

Crisis and contradictions of the Italian penitentiary system, ten years after the declaration of the state of emergency

Pierluca Massaro ^{*a}

^a University "Aldo Moro" of Bari, Bari, Italy

Abstract

The Italian penitentiary system seems to be experiencing a situation of constant emergency, in particular because of the problem of overcrowding. Since the early 1990s, a populistically oriented criminal policy has tried to ride the wave of social alarmism on the topic of crime. A demagogic use of criminal law that lost its subsidiary function to acquire a symbolic function of production of common enemies to fight, as individuals potentially dangerous to society, which only it can effectively tackle. The criminalization of drug addiction first and of irregular immigration then, together with a massive recourse to pre-trial detention, represent the main stages of the imprisonment process that led to the collapse of Italian prisons, with a occupancy level with few equals in Europe. In this context, one year after the first sentence pronounced by the European Court of Human Rights against Italy, in 2010 the state of emergency of prisons in Italy was declared. The problem was not addressed by rethinking policies, but by imagining mechanisms for decongesting prisons without a broader vision. Nevertheless, the deflationary measures introduced in the last ten years have only temporarily managed to reverse the trend, and only in the context of the coronavirus disease emergency the problem of overcrowding has been downsized. The present paper aims to analyse the contradictions and shortcomings of the Italian criminal policy in the social context of the past thirty years, and its responsibilities for the crisis of the penitentiary system.

Keywords: *criminal policy; prison; overcrowding; penal populism; fear of crime.*

1. Introduction

Ten years after the declaration of the state of emergency, Italian prisons are still experiencing a critical situation mainly due to the problem of overcrowding, which has not been resolved despite the use of some deflationary measures. An even more dramatic situation in the current context of the coronavirus disease pandemic, which has caused tensions and riots in many Italian prisons, with dozens of escapes and 13 deaths. From a contagion point of view, the substantial prison isolation from society has had a protective effect, with a limited number of cases (119 among prisoners and 162 among staff). The protests of the detainees were triggered by the extraordinary measures adopted with the "Cura Italia" decree (n. 18 on 03/07/2020), which required remote conversations with relatives. The same decree also provided for the possibility of

*Pierluca Massaro. *E-mail address: pierluca.massaro@uniba.it.*

serving a prison sentence of no more than eighteen months at the condemned person's home, with the exclusion of the most serious crimes. As a consequence of this provision, as well as due to the decrease in prison entries during the lockdown period and to a general openness in the concession of pending alternative measures, the number of prisoners has significantly decreased in less than four months, going from 61,230 on 2/29/2020 to 52,679 on 5/15/2020 (Department of Prison Administration Data), an even higher number than the number of available places (little more than 50,000).

However, protests moved out of the prison, as soon as the news of the release of hundred of "mafia bosses" for health reasons has been announced by mass media, generating a wave of indignation. As often in the past, it is at the moment of emergency that the prison comes back to the front pages of newspapers, and, as often happened in the past, social alarmism has produced at least a partial mystification of reality. In fact, the release involved 376 prisoners, many of whom were in pre-trial detention and only 3 of whom were subject to the regime of article 41 *bis* of the penitentiary law, also known as "hard prison regime" (*carcere duro*), a controversial regime whose purpose is breaking the links with the criminal association (Cifaldi and Scardaccione 2018).

Forty five years after the reform, a glimpse at the reality of Italian prison and, in particular, at the conditions of inmates, reveals a highly complicated picture which exposes the issue of overcrowding as certainly the most evident and dramatic problem. The permanent crisis of the Italian penitentiary system raises the issue of the effectiveness of the rights of inmates and the functions attributed to punishment. Thus began to spread the shared vision of the institution's inability to bear the weight of questionable and short-sighted criminal policy choices.

Increasing prisoners numbers had been contained up until the early 1990s through periodic recourse to amnesty and pardon that, following the raising of the necessary deliberative parliamentary quorum in 1992, no longer represents a smooth pathway. The lack of what had been a true escape valve for the penitentiary system explains how, since 2010, the situation has become intolerable with an essential succession of a series of mere deflationary measures.

As witnessed on previous occasions in Italy, it was necessary also in this case that the phenomenon assumed the character of an emergency, resulting in a reprimand at European level by the European Court of Human Rights, so that the appropriate measures against overcrowding could be implemented.

2. Penal populism and the problem of security

Promulgated at the height of a period of wider social and political criticism against penitentiary institutions (Foucault 1975), the 1975 Italian prison reform (law n. 354) gave substance to the constitutional principle of re-education which elsewhere was beginning to be questioned as a pure ideal, lacking significant empirical evidence, and increasingly an orphan to social and political support (Garland 2001). Modifications made over time to the reform have, in part, changed its philosophy, on the basis of security and custodial requirements which have progressively reshaped those of re-education and rehabilitation, although the security emergency would arrive in Italy around a decade later than other European countries (Pavarini 1996a: p. 160).

The so called "Gozzini law" (663/1986, "reform of the reform") had already significantly changed the prison system in 1986 by redesigning prison regimes on the

basis of the prisoners dangerousness, in line with the objectives of release (for those less dangerous) and internal security (for the most dangerous). The first was basically pursued through a controversial system of rewards allowing access to penitentiary benefits only for those inmates participating in the treatment, thus giving rise to what may be described as a “penitentiary exchange” (Pavarini 1996b), which significantly affects the flexibility of the sentence. A humanitarian and paternalistic penitentiary system oriented towards re-socialization which today is outlined as “a theoretical and legal model to which the penitentiary reality does not resemble at all” (Re 2006: p. 101).

In the years following the reform, against the background of the social crisis of the welfare state and of penal welfarism, a social demand for security has spread, feeding on a fear of crime not supported by scientific evidence, as a crime drop has been recorded in Italy since the early 1990s.

In a context marked by the loss of certainty with a progressive loosening of social ties, a sense of bewilderment seems to pervade the post-modern man (Berger, Luckmann 1995). According to Bauman (1997): “The dominant sentiment is now the feeling of a new type of uncertainty - not limited to one’s own luck and talents, but concerning as well the future shape of the world, the right way of living in it, and the criteria by which to judge the rights and wrongs of the way of living. The postmodern world is bracing itself for life under a condition of uncertainty which is permanent and irreducible”. There is undoubtedly a deep connection between the fears that cross the contemporary world and the fear of crime, which is the basis of this demand for security (Ceretti and Cornelli 2015). Bewilderment, says Castel (2003), generates a common resentment, such as a collective frustration that induces a defensive attitude that rejects differences and goes in search of those who responsible or scapegoats. It’s what Castel (2003) has labelled as the return of dangerous classes.

Anxiety regarding security means looking at phenomena of social deviance in terms of mere social threat, with the consequence of attributing the individuals involved with a certain degree of social danger, seeking urgent solutions aimed to their neutralization and social exclusion. It’s the decline of penal welfarism and the contextual affirmation of penal populism as described by Pratt: “Populist responses to crime are strongest and would seem most likely to influence policy when they are presaged around a common enemy, a group of criminals who seem utterly different from the rest of the population” (Pratt 2007: 5). A penal populism that in Italy has not led to the punitive outcome achieved in the field of criminal justice in other countries, especially those of common law, but which has nevertheless found space in a context of a “reconfiguration of the crime control field” (Garland 2001) that involved Italy as well.

Regardless of factions and allegiances, successive Italian governments have steadily elevated the issue of security to the top of the political agenda, thus riding a wave of and, at the same time fuelling, popular sentiment. A role of moral entrepreneurs in the social construction of emergency that politics shares with mass media. Fear of crime has thus been both a cause and effect of schizophrenic criminal policies without a long-term planning. Such penal saturation and its effects in terms of imprisonment indeed tend to give rise to a sense that the concern was justified. Criminal law became the most effective of populist tools in conquering consensus, resulting in the huge growth of penal legislation and a toughening of existing criminal sanctions, so inevitably putting a toll on the penitentiary system. As Bauman (1998) argues, placing imprisonment as the central strategy in the fight for the safety of citizens means

addressing the issue through highly topical language. We thus witness a “transition from an ethical-value model of legitimation of criminal law to a performative one, based on the materiality of pragmatic needs, a management tool for emergencies and problems which are more or less special and urgent” (Mosconi 2001: p. 39). This opens up doors to “emergency as a form of government. This political system thrives on emergencies and emergency seems to find its *raison d'être* and its pattern of action” (Manconi 2006: p. 54).

Consequently, a complicated set of rules, without any broader political project, overloads the work of the courts up to paralysis, also due to the persistent excessive length of trials. An issue that constantly exposes the Italian State to the risk of sanctions by the European Court of Human Rights. Italy is among the countries with the highest number of pending cases for infringement of Article 6 of the European Convention of Human Rights, which guarantees the right to a fair trial held within a reasonable timescale. The prospective of statute barred of criminal cases thus constitutes, right from the first degree of judgment, a disincentive to the request for alternative rites with a resulting increase in appeals.

Downsized the rehabilitative goal and lost sight of other sources of value-based legitimacy, the Italian prison system has been marked by a considerable aggravation of the state of crisis which it has been experiencing. A crisis of legitimation, in which incapacitation and neutralization quietly take the place of rehabilitation and reintegration, and a related and more evident crisis of the conditions of detention, mainly due to the state of prison overcrowding.

3. Overcrowding prisons in Italy

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has reprimanded Italy more than once because of the persistent problem of overcrowding prisons. Italy has one of the highest prison occupancy level in Europe (120% on 02/29/2020, 104% three months later, Department of Prison Administration Data). Prisoners number had already begun to reach worrying levels at the beginning of the 1990s and reached the peak in 2010 (67,961 on December 31st), with an overcrowding rate of more than 150%, despite in 2006 around 26,000 inmates have been released as a result of a pardon granted. The situation in Italy is made even more complex by the uneven distribution of inmates, with some under-utilized facilities and others, particularly those located in metropolitan areas, showing overcrowding rate of almost 200%. However, increasing inmates number has not been matched by a corresponding increase in prison educators or, most significantly, prison officers. Prison Administration has made up for the shortage of prison personnel, calibrating supervision according to the degree of risk posed by the inmates, so inaugurating a “dynamic surveillance” (*sorveglianza dinamica*).

The recent pronouncements of condemnation against Italy (2009 and 2013) by the European Court of Human Rights for violating the ban on inhumane or degrading punishment (Article 3 of the Convention) should be seen in this context. However, the Court criticized the structural nature of prison overcrowding that had originated as a systemic problem as the result of the chronic failure of the Italian penitentiary system, not limited exclusively to the particular case of the claimants. Overcrowding dramatically affects health (Haney 2003) and living conditions inside prisons and inevitably compromises the rehabilitative goals of punishment as enshrined within the Constitution.

The relentless rise in the number of inmates in prisons had forced the Government to declare in 2010 the state of emergency of prisons, extended for 2011 and 2012. This declaration is part of a plan of action, known as the “Prison Plan” (*piano carceri*), launched by the Italian Government in the same year. The most significant task of the Plan contemplated the need to proceed, with the utmost urgency, towards the immediate launching of actions aimed at the construction of new prison facilities and an increase in the capacity of existing structures, with ad hoc financing of no less than €500 million. Another task contemplated interventions in the area of criminal sanctions through measures that included the possibility of the execution at home for sentences of up to eighteen months (law 199/2010) as well as probation (*messa alla prova*, law 67/2014) for sentences of up to three years, with a resulting suspension of trials, as already provided for minors.

In the following years, further deflationary measures, contemplated in particular by the so-called “empty prisons” decrees (*decreti vuota carceri*), were adopted with the ultimate aim of decongesting the prisons (i.e. decree 78/2013 introduced in particular the possibility to apply pre-trial detention only for crimes punishable with a sentence of at least 5 years of detention; decree 146/2013 introduced increase of early release from 45 to 75 days per semester). However, all these measures could not to avoid the second sentencing by the ECHR in 2013 nor to definitively reverse the trend, as from 2015 number of inmates have started to grow again, as well as the occupancy level. Number of prisoners on December 31st had fallen from 67,961 in 2010 to 52,164 in 2015, before rising and reaching 61,230 on 02/29/2020 as mentioned above. A trend followed also by the occupancy level which dropped from 150% in 2010 to 105% in 2015, to go back reaching 120% in 2020, before the new decline in the context of the covid-19 pandemic.

The strategic decision to focus on building new prisons could be apparently justified by a verification of the prison population rate (number of prisoners per 100,000 people) according to 2020 International Centre for Prison Studies data, somewhat low for Italy (102), well below the European average (128) and therefore far from the figure registered in the United States (698). The problem of overcrowding could therefore be redimensioned as a mere consequence of a quantitative inadequacy of prisons. Such a reading would end up ignoring problems and contradictions inherent within criminal political direction of the past three decades, which ultimately swell the spaces of a criminal justice system that, having lost its subsidiary function, expands occupying the void left by other regulative systems. More generally, it would mean abandoning a broader reflection on the functions of the penal system and punishment.

Such a “technical-administrative” response neglects the deeper “political” matrix of this issue (Anastasia 2011), giving rise to costly, and only partially effective, solutions and disregarding the various courses of action suggested at a supranational level. According to UN Office on Drugs and Crime (2013), “Although the pressure put on prisons by the overuse of imprisonment can be temporarily alleviated by an expansion of the prison estate, if the root causes of high imprisonment rates remain unchanged, new prisons will rapidly be filled, and the prison building programme will need to be expanded on a regular basis”. Similarly, CPT (1997) states: “For its part, the CPT is far from convinced that providing additional accommodation will alone offer a lasting solution. Indeed, a number of European States have embarked on extensive programmes of prison building, only to find their prison populations rising in tandem with the increased capacity acquired by their prison estates”.

Whilst accepting the age and general inadequacy of the majority of existing prison facilities, it is not possible to view the political initiative as altogether positive. In addition to the numerous closed or unused facilities, a strategy fundamentally directed towards the construction of new institutions may only temporarily stem the overcrowding phenomenon yet is unable to combat its causes. This may be further demonstrated by citing the pardon measures of 2006 that led to a reduction of more than 60% in the number of inmates yet the results of which were annulled in the space of just three years.

As regard as the rapidity and effectiveness of the expected goals, Italian Prison Plan may undoubtedly be viewed as disappointing, as the Italian Court of Auditors also concluded in a 2012 report on the management of the prison building works.

4. Criminal policies in the field of drug addiction and immigration

As the use of clemency measures is rendered more complex, prison overcrowding is thus the inevitable consequence of criminal policies (particularly in the field of immigration and drug addiction) and the use of pre-trial detention with few equals in Europe. In the 2013 sentence, Italian State was therefore invited by ECHR to reduce to a minimum of the recourse to pre-trial imprisonment. In 2010, year of the declaration of prison emergency, pre-trial detainees were 42% of the Italian prison population, registering a rate among the highest in Europe and so justifying recent legislative initiatives aimed at further contracting the margins of implementation of this measure, as well as calls aimed at raising awareness among magistrates of the need for greater diligence in sentencing. In the following years the percentage has decreased (31% on December 31st 2019, Department of Prison Administration Data). The percentage has been decreased significantly in the months of the coronavirus pandemic, recording a further substantial drop.

Drugs-related offences represent those for which the largest number of both sentenced prisoners and those in remand has been observed, about 35% in 2020 (Department of Prison Administration Data). In the 1970s drug addiction was beginning to be considered a social issue, although it was not yet the subject of the social alarm that would occur in the 1980s, when the idea of a tough line begins to make its way. “The first law and order campaign began in the late 1980s, when zero tolerance policy for drug users was imported in Italy” (Anastasia 2012: p. 43). The reform legislative procedure had been initiated some years earlier by the will of the socialist Prime Minister Craxi, who decided to align Italian drug policy to Nancy Regan’s “Just say no” campaign after his visit to the United States. The 1990 Consolidated Law on Drugs (Presidential Decree n. 309) modified in a restrictive sense the regulatory framework outlined by the legislation previously in force (law 685/1975), which had introduced the principle of non-punishability for those who bought or were in possession of small quantities of drug (not exactly specified) for personal use.

The 1990 reform introduced an ambivalence approach, both rehabilitative and punitive: therapeutic alternative measures for drug addicts offenders and services for rehabilitation of those condemned (*SerT*) on one side, the prohibition of non-therapeutic personal use of narcotic and psychotropic substances (expressly listed) by the other side. In this latter regard, the law introduced the new principle of average daily dose (leaving the quantification of active ingredient limits for daily doses to the Health Ministry), a strict limit beyond that it looms the charge of drug dealing. The licit quantity of narcotic substances for personal use was significantly reduced. The mere

possession of more than the average daily dose would have been enough to define the drug addict as a drug dealer, automatically attributing to him a presumption of guilt. The reform provided for harsher penalties for hard drugs (opiates, cocaine, lsd, amphetamine, etc.) than for soft drugs (cannabis, etc.), while an administrative sanction (i.e. suspension of driving or arms licence) was imposed in case of personal use of a lower dose.

While rejecting the question of constitutional legitimacy of the law immediately raised by some Courts, already in 1991 the Constitutional Court left "the sensitivity of the legislator the task of verifying the goodness of the choices made and of identifying the lines of any possible and useful improvement". Nevertheless, the regulatory framework was partially modified in 1993 by a referendum, promoted thanks to the Radical Party, that amended the law in the provision regarding the prohibition of personal use, as well as in the reference to the average daily dose. Once the boundary between personal use and drug dealing has disappeared, the judge is given the discretion of deciding on the basis of circumstantial evidence. The punitive attitude of the law was thus somewhat scaled down, also in consideration of the wide network of public and private socio-health services for taking charge of drug addicts.

The 1990 Consolidated Law was significantly amended in 2006 by the so called "Fini-Giovanardi" law (n. 49), which, while extending the possibility to access to therapeutic alternatives measures, it revealed a predominantly repressive attitude. A return to the past that annulled the distinction between hard drugs and soft drugs and introduced again strict limits of quantity of narcotic substance possessed beyond which there was the automatic presumption of drug dealing. Soft and hard drugs were so equated in a single chart with same criminal sanctions, from six to twenty years in prison. The political choice was therefore the consumers' criminalization. Starting from 2006, the number of prison entries for violation of article 73 of the 1990 Consolidated Law, which punishes the illicit production, traffic and possession of narcotic and psychotropic substances, has thus gradually increased. The enormous difference in detentions compared to the crime of association aimed at illicit trafficking (article 74) makes plausible the notion of a law that ends up criminalizing "small fry", if not simple consumers in possession of amounts deemed suitable for the purposes of dealing. Nevertheless, this number has started to decrease since 2010, thanks to the various deflationary measures introduced.

Following a Constitutional Court ruling of 2014 which resulted in the unconstitutionality of the amendments to the laws on drugs introduced in 2006, the pre-existing rules were de facto brought into force, with the distinction between hard drugs and soft drugs and the diversification of penalties, as confirmed by the law 79, promulgated in 2014 to bridge the legal vacuum. An important law from a political-criminal point of view, as it provides that, in certain conditions (means, modalities or circumstances of the action, or the quality or quantity of the substances), illicit activities of article 73 constitute an autonomous crime offence and no longer a simple attenuating circumstance. A minor crime of tiny nature (so-called "*fatto di lieve entità*") with a lighter sanctioning treatment (4 years maximum), thanks to which pre-trial detention is not applicable anymore.

The number of prison inmates for drug-related offenses is not entirely superimposable to the number of drug addict prisoners, who may also be in prison for other crimes (about a third of the prison population) and that represent a problem from the health point of view as well. A drug addict offender, sentenced to a term of no more

than 6 years, may ask at any time to be remanded on probation and entrusted to the social services in order to continue or to undertake the therapeutic activities. An alternative measure not often applied, although in the last fifteen years the total number of alternative measures has approximately increased tenfold, reaching 30,000 in 2020 (on February 29th, Department of Prison Administration Data). In any case, thanks to the deflationary measures introduced since 2010, the number of prisoners for drug related crimes has decreased from 41% in 2010 to 33% in 2015, but has since increased, albeit slightly.

The percentage of foreigners out of the total number of prisoners admitted in prison for violating the drug law has been consistently high since the beginning of the 1990s, in correspondence with the consolidation of incoming migration flows in Italy. Indeed, the rapid escalation of foreign inmates now sees them make up a third of the prison population figures (32,4% on 02/29/2020, Prison Administration Service Data, a percentage that has not decreased in the following three months), entirely inconsistent with the percentage of the foreign resident population (little more than 8,9% on 1.1.2020, Italian National Institute of Statistics Data). Although since 2009 (when they were 37%) there has been a slight percentage fall, Italy remains well above the European and world average. Such trends have almost certainly contributed to fuel a social alarm regarding immigration, which has become central in the Italian public and political debate, since the beginning of the 1990s. It has been then that Italy became aware of its transition from an emigration country into an immigration country and at political level the rhetoric of the security emergency began spreading rapidly.

Overcoming the emergency approach that had guided immigration policies until then, the so-called “Turco-Napolitano” law (n. 40/1998), was the first Italian organic law on immigration (which later merged into the “Consolidated act of provisions concerning regulations on immigration and rules about the conditions of aliens”, legislative decree 286/1998). While supporting a policy of social integration of regular foreigners, it dedicated the most substantial part of its legislation to the problem of the rejections and expulsions for the fight against illegal immigrants, also creating temporary-stay centres for their administrative detention.

Recourse to criminal law, basically limited to the crimes of aiding and abetting and exploitation of immigration, increased significantly with the so-called “Bossi-Fini” law (189/2002), which modified in a restrictive sense the Consolidated act at the height of an intense politicization season of the immigration speech. In 2001 and 2008, national political campaigns were won, not by chance, waving the flag of stricter laws against immigration (Gonnella 2014: p. 15).

The restrictive approach of the law regarding the entry and stay of aliens is accompanied by the criminalization of the irregular presence. The law in fact introduces new crimes, with reference to the violation of the expulsion order and the crime of entry in violation of the ban on re-entry. The new regulation, however, did not have the expected effect, due to a very high number of rejections to applications for renewal of the residence permit which actually increased the number of illegal immigrants, with the consequence of an increase in the number of foreigners inside the administrative detention centres. A real form of detention, without, however, the adequate guarantees ensured by the criminal trial and execution.

The issue of security is, in this context, exemplified by the introduction of a so called “Security package” (*Pacchetto sicurezza*) in 2009 (law n. 15) with a set of measures concerning public security. A paradigmatic legislative act of the social

sensitivity for the security issue, the threat of which is attributed above all to the foreigner. The “Security package” introduced the crime of “illegal immigration”, that punishes with a financial sanction the alien that enters the State or remains on the State’s territory infringing the provisions of the law (art. 10 *bis* of the “Consolidated Law 286/1998). Not only those who enter the country without respecting the rules are punished, but also overstayers, those who, despite having entered regularly, find themselves in irregular situations after a period of regular stay. Many doubts were express regard this norm, about its penalization of a mere subjective condition which is not directly symptomatic of a specific social danger, and about its constitutionality, in particular regarding respect for the principles of equality and equal treatment. Furthermore, this is an ineffective rule, as the irregular foreigner is unable to pay the fine. The real sanction for this crime would not be the fine, but the expulsion, foreseen as a replacement sanction.

In conclusion, Italian legislation does not facilitate a process of social inclusion, thus increasing the number of irregular immigrants, to whom a high percentage of the crimes committed by foreigners is due. From a demographic perspective, immigrants are represented by a predominantly young population and, as such, belong to the category most at risk from falling into criminal activity and are generally reported and condemned for those crimes most common to detainees (crimes against property and drug offences). Furthermore, the high presence of foreigners in Italian prisons can however be partly read as a result of the obstacles posed to immigrants in terms of the likelihood of access to alternative measures or to home detention if they have not been condemned, as in the first place the availability of a home. Immigrants, particularly those illegal, do not in most cases enjoy domicile in Italy and lack family and social networks, leading judges to more easily deem the risk of escape as significant and, consequently, not conceding so often measures other than detention. Almost 42% of those who have a residual sentence of less than one year, and who presumably could have access to an alternative measure, are foreigners (on 12/31/2019, Prison Administration Service Data). “The paradox is that the alternative measures become progressively designed for individuals who can still count on a safety net, while prison remains hard and inescapable for the socially weak who are most in need” (Palma 2002: 386).

Of a total of persons sentenced to alternative measures to detention, just around 15% were immigrants (Prison Service Department Data), with an incidence lower than that of immigrant prisoners. The total number of individuals sentenced to alternative measures has steadily increased since 2000, only to fall dramatically in 2006 due to the effect of the pardon, before beginning to rise slowly once more, until 2009 when, thanks to legislative amendments, the number began rapidly reaching 30,000 in 2020.

However, the initial introduction and subsequent implementation of alternative measures was not mirrored by a reduction in prison admissions, fuelling in Italy, as in other countries, a reading of the phenomenon as a result of net widening (Manconi and Torrente 2015: p. 114). A plausible explanation stems from the observation that those receiving such measures would probably not end up in prison in any case.

5. Conclusions

The crisis of the Italian prison system has its roots at the turn of the 1980s and 1990s, at the beginning of a political season marked by a concern for responding to a growing social alarm over criminal matter and over the consequent demand for security.

Detention has been instrumentally used by politics as an effective tool in gaining consensus. Abandoning more complex forms of social intervention, the threat of imprisonment remains the shorter and more popular pathway, through increasingly severe penalties that calm and feed social alarm at once. A relentless stream of penal legislation based on the rhetoric of security has nevertheless produced adverse side effects, overloading a justice system already lacking the necessary resources, so as impairing its effectiveness and amplifying the fear of crime.

The inconsistency of the criminal policy framework is thus revealed in the increase of the maximum statutory penalty for many criminal offences and in the prevision of imprisonment as a sanction for some new ones (i.e. “road homicide”, art. 589 *bis* criminal code) and in the use of alteration mechanisms of the sanction's effectiveness, such as deflationary measures previously mentioned. Their implementation means facing prison emergency by eliminating its symptoms renouncing to intervene on the deeper social causes.

The responsibilities for the crisis are fundamentally political in nature, “which has always been, in this matter, a conjunctural politics, unable of reading social changes and capable only of a demagogic use of criminal law as a symbolic surrogate for its failure to face the phenomena - from immigration to drugs – except with exorcising them with their penalization” (Ferrajoli 2002: p. 17).

Criminal immigration policies in Italy can be read as constituting a “criminal law of the enemy” (Jakobs 2010), an expression which involves a preventative function of criminal law as a neutralization tool for individuals potentially dangerous to society, beyond the normal rules applied to citizens. Criminal law thus assumes a symbolic aim for the social control of emergencies and, therefore, of the enemies who are to be targeted: Criminal law thus seems to perform a fundamental function of symbolic production in relation to various emergencies, building from time to time figures of public enemies that only it appears capable of fighting (Mosconi 2001: p. 43).

The Italian justice system lends itself to a interpretation in terms of a distance between a material and a symbolic function of punishment. The material function, corresponding to the one actually applied, would be contained, if not even mild, while the symbolic exercise of the penalty assumes abnormal and therefore disproportionate dimensions (Pavarini 2001). Even today, in the face of a factually relatively contained sanctioning, appears to require high-level symbolic sanctioning, with the risk of excessively unbalancing the relationship between the threat of punishment and those actually applied, with dangerous implications in terms of selectivity criteria (Pavarini 2001: p. 90).

In recent years there have also been a few important initiatives, such as the passage of healthcare competences in prison from the Ministry of Justice to the Ministry of Health in 2008; the establishment in 2012 of the National ombudsman for the rights of persons detained and the signing in the same year of the “Charter of Prisoners 'and Internees' Rights and Duties”, which is given to each prisoner or internee upon arrival to prison to exercise their rights at the best. Two years later, with law no. 81, Judicial Psychiatric Hospitals, which hosted socially dangerous offenders, have been closed. Most of these and other initiatives have had to wait until the crisis in the penitentiary system became an emergency.

Despite the various deflationary measures described, it was thanks to an emergency, the Coronavirus health one, that the growth in the number of prisoners that began in 2015 was stopped. A new wide-ranging criminal policy, no longer

populistically oriented, could rediscover the subsidiary function of criminal law and imagine a prison system that is no longer prison-centric.

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