Research project EUPRETRIALRIGHTS

Improving the protection of fundamental rights and access to legal aid for remand prisoners in the European Union

ANALYSIS OF NATIONAL LAW

National norms as regard to access of detained persons to the law and to court

Report on ITALY

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INTRODUCTORY PART: CONTEXTUALIZATION

Introduction[1]

Italy is one of the European countries with the highest number of prisoners in pre-trial detention: in 2010 42% of Italian prisoners were waiting for a final sentence, and 20.8% were waiting for the first sentence (Source: Ministry of Justice). Today the situation has slightly improved (33.7% and 16.5%) but the numbers of prisoners waiting for a final sentence are still alarming. This very slight decrease is mainly due to the execution procedure after the *Torreggiani* pilot judgment[2] against Italy for the endemic and persistent overcrowding and inhuman and degrading prison condition. As a matter of fact, Italy has recently passed two laws (Law 117/2014 and 47/2015, see Chapter 4.3) that have certainly outlined a more liberal system, theoretically able to reduce significantly the number of suspected or defendants in pre-trial detention and the infringements of Article 5 of the ECHR. Unfortunately the data showed only a slight decrease and the historical data shows a trend toward the increasing of the general prison population[3] and a fluctuating trend in the numbers of pre trial detention[4]. Despite the positive legislative changes, the use of detention before the final sentence is increasing. Unfortunately, it is the effect of police and jurisdictional practices, which in turn are the result of the pressure of public opinion.

1. Police detention and detention resulting from a a judicial decision (*fermo*, *arresto* and *custodia cautelare in carcere*)

Arrest (*fermo*) and custody (*arresto*) are temporary measures restricting personal freedom before pre-trial detention and represent an anticipation of the protection provided for by precautionary measures (Art. 380 to 384 c.c.p.). They differ from those because of the urgency and of the lack of a decision of a judicial authority, which will intervene later in the forms of validation.
Arrest consists of a temporary deprivation of liberty by judiciary police against “those who are caught in the act of committing a crime” (*in flagrante delicto*).

Custody consists of a deprivation of liberty decided by the prosecutor "even not in flagrante delicto, when there are specific elements that, also in connection with the inability to identify the suspect, suggest the risk of flight of a person seriously suspected of a serious crime".

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[1] In order to operate a contextualization of the Italian situation of pre-trial detention, as confronted with other relevant positions, such as initial police detention, where the issue of access to lawyer and legal aid are particularly critical in Italy, we add this brief analysis, using the findings of the report on Italy of A.M. van Kalmthout, M.M. Knapen, C. Morgenstein (eds.) ; Z. Bahtiyar ... [et al.] (eds.), Pre-trial detention in the European Union : an analysis of minimum standards in pre-trial detention and the grounds for regular review in the member states of the EU JLS/D3/2007, Nijmegen, The Netherlands : Wolf Legal Publishers, 2009 and the report by Antigone for Fair Trials, Co-founded by the Criminal Justice Program of the European Commission, G. Parisi, G. Santoro, A.Scandurra, “The practice of pre-trial detention in Italy Research report”, September 2015. In particular UNIFT has spoken with Scandurra in order to highlight the main critical issue found at the end of the project and the most recent legislative and judicial intervention in the field.

[2] Torreggiani and Others v Italy, n. 43517/09.

[3] As overtly shown by the statistics provided by the Department of Prison Administration. See the historical series at the Ministry of Justice website, which reveals that since 2015 the prison population is constantly increasing. The last survey of March 31st 2018 reveals a number of prisoners currently held in the Italian prisons of 58.223, while the prison capacity is of 50.613. An assessment of these data can be found in A. Dellla Bella, Tl carcere oggi: tra diritti negati e promesse di rieducazione, Diritto Penale Contemporaneo Riv. Trim. 4/2017. As affirmed by the author: “Statistics show that prison population has significantly decreased since 2010. In the last two years, though, it has started rising again. Now is the time to think about the short and long term effects of the reforms following the judgment Torreggiani v. Italy, that has recognized a violation of ECHR Article 3. Tt seems to me that, regardless of the forthcoming reform of the penitentiary systems, there is no political will to implement changes that would be necessary to create sanctionary system in line with constitutional principles.”.

[4] Notwithstanding an initial significant decrease in the percentage of persons held in custody in 2015 (33.8% as of June 30th of 2015),in 2017 the percentage started incresing again (34.6%). Source Ministry of Justice.

As a consequence, the current Italian Code of Criminal Procedure distinguishes between three different forms of deprivation of liberty, namely: arrest (*arresto*) and detention of one suspected of a crime (*fermo di indiziato di delitto*), both types of provisional measures, and pre-trial or preventive detention (*custodia cautelare*). The provisional measures of '*arresto*' and '*fermo*' can both be categorised as initial police detention. In addition, it should be noted that fermo' is in principle ordered by the public prosecutor, while the police is permitted to adopt this measure only when the prosecutor has yet not taken charge of the investigation (Article 384.1 Italian Criminal Procedure Code, *Codice di Procedura Penale,* CPP). In contrast to '*arresto*' and '*fermo*', pre-trial detention may only be decreed by the court dealing with the case or by the judge for the preliminary investigations (GTP), and moreover, solely upon request of the public prosecutor (Article 279 and 291 CPP).

The CPP draws a clear distinction between on the one hand detention following initial police arrest (Article 5(l)(c) ECHR), which may consist of '*arresto*' or '*fermo*', and on the other hand detention following a judicial decision that a person should remain in custody (Article 5(1) ECHR), which consists of '*custodia cautelare*'. Another significant distinction that should be drawn is that between 'arresto' and 'fermo'. Although both are types of initial police detention, it should be noted that 'arresto' may only take place, when the suspect is caught red-handed (*in flagranza di reato*). Article 380 CPP regulates the situations in which '*arresto*' by the police is mandatory, while Article 381 CPP regulates the situations in which the police is competent to arrest a suspect, yet arrest is not obligatory. The difference between mandatory arrest and a merely discretionary power to arrest lies in the seriousness of the offence that has been committed.

In contrast to '*arresto*', '*fermo*' is possible when the suspect is not caught red-handed and the requirements set out in Article 384 CPP are met. In particular, there must be a specific indication that the suspect poses flight risk, moreover, there must be a serious evidence of guilt (not mere suspicions) and finally, the committed offence must be a crime involving weapons or explosives or a crime of such a serious degree that the law sets a punishment of life imprisonment or imprisonment for no less than the minimum of two years and the maximum of six years.

Despite the different prerequisites, both '*arresto*' and '*fermo*' serve the same goals. These measures are used either to protect the public safety or for investigative purposes. Therefore, an arrest or '*fermo*' may be the first step in an effort to impose some form of preventive detention. Regarding the afore-mentioned, it is not surprising that the proceedings following '*arresto*' or '*fermo*' are similar (see Articles 390-39l CPP). First of all, Article 386.3 of the CPP prescribes that the police must make the suspect available to the public prosecutor as soon as possible and in any case within 24 hours of the arrest or '*fermo*'. Subsequently, the public prosecutor must, within 48 hours, request the validation of the arrest or '*fermo*' of this person by the judge for the preliminary investigations, unless he has ordered the immediate release of the suspect by virtue of Article 389 CPP (Article 390.1 CPP). An arrest or '*fermo*' becomes ineffective if the requirements set out in Article 390.l are not met (Article 390.3 CPP).
The validation hearing should be held by the judge within the following 48 hours (Article 390.1 CPP). At this hearing, the suspect must be interrogated (Article 39l.3 CPP). According to Article 39l of the CPP, the judge must confirm the arrest or '*fermo*' within 96 hours from the arrest or '*fermo*', otherwise the person concerned must immediately be released. To this end, Article 39l.7 of the CPP prescribes that the arrest or '*fermo*' will lose its effect if the validation order has not been decreed within 48 hours after the suspect has been made available to the judge. The public prosecutor who has requested the validation of the arrest or '*fermo*' may, at the same time, also request the judge for the preliminary investigations to order pre-trial detention (*custodia cautelare*) of the suspect (Articles 29l and 39l.5 CPP). If the judge has decided not to apply such a measure, he/she shall order the immediate release of the person concerned.
Initial detention by the police may thus endure for a maximum of 96 hours (four days), starting from the moment that the suspect has been arrested or '*fermato*'. In addition, a person can also be placed in pre-trial detention on only written information. For instance, in the situation in which a court order has been issued for pre-trial detention of a free person, *i.e.* who has previously not been arrested or '*fermato*'.

The judge is, in such a case, not obliged to see the suspect before issuing the detention order. However, Article 294 of the CPP prescribes that the judge who authorises the detention of the suspect pending trial, and who he has not proceed to this act during the course of the validation hearing, interrogate the person to whom the measure is applied within five days of the execution of the measure. If the time-limit of five days is not observed, the person must be immediately released.

The judicial police who carried out the arrest or custody have several information obligations (Art. 386-387 of the CCP) towards the person (for instance to warn the person of having the right to instruct a lawyer of choice; immediately inform the lawyer, or the one appointed ex officio, of the arrest or custody). These information requirements have been further expanded with the Legislative Decree 101/2014 implementing the EU Directive 2012/13/EU.
Prerogatives and duties of the prosecutor are listed in articles 388-390 of the CCP (for instance to question the defendant, giving timely notice to his/her lawyer, to inform them of the facts under investigation and of the reasons underlying the decision to detain him/her, to communicate the evidence against him/her and, when this does not compromise the investigations, the sources of this evidence).

The distinction between police custody and pre-trial detention is particularly meaningful in Italy in relation to the right to defense, since, on paper the suspect in custody, under arrest or under other measure, can talk immediately with a lawyer (Art. 104 c.c.p.); for this purpose a lawyer has to be immediately informed (Art. 293 and 386 c.p.p.). Nevertheless, this right can be suspended for a maximum of 5 days for "specific and exceptional precautionary reasons" when the meeting with the lawyer can jeopardise the investigations (see *infra*).

Three main case scenarios have to be considered: 1) If the suspect has been caught in the act of committing a crime the prosecutor, after informing the lawyer, questions the suspect, explaining to him/her why he/she has been arrested, what is the evidence against him/her and, if this poses no threat for the investigations, the sources of this evidence. At the hearing for the validation, immediately after the decision on validating the arrest, the judge decides on the application of the pre-trial measure. The lawyer can see the file at the hearing or shortly before the hearing and in that occasion can shortly discuss the case confidentially with the suspect. 2) If the measure is requested by the prosecutor and applied by the judge later during the investigations, but before the beginning of the trial, the file is made available to the lawyer after the execution of the measure, but before the validation hearing. 3) when the measure is applied during the trial, the defender has already been able to see the file. During the entire trial the presence of legal defence is required. If the suspect or accused person does not have a lawyer of choice, a lawyer is instructed *ex officio*.

However, as noted by the Antigone report, the inequality of the means available to the parties (lawyers have little time to prepare for the initial pre-trial detention) and the lack of instruments for the judge to overcome this inequality are the main hindrances to the right of defence for pre-trial inmates and person under *fermo* or *arresto*. We refer, in particular, to the absence of a legal prevision requiring that, together with the notification of date of the hearing, the lawyer should also receive the prosecutor case file to have adequate time to prepare the defence.

As the already cited report on "Pre-trial detention in the European Union" affirms[5], one of the main problem in access to justice and the right to defence is related to the access to legal informations, specifically for person under custody or arrest in law enforcement agency (*polizia* or *carabinieri* stations). The European Committee for ıhe Prevention of Torture and Inhuman or Degrading Treatment or Punishmen (CPT) has traditionally and constantly monitored the situation of pre-trial detainees and persons held in police custody in Italy since the first visits, investigating whether the rights of detained persons are being safeguarded.

[5] Ivi, p. 16 and sequitur.

“In particular, three rights of detained persons were emphasised, namely:

- the right to notify a close relative or another third party of the custody,
- the right to have access to a lawyer,
- the right to have access to a doctor.

In addition, the CPT has repeatedly stressed that these rights should apply from the very outset of deprivation of liberty, *i.e.* from the moment when the person is obliged to remain with a law enforcement agency. Therefore, it is essential that persons detained by law enforcement agencies are informed without delay of their rights. During its visits, the CPT has noticed that the information provided to detained persons was unsatisfactory. In only one law enforcement establishment, detainees were provided with forms containing some relevant information on their rights. However, the distributed form was only available in Italian and did, moreover, not contain information on the right to notify a close relative or third person and the right to access to a doctor.

As regards the right to notify a close relative or a third party, the CPT could observe that in practice, this right becomes effective only when a detained person was formally arrested (*arrestato or fermato*). The right to notify a close relative or a third party was thus not granted to criminal suspects from the very outset of deprivation of liberty. This was also the case for the right of access to a lawyer. Although the vast majority of detained persons were effectively able to access lawyer (of their own choice or appointed ex officio) during their custody, and to benefit from the presence of a lawyer during their interrogation, the right of access to a lawyer was granted only from the moment they were formally arrested (*arrestato* or *fermato*). Consequently, such persons were on occasion subjected to an ”informal" questioning, prior to the formal arrest, without benefiting from the presence of a lawyer.

Moreover, the CPT has expressed its concern about the possibility for competent judicial authorities to delay a detained person's access to a lawyer for up to five days (Article l04(S) and (4) GPP). Although the CPT acknowledges that in exceptional circumstances it may be necessary to delay access to a particular lawyer for a certain period, it also points out that the right to talk to a lawyer in private and to have a lawyer present during interrogations cannot be totally denied during this period. In such cases, access to another trustable and independent lawyer should be granted to the detained person.

Furthermore, the CPT expressed its concern about the lack of a specific legal provision governing the right of access to a doctor. The right of access to a doctor for persons in custody is still not expressly provided for by law, and persons detained in establishments of law enforcement agencies are still not allowed to have access to a doctor of their own choice.Moreover, the CPT could observe that, although it has repeatedly stressed the importance of inspections by judicial authorities for preventing ill-treatment of detainees, the visited establishments had actually not been inspected in recent times[6]”.

i. Briefly describe the regime of detention applicable to pre-trial detainees (location of the place of detention, individual or collective system, visiting arrangements, labour, …), describe the restrictive measures that may be decided against an incarcerated defendant, and specify the authority competent to decide.

a. Regime of detention applicable to pre-trial detainees

In the Italian prison system, the separation of sentenced prisoners by pre-trial detainees is considered a fundamental condition for the protection of the presumption of innocence (Article 1 of the Italian Penitentiary law[7]). Article 6 and 14 of the same law affirm that pre-trial detainees must be guaranteed accommodation in single room cell and that the separation of the convicted prisoners from pre-trial

[6] Ivi, p. 17.
[7] Law n. 354, 26 July 1975.

detainees is guaranteed. Pursuant to Article 59 of the Penitentiary law, prison institutions are divided into remand prisons (so-called *case circondariali*), prison for the execution of sentences (so-called *case di reclusione*), institutions for the implementation of security measures and observation centers.

Historically in Italy this difference and the separation principle has never been implemented. As a matter of facts, convicted and pre-trial detainees are assigned to the same kind of institutions. As a general rule, the only separation consists in the different sectors devoted to host the sentenced prisoners (criminal sector, *reparto penale*) or the pre-trial detainees (judiciary sector, *reparto giudiziario*). Sometime even this minimum level of separation is not respected due to the endemic level of overcrowding in Italy and it is not infrequent to find pre-trial detainees in the criminal sector or convicted prisoners in the judiciary sector.

Usually and due to the fact that pre-trial detainees are not convicted and are not afforded the right to treatment and social rehabilitation, the living conditions in the judiciary sector are sensibly worse, more deprived and overcrowded, making the non punitive principle of pre-trial detention paradoxically untrue. This hybrid situation (presumption of innocence coupled with incarceration) makes the right not to be presumed guilty a double edged weapon whenever the person is deprived of her/his liberty. As a matter of facts, access to any kind of activities is theoretically impossible, since no right to rehabilitation exists, even if Article 1 of the Prison Regulatory Act[8] states that the treatment of prisoners awaiting trial consists in the provision of interventions aimed at supporting their human, cultural and professional interests. Excluding *a priori* the possibility of interventions related to the logic of the "re-education" (interventions that would be in contrast with the principle of presumption of not guilty), the situation of the pre-trial detainees related to prison treatment can be outlined as a right to take advantage of offers aimed at supporting their "human, cultural and professional interests" and, if they so request, in the right to be admitted to participate in educational, cultural and work carried out and organs.

Concerning prison labor, according to the provisions contained in the current legislation, faced with the work request made by a pre-trial detainee, the prison administration has a duty to take action by making available the corresponding job opportunities, except in the presence of "justified reasons"[9]. Comparing the legislative formula "except for justified reasons" concerning the defendants (Article 15, paragraph 3, Pl) with the correspondent "except in cases of impossibility" concerning convicted persons (Article 15, paragraph 2., Pl), it is clear that the duty on the part of the prison administration to take action through the provision of adequate jobs, is more intensely set up for the inmates and convicted than it is for pre-trial detainees. This reason, coupled with the systematic scarcity of job opportunity, makes it very difficult for pre-trial detainees to be able to work in prison.

Concerning the right of visit and communication with the outside world, the competent authority is the judge of preliminary investigation until the sentence of first degree, then the competence shifts to the Prison Director (as for the sentenced prisoners). The right to family visit and communication with the outside world can be restricted due to security reasons, and often the shift from one authority (judiciary) to the other (prison administration) provokes delays and interruption of the visits able to infringe upon the rights of the prisoners.

a.1 Right to defense for pre-trial detainees:

Article. 18 of the Penitentiary Law, and Article 37 d.p.r. 30 June 2000, n. 230, define the modalities through which contacts with the outside world must take place in prison, identifying, in particular, the subjects admitted to meet the prisoner. The lawyer is not mentioned among these subjects, since the foundation of the right to meet with the lawyer is provided by a procedural law such as Article 104 of the

[8] Presidential Decree n. 309/90.
[9] Article 15, paragraph 3

CPP expressly recognizing the right of the accused in pre-trial detention to confer with the lawyer "from the beginning of the execution of the measure".

This is a provision specifically dictated by the code in order to protect the person in custody who is not already in the execution of a final sentence, but is subject to a measure of pre-trial detention in prison. It is with particular regard to these subjects, in fact, that the purpose of the defensive guarantee established by the aforementioned law is expressed to a greater extent.

Given the regulatory framework of reference, we want to focus attention on an aspect related to the concrete conduct of these talks with the lawyer, assuming that the law guarantees absolute confidentiality, guarantee coverage for the content of the conversations themselves entertained ; the right is sanctioned by a procedural provision having general scope such as art. 103 paragraph 5 of the Italian Civil Code, which prohibits the interception of the conversations and communications between the detainee and the lawyer, as well as technical consultants and their auxiliaries, and therefore subjects whose activity is covered by professional secrecy.

The practical importance of this provision is given by the sanction established in the case of violation of the prohibition, which consists precisely in the ineligibility in court of any interceptions carried out in contrast with the right of defense. The discipline of the prohibition to subject to auditory control the conversations, physical or telephone, between prisoner and defender, expresses a corollary with the right to defense, here further guaranteed by the secrecy of the interview, which can only be submitted to visual inspection for security reasons within the penitentiary institution. The procedural law intends to safeguard in the first place the freedoms of the lawyer who, in a process of an accusatory nature such as the one outlined in the new code, constitute a defense of the defendant's right of defense, in order to make the necessary balancing with their own needs. of the investigations, which is carried out by ensuring the secrecy of the conversations, and in general communications, between the inmate and the defender.

Procedural rights of the suspect or defendant

A suspect or defendant who is held in pre-trial detention is, as every defendant, entitled to the following procedural rights:

a. The right to be informed promptly and in a way that is understandable of the charges and the existing evidence against him (Article 65.1 CPP). The sources of evidence may also be revealed, as long as this does not endanger the criminal investigation (Article 65(1) CPP). In addition, it should be noted that a person who has been put in pre-trial detention must also be informed of the reasons for being deprived of his liberty. This obligation arises out of the formal requisites that the court order decreeing pre-trial detention must contain the reasons and the grounds for applying the measures (Article 292.2 (c-bis) CPP), and that this order should be served to the person concerned (Article 293.2 CPP).
b. The right to remain silent (Article 64.3 (b) CPP): the accused cannot be obliged to answer the questions posed to him, unless the question relates to his identification;
c. The right not to incriminate him/herself or to confess guilt (Article 198.2 CPP);
d. The right to legal assistance from a lawyer of his own choosing or, if he has not chosen one, to be assigned a counsel (Article 104 and 293 CPP). Note that the right to legal assistance is not affected by the title of the restriction of liberty; whether is 'arresto', 'fermo' or pre-trial detention. The lawyer must be immediately informed of the taken measures. A person placed in pre-trial detention has the right to confer with his lawyer from the beginning of his detention (104.1 CPP). The judge may however, upon request of the public prosecutor, invoke "exceptional and specific reasons of circumspection" to delay exercise of this right for up to five days (Article 104.3 CPP). Furthermore, the lawyer can attend the interview that the judge for the preliminary investigations is obliged to carry out during pre-trial

detention (Article 294 CPP). He can also attend the proceeding for preservation of evidence (Article 393 CPP et seq).

e. The right to free assistance of an interpreter if he/she does not speak the Italian language (Article 143.1 CPP). The Court should also appoint an interpreter when it is necessary to translate a written document into a foreign language or dialect, or when a person who does not know Italian wants to or is obliged to make a statement (Article 143.1 CPP). In addition, it should be noted that "any Italian citizen belonging to a recognised linguistic minority may request interrogation or examination in his/her language, and that written proceedings should be translated for him/her (Article 109.2 CPP)".

f. Right to judicial review. A suspect or defendant has the right to contest a court's decision to pre-trial detention. Therefore, the following legal remedies are available: review (Article 309 CPP), appeal (Article 310 CPP) and appeal in Cassazione (Article 311 CPP).

b. Restrictive measures that may be decided against an incarcerated defendant

An incarcerated defendants in Italy can be subjected to the monitoring of correspondence. According to the meaningful indications offered by the European Court of Human Rights case law against Italy, the monitoring of the correspondence of prisoners (pre-trial or convicted ones) can be perpetrated only in accordance with the law and whenever it is necessary in a democratic society in the interests of public safety or for the prevention of disorder or crime.

While the previously in force text of Article 18 of the Italian Penitentiary Law was found in violation of Article 8 of the Convention in multiple cases[10], following the entry into force of Law no. 95 of 8 April 2004, a new section, Article 18 *ter*, concerning the monitoring of correspondence has been added to the Penitenariy Law. This section provides that correspondence may be monitored for a maximum period of six months in order to prevent the commission of crimes or to maintain security in prisons and to ensure the confidentiality of investigations. Monitoring is ordered in a decision with a statement of grounds by the judicial authority, at the request of the prosecuting authorities or the prison governor. Paragraph 2 of section 18 ter provides that prisoners' correspondence with, inter alia, their lawyers and international human rights bodies cannot be monitored. Lastly, paragraph 6 of section 18 ter provides that complaints against decisions to monitor correspondence may be lodged in accordance with the procedure laid down in section 14 bis of the Prison Administration Act.

ii. What bodies are entitled to receive formal complaints? How effective are they (with regard to Article 13 ECHR)?

The competent body for receiving formal application concerning rights to visits, and any other complaints concerning the contact with the outside world from the part of pre-trial inmates is the GTP (Judge for the Preliminary Investigations) until the first degree judgment. In the subsequent proceedings the competent body is the Director of the prison.

Competent for formal complaint in the form of Article 35 bis is the Surveillance Judge (monocratic organ). The history of the introduction of this remedy is essential in order to assess the role of ECtHR in the shaping of the Italian penitentiary policies and legislation. Indeed, the Italian Penitentiary law did not make direct reference to prisoners' rights and never describes or makes reference to them[11].

[10] See, among many other authorities, Calogero Diana v. Italy, § 28, Reports of Judgments and Decisions 1996-V; Domenichini v. Italy, 15 November 1996, § 28, Reports 1996-V; and Labita, cited above, § 179

[11] Except for Article 4: "Exercise of the rights of prisoners. Prisoners and inmates personally exercise the rights deriving from this law, even if they are in a state of legal prohibition". Interestingly enough, the text of the law never state or affirms the contents or type of rights.

Accordingly, for a long time the only clear jurisdictional functions attributed to Surveillance judges and Surveillance Courts in Italy related to labour rights and rights deriving from the imposition of disciplinary sanctions (according to Articles 14-ter and 69 of the Penitentiary law). Only in these cases was a clear judicial remedy and a jurisdictional procedure provided for by the law. This ambiguous normative situation contributed to the shaping of a precise common normative ideology[12] within the community of Surveillance judges, based on the idea that their main role concerned the issue of alternative measures to detention. The matter of prisoners' rights was relegated to an eventual and subordinate level.

Fortunately, resistance on the part of the Surveillance judiciary emerged and led some judges to urge the Italian Constitutional Court (ICC) to act as a lever for the protection of prisoners' rights. Taking up the mission, the ICC has tried to build, by force of many subsequent judgments, a pattern of recognition and judicial safeguard of prisoners' rights[13]. This pattern was constituted by a sort of interpretative integration strategy, using the procedure of Articles 14-ter and 69 P.I. This strategy left some major issues unresolved. First of all, the respect of the principle of due process of law remained highly questionable in a procedure where the equality of arms, adversarial proceeding, the independence and impartiality of the tribunal and the effectiveness of the remedy (*i.e.* the binding nature of the decisions of the Surveillance Judiciary) are not guaranteed. These issues were brought to the scrutiny of the ICC again in 2009[14] by the Surveillance judge of Nuoro, who affirmed the incompatibility of the said procedure with Article 6 of the European Convention[15]. While the ICC saved this procedure, the ECtHR had already begun a work of reconsideration in light of Article 6 and 13 of the Convention (See, *Enea v. Italy*[16], *Calogero Diana v. Italy* and *Domenichini v. Italy*).

In the meantime the "Italian prison overcrowding dossier", including the ineffectiveness of the domestic protection of prisoners' rights, was brought to the attention of the Strasbourg Court with the *Torreggiani* pilot judgment[17]. In that case, the applicants, who had been imprisoned in conditions that offered them less than 3 m2 of personal space, successfully argued that their rights under the Convention had been breached. The Court unanimously held that there had been a violation of Article 3. The Court also noted that the issues presented by the applicants were not isolated, but rather illustrative of a systemic problem resulting from a chronic dysfunction of the Italian penal system. The Italian government showed a compliant attitude vis-à-vis the ECtHR, introducing for the first time in Italy a combination of preventive and compensatory remedy with Law-Decrees No. 146 of December 2013 and No. 92 of June 2014.

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[12] On the concept of 'normative ideology' see A. Ross, *On Law and Justice*, University of California Press, Berkeley and Los Angeles, 1959, p. 76 ss. "A national law system is not only a vast multiplicity of norms, but is at the same time a continuous process of evolution. In each case, therefore, the judge has to thread his way through to the norm of conduct which he needs as the basis for his decision. If, in spite of all, prediction is possible, it must be because the mental process by which the judge decides to base his decision on one rule rather than another is not a capricious and arbitrary matter, varying from one judge to another, but a process determined by attitudes and concepts, a common normative ideology, present and active in the minds of judges when they act in their capacity as judges. It is true that we cannot observe directly what takes place in the mind of the judge, but it is possible to construct hypotheses concerning it, and their value can be tested simply by observing whether predictions based on them have come true".

[13] See, *inter alia*, A. Della Bella, "La Corte costituzionale stabilisce che l'Amministrazione penitenziaria è obbligata ad eseguire i provvedimenti assunti dal Magistrato di sorveglianza a tutela dei diritti dei detenuti", in *Diritto Penale Contemporaneo*, 13/06/2013.

[14] Corte cost., sent. N. 266/2009. On the role of this judgment on the perspective of the protection of prisoners' rights in Italy see, C. Renoldi, "Una nuova tappa nella "lunga marcia" verso una tutela effettiva dei diritti dei detenuti", in *Rass. penit. e crim.*, 2010, 3, 95 ss., with a note by A. Marcheselli "Tutela dei diritti dei detenuti alla ricerca della effettività. Una ordinanza "rivoluzionaria" della Corte costituzionale. Sul ruolo di questa sentenza nel processo di progressiva responsabilizzazione della magistratura di sorveglianza rispetto alle violazioni dei diritti del detenuto", see also A. Gargani, "Sovraffollamento carcerario e violazione dei diritti umani: un circolo virtuoso per la legalità dell'esecuzione penale", in *Cass. pen.*, 2011, 1259.

[15] See, Corte cost, sent. 266/2009, cited, §4, resuming the position of the *a quo* judge: "*With reference to art. 6, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms, it must be considered that the current regulatory framework does not guarantee to the applicant and to the prison administration the possibility of addressing a impartial judge , who, through a fair trial conducted in and adversarial hearing, "takes a decision that does not have only the name and the form but also the substance and the binding force of a judicial decision"* "

[16] ECtHR, *Enea v. Italy*, [GC], (Application no. 74912/01).

[17] *Torreggiani and Others v. Italy*, [GC], n. 43517/09, 46882/09, 55400/09 et al.

The effectiveness of the said remedies has been the subject of a previous project (EU Justice -Prison Litigation) which showed that a reluctant attitude and a restrictive legal reasoning approach toward the new remedies (with a high number of inadmissibility and rejects) made the remedies far from effective for the protection of prisoners' rights.

As a matter of facts, we can argue that with the introduction of the new preventive and compensatory remedies, the arena for strategic prison litigation and protection of rights was finally open.

Before the Torreggiani pilot judgment procedure, traditionally the Italian prison litigation and specifically the litigation in the field of prisoners' rights protection was an area completely devoid of dynamism and legal activity. Case law was sparse and implemented predominantly by high security prisoners and 41 bis prisoners.

The opening up of the prison litigation in the field of prisoners' rights protection, especially in a system traditionally devoid of such a litigation, needs, first and foremost, reasoned and sound argumentative applications. This means, not only applications able to depict the factual situation of overcrowding, material conditions of detention or violation of fundamental rights, but also an in depth and updated analysis of the European case law in order to present it to the domestic Judiciary (rarely inclined to move around international legal precedents and not able or not prepared to read and use ECtHR cases, especially when those cases concern other European countries).

This ability to decode and translate the factual situation into public and strictly legal issues can be achieved only though a robust system of legal aid. A system able to take into account, not only lawyers expert in the field of prison law, but also NGOs and legal clinics, potentially working in coordination, in order to achieve a multi-layered protection, the factual knowledge and monitoring achieved by NGOs should be paired with the academic research and analysis of the updated national and European case law. Finally, experienced lawyers need to be able to adopt a persuasive authority approach in order to stimulate the production of a dynamic and evolutive national case law.

iii. What is the impact of ECtHR judgments on the system of legal aid/access to legal information?

The ECtHR intervened in the Italian system of legal aid in criminal proceedings with some relevant judgments.

In *Artico v. Italy* (no. 6694/74), the Court considered the effectiveness of the then in force system of free legal aid in criminal matters. In this case, the Court found a violation of Article 6, par. 3-c. Sub-paragraph (c) of art. 6-3 which guarantees the right to an adequate defence either in person or through a lawyer, this right being reinforced by an obligation on the part of the State to provide free legal assistance in certain cases.

In this case the Court insists on the effectiveness of the right to free legal assistance and on the State's obligation to intervene in its absence: in the case the lawyer assigned to the accused had, since the beginning, refused to represent him on the basis of other duties and health reasons. Nevertheless, the competent national judicial authorities had failed to appoint a substitute; hence the statement of the Court that if the appointed lawyer is prevented from performing the service and state authorities know the situation, they have the positive obligation to impose on him/her the fulfillment of the assignment or to provide for his/her replacement;
As the Courts affirmed, in Artico:
"the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive (see the Airey judgment of 9 October 1979, Series A no. 32, pp. 12-13, par. 24, and paragraph 32 above). As the Commission's

Delegates correctly emphasised, Article 6 par. 3 (c) (art. 6-3-c) speaks of "assistance" and not of "nomination". Again, mere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations. Adoption of the Government's restrictive interpretation would lead to results that are unreasonable and incompatible with both the wording of sub-paragraph (c) (art. 6-3-c) and the structure of Article 6 (art. 6) taken as a whole; in many instances free legal assistance might prove to be worthless. In the present case, Mr. Artico did not have the benefit of Mr. Della Rocca's services at any point of time. From the very outset, the lawyer stated that he was unable to act. He invoked firstly the existence of other commitments and subsequently his state of health (see paragraph 14 above). The Court is not called upon to enquire into the relevance of these explanations. It finds, as did the Commission (see paragraph 98 of the report), that the applicant did not receive effective assistance before the Court of Cassation; as far as he was concerned, the above-mentioned decision of 8 August 1972 remained a dead letter.[18]"

To conclude that:

"Admittedly, a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes but, in the particular circumstances, it was for the competent Italian authorities to take steps to ensure that the applicant enjoyed effectively the right to which they had recognised he was entitled. Two courses were open to the authorities: either to replace Mr. Della Rocca or, if appropriate, to cause him to fulfil his obligations (see paragraph 33 above). They chose a third course - remaining passive -, whereas compliance with the Convention called for positive action on their part (see the above-mentioned Airey judgment, p. 14, par. 25 in fine)."

The consequential findings of the *Artico* case:

Wherever "the proceedings were clearly fraught with consequences for the applicant" and the case is complex, legal aid should be granted (§§ 34–35.) Even where applicants are educated persons who can understand the proceedings, the important issue is whether they can actually defend themselves without a lawyer. Applicants do not have to show that the absence of legal aid caused "actual damage" to their defence; they must only show that it appears "plausible in the particular circumstances" that a lawyer would be of assistance.

Under CoE law, how to conduct the defence is essentially a matter between the accused or suspected person and his/her lawyer, but if relevant authorities are alerted to a "manifest shortcoming" on the part of the lawyer, they should act. This obligation arises only where the failure to provide effective representation was "manifest or sufficiently brought to [the state's] attention". For example, when an appeal is deemed inadmissible due to a lawyer's omissions, this may violate the right to a practical and effective defence. Only shortcomings imputable to state authorities can give rise to a violation of Article 6 (3) (c). For example, state liability may arise where a state is aware that a lawyer has failed to act for the accused (ECtHR, Artico v. Italy, No. 6694/74, 13 May 1980, para. 33).

The case *Sannino v. Italy* (2006) concerns again the effectiveness and quality of the assistance provided by the lawyer and the connected obligations of the State if the lawyer remains inactive or provides an inadequate service; in the specific case the appellant had been assigned different *ex officio* lawyers for each subsequent hearing, so that each of them was unprepared for defense; when, as in these hypotheses, the inadequacy of the service provided is clear, the Court states that the applicant's passive conduct could not of itself relieve the authorities of their obligation to take steps to guarantee the effectiveness of the accused's defence.

[18] Artico, cited, §33.

In another case, *Goddi v. Italy*, concerning a criminal trial in which the appointed lawyer did not have sufficient time and adequate resources available to prepare the defense. The applicant was in prison and was unable to appear before the Court of Appeal, nor could his lawyer who had not been informed of the date of the hearing; the Court of Appeal had therefore appointed an office attorney without referring the case to another hearing to grant him time to study the documents.
The Court affirmed that: under CoE law, Article 6 (3) (c) of the ECHR provides that everyone who is charged with a criminal offence has the right to "defend himself in person or through legal assistance of his own choosing". The right to legal assistance is also linked to the right to legal aid and the right, under Article 6 (3) (b) of the ECHR, to have adequate time and facilities to prepare one's defence. Put simply, legal assistance cannot be effective if a defendant lacks the time and facilities to take advice and prepare his/her case properly (244 ECtHR, *Goddi v. Italy*, No. 8966/80, 9 April 1984, para. 31).

1. LEGAL SUPPORT (i.e. access to legal information (information on rights and duties))

1.1 Obligations as regard to legal support

Which texts define an obligation to provide a legal information in police custody/penitentiary facilities (related to penitentiary issues)? Are these a matter of general law or are they specific to prison issues? In what terms is the content / scope of the legal information obligation defined (in particular, is reference made to aspects of everyday life in detention)? Specify the conditions under which this obligation to provide legal information has emerged and been legally enshrined. As regards police custody, specify what information related to their rights (health, access to a lawyer, free legal aid) is provided to suspects or accused persons.

Access to legal information in prison is one of the main criticalities of the Italian system of detention.
Article 32 of the Penitentiary Law affirms that the prisoner shall be informed oft he general regulations and his/her rights and duties, on disciplin and prison treatment. Article 69 of the Presidential Decree n. 230/2000 (Executive Regulation on Penitentiary Law) substantiate this rights to legal information stating that " in every prison intitute, the texts of the penitentiary law, of the executive regulation, of the internal regulations and of the other provisions concerning the rights and duties of prisoners and inmates, along with informations on discipline and treatment, must be kept in the library or other premises to which prisoners can access. Upon entry, each prisoner is given an extract of the main rules referred to above, with an indication of the place where it is possible to consult the complete texts. The above extract is provided in the most widespread languages among prisoners and foreign internees. Prisoners are finally informed of every subsequent disposition in the matters indicated above". Moreover, the same Article 69 affirms that the Administration cannot be satisfied with a formal knowledge of these rights and duties but is obliged to clarify and motivates any disposition to the prisoner.

In practice the internal prison regulation is often not in force in many prison institutes, because it was never implemented nor approved. Therefore not only the effectiveness but the same existence of these informations is highly questionable.

Concerning police custody, in particular, as the CPT has noticed during its visits, the information provided to detained persons are unsatisfactory. In few law enforcement establishment, detainees are provided with forms containing some relevant information on their rights. However, the distributed form are only available in Italian and do not contain information on the right to notify a close relative or third person and the right to access to a doctor.

1.2 Legal support to non-native speakers

What does the law provide for in terms of legal support to non-native speakers? (support to apply for legal aid? Support once granted legal aid)

As stated in the previous section, according to Article 69.2 of the Executive Regulation, the extract on rights and duties of the prisoners is provided in the most widespread languages among foreign prisoners. This is rarely the case in Italian prison institutes.

Concerning the issue of translators and interpreters, in the Italian legal system, impartial access to justice and respect for the principle of equality are reflected in the recognition, to every foreign defendant who does not know the Italian language, of the guarantee of being assisted by the figure of the interpreter and translator during the proceedings.

Every foreign defendant, who does not know the Italian language, has in fact the right to be informed, in a language he/she understands, of the nature and reasons for the accusation made against him, so as to understand the acts and the procedural activity, to know the legal tools available to him/her and adequately prepare his/her defense, without being prejudiced in the right to participate actively in the process (articles 5 and 6 of the ECHR, 35 and 14 of the International Covenant on Civil and Political Rights).

The right to be informed of the accusation in an understandable language is inextricably linked with the right of defense. In other words, it is the foundation of every other right recognized to the person subjected to criminal proceedings: in the absence of linguistic assistance in favor of the defendant who does not speak or understand the language used in the trial, the same technical defense would prove to be a merely formal guarantee.

Article. 143 paragraph 1 of the Italian CPP (Code of Criminal Procedure) provides, in fact, that:

The defendant who does not know the Italian language has the right to be assisted free of charge, regardless of the outcome of the proceedings, by an interpreter in order to be able to understand the accusation made against him and to follow the completion of the acts in which he participates. He also has the right to the free assistance of an interpreter for communications with the defender before making an interrogation, or in order to present a request or a memory during the proceedings.

The literal tenor of the provisions - which pays attention only to the "interpreter" (and not also to the "translator") and relate the right to obtain the assistance of an interpreter to the "hearing" or "trial" – evokes the possibility of receiving linguistic assistance only to the oral phase of the trial. And yet, the scope of the guarantee goes far beyond oral language assistance at the hearing.

Paragraph 2 of the art. 143 CPP provides that the proceeding authority must arrange for the written translation, in adequate time to allow the exercise of the rights and the right of defense, guarantee information, information on the right of defense, provisions which provide for personal precautionary measures, of the 'notice of the conclusion of the preliminary investigations', of the decrees that order the preliminary hearing and the summons to judgment, the sentences and the penal decrees of conviction.

The Constitutional Court has affimed that "the right of the accused to be immediately and in detail informed in the language known by him of the nature and reasons of the accusation against him must be considered a perfect subjective right, directly enforceable…because it is a right whose guarantee, even if explicitly expressed by acts having the rank of the ordinary law, expresses a value implicit in the constitutional recognition, in favor of every man (citizen or foreigner), of the inviolable right to defense (art. 24 , paragraph 2 of the Constitution); it follows that, due to the nature of the latter as a fundamental principle, pursuant to art. 2 of the Constitution, the judge is subject to the interpretative constraint of conferring to the norms, which contain the guarantees of the rights of defense with regard to the exact

understanding of the accusation, an expansive meaning, aimed at rendering concrete and effective, to the extent possible, the indicated above the right of the accused "(Judgment of the Constitutional Court of January 12, 1993, No. 10).

The interpreter and the translator are also appointed when the judge, the public prosecutor or the judicial police officer has personal knowledge of the language or dialect to be interpreted (Article 143 paragraph 5).

The violation of the rules on linguistic assistance of the foreign accused results in the declaration of nullity of the acts and of the procedural activity.

It appears clearly, from what has been stated above, that the critical issue is not so much constituted by the trial phase and the criminal procedure, but by all the activity that take place outside of the scope of the criminal procedure and particularly in prison. The contact with the foreign prisoner and his/her understanding of the legal situation as well as his/her ability to meet with the lawyers or with NGOs' operators, ombudsperson, legal clinicians is outside of the scope of this legislation and left to the practical arrangements of these actors.

1.3 Actors providing legal information

Who are the actors responsible for providing legal information in detention? What is their status and what budgets are they dependent on? Do they have an ethical framework guaranteeing their independence and the secrecy of consultations?

The effectiveness of the right to legal information is highly questionable. On paper this duty lies on the Prison Administration at the entry of any prisoner in the facility.

In practice, the right to legal information is completely handed over to the third sector, specifically to NGOs and legal clinics operating in the field of the legal advice and rights' protection in prison.
In prison where a service of legal consultancy is not present, other kind of NGOs (confessional, religious or generic) usually provide a sort of information which being non-technical, unfortunately is sometime inaccurate and erroneous and can result in the loss of legal opportunities or in the spread of misleading information.

Every NGOs needs to comply with the European and national legislation concerning data protection and privacy rights. After the passing of the EU Regulation 2016/679 (so called GDPR) and the consequential reform of the internal legislation on privacy and data protection, a reinforced protection is granted to criminal data, see Article 10 of the GDPR: Article 10: "Processing of personal data relating to criminal convictions and offences. *Processing of personal data relating to criminal convictions and offences or related security measures based on Article 6(1) shall be carried out only under the control of official authority or when the processing is authorised by Union or Member State law providing for appropriate safeguards for the rights and freedoms of data subjects. Any comprehensive register of criminal convictions shall be kept only under the control of official authority*."

This is an important field for the assessment of the ability of the prison administration to protect personal and criminal data of prisoners. It also mean that only specialized NGOs expressly authorized by the prison administration will be able to treat criminal data.

As a matter of facts the most widespread way to receive legal information in prison is through the fellow inmates. Sometime to inmates who are paid as '*scrivani*' (a sort of prison secretariat), but often nor trained for the most basic task (as drafting an early release application). In the majority of cases to inmates who are not *scrivani*. This result in a very risky situation in terms of privacy protection, independency and balance of power in the prison community.

1.4 Practical arrangements

What are the practical arrangements for carrying out the task to provide legal information in custody, as specified by the law (regularity, type of premises, etc.)?

Traditionally, the Italian penitentiary law provides the activity of the external society in prison in order to support the rehabilitation of the prisoner. Article 17 of the las affirms that:
The purpose of the social reintegration of the condemned and inmates must also be pursued by soliciting and organizing the participation of private individuals and public or private institutions or associations in the rehabilitative action. Authorized to attend prisons with the authorization and according to the instructions of the supervisory magistrate, upon the favorable opinion of the director, all those who, having concrete interest in the work of re-socialization of the prisoners, show that they can usefully promote the development of contacts between the prison community and the free society.The persons indicated in the preceding paragraph operate under the control of the director.

This last provision indicates that the Direction of each prison can establish specific modalities of participation of the NGOs in prison. This can lead to a uneven situation at a national level and expose the third sector to the will of the prison administration in terms of practical arrangements for carrying out the task to provide legal information in custody.

1.5 Legal information tools

Under the law, are legal information tools (legal guides, Internet portals for legal information, translations of legal standards, etc) to be made available for detainees? What is detainees' access to online legal information portals?

As said, according to Article 69 of the Presidential Decree n. 230/2000, every prisoners shall be informed about his/her rights and duties and provided with relevant pieces of legislation and with the internal regulation.
According to the experience of L'Altro diritto, only in very few facilities an internal regulation exists in the form of a leaflets and is distributed to the prisoner at their entrance into the prison institute and more often, the third sector, privately of publicly financed, provided a "Guide" on prisoners' rights and distribute it among the prisoners, translated in the most common languages of the prisoners.

In 2012, the Prison Administration drafted a so called: Charter of Rights and Duties. The Charter was intended "to be distributed to each prisoner or interned during the first interview with the director or with a prison worker when he/she enters the institute, to allow the best exercise of his rights and to ensure greater awareness of the rules that conform the life in the prison context. In order to allow family members to become aware of it, the Charter is published on the website http://www.giustizia.it and a copy should be available for consultation in the interview room of each individual institution. In addition to the Charter, the prisoner should be given extracts of the law of 26 July 1975, n. 354 (Rules on the penitentiary system and on the execution of privative and limiting measures of freedom), of the Presidential decree of June 30th 2000, n. 230 (Regulation laying down rules on the penitentiary system and on the privative and limiting measures of liberty), of the internal Regulation of the institute and of the other provisions, including supranational ones, pertaining to the rights and duties of the prisoner and the interned, to the discipline and to the penitentiary treatment, including the European Convention for the Protection of Human Rights and Fundamental Freedoms. At the same time, the place where it is possible to consult the full texts of the aforementioned rules is indicated to the inmate."
According to the experience on the field, while it is true that the Charter is published online, a copy of it is not always distributed among prisoners, and no excerpts of the said legislation are distributed. A copy of the Charter and of the legislation can only be found in the prison library.

1.6 Reporting on legal information

Are bodies in charge of legal information in custody subject to an obligation to report regularly and publicly on their actions?

The Ministerial Decree of 5 December 2012 establishing the right to be provided with the Charter of Rights and Duties does not mention any obligation to report regularly on the effectiveness of the distribution and accessibility. This is all the more true, if we think that the solution always reiterated by the Prison administration to the problem of legal information is to provide another guide or leaflets. It seems like the same Prison Administration is unaware of this Charter and that the effectiveness of this tool is highly questionable if not sustained by a service of information on legal rights and the way to implement them.

Recently, the the National Department of the Prison Administration has signed a convention with Altro diritto (an NGO and an inter-university research centre connecting many universities in Italy) for the legal advice provided to prisoners by students of the legal clinics and NGO members[19]. This could be considered as a best practice in order to work on the effectiveness of the right to legal information.

2. LEGAL AID (i.e. legal costs and legal representation fees)

2.1 Fees and mandatory (or not) character of legal representation

Is the representation by a lawyer mandatory during litigation concerning the conditions of detention and, more generally, the internal status (exercise of the fundamental rights inside the prison) and external status (access to an early release measure for medical reasons)? Is access to courts subject to the payment of a fee?

Italy is still immersed in a normative ideology (mainly shared by the Surveillance Judiciary, but also, and by consequence, by lawyers and by the prison administration) which consider prison law, penitentiary litigation and prison related applications as a sort of non-jurisdictional field (worthy is to remember that we have achieved a full jurisdictionaliztion of this matter very recently and only thanks to the European stimulus and ECtHR case law). The result has been so far a very loose trial procedure and a very limited defence activity.

As a consequence, representation by a lawyer for litigation concerning internal and external status is not mandatory at the initial stages, i.e. for the filing of an application. It then becomes mandatory for the participation to the hearing, whenever a hearing is foreseen (chamber judgment).

Access to Surveillance Court is not subject to a fee. Any other civil or administrative complaint is subject to the ordinary legal fee.

2.2 Legal aid scheme

Which texts organize legal aid scheme? Briefly describe how these set out funding of the Legal aid system.

[19] https://www.gnewsonline.it/carceri-facolta-scienze-giuridiche-sostegno-detenuti/

The right to legal aid has traditionally been achieved according to two models, one based on the establishment of public legal offices and characterized by the intervention of the State for the payment of legal fees, the other, on the contrary, resting exclusively on the shoulder of the bar.

Historically, in Italy, legal aid was granted by force of R.D. December 30, 1923 n. 3282, which operates the transition from a system of public assistance to one based exclusively on the services of lawyers paid by the state.

In criminal matters, legal aid was available as of right to anyone who is in a "state of poverty" ("stato di povertà"; Article 15), which phrase is to be interpreted as meaning inability to meet the expenses involved (Article 16). The decision affording legal aid was taken by the president of the trial court (Article 15; see also Article 3 of Royal Decree no. 602 of 28 May 1931). Once granted, it was the judicial authority seised of the case which nominated the lawyer who was to act for the person concerned (Article 29 of the 1923 Decree). The prosecuting authorities or the court president could cause a substitute lawyer to be designated either on their own initiative, where there are serious reasons, or if the original lawyer "establishes legitimate grounds which oblige him to abstain, or entitle him to be excused, from acting" (Article 32).

Similarly, Article 128 of the Code of Criminal Procedure provides that an *ex officio* appointed lawyer may be replaced "for a justified reason". Article 5 of Royal Decree no. 602 of 28 May 1931 stipulated that any defence lawyer who is unable to act must supply a written statement of the reasons therefore; even after such a declaration has been made and for so long as he has not been replaced, the lawyer must fulfil the obligations of his office.

An assisted party loses the benefit of legal aid if he instructs a lawyer of his own choice (Article 128 of the Code of Criminal Procedure).

In general, legal aid came under the supervision of the prosecuting authorities; they could take such measures as may be necessary to ensure that the case of an assisted person was properly attended to and, without prejudice to the latter's action for damages, could request the imposition of disciplinary penalties on lawyers who neglect their duties (Article 4 of the 1923 Decree).

However, following the entry into force of the Italian Constitution, this legislation was subject to harsh criticism, since it had proved unsuitable to guarantee an effective recognition of the right provided for by Article 24.3 of the Constitution.

As a matter of facts, Article 24 of the Constitution affirms that: Anyone may bring cases before a court of law in order to protect their rights. Defense is an inviolable right at every stage and instance of legal proceedings. The poor are entitled by law to proper means for action or defense in all courts. The law shall define the conditions and forms of reparation in case of judicial errors." Article 24.3, therefore, is ambiguous in that it does not specify the body in charge of the protection of the right to defense of the economically disadvantage persons. Also due to this uncertainty, the discipline of the R.D. of 1923 remained in force for many years and only with the Law n. 217 of 1990 a system of legal aid in the criminal field was introduced.

The introduction of a system of legal aid in criminal matters in Italy is a direct result of the ECtHR case law. In *Artico v. Italy* (no. 6694/74), the Court found a violation of Article 6, par. 3-c. Sub-paragraph (c) of art. 6-3 guarantees the right to an adequate defence either in person or through a lawyer, this right being reinforced by an obligation on the part of the State to provide free legal assistance in certain cases. As the Courts affirmed, in Artico: "the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive (see the Airey judgment of 9 October 1979, Series A no. 32, pp. 12-13, par. 24, and

paragraph 32 above). As the Commission's Delegates correctly emphasised, Article 6 par. 3 (c) (art. 6-3-c) speaks of "assistance" and not of "nomination". Again, mere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations. Adoption of the Government's restrictive interpretation would lead to results that are unreasonable and incompatible with both the wording of sub-paragraph (c) (art. 6-3-c) and the structure of Article 6 (art. 6) taken as a whole; in many instances free legal assistance might prove to be worthless. In the present case, Mr. Artico did not have the benefit of Mr. Della Rocca's services at any point of time. From the very outset, the lawyer stated that he was unable to act. He invoked firstly the existence of other commitments and subsequently his state of health (see paragraph 14 above). The Court is not called upon to enquire into the relevance of these explanations. Tt finds, as did the Commission (see paragraph 98 of the report), that the applicant did not receive effective assistance before the Court of Cassation; as far as he was concerned, the above-mentioned decision of 8 August 1972 remained a dead letter.[20]"

As of today, a general legislation on "legal costs" includes a part expressly reforming the free legal aid in civil and administrative and criminal and penitentiary matter. The rules covering classifications and procedures regarding costs of trials, including legal aid, are set out in Presidential Decree No 115 of 30 May 2002 which contains the consolidated text on legal costs.

Legal aid corresponds to the Italian institution of "advocacy in court paid for by the State" to protect defendants with insufficient means and involves exempting such persons from having to meet certain costs (known as expenses booked to the State) and the State paying other costs.
Where there is an entitlement to legal aid, the person is not required to pay the standard charge, standard payments for official notification, certain fees (registry fees, judicial mortgage and land registry fees) and copyright.

The State pays the following:

- counsel's fees and expenses;
- travel costs and expenses incurred by judges, officials and judicial officers for performing their duties outside the court;
- travel costs and expenses incurred by witnesses, court officials and expert witnesses who incurred expenses when performing their duties are also reimbursed;
- the cost of publishing any notice regarding the judge's ruling;
- the cost of official notification.

The State has the right of reimbursement and, where it does not recover the money from the loser, it may claim repayment from the party eligible for legal aid, if the recipient wins the case or settlement of the dispute and receives at least six times the cost of the expenses incurred or if cases are discontinued or barred. There are special provisions for ensuring reimbursement in the event of the case being struck off the cause list or barred as a consequence of failure by the parties to act or meet legal requirements.

2.3 Emergence of a right to legal aid in penal facilities

When and under which political circumstances and policy implementation were the defraying of prison disputes decided?

The inclusion of penitentiary proceedings and prison disputes in the system of the Italian legal aid was provided in the first legal text which reformed legal aid in Italy, introducing an actual system of aid provided for by the State in criminal matters. Article 15 of Law n. 217/1990 expressly including

[20] Artico, cited, §33.

penitentiary proceedings (“proceeding in which competent is the Surveillance judiciary”) within the scope of legal aid in criminal matters.

The most recent reform law (Presidential Decree n. 115/2005, article 75) expressly include in the legal aid scheme each degree and each stage of the process and all any procedures, “derived and accidental, however connected”. Subsequently, though, it is established that the discipline of legal aid "applies" even in the “execution phase”, in the review process, as well as in the processes related to the application of security and preventive measures under the jurisdiction of the **Surveillance court**.

It seems that any other procedure under the jurisdiction of the Surveillance judge (first instance jurisdiction) is excluded by the legal aid.

This is a first serious impediment to the effectiveness of access to justice in prison litigation, since many important applications are lodged in front of the Surveillance judge (monocratic body), such as the request of early release, a special typology of home detention, which is a very broad one, and the compensatory and preventive remedies adopted after the *Torreggiani* pilot judgment against Italy.

The Italian Judiciary (Constitutional Court and Court of Cassazione) have repeatedly affirmed that single Surveillance judge procedures are included in the legal aid scheme, since the law refer to the “execution phase” which necessarily include all the litigation procedure concerning the execution of a sentence. Nevertheless, periodically, this interpretation is contested for different kind of proceedings which are considered as excluded by the legal aid scheme, since they lack a clear jurisdictional nature. This was evident for the application for early release, which was considered as a “non litigant” procedure, a sort of administrative, not jurisdictional procedure. Finally, the Court of Cassazione underlined the need for the protection of the right to defence in the execution phase and included the procedure for early release in the legal aid scheme (judgment n. 27757/2011).

But similar issues are likely to arise any time, since the legislator has never reformed the law so far.

Another critical issue, again concerning the performance of the system of legal aid, as underlined by many lawyers, is the need to present a specific and distinct application for admission to legal aid in relation to each surveillance procedure initiated by or against the prisoner. This provision (art. 109 of the d.p.r. 115/2002) risks to sacrifice the institute of legal aid in Surveillance proceedings. According to this last article, in fact, the defender's fees are admissible only after the lodging of an application, so all the preliminary activities (such as meetings with the client, interviews in prison, contacts with consultants or social workers, in order to lodge an application) are excluded.
In fact, it seems that only the hearing activity would be included in the legal aid.

This situation could be improved by including surveillance proceedings within those "derived and accidental procedures" mentioned in the first paragraph of art. 75 of the d.p.r. 115/2002 or, admitting the possibility of a single admission to legal aid for the entire execution phase.
A more extensive interpretation of the aforementioned article of law would allow, in fact, full protection of the right of defence as provided for by Article 24 of the Constitution.

2.4 Perimeter of the legal aid regarding prison litigation

What is the perimeter of the legal aid regarding prison litigation? Are certain aspects of prison life (that concern fundamental rights) excluded?
What is the scope of legal aid granted for criminal proceedings in terms of dealing with prisoners’ rights issues? In other words, does the legal aid granted for a criminal case provide for additional fees if the lawyer handles a proceeding linked to the defendants’ rights within the prison?

According to what we have stated above, no aspects of prison life should be excluded by the system of legal aid in Italy. As a matter of facts, The Italian Judiciary (Constitutional Court and Court of Cassazione) have repeatedly affirmed that single Surveillance judge procedures are included in the legal aid scheme, since the law refer to the "execution phase" which necessarily include all the litigation procedure concerning the execution of a sentence.

Nevertheless, periodically, this interpretation is contested for different kind of proceedings which are considered as excluded by the legal aid scheme, since they lack a clear jurisdictional nature. This was evident for the application for early release, which was considered as a "non litigant" procedure, a sort of administrative, not jurisdictional procedure. Finally, the Court of Cassazione underlined the need for the protection of the right to defence in the execution phase and included the procedure for early release in the legal aid scheme (judgment n. 27757/2011).

Additional fees are provided for any proceedings concerning prisoner's rights, but the applicant or the lawyer need to lodge a new application for the application of legal aid to the new proceeding.

2.5 Scope of the compensation

What exactly does legal aid (that does not relate to criminal proceedings) take care of in terms of acts to be done by the lawyer ? Do the texts provide for the overall management of the case, or do they differentiate between the different acts performed by the legal professional (pleadings, visiting clients in detention, hearing before the court, etc.)?

Recipients of legal aid are exempted from having to pay certain costs, while others are paid by the State, as set out in Section 131 of Consolidated Text No 2002/115. The aid covers all the costs of the proceedings required by law, including the nomination of a expert to act on behalf of the recipient. It does not, however, cover the cost of out-of-court consultancy.
The applicant's counsel's fees and expenditure are paid by the judge at the end of every stage or level of the trial and at the end of the proceedings.

Expenses and fees are also paid to the judge's assistant and any expert acting on behalf of the applicant.

The recipient and the parties involved, including the public prosecutor, are notified of and may challenge the payment order.

The applicant's counsel, the judge's assistant and the applicant's expert may not request or receive remuneration or compensation from their client other than that provided for by law. Any agreement to the contrary is null and void and any infringement of the ban is a serious disciplinary (and sometime criminal) offence.

Where there is an entitlement to legal aid, the person is not required to pay the standard charge, standard payments for official notification, certain fees (registry fees, judicial mortgage and land registry fees) and copyright.

The State pays the following:

- counsel's fees and expenses;
- travel costs and expenses incurred by judges, officials and judicial officers for performing their duties outside the court;
- travel costs and expenses incurred by witnesses, court officials and expert witnesses who incurred expenses when performing their duties are also reimbursed;

- the cost of publishing any notice regarding the judge's ruling;
- the cost of official notification.

The State has the right of reimbursement and, where it does not recover the money from the loser, it may claim repayment from the party eligible for legal aid, if the recipient wins the case or settlement of the dispute and receives at least six times the cost of the expenses incurred or if cases are discontinued or barred. There are special provisions for ensuring reimbursement in the event of the case being struck off the cause list or barred as a consequence of failure by the parties to act or meet legal requirements.

2.5 Eligibility to legal aid

Under which conditions (specifically regarding the legality of residency and economic situation) are detainees eligible to legal aid? Is there a criterion relating to the merits of the applicants' complaint and, if so, to what degree of precision is the examination prescribed?

People who earn under €11.493,82 per year are eligible for legal aid (Minsiterial Decree of 16 January 2018).
If the individual lives with his spouse or other family members, the income, for the purpose of granting the benefit, is made up of the sum of the income of all the members of the family. Only in the criminal field the income limit is high of € 1,032.91 for each cohabiting family member.
Only personal income is taken into account when the rights of the personality are the object of the case, or in the processes in which the interests of the applicant are in conflict with those of the other members of the family unit living with him.

Person eligible to legal aid at the expense of the State are:

Italian citizens; foreigners and stateless persons residing in the State; the suspect, the accused, the convicted person, the offended by the crime, the injured party who intend to constitute a civil party, the civil or civilly liable person responsible for the fine; the person offended by the crime who intends to take civil action for compensation for damages and refunds deriving from a crime.
The admission is valid for every degree and for every phase of the process and for all the possible procedures, derived and incidental, however connected.
At the execution stage, in the review process, in the revocation and third-party opposition processes, in the processes relating to the application of security or prevention measures or those pertaining to the supervisory court, the person must submit an independent request for admission to the benefit.
In civil proceedings for compensation for damages or refunds deriving from a crime, (when the reasons are not manifestly unfounded) admission to legal aid at the expense of the State has effects for all degrees of jurisdiction.

Exclusion from legal aid in criminal matters
Legal aid is excluded:

in criminal proceedings for tax evasion offenses;
if the applicant is assisted by more than one lawyer (it is now admitted, however, in proceedings concerning contraventions)
for those convicted with a definitive sentence for the offenses of the mafia association, and related to the traffic of tobacco and drugs (changes made by the law of 24 July 2008, No. 125).

This low financial ceiling, coupled with the fact that those who do qualify are often unaware that they can apply, results in a very small percentage of defendants accessing legal aid.

According to data provided for by the Prison administration, we can estimate that around 16% of the prison population is granted legal aid[21].
When a person earns above this financial threshold, even slightly, they are not entitled to any legal aid but they cannot choose to defend themselves. They must accept the lawyer appointed ex officio to them and they must pay that lawyer's fees. This puts a strain on both the defendant and the lawyer. Defendants may have to go into debt to pay for a lawyer that they did not choose or want appointed to them, and lawyers may have to take timeconsuming steps such as having to sue their clients for payment.

Special kind of legal aid (possibly relevant in prison):
- victim of discrimination can be admitted to a special Fund for the legal ais in derogation of the income limit sets out in the law (with an anticipation of expenses of 1.000,00 euros per case and with a limit of three cases per year);
-
- the victim of the crimes referred to in articles 572, 583-bis, 609-bis, 609-quater, 609-octies and 612-bis, as well as, where committed against children, by the crimes referred to in articles 600, 600- bis, 600-ter, 600-quinquies, 601, 602, 609-quinquies and 609-undecies of the Criminal Code, may be admitted to patronage also in derogation of the income limits set by the Law.
- The unaccompanied foreign minor involved in any capacity in a jurisdictional proceeding has the right to be informed of the advisability of appointing a trusted lawyer, also through the appointed guardian or the parent with responsibility under Article 3, paragraph 1, of the law 4 May 1983, n. 184, and subsequent amendments, and, based on current legislation, avail of legal aid at the expense of the State in every state and degree of the proceeding.
- Minor children or adult who are economically not self-sufficient orphans of a parent following a murder committed against the same parent by their spouse, even legally separated or divorced, on the other side of the civil union, even if the civil union has ceased , or by the person who is or has been linked by an affective relationship and stable cohabitation may be admitted to legal aid, even in derogation of the established income limits, applying eligibility in derogation to the relevant criminal proceedings and all civil proceedings arising from the crime, including those of forced execution.

2.6 Choice of the lawyer

Can the detainee choose his/her lawyer in case he/she is granted legal aid (not directly related to criminal proceedings)?

Applicants granted legal aid may nominate a lawyer from the lists of legal aid lawyers drawn up by bar associations of the court of appeal circuit of the judge who knows the merits of the case or the judge before whom it is pending.
Applicants granted legal aid may also nominate expert witnesses where allowed by law.

If the case is at the appeal stage, the lawyer will be chosen from the lists drawn up by bar associations of the court of appeal circuit where the judge who made the contested ruling has his or her chambers.

The list of legal aid lawyers comprises professionals who have applied to be put on it and have the qualifications necessary to represent clients.

The bar association takes the decision to include lawyers on the list on the basis of the lawyer's attitude, professional experience gained over at least six years and the fact that he or she has not been subject to disciplinary measures.

[21] Elaboration on data provided by the Ministry of Justice: https://www.giustizia.it/giustizia/it/mg_1_12_1.page?contentId=SPS42448&previsiousPage=mg_1_12

Lawyers may be struck off the list at any time. The list is renewed every year and made available to the public at all judicial offices on the circuit.

The problem is that the list is almost never provided in prison and the third sector is often asked to provide the list.

2.6 Application for legal aid

What are the formalities required by the texts when applying for legal aid (not directly related to criminal proceedings) / obtaining a lawyer for free?

The application for admission to legal aid in criminal matters is presented at the court's office before which the trial is pending and therefore:

to the GIP chancellery if the procedure is in the preliminary investigation stage;
to the chancellor of the judge who proceeds, if the proceedings are in the next stage;
to the registry of the judge who issued the contested provision, if the proceedings are before the Court of Cassation;

The application must be presented personally by the applicant, or it can be presented by the lawyer.

The application, signed by the interested party, must indicate:
the request for admission to the legal aid
the personal details and tax code of the applicant and of the members of his family unit
proof of income received the year before the application (self-certification)
the commitment to communicate any significant changes in income for the purpose of admission to the benefit.

If the applicant is detained, the application can be presented to the director of the prison institute who is responsible for its transmission to the proceeding judge.
If the applicant is a foreigner (non-EU) the application must be accompanied by a certification (for income produced abroad) of the competent consular authority attesting the truth of what was stated in the application. In case of impossibility, the certification can be replaced by self-certification.

If the applicant is a foreigner and is detained, interned for security measure execution, under arrest or home detention, the consular certification may be produced within twenty days from the date of the submission of the application by the lawyer or a member of the family of the applicant (or can be replaced by self-certification).

2.7 Evaluation and granting of applications for legal aid

Which bodies are competent to decide whether or not legal aid (not directly related to criminal proceedings) will be granted to the applicant? What is their composition and deliberative rules? Are there opportunities to appeal against refusals? If so, to what procedural requirements are appeals subordinated?

The competent judges are:
the GIP if the procedure is in the preliminary investigation stage;
the proceeding judge if the proceedings are in the next stage;

The Judge must decide within 10 days from the lodging of the application, the competent judge verifies the admissibility of the application and can decide in one of the following ways:

can declare the application inadmissible
can accept the request
he can reject the request.

On the question the judge decides with a motivated decree that is deposited in the registry. In any case, a copy of the application and of the decree deciding on admission to the benefit are transmitted to the Tax Office territorially competent for the verification of declared income.

Whenever the legal aid is granted, the applicant can choose a lawyer of trust among the list of legal aid lawyers held at the Bar of the competent Court of appeal and, in the cases provided by law, may appoint a technical advisor and an authorized private investigator.

Against the rejection order, the interested party can lodge an appeal with the president of the Court or of the Court of appeal within 20 days from the moment in which he has become aware of it. The appeal is notified to the Tax Office. The order deciding on the appeal is notified within 10 days to the interested party and to the Tax Office who, in the following 20 days, can appeal to the Court of Cassation. The appeal does not suspend the execution of the contested provision.

2.8 Remuneration of legal aid lawyers

What are the remuneration levels of legal aid lawyers defined by the law in prison litigation (provide comparison with other matters and indications of the level of net remuneration that this implies)?

Lawyers' fees are determined by a decree from the Ministry of Justice which provides for a minimum and maximum fee for every professional act a counsel may perform. The fee for legal aid is low; a legal aid lawyer can expect to earn €1,000-1,500 for a simple case of three to five hearings whereas a private lawyer could expect to earn €4,000-5,000 for the same case. Legal aid lawyers also complain that judges can cut the fees presented at the end of each stage of criminal proceeding. Remuneration is so low that many lawyers refuse appointment, and those who do accept appointment may lack the funds or motivation to conduct a thorough investigation of the case.

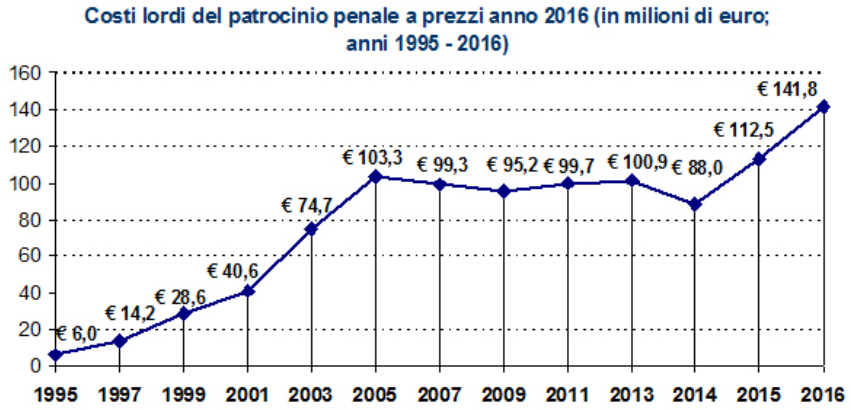
In Italy, with the Budgetary law of 2014, the remuneration of lawyers was cut of a third. Nevertheless the increased budget for legal aid in criminal proceedings (142 millions in 2016 compared to 99 millions in 2011) is due to the high increase of the requests.

The Ministry of Justice finances the provision of legal aid to indigent defendants. The total criminal legal aid budget was of €141 million in 2016.

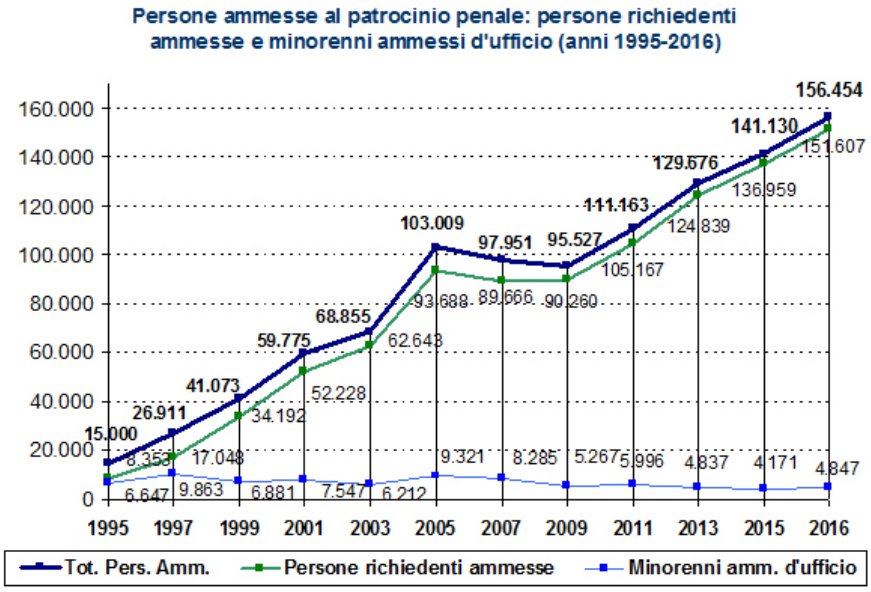
Some data provided by the Ministry of Justice[22] are able to illustrate this situation:

This chart illustrates the total criminal legal aid budget in the decade 1995-2016

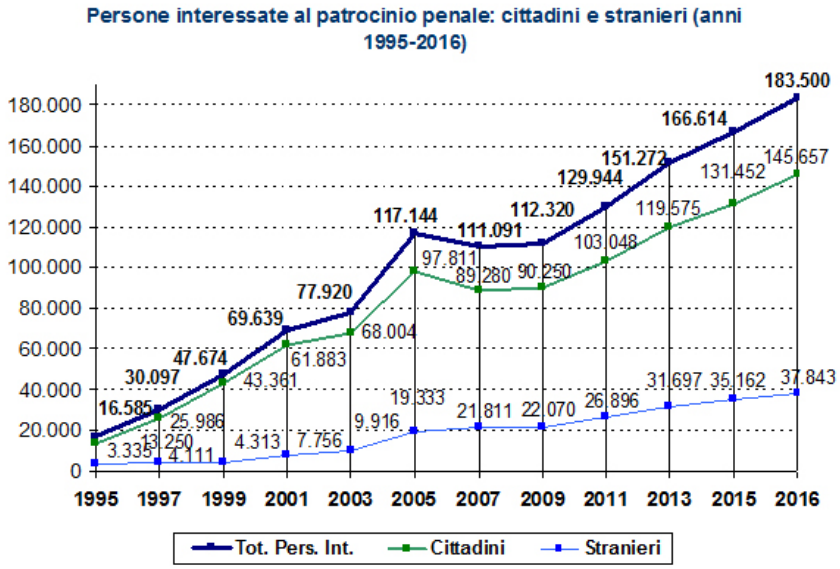
[22] https://www.giustizia.it/giustizia/it/mg_1_12_1.page?contentId=SPS42448&previsiousPage=mg_1_12



While this second chart shows the person admitted to criminal legal aid (during the criminal procedure and in penitentiary matters), including minors.
In blue is the total of person admitted to the legal aid, in green the person admitted, while in light blu the minors admitted *ex officio*.



The third chart is showing the person requesting legal aid in the same period of time (1995-2016):
In blue the total of the person interested by legal aid, in green the Italian nationals, while in light blue the foreign persons (data include minors):



2.9 Support to non-native speakers

What support is provided under the law to detainees who do not speak or understand the language of the proceedings?

A translator can be provided and must be paid for by the lawyer whom will then request compensation to the Ministry of Justice. No permanent service of interpreter or translator exists in prison.

Not only official interpreters are missing, but also and foremost, Italian prisons are lacking cultural mediators, who are an essential figure in a prison composed of a highly cultural pluralistic and multi-cultural population in an essentially culturally monolithic (white, male, catholic) society as Italy.
Cultural mediators in Italian prisons are 223, namely 1.13 every one hundred foreigners detainees. In the case of detainees from Maghreb, the ratio percentage is of 0.88. In many cases, they are not full-time workers, they are underpaid and they are not ministerial employees.

Paradoxically, recently the Prison Administration has presents a public call for the selection of 15 (!) cultural mediators for all national prison institutes…A part from the number of mediators to be selected, the call was open only for Italian and EU citizens, excluding application from all third party citizens. Altrodiritto and ASGI (an association for the rifghts of migrants) has challenged the lawfulness of the call, according to antidiscrimination law and the judge of first instance has declared the discriminatory nature of the call, thus suspending it. The administration has failed so far to present a new non-discriminatory call.

2.10 Exemption of costs for the legal aid beneficiary

Is the legal aid beneficiary exempted from the payment of expert fees and other legal fees (interpreter, copy of file…)?

Legal aid does not provide exemption from the cost of expert and other advisor, their fees will be included in the lawyer's request of compensation. As already said a service of interpretation and translation only exists pending the criminal procedure and during the criminal hearing.

2.11 Financial consequences of the failure of the proceedings for the legal aid beneficiary

What are the possible financial consequences of the failure of the proceedings for the legal aid beneficiary[23] (reimbursement of court costs, etc.)?

Persons admitted to legal aid may be subject to the control of the fiscal police, including through investigations at banks and funding agencies.

The false or omission declarations and the failure to communicate increases in income are punished with imprisonment from 1 to 6 years and 8 months and a fine of 309.87 to 1,549.37 euros; the conviction involves the revocation from admission to the legal aid with retroactive effect.

The penalty is also provided for those who fail to communicate the change in income within the period of 30 days from the expiration of one year from the submission of the application for admission or from the presentation of the previous declaration.

2.12 Opportunities in case the legal aid beneficiary is not satisfied with his counsel

What opportunities are granted to the legal aid beneficiary who is unsatisfied with his counsel (briefly)?

The relationship between lawyer and client is based on mutual trust; if this fails or if there are other reasons why the mandate can no longer be continued, it is possible to terminate the relationship, appointing a new defender during the proceedings. This faculty, intended both as a waiver by the lawyer and as a revocation by the client, is also provided when the party has been admitted to legal aid.

The legal aid can however continue only if the new defender is included in the list of lawyers qualified to defend with legal aid. The customer, for his part, must maintain the legal requirements for the benefit of the whole cause (income below the threshold of 11.493,82 euros for the year 2018).

The revocation of the mandate does not prevent the payment of the compensation in favor of the lawyer for the activity carried out until the termination of the relationship.

The liquidation takes place at the request of the revoked defender.

The fee and the fees payable to the defender are paid by the judicial authority with a payment decree, observing the professional fee so that, in any case, they do not exceed the average values of the professional fees in force relating to fees, rights and compensation, taking into account the nature of the professional commitment, in relation to the incidence of the acts assumed with respect to the procedural position of the defense person.

In parallel, the lawyer may at any time renounce the mandate, giving written notice to the client and informing him of the need to obtain a new legal advisor for legal aid.

Until the client finds a new defender, the lawyer must inform him of any communications and notifications relating to the trial, subject to the dissolution of the professional relationship.

The renunciation lawyer will in any case be entitled to the payment of the compensation for the activity carried out up to the time of the renouncement.

[23]legal aid not directly related to criminal proceedings

The professional responsibility in cases of error or lack or diligence and the possible compensation are provided even in case of legal aid lawyer.

In practice the change of lawyers with legal aid can be problematic in prison, since the passage of the file, documents and all the information as well as the same contact with the new lawyer can take time and is not entirely manageable from the prisoner inside the prison facility. The ability to assess and evaluate the work of lawyer is also difficult inside a prison and without the counsel of another professional. In Italy the public debate on this particular issue is scarce and case law is non existent.

An important case shows a changing attitude and a more sensitive approach to the issue of legal aid and legal information. According to a ruling issued by the Court of Verona, Section III, with the sentence filed on January 31, 2017, the lawyer is responsible for informing the client of the possibility of accessing legal aid, otherwise he/she will be responsible for breaching the information obligation.

3. ORGANIZATION OF BARS AND LAWYERS' ACTION IN DETENTION (7-12 PAGES)

3.1 Regulations of bars' involvement in legal support to detainees

How is the involvements of the bars in legal support to detainees regulated (at the national level, at the level of local bars…)? In particular, is the organization of legal consultation in detention mandatory for the bars?

The system of criminal legal aid in Italy is not unified or managed by one central body. Instead, it operates as an *ex officio* appointment system. If a suspect or defendant does not have a lawyer, the prosecuting authority – the police, prosecution or judge—will request the Bar Association to appoint one. These *ex officio* lawyers are not free and they will only be paid by the State if the suspect or defendant is indigent and meets the threshold for the means test.

A key characterizing feature of Italian criminal law is that it is mandatory to have a lawyer at all stages of all criminal proceedings. This is rigorously applied: a person generally cannot represent themselves during the investigation, trial, or appeal, and can be assigned a lawyer against their will. Without a robust legal aid scheme, this results in a situation where many poor defendants go into debt to pay for their lawyer.

Bars provide the specialization courses in order to be inserted within the list of legal aid lawyers.

3.2 Lawyers specialized in detention/penitentiary law

Are there special statutory qualifications for lawyers specialized in detention/penitentiary law? Is there mandatory continuous training in prison law for criminal lawyers (or others)?

Without a central body to administer and manage legal aid, it is difficult to ensure monitoring of legal aid services and quality assurance. The Bar Association and the Penal Chamber (a private association that many criminal lawyers belong to) have codes of conduct and can impose sanctions on a lawyer, but this is rare.

There is a general lack of quality control on the legal profession in Italy. The mandatory nature of legal assistance gives rise to a situation where what matters is that a lawyer was present, not whether the lawyer was prepared and sufficiently skilled to perform his or her duty. For example, at trial, the judge has the power to appoint an ex officio lawyer on the spot if the accused does not have a lawyer. The judge will ask if one of the lawyers in the courtroom is willing to accept the defence of a person without

counsel, and usually someone will volunteer. Poor remuneration leads to concerns about the quality of legal aid lawyers. However, there is generally a strong legal culture of criminal defence and some lawyers routinely accept legal aid cases on ethical grounds despite the state remuneration being lower than what they could earn applying the normal fees. The Giuristi democratici (Democratic Jurists) is an association of lawyers dedicated to taking legal aid cases and improving the legal aid system, and its members are regularly appointed ex officio across Italy.

3.3. Practical arrangements for carrying out legal assistance missions

How are the practical arrangements for carrying out legal assistance missions in custody specified by the law (regularity, type of premises, etc.)? Do lawyers have access to accommodation facilities in case of proceedings related to material conditions of detention? Do they have access to the penitentiary file of their client?

Lawyers have contact with their clients in prison regularly and access to premises is not a critical issue. Usually a simple phone call in order to set the date of the meeting is sufficient to be able to meet their client.

Difficult access can be experienced to remote prison institutes not covered by public transport and very distant from inhabited centres or towns.

Lawyers meet their client inside the prison facilities, in common area and outside of the section. They are therefore not able to assess, personally, the quality of the material conditions of detention in the section or in the cell. They can't collect evidence or measure the cell. They lack the proper means to prepare an application for compensatory remedy in cases of material conditions of detention.

Lawyers can't have direct access to the penitentiary file of their clients, but can ask the judge to order to the administration to produce it in court in litigation cases or can ask access to files and documents kept by the prison administration or the medical record to the Department of Health in order to prepare a line of defence. Prisoners can also ask directly a copy of their penitentiary file or their medical records respectively to the penitentiary or health administration, but the practice shows that this request can prove sometimes very long and difficult and only the help of a lawyer or of the NGOs can ease or unlock the situation.

4. ROLE OF NGOS, LEGAL CLINICS AND NATTONAL MONTTORING BODTES OF PRTSON CONDTTTONS (if providing legal advice)

4.1 Ability for these organisations to intervene in prison and to provide legal advice

Are human rights NGOs, actors of legal clinics and National Monitoring Bodies (only if providing legal advice) entitled to visit prisons without need of prior authorization? Can they provide legal advice? Can they correspond/meet confidentially with prisoners?

The ineffectiveness of the system of legal aid and legal information to prisoners have been historically denounced by NGOs, mainly Antigone and L'Altro diritto, which have started to provide a service of legal counselling.

The regional and local Ombudsmen, in coordination with the newly appointed National Ombudmsan and with the main NGOs operating in prison, are another lever for the effectiveness of legal information in prison and constitutes and a monitoring body able to share relevant information and work at a

negotiation and political level for the effectiveness of access to legal information, to lawyers and to legal aid in prison.

Legal clinics constitute another possible lever for the implementation of the right to legal advice in prison.

The lack of legal information and legal aid provided in prison led NGOs in prison, legal clinic devoted to the study of prison law and prisoners' right defence and ombudperson to achieve a prominent and essential role in protecting and enhancing the effectiveness of the right to legal information, defence, access to justice and access to legal aid for Italian prisoners also organizing litigation campaign and strategic campaign for the promotion and effectiveness of prisoners' rights.

This has been particularly evident after the introduction of the preventive and compensatory remedy after the *Torreggiani* pilot judgment procedure. Some NGOs and legal clinics have started a wide litigation campaign in this field promoting and challenging an evolutive interpretation of the law by the Surveillance Judiciary, as underlined by the same Surveillance judges interviewed.

NGOs, legal clinics operating in the Italian prison institutions, in particular, appears to be the most dynamic tools for the implementation of the right to defence and legal aid. First of all they are able to provide basic information concerning the detention status, the right to access to court and the right to defence since the beginning of the imprisonment, specifically providing information and legal counselling on the legal aid scheme, criteria and accessibility. This is also due to the fact that usually the most active organizations enter the prison facilities periodically (once a week, twice per month) and are therefore able to intercept the new prisoners who get to know about the legal services provided for by the NGOs through their fellow inmates or the prison staff.
Secondly, they can elaborate a legal strategy and initiate litigations in many fields, from the simplest proceedings, like the early release request, to the compensatory and preventive remedy applications. This is due to the facts that all the proceeding concerning prison litigation can be lodged personally by the prisoners and can therefore be drafted by the NGOs legal operator, lawyers and legal clinician.
Whenever the proceeding is a trial one and a hearing is foreseen (chamber procedure), the Surveillance Court provide the name of an *ex officio* lawyer[24]. This is a very delicate and complex step, since it requires a coordination between prison staff, NGOs legal operators or legal clinicians and the *ex officio* lawyers in order to assure the access to the legal aid scheme anytime the economic and personal conditions of the prisoner so require.

Usually this means that the NGOs operator or legal clinician have already analysed the prisoner's position and have provided the list of lawyers working with legal aid in the local bar. The *ex officio* lawyer is usually included in those list and can therefore be activated since the first meeting with the client in order to prepare the request for admission to the legal aid scheme to be lodged during the first hearing or filed in the Surveillance Court office before the first hearing.

NGOs, Ombudsperson and legal clinicians usually have the possibility to meet privately with prisoners, in respect of the confidentiality, in apposite rooms for the meeting, inside the section and near the cells. This is also why all of these actors are more aware of the material conditions of detention. It can happen that no rooms are available and sometime the furniture of the rooms are insufficient or highly deprived. This is an issue that has been reported many time to the prison administration and constitute a critical issue in order to the possibility of action of this actors in prison.

[24] Legal aid is governed by Decree 115/2002 and article 98 of c.p.p. It enables those who lack financial resources to qualify for free legal assistance to promote or defend themselves in civil or criminal proceedings. With legal aid the lawyer fees are paid for by the state.
The *ex officio* lawyer, on the contrary, is a lawyer appointed by the state to defend the accused that has not appointed a lawyer of choice yet, in order to ensure the right to technical defence in any criminal trial. The ex officio lawyer must be paid by the accused, and not by the State, but the accused can instruct a lawyer of choice at all times. The rules concerning legal aid and *ex officio* lawyers apply at all stages, including the proceedings regarding pre-trial measures.

As highlighted in the empirical research, issues of access and confidentiality can arise for specific and vulnerable group within the prison. This is the case of transgender in prison, usually informally allocated in secluded sector of the prison, such as in the Prison of Sollicciano, Florence. The right to defence is particularly undermined in this situation since meetings with NGO's operator, legal clinicians and lawyers must now be improvised in the duty officer's office. This solution entails a number of problems, notably with respect to the protection of the right to privacy. This problem is currently tackled by resorting to an alternative and informal solution: the officers agree to leave the room for the duration of the interview, thus protecting—though only as a result of negotiation—the right to privacy.

4.2 Dissemination of legal documents

Can they disseminate legal documents (legal guides, leaflets, brochures) in detention?

Yes, L'Altro diritto and Antigone in particular provide a comprehensive and inclusive legal service, consisting in legal information and counselling and in the drafting of the application for the access to benefits, alternative measures, execution proceeding, preventive and compensatory remedy.

Antigone and Ristretti Orizzonti are two NGOs who have historically contributed to drafting and disseminating legal documents, leaflets and guide in prison.

4.3 Legal action in court

Do these actors have standing to bring legal action in court (which may compensate for the weakness of the litigation initiated by the detainees themselves)? Can they act on behalf of a prisoner, or represent him? Can they challenge general and impersonal norms?

NGOs do not have a general and all encompassing legal standing to bring legal action in court, except in cases of anti-discrimination cases, in which it can operates on as a legal actor for the public interests. Nevertheless, they can be actors of the ECtHR's litigation on prisoners' rights ass third party intervener and following the *Valentin Câmpeanu*[25] case, it is possible to imagine a new trend and a new challenge for the recognition of legal standing for NGOs working in prison in particularly sensitive cases, not only at a European, but also at a national level, starting from the principle that prisoners' rights are human rights and following the same path of the anti-discrimination legal procedural protection.

In Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania (n. 47848/08) the Court granted standing to an NGO to act as a representative of a highly vulnerable person, with no next-of-kin, Mr Câmpeanu, a young Roma man with severe mental disabilities who was infected with HIV, who spent his entire life in the care of the State authorities and who died in hospital at the age of 18, as a result of neglect. He had no relatives, legal guardians or representatives, was abandoned at birth and lived in various public orphanages, centres for disabled children and medical facilities, where he did not receive proper health and educational treatment.

This case constitutes an important precedent for the possibility of establishing and assigning locus standi directly to NGOs in cases in which the highly vulnerable individual needs protection against violations of Article 2 and 3 rights, creating a concept of de facto representation, for cases involving extremely vulnerable victims who have no relatives, legal guardians or representatives.

An important case in which two NGOs worked together and acted as a plaintiffs before Court is an ill treatment case in the prison of Sollicciano.

[25] Centre for Legal Resources on behalf of *Valentin Câmpeanu v. Romania*¸ no. 47848/08.

The NGOs l'Altro diritto and Antigone acted as a plaintiff before court in the proceeding against four officers guilty of ill-treatment of some inmates in the Sollicciano prison in Florence. The facts go back to the period between September and December 2005. Three incidents were reported involving the agents accused of having applied "severe measures not allowed by law", in violation of article 608 of the Criminal Code, launching slaps against prisoners or hitting them with objects blunt. The most serious incident occurred on October 26, 2005, when, according to the prosecution, one of them repeatedly hit an inmate with the handle of a broom "until he broke it in several parts". The first instance sentence arrived on the June 21th 2013 and convicted the three officers, with sentences ranging from eight months to a year and six months of imprisonment plus compensation for damages in favor of the civil parties. On April 17, 2018, five years after the first decision, the second instance judgement is delivered. This one absolves partially the three officers but the sentence remains for multiple injuries and compensation for the victims. On the other hand, the charges for the violation of Article 608 fall, according to an interpretation of the law, requires, in order for the fact to exist, the further limitation of personal freedom already compressed. The three officers benefited from the time limitation. Two of them have chosen to renounce to it while the officer who has not renounced yet is still in service. Alongside the criminal proceedings, the disciplinary hearing (which was held before the appeal) has also ended because the facts have been considered as not having caused "disturbance". The sentence delivered by the second instance was sent to the penitentiary administration.