MONITORING PENAL POLICY IN EUROPE

Edited by
Gaëtan Cliquennois and Hugues de Suremain

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5 Marriage Italian style

A decryption of Italy and ECtHR's relationship concerning prisoners' rights

Giuseppe Caputo and Sofia Ciuffoletti[1]

Introduction

Concerning prison policies, Italy has gone from being the bad student of Europe to being among the teacher's pets within a five year time frame. This was due to the prompt answer that the Italian government provided as a redress after the finding of a violation of Article 3 of the Convention in two subsequent and highly publicized cases concerning inhuman and degrading prison conditions: *Sulejmanovic* and *Torreggiani*.

Both at the ECtHR and at the Committee of Ministers level, Italy convinced Europe that its strategy, a combination of compensatory and preventive remedies, along with other minor measures, was a successful one in order to achieve the goal of decreasing the endemic phenomenon of overcrowding and providing decent conditions of detention, respectful of the human rights enshrined in the 1950 European Convention. This article aims at deconstructing this idyllic version, investigating the whole Italian model of compliance with the European stimulus through the lens of the effectiveness of the protection of rights offered both at a European and domestic level.

We will use the principle of effectiveness (Arnull, 2011) extending the notion from its interpretative roots to a wider semantic area. As an interpretative tool, the principle of effectiveness is part of the judicial activist methods (along with the evolutive interpretation or living instrument doctrine and the doctrine of autonomous concepts[2]) and linked with the idea of the judicial creativity.[3] The essence of the doctrine of effectiveness is that States' compliance with the Convention cannot be limited to prohibiting conducts that contravene the Convention, they need to put in place positive actions. The Court, by using this approach, has elaborated a case law imposing positive obligations on contracting States. Following this theoretical perspective, we propose to evaluate the efforts made by Member States in order to conform to ECtHR's judgments on the basis of an empirical analysis of these actions, testing their suitability for the purpose of reducing the overcrowding rate in a long term perspective and of increasing prison conditions for each inmate (Schoenfeld, 2010; Simon, 2014), protecting their rights by making them justiciable (Francioni, 2007).

Our analysis relies on the EU-funded Prison Litigation Network project[4] and on the critical analysis of the Italian prison and penological system (Santoro, 2004 and 2015, Melossi and Pavarini, 1981) from a legal sociological standpoint, as well as on the literature on the European system of rights as a new *forum* for the protection of minorities and marginalities within our societies (Van Zyl Smit and Snacken, 2009). The fieldwork conducted across Italian prisons allowed us to measure the impact of the new system of remedies on the everyday life of prisoners and to assess the effective protection of their rights. Certainly, Europe has become a relevant context for the substantive justice of Italian prisoners and it can undoubtedly be affirmed that "there is a judge in Strasbourg" for Italian prisoners. Nevertheless, our study seeks to decode and evaluate the direct consequences of the measures implemented at a domestic level on the quality of life of prisoners in Italy, as well as the improvements in the protection of their rights.

1 Crime and punishment

1.1 The Europeanization of the Italian penitentiary system

During the last decade, the European Court has developed a consistent case law aiming at interpreting Article 3 of the Convention as to include a right for prisoners to be held in decent detention conditions (Van Zyl Smit and Snacken, 2009; Snacken, 2011). Italy has, since the beginning, became one of the most relevant context for the analysis of the Strasbourg Court's case law on the issue of prison conditions and overcrowding.

The first step taken by the Court in order to challenge the domestic prison condition in Italy is the Grand Chamber judgment *Sulejmanovic v. Italy*.[5] The judgment constitutes the first serious intervention of the European Court of Human Rights in the field of prison overcrowding and prison conditions in Italy, requiring a reflection over the domestic prison policy and legislation and demanding a revision of the persistent paradigm of systemic violation of some of the more basic prisoners' human rights.

This is a pivotal moment for Italy since it represents the very first time the inhuman and degrading condition of the Italian prison system becomes an open topic in the public debates. This confirms a trend toward the interpretation of the case law of international courts, and the Strasbourg court particularly, as the arena in which new conflicts arise and get solved, shaping the new grammar and the new semantic of rights in our contemporary societies (Stone Sweet, 2009; Keller and Stone Sweet, 2008). In this regard, the Sulejmanovic judgment has shown the potential impact of the European Court in a topical matter and has been received with great interest by the Italian media, prison professionals and scholars.[6]

The *Sulejmanovic* judgment was final in 2009 and a first set of deflationary measures was presented by the Italian Government in an action plan of 29 June 2012. These measures included changes to the law, with the introduction of a new form of house detention[7] and a program to build new prisons (so called *Piano Carceri*[8]). The measures entailed a decrease in the number of the Italian prison

population. According to the data provided by the Italian Ministry of Justice, from 68.258 prisoners at the date of 30 of June 2010 the prison population decreased to 66.487 prisoners at the date of 31 of May 2012.

One very important issue remained nonetheless dramatically unsolved. The internal way of complaining to a judicial authority about the material conditions of detention in Italy showed a lack of effectiveness due to the generic nature of the measure itself. As stated by the Constitutional Court in judgment n. 26 of 1999, the Surveillance Court (*Tribunale di Sorveglianza*) is the judicial authority appointed to protect and guarantee the human rights of prisoners against any detrimental acts or decisions of the prison administration according to the principles and procedures set out in Articles 35 and 69 of the Italian Penitentiary Law. This principle was subsequently confirmed in the Constitutional Court decision n. 266 of 2009 but lacked a proper implementation in terms of a shared normative ideology from the part of the Surveillance Judges (Santoro, 2015) and due to the practical ineffectiveness of an eventual judgment establishing a violation. The dearth of a defined judicial procedure in this domain only increased the difficult access to a substantial protection for prisoners in the event of an administrative violation of their fundamental rights.

The situation was acknowledged as such in the further *Torreggiani* judgment, where a Pilot Judgment Procedure was enacted by the Court. The Court decided to apply this procedure in view of the growing number of persons potentially concerned in Italy and of the judgments finding a violation liable to result from the applications in question.

The Court concluded that the State must have put in place, within a year from the date in which the judgment became final, a set of effective domestic remedies combining a preventive and a compensatory function.

Contrary to the first pilot judgment on overcrowding and prison conditions, *Ananyev v Russia*,[9] the Court decided to adjourn the examination of applications dealing solely with overcrowding in Italian prisons during one year, pending the adoption of measures at national level. Comparing this provision with the *Ananyev* case, there seems to be a sort of "double standard" concerning the adjournment of similar cases in Pilot Judgment Procedures. In the *Ananyev* case, the Court, after having reminded that adjournment is a possibility rather than an obligation, as clearly shown by the inclusion of the words "as appropriate" in the text of Rule 61 § 6 and the variety of approaches used in the previous pilot judgments[10], evaluates that due to the "fundamental nature of the right protected by Article 3 of the Convention and the importance and urgency of complaints about inhuman or degrading treatment, does not consider it appropriate to adjourn the examination of similar cases".[11] On the contrary, the Court observes that "continuing to process all conditions-of-detention cases in a diligent manner will remind the respondent State on a regular basis of its obligations under the Convention and in particular those resulting from this judgment".[12] This safeguard seems no more operative in the *Torreggiani* case where, on the contrary, the Court chooses to adopt a more deferential approach and to adjourn all similar cases. We could argue that the Court had expectations of the diligent compliance of Italy, even if

the scope and potential reach of a Pilot Judgment Procedure against a Member State also depends from decision. We shall see whether and how these expectations have been met.

1.2 Redemption: the Stella judgment and the execution procedure in front of the committee of ministers of the council of Europe

The decision in *Stella v. Italy*[13] offered a positive evaluation of the system of remedies put in place by the Italian government, considering that no evidence enabled the Court to find that those same remedies did not offer, "in principle", prospects of appropriate relief for the complaints submitted under Article 3 (prohibition of inhuman or degrading treatment) of the Convention.

Interestingly enough, the applications in the present case had been lodged before the entry into force of the new legislative provisions, thus allowing the Court to examine the situation at a time in which no remedy was available for the applicants. Nevertheless, respectfully asserting the crucial importance of its subsidiary role, the Court considered that there were grounds in the *Stella* case for departing from the general principle that the exhaustion requirement should be assessed with reference to the time at which the application was lodged and that this exception could apply to all similar cases pending before it.[14] Those exceptions seem to include specifically situations in which, after a Pilot Judgment Procedure, the State enacts a number of measures aimed at resolving the structural problem at a national level.[15] In order to solve the issue, the Italian law gave a six month time limit, starting from the date of the enactment of the law itself (June 2014) to prisoners who had already lodged an application to the ECtHR. The time frame between the *Stella* case (September 2014) and the end of the six month limit (December 2014) left almost no time for prisoners to learn about the deadline and to file an application in front of the domestic judiciary on time.

The analysis of the *Stella* judgment shows how the relevance conferred to the effectiveness of the remedies, stressed once and again in the reasoning of the judgment, conflicts with the idea that the "remedies did not offer, *in principle*,[16] prospects of appropriate relief".[17] Indeed, the principle of effectiveness at a European level can have multiple dimensions (Rietiker, 2010) and the *Stella* case clearly implies a more formalistic approach to effectiveness, tested according to specific data that presents a *prima facie* version of effectiveness, as we will try to prove *infra*.

Significantly, though, the Court underlines that the positive evaluation in *Stella* does not undermine an eventual future re-assessment of the effectiveness of the remedies, "notably considering the ability of domestic Courts to provide a uniform case-law that is compatible with the requirements of the Convention".[18]

The decision in *Stella* seemed a clear endorsement of the Italian way of dealing with overcrowding and inhuman and degrading prison conditions. Nevertheless, the real *imprimatur* of the Italian reforms was referred to the execution procedure in front of the Committee of Ministers. The Italian government submitted an

action plan and various updated information, while communications were submitted by the NGO Radicali Italiani[19] and by the NGO l'Altro diritto.[20]

The Committee of Ministers with the Resolution CM/ResDH(2016)28,[21] "welcoming the response given by the Italian authorities to the *Torreggiani and Others* pilot judgment through the adoption of major reforms aimed at solving the problem of prison overcrowding and the significant results achieved to date in this area" decided to close the case.

This decision was a further and final *placet* towards the policies enacted by the Italian government in order to face the Pilot Judgment Procedure. Nevertheless, it is interesting to assess the level of consideration that the Committee of Ministers devotes to the effectiveness of the execution in cases of "enhanced supervision" (Lambert-Abdelgawad, 2010 and Shany, 2014). We can argue that in light of the shifting from an individual justice to a constitutional justice in the Strasbourg system (Greer and Wildhaber, 2012), the execution procedure has become less political and more transparent and rigorous (Shany, 2014), also due to the latest rules and working documents adopted by the Committee of Ministers.[22] We shall try to assess the level of attention devoted to the principle of effectiveness of compliance by using Italy as a case study.

1.3 Italy strikes back: the building of the Italian model

As a matter of facts, since the *Stella* judgment and the end of the Pilot Judgment Procedure ratified by the Committee of Ministers, the ECtHR has started to refer to the Italian way as a sort of positive paradigm for the compliance with this kind of Pilot Judgment Procedure. Significantly, the European Court refers to the Italian model of compliance in two subsequent Pilot Judgment Procedures in the *Neshkov and Others v. Bulgaria*[23] and *Varga and Others v. Hungary* cases.[24]

The Court in Neshkov assessed the effectiveness of the Italian preventive measure (art. 35 bis, Law 354/1975), proposing the Italian model to Bulgaria, underlining the judicial nature of the authority supervising prisons, monitoring violations of prisoners' rights and capable or rendering binding and enforceable decisions, indicating appropriate redress.[25]

Discussing possible models of compensatory remedies to be introduced in Bulgaria, the Court also evaluate Italy positively as a paradigmatic experience for tackling the issue of prison conditions and violations of Article 3. In order for the Bulgarian State to comply with the need for a general remedy allowing protection at the domestic level of the rights and freedoms enshrined in the Convention, in this case, the right not to be subjected to inhuman or degrading treatment:

"Another option is to put in place special rules laying down in detail the manner in which claims concerning conditions of detention are to be examined and determined, as was recently done in Italy" (see *Stella and Others*, cited above, §§ 19–20 and 56–63).[26]

In the *Varga* judgment, the Court makes an even more general statement, ratifying the favor for the Italian experience, by saying that:

"The recent example of Italy shows that such measures, implemented in the context of a pilot procedure, can contribute to solving the problem of overcrowding" (see *Stella and Others v. Italy* (dec.), nos. 49169/09, 16 September 2014).[27]

This positive evaluation of the Italian context will, in a recent future, need to take into account the real effectiveness of the interpretation and application of the new remedies by the Surveillance Judge (see *infra*), an issue that has so far shown a reluctant attitude and a restrictive legal reasoning that are potentially undermining the real reach of the so called "Italian model".

2 The Italian reaction

2.1 The Italian system of remedies ante Torreggiani

As a matter of facts, the system existing in Italy prior to the pilot judgment in Torregiani was judged ineffective by the ECtHR. Indeed, the Italian Penitentiary law (P.l.) provided few ad hoc remedies for the protection of prisoners' rights. Existing literature has often underlined that the affirmation of the constitutional rule of law and the recognition of human rights have never really affected the Italian penitentiary system (Bricola, 1977). The fascist penitentiary regulation survived 27 years to the Democratic Constitution of 1948, since the Italian Penitentiary law was adopted only in 1975. Also the adoption of the penitentiary law never led to a general recognition of prisoners' rights along with the introduction of effective remedies. Following the influence of the UN Standard minimum rules of 1955, the 1975 reform introduced a correctional normative model that still considers the prisoners as a sick individual, necessarily affected by physical or mental illnesses (Art. 13 of P.l.). This paternalistic approach implied the lack of a specific prisoners' rights list, rather these rights are an indirect consequence of the rules concerning the prison administration.

Consequently, the judicial system of prisoners' rights protection was very limited. The judicial authority competent for the protection of prisoners' rights in Italy was a special body, namely the Surveillance Court. This body, introduced for the first time with the fascist reform of the penitentiary system in 1931, was competent in the following subjects: supervise the organization of prisons, approve the prisoners' treatment programs, supervise the respect of prisoner's rights with special regard to disciplinary sanctions and prison labour, apply both alternative measures to imprisonment and security measures for "socially dangerous" offenders (e.g. internment in criminal asylum).

According to this system, a prisoner could apply to the Surveillance Court against a prison authority's decision in only two cases, namely violations of the norms concerning the disciplinary sanctions and the prison labour. In these cases, according to Article 14 ter of the Penitentiary law, the procedure was as follows: the prisoner could apply personally within 10 days from the violation and the Court had to decide within the following 10 days. Both the prisoner and the prison authority were only allowed to send written pleadings, while the procedure only

allowed the participation of the prisoner's attorney and of the prosecutor in the chamber hearing.

In all other cases, a proper legal application against a prison authority's decision or behavior that infringed upon a prisoner's rights was not provided for by the law. Inmates could merely send non-judicial claims to the Court since Article 35 of the Penitentiary law stated that prisoners were able to communicate with the Judge with an oral or written "complaint" contained "in a sealed envelope".

The original paternalistic conception of the Penitentiary law has been partially outdated by the national jurisprudence that has developed judicial proceedings for the protection of prisoner's rights (a similar process occurs in other contexts such as in the US, see Jacobs, 1977). Firstly, the Italian judiciary gradually expanded the scope of the judicial appeal (Article 14. T P.1.) to all violations of prisoners' rights, going beyond the ones concerning disciplinary power and prison labour's rules.[28]

Secondly, it recognizes the judicial nature of the remedy provided by the Penitentiary law in Article 35. For a long time the Surveillance Courts' case law in the field of prisoners' rights was based on the principle that the Courts' decisions or orders were not binding on prison authorities, they were considered merely discretionary. This interpretation of powers frustrated the potential effectiveness of the Surveillance Courts' decisions and discouraged prisoners from applying against violations of their rights. Only in 2009 a Constitutional Court's judgment (n. 266 of 2009) made clear that the decisions of the Surveillance Courts are binding and that prison authorities have the duty to implement them. However, this decision did not solve the issue once and for all, since Surveillance Courts still lacked proper tools to enforce their orders.

Lastly, a Constitutional Court decision (no. 341 of 2006) ruled the unconstitutionality of Article 69 and affirmed the jurisdiction of the Ordinary Courts in the field of prison labour.

2.2 First reaction to the ECtHR decision: the introduction of a preventive remedy

The first reaction from the Italian Government to the requirements of the *Torreggiani*'s decision was the Law-Decree No. 146/2013 of December 2013. The law contained a wide range of norms, in order to reform the system for prisoners' rights protection (i.e. the provision of a national ombudsman and a new judicial procedural remedy to apply to Surveillance Courts) and to face overcrowding (e.g. the reform of the Italian law on drug in order to decrease sanctions and inhibit pre-trial custody for minor offenses and a temporary expansion of day release benefit for most crimes).

The new preventive remedy provided for by Article 35 bis p.l. solves most of the problems of the previous system of judicial protection of prisoners' rights, even if it holds serious problems affecting its effectiveness.

According to the new remedy a prisoner can appeal directly, at every time and without any term, to the competent Surveillance Court by claiming a violation of

the Penitentiary law by the prison authorities. The only substantial admissibility condition required by the norm is that the damage deriving from the violation has to be "ongoing" at the time of the claim. In case of violation of norms ruling on the application of disciplinary sanctions, the prisoner has to apply within 10 days from the communication of the disciplinary sanction.

The reform reaffirms the competence of the Surveillance Judge for the protection of prisoners' rights, specifically to the Surveillance Court in its monocratic composition. The remedy provided for by Article 35 bis can be used by all prisoners, including prisoners on remand and mentally ill interned, since the norm generically refers to "prisoners". The Law now finally requires the application of the general proceeding rules, regarding litigation and participation to the audition, instead of the special rules previously provided for by the Penitentiary law (Article 14 ter). The procedure to be applied is the one established for the criminal execution and provided for by Articles 666 and 678 of the Italian criminal procedure code. According to the general norms, the prisoner has to be assisted by an attorney who needs to be present, together with the Prosecutor, to the chamber audition. The prisoner can take part in the debate, while the prison administration can now participate in the debate and/or send written pleadings. The decision of the judge can be appealed to the Surveillance Court in its collegial composition (Surveillance Court) within 15 days, the decision of the Court can also appealed in front of the Supreme Court (Corte di Cassazione) within 15 days.

The reform has finally solved the problem of the unclear definition of the powers of the Surveillance Court. Now when the Surveillance Court finds a violation of a norm concerning the system of disciplinary sanctions, it can annul the prison authority's decision. In all other cases, the norm does not explicitly give to the Surveillance Court the power to annul any administrative decision, but it nonetheless states that the judge, "once verified the existence of an ongoing damage, orders the administration to amend it within a certain time frame". Article 35 also provides relevant tools to implement the Judge's decisions. Indeed, when the prison authorities do not enforce the order, the Surveillance Judge has the power to:

a) Schedule a detailed action plan addressed to the prison authority in order to remedy the violation;
b) Annul any decisions of the prison authority that violates the Court's decision;
c) Assign an *ad acta* Commissioner.

The application of the general rules regarding the access to the court and the definition of the powers of the court do not solve all the problems of inadequacy of the system in providing an effective protection to prisoners' rights violations. Indeed, three major concerns still remain. The first regards the term for the decision, since the proceeding does not guarantee a prompt judicial answer. The remedy does not provide any peremptory term for the Judge's decision, (it only implies terms in order to appeal). But the Surveillance Judge's decision is usually taken from three to six months after the prisoner's claim, while the appeal

decision may arrive one year or more after the claim. The law does not provide any interim measures to be adopted in urgent cases (an imminent risk of irreparable harm), similar to the ones provided by Article 39 of ECtHR rules.

The second concern regards the complexity of the proceeding in order to appoint the ad acta commissioner, when the prison administration does not enforce the Judge's decision motu proprio. The compliance proceeding can be started only when the Judge's decision is no longer subject to appeal. Whenever the prison administration appeals against the Court's decision in front of the Supreme Court (which is almost always the case, as a traditional defensive strategy), the procedure may take one year or more from the appeal.

Another concern is the lack of rules regarding the burden of proof and the protection of prisoners from the risk of retaliation. Surveillance judges used to apply the judge-made principle affirmanti incumbit probatio, according to which the burden of proof is on the claimant. But the norm does not provide any specific tool facilitating prisoners in accessing any kind of documentation in order to support and substantiate her/his claim. Moreover, the prison administration seems to be under no obligation to provide any better proof than a simple standard report affirming its version of the events. The result is that whenever the word of the prisoners is set against the word of the prison administration, the latter prevails, completely reversing the principle constantly stated by the ECtHR case law on this aspect.

2.3 Second reaction to the ECtHR decision: the introduction of a compensatory remedy

Within the execution procedure, a decision of the Committee of Ministers of the Council of Europe[29]– that appreciated the new preventive remedies (Art. 35bis) but had also asked the Italian Government to carry forward the reform's process – led the Government to enact a new bill[30]introducing a compensatory remedy (Article 35 ter) to be used in cases of violation of Article 3 of the European Convention.

The new Article 35 ter explicitly defines the categories of prisoners covered by the protection of the compensatory remedy, namely all prisoners, including those convicted and on remand. The law breaks up with the tradition, adding a new competent judicial body for prisoner's rights, along with the Surveillance Court. Ordinary civil courts are competent for all the claims coming from prisoners on remand and former prisoners, while the Surveillance Judge (monocratic) is competent for all the claims coming from convicted prisoners.

As for the procedure in front of the Surveillance Court, a prisoner can apply directly in front of the competent Surveillance Judge, claiming a violation of Article 3 of the Convention. According to the new law, the Judge can compensate every time a violation of a right is so serious as to constitute a violation of Article 3 of the Convention. To guide the domestic judge in the interpretation of Article 3, the norm explicitly refers to the ECtHR case law that is binding on national courts.[31]

For the first time, in a civil law system, such as Italy, the Italian legislator urges the Judiciary to consider precedents as a binding source of law, i.e. the ECtHR case law, in order to assess a violation of Article 3 of the Convention.

The procedure in front of the Surveillance Judge is accessible and easy, no legal assistance is necessary in order to draft and send the application (in the following hearing, an attorney must be appointed by the Court) and no legal costs are due[32]. On the contrary, the procedure in front of the Civil Court is an ordinary procedure. Legal assistance is mandatory for the drafting and filing of the application and general legal costs, such as registration fees, are due.

According to Article 35 ter of the Penitentiary Law, the Surveillance Judge, in addition to the usual measures to be adopted in case of violation of a prisoner's rights, has the power to grant a compensation for serious breach of the national law and of the European Convention. The norm has a compensatory ratio as well as a deflationary one, since it aims to reduce the rate of prison overcrowding. Pending the prison execution and when the violation has lasted more than 15 days, a mitigation of the sentence in the measure of 1 day every 10 days spent in the condition that violates Article 3 of the Convention must be granted. When the 10 per cent of day release compensation cannot be applied (e.g. prisoners on remand, former prisoners, violations prolonging for less than 15 days), the norm provides a monetary compensation of 8.00 euros for every day spent in breach of Article 3 of the Convention. The compensatory nature of the remedy is consistent with the ECtHR case law, but it has to be noted that the monetary compensation is three of four times less than the amount generally recognized by the European Court in similar cases, such as in the Torreggiani case.

The compensatory remedy has been variously applied and interpreted by the Italian doctrine and case law. The general reluctance of most of the Italian judges to accept the innovations introduced by the reform has led to a restrictive interpretation and application of the norm and, finally, to its substantial infectiveness. An important role in this sort of judicial ostracism is definitely played by the misinterpretation of the ECtHR's case law.

The first attempt to nullify the application of the remedy came from a technical advice of the Consiglio Superiore della Magistratura (CSM), that suggested the requirement of an "ongoing violation" in order to apply for the compensatory remedy (a condition explicitly and correctly requested only for the preventive remedy[33]). As a result, the compensatory remedy could not be activated in cases of past violations of Article 3 of the Convention, thus frustrating the scope of the same compensatory protection. This kind of interpretation has been widely accepted by most of the Surveillance Judges in the first months from the entry into force of the new remedy, when thousands of prisoners applied to the Surveillance Courts claiming the violation of Article 3 for overcrowding and prison conditions.

A portion of the legal doctrine and a minority of the judiciary is rejecting this interpretative position, arguing that it is based on a wrong textual interpretation of the norm and that it nullifies the intent of the legislator to provide the effective remedies requested by the ECtHR in the Torregiani's case (Santoro, 2015; Della Bella, 2014). The norm introducing the compensatory remedy was not clearly

drafted, but it could easily be interpreted in order to enforce the ratio of the law, i.e. the compensation to prisoners after a detention in conditions of overcrowding (Santoro, 2015).

The resistance of the Italian judiciary in granting the remedy may be explained with different arguments among which include cultural resistance to this change. Surveillance Judges have traditionally interpreted their role as judges of the execution of the sentence, specifically competent for alternative measures to detention and penitentiary benefits. They have developed collaborative relationships with prison administration and all other institutional actors involved in the execution phase. This role seems to clash with the new one assigned by the law, consisting in monitoring and controlling the acts of the same administration.

The reluctance of the Italian judiciary may also be explained with pragmatic arguments. The extremely huge number of claims, applied in the first months after the law, has pushed the Courts to develop standardized solutions in order to contain the involvement of their offices in a situation of hugely increased workload. The solution proposed by the above mentioned technical advice of the CSM seemed a good way to cut the number of triable applications without the need for an in-depth investigations. From the entry into force of the remedy until October 2015, about 23.600 claims were filed: only 6.1 per cent have been accepted, while 7.35 per cent have been rejected, 5.2 per cent were found "non suitable" and 77 per cent "inadmissible" mostly because the violation was not ongoing at the time of the decision (Caputo and Ciuffoletti, 2016).

Furthermore, the necessity of a standardized framework to decide on overcrowding cases has led to a limited and superficial interpretation of the ECtHR case law in the field of Article 3, which traditionally takes into account other factors – beyond the amount of personal space – in order to assess the inhuman and degrading conditions of detention. A comprehensive and deep assessment of all the factors affecting the quality of life in prison would require an in depth investigation, especially in cases where prisoners have between 3 and 4 square metres of available living space. Nevertheless the Italian Judiciary has limited its attention only to the living space factor, certainly the easiest to assess if compared to others. Notwithstanding the major attention devoted by the Italian case law on the available living space, the existing case law presents contradictory solutions even on the measuring criterion. It took two years for the Italian judiciary to solve the most controversial issues of all, namely the inclusion or not of the bedding in the measure of the available living space. Only a recent decision from the Corte di Cassazione finally established that the bed cannot be considered "a living space", as the Italian Surveillance Judges had repeatedly proclaimed.

The reluctance of the Italian Surveillance Courts to play their new role as prisoners' rights defender is evident also from the way they have applied (or simply misregarded) the ECtHR's principles in the field of the burden of proof. After an initial period[34] in which Surveillance Judges passively awaited for the prison administration to provide the requested documentation in order to assess the violation, a line of interpretation arose expressly applying the civil procedural principle of the "non-rebuttal" (i.e. whenever an allegation by the applicant is not explicitly

rebutted by the part, it is to be considered as proven). Unfortunately this line of reasoning is not gaining a uniform approval and the Italian Surveillance Judges case law shows that it is more likely for the judge to await the prison administration without any term. In any case, Courts are satisfied with a standardized statement by the prison administration about the living space available for prisoners and, eventually, the prison conditions, without any individualization of the information and no material evidence in order to prove the content of the statement.

Conclusion

As we have highlighted, the Italian government's reaction to the various European inputs, seemed clearly compliant, from a political and a cultural point of view. Actually, the Italian government, both after the Sulejmanovic case and even more so after the Torreggiani pilot judgment, implemented a twofold strategy, aiming, on the external front, at answering to the European requests in a very prompt way. On the internal front, instead, the government justified the prison reforms aiming at improving prison conditions, as an irrefutable "European" request[35] (sometimes minimizing the scope of the provisions, for example by stressing their temporary dimension, e.g. the temporary increasing of early release).

In this context, the answers of the government were inadequate to produce a real improvement of prison conditions (Feeley, and Swearingen, 2004). Overcrowding was only faced through deflating and temporary measures, not pursuing decarceration and decriminalization policies, as recommended, inter alia, by the CoE (European committee, 2015).[36] Consequently, overcrowding in Italian prisons has never been totally solved[37] and, as a result, prison population has started increasing again.[38] This is due to the fact that one of the most relevant deflating measure adopted, the increased early release, has not been extended by the government[39] after the positive evaluation of the execution procedure in the Torreggiani case.

At the same time, the relevant reforms in the field of prison litigation found the strong resistance of the Italian judiciary. As we have seen, this fact has played a major role in the reductive implementation of the reforms and nullified the scope of both the preventitive and compensatory remedy.

Lastly, the impact of this context on Italian penitentiary policies deserves to be mentioned. The political and judicial attention on the penitentiary system has pushed prison administration to adopt an adjustment strategy and a new bureaucratic approach to prison management.[40] No real pragmatic strategies and investments have been employed to improve the prisoners' quality of life. Nothing has been done to solve the structural and endemic problems of Italian prisons. Prison administration has only developed an electronic system in order to monitor the level of overcrowding in the prisons[41] and introduced a semi-open regime that allows prisoners to spend from 6 to 8 hours out of the cells, in the corridors of the prison or, rarely, in common rooms. This has partially decreased the detrimental effect of the previous restrictive regime, but it has not improved prison life, since corridors and common spaces are not usually equipped for any kind of social and educational activities. While before the Torreggiani case prisoners were forced to

idle inside the cell, now they are forced to idle in the corridors. The reason for this change was to comply with the ECtHR's case law which views the time spent out of the cell as a mitigating factor of the phenomenon of overcrowding.

This scenario has been positively ratified by the Committee of Ministers in the execution procedure against Italy, without any further considerations concerning the effectiveness of the Italian model. This shows the limits of the execution procedure of the ECtHR's judgments, infringing upon the whole idea of the European Court as the new Constitutional arena for human rights at an international level (Greer, 2017).

Expanding the angle of perspective, Italy and the ECtHR seems engaged in a marriage of convenience. While Italy behaves diligently, complying to the requirements of the Pilot Judgment Procedure, the ECtHR is showing a rather lenient attitude towards Italy (see the adjournment of all pending cases in the Torreggiani decision or the departure from the general principle that the exhaustion requirement should be assessed with reference to the time at which the application was lodged in the Stella case). As a result, on one hand, Italy passed the European test with the positive definition of the execution procedure in Torreggiani and the ratification of its system of remedies with the validation of the Italian model. On the other hand, the ECtHR, received an important imprimatur on a Pilot Judgment Procedure by a compliant Member State, after the exposure of the ineffectiveness of the execution procedure against the UK in the prisoners' voting right saga (see infra, Creighton, Padfield and Pirosa).

The Italian model can therefore be seen as formally exemplary, but concretely ineffective for the purpose of reducing overcrowding on a structural basis and turning inhuman and degrading prison conditions into a human rights and dignity based detention.

Notes

1 The authors worked together in an integrated way to the development and discussion of methodology, fieldwork and results, and of all the theories that belong to this work. Giuseppe Caputo developed in particular the Introduction and paragraph 3, Sofia Ciuffoletti paragraph 1 and the conclusion.

2 For a review of all these principles, see G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford: Oxford University Press 2007.

3 See A. Mowbray, *The Creativity of the European Court of Human Rights*, (2005) 5 Human Rights Law Review 57.

4 See www.prisonlitigationnetwork.eu.

5 *Sulejmanovic v. Italy*, application no. 22635/03, 16 July, 2009. The Court, in the *Sulejmanovic* judgment found a violation of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights regarding the applicant's conditions of detention. The *Sulejmanovic* judgment appears to consolidate the previous Strasbourg jurisprudence concerning prison overcrowding, prison conditions and the scope of Article 3 of the Convention. At the same time it provides a practical approach and a set of clear principles and procedural obligations for Member States, consolidating a jurisprudential trend that presumes a violation of Article 3 when the personal space available to prisoners is inferior to 3 m^2 and assuming that when the available space in the cell falls between 3 m^2 and 4 m^2 the violation can be assessed in

the presence of other relevant factors such as such as the possibility of using the toilet in private, availability of ventilation, access to natural light or air, adequacy of heating arrangements, and compliance with basic sanitary requirements. In any other case the Court should rely on elements such as the duration of detention in particular conditions, the possibilities for outdoor exercise, the physical and mental condition of the detainee, and so on.

6 See, inter alia Di Perna, A. (2009), p. 117 and:
https://antonellamascia.wordpress.com/2009/08/07/nel-caso-sulejmanovic-c-italia-la-cedu-accerta-per-la-prima-volta-la-violazione-dell%E2%80%99articolo-3-della-convenzione-per-eccessivo-sovraffollamento-carcerale/
http://camerepenali.it/public/file/Documenti/Documenti%20osservatorio%20carcere/Passione%20-%20commento%20Torregiani%20e%20altri.pdf
www.duitbase.it/database-cedu/sulejmanovic-c-italia
www.sidi-isil.org/wp-content/uploads/2010/02/Di-Perna-SIDI.pdf

7 Law n. 199/2010.

8 www.pianocarceri.it.

9 *Ananyev and Others v. Russia*, applications no. 42525/07, 60800/08, 10/01/2012.

10 *Ivi*, § 235.

11 *Ivi*, §236.

12 *Ibidem*.

13 *Stella and Others v. Italy*, applications no. 49169/09, 54908/09, 55156/09, 16 September 2014.

14 §45.

15 §41.

16 Emphasis added.

17 See *Stella*, cit., § 63.

18 §63.

19 See, inter alia:
https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804a91a6#search=radicali%20italiani%20torreggiani.

20 See: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804aa9a9#search=altrodiritto.

21 Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c1a5b.

22 Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (adopted by the Committee of Ministers on 10 May 2006 at its 964th Session), Appendix 4, item 4.4 and DGHL-Exec/Inf (2010)1, 18 May 2010 Entry into force of Protocol No. 14: consequences for the supervision of the execution of judgments of the European Court by the Committee of Ministers. All documents available at: www.coe.int/en/web/execution/rules-and-working-methods.

23 *Neshkov and Others v. Bulgaria*, applications nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015.

24 *Varga and Others v. Hungary*, applications nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 10 March 2010.

25 See, *Neshkov*, cited, §282.

26 *Ivi*, §286.

27 See, cited, § 105.

28 The Constitutional Court, with its decisions n. 212 of 1997 and n. 26/1999 recognized the judicial nature of the generic claim provided for by Article 35. A decision of the Corte di Cassazione (n. 25079 of February 26, 2003) detailed the proceedings to be followed in front of the Court: the generic complaint (Article 35), implemented by the procedure provided for by Articles 69, 71 and 14-ter, became a general remedy for all cases of violations not equipped with a specific legal remedy.

29 Cases No. 10, 1201st meeting, June 5th, 2014.

30 Decreto legge No. 92/2014, convertito. con modifiche in l. No. 117/2014.
31 See Chapter 1 in this book.
32 According to the general norms of the Italian criminal procedure code, the prisoner has to be assisted by an attorney who needs to be present, together with the Prosecutor, to the chamber audition. The proceeding follows the general rules of litigation trial and the prisoner can take part to the debate. Also, the prison administration can now participate in the debate and/or send written pleadings. The competence is given to the Surveillance Court in its monocratic composition (Surveillance Judge). The decision of the judge can be appealed to the Surveillance Court in its collegial composition (Surveillance Court) within 15 days. Lastly, the decision of the Court can be appealed to the Supreme Court (Corte di Cassazione) within 15 days. The procedure in front of the Civil Courts is the one provided by the Italian procedural civil code Article 737 (and followings). Civil judge's chamber decision can be appealed in front of the Civil Court within 10 days.
33 The misinterpretation is a consequence of the unclear distinction between the two remedies. Indeed, the preventive and compensatory remedies have different ratio and scopes, the first, aiming to stop a current damage, obviously requires an "ongoing violation" at the time of the application to the Court, while the second one aims to give a compensation when the damage is over.
34 Lasted months, sometimes more than one year.
35 The Italian political discourse has often used the idea of a mythological "Europe" in order to justify any unpopular national reforms and policies since the 90s.
36 The only two relevant reforms going in the direction suggested by Coe were the reform of preventive custody and the partial decarceration of minor drug crimes.
37 Overcrowding rate was 110 per cent on October 31, 2016 (www.giustizia.it).
38 At the time of the first reform Prison population was 66.028 (on June 31, 2013) and has decreased to the minimum level of 52.164 on December 31, 2015. Last statistics show a slow but costant increase: 55.000 prisoners on October 31, 2016, an increase of 6 per cent. (www.giustizia.it).
39 The increased early release to 75 days instead of 45 was significantly impacting on overcrowding but temporary.
40 Similar effects can be found in Countries, such as the US, which have developed litigation as a tool to protect prisoners' rights (Jacobs, 1977; Feeley – Rubin, 1992; Feeley – Swearingen 2004).
41 This system allows Prison administration to know when overcrowding in a prison is going too far from limits and to transfer prisoners to less overcrowded prisons.

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