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## ITALIAN PRISON SYSTEM IN THE TIME OF COVID-19

*ABSTRACT. This essay aims to analyse the extraordinary measures adopted in the Italian prison system in order to reduce overcrowding and contain the spread of Covid-19 pandemic within inmates, to protect the health of prisoners and prison staff. These measures have not always proved adequate to reduce the pervasive problem of prison overcrowding and to keep the social distance within the penitentiary institutions. In an attempt, therefore, to fill the gaps of the legislator and ensure that the execution of the detention takes place in accordance with the constitutional principles of health protection and humanity of treatment, the Supervisory Penitentiary Magistrates have exercised and continue to exercise a role of substitute.*

**CONTENT.** 1. Background. Prison overcrowding and the high-risk of exposure to Covid-19 – 2. Measures adopted for the prevention of contagion from Covid-19 – 2.1. Home detention – 2.2. Extraordinary leave of absence from prison – 3. The pre-trial detention: a forgotten issue – 4. The subsidiary role of the Supervisory Penitentiary Magistrates – 5. Conclusions

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### **1. Background. Prison overcrowding and the high-risk of exposure to Covid-19**

Well in advance of the spread of the Covid-19 pandemic, the Italian penitentiary system experienced a condition of deep crisis due to pervasive problem of prisons' overcrowding.<sup>1</sup>

The "Italian drama" of the prison overcrowding has roots dating back in time, but it's only with the well-known *Torreggiani v. Italy* judgment that the European Court of Human Rights has recognized this issue as a "systemic problem caused by the chronic malfunctioning of the Italian prison system."<sup>2</sup>

Through a pilot judgment,<sup>3</sup> the European Court of Human Rights imposed to Italy to adopt, on one hand, general measures suitable to solve the systemic problem of prison overcrowding; on the other hand, to guarantee effective remedies for inmates who are subject to inhumane or demeaning treatment.<sup>4</sup>

The sudden pandemic emergency has once again drawn attention to the dramatic state of overcrowding of Italian prisons, exposing the pre-existing defects and

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<sup>1</sup> For further considerations on prison overcrowding in the Italian prison system, see, among many other studies, R. DEL COCO, *Il sovraffollamento carcerario e l'ultimatum di Strasburgo*, in R. DEL COCO-L. MARAFIOTI-N. PISANI, *Emergenza carceri. Radici remote e recenti soluzioni normative. Atti del Convegno (Teramo, 6 marzo 2014)*, Giappichelli, Torino, 2014, p. 15; C. FIORIO, *Sovraffollamento carcerario e tensione detentiva*, in *Diritto penale e processo*, 2012, p. 410; G. GIOSTRA, *Sovraffollamento carceri: una proposta per affrontare l'emergenza*, in *Rivista italiana di diritto e procedura penale*, 2013, p. 55; P. CORVI, *Sovraffollamento carcerario e tutela dei diritti del detenuto: il ripristino della legalità*, *ivi*, 2013, p. 1796; A. PUGIOTTO, *La parabola del sovraffollamento carcerario e i suoi insegnamenti costituzionalistici*, in *Rivista italiana di diritto e procedura penale*, 2016, p. 1204.

<sup>2</sup> European Court of Human Rights, 8 January 2013, *Torreggiani and others v. Italy*, in *Diritto penale contemporaneo*, 9 January 2013, with comment by F. VIGANÒ, *Sentenza pilota della Corte EDU sul sovraffollamento delle carceri italiane: il nostro paese chiamato all'adozione di rimedi strutturali entro il termine di un anno*. For other comments on this judgment, see M. PELISSERO, *La crisi del sistema sanzionatorio e la dignità negata: il silenzio della politica, i compiti della dottrina*, in *Diritto penale e processo*, 2013, pp. 261 ss; G. TAMBURINO, *La sentenza Torreggiani ed altri della Corte di Strasburgo*, in *Cassazione penale*, 2013, pp. 11 ss.

<sup>3</sup> The pilot judgment procedure was developed as a technique of identifying the structural problems underlying repetitive cases against many countries and imposing an obligation on States to address those problems.

<sup>4</sup> An overview of the legislation adopted following the "warning" of the European Court of Human Rights is offered by DEL COCO-MARAFIOTI-PISANI, *Emergenza carceri. Radici remote e recenti soluzioni normative. Atti del Convegno (Teramo, 6 marzo 2014)*, cit.; F. CAPRIOLI-L. SCOMPARIN, *Sovraffollamento carcerario e diritti dei detenuti, le recenti riforme in materia di esecuzione della pena*, Giappichelli, Torino, 2015; M. RUOTOLO, *Il senso della pena. Ad un anno dalla sentenza Torreggiani della Corte EDU*, Editoriale Scientifica, Napoli, 2014.

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criticalities of the prison system.<sup>5</sup>

In fact, in the exceptional context of the pandemic emergency that struck Italy, the problem of overcrowding – as was foreseeable – took on an even more delicate role, since it amplifies and continues to amplify the risk of exponentially increasing danger of Covid-19 infections. This is because people in places of detention tend to be more exposed to infection than the general population because of the conditions of confinement in which they live for prolonged periods.<sup>6</sup>

Overcrowding means having no living space. It means, for example, to share twelve square meters and a single shared bathroom in four or five people, as well as to sleep on the third level of a bunk bed, and to share a shower with fifty people.

Indeed, the chronic insufficiency of space compared to the number of people confined, as well as the often-precarious hygienic conditions of penitentiary institutions, make it almost impractical to keep the social distance and to sanitize the environments, as minimum precautions to prevent the spread of the virus.

Suffice it to say that, at the start of the pandemic on March 2020, Italy had 61,230 presences in prison institutions, compared to a regulatory capacity of 50,931 inmates.<sup>7</sup>

Therefore, this situation made the need to alleviate the pressure of the presences within the institutions even more urgent, in order to ensure, even in prison, the social distance.

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<sup>5</sup> On the relationship between the context of the pandemic emergency and the problem of overcrowding, see, among many other studies, P. MASSARO, *Crisis and contradictions of the Italian penitentiary system, ten years after the declaration of the state of emergency*, in *Sociology and Social Work Review*, 1/2020, pp. 7 ss.; S. CARNEVALE, *Carcere e coronavirus: intorno a ciò che emerge dall'emergenza*, in *disCrimen*, 9 February 2021.

<sup>6</sup> In this regard, see World Health Organization (WHO) Interim Guidance, “*Preparedness, prevention and control of COVID-19 in prisons and other places of detention*”, 15 March 2020 and European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), “*Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease (COVID-19) pandemic*”, in *Sistema penale*, 21 March 2020: “as close personal contact encourages the spread of the virus, concerted efforts should be made by all relevant authorities to resort to alternatives to deprivation of liberty. Such an approach is imperative, in particular, in situations of overcrowding”.

<sup>7</sup> E. DOLCINI-G.L. GATTA, *Carcere, coronavirus, decreto ‘Cura Italia’: a mali estremi, timidi rimedi*, in *Sistema penale*, 20 March 2020, report that current statistics indicate a rate of overcrowding of 120%, with about 10,299 inmates in excess of the capacity of Italian prisons. For a constant update of numbers and data, see the website of the Antigone Association, as well as the website of the National Guarantor for the Rights of Persons Detained or Deprived of Liberty.

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## ***2. Measures adopted for the prevention of contagion from Covid-19***

To this end, numerous regulatory interventions have followed, with the same emergency character.

In the very first days of the spread of the pandemic, the emergency legislation addressed the issue of prevention of contagion from Covid-19, with D.L. 8 March 2020, n. 11,<sup>8</sup> aimed at “closing” the prison from the outside, in order to limit the dangers of external contagion, without, however, a contextual intervention on the chronic problem of overcrowding of penitentiary institutions.

In particular, Article 2, paragraphs 8 and 9 of D.L. 8 March 2020, n. 11 prescribed the interruption of all face-to-face interviews to be replaced by video calls and, at the same time, the suspension of the granting of the bonus leave and semi-freedom, i.e., the measures that entail leaving and re-entering prison and therefore the possibility of conveying the virus.

The inability of inmates to fully understand the emergency and the interruption of contacts with their families has generated numerous protests and riots, broke out in many Italian prisons on 7-9 March 2020.<sup>9</sup>

These first measures adopted by the Government to limit the spread of Covid-19 in prisons, to protect prisoners and prison staff, proved to be immediately inadequate, since the objective of “closing” the prisons, with no possibility of “exit”, did not allow to deal with the roots of the problem: that is, to relieve the pressure of the presences inside the penitentiary institutions in order to ensure the necessary distance between people, as a precautionary hygiene measure, essential to prevent – or at least to slow down – the spread of the infection.

For these reasons, it was felt the need to use the deflationary tools already in force in our system to encourage the release from prison of inmates whose confinement

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<sup>8</sup> D.L. 8 March 2020, n. 11, «Extraordinary and urgent measures to counter the epidemiological emergency from COVID-19 and contain the negative effects on the performance of judicial activity», extended to the entire national territory the restrictive provisions set forth by D.L. 2 March 2020, n. 9 for Lombardy Region and 14 provinces in Northern Italy. A deeper analysis of this legislation is offered by G. DARAIO, *Emergenza epidemiologica da Covid-19 e sistema penitenziario*, in *Diritto penale e processo*, 7/2020, pp. 936 ss.

<sup>9</sup> On this topic, see V. POLIMENI, *COVID-19. Riflessioni a margine delle rivolte in carcere: l'ennesimo campanello d'allarme*, in *disCrimen*, 2/2020, pp. 351 ss.

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is not necessary.

The Government has thus adopted several measures aimed, in particular, at “opening” the prison for those not convicted of serious crimes, in order to serve their sentence in alternative ways.

Among the most important, it is worth mentioning D.L. 17 March 2020, n. 18 (so-called “*Cura Italia*”)<sup>10</sup> and, most recently, D.L. 28 October 2020, n. 137 (so-called “*Ristori*”)<sup>11</sup> that intervenes in penitentiary matters with solutions that propose, at least in part, the emergency measures already experienced during the first epidemic “wave”.

The aim pursued by the legislation is to prevent the onset of new epidemic outbreaks within prisons through the adoption of measures capable of reducing the prison overcrowding.

In particular, Articles 123 and 124 of D.L. 17 March 2020, n. 18 tried to “open” the doors of the prison from the inside and to “close” them with respect to the entry of new prisoners through the provision of two types of measures: the introduction of an extraordinary and temporary home detention and the implementation of bonus leave for semi-free and common prisoners.

The recently introduced penitentiary measures move along two directions.

On one hand, the possibilities of home detention for short sentenced are extended.

On the other hand, the provision of bonus leave of exceptional duration aims

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<sup>10</sup> D.L. 17 March 2020, n. 18 (conv. L. 24 April 2020, n. 27), «Measures to strengthen the National Health Service and economic support for families, workers and businesses related to the epidemiological emergency by COVID-19». On this legislation, see DOLCINI-GATTA, *Carcere, coronavirus, decreto ‘Cura Italia’: a mali estremi, timidi rimedi*, cit.; F. FIORENTIN, *Decreto legge “Cura Italia”: le misure adottate dal Governo per affrontare l'emergenza COVID-19 in materia penitenziaria*, in *Il Penalista*, 20 march 2020; M. RUARO, *Le disposizioni relative all'esecuzione penale del D.L. “Cura Italia” (D.L. 17 marzo 2020, n. 18, conv. L. 24 aprile 2020, n. 27)*, in *Cassazione penale*, 2020, pp. 2185 ss.

<sup>11</sup> D.L. 28 October 2020, n. 137 (conv. L. 18 December 2020, n. 176), «Further urgent measures in the field of health protection, support to workers and businesses, justice and security, related to the epidemiological emergency from COVID-19». On this legislation, see FIORENTIN, *Carceri: un intervento solo parziale che condiziona la vita degli operatori - Commento al d. l. 137/20*, in *Guida al diritto*, 45, 2020; F. GIANFILIPPI, *Il contrasto all'emergenza epidemio- logica in carcere nel D.L. “Ristori”*, in *Diritto penale e processo*, 2/2021, p. 190 et seq.; M. PERALDO, *Licenze, permessi e detenzione domiciliare “straordinari”: il decreto “ristori” (D.L. 28 ottobre 2020, n. 137) e le misure eccezionali in materia di esecuzione penitenziaria*, in *Sistema penale*, 16 November 2020.

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to encourage those prisoners who already benefit from *extra-moenia* treatment resources and who reached a more advanced stage of social reintegration to remain outside of prison.

### **2.1. Home detention**

Under the first profile, the legislator introduces a form of home detention, similar to the measure of prison deflation referred to in Article 1 of L. 26 November 2010, n. 199, recognizing the possibility for prisoners with less than 18 months left to serve – under certain conditions and for certain categories of offences – to be released on home detention.

The relevant regulations – pursuant to Article 123 of D.L. 17 March 2020, n. 18 and also to Article 30 of D.L. 28 October 2020, n. 137 – refer, in general, to the measure provided by Article 1 of L. 26 November 2010, n. 199, whose provisions are applied to the newly introduced measure, “as far as compatible.”<sup>12</sup>

Among the application prerequisites for this measure is the edictal limit of 18 months of the sentence to be served *ab initio* or as the residue of a greater sentence, in order to access the benefit.

The decision to limit the access to the alternative measure to 18 months of residual period of detention raised several concerns by commentators, since the measure should adapt to a situation of absolute emergency, in which the collective health is under serious and unprecedented dangers.<sup>13</sup>

In addition to this objective requirement, the legislator provides for six preclusive automatism,<sup>14</sup> in order to exclude, from the scope of application of the measure, a whole series of prisoners who, for certain requirements, are not considered

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<sup>12</sup> The special relationship between L. 199/2010 and D.L. 18/2020 is well expressed at the beginning of Article 123 of D.L. 18/2020, which derogates the provisions of paragraphs 1, 2 and 4 of Article 1 of L. 199/2010, as well as in paragraph 8 of the same provision which maintains «without prejudice to the other provisions of Article 1 of L. 199/2010, where compatible».

<sup>13</sup> In this sense, DOLCINI-GATTA, *Carcere, coronavirus, decreto ‘Cura Italia’: a mali estremi, timidi rimedi*, cit.

<sup>14</sup> A wide analysis of these preclusive provisions is offered by RUARO, *Le disposizioni relative all’esecuzione penale del D.L. “Cura Italia” (D.L. 17 marzo 2020, n. 18, conv. L. 24 aprile 2020, n. 27)*, cit., pp. 2190 ss.

“worthy”<sup>15</sup> of accessing to this measure.

The first five negative requirements are related to the dangerousness of the convicted person,<sup>16</sup> in its different levels of intensity (concrete and abstract dangerousness), while the sixth contemplates a requirement which is not referred to the person himself, rather to the unsuitability of the domicile.

Starting from the last one, letter f) of Article 123 of D.L.17 March 2020, n. 18 – and likewise Article 30 of D.L. 28 October 2020, n. 137 – excludes from the scope of the measure prisoners without an effective and suitable domicile, considering also the need to provide protection to the victim of the crime. As to assess the suitability of the domicile, from the point of view of the “protection of the persons offended by the crime,” it must verify that they are not present in the same domicile or, if they are, that they are willing to host the offender. The scope of this scrutiny, however, appears to be reduced, since Article 123, paragraph 1, letter a), precludes the access to the measure not only for convicted sex offenders, but also for perpetrators of domestic violence and stalking (persons for whom the need to verify an adequate distance from the victims is usually more stringent).

In fact, letter a) of Article 123 grounds a preclusion on an abstract social dangerousness of people convicted for any crime contemplated by Article 4-*bis* of L. 26 July 1975, n. 354 (Penitentiary Act and enforcement of liberty deprivation and restriction measures)<sup>17</sup> or for the crimes of family ill-treatment (Article 572 of the Criminal Code) and stalking (Article 612-*bis* of the Criminal Code).

Article 123, paragraph 1, letter b), on the other hand, takes into consideration

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<sup>15</sup> M. PASSIONE, *‘Cura Italia’ e carcere: prime osservazioni sulle (poche) risposte all’emergenza*, in *Questione giustizia*, 19 March 2020.

<sup>16</sup> A recent overview of the concept of “dangerousness” is provided by GIANFILIPPI-L. LUPARIA, *Organizzazione penitenziaria, ordine e sicurezza*, in F. DELLA CASA-GIOSTRA, *Manuale di diritto penitenziario*, Giappichelli, Torino, 2020, pp. 132 ss.

<sup>17</sup> On this preclusion, see, among many other studies, P. CORVI, *Trattamento penitenziario e criminalità organizzata*, Cedam, Padova, 2010, pp. 37 ss.; DEL COCO, *La sicurezza e la disciplina penitenziaria*, in P. Corso (a cura di), *Manuale della esecuzione penitenziaria*, Monduzzi Editore, Bologna, 2019, pp. 206 ss.; FIORIO, *Il “doppio binario” penitenziario*, in *Archivio penale*, 2018, n. 1, web; G. FIORELLI, *Il “doppio binario” in executivis, tra nuove tendenze e residue incertezze*, in *Indice penale*, 2019, n. 3, pp. 489 ss.

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the actual social dangerousness, prohibiting the measure to subjects declared habitual, professional criminal or offender by inclination.

The legislator then introduces three further preclusions, all connected to the intramural dangerousness of the subject.

Letter c) of Article 123 forbids the measure to the inmate who, at the time of the decision, is subject to the regime of special surveillance ex Article 14-*bis* of the Penitentiary Act and, therefore, to those who are considered likely to endanger the good order of a prison.

The inclusion of letters d) and e) in Article 123 represents an exclusion expressly aimed at “punishing” the misconduct of inmates.

Specifically, letter d) precludes the access to the measure to inmates who have been imposed a disciplinary sanction following the commission of serious offences “in the last year,” such as participation in riots or disturbances (as well as the promotion of such events), escaping from prison and the commission of any crime against fellow inmates, prison workers or visitors, ex Article 77, paragraph 1, numbers 18, 19, 20 e 21 of the Decree of the President of the Republic, 30 June 2000, n. 230 (Regulations containing norms relating to the prison system and to measures depriving and limiting personal freedom).

Finally, in accordance with letter e), also those persons, against whom – starting from the entry into force of the Decree – even only a “disciplinary report” is drawn up, must be excluded, because they are deemed to be promoters or participants in riots or disturbances after 7 March 2020.

This preclusion has a clear punitive and deterrent nature since it aims at “punishing,” with the prohibition of access to home detention, those who have taken part – and will take part – in riots and disturbances inside the prison.

The reference to the simple “disciplinary report,” instead of the “sanction,” in order to preclude access to this measure, raises many doubts<sup>18</sup> because the preclusion

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<sup>18</sup> About this critical aspect, see GIANFILIPPI, *Il contrasto all'emergenza epidemiologica in carcere nel D.L. "Ristori"*, cit., p. 196; PERALDO, *Licenze, permessi e detenzione domiciliare "straordinari": il decreto "ristori" (D.L. 28 ottobre 2020, n. 137) e le misure eccezionali in materia di esecuzione penitenziaria*, cit., p. 11; A. PULVIRENTI, *COVID-19 e diritto alla salute dei detenuti: un tentativo, mal riuscito, di semplificazione del procedimento per la concessione dell'esecuzione domi-*



operates on the basis of a merely provisional act, which could be overcome by the assessment made by the disciplinary committee. The contents of the report drawn up by prison staff could, in fact, prove to be groundless at the end of the disciplinary procedure or, in any case, not lead to the imposition of a sanction.

In this way, the operation of preclusion, based solely on the “disciplinary report,” greatly lowers the level of guarantees for the protection of the prisoner,<sup>19</sup> since it is a new form of preclusion based on the “presumed penitentiary dangerousness.”<sup>20</sup> This is probably justified by the difficulties, also of a practical nature, of conducting disciplinary proceedings in the period of the epidemiological emergency.

Once the absence of preclusive automatisms has been assessed, the Supervisory Penitentiary Magistrate – who is responsible for deciding whether to grant the benefit – may not order the execution of the sentence at home detention if he finds “serious reasons that prevent the measure from being granted.” With the inclusion of this generic formula, the legislator recognizes to the judge a residual margin of appreciation of further reasons hindering the granting of the measure.<sup>21</sup>

The extreme generality of this formula, along with the provision of the many conditions that prevent the granting of home detention, ends up thwarting the effectiveness of this measure and, consequently, its ability to reduce the prison population.<sup>22</sup>

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*ciliare della pena (dalle misure straordinarie degli artt. 123 e 124 del d.l. n. 18/2020 alle recenti novità del d.l. n. 29/2020, in Legislazione penale, 26 May 2020, p. 11 et seq.; RUARO, Le disposizioni relative all'esecuzione penale del D.L. “Cura Italia” (D.L. 17 marzo 2020, n. 18, conv. L. 24 aprile 2020, n. 27), cit., pp. 2195 ss.*

<sup>19</sup> This same criticism was also raised by PERALDO, *Licenze, permessi e detenzione domiciliare “straordinari”: il decreto “ristori” (D.L. 28 ottobre 2020, n. 137) e le misure eccezionali in materia di esecuzione penitenziaria*, cit., p. 11.

<sup>20</sup> Litterally, RUARO, *Le disposizioni relative all'esecuzione penale del D.L. “Cura Italia” (D.L. 17 marzo 2020, n. 18, conv. L. 24 aprile 2020, n. 27)*, cit., p. 2197.

<sup>21</sup> Several Authors wonder if the «serious reasons that prevent the measure from being granted» include the prognostic evaluations of the “risk of flight” and the “danger of recidivism” despite the legislator did not expressly contemplated them in the cited provisions: C. MINNELLA, *Coronavirus ed emergenza carceri*, in *Diritto penale e uomo*, 4/2020, p. 25; PERALDO, *Licenze, permessi e detenzione domiciliare “straordinari”: il decreto “ristori” (D.L. 28 ottobre 2020, n. 137) e le misure eccezionali in materia di esecuzione penitenziaria*, cit., p. 9; RUARO, *Le disposizioni relative all'esecuzione penale del D.L. “Cura Italia” (D.L. 17 marzo 2020, n. 18, conv. L. 24 aprile 2020, n. 27)*, cit., pp. 2199 ss.

<sup>22</sup> About the contradictions of the Italian criminal policy in the context of the pandemic emergency, see A. AVERARDI,

The specific modalities of execution of the measure also contribute to frustrating the usability of home detention.

In fact, the executive modalities of home detention require the application of an electronic monitoring procedure,<sup>23</sup> whenever the sentence, even residual, to be executed against an adult convict is longer than six months. The use of the electronic monitoring, which always requires the consent of the interested person, represents a necessary condition for the granting of the measure, in the absence of which it cannot be ordered.

Therefore, the provision of a compulsory monitoring procedures through electronic devices makes the home detention unenforceable, due to the limited availability of electronic bracelets, also due to the fact that the provision of such instruments must take place – according to the Decree – “within the limits of the financial resources available at the current legislation.”<sup>24</sup>

So, it could happen that the Supervisory Penitentiary Magistrate, even after ascertained the fulfilment of all the requirements to grant home detention, cannot actually execute it because of the lack of electronic bracelets, i.e., for a cause not attributable to the behaviour of the subject and in any way not dependent on his will. This problem risks to limit, *de facto*, the access to this measure almost exclusively to prisoners with a residual sentence of no more than six months or to juvenile offenders.

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*La Costituzione «dimenticata». La funzione rieducativa della pena*, in *Rivista trimestrale di diritto pubblico*, 2021, pp. 161-162.

<sup>23</sup> The electronic monitoring was introduced by L. 4 January 2001, n. 19, through the introduction of paragraph 4-bis in Article 47-ter o.p. and, subsequently, with the provision: Article 58-quinquies o.p., by L. 21 February 2014, n. 10. On the use of the electronic monitoring, see PITTIRUTI, *Le modalità di controllo elettronico negli arresti domiciliari e nell'esecuzione della detenzione domiciliare*, cit., p. 102.

<sup>24</sup> On the risk that the limited availability of electronic monitoring may weaken the home detention, see CARNEVALE, *Carcere e coronavirus: intorno a ciò che emerge dall'emergenza*, cit., pp. 7-8; DARAIO, *Emergenza epidemiologica da Covid-19 e sistema penitenziario*, cit., pp. 942-943; A. NATALINI, *Detenuti: domiciliari con “braccialetto” per pene fino a 18 mesi*, in *Guida al diritto*, 2020, n. 15, pp. 18 ss.; PULVIRENTI, *COVID-19 e diritto alla salute dei detenuti: un tentativo, mal riuscito, di semplificazione del procedimento per la concessione dell'esecuzione domiciliare della pena (dalle misure straordinarie degli artt. 123 e 124 del d.l. n. 18/2020 alle recenti novità del d.l. n. 29/2020)*, cit., p. 17.

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## ***2.2. Extraordinary leave of absence from prison***

The second area of intervention by the emergency legislator concerns the extension of the duration of the bonus leave granted to those convicts who have already been admitted to the alternative measure of semi-freedom, as well as to common inmates.

With reference to prisoners on semi-freedom, the bonus leave – so-called “licence” – is a rewarding instrument which let them to have more freedom, thanks to which they may not return to the penitentiary institution to spend the night there, even for many days, within the maximum limit of 45 days per year, as provided by Article 52 of the Penitentiary Act.

As exception to the overall maximum time limit of this benefit, both the licences already granted and in progress, at the time the Decree comes into force, and the new licences, arranged after that date, may last longer than what is provided for by the law.

The aim of this regulation is to reduce the frequent re-entry into penitentiary institutions by semi-free prisoners in order to avoid that the exit from prison and the subsequent re-entry, on a daily basis, may facilitate the spread of the virus.<sup>25</sup>

Licences are granted “unless the Supervisory Penitentiary Magistrate finds serious reasons to prevent the measure from being granted”. With respect to these measures, it is still difficult to establish the meaning of the “serious hostile reasons,”<sup>26</sup> since – unlike home detention – the granting of semi-freedom requires that a judgement of “merits” of the convicted person has been previously formulated.

Therefore, the existence of “serious hostile reasons” – such as, for example, the increase in the danger of recidivism – should have already excluded the granting of the alternative measure of semi-freedom or, at most, caused the revocation of the same in

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<sup>25</sup> In this sense, GIANFILIPPI, *Il contrasto all'emergenza epidemiologica in carcere nel D.L. "Ristori"*, cit., p. 192; PERALDO, *Licenze, permessi e detenzione domiciliare "straordinari": il decreto "ristori" (D.L. 28 ottobre 2020, n. 137) e le misure eccezionali in materia di esecuzione penitenziaria*, cit., p. 3; RUARO, *Le disposizioni relative all'esecuzione penale del D.L. "Cura Italia" (D.L. 17 marzo 2020, n. 18, conv. L. 24 aprile 2020, n. 27)*, cit., p. 2207.

<sup>26</sup> FIORENTIN, *Carceri: un intervento solo parziale che condiziona la vita degli operatori - Commento al d.l. 137/20*, in *Guida al diritto*, 45, p. 2020.

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accordance with Article 51, paragraph 1 of the Penitentiary Act.<sup>27</sup>

The same logic of favouring the prolonged staying of the inmates outside of prison is pursued by the extension of the duration of the bonus leave, set forth by Article 30-*ter* of the Penitentiary Act.

Under Article 29 of D.L. 28 October 2020, n. 137, offenders, who have already been granted bonus leave or who have been assigned to work outside the prison or admitted to vocational training or education outside the prison, can be granted with bonus leaves for a longer period than that ordinarily provided for by Article 30-*ter* of the Penitentiary Act, and therefore for more than 15 days at a time and for more than 45 days in total per year.

Therefore, special bonus leaves will be granted to those who should ensure greater reliability in the proper execution of the permit of longer duration. In fact, there is no doubt that the offender who has taken (at least) ordinary bonus leaves and the one authorized to work daily outside the prison, have already revealed a constant sense of responsibility and correctness and can, in general, be considered worthy to this benefit.

However, the scope of the benefit is likely to be significantly limited by the provision of several exclusions to the granting of extraordinary bonus leave: for instance, in case of conviction of any of the crimes indicated in Article 4-*bis* of the Penitentiary Act and in Articles 572 and 612-*bis* of the Criminal Code.<sup>28</sup>

### ***3. The pre-trial detention: a forgotten issue***

No measure, however, is expressly provided for inmates in pre-trial detention, despite the fact that they represent 30% of the prison population.<sup>29</sup>

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<sup>27</sup> This is the opinion expressed by PULVIRENTI, *COVID-19 e diritto alla salute dei detenuti: un tentativo, mal riuscito, di semplificazione del procedimento per la concessione dell'esecuzione domiciliare della pena (dalle misure straordinarie degli artt. 123 e 124 del d.l. n. 18/2020 alle recenti novità del d.l. n. 29/2020*, cit., p. 28; RUARO, *Le disposizioni relative all'esecuzione penale del D.L. "Cura Italia" (D.L. 17 marzo 2020, n. 18, conv. L. 24 aprile 2020, n. 27)*, cit., p. 2208.

<sup>28</sup> On this point, see GIANFILIPPI, *Il contrasto all'emergenza epidemiologica in carcere nel D.L. "Ristori"*, cit., pp. 193-194.

<sup>29</sup> On 29 February 2020, out of 61,230 inmates, 18,952 (31%) were pre-trial detainees.

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Such a gap has grounded many perplexities within Authors,<sup>30</sup> especially if we consider the contradiction of the legislative choice to begin to “empty the prisons” starting from convicted prisoners, who have already been found guilty by a final judgment, rather than from subjects confined in precautionary detention, whose legal position is still subject to the presumption of innocence under Article 27, paragraph 2, of the Constitution.

In this perspective, there could be an unreasonable disparity of treatment – in violation of Article 3 of the Constitution – between detainees serving a definitive sentence, for whom some alternative measures to detention have been designed, and pre-trial inmates who under the law are presumed innocent but to whom, on the contrary, the lawmaker has not shown as much sensitivity.<sup>31</sup>

The only discipline expressly provided for pre-trial detainees concerns the suspension of the maximum duration of pre-trial detention in prison for the same period in which the trial is suspended.<sup>32</sup>

Such a suspension implies, *de facto*, an extension of the time of the detainee’s subjection to the measure and increases the risk of contracting the virus inside the penitentiary.

It is unreasonable, therefore, to think that an allegedly innocent person could be exposed by the State to a serious risk to his health, due to the “hoax” of having the limit of pre-trial detention suspended during the emergency.

Otherwise, the legislator should have provided for a temporary discipline requiring the judge to take into account, when applying and modifying the prison

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<sup>30</sup> This gap is highlighted, among many other, by DARAIO, *Emergenza epidemiologica da Covid-19 e sistema penitenziario*, cit., pp. 943 ss.; MINNELLA, *Coronavirus ed emergenza carceri*, cit., p. 32; C. CONGESTRI, *L'emergenza covid-19 negli istituti penitenziari*, in A. Massaro (a cura di), *Connessioni di Diritto penale*, Roma Tre Press, 2020, pp. 70 ss.

<sup>31</sup> In this regard, F. VERGINE, *Emergenza epidemiologica da Covid-19, efficienza e processo penale*, in *Il Processo*, 3, 2020, p. 843 remarks a two-speed regime: one for defendants and the other for inmates serving their sentence.

<sup>32</sup> For a critical overview of the suspension of time limits for the maximum duration of precautionary detention, see O. MAZZA, *Sospensioni di primavera: prescrizione e custodia cautelare al tempo della pandemia*, in *Archivio penale*, 2020, n. 1; L. MARAFIOTI, *Il processo penale di fronte all'emergenza pandemica*, in *disCrimen*, 1/2021, p. 135; E. MARZADURI, *Le sorti dei detenuti sottoposti a custodia carceraria ai tempi del Coronavirus*, in *Lalegislationepenale.ue*, 24 March 2020; A. SCALFATI, *La custodia cautelare durante l'emergenza sanitaria: leggi confuse e illiberali*, in *Archivio penale*, 2020, n. 2.

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measure, also the current health emergency.

The suggestion is to include the epidemic risk – and, therefore, the concrete prejudice for the individual and collective health resulting from a detention in constancy of a Covid-19 pandemic – among the criteria for the choice of pre-trial detention in prison.<sup>33</sup> In this way, the requesting Public Prosecutor and the Judge, who orders the measure, should be able to balance the precautionary needs with the right to health, provided for by Article 32 of the Constitution, accordingly to Article 275, paragraph 3 of the Criminal Procedure Code, for which “precautionary detention in prison shall be ordered only when all the other coercive or prohibitive measures are inadequate,” coherently to the principle of *extrema ratio* of the precautionary custody in prison.

In fact – as the General Attorney at the Supreme Court reminds us – never as in this period prisons must really be the *extrema ratio*, making it necessary to encourage the decision of other measures suitable to relieve the pressure from unnecessary presence in the penitentiary.<sup>34</sup>

The suggestion, which remained unheeded by the legislature, has been accepted by the jurisprudence that – as can be seen in some decisions immediately following the spread of the virus<sup>35</sup> – has interpreted several provisions of the procedural and penitentiary system taking into account the existing health emergency.

In particular, some decisions recognized – with respect to the danger of infection by Covid-19 – situations of incompatibility with the prison regime because of the severe health condition of prisoners, pursuant to Article 275 paragraph 4-*bis* of Criminal Procedure Code, according to which “precautionary detention in prison shall not be ordered nor maintained if the accused suffers [...] from any other particularly severe

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<sup>33</sup> In this sense, see the proposals contained in *Documento dell'Associazione tra gli Studiosi del Processo penale: Emergenza COVID-19 e custodia in carcere: perplessità e proposte, anche in vista della conversione del d.l. n. 18/2020*, in *Sistema penale*, 2 April 2020; and in *Le osservazioni dell'Associazione tra gli Studiosi del Processo Penale “G.D. Pisapia” sulle disposizioni eccezionali per la giustizia penale nell'emergenza COVID-19*, *ivi*, 14 April 2020.

<sup>34</sup> This is suggested in *Documento della Procura Generale della Cassazione (1° aprile 2020)*, in *Sistema penale*, 3 April 2020.

<sup>35</sup> See, among others judgments, *Giudice per le indagini preliminari – Tribunale di Caltanissetta*, 21 April 2020; *Giudice dell'Udienza preliminare – Tribunale di Trani*, 26 March 2020; *Giudice per le indagini preliminari – Tribunale di Milano*, 23 March 2020; *Tribunale di Roma, Sez. VII*, 18 March 2020.

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disease which makes his health conditions incompatible with detention or which hampers adequate treatment in case of detention in prison.”

The assessment of the incompatibility of pre-trial detention in prison with the health conditions of the detainee, in view of the risk of infection by Covid-19, must be carried out on the basis of a double verification: an abstract verification of the presence in the suspect of one or more diseases and a further concrete verification of the risk that the detainee may contract the virus.

The risk of contracting the virus in prison must result from specific elements that reveal factors of real and concrete danger for the prisoner, evaluated in the light of the situation existing in the prison where the person is confined, including: the existence of specific cases of Covid-19 contagion ascertained among the inmates of the relevant institution, the presence of precautionary measures adopted to ensure a safe distance between inmates “at risk” and the possibility that inmates, who are in a more precarious health conditions, may be transferred to other institutions or to more appropriate health facilities.<sup>36</sup>

#### ***4. The subsidiary role of the Supervisory Penitentiary Magistrates***

A further fundamental contribution, in order to ensure that the execution of prison sentences is carried out in compliance with the constitutional principles of protection of health and humanity of treatment, is also provided by the Supervisory Penitentiary Magistrates.

Because of the inadequacy of the measures introduced by the legislature, the Supervisory Penitentiary Magistrates have played a real role of substitution,<sup>37</sup> aimed at finding, case by case, adequate solutions to reconcile the instances of collective security with those of maximum protection of the health of prisoners and of all those who work

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<sup>36</sup> On the identification of criteria to verify the incompatibility of health conditions with the state of detention for the danger of contagion, see, *ex plurimis*, Corte di Cassazione, 15 April 2021, n. 16167; Corte di Cassazione, 25 February 2021, n. 18420; Corte di Cassazione, 23 September 2020, n. 27917, in *Cassazione penale*, 2021, p. 1345; Corte di Cassazione, 6 October 2020, n. 35012, in *Sistema penale*, 18 January 2021, with note of C. CATANEO, *La valutazione di compatibilità delle condizioni di salute dell'imputato per associazione mafiosa con lo stato detentivo durante l'emergenza sanitaria: la posizione della Cassazione*.

<sup>37</sup> *Consiglio Superiore della Magistratura*, Opinion on the Draft Law n. 1766, p. 18.

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in penitentiary institutions.

To this end, the Supervisory Penitentiary Magistrates chose to resort to instruments already present in the penitentiary law system, by a “reinterpretation” of the application requirements through the “lens” of the pandemic emergency.<sup>38</sup>

So, the Supervisory Magistrates sought to strengthen the application of alternative measures, encouraging their provisional application directly by the Supervisory Magistrate, on the basis of the consideration that the health emergency integrates “a serious prejudice resulting from the continuation of the state of detention,” required under Article 47, paragraph 4, of the Penitentiary Act for the granting of provisional measures.<sup>39</sup>

Always resorting to the instruments that our system offers, the Supervisory Penitentiary Tribunal has opted – in the case of “serious physical” or “supervening psychic”<sup>40</sup> infirmity – for the deferment of the execution of the sentence, pursuant to Articles 146 and 147 of the Criminal Code, also in the form of “surrogate” home detention as per Article 47-ter, paragraph 1-ter of the Penitentiary Act, in the light of which “when the compulsory or optional postponement of the execution of the sentence could be ordered pursuant to Articles 146 and 147 of the Criminal Code, the supervisory court, even if the sentence exceeds the limit referred to in paragraph 1, may order the application of home detention.”

Indeed, due to the persistent serious epidemiological situation and the health emergency situation that has been created in the territory as a result of the rapid evolution of the Covid-19, the Supervisory Penitentiary Tribunal has considered, in

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<sup>38</sup> An extensive review of the judgments of the Supervisory Penitentiary Magistrates can be found in A. DELLA BELLA, *La magistratura di sorveglianza di fronte al COVID: una rassegna dei provvedimenti adottati per la gestione dell'emergenza sanitaria*, in *Sistema penale*, 29 April 2020; V. MANCA, *Esecuzione della pena ed emergenza Covid-19: le prime ordinanze dei Tribunali di sorveglianza*, in *Il Quotidiano giuridico*, 9 April 2020; A. MANNA, *Coronavirus, emergenza carceraria ed il ruolo della magistratura di sorveglianza*, in *Dirittodidifesa*, 29 April 2020, p. 7.

<sup>39</sup> *Ex multis*, Ufficio di Sorveglianza di Siena, 1 April 2020, n. 466/2020, by which probation was provisionally applied, in the “extended” form provided by Article 47, paragraph 3-bis of the Penitentiary Act.

<sup>40</sup> Corte Costituzionale, 19 April 2019, n. 99, in *Giurisprudenza Costituzionale*, 2019, p. 1088, stated that Article 47-ter, paragraph 1-ter, of the Penitentiary Act, is illegitimate in the part in which it does not provide that, in the event of serious mental illness, the Supervisory Penitentiary Tribunal may order the application of home detention to the convicted person, even out of the limits set forth by paragraph 1 of the same Article 47-ter of the Penitentiary Act.

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several decisions, that it cannot exclude, “in case of possible contagion, the occurrence of a serious deterioration of the health conditions of the subject, difficult to cope with inside the prison.”<sup>41</sup>

These measures, aimed at facilitating the release from prison of inmates with serious diseases, have caused much uproar in the public opinion and harsh attacks by some political forces to the Supervisory Penitentiary Magistrates<sup>42</sup> accused of having led to an undue release of prisoners who have been convicted for mafia-type offences and subjected to “41-*bis* regime.”<sup>43</sup>

The relevant harsh political debate led to the issuance of a series of emergency measures, aiming to establish a control over the decisions of the Supervisory Penitentiary Magistrates.

First of all, under D.L. 30 April 2020, n. 28,<sup>44</sup> the Supervisory Penitentiary Tribunal or Magistrate – before proceeding to grant home detention in “surrogate”, ex Articles 147 Criminal Code and 47-*ter* paragraph 1-*ter* of the Penitentiary Act, or ordinary leave, ex Article 30 of the Penitentiary Act – have to acquire the opinion of the District Anti-Mafia Prosecutor of the place where the crime was committed and, for inmates under “41-*bis* regime,” the opinion of the National Anti-Mafia and Anti-Terrorism Prosecutor’s Office, which are required to express their opinion on the actuality

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<sup>41</sup> See, *ex plurimis*, Ufficio di Sorveglianza di Livorno, 19 March 2020; Ufficio di Sorveglianza di Padova, 30 March 2020, n. 1541/2020; Tribunale di Sorveglianza di Milano, 31 March 2020, n. 2206/2020; Ufficio di Sorveglianza di Brescia, 3 April 2020, n. 1553/2020; Ufficio di Sorveglianza di Siena, 6 April 2020, n. 481/2020.

<sup>42</sup> G. FIANDACA, *Scarcerazioni per motivi di salute, lotta alla mafia e opinione pubblica*, in *Sistema penale*, 19 May 2020.

<sup>43</sup> Ufficio di Sorveglianza di Milano, 20 April 2020; Tribunale di Sorveglianza di Sassari, 23 April 2020, ordered the postponement of the sentences, under home detention, of two people convicted of Mafia crimes subject to the 41-*bis* regime. For a comment about these judgements, A. DELLA BELLA, *Emergenza covid e 41-bis: tra tutela di diritti fondamentali, esigenze di prevenzione e responsabilità politiche*, in *Sistema penale*, 1 May 2020.

<sup>44</sup> D.L., 30 April 2020, n. 28, «Urgent measures for the interception of conversations or communications, further urgent measures on the penitentiary system, as well as supplementary and coordinating provisions on civil, administrative and accounting justice and urgent measures for the introduction of the Covid-19 alert system». On this legislation, F. GIANFILIPPI, *Emergenza sanitaria in carcere, provvedimenti a tutela di diritti fondamentali delle persone detenute e pareri sui collegamenti con la criminalità organizzata*, in *Giurisprudenza penale web*, 4 May 2020; M. GIALUZ, *L'emergenza nell'emergenza: il decreto legge n. 28 del 2020*, in *Sistema penale*, 1 May 2020; DELLA CASA, *L'intervento del d.l. 28/2020 sull'istruttoria dei permessi di necessità: un innesto sine causa e fuori asse rispetto al divieto di detenzione inumana*, *ivi*, 9 July 2020;

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of the connections with organized crime and the dangerousness of an eventual release of the inmate.

Just ten days after the issuance of D.L. 30 April 2020, n. 28, D.L. 10 May 2020, n. 29<sup>45</sup> intervened as to introduce, among other things, a mechanism of anomalous compulsory re-evaluation of the orders that have granted home detention or deferment of punishment, and of those that have substituted home arrest for pre-trial detention, for “reasons related to the health emergency from COVID 19,” in order to verify, through continuous and close checks, the “permanence of the reasons related to the health emergency.”<sup>46</sup>

It is, evidently, a mere political intervention,<sup>47</sup> the expression of a material distrust for the Supervisory Penitentiary Magistrates<sup>48</sup> and aimed exclusively at demonstrating to the public opinion the ability of the Government to place constraints to the prudent appreciation of judges.

## 5. Conclusions

In conclusion, the pandemic emergency has once again brought to the surface all the complexity and fragility of the living conditions and health within the penitentiary institutions, with respect to which the legislature has not been able – or

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<sup>45</sup> D.L., 10 May 2020, n. 29, «Extraordinary measures concerning home detention or deferment of the execution of the sentence, as well as concerning the substitution of pre-trial detention in prison with the measure of home arrest, for reasons related to the COVID-19 health emergency, of persons detained or interned for crimes of mafia-type organised, or for offences of criminal conspiracy linked to drug trafficking or for offences committed by availing themselves of the conditions or with the aim of facilitating mafia conspiracy, as well as inmates and internees subjected to the “41-bis regime”. For a comment on this legislation, see A. CAMBIALE, *Covid e “scarcerazioni”: diventano legge, con alcune novità, i contenuti dei dd.ll. nn. 28 e 29 del 2020*, in *Sistema penale*, 13 July 2021; L. CESARIS, *Il d.l. n. 29 del 2020: un inutile e farraginoso meccanismo di controllo*, in *Giurisprudenza penale trimestrale*, 2020, 2, p. 39.

<sup>46</sup> On the issue of constitutional legitimacy of the revocation *de plano* of the previous alternative measure of detention, see Magistrato di Sorveglianza di Spoleto, 26 May 2020, with comment of M. GIALUZ, *Il d.l. antiscarcerazioni alla Consulta: c'è spazio per rimediare ai profili di illegittimità costituzionale in sede di conversione*, in *Sistema penale*, 5 June 2020.

<sup>47</sup> GIALUZ, *L'emergenza nell'emergenza: il decreto legge n. 28 del 2020*, cit., p. 2.

<sup>48</sup> For this opinion, among the others, see DELLA CASA, *L'intervento del d.l. 28/2020 sull'istruttoria dei permessi di necessità: un innesto sine causa e fuori asse rispetto al divieto di detenzione inumana*, cit.; PULVIRENTI, *Covid-19 e diritto alla salute dei detenuti: un tentativo, mal riuscito, di semplificazione del procedimento per la concessione dell'esecuzione domiciliare della pena (dalle misure straordinarie degli artt. 123 e 124 del d.l. n. 18/2020 alle recenti novità del d.l. n. 29/2020)*, cit., p. 32.

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perhaps did not want – to show the necessary sensitivity, more focused on supporting the demand of social security, under the emotional pressures of the community.

The legislator has undoubtedly missed a great opportunity to direct, in a more courageous way, the solutions prepared to deal with the pandemic emergency towards the effective recovery of a criminal policy constitutionally oriented to the protection of the dignity of prisoners and the prohibition of inhuman or degrading punishment.

It remains, however, the bitter feeling, now widely spread not only in public opinion but also in the political world, that the fundamental right to dignity and health should be deserved and is not recognized to each man as such and regardless of his behaviour.<sup>49</sup>

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<sup>49</sup> CARNEVALE, *Carcere e coronavirus: intorno a ciò che emerge dall'emergenza*, cit., p. 1.

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