

PRISON OVERCROWDING IN ITALY: THE NEVER ENDING STORY?

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ABSTRACT

After the ECtHR *Torreggiani* judgment, Italy adopted several measures in order to improve detention conditions. Nonetheless, in 2017 the penitentiary system still suffers from overcrowding. The aim of this paper is to analyse the principal measures adopted by Italy, pointing out the shortcomings that weaken their impact, thereby preventing the Italian compliance with regional standards.

Keywords: *Overcrowding; prisons; Italy; CoE; ECtHR.*

PREMISES

It is a matter of fact that prison overcrowding seriously affects Italy. After having postponed the solution of the problem for decades, following the *Torreggiani* case of the European Court of Human Rights (ECtHR) Italy enacted an unprecedented reform of its penitentiary system. The measures taken produced extremely positive results. However, the problem of overcrowding persists, since many prisons in Italy are still operating above their official capacity. This is partly due to the fact that such reform is quite young and needs time to produce its full results. Nevertheless, overcrowding in Italy is an elusive phenomenon stemming from several interlinked structural problems that impinge the system of criminal justice as a whole. Thus, its solution requires the concurrent involvement of the judiciary and the legislator.

EUROPEAN AND ITALIAN STANDARDS ON PERSONAL LIVING SPACE IN PRISON

There are no international or regional accepted standards for the minimum living space to be granted to each prisoner.

Rom. Jour. of Sociological Studies, New Series, No. 1, p. 53–68, Bucharest, 2018



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Since 1991 the European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Prevention (CPT) has developed minimum standards regarding the living space that a detainee should be afforded, stating that a single-occupancy cell should measure 6m² and a multiple-occupancy cell should measure 4m² per prisoner (CPT 2015, §9). These minima should not be regarded as absolute. On the one hand, a minor deviation from these standards cannot in itself be considered as amounting to inhuman treatment, as long as other alleviating factors can be found, such as the possibility for the inmates to spend time outside the cells. On the other hand, the CPT emphasises that the desirable standard size for a cell would be 8-9m² to hold one prisoner and 12m² for no more than two (CPT 2015, §§16–17).

In the ECtHR's jurisprudence the size of the cell is not *per se* an exclusive criterion for the qualification of the conditions of detention as inhuman treatment. However, the ECtHR seems to apply a double option, depending on whether the cell offers less or more than 3m² of personal living space. Indeed, when the available personal space is inferior to 3m² it should be considered so manifestly insufficient as to "lead to an irrebuttable presumption of a violation of Article 3" of the ECHR (ECtHR 2016, *Muršić v. Croatia*, §88). Conversely, where the lack of space is not so extreme, the Court examines the cumulative effects of the material conditions of detention (such as the access to natural light, air and ventilation and the possibility to spend time outside the cell) and all specific information regarding the applicant (sex, age, physical/mental state), with the result that an accumulation of harsh conditions may amount to a breach of Article 3 (ECtHR 2001, *Dougoz v. Greece*, §46).

Concerning Italy, under Article 27§3 of the 1948 Italian Constitution, punishment cannot consist in treatments contrary to human dignity and must aim at rehabilitating the offender (O.G. 1947, No. 298). Along this line, the prison system is ruled by the 1975 Penitentiary Law, largely amended over time (O.G. 1975, No. 212). The Penitentiary Law does not provide for specific criteria concerning the minimum living space for each detainee; it simply states the need for appropriate prison conditions in terms of space, privacy, hygiene, light and heating (Article 6). However, an Act adopted in 1988 by the Ministry of Justice calculates the minimum living space for each prisoner by reference to the 1975 Decree of the Ministry of Health, thus requiring 9m² for a single cell and 5m² per inmate in multiple-occupancy cells (Ministry of Justice 2015).

This said, there is a huge discrepancy between the provisions of law and the reality on the ground. In 2004 there were 56,068 inmates in Italy (+130%) (International Centre for Prison Studies 2018). At the end of 2005 the percentage of overcrowding increased to 139% (Statista 2017). In 2006 the Parliament voted a collective pardon, after which prison population restarted soon to grow (O.G. 2006, No. 176). The rate of overcrowding increased from 107% in 2007 to 135% in 2008 (European Parliament 2014, 12). At the end of 2009 Italian prisons could

accommodate about 44,500 inmates but the number of detainees reached 67,961 (+151%) (International Centre for Prison Studies 2018).

In January 2010 the Italian Government declared a state of emergency in relation to its penitentiary system and adopted an Action Plan aiming at reducing the inmate population (Ristretti Orizzonti 2010). Despite this measure, at the end of 2012 there were 65,701 detainees against a prison capacity of 47,040 (+140%) (Ministry of Justice 2017). As for the overcrowding rate, Italy resulted as the third most overcrowded country within the Council of Europe (CoE), only after Serbia and Greece (CoE 2013).

THE ECtHR *TORREGGIANI* JUDGMENT AND THE REFORMS ENACTED BY ITALY

The ECtHR dealt with the phenomenon of prison overcrowding in Italy since the 2009 *Sulejmanovic* case (ECtHR 2009, *Sulejmanovic v. Italy*). This judgment appears to consolidate the jurisprudential trend that presumes a violation of Article 3 of the ECHR when the personal space available to inmates is inferior to 3m², assuming that if the space in the cell falls between 3m² and 4m² the violation can be declared when concurring other relevant factors.

After the *Sulejmanovic* judgment, the ECtHR acknowledged the structural and endemic nature of overcrowding in Italy with the *Torreggiani* case of 8 January 2013 (ECtHR 2013, *Torreggiani and Others v. Italy*). The ECtHR considered that the conditions of detention – the shortage of living space, inferior to 3m², and some additional suffering (such as the lack of hot water and inadequate lighting/ventilation) – breached Article 3 of the ECHR, having subjected the applicants to hardship whose intensity exceeds the level of suffering inherent in detention. Noting that the overcrowding in Italian prisons was a widespread problem, the ECtHR decided to apply the pilot judgment procedure. Accordingly, the ECtHR allowed to Italy a year (27 May 2014) to adapt its prison system to the principles of humanity and to put in place a combination of remedies having both preventive and compensatory effects, to the purpose of redressing any violations of the ECHR due to overcrowding in prison (Della Morte 2013, 147-158).

Following the *Torreggiani* judgment, the Italian Ministry of Justice instituted three special Committees on penitentiary issues: one Committee had the task to intervene with non-normative measures on the prison quality of life, while two Committees were entrusted to elaborate legislative measures against overcrowding (Favuzza 2017, 153–173). As to the legislative measures, Italy adopted Law Decree No. 146/2013 and Law Decree No. 92/2014 (O.G. 2014, No. 43; O.G. 2014, No. 192).

In 2014 the ECtHR positively considered some of these measures. In 2016 the Committee of Ministers decided to close its supervision of the execution of the ECtHR's pilot judgment, basing its decision not only on the significant results

achieved by Italy but also on the government's commitment to continue its efforts in order to find a lasting solution to overcrowding (CoE 2016). According to data, in December 2013 the number of prisoners was 62,536 (-8% compared to 2010) (Chamber of Deputies 2017, 45). Inmates were 53,623 in 2014 and 52,164 in 2015 (-16,000 in 5 years) (Ministry of Justice 2017).

Despite this progress, from the end of 2015 the level of overcrowding rose again. In December 2016 inmates raised to 54,653 (+109%) (International Centre for Prison Studies 2018). As at 30 November 2017 there were 58,115 detainees in the Italian prisons for an official capacity of 50,511 (Ministry of Justice 2017). Many Italian Regions (10 out of 20) suffer from overcrowding (Senate of the Italian Republic 2017, 35). In 2017 there have been 48 suicides in prisons (45 in 2016; 43 in 2015) (Ristretti Orizzonti 2017). The increase of prison population is remarkably large especially taking into account that criminal offences decreased significantly in the last few years. This indeed confirms that "rates of imprisonment" and "crime" may evolve independent of each other. This further leads to the conclusion that it is necessary to look elsewhere in order to assess the fundamental reasons for prison overcrowding in Italy.

REORGANIZATION OF THE DETENTION REGIME

Since 2011 the dual aim of Italy is to review detention spaces with the purpose of ensuring the minimum square meters for each prisoner and to reshape the detention system as a whole.

As regards the first target, new spaces have been built and the existing ones have been renovated. There are 190 prisons in Italy. In March 2014 the capacity of the penitentiary facilities was 48,416 places (+4,415 places between 2010-2014) (Ministry of Justice 2014, 6). As at 30 November 2017 the official capacity of the prison system is 50,511 (Ministry of Justice 2017). It should also be noted that currently no detainee is held in a space less than 3m² (there were over 7,500 in January 2013) (Chamber of Deputies 2017, 45).

Notwithstanding these huge attempts, the deficiencies of prison infrastructures remain a serious matter, as stated by the CPT during its visit to Italy in 2016 (CPT 2017, §§35-36). Solutions are very difficult to achieve, since they fundamentally require structural and expensive interventions. Moreover, in 2015 the Italian Court of Auditors found that, in contrast to €462,769 million allocated to this purpose for the period 2010-2014, the Government spent only €52,374 million (Senate of the Italian Republic 2017, 20).

With reference to the distribution of inmates in the penitentiary system, Italy announced in 2014 to the CoE its intention to operate a separation between the institutions for prisoners serving their sentence and those for persons detained on remand, but no definitive solutions to this problem have been found so far

(Ministry of Justice 2014, 9). Nowadays prisoners are divided into three main categories: “high security”, “medium security” and “low-security” (Ministry of Justice 2017). But reality is quite different because the category of “medium security” detention includes detainees having different needs according to which they should be separated (pre-trial inmates/sentenced; young/old offenders; ill or psychiatrically unstable/the rest of prisoners).

As regards the second target, attention has been directed towards the creation of a new management prison system. The main response to this issue is the application of the “open regime” (or “dynamic surveillance”). This regime was already envisaged in the 1975 Penitentiary Law but it was implemented only from 2010. Accordingly, today 95% of the inmates in “medium security” detention are free to spend at least 8 hours per day outside their cells (65% in 2014) (Couble 2016, 35).

During its visit to Italy, the CPT noted positively the application of the “open regime”. Nevertheless, the CPT stressed that “the generous out-of-cell entitlement enjoyed by medium-security prisoners was not accompanied by an adequate range of purposeful activities.” (CPT 2017, §40). Only 28% of inmates are involved in a remunerated activity (15,272 detainees out of the 54,072 people held in the penitentiary system). More than 80% of these prisoners work for the Penitentiary Administration on low-skilled jobs, consisting in activities for facilities’ maintenance. Usually a prisoner is paid €3,00 per hour, but from this amount should be deducted the cost of maintenance and compensation. In 2016 many inmates complained to the CPT about the fact that the increase in the percentage on their salaries had been retained up to two-fifths of the total monthly salary for maintenance purposes (CPT 2017, §42).

ALTERNATIVE MEASURES TO DETENTION

The 1975 Penitentiary Law devotes its Chapter VI to alternative measures to imprisonment, in order to ensure the rehabilitation role of penalties envisaged by the Constitution. After the *Torreggiani* judgment, Italy provided for an increased use of alternative measures to detention by modifying the Criminal Code and the Code of Criminal Procedure. In particular, Law No. 67/2014 delegated the Government to reform penalty sanctions (O.G. 2014, No. 100). In addition, as already mentioned, the Government adopted Law Decree No. 146/2013.

The increasing use of alternative measures contributed to the decrease of detainees (CoE 2017). Alternative measures have also proved to have a much better impact than imprisonment in terms of recidivism: offenders who serve their sentence under alternative measures show a recidivism rate between 20%-30%, while rates for offenders who serve sentence in prison fluctuate between 65%-75% (Palmisano 2013, 29). As at 30 November 2017, 47,193 persons were entitled to

measures alternative to detention (Ministry of Justice 2017). However, these measures suffer from some limits that negatively affect their use.

Law No. 67/2014 introduced the *messa alla prova*, according to which in case of crimes punishable with no more than 4 years of detention the defendant may request the suspension of the proceeding. If the suspension is granted, the person is put on probation under the control of the social services. The positive ending of the probation extinguishes the crime (Marietti 2015, 23). As regards the *messa alla prova*, rates are constantly increasing: 2 (June 2014); 503 (December 2014); 3,969 (June 2015); 9,090 (December 2016); 10,530 (November 2017) (Chamber of Deputies 2017, 46, 63). Nevertheless, this measure encounters many problems due to the operational difficulties faced by the Probation agencies, responsible for promoting the social rehabilitation of convicts serving their sentences through alternative measures to detention.

The *home detention*, according to which sentences up to 18 months of imprisonment may be served at home, introduced by Law No. 199/2010 as a temporary measure, has been confirmed. Home detention is to be ordered with the support of *electronic surveillance devices*, provided that such devices are available. Since 2010 this measure has increased by more than 20% (4,304 people in 2011, 2,329 in 2016, 3,605 in 2017) (Senate of the Italian Republic 2017, 21). Nevertheless, home detention is merely conceived as an instrument dictated by the need for cutting prison population, but does not have any impact on the rehabilitation of the offender. Its use is also significantly affected by the fact that only around 2,000 electronic bracelets are available to date, despite the large amounts of money already spent on these devices (€9 million) (Maturò 2017).

Supervisory judges may order *probation* for inmates who still have to serve up to 4 years of imprisonment (previously 3 years), if they consider that there is no danger that the person will commit other crimes. Detainees who are addicted to drugs or alcohol may be granted *special probation* in rehabilitation centres. The previous existing rule, according to which such probation could only be granted twice, has been cancelled. However, regarding drug users in prison (13,561 people in June 2016, of which 4,292 non-nationals), it is necessary to point out the current lack of places available in the therapeutic centres. Thus, the number of people that acceded to such measure decreased from 2014 (3,259) to 2016 (2,991) (Chamber of Deputies 2017, 81-82).

Law Decree No. 146/2013 introduced a *special early release*, namely a provision that allows deducting from the sentence a total of 75 days (previously 45 days) for every 6 months of conviction in the case of good behaviour. This measure involved 29,747 people in 2013, 31,362 in 2014, 32,113 in 2015 and 33,827 in 2016 (Senate of the Italian Republic 2017, 25). However, the *special early release* had only a temporary nature, from January 2010 to February 2016. This explains why the prison population has risen again from 2016 to date (Chamber of Deputies 2017, 46).

Finally, the Prison Administration devotes most of its budget on detention, while the resources allocated to alternative measures are less than 5% of the total amount (Ministry of Justice 2017). The budget has fluctuated between €2,784 million in 2010 and €3,084 million in 2013. In 2017 the budget reached €2,853 million, almost €40 million less than in 2016. It is worth noting that 85% of the budget focuses on wages and staff costs, thus leaving insufficient funds for prison maintenance and rehabilitation programs.

In conclusion, despite numerous efforts to improve the use of alternative measures to detention, in Italy the majority of convicted remains in prison (55%), while this is the case for 30% in France and 28% in Germany (Meroni 2016).

PREVENTIVE AND COMPENSATORY REMEDIES

Italy implemented the *Torreggiani* judgement by introducing preventive and compensatory remedies for violations of prisoners' human rights. As regards the *preventive remedy*, Law Decree No. 146/2013 inserted Article 35-*bis* in the 1975 Penitentiary Law. Article 35-*bis* allows an inmate to apply to the Surveillance Judge against disciplinary measures taken by the Penitentiary Administration, should such measures seriously infringe their rights, including the right to enjoy sufficient personal living space (Caputo et al 2016, 18). The Surveillance Judge is empowered to order the Penitentiary Administration to remove any violation ascertained. Legal means are provided to enforce the order. In particular, as a result of a new appeal, the Surveillance Judge can: appoint a commissioner *ad acta*; annul the decisions of the Penitentiary Administration; schedule a detailed action plan addressed to the Penitentiary Administration to remedy its violation.

As to the *compensatory remedy* for detainees' damages suffered in consequence of prisons' overcrowding, Law Decree No. 92/2014 introduced Article 35-*ter* in the 1975 Penitentiary Law. It is now possible to obtain a reduction in sentence for inmates who are still in prison (1 day every 10 days spent in condition contrary to Article 3 of the ECHR) and a monetary compensation (€8,00 for every day spent in breach of Article 3) for detainees on remand and former inmates who have already been released.

The adoption of such measures is a tangible sign of the Italian determination to fully comply with the ECtHR's pilot judgment. In 2014 the ECtHR has positively considered preventive and compensatory remedies, declaring that these remedies offer in principle the prospects of appropriate relief for the complaints submitted under Article 3 of the ECHR; thus, the ECtHR rejected applicants' complaints on the basis of the non-exhaustion of domestic remedies (ECtHR 2014, *Stella v. Italy*; ECtHR 2014, *Rexhepi v. Italy*).

However, the concrete application of both remedies has proven to be limited: on the one hand, they appear lengthy and expensive, thus discouraging individuals

to benefit from them; on the other hand, judges seem to be very reluctant to decide in favour of the applicant. According to data related to compensatory remedy, until October 2015 more than 23,000 inmates applied to the Surveillance Judge but the large number of applications were declared inadmissible (80%) or non suitable (5%) (CoE 2015).

FOREIGNERS IN ITALIAN PRISONS

In conjunction to the Italian transformation from an emigration to an immigration country, the number of foreign detainees shifted from 15% (in early 90's) to 30% (in 2002) and reached 37.48% (in 2007) (Ministry of Justice 2017). In 2010 there were 24,954 foreigners in Italian prisons (36.72%) (Ministry of Justice 2017). As to 30 November 2017 non-nationals were 19,903 (34%) (Ministry of Justice 2017). More than 40% of foreigners are under pre-trial regime (Gonnella 2016). In addition, non-nationals encounter huge difficulties to access alternative measures to detention, due to their legal status and other factors, such as the lack of a permanent home address or family ties in the detaining State (Ronco et al 2014, 1160).

In recent years, emphasis has been placed on the better application of instruments allowing foreigners to serve sentence in their country of origin. In this perspective, Italy entered into bilateral agreements with a large number of States (Ministry of Justice 2017). In addition, Law Decree No. 146/2013 inserted expulsion as a substitutive measure for non-EU prisoners sentenced to up to 2 years' imprisonment.

In this field, the CoE and the EU have adopted a reductionist approach, in order to cut the stay in European prisons of non-national.

Within the CoE, the 1983 European Convention on the transfer of sentenced persons gives foreigners convicted the possibility of serving sentences in their own countries. Transfer is subject to the consent of the sentencing State and the administering State as well as to the one of the sentenced person. All these consents to be obtained for each transfer involved substantial difficulties in the implementation of the Convention.

Italy ratified the 1983 Convention in 1988 (O.G. 1988, No. 188). However, the rate of transfers is very low. This is mainly due to the length and complexity of the procedures laid down in the Convention and mostly to the fact that the treaty relates only to sentenced by final judgment, thus excluding detainees under pre-trial regime. According to data, transfers of prisoners reached 131 in 2012, 133 in 2014, 149 in 2015 and 112 in 2016 (Cavallini and Amato 2017, 15). Romania recorded the largest increase in transfers (70 in 2014; 110 in 2016). In the EU context, the Council adopted in 2008 and 2009 three Framework Decisions on transfer of prisoners, on probation and alternative sanctions, and on European supervision order.

In particular, compared to the 1983 European Convention, the EU Decision on transfer of prisoners strengthens the procedures by removing in some defined circumstances the compulsory consent to the transfer by the inmate. The consent is not required when: the person is a national of the executing State and also lives there; the person would be deported to the executing State on completion of the sentence; or the person has fled or otherwise returned there in response to the criminal proceedings.

Italy implemented this Decision with Legislative Decree No. 161/2010, covering sentences and any measure involving deprivation of liberty (O.G. 2010, No. 230). Even if the new legislation entered into force at the end of 2010, it has become operational only from 2014. This explains the rise in the number of transfers in 2015 (121). In this matter, greater attention must be paid to possible breaches of human rights as a result of the transfer of detainees. In 2016 the Court of Justice of the European Union (CJEU) found that a European arrest warrant may be postponed, and ultimately refused, if the person concerned would be at risk of inhumane or degrading treatment due to the detention conditions in the executing Member State (CJEU 2016, *Aranyosi and Căldăraru*). Thus, Italian judiciary is required to assess *in concreto* the conditions in which the requested person will be detained, by referring mostly to the ECtHR's jurisprudence.

Finally, alongside the presence of non-nationals in the Italian prisons, it is necessary to add the large number of migrants/asylum seekers temporarily held in the administrative detention centres. This issue does not strictly found within the scope of the present paper. Nevertheless, it seems necessary to point out that the ECHR applies to all individuals who are within the jurisdiction of the Contracting States irrespective of where they are held, prison systems or administrative centres. In some cases, the ECtHR held that detention in the Italian administrative centres did not comply with Articles 3 and 5 of the ECHR (ECtHR 2008, *Saadi v. Italy*; ECtHR 2009, *Ben Khemais v. Italy*; ECtHR 2011, *Toumi v. Italy*; ECtHR 2012, *Hirsi Jaama and Others v. Italy*; ECtHR 2016, *Khlaifia and Others v. Italy*).

PRE-TRIAL DETENTION

In Italy pre-trial detention relates to persons awaiting trial and those on appeal (Court of Appeal and Court of Cassation). This is because the presumption of innocence (Art. 27§2 of the Constitution) extends beyond the first instance, so that also the second and third grade appellant is considered as not serving a final sentence (Parisi et al 2015, 12). In this perspective, Italy is among the European countries with the highest percentage of detainees in pre-trial detention both in absolute terms and in relation to the total prison population (CoE 2017). In 2008 51% of prisoners were in pre-trial regime (28% waiting for the first sentence; 23% waiting for a final sentence). In 2010 numbers rose to 60.8% (20.8% waiting for

the first sentence; 42% waiting for a final sentence) (Senate of the Italian Republic 2017, 31).

The ECtHR issued numerous judgments against Italy for violation of Article 5 of the ECHR. According to the ECtHR, pre-trial detention may be imposed only when “other, less severe measures have been found insufficient” (ECtHR 2000, *Witold Litwa v. Polonia*, §78). The ECtHR emphasises the use of proportionality in decision-making, balancing the need to preserve public order and the importance of the right to liberty (ECtHR 1992, *Tomasi v. France*, §91). In particular, a “reasonable suspicion” of guilt must be established in order to put an individual in detention. In the case *Labita v. Italy*, the ECtHR pointed out that a suspicion of guilty implies that “there must be facts or information which would satisfy an objective observer that the person concerned may have committed an offence” (ECtHR 2000, *Labita v. Italy*, §155).

Because pre-trial detention is intended as an exceptional measure, it must be subject to regular judicial review to ensure that it is still justified. According to the ECtHR, the passage of time entails for States an obligation to check the actual presence both of indicia of guilt and of the precautionary needs. In the case *Vaccaro v. Italy*, the ECtHR held that “the initial relevance of the grounds cited by the national authorities was reduced over time” (ECtHR 2000, *Vaccaro v. Italy*, §34).

In particular, Italy has been repeatedly condemned especially with regards to the excessive length of pre-trial detention and the lack of guarantees for the accused during the proceedings concerning precautionary measures (Art. 5, §§3–4) (ECtHR 1984, *Luberti v. Italy*, §§34–37; ECtHR 2005, *Rapacciuolo v. Italy*, §31; ECtHR 2005, *Picaro v. Italy*, §§65–71; ECtHR 2006, *Fodale v. Italy*, §39; ECtHR 2008, *Marturana v. Italy*, §§110–114; ECtHR 2008, *Rizzotto v. Italy*, §§33–35). Following the *Torreggiani* judgment, Italy enacted some reforms to the legislation on pre-trial detention. Law No. 47/2015 amended Article 275 of the Code of Criminal Procedure, by introducing the principle of the least afflictive measure among those that, in the specific case, meet the precautionary requirements (O.G. 2015, No. 94). Article 275 stresses the absolute *ultima ratio* use of pre-trial detention, which can be ordered only if there is clear evidence of a serious offence and only when other alternative measures to detention, even if applied cumulatively, are inadequate. Lastly, in case of violation of the measure, the automatic “mechanism of aggravation” is abolished: the judge has to assess the entity of the violation and when it is considered to be of mild entity the measure can be kept in place, eventually applying jointly another alternative measure to imprisonment.

This provision contributed to a significant reduction of pre-trial detainees in the last few years. Despite progress, numbers are still alarming. In 2014 pre-trial inmates were 22,240 (36.56%) (Ministry of Justice 2017). As to 30 June 2017 the percentage was about 34.5% (17% waiting for the first sentence; 17% waiting for a final sentence) (Ministry of Justice 2017).

EXCESSIVE LENGTH OF PROCEEDINGS

The extensive rate of pre-trial detention in Italy is mainly due to the length of criminal proceedings. In view of this, pre-trial regime acts as an anticipation of punishment, which is contrary to the principle of the presumption of innocence and to the precautionary nature of pre-trial detention.

The ECtHR held that criminal and civil proceedings breached the right to a trial within a reasonable time so frequent that excessively long proceedings have become almost institutionalised (ECtHR 1982, *Foti and Others v. Italy*; ECtHR 1983, *Pretto and Others v. Italy*; ECtHR 1987, *Capuano v. Italy*; ECtHR 1991, *Adiletta and Others v. Italy*; ECtHR 1992, *Cormio v. Italy*; ECtHR 1994, *Katte Klitsche de la Grange v. Italy*).

Thus, the ECtHR found, in the *Bottazzi* case, that in Italy exists “a practice that is incompatible” with Article 6§1 of the ECHR (ECtHR 1999, *Bottazzi v. Italy*, §22).

As a result, Constitutional Law No. 2/1999 modified Article 111 of the Constitution, by including the “fair trial” principle and the “reasonable duration” of trials (O.G. 1999, No. 300). In order to ensure the application of the “reasonable time” principle, Law No. 89/2001 (“Pinto Act”) introduced a remedy against the excessive length of judicial proceedings, allowing victims of unreasonable delay to apply for compensation (O.G. 2001, No. 78). Consequently, the ECtHR used this new instrument to declare applications inadmissible because of non-exhaustion of domestic remedies (ECtHR 2001, *Brusco v. Italy*).

However, the legal remedy is not completely satisfactory. First, in the *Scordino v. Italy* case, the ECtHR made two critical remarks to the Pinto Act: compensations are usually paid within an unreasonable delay (between 11 months-3 years, against the 6 months established by the Court) (ECtHR 2006, *Scordino v. Italy (No. 1)*, §§143, 198); the amounts awarded by the Italian courts are inadequate (between 8%-27% compared to sums usually awarded by the ECtHR) (ECtHR 2006, *Scordino v. Italy (No. 1)*, §223).

Second, the domestic remedy does not solve the structural problem of the lack of effectiveness of the judicial system, since it merely compensates victims without addressing the root causes of the matter. Indeed, it creates a vicious circle: given that compensation cases are dealt by the Appeal Courts, this leads to a significant increase of workload, with the result that the Appeal Courts are forced to postpone ordinary proceedings, thus determining further procedural delays.

Third, the mechanism is very costly: right now Italy compensated €316 million, accumulating debts for more than €451 million (Ministry of Justice 2017). To this impressive figure must be added costs related to compensations for unfair detention of persons acquitted after long years of trial proceedings: €648 million from 1992 (€42 million in 2016). The 2016 Report on the supervision of the execution of the ECtHR’s judgments held that most of the Italian cases pending in

front of the Committee of Ministers of the CoE concern the excessive length of civil proceedings (1,725), of criminal proceedings (163), and the insufficient amounts and delays in the payment of compensation under the Pinto Act (131) (CoE 2016).

CONCLUSIONS

Prison overcrowding in Italy rose again from 2016. The key answer to this problem depends mostly on the concurrent action of the judiciary and the legislator. Judiciary is required to provide full implementation of the legal instruments enacted by Italy since 2013, especially by overcoming the lack of confidence in alternative measures to detention. The legislator is responsible for detecting long-term legal solutions. *Inter alia*, the legislator should intervene by decriminalising some non-violent crimes. This applies in particular to drug offences that since the 1990s have the largest impact on increasing the prison population. In 2009, as a result of Law No. 49/2006 that removed the distinction between “hard” and “soft” drugs, thus unifying penalty provisions for those crimes, 42% of all inmates had been convicted for drug-related offences (Senate of the Italian Republic 2017, 32). In 2014 the Constitutional Court declared unconstitutional the strongly repressive normative on drugs (O.G. 2014, No. 11). Consequently, Law No. 79/2014 distinguished “less” and “more” dangerous drugs and reduced the previous penalties, thereby contributing to reduce prisons’ overcrowding (O.G. 2014, No. 115). However, in 2015 and in 2016 the percentage of people convicted for drug offences was still very large (more than 34%, in contrast to 16.5% of European countries) (Senate of the Italian Republic 2017, 33). More specifically, the high rates in the prison population from 2016 to date stem significantly from the increase in the number of drug offenders entering the prisons (about 30% of all the entrances) (Fuoriluogo 2017). Therefore it is time to address more seriously than in the past national drug policies, in order to respond to the prison overcrowding’s crisis, thus bringing Italy in line with regional standards.

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