CHAPTER 15

The Evolution of Italian Penitentiary Legislation. Rehabilitation as an Aim of Sentencing and Prisons. A Possible Combination?

Loredana Giani

This chapter seeks to provide an analysis of the evolution of the legislative framework of the Italian prison system to highlight the influence of the functional profile on its structure. This includes not only its organisation, but also those aspects connected with the architecture of prisons.

In Italy, the philosophy concerning prisons has been characterised, since the end of the nineteenth century, by a custodial logic that finds its full expression in the general regulations of "Prisons and Reformatories" of 1891. This set the cornerstone of the new prison policy, characterised by the importance placed on the human and social conditions of the condemned, as a result of a criminological positivism that found its core in the differential, scientific and individualised treatment of those convicted.

This system declined with the rise of Fascism under which sentencing abandons the re-educational perspective in favour of a purely punitive dimension, an expression of the right of the state to protect and defend itself.

This ideology is faithfully represented in the Regulations for the "istituti di prevenzione e pena", issued by Royal Decree no. 787 of 18 June 1931, which would remain in force until 1975.

Within this framework, the three fundamental and mandatory laws for prison life are work, civil education and religious practices, with a strict separation between prison and the outside world.

The Regulation of 1931 was followed by Law no. 527 of 9 May 1932, "provisions on prison reform" consisting of five articles. These included one on the renovation of prison buildings, but since no specific funding was set aside for this, it marked the beginning of the decline of the architectural model and saw the construction of smaller buildings.

With the entry into force of the post-war Constitution, re-education is established as a constitutional principle. This leads to a debate on the function of sentencing that necessarily has implications for the prison system itself, and therefore on the structure and organisation of prisons oriented towards the resocialisation of the prisoner.

This perspective enters into crisis in the late 1980s. If, on the one hand, the system seemed oriented towards seeking a balance between security and the progressive projection of individualised treatment beyond the prison walls, then on the other hand, the resurgence of the violence of organised crime led to the introduction of a differentiated and more severe regime, based on the nature of the crime committed by the convicted person. This new element had notable consequences on the structural profile.

In order to foresee future developments, also from a structural point of view, in the prison system, the regulations must necessarily be brought under the framework established by the European Prison Rules, which requires a different approach in which, as early as the profile of prison architecture, greater attention is paid to the constitutional status of the detainee.

After the Fall. An Outline of the System Post-Unification

In order to understand fully the evolution of the Italian penitentiary system, especially with a view to grasping the development towards fully guaranteeing the rehabilitation of offenders, it is necessary to review the principal moments

of this evolution. We begin with the emergence of the concept of institutionalised internment concurrent with the establishment of the rule of law.

A "custodial" logic characterises the various regulatory interventions in the Italian system in the final decade of the 19th century.

After Unification, the criminal justice system too saw a process of "Piedmontisation" that led to the promulgation of regulations intended to govern the various types of prisons[1] in a unified way, significantly placing all under the control of the Interior Ministry and not the Justice Ministry, albeit at different times.

It was only with the entry into force of the Zanardelli Code (1 January 1890) that a path began, at least in terms of legislative innovations, which opened the door to reform of the prison system. Until then this had been inspired by a philosophy of perpetual segregation, laid down by the first penitentiary law of the Kingdom of Italy (Law no. 1653 of 28 January 1864, on the means of rationalising and constructing prisons).

But that custodial logic found its full expression in the general regulation of prisons and reformatories of 1891 (Royal Decree no. 260 of 1 February 1891), emanated to implement the prison reform law (Law no. 6165 of 14 July 1889) which established the new cornerstone of prison policy, centred on the human and social conditions of the condemned. This was a result of criminological positivism that had the differentiated, scientific and individualised treatment of the condemned at its core. This shifted the focus of thinking about punishment onto the human and social conditions of the offender.

The effectiveness of the regulation, which dealt in detail with the various types of prisons, ran up against the structural problem, thus affecting the employment of those criteria (innovative for the time) for the carrying out of a sentence under the Criminal Code.

Despite these declarations of principle, conditions for detainees were still inhumane.

That situation continued in the period of Giolitti, which saw a number of reforms such as the abolition of foot chains for those condemned to hard

1 Royal Decree of 19 September 1860, regulating penal colonies; Royal Decree of 27 January 1861, no. 4681 regulating judicial prisons; Royal Decree of 13 January 1862, no. 413 regulating prisons; Royal Decree of 28 August 1862, no. 813, regulating houses of confinement; Royal Decree of 27 November 1863, n. 1018, regulating custody houses.

labour, and an easing of disciplinary measures, such as the abolition of straitjackets, irons and the dark cell, used in cases of disciplinary violations by inmates.

The regulatory framework for the management of prisons did not change significantly until the First World War.

The most important intervention was the promulgation, in 1907, of Royal Decree no. 150 of the approved regulation on prison guards, and of Royal Decree no. 606 on reformatories for minors, which foresaw, among other things, the establishment of a body of educators instead of prison guards.

The principle that prisoners should be the subject of care for rehabilitation purposes, rather than for ones of simple repression and punishment, was only implemented between 1921 and 1922. Those years saw a number of memoranda that would be transposed within Royal Decree no. 393 of 19 February 1922, significantly governing certain areas such as visiting, correspondence and work done in prisons.

The same period saw the passage of the Directorate General of Prisons and Reformatories from the Interior Ministry to the Justice Ministry, resulting in the transfer of the duties of prefects and vice-prefects to the general prosecutors at the Courts of Appeal and the public prosecutors, resulting in the imposition of the sentence becoming jurisdictional as well.

The situation, already far from rosy, worsened significantly with the advent of Fascism. This period saw a marked decline in the system, characterised by the abandonment of sentencing with any notion of re-education, and a return to a purely punitive dimension, the expression of the right of protection and defence of the State.

What disappears is any thinking that might tend to reconnect a re-educational aim to punishment, and this is made clear in the description, found in many writings, of the offender in terms of a "criminalised sinner". Redefining the directorate general as dedicated to "institutions of prevention and punishment" was certainly significant.

This notion was maintained in the Rocco (Criminal) Code of 1930 and the Criminal Procedure Code of the following year. It found its faithful transposition into the Regulations for Institutions of Prevention and Punishment, issued by Royal Decree no. 787 of 18 June 1931, which remained in force until 1975.

In the framework outlined by the regulations, prison life was essentially organised on just three elements: work, civic education and religious practices,

with a strict separation of the prison world from the outside and without any form of recreation.

Prison was essentially designed as a closed institution, characterised not only by a clear separation from the outside world, but also by rigidity, not only in terms of planning with regard to the three fundamental laws of treatment mentioned above (religious practices, work and education), but also in the management of prisoners. Inmates were called, with the obvious intention of suppressing their personalities, only by their serial number, and isolated within institutions where access was denied to outsiders.

A brief look at the structure of the Regulations of 1931 clarifies the concept of punishment that it was based on. It listed in detail everything that was forbidden, providing related punishments. There was to be no disrespectful demeanour, no use of profane words, no playing cards, no staying in bed during the day unless justified by illness or other reasons, no refusing to attend religious services, no reading or possession of texts with a political content, and no writing more than two letters a week to family members. Among other things, it was forbidden to write these two letters to the same person, to the extent that prisoners were given a pencil and a sheet of paper that were then to be handed back after writing the letter. Visits with relatives, which took place separated by wire mesh, were listened to by the prison staff. The sanctions regime went from a ban on smoking, writing, washing and shaving for a few days, to a ban on visits, and to a restraining bed, or imprisonment in a padded cell.

Then, there were numerous offences that resulted in penal sanctions which were added to those for which the prisoner was being detained.

The notion of punishment as a reaction of the state to a personal "condition" of the "criminalised sinner" can be seen in the fact that the records of the prisoner noted not only their own crimes and behaviour in prison, but also the records of family members and their economic conditions and political ideas. This went as far as noting cases of madness, alcoholism, syphilis, suicide or prostitution.

The prison system provided for three groups of prisons: remand prisons, including judicial prisons intended for those detained awaiting trial to ensure their presence in court; ordinary prisons; and prisons for the implementation of special sentences.

The 1931 regulation was followed by Law no. 527 of 9 May 1932, "provisions on prison reform", composed of five articles, governing the work of prisoners,

the restructuring of prison buildings, prison accounting and the institutions of assistance to prisoners.

It is interesting to note that, despite one of the points of the reform being the "strengthening" and "redevelopment" of prison buildings, the lack of an express programme of financing meant that any intervention depended on the Ministry of Public Works. In reality this resulted in the decline in the existing structures.

A new wave of legislation appeared starting in the 1930s, with the enactment of Laws no. 1404 and 1579, in 1934, which rewrote the provisions regarding juvenile courts and rehabilitation homes for minors. Seven years later a new discipline for district prisons was issued, dividing them into two categories, depending on their size: the first, type A, smaller, established in smaller judicial centres; the second, type B, larger, established in districts, that is, in areas that were the responsibility of the courts and returned to the direction of the magistrates. This intervention was part of the Grandi Plan of 1941 within which a major role is played by the construction of the "penitentiary city" of Rebibbia in Rome, inspired by the principles of observation and the individualisation of treatment, resulting in a diversification at the planning level of the buildings depending on their target: females, remand prisoners, etc.

Riot Act. Reflections on Sentencing in the Constituent Assembly

With the enactment of the Italian Constitution (1948), the rehabilitative aspect of sentencing becomes a full constitutional principle. This was a synthesis and, at the same time, the start of a wide debate about the function of sentencing. This necessarily had repercussions on the prison system and, therefore, on the structure and organisation of prisons, apparently geared towards re-socialisation.

Interestingly, the debate in the Constituent Assembly[2] did not include extensive discussion in relation to the discipline of punishment and its pur-

2 The regulation of the sentence was treated by the first and second Subcommittee and by the Commission for the Constitution and by the Assembly in plenary session. The debate was held within the first subcommittee on 17, 18 and 19 September and 10 December 1946; within the second subcommittee on 12 December 1946, and the Commission for the Constitution on 25 January 1947, to arrive in the Constituent Assembly on 15 April 1947.

pose and, in particular, in relation to the question of guilt as a structural element of the offence. This also applied to the inherent profiles of the causal link, underlining, in part because of past experiences, the need to postulate the prohibition of vicarious liability. What emerges is a clear choice not to assume a position "in relation to the age-old problem of the function of punishment", overshadowing a setting in which the re-educational end would be only collateral to the same[3].

This period saw a number of bloody riots in the prison system. They involved the Regina Coeli prison in Rome, the Nuove in Turin and the San Vittore in Milan[4], to the extent that the members of the Constituent Assembly had to act.

And it is this cultural and theoretical context that gives birth to Article 27 of the Constitution which provides in the last two paragraphs, on the one hand, a ban on the death penalty (paragraph 4) as well as inhuman punishment (paragraph 3), but also that punishment "must aim at the rehabilitation of the convicted person". This last provision, which in the opinion of the Right Honourable Maffei, should have been reformulated to provide that "the prison environment must be organised in accordance with the social need of the re-education of the offender"[5].

There can be no doubt that this sort of structure leaves ample room for the legislator to determine the characteristics of the punishment aimed at ensuring the public good in relation to the preservation of social order, hence the proportional character of the same. This has been postulated since the time of Cesare Beccaria, and it also responds to the aim of strengthening the deterrent effect with respect to crimes that are more damaging to society.

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3 From a reading of the Assembly what emerges in the face of the Right Honourable Togliatti's proposal to do away with the death penalty and life imprisonment, is the Right Honourable Tupini, President of the First Subcommittee, stressing that "the abolition of life imprisonment could be an incentive to commit terrible crimes, having suppressed the only penalty, that of death, capable of frightening great criminals". And again in the meeting of 10 December 1946, the Right Honourable Aldo Moro stressed the "need for the preservation of human society which is compromised by the proliferation of heinous acts. Having abolished the death penalty, life imprisonment remained the only inhibition to crime".

4 In the prison of San Vittore, the first bloody revolt in 1946 took place at Easter. On that occasion, the inmates, led by the bandit Enzo Barbieri and former Fascist leader Caradonna, took possession of the whole prison, holding twenty prisoners hostage. A few months later, on 18 August, the inmates of the fourth arm held an assembly, made possible by the absence of doors and locks, to protest against the reduction of food rations ordered by the Allied authorities.

5 Right Honourable Maffei, morning sitting of the Constituent Assembly, 15 April 1947.

No Action. The Evolution of the System in the Early Years After World War II

1948 saw the establishment of the first parliamentary commission of inquiry into the state of prisons. The commission was chaired by Senator Giovanni Persico. Two years after taking on the role, in 1950, he presented to the Chamber of Deputies a long report which, however, did not address critical points of the prison system. In no way, in fact, were the foundations of the system touched, built as it was on the isolation of prison from civil society. The most significant proposals in the report were the abolition of daytime confinement, the introduction of music as a means of rehabilitation, greater emphasis on agricultural labour, the abolition of standard haircuts, the right to request and purchase books, the abolition of the system of calling detainees by their serial numbers, and other humanising innovations.

The only changes attempted came through memoranda, and not therefore by interventions of Parliament. These related to visits, the possibility of reading and writing, and calling prisoners by their own names. These changes were retracted three years later, with the memorandum of the Minister of Justice De Pietro (24 February 1954) which restored a more conservative character to prison regulations.

The prison system only came back to the attention of Parliament in 1960 with a bill presented by the Minister of Justice Gonella, with which he tried to bring the prison system into line with the Minimum Standards of the UN. This included the introduction of the individualisation of re-educational treatment based on observations of the prisoner's personality. Although never enacted, and abandoned in 1963 at the closing of the legislature, the contents of the bill were very interesting, such as planned new elements – educators and social service centres – as well as the introduction of probation. It was no coincidence that it was taken up again on several occasions as the basis for various bills that were presented.

Human Touch. The Emergence of the Rehabilitative Aim of the Sentence

For our purposes we need to focus on the emergence of the rehabilitative aim of the sentence. This element necessarily conditions the legal system, as well as

the behaviour of judges in the concrete determination of sentences, whose evolution, albeit with certain moments of immobility[6], has been characterised essentially by the gradual abandonment of the (exclusively) retributive view of the sentence. It was mainly thanks to realist theories[7] that there was a formulation of a multi-purpose theory of punishment that, while maintaining a retributive aim with a function of social prevention, assumed not just a tendency towards, but the primary aim of re-education. Therefore, no longer sentencing as a logical category linked to rehabilitation and punishment, but sentencing was now also a historical category with a rehabilitative purpose[8].

Rehabilitative purpose, in the sense of a full social reintegration of the prisoner, through a "useful sentence" which, as maintained by the theorists of the "New Social Defence", ensures compliance with the obligation of the state to recover the individual for society, identifying the aim of protecting society with this element.

It is, in fact, thanks to the efforts of the proponents of this approach, together with scholars from the school of clinical criminology, as it was known, that 1955 saw the publication of the "Minimum Rules for the Treatment of Prisoners" adopted by the UN and aimed essentially at an individualised treatment of the offender.

These rules were taken up in the standards adopted by the Council of Europe with its 1973 resolution (no. 5), reviewed later (Recommendation R (87)3 of 12 February 1987) in terms of an increased focus on the physical and mental health of prisoners, their living conditions in prison and their reintegration into society.

In Italy, this debate finds its consecration in regulatory terms in the 1975 reform that brought an end to an intense discussion which began in 1968 on the very usefulness of prison. This was affected, clearly, by a strong ideological input that tended to establish a link between imprisonment and the social position of the imprisoned. This was partly a result of the social and political upheaval taking place at the time that had definite repercussions within the

6 Consider, for example, the provisions adopted in the period of terrorism or the special provisions adopted in the fight against the Mafia.

7 G. Vassalli, "Funzioni e insufficienza della pena", in *Riv. it. Dir. Proc. Pen.*, 1961, pp. 296 ff.

8 P. Nuvolone, "La prevenzione nella teoria generale del diritto penale", in *Riv. it. Dir. Pen.*, 1956, pp. 13 ff.; F. Gramatica, *Principi di difesa sociale*, Cedam, Padua, 1961.

prison system as well, and saw a new season of struggles, characterised by a high degree of politicisation among inmates.

Let Them All Talk. The Reform of the '70s

Laws no. 354 of 26 July 1975 "Norms on penitentiary regulations and the implementation of measures preventing and restricting freedom" is the first organic reform of penitentiary institutions[9].

Divided into two parts, the regulations concerned penitentiary treatment (Articles 1-58) and penitentiary organisation (59-91). The characteristic features were the principle of the qualification of the treatment which, by express provision in Article 1, must have as its foundation the safeguarding of the dignity and personality, and the protection of the rights of all who are deprived of their personal freedom[10]; the regulation of labour in prison which was recognised as being of great importance; the creation of new forms of specialised operators which included educators and social workers for adults; alternatives to detention – community service, probation and early release – which were in line with the idea of ensuring the individualisation of treatment, allowing the adoption of a differentiated strategy also because of the profound differences between various types of criminality; and control of the carrying out of the sentence through the surveillance of the magistrates and courts.

As for the structure of adult institutions, there are 4 types:

- remand institutions (Article 60), divided into district prisons – for the custody of accused available to the magistrate, established in district capitals which do not have prisons; and prisons – for the custody of accused available to all the judicial authorities, in district capitals[11];
- institutions for the implementation of sentences (Article 61) including remand centres, for the execution of the arrest; and prisons for the implementation of the sentence;

9 The Implementing Regulation was adopted the following year – Presidential Decree no. 431 of 29 April 1976.

10 The need to achieve individualisation of treatment in relation to the specific conditions of the subject and their particular needs has to be acknowledged, in order to ensure that with the expiry of the sentence the best result can be obtained for the offender's recovery and reintegration into society.

11 The district and county prisons also ensure the custody of persons detained or arrested by the forces of law and order and that of prisoners in transit.

- institutions for the implementation of detention measures (Article 62) broken down into agricultural colonies, work houses, nursing and custodial homes and psychiatric hospitals;
- observation centres (Article 62), autonomous institutions or sections of other institutions designated to carry out observation aiming to identify the treatment referred to in Article 13 of the law.

An essential feature of the system thus introduced was the rethinking of "penitentiary treatment", evidently inspired by a different philosophy that takes into account, for the purpose of combating them, the negative effects of detention and imprisonment[12]. Treatment, and in particular rehabilitative treatment, consists of a programme aimed at changing those attitudes of the subject that are at the root of their failed social integration, a programme which, as also specified in Presidential Decree 431/1976, must be drawn up taking into account the particular needs of the subject.

Article 15 of the penitentiary regulation places alongside education[13], as essential elements of treatment: work, religion, cultural, recreational and sporting activities, as well as the facilitation of "appropriate contacts with the outside world and relationships with the family".

The "new" elements through which treatment unfolds are reflected essentially in telephone usage and visits (Article 18 Penit. Regs.), work outside the prison (Article 21 Penit. Regs. and Article 46 Exec. Reg. 1976), permits (Articles 30 and 30 *ter* of the Penit. Regs. and Articles 61 and 61 *bis* of Exec. Reg. 1976), the participation of private entities in educational activities in prison (Article 17 and 78 Penit. Regs.) and alternatives to detention.

This has also had a considerable impact on staff in the prison system through the introduction of new operators, all engaged in the process of the social reintegration of prisoners (the final aim of the rehabilitation treatment programme). These educators, social workers, teachers, voluntary workers,

12 F. Lupone, *Il trattamento penitenziario e la sua attuazione processuale*, Jovene, Naples, 1984, p. 47.

13 It should be observed that in addition to compulsory education, which is offered in prison, it is foreseen that penal institutions can establish secondary schools, with the obligation to transfer detainees who have shown an intention to continue their studies to institutions at which these courses are offered. The penultimate paragraph of Article 19 of the Penitentiary Regulations also expressly provides that "access to university courses and the equivalent is to be facilitated and correspondence, radio and television courses are to be favoured". In addition, the last paragraph includes the undertaking of the prison administration to facilitate "access to publications in the library, with full freedom in the choice of reading".

psychologists, psychiatrists and criminologists are under the internal control of the director of the institution and externally of the supervising magistrate.

Jailhouse Tears. Attempts to Modify the System

The system outlined was the subject of various interventions that were also necessary to cope with the climate of tension that grew in those years.

In 1977, the government issued an inter-ministerial decree (Decree no. 450 of 12 May 1977) "for the coordination of external security services in prisons" with which, under the internal organisational structure, the power of coordinating security (internal and external) of correctional facilities was entrusted to a senior Carabinieri officer; while structurally special prisons – Institutions of Maximum Security – were established[14].

Other interventions had to do with equipment and the use of certain categories of prison workers (Decree Law no. 111 of 14 April 1978); the requirement to record in the criminal records office the measures used by the surveillance section (Law no. 689 of 24 November 1981), probation for drug addicts or alcoholics (Law no. 197 of 21 June 1985). However the reform only took place eleven years after its enactment, with Law no. 663 of 10 October 1986, known as the "Gozzini Law".

This was a measure that was born with the intention of enhancing the rehabilitative aspect of incarceration, making it prevail over punishment which until then had been the principal scope. And thus good-behaviour passes, being entrusted to the social services, home detention, probation, parole, the extinction of life imprisonment, after five years of parole, early release and no mention of the sentence in the criminal record in favour of the convicted person with exemplary conduct and who enjoys a reduction in their sentence.

Apparently going against this was the introduction of the harsh prison regime (so-called Article 41 *bis*) into penitentiary law, originally intended to deal with situations of revolt or other serious internal emergency situations in Italian prisons, and which consisted in the possibility, recognised to the Minister of Justice, of suspending the application of the rules on treatment.

14 This same decree established the Special Prisons – "Maximum Security" Institutes. In three years, the following special prisons came into operation: Asinara, Cuneo, Novara, Fossombrone, Trani, Favignana, Palmi, Badu 'e Carros, Termini Imerese, Ascoli Piceno; and for women, Latina, Pisa and Messina; furthermore special sections were also set up in all the judicial prisons of the large cities.

More specifically, the measures applicable are strengthening security, restrictions on the number and means of implementation of visits, the reduction/suspension of outdoor exercise, and censorship of correspondence.

A result with great impact, also in line with some important interventions of the Constitutional Court (Sentences 185 and 312/1985; 343/1987, 282, 386 and 559/1989), was obtained by the introduction of the "new arrivals" service. This involves a preliminary intervention to completely describe the subject on their entering prison (first psychological exam, medical examination, first interview with an educator).

The Gozzini Law also introduced a special surveillance regime, with strict security standards for special cases: individuals who exhibit "penitentiary dangerousness", that is, displaying behaviour that could compromise the security or order of the institutions. This behaviour, though, is evaluated by the supervisory staff. It is a regime that does not affect constitutionally guaranteed rights, and so cannot relate to food, hygiene, clothing, health, religious practices, but which can also lead to a decision to transfer an inmate to another institution deemed more suitable. A practice then institutionalised by Law no. 279 of 23 December 2002 with which the maximum-security regime was established.

The Land of Give and Take. Adapting to the Need for Social Protection

Another significant change in the system occurs with the Simeone-Saraceni Law (no. 165 of 27 May 1998). This strengthens the system of alternative measures to detention, assisted by the general provision of an automatic suspension of sentences of less than three years (four years for drug addicts and alcoholics), with the possibility for the convict to ask for one of three alternative forms of detention (community service, home detention or probation). The primary goal of the law was to be able to realise "the non-entry policy" for individuals for whom the experience of prison would be more criminalising than rehabilitative.

Many controversies have followed the enactment of this provision arising from the constant demands for greater safety on the part of civil society, especially following the horrendous incidents of violence perpetrated by organised crime organisations in the early '90s. These pressures led to a kind of reversal of the trend that culminated in the introduction of Article 4 *bis* (introduced by

Article 1 of Law by Decree no. 152 of 13 May 1991, converted into Law no. 203 of 12 July 1991, subsequently amended by Law by Decree no. 306 of 8 June 1992, converted into Law no. 356 of 7 August 1992). This allowed the introduction of a harsh regime for those convicted of offences considered to be of particular social concern, that is, for crimes committed under the conditions provided for in Article 416 *bis* of the P.C., or in order to facilitate the activities of the associations provided for in that article. In other words, the rule prevented, in its original version, the provision of measures such as the allocation of work outside, good-behaviour passes and alternatives to imprisonment, except for early release, to prisoners jailed for Mafia crimes, terrorism, kidnapping with extortion, and the production and trafficking of drugs. Crimes to which were then added associations aimed at enslavement, sexual violence, abuse and sexual exploitation of children, the trafficking of pornographic material involving minors and significant smuggling of tobacco.

Thus was introduced a rule intended to establish a dual penitentiary system, differentiated according to the nature of the offence, for persons sentenced for crimes typical of organised crime or subversion, for whom prison re-education measures could be applied only in cases of cooperation with justice, or the acquisition of elements that indicated the non-existence of links with organised crime or subversion.

The tightening of the regime then included changes made to the good-behaviour passes, the conditional release from the sentence and the assignment of external work to those convicted of such crimes.

It was in this context that Presidential Decree no. 230/2000 saw the light of day, born with the objective of outlining a new treatment, more in line with the aims declared in 1975, in which the priority was building relationships with society outside prison, in order to ensure the full social reintegration of the offender. In this context, obviously, education plays a central role, to the extent of allowing the detainee, who receives economic aid for this end, to keep instruments (such as computers) needed for work or study purposes in their cell.

Getting Mighty Crowded. The Buffer Operations

The framework thus briefly described, albeit not obviously, highlights the close relationship between the abstract purpose of the sentence, which cannot now

be separated from rehabilitation, and the structure that necessarily must include those elements that ensure the realisation of those paths that characterise the treatment, from the point of view of the social reintegration of the subject.

But if, on the level of principle, this process appears straightforward, in reality the problems encountered have been enormous. They have highlighted on various occasions the unsuitability of the structures on which, over the years, the interventions carried out were certainly not responsive to the needs of a real modernisation policy designed to ensure a correspondence between the aim of the sentence and the functioning of the structure.

Confirmation of this can be found in the atavistic problem of overcrowding. Not surprisingly this was defined in terms of a "physiological condition" of prisons, that is, a "structural problem". In this sense the Parliamentary conversion into law of Law by Decree no. 211 of 22 December 2011, attempted to employ amnesty measures to deal with the issue, which obviously had a "buffer" effect on the emergency situation, but did not in any way provide a structural solution. Suffice to think of the recently enacted measure, known as the Empty Prisons Law (Law by Decree no. 146 of 23 December 2013, ratified by Law no. 10 of 21 February 2014, "Urgent measures concerning the protection of the fundamental rights of detainees and a controlled reduction of the prison population". This finds its antecedent in the aforementioned Law by Decree 211/2011, converted into Law no. 9 of 17 February 2012, entitled "Urgent measures for combating custodial tension caused by overcrowding in prisons").

These are measures which obviously tend to affect the number of people held in prison by introducing measures to reduce the incoming number – think of interventions in the field of small-time drug dealing – and to facilitate access to alternative measures. This, however, created many problems from the first intervention in 2010 which had included the possibility of serving the last year of a prison sentence at home, but in this way discriminated, for example, within the prison population against foreigners who did not have a fixed abode. The application of the provision, in that case, was restricted until the complete implementation of the "extraordinary plan for prison construction", but in any case no later than 31 December 2013 and was instead revived, with an even wider scope of application.

With this last intervention, then, the figure was introduced of the national guarantor for the rights of prisoners or others deprived of personal freedom,

as well as new judicial proceedings before the supervising judge intended to ensure the protection of prisoners' or detainees' rights.

Without going into the merits of each provision, there is no doubt that they are an indicator of a malaise in the system which, as is clear from the "report on the state of human rights in prisons and in detention and holding centres" by the Extraordinary Commission for the Protection and Promotion of Human Rights of the Senate, is in an ongoing state of illegality (because of the violation of human rights). There is even widespread appeal to the concept of "tolerable capacity", therefore, not a real capacity compatible with "normal" living conditions respectful of the fundamental rights of detainees, but a capacity intended in some ways to justify and incorporate the natural overcrowding of the facilities.

And it is this overcrowding, combined with the shortage of warders, that lies behind a "non-application" of treatment in the aforementioned sense, that is, the realisation of "a satisfactory programme of activities (work, education, sport)" that, as observed by the CPT "is of paramount importance for the well-being of prisoners".

This situation, in fact, marks a return to the concept of prison as a place of segregation in which, among other things, those on remand are often placed as well. With regard to this the European Commission presented a Green Paper on the application of EU criminal justice legislation in the field of detention whose problems are considered as "a relevant aspect of the rights that must be safeguarded in order to promote mutual trust and ensure the smooth functioning of mutual recognition instruments" (European Commission, Brussels, 14 June 2011, the Green Paper on the application of EU criminal justice legislation in the field of detention).

This is not the place in which to examine in detail the many decisions with which the European Court of Human Rights has intervened on the subject of sentences, their implementation and above all their compatibility with the fundamental rights of individuals.

For our purposes it should be pointed out how with a succession of decisions, think of the Sulejmanovic affair (European Court of Human Rights, sect. II, 16 July 2009, Sulejmanovic v. Italy), the Court of Strasbourg has stated that the sentence should never exceed "the minimum necessary", that is, it should never affect non-negotiable positions including the "concrete assessment of the overall life of the prisoner in the prison", with respect to which the

"flagrant" lack of personal space in itself has to be considered as constituting inhumane and degrading treatment.

And Italy's condemnation was reiterated in the famous Torreggiani judgment (European Court of Human Rights, II, 8 January 2013, Torreggiani and Others v. Italy) which the same court defined in terms of a "pilot judgment" (whose procedure, based on Article 46 ECHR, and governed by Article 61 of the Rules of Court, has been affirmed since in Broniowski v. Poland, 22 June 2004, no. 31443/96, and which can be activated insofar as the case shows that there is a structural problem due to a practice, destined to impact a large number of people, which is incompatible with the ECHR) by which Italy is condemned "sans retard" to provide the development of an "appeal or a set of effective remedies, which have preventive and compensatory effects and really provide adequate and sufficient redress of violations of the Convention resulting from prison overcrowding in Italy".

In the same judgment the Court, precisely in relation to the hypothesis of overcrowding in para. 76, identified the parameters with regard to which that level of habitability recommended by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (C.P.T.) must be considered breached, corresponding to 4 square metres per person. A violation that, according to the Court, infringes Article 3 of the European Convention on Human Rights.

But, in fact, it is only with the Prison Plan, launched in 2010 and entrusted to a special commissioner, that an attempt has been made, unsuccessfully, to resolve the problem. This plan has run aground on the desks of the criminal judges.

Changing Partners. Attempts at Outsourcing

In conclusion, a quick look at the issue of outsourcing with regard to various sorts of problems primarily related to the absence of specific legislation and practices in the sense of the non-use of public tendering, in sharp contrast to the recognised "public" nature of the prison system.

The levels on which outsourcing might manifest itself are essentially two: one related to the building of the structure and the other relating to the management of the same in whole or in part.

With regard to the first, in 2001, the possibility was introduced for the prison administration to make use of project financing.

Two years later "Patrimonio dello Stato S.p.A." – a public company, controlled by the Ministry of Economy and Finance, for the management of public assets being sold – established Dike Aedifica S.p.A. for the realisation of prisons contributing "to the development of the prison system by using historical prison buildings to provide financial leverage for modern prison infrastructure, thereby reducing the burden on public finances". Many criticisms have been levelled against this system also in relation to the increase in costs that followed.

In general, it is impossible not to notice the absence of a well-defined regulatory framework on the subject, in which emerges a cardinal principle of public management of prisons with regard to security, the management of the treatment and transfer of detainees, while not ruling out the involvement of private companies, in the form of non-profit organisations, in those institutions of "attenuated custody" such as the Castelfranco Emilia Institute.

This is an isolated case of a work house converted into an institution of reclusion for drug addicts, in 2001, as part of the Equal project. The handover to a private party, a religious cooperative, of the management of the establishment, in order, among other things, to experiment with new forms of organisation, took place in the absence of a tendering process, and is governed by a partnership agreement which, however, relates only to accounting and administrative controls; but despite managing an essentially public activity, publicly funded, there are no forms of management control.

Although this experience presents substantially positive results, there have been problems in relation, for example, to the regulation of relations with the staff – public – who come into contact with the structure. Think, for example, of the health professionals involved in the certification of drug addiction which, because of a series of regulatory interventions, can also be certified by private employees who, unlike public ones, might have an interest in certifying a state of dependence even on light drugs.

There can be no doubt that, given the involvement of fundamental rights, the outsourcing of sovereign functions such as those at issue here leads to a certain perplexity. In the report of the subcommittee "for the fight against discrimination and for the protection of minorities", it is stressed how private management could bring into question the observance of fundamental guarantees, especially in the absence of a clear system of checks and responsibility.

And this is certainly the risk that the Italian system runs as well, in the absence of clear rules, essential in these cases, in respect of which, at present, we can hardly make positive judgments about the degree of civilisation in Italy, especially if we were to employ Voltaire's maxim "Do not let me see your palaces but your prisons, since it is from them that we measure the degree of civilization of a nation".

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