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Review Paper

Life Imprisonment and the Special Prison Regime (art. 41 bis Penitentiary Order) in Italy

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The essay deals with two issues debated in criminal doctrine and jurisprudence in Italy: life imprisonment without review and the special prison regime, institutions united by the fact that in most cases they are applied to people convicted of organised crime offences, in particular mafia crimes. The work studies their historical genesis, their regulation, their apparent purposes and those that in practice these institutions have taken on, also scrutinising the jurisprudence of the Italian Constitutional Court and the European Court of Human Rights. The conclusions highlight the fact that the real objective of life imprisonment and 'hard prison' in Italy is probably not so much and only that of preventing the offender from resuming or continuing relations with criminal organisations, but that of attempting to force the prisoner to cooperate with justice, which however poses problems of compatibility with many principles of the Italian Constitution and the ECHR.

Keywords: *Life imprisonment, Hard prison, Social dangerousness, Re-education*

Life imprisonment in Italy: problems of constitutionality

In Italy, the death penalty no longer exists, but there is a penalty «up to death» (Musumeci, Pugiotto, 2016, p. 64), i.e. life imprisonment and all related disciplines, such as the 'hostile' form of the same, and the regime of the so-called 'hard prison', *ex* art. 41 *bis* ord. penit. (Della Bella, 2012: *passim*). The subject of life imprisonment is, of course, much discussed and provokes conflicting social reactions. Life imprisonment, today, is the

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maximum punishment contemplated in the Italian legal system: Article 17 of the penal code places it among the punishments provided for crimes, together with imprisonment and a fine.
What distinguishes life imprisonment is its perpetuity: Article 22 of the Criminal Code states that «the sentence of life imprisonment is perpetual and is served in one of the establishments intended for that purpose, with the obligation of work and night solitary confinement" (Riondato, 2017: *passim*). When the Italian Penal Code came into force in 1930, life imprisonment was really perpetual, but gradually this characteristic changed and in 1962 the legislator established that a person sentenced to life imprisonment could be eligible for conditional release after serving twenty-eight years, reduced to twenty-six by the so-called Gozzini law[1] . Today, therefore, in Italy life imprisonment, at least 'on paper', has the face, rather than that of a perpetual penalty, of a penalty 'with progressive execution', in that the convicted person can change his prison status and move towards social reintegration.
On the legitimacy of life imprisonment, the Italian Constitutional Court, over the years, has always shown caution. An *excursus* of the main constitutional jurisprudence shows that the Giudice delle leggi first deemed life imprisonment not illegitimate, precisely because the offender can be set free (Constitutional Court, 22 November 1974, no. 264), and then also admitted life prisoners to the enjoyment of benefits, in particular the possibility of conditional release (Constitutional Court 21 September 1983, no. 274; Grevi, 1984, p. 19).
This legislation, however, changed in the early 1990s, when in a moment of emergency linked to the considerable increase in attacks and massacres at the hands of mafia-type organised crime, which increasingly affected representatives of the institutions, the legislator introduced an emergency legislation, which profoundly modified the prison system outlined in the Gozzini Law of 1986. The most important change concerned the prison treatment of those convicted of organised crime: Article 4 *bis*[2] was inserted

[1] Law No 663 of 10 October 1986 provides that a person sentenced to life imprisonment, once he has served the minimum number of years of his sentence and has maintained a conduct that suggests a critical review of what he has done, may obtain the application of a security measure for five years, at the end of which the sentence expires. Once twenty years of imprisonment have been served, moreover, a person sentenced to life imprisonment may be admitted to the alternative measure of semi-freedom and, after ten years of imprisonment, be granted a period of leave not exceeding forty-five days per year.
[2] The new provision of Article 4 *bis* of the prison regulations was introduced by Legislative Decree No 152 of 13 May 1991, later converted into Law No 203 of

into the prison regulations. The purpose of this change was clearly to tighten prison treatment for offenders of mafia-type organised crime (Guazzaloca, Pavarini, 1995, p. 303). An 'emergency' discipline (Moccia, 1997: *passim*), therefore, which introduced and shaped different life sentence regimes, through the combination of the new articles 4 *bis* and *58-ter* of Law no. 354/1975. Regimes that – not being able to go into detail here – diverge in the possibility of accessing or not accessing prison benefits, including that of regaining liberty[3] . In the case of a life sentence for crimes of organised crime, terrorism or subversion, access to the benefits is possible only if there is the acquisition of elements that exclude the actuality of the links between the prisoner and organised, terrorist or subversive crime, as well as collaboration with justice, *pursuant to* Article 58 *ter* of the Prison Order, in the absence of which, excluding cases of impossible or useless collaboration[4] , imprisonment remains 'until death' (Dolcini, 2019, p. 96; Dell'Andro, 2019, p. 955).

If, then, life imprisonment, in the formula allowing access to prison benefits, appears as the "presentable face" of perpetual punishment, a similar consideration cannot be made for the so-called life imprisonment. Life imprisonment, as redesigned by Article 4 *bis* of Law 354/1975 introduced in 1991, does not present any re-educative purpose conducive to social reintegration, as stated in the Italian Constitution, posing itself, on the contrary, as a perpetual penalty, which can only be reviewed in the event of cooperation with justice. Such a prison regime, well, is nothing more than a markedly afflictive sanction, with the sole objective of the offender's cooperation with justice and, therefore, if so placed, is far from any re-educative purpose, as well as from the sense of humanity of punishment (Risicato, 2015, p. 1246).

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12 July 1991. The legislator thus identified the conditions in the presence of which those convicted of offences considered to be particularly serious, traceable to organised crime, can have access to alternative measures to detention, to extramural work and to bonus permits.

[3] The benefits contemplated by Article *4a* of the Prison Ordinance are assignment to outside work, premium leave, alternative measures to detention; early release is excluded.

[4] Impossible collaboration is defined as the provision of information, but when there has already been a full ascertainment of the criminal act and responsibility, on which there was also an irrevocable judgement; collaboration, on the other hand, is useless or irrelevant when the convicted person has had limited participation in the criminal act and this does not allow for knowledge that would make collaboration worthwhile.

The issue of the alleged illegitimacy of life imprisonment, debated at both national and European level – which will be discussed below – is part of a broader problem of remodelling the prison system and reconsidering the function of punishment.

Wanting to try to illustrate way the hiatus between life imprisonment and a system oriented to the Italian Constitution in a simple, we could identify two main issues. The irreconcilability of life imprisonment with the purpose of re-education recalled by the Constitution, which normatively we can already infer implicitly from the abolition of the death penalty; the denial, for those sentenced to a sentence 'up to death', of any possibility and usefulness of re-education and resocialisation, according to the reasoning that the death penalty is a physical and material elimination, while the sentence 'up to death' is a civil and virtual elimination (Risicato, 2015, p. 1246). The life sentenced, on whose documents under the heading 'end of sentence' is indicated «year 9999», will probably never see the end of prison[5], except through his death. It is clear, therefore, that there would be little or no point in his re-socialisation and, on closer inspection, not even the offender is encouraged to adhere to the possible offers of procedures aimed at re-education and re-socialisation, as any effort would be an end in itself, practically useless.

With reference, on the other hand, to the irreconcilability of life imprisonment with the prohibition of treatment contrary to the sense of humanity under Article 27, para. 3, of the Italian Constitution, which places the person and his dignity above the state's need for prevention, it must be said that – also in light of prison overcrowding, which presents itself as dehumanising – a sentence 'until death', i.e. without end, generates an exacerbating effect, «even divorced from the abstractly and concretely imposed punishment» (Pugiotto, 2012, p. 125; Risicato, 2015, p. 1246).

It is evident, therefore, that ''ostensive'' life imprisonment, at least in its original conception, shows more strident elements with the Italian Constitution, revealing obvious disharmonies with Articles 3, 25 and 27 of the same fundamental Charter, posing itself not as a determinate penalty, not as a re-educative penalty, not as a proportionate penalty (Bianchi, 2015, p. 3822).

The European Court of Human Rights has also been asked on several occasions about the compatibility of life imprisonment with the provisions

[5] The legislation that has now been superseded by Decree-Law No. 162 of 31 October 2022, converted by Law No. 304 of 30 December 2022, has eliminated, at least formally, the absolute presumption of dangerousness of the non-cooperating life sentence.

of the European Convention itself. In the numerous judgments of the Edu Court on the subject of life imprisonment, the conventional legitimacy of this punishment has never been questioned, but rather its compatibility with the prohibition of inhuman and degrading treatment as laid down in Article 3 of the Convention.

As well as the Italian Constitutional Court, the Strasbourg Court legitimises the perpetual sentence, since, in the execution phase, thanks to access to benefits and alternative measures, as well as conditional release, it tends [in theory] not to be perpetual and guarantees the so-called 'right to hope' to the prisoner, precisely the possibility of seeing the duration of detention reduced (Colella, 2011, p. 194). The issue of the Italian 'ostensive' life imprisonment also came before the Edu Court with the Viola case, a convict who had always proclaimed himself innocent, so much so that he had never taken the path of cooperation (ECHR, *Viola v. Italy*, no. 2, 13 June 2019). The Strasbourg judge qualified Italy's 'ostensive' life sentence as a *de facto* irreducible penalty. The reasoning carried out by the European Court to reach this conclusion was developed from two points of view: on the one hand, the punishment of 'hostile' life imprisonment was based on an absolute presumption, which was completely irrational, since it was based on the idea that the convicted person is always free to choose whether to cooperate or not, when, in truth, often environmental and contextual conditions make such a choice dangerous; on the other hand, this legislative presumption, when it equated failure to cooperate with continued social dangerousness, did no more than outline the prisoner's condition as it already was at the time of the commission of the criminal act and, therefore, without taking possible changes that occurred during the execution of the sentence into account (Pugiotto, 2016, p. 17).

The 'ostensive' regime in the version prior to Decree-Law No 162 of 31 October 2022 – according to the reasoning followed by the Strasbourg Court – excessively restricted access to measures aimed at resocialisation and for this reason was at odds with the principle of the necessary finality of punishment, which, in turn, according to Article 3 of the ECHR, «would constitute a real "*positiv obligation*" incumbent on the member states of the Council of Europe» (Siracusa, 2020, p. 4).

What the European Court has provided, in the judgment under review, is a revision of the sentence of life imprisonment in order to ensure that prisoners, who are subjected to this prison regime, have a real possibility of reintegration and the opportunity to obtain their freedom again. The address given by the European Court to Italy, then, was that of a reform that would allow for a case-by-case assessment of the re-educational path of the convicted person, in the light of a critical review of the crime

committed, to the point of deeming detention no longer necessary. The implications of the Viola case soon became apparent in Italian jurisprudence (Brucale, 2020, p. 49; De Cesare, 2020, p. 83; Galiani, 2020, p. 113). Immediately after the Strasbourg Court's pronouncement, in fact, the Italian Constitutional Court, with an innovative if not unexpected ruling, found itself expressing its opinion on the so-called double sanctioning track (Corte cost., 4 December 2019, no. 253). This decision, on the subject of life imprisonment and premium permits, undoubtedly represents a step forward towards strengthening the re-educative finalism of punishment. This ruling upheld the objection of unconstitutionality of the preclusion of access to premium leave for prisoners serving a temporary sentence or life imprisonment for the offence referred to in Article 416 *bis of* the Criminal Code, in the event of their failure to cooperate with the justice system. As a result of this preclusion, the life sentence for the non-cooperating convict, according to the Court, was a flexible prison sentence only in law, thus merely in the abstract, but in fact it remained a perpetual sentence, which made the mere purpose of general prevention prevail, rather than that of the re-education of the convicted person (Constitutional Court 4 December 2019, no. 253: § 8.1 and 8.2). Among the reasons for the unconstitutionality of Art. 4 *bis* Prison Order, the Court used the irrationality of the absolute presumption, which was placed at the basis of the "hostile" regime, as it is not possible to exclude that in practice, even with voluntary cooperation, the convicted person remains socially dangerous, just as in the opposite hypothesis, even in the absence of cooperation, the conditions of social dangerousness may in reality be lacking. In the light of the Court's decision, however, it is evident that although the presumption is no longer seen as absolute, but relative, the procedure of granting the bonus permit to a person convicted of mafia-type crimes is very complex: according to the Constitutional Court, the social dangerousness of the convicted mafia offender cannot be overcome by the mere observation of his behaviour during the period of detention and his adherence to a re-education and re-socialisation path, not even by a mere declaration of dissociation, but only by the acquisition of congruous and specific elements in favour of the coming to an end of this associative bond, therefore with the reduction of the social dangerousness, which must be demonstrated by the convicted offender himself.

The Italian Constitutional Court also returned to examine the legitimacy of life imprisonment in 2021. On this last occasion (Corte cost., 11 May 2021, no. 97), however, the type of decision was different from that of the other rulings of the same Court on the subject of life imprisonment (e.g. Corte cost, 9 April 2003, no. 135), since it did not enter into the merits of the issue, opting, on the contrary, to postpone the treatment, with the aim of

allowing Parliament sufficient time to discuss and regulate the matter in a manner consistent with the Constitution (Siracusano, 2022, p. 1354; Pugiotto, 2022, p. 761; Risicato, 2021, p. 653). In the judgment in question, the Court listed several reasons that justified a different regulation of life imprisonment, first and foremost the existence of a series of acts of Parliament, capable of suggesting a concrete possibility of reforming the system, making clear reference to the bills already presented. The Consulta considered – we read in its reasoning – that its intervention in the matter would have been destabilising because it would have equated the figure of the collaborator of justice with that of the reticent, thus making a choice of criminal policy, which, instead, is a matter for the legislative power. With the position taken by the Constitutional Court in its 2021 judgment, moreover, we are faced with the recognition of the unconstitutionality of life imprisonment, without, however, this unconstitutionality having been declared.

The discipline of life imprisonment, and not only that, following the aforementioned Constitutional Court ruling of 2021, was reformed by Decree-Law No. 162 of 31 October 2022, converted by Law No. 304 of 30 December 2022 (Bernardi, 2022: *passim*). Coming to the core of the novelty on the subject of 'hostile' life imprisonment, the decree law, in addition to eliminating the relevance of 'impossible' and 'unreliable' cooperation, redesigned the prerequisites, in the absence of cooperation, for access to external prison benefits. Since the pronouncement of the Constitutional Court (Ordinance No. 97/2021) to which the Government intended to give an 'answer' shows that there cannot be an absolute presumption of social dangerousness deriving only from non-cooperation, the Decree sanctions a series of elements that the detainee must demonstrate in order to overcome a presumption that, at this point, should be considered only relative, at least 'on paper'. The reform, therefore, with regard to associative offences, goes to great lengths to identify the elements that the detainee must demonstrate in order for the presumption linked to non-cooperation to be overcome: 1) «the fulfilment of the civil obligations and obligations of pecuniary reparation resulting from the conviction or the absolute impossibility of such fulfilment»; 2) «specific elements [...] that make it possible to exclude the actuality of links with organised, terrorist or subversive crime and with the context in which the crime was committed, as well as the danger of re-establishing such links, even indirectly or through third parties». It is specified that these elements must be «different and additional to the regular prison conduct, to the participation of the detainee in the re-educational path and to the mere declaration of dissociation from the criminal organisation to which he may

belong», all this «taking the personal and environmental circumstances, the reasons that may have been deduced in support of the non-cooperation, the critical review of the criminal conduct and any other information available into account». It is added that «in order to grant the benefits, the judge shall also ascertain the existence of initiatives of the person concerned in favour of the victims, both in the forms of compensation and restorative justice».
The idea that one gets from a cursory reading of the new rule is that it was intended to set a series of conditions that are very difficult, if not impossible, to prove - although the rule speaks of [mere] «allegation» - all the more so for a detainee who has been locked up for decades in a penal institution, with all the complications that this entails also from the evidentiary point of view. Perhaps what is most perplexing is what appears to be a paradox, i.e. the burden of proving [non-]future events, i.e. alleging elements that make it possible to exclude not only the actuality of links with organised, terrorist or subversive crime, but also the danger of re-establishing such links. In fact, although the Constitutional Court has expressed the need to exclude the risk of a future re-establishment of criminal links, the legislative reform places this negative proof [or allegation] on the prisoner, while this burden would seem to fall more properly on the other party, the one who wants to prevent release, because it is one thing if a lifer lets one glimpse 'positive' elements such as to reasonably suppose the will to re-establish links with criminality, elements that could and should form the subject of positive proof by the Public Prosecutor; it is another matter to make the granting of the benefit conditional on the *probatio diabolica*, on the prisoner's part, of elements that would make it possible to prove the lack of a danger of re-establishing links with criminality.
The new rule, moreover, is based on concepts that are too elastic, such as 'context' or 'indirect connections', which are ductile and instrumental to the point of allowing, in some way, to keep the lifer always in prison, lacking a reference, a really demonstrable substratum and, therefore, in practice interpretable almost at the magistrate's pleasure. It therefore appears that the government, to the absolute presumption has wanted to replace one that is only formally relative, but substantially almost impossible to overcome, thus 'betraying' the spirit that can be drawn from the constitutional principles, even in the case of non-cooperation. The rationale that can be drawn from Italian and European constitutional jurisprudence, which has matured to date, is that the lack of cooperation itself cannot be taken as a diriment index, excluding as such the re-education of the lifer. The amendment, on the other hand, although formally attempting to comply with this guideline, in fact betrays it, emptying it of real content (De Vito, 2022, p. § 6).

It should be added that Decree-Law No 162/2022 for non-cooperating lifers has modified the minimum threshold of years of imprisonment to be eligible for conditional release: no longer the twenty-six years of sentence required by Article 176 of the Criminal Code, but thirty years. Finally, the sentence can be extinguished no longer after five years, but ten years from the conditional release and probation application, which therefore – if the prisoner succeeds in overcoming the difficulties of the relative presumption of social dangerousness – will last longer than in the past and will always entail the prohibition to meet or maintain contact with persons convicted of crimes of serious social alarm (those referred to in Article 51 of the Code of Criminal Procedure) and with persons subject, in certain cases, to personal or patrimonial prevention measures.

The discipline of hard 'prison' in Italy: genesis and purpose

One cannot speak of life imprisonment without touching on the delicate subject of the so-called 'hard prison' in Italy, i.e. the provision of Article 41 *bis* of the Italian Prison Ordinance, a special detention regime to which, in 2023, 740 people were subjected. In Italy, in fact, inmates subjected to this special detention regime are often sentenced to long prison terms and approximately 17% are sentenced to life imprisonment. If it must be said that the special detention regime is also, and not infrequently, applied to persons still awaiting trial or not definitively sentenced, it must also be pointed out that in most cases the offences generating both the sentence to life imprisonment and the so-called 'hard prison' regime are those of mafia-type organised crime. This is why the life sentence and the special detention regime pursuant to Article 41 *bis* of the penitentiary order are intimately connected.

Ever since the entry into force of the Prison Rules Act of 1975, practices concerning prison life seemed to be oriented towards a greater openness to the maintenance of family relationships and, more generally, of emotional ties, also and above all with the aim of succeeding in achieving the re-educative purpose of punishment (§ 6).

The complex of disciplines enshrined in the prison regulations, however, especially in the light of the terrorist acts that occurred in Italy in the 1970s, began to undergo changes, the most important certainly being the one concerning the introduction of Article 90 of the prison regulations, the original text of which, contained in Law no. 354 of 26 July 1975, was immediately subject to reform due to the worrying advance of terrorist groups and criminal organisations. In an emergency scenario, the Italian legislator felt the need to differentiate prison treatment for those persons

considered most dangerous, as they were more likely to commit crimes. Hence the drafting of Article 90 of the Prison Ordinance, which provided for special rules of treatment within penal institutions.
The text of this article, entitled «security requirements», now repealed, provided that whenever serious and exceptional reasons that could compromise public order and security arose, the Minister of Justice could suspend the application, for a fixed period of time, of the ordinary rules of prison treatment laid down by law, which were in conflict with that need for order and security. The rationale was, therefore, to contain, in special prisons or in separate sections, those subjects considered to be promoters of disorder and who, therefore, in the prison context could generate protests and, therefore, compromise the internal security of the prison.
The rule set out in the aforementioned Article 90, however, although initially conceived to remedy any difficult internal management situations in penal institutions, subsequently began to be recalled whenever it was necessary to transfer persons who had prominent positions in criminal organisations to these special prisons, not only to avoid the occurrence of violent episodes or protests in the prison, but also to remove the other inmates from their subjection.
In these special prisons or special sections, in order to better fulfil the provisions of art. 90 Prison Ordinance, a series of restrictions – which cannot be fully discussed here – were introduced, in particular the ban on organising cultural, sporting and recreational activities, the ban on participation in prisoners' representations in charge of food and library control, the impossibility of talking to visiting relatives unless separated by glass panes, the ban on being able to telephone relatives, the reduction of air time and the control of correspondence with other prisoners.
Underlying the application of Article 90 of the Prison Ordinance, as mentioned above, is the need to deal with an emergency situation, and the verification of the existence of such a situation passes through the Ministry of Justice, which, having recognised the urgency of applying the differentiated regime, establishes the deadline for the suspension of the ordinary treatment rules provided for by the Prison Ordinance.
Article 90 of the Prison Law was repealed by Law No. 663 of 10 October 1986 – better known as the Gozzini Law – and, in its place, Article 41 bis of the same law was introduced, which initially contained all the provisions in a single paragraph. In substance, there was no change, as the text was not renewed compared to that of the previous discipline, except in the part clarifying what were the prerequisites legitimising the power of the Minister of Justice to suspend the ordinary rules of treatment. Article 41 bis, at least in its original wording, referred precisely to exceptional cases

of revolt or other emergency situations. The main innovation lay, therefore, in a limitation of the Minister's discretion in applying the differentiated regime. In fact, the old Article 90 of the penitentiary order was much more generic and this had allowed prisoners whose social dangerousness had not even been carefully assessed to be subjected to this differentiated regime.
The wording of 41 bis, on the contrary, placed an important limit on the power of the administrative authority, providing that the occurrence of extraordinary facts was necessary for its application.
However, the door of Article 41 bis of the prison regulations, by means of Decree-Law No. 306 of 8 June 1992, was widened with the introduction of a second paragraph, dedicated to solitary confinement in places of punishment for leaders and affiliates of mafia-type criminal organisations, such as the notorious Cosa Nostra[6]. This reform was considered necessary by the legislator following the attack by the Sicilian mafia on the State, with a long trail of deaths and bloodshed, which prompted a change of pace and a response as a counteroffensive by the State to mafia power.
The first decrees applying the 41 bis prison order were not issued *ad personam*, but rather were cumulative measures addressed to several persons convicted of very serious crimes, with the validity of the measure set at one year, but extendable indefinitely.
It has already been said that the differentiated regime of Article 41 bis of the penitentiary order was conceived as a tool to deal with an emergency, but with Law No 279 of 23 December 2002, this special prison regime was 'stabilised' and became a permanent tool of special prevention. If, on the one hand, the new legislation was concerned with typifying the content of Article 41 bis, on the other hand, it regulated the procedure for challenging the implementation decrees and the extension of the special prison regime, attributing full powers to the supervisory court.
An important aspect of the 2002 legislative amendment is certainly the exclusion of the application of the special regime solely on the basis of the offence title. On the basis of the previous constitutional jurisprudence (Constitutional Court, 5 December 1997, no. 376), in fact, it has been established that in order for Article 41 bis of the penitentiary order to be applicable, it is necessary to ascertain the danger of the existence and permanence of links with the organised crime to which he belongs. (Corvi, 2010, p. 138). The purpose of the institute, then, is to be found not so much in preventing a «collective dangerousness», but more in intercepting an individual dangerousness, i.e. the risk that a given prisoner may continue criminal activity even from inside the prison, precisely by being able to rely

[6] It is a mafia-terrorist criminal organisation present in Italy and especially in Sicily.

on links with external organised crime (Della Bella, 2016, p. 225).
After a few years, the 2002 reform was considered by the legislator to be an insufficient response to organised crime, so much so that the need was felt to intervene again on the special prison regime, and this because the criminal associations had returned to forging ties with the imprisoned bosses who, although subjected to the regime under Article 41 bis, continued to give orders and dictate operational and economic rules to the mafia group of reference. Law No. 279 of 2 February 2009 thus redesigned the wording of Article 41 bis of the penitentiary order.
The text of Article 41 bis of the Prison Ordinance, which is currently in force, is entitled «emergency situations» and is the synthesis of a series of interventions aimed at perfecting, in a comprehensive manner, the special prison regime that, as in its original formulation, entrusts the Ministry of Justice with the possibility of suspending the application of the ordinary prison treatment rules. First of all, it is necessary to identify the addressees of the provisions of Article 41 bis of the prison regulations. From reading the second paragraph, it is easy to understand that the addressee of the provision is a prisoner either final, i.e. with a sentence that can no longer be appealed, or still awaiting trial. The criterion for selecting the recipients of the special prison regime refers, explicitly, to Article 4 bis, para. 1, Prison Regulations, therefore, in a nutshell, the application of this regime is addressed to persons who have committed one or more "qualified hostile offences"[7]. In practice, however, mostly mafia-type offenders are subjected to the Article 41 bis regime.
The investigation, aimed at ascertaining the social dangerousness of the recipients of the differentiated prison regime, must take into consideration, as indices, the degree of operativeness on the territory of the criminal association to which the detainee belongs, as well as the role played in the mafia organisation by the same subject. A natural consequence of what has been said so far is that the functional prerequisite, although it exists, is lacking in the case in which the detainee decides to cooperate with justice pursuant to Article 58 ter of the penitentiary order.

[7] In particular, offences for the purposes of terrorism, including international terrorism or subversion of the democratic order through the perpetration of acts of violence; offences of mafia-type criminal association; offences committed by availing oneself of the conditions provided for by mafia-type criminal association, or in order to facilitate the activities of mafia-type criminal associations; offences of reduction to or maintenance in slavery or servitude; child prostitution; offences of pornography and child pornography; offences of trafficking in persons: the crime of group sexual violence; the crime of buying and selling slaves; the crime of kidnapping for the purpose of robbery or extortion; the crime of criminal association for the purpose of smuggling; the crime of association for the purpose of drug trafficking.

The measure applying the special detention regime takes the form of a reasoned decree issued by the Minister of Justice, also at the request of the Minister of the Interior, and, therefore, is taken when there are serious reasons of order and security, with reference to the capacity of certain detainees to maintain links with the criminal, mafia, terrorist or subversive association to which they belong. Before the decree is issued, the public prosecutor conducting the preliminary investigations or the proceeding judge must be consulted, and the necessary information must be acquired from the National Anti-Mafia Directorate, the central police bodies and those specialised in combating organised crime.

The measure applying or extending the special prison regime, therefore, is the consequence of the collection of elements demonstrating a danger to public safety, through a collaboration between the Department of Prison Administration, law enforcement agencies, the National Anti-Mafia and Anti-Terrorism Directorate and the District Anti-Mafia Prosecutor's Office. The ministerial decree applying this regime is considered, according to one thesis, an administrative act of an authoritative nature with a preventive purpose, which aims to ensure the maintenance of public order and security; another thesis, however, gives the ministerial decree a 'justicial content' (Ardita, 2007, p. 80).

The element on which the applicability of the ministerial measure for the special prison is based is – as we have already said – to be found in the "social dangerousness" of the prisoner or inmate. If this were not the case, and if, therefore, the limiting measures of Article 41 bis of the penitentiary order were personalised and based on elements other than "social dangerousness", we would be faced with a regime that would perform a retributive function, in contrast with the very purpose of the institution which is, instead, that of limiting communications as a preventive effect of the commission of offences.

This preventive function of the ministerial decree is confirmed in the judgment of 15 December 2014, no. 52054 of the Court of Cassation, which specifies that the differentiated detention regime, despite the amendments, has retained its preventive nature, without ever turning into a 'differentiated penalty'. The Constitutional Court has also expressed itself in this sense, specifying that the limitations of Article 41 bis of the penitentiary order cannot take on the appearance of a criminal sanction, but only «of caution in relation to current dangers to order and security, concretely linked to the detention of certain convicted persons or defendants for offences of organised crime" (Constitutional Court, 5 December 1997, no. 376).

Turning now to the conditions for the applicability of the ministerial

measure, it is appropriate to reiterate that a prior assessment of the "social dangerousness" of the detainee recipient of the measure provided for in Article 41 bis of the penitentiary order is necessary. Such dangerousness must be configured as "qualified", i.e. the detainee must have the capacity to maintain or resume relations with the criminal association to which he belongs. It can be said, then, that for the first application of the measure provided for in Article 41 bis of the penitentiary order, and also for its extension, an inspection is required not only on the actuality of the criminal contacts, but also on the possibility and capacity of the detainee to resume such contacts with the association to which he belongs and to bind himself with it.

As already mentioned, the effectiveness of the measure ordering the special prison regime has a fixed duration. This is enshrined in Article 41 bis, para 2 bis, which sets this duration at four years, «extendable in the same form for subsequent periods, each equal to two years»; extension is necessary when the ability to maintain links and connections with the criminal association has not disappeared (Montagna, 2004, 1289). Of course, in order to proceed with the extension, it is necessary for the investigation aimed at verifying the 'social dangerousness' to be conducted again, and this follows the same procedure as the issuance of the measure of first application. The extension, then, must also be based on the collection of significant elements demonstrating the detainee's continuing ability to maintain contacts with organised crime, thus following the parameters dictated by Art. 41 bis, para. 2 bis of the penitentiary order. The Court of Cassation, with reference to the extension of the special prison order, stated that «the existence of links with a criminal, terrorist or subversive association, required by the rule, does not have to be demonstrated in terms of certainty, it being necessary and sufficient that it can be reasonably considered probable on the basis of the cognitive data acquired» (Cort. cass., sez. I, 6 February 2015, no. 18791).

The measure subjecting a detainee to the regime provided for in Article 41 bis of the prison regulations must be adequately motivated. This necessity arises from the fact that this is a prison treatment that has restrictive effects that significantly affect the freedom of the person subjected to the differentiated regime. The justification must be complete and must contain all the elements underlying the reconstruction of the "social dangerousness"and, therefore, supporting the thesis according to which keeping the prisoner under the ordinary regime would run the risk of public order and security problems. In particular, it is necessary to refer to the information according to which the subject of the measure is "socially dangerous", as well as to the fact that he is in a position to keep in contact or to establish contact again with the criminal group to which he belongs, still active and operating outside. A similar

discourse applies to the measure extending the differentiated regime: in this case, however, the grounds must be based on the findings from which it can be deduced that the reasons of public order and security are current. In the decree of extension, therefore, it will be necessary to retrace the assumptions that led to the issuance of the first ministerial measure, reaffirming, then, the need to reconfirm the subjection to the differentiated regime, since there has been a new recognition of the dangerousness of the detainee and of his capacity to maintain contacts with the criminal association. Such 'qualified' dangerousness, according to jurisprudence, is to be verified by means of the so-called 'legal proof', whereby in the absence of unequivocal elements concerning the disappearance of links with the criminal group, membership of the same is to be considered current and permanent. The motivation is fundamental, as it is on this that the detainee can base his complaint against the administrative decision to apply the special prison regime.

Prison life *under* Art. 41 bis: rules and limitations for detainees in 'hard prison'

The name 'hard prison' of the differentiated regime in Article 41 bis of the penitentiary order makes it clear that the prisons housing inmates subjected to special imprisonment are maximum security prisons and inside them the harshest face of the State is shown.

Prisoners or internees receiving a measure applying the 41 bis prison regime come from the high-security circuits (a circuit housing prisoners accused or convicted of offences under Article 4 bis of the Criminal Code or Article 74 of Presidential Decree 309/90), but once they have entered the 'hard prison' circuit, they have to start reckoning with a series of much stricter limitations. If in the high-security circuit they could enjoy four hours of daily air time, telephone home once a week for six minutes, have four interviews a month, buy groceries at the prison's 'supermarket'[8] and use the gas cooker in their cell for cooking, as well as attend study courses and listen to mass on Sunday mornings in the prison chapel, with the special regime of the 'hard prison' all this is no longer allowed. Even in the matter of searches, the submission to the differentiated regime tightens the modalities: the ordinary search, carried out with non-invasive instruments, such as the metal detector, is replaced by the extraordinary search, which even provides for the undressing of the detainee at the end

[8] Overstay is the possibility for inmates to purchase, following a formalised procedure and with authorisation, products from the outside contained in a list of eligible items.

of each of his movements and before his return to the ward and cell.
The custody and surveillance of this category of detainees is managed by the mobile operational group (GOM), composed of selected prison administration personnel, who guard the twelve special regime wards under Article 41 bis distributed throughout the country.
The cells, at least in most cases, have a surface area of six square metres, in which an iron cot and a stool are placed, both nailed to the floor, then again a small table and a wardrobe, this time fixed to the wall. While ordinary prisoners have the possibility to engage in recreational activities, as well as reading, having access to the prison libraries, for prisoners under the 'hard prison' regime this is not allowed.
It is not even possible to cook because in the cells of the Article 41 bis regime, pots and pans cannot be kept and it is forbidden for prisoners to buy food requiring cooking. A gas cooker is not allowed in the cell, which they may use only at certain times and in places other than the detention room, by order of the prison administration, in the manner established by the Institute management.
One does not work, except through ward activities: there is, in fact, the figure of the worker, who is in charge of cleaning the common areas of the ward, that of the food carrier, who distributes the food in each cell, passing in front of them with a trolley, and that of the footman, who is a personal assistant, the person who is seen as a prisoner that assists another inmate who is ill and unable to perform even the simplest activities of daily life.
Important restrictions are linked to the so-called 'air hour', i.e. the time of day when they can leave their cells to go for walks, in places in the open air, which in prison jargon are called 'promenades'. In the regime of 'common' prisoners, the air time is done together with all the prisoners in the same section, whereas in the case of prisoners subject to the Art. 41 bis regime it is organised in small groups; they must be 'compatible subjects', thus referring to the impossibility of bringing together prisoners who belong to the same criminal organisation or alliance, or even to organisations operating in neighbouring territories; meetings between prisoners from the same city or region are also prohibited. For this reason, the head of the department will have to study the groups, of four persons, which must be composed of individuals who have never met before their entry into prison or just casually, very carefully.
Lastly, as mentioned at the beginning, this category of detainees undergoes a strip search: the search is carried out upon returning to the cell and, although it does not have to be validated by the judicial authority, it must in any case comply with the criteria established by the Constitutional Court, which has clarified that it should not be used in ordinary situations,

but only if internal security requirements emerge or if the detainee is dangerous due to concrete facts (Constitutional Court, 22 November 2000, no. 526). Prisoners subject to the special regime are also subject to continuous video surveillance of their cells.

It is not possible, at least here, to address in detail the many constraints to which prisoners in the differentiated regime are subjected, so we will only focus on a few, by giving examples.

Subparagraph (b) of para 2c of Article 41 bis of the penitentiary order regulates the matter of interviews with family members. The interview could be a form of communication for the detainee to continue to convey directives and orders to the outside world, thus carrying on his mafia activity and maintaining his top position within the criminal syndicate. Prisoners under the ordinary regime may have a maximum of six interviews per month; for those subject to the regime provided for in Article 4 bis of the penitentiary order, on the other hand, there are four interviews and they may be held with family members and cohabitants, lasting one hour, subject to the authorisation of the director of the penal institution. On the other hand, for prisoners subject to a differentiated regime, there is only one interview per month, which may only be held with family members and cohabitants. There is no minimum or maximum duration of interviews, as stated in the general rules.

With regard to the way in which interviews are conducted, while for prisoners under the ordinary regime these take place indoors without any partition or outdoors in designated areas, especially if there are young children present, supervised by prison police staff, in the case of prisoners under the special regime the interviews take place in rooms that are furnished in such a way as to prevent the passage of objects: there is, in fact, a full-height glass partition separating the detainee from the visitor, and they speak by using an intercom; the interviews of this category of detainees are subject to auditory control and are also recorded, subject to the reasoned authorisation of the judicial authority. There are, however, exceptional cases for which the glass partition obligation is waived, in the case of imminent danger of death, the celebration of a marriage or the birth of a child (Fiorentini, 2013: 198). Again, in cases of impossibility or serious objective difficulty in conducting interviews, the prison administration must arrange for the interview in the form of a video call (Cort. cass., 11 August 2020, no. 23819).

The tightening of the regime also had repercussions, of course, on the subject of interviews with the defence counsel. With the legislative change of 2009, i.e. the amendment of paragraph 2 of Article 41 bis of the penitentiary order, interviews with defence counsel were allowed in the number of three per week

and the restrictions provided for interviews with family members did not apply in the way they were carried out, i.e. with partition glass and intercom, while the quantitative limits remained. The latter aspect was the subject of a ruling by the Constitutional Court, which recognised a compression of the right of defence (§ 4).
The aim of limiting and, to some extent, precluding communication with the outside world could not but lead to a further restriction for prisoners subjected to a differentiated prison regime, namely that of correspondence which, pursuant to Article 41 bis, para. 2 quater letter e) must be censored, except for the one held with members of Parliament or national and European authorities having jurisdiction in matters of justice.

The regime of Art. 41 bis of the Italian penitentiary order in Italian constitutional jurisprudence

Since its introduction, the institution governed by Article 41 bis of the Prison Ordinance has received much criticism, so much so that it has been the subject of legitimacy scrutiny on numerous occasions. The harsh censures have been made to highlight the character of extreme and, at times, gratuitous affliction, as well as to highlight the various profiles of incompatibility with the protection of fundamental individual rights (Nicosia, 2009, p. 1245).
Soon, therefore, the wording of Article 41 bis of the penitentiary order came up against censures of unconstitutionality, especially with reference to the possibility of an unlimited derogation from the rules of prison treatment. The Constitutional Court, using interpretative judgments of rejection[9] , has rejected most of the matters of constitutional legitimacy brought up, offering, however, hermeneutical indications that, through a constitutionally oriented reading of Article 41 bis, have tended to respect the fundamental principles of the prison system. For this reason, it is important to recall the decision by which the Constitutional Court identified the so-called "external limits"to ministerial power (judgment No. 349 of 28 July 1993). The Court, in essence, affirmed that the prison administration has the power to adopt measures concerning the treatment of detainees in the penitentiary circuit, but always guaranteeing respect for the constitutional principles that guarantee individual freedoms compatible

[9] These are judgments in which the Italian Constitutional Court rejects the question of the legitimacy of a rule interpreted in a certain way. In essence, the Court, among the possible interpretations of a rule, declares the one that is not incompatible with the Constitution.

with the state of detention, the re-educative purpose of punishment and the right of defence. On the other hand, the Constitutional Court has recognised that the judicial authorities may adopt measures affecting the quantity and quality of the sentence (Constitutional Court, 28 July 1993, no. 349). With another important pronouncement, the Constitutional Court sought to re-establish a legitimate balance between the prerogatives of the prison administration and the constitutional rights of detainees, especially with reference to the failure to provide for a system of appeal to the judicial authority of ministerial decrees providing for the application of Article 41 bis of the Prison Ordinance. The Constitutional Court, in fact, rejected the question raised by the Surveillance Court of Milan, specifying however that, in cases where there were no provisions on the system of appeals, if there was a violation of fundamental subjective rights, the legitimacy of the decrees could be reviewed by the judicial authority, in particular by the Court of Supervision (Constitutional Court, 23 November 1993, no. 410). The Constitutional Court, again, rejected the censures in the abstract of the special regime of Article 41 bis, specifying that any violations of the fundamental rights of detainees must be sought not so much in the wording of the law, but rather, case-by-case, in the individual application measures (Constitutional Court, 5 December 1997, no. 376).

The Constitutional Court, on the other hand, has ruled, albeit partially, on the unconstitutionality of Article 41 bis of the penitentiary order, with a judgment that declared the illegitimacy of para. 2-quater, letter b), last sentence, in the part in which it quantitatively limits telephone calls and interviews between the detainee under special regime and the defenders (Constitutional Court, 20 June 2013, no. 143), marking a further step «in the path of recovery of those constitutional values that have been rediminished by the amendments made to the regime through Law 94 of 2009» (Corvi, 2013, p. 1189). It is not possible here to deal in detail with the observations made by the Constitutional Court in pronouncing this conclusion, but the decision also establishes some key principles related to the entire system (Marini, 2022, p. 12).

The second declaration of illegitimacy of Article 41 bis occurred with a pronouncement that addresses a very circumscribed issue, relating to a provision introduced by Law No. 94 of 15 July 2009, of which Article 2, para. 25(f)(3) was censured, in the part in which it "requires that all necessary security measures be adopted to ensure that the absolute impossibility for detainees under a differentiated regime to cook food is ensured" (Cort. cost., 26 September 2018, no. 186). The ruling moves within the framework of the internal parameters of legitimacy, in particular Articles 3, 27 and 32 of the Italian Constitution, not evoking instead

supranational parameters, derivable in particular from the European Convention on Human Rights. The Court noted the blatant unreasonableness of the prohibition, which was considered «incongruous and unnecessary in the light of the objectives to which the restrictive measures authorised by the provision in question are directed». A measure that configured an unjustified derogation to the ordinary prison regime, endowed with a «merely and further afflictive» value (Constitutional Court, 26 September 2018, no. 186).
A further regulatory provision characterising the special detention regime is that of the prohibition of exchanging objects between prisoners. The issue was brought before the constitutional judges, who declared the illegitimacy of Article 41 bis, para. 2 quater, lett. f), Prison Rules, in the part in which it provided for the adoption of the necessary security measures aimed at ensuring «the absolute impossibility of communicating between inmates belonging to different social groups, exchanging objects" instead of «the absolute impossibility of communicating and exchanging objects between inmates belonging to different social groups» (Constitutional Court, 5 May 2020, no. 97), clarifying, however, that the possibility for the prison administration to regulate the modalities of exchange remains firm and that any limitations must be justified by certain requirements, subject of specific and express reasons, which may be reviewed by the supervisory judge.
The Constitutional Court found itself, once again, ruling on the relationship between the differentiated regime and the right of defence, declaring illegitimate letter e) of Article 41 bis, para. 2 quater, Prison Regulations, in the art in which it did not exclude correspondence with the defence counsel from being subject to censorship (Constitutional Court, 2 December 2021, no. 18). In order to reach this decision, the constitutional judges referred both to their own precedents, in particular sentence no. 143 of 2013, and to the rulings of the European Court of Human Rights (ECHR, 20 January 2009, Zara v. Italy), considering the provision «entirely inadequate» and «certainly excessive" with respect to the primary purpose of the differentiated regime, i.e. to prevent the detainee from continuing to maintain relations with the criminal organisation to which he belongs.
The Constitutional Court's objective, which can be deduced from the aforementioned judgments, seems to be to bring the direction taken by the legislature, first, and by the prison administration, later, back into 'tracks' compatible with constitutional principles.

The 'hard prison' in European case law

With regard to persons deprived of their liberty, Art. 3 ECHR imposes a positive obligation on the States to ensure that they are detained in conditions compatible with respect for human dignity, that the manner in which the measure is carried out does not subject them to a debasement or ordeal the intensity of which exceeds the inevitable level of suffering resulting from detention, and that, taking into account the practical requirements of imprisonment, the health and well-being of the detainee are adequately ensured (ECHR, Kudla *v.* Poland, no. 30210/96, 2000; Enea *v.* Italy, no. 74912/01, 2009). If these parameters are taken into account, the special regime of Art. 41 bis of the penitentiary order could be in conflict with Art. 3 of the European Convention on Human Rights, as the limitations and afflictions to which one is subjected in such a regime could go beyond the suffering inevitably connected with a legitimate form of treatment or punishment (ECHR, Labita *v.* Italy, no. 26772/95, 2000).

The problem of the compatibility of the Art. 41 bis prison regime with the prohibition enshrined in Art. 3 of the European Convention on Human Rights has arisen not only because of the numerous appeals to the Court censuring detention conditions and treatment contrary to the sense of humanity, but also in the light of the reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment (Cpt), which has observed that the Art. 41 bis is one of the «among the 21 harshest regimes that the Cpt has hitherto been given to observe», and *ad hoc* recommendations have been made, aimed in particular at making the isolation regime to which detainees are exposed less intense (Report to the Italian Government on the visit made by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment to Italy from 22 October to 6 November 1995, § 91).

In spite of the harshness of the regime and the numerous criticisms from doctrine and the Cpt, the Edu Court, from the very first judgements on the subject, considered it legitimate because it would not reach the threshold to constitute a violation of Article 3 of the ECHR, because such a regime would be necessary to guarantee order within the prison establishments and public safety, provided that, in particular cases, the dignity of the prisoner is respected. Already since the Natoli case, the then European Commission had considered that the regime under Article 41 bis gave rise to a form of social isolation that was only partial, since forms of contact with other persons were in any case ensured, albeit in a reduced manner, and the possibility of working or carrying out other activities in prison was not

entirely excluded. The measure, therefore, did not reach the threshold necessary to be considered an inhuman or degrading treatment (ECHR, Natoli *v.* Italy, no. 26161/95, 1998; ECtHR, Messina *v.* Italy (2), no. 25498/94, 30, 2000). This, however, has not prevented convictions against Italy for violating Article 3 of the ECHR reagarding detainees subject to the Article 41a regime, such as the one in the Labita case, but not for the rigidity of the detention regime as such, but for individual episodes of violence within the special prisons.

Having clarified that the special regime under Article 41 bis, according to the Edu Court, is not to be considered, as such, as inhuman or degrading treatment, it is appropriate to verify whether there are any factors which, in addition to the conditions of partial isolation, may in some way further aggravate the severity of the regime and, therefore, raise a more stringent problem of compatibility with Article 3 ECHR.

It has already been observed that a treatment, in order to violate Article 3, must reach a minimum threshold of severity: it is necessary to assess the elements of the concrete case, such as the duration of the treatment, its physical and mental effects and, sometimes, the sex, age and state of health of the detainee (Cedu, Price *v.* United Kingdom, no. 33394/96, 2001; ECtHR, Mouisel *v.* France, no. 67263/01, 2002; ECtHR, Gennadi Naoumenko *v.* Ukraine, No. 42023/98, 2004).

The time factor, then, is the one that can most affect the legitimacy of the Article 41 bis regime, as it is capable of transforming a detention regime from legitimate to illegitimate (Della Bella, 2016: 328). Although it has always been considered a form of non-absolute solitary confinement (ECHR, Ercolano *v.* Italy, no. 9870/04, 2008), the Court has observed that even relative solitary confinement regimes, if applied for long periods, can, in the absence of adequate physical and mental stimulation, cause, in the long term, harmful effects destined to take the form of a deterioration of the detainee's mental faculties and relational abilities (Minnella, 2004, p. 206).

The Court, in its various rulings, has always recognised in general that the prolonged application of certain restrictions may place a detainee in a situation that could constitute inhuman or degrading treatment, however, it has stated that it cannot identify a *priori a* precise duration to determine the moment from which the minimum threshold of seriousness for a violation of Article 3 of the ECHR may be considered to have been reached (ECtHR, Gallico *v.* Italy, no. 53723, 2005). The Court, moreover, specified that the prolonged application of the regime must be examined in light of the circumstances of the concrete case, in particular it must be established that the renewal and extension of the restrictions are well-founded, that they do

not therefore constitute a mere repetition of restrictions that can no longer be justified on their merits (Enea *v. Italy*, no. *74912/01*, ECR, no. 74912/01, 2005). Italy, no. 74912/01, 2009; CEDU, Argenti *v.* Italy, no. 56317/00, 2005; CEDU, Asciutto *v.* Italy, no. 35795/02, 2007; CEDU, Paolello *v.* Italy, No. 37648/02, 2015). These are important statements of the Edu Court, which, however, has always held that there is no violation of Article 3 ECHR due to the prolonged application of Art. 41 bis, even in cases of the application of the regime for more than twelve years, as in the Gallico case, and this on the basis of two arguments: on the one hand, the prolonged application of the restrictions appeared justified in the light of the requirements of prevention; on the other hand, it was held that the proof that the prolonged application of the regime had caused physical or psychological effects on the applicant that violated Article 3 ECHR had not been reached.

Only in one case has the Edu Court recognised a violation of Article 3 as a result of a prolonged application of a rigorous detention regime, in the Öcalan case, which was followed by the condemnation of the Turkish State for subjecting the applicant to almost absolute solitary confinement for approximately ten years (ECHR, Öcalan *v.* Turkey, No. 24069/03, 2014).

The Öcalan case – despite the fact that the Turkish regime was considered harsher than that of Article 41 bis of the Italian penitentiary order – can serve as a warning: if it is possible to deduce from the Turkish case that detention regimes stricter than 41 bis, if applied for ten years, are contrary to Article 3 ECHR, even 41 bis, if applied for very long periods, can reasonably be considered an inhuman and degrading treatment. One thinks of the case of the Mafioso Leoluca Bagarella, subjected to the special regime since 10 July 1995, in whose case the European Court of Human Rights, in 2008, did not recognise a violation of Article 3 of the European Convention on Human Rights due to the prolonged application of the regime (Bagarella v. Italy, 15625/04, 2008). Can an inhuman and degrading treatment be found now, after twenty-nine years of imprisonment under a differential regime, given what was stated in the Öcalan judgment?

From the most recent case law, however, it seems that the European Court of Human Rights, albeit timidly, is beginning to show greater sensitivity to the issue and this can be said in the light of the ruling on the case of the Mafia boss Bernardo Provenzano, whose last years of detention were marked by various medical events, due to the numerous pathologies from which the detainee suffered and their progressive worsening, also characterised by a serious deterioration of cognitive functions, which ended up limiting and cancelling even his communication skills. The

Strasbourg judges, hearing the appeal against the measure extending the regime a few months before his death, going beyond what had hitherto been generically argued on the subject of the prolonged application of the special detention regime, considered it necessary to verify whether the Italian authorities had carried out an effective assessment of the detainee's dangerousness, taking into consideration any possible change in the applicant's situation that might question the continuing need for such restrictive measures (ECHR, Provenzano *v.* Italy, no. 55080/13, 2018).

Punishment and social reintegration

In criminal matters, among the constitutional principles, of particular importance is Article 27(3), according to which «punishments may not consist of treatment contrary to humanity and must aim at the re-education of the convicted person». The lexical tenor is unequivocal: the provision enshrines the principle of humanity and the re-educative purpose of punishment. Already at the end of the 19th century, moreover, with the theorisation of Franz v. Liszt, individual intimidation and neutralisation were flanked by aspects of true resocialisation (Litz, 1883, p. 51).

It is important to clarify that, in the general landscape, there is no 'winning' theory of punishment, as the legitimacy of criminal sanction varies depending on the type of state (Marinucci, Dolcini, Gatta, 2018, p. 5). The connotations that are outlined in our Constitutional Charter are those of a social state under the rule of law, secular and pluralist. In criminal matters, then, what marked a profound novelty in Italy was precisely the choice made by the Constituent Assembly, since – it is clear – it wanted to consecrate *expressis verbis* the teleological guideline of the re-education of the convicted person, closely linked to the personalistic and solidaristic inspiration of our State (Mongillo, 2009, p. 179). It is clear, in fact, that in a social state governed by the rule of law, the relationship between authority and the individual has a completely different face from that of an authoritarian or totalitarian state or a confessional state.

The State – at least according to the Italian Constitutional Charter – cannot use punishment as a mere deterrent, nor can it have recourse to it to achieve transcendent purposes, which pertain to a sphere other than that of civil coexistence (Dolcini, 2019, p. 17). The question of what are the legitimate purposes of punishment, however, remains very complex and of permanent topicality, also because it is affected by social conjunctures, as well as by the political-legal system of reference.

After the first attempts by both doctrine and constitutional jurisprudence to curb the innovative thrust of the constitutional dictate, a 'syncretistic'

approach, hinging on the concept of the multifunctionality of punishment (Mongillo, 2009, p. 179), eventually consolidated. It is precisely the multifunctional theory of punishment that has long been accepted by the Constitutional Court through a series of rulings (Vassalli, 1961, p. 296). Fundamental, in this perspective, have been the rulings on common life imprisonment, in which the Court stated that the re-educative purpose is not the only one attributable to punishment and that its non-implementation, with specific reference to certain types of punishment, could not justify a declaration of unconstitutionality (Constitutional Court, 12 February 1966, no. 12; Constitutional Court, 22 November 1974, no. 264). In multifunctional constructions, the idea of re-education is of particular importance because it is not only considered a constitutional cornerstone, but also an achievement of civilisation (Mongillo, 2009: 179). The process of re-education is understood as «a commitment of the State towards the delinquent» (Palazzo, Viganò, 2018, p. 33).

The last forty years of jurisprudence, however, have been marked by a slow but very significant evolution that, moving from the polyfunctional conception of punishment in the perspective of a cautious transposition of the re-educative end, has progressively achieved moments of broader valorisation of it, until it came to qualify the re-education of the sentenced person as the main inescapable aim of punishment itself. Hence the overcoming of the polyfunctional theory of punishment and the beginning of the discussion on the claim that its execution is not inhuman. The answer certainly comes from Cesare Beccaria's oldest statement, according to which, in order for punishment not to be seen as pure violence, it must be the minimum possible, i.e. the one absolutely necessary to defend «the deposit of public health» (Beccaria, 1981, p. 65). Punishment, in this perspective, meets the criteria of proportionality and minimisation of the state use of violence. It goes without saying that disproportionate punishment turns into prevarication.

So, it is clear that the principle of re-education is closely connected to the principle of humanity of punishment and therefore to the principle of proportion: it is a synergy brought into play on the one hand by the Constitutional Court and on the other by the European Court of Human Rights. As is well known, in fact, the principle of the humanity of punishment is affirmed not only by Article 27, para. 3 of the Constitution, but also by Article 3 of the ECHR (ECHR, 6 April 2000, Labita v. Italy, no. 119 ff.). The impulse given by the Strasbourg Court to Italy was aimed at intervening both on the content and on the executive modalities of custodial sentences, as well as reconsidering the relationship between custodial sentences and other penalties limiting personal freedom. All this,

of course, to ensure detention conditions that respect human dignity. It is precisely the minimum standards of dignity in the phase of deprivation of personal liberty within the prison that represent a fundamental objective to be achieved not only to avoid trampling on the dignity of the detainee, but also and above all to aspire to achieve the re-educative goal. Our Constitutional Court, in fact, already when it was still embracing the polyfunctional theory of punishment, recognised that «penal treatment inspired by criteria of humanity is necessary for a re-educative action of the convicted person» (Constitutional Court, 4 February 1966, no. 12). The conditions of Italian prisons, however, do not allow one to be very confident, indeed they turn the constitutional premises on punishment into yet another unfulfilled promise. It is no coincidence that the decrease in the overcrowding index - although recorded in the past, except for a new rise in recent years - does not automatically correspond to the respect of Article 3 of the ECHR (Pugiotto, 2016, p. 1204). In the light of this, it emerges that the re-educative capacity of punishment is often limited by the prisoner's conditions of discomfort and suffering, so much so that it is useless to think about actions aimed at social rehabilitation if the preconditions for safeguarding the dignity of prisoners as persons are not created first.

Coming, finally, to the relationship between the re-educative purpose of the penalty and the 'hard prison', the inmate in the Article 41 bis regime – we have seen – lives in an exceptional condition compared to all the other inmates: his social dangerousness, in fact, seems to legitimise a suspension of the ordinary penitentiary treatment and this is aimed at its neutralisation. When, however, one looks only at the social dangerousness, instead of looking at the person, the punishment runs the risk of pursuing exclusively prevention purposes, leaving out the re-education and re-socialisation pathway. According to the Italian Constitution, punishments, all of them, must aim at the re-education of the convicted person, whatever crime he has committed. The fundamental Charter does not allow detention to have [exclusively] a punitive, preventive or retributive character. The special prison regime, moreover, does not appear to have anything reeducative about it because in many ways it is based on restrictions that appear to be physical and psychological harassment contrary even to international human rights conventions. For example, imposing very stringent militias on the possibility of reading books or listening to music, seems to be a merely afflictive, punitive instrument, with no effective function for the exclusion of links with the outside world and without revealing any re-educational capacity, indeed in the latter perspective these activities should be promoted.

Conclusions

The life imprisonment and the special detention regime in Italy are united – in the majority of cases – by the fact that they originate from organised crime offences, in particular mafia offences. The other element that the two institutions have in common is their purpose or, rather, the reasons that apparently justify them. On the one hand, the hostile nature of life imprisonment, which in practice does not allow one to leave prison even after many decades unless one has cooperated with the justice system or other conditions whose proof is very difficult if not impossible, and, on the other hand, the special detention regime with its very penetrating afflictions and limitations, find their apparent rationale in the legislator's desire to prevent the prisoner, if released (in the case of a life sentence review) or from within the prison (in the case of the special regime), from resuming or continuing relations with criminal organisations. To this rationale 'on paper', capable of overcoming a series of censures of constitutionality and violation of the ECHR, in fact, another one is likely to be added, with a less presentable and, therefore, unreported face. The 'life sentence' and the 'hard prison', in fact, in practice lend themselves well to being used as instruments to try to obtain the cooperation of prisoners because, if they cooperate with justice, they will obtain a review of the life sentence and/or the termination of the special detention regime.
This likely discordance between the apparent and the real function of both the life sentence and the special prison regime emerges, for example, from the consideration that cooperation with the law is not in itself a guarantee of severing links with the criminal organisation, because it could be merely instrumental in obtaining prison benefits. 41 bis prison regulations, which do not appear to be useful in preventing communication with the outside world and, instead, appear to be afflictive treatments that, in the end, are only useful to cause greater 'suffering' and thus stimulate cooperation with the law.
If what we have now written is true, i.e. that the real objective of life imprisonment and 'hard prison' in Italy is not so much and only that which formally appears, but that which reality shows, i.e. that of attempting to force the prisoner to cooperate with justice, these institutions pose considerable problems of compatibility with many principles of the Italian Constitution and also of the ECHR. In fact, these are punishments that may be disproportionate, particularly afflictive and that, in any case, do not preserve anything of the re-educative purpose that Article 27 of the Constitution attributes primarily to punishment. Moreover, even if one wished to recognise that the primary purpose of life imprisonment and 'hard prison' is that, declared, of special prevention and security

compromised by the dangerousness of the prisoner, it is sufficient here to recall the verses written in the first decade of the 19th century by Francisco de Goya at the foot of two of his engravings: «*tan bárbara la seguridad como el* delito»[10] and «*la seguridad del reo no exige* tormento»[11] .

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[10] 'The custody is as barbarous as the crime'.

[11] "The custody of a prisoner does not call for torture".

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