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Life imprisonment, Organized Crime, Fundamental Rights

Ergastolo, Criminalità organizzata, Diritti fondamentali

Cadena perpetua, Criminalidad organizada, Derechos fundamentales

Abstracts

Few years after the European Court of Human Rights' (ECtHR) ruling in Viola v. Italy, which declared the Italian life imprisonment under section 4-bis of the Prison Administrative Act incompatible with Article 3 of the European Convention on Human Rights (ECHR) –, the Italian legislator reformed the regulatory framework of 'ergastolo ostativo', by enacting Law 199/2022. However, the legislator seems to not have correctly implemented the principles enshrined in the Convention. Indeed, the present work seeks to evaluate the extent to which the new 'ergastolo ostativo,' as reformed by Law 199/2022, is compatible with Article 3 of the ECHR. The present study, through a critical analysis of the relevant ECtHR case law and doctrine on the matter, will show how the current formulation of Article 4-bis can raise no few challenges to the ECHR. Hence, this work, after a preliminary analysis of the primary ECtHR jurisprudence on life imprisonment, highlights the need to reconsider the new regulatory framework of 'ergastolo ostativo' in order to ensure the compliance with the principles enshrined in the Convention.

Pochi anni dopo la sentenza della Corte europea dei diritti dell'uomo (Corte EDU) nella causa Viola v. Italia – che ha dichiarato incompatibile con l'articolo 3 della Convenzione europea dei diritti dell'uomo (CEDU) l'ergastolo ostativo sensi dell'articolo 4-bis dell'ordinamento Penitenziario – il legislatore italiano ha riformato il quadro normativo dell'ergastolo ostativo, con la legge 199/2022. Questi, tuttavia, non sembra aver attuato correttamente i principi stabiliti dalla Convenzione ed elaborati dalla Corte europea dei diritti dell'uomo. Il presente lavoro, quindi, si pone l'obiettivo di indagare se e in quale misura il nuovo ergastolo ostativo, come riformato dalla legge 199/2022, sia compatibile con l'articolo 3 della CEDU. Tramite un'analisi critica approfondita delle nuove disposizioni in materia di ergastolo ostativo alla luce della dottrina e giurisprudenza della Corte EDU in materia, il presente lavoro mostrerà come l'attuale formulazione dell'articolo 4-bis sollevi non pochi dubbi di legittimità con riferimento alla CEDU. Pertanto, dopo un esame preliminare della giurisprudenza primaria della Corte EDU in materia di ergastolo, la presente ricerca evidenzia la necessità di riconsiderare il nuovo quadro normativo dell'ergastolo ostativo al fine di garantire la tutela dei principi sanciti dalla Convenzione.

* The author wishes to thank Professor Laura Peters, LL.M. thesis supervisor from University of Groningen, as well as the two anonymous referees for their insightful comments. All errors remain mine.

Pocos años después de la sentencia del Tribunal Europeo de Derechos Humanos (TEDH) en el caso Viola v. Italia, que declaró la prisión perpetua italiana, prevista en el artículo 4-bis de la Ley Penitenciaria, incompatible con el artículo 3 del Convenio Europeo de Derechos Humanos (CEDH), el legislador italiano reformó la regulación de la "prisión perpetua optativa", mediante la promulgación de la Ley 199/2022. Sin embargo, el legislador parece no haber aplicado correctamente los principios consagrados en el Convenio. En efecto, el presente trabajo pretende evaluar si la nueva "prisión perpetua optativa", tal y como ha sido reformada por la Ley 199/2022, es compatible con el artículo 3 del CEDH. A través de un análisis crítico de la jurisprudencia y doctrina del TEDH relevantes en la materia, se mostrará cómo la actual regulación del artículo 4-bis puede plantear no pocos desafíos al CEDH. De ahí que en este trabajo, tras un análisis preliminar de la jurisprudencia del TEDH sobre la prisión perpetua, se pondrá de manifiesto la necesidad de reconsiderar el nuevo marco normativo de la "prisión perpetua optativa", a fin de garantizar el cumplimiento de los principios consagrados en el Convenio.

Sommario

1. Introduction.

Until October 2022, Article 4-bis (*ergastolo ostativo*) of the Prison Administrative Act[1] (hereinafter O.P.) provided that the prisoners convicted for particularly serious crimes, such as mafia offences and terrorism, could only be granted special prison benefits upon request if they cooperated with the judicial system. In other words, should a convicted prisoner for one of the offences listed in Article 4-bis O.P. had not cooperated with judicial authorities,[2] he or she would not have been eligible for parole or other beneficial treatments, such as the possibility to obtain temporary release, alternative measures to detention, or to work outside the prison.

In the case *Viola v. Italy (n.2)*[3] the European Court of Human Rights (hereinafter ECtHR) highly criticized the approach of Article 4-bis O.P., as formulated before the enactment of reform in 2022.[4] More specifically, the ECtHR considered that the absolute presumption set forth by the provision prevented the competent court from reviewing the application for conditional release and whether the applicant had made progress towards rehabilitation that the detention could no longer be justified on legitimate penological grounds. The Court ultimately found the violation of Article 3 European Convention on Human Rights (hereinafter ECHR) claiming that *ergastolo ostativo*, as provided by the law in force at that time, drastically limited both the prospect of release of the prisoner and the possibility of a review.

On October 2022, three years after *Viola v. Italy*, the Italian Government, with Law Decree D.L. 162/2022, converted into law L. 199/2022, reformed the legislative framework of the *ergastolo ostativo*. Nevertheless, the Law poses no few problems with regard to the compatibility of the new formulation of *ergastolo ostativo* with the principles enshrined in the ECHR.

Indeed, the following section (section 2) will delve into the analysis of the foundational principles enshrined in Article 3 of the ECHR, shedding light on the main principles on life imprisonment elaborated by the European Court of Human Rights. This will serve as the theoretical framework for the subsequent critical analysis of the current legislative framework of *ergastolo ostativo*. Subsequently, a brief historical analysis will be conducted in order to trace the development of the legislative framework of *ergastolo ostativo* (section 3). Hence, this section aims to provide context in order to understand the legal dynamics that have shaped the Italian approach to *ergastolo ostativo.* Then, the focus will shift toward the analysis of *Viola v. Italy* (section 4), a critical point of reference for understanding legislative framework of *ergastolo ostativo*. Section 5 will, in brief, scrutinize the reaction of the Italian Constitutional Court to *Viola v. Italy*. Ultimately, section 6 will propose some recommendations for the Italian legislator, with the aim of aligning the current regulatory framework of *ergastolo ostativo* with

[1] Law July 26, 1975 n. 354 (Norme sull'Ordinamento Penitenziario e sull'esecuzione delle misure privative e limitative della libertà).
[2] According Article 58-ter O.P. to effectively cooperate with law enforcement and judicial authorities means to make efforts to prevent the criminal activity from being carried to further consequences or concretely assist the police or judicial authority in gathering decisive elements for the reconstruction of the facts and for the identification or capture of the perpetrators of the crimes.
[3] *Marcello Viola v Italy (n° 2)* App no 14612/19 (ECtHR, 13 June 2019)
[4] Law December 30, 2022 n. 199.

international human rights standards and principle elaborated by the ECtHR.

2. Article 3 ECHR: principles on life imprisonment.

Article 3 ECHR is considered to be one of the core rights of the Convention and 'one of the fundamental values of democratic societies',[5] Together with Article 2, the right to life represents one of the most important pillars within the context of human rights. In fact, under no circumstance is a derogation possible (*jus cogens*),[6] not even in case of public danger,[7] regardless of the nature of the offence committed.[8]

Although very clear in its formulation, Article 3 gave rise to a proliferation of case law by the ECtHR,[9] aimed at assessing whether life imprisonment[10] is in violation of the Convention. On the one hand, the Convention does not expressly prohibit the imposition of life sentences on Contracting States. However, on the other hand, it is self-evident that such a form of punishment poses not few concerns with regard to human rights. Particularly, the judgments rendered by the ECtHR concern claims alleging both degrading treatment and an incompatibility with the human dignity of whole-life sentences.

In accordance with Article 3, 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment'. In particular, torture was defined by the European Commission on Human Rights in the *Greek* Case as 'an inhuman treatment which has a purpose such as the obtaining of information or confessions, or the infliction of punishment and it is generally an aggravated form of inhuman treatment'.[11] Inhumane are all treatments that cause not only physical but also mental unjustifiable severe suffering. Of course, not all ill treatments can be labeled as inhumane treatments. As the Court stated in *Gäfgen v. Germany*, 'in order for an ill-treatment to fall within the scope of Article 3, it must attain a minimum level of severity'[12] meaning that it requires a sufficient degree of suffering or infliction of pain. Such minimum level of severity is assessed, as the Court recalled, having regard to the circumstances of the case, such as the duration of such treatment, and the mental and/or physical effect produced.[13] To assess whether an ill-treatment can be classified as torture two conditions have to be met: 1) there must be a severe treatment, causing a very serious and cruel suffering; 2) such severe pain must be inflicted with the aim of obtaining information, inflicting punishment, or intimidating.[14]

Whereas, a degrading treatment can be classified as a punishment or other treatment aimed at degrading or 'grossly' humiliating a person in front of another individual, including treatments that compel the victim to act against his will.[15] As it can be inferred, it is very difficult to draw a line between degrading treatment and treatments that fall outside the scope of the Convention. This difficulty is mainly due to the crucial role that the subjective element of torture – namely how the victim perceives the treatment –, plays in the definition of the offence.[16]

As above mentioned, the challenges to Article 3 ECHR arise specifically with regard to the claim of inhumane and degrading treatment of whole-life sentences. Because of the extremely intrusive nature of such punishment, the ECtHR elaborated a set of criteria that have to be fulfilled in order for a life sentence to fall under the scope of Article 3 ECHR. Indeed, in the following paragraphs, the main principles of life imprisonment elaborated by the ECtHR will be examined, through an accurate analysis of the relevant Court's jurisprudence on the issue.

[5] *Saadi v Italy*, App no 37201/06, para 127 (ECtHR, 28 February 2008).
[6] Article 15(2) ECHR.
[7] *Ireland v the United Kingdom*, App no 5310/71, para 1631(ECtHR, 8 January 1978): '(…) there can be no derogation therefrom even in the event of a public emergency threatening the life of the nation (…)'.
[8] *Indelicato c Italie*, App no31143/96 (ECtHR,18 October 2001), para 30; '(…) La nature de l'infraction qui était reprochée au requérant est donc dépourvue de pertinence pour l'examen sous l'angle de l'article 3'.
[9] Duffy (1983), p. 316.
[10] Life imprisonment has been defined as a form of punishment pursuant to which a prisoner, as a result of a criminal conviction, is detained for his entire life *see* Smit D. and Appleton C. (2019), p. 35.
[11] The Greek Case (1969) 12 Yearbook of the European Convention on Human Rights 186.
[12] *Gäfgen v Germany* App. no 22978/05 (ECtHR, 1 June 2010) para 88.
[13] *Jalloh v Germany* App. no 54810/00 (ECtHR, 17 July 2006) para 67.
[14] *Gäfgen v Germany* App. no 22978/05 (ECtHR, 1 June 2010) para 63.
[15] Directorate of Human Rights Council of Europe, *Yearbook of the European Convention on Human Rights* 12 (Springer Dordrecht, 1969) 186.
[16] Rodley N. and Pollard M. (2015), p. 94.

As a preliminary notion, the Court has always stressed that only States are competent to design penal policies and to establish the conditions for the sentences' review mechanisms. Nevertheless, the Court constantly reminded that such policies must be implemented in light of the principles of the Convention.

As well described by the Chamber in the *Vinter* case,[17] there are three different types of life sentence: 1) a life sentence that provides the eligibility of release after having served a part of it; 2) a life sentence required by the law that does not contain any provision concerning the possibility for parole which requires a judicial decision in order to be imposed; 3) a life sentence without the possibility of parole imposed by a judge who has no discretion as to whether impose it or not.[18] The Chamber, as reported by the Court in *Vinter,* found that no issue arise with regard to the first type of sentence. The most problematic types of whole-life sentences are undoubtedly the second and the third. Indeed, the focus of the ECtHR's judgments that will be analyzed in the following lines primarily concerns these two types of life sentences.

In the first place, as previously mentioned, and as recalled several times by the ECtHR, the imposition of a life sentence on adults is not *per se* contrary to the scope of the Convention.[19] Nevertheless, the Court found that, because a life sentence without parole may raise issues with regard to the compatibility with Article 3,[20] minimum guarantees have to be met when imposing such a form of punishment.

2.1. *The prospect of release and the possibility of a review: the* de facto *and* de jure *reducibility of whole life sentences.*

According to the Court, in order for a life sentence to be compatible with Article 3 ECHR, there must be a prospect of release[21] and a possibility of a review.[22] This means that, when evaluating the compatibility of life imprisonment to Article 3, the attention must be focused on finding whether there is any hope for the prisoner to be released.[23] And such a requirement is met when the sentence is *de jure* and *de facto* reducible. With the wording '*de jure*' the Court intended to say that in domestic systems must exist a norm that expressly provides for an effective mechanism of review of the sentence. Whereas *'de facto*' has been interpreted as meaning that the prisoner must not be deprived of a concrete prospect of release. In other words, 'the prospect of release must exist in concrete terms',[24] namely there must be a 'genuine possibility of release'.[25] Nevertheless, as highlighted by the Court in *Kafkaris*, the Convention does not grant persons serving life sentences the right to early release, nor the right to the termination or remission of the sentence through an administrative or judicial review.[26]

Indeed, as it can be observed, the concept of reducibility of a life sentence appears to be strictly related to the concept of (early) release, which is itself subordinate to the existence of a review mechanism. Accordingly, the presence of a provision under national law that allows the judge to at least take into account the possibility of an early release is to be considered a crucial factor when the compatibility of a life sentence to the Convention is assessed.[27] In this regard, it is interesting to note how the Court in *Kafkaris* affirmed that the existence of such a provision should be only considered as a crucial factor that has to be taken into account, rather than decisive criteria for assessing whether there has been a violation of Article 3.[28]

[17] *Vinter Et Autres c Royaume-Uni* App no 66069/09 130/10 3896/10 (ECtHR, 9 July 2013).
[18] *Ibid* para 84.
[19] *Kafkaris v Cyprus* App n 21906/04 (ECtHR, 12 February 2008) para 97 and references cited therein.
[20] See generally, *Nivette v France* App no 44190/98 (ECtHR, 3 July 2001); *Einhorn v France* App no 71555/01 (ECtHR, 16 October 2001); *Stanford v the United Kingdom* App no 16756/90 (ECtHR, 23 February 1994).
[21] *Kafkaris v Cyprus* App n 21906/04 (ECtHR, 12 February 2008) para 97 para 98.
[22] *Vinter Et Autres c Royaume-Uni* App no 66069/09 130/10 3896/10 (ECtHR, 9 July 2013), para 110
[23] *Iorgov v Bulgaria (no 2)* App no 36295/02 (ECtHR, 2 September 2010) para 49.
[24] *Kafkaris v Cyprus* App n 21906/04 (ECtHR, 12 February 2008) para 97 Joint Partly Dissenting Opinion of Judges Tulkens, Cabral Barreto, Fura-Sandström, Spielmann and Jebens, para 2.
[25] *Ibid.*
[26] *Kafkaris v Cyprus* App n 21906/04 (ECtHR, 12 February 2008) para 99.
[27] *Ibid.*
[28] Viganò F. (2012), p. 3.

2.2. *The legitimate penological grounds.*

All the above mentioned is not to say that a sentence that must be served in full is *per se* contrary to the scope of Article 3.[29] In fact, a prisoner might be obliged to serve the full sentence if, after having been considered for (early) release, he is refused 'on the ground that he or she continued to pose a danger to society'.[30] In this regard, the Court recalled that States have the obligation to take measures for the protection of society from violent crimes.[31] For this purpose, it might be necessary to impose an indeterminate (life) sentence that entails a continued detention of the dangerous prisoner.[32] Hence, it is enough that the sentence is *de jure* and *de facto* reducible, meaning that national law must provide for a review mechanism aimed at finding whether the changes and the progress in the life of the prisoner are so significant, that detention can no longer be justified on 'legitimate penological grounds'.[33] A detention can be considered to be justified on legitimate penological grounds when its primary aim(s) is/are either punishment, deterrence, public protection, or rehabilitation.[34] Should at least one of these 'penological grounds' not be present at the time when a life sentence is imposed, a prisoner cannot be lawfully and legitimately detained.[35] Of course, as the Court noted in *Vinter,* such penological grounds, on which the detention must be justified, may change throughout the course of the sentence. Thus, for this reason, it is crucial to carry out 'the review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated'.[36]

2.3. *The role of rehabilitation and the right to hope.*

The Court noted that within the European penal policy, much more emphasis has been placed on rehabilitation and reintegration. These two facts have both become two crucial penological grounds that Contracting States have to take into consideration while implementing their penal policies.[37] On the other hand, it has been pointed out that the Convention itself does not guarantee *per se* a right to rehabilitation of the prisoners. Hence, Article 3 cannot be interpreted as imposing an absolute duty for prison authority to engage prisoners in rehabilitative and social reintegrative programs and activities.[38] However, the Court stressed that Article 3 has to be interpreted as requiring those authorities to give life sentence prisoners not only 'a chance, however remote, to someday regain their freedom, but also a real opportunity to rehabilitate themselves', in order to make that chance 'genuine and tangible'.[39] Indeed, depriving a whole-life prisoner of his freedom, without giving him any possibility of rehabilitation nor the 'chance to regain that freedom at some future date' would be incompatible with human dignity and would entail a degrading punishment contrary to the scope of the Convention. In other words, a prisoner convicted of life term imprisonment must be guaranteed the so-called 'right to hope',[40] namely the right 'to know, at the outset of his sentence, what he must do to be considered for release and under what conditions'[41]. In fact, the knowledge of the conditions for release allows prisoners to properly work on the pathway toward rehabilitation and

[29] *Kafkaris v Cyprus* App n 21906/04 (ECtHR, 12 February 2008), para 98; *Vinter Et Autres c Royaume-Uni* App no 66069/09 130/10 3896/10 (ECtHR, 9 July 2013), para 108.
[30] *Vinter Et Autres c Royaume-Uni* App no 66069/09 130/10 3896/10 (ECtHR, 9 July 2013), para 108.
[31] *Osman v the United Kingdom* App no 23452/94 (ECtHR, 28 October 1998) para 115.
[32] *Dickson v the United Kingdom* App no 44362/04 (ECtHR, 4 December 2007) para 75; *Vinter Et Autres c Royaume-Uni* App no 66069/09 130/10 3896/10 (ECtHR, 9 July 2013), para 108; *T v the United Kingdom* App no 24724/94 (ECtHR, 16 December 1999), para 97; *V v the United Kingdom* App no 24888/94 (ECtHR, 16 December 1999), para 98.
[33] *Vinter Et Autres c Royaume-Uni* App no 66069/09 130/10 3896/10 (ECtHR, 9 July 2013), para 119.
[34] *Ibid*, para 111.
[35] *Ibid.*
[36] *Ibid.*
[37] *Dickson v the United Kingdom* App no 44362/04 (ECtHR, 4 December 2007), para 75; See also *Harakchiev and Tolumov v Bulgaria* App no 15018/11, 61199/12 (ECtHR , 8 July 2014) para 243-246; *Khoroshenko v Russia* App no 41418/04 (ECtHR, 30 June 2015) para 121.
[38] *Harakchiev and Tolumov v Bulgaria* App no 15018/11, 61199/12 (ECtHR , 8 July 2014), para 264.
[39] *Ibid.*
[40] *Vinter Et Autres c Royaume-Uni* App no 66069/09 130/10 3896/10 (ECtHR, 9 July 2013), para 122: '(…) who commit the most abhorrent and egregious of acts and who inflict untold suffering 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'. (Concurring opinion of Judge Power-Forde).
[41] *Ibid*. para 122.

social reintegration.[42] The Court stressed the importance of the rehabilitative principle also in *Dickson* where it clearly showed support for the principle of progression, according to which the more advanced the sentencing stage, more room should be given to rehabilitation, and less to retribution.[43]

Thus, it is possible to infer that the concepts of 'right to hope', rehabilitation, and social reintegration are interrelated as each of them strives for the protection of the human dignity of whole-life prisoners. Precisely, what links human dignity to the right to hope is the concept of the right to personal development that must be ensured for the convicted prisoner.[44] In light of what has been said so far, it can be concluded that aiming at the rehabilitation of the prisoner without giving him the right to hope or provide of the possibility of a review without a path toward rehabilitation, would be irrational[45] and contrary to the principles enshrined in the Convention.

2.4. *The review of the sentence: general conditions.*

It has to be reminded that is not the Court's task to establish the form and timing in which the review should take place, as this is left to the discretion of Contracting States.[46] Contrarily, the Court's main task is to make sure that domestic law of Contracting States provides for the possibility of such review and sanction the States where whole life sentences do not meet the standards of Article 3 of the Convention, namely where such review mechanisms are absent.[47] Should domestic law not provide any mechanism or possibility of reviewing a whole life sentence, Article 3 is to be considered violated from the moment of the imposition of such a sentence.[48] States are not only required to provide a review mechanism under their national law, but they must make clear under what conditions a whole-life prisoner might be taken into account for release.[49] Indeed, where an 'objective, pre-established criteria of which the prisoner [have] precise cognizance at the time of imposition of the life sentence' is lacking, a violation of Article 3 for the inadequacy of a sentence review mechanism would occur.[50]

In sum, the review mechanism, in order to be compliant with Article 3 ECHR must follow the following principles, as pointed out by Judge Pinto Albuquerque in his partly dissenting opinion in the case *Murray v. the Netherlands:*[51]

1) The principle of legality ("rules having a sufficient degree of clarity and certainty," "conditions laid down in domestic legislation");

2) The principle of the assessment of penological grounds for continued incarceration, on the basis of "objective, pre-established criteria," which include resocialization (special prevention), deterrence (general prevention), and retribution;

3) The principle of assessment within a pre-established time frame and, in the case of life prisoners, "not later than 25 years after the imposition of the sentence and thereafter a periodic review";

4) The principle of fair procedural guarantees, which include at least the obligation to give reasons for decisions not to release or to recall a prisoner;

5) The principle of judicial review.

2.5. *The presidential pardon.*

At this point, the following question should be addressed: is the sole possibility under the national law of adjustment of a life sentence through presidential pardon or clemency sufficient for the purpose of Article 3 ECHR? In this regard, the Court found no violation of the

[42] Minervini G. (2020), p. 244.
[43] *Dickson v the United Kingdom* App no 44362/04 (ECtHR, 4 December 2007), para 28.
[44] Smit D. and Appleton C. (2019), p. 298.
[45] Minervini G. (2020), p. 225.
[46] *Vinter Et Autres c Royaume-Uni* App no 66069/09 130/10 3896/10 (ECtHR, 9 July 2013), para 120.
[47] *Ibid*, para 121.
[48] *Ibid*, para 122.
[49] *Ibid.*
[50] *Trabelsi v Belgium* App no 140/10 (ECtHR,4 September 2014), para 137.
[51] Partly dissenting opinion, Judge Pinto de Albuquerque, *Murray v the Netherlands*, App no 10511/10 (ECtHR, 26 April 2016), para 52.

Convention when such possibility is given only in the form of pardon/commutation of the President,[52] or it is subject only to the discretion of the Head of State.[53] However, where the mere provision of presidential clemency under domestic law is completely detached from any assessment concerning the eligibility for release on parole, such provision would be in contrast with the Convention. In fact, it would not allow prisoners to know under what conditions they might be considered for release.[54] And this is even more evident where the provisions concerning presidential clemency are extremely vague,[55] or where there is no obligation for the President to motivate the decisions on clemency.[56]

2.6. *The timing of the review: the twenty-five years criteria.*

Until 2011, the ECtHR's case law on life imprisonment had primarily concerned the nature of such punishment. Only after 2011, had the Court started to also examine issues regarding the duration of the imprisonment. Be as it may, throughout the course of the years, the Court has always highlighted that it is not the Court's task to establish neither the appropriate length of detention nor the timing in which the review should take place.[57] Nevertheless, the Court, in the last fifteen years, tried to interpret the cases at issue in light of the comparative and international law practice of the Contracting States. Very peculiar, and different from the *post-Vinter* scenario, is the *Törköly* case where the Court found that a prisoner who would become eligible for conditional release after forty years of imprisonment constituted 'a distant but a real possibility'.[58] Contrarily, in 2016 and in 2021, respectively in *T.P. and A.T. v. Hungary*[59] and *Sandor Varga and others v. Hungary,*[60] the Court found that the possibility of parole after forty years of imprisonment is incompatible with the meaning of Article 3 ECHR.

Indeed, it is clear that from *Vinter* onwards, the Court has been sufficiently consistent in remarking the comparative and international support for a review mechanism capable of being activated no later than twenty-five years after the imposition of a life sentence, 'with periodic review thereafter'.[61] In support of this argument, the Court in *Vinter* cited, *ex multis,* the provision under the International Criminal Court's s Statues, which is considered to set international standards, where Article 110(3) provides that the review of a sentence shall not be conducted before the prisoner convicted to life imprisonment has served at least twenty-five years of the sentence. Interestingly, this European and international trend, namely the (potential) release after having served twenty-five years of the sentence, according to Van Zyl Smit and Appleton, certifies the European and International attention to the right of the prisoner to resocialization.[62]

For instance, the Court found no violation of Article 3 in *Čačko* where the domestic law at issue provided for the possibility for a whole-life prisoner to be conditionally released after having served twenty-five years of his term.[63] Analogously, in *Bodein* the Court considered the applicant's sentence to be in compliance with the criteria established in *Vinter*, as he was eligible to apply for release twenty-six years after the imposition of the life sentence, even though under domestic law the review was possible after 30 years' incarceration, well beyond the abovementioned international supported standards. In this regard, the Court clarified that the timing for the review mechanism should be calculated from the imposition of the sentence and not from the very first incarceration, which it might take place before any judgment is rendered as a security measure. Hence, as a general principle, it can be said that a period of

[52] *Iorgov v Bulgaria (no 2)* App no 36295/02 (ECtHR, 2 September 2010), para 51-60.
[53] *Kafkaris v Cyprus* App n 21906/04 (ECtHR, 12 February 2008), para 103.
[54] *László Magyar v Hungary* App no 73593/10 (ECtHR, 20 May 2014), para 58.
[55] *Trabelsi v Belgium* App no 140/10 (ECtHR,4 September 2014), para 133-138. For instance, in the case of *Petukhov,* domestic law provided that presidential clemency could have been granted in 'exceptional and extraordinary circumstances', without specifying what those terms meant (*Petukhov v Ukraine (no 2)* App no 41216/13 ECtHR, 12 March 2019 para 173).
[56] *Murray v the Netherlands*, App no 10511/10 (ECtHR, 26 April 2016), para 100.
[57] See, ex multis, *T v the United Kingdom* App no 24724/94 (ECtHR, 16 December 1999), para 117; *V v the United Kingdom* App no 24888/94 (ECtHR, 16 December 1999), para 118; *Vinter Et Autres c Royaume-Uni* App no 66069/09 130/10 3896/10 (ECtHR, 9 July 2013), para 105.
[58] *Törköly v Hungary (dec)* App no 4413/06 (ECtHR), p. 5.
[59] See generally, *T.p and A.t v Hungary* App no 37871/14, 73986/14 (ECtHR, 4 June 2016).
[60] *Sandor Varga and others v Hungary* App no 39734/15, 35530/16 and 26804/18 (ECtHR, 17 June 2021).
[61] *Vinter Et Autres c Royaume-Uni* App no 66069/09 130/10 3896/10 (ECtHR, 9 July 2013), para 120; *Murray v the Netherlands*, App no 10511/10 (ECtHR, 26 April 2016), para 99; *Hutchinson v. The United Kingdom* App no 57592/08 (ECtHR, January 17 2017), para 69.
[62] Smit D. and Appleton C. (2019), p. 216.
[63] *Čačko v Slovakia* App no 49905/08 (ECtHR, 22 July 2014), para 77.

about twenty-five years or less, which run from the moment in which the life sentence is imposed, is sufficient to consider a life sentence as reducible.[64]

3. The evolution of the regulatory framework of *ergastolo ostativo*: a brief overview.

Article 4-bis was introduced with the enactment of Law n. 354 of 1975. The aim of such provision was to set stricter conditions for access to alternative measures to detention by the prisoner convicted for organized crime. In its original formulation, Article 4-bis O.P. provided a double-gradient system,[65] where the relevant offences were divided into two groups. For prisoners convicted for the offences listed in the first group, which were related to organized crime, access to alternative measures to detention was subject to the acquisition of evidence capable of excluding any link with organized crime. Whereas, for those who were convicted for the offences listed in the second group – which were not related to organized crime but were still classified as "particularly serious" –, the access to alternative measures and to the prison benefits was subject to the mere objective assessment of ongoing links with criminal organizations.

In 1992, Article 4-bis O.P. was tightened even more after judge Giovanni Falcone, together with his wife and the police escort agents, was killed in a brutal bombing attack carried out by *Cosa Nostra* on the 23rd of May 1992 in Sicily, also known as Capaci bombing (*Strage di Capaci*). This terror attack triggered a series of legislative reforms, aimed at contrasting the mafia phenomenon, which drastically changed the world of anti-mafia law and legislation. Hence, Law Decree n. 306 of 1992, converted into Law n. 356 on August 1992, harshened even more the penalty treatment for those convicted to mafia offences, with the aim of ensuring general prevention and public safety.[66] For those crimes, and for the above-mentioned first set of offences,[67] it was provided that temporary releases, the release on parole, the possibility to work outside the prison, and the alternative measure to detention, excluding the early release (*liberazione anticipata*), could have been granted only to those who "effectively" collaborate with judicial authorities in accordance with Article 58-ter O.P., except where the collaboration was considered to "impossible" or "irrelevant", as long as there were elements from which to infer the termination of any links with the criminal organization. According to Article 58-ter O.P. to "effectively" collaborate meant, and still means, either to work with the aim to avoid the continuation of a criminal activity or to help law enforcement or judicial authorities in the acquisition of elements crucial for the recollection of the facts and for the identification or capture of the offenders. Such collaboration was the only mean for proving the termination of the links with criminal organizations[68] and for disrupting the presumption of social dangerousness. It was in this peculiar context that was born what scholars will subsequently address as *ergastolo ostativo*. As pointed out by some scholars, in essence, *ergastolo ostativo* is a penalty that, on the basis of an absolute presumption *ex lege* of social dangerousness of the (non-collaborative) prisoner – who was presumed to be still linked with the original criminal organization[69] –, excluded the possibility of any reintegration in the society whatsoever.[70]

Then, in 1993 the Constitutional Court ruled the unconstitutionality of the "automatism" *ex* Article 4-bis O.P., as in contrast with the rehabilitation principle enshrined in Article 27 of the Italian Constitution. In particular, the Court criticized the norm in the extent to which it provided that the lack of collaboration was sufficient *per se* to presume the social dangerousness of the prisoner. In the following years, the legislator intervened with a series of legislative reforms with the aim of expanding the scope of application of Article 4-bis O.P.. Some of

[64] *Murray v the Netherlands*, App no 10511/10 (ECtHR, 26 April 2016), para 99; *Vella v Malta (déc)* App no 14612/19 (ECtHR, 27 February 2018), para 19.
[65] *See also* C. Cost., sent. n. 253/2019, para 7.1.
[66] C. Cost., sent. n. 306/1993, para 9.
[67] The crimes of mafia-type associations, the crimes committed for the purposes of terrorism or subversion of the constitutional order; the crimes *ex* Article 630 c.p. and those referred to in Article 74 of the D.P.R. 309/1990.
[68] Commissione Parlamentare di inchiesta sul fenomeno delle mafie e sulle altre associazioni criminali, anche straniere L. 99/2018, "Relazione sull'istituto di cui all'articolo 4-bis della legge n.345 del 1975 in materia di Ordinamento Penitenziario e sulle conseguenze derivanti dalla sentenza n.235 del 2019 della Corte Costituzionale", Doc. XXIII n.3.
[69] Pace L. (2015), p. 3. *See also*, C. Cost., sent. n. 253/2019, para 7.1.
[70] Dolcini E. (2021), p. 7.

the most significant changes were introduced by Law 279/2002 and by Legislative Decree n. 11 of 2009 that moved respectively terrorist and sexual offences[71] from the second to the first group. Further, in 2019 the range of offences within the scope of Article 4-bis was additionally widened with Law n. 3 of 2019 (also known as *Spazzacorrotti*) that included in the first group of Article 4-bis O.P. also the offences against Public Administration.[72]

After continuous legislative reforms and several judgments of the Constitutional Court,[73] in 2019 the ECtHR, in *Viola v. Italy*,[74] intervened again on the matter by harshly criticizing the legislative framework in force back then. Before examining in detail the decision of the Italian Constitutional Court, it seems appropriate to analyze first the ECtHR's ruling of *Marcello Viola v. Italy*.

4. Viola v. Italy.

On June 2019 the Grand Chamber of the ECtHR in *Viola v. Italy* rendered a decision concerning the compatibility of Article 4-bis of the Italian Prison Administration Act L. 354/1975 (hereinafter P.A.) with Article 3 ECHR. The case dealt with the reducibility of a life sentence imposed on a person who was found guilty of crimes committed within the context of a mafia criminal organization. This type of life sentence (also commonly referred to as *ergastolo ostativo*), before the reform enacted in November 2022 provided, as described in Chapter 1, that a prisoner convicted for particularly serious offences, such as Mafia offences or terrorism, could not be eligible for release on parole or other beneficial treatments, such as the possibility to work outside the prison and alternative measures to detention, unless he did cooperate with law enforcement, except for the hypothesis that such collaboration was considered to be 'impossible' or 'irrelevant'. The Grand Chamber ultimately found that this type of life imprisonment was in violation of Article 3 ECHR, as the applicant's sentence was *de facto* irreducible.

4.1. *The case.*

The judicial development of this case is particularly complex. In the following lines, we will try to point out the relevant facts that led the applicant to file an appeal to the ECtHR. In the first place, it has to be highlighted that the applicant was convicted several times by different courts. The first trial was held between 1990 and 1992 at the end of which the Court of Assize of Appeal of Reggio Calabria in 1999 convicted Mr. Viola to twelve years of imprisonment. In the second trial, also known as the 'Taurus Trial', he was convicted to life imprisonment again by the Court of Assize of Appeal of Reggio Calabria in 2002. In both trials, the applicant was convicted for having committed several crimes, including the crime *ex* Article 416-bis Italian Criminal Code (*associazione di stampo mafioso*).[75] Then, he was subject to the special detention regime 41-bis O.P. between 2000 and 2006, until the *Tribunale di Sorveglianza* revoked such measure in 2006. Subsequently, later in the years, he filed two requests for the obtainment of a temporary release (*permesso premio*), which were both rejected respectively in 2011 and in 2015. Simultaneously, in 2015, Mr. Viola presented also a request for release on parole (*liberazione condizionale*) *ex* Article 176 c.p. to the *Tribunale di Sorveglianza* of L'Aquila. As grounds, he claimed the good behavior taken in prison, and the absence of links with criminal organizations, alleging also the unconstitutionality of Article 4-bis O.P. for contrasting both

[71] Only the most serious sexual offences such as child prostitution and sexual violence.
[72] It is interesting to note that these last legislative reforms seem to have made collaboration fall outside its original scope, since it is unreasonable to think that sexual offences and crimes against Public Administration can be said to be directly linked to organized crime.
[73] For a detailed analysis of the constitutional jurisprudence on Article 4-bis O.P. *see*, *ex multis*, Donnarumma, MR. (2020), p. 11-13.
[74] *Marcello Viola c Italie (n° 2)* [2019] ECtHR 77633/16.
[75] This offence does not have a proper translation since only the Italian system of criminal justice does have a specific provision within the criminal code (Art. 416-bis) specifically aimed at contrasting Mafia Associations and crimes linked to it. A 'forced' translation of *associazione di stampo mafioso* could be 'Mafia-type criminal association/organization': 'The association is a Mafia-type criminal association when the participants take advantage of the intimidating power of the association and of the resulting condition of submission and silence to commit offences, to manage or control, either directly or indirectly, economic activities, concessions, authorizations, public contracts and services, or to obtain unlawful profits or advantages for themselves or for any other persons, or with the aim of stopping or making it difficult to exercise the free right to vote, or to organize votes for themselves or others during public elections'.

with Article 27(3) of the Italian Constitution and with Article 3 ECHR. His request was first rejected on May 2015 on the basis that because of Article 4-bis O.P. the applicant could not be considered to be eligible for release on parole, as the collaboration with judicial authorities, which in that circumstance was not neither 'impossible' nor 'irrelevant', was lacking. Against this decision, Mr. Viola filed an appeal to the Italian Court of Cassation in which he claimed the unconstitutionality of the provision at hand, in the extent to which it did provide a legal mechanism that rendered the 'non-collaborative' prisoner unable to obtain the release on parole. However, the Court of Cassation rejected his appeal with the judgment N. 1153/16, in which it pointed out the absolute character of the presumption of social dangerousness in case of absence of collaboration and the total discretion of the legislator to determine the requirements that have to be met for the obtainment of the release on parole.[76] Hence, the applicant ultimately started the proceedings before the ECtHR, complaining about the violation of Article 3 ECHR, as the life sentence it was imposed on him was *de facto* and *de jure* irreducible.

4.2. *The decision of the Court.*

The Court, in deciding over the issue, in the first place, took into account both the national legislation and the relevant case law of the Court of Cassation and of the *Corte Costituzionale*. In analyzing the jurisprudence of these two Courts, not only did the ECtHR find that the principles of rehabilitation and resocialization of the punishment were two core principles in the Italian system of criminal justice,[77] but also that the *ergastolo ostativo* was found to be compatible with the Italian Constitution.[78]

Subsequently, after having recalled principles on life imprisonment elaborated by the ECtHR in *Vinter*, *Kafkaris*, *Murrary*, and *Hutchison*, the Court undertook the analysis of the case at hand. In order to assess whether the sentence of Mr. Viola was *de jure* and *de facto* reducible, the Court focused its attention, particularly on the relationship collaboration-eligibility for obtaining benefits. In other words, the Court's aim was to find to what extent the subordination of the eligibility for the obtainment of parole or temporary releases to the collaboration with judicial authorities was in compliance with Article 3 ECHR.

The Court started by pinpointing that the access to release on parole and to the other benefits was not entirely precluded by the system in force back then. Rather it was subject to the collaboration of the prisoner with judicial authorities.[79] Then, the Court acknowledged the complexity and gravity of the mafia phenomenon, which is characterized by an ongoing adherence to the criminal belief of the members, which led the Italian legislator to prioritize general prevention and public safety. In other words, the Court was fully aware that Article 4-bis O.P. did constitute a precious resource within the war against mafia. Nevertheless, the Court questioned the legitimacy of *ergastolo ostativo* insofar as it subordinated the release on parole and other beneficial treatments to the collaboration of the prisoner. If on the one hand, the system then in force gave the prisoner the freedom of choice as to whether to collaborate or not, the Court 1) doubted the freedom of that choice and 2) highly questioned the equivalence: absence of collaboration = social dangerousness.[80] With regard to the first issue, the Court noted that the choice to not collaborate may depend on the fear of putting the lives of the prisoner and of his relatives in serious danger. Hence, a lack of cooperation, according to the Court, cannot always be considered a result of a free choice and something from which it is possible to unquestionably infer the ongoing support to the criminal organization.[81] With regard to the second issue, the Court argued that the derivation of an absolute presumption of social dangerousness from a lack of collaboration of the prisoner does not allow to take into account other circumstances relevant for assessing the progress made towards rehabilitation.[82] In fact, as argued among scholars, such equivalence "freezes" the absolute presumption of social dangerousness at the time of the commission of the offence,[83] and did not reflect the pro-

[76] *Marcello Viola v Italy (n° 2)* App no 14612/19 (ECtHR, 13 June 2019), para 28.
[77] See e.g. C. Cost., sent. n. n.12/1966; C. Cost., sent. n. 313/1990.
[78] *See*, ex multis, C. Cost., sent. n. 306/1993.
[79] *Marcello Viola v Italy (n° 2)* App no 14612/19 (ECtHR, 13 June 2019), para 101.
[80] *Marcello Viola v Italy (n° 2)* App no 14612/19 (ECtHR, 13 June 2019), para 116. See also, Santini S. (2019), p.4.
[81] *Marcello Viola v Italy (n° 2)* App no 14612/19 (ECtHR, 13 June 2019), para 118. In this regard, see also Mori SM (2019), p. 7.
[82] *Marcello Viola v Italy (n° 2)* App no 14612/19 (ECtHR, 13 June 2019), para 121.
[83] Minervini G. (2020), p. 226; Donnarumma MR (2020); *See also,* Palazzo F. (2019), p. 652.

gress made by the prisoner.[84] In other words, for the prisoner convicted to *ergastolo ostativo*, it was as if the time stopped at the moment of the reading of the sentence at the end of the trial. Whereas the Court reasonably observed that the personality of a convicted prisoner evolves during the period of detention, being that the ultimate scope of the detention, in accordance with the rehabilitation principle.[85] Hence, the Court declared the violation of Article 3 ECHR on the basis that the abovementioned absolute presumption provided by Article 4-bis O.P. *de facto* prevented the judge from correctly assessing: 1) the request for the release on parole; and 2) whether, during the course of the sentence, the applicant had made substantial progress toward rehabilitation so that detention could not have been justified on legitimate penological grounds. Further, as to the claim of the Government pursuant to which the applicant in any event could have received presidential clemency or requested the release on parole for medical reasons, the Court, by recalling its jurisprudence on the matter, clearly said that a prisoner convicted to life imprisonment, such as the applicant, cannot be said to have a *prospect of release*, just for the fact he can potentially rely on clemency or on grounds of health or age.[86]

5. After *Viola*: the reaction of the Italian Constitutional Court.

Shortly after the judgment rendered by the ECtHR in *Viola v. Italy*, the Italian Constitutional Court declared the unconstitutionality of Article 4-bis (1) O.P. in the extent to which it did not provide for the possibility to grant temporary releases (*permessi premio*) to prisoners convicted for the offence *ex* Art. 416-bis c.p., and the related ones, who failed to collaborate with judicial authorities, but not socially dangerous anymore. Before analyzing in detail the judgment, a few remarks should be made. In the first place, the Court did not declare the unconstitutionality of the *ergastolo ostativo*, but merely the unconstitutionality of the first paragraph of Article 4-bis O.P., along with the absolute preclusion to the access to temporary releases for the non-collaborative convicted prisoners.[87] In the second place, the Court automatically extended the (partial) declaration of unconstitutionality also in favor of all other prisoners, including the ones convicted for terrorism. Lastly, the decision of the Court concerned *only* temporary releases, and not also the release on parole, early release, access to alternative measures to detention, and work outside the prison. [88]

With regard to the merit of the judgment, the Court first briefly retraced the history and the development of Article 4-bis O.P.. Then, the Court started by pointing out that the presumption of social dangerousness of the non-collaborative prisoner *ex* Article 4-bis(1) O.P. constituted an absolute presumption, as it could be overcome only with an effective collaboration, which was indeed the only way to obtain the abovementioned temporary releases.[89] Hence, the Court did not question the legitimacy of the presumption in itself, since, as recalled by the Court itself, it is completely reasonable to infer from the non-collaboration the fact that the prisoner is still devoted to the criminal organization. Rather, it was the absolute character of such presumption to be in contrast with Articles 3 and 27 of the Italian Constitution for three main reasons.[90]

In the first place, the absolute character, though merely linked to criminal policy and public safety reasons, affected and aggravated the normal course of the execution of the penalty, which should not be interfered with by external elements.[91] Thus, in the Court's opinion, the infliction of a detrimental treatment to a non-collaborative prisoner, who was presumed "*iuris et de jure*" to be linked to organized crime and therefore as being socially dangerous, was considered to be unreasonable.[92]

In the second place, in contrast to Article 27 of the Constitution, the absolute presumption did not allow the judge (*magistrato di sorveglianza*) to assess *in concreto* the condition

[84] Mori SM (2019), p. 7.
[85] *Marcello Viola v Italy (n° 2)* App no 14612/19 (ECtHR, 13 June 2019), para 125.
[86] *Ibid* para 133. See also, *Kafkaris v Cyprus* App n 21906/04 (ECtHR, 12 February 2008), para 127; *Öcalan v Turkey (no 2),* App no 24069/03, 197/04, 6201/06, 10464/07 (ECtHR, 18 March 2014) para. 203; *László Magyar v Hungary* App no 73593/10 (ECtHR, 20 May 2014), para 57-58.
[87] C. Cost., sent. n. 253/2019, para 5.2. *See also*, Commissione Parlamentare di inchiesta L. 99/2018 cited above.
[88] C. Cost., sent. n. 253/2019, para 5.2.
[89] *Ibid.*, para 7.2.
[90] *Ibid.*, para 8.
[91] *Ibid.*, para 8.1.
[92] *Ibid.*

of the detainee. In fact, the temporary release, which may be granted for family, work, or cultural reasons, is characterized by what is called a "pedagogical-propulsive"[93] function; in other words, the very first step toward rehabilitation.[94] Hence, by preventing access to such measures, the rehabilitation path was "nipped in the bud".[95]

In the third place, the presumption was based on a general premise that, in reality, might be contradicted by further allegations aimed at excluding the presence of any links with the criminal organization and the danger of the restoration of such links.[96] In this regard, the Court remarked that, if from an absolute presumption can be formulated counter-arguments against the generalization on which the presumption itself is based, such presumptions are arbitrary and unreasonable, and for this reason, they do violate the equality principle.[97]

In the underlying case, the general premise on which the presumption was based can be expressed with the following equation: lack of collaboration = ongoing links with the criminal organization = social dangerousness. And such a general premise, in the Court's opinion, cannot be overcome by the mere participation to the rehabilitation process or by a mere declaration of detachment from the criminal organization. Instead, according to the Court such presumption of social dangerousness should be capable of being overcame by the acquisition of "additional, congruous and specific elements"[98] from which to exclude not only the presence of links with organized crime but also the danger of the restoration of such links in the future.[99]

More or less, this same line of reasoning adopted by the Court in 2019 was replicated in the judgment n. 97 of 2021, but here the *thema decidendum* was the constitutional legitimacy of *ergastolo ostativo* as a whole. In particular, the Court analyzed the constitutionality of Article 4-bis O.P. where it did not allow the prisoner convicted for mafia offences who did not effectively collaborate with judicial authorities, and who already served twenty-six years of his sentence, to be eligible for release on parole (*liberazione condizionale*). The Court, along the lines of judgment n. 253 of 2019, recalled that the absolute presumption of social dangerousness inferred from the lack of collaboration – which prevent the prisoner to be considered eligible for parole or other benefits – was constitutionally illegitimate and unreasonable, as was based on a generalization that can be, instead, contradicted from ordinary facts.[100] As pointed out among scholars, a legal presumption, in order to be considered constitutionally legitimate, must be relative, namely capable of being overruled by counter-arguments.[101]

Coming to the merits of the judgment, if on the one hand, the Court acknowledged that the petition was not manifestly ill-founded (*non manifesta infondatezza*), on the other hand, it refrained from declaring the unconstitutionality of *ergastolo ostativo*. In fact, considering the sensitivity of the matter, the Court "decided to not decide" and let the legislator intervene within one year period.[102] Indeed, with the judgment at issue, the Court "merely" assessed the constitutional violation of Article 4-bis.[103] The Court observed that a final ruling on the matter would have put at stake the stability of the legislative framework on *ergastolo ostativo*.[104] For example, as the Court pointed out, a potential declaration of unconstitutionality of Article 4-bis O.P., would have set the same conditions for accessing conditional release and other benefits both for the collaborative prisoners convicted for mafia crimes and for the non-collaborative prisoners convicted for organized crimes. In other words, it would have been "incongruous" and disproportionate on a constitutional level.[105] Hence, because of the delicate nature of the constitutional interests at issue, the Court believed it was more appropriate if the

[93] In this sense, C. Cost., judgment n. 504 of 1995; C. Cost. judgment n. 445 of 1997; C. Cost., judgment n. 257 of 2006. *See also*, Mengozzi M. (2020), p. 11.
[94] Donnarumma MR. (2020), pp. 11-12.
[95] In these words, Donnarumma MR. (2020), pp. 11-12.
[96] C. Cost., sent. n. 253/2019, para 9.
[97] *Ibid.*, para 8.3.
[98] *Ibid.*, para 9. In the Court's opinion, these additional and specific elements could be the social context in which the prisoner would be allowed to access, albeit temporarily and episodically, as well as other information acquired by law enforcement.
[99] *Ibid.*
[100] Corte Costituzionale, Ordinanza 97/2021, para 6-7. Tale argomentazione è stata inizialmente elaborata dalla Corte con la pronuncia n.253/2019 in occasione della quale i giudici costituzionali hanno sottolineato che "[…] l'assolutezza della presunzione si basa su una generalizzazione che può essere, invece, contraddetta, a determinate e rigorose condizioni, dalla formulazione di allegazioni contrarie che ne smentiscono il presupposto, e che devono poter essere oggetto di specifica e individualizzante valutazione da parte della magistratura di sorveglianza" (para 8).
[101] Ciafardini L. (2020), p.4.
[102] C. Cost., Ordinanza n. 97/2021, para 10.
[103] Galliani D (2021), p. 1.
[104] C. Cost., Ordinanza 97/2021, para 9.
[105] *Ibid.*, para 9.

legislator would have intervened on the matter, on the basis of the criteria elaborated by the ECtHR in *Viola v. Italy* recalled by the Court itself.

For this purpose, the Court initially postponed the hearing to the 10 May 2022, and then to 8 November 2022 in order to let the legislator intervene in the meantime. And on December 2022, almost exactly after one year after the Court's judgment, *in limine temporis*, a new reform on *ergastolo ostativo* was finally passed.

6. The new Article 4-*bis* O.P.: the possible challenges to article 3 ECHR.

According to the new provisions, the lack of collaboration with judicial authorities and law enforcement does not automatically preclude access to prison benefits *ex* Article 4-bis (1) O.P.. The previous system was reformed in light of the judgments rendered by the ECtHR[106] and the Italian Constitutional Court.[107] The two courts highly condemned the absolute character of the presumption of the dangerousness of the non-collaborative prisoner.[108]

Indeed, the new regime, allows also non-collaborative prisoners to obtain the aforementioned prison benefits, under certain conditions. The new provision requires, by inverting the burden of proof, the allegation by the prisoner of additional facts and to the evaluation of additional circumstance that does not strictly concern the rehabilitation of the prisoners and the assessment of his social dangerousness. Indeed, according to the new formulation of Article 4-bis(1-bis), the prisoner convicted to *ergastolo ostativo* shall be considered eligible for prison benefits, also in absence of an 'effective collaboration' *ex* Article 58-ter O.P., under certain strict conditions. In brief, the prisoner is required to prove: 1) the absence of any links with the 'criminal context in which the crime was committed', and 2) the absence of any risk of the restoration of those connections. In order to prove his present and future detachment from the criminal context, the prisoner shall also prove additional circumstances. In the first place, he shall prove either the fulfillment of any civil obligations and pecuniary reparation obligations resulting from the conviction, or the impossibility of such reparation. In the second place, the prisoner shall pinpoint 'specific, different and additional circumstances' other than the prison behavior, the participation in the rehabilitation process, and the mere declaration of detachment from the criminal context. In order to assess whether the detachment of the prisoner from any possible criminal context took place, the judge (*magistrato di sorveglianza*) will take into account also: 1) the personal circumstances; 2) the alleged reasons for the non-collaboration with the justice authorities, and 3) any other available information, including whether any form of reparation or restoration took place.

Indeed, the next sections will be aimed at analyzing in detail the current provision. In particular, section 3 will examine the requirement of damage compensation, whereas section 4 will reason upon the 'additional, specific and different elements'.

6.1. *The fulfillment of civil obligations and pecuniary damage caused by the crime or the proof of the impossibility to do so.*

In the first place, in order to overcome the abovementioned presumption of social dangerousness, the prisoner is now asked to prove the fulfillment of civil obligations and pecuniary reparation obligations resulting from the conviction (damage compensation). Where this would result impossible, the prisoner must prove the (absolute) impossibility of this repara-

[106] *Marcello Viola v Italy (n° 2)* App no 14612/19 (ECtHR, 13 June 2019).
[107] Corte Cost., 23 October 2019, judgment n. 253; Corte Cost., 15 April 2021, judgment n.97.
[108] In the case of *Viola* (n 4), the ECtHR ruled that the life sentence (*ergastolo ostativo*) imposed on the applicant restricted both his prospects of release and the possibility of the review. Indeed, the Court found that applicant's sentence was de facto irreducible, as the abovementioned absolute presumption provided by Article 4-bis O.P. prevented the judge correctly assess: 1) the request for the release on parole; and 2) whether, during the course of the sentence, the applicant had made substantial progress toward rehabilitation so that a detention could not have been justified on legitimate penological grounds. With regard to the judgment 97/2021 of the Italian Constitutional Court, the Court concluded that absolute presumption of social dangerousness inferred from the lack of collaboration – which prevent the prisoner to be considered eligible for parole or other benefits – was constitutionally illegitimate and unreasonable as was based on a generalization that can be, instead, contradicted from ordinary facts (para. 6-7).

tion. However, to which extent is it legitimate to subordinate the access of these benefits to the fulfillment of pecuniary and civil obligations by the prisoner? The ECtHR in *Matiošaitis and Others v Lithuania*[109] partially tried to give an answer to this question. The underlying case concerned the granting of the presidential pardon. For this purpose, according to the national legislation, judicial authorities were required to take into account whether the compensation for pecuniary damage caused by the crime had been paid. Interestingly, the Court found that such criteria was legitimate, as it allowed the President to assess whether a life prisoner's continued imprisonment was justified on legitimate penological grounds.[110]

Under the Italian Criminal Code, the release on parole (*liberazione condizionale*) and presidential clemency (*grazia*) are causes of extinction of the sentence (*cause di estinzione della pena*). As such, they are subject to the fulfillment of civil obligations arising out of the judgment. Instead, the temporary releases, the work outside the prison, and the alternative measures to detention cannot be classified as causes of extinction of the sentence: they are prison benefits, more or less temporary, or different ways of serving a sentence. On the one hand, it can be said that it might be reasonable to require the fulfillment of the aforementioned obligations as a precondition for granting measures of extinction of the sentence (such as the release on parole). In fact, these measures entail a complete assessment of whether a life prisoner's continued imprisonment is justified on legitimate penological grounds. On the other hand, it can be argued that requiring damage compensation and the fulfillment of civil obligations for the prison benefits other than the release on parole, seems disproportionate. In fact, those measures do not imply a full assessment of the rehabilitation of the prisoner. Only the release on parole or presidential clemency can be said to imply such an assessment. Instead, these measures are supposed to further the process of rehabilitation and social reintegration of the prisoner. Even a single temporary release, such as a day out of prison for work reasons, or a single day of social service probation can have extremely beneficial effects on the prisoner. Thus, it can be concluded that requiring the fulfillment of civil obligations and compensation for damages even to access prison benefits other than conditional release, because they make the access to these measures more difficult, the rehabilitation process may be obstructed *a priori*, where the prisoner should not be able to fulfill these obligations.

At this point, another question arises: to what extent can the lack of fulfillment of pecuniary and civil obligation be classified as an element from which to infer the social dangerousness of a prisoner? It can be argued that the fulfillment of the civil obligations and the compensation for pecuniary damages caused by the crime are not directly related to the concrete assessment of social dangerousness, namely the existence of any links between the prisoner and organized crime. In fact, a prisoner may fulfill the aforementioned obligations while nevertheless continuing to adhere to the criminal belief of their original criminal organizations and maintain a stable relationship with them. Hence, it can be concluded that from the fulfillment of civil and pecuniary obligations, it is impossible to ascertain, even only partially, whether a prisoner is still linked to a criminal organization. Accordingly, the fulfillment of civil and pecuniary obligations must not be intended as one of the factor from which to infer the lack of social dangerousness. Similarly, the lack of fulfillment of these obligations cannot be intended as a symptom of social dangerousness.

Ultimately, one could argue that the fulfillment of these obligations, in reality, is not a proper condition for the grant of the aforementioned prison benefits. In fact, according to the new provision, the prisoner may nevertheless be considered eligible for the benefits *ex* Article 4-bis (1) O.P. where the fulfillments of these obligations result to be impossible. However, the law also requires that in this case, the prisoner must prove the 'absolute impossibility' of such fulfillment. Further, not only is the new legislation silent on how the prisoner is supposed to prove such impossibility, but also it does not give any information whatsoever regarding what should be classified as an 'absolute' impossibility.

Conclusively, taking into consideration what has been said so far, the threshold for accessing these benefits seems to be very high under the new legislative framework. And the threshold seems to be even higher in the remaining part of the provision. In fact, the fulfillment of civil obligations and the payment of pecuniary damages, or alternatively the proof of the absolute impossibility of that, is not the only condition that has to be met to access the abovementioned prison benefits.

[109] *Matiošaitis and Others v Lithuania,* App. n. 22662/13, 51059/13, 58823/13, 59692/13, 60115/13, 69425/13 (ECtHR, 23 May 2017).
[110] *Ibid* para 168. Examples of 'legitimate penological grounds' are e.g. punishment, deterrence, protection of the public and rehabilitation.

6.2. *The 'additional, specific and different elements': the inversion of the burden of proof.*

Under the new provision it is also required, through an inversion of the burden of proof, the attachment by the prisoner of 'additional, specific and different elements'. According to the new law, these elements must be additional and different from the mere prison behavior, the mere participation in the rehabilitation process, and the mere declaration of detachment from the criminal organization. From these 'additional and different elements' judicial authorities should be able to infer 1) the absence of any links with the 'context in which the crime was committed', and 2) the absence of any risk of the restoration of those links.

The new formulation of Article 4-bis(1-bis) O.P., with regard to this inversion of the burden of proof, has been partially 'suggested' by the Italian Constitutional Court. In fact, the Court in 2019 and 2021 claimed that, in absence of collaboration, the presumption of social dangerousness can be overcome by the acquisition of 'additional, congruous and specific elements'. Indeed, even in the Court's opinion, the mere participation in the rehabilitation program or the mere declaration of detachment from criminal organizations should not be sufficient for ascertain the present and future detachment of the prisoner from the criminal context.[111] With regard to the access of temporary release, the Court observed that these elements could be, for instance, the social context that prisoner would be allowed to access, albeit temporarily and episodically, as well as other information acquired by law enforcement.

Passing to the analysis of the first part of the provision, in the first place it should be pointed out that no clear definition of 'additional elements' is given, nor any criteria whatsoever useful to identify those elements. In the second place, it should be noted that the norm is unclear also as to whether these additional elements must be acquired regardless of the assessment of 1) the rehabilitation of the prisoner, 2) his declaration of the detachment of the criminal context, and 3) the prison behavior. In fact, the norm only mentions that these elements should be 'additional' and 'different' from such assessment. As regards to the *ratio legis*, it can be said that it was not the legislator's intention to completely detach the evaluation of the rehabilitation process from the assessment of the social dangerousness of the prisoner. Rather it can be assumed that the intention of the legislator was to require the evaluation of the progresses toward rehabilitation made by the prisoner together with the assessment of additional circumstances, also in light of personal circumstances, of the alleged reasons of non-collaboration, of the "critical rethinking" (*revisione critica*) of the criminal conduct, and in light of any other available information. Hence, the mere participation in rehabilitation programs, the mere declaration of detachment from the criminal context, and the mere prison behavior are, indeed, not sufficient for the granting of the aforementioned prison benefits. However, Article 3 ECHR 'must be interpreted as requiring […] domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds'. But how can the progresses toward rehabilitation of a prisoner be assessed, for the purpose of a future release, if his conduct and his participation in the rehabilitation programs are not even sufficient for the granting of benefits that are supposed to, instead, enhance the rehabilitation process itself?

At this point, a clarification needs to be made. According to the Court of Cassation,[112] along the same lines as the Constitutional Court,[113] Article 4-bis (1-bis) O.P. would not set *per se* an inversion of the burden of proof at the expense of the prisoner. In this regard, the Court of Cassation argued that there would be a difference between the term 'allegation' and 'proof': by requiring just the 'attachment' (*allegazione*) of 'additional, specific and different elements', the new norm would not ask the prisoner to actually 'prove' (*dimostrazione*) these elements. In the Court's opinion, only in the event that any elements from which to infer the existence of ongoing links with criminal organization come to light, the prisoner would be asked to provide contrary evidence (*elementi di prova contraria*), by the *proof*, and not the mere attachment, of these elements. Be as it may, the Court's reasoning is not convincing. In fact, nowhere does the new formulation of Article 4-bis(1) expressly provide that the prisoner

[111] C. Cost., sent. n.2 53/2019; C Cost., ordinanza n. 97/2021.
[112] C. Cass., 8 March 2023, sez. I Penale, para. 9, Requisitoria per Udienza in Camera di Consiglio.
[113] C. Cost., sent. n. 227/2022.

would be required to 'prove' rather than 'attach' the aforementioned additional elements in the event that evidence of his social dangerousness would arises. The norm only refers to the attachment of these additional elements as a *conditio sine qua non* for the access to the prison benefits *ex* Article 4-bis O.P., not even taking into consideration the hypothesis of emersion of evidence from which to infer the existence of links between the prisoner and the criminal organization. Nevertheless, even if the legislator's intention was to require the prisoner to 'prove', and not simply to 'attach', additional elements only when some indication of ties with organized crime would come up, the prisoner would be in any event required to provide contrary evidence 'within a reasonable period of time'. Indeed, this would result, in any event, in an inversion of the burden of proof.[114]

In light of all abovementioned, it is clear that what is asked to prisoners is the fulfillment and the proof of additional obligations and requirements completely detached: 1) from the assessment of the exclusion of any links with criminal organizations; 2) the assessment of the danger of the restoration of such links; 3) the assessment of the progress of the prisoner toward rehabilitation.[115] Indeed, because the benefits listed in Article 4-bis §1 O.P. it can be argued to constitute the very first step toward rehabilitation, by subordinating the access to these measures to such unreasonable[116] high burden of proof, the rehabilitation process might be seriously hindered.

It is true that the Convention does not guarantee a right to rehabilitation *per se*. Nevertheless, the ECtHR highlighted that the support and commitment to the rehabilitative aim of punishment among Contracting States, especially Italy, is undeniable.[117] In light of such wide support for rehabilitation, according to the Court, the Convention does, instead, require prison authorities put life prisoners in the conditions to rehabilitate themselves.[118] In this regard, the Court recalled in *Kaytan* v. *Turkey* that life sentence prisoners 'should be given the opportunity to progress towards rehabilitation'.[119] Further, as stressed in *Vinter*'s concurring opinion by judge Power-Forde, even prisoners who commit the most horrendous crimes 'nevertheless retain their fundamental humanity and carry within themselves the capacity to change'. Hence, they must be guaranteed the so-called right to hope, namely the right to 'hope that, someday, they may have atoned for the wrongs which they have committed'.[120]

In the case at issue, it is true that on the one hand, under the new legislation, prisoners are *de jure* provided with an opportunity for rehabilitation. On the other hand, the access to the aforementioned measures, which constitutes the essence of the rehabilitation process, can be said to be *de facto* rendered impossible by a *probatio diabolica*,[121] namely the disproportionate evidentiary regime featured by an unreasonable inversion of the burden of proof at the expenses of the prisoner. Further, with regard to the release on parole, such *probatio diabolica* also deprives the prisoners of any concrete prospect of release. Hence, it can be concluded that because prisoners are not given a 'real opportunity' to rehabilitate themselves nor a 'right to hope', the new formulation of Article 4-bis(1-bis) O.P., as reformed by Law 199/2022, should be considered as entailing a degrading punishment contrary to principles enshrined in Article 3 ECHR.

[114] De Vito R. (2022).
[115] See also Comunicato Camere Penali, 'Rinvio della riforma Cartabia e stretta sulle ostatività: la presa di posizione dell'Unione', 31st of October 2022: 'La riscrittura del comma 1 bis dell'articolo 4bis (…) inserisce un percorso talmente contorto e ricco di requisiti aggiuntivi, tautologici o assolutamente disancorati rispetto alla congrua valutazione per la esclusione di collegamenti attuali con la criminalità organizzata e del pericolo di concreto ripristino (…)'.
[116] Gonnella P. (2022).
[117] *Vinter Et Autres c Royaume-Uni* App no 66069/09 130/10 3896/10 (ECtHR, 9 July 2013), para 118.
[118] *Harakchiev and Tolumov v Bulgaria* 15018/11, 61199/12 (ECtHR, 2014), para 264: '(…) While the Convention does not guarantee, as such, a right to rehabilitation, and while Article 3 cannot be construed as imposing on the authorities an absolute duty to provide prisoners with rehabilitation or reintegration programs and activities, such as courses or counselling, it does require the authorities to give life prisoners a chance, however remote, to someday regain their freedom. For that chance to be genuine and tangible, the authorities must also give life prisoners a real opportunity to rehabilitate themselves (…)'; *Dickson* (n 33) para 75; *Khoroshenko v Russia* App no 41418/04 (ECtHR, 30 June 2015), para 121; *Murray v the Netherlands*, App no 10511/10 (ECtHR, 26 April 2016), para 104: '(…) Life prisoners are thus to be provided with an opportunity to rehabilitate themselves. As to the extent of any obligations incumbent on States in this regard, the Court considers that even though States are not responsible for achieving the rehabilitation of life prisoners, they nevertheless have a duty to make it possible for such prisoners to rehabilitate themselves (…)'.
[119] *Kaytan v Turkey* App no 27422/05 (ECtHR, 15 September 2015), para 62.
[120] *Vinter Et Autres c Royaume-Uni* App no 66069/09 130/10 3896/10 (ECtHR, 9 July 2013), concurring opinion of Judge Power-Forde 54.
[121] In this sense, see also, Comunicato dell'Associazione Professori di Diritto Penale sul d.l. 162/2022: rinvio riforma Cartabia, ergastolo ostativo, rave party e nuovo delitto, availabe on *www.sistemapenale.it*.

6.3. *The timing of the review.*

Under Article 2(1)(b) of Law 199/2022 the prisoner convicted to *ergastolo ostativo* under Article 4-bis (1) O.P. can be considered eligible for parole (*liberazione condizionale*) only after having served at least *thirty* years of their sentence, without prejudice to the conditions required by the same Article 4-bis for the granting of the aforementioned prison benefits.

From a close reading of the norms, one could immediately notice that there is a slight but important departure from the original provision. In fact, pursuant to the old regime, the prisoner convicted to *ergastolo ostativo* was considered eligible for parole after having served twenty-six years of his sentence. Hence, it is self-evident that the period after which the prisoner can request a review of his sentence has been reformed *in peius.* Indeed, at this point, it should be addressed the question of whether the timing of the new review mechanism measures up to the standards of Article 3 of the Convention.

It has been recalled several times by the ECtHR that it is not the Court's task establish neither the appropriate length of detention nor the timing in which the review should take place[122]. However, it is undeniable the comparative and international support for a review mechanism capable of being activated no later than twenty-five years after the imposition of a life sentence, 'with periodic review thereafter'.[123] It is true that the ECtHR in *Bodein v. France*,[124] for instance, found no violation of the Convention, even though under domestic law the review was possible after 30 years of incarceration. Nevertheless, in the underlying case, the applicant was fully eligible to apply for release twenty-six years after the imposition of his life sentence. In general, in order for a mechanism review to be compatible with the principles enshrined in Article 3 ECHR, it should entail a period of about twenty-five years or less, that run from the moment in which the life sentence is imposed.[125]

Turning back to the *ergastolo ostativo*, the new provision does not specify whether the timing of the review should be calculated from the incarceration or from the imposition of the sentence. The law only provides for the possibility to request release on parole after having served thirty years of the sentence, or, in case of temporary punishment, at least two third of it. Although very unlikely, if not impossible, considering the nature of the offenses punished *ex* Article 4-bis, it cannot be excluded that a prisoner convicted to *ergastolo ostativo* may be *de facto* considered eligible for parole (*liberazione condizionale*) well before the 30th year, as it happened in *Bodein*. Nevertheless, it is evident that, in case where a prisoner is required to serve thirty years of his sentence before being considered eligible for parole, the review mechanism would fall outside the scope of the principles established in the Convention.[126] In fact, through the infliction of an aggravating treatment on prisoners who lawfully decide to not collaborate with judicial authorities,[127] such mechanism would render the sentence *de jure* irreducible, depriving the prisoner of any prospect of release.

7. Need for urgent reforms: some recommendations to the legislator.

Undoubtedly, Article 4-bis O.P. has always been, and will continue to be, one of the most effective tools in the fight against the mafia; indeed, it is not conceivable to definitely set aside such an instrument. However, the new system of *ergastolo ostativo* needs to be partially reformed along the lines of what has been shown so far, bearing in mind that any reform must

[122] See, ex multis, *T v the United Kingdom* App no 24724/94 (ECtHR, 16 December 1999), para. 117; *V v the United Kingdom* App no 24888/94 (ECtHR, 16 December 1999), para 118; *Vinter Et Autres c Royaume-Uni* App no 66069/09 130/10 3896/10 (ECtHR, 9 July 2013), para 105.
[123] *See Vinter Et Autres c Royaume-Uni* App no 66069/09 130/10 3896/10 (ECtHR, 9 July 2013), para 120; *Čačko v Slovakia* App no 49905/08 (ECtHR, 22 July 2014), para 77; *Bodein v France*, App no 40014/10 (ECtHR, 13 February 2015); *Murray v the Netherlands*, App no 10511/10 (ECtHR, 26 April 2016), para. 99; *Hutchinson v. The United Kingdom* App no 57592/08 (ECtHR, January 17 2017), para 69. More recently, the Court reiterated that the possibility of parole after forty years of imprisonment is incompatible with the meaning of Article 3 ECHR, *Sandor Varga and others v Hungary* App no 39734/15, 35530/16 and 26804/18 (ECtHR, 17 June 2021); See also *T.p and A.t v Hungary* App no 37871/14, 73986/14 (ECtHR, 4 June 2016).
[124] *Bodein v France*, App no 40014/10 (ECtHR, 13 February 2015).
[125] *Murray v the Netherlands*, App no 10511/10 (ECtHR, 26 April 2016), para. 99; *Vella* (n 65), para 19.
[126] *Ibid.*; *Vella v Malta (déc)* App no 14612/19 (ECtHR, 27 February 2018), para 19.
[127] Comunicato Camere Penali (n 87).

be carried out in light of the extreme social dangerousness of the mafia phenomenon. For this purpose, in the first place, the legislator should consider setting a different evidentiary regime for non-collaborative prisoners on the basis of the prison benefit requested (section 8.1.). In the second place, it should be (re)introduced a more simplified evidentiary regime for prisoners who did not collaborate because of their limited participation in the offence (section 8.2.). In the third place, more value should be given to the rehabilitation path and to prisoner's redemption (section 8.3.). Ultimately, the legislator should consider to lower the timing required for the review of the sentence from thirty to twenty-five years (section 8.4.).

7.1. *Set a different evidentiary regime for non-collaborative prisoners on the basis of the prison benefit requested.*

In order to reform the current system in the sense of Article 3 ECHR, in the first place the legislator should differentiate the hypothesis of non-collaborative prisoners seeking a temporary release, an alternative measure to detention or to work outside the prisoner, from non-collaborative prisoners requesting a release on parole (*liberazione condizionale*). As has been underlined in the previous subsections, the access to these measures should be differentiated, as they imply different assessments and affect sets of interests. On the one hand, the release on parole requires a full assessment of 'whether there are legitimate penological grounds for the continuing incarceration of the prisoner',[128] by taking into account 1) any significant changes in the life of the prisoner and 2) the progress towards rehabilitation made in the course of the sentence.[129] On the other hand, the work outside the prison, the temporary releases, and the alternative measures to detention do not require such assessment as they do not imply a potential review of the sentence and a potential full release. Instead, if granted, these measures put the prisoners in the condition to slowly reintegrate themselves into society, but do not give them complete freedom. Hence, it is safe to say that the assessment of the social dangerousness of prisoners seeking a first opportunity to rehabilitate themselves cannot be the same for prisoners requesting to be released: the threshold should be much lower for the first set of prisoners and higher for the second one. For this purpose, in order to render the current framework compatible with Article 3 ECHR, it could be provided that the prisoners applying for prisoner benefits other than the release on parole may be granted those benefits under a simplified evidentiary regime, with the aim of facilitating his rehabilitation process, rather than making it *de facto* impossible. For instance, in order to overcome the presumption of social dangerousness in a way that does not entail degrading punishment in violation of Article 3 ECHR, it could be provided for those prisoners to jointly take into account: 1) the participation in rehabilitation programs, as well as the prison behavior; 2) the signs of termination of the links with the criminal organizations, such as the declaration of detachment from the criminal context or the "moral redemption" of the prisoner; and 3) the social context in which the prisoner will be temporarily placed (e.g. in case of granting of a temporary release or social work). Whereas, for prisoners seeking for release on parole (*liberazione condizionale*), it could be provided a tightened evidentiary regime that would require, in addition to the evaluation of progresses toward rehabilitation and the declaration of detachment from the criminal world, also the alleged reasons for not cooperating with judicial authorities, such as the fear of retaliation against one's self or family.

As above mentioned, the fulfillment of civil and pecuniary obligations caused by the crime appears to be an unreasonable requirement for access to temporary releases, work outside the prison, and to alternative measures to detention. On the other hand, it is safe to say is not disproportionate to take into account the fulfillment of these obligations when granting the release on parole, as long as such fulfillment is not to be intended as a circumstance from which to derive the lack of social dangerousness. Indeed, we believe that the fulfillment of the aforementioned obligations should be only seen as an additional circumstance to take into account, rather than a precondition under which access to the release on parole should be subject.

In any event, regardless of whether a prisoner is asking for the release on parole or for oth-

[128] *Hutchinson v. The United Kingdom* App no 57592/08 (ECtHR, January 17 2017), para 42.
[129] *Vinter Et Autres c Royaume-Uni* App no 66069/09 130/10 3896/10 (ECtHR, 9 July 2013), para 199.

er prison benefits, the burden of proof should not be on him. Rather, it should be on judicial authorities who should deeply investigate the reasons for non-collaboration, as also suggested in the *Progetto della Commissione Francesco Palazzo,* 2013.[130]

7.2. *(Re)introduce a more simplified evidentiary regime for prisoners who did not collaborate because of their limited participation in the offence.*

Then – along the lines of what the Italian Constitutional Court held in 1994[131] –, it should be re-introduced the possibility to grant the prison benefits *ex* Article 4-bis to the prisoners who were not capable of collaborating because of their limited participation in the criminal offenses and/or their marginal role in the association. For this category of prisoners, it could be introduced a more simplified evidentiary regime – as they can be assumed to be less socially dangerous – that would only require the assessment of exclusion of any link with organized crime through a mere declaration of detachment from criminal organizations.

7.3. *Giving more value to the rehabilitation path and to prisoner's redemption.*

It is true that from the participation in rehabilitation programs, from the prison behavior, and from the mere declaration of detachment from the criminal context it cannot be univocally inferred a lack of social dangerousness. In fact, a criminal may have progressed toward rehabilitation and have declared to not have any link whatsoever with criminal organizations, while having the intention to rejoin the association when he will have the possibility to do so. However, it would be unreasonable and unfair to ignore these two circumstances as they constitute a crucial factor for the assessment of the social dangerousness of the prisoner. That is why it would be reasonable to provide that, for prisoners seeking prison benefits other than the release on parole, these two elements should be evaluated also in light of the social context in which the prisoner will be placed during the temporary release or when serving an alternative measure to detention: this would be crucial for the successful completion of the gradual reintegration process of the prisoner. Similarly, for prisoners seeking a release on parole, in addition to the evaluation of the rehabilitation stage of the prisoner, it might be necessary to inquire also on the alleged reasons for non-collaboration.

7.4. *Lower the timing required for the review of the sentence from thirty to twenty-five years.*

As regards the timing of the review set under the new legislative framework, as it has been shown above, is undoubtedly incompatible with the ECHR, as it renders the entire sentence irreducible. Indeed, the current formulation of Article 4-bis (2), in order to fall within the scope of Article 3 ECHR, must be reformed in the sense of setting the timing of the review of the sentence, namely when the release on parole may be requested, at twenty-five years, instead of thirty, after the imposition of the sentence. This would make the judgment *de jure* and *de facto* reducible and would allow the prisoner to reintegrate himself into society.

[130] Ministero della Giustizia - Commissione per elaborare proposte di interventi in tema di sistema sanzionatorio penale (Commissione istituita con decreto del Ministro della Giustizia del 10 giugno 2013, presieduta dal Prof. Francesco Palazzo). See also, Pinto de Albuquerque (2015), p. 10
[131] C. Cost., sent. n. 357/1994.

8. Concluding remarks.

In light of what has been argued so far, the new legislation raises not few challenges to Article 3 ECHR. On the one hand, the amended version of Article 4-bis, by inverting the burden of proof, places an unreasonable high evidentiary burden on the prisoner, making more difficult the access to prison benefits. On the other hand, by raising up to thirty years old the period after which the release on parole is now possible, the new provision renders the review mechanism *de facto* impossible.

In this work we tried to find to which extent the Italian *ergastolo ostativo*, as reformed by Law n. 199/2022 is compatible with Article 3 ECHR. We started with a brief scrutiny of the new legislative framework. Subsequently, we critically assessed each controversial point of the new formulation of Article 4-bis O.P. As first, we pointed out how the broad and vague terminology used in the provision that leave room for mis-interpretations and mis-understandings. Then, we argued how under the new legislation the prisoner is subject to a very harsh regime of burden of proof. Indeed, we pointed out how the prisoner is required to fulfill obligations that are completely detached from the mere assessment of his rehabilitation stage. Hence, we conclude that such harsh probatory regime, that we have addressed as a being a *probatio diabolica*, makes *de facto* impossible the access to the benefits listed in Article 4-bis O.P. As a consequence, because the rehabilitation process can be seriously hindered, we concluded that the new formulation of Article 4-bis(1-bis) O.P., as reformed by Law 199/2022, should be considered as entailing a degrading punishment contrary to principles enshrined in Article 3 ECHR. Conclusively, we argued that because the new provision allows for a review mechanism (*liberazione condizionale*) after thirty years since the imposition of the sentence, the international support of the 'twenty-five years criteria', fully acknowledged by the Court, has been violated. As a result, also on this point, the new provision seems to be in violation of the principles enshrined in Article 3 of the Convention.

As a final remark, we have brought to the attention of the academic community a possible way of reforming the current legislative framework of *ergastolo ostativo*. The reform that we have proposed tries to balance several sets of interests, by taking into account the interests of public safety and public security with the interests of the prisoners to the rehabilitation process. In particular, we argued for an introduction of two different probatory regimes: a stricter one for the access to the release on parole (*liberazione condizionale*), and another one more simplified for the access to measures different from the release on parole. We firmly believe, in fact, that the access to all these benefits should be facilitated, as such measures constitute the essence of the rehabilitation process.

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