AMICUS CURIAE

Application No. 77633/16 – Viola v. Italy
- First Section -

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§ 0. A brief note on the terms which will be used in this Amicus. Whilst the term “ergastolo ostatativo” can be translated into French with the expression “réclusion à perpétuité réelle”, the words which best express the term “ergastolo ostativo” in English would be Real Life Imprisonment or Perpetual Life Imprisonment. As the second term is more similar to the actual meaning of “ergastolo ostativo”, we will employ it for the rest of the Amicus- considering that the use of the term “pena perpetua” (“perpetual penalty”) in Article 22 of the Italian Penal Code derives from the French expression “perpétuité”.

§ 1. The European Court of Human Rights (hereinafter: the Court) is evaluating, for the first time since its institution, the compatibility of the Italian penalty of Perpetual Life Imprisonment (hereinafter: P.L.I.) with the Convention. Although the issue is completely new and there are serious questions regarding the Convention’s interpretation, we will not pronounce on the opportunity of relinquishment.

§ 2. We would like to highlight the fact that when the Court has to deal with cases of Life Imprisonment it has always, since Vinter and Others v. the United Kingdom (Grand Chamber, 9 July 2013) up to now, linked the matter to Article 3 of the Convention. Moreover, taking into account the diversity of the cases, the Court has almost unanimously found a violation of Article 3 in nine cases, and a non-violation of Article 3 in two cases(1).

It is essential to note that the Court has derived the concept of human dignity from Article 3, since Tyrer v. the United Kingdom (25 April 1978), even though the concept itself is not explicitly stated in the Convention. It goes without saying that the concept of human dignity is the basis of the Convention’s whole human rights system. Moreover, the Court has emphasised, based on Article 15, that the prohibition to violate human dignity cannot be derogated. Therefore, human dignity must be guaranteed even in times of war and regardless of any other public emergency threatening the life of the nation. The Court recognised that human dignity must be upheld no matter what crimes the individual has committed.

During the Tyrer case, which undoubtedly may be described as a landmark case in the Court’s sixty-year jurisprudence, the Court expressed two other extremely important concepts, which have never been doubted again since then (2). It is worth remarking that the Court unanimously rejected the Party’s request to strike out the case as it involved “general questions” which regarded the Court’s interpretation of the Convention(3).

On one hand, the Court (§ 31) has described the Convention as a “living instrument” whose interpretation should follow the evolution of the State legal systems and of the European legal systems, which both consider human dignity to be a primary and fundamental objective. On the other hand, the Court (§ 32) has underlined that in order to determine whether or not a penalty or treatment is degrading

(1) After the Vinter case, the violation of Article 3 was declared by the Court in 1) Öcalan v. Turkey no. 2, Second Section., 18 March 2014, final 13 October 2014, 2) Lazlo Magyar v. Hungary, Second Section, 20 May 2014, final 13 October 2014, 3) Harakchiev and Tolunov v. Bulgaria, Fourth Section, 8 July 2014, final 8 October 2014, 4) Trabelsi v. Belgium, Fifth Section, 4 September 2014, final 16 February 2015, 5) Kaytan v. Turkey, Second Section, 15 September 2015, final 15 December 2015, 6) Murray v. the Netherlands, Grand Chamber, 26 April 2016, 7) T.P. and A.T. v. Hungary, Fourth Section, 4 October 2016, final 6 March 2017 and 8) Matheosidis and Others v. Lithuania, Second Section, 23 May 2017. The non-violation of Article 3 was declared by the Court in Bodin v. France, Fifth Section, 13 November 2014, final 13 February 2015, and in Hutchinson v. the United Kingdom, Grand Chamber, 17 January 2017. In Čačko v. Slovakia, Third Section, 22 July 2014, final 15 December 2014, the Court did not examine the question regarding Article 3. In Khantakhv v Aksamikh v. Russia, Grand Chamber, 24 January 2017, the issue involved only Article 14 of the Convention. Basically, the Court, including Murray of the Grand Chamber, unanimously decided all cases of violation. The only exceptions are T.P. and A.T., decided by six votes to one, and Vinter and Others v. the United Kingdom of the Grand Chamber, decided by sixteen votes to one. In Hutchinson, the non-violation, declared by the Fourth Section, 3 February 2015, was decided six votes to one, whereas the Grand Chamber declared the non-violation fourteen votes to three. The decision on Bodin was unanimous. We note that in France the conditional release is “only” subject to time-restrictions (30 years). In Harkins v. the United Kingdom, Grand Chamber, 10 July 2017 (decision), the Court, by a majority, declared compliance under article 3 inadmissible.

(2) The importance of the Tyrer case is unanimously recognised. The case is constantly used by the Court, also in its most recent judgments (see Bousyd v. Belgium, Grand Chamber, 28 September 2015, § 87).

(3) The applicant decided to withdraw the application but the Commission rejected the request of strike out. The Chamber, with regard to the subsequent request by the Government, confirmed the decision of the Commission.
“it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others”. The Court has established this considering that the primary function of Article 3 is to protect “a person's dignity and physical integrity”.

Therefore, a penalty or a treatment must never violate human dignity “whatever their deterrent effect may be” (§ 31) and we may determine whether or not an individual has been subject to inhumane or degrading penalties or treatments only if we view the matter in the individual's own eyes.

§ 3. This point is extremely important in order to understand P.L.I. because it is a genus of penalty, which manifestly violates the moral liberty of a person that may be defined as a fundamental aspect of human dignity, which can never be earned thanks to merits or lost because of demerits(4).

Indeed, as human beings, moral liberty belongs to each one of us. This is precisely why it cannot be violated, restricted or eliminated.

Individuals may gain benefits if they choose to collaborate usefully with justice(5). This is the only possibility P.L.I. provides in order to obtain all alternative measures to detention(6) and other instruments which are useful for the detainees’ resocialisation (like allowing them to work outside prison walls). Even though individuals may gain benefits if they choose to collaborate with justice, the choice not to collaborate should not be sanctioned. Indeed, punishing individuals on the basis of their choice not to collaborate with justice, considering that choice is an expression of moral liberty, would be against Article 3.

We must consider that the right to silence, which is recognised in the Court’s jurisprudence and in EU law (Directive (EU) 2016/343 of 9 March 2016), is a human right which cannot be restricted or limited. The right to silence should always be guaranteed, both during the trial before the sentence and in the subsequent executive phase. On the contrary, according to the Italian law, the choice of exercising one's right to silence will cause grave consequences, such as the permanent exclusion from all alternative measures to detention thus creating a regime which never allows non-cooperating detainees condemned to P.L.I. to leave prison(7).

The right to silence is a projection of moral liberty and is therefore inextricably linked to human dignity. It cannot exist one day and disappear the next one. The right to silence has to be respected during the trial and even more so in the subsequent phase where personal liberty is restricted in prison (which amounts to a “minimum” degree of suffering).

§ 4. We may state that there are three main problems regarding Article 3 and P.L.I.:

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(4) These are the words used by Professor Gaetano Silvestri in the Prefazione [Preface] to the book C. Musumeci, A. Pugiotto, Gli ergastolani senza scampo. Fenomenologia e criticità costituzionali dell'ergastolo ostativo [Hopeless Lifers. Phenomenology and Constitutional Challenges of Perpetual Life Imprisonment], Editoriale Scientifica, Naples, 2016, Series Diritto penitenziario e Costituzione [Penitentiary Law and the Constitution], directed by Professor Marco Ruotolo.

(5) In this Amicus Curiae, we will use the terms “collaboration with justice” or “collaboration” as synonymous of “useful collaboration with justice”.

(6) Thus the “leave permission”-temporary and brief permission to leave prison, the “semi-liberty”-day outside and night inside prison, and “conditional release” (respectively, “permesso premio”, “semilibertà”, “liberazione condizionale”).

(7) The Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 frequently mentioned the Court’s case law. Article 7 of the Directive provided for the right to silence. Regarding the Court’s case law, the right to silence, although not explicitly provided for by Article 6 of the Convention, is “generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6” (Saunders v. the United Kingdom, 17 December 1996, § 68).
a) Considering that the only other alternative would be spending the rest of their lives in prison, is it not degrading to force these lifers to make choices, which may put their life, safety or integrity or their families’ and acquaintances’ lives, safety and integrity at risk? Or any other person’s life, safety or integrity?

b) Considering that the respect of human dignity prohibits the degradation of human beings and therefore their manipulation, is manipulation of these lifers not inhumane? Regardless of the fact that the purpose of manipulation could pursue goals which deserve to be protected. In fact, when it comes to human rights the ends do not justify the means.

c) Is legislative automatism not inhumane and degrading, considering that it is the axiom on which P.L.I is founded upon? We have to take into account that according to the legislative automatism the choice not to collaborate with justice entails the persistent presence of social dangerousness. This means that any evaluation of how the detainee’s time in prison is spent and the progress in prison treatment, which is attested by the reports of the penitentiary authorities, are not worth anything.

§ 4.1. In order to evaluate the problems related to P.L.I., we should analyse its legislative history and the Constitutional Court’s, the Government’s and the Parliament’s interventions on the matter.

P.L.I. was first introduced by the Government, through law decree 13 May 1991, no. 152, which introduced Article 4 bis in the Penitentiary Law (Ordinamento Penitenziario). Article 4 bis was meant to be applied to a limited category of crimes, and above all provided the collaborating detainees with the possibility to ask for alternative measures to detention before ordinary time limits- unless the detainees still had connection with criminal organisations.

After the Capacì bombing on 23 May 1992, the Government approved a new law decree, law decree 8 June 1992, no. 306. It completely changed the functioning of Article 4 bis. This is because it stated that unless detainees cooperated with justice, they could never obtain alternative measures to detention. Moreover, Article 41 bis of the Penitentiary Law was introduced in the same 1992 law decree. As it is known, this article introduced the special detention regime (so-called “harsh detention”, “carcer dio duro”). This special regime could, and still can, be applied solely by the Minister of Justice and uniquely to those indicted and convicted on the basis of the crimes provided for by Article 4 bis.

Once the Government’s law decrees had to be converted in laws, there was criticism during the parliamentary debates. The criticism was overridden by the fact that these were emergency and extraordinary measures caused by the extremely violent activities of the Mafia at that time.

The further developments show other problematic aspects connected to Article 4 bis. The number of crimes through which individuals can be condemned under Article 4 bis dramatically increased during the years. As a consequence, the crimes listed in Article 4 bis have become heterogeneous and very different from the original crimes present in Article 4 bis.

Even the Constitutional Court has underlined this contradiction many times. For example, in sentence no. 239 of 2014, § 3 and § 9, the Constitutional Court described the crimes listed in Article 4 bis as “notably heterogeneous” and “profoundly diversified”.

Indeed, we may observe that the current list of crimes present in Article 4 bis (1 comma) includes original crimes of terrorism and international terrorism, threat to the democratic system (“eversione dell’ordine democratico”), mafia-related criminal organisations (“associazione di tipo mafioso”), and the new crimes of slavery, child prostitution, child pornography, group sexual violence (“violenza sessuale di gruppo”), criminal organizations involved into the contraband of tobacco (“associazione per delinquere finalizzata al contrabbando di tabacchi lavorati esteri”) and lastly the crime of favouring illegal immigration (“favoreggiamento dell’immigrazione clandestina”).

This list of heterogeneous crimes should not be in the hands of the Parliament and the Government. And this poses compatibility problems with the Convention. Applying the regime of Article 4 bis to a series of such heterogeneous crimes causes compatibility problems with the principles of equality, reasonableness, proportionality and culpability. All these principles are definitively recognized as principles that belong to the European law tradition.
§ 4.2. The Constitutional Court's jurisprudence proves that there is a difficult co-existence between P.L.I. and human dignity. It is clear that when the Constitutional Court declared Article 4 bis unconstitutional - related to the non-exclusion of “impossible”, “irrelevant” and “irrecoverable” (“inesigibile”) cases of collaboration - it *de jure* and *de facto* handed back to the judge the role which had been stolen by the legislator.

Considering that the case-by-case evaluation which has been entrusted to judges is the jurisdictional projection of the principle of penal personal responsibility, the Constitutional Courts’ interventions mean that the main problem of P.L.I. - the prediction of the legislative automatism not related to the self determination of the persons and to their possibility of repentance (ravvedimento) - has to do with human dignity. In the light of the Constitutional Court’s approach, every person has to maintain the right that judges could sooner or later evaluate whether the initial purposes of the penalty are still actual and practical.

Therefore, the evaluation of the consequentiality between penalty and detention must be guaranteed. In conventional terms, we should discuss after how long and to whom the organ may entrust the review to. In any case, always excluding this review is not permitted. This is exactly what happens in the case of P.L.I. because the legislative automatism truly means that if you choose not to collaborate you will always be socially dangerous.

The fact that it is impossible to always exclude the review of the casual connection between the penalty and the detention, whatever form the review may take, is the most relevant principle, which characterises the jurisprudence of the Court when dealing with Life Imprisonment, starting with *Kafkaris v. Cyprus*, Grand Chamber, 12 February 2008 including the 2013 *Vinter* case and up to now with the *Hutchinson v. the United Kingdom*, Grand Chamber, 17 January 2017 case.

§ 4.3. The recent legislative developments regarding Article 4 bis and particularly P.L.I. are worth examining.

During the current Legislature, started on 15 March 2013, three bills concerning modifications of Article 4 bis, promoted by different Members, have been presented to the Parliament.(8)

In addition, the results of two Commissions have been published. The first Commission has been fostered by the Consiglio Superiore della Magistratura (*Conseil Supérieur de la Magistrature*), with Professor Glauco Giostra as its President, and the second Commission has been promoted by the Ministry of Justice, with Professor Francesco Palazzo as its President. Both Commissions proposed to modify Article 4 bis, in order to make relative the current absolute legislative presumption. The very clear aim of the Commissions’ proposals is to permit the judge’s evaluation of other elements in order to eventually prove re-education. This evaluation by the judge cannot involve collaboration only.

Furthermore, another significant initiative has been promoted by the Ministry of Justice. Many and various experiences and professional skills have been shared by the so-called initiative “Stati generali dell’esecuzione penale” (“États généraux de la exécution de les peines”), promoted by the Ministry of Justice just after the *Torreggiani and Others v. Italy* (unanimous) case, Second Section, 8 January 2013 (final 27 May 2013)(9). On 23 September 2015, a bill was presented to the Parliament by the Ministry of Justice in agreement with the Home Ministry and the Ministry for Economic Affairs. Several conclusions achieved by the “Stati generali dell’esecuzione penale” (“États généraux de la exécution de les peines”), many of which have been drafted in the form of a bill, have eventually been included in this bill, endorsed by the Government.

(8) On 26 March 2013 and on 4 April 2013 to the Senate, and on 4 May 2015 to the Chamber.

(9) More than 200 members, including University professors, judges, lawyers and other experts, were part of the “États généraux”, which organised their work around 18 key issues. The coordination has been assigned to a Committee of Experts chaired by Professor Glauco Giostra- including University professors, former President of the European Working Groups on penal issues, President of NGOs dealing with prison and dissemination of legality and the culture of legality.
Well, this bill was finally approved by the Parliament on 14 June 2017, and consequently it became law on 23 June 2017, no. 103(10). According to article 1, comma 85, paragraph e) of the bill, the Government has been given some relevant tasks: a) “the automatism and other instruments which block the individualisation of penitentiary’s treatment shall be removed” and especially b) “the obstacles to the alternative measures to the detention provided for the lifers shall be revised, apart from the exceptionally serious cases and in any case apart from the mafia and the international terrorism sentences”.

§ 5. Some brief remarks introducing P.L.I.’s de jure and de facto reducibility issue. The de jure and de facto criterion used by the Court raises two questions. Firstly, it appears not entirely convincing. If death penalty has been deleted from the European Union law and from the European Convention of Human Rights law regardless of whether the death penalty is de jure and de facto a reducible penalty, in the *Soering v. the United Kingdom*, Plenary, 9 July 1978 case, death penalty was even unanimously evaluated in breach with Article 3 of the Convention with regard to the so-called “death row phenomenon”, which is the inhumane and degrading time detainees wait for their death.

Secondly, using the de jure and de facto criterion with regard to P.L.I. appears very complicated. We may discuss the de jure reducibility of P.L.I. in one and very limited sense seeing the collaboration with justice(11). However, the de facto reducibility of P.L.I. is problematic as it would entail an obligation to collaborate with justice, an obligation that is a violation of human dignity. Indeed, if a right shall be practically safeguarded and not theoretically safeguarded, how could we possibly avoid linking P.L.I. to inhumane and degrading penalty?

Another point should be added. The de jure and de facto criterion has always been used by the Court in order to practically verify the mode of operation of what abstractly provided for by the legislator. For example, this criterion has been used with reference to the Life Imprisonment and the pardon power. The de jure reducibility of Life Imprisonment thorough the pardon power is not enough. Whether or not lifers have effectively been pardoned should be considered.

In the P.L.I. case, this de jure and de facto comparison is not possible. There is a legislative automatism with leaves no choice. If a person decide not to collaborate with justice he is always dangerous which means that (pardon and) alternative measures to detention are excluded(12).

Data on how many individual have decided to collaborate with justice have never been provided. Yet, we do have data on the number of lifers serving under P.L.I. According to the Minister of Justice’s 30 September 2016 data, 72.5% of lifers serving P.L.I., so 1,216 lifers out of 1,678(13).

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(10) A special instrument (so-called “questione di fiducia”) was used by the Government in order to obtain the final approval of the bill. If the bill is not approved by the Parliament the Government shall resign.

(11) In this argumentation, the impossible, irrelevant or irrecoverable cases of collaboration with justice are irrelevant. In any case, we underline that Life Imprisonment is compatible with the Italian Constitution because the conditional release is governed by the judge, and not by the Ministry of Justice. This is the unequivocal statement declared by the Italian Constitutional Court with sentences no. 204 and no. 264 of 1974. Therefore, Life Imprisonment cannot be considered de jure reducible thanks to the power of pardon held by the Head of State. In any case, P.L.I. is not a de facto reducible penalty, since 1991 up to now no lifer serving P.L.I. has been pardoned. In this regard, sentence no. 200 of 2006 of the Constitutional Court is not useful because it resolved the problematic issue regarding the collaboration between the Ministry of Justice and the Head of State. Of course, it is theoretically possible that, using pardon, the resocialisation may be considered by the Head of State, however the subsequent situation would be very strange- the Head of State must “breach” the law, which established that only collaboration with justice allow detainees to ask for alternative measures to detention. The only possibility to consider P.L.I. de jure reducible is pardon for health reasons but the Court has just clearly declared that this is not sufficient to respect Article 3 of the Convention. The judge’s detention deferral for health reasons deserved the same considerations because any evaluation regarding dangerousness and resocialisation is completely absent.

(12) Even in the case the detainee shows adhesion to the resocialisation treatment, as it was pronounced by the Court of Cassation, First Section, 11 December 1991, judgement no. 4822. See previous note 11.

(13) The previous 12 October 2015 data were very similar. Out of 1,619 lifers, 1,174 of them served P.L.I., which means 72.5% of the total. The percentage was similar to the 2016 percentage but it is clear that the number of lifers serving P.L.I. has increased.
§ 6. Of course, in the Italian system, we have a lack of organs who can evaluate the person’s progress during the time spent serving under the P.L.I. regime. No one can evaluate if the original purposes of the sentence are still, after a certain period, lawful.

If the lifer serving P.L.I. lawfully decides not to collaborate with justice, he is socially dangerous by law. This automatism is decided by the legislator himself according to the type of crime (this is the so-called “author's penal law”, “diritto penale d’autore”) and it excludes any kind of evaluation by any kind of organ about the lawfulness of detention.

A judge may not evaluate a person’s dangerousness and re-education. He cannot do this in the absence of a collaboration with justice. All this is decided a priori by the legislator: if you collaborate you are not dangerous, so you can ask for alternative measures to detention, but if you do not collaborate you are dangerous, and you cannot ask for alternative measures to detention.

We should note that the reasons for non-collaboration, just like the reasons for collaboration, are diverse. Indeed, the reasons for non-collaboration could be the moral liberty to decide not to accuse anyone, the protection of one’s life, the safeguard of the life of one’s family, partners, acquaintances, and the possibility of being sentenced because of a judicial error.

What counts, juridically, is solely the type of crime a person is accused of or sentenced to and, as a consequence, the collaboration or the non-collaboration with justice. The reasons behind this choice are not considered and they may very well be the desire to fight against criminal organisations but they may also be the desire of vengeance or a mere plan.

This system appears to be in contrast with common experience- the so-called Id quod plerumque accidit: to consider that solely the lack of collaboration with justice means dangerousness is extremely arbitrary. This legislative automatism, with regard to P.L.I., transforms its juridical nature: formally speaking it is a penalty, substantially it operates like an abnormal and perpetual security measure.

We must ask ourselves if it is reasonable and compliant with the common experience to always consider dangerous a person who has explicitly dissociated himself from criminal organisations, publicly taking a stand against any type of criminality in favour of the law, showing their profound remorse towards the victims, and fulfilling all obligations that derive from the crime.

We should ask ourselves, on the contrary, if collaboration with justice can be the only way through which alternative measures to detention can be requested by lifers serving P.L.I., especially considering that an individual could choose to collaborate without demonstrating any understanding of the gravity of their crimes and without showing any remorse for the damage caused to the victims and their families. An individual may choose to collaborate with justice in order to benefit from alternative measures to detention and then resume one’s criminal activities.

The only way to face these problems it to give judges the possibility to evaluate whether or not an individual is really dangerous and the effects of re-education treatment. In this way, the judge's institutional function will be restored, as it cannot be usurped by a legislative choice which is questionable on the basis of the common experience.

§ 7. Just as we have stated, precedents do not exist with regard to P.L.I. However, in the unanimous Trabelsi v. Belgium (Fifth Section, 4 September 2014, final 16 February 2015) decision, where referral to the Grand Chamber was rejected, the Court went so far as to state (§ 137) that “no lengthy disquisitions” were necessary in order to determine whether or not a regime with similar aspects to P.L.I. clearly breached Article 3, according to the standards stated in the Vinter case and then established in the Court’s jurisprudence.

This was said when evaluating the possibility to consider whether or not Life Imprisonment in the United Stated (federal level) was de jure and de facto reducible, based on the judge’s power to evaluate the lifers’ cooperation with justice, so-called substantial assistance.

Considering that the Court took this peremptory position (“no lengthy disquisitions”) when evaluating systems where judges still had the effective and practical choice to reduce the detainee’s Life...
Imprisonment Without Parole (LWOP), we should recognise that the Court should take the same position, at the very least, when analysing a regime which excludes the judge’s evaluation which is granted in the United States (federal level). We are talking about the P.L.I. regime of course.

Only the pardon and the early release for health reasons remain in the case a lifer serving the LWOP chooses to not cooperate with justice. Considering the case a lifer serving P.L.I. chooses to not collaborate with justice, “no lengthy disquisitions” are required to show that the conclusion is the same: pardon and early release for health reasons are the only remaining possibilities(14).

§ 8. States have positive obligation to guarantee that the penitentiary treatments are consistent with the function of resocialisation. This function’s fundamental importance has long been highlighted by the Court, especially in the Dickson v. the United Kingdom, Grand Chamber, 4 December 2007 landmark case.

It has also been emphasised by the jurisprudence of many constitutional courts. For example, as underlined by V’inter (respectively, §§ 69-71 and § 72), the German Federal Constitutional Court and the Italian Constitutional Court recognise this.

According to judgment no. 313 of 1990 (§ 8) delivered by the Italian Constitutional Court, the resocialisation was defined as “a principle which has now become part of the European legal culture patrimonium, even though it can be differently outlined”.

In the case of P.L.I., the lack of collaboration with the justice always excludes the possibility to gain any alternative measures to the detention. So, there is a breach of the two fundamental principles of the penitentiary treatment which have been underlined by the Council of Europe’s provisions and by the Court’s jurisprudence, the most recent one was Khoroshenko v. Russia, Grand Chamber, 30 June 2015 case in which the Court took an unanimous decision in favour of the violation of Article 3.

These principles are individualisation and progressiveness of the penitentiary treatment.

In the first case, regarding all lifers subject to P.L.I., the treatment takes place only inside prisons(15), without considering whether or not the detainees may be socially dangerous, because this is assumed by non-collaboration.

In the second case, all alternative measures to detention are always denied. Therefore, not only is the conditional release denied, not only is semi-liberty denied, but also leave permissions are denied. Leave permissions are the very first instruments useful to maintain family’s and social’s bonds and to satisfy all interests and activities useful to a person’s resocialisation. Denying leave permissions means denying the attribution of any relevance to the progressiveness of the treatment because there will never be resocialisation. The detainees will never be allowed to spend one minute with their families outside prison walls(16) or for example to University in order to discuss their dissertation(17).

This situation, which goes on and on throughout the whole detention, and throughout the individual’s whole natural life in the case of P.L.I., seems extremely unreasonable considering that it does not permit

(14) See previous note no. 11.
(15) The treatment may only get worse through the application of the special regime provided for by Article 41 bis.
(16) The Italian law does not provide for provisions allowing privacy visits. In many other European States, the situation is considerably different. In Italy, as provided for by the law, the visits shall happen under visual penitentiary police control, even in the “green zones” inside the prison, which are under video-surveillance. We can underline other five limitations in order to consider some additional restrictions regarding Article 4 bis and lifers serving P.L.I. 1) If nothing is established in the specific act by which the Parliament can approve the “general pardon” (indulto), all lifers have been excluded to it by the Court of Cassation jurisprudence. 2) During the pre-trial detention work outside prison is banned with regard to persons charged with the crimes listed in Article 4 bis. 3) Furthermore, if a sentence is based on the crimes listed in Article 4 bis (I comma) visits and phone calls are restricted. 4) A fourth consequence is that if the sentence is based on the crimes listed in Article 4 bis (I comma) the detainee is mandatorily placed in special prison sections (High-Security Sections, Sezioni di Alta Sicurezza), specifically in those with more restrictions (High-Security Sections 1, Alta Sicurezza 1). 5) Finally, a fifth effect is that the open cells regime (custodia aperta) is always banned.
(17) The judge could grant the “permission of necessity” (“permissio di necessità”), which nevertheless is not linked to the resocialisation. As provided for by Article 30 of the Penitentiary Law, to obtain “permission of necessity” an eminent threat to life regarding one familiar or an exceptional event of particular gravity shall be demonstrated. If the judge (correctly) decides to deny the necessity permission, the only useful way to permit the detainee’s graduation discussion may be transferring the evaluation commission into prison.
to take into account, in any way, the detainee’s behaviour throughout the years spent in prison. For example, if a person is condemned to P.L.I. at the age of twenty and does not collaborate with justice, he will have to spend the rest of his days in prison, and he will not even be able to leave prison for one hour through a leave permission.

If the penitentiary authority submits positive reports, these are not going to be of any importance. The hours spent working, studying or actively participating in any other activities in prison will all be wasted, as if they had been accomplished for nothing, because they will not be taken into consideration and will not have any relevance. The same is for the cases in which a detainee serving P.L.I. decides not to work in prison, not to participate to any treatments’ activities, does not have a regular conduct and does not show any signs of repentance. Every judgment concerning how detainees have spent time in prison is blocked by the choice of not collaborating.

The only parameter useful “to judge” dangerousness and re-education is whether or not the detainee collaborates with justice. This is why stating that judges can truly judge is false: as we have seen, there is an actual legislative automatism, which judges cannot do anything but respect. If the detainee chooses not to collaborate he is dangerous. Hence, even if he could be re-educated alternative measures to detention shall be denied.

The function of resocialization is thus denied to its very roots. Even the other penalty’s functions are very problematic compared to P.L.I. as we could never consider that this penalty pursues any legitimate goal worth pursuing such as the retributive function interpreted in the classical sense. P.L.I. cannot be considered to be a “just” penalty which the detainee deserves on the basis of his crime, considering that a “just” penalty should completely ignore the detainee’s subsequent behaviour in prison. The retributive function, interpreted in the modern sense, is not upheld either. P.L.I. may not be proportional as its length does not depend on the crime committed. The special negative prevention is not respected either, because this legitimate penalties’ function shall consider only the social dangerousness, not the choice not to collaborate. Finally, another penalty’s purpose that is not respected is obviously - as we have just underlined - the scope of resocialisation, considering that society should readmit a person re-educated, not a person evaluated by judges after the person’s choice to collaborate.

It is therefore very difficult, when analysing the objectives of a penalty, to understand which is the objective of P.L.I. as the only objective which is truly pursued has, in reality, to do with nothing more than a pronounced criminal policy aim that is certainly deserving protection but is alien to the legitimate aims a penalty may pursue.

So, the only purpose of P.L.I. would be for it to serve as a deterrent. However, as demonstrated in the Tyre case since 1978, this is surely incompatible with the respect of human dignity because human beings cannot be used as mere instruments. In the Italian law, the right of lifers serving P.L.I. to ask whether or not the detention is still lawful is completely ignored in favour of upholding certain objectives which have to do with criminal policy.

§ 9. P.L.I.’s main problem re-emerges: the legislator consents the detainee only to internally amend one’s way as there is no possibility whatsoever to evaluate one’s re-education, except in the case of collaboration.

This was not even allowed in one of the most difficult cases evaluated by the Court- Hutchinson v. the United Kingdom. The Ministry could have at least considered early release of a person whose detention did not have any other legitimate purpose. This is an exceptional event but the whole lifers’ detention could hypothetically be evaluated.

However, in Italy it could never be realized. No one - either the Ministry or the judge - may evaluate the possibility of early release if detention does not have any other legitimate purposes with regard to the
initial penalty aim. P.L.I. is truly a hopeless penalty, a ‘no escape’ penalty (18). The only thing coming out “from the outset of the sentence” is that to leave prison - before death in the case of lifers serving P.L.I. - a person has to choose to collaborate with justice.

It is not coincidental that no other State Party of the Convention has a similar regime to P.L.I., even if extremely grave crimes, such as terrorism and international terrorism, have to be increasingly taken into consideration(19).

§ 10. We should consider that even if P.L.I. were applied to a small number of people, it would still be problematic. If we take a look at the statistics provided by the Minister of Justice, we may observe that on 30 of September 2016, 1,216 detainees, out of a total of 1,678 lifers, were condemned to P.L.I. That means that ¼ of lifers are serving P.L.I.

This shows two things. The first is that problems related to P.L.I. concern a vast number of people. The second is that this is exactly why this issue should be judged by taking a principle-based approach, which must inevitably be taken when dealing with human dignity, as the Court clearly demonstrated in the Bouyid v. Belgium, Grand Chamber, 28 September 2015 case, one of the most recent cases in which the Court explicitly reaffirmed what it had stated in the Tyier 1978 case.

Even if we allowed the State to have a certain margin of appreciation, we would have to consider that the rule guaranteed by Article 3 is absolute and non-derogable, as stated by the Court’s jurisprudence during the years. Therefore, the detainees serving under the regime of P.L.I. (and also with reference to any other members of society) should be guaranteed the possibility for the penalty to be, one day or another, re-evaluated on the basis of their actual behaviour, which cannot be assumed to be dangerous just because the detainee does not collaborate with justice.

Otherwise, this would be as if there were, in Europe, a penalty until death, in many ways similar to the death penalty, which is based on the judgment that the detainee will always be dangerous, and that this dangerousness once sentence has been delivered may never be re-evaluated by a judge or any other organ.

P.L.I. is a penalty whose aim is to eliminate people who do not collaborate with justice from civil society as these detainees will be considered dangerous. Even though P.L.I. does not obviously eliminate these detainees physically, it appears very difficult to understand substantial differences between death penalty and penalty until death- except for collaboration.

This would explain why hundreds of lifers serving P.L.I. have decided to send a letter to Professor Mauro Palmi, the National Guarantor for the Rights of Detainees. The letter provocatively proposed to present a bill that would ensure the introduction of euthanasia in Italy. We must note that they presented the letter with the intention of benefiting from the practice of euthanasia. Although extreme, this initiative truly shows how inhumane and degrading P.L.I. is. The National Guarantor could do nothing but to take the initiative into consideration, observing that this gesture demonstrated that there is a contradiction between Article 3 of the Convention and P.L.I. which does not provide for any right to hope(20).

(18) P.L.I. shows apparent violation of the foreseeability principle, provided for by Article 7 of the Convention. Indeed, the judge can post sententiam decide that the crime was committed to facilitate criminal organisations’ activities. On P.L.I. as non-reducible perpetual penalty, see amplus C. MUSUMECI, A. PUGIOTTO, Gli ergastolani senza scampo, 109-123.

(19) See Life Imprisonment and Human Rights, Edited by DIRK VAN ZVYL SMIT and CATHERINE APPLETON, Oxford and Portland, Hart, 2016. The Spanish Life Imprisonment is different from P.L.I. Article 72 § 6 of the Penitentiary Law was introduced by the Ley Orgánica 7/2003. Article 72 § 6 can be applied only to the crime of terrorism and the crimes committed “en el seno” of criminal organisations, and the breakup of the previous activities “en el seno” of criminal organisation cannot be proved solely by the collaboration with justice. The judges could evaluate other behaviours, as the repudiation of any violent activities and the abandoning of any form of violence. If the detainee asks for pardon, this could be considered by the judge. As it is known, Life Imprisonment was provided for by the following Ley Orgánica 1/2015.

(20) See the official statement issued on 12 April 2017 by the National Guarantor for the Rights of Detainees, and published on the Guarantor’s internet site.
The European Convention for the Protection of Human and Fundamental Freedoms and the jurisprudence of the European Court of Human Rights have demonstrated that human dignity cannot be gained thanks to merits or eliminated because of a person’s demerits.

This principle is breached by Perpetual Life Imprisonment- a hopeless penalty that contrasts with human dignity that is a cardinal feature of the conventional system of the protection of human rights.

Human dignity cannot be violated and must be respected and protected, as recognised in Article 1 of the Charter of Fundamental Rights of the European Union and as admitted through the common constitutional traditions of the States Parties of the European Convention, and through decades of long jurisprudence of the European Court of Human Rights, whose main purpose is “ensuring that the essential minimum standards are respected everywhere” (21). This clearly includes human dignity that is essential and indispensable.

§ 11. We may conclude our Amicus Curiae by underlining that the Court, in its last case dealing with Life Imprisonment, Matiosaitis and Others v. Lithuania, Second Section, 23 May 2017, resolved the issue by using the same words used by Judge Ann Power-Forde in her concurring opinion in the Vinter case. The Matiosaitis and Other case (§ 180) confirmed the concept expressed by Judge Ann-Power Forde with reference to the right to hope:

“The Court reiterates that the mere fact that a prisoner has already served a long term of imprisonment does not weaken the State’s positive obligation to protect the public, and that no Article 3 issue could arise if a life prisoner continues to pose a danger to society. This is particularly so for those convicted of murder or other serious offences against the person (…). However, it equally considers that even those who commit the most abhorrent and egregious of acts, nevertheless retain their essential humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, some day, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and to do that would be degrading”.

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(21) See the speech given by the President of the Court, Judge Guido Raimondi, during the Treaties of Nijmegen Medal award ceremony (18 November 2016).