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Punishments and Italian Prison System: Are Constitutional Principles Effective?

Keywords: penitentiary system in Italy, whole-life imprisonment, goal of punishments, re-socializing treatment, detainee's rehabilitation

Summary: The publication discusses the constitutional regulations concerning criminal law in Italy about punishment and execution of punishment. Attention was paid to the rehabilitation nature of the imprisonment sentence. Also discussed de facto obstacles to the detainee's rehabilitation: prison overcrowding.

Karanie i włoski system więziennictwa: czy konstytucyjne zasady są efektywne?

Słowa kluczowe: system penitencjarny we Włoszech, kara dożywotniego pozbawienia wolności, cel kar, leczenie resocjalizacyjne, resocjalizacja osadzonego

Streszczenie: W publikacji omówiono konstytucyjne regulacje dotyczące prawa karnego we Włoszech w szczególności związane z problematyką kar i ich wykonywaniem. Zwrócono uwagę na resocjalizacyjny charakter kary pozbawienia wolności. Przedstawiono i omówiono również faktyczne przeszkody w rehabilitacji osadzonego skazanego na karę dożywotniego pozbawienia wolności związane z przeludnieniem więzienia.

1. Crime, punishment and Italian Constitution: relevant principles

Substantially, a criminal sanction is a deprivation or a decrease of an individual asset.

In past ages, there was a great variety of punishments, some of which directly affected honour[1] and other ones personal integrity[2]. In most of modern States, sanctions usually affect three goods only: life (death penalty), freedom (punishments restricting personal freedom), and property (financial penalties).

[1] Infamous punishments: for instance, pillory and mark.
[2] Corporal punishments: for example, mutilation and flogging.

We can say that in modern times the dominant model of criminal sanction is the custodial sentence or, better to say, the prison sentence. In this case, the sentenced person must serve a sentence by spending a certain period of his life, or possibly, in particular instances, his whole life, locked in an institutional space, a prison.

The prison sentence is a relatively recent invention: it is, indeed, the result of the Enlightenment reform (18th century)[3].

Currently, in the Italian criminal system, primary criminal sanctions are life imprisonment, imprisonment, and fines for severe crimes (*delitti*), and arrest and *ammenda* for minor criminal offences (*contravvenzioni*) (art. 17 of the Italian Criminal Code)[4]. Further punishments are, for military crimes, military imprisonment (art. 22 of the Italian Military Criminal Code of Peace) and, for offences under the jurisdiction of Judges of the Peace, homestay and work of public utility (art. 52 Legislative Decree 28 August 2000, No. 274).

In the past, the death penalty was added to those punishments.

The Italian legislator chose to abolish the death penalty between 1944 and 1948[5]. Subsequently, that choice was corroborated in various stages, the last of which concerned wartime military laws.

In 1994 the death penalty came out of the scene in the sphere of wartime military criminal laws too[6]. In 2007, Constitutional Law No. 1 of 2007 changed art. 27 para. 4 of the Italian Constitution deleting the words "except in cases provided for under wartime military laws": that has blocked the reintroduction of the death penalty with ordinary laws[7].

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[3] See T. Padovani, *La pena carceraria*, Pisa 2014, p. 21.

[4] Italian criminal sanctions can be divided into primary sanctions and accessory ones. Accessory criminal sanctions regarding *delitti* are, for example, banning from holding public office, and loss of the parental responsibility. An accessory criminal sanction about *contravvenzioni* is suspension of professional or art activity. Accessory penalty concerning both *delitti* and *contravvenzioni* is the publication of the sentence.

[5] In 1944, the death penalty was abolished in the Italian Criminal Code; in 1948, it was cancelled in special criminal laws. On its part, art. 27 para. 4 Italian Constitution, which entered into force on 1 January 1948,stated: "The death penalty is not permitted, except in cases provided for under wartime military laws".

[6] See Law 13 October 1994, No. 589.

[7] On the other hand, the Italian Constitutional Court, with judgment 223/1996, declared the unconstitutionality of a provision of the Italian Criminal Procedure Code (art. 698 para. 2). That provision allowed Italy to grant extradition for crimes punished with the death penalty by the law of the requesting State. In essence, that chance was subject to the condition that the requesting State offered sufficient guarantees that the death penalty would not have been imposed or if already imposed, would not have been enforced. According to a line already traced in its previous case-law (see judgment 54/1979), the Italian Constitutional Court confirmed the absolute nature of the prohibition of the death penalty and, therefore, its effectiveness also in international relations. The Court has underlined that the provision included in art. 27 para. 4 of the Italian Constitution is a reflection of the right to life, which is the first of the inviolable human rights recognised by art. 2 of the Italian Constitution. See G. Marinucci, E. Dolcini, *Diritto penale*, Milan 2012, p. 550.

No legal provision crystallises the general notion of punishment as an affliction, or more generally, as limitation of the rights of the author of an illicit fact. However, that notion is usually recognised and accepted by scholars that still today deal with the problems of the foundation and function of criminal sanctions. Those problems must take into account the provisions introduced in 1948 by the Italian Constitution.

Only few Italian constitutional rules directly take into account punishment.

Art. 27 Italian Constitution at paragraph 3 states that punishment cannot consist of inhuman treatment and must aim at the rehabilitation of the convicted person. Article 27 Italian Constitution, at section 4, prohibits the death penalty.

Art. 87 paragraph 11 of the Italian Constitution, which provides that the President of the Italian Republic may grant pardons and commute punishments, is another rule that comes into consideration.

However, some different provisions indirectly consider criminal sanctions, such as art. 25 paragraph 2 of the Italian Constitution, under which no one may be punished except under a law in force before the time the offence was committed. That is the so-called principle of legality of punishment. Therefore a criminal sanction cannot be imposed except in cases expressly established by law (*nullum crimen sine lege*), and only the penalties provided for by law (*nulla poena sine lege*) can be inflicted.

Those two principles are the content of the fundamental rule included in art. 1 Italian Criminal Code.

The legislator has the responsibility to choose the goods or values to be protected under criminal law. However, the lawmaker can only criminally punish behaviours that cause social damages, that is, behaviours that harm or endanger the conditions of existence and development of society.

About the crime's structure, the legislator cannot punish an individual for what he/she is or for what he/she wants. The lawmaker can only punish facts that harm or endanger the integrity of a legal good (harm principle, literally principle of harmfulness).

From Article 27 para. 1 of the Italian Constitution, according to which "criminal responsibility is personal", derives that criminal sanctions can affect only the offender.

That principle is a result of human progress because in past ages a punishment could be inflicted on people unrelated to the criminal act, such as the members of social group or family to which the offender belonged.

Such principle also implies that punishment is allowed only about offences committed guiltily, namely about crimes that can be personally reproached to their author. We can speak of the principle of guilt, which is also connected to the

rehabilitation function of the punishment (art. 27 para. 3 Italian Constitution). It would not make sense, states the Italian Constitutional Court in a judgment[8], to rehabilitate those who do not need to be re-socialised, not having at least committed a culpable offence.

In general, we can say that in a modern constitutional democracy, the function of punishment is both to protect the fundamental rights of the individuals from crimes and to safeguard the same type of rights of those who are guilty of criminal conduct[9].

The relationship between punishments and fundamental rights is, therefore, twofold. The need to protect constitutionally relevant fundamental rights, first of all, imposes the need for the State to provide for criminal cases that threaten a punishment of conduct infringing those rights and to ensure the material organisation necessary for the effectiveness of the sentence[10].

However, the punishment must be proportionate to the seriousness of the committed crime.

The proportion principle of the sentence performs the task of protecting fundamental rights both of the authors of crime, and of those the State wants to protect from crimes. Moreover, a proper punishment guarantees the effectiveness of the canon of equality to protect equal social dignity. An appropriate sentence also ensures a human person is not considered as an object the State can use for demonstration or deterrence purposes.

On the matter, the Italian Constitutional Court argued that the principle of equality requires that punishments fit the value of the fact committed so that the sanctioning system at the same time fulfils the function of social defence and that of protecting individual positions[11]. In recent times, the Court went over, stating that an inadequate punishment is an obstacle to its re-educational function[12].

2. Humanisation and rehabilitation goal of punishments

Another fundamental legal principle to protect the rights of the convicted person is the principle of humanisation of punishments. We can find it in art. 27 para. 3 of the Italian Constitution, according to which "punishments cannot consist in

[8] Constitutional Court, judgment 322/2007.

[9] See L. Ferrajoli, *Diritto e ragione. Teoria del garantismo penale*, Rome-Bari 2011, p. 329; A. Toscano, *La funzione della pena e le garanzie dei diritti fondamentali*, Milan 2012, p. 211.

[10] See A.Toscano, *op. cit.*, p. 212.

[11] Constitutional Court, judgment 409/1989.

[12] Constitutional Court, judgment 40/2019. See M. Cartabia, *L'attività della Corte costituzionale nel 2019*, 28 April 2020, p. 21-23; I. Grimaldi, *Il principio di proporzionalità della pena nel disegno della Corte costituzionale*, in *Giurisprudenza Penale Web*, 2020, 5.

a inhuman treatment and must aim at the rehabilitation of the convicted person". The constitutional rule prohibits the lawmaker from providing for punishments that offend the dignity of the person, as well as corporal sanctions and penalties that involve an excessive content of physical and psychological suffering.

Of course, even more so, the principle of humanisation of punishments also includes the mandatory ban on torture, intended as psychophysical humiliation of maximum intensity.

Article. 27 para. 3 Const. also forbids all sanctions that compromise or simply endanger the right to health.

The Italian Constitutional Court stated about it that the protection of health is inextricably linked with the prohibition of treatments contrary to the sense of humanity, insofar as the prison represents an attack on the constitutional right to health[13]. The criminal system has, sometimes, made a balance between the interest in satisfying the punitive claim and the right to health. For instance, to safeguard the right to health the prison sentence enforcement must or may be delayed[14]. What said shows that in the rule of law, the duty to give effect to the criminal sanction is not a requirement unrelated to any constraint, but it can and must recede in front of the need to protect the fundamental rights of the convicts[15].

More generally, the first part of article 27 para. 3 Italian Constitution implies the need for a prisoner to see all his fundamental rights recognised and protected, compatibly with the prison conditions[16]. The Italian Constitutional Court has indeed argued that the deprivation of personal freedom can allow the narrowing of the spectrum of faculties inherent to fundamental rights, but not their definitive and total suppression[17].

The doctrine agrees on the matter too, noting that the penitentiary system does not represent a legally separate system. It must, on the contrary, be considered an integral part of the State legal system[18].

The second part of article 27 para. 3 of the Italian Constitution deals with the rehabilitation purpose of punishment.

The rehabilitative goal of the punishments represents one of the possible shapes of the idea of individual prevention, which concerns the person who committed a crime.

The most recent version of the individual prevention theory is the one based on the concept of rehabilitation or re-education.

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13 See Constitutional Court, judgments 99/2019; 264/2009.
14 See articles 146 (para. 1 No. 3) and 147 (para. 1 No. 3) Italian Criminal Code.
15 A. Toscano, *op. cit.*, p. 216-217.
16 See Constitutional Court, judgment 349/1993.
17 See Constitutional Court, judgments 26/1999; 349/1993; 114/1979.
18 A. Toscano, *op. cit.*, p. 217.

What does rehabilitation mean? Among the most comprehensive definitions of that concept in an international context, we can mention the one proposed by the Academy of Sciences of Washington. According to the Academy »rehabilitation is the result of any planned intervention that reduces an offender's further criminal activity, whether that reduction is mediated by personality, behavior, abilities, attitudes, values, and other factors. The effects of maturation and the effects associated with "fear" or "intimidation" are excluded, the results of the latter having traditionally been labelled as specific deterrence«[19].

As for Italy, if we look at its constitutional case-law, we can see how the Constitutional Court uses different linguistic expressions to describe the principle in question: it goes from "readaptation to social life" indicated by the judgment 168/972 to "re-socialization" and "reintegration of the sentenced person in the society" to which the most recent judgments of the Court refer[20]. However, in order to prevent that concept from trespassing into authoritarian drifts, it is necessary to specify that the prisoner must voluntarily accept rehabilitation.

In short, it can be stated that art. 27 para. 3 Italian Constitution opts for the positive components of individual prevention, emphasising rehabilitation without excluding intimidation.

Despite the provision of art. 27 para. 3 of the Italian Constitution, the progressive emergence of the re-educational idea in the Italian legal system has followed a rather slow and painful path.

In Italy, the primacy of the retribution theory of punishment, (stating that criminal sanction is the committed crime's price), began to be in crisis during the 1960s because of the progressive emergence of a multifunctional concept of punishment. Under the multifunctional idea of punishment, it is possible to assign to the criminal sanction different political-criminal purposes: satisfactory purposes, general preventive purposes, to divert all people from carrying out criminal acts, and individual preventive purposes.

With the law 26 July 1975 No. 354, which is the fundamental law regarding the Italian penitentiary system, there is the first choice of field in Italian criminal legislation in favour of the sentenced person during the enforcement of the sentence.

Law No. 354 of 1975 is a legal text in which the provisions of art. 27 para. 3 Italian Constitution received the maximum possible enhancement.

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[19] National Academy of Sciences, *The Rehabilitation of Criminal Offenders: Problems and Prospects*, Washington, D.C. 1979, p. 4-5. See G. Mannozzi, *Razionalità e "giustizia" nella commisurazione della pena. Il* Just Desert Model *e la riforma del* Sentencing *americano*, Padua 1996, p. 117-118. In the area of individual prevention, some theories tend to enhance the concept of re-socialisation, which means the use of individualised convict treatment aimed at the positive elimination or mitigation of the causes that produced a crime: see E. Dolcini, *La commisurazione della pena*, Padua 1979, p. 154.

[20] See Constitutional Court, judgment 149/2018.

Specifically, art. 1 Law No. 354 of 1975 shows to accept both rules contained in art. 27 para. 3 Italian Constitution: the prohibition of treatments contrary to the sense of humanity and the re-education purpose of punishment.

The prisoner and his rehabilitation needs, therefore, take on a central position in the context of Law No. 354 of 1975. Whatever the fact committed, the convicted person is entitled to a treatment in accordance with humanity sense and tailored to his needs for re-socialisation.

It is interesting to point out that the development of the re-educational paradigm in the Italian penitentiary system coincided with the loss of confidence in that model by the legal systems which had invested most in the convict's treatment programs, such as the United States and the Scandinavian countries[21].

Notwithstanding, the rehabilitation function of the sentence continued to play a central role in the Italian legal system: in confirmation of that, for instance, Law 23 June 2017, No. 103 reaffirmed the need for the effectiveness of the re-education function of the sentence as an indispensable prerequisite for the Italian penitentiary system to comply with the constitutional principles fully[22].

3. Legislative shortcomings about the rehabilitative goal of punishments: the so-called whole-life imprisonment

Despite solemn statements of principle, the rehabilitation goal of punishments is not always pursued in Italy, *de jure and de facto*.

As a matter of law, art. 27 paragraph 3 of the Italian Constitution leads to reflect on the legitimacy of a particular form of life detention, the so-called whole-life imprisonment, introduced into the Italian legal system in the early 90s, following some mafia massacres[23].

What does whole-life imprisonment mean?

The so-called whole-life imprisonment in the Italian penitentiary language means a sentence that lasts the entire life of the sentenced person, and it is full prison detention[24].

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[21] See G. Mannozzi, *Art. 1 L. 26 luglio 1975, n. 354*, [in:] F. Palazzo, C.E. Paliero (eds.), *Commentario breve alle leggi penali complementari*, 2nd ed., Padua 2007, 1906.

[22] See art. 1, para. 85 lett. q) Law No. 103 of 2017.

[23] Law Decree 8 June 1992, No. 306, resulted in Law 7 August 1992, No. 356.

[24] See A. Pugiotto, *Criticità costituzionali dell'ergastolo ostativo*, in C. Musumeci, A. Pugiotto, *Gliergastolani senza scampo. Fenomenologia e criticità costituzionali dell'ergastolo ostativo*, Naples 2016, p. 65. On the issue also see G. Chiola, *Il sistema carcerario italiano. Principi costituzionali*, Turin 2020, p. 177; G.L. Gatta, E. Dolcini, G.M. Flick, G. Neppi Modona, M. Chiavario, L. Eusebi, A. Pugiotto, D. Galliani, M. Bontempelli, *Ergastolo "ostativo": profili di incostituzionalità e di incompatibilità convenzionale. Un dibattito*, in *Rivista Italiana di Diritto e Procedura Penale* 2017, p. 1495-1530.

It is, therefore, an endless and unchangeable punishment, unless the person concerned usefully cooperates with the judicial authorities with decisive information enabling them to prevent the consequences of the offence and assisting them in establishing the facts and identifying the perpetrators of crimes.

It must be pointed out an essential difference between those sentenced to whole-life imprisonment and common life-imprisonment: people condemned to common life-imprisonment have the right to hope, that is, the right to have the prison sentence reviewed periodically, in order to access penitentiary benefits and alternative measures to detention. Specifically, those sentenced to common life-imprisonment may hope to access conditional release after having served a 26-year sentence and under conditions required by art. 176 of the Italian Criminal Code. Instead, for those sentenced to whole-life imprisonment, any prospect of release is subject to their cooperation, if possible, with the judicial authorities.

In other words, that is the only hypothesis within the criminal system in which life imprisonment, even if the sentenced person participates in the rehabilitation process, is an effectively perpetual punishment.

The issue has a significant practical impact, given that in 2019 life sentences amounted to 1,790, of which 1,250 were whole-life sentences.

The percentage of whole-life sentence prisoners is then around 70% out of all those sentenced to life imprisonment.

From a legal point of view, whole-life imprisonment concerns people who have been serving a life imprisonment sentence following a conviction for one or more of the severe crimes set out in paragraph 1 of art. 4-*bis* Law No. 354 of 1975[25].

The nature of the crimes listed by art. 4-*bis* Law No. 354 of 1975 reflects more the social alarm derivingfrom the offence than the seriousness of the crime itself. The catalogue then entails an evaluation parameter of a political nature, as such highly exposed to "irrational" influences[26].

[25] Crimes committed for terrorism purpose, including international one, or for subversion of the democratic order by carrying out acts of violence; crimes against Public Administration; mafia-type association, including foreign ones (art. 416-*bis* Italian Criminal Code); political-mafia electoral exchange (art. 416-*ter* Italian Criminal Code); mafia-type crimes; reduction or maintenance in slavery or servitude (art. 600 Italian Criminal Code); child prostitution (art. 600-*bis* para. 1 Italian Criminal Code); child pornography (art. 600-*ter*, para. 1 and 2 Italian Criminal Code); trafficking in human beings (art. 601 Italian Criminal Code); purchase and sale of slaves (Article 602 Italian Criminal Code); group sexual assault (art. 609-*octies* Italian Criminal Code); kidnapping for extortion (art. 630 Italian Criminal Code); criminal association for smuggling foreign manufactured tobacco; association aimed at the illicit trafficking of narcotic or psychotropic substances (Article 74 of Presidential Decree 9 October 1990, No. 309); crimes of aiding illegal immigration and crimes of aiding illegal immigration for profit (Law Decree 18 February 2015, No. 7, res. in Law 17 April 2015, No. 43).

[26] See F. Della Casa, *Misure alternative alla detenzione, in Enciclopedia del diritto*, *Annali*, III, Milan 2010, p. 826.

Proof of that is the expansion over time of such catalogue, within which various crimes have been inserted, with a consequent multiplication of prison situations marked by a punishment not subject to mitigation.

A large part of the crimes included in the list referred to in para. 1 of art. 4-*bis* Law No. 354 of 1975 implies the inclusion of a person in a criminal organisation, whether they are crimes attributable to Mafia-type criminal organisation[27], or whether they are crimes for terrorist purposes, including international ones.

Whole-life imprisonment is an absolute obstacle to re-socialisation since it prevents the granting of most of the opportunities for the social reintegration of the offender[28].

The principle of the re-educational purpose of punishments provided for by the second part of the art. 27 para. 3 of the Italian Constitution is thus annihilated.

Section I of the Court of Strasbourg recently ruled on the matter in the case of Viola v. Italy, condemning the Italian State for violation of art. 3 ECHR[29].

Specifically, the European judges considered that the life sentence imposed on Mr Viola under art. 4-*bis* paragraph 1 Law No. 354 of 1975 restricted his prospect of release and the possibility of review of his sentence to an excessive degree. Accordingly, his sentence could not be regarded as reducible for the purposes of art. 3 of the Convention.

The Alsatian judges, confirming what has recently been stated by the Italian Constitutional Court[30], underlined that a convicted prisoner's personality does not remain unchanged from the time of the committed crime, as the condemned person is enabled to a process of re-socialisation that allows him to critically review his criminal past and rebuild his personality[31]. Vice versa, the statement "lack of cooperation equal irrebuttable presumption of dangerousness" anchors the dangerousness of a prisoner at the time the crime was committed, not allowing the judge to take into account the individual process of re-socialisation undertaken since the conviction. That also prevents the prisoner from knowing what he needs to do in order to be considered for release[32].

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[27] See art. 416-*bis* Italian Criminal Code.

[28] Foreclosures concern: outside work (art. 21 Law No. 354 of 1975); probation under art. 47 Law No. 354 of 1975; various types of home detention under art. 47-*ter* Law No. 354 of 1975; semi-custodial regime under art. 48 Law No. 354 of 1975; conditional release under art. 176 Italian Criminal Code (art. 2 Law decree 13 May 1991, No. 152 resulted in Law. 12 July 1991, No. 203); conditional suspension of the enforcement of the prison sentence up to a maximum of two years under Law 1 August 2003, No. 207.

[29] See ECtHR, 13 June 2019, Viola v. Italy (No. 2).

[30] See Constitutional Court, judgment 149/2018.

[31] ECtHR, 13 June 2019, Viola v. Italy (No. 2), para. 125.

[32] ECtHR, 13 June 2019, Viola v. Italy (No. 2), para. 126.

Hence, the declaration of violation of art. 3 ECHR by the Italian system, given that it would be incompatible with human dignity to deprive individuals of their freedom, without striving towards their rehabilitation and providing them with a chance to regain that freedom in the future[33].

European judges asked the Italian State to implement a law reform of the so-called whole-life imprisonment, which guarantees the possibility of reviewing the sentence. On the matter, the Court is clear: while admitting that the State might require the demonstration of "dissociation" from the mafia environment, it affirms that the severing of ties with mafia circles might be expressed with ways other than cooperation with the judicial authorities[34].

Thus, we can think of a system that considers failure to cooperate as a rebuttable presumption of social dangerousness, such as to preclude access to the benefits provided by the penitentiary system[35]. That presumption should, however, be overcome if it appears that a prisoner reached an adequate degree of rehabilitation and if it could be proved that he had severed all links with mafia-type or terrorist groups.

Waiting for a possible legislative intervention, on October 2019 the Italian Constitutional Court declared the constitutional illegitimacy of art. 4-*bis* paragraph 1 Law No. 354 of 1975, where it did not allow to prison leave detainees convicted of crimes under the same section, such as Mafia-type offences, who did not cooperate with the judicial authorities, if it was proved that they had severed all links with the Mafia-type groups[36]. That judgment does not directly concern whole-life sentence prisoners since it does not regard conditional release. Nevertheless, it can be considered an essential step in the process of transforming the presumption of social dangerousness from absolute to rebuttable when cooperation with the judicial authorities lacks.

As a confirmation of that, recently, the Italian Court of Cassation challenged the constitutional legitimacy of the Italian whole-life imprisonment[37]. According to the Supreme Court, the purposes of criminal and social defence policy, underlying the absolute presumption of on-going links with a criminal organisation, intolerably collide with the punishment's re-educational aim, which is an ontological quality of a criminal sanction from its creation by the general law provision, until it concretely expires.

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[33] ECtHR, 13 June 2019, Viola v. Italy (No. 2), para. 136.
[34] ECtHR, 13 June 2019, Viola v. Italy (No. 2), para. 143.
[35] See Law proposal (No. 1951) introduced on 25 September 2019.
[36] See Constitutional Court, judgment 253/2019.
[37] See Court of Cassation, 3 June 2020, No. 18518-20, *www.sistemapenale.it* [data dostępu: 19.06.2020].

4. *De facto* obstacles to the detainee's rehabilitation: prison overcrowding

From another perspective, the re-educational function of punishments is *de facto* put in doubt because of prison overcrowding that inevitably leads to reduce the possibility of offering adequate re-socializing treatment. Italy is chronically affected by a prison-overcrowding situation, which in 2013 had led the European Court of Human Rights to condemn the Italian State for a violation of art. 3 ECHR with a pilot-judgment procedure[38]. Following the law measures adopted in the aftermath of that judgment, the overcrowding rate decreased, reaching a percentage of 105% in 2015. The situation in 2015 made it possible for Italy to close the infringement procedure before the Strasbourg Court[39]. After 2015 the number of prisoners started to rise again, reaching 61,230 detainees against 50,931 regulatory places available, with an overcrowding rate of about 120% on 29 February 2020.

The need to protect prisoners and prison workers from the risk of the spread of the coronavirus disease (Covid-19) in prisons prompted the Italian Government to adopt a law decree that until 30 June 2020 eased home detention for non-dangerous detainees with less than 18 months left to serve on their sentence, and extended the duration of licenses for semi-liberty prisoners[40]. For its part, the judiciary has, on the one hand, increased the granting of alternative measures to detention and, on the other hand, decreased the use of pre-trial detention.

The result of the combination of such remedies was a significant decrease in the prison population: on 30 June 2020, there were 53,579 individuals in prisons against a regulatory capacity of 50,501.

The prison overcrowding issue draws the attention to the significance of prison space, both in a quantitative sense and in a qualitative meaning.

In order to allow the realization of effective re-socializing treatment interventions, prisons cannot be considered as mere containers. On the matter, it has been emphasized that the homogeneity of treatment provided for by law does not correspond to a structural homogeneity of the Italian penitentiary establishments[41]. In Italy, structures built in different periods, with different purposes and functions coexist, and all this affects the prison experience. Antigone NGO observed that

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[38] See ECtHR, 8 January 2013, Torreggiani and Others v. Italy.

[39] The Committee of Ministers declared the procedure closed because of the data reached in 2015: see CM/ResDH (2016)28, Final Resolution adopted on 8 March 2016.

[40] See articles 123 and 124 Law Decree 17 March 2020, No. 18, resulted in Law 24 April 2020, No. 27.

[41] See S. Paone, *Ripensare lo spazio carcerario*, in Antigone, *Il carcere al tempo del coronavirus. XVI Rapporto sulle condizioni di detenzione*, 2020, p. 176. Antigone is a cultural and political NGO "for rights and guarantees in the penal system".

out of 98 prisons visited by the NGO's Observatory during 2019, 19.5% was built before 1900[42].

Even the personal space available to prisoners is not homogeneous across the national territory. In 25 of the 98 prisons visited by Antigone, there were cells in which the living space was less than 3 square meters per person[43].

Prison overcrowding not only reduces the physical space available for each prisoner but also lessens the possibility of re-socialization inside the prison. It weakens the possibility of being followed by prison staff members, which on the contrary are often less than necessary. It lowers access to work and the possibility of studying in prison.

It, therefore, becomes essential to reduce the prison population and, at the same time, make penitentiary establishments compatible with the performance of treatment activities, also creating spatial solutions that allow the progressive transition from a "closed custody" model to an "open custody" one[44].

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[42] See S. Paone, *op. cit.*, p. 177.

[43] See Antigone, *op. cit.*, p. 11. In Italian case-law there is no agreement on how personal space needs to be calculated for each prisoner. The Sezioni Unite of the Italian Court of Cassation will soon establish whether the criteria for calculating the minimum available space for each prisoner should be defined considering the net surface of the room and therefore deducting the space occupied by furniture and fixed structures or by including the furniture necessary for carrying out daily life activities. In particular, the Supreme Court will also decide whether the space occupied by the bed or beds in the multi-bed rooms takes on importance, regardless of the structure of the "bunk" or "single" bed, or whether only the bunk bed and not the single one must be deducted: see Court of cassation, 21 February 2020, No. 14260.

[44] See some proposals included in Stati Generali dell'Esecuzione Penale, *Documento conclusivo*, 18 April 2016, Chapter IV, para. 2, suggesting as a reference model that of autonomous residential units, adopted in recently ears in Spain and some Northern European countries (*www.giustizia.it*).

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