Italy's Penitenciary Order: art.41 bis OP. Juridical and criminological profiles

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Abstract

The introduction in our penitentiary system of differentiated regimes for the execution of the sentence is based on some fundamental principles underlying our system that mainly concern the social danger and the treatment of the convicted person. Both concepts are strongly oriented on the person of the condemned because the social hazard is configured, according to the same normative dictate (art.203 cp), as quality of the person and treatment as a tool for re-education and re-socialization and, therefore, modification of the behavior of the person. On these principles is based the reform of 1975. The introduction of differentiated regimes, which seems to contradict the principles established by the reform, however, takes on a political significance as it corresponds to historical periods of particular social alarm determined, in a first phase, from the phenomenon of terrorism and, in a second phase, from the increase in the mafia phenomenon. The text traces the historical development of the legislation in its evolution and subsequent changes, identifying some aspects that have been criticized regarding the principles of protection of the rights of prisoners and the possible violation of constitutional principles. However, the possibility of differentiated regimes for detainees belonging to organized crime is reiterated, as an effective means of breaking the links between the convicted person with the criminal association, in a process of fight against the Mafia which continues even during the execution of the sentence. It ends with the presentation of the most recent modification proposals.

Keywords: social danger; penitentiary treatment; organized crime; rights; social defense.

1. Premise

The provision of a differentiated regime for some categories of prisoners characterizes the enforcement systems of many countries and not only with regard to Italy. The rule is generally dictated by the need to provide for the execution of sentences that do not leave the condemned the possibility of continuing to harm

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even if he has been convicted and in any case is in a situation of captivity with the strict control of the competent authorities.

It is possible to identify general criteria that are independent from the single penal systems underlying the application of differentiated enforcement systems. In the first place the type of crime: there are crimes in fact that cause a particular social alarm for the physical and psychological damage caused to the victims and for the fallout they have on social perception. Reference can be made to all crimes against the person, especially if committed with particular violence, to sexual crimes, especially if perpetrated to the detriment of minors or crimes against property and against the person who assume particular importance from the point of view of social dangers as they presuppose adherence to an association structurally oriented towards criminal activities. Another criterion that generally justifies the application of differentiated penal enforcement regimes concerns the criminal career of convicts: the repetitiveness of the criminal conduct is indicative of a stable delinquent profile to make the subject more predisposed towards a stabilization of criminal behavior. This also presupposes even more severe sentences. Another criterion concerns the personality profile of the condemned person who refers to particular categories of offenders where there are psychopathological disorders that, even if not such as to justify an assertion of non-imputability of the subject, create conditions of execution of the sentence that they can not be assimilated to those of other prisoners. To this category can be added that of drug addicts, who however have even more specific characteristics, with particular effects on the behavior in prison due to the deprivation of the substance. So far, there have been highlighted the conditions that determine differentiated enforcement procedures based on characteristics that are structurally related to the type of crime and the characteristics of its author, while there are conditions that determine the application of differentiated and contextual systems that presuppose contingent situations. S refers to behaviors by prisoners related to the prison environment and which may jeopardize prison safety. In this case, these are restrictive measures that can be transitory when the management of prison life has returned to normal. These are rebellions and riots or insubordination that may occur among prisoners during prison life that put at risk, not only the normal administration of the institution, but also the physical safety of the personnel and other prisoners.

Coming more in detail to the Italian situation, a substantial distinction must be made when referring to differentiated enforcement regimes between differentiated regimes for restrictive purposes and differentiated regimes for curative and educational purposes: in the first case the objective is to ensure internal security (in case of behaviors damaging security inside the prison) or external (regarding the fallout that some categories of offenses and types of offenders can have on the safety of the social community), in the second case the objective is to ensure to particular categories of prisoners the specialized interventions necessary for adequate social reintegration. In the first case the

inspiring principle is that of the dangerousness that distinguishes some categories of convicted intesa, as stated in the same art. 203 of the c.p., "a quality of the person", a concept that inevitably can not ignore the type of crime and the characteristics of the authors especially regarding their criminal career.

Another aspect that can not be neglected of our penitentiary system is the concept of treatment, the cornerstone of penal execution in Italy and still the backbone of our penitentiary system. Concretely, the treatment is based on a model of justice that is strongly sociorebilitative and which is also reflected, as already mentioned, in the Constitutional Charter, and should be considered the purpose of social reintegration of the offender in a perspective that sees the penalty as an instrument, perhaps using a paradoxical expression of "compensation" on the part of the institutions towards subjects previously deprived of social opportunities. It is clear that such goals often come to assume a utopian meaning even if they involve highly trained and highly motivated staff. To the ideology of the treatment, which often failed and was criticized because of the non-reduction of recidivism which was supposed to be the most ambitious result, an ever-increasing expansion was added in our system of punishing contacts with the territory and the tendency to increasingly implement the prisoner's relations with the outside world both with admission to prison benefits and such contacts provided, both with the granting of non-custodial measures and facilitating the inclusion of the subject in the social context after assessment, of course , of a positive prognosis on future behavior. It is clear that this system could not include convicts with a particularly alarming criminal profile such as not only to offend the collective sensibility, but also to undermine the sense of security of the community.

In fact, our penitentiary system provides for regimes differentiated by virtue of the normative dictates of the person "socially" dangerous with different facets and executive aspects that have developed over time: it is appropriate at this point a brief historical account of how it is configured in our system penitentiary this orientation.

2. Historical development of the norm

The law n. 354/1975 represents a moment of historical importance for the execution of penalties in Italy. After 30 years of political, legal and cultural debate, a reform of our criminal justice system has been launched, for years in crisis because it is anchored to old custodial assumptions and not enough to protect the rights of the condemned. 1955, they had expressed themselves with the Minimum Rules of the Rights of the inmate emanated by the United Nations. With the prison reform, the constitutional principle laid down in Article 27 is finally complied with and numerous innovations are introduced which will undergo, over time, significant changes in an expansive or deflationary direction depending on historical-political circumstances. Among the fundamental contents, the conception of a sentence based on the personality of the condemned, based on the principle of scientific observation of the personality as a prerequisite for the activation of

treatment interventions that have the main objective of the re-socialization of the condemned, aimed at the reduction of recidivism. Another fundamental aspect is the introduction of alternative methods to the execution of the penalty that do not prescind the detention, considered, in the sociooreacative perspective of the reform, instruments even more effective for the social reintegration of the condemned in particular for specific categories of convicted as example drug addicts. Execution outside the criminal court is inserted both in a rewarding perspective, which refers to the regulation of permits, both to the application of real penal measures governed by a regulation that provides for them as autonomous measures, applicable according to legal requirements and not only in relation to the behavior held during the execution of the sentence. The treatment model of execution of the sentence and the philosophy of the benefit, as well as the prospect of a system that does not constrain the response of the state to the crime to the exclusive use of detention, has represented a cornerstone of our penitentiary system and still represents a significant foundation demonstrated by a constant expansion over time of alternative measures to detention.

And the differentiated schemes? The reform does not give up the type of socially dangerous prisoner supported by a historical period in which inside our prisons there are "special" prisoners convicted of crimes such as armed band association and terrorist activity. The provision of a special surveillance regime for terrorists is governed by Article 90 of the penitentiary system and provides, on the initiative of the Minister, the suspension of routine treatment activities for a pre-arranged period strictly necessary for security needs. The provision is not exempt from criticism; the general physiognomy of the law, the excessive power attributed to the administrative authority and the fact that over time the prescription tends to become stable even if the security needs have ceased is challenged. The establishment of special prisons has marked the remission of the application of Article 90 even if the provision sometimes continues to exist even within special prisons.

With the overcoming of the "years of lead" the Gozzini law (1986) seems to bring to completion the process of renewal of the criminal execution begun with the reform of '75, eliminating the impeding crimes for access to alternative measures to detention and expanding and fostering relations between prison and territory. It also reduces the period of scientific observation of the detainee's personality from 3 months to a month in order to facilitate the entry of the condemned man to a regime of freedom, this trend of our penitentiary system that will have a constant development concretized with adjustments subsequent regulations.

The Gozzini reform replaces art. 90 with art. 41 bis I subparagraphs: even if no substantial changes are introduced as the Minister remains in issuing the provision and the indeterminateness of the provision still remains subject to the internal security needs of the institution, a greater guarantee for the condemned. In issuing the provision there is an obligation for the minister to limit the elimination

of the treatment opportunities to a single prison and only in cases where particularly serious conditions for the order and security are found. There is no reference in the prison legislation to mafia association crimes for which there is no foreclosure for access to ordinary treatment practices or to penitentiary benefits.

3. The introduction of the art. 41bis

The introduction of art. 41 bis OP. was inserted in a significant social and political context for the history of our country. The 90s are in fact characterized by an emergency due to the expansion and spread of the mafia phenomenon that has occurred in massacres that affect the heart of the state and the population, culminating in the killings of the magistrates Falcone and Borsellino. The spread of the mafia phenomenon that, in addition to the territory, also extends to the prison following the Palermo maxi trial and the arrests that ensue, impose special legislation that provides for a regime of execution of differentiated punishment for subjects characterized by a social dangerousness which tends to persist even during the period of detention. These legislative interventions mean that even the execution of the sentence, and not only the activity of law enforcement, become part of the strategies to combat organized crime.

With the law n. 203/1991 and n. 356/1992 introduces in our penitentiary system a so-called "dual-track" route addressed mainly, if not exclusively, to organized crime. The art 4 bis of the OP in fact provides for the exclusion from the granting of premiums, alternative measures, excluding early release, for crimes involving the mafia association (416 bis of the criminal code) but also for other types of offense that require however a condition of social danger of the subject. If with the 2002 reform (Law of December 27, 2002, No. 279), which definitively stabilized the discipline, the application of a different regime was limited to the detainees who were challenged by the aggravating circumstance of 416bis, then there was more and more the range of crimes for the application of a special regime has been expanded, thus creating a rather heterogeneous crunch of crimes and not exclusively referring to convicted persons involved in organized crime. Unlike the first paragraph of art. 41bis which provides for the suspension of the treatment benefits for a specified period and in the case of exceptional damage to the internal security of the institution, the second paragraph and the second paragraph bis provide for the suspension of the treatment regime for a fixed period (4 years) but extendable by two years in two years. The extension or suspension is subject to the detachment by the convicted person with the criminal association. The introduction of art. 14 bis which introduces the special surveillance regime: in this case the provision, of a transitory nature, but extendable, is determined by ascertaining the behavior of the detainee of destabilizing behaviors for the balance inside the prison such as, for example , violence and threat to other inmates or attempts at subjection and subordination.

This provision certainly has its justification: in the past the prison for the mafia did not represent an obstacle and an impediment in continuing the criminal

activity both as regards contacts with the outside and as regards the restructuring of a hierarchical system to the internal prison of the mafia organization. In this perspective, the application of art. 14a. The prison for the mafia also represented a reason for pride and a phase in which contacts were constantly maintained outside with the mafia association, which were given orders, as well as representing an opportunity for recruitment of new work once finished the expiation of the sentence.

Article. 41bis I and II comma both refer to the concept of hazard but while the first paragraph considers an "internal" danger, referring to the internal security needs of the institute, the second paragraph considers an "external" danger that involves social security (Canepa, 2010). External dangers as it is reflected on the impact that a certain type of crime has on society (Cifaldi and Serban, 2018: p. 701; Goga, 2017: pp. 78-90), but which also presupposes a structural aspect of the offender, socially dangerous by virtue of the type of crime to which it belongs. The application of hard prison in the enforcement system is not justified by the criminal offense but by the ability to liaise with an association operating in the territory considered to be of high potential for social danger. The application of art. 41 bis configures the past and the present of the condemned man, since it is constitutive elements of membership in the criminal association and the current ability to maintain contacts by issuing orders and directives.

We are certainly facing an exception from the principle of personality profile and scientific observation that the penitentiary system contained in its original formulation. From a criminological point of view, a personality profile of the convicted person with characteristics of a socially dangerous subject emerges, not so much in relation to the type of crime committed as in virtue of the criminal context from which it comes.

It should not be overlooked another aspect that emerges from the first paragraph of art. 4 bis where it is explicitly stated that access to penal benefits is favored if the special convicts decide to collaborate with the justice and to help the police and justice in the fight against the mafia organization or to sever the bond with the mafia organization, aspect that makes Pavarini (2007) say that we are faced with a "soft inquisition" capable of "dissolving languages".

4. Benefits of the application of art.41 bis, results and subsequent re-elaborations

Article. 41bis in all its application modalities obeys to precise preventive purposes and social defense and should not be interpreted as a more severe form of punishment towards criminals who have been guilty of particularly serious crimes. The discriminating factor is represented by the extent to which the perpetrator represents a danger to the same social organization that feels threatened: the social danger of the subject is therefore placed in a perspective of collective security that disregards the damage, however significant, that can have suffered the single victim. Particular importance therefore assumes the purpose to favor the separation

from the mafia association, to carry out an effective control in relation to any contact with the criminal association and former prison guide especially by those who play a leading role in the association, promote the acquisition of valuable information with the promise of suspending access to prison benefits for the capture of other members of organized crime. It is in this perspective that the provision envisaged pursuant to art. 4 bis I paragraph with the provision of restoration of prison benefits in case of availability by the sentenced to cooperate with the justice or in the case of convicted who, having played a marginal role in the criminal association, can not make a significant contribution to the investigation judicial. This regulatory provision confirms the instrumental nature of the new legal framework and the political project to achieve a fight against organized crime that involves all phases of criminal intervention.

Despite the need for a restrictive measure and its effectiveness in countering the mafia phenomenon, numerous criticisms of the introduction of art. 41 bis, which apparently seems to derogate from the founding principles of the Penitentiary Reform in our country. According to some criticisms, there is a violation of Article 27 of the Constitution and the principle according to which the penalties must be inspired by the principle of humanity and tend to re-educate the condemned even if both the Constitutional Court and the Court of Strasbourg have never disregarded the conformity of this provision in its substantial plant, but only in respect of individual measures considered unnecessarily vexatious.

Constitutional doubts have also been expressed with regard to the provision of the art.41bis II paragraph of the application of the jail hard even to individuals not condemned to final punishment but awaiting trial: the Constitutional Court has expressed itself in this sense by stating first that " belonging to a mafia association implies a permanent adhesion to a criminal association normally strongly rooted in the territory, characterized by a dense network of personal connections and endowed with particular intimidating force "(Corte Cost., sent 21 July 2010, No. 265), and, secondly, arguing that in the presence of the challenge of Article 416bis c.p. one can not ignore the application of the most afflictive measure "since it is not" minor "measures sufficient to sever the relationship between the suspect and the belonging criminal sphere, neutralizing the dangers" (Court of Justice, judgment of 21st July 2010 , No. 265). The Court itself therefore neutralizes the risk of injury to constitutional rights by appealing to the need to preclude any possibility that the defendants of crimes committed within a mafia association they can continue to maintain contacts with them and therefore continue to represent, even if they are brought to justice, a public danger for the community.

Wanting to resume what Vittorio Grevi claims "the involvement of the prison apparatus towards the achievement of heterogeneous objectives with respect to the functions proper to it, is one of the many prices that have had to be paid in the framework of the more general strategy to combat organized crime. A rather high price, [...] probably necessary at a particular historical moment characterized by the offensive of the worst crime ", which" we hope [should not] be paid for a long time

"(1994, p.15). After more than twenty years from those words, our order continues to pay that price, perhaps a sign of the persistence of an emergency, the mafia, far from the sunset.

Ministerial circular 3619/6069 of 21 April 2009, introduces a new aspect in the regulation of art. 41bis, as it provides for the establishment of a High Security section for the execution of the sentence of those for whom there has been revocation of the regime of the hard prison, as ceased the conditions of social dangerousness following the loss of contact with the mafia association. This way of execution of the sentence also configures another type of convict belonging to a mafia association characterized by a non-apical role within the organization, but rather marginal and perhaps of low labor. However, these are "different" prisoners from others subject to a reinforced control regime but not excluded from the treatment opportunities in which particular precautions are applied (Falzone, 2015). The discriminating factor in the application of the high security regime compared to the "hard prison" is not so much the different criminal position concerning the role played in the criminal organization by the condemned man, but rather the prevention of excessive concentration of convicts belonging to organized crime and avoiding contamination, exchange of information and proselytism among leaders and affiliates inside the prison. The purpose of the fight against the organization is always the prevailing requirement of the criminal and penitentiary response. A signal of change, while preserving the supporting structure of art.41bis, and its physiognomy as an instrument to combat the mafia phenomenon, comes from circular DAP 3676/616 of 2 October 2017 solicited by the work of Table 2 of the General States of the Criminal execution - detaining life, responsibility, security circuits. The circular seeks to reconcile the difficult need for the homogeneity of the execution of the sentence and its humanity with prevention and social defense. In its contents, the objective is to eliminate from the restrictions provided for by art. 41bis any vexatious and arbitrary content, specifying uniform rules of execution in compliance with the law and constitutional principles. The objective is to ensure that the application of art.41bis does not represent "... an additional affliction to the penalty already imposed" but "must remain linked to the preventive purpose".

Reconciling the protection of the rights of the condemned with the need for prevention and social defense is never an easy task in the administration of justice and it can not be excluded that there are contingent circumstances that impose the sacrifice of individual rights for the protection and recognition of collective rights, among which, of primary importance, those of victims. The only risk that must be avoided is that certain provisions, so to speak, of emergency, do not become a stable and indiscriminate procedure no longer justified by the circumstances that produced it.

There remains a problem that the jurisprudence has often posed, that is if "the hard prison" should be destined only to those who played a pioneering role in the mafia organization if the end of the special regime was to be the fracture of the link

with the association criminal. A tendency towards a discretionary assessment concerning the role played by the convict in the criminal organization seems to prevail and therefore the possibility that he has to maintain contact with it and provide information. It is therefore a matter of resorting to a non-a priori evaluation to avoid applying purely afflictive punishment procedures, an assessment which the administration must take on.

5. Conclusions

The introduction of the so-called hard prison regime in our penitentiary system undoubtedly represents a regression with respect to a manner of execution of the sentence certainly advanced and in line with the European principles introduced with the reform of '75. Those principles of humanisation of punishment considered indispensable in a modern penitentiary system are no longer valid, not only through methods of enforcement of the punishment of the dignity of the person and his physical integrity, but also in the availability of opportunities for social reintegration after it has been the penalty is served. But we know that an effective process of recovery of the individual can not ignore a path of reflection of the crime, and in this sense expresses the same principle introduced by the law n.230 of 2000 to the art.27, with the purpose to develop in the convicted an assumption of responsibility that does not exclude the same recognition and the need for reparation against the victim of the crime. The main instrument for achieving this objective is represented by the elements and contents of the penitentiary treatment and by the opportunities offered by our penitentiary system to be able to expiate the sentence outside the prison. The application of the different enforcement system of the sentence, as mentioned above, denies the prisoner such possibilities but is justified by essential needs and fully compatible with an emergency that was necessarily faced. Article. 41 bis was in fact an effective means of contrast since, faced with pervasive criminal phenomena and which do not remain foreign to the internal organization of (Cifaldi, Serban 2018: p. 716), the repressive action must involve all the agencies involved in the control, including prison. We could not continue to make the prison itself become an instrument of prosecution or even confirmation of the criminal phenomenon of the mafia type. In fact, the differentiated prison regime has not only helped to prevent prisoners from continuing to maintain contacts with the criminal organization, but also to allow the identification of others belonging to the organization and to bring them to justice. The phenomenon of pentitism, also favored by the 41 bis, even with its lights and shadows, has in fact allowed the discovery of several mafia cells and the capture of prominent members of the criminal organization.

The fundamental problem therefore is not so much the injury of the constitutional principles, even if there were no abuses on which the same Court of Strasbourg has expressed, due to the lack of access to the treatment regime reserved for all prisoners, as the moral fallout that such exclusion leads. If the instrumental objective has certainly been reached, the exclusion from the treatment opportunities

in cases where the differentiated regime has never been revoked, has led to foreclosure in the condemned to start a process of recognition of the gravity of his own history and of the entity of the damage done to the moral reform of the person to whom we must always tend. The establishment of the High Security Section and the recent ministerial proposals have opened a door to a fight against organized crime phenomena that, while not renouncing the right punishment and control, do not neglect, perhaps utopistically, even the change of motivations and orientations in the personal dimension.

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