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The "right to life" of people convicted in italy to life in prison: an analysis of italian and european jurisprudence*

O direito à vida dos condenados à prisão perpétua na itália: uma análise da jurisprudência italiana e europeia

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Abstract

The present article addresses the issue of the right to life from a double perspective.
If – in fact – the protection of life must induce the legislator to introduce particularly effective sanctions to protect this right from unjustified aggression, on the other hand, the punitive claim of the State cannot exclusively consist, in any case, in the neutralization of the offender for life, since this would constitute an exploitation of the human being for contingent purposes of criminal policy and would be in contrast with the re-educational function of the penalty, as it is provided by the Article 27, par. 3., of the italian Constitution and with the principle of human dignity.
A similar prejudice would seem to be recognized in the case of life imprisonment, which – as a perpetual penalty – limits (and we will see later how) any possibility of liberation of the condemned and frustrates his expectations and hopes.
In detail, therefore, the paper will examine the recent developments of the jurisprudence of the European Court of Human Rights and of the Constitutional Court on life imprisonment, trying to highlight the illegality not only of the so-called "life imprisonment impediment" (as it was recently affirmed by the ECHR and by the Constitutional Court) but – more generally – also to life imprisonment in all its forms and to propose – de lege ferenda – possible alternatives to the perpetual sanction, necessary to protect the right to life and hope of the offender.

Keywords: Right to life. Right to hope. Life imprisonment. Life imprisonment impediment. EuropeanCourt of Human Right. Constitutional Court.

Resumo

O presente artigo aborda o direito à vida mediante uma dupla perspectiva. Se de um lado a proteção à vida deve induzir o legislador a introduzir determinadas sanções para protegê-lo contra agressões injustificadas, de outro lado, a pretensão punitiva do Estado não pode exclusivamente consistir, em qualquer caso, na neutralização do ofensor eternamente. Isso pois, haveria uma exploração da condição humana para fins criminais bem como seria contraditório a pena como função reeducadora, conforme determinam a dignidade da pessoa humana e o artigo 27, §3° da Constituição Italiana. Um prejuízo similar deve ser reconhecido no caso da prisão pela vida inteira, como uma pena perpétua – que limita, como será visto, qualquer possibilidade de liberação do condenado e frustração das suas expectativas e esperanças. Particularmente, este trabalho examinará desenvolvimentos jurisprudenciais recentes da Corte Europeia de Direitos Humanos e da Corte Constitucional sobre prisão perpétua, buscando iluminar a ilegalidade não apenas em virtude do chamado "impedimento de prisão perpétua" (como recentemente afirmado pelos tribunais citados), mas, de forma mais geral.

Palavras-Chave: Direito à vida. Direto à esperança. Prisão perpétua. Impedimento à prisão perpétua. Corte Europeia de Direitos Humanos. Corte Constitucional.

Introduction

The purpose of the analysis

The present article addresses the issue of the right to life from a double perspective, as the theme of the right to life can be declined under a specular profile.

Indeed, if the need to protect the life, the psycho-physical integrity and the individual incolumity leads the legislator to introduce criminal sanctions aimed at protecting such legal assets from unjustified aggression, their protection should (*rectius*, must) also constitute a limit to the punitive claim of the State, which – in a constitutionally oriented penal system – cannot impose a punishment intended exclusively to neutralize the offender for life, since this would constitute an exploitation of the human being for contingent objectives of criminal politics.

For the first profile the human life, although not expressly mentioned in the Italian Constitution – unlike what happens in German (Article 2, par. 2), Spanish (Article 15) and Portuguese (Article 24, par. 1) Constitutions –, represents a primary legal asset, which is highly personal, pre-existing to any legal recognition and pertaining to the person as such. Its protection can be indirectly inferred from constitutional provisions related to other contiguous rights (*i.e.* the right to health) or dictated for particular purposes (*i.e.* the prohibition of the death penalty) or else by ordinary rules (*i.e.* the crimes against life). Above all, the personalistic principle, provided in Article 2 of Italian Constitution[1], is extremely relevant, due to the fact that establishes the centrality and the primacy of the human person over any other value and rises the life to the rank of the highest interest, since its protection is a priority for the enjoyment of every other right (physical integrity and personal freedom) and is preeminent over other personal goods[2]

Life also ranks at the apex of human rights contemplated by the Universal Declaration of Human Rights (Article 3), by the European Convention on Human Rights – which requires member states to legally protect it, also through rules of a preventive nature (Article 2), as "*first of human rights*" and "*supreme value in the scale of human rights*"[3] – and by the Charter of Fundamental Rights of the European Union (Article 2).

Although – traditionally – there is a tendency to deny the existence of constitutional obligations of criminalization, the criminal punishment appears

1 According to Article 2 of Italian Constitution, "*the Republic recognises and guarantees the inviolable rights of the person, as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled*".

2 LEONCINI, I. I reati contro la vita. In A. Fiorella (Cur), Questioni fondamentali della parte speciale del diritto penale. 2019.

3 ECHR, *Streletz, Kessler e Krenz v. Germania*, sent. 22.3.2001, ric. n. 35532/1997, 34044/1996 and 44801/1998.

essential to the effective safeguard of human life, which is protected, directly or indirectly, in a wide range of incriminating norms, monoffensive and plurioffensive, placed in the Italian Criminal Code and in special laws.

Therefore, given that the national legal system is called – in order to defend goods such as life – to adopt suitable measures for the repression of facts that seriously offend them, in doing so it cannot avoid to take into consideration the necessity to offer to the convicted a path of resocialization, necessarily oriented towards the return of each convict – also the one most difficult to "recover" – in the society[4].

This last consideration leads to deepen the second – opposite – profile of the right to life, whose safeguard cannot, in fact, allow the State to commit acts that are harmful or – in any case – excessively restrictive of this legal asset.

The two-faced nature of the theme emerges in the case of life imprisonment (pursuant to Article 17 of the Italian Criminal Code) that, from a victim-centric perspective, constitutes the maximum sanction imposed for those more serious crimes that harm the lives of individuals or their public safety– including that of slaughter with the death of one or more people, murder pursuant to Articles 576 and 577 of the criminal code, torture in which the death of the victim is voluntarily caused (Article 613-bis of the criminal code) or of kidnapping for the purpose of extortion, followed by the death of the kidnapped as a consequence desired by the agent (Article 630, par. 3, criminal code) –, on the other hand, for the condemned represents a sort of "civil death", given that the guilty is deprived, for his entire existence, of the hope of being able to be reintegrated into society.

Thus, although the death penalty no longer exists in the Italian legal system, there is still a penalty "*untill the death*" [5]that is the life imprisonment, on whose peculiarities and different forms we will focus on in the following pages; in fact, the life sentence represents a subject that is still deeply discussed, which arouses conflicting social reactions and agitates the sensitivity of the jurists.

The context of the analysis

Although the penalty assumes *de facto* a polyvalent physiognomy, being afflictive and preventive, both in a special and general sense, its main purpose – attributed *de jure* by the Italian Constitution – is the social integration; so, the afflictive and preventive effects that characterize the penalty should not compromise *tout court* its re-educational aim.

Any penalty imposed on the perpetrator of a crime – so even that one of life

4 MONTAGNA, M. Obblighi convenzionali, tutela della vittima e completezza delle indagini. Rivista Archivio Penale, fasc. 3. 2019.

5 Musumeci C. - Pugiotto A., Gli ergastolani senza scampo. Fenomenologia e criticità costituzionali dell'ergastolo ostativo, Editoriale Scientifica 2016.

imprisonment – cannot consist only of an eternal punishment for the fact committed, but – in a constitutionally oriented perspective – must be marked by humanity and should tend to re-educate the offender (Art. 27, par. 3, Constitution).

In the second half of the last century, in order to reduce the severity of the discipline affecting the life imprisoner, were introduced the institutions of conditional release (Article 176, par. 3, Criminal Code) – which allows the convicted to life imprisonment to suspend the prison penalty and to replace it with another less affective, if at least twenty-six years of prison have been served – of premium permits – to which the condemned can access after having spent at least ten years in prison (Article 30 of Law No. 354, the so-called Penitentiary Law, hereinafter "PL") – of the semi-liberty (Article 50, par. 5, PL) – which can be granted to the offender who has served twenty years of sentence – and external work for public or private companies or in public administrations (Article 21, par. 2, PL). These benefits – although they can be used only if the offender has shown constant evidence of good conduct and repentance in order to an effective social recovery – theoretically discolour the fixed, rigid and perpetual nature of life imprisonment.

However, similar beneficiary institutions have suffered a strong limitation by the so-called "Emergency legislation" – introduced in the 90s to deal with the mafia massacres that have bloodied Italy[6] – which has provided for various life imprisonment regimes due to the combined effect of the new Articles 4 *bis* and 58 *ter* PL. In the cases of the so-called "impedimental crimes", indicated at art. 4 *bis* PL[7], in fact, the possibility of regaining freedom after having served a period of detention is subject to the acquisition of elements such as to exclude the actuality of links with organized, terrorist or subversive crimes that could harm the life of the citizen, as well as the collaboration with the justice (pursuant to Article 58 *ter* PL), in the absence of which

6 Act. No. 203 of 12 July 1991.

7 The list of crimes listed in the Article 4 bis PL is – actually – heterogeneous. It encompasses the crimes committed for the purpose of terrorism, even international, or subversion of the democratic order, by committing acts of violence; crimes referred in articles 314, first paragraph, 317, 318, 319, 319 *bis*, 319 *ter*, 319 *quater*, first paragraph, 320, 321, 322, 322 *bis* of the Criminal Code (*i.e.* Crimes against the Public Administration), crimes referred in articles 416 *bis* and 416 *ter* of the Criminal Code (Organized Crimes) or crimes committed using the conditions set out in the article 416 *bis* or in order to facilitate the activities of the associations envisaged therein. Crimes referred in articles 600 (Reduction into slavery), 600 bis, first paragraph, (Child prostitution) 600 ter, first and second paragraphs (Child pornography), 601 (Human trafficking), 602 (The buying or the alienation of slaves), 609 *octies* (Group sexual assault) and 630 (Kidnapping for ransom) of the Criminal Code; crimes of Article 12, paragraphs 1 and 3, of the Legislative Decree n. 286/1998 (Crimes committed in the framework of illegal immigration); crimes of the Article 291*quater* of the Decree of the President of the Republic n. 43/1973 (Organized crime to smuggle foreign manufactured tobacco) and Article 74 of the Decree of the President of the Republic n. 309/1990 (Organized crime for the illicit trafficking in narcotic drugs or psychotropic substances).

– unless this cooperation is impossible or useless[8] – imprisonment is endless and normally accompanied by the so-called "regime of hard prison", *ex* Article 41 *bis* PL. This prison regime, born as a temporary measure to cope with the exceptional resurgence of the mafia phenomenon, is now permanently included in the prison system as a tool aimed at separating the links between certain types of prisoners and criminal organizations, depriving the convicted of any relationship with the outside world and inevitably frustrating the re-educational function of punishment.

Article 4 *bis* PL, therefore, introduced a differentiated treatment (the so-called "double track sanctions") according to whether the offender (for the crimes indicated therein) collaborates – thus being able to be admitted to the enjoyment of penitentiary benefits – or does not collaborate with the justice system; in this latter case, on the basis of the absolute presumption of persistent danger, any possibility of return – temporary or definitive – to free society is excluded.

All the inmates serving an irreducible life imprisonment (in Italy about 70% of the life prisoners), who decide to make use of their right to remain "in silence" and not collaborate with the justice system, are not allowed to plan their existence for the years following the detention, as this is a phase which is unlikely to be realized; their life is marked, day after day, by the awareness that the restrictions in which they find themselves will probably be the same for their entire existence and this regardless of the path taken in prison.

The distance between this form of life imprisonment and the re-educational purpose of the sentence and its sense of humanity is evident: the objective of social integration is stripped down and the punishment remains the only elements of affliction; the guarantees of the offender are sacrificed in the name of prevailing political-repressive needs and the person is exploited to obtain results unrelated to those that the punishment must pursue according to the Constitution[9].

In the light of this, emerges a prison system that presents more and more obscure recesses, obscured by that "prison-centered" attitude, typical of the "criminal populism" reigning in Italy, which – deviating from the legitimate functions of the penalty – focuses the sanction on a totalizing detention. Gradually, the need to review this system is becoming evident and therefore requires the intervention of the Constitutional Court and of the European Court of Human Rights, which – with different rulings – have progressively breached the wall of obstativeness to penitentiary

8 DOLCINI, E. Collaborazione impossibile ed ergastolo ostativo. In G. Brunelli, A. Pugiotto & P. Veronesi, Per sempre dietro le sbarre? L'ergastolo ostativo nel dialogo tra le Corti. Vol. 10, 96-102. 2019. Disponível em: https://www.forumcostituzionale.it/wordpress/wp-content/uploads/2019/10/VOLUME-Amicus-Curiae-2019.pdf;

9 CATERINI, M. L'ergastolo in cammino: da Strasburgo a Roma, passando dallo Stato sociale di diritto, sta giungendo al capolinea. *Rivista Legislazione Penale*. 2020. Disponível em: http://www.lalegislazionepenale.eu/wp-content/uploads/2020/05/Caterini-Approfondimenti.pdf

benefits, even going so far as to establish that life imprisonment impediment – leveraging on collaboration as the only way to recover freedom – is an irreducible sanction *de iure* and *de facto*, considering that its depriving the right of the condemned to hope and life and therefore it is incompatible with the Constitution and the EHR Convention.

Prison, in fact, cannot be assimilated to Dante's hell, there those who enter abandon all hope; while representing a tortuous path, full of contradictions and fears, it – in the interest of all the people – should end with the ascent "into the clear world", so that the desire for justice does not suffer revenge infiltration.

The problems related to life imprisonment

Life imprisonment in the ECHR Jurisprudence

As noted by Pinto De Albuquerque[10] "*the most important penological issue on the European agenda today is life imprisonment*". If, however, the first rulings of the Strasbourg Court in the matter of life imprisonment were limited to considering adequate, in order not to assert the incompatibility of this penalty with Article 3 of the Convention (which prohibits torture and inhuman and degrading treatment), that the internal legislation of the States envisaged concrete possibilities of accessing forms of liberation, is only with the *Vinter et. others. v. United Kingdom* case, relating to the institution of life imprisonment without parole of the English legal system, that there is a change of pace in the ECHR.

If, the IV Chamber of the Court[11], called in the first instance to deal with this case, taking up what was stated in its previous rulings, has asserted that the whole life order can be a disproportionate sanction only if there is no perspective – *de iure* or *de facto* – of early release and if the detention is no longer functional to any of the legitimate purposes of the sentence (punishment, general prevention, protection of the community, resocialization, which – in the specific case – had not been demonstrated by the applicant), it is only with the decision of the *Grand Chambre* on the same question that it is declare the violation of Article 3 of the ECHR by the United Kingdom, in relation to the provision, in the British legal system, of the sentence of life imprisonment without the possibility of conditional release[12].

In the opinion of the Alsatian Judges, life imprisonment is illegitimate when it does not allow the detainee to prove that he has achieved, with the portion of the sentence already expiated, the objectives that the penalty is intended to implement

10 ALBUQUERQUE, P. Pinto de. Life Imprisonment and the european right to hope. Rivista AIC, Osservatorio Costituzionale, fasc. 2. 2015. p. 2-10.

11 ECHR, *Vinter et al. v. Regno Unito*, sent. 17.01.2012, ric. n. 66069/09, n. 130/10 and n. 3896/10.

12 ECHH, *Vinter et al. c. Regno Unito*, sent. 9.07.2013, ric. n. 66069/09, 130/10 and 3896/10.

(identified in repression, dissuasion, correction and social defense), and that he deserves his reintegration into society. It follows that, according to the European Judge, there is no violation of Article 3 of the ECHR if a prisoner remains restricted to life because still dangerous to the outcome of specific review (§ 108).

Provided that the assessment of the persistence of legitimate reasons for detention must be carried out at the stage of implementation (*ex post*), life imprisonment is in any case contrary to the principles of the Convention if the offender is deprived of the possibility of knowing *ab initio* when, how and what he must do to obtain conditional release. The State is therefore called upon to ensure prior knowledge of the conditions and times to allow the condemned to be released.

Thus, the Court found that the sentence of life imprisonment in the meantime can be compatible with the Convention if the State adopts a mechanism for reviewing the effective need to continue the execution of the sentence in relation to the purposes of the penalty itself, which takes into account any changes of the offender and the progress made during the rehabilitation process.

Such a mechanism must be devised in such a way as to offer concrete prospects of release to the condemned once a minimum period of detention has elapsed, there the State can discretionally quantify, taking care, however, to clearly predetermine the timing and the modalities of the review, so that the offender is placed in a position to know, from the beginning of the execution of the sentence, what are the requirements for access to conditional release (§§ 119-122).

On the basis of this decision, the following years, three rulings of the ECHR have stated the violation of Art. 3 of the Convention by some member states of European Council.

With the decision *Trabelsi v. Belgium*[13] – concerning a Tunisian citizen guilty of terrorist activities and extradited from Belgium to the United States to serve there his sentence – the Court condemned Belgium for having granted the extradition of the convict in a system (that of the U.S.) not capable to treat the prisoners with the guarantees provided by the Convention. With the cases *Ocalan v. Turkey*[14] and *Harakchiev and Tolumov v. Bulgaria*[15], the judges censured the norms of these states having previewed life imprisonment without parole.

Common content presents the case *Murray v. Netherlands*[16], of 2016, concerning the case of a mentally ill prisoner, to whom it was denied the possibility of being placed in center specialized in the treatment of psychiatric subjects, thus depriving him of the hope of obtain conditional release.

13 ECHR, sent. 4.09.2014, ric. n. 140/ 2010.

14 ECHR, sent. 18.03.2014, ric. n. 24069/2003, n. 197/2004, n. 6201/2006 and n. 10464/2007

15 ECHR, sent. 08.07.2014, ric. n. 15018/2011 and 61199/2012.

16 ECHR, sent. 26.04.2016, ric. n. 10511/2010.

Instead, with the case *Hutchinson v. United Kingdom*[17], of 2017, in contrast to what would have been desirable, the *Grand Chambre* ratified the decision of the Fourth Chamber, rejecting the applicant's reasons relating to the violation of Article 3 of the ECHR, noting that life imprisonment without the possibility of a early release is not in itself incompatible with the provisions of the Convention if it remains both "*a prospect of release and a possibility of revision*" (Monaco, C., 2019).

In this context fits the *Viola v. Italy*[18] case, in which it was addressed the legitimacy of the choice of the Italian legislator to render the life sentence incompressible – hindering the granting of penitentiary benefits – for needs related to the lack of cooperation with justice. Indeed, the Italian life imprisonment impediment arrived in front of the ECHR on appeal by Marcello Viola, sentenced to life imprisonment, but always proclaimed innocent, so much so that he has never collaborated with justice.

The Strasbourg Judges held (with a majority of six judges to one) that the regulatory mechanism envisaged in Italy to prevent the granting of conditional release to a type of life convicted constituted an irreducible penalty *de facto*, excessively limiting the prospect of freedom and the possibility of re-examining the sentence imposed on the non-collaborating offender (§ 137).

Therefore, the European Court, while recognizing collaboration with justice as a significant manifestation of dissociation from the criminal environment, stated that the Italian legislation, in the part in which the demonstration of the detachment from the association becomes a legal index of repentance, crystallizes an absolute presumption of the subject's dangerousness, without any reasonable basis because there is a doubt whether the choice to collaborate with justice always constitutes an individual choice that is effectively free and aware (being able to depend for purely utilitarian and opportunistic reasons, see § 119), and that the lack of collaboration constitutes in itself an index of social danger (given that the silence kept by the condemned person could depend on evaluations that disregard the continuing membership of the subject, see § 118)[19].

According to the Strasbourg Judge, "*other elements*" – different than collaboration – "*have to be taken as a parameter capable of demonstrating the condemned's repentance*".

In conclusion, this form of life imprisonment undermines the protection of human dignity since it deprives "*a person of freedom, without working at the same time for his reintegration and without providing him with the possibility of one day regaining this freedom*" (§ 113) and prevents the judge to make an assessment of the possible progress made by the offender towards the goal of social reintegration (§ 143).

17 ECHR sent.17.01.2017, ric. n. 57592/08.

18 ECHR, sent. 13.6.2019, ric. n. 77633/2016.

19 On the subject of "collaboration risk" and reluctant collaborators, see Cottu, E. (2019). *L'ergastolo ostativo nel prisma del sottosistema penale premiale*, on *Rivista Sistema Penale*.

With this decision the European Court, while not opposing to the life imprisonment in general (§ 144), was opposed to that form of life imprisonment which precludes a "*prospect of release or a possibility of review*", *i.e.* a complete and personalized evaluation of the behavior of the prisoner, even if not cooperating, whose personality does not remain "frozen" at the time of the crime (§ 125) and that may have started to adhere to the rules of social life (§ 128)[20].

The protection of the right to life and the States positive obligation to prevent aggression: the dissenting opinion in the *Viola v. Italy* case

The Court's decision on the Viola case was not taken unanimously, as Polish judge Wojtyczek expressed the opposite. Significant, for the issue that concerns us, is his dissenting opinion, in which the judge, starting from the right to life enshrined in Article 2, par. 1, of ECHR, asserts that its protection must be a priority over the protection of any other right, given that without life the enjoyment of any other claim guaranteed by the State would become illusory. Therefore, the decision of the Italian legal system to prepare a rigorous system of sanctions suitable for repressing the cases in which the fundamental freedoms of the associates are infringed would be correct – as happens with criminal organizations, which represent a threat to people's lives – and it would be legitimate to choose to subordinate the granting of penitentiary benefits to certain positive behaviors of the offender, including collaboration with the justice system.

In detail, however, the Italian legislation – in the opinion of the judge – would not deprive *tout court* people sentenced to life imprisonment for the crimes referred to art. 4 *bis* PL of the hope that one day the will obtaining freedom, but it would bind its conditional release to collaboration with justice. As for the collaboration, the judge notes that the applicant – detained since 1992 and sentenced, first to twelve years in prison for having directed a mafia organization (which still represents a threat to the life and safety of people in Italy), then to life imprisonment, having also been found guilty of homicide crimes – is certainly in possession of information that could help the authorities to prosecute other person active within the association and thus contribute to considerably reduce the threat that weighs on people's lives, preventing new crimes. However, the dissenting judge recalls that the inmate "*refuses to collaborate with the authorities, protesting his innocence and invoking fear for his own life and for that of his family members*". It is precisely the reason given by Viola for refusing to collaborate that represents – according to Wojtyczek – a paradox: the fear for his life or for the lifes of

20 For a more complete analysis of the decision *Viola v. Italy.* DOLCINI, E. Dalla Corte Edu una nuova condanna per l'Italia: l'ergastolo ostativo contraddice il principio di umanità della pena. *Riv. It. Dir. Proc. Pen.* 2019, p. 925. PELISSERO, M. *Verso il superamento dell'ergastolo ostativo: gli effetti della sentenza Viola c. Italia sulla disciplina delle preclusioni in materia di benefici penitenziari,* online at http://www.sidiblog.org/.

loved ones can only be suppressed through the annihilation of the organized crime and the recovery of legality, which depends only on the collaborator's contribution to the proper conduct of justice.

If, in the sentence, it is considered possible that "*other elements*", different than collaboration, allow "*to evaluate the progress made by the prisoner*" in the belief that the "*dissociation*" with the mafia environment can be expressed differently from the "*collaboration with justice*", in the decision of the Court – in the opinion of the Polish judge – these "other" indicators are not concretely specified, but only identified, generically, "*in the evolution of personality*" or "*in the positive results of the resocialization process*", thus leaving open the serious and difficult problem to resolve of establishing how, and with what evidence, a non-cooperating convicted to life imprisonment for serious mafia crimes can prove has changed.

As for the purpose of the penalty, the motivation of the sentence with which the judge disagrees "*suggests that resocialization is its only legitimate purpose*", when, on the other hand, the punishment has a multidimensional nature so, in addition to the porpouse of the re-education of criminal, it must also aim at remuneration and must act as a deterrent towards other potential criminals. As a result, the absence of collaboration would thus not consist in an absolute presumption of social dangerousness, but it would comply with the function of the penalty; thus, in mafia crimes, it would be precisely the lack of help to the authorities to legitimize the more rigid sanctions envisaged for convicts.

Wojtyczek, adhering to the reasons that prompted the Italian legislator to introduce a "double track" for some crimes (and significantly in the cases of mafia crimes) and to distinguish the penalties inflicted on convicts who have committed common crimes from those imposed for crimes committed in being in the field of organized and subversive crime, recognizes how this discipline – which tends to withdraw from the criminal association through reward incentives – is part of the "margin of discretion" enjoyed by the States, which escapes the jurisdiction of the Court, which is not required to assess "*the rationality of political choices in criminal matters taken by the States parties to the Convention*" since "*the choice by a State of a criminal justice system, including the re-examination of the sentence and the manner of release, does not fall within the control entrusted to the Court*".

Life imprisonment impediment to the examintation of Italian Constitutional Court

Over the decades, the Italian constitutional Court has taken a cautious attitude on the legitimacy of life imprisonment, with rulings that have progressively eroded – without eliminating it – the "never ending sentence". At first, in fact, the Judge of the Laws, considered the life sentence not illegitimate because the offender can be released

if he repents after having served part of the sentence, and then extends the enjoyment of penitentiary benefits to life prisoners as well.

With the change in the discipline in the early nineties, the Court also scrutinized the constitutionality of the life imprisonment impediment and of the so-called "double track of sanctions", both with reference to the reported discriminatory character, and with regard to the re-educational function of the sentence, mitigating – with its own conclusions – some harsh obstacles. The Constitutional Court, on one hand, declined the principle according to which the presumption of greater social danger deduced from certain criminal facts must not have the character of absoluteness on the basis of automatic rules[21] and, on the other, afirmed that the greater rigor deriving from a specific type of sanction must not interrupt the re-education process in the absence of further guilty behaviors of the prisoner[22].

Following the ruling of the European Court of Human Rights in the Viola case, in which was raised "*a structural problem of the Italian system*", the Constitutional Court, on three occasions, recently express itself on some aspects of the mentioned "double track", trying to balance the influences arising from the need for harmonization with Strasbourg with the opposing solicitations of a public opinion increasingly conditioned by security obsessions, in some cases electorally emphasized by the political class.

The illegitimacy of life imprisonment in the part in which it does not provide that premium permits may be granted to non-cooperating prisoners

With the first of the aforementioned rulings[23], the Judge of the Laws declared the constitutional illegitimacy – by contrast with Articles 3 and 27, par. 3, of Constitution – of Article 4 *bis*, par. 1, PL in the part in which it does not foresee that prisoners for mafia-type crimes and for the other crimes indicated therein may be granted premium permits even in the absence of collaboration with the justice, in accordance with Article 58 *ter* of the same law. The pronouncement enhances the re-educational purpose of the sentence which requires not an automatic but an individualized evaluation of the penitentiary benefits.

This decision – unlike the most ancient jurisprudence where a clearly polyfunctional vision of the sentence prevailed – reaffirms the centrality of the re-educational purpose of the sentence with respect to the objectives of prevention, dissuasion and social defense, the achievement of which cannot compromise the ultimate purpose of the penal sanction, which according to the Italian Constitution is – in fact – re-education.

21 In this sense, Constitutional Court, sent. 12.4.2017, n. 76; Constitutional Court, sent. 23.7.2018, n. 17.

22 Argue in this sense, Constitutional Court, sent. 28.7.1994, n. 168; Constitutional Court, sent. 1.3.1995, n. 68; Constitutional Court, sent. 1.12.1999, n. 436.

23 Constitutional Court, sent. 4.12.2019, n. 253.

The Constitutional Court, while affirming that the presumption itself is not constitutionally illegitimate – since it is not unreasonable to infer that the condemned who does not collaborate keeps alive the links with the criminal organization – nevertheless found that this presumption, in order not to enter into conflict with the Constitution must be relative and, therefore, winnable with a contrary[24]. Within these limits, in the opinion of the Court, the solution is compatible with the special prevention and with the resocialization imperatives inherent in the penalty.

To provide a contrary evidence, the ruling explains that the so-called "good behavior" in prison or the adherence to a re-education process and a simple declaration of dissociation are not enough, as are necessary specific elements, capable of demonstrating the lack of criminal bond and a concrete evaluation of this change, which should be carried out on the basis of a high-probability parameter, of reinforced evidence to ascertain the non-existence of a negative condition. The overcoming of the presumption of dangerousness of the prisoner who does not cooperate can only be based on the specific "allegation" of elements such as to exclude both the actuality of connections with organized crime and the danger of their recovery; this allegation charges on the convicted person with a sort of inversion of the burden of proof.

Therefore, many difficulties remain in granting a permit to a prisoner convicted of mafia association crimes, as this will depend on the information acquired – for example – from the reports of the Penitentiary Authority and from the Committee for Public Order and Security[25], as well as, according to Art. 4 *bis*, par. 3 *bis*, PL, from the actual links with organized crime. Furthermore, the Court specified that, if the information from the Committee for Public Order and Security are negative, the convicted person is charged with "not only the burden of alleging the elements in favor, but also that of providing real elements of supporting evidence".

We can speak of [almost] diabolical *probatio*, since – under these conditions – the granting of the premium permits is almost impossible, except perhaps for the hypothesis in which the Prosecutor's assessment is generic and limited to the mere lack of positive elements[26].

Therefore, although the Court has proclaimed the principle according to which it is legitimate to reward the prisoners who collaborates, while it is inadmissible to further punish them for failure to cooperate on the basis of a presumption *iuris et de iure*, the practical value of this opening risks being undermined by the weight of the

24 In this sense also Constitutional Court, sent. 15.12.2016, n. 268; Constitutional Court, sent. 23.7.2015, n. 185.

25 According to art. 4 bis, co. 2., O.p., the Provincial Committee for Public Order and Security (appendix to the National Committee for Public Order and Security, auxiliary advisory body of the Minister of the Interior) provides the competent Supervisory Magistrate with information on the convicted person.

26 See, Italian Supreme Court, sent. 15.3.2019, n. 28194; Italian Supreme Court, sent.13.9.2016, n. 51878; Italian Supreme Court, sent. 6.12.2013, n. 49130.

evidence imposed on the condemned to overcome the presumption of dangerousness which, although it is defined as relative in the motivation of the Judge of the Laws, still remains, in some ways, almost-absolute.

If, as clarified by the Council itself in the ruling, the question resolved did not concern the impedimental life sentence – because it did not involve the foreclosure on the conditional release of the non-collaborating life imprisoner who had already served twenty-six effective years of prison, but the case of whom was convicted for one of the impedimental offenses included in the heterogeneous list of Article 4 *bis*, par. 1, PL, that cannot access to bonuses unless after a useful collaboration – this does not mean that the principles expressed therein, in harmony with those proclaimed by the European Court, have had – as will soon be seen – important repercussions also on life imprisonment impediment.

The illegitimate extension of art. 4 bis PL to juvenile offenders and young adults

Almost simultaneously with the previous ruling, the Constitutional Court adopted another decision that proposes significant arguments regarding life imprisonment[27].

The opportunity was provided by Article 2, par. 3, Legislative Decree 121/2018, which extended the provisions of Article 4 *bis*, par. 1 and 1 *bis*, PL, also to juvenile offenders (for whom there is no life sentence) and young adults, in order to have access to community penal measures, bonuses or to external work.

The Court judged this extension illegitimate, not only for excess of delegation, but also for violation of Articles 2, 3, 27 par. 3, and 31, Par. 2, of the Constitution[28].

The Constitutional Court, then, reiterated the irreconcilability of art. 4 *bis* PL with the respect of the function of the penalty as outlined by the Constituent Assembly and reaffirmed the illegitimacy of rigorous regulatory automatisms that contradict the progressiveness and the flexibility of treatment as a corollary of the rehabilitative purpose of the offender.

In addition, the Judges have established that in the juvenile trial there is no space for any presumption, not even relative, thus leaving the possibility that – even in trials against adults – it is not legitimate to impose on the offender burdens so difficult to satisfy.

27 Constitutional Court, sent. 6.12.2019, n. 263.

28 BERNARDI, Silvia. Per la Consulta la presunzione di pericolosità dei condannati per reati ostativi che non collaborano con la giustizia è legittima solo se relativa: cade la preclusione assoluta all'accesso ai permessi premio ex art. 4-bis comma 1 ord. pen. *Rivista Sistema Penale*. .2020. Disponível em: https://www.sistemapenale.it/it/scheda/bernardi-corte-costituzionale-253-del-2019-illegittimita-presunzione-pericolosita-condannati-reati-ostativi;

Further profiles of the illegitimacy of life imprisonment: towards a sentence in accordance with the sense of humanity and the re-education of the condemned person?

The Italian Constitutional Court – lastly – expressed itself on the question of legitimacy raised by the Supreme Court[29] in relation to Art. 4 *bis* PL in the part in which it does not allow a person sentenced to life imprisonment, who does not cooperate usefully with the justice system, to request – after a long time in prison – a concrete assessment of his certain repentance, which is a prerequisite for access to parole and, therefore, for the extinction of the sentence (at the end, morover, of a further period of supervision by the authority)[30].

Unlike the case examined by the Court with the decision 253/2019, relating to premium permits, in this situation the question submitted to the scrutiny of the judges is even more radical, since are examinated both the conditions under which the perpetual penalty can be considered compatible with the Constitution, and the possibility for the condemned to hope for the end of the sentence.

The constitutional Court, in this case, was – in fact – called to evaluate the possibility of allowing, even the non-collaborating life imprisoner for the crimes referred to in art. 4 *bis* PL, the access to the institute of conditional release, which determines – upon successful completion of the probation period – the extinction of the sentence and the definitive re-acquisition of freedom; situation quite different from that concerning the bonuses, consisting in the granting of a brief suspension of imprisonment, without however interrupting the execution of the sentence. Indeed,

> […] the leave of absence bonuses [...] have a contingency connotation that does not allow them to be fully assimilated to alternative measures to detention, because they do not modify the restrictive conditions of the offender. Only with respect to the latter are the reasons of criminal policy subject to absolute foreclosure pursuant to art. 4-bis, co. 1, Op may appear to meet the needs of fighting organized crime[31]

The Court concludes in the sense that the presumption of dangerousness weighing on the condemned for crimes committed in a "mafia context" who did not collaborate with the justice system, must be able to be overcome also on the basis of factors other than collaboration, indicative of the path of resocialization of the interested party. The absolute nature of the presumption in question is therefore incompatible with the Constitution, as it makes the collaboration with the law the only

29 Italian Supreme Court, ord. 3.06.2020, n. 18518.

30 Constitutional Court, ord. 11.05.2021, n. 97.

31 Italian Supreme Court, sent. 20.11.2018, n. 57913.

way available to the inmate to access the evaluation of the surveillance judiciary on which depends his return to freedom.

Among other things, it can often be doubted that the collaboration is the result of a free choice. Without questioning "the importance and usefulness of collaboration, understood as a free and thoughtful decision to demonstrate the break with the criminal environment", the ordinance emphasizes that the current discipline prefigures a sort of "exchange" between information useful for investigative purposes and the consequent possibility of accessing to penitentiary benefits; therefore, the life sentence that aspires to conditional freedom is placed before the dramatic choice between "the possibility of regaining freedom and its opposite, that is, a destiny of endless confinement". There are also extreme cases in which such a choice can be "tragic", as the condemned person has to decide "between his (eventual) freedom, which may however involve risks for the safety of his loved ones, and renounce of freedom, in order to preserve them from dangers".

If the lack of cooperation cannot be an absolute impediment, according to the Judge of the Laws it is not unreasonable to place it as the basis of a presumption of specific danger, since it is not senseless to believe that the offender retains his links with the criminal organization of original belonging. The Court, in fact, reminds that belonging to a mafia-type association usually implies a stable membership in a criminal association, strongly rooted in the territory, characterized by a dense network of personal connections, with particular intimidating force that is capable of lasting over time. It is therefore quite possible that the associative bond remains unaltered even after long imprisonments – precisely due to the characteristics of the criminal association in question – until the subject makes a choice of radical detachment, such as that which is generally expressed by collaboration with justice.

The Constitutional Court has taken an explicit position in the sense of believing that

> […] the current discipline of life imprisonment absolutely precludes, to those who have not usefully collaborated with justice, the possibility of accessing the procedure to request conditional release, even when his repentance is certain" and therefore "by making collaboration the only way for the condemned to recover his freedom, is in contrast with Articles 3 and 27 of the Constitution and with Article 3 of the European Convention on Human Rights

Despite this, the Court found that a merely "demolishing" intervention consisting in an immediate declaration of illegitimacy would jeopardize the overall balance of the discipline in question and the needs of general prevention and collective security that it pursues to combat the phenomenon of the organized crimes.

According to the Constitutional Court, in fact, belongs to the legislative discretion, and not to the Court itself, to decide which further choices are appropriate to distinguish the condition of a non-cooperating perpetual sentence from that of other life prisoners, choices among which for example, it could include the emergence of the specific reasons for the non-cooperation, or the introduction of specific prescriptions that govern the period of supervised freedom for the author of the crime.

In the opinion of the Court, the particularity of this criminal phenomenon prevents an immediate declaration of constitutional illegitimacy of the contested provision, which could lead to disharmonies and contradictions in the overall discipline to combat organized crime and undermine the importance that collaboration with justice it continues to assume in the current system.

For these reasons, the Court granted Parliament one year (setting a new discussion of the issues at the hearing on May 10, 2022, until then suspending *a quo* the case) to fully intervene in the discipline, trying both to prevent the felonies connected with organized crime and to exercise properly the constitutional and penitentiary rules.

The Constitutional Court, therefore, hopes for the enactment of a law capable of eliminating the condition of collaboration with the justice as an essential element for access to conditional release, due to the fact that this condition is often functional to "use" the offender to pursue the purpose of the fight against mafia which – although noble and dutiful – cannot jeopardize the protection of human dignity, even of those sentenced to life imprisonment.

Moreover, this decision does not take into account the risk that if – through this "postponement" technique – the legislator remains 'in default' (as is presumable and it has already happened in the past), the Italian legal system will maintain an unconstitutional law. And this to the detriment of people in "flesh and blood" who will have to wait for their release for (at least) another year, even if the rule that keeps them in prison is not in accordance with the constitutional provision, by the admission of the Constitutional Court [32].

Possible conclusions

The sophism of legitimacy of life imprisonment only if it is not for life

The Constitutional Court, with the recent order no. 97/2021, found that the compatibility of the perpetual sentence with the Constitution depends on the actual possibility of obtaining parole; if it is absolutely excluded, life imprisonment is in contrast with the re-educational purpose of the sentence (Article 27, paragraph 3, of the Constitution).

32 ROMANO, B. L'incostituzionalità "prospettata" dell'ergastolo ostativo. *Rivista Penale Diritto e Procedura*. 2021. Disponível em: https://penaledp.it/lincostituzionalita-prospettata-dellergastolo-ostativo/;

The Court, in fact, considered the doubts of constitutional legitimacy about life imprisonment in general to be overcome, precisely by relying on the fact that this is only "in abstract" a perpetual penalty. In this discussion – however – life imprisonment would appear as a [almost] symbolic sanction with respect to the lack of its full effectiveness, characterized by a sort of contradiction and ambiguity, in the sense that it is illegitimate only when it is not for life, demonstrating – on the contrary – how a perpetual punishment is unconstitutional.

If a life punishment is in contrast with Art. 27, par. 3, of the Constitution, this contrast should already be present at the level of abstract prediction, regardless of the circumstance that in some cases there are regulatory mechanisms that concretely readmit the offender to some forms of freedom.

The purpose of social reintegration of the offender proper of the Italian Constitution, in fact, must be kept in mind not only in the phase of execution of the sentence, but also at the level of abstract legislative provision, a penalty disproportionate *ab origine* – functional to purely remunerative needs, repressive or mere general prevention – compromises the possibility of re-educating that condemned who will feel the penalty as an unjust abuse of power, with prejudice to the process of re-approaching the values of the legal system.

Moreover, following the decisions of the Constitutional Court, life imprisonment is legitimate if the re-educational purpose, which should characterise it, guarantee the achievement of the resocialization results; according to the re-educational purpose, the offender have to receive a valid and effective program of social integration, the task of which falls primarily to the State, that – after a certain period of intramural detention – should concretely open to instruments more compatible with a path of social integration.

Statistical data show – instead – that, in Italy, for the 70% of life prisoners it is currently impossible to obtain conditional release for the "impediment" mechanisms seen above, while for the remaining 30% of "ordinary" life prisoners, although abstractly it would be possible to reacquire freedom, concretely this does not happen or does happen for a negligible number of cases (e.g. only 4 in the last year). In the rest of the world the situation is reversed: some states (15%) have abolished the life imprisonment, the 70% of the remaining countries foresee that, even in the case in which the sentence of life imprisonment is imposed, the offenders can access to conditional release, allowing – in fact – a similar possibility to 80% of life prisoners[33].

The Italian situation is therefore the opposite, with a life sentence that in the balance between danger and re-education clearly leans in favor of the first, contradicting the purpose of social integration inherent in the Italian Constitution.

33 DOLCINI, E; FIORENTIN, F.; GALLIANI, D.; MAGi, R.; PUGIOTTO, A. Il diritto alla speranza davanti alla corte. Ergastolo ostativo e articolo 41-bis. Giappichelli Editore. 2019.

Perpetuity, only possible in abstract, proves to be real in many cases and calls into question the legitimacy of life imprisonment which can hardly be considered an acceptable cost in cases where the eventual perpetuity turns into actual.

And this applies to both the life sentence impediment and the ordinary one: the difference between these two forms, however, is not such as to weigh in terms of unconstitutionality of the only life imprisonment without parole. If it is true, in fact, that overcoming potential perpetuity is more difficult in cases of impeding life imprisonment, in which there is a greater compression of the re-educational purpose, it is equally true that between these two forms there is only a quantitative distinction and not an ontological one.

The "tied" hand of the state: from life imprisonment to security measures

Limiting the rehabilitation purpose of the penalty to the execution phase means transforming life imprisonment into a sort of anomalous security measure of indefinite duration and based on the alleged permanence of the danger of the offender[34].

Indeed, as observed by Pulitanò[35], in the case of life imprisonment impediment, the regulatory mechanism that it produces involves a restriction of rights in the absence of active conduct (*i.e.* collaboration with the justice system) which presents itself as a further sanction, disconnected from the fact for which the sentence is served, since – on one hand – there is no formal obligation of collaboration from which derive another formal sanction for not having fulfilled it, and – on the other – the effects are practically sanctioning because from the lack of cooperation follows the permanence in prison. The (free) choice to not collaborate is thus – substantially –a duty of collaboration, in order to end the protraction of the imprisonment.

Such a presumption, however, appears to be contrary to Articles 3 and 27, par. 3, of the Constitution, with regard to Articles 3 and 5 of the ECHR (Art. 5 is interpreted by the Court as the deprivation of personal liberty cannot be based on elements that have taken place in the executive phase, but must focus exclusively on the fact that was object of the original conviction[36]). And the contrast is seen not only with the re-educational principle – linked to the idea that is illegitimate a sanction that presents itself as a security measure indefinite in its duration – but also with that of the proportion of the sentence – as life imprisonment risks to be reduced at the mere neutralization of the offender – and with the prohibition of attributing to the sanction the aim of making the offender adhere to a specific ethical concept; the same have to

34 GALLIANI, D.; PUGIOTTO, A.. L'ergastolo ostativo non supera l'esame a Strasburgo (A proposito della sentenza Viola v. Italia n. 2). Rivista AIC. Osservatorio costituzionale, 4. 2019. p. 191-208

35 30. PULITANÒ, D.. Sulla pena. Fra teoria, principi e politica. Rivista Italiana Diritto Penale e Processo, 2. 2016. p. 641-669;

36 ECHR, *M. c. Germania*, 17.12.2009, ric. n. 19359/04.

be free to self-determine and therefore cannot be subjected to measures that have the exclusive incapacitating or corrective, treatment or therapeutic purpose.

Therefore, the abstract prediction of the penalty, even if it is a political question, should in any case be guided by the constitutional parameters of the re-education, proportion and dignity of the person, under which the prison term – already at the level of provision legislative – must not have an indefinite duration, but should be prefixed in quantities parameterised to the seriousness of the crime and the devaluation of the case in question.

Thus, once the period of effective detention has elapsed, there should be a sort of presumption of completion the process that aimed at orienting the convict towards an existence respectful of that of others, especially if the penitentiary system was truly marked by the social integration of the offender. This presumption is opposite to the one currently implemented by the Italian law, which implicitly reveals the awareness that the prison system, as it is really structured, difficulty allow the prisoner to carry out an effective process of social integration. If, in fact, after twenty-six years of detention the dangerousness of the detainee is still presumed, this means that the italian prison system is not organized in such a way as to achieve, in an appreciable number of cases, the constitutional objective of re-education.

What are the solutions?

If we don't want to lean towards the elimination of the life sentence – a decision that might be in harmony with the Constitution and in accordance with the choices made by various other countries – we could – however – try, in order to mitigate the rigor of its discipline, to follow to the prison sentence, after the expiration of a certain number of years, with a security measure that is not unlimited in time and intervenes only for those prisoners of proven social dangerousness, within the limits and in a manner strictly necessary to stem the risk [37]. Thus, if the access to conditional release after a certain period of time should be the rule, the granting of a possible security measure would represent – instead – the exception; an "extraordinary" instrument left to the initiative of the public prosecution that would periodically be required to the burden of proving the continuing danger of the offender, in the absence of which the inmate must be released [38].

A similar mechanism, on the other hand, would not be dissimilar to that is already envisaged in other European countries. And indeed, art. 39 of the Norwegian

37 RISICATO, L. La pena perpetua tra crisi della finalità educativa e tradimento del senso di umanità. Rivista Italiana Diritto e Procedura Penale, vol. 58, no. 3. 2015. p. 1238-1258;

38 CATERINI, M. L'ergastolo in cammino: da Strasburgo a Roma, passando dallo Stato sociale di diritto, sta giungendo al capolinea. Rivista Legislazione Penale. 2020. Disponível em: http://www.lalegislazionepenale.eu/wp-content/uploads/2020/05/Caterini-Approfondimenti.pdf;

Criminal Code, which contemplates a maximum period of 21 years of imprisonment, also establishes that this period can be extended by 5 renewable years, in cases the judge considers the offender still dangerous; in Germany, on the other hand, security custody (*Sicherungsverwahrung*) is potentially applicable in conjunction with life imprisonment, so after the minimum detention period of 15 years (§ 49, co. 1, no. 1, StGB), the provisions relating to custody can be extended; these, in case of probation during the execution of the *Sicherungsverwahrung*, provide for the application of probation, not envisaged in the event of a life sentence.

As for the issue of non-collaboration, the obstacle to the granting of benefits (on which the legislator will hopefully intervene in the short term), could be framed, rather than as an absolute presumption, in the scheme of simple presumptions. If all presumptions are based on the possibility of considering an existing fact (in this case, the danger of the detainee) on the basis of the existence of another circumstance actually ascertained (lack of cooperation), only the simple presumptions find their basis in a *maximum of experience*, the *id quod plerumque accidit*, which by a logical-deductive way allows us to believe that, once a fact has been ascertained, the existence of a further fact is probable (Ca-terini, M., 2020). These presumptions do not provide legal parameters for the formal establishment of the fact, *ex ante,* but they form the conviction of the judge in the specific case; the lack of cooperation should therefore be understood as a simple militant clue in the sense of the danger of the detainee and which could well be contradicted or balanced by other circumstances that the judge should consider and, in the presence of a reasonable doubt, tend to favor of inmate.

Such a reform would lend itself to various objections, relating – above all – to its supposed indulgent character, which would make it unsuitable for a system, such as the Italian one, used to respond to organized crime with exceptional measures for dealing with the extraordinary nature of this phenomenon. If the degree of the civilization of a State is measured by the level of mix between criminal law and fight [39]given that a law that looks too much like violence, or that is identified with it, is a delegitimated right – as was stated by Barak

> […] only a strong, secure and stable democracy can afford to respect and protect human rights […]. Precisely for this reason […] not all means are acceptable in democracy; not all practices drawn from the enemies of democracy can be used by those who defend it; although a democracy often has to fight with one hand tied, it will still have the other at its disposal[40]

39 DONINI, M. Diritto penale di lotta. Ciò che il dibattito sul diritto penale del nemico non deve limitarsi a esorcizzare. Studi sulla Questione Criminale, fasc. 2. p. 55-87. 2007.

40 BARAK, A. *Democrazia, terrorismo e corti di giustizia*, in *Giut. Cost.* 2002. p. 3390.

If, Nun Marie Vojtěcha Hasmandová, in her letters, describing the situation experienced in the prisons of the Czech totalitarian regime, confided to be "*in the palm of God's hand*", the hope for those sentenced to life imprisonment in Italy is that the State fights crime with a strong hand, but not brutal, and grants the hope of life even to those who have no faith if not in a Social State of Law.

Conflict of Interest

The authors declare that they have no conflict of interest.

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