JUDGMENT NO. 279 YEAR 2013

In this case the Court considered a referral order questioning a provision of the Criminal Code which only allowed for the deferred enforcement of sentences in the closed list of cases specified, whereas in the cases before the lower courts a deferral was claimed to be necessary on the grounds that enforcement would occur under conditions contrary to human dignity (due to prison overcrowding). The Court rejected the questions as inadmissible, finding that to allow deferred enforcement on the grounds of prison overcrowding would be to differentiate between prisoners in an arbitrary manner. Whilst both preventive and compensatory remedies were necessary, it had not been demonstrated that the power sought by the referring courts was essential and was the only instrument available for rectifying the potential breach of constitutional law. However, the Court noted finally that "an excessive prolongation of legislative inertia would not be tolerable, having regard to the serious problem identified in this ruling".

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 147 of the Criminal Code, initiated by the Venice Supervision Court [*Tribunale di Sorveglianza di Venezia*] by the referral order filed on 18 February 2013 and by the Milan Supervision Court [*Tribunale di Sorveglianza di Milano*] by the referral order filed on 18 March 2013, registered as nos. 67 and 82 in the Register of Orders 2013 and published in the Official Journal of the Republic nos. 16 and 18, first special series 2013.

Considering the interventions by the *Unione delle Camere penali italiane* [Union of Italian Criminal Chambers], the association *VOX–Osservatorio italiano sui diritti* [VOX–Italian Rights Monitoring Centre] and the President of the Council of Ministers;

Having heard the Judge Rapporteur Giorgio Lattanzi in chambers on 9 October 2013.

[omitted]

Conclusions on points of law

1.– By two analogous orders, the Venice Supervision Court and the Milan Supervision Court raised, with reference to Articles 2, 3, 27(3) and 117(1) of the Constitution, the last in relation to Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter, ECHR), signed in Rome on 4 November 1950, ratified and implemented by Law no. 848 of 4 August 1955, a question concerning the constitutionality of Article 147 of the Criminal Code "insofar as it does not provide for the option of deferring enforcement of the sentence where this would necessarily occur under conditions contrary to human dignity other than in the cases expressly contemplated thereunder".

According to the referring courts, by excluding deferral of enforcement in such cases, the contested provision violates Article 27(3) of the Constitution on two grounds: first in relation to the prohibition on treatment contrary to human dignity, whereby the treatment covered by the referral order may be classified as such pursuant to Article 3 ECHR, as interpreted by the European Court of Human Rights, which considers treatment to be inhuman or degrading where the person in custody is provided with detention cell space of 3 square metres or less, irrespective of the living conditions otherwise guaranteed in the prison; and secondly with reference to the re-educative goal of punishment, which goal is undermined where a person is imprisoned in “inhuman” conditions because “his restriction to cramped spaces, squeezed together with other people, negates his personal dignity in its entirety, thus relieving him of responsibility and removing a sense of guilt by failing to take the convicted person through the significant process of self-improvement which, by virtue of individually-tailored treatment, enables ordinary social relationships to be re-established”.

The contested provision is also claimed to breach Article 117(1) of the Constitution in relation to Article 3 ECHR, as interpreted by the European Court of Human Rights, which has specified levels of "minimum living space" below which detention may be defined as "inhuman or degrading treatment".

Finally, Article 147 of the Criminal Code is claimed first to violate Articles 2 and 3 of the Constitution, as human dignity must be regarded as an inviolable right (which is a "prerequisite laid down by Article 27 of the Constitution") and secondly, also in the light of the experience under other legal systems, is alleged to undermine the legal

rationality and constitutional coherence of the system due to the lack of the "instrument of deferral or suspension of the sentence in order to re-establish legality in the enforcement of a custodial sentence in circumstances involving an evident violation of the prohibition on 'cruel punishment'".

When seeking to substantiate the breach of Article 117(1) of the Constitution, in relation to Article 3 ECHR, both orders refer to the judgment of the European Court of Human Rights of 8 January 2013 in *Torreggiani v. Italy* involving appeals by seven prisoners who complained that they had been subject to inhuman and degrading treatment due to overcrowding and the decayed condition of the cells in which they were forced to live.

The European Court held that, during the course of their period in custody, the appellants had been provided with individual living space in their cells of three square metres, which was further reduced by the presence of furniture, and held that the lack of space "in itself" amounted to treatment in breach of the Convention, which was further aggravated by other environmental conditions objected to, such as the lack of hot water and insufficient lighting and ventilation. The Court thus concluded that Article 3 ECHR had been violated.

The Strasbourg Court held in the judgment that "prison overcrowding in Italy does not concern exclusively the appellants" and that, as is demonstrated by statistical data, "the violation of the appellants' right to benefit from adequate conditions of detention is not a consequence of isolated episodes, but originates from a systemic problem resulting from a chronic malfunctioning of the Italian prison system, which has affected and may continue to affect numerous persons in future". Considering this situation, whilst it was mindful of the "need for resulting efforts that are sustained over the long-term in order to resolve the structural problem of prison overcrowding", the Court held that "given the inviolable status of the right protected under Article 3 of the Convention, the state is required to organise its prison system in such a manner that the dignity of prisoners is respected" and that, where it is unable to guarantee each prisoner conditions of imprisonment that comply with Article 3 ECHR, it is required to act "in such a manner as to reduce the number of persons incarcerated, in particular through a wider application of non-custodial sentences (…) and a reduction to a minimum of the recourse to pre-trial imprisonment".

In view of the above, the European Court took account of the "internal remedies which must be adopted in order to deal with the systemic problem" brought to light by the appeals and asserted that, "in relation to conditions of incarceration, 'preventive' remedies and 'compensatory' remedies must coexist in complementary fashion". Thus, "when an appellant is detained in conditions contrary to Article 3 of the Convention, the best redress possible is the swift cessation of the violation of the right not to suffer inhuman or degrading treatment"; in addition, the appellant "must be able to obtain redress for the violation suffered".

In view of these principles, the Court added that the right to complain to the supervision judge under Articles 35 and 69 of the Prison Code does not comply with the principles laid down by the Convention as it amounts to "a remedy that is accessible, but not effective in practice, because it does not enable incarceration in conditions contrary to Article 3 of the Convention to be ended swiftly". The European Court thus held in conclusion that "the national authorities must establish without delay a form of appeal or a combination of appeals which have preventive and compensatory effects and tangibly guarantee effective redress for violations of the Convention caused by prison overcrowding in Italy" within one year of the date on which the Torreggiani judgment becomes final.

2.– Since the questions are identical, the cases must be joined for resolution in one single judgment.

3.– As a preliminary matter, it must be pointed out that the intervention by the association *VOX–Osservatorio italiano sui diritti* and the *Unione delle Camere penali italiane* were filed after the time limit laid down by Article 4(4) of the supplementary rules on proceedings before the Constitutional Court, with the result that these interventions are inadmissible (order no. 150 of 2012). Moreover, the time limit laid down by Article 10 of the supplementary rules, which was invoked by the *Unione delle Camere penali italiane*, cannot be invoked with contrary effect as this time limit refers merely to the filing of written statements.

4.– The State Counsel [*Avvocatura generale dello Stato*] filed two objections alleging that the questions are inadmissible.

The first objection asserts that the circumstances presented by the referring courts lack objective corroboration and are liable to "change over time and open to entirely

discretionary presentation by the interested party and the court", whereas the conditions under which Article 147 of the Criminal Code allows the optional deferral of enforcement of the sentence are "highly precise and related to factors which are defined exactly and may be assessed by the court with precise references to the interests to be weighed up", which supposedly prevents "the basing of proceedings before the Constitutional Court on a provision which is perfectly in line with the relevant principles of constitutional law"; it also asserts that "the inconveniences objected to by the incarcerated applicant may [supposedly] be pursued using means that are suited to the system, specifically according to administrative regulations other than those laying down organisational arrangements for prisons, which fall within the remit of the competent authority and outwith the judicial powers of the Supervision Court".

The objection is groundless. The factual circumstances stated by the referring courts have also been ascertained through the taking of specific evidence; their description complies with the requirement to provide a full account of the facts at issue in the proceedings before the lower court and establishes that the conditions of incarceration would be considered by the Strasbourg Court to breach Article 3 ECHR. Moreover, the assertion that these circumstances are liable to change over time and that the "inconveniences" complained of by the applicants may be overcome through organisational measures adopted by the competent authority is not relevant for the admissibility of the questions, which are aimed at creating a “preventive” remedy in situations in which the prison administration is unable to guarantee conditions of incarceration that are compatible with the prohibition on treatment contrary to human dignity.

The State Counsel also objects to the failure by the referring courts to carry out a critical examination of the case law which supposedly prevents the application of Article 147 of the Criminal Code to the cases at issue in the main proceedings. This objection is also groundless since the Venice and Milan Supervision Courts held that a constitutionally informed interpretation was not feasible, on the basis of a reconstruction of the scope of the contested provision based on its literal wording and in line with guidance provided in the case law of the Court of Cassation.

5.– However, the questions are inadmissible for a different reason.

6.– Owing to the complex nature of the situation underlying the questions raised by the referring courts, they must be considered within the context of the reality of overcrowding in Italian prisons, which was defined as intolerable by the President of the Republic in his message to the Houses of 8 October 2013; the referring courts operate within the context, stressing that "the fact that the capacity (including both the official capacity and the tolerable capacity) of Italian prisons is much lower than the actual number of detainees" is common knowledge.

The European Court of Human Rights, which noted in its judgment in *Torreggiani v. Italy* of 8 January 2013 that prison overcrowding in Italy is "structural and systemic", has stated the position in analogous terms.

These assessments may undoubtedly be endorsed in the light of statistical data, which points to a phenomenon which, albeit with differing levels of intensity, has been afflicting the Italian prison system for some time and has resulted in a situation that can no longer continue, given the capability of prison overcrowding to undermine the principles applicable to criminal enforcement, which have mandatory status under constitutional law, and to limit that “residual”, irreducible core of personal freedom for prisoners, both of which are manifestations of the principle of personally tailored punishment, upon which the republican Constitution is constructed (see judgment no. 1 of 1969).

However, overcrowding cannot be countered with the remedy indicated by the referring courts in that, even if it were able to bring about a significant reduction in the number of persons incarcerated in prison, it would achieve this result in a random manner, giving rise to differences in treatment between prisoners. This is because the decision over whether or not to defer enforcement of the sentence would be taken without a criterion capable of selecting who should obtain a deferral of enforcement until the number of prisoners reached was compatible with the situation of the prison facilities. The referring courts' objective is moreover not to introduce into the system an instrument capable of putting an end to prison overcrowding, but of providing protection to individuals who are treated by the criminal law in a manner that does not comply with the principles laid down by Article 27(3) of the Constitution.

Whilst it is not for this Court to stipulate criminal policy guidelines that are capable of resolving the structural and systemic problem of prison overcrowding, the indications

provided in this regard in the *Torreggiani* judgment must nonetheless be recalled. In that case the European Court referred to the recommendations of the Committee of Ministers of the Council of Europe, which called for as wide a use as possible of non-custodial measures and a refocusing of criminal policy on a minimal recourse to incarceration, along with a significant reduction of pre-trial custody. However, it must be considered that joint action on the criminal law, criminal procedure and prison code systems needs time, whilst the current circumstances cannot continue any longer and indicate that the adoption of measures called for, which would be specifically aimed at putting an end to them, is necessary.

7.– Having made the above premise concerning the general aspects of prison overcrowding, it must be considered that its structural and systemic nature led the Strasbourg Court to rule, according to the pilot judgment procedure, that the national authorities must establish without delay a form of appeal or a combination of individual appeals which have both “preventive” effects (in the sense that they must bring about "a swift end to the violation of the right not to suffer inhuman and degrading treatment") and “compensatory” effects and which guarantee effective redress for violations of the ECHR caused by overcrowding within one year of the date on which the judgment became final.

The need to introduce a “preventive” remedy in order to protect prisoners who endure conditions of detention that breach their human dignity also underlies the questions raised by the Venice and Milan Supervision Courts, compared to which the more general problem of prison overcrowding remains in the background.

The referring courts start from the requirement to "apply the principle that punishment must not be inhuman", which could be achieved by the “closure rule” on the optional deferral of enforcement of the sentence, to be introduced by an expansive ruling requested from this Court. This rule is claimed to represent "the only instrument providing effective protection before the courts with the goal of ensuring that enforcement of sentences is brought back once again within the bounds of constitutional legality", in situations in which the conditions of incarceration constitute inhuman and degrading treatment.

It should be added that, as the referring courts have correctly pointed out, the rationale and scope of the prohibition on the adoption of measures constituting

treatment contrary to human dignity cannot be detached from the reference to the re-educative goal (see judgment no. 376 of 1997): in this regard, this Court has highlighted the "unitary, indissociable" context within which the principles set forth in Article 27 of the Constitution are to be located, as each is logically functional for the other. This is in particular because "criminal treatment inspired by criteria of humanity is a necessary prerequisite for the re-education of the convicted person" (see judgment no. 12 of 1966).

7.1.– The fact that the prohibition on treatment contrary to human dignity is enshrined in the Constitution and the ECHR confirms the requirement that the legal system must put in place the “preventive” remedies necessary in order to protect the prisoner. These remedies may be first and foremost entirely “internal” within the prison system and hence, in cases such as those at issue in the referral orders, may not entail the suspension of custodial enforcement of the sentence, but for example more simply the transfer of the prisoner to another cell or his transfer to another prison.

There is thus in the first instance scope for action by the prison administration, which must be aimed at safeguarding both the right not to suffer inhuman treatment and at the re-educative goal of the sentence, because the "indissociable" context within which the two principles set forth by Article 27(3) of the Constitution are located will not tolerate any action which, with the goal of remedying a breach of the former right, ends up violating the latter.

It is also necessary, in order to guarantee the predominance of the constitutional principles with which enforcement of the sentence must comply, that the action taken by the prison administration take place against a backdrop of effective judicial protection.

In this regard, the conclusions reached in the case law of this Court on the protection of prisoner rights should be taken into account: first, the instructions issued during the course of imprisonment by the supervision judge pursuant to Article 69(5) of the Prison Code have been recognised as having the status of "requirements or orders, the binding force of which for the prison administration is an inherent aspect of the protective goals pursued by the provision" (see judgment no. 266 of 2009); secondly, it has been asserted more recently that "decisions of the supervision judge issued in relation to objections filed by prisoners seeking order to uphold their rights in accordance with the contentious procedure under Article 14-ter of the Prison Code must

be applied in actual fact and may not be deprived of practical effect by measures adopted by the prison administration or other authorities" (see judgment no. 135 of 2013).

Thus, the uncertainties expressed both by the Strasbourg Court and by the referring courts regarding the efficacy of these decisions, and hence their ability to put an end to intolerable conditions of incarceration, have been superseded; however, in order to put an end to residual ambiguities within the prison system, and also in order to implement in full the requirements set forth in the Torreggiani judgment, Parliament should complete the system by providing appropriate means of enforcement in order to ensure that administrations comply with the decisions made by supervision judges.

7.2.– Having clarified the scope within which circumstances that encroach on the principle that the sentence must not violate human dignity may and must be confronted according to “internal” remedies, it is necessary to establish whether these may be sufficient or whether it a closure rule is by contrast necessary in cases in which these remedies are unable to operate effectively due to the overcrowding and whether, as argued by the referring courts, that rule must necessarily provide for deferred enforcement, which the courts may be enabled to do were this Court to rule that Article 147 of the Criminal Code is unconstitutional.

As was rightly held in the Torreggiani judgment, considering the structural scale of prison overcrowding in Italy, it is easy to imagine that the prison authorities may not always be able to give effect to decisions made by supervision judges and to ensure that prisoner conditions comply with the ECHR. It must thus be acknowledged that prison overcrowding may in reality occur on a scale and have characteristics that are liable to result in treatment contrary to human dignity, whilst at the same time rendering the “internal” remedies mentioned above impractical. In such cases an extreme remedy is required, which enables the prisoner to be removed from the prison system when this is not otherwise possible according to the ordinary measures available under the Prison Code, and may be associated as the case may be with the imposition of non-custodial punitive and control measures against him.

8.– Thus, having found that, subject to the limits indicated, the breach objected to by the referring courts does in fact exist and that it is necessary for the legal system to adopt a remedy capable of guaranteeing the removal from the prison system of any

prisoner who is forced to live in conditions contrary to his human dignity, the questions raised by the Venice and Milan Supervision Courts are however inadmissible due to the range of legislative solutions that may be adopted; due to the variety of solutions, the expansive ruling relating to Article 147 of the Criminal Code loses its alleged essential status. In fact, other types of "preventive" remedy are conceivable alongside the mere deferral of enforcement of the sentence, such as for example those modelled on the measures laid down by Articles 47 et seq of the Prison Code, some of which were referred to in the debate following the Torreggiani judgment; in order to avoid intolerable situations resulting from prison overcrowding, these measures may be adopted by the court even where the preconditions typically required at present are not met. In particular, provided that this is compatible with personal circumstances, it is conceivable that broader use may be made of house arrest or even other punitive or control measures different from those currently provided for, which are to be considered as alternative forms of enforcement of the sentence. In fact, it must be considered that the convicted person himself may prefer measures of this kind and may not have any interest in a deferral such as that proposed by the referring courts, which may result in the process of enforcement remaining open for a very long time.

On the other hand, even if the position of the referring courts is followed, it may be necessary to specify the criteria on the basis of which the prisoner or prisoners eligible for a deferral are to be identified, in order to take account also of the requirements of "social defence" mentioned in the referral orders.

Thus, from various points of view, there is a range of possible legislative arrangements that are necessary in order to ensure that incarceration in a manner contrary to human dignity does not continue, in breach of Articles 27(3) and 117(1) of the Constitution, the latter in relation to Article 3 ECHR. Moreover, in view of this range of options, "owing to Parliament's prerogative in assessing whether the means adopted in order to ensure compliance with a requirement of constitutional law are appropriate" (see judgment no. 23 of 2013), the questions must be ruled inadmissible.

In ruling the questions inadmissible, "this Court must however assert that an excessive prolongation of legislative inertia would not be tolerable, having regard to the serious problem identified in this ruling" (see judgment no. 23 of 2013).

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

hereby,

1) rules that the interventions by the association *VOX–Osservatorio italiano sui diritti* and the *Unione delle Camere penali italiane* are inadmissible;

2) rules that the questions concerning the constitutionality of Article 147 of the Criminal Code, raised with reference to Articles 2, 3, 27(3) and 117(1) of the Constitution, the last with reference to Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, ratified and implemented by Law no. 848 of 4 August 1955, by the Venice Supervision Court and the Milan Supervision Court by the referral orders specified in the headnote are inadmissible.

Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 9 October 2013.