Hard Cases

Irreducible Life Sentences and Rehabilitation. A Point of Juncture Between Strasbourg and Rome

Alessandra Santangelo*

Abstract

The comparison between the recent Strasbourg Court case law and the Italian Constitutional Court judgments on irreducible life sentences pinpoints the emphasis on rehabilitation as prominent penological ground for incarceration, enhancing human dignity both at the national and supranational level. The judgment in *Viola* v *Italy* highlights that the domestic penitentiary regime suffers a structural problem which jeopardises the prisoners' hope for future release. In this framework, the reluctant attitude of national legislator forces the judiciary to adopt substitute remedies: in order to comply with the 'Viola doctrine', irreducible life sentences are gradually assuming a different outline eventually consistent with the Constitution itself.

I. Irreducible Life Sentences Under Arts 4-*bis* and 58-*ter* of the Penitentiary Act

The paper focuses on the Italian regime of irreducible life sentences. The national discipline of life imprisonment reflects recent amendments by the case law of both the Strasbourg Court[1] and the Italian Constitutional Court.[2] Enhancing the rehabilitation principle, those judgments have designed new boundaries for long-life sentences, fostering human dignity as an undeniable guarantee – even during detention – 'which lay at the very essence of the Convention system'.[3]

After a brief premise which illustrates the national regime, the article is divided into three sections. Firstly, the decision in *Viola* v *Italy* is analysed by assessing the requirements whole-life sentences need to respect in order to comply with the European Convention of Human Rights (ECHR). Then, the attention turns towards the most recent national case law which addresses the issue in relation to both adult and children's Courts. The paper argues that rehabilitation-based arguments espoused by the ECHR's judges prompted an equal evaluation at the national level, easing the definition of a common notion able to strengthen fundamental guarantees for the convicted subjects. In particular, the Constitutional

* Research Fellow in Criminal Law, University of Bologna.

[1] Eur. Court H.R., *Marcello Viola* v *Italy*, Judgment of 13 June 2019.

[2] Corte costituzionale 4 December 2019 no 253, available at www.giurcost.org.

[3] As the Strasbourg Court affirmed in Eur. Court H.R. (GC), *Murray* v *The Netherlands*, Judgment of 26 April 2016, para 101.

Court has been compelled to select among conflicting alternatives and declare unlawful the provisions exclusively inspired by deterrence or social defence.[4] In this light, the paper considers the interpretative shortcomings this process implies as it affects the boundaries and rationale rehabilitation infers when the most serious crimes are involved. Finally, few considerations address future challenges: as the current Italian discipline is not deemed to comply with the Convention, not only the national judges but also the legislator are asked to subvert the previous perspective in order to prevent Strasbourg Courts' further interferences.[5] In this view, the ECtHR case law has provided a considerable impulse. In order to comply with the 'Viola doctrine', irreducible life sentences are gradually developing a frame which is eventually consistent with the Constitution itself.

In fact, in accordance with Arts 22 and 176 of the Italian Criminal Code, the general regime of life imprisonment allows the convicted individual to become eligible for parole,[6] thereby ensuring the review of sentences after a set period of time (26 years).[7] On the contrary, Arts 4-*bis* and 58-*ter* of the Penitentiary Act[8] imply a special regime for prisoners who have been convicted for serious crimes, mainly connected to Mafia-type associations,[9] one that paves the way for *de*

[4] In this view, national scholars have deeply examined the so called 'penal populism' which exploits criminal measures as instruments of deterrence to the detriment of fundamental guarantees: see G. Silvestri, 'Corte costituzionale, sovranità popolare e "tirannia della maggioranza"' *Questione giustizia*, 22, 23 (2019); M. Donini, *Populismo e ragione pubblica. Il post-illuminismo penale tra lex e ius* (Modena: Edizioni Mucchi, 2019), 8, 52; G. Insolera, 'Il populismo penale', available at www.discrimen.it. As for the role performed by human rights Courts contrasting penal populism, see A. Dyer, 'Irreducible Life Sentences: What Difference have the European Convention on Human Rights and the United Kingdom Human Rights Act Made?' 16 *Human Rights Law Review*, 541, 584 (2016), where the Author stressed that 'the UK and Strasbourg jurisprudence concerning irreducible life sentences provides some reason for optimism concerning the ability of human rights charters, and other strong human rights guarantees within a jurisdiction, to achieve desirable change in the criminal justice area'.

[5] On several occasions, the Strasbourg Court has already verified if national provisions – adopted after the Court declared a violation of fundamental guarantees – respected the ECHR standards: see Eur. Court H.R. (GC), *Hutchinson* v *United Kingdom*, Judgment of 17 January 2017; Eur. Court H.R., *Dardanskis and Others* v *Lituania*, Decision of 18 June 2019, para 23.

[6] E. Dolcini, 'La pena detentiva perpetua nell'ordinamento italiano. Appunti e riflessioni' *Diritto penale contemporaneo*, 1, 7 (2018).

[7] One could argue that the Italian general provisions concerning life imprisonment are in compliance with the Convention, as per the decision Eur. Court H.R. (GC), *Vinter and Others* v *United Kingdom*, Judgment of 9 July 2013, Reports of Judgments and decisions 2013-III, 369, para 72. In particular, the Strasbourg judges referred to the Italian norms as an example of rational balancing between security interests and human dignity of the convicted (§ 117).

[8] Legge 26 July 1975 no 354.

[9] More precisely, the special regime originally applied only to the most serious crimes connected to Mafia-type and terrorist associations. Then, the legislator started extending the number of offences which could involve the more rigorous treatment, including truly varied penalties. In this perspective, scholars have deeply criticised the amendment recently adopted by the Parliament including in the list of crimes several less harmful offences committed by public officials: D. Pulitanò, 'Tempeste sul penale. Spazzacorrotti e altro' *Diritto penale contemporaneo*, 235, 237 (2019); V. Manes, 'L'estensione dell'art. 4-*bis* ord. pen. ai delitti contro la p.a.: profili di illegittimità costituzionale' *Diritto penale contemporaneo*, 105, 107 (2019).

facto irreducible life imprisonment. As a matter of fact, the law prohibits to apply prison leaves, parole, or grant any other sentence reduction if prisoners do not cooperate with a judicial authority. In particular – according to the above-mentioned Art 58-*ter* – adequate cooperation needs to provide public authorities with relevant information, thereby facilitating the collection of evidence or identifying other criminals or, even, preventing the offence from producing further harmful consequences. Those requirements shall not apply when cooperation is impossible or unenforceable, depending on the concrete circumstances of the case as long as the prisoners are able to prove all the connections with Mafia-type associations have been severed.[10]

However, it is quite evident that the rigorous model provided by this special regime generates several concerns in relation to the ECHR principles, namely the prohibition of inhuman or degrading treatment under Art 3.

II. The Strasbourg Court's Judgment *Viola* v *Italy*

In June 2019, the Strasbourg Court shook the very core of the Italian penitentiary system. In particular, the Court stated that the special regime provided by Arts 4-*bis* and 58-*ter* of the Penitentiary Act violated Art 3 ECHR, unlawfully undermining the applicant's human dignity.[11]

Briefly. Marcello Viola was sentenced – after two different proceedings – to life imprisonment with daytime isolation for two years and two months, being identified as one of the highest organisers of a Mafia-type association involved in cruel conflicts with rival clans from mid-1980s until 1996. In particular, he was convicted for Mafia-type association as well as several connected crimes such as murder, abduction and unlawful possession of firearms. Considering the high danger to society, the former years of imprisonment were held under a rigorous penitentiary regime (Art 41-*bis* Penitentiary Act), almost completely isolating the prisoner. Nonetheless, this strict treatment was discontinued when judges considered the applicant's everyday behaviour indicative of a critical reflection on his criminal experience and a gradual rehabilitation.[12] Thus, Mr Viola applied twice for prison leave and, subsequently, for parole. In doing so, he was demanding that his process towards rehabilitation would eventually be recognised. However, all the applications were rejected, claiming Mr Viola was still dangerous to public security as he did not cooperate with judicial authorities.

In this light, a closer analysis of domestic penitentiary laws could be useful

[10] In accordance with the equality principle, these exemptions to irreducible life sentences under Art 4-*bis* and 58-*ter*, Penitentiary Act, were firstly recognized by the Italian Constitutional Court (Corte costituzionale 22 February 1995 no 68 and 19 July 1994 no 357) and, secondly, expressly provided by the legislator, adding to Art 4-*bis* a further specific para (1-*bis*).

[11] Eur. Court H.R., *Marcello Viola* v *Italy* n 1 above, para 137.

[12] ibid paras 6-16.

for a better understanding of the issue. In fact, by requiring that the prison regime shall be tailored to individuals and sufficiently flexible towards alternatives to custody,[13] the Italian system provides several measures which facilitate the prisoners' progressive connections to the outside word. In other words, while during detention rehabilitation improves, the convicted person is entitled to benefit of measures conferring him – step by step – alternatives to custody so that he is gradually reintegrated within the society.[14] Nonetheless, Mr Viola's requests were rejected since he was ineligible for any non-custodial measure having chosen not to cooperate with the judicial authorities. In accordance with Arts 4-*bis* and 58-*ter* of the Penitentiary Act, national law prescribed an irrebuttable presumption that non-cooperating prisoners were still tied to the Mafia circles and, consequently, too dangerous to gain any alternatives to custody. Thus, Mr. Viola applied to the Strasbourg Court contending he could not afford any prospect of release.

In this regard, the Court deeply examined national law requirements, particularly wondering whether the choice to cooperate with local authorities could have been considered free and deliberate as well as if it necessarily implied ongoing connections with the criminal association.[15] In particular, the judges acknowledged that lack of cooperation could be reconnected to different factors: either the prisoner could fear to endanger his life and the lives of his relatives or he could refuse to provide further information able to exacerbate his judicial status according to the right to silence and the principle *nemo tenetur se detegere*.[16] Besides, it has been proved on several occasions that members of Mafia-type associations have cooperated with judicial authorities not being rehabilitated but, rather, aiming to exploit the alternative measures even though they preserved dangerous links with the criminal sphere.[17]

[13] The Italian Constitutional Court has recently confirmed that those principles are directly connected to rehabilitation, a 'Constitutional imperative' each penalty needs to pursue in accordance with Art 27, para 3, Constitution: see Corte costituzionale 11 July 2018 no 149, commented by – among others – A. Pugiotto, 'Il "blocco di costituzionalità" nel sindacato della pena in fase esecutiva (nota all'inequivocabile sentenza n. 149/2018)' *Giurisprudenza costituzionale*, 1646 (2018); F. Fiorentin, 'La Consulta svela le contraddizioni del "doppio binario penitenziario" e delle preclusioni incompatibili con il principio di rieducazione del condannato' *Giurisprudenza costituzionale*, 1657 (2018); M. Pelissero, 'Ergastolo e preclusioni: la fragilità di un automatismo dimenticato e la forza espansiva della funzione rieducativa' *Rivista italiana di diritto e procedura penale*, 1359 (2018).

[14] F. Della Casa, 'Ordinamento penitenziario', in A. Falzea, P. Grossi and E. Cheli eds, *Enciclopedia del diritto* (Varese: Giuffrè, 2008), 809.

[15] Eur. Court H.R., *Marcello Viola* v *Italy* n 1 above, para 100, where the Court highlights the different circumstances examined in the previous judgment *Ocälan* v *Turkey* (Judgment of 18 March 2014, Reports of Judgments and decisions, 2005-IV, 131, paras 200-202) where domestic norms excluded any possibility to reduce life sentences.

[16] ibid para 117.

[17] ibid para 119. On this issue, see G.M. Flick, 'I diritti dei detenuti nel sistema costituzionale fra speranza e delusione' *Cassazione penale*, 1047, 1048 (2018); M. Bontempelli, 'Diritto alla rieducazione e libertà di non collaborazione' *Rivista italiana di diritto e procedura penale*, 1527

According to the Strasbourg Court,[18] life imprisonment would be incompatible with human dignity if national provisions were to

> 'forcefully (...) deprive a person of his freedom without striving towards his rehabilitation and providing him with the chance to regain that freedom at some future date'.[19]

Although the Convention could not oblige Signatory States to achieve rehabilitation, they had the duty to ensure each prisoner the prospect of being released, thereby providing a chance to social reintegration.[20]

Against this background, the irrebuttable presumption of danger to society the domestic law prescribed for non-cooperating prisoners infringed Art 3 ECHR as it lacked any rational and empirical bases. In particular, each prisoner needed the chance to prove that his personality had changed during detention,[21] accomplishing rehabilitation so that detention was no longer justified. Otherwise, the evaluation of dangerousness would be blindfolded as it would constantly refer to the time when the offense was committed, ignoring the changes and resocialising efforts the convicted made under custody.[22]

Furthermore, the Court stressed that the crimes committed by the applicant were undoubtedly among the most dangerous to harm public security, considering the permanent and deeply rooted nature of the extremely violent Mafia-type association. Nonetheless, Art 3 ECHR bans in absolute terms inhuman or degrading treatments[23] and it could not be derogated neither in

(2017); F. Palazzo, 'L'ergastolo ostativo nel fuoco della *quaestio legitimitatis*. Relazione introduttiva', in G. Brunelli, A. Pugiotto and P. Veronesi eds, 'Per sempre dietro le sbarre? L'ergastolo ostativo nel dialogo tra le Corti' 1 *Forum Quaderni Costituzionali*, 10 (2019).

[18] As for a deeper analysis of the Strasbourg Court case law on irreducible life sentences, examining Eur. Court H.R. (GC), *Kafkaris* v *Cyprus*, Judgment of 12 February 2008, see D. van Zyl Smit, 'Outlawing Irreducible Life Sentences: Europe on the Brink?' 23 *Federal Sentencing Reporter*, 39, 41 (2010).

[19] Eur. Court H.R. (GC), *Murray* v *The Netherlands* n 3 above, para 101. Analogous principles had been already stated in Eur. Court H.R. (GC), *Vinter and Others* v *United Kingdom* n 7 above, paras 113 and 87, where the judges rule that 'an Article 3 issue would only arise when it could be shown: (i) that the applicant's continued imprisonment could no longer be justified on any legitimate penological grounds; and (ii) that the sentence was irreducible *de facto* and *de jure*'. As for the issues concerning the notion of rehabilitation shared by the Strasbourg Court, see A. Martufi, 'The path of offender rehabilitation and the European dimension of punishment: New challenges for an old deal?' *Maastricht Journal of European and Comparative Law*, 1, 4 (2019).

[20] Eur. Court H.R. (GC), *Murray* v *The Netherlands* n 3 above, para 104. In this regard, 'a possibility of being granted a pardon or release on compassionate grounds for reasons related to ill-health, physical incapacity or old age does not correspond to the notion of "prospect of release" as formulated in the *Kafkaris* judgment' (ibid para 100).

[21] E. Dolcini, n 6 above, 11, where the Author stressed that the irrebuttable presumption also violates the right to self-determination, preventing the prisoners from freely deciding whether to cooperate with the judicial authority.

[22] In fact, it is quite different recognising some further benefits to those who cooperate instead of punishing harder the non-cooperating prisoners: ibid 12.

[23] N. Mavronicola, 'Crime, Punishment and Article 3 ECHR: Puzzles and Prospects of

case of offences entangled to such a hideous phenomenon.[24]

Therefore, the Court required the Italian legal order to adopt all the initiatives necessary to amend national relevant provisions, according to the margin of appreciation the Convention recognised to the domestic level.[25] In this regard, a structural problem has been highlighted, directly encouraging the Italian Parliament to take actions in order to reform the penitentiary system in compliance with the ECHR guarantees. Accordingly, the Strasbourg Court identified a political concern: the legislative power should correct the unlawful provisions and rationally assess prison laws,[26] avoiding further discriminations the involvement of judicial remedies could bring about.[27]

Nonetheless, as explained in the sections below, several questions have been raised when national authorities started following suit.

III. The Enforcement at National Level

1. One First Step: Prison Leaves Towards Rehabilitation

The Italian Constitutional Court was already called on to deal with irreducible sentences under Arts 4-*bis* and 58-*ter* of the Penitentiary Act. In particular, the Court in a relevant precedent stated that this special regime was consistent with the Constitution since prisoners exerted a free choice whether to cooperate with judicial authorities or not.[28] Accordingly, the rigorous prison treatment could

Applying an Absolute Right in a Penal Context' 15 *Human Rights Law Review*, 721 (2015), where the Author recognises among the fundamental components of Art 3 ECHR the fact that 'whether the victim or potential victim is an innocent child or a cold-blooded murderer, they enjoy the protection of Article 3 alike'.

[24] In this regard, it is necessary to observe that the dissenting opinion written by Judge Wojtyczek stressed the exceptional circumstances which characterised Mr Viola's application. According to his view, Art 3 ECHR may be derogated when such dangerous offences are involved as the ones connected to any Mafia-type association in order to pursue the preeminent interest of public security: Id, *dissenting opinion*, para 1.

[25] Eur. Court H.R., *Marcello Viola* v *Italy* n 1 above, paras 140-144, where the Court specified its power for the purposes of Art 46 ECHR.

[26] As for the interconnections with rule of law and separation of powers, see D. Galliani, 'Una cinquina di problemi in materia di ergastolo ostativo' *Rivista italiana di diritto e procedura penale*, 1522, 1523 (2017).

[27] On this issue, see F. Fiorentin, 'La Consulta' n 13 above, 1660. In particular, it has been stressed that decisions involving rights and duties pertain to the political sphere so that – in Civil Law legal orders – they shall be adopted not by the judiciary but by the Parliament: M. Luciani, 'Costituzionalismo irenico e costituzionalismo polemico' *Giurisprudenza costituzionale*, 1643, 1663 (2006). As for the hypothesis that the solution to this problem could be offered by the Italian Constitutional Court: V. Zagrebelsky, 'La pena detentiva "fino alla fine" e la Convenzione europea dei diritti umani e delle libertà fondamentali. Relazione introduttiva', in G. Brunelli, A. Pugiotto and P. Veronesi eds, n 17 above, 15, 25.

[28] The Court stated that considering the serious crimes they committed, the irrebuttable presumption of dangerousness had to be regarded as lawful: Corte costituzionale 9 April 2003 no 135, available at www.giurcost.org.

be legitimised by the prisoner's deliberate choice not to severe the connections with Mafia-type association, encumbering cooperation with the judiciary.

However, the Strasbourg Court highlighted the misleading aspects of the national approach, pointing out that the refusal to cooperate could depend on different reasons.[29] Even though the legislative presumption could comply with the Convention considering the offences involved, its irrebuttable nature infringed the absolute prohibition of inhuman or degrading treatment: every prisoner should at least be afforded an effective prospect of release.[30]

This conclusion, on closer inspection, recalls the most recent case law of the Italian Constitutional Court in relation to whole-life sentences.[31]In particular, national judges have already declared long-life sentences unlawful whether the strict conditions provided by Art 58-*quater* of the Penitentiary Act apply.[32] This judgment is particularly relevant in that it stresses rehabilitation as a Constitutional imperative, being an irrevocable aim for every penalty to be regarded as lawful notwithstanding the category of penalties committed.[33]

In this framework, the decision no 253 of 2019 strengthens the judicial approach, enhancing a common perspective between national and supranational jurisdiction.[34] However, it is important to stress that the judgment exclusively concerns prison leaves provided by Art 30-*ter* Penitentiary Act and it does not investigate whether the same prohibition is legitimate in relation to the other alternatives to custody.[35] The Court states that the absolute prohibition for non-cooperating prisoners to apply for prison leaves infringes the Constitutional

[29] Eur. Court H.R., *Marcello Viola* v *Italy* n 1 above, para 117. Actually – as recognized by the Strasbourg Court itself – the Italian Constitutional Court in the past showed a more lenient approach admitting that on certain circumstances cooperation could be determined not by rehabilitation but rather by opportunistic aims, namely the intention to benefit from the alternatives to custody national law allowed: Corte costituzionale 11 June 1993 no 306, available at www.giurcost.org.

[30] ibid paras 128-130.

[31] F. Palazzo, 'L'ergastolo' n 17 above, 5-6. As for the trend the Constitutional Court has followed reducing life imprisonment in order to ensure the protection of fundamental guarantees: see F. Fiorentin, 'Sicurezza e diritti fondamentali nella realtà del carcere: una coesistenza (im)possibile?' *Diritto penale e processo*, 1596, 1602 (2019).

[32] The provision stated that, in case of specific serious crimes, no beneficial measures – alternative to custody – could be applied for 26 years even though the prisoners had been completely resocialised. Thus, relying on rehabilitation for the purposes of Art 27, para 3, Constitution, the Constitutional Court declared the regime unlawful: Corte costituzionale 11 July 2018 no 149 n 13 above.

[33] ibid.

[34] In particular, the Constitutional Court is required to assess whether the rigorous treatment prescribed by Art 4-*bis* and 58-*ter*, Penitentiary Act, complies with rehabilitation and equality in so far as it prevents the application of prison leaves: Corte costituzionale 4 December 2019 no 253 n 2 above.

[35] As already mentioned, the Italian penitentiary system includes several benefits which help the prisoners to be gradually reintegrated within the society (ie prison leaves, outside work, parole): G. Neppi Modona, 'Ordinamento penitenziario', in R. Sacco ed, *Digesto discipline penalistiche* (Torino: UTET, 1995), 41, 50.

principles on three specific grounds.

In the first place, the right to silence implies that during custody the prisoners have no obligation to facilitate investigative initiatives or judicial activities. While the democratic legal order recognises the principle *nemo tenetur se detegere*, it would be incoherent demanding the convicted persons to provide useful information which risks worsening their individual position.[36] Thus, if cooperation could be regarded as a condition to improve the prisons' treatment, it could never become an element sufficient to heighten punishments.[37]

Secondly, national judges observe that prison leaves represent a unique measure: being the first step of the reintegration process into the society, they constitute a sort of turning point.[38] In fact, in order to apply those measures, the judge is required to provide a positive evaluation on the applicant's personality, taking into account the rehabilitation process he is pursuing and his dangerousness to public security. In other words, once those measures are prescribed, the prisoner begins to regain his freedom.[39]

Thus, the irrebuttable presumption freezes rehabilitation at its very beginning, bringing about an unlawful treatment in contrast with Art 27, para 3, Constitution. Besides, according to the Court, prison leaves are not able to affect either the conditions of release or the penalty's actual scope.[40] In particular, overruling the previous case law which stated the retroactive effect of less favourable penitentiary norms,[41] the Constitutional Court has distinguished among the penitentiary measures in order to apply the ECHR broader definition of criminal charge.[42] In fact, according to the Grand Chamber's judgment *Del Rio Prada* v *Spain*,[43] the rules that enforce penalties shall not be excluded from the

[36] Corte costituzionale 4 December 2019 no 253, n 2 above, para 8.1.

[37] Otherwise '*carceratus tenetur alios detegere*', in accordance with the suggestive expression forged by the Constitutional judges (ibid para 8.1). Besides, after a significant period spent in custody, cooperation might become less useful as the information available to the convicted subjects referred to a moment distant in time, not reflecting the actual status of the criminal circles: D. Pulitanò, 'Problemi dell'ostatività sanzionatoria. Rilevanza del tempo e diritti della persona', in G. Brunelli, A. Pugiotto and P. Veronesi eds, n 17 above, 153, 157. In fact, the Constitutional Court expressly considered the hypothesis where, during custody, the association had been completely eradicated and cooperation consequently became unenforceable.

[38] F. Della Casa, n 14 above, 809.

[39] Corte costituzionale 4 December 2019 no 253 n 2 above, para 8.2.

[40] Corte costituzionale 26 February 2020 no 32, where the Court affirms that the principle of legality applies to penitentiary measures which are able to affect the conditions of early release and the penalty's actual scope.

[41] The judicial approach which applied the principle of *tempus regit actum* to penitentiary rules had been upheld by the majority of national judges, see – *inter multis* – Corte di Cassazione Sezioni Unite 30 May 2006 no 24561.

[42] V. Manes, 'Common-lawisation of Criminal Law? The Evolution of *Nullum Crimen Sine Lege* and the Forthcoming Challenges' 8 *New Journal of European Criminal Law*, 334, 340 (2017). On the autonomous notion of criminal matters, see A.M. Maugeri, 'The Concept of Criminal Matter in the European Courts' Case Law – The Protection of Fundamental Principles v. Political Compromise' 1 *European Criminal Law Review,* 4 (2019).

[43] Eur. Court H.R. (GC), *Del Rio Prada* v *Spain*, Judgment of 21 October 2013, where the

legality principle under Art 7 ECHR if they retain a substantially punitive scope.[44] In this perspective, it has been excluded that the prison leaves' regime could be considered 'criminal in nature' and assisted by the *nullum crimen* guarantee: the short periods spent outside the penal institution are temporary and conditioned to specific requirements not being able to affect the custodial terms of penalty's enforcement.[45] Thus, it seems even more urgent to extend the legal reasoning of judgment no 253 to the other measures able to alter the *status* of imprisonment, allowing national long-life sentences to be considered *de iure* and *de facto* reducible (see para IV below).

Lastly, the Court states that the law under scrutiny undermines the idea that prisoners' personality does not remain unchanged but, rather, evolves during detention so that the sentence shall be reviewed when the convicted person has re-examined his past criminal experiences, shaping a new identity.[46] Even though the special regime could seem reasonable considering the tragic events that brought to the Capaci's massacre – requiring the Italian jurisdiction to promptly react in order to challenge Mafia associations – the Constitutional Court declares the irrebuttable presumption of dangerousness unlawful. Notwithstanding the criminal behaviour committed in the past, the State shall ensure every prisoner the hope to regain his freedom towards rehabilitation.[47]

Court claimed that the calculation of the total term of imprisonment based on the more severe 'Parrot doctrine' adopted by the national Supreme Court fell within the scope of Art 7 ECHR and was unlawfully applied to the detriment of the applicant's rights which prevented the retrospective application of criminal law. On the impact of this ECHR judgment on national legal order, see C. Ruiz Miguel, 'The "Del Rio Prada" Judgments and the Problem of the Enforcement of ECtHR Decisions', in M. Pérez Manzano and Others eds, *Multilevel Protection of the Principle of Legality in Criminal Law* (Switzerland: Springer, 2018), 213.

[44] Eur. Court H.R. (GC), *Del Rio Prada* v *Spain* n 43 above, para 81, where the judges state that 'to render the protection offered by Article 7 effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision'. Even though the Strasbourg Court firstly denied that penalties enforcement's rules fell within the scope of Art 7 ECHR (*Uttley* v *United Kingdom*, Judgment of 25 November 2005), the judicial approach had been overruled as shown by *Kafkaris* v *Ciprus*, Judgment of 12 February 2008. Thus, on the judicial process from *Kafkaris* v *Ciprus* to *Del Rio Prada* v *Spain*, see S. Sanz-Caballero, 'The Principle of *Nulla Poena Sine Lege* Revisited: the Retrospective Application of Criminal Law in the Eyes of the European Court of Human Rights' 28 *European Journal of International Law*, 787 (2017).

[45] As for the critical aspects of the Constitutional Court's legal reasoning, see V. Manes and F. Mazzacuva, 'Irretroattività e libertà personale: l'art. 25, secondo comma, Cost., rompe gli argini dell'esecuzione penale' *Sistema penale*, 23 march 2020, available at https://tinyurl.com/yckdt63h (last visited 27 December 2020).

[46] More broadly, this aspect has been stressed as one of the main characteristics of the European approach towards criminal sentences, considerably different from the American perspective: J. Kleinfeld, 'Two Cultures of Punishment' 68 *Stanford Law Review*, 933 (2016).

[47] Similarly, considering the Grand Chamber's judgment *Vinter and Others* v *United Kingdom*, it has been observed that under Art 3 ECHR '[n]o matter what they have done, [prisoners] should be given the opportunity to rehabilitate themselves while serving their sentences, with the prospect of eventually functioning as responsible members of free society again': D. van Zyl Smit, P. Weatherby and S. Creighton, 'Whole Life Sentences and the Tide of European Human

Moreover, national judges rule that, if the prisoner has been convicted for crimes related to Mafia-type associations, prison leaves could be granted exclusively where the applicant is able to demonstrate that he has no actual connection with such a dangerous criminal sphere as well as there are no risks that in the future he could rebuild similar links. A special burden of proof has been established to avoid the risk of undermining public security, fighting against the most dangerous criminal organisations.

In this regard, according to the ECHR, legislative presumptions do not contrast with fundamental guarantees when they are rebuttable.[48] As for the national level, automatic measures imposed by the Parliament comply with the Constitution exclusively when they preserve actual connections with the empirical sphere,[49] complying with the standard of *id quod plerumque accidit*.[50] Thus, the choice not to automatically infer a prisoner's dangerousness to society from the lack of cooperation seems consistent both with national and supranational guarantees. However, the Court identified a particularly rigorous burden of proof in order to exclude actual and future links between the interested person and the criminal organization.[51] In fact, some scholars persuasively observe it is so demanding that the presumption remains irrebuttable in nature.[52] It seems extremely difficult to demonstrate that there will be no risk of future links with unlawful associations, particularly as the burden of proof rests on the private parties.[53] Furthermore, the Court has extended the judicial outline to all the crimes ruled by Art 4-*bis* even though some offences do not imply any reference to criminal organizations.[54] The goal is avoiding unreasonable discriminations against those offences which are deemed to be less dangerous to the society. At the same time, the general extension of the judicial rule has questioned the actual object and limits of that specific burden of proof. In fact, the report the Parliament's Anti-Mafia Commission recently presented to the national legislator has suggested several alternatives to regulate this specific aspect,[55]

Rights Jurisprudence: What Is to Be Done?' 59 *Human Rights Law Review*, 65 (2014).

[48] Eur. Court H.R., *Marcello Viola* v *Italy*, n 1 above, para 131. Accordingly, see also Eur. Court H.R., *Pantano* v *Italy*, Judgment of 6 November 2003, para 69, considering the legitimacy of legislative presumptions in relation to pre-trial measures in case of offences related to Mafia-type associations.

[49] For a deeper analysis, see the recent work V. Manes-V. Napoleoni, La legge penale illegittima. Metodo, itinerari e limiti della questione di costituzionalità in materia penale (Torino: Giappichelli, 2019), 270, 284.

[50] On the issue, see Corte costituzionale 21 July 2010 no 265, available at www.giurcost.org.

[51] Corte costituzionale 4 December 2019 no 253, n 2 above, para 9.

[52] M. Ruotolo, 'Reati ostativi e permessi premio. Le conseguenze della sent. n. 253 del 2019 della Corte costituzionale', 12 December 2019, available at https://tinyurl.com/yckdt63h (last visited 27 December 2020), where the presumption is described as 'almost-irrebuttable'.

[53] S. Talini, 'Presunzioni assolute e assenza di condotta collaborativa: una nuova sentenza additiva ad effetto sostitutivo della Corte costituzionale' *Consulta OnLine*, III, 729, 741 (2019).

[54] Corte costituzionale 4 December 2019 no 253, n 2 above, para 12.

[55] Commissione parlamentare d'inchiesta sul fenomeno delle mafie e sulle altre associazioni

aiming to assess the potential infringement of fundamental guarantees as the last section tries to explain.

2. A Second More 'Radical' Step in Relation to Children's Courts

Two days after the decision no 253 of 2019, the Constitutional Court published an even more radical judgment in relation to sentences served by minors who had been convicted for offences connected to Mafia-type associations.[56] In fact, even though a legislative reform had been recently approved in order to enhance the best interests of the child,[57] national legislator chose to extend the special regime provided by Arts 4-*bis* and 58-*ter* Penitentiary Act even to children's sentences.

In this regard, the Court examined several International Conventions[58] and the EU most recent provisions which enforced the role of rehabilitation to further juvenile protection and well-being.[59] Accordingly, the young age of the prisoners represented a crucial element each jurisdiction needed to consider in order to allow the young persons to critically reflect on their criminal past and reconstruct their personality, achieving social reintegration. Having already undermined some rigorous aspects of the special penitentiary regime,[60] the Court stated that the legislative option was incoherent with its previous case law and inconsistent with the general scope that governed the development of penalties' enforcement. In this view, the Constitution prevented normative solutions which were based exclusively on deterrence and social defence,

criminali, anche straniere, 'Relazione sull'istituto di cui all'articolo 4-*bis* della legge n. 354 del 1975 in materia di ordinamento penitenziario e sulle conseguenze derivanti dalla sentenza n. 253 del 2019 della Corte costituzionale', available at www.senato.it.

[56] Corte costituzionale 6 December 2019 no 263, available at www.giurcost.org.

[57] Decreto legislativo 2 October 2018 no 121. In particular, the legislator aimed to organise the minors' prison rules so that they would enhance the juvenile personality and ensure that the young convicted ones gained the best chances to social reintegration. The main scope was providing minors' sentencing with rules autonomous from the adults' prison system. However, the legislator also extended the special regime under Art 4-*bis* and 58-*ter*, Penitentiary Act, to Children's Courts.

[58] In fact, the Court decided according to International law. In particular, the Court refers to – among others – the so called 'Beijing Rules' assessing minimum standards to enforce specific guarantees for juvenile justice (29 November 1985) and the United Nations' Convention on the Rights of the Child (20 November 1989).

[59] As for the EU legislation, it is particularly important to recall the Directive EU/2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings which states that 'Member States should be able to derogate from the obligation to carry out an individual assessment where such a derogation is warranted in the circumstances of the case, taking into account, *inter alia*, the seriousness of the alleged criminal offence and the measures that could be taken if the child is found guilty of such an offence, provided that the derogation is compatible with the child's best interests' (recital no 40).

[60] Corte costituzionale 22 February 2017 no 90, which declared unlawful the provisions requiring the condemned young person to be detained while alternative measures were under judicial scrutiny in case Art 4-*bis* applied. On the relevant outlines of the decision – in relation to the notion of 'best interests of the child' – see M. Bertolino, 'I diritti dei minori fra delicati bilanciamenti penali e garanzie costituzionali' *Rivista italiana di diritto e procedura penale*, 1, 21, 37 (2018).

clarifying the thresholds of legitimate penalties.

Thus, the judgment's legal reasoning demonstrates that insurmountable legislative obstacles against resocialisation infringe rehabilitation for the purposes of Art 27, para 3, Constitution:[61] national judges have declared unlawful the norm itself which extended the entire regime under Arts 4-*bis* and 58-*ter* Penitentiary Act to minors' sentences. In this peculiar field, the Constitutional Court has not only extended its judgments to all the measures of early release but also excluded any presumptive provision, even the rebuttable ones. As a result, the different penitentiary regime provided for young prisoners implies further interpretative questions concerning the interconnections among national and supranational dimension.

3. Interpretative Unsolved Questions

The issue at stake raises some questions relating to the rationale and boundaries of rehabilitation whether the most serious crimes are involved. In fact, the decision pronounced by the Court on prison leaves is not to be taken for granted. Few months before, the judgment no 188 saved the legitimacy of the list provided by Art 4-*bis*, stating that it ensured social defense. The legislator had discretionary selected those crimes which were deemed to represent dangerous threats to public security: the worsen penitentiary regime aimed to appease public opinion.[62] However, this approach seems inconsistent with the ECHR's case law: the Strasbourg judges point out that the tackle to the most hideous crimes cannot justify derogations from Art 3 ECHR which prohibits in absolute terms degrading or inhuman treatments.[63] The enhancement of deterrence and public security could not override rehabilitation unless the penalty would misplace its legitimation.[64]

On one hand, the judgment no 253 has enhanced a common interpretation of rehabilitation between the national and the supranational level. On the other, it requires further explanation on the rationale of the most severe regime

[61] On the issue, see recently A. Pugiotto, 'Due decisioni radicali della Corte costituzionale in tema di ostatività penitenziaria: le sentenze nn. 253 e 263 del 2019' *Rivista AIC*, 1, 501, 502 (2020).

[62] Corte costituzionale 18 July 2019 no 188, available at www.giurcost.org.

[63] Eur. Court H.R., *Marcello Viola* v *Italy* n 1 above, para 130. In fact, as already mentioned, while criminal sanctions undoubtedly entail punitive outlines, International and European criminal policy has recently focused on social reintegration, identifying rehabilitation as a fundamental guarantee at the supranational level: in this perspective, the Strasbourg Court's Grand Chamber considers 'Rules 6, 102.1 and 103.8 of the European Prison Rules, Resolution (76) 2 and Recommendations Rec (2003)23 and Rec (2003)22 of the Committee of Ministers, statements by the Committee for the Prevention of Torture, and the practice of a number of Contracting States' as well as 'Article 10 § 3 of the International Covenant on Civil and Political Rights': Eur. Court H.R. (GC), *Murray* v *The Netherlands* n 3 above, para 101.

[64] In this perspective, see again Eur. Court H.R. (GC), *Murray* v *The Netherlands* n 3 above, para 101, affirming that '[w]hile punishment remained one of the aims of imprisonment, the emphasis in European penal policy was now on the rehabilitative aim of imprisonment'.

reserved to those particularly dangerous crimes so that the Constitutional case law does not incur potential incoherencies. In other terms, it is essential to clarify whether – according to the Court – aims of deterrence or public protection could overtake rehabilitation in some specific circumstances or, rather, it has to prevail the idea that – despite the serious crimes committed in the past – each person might change his attitude and rebuild his personality, nurturing the hope for social reintegration. Actually, the Constitutional Court has recently specified that the recalled decision no 188 of 2019 refers to a different legal reasoning:[65] in this view, it is possible to perceive a specific attempt to distinguish among the material facts and preserve the inner coherence of the case law related to those serious offences.

However, even claiming the predominance of rehabilitation, further questions arise in relation to the different penitentiary regime prescribed for adults and minors. In fact, according to the Constitutional Court, while prison leaves could be granted if the detained person meets specific standards of proof, no presumptions – not even rebuttable – apply to young age prisoners which have been condemned for the same crimes. When minors are involved, it is well-known, the Constitutional case law has continuously enhanced the role played by rehabilitation in order to foster a process of personal development and education.[66] In fact, the preeminent best interests of the child have allowed national judges to evaluate rehabilitation in order to ensure that imprisonment would be a measure of last resort, fostering flexible training programs as well as aiding the child to assume a constructive role in the society.[67]

Nonetheless, the recent general emphasis on Art 27, para 3, Constitution, enhances individualized programs even in case of adults sentenced to life imprisonment,[68] sharing the approach adopted at the supranational level. In fact, although it is not expressively recognised, 'there is also now clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved'.[69] The Strasbourg Court's Grand Chamber has clearly stated that in jurisdictions whose very essence is

[65] Corte costituzionale 12 March 2020 no 52, para 3.2, available at www.giurcost.org.

[66] In this perspective, it is possible to recall several decisions of the Constitutional Court; among the main issues, it seems interesting to mention the judgment which declared long-life sentences unlawful in relation to young age prisoners (sentence 28 April 1994 no 168) or the one which required the legislator to take action in order to distinguish among minors and adults as for unacceptable restrictions of rehabilitation (25 March 1992 no 125).

[67] On the interconnections between constitutional and conventional law, see E. Lamarque, *Prima i bambini. Il principio dei* best interests of the child *nella prospettiva costituzionale* (Milano: FrancoAngeli ed, 2016), 37, 87. In order to examine the moral foundation of children's rights in relation to the 'adult-centric' Western tradition of human rights, see J. Tobin, 'Justifying Children's Rights' 21 *International Journal of Children's Rights*, 395 (2013).

[68] See, as for a broader analysis, A. Pugiotto, 'Il "blocco di costituzionalità"' n 13 above, 1646.

[69] Eur. Court H.R. (GC), *Vinter and Others* v *United Kingdom* n 7 above, para 114.

protecting human dignity even life sentences shall pursue rehabilitation.[70] A periodical review of the sentence is required so that the detained person is encouraged to 'develop himself or herself to be able to lead a responsible and crime-free life'.[71]

Therefore, while common minimum standards emerge between the penitentiary regimes of young and adult prisoners – both of which are equally expected to respect prisoners' dignity – the process followed by the Constitutional Court entails some uncertainties. In particular, the choice not to extend the more lenient rules adopted for young prisoners demands a specific rationale. In this light, even though there is no doubt education plays an essential role, rehabilitation became the preeminent penological ground[72] for juvenile justice as well as for adults' imprisonment. Thus, the Constitutional Court should clarify whether rehabilitation exerts – at the national level – different functions depending on the age of the convicted person or, rather, other aspects became relevant in order to uphold the more favorable regime applied to minors.[73]

Moreover, focusing on the Constitutional Court's judgment on prison leaves, the rebuttable presumption the judges introduced in order to face the threat of Mafia-type associations requires further attention. In fact, the innovation suggested by the Court risks impinging on the separation of powers[74] as it considerably affected the previous legislative regime, adding specific standards of proof.[75] In particular, the Court adopted a proactive approach, trying to develop through the peculiar standard of evidence a balanced solution to face an extremely dangerous phenomenon to the society. Even though several alternatives were consistent with the Constitution, national judges stressed previous normative references in order to transform the unlawful regime.[76]

In this perspective, the issue does not directly affect the European sphere:

[70] ibid para 113, where the supranational judges recall the German Federal Constitutional Court's case law affirming that 'it would be incompatible with the provision on human dignity in the Basic Law for the State forcefully to deprive a person of his freedom without at least providing him with the chance to someday regain that freedom'. Thus, '[i]t follows from this strong emphasis on human dignity that life sentence prisoners should now be able to claim as a matter of right that they should be given opportunities for rehabilitation': D. van Zyl Smit, P. Weatherby and S. Creighton, n 47 above, 69.

[71] Eur. Court H.R. (GC), *Murray* v *The Netherlands* n 3 above, para 103.

[72] See, in particular, Corte costituzionale 28 April 2017 no 90, para 5.

[73] Considering the need to clarify the notion of rehabilitation when dangerous phenomena such as Mafia-type associations are involved, see – recently – G. Fiandaca, 'Ergastolo ostativo e 41-*bis* ord. pen. L'interazione virtuosa tra giudici ordinari e Corte costituzionale' *Giustizia insieme* (2020).

[74] As for the risks implied by judicial activism in the criminal field whether Civil Law paradigms are involved, see F. Palazzo-F. Viganò, *Diritto penale. Una conversazione* (Bologna: il Mulino, 2018), 56.

[75] Considering the outlines that a new idea of legality could exert upon the Civil Law's separation of powers, see V. Manes, 'Common-lawisation' n 42 above, 338.

[76] Considering the judgment at stake as an example of judicial law-making, F. Fiorentin, 'Preclusioni penitenziarie e permessi premio' *Cassazione penale*, 3, 1019, 1023 (2020).

when criminal charges are involved, the autonomous notion the Strasbourg Court adopted – interpreting Art 7 ECHR – equalizes law and case law.[77] Nonetheless, once the ECHR judges recognized the structural problem jeopardizing the Italian penitentiary regime, the input provided under Art 46 ECHR required the Parliament not the judiciary to undertake the renovation of domestic penitentiary rules.[78] In other words, taking into account the national margin of appreciation, the Strasbourg Court strove to prevent judicial activism so that the judiciary would not be forced to exert a 'countermajoritarian role'.[79] Besides, although identifying a similar structural problem as the Russia's penitentiary system infringed Art 3 ECHR, the Court has recently stated under Art 46 ECHR that 'the choice of instruments remains fully at the discretion of the respondent Government'.[80] This cautious approach stresses the self-restraint of ECHR judges and, at the same time, it emphasises the opposite intrusive approach adopted towards the Italian government.[81]

IV. Future Perspectives

As already mentioned, the decision no 253 strictly respects the *thema decidendum* raised by the applicants, by only examining prison leaves. This choice certainly reflects the procedural norms governing Constitutional trials

[77] It is well-know, this notion has been clarified by the Strasbourg Court in several judgments; among the most relevant cases, see Eur. Court H.R., *S.W. and C.R.* v *United Kingdom*, Judgments of 22 November 1995; *Cantoni* v *France*, Judgment of 11 November 1996, para 29; *Cöeme and Others* v *Belgium*, Judgment of 22 June 2000, para 145; most recently, *Contrada* v *Italy*, Judgment of 15 Apil 2015, para 60 and *Navalnyye* v *Russia*, Judgment of 17 October 2017, para 54, all available at www.hudoc.echr.coe.int.

[78] Eur. Court H.R., *Marcello Viola* v *Italy* n 1 above, para 143.

[79] On this issue, see, among others, L.R. Barroso, 'Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies' 67 *The American Journal of Comparative Law*, 109 (2019), where the Author observes Constitutional Courts not only exert a countermajoritarian role but also satisfy social needs not provided by legislators and develop new approaches that enforce a 'civilizing process'. As for the role performed by Constitutional Courts as countermajoritarian authorities, see also the considerations of R. Cotterrell, *The Politics of Jurisprudence. A Critical Introduction to Legal Philosophy* (New York: Oxford University Press, 2003), 160, relating to Ronald Dworkin's theoretical achievements.

[80] Eur. Court H.R., *N.T.* v *Russia*, Judgment of 2 June 2020, para 70. The Court examines the compliance of a special correctional regime imposed by the Russian government with the prohibition of inhuman and degrading treatments. In details, the judges unanimously declared the violation of Art 3 ECHR since the applicant's '[...] isolation, limited outdoor exercise and lack of purposeful activity [...] resulted in intense and prolonged feeling of loneliness and boredom, which caused significant distress to the applicant and due to the lack of appropriate mental and physical stimulation could result in institutionalisation syndrome, that is to say the loss of social skills, and individual personal traits. This amounted to treatment prohibited by Article 3 of the Convention' (para 52).

[81] On the ECHR judges' expanding role in the definition of remedial measures under Art 46 ECHR, see A. Mowbray, 'An Examination of the European Court of Human Rights' Indications of Remedial Measures' 17 *Human Rights Law Review,* 451 (2017).

but, at the same time, provides an interesting signal against judicial activism. However, waiting for the legislator to intervene,[82] national penitentiary's regime is not to be regarded as consistent with the ECHR: the adults' special discipline of life sentences under Art 4-*bis* is not *de iure* et *de facto* reducible for the purposes of Art 3 ECHR. In fact, non-cooperating prisoners are currently allowed to apply only for prison leaves, being national judges unable to further assess the rehabilitation process in relation to penitentiary measures which affect the actual scope of penalty.[83] Notwithstanding the serious offences involved,[84] the chance to apply for prison leaves does not represent an adequate measure to enhance prisoners' human dignity.

Therefore, it is not surprising that those arguments have persuaded the Italian Supreme Court to refer the issue again to the Constitutional Court in order to extend the rule provided for prison leaves to releases on parole.[85]Although in several judgments the Italian Supreme Court confirmed that irreducible imprisonment under Art 4-*bis* was lawful since it depended on the deliberate choice to cooperate with public authorities,[86] this last decision has overruled the previous case law. In particular, national judges expressively recall both the Constitutional and the ECHR case law maintaining a violation not only of national provisions but also of the international obligations binding upon the domestic law.[87]

In this framework, it is highly likely that the Constitutional Court would include releases on parole,[88] challenging the previous legislative approach in order to comply with the rules prescribed by the Strasbourg judges. However, this scenario would be inconsistent with the remedy suggested under Art 46 ECHR. In particular, even though the judicial remedy did not infringe the legality principle under the Convention, a Parliament's reform would represent the more suitable remedy in order to balance the opposite interests in accordance with the rule of law governing civil law's paradigm.[89]

Therefore, it seems relevant that – even if no draft legislation has seriously

[82] F. Palazzo, 'L'ergastolo' n 17 above, 4.

[83] Corte costituzionale 26 February 2020 no 32 n 40 above.

[84] F. Palazzo, 'Crisi del carcere e culture di riforma' *Diritto penale contemporaneo*, 4, 7 (2017), where the Author examines the danger that penal populism might entail exacerbating prisons' rules.

[85] Corte di Cassazione 3 June 2020 no 18518, available at https://tinyurl.com/yckdt63h (last visited 27 December 2020).

[86] See, for instance, Corte di Cassazione 22 March 2016 no 27149, available at www.italgiure.it.

[87] Corte di Cassazione, n 85 above, para 20, where the Court recognized the violation of rehabilitation under Art 27, para 3, Constitution, as well as Art 117 Constitution, which requires to respect EU and international laws.

[88] Stating that the decision no 253 of 2019 has already started the process which would lead to a general reform of irreducible life sentences, see A. Pugiotto, 'Due decisioni' n 61 above, 517. As for the possibility the Constitutional Court would have to extend its case law, see F. Fiorentin, 'Sicurezza' n 31 above, 1605.

[89] Eur. Court H.R., *Marcello Viola* v *Italy* n 1 above, para 143.

been considered yet – recalling the urgent call made by the Strasbourg Court and the Constitutional Court, the Anti-Mafia Commission presented several recommendations to the Parliament in order to transform the penitentiary laws in relation to Art 4-*bis*.[90] On one hand, the report encourages the domestic legislator to regulate in details the burden of proof necessary to have access to penitentiary measures despite the prisoner's lack of cooperation with public authority. The main goal would be to distinguish Mafia-type associations from other offences so that the burden of evidence reflects the peculiar categories of crimes ruled by Art 4-*bis*.[91] On the other, it requires the Parliament to coordinate the remedies adopted for adults and minors, considering the outlines reached by the Constitutional judges.[92]

In conclusion, the interconnections between Rome and Strasbourg have endorsed the efforts to eradicate criminal organisations[93] avoiding unlawful limitations of human dignity for the purposes of Art 3. As a result, the guarantees involved have reached more developed standards, enhancing the actual rationale of the Constitutional principles. Moreover, the judicial synergism among national and supranational judges could encourage the domestic legislator to start a process[94] that would hopefully instruct a general reform, obviating precarious solutions inevitably dependent on fortuitous contingencies such as the Courts' temporary composition.

[90] Relazione n 55 above.

[91] ibid 31.

[92] ibid 36.

[93] The Strasbourg Court undoubtedly recognises that 'States also have a duty under the Convention to take measures to protect the public from violent crime and that the Convention does not prohibit States from subjecting a person convicted of a serious crime to an indeterminate sentence allowing for the offender's continued detention where necessary for the protection of the public': Eur. Court H.R. (GC), *Murray* v *The Netherlands* n 3 above, para 111.

[94] In this perspective, a positive example is offered by the case *Torreggiani* v *Italy* (Judgment of 8 January 2013): after the Court condemned the national jurisdiction identifying a structural violation of the ECHR guarantees in relation to prison overcrowding, the Parliament adopted several measures which led the Strasbourg Court to recognize the efforts the domestic law made to be consistent with the Convention (*Stella and Others* v *Italy*, Decision of 16 September 2014, paras 41-42, 53-54). In this regard, see G. Giostra, 'Questione carceraria, insicurezza penale e populismo penale' *Questione Giustizia*, 11 (2014); A. Martufi, 'La Corte EDU dichiara irricevibili i ricorsi presentati dai detenuti italiani per violazione dell'art. 3 CEDU senza il previo esperimento dei rimedi *ad hoc* introdotti dal legislatore italiano per fronteggiare il sovraffollamento' *Diritto penale contemporaneo* (2014), available at www.archiviodpc.dirittopenaleuomo.org; F. Favuzza, 'Torreggiani and Prison Overcrowding in Italy' *Human Rights Law Review*, 153 (2017).