

## **‘Back door sentencing’ in Italy: common reasons and main consequences for the recall of prisoners**

Alessandra Gualazzi<sup>1</sup>  
Chiara Mancuso<sup>2</sup>  
Annalisa Mangiaracina<sup>3\*\*</sup>

### **Abstract**

Italian law only provides the general conditions for the institution of recall. It follows that significant discretionary powers are enjoyed by the surveillance judges (and in particular by the Surveillance Tribunal) who evaluate on a *case-by-case basis* whether the commission of another offence or the infringement of parole conditions demonstrate the offenders’ negative attitude to reintegrate into society. However, especially with reference to the commission of serious crimes, the judges’ discretionary assessment can result in a restrictive application of the law on recall with the consequence that parolees are returned to prison even when they commit minor violations.

The Italian penitentiary system is currently undergoing a serious crisis mainly caused by prison overcrowding. This article argues that reform of the system is thus urgently needed. Such reform should be aimed, among other objectives, at strengthening the role of the bodies which are involved in the different phases of recall (e.g. social services, prison staff, etc.), in order to assist and support judges in their difficult task of decision making in an area – such that of recall – full of social implication.

**Keywords:** Back door sentencing - Recall – Italy -

### **1. Introduction**

Prisoners in Italy can be divided into two categories: those serving determinate sentences and those serving a life sentence.

Prisoners who receive a determinate sentence fall into two categories:

- a) Custodial sentences of less than 3 years are automatically suspended.<sup>4</sup> The convicted

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\*\*The research is the result of a collective work, but for the purpose of this paper, A. Gualazzi has written paragraph 5, C. Mancuso paragraphs 3-4 and A. Mangiaracina paragraphs 1-2.

<sup>1</sup> Alessandra Gualazzi has a PhD from the University of Urbino. She qualified as a lawyer in 2005 at the Bar of Ancona where she currently practises in criminal law. She also works with the Department of Criminal Procedure of the University of Urbino. Contact: alessandragualazzi@libero.it

<sup>2</sup> Chiara Mancuso has a PhD in Comparative and European Criminal law and has several publications in Italian and English. She was a researcher at the University of Palermo from 2005 to 2009 and qualified as a lawyer at the Bar of Palermo in 2005. Contact: chiara@mancuso.co.uk

<sup>3</sup> Annalisa Mangiaracina has a PhD in Criminal Procedure and is a practising criminal lawyer in Palermo. She has over 25 publications and her recent research includes a book on trials in absentia. Contact: annalisamangiaracina@libero.it

<sup>4</sup> Pursuant to article 656 of the code of criminal procedure (c.p.p.), custodial sentences of less than 3 years (or 4 years in

person can apply for an alternative measure to detention (probation under social services' supervision (*affidamento in prova ai servizi sociali*); home detention (*detenzione domiciliare*); automatic remission (*liberazione anticipata*) and day release (*semilibertà*)<sup>5</sup>. Exceptions apply for some categories of offences, for repeat offenders and for those who are held in pre-trial custody.

b) Custodial sentences of more than 3 years are served in prison, but the offender who meets the requirements provided by the law can submit an application for an early release scheme (probation under social services' supervision; home detention; automatic remission, day release and conditional release). Early release benefits are granted by a specific judicial authority called Surveillance tribunal (*Tribunale di Sorveglianza*) and are revoked if the offender infringes the courts' conditions, commits a further offence or receives another definitive sentence. Numerous exceptions apply for certain categories of serious criminals and for repeat offenders.

Life sentenced prisoners can be granted day release after having served 20 years or conditional release after having served at least 26 years in prison.

The common forms of release, so called "back door measures", are regulated by law 26 July 1975 no 354, so called "law on the penitentiary system" (*legge penitenziaria*) (hereafter PL) which provides several schemes that enable prisoners to leave, permanently or temporarily, jail before the end of their sentence.

Probation under social services' supervision (normally referred to simply as "probation") is regulated by article 47 PL and can be granted to offenders who have been sentenced to an imprisonment of no more than 3 years (or whose remaining sentence does not exceed this period)<sup>6</sup> when they meet the criteria set forth by the law (e.g. low risk assessment, availability of a stable accommodation, etc.).

Home detention curfew is regulated by article 47-ter PL and is granted to prisoners sentenced to a term of imprisonment of no more than 2 years (or when less than two years remains of a longer sentence), or no more than 4 years (even when this is the residual portion of a longer sentence), whose health condition does not allow their permanence in a correctional facility, or who belong to one of the categories listed by the law (e.g. pregnant mothers or mothers with young children living with her; fathers with young children living with him when the mother is dead or seriously ill; etc.).

Conditional release is the only form of release regulated by the criminal code (articles 176 and 177 c.p.) The scheme is rarely applied in practice and is awarded to prisoners who have served at least 30 months, or the halfway point of their sentence if the residual penalty is no

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some specific cases) are automatically suspended (except some certain types of offences). Offenders have the right to submit an application, within 30 days, for an alternative measure to detention. If they do not apply within the statutory time limit, the suspended penalty regains its legal effects and the offender is conducted to prison.

<sup>5</sup> We will not cover in this paper the schemes of day release and automatic remission. Day release, despite its inclusion within the system of early release measures (articles 48-51 law 26 July 1975 no 354) is predominantly considered by scholars and case-law to be an anomalous form of release insofar as the prisoner remains subject to prison life, being only granted the possibility to spend part of the day outside jail in order to take part to activities (work, education, etc.) which may help his re-entry into society. The offender who is awarded this measure can be recalled to jail if his conduct proves to be no longer compatible with the re-socialisation goals sought by the release, or if he remains outside jail for more than twelve hours without a valid justification, or he is convicted with the offence or escape. Another form of early release is automatic remission. In accordance to article 54 law 1975/354 the prisoner undergoing detention who has given proof of his participation in the process of re-education is granted a reduction of forty-five days for every six months served, in recognition of such participation and in order to encourage his effective reintegration into society. For the above purpose, the period spent in protective custody or house arrest is also evaluated.

<sup>6</sup> Special cases of probation are contained in article 47-bis and 47-quater PL and relate to drug and alcohol addicted who intend to begin or continue a therapeutical programme and to offenders suffering from Aids or other serious illnesses who are under medical treatment.

longer than 5 years; or 4 years and not less of 3/4 of their sentence in case of repeat offenders; life sentence prisoners can be granted conditional release after having served at least 26 years (or 21 if they have been granted the penalty discounts provided by automatic remission).

## **2. Reasons for recall**

In general, offenders are recalled to prison when they do not comply with the prescribed licence conditions imposed upon them or when their behaviour is no longer compatible with the continuation of the release measure. The Surveillance Tribunal is the competent judicial authority for the recall of prisoners. Among the members of the Tribunal there is the Surveillance judge (*magistrato di sorveglianza*) who initiates the proceedings for the suspension or the revocation of the benefit.

All forms of early release can be suspended or revoked. If the measure is suspended, the offender is temporarily recalled to prison while the Surveillance judge promptly transmits all relative documentation to the Tribunal which should pronounce its decision within the following 30 days. If a judgment is not made within the 30 days period the offender is released again and continues to benefit of the effects of the measure which he had been originally granted.

The Surveillance Tribunal enjoys, in relation to recalls, a wide discretionary power, especially where the recall is caused by the offender's general misconduct. For instance, with specific reference to probation, if the released offender was originally convicted of a drug trafficking offence and, whilst on licence, he does not comply with the prohibition to keep regular contact with people who deal with drugs or who are drug addicted, or to attend places where drug is smuggled, it is up to the Tribunal to return him or not to prison. The endurance of a stable working condition, despite not being qualified by law as a requirement for granting or revoking probation, is in practice seen by surveillance judiciary as a necessary requisite for the prosecution of the measure. Therefore, job losses, whether in conjunction with other elements, usually result in the offender being recalled to jail.

The prescription/prescriptions violated by the offender (and which cause his recall) do not need to be criminal provision. On the opposite, a violation of a criminal provision does not automatically lead to the offender's return to jail.

Indeed, as has been explained by the Court of Cassation (*Corte di Cassazione*) – which is the Italian Supreme Court – an offender cannot be returned to prison on the sole basis of the commission of a crime or the violation of a specific law or prescription; however, the recall decision should be based on facts demonstrating an overall negative attitude which collides with the initial re-education assessment of the prisoner (*prognosi di rieducabilità*)<sup>7</sup>.

In contrast, however, if the offender commits a crime, the Surveillance Tribunal is not required to wait for the criminal proceedings to be concluded, and it can recall the offender to jail on the basis of the evidence available in those proceedings (e.g. seizure, searches, phone tap evidence, witnesses' declarations, etc.)

It is worth noticing that the recall can only be caused by misconducts that have been carried out by the offender after he had been granted an early release measure and that, thus, offences committed before this period cannot be taken into account in the recall process.

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<sup>7</sup>Cass., sez. I, 7.10.1994, Falletti, n. 4365.

Moreover, as has been ruled by the Supreme Court, offenders under probation who have been remanded in custody pending trial do not have their early release automatically revoked. According to the Court in these cases, the release benefit is temporarily “frozen” and the Surveillance tribunal shall assess whether the offender’s conduct, described in the pre-trial detention order (*ordinanza cautelare*) is symptomatic of the failure of the rehabilitation<sup>8</sup>.

Finally, the filing of complaints or the reporting to the police of the person on probation may result in the recall of the offender when he performs a conduct that is found to be in breach of the law or of the licence conditions, or which is, otherwise, irreconcilable with the purposes of treatment.

With regard to probation the most common rules and conditions for release are the following:

- To keep regular contact with social services (UEPE).
- To enroll in a professional course.
- To seek and maintain an employment position.
- To follow a treatment program at one of the advised therapeutic community centre.
- To compensate or to keep a certain attitude towards the victim of his crime.
- To refrain from attending certain places or people.
- To refrain from performing certain activities.
- Not to leave home at certain times or in the night.
- Not to detain or use weapons or other objects.
- Not to live in a particular city, town or village.

In practice, though, the Surveillance Tribunal, in reason of the substantial freedom enjoyed by the offender whilst under probation and the absence of a real control by the social services, tends to recall him whenever he violates any of the above prescriptions. These misconducts are treated by the Tribunal as indication of the offender’s lack of commitment to the rehabilitation and a sign of his scarce sense of responsibility.

With regard to home detention, the most frequent cases of recall concern the breach of the following rules:

- The prohibition to leave the offender’s house, home, residence, private property, or any other place of cure or assistance where he may be temporarily housed, except when the Surveillance Tribunal has granted the offender permission to do so (e.g. for working or studying reasons, childcare arrangements; religious observance; regular hospital appointments; appointments at benefit offices, etc.). In this case, the prescribed period of times which can be spent outside must be strictly observed.
- The prohibition to communicate with people other than those who cohabit with him or assist him.
- The prohibition to associate with individuals who have criminal records or are drug addicted or with other individuals deemed as inappropriate by the Tribunal.
- The prohibition to possess or carry out weapons or drugs.
- The prohibition to attend certain places or perform certain activities<sup>9</sup>.

If the offender is charged with the alleged offence of escape<sup>10</sup> (which occurs when he breaches the curfew conditions specifying the times and days which can be spent outside his residence)<sup>11</sup>, the Surveillance Judge usually suspends the execution of the measure.

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<sup>8</sup> Cass., Sez. fer., 10.8.2010, M., n. 32363 and see also Cass., Sez. I, 19.03.2008, Uliano, n. 14668, Rv. 239405; Cass., Sez. I, 18.2.2009, Del Buono, n. 8656, Rv. 242892.

<sup>9</sup> It is worth mentioning that the Surveillance Tribunal cannot impose upon offenders positive obligations.

<sup>10</sup> The offence of escape (*evasione*) is regulated by article 385 of the penal code.

<sup>11</sup> Cass., sez. Fer., 21.08.2008, S., n. 34286.

Nonetheless, in these cases, the offender is not automatically recalled to jail, but the Surveillance Tribunal should decide whether the subjective and objective elements of the alleged misconduct constitute an excusable infringement of the curfew condition and whether they clearly reveal the offender's inability to comply with his licence rules and with the execution of the measure in general.

Often prisoners on home detention are found by the police (who has the control over prisoners released under this scheme) in front of their houses, but outside the external fence or gate of the property. Technically these conducts should amount to offences of "escape", but often in practice a recall would not be brought forward if the Tribunal finds that the offender did not intend to deliberately and maliciously breach his licence conditions and rather, that he had just been inattentive (e.g. because he was helping his wife to download the car and bring the shopping home or was chatting with a neighbour who had not been well for a while).

Finally, two are the main reasons for the recall of prisoners who have been granted conditional release or parole. Conditionally released offenders are returned to jail when they: (i) perpetrate a crime of the same type of the one for which they have been convicted; (ii) fail to comply with the prescriptions set forth in article 230 c.p. In the second case the misconducts will generally consist in a violation of the common restrictions imposed on the offender, such as the prohibition to leave his house in the night, or to leave his town or country, or to attend certain people and places or to perform certain types of activity.

The Constitutional Court (*Corte Costituzionale*)<sup>12</sup> has ruled that the commission of another offence or the infringement of parole prescriptions should not automatically lead to the offender's return to prison. Indeed, the Surveillance Tribunal should always investigate whether the offender's conduct, in relation to the nature of the crime committed or the gravity of the rules violated (inferred by the factors listed in article 133 c.p.), is still compatible with the continuation of the conditional release. In accordance to this important constitutional ruling, conditionally released prisoners can be recalled only when their wrongdoings clearly express a lack of repentance and, hence, contradict the original decision on the offender's suitability to benefit of the release. In addition, also the Court of Cassation has stressed that the recall decision must be adopted by the Surveillance courts only at the end of a comprehensive and exhaustive examination aimed at ascertaining, without any doubt, whether the serious offender's misconduct could jeopardise the whole rehabilitative process<sup>13</sup>. Pursuant to these guidelines, in practice, surveillance judges tend not to recall offenders who occasionally but not systematically violate the prohibition to mix up with criminals.<sup>14</sup> On the opposite, though, offenders can be recalled when they commit a single violation which is otherwise deemed to be seen as an irretrievable breach of the parole "agreement". As in the case of the offender who was returned to prison because, in spite of the obligation upon him imposed, had kept contacts with subjects who had several criminal records<sup>15</sup>; or the offender who had not complied with the prescription of remaining within a particular area and had, without judicial authorisation, deliberately travelled in order to meet his employer who was involved in drug trafficking<sup>16</sup>.

Finally, it is worth mentioning that recall decisions can also be revoked by the Court when the grounds on which they were based do not longer exist, as in the case when the recall was

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<sup>12</sup> See on this topic, Corte Cost., 23.12.1998, n.418; and also Cass., Sez I, 24.10.2011, n. 44605.

<sup>13</sup> Cass., Sez. I, 19.12.1997, n. 7184.

<sup>14</sup> Cass., Sez. I, 22.4.2009, n. 19362.

<sup>15</sup> Trib. Sorveglianza, 9.1.2003, n. 9.

<sup>16</sup> Cass., sez. I, 31.1.1992, Vincis, in *Cass. Pen.*, 1993, 827.

caused by the institution of criminal proceedings against the offender for a crime allegedly committed during the licence period and the offender had been later found non guilty<sup>17</sup>.

### 3. Consequences of recall

Recall has generally two consequences on offenders: first of all, recalled offenders will immediately be returned to prison; secondly they might suffer some restrictions before being able to submit an other release application.

With specific reference to probation, which is the most common form of early release, the recalled offender will need to have his penalty redetermined by the Surveillance Tribunal.

The portion of residual penalty to be served in prison will be recalculated by the Tribunal on the grounds of: i) the objective and subjective seriousness of the offender's conduct; (ii) the violations of the law or of the prescriptions set forth by the court; (iii) the overall constraints suffered by the offenders from the execution of his penalty until the alleged/occurred misconduct.

The law does not provide any guidance with regard to whether the probation period should count towards the calculation of the penalty still to be served by the prisoner. Therefore, the Surveillance Tribunal enjoys a wide discretionary power in the matter. The Constitutional Court has stated that the Surveillance Tribunal, after recalling the offender to jail, should promptly calculate the period of penalty still to be served, keeping into due account the overall conduct performed by the offender whilst on probation. This means that there is no obligation upon the Tribunal to consider the probation period as a portion of the penalty which is still to be spent<sup>18</sup>. In practice (and pursuant to the guidelines later provided also by the Court of Cassation), the Tribunal can condemn the recalled offender to serve all the remaining sentence when the type and seriousness of the violation committed reveal that since his release he had not been genuinely willing to participating in his re-socialisation programme and that had only "pretended" to adhere to the conditions of the licence.

The second consequence of recall consists in the imposition upon offenders on a three-year ban period during which they cannot apply for any other forms of release or be granted other privileges, apart from automatic remission<sup>19</sup>. In broader terms, from the moment when execution of detention is resumed, or when the revocation has been issued, the prisoner who has had an alternative measure revoked cannot be released again for at least three years.

Finally, an interesting topic is the evaluation of the misconducts performed by the offender after the conclusion of the probation period. At the end of probation the Surveillance Tribunal assesses whether the probationary period has been successfully completed. If this is the case, the Tribunal officially declares the conviction to be entirely "spent"<sup>20</sup>.

The serious wrongdoings committed by the offender after the end of the probation period but before the Tribunal's decision can constitute indications of the failure of the offender to achieve the social reinsertion goal sought with the release measure; moreover, they type and level of the misconducts can influence the judicial decision on the determination of the portion of penalty which the offender still needs to spend in prison. This means that even if the offender has successfully completed his probation period and has not been recalled to

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<sup>17</sup> See, in this respect, Corte cost., 31.5.1996, n. 181.

<sup>18</sup> Cass., Sez. I, 13.6.2001, Modaffari, n. 29343; Cass., Sez. I, 12.1.2005, Ricconi, n. 2885.

<sup>19</sup> See article 58-*quater* PL.

<sup>20</sup> Cass., sez. I, 26.6.1981, Milito, in *Cass. pen.*, 1982, p. 1631.

prison, if he engages in a serious misconduct (e.g. after terminating probation he commits another offence) he could be sent back to prison to serve his full original custodial penalty.

The assessment of the outcome of probation has been the subject of a heated debate among scholars and has led to several different judicial pronouncements. According to a landmark ruling of the Court of Cassation<sup>21</sup> in these cases the Tribunal should make a case-to-case evaluation taking into account the convict's behaviour during the execution of the measure; the type and seriousness of the facts occurred after probation; the length of time between the end of probation and the misconduct, and the connection and relevancy of the successive misconduct in respect to the conditions on the licence. Specifically, the case decided by the Court dealt with an offender who, just few days after completion of the probationary period, has robbed the employer for whom he had worked while on probation. Given the offender's course of action, the Court ruled that the offender had carefully planned the crime during his probationary period and that the release measure had failed to reach the purposes of re-socialisation and rehabilitation at which it was aimed. However, as the Court has pointed out, often the responsibility for the negative outcome of the release measure is not only of the offender, but it also lies with the social services and the other bodies which should help and support offenders to reintegrate into society, which are too often understaffed and not properly trained. To be also blamed is, according to the Supreme Court, the excessively afflictive nature of some of the licence terms which impose an unnecessary and disproportionate burden upon offenders.

Similar considerations apply for offenders who are released on home detention curfew. However, unlike probation, offenders who are allowed to serve their prison sentence at home maintain their state of "prisoners". This produces, as main result, that in case of recall, in spite of the seriousness of the offender's misconduct, the time spent on curfew is always counted as time served. Indeed, the Surveillance judiciary does not have any discretion in the matter. Moreover, the recalled offender, who meets the criteria set forth by law, could still apply in the future for a temporary release measure (*permessi premio*), except when reason for the recall was the commission of an intentional offence (*reato doloso*).

Lastly, with reference to conditional release or parole, according to the wording of article 177 c.p. "the period spent on parole is not calculated as a portion of the penalty and the prisoner cannot be re-released". However, the Constitutional Court partially invalidated the provision and with ruling 28/1989 affirmed that in case of recall, the Surveillance Tribunal should take the parole period into account when calculating the portion of penalty still to be served by the offender<sup>22</sup>. Once again –as the Court has highlighted – the Tribunal's decision should be based on the conduct held by the prisoner during the entire period of probation and on the number and type of restrictions and conditions imposed on him during this period.

With another remarkable pronouncement<sup>23</sup> the Constitutional Court has ruled that life sentence prisoners who have been recalled can apply to be released again if they meet the required criteria.

As already mentioned, the Surveillance Tribunal's decisions can be challenged before the Court of Cassation which merely deals with matters of law and does not allowing a fresh determination of the merit of the case. The most common ground of appeal<sup>24</sup> against the

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<sup>21</sup> Cass., Sez. Unite, 27.02.2002, Martola, in *Giust. Pen.*, 2002, II, 566.

<sup>22</sup> Corte Cost., 25.5.1989, n. 282.

<sup>23</sup> Corte Cost., 4.6.1997, n. 161.

<sup>24</sup> We refer here to "appeal", but the proper term in the Italian law is *ricorso*. The distinction is more than merely terminological, because unlike the *ricorso per cassazione*, the appeal - before the Court of Appeal - allows the merits of

Tribunal's decisions before the Court of Cassation will involve the scarce reasons given by the judges<sup>25</sup> or the contradictory and illogical reasoning of their findings.

#### **4. Numbers<sup>26</sup>**

The Italian prison population is constantly increasing. The number of inmates was 58.127 in 2008, 64.791 in 2009 and 67.104 in August 2011, in contrast with a current certified accommodation capacity of 45.647 unities.

In particular, on a total of 15.784 cases in the first six months of 2011, 6.482 inmates were awarded probation whilst 9.302 were awarded home detention. The total number of recalls was 714, accounting for 4.52% of the total of early releases.

With specific reference to probation, in the first six months of 2011, 256 offenders had been recalled to jail, accounting for 3.94 % on a total 6.482 cases. The greatest number of recalls (186 for a total of 2.86%) was caused by failure to comply with the terms of licence; 24 (0.37%) were recalled for committing an offences while outside prison; 19 offenders (0.29%) had been recalled on the basis of a change of juridical status (imposition of a new sentence for offences committed before the award of the measure and in consequence of which the requirement of penalty limit stated for the single types of release is no longer met); 14 (0.21%) were recalled on the grounds of monitoring failure; and 13 (0.20%) for unspecified reasons.

In the same period (January- June 2011) 458 offenders who were granted home detention had been recalled to jail, accounting for 4.92% on a total 9.302 cases. Also in this case the greatest number of recalls (189 for a total of 2.03%) was caused by failure to comply with the terms of licence; 107 offenders (1.15%) had been recalled on the basis of a change of juridical status; 59 (0.63%) for unspecified reasons; 52 (0.55%) were recalled on the grounds of monitoring failure and 51 (0.54%) were recalled for committing an offences while outside prison.

#### **5. Conclusions**

The recall process is initiated by the Surveillance Judge who provides the Surveillance Tribunal with all the elements and evidence upon which the final decision of returning the offender to jail is based. This is the real problem with the recall system in Italy, the so called "penitentiary sentencing". This expression does not refer to the recall procedure in itself – which is a judicial procedure specifically regulated, in all its phases, by the law and subject to the control of the Supreme Court – but rather to the excessive discretion attributed to surveillance judges.

It could be argued that the discretion enjoyed by the surveillance judiciary is necessary both with regard to the initial determination of the terms of the licence and to the recall process, in that it allows the rehabilitative program to be tailored to the individual's specific needs, to take into account the subjective circumstances of the offender. However, there is a real concern that the overall extensive decision-making power of the judges in this area is exposed to the influence of the natural prejudices linked to the nature of the offence committed, especially in case of particularly serious crimes.

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the case to be re-examined. The grounds of appeal before the Court of Cassation are limited to errors of substantive and procedural law and are listed in article 606 c.p.p.

<sup>25</sup> In Italy judges have a constitutional duty to provide adequate reasons for their decisions (article 111 § 6 of the Italian Constitution).

<sup>26</sup> The data are provided by the Department of Penitentiary Administration and are available online at <http://www.giustizia.it>. There is no official data on conditional release.



The dilemma faced by the judges is that, in absence of clear legal rules and guidance, they often have to decide whether to “re-punish” the offender, imposing on him the heavy burden of returning to prison life (also in view to set a strong example for other inmates); or to close an eye to the offender’s misconduct, with the risk that he might soon re-offend and fail to achieve an effective rehabilitation.

In this respect, it is worth mentioning an important decision adopted by the ECHR against Italy in December 2009<sup>27</sup>, which could influence the future position assumed by the surveillance judiciary with regard to offenders’ recalls. The application to the European Court was lodged by the family of two women who were killed in April 2005 by a lifer who had been granted early release. According to the applicants, the surveillance judges who released the killer were negligent and had not taken into proper account the fact that the offender had already breached some of the rules governing his temporary licence and had been involved in several incidents during his time in prison (for which he had further been convicted). The Court declared the infringement by Italy of article 2 ECHR, according to which “Everyone’s right to life shall be protected by law” and affirmed that Member States should refrain from causing intentionally and illegally the death of their citizens and should adopt all necessary measures to protect the life of people who are under their jurisdiction. In particular, according to the ECHR, States are under the obligation to guarantee a wide protection of the community against criminal conducts adopted by people who have been convicted for serious and violent crimes. Hence, the Court, despite reaffirming the right of every person convicted to apply for an early release from prison, has condemned the superficial behaviour of the Italian surveillance judges who had released the prisoner whilst taking inadequate note of the evidence of his behaviour in prison, which was not an expression of genuine repentance. It is interesting to note that in May 2005, and therefore prior to the Court’s ruling, the Minister of Justice instituted a disciplinary action against the judges involved in the case which ended with the issuing of an official reprimand against them by the *Consiglio Superiore della Magistratura* (the body controlling the activity of judges), whose decision was further upheld by the Court of Cassation in 2009. This case, which originated an unprecedented debate (also because of the notoriety of the offender involved)<sup>28</sup> on the effectiveness of the legislation and resources available and on the level of discretion enjoyed by judges in early release procedures, could have a profound impact on future recalls, insofar as it could lead judges to adopt a consistent harder approach in matter of recalls.

Finally, according to the available numbers, the main reason for recall in Italy appears to be the violation of the conditions imposed upon release. Nonetheless, the law merely provides a list of generic requirements which should be specified by the competent judicial authority which indeed retains a wide freedom in the matter.

It should also be considered that the whole matter of early release and recall is strictly connected to the thorny question of prison overcrowding and to the failure of the ideals of rehabilitation and re-education stated by article 27 of the Constitution. Therefore, the role of the surveillance judiciary is extremely delicate in virtue of the effects that the decisions taken with regard to the single offender can have on the entire community, as it is obviously the case when a released prisoner becomes a danger for society and/or commits other offences.

Unfortunately, as it is often the case in Italy, the legislative measures adopted with reference

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<sup>27</sup> ECHR, 15.12.2009, *Maiorano and others v. Italy* (n°28634/06).

<sup>28</sup> The murderer of the two women, Angelo Izzo, is a famous Italian criminal. He was involved, with other two accomplices, in the so called “Circeo massacre” of 1975, where he kidnapped, raped and brutally abused two girls for several days, finally murdering one and nearly killing the other.

to criminal justice are motivated by cases of special urgency and often lack consistency and uniformity, failing to achieve a more comprehensive approach and to offer long term solutions. The rise in illegal immigration and the increased use of prison sentences have had a remarkable impact on the penitentiary system with all the related consequences on the level of rehabilitation and crime control.

More recently, in order to ease prison overcrowding – and after the condemnation of Italy by the European Court (*Sulejmanovic v. Italy*) in July 2009 – a new criticised piece of legislation was passed in November 2010. According to the law 26 November 2010, no.199 (so called “empty jails” law) prison sentences not exceeding 12 months, even as part of longer sentences, are generally (but exceptions apply) carried out at the offender’s house or in other public or private structures outside prison. The law is designed to apply until the full implementation of the reform of alternative measures to imprisonment and, in any case, no later than December 2013. Basically, the Italian government lacks the financial resources to build new prisons and is just adopting some buffer measures which are not able to provide a long term solution to the problem.

Pending an organic reform of the sentencing and penitentiary system, the law 199/2010, which has been in force since December 2010, has the ambitious goal to finally resolve or, more realistically, to contain, the currently growing prison population. In general terms, the new legislation creates a special type of home detention which is granted to those who have been imposed a custodial sentence up to one year<sup>29</sup> (with the exception of serious or repeat offenders and certain categories of dangerous prisoners) and who meet the subjective and objective requirements listed in its article 1.

However, the award of the measure is subject to the final discretionary assessment of the Surveillance Judge who shall consider whether the offender is likely to escape or to re-offend; or whether the offender’s house or other equivalent place is adequate and allows the necessary control required by law to public safety. In this case, then, only the Surveillance judge, and not the whole Tribunal, is endowed with the competence to decide on the prisoner’s application. Hence, also in reason of the low threshold of the prison sentences involved, these judges will find themselves charged with the responsibility of a very difficult choice and will have to produce massive risk assessments in order to ascertain the suitability of the offender to the release scheme.

The Surveillance Judge adopts his decision without hearing the parties and without the intervention of defence lawyers, upon information obtained from a variety of sources including, for instance, the report filed by the prison authorities on the offender’s behaviour in pre-trial custody and after evidence of a suitable curfew address is given. In general, then, all the rules regulating home detention apply also to this type of early release. The judge’s decision can be challenged before the Surveillance Tribunal.

According to the data produced so far, the number of inmates who have benefited of an early release on the basis of the so called “empty jails” law is almost 3000<sup>30</sup>. This rather modest

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<sup>29</sup> This limit has now been increased to 18 months by the decree law (*decreto legge*) 22 Dec 2011, no 211 (published in the Official Journal of 22 Dec 2011, no 297), entitled ‘Urgent measures to tackle the problems caused by prison overcrowding’.

<sup>30</sup> This low figure is also to be explained on the basis of other two factors: first, the significant percentage of foreign prisoners currently detained in Italy. In August 2011 there were 24.155 foreign inmates on a total of 67.104 unities. Indeed, foreigners, often illegally present in the Country, do not often have a stable or suitable accommodation or a job and are, thus, unable to meet the criteria required by law in order to be awarded the benefit. The second factor consists in the lack of material and human resources employed in the rehabilitation of criminals.

figure is explained in virtue of what we have been argued above with regard to the enormous responsibility (and the related risks for society) of releasing offenders which the law has attributed to judges.

This is, essentially, a problem of method. The recall system should undergo a comprehensive reform, able to address all issues related to the lack of resources suffered by the bodies involved in the different phases of the process, in order to ensure the effective re-socialisation of offenders and to prevent that he, who had been initially recognised as “rehabilitated” enough to be released, is not “too easily” returned to jail.

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