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PRISON OVERCROWDING AND ALTERNATIVES TO DETENTION

Final proposals on possible guidelines in the EU-policy in order to implement the best practices in the fields of detention conditions and alternatives to detention

SUMMARY: 1. The humanization of punishments as an objective of EU policy - 2. Possible guidelines at the European level in the light of the *best practices* - 2.1. A European monitoring body on prisons and alternatives to detention - 2.2. A European support program for the modernization of prisons - 2.3. A European support program for the implementation of alternatives to prison

1. The humanization of punishments as an objective of EU policy

The research presented in this volume relating to six EU Member states (Belgium, France, Italy, Spain, Poland and Romania) confirms a fundamental fact that emerges from the Space I-2014 Report by the Council of Europe¹: *prison overcrowding* in the EU is still a present problem; even though, since 2011, it has been in a phase marked by a slow reduction. Significant differences exist between the States, which may also be a consequence of convictions for violations of Article 3 of the ECHR handed down by the European Court of Human Rights against several EU Member States. This is a problem that is traditionally addressed by the individual Member States with a predominantly national perspective and that, as the positive effects of the Court of Strasbourg case law show, may instead find a more rapid solution if it is approached from an international perspective. Policy guidelines to reduce the use of prisons or to improve prison conditions with costly burdens on the public deficit can hardly find space at the top of a government's agenda in this or any other country. In fact, these policies that are likely to lose more electoral consensus than gain such. Precisely for this reason, as shown recently in several European countries (i.e. Italy), a push from international settings can lead policy makers to implement actions to reduce the prison population - and to improve prison conditions – and present these actions to voters as necessary steps to be taken in order to avoid international censure. Although policy on criminal law issues

¹ See E. Dolcini, *L'Europa in cammino verso carceri meno affollate e meno lontane da accettabili standard di umanità*, in *Diritto penale contemporaneo* (www.penalecontemporaneo.it), 16 March 2016.

undoubtedly falls under the competence of the Member States, the impression one gets from the overall research presented in this volume is that the European Union - like the Council of Europe - can do a lot more to identify common guidelines for the Member States in the fight against prison overcrowding and in the identification of effective alternatives to detention.

A prison with a human face and a punishment in prison or in the “community” oriented towards the re-socialization of convicted offender represent, in fact, fundamental objectives for the European Union, which is “founded on the values of respect for human dignity ... the rule of law and ... human rights” (Article 2 TEU) to “combat social exclusion” (Article 3 TEU). The prohibition against inhuman and degrading punishments, then again, is specifically raised as a fundamental principle of the European Union (Article 4 of the Charter of Fundamental Rights) as it is commonly known within the Council of Europe (Article 3 ECHR).

The research results published in this volume, however, reflect that in Europe even in countries with a longer tradition of the process of the humanization of punishment and recognition of fundamental human rights, much still needs to be done in the view towards the fulfillment of the objectives mentioned above. The problem - we reaffirm - is demonstrated in dramatic fashion by a number of judgments in which the European Court of Human Rights, even in recent years, has censured some of the EU Member States for prison overcrowding and inhumane detention conditions.

These condemnations formally relate only to the individual Member States. However, as a matter of fact, they also involve the European Union: they demonstrate how much still needs to be accomplished along the way of the process of humanization of punishments, which, as we have said, is a fundamental objective of the Union itself. The problem, from the European perspective, is that of *raising and harmonizing the standards of protection of fundamental rights* of the individuals subject to punishments that deprive or limit their personal freedom. Furthermore, it is a problem that, in our opinion, this could be considered in the context of an extensive program of policy guidelines with a broader vision than the traditional view of judicial cooperation in criminal law issues. Overcrowded prisons in Europe as well as the insufficient implementation of alternatives to detention are problematic not only because they impede judicial cooperation (for example, issues of expulsion, extradition, European arrest warrants, and the recognition of judicial decisions), but, even before such, because they pose *a problem of violating fundamental human rights and they reflect a failure to achieve the fundamental objectives* of the European Union itself, recited in the first articles of its founding treaty.

We find it necessary to reiterate that it is true that policy on criminal law issues is traditionally reserved to the competence of the Member States; but it is equally true that membership in the European Union requires compliance with high standards of protection of fundamental rights and the pursuit of common objectives in terms of policies of social inclusion for inmates once they have served their sentences. Criminal law and penitentiary practices, insofar as they undoubtedly have a national character, must thus necessarily deal with those goals at the European level. This means that the prison conditions and the reality of punishment in general must not be considered as domestic problems: in reality, these issues are often uncomfortable and hidden in terms of international relations. Instead the opposite is true. The reality of punishment – starting from the custodial punishment - is *a reflection of the degree of civility of a country* and it is a matter that the European Union must inevitably take into account to achieve its objectives and, to that end, direct its policies. A Europe that is inspired by the values of respect for human rights may not tolerate repeated condemnations, which verify the violation of fundamental human rights related to detention conditions, by the European Court of Human Rights against Member States. It is, in political terms, more of a significant problem from the point of view of instruments of judicial cooperation in criminal law matters, in whose view most of the measures in the EU area have been, to date, adopted. The research presented in this volume suggests, at a political level, that actions by the EU demonstrate awareness of the greater magnitude of the problem of prison overcrowding, which is essentially a human rights issue in accordance with the EU Charter of Fundamental Rights. It is surprising, in this perspective, to read the Report on the application of the EU Charter of Fundamental Rights (2015)², commenting on Article 4 (Prohibition of torture and inhuman or degrading treatment or punishment), considerations that relate *only* to the diverse problem of illegal migration and human rights guarantees in repatriation proceedings.

2. Possible courses of action at the European level in light of best practices

2.1. A European monitoring body on prisons and alternatives to detention

A proposal that could be evaluated at the EU level is for the creation of a permanent monitoring body on prisons and alternative detention measures in cases under the purview of the European Agency for Fundamental Rights. A measure of this kind would have major cultural and political significance and would allow for the collection of large-scale amounts of data and information and the identification and monitoring over time of the *best practices*, which may be a model for the different Member States and also through the appropriate exchange of expertise and knowledge.

² See http://ec.europa.eu/justice/fundamental-rights/files/2015_charter_report_full_version_en.pdf.

The practices of the countries involved in the research set forth herein – and even States outside the EU such as the United States of America³ - show, there again, how in order to improve living conditions in prisons and to implement alternative measures it is essential to invest public funds. Without the appropriate resources, reaching these goals is unthinkable. Therefore, it would be beneficial to have, from the EU, a policy of economically supporting initiatives for improving living conditions in prisons and alternatives to prison.

2.2. A European support program for the modernization of prisons

As specifically relating to prisons and as pointed out by the former director of the Milan-Bollate prison Lucia Castellano during a meeting organized at the University of Milan as part of this research project⁴, it is good to see a public project for a public service like a hospital or a great means of communication. European funding for construction projects in prisons could, thus, be considered in the appropriate places. In our view, the priority should not be represented by an increased number of prison beds - which, as is shown in the research presented here (i.e., France), does not solve, in a structural way, the problem of overcrowding – but rather the priorities should be represented by an *improvement of structures*, many of which, in different Member States, are obsolete, deteriorating and do not function properly in terms of *rehabilitation* activities, and by meeting the standards of protection of prisoners' rights as to the prison spaces and *facilities* in general.

2.3. A European support program for the implementation of alternatives to prison

Above all, a European support program could allow the Member States, each according to its own political choices, to introduce new alternative measures to detention or to improve the existing measures extending the application of such to a larger number of individuals. The comparison of the knowledge and expertise of the countries involved in the research presented here confirms that without appropriate investment, alternatives to detention (consider for example even electronic monitoring) not only just remain on paper, but (consider for example *probation* or *community service*) may lead to prison overcrowding. In some countries (i.e. Poland), in fact, the number of inmates is in significant part made up of people whose alternative detention measures were revoked because they were not properly followed by social services during the process of reintegration.

³ See https://www.justice.gov/archive/fbci/progmenu_reentry.html.

⁴ “Open” prison and recidivism: results of an empirical study on the experience of the Milan-Bollate prison, University of Milan, 23 March 2015.

Upon closer look, the profile of social reintegration itself, which represents the goal of alternative measures to detention, may justify the use of European funds according to a point of view not far from that of the European Social Fund.

A EU-wide program of guidelines- funded in theory, at least in part, with the proceeds of pecuniary fines (which do not remain substantially unexecuted everywhere, as is the case in Italy) from the Member States - might aspire to support the dissemination and implementation of the *best practices* some of which are identified and highlighted in the research published in this volume.

It is the case of *community service* in Spain and in Belgium, and also in Italy even if it is limited to certain crimes⁵, which in order to find extensive and efficient application requires agreements with public or non-profit entities and involves costs related to, for example, the stipulation of insurance contracts. It is also the case that the different forms of *probation* - with the suspension of the offender's trial or suspension of the execution of the offender's sentence, possibly accompanied by forms of *criminal mediation* – show how the comparative experience needs, in order to be successful, a complex organization with equipment and personnel and, referring to the model of the UK *probation office*, also needs costly monitoring tools such as *electronic monitoring*. As for the number of staff members working in the *probation* agencies, the data of the Space-II 2014 Report by the Council of Europe reflects significant differences from State to State. In Italy, for example, the number of staff members is 2048. If we look at the relationship with the population, the Italian figure is lower than the European average: 3.4 versus 4.7 (per 100,000 inhabitants). The highest number is found in England and Wales, with 29.9. This is, obviously, a decisive aspect in relation to non-custodial measures that aim at fulfilling the actual oversight functions and/or aiding the recipient. Furthermore, it is for this reason that a common program of guidelines at the European level could enable the Member States to make significant progress towards the construction of an efficient system of credible prison alternatives: a goal that the Europe envisioned by Cesare Beccaria must carry out with conviction.

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⁵ This relates to the crimes of driving under the influence of drugs or alcohol.