of personality disorder, a more extensive application of the case could be configured, to the point that even the deprivation of food or sleep is considered criminally relevant; if the psychic trauma outlined by the case is understood to be equivalent to the only medically ascertainable *disorders, the application of the new crime is configured in much more restrictive terms*».

[294] Among the main criticisms made by the UN Committee against the definition of torture in Italy: not having provided for specific intent, i.e. the direction of acts of torture aimed at the provisions of Article 1 of the Convention: «the definition set forth in new article 613-bis of the Criminal Code is incomplete, inasmuch as it fails to mention the purpose of the act in question, contrary to what prescribed in the Convention. Moreover, the basic offence does not include specifications relating to the perpetrator, namely, reference to the act being committed by, at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity».

committed by a public official or a public service appointee, with abuse of powers or in violation of the duties inherent in the function or service». The legislator's intention would seem clear: to provide for an aggravating circumstance of the basic offence[295].

Paragraph 3 of Article 613-*bis* c.p. states that paragraph 2 «does not apply in the case of suffering resulting solely from the execution of legitimate measures of deprivation or limitation of rights»[296]. The rationale of the aforementioned provision is clear: the legislator wants to limit the scope of the punishment of the new crime of torture.

Some scholars, therefore, using the latter provision, exclude the possibility of identifying perpetual life imprisonment as torture, as it is a sanction legitimately imposed. «It's only an apparent obstacle. Let's see why»[297].

9.1. Is perpetual life imprisonment a lawful penalty?

Before the entry into force of art. 613-*bis* c.p., the formalistic objection that perpetual life imprisonment would be considered extraneous to the international prohibition of torture, which «does not include pain or suffering that results exclusively from […] lawful sanctions», was raised with respect to Article 1 of CAT.

The term «lawful sanctions» is subjected to two interpretations. The first interpretation considered all sanctions provided for by the domestic law of a country to be lawful, leaving a dangerous discretion. The second, on the other hand, leads to only sanctions legalised under international law being considered lawful.

[295] Part of the doctrine speaks of "autonomous hypothesis of crime" instead of aggravating circumastance. FALCINELLI, *Il delitto di tortura, prove di oggettivismo penale,* in *Archivio Penale,* 3/2017, p. 25*;* TUNESI*, Il delitto di tortura,* cit*.,* p. 11 "The option for an autonomous type of crime is more compatible not only with supranational indications, but also with criminal policy reasons that suggest that the harassment perpetrated by a subjectively qualified person should be considered more serious".

[296] Article 1 CAT provides for a similar provision, where it states that the definition of torture offered therein does not extend to pain or suffering resulting solely from sanctions legitimate, inherent in or caused by such sanctions.

[297] PUGIOTTO, *Repressione penale della tortura e costituzione: anatomia di un reato che non c'è*, in *Riv*. *Dir. Pen. Cont.*, 2/2014, p. 150.

Therefore, all punishment and treatment that could be described as cruel, inhuman and degrading were subject to prohibition[298].

Moreover, our rigid Constitution is able to expel sanctions that are lawful (provided for by law) but illegitimate (because unconstitutional) because what the Constitution admits is the use of force, of which the State has a monopoly, but cannot make use of punishments that have the connotations of torture[299]. Therefore, regardless of any legislative provision, torture can never be considered a lawful punishment. The hypothesis of invoking the prohibition of torture is confirmed to be practicable, especially now that it has also been formally recognised in our legal system, as a parameter for the constitutionality of penalties which are identifiable as case of torture (such as Article 4-*bis*).

9.2. Judicial Torture

Part of the doctrine has spoken of perpetual life imprisonment as judicial torture[300]. The latter consists of «any judicial procedure by which an attempt is made to extort the accused or another subject of the proceedings, with force or artifice bending the contrary will, a confession or other statements useful to ascertain facts not otherwise ascertained, in order to define the judgement on the basis of the truth thus obtained»[301].

In fact, the sentenced to perpetual life imprisonment can access a different imprisonment regime only in the presence of a useful collaboration with justice[302], seeing his self-determination completely undermined. The same condition which is then defined as torture in Article 1 of CAT where it prohibits «any act by which

---

[298] PUGIOTTO, *Repressione penale della tortura,* cit., p. 151; MUSUMECI-PUGIOTTO, *Ergastolani senza scampo*, cit., p. 136.

[299] PUGIOTTO, *Come e perché eccepire l'incostituzionalità dell'ergastolo ostativo*, in DOLCINI, FASSONE, GALLIANI, DE ALBUQUERQUE, PUGIOTTO (a cura di), *Il diritto alla speranza: l'ergastolo nel diritto penale costituzionale,* Torino, 2019, p. 122.

[300] MUSUMECI-PUGIOTTO, *Ergastolani senza scampo*, cit., p. 134; PULITANÒ, *Problemi dell'ostatività sanzionatoria rilevanza del tempo e diritti della persona*, in *Per sempre dietro le sbarre*, cit. p.156; DE FREITAS, *L'ergastolo e la dignità umana: un caso lampante di disattuazione della costituzione e degli obblighi internazionali assunti dallo Stato italiano,* in *Juris,* Rio Grande, v. 25/2016, p. 67 The author considers life imprisonment as «inhuman punishment, which violates human dignity and must be equated with torture».

[301] SERGES *La tortura giudiziari. Evoluzione e fortuna di uno strumento d'imperio*, extracted from PACE, SANTUCCI, SERGES (a cura di), *Momenti di storia della giustizia*, p. 215- 323.

[302] DI CARO, *Ergastolo "ostativo",* cit., p. 13: "Indeed, in the aforementioned hypothesis, the collaboration is translated into the result of the torture regime to which the lifer is subjected".

serious physical or mental pain or suffering is intentionally inflicted in order to obtain […] information or confessions»[303]. The Constitutional Court (rulings no. 135/2003 and 239/2014) has always tried to deny this qualification by relying on the freedom of choice of the convicted person to cooperate.

Is he not forced to cooperate under the threat of punitive detention?

9.3. The elements of the conduct

To figure out the torture in the framework of perpetual life imprisonment, the presence of the "material element" must first be ascertained. Life sentenced to the 4-*bis* regime is in a situation of severe psychophysical constraint, comparable to the state of suffering caused by torture, due to a number of factors: the duration *sine die*[304], the lack of proportionality between the fact for which he was convicted and the penalty, established only on the basis of the title of the offence, the possibility of being subject to a special prison regime with greater limitations (41-*bis*). These factors converge towards a single goal: to exert psycho-physical pressure on the condemned person in order to persuade him to cooperate[305].

The inhumanity and intolerability of perpetual life imprisonment is particularly evident in the letter that 310 prisoners sent to the President of the Republic, Giorgio Napolitano, on 31 of May 2007, asking him to convert life imprisonment into the death penalty, as the latter would be less painful. It is said, in fact:

"... life imprisonment makes you die inside little by little. The closer you get to the finish line, the further it goes. Life imprisonment is a pointless punishment because there is no person who remains the same in time. Life imprisonment is death by sips, why don't we all get together and stop drinking?"[306].

---

[303] Senators Perduca and Poretti proposed a draft A.S. No. 2567 according to which the condition of those sentenced to perpetual life imprisonment would coincide with the definition of torture contained in Article 1 of CAT. Hence the government was asked to review the clauses preventing access to prison benefits.

[304] MUSUMECI-PUGIOTTO, *Ergastolani senza scampo*, cit., p. 139. It is not possible to know the duration of torture and life imprisonment in advance, depending on the "resistance of the passive subject".

[305] PUGIOTTO, *Come e perché eccepire l'incostituzionalità dell'ergastolo ostativo*, in *Il diritto alla speranza* cit, cit., p. 121.

[306] DE FREITAS, *L'ergastolo e la dignità umana*, cit., p. 67.

The "psychological element" of torture is *in re ipsa* because the «intent is to encourage cooperation with the judiciary for investigative and criminal policy reasons»[307].

This prospect had also been put forward by Judge Borrego in the case *Kafkaris v. Cyprus* (see *supra* Chapter I para. 3.1.1.). In his partially dissenting opinion, he argued that the continuation of the detention was determined by the applicant's refusal to identify the perpetrator of the murder and therefore the same teleological element of torture could be configured. The similarities of that case with our system of collaboration of justice are clearly evident: in fact, if the sentenced to perpetual life imprisonment does not help the investigating authorities «in order to prevent the criminal activity from leading to further consequences or have concretely assisted the police or judicial authorities in the collection of decisive elements for the reconstruction of the facts and for the identification or capture of offenders», it will never be taken into consideration for parole and is therefore doomed «to die behind bars»[308].

10. Is the journey of perpetual life imprisonment at the end of the line?[309]

The Constitutional Court has been called upon recently by the Court of Cassation and the Court of Surveillance of Perugia to give its opinion again on the logical-legal basis of the regime referred to in Article 4-*bis* para 1. It is invited to give its verdict on the compatibility of this arrangement with the new spirit now infused into Articles 27 and 3 of the Constitution, by its own abundant case-law, and that of the European Court of Human Rights[310].

The question of legitimacy raised by the two Courts concerned the preclusive discipline of the 4-*bis* in conjunction with Article 58-*ter*, which did not allow access to prison benefits (in this case, to the prison permits) in the absence of useful cooperation, contesting how the absolute presumption of dangerousness of

[307] Constitutional Court no. 239/2004 and 239/2014.
[308] MUSUMECI-PUGIOTTO, *Ergastolani senza scampo*, cit., p. 140.
[309] The expression is taken from GALLIANI, *Ora tocca i giudici costituzionali, il viaggio dell'ergastolo ostativo al capolinea?,* in *Per sempre dietro le sbarre*, cit., p. 113.
[310] CARNEVALE, *Diritto al giudice e habeas corpus penitenziario: l'insostenibilità delle presunzioni assolute sui percorsi individuali,* in *Per sempre dietro le sbarre*, cit., p. 56.

the offender who has not collaborated with justice, collides with the principles of progressive treatment and flexibility of the penalty.

The recent ruling of the European Court of Human Rights (First Chamber, 13.6.2019, case *Viola v. Italy* No. 2)[311] concentrates, as it has been examined before, its attention on this profile of the presumptive mechanism, opposing the following observations: the lack of cooperation may not always be linked to a free and voluntary choice since different circumstances or considerations (other than the persistent desire to remain linked to the criminal association) may lead the convicted person to refuse to cooperate, reason for which, considering cooperation with the authorities as the only possible demonstration of the convicted person's "dissociation", no account has been taken of the other elements, enabling the progress made by the prisoner to be assessed. Indeed, it is not excluded that the "dissociation" with the *mafia* environment may be expressed in a different way from collaboration with justice; the immediate equivalence between the absence of collaboration and the absolute presumption of social dangerousness ends up not corresponding to the real re-education path of the convicted person; therefore, such an absolute legal presumption of non-dangerousness deduced from the mere collaborative choice damages human dignity, a value placed at the centre of the system created by the Convention, and therefore art. 3 of the Convention, in so far as it excessively restricts the prospect of the person concerned being released and the possibility of the review of the penalty[312].

In spite of the differences that characterize the judgements, the central argument brought to the attention of the constitutional judges and the international judges is the same: the legitimacy of the choice made in Art. 4-*bis*, to assume the condemned person's lack of collaboration with the justice system as an absolute presumption of dangerousness, such as to hinder any form of resocialization through access to the so-called prison benefits[313].

---

[311] See Chapter I para 3.1.6.

[312] CECCHI, *A partire dal bene offeso come parametro di legittimazione della pena carceraria,* in *Per sempre dietro le sbarre*, cit., p. 65.

[313] MENGOZZI, *Il dialogo tra le corti sull'ergastolo ostativo: un'opportunità per il giudice delle leggi,* in *Per sempre dietro le sbarre*, cit., p. 137.

10.1. Court of Cassation no. 57913/2018

The question of constitutionality raised by the Court of Cassation concerns one aspect of the discipline of perpetual life imprisonment. In particular, the question concerns «the legitimacy of Article 4-*bis*, paragraph 1, in the part in which it excludes that a person sentenced to life imprisonment, for crimes committed using the conditions set out in Article 416-*bis* of the Italian Criminal Code or in order to facilitate the activity of the associations provided for by the same law, who has not cooperated, may be admitted to prison-permits»[314]. The case concerned a person convicted for crimes committed in order to facilitate the *mafia* association (416-*bis* c.p.), who had rejected his complaint against the decree, declaring his request for access to the prison permit inadmissible (art 30-*ter* o.p.), on the basis that he was convicted for one of the crimes referred to in paragraph 1 of 4-*bis* and had not cooperated in accordance with art 58-*ter* o.p. The convicted person proposed the question of the suspected unconstitutionality of Article 4-*bis*, paragraph 1, for breach of Articles 27(3) and 117 Cost, in relation to Article 3 of ECHR.

In the applicant's view, the absolute preclusion established by the censured provision is contrary to the re-educational function of the sentence, which is constitutionally guaranteed, both because it prevents the achievement of the rehabilitative purposes of prison treatment and because it appears disharmonious with respect to the principles affirmed by Article 3 of the Convention; the latter provision, in fact, requires Member States to provide for certain time parameters on the basis of which, in the presence of a life sentence, the prisoner is guaranteed the possibility to obtain, as a result of his re-education, the revision of the sentence[315].

The issue analysed by the Court is focused on the particular case of the claimant: the absolute preclusion of access to the prison permit. The prerequisite for the granting of the latter is to have served at least 10 years of a sentence, to have behaved well and not to be socially dangerous. In the present case, however, the request for access had been automatically refused by the Court because the

[314] See UBIALI, *Ergastolo ostativo e preclusione all'accesso ai permessi premio: la Cassazione solleva questione di legittimità costituzionale in relazione agli artt. 3 e 27 cost.,* in *www.penalecontemporaneo.it,* 28 gennaio 2019.
[315] Court of Cassation, Sec I, no. 57813/2018.

convicted person had not cooperated and, being subject to the preclusive regime of Article 4-*bis* paragraph 1, his dangerousness had not been the subject of any evaluation of merit.

The Court of Cassation, in affirming the unreasonableness of such discipline (according to art. 3 Cost), recalls some previous rulings – no. 57/2013[316] and 48/2915[317] - on absolute social dangerousness preclusions, in matters of precautionary measures, which had been declared contrary to the principle of equality[318].

In addition, other rulings[319], that have censored the 4-*bis* rules on absolute ban on access to certain measures and benefits for the mother detained, are evoked (see *supra* para 7.2). Therefore, the absolute presumption of social dangerousness for the convicted mother had not been considered admissible without the evaluation of the specific case of the judge. Consequently, if the absolute presumption of social dangerousness has been declared unconstitutional, the same could be said for the fact that lack of collaboration is considered incontrovertible proof of the links with organized crime. This choice, according to the Court of Cassation, may not coincide with the desire to remain tied to the organisation to which he belongs[320].

The second aspect of illegality concerns Article 27(3) of the Constitution, which is breached when the special function of prison permits, which unlike the other alternative measures, are of a contingent nature (it means that do not change the restrictive condition of the convicted person), is not taken into account. They are considered an integral part of the sentenced person's re-education process.

[316] LEO, *Illegittima la previsione della custodia "obbligatoria" in carcere per i reati di contesto mafioso (ma non per le condotte di partecipazione o concorso nell'associazione di tipo mafioso)*, in *www.penalecontemporaneo.it.*, 7 aprile 2013.
[317] LEO, *Cade la presunzione di adeguatezza esclusiva della custodia in carcere anche per il concorso esterno nell'associazione mafiosa*, in *www.penalecontemporaneo.it.*, 30 marzo 2015.
[318] MENGHINI, *La Consulta apre una breccia nell'art. 4 bis o.p. Nota a Corte cost n. 253/2019,* in *osservatorio costituzionale AIC*, 2/2020, p. 5.
[319] Const Court no. 239/2014; 76/2017; 149/2918.
[320] As the First Section recalled, "such a choice can be explained by evaluations that regardless of the re-educational path, among which, we can cite: the risk for one's own safety and that of one's family members; the moral refusal to make statements of accusation against a relative or persons linked by emotional ties; the repudiation of a utilitarian collaboration, or, more simply, the claim of one's own innocence" (Court of Cass. No. 57813/2018).

Therefore, if any kind of evaluation of the re-educational path is prevented, the rehabilitation function of the penalty is sacrificed[321].

The Supreme Court seems to ask the Constitutional Court to evaluate «this different nature of the prison permits with a view to disarming the mechanism of ban on access to the benefits referred to in Article 4-*bis*, paragraph 1»[322].

10.2. Court of Surveillance of Perugia no. 725/2019

The second ruling contesting the constitutional legitimacy of art 4-*bis,* in relation to the life sentenced who was found to be ineligible for the awarding of permits, on the grounds that he did not cooperate with justice under 58-*ter* o.p., is the one raised by Perugia Surveillance Court.

Unlike the case which is the subject of the ordinance of the Court of Cassation, where the convicted person was detained for external complicity in a mafia-type association[323], in the case which is the subject of the ordinance of the Surveillance Court, he is a member of a mafia-type association, a real participant in the association. The Court in the present case shares the Cassation's claims and suspends the matter until the Constitutional Court has ruled on the Supreme Court's ordinance. Indeed, «only a declaration of the unconstitutionality of the absolute preclusion for the granting of the prison permit would allow the Surveillance Court to verify, in the specific case, whether the requirements for the granting of art. 30-*ter* o.p. are met», what has been the course of its treatment and its current dangerousness[324].

---

[321] This principle have been already affirmed in 2018 with sentence no. 149: "for the condemned person who has reached the time thresholds established by the legislator and has shown active participation in the re-education process, any indiscriminate preclusions to access to prison benefits can be legitimized at the constitutional level only on the basis of an individualized evaluation of prison treatment, based on special prevention needs concretely found, since it is not possible to sacrifice the re-educational function recognized by Article 27, paragraph 3, Constitution on the altar of any other function of the penalty".

[322] UBIALI, *Ergastolo ostativo e preclusione all'accesso,* cit., p. 7.

[323] He was an inmate sentenced to life imprisonment with daytime isolation of two years and eight months, for mafia-type organized crime, with an apical role within the criminal consortium to which he belongs (in the trials, it was, in fact, clarified that he had assumed "an active role in extortion activities and in the fire groups protagonists of the clashes with the opposing clans between the end of the 80's and the early 90's").

[324] Court of Surveillance of Perugia no. 725/2019.

What the Court of Surveillance has doubts about is the compatibility with articles 3 and 27(3) Cost. of the collaboration as legal proof of the lack of dangerousness, preventing the individualisation of the sanctioning response, that would allow other reasons for the refusal of collaboration to be examined[325].

Here, too, the Court emphasizes the centrality of prison permits, since they are instrumental in protecting the interests of third parties too[326], they cannot be evaded from the assessment of the specific case. In fact, relations with relatives outside the prison walls are inhibited, except for the granting of permits for serious reasons (art. 30 o.p.), preventing those sentenced to life imprisonment from participating in moments of family life. The re-educational purpose behind this benefit, which serves to start the condemned person on the path of re-socialisation, is damaged and the absolute denial of access to it ends up emptying the sense of time spent in detention.

In addition, reiterating the steps that the Constitutional Court, ruling no. 149/2018, had taken to support the pre-eminence of the re-educational function of the penalty in particular in the executive phase, it said that only at this stage (the executive phase) it is possible to appreciate the progress made by the convicted person, since some time has elapsed from when the crime was committed and therefore no absolute presumption is permitted[327]. Here, too, reference is made to the case law of the European Court of Human Rights which, in the *Vinter* case[328], had said that Member States were obliged to provide for a review of the perpetual penalty in order to assess whether the grounds leading to the conviction still exist.

---

[325] MENGHINI, *La Consulta apre una breccia nell'art. 4 bis,* cit., p. 8.

[326] In the present case, the application for a prison permit was for family reasons. The purpose of this benefit is to guarantee "the full exercise of the rights of the person concerned, which would otherwise be compressed by the condition of imprisonment, and in particular the maintenance of relations with the family" (Court of Surv. No. 725/2019).

[327] We find in the judgment *Viola v. Italy* much of what was expressed in the ordinance of the Court of Perugia, with specific reference to the value of time during the execution of the sentence. According to the European Court of Human Rights, the personality of the sentenced person evolves naturally during the execution of the sentence; for this very reason the sentenced person must be able to know what behaviour is potentially appreciable in order to be released. The presumption of dangerousness linked to the type of offence committed, on the other hand, links dangerousness to the moment the offence is committed without taking proper account of the re-education process that the sentenced person undertakes during the execution of the sentence. See ECtHR, *Viola v. Italy*, 16 June 2019, Rec. no. 77633/16, para 125-130.

[328] See Chapter I para 3.1.2.

In conclusion, the preclusive automatism, such as that inherent in prison permits, ends up nullifying the possibility of concrete verification of the convicted person's evolution and the re-educational function is annulled. Therefore, the proceeding is suspended, and the acts transmitted to the Constitutional Court.

10.3. The absolute ban on access to prison permits ends

The Constitutional Court[329], called to rule on the constitutional legitimacy of the preclusive regime established by Article 4-*bis*, paragraph 1, regarding access to prison permits, by those convicted of *mafia* crimes who have not collaborated, decides to put together the two questions raised by the Court of Cassation and by the Court of Surveillance of Perugia, as the two ordinances censured the same provision and evoked the same constitutional parameters (Art. 3 and 27 para 3 Cost).

Just a few weeks before (7 October 2019), the ruling of the European Court of Human Rights on the *Viola* case had become binding for the Italian State according to Article 46 ECHR[330]. And although this ruling did not have a binding effect outside of the single case dealt with, as it is not a "pilot ruling", the decision nevertheless highlights a «structural problem»[331] in the Italian legal system that requires the legislator to resolve with the appropriate amendments. In fact, in the aftermath of the *Viola* judgement, among legal experts[332], many people hoped that the Constitutional Court's ruling would sanction the consequential illegitimacy of the entire regime of perpetual life imprisonment following the path taken in the ECtHR's ruling.

But it is the Constitutional Court itself that, in delimiting the boundaries of the *thema decidendum*[333], specifies that the issue does not concern the so-called

[329] Const. Court, no. 253/2019, 23 of October 2019.
[330] Article 46 ECHR, interpreted in the light of Article 1 ECHR, requires Member States to take all appropriate general and/or individual measures to eliminate the consequences of the infringements which have been ascertained.
[331] Among 1.790 life-sentenced prisoners, 1.250 is condemned to the regime of "perpetual life imprisonment". (*Il Messaggero,* 24 October 2019, p.7)
[332] On the expectations of scholars on the subject, see the discussions of the *Amicus Curiae* seminar held in Ferrara on 27 September 2019, published in BRUNELLI, PUGIOTTO, VERONESI (a cura di), *Per sempre dietro le sbarre?,* cit.
[333] The Latin expression, which is widely used in the legal sphere, indicates the main question which the court must resolve in order to decide the dispute before it.

perpetual life imprisonment[334], since access to parole in case of non-cooperation has not been censured. Although the issue concerns art. 4-*bis* para 1, with respect to access to prison permits, not other benefits, for prisoners convicted of crimes of mafia-type association and *mafia* context. Those convicted of such crimes are subject to an absolute presumption of permanent connection with the criminal organization and «the only suitable choice to remove the obstacle, to the granting of the benefit, is the choice to cooperate with justice»[335].

In its argumentation, the Constitutional Court reviews the legislative development of Article 4-*bis* and the criminal policy reasons[336] which led to the creation of a differentiated regime for certain offences and the recognition in the collaboration as qualified conduct, suitable to demonstrate the willingness to break the link with the criminal organization. Taking up what had been stated in sentence 306 of 1993, the Court observed that inhibiting access to prison benefits involves a significant «compression of the re-educational purpose of the penalty» because the choice based on the title of the offence does not appear to be in line with the principles of individualisation of the penalty which characterise prison treatment. On the basis of the conclusions reached in the previous ruling, the questions raised are accepted. For the Court, the presumption in itself, of the existence of an actual link in the absence of cooperation, is not constitutionally unlawful. Rather, it is unreasonable to presume that the presumption cannot be overcome by evidence to

[334]The question of the legitimacy of the Italian legislation of 4-*bis* o.p. with respect to Article 3 of the ECHR could have been addressed if Article 117 of the Constitution had also been invoked as a parameter of constitutionality. In a different opinion, BAILO, *L'ergastolo ostativo al vaglio della Corte Costituzionale*, in *Per sempre dietro le sbarre*, cit., p. 31.

[335] For a comment on the judgment: RUOTOLO, *Reati ostativi e permessi premio. Le conseguenze della sent. n. 253/2019 della Corte Costituzionale*, in *Sistema Penale*, 12 dic. 2019; MENGHINI, *La Consulta apre una breccia nell'art. 4 bis,* cit., p. 11; BERNARDI, *Per la Consulta la presunzione di pericolosità dei condannati per reati ostativi che non collaborano con la giustizia è legittima solo se relativa: cade la preclusione assoluta all'accesso ai permessi premio ex art. 4-bis comma 1 ord. pen*., in *Sistema Penale,* 28 gennaio 2020; MENGOZZI, *Il meccanismo dell'ostatività alla sbarra. Un primo passo da Roma verso Strasburgo, con qualche inciampo e altra strada da percorrere* (nota a Corte Cost., sent. n. 253 del 2019), in *Osservatorio Cost. AIC*, 2020, fasc. 2 (3 marzo 2020); RICCI, *Riflessioni sull'interesse del con- dannato per delitto ostativo e non collaborante all'accertamento di impossibilità o inesigibilità di utile collabora- zione con la giustizia ex art. 4-bis, comma 1-bis, o.p. a seguito della sentenza della Corte costituzionale n. 253 del 2019*, in *Giur. Pen. Web*, 2020, fasc. 1; BLASCO, *La nuova fisionomia dell'ergastolo ostativo: un dialogo tra le corti. Fine pena mai, in Magistratura indipendente*, 11 marzo 2020, p. 19.

[336] See *supra* para 5.1.

the contrary. The unconstitutionality lies only in the "absoluteness" of the presumption.

First of all, because of the «further afflictive consequences» charged to the non-cooperative prisoner; secondly, because it prevents an individualized evaluation of the concrete case by the Surveillance Court, with particular regard to the re-education path undertaken by the convicted person; thirdly, because the presumption itself is based on a generalization which could instead be rebutted thanks to the evaluation of the concrete case[337].

With regard to the first profile, the legislative mechanism inserted in Art. 4-*bis* para. 1 is the expression of a transparent investigative and criminal policy option. As such, it introduces into the prison path of the convicted person - through the decisive importance attributed to the collaboration with the justice even after the conviction - elements extraneous to the typical characteristics of the execution of the sentence, prefiguring a sort of "exchange" between information useful for investigative purposes and consequent possibility for the prisoner to access the normal path of penitentiary treatment. For those convicted of the crimes listed in the censored provision, in fact, a significantly different set of rules has been established from those for general prisoners[338]. With regard to the second profile, taking up the arguments used by the Surveillance Court of Perugia (see *supra* para. 10.2), it recognises the speciality, for the rehabilitation of the convicted person, of the benefit of the prison permits. Therefore, the lack of the possibility of conducting an individualized evaluation of the progress for the purposes of granting the benefits is contrary to Article 27, paragraph 3, of the Constitution.

Moreover, as has also been pointed out in previous case law[339], absolute presumptions that limit a fundamental right of the person infringe the principle of equality if they do not respond to generalised data of experience *(id quod plerumque accidit*). In the present case, the presumption is based on the assumption that if the

[337] MENGHINI, *La Consulta apre una breccia nell'art. 4 bis,* cit., p. 13; RUOTOLO, *Reati ostativi e permessi premio,* cit., p. 3; BERNARDI, *Per la Consulta la presunzione di pericolosità,* cit., p. 9; BLASCO, *La nuova fisionomia dell'ergastolo ostativo,* cit., p. 23.

[338]The right to silence (art 24 Cost) of the detainee is therefore compromised, understood as the right not to offer cooperation.

[339] Rulings no. 268/2016; no. 185/2015, no. 232, no. 213 e no. 57 of 2013, no. 291, no. 265, no. 139 of 2010, no. 41/1999 and no. 139/1982.

person convicted of mafia-crimes does not cooperate, then it is an indication that he has not severed the ties. This is because the mafia-type criminal association is characterized by a stable bond between the associates and is long-lasting. But the Court points out that the presumption does not take account of the lapse of time, during the execution of the sentence. The latter, in fact, can bring about significant changes, both to the personality of the prisoner, but also to the context outside the prison, the organization may no longer exist.

The presumption, therefore, cannot be absolute, but relative. Only in this way can the legislative choice be «constitutionally compatible with the imperatives of resocialization inherent in punishment»[340].

The Court specifies that in order to remove the presumption that the non-cooperative prisoner is socially dangerous, it is necessary to acquire appropriate and specific information. It is not enough to «acquire elements such as to rule out the actuality of links with organised crime», but it is necessary to acquire elements such as «to prevent the danger of their restoration»[341]. With a substantial reversal of the burden of proof it will be the detainee who will have to enclose the evidence of the above-mentioned elements[342].

The conditions set out in judgment no. 253 of 2019 are such as to make it seem as if the absolute presumption has been replaced by «a semi-absolute one»[343], given the difficulty of enclosing elements such as to rule out the danger of re-establishing links with the organisation. This requirement interpreted literally would seem to refer to «predictive capabilities far from the investigative standards based on material evidence»[344]. This being so, the possibility of access to prison permits seems to remain quite exceptional[345].

---

[340] Const. Court, cit., para 8.
[341] Const. Court, cit., para 9.
[342] Of different opinion MENGOZZI, *Il meccanismo dell'ostatività alla sbarra,* cit., p. 372, according to which, given the difficult situation of the restricted person, who is very limited in the ability to gather evidence, it will be the supervisory judge who will exercise his investigating powers to verify the attached circumstances.
[343] RUOTOLO, *Reati ostativi e permessi premio,* cit., p. 4.
[344] PUGIOTTO, *Due decisioni radicali della corte costituzionale in tema di ostatività penitenziaria: le sentenze nn. 253 e 263 del 2019,* in Riv. *AIC*, n. 1/2020*,* p. 513.
[345] MENGHINI, *La Consulta apre una breccia nell'art. 4 bis,* cit., p. 15; On the reason for such a rigorous choice PUGIOTTO, *Due decisioni radicali della corte costituzionale,* cit. p. 505. He affirms the need to avoid alarmist scenarios of a generalized "freedom for all".

Finally, «in order to avoid the creation of a paradoxical disparity», the Court declared, as a consequence, the constitutional illegitimacy, in the above mentioned terms, also with reference to the remaining offences listed in Art. 4-*bis*, para 1 o.p., not only for those of mafia-type for which the question of legitimacy had been raised[346].

From the sentence in question, however, the "right" of the condemned person to obtain the prison permit does not arise, but the possibility of applying for the benefit is permitted[347]. The supervisory judge will decide through a series of elements not only related to prison conduct or participation in the re-education process, but also related to the external social context, also on the basis of information provided by the competent Committee for Public Order and Security (Art. 4-*bis*, para 2) and the communications of the National Anti-mafia Prosecutor and the District Prosecutor (para 3-*bis*).

11. The alignment between Rome and Strasbourg

The ruling of the Constitutional Court of 23 October 2019 undoubtedly signs a radical shift, with regard to the attitude manifested towards the system established by Art. 4-*bis*[348]: for the first time the legitimacy judges recognized the contrast between this legal framework and the constitutional principles (Art. 3 and Art. 27(3) of the Constitution), with a decision which appears to undermine the foundations of the "double track" system as we have known it so far[349]. The Court affirmed that non-cooperative prisoners convicted of one of the crimes referred to in art. 4-*bis*, paragraph 1, may also be granted the benefit of the prison permit.

This ruling follows the line drawn by the European Court in the *Viola* case, although the Italian judge's *thema decidendum* does not consider conditional

[346] Const. Court cit., para 12. Since there are crimes for which the collaboration «*is without justification»* to access the benefits and there is nothing to prove about the actuality of the links, because the association has never existed.
[347] With the words used by the ECtHR in the *Viola* case: "*it is an obligation of means, not of result*" (para. 113).
[348] PUGIOTTO, *Due decisioni radicali della corte costituzionale,* cit., p. 502. "*The path followed by the Court is countercurrent with respect to the idea of certain and neutralizing punishment, to be served until the end behind bars".*
[349] BERNARDI, *Per la Consulta la presunzione di pericolosità,* cit., p. 9.

release[350]. The Strasbourg judge, in excluding the compatibility with the Convention's principles of the provision of the Italian system on perpetual life imprisonment, states the need to allow a re-examination of the prisoner's re-education process taking into account other circumstances, that may have led the sentenced person not to cooperate[351]. There is therefore an erosion of "cooperation with justice" as the only instrument capable of affirming the breaking of criminal ties between the prisoner and the organisation[352].

It now appears that the Constitutional Court has become aware of the incompatibility of the 4-*bis* regime with the re-educational purpose of the penalty. It has not accepted neither the arguments produced by the Government, which demanded the inadmissibility of the question, since the choice in matters of prison policy was reserved to the discretion of the legislator; nor to the arguments of the previous ruling no. 135/2003, where it had expressly excluded that the preclusion was the result of a legislative automatism, deriving from a free choice of the convicted person not to cooperate. Actually, it has shown that its intention «to converge» on the conclusions of the European Court of Human Rights[353]. Therefore, in the light of recent decisions by both Courts, new rulings could be issued on the unconstitutionality of the above mentioned rule[354], which would relativize the presumption of dangerousness on which the legal preclusion is based, also with respect to other prison benefits and, last but not least, to conditional release[355]. It is worth remembering that, the latter is the only institution that allows

[350] DONNNARUMMA, *La funzione rieducativa della pena e l'ergastolo ostativo*, in *Giurisprudenza Penale*, 3/2020, p. 16.
[351] The ECtHR denies that the lack of cooperation is «solely due to the persistence of adherence to "criminal values and the maintenance of links with the group to which it belongs» (*Viola v. Italy* para 118).
[352] BLASCO, *La nuova fisionomia dell'ergastolo ostativo,* cit., p. 36.
[353] PUGIOTTO, *Due decisioni radicali della corte costituzionale,* cit., p. 509.
[354] With sentence no. 263/2019, the Constitutional Court sanctioned the constitutional illegitimacy of the provision (Article 2(3) of d.lgs no. 121 of 2 October 2018) which extends to minors the provisions of Article 4-*bis*, paragraphs 1 and 1-*bis*, for the purposes of access to benefits and alternative measures. The presumption of dangerousness is entirely censored for contrast with Articles 76, 27(3), and 31(2) of the Constitution, since in the juvenile penitentiary system, which recognizes the re-educational function of the punishment as pre-eminent, no room can be left for presumption, not even if relative. For a comment on this latest judgment see BERNARDI, *L'ostatività ai benefici penitenziari non può operare nei confronti dei condannai minorenni: costituzionalmente illegittimo l'art. 2 co. 3 d. lgs. 2 ottobre 2018, n. 121*, in *Sistema Penale*, 29 gennaio 2020.
[355] BERNARDI, *Per la Consulta la presunzione di pericolosità,* cit., p. 11; RUOTOLO, *Reati ostativi e permessi premio,* cit., p. 10 According to the author, the pronouncement of unconstitutionality of

the suspension of execution and, then, the extinction of the sentence, thus guaranteeing the prospect of resocialization, that constitutional and conventional jurisprudence indicates as necessary for the legitimacy of the life sentence. The re-educational principle of punishment thus transcends national borders and becomes a «common heritage of European legal culture»[356], strengthening first the position of the individual against inhuman and degrading punishment and also enhancing the responsibility of each State to achieve this objective[357].

As previously stated, life imprisonment is a punishment characterised by a deep backwardness, having been conceived in the context of slavery. A penalty that the current political orientation tends to use to respond to the demands of social revenge of public opinion, encouraging a model of criminal law "without limits"[358] – far from any criterion of rationality and proportionality, as well as from any attention to the re-educational purpose of the sentence – where the rights of life sentenced persons are seen as obstacles to achieving the primary objectives of public security and certainty of punishment. Strasbourg Court is pursuing what could be described as a "gentle revolution"[359], towards the process of humanisation of punishment which has repudiated the idea of punishment as revenge, and which has conferred on it a social utility.

This process has not reached the totality of the subjects to whom the punishment is destined. There is always someone who is considered unrecoverable «as if there were two groups of criminals: those who are reformed and those who are eliminated»[360]. Until the humanization of the punishment reaches these people too, it is as if the death penalty is restored, depriving the life imprisoner of any hope, of any perspective, it is as they are permanently eliminated from the social

art. 4-*bis* becomes likely if further tightening of the legislative discipline of perpetual life imprisonment such as to compromise the re-educational purpose.

[356] PUGIOTTO, *Il blocco di costituzionalità nel sindacato della pena in fase esecutiv*a, in *Giur. Cost*., 2018, p. 1647.

[357] SANTANGELO, *La rivoluzione dolce del principio rieducativo tra Roma e Strasburgo*, cit., p. 3777.

[358] See MANES, *Il diritto penale no-limits. Garanzie e diritti fondamentali come presidio per la giurisdizione*, in *Questione Giustizia*, 1/2019, 87 ss.

[359] SANTANGELO, *La rivoluzione dolce del principio rieducativo tra Roma e Strasburgo*, cit., p. 3785.

[360] VIANELLO, *'Mai dire mai': contro l'ergastolo, per una penalità inquieta*, in *Riv. Antigone*, n. 1/2015, p. 160.

consortium[361]. And that is what the life imprisoners have provocatively asked for in a letter to the President of the Italian Republic: “we ask for the certainty of our sentence, simply, a certain and fixed date. If our rehabilitation is impossible, why do we go on living? If our recovery is impossible and we don't deserve another chance, we ask that our life sentence be turned into a death sentence”[362].

[361] «Capital punishment and life imprisonment may be subsumed in the same category as death as a penalty, due to their eliminatory nature». PUGIOTTO, *Tre telegrammi in tema di ergastolo ostativo*, in *Riv. It. Dir. Proc Pen.*, 4/2017, p. 1519.
[362] *La Repubblica* 31 Maggio 2007.

CHAPTER III

ABOLISHMENT OF LIFE IMPRISONMENT: THE NORWEGIAN ALTERNATIVE SOLUTION

1. General overview

«The real divide between criminal justice systems is not between those that include the death penalty and the others; it is between those that allow irreversible sentences and those that don't»[1]. In Europe, only half a dozen countries do not include life imprisonment among penalties, in their penal codes[2]. Among nations that ignore this sentence, Norway has the least severe penal system in the world. «Norwegians have a clear understanding of the pointlessness of very long sentences; this is because they are not hooked on the seriousness of the crime but are focused on chances for the prisoner to reintegrate» explains Jean-Marie Delarue[3].

After one of the most heinous terrorist attacks in modern Europe[4], many observes in other parts of the world have looked at the Norwegian penal model with astonishment. Specifically, the attacks seriously tested the Scandinavian countries' traditional commitment to organizing punishment around the principles of rehabilitation and reintegration. In Northern Europe, «where alternative sanctions are preferred over imprisonment and short prison sentences are generally preferred over longer periods behind bars»[5] the question arose as to how the state and society should best deal with serious offenders like Breivik.

The present work will try to look at the Norwegian experience to prove that life sentences are not necessarily more effective in preventing crime than other alternatives.

---

[1] Philosopher Michel Foucault in 1981, during debate on the abolition of death penalty in France.
[2] Andorra, Bosnia and Herzegovina, Croatia, Montenegro, Portugal, San Marino, Serbia, Spain.
[3] President of the National Consultative Commission for Human Rights until 31 October 2019.
[4] Reference is made to the attack committed by Anders Behring Breivik on 22 July 2011 in Oslo which led to the deaths of 77 people, mostly young people. See *infra* para 3.
[5] SCHARTMUELLER, *Life imprisonment in Scandinavia: the ultimate punishment in the penal environments of Denmark, Finland, and Sweden,* Northern Arizona University, August 2015.

1.1. Historical framework

Norway, Denmark, Sweden and Finland share a long common history. As a result of their geographic, economic and social similarities these countries are referred as a uniform cluster, called "Scandinavian or Nordic" region.

In the late fourteenth century, Norway, Denmark and Sweden formed a state coalition, called Kalmar Union[6]. The alliance was formed to combat the commercial power of the Hanseatic League, which was a Northern German commercial confederation of seafaring merchants. The Union broke up in 1523, but Norway remained part of Denmark until 1814. The King of Denmark/Norway was forced to renounce his rights to Norway to the King of Sweden, granting him full sovereign powers. However, para. 1 of the new Norwegian Constitution[7] provides that "The Kingdom of Norway is a free, independent and indivisible realm". In other words: Norway submitted to a union with Sweden as a sovereign nation. The union with Sweden ended in 1905 when Norway became an independent constitutional monarchy[8].

Even during this period each country maintained its own laws. However, due to the common history and close political and cultural ties, legal developments have followed similar routes. In the Nordic medieval countries, the sanctions were mainly monetary penalties, and the death penalty was reserved for only a few offences[9]. During the period of 1500 to 1600, criminal justice became more severe, but it never reached the level of brutality observable in continental Europe[10].

The first penal codes in the Scandinavian countries were implemented during the seventeenth century: Denmark introduced a new Criminal Code in 1663

---

[6] Finland was then part of Sweden, which meant that it was (indirectly) also part of the Kalmar Union during that time.

[7] The Constitution of Norway was adopted on 16 May 1814, it is the second oldest single-document national constitution in Europe (after Poland 1791). During May 2014 it has been modified including paragraphs on human rights.

[8] A. BERTNES, *Guide to legal research in Norway,* in *Global law & Justice*, 2007, p. 2.

[9] LAPPI-SEPPÄLÄ, *Life Imprisonment and Related Institutions in the Nordic Countries,* in *Life imprisonment and Human Rights*, VAN ZYL SMIT, APPLETON (a cura di), Hart Pub Ltd, 2016.

[10] Explanations for this early 'Nordic exceptionalism' range from cultural factors, to social and demographic factors (in comparison to continental Europe, the Nordic countries did not suffer from the mass poverty which contributed to widespread unrest and rebellion to be met with increased penal repression), a combination of geographical factors and penal ideology (the deterrent effect of public executions was deemed to be much more modest in sparsely populated Nordic countries compared to a densely populated European metropolis). LETTO-VANAMO, TAMM, MORTENSEN, OLE, *Nordic law in European context,* Springer, 2019, p. 180.

and Norway five years later in 1668. Sweden completed the codification work in 1734[11]. These first codes pursued the aim of deterrence expressed by "an eye for an eye, a tooth for a tooth", so far from the ideas developed in enlightened circles in Europe. Almost a hundred years later a season of criminal reforms was launched. Norway enacted a new criminal code in 1848. In Sweden, King Oscar I (1844 to 1859) wrote a book "On Punishment and Penal institutions" calling for the abolition of the death penalty and its replacement by solitary confinement. He believed that the success of the penalty, measured in terms of reducing crime, depended on increasing opportunities for the prisoner, since the main purpose of imprisonment should be the successful reintegration of the prisoner[12]. Under the new King Carl IV, Oscar I's efforts towards penal reform led to the implementation of a New Penal Code in 1864[13].

The disappearance of the death penalty was gradual. It was abolished firstly by Norway (1902), secondly by Sweden (1921), thirdly by Denmark (1930) and lastly by Finland (1949) and was only used during wartime. This last use was also eliminated and at the end of the 1970s the Scandinavian countries no longer had the capital punishment[14].

Largely driven by social democratic governments, the Scandinavian countries developed strong social welfare states at the beginning of the twentieth century. They are described as among the most egalitarian societies in the world, with a narrow field of class differences, factors which help them to consistently do well on the UN Human Development Index[15].The peculiarity of Scandinavian welfare is based on universalism[16]. Benefits are granted to all members of society, without exception because of employment, social status or family situation. The intertwining of welfare and criminal policy has led to talk about "penal

[11] Ibidem.
[12] SCHARTMUELLER, *Life imprisonment in Scandinavia,* cit., p. 79.
[13] The new Code maintained the death penalty, but the number of executions was significantly reduced LAPPI-SEPPÄLÄ, *Life Imprisonment and Related Institutions in the Nordic Countries,* cit., estimated that between 1865 and 1910 only 134 were sentenced to the death penalty (an annual average of 3 persons).
[14] For a comparison between different criminal justice policies in Scandinavia see BONDESON, ULLA, *Crime and Justice in Scandinavia*, Forlaget Thomson, Copenhagen, 2005, p. 427-44.
[15] In the 2019 report, Norway is ranked 1, Denmark 11, and Sweden 7 out of the 189 countries listed.
[16] LAPPI-SEPPÄLÄ, *Penal policy in Scandinavia*, in *Crime and Justice*, Vol. 36, No. 1, Crime, punishment and Politics in a comparative perspective (2007), p. 223.

welfarism"[17]. More generally, there exists a connection between social policy and criminal policy and understanding changes in the latter domain mandates attending to transformations in the former[18]. This model has progressively led to the construction of new alternatives to imprisonment, shortened sentences and restricted use of indeterminate sentencing[19].

1.2. Legal system

Norway is a constitutional monarchy, with a parliamentary form of government. The executive power is held by the King and Council of State, which is composed of ministers and the Prime Minister. The national parliament (*Stortinget*) has the legislative power and is composed of 169 members. The judiciary of Norway is hierarchical. The Supreme Court is at the apex and the judges are appointed by the King in Council. There are certain statutory prerequisites for the appointment of judges: only Norwegian citizens with a right to vote may be appointed; judges must have a law degree with the best or second best grade, and there is an age requirement (Supreme Court justices 30 and 25 for the other judges) and the judges must also be economically reliable. It does not follow explicitly from the Norwegian Constitution that judges are independent. But the principle of judicial independence is still a fundamental principle in the Norwegian system, which is based on the principle of division of powers. The principle is also expressed explicitly in section 55 of the "Courts of Law Statute" which states that a «judge is independent in his/her judicial work»[20].

As far as the structure of the court' system there is a conciliation boards that only hears certain types of civil cases. Then the District Courts are deemed to be the first instance and Courts of Appeal are the second instance. At the highest level

[17] GARLAND, *The crisis of Penal Modernism*, The culture of control: crime and social Order in Contemporary society, p. 53-73, University of Chicago Press, (2002).
[18] SHAMMAS, *Prisons of labour: social democracy and the triple transformation of the politics of punishment in Norway 1900-2014*, in *Scandinavian Penal history, culture and prison practice. Embraced by welfare state?*, SMITH, UGELVIK (a cura di), Palgrave Studies in prisons and penology, 2017.
[19] LAPPI-SEPPÄLÄ, *Penal policy in Scandinavia*, cit., p. 255. These were the main aims of the report "On Crime Policy" presented by the Norwegian Ministry of Justice to the Norwegian Parliament in 1978.
[20] BRUZELIUS, *The Norwegian legal system, the work of the Appeals Committee and the role of precedent in Norwegian law,* in *Norlam (The norwegian mission of rule of law advisers to moldova).*

is the Supreme Court whose function is to contribute to the clarification and the unity of the existing law and to the development of the law[21].

There is no distinction between civil and criminal judiciary, all the courts can rule on both civil and criminal cases (there is no autonomous administrative jurisdiction). Supreme Court judges also deal with a wide variety of cases without specialising in any specific subject matter. It should be noted that the Supreme Court cannot decide whether or not a person is guilty of a crime, the last word always belongs to the Court of Appeal. However, the Supreme Court may set aside a judgement by the Court of Appeal and remit a case if the Supreme Court finds that the case has been decided on the basis of an erroneous interpretation of a statutory provision or that procedural rules have not been followed. Court procedure is relatively informal and simple, and there is a strong lay influence in the judicial assessment of criminal matters. This lay influence is created through the use of both a jury system and a system whereby lay judges (without formal legal qualifications) sit with professional judges in the hearing of cases.

Since 1963, the Ombudsman (elected every four years by the Parliament) has been in charge of assisting citizens who are victims of mistakes or abuses of public administration. The Parliament has assigned the national Ombudsman a special responsibility for the investigation of how rights of people who are deprived of their liberty are safeguarded. It is also responsible for the oversight of the prison conditions[22].

For administrative and political purposes, the country is divided into 11 counties (*fylker*) and 356 municipalities (*kommuner*). «While the various counties and municipalities are responsible for running a large number of vital welfare services, responsibility for organizing and financing the criminal justice system lies

[21] The Norwegian Supreme Court carries out its work in four different institutional forms. The daily work is carried out in panels of five Justices. Particularly important cases involving the compatibility of statutory legislation with constitutional provisions or international conventions sitting in plenary. Instead of plenary session it may hear a case as a Grand Chamber wit 11 justices. Lastly, the Appeals Committee of the Supreme Court, made up of three Justices who sit on a rotation basis, has as its main task to decide appeals against interlocutory orders and examining appeals against judgements with a view to granting or refusing leave for the appeal to proceed. (BRUZELIUS, *The Norwegian legal system, cit.)*

[22] In 2014 Ombudsman has established a "Prevention Unit against Torture and Inhuman Treatment and detention", which visits all place where people are deprived of their freedom.

primarily with central government agencies, most notably the Ministry of Justice and Police»[23].

1.3. Constitutional principles

The highest source of law in Norway is the Constitution. It was adopted in 1814[24] and it is the second oldest Constitution in the world still in existence. Among the rights presently guaranteed by the Constitution concerning criminal matter, it is set the rule of law principle, that no one may be convicted of a crime except according to law or punished except by virtue of a court judgement[25]. Also, the ban on retroactive legislation should be mentioned[26]. A significant intervention took place in 1994 with the introduction of the Article 110 c which stated that it was the responsibility of the authorities of the State to respect and ensure international human rights. Furthermore, the article prescribed that specific provision for the implementation of treaties on human rights may be determined by law[27]. Thanks to this provision, a number of human rights have finally found protection within the

[23] BYGRAVE, *World Factbook of Criminal Justice Systems: Norway*, in *NCJRS*, State University of New York at Albany School of Criminal Justice United States of America, 1997.

[24] In a brief intermezzo of geopolitics, Norway embarked on the frenetic drafting of a constitution. While Sweden had formally gained Norway from Denmark under the January 1814 Treaty of Kiel due to Denmark's support for the Napoleonic forces, Norwegians contested this transfer of sovereignty as against natural law. Claiming instead that sovereignty reverted to Norway after the dissolution of the union with Denmark an alliance of Norwegian elites, free peasants and the resident Crown Prince of Denmark sought to thwart the transfer. On 16 May 1814, after just six weeks of negotiations at Eidsvoll, a constitutive assembly of elected representatives adopted the Norwegian Constitution, which, with a selection of individual rights and elected parliament, was markedly liberal for the time. The Danish prince Christian Fredrik was elected as King of Norway the following day. Independence was short-lived, as Swedish troops overpowered the undermanned Norwegian forces a few months later, but the Norwegian constitutional efforts allowed Norway to enter into a union with Sweden on a more equal footing. The newly minted constitution survived, as well as the governing system it created, though with the Swedish King as head of state. (LAGNGFORD AND BERGE, *Norway's Constitution in a Comparative Perspective*, in *Oslo law review*, Vol. 6, 3/2019, p. 199-228).

[25] Art. 96 Cost.

[26] Art. 97 of Cost.

[27] This power is used first and foremost through the adoption of the *Human Rights Act* in 1999,which incorporates a number of important treaties on human rights into the domestic legal system on a general basis, including the European Convention of Human Rights and the International Covenants on Civil/Political and Economic/Social/Cultural Rights. Article 3 of the *Human Rights Act* establishes that if there is a conflict between a provision in one of the enumerated conventions and any statutory provision adopted by Parliament or any other domestic law, the treaty-provision shall prevail. Hence, the conventions acquired by the Human Rights act a sort of semi-constitutional status in Norwegian law. See the speech of judge BÅRDSEN *The Norwegian Supreme Court and Internationalisation of law*, during Seminar for the EFTA Court and the Norwegian Supreme Court, 7th and 8th of October 2014, Norwegian Supreme Court.

internal legal system, while others already in place have been strengthened and their protection has been extended.

On the 13th of May 2014 a series of articles on human rights were enshrined in the Constitution and a full language revision of the Constitution was adopted. A number of rights were introduced, including the right to life and the prohibition to be subjected to inhuman or degrading treatment (art 93), by imposing an absolute ban on the death sentence, the right to a fair trial (art 95), the principle of equality (art 98) and the presumption of innocence (art 96 para 2), the right to freedom of expression (art 100). Article 110 c was also replaced by a new Article 92, which opens the new Chapter E on the protection of human rights, according to which the State authorities must respect and guarantee human rights under the Constitution and international treaties ratified by Norway.

1.4. The Norwegian sanctions system

Scandinavian law is codified, and the court systems consist of local courts, regional appellate courts and a Supreme Court. «The Nordic systems have sometimes been classified as belonging to the Roman-Germanic family. However, these countries never adopted the Roman law as such, but borrowed some pieces and made their own mixtures of the continental tradition and the more pragmatic common-law approach»[28]. The main legal sources of the Norwegian penal system are "the new Criminal Code" which entered into force the 1st of October 2015[29], and the "Criminal procedure Code" (1981, amended 2013).

The death penalty is prohibited in all Nordic countries, including in wartime. The maximum penalty was life sentence until 1970s, when at the height of the abolitionist movement, the idea of abolishing it was hotly discussed[30]. There was a

[28] LAPPI-SEPPÄLÄ, *Penal policy in Scandinavia*, cit., p. 224.
[29] It amended the previous code of 1902. The code was already enacted in 2005 but the entry into force occurred years later. See for in depth-analysis JACOBSEN AND SANDVIK, *An outline of the New Norwegian Criminal Code, in Bergen Jour. of Criminal law and Criminal justice*, Vol. 3, Issue 2, 2015, p. 162- 183. "The unusually long-time span between the enactment of the code and its entry into force was due to pragmatic reasons. It was claimed that the computer systems applied by the police authorities were not capable of handling the new code".
[30] "During the 1960 and 1970s […] in Nordic countries both life imprisonment and other forms of indefinite detention were subject to sustained challenge because of the belief that unjustified rehabilitative claims made for them led to disproportionately severe interventions in the liberty of those upon whom they were imposed". VAN ZYL SMIT, APPLETON, *Life imprisonment: A Global Human Rights Analysis*, Harvard University Press, 2019, p. 18.

general conviction that criminal law was only one of many means of crime prevention and that other means were often much more effective. «Furthermore, it was stressed that […] the effective functioning of criminal law is not necessarily conditioned by severe punishments, but by legitimacy and perceived fairness»[31]. Norway was the only that decided to abolish the death penalty in 1981, among the Scandinavian. The decision was driven by the principle of humanity and its incompatibility with life imprisonment due to its socially exclusionary effects[32]. One of the main goals of criminal policy, during that period, was to minimize the suffering caused by the criminal control system by using the principle of proportionality, whose main function was thus to define the upper limit that the punishment may never exceed[33]. Whereas, the other Nordic countries recognised the symbolic value of perpetual punishment and stated that it should only be used in the most serious cases such as crimes against State security[34].

Due to the abolition of life sentence in Norway, the maximum penalty is set at a fixed term of twenty-one years, even for the most serious offences. A significant increase of up to 30 years of imprisonment took place with the introduction in the new code of the hypothesis of genocide, crimes against humanity and war crimes (Chapter XVI)[35].

For offenders deemed dangerous it is applicable the preventive detention (*forvaring*)[36]. Alternatively, to a sentence of imprisonment may be imposed a "community sentence" if «the severest penalty that would otherwise have been imposed is imprisonment for a term of one year» or if «the purpose of penalty would not be defeated by a non-custodial sanction» (Section 48). It is also required the offender's consent and that he is resident in Norway. The measure mainly consists of the provision of services for the benefit of the community and may also include programs and activities aimed at reducing the recidivism rate and, at the same time,

[31] LAPPI-SEPPÄLÄ, *Penal policy in Scandinavia,* cit., p. 233.
[32] JACOBSEN AND SANDVIK, *An outline of the New Norwegian Criminal Code,* cit.
[33] LAPPI-SEPPÄLÄ, *Penal policy in Scandinavia*, cit., p. 233.
[34] SCHARTMUELLER, *Life imprisonment in Scandinavia,* cit., p. 137; LAPPI-SEPPÄLÄ, *Life Imprisonment and Related Institutions in the Nordic Countries,* cit. The only possibility to escape perpetual punishment was in the forgiveness of the government, but since this practice was considered contrary to the principle of legality and predictability, it was reconfigured with a more transparent procedure in the 2000s.
[35] This amendment was introduced on the 7th of March 2008.
[36] See *infra* para 1.4.1.

at ensuring that the convicted person does not leave the social context of the country. One type of community sentence is "conditional release", which can be applied for after two thirds of the prison sentence has been served. Prison services may impose certain conditions if they consider it necessary. These may include the obligation to report to the probation office sober or to comply with instructions concerning the place of residence, treatment, work or education and the community of certain persons[37]. Among the less severe punishments there are "fines" (Section 53). The amount depends on the financial situation of the offender. If the fine is not paid, it may be converted into imprisonment (default imprisonment) through separate proceedings. Lastly, among penalties according to Section 29, there is the "loss of rights". A person may be deprived of his rights when committing a particular offence, for example if he occupies a position in an enterprise and commits a crime, he loses the right to hold that position (also for the future). The duration of the loss of civil liberties is regulated in section 58. For some liberties, such an order can in exceptional cases be imposed indefinitely.

In addition, the code provides for a number of criminal sanctions which are not considered as punishment, but rather serve other purposes. Such as "deferment of sentence" which can be imposed when the offender is considered guilty and can lead to a probation period wherein the final sentence is not yet set (Section 60). Then according to section 61 it is possible to "waive the sentence" in case of exceptional circumstances. In the decision of whether such special reasons are present, particular consideration must be taken as to whether pronouncing the sentence will be unreasonably burdensome for the offender[38]. In case of mental issue, the offender is exempt from punishment and he may be "committed to psychiatric care" (Section 62 and 63)[39]. Together with other criminal sanctions can be imposed "confiscation". The main form is confiscation of proceeds of crime (Section 67).

[37] PLOEG, *Scandinavian Acceptionalism? Developments in Community Sanctions in Norway*, in *Scandinavian Penal history* cit., p. 308.
[38] JACOBSEN AND SANDVIK, *An outline of the New Norwegian Criminal Code,* cit., p. 178.
[39] See para 1.4.2.

1.4.1. Preventive detention (*forvaring*)

Norway has been the first, among the Nordic countries, to create a "second track" of indeterminate sanctions in its criminal law. The double-track system was introduced at the beginning of the 20th century, when attention was focused on a group of criminals considered to be incorrigible recidivists. These offenders could not be deterred by punishments proportionate to their crimes. The second track was designed to stand out from the penal framework, in the sense that it was not conceived as a form of punishment, although the measure was imposed by criminal courts and was often implemented by detaining the individual in a prison[40].

The Norwegian Criminal Code of 1902 provided for two forms of preventive detention called "*forvaring*" and "*sikring*". The first was reserved for those who were considered more dangerous. The second was reserved for offenders with diminished or totally lacking criminal responsibility due to mental disorders, with a risk of reoffending[41]. In 2002 a reform replaced the double-track-system with three new types of special sanctions. For those criminally not responsible there are now two forms of compulsory psychiatric care orders, depending on the nature of mental disorder. The third specific sanction (*forvaring*) is reserved for those criminally responsible[42].

Forvaring has remained the most severe sanction under Norwegian law. A basic precondition is that a general time-limited prison sentence is insufficient for protecting the community (Section 40 Criminal Code). «This form of punishment diverges from a prison sentence mainly by its purpose. Where imprisonment is a classical, backwards-looking, and proportional punishment for an offence, […] this aims to protect society from the risk of further offences and is thus future-oriented»[43]. Preventive detention is applied to serious crimes such as violent offences, sexual crimes or crimes that endanger the health and freedom of others and there is an imminent risk that the offender will again commit such a felony. It may be applied also, in the case of less serious crimes if certain conditions are met,

[40] VAN ZYL SMIT, APPLETON, *Life imprisonment,* cit., p. 81.
[41] LAPPI-SEPPÄLÄ, *Life Imprisonment and Related Institutions in the Nordic Countries,* cit.
[42] DÜNKEL, JESSE, PRUIN, DER WENSE, *European Treatment, Transition Management and Re-Integration of High-Risk Offenders: Results of the Final Conference at Rostock-Warnemünde, 3-5 ... transition management of high-risk offenders,* Forum Verlag Godesberg, 2016, 129.
[43] JACOBSEN AND SANDVIK, *An outline of the New Norwegian Criminal Code,* cit., p. 176.

such as the fact that he has previously committed a serious crime among those mentioned above and there is the risk of relapsing into a new felony. This type of punishment includes a careful analysis of the offender's conduct, to assess the criminal's dangerousness, and the court may decide that the person charged shall be subjected to forensic psychiatric inquiry[44]. Indeed, the purpose is to verify the change in the offender's behaviour and its adaptation «to a law-abiding life»[45].

The law sets initial limits on the duration of *forvaring.* The court must specify a term that should usually not exceed 15 years and may not exceed 21 years. With the exception of crimes for which the penalty is 30 years imprisonment (genocide, crimes against humanity), the court may set a time frame not exceeding 30 years. A minimum period not exceeding 10 years must also be determined. If the judge considers that there is still a risk that the detainee will commit an offence, he has the possibility of extending the term by 5 years at a time after the expiry of the time frame, but also in that case a minimum period must also be determined. Preventive detention can, in principle, lead to lifetime in prison, but that has not occurred in practice so far.

The convicted person can ask to be released on probation before the end of the period of preventive detention (Section 44). If the prosecutor does not agree on the request made by the convicted person or by the prison services, the prosecuting authority submits the case to the District Court, which makes a judgment. The court may decide that the individual shall be monitored by the correctional services during the period of probation. Prisoners subject to *forvaring* are detained in three maximum security prisons: Ila, Trondheim and Bredveit (for women). Prisoners in *forvaring* may apply for prison leave and permission to work outside the prison however, even though there are some time limits to be respected[46]. In the end, after the abolition of life sentence, social protection may be maintained through specific security measures such as indeterminate preventive detention.

[44] DÜNKEL, JESSE, PRUIN, DER WENSE, *European Treatment, Transition Management and Re-Integration of High-Risk Offenders: Results of the Final Conference at Rostock-Warnemünde, 3-5 ... transition management of high-risk offenders,* Forum Verlag Godesberg, 2016, 138.
[45] LAPPI-SEPPÄLÄ, *Life Imprisonment and Related Institutions in the Nordic Countries,* cit.
[46] These benefits are usually granted after two-thirds of the sentence has been served.

1.4.2. Psychiatric care orders (*sikring*)

Sikring was the collective name for security measures that can be imposed upon offenders who cannot deemed to be entirely responsible for the crime they committed because of their inadequate development or impairment or disturbance of mental abilities[47].

The new Criminal Code recognises two forms of compulsory treatment orders, "committal to psychiatric care" and "committal to care" (Section 62 and 63). Both orders imply the non-liability of the offender due to his mental state. In order to adopt such a measure, it is necessary to make a risk assessment, following the same criteria for the application of *forvaring*[48]. Compulsory mental health care may not be applied unless a physician has personally examined the person concerned in order to ascertain the legal conditions for such care are satisfied.[49] It may be applied if it has appeared to be the best solution for the person concerned because he constitutes a risk to the life or health of himself or the life of others. The order is taken by administrative decision by the responsible mental health professional the patient may appeal a decision to the supervisory commission. The treatment can also take place under open conditions, but it must include at three week's institutional treatment in a closed unit. Psychiatric care pursuant to section 62 and care pursuant to section 63 may be maintained as long as the condition in section 62 regarding the risk of repetition is met. The continuation must be taken by the prosecutor for the District Court at the three-year intervals[50]. Some concerns about this institution have been raised because deprivation of liberty is ordered by an administrative measure rather than a court decision, contrary also to the provision of art. 5 of ECHR[51]. *Sikring* and *forvaring* have been strongly criticised for their indeterminate duration[52], for the failure of the treatment ideology, for the

---

[47] VAN KALMTHOUT - TAK, *Sanctions-systems in the Member states of the Council of Europe part II. Deprivation of Liberty, Community Service and other Substitutes,* Kluwer Law and Taxation, 1992, p. 818.
[48] LAPPI-SEPPÄLÄ, *Life Imprisonment and Related Institutions in the Nordic Countries,* cit.
[49] *Mental Health Care Act*, Act no. 62 of 2 July 1999, Section 3.1.
[50] LAPPI-SEPPÄLÄ, *Life Imprisonment and Related Institutions in the Nordic Countries,* cit.
[51] Art. 5: "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law…The lawful detention of persons for the prevention of spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants".
[52] A similar discipline can be found in the Italian system. The legislator has provided for the double-track system, introducing security measures (imprisonment) alongside traditional criminal

lack of sufficient judicial certainty and proportionality between the offence and the punishment. Some proposals for changes to these preventive measures have been drawn up. These proposals aim to restrict the application of such measures even if the judicial practice has already anticipated these changes by only using *sikring* and *forvaring* in very exceptional circumstances[53].

1.5. Criminal law principles

The Norwegian criminal law culture reflects the continental background. As it can be seen in the preparatory work of the new criminal code, retributive ideas have been downplayed, while general deterrence has been taken to the forefront[54]. One of the guiding principles of criminalization is the idea «that punishment should solely be used as a reaction towards actions that lead to, or could lead to, harm being inflicted on someone»[55], this is also cited as the "harm principle". Another corollary of this principle is the provision of certain rules designed to protect people from harm that can be self-inflicted[56]. For example, a general ban on drug use not only protects the individual but also the community (such provision is called paternalistic provision).

The key principle of criminal law as set out in the first chapter of the Code is the prohibition of non-retroactivity of criminal law: «the criminal provisions in force at the time of the commission of an act shall be applicable, unless the criminal provisions in force at the time of the trial lead to a more favourable decision for the accused»[57]. Then, the principle *nulla poene sine lege*[58] is expressed in section 14.

---

sanctions. The premise is to neutralize the dangerousness of a subject considered as such. In contrast to the penalty, it can also apply to a person who is not accountable, but who is deemed to be dangerous. The measure ceases when the subject is no longer considered a danger to society, so the law sets a minimum time limit, but the duration remains indefinite (art. 207 of the Italian criminal code). When the minimum time limit expires, the judge reviews the social dangerousness and makes a new prognosis (art. 208). After years of debate, the legislator, with the Law of 30 May 2014, no. 81, established that "Provisional or definitive custodial security measures, including hospitalization in residences for the execution of security measures, may not last longer than the time established for the custodial sentence provided for the crime committed, taking into account the maximum legal limit". For further information see PELISSERO*, Ospedali psichiatrici giudiziari in proroga e prove maldestre di riforma della disciplina delle misure di sicurezza*, *in Dir pen proc*, 2014, 918 ss.

[53] VAN KALMTHOUT - TAK, *Sanctions-systems in the Member states,* cit. p. 819.

[54] JACOBSEN AND SANDVIK, *An outline of the New Norwegian Criminal Code,* cit., p. 167.

[55] This was set out in NOU 2002: 4, see in particular p. 79-81.

[56] NOU 2002: 4 p. 80-81.

[57] JACOBSEN AND SANDVIK, *An outline of the New Norwegian Criminal Code,* cit., p. 171.

[58] Latin expression for the principle "no punishment without law".

In sections 17, 18, 19 the causes of justification are found: an act that would otherwise be punishable is legitimate in case of self-defence, self-enforcement and necessity.

In order to incur criminal liability, the person must have criminal capacity, i.e. the person has to be mentally sound at the time of performing the act and must not be under 15 years of age or psychotic or mentally disabled or unconscious at the time of the act (Section 20)[59]. The general rule provides that to be punishable a person must have committed it intentionally, except in cases where the law provides for punishment for negligence or gross negligence. Intent includes cases where the offender considers it possible that his action may lead to the commission of a crime but decides to act anyway (*dolus eventualis*). In section 24 there is the provision on unintended consequences, while mistake of fact and mistake of law are regulated by sections 25 and 26.

2. The central principles of penitentiary law

Norwegian prisons are often considered as "models"[60], mostly because they reflect the Norwegian welfare-punishment approach. This entails that the various welfare policy measures were supposed to apply to prisoners through the so-called "import model": «prisons inmates should not lose their right to social services such as education just because they are in prison, furthermore, the services should be offered by the same organisations as in society as a whole»[61]. In this way, essential services for reintegration are provided to the prison by local and municipal service providers. Prisons do not have their own staff to provide medical, education or library services. These are imported from the community[62]. The main justification

[59] In particular the psychosis alternative has been debated in the aftermath of the Breivik case. See *infra* para 3.2.

[60] From 9 to 12 November 2015, a delegation composed of 9 representatives of the 18 component Tables of the 'States-General on the execution of the sentence' promoted by the Italian Ministry of Justice and by the Head of Department of Penitentiary Administration, was hosted in the city of Oslo in order to visit some of the penitentiary facilities and learn more about the regulations and the functioning of the Norwegian prison system. See *Relazione sulla visita in Norvegia di una delegazione degli stati generali sull'esecuzione penale* in www.giustizia.it.

[61] See LANGELID, *The Sharing of Responsibility in the Rehabilitation of Prisoners in Norway The Import-Model in Theory,* in *Journal of Correctional Education* (1974), Vol. 50, No. 2, Restorative Justice Efforts in Correctional Education (June 1999), p. 52-61.

[62] PLOEG, *Scandinavian Acceptionalism? Developments in Community Sanctions in Norway*, in *Scandinavian Penal history* cit., p. 305.

for this model is twofold: firstly, because education is considered a right, not an optional program; secondly, the "import model" aims to establish a relationship with the community to which the prisoner will have to return.

One of the cornerstones of the Norwegian prison system is the principle of "normality". It is defined in White Paper II[63] as follows: the person's existence during the execution of the sentence shall, as far as possible, be the same as existence elsewhere in society. The punishment is deprivation of liberty itself and therefore no prisoner should be subject to other unnecessary restrictions. One is sent to prison *as* punishment, not *for* punishment[64]. «The idea behind all this is to reduce the risk of reoffending by "producing" citizens motivated to a "normal" life»[65].

In accordance with the principle of normality, the principle of "progression through a sentence" should be aimed at re-entering to the community. This principle is based on an underlying belief that the more isolated and confined system is, the harder it will be for a person to return to freedom successfully[66]. Therefore, the inmate will transition from imprisonment to complete freedom gradually[67]. He will move from High Security prisons at the beginning of the sentence to Lower Security prisons later, through a transition from the highest level of custody to the lower. It is important to stress the importance of reintegrating former prisoners into the government's agenda. Research on the living conditions of Norwegian prisoners has shown that before detention there are a number of factors that adversely affect the lifestyle of those who commit crimes such as unemployment, drug addiction or other problematic circumstances. If these circumstances played a role in committing the offence, as often happens, there will be a serious risk of re-offending[68]. So, here is the importance of offering alternatives to the prisoner already inside the prison such as work and other activities. The Norwegian

[63] The White Paper II is a parliamentary report ordered by the Ministry of Justice, published in 2008. It uploades the principles of correctional care and it has also a focus on the work that is required to ensure a successful reintegration of former inmates.
[64] VAN ZYL SMIT, APPLETON, *Life imprisonment,* cit., p. 19.
[65] PLOEG, *Scandinavian Acceptionalism? Developments in Community Sanctions in Norway,* in *Scandinavian Penal history* cit., p. 303.
[66] HOIDAL, *Normality behind the walls: examples from Halden prison,* in *Federal sentencing reporter,* Vol. 31, no 1, Oct. 2018, p. 61.
[67] The Execution of Sentence Act, Section 3, "In the execution of sentences of imprisonment (…) there shall, insofar as possible, be a gradual transition from imprisonment to complete freedom, and opportunities to participate in leisure activities shall also be provided".
[68] PLOEG, *Scandinavian Acceptionalism?,* cit., p. 306.

government has a «reintegration guarantee for those who have served their sentence. They shall — if relevant — have an offer of employment, education, suitable housing accommodation, some type of income, medical services, addiction treatment services and debt counselling»[69].

These principles are underpinned by the rehabilitation purpose of the penalty which is the way to achieve the legal aim of the Norwegian justice system, i.e. crime prevention[70]. This purpose is also recognized at the legislative level, section 2 of the Execution of Sentence Act (ESA)[71] affirms that a sentence shall be executed in a manner that «serves to prevent the commission of new criminal acts». To do this it is necessary to undertake a «restorative process» during the execution of the sentence, the prisoner has the duty to take an active part participating to work, service to the community and other rehabilitation programmes. Education is regarded as being particularly important as a measure to avert the commission of new crimes[72]. It is a benefit encompassed by the obligation on the correctional services to «provide satisfactory conditions»[73] for the prisoners during the execution of the sentence. It is also, provided that a range of activities outside the prison must also be made available to the detainee if there are no security reasons to the contrary[74]. In this way the inmate is offered the motivation to change. «The focus is on counteracting key crime-causing factors, such as unemployment and social exclusion»[75]. Although crime prevention is achieved through the incapacitation of the offender, this is not enough to guarantee public safety. At some point the prisoners will be released, and the best way of preventing the loss of health and life, saving society from large costs and creating a safer society is through rehabilitation and improved reintegration into society after release[76].

---

[69] LABUTTA, *The prisoner as one of us: Norwegian Wisdom for American Penal Practice*, in *Emory International law review*, Vol 31, 2017, p. 343; KRISTOFFERSEN, *Relapse Study in the Correctional Services of the Nordic Countries: Key Results and Perspectives*, in *Euro Vista*, Vol. 2, No. 3, 2013.
[70] ANDERSON, GRÖNING, *Rehabilitation in Principle and Practice: perspectives of Inmates and Officers*, in *Bergen Jour. of Criminal law and criminal Justice*, vol. 4, Issue 2, 2016, p. 220-246.
[71] It has entered into force the 1st of March 2002.
[72] GRÖNING, *Education for foreign inmates in Norwegian prisons: A legal and humanitarian perspective,* in *Bergen Jour. of Criminal law and Criminal justice*, Vol. 2, Issue, 2, 2014, p. 172.
[73] ESA, Section 2.
[74] ESA, Section 20.
[75] ANDERSON, GRÖNING, *Rehabilitation in Principle,* cit., p. 223.
[76] FREDWALL, *Guarding, Guiding, gate opening: Prison officer work in Norwegian Welfare Context,* in *Scandinavian Penal History*, cit., p. 162.

Rehabilitation is seen first and foremost as an objective of the individual, before a social project, understood as an inner change that cannot be implemented by coercion, but must be based on free will.

2.1. Scandinavian exceptionalism

At the international level, the conditions in Norwegian prisons have been seen as exceptional. It has been developed the notion of "Scandinavian exceptionalism"[77], which is used to denote the low imprisonment rate[78] and humane prison conditions. These latter can then approximate to life outside as far as possible, rather than being allowed to degrade and debase all within, because it is recognised that going to prison is itself the punishment for crime. «The notion of penal exceptionalism seems to fit well with Scandinavian self-perceptions in general»[79]. In 2012 the Norwegian Minister of Justice, Grete Faremo, said: "We are administrating the world's best prison service (…) We have good reason to be proud"[80].

The exceptional quality is often illustrated by pointing to some specific prisons in Norway such as the human- ecological prison of Bastøy[81] and the most human prison in Halden[82].

The high security prison of Halden is one of the largest in Norway (contains 258 prisoners), it has been opened in 2010 as a result of a prison policy that placed explicit emphasis on the rehabilitation of prisoners through education, vocational training and therapy. The prison system made reintegration a priority, with particular emphasis on helping prisoners to find housing and work on a steady

[77] See PRATT, *Scandinavian exceptionalism in an era of penal excess*, in *the British Journal of Criminology*, Vol. 48, issue 2, 2008, p. 119-137; NELKEN, *Comparative criminal Justice. Beyond Ethnocentricism and Relativism*, in *European Journal of Criminology*, Vol. 6, 2009, p. 294.
[78] The average prison population in Norway in 2019 was 3,200 (60 prisoners per 100,000 inhabitants).
[79] SMITH AND UGELVIK, *Introduction: punishment, welfare and Prison history in Scandinavia*, in *Scandinavian Penal history,* cit., p. 18.
[80] The Norwegian Minister of Justice, Grete Faremo, in *Aktuelt for kriminalomsorgen*, no. 1, 2012, p. 14.
[81] See *infra* 2.1.1.
[82] PLOEG, *Scandinavian Acceptionalism?,* cit., p. 298.

income before they were released[83]. Halden was the first prison built after this review, and so rehabilitation became the basis of its design process[84].

The purpose of punishment as is set in White Paper II consists in deterrent and rehabilitative measures and in the long term should have an effect on the development of norms and attitude toward crime in society as a whole. The aim of giving the inmates the tools for change lies at the core of the mission statement of Halden prison[85]. Therefore, the motto of the prison is a "change that lasts". To achieve this goal prison staff are trained based on "the dynamic security" approach, which prioritizes dialogue instead of coercive measures. In Norwegian prison systems, in addition to the use of normal control devices (such as surveillance cameras), which constitute so-called "static security", it is used "dynamic security", which aims at establishing a good relationship between the prison staff and the inmates both for security and rehabilitative reasons[86]. According to this philosophy, prisoners must be treated like equal human beings with whom the guards have conversations, often over tea or coffee. The prison stay should have an impact on the inmates, it has to tend to rehabilitation and change in inmates, within this task, the officers are referred to as the very "backbone of the work of change and reintegration that is carried out in the prisons"[87]. One important initiative has been the arrangement for prisoners to have personal "contact officer" who is supposed to help the inmate during the rehabilitation process also by advising him and listening to his demands[88]. The effort has been made in changing the role of the prison officers «from being "just a guard", focused on static security measures, to one that also required them to work directly with the inmates on their rehabilitation»[89]. This change of role has made it necessary to set up appropriate educational programmes for prison officers where they receive knowledge of

[83] With this in mind, an agreement *Housing for Welfare* (2014-2020) between the Minister of Justice and the local authorities should provide the person who has finished serving his or her sentence with a home at the time of release.
[84] BENKO, *The Radical Humaneness of Norway's Halden Prison. The goal of the Norwegian penal system is to get inmates out of it,* in *New York Times*, March 26, 2015.
[85] HOIDAL, *Normality behind the walls,* cit., p. 63.
[86] ANDERSON, GRÖNING, *Rehabilitation in Principle,* cit., p. 228.
[87] Norwegian Directorate for Correctional Services 2004, p. 8.
[88] For more details: MILAND-LUNDEBERG-GLOPPEN, *Penal hybridization: staff-prisoner relationships in a Norwegian drug rehabilitation unit,* in AASEN-GLOPPEN-MAGNUSSEN-NILSEN, *Juridification and social citizenships in the welfare state*, 2014, Cheltenham-Northampton, 284 ss.
[89] HOIDAL, *Normality behind the walls,* cit., p. 65.

psychology, criminology, law, human rights and ethics, as well as practical training[90].

Also, from an architectural point of view, within the prison walls it has been replicated a "normal" tiny city. As a result, Halden Prison consists of several divided buildings, many with a specific use (i.e. education, recreation, workshops) and it «is perceived as a society in miniature»[91]. This layout is designed to reflect the everyday movement in the community, translating the principle of normality into practice. The idea of designers was to reconcile two elements: hard and soft. «The word "hard" represents harsh and restrictive prison spaces, which are characterized by means of detention and physical barriers, while "soft" represents the notion of rehabilitation, with community housing and co-location of employees and prisoners»[92].

The exceptional conditions in most Norwegian prisons, while not eliminating the pain of imprisonment, must surely ease it trying to make life more or less "ordinary"[93]. This is confirmed by the fact that each prisoner has his own single cell[94] without windows security bars[95], with television inside, private toilet and shower, while a well-equipped kitchen[96] is in common to let inmates cook for themselves if they want to. There is also the possibility of going to work or school during the day, having meals at normal times and recreational activities in the afternoon. The Norwegian prisoners do not have uniforms provided by the prison

[90] ESA, Section 8.
[91] HOIDAL, *Normality behind the walls,* cit., p. 64.
[92] Ibidem.
[93] JOHNSEN, *Exceptional Prison conditions and the quality of prison life: Prison size and prison culture in Norwegian closed prisons*, in *British Journal of Criminology*, 2011, p. 515-529.
[94] As of 31 December 2017, there were 3.500 prison individual cells, 530 double cells, 94 for more than two inmates. In order not to derogate from the policy of a single-cell-prisoner policy and because of the increase in the number of prisoners (mainly foreigners), the Government has created a "sentence queue" for convicted persons waiting up to six months to serve their sentence, instead of overcrowding. Another way to solve the problem of overcrowding has been an agreement with the Netherlands regarding the execution of sentences. A convicted person could serve a sentence in a prison located in the Netherlands, but the prisoner remained considered to be imprisoned in Norway and has the same rights and obligation arising from this. The agreement expired on 31 August 2018.
[95] See *Report* to the Norwegian Government on the visit to Norway carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 28 May to 5 June 2018, p. 38.
[96] VANDER BEKEN, *In search of Norwegian Penal Exceptionalism: A prison tourist's perspective*, in *Scandinavian Penal history,* cit., p. 434 writes: "Throughout Norway, even in higher-security prisons than Bastøy (…) I spot large knives hanging from the wall that inmates would have no trouble in using—or in taking elsewhere".

administration; they can wear their private clothing. Prisoners can look for a doctor, dentist, library, shop or chapel, as if they were living outside the prison walls.

It is known that underlying the whole penal system there are effective social policies that guarantee health care, education and pension rights for all citizens, contributing significantly to Norway's low levels of incarceration and recidivism, which are among the lowest in the world (recidivism around 20%)[97]. In a generous and economically and socially safe welfare state, there is less pressure toward incarceration for a number of reasons: other and better alternatives are usually at hand (such as community services)[98], there is less economic inequality, less social exclusion and more prosperity. Some reasons for committing crimes, such as hunger and desperate need, are thus emptied[99]. Indeed, Nordic penal policy reflects the values of the Nordic welfare state and «emphasizes that measures against social marginalization and inequality also work as measures against crime»[100].

2.1.1. Bastøy: the jail without bars

The «world's most famous open prison»[101] is set on the small island of Bastøy, located in the Oslo Fjord. The small Vederøy ferry, which goes back and forth, is the only link with the outside world. Bastøy Prison is an "open" prison layout where there are no barriers between the prison and the outside world, and some inmates even commute to the mainland each day for their jobs before returning to the prison at night when only 5 prison officers remain on the island. Bastøy is, not only, a prison for those who arrive at the end of their sentence, who are transferred here from less open prisons, but it can be also the first prison to which they are transferred after the trial (in any case, it is not possible to spend more than 5 years on the island). The aim is to make them relearn as much as possible how to live in the outside world.[102]

---

[97] In this sense FREDWALL, *Guarding, Guiding, gate opening,* cit., p. 161.
[98] LAPPI-SEPPÄLÄ, *Penal policy in Scandinavia,* cit., p. 274.
[99] LABUTTA, *The prisoner as one of us,* cit., p. 343.
[100] LAPPI-SEPPÄLÄ, *Penal policy in Scandinavia,* cit., p. 285.
[101] SMITH AND UGELVIK, *Introduction: punishment, welfare and Prison history in Scandinavia*, in *Scandinavian Penal history,* cit., p. 18.
[102] VANDER BEKEN, *In search of Norwegian Penal Exceptionalism: A prison tourist's perspective*, in *Scandinavian Penal history,* cit., p. 431- 435.

The environment where the inmates live are small wooden houses where they are obliged to stay between 11pm and 7am. During the day they have to work and are free to move around at will. Roll call is made four times a day. After work and housework, are free to carry out various activities. «There is a lot of fishing, and in summer they swim a lot in the fjord»[103]. Each man has his own room and shares the kitchen and other facilities with the other inmates. A meal a day is provided for them; any other food must be bought from the local supermarket and prepared by the prisoners themselves, who receive an allowance of $90 a month.

It is also an ecological prison, bicycles are used to move around, organic vegetables are grown by the prisoners, and power supplies are generated from the waste produced on the island. Prisoners even have access to chainsaws that they use to cut down trees for firewood[104].

That's all part of Bastøy rehabilitation model. The aim is to instil a sense of duty, responsibility and ethics in prisoners. This is because once the prisoner has served his sentence, he will return to society and the more a prison system is closed, the more difficult it is will be for the offender to reintegrate into the community when he is given freedom. The philosophy behind the Norwegian system is always the principle of normality according to which the life inside the prison must resemble life outside as much as possible.

The prison policy seems to be effective. The prison's recidivism rate is just 16%, which is even lower than the Norwegian recidivism rate as a whole.

2.2. Prison system

To ensure an adequate level of security[105] the Norwegian penitentiary system is built up on three different levels[106]: high security (closed prisons), lower security (open prisons), and halfway houses (or transitional housing). In high

[103] Ibidem.
[104] It is known as the "world's first human ecological prison." See BERGER, *Kriminalomsorgen: A Look at the World's Most Humane Prison System in Norway,* 10 Dec 2016, http://dx.doi.org/10.2139/ssrn.2883512.
[105] See GRØNING, *Education for foreign inmates,* cit., The author says: "It follows from section 2 ESA, read in the light of section 3, that security is a dominant concern. It represents a necessary part of the carrying out of the sentence and can also limit the prisoner's opportunity to fully exercise all of their right".
[106] ESA, Section 10.

security prisons there is a strict regime (high walls, security cameras, locked doors etc.) and the inmates cannot leave the site. In prisons with lower security there are lighter control measures and the inmates are encouraged to have contact with the community. The cells are only locked during the night. The halfway houses are the least restrictive incarceration option where inmates can be transferred when part of their sentences is executed. The prison has multiple wings and according to the principle of progression of the sentence the inmates can be transferred from higher to lower security wings, based on their progress until the eventual freedom[107].

It is possible to serve your sentence outside prison if certain conditions are met, such as have served at least half of the sentence and having no security reasons to the contrary. As a precondition the convicted person shall have a permanent residence and be employed in a form of work, training or other measures[108]. A series of alternative measures to imprisonment have been set in order to serve a sentence in a less alienating environment than prison and to contribute to reducing the risk of new criminality. In addition to community sentences[109], it is provided for a program against the intoxicated drivers and against the drug use under judicial control. There is also the possibility to serve the prison sentences at home with electronic foot-chain[110]. Access to the benefit must be subject to objective and subjective conditions. At least two-thirds of the sentence must have been served, it is required the residence on Norwegian territory and the house where the measure is to be served must be suitable for inspection by officials.

The Ministry of Justice and Public Security is responsible for the administration, control and security of the penitentiary facilities. The Norwegian Correctional Service (NCS) is the body responsible for ensuring the proper execution of prison sentences and it is financed by the Norwegian Ministry of Justice. NCS is organized into three levels: the Norwegian Directorate for Correctional Services which has the highest administrative responsibility, five regional administrations, and, local prisons and probation offices. All criminal enforcement is therefore managed by the administrative authorities and it is up to

[107] ESA, Section 15.
[108] ESA, Section 16.
[109] See *supra* para 1.4.
[110] This measure is set by the "Regulation relating the execution of Sentences", Chapter 7.

them to grant exit permits to detainees and who admit them to work. If such a request is rejected, the inmate can appeal to the next higher level (according to a system of hierarchical appeals).

The work of NCS lies on five pillars: to respect the purpose of the sanction given by the legislator, to have a humanist approach, to follow the principle of due process, equal treatment and the principle that convicted persons paid their debt to society when the sentence was served, and the normality principle. The whole can be summarized in the idea of "punishment that works" [111]. The government's objective is that the punishment should be implemented in such a way as to reduce the number of offenders who commit new criminal acts after serving their sentence. A good starting point for achieving this is facilitate rehabilitation during the imprisonment. The smaller is the difference between life inside and outside prison, the easier is the transition from prison to freedom. As far as possible, prisoners should have opportunities for social contact, including visits, leave and telephone communications, and should have access to radio, television and newspapers and, in other ways, be able to follow what is happening in society in general[112].

The aim of the Norwegian prison system is to export the idea of the "village prison" like Bastøy 's[113]. Meaning that the prison must be a «training arena for the mastery of life skills»[114] where prisoners must gradually get used to having their freedom under responsibility.

2.3. Solitary confinement

The excessive use of solitary confinement is very problematic in Norway, so much so there has been talk of «peculiarly Scandinavian phenomenon»[115]. As recently the European Committee for the prevention of Torture (CPT) has expressed in its report, the lack of human contact could affect the mental, somatic

[111] NORWEGIAN MINISTRY OF JUSTICE AND THE POLICE, *Punishment That Works—Less Crime—A Safe Society: Report to the Storting on the Norwegian Correctional Services* (English Summary), in *Federal Sentencing Reporter*, Vol. 31, No. I, Oct. 2018, p. 52.
[112] Ibidem.
[113] See *supra* 2.1.1.
[114] NORWEGIAN MINISTRY OF JUSTICE AND THE POLICE, *Punishment That Works,* cit., p. 55.
[115] EVANS-MORGAN, *Preventing torture: a study of the European convention for the prevention of Torture and inhuman or degrading treatment or punishment,* Oxford, 1998, p. 247.

and social health of inmates[116]. A long list of symptoms has been documented and the effects have been reported to occur even after only a few days in solitary confinement[117]. To identify the damaging effects connected especially with this form of imprisonment, some scholars have used the term "isolation panic"[118], which describes a range of symptoms including panic, rage, loss of control and complete breakdown. On this background, the use of isolation, and recent years' increase in its use, has been described as a "very problematic and worrying development"[119]. Indeed, recent research shows that Norwegian prisons have had a high number of suicides in prison relative to the population[120], and some researchers have argued that isolation constitutes an additional suicide risk factor[121]. In the Norwegian system isolation can be used both as a punishment if the prisoner breaks the prison's rules, and as well as a preventive measure for the purpose of protecting ongoing criminal investigation. In the latter hypothesis the Court may impose solitary confinement, that must not exceed two weeks[122], to prevent the prisoner from tampering with evidence (Section 186a of the Criminal Procedure Act). In other cases, it is up to the prison authorities to decide if a prisoner should be subject to solitary confinement. It can be imposed as preventive measure in ordinary situations (Section 37 of ESA) or impose "immediate exclusion from company" as

[116] *Report to the Norwegian Government on the visit to Norway carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (CPT) from 28 May to 5 June 2018, p. 32-34.

[117] A Norwegian study of remand prisoners found serious and widespread health effects (including anxiety, depression, and self-mutilations) after four weeks of isolation. (GAMMAN, *Om bruk av isolasjon under varetektsfengsling. Nordisk Tidsskrift for Kriminalvidenskab,* 2001, p. 45.)

[118] See SMITH, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature,* in *Crime and Justice*, vol. 34, no. 1, 2006, p. 484.

[119] *The Istanbul Statement on the Use and Effects of Solitary confinement* p. 2. See Chapter I for the assessment of solitary confinement in the context of art 3 of the ECHR.

[120] FAZEL, RAMESH, HAWTON*, Suicide in prisons: an international study of prevalence and contributory factors*, in *The Lancet Psychiatry*, 4 (12), 2017 p. 946–952. In the article, Norway tops the list for the number of suicides among the countries studied. The source data include the year 2013, when there was an unusually high number of suicides in Norwegian prisons. Norway would still feature high up the list, even if this was adjusted for.

[121] According to psychiatrist GAMMAN, cit., "more than half of all suicides in Norwegian prisons are committed during periods of isolation" p. 42.

[122] Art 186 a CPA provides that: "It may be extended by court order by not more than two weeks at a time. If the nature of the investigation or other special circumstances indicate that a review of the order after two weeks would be pointless, and the person charged has reached 18 years of age, the time".
limit may be extended by not more than four weeks at a time.

disciplinary sanction (Section 39 of ESA) or the placement in a security cell (Section 38 of ESA) in order to prevent possible damage to people or property.

The most debated case, which has also been brought before the European Court of Human Rights[123], is that of prisoners placed in high security regime (in particular, prisoners held in preventive detention). According to Section 17, para 2 of ESA, they can be subjected to solitary confinement «in the interests of peace, order and security, or if this is in the interests of the inmates themselves or other inmates and does not appear to be a disproportionate measure».

The main issue is that there is no time limit for such measure and can be renewed for an infinite number of times[124].

3. *Breivik* case

In the aftermath of what has been described as «the worst atrocity in Norway since the Second World War»[125], the Breivik's terrorist attack, which led to the murders of 77 people, the Norwegian criminal justice system has been challenged. According to proponents of a retribution theory of punishment there are some crimes that are so heinous that no sentence, other than one guaranteeing the incarceration of the person until death in prison, is sufficiently severe.[126] As previously mentioned, the Norwegian penal system does not provide for life imprisonment, or death penalty; the maximum sentence is 21-years of imprisonment. Having sentences limited in time means that the system is focus on the rehabilitation the offender because sooner or later he will return to society.

Thus, the year after the attack, Breivik was sentenced to a definite time sentence of twenty-one years, a type of sentence referred to as *forvaring* (preventive detention), although his sentence can be extended for another five years at a time if he is still considered a threat to society. While «Breivik's fate led to "confused dismay" by many observers in other parts of the world»[127]. The victims supported

[123] See *infra* para 4.2.
[124] The issue of solitary confinement will be discussed in more detail in paragraph 4.
[125] SYSE, *Breivik - The Norwegian terrorist case,* in *Behavioral Sciences and the Law*, n. 32, 2014, p. 402.
[126] VAN ZYL SMIT, APPLETON, *Life imprisonment,* cit., p. 301.
[127] SCHARTMUELLER, *Life imprisonment in Scandinavia,* cit., p. 12.

the court's verdict[128] , and Norwegian Prime Minister Stoltenberg unexpectedly said that the Breivik attack had not changed the values and that the response to so much violence would be «more democracy, more openness, and more humanity»[129]. The reason behind this is that a good society is built only by constantly activating, also through criminal sanctions, conditions for the restoration of good in the face of evil (restorative justice)[130]. The fact that negative action has been committed does not constitute a valid justification for inflicting a further harm in order to prevent crimes. Not because the seriousness and danger of certain criminal actions is underestimated, but because a society which is in turn malicious produces only further violence. Criminal justice is suitable only where it expresses other than the crime committed, «far from the static nature of retributive justice in order to open up to a project-oriented and inspirational vision of prevention so that the criteria for "doing justice" take on the opposite connotations as compared to those underlying the offence»[131].

The following will illustrate the matter in more detail and try to understand whether the response given in terms of sanctions could serve the purpose of incapacitation of the offender (negative special prevention) as for the life sentence[132].

3.1. The massacre of Utøya

On July 22nd, 2011, Anders Breivik began his "fight" against the "Marxist/multiculturalist elites" who were leading Europe to "Muslim slavery", as

[128] Eighty percent of the Norwegian public and most of the victims' families supported the court sentence for Breivik. See SU-SYAN JOU, *Norwegian Penal Norms: Political Consensus, Public Knowledge, Suitable Sentiment and a Hierarchy of Otherness*, in *National Taiwan U.L. Rev*., Vol. 9: 2, p. 292, 2014.
[129] ORANGE, '*Answer hatred with love': how Norway tried to cope with the horror of Anders Breivik*, in *The Guardian*, 15 Apr. 2012.
[130] BRØTHER, ANKE HANSEN, *How Norway Remained True to its Democratic Values in the face of evil,* in *Journal of Parliamentary and Political Law*, March 2013.
[131] EUSEBI, *Pena e perdono*, in *Riv. It. Di. Proc. Pen.,* 3/2019, p. 1137 ss.
[132] "Punishment that removes offenders from society is sometimes justified simply on the basis that it incapacitates them, thus protecting society from the crimes that they could otherwise commit as they are permanently excluded from normal society". VAN ZYL SMIT, APPLETON, *Life imprisonment,* cit., p. 6.

he had written in his *Manifesto*[133], published online just before the attacks. First by blowing up a car bomb in front of government offices, killing 8 people, then moving to the nearby island of Utøya, where he carried out a real massacre. The Labour Party youth association summer camp was being held on the island and there were young people between 14 and 23 years old. Breivik dressed as a police officer who pretended to protect the youngsters, arrived on the island. He shot down unarmed adolescents, killing 69 persons, and he was arrested only an hour later by the police SWAT unit[134].

During his first interrogation, Breivik claimed that he had acted as a "knight" to save Norway and western Europe from a Muslim takeover, and that the Labour Party had to "pay the price" for promoting the opening of Norway to multiculturalism.

The terroristic attack came «like lightning from a clear blue sky»[135] in a country that had always been a leader in promoting peace and human rights. After the first explosion in front of the government buildings, most commentators had considered it plausible that the attack was of Islamic origin, the thing that shocked them was to find out that he was a «west end boy»[136].

3.2. Oslo District Court's Judgment

«The ten-week Breivik trial was one of the biggest terrorism trials in the history of modern continental Europe»[137] . The prosecution's initial strategy was to ask to confine him to psychiatric care without a pre-specified time limit[138], instead of imprisonment, by considering him non-accountable (insanity defence)[139],

---

[133] A 1518-page work that exposes the Muslim plot to conquer Christendom. See VON BRÖMSSEN, *"2083 – A European Declaration of Independence" - An Analysis of Discourses from the Extreme,* in *Nordidactica – Journal of Humanities and Social Science Education,* 2013:1.
[134] More details in SYSE, *Breivik - The Norwegian terrorist case,* cit., 389-390.
[135] Ibidem.
[136] Based on the title of SHATZ, *West End Boy*, in *London Review of Books*, Vol. 36, No. 22, Nov. 2014.
[137] See for an accurate analysis: DE GRAAF, VAN DER HEIDE, WANMAKER AND WEGGEMANS, *The Anders Behring Breivik Trial: Performing Justice, Defending Democracy,* in *ICCT Research Paper*, June 2013, p. 4.
[138] See *supra* para 1.4.2.
[139] For an in-depth examination of the relationship between Criminal insanity and the Norwegian law, see GRØNING, HAUKVIK, MELLE, *Criminal Insanity, Psychosis and Impaired Reality Testing in Norwegian Law*, in *Bergen Journal of Criminal Law and Criminal Justice*, Vol. 7, Issue 1, 2019, 27-59.

focusing on the facts and potential flaws in the stories he had presented during the trial and in his manifesto. The prosecutors wanted to paint him as a liar. In order to convince others of Breivik's delusional state and to prevent him from being considered a hero to emulate. Indeed, one of the principles of Norwegian criminal law is that to be held criminally liable it is necessary to be conscious at the time of performing the act, therefore «criminal incapacity and criminal insanity are understood as circumstances that exempt a defendant from an otherwise wrongful and criminalized act»[140].

Breivik declared that he acted in self-defence as a "Templar Knight" on behalf of his country, so he demanded to be found innocent of all charges[141].

The question to be determined in the proceeding was whether or not Breivik would be assessed accountable for his acts. A first examination by two court-appointed forensic psychiatrists led to a diagnosis for paranoid schizophrenia[142]. Obviously, the verdict received media's attention and was not exempt from criticism even from the relatives of the victims[143]. Breivik himself was not pleased to be labelled as insane, as far as it prevents him from being seen as a role model for right-wing extremists for carrying on the battle against the "Islamization of the continent". In a letter written in jail and sent to various Norwegian media, he said that it was the «worst that could happen […] as it would be the ultimate humiliation. […] Sending a political activist to a mental hospital is more sadistic and crueller than killing him! It is a fate worse than death»[144].

The Court, after much public pressure, requested a second psychiatric evaluation. The conclusion was that Breivik was not psychotic during the attacks. The second psychiatric observation said that Breivik had an antisocial personality disorder and a narcissistic personality disorder, but accountable for the criminal acts.

---

[140] Ibidem.
[141] As reported by RITTER, *Anders Behring Breivik trial: I acted out of goodness*, in *The Scotsman*, 17 April 2012.
[142] The report can be found here: https://www.document.no/2012/02/09/forensic-psychiatric-statement-anders-behring-breivik-i/?cn-reloaded=1.
[143] Counsels representing families and victims of the Utøya massacre ask the court to order a second opinion.
[144] REUTERS, *"Diagnosis of insanity would be 'worse than death', Norway killer says*", in *The Globe and Mail* (4 April 2012).

Although the Oslo District Court faced with two teams of expert witnesses with qualitatively different diagnostic assessments of the defendant, unanimously[145] found Breivik sane and guilty[146]. Breivik was sentenced to preventive detention (*forvaring* ex Sec. 39-c)[147] of twenty-one years because he had committed acts of terrorism which were among the particularly serious crimes required by the law. In addition, the risk of recidivism was considered very high and imprisonment was deemed to be insufficient to protect society[148]. The Court's assessment was based on the statements made both by the expert witnesses and the defendant himself during the trial, where he had expressed no remorse, indeed he hoped that his political project would continue with new terrorist attacks. Although, the sentence of preventive detention cannot exceed 21 years[149], the Court may upon the expiry of the fixed term extend the preventive detention by five years at time, depending on the assessment of the danger he poses to society. In addition to the maximum term, the Court is of the opinion that a minimum period must be determined. The significance of the minimum period is that a release on probation cannot take place prior to its expiry. This minimum term was fixed at 10 years. Neither the prosecutor nor Breivik appealed the verdict.

3.3. Is twenty-one years a fair sentence?

After Breivik was sentenced to 21 years' preventive detention, many at international level questioned whether it was sufficient in relation to the killing of

[145] Breivik was judged by three lay judges and three professional judges.

[146] Oslo District Court- Judgment 24 of August 2012. "The Court still assumes that the defendant's capacity to carry out the reported acts may partially be explained by a combination of fanatic right-wing extremist ideology, the intake of performance enhancing substances and possible autosuggestion in combination with pathological or deviant personality traits. Upon an overall assessment, the Court finds it has been proved beyond any reasonable doubt that the defendant was not psychotic at the time the crimes were committed, cf. the Penal Code, section 44. Consequently, the defendant shall be punished for his acts".

[147] See *supra* para 1.4.1.

[148] Oslo District Court, cit., "The cruelties of the defendant's acts are unparalleled in Norwegian history. It follows from the Supreme Court's practice that it takes a lot to assume that such a long sentence for a specific term is not considered sufficient to protect society against the danger a convicted person represents at the time of the delivery of the judgment (…). Notwithstanding this, the Court is in no doubt that also the basic requirement for preventive detention is fulfilled in this special case".

[149] He could not be sentenced to the 30-year sentence provided for by the amendment of Chapter XVI of the Penal Code for those who committed crimes against humanity because the new Penal Code had not yet entered into force.

77 people. From a retributive point of view, what he has done can never be repaid fairly. « Shall we take him to the gallows 76 times without hanging him, but only after the 77th time? »[150]. Such atrocities cannot be rebalanced by a fair amount of pain, there must be something else: by referring to the values of society and thus of Norwegian law[151]. First of all, Breivik has been guaranteed a fair trial[152]. Victims were given the opportunity to have a «direct voice» in the trial. The Court heard 77 autopsy reports and the biographies of each of them. Thus, the victims were able to share their feelings by exorcising their suffering[153]. Bjorn Magnus Ihler, one of the Utøya's survivors, said that Norway's treatment of Mr. Breivik was a sign of a fundamentally civilized nation. «If he is deemed not to be dangerous any more after 21 years, then he should be released» Mr. Ihler said. «That's how it should work. That's staying true to our principles, and the best evidence that he hasn't changed our society»[154]. This level of social trust has certainly contributed to making the Norwegian response to the 22 July attacks more focused on solidarity and love than on hate and revenge. In such welfare model it is easier to see these atrocities as exceptions that should not be allowed to change society[155].

In the rest of the countries that have maintained life imprisonment as the maximum penalty, they see the perpetual punishment as the only penal response proportionate to the criminal conduct of the perpetrator of the most serious crimes. Because of its intimidating effect on the community an effect which is assumed to outweigh that of a long-term prison sentence, but which provides for an end[156]. It is

---

[150] NILS CHRISTIE, *La riparazione dopo le atrocità. È possible?,* in *Il carcere al tempo della crisi*, FONDAZIONE GIOVANNI MICHELUCCI (a cura di), Firenze, dicembre 2013, p. 78.

[151] «The most important explanation as to why Norway reacted with such calm and composure is trust. […] Trust breeds compassion, which in turn breeds solidarity. Solidarity fosters togetherness, and when you feel you have something in common with someone, that they are not complete strangers, it becomes easier to trust the person. Thus, a circle of mutual trust is formed, producing a society where humanity, democracy and rule of law are treasured values» BRØTHER, ANKE HANSEN, *How Norway Remained True to its Democratic Values,* cit.

[152] DE GRAAF, VAN DER HEIDE, WANMAKER AND WEGGEMANS, *The Anders Behring Breivik Trial,* cit., p. 12.

[153] FISHER, *A different Justice: Why Anders Breivik Only Got 21 Years for killing 77 people*, in *The Atlantic*, August 24, 2012.

[154] As reported by LEWIS AND LYALL, *Norway Mass Killer gets the maximum: 21 Years,* in *The New York Time*s, 24 August 2012. https://www.nytimes.com/2012/08/25/world/europe/anders-behring-breivik-murder-trial.html

[155] BRØTHER, ANKE HANSEN, *How Norway Remained True to its Democratic Values,* cit.

[156] DOLCINI, *La pena perpetua nell'ordinamento italiano. Appunti e riflessioni*, in *Riv. Dir. Pen. Cont.*, 17 Dec. 2018, p. 41.

feared that the abolition of life imprisonment may be perceived by the population as a failure of the state to deal with the most serious forms of crime. But life imprisonment is not the only way «to reassure good citizens and to inhibit those who are malicious»[157]. The second argument that is brought in favour of life imprisonment is that some offenders are so dangerous that they should be given a sentence that ensures that they never be set free.

In the case of Norway, even if it has abolished life sentence, it retains a second-track, post-sentence preventive detention as a mean of ensuring that persons convicted of serious offences who remain dangerous can be incapacitated by continuing to detain them, potentially for the rest of their lives[158].

In order to understand the *ratio* behind the the Norwegian penal system is shaped in this way it is necessary to take account of the main purposes of the punishment, which are the rehabilitation and the restoration[159].

The aim of the Norwegian system is to prevent that something like this from happening again (negative special prevention) through the best prison treatment that can be offered, ensuring the constant review of offender's suitability for release into the community. The purpose of the sentence is to offer the condemned person a chance of reintegration into the society, once he proves to have changed his attitude. From the point of view of restorative justice, it is necessary to overcome the scheme of responding to the negative with the negative (retributive justice); that is, to try to restore relationships according to justice and to allow, as far as possible, the repair of damage. It can be said that «there is no justice without forgiveness»[160], i.e. to forgive means to keep open a "willingness" to those who have done wrong, that is, to maintain an interest in their future and in the change of attitudes that underlie their negative actions: willingness which does not imply automatic achievement. Therefore, as long as the offender is a danger to society he must remain in prison. In principle, new court hearings may decide to renew Breivik's detention

[157] RISICATO, *La pena perpetua tra crisi della finalità rieducativa e tradimento del senso di umanità*, in *Riv. Dir ita e proc. pen*., 3/2015, p. 1254.
[158] VAN ZYL SMIT, APPLETON, *Life imprisonment,* cit., p. 315.
[159] See NYLUND, *Restorative justice and victim-offender mediation in Norway*, in *Academia.edu*; BOUCHARD, *Breve storia della giustizia riparativa,* in Questione Giustizia, n. 2/2015, p. 66-78.
[160] On the correlation between punishment and forgiveness see: EUSEBI, *Pena e perdono*, cit., p. 1150.

indefinitely, resulting in a real-life sentence, but only if there is still a danger to society. In this way it is ensured the need for security required by the community.

According to human rights standards indefinite sentences are forbidden on purely retributive grounds. «No one should serve a sentence or a measure for longer than they deserve, in order to protect the public, or for any other reasons. The only permissible sentence is the minimum number of years necessary to reflect the purposes of punishment»[161].

The choice made by Norway appears to be compatible, not only with the human rights standards, but also with the rulings of the European Court of Human Rights on long-term imprisonment[162]. A perpetual sentence does not constitute inhuman or degrading treatment (Art. 3 ECHR) if it is reducible, i.e. if it can be reviewed to enable the national authorities to verify whether, during the execution of the sentence, the prisoner has made such progress on the road to redemption that no legitimate reasons can justify his detention. As it has been said in Chapter I, a punishment that precludes the condemned person from any chance of regain freedom would be against human dignity, that has become a «core organizing principle of human rights law»[163]. It means that any punishment that violates human dignity is unacceptable. That is why the Norwegian preventive detention sentence seems to be compatible with human dignity: even a mass killer has the hope of one day being able to regain his freedom through his personal development[164].

4. Breivik's conditions as inhuman and degrading treatment

After his criminal trial, Breivik questioned his detention conditions, having been kept in constant solitary confinement. He was under strict security regime (S.H.S)[165] because the prison officers were afraid that other inmates may hurt him or that he could be a danger to them[166]. His correspondence was subject to

[161] VAN ZYL SMIT, APPLETON, *Life imprisonment*, cit. 316.
[162] See Chapter I para 3.1.
[163] VAN ZYL SMIT, APPLETON, *Life imprisonment,* cit., p. 298.
[164] Ibidem.
[165] Initially detained in Ila Detention and Security Prison, in a maximum-security wing (SHS) and then from September 2013 transferred to Telemark prison.
[166] Regulations relating to the Execution of Sentences (RES), Sec 6.2 «Convicted persons and persons remanded in custody who are considered to represent a high risk of escape, risk of receiving outside assistance to escape, risk of taking hostages or risk of committing new, very serious crimes, may be placed in a department with an especially high security level».

monitoring by the authorities, except for that with his lawyer. Although Breivik could have no contact with anyone, other than the prison guards, he lived in a cell of almost 30 square meters divided into three rooms: one for sleeping, one for studying, and another for exercise. In addition, he was granted a television, access to an outdoor courtyard, a PlayStation 2[167], a multi-purpose weight training machine, a spinning bike and the opportunity to take distance learning courses at the faculty of Political Science at the University of Oslo.

Despite these comforts, Breivik sued the Norwegian government in 2015, claiming his nearly five years in solitary confinement violate Article 3 of the European Convention on Human Rights (ECHR), which prohibits "torture or inhuman or degrading treatment or punishment" [168].

4.1. Breivik against Norway

Breivik accused the Norwegian Government of violating Art. 3 and 8 of the European Convention on Human Rights. Specifically, he claimed that the state of endless isolation to which he had been subjected constituted "inhuman treatment" within the meaning of the Convention[169]. The plaintiff complained that he had no human contact and spent 22-23 hours per day alone in the cell. Norwegian legislation provides that prisoners assigned to a high security section (SHS) may not have contact with other ordinary prisoners (Sec. 6.3 RES). Above all, it can be deduced that the isolation is not subject to a time limit. In this context all «the external facilities surrounding» him were «of little significance»[170].

The excessive severity of the restrictions had resulted in Breivik suffering isolation damage, in his opinion, for which he claimed not to have received

[167] Anders Behring Breivik threatened a hunger strike if he was not provided with updated video games to improve his stay in the prison. See BACCHI, *Anders Breivik Threatens Hunger Strike for PlayStation 3 and Adult Games,* in *International Business Times,* Feb. 14, 2014, https://www.ibtimes.co.uk/anders-breivik-threatens-hunger-strike-playstation-3-adult-games-1436492.

[168] ROVNER, *"Everything is at stake if Norway is sentenced. in that case, we have failed": solitary confinement and the "hard" cases in the United States and Norway,* in *UCLA Criminal justice law review*, 2017: 77, p. 79.

[169] See ROCCATAGLIATA, *Anders Breivik suffered from inhuman and degrading treatments while in prison. The Oslo District Court sentences Norway to financial compensation for violating art. 3 ECHR*, in *Giurisprudenza Penale Web*, 2016, 4.

[170] See *Breivik v. Ministry of Justice and Public Security*, No. 15-107496TVI- OTIR/02 (D. Oslo Apr. 20, 2016) (Sekulic, J.), Certified Translation of Judgment at 2 (Nor.) [hereinafter Breivik Translation] (on file with the Criminal Justice Law Review).

adequate medical care. He also complained that he was being subjected to frequent strip-searches and being woken up in the night, according to the plaintiff these constitute a form of "degrading treatment" (Art. 3 ECHR). With regard to the right to respect for private and family life (Art. 8 ECHR), Breivik argued that he could not establish any personal relation, as the possibilities to make and receive phone calls, letters or visits were very limited.

For its part, the government claimed that the high-security regime (SHS) to which the perpetrator had been subjected did not constitute a violation of human rights. Referring to the interpretation given by the European Court of Human Rights of the terms "degrading" and "inhuman", it stated that the required minimum level of severity had not been reached for asserting a violation of the Convention[171]. The breach should be established taking into account various circumstances not only the isolation itself, such as «duration, physical and mental impact on the inmate, physical prison conditions, gender, age, state of health and compensating measures»[172]. In addition, Breivik himself had cut off contact with his family and refused visits from Red Cross volunteers. Security measures taken such as handcuffs or body-searches were considered necessary by the Norwegian Correctional Service. Lastly, in order to prevent disorder and crime, Art. 8 para 2 of the Convention entails the possibility of control the correspondence and other communications[173]. According to Norwegian law, correspondence can be read, without any preconditions being specified, and without any involvement of the judicial authorities (Sec. 6.11 RES); the prisoner's telephone calls are fully heard and are authorised by the director of the institution (Sec. 6.12 RES).

However, the Oslo District Court stated that the prohibition in Article 3 of the Convention does not allow any exceptions and is a fundamental value in democratic society. In order to a sanction to constitute inhuman treatment, it must be verified whether after an overall evaluation of the circumstances to which the prisoner is

[171] See Chapter I para 2.3.
[172] *Breivik v. Ministry of Justice and Public Security,* cit., p. 10.
[173] Art 8 para 2 ECHR 2, "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

subjected, does not respect human dignity. The Court had to decide in the present case, whether the isolation of 4 years and 9 months to which Breivik had been subjected, constituted a violation of Art 3 of the Convention. It referred to what the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) said: "Solitary confinement can have an extremely damaging effect on mental and social health […] and should only be imposed in exceptional circumstances, as a last resort and for the shortest possible time"[174].

After reviewing the cases in which the European Court had found that isolation together with other circumstances constituted inhuman and degrading treatment[175], the judges go on to examine the Breivik's situation. The Court questioned the need to extend the state of isolation for such a long time, underlining that no other stay has lasted this long since the end of World War II[176]. It has noted that, contrary to the CPT's recommendations, the state of isolation had not been the subject of a separate assessment but had been implicitly applied following assignment under the high security regime (SHS wing)[177]. Furthermore, according to the Court, the measures put in place to offset the harmful effects of the isolation on the plaintiff were not considered sufficient[178]. Such as the fact that any kind of communication with visitors was done with a glass wall in between, despite the psychiatrist' opinion was to remove such glass wall after having examined his behaviour which «has been fairly exemplary»[179]. The removal of the glass wall would have constituted an appropriate antidote to the harmful effects that the

[174] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Standards* (2015) p. 29 and 37.
[175] According to the Strasbourg Court, solitary confinement does not *per se* constitute an inhuman treatment, unless the manner and method of the execution of the measure subject the person to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention (*Van Der Ven v. The Netherlands; Sanchez v. France; Enea v. Italy; Onofriou v. Cyprus*). See Chapter I para 2.6.1.
[176] *Breivik v. Ministry of Justice and Public Security,* cit., p. 31.
[177] "It cannot be considered sufficient that an evaluation of prison conditions is implicit in the assessment of whether a basis still existed for detention in maximum security wing" (*Parliamentary Ombudsman's letter* to the Correctional Service Directorate 12 June 2014).
[178] The prison administration should take the necessary measures so as not to weaken the situation of the isolated person, as can be seen from its constant jurisprudence: ECtHR, *Romaniuk v. Poland*, 17 Jan. 2016, para 41; ECtHR, *Radev v. Bulgaria*, 17 Nov. 2015, para 48.
[179] The psychiatrist Rosenquist in a report of 18 Dec. 2015.

prolonged state of isolation was beginning to have on the applicant's psychic stability[180].

According to the Court, although Breivik was a dangerous subject[181], the regime of solitary confinement constituted an inhuman treatment taking into account, among other factors, its duration, the lack of assessment of the necessity for its extension and the lack of possibility of administrative appeal. The remedy offered by Norwegian law is that of a hierarchical appeal to the higher-ranking prison administration body than the one which ordered the measure and in Breivik's case the central body (Krminalsorgsdirektoratet) has always rejected complaints about the extension of his detention and his continued isolation, without providing reasons. The proximity of the second-degree body with the one that made the decision complained of is considered to be a symptom of lack of impartiality[182]. The procedural safeguards which, according to the Strasburg's Court case law[183], must comply with when prison authorities subject the prisoner to solitary confinement as in Breivik's case have not been respected[184].

With regard to the continuous strip-searches every time the plaintiff went into the exercise yard even if it was under camera surveillance and a prison officer, the Court stated that these were not necessary measures given the restrictions to which he was already subjected. The humiliating conditions of the inspections he was subjected to, constituted a degrading treatment for the Court[185]. As a consequence, it declared that Art. 3 of ECHR has been violated in relation to Breivik's conditions of detention[186].

---

[180] *Breivik v. Ministry of Justice and Public Security,* cit., p. 39.
[181] It should be remembered that precisely taking into account the dangerousness of Breivik, it was considered risky to order his transfer to Oslo, so the trial took place in the gymnasium of Telemark prison, where he is being held.
[182] See DELLA CASA, *La detenzione speciale norvegese "al setaccio" dell'art 3 CEDU. La corte di Oslo apre alle doglianze del condannato Breivik*, in *Riv. It. Dir. Proc. Pen.,* 3/2016, p. 1539-1541.
[183] ECtHR, *Babar Ahamad v. The United Kingdom*, para 212: "It is essential that a prisoner should be able to have an independent judicial authority review the merits of and reasons for a prolonged measure of solitary confinement"
[184] DELLA CASA, *La detenzione speciale norvegese,* cit., p. 1546-1547.
[185] The modalities of the strip-searches are relevant with respect to the violation of art. 3 ECHR: in order to prove that he has no hidden objects in the anal cavity Breivik is forced to do push-ups in front of the controller who observes him, and female personnel also participate in the full strip-searches.
[186] *Breivik v. Ministry of Justice and Public Security,* cit., p. 35.

Whereas limitations on correspondence and telephone contacts did not constitute a breach of Art. 8 of ECHR, as far as the State's interest in preventing contact with the right-wing extremist prevails[187].

The Court's verdict generated a lively debate in Norway. For some, the duration of the isolation was significant, but much shorter than the duration required by the Strasburg Court for a breach to occur. As well as the degree of isolation is severe, but not worse than the European Court of Human Rights has previously accepted[188]. In addition to those who welcomed it with surprise, there were those who were proud of it, because «demonstrated that the Norwegian legal system is capable of protecting the human rights of everyone, regardless of what they have done»[189]. The Court's decision, as well as the recognition of the harmful psychological effects of solitary confinement, is significant in that «it respects the inherent dignity that Breivik possesses as a member of the human family, despite the atrocity of his crimes and his disregard for the humanity of his victims»[190]. The judges «depersonalized» Breivik. In front of them was not the "monster", but an individual who, whatever his past, complained about an inhuman condition of his present[191]. In Oslo the validity of the universal principle of human dignity was thus reaffirmed, in accordance with the absolute nature of the protection guaranteed by Article 3 of ECHR[192].

4.2. Breivik before the ECtHR claims violation of the Art. 3 of ECHR

After the District Court's ruling in favour of Breivik both the Court of appeal[193] and the Norwegian Supreme Court[194] overturned the previous verdict and found no violation of ECHR. According to the judges, there were no clear indications that he has suffered isolation damage during imprisonment. Moreover,

[187] Ibidem, p. 39.
[188] Of this view is LARSEN, *The inhuman treatment of a terrorist: Refections on the Norwegian Breivik case,* in *Riv. AIC,* n. 2/2016, p.7.
[189] Ibidem.
[190] ROVNER, *Everything is at stake if Norway is sentenced,* cit., p. 91.
[191] DE CATALDO, *Breivik: se l'assassino diventa una vittima*, in *La Repubblica*, 21 aprile 2016, p. 31.
[192] FEARN, *Upholding a monster's rights is unpalatable, but necessary,* in *The independent* (on line), 22 Apr. 2016, p. 36.
[193] Court of Appeal, *The State v. Breivik*, 16-111749ASD-BORG/02, 1 March 2017.
[194] Supreme Court of Norway, 8 June 2017.

the risk of violence both from and against Breivik made isolation necessary. The lack of contact with other inmates had been compensated for by other measures and its conditions were in fact better than those of other Norwegian inmates. The restrictive measures adopted, in the Court's view, «appear to have been necessary» and had not exceeded the threshold of gravity such as to constitute an infringement of Article 3 of the ECHR[195].

Following the judgment of the Supreme Court, Breivik raised an application to the European Court of Human Rights[196], complaining that his detention conditions, in particular his prolonged solitary confinement, constituted a violation of Articles 3 and 8 of the Convention[197]. It must be noted upfront that the use of solitary confinement does not itself constitute a violation of Article 3: "the removal from association with other prisoners for security, disciplinary or protective reasons does not in itself amount to inhuman treatment or degrading punishment"[198].

The Strasburg Court firstly reaffirmed that in order to ascertain whether a sanction is covered by the ban, it is necessary to reach a minimum level of severity[199]. «The assessment of this minimum depends on all the circumstances of the case»[200]. In the Court's opinion the solitary confinement complained of by the applicant, despite the fact that it is a form of "imprisonment within the prison", which should be adopted in exceptional circumstances[201], cannot be considered "complete isolation"[202]. Indeed, Breivik was allowed to attend university courses, watch TV, read newspapers, write letters and receive visits or phone calls even if with the necessary security measures.

In addition, the Court after examining the compensatory measures implemented by the Norwegian Correctional Service, came to the conclusion that there was a fair balance between those measures and the "relative" degree of

[195] Court of Appeal, cit. p. 49-51.
[196] ECtHR, *Hansen v. Norway*, Sec. V, no. 48852/17, 21 June 2018.
[197] See ROCCATAGLIATA, *Anders Breivik did not suffer from inhuman or degrading treatment while in prison, rules the ECtHR*, in *Giurisprudenza Penale Web*, 2018, 6.
[198] *Treholt v. Norway*, EComHR 9 July 1991, no. 1410/89; ECtHR, *Öcalan v. Turkey,* Grands Chamber, no. 46221/99, para 191.
[199] Among the latest: ECtHR *Bamhouhammad v. Belgium*, 17 Nov 2015, para 115; ECtHR, *Rhode v. Denmark*, 21 Jul. 2005, para 96.
[200] ECtHR, *Hansen v. Norway*, para 145.
[201] European Prison Rules adopted by the Committee of Ministers on 11 Jan. 2006, para 53.1.
[202] ECtHR, *Hansen v. Norway*, para 149.

isolation to which the applicant was subjected to. Furthermore, the health of the prisoner has been constantly monitored by the prisons' health services and he didn't seem to suffer any damage due to his solitary confinement[203]. The Court has repeatedly stressed that the existence of a legitimate interest by isolating a person is a necessary element when justifying use of isolation. In *Breivik* case among legitimate interests, besides the danger that the detained person poses, it considers the interest in preventing the detainee from establishing criminal contacts, as well as other security interests, to be relevant.

Conclusively the ECtHR found no grounds for reaching a different conclusion to that of the national courts, the "relative" isolation to which the applicant was subjected did not constitute treatment or punishment above the threshold of what is "inhuman or degrading" and hence contrary to Article 3.

With regard to the right to respect for private life and the right to correspondence, which are guaranteed by Article 8 of the Convention, no infringement has been detected since there has been a strong social interest in hindering the applicant from sending letters containing appeals for violence that could have helped to establish links with extremist associations[204].

The Court therefore found Breivik's application ill-founded and therefore unanimously declared it inadmissible[205]. Although the verdict was not in Breivik's favour, it helped to increase attention on the problematic use of solitary confinement in Norwegian prisons[206].

4.3. *Breivik* and *Viola* before the ECtHR: a comparison

As was previously set out in Chapter I, the violation of Article 3 of the European Convention on Human Rights was invoked also in the case of *Viola v.*

[203] Ibidem, para 151-152
[204] Ibidem, para 157-158.
[205] Ibidem, para 160.
[206] As it can be read in the *Report* to the Norwegian Government on the visit to Norway carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 28 May to 5 June 2018, p. 39. "It is matter of serious concern that in Block A-East at Bergen Prison, a number of sentenced prisoners, who were not subjected to any formal restrictions and who, according to the management, did not pose a security risk – were nevertheless locked up in their cells for 22 to 23 hours per day (with only one hour of outdoor exercise). They were not offered any education, work or other purposeful activities, but merely had four to nine hours per week of association with fellow inmates. A few prisoners had been held for several years *de facto* in a solitary-confinement- type regime which was neither a disciplinary nor a security measure and devoid of a legal basis".

Italy (No. 2), which has led to a condemnation of Italy. Although it was not the same issue raised above by Breivik, it is possible to get useful insights from the two rulings in order to compare two systems as different as the Italian and the Norwegian one.

Article 3 of ECHR, which imposes an absolute prohibition of inhuman or degrading treatment or punishment, is invoked by the applicants for two different institutions: on one hand, Viola complained about the impossibility of access to conditional release, undergoing a *de facto* perpetual penalty, on the other, Breivik, declared that the long solitary confinement to which he was subjected to, was contrary to the purpose of the Convention. As pointed out above, Article 3 of the ECHR is brief in its wording. It does not mention any type of ill-treatment in particular. Consequently, the Court has been played a central role in determining which type of treatment falls within the scope of Article 3 and the threshold that such treatment must exceed in order to constitute ill-treatment contrary to Article 3[207].

According to the standard case law, legitimate punishment involves an inevitable element of suffering[208], so in order to be qualified as inhuman punishment (or treatment) the suffering must go beyond a certain threshold. Both life imprisonment and isolation do not itself constitute a breach of Article 3[209]. Usually such sanctions are imposed on the basis of a legitimate grounds as long as the conditions of detention are not contrary to human dignity. In order to establish the infringement, therefore, it is necessary to make an overall assessment of the circumstances of the case. The Court considers whether they are justified on legitimate penological grounds and if there is a possibility of review.

Italy's conviction was due to the fact that it was impossible for the applicant to prove that there were no longer any legitimate grounds for maintaining him in detention and that such maintenance was therefore contrary to Article 3 of the Convention. The Italian legislation has made the reintegration process and any progress made after conviction irrelevant, so Viola was unable to benefit from any

[207] See Chapter I para 2.6.
[208] ECtHR, *Ramirez Sanchez v. France*, no. 59450/00, para 115-119.
[209] VAN DIJK, VAN HOOF, VAN RIJN, ZWAAK, *Theory and Practice of the European Convention on Human Rights,* 5 ed., United Kingdom, 2018, p. 398 and 415.

prison measures or benefits aimed at facilitating the prisoner's re-socialisation purpose. The condemned person was subjected to an absolute presumption of dangerousness because he had not cooperated with justice, which deprived him of any possibility of release[210]. On the contrary, the Strasbourg judges have not condemned Norway because Breivik was not subjected to complete (absolute) isolation rather relative, because he had access to a series of compensatory measures that balanced the condition of isolation to which he was subjected to.

The cases before the Court are different, but they are based on the fundamental principle of respect for human dignity «that is the birth right of every person»[211], recognised by Article 3 of the Convention. Inasmuch as in the Italian case the principle has been affirmed in a positive sense (violation of Article 3 ECHR) since the Italian legislation does not give the possibility to take into account the peculiarities of the individual case, i.e. Viola could not prove that he had broken the ties with the criminal association, except through collaboration with the judicial authorities. While in the Norwegian case, the principle was invoked in a negative sense (non-violation of Article 3 ECHR) taking into account how the isolation in the specific case was implemented.

Viola was the head of a *mafia* criminal organization and Breivik was guilty of a brutal massacre. These two cases show that the crime committed is irrelevant when assessed against the principle of respect for human dignity. Today's democratic societies gravitate around this principle. While punishment inevitably limits the human rights of those subjected to it, it cannot deny their fundamental dignity[212]. This reflects progress in human rights arguments about how detainees should be treated, which goes beyond the negative right not to be subject to unacceptable punishment, to the positive recognition that detainees have a social right to public assistance and care[213].

[210] *Viola v. Italy (no. 2),* ECtHR Sec I, n. 77633/16, 13 June 2019, para 125-127.
[211] ROVNER, *Everything is at stake if Norway is sentenced,* cit., p. 93.
[212] VAN ZYL SMIT, APPLETON, *Life imprisonment,* cit., p. 15-16.
[213] Ibidem p. 298.

FINAL CONSIDERATIONS

In the light of the analysis conducted in this work, it seems crucial to rethink of the use of life imprisonment as a criminal sanction, in relation to human rights standards. «An endless punishment is not a human condemnation: it is torture»[1].

In particular, life imprisonment without parole (LWOP) does not seem compatible with the protection of human dignity, which represents the fundamental value of the legal system and is a source of legitimacy for all types of authority. Taking dignity as the supreme value means that it could not be reduced by balancing it with other interests, since it is itself the balance, the criterion for measuring all principles and all rights[2]. Human dignity is embodied in the right to "respect", that is, the right to recognition and equal consideration of all persons, even if they are imprisoned. Dignity and person coincide, thus suppressing the dignity of a subject means in some way diminishing his or her quality as a human person. This is not permitted for any reason. The ruling of the First Chamber of the ECtHR, *Viola v. Italy,* of 13 June 2019, speaks of dignity, clarifying that "it is at the heart of the system established by the Convention and prevents the deprivation of a person's freedom by coercion without at the same time working to reintegrate him or her and to give him or her a chance to recover this freedom one day"[3].

In its development, the case law of the Strasbourg Court has clearly evolved, in the sense of configuring life imprisonment as an inhuman treatment, within the meaning of Article 3 of the Convention. When this, over time, becomes unjustified in relation to the re-educational purpose of the sentence and only the punitive and preventive purposes of the sentence are fulfilled[4]. As has been pointed out in Chapter I, even in the absence of an express indication of the purpose of the sentence in the wording of the Convention, the ECtHR has identified the aims of the punishment, in general and special prevention, i.e. the protection of public order

[1] MUSUMECI, *Papa Francesco e l'ergastolo: 'Una condanna senza future è una tortura',* in *www.agoravox*.it, 19 Jen. 2018.
[2] In this sense SILVESTRI, *La dignità umana dentro le mura del carcere* (Intervento del Presidente Silvestri al Convegno "Il senso della pena. Ad un anno dalla sentenza Torregiani della CEDU" Roma, Carcere di Rebibbia, 28 maggio 2014), in Riv. *AIC*, 2/2014.
[3] BRUCALE, *Spes, ultima dea*, in *Per sempre dietro le sbarre*?, BRUNELLI, PUGIOTTO, VERONESI (a cura di), in *Forum di quaderni costituzionali rassegna*, n. 10/2019, p. 51.
[4] ZAGREBELSKY, *La pena detentiva "fino alla fine" e la convenzione europea dei diritti umani e delle libertà fondamentali*, in *Per sempre dietro le sbarre*?, cit.,, p. 17.

and the social reintegration of the convicted person. These are aims which legitimise the imposition of the criminal sanction, but without one prevailing to the detriment of the others. The Court noted that, in both European and international law, the possibility of being reintegrated into society must be recognised, including for life sentenced persons. In the light of the emerging European orientation towards the right to social rehabilitation, LWOP sentences that do not allow for the prospect of rehabilitation, because they make impossible for the convicted person to ever be released, should be removed from the legal systems[5]. It is therefore necessary for the law to provide for a review of the penological grounds of the sentence.

Initially, the compatibility of life imprisonment with the principles of the Convention was recognised if the only prospect of release was a presidential pardon[6]. Subsequently, the Court changed its orientation, believing that pardon was of a purely humanitarian and unpredictable nature. It therefore required States to set a minimum period of time after which the life sentenced person should be considered for release[7]. In this respect, the European Court of Human Rights, following the International Criminal Court and other international indications, has found the maximum minimum period of twenty-five years to be appropriate.

In the interpretative framework drawn up by the Strasburg Court, the rules on perpetual life imprisonment (art. 4-*bis* o.p.) in the Italian legal system violate Article 3 of the Convention, since they exclude the possibility to access to prison benefits and in particular to parole, making the penalty *de facto* irreducible, unless the condemned person offers useful cooperation with justice. This kind of perpetual punishment does not exist in any other country in the world.

Among the criticisms addressed to European judges, following the *Viola* ruling, which condemned Italy, there was the failure to take sufficient account of the peculiarity of the *mafia*, which is an entirely «Italian phenomenon, certainly not Norwegian»[8]. A verdict that has been considered "dangerous" by the most important experts in the fight against the mafia-type organization.

---

[5] VAN ZYL SMIT, APPLETON, *Life imprisonment: A Global Human Rights Analysis*, Harvard University Press, 2019, p. 300.
[6] *Kafkaris v. Cyprus*, cit., § 103;
[7] *Vinter v. The United Kingdom*, cit., §119.
[8] GALLIANI, *Ponti, non muri. In attesa di Strasburgo, qualche ulteriore riflessione sull'ergastolo ostativo,* in *Riv. It. Dir. Proc. Pen.,* 3/2018, p. 1156.

Actually, it should be noted that perpetual life imprisonment (*ergastolo ostativo*) does not only concern the mafia-type association but is provided for in a wide range of crime hypotheses, including non-organized crime (e.g crimes against the Public Administration introduced by Law no. 3/2019). Moreover, the *mafia* is now a global phenomenon and there does not seem to be any similar legislation of the other States, following the Italian model. A first «breach»[9] in the Italian legislative automatism was opened thanks to the constitutional judgment no. 253/2019, which put an end to the absolute equivalence between cooperation with justice and the breaking of links with organised crime.

In favour of maintaining such a punishment, there is the idea that a perpetual penalty, of an amount equal to the seriousness of the offence, meets the need for public safety[10]. In the present historical context, the tendency to use exemplary punishment as a deterrent to the commission of particularly serious crimes persists[11]. The key words in the political debate are ensuring the safety of citizens through the certainty of punishment. The latter formula is being exploited, used not in the sense of bringing offenders to justice, but to justify the need for a sentence that cannot be changed *in itinere*. Certainty of punishment in this sense means to disregard any change over time in the personality of the convicted person, it means the ban on any incentive to encourage the participation of the convicted person in re-education paths[12]. In the opposite direction to that of the political debate, both the European Court of Human Rights and the Italian Constitutional Court have affirmed the principle of "progressive treatment and flexibility of the penalty" as the implementation of the re-educational purpose of the punishment. Indeed, the legislator to provide for institutions that encourage the sentenced person to undertake a rehabilitation process and allow the judge to verify the progress made by the sentenced person.

---

[9] MENGHINI, *La Consulta apre una breccia nell'art. 4 bis o.p. Nota a Corte cost n. 253/2019,* in *osservatorio costituzionale AIC*, 2/2020.

[10] ERRANTE, *Giustizia: intervista al Pm Franco Roberti per i reati piu gravi l'ergastolo deve rimanere*, *II Messagero*, 25 October 2014; and MENAFRA, *Giustizia: in Italia ergastoli in crescita, ma uno su tre esce prima, II Messagero*, 25 October 2014.

[11] See RISICATO, *La pena perpetua tra crisi della finalità rieducativa e tradimento del senso di umanità*, in *Riv. Dir ita e proc. pen*., 3/2015, p. 1250.

[12] DOLCINI, *La pena detentiva perpetua, nell'ordinamento italiano. Appunti e riflessioni*., in *Dir. Pen. Cont. Riv. Trim.*, 3/2018, p. 43.

Rights to opportunities for resocialization and realistic prospects of release are powerful factors in the contemporary evolution of life imprisonment and should shape thinking about its future modifications[13].

Once it has been established that life imprisonment without the possibility of parole (LWOP) contravenes respect for human dignity, and therefore Article 3 of the ECHR, the simplest solution would be to prevent the imposition of life imprisonment of any kind. And that was the choice that Norway made.

The abolition of life imprisonment and the setting of a maximum sentence for even the most serious crimes was the Norwegian solution adopted since 1981. The crime rate is one of the lowest in the world[14], and while it is true that there is no *mafia* presence, there have been events that have taken the country to the top of the world news. The massacre carried out by Breivik was one of the most heinous terrorist attacks in modern Europe. Despite the seriousness of the crime committed, the "penal welfarism" has remained faithful to its democratic principles and has not yielded to the demands of retributive justice[15]. In the light of the study carried out on the Scandinavian penal system, it therefore appears that the deterrent effect of life imprisonment is no greater than that of a long fixed-term sentences.

However, it should be noted that Norway retains the second-track, post-sentence indefinite detention as a means of ensuring that persons convicted of serious offenses who remain dangerous can be incapacitated by continuing to detain them, potentially for the rest of their lives. These individuals are guaranteed access to the best possible treatment while in prison and constant verification of their suitability for release into the community.

Such a system would also be desirable in the other States that are parties to the Convention, which, like Italy, continue to maintain a life sentence in their penal system, having a potentially detrimental and destructive impact on the individuals who serve it. It should be set a minimum term of imprisonment, and the life-

[13] VAN ZYL SMIT, APPLETON, *Life imprisonment,* cit., p. 314.

[14] A UNDP (United nations development programme) study showed that the number of people who were released from prison and reoffended within two years was less than 20%. Furthermore, less than 30 people were victims of "intentional homicides" in Norway in 2017, which amounts to 0.5 murders per 100.000 population.

[15] BRØTHER, HANSEN, *How Norway Remained True to Its Democratic Values in the Face of Evil,* in *Journal of Parliamentary and Political Law,* March 2013.

sentenced prisoners should only be detained beyond the minimum where there is clear evidence that they «continue to pose a vivid danger to society»[16].

It is therefore clear that, also in the light of the latest developments in European jurisprudence, it is desirable a cultural conversion: it is necessary to rethink the concept of punishment so that it does not put an end to the multi-dimensioned and complex life dynamics of the individual, bearing in mind that «life imprisonment is not a solution to problems, but a problem to be solved»[17].

[16] VAN ZYL SMIT, APPLETON, *Life imprisonment,* cit., p. 316.

[17] These are the words used by the Pope, in a letter sent to prisoners in 2017. In addition, the Vatican has taken a clear position on the issue, abolishing in 2014 the use of life imprisonment as a permissible punishment in the Vatican. See ALMENARA, VAN ZYL SMIT, *Human Dignity and Life Imprisonment: The Pope Enters the Debate,* in *Human Rights Law Review,* 2015, 15, 369-376.

BIBLIOGRAPHY

ADDO M.K., GRIEF N., *Does article 3 of the European Convention on Human Rights enshrine absolute rights*?, in *European Law Review*, 1998, vol. 9, 510.

ALBERTA V., *L'introduzione dei reati contro la pubblica amministrazione nell'art. 4 bis, co. 1, OP: questioni di diritto intertemporale,* in *Giurisprudenza penale Web*, 2/2019.

ALBUQUERQUE P., *Life Imprisonment and the European Right to Hope*, in *Riv. AIC*, 2015, n 2, 1.

ALBUQUERQUE P., GALLIANI D., *I diritti umani in una prospettiva europea. Opinioni concorrenti e dissenzienti (2011-2015),* Torino, 2016.

ALLAIN J., *The Jus Cogens Nature of Non-Refoulment,* in *International Journal of Refugee Law*, 2001, n. 4, 533.

ALMENARA, VAN ZYL SMIT D., *Human Dignity and Life Imprisonment: The Pope Enters the Debate*, in *Human Rights Law Review*, vol. 15, no. 2, 2015, 369.

AMATO S., PASSIONE M., *Il reato di tortura*, in *www.penalecontemporaneo.it.*, 15 Jan. 2019.

ANASTASIA S., CORLEONE F., *Contro l'ergastolo. Il carcere a vita, la rieducazione e la dignità della persona,* Roma, 2009.

APPLETON C., *Life imprisonment and Human Rights,* Bloomsbury, 2016.

APPLETON C., GRØVER B., *The pros and cons of life without parole*, in *British Journal of criminology*, Vol. 47, Issue 4, 2007, 597.

ARAI–YOKOI Y., *Grading scale of degradation identifying the threshold of degrading treatment or punishment under article 3 ECHR*, in *Netherlands Quarterly of human rights*, 2003, Vol. 21/3, 385.

ASCHIERI A., voce *Ergastolo*, in *"Il digesto italiano*", volume X, Torino 1895-1898.

BALSAMO A., TRIZZINO L., *La Corte europea, l'ergastolo e il diritto alla speranza,* in *Cass pen*, n 12/2013, 4672.

BARBERO F., *La (seconda) audace sentenza in tema di concessione di benefici penitenziari: dalla Consulta un forte richiamo alla finalità rieducativa della pena,* in *Giurisprudenza Penale*, 11/2019.

BARTOLE S., CONFORTI B., RAIMONDI G., *Commentario alla convezione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, Cedam, 2012.

BARTOLE S., DE SENA, ZAGREBELSKY, *Commentario breve alla convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali*, Padova, 2012.

BECCARIA C. (1738-1794), CALAMANDREI P., *Dei delitti e delle pene*, Firenze, 1965.

BERGER R., *Kriminalomsorgen: A Look at the World's Most Humane Prison System in Norway,* 10 Dec 2016.

BERNARDI S., *Per la Consulta la presunzione di pericolosità dei condannati per reati ostativi che non collaborano con la giustizia è legittima solo se relativa: cade la preclusione assoluta all'accesso ai permessi premio ex art. 4-bis comma 1 ord. pen*., in *Sistema Penale,* 28 gennaio 2020.

BERNARDONI P., *I molteplici volti della compassione: la Grande Camera della Corte di Strasburgo accetta le spiegazioni dei giudici inglesi in materia di ergastolo senza possibilità di liberazione anticipata*, in *www.penalecontemporaneo.it.*, 11 aprile 2017.

BERNASCONI, *La riforma della legge sui collaboratori di giustizia: profili generali e intersezione con le tematiche del "giusto processo",* in *Legislazione penale,* 2002, 75.

BERTNES A. P.*, Guide to legal research in Norway,* in *Global law & Justice*, 2007.

BENKO J., *The Radical Humaneness of Norway's Halden Prison*, in *New York Times magazine*, 2015.

BENTHAM J., *Theorie des peines*, in *Oeuvres*, (a cura di) DUMONT, Bruxelles 1841, Libro II, 73.

BETTIOL G., *Sulle massime pene: morte ed ergastolo*, in *Scritti giuridici*, II, Padova, 1966, 888.

BLASCO A., *La nuova fisionomia dell'ergastolo ostativo: un dialogo tra le corti. Fine pena mai, in Magistratura indipendente*, 11 marzo 2020.

BLATT D., *Recognizing Rape as a Method of Torture,* in *New York University Review of Law and Social Change,* Vol XIX, 1992, 821.

BOCCHI M., *I casi Hutchinson e Paradiso Campanelli: la Grande camera riscrive il diritto della Convenzione europea,* in *Quaderni costituzionali*, n. 2/2017, 442.

BONDESON, ULLA, *Crime and Justice in Scandinavia*, Forlaget Thomson, Copenhagen, 2005.

BOUCHARD M., *Breve storia della giustizia riparativa,* in Questione Giustizia, n. 2/2015, 66.

BOULESBAA A., *The U.N. Convention on torture and the prospects for enforcement*, The Hague-Boston-London, 1999.

BOULOS S., *Towards reconstructing the meaning of inhuman treatment or punishment: a human capability approach*, in *The Age of Human Rights Journal*, 12, 2019, 35.

BRØTHER E., ANKE HANSEN L.K., *How Norway Remained True to its Democratic Values in the face of evil,* in *Journal of Parliamentary and Political Law*, March 2013.

BRUNELLI G., PUGIOTTO A., VERONESI P., *Per sempre dietro le sbarre? L'ergastolo ostativo nel dialogo tra le Corti,* in *Forum di quaderni costituzionali rassegna,* n. 10/2019, Ferrara, 2019.

BRUZELIUS, *The Norwegian legal system, the work of the Appeals Committee and the role of precedent in Norwegian law*, in *Norlam* (The norwegian mission of rule of law advisers to Moldova).

BYGRAVE L., *World Factbook of Criminal Justice Systems: Norway*, in *NCJRS*, State University of New York at Albany School of Criminal Justice United States of America*,* 1997.

CANEPA M., MERLO S., *Manuale di diritto penitenziario*, Milano, 2010.

CANTARELLA E., *I supplizi capitali. Origini e funzioni delle pene di morte in Grecia e a Roma*, Milano, 2005.

CARNELUTTI F., *La pena dell'ergastolo è costituzionale?,* in *Riv. di dir. proc*., XI, pt. I (1956), 1.

CASSIBBA F., COLELLA A., *Art. 3 - Proibizione della tortura*, in UBERTIS G., VIGANÒ F., (a cura di), *Corte di Strasburgo e giustizia penale*, Torino, 2016, 71.

CECCHINI F., *La tutela del diritto alla salute in carcere nella giurisprudenza della corte europea dei diritti dell'uomo,* in *www.penalecontemporaneo.it*, 2017.

CESARIS, *Sulla valutazione del sicuro ravvedimento ai fini della liberazione condizionale,* in *Riv. It. Dir. Proc. Pen*., 1979, 291.

CESARIS L., *Un ulteriore passo verso l'eliminazione dei divieti aprioristici di concessione di benefici penitenziari,* in *Giur. Cost*., 4/2010, 2250.

CIGOLINI F., *Sull'abolizione della pena dell'ergastolo*, in *riv. Pen*., LXXXIII, 3a serie (1958), 301.

COLEMAN N.*, Non-Refoulement Revised Renewed Review of the Status of the principle of Non-Refoulment as Customary International Law,* in *Eur. Jour. Migr. Law*, 2003, n. 1, 23.

COLELLA A., *C'è un giudice a Strasburgo. In margine alle sentenze sui fatti della Diaz e di Bolzaneto: l'inadeguatezza del quadro normativo italiano in tema di repressione penale della tortura,* in *Riv. It. Dir. Proc. Pen.,* 2009, 1801.

COLELLA A., *La giurisprudenza di Strasburgo 2008-2010: il divieto di tortura e trattamenti inumani o degradanti (art. 3 CEDU),* in *Dir. Pen. Cont. Riv. Trim*., 1/2011, 221.

COLELLA A*., La giurisprudenza della Corte di Strasburgo 2011: il divieto di trattamenti inumani e degradanti*, in *Dir. Pen. Cont. Riv. Trim.*, 4/2012, 213.

COLELLA A., *La repressione penale della tortura: riflessioni de iure condendo*, in *www.penalecontemporaneo.it,* 22 July 2014.

COLELLA A., *Il nuovo delitto di torura,* in *www.penalecontemporaneo.it,* 26 aprile 2018, 1.

CORLEONE, PUGIOTTO, *Volti e maschere della pena*, Roma, 2013.

CORTESI M.F., FILIPPI L., SPANGHER G., *Manuale di diritto penitenziario,* Milano, 2019.

CUPELLI C, *Il nuovo art. 270 bis c.p.: emergenze di tutela e deficit di determinatezza,* in *Cass. Pen*., 2002, 897 ss.

DALL'ORA A., *L'ergastolo e la Costituzione, nota all'ordinanza della Cassazione*, in *Riv. Ita. di diritto penale*, a. IX (1956), 488.

DANUSSO C., *Patibolo ed ergastolo dall'Italia liberale al fascismo,* in *Dir. Pen. Cont. Riv. Trim*., 4/2017, 51.

DANUSSO C., *Ergastolo e Costituzione: il dibattito del 1956*, in *Historia e ius, rivista di storia giuridica dell'età medievale e moderna,* n. 14/2018, paper 3, 1.

DE CATALDO, *Breivik: se l'assassino diventa una vittima,* in *La Repubblica*, 21 aprile 2016, 31.

DE FREITAS J.T.C., *L'ergastolo e la dignità umana: un caso lampante di disattuazione della costituzione e degli obblighi internazionali assunti dallo Stato italiano,* IN *Juris*, Vol. 25, 2016, 61.

DEFILIPPI C., BOSI D*., Il sistema europeo di tutela del detenuto*, Milano, 2001.

DE GRAAF B., VAN DER HEIDE L., WANMAKER S., WEGGEMANS D., *The Anders Behring Breivik Trial: Performing Justice, Defending Democracy,* in *ICCT Research Paper*, June 2013.

DELLA CASA F., *Quarant'anni dopo la riforma del 1975*, in *Riv. It. Dir. Proc. Pen.,* 3/2015, 1168.

DELLA CASA, *La detenzione speciale norvegese "al setaccio" dell'art 3 CEDU. La corte di Oslo apre alle doglianze del condannato Breivik*, in *Riv. It. Dir. Proc. Pen.*, 3/2016, 1539.

DI CARO F*., Ergastolo "ostativo": la "presunta" legittimità costituzionale del "fine pena mai" tra spinte riformatrici nazionali e sovranazionali*, in *Giurisprudenza Penale Web*, 2017, 5.

DI MARTINO C., *Il difficile connubio tra funzione rieducativa della pena e benefici penitenziari a favore dei "pentiti*", in *Rass. penit, crim.*, 2003, 227.

DOLCINI E., *La "questione penitenziaria", nella prospettiva del penalista: un provvisorio bilancio*, in *Riv. It. Dir. Proc. Pen*., 2015, 1659.

DOLCINI E., *La pena dententiva perpetua nell'ordinamento italiano, appunti e riflessioni,* in *Dir. Pen. Cont. Riv. Trim*., 3/2018, 1.

DOLCINI E., *La riforma penitenziaria Orlando: cautamente, nella giusta direzione*, in Riv. *Dir. Pen. Cont.*, 2/2018.

DOLCINI E., *Dalla Corte Edu una nuova condanna per l'Italia: l'ergastolo ostativo contraddice il principio di umanità della pena*, in *Riv. It. Dir. Proc. Pen*., 2/2019, 926.

DOLCINI E., FASSONE E., GALLIANI D., ALBUQUERQUE P., PUGIOTTO A., *Il diritto alla Speranza: l'ergastolo nel diritto penale costituzionale,* Torino, 2019.

DONNNARUMMA M.R., *La funzione rieducativa della pena e l'ergastolo ostativo*, in *Giurisprudenza Penale Web*, 3/2020.

DÜNKEL D., JESSE J., PRUIN I., DER WENSE M., *European Treatment, Transition Management and Re-Integration of High-Risk Offenders: Results of the*

Final Conference at Rostock-Warnemünde, 3-5 ... transition management of high-risk offenders, Forum Verlag Godesberg, 2016, 129.

ESPOSITO A., *Il diritto penale flessibile: quando I diritti umani incontrano I sistemi penali*, Torino, 2008.

EUSEBI L., *Ergastolano "non collaborante" ai sensi dell'art. 4-bis ord. penit. e benefici penitenziari: l'unica ipotesi di detenzione ininterrotta, immodificabile e senza prospettabilità di una fine,* in *Cass. Pen.*, 2012, fasc. 4.

EUSEBI L.*, Ostativo del fine pena. Ostativo della prevenzione, aporie dell'ergastolo senza speranza per il non collaborante,* in. *Riv. It. Dir. Proc. Pen.*, 4/2017, 1515.

EUSEBI L., *Pena e perdono*, in *Riv. It. Dir. Proc. Pen.,* 3/2019, 1137.

EVANS M., MORGAN R., *Preventing torture: a study of the European convention for the prevention of torture and inhuman or degrading treatment or punishment,* Oxford, Claredon Press, 1998.

FALCINELLI D., *L'umanesimo della pena dell'ergastolo. Ideologia e tecnica del diritto dell'uomo ad una pena proporzionalmente rieducativa*, *in Federalismi.it*, 2013, n. 1.

FALCINELLI D., *Il delitto di tortura, prove di oggettivismo penale,* in *Archivio Penale Web,* 3/2017.

FALCONE G., *Cose di Cosa Nostra*, 1993.

FASSONE E*., Fine pena: ora*, Sellerio, Palermo, 2015.

FASSONE E., *Ergastolo e il diritto alla speranza*, in *Questione giustizia*, 24 Feb. 2020.

FAZEL S., RAMESH T., HAWTON K*., Suicide in prisons: an international study of prevalence and contributory factors*, in *The Lancet Psychiatry*, 4 (12), 2017, 946.

FERRAJOLI L., *Ergastolo e diritti fondamentali.,* in *riv. Antigone*, n 1/2011, 15.

FILIPPI L., *La novella penitenziaria del 2002: la proposta dell'Unione delle Camere Penali e una controriforma che urta con la Costituzione e la Convenzione Europea,* in Riv. *Cass. Pen*., 2003, 30.

FIORELLI P., in Enc. dir., Vol. XV, Giuffrè, 1966.

FIORENTIN F*., Questioni aperte in materie di benefici penitenziari a condannati per i delitti dell'art 4-bis l. n. 345 del 1975*, in *Giurisprudenza di merito*, 2/2012, 504.

FIORENTIN F., *La Consulta dichiara incostituzionale l'art. 4 bis ord. penit. laddove non esclude dal divieto di concessione dei benefici la detenzione domiciliare speciale e ordinaria in favore delle detenute madri,* in *www.penalecontemporaneo.it*, 27 ottobre 2014.

FIORENTIN F., *L'ergastolo ostativo ancora davanti al giudice di Strasburgo*, in *Dir. Pen. Cont. Riv. Trim.*, 3/2018, 5.

FIORENTIN F., *La Corte di Strasburgo conferma: la pena perpetua non riducibile è sempre contraria alla convenzione europea,* in *Riv. Cass. Pen*., n. 8/2019, 3066.

FIORIO C., *Il "doppio binario" penitenziario,* in *Arch. Pen*. n. 1/2018.

FLICK G.M., *Dei diritti e delle paure*, in MOCCIA (a cura di*), I diritti fondamentali della persona alla prova dell'emergenza,* ESI, Napoli 2009, 76.

FLICK G.M., *L'ergastolo ostativo: contraddizioni e acrobazie,* in *Riv.ita di dir e proc. pen.*, 4/2017, 1505.

FLICK G.M., *I diritti dei detenuti nel sistema costituzionale fra speranza e deluzione*, in *riv. AIC*, 1/2018, 1.

GALLIANI D*., Il diritto di sperare. La pena dell'ergastolo dinanzi alla Corte di Strasburgo,* costituzionalismo.it, fascicolo 3, 2013.

GALLIANI D., *The reducible Life Imprisonment standard from a worldwide and European perspective,* in *Global Jurist*, 2016.

GALLIANI D., *Murray c. Paesi Bassi: progressi in materia di pena perpertua*, in *Riv. Quaderni costituzionali,* n. 3/2016, 603.

GALLIANI D., PUGIOTTO A., *Eppure qualcosa si muove: verso il superamento dell'ostatività ai benefici penitenziari,* riv. *AIC*, n. 4/2017, 1.

GALLIANI D., *Ponti, non muri. In attesa di Strasbrurgo, qualche ulteriore riflessione sull'ergastolo ostativo,* in *Riv. It. Dir. Proc. Pen.*, 3/2018, 1156.

GALLIANI D., *Riflettere, insieme, sull'ergastolo ostativo*, in *Riv di studi e ricerche sulla criminalità organizzata*, vol. 5, n. 1/2019, 139.

GALLIANI D, PUGIOTTO A., *L'ergastolo ostativo non supera l'esame a Strasburgo (A proposito della sentenza Viola v. Italia n.2)*, in *osservatorio AIC*, n 4/2019, 202.

GAMMAN T., *Om bruk av isolasjon under varetektsfengsling. Nordisk Tidsskrift for Kriminalvidenskab*, 2001, 42.

GARDINER, *The purposes of criminal punishment*, in *Modern law review*, Vol. 21, March 1958, no. 2.

GARLAND D., *The crisis of Penal Modernism*, The culture of control: crime and social Order in Contemporary society, p. 53-73, University of Chicago Press, (2002).

GARLATI L., *La proposta abolizionista di Beccaria nel dibattito italiano di fine Settecento tra tiepidi entusiasmi e tenaci opposizioni,* in *Un uomo, un libro. Pena di morte e processo penale nel Dei delitti e delle pene di Cesare Beccaria*, a cura di GARLATI E CHIODI, Milano, 2014, XX-XXI.

GIOSTRA G., *Ragioni e obiettivi di una scelta metodologicamente inedita*, in *Riv. It. Dir. Proc. Pen*., 1/2016, 500.

GIOSTRA G., *Che fine hanno fatto gli Stati Generali?,* in *www.penalecontemporaneo.it*., 20 April 2017.

GIOSTRA G., BRONZO P. (a cura di)*, Proposte per l'attuazione della delega penitenziaria*, in *www.penalecontemporaneo.it*, 15 July 2017.

GONELLA G., *Riforme dei codici e nuovi ordinamenti giuridici,* in *Riv. It. Dir. Proc. Pen.*, 1969, 303.

GRAHAM, L*., From Vinter to Hutchinson and Back Again? The Story of Life Imprisonment Cases at the European Court of Human Rights*, *in European Human Rights Law Review*, 2018 (3), 258.

GREVI V., GIOSTRA G., DELLA CASA F., *Ordinamento penitenziario commentato*, Padova, 2019.

GRÖNING L., *Education for foreign inmates in Norwegian prisons: A legal and humanitarian perspective,* in *Bergen Journal of Criminal Law and Criminal Justice*, 2014, 164.

GRÖNING L., ANDERSON., *Rehabilitation in Principle and practice: Perspectives of Inmates and Officers*, in *Bergen Journal of Criminal Law and Criminal Justice*, Vol 4, Issue 2, 2016, 220.

GRÖNING L., HAUKVIK, MELLE, *Criminal Insanity, Psychosis and Impaired Reality Testing in Norwegian Law*, in *Bergen Journal of Criminal Law and Criminal Justice*, Vol. 7, Issue 1, 2019, 27.

HANNUM H., *The universal declaration of human rights in National and International law*, in *Health & Human Rights*, vol. 3, n. 2/1998, 154.

HOIDAL A., *Normality behind the walls: examples from Halden prison,* in *Federal sentencing reporter,* Vol. 31, no 1, Oct. 2018, 58.

JACOBSEN J. E SANDVIK V. H., *"An Outline of the New Norwegian Criminal Code",* 2015, in *Bergen Journal of Criminal Law and Criminal Justice,* Volume 3, Issue 2, 162.

JOHNSEN B., *Exceptional Prison conditions and the quality of prison life: Prison size and prison culture in Norwegian closed prisons*, in *British Journal of Criminology*, 2011, 515.

KRISTOFFERSEN R., *Relapse Study in the Correctional Services of the Nordic Countries: Key Results and Perspectives*, in *Euro Vista*, Vol. 2, No. 3, 2013, 168.

LABUTTA E., *The prisoner as one of us: Norwegian Wisdom for American Penal Practice*, in *Emory International law review*, Vol 31, 2017, 329.

LAGNGFORD M., BERGE B.K., *Norway's Constitution in a Comparative Perspective*, in *Oslo law review*, Vol. 6, 3/2019, 199.

LANGELID T., *The Sharing of Responsibility in the Rehabilitation of Prisoners in Norway The Import-Model in Theory,* in *Journal of Correctional Education* (1974), Vol. 50, No. 2, Restorative Justice Efforts in Correctional Education (June 1999), 52.

LAPPI-SEPPÄLÄ T., *Penal policy in Scandinavia*, in *Crime and Justice*, Vol. 36, No. 1, Crime, punishment and Politics in a comparative perspective (2007), 223.

LAPPI-SEPPÄLÄ T., *Life Imprisonment and Related Institutions in the Nordic Countries,* in *Life imprisonment and Human Rights*, VAN ZYL SMIT, APPLETON C. (a cura di), Hart Pub Ltd, 2016.

LARSEN M., *The inhuman treatment of a terrorist: Refections on the Norwegian Breivik case,* in *riv. AIC,* n. 2/2016.

LEO G., *Illegittima la previsione della custodia "obbligatoria" in carcere per i reati di contesto mafioso (ma non per le condotte di partecipazione o concorso nell'associazione di tipo mafioso)*, in *www.penalecontemporaneo.it.,* 7 aprile 2013.

LETSAS G., *The ECHR as a living instrument: its meaning and legitimacy*, in *Constituting Europe* (a cura di) FOLLESDAL A., PETERS B., ULFSTEIN G., Cambridge university press, 2013, 106.

LETTO-VANAMO P., TAMM D., MORTENSEN G., OLE, *Nordic law in European contex*t, Springer, 2019.

LEWIS M., LYALL, *Norway Mass Killer gets the maximum: 21 Years*, in *The New York Time*s, Aug 2014 https://www.nytimes.com/2012/08/25/world/europe/anders-behring-breivik-murder-trial.html

MANCA V., *Le declinazioni della tutela dei diritti fondamentali dei detenuti nel dialogo tra le Corti: da Viola c. Italia all'attesa della Corte costituzionale,* in *Archivio penale,* n 2/2019, 1.

MANES V., *Il diritto penale no-limits. Garanzie e diritti fondamentali come presidio per la giurisdizione*, in *Questione Giustizia*, 1/2019, 86.

MANES V., *L'estensione dell'art.4-bis o.p. ai delitti contro la p.a: profili di illegittimità costituzionale,* in *Dir. Pen. Cont. Riv. Trim.*, 2/2019, 105.

MANES V., ZAGREBELSKY V., *La convenzione Europea dei diritti dell'uomo nell'ordinamento penale italiano,* Milano, 2011.

MANTOVANI F., *Mafia: la criminalità più pericolosa*, in *Riv. It. Dir. Proc. Pen.*, 2013, 9.

MANVRONICOLA N., *Inhuman and Degrading Punishment, Dignity, and the Limits of Retribution,* in *Modern law review*, Vol. 77, Issue 2, 2014, 293.

MARINUCCI G., DOLCINI E., *Manuale di diritto penale. Parte generale*, ed. VI, Milano, 2017.

MARTINI A., *L'ergastolo ed isolamento continuo: l'art. 72 c.p. fra abrogazione ed incostituzionalità,* in *Cass. Pen*., 2/1982, 217.

MAUCERI E., *Pedagogia e contesto penitenziairio, alcune riflessioni sul significato e il ruolo dell'educazione in prigione*, in Rass. Penit. e crim., 1/2001, 297.

MAZZACUVA N*., Da Zanardelli a Rocco: l'ergastolo e la pena di morte,* Reggio Calabria, 1937.

MENGHINI A., *La Consulta apre una breccia nell'art. 4 bis o.p. Nota a Corte cost n. 253/2019,* in *osservatorio costituzionale AIC*, 2/2020, 307.

MENGOZZI M., *Il meccanismo dell'ostatività alla sbarra. Un primo passo da Roma verso Strasburgo, con qualche inciampo e altra strada da percorrere* (nota a Corte Cost., sent. n. 253 del 2019), in *Osservatorio Cost. AIC*, 2020, fasc. 2 (3 marzo 2020), 354.

MEREU I., *Note sulle origini della pena dell'ergastolo,* in *Dei delitti e delle pene*, 2/1992, 95.

MERON T., *Human rights and Humanitarian Norms as Customary International law,* Oxford, 1989.

MILAND, LUNDEBERG, GLOPPEN, *Penal hybridization: staff-prisoner relationships in a Norwegian drug rehabilitation unit,* in AASEN H.S., GLOPPEN S., MAGNUSSEN A.M., NILSEN E. (a cura di), *Juridification and social citizenships in the welfare state*, 2014, Cheltenham-Northampton, 284.

MOCCIA S., *La perenne emergenza. Tendenze autoritarie nel Sistema penale*, Napoli, 2000.

MORI M.S., ALBERTA V., *Prime osservazioni sulla sentenza Marcello Viola c. Italia (n. 2) in materia di ergastolo ostativo, in Giurisprudenza penale*, 6/2019.

MORO A. (1976), *La funzione della pena*, in ANASTASIA, CORLEONE, (a cura di), *Contro l'ergastolo. Il carcere a vita, la rieducazione e la dignità della persona*, Roma, 2009, 125.

MOSCONI G., *La controriforma carceraria*, in *Dei delitti e delle pene*, 1991, II, 141.

MUSCO E., *La premialità nel diritto penale,* in AA.VV., *La legislazione premiale*, Milano, 1987, p.121.

NELKEN D*., Comparative criminal Justice.* Beyond Ethnocentricism and Relativism, in *European Journal of Criminology*, Vol. 6, 2009, 291.

NICOSIA E., *Convenzione Europea dei diritti dell'uomo e diritto penale*, Giaapichelli, Torino, 2006.

NILS CHRISTIE, *La riparazione dopo le atrocità. È possible?, in Il carcere al tempo della crisi*, FONDAZIONE GIOVANNI MICHELUCCI (a cura di), Firenze, dicembre 2013, 75.

NYLUND A., *Restorative justice and victim-offender mediation in Norway*, in *Academia.edu.*https://www.academia.edu/24358893/Restorative_justice_and_victim-offender_mediation_in_Norway

NORWEGIAN MINISTRY OF JUSTICE AND THE POLICE*, Punishment That Works—Less Crime—A Safe Society: Report to the Storting on the Norwegian Correctional Services* (English Summary), in *Federal Sentencing Reporter*, Vol. 31, No. I, Oct. 2018, 52.

ORANGE, '*Answer hatred with love': how Norway tried to cope with the horror of Anders Breivik*, in *The Guardian*, 15 Apr. 2012.

ORANO G., *Saggio di uno studio sulla pena dell'ergastolo*, in *La Giustizia Penale*, III (1897), 1057-1065.

PACE L., *La "scure della flessibilità" colpisce un'altra ipotesi di automatismo legislativo. La Corte dichiara incostituzionale il divieto di concessione della detenzione domiciliare in favore delle detenute madri di cui all'art. 4 bis dell'ordinamento penitenziario,* in *Giurisprudenza costituzionale,* 2014, 3948.

PACE L., *L'art. 4-bis dell'ordinamento penitenziario tra presunzioni di pericolosità e "governo dell'insicurezza sociale*", in *Costituzionalismo.it*, 2/2015, 1.

PACE L., *Preminente interesse del minore e automatismi preclusive alla luce della sentenza costituzionale n. 76/ 2017*, in *Studium Iuris*, 12/2017.

PALAZZO F., *Fatti e buone intenzioni. A proposito della riforma delle sanzioni penali,* in *www.penalecontemporaneo.it,* 10 febbraio 2014.

PALMER S., *A wrong turning: article 3 echr and proportionality,* in *Cambridge law journal*, vo. 65(2), 2006, 439.

PARODI C., *Ergastolo senza liberazione anticipata, estradizione e art. 3 cedu,* in *www.penalecontemporaneo.it.*, 3 nov. 2014.

PELLISSERO M., *Ospedali psichiatrici giudiziari in proroga e prove maldestre di riforma della disciplina delle misure di sicurezz*a, in *Dir. Pen e proc*., 2014, 918.

PELISSERO M., *Ergastolo e preclusioni: la fragilità di un automatismo dimenticato e la forza espansiva della funzione rieducativa*, in, *Riv. It. Dir. Proc. Pen.,* 2018, 1359.

PERSANO F., *L'adesione dell'Italia al Protocollo opzionale del 18 Dicembre 2002 alla Convenzione delle Nazioni Unite contro la tortura e altri trattamenti o pene crudeli*, *inumane o degradanti,* in *Responsabilità civile e previdenza*, n. 2/2013, 713.

PESSINA E., *Il nuovo codice penale italiano*, Milano, 1890.

PETTIGREW M., *A Vinter retreat in Europe: Returning to the issue of whole life sentences in Strasbourg,* in *New Journal of European Criminal Law*, vol. 8(2), 2017, 128.

PETTIGREW M., *Politics, power and parole in Strasbourg: dissociative judgement and differential treatment at the ECtHR,* in *International Comparative Jurisprudence*, Vol. 4, Issue 1, 2018, 16.

PEYRON, voce *Liberazione condizionale*, in *Enc. Dir*. XXIV, Milano, 1974.

PIERANDREI F., *Corte costituzionale,* in *Enc. del dir*., X, Milano 1962, 883.

PICCIANI A., *La premialità nel sistema penale*, in ARMELLINI E DI GIANDOMENICO (a cura di), *Ripensare la premialità. Le prospettive giuridiche, politiche e filosofiche della problematica,* Torino, 2002, 310.

PISANI M., *Per un nuovo codice penale. Schema di disegno di legge-delega al Governo*, Quaderni n. 9 dell'Indice penale, 1993.

PISANI M., *La pena di morte in Italia*, in *Riv. It. Dir. Proc. Pen*., 1/2015, 1.

PISANI M., *La pena dell'ergastolo*, in *Riv. It. Dir. Proc. Pen*., 2/2016, 575.

PITEA C., *Rape as a Human Rights Violation and a Criminal Offence: The European Court's Judgment in M.C. v. Bulgaria*, in *Journal of International Criminal Justice*, 2005, 447.

PRATT J., *Scandinavian exceptionalism in an era of penal excess*, in *the British Journal of Criminology*, Vol. 48, issue 2, 2008, 119.

PRESUTTI A., *Alternative al carcere e regime delle preclusioni e sistema della pena costituzionale*, in PRESUTTI (a cura di), *Criminalità organizzata e politiche penitenziarie*, Milano, 1994, 83.

PUGIOTTO A., *Una quaestio sulla pena dell'ergastolo*, in *www.penalecontemporaneo.it.*, 5 March 2013, 1.

PUGIOTTO A., *Il volto costituzionale della pena (e i suoi sfregi)*, in *www.penalecontemporaneo.it.*, 10 June 2014, 1.

PUGIOTTO A., *Repressione penale della tortura e costituzione: anatomia di un reato che non c'è*, in *Dir. Pen. Cont. Riv. Trim.*, 2/2014, 150.

PUGIOTTO A., *Tre telegrammi in tema di ergastolo ostativo*, in *Riv. It. Dir. Proc. Pen*., 4/2017, 1519.

PUGIOTTO A., *Una legge "sulla" tortura, non "contro" la tortura (Riflessioni costituzionali suggerite dalla l. n. 110 del 2017)*, in *Quaderni costituzionali*, fasc. 2, 2018.

PUGIOTTO A., *Il blocco di costituzionalità nel sindacato della pena in fase esecutiv*a, in *Giur. Cost*., 2018, 1647.

PUGIOTTO A., *Due decisioni radicali della corte costituzionale in tema di ostatività penitenziaria: le sentenze nn. 253 e 263 del 2019,* in riv. *AIC*, n. 1/2020*,* 501.

PUGIOTTO A. MUSUMECI C., *Gli ergastolani senza scampo. Fenomenologia e criticità costituzionali dell'ergastolo ostativo*, Napoli, 2016.

PULITANÒ D., *Tecniche premiali fra diritto e processo penale,* in *Riv. It. Dir. Proc. Pen*., 1986, 1005.

PULITANÒ D., *Diritti umani e diritto penale,* in *Il lato oscuro dei diritti umani*, MECCARELLI, PALCHETTI, SOTIS (a cura di), Madrid, 2014, 81.

RANALLI D., *L'ergastolo nella giurisprudenza della Corte Europea dei diritti dell'uomo; tra astratto "diritto alla speranza" e concreto accesso alla liberazione condizionale*, in *Rassegna penitenziaria e criminologica*, n 1/2015, 289.

RENUCCI, *Droit européen des droits de l'homme*, Paris, 1999.

REUTERS, *"Diagnosis of insanity would be 'worse than death', Norway killer says*", in *The Globe and Mail* (4 April 2012).

RICCI A., *Riflessioni sull'interesse del con- dannato per delitto ostativo e non collaborante all'accertamento di impossibilità o inesigibilità di utile collaborazione con la giustizia ex art. 4-bis, comma 1-bis, o.p. a seguito della sentenza della Corte costituzionale n. 253 del 2019*, in *Giur. Pen. Web*, 2020, fasc. 1.

RISICATO L., *La pena perpetua tra crisi della finalità rieducativa e tradimento del senso di umanità*, in *Riv. Dir ita e proc. pen*., 3/2015, 1254.

RITTER K., *Anders Behring Breivik trial: I acted out of goodness*, in *The Scotsman*, 17 April 2012.

ROCCATAGLIATA L., *Anders Breivik suffered from inhuman and degrading treatments while in prison. The Oslo District Court sentences Norway to financial compensation for violating art. 3 ECHR*, in *Giurisprudenza Penale Web*, 2016.

ROCCATAGLIATA L., *Anders Breivik did not suffer from inhuman or degrading treatment while in prison, rules the ECtHR*, in *Giurisprudenza Penale Web*, 2018.

ROCCO, *Relazione al Re*, in *Lavori preparatori del codice penale e del codice di procedura penale*, VII, Testo del nuovo codice penale, Roma, 1930, 21.

ROCCO, *Sul ripristino della pena di morte in Italia,* Opere giuridiche, III, Scritti giuridici vari, Roma, 1933.

ROMOLI F., *Il sovraffollamento carcerario in Italia quale violazione del divieto di trattamenti inumani o degradanti. A prima lettura della sentenza-pilota Torreggiani,* in *Archivio penale* 1/2013, 1189.

ROVNER L, *"Everything is at stake if Norway is sentenced. in that case, we have failed": solitary confinement and the "hard" cases in the United States and Norway,* in *UCLA Criminal justice law review*, 2017: 77, 79.

RUGA RIVA C., *Il premio per la collaborazione processuale*, Milano, 2002.

RUOTOLO M., *Reati ostativi e permessi premio. Le conseguenze della sent. n. 253/2019 della Corte Costituzionale*, in *Sistema Penale*, 12 dic. 2019.

RYNGAERT C., *Universal criminal jurisdiction over torture: a state of affairs after 20 years UN Torture Convention*, in *Netherlands Quarterly of human rights*, 2005, Vol. 23/4, 571.

SANTANGELO A., *La rivoluzione dolce del principio rieducativo tra Roma e Strasburgo,* in Riv. *Cass. Pen*, n 10/2019, 3769.

SANTORO, *Amicus Curiae- L'altro diritto onlus Corte Edu, I Sezione, Viola v. Italia n. 2,* in *www.penalecontemporaneo.it*. 14 Marzo 2018.

SALVATI A., *Profilo giuridico dell'ergastolo in Italia,* in *Amministrazione in cammino*, 4 May 2010, p. 4.

SANTINI S., *Anche gli ergastolani ostativi hanno diritto a una concreta "via di scampo": dalla Corte di Strasburgo un monito al rispetto della dignità umana,* in *www.penalecontemporaneo.it,* 1 July luglio 2019.

SARTARELLI G., *Riflessioni sulla formazione e sul ruolo dell'educatore penitenziario*, in *Rass. Penit. e crim*., 3/1998, 222.

SCARCELLA A., *La normativa italiana sul c.d. ergastolo ostativo è contraria alla Convenzione EDU,* in *il Quotidiano Giuridico*, 17 giugno 2019.

SCAROINA E., *Il delitto di tortura: l'attualità di un crimine antico*, Bari, 2018.

SCHABAS W., *The European convention on human rights: a commentary,* Oxford University press, New York, 2017.

SCHARTMUELLER, *Life imprisonment in Scandinavia: the ultimate punishment in the penal environments of Denmark, Finland, and Sweden,* Northern Arizona University, August 2015.

SERGES G. *La tortura giudiziaria. Evoluzione e fortuna di uno strumento d'imperio*, extracted from PACE L., SANTUCCI S., SERGES G. (a cura di), *Momenti di storia della giustizia*, 215.

SHATZ A., *West End Boy*, in *London Review of Books*, Vol. 36, No. 22, Nov. 2014.

SILVESTRI G., *La dignità umana dentro le mura del carcere*, in Riv. *AIC*, 2/2014.

SIRACUSANO F., *Dalla Corte Costituzionale un colpo "ben assestato" agli automatismi incompatibili con il finalismo rieducativo della pena,* in *Riv. It. Dir. Proc. Pen.,* 3/2018, 1787.

SMITH S., *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature,* in *Crime and Justice*, vol. 34, no. 1, 2006, 441.

SMITH S., UGELVIK T., *Scandinavian Penal History, Culture and Prison Practice. Embraced By the Welfare State?,* Palgrave Studies in prisons and penology, 2017.

SPRICIGO B., *La riflessione critica sul reato e l'automatismo ostativo dell'art. 4-bis o.p.*, in *Criminalia*, 2014, 619.

SU-SYAN JOU, *Norwegian Penal Norms: Political Consensus, Public Knowledge, Suitable Sentiment and a Hierarchy of Otherness*, in *National Taiwan U.L. Rev*., Vol. 9: 2, 2014, 292.

SYSE A., *Breivik – the Norwegian terrorist case,* in *Behavioural sciences and the Law, n 32,* 2014, 389.

TRABACE C., *Abbreviato riformato e successione di norme nel tempo*, in *Riv. It. Dir. Proc. Pen.,* 1/2019, 283.

TRONCONE P, *La legislazione penale dell'emergenza in Italia: tecniche normative di incriminazione e politica giudiziaria dallo stato liberale allo stato democratico di diritto*, Napoli, 2001.

TRONCONE P., *Manuale di diritto penitenziario*, Torino, 2015.

TUNESI S., *Il delitto di tortura. Un'analisi critica*, in *Giurisprudenza Penale Web*, 11/2017.

UBIALI M.C., *Ergastolo ostativo e preclusione all'accesso ai permessi premio: la Cassazione solleva questione di legittimità costituzionale in relazione agli artt. 3 e 27 cost.,* in www.penalecontemporaneo.it*,* 28 gennaio 2019.

VAN KALMTHOUT A., TAK J.P., *Sanctions-systems in the Member states of the Council of Europe part II. Deprivation of Liberty, Community Service and other Substitutes,* Kluwer Law and Taxation, 1992.

VAN ZYL SMIT D., WEATHERBY P., CREIGHTON S., *Whole Life Sentences and the Tide of European Human Rights Jurisprudence: What Is to Be Done?,* in *Human Rights Law Review,* 2014, 59.

VAN ZYL SMIT D., APPLETON C., *Life imprisonment: A Global Human Rights Analysis,* Harvard University Press, 2019.

VERMEULEN B., BATTJES H., in Theory and Practice of the European Convention on Human Rights, (a cura di) VAN DIJK P., VAN HOOF F., VAN RIJN A., ZWAAK L., 5th ed, Intersentia, 2018, 383.

VIANELLO F., *'Mai dire mai': contro l'ergastolo, per una penalità inquieta*, in *Riv. Antigone*, n. 1/2015, 160.

VIGANÒ F., *Diritto penale sostanziale e convenzione europea dei diritti dell'uomo*, in *Rivista. Dir e proc. pen.*, n. 1/2007, 42.

VIGANÒ F., *Ergastolo senza speranza di liberazione condizionale e art. 3 cedu: (poche) luci e (molte) ombre in due recenti sentenze della corte di Strasburgo,* in *Riv AIC*, n. 2/2012, 1.

VIGANÒ F., *La neutralizzazione del delinquente pericoloso nell'ordinamento italiano,* in *Riv. It. Dir. Proc. Pen.*, 2012, 1343.

VIOLANTE L., *L'infausto riemergere del tipo di autore*, in *Questione Giustizia*, 1/2019, 101.

VON BRÖMSSEN K., *"2083 – A European Declaration of Independence" - An Analysis of Discourses from the Extreme*, in *Nordidactica – Journal of Humanities and Social Science Education*, 2013:1.

WALDRON J., *Torture, terror, and trade-offs: Philosophy for the White House*, Oxford University Press, 2010.

WEISSBRODT D., HEILMAN C., *Defining torture and cruel, inhuman, and degrading treatment*, vol 29, in *Law and Inequality*, 2011, 343.

TABLE OF CASES

ECtHR, *Tyrer v. United Kingdom*, 25.04.1978, no. 5856/72, *ivi*.

ECtHR, *X and Y v. The Netherlands*, 26.03.1985, no. 8978/80, *ivi*.

ECtHR, *Soering v. United Kingdom*, 07.07.1989, no. 14038/88, *ivi*.

ECtHR, *Tomasi v. France*, 27.08.1992, no. 12850/87, *ivi*.

ECtHR, *Costello-Roberts v. United Kingdom*, 25.03.1993, no. 13134/87, *ivi*.

ECtHR, *Ribitsch v. Austria*, 04.12.1995, n. 18896/91, *ivi*.

ECtHR, *Askoy v. Turkey*, 18.12.1996, no. 21987/93, *ivi*.

ECtHR, *Aydin v. Turkey*, 25.09.1997, no. 23178/94, *ivi*.

ECtHR, *Selmouni v. France*, 28.07.1999, no. 25803/94, *ivi*.

ECtHR, *Labita v. Italy, 0*6.04.2000, no. 26772/95, *ivi*.

ECtHR, *Kauldla v. Poland*, 26.10.2000, no. 30210/96, *ivi*.

ECtHR, *Z and Others v. United Kingdom*, GC, 10.05.2001, no. 29392/95, *ivi*.

ECtHR, *Al-Adsani v. United Kingdom,* 21.11.2001, no. 35763/97, *ivi*.

ECtHR, *Pretty v. United Kingdom*, 29.04.2002, no. 2346/02, *ivi*.

ECtHR, *Ilascu and Others v. Moldova & Russia*, 8.07.2004, no. 48787/99, *ivi*.

ECtHR, *Krastanov v. Bulgaria*, 30.09.2004, Sec I, no. 50222/99, *ivi*.

ECtHR, *Farbthus v. Latvia,* 02.12.2004, Sec I, no. 4672/02, *ivi*.

ECtHR, *Corsacov v. Moldavia,* 04.04.2006, no. 18944/02, *ivi*.

ECtHR, *Ramirez Sanchez v. France*, 04.07.2006, no. 59450/00, *ivi*.

ECtHR, *Chitayev v. Russia*, 18.01.2007, no. 59334/00, *ivi.*

ECtHR, *Kafkaris v. Cipro*, 12.2.2008, no. 21906/04, *ivi.*

ECtHR, *Enea v. Italy*, ric. n. 74912/01, 2009, *ivi*.

ECtHR, *A and Others v. UK*, GC, 19.02.2009, no. 3455/05, in *ivi*.

ECtHR, *Polonskiy v. Russia*, 19.03.2009, no. 30033/05, *ivi*.

ECtHR, *Onoufriou v. Cyprus,* 07.01.2010, no. 24407/04, *ivi*.

ECtHR, *Al-Saadoon and Mufdhi v. UK,* 2.03.2010, no. 61498/08, *ivi*.

ECtHR, *Xiros v. Greece*, 09.09.2010, no. 1033/07, *ivi*.

ECtHR, *M. and Others v. Italy and Bulgaria*, Sec II, 31.07.2012, no. 40020/03, *ivi*.

ECtHR, *Harkins and Edward v. United Kingdom,* 17.01.2012, no. 9146/07 and 32650/07, in *ivi*.

ECtHR, *Scoppola v. Italy (no. 3)*, 22.05.2012, no. 126/05, *ivi*.

ECtHR, *Vinter and Others v. The United Kingdom,* GC, 9.07.2013, no. 66069/09, 130/10, 3896/10, in *ivi*.

ECtHR, *Janowiec and Others v Russia*, GC, 21.10.2013, n. 55508/07, *ivi*.

ECtHR, *Murray v. The Netherlands,* Sec III, 10.12.2013, no. 101511/10, in *ivi*.

ECtHR, *Öcalan v. Turkey (no. 2*), Sec II, 18.03.2014, no. 24069/03, 197/04, 6201/06 and 10464/07, *ivi*.

ECtHR, *Trabelsi v. Belgium*, 4.09.2014, Sec V, no. 140/10, in *ivi*.

ECtHR, *Murray v. The Netherlands,* GC, 26.04.2016, no. 10511/10, in *ivi*.

ECtHR, *T.P. and A.T. v. Hungary,* IV Sec, 4.10.2016, in *ivi*.

ECtHR*, Hutchinson v. The United Kingdom,* GC, no. 57592/08, 17.01.2017, in *ivi*.

ECtHR, *Cirino and Renne v. Italy*, Sec I, 26.10.2017, no. 2539/13 and 4705/13, *ivi*.

ECtHR, *Matiosaitis and Others v. Lithuania*, Sec II, 23.05.2017.

ECtHR, *Hansen v. Norway*, 21.06.2018, Sec. V, no. 48852/17, in *ivi*.

ECtHR, *Viola v. Italy (no. 2),* 13.06.2019, no. 7763/16, in *ivi*.

Oslo District Court – Judgment, 24.08.2012, TOSLO – 2011 – 188627, in *https://lovdata.no*

Oslo District Court – Judgment, 20.04.2016, n. 15-107496TVt- OTtR/02, in *https://www.domstol.no*

Court of Appeal, *The State v. Breivik*, 1.03.2017, n. 16-111749ASD-BORG/02, in *ivi*.

Supreme Court, *Breivik v. The State*, 08.06.2017, n. 2017/778, in *ivi*.