



**Maria Cristina Carta**

**THE HUMANITARIAN PRINCIPLE OF PUNISHMENT  
AND THE PROTECTION OF PRISONERS  
WITHIN THE EUROPEAN LEGAL SPACE**



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MARIA CRISTINA CARTA

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# **THE HUMANITARIAN PRINCIPLE OF PUNISHMENT AND THE PROTECTION OF PRISONERS WITHIN THE EUROPEAN LEGAL SPACE**

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## CHAPTER I

### THE MULTILEVEL PROTECTION OF PRISONERS IN THE EUROPEAN LEGAL SPACE

SUMMARY: 1.1 The relationship between criminal law and the protection of fundamental human rights in modern States of law. – 1.2 The *humanitarian principle* in the Italian Constitutional Court case law. – 1.3 Multilevel protection of prisoners in the *European Legal Space*.

#### **1.1 The relationship between criminal law and the protection of fundamental human rights in modern States of law.**

A penalty, in particular incarceration, is an instrument that achieves “the protection of legal assets through the lesion of the same”<sup>1</sup>. While being executed, incarceration is characterized by placing the person in a system that, by its nature, subjects the individual to restrictions that compress some of his or her prerogatives (including primarily, freedom of movement), thus reducing the space within which he or she can develop his or her personality.

In this regard, Italian Constitutional Court Ruling no. 313 of 4 July 1990<sup>2</sup> specified that a penalty necessarily has a punitive nature and that the latter is deeply connected to the need for social defence and general crime prevention. On the one hand, the Constitutional Court also resolved that its retributive and punitive functions partially reflect the minimum conditions

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1 See G. FORTI, *Dignità umana e persone soggette all’esecuzione penale*, in *Diritti umani e diritto internazionale*, 2013, p. 246.

2 Italian Constitutional Court, Judgment of 26 June – 2 July 1990, no. 313.

without which the penalty would cease to function; on the other hand, the Court clarified that reintegration, intimidation and social defence are values which have a constitutional foundation, but not such as to allow the detriment of the correctional purpose expressly enshrined in the Italian Constitution in the context of penalty.

That being said, the relationship between criminal law and fundamental rights in modern legal systems is characterized by the fact that, on the one hand, human rights are a barrier against any repressive excesses and abuses by State apparatuses, and, on the other hand, they are deemed as necessary protection mechanisms<sup>3</sup>. In this regard, reference should be made to Italian Constitutional Court Ruling no. 26 of 8-11 February 1999 regarding the recognition of inviolable human rights<sup>4</sup>, which must be secured to all prisoners throughout the execution of the sentence, and the exercise of which is not left to the mere discretion of the administrative authority.

The recognition of the entitlement to rights must follow – as the Italian Constitutional Court points out – the recognition of the power to enforce them before a judge during judicial proceedings<sup>5</sup>. As a matter of fact, the principle of absolute, inviolable and universal judicial protection of rights precludes any judicial positions of substantive law without there being a court before which they can be enforced (as provided for by Constitutional Court Ruling no. 212 of 19 June-3 July 1997<sup>6</sup>). In this regard, the legal action for the defence of one's rights is itself the content of a fundamental right protected by art. 24<sup>7</sup> of the Italian Constitution, and it is one

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3 See D. PULITANÒ, *Diritti umani e diritto penale*, in *Riv. it. dir. proc. pen.*, 2013, p. 1613 et seq.; A. TOSCANO, *La funzione della pena e le garanzie dei diritti fondamentali*, Milan, 2012, p. 221

4 Italian Constitutional Court, Judgment of 8 – 11 February 1999, no. 26.

5 See GREVI, G. GIOSTRA, F. DELLA CASA, *Ordinamento penitenziario commentato*, Padova, 2011.

6 Italian Constitutional Court, Judgment of 19 June – 3 July 1997, no. 212.

7 This provision reads: “*All persons are entitled to bring cases before a court of law to protect their rights and legitimate interests. Defence is an inviolable right at every stage and instance of legal proceedings. Proper means for action or defence in all courts are guaranteed to the poor by appropriate measures. The law defines the conditions and*



of the inviolable rights attributable to art. 2 of the Italian Constitution<sup>8</sup>.

In the tangible punitive dimension of its execution, a penalty affects and restricts fundamental rights. However, during the last century, several legal and social studies have limited its natural brutality. Indeed, the principle that no punishment or violation of the dignity of any *in vinculis* persons is allowed, is an indispensable cornerstone of the current “European constitutional heritage”<sup>9</sup>. Within the *European Legal Space*<sup>10</sup>, such prohibition shows its

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*forms for reparation in the case of judicial errors”.*

8 This provision reads: “*The Republic recognises and guarantees the inviolable human rights, be it as an individual or a social group expressing their personality, and it requests the performance of the unalterable duty to social, economic, and political solidarity*”.

9 In the doctrine, this expression is generally used to designate the set of values historically and culturally common to the European States. See R. TARCHI (ed.), *Il patrimonio costituzionale europeo e tutela dei diritti fondamentali*, Turin, 2012, p. 27 et seq.; A. PIZZORUSSO, *Il patrimonio costituzionale europeo*, Bologna, 2002, p. 30 et seq. and 176 et seq.; A. SOMMA, *Diritto comunitario e patrimonio costituzionale europeo: cronaca di un conflitto insanabile*, in P. COSTANZO, S. MORDEGLIA (ed.), *Diritti sociali e Servizio sociale. Dalla dimensione nazionale a quella comunitaria*, Milan, 2005, pp. 79 – 118.

10 In this volume, this expression will be used in a broad sense, to refer to the overall European Legal Space (not only to the European Union), defined by the doctrine as “para-constitutional” or “inter-institutional” or “multilevel”, with the primary aim of effectively inducing the idea of subjective legal situations which receive protection within different jurisdictions, through a jurisdiction that is not attributable to unity or hierarchy. In this regard, see R. PISILLO MAZZESCHI, *Diritto internazionale dei diritti umani. Teoria e prassi*, Turin, 2020, p. 160 et seq.; C. AMALFITANO, *Rapporti di forza tra Corti, sconfinamento di competenze e complessivo indebolimento del sistema UE?*, in [www.lalegislazionepenale.eu](http://www.lalegislazionepenale.eu), 4.2.2019, 1-36; R. MASTROIANNI, *Stato di diritto o ragion di Stato? La difficile rotta verso un controllo europeo del rispetto dei valori dell’Unione negli Stati membri*, in E. TRIGGIANI, F. CHERUBINI, I. INGRAVALLO, E. NALIN, R. VIRZO (ed.), *Dialoghi con Ugo Villani*, Bari, 2017, 605-612; M. C. CARTA, *I “livelli” di tutela dei diritti fondamentali nello Spazio giuridico europeo: i limiti del “dialogo” tra Corti*, in *Studi sull’integrazione europea*, I, 2019, p. 161 et seq.; CARTA M. C., *Il principio del ne bis in idem nell’art. 50 della Carta dei Diritti fondamentali UE e nella recente giurisprudenza della Corte di Giustizia*, in *Diritto&Storia*, n. 17/2019; C. AMALFITANO, *General Principles of EU Law and the Protection of Fundamental Rights*, Cheltenham, 2018; E. Malfatti, *I “livelli” di tutela dei diritti fondamentali nella dimensione europea*, Turin, 2018, p. 6 et seq.; see also, MORVIDUCCI, *I diritti dei cittadini europei*, Turin, 2017, 61 et seq.; F. FERRARO, *Lo Spazio giuridico europeo tra sovranità e diritti fondamentali. Democrazia, valori e rule of law nell’Unione al tempo della crisi*, Naples, 2014, p. 188 et seq.; R. C. VAN CAENEGEM, *I sistemi giuridici europei*, Bologna, 2003, p. 147 et seq.; A. M. SALINAS DE FRÍAS, *La Protección de los Derechos Fundamentales en la Unión Europea*, Granada, 2000. With reference to the concept of “integrated” protection of fundamental rights within the

mandatory nature at all levels<sup>11</sup>, resulting in the ban of corporal penalties and other measures involving an excessive physical and psychological suffering. Related to this prohibition is the other mandatory prohibition of torture and inhuman and degrading treatments, intended in particular as humiliation and serious psycho-physical suffering.

## 1.2 The *humanitarian principle* in the Italian Constitutional Court case law.

The principle of “humanization” during the execution of a sentence<sup>12</sup> implies and reinforces the protection granted to the value of individuals, whose inviolable rights must always be protected, even in the very special condition of imprisonment<sup>13</sup>. The above-mentioned principle tangibly applies through the prohibition of particularly severe or degrading punitive actions while enforcing the different types of sanctions<sup>14</sup> which, without any derogation<sup>15</sup>,

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European Legal Space, see A. DI STASI, *Introduzione alla Convenzione europea dei diritti dell'uomo e delle libertà fondamentali*, Milan, 2018, p. 38 et seq.; A. RUGGERI, “Itinerari” di una ricerca sul sistema delle fonti, Turin, 2015; B. NASCIMBENE, *La centralità della persona e la tutela dei suoi diritti*, in *Studi sull'integrazione europea*, n. 1, 2013, p. 9 et seq.; G. STROZZI, *Il sistema integrato di tutela dei diritti fondamentali dopo Lisbona: attualità e prospettive*, in *Il diritto dell'Unione europea*, 2011, n. 4, p. 837 et seq.

11 See F. MEDICO, *I rapporti tra ordinamento costituzionale ed europeo dopo la sentenza n. 20 del 2019: verso un doppio custode del patrimonio costituzionale europeo?*, in [www.dirittounione europea.eu](http://www.dirittounione europea.eu), I/2019.

12 See M. C. CARTA, *Dignità umana e tutela dei detenuti nello “Spazio di giustizia” dell'Unione europea*, in *Freedom, Security and Justice. European Legal Studies*, II/2020.

13 Italian Constitutional Court, Ruling no. 274 of 23 – 31 May 1990.

14 Italian Constitutional Court, Ruling no. 279 of 22 November 2013, in *Giurisprudenza costituzionale*, 2013, p. 4515 et seq. with footnote by A. PUGIOTTO, *L'Urlo di Munch della magistratura di sorveglianza. Statuto costituzionale della pena e sovraffollamento carcerario* (nota a C. cost., sent. 22 novembre 2013, n. 279), in *Giurisprudenza costituzionale*, 2013, p. 4515 et seq. and also in *Diritto penale contemporaneo*, 9 March 2014; see also A. RUGGERI, *Ancora una pronuncia di incostituzionalità accertata ma non dichiarata* (nota minima a Corte cost. n. 279 del 2013, in tema di sovraffollamento carcerario), in [www.giurcost.org](http://www.giurcost.org); E. MALFATTI, “Oltre le apparenze”: Corte costituzionale e Corte di Strasburgo “sintoniche” sull'(in)effettività dei diritti dei detenuti in carcere», in [www.forumcostituzionale.it](http://www.forumcostituzionale.it), 16 December 2013.

15 ECtHR, Judgment of 25 October 2018, *Provenzano v. Italy*, Application no. 55080/13,

must be compatible with human dignity, that is, the minimum and irreducible core of all fundamental rights<sup>16</sup>.

On the one side, the Italian Constitution confirms the general principle that “*punishment cannot consist in inhuman treatment and must aim at re-educating the convicted*” (art. 27 § 3 of the Constitution), while on the other side, it specifies that “*Any acts of physical or moral violence against persons subject to restrictions of personal liberty are to be punished*” (art. 13 Const.). This rule is related to the above-mentioned art. 2 Const. according to which “*the Republic recognises and guarantees the inviolable human rights*”, and it implicitly prohibits the use of any corporal punishments and measures, death penalty or defamatory sanctions.

In the framework of these regulations, great attention has traditionally been paid to human rights in the case law of the Constitutional Court. The principle of equal respect for civic dignity also applies to a detained person, as provided for by art. 3 Const., that reads: “*all citizens have equal social status and are equal before the law*”. This provision also implies that a prison is a place where all fundamental rights are to be respected and secured, pursuant to art. 2 of the Italian Constitution. Such rights include the right to identity, psychophysical integrity, choice of religion, work, education, health, relations and social relations, in accordance with the restrictions on personal freedom, and compatibly with social solidarity provisions. Such fundamental rights are also protected by other articles of the Italian Constitution (art. 2, 3, 4, 13, 24, 25, 32), being the heritage of any human being, regardless of his or her state

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in which in § 127, also with reference to a prisoner detained according to art. 41 bis of the Italian Criminal Code (so-called strict regime), it is stated that: “*The State must ensure that a person is detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure of deprivation of liberty do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention*”. See also ECtHR, Judgment of 13 June 2019, *Viola v. Italy*, Application no. 77633/13.

16 With regard to the prison regime and the rights of prisoners, one of the most important Italian sources to guarantee them is the one of the most important national sources to guarantee them is the *Charter of the rights and duties of prisoners and internees* (Carta dei diritti e dei doveri dei detenuti e degli internati), in [https://www.giustizia.it/resources/cms/documents/carta\\_diritti\\_detenuto\\_.pdf](https://www.giustizia.it/resources/cms/documents/carta_diritti_detenuto_.pdf).

of detention. Their inviolability requires that all restrictions during detention are, at all times, proportional to the real needs of imprisonment and safeguard dignity, that is, the very core of fundamental rights.

Pursuant to the strict implementation of the above-mentioned constitutional principles, art. 1 of Italian Law no. 354 of 1975, reforming the Italian penitentiary system, reads “*the penitentiary treatment must be in accordance with humanity and must implement respect for the dignity of the person*”. This is the main principle of the Italian penitentiary system, that was also confirmed by the later 1986 *Legge Gozzini*<sup>17</sup> and more recently, by Law no. 3 of 9 January 2019<sup>18</sup>. Based on the rules and regulations mentioned above, the current concept of “penalty” does not necessarily involve the concept of suffering, but rather, it refers to the deprivation or diminishing of the rights of the individual. However, in this context the everyday experience of the denial of rights raises the problem of the demonstrative value of the *principle of humanization*, that, according to the Italian Constitutional Court, is a logical condition for the execution of the correctional purpose of penalties<sup>19</sup>. In 1996, in the framework of two fundamental rulings<sup>20</sup>, referring to the issue of the humanization of penalties, the Italian Constitutional Court resolved that: “*treatment not contrary to the sense of humanity must objectively characterize the content of the individual type of penalty, regardless of the type of crime for which a certain type of penalty is specifically imposed*”. This means that

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17 See Law no. 663 of 10 October 1986, published in the Official Journal of 16 October 1986 n. 241- S.O., concerning amendments to the penitentiary order law and the enforcement of detention and restraint measures.

18 Misure per il contrasto dei reati contro la pubblica amministrazione, nonché in materia di prescrizione del reato e in materia di trasparenza dei partiti e movimenti politici (18G00170) (*Measures to combat criminal offences against the public administration, as well as on the statute of limitations and on the transparency of political parties and movements*) in <https://www.gazzettaufficiale.it/eli/id/2019/01/16/18G00170/sg>.

19 Italian Constitutional Court, Judgment of 22 November 2013, no. 279, in *Giurisprudenza costituzionale*, 2013, p. 4515 et seq. with note by A. PUGIOTTO, *L’Urlo di Munch della magistratura di sorveglianza (statuto costituzionale della pena e sovraffollamento carcerario)*, p. 4542 et seq.

20 Italian Constitutional Court, Judgment of 16-24 May 1996, no. 165 and Italian Constitutional Court, Judgment of 14-18 October 1996, no. 351.

the concept of inhuman treatment cannot be regarded as final or immutable and therefore, its definition is not static. Violations of – or restrictions to – the humanitarian principle must be resolved, from time to time, applying a case-study methodology in relation to the conditions of detention and in accordance with specific methods of punishment.

Therefore, the principle of humanization does not imply a mere exclusion of inhuman and degrading treatments, but it must go hand in hand with the recognition of the fundamental rights of prisoners, as an innate heritage of any human being. In this regard, the Italian Constitutional Court stated that “*the detention cannot involve a total and absolute deprivation of the freedom of the person, certainly constituting a serious limitation, but not the suppression thereof*”. Therefore, the Court confirmed that, in order to guarantee fundamental rights, a penalty should only affect some elements of the prisoner’s freedom, while the remaining part should secure his or her development consistently with the exercise of the other rights he or she enjoys. This is the meaning behind the sentence, reading “*the prisoner, although deprived of most of his freedom, always retains a remnant, which is all the more precious in that it constitutes the last area in which he can expand his individual personality*”<sup>21</sup>.

To trace back the constitutional premises that led to the re-calibration of the content of penitentiary treatment in connection with inviolable human rights, it is necessary to start from the concept of human dignity as a value and a fundamental constitutional principle. The Italian Constitution – just like any other fundamental charter – placed this axiological premise at the centre of the system it created, determining a radical change of fundamental values compared to the pre-Republican order<sup>22</sup>. Therefore, the rise of human dignity marks the transition from the liberal State to the constitutional State, based on the pre-existence of individual rights over the authority of

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21 See Italian Constitutional Court, Ruling no. 349 of 1993 in *Foro italiano*, 1995, I, p. 488, § 4.3 of the “Considerato in diritto” section. In this regard, see A. MALINVERNI, *Esecuzione della pena e diritti dell’individuo*, in *Indice penale*, 1973, p. 24.

22 See P. RIDOLA, *La dignità dell’uomo e il «principio libertà» nella cultura costituzionale europea*, in ID., *Diritto comparato e diritto costituzionale europeo*, Turin, 2010, p. 77 et seq.

the State and the principle that a State must be at the service of its people.

However, everyday life in prison is a dramatic proof of the gap between the assertion of the principle of equal social dignity enshrined in the Italian Constitution and the actual experience of imprisonment. Nowadays, the theoretical correctional objectives of penalties, legality and the respect for dignity, which are supposed to generate security by returning a free man or woman to society after serving their sentences, do not seem to be confirmed by the overall failure of the current prison system, the lack of a solution to the problem, and the denial of legality, freedom and security<sup>23</sup>. In particular, security is often distorted and confined by the exclusion of the “other” and the illusion that a *pax carceraria* is even possible in overcrowded facilities, where the success of security measures is evaluated – when it is achieved – in terms of lack of escapes, riots, self-harming and suicides.

### **1.3 Multilevel protection of prisoners in the *European Legal Space*.**

The analysis of the protection of the fundamental rights of persons subject to detention begins with a reflection on the balance between the needs of freedom and security, namely the limitation of the former to protect the latter<sup>24</sup>. In this regard, an increasingly necessary contribution comes from supranational law, in particular from the “*European law of human rights*”.

Fundamental rights benefit from a “multi-level” protection<sup>25</sup> in the “*dia-*

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23 See G. M. FLICK, *I diritti dei detenuti nella giurisprudenza costituzionale*, in *Diritto e Società*, I, 2012, p. 187.

24 See A. TOSCANO, *La funzione della pena e le garanzie dei diritti fondamentali*, Milan, 2012, p. 221.

25 The issue was the subject of significant doctrine study. See *ex multis* L. DANIELE, *La protezione dei Diritti Fondamentali nell’Unione europea dopo il Trattato di Lisbona: un quadro d’insieme*, in *Dir. Un. eur.*, 2009, n. 3, p. 646 et seq.; I. PERNICE, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, in *Columbia Journal of European Law*, 2009, p. 349 et seq.; G. DELLA CANANEA, *Is European Constitutionalism really “Multilevel”?*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2010, p. 283 et seq.; J. ZILLER, *I diritti fondamentali tra tradizioni costituzionali e “costituzionalizzazione” della*

logue between European Courts”<sup>26</sup>, acting as the main corrective tool in case of unsatisfactory functioning of internal protection mechanisms<sup>27</sup>. The issue under study is a part of what is defined in the doctrine as the progressive osmosis<sup>28</sup> of regulatory sources operating within the *European Legal Space*<sup>29</sup>.

The current “multidimensional”<sup>30</sup> system of human right protection is characterized by the operation of the various jurisdictions involved (Constitutional Courts and National Judges, Court of Justice of the European Union and European Court of Human Rights), which implement the principles set out in the Charters of Rights (*National Constitutions, Charter of Fundamental*

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*Carta dei diritti fondamentali dell’Unione europea*, in *Diritti fondamentali e politiche dell’Unione europea dopo Lisbona*, 2011, p. 47 et seq.; G. CAGGIANO, *La tutela europea dei diritti della persona tra novità giurisprudenziali e modifiche istituzionali*, in *Scritti in onore di Giuseppe Tesaurò*, Naples, 2014, p. 65 et seq.; ID., *I “cerchi” dell’integrazione. Sovranazionalità e sovraordinazione normativa nell’Unione europea e nella Convenzione europea dei diritti dell’uomo*, in G. CAGGIANO (ed.), *Integrazione europea e sovranazionalità*, Bari, 2018, p. 25 et seq. In literature, the wording “constitutional pluralism” is often also just to highlight the idea of incorporating different regulatory and judicial systems within a single “composite constitutional system”. In this regard, see M. AVBELJ, J. KOMÁREK (eds.), *Constitutional Pluralism in the European Union and Beyond*, 2012; F. SORRENTINO, *La tutela multilivello dei diritti*, in *Rivista di diritto pubblico comunitario*, 2005, I, p. 79 et seq.; G. DI FEDERICO, *Fundamental Rights in the EU: legal pluralism and multi-level protection after the Lisbon Treaty*, in G. DI FEDERICO (ed.), *The EU Charter of Fundamental Rights. From declaration to binding instrument*, London-New York, 2011, pp. 22-23.

26 This refers to the interaction between judges operating on multiple levels of protection of Human Rights. Therefore, in the Italian legal system to the Constitutional Court and to the ordinary judges and in Europe to the Court of Justice of the European Union and the European Court of Human Rights.

27 See M. C. CARTA, *I “livelli” di tutela dei diritti fondamentali nello spazio giuridico europeo: i limiti del “dialogo” tra Corti*, in *Studi sull’integrazione europea*, 2019, p. 175.

28 See B. PASTORE, *Sul disordine delle fonti del diritto (inter)nazionale*, in *Diritto & Questioni pubbliche*, 2017, pp. 13-30; L. SCHIANO DI PEPE, *Diritto comunitario e diritto dell’Unione europea*, in R. BIFULCO, A. CELOTTO, M. OLIVETTI (ed.), *Digesto delle discipline pubblicistiche. Aggiornamento 2009*, Turin, 2010, pp. 121-134; A. RUGGERI, *Dimensione europea della tutela dei diritti fondamentali e tecniche interpretative*, in *Itinerari di una ricerca sul sistema delle fonti*, Milan, 2010, p. 453 et seq.

29 See *supra* note 10.

30 With regard to the autonomy and self-sufficiency of each system of rights protection see, *ex multis*, F. SORRENTINO, *La tutela multilivello dei diritti*, in *Riv. It. Med. Pubbl. Com.*, 2005, I, p. 79 et seq.; see also, P. BILANCIA, *Le nuove frontiere della tutela multilivello dei diritti*, 2006, in [www.archivio.rivistaaic.it](http://www.archivio.rivistaaic.it).

*Rights of the European Union*<sup>31</sup> and *European Convention for the Protection of Human Rights and Fundamental Freedoms*)<sup>32</sup>, which “are open to mutual recognition”<sup>33</sup>.

The doctrine uses the expression “multi-level constitutionalism”<sup>34</sup> or “constitutional pluralism”<sup>35</sup>, to describe this mechanism and emphasize the

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31 The *Charter of Fundamental Rights of the European Union* (CFR) was adopted by the European Council in Nice in 2000, adapted (to the medium-time needs that emerged) and amended in Strasbourg in 2007; in December 2009, with the entry into force of the Treaty of Lisbon, it was given the same binding legal effect as the Treaties (Art. 6 TEU) and, therefore, can no longer be considered as *soft law* legislation. V. PICCONE, *Il giudice e l'Europa dopo Lisbona*, in S. CIVITARESE MATTEUCCI, F. GUARRIELLO, P. SEE PUOTI (ed.), *Diritti fondamentali e politiche dell'Unione europea dopo Lisbona*, Rimini, 2013, p. 97.

32 See *amplius* G. ROLLA, *Alcune considerazioni sui possibili effetti delle codificazioni e della giurisprudenza sovranazionali in materia di diritti sul c.d. “sistema europeo” di giustizia costituzionale*, in *Il sistema europeo di protezione dei diritti fondamentali e i rapporti tra le giurisdizioni*, Milan, 2010, p. 21 et seq.; G. See DE VERGOTTINI, *Oltre il dialogo tra le Corti*, Bologna, 2010; M. CARTABIA, *Fundamental Rights and the Relationship among the Court of Justice, the National Supreme Courts and the Strasbourg Court*, in A. TIZZANO, J. KOKOTT, S. PRECHAL (ed.), *50eme Anniversaire de l'arrêt Van Gend and Loos 1963-2013, Actes du Colloque – Luxembourg, 13 May 2013*, Luxembourg, 2013, p. 155 et seq.

33 See P. PAROLARI, *Tutela giudiziale dei diritti fondamentali nel contesto europeo: il “dialogo” tra le corti nel disordine delle fonti*, in *Diritto e questioni pubbliche*, 2017, p. 31-58.

34 See L. DANIELE, *La protezione dei Diritti Fondamentali*, quot., p. 645 et seq.; I. PERNICE, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, in *Columbia Journal of European Law*, 2009, p. 349 et seq.; G. DELLA CANANEA, *Is European Constitutionalism really “Multilevel”?*, in *Zeitschrift fuer Ausländisches Oeffentliches Recht und Voelkerrecht*, 2010, p. 283 et seq.; J. ZILLER, *I diritti fondamentali tra tradizioni costituzionali e «costituzionalizzazione» della Carta dei diritti fondamentali dell'Unione europea*, in *Diritti fondamentali e politiche dell'Unione europea dopo Lisbona*, 2011, p. 47 et seq.; G. CAGGIANO, *La tutela europea dei diritti della persona*, quot., pp. 66-67.

35 See M. AVBELJ, J. KOMÁREK (eds.), *Constitutional Pluralism in the European Union and Beyond*, 2012; F. SORRENTINO, *La tutela multilivello dei diritti*, in *Rivista di diritto pubblico comunitario*, 2005, I, p. 79 et seq.; G. DI FEDERICO, *Fundamental Rights in the EU: legal pluralism and multi-level protection after the Lisbon Treaty*, in G. DI FEDERICO (ed.), *The EU Charter of Fundamental Rights. From declaration to binding instrument*, London-New York, 2011, pp. 22-2; I. PERNICE, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, in *Columbia Journal of European Law*, 2009, p. 349 et seq.; G. DELLA CANANEA, *Is European Constitutionalism really “Multilevel”?*, in *Zeitschrift fuer ausländisches öffentliches Recht und Völkerrecht*, 2010, p. 283 et seq.; J. ZILLER, *I diritti fondamentali tra tradizioni costituzionali e “costituzionalizzazione” della Carta dei diritti fondamentali dell'Unione europea*, in *Diritti fondamentali e politiche dell'Unione*



idea of incorporating several regulatory and judicial systems into one “composite constitutional system”<sup>36</sup>. This system is based on taking over joint responsibility of European national judges to determine “what constitutes the law in every concrete case”<sup>37</sup>.

The traditional (State-oriented) theory of sources of law must increasingly be integrated with the judicial interpretation theory. As a matter of fact, the burden of interpreting several different sources regarding fundamental rights or determining which of them should prevail in the event of regulatory conflicts that cannot be avoided by consistent interpretation techniques, lies primarily with the judges<sup>38</sup>.

Over the years, the necessary intersection of the protection of human rights (and, in particular, prisoners) in the framework of judicial cooperation in criminal matters, has resulted in a partial overstepping of domestic jurisdiction<sup>39</sup> at the European level. This has occurred to better implement and facilitate the recognition of judicial decisions and, more generally, to facilitate the consistent management of judicial activities<sup>40</sup> as much as possible, both in substantial and procedure-related terms. As noted by authoritative

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europa dopo Lisbona, 2011, p. 47 et seq.; G. CAGGIANO, *La tutela europea dei diritti della persona tra novità giurisprudenziali e modifiche istituzionali*, in *Scritti in onore di Giuseppe Tesaurò*, Naples, 2014, p. 65 et seq.

et seq.; ID., *I “cerchi” dell’integrazione. Sovranazionalità e sovraordinazione normativa nell’Unione europea e nella Convenzione europea dei diritti dell’uomo*, in G. CAGGIANO (ed.), *Integrazione europea e sovranazionalità*, Bari, 2018, p. 25 et seq.

36 See F. SORRENTINO, *La tutela multilivello dei diritti*, quot., p. 79 et seq.

37 See G. DI FEDERICO, *Fundamental Rights in the EU: legal pluralism and multi-level protection after the Lisbon Treaty*, in G. DI FEDERICO (ed.), *The EU Charter of Fundamental Rights. From declaration to binding instrument*, London-New York, 2011, pp. 22-23.

38 See M. VOGLIOTTI, *Il giudice al tempo dello scontro tra paradigmi*, in *Dir. pen. cont.*, 2016, p. 1 et seq.

39 See on this topic, L. PULITO, *La destatualizzazione delle garanzie nello Spazio giuridico europeo*, in *Diritto penale e processo*, 2010, n. 7, p. 891 et seq.; B. CONFORTI, C. FOCARELLI, *Le Nazioni Unite*, 2017, Padua, p. 176 et seq.; A. GIOIA, *Diritto internazionale*, Milan, 2019, p. 179 et seq.; A. D’AMATO, *Domestic Jurisdiction* (voce), in *Encyclopedia of Public International Law*, 1992, pp. 1090-1096.

40 See A. DI STASI, *Presentazione*, in A. DI STASI, L. S. ROSSI (ed.), *Lo Spazio di libertà, sicurezza e giustizia*, quot., p. 12.

doctrine, “the *virtuous impact* of the protection of human rights”<sup>41</sup> on judicial cooperation in criminal matters has long been associated with the complex construction of the European Space of Freedom, Security and Justice, both in legislative and judicial terms.

The prohibition of treatments which are contrary to human dignity, and the protection of the prisoners’ fundamental rights which are “an inseparable gift enjoyed by any human being”<sup>42</sup>, have been fully recognised by the national systems of many Countries, as well as within the European Union and the Council of Europe. This prohibition also appears in the International Agreements on fundamental rights, which sanction their universal and general value to the point that some tend to recognize it as a fully-fledged rule of customary international law, to which the highest rank and *ius cogens* must be recognized<sup>43</sup>.

Unlike other international documents, such as the *International Covenant on Civil and Political Rights* (ICCPR)<sup>44</sup>, the *American Convention on Human Rights*<sup>45</sup>, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (commonly known as the *United Nations Convention against Torture* (UNCAT))<sup>46</sup>, the *European Convention for the*

41 As in A. DI STASI, *Tutela multilevel dei diritti fondamentali*, quot., p. 14.

42 See A. MARTUFI, *Diritti dei detenuti e Spazio penitenziario europeo*, Naples, 2015, p. 56.

43 See G. VENTURINI, S. BARIATTI, *Droits individuels et justice internationale*, Milan, 2009, p. 795; S. NEGRI, *Violenze, maltrattamenti ed abusi commessi dalle forze dell’ordine (artt. 2 e 3 CEDU)*, in A. DI STASI (ed.), *CEDU e ordinamento italiano. La giurisprudenza della Corte europea dei diritti dell’uomo e l’impatto nell’ordinamento italiano (2010-2015)*, Vicenza, 2016, pp. 115-146.

44 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976. Art. 10 § 1: “*All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person*” and § 3: “*The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation*”.

45 It is also known as the *Pact of San José*; it is an international human rights instrument. It was adopted by many countries in the Western Hemisphere in San José, Costa Rica, on 22 November 1969. Art. 5 § 2 “*No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person*”.

46 Adopted and opened for signature, ratification and accession by General Assembly

*Protection of Human Rights and Fundamental Freedoms* (ECHR)<sup>47</sup> does not include any specific reference to the state of persons deprived of their liberty<sup>48</sup>. Art. 3 ECHR<sup>49</sup> does not provide for any specific protection principle in this regard, but it merely states that: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”. Nevertheless, over the years, this gap has been filled by the judicial activity of the European Court of Human Rights (ECtHR)<sup>50</sup>, a jurisdictional body of the Council of Europe that has been active since the mid-1960s among others to fill this regulatory gap.

The above-mentioned European constitutional or pseudo-constitutional<sup>51</sup> Charts of Rights provide for specific jurisdictional guarantees to protect

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resolution 39/46 of 10 December 1984, entry into force 26 June 1987, in <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>.

47 The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, was opened for signature in Rome on 4 November 1950 and came into force in 1953. It was the first instrument to give effect to certain of the rights stated in the Universal Declaration of Human Rights and make them binding. Since its adoption in 1950, the Convention has been amended several times and supplemented with many rights in addition to those set forth in the original text.

48 See P. LAMBERT, *Le sort des détenus au regard des droits de l’homme et du droit supranational*, in *Rivista trimestrale dei diritti dell’uomo*, v. 9, no. 34, 1998, p. 291-302.

49 For further information on the content and interpretation of the art. 3 ECHR, see in particular P. PUSTURIN, *Commento dell’art. 3 CEDU*, in BARTOLE S., DE SENA P., ZAGREBELSKY V. (ed.), *Commentario breve alla Convenzione Europea dei diritti dell’Uomo*, Padua, 2012, p. 63.

50 The European Court of Human Rights is an International Court set up in 1959. It rules on individual or state applications alleging violations of the civil and political rights set out in the European Convention on Human Rights. Since 1998 it has sat as a full-time court and individuals can apply to it directly. The Court monitors respect for the human rights of 800 million Europeans in the 47 Council of Europe member States that have ratified the Convention.

51 Regarding the “attempt to create a pseudo-constitutional charter for fundamental rights” during the drafting of the Treaty adopting a Constitution for Europe and, later on, by the publication of the European Chart of Fundamental Rights, see *amplius* A. DI STASI, *Libertà e sicurezza nello Spazio giudiziario europeo: mandato di arresto e “statuto” dei diritti fondamentali nell’unione europea*, in *Diritto comunitario e degli scambi internazionali*, 4/2007, pp. 657-694, spec. p. 678 et seq.; *Id.*, *L’evoluzione dello “statuto” giurisprudenziale dei diritti fondamentali nell’Unione europea in “statuto” normativo degli stessi. Il valore aggiunto della Carta dei diritti fondamentali*, in A. DI STASI, L. S. ROSSI (ed.), *Lo Spazio di libertà, sicurezza e giustizia*, quot., pp. 58-59.

persons, outlining principles that can also be applied to criminal matters. Reference should be made to the ECHR, art. 3 of which sets out an absolute ban for torture and inhuman and degrading treatment, just like art. 4 of the latest *Charter of Fundamental Rights of the European Union* (CFR), where art. 1<sup>52</sup> confirms the inviolability of human dignity.

In this regard, today the value of human dignity<sup>53</sup> aims at assuming a specific legal value at the International and EU law levels, as a prerequisite for the protection of all (or almost all) human rights<sup>54</sup>. There is a “one-to-one relation”<sup>55</sup> between human rights and human dignity, meaning that these two regulatory concepts “imply and legitimise each other”, being the pillars of modern European law: one is supported by the other, since they both express “a common and coextensive ontology of human moral values”<sup>56</sup>.

Needless to say that the Charter of Fundamental Rights of the European Union published in the year 2000, readjusted and proclaimed with some amendments in Strasbourg in 2007, is the source of first-degree European Union law binding all EU 27 Member States<sup>57</sup> (including

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52 Art. 1 CFR: «*Human dignity is inviolable. It must be respected and protected*».

53 In this regard see art. 1 of the Universal Declaration of Human Rights (UDHR), adopted by the General Assembly of the United Nations on 10 December 1948 with Resolution 217 A, according to which: “*All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood*”.

54 In this regard, see A. DI STASI, *Human Dignity as a Normative Concept. “Dialogue” Between European Courts (ECtHR and CJEU)?*, in P. PINTO DE ALBUQUERQUE, K. WOJTYCZEK (eds.), *Judicial Power in a Globalized World: Liber Amicorum Vincent De Gaetano*, Cham, 2019, p. 116, where the author states that: “*From being an ethical and pre-juridical value, a principle informing national catalogues and deontological codes, human dignity aims more and more to assume, in International and European law, a juridical value as basis and source of the respect of all (or almost all) human rights*”.

55 In this regard, see E. MAESTRI, *Genealogie della dignità umana*, in *Diritto e questioni pubbliche*, IX, 2009, p. 509.

56 On the conceptual connection between human dignity and human rights, see more E. MAESTRI, *Genealogie della dignità umana*, quot., p. 509.

57 See A. BARBERA, *La Carta europea dei diritti: una fonte di ri-cognizione?*, in *Diritto dell’Unione europea*, 2001, p. 241 et seq.; A. MANZELLA, P. MELOGRANI, E. PACIOTTI, S. RODOTÀ, *Riscrivere i diritti in Europa. La Carta dei diritti fondamentali dell’Unione europea*, Bologna, 2001; L. MONTANARI, *I diritti dell’uomo nell’area europea tra fonti in-*

Italy and Poland) which are also part of the Council of Europe and, as such, are bound by the jurisdiction of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR).

Lastly, the *European Prison Rules* drawn up by the Council of Europe on 11 January 2006<sup>58</sup> have been added to the provisions listed above, which have completed the legislative process initiated internationally with the *Standard Minimum Rules for Treatment of Prisoners*<sup>59</sup> and approved by the UN Economic and Social Council in 1957, with the aim of providing for protective measures focusing on the respect for dignity and the humanization of treatments.

The specific provisions of the *European Prison Rules* are part of a wider context of general principles (Part I, §§ 1-3: “*All persons deprived of their liberty shall be treated with respect for their human rights*”; “*Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody*”; “*Restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed*”). The *ratio legis* of these provisions emphasizes that dignity cannot exist without

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*ternazionali e fonti interne*, Turin, 2002; C. DI TURI, *La prassi giudiziaria relativa all'applicazione della Carta di Nizza*, in *Il Diritto dell'Unione europea*, 2002, p. 671 et seq.; E. TRIGGIANI, *Trattato che adotta una Costituzione per l'Europa*, Bari, 2004, p. 9 et seq.; E. TRIGGIANI, *L'Unione europea dopo la riforma di Lisbona*, Bari, 2011, p. 124 et seq.; U. VILLANI, *I diritti fondamentali tra Carta di Nizza, Convenzione europea dei diritti dell'uomo e progetto di Costituzione europea*, in *Il Diritto dell'Unione europea*, 2004, p. 72 et seq.; M. See CARTABIA, *L'ora dei diritti fondamentali*, quot. p. 13 et seq.; F. SEATZU, *La Carta dei diritti fondamentali: un nuovo parametro di legittimità degli atti comunitari?*, in *Studi sull'integrazione europea*, 2007, p. 377 et seq.; P. See PUOTI, *I diritti fondamentali dell'Ue dopo «Lisbona»*, in *Diritti fondamentali e politiche dell'Unione europea dopo Lisbona*, 2013, p. 26 et seq.; A. ADINOLFI, *La rilevanza della Carta dei diritti fondamentali nella giurisprudenza interna: qualche riflessione per un tentativo di ricostruzione sistematica*, in *Studi sull'integrazione europea*, 2018, p. 29 et seq.

58 Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules in <https://www.coe.int/en/web/human-rights-rule-of-law/european-prison-rules>.

59 Resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, in [https://www.unodc.org/pdf/criminal\\_justice/UN\\_Standard\\_Minimum\\_Rules\\_for\\_the\\_Treatment\\_of\\_Prisoners.pdf](https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf).

complying with the minimum living conditions required for prison facilities (see art. 18 § 1: “*The accommodation provided for prisoners, and in particular all sleeping accommodation, shall respect human dignity and, as far as possible, privacy, and meet the requirements of health and hygiene*”), which are mandatory even when facilities are overcrowded.

On 22 May 2015, the *Commission on Crime Prevention and Criminal Justice* (CCPCJ)<sup>60</sup> adopted a resolution on the new *Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules)*<sup>61</sup>. All 122 principles are intended to guarantee the dignity of prisoners who not only cannot be subjected to torture, inhuman and degrading treatments, but they must live a dignified life, with adequate living and health standards. National authorities are therefore required to guarantee their rights, such as the right to health, food, adequate conditions of detention, and among others, the protection of vulnerable groups. With regard to the detention units, each cell may only be occupied by the set number of persons, in full compliance with hygiene rules and served by adequate Heating, Ventilating and Air Conditioning (HVAC) systems.

These provisions are supplemented by the *Draft Principles*, adopted by the UN in 1962, in the *International Covenant on Civil and Political Rights*, the *European Convention on Human Rights* (art. 3), and the *Charter of Fundamental Rights of the European Union* (art. 4), all of which aim at respecting dignity and humane treatment. In particular, as specified below, art. 3 ECHR has been used by ECtHR in order to affect the actual execution of incarceration measures. The result achieved is not only a consequence of the distinction – developed by the ECtHR case law - between inhuman and

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60 The Commission on Crime Prevention and Criminal Justice (CCPCJ) was established by the Economic and Social Council (ECOSOC) resolution 1992/1, upon request of General Assembly (GA) resolution 46/152, as one of its functional commissions. The Commission acts as the principal policymaking body of the United Nations in the field of crime prevention and criminal justice.

61 Commission on Crime Prevention and Criminal Justice Twenty-fourth session Vienna, Resolution A/RES/70/17518-22, May 2015, United Nations Standard Minimum Rules for the Treatment of Prisoners (*Mandela Rules*), in [https://www.un.org/en/events/mandeladay/mandela\\_rules.shtml](https://www.un.org/en/events/mandeladay/mandela_rules.shtml).

degrading treatment and torture<sup>62</sup>, but more generally, an effect of the need to verify a minimum level of severity and show that conventional rights have been infringed in all respects.

Rather, it is the result of the largely case-study nature of the decisions of this supranational jurisdiction (ECtHR), the ruling of which does not usually concern the legitimacy of regulations, but the violations resulting from the material acts attributable to the State and, in any case, from acts which are not necessarily attributable to a specific provision. Looking through the lenses of transnational law, it is easier to understand the controversial relationship between penitentiary treatment and fundamental rights from a different perspective. As the Italian Constitutional Court suggests, it is not a matter of assessing the legitimacy of the laws, but to consistently study cases and methodologies implemented to restrict freedom, in order to verify their compliance with fundamental right provisions, considering the role played by the “value of dignity” in the attribution of inviolable rights to prisoners.

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62 See A. SCUTELLARI, *Proibizione della tortura e trattamenti inumani*, in P. GIANNITI (ed.), *La CEDU e il ruolo delle Corti*, Bologna, 2015, p. 715 et seq. and in particular p. 736 and p. 755; P. GIANNITI, *Il sistema CEDU nel quadro dei sistemi internazionali di protezione dei diritti fondamentali*, in ID. (ed.), *La CEDU e il ruolo delle Corti*, Bologna, 2015, p. 391 et seq.

## CHAPTER II

### THE RIGHTS OF PRISONERS IN THE EUROPEAN UNION'S AREA OF FREEDOM, SECURITY AND JUSTICE

SUMMARY: 1.1 Personal freedom, human dignity and rights of persons detained in prisons in the *Charter of Fundamental Rights of the European Union* (CFR). – 2.2 The European Union's *Area of Freedom, Security and Justice* (AFSJ) as a “convergence point” between the *European Convention on Human Rights* (ECHR) and the *Charter of Fundamental Rights of the European Union*. – 2.3 The Impact of ECHR in building the European Union AFSJ. – 2.4 From “equivalent protection” to partial “integrated protection” in EU Law. – 2.5 The principles of necessity and proportionality of penalty in post-Lisbon European Union Law.

#### **2.1 Personal freedom, human dignity and rights of persons detained in prisons in the *Charter of Fundamental Rights of the European Union* (CFR).**

In order to provide a comprehensive overview of supranational obligations in this matter, this paragraph focuses on the increasing importance of prison treatment and the rights of prisoners in the European Union Law. In this context, recent attempts have been made to ensure common detention standards<sup>63</sup> for a closer and more effective cooperation between the judicial authorities of EU Member States<sup>64</sup>.

To rebuild the constitutional heritage of shared principles and legal values<sup>65</sup> which, under the European Union law, govern penitentiary matters, the

63 See S. NEGRI, *La realizzazione dello spazio europeo di libertà, sicurezza e giustizia tra carta dei diritti fondamentali e CEDU: dalla convergenza alla integrazione tra sistemi?*, in A. DI STASI (ed.), *Spazio europeo e diritti di giustizia. Il Capo VI della Carta dei Diritti fondamentali nell'applicazione giurisprudenziale*, Padua, 2014, p. 111 et seq.; B. NASCIMBENE, *Lo spazio di libertà, sicurezza e giustizia a due anni dall'entrata in vigore del Trattato di Lisbona*, in *Diritto, immigrazione e cittadinanza*, n. 4, 2011, p. 13 et seq.

64 See S. BUZZELLI, *Il rompicapo penitenziario italiano nello spazio unico europeo*, in *Arch. pen.*, 2014, 546 et seq.; E. BAKER, *The emerging role of the EU as a penal actor*, in T. DAEMS, D. VAN ZYL SMIT, S. SNAECKEN (eds.), *European penology?*, Oxford, 2013, p. 77 et seq.

65 See P. MORI, *Il principio di legalità e il ruolo del giudice comune tra Corte costitu-*



basic sources of this system must be examined, namely the provisions of the Treaties and general principles of unwritten law. As national and supranational law sources coexist and compete at the same time<sup>66</sup>, the rights enshrined in the *Charter of Fundamental Rights of the European Union* (CFR)<sup>67</sup> play a role of utmost importance. It is true that the values of the “*European constitutional heritage*”<sup>68</sup> have continued to be expressed during the whole EU path<sup>69</sup>, long before the proclamation of the CFR in the year 2000. However, in terms of constitutionalization, it would be a mistake to deny the extraordinary importance assumed by the entry into force of this text<sup>70</sup>, that well before being awarded its “legally binding” value by the Treaty of Lisbon (Art. 6 Treaty on

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zionale e Corti europee, in *Il Diritto dell’Unione europea*, I/2018, p. 97 et seq.

66 See *supra* § 1.3.

67 See V. PICCONE, *Il giudice e l’Europa dopo Lisbona*, in P. PUOTI, F. GUARRIELLO, S. CIVITARESE MATTEUCCI (ed.), *Diritti fondamentali e politiche dell’Unione europea dopo Lisbona*, Rimini, 2013, p. 97; A. ADINOLFI, *La rilevanza della Carta dei diritti fondamentali nella giurisprudenza interna: qualche riflessione per un tentativo di ricostruzione sistematica*, in *Studi sull’integrazione europea*, 2018, p. 29 et seq.

68 See A. PIZZORUSSO, *Il patrimonio costituzionale europeo*, Bologna, 2002.

69 See P. COSTANZO, *Le tappe dell’edificazione comunitaria: dall’idea di Europa all’Unione europea*, in P. COSTANZO, L. MEZZETTI, A. RUGGERI (ed.), *Lineamenti di diritto costituzionale europeo*, Turin, 2010, p. 37 et seq.; L. TRUCCO, *Carta dei diritti fondamentali e costituzionalizzazione dell’Unione europea: un’analisi delle strategie argomentative e delle tecniche decisorie a Lussemburgo*, Turin, 2013, p. 7 et seq.

70 Regarding the legal value of CFR, see L. S. ROSSI, *La Carta dei diritti come strumento di costituzionalizzazione dell’ordinamento comunitario*, in *Quaderni costituzionali*, 2002, p. 565 et seq.; R. A. GARCIA, *The General Provisions of the Charter of Fundamental Rights of the European Union*, in *European Law Journal*, VIII, n. 4, December 2002, p. 492 et seq.; A. WILLIAMS, *Mapping Human Rights, Reading the European Union*, in *European Law Journal*, IX, n. 5, December 2003, p. 659 et seq.; E. PAGANO, *Il valore giuridico della Carta dei diritti fondamentali e le competenze dell’Unione europea*, in *Diritto pubblico comparato europeo*, 2003, p. 1723 et seq.; H. HOFFMANN, *I diritti dell’uomo, la sovranità nazionale, la Carta europea dei diritti fondamentali e la Costituzione europea*, in P. BARCELLONA, A. CARRINO (ed.), *I diritti umani tra politica, filosofia e storia*, Naples, 2003, p. 142 et seq.; A. LOIODICE, *L’incorporazione della Carta di Nizza nella Convenzione europea: innovazioni nella tutela multilivello dei diritti*, in P. BILANCIA, E. DE MARCO (ed.), *La tutela multilivello dei diritti*, Milan, 2004, p. 81 et seq.; A. L. YOUNG, *The Charter, Constitution and Human Rights: is this the Beginning or the End of Human Rights Protections by Community Law?*, in *European Public Law*, II, 2005, p. 219 et seq.

European Union<sup>71</sup>), it steered the activities of EU institutions<sup>72</sup>. These sources are supplemented by non-binding acts of the European Union, which include the *European Parliament Resolution of 5 October 2017 on prison systems and conditions (2015/2062(INI))*<sup>73</sup> whereby the democratic European institutions clearly confirm that “*the deprivation of liberty does not equate to deprivation of dignity*” (§ 1).

Taking all this into account, in the CFR principle catalogue, interestingly “criminal justice” shows no reference to the legal position of prisoners. However, this CFR protection-related gap seems to be partially filled by the interpretation provided by the Court of Justice of the European Union (CJEU) in art. 4 CFR, banning inhuman and degrading treatment and in art. 1 CFR, implying that the very concept of “human dignity” is the axiological premise for the protection of all fundamental rights<sup>74</sup>.

From this point of view, the latest case-law on asylum and immigration,

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71 See Art. 6 § 1 TEU: “*The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties*”.

72 See A. CELOTTO, G. PISTORIO, *L’efficacia giuridica della Carta dei diritti fondamentali dell’Unione europea*, in *Giur. it.*, 2005, II, p. 427 et seq.; A. RUGGERI, *La forza della Carta europea dei diritti*, in *Riv. dir. pubbl. comp. europ.*, 2001, p. 184.

73 See P8\_TA(2017)0385 Prison systems and conditions. European Parliament resolution of 5 October 2017 on prison systems and conditions (2015/2062(INI)), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017IP0385&from=EN>.

74 The doctrine has observed that in this provision the reference to human dignity “*is not consecrated as a right to dignity, but it is set up as a general clause, implying the recognition of the character of an inviolable and legally protected good*”. In this regard, see A. DI STASI, *Human Dignity as a Normative Concept*, quot., pp. 119-120 pointing out that the fact that art. 3 dignity is described as a right to the physical and psychological integrity of the person, and that even in the Preamble to its legal source, dignity is mentioned as the first indivisible and universal values underpinning the European Union, suggest that the CFREU imbues the concept of human dignity with an almost “*holy character*”. As the author highlights, this assumption also appears to be confirmed by the setup of the CFREU rules, the first section whereof is Chapter I entitled “Dignity” (before Chapter II “Freedom” and Chapter III “Equality”), to signify that human beings, in their uniqueness and self-determination, are the holders of a value that transcends any condition they can be. See also P. MENGOLZI, *La cooperazione giudiziaria europea e il principio fondamentale di tutela della dignità umana*, in *Studi sull’integrazione europea*, 2/2014, p. 225 et seq.

and in particular the priority judgment on the conditions for the administrative detention of migrants during the asylum procedure, play a critical role.

In this regard, a significant achievement – that would affect future interpretative developments in criminal matters – was the C-441/10 sentence<sup>75</sup>, where the CJEU has been referred for a preliminary ruling on the interpretation of the Council Regulation (EC) No. 343/2003<sup>76</sup> (*Dublin II*) requiring Member States to transfer the seeker to the EU State responsible for examining the application for his or her asylum request (see Art. 3 of the above-mentioned Regulation). In particular, the referring court asked the CJEU to clarify whether the requirement to respect EU fundamental rights precluded “the application of a conclusive presumption that the competent State will observe the applicant’s fundamental rights under European Union law”. In this respect, the EU rules provide that, in principle, Member States which respect the non-refoulement principle, must be considered as safe States for third-country nationals. The question aimed at clarifying whether non-compliance with the non-refoulement rule may occur, and thus the unlawfulness of art. 3 § 1 of the Regulation and contradictions to the CFR in a situation where, after transferring a person to the competent Member State, there would be a risk of exposing the applicant to violation of art. 3 ECHR, determined by inappropriate conditions of incarceration in prison.

On this point the CJEU stated that: “*the article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the Member State responsible within the meaning of Regulation No*

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75 See CJEU C411/10 e C493/10, *N. S. v. Secretary of State for the Home Department and M. E. and others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, (References for a preliminary ruling from the Court of Appeal (England and Wales) (Civil Division) and from the High Court (Ireland)), in <http://curia.europa.eu/juris/document/document.jsf?text=&docid=131157&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=391191>.

76 Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, No longer in force, Date of end of validity: 18/07/2013; Repealed by 32013R0604. Latest consolidated version: 04/12/2008, ELI: <http://data.europa.eu/eli/reg/2003/343/oj>.

*343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that that asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision”.*

Therefore, based on this assumption and in this framework, the EU legislation – the strict application thereof would not be a solution to problems such as this, but rather an increased risk of inhuman and degrading treatment – should not require a presumption of absolute respect for fundamental rights in favour of the competent State, resulting in an obligation to “refuse cooperation” where widespread violations of fundamental rights undermine mutual trust between State authorities. This solution also has clear consequences on “criminal justice”: the principles developed by the CJEU seem – *mutatis mutandis* – to be applicable also to prison detention, thus making art. 4 CFR a major “European constitutional parameter” to be used to assess the conditions of detention<sup>77</sup>.

However, it is worth recalling that pursuant to art. 52 § 3 CFR, art. 4 CFR has the same meaning and scope of art. 3 ECHR (and also art. 5 of the *Universal Declaration of Human Rights* (UDHR) of 1948), the wording of which is repeated in full. This provision is closely connected to art. 49 §3 CFR, according to which “*the severity of penalties must not be disproportionate to the criminal offense*”, in accordance with the general principle of the proportionality of offenses and penalties enshrined in constitutional traditions shared by EU Member States and in the CJEU case law<sup>78</sup>.

These provisions are supplemented by the *compatibility clause* provided

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<sup>77</sup> See E. BAKER, *The emerging role of the EU as a penal actor*, quot., p. 90 and 105.

<sup>78</sup> *Communication from the Commission to the European Parliament, the Council, the European economic and social Committee and the Committee of the Regions towards an EU criminal policy: ensuring the effective implementation of EU policies through criminal law* COM/2011/0573 final in <https://eur-lex.europa.eu/legal-content/en/txt/html/?uri=celex:52011dc0573&from=it>.

for by Article 53 CFREU<sup>79</sup>, under which any interpretations of the Charter which hinder or restrict the protection guaranteed by other international sources (in particular ECHR provisions) are not permitted. This does not mean that, although the current wording of art. 6 § 1 TEU places the Charter of fundamental rights of the European Union at the centre of the European system of fundamental right protection, the interpretative provisions enshrined in articles 52 and 53 of the Charter - associated with the reference to the rights guaranteed by the ECHR as identified by art. 6 § 3 as general principles of EU law – mean that even after the Lisbon Treaty, the ECHR continued “to assume primary importance, both directly pursuant to art. 6 and the notion of principles [...], and indirectly, being mediated materials by the Charter and Explanations”<sup>80</sup>.

These are very important implications for the specific functioning of some derivative law instruments directly related to criminal law. Special reference is made to the acts adopted by EU policy-makers on judicial cooperation in criminal matters, inspired by the principle of mutual recognition of judicial decisions<sup>81</sup>, that is the “cornerstone” of the European Space of Freedom, Se-

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79 This provision essentially prevents States from applying the minimum standards set by the Convention when such standards are less favourable compared to other protection systems applied in different jurisdictions, including domestic law, international treaties, and the EU rules and regulations mentioned by the Charter. Therefore, as provided for by art. 53 ECHR, the Contracting Parties agree to guarantee the most favourable and protective measures, in the case of a conflict. In this regard, see A. BULTRINI, *I rapporti fra Carta dei diritti fondamentali e Convenzione europea dei diritti dell'uomo dopo Lisbona: potenzialità straordinarie per lo sviluppo della tutela dei diritti umani in Europa*, in *Il diritto dell'Unione europea*, 2009, n. 3, 708-709; A. M. SALINAS DE FRÍAS, *La Carta de los Derechos Fundamentales de la UE: ¿Hacia una mayor protección europea?*, in *Servicio de Publicaciones de la Universidad de Málaga*, 2005, pp. 239-248.

80 See A. GIANNELLI, *L'adesione dell'Unione europea alla CEDU secondo il Trattato di Lisbona*, in *Il diritto dell'Unione europea*, 2009, n. 3, p. 678 et seq.

81 The principle of mutual recognition is the “cornerstone” of judicial cooperation in criminal matters between the Member States of the European Union. It was identified for the first time in the conclusions of the Tampere Council of 1999 and has assumed the status of primary rule as a result of its codification in art. 82 § 1 of the Treaty on the Functioning of the European Union (TFEU). See F. BIANCO, *Mutuo riconoscimento e principio di legalità alla luce delle nuove competenze dell'Unione europea in materia penale*, in G. See GRASSO, L. PICOTTI, R. SICURELLA (ed.), *L'evoluzione del diritto penale nei settori*

curity and Justice, provided for by Title V of the Treaty on the Functioning of the European Union (TFEU)<sup>82</sup>.

To overcome the traditional domestic resistance to the recognition and execution of foreign criminal decisions – *national protectionism*, as defined by Joachim Vogel<sup>83</sup> – these instruments, including in particular the simplified extradition procedure and the European arrest warrant<sup>84</sup>, have introduced a presumption of adequacy of jurisdictional measures adopted in another Member State, providing for a general obligation to implement them when there is no reason for refusal. As a matter of fact, the proper functioning of this mechanism implies a high level of mutual trust, with particular regard to

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*d'interesse europeo alla luce del Trattato di Lisbona*, Milan, 2011, p. 170 et seq.

82 The objectives for the AFSJ are laid down in Article 67 TFEU: “The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States; It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals. The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters

83 See J. VOGEL, *Cooperation in criminal matters in the European Union. Five major tendencies - Five proposals for future action*, in L. ARROYO-ZAPATERO, A. NIETO MARTÍN, *European criminal law: an overview - European criminal area: current situation and future perspectives. L'espacio judicial penal europeo: situación actual y perspectivas futuras*, Cuenca, 2010, p. 157.

84 See A. DI STASI, *Tutela dei diritti fondamentali nell'Unione europea e mandato di arresto europeo: osservazioni sull'art. 2 della Legge 69/2005*, in AUCTORES VARI, *Scritti in onore di Umberto Leanza*, Naples, 2008, vol. I, pp. 1009-1044; U. VILLANI, *Sul controllo dello Stato di diritto nell'Unione europea*, in *Freedom, Security & Justice: European Legal Studies*, 2019, n. 1, p. 10 et seq.; M. BARGIS, *Mandato di arresto europeo e diritti fondamentali: recenti itinerari virtuosi della Corte di giustizia tra compromessi e nodi irrisolti*, in [www.penalecontemporaneo.it](http://www.penalecontemporaneo.it), 26 June 2017; L. PANELLA, *Mandato di arresto europeo e protezione dei diritti umani: problemi irrisolti e “incoraggianti” sviluppi giurisprudenziali*, in *Freedom, Security & Justice: European Legal Studies*, 2017, n. 3, pp. 5-33; G. FERRANTI, *La cooperazione giudiziaria in materia penale nelle convenzioni del Consiglio d'Europa e nel diritto dell'Unione Europea*, Naples, 2008, p. 64 et seq.

respect for fundamental rights. This is a truly “cultural” pre-condition<sup>85</sup>, that seems to be essential when the judicial measure affects personal freedom, by implementing a restriction as a precautionary measure or by virtue of a conviction sentence (this is the case with a European arrest warrant). In this context, a violation of prisoners’ rights in general, and prison overcrowding in particular, risk undermining the proper functioning of judicial cooperation instruments based on the principle of mutual recognition

On 14 June 2011, to follow up the European penitentiary regulations adopted by the Council of Europe, the European Commission published the *Green Paper Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention*<sup>86</sup>. In that act, the European Commission found the necessity “to explore the extent to which detention issues impact on mutual trust, and consequently on mutual recognition and judicial cooperation generally within the European Union” and asked Member States to provide information on alternative measures for temporary arrest and detention. It also requested Member States to comment on the possibility to promote such measures at the EU level, also by setting minimum standards in the EU to regulate the maximum duration of pre-trial detention.

The text highlights the connection between the conditions of detention and mutual recognition, to the point that – in order to improve the effectiveness of the latter – the European Commission does not rule out the possibility to adopt future measures setting standards on the treatment of prisoners which are equivalent to those provided by the European Prison Rules. Despite the

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85 With this in mind, in a “sensitive” area such as criminal proceedings, mutual trust between EU States requires a “mindset” capable of accepting the criminal law in force in other EU States, without any derogations or exceptions. This logical precondition implies, on the one hand, that all the legal systems of the EU Member States provide for and share a system of protection of rights that is sufficiently guaranteed, and, on the other hand, the acceptance that the application of the criminal law of another State does not necessarily lead to solutions similar to those which would result from the implementation of one’s own national law.

86 COM(2011)327 def., <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX-%3A52011DC0327>.

lack of primary EU law provisions explicitly mentioning the protection of prisoners' rights, this issue seems to be very topical and it should remain at the top of the European agenda also in the near future. Despite not being dedicated to penitentiary treatment regulations, the above-mentioned legal texts on mutual recognition contain provisions which prisoners may appeal for to seek protection, in particular to facilitate their return to society.

However, the severity of prison overcrowding may result in a general deterioration of the high level of trust between States, that underpins the entire judicial cooperation in criminal matters within the EU, undermining the cultural conditions underlying the mutual recognition of judicial decisions<sup>87</sup>. This refers to the *Council Framework Decision on the European arrest warrant*<sup>88</sup> establishing an efficient mechanism of cooperation between national judicial authorities for the surrender of wanted persons, including with regard to the execution of a sentence, in accordance with the principle of mutual recognition. Overcoming the traditional extradition mechanism provided by this tool is justified precisely by mutual trust, that should underpin relations between EU Member States, since all of them signed the ECHR<sup>89</sup>. Clearly, violations of fundamental rights such as those ascertained in the *Sulejmanovic* and *Torreggiani*<sup>90</sup> judgments, may jeopardize the relations between Member States, and the national authority executing the sentences might refuse to release the prisoner to the other State.

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87 See G. STESSENS, *The principle of mutual confidence between judicial authorities in the area of Freedom, Security and Justice*, in G. DE KERCHOVE, A. WEYEMBERGH, *L'espace pénal européen: enjeux et perspectives*, Brussels, 2002, p. 93 et seq. See Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States {SEC(2005)641}, in <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0195&from=EN>.

88 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision. Current consolidated version: 28/03/2009, ELI: [http://data.europa.eu/eli/dec\\_framw/2002/584/oj](http://data.europa.eu/eli/dec_framw/2002/584/oj).

89 See V. GREVI, *Linee di cooperazione giudiziaria in materia penale nella Costituzione europea*, in E. DOLCINI, C. E. PALIERO (ed.), *Studi in onore di Giorgio Marinucci*, vol. III, Milan, 2006, p. 2783 et seq.

90 See *Infra* § 3.2.



## 2.2 The European Union's *Area of Freedom, Security and Justice* (AFSJ) as a “convergence point” between the *European Convention on Human Rights* (ECHR) and the *Charter of Fundamental Rights of the European Union*.

While developing and strengthening the European Area of Freedom, Security and Justice (AFSJ) by building a “Europe of Rights” and a “Europe of Justice” – that is, the goals that the *Stockholm Programme*<sup>91</sup> had already set at the top of EU political agenda – common principles and essential values<sup>92</sup> must be complied with, including the respect for human beings and their dignity, and other rights enshrined in addition the CFR<sup>93</sup> and, in particular, the ECHR.

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91 The **Stockholm Programme**, adopted by the European Council in December 2009, provides a framework for EU action on the issues of citizenship, justice, security, asylum, immigration and visa policy for the period 2010–2014. It calls for a coherent policy response which goes beyond the area of freedom, security and justice. It includes external relations, development cooperation, social affairs and employment, education and health, gender equality and non-discrimination. See [https://ec.europa.eu/anti-trafficking/sites/anti-trafficking/files/the\\_stockholm\\_programme\\_-\\_an\\_open\\_and\\_secure\\_europe\\_en\\_1.pdf](https://ec.europa.eu/anti-trafficking/sites/anti-trafficking/files/the_stockholm_programme_-_an_open_and_secure_europe_en_1.pdf). In doctrine, see *ex multis*: A. DI STASI, *Spazio europeo e diritti di giustizia. Il capo VI della Carta dei diritti fondamentali nell'applicazione giurisprudenziale*, Padua, 2014, p. 3 et seq.; ID., *Tutela dei diritti fondamentali e spazio europeo di giustizia*, 2019; ID., *Lo spazio di libertà, sicurezza e giustizia. A vent'anni dal Consiglio europeo di Tampere*, 2020.

92 The *Stockholm Programme. An open and secure Europe serving and protecting citizens* (2010/C 115/01), *OJEU* C 115, 4 May 2010, pp. 1- 38, § 1.1.

93 With specific reference to the protection of fundamental rights in the Treaty of Lisbon see *ex multis* L. DANIELE, *Carta dei diritti fondamentali dell'Unione europea e Trattato di Lisbona*, in G. VENTURINI, S. BARIATTI (ed.), *Liber Fausto Pocar*, I, Milan, 2009, p. 235 et seq.; ID., *La protezione dei diritti fondamentali nell'Unione europea dopo il Trattato di Lisbona*, in *Il diritto dell'Unione europea*, 2009, n. 3, p. 646 et seq.; V. ONIDA, *I diritti fondamentali nel Trattato di Lisbona*, in E. PACIOTTI (ed.), *I diritti fondamentali in Europa*, Rome, 2011, p. 11 et seq.; P. DE PASQUALE, *Dalla primauté delle libertà economiche a quella dei diritti dei cittadini?*, in P. DE PASQUALE, C. PESCE (ed.), *I cittadini e l'Europa-Principio democratico e libertà economiche*, Naples, 2015, p. 128 et seq.; P. PAROLARI, *Tutela giudiziale dei diritti fondamentali nel contesto europeo: il “dialogo” tra le corti nel disordine delle fonti*, in *Diritto e questioni pubbliche*, 2017, pp. 31-58; F. BESTAGNO, A. ARENA, G. ROSSOLILLO, *Mercato unico e libertà di circolazione nell'Unione europea*, Turin 2020, p. 17 et seq.; M. C. CARTA, *Dalla libertà di circolazione alla coesione territoriale nell'Unione europea*, Naples, 2018, pp. 1-15; M. CONDINANZI, A. LANG, B. NASCIMBENE, *Cittadinanza dell'Unione e libera circolazione delle persone*, Milan, 2003.

It is well known that even before the publication of the CFR, ECHR and the ECtHR case law served as the international source of regulation for the common values of EU Member States. The importance of the ECHR and the ECtHR's contribution to the implementation of “*common values and respect for fundamental rights*” – serving as the basis for the construction of the “European Judicial Area” – is proven by the *Stockholm Programme*<sup>94</sup> wherein the European Council also highlighted the extreme importance of a rapid EU accession to the ECHR<sup>95</sup>.

The European AFSJ is primarily intended to act as a single space where fundamental rights and freedoms are protected and it is now an “area of con-

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94 *Stockholm Programme* § 2.1 A Europe built on fundamental rights: “*The Union is based on common values and respect for fundamental rights. After the entry into force of the Lisbon Treaty, the rapid accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is of key importance. This will reinforce the obligation of the Union, including its institutions, to ensure that in all its areas of activity, fundamental rights and freedoms, are actively promoted. The case-law of the Court of Justice of the European Union and the European Court of Human Rights will be able to continue to develop in step, reinforcing the creation of a uniform European fundamental and human rights system based on the European Convention and those set out in the Charter of Fundamental Rights of the European Union*”.

95 See G. RAIMONDI, *Spazio di Libertà, sicurezza e giustizia e tutela multilevel dei diritti fondamentali*, in A. DI STASI, L. S. ROSSI (ed.), *Lo Spazio di libertà, sicurezza e giustizia*, quot., p. 29; E. PÉREZ VERA, *La problemática adhesión de la Unión europea al Convenio europeo de Derechos Humanos*, in J. ALCAIDE FERNÁNDES, E. W. PETIT DE GABRIEL (eds.), *España y la Union Europea en el orden internacional*, Valencia, 2017, p. 57 et seq.; I. ANDRÒ, *L’adesione dell’Unione europea alla CEDU. L’evoluzione dei sistemi di tutela dei diritti fondamentali in Europa*, Milan, 2015; T. LOCK, *The Future of the European Union’s accession to the European Convention on Human Rights after opinion 2/13: is it still possible and is it still desirable?*, in *European Constitutional Law Review*, 2015, n. 2, pp. 239-273; F. CHERUBINI, *In merito al parere 2/13 della Corte di giustizia dell’UE: qualche considerazione critica e uno sguardo de jure condendo*, 2015, available online; C. ZANGHÌ, *La mancata adesione dell’UE alla CEDU nel parere negativo della Corte di giustizia*, in *Studi sull’integrazione europea*, 2015/1, p. 33 et seq.; A. GIANELLI, *L’adesione dell’Unione europea alla CEDU secondo il Trattato di Lisbona*, in *Il Diritto dell’Unione europea*, 2009, p. 668.; L. S. ROSSI, *Il parere 2/2013 della CGUE sull’adesione dell’UE alla CEDU: scontro fra Corti?*, 2014, available online; F. CHERUBINI, *In merito al parere 2/13 della Corte di giustizia dell’UE: qualche considerazione critica e uno sguardo de jure condendo*, 2015, available online; C. ZANGHÌ, *La mancata adesione dell’UE alla CEDU nel parere negativo della Corte di Giustizia*, in *Studi sull’integrazione europea*, 2015/1, p. 33 et seq.

vergence”, a “crossroads” of the two main European legal systems protecting the rights of individuals and their sources. Such convergence is also the result of the ongoing hybridization process between the traditional ECHR model and the emerging European model, and it shows the central role of the ECHR, as interpreted and supplemented by the developing ECtHR case law<sup>96</sup>, within the EU system.

The importance of the ECHR within the EU system is undeniable, and it was established quite a long time ago. This was already clear in the provisions of the 1992 *Maastricht Treaty*, in particular art. F. § 2, that defined it as a source of fundamental rights that the newly-established EU was undertaking to respect as the set of “*general principles of Community law*”, as well as art. K.2 § 1, regarding the establishment of the Justice and Internal Affairs areas. The Treaty provided that “*matters of common interest*”, such as judicial cooperation in criminal matters (art. K.1, n. 7) “*shall be dealt with in compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms*”. In the Treaty of Amsterdam signed on 2 October 1997, the reference to fundamental rights arising from the ECHR and the Union’s obligation to respect them were included in the text of Article 6 TEU<sup>97</sup>, using a wording that was kept unchanged until the “rewriting” of those provision in the Treaty of Lisbon<sup>98</sup>.

The role played by the ECHR in relation to the origin and interpretation of what art. 6 TEU describes as the primary legal source of fundamental rights in the EU – that is, the CFR – is topical for the purpose of this paper. In particular, it is demonstrated by the preamble to the CFR, reading that it “*reaffirms [...] the rights as they result, in particular, from [...] the European*

96 See M. O’BOYLE, *The Future of the European Court of Human Rights*, in *German Law Journal*, 2011, p. 1862 et seq.; U. VILLANI, *Dalla Dichiarazione universale alla Convenzione europea dei diritti dell’uomo*, Bari, 2012, p. 89 et seq. and p. 111.

97 See L. DANIELE, *La protezione dei diritti fondamentali nell’Unione europea dopo il Trattato di Lisbona: un quadro d’insieme*, in *Dir. Un. eur.*, 2009, n. 3, p. 645 et seq., p. 648.

98 As it is commonly known, the Union is actually founded on two Treaties: the Treaty on European Union (TEU) and the Treaty of the Functioning of the European Union (TFEU).

*Convention for the Protection of Human Rights and Fundamental Freedoms [...] and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights*”, and it is confirmed by the presence two important coordinating clauses established to safeguard the minimum level of protection offered by the ECHR and the ECtHR case law<sup>99</sup>. This is the above-mentioned “clause of equivalence” that appears in art. 52 § 3<sup>100</sup>, according to which the rights enshrined in the CFR, which correspond to the rights guaranteed by the ECHR, should be given the same meaning and scope<sup>101</sup> (except when CFR offers a broader protection) and the “compatibility

99 See A. BULTRINI, *I rapporti fra Carta dei diritti fondamentali e Convenzione europea dei diritti dell'uomo dopo Lisbona: potenzialità straordinarie per lo sviluppo della tutela dei diritti umani in Europa*, in *Dir. Un. eur.*, 2009, n. 3, p. 700 et seq., pp. 708-709.

100 Art. 52 § 3 CFR: “*In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection*”.

101 See A. DI STASI, *Spazio europeo di libertà, sicurezza e giustizia e cooperazione giudiziaria in materia penale: il rispetto dei diritti fondamentali e della diversità tra ordinamenti nazionali e tradizioni giuridiche*, in L. KALB (ed.), «Spazio europeo di giustizia» e procedimento penale italiano. Adattamenti normativi e approdi giurisprudenziali, Turin, 2012, pp. 3-54, spec. chap. I, §§ 5 and 6; Id, *Brevi osservazioni intorno alle “spiegazioni” alla Carta dei diritti fondamentali dell’Unione europea*, in C. ZANGHÌ, L. PANELLA (ed.), *Il trattato di Lisbona tra conferme e novità*, Turin, 2010, p. 425 et seq.); A. DI STASI, *Diritti umani e sicurezza regionale. Il “sistema” europeo*, Naples, 2011, II edition being reprinted with updates, p. 247 et seq., 274-276; A. BULTRINI, quot.; B. GENEVOIS, *La Convention européenne des droits de l’homme et la Charte des droits fondamentaux de l’Union européenne: complémentarité ou concurrence?*, in *RFDA*, 2010, n. 3, p. 437 et seq.; U. VILLANI, *I diritti fondamentali tra Carta di Nizza, Convenzione europea dei diritti dell’uomo e progetto di Costituzione europea*, in *Dir. Un. eur.*, 2004, n. 1, p. 75 et seq.; O. LE BOT, *Charte de l’Union européenne et Convention de sauvegarde des droits de l’homme*, in *Rev. trim. dr. homme*, 2003, n. 55, p. 781 et seq.; P. MAHONEY, *The Charter of Fundamental Rights of the European Union and the European Convention on Human Rights from the Perspective of the European Convention*, in *HRLJ*, 2002, n. 23, p. 300 et seq.; B. CONFORTI, *La Carta dei diritti fondamentali dell’Unione europea e la Convenzione europea dei diritti umani*, in L. S. ROSSI (ed.), *Carta dei diritti fondamentali e Costituzione dell’Unione europea*, Milan, 2002, p. 3 et seq.; P. LEMMERS, *The Relation between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights*, in *Maastricht JECL*, 2001, n. 1, p. 49 et seq.; G. GAJA, *Carta dei diritti fondamentali e Convenzione europea: una relazione complessa*, in U. DE SIERVO (ed.), *La difficile Costituzione europea*, Bologna, 2001, p. 211 et seq.

clause” expressed in art. 53 CFR<sup>102</sup>, that prevents CFR interpretations which could hinder or impair the protection guaranteed by other international sources, in particular ECHR.

### 2.3 The impact of ECHR in building the European Union AFSJ

The ECHR’s permanent central position in the European system of human rights protection also applies to the implementation of the provisions of Title V of the Treaty on the Functioning of the European Union (TFEU). As a matter of fact, while providing that the EU establishes an area of freedom, security and justice protecting fundamental rights, it is clear that Art. 67 § 1 TFEU – together with art. 6 § 3 Treaty on European Union (TEU) – requires institutions to exercise the powers awarded to them under Title V in accordance with the standards reinforced not only in the *acquis communautaire*, but also in the practical implementation of the ECHR and in the ECtHR case law.

According to the provisions of Title V TFEU, the construction of the *Area of Freedom, Security and Justice* is based on the implementation of increasingly advanced forms of judicial cooperation between national authorities competent in civil and criminal matters. The TFEU defines as the core objectives of EU actions, the guarantee of “*a high level of security through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws*” (art. 67 § 3)<sup>103</sup>. The mutual recognition of decisions issued by

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102 Art. 53 CFR: “*Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions*”.

103 See G. BIAGIONI, *Carta dei diritti fondamentali e cooperazione giudiziaria civile*, Naples, 2018.

homologous foreign authorities is therefore essential for the development of closer cooperation between civil and criminal judicial authorities. This principle depends on the strengthening of mutual trust between States and their will to cooperate with those who share the same legal values<sup>104</sup>.

This dynamic includes the ECHR *acquis*, that contributes to define the minimum levels of protection that should underpin the construction of a European area of “common justice”, especially when harmonisation measures may affect the conditions, rights and freedoms of individuals<sup>105</sup>. This means that judicial cooperation measures in civil and criminal matters adopted pursuant to art. 81 and 82 TFEU, must be clearly defined and meet ECHR standards, according to the interpretation and continuous “revitalization”<sup>106</sup> of its natural Court (ECtHR). ECHR standards are therefore essential pillars for the adoption of minimum harmonization rules to approximate the laws and regulations of all Member States in order to strengthen their mutual trust and implement the principle of mutual recognition of judgments and judicial decisions. As a result, the ECHR *acquis* is an element that deeply affects the implementation of the European Area of Justice and the relevance of the case-law interpretation of art. 5, 6, 7, 8 and 13 (in the procedural perspective) and 2, 3 and 8

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104 See D. RINOLDI, *Lo spazio di libertà, sicurezza e giustizia*, in U. DRAETTA, N. PARISI (ed.), *Elementi di diritto dell'Unione Europea. Parte speciale – Il diritto sostanziale*, III ed., Milan, 2010, p. 1. et seq, spec. §§ 1 and 5; R. CAFARI PANICO, *Lo Spazio di libertà, sicurezza e giustizia nel trattato di riforma: le disposizioni generali*, in *Sud in Europa*, February 2008, p. 19 et seq.; G. CAGGIANO, *L'evoluzione dello Spazio di libertà, sicurezza e giustizia nella prospettiva di un'Unione basata sul diritto*, in *Studi sull'integrazione europea*, 2007, n. 2, p. 335 et seq.

105 See N. PARISI, *Funzione e ruolo della Carta dei diritti fondamentali nel sistema delle fonti alla luce del Trattato di Lisbona*, in *Dir. Un. eur.*, 2009, n. 3, p. 653 et seq., in particular pp. 658-661; R. CAFARI PANICO, *Lo Spazio di libertà, sicurezza e giustizia nel trattato di riforma: le disposizioni generali*, in *Sud in Europa*, February 2008, p. 19 et seq.; G. CAGGIANO, *L'evoluzione dello Spazio di libertà, sicurezza e giustizia nella prospettiva di un'Unione basata sul diritto*, in *Studi sull'integrazione europea*, 2007, n. 2, p. 335 et seq.

106 S. NEGRI, *La realizzazione dello Spazio europeo di libertà, sicurezza e giustizia*, quot., p. 130.

ECHR, as well as art. 4<sup>107</sup> ECHR Protocol 7<sup>108</sup>, is clear to protect the “right to justice”, with particular reference to the prisoner’s status. Especially in the context of judicial cooperation in criminal matters<sup>109</sup>, the positive impact of the 1950 Rome Convention seems to be clear.

However, while in the context of civil judicial cooperation, the presence of references to ECHR in EU documents seems sporadic – only the Directive 2003/8/EC improved access to justice in cross-border disputes by establishing minimum common rules relating to legal aid<sup>110</sup>, – the impact of the ECHR appears to be fully visible in the context of judicial cooperation in criminal matters<sup>111</sup>.

In this sector, the need to establish minimum human rights standards in criminal proceedings has resulted in a number of major harmonisation measures, namely, the provisions under the Stockholm Program (Directive

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107 Article 4 – Right not to be tried or punished twice: “1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State. 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. 3. No derogation from this article shall be made under Article 15 of the Convention”.

108 Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 22.XI.1984, [https://www.echr.coe.int/Documents/Library\\_Collection\\_P7postP11\\_ETSI17E\\_ENG.pdf](https://www.echr.coe.int/Documents/Library_Collection_P7postP11_ETSI17E_ENG.pdf)

109 See V. S. NEGRI, *L’incidenza della Convenzione europea dei diritti dell’uomo sulla cooperazione giudiziaria penale nell’Unione europea*, in L. KALB (ed.), “Spazio europeo di giustizia” e procedimento penale italiano, quot., pp. 55-92.

110 Directive 2003/8/EC improved access to justice in cross-border disputes by establishing minimum common rules relating to legal aid, 27.01.2003, in OJEU L 24, 31.01.2003, pp. 41-47, n. 4: “All Member States are contracting parties to the European Convention for the Protection of Human Rights and Fundamental Freedom of 4 November 1950. The matters referred to in this Directive shall be dealt with in compliance with that Convention and in particular the respect of the principle of equality of both parties in a dispute”.

111 See V. S. NEGRI, *L’incidenza della Convenzione europea dei diritti dell’uomo sulla cooperazione giudiziaria penale nell’Unione europea*, in L. KALB (ed.), «Spazio europeo di giustizia» e procedimento penale italiano, quot., pp. 55-92.

2010/64/EU, Directive 2012/13/EU and Directive 2013/48/EU <sup>112</sup>, and also Directive (EU) 2016/343 <sup>113</sup>, Directive (EU) 2016/800 <sup>114</sup> and Directive (EU) 2016/1919<sup>115</sup>).

These are generally measures aimed at strengthening the procedural rights of persons subject to criminal proceedings within the EU and, at the same time, strengthening the mutual recognition of judicial decisions. They have the same objective: they set functional “minimum standard” for the approximation of the laws of Member States<sup>116</sup>, enabling them to extend their rights to ensure a higher level of protection in situations which are not explicitly regulated. Also, with regard to the above-mentioned harmonising measures, the importance of the ECHR *acquis* is fully confirmed. On the one hand, the Directives above provide that “*the provisions of this Directive that correspond to rights guaranteed by the ECHR or the Charter should be interpreted and implemented consistently with those rights, as interpreted in the relevant case-*

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112 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, in OJEU L 280, 26.10.2010, pp. 1-7; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, in OJEU L 142, 1.06.2012, pp. 1-10; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, 22.10.2013, in OJEU L 294, pp. 1-12.

113 Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, in OJEU L 65 of 11.3.2016, pp. 1–11.

114 Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, in OJEU L 132 del 21.5.2016, pp. 1–20.

115 Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, in OJEU L 297 del 4.11.2016, pp. 1–8.

116 Recital no. 40 of directive 2012/13: “*This Directive sets minimum rules. Member States may extend the rights set out in this directive in order to provide a higher level of protection also in situations not explicitly dealt with in this directive. The level of protection should never fall below the standards provided by the ECHR as interpreted in the case-law of the European Court of Human Rights*”; see also Recital no. 54 of directive 2013/48.



*law of the European Court of Human Rights and the Court of Justice of the European Union*”<sup>117</sup>; on the other hand, they provide for the extension of the catalogue of rights and the explicit recognition of rights of case-law origin.

These measures confirm the principle of non-regression of the European common minimum standard. Indeed, several pieces of legislation have a “non-regression clause”, enshrined in art. 82 § 2 TFEU<sup>118</sup>, providing that EU measures cannot be used to lower the existing level of protection, waive current legislation or weaken the status of secured rights. The clauses are formulated in such a way as to allow the legal systems of individual Member States to maintain levels of guarantees which are higher than those adopted at the European level; in some cases, they expressly prohibit limitations or derogations from procedural rights and guarantees granted by the ECHR or other international regulatory sources<sup>119</sup>.

The reference also to non-EU international sources, such as the *International Covenant on Civil and Political Rights*, shows the increasingly common synergies between various sources which work together to create a Europe based on fundamental rights, especially in the latest EU legislation, as the above-mentioned *Stockholm Programme* hoped for.

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117 Recital no. 33 of Directive 2010/64; recital no. 42 of Directive 2012/13; recital no. 53 of Directive 2013/48.

118 Art. 82 § 2: “*To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States*”.

119 Art. 8 of directive 2010/64: “*Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union, other relevant provisions of international law or the law of any Member State which provides a higher level of protection*”. An identical wording is used in art. 14 of Directive 2013/48 and art. 10 of Directive 2012/13. See also art. 12 of the COM(2013) 821/2, art. 22 of the COM(2013) 822/2 and art. 7 of the COM(2013) 824.

## 2.4 From “equivalent protection” to partial “integrated protection” in EU Law.

The European area of freedom, security and justice is being constructed on the respect for human rights and, above all, the procedural guarantees underlying the European concept of Justice (hence, a fair trial), that is, the fundamental legal value of the European Union system, shared by the Member States in accordance with common constitutional traditions and standards, set out in the ECHR and the ECtHR case law.

The previous paragraphs showed the importance of the ECHR *acquis* in relation to the strengthening of the “European Area of Justice”, based primarily on judicial cooperation in criminal matters. Reference to the practical consequences and obligations of EU policymakers was also made, in particular following the harmonization measures implemented to approximate national laws and, thus, achieve a higher level of mutual trust between national authorities. In this perspective, the central role and non-regression of the rights set out in the ECHR, as well as the minimum standards of protection interpreted by the ECtHR, permeates the EU system through the clearance offered by art. 6 §3 TEU (recognized as general principles of EU law) and articles 52 and 53 CFR (referred to as interpretation and application parameters).

The convergence of the two European systems for the protection of fundamental rights, achieved through the above-mentioned provisions connecting sources, and supported by the progressive establishment of largely overlapping application standards, persuaded the European Court of Strasbourg to proclaim the principle of equivalent protection. The direct consequence of this principle is that the ECtHR declares itself incompetent with respect to the required compliance check of EU self-executing documents with the ECHR *acquis*.

Therefore, the European Area of Freedom, Security and Justice provided for in Title V TFEU, is still an *ongoing* space of convergence between the ECHR and the EU system of protection of human rights, and it is expected to become a fully integrated (rather than generally integrated) space of pro-

tection of fundamental rights<sup>120</sup>. The EU accession to the ECHR is yet to be completed due to the alleged (and unambiguous) asymmetries between the two European legal systems and their different States of reference<sup>121</sup>. However, it is still likely to be finalized considering the recent signs of openness<sup>122</sup> shown by Member States in the field of criminal judicial cooperation, which suggest the development of a greater synergy between the two systems (EU and Council of Europe). These synergies go well beyond the already experimented convergence, shifting towards a greater integration that will be achieved primarily in terms of guarantees and, therefore, legal protection.

If the EU accession to the ECHR is completed, ECtHR competences will

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120 In this regard, see. A. DI STASI, *Tutela multilevel dei diritti fondamentali*, quot., p. 25, that reads “a space of (only) general convergence between the main human rights protection legal systems”.

121 See Court of Justice (Plenary session), Opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454, in GUUE C 65 of 23 February 2015, p. 2. In doctrine, see *ex multis* E. PÉREZ VERA, *La problemática adhesión de la Unión europea al Convenio europeo de Derechos Humanos*, in J. ALCAIDE FERNÁNDES, E. W. PETIT DE GABRIEL (eds.), *España y la Union Europea en el orden internacional*, Valencia, 2017, p. 57 et seq.; I. ANDRÒ, *L’adesione dell’Unione europea alla CEDU. L’evoluzione dei sistemi di tutela dei diritti fondamentali in Europa*, Milan, 2015; T. LOCK, *The Future of the European Union’s accession to the European Convention on Human Rights after opinion 2/13: is it still possible and is it still desirable?*, in *European Constitutional Law Review*, 2015, n. 2, pp. 239-273; F. CHERUBINI, *In merito al parere 2/13 della Corte di giustizia dell’UE: qualche considerazione critica e uno sguardo de jure condendo*, 2015, available online; C. ZANGHÌ, *La mancata adesione dell’UE alla CEDU nel parere negativo della Corte di giustizia*, in *Studi sull’integrazione europea*, 2015/1, p. 33 et seq.; A. GIANELLI, *L’adesione dell’Unione europea alla CEDU secondo il Trattato di Lisbona*, in *Il Diritto dell’Unione europea*, 2009, p. 668.

122 See the Copenhagen Declaration adopted at the High-Level Conference held in Denmark from 11 to 13 December 2018 that was also attended by 22 Ministers of Justice and officially adopted at the May session of the Council of Europe. On that occasion, the Member States of the CoE stressed the importance of accession to the ECHR for the protection of human rights in Europe and declared that “they welcome the regular contacts between the European Court of Human Rights and the Court of Justice of the European Union and, as appropriate, the increasing convergence of interpretation by the two courts with regard to human rights in Europe”. As is in A. DI STASI, *Tutela multilevel dei diritti fondamentali*, quot., p. 33-34. On the most recent developments in the EU accession process to the ECHR, see G. RAIMONDI, *Spazio di Libertà, sicurezza e giustizia e tutela multilevel dei diritti fondamentali*, in A. DI STASI, L. S. ROSSI (ed.), *Lo Spazio di libertà, sicurezza e giustizia*, quot., p. 29.

be extended to any person damaged by measures adopted by the EU under Title V TFEU, and as a consequence, the external control of the EU system will be opened, favouring dialogue between European Courts. Such dialogue will contribute to the development of a new set of measures available to individuals and, thus, a more comprehensive and effective European protection. The establishment of the European Area of Freedom, Security and Justice will benefit from the proposed “integrated protection”, since EU accession to the ECHR will contribute to the creation of a single European Legal Space in the field of protection of fundamental rights. The proper and uniform administration of justice will play a key role in this space.

## **2.5 The principles of necessity and proportionality of the penalty in post-Lisbon European Union Law.**

The Treaty of Lisbon introduced two fundamental principles in the EU law: the principle of proportionality, pursuant to art. 49 CFR § 3, reading “*the severity of penalties must not be disproportionate to the criminal offence*”; and the necessity for punishment. The word “essential” even appears in the original text, highlighting the requirement for Member States to identify crimes complying with EU legal principles. This principle of necessity is enshrined in art. 83 § 2 TFEU that reads “*if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy (...) directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned*”.

This provision is particularly relevant because it supplements the EU legal framework with a reference to the concept of “necessity”, highlighting the requirement for Member States to identify crimes complying with EU legal principles. This principle bounds the assessment of necessity for punishment, but at the same time, it gives competence to the EU to exercise it. Indeed, by using Directives as the legal instrument to regulate criminal matters, the pro-

vision mentioned above leaves a great deal of discretion to Member States to issue the ruling and the penalty connected to it. This results in a “mediated” system of protection that, as highlighted by European Court of Justice<sup>123</sup> in several occasions, in order to establish the criminal liability of an individual, requires the existence of a national law that clearly shows the criminal liability for the violation of the European law.

With regard to the production of relevant EU acts in criminal matters, the afore-mentioned principle of necessity seems to act as a specification of the more general principle of proportionality/necessity of attribution of competence pursuant to art. 5 § 4 TEU, reading: “*The use of Union competences is governed by the principles of subsidiarity and proportionality*”. Therefore, upon signing the Treaty of Lisbon, the European Union was awarded at least the power to formulate an abstract assessment of the necessity for punishment, though it still lacks the *ius puniendi* (right to punish)<sup>124</sup>, i.e. the capability to establish a European system of penalties. Moreover, the EU legal framework does not provide a common European standard as regards the severity of penalties<sup>125</sup>.

Since it has no *right to punish* and there is no clear European constitution-

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123 ECJ, Judgment of 7 January 2004, Case C-60/02, *X*, ECLI:EU:C:2004:10, § 61, ECLI:EU:C:2004:10; ECJ, Grand Chamber, Judgment of 16 June 2005, Case C-105/03, *Maria Pupino*, ECLI:EU:C:2005:386, § 45, where the application of the *lex scripta* principle (that is, the “indirect” or “mediated” rule of law in criminal cases) the following is provided: “The Directive cannot have the effect, by itself and independently, of a national law of a Member State adopted for its implementation, determining or increasing the criminal liability of persons who act in violation of those provisions.” For more details, see R. PALLADINO, *I principi della legalità e della proporzionalità dei reati e delle pene nell’art. 49 della Carta dei diritti fondamentali dell’UE*, in A. DI STASI (ed.), *Tutela dei diritti fondamentali e Spazio europeo di giustizia*, quot., p. 303.

124 Regarding the lack of EU’s *ius puniendi*, see C. SOTIS, *Il Trattato di Lisbona e le competenze penali dell’Unione europea*, in *Cassazione penale*, 2010, p. 326 et seq.; see also AMALFITANO C., *Unione europea e garanzie processuali: il diritto all’interpretazione e alla traduzione nei procedimenti penali*, in *Studi sull’integrazione europea*, 2011, n. 8, p. 83 et seq.

125 See C. SOTIS, *I principi di necessità e proporzionalità della pena nel diritto dell’Unione europea dopo Lisbona*, in [www.criminaljusticenetwork.eu](http://www.criminaljusticenetwork.eu); M. DELMAS-MARTY, G. GIUDICELLI-DELAGE, E. LAMBERT-ABDELGAWAD (ed.), *L’harmonisation des sanctions pénales en Europe*, Paris, 2003.

al criminal law ideology, it is hard to understand how the Court could judge the formal proportionality between the severity of an offense and the penalty attached to it, or even the proportionality of future European penalty-related obligation established by a Directive. In this regard, the principle of necessity of the penalty will underpin the actions taken by the European Union regarding criminalization requests, pursuant to art. 83 § 2 TFEU, establishing the indirect criminal jurisdiction of the European Union.

In this author's opinion, the main limitation of this "necessity" clause is that the necessity judgment pursuant to art. 83 § 2 TFEU refers to the effective implementation of an EU policy in criminal matters, rather than the protection of a legal right. This is a significant connotation, because by saying that the necessity of the penalty is contingent on the assessment of effective protection of the underlying legal interests, or the effective implementation of rules and regulation, essentially means that action in criminal matters is necessary "for the compliance with a rule, rather than the protection of a legal right"<sup>126</sup>. This limitation seems to imply that, especially in terms criminal law, the EU fundamental rights protection system often tends to be governed by the legal principles laid down by the ECtHR, making reference to EU primary sources mainly to consolidate and cement (*ad adiuvandum* function) them, being available as official legal sources.

The second principle introduced by the Charter of Fundamental Rights of the European Union is the proportionality between crime and punishment, pursuant to art. 49 § 3<sup>127</sup>, reading "*The severity of penalties must not be disproportionate to the criminal offence*"<sup>128</sup>. In this regard, even before the Charter of Fundamental Rights came into force, the European case law had reiterated

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126 See G. MANNOZZI, F. CONSULICH, *La sentenza della Corte di giustizia C-176/03: riflessi penalistici in tema di principio di legalità e politica dei beni giuridici*, in *Riv. trim. dir. pen. ec.*, 2006, p. 926 et seq.

127 With particular reference to the correspondence between art. 49 CDFUE and art. 6 CEDU, see ECJ, Judgment of 28 March 2017, Case C-72/15, *PJSC Rosneft Oil Company v. Her Majesty's Treasury and Others*, ECLI:EU:C:2017:236.

128 See M. PANZAVOLTA, *Legalità e proporzionalità nel diritto penale processuale*, in R. MASTROIANNI, O. POLLICINO, S. ALLEGREZZA, F. PAPPALARDO, O. RAZZOLINI (ed.), *Carta dei diritti fondamentali dell'Unione europea*, Milan, 2017, pp. 972-1001 and pp. 1001-1014.

that penalties must be reasonable, rational and proportionate<sup>129</sup>. More specifically, since the late 1980s, the Court of Justice has established the principle that, although the Member States have the right to choose which sanctions are to be applied, they are required to make sure that violations of EU law are sanctioned, substantively and procedurally, as envisaged for violations of domestic law of a similar nature and importance, and in any case, they imbue the sanction with an “effectiveness, proportionality and deterrence”<sup>130</sup>. More recently, this case law has been taken up by the Court of Justice to clarify the extent of the need for adequate sanctions established by national laws<sup>131</sup> without having to provide for an explicit reference to Article 49 § 3 CFREU<sup>132</sup>. Regarding the application of the European principle of proportionality to national case law<sup>133</sup>, the doctrine has highlighted the difficulty to determine the independent nature of art. 49 § 3, considering its substantial “incorporation”<sup>134</sup> in constitutional laws. In particular, since the aforementioned provision refers to the principles of equality and equanimity already “rooted” in art. 3 and art. 27 of the Italian Constitution, it serves as a “important confirmation”<sup>135</sup> of

129 See R. PALLADINO, *I principi della legalità*, quot., spec. pp. 321-322.

130 See ECJ, Judgment of 21 September 1989, Case 68-88, *Commission of the European Communities v Hellenic Republic*, ECLI:EU:C:1989:339, spec. §§ 23-24; ECJ, Judgment of 15 January 2004, Case C-230/01, *Intervention Board for Agricultural Produce v. Penyrcoed Farming Partnership*, ECLI:EU:C:2004:20, § 36. In doctrine, see B. NASCIMBENE, I. ANDRÒ, *La tutela dei diritti fondamentali nella giurisprudenza della Corte di giustizia: nuove sfide, nuove prospettive*, in *Rivista italiana di diritto pubblico comunitario*, 2017, n. 2, p. 323 et seq.

131 ECJ, Grand Chamber, Judgment of 26 February 2013, Case C-617/10, *Åklagaren v. Åklagaren Fransson*, ECLI:EU:C:2013:105, § 36.

132 An express reference to that provision is contained in ECJ, Opinion of Advocate General J. KOKOTT delivered on 12 January 2012, Joined Cases C-628/10 P and C-14/11 P, *Alliance One International Inc., formerly Standard Commercial Corp., and Standard Commercial Tobacco Co. Inc. v. European Commission and European Commission v. Alliance One International Inc. and Others*, § 175.

133 See V. R. PALLADINO, *I principi della legalità e della proporzionalità*, quot., p. 323.

134 Supreme Court of Cassation, Criminal section, ordinance of 9 May 2013, n. 1426, § 5. More recently, see Italian Criminal Court of Appeal, Part IV, judgment of 20 July 2018, no. 47768 referring to the ruling of the Italian Criminal Court of Appeal, judgment of 20 December 2017, no. 269.

135 Supreme Court of Cassation, Criminal section IV, sentence of 14 December 2017,

the principle of proportionality in the national law or “complementary to the Constitution”<sup>136</sup>.

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no. 3867.

136 Supreme Court of Cassation, Criminal section II, sentence of 10 October 2014, no. 44572.



## CHAPTER III

### PRISON OVERCROWDING IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

SUMMARY: 3.1 The role of the European Court of Human Rights in the system of judicial law-making in the field of fundamental rights. – 3.2 The rights of prisoners in the ECHR system. – 3.3 Italy's violations of the ECHR: from the *Sulejmanovic* case law to the *Torreggiani* pilot sentence.

#### **3.1 The role of the European Court of Human Rights in the system of judicial law-making in the field of fundamental rights.**

Despite the indisputable differences between ECHR and EU law, considering the status of such provisions within the hierarchy of norms, and in terms of their effectiveness and binding nature in the national legal system, they both reinforce constitutional legitimacy criteria and prison administration provisions, based on the well-known prevalence of supranational law over national law. Moreover, pursuant to the obligations of the legal system governing national authorities, the “European legislation on Rights Protection” is cited more and more frequently by national judges in their hermeneutic activity<sup>137</sup>.

With regard to the ECHR law, a preliminary reference should be made regarding the role played by the ECtHR in the fundamental rights protection system. Indeed, the ECtHR is engaged in a *judicial law-making* system also due to the general character of national legal provisions, granting to the ECtHR a significant margin of creativity. This creative work by ECtHR is only partially offset by the need to ensure the stability in

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137 See A. BERNARDI, *Interpretazione conforme al diritto UE e costituzionalizzazione dell'Unione Europea*, in *Diritto penale contemporaneo*, 2013, p. 230 et seq.; MANES, *La lunga marcia della Convenzione europea e i nuovi vincoli per l'ordinamento e il giudice penale interno*, in V. MANES, V. ZAGREBELSKY (ed.), *Convenzione europea dei diritti dell'uomo e diritto penale italiano*, Milan, 2011, p. 21 et seq.

its case law by a continuous reference to the previous jurisprudence<sup>138</sup>.

The authority granted to the previous jurisprudence does not exclude jurisprudential evolutions and indeed leave the door open to specific cases, mainly using legal argument techniques, such as *distinguishing* precedents which are found specific to the present case and changing previous decisions, if applicable. Conventional law is a “law in motion”, a dynamic entity, that is continuously updated by the ECtHR’s interpretative activity. The ECHR law is, by definition, a living right that can adapt to the ever-changing demands of human rights protection in a democratic society and, therefore, it may be affected by historical and social changes<sup>139</sup>. The evolution of ECHR law appears to be facilitated by the undeniable vagueness of the ECHR provisions, the scope of which is continuously defined by the interpretation given by the ECtHR, the content thereof is affected by the evolution of the ECtHR case law.

Thanks to this interpretation model, the ECtHR could fill the gap that the ECHR had left open, in particular with regard to the protection of prisoners. As already mentioned, the ECHR did not include any guarantee for the protection of persons detained under specific detention regimes and the ECtHR’s interpretation of ECHR provisions allowed the extension (through the *par ricochet*<sup>140</sup> technique) of conventional provisions also to areas which had traditionally been regarded as non-conventional, such as the treatment of prisoners<sup>141</sup>.

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138 See M. C. CARTA, *Le incognite della nuova competenza consultiva della Corte EDU ispirata al rinvio pregiudiziale alla Corte di Giustizia UE*, in *Ordine internazionale e diritti umani*, n. 3/2020.

139 See E. NICOSIA, *Convenzione europea dei diritti dell’uomo e diritto penale*, Turin, 2006, p. 22 et seq.

140 This technique allows “to assess ECHR compliance of institutions or practices which did not directly fall within the scope” of the Convention, so as to fill some gaps, especially regarding the conditions of detention. See A. ESPOSITO, *Il diritto penale flessibile. Quando i diritti umani incontrano i sistemi penali*, Turin, 2008, p. 126.

141 See *Guide on the case-law of the European Convention on Human Rights - Prisoners’ rights*, Updated on 31 December 2019, in [https://www.echr.coe.int/Documents/Guide\\_Prisoners\\_rights\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Prisoners_rights_ENG.pdf). The Guide provides an overview of the Court’s case-law related to prisoners’ rights. Its structure reflects different phases of imprisonment and elaborates on different aspects of life in prison. The Guide contains a transversal analysis of the Court’s case-law, taking into account all relevant provisions of the Convention related to prisoners’ rights.

Following the *Soering*<sup>142</sup> case, the ECtHR extended the application of ECHR provisions also to those matters<sup>143</sup>. In the *Soering* ruling – relating to the case of a German national who, if extradited to the United States for a double murder committed there, could have been subjected to the death penalty – the ECtHR made it clear that the exercise of certain powers by the contracting States had to take place in accordance with the rights granted by the ECHR, including in cases indirectly affected by it. Therefore, although the way prisoners are treated is not expressly covered by the ECHR, its implementation cannot result in a violation of the rights enshrined in the Convention. In addition, the explicit recognition of the guarantees provided by the ECHR extended the scope of ECHR's application to the punishment and, in particular, to the conditions of detention.

### 3.2 The rights of prisoners in the ECHR system.

Following the *Golder*<sup>144</sup> sentence – relating to the case of a British prisoner who had been denied the chance to appeal against certain disciplinary charges and communicate with his lawyer – the ECtHR ruled that the deprivation of liberty does not, by itself, imply the loss of the rights granted by the ECHR. The ECtHR decided to change its approach, that until then had provided that the deprivation of personal freedom would result in the non-recognition of the rights granted to free men and women<sup>145</sup>. On the other hand, as the Coun-

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142 ECtHR, Plenary, Judgment 07 July 1989, Case of *Soering v. the United Kingdom*, Application no. 14038/88.

143 N. RODLEY, M. POLLARD, *The Treatment of Prisoners Under International Law*, Oxford, 2009; M. W. JANIS, R. S. KAY, A. W. BRADLEY, *European Human Rights Law*, 2008.

144 ECtHR, Plenary, Judgment 21 Feb 1975, Case of *Golder v The United Kingdom*, Application no. 4451/70.

145 See G. SMAERS, *Gedetineerden en mensenrechten*, Antwerp, 1994; G. ZELICK, *The rights of prisoners and the European convention*, in *Modern law review*, 1975, p. 683 et seq.; G. VÓKÓ, *Europäisches Strafvollzugsrecht*, quot., p. 63 et seq.; H. JUNG, *Sanktionensysteme und Menschenrechte*, quot., p. 91 et seq.; A. LUNI DAL RUSSO, *Prisoner's right of access to the Courts: a comparative analysis of Human rights jurisprudence in*

cil of Europe has reiterated, the rights recognised by the ECHR also apply to persons who are lawfully deprived of their personal freedom<sup>146</sup>.

Regarding life imprisonment, experts maintain that it infringes the conventional system, not because of its abstract character of perpetuity, but when it proves to be absolute and irreducible in practice<sup>147</sup>. More precisely, art. 3 ECHR, that prohibits torture and inhuman and degrading treatment, is violated if – with reference to the threat of penalty or its practical application – the deprivation of liberty is also accompanied by a “deprivation of hope”, meaning that national laws rule out any possibility of access to forms of early release. Reference is made to what the Italian law refers to as *ergastolo ostativo* (life imprisonment)<sup>148</sup>.

By changing the previous approach<sup>149</sup>, after the *Léger*<sup>150</sup> sentence, the ECtHR clarified that life sentence is not by itself incompatible with art. 3 ECHR<sup>151</sup>. Such a conflict would be excluded whenever the law or practices

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*Europe and in the United States*, in G. ALPERT (ed.), *Legal rights of prisoners*, Beverly Hills-London, 1980, p. 129 et seq.

146 ECtHR, *Campbell and Fell v. United Kingdom*, 28 June 2008, Application no. 7819/77; 7878/77, § 69.

147 See G. MANNOZZI, *Diritti dichiarati e diritti violati: teoria e prassi della sanzione penale al cospetto della Convenzione europea dei diritti dell'uomo*, in V. MANES, V. ZAGREBELSKY (ed.), *Convenzione europea dei diritti dell'uomo e diritto penale italiano*, quot., p. 342; P. PONCELA, *La logique modale de la peine dans la jurisprudence de la Cour européenne de droits de l'homme*, in Y. CARTUYVELS, H. DUMONT, F. OST, M. VAN DA KERCHOVE, S. VAN DROOGHENBROECK (eds.), *Les droits de l'homme. Bouclier ou épée du droit pénal?*, quot., p. 363 et seq.

148 ECtHR, Grand Chambre, Judgment of 11 April 2006, *Léger v. France*, Application no. 19324/02, § 90 et seq.

149 ECtHR, Judgment of 14 December 2000, *Nivette v. France*, Application no. 44190/98; ECtHR, Judgment of 19 July 2001, *Einhorn v. France*, Application no. 71555/01; ECtHR, Judgment of 14 January 2003, *Izquierdo Medina v. Spain*, Application no. 2485/02, as in A. ESPOSITO, *Le pene vietate nella giurisprudenza della Corte europea dei diritti dell'uomo*, quot., p. 169 showing how such rulings held that the compatibility of life sentence with art. 3 ECHR appeared to be conditional on its atonement.

150 ECtHR, Grand Chambre, Judgment of 11 April 2006, *Léger v. France*, Application no. 19324/02.

151 *Ibidem* § 90: «La Cour a déjà déclaré que la compatibilité avec l'article 3 d'une 'peine indéterminée' infligée à des mineurs pourrait «inspirer des doutes» sans les motifs avancés à l'appui (*Weeks précité*, § 47; *Hussain précité* § 53; *arrêts T. et V. précités*, §§

of the prosecuting State grant the prisoner the chance to request the Court to reconsider his or her state of detention, while serving it. The flexibility of the executive relationship should not be provided for by the law, since the chance of release should be secured *de facto*: in this regard, in the *Kafkaris*<sup>152</sup> sentence, the ECtHR held that even the unlikely possibility of a pardon by the President of the Italian Republic seemed to be sufficient to exclude the violation of conventional law.

In this perspective, the fact that the release of the convicted depends on a fully discretionary decision and that it is unrelated to the degree of social rehabilitation of the prisoner, does not seem to be a problem. This was evidenced by the fourth Chamber of the ECtHR in the *Vinter*<sup>153</sup> case, when life imprisonment without any possibility of release or parole – imposed by British judges on offenders apprehended for major crimes – was deemed compatible with art. 3 ECHR<sup>154</sup> since the Secretary of State had the right to grant a release in exceptional circumstances, such as the prisoner's severe health conditions<sup>155</sup>. More generally, the ECtHR pointed out that the compatibility of such penalty under art. 3 ECHR should have been assessed in the light of the principle of proportionality, when the penalty imposed for a violation

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99 et 100).

152 ECtHR, Grand Chamber, Judgment of 12 February 2008, *Kafkaris v. Cyprus*, Application no. 21906/04.

153 ECtHR *Vinter and Others v. the United Kingdom*, 9 July 2012, Applications nos. 66069/09, 130/10 and 3896/10. Regarding that judgment, see the comments by A. SCARCELLA, *Fine pena mai viola l'art. 3 CEDU*, in *Cass. pen.*, 2013, p. 4670 et seq.; A. BALSAMO, L. TRIZZINO, *La Corte europea, l'ergastolo e il «diritto alla speranza»*, in *Cass. pen.* 2013, p. 4672 et seq. and D. GALLIANI, «The right to hope». *La sentenza «Vinter e altri v. Regno unito» della Corte di Strasburgo*, in *St. Iuris*, 2014, p. 404 et seq. As for the developments resulting from the *Vinter* sentence in the British legal framework and the “dialogue” with the ECtHR, see the most recent judgement of 3 February 2015, *Hutchinson v. UK*.

154 ECtHR *Vinter and Others v. the United Kingdom*, 9 July 2012, quot.; ECtHR *Harkins e Edwards v. the United Kingdom*, 17 January 2012, Application nos. 9146/07 and 32650/07.

155 See D. VAN ZYL SMITH, P. WEATHERBY, S. CREIGHTON, *Whole Life Sentences and the Tide of European Human Rights Jurisprudence: What Is to Be Done?*, in *Human Rights Law Review*, 2014, p. 59 et seq.

was proven to be excessive compared to the severity of such violation<sup>156</sup>.

More precisely, since the *Léger* case, the ECtHR has divided the execution of life sentences into two phases: the first phase, inspired by the need for retribution, is characterized by absolute inflexibility, since the prisoner is required to serve a period of incarceration that is proportionate to the severity of the crime; the second phase, focusing on the need for social defence and the prevention of re-offending, is characterized by greater flexibility allowing for a reconsideration of the necessity of the penalty. In this perspective, rehabilitation purposes seek a more humane sentence to be served<sup>157</sup>.

The ruling by the Grand Chamber of the ECtHR overturned the *Vinter* sentence made by the fourth Chamber. In that ruling – that launched a new case law approach in terms of life imprisonment without “early release”<sup>158</sup> – the ECtHR reconsidered the compatibility of life sentence without the possibility of release with art. 3 ECHR and ruled that such sentence was a violation of conventional law. A crucial first point concerned the proportionality of life sentence without the possibility of release compared to the severity of the offence; in this respect, the ECtHR reiterated that life sentence could prove to be inhuman if it appeared unreasonably punitive compared to the intrinsic severity of the offence requiring the penalty.

The second point concerned the principles of rehabilitation and human dignity based on the retributive and generally preventive objective of a life sentence, according to the ECtHR’s approach until that moment. According to the European judges, the deprivation of freedom must be accompanied by a prisoner’s prospect of release and chance to reconsider the objectives pursued by the penalty. Otherwise, the aims of social rehabilitation and – given the

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156 With reference to the ECtHR sentence *Vinter and Others v. the United Kingdom*, see F. VIGANÒ, *Ergastolo senza speranza di liberazione e art. 3 CEDU: (poche) luci e (molte) ombre in due recenti sentenze della Corte di Strasburgo*, in *Dir. pen. cont.*, 4 July 2012, p. 11.

157 See A. ESPOSITO, *Le pene vietate nella giurisprudenza della Corte europea dei diritti dell’uomo*, quot., p. 174.

158 See P. PINTO DE ALBUQUERQUE, *Life Imprisonment and the European Right to Hope*, in *Riv. AIC*, 29 May 2015. In this regard, see the ECtHR rulings *Laszlo Magyar v. Ungheria*, 20 May 2014; ECtHR *Trabelsi v. Belgio*, 4 September 2014.

duration of the sentence – also the prisoner’s dignity would be jeopardised.

More specifically, the principle of rehabilitation requires, on the one hand, a review of the executive regime to understand whether the retributive needs underpinning the penalty are still valid<sup>159</sup> and, on the other hand, the prisoner’s right to know under which conditions the penalty may be reviewed<sup>160</sup>, since the abstract legal provision.

The connection between human dignity and rehabilitation, as interpreted by the ECtHR, requires the State to set the conditions and time frames<sup>161</sup> of release. Therefore, the prisoner sentenced to life imprisonment should not be left in doubt as to the likelihood of being released. The simple right to hope has evolved in the more tangible right to be rehabilitated, recognized by the Italian Constitutional Court. The jurisprudence of the Italian Constitutional Court relating to life imprisonment was expressly mentioned by the ECtHR to establish the existence of that “International consensus” needed to interpret

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159 After a minimum period of penalty that – based on a preliminary comparative study – according to the Court should not exceed twenty-five years, see EChHR *Vinter and Others v. the United Kingdom*, 9 July 2012, § 68.

160 Otherwise, it would not be logical to expect from a person sentenced to life imprisonment without the possibility of release, any effort for his or her reintegration into society. D. GALLIANI *The «right to hope». La sentenza «Vinter e altri v. Regno unito» della Corte di Strasburgo*, quot., p. 411.

161 EChHR *Vinter and Others v. the United Kingdom*, 9 July 2012 § 129: “As a result, given the present lack of clarity as to the state of the applicable domestic law as far as whole life prisoners are concerned, the Court is unable to accept the Government’s submission that section 30 of the 1997 Act can be taken as providing the applicants with an appropriate and adequate avenue of redress, should they ever seek to demonstrate that their continued imprisonment was no longer justified on legitimate penological grounds and thus contrary to Article 3 of the Convention. At the present time, it is unclear whether, in considering such an application for release under section 30 by a whole life prisoner, the Secretary of State would apply his existing, restrictive policy, as set out in the Prison Service Order, or would go beyond the apparently exhaustive terms of that Order by applying the Article 3 test set out in *Bieber*. Of course, any ministerial refusal to release would be amenable to judicial review and it could well be that, in the course of such proceedings, the legal position would come to be clarified, for example by the withdrawal and replacement of the Prison Service Order by the Secretary of State or its quashing by the courts. However, such possibilities are not sufficient to remedy the lack of clarity that exists at present as to the state of the applicable domestic law governing possible exceptional release of whole life prisoners”.

the contents of art. 3 ECHR<sup>162</sup>. As a result of well-known indirect influence of the ECtHR judgments on domestic laws<sup>163</sup>, also the *Vinter* sentence might affect national sanction system, raising many concerns on the “conventional legitimacy” of *ergastolo ostativo*, that is, life sentence, applied to prisoners pursuant to art. 41-bis of the Italian Penitentiary System and that does not provide any chance for conditional release – unless the prisoner is an informer in accordance with art. 58-ter of the Italian Penitentiary System.

### **3.2 Italy’s violations of the ECHR: from the *Sulejmanovic* case law to the *Torreggiani* pilot sentence.**

According to common experience, prison overcrowding<sup>164</sup> is an inevitable source of tension in the prison system, as well as *vulnus* of the humane character of punishment and the protection of the dignity of prisoners. Overcrowding can sometimes be such a severe punishment that it may jeopardise the rehabilitative purposes of incarceration and may be a form of suffering in “addition” to the implicitly inherent state of detention. Such condition supplements the “minimum level of severity” required by art. 3 ECHR<sup>165</sup> and as interpreted by the Court of Strasbourg, in such a way that incarceration becomes an inhuman and degrading punishment.

In those cases, the ECtHR reiterated the need to implement both a preventive and a reparative measure, defining the principles referred to in the *Ananyev and Others v. Russia*<sup>166</sup> leading case, as an instrument to address a

162 ECtHR *Vinter and Others v. the United Kingdom*, 9 July 2012, § 72 et seq.

163 See E. NICOSIA, *Convenzione europea dei diritti dell’uomo e diritto penale*, quot., p. 25; M. DE SALVIA, *L’acculturazione incompiuta al diritto europeo dei diritti dell’uomo*, in *Riv. internaz. dir. uomo*, 2000, p. 447 et seq.

164 This expression refers to the “situation when the number of prisoners convicted in a prison facility exceeds the maximum capacity of the prison”. As in M. L. AVERSANO, *Il sovraffollamento carcerario*, quot., p. 206.

165 ECtHR, Judgment of 11 February 2014, *Contrada v. Italy* (n. 2), Application no. 7509/08, §§ 66-67.

166 ECtHR, Pilot Judgment of 10 January 2012, *Ananyev and others v. Russia*, quot.



structural and systemic conventional violation due to prison overcrowding.

In 2009, the condition of the rights of prisoners was officially an Italian issue. With the 2009 *Sulejmanovic* sentence<sup>167</sup>, the ECtHR ruled against Italy for a violation of art. 3 of the ECHR. The applicant was a citizen from Bosnia and Herzegovina, Izet Sulejmanovic, who had been detained in the Rome-based Rebibbia prison, sharing his 16.20 sqm cell with five other prisoners, each of which had a 2.70 sqm area available. Later on, he was moved to another cell, shared with four other people, each of which had a 3.40 sqm area available. During his period of detention, Sulejmanovic had been locked in his cell every day for eighteen hours and thirty minutes, and he had only one hour available to have his meals. That meant that he could leave his cell for 4 hours and 30 minutes a day. He had also asked twice to work during his detention, but in vain, until October 20, 2003, when he was granted an early release.

In that sentence, the ECtHR preliminarily reminds that art. 3 ECHR enshrines one of the fundamental values of all democratic societies, and it requires the State to guarantee that: prison conditions are compatible with the respect of human dignity; the execution of the sentence does not subject the prisoner to discomfort or to a level of suffering greater than the deprivation of personal freedom, and; given the practical requirements of incarceration, the health and well-being of prisoners are adequately guaranteed. For the purposes of these evaluations, the ECtHR used the criteria of the *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (CPT)<sup>168</sup> as its benchmark, and ruled that 7 sqm should be the minimum area suggested for a prison cell<sup>169</sup> (2nd General Report on the CPT's activities CPT/

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167 ECtHR, Judgment of 16 July 2009, *Sulejmanovic v. Italy*, Application no. 22635/03.

168 The CPT was set up in 1989 under the auspices of the Council of Europe's "European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment". The CPT therefore complements the judicial work of the European Court of Human Rights (ECHR), as regards Article 3 of the ECHR (prohibition of torture). The CPT visits any places within the State's Party jurisdiction where persons are deprived of their liberty by a public authority with a view to examine the treatment of such persons and make any recommendations it considers necessary.

169 ECtHR case of *Sulejmanovic v. Italy*, ECtHR, Judgment of 16 July 2009, *Sulejmanovic v. Italy*, quot.

Inf(92)3)<sup>170</sup>. The ECtHR then explained that it was impossible to measure the actual space that had to be made available to prisoners<sup>171</sup> pursuant to the ECHR, since such space depended on several factors, such as the duration of the deprivation of personal freedom, the possibility to walk outdoors, as well as the mental and physical conditions of prisoners<sup>172</sup>. In this case, however, in analogy with other precedents<sup>173</sup>, the ECHR declared that overcrowding was so clear that it could be regarded, by itself, as a violation of art. 3 ECHR.

The ECtHR reiterated that art. 3 ECHR enshrined the fundamental value of the absolute prohibition of torture and punishment or inhuman or degrading treatment, regardless of the prisoner's behaviour; it required the State to guarantee that prisoners were kept in conditions of respect for human dignity, that the execution of the sentence did not subject the prisoner to discomfort or to a level of suffering greater than the deprivation of personal freedom, and that, given the practical requirements of incarceration, the health and well-being of prisoners were adequately guaranteed.

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170 2nd General Report on the CPT's activities covering the period 1 January to 31 December 1991, Strasbourg, 13 April 1992, in <https://rm.coe.int/1680696a3f>.

171 With regard to the characteristics of the premises where prisoners are required to stay, the Court referred to art. 6 of Law no. 354 of 26 July 1975 (for the Italian national legislation), while at the international level, the Court made express reference to art. 18 of the European Prison Rules, adopted by Recommendation rec(2006)2 of the Committee of Ministers of the Council of Europe.

172 See cases: ECtHR *Muršić v. Croatia*, Grand Chambre, Judgment of 20 October 2016, Application no. 7334/13, § 103; ECtHR, Judgment of 28 February 2012, *Samaras and Others v. Greece*, Application no. 11463/09, § 57; ECtHR, Judgment of 10 March 2015, *Varga and Others v. Hungary*, Application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, § 76, in which the Court has stressed that under Article 3 it cannot determine, once and for all, a specific number of square metres that should be allocated to a detainee in order to comply with the Convention. Indeed, the Court has considered that a number of other relevant factors, such as the duration of detention, the possibilities for outdoor exercise and the physical and mental condition of the detainee, play an important part in deciding whether the detention conditions satisfied the provisions of Article 3.

173 See cases: ECtHR, Judgment of 26 October 2000, *Kudla v. Poland*, Application no. 30210/96, §§ 92-94; ECtHR, Judgment of 28 February 2008, *Saadi v. Italy*, Application no. 37201/06, § 127; ECtHR, Judgment of 6 April 2000, *Labita v. Italy*, Application no. 26772/95, § 119.

The text of the sentence also included a reference to specific cases wherein, by providing a personal space smaller than 3 sqm to each prisoner, the lack of personal space was so evident to justify, by itself, a breach of art. 3 ECHR<sup>174</sup>; in other cases, wherein a 3 to 4 sqm space was made available to each prisoner, the infringement of art. 3 ECHR was reported since the lack of personal space was also combined with the lack of proper ventilation and lighting<sup>175</sup>.

Accordingly, with respect to this case and considering the first period between 30 November 2002 and April 2003, when the applicant had been granted a 2.70 sqm available space, the ECtHR declared that a clear lack of personal space was, by itself, an inhuman or degrading treatment. That situation clearly caused discomfort to the applicant, who was forced to live in a very limited space, much smaller than the minimum desirable space set by the CPT. As far as the following period was concerned, when the applicant could enjoy a 3.24 sqm available space for a cell shared with four other prisoners, a 4.05 sqm space for a cell shared with four other prisoners, and a 5.40 sqm for a cell shared with four other prisoners.

With regard to the chance to leave his cell, the applicant had almost nine hours available to go to the backyard and socialize with other prisoners. Therefore, although regrettably the applicant had not been authorized to work inside the prison, the ECtHR thought that the overall condition, by itself, was not a violation of art. 3 ECHR. Therefore, for this second period, the prisoner's treatment did not exceed the minimum level

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174 See cases, all against Russia: ECtHR, Judgment of 12 March 2009, *Aleksandr Makarov v. Russia*, Application no. 15217/07, § 93; ECtHR Judgment of 6 December 2007, *Lind v. Russia*, Application no. 25664/05, § 59; ECtHR, Judgment of 21 June 2007, *Kantyreva v. Russia*, Application no. 37213/02, §§ 50-51; ECtHR, Judgment of 29 March 2007, *Andreï Frolov v. Russia*, Application no. 205/02, §§ 47-49; ECtHR, Judgment of 16 June 2005, *Labzov v. Russie*, Application no. 62208/00, § 44 and ECtHR, Judgment of 20 January 2005, *Mayzit v. Russia*, Application no. 63378/00, § 40.

175 ECtHR, Judgment of 9 October 2008, *Moisseiev v. Russia*, Application no. 62936/00; ECtHR, Judgment of 18 October 2007, *Babouchkine v. Russia*, Application no. 67253/01, § 44 and ECtHR, Judgment of 19 April 2001, *Peers v. Grecia*, Application no. 28524/95, §§ 70-72.

of severity required to be reported as contrary to conventional treatments.

Italy was sentenced to pay the applicant € 1,000 for moral damages under art. 41 ECHR, reading “*if the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party*”. According to the ECtHR, the degrading conditions wherein the prisoner had been kept for a relatively long period of time and due to the sudden overcrowding of prisons, were not likely to necessarily or possibly result in his psychological and physical impairment, or harm his integrity; however, they were considered clearly well beyond the standards recommended by the CPT regarding cell space available to prisoners. In these particular circumstances, the inhumanity of the situation was proven by the fact that the State had not proved to have adopted all additional compensating measures to alleviate those extremely harsh conditions.

From 2009 to 2013, nothing or little appeared to have changed.

The fundamental difference between the two judgments lies in the fact that the *Torreggiani case*<sup>176</sup> was a so-called *pilot judgment*<sup>177</sup> and it showed not only a clear violation of one of the fundamental rights laid down in the ECHR, but also the inevitable “binding” force that seeks to ensure the enforcement of the decisions made by the ECtHR, in compliance with art. 46 ECHR. Another peculiarity is that those were the first rulings against Italy due to a violation of

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176 ECtHR, Pilot Judgment of 8 January 2013, *Torreggiani and Others v. Italy*, Applications nos. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 e 37818/10. In doctrine, see F. VIGANÓ, *Sentenza pilota della Corte EDU sul sovraffollamento delle carceri italiane: il nostro Paese chiamato all'adozione di rimedi strutturali entro il termine di un anno*, in <http://www.penalecontemporaneo.it>, 9 January 2013.

177 The ECtHR pilot judgment procedure was developed as a technique to identify the structural problems underlying repetitive cases against many countries and imposing an obligation on States to address those problems. Where the Court receives several applications that share a root cause, it can select one or more for priority treatment under the pilot procedure. In a pilot judgment, the Court's task is not only to decide whether a violation of the European Convention on Human Rights occurred in the specific case but also to identify the systemic problem and to give the Government clear indications of the type of remedial measures needed to resolve it.

art. 3 ECHR, related to the overcrowding of prisons. Until then, those kinds of violations had been reported against other countries, against which the ECtHR had already issued pilot sentences<sup>178</sup> concerning the overcrowding of prisons.

On 8 January 2013, the ECtHR ruled against Italy in the *Torregiani* case for a violation of art. 3 ECHR. Also, that time, the applicants complained about the lack of living space inside their cells, further reduced by the presence of furniture, being two people sharing a 9 sqm cell. In addition, the applicants reported serious problems in the distribution of hot water in the Busto Arsizio and Piacenza prisons, and they complained that the lack of hot water had resulted in showers being available three times a week, for a long period of time. Moreover, those prisoners in Piacenza complained that the heavy metal bars mounted on their windows prevented air and daylight to enter the cells. Also, in that circumstance, the ECtHR started from the consideration that, usually, measures involving the deprivation of personal freedom cause some disadvantages for prisoners.

However, it reminded that incarceration does not deprive prisoners of the rights enshrined in the ECHR. On the contrary, in some cases, a prisoner may need more protection because of the vulnerability of his or her situation and his or her being under the full responsibility of the State. In this context, art. 3 ECHR requires the authorities to guarantee that a person is detained in conditions which are compatible with the respect of human dignity, that the execution of the punitive measure does not subject the prisoner to discomfort or to a level of suffering greater than incarceration, and that, given the practical requirements of incarceration, the health and well-being of prisoners were adequately guaranteed.

With regard to prison conditions, the ECHR took into account their cumulative effects, as well as the specific allegations of the applicant. In particular, how long the prisoner was kept in the conditions reported is an important factor to consider. When prison overcrowding reaches a certain level, the lack

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178 ECtHR, Pilot Judgment of 10 January 2012, *Ananyev and Others v. Russia*, Applications nos. 42525/07 e 60800/08 and ECtHR Judgment of 22 October 2009, *Orchowski v. Poland*, Application no. 17885/04.

of space in a prison can be the central element to consider while assessing compliance with art. 3 ECHR provisions. So, when he had to deal with cases of severe overcrowding, the ECtHR held that such overcrowding, by itself, is enough to confirm a violation of art. 3 ECHR. Normally, they are typical cases when the personal space made available to the applicants was smaller than 3 sqm<sup>179</sup>.

On the other hand, when the overcrowding was not as severe as to infringe, by itself, art. 3 ECHR, the ECtHR highlighted the need to evaluate other aspects of the prisoners' conditions. Also, in circumstances when each prisoner had 3 to 4 sqm available, the ECtHR reported a violation of art. 3 when the lack of space was followed by poor ventilation, natural light, access to reserved restrooms, limited access to outdoor time or non-compliance with basic health rules or poor-quality heating<sup>180</sup>. The ECtHR, that is aware of the vulnerability of prisoners who are under the exclusive control of State agents, highlights that the procedure laid down by the ECHR does not strictly apply the principle according to which the burden of proof rests upon the applicant. This is because sometimes the Government, that is, the defendant, is the only one to have access to information that can confirm or rebut the applicant's allegations. As a result, the fact that the Government's defence denies the information provided by the applicant does not mean that the Court will dismiss the applicant's allegations as unproven, in the

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179 ECtHR, Judgment of 7 April 2005, *Karalevičius v. Lithuania*, Application no. 53254/99; ECtHR, Judgment of 21 June 2007, *Kantyrev v. Russia*, Application no. 37213/02 §§ 50-51; ECtHR, Judgment of 29 March 2007, *Andreï Frolov v. Russia*, Application no. 205/02, §§ 47-49; ECtHR, Judgment of 4 May 2006, *Kadikis v. Latvia*, Application no. 62393/00, § 55; ECtHR, Judgment of 16 July 2009, *Sulejmanovic v. Italy*, Application no. 22635/03, § 43.

180 ECtHR, Judgment of 9 October 2008, *Moisseiev v. Russia*, Application no. 62936/00; ECtHR, Judgment of 12 June 2008, *Vlassov v. Russia*, Application no. 78146/01, § 84; ECtHR, Judgment of 18 October 2007, *Babouchkine v. Russia*, Application no. 67253/01, § 44; ECtHR, Judgment of 17 January 2012, *Harkins e Edwards v. the United Kingdom*, Application nos. 9146/07 and 32650/07, § 26; ECtHR, Judgment of 1 March 2007, *Belevitskiy v. Russia*, Application no. 72967/01, §§ 73-79; ECtHR, Judgment of 2 June 2005, *Novoselov v. Russia*, Application no. 66460/01, §§ 32, 40-43.

absence of any relevant document or explanation from the Government.

The peculiarity of the *Torreggiani* judgment was that the ECtHR had interpreted the information on the prisoners' conditions during incarceration, as reported by the applicants, in a wide perspective, by considering the general conditions of Italian prisons during that time (that has not changed much to date). The ECtHR noted that the appeals and the reports focusing on the conditions of the Italian prison system showed that the prisons where the applicants were incarcerated were severely overcrowded. However, those conditions were not discussed by the Italian Government before the ECtHR.

The ECtHR noted that “*overcrowding in Italian prisons did not affect the applicants alone. It observed that the structural nature of the problem was confirmed by the fact that several hundred applications were pending before the Court raising the issue of the compatibility of the conditions of detention in a number of Italian prisons with Article 3 of the Convention*”. ECtHR's negative opinion was based on the existence of a systemic problem resulting from a chronic malfunctioning of the Italian prison system, which had affected and could affect several people in the future.

The remedies implemented by the Italian Government in the aftermath of the ECtHR's ruling, were much appreciated by the Committee of Ministers of the Council of Europe that, while monitoring the execution of the *Torreggiani* judgment, and in particular at the end of the Meeting no. 1201 of 5 June 2014, welcomed the launch of a prior appeal mechanism by the deadline set by the pilot judgment and the establishment of a claim for damages. Having reviewed the situation, the Committee of Ministers of the Council of Europe considered that Italy had fully complied with the *Torreggiani* judgment and closed the case on 8 March 2016<sup>181</sup>. However, the judgments expressed by the ECtHR in the *Cestaro v. Italy*<sup>182</sup> and *Bartesaghi Gallo and Others v. Italy*

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181 Resolution CM/ResDH(2016)28 - Execution of the judgments of the European Court of Human Rights - Two cases against Italy (*Torreggiani* and *Sulejmanovic*), in <https://www.juridice.ro/wp-content/uploads/2017/01/7.pdf>.

182 ECtHR, Judgment of 07 April 2015, *Cestaro v. Italy*, Application no. 6884/11.

<sup>183</sup> and the latest *Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (CPT) from 12 to 22 March 2019<sup>184</sup>, confirm that, despite efforts recently made by Italy, overcrowding is still a problem and cases of abuse are still reported. For this reason, it is fair to say that, to date, the process of adaptation to conventional standards is still far from be over. Pursuant to Italian Law no.110/2017, Italy followed up the final invitation of the ECtHR to adopt appropriate and effective measures to fight any conducts in violation of art. 3 ECHR, introducing the crime of torture in art. 613bis and art. 613ter of the Italian Criminal Code. It certainly was an important first step on the path suggested by the ECtHR to fill a gap of the Italian law that was no longer acceptable.

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<sup>183</sup> ECtHR Judgment of 22 June 2017, *Bartesaghi Gallo and Others v. Italy*, Application nos. 12131/13 and 43390/13.

<sup>184</sup> <https://rm.coe.int/16809986b4>.



## Conclusions

The previous paragraphs show that, in the context of a multilevel and multi-centric European system of protection of fundamental rights, there is a wide range of improvements which may be implemented to extend and/or redefine the procedural and legal guarantees. The permeability between national and European laws (that is, *latu sensu*, EU regulations and the ECHR provisions) and the continuous cross-referencing between national, supranational and international sources which affect and supplement each other, have fostered a need for cooperation between different Courts which are entrusted with the protection of fundamental rights in the European Legal Space.

The Area of Freedom, Security and Justice has a great potential for development. It is no coincidence that this sector is currently one of the most dynamic areas of integration and promotion of fundamental rights protection. Several new pieces of legislation are being published and, thanks to the uniform interpretation (especially CFREU) provided the Court of Justice, the new legal framework is enhancing the approximation of European national laws, based on the principles of mutual trust and sincere cooperation. The developments in the jurisprudence of the Luxembourg Court have certainly been favoured by the “dialogue” with the ECtHR, characterized primarily by the common reference to “human dignity” as a legal principle informing the human rights protection system as a whole. The dialogue proved to be particularly intensive on the protection of *in vinculis* persons, with specific reference to the role of European Courts in the monitoring of any violation of human dignity due to (severe) prison overcrowding, the latter being an issue common to several EU countries.

This publication highlights the importance of the ECtHR *acquis* to foster the consolidation of the *European Area of Justice*, mainly based on judicial cooperation in criminal matters and it underscores the practical implications and obligations for EU policy-makers who wish to harmonize measures to approximate the law of EU Member State and achieve a higher level of mu-

tual trust between national authorities. Failure to comply with such obligations would result in the measures being declared unlawful. In this regard, the central role and non-derogation of the rights described in the ECHR, and the minimum standards of protection established by the Strasbourg Court, have already been highlighted. Such standards affect the Union through art. 6 § 3 TEU and art. 52 and 53 of the Charter of Fundamental Rights, being parameters used for the interpretation and application of the Charter. The analysis of those provisions shows that, although the CFREU plays a major role in the European system of protection of fundamental rights, the rules of compliance mentioned above, the rights guaranteed by the ECHR as “general principles of the EU law”, even after the Treaty of Lisbon, assign to the ECHR (animated by the Strasbourg jurisprudence) a paramount importance within a system that is only “partially” integrated by the protection of human rights.

Considering the mutual permeability of the two systems (EU and ECtHR) and their rights, the consolidation of the European Area of Freedom, Security and Justice is still *in progress* and it has persuaded EU Member States to endorse the so-called *European constitutional heritage*, based on the principles and values protected by the Charter of Fundamental Rights and the ECHR, including primarily the respect for human dignity and the prohibition of inhuman and degrading treatment against prisoners. Even before the publication of the Charter of Fundamental Rights, the European Union had been fairly active in this sector, fostering the principles enshrined in the ECHR, as interpreted by the European Court of Human Rights.

In particular, by reviewing the judgments of European Courts, some important conclusions can be drawn. Firstly, an inhuman and degrading treatment is reported whenever an individual, being deprived of his or her personal freedom, is locked in cell with an available space equal to or smaller than three square meters, regardless of the circumstances that led to detention. An indisputable equivalence may be established between a given fact (a measurable space) and a given effect (the avoidable suffering resulting from detention).

Secondly, an inhuman and degrading treatment is reported whenever, al-

though the space available inside a cell is larger than three square meters, the prisoner's living conditions are particularly severe and punitive; this should consider the duration and the methods of the treatment, the characteristics of the cell (e.g. type of ventilation and natural lighting, heating and access to a reserved toilet), the activities allowed outside the cell, the chance to "socialize" with other prisoners, the cell gate opening time, the physical and psychological effects in relation to gender, age and state of health. In this case, it would be an equivalence between a complex production (particularly punitive living conditions), for which the burden of proof is borne by the State, and a given effect that is incompatible with art. 3 ECHR provisions (inhuman treatment).

Thirdly, when a prisoner is subject to an inhuman treatment, an infringement of a human right is reported and such infringement results in a non-material damage that must be compensated by the State.

So far, Italy has not been fully capable of ensuring the execution of a penalty preventing any kind of human suffering not connected to the deprivation of personal freedom. This is the true *punctum dolens* of the whole matter. According to common experience, on the one hand, no "humanizing" process could ever match the conditions of prison life with the conditions of life out of prison, while keeping the functions of the penalty unchanged; and, on the other hand, the constitutional principle of penalty humanization could never be considered "synonymous with humane treatment". Since the very idea of "sense of humanity" is ever-changing, this principle is supplemented by the wider and meaningful respect of a prisoner's individual personality and dignity. Indeed, the full respect the prisoner's individual personality implies the recognition of the citizen's fundamental rights, being legal categories affected by the changing state of well-being of society.

The exercise of the rights recognized to all citizens by art. 2, 3 et seq. of the Italian Constitution, must be compatible with the prisoners' *status detentionis* and the danger posed by the person *in vinculis*. The peculiarity of the ECtHR is that it sets a fixed "quantitative" parameter, that can be measured, and beyond which the detention ends up providing a level of suffering "greater

than incarceration”, resulting in an unacceptable, unjustified and unnecessary (not to mention, useless) impairment of human dignity, and a degradation of his or her rights.

Data suggest that ECtHR jurisprudence and priorities require urgent measures and they should serve as a launchpad to rethink the venues where a penalty must be served. The European Prison Rule no. 6 reads that “*All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty*”, acknowledging the fact that, at one point, the penalty expires and that, one day, prisoners will be free again and that life in prison must be reorganized focusing on this final outcome. Prisoners must be maintained in good physical and mental health to reduce the harmful effect of imprisonment, especially for long-term prisoners, making it possible for them to live a life as similar as possible to a free life, and accustoming them to be free again. Art. 5 of the Italian Prison System provides that prisons must accommodate “a low number of prisoners or internees”, to facilitate the knowledge and management of individual prisoners, while complying with the basic guidelines provided by the law.

The European Prison Rule no. 4 reads that “*prison conditions that infringe prisoners’ human rights are not justified by lack of resources*”. Any violation due to the lack of financial resources, related to the rights of prisoners and internees in terms of living conditions, health care, active life and resocialization, is not an acceptable justification for the infringement of such rights. The necessary resources must be found. Any failure to comply with the law may not be justified by the lack the resources to implement it.

The prison system is responsible of the people entrusted to it, their lives, their health, their rehabilitation. Therefore, saying that the protection of fundamental rights of prisoners is guaranteed, at a theoretical level, is not enough. Evidence of the respect of those rights in practice is of topical importance. Indeed, prison overcrowding cannot be solved by just increasing the space available to each prisoner. As highlighted by the doctrine, a greater engagement and, therefore, a greater number of prison operators, such as prison officers,

educators, psychologists, etc., and the availability of working experiences in prison are necessary.

Today's challenge is to make sure that rights in prison are upgraded to the category of "new declared and actual rights", making sure that organizational requirements and a demand for greater security do not end up downgrading them to "unheeded rights".



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