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Paula Uematsu Arruda

STRUCTURAL REFORM LITIGATION AT THE ECHR AND THE IACHR: FROM SELF-RESTRAINT TO ACTIVISM AND WHAT IS IN-BETWEEN[*]

ABSTRACT

Il contenzioso sulle riforme strutturali non è un fenomeno esclusivo dei tribunali nazionali. Questo articolo cerca di dimostrare come funziona il contenzioso strutturale nella procedura pilota della CEDU e nelle decisioni sulle misure provvisorie della IACHR sulla violazione dei diritti umani dei detenuti. Ritengo che tra i due poli tradizionalmente utilizzati come parametri per identificare il tipo di controllo giurisdizionale – quello dell'attivismo e quello dell'autocontrollo – ci siano altri tipi di classificazioni. La revisione "manageriale" IACRH e la revisione "sperimentalista" della CEDU analizzate in questo articolo sono esempi che si trovano tra i poli tradizionali.

Structural reform litigation is not an exclusive phenomenon of national Courts. This article seeks to demonstrate how structural litigation works in ECHR pilot procedure and IACHR provisional measures decisions on the violation of the inmates' human rights. I argue that between the two poles traditionally used as parameters to identify the kind of judicial review - the activism and self-restraint pole - there are other types of classifications. IACRH managerial review and ECHR experimentalist review analyzed in this article are examples of reviews that lies in-between the traditional poles.

PAROLE CHIAVE

Corte Europea dei Diritti Umani – Corte Interamericana dei Diritti Umani – Contenzioso sulle riforme strutturali

European Court of Human Rights – Inter-American Court of Human Rights – Structural reform litigation

1. Structural reform litigation involves the judiciary as a central agent in the evaluation of the effectiveness of public policies. In some cases, the judicial power

[*] Saggio sottoposto a revisione secondo il sistema per *peer review*.

modifies the execution of public policies and supervises their application in order to adjust government action to the realization of human rights.

I argue that structural reform litigation is not an exclusive phenomenon of national Courts. Both, Inter-American Court of Human Rights (IACHR) and European Court of Human Rights (ECHR) have developed different procedural forms to deal with structural reform litigation.

I suggest that Courts, when deciding a structural case, can adopt measures that goes through two judicial review poles: from self-restraint to activism. The polarization reflects the tension between democracy and judicial power. In-between these two poles there are other types of judicial review – deferential, conversational, experimentalist, managerial and peremptory as presented by Young[1].

I intend to investigate to what extent the ECHR, in applying the pilot-procedure in *Torreggiani* case and the IACHR through the provisional measures adopted in *Curado Complex* case, empirically express the adoption of those stances. The research findings demonstrate that the first is closer to experimentalist review and the second to managerial review.

The article has five sections. The first introduces the emergence of some key concepts such as structural reform litigation, judicial activism, and judicial self-restraint. The second introduces the discussion about the legitimacy and the capacity of the Courts and presents the typology of judicial review. The third section brings the pilot-judgment procedure delivered by the ECHR in *Torreggiani* case. In the fourth section the IACHR approach about the provisional measures of the Penitentiary *Complex of Curado* case. In the fifth and final section the different types of review adopted by the Courts.

2. Structural reform litigation (structural injunction)[2] emerged in the United States, from judicial activism which marked the performance of the American Judiciary between 1950 and 1970. The US Supreme Court leading case is *Brown v. Board of Education of Topeka*[3] in which the Court held that was unconstitutional admit students to US public schools based on a system of racial segregation. By determining the acceptance of the enrollment of black students in a public school, in which only white students were accepted, the Supreme Court began a broad process of changes in the public education system, giving rise to what was called structural reform. According to Fiss[4] over time structural reforms were broadened to include the police, prisons,

[1] K.G. Young, *A Typology of Economic and Social Rights. Adjudication: Exploring the Catalytic Function*, in *International Journal of Constitutional Law*, 3, 2010, pp. 387-388.

[2] According to Fiss a structural injunction seeks to "effectuate the reform of a social institution". O.M. Fiss, *The Civil Rights Injunction*, Indiana University Press, Bloomington 1978, p. 9.

[3] United States Supreme Court. *Brown v. Board of Education of Topeka*, 347 U.S. 483, May 17, 1954.

[4] O.M. Fiss, *Two models of adjudication*, in R.A. Goldwin, W.A. Schambra (eds.), *How Does the Constitution Secure Rights?*, American Enterprise Institute for Public Policy Research, Washington and London 1985, p. 761.

asylums, institutions for the mentally disabled, public housing aid authorities, and social welfare agencies. In other words, the model of the decision rendered in the case *Brown v. Board of Education of Topeka* expanded and was adopted in other cases, by the United States Judiciary, through its decisions, began to impose broad structural reforms in certain bureaucratic institutions.

Another leading structural case is *Holt v. Sarver*[5], through which the entire prison system of the state of Arkansas, in the United States, was judicially challenged, in demands aimed at the complete reform of the penitentiary system and which served as the basis for other similar demands, launched later, in 1993, against forty other US states.

In the 1980s and 1990s, structural reform litigation spread beyond USA to Colombia, Costa Rica, India, South Africa, Brazil, Argentina, and other countries.

According to Abram Chayes, the structural litigation main features are:[6] a) the petition to the Court is of such a nature that, even if formally filed as an individual claim, it has implications beyond the individual litigant, that is, the complaint is usually about the malfunction or complete omission of a public policy, b) the relief, according to the author is «forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees», c) differently from what happens with the just satisfaction model, in which a case ends with the final judgment, «in structural reform cases, the judgment only signals the end of the adjudication phase and the beginning of the monitoring phase: the Court becomes involved in the long-term supervision, guidance, and assessment of the implementation of the order […] not only does the judiciary order the implementation of a particular policy, it also becomes involved in its execution».[7]

Structural reform litigation has a multiplicity of interests involved because the problems are also multiple, reaching many people that sometimes cannot be measured. The diversity of interests involved tends to expand the possibilities of solution.

The Court decisions tend to be complex, since it escapes from the classic model of monetary reparation, those decisions proposes that the States change the functioning or implementation of a rule or public policy in order to comply with a right provided for in the Convention. That is, the decision aims to overcome a situation of omission of one or more state agents.

Decisions with a polycentric effect are those that can affect an unknown but potentially vast number of stakeholders with multiple social, economic, complex, and unpredictable repercussions. Thus, what is at stake are not mere individual issues, but

[5] U.S. District Court for the Eastern District of Arkansas, June 20, 1969, case *Holt v. Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969).
[6] A. Chayes, *The Role of the Judge in Public Law Litigation*, in *Harvard Law Review*, 7, 1976, pp. 1281-1316.
[7] A. Hunneus, *Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts*, in *Yale Journal of International Law*, 1, 2015, p. 14.

the realization of rights that affect a vast part of the community. Some authors criticize the participation of judges in polycentric decisions, claiming that the judiciary could not and should not participate in highly complex demands whose repercussion goes beyond the parties and the facts in dispute[8].

Authors such as Landau[9] and Garavito[10] suggest that collective disputes or those that have polycentric effects should be judged through structuring decisions (structural injunctions). They recognize that the judiciary could influence the adoption of public policies to guarantee the fulfillment of fundamental rights.

Decisions in which litigation transcends individual and private interest reaching a collective dimension are considered structuring, whose objective is to promote the restructuring of a certain social organization or public policy (structural reform) so that these policies are elaborated in a way that their implementation can be carried out in accordance with fundamental rights. These disputes are complex, as multiple social interests collide, requiring a change in judicial action based on a responsive, repressive model, which takes place a posteriori, after the facts have already occurred, to a resolving and participatory model, which can precede harmful facts and result in the joint construction of adequate legal solutions, involving dialogue between the judiciary and state bureaucracy through the dissemination of human and fundamental rights values in the functioning of institutions and public bodies[11].

Structural decisions would also collaborate to broaden the debate about the quality of democracy. One of the characteristics that provide a quality gain to democracies is deliberation and public debate. This type of decision would contribute to broadening the discussions on fundamental and human rights.

Acting as mediators and promoters of structural reform, judicial bodies would play a role in strengthening democracy. Democracy is not just about the majority rule. Democracy includes a dimension of citizenship that encompasses respect for and promotion of fundamental and human rights.

Two Models of International Rights Adjudication

	Declaratory	**Structural**
Scope of Claim	Facts and parties before Court	Structural situation
Aim of Remedy	Restitutio ad integrum	Reform of structural dysfunction

[8] L. Fuller, *The Forms and Limits of Adjudication*, in *Harvard Law Review*, 2, 1979, pp. 353-409.
[9] D. Landau, *The Reality of Social Rights Enforcement*, in *Harvard International Law Journal*, 1, 2012. pp. 190-247.
[10] C.R. Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights*, in *Latin America. Texas Law Review*, 7, 2011, pp. 1670-1698.
[11] O.M. Fiss, *The forms of justice*, in *Harvard Law Review*, 1, 1979, pp. 1-58.

Method of Enforcement	Political supervision	Judicial supervision

Source: A. Huneeus[12]

Judicial activism also date back to North American case law. Its first phase was conservative like in the Dred Scott v. Sanford (1857) and the Lochner era (1905-1937) when the US Supreme Court contributed to strike down social and labor laws in general. This situation changed in the 50's with the coming of Warren era (1953-1969) and the first years of the Burger era (till 1973). This period produced a series of progressive case law like *Brown v. Board of Education* (1954), *Miranda v. Arizona* (1966), *Richardson v. Frontiero* (1973), *Griswold v. Connecticut* (1965) and *Roe v. Wade* (1973).

The idea of judicial activism is associated with a broader and more intense participation of the Judiciary in the realization of the human and fundamental rights with a stronger interference in the space of action of the elected powers of the states, through the imposition of conduct or abstentions to the public state power, notably in terms of public policies. According to Simon and Sabel public law litigation is a «core instances of destabilization rights» – rights to disentrench an institution that has «systematically failed to meet its obligations and remained immune to traditional forces of political correction».[13]

3. The opposite of activism is judicial self-restraint. Self- restraint Courts are usually that ones in which the judges defer the power to the elected branches supported by the formalism or legalism doctrine, they assume that judges apply the law, they don't make it, in doing so, they are reluctant to declare executive or legislative action unconstitutional[14]. On the other side, an activist Court reflects the extent to which the judiciary overturns the product of democratically elected bodies by assuming that Court's decision can and should go beyond the applicable law.

Supporters of democratic theory argue about the lack of democratic legitimacy of the Judiciary, whose members are not elected by popular vote, to actively act in the design and implementation of public policies. It would be undemocratic for non-elected judges to intervene in exclusively political issues, such as in the choices of other powers in the elaboration, execution, and allocation of public policy resources. For them, the judiciary clearly should not assume a political role[15]. Critics of the judges' active

[12]A. Hunneus, *Reforming*, cit., p. 15.
[13] C.F. Sabel, W.H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, in *Harvard Law Review*, 1, 2004, p. 1.
[14] R.A. Posner, *The Rise and Fall of Judicial Self-Restraint*, in *California Law Review*, 3, 2012, p. 519.
[15] E. Palmer, *Judicial Review, Socio-Economic Rights, and the Human Rights ACT (Human Rights Law in Perspective)*, Irish Academic Press, Ireland, 2009, p. 14 and C.R. Sustein, *Response: From Theory to Practice Order of the Coif Lecture: Response*, in *Arizona State Law Journal*, 2, 1997, p. 329.

participation in political issues consider this action a sign of abandoning the field of laws when entering the field of politics in which negotiations and bargains prevail[16]

According to Waldron,[17] one of the greatest exponents of democratic theory, justiciability means giving judges the power to decide definitively, that is, to have the last word on a given matter without this decision being reversed by acts of other powers. For the followers of this theory, giving judges the power to decide on certain issues would entail a profound disrespect for democratic and representative values. The exercise of judicial review always means an affront to the will of the majority, represented by the Parliament. Promoting judicial self-restraint, judges should deny the justiciability of political issues[18].

It is also questioned the lack of capacity of the Courts that would not be prepared to carry out detailed designs and planning of public policies. Judges would not have sufficient technical knowledge and information to plan public policy actions, however, they would be able to identify the absence of a public policy or the presence of a governmental violation or omission.

Another issue related to the legitimacy and capacity of the judiciary is the discussion on the allocation of resources, since the judicialization of a positive obligation would also lead to a decision on the allocation of state resources destined to its fulfillment. According to some scholars, whenever a decision involves public spending, it should be taken by the political power, which is competent, according to the principle of separation of powers, to decide on budgetary issues. If the judiciary assumed this role, it would be invading the sphere of competence of another power[19]. Therefore, the judiciary would not be the most adequate to discuss and decide issues of public policies that can prioritize objectives, distribute resources, and balance divergent interests.[20]

For another group of scholars represented by Ely[21] democracy, conceived as majority rule, sometimes excludes the minority from the political process. The judiciary would play a fundamental role in correcting this inequality, acting as an institution that strengthens the democratic process, revealing a counter-majoritarian role of the judiciary in preserving the rights of minorities, promoting an institutional channel for claims of these groups that usually are excluded from the political

[16] K. Roach, *The Challenges of Crafting Remedies for Violations of Socio-Economic Rights*, in M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge University Press, Cambridge 2009, pp. 46-58.
[17] J. Waldron, *Law and Disagreement*, Oxford University Press, Oxford 1999.
[18] J.J.G. Canothilho, *Direito Constitucional e Teoria da Constituição*, III ed., Almedina, Coimbra 2000, p. 1224.
[19] Y. Shany, *Stuck in a Moment in Time: The International Justiciability of Economic, Social and Cultural Rights*, in D. Barak-Erez, M.A. Gross (eds.), *Exploring Social Rights – between theory and practice*, Hart Publishing, Oxford 2007, p. 78.
[20] A. Chayes, *The Role*, cit., p. 1283.
[21] J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review*, Harvard University Press, Cambridge 1980, p. 103.

process.[22] The Courts would therefore play a non-competitive role, but a strengthening of democracy, allowing some minority voices to be incorporated in the elaboration of public policies.[23]

The discussion about the capacity and legitimacy of the Courts to decide on an issue related to positive rights is at the heart of the classification adopted by Tushnet between strong and weak judicial review. According to the author, the Courts adopt a weak model of judicialization when they act with deference to the other powers, that is, they leave the last word to the democratically elected powers even when what is at stake is a matter of fundamental and human rights interpretation. Courts would prefer to adopt a weak model because it entails a low cost of legitimacy and capacity. On the other hand, a strong model is adopted when the Courts detail what the administration must do, identifying goals, establishing specific deadlines for their fulfillment.[24]

Courts, when deciding a structural case, can adopt measures that are between two poles of judicial review – from self-restraint to activism – which reflects the tension between democracy and fundamental rights adjudication. In-between these two poles there are other kinds of judicial review. In this sense, the typology elaborated by Katharine G. Young[25] of judicial review is very useful for comparative studies. The author presents a typology of review with five stances: a) Deferential review – Courts give credence to the legal and epistemic authority of the elected branches, b) Conversational review – promotes dialogue between the actors responsible for implementing public policies, c) Experimentalist review – transform the judicial process into a 'locus of deliberation' promoting the dialogue between the political powers and the population affected by the state inertia. The Court will be prepared to order remedies that may take on a limited structural form promoting a destabilization of public institutions,[26] d) Managerial review – «suggests a heightened review of government action and a structured and/or mandatory form of relief that requires continuing, ground-level, day-to-day control», e) Peremptory review – involves the rigorous scrutiny of government legislation or policy. Once an infringement is found, the remedy may be for the Court to overturn the legislation or policy.

This study adopts this typology to investigate to what extent the ECHR, applying the pilot-procedure in *Torreggiani* case and the IACHR through the provisional measures adopted in the *Curado Complex* case empirically express the adoption of those stances.

[22]A.P. Grinover et al, *Avaliação da prestação jurisdicional coletiva e individual a partir da judicialização da saúde*, CEBEPEJ e Centro de Pesquisa Jurídica Aplicada da Escola de Direito de São Paulo da Fundação Getúlio Vargas, São Paulo 2014, p. 16.
[23] M.M. Taylor, *O judiciário e as políticas públicas no Brasil*, in *Dados*, 2, 2007, pp. 229-257.
[24] M. Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, Princeton University Press, Princeton 2009, p. 248.
[25] K.G. Young, *A Typology*, cit., p. 2.
[26] A. Hunneus, *Reforming*, cit., p. 15.

4. IACHR and ECHR have developed different procedural forms to deal with structural reform litigation. In the following chapters, I analyze the methods used by the Courts through the observation of *Torreggiani* (ECHR) and *Complex of Curado* (IACHR) cases.

Structural reform litigation goes beyond the classic declaratory and individual litigation model, nominated by the Court as «just satisfaction»[27] which is predominant in the judgments of the ECHR. It consists in a party involved in an actual or possible legal matter ask to the Court to conclusively rule on and affirm the rights, duties, or obligations of one or more parties. If the ECHR finds that there has been a violation of the Convention or the Protocols 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».[28] The purpose of the Court's award under Article 41 of the Convention in respect of damage is to compensate the applicant for the actual harmful consequences of a violation. «It may cover pecuniary damage; non-pecuniary damage; and costs and expenses»[29]. Depending on the specific circumstances of the case, the Court may consider it appropriate to make an aggregate award for pecuniary and non-pecuniary damage. The Court concerns itself only with the individual victims by assuming monetary compensation. This means that the Court focuses on the application of a law to a particular case rather than reviewing its content.

The declaratory model of human rights litigation nonetheless was based on and shared many features of the traditional civil litigation model. According to Abram Chayes the main features of this litigation model are a) A bipolar process characterized by the existence of two poles, based on the idea that «the winner takes all», b) The litigation is retrospective. The controversy revolves around an identified series of past events, c) The law and the remedy are interdependent. The reaching of reparation follows, in some measure, the logically from the substantive violation, under the general theory that the plaintiff will obtain a compensation based on the damage caused by the wrongful actions of the defendant, granting the actor the money that he/she would have had if he/she had not incurred in such illicit, paying the value of the damage caused, d) The impact of the sentence is restricted to the parties. If the plaintiff wins, usually there will be the payment of a sum of money. Only occasionally, there will be the return of a thing or the performance of a certain act. If the defendant wins, the damage remains as they were before the lawsuit. In any case, the issuance of the sentence concludes the judicial activity, e) The process is initiated and controlled by

[27] The term includes equitable relief as well as monetary compensation.
[28] European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 1950.
[29] European Court of Human Rights. *Practice Directions. Just satisfaction claims. Rules of Court* – 3 June 2022. https://www.echr.coe.int/documents/pd_satisfaction_claims_eng.pdf.

the parties. The judge is a neutral arbitrator of such interactions, which decides legal issues only if these are appropriately raised by one of the parties.[30]

According to Landau[31] individual actions are preferable by the Courts due to their low cost of capacity and legitimacy, compared to collective actions that have a high cost. Individual litigation prevents the Courts from having to deal with complex issues, such as those involving collective litigation.

With the close of the Cold War, European Court also came to feel the limits of the declaratory model. This situation was mainly due to the grew of the Council of Europe System in order to include the post-communist states. The Court's jurisdiction grows from twenty-three to over forty states in a few years. By the 2000s, the Court's docket was deluged with cases, threatening the Council of Europe System's viability. Many of the cases, moreover, were repetitive or clone cases.

This situation clearly pointed to the crisis of the declaratory model since, on the one hand, states complied with the monetary relief demanded in the operative section of the judgment, but on the other hand, they failed to fix the underlying state law or practice that gave rise to the violation in the first place. This situation contributed to the emergence of numerous repetitive cases since the states did not seek to solve their structural problems.

In 2004, the Court adopted the pilot-judgment procedure to address structural «dysfunction affecting the protection of the Convention right in question in the national legal order»[32]. This procedure «intended to help the national authorities to eliminate the systemic or structural problem highlighted by the Court as giving rise to repetitive cases»[33], which derive from the same structural problem in one of the Contracting Parties and force the Court to repeatedly apply its case law to an overwhelming number of almost identical situations.[34]

The European Court of Human rights adopt the following steps: a) chooses one model case, b) freeze similar cases, c) issues complex remedial orders demanding that the state restructure the institutions creating the repeat cases, d) takes on a greater role monitoring compliance.

How does the supervision process work?[35]

[30] A. Chayes, *The Role of the Judge in Public Law Litigation*, in *Harvard Law Review*, 7, 1976, pp. 1281-1316.
[31] D. Landau, *The Reality*, cit., pp. 190-247.
[32] European Court of Human Rights, June 19, 2006, App. No. 35014/97, *Hutten-Czapska v. Poland*.
[33] European Court of Human Rights. *The Pilot-Judgment Procedure.2009.* https://www.echr.coe.int/documents/pilot_judgment_procedure_eng.pdf.
[34] Council of Europe, *Recommendation Rec (2004)6* of the Committee of Ministers to member states on the improvement of domestic remedies, 12 May 2004, 114th Session, Appendix.
[35] Council of Europe. *Department for the Execution of Judgments of the European Court of Human Rights.* https://www.coe.int/en/web/execution/the-supervision-process.

- The measures to be taken are, in principle, identified by the state concerned, under supervision of the Committee of Ministers[36]. The Court can assist the execution process, in particular through the pilot-judgment procedure.
- Once judgments and decisions become final, states indicate to the Committee of Ministers as soon as possible the measures planned and/ or taken in an «action plan». Once all the measures have been taken, an «action report» is submitted. During the supervision process, applicants, NGOs and National Institutions for the promotion and protection of Human Rights can submit communications, in writing.
- The supervision of the adoption and implementation of action plans has followed a new twin-track procedure since January 2011. Most cases follow the standard procedure. An enhanced procedure[37] is used for cases requiring urgent individual measures or revealing important structural problems (pilot-judgments) and for inter-state cases.
- Where necessary, the Committee of Ministers may assist execution in different ways, notably through recommendations set out in decisions and interim resolutions.

Thus, it is the Committee of Ministers duty to enhanced supervision, that is, oversee the measures adopted by states and the fulfillment of their obligations.

However, in pilot procedure this is not an exclusively duty of the Committee. The Court can assist the execution process. Taking on a greater than usual role in supervision through the pilot procedure «the Court is charged with deciding when to open and when to close the pilot procedure, when repetitive cases should be stayed pending a state's implementation to the orders issued by a pilot judgment»; and when, «in the event of the failure of the Contracting State concerned to comply with the operative provisions of a pilot judgment, the Court shall resume its examination of the applications which have been adjourned».[38]

Source: Council of Europe https://www.coe.int/en/web/execution/the-supervision-process

According to Favuzza, the Committee may, anytime transfer the case from enhance to standard supervision when «the developments of the national execution process no longer justify an enhanced supervision».[39]

5. *Torreggiani* case is important because it was selected by the ECHR in 2013, as a model case, from which other cases related to the prison system would be judged.

[36] The Committee of Ministers is the political body from the Council of Europe, composed of the Ministers for Foreign Affairs of the 46 member States of the Council of Europe.
[37] An enhanced procedure is used for cases requiring urgent individual measures or revealing important structural problems (in particular pilot-judgments) and for inter-state cases.
[38] A. Hunneus, *Reforming*, cit., p. 33.
[39] F. Favuzza, *Torreggiani and Prison Overcrowding in Italy*, in *Human Rights Law Review*, 1, 2017, p. 165.

Italy occupies the 37th position in the ranking of countries with the largest prison population[40]. The situation of Italian prisons was considered as a structural problem by the Court who pointed out that «by the fact that several hundred appeals brought against Italy in order to raise a problem of compatibility with article 3 of the Convention of inadequate conditions of detention linked to overcrowding prison in various Italian prisons are currently pending before it. The number of this type of appeals is constantly increasing»[41]. The Court also highlighted that a systemic problem arising from a chronic malfunction of the Italian penitentiary system, which has affected many people and may still interest many others in the future[42].

In 2013 the same situation complained of by the applicants of *Torreggiani* case concerns about 3.500 other applications which were pending before the Court showing that the prison overcrowding in Italy represented an endemic and structural problem that was incompatible with the European Convention on Human Rights.

The main issue in this case was whether the space allocated to each applicant in their cell was small enough to constitute inhuman and degrading treatment breaching the Convention[43]. The prisoners were kept in overpopulated cells which had insufficient ventilation, lighting, and heating.

The Court established that Article 3:

> Places a positive obligation on the authorities which consists in ensuring that every prisoner is detained in conditions compatible with respect for human dignity, that the modalities of execution of the measure do not subject the person concerned to a state of despair or a test of intensity that exceeds the inevitable level of suffering inherent in detention and which, taking into account the needs practices of imprisonment, the health and well-being of the detainee are adequately ensured[44] […] when prison overcrowding reaches a certain level, the lack of space in a prison may be the element central to be taken into account in the conformity assessment of a given situation in Article 3. So, when it is due dealing with cases of severe overcrowding, the Court ruled that such element, alone, is enough to conclude for the violation of Article 3 of the Convention.[45]

The Court concludes that:

«National authorities must immediately prepare a remedy or a combination of remedies that have «preventive and compensatory effects and, in fact, guarantee an effective remedy for violations of the Convention arising from overcrowding in Italian

[40] World Prison Brief. Highest to Lowest - Prison Population Total | World Prison Brief (prisonstudies.org).
[41] European Court of Human Rights, January 8, 2013, Appl. 43517/09, 46882/09, 55400/09 *Torreggiani and Others v. Italy*, para. 89.
[42] European Court of Human Rights, *Torreggiani*, cit., para. 88.
[43] The applicants alleged they were kept in cells with two other inmates, the cells being 9 sq. m in size, thus leaving each applicant with only 3 sq. m of personal space.
[44] European Court of Human Rights, *Torreggiani*, cit., para. 65.
[45] European Court of Human Rights, *Torreggiani*, cit., para. 67, and *Karalevičius v. Lithuania*, 2005.

prisons. These remedies must comply with the principles of the Convention, as mentioned in this judgment, and must be implemented within one year from the date on which this becomes a definitive».[46]

The Court decision gave rise to a wide debate in Italy on the measures that the state should adopted to comply with the judgment of the European Court, among which non-custodial sentences, procedural reforms, derogation of presumptions of dangerousness, reform of the narcotic's law, house detention, probation, electronic control, anticipation of releases, etc[47].

In this way, Italian authorities submitted its first Action Plan in November 2013. Basically, Italy has assumed a commitment to comply with «four lines of action».[48]

1) Legislative actions – «reducing prison entry flows and enabling prisoners to progressively leave the prison system through the adoption of alternative measures accompanying their reintegration in the external community».[49]

2) Managing and organization actions – implementing of an open prison regime for prisoners who are classified as requiring «medium or low security measures»[50].

3) Building actions – build new prisons and renovate the existing ones.

4) Adopt other domestic remedies – preventive remedies which «puts an end to the perpetuation of situations of violation found by the Court, and the compensative remedy for those who suffered a treatment in violation of their fundamental right».[51]

In April 2014 the represents of the Italian Ministry of Justice provided information about the execution of the Plan to the Department of Execution of Judgments of the ECHR.[52]

In June 2014 the Committee of Ministers realized a meeting in which decided to «welcomed the Italian authorities commitment to resolve the problem of prison

[46] European Court of Human Rights, *Torreggiani*, cit., para. 99.

[47] R. Del Coco, L. Marafioti, N. Pisani (a cura di), *Emergenza Carceri. Radici remote e recenti soluzioni normative, Atti del Convegno Teramo, 6 marzo 2014*, Torino 2014.

[48] F. Favuzza, *Torreggiani and Prison*, cit., pp. 160-162.

[49] The Italian state adopted the following legislations: Decreto-legge n. 78 del 1° luglio 2013, Disposizioni urgenti in materia di esecuzione della pena, in *G.U.* n. 153 del 2 luglio 2013, convertito con modificazioni dalla L. n. 94 del 9 agosto 2013, in *G.U.* n. 193 del 19 agosto 2013; Decreto-legge n. 146 del 23 dicembre 2013, Misure urgenti in tema di tutela dei diritti fondamentali dei detenuti e di riduzione controllata della popolazione carceraria, in *G.U.* Serie Generale, n. 300 del 23 dicembre 2013, coordinato con la Legge di conversione n. 10 del 21 febbraio 2014, in *G.U.* Serie Generale, n. 43 del 21 febbraio 2014.

[50] ITALY. Ministry of Justice. Progress of the Action Plan Submitted to the Department for the Execution of Judgments of the ECHR (Judgment *Torreggiani and others v/Italy* 43517/09). https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168004a8be1.

[51] Action Plan Presented by the Italian Government, November 27, 2013, http://www.ristretti.it/commenti/2014/gennaio/pdf5/commissione_palma.pdf.

[52] ITALY. Ministry of Justice. *Progress of the Action Plan Submitted to the Department for the Execution of Judgments of the ECHR* (Judgment *Torreggiani and others v/Italy* 43517/09). https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168004a8be1.

overcrowding in Italy and the significant results achieved in this area, through the various structural measures adopted in order to comply with the judgments in this group, including an important and continuing drop in the prison population, and an increase in living space to at least 3m2 per detainee» and asked to the authorities to provide further information about the adopted domestic remedies in order to evaluate its implementation.[53]

In September 2014 the Italians authorities presented an Updated Action Plan[54] informing that the state has adopted the Decree-Law 26 June 2014, n. 92 providing for two kinds of compensatory remedy available for those people who suffered a detention non-compliant with Article 3 of the Convention: a) «those who are still detained may apply for a reduction of the residual period of detention to be served (one day of reduction every ten days of detention already served in conditions noncompliant with Article 3 of the Convention)», b) «those who have already served their entire sentence in prison, and those who have been detained on remand, may apply for a pecuniary compensation (8 EUR per diem, for each day of detention served in conditions non-compliant with Article 3 of the Convention)».

In December 2014 the Committee of Ministers realized a new meeting in which decided to «welcomed the steps taken by the authorities to rapidly put in place the remedies required, noted with interest the latest statistics provided by the authorities, which continue to show the positive trend previously observed» and invited the Italians authorities to «provide a consolidated action plan/report, and underlined that this consolidated document should include information on the functioning of the remedies in practice; statistics showing a consolidation of the positive trends achieved so far; along with information on all other measures aimed at improving conditions of detention».

The Committee also decided to transfer the cases to the standard procedure.

In January 2016 the Italian authorities again presented to the Committee further information on the functioning in practice of the preventive and compensatory remedies.[55] In March of the same year the Committee of Ministers decided to close the examination of the execution of the *Sulejmanovic* and *Torreggiani* judgments considering being «satisfied itself that all the measures required by Article 46, paragraph 1, had been adopted»,[56] basing its decision not only on the significant results

[53] Committee of Ministers, 1201st meeting, June 5, 2014, *Torreggiani* and *Sulejmanovic* case, https://rm.coe.int/compilation-decisions-2014-2018-en-/168077bad6.

[54] ITALY. Ministry of Justice, October 1, 2014, Updated Action Plan, https://rm.coe.int/09000016804ae1a2.

[55] Italy. Ministry of Justice, Communication from the authorities concerning the case of *Torreggiani and others* against Italy (Application No. 43517/09). https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805ac90a.

[56] Committee of Ministers, *Resolution CM/ResDH (2016)28*. Execution of the judgments of the European Court of Human Rights. Two cases against Italy.2016. https://hudoc.echr.coe.int/eng?i=001-161696.

achieved by Italy but also on the government's commitment to continue its efforts in order to find a lasting solution to overcrowding.

The case *Stella and others v. Italy*[57] from 2014, therefore, after the *Torreggiani* case, again brought to the Court a complaint about overcrowding in prisons in Italy.

The Court decided not to admit the case on the grounds that following the *Torreggiani* case. The Court also recognized that the Italian state:

> Had enacted a number of legislative measures aimed at resolving the structural problem of overcrowding in prisons and, in parallel, had reformed the law to allow detained persons to complain to a judicial authority about the material conditions of detention and had also introduced a compensatory remedy providing for damages to be paid to persons who had been subjected to detention contrary to the Convention […] the respondent State's domestic authorities had thus complied with the principles established in the Court's case-law in this area, and with the findings set out in the pilot judgment under Article 46 of the Convention […] the applicants were required to use the new remedy introduced into Italian legislation, in order to obtain acknowledgment of the violation and, where appropriate, adequate compensation. With regard to those applicants who might still be detained in poor conditions, they were also to submit a complaint to the judge responsible for the execution of sentences, with a view to obtaining an immediate improvement of their living conditions in prison […] as regards the applicants who could still be detained in poor conditions, the Court considers that they must also, in accordance with Article 35 § 1 of the Convention, refer the matter to the judge responsible for the execution of prison sentences.[58]

Parliamentary Assembly of the Council of Europe, in its inform named «Impact of the European Convention on Human Rights in States Parties: selected examples», points out that the measures adopted by Italian government[59] following *Torreggiani* case illustrates how the protection of human rights and fundamental freedoms has been strengthened at the domestic level thanks to the Convention and the Strasbourg Court's case law[60].

Italy has adopted a range of measures to remedy a structural and systemic problem relating to overcrowding in prisons in order to comply with the Court's pilot judgment *Torreggiani*. Legislative reforms were introduced to combat overcrowding, and a compensatory remedy providing for damage was established which the Strasbourg Court recognized as effective in two inadmissibility decisions issued on 16 September 2014, *Stella and Others v. Italy* and *Rexhepi and Others v. Italy*.

[57] European Court of Human Rights. *Stella and others v. Italy*, 2014. https://hudoc.echr.coe.int/eng?i=001-146873.
[58] European Court of Human Rights. *Stella and others*, cit., para. 67.
[59] Decrees Nos 146/2013 and 92/2014.
[60] Council of Europe Parliamentary Assembly, January 8, 2016, *Impact of the European Convention on Human Rights in States Parties: selected examples*, AS/Jur/Inf (2016)04, at 21.

Despite the ECHR decision and all the measures adopted by the Italian authorities, the Italian´s prisons seams to still be overcrowded and problematic.

In the beginning of 2020, the Italian figure was in fact the second worst in the EU, with about 120 inmates for every 100 places available. A share negatively exceeded only by Cyprus (134.6 out of 100)[61].

Given the incompatibility between a situation of overcrowding and the policies to contain the spread of the virus, this situation led many European countries to adopt a mix of measures like reduce the number of detainees among the less serious crimes, the suspension of interviews and external entry of people with whom the detainees carried out work, educational, training, and recreational activities.

As a result of those measures, the prison occupancy rate dropped rapidly, passing from 120 inmates for every 100 places detected in February 2020 to 114 in the following month, and then further falling below 110, reaching 106,9 in April 2020. In April 2022 the overcrowding rate was 107,7. [62] Those measures unfortunately did not have a wide systemic scope but were limited to the pandemic situation.

According to Eurostat, the highest overcrowding rates in 2020 were observed in Greece (111.8), Romania (111.4), Belgium (111.0), Slovenia (109.2) and Italy (106.8) in 5th place [63].

The information published by World Prison Brief shows that Italy occupies the 36th place in the world ranking of prison population with 55 637 prisoners (2022).[64]

6. Provisional measures are dictated by the Inter-American Court in cases of extreme gravity and urgency, and when it is necessary to avoid irreparable damage to persons. On many occasions these provisional measures can save the life of a person or a collective when there is a real threat to human rights.

Article 63.2 of the American Convention on Human Rights provides that the IACHR, «In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission». The provisional measures are also ruled in the article 27 of the Rules of Procedure of the Inter-American Court of Human Rights[65].

[61] Council of Europe Annual Penal Statistics, 1st January 2020. https://wp.unil.ch/space/space-i/prison-stock-on-1-january/prison-stock-on-1st-january-2020.

[62] Dates from Openpolis. More information can be found at: https://www.openpolis.it/la-condizione-nelle-carceri-dopo-lemergenza-covid.

[63] Eurostat. Prison occupancy statistics. https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Prison_occupancy_statistics#countries_experienced_overcrowded_cells_in_2020.

[64] World Prison Brief Italy | World Prison Brief (prisonstudies.org).

[65] See https://www.corteidh.or.cr/sitios/reglamento/nov_2009_ing.pdf.

The Court, in the cases under its analysis, may act ex officio or at the instigation of the victims or representatives. The victim has a procedural right to apply directly to the Court for the appropriate provisional measures. In cases not yet submitted to its consideration, the Court can only act at the request of the Commission.

The State must comply with the provisional measures and periodically inform the Court. The IACHR will include in its annual report to the General Assembly a list of the provisional measures that it has ordered during the reporting period and, when such measures have not been properly implemented, it will make the recommendations it deems pertinent.

As main features of the provisional measures I can highlight that
• The judges have a directly involvement in the supervision process.
• The Court gives a special importance for the participation of the parties in the dialogue toward compliance.

According to the data published by World Prison Brief in 2021, Brazil has the third largest prison population in the world with 835 643 persons deprived of liberty. This situation allows for the perpetuation of a series of human rights violations of the persons deprived of their liberty, of the professionals who interact with them, as well as of family members and human rights defenders who claim for justice.

Precisely because of the complexity and fragmentation of action between the involved bodies (federal government, federal-states, and municipal actors), the possible institutional response demands the adoption of a public policy. The obligation to adopt a comprehensive public penitentiary policy stem from art. 1(1) of the American Convention on Human Rights.

Curado Penitentiary Complex, located in the federal state of Pernambuco, Brazil, consists of three prisons: Presídio ASP Marcelo Francisco de Araújo (PAMFA), Presídio Juiz Antônio Luiz Lins de Barros (PJALLB) e Presídio Frei Damião de Bozzano (PFDB).

The situation of serious risk inside the Curado Complex, was reported to IACHR at the request of the Inter-American Commission which pointed to the high rate of violent deaths, degrading treatment resulting from overcrowding and poor prison conditions, as well as of reports by prisoners of torture and sexual violence committed by prison staff.

The Court adopted six specific resolutions on provisional measures.[66] Below I highlight the main points of these resolutions.

May 2014 /October 2015 resolutions**:** In May 2014 and October 2015 resolutions the Court established that it was essential that the State adopt short-term measures to:

a) develop and implement an emergency plan regarding medical care in Curado Complex for inmates with contagious diseases, and to take measures to prevent the spread of diseases, b) prepare and implement an emergency plan to reduce the situation of overcrowding, c) eliminate the presence of weapons of any type within the Complex, d) ensure the conditions of security and respect for the life and personal integrity of all inmates, employees, and visitors of the Curado Complex, e) eliminate the practice of humiliating revisions that affect the intimidation and dignity of visitors, f) address the infrastructure and vulnerable groups. Similarly, the State was requested to provide information on the provisional measures adopted in compliance with the decision.

November 2015 resolution: In the resolution of November 2015, the Court addressed that Brazil should also adopt all possible measures to guarantee protection to the representative of the applicants, Ms. Wilma Melo.

November 2016 resolution: In the November 2016 resolution the Court remembered that their judges visited the Complex of Curado in June 2016. Noting that many efforts were carried out by the State as part of the implementation of measures and activities aimed at improving the situation of the beneficiaries of the provisional measures, particularly in relation to health care, the realization of preventive campaigns and educational institutions, the monitoring of sexual transmission diseases, and the effort to make medical controls and hospitalizations feasible, among others. The Court urges the State to continue with the development of these activities, although, highlighted many other measures that should also be adopted: a) within the non-extendable period of 90 days the state must present to the Court, a technical diagnosis to determine the causes of the situation of overpopulation and a contingency plan, with concrete measures, to resolve this situation and guarantee the rights to personal integrity and the life of the beneficiaries, b) in addition, as a matter of priority, the State must adopt all the necessary measures to prevent the situation of risk to the rights of life and the integrity of inmates that has persisted since the adoption of the last Court resolution. In particular, the state must: i. informs if the judges responsible for the execution of the sentence carry out periodic visits to the Curado Penitentiary Complex and what is the result of these visits, ii. adopt urgent and sustainable measures to prevent the presence of any type of weapon and prohibited substances and objects inside the Curado Penitentiary Complex in the possession of inmates, iii. initiate procedures for the hiring of public defenders and guards in a sufficient number to

[66] IACHR. Provisional Measures Regarding Brazil Matter of *Penitentiary Complex of Curado*. Resolutions: May of 2014, October 2015, November 2015, November 2016, November 2017, and November 2018.

comply with the proportion established in the national rules and guarantee security and order of this Penitentiary Complex through State officials, iv. adopt specific measures to protect the personal integrity and life of groups in situations of vulnerability, such as inmates with disability and the LGBT population, v. allows monitoring work by the representatives of the beneficiaries and their entry into the Curado Penitentiary Complex without undue or unjustified restrictions.

The Court also requests the implementation of a Technical Diagnosis and Contingency Plan and also, in a period of 90 days, the state should provide the number of prisoners housed in the Curado Penitentiary Complex, distinguishing which are prisoners with conviction by a firm sentence and who remain without a firm sentence, indicating in each case, the crimes for which they were convicted or were indicted and prosecuted, as well as the time that each one is deprived of freedom by condemning.

In March 2017, Brazil has presented to the Court the Technical Diagnosis and Contingency Plan. Thus, the Court highlighted the efforts carried out by the state, however noted that the situation of the beneficiaries remained very worrying and required the adoption of others urgent structural changes in the Curado Penitentiary Complex.

November 2017 resolution: In the resolution of November 2017, the IACHR added other measures to be taken:

a) adjusting the conditions of Curado Complex to the international and national norms for the protection of human rights applicable to the matter, b) develop the actions determined in the Contingency Plan to reduce the capacity and the overcrowd, c) investigation and dismantling of criminal structures that facilitate the presence of weapon, objects and prohibited substances in the possession of inmates, d) Complete the procedure for hiring personnel (including public defenders and security guards) and guarantee security and order.

November 2018 resolution: In August 2016 the Brazilian Supreme Court decided that the lack of adequate penal establishment does not authorize the maintenance of the convict in a more severe prison regime. In the resolution from November 2018 the IACHR established that: a) as from the notification of this resolution, no new prisoners should be admitted to the Curado Complex, b) within a period of six months from the present decision, each day of deprivation of liberty served in the Curado Complex shall be doubled for all for all prisoners who are not accused of crimes against life, physical integrity, or sexual crimes acts, c) the State must organize, within four months from the present decision, a criminological team of professionals, especially psychologists and social workers who, in opinions signed by at least three of them, evaluate the prognosis of conduct, based on indicators of aggressiveness of prisoners accused of crimes against life and physical integrity, or of sexual crimes. According to the result achieved in each case, the criminological team, or at least three of its professionals, depending on the prognosis of the conduct to which it has arrived, will advise the convenience or inconvenience of the calculation in double the time of deprivation of liberty or,

alternatively, its reduction, d) the state must provide the criminological team with the number of professionals and the necessary infrastructure so that the work can be carried out in up to 8 months, e) request the State to continue to inform the IACHR every three months from the date of notification of this resolution, on the implementation of the provisional measures adopted pursuant to this decision, and on their effects, f) continue evaluating, over the course of a year, the relevance of a delegation of the Inter-American Court carrying out a new investigation *in situ* at the Curado Penitentiary Complex and asking for the opinion of experts on the matter in order to verify the implementation of the provisional measures, after the consent of the Federative Republic of Brazil, g) order that the State immediately bring this resolution to the attention of the bodies responsible for monitoring the present provisional measures, as well as the Federal Supreme Court and the National Council of Justice.

From the resolutions adopted by the Court, I consider the option of the IACRH to conduct extremely detailed measures, guiding the steps to be followed by the State.

7. As I observed in the previous section, the IACHR issues more detailed remedial orders in the contrast to the ECHR orders that opened space for the adoption of measures chosen by the Italian authorities[67].

The IACHR undertakes supervision on its own. The judges meet with the parties and conduct personal visits to the prison. On the other side, the ECHR shares the supervision role with the Committee of Ministers.

In the IACHR the participation of the stakeholder is highly considered. By contrast, the ECHR pays little attention to the stakeholder. The proceeding is only between the state and the Court. The Committee of Ministers participate only in the supervision phase.

In *Torreggiani* case decision, the Court did not specify in detail what measures should be taken by Italy, respecting the discretion (margin of appreciation) of the Italian state to adopt the measures it deems necessary to comply with the Convention.

The Committee of Ministers also did not interfere or suggest which measures the state should adopt. Italy is free to choose any measures it deemed necessary to solve the problem of overcrowding in prisons.

After Italy presented the adopted measures, the Committee of Ministers considered the case closed in 2016[68]. All cases that were subsequently brought before the Court on overcrowding were considered inadmissible and closed by the Court.

In contrast, the Inter-American Court specified the measures to be adopted by Brazil. In addition, with each measure effectively adopted by the country, the Court evaluated their results, proposing improvements and advances. Therefore, the state and their prison situation are being constantly evaluated with no end prediction.

[67] A. Hunneus, *Reforming*, cit., p. 37.
[68] Committee of Ministers Resolution CM/ResDH (2016)28.

Unlike what happens in the ECHR the IACHR did not suspend similar cases and did not choose one case as representative of the others. All cases concerning prisons that are subject to provisional measures are analyzed separately by the Inter-American Court.

The table below contemplates the fundamental differences between the decisions of the Courts.

	IACHR	**ECHR**
Remedial orders	The Court issues very detailed remedial orders to the state.	The state has a limited/ conditioned discretion to adopt the measures it deems necessary.
Supervision of the compliance with the adopted measures	The Court undertakes supervision of its own orders. The judges meet with the parties and conduct personal visits to the prison.	The Court shares the supervision role with the Committee of Ministers.
Stakeholders' participation	The participation of the stakeholder is highly considered.	The proceeding is only between the state, the Court, and the Committee of Ministers (supervision phase) [69]
Representative case	All cases are analyzed separately	The Court chooses a representative case that will be adopted as a model for the other cases (pilot-judgment procedure)

8. On the one hand, I conclude that ECHR *Torreggiani* case decision is close to a model of experimentalist review. Firstly, because the Court gives a strong interpretation to the article 3 (prohibition of torture) of the European Convention on Human Rights by establishing that it carries a positive dimension, recognizing that it «places a positive obligation on the authorities which consists in ensuring that every prisoner is detained in conditions compatible with respect for human dignity»[70].

Secondly, the ECHR gives to the Italian state a conditioned/limited discretion in choosing the measures to be adopted, also imposes a deadline (one year) for the state implement the remedies. The Court makes clear that Italian authorities must «immediately prepare a remedy or a combination of remedies that have preventive and compensatory effects and, in fact, guarantee an effective remedy for violations of the Convention arising from overcrowding in Italian prisons. These remedies must be implemented within one year from the date on which this becomes a definitive».[71]

[69] The member states not party to the case can participate emphasizing the interactions between the Court, the Committee of Ministers, and the state.
[70] European Court of Human Rights, *Torreggiani*, cit., para. 69.
[71] European Court of Human Rights, *Torreggiani*, cit., para. 70.

In this sense, I can say that the discretion of the Italian state in choosing the measures to be adopted is, therefore, conditioned, limited since the Court: a) explicitly says what purpose and effects the measures chosen by the state should achieve, b) sets a deadline for the adoption of the measures. Therefore, the Italian authorities, «previously immune from political scrutiny are placed in a position of justifying their strategies and goals».[72]

It is also important to remember that the Committee of Ministers plays a significative role in the Court experimentalist review, acting as a political actor who dialogues with the Court and state authorities. In this regard, the Committee also established recommendations inviting states to «encourage prosecutors and judges to make use of alternative measures to detention wherever possible, and to devise their penal policies with a view to reducing recourse to imprisonment, in order, among other objectives, to tackle the problem of the growth in the prison population».[73]

On the other hand, in *Curado Complex* case, the IACHR issued very detailed remedies orders to Brazil. The Court judges take by its own the supervision of the measures adopted, making in loco visits to Curado Complex and conducting meetings with the parties. Therefore, I may say that the Court adopted a managerial review through an «structured and/or mandatory form of relief, which requires a continuing, ground-level, day-to-day control […] detailed remedies are ordered and subject to ongoing supervision by the Court».[74]

The same characteristics of managerial judicial review can find out at in *Petite v. Governor*, a U.S. case from 1972 also related to inmates' fundamental rights violation where the judge of the case engaged herself in a directly dialogue with the parties, calling them into her chambers and telling them to find a joint solution in a pre-set time. Unable to obtain an agreement and dissatisfied with continued unsafe and unsanitary conditions Judged Breaux dictated, in detail, the measures that should be adopted by the public power to solve the problems within the prison establishment. Resnik[75] recognized the great judicial discretion in the case where «judges become enmeshed in extended relations with institutions […] they are at the center; they are personally involved in the implementation of their decrees», characteristics that the author classified as managerial judges.

The effectiveness of the pilot procedure and the provisional measures for the resolution of the several inmates' fundamental rights violation is not the object of the present work. However, I cannot avoid mentioning some achievements and unchanged situations.

[72] Italy. Ministry of Justice, Communication from the authorities concerning the case of *Torreggiani and others* against Italy (Application No. 43517/09). https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805ac90a.
[73] European Court of Human Rights, January 2013, Information Note on the Court's case-law No. 159.
[74] K.G. Young, *A Typology*, cit., pp. 23-24.
[75] J. Resnik, *Managerial Judges*, in *Harvard Law Review*, 1982, p. 387.

Italy	Brazil
• The Italian Ministry of Justice instituted three special Committees on penitentiary issues. • Legislative measures: Italy adopted Law Decree No. 146/2013 and Law Decree No. 92/2014. • After Torreggiani's judgment, Italy provided for increased the use of alternative measures to detention by modifying the Criminal Code and the Code of Criminal Procedure. • Italy also introduced preventive and compensatory remedies for violations of prisoners' human rights. • Regarding to the increased number of immigrants detained, Italy adopted some instruments allowing foreigners to serve sentence in their country of origin. • Despite the drop in the number of prisoners, Italy still occupies the 5th place in the European ranking of prison occupancy (prison occupancy rate 2019-2020) .[76] • Reduce the length of time in criminal Court proceedings. • Measures taken to reduce the percentage of detainees in pre-trial detention.	• Reform and build new detention facilities in the State of Pernambuco. • Cooperation agreements between the State and federal governments in order to improve the medical care in prisons, combat alleged acts of torture and mistreatment, improve the management of the prison system as a whole and the security conditions specifically within the Curado Complex. • Permanence of prison overcrowding in the Complex, with special emphasis on the excessive number of pre-trial detainees. • Permanence extreme insecurity of the Complex due to the total lack of control in the entry of weapons. • Despite the Inter-American Court's decision to ban new admissions as a measure to control the prison population, the Complex continued to receive new prisoners. • A resolution[77] adopted by the Court in another case involving the situation of prisons in Brazil, determines that each day of imprisonment must count as two days. This determination is being partially fulfilled for some judges and tribunals.[78] • Local judges report that there was no compliance with the determination for counting twice the deadline for regime progression. • They emphasize that, at the time of the adoption of the provisional measures, there was a mobilization of the actors of the justice system, with a more intense monitoring of the situation. They report on the creation of a Monitoring Forum that involves multiple institutions and civil society, being coordinated by the Federal Public Ministry. • The National Council of Justice (CNJ) gave eight months for the Pernambuco Court of Justice (TJPE) to reduce the number of prisoners in the Curado Prison Complex by 70%. • Increased the use of alternative measures to detention. • Despite the creation of new vacancies for inmates in the state of Pernambuco the deficit of vacancies remains.

[76] EUROSTAT. https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Prison_occupancy_statistics
[77] IACRH. Resolution from 22. Nov.2018. https://www.corteidh.or.cr/docs/medidas/placido_se_03_por.pdf
[78] Tribunal de Justiça do Distrito Federal. https://www.tjdft.jus.br/institucional/imprensa/noticias/2022/abril/turma-nega-pedido-de-contagem-dobrada-da-pena-por-superlotacao.

Despite criticisms about the lack of capacity and legitimacy of the Courts to decide on issues involving public policies or legislative changes I have found that just like in Constitutional Courts, International Human Rights Courts have developed forms of structural reform litigation. Both ECRH and IACHR issued structural remedies and supervised their implementation.

The complexity of the structural litigation (such as the large number of affected people and state institutions involved in the case), led the Courts to adopt a specific procedure to address this new challenge that the traditional model of judicial review (civil litigation) was unable to solve. The ECHR adopted the pilot-judgment procedure and IACHR through the provisional measures.

I also address the typology of judicial review presented by Young, applying this theoretical basis on the IACHR and ECHR decisions on the violation of the inmates' human rights in order to discover if the Court's decision are more closely to a self-restrain or activist model of judicial review.

I found out that, regarding the situation of the violation of the inmate's human rights ECHR choose to take it decision through the pilot-judgment procedure choosing *Torreggiani* as a representative case for the solution of other similar cases. The Court gave a strong interpretation of the article 3 of the European Convention on Human Rights (prohibition of torture) addressing a positive obligation of the state to ensure that all persons who are deprived of their liberty have their dignity respected.

The Court also imposed limitations on the Italian state's discretion to choose measures in order to solve the problem of overcrowding in prisons, established as well deadline for the adoption of the measures weakening the state margin of appreciation.

I consider, in particular, the role played by the Committee of Ministers in the supervision phase promoting dialogue between the Italians authorities, and the Court. I also highlight the fact that the Court shares with the Committee the supervision role.

Therefore, I have classified the *Torreggiani* case decision as being close to the model of experimentalist review.

On the other side, the remedies adopted by IACHR at *Complex of Curado* case are very detailed. The Court issued six resolutions evaluating the measures already taken by the state and adding new measures to be adopted. The remedies have a comprehensive approach: the health conditions of prisoners, the rights of vulnerable people, such as the LGBT+ population, the control of the entry of firearms, the safety of employees, and the problem of overcrowding.

The judges conduct personal visits to the Brazilian prison reporting their impressions about the physical conditions of the prison and the inmates.

Finally, I emphasize that all parties involved in the matter can be heard.

Thus, considering all these characteristics I have classified the provisional measures adopted by the IACRH in *Complex of Curado* case as a model of managerial review.

Therefore, between the two poles traditionally used as parameters to identify the type of judicial review there are other types of classifications. The decisions of International Human Rights Courts analyzed in this article lies in-between of these two poles.