

# ALTERNATIVE MEASURES TO DETENTION IN THE POST-TRIAL PHASE *The Italian Experience*

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## Alternatives to detention – sentence execution

- Law no. 354/1975: “*Provisions on penitentiary system and on the execution of the measures restricting personal freedom*”  
Art. 27.3 Cost.: “Punishments must aim at resocializing the offender”
- Law no. 165/1998: “Amending (...) law no. 354/1975”
- “*Post-Torreggiani*” legislation (ECHR *Torreggiani v. Italy*):  
laws no. 94/2013, no. 10/2014, no. 117/2014 (further amendments to legislation in force)

## Alternatives to detention – sentence execution

- ECHR *Torreggiani v. Italy*, 8.1.2013: violation of the applicant's rights protected under art. 3 ECHR (prohibition of inhuman and degrading punishment) because of inadequate prison conditions
- “Pilot judgement”:
  - “structural problem” highlighted in the Italian prison system: prison overcrowding caused inconsistency between detention conditions of a number of prisoners and art. 3 ECHR;
  - Italian authorities were called on to adopt (within 1 year) remedies in order to prevent systematic violation of the Convention



## Alternatives to detention as an instruments for reducing prison population

- “*Post-Torreggiani*” legislation (laws no. 94/2013, no. 10/2014, no. 117/2014)  
purpose: reducing prison overcrowding by extending scope of application of alternative measures to detention set out under law no. 354/1975
- Special focus on “*reiterated reoffenders*”, art. 99 § 4 C.C. (as amended by law no. 251/2005): **a reoffender who commits a further offence** (with intent)
- Besides sentence aggravation, reiterated reoffenders – after law no. 251/2005 – had very narrow chances to benefit from alternative measures

# Law no. 354/1975

- **General Purpose:** implementing art. 27 § 3 Italian Constitution: “Punishments must aim at resocializing the offender”
- **Individualized rehabilitation programme**, drafted and implemented by a set of different institutions (social services, educators, prison’s administration staff)
- Programme could start only *after* the offender had already entered into prison
- **Manifold list of alternative measures:** probation under social services’ supervision; day release with curfew; automatic remission; outside work (...)
- Application of alternative measures: **judicial procedure** (Supervision Judge and Tribunal)
- **Practical impact** on prison population: historical fluctuations

# Law no. 165/1998: automatic suspension of custodial penalties enforcement

- Art. 656 CCP: the enforcement of an imprisonment term not exceeding *three years* shall be *automatically suspended for 30 days* on the initiative of the public prosecutor
- Under special circumstances, the maximum limit shall be extended to *four years* (“*post-Torreggiani legislation*”: *when the offender is eligible for “humanitarian” home-detention applies*) or *six years* (drug-addicted and alcohol-addicted offenders)
- Conditions for exclusion (art. 656 § 9 CCP):
  - Convictions for most serious crimes (terrorism, human being trafficking, mafia-crimes, drug-related offences ...)
  - If the offender is in pre-trial custody when the conviction becomes final
  - The exclusion for “repeated reoffenders” was eliminated under “post-Torreggiani” legislation

# Law no. 165/1998: automatic suspension of custodial penalties enforcement

- **Purpose:** addressing prison overcrowding by avoiding the entrance into prison of offenders entitled to benefit from a non-custodial form of sentence execution
- Within 30 days, the offender is entitled to apply for an alternative measures. If no application is submitted the custodial penalty shall be enforced.
- **Competent authority** for the application of the alternative measure: Supervision Tribunal (decision within 45 days from the application)
- **Effect:** alternative measures applicable *before* custodial sentences are enforced as *exclusive way to serve the sentence*



# Law no. 165/1998: automatic suspension of custodial penalties enforcement

- Important clear-cut distinction between automatic suspension and conditional suspension (art. 163 CC):
  - Conditional suspension:
    - applied by the trial judge;
    - the sentence conditionally suspended may also be not final (e.g. imposed at first instance);
    - the sentence (whatever it is, imprisonment, fine, disqualification) is **suspended** and *no alternative punishment is enforced*; in case of no reoffending, the offence is extinguished
  - Automatic suspension of custodial penalties:
    - the custodial sentence has become final;
    - however*, on the initiative of the public prosecutor, custodial sentence is not *immediately enforced*;
    - if the offender's application is received by the Supervision Tribunal, the sentence is *enforced* by means of an *alternative punitive measures*



# Law no. 165/1998: automatic suspension of custodial penalties enforcement

- **Statistics:** 22982 applications during year 2014
- Considerable impact on the decrease of prison population since alternative measures became immediately applicable *before* the offenders enter into prison to serve the custodial sentence
- Therefore, *no observation of the prisoner's behaviour functional to the individualization of the rehabilitation programme is possible*
- **Alternative measures have lost their original re-socialization purpose**, as *component* of an individualized rehabilitation programme, to be drafted *on the basis* of the observation of the prisoner into custody: they have become a mere instrument addressing prison overcrowding
- Analogy with alternative *sanctions* (e.g. fine instead of imprisonment) applicable **by the trial judge**

# Alternative measures/early release scheme

- Law no. 354/1975:
  - Probation under the social services' supervision (*Affidamento in prova al servizio sociale*)
  - Ordinary/Special Home detention (*Detenzione domiciliare ordinaria e speciale*)
  - Special Probation and Home detention for AIDS affected offenders
  - Day release with curfew (*Semilibertà*)
  - Automatic remission (*Liberazione anticipata*)
  - Outside work (lavoro all'esterno)
- Law no. 199/2010: "Home execution" of custodial sentences within 18 months (outside the scope of application of home detention)
- Crim. Code, art. 176-177: Parole (*liberazione condizionale*)
- D.lgs. 286/1998., art. 16: Expulsion (*Espulsione*) of illegally-staying non-EU citizens (alternative to custodial sentences within 2 years)

# Law no. 354/1975

- Art. 4 bis – **General prohibition of application of all early release schemes/other benefits** (with the exception of automatic remission):
  - §1 in case of conviction for most serious offences related to organized crime (terrorism, mafia-related crimes, slavery and trafficking in human beings, large-scale drug trafficking ... ) *unless* the offender cooperates with police and judicial authorities
  - § 1ter: in case of conviction for very serious offences, different from those under § 1 (e.g. murder, robbery, extortion, rape ...); prohibition is waived when there is no evidence of persistent connection with a criminal organization after the conviction

# Probation under the social services' supervision

- Art. 47 law no. 354/1975:
- Requisites:
  - a) Offender sentenced to term of imprisonment of no more than 3 years (or when the remaining sentence to be served does not exceed 3 years);
  - b) Positive prediction of offender's re-education chances and of no-recidivism, upon an evaluation of the offender's behaviour;
  - c) Limit extended to 4 years, if the behaviour of the applicant during the year before the application allows a positive assessment under let. b.

**Purpose:** originally rehabilitation; reducing prison population

**Competent authority:** Supervision Tribunal



# Probation under the social services' supervision

- **Contents:** Supervision Tribunal specifies the conditions of the probation, concerning e.g. attendance of an educational programme, undertaking therapeutic treatment, prohibition on meeting specific people or attending specific places or possessing specific objects...)
- Social Service shall submit **periodical reports** on the offender's behaviour to the Supervision Tribunal, which can modify probation conditions according to the evolution of the rehabilitation programme
- **Suspension and revocation:** Supervision Tribunal shall suspend and also revoke the probation order in case the offender infringes the conditions, reoffends or receives another definitive conviction; in such case, the remaining period of the sentence shall be served in prison (**4,42% of revocation** orders in 2014)
- **Statistics:** 12539 offenders in probation at 30.4.2015; **substantial impact on prison population; in addition, low recidivism rates**

# Home detention

- Art. 47 *ter* law no. 354/1975
- Requisites:
  - a) **No maximum limit** of imprisonment for offenders **older than 70 years**; exclusions for most serious offences and for professional offenders/recidivist
  - b) **Maximum limit of 4 years** for “vulnerable” offenders (pregnant woman; mother of young children; father when mother is absent; impaired elderly and seriously ill prisoners; offenders under the age of 21 when special family, study or work reasons occur)
  - c) **Maximum limit of 2 years**, when probation is not applicable and a prediction of no-reoffending recidivism

As for let. b and c, previous restrictive conditions for recidivist (“reiterated reoffenders”) has been abolished under “post-Torreggiani” legislation

- **Purpose:** let. a-b “humanitarian” reasons; let. c reducing prison population
- **Competent authority:** Supervision Tribunal (temporary application: Supervision Judge)

# Home detention

- **Content:** offenders serve **part (or all) of their custodial sentence** either in their **home** or in any other private accommodation of public place of assistance and treatment
- Supervision Tribunal lays down the conditions to be respected, which can be modified by the Supervision Judge; authorization to leave the confinement place in certain hours is possible
- Home detention shall be **revoked** in case of behaviour incompatible with the prosecution of the measure, in case the requisites for the application cease (e.g. when children grow) or in case of non-authorized *escape* from home. **In the latter case the revocation is now discretionary, not automatic** (revocation 6,96% in 2014)
- **Statistics:** 25376 application (2014); 9635 offenders in home detention (30.4.2015); substantial impact on prison population; recidivism higher than probation

# “Home execution” of custodial sentences

Art. 1 law no. 199/2010: Custodial sentences of not more than 18 months (as remaining part of a longer term too) shall be served in the offender’s home

- **Conditions of exclusion:** Risk of reoffending; Inadequateness of offender’s home as a place for execution, with special regard to victim’s protection; categories of serious crimes set out under art. 4*bis* law no. 354/1975; professionals offenders (...)
- **Differences “home detention” – “home execution”:** “home execution” applicable also to reiterated reoffenders, to whom home detention (until 2013) was not always applicable; since post-Torreggiani legislation has abolished the latter restrictions “home execution” has now a very limited scope of application
- **Competent authority:** Supervision Judge (and not Supervision Tribunal); faster application procedure (*ex officio*: the offender’s request is not indispensable)
- **Statistics:** from entry into force to 31.12.2014, 15.814 prisoners (many reiterated reoffenders) have been released



# Probation and Home Detention for AIDS affected prisoners

- Art. 47 *quater* law no. 354/1975
- Requisites:
  - Prisoners affected by AIDS, or any other serious immunodeficiency, can benefit from **probation** (art. 47) and **home detention** (art. 47 *ter*) also **outside the maximum custodial sentence limits** therein established, in case they wish to undertake (or they have already undertaken) a healthcare programme
- Nor general limitations under art. 4 *bis* (concerning serious crimes) apply
- **Revocation**: commission of a new offence; behaviour incompatible with prosecution of the measure (in 2014 11 revocations, 5,33%)
- **Purpose**: let. a-b “humanitarian reasons”; healthcare of prison population, given the considerable risk of AIDS transmission in prison
- **Competent authority**: Supervision Tribunal
- **Statistics**: in 2014, 101 probation and 105 home detention

# Special Home Detention for Parents

- **Art. 47 *quinquies*** law no. 354/1975
- **Requisites:** Mother of children under the age of 10 (father as well if the mother is absent) can benefit from home detention for the purpose of allowing cohabitation with the minor also when the conditions for the application of “ordinary” home detention are not satisfied provided:
  - At least **1/3 of the sentence** has been served (or 15 years in case of **life sentence**);
  - There is **no risk of reoffending**
- **Competent authority:** Supervision Tribunal, which lays down the conditions of the measures
- **Revocation:** in case the conditions are infringed or the behaviour of the offender is incompatible with the prosecution of the measure

# Day release with curfew (*Semilibertà*)

- Art. 48-51 law no. 354/1975
- Requisites:
  - custodial sentences up to **6 months** if the offender is not eligible for probation under social services' supervision; *or* when **half of the sentence** has been served (2/3 in case of serious crimes); *or* after **20 years** in case of **life sentence**; **stricter conditions for reiterated recidivism have been abolished in 2013**;
  - good progress in the rehabilitation programme
- **Contents:** the offender spends part of the day outside the prison to take part in different rehabilitative activities (work, study, education)
- **Revocation/suspension:** in case the offender remains outside prison for more than 12 hours without authorization
- **Purpose:** rehabilitation
- **Statistics:** 775 prisoners under day release regime at 31.4.2015

# Automatic remission (*Liberazione anticipata*)

- Art. 54 law no. 354/1975
- **Requisite:** active participation in rehabilitation treatments
- **Content:** discount of 45 days for every six months of penalty served into prison; such discount has been increased to 70 days for every six months of penalty served into prison between 2010 and 2015 (temporary measure with the mere objective of decreasing prison population)
- **Revocation:** in case of conviction for intentional offence perpetrated after the automatic remission has been applied
- **Purpose:** promoting the participation to rehabilitation programmes; decreasing prison population by reducing the length of custodial terms.
- **Competent authority:** Supervision Judge
- **Statistics:** N. A.



# Outside work

- Art. 54 law no. 354/1975
- **Requisite:** in case of conviction for most serious crime, at least 1/3 of the sentence must have been served; 10 years in case of life sentence
- **Content:** possibility to work outside the prison, on the basis of a rehabilitation programme approved by the Supervision Judge
- **Purpose:** promoting the participation to rehabilitation programmes;
- **Competent authority:** Supervision Judge
- **Statistics:** 1025 applications (2014)

# Statistics

	Number of application	% over total amount of alternative measures	Revocation Rate
Probation under social services' supervision (including special probation)	13.332 (2014) <b>12539 (30.4.2015)</b>	31 (2014)	<b>4,42 (2014)</b>
Home detention (including home execution of custodial sentence – law no. 199/2010)	25376 (2014) 9635 (31.4.2015)	49,2 (2014)	<b>6,96 (2014)</b>
Home execution of the custodial sentence (law no. 199/2010)	<b>15.814 releases</b> (from entry into force to 31.12.2014)		
Day release with curfew	775 (31.4.2015)	1,5 (2014)	N. A.
Outside work	1025 (2014)	1,6 (2014)	N. A.

# Conclusive Remarks

- Amendments enacted by recent law reforms have brought about considerable decrease of prison population
- Balance between respect of prisoners rights – rehabilitation – social defence not always adequate: the first often prevails
- Emergency measures instead of rational long-term criminal policy
- Early release schemes as such do not always display desirable consequences
- Social services and rehabilitation programmes imply considerable financial burden
- Alternative-complementary way: rational decriminalization process (namely small-scale drug dealing)