

## THE SPECIAL PRISON REGIME UNDER ARTICLE 41BIS IN ITALY: BETWEEN DETENTION REGIME, ACCESSORY PENALTIES AND PRISONER DEHUMANISATION<sup>1390</sup>

### **O REGIME PRISIONAL ESPECIAL DO ARTIGO 41BIS NA ITÁLIA: ENTRE O REGIME DE DETENÇÃO, AS PENAS ACESSÓRIAS E A DESUMANIZAÇÃO DOS PRESOS.**

**Michele Di Salvo**

Degree in law and specialises in administrative law and ethics. He is research coordinator at Enia, the Italian National Foundation for Artificial Intelligence. He is a member of the Society for Neuroscience, the European Federation of Neuroscience Societies, the International Neuropsychanalysis Society, and the CNS - Cognitive Neuroscience Society - Centre for Mind and Brain, UC Davis - Chief of Board at CrossMedia Labs. E-mail: mik.disalvo@gmail.com

**ABSTRACT:** The proposed article deals in detail with the mechanics of the special prison regime of maximum restriction applied in Italy. This regime is not dissimilar from its counterparts in various prison systems, which may sometimes be more rigid and restrictive in their normative prediction, and at other times more so in their concrete application. If the quality of a democracy is measured by the quality of life in its prisons, to deal with it, especially in regimes of specific fragility of prison life (juvenile prisons, special restriction regimes, psychiatric prisons), is to deal with the civilisation of a country. Psychologists can - and must - do a great deal in this critical and concrete analysis, especially in highlighting the psychologically critical aspects of deprivation regimes. Article 41bis of the Italian Prison Ordinance Law has raised numerous and penetrating constitutionality issues

over the years, almost all of them centred on the substantial conflict of the prison legislation with Article 27 paragraph 3 of the Constitution. In addition to a brief examination of the article in question, we will discuss its application, which poses quite a few critical elements in terms of the dehumanisation of the prisoner and the overall system envisaged.

**KEYWORDS:** prison system; prison population; psychological and psychiatric conditions; ministerial circular; constitutional court.

**RESUMO:** O artigo proposto trata detalhadamente da mecânica do regime prisional especial de máxima restrição aplicado na Itália. Esse regime não é muito diferente de seus equivalentes em vários sistemas prisionais, que às vezes podem ser mais rígidos e restritivos em sua

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previsão normativa, e em outras ocasiões mais em sua aplicação concreta. Se a qualidade de uma democracia é medida pela qualidade de vida em suas prisões, lidar com ela, especialmente em regimes de fragilidade específica da vida prisional (prisões juvenis, regimes especiais de restrição, prisões psiquiátricas), é lidar com a civilização de um país. Os psicólogos podem – e devem – fazer muito nessa análise crítica e concreta, especialmente ao destacar os aspectos psicologicamente críticos dos regimes de privação. O Artigo 41bis da Lei Italiana de Regulamentação Prisional levantou ao longo dos anos inúmeras e penetrantes questões de constitucionalidade, quase todas centradas no conflito substancial da legislação prisional com o Artigo 27, parágrafo 3 da Constituição. Além de um breve exame do artigo em questão, discutiremos sua aplicação, que apresenta vários elementos críticos em termos da desumanização do prisioneiro e do sistema geral previsto.

**PALAVRAS-CHAVE:** sistema prisional; população prisional; condições psicológicas e psiquiátricas; circular ministerial; Tribunal Constitucional.

## INTRODUCTION

The proposed article addresses in detail the mechanics of the special prison regime of maximum restriction applied in Italy.

Such a regime is not dissimilar to its counterparts in various prison systems, which may sometimes be more rigid and restrictive in their

statutory provision, and at other times more so in their application in practice.

Churchill stated that the quality of a democracy is measured by the quality of life in its prisons, a concept in turn echoed by Voltaire.

To deal with them, especially in regimes of specific fragility of prison life (juvenile prisons, special restriction regimes, psychiatric prisons), is to deal with the civilisation of a country.

Often, going into the merits of regulatory provisions is confused as 'political criticism' when we refer to the norm in our country.

Therefore, it is useful to carry out this exercise by dealing with 'another' carceric regime, possibly making the necessary comparisons.

Psychologists can - and must - do a great deal in this critical and concrete analysis, especially in highlighting the psychologically critical aspects of deprivation regimes.

When talking about a standard and a specific country, it is important to contextualise with the description of the reference prison population.

Methodologically, it would be interesting to project the same data country by country and compare the respective standards - in their application in practice - in general prison populations and the most fragile ones in particular.

## 1. THE ROLE OF THE TECHNICIAN (PSYCHOLOGIST AND PSYCHIATRIST) IN THE PRISON SYSTEM

This role of criticism-fine, of an almost pedantic analysis of the single

administrative rule from which a precise overall prison regime derives is even more necessary since more and more the figure of the psychologist (in some respects) and that of the psychiatrist-physician (for others) is entrusted with, and more often than not delegated, a function that is not their own: to decide on the criminal capacity of the person, sometimes to delegate to the judge on his responsibility and guilt, and to identify the conditions of detention; worse when this delegation covers the conditions and requirements of probation, parole, substitute sentences, alternative measures to prison.

In fact, it is good to remember that the interest and position of the psychologist and the psychiatrist are ontologically (it is healthy to be so) in conflict of interest in criminal proceedings: the judge is responsible for judging whether or not conduct contrary to the law is involved; the psychologist and the psychiatrist are responsible for the person's well-being and psycho-physical state.

The two roles may stand side by side, complement and dialogue, but they are neither overlapping nor interchangeable. This is not the case in any system considered. Unless one surrenders, and thus loses, part of one's autonomy and looks at the person 'with the other's eyes and point of view', which can never happen.

Basaglia's international battle (1975) against the institutionalisation

of the psychiatric system is part of a movement that, in the wake of May '68, rethought the relationship between state and citizen, redefining the perimeter and the ownership of rights, and this overall and general rethinking could only find its apex expression in the major forms of institutionalisation in which state power is represented: in schools, prisons and psychiatric institutions. Outside Europe, it could only find even more immediate ground in the battles for civil rights (the United States) and the struggles for decolonisation (Africa).

Basaglia<sup>1391</sup> writes

*We, the champions of the great western civilisation that claims the values of the individual, the spirit and reason, find ourselves weakened and destroyed by a system whose logic survives on our weakness, our acquiescence and the manipulation of this weakness and acquiescence. The absolute values that have always been proposed to us (the pride of our civilisation populated by saints and heroes) have acted - in their unattainable and inhuman perfection - as an instrument of domination through the blame game in those who fail to realise them, and as a training in compromise and the acceptance of one's own impotence in the stubborn ones who try to do so. The*

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<sup>1391</sup> BASAGLIA, F., (1972) Introduction to *La salute mentale in Cina*, by Gregorio Bermann, Einaudi

*distance between absolute and relative, when the value proposed as the only one is absolute, serves as an instrument of subjection, dependence, manipulation; it serves to make every action absolutely relative (hence empty, useless, meaningless) in the eyes of those who act; it serves to make them supinely and uncritically accept the inhuman condition in which they live.*

Even more so today, where advances in diagnostic examinations and recent neuroscience studies seem to offer more scientific criteria on which to base diagnoses, it is essential to clarify the role and position of the psychologist and psychiatrist, to prevent them from de facto taking the place of the criminal judge, by proxy of the latter who, behind an apparent scientific technique, in fact derecognises his own role.

The risk of psychologists and psychiatrists becoming 'part of the administrative apparatus' of repression, in the context in which criminal law is more and more an 'instrument of social policy' than of crime repression, is strong and persistent.

By this we mean - data in hand - that prison, instead of a recovery function after a certain and final sentence [27% of the population is awaiting a final judgement], is in many cases a 'container place' in which to 'solve the social problem' of petty criminals [65% of the total are

imprisoned for crimes against property] often linked to drug addiction [40% of the total]. 31% are foreigners, often in caecere because they do not have a residence permit and have no other stable abode in which to await trial or serve alternative sentences, such as house arrest.

Approximately 40 per cent of the entire prison population ranges from a diagnosis of a serious illness to the use of antidepressant drugs.

Let us see the numbers in detail.

## 2. THE ITALIAN PRISON POPULATION

The Italian penal institutions could accommodate a maximum of just over 51 thousand persons, but more than 3 thousand places are actually not available. On 30 April 2023, there were approximately 56.7 thousand inmates in the prisons, i.e. 9 thousand more than the regulatory capacity, with an average overcrowding rate of 119 per cent.

More than 73 per cent of Italian prisoners are in prison serving a final sentence. Approximately 14 per cent are awaiting trial, almost 7 per cent are waiting for an appeal judgement and more than 4 per cent for the Supreme Court judgement.

In 2020, the number of inmates sentenced to short sentences increased: final sentences of up to one year corresponded to 3.1 per cent of the inmates in 2021 and rose to 3.7 per cent in 2022, while those sentenced to up to three years increased from 19.1 per cent to 20.3 per cent. We are still

talking about lower percentages than in the past.

On the other hand, 6.6 per cent of the prisoners with final sentences of more than 20 years have a sentence of more than 20 years, while those sentenced to life imprisonment are 4.6 per cent, slightly down from 2021, although the number in absolute terms has increased by 46 (from 1,810 to 1,856).

There are 740 prisoners under 41-bis (the so-called 'hard prison'), of whom 728 are men and 12 are women. This figure has been stable for a few years, but has risen compared to twenty years ago, when there were less than 500.

### 3. WHO ARE THE DETAINEES

At the end of 2022, those aged 50 and over accounted for 29 per cent of the prison population compared to 17 per cent ten years ago. Prisoners over 70 years of age also increased, although remaining at a rather low level, from 1 per cent to 2 per cent. The youngest, from 25 years of age and under, dropped from 10 to 6 per cent.

There are 2,480 women in prison, or 4.4 per cent of the prison population, a stable figure over time.

Foreign detainees account for 31.3 per cent of the total, a figure that is decreasing compared to the past both in relation to the number of detainees and to the number of foreigners present in Italy. However, non-Italian detainees are overrepresented among those in pre-trial detention (33.7 per cent) and

among those awaiting trial (35 per cent).

The majority of the detained population is in prison for crimes against property, with a total of 32,050, immediately followed by crimes against the person (24,402) and drug offences (19,338). In fourth place there are 9,302 persons imprisoned for offences against the public administration; in fifth place for mafia association, with 9,068.

31.6 per cent of the inmates are enrolled in a school course, but less than 50 per cent have obtained a promotion. Prison courses are divided into first-level courses (literacy, achievement of the lower secondary school leaving certificate and acquisition of skills for the first two years of high school) and second-level courses (admission to the second two years of high school, admission to the last year of high school and acquisition of a diploma).

A total of 1,114 inmates are enrolled in a degree course, mostly three-year degrees, a figure that is increasing compared to the past. In 2021, 39 degrees were awarded among the inmates.

In 2022, however, the number of working prisoners was 19.8 thousand, 35.2 per cent of those present in penal institutions (this figure also includes those working a few hours per month in rotating shifts). 86.8 per cent work for the prison administration in internal activities that are not very spendable once they leave prison, while only 4.6 per cent of the inmates work for external employers. On the other hand, vocational training is almost

completely absent, which concerns only 4 per cent of the inmates.

#### 4. PSYCHOLOGICAL AND PSYCHIATRIC CONDITIONS

Considering an average prison population of 55.2 thousand, there were 15.2 suicides in prison for every 10 thousand people, while according to the latest ISTAT data for 2019 in Italy, there were 0.71 suicides for every 10 thousand inhabitants. In other words, suicides are 22 times more common in prison than in the general population.

Of the 85 persons who committed suicide, 50 took their own lives in the first six months of detention. Of these, 21 in the first three days, 16 in the first ten days and 10 in the first 24 hours. In 28 cases there had already been a suicide attempt and 68 had been involved in other critical events.

In 2022, there were 9.2 (almost 10 per cent) serious psychiatric diagnoses per 100 prisoners. In addition to the numbers of persons with a medically defined diagnosis, 20 per cent (double the percentage of inmates with a diagnosis) of the inmates were taking mood stabilisers, antipsychotics or antidepressants and as many as 40.3 per cent were taking sedatives or hypnotics.

Against this, psychiatrists' service hours averaged 8.75 per 100 prisoners, psychologists' 18.5 per 100 prisoners. Breaking down the numbers by gender, it turns out that psychological distress is greater among female prisoners than among men. Women with serious psychiatric diagnoses accounted for 12.4 per cent

of those present, compared to 9.2 per cent in the overall survey; women who regularly used psychotropic drugs represented 63.8 per cent of those present.

In 2022, 247 persons, 232 men and 15 women, were housed in the 32 Mental Health Protection Units (prison sections where patients with mental distress are placed) located in 17 penal institutions.

There are 102 disciplinary isolation sections (of which 13 for women). According to the data, the number of disciplinary isolations performed during the year averaged 15 per 100 inmates. The use of solitary confinement differs widely from prison to prison and reaches 313 isolations for every 315 inmates in the Ancona Montacuto prison, 86.5 isolations for every 100 inmates in the Brindisi prison, 80 isolations for every 100 inmates in the Salerno prison. In Ferrara 79.6 episodes of self-harm for every 100 prisoners, in Pisa 67.5. In small prisons the number drops. Suicide attempts average 2.3 per 100 inmates.

In 61.9 per cent of the establishments during 2022, interviews also take place in the afternoon, while in 29.9 per cent this does not happen, obviously creating problems for working relatives and children attending school. In 49.5% of prisons, interviews take place on both Saturdays and Sundays, in 37.1% only on Saturdays and in 6.2% neither on Saturdays nor Sundays.

The possibility of frequently hearing from loved ones on the phone, without being limited to the ten

minutes of conversation per week stipulated in the regulations, poses no security problems and is of fundamental importance in maintaining social ties. It is also a concrete tool to combat the drama of suicides in prison: in a moment of despair it can save a life.

The Dap Circular of 26 September 2022 warmly invited the Proveditori and institute directors to exercise their wide discretion on this matter in authorising the various forms of communication (interviews, video interviews and telephone calls) between detained or interned persons and their socio-family contacts, stating that "it will be their task to exercise this discretion in the context of the absolute necessity that such authorisations be granted in a consciously wide manner (i.e. beyond the ordinary limits established under Articles 37-39 of the Enforcement Regulations)".

At present, in many Italian prisons, there has unfortunately been a return to the discipline that existed before the Covid-19 pandemic. However, the directors of some prisons have taken the opposite decision and are using their discretion to encourage more frequent correspondence between inmates and their families.

## 5. THE PRISON REGIME UNDER ARTICLE 41BIS IN THE CONCRETE OF THE PROVISIONS OF MINISTERIAL CIRCULAR 3676/6126 OF 2017 BETWEEN DETENTION REGIME, ACCESSORY PENALTIES AND

## DEHUMANISATION OF THE DETAINEE.

### 5.1. ARTICLE 41BIS

The mechanism introduced by the Article 41bis prison regime is apparently known to everyone, but we could start by reminding the uninitiated (who often comment on this matter out of hand) that it is not an article of the code, neither criminal nor of criminal procedure, but more properly Article 41bis of the Prison System Act (Law No 354 of 26 July 1975).

The article defines the general criteria for the application of this regime and was introduced by the so-called Gozzini Law, which amended Law 354 of 26 July 1975 in 1986.

Originally, Article 41a consisted of only one paragraph:

*In exceptional cases of riot or other serious emergency situations, the Minister of Justice has the power to suspend in the institution concerned or in part of it the application of the normal rules of treatment of prisoners and internees. The suspension must be justified by the need to restore order and security and shall be for the duration strictly necessary for the achievement of the aforementioned end.*

The rule thus had a preventive purpose in relation to situations of danger exclusively internal to the prison, such as revolt. This rule thus completed the framework outlined by Article 14-bis, which provided for the

so-called 'special surveillance system', an institute applicable to all those prisoners deemed dangerous because of their behaviour inside the prison.

In 1992, after the Capaci massacre, a second paragraph was added to the article by Decree-Law No 306 of 8 June 1992 (so-called *Martelli-Scotti Anti-Mafia Decree*), converted into Law No 356 of 7 August 1992. The text has since been amended several times.

## 6. THE PURPOSE OF THE STANDARD

Under the new provision, in the presence of 'serious reasons of public order and security', the Minister of Justice was allowed to suspend the guarantees and institutes of the prison system, in order to apply 'necessary restrictions' to prisoners convicted, investigated or accused of crimes of mafia-type criminal association, as well as crimes committed through the association or for its benefit.

The legislator's aim was to prevent the passage of orders and communications between criminals in prison and their organisations on the ground. Therefore, in this second hypothesis, the rationale is to prevent risk situations outside prison; in the same article, the legislator has therefore regulated two different cases in terms of content, prerequisites and purpose.

This premise is important to clarify the scope of the rule.

As Virgilia Burlacu and Massimo Bianca have recently well summarised,

*It follows from this assumption that the 41-bis is not an additional punitive measure, but has a purely precautionary ratio, i.e. to prevent a dangerous prisoner from continuing to exercise his power over the outside world even from prison. It is therefore intended to prevent the continuation of criminal activity and to protect the safety of other inmates and prison officers. The assessment of the Minister of Justice is discretionary but limited: in content, by the total or partial suspension of the rules of treatment of inmates; in purpose, by the restoration of order and security in the prison establishment concerned; in time, by the timeframe strictly necessary to achieve the objective of containing the emergency situation; and in form, by the need for the motivation of the measure. The foundation and legitimacy of the special regime have been defined on several occasions by the Constitutional Court, which has outlined the 'perimeter' that defines it, a perimeter determined by the purpose of "containing the dangerousness of individual prisoners, projected also outside the prison, in particular by preventing the links of prisoners belonging to criminal organisations with each other*

and with members of these organisations who are at large" (judgment 97/2020).

## 7. THE INTERVENTIONS OF THE CONSTITUTIONAL COURT

It is worth remembering that the criminal sanction can never be contrary to Article 27(3) of the Constitution: in particular, it must always tend towards the goal of social rehabilitation of the offender.

The function of punishment, in our legal system and in the overall and broader constitutional framework, cannot consist in mere chastisement, nor even in forms of harsh imprisonment aimed at exemplary purposes. Nor can punishment consist in inhuman treatment aimed at 'neutralising' a person by inflicting suffering beyond the deprivation of liberty.

With sentence number 186/2018, the Constitutional Court ruled on the ban on cooking food imposed on detainees in the regime of hard prison and sanctioned by paragraph 2 quater, letter f): this provision was declared unconstitutional because it is in conflict with Articles 3 and 27 of the Constitution. Prohibiting the cooking of food to detainees under the 41 bis regime puts in place an unjustified unequal treatment, being, on the contrary, allowed to cook to other detainees; it has a purely afflictive and vexatious character, contrasting with the re-educative purpose of the sentence and with the prohibition to

inflict punishments contrary to the sense of humanity.

In its judgment no. 97/2020, the Court declared the unlawfulness of paragraph 2c(f) of Article 41 bis insofar as it establishes an absolute ban on exchanging objects between prisoners belonging to the same social group. In this case, too, there is a conflict with Articles 3 and 27(3) of the Constitution.

The Court stated that the provision of a differentiated regime such as that in Article 41 bis of the Prison Ordinance Act meets precise limits and cannot result in a disproportionate compression of prisoners' rights.

The Constitutional Court returned to rule on the subject of 41 bis with sentence number 18/2022, upholding the question of legitimacy raised by the Court of Cassation, and declared the constitutionality of paragraph 2c, letter e) of Article 41 bis to be unconstitutional insofar as it did not exclude correspondence between the detainee and his defence counsel from being subject to censure, as it saw a violation of the right to defence.

## 8. MINISTERIAL CIRCULAR 3676/6126 OF 2 OCTOBER 2017

Beyond the article of law itself, it is of interest here to deal with Ministerial Circular 3676/6126 of 2 October 2017, which in 52 pages deals with the 'Organisation of the special detention circuit provided for in Article 41bis of the Prison Ordinance'.

This is the single reference regulation that lays down the internal prison rules of the detention regime

under consideration, and it is this that is perhaps the most perplexing source of legislation-implementation in practice.

The document describes all the measures that concretise the perimeter of the prisoner's day under this regime.

These include

*Art. 5 "The prisoner/inmate may keep foodstuffs that can be bought at the surplus, provided that they do not exceed the weekly requirement."*

*Art. 6 "The use of pots and pans - to the extent of one pot with a max. diameter of 25 cm, one pot with a max. diameter of 22 cm made of light steel alloy, and a one-cup mocha-type coffee machine - is permitted in the cell from 7 a.m. until collection at 8 p.m. ..."*

*Art. 7 "It is permitted to buy the items for sale in the boarding house larder, as indicated in form 72, ... A summary list of all permitted items is annexed hereto ... The items purchased must correspond to weekly requirements"*

*Given the direct reference to the 'Model 72', it would be interesting to know the preventive-correctional logic of the quantitative criteria among which I freely quote*

*Butter Max 1, Cocoa Max 2, Coffee Max 3, Chamomile Max 5, Capers Max 1, Candies Max 3, Canned meat Max 1, Canned chickpeas Max 1,*

*Chocolate Max 2, Corn-flakes Max 2, Garlic Max 1, Carrots Max 1, Onion Max 3 and so on*  
*Art. 8 "At the boarding house the inmate/inmate may purchase foodstuffs conforming in type to the provisions of the attached table ... the use of personal cookers (gas, until the complete installation in all establishments of electric induction cookers) is permitted only for heating already cooked foodstuffs, as well as for the preparation of hot drinks and foodstuffs that are easy and quick to prepare, including pre-cooked frozen foodstuffs."*

*Art 11.2 "In the walking courtyards it is permitted to carry out physical exercises and to bring only and exclusively the material listed below: - no. 1 sealed bottle of water; - no. 1 packet of paper handkerchiefs; - no. 1 packet of cigarettes; - no. 1 lighter; - no. 1 underwear and a small towel; - no. 1 fitness mat."*

*Art. 11.4 'In the lounge you may only bring: - no. 1 sealed bottle of water; - no. 1 packet of tissues; - no. 1 pen; - no. 1 sheet of paper. ... In the gym you are permitted to bring: - no. 1 sealed bottle of water; - no. 1 vest and a small towel; - no. 1 fitness mat."*

*Art. 11.5 "In the painting room it is possible to make pencil or pastel drawings on sheets/cards and paintings on*

*canvas of the format indicated in the part concerning purchases - model 72.... No more than: no more than 1 pencil, no more than 1 eraser, no more than 2 pencils. no. 1 pencil, no. 1 eraser, no. 1 tempera pencil, no. 1 canvas or drawing board no larger than cm 50×50, no. 3 brushes of various sizes, no. 1 pack of tempera or oil paints no larger than 12 colours or no. 1 pack of watercolour paints no larger than 12 colours or no. 1 pack of coloured pencils no larger than 12 colours, no. 1 packet of non-flammable thinner and/or solvent ... In view of the purpose of the special scheme ... the artefacts in question, once made, will be stored in the storeroom or, if their size permits, the author may be authorised to hang them on the walls of his room ... Prisoners/inmates may only bring a sealed bottle of water and a packet of paper handkerchiefs."*

*Art. 11.6 "The detainee/inmate may use the special library, have access to the loan of the texts kept there, and keep a maximum number of four volumes in the room at a time, for a period not exceeding 40 days for each text."*

*Art. 13 'It is permitted to keep in one's room images and symbols of one's religious denominations, as well as photographs not exceeding 30*

*in number and of a size not exceeding 20×30.'*

*Art 17 "Each detainee/inmate is allowed, subject to the authorisation of the competent judicial authority, to take one photograph during the year. The requesting inmate/inmate may be photographed alone or with his children/grandchildren under the age of 12 ... Photographs must be taken by the institution's own photographer".*

*Art. 18 'It is not permitted to send... greeting cards and photographs in a postal package'.*

*Art. 20 "The prisoner/inmate may receive two parcels per month, not exceeding a total weight of 10 (ten) kilograms... The prisoner/inmate may receive two extraordinary annual parcels containing exclusively clothing, underwear, undergarments, footwear et similia on the occasion of seasonal changes... Ordinary monthly parcels, therefore excluding seasonal parcels, may contain "goods and objects" and therefore also foodstuffs, but only if they are non-perishable, specially packaged in such a way that it is still possible to easily check them inside and that they do not require cooking... It is absolutely forbidden, however, to receive foodstuffs inside seasonal parcels."*

*Art. 23 "With regard to his state of health, the prisoner/inmate, ... may obtain a copy of all or part of the medical records or individual documents on file. ...To this end, he must submit a reasoned request ..."*

## 9. CRITICAL COMMENTARY ON MINISTERIAL CIRCULAR 3676/6126

In all the above-mentioned points, it really remains often incomprehensible 'the meaning' of certain provisions.

Why prevent a prisoner from inserting a greeting card along with a gift parcel, considering that all correspondence - in whatever form, parcel contents included - is subject to censorship and control anyway?

Why can't the prisoner have two small towels in the gymnasium? Or a big one and a small one?

Why just one vest and not two?

Why only one bottle of water?

Why just one photograph per year, and not two or four? Or one with each family member? What is the difference?

What is the rationale behind the size of photographs, drawing board, the maximum number of 12 colours for crayons, the maximum of 'four books'...?

Why - it seems ridiculous to discuss this - garlic and carrot 1 and onion 3?

In reality, there is no rationale in these measures, which appear to imply more 'administrative randomness' than penal weighting: as if to say 'we have to

indicate quantities' and we do so even where it makes no sense.

We could also be much more pedantic in this respect, for example: is toilet paper one pack? How many rolls? Each roll how long? Or just one roll per week? This also when the inmate is menstruating? In this case are the 3 pads three packs or three individual pads? And the packs of how many pads?

## 10. DEHUMANISING PROFILES

However, taken all together, these provisions, with their aseptically administrative tone, beyond the border of sterile bureaucracy, end up - even where not in the intentions of the draftsman of the circular - by creating an overall situation of concrete dehumanisation.

In this sense, it is not the individual phrase, statement, prediction that is more or less constitutional, but it is the overall picture that in fact - and certainly in law - constitutes a deformed, inhuman situation, precisely because it is determined purely bureaucratically.

Nor can one rely on the merely human-individual criterion for a declination of these protocols in a concretely, at least civilised key.

From this point of view, an additional penalty appears to prevail in practice, which not only restricts the individual's personality, already severely limited by 22 hours a day spent alone in a cell, but also creates a situation of objective mental and psychological pathologisation, overall

objectively contrary to the meaning of Article 27 of the Constitution and to the broader aim and purpose of punishment.

Quite a different matter, however, if one does not understand 41 bis as an instrument to 'break definitively' the resistance of the so-called 'diehards' or to induce repentance (whatever this word means in the context of this regime).

In this case and to this end, it is unclear why we should allow exercise in the cell, not limit books to one (if anything, chosen from a very limited pedagogically oriented selection), eliminate drawing and painting, televisions, electric shavers and radios. After all, none of these are 'necessary' goods.

But, going deeper, if this is the true purpose (which cannot be manifest) of the regime under consideration, we should admit that the first effect of dehumanisation is on the *ex ante* predisposition of the regime in concrete terms. But not in the dehumanisation of the prisoner, but in the sense of the dehumanisation of the prison regime, and therefore of us all, who end up - even simply by our *siclenzio-assent* - being accomplices and architects of a process of dehumanisation.

We accept - to use explicit terms - that our society defines 'monsters' to be subjected to additional punishment regimes: we affirm that a legal regime of dehumanisation is legitimate.

In the United States, a judge in Los Angeles denied Italy the extradition of a member of the Gambino mafia family, arguing that the detention

regime set by Article 41 bis of the prison system - to which he would most likely be destined - amounts to a form of torture and violates the relevant UN convention. Federal Judge D. D. Sitgraves blocked the extradition, upholding the appeal of Gambino's defence lawyer, Joseph Sandoval, who argued that it was 'a humanitarian issue', because if the alleged mafioso were subjected to the prison regime established by the Italian 41bis article 'he would be in conditions that would threaten his life'.

This in a country where the death penalty exists, and where the extraordinary regime of Guantanamo is considered "constitutionally legitimate", but to avoid "interference" by the Supreme Courts of individual states or the Federal Supreme Court the special prison for terrorist detainees has been "placed" on "Cuban territory under US military control" in Guantanamo. As if to say: we are aware that this is a non-constitutional prison regime and to avoid 'judicial interference' to restore legality we 'extraterritorialise' the detention of the 'special regime'.

The problem lies here, in the purpose of the punishment, and in this case in the purpose of the special prison regime.

And in reminding us that the first to be dehumanised is not the special regime prisoner, but the jailer, the prison organisation upstream and those who planned and regulated the proceedings. So much so that it is now literature that many of the prisoners at Guantanamo have been diagnosed

with psychotic illnesses and post-traumatic stress disorder.

### 11. A CRITICAL POINT REGARDING THE PURPOSE OF 41BIS

Should one then wish to concretely exclude all communication with the outside world, the formulas for the transmission of documents with lawyers should also be concretely reviewed, and this even without infringing the right of defence - because it seems right to hold the defender to be a person of integrity, but certainly one cannot a priori certify the exclusion of the risk of collusion.

It provides for the same regulation:

*Art. 16.3 "Visual interviews with defence counsel are conducted without a glass partition and have no limits as to duration or frequency."*

*Art. 16.4 "Correspondence relating to judicial and/or procedural acts and documents that the defence counsel wishes to hand over *brevis manu* to the detainee/inmate during face-to-face meetings must be accompanied by a special declaration that it is correspondence for reasons of justice pursuant to Article 103 of the Code of Criminal Procedure and Article 35 of the Code of Criminal Procedure. The number of the criminal proceedings to which the correspondence relates and the confirmation from the*

*Director of the institution that the defendant is duly appointed in the relevant proceedings must be indicated. In the same way, if the prisoner/inmate wishes to hand over the procedural documents to the defence counsel, the rule concerning confidential correspondence for defence purposes will be applied. In such cases, it must be ensured that the documents are not read."*

Neither of the two rules stipulates that documentation should not be annotated - as elsewhere there is an effort to regulate even the slightest and theoretical risk of messages being passed on - and this entails the serious risk that through signs, underlining, highlighting, messages may in fact be circulated and conveyed to the outside world.

But it appears to the writer that this asymmetry lies in this.

It is easy to limit the carrot of the 41bis prisoner to one (strong with the weak) but not so easy to limit the rights of the defence (weak with the strong).

On closer inspection, this strength and weakness no longer reside in either law or constitutional rights, but only in being in and being out: which is not really a discriminating feature of a civilised country.

### REFERENCES

ASS. ANTIGONE (2023) XIX Report on Italian Prisons  
<https://www.antigone.it/upload2/>

- uploads/docs/XIXRapportocartella%20stampa.pdf
- BARLACU, V., BIANCA, M. (2023) 41 bis, relationship with the Constitution and prospects of hard prison in Ntplusdiritto - ilsole24ore
- BASAGLIA, F., (1972) Introduction to *La salute mentale in Cina*, by Gregorio Bermann, Einaudi
- DAP CIRCULAR 26 September 2022
- ITALIAN CONSTITUTIONAL COURT - judgment number 186/2018
- ITALIAN CONSTITUTIONAL COURT - judgment number 97/2020
- ITALIAN CONSTITUTIONAL COURT - judgment number 18/2022
- DECREE-LAW No. 306 of 8 June 1992 (so-called *Martelli-Scotti Anti-Mafia Decree*), converted into Law No. 356 of 7 August 1992.
- DI SALVO, M. (2023) - The ex 41bis prison regime - in Diritto.it
- LA STAMPA (15 October 2007) - 41 bis is a form of torture
- LAW No. 354 of 26 July 1975
- LAW 663/1986 (so-called Gozzini Law)
- MINISTRY OF JUSTICE - Ministerial Circular 3676/6126 of 2/10/2017)