



BRILL

Case Notes



A New Technique for Implementing ECtHR Judgments: Will It Work?

The Corte Costituzionale “Urges” the Houses to Reform the Ergastolo Ostativo

Note to: Corte Costituzionale, 15 April 2021, Order No. 97

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Abstract

In this much-awaited ruling (Order No. 97 of 15 April 2021), the *Corte Costituzionale* had to decide on the constitutionality of the existing prohibition on release on parole for life prisoners convicted for Mafia-related crimes, in the absence of any cooperation with justice (*ergastolo ostativo*). This form of life imprisonment without prospect of release had already been deemed in contrast with Article 3 of the European Convention of Human Rights (ECHR) in the judgment rendered by the Strasbourg Court in *Viola v. Italy* (No. 2): on that occasion, the ECtHR invoked a legislative reform of the *ergastolo ostativo*. In the order at hand, the *Corte Costituzionale*, instead of formally declaring the unconstitutionality of relevant provisions, resorted to a recently crafted technique to postpone the hearing (until 10 May 2022) so as to give the Houses time to pass new legislation and fix the “systemic problems” outlined by the Strasbourg Court. This contribution aims at offering initial reflections on the use of such technique as an instrument for ensuring the proper implementation of ECtHR judgments in the domestic legal order. For this purpose, after an overview of the ECtHR case law in the field of *ergastolo ostativo*, it will provide an analysis of relevant proceedings before the Committee of Ministers *qua* monitoring body of the execution of ECtHR judgments.

Finally, a critical appraisal of the reasons militating in favor of and against this technique, from the standpoint of the respect of human rights, will ensue.

Keywords

implementation of ECtHR judgments – life imprisonment without prospect of release – human rights – systemic problems – principle of subsidiarity

1 Abstract of the Decision

The Italian legislation does not allow individuals convicted for Mafia-related crimes and sentenced to life imprisonment to qualify for release on parole absent any cooperation with justice, as that individual is presumed dangerous irrespective of any progress made in their rehabilitation. Under this regulation, life imprisonment is irreducible *de facto*. Such form of punishment has repeatedly been deemed inconsistent not only with the Constitution, but also with the European Convention on Human Rights (more precisely with the right not to be subject to inhuman or degrading treatment). This notwithstanding, a merely “demolishing intervention” by the Constitutional Court, resulting in the elimination of specific provisions of the relevant legislation *qua* contrary to the Constitution, without the proper inception of new provisions and the modification of existing ones, may jeopardize the delicate balance between the need to fight Mafia-type criminality and the individual’s rehabilitation. Given that choices regarding penal policy inherently pertain to the Legislative, and in the name of institutional cooperation between constitutional bodies, the Court decided to postpone the hearing and adjourn it to 10 May 2022, so as to give the Houses adequate time to rule on the matter.

2 Key Passages from the Ruling

(Paragraph 4) “From the ECtHR’s Grand Chamber Judgment of 12 February 2008, *Kafkaris v. Cyprus* to the recent *Viola v. Italy (No. 2)* Judgment of 2019, the Strasbourg Court has affirmed that the compatibility of life imprisonment without prospect of release with the ECHR, and in particular with Article 3 (which prohibits the subjection to ‘torture’ or to ‘inhuman or degrading treatment or punishment’), must respect certain conditions.

Leaving aside some tendencies to lower the guarantees of concreteness and predictability of the instruments for the release of ‘re-educated’ offenders

(as exemplified by the judgment rendered by the ECtHR's Grand Chamber in *Hutchinson v. United Kingdom*, 17 January 2017, which deemed sufficient the existence of political and administrative instruments of release based "on compassionate grounds"), the ECtHR has made it clear that *in abstracto* life imprisonment is not in itself a violation of the dignity of the person and therefore it does not constitute inhuman or degrading treatment, provided that legal mechanisms are in place that may practically interrupt detention and reintegrate deserving offenders into society.

As a matter of fact, this is encapsulated by the idea whereby life imprisonment needs to be 'reducible', both *de jure* and *de facto*. This result may be attained through the provision of rules imposing a minimum of years of effectively serving the sentence before being allowed access to release mechanisms (see, among others, *Vinter v. United Kingdom*, 9 July 2013; *Trabelsi v. Belgium*, 4 September 2014; *Murray v. the Netherlands*, 26 April 2016; *T.P. and A.T. v. Hungary*, 4 October 2016)".

(Paragraph 9) "Furthermore, it must be considered that, in the present judgment, key components of the norms on the fight against criminal organizations are suspected of constitutional illegitimacy: both with regard to the type of crime (crimes committed availing themselves of the conditions of Art. 416-bis of the Criminal Code, or with the purpose of facilitating the activities of the associations provided for therein), and with reference to the entity of the inflicted sentence (life imprisonment), as well as in relation to the benefit at hand, namely release on parole, which leads to the extinction of the sentence. In such conditions, a merely 'demolishing' intervention by this Court could jeopardize the overall balance of the regulation under scrutiny, and, above all, the requirements of general prevention and collective security which it pursues to counteract the pervasive and deep-rooted phenomenon of Mafia-related crimes. [...]

The present case is strictly connected with delicate matters of penal policy: what is at stake are choices regarding the continuing presumption of dangerousness for life prisoners. As such, those choices are up to the Legislative power and, to the extent that those are not constitutionally obligated, for this Court to impose one choice would exceed its inherent powers. [...] In the light of the peculiarities of the criminal phenomenon under consideration, an immediate declaration of constitutional illegitimacy of the provisions at hand, even if supported by the abovementioned reasons, could give birth to inconsistencies and contradictions in the normative framework as a whole, as well as undermine the current importance of cooperation with judicial authorities.

It is no coincidence that the European Court of Human Rights itself, in the *Viola* Judgment, stated that the legislation in question poses 'a systemic problem', thus requiring Italy to amend it, 'preferably through the initiative of the Legislative'".

(Paragraph 11) “For all these reasons, the need for institutional cooperation between constitutional bodies requires this Court to use its powers to manage the constitutional process and postpone the proceedings under way. Therefore, it decides to schedule a new hearing on the questions of constitutionality under consideration for 10 May 2022, giving the Parliament’s Houses adequate time to deal with the matter. In the meantime, the proceedings before the referring judge will remain suspended. Indeed, it is primarily up to the Legislative to seek a balance between the competing interests at issue, also in light of the reasons of incompatibility with the Constitution currently exhibited by the legislation censured. On the other hand, this Court’s task is to verify *ex post* the conformity with the Constitution of the Houses’ actual conduct (Orders No. 132 of 2020 and No. 207 of 2018)”.

3 Comment

3.1 Preliminary Remarks

In the case under analysis, the *Corte Costituzionale* was requested to rule on the constitutionality of Sections 4-*bis* and 58-*ter* of Law No. 354/75 (*Legge sull’ordinamento penitenziario*, Prison Administration Act, hereinafter PAA) and Article 2 of Decree Law No. 152/91 as converted by Law No. 203/91, to the extent that they exclude the possibility of release on parole for a person sentenced to life imprisonment for Mafia-related crimes, provided that that person does not cooperate with justice. The abovementioned crimes are those committed by taking advantage of the conditions laid down in Article 416-*bis* of the Criminal Code, or with a view to facilitating the activities of the associations referred to therein.

Such regime of life imprisonment is domestically referred to as *ergastolo ostativo*: individuals convicted of crimes established by law (which are not limited to Mafia-related ones) are not admitted to various release mechanisms – such as release on licence, alternatives to custody, and, especially, release on parole – unless they cooperate fruitfully with judicial authorities. In other words, for those individuals who choose not to cooperate, any prospect of release remains unavailable and life imprisonment turns irreducible *de facto*. Incidentally, it is worth noting that individuals convicted for those Mafia-related crimes are often subjected also to the so-called ‘Section 41-*bis*’ regime of imprisonment (*carcere duro*), which further restricts prisoners’ rights during

1 As to the compatibility of this regime of imprisonment with the ECHR, see *inter alios Provenzano v. Italy*, Application No. 55080/13, Judgment of 25 October 2018, paras. 147 ff.

detention (including release mechanisms) with the aim to hinder contact with members of the criminal organization, both within and outside prison.¹

The underlying proceedings may be summarized as follows. The *Corte di Cassazione* (acting as referring judge) had been seized by an individual sentenced to life imprisonment for Mafia-related crimes, who had already served 26 years of his sentence, that is the minimum to qualify for release on parole pursuant to Article 176, co. 3, of the Criminal Code. Given the type of crimes and the absence of any cooperation with the justice system on the part of the convicted, the competent judge responsible for the execution of sentences (*magistrato di sorveglianza*) had been precluded from scrutinizing any progress made by the life prisoner towards his rehabilitation, in particular with regard to “proved repentance” (*sicuro ravvedimento*) as requested by Article 176. According to the *Corte di Cassazione*, the legislation under scrutiny established an irrefragable presumption of dangerousness: the absence of cooperation with justice is equated to the continuing dangerousness of the individual convicted for a certain category of crimes and serving a life sentence, and any progress made towards rehabilitation cannot even be taken into account by the *magistrato di sorveglianza*. The nature of such presumption raised several doubts of constitutionality, namely with regard to Article 3 (principle of equality), Article 27, co. 3 (principle of rehabilitation), and Article 117, co. 1 (to the extent that it gives application to Article 3 ECHR in the domestic legal order) of the Constitution.

Following the referral by the *Corte di Cassazione*, the *Corte Costituzionale* decided not to declare the unconstitutionality of the impugned provisions for the time being, but to postpone the hearing to 10 May 2022 so as to give the Parliament’s Houses appropriate time to pass new legislation and ensure a coherent regulation of the matter. By so doing, the *Corte Costituzionale* made use of its inherent powers to administer constitutional justice, by resorting to

2 The issue of whether this kind of decisions, while formally orders, are substantially judgments (in that they contain a clear ruling on the unconstitutionality of the impugned provisions, whose effects are merely postponed), is debated extensively by constitutional lawyers. See ROMBOLI, “Il nuovo tipo di decisione in due tempi ed il superamento delle ‘rime obbligate’: la Corte costituzionale non terza, ma unica camera dei diritti fondamentali?”, *Foro italiano*, 2020, col. 2565; PINARDI, “La Corte ricorre nuovamente alla discussa tecnica decisionale inaugurata col caso Cappato”, *Forum di Quaderni Costituzionali*, 4 August 2020; RUGGERI, “Venuto alla luce alla Consulta l’ircocervo costituzionale (a margine della ordinanza n. 207 del 2018 sul caso Cappato)”, *Consulta Online*, 20 November 2018. As my reflections on this topic are the result of extensive and thought-provoking discussions with Giovanni Aversente, Ph.D. student at the University of Pisa and fellow colleague at the University of Florence, I can but thank him – yet in the limited space of this footnote – for the time he was so kind to share with me during the drafting process.

a recently-crafted procedural technique to elicit the Houses to exercise their powers.² The decision at hand is noteworthy from a number of perspectives, first and foremost from the standpoint of the Italian constitutional system and, in particular, of the relationship between constitutional bodies. The order under scrutiny raises important questions pertaining to the implementation of the ECtHR's judgments in the Italian legal order. This case-note will delve into the latter.

3.2 *The Case Background: The Viola v. Italy (No. 2) Judgment and its (Intended) Effects on the Italian Legal System*

Before turning to the most salient features of Order No. 97/2021, it seems appropriate to briefly recapitulate the ECtHR's case law on life imprisonment without prospect of release and to test the Italian *ergastolo ostativo* against it. The order itself contains numerous references to judgments rendered by the ECtHR on this form of punishment, which is held to be contrary to Article 3 of the ECHR to the extent that it deprives the convicted person of any hope to someday regain freedom and, thus, of their inherent dignity.³

The ECtHR's jurisprudence on this matter has grown extensively in the last decades, and the topic of life imprisonment has gained traction also before other human rights monitoring bodies (at both universal and regional levels).⁴ According to the ECtHR, all forms of life imprisonment that are not reducible, either *de jure* or *de facto*, qualify as inhuman or degrading punishment, in that they end up vanishing any effort that prisoners may make towards their own rehabilitation.⁵ While life imprisonment in itself has not been deemed in contravention with the ECHR,⁶ the Strasbourg Court has scrutinized the Italian *ergastolo ostativo* in the leading case of *Viola v. Italy (No. 2)* (hereinafter: *Viola*) and affirmed its contrast with Article 3 of the ECHR.⁷

In that case, the ECtHR held that subordinating access to early release mechanisms (such as conditional release, as in the case at hand) to cooperation with justice amounted to inhuman treatment. On closer inspection, the

3 See in particular *Vinter and Others v. the United Kingdom*, Applications No. 66069/09 and others, Judgment of 9 July 2013, para. 50 ff.

4 For more on this, see BERNAZ, "Life Imprisonment and the Prohibition of Inhuman Punishments in International Human Rights Law: Moving the Agenda Forward", *Human Rights Quarterly*, 2013, p. 470 ff.; MAURI, "Life Imprisonment Without Prospect of Release: Comparative Remarks from a Human-Rights Perspective", *DPCE Online*, 2019, p. 2479 ff.

5 See more extensively DOLCINI, "La pena detentiva perpetua nell'ordinamento italiano. Appunti e riflessioni", *Diritto penale contemporaneo – Rivista trimestrale*, 2018, p. 1 ff.

6 *Garagin v. Italy*, Application No. 33290/07, Decision of 29 April 2008.

7 Application No. 77633/16, Judgment of 13 June 2019.

breach of Article 3 of the ECHR stemmed from the Italian legislation's general insensitiveness to the actual *reasons* at the basis of the life prisoners' refusal to cooperate with the authorities. Put simply, the irrefutable presumption of dangerousness of non-cooperating prisoners ended up treating quite different situations alike. As a matter of fact, an individual may choose not to cooperate with authorities (e.g. to "name names") out of fear for their next-of-kin's personal integrity (for instance, because of reprisals on the part of the Mafia-type organization). While progressed in his or her path towards rehabilitation, this individual would be treated in the same way as prisoners deciding not to cooperate due to their continuing alliance with the organization. Evidently, this argument resonates with the one submitted with the *Corte Costituzionale* and based on the principle of equality as per Article 3 of the Constitution.

Rather than focussing on the ECtHR's reasoning on the contrariness of the *ergastolo ostativo* to the ECHR, it is more interesting to look at the consequences that the *Viola* judgment has produced on the Italian legal order. Pursuant to Article 46 of the ECHR, States Parties to the ECHR undertake to abide by the (final) judgments rendered by the ECtHR in cases they are parties to. Due to the circumstance that, as illustrated above, the impugned events pointed to "structural deficiencies" of the Italian legal system (as confirmed by the number of pending cases on the same matter), the ECtHR was requested to indicate also *general* measures to the respondent State.⁸ However, the Strasbourg Court decided not to rule on Article 46, but rather it contented itself with arguing that Italy should set up, "preferably through the initiative of the Legislative", a global reform of the *ergastolo ostativo*. In particular, what needed to be dismantled and rethought entirely was the irrefragable character of the presumption of dangerousness, to be replaced by a system allowing the proceeding judges to take into account the actual situation of the prisoners and appreciate the reasons for their refusal to cooperate with justice *in concreto*.

In sum, the ECtHR refrained from indicating general measures in the operative part of the ruling, although the judgment clearly contains, in its reasoning part, a strong affirmation of the systemic problems underlying the Italian legal system.

3.3 *Implementing Viola: From the Supervision of Execution of ECtHR Judgments to the Corte Costituzionale's Order*

Order No. 97 of 2021 can be better understood by taking into account the current status of execution of the *Viola* Judgment. As is known, supervision of ECtHR judgments is incumbent upon the Council of Europe's Committee of Ministers (CM) pursuant to Article 46, para. 2, of the ECHR.

⁸ *Ibid.*, para. 141.

While often remaining outside the scope of scholarly investigation, proceedings before the CM may add useful elements to understanding how and to what extent ECtHR judgments are implemented domestically. Firstly, the Rules of the CM for the supervision of the execution of judgments establish that the CM shall consider communications not only from the “injured party” (that is, the applicant in favour of whom the ECtHR accorded just satisfaction and, if any, individual measures), but also from NGOs and other institutions that intervened in the proceedings before the Court or “whose aims and activities include the protection of human rights”.⁹ This means that virtually any actors meeting the (relaxed) requirements set forth by the Rules have a chance to file their own arguments with the CM, which are particularly useful when the case at hand discloses systemic problems. Secondly, unless the CM decides otherwise to protect “legitimate public or private interests”, documents filed to the CM, its agenda and relevant decisions are “accessible to the public”.¹⁰ The dialectic confrontation between the injured parties, the authorities of States and intervening actors has thus a practically unlimited audience, including – importantly – legal scholars. Thirdly, the CM must prioritize, in its agenda, the supervision of the execution of judgments in which the ECtHR identified “systemic problems”,¹¹ and thus likely to “give rise to numerous applications”.¹²

The execution of *Viola* has given birth to distinctively vivid proceedings before the CM. The Italian authorities filed an “Action Plan” on 7 September 2020, in which the Government argued that the *ergastolo ostativo* was undergoing a series of structural reforms domestically, by way of both legislation and constitutionality judgments. To this end, *Corte Costituzionale*’s Judgment No. 253 of 23 October 2019 was quoted: in that case, the *Corte* – yet without invoking *Viola* directly – ruled that the prohibition on prison leave pursuant to Section 4-*bis* and 53 PAA ran contrary to Articles 3 and 27, co. 3, of the Constitution.¹³ This judgment is relevant for both the individual measures that

9 Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, adopted by the CM on 10 May 2006 and amended on 18 January 2017, Rule 9.

10 *Ibid.*, Rule 8.

11 *Ibid.*, Rule 5.

12 Resolution Res(2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem, adopted by the CM on 12 May 2004.

13 For more on this, see also VIGGIANI, “Viola n. 2: la mancata collaborazione quale automatismo legislativo, lesivo della dignità dell’*ergastolano ostativo*”, *Diritti umani e diritto internazionale*, 2019, p. 646 ff.; MINERVINI, “*Viola v. Italy*: A First Step towards the End of Life Imprisonment in Italy”, *Italian Yearbook of International Law*, 2020, p. 217 ff.; MOTTESE, “*Ergastolo e diritti umani nella prospettiva del diritto internazionale ed europeo*”, *Diritti umani e diritto internazionale*, 2020, p. 55 ff.

Italy has to take vis-à-vis Marcello Viola's situation and, to a lesser extent, the general measures required to fix the underlying systemic problem: as a result of Judgment No. 253/2019, the applicant and all life prisoners in a situation like Viola's can now apply for prison leave (but not release on parole, which was at issue in *Viola* and in the case at hand). The Government also referred to the bill of reform of Section 4-*bis* of the PAA (so-called "Bruno Bossio") currently pending before the Houses.¹⁴ Importantly, with regard to this reform, "Nessuno Tocchi Caino" (an Italy-based NGO active in the field of protecting prisoners' rights) filed two submissions before the CM pursuant to Rule 9.2, voicing concerns at the current lack of progress regarding the bill.¹⁵

The applicant, the Government, and "Nessuno Tocchi Caino" all referred to the *Corte Costituzionale's* order under scrutiny today in their most recent communications.¹⁶ It was thus noted that, while the legislative process initiated in 2019 does not seem to be moving as rapidly as one may expect (given the structural nature of the violation ascertained as well as the importance of the impinged right, one from which no exception or derogation is allowed), Order No. 97/2021 has to be welcomed "with satisfaction as it provides further impetus and direction to the execution process".¹⁷ What is more, the CM considered that the Italian authorities are requested "to put an end to the violation of the applicant's rights and to guarantee non repetition of violations of Article 3" of the ECHR.¹⁸

This point is particularly interesting, as it echoes the well-known set of secondary obligations incumbent on States responsible for internationally wrongful acts, namely the obligation to cessation and that of offering appropriate assurances and guarantees of non-repetition. Those obligations have been codified by Article 30 of the Articles on the Responsibility of States for Internationally Wrongful Acts ("ARSIWA").¹⁹ While largely absent in ECtHR judgments, these

14 "Proposta di legge d'iniziativa della deputata Bruno Bossio", House of Deputies, Act No. 1951 of 2 July 2019.

15 Communication from an NGO (Hands OFF Cain), 27 April 2021, DH-DD(2021)466.

16 *Ibid.*; Communication from the applicant (Marcello Viola), 4 May 2021, DH-DD(2021)454; Communication from the authorities, 19 April 2021, DH-DD(2021)411.

17 Analysis of the Secretariat, 1406 CM-DH meeting (7–9 June 2021). See also the decisions adopted by the CM: "The Deputies [...] 4. noted with satisfaction in this connection that in April 2021 the Italian Constitutional Court, in accord with the European Court's judgment, called for a legislative reform of the existing automatic mechanism by which cooperation with the judicial authorities is a prerequisite for any evaluation of the convicted person's rehabilitation; noted further that a bill aimed at amending the relevant provisions has been pending before Parliament since 2019".

18 *Ibid.*

19 *Yearbook of the International Law Commission*, 2001, vol. II (Part II).

duties take flesh in the proceedings before the CM, the organ vested with the power to scrutinize execution measures more closely. It must be recalled that, some years ago, the CM invited the Court to identify, in its judgments, the individual and general measures that States must adopt to remedy a particular violation of the ECHR.²⁰ Traditionally, the ECtHR refrained from indicating specific measures, limiting itself to recalling that States are subject to the obligation to “choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures”, and so leaving a certain margin of appreciation as to *how* to remedy a particular violation.²¹ More recently, and also thanks to the impulse given by the CM, the practice of the ECtHR has changed: frequently now the Court identifies systemic problems of the national legal order and indicates, where appropriate, measures to be taken.²²

In light of all this, the order under scrutiny can be regarded as one step further in the direction of fixing a systemic problem of the Italian legal system, in line with both the ECtHR's judgment in the *Viola* case and the decisions adopted thus far by the CM in the supervision of the execution of judgments. In particular, by postponing the final ruling until May 2022 and “urging” the Houses to enact legislation to rectify the *ergastolo ostativo*, the *Corte Costituzionale* acted in harmony with the ECtHR, which had been the first to indicate that a legislative reform would be the best solution to balance all the interests at stake (essentially, the fight against Mafia-related crimes and the individual's rehabilitation).²³ According to some authors, though, the *Corte Costituzionale's* choice to postpone the declaration of unconstitutionality is, on the merits, questionable at best, as it ends up protracting the continuing violation of Article 3 ECHR without fixing what it has already identified as a systemic problem.²⁴ To others, the chances of a timely and appropriate legislative intervention – also on the basis that the Houses were unable to timely intervene in the two cases where the *Corte Costituzionale* has adopted this technique so far – are quite slim.²⁵

20 Resolution Res(2004)3, cit. *supra* note 12, I.

21 *Scozzari and Giunta v. Italy*, Applications Nos. 39221/98 and 41963/98, Judgment of 13 July 2000, para. 249.

22 CANNONE, *Violazione di carattere sistemico e Convenzione europea dei diritti dell'uomo*, Bari, 2018; SACCUCCI, *La responsabilità internazionale dello Stato per violazioni strutturali dei diritti umani*, Naples, 2018.

23 *Viola v. Italy* (No. 2), cit. *supra* note 7, para. 141.

24 DOLCINI, “L'ordinanza della Corte costituzionale n. 97 del 2021: eufonie, dissonanze, prospettive inquietanti”, *Sistema Penale*, 25 May 2021; MENGOLZI, “Un passo in avanti e uno indietro: la Consulta sull'ergastolo ostativo opta per il rinvio con monito”, *Diritti Comparati*, 20 May 2021.

25 GALLIANI, “Il chiaro e lo scuro. Primo commento all'ordinanza 97/2021 della Corte Costituzionale sull'ergastolo ostativo”, *Giustizia Insieme*, 20 May 2021.

While those concerns are perfectly understandable, in our view there are two interesting (and intertwined) aspects of Order No. 97/2021 that have to be highlighted. First, this recently-adopted technique may be justified as a straightforward application of the principle of subsidiarity, which by means of Protocol No. 15 to the ECHR has recently made its way to the Preamble.²⁶ If States have the “primary responsibility” to secure the rights enshrined in the ECHR, and provided that they feel the need to restate that “in doing so they enjoy a margin of appreciation”, then Italy *as a whole* is allowed to find the best way to implement the ECHR. By urging the Houses to enact new legislation, two constitutional bodies – each one on the basis of their constitutional prerogatives – are involved in fixing systemic problems of the domestic legal order. The *Corte Costituzionale* itself refers to the “institutional cooperation between constitutional bodies” as basis for its decision:²⁷ while invoked in its domestic dimension, such reference can be justified *also* at the ECHR level. Yet, the ultimate responsibility for securing the rights contained in the ECHR lies with Italy: if its organs prove to be incapable of fixing the systemic violation as ascertained both by the ECtHR and the CM, the subsidiarity/margin of appreciation argument will fade away. States may enjoy a margin of appreciation as to the choice of *means*, but not as to the *results*, which have to be in keeping with ECHR obligations.

Second, Order No. 97/2021 can be appraised also as an instrument for ensuring the expansion of ECtHR judgments *beyond* the particular case. As illustrated above, the ECtHR in *Viola*, while refraining from ordering the adoption of specific general measures, clearly identified a systemic problem in the Italian legal system.²⁸ A point deserving further inquiry (but going beyond the space of the present note) is on which legal basis an obligation to adopt general measures – even if not indicated by the ECtHR in its judgment or by the CM afterwards – can be grounded. Surprisingly, on one occasion the *Corte Costituzionale* traced this duty back not to the ECHR, but to the Italian legal order, holding that ECtHR judgments may be expanded beyond a particular case even if the Court does not indicate general measures, as in those cases it is incumbent on the constitutional organs of the Italian state, “each one rigorously respecting their own competences”, to put an end to ECHR violations.²⁹

26 Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, 24 June 2013, CETS No. 213, Article 1. The Protocol will enter into force on 1 February 2022.

27 Order No. 97 of 15 April 2021, para. 11.

28 SACCUCCI, *cit. supra* note 22, p. 42 ff.

29 *Corte Costituzionale*, Judgment No. 210 of 3 July 2013, para. 7.2.

This last contention seems perfectly applicable to the case under scrutiny: the *Viola* judgment clearly suggested the adoption of measures going beyond the particular case and requiring joint action by different constitutional bodies. One may object that, if the ultimate goal was to ensure the extension of *Viola*'s effects beyond that particular case, the *Corte Costituzionale* could have just contented itself with declaring the unconstitutionality of the impugned provisions: this would surely have been the most straightforward way to put an end to the violation.³⁰ However, the *Corte Costituzionale* decided to listen the ECtHR... literally, and thus to reiterate the invitation to a legislative reform of *ergastolo ostativo*. In our view, this is Order No. 97/2021's most noteworthy feature: the need to fix the underlying systemic problem in the long run has been tempered with the need to ensure the proper balancing of all interests at stake, one which only a comprehensive legal reform would ensure.³¹

4 Concluding Remarks

Order No. 97/2021 marks the third time, in about two years, that the *Corte Costituzionale* employs a new technique for urging the Houses to enact new legislation to remove unconstitutional provisions. So far, however, the *Corte*'s strategy has been all but successful: in both precedent cases, orders have been followed by judgments declaring the unconstitutionality of impugned norms as a result of the Houses' inaction.³² Taking into account the substantial lack of progress of the bill reforming the *ergastolo ostativo*, one may realistically anticipate an analogous denouement also with regard to the case at hand.

Admittedly, the order will leave some commentators skeptical and unsatisfied – and understandably so. The *ergastolo ostativo*, as regulated today, has been found in sharp contrast not only with the Constitution, but also with

³⁰ For instance, that is what happened in respect of the norms prohibiting the establishment of trade unions by members of the armed forces: see *Corte Costituzionale*, Judgment No. 120 of 11 April 2018. For a different case, equally telling about the new tendencies emerging within the *Corte Costituzionale* to modulate the effects of its rulings, see *Corte Costituzionale*, Judgment No. 41 of 25 January 2021 (deferring the declaration of unconstitutionality until the expiry of the deadline for the reform of justice as per Article 21 of Legislative Decree No. 116 of 13 July 2016, that is 31 October 2025).

³¹ MAURI, "La prevista censura dell'ergastolo ostativo non andrà in onda: al suo posto, un 'invito al legislatore'", SIDIBlog, 27 May 2021.

³² *Corte Costituzionale*, Order No. 207 of 24 October 2018, and Judgment No. 242 of 25 September 2019 (for a case regarding the criminal provision on assisted suicide); Order No. 132 of 9 June 2020, and Judgment No. 150 of 22 June 2021 (for a case regarding prison sentence for journalists convicted of defamation).

Article 3 of the ECHR, one of the whole Convention's bedrock provisions: even in light of this, the *Corte Costituzionale* preferred to invoke the "institutional cooperation between constitutional bodies" and to involve the Houses in the effort to reshape such an important tool for fighting Mafia-related crimes and make it more consistent with human rights.

It is argued that, while leaving much to be desired, this decision can be justified not only as a tool to enhance execution of ECtHR judgments beyond the particular case, but also – and *at least* – on the basis of the principle of subsidiarity. All in all, the *erga omnes* declaration of unconstitutionality of impugned provisions (the "demolishing intervention" put forth by the *Corte Costituzionale*) would be, on the long run, a sub-optimal solution, as it would frustrate the adequate balance of all interests at stake – one which the Houses are *in principio* best placed to handle. But it will be hard to avert such scenario, if the road to a legislative reform – the *via maestra* indeed – remains idly untaken.