

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

# POLICY DEPARTMENT

## CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



Constitutional Affairs

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Petitions

## Background information for the LIBE delegation to Italy on the situation of prisons 26-28 March 2014

In-depth analysis for the LIBE Committee







**DIRECTORATE GENERAL FOR INTERNAL POLICIES**  
**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND**  
**CONSTITUTIONAL AFFAIRS**

**CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS**

**Background information for the**  
**LIBE delegation to Italy**  
**on the situation of prisons**  
**26-28 March 2014**

**IN-DEPTH ANALYSIS**

**Abstract**

Upon request by the LIBE Committee, this internal note provides background information for the delegation of the Committee on civil liberties, justice and home affairs (LIBE) to Italy on the situation of prisons on 26-28 March 2014. After a preliminary overview of some initiatives on detention conditions at EU level (by the European Parliament and the European Commission), the note analyses the Italian situation regarding overcrowding of prisons and conditions of detention, defined by the Council of Europe and the European Court of Human Rights as inhuman and degrading treatment in some cases. The note also refers to recent Italian legislative and jurisprudential developments, whose effects on the situation of prisons have yet to be determined.

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COMMITTEE ON CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS**

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## **CONTENTS**

|  |           |
|--|-----------|
| <b>CONTENTS</b>  | <b>3</b>  |
| <b>1. INTRODUCTION</b>   | <b>4</b>  |
| <b>2. STRUCTURE OF THE NOTE</b>  | <b>5</b>  |
| <b>3. OVERVIEW OF SOME INITIATIVES AT EU LEVEL ON DETENTION CONDITIONS</b>   | <b>6</b>  |
| 3.1 The European Parliament resolution on detention conditions in the EU of 15 December 2011   | 6         |
| 3.2 The European Commission Green Paper on the application of EU criminal justice in the field of detention of 14 June 2011  | 6         |
| 3.3 The European Commission reports of 5 February 2014 on the state of play of implementation of three Framework Decisions on transfer of prisoners/probation and alternative sanctions/European supervision order | 7         |
| <b>4. THE SITUATION IN ITALY CONCERNING OVERCROWDING OF PRISONS AND CONDITIONS OF DETENTION – LATEST LEGISLATIVE AND JURISPRUDENTIAL DEVELOPMENTS</b>  | <b>8</b>  |
| 4.1 The ECtHR “Torreggiani” pilot judgment   | 8         |
| 4.2 The Council of Europe Committee for the prevention of torture (CPT) report on Italy of May 2012  | 9         |
| 4.3 Italian laws and regulations on the prison system  | 10        |
| 4.4 Some data on overcrowding in prisons and detention conditions in Italy   | 11        |
| 4.5 Ongoing parliamentary discussions on draft laws on amnesty and general pardon (amnistia e indulto)   | 12        |
| 4.6 Ongoing parliamentary discussions on a draft law on the definition of the crime of torture   | 13        |
| 4.7 February 2014 changes in the law on drugs  | 13        |
| 4.8 The so-called law “empty prisons” (legge “svuota carceri”) of February 2014  | 14        |
| 4.8.1. Measures to reduce overcrowding   | 14        |
| 4.8.2. A new system of remedies  | 15        |
| <b>CONCLUSIONS</b>   | <b>16</b> |

## 1. INTRODUCTION

On 8th October 2013, **President Giorgio Napolitano** sent a written **message to the Italian Parliament** (both the Senate and Chamber of Deputies), once more urging Italian lawmakers **to pass an amnesty measure** (by pardoning thousands of people convicted of minor crimes) to relieve Italy's overcrowded jails, while also telling MPs that the “painful, **humiliating, inescapable prison emergency**” is one of Italy's main challenges and “a disgrace” prompting even the European Court of Human Rights to call upon the country to tackle it. President Napolitano reiterated this message on the occasion of a meeting with Italian MEPs during his **visit to the European Parliament** on 4<sup>th</sup> February 2014.

This regrettable situation is no longer tenable, taking into account the **unreasonable length of criminal proceedings** in Italy and the principle of the **presumption of innocence**, which makes it even more difficult to accept the high number of people on remand (**pre-trial detention**). In the “**Torreggiani**” (**pilot**) **judgment**, the **European Court of Human Rights (ECtHR)** found that overcrowding in prisons can be considered, in some circumstances, as inhuman and degrading treatment in **violation** of Art.3 of the **European Convention on Human Rights (ECHR)**. It therefore called on the Italian authorities to put in place, by the end of May 2014, a remedy, or a combination of remedies, capable of affording adequate and sufficient redress in such cases. The Committee of Ministers of the Council of Europe will assess later this year (in June 2014) the compliance of measures (to be) undertaken by Italy with this judgment.

## 2. STRUCTURE OF THE NOTE

This note, drafted by the Policy Department taking into account also data provided by the Italian Ministry of Justice, provides **background information** for the **LIBE delegation** to Italy on 26-28 March 2014 on the **situation of prisons**. The note is divided into two parts.

The **first part** is an overview of some initiatives at European level regarding detention conditions: 1) a **resolution of the European Parliament** of 15 December 2011 on the detention conditions in the EU; 2) the **European Commission Green Paper** of 14 June 2011 on the application of EU criminal justice legislation in the field of detention; 3) the **European Commission reports** of 5 February 2014 on the state of play of **implementation of three Framework Decisions** on transfer of prisoners, probation and alternative sanctions, and on the European supervision order.

The **second part** analyses the **situation in Italy** concerning **overcrowding of prisons** and **conditions of detention**, defined by the European Court of Human Rights as inhuman and degrading treatment in some cases. In this context, the ECtHR "**Torreggiani**" (**pilot judgment**) and its consequences are explained. The note covers the **Council of Europe's Committee for the prevention of torture (CPT) report** of May 2012 on Italy. It also refers to (very) **recent Italian legislative developments**, such as the so-called **law "empty prisons"** (legge "svuota carceri") of February 2014, **ongoing parliamentary discussions** on **draft laws** on **amnesty** and **general pardon** (amnistia e indulto) and on the definition of the crime of **torture**. Finally, the note will make reference to the recent (February 2014) **judgement of the Italian Constitutional Court** annulling a law (legge Fini-Giovanardi) which had cancelled the difference in punishments for crimes relating to **"soft" and "hard" drugs**. The effects of these latest developments on the situation of Italian prisons have yet to be determined.

### 3. OVERVIEW OF SOME INITIATIVES AT EU LEVEL ON DETENTION CONDITIONS

#### 3.1 The European Parliament resolution on detention conditions in the EU of 15 December 2011

In its [resolution of December 2011](#), the European Parliament recognised that “whereas detention conditions and prison management are primarily the responsibility of Member States”, “shortcomings, such as prison overcrowding and allegations of poor treatment of detainees, may undermine the trust which must underpin judicial cooperation in criminal matters based on the principle of mutual recognition of judgments and judicial decisions by EU Member States”. **The Parliament called “on the Commission and EU institutions to come forward with a legislative proposal on the rights of persons deprived of their liberty**, including those identified by the EP in its resolutions and recommendations, and to develop and implement minimum standards for prison and detention conditions, as well as uniform standards for compensation for persons unjustly detained or convicted”. The MEPs called “on the Member States to  **earmark appropriate resources for the restructuring and modernisation of prisons, to protect detainees' rights, to successfully rehabilitate and prepare detainees for their release and social integration**”. The Parliament also called “on the Member States to ensure that **pre-trial detention** remains an exceptional measure to be used under **strict conditions of necessity and proportionality and for a limited period of time**, in compliance with the fundamental principle of presumption of innocence and of the right not to be deprived of liberty”.

#### 3.2 The European Commission Green Paper on the application of EU criminal justice in the field of detention of 14 June 2011

In **June 2011**, the European Commission adopted a [Green Paper](#) recognising that “detention conditions can have a direct impact on the **smooth functioning of the principle of mutual recognition of judicial decisions**. Pre-trial detainees and convicted prisoners alike are entitled to a reasonable standard of detention conditions. Prison overcrowding and allegations of poor treatment of detainees may undermine **the trust that is necessary to underpin judicial cooperation within the European Union**”. The European Commission stressed that “a number of mutual recognition instruments are potentially affected by the issue of detention conditions: the instruments in question are the Council Framework Decisions on the European Arrest Warrant, the transfer of prisoners, mutual recognition of alternative sanctions and probation and the European Supervision Order”. The following paragraphs of the Green Paper explain the **relationships between the EU and ECHR rules regarding these sensitive matters**: “The [Charter of Fundamental Rights](#) of the European Union (EU Charter) sets a standard with which all EU Member States must comply when implementing EU law. The **European Court of Human Rights (ECtHR)** has ruled that unacceptable detention conditions can constitute a violation of **Article 3 of the European Convention on Human Rights (ECHR)**. Article 4 of the EU Charter is worded identically to Article 3 of the ECHR, these two provisions have the same scope and meaning. Article 19(2) of the EU Charter also states that no one may be handed over to a State where there is a serious risk that the person concerned would be subjected in particular to inhuman or degrading treatment. Despite the fact that the law and criminal procedures of all Member States are subject to ECHR standards and must



comply with the EU Charter when applying EU Law, there are still doubts about the way in which standards are upheld across the EU”.

### **3.3 The European Commission reports of 5 February 2014 on the state of play of implementation of three Framework Decisions on transfer of prisoners/probation and alternative sanctions/European supervision order**

On 5 February 2014, the **European Commission** adopted a [report](#) **examining the implementation of three separate EU Framework Decisions** covering: 1) the transfer of prisoners, 2) probation and alternative sanctions, 3) the European Supervision Order. The three EU Framework Decisions enable prison sentences, probation decisions or alternative sanctions and pre-trial supervision measures to be executed in an EU country other than the one in which the person is sentenced or awaiting trial. This may be the country of nationality, habitual residence or another EU country with which the person has close ties. The rules, agreed between 2008 and 2009, should have been implemented by 5 December 2011 (1), 6 December 2011 (2) and 1 December 2012 (3) respectively. However, these common rules on matters related to detention, adopted unanimously by Member States, have been **implemented only in around half of the EU 28 countries**. The Commission has urged all the Member States which have not yet done so to take swift measures to implement these EU laws fully. As of 1<sup>st</sup> December 2014 (at the end of the transitional period concerning measures adopted under the former third pillar), the Commission will be able to launch infringement proceedings. The late or incomplete implementation by several Member States is **particularly regrettable** as the Framework Decisions have **the potential to lead to a reduction in prison sentences** imposed by judges on non-residents. **This could serve to reduce prison overcrowding** and thereby **improve detention conditions**, but also allow for savings in national prison budgets. **Italy has transposed into national legislation only the Framework Decision on transfer of prisoners.**

## 4. THE SITUATION IN ITALY CONCERNING OVERCROWDING OF PRISONS AND CONDITIONS OF DETENTION – LATEST LEGISLATIVE AND JURISPRUDENTIAL DEVELOPMENTS

### 4.1 The ECtHR “Torreggiani” pilot judgment

The case “[Torreggiani and Others v. Italy](#)” deals with the issue of **overcrowding** in Italian prisons. The applicants alleged that their **conditions of detention** in Busto Arsizio and Piacenza prisons amounted to inhuman and degrading treatment. On 8 **January 2013**, the **European Court of Human Rights** held that there had been a **violation of Article 3** (prohibition of inhuman or degrading treatment) of the ECHR. It found that the applicants’ **living space** had not conformed to the standards deemed to be acceptable under its case-law. The ECtHR pointed out that the standard recommended by the European **Committee for the Prevention of Torture (CPT)** in terms of living space in cells was **4 sq. m per person**. The shortage of space to which the applicants had been subjected had been exacerbated by **other conditions**, such as the lack of hot water over long periods, and inadequate lighting and ventilation in Piacenza prison. All these shortcomings, although not in themselves inhuman and degrading, caused **additional suffering**. While there was no indication of any intention to humiliate or debase the applicants, the Court considered that their conditions of detention had subjected them – in view of the length of their imprisonment – to hardship of an intensity exceeding the unavoidable level of suffering inherent in detention.

**Under Article 46** (enforcement of the Court judgments) of the Convention, the Court further called on the Italian authorities **to put in place, within one year, a remedy** or combination of remedies providing redress in respect of violations of the Convention resulting from overcrowding in prison. In particular, the Court called on the Italian authorities to follow the [Recommendations](#) of the Committee of Ministers of the Council of Europe on the use of **remand in custody** and to set up a system of **remedies** having both a **preventive and a compensatory effect** (i.e., remedies aiming at preventing any further violation of the human rights of the detainees and at compensating them for violations which already occurred). According to the Court, **existing national judicial remedies are not effective**.

The ECtHR “Torreggiani” **judgement** became **definitive in May 2013**; therefore **the deadline set to the Italian authorities will elapse at the end of May 2014** (in approximately two months). In this case, the Court decided to follow the **pilot-judgment procedure** in view of the growing number of persons that could be potentially concerned in Italy. Such a procedure allows the ECtHR to clearly identify the **existence of structural problems** underlying the violations and to indicate specific measures or actions to be taken by the respondent State to remedy them. The structural nature of the problem was confirmed by the fact that **several hundred applications were currently pending before the Court** raising the issue of the compatibility of the conditions of detention in a number of Italian prisons with Article 3 of the Convention. The ECtHR ruled that **the examination of applications dealing solely with overcrowding in Italian prisons would be adjourned** until one year after the judgment became final (May 2014), pending the adoption by the domestic authorities of measures at national level. The Court held that Italy was to pay to the applicants around **100,000 EUR** in respect of **non-pecuniary damage**, in addition to costs and expenses. In case of **non-compliance** with the

measures requested by the ECtHR by the deadline (27 May 2014), Italy will have to **pay further** compensations.

On **6 March 2014**, at a meeting of the Council of Europe **Committee of Ministers** (in charge of examining the state of **implementation of ECtHR judgements**), [the Deputies recalled](#) that in response to the Torreggiani pilot judgement **the Italian authorities “must put in place, by 27 May 2014, a remedy** or combination of remedies with preventive and compensatory effect affording adequate and sufficient redress in respect of Convention violations stemming from overcrowding in Italian prisons”. The Deputies “expressed concern that **the remedy under consideration is only compensatory and only available in limited circumstances**”. They “noted however that **further information is needed** in order to understand the scale of overcrowding in Italian prisons and assess the effectiveness of the measures taken, in particular on how the total capacity of the prison establishments is calculated, monitoring carried out on detention conditions, **up-to-date statistics** on the reduction of the prison overcrowding and details on the impact of the different measures adopted so far, along with **a timetable for the measures planned**, and invited the authorities to provide a **consolidated action plan** with this outstanding information, so that it can be fully assessed”. The Deputies will **resume examination** of this case **in June**.

## **4.2 The Council of Europe Committee for the prevention of torture (CPT) report on Italy of May 2012**

Italy is a party to the 1987 Council of Europe [Convention for the Prevention of Torture](#). In accordance with its article 1, the **Committee for the Prevention of Torture (CPT)** regularly examines the treatment of persons deprived of their liberty through country visits and publishes **reports**.

In its [2012 Report on the visit to Italy](#), the CPT described the situation of persons held in police custody (after a *fermo* or *arresto*, i.e. temporary arrest prior to its confirmation by a judge), of foreigners in pre-return detention, and of detainees accused or convicted of crimes held in ordinary prisons and in mental health hospitals.

The **CPT recommended** that Italy should foresee **torture as a separate crime** in its national legislation, not to be subjected to a statute of limitation. It found that ill-treatment of prisoners was rare, but recommended more **training of police officers** on the need to avoid unnecessary use of force. Since **prisons overcrowding** had risen to a level of 45%, it welcomed Italy's efforts to solve the problem (in particular, through the construction of new prisons and the increase in the application of non-custodial measures) and recommended that Italy should continue on the path taken. It also recalled that prisoners in multi-occupancy cells should have **at least 4 sq. m of living space** each and that they should be offered a programme of activities, including work and vocational training opportunities. It also examined the situation of prisoners in the **41-bis regime** (a high security regime for persons convicted for particularly serious crimes, such as *mafia* crimes or terrorism, which aims to ensure that they cannot keep contact with the criminal network they belong to), and called on Italy to adopt some limited reforms to such regime. Finally, it encouraged Italy to improve the situation in **psychiatric establishments**, particularly by ensuring adequate staffing and clearer rules on seclusion.

### 4.3 Italian laws and regulations on the prison system

The basic provisions are the **Penitentiary Act** ([Law n.354/1975](#)) and the **Regulations of enforcement** (DPR n. 230/2000). Within the Ministry of Justice, the **Department of Penitentiary Administration** (Dipartimento Amministrazione Penitenziaria – DAP) is the relevant service dealing with prisons.

In Italy there are **206 prisons**, which have [different names](#), depending on their structure and type of prisoners hosted: carcere or istituto penitenziario, casa mandamentale, casa circondariale, casa di reclusione or casa penale, ospedale psichiatrico giudiziario (for detainees with mental health problems), istituto penale minorile (for juveniles), etc.

[Article 27](#) of the **Italian Constitution** states that “**Punishments shall not consist of treatments against the sense of humanity** and shall be aimed at the **re-education** of the sentenced person”, thus stressing the **principle of the rehabilitative purposes** of punishments. In this context a variety of actors (social workers, prisons’ directors and staff, penitentiary police, Ministry of Justice/DAP and supervisory judges) are involved in the rehabilitation-related treatment of prisoners.

It is worth mentioning the existence in Italy of the [Charter of Prisoners’ and Internees’ Rights and Duties](#) which has also been translated into several foreign languages. The document contains clear and simple information in order to ensure a wider exercise of the rights of prisoners and a greater awareness about the rules regulating their life in Italian prisons.

Another element to be mentioned is the new prisons’ structure being put in place by the Italian authorities: the “**prisons’ plan**” (piano carceri/edilizia carceraria) that foresees 12.000 new detention’s places (5.000 already delivered in 2012-2013).

The Department of Penitentiary Administration carried out a **review of the prison circuits** to ensure the distribution of prisoners on the basis of their dangerousness, of the length of their sentences and of the principle of territoriality and the right to family relationships, in order to ensure best observation and tailored treatment. A **more rational distribution of prisoners** will also allow a more effective use of spaces. All the workers will give their contribution to security in prisons together with Penitentiary Police staff and, at the same time, Police will play a role in all treatment activities. Article 6 of the Penitentiary Act defines the cell as a place to stay overnight. Italy has announced its intention to create “**open prisons**” for medium security prisoners where inmates’ life will take place outside the cell, so as to create the conditions for a prison treatment in accordance with **humanity standards and dignity**. The penitentiary agent, together with the educator, the psychologist, the doctor, the teacher, the chaplain, and volunteers will have a direct relationship with the inmate. The control will be based on the idea of “**dynamic surveillance**”.

According to the Italian Penitentiary Act, “**Supervisory Judiciary**” (Magistratura di Sorveglianza) is a jurisdictional body which **supervises the enforcement of the sentence** in compliance with the law, ensures that the law is respected and has the power to adopt measures to eliminate violations of rights. Supervisory Offices in Italy have effective powers of control on life conditions in penal institutions. The Department of Penitentiary Administration has recently promoted regular meetings with Supervisory Judges to develop lines of understanding and cooperation, in particular to provide agreed procedures to speed up **admission to alternative measures**. A form of close cooperation

with the offices of the Supervisory Judge deals with critical events, which are the expression of a particular discomfort, such as **self-harm, suicide attempts and hunger strikes** – in these cases the Supervisory Judges may postpone the execution of the sentence. As a result of these interventions, the DAP has measured a decrease in self-harm, a considerable **drop in cases of suicide** (63 during 2011) and a reduction of aggression.

Supervisory Judges, in full cooperation with the probation services (external Execution Offices), are responsible for the **adoption of measures alternative to detention**, provided for by Italian law after a final prison sentence is given or after a period of execution of a prison sentence. Among measures alternative to detention (post-trial) we can quote: assignment of the offender to the **probation service**, special probation for drug addicts or alcoholics, **home detention**/house arrest, **semi-liberty, conditional release and early release**. Supervisory Judges also decide on all the **general penitentiary benefits** that can be granted to the persons who have been sentenced, such as leaves, leave for good conduct and permission to work outside prison.

#### **4.4 Some data on overcrowding in prisons and detention conditions in Italy**

According to the **Council of Europe (CoE) [2011 penal statistics survey](#)** (SPACE), **prison overcrowding** is a common problem for the European penitentiary administrations, including the Italian one. The collected data, related to 2011, show how in the 47 CoE Member States prisons are used at the top of their capacity, holding an **average of 99,5 detainees for 100 places**. After Serbia (157,6) and Greece (151,7), **Italy** is the CoE country with the **greatest prison overcrowding: 147 detainees for 100 available places**. In relation to prisons' overcrowding, in 2010 the Italian Government declared a **[state of emergency](#)**, which lasted until the end of 2012. Italy moreover, after Ukraine and Turkey, is the country with the **highest number of inmates in pre-trial detention**, almost 21%. As already indicated earlier in this note, the European Court of Human Rights, in the **pilot judgement in the Torreggiani case**, adopted on 8 January 2013, asked Italy to solve the structural problem of overcrowding.

**Data** provided by the **Italian Ministry of Justice** show a **constant decrease** of the total **number of prisoners: from 69.000 in 2010** to 64.333 in October 2013, 61.449 on 31 January 2014, 60.828 on 28 February 2014 and **60.509** on 17 **March 2014**.

As regards **pre-trial detainees**, they decreased from 30.549 in 2009 to 24.744 - in October 2013, 12.348 of them are awaiting first degree trial.

The above-mentioned decrease in the number of prisoners can be explained by a **variety of factors**, such as: 1) a total of 3.178 **new** (prison/bed) **places** in 2013 with further 6.700 expected to be available by the end of May 2014; 2) measures affecting criminal sanction system (**de-penalization**); 3) measures affecting penal procedures (**reduction of remand in custody**); 4) increase in access to **alternative measures**. Furthermore, we can add two **very recent** (both dated February 2014) **legislative and jurisprudential developments** (law "empty prisons" and Constitutional Court judgement on soft/hard drugs, to be explained in the following sections of this note).

If such a positive trend is confirmed, **in a few months** the total number of prisoners could go down **below the threshold of 60 thousand**, which is in any case well **above the regular capacity of the Italian system**, which was **47.599 places in October 2013**.

The peculiarity of the Italian system is not only overcrowding. There is a significant presence of **foreign prisoners**, a very high number of **pre-trial prisoners** and a high presence of members of criminal organizations. According to data of June 2013, **37,34%** of the **prisoners are in pre-trial detention**, and 18,78% out of them are waiting for a first judgement (the Italian judicial system provides for three levels of judgement before receiving a final sentence, which obviously makes the trial very slow). **24%** of prisoners are **drug-addicts**. **30%** of the prisoners have **psychiatric problems**. Moreover, one specific problem in Italy is the high number of **members of criminal (mafia-related) organizations** (10,50%). In fact, there are about six thousand (6.758 at 30 June 2013) prisoners under high security regime, for crimes connected with mafia-type criminal associations. In addition, as of 16 September 2013, there are seven hundred prisoners under the special maximum security regime, provided for by article 41bis of the Penitentiary Act. **35%** of the prison population is composed of **persons coming from other countries**.

**Prison overcrowding** is not only the result of rising crime rates or improved effectiveness in investigating crimes and sanctioning perpetrators. The problem is also related to the excessive **length of proceedings**, the subsequent **pre-trial detention** and the **lack of investment in non-custodial measures**. In this sense, solving the problem of an effective prisoners' treatment involves the Legislator, the Judges and the Prison Administration in the same way. **Overcrowding** negatively affects the quality of life within prisons in terms of: 1) deteriorating **health and sanitary conditions**; 2) growth of internal **security problems**; and 3) difficulty in achieving an effective **rehabilitation** treatment. It is important to underline that the fight against **overcrowding in prisons** is not only a matter of achieving **better material conditions**, but also of **giving offenders** good and **human conditions** while respecting their **dignity**, with a view to achieving an effective **rehabilitation and reducing the risk of recidivism**, with certain positive consequences in terms of increased social security.

#### **4.5 Ongoing parliamentary discussions on draft laws on amnesty and general pardon (amnistia e indulto)**

The Italian **Parliament** is **currently examining some [draft laws](#)** regarding **amnesty** (amnistia) and **general (collective) pardon** (indulto). These are **clemency** measures with retroactive effects. These measures are of **general nature**, unlike the pardon (grazia) which is granted by the President of the Republic to individuals under specific circumstances. Amnesty and collective pardon are **controversial** measures, which are provoking **harsh debates** (due to ethical and moral reasons) within the Parliament (where they will have to be approved under a special legislative procedure) and the general society. Amnesty affects the crime/offence, while the general/collective pardon affects the sentence. The **last amnesty** was approved in Italy **in 1990**, while the **last general/collective pardon** was approved **in 2006** (in the latter case, serious offences were excluded). As a consequence of the general/collective pardon (indulto), in the period 2006-2011 approximately **28.000 detainees left prisons** in Italy (the majority, approximately 25.000, during the first year). It has however to be recalled that in the same period (2006-2011), **approximately 12.500 (half of those who had been released)**

**people returned to prison.** This will have to be taken into account during the forthcoming debate concerning the appropriateness and usefulness of **amnesty** (amnistia) and **general (collective) pardon** as necessary means to fight prisons' overcrowding.

#### 4.6 Ongoing parliamentary discussions on a draft law on the definition of the crime of torture

According to the **Italian Constitution** (Art. 13), "any act of physical and moral violence against a person subjected to restriction of personal liberty shall be punished."

However, up until now, acts of **violence against detainees** are only punishable as **ordinary crimes** (through the ordinary provisions on assault and infliction of bodily harm - articles 581 ff. of the criminal code), albeit aggravated if committed by a public officer or with cruelty (art. 61 n. 4 and n. 9). Moreover, as recalled by the CPT, prosecution only takes place *ex officio* (absent a complaint by the victim) if the prognosis of recovery for the assault is over 20 days. Over the years, the CPT and the [UN Committee against Torture](#) have called on Italy to introduce **a specific crime of torture**. Draft legislation has been presented and discussed several times, but up until now it was never adopted.

However, on 5 March 2014, the Senate approved (with 231 votes in favour, 3 abstentions, and no vote against) a **draft law on torture** and transmitted it to the Chamber. The [bill](#), if adopted, will introduce in the Criminal Code a specific **crime of torture**: the offence, which may be committed **by anyone** (being a public officer is an aggravating factor, not a constitutive element of the crime), is punishable with imprisonment between **3 and 10 years** (lifelong imprisonment is foreseen if the victim dies). Additionally, the bill foresees the criminalization of whoever instigates a public officer to commit torture, the exclusion of evidence obtained by torture from use in criminal trials (except in trials against the torturer), and a clear rule on *non-refoulement*.

#### 4.7 February 2014 changes in the law on drugs

According to [recent data](#), in 2011, **41% of the persons detained** in Italian prisons had been convicted **for drug-related offences**. Thus, changes in the law on drugs are likely to greatly affect the situation in the prisons.

On 25 February 2014, the **Italian Constitutional Court** adopted its judgment n. [32](#), concerning a law decree (so-called "Fini-Giovanardi") that had amended the national law on drugs (DPR 309/1990) eliminating the difference in punishments for offences concerning **"soft" and "hard" drugs**. The constitutional judgment quashed the amendments on procedural grounds, since the original law decree (an instrument to be used in urgent cases) did not concern the criminal legislation on drugs, and its amendment was actually not urgent.

The effects of this judgment on the Italian penitentiaries are yet unclear: indeed, the situation is very complex and gives rise to [several problems](#) (for instance, the Court of Cassation is still debating whether, when a judgment of unconstitutionality does not concern a crime but merely reduces the maximum sentence, it is possible to re-determine the punishment after the sentence has become final and binding). However, the decision

has reintroduced a distinction between crimes (such as producing, selling or receiving) concerning **"hard" drugs**, which are now punishable with imprisonment between **8 and 20 years**, and **"soft" drugs**, now punishable with **2 to 6 years** imprisonment: previously, all cases led to imprisonment for 6 to 20 years. Thus, sentences might need to be re-determined, and many detainees convicted for offences relating to "soft" drugs might be released. Moreover, future convictions for drug-related offences will be, on average, shorter, which will also contribute to reduce prisons' overcrowding.

In addition, the law *"svuota carceri"* adopted in February 2014, and examined below, also amends the legislation concerning drugs. In particular, it introduces a new, mitigated crime for less serious cases (*casi di lieve entità*), for which the maximum penalty is 5 years of imprisonment. This provision thus also allows for the infliction of lower penalties for drug-related crimes.

## 4.8 The so-called law "empty prisons" (legge "svuota carceri") of February 2014

In December 2013, in reaction to the "Torreggiani" pilot judgment, the Government adopted a law decree, which was converted into [law n. 10/2014](#). The decree's two main aims are: to **reduce the rate of overcrowding** in the national prisons, and to create a system of **preventive and compensatory remedies**, as requested by the ECtHR.

### 4.8.1. Measures to reduce overcrowding

**Special early release** (*liberazione anticipata speciale*): this temporary provision allows **deducting from the sentence a total of 75 days for every 6 months** that the detainee spends in prison, in the case of good behaviour. According to the [Ministry for Justice](#), this should allow supervisory judges to order the immediate release of around 1.700 detainees, if their behaviour is considered to be good.

**Probation** (*affidamento in prova*): supervisory judges may order probation for detainees who (still) have to serve **up to 4 years of imprisonment** (the limit used to be 3 years before the new decree), if they consider that the measure can serve to re-educate the person and to prevent the risk that he commits new crimes.

**Special probation** (*affidamento in prova in casi particolari*): detainees who are addicted to drugs or alcohol may be granted **therapeutic probation** (where the probationary period is to be spent in a rehabilitation centre) several times; the previously existing rule, according to which such probation could only be granted twice, has been cancelled.

**Home imprisonment** (*esecuzione presso il domicilio della pena detentiva*): the provision according to which **sentences up to 18 months of imprisonment may be served at home**, introduced in 2010 as a temporary measure, has been confirmed and becomes a permanent measure. According to the Ministry for Justice, since its introduction, this measure had allowed the release of around 12.000 detainees.

**Expulsion as an alternative to detention for third-country nationals** (*espulsione come misura alternativa*): the requirements for this measure, which is applicable to third-country nationals sentenced to up to 2 years' imprisonment, become less stringent;



moreover, such persons are to be identified during their imprisonment, so as to reduce the need to keep them in pre-return detention once released.

**Electronic surveillance devices** (*braccialetto elettronico*): home arrest and home detention of suspects and convicted persons is always to be ordered together with their electronic surveillance, unless this is considered unnecessary, provided that the relevant devices are available.

#### 4.8.2. A new system of remedies

The law decree also implements the recommendations of the ECtHR in the Torreggiani case as regards remedies for violations of prisoners' human rights. The decree amends the Penitentiary Act, reforming the pre-existing "generic" type of remedy (a general means of recourse, administrative in nature, which allows detainees to complain about their detention conditions) and introducing a new, truly jurisdictional, remedy.

The **jurisdictional remedy** (*reclamo giurisdizionale*) had actually been introduced by the Italian Constitutional Court (judgment [26/1999](#)); however, in practice, decisions taken by the surveillance judge could be disregarded by the penitentiary administration (as stated by the ECtHR in Torreggiani and by the Constitutional Court, judgment [279/2013](#)).

The new provision allows detainees to file a claim to the surveillance judge to **appeal against disciplinary measures** taken by the penitentiary administration, or against violations of the penitentiary law or the enforcing regulations by the administration, in case they give rise to a **serious and present infringement of their rights**. These claims are tried following a special jurisdictional procedure (supervisory proceedings) and lead to the adoption of **an order** on the part of the supervisory judge.

Should the order not be enforced by the administration, the detainee can open a **compliance procedure**, at the end of which the supervisory judge may: **order the execution of its decision** (if necessary, also by appointing an enforcement agent – *commissario ad acta*); **declare acts** adopted by the penitentiary administration to be **null and void**; or **order payment to the detainee** to compensate the violation.

In addition, the "generic" remedy has also been amended. This procedure allows detainees to complain about their detention conditions, i.a., in front of the newly established **Garante nazionale dei diritti delle persone detenute**. This sort of national Ombudsperson for detainees is composed of three persons appointed by decree of the President of the Republic and has a right to visit all types of detention centres and to make recommendations to the public administration.

## CONCLUSIONS

**Prison overcrowding** is not only the result of higher crime rates or improved effectiveness in investigating crimes and sanctioning perpetrators. The problem is also related to the **excessive length of criminal proceedings** and the **subsequent pre-trial detention** and, above all, it is related to the **insufficient use of non-custodial measures**.

It is important to underline that the fight against **overcrowding in prisons** is not only a matter of achieving **better material conditions**, but also of **giving offenders** good and **human conditions** respecting their **dignity**, with a view to achieving an effective **rehabilitation**, thus **reducing the risk of recidivism** with certain positive consequences in terms of increased social security.

**The use of alternatives to prison** is one of the most effective and constructive ways to **prevent** and reduce **re-offending** and to **promote prisoners' rehabilitation**, providing the detainee with planned, assisted and supervised reintegration into the community. The statistical data on repeat offenders give us extremely relevant information. Persons serving their sentence entirely in prison have a probability of relapse between 65% and 75%, compared with a recurrence rate of between 20% and 30% for those who have access to an alternative measure. The reasons why this happens are clear: those who undergo an alternative measure (especially in probation) have a treatment program that develops under the control of the Supervisory Judge, which allows a gradual reintegration into society through a process of vocational training or work, which naturally leads to a reduction in the risk of relapse into crime.

In accordance with the principles set out by the Council of Europe and the European Union, Member States' **criminal legislation should provide:**

- 1) **non-custodial sanctions** for less serious crimes,
- 2) the adoption of measures to reduce the **length of prison sentences**,
- 3) a greater recourse to the institution of **conditional release** (parole),
- 4) penal **mediation** and **restorative justice**,
- 5) an efficient **supervision during the execution of prison sentences** which adequately prepares reintegration into society and prevents the possibility of recurrence.

In this context, the **following issues can be raised and deserve careful analysis:**

**--- What are the measures being undertaken by the Italian authorities to comply with the "Torreggiani" pilot judgement? Will the deadline set by the European Court of Human Rights be met?**

**--- To what extent will recent legislative and jurisprudential developments, which have been reviewed in this note, make a contribution towards a positive solution of the emergency concerning prisons' overcrowding in Italy?**



DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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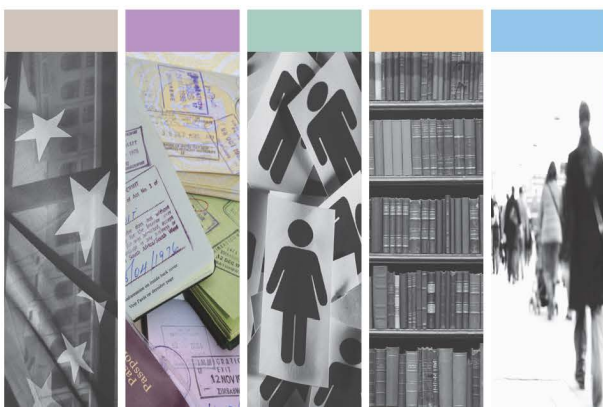
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