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Prison Leave in Italy: Legislation and Practical Application Is the Italian Regulation on Prison Leave Ensuring the Constitutional Purpose of Punishment?

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Abstract
This paper provides a description of the prison leave regulation in the Italian criminal system in order to bring out critical points and questionable compatibility with the Italian Constitution. The work starts with an analysis of the principles of rehabilitation and the prohibition of inhuman treatments which stem from the Italian Constitution (Article 27, third paragraph) and the Prison Act (Law no. 354/1975). Particularly, Art. 30 of the Prison Act allows prison leave only for woeful events occurring in the life of the detainee. In addition, "bonus leave"—introduced by further provision in Law no. 663/1986—can be granted in order to foster family ties and cultural or work interests, but only to convicts who have maintained good behaviour while imprisoned and are not labelled as "socially dangerous". Starting from a study of statutory law and its practical application, the paper analyses the main trends in court rulings and the recent Italian prison system reform, entered into force in October 2018.

Keywords Italian Constitution · Human rights · Prison leave · Rehabilitation purpose · Family ties

Introduction: Objectives and Methods of the Analysis

The Italian Constitution[1] (1948) establishes that "Punishment cannot consist in inhuman treatment and shall aim at the rehabilitation of the convicted person". The same principle is provided by Art. 1 of the Prison Act (hereafter, P.A.), specifying that prison treatment shall *conform to humanity* and ensure *respect for people's dignity*. It also guarantees impartiality, without discrimination in terms of sex, gender identity, sexual orientation, race, nationality,

[1] Art. 27, par. 3

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economic and social conditions, political opinions and religious beliefs, and it conforms to models that foster autonomy, responsibility, socialisation and integration.

The purposes of this research are to understand if the rehabilitation through punishment is guaranteed in the Italian prison legislation and to analyse the regulation of the different kinds of prison leave. For prisoners, the prison leave clearly sets up a tool that represents an important step towards their *reintegration into society*, which is also useful for limiting the negative effects of detention, including social isolation and separation from their family.

It is a complex exploration that imposes, as a starting point, a brief analysis of the constitutional framework regarding human dignity, fundamental rights and deprivation of personal freedom in relation to individuals subjected to the criminal system. We will, therefore, try to apply a method of investigation that combines a normative analysis of prison leave in Italy with empirical insights and the use of statistics. The aim of the paper is to provide an *analysis of the constitutionality of prison leave*, highlighting the aspects of greater interest for the prisoner's rehabilitation plan in view of their release.

Rehabilitation Purposes and Safeguards Addressing Inmates in the Italian Constitution

First of all, the Italian Constitution gives strong emphasis to the principles of *solidarity* and respect for the *dignity* of every individual[2] for whom the Republic recognises these inviolable rights that must be guaranteed regardless of the behaviour and choices made by an individual (including criminal ones). In particular, Art. 2 of the Constitution represented a decisive change in the conception of the individual in relation to the public authority. By using the adjective "inviolable",[3] the Constitution affirmed the *pre-existence of rights* with respect to the public powers, and reversed the individual/State relationship scheme that had characterised the previous decades.[4] State institutions, therefore, have the constitutional duty to guarantee human rights at every moment of social life—even when the breach of criminal law may have occurred.

Alongside the recognition of the inviolability of rights, the State is required to respect the mandatory duties of solidarity—political, economic and social—that constitutional decisions have included among the fundamental values of life in the community.[5] The individual, to whom Article 2 of the Constitution refers, then, is not an isolated or abstract subject; quite the opposite, the Constitution protects the person in reference to their relationship with other individuals and public institutions.

The Republic is also given an incisive duty: to remove the economic and social obstacles that reduce the freedom and equality of citizens and prevent the full development of the person.[6] Therefore, public authorities have a specific, constitutional obligation to ensure that

[2] On the joint reading of Articles 2 and 3 of the Constitution, see Caretti (2010), *I diritti fondamentali*. Torino, Giappichelli (Ed); Modugno (1995), *I "nuovi diritti" nella giurisprudenza costituzionale*. Torino, Giappichelli (Ed).

[3] Inviolable, inalienable (translation note)

[4] The previous Prison Regulation (no. 787/1931), approved under the Fascist dictatorship, was based on an afflictive vision of the criminal punishment; next to the death penalty, the only sanction was prison confinement, an isolated place where the detainees were not entitled to any rights.

[5] On this point, among many, the Constitutional Court ruling no. 138/2001

[6] Article 3, second paragraph, Italian Constitution

social dignity is effectively recognised for all human beings, without any distinction (not even between free and imprisoned ones).

This is necessarily reflected in the criminal system and in the principles of humanity and rehabilitation through punishment, as well as in the normative provisions on prison leave in Italy. The Italian Constitution requires that public authorities ensure full respect of the inviolable rights and dignity of each prisoner, making any re-educational plan aimed at the prisoner's social rehabilitation effective.[7]

Rehabilitation is a goal—here a central point—that is not identified with the compulsory repentance or with the moral indoctrination of the prisoner. The rehabilitation purpose shall only aim at *re-inserting the person into society*, identifying this process with the term "resocialization".[8],[9]

The regulation on prison leave, which allows the detainee to spend a short period in the community—with the obligation to spontaneously come back to the penal facility once the leave has expired—belongs to this constitutional context. It tends towards the gradual return of the prisoner to the society, holding him or her responsible for their actions while pursuing their self-determination. The present analysis aims to discuss whether the current scheme on prison leave in Italy is or is not suitable for the purpose of the prisoner's reintegration into society.

Preserving Contacts with the Outside World in the Italian Prison System

In order to understand whether the regulation on prison leave in the Italian legislation actually fulfils the constitutional function of social rehabilitation, it is necessary to start from the legislation on the prison system. Before Law no. 354/1975, the Italian penitentiary system did not provide for any kind of leave: from the Fascist period, sentences were served in prison custody and no possibility of leave was granted.

Only since 1975 has the law provided a tailor-made prison treatment tending towards social integration through contacts with the outside world, thus related to the specific conditions of the individuals concerned. With this purpose, rehabilitation treatment is carried out mainly using education; vocational training; work; participation in projects of community work; religion; and cultural, recreational and sports activities, as well as facilitating proper contacts with the outside world and relations with the family.[10] The rationale of this new perspective is

[7] A limitation of the rights of detainees is therefore only possible if there are opposing constitutional interests such as the guarantee of specific security needs. Among the many decisions of the Constitutional Court on the subject, cf. nos. 114/1979, 349/1993 and 26/1999. See, recently, also the ruling of the Court of Cassation (hereafter, Cass.), sect. I, nn. 27766, 5/06/2017

On the concept of dignity in relation to the state of detention Ruotolo (2014), *Dignità e carcere*. Napoli, Editoriale scientifica (Ed.)

[8] Cf. Dolcini (1981), *La "rieducazione del condannato" tra mito e realtà*. In Grevi V. (edited by), *Diritti dei detenuti e trattamento penitenziario*. Bologna, 57–60

Also, the Constitutional Court has progressively used the term "social reintegration" rather than "re-education", *ex plurimis*, sentt. nn. 168/1972, 126/1983, 271/1998, 296/2005

[9] Also, fundamentally, the article 13 of the Constitution, which establishes the inviolability of personal freedom, guarantees of the reserve of law and jurisdiction, the prohibition of physical and moral violence against persons deprived of their liberty.

[10] Article 15 P.A. is dedicated to the discipline of the elements through which the rehabilitation treatment is implemented.

to be found in the awareness that a lack of contact with the world outside the prison involves serious psychophysical and behavioural discomforts that inevitably fall on the pathway to social reintegration, the ultimate goal of every punishment.[11]

In other words, as of 1975, it was clearly pointed out that only a criminal system "heading outside the prison walls", can guarantee an effective rehabilitation pathway for the convicted person while helping the detainee to gradually readapt to society. This is due to the fact that prison confinement represents a forced removal from society, which almost inevitably results in a strong process of alienation of the person. This new approach, according to the constitutional framework, is, therefore, affirming that the criminal execution in Italy should not necessarily take place "inside" the prison. The prison facility is not a place where convicts are sent to be segregated. Indeed, it is quite the opposite: it is a complex and diversified system entrusted with the constitutional purpose of promoting the rehabilitation of every prisoner in respect of their dignity.

The rules concerning the regulation of prison leave are part of this regulatory context, looking out and beyond the prison walls.

Emergency Leave: Features and Critical Aspects

The original text of the 1975 prison reform was exclusively provided for "emergency leave" (Article 30 P.A.), while the "bonus" or "bonus leave" (Article 30-ter P.A.) was foreseen ten years later.[12] Let us first deal with the characteristics of the first type of leave and its several pragmatic issues.

[11] As underlined by many sociologists: see, among many, Sykes (1958), *The society of Captives. A study of a Maximum Security Prison*. Princeton Classic Editions (Ed.) and Clemmer (1940). *The Prison Community*. New York: Holt, Rinehart & Winston. In particular, it is observed that the absolute segregation in prison, favouring processes of regression, increases exponentially the feeling of oppression and marginalisation of the person. In this regard, Gresham Sykes notes that in modern prison, immaterial deprivations and frustrations "can be as painful as physical ill-treatment"; the destruction of the psyche "is not less frightening than the affliction of the body" (Gresham G.M., *The Society of Captives*, 242).

A wide sociological reflection on the detention and family dynamics is contained in Bargiacchi (2002), *Esecuzione della pena e relazioni familiari*. Altro Diritto, Resource document. http://www.adir.unifi.it/rivista/2002/bargiacchi/index.htm. Accessed 2002.

Famous jurists also intervened on this point. It has been stated that a prospect of social reintegration cannot consider prison segregation as a useful tool. It is impractical, therefore, for imprisonment to be justified, or prolonged, for reasons relating to the improvement of the future life chances of the detainee. In this sense, Ferrajoli (2009), *Diritto e ragione. Teoria del garantismo penale*. Bari Laterza (Ed.).

Criticism of imprisonment as an obstacle to the re-socialisation of the condemned man is not recent. Already in the first half of the 1800s, Jeremy Bentham described the criminal effects deriving from prison experience and the consequent removal of the person from life in society (Bentham (1829), *Théorie de peines et de recompense*. Bruxelles, Louis Hauman et Compagnie).

[12] Law no. 663/1986

Emergency leave may be granted by the Supervisory Penitentiary Judge[13] to allow the convicted person to visit, with the provisions laid down in the regulation, a member of his/her immediate family or close relative who is seriously ill and likely to die soon. It can also be granted for exceptional serious family circumstances.[14]

Before ruling on the request, the judge must collect information on the existence of the reasons given with the help of the public security authorities (also at the place where the inmate is allowed to go). The decision is taken with a motivated act that must be immediately communicated to the Public Prosecutor and to the victim of the crime who can, within twenty-four hours, lodge a claim that suspends its effects.[15] The judge, after having acquired summary information, may rule within ten days. The General Attorney at the Court of Appeal is informed about the granted leave and the related outcome with a quarterly report from the bodies that issued the said leave.

We can state that the emergency leave was introduced in the penitentiary system as an *exceptional tool*, granted to offer prisoners the opportunity to leave prison solely for serious family needs, thereby also attenuating the isolation deriving from detention. Due to its strict applicative set of rules, it has a very limited scope of application. Its allowance is, indeed, subject to the existence of "exceptional and particularly serious situations" whose assessment, in the absence of precise legal indications, is up to the Penitentiary Judge.[16]

This kind of leave is not functional to the rehabilitation purposes, neither is it possible for the inmate to use it with continuity—only where the Judge deems it appropriate by evaluating various problems relevant to its enforcement. First, a leave is granted exclusively for purposes related to the emotional dimension: it is not applicable to cultural, work or study necessity (as distinct from the leave granted by Article 30-ter P.A.). The second question concerns the very limited cases in which the article is foreseen.

Italian judges have, for a long time, interpreted the word "seriousness" in the sense of including exclusively "negative" events occurring in the prisoner's family (funerals, serious illness and so on). Only in the last ten years have courts developed a new interpretation: in some cases, the term "seriousness" has been intended in its broader meaning of "relevance or importance" of the event for the detainee.

In decision no. 36329 of November 2015, the Court of Cassation specified that: "among the particularly serious family events to which the granting of leave is subject (...) fall not only tragic events, but also exceptional events, which are not usual, but are particularly significant in the life of

[13] The magistrate who, in the Italian system, protects detainees' rights

[14] Art. 30 P.A. Connected to the aims of the ordinary leave, the law provides the provision of family visits to an under-aged child (Article 21-ter P.A.), introduced by Law no. 62/2011. The first paragraph of the article provides the possibility for the imprisoned parent to visit the child who is seriously ill and likely to die or when they are suffering from a serious disability, subject to the authorisation of the Supervisory Judge or, in situations of emergency, of the prison governor. In case of a child's hospitalisation, the modalities of the visit shall be regulated by the same Supervisory Judge keeping into account the duration of the hospitalisation and the course of the illness.

The same article provides for the possibility for parents to assist the child during visits by consultants if they are related to serious illness and when the child is under ten years old. In these cases, the authorisation measure is issued by the competent Judge, which also determines the operating procedures (in the case of an accused person, the Judge with knowledge is in charge; in the execution phase, the jurisdiction is up to the Supervisory Judge, the same body that decides on the emergency leave referred to in Article 30 P.A.).

[15] If the provision was issued by the Supervisory Judge, the appeal is addressed to the Supervisory Court; if the provision was issued by another judicial body, it is lodged with the Court of Appeal.

[16] In addition to the granting of leaves and visits, Art. 69 P.A. entrusts the management of many competences to the Supervisory Judge.

a person, because they are capable of profoundly affecting prisoner's life plan and therefore the degree of humanity of detention and the importance of their rehabilitation pathway". Therefore, according to the Court, the emergency leave can also be applied to positive events, provided they are exceptional as assessed from time to time by the judge. Following this direction, a court decision has recently granted a detainee under a special detention regime[17] an emergency leave, allowing him to witness the birth of a child conceived through medically assisted reproduction.[18]

However, this is a minor and not a consolidated case law.

In different cases (the possibility for an inmate to attend his son's wedding day,[19] to procreate within the marriage[20] or to make a declaration of paternity at the municipal offices[21]), judges have denied emergency leave. According to these decisions, the nature of a happy event excludes "that charge of exceptional emotional tension which must—normatively—characterise the family event of particular gravity".[22]

Therefore, judges have recently confirmed the restrictive interpretation: granting ordinary leave remains subject only to the occurrence of *negative events* in the family life of a prisoner, such as grief or serious illnesses.

The narrow range of application of the emergency leave raises several issues. The impossibility of including positive events appears to be in contrast with the importance given to family ties in the prisoner's social reintegration.[23]

In particular, the penitentiary law establishes that during the execution of the sentence, particular care is dedicated to *maintaining, improving or re-establishing relations between prisoners and internees and their families.*[24] It has, therefore, expressed an absolute preeminence of the protection of the emotional dimension of the prisoner's social reintegration, becoming an element on which to adjust the treatment plan. Particular attention is also dedicated to the crisis resulting from the removal of the subject from the family unit, to make it possible to maintain a good relationship with the children, especially if of younger age, and to prepare the family, next environment of life and the subject himself to get back to the social context.[25] Even when arranging transfers, the subjects are destined to the institutions closest to their home or to that of their family or to their social community of reference.[26]

[17] The regulation of the special detention regime is provided by Art. 41 *bis* P.A., and it applies, above all, to the ones convicted for crimes related to organised crime, terrorism or subversion of the social order.
[18] Cass., sect. I, 26/05/2017, no. 48424
[19] Cass., sect. I, 14/12/2017, no. 55797
[20] Cass., sect. I, 05/02/2013, no. 11581: "The necessity to consummate a marriage also in view of the procreation of children can not constitute an event likely to be traced to the category of exceptional events, as characterised by particular gravity. Ordinary leave is, instead, aimed at preventing the suffering of detention from adding that deriving from the impossibility of being close to family members on the occasion of particularly negative events".
[21] Court of Turin, August 22, 2012: "Since the recognition of the natural child can also be done in the place of detention, permission must be rejected motivated by the need for the prisoner to go to the child's place of birth".
[22] Cass., sect. I, 14/12/2017 no. 55797
[23] The Italian Constitution openly protects the emotional dimension by the provisions contained in Articles 29, 30 and 31.
[24] Art. 28 P.A.
[25] These previsions are also widely included in the "Chart of rights and duties of prisoners and inmates" (2012), a document released by the Ministry of Justice that clarifies the provisions of current legislation, also in reference to personal ties, for detainees and their family members.
[26] The prevision was strengthened by recent legislative decree no. 123 of 2018, which includes in the first paragraph of Art. 14 P.A. the following provision: "The detainees (...) have the right to be assigned to an institution as close as possible to the permanent residence of the family or, if identifiable, to their social community of reference, in absence of any specific contrary reason".

Many other provisions are dedicated to the maintenance, improvement or restoration of detainees' emotional ties. Consider, for example, the right to promptly inform family members of a custody order, or in case of a prisoner's transfer, to provide economic assistance to families and the possibility for detainee's relatives to request penitentiary benefits and alternative measures.

The Court of Cassation clearly stated that *the maintenance of family relations is an unavoidable right of the prisoner*, functional to the re-educational process imposed by the Italian Constitution.[27] Granting emergency leave only for negative family events does not seem, therefore, in line with the rehabilitation purpose given by the Italian prison regulation and international principles of the protection of the prisoner's right to family. Since its origins (1975), the regulation has been conceived without also assessing the need to guarantee the reintegration (especially within a family) of the offender, and this, not only when parental bonds are compromised by grief or serious illness but also when they could be strengthened by positive changes.

Trying to draw some general conclusions, it may be said that the regulation regarding emergency leave appears, in the phase of its concrete application, as an *exceptional instrument* completely unsuitable to concretely foster the prisoner's rehabilitative needs. This circumstance is also ascribable to the obvious indeterminacy of the same regulatory framework that does not allow the identification, even in general terms, of what are the "serious family events" that allow the granting of emergency leave.

Another important problem concerns the case law which subordinates the leave allowance to the investigation of good conduct of the condemned in the course of his/her detention. These findings are unrelated to the rationale of an institution that, unlike the bonus leave (Article 30-ter P.A.), does not have the nature of a reward. As also noted by the Court of Cassation, in cases of emergency leave, any security need can be duly guaranteed with various securing devices—such as the possibility of an armed escort for the prisoner—and "with every other safeguard that makes the exit from the institution compatible with the requirements of the order and public security".[28]

Based on the foregoing considerations, we can deduce that the emergency leave presents, in the Italian legal system, an essentially marginal nature, which results in a strictly limited application of such provision. In this way, the humanitarian and rehabilitative purposes imposed by the Italian Constitution are disregarded, hence the need for a profound rethinking of the law.[29]

The Failure of Some Recent Reforms

Concerning these serious problems, a reform of the emergency leave has been attempted. The "Giostra Commission", called to work on a draft decree to reform

[27] Cass., no. 6754, 23/03/2003. Moving towards the same direction, several Judgements by the European Court of Human Rights (ECtHR): ECtHR, *Aliev v. Ucraine*, no. 29/04/2003, 41,220/98; ECtHR, *Dickson v. the United Kingdom*, no. 04/12/2007, 44,362/04

[28] Cass., sect. I, 27/11/2015, no. 15953

[29] Unfortunately, on this topic, the Penitentiary Administration Department does not provide any data.

the penitentiary system,[30] had proposed the granting of emergency leave—with the exception of prisoners subject to a special detention regime—for "particularly important" family events.

According to the Explanatory Report, the change was motivated by the need to prepare concrete implementation of the rehabilitation goals of punishment through the granting of this type of leave. In this sense, it is stated that the increase in the scope of application of the emergency leave would be aimed at comprehending a vast series of situations that today are not adequately addressed by the Italian system. In support of the proposal, the Commission emphasised that the amendment had long been advocated by many well-known legal experts,[31] as well as some others from the judicial system, in order to allow a wider application of the provision in relation to family situations of particular relevance which are not necessarily serious in the sense of "mournful", but still important for the prisoner's relationships.

Also very relevant, the proposal for a modification suggested by the Panel no. 6 of the General Consultation on the penal execution,[32] dedicated to "family relationships and the local enforcement of punishment", proposed the introduction of a further type of leave called "emotional prison leave", not exceeding ten days every six months of detention, in order to specifically cultivate family bonds and to spend some time with those close to the prisoner. The leave could not be granted when there was a danger that the convict, during the period of leave, may commit new crimes or when, once the leave expired, the detainee might not return to prison.

It is evident that this proposal was aimed at introducing an "extraordinary leave" to improve the emotional and sexual sphere of the prisoner. This latter aspect is particularly problematic in

[30] For a brief but exhaustive summary of the leading principles and criteria contained in the enabling act on the penitentiary system reform, see Della Bella (2017), *Riforma Orlando: la delega in materia di ordinamento penitenziario*. Diritto penale contemporaneo, Resource document. https://www.penalecontemporaneo.it/d/5499-riforma-orlando-la-delega-in-materia-di-ordinamento-penitenziario. Accessed 20 June 2017

A large study on the possibilities of implementation of the criteria contained in the enabling act is contained in the volume of Giostra and Bronzo (2017). *Proposte per l'attuazione della delega penitenziaria*. Roma, Sapienza University Press (Ed.)

[31] See Fiorentin F. (2018), *Art. 30 P.A.* In Della Casa F., Giostra G. (Edited by), *Ordinamento penitenziario*. Padua, Cedam (Ed.), 344–351

[32] We are referring to the wide path of reflection and deepening promoted by the Ministry of Justice from May 2015 to April 2016. The General Consultation had the purpose of developing concrete proposals for a redefinition of the model of the criminal system, with the aim of a concrete realisation of constitutional and conventional principles on this topic. The eighteen thematic tables were attended by over two hundred experts working in the field of criminal execution (prison managers, educators, custodians, social workers, university professors and researchers, members of the world of associations and voluntary work, etc.).

The reports of the working groups and the final report prepared by the Committee of Experts are published on the website of the Ministry of Justice (www.giustizia.it).

On the importance of the General Consultation for a change of paradigm in criminal justice, see Giostra (2018), *La riforma penitenziaria: il lungo e tormentato cammino verso la Costituzione*. Diritto penale contemporaneo, Resource document. https://www.penalecontemporaneo.it/pdf-viewer/?file=%2Fpdf-fascicoli%2FDPC_4_2018.pdf#page=119. Accessed 9 April 2017

See, in the same magazine, Ruotolo (2016), *Gli Stati generali sull'esecuzione penale: finalità e obiettivi*. Diritto penale contemporaneo, Resource document. https://www.penalecontemporaneo.it/d/4537-gli-stati-generali-sull-esecuzione-penale-finalita-e-obiettivi. Accessed 11 March 2016

the Italian system which, unlike most European countries,[33] does not safeguard the right to conjugal visits with the loved one while in prison.[34]

These proposals were aimed at improving prisoner rehabilitation by strengthening the connection with the outside world and the emotional dimension, a link which must necessarily take into account each treatment programme, varying according to the situation and personal history of the prisoner. However, when approving the recent prison system reform,[35] the Government did not include the mentioned proposals: the granting of the emergency leave remains subordinated only to the occurrence of exceptional events of particular gravity, without solving the problems discussed above.[36]

Bonus Leave: a Step Towards Social Reintegration

Available statistics testify a gradual increase in the granting of bonus leave in recent years, as shown in Table 1.

In spite of these numbers, prison leave still has a limited range of application with respect to its potential. Let us analyse why.

As anticipated, it is only from 1986 that Italian legislation is providing the prisoner with an instrument that is actually pursuing the inmate's social reintegration: the bonus leave described in Article 30-ter P.A.[37] For those who have displayed "good behaviour" and who are not socially dangerous, the Penitentiary Judge, after hearing the prison governor, can grant a "reward" leave, lasting a maximum of fifteen days each time, for the purpose of allowing the prisoner to cultivate family, cultural or work interests.[38] The duration of the leave cannot exceed a total of forty-five days per year spent in detention.[39]

The behaviour of the convicted persons is considered "good" when the person, during the detention, has expressed a constant sense of responsibility and correctness in personal behaviour in the activities organised in the prison and in any work or cultural activities. It is a provision undoubtedly connected with the prisoner's rehabilitation because the experiences lived in the community are an integral part of the treatment programme that is followed by the

[33] In the European Union, there are eleven countries that have introduced the right to conjugal visits in prison: in Spain, in the region of Catalonia, the law grants two intimate visits every month, one with the family and the other with the partner (so-called intimate visit); in Switzerland, personal meetings without visual overview were introduced in the early 1980s; and in France, some experiments are under way in order to guarantee the right to conjugal visits, through the provision of Family Visit Units (FVU) set up within the penitentiary facilities.

[34] With reference to the failure to guarantee the right to conjugal visits in the Italian prison legislation, the cross reference is to Talini (2018a), *La privazione della libertà personale. Metamorfosi normative, apporti giurisprudenziali, applicazioni amministrative*. Napoli, Editoriale Scientifica (Ed.), 253–284. On this point, the same Panel no. 6 of the General Consultation on the penal execution proposed to provide, within the facilities, places where the detainees could meet their family members out of the eye of the prison police, currently imposed by Art. 18, par. 2, P.A.

[35] D.lgs. nn. 122, 123 and 124, 2 October 2018

[36] A deeper analysis of the issue is contained in Talini (2018b), *Gli articoli 18 e 30 dell'ordinamento penitenziario tra interpretazione conforme a costituzione e possibili questioni di legittimità costituzionale*. Osservatorio AIC, Resource document. https://www.osservatorioaic.it/images/rivista/pdf/14-Talini_definitivo.pdf. Accessed 18 October 2018.

[37] This kind of leave was introduced by Law no. 663/1986.

[38] The provision concerning bonus leave is subject to a claim before the Supervisory Court according to the procedures described in the aforementioned Article 30-bis P.A. (as specified by Article 30-ter, paragraph 7).

[39] For minors, the duration of the bonus leave cannot exceed thirty days each time and the total duration cannot exceed one hundred days per year of detention (Article 30-ter, paragraph 2 P.A.).

Table 1 Bonus leave in Italy: years 2015–2018

Year	Bonus leave granted to detainees
2017/2018	35,912
2016/2017	34,105
2015/2016	32,617

Data published in the "Statistics" section of the Ministry of Justice website (www.giustizia.it). However, there is no available data relating to necessity permits (Article 30 P.A.), as further proof of the exceptional nature of this institute

rehabilitation officers and the prison social workers in collaboration with the local social services.

The link of the bonus leave with the rehabilitation programme was also enhanced by the Constitutional Court, according to which the bonus leave represents an incentive for the prisoner's collaboration within the prison institution and, at the same time, "a re-education device, allowing an initial reintegration of the condemned in the society, being therefore an integral part of the rehabilitative treatment".[40] For these reasons, the use of bonus leave is monitored by the rehabilitation officers and the prison social workers in collaboration with the local social services; therefore, a contact point is created between the *prison and the community outside*, allowing the intervention of the latter, through the appropriate territorial authorities, in the prisoner's rehabilitation.

From a historical, regulatory point of view, bonus leave, having a broader nature compared with the emergency leave, had already emerged during the drafting of the penitentiary reform of 1975, taking concrete form in two positions. Some felt there was a need to grant short leave to cope with unexpected family needs; others felt there was a need to mitigate the emotional isolation resulting from detention. The granting of short periods of freedom intended to favour the maintenance of family bonds and to reduce the effects of sexual deprivation was thus proposed. Both instances were not accepted in the 1975 reform, which, as mentioned, only codified the prison leave for "particularly serious family events". The introduction of the bonus leave came ten years later through the aforementioned Law no. 663 of 1986.

Since 1986, therefore, it has been possible to identify two kinds of prison leave: those that respond to a function of humanisation of punishment alone (the emergency leave) and those that, as part of the individualised treatment of the convicted, perform a gradual reintegration into society (bonus leave). The characteristics of the two forms of leave are, therefore, completely different: emergency leave is provided exclusively to cope with serious and exceptional family events that are independent from the behaviour of the prisoner; bonus leave, on the contrary, implies the "goodness" *of the condemned person's conduct* and the prognosis that can be foreseen in the free environment.

More generally, it can be said that there are two elements that structurally differentiate this type of leave from emergency leave: first, the value of "reward" given to its function; second, the fact that bonus leave is provided as an integral part of the rehabilitative treatment, individualised and in constant transformation.[41]

[40] Constitutional Court, sent. no. 118/1990. In another ruling, the Court has specified that the special permits represent an "instrument (...) often irreplaceable in order to avoid that detention does not entirely prevent affective, cultural or work interests, aimed at effectively pursuing that progressive reintegration of the person in society, which constitutes the essence of the rehabilitation purpose" (sent. no. 403/1997).

[41] According to renowned interpretation, the basis of special permits is the idea of putting the condemned in front of their responsibilities, allowing them to abandon—or reiterate—their past choices.

The Constitutional Court has also accepted a "plurifunctional" conception of the bonus leave. In judgement no. 296 of 1997, the Court affirms that such leave, as well as an incentive for the collaboration of the prisoner with the prison institution, is a rehabilitation instrument, allowing a gradual reinsertion of the detainee in society; in fact, its concession is subject to "the absence of particular social danger, as a consequence of the so-called "good behaviour".

Subjects and Application Requirements

Bonus leave can only be granted to convicted prisoners; remand prisoners are excluded, together with those who are subjected to alternative measures of home detention and are assigned to the probation service. In relation to prisoners on semi-liberty,[42] the function of the bonus leave is absorbed in the prisoner's so-called licence, which can always be granted by decree motivated by the Judge as a reward for a duration not exceeding forty-five days a year. During semi-liberty, the person is subjected to the probation regime and, if the obligations imposed are violated, the measure may be revoked.

If at the end of the day in semi-liberty, or after its revocation, the detainee does not return to the facility without a justified reason for no more than twelve hours, she or he shall incur disciplinary actions and the judge may revoke his/her semi-liberty. If the absence continues for longer than 12 hours, the person is punishable for being guilty of escape; this crime results in the automatic suspension of the semi-liberty and the judge imposes its revocation.

Specific limits are also established with respect to the length of the conviction. The granting of bonus leave is allowed[43]:

a) For those sentenced "to arrest" or detention not exceeding four years;
b) For those sentenced to detention exceeding four years after having served at least one quarter of the sentence;
c) For those sentenced to life imprisonment, after having served at least ten years of their sentence.

Further limitations on the granting of bonus leave are provided in the case of particular offences:

a) Convicted offenders for association crimes may only have the right to have the bonus leave granted if they collaborate with the judicial authorities;
b) Convicted offenders for other serious crimes (committed for the purpose of terrorism, murder, aggravated robbery, aggravated extortion, aggravated drug trafficking) may have the right to a bonus leave only if there is no evidence to suggest that there are links with organised crime or subversive groups.
c) Convicted offenders who escaped, or who had a revocation of an alternative measure, cannot have access to the "benefit" for two years.

Reporting these categories is very important for the purpose of our analysis. As can be easily understood, the granting of bonus leave is very limited, based on the type of crime committed

[42] The day-release regime allows convicts to spend part of the day outside the facility engaging in work, studying or other activities useful for their social reintegration (Article 48 P.A.).
[43] Art. 30 ter, par. 4, P.A.

and the length of the sentence. This inevitably reduces the application of such measure, significantly compressing its rehabilitation purpose.

Granting a bonus leave depends on three requirements. First of all, the judge must evaluate the "good" behaviour displayed by the prisoner. This condition occurs when the person, during detention, has expressed a constant *sense of responsibility and correctness* in the activities organised within the prison facility and in any work related or cultural activity. The Judge shall therefore evaluate, through a dialogue with the prison officers, whether the convicted person has behaved positively towards other prisoners and prison staff, as well as the participation of the person in the organised activities, with particular regard to those related to education, work, culture and sport.[44] In conclusion, the existence of the assumption of "good" behaviour must result from the overall assessment of the conduct held by the subject during his sentence. The opinion, mandatory but not binding, of the prison governor becomes decisive for the assessment of this first condition on which, as will be said shortly, several circulars of the Penitentiary Administration were issued.

The second requirement concerns the absence of social danger. The judge must make a probability judgement on the presumable conduct of the person in the community, granting the permission if she/he assesses that no new offences will be committed. In order to ascertain the lack of social danger, the Supervisory Judge collects information from the police authorities of the place where the prisoner is detained and asks to be reinserted.

As anticipated, the Department of Penitentiary Administration has intervened several times to clarify some applicative and interpretative aspects in view of a correct management of bonus leave. With circular no. 3191/5641 of 29 December 1986, the Ministry of Justice repeated that the decision regarding the adoption of the leave is under the responsibility of the Judge who identified the criteria that the prison directors must follow in order to express their mandatory but nonbinding opinion. In order to assess the "good conduct" requirement, the director must also consider the time in detention served in other facilities; in relation to the requirement of the absence of social danger, it is necessary to evaluate criminal history and records. The same document emphasised the need to verify the existence of both conditions: "The existence of good conduct cannot imply in itself the absence of particular social danger. There may be prisoners who, although maintaining a formally good conduct, are nevertheless to be considered particularly dangerous".

The Ministry of Justice returns to the topic with another circular no. 3246/5696 of 30 May 1988. To verify the existence of the requirement of "good conduct", the circular specifies that any element upon which the prisoner can be concretely and reasonably deemed to deserve great trust because of their positive behaviour must be considered. The circular also precisely defines the second requirement concerning social danger: This is based on the fear that the detainee will not reenter the facility when the leave expires, may commit new crimes or maintain links with a criminal organisation or may act as a link between prisoners and the outside world. In order to carry out this delicate task, the director must always evaluate the attitude of the subject, the seriousness of the crimes committed, the duration of the incarceration suffered and the existence of links with criminal associations. Further, indications contained in the same document concern the attention that must be paid to any social alarms that could derive from the granting of the leave, as well as due respect for the victims of crime

[44] On the importance of sport leave: Gras L., *Inmates on Sports-Related Leaves: a Decisive Experience*. Penal field, resource document. https://journals.openedition.org/champpenal/2302#tocto2n1. Accessed 21 September 2007

and for their relatives and loved ones. To fulfil this task, prison directors must acquire information from law enforcement, expressing an opinion that is always well articulated in its motivations.

The third and last requirement concerns the necessity that the bonus leave allow the convict to cultivate family, cultural or work interests. This list must not, in any way, be considered as exhaustive: The Judge can also grant permission to allow the convict to cultivate interests of different kinds than those expressly indicated by the law, provided they are useful for his/her rehabilitation purposes. Particularly relevant are emotional reasons that allow offering a solution to the aforementioned problem of the Italian system's failure to guarantee the right to conjugal visits in prison. This is not only a partial solution, but one which does not exempt the prison administration from protecting prisoners' right to family contacts, conjugal visits and sexuality for every prisoner, not only the ones who are granted the leaves.

To be noted, finally, is how the Judge has included in the purpose of "cultivating cultural interests" the issues related to the right to study (let us think, for example, to the possibility to take university exams outside prison). The Ministry of Justice first circular no. 3191/5641 of December 1986 specifies that the success of the bonus leave also depends on the ability to provide local welfare services to the prisoner, inviting rehabilitation officers and the local social workers to identify "those the prisoner can contact in case of emergency".

Bonus Leave Grant Procedure and Duration

The duration and the procedure to grant the bonus leave are two aspects that must be analysed in order to understand if the bonus leave really tends to socially reintegrate the prisoner. To grant a bonus leave, the judge adopts a motivated decision stating the existence of three criteria required by the law. As stated above, the opinion of the prison governor, assessing the existence of "good" conduct by the interested subject, is of great importance: It is not a binding opinion, but it must be taken into serious consideration by the judge in relation to the need to appropriately assess granting conditions.

The magistrate, immediately and without formality, transmits the provision to grant or refuse the prison leave to the Public Prosecutor and to the interested party, who, within twenty-four hours, may lodge a complaint with the Supervisory Court which will meet within ten days. The decision of the Supervisory Court can be appealed to the Court of Cassation within fifteen days from the date of notification. This appeal does not suspend the execution of the order that is immediately enforceable unless otherwise decided by the Court.

If the bonus leave is granted, the prison director shall send it to the competent social service and, in the eventuality that the measure is to be carried out in a different location from the one in which the prison is based, documentation is sent to the competent social service centre that will report on the interventions.[45] From these considerations, it can be seen how the regulation of bonus leave in the Italian system is connected with local services. In order for the leave to be genuinely aimed at the prisoner's rehabilitation, direct cooperation among all the administrations is needed.

The total duration of the bonus leave cannot exceed forty-five days within each year spent in prison; the single leave duration cannot exceed fifteen days. The provision of such a short

[45] Specifications regarding the connection between the penitentiary institution and the Social Services having territorial jurisdiction are contained in the circular no. 582424-4-1 of 6 June 1988 by the Department of Penitentiary Administration.

time limit represents a critical aspect for the enforcement of bonus leave in Italy. In consideration of its link with rehabilitation, it would rather be preferred to leave the timing choices to the Judge. This would make it possible to modulate each leave on the needs of the individual, also assuring the individualisation of the sentence.

In order to fulfil law enforcement's demands, as in the case of an emergency leave, the Judge may take certain precautions. In particular, if some element emerges that may lead to the presumption of failure to return to the prison institution or of a risk to perpetrate crimes, the judge may arrange the escort of the convict for all or part of the prison leave and provide prescriptions about the observance of particular times, presentation before law enforcement authorities and obligations of permanence at the domicile for a fixed time.

If the detainee does not return to the penitentiary institution at the end of the leave, it is provided the same as for the emergency leave: disciplinary sanctions if the absence continues beyond three hours; if the absence, instead, exceeds twelve hours, the detainee can be charged with escape.

Finally, it is particularly important that the law provides that the time spent by the detainee on leave or under licence is counted for all purposes in the duration of the sentence, confirming the strong link between rehabilitation treatment and the granting of bonus leave, which becomes a real individualised measure (also for the purpose of calculating the prisoner's early release).[46] For the purposes of this analysis, this last consideration is of great importance. It is confirmed that the bonus leave represents an important measure that accompanies convicts towards their gradual reintegration into society and limiting the negative effects of prison—also requested by the European Court of Human Rights (ECtHR) in the *Boulois v. Luxembourg* judgement.[47]

Conclusions

From the above considerations, it clearly emerges how prison leave, allowing the convicted to maintain a relationship with the outside world, represents an indispensable tool for the rehabilitation purpose imposed by Article 27 of the Italian Constitution. In this perspective, the original text of the Prison Act was largely inadequate, especially considering the impossibility for the Judge to grant emergency leave for positive events happening in the life of an inmate.

To avoid a residual application of ordinary leave, the 1986 reform established a clear link between the rehabilitation purpose and a new benefit by introducing the bonus leave. From then on, the possibility is granted that a person permanently deprived of personal liberty may spend a short period in the community, under certain conditions and with the obligation to spontaneously return to the penitentiary institution at the end of the leave.

The Penitentiary Administration has welcomed with great favour this news, by expressing the hope that the 1986 reform would be applied by all "with the maximum conviction, commitment and enthusiasm".[48] From these words, a very favourable opinion about the reform has emerged.

[46] A measure consisting in a reduction of 45 days of imprisonment every six months served, granted by the Judge to the detainee who has both shown proactive participation in the rehabilitation programme and has never incurred any disciplinary sanction (Article 54 P.A.).

[47] ECtHR, *Boulois v. Luxembourg*, no. 03/04/2012, 37575/04

[48] Circular by the Penitentiary Administration no. 3291/5741 of 3 July 1990. In the same direction also to the preceding circular no. 3246/5696 of 30 May 1988

Table 2 Prison population in Italy: years 2015/2018

Year	Prison population
2015/2016	54.653
2016/2017	57.608
2017/2018	59.655

All data are published in the "Statistics" section of the Ministry of Justice website (www.giustizia.it)

Table 3 Bonus leave granted to detainees: years 2017/2018

Regions	Overall bonus leave
Abruzzo	1043
Basilicata	137
Calabria	920
Campania	2373
Emilia-Romagna	1729
Friuli-Venezia Giulia	179
Lazio	1345
Liguria	994
Lombardia	13,081
Marche	324
Molise	214
Piemonte	2.723
Puglia	1065
Sardegna	1988
Sicilia	2556
Toscana	2840
Trentino-Alto Adige	177
Umbria	1156
Valle d'Aosta	42
Veneto	1026
Nationwide total	35,912

Data updated as of 31 December 2018

Table 4 Bonus leave granted to detainees: years 2016/2017

Regions	Overall bonus leave
Abruzzo	1007
Basilicata	118
Calabria	849
Campania	2456
Emilia-Romagna	1931
Friuli-Venezia Giulia	246
Lazio	1411
Liguria	659
Lombardia	12,078
Marche	287
Molise	164
Piemonte	2643
Puglia	917
Sardegna	1805
Sicilia	2339
Toscana	2904
Trentino-Alto Adige	132
Umbria	924
Valle d'Aosta	57
Veneto	1178
Nationwide totals	34,105

Data updated as of 31 December 2017

Table 5 Bonus leave granted to detainees: years 2015/2016

Regions	Overall bonus leave
Abruzzo	955
Basilicata	109
Calabria	617
Campania	2236
Emilia-Romagna	1941
Friuli-Venezia Giulia	193
Lazio	1426
Liguria	683
Lombardia	12,405
Marche	325
Molise	184
Piemonte	2119
Puglia	745
Sardegna	1415
Sicilia	2338
Toscana	2716
Trentino Alto Adige	171
Umbria	688
Valle d'Aosta	53
Veneto	1298
Nationwide total	32,617

Data updated as of 31 December 2016

Statistics and data reported below—divided by Italian regions—also testify to a gradual increase in the granting of bonus leave in recent years: 32,617 in 2015/2016, 34,105 in 2016/2017 and 35,912 in 2018/2019. However, in spite of these numbers, prison leave still has a limited range of application with respect to its potential.

This is primarily due to its inapplicability towards prisoners awaiting trial who represent almost 20% of the Italian prison population. Out of 60,348 inmates living in one of the 190 Italian prisons, 19,610 are not convicted and cannot, therefore, benefit from semi-liberty.[49] The scope of application of the bonus leave is further reduced due to its inapplicability towards the categories of prisoners deemed as most dangerous by the legislature; think about the impossibility of accessing it for those convicted for especially heinous crimes that refused to cooperate with justice authorities.

Even if it is certain that bonus leave is an important instrument for appreciation of the progressive implementation of treatment programmes—allowing it to reduce the negative effects resulting from imprisonment[50]—it is equally true that, today, the present legislation on prison leave in Italy does not show its full potential.

A greater use of prison leave would make it possible to solve, at least in part, the main problem of the Italian penitentiary system: prison overcrowding. This is an important issue, as Italy has been repeatedly condemned—with the well-known judgments Sulejmanovic (2009)[51] and Torreggiani (2013)[52]—by the ECtHR for violating Article 3 of the European Convention on Human Rights that forbids torture and inhuman or degrading treatments. A wider application of prison leaves could relieve the pressure on the administration, allowing them to commit

[49] Last available data was updated 28 February 2019 ("Statistics" section, website of the Ministry of Justice, www.giustizia.it).
[50] Particularly, the legislative decrees no. 123 and 124 of 2 October 2 2018
[51] ECtHR, *Sulejmanovic v. Italy*, no. 16/07/2009, 22,635/03
[52] ECtHR, *Torreggiani and Others v. Italy*, no. 08/01/2013, 4357/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10, 37818/10

more resources to rehabilitation-focused activities for those who cannot be granted any leave. Still, overcrowding is a structural problem that should be faced by the Parliament with a strongly blended approach, reducing the use of prison confinement as a response to illegal behaviours and fostering nonjudicial pathways (i.e. restorative justice), rather than just being "mitigated" through partial solutions.

On this aspect, as indicated before, the recent law reforming the Italian prison system did not meet these expectations. It is unquestionably a missed opportunity in view of a broader implementation of the constitutional principles regarding humanisation and the prisoner's social reintegration through greater enhancement of semi-liberty.

Tables 2, 3, 4 and 5 show the trends in prison leave in Italy during the last three years. Even though a slight rise can be appreciated, it is probably due to a correspondent rise in the prison population (see Table 2): In other words, the rise can be linked to the increased number of beneficiaries, more than to a more widespread application of this instrument by Italian judges.

References

Bargiacchi, C. (2002). *Esecuzione della pena e relazioni familiari*. Altro Diritto, Resource document. http://www.adir.unifi.it/rivista/2002/bargiacchi/index.htm. Accessed 2002.

Bentham, J. (1829). *Théorie de peines et de recompense*. Bruxelles: Louis Hauman et Compagnie.

Caretti, P. (2010). *I diritti fondamentali*. Torino, Giappichelli (Ed.)

Clemmer, D. (1940). *The prison community*. New York: Holt, Rinehart & Winston.

Della Bella, A. (2017). Riforma Orlando: la delega in materia di ordinamento penitenziario. Diritto penale contemporaneo, Resource document. https://www.penalecontemporaneo.it/d/5499-riforma-orlando-la-delega-in-materia-di-ordinamento-penitenziario. Accessed 20 June 2017.

Dolcini, E. (1981). *La "rieducazione del condannato" tra mito e realtà*. In V. Grevi (Ed.), *Diritti dei detenuti e trattamento penitenziario*. Bologna.

Ferrajoli, L. (2009). *Diritto e ragione. Teoria del garantismo penale*. Bari: Laterza.

Fiorentin F. (2018), Art. 30 P.A. In Della Casa F., Giostra G. (Edited by), *Ordinamento penitenziario. Padua*, Cedam (Ed.)

Giostra, G. (2018). La riforma penitenziaria: il lungo e tormentato cammino verso la Costituzione. Diritto penale contemporaneo, Resource document. https://www.penalecontemporaneo.it/pdf-viewer/?file=%2Fpdf-fascicoli%2FDPC_4_2018.pdf#page=119. Accessed 9 April 2017.

Giostra, G., & Bronzo, P. (2017). *Proposte per l'attuazione della delega penitenziaria*. Roma: Sapienza University Press.

Modugno, F. (1995). *I "nuovi diritti" nella giurisprudenza costituzionale*. Torino, Giappichelli.

Ruotolo, M. (2014). *Dignità e carcere*. Napoli: Editoriale scientifica.

Ruotolo, M. (2016). Gli Stati generali sull'esecuzione penale: finalità e obiettivi. Diritto penale contemporaneo, Resource document. https://www.penalecontemporaneo.it/d/4537-gli-stati-generali-sull-esecuzione-penale-finalita-e-obiettivi. Accessed 11 March 2016.

Sykes, G. M. (1958). *The society of captives. A study of a maximum security prison*. Princeton: Classic Editions.

Talini, S. (2018a). *La privazione della libertà personale. Metamorfosi normative, apporti giurisprudenziali, applicazioni amministrative*. Napoli: Editoriale Scientifica.

Talini, S. (2018b). Gli articoli 18 e 30 dell'ordinamento penitenziario tra interpretazione conforme a costituzione e possibili questioni di legittimità costituzionale. Osservatorio AIC, Resource document. https://www.osservatorioaic.it/images/rivista/pdf/14-Talini_definitivo.pdf . Accessed 18 October 2018.

Court decisions

European Court of Human Rights, *Torreggiani and Others v. Italy*, n. 08/01/2013, 4357/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10, 37818/10.

European Court of Human Rights, *Boulois v. Luxembourg*, no. 03/04/2012, 37575/04.

European Court of Human Rights, *Sulejmanovic v. Italy*, no. 16/07/2009, 22635/03.

European Court of Human Rights, *Dickson v. the United Kingdom*, no. 04/12/2007, 44362/04.

European Court of Human Rights, *Aliev v. Ucraine*, no. 29/04/2003, 41220/98.
Constitutional Court sent. no. 296/2005.
Constitutional Court sent. no. 271/1998.
Constitutional Court, sent. no. 296/1997.
Constitutional Court sent. no. 168/1997.
Constitutional Court, sent. no. 118/1990.
Constitutional Court sent. no. 126/1983.
Court of Cassation, sect. I, no. 48424, 26/05/2017.
Court of Cassation, sect. I, no. 55797, 14/12/2017.
Court of Cassation, sect. I, no. 36329, 27/11/2015.
Court of Cassation, sect. I, no. 15953, 27/11/2015.
Court of Cassation, sect. I, no. 11581, 05/02/2013.
Court of Cassation, sect. I , no. 6754, 23/03/2003.

Legal texts

European convention of human rights.
European Prison Rules, COE Rec(2006)2.
Italian Constitution.
Law no. 62/2011.
Law no. 354/1975 (Prison Act).
Law no. 663/1986.