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# Recent developments in national Jurisdictions: Italy

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On 4 July 2017 law n. 103/2017 was approved by the Italian Parliament. With the enforcement of this law, after two and a half years of parliamentary activities, the Orlando reform (from the name of the Minister of Justice, Mr. Andrea Orlando, who has been the promoter of this law) was brought to the finish line.

The reform has been strongly criticised by the Union of Italian criminal lawyers associations, which has approved several strikes and abstentions from judicial work in all criminal courts. According to the Union, the reform, even if it was initially addressed to strengthen the defendant's rights and the protection of the right to a reasonable length of proceedings, went in the opposite direction, shaming the dignity of the defendant and violating fundamental conventional and constitutional principles. Also the Italian National Association of Judges has highly disapproved the reform, considering that it will slow down criminal proceedings and provoke a huge damage for all citizens and the entire criminal judicial system, which will be completely blocked and may collapse.

Apparently, the Orlando reform is not able to satisfy anyone, neither lawyers, nor judges.

In this context, it seems useful to speak about the modifications of the Italian criminal system that could give several causes of reflection, also from a comparative and supranational point of view.

## I. Statute of limitations

As is well known, the statute limiting the time for the sentencing of crimes has been the subject of critics from the supranational courts.

In the case of Alikaj and others versus Italy (n. 47357/08) and in the case of Cestaro versus Italy (n. 6884/11), Italy was condemned by the European Court of Human Rights (ECtHR) for a violation – respectively – of Article 2 ("*Right to life*") and 3 ("*Prohibition of torture*") of the European Convention of Human Rights (ECHR). The Court applied the same grounds in the two judgments of 2011 and 2015, according to which protection against torture and inhumane and degrading treatment requires a national order to ensure, with every means available, an adequate reaction to the facts which undermine those fundamental rights, both on a legal and judicial level. Moreover, in 2015 the European Court of Justice (ECJ) ruled in the case of Taricco (C-105/14), which was based on the same premise: the Member States, in order to counter illegal activities affecting essential interests – in the case of EU, the financial interest of the European Union – must provide for effective deterrent measures. Therefore the national court must not apply the provisions of national law (in that case, the legislation concerning the statute of limitations which may give rise to impunity) the effect of which would be to prevent the Member State concerned from fulfilling its obligations.

From this point of view, the Italian legislator had a duty to reform the statute of limitations, in order to respond to the request of the supranational courts. However, the statute of limitations is destined to be in hot water, pressed by two different needs. On the one hand, there is the aforementioned issue of impunity: more than 100,000 offences every year are not heard in Italy due to the extinction of the time for sentencing. This is equal to one in every ten crimes. On the other hand, the Italian system has to face the unacceptable length of criminal proceedings, with regard to which the statute of limitations seems to be the only effective remedy for the safeguard of the defendant.

To adopt a suitable metaphor by Italian scholars, we can say that the statute of limitations is an emergency medication for Italian criminal proceedings, affected by a chronic slowness. A medication, however, capable of having an effect on symptoms and not on the causes, and that risks having substantial side effects.

The preceding discipline of the statute of limitations connected the time limit to the maximum punishment for each offense (except for the less serious offenses, for which in any case a minimum time was indicated). That system was completed by the setting up of a series of acts, which gave rise to an interruptive effect, and therefore the need for the term to begin again (until a certain cap).

Following this strict linkage between the time limit and the maximum punishment for each crime, every modification of the punishment has a reflection on the time limit. This is a strong restriction for all the reforms that are going towards a lowering of maximum punishments (which would be inevitably followed by a reduction of the time limit). That model leaves in the shadows, and not discussed, to what extent (and after how much time since the committed offence) is right to fix the time of extinction. An explicit quantification would be more exposed to criticism, and it could be qualified as being too strict or too weak.

Bearing this in mind, the Orlando reform followed the goal of postponing the time limit and thus moving beyond the time of the extinction in three different directions.

Firstly, the postponement of the time limit with regard to certain offenses committed against minors. The start of the statute of limitations is imposed by the Italian legislation on the date of the eighteenth year of the victim or from the receipt of the *notitia criminis*, if the criminal action was brought before that date.

Secondly, the postponement of the statute of limitations, with regard to certain offenses against the public administration. The legislator has taken note of the latest statistics, which in fact point out that offenses against public administration hold the highest risk of extinction due to the statute of limitations.

Lastly, the postponement of the time limitation for all offenses, obtained through the introduction of new cases - in some ways, revolutionary - of suspension during the criminal proceedings. This is undoubtedly the most influential and novel intervention on the discipline of the statute of limitations. In particular, the period is suspended from the expiry of the time-limit for filing the reasoning of the judgment, until the sentence is pronounced in the judgment defining the subsequent grade of judgment - both in appeal and in front of the Italian Supreme Court - for a period not exceeding one year and six months.

The introduction of this suspension model for a definite time is most interesting. This is a rational model for determining the length of the statute of limitations, because it considers a certain period of time, plus some periods of suspension that come to cover a reasonable length of time (considered by the legislator in an abstract evaluation). Compared with the model of interrupting acts, from which the time limit starts again, the suspension for a given period has a more rational structure: the time required to sentence is thus moved forward to a measure that should not exceed a reasonable period of time.

The main issue of the Orlando reform is to match the previous model of interrupting acts and the new model of suspension, causing criminal proceedings to be too long.

Why change only the emergency medication, and not go to the cause, *i.e.* on the length of the Italian criminal proceedings? The answer is easy: healing the illness requires serious systematic reforms and sizeable investments (from improving human resources in the justice system, to a enhancing organizational structures while accelerating the digitalization process).

The modification of just the statute of limitations, resulting in a lengthening of criminal proceedings, will satisfy only the conventional request by ECtHR and ECJ for the offences to be sentenced, but will not meet the needs of the reasonable length of proceedings, and therefore safeguarding of individual.

## II. The length of Preliminary Investigations

The legislator, under the Orlando reform, does not modify one of the most relevant causes of the extinction of a crime due to the statute of limitations, *i.e.* the length of preliminary investigations.

The Italian system allows the Public Prosecutor to carry on investigations for a limited period of time (6 months or 1 year, depending on the crime committed), which can be extended for another one year period. The reform attempts to limit the cases in which the Public Prosecutor, after the end of that period (that could last, considering the extensions, two years), does not take any decision, even if he/she no longer has the possibility to continue any investigations.

The legislator cannot force the Public Prosecutor, which is considered an independent body, to take a decision, when the time provided by the law has ended. The reform formalizes the possibility for the Public Prosecutor for "thinking time", in order to reach a final decision (between dropping the case or proceeding). In a word, the reform legitimizes the practice of the postponement, in the hope of shortening the length of the preliminary investigations. Therefore, the phase of investigations is now divided in two key stages: in the first, the Public Prosecutor gathers evidence; while in the second, he/she reflects on the evidence and reaches a viable outcome.

This gives rise to several doubts if we consider the means provided by the legislator to enforce the new procedure: if the Public Prosecutor does not act upon the conclusion of the "thinking time" period, he/she must dispatch an immediate notice to the General Public Prosecutor within the Court

of Appeal. Therefore, the law now requests to the Public Prosecutor breaching the procedure to make a self-claim, without imposing any sanction or penalty where this is not done.

In effect, the legislator, omitting to provide for a strong and effective tool to shorten the length of the investigations, has not provided any substantial modification to the existing legislation, in order to satisfy the conventional request for a reasonable length of proceedings.

## III. Appeal and renewal of the evidentiary hearing

Italy has been condemned several times for violation of fair process rights, provided by Article 6 ECHR ("*Right to a fair trial*"), for not having allowed the renewal of evidentiary hearing, by the Court of Appeal which overruled a first instance sentence of acquittal. The last case of condemnation of Italy was Lorefice versus Italy (n. 63446/13), which was issued post the Orlando reform, that introduced a modification for this point.

The ECtHR stated that, in a case of judgment of acquittal issued in a first instance proceedings and grounded only or mostly on oral evidence, the Court of Appeal, before overruling the sentence, should proceed with a new examination of all relevant witnesses. Otherwise, the judge will be in violation of Article 6 ECHR, and in particular paragraph 3, letter d) (the right of the defendant "*to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him*"). As a consequence, the ECtHR recognised a violation of the right of fair trial and condemned Italy.

Following the numerous condemnations received by Italy, the Italian Supreme Court, with sentence n. 27620/2016, gave a legitimate interpretation, in line with the ECHR, of the law concerning the renewal only in the extreme case of necessity.

According to Supreme Court, the ECHR requests for a renewal of the evidentiary hearing for all the relevant witnesses involved, in the case in which the Court of Appeal chooses to reform a sentence of acquittal handed down at the first instance proceedings. In a nutshell, the Italian judiciary was already compliant with the conventional guidelines.

In spite of this, the legislator, under the Orlando reform, reformed the aforementioned law, now requesting a renewal in the case of an appeal filed by the Public Prosecutor against a sentence of acquittal, which centres on key witness testimony.

The reform in itself, however, comes across as too stringent, because it requests for a renewal in every case, while according to the ECHR there is no need to renew when there is the existence of safeguards against arbitrary or unreasonable assessment of evidence or establishment of the facts, such as the duty of the judge, in case of overruling, to provide substantial grounds for alternative or diverse evaluation of the witness evidence in question, highlighting or drawing attention to the first instance judge erroneous sentence.

In conclusion, even if we have overstepped the mark in meeting the ECHR demands, we have made significant progress in effectively respecting due process rights, and protecting fair proceedings of appeal to the individual, so that Italy is on track to avoiding being condemned by the conventional court for this peculiar aspect.