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The Condemnation of the Italian State for Violation of the Prohibition of Torture.

Remarks on the Ruling passed by the European Court of Human Rights, Section IV, 7th April 2015, Application no. 6884/11, case of Cestaro v. Italy

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Abstract— **This paper analyzes the *European Court of Human Rights*' ruling in the Cestaro v. Italy case, focusing specifically on the conviction for violation of Article 3 of the European *Convention for the Protection of Human Rights and Fundamental Freedoms* by Italian criminal law, whose framework does not recognize torture as a crime and does not provide instruments of deterrence to effectively prevent the execution and the recurrence of such acts.**

Currently, the Italian Parliament is discussing a draft amendment to the Criminal Code and aims to introduce the concept of torture as a crime; however, in the light of comments made by the *European Court of Human Rights*, this project questions whether the proposed solution will be able to prevent a repeat of events similar to those that occurred in 2001 after the G8 Summit in Genoa.

Keywords: human rights; torture; human dignity; Italian criminal law; European Court of Human Rights.

I. INTRODUCTION

In a limited government, the preeminent and unsurpassed value is the respect for human dignity: thus, torture has no place either in legalized forms or through practices more or less silent [1].

For these reasons, all international and supranational charters of rights, ratified also by the Italian State, have established both the prohibition of torture and the legal procedures to follow when torture is apparent: from the *Universal Declaration of Human Rights* of 1948 and the European *Convention for the Protection of Human Rights and Fundamental Freedoms* (*European Convention*) of 1950, to the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (*CAT*), adopted by the United Nations in 1984, its *Optional Protocol* of New York of 2002 and the *Charter of Fundamental Rights* of the European Union of 2000[a].

According to the prevailing legal literature [2] and some judicial pronouncements[b], the prohibition of torture is also a norm of general international law and, in particular, *ius cogens* [3] valid for all states in the international community, regardless of its express provision through agreements [4].

Nevertheless and although the Italian Constitution states that «Any acts of physical or moral violence against persons subject to restrictions of personal liberty are to be punished» (art. 3, § 4) [5], the Italian State has not yet introduced the crime of torture in criminal law, contrary to the express provisions of art. 1 of the *CAT* [6] and art. 3 (*Prohibition of Torture*) of the *European Convention* [7]. For years, the Committee against Torture[c] of the United Nations and the Committee for the Prevention of Torture[d], a body of the Council of Europe, have repeatedly criticised and denounced this omission [8] while the *European Court of Human Rights*

[a] The Italian State is a signatory of other international charters which enshrine the prohibition of torture and, in particular, the *Geneva Convention* relative to the *Treatment of Prisoners of War* of 1949, the *International Covenant on Civil and Political Rights* of 1966, the *European Convention* for the *Prevention of Torture and Inhuman or Degrading Treatment* of 1987, the *Rome Statute of the International Criminal Court* of 1998.

[b] Cf., e. g., *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, 10th December 1998, case no. IT-95-17/1, Prosecutor v. Anto Furundžija (§ 144 ff.), and *European Court of Human Rights*, 21st November 2001, Application no. 35763/97, case of Al-Adsan v. The United Kingdom. The General Assembly of the United Nations took note of the customary nature of the prohibition of torture in the Resolution 61/53 on *Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 19th December 2006.

[c] Cf. *Report of the Committee against Torture*, 1st December 2007 (A/62/44, § 40 C), where the Committee reiterated its previous recommendation (A/54/44, § 169 a) «that the State party proceed to incorporate into domestic law the crime of torture and adopt a definition of torture that covers all the elements contained in article 1 of the Convention. The State party should also ensure that these offences are punished by appropriate penalties which take into account their grave nature, as set out in article 4, paragraph 2, of the Convention».

[d] Cf. *Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 13rd to 25th May 2012*, p. 8 (Strasbourg, 19th November 2013).

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(*ECHR*) has ascertained on several occasions the responsibility of the Italian State for the violation of the absolute prohibition of torture and the use of inhuman or degrading treatment[e].

The *ECHR* ruling in the Cestaro v. Italy case, passed the 7th April 2015, is a further condemnation of the Italian State not only for the substantive violation of art. 3 of the *European Convention*, but also for the lack of an effective criminal law to persecute the acts of torture committed.

II. Facts and Decisions of European Court of Human Rights

In its ruling, the *ECHR* unanimously agreed that there had been a violation of art. 3 of the *European Convention* on account of ill-treatment sustained by the applicant during events which occurred at the end of the G8 Summit in Genoa in July 2001 in the Diaz-Pertini School, whose building was made available at the time by the municipal authorities for demonstrators to use as a night shelter. On the nights of the 21st and the 22nd of July an anti-riot police unit entered the building to carry out a search, leading to acts of violence.

A. The material violation of art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms

First of all, the *ECHR* refers to the definition[f] of torture contained in the *CAT* and the evolution of this concept in the case law of the *Court* itself[g]: in the light of this reconstruction, the *ECHR* ruled that the violence committed in the Diaz-Pertini School, of which the applicant is a victim, had a punitive end as well as being an act of retaliation aimed to cause humiliation, pain and suffering of the victims. Therefore, these forms of violence have the characteristics of real torture, pursuant to art. 1 of the *CAT*[h].

The violence inflicted on the applicant were particularly serious acts of cruelty, because it was completely gratuitous as the victim did not pose any resistance: i.e., the police abused their position of power, and committed a deliberate and premeditated act, devoid of any foundation[i]. This is demonstrated not only by punitive irruption into the Diaz-Pertini School, but also by the subsequent efforts of the national authorities to justify the search of premises and arrests on the basis of false evidence, e.g. simulating the discovery in the courtyard of the School of two Molotov cocktails[j].

As a result, the *ECHR* ruled that all the facts indicate that the treatment contrary to human dignity suffered by the applicant should be qualified as torture[k].

B. The infringement of article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms on the procedural side

According to the case law of the *ECHR*, a mere compensation is not enough to overcome the victim status; instead, it is necessary to punish those responsible for acts of torture[l]. In this way, the *ECHR* identifies the second aspect of the responsibility of the Italian State in accordance with the procedural requirements of art. 3 of the *European Convention*: indeed, each contracting country has to carry out effective investigations into all cases of material breach of this article, in order to identify, prosecute and convict accordingly those responsible for acts of torture and inhuman or degrading treatment[m].

The *ECHR* states that only the Italian judicial authorities can sanction sentence reductions or legal allowances for perpetrators of torture: however, pursuant to Art. 19 of the *European Convention* and in accordance with the principle that the *Convention* is both a theoretical and practical guarantee, the *ECHR* rules that it must monitor and intervene when there is a clear discrepancy between the gravity of the act and the penalty imposed[n]. Moreover, in cases of torture committed by state officials, criminal proceedings should never become extinct through the statute of limitation, while amnesty and pardon should never be granted for this type of crime nor should the sentence be suspended[o].

It is therefore necessary that each contracting state to the *European Convention* introduces provisions of criminal law, in accordance with the provisions of art. 3 of the European *Convention*, while, in terms of disciplinary measures, the *ECHR* considers that, when the perpetrators are state officials, it is important that these are suspended during the period of investigation and trial and are permanently removed if convicted[p].

In the present case, the *ECHR* has found a number of violations of the positive obligations under art. 3 of the *Eu-*

[e] The first conviction by the *ECHR* is the ruling of the 6th April 2000, Application no. 26772/95, case of Labita v. Italy. After this one, the *ECHR* found a violation of art. 3 of the *European Convention* by the Italian State in a growing number of cases: recently, it can recall the rulings of the second Section of the 31st July 2012, Application no. 40020/03, case of M. and Others v. Italy and Bulgaria, and the 8th January 2013, Applications no. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, case of Torreggiani and Others v. Italy.

[f] The art. 1, § 1, states that «For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.»

[g] Cestaro v. Italy, § 171 ff.

[h] *Ibidem*, § 177 ff.

[i] *Ibidem*, § 179 ff.

[j] *Ibidem*, § 184.

[k] *Ibidem*, § 190.

[l] *Ibidem*, § 230 ff.

[m] *Ibidem*, § 204 ff.

[n] *Ibidem*, § 207.

[o] *Ibidem*, § 208.

[p] *Ibidem*, § 209.

ropean Convention: the police did not cooperate with the investigating authorities to identify the perpetrators of violence and the Italian Government has yet to respond to requests for information regarding the necessary suspension from duty of police officers subjected to criminal proceedings[q].

In any case, the most serious aspect is the impunity of the authors: the defendants were sentenced to prison terms by the national courts for minor offences of forgery committed with the intent to conceal the facts of torture, while with relation to offences of intentional injury, beatings, private violence and abuse of office, they have benefited from the limitation of actions and a sentence reduction as determined by the pardon governed by Law no. 241/2006[r].

Consequently, the *ECHR* found that the authorities were incompetent in their response to such serious acts: however, this result cannot be imputed to the shortcomings or negligence of the public prosecutor's office or the domestic courts[s]. The problem has a structural nature: the present case had proved that the Italian criminal legislation does not recognize torture and is devoid of the necessary deterrent effect to prevent other similar violations of art. 3 in the future[t].

The *ECHR* pointed out that the State's positive obligations under art. 3 of the *European Convention* include the duty to introduce a properly adapted legal framework, including effective criminal-law provisions[u]. Therefore, the *ECHR* concluded that the Italian legal system should be endowed with the legal means to ensure the appropriate punishment of perpetrators of acts of torture or other ill-treatment under art. 3 of the *European Convention* and be empowered to prevent perpetrators of torture benefiting from measures of relief that are contrary to the *Court*'s case-law[v].

III. The Bill before Parliament

The Italian Parliament must then recognize torture as a crime, without delay, in order to ensure effective respect for human dignity and prevent the further compromise of the Italian State's international credibility.

The bill before Parliament[w] includes an introduction to the concept of torture as a crime under art. 613-*bis* of the Penal Code: «Anyone, with violence or threat or violation of his obligations of protection, care and assistance, intentionally causes a person entrusted to him, or at least under his authority, supervision or custody, acute physical or mental suffering in order to obtain information or statements, or as a form of punishment, or as a means to curb resistance, or for any reason based on ethnicity, sexual orientation or political or religious opinions, shall be punished with imprisonment from four to ten years. If the facts mentioned in the first paragraph are committed by a public official or a person responsible for a public service, with abuse of authority, or in violation of the duties inherent to the function or service, the applied punishment will be imprisonment from five to fifteen years.»[x]

The bill provides for the introduction of aggravating circumstances if the acts committed lead to the unintended consequence of death, establishing an increase of two-thirds of the sentence; while, if the perpetrator intentionally causes death, the penalty is life imprisonment.

Moreover, art. 613-*ter* introduces the crime of instigation of a public official to commit torture.

While the sentencing for the crime of torture is subject to a statute of limitation, the period of time within which proceedings must be instituted doubles penalty prescribed by the law: therefore, the crime of torture is extinguished after a period of 20 years, or after 30 years when it is committed by a public official or a person responsible for a public service.

The bill also enshrines the ban on the use of statements obtained through the crime of torture and the prohibition to expel or return migrants when it is assumed that, in the countries of origin, they are subjected to torture. Finally, diplomatic agents under investigation or sentence in their country of origin for this offence would be stripped of their diplomatic immunity.

IV. Critical Considerations to the Draft Law

The legislature would introduce a wider configuration of the crime of torture than required by the *CAT* because, next to the most serious offence committed by a public official or a person responsible for a public service (§ 2), the crime of torture committed by private persons is also contemplated (§ 1). This solution is satisfactory because it would respect fully the positive obligations of prevention that each State party must comply to, in accordance with art. 3 of the *European Convention*.

However, the legislature still fails to address all aspects of torture.

First, the provision of the law before Parliament circumscribes the victims of the crime only to the people entrusted to the police officer, or otherwise subjected to his authority, supervision or custody, thus excluding the possibility of recognizing the existence of the offence, in the case of serious violence, freely aimed at causing the victims' suffering, perpetrated by the police in the operations of public policy before the victims are under the authority of the po-

[q] *Ibidem*, § 214 ff. and § 227 ff.

[r] *Ibidem*, § 219 ff.

[s] *Ibidem*, § 222 ff.

[t] *Ibidem*, § 225.

[u] *Ibidem*, § 243.

[v] *Ibidem*, § 246.

[w] The bill no. 2168 was approved by the Chamber of Deputies on 9th April 2015 and is currently before the Senate of the Republic.

[x] Trans. mine.

lice. This provision would therefore fail to recognize instances of torture similar to the acts committed in the Diaz-Pertini School, a case that only became classified as torture once it was recognized as such by the *ECHR*. As a result, this provision would not be able to punish and prevent the commission of new facts similar to those condemned by the *ECHR*. However, it would expose Italy to further future international responsibilities because the proposed solution would be inconsistent with the obligations under the *CAT*.

Another critical point is the description of the conduct because the provision requires the use of "violence or threat": torture is often performed without the use of these modes, so it would be preferable to structure the offence to "free form" as required by the *CAT*.

Similarly, the request for a specific intent, i.e. the fact that the performed behavior aimed for a specific purpose, fails to identify cases of intentional infliction of physical or moral suffering executed without any apparent purpose, but only for revenge or sadism: just think, once again, of the events of the Diaz-Pertini School.

With regards to offences that are committed by a public official or a person responsible for a public service, the legislature still does not rule out possible allowances for the accused on the basis of extenuating circumstances, even though it does outline an appropriate maximum penalty. Consequently, those responsible for these crimes could benefit from reduced sentences.

Finally, the draft law does not exclude the applicability of exoneration, in contrast with the provisions of the *CAT* (art. 2, §§ 2 and 3), nor does it preclude the statute of limitation and the applicability of amnesty or pardon, unlike the reconstruction rooted in case law of the *ECHR*. In fact, according to the international order, the condemnation of torture has an absolute and imperative value because neither a state of war, threat of war nor internal political instability can be invoked as a justification for torture (*CAT*, art. 2, § 2): the prohibition of torture does not allow exceptions, limitations, compensations, nor any derogation (*European Convention*, art. 15, § 2)[y] [10].

V. Evaluation Summary

The legal literature has emphasized that the use of torture and inhuman or degrading treatment - along with authoritarian tendencies, the return to forms of racism and the absence of standards of social equity - are an index of the regressive nature of time, characterized in that «rights seem to "have a price": the price of so-called public safety» [11].

It is a sort of inversion of values: the guarantee of freedoms and fundamental rights, at times, is seen as an obstacle to the protection of other values considered to be more important such as security. Ensuring security is no longer understood as functional to the protection of fundamental rights, instead, in sharp contrast with these, it is used to explain the recent debate on the legalization of torture [12]. National interest is reacquiring prevalence over the founding principles of the rule of law [13].

In addition to these reasons that characterize the policy choices of many countries, there are other explanations for the delay in the recognition of torture as a crime in Italian law: the express provision of this offence would be capable of eroding the impunity still enjoyed by some officials and public officers. There are additional reasons: policies targeted at illegal or undocumented immigrants would need to be abandoned and the current penitentiary system would also need to be reviewed.

Nevertheless, in a Constitutional State of Law, the dignity of each individual is the supreme value, meaning that they cannot be treated as a means to achieve an end that transcends them: therefore, torture and inhuman or degrading treatment can never be justified because they dehumanize both the victims and the perpetrators.

Torture is a brutal and disturbing reality, more or less hidden and close to home [14], yet while it is often ignored, it is an issue that must be addressed in the social, political and legal spheres, and accompanied by a comprehensive public campaign to inform on its associated risks.

The stance on torture determined by domestic [15] and international courts is essential to prevent human rights from being eroded, but it is also necessary that the principles of inviolability of the person and of human dignity become ingrained in cultural and social consciousness. Only then will torture and inhuman or degrading treatment be perceived as non-justifiable under any circumstances.

[y] The *ECHR*, in the case of Khashiyev and Akayeva v. Russia, Section I, 24th February 2005 (Applications no. 57942/00 and 57945/00), ruled that «article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organized crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and its Protocols, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15, § 2 even in the event of a public emergency threatening the life of the nation» (§ 170).

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