UNIONE FORENSE PER LA TUTELA DEI DIRITTI UMANI

and

CENTRO DI STUDI SULLA GIUSTIZIA MINORILE
University of Macerata

OBSERVATIONS

ON THE THIRD AND FOURTH PERIODIC REPORTS OF ITALY TO THE COMMITTEE ON THE RIGHTS OF THE CHILD

(CRC/C/ITA/3-4)

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1. PRESENTATION OF THE AUTHORS

1.1. UNIONE FORENSE PER LA TUTELA DEI DIRITTI UMANI

Unione forense per la tutela dei diritti umani (hereinafter "UFTDU") is a **non-profit association** founded on March 2nd 1968 by a group of Italian lawyers, judges and scholars. As enshrined in Article 2 of its Statute, the main purpose of the association is "to spread, especially among those belonging to the Bar and among law practitioners, the knowledge of national and international norms concerning the protection of human rights, and to promote their actual and effective observance at the judicial, administrative and legislative level".

Over the years, the association has pursued its statutory engagements mainly through **human rights advocacy activities**, both at the political level – actively contributing to the drafting of human rights bills, and to public debate on relevant human rights issues, notably through its internet web-site (*www.unionedirittiumani.it*) and the publication of a legal review (*I diritti dell'uomo. cronache e battaglie*) – and at the judicial level – taking part as *amicus curiae* in proceedings before national and international courts or quasi-judicial bodies (in particular, the European Court of Human Rights, the European Court of Justice, and the UN Human Rights Treaty Bodies), as well as supporting direct representation of human rights victims by its team of specialized lawyers.

In the same context, UFTDU actively **participates in UN Charter-based and treaty-based supervisory procedures** to ensure Italy's compliance with obligations resulting from its adherence to the UN Charter, the Universal Declaration of Human Rights and other human rights treaties. In particular, UFTDU – in cooperation with the Open Society Justice Initiative – took part in Italy's Universal Periodic Review procedure before the UN Human Rights Council, submitting on September 2009 an alternative report which highlighted major critical points with respect to the situation of human rights in Italy, and participating in the 7th Session of the UPR Working Group, which took place in Geneva on 18-19 February 2010. Main concerns raised by UFTDU and the Open Society Justice Initiative related to freedom of expression, the discrimination of Roma and Sinti, and the treatment of migrants.

Furthermore, UFTDU has been for a long time the only Italian NGO fully participating in the **periodic report examination of Italy under relevant UN human rights treaties**. In November 2005, UFTDU submitted an alternative report to the UN Human Rights Commission in relation to the examination of the 5th Italian periodic report under the International Covenant on Civil and Political Rights, and took part in the public session of the Commission with the support of the International Federation of Human Rights. Similarly, on May 2007, UFTDU participated in the examination of the 4th Italian periodic report to the Committee against Torture and, on February 2008, to the examination of the 14th and 15th Italian periodic report to the Committee for the Elimination of Racial Discrimination, submitting its alternative reports (available on the web-site of the Office of the High Commissioner for Human Rights), participating in closed session with Committees' members, attending the public discussion of the reports before the Committees, translating and disseminating the Committees' concluding observations, and monitoring their enforcement.

As part of its activities aimed at raising-awareness and improving human rights protection in Italian legal system, UFTDU has set up an online **Permanent Observatory of ECHR case-law**, where main judgments and decisions of the Court are periodically published fully translated into Italian, together with summaries and keynotes.

Generally, UFTDU daily endeavors, through the efforts and professionalism of its members, to **raise public awareness on issues of general importance for the protection of human rights in Italy,** where the association's engagement is greater. This aim has been pursued over the years through the organization of roundtable discussions, national and international conferences seminars, symposia, and forums, the participation to tenders and projects funded by national and international bodies and institutions, the implementation of training programs for law practitioners and public officials, and the editorial activity.

Moreover, UFTDU has created a **solid network of contacts and relationships** with other non-governmental organizations and human rights militants, operating in Italy and abroad, with the purpose of establishing partnerships and other forms of cooperation to achieve its statutory engagements. The association is currently associate member of the International Federation of Human Rights (F.I.D.H.), and of the Institute de Droits de l'Homme des Avocats Europeéns (IDHAE).

UFTDU has also established a close cooperation with several national and international governmental agencies and organizations, such as in particular the National Office against Racial Discrimination (UNAR), the Council of Europe, the EU Agency for Fundamental Rights, and the Organization for the Security and Cooperation in Europe.

1.2. CENTRO DI STUDI SULLA GIUSTIZIA MINORILE, UNIVERSITY OF MACERATA

The Centre for studies about juvenile justice was founded in 2003 by Glauco Giostra (now Professor of Criminal procedure in Rome, University La Sapienza) in Macerata, where it still has its seat in C.so Garibaldi 20, in Macerata University – Faculty of law.

The main goal of the Centre is the development of studies about every profile of protection of children's rights in criminal and civil justice system, through interdisciplinary research, analysis of practises, courts' decisions, bills of reform, and law, appraisal of efficient fulfilment of international standards of guarantees in national law. The Centre, directed at the moment by Claudia Cesari (Professor of Criminal procedure in University of Macerata), is composed by scholars specifically interested and specialised in juvenile justice problems. It also publishes a series of books about specific issues of particular interest in the field of protection of minors in justice system, such as the following:

Il processo penale dei minori: quale riforma per quale giustizia (Criminal process for minors: which reform, which justice) (2004– coord. Glauco Giostra)

Per uno statuto europeo dell'imputato minorenne (A European statute for the minor suspect) (2005 – coord. Glauco Giostra)

European juvenile justice systems I (2007 – coord. Glauco Giostra, Vania Patanè)

Il minorenne fonte di prova nel processo penale (Minors as source of evidence in criminal trials) (2009-coord. Claudia Cesari)

L'esecuzione penitenziaria a carico del minorenne nelle carte internazionali e nell'ordinamento italiano (The penitentiary treatment of minors in international charters and in Italian law) (2010 – coord. Maria Grazia Coppetta)

The Centre promotes seminars and meetings on the most interesting issues and problems of juvenile justice, such as the most recent about penitentiary treatment of minors, made in Macerata, 13th may 2011.

2. PRELIMINARY REMARKS

Over the last decades the Italian legislator paid a special attention to juvenile offenders, establishing a detailed criminal proceeding for young adults, differentiated by the specific one for adults, thus considering the uniqueness of their condition, characterized by the peculiar fragility of their evolving personality.

Nevertheless, the executive mechanisms related to sanctions have not been implemented in a different manner, although the latter is imposed by the Italian Constitution (art. 31 and 27 par. 3) and derives from United Nations' international documents (among the most significant ones, the *Beijing Rules* of 1986, the *New York Convention* of 1989, the *Riyhad Guidelines* of 1990, the *Havana Rules* of 1990), as well as from the CM/Rec(2008)11 of the Council of Europe[1], which upholds and strongly reaffirms the basic principle, derivable from the above-mentioned international documents, on the specificity of the juvenile condition.

Back in 1975, during the approval of Prison Law, no. 354 of 26th of July 1975 regulating the penitentiary system for adults, the Italian Legislator recognized the necessity of a specific law for the juvenile penitentiary system: at that time, aware of not being able to enact a full reform of the juvenile sector all at once, the legislator added article 79 to the above-mentioned law, which should have provided, in a provisional way, the application of the enacted prison law even towards juvenile offenders subject to criminal measures. Therefore, in the legislator's intention, the extension of the adults' prison law towards juvenile offenders should have been "temporary", limited to a given period of time, literally *"until a specific law will be enacted"*. Unfortunately, since then, the legislator has been, and still is, inactive on this issue. Above all, the legislator lost the opportunity to autonomously regulate the juvenile prison law in 1988, when, at the time of the reform of the Criminal Procedure Code, he enacted the d.p.r. no.448 on the 22nd September 1988, which designed the juvenile criminal trial as a subsystem of the ordinary one, tightly related to the latter, but strongly stated on peculiar features that should respond to the juvenile condition's demands. The pattern which has been chosen to design criminal proceedings, balancing the diverse existing interests, should ave been adopted to regulate the penitentiary field as well: the idea of the juvenile prison law as a subsystem of the adults' one, instead of degrading its peculiarity, could have refined and enhanced its specificity through a comparison with the adults' situation.

Over a long period of time (more than thirty years from the approval of the prison law and twenty years since the enactment of the d.p.r. 448/1998), not even the intervention of the Constitutional Court could help getting over this inactivity. The Court, through Act 125/1992, noticing the excessive disagreement as to constitutional principles and existing juvenile prison law, pronounced about possible lapse of its legal effects, *"if the legislator wouldn't promptly enact a regulation on this issue complying to the constitutional principles"*, and especially to the principles deriving from a careful interpretation of articles 3 and 27 par. 3 and 31 of the Constitution. Indeed, the above-mentioned declarations of unconstitutionality were applied first of all to prohibition of re-educative measures'

[1] See *Recommendation of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures*

application, introduced by the anti-criminal law enacted at the beginning of the nineties. The Constitutional Court assumed that the automatism deriving from the strict remand to the provisions set by law 354/1975 for the generality of condemned people – and therefore to the prohibitions on the concession of some benefits – banned flexible and individual evaluations aimed at protecting minor's personality (Constitutional Court 168/1994). Pronunciations made by the Constitutional Court involved as well some measures constraining freedom, to be found outside the penitentiary regulations.

Back in 1994, the Court declared unconstitutional articles 17 and 22 of the Criminal Code, where was not excluded life imprisonment for chargeable minors (Const. Court 168/1994): the Court stated the principle that the minor's peculiar condition compels "*the greatest diversification of the minor's treatment from the general punishing discipline*". The same was done for substitutive sanctions (const. Court 109/1997 and 16/1998) and security measures (324/1998) applicable to minors, thus radically changing the features of the corresponding measures provided by the Criminal Code.

Despite that, Constitutional Court couldn't set a framework for an autonomous system of juvenile prison law, nor could regulate the existing law conceived for adults suitable for the minors' needs. Undoubtedly the Court, reporting against the inactivity of the law-making process and defining the principles these regulations should be based on, in order to be expression of the protection guaranteed by the constitution, did a worthy work, but unfortunately couldn't affect in a significant way the regulations here considered, which remained incomplete and fragmentary.

Two reasons have been provided in order to "justify" the lack of an autonomous juvenile prison law: first, since the enactment of the d.p.r. 448/1998, sentence is considered as *extrema ratio,* due to the application of legislative provisions as early definition of trial because of irrelevance of the fact or as *probation*, that ensured the decrease of numbers of juvenile detainees; second, the high degree of specialization of the surveillance court and of the juvenile social services are reckoned to be able to relieve the damages regulation lack can cause in the psycho-social sphere of a young and vulnerable person. The above-mentioned reasons cannot compensate the inconveniences deriving from the lack of a juvenile prison law: the rule of law is the irremissible condition to the enforcement of sentences, that affect a wide range of the minors' rights, most of all protected by the Constitution and by International Acts.

Therefore, Italian legislation reveals several serious deficiencies concerning convicted minors, as for custodial and non-custodial measures.

3. CUSTODIAL MEASURES

Rules concerning juvenile custodial measures are not distinguished at all by ones provided for adults. Particularly the lack of a juvenile prison law has specific consequences for *intra moenia* treatment: it is inadequate in the re-educative and rehabilitative system .

Among the wide and complex legislative provisions focused on work, as generally stated by prison law, professional training aimed to custodial work is the only one considered for juveniles convicted.

Even if in the IPM[2] work is considered as a method of implementation of responsibility towards society, promoting social rehabilitation of convicted, the proposal of work activities is limited to the field of ordinary maintenance of buildings and gardens, or domestic jobs, due to the endemic crisis of custodial work.

In order to implement social rehabilitation of juveniles convicted, the judicial authority should take into consideration the rehabilitative needs of the offender, creating other spaces and articulations of *intra moenia* work with strong view outside prisons.

Professional training, intended as extra-curricular educational activity aimed at improving personal professional skills, should be useful for future integration in the labour market. Nevertheless, in practice, the very few work education initiatives, as well as the most consistent professional training activities, are realised only within prisons.

School system is not even better: activation of compulsory education courses in compliance with prison law is mandatory up to three years of secondary school, not for biennium of tertiary education that became mandatory in Italy since 1999. There are no provisions about how school programs should be structured.

The situation gets even worst, violating non-discrimination principle, considering education system towards juveniles migrant minors convicted (as for Roma and Sinti), who are a great part in the IPM, and for whom there is no "trace" of different treatment seeing their cultural diversity: Italian policies lack of an adequate provision to deal with unaccompanied children.

4. RULES ABOUT SEVERITY TREATMENTS INTRA MOENIA

Rules concerning tools for order and discipline *intra moenia* are inadequate and unsatisfactory, which for their peculiarity would have required a radical diversity. Once more there is no differentiation, and, the system relies both on the flexible application of these rules and on the professionalism of operators, in order to mitigate lack's negative effects.

Prison's regulations are based on provisions like disciplinary regime, special supervision and suspension of treatment rules, considered as fundamental tools for order and security maintenance, representing an unavoidable condition for the rehabilitative function of sanction.

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[2] See *Istituto Penitenziario Minorile,* Juvenile prison

The disciplinary regime, based on the traditional dual-concept rewards-punishments, was fully regulated since 1975, pursuing the dual objective of ensuring the peaceful coexistence in prison and contributing to re-education. In this perspective, the legislator has paid specific attention to sanctions, aiming at structuring a system in respect of dignity and inalienable rights of a detainee. In particular, law 354/1975 enforces fundamental principles of *rule of law* and *mandatory law*, constitutionally regulated, humanizes contents and introduces some typical jurisdictional guarantees. However, the disciplinary mechanism suffers from a number of limits, which are intensified towards minors. For instance, let's consider the over-estimated sanctions imposed for unimportant offences, damaging the rehabilitative aim of juvenile detention and ignoring needs of a growing personality.We are referring to "exclusion from rehabilitative or sportive activities", "isolation during open air pause", and also to "exclusion from collective activities".

Referring to art. 36 Prison Law, severe treatments should be adjusted to *"psychic conditions of the subjects"*, therefore management of the severe treatments in the IPM requires *"a close connection and comparison between the security and the psycho-pedagogical areas"* and an engagement of the operators aimed at decoding minor's behaviour to adopt specific and adequate measures *"such as psycho-educational intervention, conflict mediation, atonement, clarification and support conversations among detainees and social operators, both individually and collectively"* (Circolare min. 17 February 2006 n. 5391). The above mentioned clause introduces alternative strategies aimed at avoiding sanctions' application, but if sanctions are applied, those strategies cannot influence its content. Therefore if this clause remains ineffective, there is no other solution than application of measures incompatible with social rehabilitative perspective.

The situation becomes unbearable analysing remaining severity treatments, introduced in the juvenile prison law by art.79 par.1 Prison Act. "Close supervision", stated by art. 14-*bis* Prison law and introduced by law 663/1986[3], in order to contrast misbehaviours ensuring internal security, is based on the parameter of "penitentiary dangerousness" of the detainees, but, even if it is applied as individual treatment with precautionary and not punitive purposes, is not graduated on juveniles' dangerousness. Consequences of its inappropriateness were: giving up of developing, at least in theory, possible forms of adaptation to juveniles' dangerousness, its impossible practical enforcement and its suppression in law proposals concerning sentence execution.

Fortunately, art 41*bis* par.2 Prison Law, was not enforced, even though theoretically allowed. The so called "*carcere duro*" (harsh jail), regulated for detainees, accused or convicted for crimes related to different kinds of criminal conspiracy (Mafia, terrorism and subversion), if dangerous for order and public security, consists in the suspension of rehabilitative treatments. Detention becomes both a mere custody, in order to cut every relation between the prisoner and the outside (as criminal association), and a punishment aimed at promoting collaboration with justice. This brief description of the rule is sufficient to prove that it cannot be imposed to juveniles, neither as an IPM management tool, nor as a severity treatment measure.

The non-application to juveniles, or rare use, of severity treatment measures provided for adults it is comforting, but at the same time alarming: Comforting, because

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[3] See Law 663/1986, *"Modifiche alla legge sull'ordinamento penitenziario e sulla esecuzione delle misure privative e limitative della libertà",* Amendments to Prison Law and to implementation of deprivating or limitating measures

extra ordinem measures, at least in practice, are forbidden to safeguard order and security in juvenile prisons. However it is alarming the lack of a specific regulation of severity treatments, depending, therefore, on discretionary power of the Administration, without respecting fundamental principles such as rule of law, mandatory law and jurisdiction.

5. THE ALTERNATIVE MEASURES

Analyzing *extra moenia* treatments, it seems clear that the Italian legislator has paid few attentions to the minors. The alternative measures, "core" of the Italian prison law, are *de facto* tailored on adults. Consequently, those measures both in their premises and in contents are not suitable for being applied towards juveniles. Rules about implementation of beneficial regime are often left to the Surveillance Court's discretion, which often ought to force applicable law to meet educational needs of the recipients. Moreover, the absence of a juvenile focus, at least in terms of progressive treatment mechanism (which is most evident related to juveniles) challenges the priority relevance of the re-educative principle.

Over the last twenty years, in Italy, the inadequacy of non-custodial measures has increased exponentially due to the security policies enforced by the national legislator. Indeed, he has adopted these policies in order to stem some phenomena - sometimes more serious and alarming, sometimes less - which are commonly perceived as extremely disturbing. Therefore, the Legislator set different patterns inspired by the principle of "*zero tolerance*", which mainly resulted in the prohibition of access to benefits, so called non-custodial measures, provided both towards whom has committed a high alarming offence, as stated in art. 4-bis prison law, and for offenders which have been sentenced for reiterate second offence. The application of these norms is extended even to minors by the art. 79 Prison Law. According to some automatic mechanisms, which the Constitutional Court modified only in part, also this fragile category is submitted to such restrictive regimes.

Despite, alternative measures are less applied to minors for several reasons. First of all such measures can be imposed only to convicted minors or to whom did not benefit of the pre-trial restorative measures, as acquittal for irrelevance of the fact ex art. 27 d.P.R. 448/1988, judicial forgiven ex art.169 c.p and in particular the probation ex artt. 28-29 d.P.R. 448/1988. It is worthy to highlight the plight of migrant minors, whom cannot benefit of those alternative measures both because of the absence of familiar references in the national territory, and of the absence of reception facilities. Obviously, their impossibility to benefit of non-custodial measures represents an intolerable violation of the non-discrimination principle.

The general bleak situation doesn't change considering the enforcement of each alternative measures. Considering probation for example, which is the measure most imposed to minors[4], the situation does not change. In fact, neither the legislative action made in 1998 - indirectly aimed to increase the *extra moenia* treatments towards convicted minors - has been able to implement the probation, which is still applied in a little percentage of cases. Probation services may not be practical options for many countries

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[4] Note that in 2009 among 193 requests for application of alternative measures, 108 (55.9%) were related to Placement Under the Supervision of the Social Services, 77 (39.8%) house arrest, 0 on probation and 8 (4.1%) conditional release. A similar trend was recorded in previous years: in 2008 there were 71 (66.98%) order of foster care and in 2007 they were 41 (65.07%) (Department of Juvenile Justice - Statistics Service).

where resources are too scarce to set up and maintain a probation system with adequate staff and finances. Such is confirmed by the fact that only few projects developed by the juvenile social services and presented to the Surveillance Court are actually enforced.

A drug/alcohol addict minor, attending a treatment plan can benefit of therapeutic probation ex art. 94 t.u. 309/1990. This measure reiterates the structure of art. 47 prison law, but it differs from the ordinary probation for its content, minor can be conditionally discharge to follow the therapeutic treatment. The *therapeutic aim* is inferable by art. 94 par.4 t.u. 309/1990 which states: *"executive procedures should be included among rules intended by the article"* and a monitoring system should be implement. But, given that therapeutic aim is prevailing on social rehabilitation scope, this alternative measure doesn't respond to detention objectives.

Referring to art. 47 par.1 let.*e* Prison Law, a young adult whom does not benefit from probation can be admitted to house arrest, except for objective limits or hindering conditions. Nonetheless this measure is scarcely implemented. House arrest regime is less applied than probation: there is a broad gap between the requests done and concessions made. There are several reasons that explain the scarce application of such measure: probably the most striking one is that this measure does not reach juvenile migrant, including Roma or Italians who can hardly count on a family or on a tutor. Usually they don't have economic and personal resources, that don't enable them to secure a home limiting *de facto* their possibility to access to domiciliary measures. Nonetheless, also the lack of available private or public facilities do not enable them to access to domiciliary detention, being therefore hosted in the IPM.

Regulation of probation for juvenile offenders is deeply incongruent. The most inconsistency is between *probation* and *conditional release* ex art. 21 r.d.l. n. 1404/1934, this contradiction puts in strain and makes impracticable the progressive treatment principle, properly based on probation system. This issue cannot be solved by exegesis and it seems also not remediable by a lapsing effect decision of the Constitutional Court. Indeed, neither formal nor substantive adjustments of probation requirements could restore consistent enforcement of the two different alternative measures. Hence, the Italian legislator should provide for a comprehensive reform of juvenile prison law.

Since the Prison law was entered in force there has been several problems in coordinating old alternative measures, as conditional release, and new ones, as probation. Solution appears to be an organic reform of the executive procedures. Actually, it seems that there are no friction between the *de qua* measure and probation. In fact, when the content of the conditional release id disposed by art 20 d.P.R. n. 448/1988, the two benefits are structurally related because both allow a full social rehabilitation, albeit controls provided for specific case. Despite the affinity among the two measures (for the *conviction* within three years), probation finds more consents while the granting of conditional release is by the way less used[5].

Also procedural rules concerning applicability and revocation of alternative measures seem completely inadequate to meet juveniles' re-educative needs. In fact rules enforced are those stated for adults, which don't guarantee protection of the fragile evolving personality of minors. In particular, nobody is appointed to lend psycho-

[5] There were only 8 measures of conditional release in 2009; 4 in 2008 and 2 in 2007 (Department of Juvenile Justice - Statistics Service)

emotional support aimed at limiting the traumatic impact of the trial (such as parents, suitable person, social services) nor to fill out the technical defense and to check the personality of the convicted and his/her condition of life and that should be considered as a prerequisite for the planning of an individual re-educative program.

6. LEGISLATIVE INITIATIVES CONCERNING THE JUVENILE PENITENTIARY SYSTEM

The Chamber's bill n.3912 for a juvenile prison law is now trying to fulfill the above-mentioned huge legislative gap. The bill has been written upon the guidelines of draft n.28650 presented by the Department of Juvenile Justice of the Ministry of Justice on the 6th of August, 2007. Compared to the two prior drafts presented in 1986 and 2000, which expired at the end of the 9th and 11th legislature, the examined bill covers a wider range of subjects and is more organic.

First of all, it is important to highlight that the minor's treatment is based upon the principle of a great weakening of the detention's segregating dimension through the establishment of a wide range of alternative measures: some of them are known and some are not, but all of them aim at establishing executive's procedures to be carried out in a territorial dimension. Some measures present very innovative features, for instance the tempered custody communities, the bonus leave of absence, the house detention on weekends and the early release for positive participation to re-educational program.

The variety of *extra-moenia* measures gives the opportunity to adapt the treating interventions to detainees' needs, and to diversify actions according to the specific categories of inmates. The bill, indeed, pays special attention to the following: *a.* young adults, for whom are enforced *ad hoc* measures*; b.* foreigners, for whom detention has to respond to the needs deriving from cultural differences, following a multicultural pattern achieved even by the employment of professional mediators; *c.* people subject to preventive detention, for whom has to be targeted individual re-educational programs, according to their will. The last measure seems even more worthwhile if one thinks that almost half of the IPM's guests are charged.

Nevertheless, even the bill is exceptionable for different features: the total opening of the IPM to the outside world and the full clarification of the young detainees' rights seem to be incomplete. A serious lack is to be seen in the absence of order and security measures which reckon with the specificity of the minor's condition: this justifies the importation of severity measures from the "ordinary" penitentiary system, these measures being too heavy for a juvenile detainee and having a high rate of negative consequences on his/her social labeling.

The proposed modifications of sanctions applicable to the convicted minor are even less convincing: it is easily understandable that the right way to achieve in this complex and complicated operation is the reform of the Criminal Code. The criticisms on the above-mentioned bill, however, do not affect its potentiality to be a good basis for launching a productive and quick parliamentary debate.

7. CONSEQUENCES OF THE ABSENCE OF A CHILD FOCUS ON MIGRATION: THE UNSOLVED PROBLEM OF MIGRANT JUVENILES' ADMINISTRATIVE DETENTION

A worrying and pervasive defect with the current Italian administration of migration control is the widespread and largely unmonitored use of detention instead of child welfare protection to house unaccompanied migrant children.

The complexity of migrant minors condition is determined by their status, which places them at the intersection of multiple legal affiliations: their being minors, foreigners, asylum seekers, trafficking victims, makes it difficult to articulate the relationship between the different branches of law. As well as, their protection requires the intermediation of multiple legal parties, administrative and social, in the path of integration of the child often does not ensure effective care.

There is an increasing awareness that the double vulnerability of migrant children – a product of their tender age and their marginal legal status – presents a serious challenge for states and policy makers. As the Committee on the Rights of the Child stated in introducing their General Comment on the "Treatment of Unaccompanied and Separated Children Outside their Country of Origin,"[6] recognition of the growing number of children in these situations, and the existence of serious protection gaps, mandates a response.

Let's consider the case of "John", a child who arrived in Italy as an unaccompanied minor fleeing life as a child soldier: After arriving on the small island of Lampedusa, just off the Southern Italian coast, he was taken to an adult detention center and ordered to get undressed for a body check. He told them that he was only 16 years old, yet he was detained at the Lampedusa center for 2 days where he slept in a room with 6 adult men. He was later transferred to another center in southern Italy where he had to share a room with 12 adults for a month. "John" eventually found accommodation in a reception center for minors. However, 5 months after his arrival in Italy, a guardian had still not been appointed to represent him."[7]

As the case clearly explains, Italian policies lack of an adequate reception facilities to deal with unaccompanied children. There's an abuse of the administrative detention to deal with this issue. In Italy, for example, it has been reported in 2009 that, despite a 48-hour limit imposed by the law, children have often had to remain in the center for more than 20 days, with some remaining for over 37 days, after which they have been transferred to reception centers for adults on the mainland, instead of residential care for children.[8]

Indeed in Italy, detention may be ordered by the police chief, but within 48 hours, the detainee must be brought before a justice of the peace. The initial order for detention can be for up to 30 days, and can be renewed for another 30 days on application to the court. However, although a "judicial" review, it is unclear how independent a view the

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[6] See General comments on http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/532769d21fcd8302c1257020002b65d9/$FILE/G0543805.pdf.

[7] Amnesty International, "Invisible children – The human rights of migrant and asylum- seeking minors detained upon arrival at the maritime border in Italy," at http://web.amnesty.org/library/index/engEUR300012006.

[8] See Save the Children, *News*, at www.savethechildren.net/alliance/media/newsdesk/2009-01-26a.htm.

magistrate is prepared to take. The United Nations Working Group on Arbitrary Detention, reporting following its mission to Italy in 2009 noted that in one center visited, the justice of the peace would order the 30-day extension automatically upon request of the police without holding a hearing. The Working Group concluded that review "appears to be in most cases an empty formality"[9] The Working Group went on to note that "it is striking to consider that in the criminal justice system, decisions on remand detention are taken by professional judges and appealable to a tribunal composed of three professional judges, while the administrative detention of migrants is only reviewed by a single justice of the peace."

It is important to note that towards a more child sensitive response to immigration, the government has to fulfill its commitment to removing all children from immigration detention and realize a concrete policy to implement guarantees and protect children's rights.

8. THE NATIONAL OMBUDSPERSON FOR THE PROTECTION OF CHILDREN'S RIGHTS

Italy has recently filled the gap of the inadequate situation deriving from the lack of an Authority charged to guarantee the respect of the detainees' rights over the whole national territory in a homogeneous way.

With the enactment of the law no.112 of the 12th July 2011, Italy has finally created a national Ombudsperson for childhood and adolescence. The law entered into force on the last 3rd of August and has received a bipartisan vote both from the Chamber and the Senate (in particular, on the 22nd of June the Senate approved unanimously the final text).

The so-called Ombudsperson for childhood is a new, independent administrative authority, already existing in some other European countries who subscribed the New York Convention (for instance Austria, Belgium, Croatia, Denmark, Finland, France, Germany, Norway, Poland, Portugal, Spain, and Sweden).

Outlining the Ombudsperson's features, the Italian legislator has basically reproduced the standards detected from the so-called European Network of Ombudspersons for Children (ENOC). Indeed, as in almost every other State, this new authority is a monocratic organ with autonomous organizational powers, administrative independence and – supposedly, at least - freedom from hierarchical subordination obligations towards the government, his nomination being made together with the presidents of the Chamber and the Senate and having full autonomy on his judgment and assessment. Nevertheless, it has to draft a periodic report on its work, to be presented annually to the Chambers within the 30th of April, focusing on the activities it carried out in the previous solar year.

The Ombudsperson remains in office for four years and his/her mandate is renewable only once. He/she has his/her own economic "independence", having the possibility to dispose of a staff subjected to his/her authority and formed by personnel from the Ministry or from other public administrative offices; and of a fund for the expenditures related to the fulfillment of his/her tasks which is added to the budget of the

[9] United Nations Security Council, WG on Arbitrary Detention: Addendum: Mission to Italy (2009), U.N. Doc.A/HRC/10/21/Add.5.

Presidency of the Council of Ministries. The complete autonomy in managing this fund, however, doesn't exempt the authority from ordinary audits.

The Ombudsperson is chosen amongst people who are well-known for his/her independence, morality and specific and attested professionalism, competences and experiences in the following fields: minors' rights, family and educational problems, promotion and protection of juveniles. He/she has different duties of promotion, cooperation and guarantee, as well as consultative competencies such as pronouncing opinions on bills and government's laws on the protection of children and adolescent's rights; he/she can also report to the government, to the regions or to local and territorial administrations, about initiatives aiming at the full promotion and protection of children and adolescents' rights, especially concerning the right to a family, to education, to health care. While establishing these duties, the Italian legislator has followed the guidelines set out by the other European States where an Ombudsperson for the protection of children's rights is already established.

One of the critical issues concerning the law enacted on the last 12th of July is the relationship between the national and the regional ombudspersons: if, on the one hand, the system for the guarantee of children and adolescent's rights must undoubtedly rely upon the national ombudsman as a point of reference and coordination, but has to develop itself on a regional base in order to be effectively operative, on the other hand, the generic character of the above-mentioned regulation could cause some problems concerning coordination and overlap of duties. Indeed, article 3 par. 6 states that, *"in respect of competences and organizational autonomy of the regions, of the autonomous provinces of Trento and Bolzano and of the local autonomies concerning safeguarding and child protection policies, the National Authority assures an appropriate cooperation with the regional ombudspersons for childhood and adolescence or for similar situations, that can be established by the Regions with regard to some requirements – the same requested for the Ombudsman - of independence, autonomy and exclusive competence in the field of childhood and adolescence"*. Concerning this issue, the establishment of a national Conference for children' and adolescents' rights guarantee - formed by the regional ombudspersons or public officials with similar competences, the Ombudsperson being the chairman – whose duties are the promotion of common guidelines for action and the detection common patterns for facts and information exchange. It is clear, indeed, that this regulation protects and encourages the cooperation between central and local authorities, without setting a deadline in order to prevent the overlapping and duplication of competences or, even worse, to avoid uncertain responsibilities. A positive example can be seen in the Austrian system, where an effective and efficient decentralization is possible due to the fact that the central office performs the only duty of cooperating and connecting the local *Laender* offices, and does not cover individual cases.

Eventually, one remarkable feature is the tasks of supervision of enforcement proceedings against minors and of underage detainees' condition, even though these duties are subject to an authorization by the competent jurisdictional organ.

9. RECOMMENDATIONS

Considering the relevance of the outlined deficiencies of the Italian juvenile justice system, and in order to fully implement the rules laid down by the Convention on the Rights of the Child, UFTDU and Centro di Studi sulla giustizia minorile, University of

Macerata strongly recommend the Italian Government to approve as soon as possible a reform of juvenile prison law, which should be based on following principles:

a. To base the Juvenile justice system on the Rule of Law;
b. To guarantee a Juvenile Convicted the right to benefit from *intra* and *extra moenia* re-educative measures;
c. To adequate re-educative measures on individual situation, aiming at progressive and out-side rehabilitation;
d. To provide the reform with a wide range of alternative measures focused on social rehabilitation;
e. To provide specific criteria diversifying treatment for vulnerable subject as disabled or sick person, young mothers, foreigners belonging to ethnical or linguistic minorities;
f. To provide guarantees of judicial, as self-defense, psychological and technical support, cross examination, reasons for decision, when granting or withdrawing alternative measures.

Unione forense tutela dei diritti umani

President Avv.Mario Lana

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