queste istituzioni

The Italian case

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Context

Here follows the text of the presentation (entitled *The Italian case* in the session dedicated to the theme *Strengthening NPMs' role in oversight and advocacy*) held in Strasbourg (France) by Alessandro Albano at the workshop *Tackling overcrowding in European prisons: strengthening NPMs' role in safeguarding rights and ensuring effective oversight* organized in the framework of the *European Forum of National Preventive Mechanisms (NPM)*. The workshop, held at the Agora building (Council of Europe) from 5 to 6 February 2025, gathered over 80 participants representing European NPMs, experts in criminal justice, policymakers, and other stakeholders to address the persistent issue of overcrowding in detention facilities. Alessandro Albano represented the National Guarantor for the Rights of Persons Deprived of Liberty (Garante nazionale dei diritti delle persone private della libertà personale - GNPL) which is the Italian National Preventive Mechanism under the Optional Protocol to the UN Convention against Torture (OPCAT).

First of all, I'm going to summarize and clarify the recent history of prison overcrowding in Italy that is strictly linked to the development of the National Guarantor for the rights of persons deprived of liberty namely the Italian NPM[1]. These two stories are then connected to the case-law of the Strasbourg Court.

Let's see how.

1. The pilot judgement of the Strasbourg Court on prison overcrowding and its effects.

The milestone date was 8 January 2013, when the European Court of Human Rights (ECtHR), in its Pilot Judgement *Torreggiani and Others v. Italy*, decided for the violation of Article 3 of

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[1] On the National Guarantor, see A. ALBANO, *Lo sviluppo del paradigma preventivo. L'esperienza del Garante nazionale dei diritti delle persone private della libertà personale (GNPL). Prima parte*, in *Studium iuris*, 2021, n. 10, 1161 and *Seconda parte*, in *Studium iuris*, 2021, n. 11, 1299. See also A. ALBANO, M. PALMA, *What does visible mean?*, in Queste Istituzioni, 2022, n. 3, 7. On the OPCAT system see A. ALBANO, D. DE ROBERT, M. PALMA (edited by), *Nelle mani altrui*, series *Da dove*, vol. n. 4 – Quaderno del GNPL, Rome, 2022; see also the study of the current President of the National Guarantor R. TURRINI VITA, *Il Protocollo addizionale contro la tortura*, in *Rassegna penitenziaria e criminologica*, n. 1-2, January-August 2002, 35.

European Convention of Human Rights (ECHR) basically due to systemic prison overcrowding and to the lack of domestic remedies against it[2]. Thousands of cases, all concerning the lack of living space in prison cells, were pending before the European Court revealing the existence of a structural or systemic problem. As we know, the Court may only deal with the matter after all domestic remedies have been exhausted. At that time, Italy lacked any effective domestic remedies to address prison overcrowding, whether preventive or compensatory. Therefore, the Strasbourg Court was able to resort to the pilot judgement procedure provided for by art. 61 of the Rules of Court. The pilot judgement *Torreggiani* recalled, among other things, «the Recommendations of the Committee of Ministers of the Council of Europe, which call upon States to urge prosecutors and judges to make as much use as possible of alternative measures to detention and to reorient their penal policy towards the minimum use of imprisonment with the aim, inter alia, of solving the problem of the growth of the prison population, referring in particular to the 1999 Committee of Ministers *Recommendation concerning prison overcrowding and prison population inflation* and the subsequent 2006 *Recommendation on the use of remand in custody*»[3].

Italy presented an Action Plan – followed by an Action Report – basically consisting of four lines of action[4].

1. Legislative actions aimed at: a) reducing prison entry flows b) and improving the access to community sanctions and measures (in other words «front door strategies» and «back door strategies»[5]).

2. Building actions, mainly focused on refurbishing the existing prisons or rebuilding part of them rather than to expand the prison estate. The *arrière-pensée*, the idea behind these building actions was to make these prisons capable of offering detention conditions basically centered on meaningful out-of-cell activities. This line of action should be read in connection with the third one.

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[2] *Torreggiani and Others v. Italy*, 8 January 2013 (*Applications no. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10*). It is important to point out one circumstance: this pilot judgement was preceded by another judgement that for the first time established a violation of Article 3 of the European Convention due to an exclusive problem of lack of space in a single prison not associated with other critical issues. It was the *Sulejmanovič* case – *Sulejmanovič v. Italy*, 16 July 2012 *(Application no. 22635/03)*.

[3] *Recommendation R (99) 22 concerning Prison Overcrowding and Prison Population Inflation* and *Recommendation Rec (2006) 13 on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse*.

[4] See *Progress of the Action Plan submitted to the Department for the Execution of Judgements of the ECHR (Judgement Torreggiani and Others v./Italy 43517/09)*, DH-DD(2014)471, 8 April 20014 and *Consolidated Report on the Execution of the ECtHR Pilot Judgement Torreggiani and Others v./Italy 43517/09*, DH-DD(2015)1251, 20 November 2015 in hudoc.exec.coe.int.

[5] D. VAN ZYL SMIT, S. SNACKEN, *Principles of European prison law and policy. Penology and human rights*, Oxford University Press, 2011, 87.

3. Managing and organizational actions through the implementation of more open prison regimes, in particular for prisoners who are classified under "medium or low security" measures, firstly by redefining the function of prison cells as places which inmates should primarily use for their rest instead of being confined to them all day, and secondly on assuring compliance with the European Prison Rules. These actions are intended to implement a prison regime in line with the idea that punishment should aim at social resettlement, emphasising that overcrowding is not only a matter of cell space but also of time spent outside cells engaged in meaningful activities.

4. The fourth line of Action was to establish a system of preventive and compensatory remedies. The "preventive remedies" are basically three: 1) a judicial application aimed to effectively stop any violations; 2) the implementation of a computerised system able to give a clear and continuously updated overview of the prisoners' accommodation parameters, as well as information about positive or problematic events during prisoner's daily life (family visits, activities and so on, and on the contrary lack of contacts, change of behaviour et cetera); 3) the provision of an internal independent and continuous monitoring of the places of deprivation of liberty (in line with OPCAT).

Furthermore the "compensative remedy" is a judicial measure for individuals who have suffered prison conditions that violate Article 3 of the Convention. This remedy can provide, not only and not primarily financial compensation, but also a reduction of the sentence, for those who are still detained.

On 8 March 2016, the Council of Europe decided to close the examination of the *Torreggiani* case adopting a Resolution[6] that welcomed the establishment of a combination of effective remedies, preventive[7] and compensatory[8]. From the point of view of non-jurisdictional preventive remedies, the Council of Europe, in particular, noted with satisfaction the

[6] *Resolution CM/ResDH(2016)28*, Execution of the judgements of the European Court of Human Rights, Two cases against Italy *(Adopted by the Committee of Ministers on 8 March 2016 at the 1250th meeting of the Ministers' Deputies)*.

[7] The jurisdictional preventive remedy was established in the Prison Act by Law-decree 23 December 2013, n. 146 converted into Law 21 February 2014, n. 10. The new article 35-bis of the Prison Act – together with other rules – after the complaint lodged by the detainee, allows the Supervisory Judge to a) put an end to a situation, which is possibly violating article 3 of the Convention; b) order the prison authorities to redress a situation not respectful of the applicant's rights; c) transfer the person to another prison in case of cramped conditions of detention, obviously taking into account his/her family bounds and sentence plan.

[8] The jurisdictional compensatory remedy was provided by the article 35-ter of the Prison Act introduced by the Law decree 26 June 2014, n. 92 converted into Law 11 August 2014, n. 117. This new article 35-ter establishes a compensation that gives the prisoner the possibility to have his/her sentence shortened if the prison conditions violated article 3 of the Convention, as interpreted by the ECtHR case-law. The possible reduction shall be of one day every ten. This compensation can be requested to the Supervisory Judge by those who have spent at least 15 days in such conditions and are still serving a sentence. If the time spent in custody before the end of the sentence does not allow the prisoner to shorten his/her sentence length, the Judge shall define a monetary compensation of 8 Euros for each day of violation. Those who have experienced these conditions during their remand detention, and have fully served their time in prison, may apply, within six months after the end of their detention, to the ordinary Civil Judge who shall define the same compensation by applying the same criteria, in full compliance with the jurisprudence of the ECtHR.

establishment of a system of computerised monitoring of the living space and conditions of detention of each detainee as well as the establishment of an independent national mechanism of supervision of detention facilities – the National Guarantor (GNPL) – which will allow the competent authorities promptly to take the necessary corrective measures.

The establishment of the NPM in Italy is primarily due to the pressure coming from the European Court's case-law on prison overcrowding. And that's why I initially said that with respect to Italy there is a special link between severe overcrowding, the development of the NPM and the ECtHR.

2. An overlook on figures.

Let us have a look to some data on the Italian case. Before I have to clarify some important aspects. How does Italy calculate the capacity of its prison system? Since 1988 on the basis of a provision of the Prison Administration establishing the criterion of 9 square metres for a single cell plus 5 square metres for each additional person. It's something like the "design capacity" but it's not the "design capacity", neither is it the "operational capacity". It's a simple and abstract criterion given by the Prison Administration in the Nineties, when Italy had a prison capacity of about 30.000 places and about 25.000 detainees[9]. It's a criterion not established by law, so detainees do not have a legal right to that space. In reality, prisoners in Italy, do not have 9 plus 5 square metres at their disposal. But how can Italy determine how much space, prisoners actually have? By consulting the said computerised system implemented by the Penitentiary Administration which is regularly used by the NPM to monitor the "state of play" in prison and to ensure the correct implementation of the same computerised system.

Now we can consider in the right way the figures of the Italian penitentiary system[10].

Therefore, although I have them, I will not give you the data on prison density because they are not very meaningful. I will give you the data about the space that prisoners really have in their cells[11].

In 2013, at the time of the *Torreggiani* judgement, Italy had 66,585 inmates and there was no computerised system.

[9] In 1990 Italy had 29,836 places (it was calculated with the criterion of "9 plus 5 square metres") and 25,804 detainees.

[10] See www.giustizia.it, www.garantenazionaleprivatiliberta.it as well as A. ALBANO, A. LORENZETTI, F. PICOZZI, *Sovraffollamento e crisi del sistema carcerario. Il problema "irrisolvibile"*, Giappichelli, Torino, 2021.

[11] On the subject of overcrowding in Italy, the most comprehensive book is A. ALBANO, A. LORENZETTI, F. PICOZZI, *Sovraffollamento e crisi del sistema carcerario*, cit. Furthermore, for interesting critical insights see R. TURRINI VITA, *Adeo iam fracta est aetas*, in Queste Istituzioni, n. 3, 2021, 8. For further ideas on the topic of media communication on overcrowding, see also F. PICOZZI, *Alcune considerazioni sulla narrazione mediatica del sovraffollamento degli istituti penitenziari*, in Queste Istituzioni, 2024, n. 4, 96.

If we check on the said computerised system, we can see that on 30 April 2016 there were 53,495 detainees. The 17% (9,267) of them had less than 4 sqm of living space per inmate. Therefore the 83% (44,228) of inmates had at their disposal more than 4 sqm.

Furthermore, we can see that on 20 December 2024 there were 61,454 inmates: 61 detainees were living under 3 square metres per person, the 25 % (15,314) of detainees had between 3 and 4 square metres and the 75% (46,079) of inmates had more than 4 square metres.

At the same time, probation and community sanctions had been expanding as alternatives to imprisonment without reducing the number of people in prison.

In fact, on 1 January 2013, there were a total of 26,028 community sanctions or measures.

In January 2016, community sanctions or measures had risen to 39,338.

On 31 December 2024 community sanctions or measures had risen to 93,880.

And what does it mean?

1) From the Nineties until today, the prison population has practically doubled.

2) From the Torreggiani judgement to the present day, the consistent increase of community sanctions and measures has not reduced overcrowding, it has only increased the area of penal control.

3) Out of 61,852 detainees, 19,703 are foreigners and 42,061 are convicted with a final sentence, but we have to consider that in Italy there are three degrees of judgement. It should be emphasised that there are 9,473 waiting a sentence.

4) There are no internationally agreed precise definitions of what constitutes overcrowding, therefore it's important to understand if we are speaking about overcrowding according to the ECtHR definition (3 square meters), according to the CPT definition (6 plus 4 square meters) or according to the Italian abstract criterion (9 plus 5 square meters).

5) According to the recent SPACE annual penal statistics Italy has communicated the data referred to the regulatory capacity calculated according to the criterion of 9 plus 5 square meters without considering the unavailable places.

3. What can a National Preventive Mechanism do?

It's worth asking what we can do in such a situation. In this connection I always remember the story of *the knight and the sparrow* told by Antonio Cassese, that was a metaphor about the protection of human rights: "One does what one can"[12]. Therefore, what can a National preventive mechanism do?

1) It must carry out monitoring visits and making recommendations, in a *constant struggle* to help the Prison Administration to better *see what is in front of one's nose*, quoting George Orwell.

[12] A. CASSESE, *I diritti umani oggi*, Laterza, Roma-Bari 2019, 231 and *Podcast – Antonio Cassese: The Stubborn Sparrow – Episode 0: the Knight and the Sparrow*, www.irpa.eu.

2) It can regularly use the said computerised system in order to keep the Penitentiary Administration's occupancy levels under control and to publish the real state of play of prison overcrowding.

3) It can submit proposals and observations concerning existing or draft legislation.

4) It can recall the international relevant standards, tools and reports: the *European prison rules*, the *Recommendation R (99) 22 concerning Prison Overcrowding and Prison Population Inflation*, the *Recommendation Rec (2006) 13 on the use of remand in custody*, the *White Paper on prison overcrowding*, the *CPT standards* on *Living space per prisoner in prison establishments* published on 15 December 2015 (CPT/Inf (2015) 44) as well as the very important *annual report of the CPT n. 31* having a whole chapter about *Combating prison overcrowding* containing two sections: *Establishing thresholds* and *Putting an end to overcrowding*. In particular, the National Guarantor has recently addressed to our Parliament an opinion recalling the latter significant tool, sharing the conclusions of the CPT, that sum up everything important about the matter[13]. It goes as this: *The Committee's visits demonstrate that the phenomenon of overcrowding should be examined discerningly: a country may not have an overcrowding problem in the entire prison system, but it is not unusual for the Committee to find that particular prisons, parts of a prison or even an individual cell or dormitory are overcrowded.* […] *The way forward must start with a detailed overview of the situation of occupancy levels. To this end, it is crucial to use a common measuring rod when it comes to the minimum amount of living space that should be offered to each prisoner and to determine with precision the actual level of overcrowding in each prison cell, in each prison and in the prison system as a whole.* […] *The minimum amount of living space per prisoner should be monitored in the light of the CPT standards and the Court's case-law, and the official capacities of all prison establishments revised accordingly. The Committee considers that, for every prison, there should be an absolute upper limit for the number of prisoners ("numerus clausus"), in order to guarantee the minimum standard in terms of living space, namely 6m² per person in single cells and 4m² per person in multiple-occupancy cells (excluding the sanitary annexe). Thus, whenever a prison has reached that limit, appropriate steps must be taken by the relevant authorities to ensure that a person, who has been newly remanded in custody or sentenced to imprisonment, is offered acceptable conditions of detention (including in terms of living space)*[14]. Finally, it's important *to recall that prison overcrowding is neither just a problem for prison governors and prison administrations to solve, nor one that Governments can tackle alone. Instead, the CPT's experience has shown that combating prison*

[13] *Audizione del Garante Nazionale dei diritti delle persone private della libertà personale, Camera dei Deputati – II Commissione Giustizia, Camera dei Deputati A.C. 552, Proposta di Legge d'iniziativa del deputato On.le Roberto Giachetti Modifiche alla legge 26 luglio 1975, n. 354, in materia di concessione della liberazione anticipata, e disposizioni temporanee concernenti la sua applicazione*, Roma, 24 April 2024, www.garantenazionaleprivatiliberta.it.

[14] On the role of international soft law in the system of sources in the prison sector in Italy, see the recent book by A. LORENZETTI, *Il sistema delle fonti nel settore penitenziario. Una prospettiva di diritto costituzionale*, Editoriale scientifica, Napoli, 2024, 141.

overcrowding requires a systemic approach. In terms of concrete actions this can means that overcrowding is neither just a problem of space but it's also a matter of time, time spent outside the cells engaged in meaningful activities and hopefully in an empowering context that does not humiliate people, as Avishai Margalit teaches[15].

Becoming aware of this is a very challenging task.

[15] A. MARGALIT, *The Decent Society*, Harvard University, Press, 1998.