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Sezione Provincia di Firenze
Atto dirigenziale n. 363 del 5/2/2003

To the attention of:
Committee of Ministers of the Council of Europe

Copy to:
Department for the Execution of Judgments of the ECtHR
Directorate General of Human Rights and Rule of Law
Council of Europe

Communication in the case of *Torreggiani and Others against Italy* (Application No. 43517/09)

Introduction and scope of the report

In fulfilment of the requirements of the pilot judgment (*Torreggiani v. Italy*), Italy introduced articles 35bis and 35ter in its penitentiary law (Law n. 354/1975), which foresees both a preventive and a restorative remedy for violations of prisoners' rights.

As a matter of facts these two remedies (the so-called "Italian model") have been recently ratified in the *Stella v. Italy* decision. They have been indicated as a possible way of dealing with the issue of endemic overcrowding and systematic violations of the material condition of detention, in the subsequent Pilot Judgments (*Neshkov v. Bulgaria*, §§ 282 and 286, *Varga v. Hungary*, § 105).

The aim of our report is to argue that these remedies are, on the contrary, largely ineffective. This is due, primarily, to the legal drafting and the procedure and implementation system provided for by the law. Secondly, the effectiveness of the said remedies has been deeply affected by the decisions of the Italian Surveillance Courts and, partly, of the Civil Courts too.

Our analysis is supported by three sources of empirical evidences:

1) the legal cases that our NGO, L'Altro Diritto, has followed since the introduction in the Italian legal system of Articles 35 bis and ter;

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2) the monitoring activity and the empirical research conducted within the EU Justice Project "Prison Litigation Network", a European research project aimed at assessing the implementation of the ECtHR's decisions at a domestic level;

3) the data about the applications under article 35 ter provided by the Italian Prison Administration (DAP), within the above mentioned project.

It is worthwhile to spend a few words on the reliability and coverage of this data. The statistical office of the penitentiary administration did not collect systematically data about compensatory remedy's applications, proceedings and final decisions. The Section on Judiciary Applications of the penitentiary administration asked the Regional offices of the same administration for the data that they possessed. Every regional office sent different data, collected in different ways and relating to different periods (some regions sent data referring to the situation until June, others until the end of September). Thus, the collection of data was very unsystematic and more descriptive of a trend than "scientific".

The more reliable data seem to be those related to the number of positive decisions (a bit less than one thousand cases), because the conviction of the Administration is always notified. The number of inadmissibility decisions (more than 12,000, about 50% of all applications) is not very reliable: often the Regional offices have communicated just the decisions that, in their opinion, could result in an appeal from the applicant. So, in many cases in which the application was declared inadmissible because totally unfounded, the inadmissibility decision could have not been notified to the central office. As a result the number of inadmissibility decisions is probably underestimated.

Anyway we think that the number of applications communicated to the office (more then 23,000, which corresponds to around one third of the prisoners at the time of the Torreggiani judgment) is significant. This data alone is able to prove that, according to the Italian prisoners, overcrowding was a real structural problem, as the ECtHR affirmed in the Torreggiani pilot judgment.

The fact that just one thousand applications has been successful seems instead to demonstrate that this perception was not shared by the Italian surveillance judges. Moreover, we know that in Tuscany prison administration appealed against many of the decisions upholding the complaints of the prisoners. We can conclude that even the penitentiary administration seems to think that overcrowding was not a structural problem.

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On the effectiveness of the Preventive remedy (Article 35 bis Penitentiary law)

One of the most critical aspects of the Italian preventive remedy appears to be the incompatibility of the urgent nature of the remedy with the length and complexity of the procedure . This is all the most true considering that judges do not have a deadline to deliver a decision on Article 35 bis applications.

According to the text of Article 35 bis, the Surveillance judge, once a violation is found, has the power to pronounce a binding order, to start a compliance procedure, to annul the administrative act or behaviour, but he/she has not the power to implement his/her own precautionary order as in the ordinary civil procedure. The judge must appoint an *ad acta* commissioner.

The wording of Article 35 bis clearly indicates that this procedure can be appealed to the Supreme Court (Corte di Cassazione) with the consequent suspension of the same compliance procedure. The *ad acta* commissioner can be appointed only when the procedure is completed and the decision becomes final. It is not surprising that not a single judgment has been executed so far. Indeed, Article 35 bis does not indicate any urgent precautionary injunction such as in the ordinary administrative procedure, nor any additional sanction in case of non-fulfilment and extra-damage. As a result a preventive remedy and procedure, such as the one provided for by Article 35 bis, may be implemented after more than one year, considering the average length of our Supreme Court procedure. Moreover, it is not clear whether the precautionary decision is binding in ordinary civil liability actions against public officials. Based on our experience, because of this ambiguity, administrations often appeal the Surveillance Court's decisions in order to protect their officials from potential compensatory liability.

The above considerations are related to the drafting side.

On the case law side, the Penitentiary administration has not collected any data on the preventive remedy applications.

We think that for a preventive remedy the question of the time of the decision is extremely relevant.

We do not have official data on this crucial aspect. We can just rely on our experience in four cases of 35 bis applications. The first case of appeals under Article 35 bis filed by L'Altro diritto concerns the inhuman and degrading situation of the female section of the Sollicciano Prison. In March 2015, a number of

Article 35 bis applications were filed to the Surveillance Court claiming a reinstatement of the open regime and the ending of the structural critical hygienic conditions. The Surveillance Court answered after four months declaring the inadmissibility of all of the applications because of the fact that the open regime was reinstated. It is clear that if judges can wait for the ending of the violation, the remedy has no effectiveness.

Afterwards we filed applications under Article 35 bis on behalf of the inmates of three different criminal psychiatric hospitals (Ospedali Psichiatrici Giudiziari, OPG): 58 applications were filed from the OPG of Montelupo Fiorentino, 24 applications from the Reggio Emilia OPG, 28 applications from the Barcellona Pozzo di Gotto OPG. The inmates asked, under the new Law n. 81/2014, to be transferred in special hospitals (REMS) under the control of the Ministry of Health.

In Florence, due to procedural issues (i.e. an error of notification from the part of the Surveillance Court itself) and to a change of the proceeding judge, the hearings were constantly re-adjourned and the decision was rendered only on November 2015 (after 4 months from the filing of the applications). The Surveillance Judge's decision assessed the violation of both the domestic legislation and the Constitution and ordered the Region of Tuscany to transfer the inmates to the REMS, giving a time limit of 3 months to execute the order. The Region of Tuscany (who had not intervened in the proceeding in front of the Surveillance Judge) appealed the decision and the deadline of three months for possibly appointing the *ad acta* commissioner, is consequently suspended and it can remains suspended until the decision of Corte di Cassazione. The appeal by the Region of Tuscany seems to be a protective action of the administration toward its officials. This state of affairs can prolong for a year the unlawful condition of the mentally ill inmates within the OPG of Montelupo Fiorentino.

The Surveillance judge of Reggio Emilia decided on the applications of the local inmates in a shorter but not reasonable time (two months) for a preventive remedy. Instead, we are still awaiting a decision by the judge of Barcellona Pozzo di Gotto, after two months and half from the filing of the applications (as at the end of November 2015).

On the effectiveness of the Compensatory remedy (Article 35 ter Penitentiary Law)

According to art. 35 ter, the jurisdiction for the compensatory remedy is shared between the Surveillance judge (monocratic organ) who has jurisdiction for claims coming from convicted prisoners, and

the Ordinary civil courts (monocratic organ) who have jurisdiciton for claims coming from prisoners on remand and former prisoners.

The Surveillance Judge has the power to grant a sentence reduction in the measure of 1 day for every 10 days spent in a condition that violates Article 3 of the Convention (restitution in kind). In any case of not enough time left to serve, a monetary compensation of 8 euros for every day spent in breach of article 3. This form of equivalent compensation has been repeatedly described by the ECtHR case law as subordinated and as less preferable than the restitution in kind.

Our experience, as well as the finding of the empirical research conducted within the Prison Litigation Network project, shows that this basic principle is potentially affected by the length of the proceeding in front of the Surveillance Judge. Take the case of a prisoner that files his/her application to the Surveillance Court while still in prison and in the course of the proceeding (often due to the length of the procedure itself) ends serving his/her time. According to the law, a former prisoner has to file his/her application to the ordinary Civil Court. At the moment in which the prisoner is freed, the Surveillance Judge is forced to decline jurisdiction. In all cases in which the former prisoner must lodge a new application to the civil judge or the surveillance judge transfers the controversy to the same civil judge, the applicant needs a technical defence in order to adapt the claims to the specific rules of the civil procedure, facing also the ordinary procedural expenses. We think that the same fact that the length of the procedure is able to cause the loss of the remedy of the restitution in kind is clearly in contrast with the constantly re-affirmed favour for the restitution in kind expressed by the ECtHR's case law.

No data on this forced transition from one court to another are available, but we can argue that it has happened in the past, and can happen again in a high number of cases, since no mandatory deadline for the investigation and the decision are imposed by the law to the surveillance judges. This scenario appears to be all the most likely for short term sentence cases or for those cases in which the violation of Article 3 occurred near the end of detention. We can argue that his state of affairs directly affects the effectiveness of the remedy.

Temporary norms and the detrimental condition of prisoners who lodged an application to the ECtHR.

Article 2 of the legislative decree n. 92/2014 provides two temporary norms.

The first one concerns the situation of the former prisoners already released at the time of the entry into force of the law. The norm provides them with a time limit of 6 months from the entry into force of the law itself in order to file an application to the Civil Court.

The second one concerns the situation of prisoners who, at the time of the entry into force of the legislative decree, had already lodged an application in front of the ECtHR. Even in this case, the law provides these prisoners with a time limit of six months in order to file a new application to the domestic courts, unless the ECtHR has communicated a decision on application.

This situation can induce a paradoxical result: the prisoners who claimed their rights, applying to the ECtHR, appear to be the ones deprived of the judicial protection offered by the new remedy. As a matter of fact, the prisoners who are still serving their time at the moment of the entry in to force of the law and who had not lodged any application to the ECtHR have a time limit of 10 or 5 years (according to the interpretative trend considering article 35 ter as a case of liability in contract or liability in tort) to apply under article 35 ter. Instead the prisoners who asked for the protection of the ECtHR found themselves potentially deprived of this remedy. As a consequence, prisoners who applied to the ECtHR and did not re-apply to Surveillance Court on time, found themselves deprived of all *ad hoc* remedies and forced to apply for the ordinary civil compensatory action under article 2043 of the civil code (a remedy already considered in itself not satisfactory by the ECtHR, see Torreggiani vs. Italy).

The necessity of an ongoing violation.

The Italian surveillance judges' case law shows a number of controversial interpretative issues, able to influence the potential effectiveness of the compensatory remedy. One of the main issues appears to be the necessity of an ongoing violation in order to assess the admissibility of the claim under Article 35 ter. This requirement has been initially supported in a technical advice drafted by the Consiglio Superiore della Magistratura (CSM, Odg. 1095 – July 30th, 2014), and it has strongly influenced the case law of the Italian Surveillance Courts.

We can now analyse the situation of the applications of Article 35 ter, in the light of the data collected by the prison administration. These data, notwithstanding their precarious reliability, are able to offer picture of the general tendency of the Courts on this issue. According to these data, as of October 13th 2015, more than 23,000 inmates applied to the Surveillance Court, but only in some 5,000 of these cases was

the administration notified in order to take part to the proceeding. The reason for the paucity of cases in which judges have started the proceeding can be found in the large number of applications declared "inadmissible" (around 80% of the cases) or "non suitable" (about 5%).

According to the legal office of the penitentiary administration, in many cases, the application was judged "generic". The lack of a proper technical assistance by a lawyer or an NGO can explain this outcome. From the data, we can argue that in most cases applications were rejected because the violation was not ongoing at the time of the decision. This conclusion is based on the fact that out of more than 23,000 applications, only some 12,000 were alleging an ongoing violation, and a little more than 12,000 were declared inadmissible. The only equation that these data allow us to do it is: 23,000 less 12,000 equals 11,000… The cases in which an ongoing violation was not alleged seems to be exactly those declared "inadmissible" .

According to our experience only the majority of the surveillance judges of four regions (Puglia, Tuscany, Emilia Romagna and Sicily) are accepting applications coming from prisoners that aren't in a situation of ongoing violation, whereas the majority of the judges of all the other regions are declaring their inadmissibility. And this is just a general trend, since in some Regions, individual judges may differs from the majoritarian trend of their office.

Concerning the problem of the time of the violation, the Italian Supreme Court the same day issued two schizophrenic decisions, giving opposite solutions to the problem. In decision No. 43722 11/6/2015, the Court has criticized the norm's drafting technique and has supported a systematic interpretation according to which the existence of an ongoing violation cannot be a requirement for the access to the remedy. In another decision of the same day (No. 43727), the same First section of the Court, with the same president but a different drafter, has affirmed the contrary that the main requirement for the access to remedy has to be an ongoing violation.

A subsequent decision by the Supreme Court[1] intervened confirming the first interpretation (ongoing violation not necessary). It is worth noting, nevertheless, that this decision has again been delivered by a simple section and not by the joint sections of the Supreme Court and therefore does not guarantee any change in the majoritarian interpretative trend.

General ineffectiveness of the remedy.

[1] Corte di Cassazione, n. 2224, 26/11/2015.

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Putting together the data of the prison administration, in some 1,100 cases the application has been upheld. Those cases have provided an average compensation of euro 215 per inmate and an average sentence reduction of 54 days per inmate.

In those 1,100 cases, the surveillance judges found a violation of Article 3 of the Convention due to overcrowding for an average time of 540 days each. This data in itself is able to show the ineffectiveness of the remedy provided by article 35ter. According to the ECtHR's decision in the Torreggiani case, the overcrowding in Italy was structural. As we said at the beginning, the number of applications of prisoners under art. 35ter and the about 12,000 applications alleging an ongoing violation clearly confirm this statement. This mismatch between the situation denounced by the ECtHR and prisoners and judges' decisions mainly depends on the fact that in about 80% of the cases, national courts have not verified a violation of Article 3 of the Convention but have declared the application "inadmissible" on the ground that the violation was not ongoing at the time of the decision.

An example of the unwillingness of some surveillance judges to deal with the compensatory remedy are the cases in which the judges decline jurisdiction to decide on the restitution in kind when the applicant is serving a non-detention measure. In our opinion, these decisions are clearly incorrect, and we wish that the Corte di Cassazione will have the opportunity to make this clear. The Act introducing the remedy said that the surveillance judge has no jurisdiction on "those who have finished to serve their time in prison", but whoever is serving an alternative measure has not "finished to serve their time in prison": for example, he/she can be sent back to prison for violation of a prescription of the measure.

On the issue of prisoners serving a life sentence and non-imputable people serving a security measure.

The compensatory remedy, being based primarily on a sentence reduction, raises a number of critical issues regarding the cases of prisoners with an indeterminate conviction.

The first case concerns prisoners serving a life sentence. On this issue, the Surveillance Judge of Padua has filed an application to the Italian Constitutional Court. The Surveillance judge argued for the unconstitutionality of Article 35 ter based on the fact that the remedy discriminates the lifers with respect to the compensatory protection. This application is still pending before the Italian Constitutional Court.

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The second case concerns non-imputable inmates serving a security measure. In this case, also, there is no fixed term for the security measure, since it ends when the person is no longer considered socially dangerous by the Surveillance Judge. Therefore, the measure appears to be indeterminate thwarting the application of the compensatory remedy.

Conclusion

In light of the above-mentioned facts and considerations, we argue that the remedies introduced in Italy in order to comply with the assessment of the ECtHR in the Torreggiani pilot judgment have proven largely ineffective and are not able to offer a proper protection to cases of violation of Article 3 of the Convention.

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