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PRISON OVERCROWDING AND THE RIGHT TO HOPE IN EUROPE AND ITALY: AN ANALYSIS THROUGH THE LENS OF ARTICLE 3 ECHR

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INTRODUCTION

The violation of prisoners' fundamental rights is still a scourge that afflicts most European countries, including Italy. Inadequate detention conditions compared to the principles enshrined in the European Convention on Human Rights, together with the frequent violation of the supranational standards of imprisonment and the recurring ascertainment by the European Court of Human Rights of breaches of fundamental prerogatives have led to an increased sensitivity of the public opinion on the issues concerning the protection for the rights of persons deprived of their personal freedom.

Article 3 ECHR represents one of the norms enshrined in the European Convention on Human Rights of which the European Court of Human Rights have most frequently found a violation. Among the conditions constituting torture and inhuman or degrading treatment, the above-mentioned Court has identified prison overcrowding and the failure to ensure inmates a widely acknowledged right to hope to regain their personal freedom once served their sentence.

With regard to the problem of overcrowding, not only the detention of prisoners in extremely narrow spaces constitutes a potential violation of Article 3 ECHR. In fact, the excessive number of inmates compared to the capacity of prisons causes further negative consequences which, considered as a whole, make imprisonment a form of torture or inhuman or degrading treatment. Among them, the impossibility to carry out work due to the scarce opportunities available, the risk of inadequate health care support, the risk of violence and intimidation. Other relevant outcomes of prison overcrowding are the risk of spreading epidemics, the violation of privacy and confidentiality of detainees, the impossibility of using toilets and showers at adequate intervals. Even the ageing of prison facilities often aggravates detention conditions that are already borderline.

Focusing on the matters linked to the right to hope, national legislations of many European States establish, among criminal penalties, life imprisonment without the possibility to be released. It is a custodial sentence applied to offenders who have committed certain crimes and it differs from ordinary long-term imprisonment because it precludes detainees to apply for their release although they have served part of their sentence. In Italy such regime is known as "*ergastolo ostativo*" and it is regulated by Article 4 *bis* of the Law 26 July 1975, no. 354 (*Ordinamento Penitenziario* or Prison Administration Act). It is applied to those offenders who have been condamned for one of the crimes listed by the same norm and who have decided to not cooperate with the judicial authority. Taking into account the re-educational purpose of the sentence, *ergastolo ostativo* as well as, more in general, life imprisonment without the possibility of release, has raised doubts of compliance with Article 3 ECHR (in Italy, also with Article 27 of Italian Constitution). In the wake of previous judgements through which European judges have stated the incompatibility among life imprisonment without the possibility to be released and the principles of the European Convention on Human Rights, the European Court has recently claimed the uncompliance of the *ergastolo ostativo* with the prohibition of torture and inhuman or degrading treatments laid down in the aforementioned Article 3 ECHR. Indeed, such sentence precludes detainees from any prospect of release, regardless of any further judicial assessment of both the re-eductional path occurred during imprisonment and the reasons on which the decision to not cooperate is based.

This research work analyses the compatibility of the Italian legal framework with the European principles on deprivation of liberty. More precisely, it aims at ascertaining whether Italian legal system complies or not with the prohibition of torture and inhuman or degrading treatments set forth by Article 3 ECHR focusing on the specific matters of prison overcrowding and the right to hope.

In the first chapter the work examines in depth Article 3 of the Convention and it explains why prison overcrowding and the violation of the right to hope constitute an inhuman or degrading treatment. Then, it focuses on European documents on detention by stressing their links with the above-mentioned Article 3. The research work analyzes both the activity carried out by the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the standards that such body has identified to ensure that imprisonment fulfills the principle of humanity established by the Convention.

The second chapter deals with the developments of the case-law of the European Court of Human Rights on the issues of prison overcrowding and the right to hope. With regard to the former, the research work focuses on the rulings of the Court that have become points of reference in identifying standards and minimum conditions of detention which ensure the respect of Article 3 ECHR. After their dissertation, such standards are put in relation with those defined by the CPT in order to stress similarities and differences among them. The second chapter also focuses on some of the most significant judgments of the European Court of Human Rights on the right to hope, in order to identify the issues underlying life imprisonment without the prospect of release. In this regard, the research work analyses the critical profiles and the solutions developed by the European Court of Human Rights in order to ensure that life imprisonment complies with the principles laid down in Article 3 ECHR.

The third chapter focuses on Italian framework and deals with the problem concerning prison overcrowding and the (failure to) grant the right to hope to certain categories of prisoners. Regarding the first issue, the research work examines the situation before and the remedies adopted following the Torreggiani judgment in order to comply with the ECtHR's "guidelines". In particular, the third chapter analyzes the recommendations suggested by the *Stati Generali sull'Esecuzione Penale* experts to face the issues of Italian prison system and the measures introduced by the legislator through the subsequent *Orlando* reform. Then, taking into account the data on Italian penitentiaries and the outcomes of the CPT's report

on the recent visit to Italy, the research work tries to ascertain if the actions carried out by national legislator have been efficient to improve imprisonment conditions and to prevent the reoccurrence of an overcrowding condition arising to a violation of the Article 3 ECHR. As to the application by national judges of the so-called "*Muršić* criteria", which have been set by the European Court of Human Rights to determine the space concretely available for each prisoner and the recurrence or not of imprisonment conditions leading to a human rights breach, the research work analyzes the recent Court of Cassation's ruling no. 6551 of 2020. Through such judgement, the *Sezioni Unite* have solved the doubts on the correct interpretation of the ECtHR's statements concerning the calculation method of the above-mentioned space available and the criteria to ascertain whether or not imprisonment may lead to an inhuman or degrading treatment.

Finally, the research work faces the matter concerning the preclusion of the right to hope afflicting *ergastolani ostativi* through the analysis of the most recent rulings of the Constitutional Court on the issue. Indeed, given the reluctance of Italian Parliament to enact a legislative reform which would grant even to "Article 4 *bis* prisoners" a concrete possibility to hope to regain their freedom, national judges have intervened in order to implement the statements of the European Court of Human Rights. Following the guideline set in the *Marcello Viola v. Italy* judgement by the ECtHR, the Constitutional Court has declared first the partial constitutional unlawfulness of Article 4 *bis* of Prison Administration Act only with regard to *permessi premio*. Then, the same Court has put upon the Italian Parliament a very important (and difficult) task: it must intervene in order to reform the prison legislation and to grant even to prisoners sentenced for one of the so-called *reati ostativi* the right to hope to regaining their personal freedom regardless their collaboration with judicial authority.

In the text of this research work the expressions "*misure alternative*" (measures alternative to imprisonment) and "*benefici penitenziari*" (benefits for prisoners), as well as

single measures and benefits established by Italian law, are quoted in Italian. This methodological choice derives from three reasons. Firstly, due to the peculiarities of the measures established by the Italian law, of which only some have equivalents in foreign legal systems. Secondly, because only for few of them there is a suitable translation in English, which has been used by scholars and the European Court of Human Rights. Thirdly, to ensure uniformity in the body of the text.

CHAPTER I

THE PROHIBITION OF INHUMAN AND DEGRADING TREATMENTS IN EUROPE IN RELATION TO PRISON OVERCROWDING AND THE RIGHT TO HOPE

1. Article 3 of the European Convention on Human Rights (ECHR or the Convention): the prohibition of inhuman or degrading treatments in Europe - 2. Follow: Article 3 ECHR and the problem of prison overcrowding - 3. Follow: Article 3 ECHR and the right to hope (to regain one's freedom) - 4. European Prison Rules (EPRs) and Article 3 ECHR - 5. The White Paper on Prison Overcrowding - 6. The role of the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in the protection of fundamental rights under Article 3 ECHR - 7. Standards on detention developed by the CPT to avoid the risk of inhuman or degrading treatments.

1. Article 3 of the European Convention on Human Rights (ECHR or the Convention): the prohibition of torture and inhuman or degrading treatments in Europe

To ensure an effective protection of people's fundamental rights, which are considered as the «foundation of justice and peace in the world»[1], the Council of Europe enacted the European Convention on Human Rights[2]. It is an international Convention which represents the first document that has enshrined, also at European level, several of the rights already safeguarded by the Universal Declaration of Human Rights[3].

[1]Preamble to the European Convention on Human Rights

[2] It was opened for signature in Rome on 4 November 1950 and it came into force on 3 September 1953.

[3] Drafted by representatives with different backgrouds from all regions of the world, the Declaration was proclaimed by the United Nation General Assembly in Paris on 10 December 1948 as a common standard of

Despite the importan role assigned to the European Court of Human Rights (ECtHR or the Court) in assessing whether certain behaviour constitutes a breach of human rights, the European Convention on Human Rights is mainly inspired the principle of subsidiarity. It means that each adherent State must ensure compliance with the principles laid down in the Convention (Polakiewicz and Jacob-Foltzer, 1991) while the ECtHR plays a suppletive role by intervening only after the applicant has exhausted all domestic remedies.

Among the various prerogatives enshrined in the above-mentioned European Convention, the Court has repeatedly ranked Article 3 ECHR ("prohibition of torture") - together with Article 2 ECHR ("right to life") - as one of the most important rights safeguarded by the Convention, «whose core purpose is to protect a person's dignity and physical integrity» (Reidy, 2003).

Article 3 of the Convention is stated in absolute and unconditional terms since it guarantees absolute rights not admitting any derogation, regardless of any circumstances that may arise (Barrett, 2013; Reidy, 2003). Both its absoluteness and the lack of specificity of the provision has allowed the ECtHR to find a violation of Article 3 ECHR in a variety of cases that could not have been envisaged by the "architects" of the Convention (Addo and Grief, 1998). Indeed, principles enshrined in the Convention are rules of general application that concerns also fields that, at least initially, were considered to be outside the scope of conventional law.

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achievements for all people of all nations. It sets out, for the first time, fundamental human rights to be universally protected. In addition to the European Convention on Human Rights, the Declaration have inspired other several human rights treaties, among which the Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nation Congress on the Prevention of Crime and the Treatment of Offenders in 1955) and the more recent *Mandela Rules*, through which in 2015 the United Nation General Assembly adopted and revised the above mentiond Standard Minimum Rules for the Treatment of Prisoners.

Albeit it is expressed in negative terms, Article 3 ECHR puts upon signatory States not only a negative obligation to refrain from certain practices but also positive warranty obligations aimed at protecting the physical integrity of persons deprived of their liberty[4]. As specified by the ECtHR, positive obligations compel national authorities to take reasonable and appropriate measures to protect the rights of individuals. They may be judicial (e.g. where the State is required to introduce penalties for violations of the Convention or it is required to enact legislative reforms) or they may consist of practical measures. Taking into account that positive obligations often extend the requirements that each State must satisfy and that the Court cannot protect rights which are not enshrined by the Convention's norms, the ECtHR have linked each positive obligation to a clause of the Convention (Akandji-Kombe, 2007). Given such assumptiomn, the category of positive obligations referable to Article 3 ECHR has been constantly expanded by ECtHR's case law in order to afford safeguard to an increasing number of situations which might need protection. Thus, with regard to detainees, the Convention does not only prohibit to apply against those people inhuman and degrading treatments or forms of torture. In fact, it also requires each signatory State to take proactive and positive interventions aimed at ensuring that prison treatment respects human dignity and that it grants adequate protection to inmates' physical and mental health.

According to the wording of Article 3 ECHR[5], the norm identifies three prohibited behaviours which are distinguished according to the different level of severity of the abuses committed against the victim[6]. Nevertheless, the norm does not provide any criterion to

[4] Commission, Report 8 July 1993, *Hurtado v. Switzerland*, §79 in which the European Commission considered the lack of adequate medical care an inhuman and degrading treatment.

[5] «No one shall be subjected to torture or to inhuman or degrading treatment or punishment».

[6] The "severity parameter" refers to the objective intensity of the suffering caused to the victim. See *Tomasi v. France*, application no. 12850/87, 27 August 1992.

distinguish between these conducts. The preparatory work on Article 3 of the Convention shows that such lack was a conscious choice of the Council of Europe[7]. Indeed, a listing of prohibited conducts could have overlooked certain abuses and it could have left protection gaps or grey areas (Montagna, 2013). Further, it could have excluded among forbidden behaviours even new and hardly imaginable form of abuses (Zagrebelsky, 2016). Therefore, in defining the content of the conducts prohibited by Article 3 ECHR, the European Court of Human Rights has assumed an important interpretative role.

Bearing in mind the definition of torture given by the UN Convention against torture[8], the ECtHR qualifies such abuse as a deliberate inhuman treatment causing very serious and cruel suffering. It is characterised by an intentional element which qualifies torture as a conduct aimed at obtaining information, punishing or intimidating the victim[9]. In *Ireland v. the United Kingdom*[10] the Court stressed that the disjunction between "torture" and

[7] *Council of Europe, Preparatory Work of article 3 of the European Convention on Human Rights, Memorandum prepared by the Secretariat of the Commission,* DH (56), 5, 8.

[8] *UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984. It entered into force in 26 June 1987. Article 1 defines torture as «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».

[9] European Commission of Human Rights, *The Greek case*. See also, *ex multis*, *Cestaro v. Italy*, application no. 6884/11, 7 April 2015, §§ 164-176, *Labita v. Italy* [GC], application no. 26772/95, 6 April 2000, §§ 113 ff., *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], application no. 39630/09, 8 October 2010, §§ 205 ff.

[10] *Ireland v. The United Kingdom*, application no. 5310/71, 18 January 1978.

"inhuman or degrading treatment" established by Article 3 of the Convention gives torture a special stigma, describing it as a deliberate inhuman treatment causing very severe and cruel sufferings.

More precisely, torture is

> «*an aggravated form of inhuman treatment causing intense physical and/or mental suffering. Although the degree of intensity and the length of such suffering constitute the basic elements of torture, a lot of other relevant factors had to be taken into account. Such as: the nature of ill-treatment inflicted, the means and methods employed, the repetition and duration of such treatment, the age, sex and health condition of the person exposed to it, the likelihood that such treatment might injure the physical, mental and psychological condition of the person exposed and whether the injuries inflicted caused serious consequences for short or long duration are all relevant matters to be considered together and arrive at a conclusion whether torture has been committed*» (Separate opinion of Judge Zekia).

Whenever an abuse does not reach the level of cruelty inherent in torture or whenever it is aimed at different purposes, such behavior constitutes an inhuman treatment. Thus, the above-mentioned abuse represents a residual category «somewhere between torture and degrading treatment with no formal characteristics of its own». It is characterised by elements typical of both torture and degrading treatment, however without assuming the same severity as the former and the features of the latter (Evans and Morgan, 1998). The Court describes the inhuman treatment as an abuse «premeditated […] applied for hours at

a stretch and causing either actual bodily injury or intense physical and mental suffering»[11] while Cassese (1993) stressed that such behaviour requires at least three elements: the aim to cause an ill-treat, a severe suffering and the lack of any lawful justification. Taking into account the features which characterize the inhuman treatment, it differs from torture due to the lower degree of sufferings caused to the victim. Such level of severity is defined by evaluating either subjective and objective factors (Aray-Yokoy, 2003).

A treatment or a punishment is degrading whenever it arouses in the victim feelings of fear, anguish and inferiority which humiliate and debase them[12]. More precisely, such abuse results in a behavior that shows a lack of respect for victims' human dignity or which causes them feelings of fear, anguish or inferiority that break the individual's moral and physical resistance[13]. The suffering and humiliation involved must go beyond the inevitable element of suffering or humiliation resulting from a legitimate treatment or punishment (Aray-Yokoy, 2003).

Taking into account the complexity to quantify and qualify both the suffering of the victims and the conduct carried out by offenders, it is often difficult to define once and for all to which category the abuse committed belongs (Barrett, 2013). Indeed, the conducts covered by Article 3 ECHR have no clear boundaries, to the extent that the European Court of Human Rights often finds a violation of the norm without specifying which abuse it can be referred to. In order to distinguish among torture, inhuman and degrading treatment or punishment, some scholars have referred to a hierarchical progression of severity of sufferings: torture represents the most severe form of abuse, inhuman treatment an intermediate form and degrading treatment the mildest form of abuse (Mavronicola, 2015;

[11] *Kudla v. Poland*, application no. 30210/96, 26 October 2000, §92 and *Kalashnikov v. Russia*, application no. 47095/99, 15 July 2002, § 95.

[12] *Ireland v. The United Kingdom.*

[13] *M.S.S. v. Belgium and Greece* [GC], application no. 30696/09, 21 January 2011.

Sudre, 1999; Webster, 2018). Even the Court has held that there is a three-tier hierarchy of proscribed forms of ill treatments: torture as ''*seuil supérieur*'', inhuman treatment or punishment as ''*seuil intermédiaire*'' and degrading treatment or punishment as ''*seuil minimum de déclenchement de l'article 3*'' (Aray-Yokoy, 2003). More precisely, in the *Greek case*[14] the Commission emphasized that all tortures must be an inhuman or degrading treatment and that an inhuman treatment must be also a degrading one. However, this categorisation seems to be effective only theoretically since, when applied in practice, the borders between the different types of abuse are blurred and difficult to identify. Indeed, «the hierarchy distinguishing the three categories of ill-treatment is fluid in nature and has to be assessed in harmony with societal progress»[15].

Not all conduct that ostensibly falls within the categories described in Article 3 of the Convention constitutes a form of torture or inhuman or degrading treatment. Indeed, the ECtHR has claimed that abuses must exceed a minimum level of severity to overcome the Article 3 ECHR threshold. As stressed by the Court, the assessment of the minimum level of severity is relative and depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the gender, the age and the state of health of the victim[16]. Nevertheless, the borderline between harsh treatment and a violation of Article 3 of the Convention may sometimes be difficult to establish[17].

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[14] *European Commission of Human Rights, The Greek case*, application no. 3321/67 – *Denmark v. Greece*, application no. 3222/67 – *Norway v. Greece*, application no. 3323/67 – *Sweeden v. Greece*, application no. 3344/67 – *Netherlands v. Greece*.

[15] *Selmouni v. France* [GC], application no. 25803/94, 28 July 1999.

[16] *Ireland v. The United Kingdom*, cited above, § 97. See also *Keenan v. the United Kingdom*, application no. 27229/95, 3 April 2001, §20; *Valašinas v. Lithuania*, application no. 44558/98, 24 July 2001, §120 and *Labita v. Italy* [GC], cited above, §120.

[17] *McCallum v. the United Kingdom*, Report of 4 May 1989, Series A no. 183, p. 29

The field in which most violations of Article 3 ECHR occur concerns the treatment of prisoners (Reidy, 2003). Indeed, one of the main implicit rules enshrined in the Convention establishes that no one, including detainees, can be subjected to treatment contrary to above-mentioned norm since «justice cannot stop at the prison gate»[18]. Hence, although the Convention does not specifically enshrine the right not to be subjected to particular conditions of detention (Esposito, 2012), by declining Article 3 ECHR provisions with regard to persons deprived of their liberty it is possibile to deduce a further important principle. According to it, inmates cannot be subjected to a detention regime which amounts to torture or to inhuman or degrading treatment. Indeed, persons deprived of their freedom benefits from all freedoms and fundament rights granted them under the Convention as long as such prerogatives are compatible with the deprivation of personal liberty. Among the cases in which the Court has found a violation of Article 3 ECHR, the most significant include those related to the problem of prison overcrowding as well as those concerning the denial of the right of life prisoners to hope to regain their freedom.

2. Follow: Article 3 ECHR and the problem of prison overcrowding

Article 3 ECHR and prison overcrowding are in a mutual strong relationship. As stated - among the others - by the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in its annual reports[19], the presence of several detainees in relatively small places may lead to a violation of Article 3 of the Convention for many reasons. For instance, the lack of re-educational activities and work opportunities due to the excessive number of requests compared to the available employments, the

[18] *Ex multis*, *Campbell and Fell v. the United Kingdom*, applications nos. 7819/77 and 7878/77, 28 June 1984, § 69, *Ezeh and Connors v. the United Kingdom* [GC], applications nos. 39665/98 and 40086/98, 9 October 2003, § 83 and *Enea v. Italy* [GC], application no. 74912/01, 17 Semptember 2009, § 105.

[19] See, among the others, the 2019's and 2020's CPT reports.

inadequate medical support compared to the high number of potential patients, the unavailability of living space within the cell are all factors which, taken together, may determine a breach of conventional principles.

The problem of prison overcrowding has been addressed by numerous judgments of the European Court of Human Rights. More precisely, such phenomenon has lead the Court to promote the pilot judgment procedure against several States, among which Bulgaria (*Neshkov and Others v. Bulgaria*, 2015), Hungary (*Varga and Others v. Hungary*, 2015), Italy (*Torreggiani and Others v. Italy*, 2013), Poland (*Orchowski v. Poland*, 2009; *Norbert Sikorski v. Poland*, 2009), Romania (*Rezmiveș and Others v. Romania*, 2017), Russia (*Ananyev and Others v. Russia*, 2012); and Ukraine (*Sukachov v. Ukraine*, 2020)[20]. Although an adequate living space is an important requisite for ensuring a prison environment compatible with Article 3 ECHR, in recent judgments the European Court of Human Rights has repeatedly stated that the lack of such minimum space is not in itself sufficient to constitute a violation of the Convention. In fact, the overpopulation of penitentiary facilities and the consequent unavailability of a minimum surface able to ensure prisoners' freedom of movement within cells must be considered together with all other relevant factors which could compensate such potential human rights' breach. Indeed, the lack of adequate space represents an unlawful condition that can be compensated by allowing inmates to spend most

[20]*Neshkov and Others v. Bulgaria*, applications nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015; *Varga and Others v. Hungary*, Application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2015; *Torreggiani and Others v. Italy*, applications nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 e 37818/10, 8 January 2013; *Orchowski v. Poland*, application no. 17885/04, 22 October 2009; *Norbert Sikorski v. Poland*, application no. 17599/05, 22 October 2009; *Rezmiveș and Others v. Romania*, applications nos. 61467/12, 39516/13, 48231/13 and 68191/13, 25 April 2017; *Ananyev and Others v. Russia*, applications nos. 42525/07 and 60800/08, 10 January 2012; *Sukachov v. Ukraine*, application no. 14057/2017, 30 January 2020.

of the day outside their accommodations, engaged in work, re-education or physical activities. Other compensatory factors include the brevity of the period of imprisonment in overcrowded cells and overall decent prison conditions. The latter factor can be deduced from several elements: the availability of adequate lighting, heating and hot water in the cells, the quality of food, the availability of toilets in the prisoners' rooms, the adequacy of medical care, the possibility of carrying out work and resocialising activities outside the cells. The assessment of these factors as a whole lead to determine whether or not prison overcrowding contributes to a penitentiary environment that does not meet the standards set by the European Convention on Human Rights (Montagna, 2013).

The connection among prison overpopulation and the risk of torture and inhuman or degrading treatments has been also stressed by the UN General Assembly[21] which has argued that overcrowding constitutes a severe form of ill-treatment[22], an inhuman or degrading treatment[23] and, in several cases, even torture[24]. More precisely «poor material conditions are exacerbated by overcrowding and adversely affect all individuals living or working in places of detention. They contribute to tensions and deterioration of relations among prisoners and between prisoners and personnel, which in turn increase the risk of ill-treatment»[25].

[21] Human Rights Council, Thirtieth session, Agenda items 2 and 3, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, 2015.

[22] CAT/OP/BRA/1, para 75.

[23] Council of Europe documents CPT/Inf (92) 3, para. 46, and CPT/Inf (2014) 26, § 100.

[24] CAT/OP/MLI/1, para. 49, and E/CN.4/2004/56, para. 49.

[25] Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, 2015, p. 6.

3. Follow: Article 3 ECHR and the right to hope (to regain one's freedom)

The right to hope is strickly related to those condemns which imposes on inmates life imprisonment. It can be defined as «a sentence, following a criminal conviction, which gives the State power to detain a person in prison for life, that is, until they die there» (Van Zyl Smit and Appleton, 2019). Thus, life imprisonment is not a penalty like the other, only longer. According to scholars, it can be perceived as ontologically different from other prison sentences - even very long ones - if the adjective "perpetual" applied to the concept of punishment is replaced by the adverb "never", resulting in the "never-end sentence" of the prisoner. That "never" means the end of hope, and hope is necessary to live: it is coessential to existence. No one can really live without planning some fulfilment and without setting oneself some objective for the future, and these perspectives which refer to a period after imprisonment are deleted by linking the above-mentioned adverb "never-end" to "sentence" (Fassone, 2020).

That said, life imprisonment can be distinguished in life sentence with parole and life sentence without parole. They defer according to the possibility or not for inmate to be released after serving a period of imprisonment which ensures the successfully achievement of an adequate and effective re-education level. The entity of such period, which must not be lower than certain limits set by law[26], may vary according to different parameters.

As argued by the ECtHR[27], life imprisonment does not determine *ex se* a violation of Article 3 of the Convention. Indeed, as far as national legislation ensures the possibility to

[26] The minimum term of imprisonment in cases of life sentences varies according to the legislation of each State. In Italy, for instance, a prisoner sentenced to life imprisonment is eligible for *liberazione condizionale* (a form of conditional release) after serving at least 26 years, as established by Article 176, clause 3 of Italian Criminal Code.

[27] *Ex multis*, *Garagin v. Italy*, application no. 33290/07, 29 April 2008 and *Scoppola v. Italy* [GC], application no. 10249/03, 8 September 2005.

regain freedom under certain conditions, such penalty complies with the prohibition of torture and inhuman or degrading treatment established by Article 3 ECHR. They include prisoners' participation in resocialisation activities, their cooperation in the re-education process, their repentance and, more in general, their behaviour during the period of deprivation of personal freedom.

On the contrary, whenever a life sentence cannot be reduced neither *de iure* nor *de facto*, it determines a breach of prisoners' human rights. As stressed by the European Court of Human Rights[28], a life sentence does not become "irreducible" by the mere fact that - in concret - it may be served in full. Indeed, the lack of any prospect of release regardless prisoners' re-socialization and their progress through the re-educative path is the factor that constitutes an inhuman and degrading treatment since it implicitly excludes that the personality of detainees may change during detention. Similarly, the above non-reducibility of the sentence prevents the judge from assessing whether the limitation of personal liberty imposed through the sentence is still justified or not by the same requirements of criminal repression which existed at the time of conviction. Thus, although the Convention does not confer a general right to benefit from a review of the sentence by a national authority, the existence of a system which afford the possibility to regain personal freedom is a factor to take into account in assessing the compatibility of life sentence with Article 3 ECHR.

It is up to each State to establish the procedure, the requirements and the condition of life sentences' review. Indeed, to avoid a breach of the Convention, the European Court considers as sufficient that national legislations grant inmates an adequate prospect of release

[28] *Ibidem*. See also *Kafkaris v. Cyprus* [GC], application no. 21906/04, 12 February 2008, *Vinter and Others v. The United Kingdom* [GC], applications nos. 66069/07, 130/10, 3896/10, 9 July 2013, *Marcello Viola v. Italy*, application no. 77633/16, 13 June 2019.

which does not correspond neither to a prospect of imminent freedom nor to the certainty that the sentence will not be fully served.

The European Court of Human Rights has extended the meaning of Article 3 of the Convention arguing that the norm implicitly grants another important principle which is strickly related to the right to hope: the prohibition of gravely and manifestly disproportionate sentences. According to the Court[29], a penalty served with modalities which are compatible with the above-mentioned Article 3 still constitutes an inhuman or degrading punishment if it is not proportionated to the seriousness of the offense committed, as it happens in case of deprivation of the right to hope when serving a life sentence. Indeed, the infliction of such penalty, even before its execution, constitutes an unjustified suffering for the convicted person and a breach of Article 3 ECHR (Viganò, 2012). Thus, the sentence shall be considered legitimate only when it is proportionate (or at least not manifestly and grossly disproportionate) to the offence and to the purposes justifying its application. Consequently, a penalty that is not reducible *de jure* and *de facto* must be considered disproportionate and, therefore, contrary to Article 3 ECHR since it doesn't allow for an assessment of the persistence of the conditions required for its application.

4. European Prison Rules (EPRs) and Article 3 ECHR

In the wake of international documents, the Council of Europe has developed a series of rules aimed at guaranteeing adequate detentive condition and protecting prisoners' fundamental rights. Albeit they are not legally binding for the Council of Europe countries,

[29] *Vinter and Others v. The United Kingdom*, cited above.

such norms, known as "European Prison Rules" (EPRs)[30], establish standards and good practices in the treatment of detainees and the management of detention facilities.

European Prison Rules are based on two main principles: the principle of normalisation which aims to organise life in prison as close as possible to life outside penitentiaries, and the principle of responsibilisation, strictly related to normalisation, which aims to give prisoners the opportunity to have personal responsibilities. Through EPRs the Council of Europe encourages member States to develop social life in prison and to give priority to an open regime of detention that may increase the degree of autonomy of inmates. Furthermore, it also promotes detainees' participation in activities which involve their skills and which should be carried out - as already mentioned - in conditions as close as possible to the outside world.

European Prison Rules apply several principles enshrined in the European Convention on Human Rights, among which the prohibition of torture established by Article 3 ECHR. In particular, Rule 1 directly derives from the above-mentioned Article 3. According to it, regardless the grounds for deprivation of liberty, detainees shall be treated with respect of their human rights. It means that prisoners retain all rights that are not lawfully withheld by

[30] Recommendation Rec(2006)2 of the Committee of Ministers to member States on the European Prison Rules, adopted by the Committee of Ministers on 11 January 2006 at the 952 meeting of the Ministers' Deputand. European Prison Rules consist in 108 rules organised in nine parts. Part I (rules 1 to 13) sets out basic principles as well as the regulation scope. Part II (rules 14 to 38) covers conditions of imprisonment, including nutrition, hygiene, access to legal advice, education, contact with the outside world, freedom of thought, conscience and religion. Part III deals with health and health care in prisons while Part IV deals with order and security. Part V regards management and staff, Part VI inspection and monitoring, Part VII untried prisoners. Part VIII deals with sentenced prisoners and Part IX with the requirements for updating the Rules. The last update of the EPRs dates back to 2020. The research work examines only those Rules directly or indirectly linked with Article 3 ECHR.

the decision through which they have been sentenced or remanded in custody, including those granted by the Convention.

The absoluteness of the prohibition of torture and inhuman or degrading treatment set out by Article 3 of the Convention is confirmed also by Rule 4, which establishes that neither the lack of resurces nor any other factor justify a breach of prisoners' human rights which are considired as inviolable. To support this principle, EPRs state that life in prison shall approximate as closely as possible the life in the free community, ensuring inmates a progressive reintegration into the society even thorugh the cooperation with external social services.

Strictly related to Article 3 of the Convention is also the Part II of thje EPRs which rules the conditions of imprisonment. According to Rule 17, prisoners must be allocated in detention facilities which are as close as possible to their homes or places of social rehabilitation. In fact, the impossibility to keep relations with their family members, as well as the impossibility to participate to re-socialization activities organized in cooperation with social services are factors which can concur to determine a condition of detention incompatible with conventional standards. Indeed, these preclusions, together with other aggravating factors concerning the deprivation of personal freedom, may determine a condition that could arise to an inhuman or degrading treatment.

The subsequent Rule 18 sets minimum standards with regard to prisoners' accomodations. In particular, it states that the characteristics of the cells shall comply with human dignity and shall meet the requirements of health and hygiene. To this aim several factors need to be taken into account, including the space available to prisoners (it must allow adequate freedom of movement), lighting (all cells shall have access to natural light), heating (authorities must ensure an adequate level of heating, especially during winter

months) and ventilation (all cell must be adequately ventilated)[31]. These prescriptions correspond to the same minimum standards identified by the European Court of Human Rights as "good practices" for a detention in compliance with the principles enshrined by the ECHR. Thus, as regards the minimum requirements of the cell, the EPRs establish parameters which correspond to those that the European Court of Human Rights have inferred from the prohibition imposed by Article 3 of the Convention and to those set by CPT in drafting its "minimum standards". The same Rule 18 then concretely specifies conditions under which the above-mentioned minimum requirements can be met. More precisely, in all accomodations in which prisoners live, work or congregate «the windows shall be large enough to enable the prisoners to read or work by natural light in normal conditions and shall allow the entrance of fresh air except where there is an adequate air conditioning system; artificial light shall satisfy recognised technical standards; and there shall be an alarm system that enables prisoners to contact the staff». This list describes conditions which are considered as indispensable to guarantee, at least theoretically, a detention condition in conformity with the principles of dignity and humanity that must characterise the deprivation of personal liberty. The binding nature of the provision is proved by the subsequent statement, according to which national law shall provide mechanisms for ensuring that these minimum requirements are not breached even by the overpopulation of prisons. Although Rule 18 seems to be broadly protective of prisoners' rights, its wording is excessively vague. In fact, the Rule merely lays down a general invitation to national

[31] Among the most important judgements in which the Court argued that to avoid the risk of inhuman or degrading treatment, prisoners must be ensured accommodation with an adequate personal living space, adequate ventilation al lightening and adequate heating, Torr*eggiani and Others v. Italy*, cited above, §69, *Ananyev and Others v. Russia*, *v. Russia*, cited above, § 149, *Varga and Others v. Hungary*, cited above, § 78; see also, for example, *Jirsák v. the Czech Republic*, application no. 8968/08, 5 April 2012, §§ 64-73 and *Culev v. Moldova*, application no. 60179/09, 17 April 2012, §§ 35-39.

legislators to adopt minimum standards to face prison overcrowding, without specifying which measures should be implented to cope with the need for social distancing in emergency situations, as in the case of the recent pandemic (Valente Sardina, 2020).

As regard to hygiene conditions, EPRs comply with ECtHR's statements[32] by establishing that all prison environments, including cells, sanitary facilities or other accomodations, shall be kept clean at all times. To ensure even personal hygiene, inmates shall be granted the possibility to have a bath or shower, at a temperature suitable to the climate, if possible daily and at least twice a week. As argued by the European Court of Human Rights[33], an adequate hygienic condition is one of the essential prerequisites to ensure the health of inmates.

Appropriate nutrition represents another important factor to take into account in order to ensure detainees' health and the compliance of detention condition with Article 3 ECHR. Thus, according to Rule 22 prisoners shall be provided with a diet that takes into account their age, health, physical condition, religion, culture and the nature of their work.

EPRs focus also on prison regime, considered by the European Court of Human Rights as a very important factor to assess whether inmates' fundamental rights are respected or not. Indeed, the same Court considers the lack of employment opportunities as weel as the failure to organize re-educational activities as indicative sympthoms of a prison treatment which does not comply with Article 3 of the Convention[34]. To ensure human and social interaction, EPRs establish that prison regime shall offer detainees a balanced programme of activities and it shall allow them to spend as many hours a day outside cells. Among such

[32] *Ibidem*

[33] See, *ex multis*, *Antropov v. Russia*, application no. 22107/03, 29 January 2009, *Mariana Marinescu v. Romania*, application no. 36110/03, 14 September 2010 and *Andreyevskiy v. Russia*, application no. 1750/03, 29 January 2009.

[34] *Ibidem* and *Murray v. The Netherlands* [GC], application no. 10511/10, 26 April 2016.

activities, educational courses, training and work play a very important role. As regard to the latter, although work was previously considered as an additional punishment, it shall not be understood in a negative sense, hence as a further penalty, but rather as a tool aimed at detainees' social reintegration (Bronzo, 2017). As consequence, prisoners shall have the possibility to choose their employment within available activities and work must be remurated in order to ensure inmates the possibility to save a part of their earnings, to buy articles and to grant an economic support to their families. Thus, as stated by Rule 26, national authorities shall ensure *intra moenia* labour conditions «that resemble as closely as possible those of similar work in the community, in order to prepare prisoners for the conditions of normal professional life»[35].

A further important matter linked with Article 3 ECHR concerns prisoners' right to health. In fact, although the European Convention on Human Rights lacks an explicit reference to it, the European Court of Human Rights has progressively extended the protection granted by the Convention also to the above-mentioned right, through an evolutionary and extensive interpretation of the above-mentioned norm. According to the Court, the right to health is not protected in itself, but only if, and insofar as, its infringement results in the violation of rights expressly recognized by the Convention[36]. With reference to such right, EPRs specify which conditions and minimum health cares national authorities must grant to detainees to ensure a lawful prison treatment. Among them, prisoners shall

[35] See also the Recommendation of the Committee of Ministers of the Council of Europe of 12 February 1987 and the Recommendation R(2006)2 of the Committee of Ministers of the Council of Europe of 11 March 2006 on European Prison Rules.

[36] *Hurtado v. Switzerland*, application no. 17549/90, 28 January 1994; *Kudla v. Poland*, application no. 30210/96, 26 October 2000; *Testa v. Croatia*, application no. 20877/04, 12 July 2007; *Poghosyan v. Georgia*, application no. 9870/07, 24 February 2009; *V.D. v. Romania*, application no. 7078/02, 16 February 2010; *Slyusarev v. Russia*, application no. 60333/00, 20 April 2010.

have access to health services available in the country without any discrimination based on their legal status (Rule 40.3); detainees shall be provided with all necessary medical, surgical and psychiatric services including those available in the community (Rule 40.5); in every prison personnel shall be suitably trained in health care (Rule 41.4); ill inmates who require particular care shall be transferred to specialised institutions or to civil hospitals, when the needed treatment is not available in prison (Rule 46.1); specialised penitentiaries or sections under medical control shall be established for the treatment of prisoners suffering from mental disorder (Rule 47.1).

To ensure the compliance of prison treatment with the standards imposed by Article 3 ECHR, EPRs also establish that national penitentiaries shall be inspected regularly by a governmental agency as well as by independent bodies to assess whether they are administered in accordance with the requirements of national and international law and with the provisions of the same European Prison Rules.

From the analysis of the EPRs it emerges how through this set of norms the Council of Europe has tried to explain and to specify the content of Article 3 of the Convention by establishing practices and rules that, for the most part, are prerequisites to ensure a detention condition in accordance with the principles of the European Convention on Human Rights. In fact, even in the lack of norms that explicitly clarify the concept of torture and inhuman and degrading treatment, EPRs provide for rules that forbid to subject detainees to all conduct that the ECtHR has over time qualified as treatment contrary to Article 3 ECHR. Therefore, although not formally binding on States, EPRs represent a further tool to protect the rights of detainees. Furthermore, they constitute a guideline for the proper management of prison facilities and for the treatment of inmates which respects the prohibition of torture and inhuman or degrading treatment set by the European Convention on Human Rights.

5. The White Paper on Prison Overcrowding

In order to cope with the constant worsening of the conditions of detention that was afflicting several CoE's member States and to curb the increasingly pressing problem linked to the increase in the prison population rate, in 2016 the European Committee on Crime Problems (CDPC) has intervened by drawing up the "White Paper on Prison Overcrowding" (White Paper). Although it does not introduce new specific recommendations in relation to prison overpopulation, the White Paper aims at encouraging CoE's member States to open a debate on their criminal justice system and to act in order to improve the detention regime in national penitentiaries. In particular, the White Paper identifies possible solutions and legislative actions in order to reduce the problem of prison overcrowding and to ensure compliance with the principles enshrined in Article 3 of the Convention.

Taking into account the differences between the methods to calculate prison places available established by different national authorities as well as the lack of a clear and internationally agreed definition on which condition arise to prison overcrowding, the CDPC stressed that such phenomenon is not only related to the presence of an excessive number of people in a relatively small place. Indeed, prison overcrowding is part of, and closely related to, the general issue consisting in the need to ensure adequate conditions of imprisonmnet. They require, in addition to a sufficient detention space, a prison treatment which meet the standards enshrined in Article 3 ECHR and the possibility for inmates to participate to activities aimed at their re-socialization.

In order to offer a solution to the above matters, the CDPC first examined the factors which concurred to the exponential growth of prison overpopulation. They found as two of the main reasons for such phenomenon both the excessive rigidity of the national criminal systems and the crime repressive policies which have led to an overuse of imprisonment. However, even other factors contribute to aggravate the already critical condition of national penitentiaries. Although they vary according to the State concerned, all such factors concur

to lead to the violation of Article 3 ECHR. Indeed, in several countries the measures adopted to prevent crimes have resulted in an overcrowding of pre-trial imprisonment institutions due to a limited use of alternatives to detention on remand. Thus, even though both the Council of Europe and the European Court of Human Rights persistently upheld that deprivation of liberty should be a sanction of last resort, detention is still the main measure established by the criminal code of several countries even for people who are only suspected of an offense. Albeit the presumption of innocence has become one of the main criminal principle in democratic legal systems, detention on remand still represents a large-used measure applied for different reasons, among which the public opinion pressure and the fear of crimes.

In several countries, prison overpopulation derives from the increase of short-term prisoners; on the contrary, in other States, overcrowding occurs due an increase in the length of sentences which is based on the mistaken belief that incarceration works as a deterrent as well as on the poor implementation of alternative measures (which fully or partially replace prison sentences). As regard to the latter issue, although many national legal systems provide for community measures, their application is still problematic. The factors that mostly impact on their scarce application concern, among the other, the lack of economic resources, the excessive workload of the structures in charge of supervising the inmates concerned and the high number of requests which does not allow to accept all submissions.

Taking into account the impossibility to find a single cause for prison overcrowding, the CDPC claimed that in most of the CoE's member States such phenomenon derives from a combination of all these factors.

After the above analysis, the White Paper focuses on possible solutions to grant the compliance of national prison systems with the principles enshrined in Article 3 of the Convention.

As for the issue concerning the excessive use of remand in custody, the White Paper stresses that such deprivation of personal freedom should be conceived as an exception rather than the norm. Indeed, the presumption of offender's innocence imposes on the judge to carefully assess both the recurrence of all the requirements established by law for the application of pre-trial detention and the impossibility to apply to the offender a less burdensome measure. Further, the White Paper recommends that pre-trial detention never exceed the length of the sanction provided for the offense alleged to have been committed. To avoid the risk of an undue application of remand in custody and to reduce the number of offenders deprived of liberty waiting for the trial, the White Paper suggests that the judge reviews at regular intervals the need to apply of such measure as well as the recurrence of its requirements. Thus, such evaluation should be done not only at the moment in which the remand in custody is applied nor only when lawyers ask for a new analysis of the conditions for the application of the measure.

As regards the application of alternative measures both in place of the sentence and during its execution, the White Paper reccomends various solutions that Member States could introduce into their legal systems. Among them, national legislators should stimulate an idea of restorative criminal justice based on the mediation between victims and offenders rather than promoting penalties only as a tool to punish an offense. Indeed, while on the one hand restorative justice would reduce the number of people who entry the prison, on the other it would be an efficient solution for both the social reintegration of the offender and the satisfaction of the victim's need for justice. Even legislative reforms aimed at decriminalize several minor crimes or the introduction of alternatives to criminal proceedings may concur to reduce the number of inmates and to diminish the problem of prison overcrowding. In fact, as argued by the White Paper drafters, «the reasons behind decriminalising of certain behaviour should not derive from existing prison overcrowding but from principles of humane and proportionate sanctioning of a given socially inacceptable

act». Decriminalization not only deprives certain conducts of criminal relevance, but it also allows to reach the same deflationary effect typical of criminal sanctions. Moreover, it prevents the flooding of the criminal justice system since administrative sanctions (resulting from the commission of decriminalized conducts) are applied without a trial and they have no repercussions on the criminal record, avoiding the social stigmatization of the person concerned.

For offences which cannot be decriminalized, another solution suggested by CDPC to reduce prison overpopulation consists into the reduction of the length of imprisonment and the release of certain offenders or groups of offenders through individual pardons or collective amnesties. Although these proposals seem apparently suitable for determining a significant decrease in the number of prisoners in the short term, on several occasions they have proved to be inadequate in the long term[37]. Therefore, amnesties and pardons are useless if not accompanied by a legislative reform aimed at reducing the application of prison sentences and at complying with the principles enshrined in the European Convention on Human Rights.

6. The role of the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in the protection of fundamental rights under Article 3 ECHR

The Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment was set up under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which came into force in 1989 and which

[37] See Chapter III, § 1.

has been ratified by all the 47 member States of the Council of Europe[38]. To ensure that prisoners' rights are respected and to prevent the risk of inhuman and degrading treatments or torture on global scale, the Committee of Ministers of the Council of Europe may invite any non-member State to sign the Convention.

The CPT is not an investigative or jurisdictional body. In fact, it guarantees a system of non-judicial preventive monitoring to protect persons deprived of their liberty against torture and other forms of ill-treatment. In order to assess how such persons are treated, the Committee supervises places of detention, with unlimited access to all facilities placed in the territory of the CoE's member States in which any form of deprivation of liberty by a public authority is carried out[39]. Thus, with its work the CPT complements the judicial assessment activity of the European Court of Human Rights (Peraldo, 2018).

The Committee is composed by independent and impartial experts from a variety of backgrounds, including lawyers, MDs and specialists in prison or police matters. The CPT's members do not represent their own State but they operate individually. To guarantee independence, they do not visit the country of which they are citizens.

The activity of the Committee is built upon three principles: prevention, co-operation and confidentiality. The principle of prevention, which underlying the functioning of the CPT, is based on the assumption that the risk of torture and inhuman or degrading treatment can be reduced by providing the possibility of unexpected visits to places of detention by international experts. Their reports become the basis for a constructive dialogue with the States concerned aimed at promoting legality through the protection of the rights of detainees. The principle of co-operation describes the relationship among the CPT and the

[38] The Convention enshrines a full discipline of the Committee's composition, prerogatives, powers and functioning.

[39] These places include prisons, juvenile detention centres, police stations, holding centres for immigration detainees, psychiatric hospitals, social care homes, etc.

member States. Taking into account that the Committee has no jurisdicial function and that it cannot condemn States for abuses, its activity is aimed at establishing a cooperative dialogue with national institutions to safeguard persons deprived of their liberty. Confidentiality is a characteristic of the work of the CPT: the Committee's findings, its reports and the governments' responses are, in principle, confidential. Nevertheless, a great deal of information about the CPT's work is public. Further, after each visit the State concerned may request the publication of the Committee's report, together with its own response.

With regard to the visits organized by the CPT, they are carried out by delegations, usually made up of several Committee's members, CPT's secretariat members and, if necessary, by additional experts and interpreters. These visits are planned on a periodic basis, usually once every four years, although the Committee may carry out additional *ad hoc* visits whenever it is necessary. The CPT must notify the State concerned the intention to carry out a visit. After notification, the Committee's delegation may enter any place of detention at any time and without any other notice. At the end of each visit, the CPT sends a detailed report to the State concerned which includes findings, recommendations, comments and requests for information. The CPT also requests a detailed response to the issues raised in its report. Both the reports and responses are part of an ongoing dialogue with the States concerned. If a State fails to co-operate or refuses to eliminate the criticalities stressed by the CPT also by applying its recommendations, the Committee may decide to make a public statement. Once a year it draws up and publishes a general report on its whole annual activities.

Through its monitoring activity CPT ensures an independent and impartial supervision that, together with the jurisdictional activity of the European Court of Human Rights, contributes at ensuring the respect for the principles of the Convention, among which those enshrined in Article 3 ECHR. In fact, its frequent visits allow the Committee to identify

situations in which detention conditions constitute a form of torture or inhuman and degrading treatment. Furthermore, through its reports the CPT urges States to take action in order to ensure that imprisonment complies with the precepts of the European Convention on Human Rights.

7. Standards on detention developed by the CPT to avoid the risk of inhuman or degrading treatments

On the basis of the results of its annual reports and its suggestions to ensure adequate detention conditions, the Committee has drafted several standards of imprisonment which covers all aspects of detention. They are a dynamic tool that evolves with the regulatory and cultural changes in the field of prison policies. The development of these standards aims at ensuring that CoE's member States have the necessary references to ensure the respect of the principles enshrined in the European Convention on Human Rights and to prevent the risk of subjecting inmates to torture or inhuman and degrading treatment. Therefore, CPT's standards allow States to distinguish - at least in principle - practices that comply with Article 3 of the Convention from those that, on the contrary, constitute a violation of human rights (Murdoch, 2006; Morgan and Evans, 1999). The standards developed by the CPT are not binding on member States. Nonetheless, the refusal of the country concerned to implement Committee's recommendations constitutes a violation of the duty of cooperation and it exposes to the risk of a public statement. The CPT has adopted a "variable geometry method" in the application of its standards: although recommendations and objectives set by the Committee are the same for all Member States, the Committee recommends different solutions to pursue them[40] (Morgan and Evans, 2000).

[40] As required by the principle of cooperation, according to which it is necessary to take into account the different situations of each State.

In order to comply with Article 3 ECHR, CPT's current standards establish that prisoners in pre-trial custody should be able to spend a reasonable part of the day - 8 hours or more - outside their cells, engaged in purposeful activities of a varied nature. The regime for sentenced prisoners shall be even more favorable: prison authorities shall grant them the possibility to spend the most part of the day out of the cell involved in re-educational activities. All prisoners, including those in punishment segregation, shall have the possibility to take outdoor exercise daily. Outdoor training facilities shall be reasonably spacious and, whenever possible, they shall offer shelter from inclement weather.

Adequate sanitation and good standards of hygiene are essential components of a humane environment. Therefore, the Committee considers as necessary the presence of a toilet facility within each cell or, as alternative, the possibility for prisoners who need a toilet to leave their cells without undue delay at all time. They shall also have adequate access to showers or bathing facilities. Running water should be available within each cell.

The use of force against prisoners shall be as limited as possible and shall in any case be aimed at ensuring their personal safety and the safety of the prison. Inmates against whom any force or violence has been used shall be immediately examined and, if necessary, treated by a doctor. Further, they shall be able to make a complain to authorities both inside and outside the prison system. Independent bodies with the power to inspect prisons and to hear detainees' allegations shall be allowed to carry out regular visits in order to ascertain the conditions of detention.

Prison staff shall prevent any form of inter-prisoner violence. To reach this aim, penitentiary administrations shall ensure an adequate number of staff members in any time and in all prison environments. Personnel shall be able to deal with inmates in a humane manner, it shall be alerted in case of troubles and it shall be properly trained to intervene when necessary.

According to the Committee's most recent report[41], the phenomenon of prison overcrowding continues to blight penitentiary systems across Europe and it seriously undermines the attempts to ensure lawful conditions of detention. The consequences of this chronic phenomenon are various: cramped and unhygienic accommodations, the constant lack of privacy, a reduction of out of cell activities, overburdened health-care services, an increase of violence between prisoners and between prisoners and personnel. Thus, to avoid the risk of inhuman or degrading treatment forbidden by Article 3 of the Convention, CPT's standards even focuses on living space within prison establishments[42]. With regard to the above-mentioned minimum living space, the Committee quantifies it in 6 m^2 for prisoner in a single-occupancy cell while it amounts to 4 m^2 per prisoner in a multiple-occupancy cell[43]. There shall be at least 2 m between the walls of the cell and 2.5 m between the floor and the ceiling. Cells' dimensions defined by Committee does not include the sanitary facilities placed within the cell. Consequently, a single-occupancy cell should measure 6 m^2 plus the space required for sanitaries, which is usually from 1m^2 up to 2 m^2. By the same, a multiple occupancy cell should guarantee at least 4 m^2 per prisoner in addition to the space occupied by the toilets. In any cell accommodating more than one prisoner, sanitary facilities shall be fully partitioned.

Besides such minimum standards, the CPT has also drafted desirable standard regarding multiple-occupancy cells, by adding 4 m^2 per any further inmate to the minimum living space of 6 m^2 in a single-occupancy cell. Hence, to accommodate two prisoners the Committee considers as desirable a living space which amounts at least to 10 m^2, for three prisoners at least 14 m^2, for four prisoners at least 18 m^2. Such measures, as already

[41] *30th General Report of the CPT*, 1 January – 31 December 2020.

[42] Living space per prisoner in prison establishments: CPT standards, CPT/Inf (2015) 44.

[43] The CPT considers as multiple-occupancy cells for two to four inmates See, for example, the report on the visit to Poland, 2013, paragraph 49.

specified, excludes sanitary facilities. According to the Committee, the above-mentioned cell-sizes shall not include fixed or hardly removable furnishing while the surface occupied by easily removable furniture is considered as available space. Further, the Committee emphazises that such dimensions shall not be considered in absolute terms: a minor deviation from minimum standards do not constitute in itself an inhuman or degrading treatment. Indeed, whenever the space available is below the above-mentioned minimum standards, to consider imprisonment a form of violation of Article 3 of the Convention even other factors must be taken into account. For instance, the possibility for inmates to spend most of the day outside their cells involved in workshops, classes or other activities. On the contrary, even adequate cells' dimension do not exclude in themselves an inhuman or degrading treatment. Indeed, it can derive from the combination of additional negative factors, such as an insufficient number of beds, poor hygiene, infestations with vermin, inadequate ventilation, heating or light, lack of in-cell sanitation, brief out-of-cell time and the deprivation of contacts with relatives.

Other standards defined by the Committee to grant prisoners' human rights establish that cells shall have access to natural light, they shall be ventilated to ensure a constant renewal of air and the shall be adequately heated. Dormitories shall preferably be of small size to ensure prisoners' privacy and to avoid the risk of violence which is made easier by the presence of a high number of detainees in the same room.

To compensate their harsh custodial condition, high security prisoners shall have the possibility to meet their fellow detainees and to choose their daily activities dealing with peculiarities of their status. They must not be subjected to this regime for a period longer than the one strictly necessary and regular reviews must be carried out taking into account the ongoing assessment of the prisoners' behaviour and progress towards their re-education.. Particular attention shall be paid for life or long-term sentence detainees due to the desocializing effects of their condition: prison administrations should ensure them the right

to hope to regain their freedom and the possibility to access to a wide range of activities as work, preferably with vocational value, education and sport. They shall also benefit of psychiatric or psychological support and care both during detention and in view of their (possible) release.

CHAPTER II

PRISON OVERCROWDING AND THE RIGHT TO HOPE IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

1. The European Court of Human Rights (ECtHR or the Court) - 2. The failure of the European Court to define uniform principles regarding the minimum detention space required by Article 3 ECHR: the pilot judgement *Ananyev and Others v. Russia*, the pilot judgment *Torreggiani and Others v. Italy* and the case *Apostu v. Romania* - 3. Standard parameters for assessing detention conditions: "*Muršić* criteria" - 4. The application of "*Muršić* criteria" in the recent ECtHR's case law – 5. A comparison between criteria to assess the compliance of detention with Article 3 ECHR principles drafted by the EctHR and the CPT - 6. The right to hope in the ECtHR's case law: the case *Kafkaris v. Cyprus* - 7. Follow: the Fouth Chamber and the Grand Chamber rulings *Vinter and Others v. The United Kingdom* – 8. A setback in the path of the European Court of Human Rights on the right to hope? The case *Hutchinson v. The United Kingdom* – 9. Follow: the *Marcello Viola v. Italy (no. 2)* judgement

1. The European Court of Human Rights (ECtHR or the Court)

The European Court of Human Rights is an international tribunal of the Council of Europe established on 21 January 1959 on the basis of Article 19 ECHR. It rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights. Since 1998, it has sat as a "full-time" Court and individuals can apply to it directly. The Court is composed by a number of judges which is equal to the number States which have signed the European Convention on Human Rights, currently 47. They are elected for a non-renewable nine-year term by the Parliamentary

Assembly of the Council of Europe[44]. Each Committee of the ECtHR is composed by 3 judges, each Chamber by 7 judges[45] while the Grand Chamber is composed by 17 judges. Each single judge may declare an appeal inadmissible or strike it out from the Court's scheduled cases if the decision can be adopted without any further examination. As established by Article 28 of the Convention, each Committee by unanimous vote may declare an application inadmissible or strike it out of its list of cases if the decision can be taken without further examination. Committee may also declare an appeal admissible and render at the same time a judgment on the merits if the question underlying the case is already the subject of well-established case-law of the Court. If an application has not been declared inadmissible by a single judge or a Committee, the matter is referred to a single Chamber which adopts a decision on it. Whenever a case submitted to a Chamber raises serious problems on the interpretation of the Convention or the Protocols thereto, as well as if its solution could have a result inconsistent with a judgment previously delivered by the Court, the Camber concerned may refer the case to the Grand Chamber, unless one of the parties to the case opposes such decision.

The ECtHR jurisdiction has been recognized to date by all 47 member States of the Council of Europe and it extends to all matters concerning the interpretation and application of the Convention and the Protocols thereto. It is generally divided into inter-State cases, applications by individuals against contracting Parties and advisory opinions in accordance with Protocol no.2 (Smith and Van Der Anker, 2005).

As aready mentioned, appeals to the Court can be filed either by one of the High Contracting Party or by individuals. Regarding the latter, any person or non-governmental

[44] Protocol no.14 Factsheet: The reform of the European Court of Human Rights, Council of Europe, May 2010.

[45] Although the Committee of Ministers may, by a unanimous decision and for a fixed period, reduce to five the number of judges of the Chambers at the request of the plenary Court.

organization or group of individuals have the possibility to lodge an appeal reporting a violation of the rights granted by the Convention or by its protocols. Such application can be submitted only «after all domestic remedies have been exhausted […] and within a period of six months from the date on which the final decision was taken», as stated by Article 35 ECHR[46].

The Court examines the case together with representatives of the States concerned and, if necessary, it can demand investigations for which High Contracting Parties must grant all the necessary means. The dispute can be resolved prior to the Court's decision through a friendly settlement which must comply with the Convention and the Protocols thereto. If the States concerned join a friendly settlement, the Court adopts a decision through which it explains briefly the facts and the solution reached. Then, the decision is sent to the Committee of Ministers in order to supervise the correct implementation of the above-mentioned friendly settlement.

Whenever Parties don't achieve such friendly solution, the Court decide applications by adopting a judgement. A particular decision is the so-called "pilot judgement"[47]. Through

[46] Article 35 ECHR. The norm also establishes that «the Court shall not deal with any application submitted under Article 34 that is anonymous or is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information». Moreover, «the Court shall declare inadmissible any individual application submitted under Article 34 if it considers that the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal».

[47] When the Court receives a significant number of applications concerning the same matter, it may decide to select one or more of them for a priority treatise.

this kind of ruling, the Court statements extend beyond the particular case and deals with all similar applications concerning the same issue. Indeed, through the pilot judgment the ECtHR does not only assess whether there has been a violation of the Convention in the particular case: it also identifies dysfunctions under national law, it gives guidelines to the Government concerned as to how they can be solved, it promotes the creation of domestic remedies which shall be applied even to similar cases (including those already pending before the Court). Therefore, through a pilot judgment the Court aims at stimulating national authorities to eliminate systemic or structural problems which give rise to repetitive appeals on the same matter. It is up to the European Court of Human Rights to support the Committee of Ministers in ensuring that each judgment is properly enforced by the State concerned. As established by Article 41 ECHR, whenever the Court finds a violation of the Convention or the Protocols thereto and if national law of the High Contracting Party concerned allows only partial protection, the Court may afford just satisfaction to the claimant. In exceptional cases[48], within three months from the Chamber's judgment any Party may request to refer the case to the Grand Chamber.

As stated by Article 44 ECHR, Grand Chamber's judgements are *ex se* final while those ones of each single Chamber become final if, within three months, Parties renounce to ask to refer the case to the Grand Chamber or the panel of the Grand Chamber rejects such request. All decisions of the Court must be reasoned.

According to Article 46, «High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are Parties». It means that judgments are binding and they must be implemented by the State concerned. It is up to the Committee of Ministers to supervise the correct fulfillment of the Court's statement. If the Committee finds

[48] If the case raises a serious question concerning the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance.

that a State is refusing to comply with a final judgement concerning a case in which the same country was a Party, the matter is submitted to the Court in order to evaluate the State's behavior. If the Court ascertains the above uncompliance and the violation of obligations deriving from the ruling, it shall refer the case to the Committee of Ministers to decide the measure to adopt.

In addition to its judiciary function, the Court performs an advisory function towards the Committee of Ministers on legal matters dealing with the interpretation of the Convention and the Protocols thereto. Even the Court's opinions must be motivated.

2. The failure of the European Court to define uniform principles regarding the minimum detention space required by Article 3 ECHR: the pilot judgement *Ananyev and Others v. Russia,* the pilot judgment *Torreggiani and Others v. Italy* and the case *Apostu v. Romania*

An in depth analysis of the case law of the European Court of Human Rights shows that, over the years, the Court has adopted different and sometimes divergent criteria in determining when prison overcrowding constitutes a form of inhuman and degrading treatment. Indeed, while in certain cases the Court ruled that a living space below 3 m^2 per detainee was sufficient to state a violation of Article 3 ECHR, in other judgements this condition was considered able to generate only a strong presumption of inhuman and degrading treatment. In some other rulings, the Court affirmed that a detention space below 4 m^2 constituted in itself a violation of Article 3. Emblematic cases of the above divergence

are the judgments *Ananyev and Others v. Russia*[49], *Torreggiani and Others v. Italy*[50] and *Apostu v. Romania*[51].

The pilot judgement *Ananyev and Others v. Russia* constitutes an important milestone in the European case law. Indeed, the European Court of Human Rights has defined certain criteria to verify the compatibility of detention with the rules of the Convention (Albano, 2015). More precisely, it has defined a tool, known as "*Ananyev* test", through which assessing whether or not the condition of imprisonment arises to a violation of the principles stated by Article 3 ECHR.

On the assumption that ill-treatment must attain a minimum level of severity to fall within the scope of Article 3 of the Convention and that such assessment depends on all the circumstances of the case (such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim), the Court held that «to fall under Article 3, the suffering and humiliation [...] must in any event go beyond that inevitable element of suffering and humiliation connected with the detention» (§ 141). Taking into account the evidence in the case, it seemed clear that Russian prisons were suffering from severe overpopulation and that detainees were often kept in small cells, with a living area far below the minimum of 3 m^2 per inmate. Nevertheless, the Court argued that in order to find a violation of Article 3 ECHR it is not sufficient that the available space is lower than the above-mentioned long-standing jurisprudential standard. In fact, in deciding whether or not the lack of personal space gives rise to an inhuman or degrading treatment, three elements must be assessed: each detainee must have an individual sleeping place, each detainee must have at his/her disposal at least 3 m^2 of space and the overall surface of the

[49] *Ananyev and Others v. Russia*, cited above.

[50] *Torreggiani and Others v. Italy*, cited above.

[51] *Apostu v. Romania*, applications no. 22765/2012, 3 February 2015.

cell must allow detainees to move freely. Accoding to the Court, «the absence of any of the above elements creates in itself a strong presumption», rather than absolute certainty, «that the conditions of detention amounted to degrading treatment and were in breach of Article 3» (§ 148).

Whenever prisoners have at their disposal adequate personal space, other aspects concerning conditions of detention are still relevant to assess the compliance of prison treatment with the above-mentioned norm. Among them, the possibility to access to outdoor activities, the availability of natural light and air, the availability of ventilation, adequate heating arrangements, the possibility to use the toilet in private and the compliance with basic sanitary and hygienic requirements. Therefore, «even in cases where a larger prison cell was at issue – measuring in the range of three to four square metres per inmate – the Court found a violation of Article 3 since the space factor was coupled with the established lack of ventilation and lighting» (§ 149).

In the pilot judgment *Torreggiani and Others v. Italy*, the ECtHR came to a different conclusion and held that lack of space was a sufficient factor to result in a violation of Article 3 ECHR. Even such ruling represents a milestone in European Court of Human Rights case law because, for the first time, the same Court ruled that prison overcrowding constituted a systemic issue afflicting Italian penitentiary system and that it arised to a form of inhuman or degrading treatments. Indeed, although only few years before the *Torreggiani* ruling Italian Government had been already sentenced for the same issue[52], the situation was still substantially unchanged: prisons were largely overpopulated and inmates were held in small and cramped cells, without the possibility to move freely within penitentiary environments. More precisely, at the time of the judgement *Sulejmanovic v. Italy* the number of prisoners detained in Italian penitentiaries amounted to 64.791 compared with a capacity of 44.073

[52] *Sulejmanovic v. Italy*, applications no. 22635/03, 16 July 2009.

places while at the time of the pilot judgement *Torreggiani and Others v. Italy* it amounted 62.536 compared with a whole capacity of 47.709 . Thus, in both cases the overcrowding of Italian prisons was particularly high and the penitentiary occupancy rate amounted respectively to almost 145% and 131% of the available places[53]. Before these rulings, Italian legislator intervend through several measures aimed at reducing penitentiary population, among which the so-called "*indultino*" in 2003, the pardon in 2006 and the Law 26 November 2010, no.199[54]. Nevertheless, such efforts didn't achieve their purpose and Italy was found responsible of human rights' breaches. Therefore, the Court decided to resort to the pilot judgement procedure in order to stress the uresolved and serious dysfunctions of Italian penitentiary system (Palombino, 2008).

Focusing on the situation complained by applicants, the Court first reiterated the general principle implicitly established by the European Convention on Human Rights, according to which the deprivation of personal freedom is a condition that requires even greater protection for the fundamental rights of detainees. Indeed, imprisonment must not cause greater suffering than the one which is inevitably linked with the deprivation of personal freedom. According to the Court, in order to assess the conformity of imprisonment with the principles stated by Article 3 of the Convention, the whole condition of detention must be evaluated. Nevertheless, whenever applicants complain a violation of human rights due to prison overcrowding, the space available is the main factor to be taken into account. On this matter, the Court ruled that the availability of less than 3 m^2 of floor surface for each person held in a multiple cell constituted in itself an inhuman or degrading treatment in violation of Article

[53] Source: Italian Ministry of Justice.

[54] Law 26 November 2010, no. 199, *Disposizioni relative all'esecuzione presso il domicilio delle pene detentive non superiori ad un anno*. The norm has been introduced to face the state of emergency of Italian penitentiaries assessed by the ECtHR with the judgement *Sulejmanovich v. Italy*, cited above. For a further deep analysis, Chapter III, § 1.

3 ECHR, regardless of any compensatory factor such as access to outdoor exercise, natural light or air, availability of ventilation, adequacy of heating arrangements, the possibility of using the toilet in private and compliance with basic sanitary and hygienic requirements. In fact, these factors are only relevant if the space available is more than 3 m^2.

With regard to the use of the pilot judgement procedure, the Court stated that the overcpopulation of Italian prisons was a structural and systemic problem caused by the chronic inadequacy of the Italian penitentiary system[55]. Despite the Court's previous judgments, this problem had long been unresolved and it resulted in a continued uncompliance with Article 3 ECHR principles. Consequently, the Court considered as necessary to apply the more stringent pilot judgment procedure and it ruled that the Italian national authorities «must immediately institute an appeal or a combination of appeals with preventive and compensatory effects which genuinely ensure an effective restore for the human rights violation resulting from Italian prison overcrowding. Such appeals shall be in accordance with the principles of the Convention [...] and shall be instituted within one year since this judgement become final» (§ 99).

In the case of *Apostu v. Romania*, the European Court of Human Rights referred to an even different spatial parameter in assessing whether detention gave rise to an inhuman or degrading treatment. In fact, it considered the surface of 4 m^2 as the minimum spatial threshold, offering greater protection to prisoners' rights. With regard to the condition of detention, the Court reiterated that, to comply with Article 3 of the Convention, each person must be detained in conditions which are compatible with respect for his/her human dignity and that «the manner and method of the execution of the measure do not subject him [or her] to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent

[55] Such chronicity was also proved by the hundred application submitted by people held in Italian prisons, § 89.

in detention» (§ 78). Thus, in assessing the lawfulness of the conditions of imprisonment, it must be taken into account the cumulative effects of those conditions on the inmate, as well as the specific allegations made by the applicant.

Focusing on the issue of prison overcrowding, the Court stressed that an extreme lack of space (below 4 m^2 per person in a multiple cell) due to penitentiary overpopulation determines a degrading condition under Article 3 ECHR. On the contrary, in cases where overcrowding is not so severe to raise in itself an issue under the above-mentioned Article 3, the Court must take into account other factors concerning the detention condition since they are relevant to evaluate the compliance among prison treatment and the Convention. Such further elements include, for instance, the availability of ventilation, the access to natural light or air, the adequacy of heating arrangements, the compliance with basic sanitary requirements and the possibility of using the toilet in private. Thus, in the *Apostu* case the European Court of Human Rights applied evaluation parameters different from those adopted in judgements previously analyzed. Indeed, it ruled that a living space below 4 m^2 for each detainee in a multiple cell constitutes a breach of Article 3 ECHR since it arises to a degrading treatment. Whenever prisoners are granted such minimum space, a violation of human rights cannot be straightly ruled out. Indeed, according to Court it is necessary to evaluate the conditions of detention as a whole in order to verify their compliance with conventional principles. Hence, only when an adequate living space is combined with lawful detention conditions it is possible to conclude that imprisonment doesn't give rise to a breach of inmates' human rights.

3. Standard parameters for assessing detention conditions: *"Muršić* criteria"

Through the judgement *Muršić v. Croatia*[56] the Grand Chamber of the European Court of Human Rights has faced the issue of prison overpopulation by setting criteria aimed at standardizing the method through which calculate the space available for each prisoner held in a cell. Furthermore, the same Court has also pointed out parameters that States subject to its jurisdiction must take into account in assessing the compliance of prison treatment with Article 3 ECHR in addiction to the spatial factor.

Firstly, the Court reiterated the well-established principles according to which «ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3» (§ 97), and « the suffering and humiliation involved must in any event go beyond that inevitable element of suffering and humiliation connected with detention» (§ 99). Then, it emphasized that the assessment of the above-mentioned "minimum level of severity" is relative since it is necessary to consider all the circumstances of the case such as the duration of the treatment, its psychological and physical effects, the gender, the age and the state of health of the prisoner.

Focusing on the minimum space which must be ensured to each inmate within a cell, the Court argued that it is not possible to predetermine in absolute terms a specific number of square metres to comply with the prohibition of torture and inhuman or degrading treatments. Nevertheless, it considered the limit of 3 m^2 of surface for each detainee in a multi-occupancy accommodation as the relevant minimum standard, arguing that «it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases» (§ 109). According to the Court, the living space is not the exclusive factor to evaluate in determining whether or not prison treatment constitutes an inhuman and degrading treatment. In fact, the

[56] *Muršić v. Croatia* [GC]**,** application no. 7334/13, 20 October 2016.

availability of a living space below 3 m^2 for each prisoner held in a collective cell does not determine in itself a violation of the Convention. Indeed, such condition gives rise to a strong presumption of inhuman or degrading treatment, where "strong presumption" means "strong evidence" rather than "absolute presumption". Thus, in order to overcome the above-mentioned presumption and to demonstrate the compliance of imprisonment with conventional principles, the Court has identified three factors which must occur simultaneously and which the respondent Government has to prove: the reductions in the required minimum personal space of 3 m^2 are short, occasional and minor, such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities, there are no other aggravating aspects of the conditions of inmate's detention.

The Court also set guidelines with regard to the cases in which prisoners are held in multiple cells where the space available for each of them is between 3 m^2 and 4 m^2 and above 4 m^2.

In the former case, although the space factor is still an important element that the Court must evaluate in verifying the adequacy of detention conditions, «a violation of Article 3 [occours] if the space factor is coupled with other aspects of inappropriate physical conditions of detention related to, in particular, access to outdoor exercise, natural light or air, availability of ventilation, adequacy of room temperature, the possibility of using the toilet in private, and compliance with basic sanitary and hygienic requirements» (§ 139). According to the Court, whenever prisoners are held in multiple cells where the space available for each of them is more than 4 m^2 the above-mentioned factors are still relevant to assess the lawfulness of imprisonment conditions.

The European Court of Human Rights also described the methodology for the calculation of the minimum personal space each person held in a multi-occupancy accommodation. Drawing from the CPT's methodology on the matter, it considered that the in-cell sanitary facility should not be counted in the overall available surface of the room. On the other hand,

contrary to the CPT, the above-mentioned available area should include the space occupied by furniture ("*meuble*"). According to the Court «what is important in this assessment is whether detainees [have] a possibility to move around within the cell normally» (§ 114).

The Grand Chamber's decision on the case, however, raised several concerns which were explained in the dissenting opinions attached to the judgment.

According to the first one[57], two matters emphasized by the Court raise problems: the choice of 3 m^2 as the minimum space for each prisoner and the strength of the presumption which arises once this standard has not been met. In this regard, dissenting judges stressed that the above-mentioned standard of 3 m^2 was not satisfactory and that it led to consider in line with Article 3 ECHR untenable conditions in prison. Indeed, «the standard of 3 sq. m per prisoner means in practice that the inmates constantly breach their so-called personal distance and often enter into the so-called intimacy zone» (§ 4), with detrimental effect on their personality. Further, judges argued that prison overcrowding does not only provoke strong psychological suffering. It also makes the resocialisation path undertaken by detainees much less effective. Taking into account such consequences, dissenting judges emphasized that the minimum surface which must be ensured to each prisoner should amounts to at least 4 m^2 although «it is not a fully satisfactory […] and may trigger criticism on different counts» (§ 5). A lower living space gives raise to a strong presumption of inhuman or degrading treatment which can be rebutted only in exceptional circumstances. More precisely, to counterbalance the lack of space the respondent Government should ensure «special factors which substantially alleviate the situation of detainees and go beyond the normal prisons conditions which should accompany the 4 sq. m standard» (§ 8).

[57] Partly dissenting opinion of judges Sajó, López Guerra and Wojtyczek.

As in the previous dissenting opinion, even in another one judges[58] have raised concerns on the issue related minimum personal space. More precisely, while they fully agree with the mojority's approach, according to which space below the minimum requirement should not automatically trigger a violation, they disagree on how such minimum space should be. They argued that the Court should have followed the standard set by the CPT and it should have held that personal space of less than 4 m^2 triggers the closer scrutiny mentioned above. Dissenting judges criticized the lack of convincing arguments for departing from the standard set by the CPT and that, by moving away from it, «the Court [was] overruling the specialised agency within the Council of Europe, an agency which has the particular expertise and competence to decide on such matter» (§ 9).

The last dissenting opinion[59] stressed that the lack of sufficient personal living space cannot be offset by the presence of other material conditions, such as the availability of adequate personal sleeping space, the access to natural light during the day and electric lighting at night, ventilation, heating, proper hygiene conditions and adequate food. More precisely, «a cumulative effect of "compensating" factors would water down the absolute Article 3 standard, inviting the prison authorities to go down a slippery slope with no objective limits» (§ 52). In fact, while the Court argued that the respondent Government may rebut the strong presumption of inhuman or degrading treatment proving that the periods of deprivation of the personal space of 3 m^2 were "short, occasional and minor", it doesn't provide any definition of these terms. Further, the dissenting judge emphasized that in qualifying as compensatory factors "sufficient freedom of movement outside the cell and adequate out-of-cell activities", as well as "an appropriate detention facility", the Court

[58] Partly joint dissenting opinion of judges Lazarova Trajkovska, De Gaetano and Grozev.

[59] Parlty dissenting opinion of judge Pinto De Albuquerque.

referred to what should be ordinary features of a penitentiary facility in order to justify an extraordinarily low level of personal space for individuals in detention. In other words:

> «*for the majority, normal living conditions justify abnormal space conditions. Logic would require that extraordinary negative circumstances be offset only by extraordinary positive counter-circumstances. This is not the case in the majority's logic. No extraordinary positive features of prison life are required by the majority to compensate for the deprivation of each prisoner's right to adequate accommodation in detention*» (Separate opinion of Judge Pinto De Albuquerque, § 53).

According to the separate opinion of the dissenting judge, the Court's ruling risks to create a regression of the human rights protection level already attained by the Council of Europe. Indeed, such judgment does not only discourage the activity of other European bodies engaged in fundamental rights' safeguard, but it also reinforces the impression of an incoherent European human rights protection system.

Although the judgement *Muršić v. Croatia* constitutes an important "turning point" in the identification of tools, parameters and methods to assess the compliance of detention condition with Article 3 ECHR, it has shed "lights" and left "shadow cones" (Ruotolo, 2016).

As to the formers, the Court emphasised that the lack of space is not a condition which can determine in itself a violation of prisoners' rights beyond any reasonable doubt. Indeed, relevant factors are also time (considered as the duration of the deprivation of this minimum living space) the possibility to move freely and the other compensatory factors defined in detail by the Court. In this regard, the Grand Chamber ruled an important guideline: to

ascertain whether or not there is a violation of the European Convention on Human Rights due to prison overcrowding the Court has to appreciate all these factors as a whole sinceonly the evaluation of all the above conditions can lead to a correct assessment of the actual conditions of detention.

With regard to the "shadows cones", they first concern the methodology used by the Grand Chamber to determine the space available in concrete cases. Indeed, it ruled that when calculating the available area in the cell, the space occupied by furniture must be considered as available; on the contrary, the space occupied by sanitary ware must be excluded. Another issue concerns the meaning of the words "move freely" mentioned by the Court as a parameter to overcome the strong presumption of inhuman and degrading treatment when the individual space is below 3 m^2. The Court's lack of specificity leaves wide (and perhaps excessive) margins of interpretation up to member States. This could result in a detriment of the need for certainty in a particularly sensitive context such as the protection of prisoners' rights and the prohibition of inhuman and degrading treatment.

4. The application of "*Muršić* criteria" in the recent ECtHR case law

As already mentioned, "*Muršić* criteria" represent standards adopted by the European Court of Human Rights to evaluate the conditions of imprisonment and to ascertain whether or not they comply with conventional principles, in particular with the prohibition of torture and inhuman or degrading treatments. In the last few years the Court has applied such criteria in several judgements concerning prison overcrowding and alleged violations of Article 3 ECHR due to this phenomenon.

Following the guidelines set in the *Muršić* judgement, in the case *Ulemek v. Croatia*[60] the Court firstly tried to overcome the strong presumption of human rights' breach deriving

[60] *Ulemek v. Croatia*, application no. 21613/16, 15 April 2020.

from the fact that in Zagreb prison detainees were held in multiple cell where the space available was below 3 m^2. Thus, it evaluated all the circustances of the case, including the duration and the frequency of the reductions in the required minimum personal space as well as the availability of adequate freedom of movement. As supported by the evidence adduced by parties, prisoners had to spend most of the day within their cell where they have a limited freedom of movement. Indeed, jails accommodated too many detainees in relation to their capacity and sanitary annexes occupied most of the rooms. According to the Court, such condition constituted a form of inhuman or degrading treatment. Subsequently, the ECtHR faced the partially different situation of Glina prison, in which detainees were held in cells where the space available was between 3 m^2 and 4 m^2. Taking into account that, in this case, to exclude the violation of Article 3 of the Convention the "space factor" must be coupled with other evidence of inappropriate physical conditions of detention, the Court analysed all relevant elements. It found that prisoners were allowed to move outside the cell throughout the day, prison administration organised several out-of-cell activities, the quality of the food was adequate and even hygienic conditions were acceptable. By considering such compensative factors as a whole, the Court ruled that although it seemed possible a violation of human rights due to the "space factor", the overall assessment of all the relevant circumstances excluded that, in Glina penitentiary, the conditions of detention constituted an inhuman and degrading treatment in violation of Article 3 ECHR.

In the case *Feilazoo v. Malta*[61] the Court applied "*Muršić* criteria" and, according to the evidence alleged by parties, it stated that the evidences alleged by parties proved an unlawfull condition of imprisonment. Indeed, in addition to a living space which raised a strong presumption of inhuman or degrading treatment, the Court emphasised the existence of several elements which proved the violation of the above-mentioned Article 3. First, the

[61] *Feilazoo v. Malta*, application no. 6865/19, 11 March 2021.

conditions of detention complained by the applicant, who claimed that the facility was largely overcrowded and most of the space was occupied by furniture. Prisoners were held in dormitories infested with insects and mice and toilets did not function properly. Except for personnel, no one could access the detention centre and it led difficult for inmates to keep in contact with their relatives. Even the healthcare assistance was deficient. Indeed, only after several days from his request the applicant had the possibility to seek medical treatment. The Court even evaluated the worsening of detention conditions as a result of complaints of inhuman and degrading treatment that the applicant submitted to the competent authorities: the prisoner was confined in a container for nearly seventy-five days without access to natural light, fresh air and out-of-cell activities. Further, he had a limited access to telephone calls with relatives and legal representatives. According to the Court, such factors supported the presumption of violation of Article 3 ECHR deriving from the lack of space and they further aggravated the deprivation of personal freedom that the applicant was served. Thus, the evalution of all the evidences of the case led the Court to rule that imprisonment constituted a form of inhuman or degrading treatment forbidden by the European Convention on Human Rights.

The Court reached similar conclusions even in cases *Mîrca v. the Republic of Moldova and Russia*[62] and *Lukashov v. Ukraine*[63].

The first ruling deals with a complained violation of human rights due to the condition of detention in Transdniestrian penitentiaries[64], where national administration forbade any

[62] *Mîrca v. the Republic of Moldova and Russia*, application no. 7845/06, 27 April 2021.

[63] *Lukashov v. Ukraine*, application no. 35761/07, 20 April 2021.

[64] Transdniestria, officially the Pridnestrovian Moldavian Republic (PMR), is an unrecognised breakaway state located in the narrow strip of land between the river Dniester and the Moldovan–Ukrainian border that is internationally recognised as part of Moldova. During the period of applicants' detention Russia exercised

in-prison visits by representatives of the Organization for Secure and Co-operation in Europe (OSCE) or limited the possibility for inmates to meet other international bodies representatives[65]. Thus, the Court's ascertainment of the situation within such prisons was based only on the allegations submitted by applicant who argued to have been held in highly overcrowded cells. Further, inmates had to sleep in bunk-beds, the accommodation was in poor hygienic condition withouth access to fresh air, daylight and sanitary facility. Taking into account such evidences, the Court found a strong presumption of inhuman or degrading treatment caused by the alleged condition of overcrowding afflicting Transdniestrian penitentiaries. The above presumption could not be overcome through the "*Muršić* criteria" scrutiny. Indeed, there were serious lacks concerning hygiene, sanitary facility, ventilation and daylight. Another factor evaluated by the Court was the uncooperation of Transdniestrian authorities who didn't allow penitentiary visits by international bodies, nor meetings with inmates nor any other tool to ascertain and to analyze the condition of prioners' detention. The whole behaviour of Moldovan authorities determined a breach of both positive and negative obligations put upon CoE's member States by Article 3 ECHR: according to the Court, the national Government didn't prevent nor repress conducts which had determined a breach of the Convention. Further, it did not carry out any reform to improve imprisonment conditions, as proved by the persistence of a chronic prison overcrowding and by the precarious hygienic and structural conditions of Moldovan

effective control over PMR due to its continued military, economic and political support for Transdniestria. Such influence justifies a ruling of condemnation against both Moldova and Russia.

[65] The CPT report on the visit to Republic of Moldova – Transdniestria, 2006. In 2010 a CPT delegation commenced a visit to Transdniestrian prisons. Nonetheless, such delegation was informed that, unlike the Committee's previous visits, it would not be allowed to interview remand prisoners in private. Consequently, the Committee decided to interrupt its visit in the region until such time as the enjoyment of this power could be guaranteed.

penitentiary facilities, which have left almost unchanged over the years. Thus, the Court concluded by ruling that the condition of detention in Transdniestrian prisons breached Article 3 ECHR since they constituted a form of inhuman or degrading treatment.

Even in the case *Lukashov v. Ukraine* the Court faced a complained violation of the above-mentioned Article 3. The issues concerned two different periods of imprisonment, the first one in Donetsk prison hospital and the second one in Zhytomyr prison. Taking into account the evidences alleged from both the applicant and the respondent Government, the ECtHR analyzed such periods individually and assessed the conditions of detention for each of them.

As regard to the period of inmate's hospitalization, the Court stated that even the local Prosecutor inspections revealed the overcrowding afflicting Donetsk prison hospital, where detainees were accommodated in rooms with a living space below the national standard of 4 m^2 per person. Nevertheless, the Court considered as overcome the strong presumption of inhuman or degrading treatment due to the lack of any evidence which could prove a living space below the minimum jurisprudencial standard of 3 m^2. Taking into account *Muršić* guidelines, the Court evaluated other relevant factors such as the possibilioty to access to outdoor exercise, the availability of natural light and air, the availability of ventilation, the adequacy of room temperature, the possibility of using the toilet in private, and the compliance with basic sanitary and hygienic requirements. From its assessment the ECtHR found a lack of such further compensative elements. Indeed, by analysing parties' evidences the alleged documents and the reports available, it ascertained that prisoners weren't granted the possibility to do outdoor activity and that they were held in their room for most of the day since there was not a walking courtyard. Although hygenic condition were adequate (as proved by the report of the visit made by sanitary service and by a Prosecutor after a suicide attempt of a prisoner) and the quality of food was acceptable (as attested by quality certificates), the Court found a violation of Article 3 ECHR. In fact, the impossibility for

inmates to access to an outside area, together with the overcrowding afflicting the hospital, led the Court to consider the deprivation of personal freedom served in Donetsk prison hospital a form of inhuman or degrading treatment forbidden by the Convention. Indeed, the whole of the conditions to which the applicant was subjected constituted an affliction that went beyond the inevitable element of suffering strictly linked with detention and that was able to breach prisoners' fundamental rights.

The Court reached a different conclusion for the period in which the inmate was detained in Zhytomyr prison. Indeed, even though the applicant complained to have been held in overcrowded rooms infested by rats, where prisoners could not lie on beds because they had to be fastened the room wall to allow in-cell movements, the Court stated that the above allegations were not adequately proved. Indeed, the applicant didn't specify in which accomodations and for how long he has been held and he didn't allege any evidence to support his description of the detention conditions. On the contrary, the respondent Governement produced several evidences which proved that detention conditions complied with conventional standards. In fact, in each multiple-occupancy cell it was granted to each prisoner a space of at least 4 m^2. Sanitary facilities were separated by the rest of the room by a wall, the bunk beds were collapsible to grant detainees more space and there were all forniture they need such as a table, benches, a wash basin, shelfs and a cupboard. Thus, the application of "*Muršić* criteria" led the Court to conclude that the applicant's complaint concerning conditions of detention in Zhytomyr prison «[could] not be considered proved "beyond a reasonable doubt"» (§ 147). As consequence, the ECtHR ruled out a violation of Article 3 of the Convention.

5. A comparison between criteria to assess the compliance of detention with Article 3 ECHR drafted of the ECtHR and the CPT

As mentioned in the previous paragraphs, "*Muršić* criteria" are a sort of guidelines which try to guarantee an objective scrutiny of the conditions of detention by the European Court of Human Rights. The above-mentioned assessment aims at ascertaining the compliance with the provisions of the European Convention on Human Rights and at granting an adequate protection for the fundamental rights (also) of detained persons. These criteria are flanked by those developed by the Committee for the Prevention of Torture and Inhuman and Degrading Treatment which, like those defined by the Court, aim at ensuring a lawful and adequate condition of detention. Taking into account the existence of an apparent "double system" of protection granted to detainees, it is important to clarify the relationship between these criteria in order to establish a comprehensive and defined framework of measures to safeguard the rights of detainees and to avoid a risk of competence overlap (and potential conflict) among the ECtHR and the CPT.

However, before making such a comparison of parameters, it is necessary to highlight the difference between these institutions. According to the European Court of Human Rights[66], «the [same] Court performs a conceptually different role to the one assigned to the CPT» (§ 113) since the Committee's has not the power to decide whether a certain situation amounts to an inhuman or degrading treatment or punishment within the meaning of Article 3 ECHR. Rather, it carries out a «pre-emptive action aimed at prevention» (§ 113), which aims at offering a degree of protection that is greater than that upheld by the Court when deciding cases concerning conditions of detention. Contrary to the preventive function of the CPT, the European Court of Human Rights «is responsible for the judicial application in individual cases of an absolute prohibition against torture and inhuman or degrading

[66] *Muršić v. Croatia*, cited above.

treatment under Article 3» (§ 113). Further, the same Court points out another important difference: while it must take into account all relevant circumstances of a particular case when making an assessment under Article 3 ECHR, other international institutions (such as the CPT) develop general standards which aim at preventing future human rights' breach. Despite these different tasks and functions, the Court «remains attentive to the standards developed by the CPT» (§ 113) and it carefully examines cases where detention conditions do not meet the 4 m^2 criterion set by the Committee. The importance afforded by the Court to the CPT's activity in the protection of inmates' human rights is also proved by the fact that, over time, the same ECtHR has often recalled Committee's reports and recommendations both in assessing the conditions within detention facilities and in arguing whether Article 3 ECHR principles have been violated or respected (Long, 2002)[67].

As already mentioned, there are several differences between the standards drafted by the CPT and the ones that the Court applies to assess the compliance of detention conditions with conventional principles. Regarding the available space, the Court emphazises that it is impossible to predetermine once and for all a specific number of square metres that should be ensured to each detainee in order to comply with the Convention. Nevertheless, in several judgements[68] the ECtHR stated that such space must allow prisoners to move freely between the room's furniture and, in any case, it cannot be below 3 m^2 per prisoner in a multiple-

[67] In the case *Aerts v. Belgium*, 61/1997/845/1051, 30 July 1998, the Court took into consideration the report on the visit in Belgium made by the CPT's delegation to prove the inadequacy of the care for a mental-ill prisoner. In the cases *Dougoz v. Greece*, application no. 40907/98, 6 March 2001 and *Kalashnikov v. Russia*, application no. 47095/99, 15 July 2002, the Court considered well founded the appellant's application also on the basis of the CPT's report.

[68] I.e. *Torreggiani and Others v. Italy*, cited above, *Muršić v. Croatia*, cited above, and *Ananyev and Others v. Russia*, cited above.

occupancy cell. Only in a minority of cases the Court has stated that a personal space below 4 m^2 is a factor sufficient in itself to justify a finding of a violation of Article 3 ECHR[69].

The minimum standard of space defined the CPT are different. Indeed, the Committee recommends that a single-occupancy cell shall measure 6 m^2 plus the space required for bathroom fixture (usually 1 m^2 to 2 m^2) while a multiple occupancy cell shall guarantee at least 4 m^2 for each detainee (likewise, excluding the space needed for bathroom fixture)[70]. The difference is even more marked if one considers the desirable standards developed by the CPT: in multiple occupancy cells, national authorities should guarantee an extra 4 square metres (compared to 6 square metres for a single prisoner) for each additional individual. Thus, the desirable space amount to 10 m^2 when two prisoners are held in the same cell, 14 m^2 when the cell accommodate three inmates and so on.

Both the Court and the CPT exclude the space occupied by in-cell sanitary facilities from the calculation of the minimum surface area which shall be ensured to each person in a multiple cell. However, there is a methodological difference which concerns the computation of the space taken by furniture. Indeed, the Court argues that the minimum space available includes also the area occupied by the above-mentioned furnishing as long as it allows the prisoner to move freely. On the contrary, the CPT makes an important distinction: the surface occupied by easily removable furniture shall be considered as available space while the space occupied by fixed or hardly removable furnishing shall not be included in the above calculation.

By the same, either the Committee and the Court stress the importance to take into account also other factors besides the space available in order to assess whether or not there

[69] Among them, *Apostu v. Romania*, cited above, and *Cotleț v. Romania*, application no. 49549/11, 1 October 2013.

[70] See Chapter I, § 7.

is a violation of inmates' human rights. According to both institutions, the lack of space gives raise to a strong presumption of human rights' breach. Such lack could be compensated by the concurrent factors which could exclude an inhuman or degrading treatment. Among them, the brevity of the reduction in the minimum space, the possibility for inmates to spend most of the day outside their cells involved in workshops or work, the organisation of adequate out-of-cell activities and the lack of other aggravating factors of the conditions of detention. Furthermore, either the Committee and the Court stress that providing detainees with adequate space does not in itself exclude the possibility to find a violation of Article 3 of the Convention. Indeed, it can derive from the combination of additional negative factors such as an insufficient number of beds, poor hygiene, inadequate ventilation or room temperature, insufficient heating or light, the impossibility of using the toilet in private, the uncompliance with basic sanitary and hygienic requirements and the deprivation of contacts with relatives. Those factors may constitute in itself an inhuman or degrading treatment regardless of the matter concerning the space available.

The above analysis shows that standards developed by the CPT and Court only parlty overlap. There are still considerable differences in the quantification of the minimum space and in the methodology for calculating the area available to prisoners. Nevertheless, this discrepancy actually results in an increase in the minimum protection afforded to detainees. In fact, although the jurisprudential assessment of the detention lawfulness is based on parameters defined by the European Court of Human Rights, the Committee's standards constitute best practices in safeguarding the prerogatives of prisoners and optimal objectives that the European Court of Human Rights may raise to minimum standards in the near future.

6. The right to hope in the ECtHR's case law: the case *Kafkaris v. Cyprus*

On several occasions, the European Court of Human Rights has faced the matter concerning the compatibility of life imprisonment without the possibility to be released with

the principles enshrined in the European Convention on Human Rights. The Grand Chamber's judgement *Kafkaris v. Cyprus*[71] constitutes a leading case through which the Court has established important principles regarding the above-mentioned issue. Firstly, the Court stressed the connection among Article 3 ECHR and measures depriving a person of his/her liberty: to avoid the risk to apply an inhuman or degrading treatment such deprivation must not cause to the individual concerned suffering and humiliation which go beyond that inevitable element of suffering or humiliation linked with a legitimate punishment. Thus, in accordance with Article 3 of the Convention «each member State must ensure that a person is detained under conditions which are compatible with respect for his human dignity and that the manner and method of the execution of the measure do not subject him to distress or hardship exceeding the unavoidable level of suffering inherent in detention» (§ 96).

Focusing on the matter concerning life imprisonment, the Court emphasized that the imposition of such sentence on an adult offender is not in itself prohibited by or incompatible with Article 3 or any other Article of the Convention. On the contrary, a problem of compliance with the above-mentioned norm may raise whenever the life sentence is irreducible. According to the Court, in determining whether such sentence can be qualified as irreducible it is important to evaluate if a life prisoner has or not any prospect of release. An analysis of the ECtHR's case-law on the subject shows that where national law affords the possibility of review of a life sentence, its commutation, remission, termination or where it grants prisoners' conditional release (although under certain conditions), the domestic legislation concerned complies with Article 3 ECHR[72]. For instance, whenever the law establishes that after a period of imprisonment the sentence may be reviewed to assess the

[71] *Kafkaris v. Cyprus*, cited above.

[72] Among the others, see *Nivette v. France*, application no. 44190/98, ECHR 2001-VII; *Stanford v. the United Kingdom*, application no. 73299/01, 12 December 2002 and *Wynne v. the United Kingdom*, application no. 67385/01, 22 May 2003.

possibility to grant inmates parole, the Court excludes that the prisoners concerned have been deprived of any hope of release. By the same, even if there is not a minimum term of imprisonment to serve before submitting for conditional release and if the law establishes limitation to the possibility for prisoners serving a life sentence to benefit from such measure, the ECtHR rules out the lack of any prospect of freedom. It follows that «a life sentence does not become "irreducible" by the mere fact that in practice it may be served in full. It is enough for the purposes of Article 3 that a life sentence is *de jure* and *de facto* reducible» (§ 98). Consequently, although the Convention does not confer, in general, a right to be released or a right to have a sentence reconsidered by a national authority, the Court's case-law shows that the existence of a system which ensures the possibility to regain personal freedom is a factor to be taken into account when assessing the compatibility of life sentence with Article 3 of the Convention. The Court has stated such principles in very elusive terms since the existence or not of a possibility of release is not considered as a determining criterion to establish whether or not there is a violation of Article 3 ECHR, but simply as a "factor to be taken into account" (Viganò, 2012).

In the *Kafkaris* case the European Court of Human Rights faced the complaint submitted by the applicant through the application of the the above principles. By analyzing Cypriot legal system, the ECtHR found that in case of life sentence national law does not establish a minimum term for the penalty's remission due to the good conduct or the outcome of a re-socialization path. In fact, such penalty can be reviewed at any stage irrespective of the time served in prison. According to Article 53 of Cypriot Constitution, «the President and the Vice-President of the Republic shall, on the unanimous recommendation of the Attorney-General and the Deputy Attorney-General of the Republic, remit, suspend, or commute any sentence passed by a Court», including those through which prisoner has been sentenced to life imprisonment. Thus, although national law provides for a limited prospect of release for life sentenced inmates, the Court did not find that life sentenced prisoners in Cyprus have

no possibility of release. On the contrary, it ruled that Cypriot legal system ensures that life sentence is *de jure* and *de facto* reducible. As consequence, even though the lack of a minimum term for the possibility to be released caused anxiety and uncertainty for life prisoners but, this condition is not relevant in assessing the occurrence of a violation of Article 3 ECHR since those feelings are inherent in the very nature of the sentence imposed. In excluding any violation of the above-mentioned norm, the ECtHR also stressed that the complained lack of a national parole board system in Cyprus could not be considered as a factor able to breach the Convention's principles since «matters relating to early release policies including the manner of their implementation fall within the power member States have in the sphere of criminal justice and penal policy» (§ 104). Contrary to the jurisprudential principle according to which the Convention guarantees concrete and effective rights rather that abstract and illusory ones[73], in the *Kafkaris* case the Grand Chamber has reduced the requirement of an actual possibility of early release to a vain hope left to the discretion of the President of the Republic (Ranalli, 2015).

A concurring opinion and several dissenting opinions are attached to the Court's ruling.

According to the former one[74], what amounts to an irreducible sentence inconsistent with Article 3 ECHR is a penalty for the duration of the offender's life when there isn't any "possibility" nor "hope" nor "prospect" of release. Thus, a life sentence cannot be conceived irreducible merely because the possibility of early release is limited nor because the penalty may be served in full. Cypriot legal system confers a discretional power to establish life prisoners' release up to the President of the Republic. Such decision is not subject to review by a judicial or other independent body. There are no procedural safeguards governing the exercise of the presidential discretion, there is no duty to publish the opinion of the Attorney-

[73] *Inter alia*, *Airey v, Ireland*, 9 October 1979, § 24, serie A, no. 32.

[74] Concurring opinion of the judge Bratza.

General on the admissibility of prisoners' requests nor to give reasons for the refusal of an application for early release. Nevertheless, Cypriot legal system does not exclude prisoners' "hope" or "prospect" of release and does not breach Article 3 of the Convention since the lack of any independent review or procedural safeguards does not make the above-mentioned possibility to be released "unreal and untangible".

The first partly dissenting opinion[75] emphasized a very important principle linked with the human rights protection system set up by the Convention. According to it, State's power in the sphere of criminal justice is not unlimited. In fact, although the countries' choice of a specific domestic criminal-justice system (including the possibility to review a sentence and the release arrangements) is outside the supervision that the Court carries out at European level, such decision cannot be contrary to the principles established by the ECHR. On the basis of such premise, dissenting judges stressed that, although in Cypriot legal system the prospect of release for prisoners serving life sentences exists theoretically, it is extremely limited in concrete. Then, they analyzed Article 3 and argued the such norm requires that the above-mentioned prospect of release meets two conditions: it must exist "*de jure*" (it must be a concrete possibility able to not aggravate the uncertainty and distress inherent in a life sentence) and "*de facto*" (it must be a genuine possibility to regain freedom). Taking into account domestic legislation, dissenting judges held that these conditions are not met by the Cypriot legal system since the discretionary power to grant pardons and clemency conferred on the executive is not counterbalanced by adequate guarantees against arbitrariness. Indeed, lifers is not aware of the criteria applied, nor of the reasons for the rejection of their application and such decision is not susceptible to judicial review. This lack of «a fair, consistent and transparent procedure compounds the anguish and distress which are intrinsic in a life sentence and which, in the applicant's case, have been further

[75] Joint partly dissenting opinion of judges Tulkens, Cabral Barreto, Fura-Sandström, Spielmann and Jebens.

aggravated by the uncertainty surrounding the practice relating to life imprisonment at the time» (§ 3). Furthermore, Cypriot system doesn't comply with the commonly accepted idea that, besides the punitive purpose, sentences must also encourage the social reintegration of prisoners. In fact, although life imprisonment is a law-established penalty in most countries, it does not necessarily imply that inmates must be imprisoned for the rest of their existence: several legal systems ensure the possibility to review life sentences and inmates' release after a certain number of years of imprisonment. Once accepted that the legitimate requirements of the sentence entail reintegration, «a term of imprisonment that jeopardises that aim is [..] in itself capable of constituting inhuman and degrading treatment» (§ 5).

The second partly dissenting opinion[76] stressed that «the applicant's imprisonment has amounted to torture» (§ 9) and therefore it constituted a violation of Article 3 ECHR. Indeed, it is «hypocritical to compare the lack of cooperation to a lack "significant remorse for his crimes"» (§ 9). Further, according to the dissenting judge the Grand Chamber would have made a mistake in sharing the allegations of respondent Government, according to which the refusal to the applicant's submission for release was justified by the recurrence of a "significant danger to society". In fact, such decision was based only on the risk of criticisms against Cypriot Government due to its inability to identify the real person behind the murder for which the inmate was sentenced. On the basis of such premises, the dissenting judge claimed that the prisoner's complaint was well-founded as his condition constituted an unfair deprivation of the right to hope to regain his freedom.

[76] Joint partly dissenting opinion of judge Borrego Borrego.

7. Follow: the Fourth Section and the Grand Chamber rulings *Vinter and Others v. The United Kingdom*

On 17 January 2012, the Fourth Section of the European Court of Human Rights issued the *Vinter and Others v. The United Kingdom* judgment[77]. In this ruling, the Court confirmed the principles already established by the majority of judges in the *Kafkaris* case. Moreover, it set further clarifications by referring to the arguments of the British Court of Appeal and Supreme Court in several rulings concerning the right to hope in United Kingdom. An in-depth analysis of the *Vinter* case is important because, rather than enhancing dissenting opinions of the *Kafkaris* judgment, the European Court of Human Rights has granted domestic legal systems the possibility to provide for a truly "life sentence" (Viganò 2012).

The case dealt with the "whole life order" that British judges can issue whenever an offender is found gulty of specific major crimes established by domestic law[78]. The above-mentioned order makes life imprisonment a perpetual sentence: it is served for the same length of the prisoner's life. The early release of the inmate may be granted at the discretion of the Secretary of State only in exceptional circumstances[79].

By applying the principle set by British Courts, according to which a sentence should not be grossly disproportionate[80], the Fourth Chamber emphasized the distinction between

[77] *Vinter and Others v. The United Kingdom*, cited above.

[78] Among them, premeditated murder of two or more persons, murder accompanied by sexual abuse, murder as a result of kidnapping and murder for terroristic purpose.

[79] As the prisoner's terminal illness and the lack of any residual social danger.

[80] In 2008 the *House o f Lords* claimed that life imprisonment without the possibility of early release does not in itself violate Article 3 ECHR unless it is grossly or clearly disproportionate. Later, in 2009 the UK Court of Appeal ruled that life imprisonment combined with a whole life order did not violate Article 3 ECHR since domestic law provided for the possibility of early release by decision of the Secretary of State.

three types of life sentence: «a life sentence with eligibility for release after a minimum period had been served [...], a discretionary sentence of life imprisonment without the possibility of parole (that is, a sentence which is provided for in law, but which requires a judicial decision before it can be imposed); and [...] a mandatory sentence of life imprisonment without the possibility of parole (that is, a sentence which is set down in law for a particular offence and which leaves a judge no discretion as to whether to impose it or not)» (§ 90).

The Chamber held that the first type of sentence was clearly reducible and no issue could therefore arise under Article 3 ECHR.

With regard to the second type of sentence, the same Chamber argue that

> «*[N]ormally, such sentences are imposed for offences of the utmost severity, such as murder or manslaughter. In any legal system, such offences, if they do not attract a life sentence, will normally attract a substantial sentence of imprisonment, perhaps of several decades. Therefore, any defendant who is convicted of such an offence must expect to serve a significant number of years in prison before he can realistically have any hope of release, irrespective of whether he is given a life sentence or a determinate sentence. It follows, therefore, that, if a discretionary life sentence is imposed by a court after due consideration of all relevant mitigating and aggravating factors, an Article 3 issue cannot arise at the moment when it is imposed*».

Therefore, an Article 3 ECHR issue would arise only when it is possible to prove that the applicant's continued imprisonment is no longer justified on any legitimate penological grounds and that the sentence is irreducible *de jure* and *de facto*.

As to a mandatory sentence of life imprisonment without parole, the Chamber found that such sentence is not in it self incompatible with the Convention and an issue under Article 3 may only arise in the same way as for a discretionary sentence of life imprisonment without parole.

By applying those principles, the Chamber argued that applicants' sentences were discretionary penalties of life imprisonment without parole. Further, no applicant had proved that the continued incarceration served no legitimate penological purpose. As consequence, although the ECtHR raised doubts as to whether the Secretary of State's discretionary power could be considered equivalent to a concrete prospect of release, the judges held that the applicants' detention conditions did not lead to a violation of Article 3 ECHR. This conclusion was criticized by dissenting judges, who argued that applicants' condition gave rise to a violation of conventional principles[81]. According to them, the problem lied in «in whether the need for a possibility of revisiting a whole life order requires that there should already be in place a suitable mechanism in the domestic system, so as to lend credence to the existence of such possibility, and thus afford a measure of hope to the convicted person». Indeed, in order to comply with Article 3 ECHR, domestic law must establish a suitable review mechanism i from the outset. Otherwise, the excessive uncertainty afflicting prisoners could result in a violation of the right to a concrete hope of freedom.

On 9 July 2012, pursuant to a request by the applicants dated 12 April 2012, the Panel of the Grand Chamber decided to refer the case to the Grand Chamber[82].

Following the statements of the Fourth Chamber and the *Kafkaris* ruling's ones, the Court first noted that a grossly disproportionate sentence would violate Article 3 of the Convention. Furthermore, it emphazised that a penalty cannot be considered non-reducible

[81] Joint partly dissenting opinion of judges Garlicki, David Thór Björgvinsson and Nicolaou.

[82] *Vinter and Others v. The United Kingdom*, cited above.

de jure and *de facto* just because it is served in full. In fact, to ensure compliance with the above-mentioned Article 3, national law must afford both a prospect of release and a possibility of review since the balance between justifications for detention (as punishment, deterrence, public protection and rehabilitation) is not necessarily static and it may shift while serving the sentence. Thus, it is only through a judicial assessment concerning the persistence of the requirements for imprisonment, which should be carried out after the prisoner has served part of the sentence, that these factors can be correctly evaluated. Moreover, taking into account the widely accepted principle according to which the punishment has also a re-educational purpose[83], the lack of any possibility to benefit from a review of the life sentence prevents the prisoner's re-education since «whatever the [inmate] does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable» (§ 112). As consequence, by referring to *Kafkaris* and to the Fourth Chamber rulings the Court argued that, with regard to life sentence, Article 3 ECHR must be interpreted as requiring the reducibility of the penalty. "Reducibility" must be considered as a review which allows domestic authorities to evaluate whether personality changes in the whole life prisoner are significant and whether, by serving the sentence, the inmate has made progress towards rehabilitation, so that continued imprisonment can no longer be justified on legitimate criminal grounds. On the contrary, if a domestic legal system does not ensure any mechanism of review, life sentence breaches Article 3 of the

[83] The Court stressed that «there is also now clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved» (§ 114). Further, it also emphasized that «while punishment remains one of the aims of imprisonment, the emphasis in European penal policy is now on the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence. [For instance] Rule 6 of the European Prison Rules, which provides that all detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty» (§ 115).

Convention. Furthermore, even a national law which establishes that whole life prisoners have to serve an indeterminate period of detention before they can submit a request for release fails to comply with the requirements of the above-mentioned Article 3 ECHR since «it would be contrary both to legal certainty and to the general principles on victim status» (§ 122). Thus, the Court stressed that life prisoners are entitled to know, at the outset of their sentence, what they must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought.

Focusing on the *Vinter* case, the Grand Chamber emphasized the lack of clarity of the United Kingdom national law concerning the prospect of release of whole life prisoners. Indeed, even though the British Government claimed that domestic legislation put on the Secretary of State the duty to exercise the power of release if inmates' continued detention has become unjustified (thus, incompatible with Article 3 of the Convention), the same Secretary of State has still not altered the restrictive policy on whole life sentenced prisoners release. Moreover, the possibility of release established by domestic legislation depends on circumstances linked to specific humanitarian needs set by law which, according to the Grand Chamber, are extremely restrictive. Thus, the Court held that the possibility of release established by British legal system «would be inconsistent with *Kafkaris* and would not therefore be sufficient for the purposes of Article 3» (§ 127). As consequence, it found a breach of applicants' right to hope since their life sentences could not be considered as reducible for the purposes of Article 3 of the Convention.

The Grand Chamber's judgement was joint with concurring and dissenting opinions drafted by several judges.

In explaining the reasons supporting the conclusion reached by the majority, in her concurring opinion judge Power-Forde pointed out that

> «*Article 3 encompasses what might be described as* the right to hope *[…] Those who commit the most abhorrent and egregious of acts and who inflict untold sufferings upon others nevertheless retain their fundamental humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and to do that would be degrading*»

Thus, the judge reiterated the importance of guaranteeing detainees the right to hope (of regaining their freedom) since it ensures both that the prison treatment aims at inmates' rehabilitation and that it complies with the prohibition of inhuman and degrading treatment laid down in Article 3 of the Convention.

The conclusions reached by the Grand Chamber and the attached concurring opinion have been criticized with regard to the method applied by the Court to examine the alleged breach of Article 3 ECHR[84]. First, because while the above-mentioned Article 3 would normally require an individualised assessment of each applicant's situation, the Grand Chamber has evaluated the situation for all prisoners serving whole life orders, providing for a generalised interpretation of the Article 3 ECHR. Second, because the ruling conflicted with the principle of subsidiarity underlying the Convention. Indeed, by taking a prospective view of the prisoners' situation, extended to many decades ahead in their lives, the Court provided for an abstract assessment and failed to undertake a concrete examination of each applicant's current situation. Finally, the dissenting judge stressed that «this manner of

[84] Partly dissenting opinion of judge Villiger.

proceeding overlooks the different thresholds in Article 3». In fact, the Grand Chamber did not refer as to whether the minimum threshold of severity of sufferings, held by the Court on several rulings in order to find a violation of Article 3 ECHR, had been exceeded. Thus, to avoid any risk of generalization and misapplication of Article 3 of the Convention, the dissenting judge claimed that the problematic issues concerning irreducible sentences should have been examined individually rather than as a whole.

Contrary to what was expected after the judgment of the Fourth Chamber, the Grand Chamber did not deal with the issue of whether or not a "conditional release legal mechanism" is required to consider a sentence is effectively reviewable. The solution to this issue is relevant because in the first case it would be prescribed a concrete prospect of release, in the second case it would be sufficient the hope of regaining freedom. Therefore, the analysis of both the *Vinter* judgments proves that although the Court made very important statements of principle, it did not put them into practice (Ranalli, 2015). Such conservative solution reached by the ECtHR emphasizes the difficulty of balancing between the growing need for protection of prisoners' human rights and the discretion of Member States in their criminal policy choices.

8. A setback in the path of the European Court of Human Rights on the right to hope? The case *Hutchinson v. The United Kingdom*

The *Hutchinson* case[85] faces once again the compatibility of the "whole life order" with Article 3 ECHR.

After the (re)analysis of the relevant United Kingdom law, the European Court of Human Rights held that the problems emphasized in the *Vinter* judgment had been solved. Indeed, through the *McLoughlin* judgment the British Court of Appeal had overcome the ECtHR's

[85] *Hutchinson v. the United Kingdom* [GC], application no. 57592/08, 17 January 2017.

objections regarding the lack of clarity of the domestic law concerning the prospect of release of whole life prisoners.

On the basis of such premise, the Court focused on the specific case to assess whether or not the United Kingdom rules guarantee the reducibility *de jure* and *de facto* of the whole life sentence. To this extent, the same Court identified several applicable principles.

First, it stated that life imprisonment without the possibility of early release is not in itself incompatible with Article 3 ECHR as long as there are both a prospect of release and a possibility of review aimed at verifying the persistence of legitimate penological grounds for continued imprisonment.

Second, the Grand Chamber stressed that among the above-mentioned legitimate penological grounds, the re-education of the prisoner is particularly relevant and its importance increases with the passing of time.

According to the third principle, the criteria and conditions to review a whole life sentence must be clearly defined by domestic law and they must be compatible with the principles laid down in the case-law of the European Court of Human Rights.

Fourth, the moment in which the review should be carried out is defined by individual States using as a reference the 25-year period identified on the basis of international consensus.

Fifth, the Court held that the nature of the review procedure (judicial or administrative) is left to national discretion.

By applying such principles, the European Court of human Rights stressed that the attribution to an executive body of the power to review a life sentence is not in itself contrary to Article 3 ECHR. Indeed, the decision taken by the Secretary of State must comply with the Convention, it must always be reasoned with reference to the circumstances of the particular case and it is subject to review by the domestic Courts. Further, as already argued by British Court of Appeal, the national legal system provides for a statutory duty of the

Secretary of State to exercise the power of release compatibly with Article 3 of the Convention. The exercise of the above-mentioned power depends on several factors, among which the existence of legitimate penological grounds for the continuing detention of the prisoner such as punishment, deterrence, public protection and rehabilitation. Thus, according to the statements of British Courts as transposed by the ECtHR, the Secretary of State must grant early release whenever it is necessary to ensure that detention does not extend beyond the ceasing of its lawful ground. As to the temporal parameter, the Secretary of State is not required to promote the review procedure *ex officio*. Nevertheless, the possibility for the detainee to submit such request any time, together with all the guarantees mentioned above, ensures the compatibility of the British legislation with Article 3 ECHR.

The judgment is followed by two dissenting opinions of which the most relevant is the one by Judge Pinto de Albuquerque. According to him, the ruling of the British Court of Appeal, which has been transposed by the Grand Chamber, contrasts with the wording of the domestic law: while the latter allows release only "on compassionate grounds", the above-mentioned Court of Appeal states that such rule should be interpreted as granting the release of a whole life prisoner in all cases in which there is no longer any legitimate penological ground for continued imprisonment, as already established by the ECtHR in the *Vinter* judgment. According to the dissenting judge, the British Courts' interpretation of domestic law is an extensive one, which aims at giving British legislation a meaning that is not referable to the expression "compassionate grounds". Moreover, even ignoring the above-mentioned lexical inconsistency, there is still a problem concerning the clarity of the criteria that the Secretary of State must apply in exercising his power of early release. British judges do not give any indication on this matter. Indeed, they merely state that the expression "exceptional circumstances" is in itself sufficiently clear while, actually, such argument seems to be groundless. Even the requirement to "take into account" the Convention when interpreting domestic law would not be adequate to ensure the compliance with the standards

set by the ECtHR. Indeed, the dissenting judge attaches several extracts from the decision issued by the British Court that clearly seem to consider the imposition of a "whole life order" as a truly perpetual penalty. Thus, he argued that the Grand Chamber wrongly held that, regardless of any amendment, the United Kingdom legal system complies with the European Convention on Human Rights. In fact, according to the dissenting judge, the same ECtHR considered as adequate to ensure the protection of prisoners right to hope the mere assurances of the British Court.

The decision of the European Court of Human Rights raises at least two problems.

The first is a literal issue and concerns the British law on early release. In fact, it is difficult to understand how the ECtHR can state that the lack of clarity of the domestic law (raised by judges in the *Vinter* judgment) has been solved simply through the ruling of a national Court which held that the term "exceptional circumstances" is in itself sufficiently well-defined. The term "exceptional", when not further clarified, gives no indication of the boundaries concerning the applicability of the provision. Therefore, the only information available is statistical: the granting of early release by the Secretary of State to prisoners subjected to a whole life order constitutes an extraordinary event (Bernardoni, 2017). Still from an interpretative perspective, another problem concerns the extent of "compassionate grounds". The British Court of Appeal stated that they include all cases of successful rehabilitation of the prisoner, in which the sentence has served its preventive and re-educational function. In concrete, it is difficult to suppose that the term "compassionate grounds" can include the ceasing of the sentence's requirements. Otherwise, the boundaries of the Secretary of State's assessment would become even more uncertain and it would accentuate the uncompliance with Article 3 ECHR (Bernardoni, 2017).

The second issue concerns the statement of the British Court of Appeal in the *McLoghlin* case, namely that the re-integration of life prisoners into society is an exceptional and extraordinary event. This assertion, which complies with British law and which allows the

early release of life prisoners only in exceptional circumstances and on compassionate grounds, is not in accordance with ECtHR case law. Nevertheless, on this occasion the Grand Chamber seems to "hide its head in the sand" ant it appears to be more concerned to avoid a direct dialogue with national Courts rather than to ensure the compliance with the standards of protection of human rights set through its precedents (Bernardoni, 2017). Thus, the *Hutchinson* ruling carries the risk of undermining the entire conventional system which is aimed at ensuring that human rights receive the same minimum level of protection everywhere (Viganò, 2016). Bearing in mind such observations, the above-mentioned *Hutchinson* judgment does not represent a step forward in the harmonisation of the guarantees within the Council of Europe, nor a positive example of dialogue between Courts. Rather, it is a setback in the path of the European Court of Human Rights towards a streghtening protection of the right to hope. In fact, the *Hutchinson* ruling weakens the European principle according to which inmates must know *ex ante* what they must do in order to benefit from release (Fassone, 2020).

9. Follow: the *Marcello Viola v. Italy (no. 2)* judgement

The First Chamber of European Court of Human Rights has faced the issue concerning the right to hope even with regard to Italian legal system. More precisely, in the case *Marcello Viola v. Italy (no.2)*[86] the ECtHR has faced the (un)compliance of the so-called *ergastolo ostativo* with the principles enshrined in Article 3 ECHR[87]. *Ergastolo ostativo* is

[86] *Marcello Viola v. Italy*, cited above.

[87] *Ergastolo ostativo* has been introduced in Italian legal system by law no. 356 of the 7 August 1992. Taking into account the mafia related events happened in the previous years, among which the including the numerous massacres and attacks, through such norm Italian legislator adopted urgent changes to the criminal procedure code in order to introduce measures to face mafia crimes. For a more in-depth analysis of this particular punishment, see Chapter 3, § 7 ff.

a particular life sentence regime governed by Article 4 *bis* of the Law 26 July 1975, no. 354 (noted as *Ordinamento Penitenziario* or Prison Administration Act). The norm establishes a differentiated prison treatment which application is based on particular circumstances. In fact, it precludes the application of *liberazione condizionale* and other *misure alternative*[88] (with the exception of "*liberazione anticipata*")[89] as well as the access to *benefici penitenziari*[90] whether an offender who committed certain major crimes[91] does not cooperate with the judicial authority in order to prevent further criminal activity, to support the police or the above-mentioned judicial authority in gathering decisive evidence for the inquiry and to identify or to arrest co-offenders[92]. Therefore, such regime prevents any prospect of release for uncooperative prisoners, regardless of the outcome of their prison treatment. Indeed, the lack of collaboration is considered as an irrefutable evidence of both the

[88] The expression refers to measures alternative to detention.

[89] For a focus on the matters concerning *liberazione condizionale*, Chapter III, § 9 below. For the analysis of the other *misure alternative* established by Italian legal system see https://www.giustizia.it/giustizia/it/mg_2_3_1_4.page#.

[90] The expression refers to benefits afforded prisoners by law. As regards *permessi premio*, see Chapter III, § 8. For the in-depth analysis of the other *benefici penitenziari* provided for by Italian legal system see DELLA CASA F. and GIOSTRA G., *Ordinamento penitenziario commentato*, Cedam, 2019.

[91] Among the others, mafia-related crimes, terrorism, sedition, drug-related crimes committed by a criminal association, etc.

[92] As stated by Article 58 *ter* of Prison Administration Act. The different prison treatment for such inmates aimed at soliciting their collaboration with the State authorities to face the mafia phenomenon. Article 4 *bis* also establishes an exception. In fact, whenever the judicial authority excludes the persistence of any link among the prisoner and the criminal organisation, such benefits can be granted regardless of the above offender's cooperation if his/her the minor role in committing crimes or judiciary fact-findings make it impossible the prisoner's collaboration or make it objectively irrelevant.

persistence of links with crime associations, the social dangerousness of the prisoners and the ineffectiveness of the inmates' re-education.

That said, the analysis concerning Italian legal system allows to outline three different types of life sentence: one as a perpetual punishment that can be reduced as a result of a path of re-education (ordinary life sentence), the second, also reducible but only through cooperation with the judicial authorities (life sentence for mafia affiliates and similar – *ergastolo ostativo*), the third (life sentence for kidnappers-murderers) requires, even in the case of cooperation, that the prisoner has served at least 26 years of imprisonment (Fassone, 2020).

In order to ascertain whether *ergastolo ostativo* ensures the possibility to review the sentence and the prospect of prisoners' release - so that the above-mentioned penalty can be considered *de jure* and *de facto* reducible - the European Court of Human Rights focused on the sole possibility afforded to detainees to hope for their freedom: the cooperation in the investigation and prosecution activities carried out by the national authorities. The Court stressed that national legislation does not prohibit, absolutely and automatically, to access to *liberazione condizionale* or other *benefici penitenziari*, but it subjects such possibility to the above-mentioned cooperation. Although the choice on the domestic criminal justice legislation made by each State - including the rules concerning the review of the sentence and the modalities of release - is theoretically free, the Court emphasized that, to date, penal policies in Europe enhance the re-educational aim of punishment, which is considered as important as the repressive one. The primacy of the punishments' re-educative purpose in Italian legal system is supported both by law (Article 27 of Italian Consitutition and Article 1 of Prison Administration Act) and by national case-law (*inter alia*, by several

Constitutional Court rulings[93]). According to the latter, prisoners' resocialisation is an aim that must characterize the sentence from its abstract normative formulation to its concrete execution and that must guide the activity of both the legislator, the trial judge, the supervisory magistrate and the prison authorities. The European Court of Human Rights also stressed that Italian penitentiary system is based on the principle of the detainees' "progression of treatment". According to it, inmates' active participation in the individual re-socialization programme organized by prison administration may produce positive effects on them, it may evolve their personality and it may promote their progressive reintegration into society. More precisely, as detainees gradually progresses along the re-educational path, the system guarantees them the possibility to benefit from progressively less restrictive regime and measures (from *lavoro all'esterno* to *liberazione condizionale*), as steps forward their "path to release". As already mentioned, such progressive reintegration process is precluded for prisoners serving an *ergastolo ostativo* sentence unless they decide to cooperate since only collaboration allows to overcome the absolute presumption of their social dangerousness. According to the ECtHR, although domestic legal system grants prisoners the choice of whether or not cooperate with the judicial authority, both the real freedom of such decision and the lawfulness of the equivalence between non-cooperation and the social dangerousness of the offender raise several doubts. Indeed, the lack of cooperation cannot always be ascribed to a free and voluntary choice, nor it can always be justified by the adhesion to criminal values and the persistence of links with the criminal group to which prisoners belonged. Rather, such decision may derive from a wide range of reasons, such as the need to protect one's family or the need to avoid the risk of reprisals.

[93]Constitutional Court, 12 February 1966, no. 12, *Giur. Cost. Online*; Constitutional Court, 22 November 1974, no. 264, *Giur. Cost. Online;* Constitutional Court, 25 May 1989, no. 282, *Giur. Cost. Online*; Constitutional Court, 2 July 1990, no. 313, *Giur. Cost. Online*.

Furthermore, also the choice to cooperate is not necessarily a sign of re-education or a proof of the ceasing of inmates' social dangerousness. In fact, they may decide to cooperate with judicial authorities without having cut the ties with the criminal organisation (thus remaining socially dangerous) and with the only purpose of benefiting from the advantages afforded by law in case of collaboration. Therefore, if circumstances other than the adherence to the above-mentioned criminal organisation may lead the prisoner to refuse to cooperate or if cooperation may pursue an exclusively opportunistic aim, the equivalence between the lack of collaboration and the presumption of inmates' social dangerousness cannot be absolute since cooperation may not correspond to a real re-education of the prisoners.

Another matter faced by the European Court of Human Rights concerns the impossibility to assess the evolution of prisoners' personality during detention established by Article 4 *bis* of Prison Administration Act in case of un-cooperation . Such automatism contrasts with the case-law of the ECtHR, according to which the above-mentioned personality does not remain fixed at the moment when the offence was committed. In fact, it may evolve during the execution of the sentence, in a process of progressive re-education[94]. As consequence, prisoners have the right to know what they must do and which conditions are required in order to be considered for release.

On the basis of these premises, the Court held that the lack of cooperation with judicial authority, which gives rise to an incontrovertible presumption of dangerousness, deprives prisoners of any realistic prospect of release. In fact, if detainees decide to not cooperate they are denied the possibility of proving that there are no more legitimate penological ground for continued imprisonment. Taking into account that each sentence, including life imprisonment, is compatible with Article 3 ECHR as long as there is "both a prospect of release and a possibility of review" aimed at verifying the continuing existence of

[94] *Murray v. The Netherlands*, cited above.

"legitimate penological grounds" for continued imprisonment, the Court ruled that the automatism established by Italian law which prevents any possibility of freedom without inmates' collaboration breaches the above-mentioned Article 3. In fact, the incontrovertible presumption established by Italian Prison Administration Act prevents the judge from examining the application for *liberazione condizionale* and from verifying whether or not, during the execution of the sentence, prisoners have made progress in their re-educational process, so that imprisonment is no longer justified. Therefore, the supervisory judge has only the power to verify whether there has been or not the prescribed cooperation, without further evaluations. Even admitting the seriousness of the Mafia-related crimes, the European Court of Human Rights stressed that it cannot justify any derogation from the prohibition of inhuman or degrading treatment enshrined in Article 3 of the Convention.

With regard to the other two remedies established by Italian legal system for the review of the sentence (the presidential pardon and the suspension of the sentence on health grounds), the Court emphasized that they did not amount to a concrete prospect of release able to ensure the compliance with conventional principles. Indeed, while the first meets purely humanitarian purposes since it is aimed at mitigating the rigidity of the criminal law, even the second is a review mechanism related to humanitarian reasons since it is granted only in cases of ill health, physical disability or particularly advanced age. However, the ECtHR stressed that no prisoner serving an *ergastolo ostativo* sentence has ever been pardoned by the President of the Italian Republic.

Following the analysis of the national legal system, the European Court of Human Rights held that the life sentence pursuant to Article 4 *bis* of Prison Administration Act, known as *ergastolo ostativo*, excessively restricts the prospect of inmates' release and the possibility of a review of the sentence. Consequently, that perpetual sentence cannot be qualified as reducible *de iure* and *de facto* for the purposes of Article 3 of the Convention.

The *Marcello Viola v. Italy* ruling is jointed by a dissenting opinion which criticized decision to deem *ergastolo ostativo* an inhuman or degrading treatment[95]. In fact, this particular form of detention is one of the tools that Italy has provided for the prevention and repression of organised crime, in accordance with the more general obligation to protect the people right to life under Article 2 ECHR[96]. Moreover, *ergastolo ostativo* cannot be considered as a measure that deprives persons sentenced to life imprisonment for dangerous crimes the possibility to hope to regain their freedom. In fact, *liberazione condizionale* is subject only to a specific condition: the cooperation with the judicial authority. This requirement only applies to offenders who are considered to be at the top of the criminal organisation, while the others affiliated are subject to ordinary prison terms.

According to the dissenting judge, another evidence which proves the compliance of *ergastolo ostativo* with Article 3 ECHR is the fact that the threats committed by organised crime associations against repentants does not reach a level of severity able to paralyse the choice to cooperate and the consequent application of less restrictive measures[97].

A further issue raised by the dissenting judge concerns the punishment's aim. According to him, the decision adopted by the First Chamber assigns to the penalty an exclusively re-educational function which rises to its only lawful purpose. On the contrary, punishment is a multidimensional legal tool: even though resocialisation of the offender is a fundamental target, it is not the only one. In fact, the sentence serves also a retributive function since it gives a feeling of justice both to society and to the victim and it constitutes a deterrent against other potential criminals since it reduces offenses and helps authorities to dismantle criminal organisations.

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[95] Joint partly dissenting opinion of judges Wojtyczek

[96] *Inter alia*, *Makaratzis v. Greece*, application no. 50385/99, ECtHR 2004-XI, § 57

[97] In this regard, the judge claimed that the applicant himself was convicted due to the cooperation of two repentants.

The dissenting judge also analyzed another logical step of the reasoning and he focused on the "absolute presumption" of social dangerousness that, according to the Court, results from non-cooperation. In the shared awareness of the inadmissibility of presumptions *iuris et de iure* in criminal matters, the above-mentioned judge held that the majority's reference to the presumed dangerousness of non-cooperating detainees was misleading, since non-cooperation is not an indication of dangerousness but rather an evidence that justifies the sentence imposed on the offender (Romice, 2019).

As to the reducibility *de jure* and *de facto* of *ergastolo ostativo*, the judge stressed that Italian legal system does not only allow the prisoner to know what he has to do in order to benefit from *liberazione condizionale* (the cooperation), but it also provides for two further legal tools, including the presidential pardon. The fact such pardon has not been granted to any *ergastolano ostativo* so far does not necessarily mean that it cannot happen in the future.

On the basis of these remarks, the dissenting judge concluded by claiming that *ergastolo ostativo* is compatible with the right to hope since it leaves appreciable possibilities for the prisoner to regain freedom. Therefore, such punishment may not be considered a form of inhuman and degrading treatment contrary to Article 3 ECHR.

With the decision on the *Viola* case, the European Court of Human Rights addressed Italian judicial policy strategies by censuring the norms according to which cooperation is a necessary requirement to grant a concrete right to hope to *ergastolani ostativi*, regardless of the re-educational path undertaken through the penitentiary treatment. In fact, the above-mentioned collaboration is a historical fact that has nothing to do with the evolution of inmates' personality nor with the repentance of the offender. Thus, the decision to not cooperate cannot prevent the judge from any assessment on the actual, concrete and current dangerousness of *ergastolani ostativi* in the perspective of their (progressive) release (Fiorentin, 2018). Similarly, it seems difficult to assimilate the lack of cooperation to the persistence of ties with the criminal association to which prisoners belonged. As stressed by

the Court, this analogy is excessively reductive because it does not take into account the characteristics of the mafia phenomenon and its mode of action, which is often characterised by acts of violence and threats not only against those who wish to cooperate with the judicial authority, but also (and above all) against their relatives. Therefore, if according to Italian legal system also life imprisonment pursues a re-educational purpose, the preclusion from any judicial assessment on the evolution of *ergastolani ostativi* personality in case of non-cooperation (from which it shall derive inmates' assumpted social dangerousness) amounts to deny, at least in part, the above-mentioned rehabilitation aim of the punishment. Indeed, penalty seems to rise to a tool to provoke the cooperation of prisoners: without a "confession" any prospect of freedom would be precluded and the sentence would be served for their whole life. According to the analyzed ECtHR's case law, cooperation under the conditions laid down by Italian law may not be considered as a tool which grants neither a prospect of release, nor a possibility of review. Further, whenever inmates refuse to cooperate, penalty may not be conceived as a measure justified by legitimate penological grounds. Rather, it amounts to an inhuman or degrading treatment since it is based only on an incontrovertible juridical presumption of social dangerousness, without any margin of appreciation of the circumstances of the case.

On the basis of such evidences, the European Court of Human Rights found the presence of a structural problem afflicting Italian legal system which requires an action preferably by the legislator. Therefore, the ruling *Marcello Viola v. Italy* can be considered as an "almost-pilot" judgment: although the Court has not defined general measures that Italy should adopt in order to comply with conventional principles, in arguing the violation of Article 3 ECHR the domestic structural problem and the opportunity of a legislative reform are indicated *expressis verbis* (Mauri, 2021).

CHAPTER III

PRISON OVERCROWDING AND THE RIGHT TO HOPE IN THE ITALIAN LEGAL SYSTEM

1. The problem of prison overcrowding in Italy: a historical analysis up to the recent past - 2. *Stati Generali sull'Esecuzione Penale*: an important opportunity to deal with prison overcrowding and the right to hope - 3. The *Orlando* reform: still unsolved gaps on the protection of prisoners' rights – 4. The CPT's report on the visit to Italy and the current condition of Italian prisons: the partial ineffectiveness of reforms in the medium term - 5. Problems of application of "*Muršić* criteria" in the case law of national Courts - 6. A clarifying ruling: the judgement of Italian *Sezioni Unite* no. 6551 of 2020 – 7. Life imprisonment and the right to hope in Italy – 8. The Constitutional Court's judgement no. 253 of 2019 on *permessi premio* for the so called *ergastolani ostativi* - 9. Towards an effective recognition of the right to hope? The Constitutional Court's ordinance no. 97 of 2021 on *liberazione condizionale* for mafia *ergastolani ostativi*

1. The problem of prison overcrowding in Italy: a hystorical analysis up to the recent past

Prison overcrowding is one of the most serious problems afflicting Italy: it has ancient origins and it is often considered a physiological condition of penitentiaries although it actual constitutes a disorder in the functioning and organization of the prison system (Di Stefano et al., 2013). This problem is well known. In fact, during the parliamentary session for the conversion into law of the Law Decree 23 December 2011, no. 211 (*Interventi urgenti per il contrasto della tensione detentiva determinata dal sovraffollamento delle carceri*), policy makers pointed out that the issue of prison overpopulation could not be considered as an extraordinary emergency, but rather as «*una problematica* [...] *che investe l'Italia ormai da più di quaranta anni*». The illegality of prison overcrowding was highlighted in a report

(*Rapporto sullo stato dei diritti umani negli istituti penitenziari e nei centri di accoglienza e trattenimento*) drafted by a special Commission appointed by the Italian Senate[98]. It emphasised that any violation of human rights is not only ethically reprehensible but it is also a violation of both national laws and acts adopted by the international bodies. Furthermore, the Commission argued that the persistence of the unlawful condition deriving from prison overcrowding is (also) the result of a mistaken belief concerning pre-trial detention and sentence. More precisely, it claimed that

> «*solo in una nuova impostazione che la separi nettamente dal carcere e riduca drasticamente il ricorso alla carcerazione, limitandolo ai soli casi nei quali esso appare effettivamente indispensabile, si può restituire alla pena la funzione che la Costituzione italiana le assegna. È ad una prospettiva di "carcere minimo" che bisogna gradualmente tendere con una pluralità di iniziative e di strumenti*» (Introduction of the report)

Thus, in order to reduce prison overpopulation and to assign punishment the purpose established by the Constitution, the Commission suggested the idea of imprisonment as *extrema ratio*: detention shoul be ordered only in exceptional cases, when deprivation of freedom is the only feasible solution.

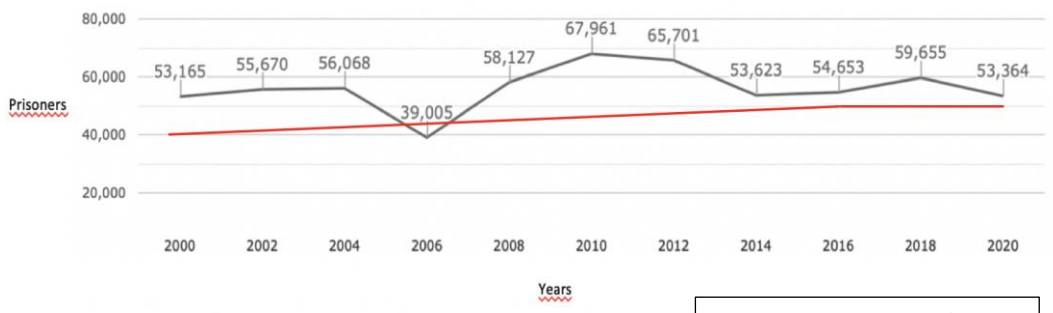
Despite these suggestions, Italian Parliament has never enacted a structural reform able to solve prison overcrowding and the solutions adopted to reduce the extent of this chronic phenomenon have been totally ineffective. In fact, the almost thirty pardons granted over the

[98] Special Commission for the Protection and Promotion of Human Rights, *Rapporto sullo stato dei diritti umani negli istituti penitenziari e nei centri di accoglienza e trattenimento per migranti in Italia*, Senato della Repubblica, XVI legislature, approved by the Commission on 6 March 2012.

last sixty years have resulted in merely "temporary palliatives" (Gargani, 2012). More precisely, they were "buffer legislative measures", justified by the urgency and the emergency of the situation, which have been effective only in the short or very short term and which did not definitively solve the problem neither in the medium nor in the long term.

These evidence on the seriousness of the problem of prison overcrowding are corroborated by statistics on the prison population published periodically by the Italian Ministry of Justice and by international bodies[99].

PRISON POPULATION IN ITALY FROM 2000 TO 2020



Source: Italian Ministry of Justice and World Prison Brief database

THE GRAPH SHOWS THE TREND OF THE PRISON POPULATION IN ITALY FROM 2000 UNTIL THE END OF 2020. THE RED LINE MARKS THE AVAILABLE PLACES IN ITALIAN PENITENTIARIES.

A historical analysis of both prison overcrowding and the legislative measures adopted to face it is useful to better understand why this phenomenon is considered as chronic. For decades, during the *prima Repubblica* period (an Italian slang term referring to the timeframe between 1948 and the early 1990s), politicians solved the problem of prison overpopulation

[99] The data available on the Ministry of Justice website cover the period between 31 December 2008 and 31 December 2021. They are complemented by data available in the "World Prison Brief" database, managed by the University of London together with the Institute for Crime & Justice Policy Research. The latter data refer to earlier period (2000 to 2008).

with periodic clemency measures. On average, a pardon or amnesty law was approved almost every two years[100]. This was the most common solution that Governments in charge used to face prison overcrowding. Such trend changed in 1992, when the Parliament approved the Constitutional Law 6 March 1992, no. 1 which established that amnesty and pardon are granted by a law which must be approved by a two-thirds majority of the members of both Chambers of the Parliament, in each of its articles and in the final vote. This reform had significant effects. Until then, a government majority was sufficient to pass clemency measures. Instead, the reform has required an agreement between the different political groups to adopt them. This resulted in an almost constant growth of the prison population: In 1991, one year after the last amnesty approved through Law 12 April 1990, no. 75, there were 35.469 prisoners, the following year 47.316, ten years later 53.165[101]. In 2003, the Government introduced the so-called "*indultino*" (Law 1 August 2003, no. 207) through which it suspended up to two years of prison sentence for those inmates who had served at least half of it. Subsequently, the legislator intervened again by issuing Law 31 July 2006, no. 241 which granted the pardon for certain crimes committed up to 2 May 2006[102]. Such measure has produced significant consequences. Indeed, the prison population has decreased from 59.523 to 39.005 inmates (reduction rate of 34%). Thus, with regard to prison overcrowding, for the first time in 15 years the Italian penitentiary system showed numbers worthy of a civilised country: there were 89 inmates per 100 available beds.

[100] Source: *Openpolis*, https://openpolis.it/2016/11/11/amnistie-indultini-svuota-carceri-il-sovraffollamento-carcerario-in-ventanni/10407.

[101] *Ibidem*.

[102] Such law granted the pardon for prison sentences which did not exceed and for pecuniary sentences - alone or combined with prison ones – which did not exceed € 10.000. The norm also listed the crimes for which the measure could not apply. Among them, subversive association, kidnapping, acts of terrorism, child pornography, sexual violence, trafficking in human beings, usury.

However, the palliative nature of the measure adopted by the Government made the situation of Italian penitentiary system only temporarily acceptable. In fact, it changed very quickly and in 2008 the number of detainees was already the same as in 2006 before the pardon: there were 58.127 inmates and the prison overcrowding rate amounted to almost 135%, with 1,35 prisoners for each available bed (the whole places available were 43.066). To cope with the alarming increase in the prison population, the Government set two different approaches.

Firstly, the building of new prisons and the enlargement of the existing ones, as suggested by the 2008 *Alfano-Matteoli* plan and those of the following Governments. More precisely, after having declared the state of emergency[103] due to a 151% prison overcrowding rate, in 2010 the Government approved the so-called Prison Plan[104], which was intended to complement the prison construction policy. The Plan, that was divided into several different measures for each year, included a new prison building programme to increase the capacity of Italian penitentiaries. In particular, for the year 2010 the Government established the expansion of some of the existing prisons. For the period 2011-2012, the Plan scheduled the construction of 18 new penitentiaries, so as to increase the capacity of Italian prisons to about 80.000 places, with an overall growth of more than 21.700. In concrete terms, the Prison Plan proved to have a limited impact. In fact, such measure increased the capacity of Italian prisons only by 4.415 places between 2010 and 2014[105] (Andreolucci, 2017).

Secondly, Italian legislator enacted the Law 26 November 2010, no. 199 through which it tried to reduce the pressure on national penitentiary system by granting offenders the *detenzione domiciliare* as alternative to imprisonment. According to such law, persons convicted with a sentence - even residual - of no more than 18 months could be eligible for

[103] The state of national emergency for one year was declared with the D.P.C.M. of 13 January 2010 and it has been subsequently extended until 31 December 2012, due to the persistence of a critical condition.

[104] Ordinance of the President of the Council of Ministers of 19 March 2010, no. 3861,

[105] Resolution of the Court of Audit (*Corte dei Conti*) of 30 September 2015, no. 6/2015/G.

detenzione domiciliare in lieu of detention in prison. Although this measure was initially planned as an extraordinary remedy expiring on 31 December 2013, the seriousness of the condition of Italian penitentiaries led the legislator to make it permanent and to introduce the role of Ombudsman for Prisoners' Rights[106] (Article 7 of the Decree Law 23 December 2013, no. 146).

Taking into account the partial inefficiency of the measures previously adopted and in order to fulfill the statements of the European Court of Human Rights' judgment *Torreggiani and Others v. Italy*[107], the Italian Government intervened by introducing into national legal system several remedies for prisoners. In particular, through the Decree Law 26 June 2014, no. 92, the legislator emended Italian Prison Administration Act by introducing specific measures that inmates can apply for in case of ascertained inhuman and degrading treatment due to prison overcrowding. Such safeguards are listed in the new Article 35 *ter* of Prison Administration Act which provides for "*rimedi risarcitori conseguenti alla violazione dell'articolo 3 della Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali nei confronti di soggetti detenuti o internati*" (Compensative remedies for violation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms afforded to detained or interned people). As to the prerequisites to request the above-mentioned remedies, the norm establishes that people concerned may apply for them when the conditions of detention determine (or have determined) a breach of Article 3 ECHR as interpreted by the European Court of Human Rights. The above-mentioned reference gives Article 53 *ter* of Prison Administration Act a significant flexibility. Indeed, it ensures the adjustment of national law to the developments of the ECtHR's case-law without further action by the national legislator. Moreover, it grants the

[106] *Garante nazionale dei diritti delle persone private della libertá personale*.

[107] See Chapter II, § 2.

applicability of the above-mentioned remedies whenever the detainee has suffered a prison treatment which the European Court has considered contrary to the prohibition of inhuman and degrading punishment, irrespective of both the factors which have caused such condition and the occurence of prison overcrowding[108] (Della Bella, 2014). Focusing on the specific remedies afforded by Italian law, Article 53 *ter* of Prison Administration Act establishes that, to compensate detainees who have been subjected to detention conditions in breach of Article 3 ECHR for at least fifteen days, the supervisory judge (*magistrato di sorveglianza*) shall reduce the duration of imprisonment still to be served by one day for every ten days during which inmates have suffered the violation of their human rights. When the period of detention still to be served does not allow the above-mentioned reduction, the judge shall settle the applicant € 8.00 for each day on which the detainee has suffered the inhuman or degrading treatment. The same remedy applies also whenever the period of imprisonment served in conditions which did not comply Article 3 of the Convention was less than fifteen days. Persons who have been subjected to inhuman or degrading treatment while in pre-trial detention (in all cases in which such period of imprisonment could not be taken into account for the calculation of the sentence to be served) as well as people who have already served their sentence can apply for the above-mentioned compensation within six months by the end of detention or pre-trial detention.

The analysis of Article 35 *ter* of Prison Administration Act shows that the remedies introduced by Italian legislator to comply with the European Court of Human Rights statements does not influence the number of prisoners and it does not contribute to prevent or solve the issue of prison overcrowding. Therefore, it cannot be considered as turning point

[108] According to this interpretation of the rule, Article 53 *ter* would be applicable, for instance, in the case of maintaining in prison people whose health conditions are incompatible with detention (as in *Scoppola v. Italy*, cited above, and in *Contrada v. Italy*, application no. 66655/13, 14 April 2015). Further, the remedy would be applicable in case of lack of medical care within the prison.

towards an adequate protection of prisoners' rights nor as a solution which could solve the long-standing problem of prison overcrowding. It can neither be considered as a remedy which could prevent future appeals to the same European Court to complaint for potential violations of Article 3 ECHR since it does not offer greater protection or a real solution against the risk of inhuman or degrading treatments. In fact, the compensations enshrined by Article 53 *ter* do not avoid sufferings and negative effects that prison overpopulation causes on detainees.

The table below shows the number of inmates in the period between 2008 and 2015 as resulting from the Italian Ministry of Justice website[109]. It includes: places available in Italian penitentiary system, number of prisoners, overcrowding rate in percentage, number of Italian prisoners, number of foreign prisoners, number of pre-trial or trial detainees and sentenced inmates. All data relate to the 31 December of each year[110].

PRISON POPULATION IN ITALY FROM 2008 TO 2015 (DATA RELATED TO 31 DECEMBER)							
Year	**Places Available**	**No. of prisoners**	**Overcrowding rate**	**Italian prisoners**	**Foreign prisoners**	**Pre-trial/trial detention**	**Sentenced**
2008	43.066	58.127	135%	36.565	21.562	31.540	26.587
2009	44.073	64.791	147%	40.724	24.067	31.646	33.145
2010	45.022	67.961	151%	43.007	24.954	30.529	37.432
2011	45.700	66.897	146%	42.723	24.174	28.874	38.023
2012	47.040	65.701	140%	42.209	23.492	26.930	38.771
2013	47.709	62.536	131%	40.682	21.854	24.065	38.471
2014	49.635	53.623	108%	36.161	17.462	19.590	34.033
2015	49.592	52.164	105%	34.824	17.340	18.268	33.896

[109] The choice to set 2008 as the first year of the analysis depends on the fact that data published by Italian Ministry of Justice refer to the period from 2008 to 2021.

[110] The chart include data from 2008 to 2015 in order to emphasize the situation of Italian penitentiary system before and after the judgment *Torreggiani* (cited above). Data from 2016 to now will be analyzed in next paragraphs.

The data analysis shows that before the *Torreggiani* judgment (from 2008 to 2012) the condition of the Italian penitentiary system was particularly critical: the number of prisoners was well above the number of available places and the average overcrowding rate exceeded 143%. The number of foreigners had a significant impact on the overcrowding problem since about one third of the prisoners were nationals of foreing countries. Finally, with regard to the trial status of inmates, the table shows a high presence of persons in pre-trial or trial detention, on average over 46% of the whole prison population. In the period between the above-mentioned ECtHR ruling and the holding of the *Stati Generali sull'Esecuzione Penale* (2013 to 2015), the rate of overcrowding declined significantly, but not enough to bring the number of prisoners below the available places. More precisely, such rate amounted, on average, to 114% (with a downward peak in 2015 with 105%) and the number of foreigners was still about one third of the total number of detainees. Regarding prisoners' trial status, persons in pre-trial or trial detention were the 33% of the whole prison population.

The significant reduction in the number of detainees after the ruling *Torreggiani* held by European Court of Human Rights is the result of an emergency intervention by the Italian Government. In fact, to promptly reduce overcrowding, the above-mentioned Government issued two decrees: the Decree Law 19 August 2013, no. 78, known as "*decreto carceri*" and the Decree Law 23 December 2013, no. 146, known as "*decreto svuota carceri*".

The first one aimed at reducing the number of prisoners by amending several domestic norms. Among the most important innovations, it established that pre-trial detention could be ordered only for committed or attempted offenses which are punished by no less than five years imprisonment. Further, the decree stated that the threshold of three years' imprisonment (even constituting the residue of a longer sentence) set to allow not-detained sentenced offenders to apply for an alternative measure is determined by deducting forty-five days for each semester of sentence served. This calculation is made by the supervisory judge when he/she considers *ab origine* that such a reduction can be granted to the offender.

The decree also established that, in cases where *detenzione domiciliare* can be allowed on humanitarian grounds (e.g. person in particularly serious health conditions), the limit of three years set by law for the suspension of the order to serve the sentence, issued by the Public Prosecutor, has been raised to four years. The decree also amended several provisions of the penitentiary legislation: as consequence of such reform, they allow for the easier access of prisoners to *benefici penitenziari*, including *detenzione domiciliare*, *semilibertà* and *permessi premio* (Bortolato, 2013).

With regard to the "*svuota carceri*" decree, through such measure the Government introduced the so-called *liberazione anticipata speciale* which was conceived as a temporary remedy operating only for two years from the entry into force of the same decree. The measure was characterised by a reduction of seventy-five days for every six months in which the sentence has been served, instead of forty-five days as in case of ordinary *liberazione anticipata*. Moreover, to further reduce the number of inmates, the legislator established that the measure would have retroactive effect and that it would apply for each semester since 1 January 2010. The decree "*svuota carceri*" also streghtened *misure alternative*. As a result of the reform, *affidamento in prova al servizio sociale* could be granted to inmates with sentences, including residual ones, up to 4 years instead of the previous 3 years. Other remedies introduced by the Government concerned drug addict and foreign detainees. For the former, the special legislation on narcotics has been reformed to reduce penalties applied by judges for minor offences. For the latter, the *misura alternativa* of the *espulsione o allontanamento dello straniero dallo Stato* has been enhanced in order to decrease the number of foreign inmates held in Italian prisons.

Finally, a further slight reduction in the prison population resulted from the Constitutional Court ruling issued in February 2014[111], through which the above-mentioned

[111] Constitutional Court, 12 February 2014, judgement no. 32, *Giur. Cost. Online*.

Court declared the "*Fini-Giovanardi* Law" on narcotics unconstitutional[112]. By reinstating the previous and more favourable legislation[113], the judgement allowed detainees sentenced for crimes related to drugs to benefit from a recalculation of sentences. This resulted into the release of several prisoners and in a consequent partly emptying of prisons.

2. *Stati Generali sull'Esecuzione Penale*: an important opportunity to deal with prison overcrowding and the right to hope

Although the legislative reforms analysed in the previous paragraph contributed to a reduction in the prison population, the problem of overcrowding has remained essentially unresolved. In fact, as already stressed, in 2015 there were 52.164 inmates held in Italian penitentiaries, the places available were 49.592 and the overcrowding rate amounted to 105%. Almost 17.340 were foreigners while 34.824 prisoners were Italian citizens. Sentenced inmates amounted to 33.896 and persons in pre-trial or trial detention were 18.268. In 2016 the number of detainees gradually began to rise again. On 31 December, people held in Italian penitentiaries amounted to 54.653 and the number of places available was 50.228. The overcrowding rate was 109%. In relation to citizenship, the number of foreigners was 18.621 while Italian prisoners were 31.607. Focusing on the juridical status, sentenced detainees were 35.400 and people in pre-trial or trial detention were 19.253. As a result, Italy has maintained the uncomfortable position of "special observed" since it was still included in the "black list" of European States with problems in protecting the fundamental rights of detained persons (Fiorentin, 2016).

[112] The law 21 February 2006, no. 49 had equated soft drugs with hard drugs for the purposes of applicable legislation. This resulted in the application of particularly long sentences to drug offenders regardless of the nature of the substances involved.

[113] The Presidential Decree 9 October 1990, no. 309, known as law "*Iervolino-Vassalli*".

In this timeframe, at the turn of the year 2015 and 2016, Italian legislator convened the so called *Stati Generale sull'Esecuzione Penale*. It was a working group composed of experts from different fields (penitentiary law, criminal law, criminal procedural as well as psychology, psychiatry, education, engineering and architecture) who were appointed to try to «*abbassare i "ponti levatoi" tra collettività e carcere in modo che l'opinione pubblica non lo percepisca più come una sorta di extraterritorialità sociale, un'enclave del male, del pericolo, della sacrosanta sofferenza*» (Giostra, 2017). Thus, to avoid the risk of going back to the situation of previous years, the *Stati Generali* experts identified and analyzed Italian penitentiary system's issues in order to suggest possible solutions to address, among the others, the problem of prison overcrowding and all other matters related to it. The experts were grouped into eighteen "working tables"[114], each with the task of analysing and facing several matters. At the end of their work, they drew up a final report aimed at suggesting legislative and structural reforms to meet the needs of inmates held in national penitentiaries and to offer possible solutions to problems afflicting Italian prison system[115]. The fundamental principle behind the proposals drawn up by the experts was a sort of "copernican revolution" (Fiorentin, 2016): it considered the sentence as aimed at the social

[114] Table 1: *Spazio della pena: architettura e carcere*; Table 2: *Vita detentiva. Responsabilizzazione del detenuto, circuiti e sicureza*; Table 3: *Donne e carcere*; Table 4: *Minorità sociale, vulnerabilità, dipendenze*; Table 5: *Minorenni autori di reato*; Table 6: *Mondo degli affetti e territorializzazione della pena*; Table 7: *Stranieri ed esecuzione penale*; Table 8: *Lavoro e formazione*; Table 9: *Istruzione, cultura, sport*, Table 10: *Salute e disagio psichico*; Table 11: *Misure di aicurezza*; Table 12: *Misure e sanzioni di comunità*; Table 13: *Giustizia riparativa, mnediazione e tutela delle vittime del reato*; Table 14: *Esecuzione penale: esperienze comparative e regole internazioni*; Table 15: *Operatori penitenziari e formazione*; Table 16: *Trattamento. Ostacoli normative all'individuazione del trattamento*; Table 17: *Processo di reinserimento e presa in carico territorial*; Table 18: *Organizzazione e amministrazione dell'esecuzione penale*.

[115] The final report is available on the website of the Ministry of Justice, https://www.giustizia.it/giustizia/it/mg_2_19_3.page?previsiousPage=mg_2_19.

rehabilitation of offenders and imprisonment as a last resort when all other alternative solutions were inadequate in the specific case. The final report of the *Stati Generali sull'Esecuzione Penale* is divided into eight thematic areas, each one focused on single topics or groups of topics.

The introduction of the report outlines the principles underpinning the work of the Committee of experts. Among them, the above-mentioned idea of imprisonment as *extrema ratio* and the rebalance of the relationship between the re-educational function of punishment and the purposes of social defence, general prevention and repression. According to experts, to ensure the compliance with the prohibition of inhuman and degrading tratments established by Article 3 ECHR, each sentence must primarily serve a re-educative aim and the prison treatment must pursue detainees' progressive reintegration into civil society. To achieve these purposes, the experts identified several possible remedies, some of which aimed at solving, directly or indirectly, the problem of prison overcrowding while others aim at safeguarding the prisoners' right to hope.

Focusing on the former problem, the experts stressed that, although managing to temporarily curb the growth of the prison population, the measures adopted by the legislator after the *Torreggiani* judgment have revealed an intrinsic weakness. First of all, because they have been implemented to face an emergency situation and to comply with the above-mentioned ruling of the European Court of Human Rights. If in the future these two preconditions should cease to exist, it could not be excluded a new growth in the application of imprisonment and a return to the previous situation. A second reason for perplexity emphasized by *Stati Generali*'s experts concerns the quality of the *extra moenia* sentence. Indeed, although it is carried out in one's own residence, *detenzione domiciliare* is only slightly more dignified and effective than detention in a penitentiary since it lacks the requirements of re-socialisation that are demanded nowadays of any kind of criminal punishment. Further, according to experts it is not satisfactory to have shifted part of the

criminal execution out of the "prison enclosure" to consider the problem of prison overcrowding solved. Indeed, *misure alternative* must guarantee a change in inmates' personality aimed at their re-socialisation. Otherwise, the risk of recidivism and the consequent massive return to prison of persons who have (although partially) regain their freedom would make futile the application of the above-mentioned *detenzione domiciliare*. Further, even the collective perception of the very nature of criminal punishment should change. In fact, as experts have pointed out, «*appare vera pena solo quella che costringe e affligge, mentre le sanzioni di tipo riparativo o risocializzante sono ritenute di minore efficacia*» (only punishment that constrains and afflicts appears to be true, while reparative or resocialising sanctions are considered to be less effective)[116]. On the contrary, the granting of "territorially anchored" measures, through which the person concerned never ceases to be part of civil society despite the commission of an offence, allows both to reduce the number of offenders within national penitentiaries and to address more efficiently the causes that may have determined the commission of the crime. Thus, the aboe-mentioned "territorially anchored" measures avoid the risk of recidivism as well as the re-growth of the prison population. Among them, experts suggested to implement "community measures": they are alternative to imprisonment and involve both offenders and civil society's actors, aiming at their embedding.

According to *Stati Generali*'s experts, the possibility to serve a sentence outside prison should not be an exception. Rather, it should be the rule because, in addition to a quicker reintegration, community measures allow for the creation and strengthening of links with civil society during the execution of the sentence and they reduce the negative impact that release can cause on prisoners. Indeed, when people who have served several years in prison without any relationship with the "outside world" regain their freedom, they are "catapulted"

[116] Part five of the Final Report.

into a different reality from the one before they entered prison, often finding themselves excluded from all social dynamics. In order to foster reintegration and to (consequently) reduce overcrowding, experts suggested a legislative reform which should establish a wider application of *misure alternative*, among which the *affidamento in prova al servizio sociale* and *detenzione domiciliare*. Regarding the former, the experts recommended to increase the restorative content of the above-mentioned *affidamento in prova*, for instance by involving offenders in community services and by encouraging the pacifying process with the victim. With regard to the latter, the same experts stressed the need to reform such measure. In fact, especially in recent years, *detenzione domiciliare* was granted prisoners mainly to reduce prison overpopulation. It still retains its custodial nature and it has does not pursue any resocialising aim since the only change in inmates' status concerns the place of imprisonment. Taking into account that *detenzione domiciliare* may be even more harmful than prison detention in terms of resocialisation[117], the experts suggested to provide for a programme of re-educational activities in which the offenders who benefit from such measure should be involved. It would avoid the risk of a decline in their rehabilitation path and it would encourage their social reintegration. With the same aim of reducing overcrowding and encouraging offenders' re-education, the experts recommended the introduction of new *misure alternative* which would greater involve the community and the local social facilities. In order to guarantee an immediate re-integration of the prisoners in the socio-economic framework, they suggested to replace *semidetenzione* with public utility work since it ensures a greater involvement of the inmates in social dynamics. Similarly, even the *liberazione condizionale* should be reformed. More precisely, the experts suggested a review of its prerequisites. Indeed, they recommended to replace the prescribed

[117] Prisoners cannot participate to education activities organized by prison administration, they may have difficulty to find a job, they may have no social life nor opportunities.

assessment of the “repentance of the offender” with the easier evaluation of the “behaviour of the prisoner” from which deducing whether or not there has been a change of his/her personality. In addition, experts suggested to afford detainees the possibility to apply for an alternative measure after having served at least four-year of the sentence regardless of the crime committed. Indeed, such term should be sufficient to allow the judicial assessment of the level of resocialisation achieved by each prisoner, to ascertain if any alternative measure should be granted and to determine the most suitable one. Although the re-socialisation of the offender still remains the main parameter to consider when deciding on the granting of *misure alternative*, an increase application of them - whether combined with adequate support from social services - could offer prisoners the possibility of regaining their freedom earlier and, at the same time, it could concur in reducing the overcrowding affecting the prison system.

The work of the *Stati Generali sull'Esecuzione Penale* also addressed the issue of life imprisonment and inmates’ right to hope. At this regard, recalling the Italian Costitution’s principle set by Article 27, according to which each sentence must serve a re-education purpose, the experts stressed that the above-mentioned precept assumes the offering of rehabilitative opportunities, which can also be realized through a re-modulation of the sentence. It may be established by the judge taking into account the behaviour of the inmate and the individualised project of re-socialisation defined by prison administration. The period during which the prisoner serves the sentence should never be a sort of existential time-out, but a time of opportunity to rediscover oneself and one’s social role. Indeed, re-education aims at making detainees people who are aware of their duties and rights and who knows how to manage themselves in the social microcosm of the prison, whose rules of life and daily activities must be as close as possible to those of the outside world. Indeed, it would prepare inmates to regain their freedom once rehabilitated. Any re-educational purpose is irremediably frustrated by a system whose rules or practices put detainees in a

situation of mere passive subjection. Thus, the *Stati Generali* experts considered both as an offenders' right and a statal duty the re-education. In order to adequately protect this prerogative, it is necessary to set up an individualised treatment programme, which must aim at the re-education of the prisoner as stated by law (Article 27, clause 3 of Italian Constitution which, among other things, refers to the prohibition of inhuman and degrading treatment provided for by Article 3 ECHR). The use of the term "aim at the re-education" is not accidental: it means that the above result must never be imposed, it must not be considered as a certain result and it must never be considered impossible. Once rehabilitated, the inmate should be released since the sentence has reached its purpose. Such rule should apply also to life prisoners. Thus, according to experts even these detainees, when they have efficiently finished the re-education path set by the judge (with the sentence) and by the prison administration (through the prison treatment), must be granted the right to hope to their regain freedom. Such right often results in a motivational boost able to promote positive psycho-behavioural evolutions in view of a fruitful and early re-entry into the civil society. The *Stati Generali*'s experts remarked that the right to hope cannot be denied even to those offenders sentenced to life imprisonment. Indeed, as held by the European Court of Human Rights, the prohibition of inhuman or degrading treatment laid down in Article 3 ECHR requires each legal system to provide for a review mechanism which allows to verify whether, during the execution of the sentence, the prisoner has made progress that there are no more legitimate reasons that can justify the maintaining detention. On the basis of these assumptions, experts found a critical issue in relation to the so called *ergastolo ostativo* established by Article 4 *bis* of Prison Administration Act. In fact, they stressed that this particular punishment may results in a clear violation of the right to hope since it prevents certain categories of inmates who do not cooperate with judicial authorities from any prospect of release. Therefore, on the assumption of the abstract re-educability of each prisoner regardless the offense committed and in order to ensure that each inmate has a real

right to hope, the experts recommended to amend the above-mentioned Article 4 *bis*. More precisely, they suggested to convert the lack of collaboration (established by Prison Administration Act as an obstructing factor to the possibility to regain freedom) from an absolute to a relative presumption of social dangerousness of the detainee concerned, which could be overcome by the judge through a careful assessment of all the circumstances of the case. On the other hand, the required lack of current ties between the prisoner and organised, terrorist or subversive crime association to which it belonged must be maintained. The experts recommended to review also the hypothesis of "impossible" or "irrelevant" cooperation which, once proved, allow to overcome the legislative preclusion to access to *benefici penitenziari*. In this regard, they suggested to add a further hypothesis consisting in the case of non-cooperation justified by appreciable reasons[118]. Finally, another desirable amendment concerns the reduction of the number of obstructing offences listed in Article 4 *bis* of Prison Administration Act by limiting the possibility of life imprisonment only for mafia and subversive crimes.

From the final document drafted at the end of the *Stati Generali sull'Esecuzione Penale*, analysed in this paragraph only in relation to the proposals aimed (directly or indirectly) at solving the issues concerning prison overcrowding and the right to hope, it emerges the experts' awareness of the need for the Italian legislator to draft a substantial reform. In fact, in addition to making prison a place where inmates can rehabilitate themself, a legislative intervention based on the reccomendations of the *Stati* Generali's experts would allow, at least theoretocally, to solve the problems found by the European Court of Human Rights rulings as afflicting Italian system. However, the proposals of the above-mentioned experts have been implemented by the Government only partly. This incomplete "evolution" of

[118] As long as the other conditions required by law for the granting of *benefici penitenziaria* are met.

Italian legal system has led to the persistence of issues that could (and should) have been definitively resolved, as it will be explained in the following paragraphs.

3. The *Orlando* reform: still unsolved gaps on the protection of prisoners' rights

After the closure of the work of the *Stati Generali sull'Esecuzione Penale*, the Italian Parliament intervened by issuing the Law 23 June 2017, no. 103, (*Modifiche al codice penale, al codice di procedura penale e all'ordinamento penitenziario*), better known as the "*Orlando* reform"[119]. Subsequently, on 2 October 2018, the Governement issued three legislative decrees of which mainly two (no. 123 and no. 124) implemented the delegation established by the aforementioned law. The analysis of the two legislative decrees shows that the Government's action has resulted in a "two-cores" reform: the first one, more conservative, re-proposes the "ancient" idea of prison as the only remedy able to neutralise the offender and, therefore, to guarantee the security of citizens; the second one, on the contrary, seems to be aimed at strengthening the Constitutional principle which emphasizes the re-socialization purpose of the santence and at simplifying the procedures for access to *misure alternative* (Della Bella, 2019).

The first core of the reform is based on the assumption according to which the sentence should result in the deprivation of personal freedom. A symptomatic aspect of this strand of thought is the lack in the Decree no. 123 of 2018 of provisions referring to a widening use of *misure alternative* and to the suppression of automatisms and preclusions to access *benefici penitenziari* in case of conviction for crimes of particular social concern. These innovations, although suggested by the experts of the *Stati Generali sull'Esecuzione Penale* and included in the Law no. 103 of 2017, have not been introduced by the Government.

[119] To the scope of the research work, the reform will be analyzed only in relation to its effects on the issue of prison overcrowding and the right to hope.

With regard to *misure alternative*, although the final document drafted by the *Stati Generali*'s experts refer them as a tool for the social reintegration of inmates, the same reference lacks in the legislative decree no. 123 of 2018. According to scholars, the decision to not transpose the section of the draft reform concerning the "revision of the procedures and conditions to access to *misure alternative*, with reference to both the subjective conditions and the sentence limits"[120] into the final text of the *Orlando* reform derives from an express political choice to not implement the delegation (Fiorio, 2019) caused by the current Government's ostracism towards *misure alternative* (Cesaris, 2018). The failure to reform the regulations on them has had several negative consequences. On the one hand, it has reduced the re-socialisation effect of the sentence, which, on the contrary, could have been accentuated through the greater accessibility of such measures. In fact, a change in the subjective and temporal requirements resulting in an easier access to *misure alternative* for those prisoners who are effectively committed to the rehabilitation programme set up for them by the prison administration would have increased the rewarding of such benefits and it would also have encouraged prisoners' participation in the re-education path. On the other hand, the choice of the Government to not intervene has indirectly produced negative consequences on the problem of prison overcrowding. Indeed, the above-mentioned simplification of the procedures to access to *misure alternative* would have allowed to admit to these measures a greater number of prisoners. This would have resulted in a possible reduction of the prison population as well as in a similar possible reduction of (at least) part

[120] The delegation concerning a wider application of *misure alternative* was conferred by Article 1, clause 85, b) of the Law no. 103 of 2017 which stated that the Government should act to review the modalities and conditions for access to *misure alternative* - both with reference to the subjective conditions and to the sentence limits - in order to foster their application, except in cases of exceptional seriousness and dangerousness and in particular for convictions for crimes of mafia and terrorism, including international terrorism.

of the problem of overcrowding[121]. Albeit Article 1 of Prison Administration Act - as reformed - explicitly establishes that the sentence must tend to the re-education of the offender, the above-mentioned political choice adopted by Italian Government proves that such re-education was still considered as an aim to be pursued mostly through imprisonment.

The reform left gaps of safeguards even with regard to the prisoners' right to hope. As specified in Article 1, clause 85, e) of the Law no. 103 of 2017, the intention of Parliament was, first and foremost, to abolish any automatism and preclusion that could prevent or delay the individualisation of the re-educational treatment and the differentiation of prison paths in relation to the type of offence committed and the personality of the offender. Secondly, the same Law no. 103 of 2017 also provided for the revision of the legislation concerning the preclusion of *benefici penitenziari* and *misure alternative* for inmates sentenced to life imprisonment, although with except of certain cases[122]. Despite the clear intention of the Parliament to protect prisoners' right to hope by eliminating several legal preclusions, the Government did not implement the parliamentary delegation. This political decision brought down an important pillar on which the reform outlined in Law no. 103 of 2017 was based and it left unchanged a regime which was contrary to the settled case-law of the Italiano Constitutional Court, according to which foreclosures in criminal matters are affected by a "suspect of unconstitutionality"[123]. But it is not only the Government's action that is questionable, since even the approach of the Parliament has given rise to doubts of

[121] In this regard, the impact of the reform on overcrowding would have depended on the requirements for access to the measures established by the Government.

[122] Crimes of exceptional gravity or dangerousness and people condemned for offences linked of mafia and terrorism phenomenons.

[123] In the past, the Court has already held that absolute presumptions in criminal matters were basically unconstitutional since they uncomply with the right of defense granted by Article 24 of Constitution. See, i.e. Constitutional Court, 12 April 2005, judgment no. 144, *Giur. Cost. Online*.

constitutionality. In fact, the delegation law underlying the *Orlando* reform allowed for only a partial change to the so-called "double track" penitentiary system, according to which the prison treatment varies taking into account the nature of the crime for which prisoners have been sentenced. The Law no. 103 of 2017 established only its mitigation rather than its removal. Indeed, due to the incontrovertible presumption of social dangerousness established by Article 4 bis of Prison Administration Act, the norm excluded from the reform the preclusion which denies the access to *benefici penitenziari* to prisoners convicted of mafia and terrorism crimes who do not cooperato with judicial authorities[124]. Such parliamentary decision appared to be a disappointing choice as it was inconsistent with the project of reform drawn up by the experts of the *Stati Generali* (Della Bella, 2019). In fact, in order to offer adequate protection to the prisoners' right to hope, they recommended to modify the absolute (and therefore incontrovertible) presumption of social dangerousness due to the choice not to cooperate into a relative one, which could be overcome by demonstrating the end of any relationship between the offender and crime association[125]. Therefore, while the Law no. 103 of 2017 had granted the Government the opportunity to introduce important changes to the regime of *misure alternative* which could have a positive impact even on the issue of prison overcrowding, a similar possibility was denied with regard to the *ergastolo ostativo*.

Taking into account the failure of the above-mentioned Government to exercise the delegation on *misure alternative* and the lack of provisions concerning the right to hope of *ergastolani ostativi* in the Law no. 103 of 2017, the *Orlando* reform was not satisfactory in relation to both the recommendations of the final document of the *Stati Generali*

[124] As already mentioned, Article 4 *bis* of Prison Administration Act subordinates the possibility of access to benefici penitenziari to the collaboration with the judicial authority. Such cooperation is considered the only way to prove the cut of ties with organised crime and that the prisoner is no longer socially dangerous.

[125] Proposal no. 1, Table no. 16 of *Stati Generali sull'Esecuzione Penale*.

sull'Esecuzione Penale and the guidelines of the Italian Constitutional Court. Before the enactment of the Decrees Law by the Government, the same Court had affirmed the primacy of the re-educational purpose over any other aim of the sentence precisely in relation to the preclusions to access to *benefici penitenziari* and *misure alternative* for those sentenced to life imprisonment[126]. Therefore, with regard to the matters concerning the right to hope and prison overcrowding, the *Orlando* reform has appeared to be totally inadequate. These issues remained completely unsolved and they continued to plague Italian system, with detrimental consequences on the detainees' fundamental rights.

4. The CPT's report on the visit to Italy and the current condition of Italian prisons: the partial ineffectiveness of reforms in the medium term

As already mentioned, the *Orlando* reform did not contribute neither to solve nor to reduce the problem of prison overcrowding, as weel as it left unsolved the issue concerning the right to hope for *ergastolani ostativi*. Such thought is proved taking into account data concerning Italian penitentiary system related to the years 2017 and 2018. More precisely, in 2017 the number of people held in Italian penitentiaries amounted to 57.608 with an increase of at least 3.000 units compared to the data related to 2016. The places available were 50.499 and the overcrowding rate amounted to 114%. 19.745 detainees were foreigners while 37.863 were Italian citizens. Sentenced inmates amounted to 37.451 and persons in pre-trial or trial detention were 17.870. In 2018 the situation was even more critical. The number of detainees held in Italian prisons amounted to 59.655 and the number of places available was 50.581. The overcrowding rate was almost 120%. In relation to citizenship, the number of foreigners was 20.255 while Italian prisoners were 39.400. As to the juridical

[126] Constitutional Court, 21 June 2018, judgement no. 149, *Giur. Cost. Online*.

status, sentenced detainees were 39.738. People in pre-trial or trial detention amounted to 19.917.

In order to evaluate the "state of health" of Italian prison system, in March 2019 a CPT's delegation visited Italian penitentiary facilities, in particular Biella, Milan Opera, Saluzzo and Viterbo prisons[127]. The report has been published in January 2020. Albeit the Committee considered positively the amendments to the Prison Administration Act adopted in 2018 through the Orlando *reform*, it stressed that a steady increase in the prison population is still affecting Italian penitentiary system. Then, the CPT focused on the issues afflicting Italian penitentiaries and suggested several reccomendations.

Taking into account the number of inmates in Italian penitentiary accommodations[128], the CPT recommended Italian authorities to take action in order to ensure that all prisoners are provided with at least $4m^2$ in multiple-occupancy cells and to bring the prison population down below the number of places available. According to the Committee, it should contribute to comply with supranational principles - among which those established by Article 3 ECHR - and to reduce the overcrowding phenomenon[129]. To achieve this goal, the CPT suggested the Italian legislator to foster the application of non-custodial measures and to adopt reforms that simplify the release of prisoners through means of supervision which are appropriate compared to the personality of the prisoners concerned and the nature of the sentence.

[127] The previous visit in Italy was carried out in 2016. Its report, as well as the one related to the 2019 visit, is available in the CPT's website, https://www.coe.int/en/web/cpt/italy. The next visit is planned in 2022.

[128] At the moment of the visit it amounted 60.611 prisoners compared with a maximum capacity of 50. 514 places.

[129] Recommendation Rec (2006)2 of the Committee of Ministers of the Council of Europe and Recommendation no. R(99)22 regarding overcrowding and the prison population inflation.

During the visit the delegation assessed that the matter concerning physical ill-treatment of inmates by staff varied according to the different prisons visited. Indeed, despite the great majority of detainees met by the Committee held that they were treated correctly by prison officers, the CPT received also several allegations on the above-mentioned ill-treatment[130]. In particular, inmates complained an excessive use of force in reaction to unruly behaviours as well as the infliction of injuries due to the unprofessional application of the means of restraint by personnel. To avoid such form of unjustified violence, the CPT recommended to report to the prison doctor, the prison director and the national Department of Penitentiary Administration (DAP) all physical or psychological detrimental treatment by staff in order to allow an investigation at both the administrative and prosecutorial levels and to prevent similar future happenings. The Committee suggested the DAP also to improve prison staff training in handling high-risk situations and in using safe methods to control and to restraint inmates, especially those with a tendency to self-harm. The Department of Penitentiary Administration should also reiterate to custodial staff that physical ill-treatment, the excessive use of force and verbal abuses against detainees are not allowed and that they are severely sanctioned.

Another matter stressed by the CPT was the inter-prisoner violence and intimidation. To prevent this phenomenon the Committee argued that prison staff shall be alert to signs of trouble and it shall be properly trained to intervene whenever it is necessary. Important factors to defuse such tensions are both the capability of penitentiary personnel to encourage a mediation among prisoners and an appropriate use of authority by the same staff.

As regards *intra moenia* activities planned for prisoners, the CPT recommended Italian authorities to increase their efforts to improve the quality of penitentiary treatment by

[130] More precisely, the situation appeared to be particularly problematic at Viterbo Prison where several prisoners alleged to have been physically ill-treated by custodial staff.

increasing vocational training opportunities and by ensuring the possibility for inmates to participate to working activities. Indeed, the possibility to carry out work represents one of the rights granted to prisoners by Italian penitentiary law and an importan step along the path for their re-socialization and reintegration in the community (Della Casa and Giostra, 2015).

About the in-prison daily life, the CPT noted that the penitentiary rule which affords medium-security detainees to spend eight hour a day out-of-cell was generally applied in each prison visited. During such out-of-cell period, inmates were allowed to spend two hours in a courtyard twice a day while, for the remaining time, they sould circulate in the corridor of their detentive section and they had access to a common room. Although this dynamic security[131] regime allows for prisoners' integration, the CPT emphasized a lack of interaction between prison officers and inmates, as well as an inadequate involvement of the prison personnel in the re-educative programs. Taking into account the Committee's definition of dynamic security regime, according to which it is the «development by staff of positive relationships with prisoners based on firmness and fairness, in combination with an understanding of their personal situation and any risk posed by individual prisoners», the CPT noted as Italian's one seemed more an only "open door" regime rather than a path to develop relationships between staff and inmate. Even though it do not constitute a violation of conventional principles, the Committee claimed that Italian dynamic security regime did not comply with the re-eductional purpose of the sentence. As consequence, the CPT recommended Italian authorities to better explain to prison staff the meaning of dynamic security and to organize training courses focused on the development of such inter-personal relationships.

[131] The so called "*sorveglianza dinamica*".

A severe concern by the Committee regarded the condition of inmates under the high-security regime[132], a particular imprisonment condition which aims at separating prisoners with a specific criminal profile from the "ordinary" ones. In addition to the lack of re-socialization activities, the classification of a detainee as a "high-security" one is established by the DAP or by the prison director basing on the criminal profile and the information given by investigative authorities. Such decision cannot be appealed to a supervisory judge. Taking into account the risk of arbitrary rulings by no-judicial bodies, the Committee suggested that the procedure to classify prisoners (as "ordinary" or "high-security") should be redefined by ensuring the possibility to apply for a review of such classification.

The CPT also criticized the *isolamento diurno*, a further penalty linked with the deprivation of inmates' personal freedom which consists in a solitary confinement that may be established by the judge when the offender is found guilty of a major crime (i.e. murder). According to the Committee, such «anachronistic measure which does not have any penological justification» could result in inhuman and degrading treatment since it prevents the possibility for prisoners to interact with other inmates. Therefore, to prevent the risk to violate Article 3 ECHR, the CPT recommended Italian authorities to ensure that even prisoners subjected to *isolamento diurno* could benefit from a structured programme of purposeful and preferably out-of-cell activities. Moreover, «the longer the solitary confinement continues, the more resources shall be made available to attempt to (re)integrate the prisoner into the main prison community».

[132] The high security regime is applied to prisoners who are considered as the most dangerous ones. It is divided into three circuits. The first one (AS 1) includes prisoners to whom the "41 *bis*" regime has been revoked. The high security two (AS 2) includes prisoners suspected or convicted of crimes related to international terrorism or to the destabilisation of the democratic order. The high-security three (AS3) encompasses those inmates who are suspected or convicted of organised crime, kidnapping, extortion and drug trafficking.

Further issues concerned the condition of prisoners under the so called *carcere duro*. It is a particular prison regime ruled by Article 41 *bis* of Prison Administration Act which applies to offenders who are affiliated to mafia, terrorist or subversive organizations and who still maintain ties with them. Such detainees have a very limited right of association, they can interact only for two hours a day, they can carry out one hour of outdoor exercise and they can access only for one hour a day in a community room. Serious limitations are established also for contacts with the outside world. In fact, such inmates are granted with one-hour visit per month with a relative constantly under audio surveillance and video-recording. As alternative, they can have a ten-minute phone call per month if a visit cannot take place. Bearing in mind the harshness of this prison regime, the Committee stressed that it might rise to a violation of Article 3 ECHR since the foreclosures applied to such detainees might represent a form of inhuman or degrading treatment. Thus, to ensure compliance with the European Convention of Human Rights, the CPT recommended that the application and any renewal of the *carcere duro* regime should be based on an individual assessment of prisoners' personal condition. More precisely, the judicial authority should ascertain not only whether there is still or not a link between them and criminal organizations but (in case of renewal) also the results of the re-education path undertaken by them. Prisoners should have the possibility to access to a wider range of activities and to spend at least four hours per day outside their cells together with other inmates. Furthermore, they should benefit from more meetings with their relatives and they should be allowed to have at least one phone call every month.

According to the Committee, the quality of prison health services is another factor to evaluate in assessing the compliance of detention with Article 3 of the Convention. In this regard, the CPT found problems and deficiencies only with regard to penitentiary psychiatric health care. Thus, it recommended Italian authorities to develop psychiatric facilities within

prisons in order to ensure adequate support and constant medical supervision for detainees with mental illness or those who are at risk of suicide.

As argued by the CPT, the introduction of such reforms in the Italian penitentiary system could contribute to increase its compliance with both the standards set by the same Committee and the principles enshrined in the European Convention on Human Rights, among which the prohibition of torture and inhuman or degrading treatment set by Article 3 ECHR. Nevertheless, to achive this aim it is necessary a structural and organizational reform of national prison system. More precisely, Italian legislator should focus on the re-education of prisoners and it should increase the means and resources necessary to grant inamtes a real chance to reintegrate themselves effectively into civil society.

Despite the reccomendations stated in the Committee's report and the effects of the previous reforms enacted by the Italian legislator, in the short period the problem of overcrowding affecting the national prison system had become still more critical. Infact, in 2019 places available were 50.688 while detained people amounted to 60.679. The overcrowding rate was 120%. 19.888 inmates were foreigners and 40.791 were Italian citizens. Prisoners in pre-trial or trial detention were 19.148 and detainees who were serving a sentence amounted to 41.531. Data related to 2020 and 2021[133] seems to be barely significant in terms of the potential impacts on medium-long period of the structural reforms

[133] As resulting from the Prison Statistics published by Italian Minister of Justice, on 31 December 2020 the number of detainees held in Italian prisons amounted to 53.364 and the places available were 50.562. The overcrowding rate amounted to 105%. In relation to citizenship, the number of foreigners was 17.344 while Italian prisoners were 36.020. As to the juridical status, sentenced detainees were 36.183. People in pre-trial or trial detention amounted to 17.181. On 31 December 2021 the places available in Italian prisons were 50.835 while the number of detainees amounted to 54.134. The overcrowding rate was 106%. Taking into account the citizenship, the number of foreigners was 17.043. Italian prisoners were 37.091. As to the juridical status, sentenced detainees were 37.631 and people in pre-trial or trial detention amounted to 16.503.

introduced by the Italian legislator. In fact, the decrease in the number of detainees shown by statistics related to the last two years is due to the emergency legislation which followed the spread of the Covid-19 virus pandemic in Italy. In order to limit the infection and to prevent the risk of virus spreading throughout national penitentiaries, the Government has taken urgent measures that resulted into an important reduction of the number of inmates, ensuring a minimum social distancing even within prisons. Thus, taking into account the ratio of the number of prisoners to the number of places available, the problem of prison overcrowding currently seems to be under control, although it is still not completely resolved. However, this conclusion should not be misleading. As mentioned above, current data are significantly altered by the existing health emergency situation which has led to the adoption of urgent measures to empty prisons in a prompt and timely manner, at least until the situation will return to normal. Consequently, if the legislator should fail to make efforts in finding solutions that could apply also to the post-pandemic period, it is reasonable to foresee the reappearance of the "spectre of overcrowding", with a progressive re-increase in the number of prisoners and an upsurge in the problem.

5. Problems of application of *"Muršić* criteria" in the case law of national Courts

As mentioned in paragraphs above, "*Muršić* criteria" are commonly considered as a sort of guideline in determining the space available for each detainee held in a single or multiple occupancy cell. Such calculation is very important since it allow to evaluate whether or not the condition of detention respects the prohibition of inhuman or degrading treatment sets by Article 3 ECHR. Nevertheless, such criteria are not the same drafted the CPT, which recommends a partialy different computation of the space available[134]. Although the Court reserves to itself the definition of the above calculation methods, the discrepancy between

[134] See Chapter II, § 5.

the computation techniques identified by the two institutions as well as the lack of clarity of the guidelines established in the *Muršič v. Croatia* judgement have caused problems in the application of the European jurisdictional criteria by Italian Courts. This criticality was emphasised by the Court of Cassation in its judgment no. 52819 of 2016[135]. More precisely, the Italian judges reached two conclusions on the matter of inhuman detention conditions due to prison overcrowding.

Firstly, in an *obiter dictum*, the Court held the same principle established in the *Muršič* judgment and it stated that the availability in the cell of a surface below 3 m^2 per person does not constitute in itself an inhuman or degrading treatment and thus a violation of Article 3 ECHR. Indeed, this lack of space can be balanced by positive elements inherent to the detention conditions.

Secondly, the Court of Cassation affirmed a principle of law, according to which the minimum space in a collective cell shall be intended as the surface of the detention room of which each detainee can benefit and that allows the inmate to move freely. Therefore, to determine the area concretely available, it must be deduced from the cell's entire surface the space occupied by toilets and fixed furniture, as well as the area occupied by the bed. According to Italian judges, this calculation method is in line with the development of the case law of the European Court of Human Rights[136].

The conclusion reached by the Court of Cassation in its judgment failed to prevent the subsequent problems in the interpretation and concrete application of the "*Muršič* criteria"

[135] Court of Cassation, 9 September 2016, no. 52819, *CED Cass*.

[136] The Court of Cassation referred to the judgment of the ECtHR's Grand Chamber *Muršić v. Croatia* of the 20 October 2016 (cited above). Italian judges were not aware of the European statements at the time of their decision since the last hearing of the domestic trial took place on 9 September 2016. Nevertheless, the "*Muršić* criteria", as well as the European Court statements, have been extensively cited in the reasoning lodged on 13 December 2016.

by individual national Courts. In particular, while the matter concerning the minimum space below which imprisonment may constitute inhuman and degrading treatment has not given rise to any particular problem by domestic case-law, the identification of the criterion for calculating the surface available has caused debates and different jurisprudential orientations (Albano and Picozzi, 2017). More precisely, national Courts have almost unanimously excluded that the area occupied by the bathroom should be considered as space available to detainees. As for the furniture, however, at least three different approaches have emerged.

According to the first of them, the available area of the cell should be calculated by dividing the entire surface by the number of prisoners within the same accomodation, without taking into account furniture (calculation gross of furniture)[137].

According to the second approach, the space occupied by any furniture - including the bed - should be deducted from the surface area of the room before dividing the resulting surface by the number of prisoners (calculation net of furniture)[138].

The third approach, which is the majority one, deducts only part of the furniture. Indeed, it states that only fixed furnishings, such as cupboards and wall units, deprive the prisoner of living space. Therefore, the surface occupied by such fixed furniture should be considered as unavailable space. On the other hand, the area occupied by other furnishings - such as the bed or chairs - should not be deducted from the free surface since they are used, even during the day, to sit, lie down and read or are easily removable (calculation net of fixed furniture or furniture that cannot be used during the day)[139].

Given the clear divergences in the application of the "*Muršič* criteria" by individual national Courts, the Court of Cassation, originally invested in some appeals concerning

[137] Supervisory Court of Ancona, ordinance 28 October 2015, no. 1289.

[138] See, i.e., Supervisory Judge of Venice, ordinance 6 February 2014, no. 301.

[139] Among the first decisions affirming this method of calculation, Supervisory Judge of Padua, ordinance 30 May 2013, *omissis*, and Supervisory Judge of Alessandria, decree 14 April 2014, no. 788.

claims under Article 35 *bis* of Prison Administration Act, provided only apparently unambiguous indications, moreover through mere *obiter dicta* (Pugiotto, 2016). Therefore, the Cassation's ruling on the matter has not had the effect of guiding national case-law, which consequently has continued to be contradictory (Verrina, 2015).

Recently, the issue concerning the interpretation of the "*Muršič* criteria" has come to the fore with regard to a decision adopted by the supervisory judge of L'Aquila[140]. By allowing a detainee's petition submitted under Article 35 *ter* of Prison Administration Act, the above-mentioned judge claimed that the inmate's condition of detention was contrary to Article 3 ECHR[141]. The Italian Ministry of Justice contested the decision of the judge, arguing that "*Muršič* criteria" had been misinterpreted. Indeed, they prescribed a different calculation method, according to which the space available to each detainee must be determined by including even the space occupied by fixed furniture. Therefore, the supervisory judge should had rejected the claim submitted by the prisoner. By ordinance of 2 April 2019[142], the competent Supervisory Court rejected the Ministry's complaint and stated that the calculation of the minimum available space should exclude the fixed furniture since they constitute an obstacle which prevents prisoners' free movement. Against this decision, the Ministry submitted an appeal to the Court of Cassation. It reiterated that the criteria established by the European Court of Human Rights had been misinterpreted since also fixed furnishings should be included in the calculation of the available area inside the cell. Due to the continuing contrast in national case-law, the *Sezione I Penale* of the Court of Cassation

[140] The *Sezioni Unite* of the Court of Cassation, in the ruling no. 6551 of 2020 – which is analyzed in the next paragraph – referref to such ordinance without further details.

[141] The complaint lodged by the prisoner concerned a period of detention of 4751 days served in the penitentiaries of Pianosa, Palmi, Reggio Calabria, Carinola, Naples-Poggioreale and Larino.

[142] Supervisory Court of L'Aquila, ordinance 2 April 2019.

decided to refer the matter to the *Sezioni Unite* in order to try to resolve, once and for all, the problems and doubts concerning the concrete application of the "*Muršič* criteria".

6. A clarifying ruling: the judgment of Italian *Sezioni Unite* no. 6551 of 2020

Following the referral by the *Sezione I Penale*, through the judgement no. 6551 of 2021[143] the *Sezioni Unite* of the Court of Cassation has offered a key to the interpretation of the criteria established by the European Court of Human Rights in the *Muršič v. Croatia* case. In particular, they identified the method that Italian Courts must apply in order to calculate the space available for prisoners and to assess whether or not imprisonment gives raise to a strong presumption of inhuman or degrading treatment. The starting point for the considerations of the *Sezioni Unite* were two questions submitted by the *Sezione I Penale*:

> «*se, in tema di conformità delle condizioni di detenzione all'art. 3 C.E.D.U. come interpretato dalla Corte Edu, lo spazio minimo disponibile di tre metri quadrati per ogni detenuto debba essere computato considerando la superficie calpestabile della stanza, ovvero quella che assicuri il normale movimento, conseguentemente detraendo gli arredi tutti senza distinzione ovvero solo quelli tendenzialmente fissi e, in particolare, se, tra questi ultimi, dovesse essere detratto il solo letto a castello ovvero anche quello singolo*»[144]

[143] Court of Cassation, 24 September 2020, no. 6551, *CED Cass.*

[144] On the issue concerning the conformity of detention conditions with Article 3 ECHR as interpreted by the European Court of Human Rights, the *Sezione I Penale* asked the *Sezioni Unite* to clarify if the minimum available space of three square metres for each detainee must be calculated taking into account the floor of the room (considered as the area which ensures normal movement), consequently deducting all furnishings without

and

> «*se, nel caso di accertata violazione dello spazio minimo, possa comunque escludersi la violazione dell'art. 3 C.E.D.U. nel concorso di altre condizioni, come individuate dalla stessa Corte Edu (breve durata della detenzione, sufficiente libertà di movimento al di fuori della cella con lo svolgimento di adeguate attività, dignitose condizioni carcerarie) ovvero se tali fattori compensativi incidano solo quando lo spazio pro capite fosse compreso tra i tre e i quattro metri quadrati*»[145].

The questions submitted to the *Sezioni Unite* referred to two issues already addressed by the European Court of Human Rights. However, the lack of uniformity in European case-law required a clarifying intervention by Italian Court of Cassation in order to ensure the application by national Courts of uniform and commonly agreed parameters (Romeo, 2021). Thus, in defining the principles to solve the matters, the *Sezioni Unite* decided to apply those ones laid down in the *Muršič* judgment for two reasons: because they had been established by the Grand Chamber and because the constant reference to them by subsequent judgments of the European Court have fostered their stabilization.

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distinction, or if in such calculation the judge must deduct only those furniture which tend to be fixed. In the latter case, if only the bunk bed or also the single bed can be considered as fixed forniture to deduct.

[145] Through the second question, the *Sezione I Penale* required the *Sezioni Unite* to clarify another important matter. More precisely, after having ascertained that the requirement concerning the minimum space has been infringed, the question deals with the possibility (or not) for the judge to rule out a breach of Article 3 of the ECHR whenever other compensative factor as identified by the EctHR are met (i.e. short duration of detention, sufficient freedom of movement outside the cell to carry out appropriate activities, dignified prison conditions), or if such factors have an impact only when the individual space is between three and four square metres.

As to the first question, the Court of Cassation analyzed the arguments concerning the *Muršič* judgment and emphasized that, in the opinion of the European Court of Human Rights, «[the] calculation of the available surface area in the cell should include space occupied by furniture» and that, however, «what is important in this assessment is whether detainees had a possibility to move around within the cell normally»[146]. The *Sezioni Unite* stressed that the principle stated by the ECtHR lends itself to two possible interpretations.

According to a first opinion, the two propositions should be considered separately, so that the available surface should be calculated by considering the lengths of the sides and deducting only the toilets. Then, it would be ascertained whether the prisoner can move within the cell[147].

According to a different opinion, the two prepositions should be interpreted systematically and jointly: the space available should be determined by deducting not only the toilets but also the furniture, since only then it would be possible to assess whether the prisoner actually enjoys freedom of movement in the cell. Thus, a fixed wardrobe or a heavy bed, which prevent normal movement within the inmate's room, should be excluded from the calculation. On the contrary, movable furniture, such as tables, chairs or stools, which can be easily moved, should be included.

The Court of Cassation considered the second approach as more consistent with the interpretation of the European Court of Human Rights. Indeed, in the grounds of the *Muršič* judgment (drafted in French, then translated in other languages) the European judges used the term "*meuble*", which in Italian corresponds to "*mobili*", hence items that can be moved. Moreover, this interpretation of the principles enshrined in the above-mentioned ECtHR's ruling is more favourable to detainees as it ensures them a greater degree of individual space

[146] § 114 of the *Muršič* ruling.

[147] As also argued by the Croatian Government in the *Muršič* case.

compared to those they would otherwise be granted. Therefore, the Court of Cassation stated a first important principle, according to which

> «*nella valutazione dello spazio minimo di tre metri quadrati si deve avere riguardo alla superficie che assicura il normale movimento e, pertanto, vanno detratti gli arredi tendenzialmente fissi al suolo, tra cui rientrano i letti a castello*»

which means that in assessing the minimum space of three square metres, the judge must take into account the area which ensures a normal movement. As consequence, furnishings that tend to be fixed to the floor, including bunk beds, must be deducted from the calculation of the space available.

As to the second question concerning the impact of compensatory factors, the *Sezioni Unite* clarified that they are not only elements which can mitigate the discomfort caused by degrading detention conditions. Indeed, such factors consist also in concurring conditions which affect detention negatively and which determine an imprisonment condition that breaches Article 3 ECHR due to their "interaction with" and "addition to" a condition of overcrowding which does not constitute in itself to an inhuman or degrading treatment. On the basis of such premise, the Court of Cassation made an important distinction among those prisoners subjected to a "close regime" (such as the *ergastolani ostativi* and all those inmates who have not the possibility to move out of their cell) and those one subjected to an "almost-open regime". With regard to the former, the *Sezioni Unite* stated that they must be provided with a minimum space of 3 m^2, excluding the surface occupied by sanitary ware and fixed furniture. As for the latter, where they are granted a space below the above-mentioned limit of 3m^2, other compensatory factors must jointly concur in order to exclude a breach of

Article 3 ECHR. Among them, the short duration of detention, sufficient freedom of movement outside the cell and the possibility of carrying out appropriate activities.

According to the *Sezioni Unite*, in case of detention in a collective cell where the space is at least 3 m^2 but less than 4 m^2, the ascertainment of inhuman and degrading treatments is the result of a multifactorial evaluation, which takes into account the overall prison treatment offered by the penitentiary administration. In this case, the concomitance of the space factor with other negative factors may lead to a violation of Article 3 of the Convention. The further negative factors are identified by the European Court of Human Rights in the lack of access to the yard or to air and natural light, poor ventilation, insufficient or excessively high temperature in the rooms, lack of privacy in the toilets, poor sanitary and hygienic conditions. According to the Court of Cassation (which referred to the ECtHR's statements), to assert the violation of Article 3 ECHR, the concomitant presence of all of them is not required.

Finally, the Italian judges stressed that where the individual space in a collective cell is more than 4 m^2, the overcrowding is not a relevant factor in assessing whether detention constitutes or not an inhuman and degrading treatment. Nevertheless, a violation of the above-mentioned Article 3 may still occur if the presence of the above negative factors is found.

Therefore, the *Sezioni Unite* anwered to the second question by stating that

> «*i fattori compensativi costituiti dalla breve durata della detenzione, dalle dignitose condizioni carcerarie, dalla sufficiente libertà di movimento al di fuori della cella mediante lo svolgimento di adeguate attività, se ricorrono congiuntamente, possono permettere di superare la presunzione di violazione dell'art. 3 CEDU derivante dalla disponibilità nella cella collettiva di uno spazio minimo individuale inferiore a tre metri quadrati;*

nel caso di disponibilità di uno spazio individuale fra i tre e i quattro metri quadrati, i predetti fattori compensativi, unitamente ad altri di carattere negativo, concorrono alla valutazione unitaria delle condizioni di detenzione».

It means that the joint occurrence of compensatory factors consisting in the short duration of detention, dignified prison conditions, sufficient freedom of movement outside the cell and the possibility to carry out appropriate activities may led to overcome the presumption of a breach of Article 3 ECHR deriving from the availability in a collective cell of an individual space lower than 3 m^2. Where the individual space is between 3 m^2 and 4 m^2, the above-mentioned compensatory factors, together with other negative factors, concur to the unitary assessment of the conditions of detention.

According to some scholars, the solution adopted by the *Sezioni Unite* seems unconvincing since, in answering the second question, juges did not consider the space of 3 m^2 per prisoner as an inviolable minimum standard. Indeed, the Court of Cassation found a "strong presumption of violation" by considering the principles established by the *Muršič* judgment as consolidated. On closer inspection, there is no settled case law on minimum cell space in the ECtHR's jurisprudence from which it is possible to draw such a conclusion (Romeo, 2021). Indeed, the idea according to which imprisonment in a cell where the space available is below 3 m^2 constitutes a strong presumption of a violation of Article 3 ECHR would be no more valid than the different opinion according to which such condition gives rise in itself to a violation of the above-mentioned norm[148]. This would result in an

[148] In defining the *Muršič* criteria as settled, the Court of Cassation applied the "consolidation criteria" of European case-law developed by the Italian Constitutional Court in its judgment 14 January 2015, no. 49. These are: the non-innovativeness of the principle established in the ruling, the uniformity with respect to other judgments, the lack of dissenting opinions (or, if present, they must not be supported by strong deductions),

unsatisfactory solution since it would have been possible to adhere to a different European case-law, more consistent with the peculiarities and criticalities of the Italian prison system and which could offer a higher standard of protection of prisoners' rights (Romeo, 2021). These considerations would lead to doubt that the principles stated in the *Muršič* judgment, although recalled also by subsequent judgments, represent a settled case-law of the European Court of Human Rights. On the contrary, on the issue of minimum cell space it seems that there would not be any really universal guideline since all appreciations would depend on the legal system concerned and the circumstances of the case. Therefore, the *Sezioni Unite* should have adhered to European judgments which take into account as much as possible the national context of reference and which guarantee the highest level of protection for prisoners' rights, such as the rulings *Sulejmanovic v. Italy* and *Torreggiani and Others v. Italy* (Romeo, 2021).

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the authoritative composition of the judging body and the evaluation of the particular characteristics of the national system. Recalling the aforementioned criteria, the *Sezioni Unite* considered the orientation expressed by the judgment *Muršič v. Croatia* as settled, since it was issued by the Grand Chamber and due to the recalling to the *Muršič* criteria by several subsequent ECtHR's judgments. Nevertheless, many more reasons depose to the contrary. Firstly, the principles set out in the *Muršič* judgment would not be part of a long-lasting and stable case-law of the ECtHR. Indeed, there several rulings according to which, where the individual space available is below 3 m^2, the lack of personal space justifies in itself a violation of Article 3 (among the others, *Aleksandr Makarov v. Russia*, application no. 15217/07, 12 March 2009; *Lind v. Russia*, application no. 25664/05, 6 December 2007; *Kantyrev v. Russia*, application no. 37213/02, 21 June 2007; *Andreï Frolov v. Russia*, application no. 205/02, 29 March 2007; *Sulejmanovic v. Italy* cited above; *Torreggiani and Others v. Italy*, cited above). Secondly, the *Muršič* judgment would fail to appreciate the peculiarities of the Italian system, since it concerns the Croatia which, by admission of the European judges, is not afflicted by problems of structural overcrowding like those in Italy. Thirdly, the *Muršič* ruling is accompanied by three dissenting opinions that would reduce its importance, especially since they all agree on the need to raise the minimum space available to each prisoner in multiple cells to 4 m^2.

On the contrary, according to other scholars the judgement *Muršič v. Croatia* constitutes an important milestone since it establishes innovative guidelines to orient national Courts in ascertaining the compatibility among detention condition and the principles enshrined in Article 3 of the Convention. Although in several previous rulings the European Court of Human Rights had reached partly different conclusions, the principles laid down in the *Murśič* judgment must be considered as settled since they express a natural evolution of the European case-law, which is not immutable over time. Indeed, as with the law, even the case-law adapts itself to the changing of society and social consciousness. The above-mentioned consolidation is evident: in subsequent judgements the ECtHR has frequently recall *Murśič* criteria in assessing the lawfulness or not of the conditions of detention complained by applicants. Further, the widespread application of those criteria has ensured both the standardisation in the protection of human rights at European level and the supranational application of the principle of equality among people in a similar situation of deprivation of liberty.

Focusing on the judgement no. 6551 of 2020, it is an important cornerstone in Italian case-law at least for two reasons.

Firstly, such ruling constitutes a positive example of dialogue between Courts (Cattaneo, 2021). Indeed, through the reference to *Murśič* criteria the Court of Cassation has directly applied in the national legal system the principles expressed by the European Court of Human Rights. At the same time, it has provided national judges with guidelines which comply with the most recent settled supranational case-law.

Secondly, the ruling no. 6551 of 2020 represents a tool through which the *Sezioni Unite* have removed all the uncertainties that had arisen between domestic Courts after the Grand Chamber's ruling of 20 October 2016. In fact, the Court of Cassation has set fixed points for national judges in order to prevent the risk of conflicts among domestic Courts in

ascertaining whether or not detention constitutes an inhuman or degrading treatment (Cattaneo, 2021).

Regardless of the theoretical debates on whether or not the principles established by the Grand Chamber in the *Muršič* case can be considered settled case-law, the judgment of the *Sezioni Unite* is a breakthrough on the Italian jurisprudential front. In fact, it clarified the doubts that arose from the ambiguous indication issued by the European judges concerning the criteria for calculating the available space within a cell. The interpretation of the Court of Cassation is favourable to the detainees and in line with sovereign and national principles that require even greater attention to be paid to persons deprived of their liberty. This, since it would be inadmissible to increase the suffering resulting from detention with further (and often unbearable) affliction deriving from the negative effects of prison overcrowding.

7. Life imprisonment and the right to hope in Italy

The right to hope to regain the personal freedom is an issue that becomes relevant in all cases in which the offender has been sentenced to life imprisonment. In fact, this penalty, known in Italy also as "*fine pena mai*", is theoretically a sentence of imprisonment for the duration of the inmate's entire life. Before addressing the specific issue of the right to hope, it is important to briefly focus on provisions of the Italian legislation which concern the sentence's aim and to inquire whether, on the basis of them, life imprisonment can be considered a penalty that complies with the principles governing the national legal system. Article 27 of Italian Constitution, in regulating criminal responsibility, states in clause 3 that «*le pene non possono consistere in trattamenti contrari al senso di umanità e devono tendere alla rieducazione del condannato*»[149]. A similar rule is also enshrined in Article 1 of Prison

[149] Namely, penalties cannot consist in treatment contrary to the sense of humanity and they must aim at the re-education of the prisoner,

Administration Act. Indeed, the clause 2 of the norm states, among the others, that «*il trattamento [penitenziario] tende, anche attraverso i contatti con l'ambiente esterno, al reinserimento sociale [del detenuto]*»[150]. There are two reasons that led the legislator to use the verb "to tend" instead of "to ensure". First, because participation in the re-educational treatment planned by the prison administration is left to the free choice of the individual detainee. Secondly, because the concept according to which penalties must aim at re-education must be interpreted as establishing that the legislator is required to constantly take into account the re-educative aim and to provide all appropriate means to achieve it[151]. Given these premises, imprisonment must be considered not as a "point of arrival" but as a new "starting point" (Flick, 2012) towards a possible re-socialisation. The Constitution does not preclude such chance to anyone, regardless the seriousness of the crime committed by the offender (Pugiotto, 2013). Moreover, the re-educational purpose must be pursued from the moment in which the penalty is theoretically prescribed by a norm and until it has been served[152]. By recalling that life imprisonment constists in a sentence which has the same length of the prisoner's life, it seems difficult to argue that even such punishment pursues the re-socialization purpose established by law, as well as that it may be considered as compatible with the prohibition of torture and inhuman or degrading treatments enshrined by Article 3 ECHR. Nevertheless, in several judgements the European Court of Human Rights has stated that life imprisonment complies with conventional principles until it is reducible *de iure* and *de facto*[153]. Similarly, even Italian Constitutional Court has held the compatibility of life imprisonment with Article 27 of Italian Constitution. According to it,

[150] Penitentiary treatment shall aim, even through contact with the outside environment, at the social reintegration of the prisoner

[151] Constitutional Court, 12 February 1966, judgement no. 12, *Giur. Cost. Online*.

[152] Constitutional Court, 2 July 1990, judgement no. 313, *Giur. Cost. Online*.

[153] The matter has been already analizyed in depth in Chapter II.

«*l'art. 27 della Costituzione, usando la formula "le pene non possono consistere in trattamenti contrari al senso di umanità e devono tendere alla rieducazione del condannato", non ha proscritto la pena dell'ergastolo (come avrebbe potuto fare), quando essa sembri al legislatore ordinario, nell'esercizio del suo potere discrezionale, indispensabile strumento di intimidazione per individui insensibili a comminatorie meno gravi, o mezzo per isolare a tempo indeterminato criminali che abbiano dimostrato la pericolosità e l'efferatezza della loro indole*»[154].

Therefore, the Italian Court has affirmed the compliance of life imprisonment with the Constitution emphasizing that it is both an indispensable means of intimidation for individuals who are insensitive to less serious punishments and a means to confine indefinitely criminals who have demonstrated the danger and cruelty of their character. Moreover, such penalty does not exclude the possibility for the inmate to regain (at least only partly) freedom. Indeed, when the prisoner has demonstrated effective participation in re-educational treatment, the judge may grant *benefici penitenziari* or *misure alternative* that allow the prisoner to reintegrate into civil society. This possibility ensures both the right to hope of inamtes and that even life imprisonment, as any other prison sentence, serves a re-educational purpose. The compatibility among such penalty and national and supranational norms is true as long as prisoners can submit a request for the application of the measures established by law or until it provides for tools which theoretically grant the detainee the possibility to request for freedom. With regard to the first hypothesis, Italian Prison Administration Act prevents prisoners to apply for *benefici penitenziari* and *liberazione*

[154] Constitutional Court, 22 November 1974, judgement no. 264, *Giur. Cost. Online*

condizionale when they are serving an *ergastolo ostativo* sentence[155]. Such regime had arised several concerns regarding its compatibility with Italian Constitution. However, the Constitutional Court, asked to clarify the recurrence or not of the above-mentioned compatibility, has claimed the compliance among the above-mentioned sentence and Constitutional principles[156], although with unconvincing arguments (Dolcini, 2017). More precisely, the Court stressed that the preclusion to apply for *benefici penitenziari* and *liberazione condizionale* which afflicts *ergastolani ostativi* does not directly derives from law. Indeed, it is a consequence of a free and personal choice of the prisoner to not cooperate with investigative or judicial authorities. Furthermore, such preclusion is not absolute since the prisoner has nevertheless the opportunity to change such choice and, consequently, to apply for those measures. Thus, not only *ergastolo ostativo* would comply with national law, but it would also not breach prisoners' right to hope since the possibility to regain their freedom is theoretically up to their own decision to cooperate.

The Constitutional Court has undermined such assumption for the first time through the judgment no. 149 of 2018[157]. Although the ruling concerned a particular sub-category of *ergastolani ostativi* (namely, those sentenced for kidnapping aggravated by the death of the victim), the Court has held important statements concerning the principles of equality and re-education of offenders. Focusing on those remarks which are also referable to persons sentenced for different offences (however listed in Article 4 *bis* of Prison Administration Act), Constitutional judges stressed that the automatic preclusion established by Article 58 *ter* of Prison Administration Act and concerning the access to *benefici penitenziari* and *misure alternative* prevents any concrete assessment of the inmate's re-education degree by

[155] The cases in which a prisoner can be sentenced to serve such particular regime has been already explained in Chapter II, §9.

[156] Constitutional Court, 9 April 2003, judgment no. 135, *Giur. Cost. Online*.

[157] Constitutional Court, 21 June 2018, no. 149, *Giur. Cost. Online*.

the supervisory judge. According to the Court, the above-mentioned presumption meets only a general preventive purpose, aimed at preventing the commission of similar offences by citizens. Such need, although important, cannot be pursued at the stage of execution of the sentence. Otherwise, it would lead to a distortion of the constitutional imperative on the re-educational role of the punishment which must primarly pursue the reintegration of the convicted person into society. Another issue emphasized by the Court concerns the legislative automatism established by Article 4 *bis* of Prison Administration Act. More precisely, Italian judges held that in order to ensure that the sentence serves its re-educational purpose, all legal automatisms based on the presumption of greater dangerousness deriving from the type of the crime committed by the offender should be removed. In fact, they prevent an individualised assessment of the actual social dangerousness of the prisoner as well as the evaluation of the possibility to apply for *benefici penitenziari* or *misure alternative*. Such condition contrasts with the constitutional principle of proportionality, the re-education aim of the punishment and the necessary individualisation of the prison treatment.

Re-socialization is a matter linked also with inmates' right to hope. Although the Constituional Court did not refer to it, it seems evident that sentence's re-educational purpose would be frustrated if prisoners would be prevented from any possibility, even at the stage of a mere hope, of regaining their personal freedom. Taking into account that the re-socialization, in turn, is aimed at affording prisoners the possibility to rejoin into civil society, the re-education purpose of the penalty, the prison treatment and the same sentence would be unusefull if the prisoner is prevented from any prospect to be released even after many years of imprisonment. Thus, although the Italian legal system does not explicitly guarantee detainees any right to hope, this prerogative can be deduced from an extensive interpretation of domestic norms (Article 27 of Italian Constitution and Article 1 of Prison Administration Act): the sentence can pursue its re-educative aim and the social reintegration

of the prisoners as far as the law grants them (at least) the right to hope to regain their personal freedom.

The idea according to which «*se il fine della pena è la risocializzazione del reo, la reclusione in carcere non può essere senza fine*» (Dolcini et al., 2019) was at the core of the appeal that led to the judgment of the European Court of Human Rights in the case *Marcello Viola v. Italy*[158]. Such ruling was followed by two important measures of the Constitutional Court, based on the assumption that «*dietro a qualsiasi perpetuità e a qualsiasi automatismo esiste una persona*» (Dolcini et al., 2019) and aimed at overcoming the contrast between the domestic system and the conventional law.

8. The Constitutional Court's judgment no. 253 of 2019 on *permessi premio* for the so called *ergastolani ostativi*

Through the ruling no. 253 of 2019[159] the Italian Constitutional Court has applied for the first time the guidelines set by ECtHR in the judgement *Marcello Viola v. Italy*. In fact, Constitutional judges declared the unconstitutionality of Article 4 *bis* of Prison Administration Act in so far as it doesn't ensure, even to inmates sentenced for Article 416 *bis* of Italian Criminal Code offenses (mafia-related or associative crimes), the possibility to

[158] Chapter II, §9.

[159] Constitutional Court, 23 October 2019, judgement no. 253, *Giur. Cost. Online*. The matter was referred to the Court both through the Court of Cassation ordinance no. 59 of 2018 (Court of Cassation, Section I, 20 December 2018, ordinance no. 59) and the Perugia Supervisory Court ordinance no. 135 of 2019 (Perugia Supervisory Court, 13 May 2019, ordinance no. 135) which stated that the impossibility for *ergastolani ostativi* to submit for *permessi premio* didn't comply with Italian Constitution.

apply for *permessi premio*[160], regardless their collaboration with judicial authority, whenever there are strong evidence which prove that the inmate has cut the ties with criminal cyrcle and that they cannot be restored.

As already said, the boundaries of ruling no. 253 of 2019 are well defined: it exclusively concerns the "absolute preclusion" of access to specific *benefici penitenziari* (*permessi premio*) for not cooperating inmates sentenced for mafia association and/or mafia-related crimes. Thus, as emphasized by the Court, the judgement does not directly concern the issue related to *ergastolo ostativo* regime faced by the European Court of Human Rights in the case *Marcello Viola* since it does not face the issue regarding *liberazione condizionale* and the right to hope. Nevertheless, this judgement represents a very important goal because the Court has clearly declared that the uncontrovertible presumption of inmates' social dangerousness deriving from their decision to not cooperate does not comply with constitutional principles. More precisely, the Court stressed that a legislative presumption of social dangerousness is not in itself unlawful. Indeed, it is not unreasonable to presume that an offender may decide to not cooperate due to the persistence of ties with the criminal organisation. Rather, such presumption is unreasonable as far as it cannot be rebutted by contrary evidence (Ruotolo, 2019), since it frustrates prisoners' re-socialization and it nullifies the re-education purpose of the penalty established by Article 27 of Italian Constitution for four reasons (Bellini and Procopio, 2021; Menghini, 2020).

First of all, because the incontrovertible presumption established by Artile 4 *bis* of Prison Administration Act is justified only by criminal policy needs which negatively affect the re-education path undertaken by the prisoner.

[160] *Permessi premio* (release on license) are permits of no more than fifteen days' duration granted to offenders who have had regular behavior and are not considered to be socially dangerous. They to enable inmates to foster their affective, cultural and working interests.

Secondly because the adverse effects deriving from the inmate's uncooperative behaviour parlty contrast with the *nemo tenetur se detegere* principle (an expression of the right to silence implicitly granted by Article 24 of Italian Constitution) which is granted the offender during the trial and which may be assured to the detainee even during the execution of the sentence.

Third, because the absoluteness of the presumption prevents the judge from any evaluation of the prisoner's re-education path.

Fourth (and finally), because such absoluteness is based on the alleged persistence of relationships with crime association which could be subverted through specific contrary proofs.

On the basis of such evaluations, the Court declared the partly unconstitutionality of Article 4 *bis* of Prison Administration Act within the above-mentioned limits and it subordinated the granting of *permessi premio* to *detenuti ostativi* to a strict burden of proof on them, as well as to a strict evaluation by judicial authority. Indeed, tha same Court stressed that to overcome the presumption of social dangerousness, prisoners who do not cooperate cannot prove only their lawful behaviour during imprisonment, nor their mere participation in the re-education process. Similarly, even their declaration of "dissociation" is not enough to benefit from *permessi premio* (Bellini and Procopio, 2021; Capitta, 2019): they must have served an adequate period of imprisonment[161], they must prove their successfully participation to the re-educative treatment and they must allege supporting evidence of the lack of any further relationship with the criminal organisation[162]. Further, the decision of the supervisory judge on prisoners' applications is also adopted taking into account the report drafted by penitentiary administration as well as the information alleged by the

[161] At least 10 years in case of life-sentence.

[162]The Court has defined such burden of proof as an «*onere probatorio rafforzato*»..

Procura nazionale antimafia, the *Procura distrettuale* and the *Comitato provinciale per l'ordine e la sicurezza*.

By an in depth analyses of the ruling no. 253 of 2019, it emerges that the Constitutional judges have left room for doubt as to how the absolute presumption set by Article 4 *bis* of Prison Administration Act can be overcome. Indeed, the Court did not explain which evidence (other from cooperation) are requested to prove the lack of any further relationship with the criminal organisation and how to satisfy the stronger burden of proof pending on prisoners. This is the major limitation of the decision adopted by the Constitutional judges: the lack of clarity which afflicts their explaination on how to overcome the absolute presumption established by law in cases of non-cooperation and, more precisely, what evidence must be adduced to prove the cut of ties with the criminal association. Thus, the conditions that the Court imposed on detainees under Article 4 *bis* of Prison Administration Act regime in order to access to *permessi premio* are such as to suggest that the granting of the above-mentioned benefit is an exception to the rule of refusal (Ruotolo, 2019).

Despite this issue, the ruling no. 253 of 2019 represents an important innovative development compared to previous rulings on the same matter, albeit it cannot be considered as an unexpected evolution of the Constitutional Court case-law. In fact, it is in line with the cornerstones of several settled rulings of the above-mentioned Constitutional Court concerning the sentence's execution[163]: the non-sacrificability of the prisoners' re-education compared to the other purposes of punishment, the principle of progressive treatment, the overcoming of absolute presumptions and legal automatisms in criminal matters (Pugiotto, 2020, a). However, this does not mean that the judgement no. 253 of 2019 is unable to leave

[163] Among the others, Constituional Court, 11 July 2018, judgement no. 149, *Giu. Cost Online*; Constituional Court, 9 October 2019, judgement no. 229, *Giu. Cost Online;* Constituional Court, 5 November 2019, judgement no. 263, *Giu. Cost Online*, although the latter is subsequent to the one analyzed.

a deep mark, since it removed the absolute preclusion to the granting of *permessi premio* as a mandatory consequence of the decision of people condemned for certain crimes to not cooperate with judicial authority. An absolute preclusion which, over time, has become an essential component in the repression of the mafia phenomenon (Chivario, 2020).

That said, what seems evident from the analysis of the ruling no. 253 of 2019 can be resumed in these few words: while it is legitimate to reward cooperation with the judicial authoritiy in facing mafia, it is not similarly legitimate to punish the decision to not cooperate since it cannot rise to the only reason to prevent prisoners to benefit from *permessi premio*. Similarly, it cannot override the outcomes of the other evidence concerning the particular case. In stating that uncooperation does not mean necessarily the persistence of contacts with criminal organizations, the Court has given «*un primo colpo di piccone al […] muro maestro*» of the «*regime ostativo penitenziario*» (Pugiotto, 2020, b).

9. Towards an effective recognition of the right to hope? The Constitutional Court's ordinance no. 97 of 2021 on *liberazione condizionale* for mafia *ergastolani ostativi*

The Constitutional Court ordinance no. 97 of 2021[164] is strictly related with the Constitutional Court's judgment no. 253 of 2019 as well as with the national and supranational precedents which faced, even indirectly, the issue of prisoners' right to hope[165]. Such decision has reversed the previous case-law of the same Constitutonal Court, according to which the foreclosure of *liberazione condizionale* did not automatically derive from Article 4 *bis* of Prison Administration Act but, rather, from the free prisoners' decision

[164] Constitutional Court, 15 April 2021, ordinance no. 97, *Giur. cost. Online*. The matter was referred to the Constitutional Court by the Section I of Court of Cassation, 18 June 2020, ordinance no. 18518.

[165] Among the other, *Kafkaris v. Cyprus*,cited above; *Vinter and Others v. The United Kingdom*, cited above; *Marcello Viola v. Italy*, cited above.

to not cooperate with judicial authority although it would be possible[166]. Taking into account its content, the ordinance no. 97 of 2021 is not limited to procedural matters. Indeed, through it the Constitutional Court has taken a very clear position on the question concerning the constitutionality of Article 4 *bis* of Prison Administration Act, with a reasoning that is typical of a judgment and which seems to precede a declaration of incompatibility of the norm *sub judice* with Constitutional norms (Mengozzi, 2021).

In the current case, the Court was asked to clarify whether Articles 4 *bis*, 58 *ter* of Prison Administration Act and Article 2 of the Law Decree no. 152 of 1991 complied or not with Italian Constitution since they establish that mafia prisoners under *ergastolo ostativo* regime who do not cooperate with judicial authority cannot benefit of *liberazione condizionale*[167] due to their social dangerousness. In answering such question, the Constitutional Court reiterated that absolute presumptions in criminal law tend to be suspicious of unconstitutionality. Among them, even the above-mentioned one, according to which prisoners who do not cooperate with judicial authority are necessarily social dangerous due to the persistence of contacts with criminal circles. Indeed, such collaboration does not necessarily prove that inmates sentenced to life imprisonment for one of the crimes listed by the above-mentioned Article 4 *bis* have cut the ties with criminal associations. Rather, even representing an important proof of re-socialization, the decision to cooperate could derive from a utilitarian evaluation aimed at benefiting from the advantages granted by law to

[166] Among them, Constitutional Court, 11 June 1993, judgement no. 306 in *Giur. cost. Online* and Constitutional Court, 24 April 2003, judgement no. 135, *Giur. Cost. Online*. In the latter ruling the Court stated that the impossibility to benefit from *liberazione condizionale* does not derive from a legislative automatism. Rather, it is a consequence of a free choice of the prisoners who can even decide to cooperate and to hope to regain their freedom.

[167] *Liberazione condizionale* consists in an alternative measure which allows inmates to regain their freedom after having served at least a part of their sentence.

cooperating mafiosi (Piva, 2021). On the contrary, the choice to not collaborate may arise out from reasons which defer from the persistence of contacts with criminal associations, such as the fear of reprisals. In this regard, the Court emphasized that

> «*la disciplina ostativa prefigura una sorta di scambio tra informazioni utili a fini investigativi e conseguente possibilità per il detenuto di accedere al normale percorso di trattamento penitenziario. Per il condannato all'ergastolo a seguito di un reato ostativo, lo "scambio" in questione può assumere una portata drammatica, allorché lo obbliga a scegliere tra la possibilità di riacquisire la libertà e il suo contrario, cioè un destino di reclusione senza fine. In casi limite può trattarsi di una "scelta tragica": tra la propria (eventuale) libertà, che può tuttavia comportare rischi per la sicurezza dei propri cari, e la rinuncia a essa, per preservarli da pericoli*».

Thus, the uncontrovertible presumption of social dangerousness established by Article 4 *bis* of Prison Administration Act puts prisoners in front of an inadmissible choice: they can decide to cooperate and, consequently, they can hope to regain their personal freedom albeit exposing their relatives to serious risks for their safety; on the contrary, they can choose to not cooperate and to protect their family members, renouncing to their liberty. Then, the Court focused on the nature of the legislative presumption established by the current domestic legislation. As already stated in the ruling no. 253 of 2019, Constitutional judges reiterated that the above-mentioned presumption of social dangerousness concerning prisoners sentenced to life imprisonment for a mafia crime who decide refrain from cooperating is not in itself contrary to constitutional principles. In fact, it is not unreasonable to assume that such decision is based on the persistence of contacts with the criminal circle.

Nevertheless, a matter of compatibility with the Constitution arises because national legislation establishes that cooperation is the only mean by which life sentenced mafiosi can prove their re-socialization and they can hope to regain their freedom. This requirement makes absolute the presumption of dangerousness established by law. Thus, to comply with national and supranational principles, the Court emphasized that the above-mentioned presumption should become a relative one, which could be overcome even without cooperation. Nevertheless, to achieve this aim it would not be sufficient to allege a proper behavior during imprisonment, nor the mere participation in the re-education treatment, nor a mere declaration of "dissociation". Rather, inmates should allege a strong proof concerning the lack of ties with the criminal environment (and the impossibility to re-establish them in the future) together with a detailed explanation of the reasons for uncooperation.

Despite these assessments, the Constitutional Court has "decided that it will decide" on the issue (Mazzola, 2020), albeit it noted several evidence on the suspected unconstitutionality of Article 4 *bis* of Prison Administration Act (Sferlazza, 2021). More precisely, the Court referred the matter to Italian Parliament and it set a one-year deadline to deal with the issue. In doing so, Constitutional judges stated that

> «*un accoglimento immediato delle questioni proposte […] comporterebbe effetti disarmonici sulla complessiva disciplina in esame*»

and that

> «*esigenze di collaborazione istituzionale impongono […] di disporre […] il rinvio del giudizio in corso e di fissare una nuova discussione delle questioni di legittimità costituzionale in esame all'udienza del 10 maggio 2022, dando al Parlamento un congruo tempo per affrontare la materia*».

The choice to refer the issue to the Parliament through a «*pronuncia monito*» (Dolcini, 2021a) instead of declaring the unconstitutionality of Article 4 *bis* of Prison Administration Act stems from the consequences that - according to the Court - could result from such a declaration. In justifying its decision, Constitutional judges held that a ruling of constitutional uncompliance would risk to compromise the needs of general prevention linked to the regulations aimed at facing the mafia phenomenon. Furthermore, it would also raise a problem of compatibility with the principle of equality established by Article 3 of Italian Constitution. In fact, the question submitted to the Constitutional Court by the Court of Cassation concerned the ineligibility for *liberazione condizionale* only of prisoners sentenced to life imprisonment for mafia related crimes. According to the judges, a ruling of unconstitutionality would have had two problematic consequences.

First, the right to hope would be ensured only for life detainees sentenced for mafia offences and not for those sentenced to life imprisonment for other *reati ostativi*, nor for mafia inmates sentenced to very long terms other than life imprisonment.

Second, the above-mentioned life prisoners would have been eligible for *liberazione condizionale* (thus, for a measure which grant them to regain their freedom) but they would not be able to benefit from *benefici penitenziari* such as *lavoro all'esterno* and *semilibertà*, which are normally intermediate steps towards the release.

Thus, the Court decided to postpone the trial on 10 May 2022 in order to grant Italian Parliament the possibility to draft a legislative reform which shall ensure even to mafia prisoners under *ergastolo ostativo* regime the possibility to access to *liberazione condizionale* and to hope for their freedom.

The "decision to not decide" adopted by the Constitutional Court through the ordinance no. 97 of 2021 has raised several critiques. Indeed, although the day of the showdown for *ergastolo ostativo* seemed to have come (Dolcini, 2020), the Court adopted a hesitant decision consisting in a «*rinvio ad incostituzionalità differita*» (Bignami, 2018). According

to some scholars, it is difficult to understand the legal reasons for which the Constitutional judges, contrary to their precedent (the judgment no. 253 of 2019), preferred to wait for a future action of the Parliament, which however seems to be improbable (at least considering the previous referrals with a request for a legislative intervention[168]) (Mengozzi, 2021). In fact, although the Court stressed that it is not appropriate to equate *permessi premio* with *liberazione condizionale*[169], the general hostility towards the granting of *benefici penitenziari* or *misure alternative* to non-cooperating mafiosi, together with the probable indifference of the Parliament on the issue, would justify a direct action by the Constitutional judges, aimed at ensuring the conformity of the national legislation with the values enshrined in Article 3 of the European Convention on Human Rights. Similarly, even the reference made by the Constitutional Court to the ECtHR's "preference" for a reform drafted by the Parliament is not persuasive: after almost two years, the national legislative body seems far from approving a reform aimed at removing the assessed breach of the Article 3 ECHR (Mengozzi, 2021). Thus, whether it seems possibile that the Parliament would not intervene despite the European Court and the Constitutional Court statements, it seems difficult that the Constitutional judges would declare in the next future the unconstitutionality of the norms *sub judice*. Indeed, such decision would contrast with the common need for justice which derives from the commission serious crimes (especially mafia related ones) as well as

[168] The Author refers to the case *Cappato* (Constitutional Court, 24 October 2018, ordinance no. 217, *Giur. Cost. Online*), concerning the suspension of care treatment for the terminally ill and the issue regarding the (un)lawfulness of that "aiding suicide".

[169] The Court emphasized that while the uncostitutionality of Article 4 *bis* of Prison Administration Act stated through the ruling no. 253 of 2019 did not raise particular problems since it concerned a benefit which allows only a provisional release, the eventual uncostitutionality of the above norm in relation to *liberazione condizionale* could cause problem since such *misura alterntiva* ensures the definitive regaining of liberty by the prisoner.

it would contrast with Article 91 of Italian Constitution which do not confer judges any power of legislative initiative nor a power to draft a legal reform as the one which would derive from the unconstitutionality of Article 4 *bis* of Prison Administration Act (Fassone, 2015; Bellini and Procopio, 2021).

A further issue linked with the Constitutional Court's decision consists in the persistence of the uncompliance of Italian penitentiary system with the Article 3 of the Convention. Indeed, despite the mandatoriness of the norm in establishing that penalty must not consists in inhuman or degrading treatments, such principle is currently (and it will be even in future) breached since the "right to hope" of not-cooperative lifers who committed a mafia related crime will be denied at least up to May 2022 due to an absolute presumption that the Constitutional Court has already considered contrary to the Constitutional principles (Dolcini, 2021a).

Despite the above critiques, the decision of the Constitutional judges to refer the matter to the Parliament seems reasonable. In fact, a declaration of constitutional illegitimacy of the norms *sub judice* within the limits of the *petitum* (*ergo*, of the question submitted by the Court of Cassation) would have led to systemic dystonias and inequalities between prisoners that the Court has properly emphasized in motivating its decision not to decide. In order to avoid a possible conflict with Article 3 of Italian Constitution and to draw up a balanced reform, it is inevitably necessary an action carried out by the Parliament that follows the guidelines of the Constitutional Court and that extends them to the other categories of *detenuti ostativi*. An action that, however, must necessarily be made quickly. In fact, it is unacceptable that, two years after the *Viola* judgment, the Parliament has failed to remove the "structural problem" identified by the European Court of Human Rights. As mentioned above, such issue might be solved - at least in part - by turning into a relative one an absolute presumption that, however, does not take into account the characteristics of the mafia phenomenon and the risks linked with the cooperation with judicial authority. Such

transformation would not necessarily lead to release inmates still affiliated with criminal circles since it would only allow a judicial evaluation on prisoners' elegibility for *benefici penitenziari* and *misure alternative*. More precisely, the new relative presumption would impose on the supervisory judge a careful assessment on the requirements for granting *liberazione condizionale* and the above-mentioned *benefici*, among which the cut of ties with criminal associations. Therefore, although the risk of releasing socially dangerous persons as members of a crime circle exists, it seems very remote considering both the power of control and screening of requests conferred on the supervisory magistracy and the request for particularly strong evidence concerning the "dissociation" of the inmate. Rather, the wished reform would only grant also prisoners who have committed serious crimes and have completed a long re-education process the right to hope to become, maybe one day, free persons again.

CONCLUDING REMARKS

The analysis carried out through this research work leads to several remarks concerning both the problem of prison overcrowding and the right to hope. These findings refer to the Italian legislation and case-law as well as to the European framework.

In relation to prison overcrowding, the *Muršić* judgment has represented a sort of watershed in the case law of the European Court. In fact, the criteria previously adopted to ascertain the violation of Article 3 ECHR were not uniform: in some cases, the judges claimed that the availability of a space below 3 m^2 was in itself sufficient to held a violation of the Convention; in other cases, however, the Court adopted a different approach. In fact, it stated not only that the availability of a space below 3 m^2 gave rise to a strong presumption of a breach of Article 3 ECHR, but also that this presumption - as a relative one - could be rebutted by alleging specific evidence of compatibility between the detention regime and the ECHR's principles. The latter approach was adopted by the Grand Chamber in the case *Muršić v. Croatia* of 2016, in which the European judges set out criteria to assess whether or not the phenomenon of prison overcrowding constitutes an inhuman or degrading treatment. The relevance of this ruling is clear: the Court has removed the automatism according to which the space factor is in itself able to determine a violation of the Convention, regardless of the other recurring circumstances. The concrete application of the criteria established by the European judges has given rise to several issues. In fact, the CPT recommended that the minimum space for each detainee in a multiple cell should be 4 m^2 as well as it stated that the space occupied by toilets and fixed furniture should be deducted from the calculation of the available area. On the contrary, the Court established the minimum space for each prisoner at 3 m^2. Then, with regard to the calculation of the available surface, it stated that the space occupied by the toilet should be deducted, that the area occupied by the "*meuble*" should be considered as available surface and that, in any

case, such assessment should take into account whether or not the prisoner could move freely within the cell. The concept of "freedom of movement" used by European judges seems to be unclear and open to different interpretations. In fact, the European Court has not provided any explanation as to the extension of this notion, nor it has given any concrete example as to when the detainee's movement may be considered free and when it should be considered impeded (thus, making detention an inhuman or degrading treatment forbidden by the Convention). Similarly, the term "*meuble*" used by the European judges seems to be ambiguous. Indeed, it is not clear whether the available space includes only the surface occupied by easily removable furniture (i.e. table, chairs etc.) or also the area occupied by non-removable furniture (i.e. bed, wardrobes etc.). The lack of a clear guideline has left a wide margin of discretion to national judges. In order to avoid the risk of divergent interpretations by the Italian Courts, the *Sezioni Unite* of the Court of Cassation intervened through an "interpretative ruling". In particular, it first reiterated the general principles established by the European judges. Subsequently, the Italian Court interpreted the "*Muršić* criteria" and it stated that the two expressions used by the ECtHR in defining the criteria to assess the available area (namely, inclusion of the surface occupied by furniture in the calculation of the space available and freedom of movement) should be jointly read. In doing so, the Court of Cassation has maximised the degree of protection afforded to prisoners within the limit of the guidelines set by the European Court of Human Rights. If the problem of interpretation of the "*Muršić* criteria" seems to have been solved at national level, it still persists at European level since the Court has not further defined the correct meaning of the expressions that it has used. Therefore, in order to grant a uniform interpretation of its criteria and to ensure similar standards of protection in each State party to the Convention, the European Court of Human Rights should be more detailed in defining the extent of its guidelines, avoiding the risk of different standards of protection in different countries. Although national judges must have a margin of free interpretation to adjust the principles

of European case-law to the various national circumstances, the Court should provide detailed guidance to remove the persisting doubts concerning both the criteria for calculating the space available to detainees and the meaning of the concept of "freedom of movement" used as a threshold between a treatment in accordance with the Convention and an inhuman or degrading condition prohibited by Article 3 ECHR.

With regard to the problem of prison overcrowding in Italy, the data on the detained population concerning the last two years should not be misleading. In fact, they are influenced by the emergency legislation enacted by Italian Government to limit the spread of the Covid-19 pandemic within penitentiaries. The lack of a structural reform by the Parliament, aimed at introducing measures to limit prison entries and to encourage the resort to *misure alternative*, suggests that the number of prisoners may rise again and the problem of overcrowding may become pressing in the near future. As regards to the limited access to the above-mentioned *misure alternative*, the table below shows Italian prison population from 2005 to 2021 focusing on inmates who are serving a residual sentence below five years[170].

[170] The decision to include prisoners with a residual sentence below five years derives from the time limit set by law to apply for a *misura alternativa*. Indeed, the request for *liberazione condizionale* can be submitted, *inter alia*, by prisoners who have served at least thirty months (or, however, at least half the penalty) if the residual sentence does not exceed five years. The *affidamento in prova "ordinario"* can be granted when the residual sentence is below three years or four years if the prisoners' behaviour proves that the above-mentioned *affidamento in prova* is useful for their re-education. The possibility of access to *detenzione domiciliare* is more diversified. The hypothesis that, however, pursues mainly deflationary purposes is the so-called *detenzione domiciliare generica*. Bearing in mind that it has no longer the connotation of a measure addressed to weak subjects (such as people who has reached the age of seventy years, pregnant women or mothers of children under ten years of age cohabiting with them, detainees who are fathers - exercising parental authority - of children under ten years of age cohabiting with them, detainees who suffer from particularly serious health conditions, inmates who are over sixty years of age and prisoners under twenty-one years of age), it is widely

PRISONERS AND RESIDUAL SENTENCE						
Year	**Up to 1 year**	**Between 1 and 2 years**	**Between 2 and 3 years**	**Between 3 and 4 years**	**Between 4 and 5 years**	**Total**
2005	10.193	7.072	5.199	3.491	2.225	28.180
2006	2.724	2.179	1.659	1.384	1.099	9.045
2007	5.510	3.108	2.190	1.585	1.029	13.422
2008	8.526	5.075	3.391	2.140	1.355	20.487
2009	10.662	6.492	4.484	2.801	1.733	26.172
2010	11.224	7.520	5.151	3.338	2.179	29.412
2011	10.430	7.667	5.406	3.559	2.428	29.490
2012	10.106	7.558	5.834	3.867	2.396	29.761
2013	9.569	7.535	5.726	3.757	2.494	29.081
2014	7.858	6.481	4.746	3.407	2.315	24.807
2015	7.749	6.479	4.809	3.373	2.245	24.655
2016	7.909	6.780	5.179	3.656	2.377	25.901
2017	8.198	7.176	5.587	3.990	2.603	27.554
2018	8.525	7.760	5.952	4.027	2.949	29.213
2019	8.682	8.146	6.171	4.380	3.186	30.565
2020	6.912	6.774	5.354	3.978	2.820	25.838
2021	6.763	6.858	5.857	7.395	6.071	32.944

The data stress how a wider application of *misure alternative* – at least for the category of detainees taken into consideration– could lead (and could have led) to a significant reduction of the prison population and, consequently, to a partial solution of the issue of prison overcrowding[171].

and almost automatically applicable. In fact, prisoners who must serve a sentence - even residual - below two years may apply for *detenzione domiciliare* as long as they have not been condemned for one of the offences listed in Article 4 *bis* of Prison Administration Act when the conditions for *affidamento in prova al servizio sociale* are not met and when the *detenzione domiciliare* is able to avoid the risk of further offences. In addition to the above-mentioned measure, there is also the *detenzione presso il domicilio* of prison sentences whose term does not exceed eighteen months, introduced by the so-called "*svuota carceri*" Law (Law 26 November 2010, no. 199) which aims at contributing to solve the problem of prison overpopulation. However, this measure is often not applicable to foreigners since they have not a domicile within the State territory.

[171] Source: Italian Ministry of Justice. Data refers to 31 December of each year. According to the Italian Prison Ombudsman, this situation raises serious challenges with respect to the granting of *misure alternative* and it

Among the possible solutions to prevent the further increase of inmates, the most recent are those enshrined in the so-called "*Cartabia* reform" (Law 27 September 2021, no. 134 - *Delega al Governo per l'efficienza del processo penale nonché in materia di giustizia riparativa e disposizioni per la celere definizione dei procedimenti giudiziari*). Although they do not directly concern the execution of sentences, the delegations to the Government include the adoption of measures that, indirectly, impact on the prison system. Firstly, the introduction of a new organic discipline of restorative justice institutions (such as *affidamento in prova*), which would review their requirements and extend their range of application. Another measure that may have a positive outcome in reducing the number of detainees (or, at least, in not increasing it) is the possibility for the judge to apply alternative sanctions (*sanzioni alternative*) already in the cognitive phase of the trial as well as the possibility to reiterate their application. These sanctions – *detenzione domiciliare*, *semilibertà*, *lavoro di pubblica utilità* and *pena pecuniaria*- have essentially the same content as the corresponding *misure alternative* that are applicable during the execution of the sentence. They depend on the extent of the penalty imposed by the judge and they can replace prison sentences of up to four years.

Despite they aim at avoiding imprisonment, some of these alternative sanctions raise dubts. In particular, *detenzione domiciliare* and *semilibertà* which may be applied in lieu of prison sentences of between 3 and 4 years. As to the former, this research work has already emphasised how *detenzione domiciliare* does not produce any re-educational effect on prisoners. Rather, it determines a forced isolation that risks to frustrate the re-socialization pathway already undertaken by them if it is not accompanied by an *extra moenia* treatment constantly supported by *ad hoc* facilities. Regarding *semilibertà*, the main doubts concern

reveals the "classist" dimension of the penitentiary system (Source: AGI, https://www.agi.it/cronaca/news/2020-06-26/carceri-detenuti-relazione-garante-suicidi-8998802/).

the fact that this measure implies the return of inmates to the prison every evening and their exit the following morning. The risk, in this case, is of an "alternating hours" overcrowding: prison with an acceptable number of detainees during the day but overpopulated at night. Doubts also concern the failure to include *affidamento in prova* among the alternative sanctions drafted by the lagislator. According to some scholars, this choice seems to be justified on the grounds that, among the above-mentioned alternative sanctions, only *affidamento in prova* does not entail any deprivation of liberty. This aspect reveals the (unsurpassed) idea that the punishment must in any case consist of a deprivation (albeit minimal) of personal freedom (Dolcini, 2021b).

Another factor which exacerbates the problem of prison overcrowding concerns the number of foreigners in Italian prisons as resulting from data published annually by the Ministry of Justice. In fact, they represent (and have represented in the past) about one third of the total number of people imprisoned. This evidence results in two different issues.

The first is mainly linked to the trial, during which it is often impossible to apply to foreigners a coercive measure other than *custodia cautelare*. Indeed, *arresti domiciliari* requires the availability of a domicile in the national territory suitable for the application of such restrictive measure. Foreign offenders are frequently people without a permanent address or a permanent accommodation, who live illegally in the national territory. If they commit an offence that requires the application of a coercive measure, their personal situation leads to their inevitable entry and stay in prison.

Clearly, the lack of domicile makes it difficult, if not impossible, also to apply *misure alternative* to foreigners who are serving a sentence. The most critical measure from this perspective is *detenzione domiciliare*, which (as already mentioned) has a negative impact on the re-educational purpose of the penalty imposed on the foreigner.

Furthermore, another issue concerns the only specific measure often applied to foreign offenders: the *espulsione o allontanamento dello straniero dallo Stato*. Although it

is apparently suitable to reduce the impact of foreigners on prison population, this measure is often ineffective as it leads to two problems.

The first issue relates to the lack of any re-educational effect, since foreigners are simply expelled from the national territory on the basis of a provision which raises doubts on its compatibility with the principle set out in Article 27 of Italian Constitution.

The second problem refers to the almost inexistent deterrent effect of the measure, since foreigners whose expulsion is ordered often do not leave the national territory or they return unlawfully after a very short time, committing new crimes and re-entering the prisons.

Therefore, it seems evident that the current national legal framework is unable to reduce the impact of foreigners on the prison system and, consequently, on the problem of overcrowding. Hence, if it is impossible to assume the lack of foreign citizens in Italian prisons, it is however necessary to adopt measures aimed at reducing their incarceration. Further, it is also important to introduce provisions which grant foreigners' effective re-education once detained, in order to limit and prevent their entry (or return) to prison and their consequent impact on the problem of prison overpopulation.

As for foreigners investigated and/or accused of crimes for which imprisonment is applied only due to the lack of personal resources on the Italian territory, a hypothetical reform may consist in the introduction of new forms of *extra moenia* public utility work, which would benefit the host community and which would have a relevant re-educational connotation aimed at the social (re)integration of the offender.

With regard to the right to hope, the European Court of Human Rights has been sufficiently clear in stating that precluding prisoners from the prospect to regain their freedom, even though after having served a period of imprisonment, constitutes inhuman or degrading treatment. It does not mean that inmates must necessarily be released. In fact, the sentence is compatible with conventional principles as far as prisoners can hope to regain their freedom once they have completed a re-education process which duration might not be

determined *ab origine*. On the basis of this assumption, through the judgement *Marcello Viola v. Italy* the European Court of Human Rights held that the *ergastolo ostativo* regime ruled by Article 4 *bis* of Prison Administration Act conflicts with Article 3 ECHR since it does not allow prisoners who have been convicted of certain categories of crimes the right to hope to regain their freedom. This ruling was followed by two important judgements of the Constitutional Court. With the ruling no. 253 of 2019, the Italian judges declared the constitutional unlawfulness of Article 4 *bis* of Prison Administration Act insofar as it does not allow *ergastolani ostativi* to benefit from *permessi premio* in case of non-cooperation with the judicial authority. With the ordinance no. 97 of 2021, the Constitutional Court has referred to the Parliament the question concerning the constitutional legitimacy of the Articles 4 *bis* and 58 *ter* of Prison Administration Act and of the Article 2 of the Decree Law 13 May 1991, no. 152 since they prevent the *liberazione condizionale* of an uncooperative person who has been sentenced to life imprisonment for crimes committed through the modalities enshrined in Article 416 *bis* of Italian Criminal Code, or in order to promote the activities of criminal associations. The "decision to not decide" adopted by the Court leads to several possible outcomes.

If the Parliament would intervene, it is difficult to assume that Article 4 *bis* of Prison Administration Act could be removed from the prison legislation, bearing in mind the general and special preventive purpose of the norm. Similarly, it is difficult to suppose that the criterion of cooperation with the judicial authorities prescribed by law would be removed from the list of factors that are relevant for the granting of *benefici penitenziari*. Nevertheless, a reform of the prison legislation seems to be necessary. In line with the guidance provided by both the European Court of Human Rights and the Constitutional Court, the Parliament should first amend the absolute presumption of social dangerousness set out in Article 4 *bis* of Prison Administration Act by making it relative, therefore one which can be overcome by contrary evidence. Such change should concern not only

ergastolani ostativi but, more generally, all prisoners convicted for one of the crimes listed in the above-mentioned norm, regardless of the *quantum* of the penalty applied to them. Secondly, the Parliament should rationalising/improving the mechanism to allow also non-cooperating prisoners to access *benefici penitenziari* according to a sort of progression, starting from the *permessi premio* and reaching *liberazione condizionale*. This possibility might be subject to several requirements: the fact that detainees have already served a period of imprisonment which is proportionate to the crime committed, that they have undertaken an effective re-educational path and the proof concerning the cut of contacts with the criminal organization. It is only through such adaptations that the "progressive treatment" would bring positive results and it would overcome the inconsistencies of the current one. In this regard, it is up to the legislator to define which elements, as alternative to cooperation, may be relevant for granting *benefici penitenziari* even to non-cooperating inmates. As suggested by the Constitutional Court, they could consist in the explanation of the specific reasons for non-cooperation, or in the introduction of special requirements governing the period of parole of the prisoner. Taking into account that collaboration with the judicial authority represents one of the most effective tools in facing mafia phenomenon, it should be encouraged by maintaining a partial difference between the treatment of cooperating and uncooperating prisoners. Such difference could concern, for instance, the moment in which the two categories of detainees can apply for *benefici penitenziari*.

The situation would be different if the Parliament would not intervene within the date set by the Constitutional judges. In this case, it seems difficult to suppose a purely "demolitive" intervention of the Court and a declaration of unconstitutionality *tout court* of Article 4 *bis* of Prison Administration Act, since this would cause the risk to produce disharmonious effects on the overall discipline in force. Therefore, it is possible to assume that the Constitutional judges will intervene within the limits of the *petitum* by declaring the unconstitutionality of the norms *sub judice* only in relation to the impossibility for

ergastolani ostativi to benefit of *liberazione condizionale*. Such decision would probably lead to further questions concerning the constitutionality of Article 4 *bis* of Prison Administration Act and further (consequent) declarations of unconstitutionality of the same norm. However, such potential outcome would not only risk to make ineffective the general and special preventive purpose of the prison legislation, but also to create regulatory gaps in a particularly sensitive field such as the prevention, fight and repression of criminal phenomena.

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