# Conditions of detention under art. 41-bis 2nd subparagraph of the penitentiary system: its exact functionality
# Some comments to the circular letter n. 3676 of 2.10.2017

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**Abstract**
Considering the sensitivity and the complexity of this topic, it cannot but be evident that its discussion will inevitably be lacking and probably flawed as well. The risk of an incomplete and biased critique is always lurking. And the circular letter's analysis about the special penitentiary system's organization, as laid down by art. 41-bis "O.P", cannot but be exposed to this kind of critique. In fact, the regulation is particularly unique, complex and structured, affecting practical realities, whose dynamics, sometimes almost undetectable, can only be completely understood by those who gained, during the many years of their profession, study and daily work, long-established knowledge of the criminal mobster phenomenon.

***Keywords****: penal institutions, conditions of detention, order, penalty.*

Several issues converge on the organization of the special penitentiary system: while on one hand there is a need of protection of the fundamental rights of the individual, detained in the restricted regime, on the other hand there are specific finalities, on a same constitutional level, concerning the guarantee of national security, public security, economic welfare, defence of order and crime prevention, health and ethic safeguard, individual's rights and freedom protection.

In the balancing process of the interests, all of a constitutional level, it is crucial to consider that the provision of a special penitentiary system is nothing but a prevention measure, aimed at interrupting contacts between prisoners, representatives of organized crime and the clique's members, which is operative outside, in order to prevent the commission of crimes.

All the prisoners subjected to this special regime share a high criminal profile and a proven ability to keep contacts with the outside world, despite the fact they are in a detention regime.

The latter is the main raison d'être underlying the adoption of particular prevention measures, laid down by law and specified in the ministerial act, which, despite the fact they determine restrictions to the ordinary exercise of individual rights of the person, are justified with the one's peculiar dangerousness and ability to maintain links with the

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outside world and, therefore, their leading position in the criminal organization, with consequent harm to public security.

The envisaged measures do not aim at punishing the prisoners, as they are not meant to exacerbate their affliction and they do not serve as an adjustment after the sentence has been served because of nature of the committed crime.

Such measures do not tend to impose an additional affliction, added to the already existing penalty, on those who are subjected to the special penitentiary system.

Their purpose is to prevent further crime commission.

This is their raison d'être.

This is why they assume full attention and a careful observation of the department life, instrumental and functional to the pre-emptive purpose, which must not be undone by merely repetitive conducts and decrease of attention.

It cannot be underestimated that, every day, in every moment of his department's day, every prison officer carries out a guarantee function towards society's safety.

The basic condition in order to properly apply the art. 41-bis regime, with due regard for its special and distinctive connotations, is the uniform implementation of the rules and practices within the penal institutions, thus preventing the system to be disrupted by procedural divergences.

In fact, a divergent application of the rules, as well as mistakes in their exact implementation, might provoke a breach in the system and, eventually, its collapse.

The contact with the outside world, which the penitentiary system promotes as functional to a social reintegration, cannot, in this peculiar detention regime, determine, in any way, even indirectly, a link among prisoners, belonging to criminal organization, with the latter's members which are at large (Constitutional Court 376/1997; order 417/2004, 192/1998).

In this perspective, the development of sociality groups inside the penal institution is of a decisive importance (Art. 3.1 of the circular letter n. 3676 of 2.10.2017 *"Nella determinazione dei gruppi di socialità il Direttore dovrà avvalersi del personale dedicato alla custodia"*).

Crucial factors in the development process of sociality groups are the culture, the knowledge of the crime syndicate and the experience acquired by those who work in the penitentiary system's sector.

The creation of the sociality group requires a careful assessment of the prisoner's backstory, of his origin's region, of his membership's clan and of the geographical area where the clan operates.

Sociality groups must be formed in a way that precludes any order, information, news coming from the outside world to be communicated and that there is no contact between prominent personalities, regardless of the criminal organization they belong to.

This is why the group's composition should consist of only one major criminal personality among less prominent members, who do not belong to the same criminal organization or to allied or opposed organization operating in neighboring territories.

Indeed, the formation of sociality groups must be made in such a way which excludes that, during the outdoors hours and sociality moments, there are any possibilities to constitute, or reconstitute, forms of aggregation, which allow to strengthen the criminal network, functional to the conception, planning and commission of crimes by prisoners subjected to the special regime.

Without any doubts, this assumes the capability of a careful, conscious and focused observation of the prisoner's life under the special regime, as, behavioral profiles, apparently insignificant, acquire crucial importance in the perspective of tracing criminal realities and projects.

The prisoner's history, directly learnt through his file, as well as through information coming from other penal institutes, where he stayed (It is also relevant to know the prisoner's conduct in the different sociality groups where he had been inserted in other penal institutions, in order to check his different behavior, calm or unruly, towards other prisoners), and his observation, allow to acquire all those elements, useful for the assessment of his skills in maintaining contacts with the criminal world, in carrying out operations of "approaching" and sharing of interests between mobster cliques, which are expression of different territorial origins.

In this perspective the attention given to the different moments of the prisoner's life, restricted to the special regime and of his behavior, is crucial.

The inspection of his correspondence, with the help of post office and censorship's employees, reveals potential contacts, between the prisoner and other people, even under the 41.bis regime.

Therefore, it is evident that the composition of the sociality group must be made considering external contacts and links which may exist between other prisoners in the 41-bis section.

And the observation of the conversations between the prisoner and his relatives allow to reveal if there are any new alliances or new approach among mobster cliques.

If it is acceptable that these must be the dynamics to consider when creating sociality groups, it also must be considered that the circular letter, when referring to the creation of sociality groups, seem to underestimate this set of knowledge and essential elements of assessment.

When stating that the Director, must use the guardianship staff in the formation of sociality groups, there is no consideration of that set of knowledge, as well as of the mobster phenomenon's dynamics, whose acquisition and chance of understanding assume direct experience and interpretative skill.

Actually, there is no clarification of which are the qualified figures, who have the necessary stock of knowledge about mobster culture and experience, who must be used by the Director in the group's formation.

Thus, with regard to the "impossibility to communicate" of art. 3 (Art. 3 "*Dovrà essere assicurata l'impossibilità di comunicare e di scambiare oggetti tra tutti i detenuti/internati anche appartenenti alla stesso gruppo di socialità".* Such provision has been introduced after Cass. n. 5977 of 8.02.2017, modifying the common practice of allowing the transfer of foodstuffs, coming from the monthly package, to the sociality fellows) of the circular letter, it would have been appropriate to punish the breach of the prohibition. This is because of the different thinking of the different institutes directors who, in the case of breach of the prohibition, do not conclude the disciplinary procedure with a sanction, filing proceedings initiated against the detainees responsible for the "greetings".

In the prison culture and in particular in the hierarchical scale of the criminal organizations, it has been observed that addressing the greeting is the one who usually occupies positions of paramount criminal responsibility, against which there is submission and obedience by the other constraints. Whoever is in the position of preeminence has the

power to move the balance within the section in which he or she resides, assigns the order, and grants his approval to take certain actions.

Sometimes all of this is backed up in the greeting to one of the same rank, or to a superior rank criminal subject.

No aspect of a detainee's life, restricted to the special regime, must be underestimated.

In this regard, the European Court of Human Rights (CEDU, Nov 13th 2007, appeal 65039/01, Schiavone vs Italy) has held that the special restrictions of the 41-bis regime, while constituting an interference in the exercise of the right to respect for family life, guaranteed by art. 8, par. 1 of the European Convention for the Protection of Human Rights ("*Everyone has the right to respect for his private and family life, his home and his correspondence."*), cannot be regarded as infringements of the same law when the conditions set out in para. 2 of the same art. 8 ECHR are met.

According to the latter, "*there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".*

Thus, the Strasbourg Court held that the special regime governed by art. 41-bis of the "O.P" does not constitute a violation of the fundamental right enshrined in the conventional law, but points out that an interference, in order to be considered necessary in a 'democratic society', must in particular remain proportionate to the legitimate aim pursued.

In this way an interpretative canon of the discipline of art. 41-bis has been introduced.

Therefore, the ECHR considered the restrictions related to the talks and the visits of the family members in the case of prisoners under 41-bis compatible with Art. 8 of the Convention, because they aimed at breaking the links between the detainee and the mafia membership organization.

The aim is to minimize the risk of exploitation of family and personal relationships, given the established use of family reunion, as a vehicle for the transmission of orders and instructions outside the prisons, in order to achieve the aim of prevention related to the prevention of crimes (ECHR, GC, 17.09.2009, Enra vs. Italy; ECHR, sect. ii, 12.01.2010, Mole vs. Italy; ECHR, sect. ii, 19.01.2010, Montani vs. Italy; ECHR, sect. ii, 13.11.2007, Schiavone vs. Italy).

In this regard, the Administration, in implementation of the Constitutional Court ruling 376/1997, initially introduced the possibility of carrying out a part of the visual talk with children under 16 years without partition glass to protect the need for affectivity of children, towards the parent detained, and to prevent the minors from having negative consequences due to the prolonged detachment from the parental figure (Circular dap n. 543884.1.1. 41 bis of 6.02.1998).

Legislation prior to 2009 allowed more room for discretion. Subsequent regulatory developments have progressively led to a reduction in margin of discretion.

With circular no. 3592/6042 of 9 October 2003, the Administration has established a lowering of the age limit from 16 to 12, stating that interviews of prisoners subject to the 41-bis regime with children under 12 years of age may take place without partition glass,

in talking rooms with video-recording equipment throughout the duration of the interview, in the case where the talk is exclusively with the child, or for a time not exceeding 1/6 of the total duration, in the case where there are also other family members.

Law 94/2009 further amended the regime in art. 41 bis, reducing again the scope for organizational discretion, allowed to the administration in the choice of concrete restrictive measures to be taken.

However, the administration, with circular dap n. 0101491, dd.12.03.2012, while respecting the changes to the detention system, which intervened after the law 94/2009, has decided to confirm the most favorable arrangements for the interviews of restricted persons under the regime of art. 41-bis with the minors, in order to ensure a balance between the exercise of the affectivity of minors at an early age towards detainees and security needs.

The restricted regime, even with regard to talks, has a significant difference to the ordinary prison system, justified by the need to prevent the passage of communications between the detained person and members of the mobster association outside the prison.

These limitations are already expressed in indent 2-quarter lett. B of art. 41-bis and imply both quantitative restrictions ("the suspension of the rules of treatment and the institutes referred to in paragraph 2 precedes ... the determination of the interviews in the number of one per month to be performed at regular intervals"), and qualitative ones (prohibition of the passage of objects), as well as in relation to the confidentiality of the interviews, subject to audit and registration.

In this regard, the Strasbourg Court found that the presence of isophonic glass, as a barrier to physical separation between the prisoner and the members of the prison during the encounters in the prison context, is justified by the need to prevent the passage of objects that could facilitate escape of the detainee, of the commission of further offenses and ultimately of reasons for the protection of the community, which, pursuant to art. 8 ECHR, allow such forms of interference in individual and family life (ECHR, G.C. 17.09.2009, Enea vs. Italy).

Based on the foregoing, with specific reference to art. 16 of the circular, it should be noted that the provision concerning the interviews, with no partition glass between the detainees in a differentiated regime and the children under twelve years old, does not seem to adequately assess the security requirements, coterminous to the restricted regime, to the extent which it does not provide for revocation of the permission to use the interview with no partition glass with minor, responsible for the delivery of messages between the prisoner and the adult family members.

Similarly, the provisions concerning the strolls, the room and the painting room (Art. 11.2, 11.4 and 11.5 circular n. 3676/6126 of 2.10.2017) cannot fail to comply with the purposes of the restricted regime and those requirements of homogeneity "of application, within the various prisons, of the rules and practices which characterize the detention under the dictates imposed by art. 41 bis O.P ", as stated in the preamble to Circular no. 3776/6126 of 2.10.2017.

In fact, the wording of the provisions in question leaves room for different interpretations and consequently for various disputes.

And indeed detainees can stay outdoors for no more than two hours a day.

The problem is, however, to understand how such hours should be distributed.

Two hours outdoors are set: one hour at the strolls and one hour in the break room equally.

The problem is to figure out how to settle if the detainee wants to make two hours in the break room, since art. 11.4 of the circular provides only one hour of room use.

Practical application of this provision may be easy in some institutes, but for structural reasons it is impracticable in others.

Even the attendance of the painting room presents numerous problems.

And indeed, despite the submission to censorship of the correspondence of the prisoners, there is the use of colors that can facilitate the outside circulation of cryptic messages.

Considering the purpose of the restricted prison system there was and there is to be a reflection on the opportunity to use colors for the editing of correspondence, rather than leaving it to the sensitivity of the censorship staff.

In fact, it must be considered that detainees in the regime provided for in art. 41-bis are, however, the prominent figures of the mafia organization, which, as history confirms, if not prevented, would have no hesitation in prosecuting criminal activities.

Criminal attitudes almost ontologically pervade their individual identity.

For this reason circular's provision concerning the library and book service, as well as those on personal computers (Art. 11.6 "library and book service"; art. 14.1 "personal computer") lend themselves to inevitable criticisms.

The possibility of buying books, through a maintenance company, even with a hard cover, renovate the subject.

Hardcover books were previously forbidden, as it was believed that they would be used to conceal the so called "pizzini" (Hand-written piece of paper containing messages), handcrafted daggers and more, as they were difficult to inspect.

The reasons for the ban did not stop, though the ban was inexplicably removed.

The provision regarding the personal computer erroneously also refer to the provision of art. 16.5 instead of 16.4, which regulates the delivery of documents and documents between detainees and defendants, correspondence assisted by the guarantees referred to in art. 103 C.p.p. and 35 disp. att. C.p.p.

The provision reflects a serious discrepancy.

Indeed, on the one hand, the consultation of judicial material on computer support is subject to the authorization of the Judicial Authority, on the other hand, the delivery of judicial acts between detainees and defenders (on digital support) is taken out of any control whether it is a prior or subsequent one.

It cannot but be emphasized in this regard the perplexity around the choice made by the circular to derogate from the provisions of ordinary law.

And most importantly, it must be considered that the ability to receive DVDs and CDs will make having external contacts easier, enabling encrypted files to circulate and more.

The indispensability of controls arises not only from the need to interrupt the contacts between the mobster criminal and the external criminal world, but also to ensure the safety of other prisoners and of the prison employees.

So in terms of searches (Art. 25.1 "perquisizioni"), the provision lends itself to criticism.

The provision objectively limits (and inappropriately) the search power.

Meanwhile, mere instrumental control, by means of a metal detector, does not allow to detect any "pizzini", handmade daggers derived from wooden sticks of the brooms, blades extracted from the razors supplied enclosed in the oral cavity and inside the pockets

Nevertheless, the norm raises the attention threshold of prison employees, stating that "particular attention should be paid whenever the detainee / interned within the institution has the possibility of physical contact with family members or with third parties, in order to avoid message delivery and the exchange of items ".

And it is true that the provision allows manual search and denudation, but only in case of "grounded suspicion" about the possession of objects that are not allowed, dangerous for the order and the security of the institute not detectable through the technical system control.

The provision inevitably raises the question of when this suspicion can reasonably be excluded in the presence of individuals of such high crime, such as those under the restricted regime.

Moreover, with regard to the search provision, in the case of a manual search, it is must be written a specific report, in which the reasons for requiring manual search must be specified, and it may be absurd to have to write, in larger departments, about 200/300 reports per day, with considerable workload.

Not to mention that sometimes the need for control may arise from a mere intuition of the prison employee and his subsequent groundlessness would led to continuous complaints from the detainees' lawyers.

After a careful reading of the recent circular content is it clear that it does not take into account the complex reality of the restricted regime of 41-bis, the resources provided by the institutes and in some cases the purposes of the special detention regime.

This also emerges from the provision concerning spiritual assistance (Art. 36 "assistenza spirituale").

The previous departmental provisions in this regard, concerning the movement of prisoners under a restricted regime, state that the opening of the detention room is allowed in the presence of at least two units of the Penitentiary Police.

It follows that the simultaneous opening of the detention rooms presupposes the mobilization of prison police personnel, probably not available within the individual institutes, with consequent vanishing of the purpose of preventing fraudulent contacts between detainees belonging to different social groups.

The major need after this brief review of some of the circular's profiles is that, even after the necessary and indispensable process of balancing the interests of the detainee as a person and of national security and public order, there shall be no space of freedom, which can, to some extent, be inappropriately used for the consolidation of the criminal network.

Every regulatory vacuum, any incompleteness of the law provision, any neglect and superficiality of discipline is always perceived by the citizen as a *vulnus*, such as a defeat of the Institutions and as concessions of room for manoeuvre to criminal organizations.

This is not because people ask for revenge.

But it cannot be neglected that forgiveness, which falls within the sphere of subjectivity of each individual, is different from the oblivion and the need for guaranteeing public order, the security, the safety and the freedom of those living in this State.

And this is a fundamental and indispensable guarantee, which is at the same time the reason for the existence of a State that wants to be based on the values expressed by our Constitution.

What ordinary people ask is not to be humiliated by instrumental forgiveness, which is perceived by Mafia as a message of weakness and dialogue.

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