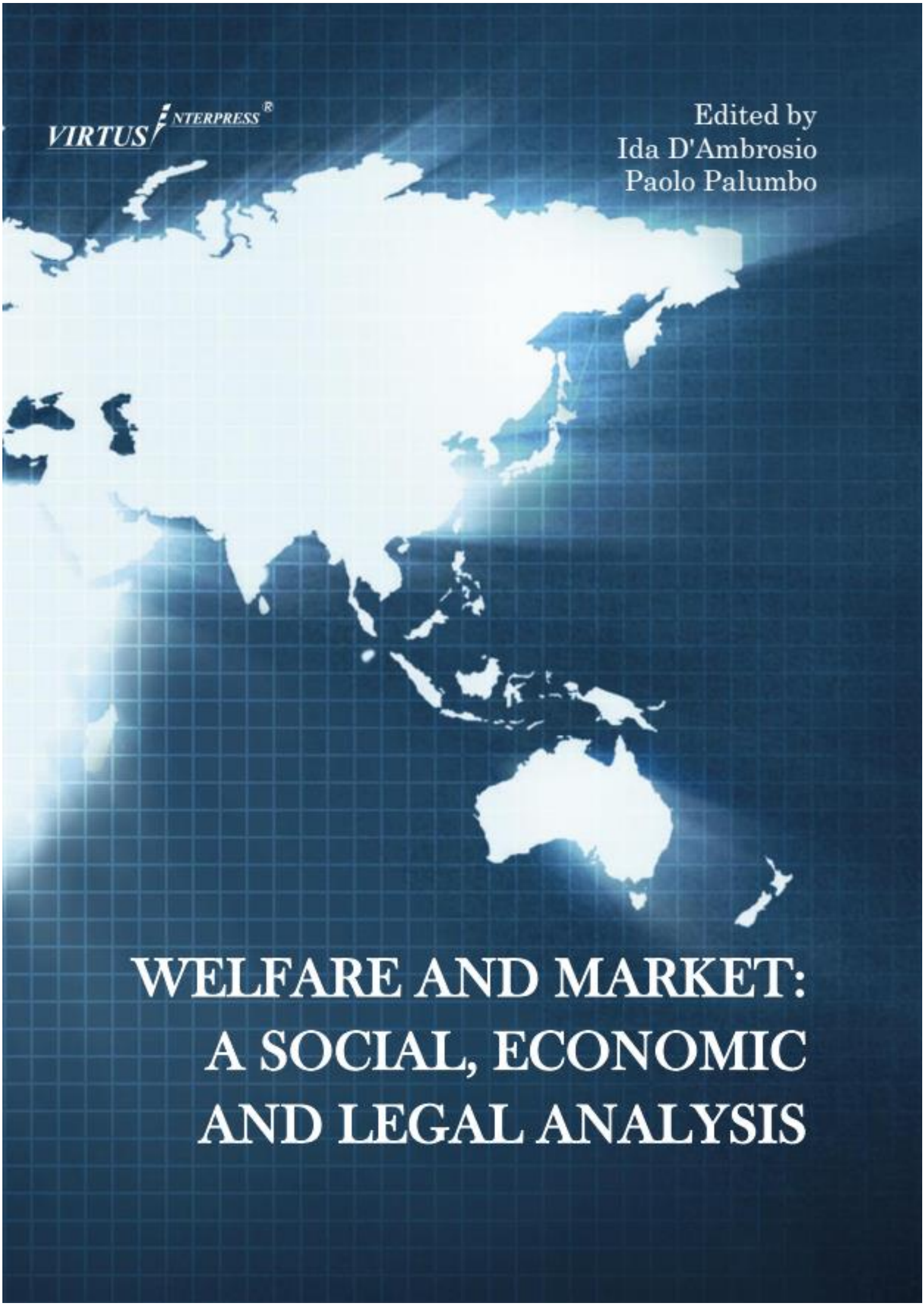
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WELFARE AND MARKET:
A SOCIAL, ECONOMIC
AND LEGAL ANALYSIS

WELFARE AND MARKET: A SOCIAL, ECONOMIC AND LEGAL ANALYSIS

Ida D'Ambrosio
Paolo Palumbo

名誉	良心	高貴
Meiyo	*Ryoushin*	*Kouki*
Honor	*Conscience*	*Nobility*

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CONTENTS

PAPERS SOCIAL AND ECONOMIC SECTION

NEW GUIDELINES FOR SOCIAL INCLUSION POLICIES RELEVANT TO MENTAL ILLNESSES INSIDE THE PRISON CONTEXT

Giovanni Chiola[*]

Keywords: Folli Rei, Rei Folli, Psychiatric Illness While Incarcerated, Forensic Psychiatric Hospitals, Alternative Penalties to Prison, Dignity, Rights of Detainees

1. Introduction

In the public imagination, prisoners have long been considered "social waste" (De Rossi, Bologna, Colcerasa, & Renzulli, 2011) to be eliminated from the social context and to be hidden in separate places, just like mental patients, to be then considered people receiving national and supranational rules, towards which to impose limits in order of the deprivation of one's own personal freedom, and even to apply guarantees on how this action is carried out. The research is mainly based on the prison overpopulation and on the possible means to solve the problem, in the specific case, the scarce legal protection against detained people who – if they were carriers of mental illness, occurred at the sentence – suffered strong discrimination in the execution of the sentence, because there was no compliance of the therapeutic needs guaranteed by Art. 47-ter, c. 1-ter of Law n. 354 of 1975, to other prisoners suffering from serious physical pathologies. It is about double discrimination suffered by many individuals living in strong social isolation, whether for mental conditions or for the place where they serve their sentence. The problem becomes complicated when a discriminatory element, such as prison, can be the cause of the unbalance and, therefore, of serious pathologies of the prisoners (so-called *rei folli*). Recently, the Constitutional Court has intervened to solve this complicated puzzle and in judgement n. 99 of 2019, argued that mental disorders can get worse and intensify due to reclusion, to the point of implying, in extreme cases, a real incompatibility between prison and mental disorder. Moreover, the judges of the Court have established that "in contrast to the constitutional principles ex. Art. 2, 3, 27, third paragraph, 32 and 117, the first paragraph of the Constitution, the absence of an alternative to prison, which prevents the judge from deciding that the sentence is served outside the detention institutes, even if, after all the necessary medical inspections, it has been found a mental disease causing such serious suffering that, cumulated with the ordinary affliction of the prison, brings forth an additional sentence contrary to the sense of humanity".

Such convicts with an occurred mental disease, even if the residual sentence is longer than four years, have finally the possibility of being treated in the small Departments for the safeguard of mental illnesses and by the DSM (Departments of Mental Illness), existing in prisons, but even – if these intra-wall remedies are inadequate for the serious mental illness – outside the prison, through alternative measures arranged by the surveillance court, such as the institutions for the mandatory or optional deferral of the sentence, or through the house detention, also called "humanitarian" or "derogating", on the same terms of physical illness, ex. Art. 147 and 148 penal code.

2. The judgement of the Constitutional Court n. 99 dated 19 April 2019

Through Judgement n. 99 of 19 April 2019, the Constitutional Court has recovered the reform proposal formulated by the Commission Pelissero that wanted to extend Art. 47 penal code (optional postponement of the sentence execution towards convicts suffering from serious physical illnesses) even to serious mental disabilities and to abrogate Art. 148 penal code (mental disorder occurred to the convict), seeing that the OPG (Forensic Psychiatric Hospitals) have been dismantled (where also rei folli to whom the execution of the sentence was precluded, due to the occurred mental illness,

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were accepted). On the one hand, if the proposals put forward by the ministerial Commission have not been taken into consideration by the subsequent rearrangement law of penal rules, of the penal procedure and the penitentiary law (Law n. 103 of 2019), on the other hand, judgement n. 99 of 2019 tried to put at the core of the debate the protection of the health of detainees with mental illness (Della Bella, 2018) but also the unease of the prison police expressed, as we will see later, through the increase of the suicides rate in prison. The Constitutional Court has cancelled what was put into effect by the Legislative Decrees of 2 October 2018, n. 123 and 124, executive of Law n. 103 of 2017, paragraph 16, which had completely removed the matter of psychiatric assistance in penal institutions. On the contrary, as for Art. 148 penal code, the Constitutional Court itself argued about the judgement under review that "has now become inapplicable, because overtaken by legislative reforms that, without expressly prescribing their repeal, have completely emptied it of its contents...".

Into the merits, judgement n. 99/2019 resolves the doubt of constitutionality raised by the Cassation Court on the difficult question of the rights of the psychic patients, finally managing to equalize detainees, suffering from serious physical illness to those suffering from a serious deep-rooted mental illness. The question submitted to the judgment of the Constitutional Court refers, in particular, to the prisoners who – if they were carriers of mental illness, occurred after the conviction – suffered from strong discrimination in the execution of the sentence, because the therapeutic needs guaranteed by Art. 47-ter, c. 1-ter of Law n. 354 of 1975, to other prisoners suffering from serious physical pathologies, was not taken into consideration. Such decision allowed that even these prisoners with an occurred mental illness, who had to serve sentences even longer than four years (for "humanitarian" criteria), had to be assisted in the health sections of prisons, or outside the prison, with alternative measures arranged by the surveillance court, such as the institutions of the mandatory or optional respite of the sentence, or the house arrest, "humanitarian" or "derogating", like the physical illness, ex-Art. 147 and 148 penal code. House arrest can therefore be applied to the prisoner, suffering from occurred serious mental illness and can take place "at home or in another place of private residence", or in a "public place of medical care, assistance or reception", as provided for in Art. 284 criminal procedures code and as reaffirms paragraph 1 of the same Art. 47-ter penitentiary order. Consequently, we can deduce that house detention constitutes "not an alternative measure to the sentence, but an alternative sentence to detention or, if you like, an execution method of the sentence", adding that it is accompanied by "restrictive provisions of freedom, under the vigilance of the supervisory magistrate and with the intervention of the social service" (Leonardi, 2007).

3. Judge's assessment of the detainee suffering from mental illnesses

The judge has to evaluate, on the basis of the constitutional law, if the penitentiary treatment is individualized case by case, but at the same time, has to weigh up the riskiness and the treatment progress, because every different situation deserves a different treatment.

The decision about if the condemned person, suffering from a serious mental illness, is in the condition to remain in prison or to be transferred to an external place, is a difficult task that has to be assessed, case by case and moment by moment, according to the individual situation. The supervisory judge will no longer use the criterion linked to the mere presence of serious mental illness – meant, in a general sense, as a social stigma implying the logic of the mental hospital – but the medical test of the prisoner, of his social and family conditions, of the care structures and services offered by the prison, of the protection needs of the other prisoners and all the personnel, working inside the penitentiary institution, which shall be adequately balanced by the need to safeguard the safety of the community. If the requirements of public safety prevail, the supervisory magistrate will deem them impedimental to the concession of alternative measures. The same judge will adopt precise criteria to define the mental illness and to offer his evaluation, as well as the management ways and the operational effects on mental health departments and professional responsibilities. After the achievement of the DSM certification of serious mental illness and the preparation of a therapeutic path and of psychiatric assistance, the condemned person can be committed on probation, through an order indicating the "prescriptions" he/she has to comply with. However, in order to ensure the respect of the sentence and that justice and health competencies are set out, it is fundamental to

define the meaning of "serious mental illness" and to establish the relationship between "prescriptions" and "program of care" (Galliani, 2018). Otherwise, the measures that do not take into consideration the feasibility of the PT, would shift onto the public healthcare conditions of mere maladjustment to detention in prison, compromising the places of care that have to manage false patients[1].

4. The non-physical and mental health of the restricted and the reference community

With respect to physical pathology, the Court of Human Rights has declared that the State has to take into account the practical needs of imprisonment, adequately ensuring the health, but also the well-being of the detainee. In this regard, the administration of the required medical care cannot be denied in no case, e.g. *Kudła v. Poland* [gc], n. 30210/96, § 94, Cedu 2000-XI; *Rivière c. France*, n. 33834/03, § 62, 11 July 2006 (Conti, 2013), that have to be provided within the prison and correspond to those given to the entire population. In order to protect the physical integrity of those people deprived of their freedom, the release of the prisoner or his transfer to a civil hospital is justified, when the disease is particularly difficult to be treated. As for mental illness, on the other hand, thanks to the recent judgement of 19 April n. 99 of 2019, the Constitutional Court has solved the doubt of constitutionality raised by the Cassation Court on the difficult issue of the rights of the psychic patients, finally managing to equalize detainees, suffering from serious physical illness to those suffering from a serious deep-rooted mental illness. In doing so, the Court took an important step towards the realization of some provisions of the European penitentiary policies (Council of Europe: Committee of Ministers, 2006) in order to change the rigid detention system – without affecting, at present, the granitic Penal Code Rocco of 1930 – involving the population of prisoners, including the rei-folli[2]. The sentence will not have repercussions only on rei folli, but also because it will shed light on the penitentiary institution, considered until now a *Sancta Sanctorum* of the Italian penal system. The legislator had already perceived the problem of detainees with mental illnesses and with Law n. 354/75, on Art. 11, established that: "each penitentiary institution has to avail itself of the professional advice of at least one specialist in psychiatry". This provision imposed the Prison Administration to introduce within the penal institutions, an intra-wall psychiatric service, managed by a group of professionals, able to ensure a necessary therapeutic continuity, in order to face situations of psychic discomfort[3].

It is about the so-called "small departments for the protection of mental health", authorized to host infirm and mentally disabled people inside prisons (ex. Art. 111, c. 5 and 112, c. 2 of Presidential Decree n. 230/00), as well as those individuals convicted to penalty, reduced due to partial defect of the mind, at the moment of the fact perpetration (89 penal code).[4] The Court has often stressed that the condition of the frailty of the convict produces a positive obligation for the State to guarantee the respect of worthy conditions for the individual. This would confirm the attention of the Constitutional Court to the previous decisions of the Strasbourg Court and therefore, to the respect of the total prohibition of torture or inhuman or degrading treatments (EDU Court, second section, judgement n. 17 November 2015, *Bamouhammad v Belgium*, paragraph 119; EDU Court, Grand

[1] The non-official data drawn by SIP (National Conference of 21-23 June) on April 2019, underline that every year more than 400 people (5%), coming from prison, are transferred to psychiatric structures without any clinical indication on the imprisonment methods considering that 8 thousand real patients obtain a non-detention security measure at the DSM or detention in the REMS.

[2] Art. 12 of the European Prison Rules provides that, in case of incompatibility between detention inside prison and people suffering from mental illnesses, they should be detained in an institution expressly conceived for this purpose. If, however, these people are exceptionally detained in a prison, their situation and their needs have to be regulated by special rules.

[3] See the goal project for the protection of mental health in the penitentiary field, issued to implement the reform of penitentiary medicine with Legislative Decree n. 230 of 22 June 1999. The goals highlight the need to maintain a strong collaboration between the territory, represented by the DSM, and the psychiatric service in the penal institutions; Art. 111 c. 5 and 112 c. 2 of Presidential Decree n. 230 of 30 June 2000 (Regulation bearing the rules on the penitentiary system and on the privative and restrictive measures of freedom), published in G.U. (Official Gazette) n. 195 of 22 August 2000 – Suppl. Ord. n. 13. Finally, the Decree of the Council of Ministers President of 1 April 2008, which will provide an adequate regulatory response to prisoners in the period in which the OPG (Judicial Psychiatric Hospitals) were still open.

[4] See the Agreement of 13 October 2011, sanctioned in Unified Conference, on the document bearing "Integration to priority addresses on interventions in judicial psychiatric hospitals (OPG) and in Care and Custody Homes (CCC) referred, as per Annex C of the Decree of the Council of Ministers President, 1st of April 2008".

Chamber, judgement of 26 April 2016, *Murray v Low Countries*, paragraph 105). In the event of infringement, it is mandatory "that the jurisdictional authority provides for the interruption of imprisonment", remembering that the area of the prohibition application ex Art. 3 of the ECHR, has to be extended to the entire prison system, also including the prison psychiatric department, because even in this place it could be practiced "a degrading treatment when used therapies are improper and the detention extends over a significant period of time…".

The long wave against prejudice goes until the heart of the Italian prison system, affecting the automatisms (absence of collaboration) that were deemed unacceptable because they preclude the access to benefits (Art. 85, point e) of Law n. 103 of 2017 (Alterations to penal code, penal procedure code, and penitentiary system). Vide, then, the ECHR October 2018, Art. 41 bis, which condemned Italy for inhuman and degrading treatments, having prevented Bernardo Provenzano, who was serving an impedimental life sentence and who was at death's door, to enjoy the benefits regarding his bad physical conditions, because he was however considered an individual at a high level of perilousness. The same concerns the judgement of the EDU Court that in the case *Marcello Viola c. / Italy (n. 2)*, Appeal n. 77633/16, judgement of 13 June 2019, condemned Italy for infringement of Art. 3 Human Rights Convention, that is the right of the prisoner condemned to impedimental life imprisonment not to be subjected to inhuman and degrading treatment, and therefore, to enjoy discounts of penalty or benefit. Thanks to this last ECHR decision, the legislator has to take his cue to change the prison rules and to conform to some penal institutions (for example, the special detention regime), with international human rights standards.

5. Prison overpopulation and its potential pathogenesis

Mental health in prison is a particularly sensitive area within the general health of prisoners. That's because recently, mental health has been strongly compromised by the conditions of detention life – especially in contexts characterized by a systemic and structural prison overpopulation (Edu Court, judgement of 8 January 2013, *Torreggiani and others c. Italy*) – intervened the Constitutional Court, the National Bioethics Council and the Strasbourg Court, in order to defend health protection as a human and constitutional right, valid both inside and outside prison walls, in conditions of equal treatment between free individuals and prisoners. Starting from the postulate on the basis of which the punishment of prison is per se a distortion of the fundamental individual rights (Pelissero, 2018), mental health is undermined by the suffering linked to imprisonment (World Health Organization, 2014), that is to the renunciation of autonomy, of sexual choices, of identity and security, which would be followed by a process of adaptation to the prison environment (Sanna, 1990). Scientific studies by The Regional Health Agency (ARS) of Tuscany and the Ministry of Health (2015) show the development of prison-reactive syndromes[5] that are similar to those related to prolonged stay in closed institutions (Schnittker & John, 2007).

However, the point is not only linked to the illness of the prisoner but of the prison itself, especially when this is illegal because it contains more prisoners than those set by law. Therefore, in order to try to understand how prison can show up and, in case, produce more or less serious forms of psychic distress of the restricted, usually before the execution of the sentence and while serving it, it is necessary to analyze the data that describe the Italian penal system (Pellegrini, 2019)[6].

The increase in the population detained in the first decade of 2000 in many European countries, including Italy, is related to the principle of "tough on crime" (Simon, 2007), that is the legislative exacerbation and the massive use of coercive systems of repression of crimes. The growth of the prison population, compared with the rest of Europe, proved to be anomalous in Italy (+ 1% in the last decade; + 7.5% from 2016 to 2018), even if crimes have largely decreased in comparison with the average of the continent[7] (SPACE, 2018). Consequently, the reason for such

[5] Among these syndromes, we find the imprisonment syndrome, persecutory, isolation and sensory deprivation syndrome, states of regression, inaction syndrome and freezing syndrome, motor syndrome, adjustment, vertigo at the exit and creative function.
[6] The author uses the data of the Emilia-Romagna Region Report 2017 on health in prison in Emilia-Romagna, according to which the problem of mental health and pathological addictions in penal institutions is considerable, with 16.1% of prisoners showing clinically significant psychiatric cases. Most of these are neurotic and somatoform disorders (40%), personality disorders 19.4%, substance abuse-addiction 37.8%, heroin, 29.4% cocaine, while psychotic disorders are less than 8%.
[7] For example, murders between 2015 and 2016 decreased by 14.6% against an average of 3.3%; from 2012 to 2016 the robberies decreased by 24%; home burglaries of 10%.

an increase does not depend on the linear increase in criminality and on the number of detained individuals, in particular foreigners, who decreased by 3.68%[8] in the last ten years. In fact, the number of crimes is constantly on the decline, according to the latest Antigone data. If in 2003 on 100 foreigners duly domiciled in Italy, 1.16% of them ended up in prison, today the percentage has decreased by 0.36%[9]. Then, the highest number of prisoners becomes clear through the long duration of the preventive detention, with the ineffective legislation about drugs, which inter alia, represents one of the main causes of entry and stay in prison[10], but also through the scarce investment in alternative measures that can often be more effective in reducing relapses. The Italian prison overpopulation is so dramatic that it constitutes an additional punishment per se. The data shows that Italian prisons can hold statutorily 50,480 convicts, while at present they are 60,522. Compared with the European average of 93%, Italian prisons are much more crowded with a rate of 115%, which means that, instead of hosting 100 prisoners, 115 are present. Since 2008 we are in a situation of great overpopulation, with extreme peaks in 2010/11 (68,258), and if in the next five-years period, the number seemed to stabilize, decreasing to 52,162 – or rather not exceeding too much the European average – it increased again in the following years reaching 60,522. The increase in the prison population, as shown by recent statistical data, was one of the factors, which led to a notably increase not only in the number of prisoners suffering from mental illnesses but also to exacerbate mental disorders[11]. The demonstration of the difficult life inside prisons resides in the increase in prisoners' suicides[12]. In the past, the National Bioethics Committee had already expressed itself on suicides inside prisons, producing a document (17 January 2003) in which it was underlined that the suicides rate was about 20 times higher than the national one, not to mention the staggering number of self-destructive behaviors. Consequently, the prison has to be considered not only as a punishment but also as a degrading place, and we would say pathogenic too, seeing that even the police employed in prison surveillance are strongly affected by the suicidal phenomenon, which has assumed exponential proportions with respect to the country's average.[13]

6. The prison deflation and the scarce alternative measures

On the threshold of the third millennium, the Council of Europe has produced several recommendations aimed at promoting the use of alternative measures to prison, just to reduce the prison population and the relapse (Committee of Europe, 2010). If in many European countries, it brought forth to a series of reforms aimed at replacing prison with alternative measures, in Italy this process has stopped. Until prison is meant as an ordinary sanction, while alternative measures ancillary, it is difficult to believe that such measures can replace or even overcome prison as the main form of social control of the repressive character. Alternative measures have a deflationary power that can be often neutralized by public opinion that subordinates them to prison (Firouzi, Miravalle, Ronco, & Torrente, 2018). Rehabilitation is an ideal that seems to contradict itself in favor of pursuing the control-oriented function of alternative measures during the various phases of resorting to alternatives to detention. The gap between care and control characterizes the application of

[8] Data of the Ministry of Justice (www.giustizia.it) show that foreign prisoners present in Italian prisons, as of 31 July 2019, are equal to 33.42% that is 20,088 on a global prison population of 60,522. About 10 years ago, foreign prisoners were 37.15% or 24,067 on a global prison population of 64,791.

[9] See XV half-year report of Antigone, 25 July 2019 (www. antigone.it).

[10] Data of the Ministry of Justice of 30 June 2019 (www.giustizia.it) show that among the categories of crime, including the highest number of involved subjects is the crime against wealth (33,709), against the person (24,541) and of the drug law (21,337).

[11] The Italian Society of Medicine and Penitentiary Health estimated that in 2015, around 42.000 prisoners (77%) on 54.000 have a mental discomfort (www.sanitapenitenziaria.org).

[12] According to the data provided by the Ministry of Justice, from 1990 to 2011, 1128 people committed suicide in the country's prisons. Starting from 2011, the survey was replaced by the data processing in the informative system Critical Events, used at the Office for Inspection and Control Activity – Situation Room, whose result was a gradual decrease in the rate of suicides, starting again in 2017 with 48 cases and even 61 in 2018. Contrarily, according to the data provided by the dossier 'Dying of Prison, provided by Restricted Horizons, updated in August 2019, from 2000 to today suicides were 1085, equal to about one-third (2970) of the total deaths among persons deprived of their liberty (Deaths for unclear causes, overdoses, appalling healthcare and suicides).

[13] To demonstrate the particular stressful working situations within a penitentiary institution, according to the aggregate official data of suicides, submitted by the Ministry of the Interior, in the five-year period 2009-2014, 47 prison police officers committed suicide. According to the data provided by the Study Center of Restricted Horizons, there were 143 suicides among the members of the Penitentiary Police Corps (1997-2018). See www.poliziapenitenziaria.it, in which it was ascertained an average of 7 suicides per year, which according to ISTAT parameters would correspond to 14.25 cases each 100,000. In summary, among the members belonging to the Penitentiary Police, one commits suicide 3 times more than in the Italian society.

probation (Vanstone, 2004; Bhui, 2001; Hemmes & Stohr, 2000, Bondeson, 1994); the more we move towards control, the more the Welfare State model is endangered. Hence, the need to revise the cultural approach to the recourse to prison, as a total institution, in order to lay the foundations of a more solid penal and prison system, supporting the respect of civil rights, because through the alternative measures to the sentence, it is required the minor sacrifice of personal freedom, combining security policies and social interventions, aimed at fighting the cases of marginality. This would help the prison's deflationary policy, perhaps together with a real operation of strong decriminalization, of replacement of the juvenile prison with various social structures, of wide remission, and finally, of the use of several alternative measures that allow prisoners their reintegration into the society. The value of the person shall never be diminished in prison; on the opposite, the human dignity of the prisoner must remain intact, even behind bars (Silvestri, 2014). Penalty ex. Art. 27, co. 3, Constitution, must not have a purely afflictive purpose, but rather has to aim at the rehabilitation of the condemned. In comparison with the deprivation of personal liberty, any limitation in the exercise of the rights of prisoners, which is not strictly functional to this target, acquires an additional afflictive value (Judgement Constitutional Court n. 135 of 2013). For this reason, the judicial authority is competent to set out all the provisions that balance the right to health with due safety, for example for AIDS patients. Even if it does not imply the automatic postponement of the expiration of the sentence, it is required that the evaluation is entrusted to the judge, giving priority to the needs of humanitarian nature (Judgement Constitutional Court n. 264 of 2009). In case of suspension of ordinary treatment rules, ex Art. 41-bis penal code, it has to be verifiable by the judge in order to ascertain that the provision is compatible with the right to health (sentence n. 390 of 2002). The security requirements of custody limit the expansion of the rights that constitute human dignity. From a constitutional point of view, the right to take advantage of alternative measures to prison has to be founded on this balancing, provided that their adoption is not blocked by reasonable safety reasons, which the judge has to assess on a case-by-case basis. House detention would guarantee more decent living conditions in comparison with the prison restriction.

To the prescription of Art. 27 of the Constitution corresponds whether Art. 3 of the ECHR, which is the prohibition of torture and penalties consisting of inhuman and degrading treatment, or Art. 4 of the EU Charter of Fundamental Rights (Prohibition of torture and penalties or inhuman or degrading treatments). The inhuman prison conditions would prevent the process of re-orientation of the prisoner towards the values of sociality and legality, while penalties would seem as a vengeance of the authority, which deprives the prisoners of their personal freedom and humiliates them, eliminating the minimal conditions of respectable life, apart from their merits or demerits. According to the sentence Torreggiani, overpopulation causes a situation of suffering in prisoners that exceeds the discomfort induced by the deprivation of personal freedom.

The Constitutional Court (judgement n. 279 of 2013), aware of the gravity and complexity of the Italian prison situation, confirming a previous decision (judgement n. 23 of 2013), has declared inadmissible the problems related to prison overpopulation, as an act of deference towards the legislator, reserving however in a subsequent procedure, due to the inertia of the Parliament, to adopt the necessary decisions aimed at breaking off the execution of the sentence in conditions opposed to the sense of humanity. Moreover, the Court has even believed that the postponement of the sentence was not the only possible remedy but showed some drawbacks (the prisoner could prefer the execution of the sentence with house arrest, instead of the postponement).

7. Alternative penalty to prison

Following the precept of Beccaria, the right to have rights within the penal area, that is the right to execute a human sentence, makes sure that the sentence is not be transformed into a crime (Corleone & Pugiotto, 2012). In order to avoid that the penalty constitutes violence, it has to be the minimum possible, in the sense that it has to be introduced a minimum criminal right as a normative model (Ferrajoli, 2011). If we consider the prisoners, the crimes typology, and the detention conditions due to overpopulation, we would notice that demagogic security policies have affected mostly immigrants and drug-addicted. Such people, economically and socially weak, were the victims of the so-called *laws to fill prisons*, including the Bossi-Fini law (Law n. 189 of 30 July 2002), the ex Cirielli law (Law n. 151 of 5 December 2005) and the Fini-Giovanardi law (Law n. 49 of 21 February 2006,).

In order to invert the process of letting become chronic the overpopulation within the Italian penal system, as claimed by the European Court of Human Rights, it would be necessary to change radically social and security policies, so that prison does not constitute an *extrema ratio*. The constitutional jurisprudence and the Constitution inflect the term sentence in the plural, to indicate the prison and even other penalties that have to aim to the rehabilitation of the condemned person and have to consist in treatment in accordance with the sense of humanity. The rehabilitative principle has to respect necessarily the dignity being due to the human being as such. The prison must respect and promote the freedom of prisoners and encourage a process of self-realization. The respect for the dignity of the person takes on a value that goes beyond the mere prohibition of inhuman and degrading treatments. Some measures of alternative penalty to prison and of decriminalization, through measures based on alternative measures to prison, could consist of:

- the greater use of early release, (proposed by the Head of the Penitentiary Administration Department, as a remark on the judgement Torreggiani, as a defense clause);
- in the conversion of the order of execution of the prison sentence into an obligation to stay at home, with possible prescriptions established by the judge responsible for the execution;
- in the request for constitutional illegitimacy of Art. 147 penal code, in the part where it does not foresee, besides the cases expressly considered therein, the hypothesis of optional postponement of the executive;
- in the order of the supervisory magistrate – clerical or under the complaint of the interested person – to the Director of the penal institute, to the regional Superintendentship or the Department of penitentiary administration, not to proceed with the assignment or the acceptance of other prisoners, if not upon the getting out of others.

The intervention of European jurisprudence – even if it asserts that inside Italian prisons, infringements on the dignity of the person are perpetrated – consists of occasional and jurisprudential answers that are per se not always sufficient (Ruotolo, 2014). As well as the constitutional jurisprudence, which cannot perennially solve penal problems, so that it is necessary an intervention of the Parliament and of the Government that gives priority on the important theme of the political debate, to be added to the agenda. If the Courts can order the reduction of the prison population, they cannot replace the legislator in the structural penal and social policy choices. Consequently, in the future, it will be necessary to act on two fronts: the therapeutic measures alternative to prison and the prison health in the strict sense. The challenge, with respect to the first objective, consists in recognizing the greater effectiveness of alternative measures, as a precondition for a real policy of deflation instruments inside prisons, in opposite trend with the prison-centric system, which instead promotes penal expansionism. It will be necessary to offer staff training for those who work in the external execution (U.E.P.E. – Office for the external penal execution); secondly, it will be fundamental to work on public opinion that does not even consider alternative measures of penalties at the same rank of the detention ones, but by far inferior. The solution concerning alternative measures would align itself with the reform of the criminal policy turned to overcome the instrumental use of the criminal law characteristic of the "penal populism"[14] (Fiandaca, 2013), which identified prison as the institution par excellence of the penal system. At the regulatory level, however, some specific interventions could affect Art. 47 penal order, and have been carried out through the introduction of the provisional application of house arrest (Art. 2 Legislative Decree n. 78 of 10 July 2013, conv., with an amendment in the Law n. 94 of 9 August 2013) and with the due extension of the possibility of applying the on probation care to the social service (Art. 3 of the Legislative Decree n. 146 of 23 December 2013, conv., with an amendment in Law n. 10 of 21 February 2014). The National project called INSIEME[15] was created in 2016 for the achievement of the second objective, with the aim to break up the vicious circle of mental suffering in prison and to introduce a welfare therapeutic path that could combine the different professional figures who work within the prisons, which assured a therapeutic and welfare continuity even after the release from prison.

One can add also the MEDICS project (Mentally Disturbed Inmates Care and Support), set up in 2013, upon request by the European Commission, for the improvement of detention treatment, through the synergy of all institutions, because the prison cannot act on its own. The reached conclusions comply with those of Table 10 of the General States on penal execution, promoted in

[14] In answer to the fear resulting from some crimes, criminal populism is aimed at achieving popular consent demagogically.
[15] Project INSIEME – Mental health in prison, promoted by SIMSPe, SIP and the Psychiatric Italian Society of Addictions with the support of Otsuka.

2015 by the Ministry of Justice, that is the need to arrange a more effective system to monitor the needs of prisoners, by creating a digital medical record to be shared between the penitentiary administration and the health facilities of the territory and the need to provide alternatives to detention for those convicted suffering from mental illnesses (for example, a therapeutic measure on the same lines of the measures for drug-addicted).

8. Conclusion

Mentioning the words of the Court's judgement, the mental illness, behind bars, has to be treated not only within the small departments for the protection of mental health or by the DSM in prison, but in external places (house or public places of care, assistance or reception), with modalities that guarantee safety, but above all, health. The delicate balancing between surveillance and we would say cure instead of punishment, as Foucault (2010) wrote, allows to obtain the optimum by the prison.

The judgement n. 99 of 2019 is part of a juridical context that tried to amend the inequalities between "rei folli" and "folli rei", reviewing the function of security measures and rethinking the principle of the double binary[16] (Palazzo, 2016; Pelissero, 2016). Despite the innovative contribution of judgement n. 99 of 2019, as we pointed out in my work about the field of mental illness, the Criminal Code of 1930 resisted the judgement and the thorough changes introduced by the Basaglia Law n. 170 of 1978, regarding the opening of mental hospitals and by the Law n. 81 of 2014, regarding the closing of the forensic psychiatric hospitals. The effort made by the Court with judgement n. 99 of 2019 was to give a propelling thrust to the person placed at the center of the community. However, in order to execute the sentence, it is important to involve the Ministry of Health, the Regions, the ASL, and the DSM, as well as the entire community welfare system. The future overview after the judgement is completely new and concerns alternative solutions to the prison, whose contribution could be the summoning of an executive regional Conference, involving all the subjects, but also the allocation of new economic resources. People who get sick in prison should be treated not only inside the prisons, but be included in the community, because as per indications of the MEDICS project, such situations have to find the solution required by civilization rules. In collaboration with the justice system, it is, therefore, necessary to activate the competent social services for the territory, acting in concert with organizations such as the UEPE and the Department of juvenile justice and of community. The DSM competent for the territory shall have to identify the places where to carry out alternative measures to the subjects, whose serious mental illness is incompatible with the detention. In this regard, it is essential to regional planning of the single local health corporations. One could say that the old, but still current logic of the double binary – that is of the binomial social perilousness and security measure – could be replaced by this sentence, which would stir again the hope of a reforming project that involves healthcare and justice. For this purpose, it will be possible to carry out the observation of the person in the community and freedom. To do this, it will be essential to realize educational actions and observatories, but also to work out guarantees and protections so that the system is open to the social community rather than being relegated to the skilled workers. However, some points of the sentence under examination do not meet a broad consensus by the doctrine (Spinelli, 2019), not only on the difficult structural equalization of the physical illness to the psychic one – the physical illnesses have a limited duration in the course of time, while the psychiatric ones would have a perpetual character and therefore the objective impossibility of healing – but also and above all, because of a passage in the judgement, where the judge, if he considers prevailing the needs of public security, in the single case, will impose the penal detention to the prisoner, suffering from serious mental illness, rather than the transfer to an external place of care. Not to mention the growing number of "false patients", perpetrators of crimes, that is those who are suffering from Antisocial and Personality Disorder who – in order to reduce the prisons overpopulation – would be entrusted to psychiatrists for the prevention of crimes reiteration, transforming the places of care into precautionary and custody places. The recent judgement n. 99 of 2019 has been pronounced in socio-cultural climate, almost secure and justicialist, in which "prison-centric" policies are resolved by crowding prisons with convicts, beyond the danger

[16] The legislator has delegated the government to review the entire system of personal security measures in Art. 13, c. 1, lett. b of the large unified text (bill AC 4368).

limits and preventing prisoners inmates from internalizing, at the end of the condemnation, the re-socialization that makes them ready to be socially rehabilitated. The scarce regulation of the alternative measures to prison sentences, as well as the increase in the penalization of some crimes, seem to confirm the existence of a penal populism that continues to grow and to strongly condition the legislator. Real examples of the recent change in the cultural climate on security can be inferred from the decree-law on the subject of public order and security (Legislative Decree n. 53 of 14 June 2019); from the amendments of the penal code and other provisions on legitimate self-defense (Law n. 36 of 26 April 2019,); by the decree on International protection and immigration, public security... (Legislative Decree n. 113of 4 October 2018, turned with an amendment in Law n. 132 of 1 December 2018,); finally, from the urban safety decree (Legislative Decree n. 14 of 20 February 2017). Such measures, despite statistical data, prove the contrary[17], indulge a crime perception exaggerated by mass media, increasing the social dangerousness that from delimited and restricted areas, reserved by the Rocco Code, would run over until occupying places of punishment that originally did not appertain to it.

This dangerous justicialist air could disappear with the recent judgement of the Court, which would recover what was hardly developed in favor of the right to the health and the care of prisoners with mental problems, but rather would guarantee new therapeutic and health solutions. Previously analyzed National projects could improve prison healthcare, using a model based on the continuity of care. However, this would happen only if the cultural approach to the resort to prison, as a total institution, would be revised in order to fix the basis of a penal system more solid and more defender of civil rights. Therefore, it will be necessary to have a prison system characterized by the humanization of punishment and by solidarity, which has to be considered as due rights, being aware that legality, especially in prison, is a value to be affirmed with greater determination and... it would be a real pity if the legislator should not adopt any inclusive policy in this regard.

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[17] See Yearbook of official statistics of the Inner Administration, by the Central Statistics Office, November 2015. As for predatory crimes, in 2014 there was a sharp decrease in bank robberies (equal to -25.5 %) and in houses (-6.0%).

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