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THE CRIME OF TORTURE. THE FUTURE NORMATIVE SCENARIO: AN OCCASION NOT TO BE MISSED.

The European Court of Human Rights has convicted Italy for the inadequacy of laws concerning the torture and, as a result, Italian Parliament is now trying to make up for the lost time.

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On 7th April, the European Court of Human Rights ^[1] has convicted Italy, since **Italian criminal legislation** is not suitable and lacks dissuasive contents to prevent efficiently the reiteration of violence on the part of police force.

More precisely, we are dealing with the **Affaire Cestaro and Italy**, concerning the events that took place during the G8 ^[2] in Genoa in Pertini-Diaz ^[3]. These events, of course, fire up the debate on the crime of torture and, consequently, Europe is wondering if Italian government is able to fill this gap.

Unfortunately, Italy is well-known for everlasting delay in adaptation to international commitments and in this occasion the conviction from Europe, due to the unacceptable lack of a norm that outlaws the torture ^[4], is incredible and could have been avoided.

If we consider the juridical doctrine ^[5], Italian Constitution does not consider any other conduct criminally relevant, except the torture, as demonstrated by the **article 3 clause 4** of the Constitution: "Any sort of physical and psychological violence on persons subject to restriction of freedom is punished".

Many years have passed and different governments have alternated, nevertheless none of them was able to fill the gap. In addition, up to now Italy has not taken interest in this constitutional principle but, paradoxically, has approved several **conventions on human rights**, among which the **Universal Declaration of Human Rights (UDHR)**, the **International Covenant on Civil and Political Rights (ICCPR)**, the **United Nations Convention against Torture (CAT)** and the **European Convention for the Prevention of Torture (CPT)**.

After the ratification of **CAT** in 1984, Italy should have recognized and adopted the principles of Convention, introducing a regulation, that still does not exist. Since they were **self-executing rules**, the Italian government found it not necessary to introduce a specific crime (crime ad hoc); furthermore, the **article 1** of the Italian **Penal Code** was thought to consider all aspects, even acts of **violence committed by public officials in the execution of their duties** ^[6], such as: blows (art.581 p.c.), injuries (art. 582 p.c.), kidnapping (art. 605 p.c.), illegal detention (art. 606 p.c.), restriction of personal freedom (art. 607p.c.), threats (art. 612 p.c.) and state of inability due to violent acts (art. 613 p.c.).

The Italian legislation considers these crimes as common offences, with respect to the norms of international criminal law, according to which they are offences of public office. ^[7] Furthermore, the Italian laws do not recognize the psychological violence in these crimes, whereas the international right states that: "The torture occurs in any acts of

violence, with which anyone inflicts intentionally pain or physical and psychological suffering on someone else." [8]

Besides, we should remember that it is not only the *ius cogens* of international law - also called **peremptory norm** - that makes the Italian Parliament introduce a law concerning the crime of torture, but a constitutional norm as well: more precisely, we refer to the content of the article 25 clause 2 of Italian Constitution: "One cannot be punished for a crime, that is not recognized by law" (in latin: "Nulla poena sine praevia lege poenali").

Since 1984, several bills have been proposed but have never been approved. The current legislature, the eighth, is examining different bills. I would cite the debate, started on 22nd April 2013, in the Italian Senate, that contributed to the publication of a law text, unanimously approved on 5th March 2014. After the endorsement by the Chamber of Deputies, this text is set to be approved by the Senate. It is a bill, divided into seven articles, which aims to the introduction of the crime of torture; nevertheless, in contrast with the proposal made by the promoter (the senator Luigi Manconi), the crime is considered as a common offence.

First of all, a new type of **offence** is introduced in the criminal code; as a matter of fact, the **article 613bis** states: "Anyone who, with violence and threats or violating his/her protection duties, intentionally causes pain or suffering to someone under his/her protection or care for sexual, ethnic, political, religious reasons or with the purpose of getting information and declarations or with the purpose of inflicting a punishment, is sentenced at least to 4 to a maximum of 10 years of prison."

Secondly, the law considers an aggravating factor in case the crime is committed by "an **official** or a commissioned officer who abuses of his/her power or violates his/her duties." In this case, those who commit the crime are sentenced to a minimum of **5 years** to a maximum of **12 years of prison**. Moreover, the sentence increases, if the torture causes personal damage to the victim; whereas in case of death of the victim, the offender is sentenced to **30 years of prison**; lastly, if the **death is caused intentionally**, the aggressor is punished to the **life sentence**.

Thirdly, the crime of "Instigation to commit torture" is introduced: a crime that was considered in the previous article 613 ter [9] that punishes - to at least 1 year to 6 years of prison - officials and commissioned officers, who instigate someone else to commit torture.

Furthermore, the statute barred is redoubled and it has been decided that the declarations obtained through torture are not useable; moreover, it has been established the prohibition

to expel non-European citizens who had undergone torture in their countries and, lastly, diplomats who are under investigation or have been sentenced for the crime of torture in their countries cannot avail themselves of the immunity.

Looking forward further progress, we quote the famous sentence written by Cesare Beccaria ^[10]:

"What judgment should we give about secret and private tortures,

That human tyranny commits on kings and innocents?"

^[1] It is the European Court of Human Rights, that is not an institution of European Union and should not be confused with the Court of Justice of the EU, seated in Luxembourg.

^[2]G8: the Group of eight leading advanced economies of the world: United States of America, Japan, Germany, France, Italy, Canada, Russian and United Kingdom.

^[3] This school was made available as accommodation for demonstrators. On the night between 20th and 21st July 2001, the police burst into the school and, instead of conducting a search, committed torture. As a matter of fact, the claimant, referring to the violation of the article 3 of the European Convention of Human Rights, claims to be victim of torture and persecution.

^[4] According to a research conducted by Amnesty International, at least 27 methods of torture have been used, among which: electric shocks, cigarette burns, rape, rape threats, humiliation, forced abortion, forced sterilization and ingestion of urine and of chemical substances.

^[5] A. Pugiotto - *Repressione totale della tortura e Costituzione: anatomia di un reato che non c'è* - in *Diritto Penale Contemporaneo*, 2014.

^[6] I. Marchi - *Luci ed ombre del nuovo Disegno di Legge per l'introduzione del Delitto di Tortura nell'Ordinamento Italiano: un'altra occasione persa?* - in *Diritto Penale Contemporaneo*, 2014.

[7] A common offence can be committed by anyone, whereas offences of public office are committed by a certain class of offenders only.

[8] A. Pugiotto.

[9] The introduction of this crime does not exclude the application of common offence, considered in the article 414 of Italian Criminal Code, "Instigation to crime".

[10] C. Beccaria - Dei Delitti e delle Pene.
