Legal and criminological profiles of Article 41 bis OP: purposes, limits and perspectives

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Abstract

The introduction into our penitentiary system of differentiated systems of execution of the sentence is based on some fundamental principles underlying our system which mainly concern the social dangerousness and the treatment of the offender. Both concepts are strongly oriented on the person of the offender since the social dangerousness is configured, according to the same legislative dictate (Article 203 of the Criminal Code), as a quality of the person and treatment as a tool for re-education and resocialization and, therefore, of modification of the behavior of the person. In fact, the 1975 reform is based on these principles. The introduction of differentiated regimes, which seems to contradict the principles affirmed by the reform, nevertheless assumes 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 of the mafia phenomenon. The paper traces the historical development of the legislation in its evolution and subsequent amendments, identifying some aspects that have been the subject of criticisms concerning the principles of protection of the rights of prisoners and the possible violation of constitutional principles. However, the opportunity of differentiated regimes for detainees belonging to organized crime is reiterated, as an effective tool for breaking the ties between the convict and the criminal association, in a process of fighting the mafia that continues even in the execution phase 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. Public corruption: the seriousness and relevance of the phenomenon in Italy

The provision of a differentiated regime for certain categories of prisoners characterizes the systems of execution of sentences in many countries and not only in Italy. The rule is generally dictated by the need to provide for methods of execution of the sentence that do not leave the convict the possibility of continuing to harm even if he has been convicted and in any case is in a situation of captivity with the strict control of the competent authorities. General criteria can be identified that disregard the individual criminal systems underlying the application of differentiated systems for the execution of the sentence. First of all, the type of crime: there are crimes that arouse particular social alarm for the physical and psychological damage caused to the victims and for the repercussions they have on social perception. Reference can be made to all crimes against the person, especially if perpetrated with particular violence, crimes of a sexual nature, especially if perpetrated to the detriment of minors or crimes against property and against the person which assume particular relevance from the point of view of social dangerousness as they presuppose the adhesion to an association structurally oriented to

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criminal activities. Another criterion that generally justifies the application of differentiated punishment regimes concerns the criminal career of the convicted: the repetitiveness of the criminal conduct is an indication of a stable delinquent profile, making the subject more predisposed to a stabilization of criminal behavior. This also presupposes more severe sentences. Another criterion concerns the personality profile of the offender which refers to particular categories of offenders where psychopathological disorders are highlighted which, even if not such as to justify a statement of non-imputability of the subject, create conditions for the execution of the sentence that they cannot be assimilated to those of other prisoners. This category can be accompanied by that of drug addicts, who in any case have even more specific characteristics, with particular repercussions on behavior in prison due to substance deprivation. Up to now, conditions have been highlighted that determine differentiated regimes for the execution of the sentence based on characteristics that structurally concern the type of crime and the characteristics of its perpetrator, while there are conditions that determine the application of different contextual regimes that presuppose contingent situations. S refers to behaviors by inmates inherent to the prison environment and which can jeopardize the safety of the prison. In this case, it is a question of restrictive measures that can be transitory when the management of prison life has returned to normal. These are rebellions and riots or insubordination that can occur among prisoners during prison life that endanger not only the normal administration of the institution, but also the physical safety of staff and other prisoners. Coming in more detail to the Italian situation, a substantial distinction must be made when it comes to differentiated regimes for the execution of the sentence between differentiated regimes with restrictive purposes and differentiated regimes with curative and educational purposes: in the first case the objective is to ensure internal security (in in the case of conduct harmful to safety inside the prison) or external (regarding the impact that certain categories of crimes and types of perpetrators may have on the safety of the social community), in the second case the objective is to ensure particular categories of inmates the specialist interventions necessary for adequate social reintegration. In the first case, the guiding principle is that of the dangerousness that distinguishes some categories of condemned, as stated in the same art. 203 of the Criminal Code, "a quality of the person", a concept that inevitably cannot ignore the type of crime and the characteristics of the perpetrators, especially with regard to their criminal career, Another aspect that cannot be overlooked in our penitentiary system is the concept of treatment, the cornerstone of criminal execution in Italy and still the backbone of our penitentiary system. In practice, the treatment is based on a strongly social rehabilitative model of justice which is also reflected, as already mentioned, in the Constitutional Charter, and the aim of social reintegration of the offender must be considered in a perspective that sees the punishment as an instrument , perhaps using a paradoxical expression, of "compensation" by the institutions against subjects previously deprived of social opportunities.

It is clear that these objectives often take on a utopian meaning even if they often involve trained and highly motivated personnel. The ideology of treatment, which has often failed and been criticized due to the failure to reduce recidivism, which must have been the most ambitious result, has been joined by an ever greater expansion in our system of the execution of the punishment of contacts with the territory and of the tendency to increasingly implement the prisoner's relations with the outside world both with the admission to penitentiary benefits that these contacts envisaged, and with the granting of non-custodial measures that facilitated the insertion of the subject in the social context after verification, 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 not only as to offend the collective sensitivity, but also to undermine the sense of security of the community. Our penitentiary system in fact provides for differentiated regimes by virtue of the normative dictation of the "socially" dangerous person with different facets and executive aspects that have developed over time: at this point it is appropriate to give a brief historical report on how it is configured in our system penitentiary this orientation.

2. Historical development of the norm

Law no. 354/1975 represents a moment of historical importance for criminal execution in Italy. After 30 years of political, legal and cultural debate, a reform of our criminal executive system is finally launched, which has been in crisis for years because it is anchored to old custodial assumptions and not very protective of the rights of the condemned person for some time now affirmed by international organizations which, since 1955, had expressed themselves with the Minimum Rules of the Rights of the detainee issued by the United Nations. With the penitentiary reform, the constitutional principle dictated by Article 27 is finally complied with and numerous innovations are introduced that will undergo, over time, significant changes in an expansionary or deflationary sense depending on historical-political circumstances. Among the fundamental contents is the conception of a sentence tailored to the personality of the offender, 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 resocialization of the offender, with the ultimate aim of reducing recidivism. Another fundamental aspect is represented by the introduction of alternative methods to the execution of the sentence that do not take into account detention, considered, in the socio-rehabilitative perspective of the reform, even more effective tools for the social reintegration of the offender, especially for specific categories of convicts such as drug addicts, for example. External criminal execution is part of both a rewarding perspective, which refers to the discipline of permits, and the application of real criminal measures governed by legislation that provides for them as autonomous measures, applicable according to legal requirements. and not only in relation to the conduct 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, represented a cornerstone of our prison system and still represents a significant foundation demonstrated by a constant expansion over time of alternative measures to detention. And the differentiated regimes? The reform does not renounce the type of socially dangerous prisoner sustained by a historical period in which inside our prisons there are "special" prisoners convicted of crimes such as armed gang 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, for the suspension of ordinary treatment activities for a preordained and strictly necessary period for supervening security needs. The provision is not exempt from criticism; the generic physiognomy of the rule is contested, the excessive power attributed to the administrative authority and the fact that over time the prescription tends to become stable even if the security requirements have ceased. The establishment of the special prisons marked the remission of the application of Article 90 even if the provision sometimes continues to exist even within the 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 offenses impeding access to

alternative measures to detention and expanding and fostering relations between prison and territory. The period of scientific observation of the detainee's personality is also reduced from 3 months to one month precisely in order to facilitate the entry of the condemned to a regime of freedom, a trend of our prison system which will have a constant development materialized with adjustments. subsequent regulations. The Gozzini reform replaces art. 90 with art. 41 bis I paragraph: even if no substantial changes are introduced as the Minister has the competence to issue the provision and the indeterminacy of the provision itself remains subject to the internal security needs of the institute, a greater guarantee is determined for the condemned. In issuing the provision there is an obligation for the minister to limit the suppression of treatment opportunities to a single penitentiary institution and only in the event that particularly serious conditions for order and security are identified. There is no reference in the penitentiary legislation to mafia association crimes for which there is no foreclosure for access to ordinary treatment practices or penitentiary benefits.

3. The introduction of Article 41bis II paragraph as an emergency provision

The introduction of art. 41 bis OP. it must be placed in a social and political context that is significant for the history of our country. In fact, the 1990s were characterized by an emergency due to the strengthening and spread of the mafia phenomenon which manifested itself in massacres that hit the heart of the state and the population, culminating in the killings of the magistrates Falcone and Borsellino. The spread of the mafia phenomenon which, in addition to the territory, also extends to the prison following the maxi trial in Palermo and the resulting arrests, impose special legislation that provides for a differentiated penalty execution regime for subjects characterized by social dangerousness which tends to persist even during the period of detention. These legislative interventions ensure that even the execution of the sentence, and not just the activity of the police, becomes part of the strategies to combat organized crime. With the law n. 203/1991 and n. 356/1992 introduces in our penitentiary system a path so to speak "double track" addressed mainly, if not exclusively, to organized crime. In fact, Article 4 bis of the OP provides for the exclusion from the granting of bonus permits, of alternative measures, excluding early release, for crimes involving mafia association (416 bis of the Criminal Code) but also for other types of crimes that presuppose in any case a condition of social dangerousness of the subject. If with the 2002 reform (law no.279 of 23 December 2002), which definitively stabilized the discipline, the application of a differentiated regime was limited to prisoners who were challenged with the aggravating circumstance of 416bis, subsequently widened the range of crimes intended for the application of a special regime thus creating a heterogeneous mass of crimes and not referring exclusively to convicts involved in organized crime. Unlike the first paragraph of art. 41bis which provides for the suspension of the treatment benefits for a determined period and in the event of exceptional prejudice 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 offender 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 which can be extended, is determined by the ascertainment of behavior by the inmate of destabilizing behavior for the balance within the prison such as, for example , violence and threats towards other inmates or attempts at subjection and subordination.

This provision certainly has its own justification: in the past the prison for the mafioso did not represent a hesitation and an impediment in continuing the criminal activity both as regards contacts with the outside world and as regards the restructuring of a hierarchical system at the inside the prison of the mafia organization. In fact, the application of art. 14bis. The prison for the mafia also represented a source of pride and a phase in which contacts were constantly maintained outside with the mafia association, to which orders were given, as well as representing an opportunity to recruit new workers once finished. the expiation of the sentence. Art. 41bis I and II paragraphs both refer to the concept of danger but while the first paragraph considers an "internal" danger, or rather refers to the internal security needs of the institution, the second paragraph considers an "external" danger that involves social security (Canepa, 2010). External danger as it reflects on the impact that a certain type of crime has on society, 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 the hard prison in the penalty execution regime is not justified by the criminal offense but by the ability to connect with an association operating in the area considered to have a high potential for social danger. The application of art. 41 bis configures the past and the present of the condemned, as membership in the criminal association and the current ability to maintain contact with them by issuing orders and directives are constitutive elements. We are certainly facing a derogation from the principle of the personality profile and the scientific observation that the prison system contained in its original formulation. From a criminological point of view, a personality profile of the offender is outlined with the characteristics of a socially dangerous subject, not so much in relation to the type of crime committed as by virtue of the criminal context from which he comes. Another aspect should not be overlooked, which can be seen from the first paragraph of art. 4 bis where it is explicitly stated that access to penitentiary benefits is favored if the special convicts decide to collaborate with the justice system and to help the police and justice in the fight against the mafia organization or to sever the link with the mafia organization, an aspect that makes Pavarini (2007) say that we are faced with a "sweet inquisition" capable of "melting tongues".

4. Benefits of the application of Article 41 bis, results and subsequent revisions

Art. 41bis in all its application modalities obeys precise preventive and social defense purposes and should not be interpreted as a more pronounced form of punishment against criminals who have committed particularly serious crimes. The discriminating factor is represented by the extent to which the perpetrator of the crime represents a danger for the same social organization that feels threatened: the social danger of the subject is therefore placed in a collective security perspective that ignores the damage, however significant, that may having suffered the single victim. Therefore, the aim of favoring detachment from the mafia association assumes particular importance, to carry out an effective control against any contact with the criminal association and ex-prison driving, especially by those who hold a prominent role in the association, promote the acquisition of valuable information with the promise of suspension of access to prison benefits useful 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 the restoration of penitentiary benefits in case of willingness on the part of the condemned to collaborate with justice or in the case of a convict who, having played a marginal role in the criminal association, cannot make a significant contribution to the investigations judicial. This regulatory provision confirms the instrumental nature of the new legal framework and the

political project to implement a fight against organized crime involving all phases of criminal intervention. Despite the need for a restrictive measure and its effectiveness in combating the mafia phenomenon, there have been 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 critics, there is a violation of art. 27 of the Constitution and the principle according to which penalties must be inspired by the principle of humanity and aim at the re-education of the convicted even if both the Constitutional Court and the Court of Strasbourg have never denied the conformity of this provision in its substantive structure, but only in relation to individual measures considered unnecessarily oppressive. Constitutional doubts have also been expressed regarding the provision of Article 41 bis II paragraph for the application of the hard prison even to subjects not sentenced to a definitive sentence but awaiting trial: the Constitutional Court has expressed itself in this sense, stating in the first place that " belonging to a mafia association implies permanent adherence to a criminal association which is normally strongly rooted in the territory, characterized by a dense network of personal connections and endowed with particular intimidating force "(Constitutional Court, ruling 21 July 2010, n. 265), and, secondly, arguing that in the presence of the contestation of art. 416bis of the criminal code we cannot ignore the application of the more lenient measure "since" minor "measures are not sufficient to sever the relationship between the suspect and the criminal area to which he belongs, neutralizing the danger." (Constitutional Court, ruling 21 July 2010 , no. 265). The Court itself therefore neutralizes the risk of infringement of constitutional rights by appealing to the need to preclude any possibility that the accused of crimes committed within a mafia association can continue to maintain contacts with it and therefore continue to represent, even if if brought to justice, a public danger to the community.

Wanting to take up what Vittorio Grevi maintains, “the involvement of the penitentiary systems towards the achievement of heterogeneous objectives with respect to their functions, is one of the many prices that have had to be paid within the framework of the more general strategy to combat organized crime. A rather high price, […] probably necessary in a specific historical moment characterized by the offensive of the worst crime », which« it is hoped [should not] be paid for much longer »(1994, p. 15). More than twenty years after those words, our legal system continues to pay that price, perhaps a sign of the persistence of an emergency, the mafia one, far from sunset. The ministerial circular 3619/6069 of 21 April 2009 introduces a new aspect in the discipline of art. 41bis as it provides for the establishment of a High Security section for the execution of the sentence of those for whom the regime of hard prison has been revoked, as the conditions of social danger ceased following the loss of contact with the mafia association. This method of execution of the sentence also configures another type of convict belonging to a mafia association characterized by a non-topical role within the organization, but rather marginal and perhaps of low labor. However, these are prisoners "different" from the others subjected to a reinforced control regime but not excluded from treatment opportunities against which particular precautions are nevertheless applied (Falzone, 2015). The discriminating factor in the application of the high security regime with respect to the "hard prison" is not so much the different criminal position relating to the role played in the criminal organization by the offender, but to prevent an excessive concentration of offenders belonging to organized crime and avoid contamination, exchange of information and proselytism between bosses and affiliates inside the prison. The purpose of the fight against organization always represents the prevailing need for the criminal and penitentiary

response. A sign of change, while saving the backbone of article 41bis, and its physiognomy as an instrument to combat the mafia phenomenon, comes from the circular DAP 3676/616 of 2 October 2017 solicited by the work of table 2 of the States General of the Criminal Enforcement - Prison Life, Accountability, 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, it aims to eliminate the restrictions provided for by art. 41bis any vexatious and arbitrary content specifying uniform executive procedures in compliance with the law and constitutional principles. The goal is to ensure that the application of Article 41bis does not represent "... a further additional affliction to the sentence already imposed" but "must remain linked to the preventive purpose". Reconciling the protection of the rights of the offender with the need for prevention and social defense is never an easy task in the administration of justice and it cannot be excluded that there are contingent circumstances that require the sacrifice of individual rights for the protection and recognition of collective rights including, of primary importance, those of the victims. The only risk that must be avoided is that certain emergency provisions, so to speak, do not become a stable and indiscriminate procedure no longer justified by the circumstances that produced it. There remains an open problem that the jurisprudence has often raised and that is whether "the hard prison" should be destined only for those who held a top role in the mafia organization if the purpose of the special regime was to be the breaking of the link with the association criminal. There seems to be a tendency towards a discretionary evaluation concerning the role played by the offender in the criminal organization and therefore the possibility that he has to maintain contact with it and provide information. It is therefore a question of resorting to a non-a priori assessment to avoid applying merely afflictive methods of execution of the sentence, an assessment which the administration must bear.

5. Conclusions

The introduction of the so-called hard prison regime in our penitentiary system undoubtedly represents a regression with respect to a method of execution of the sentence certainly advanced and in line with European principles introduced with the reform of '75. Those principles of humanization of the sentence considered indispensable in a modern penitentiary system that must materialize not only with methods of execution of the sentence that protect the dignity of the person and his physical integrity, but also in the availability of opportunities for social reintegration after it has been served the sentence. But we know that an effective process of recovery of the individual cannot be separated from a process of reflection of the crime, and in this sense the same principle introduced with the law n.230 of 2000 in article 27 is expressed, with the aim to develop in the offender an assumption of responsibility that does not exclude the same recognition and the need for reparation towards 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 atone for the sentence outside of prison. The application of the differentiated regime of execution of the sentence, which has been mentioned, denies the prisoner such possibilities but is justified by indispensable needs and fully compatible with an emergency that necessarily had to be addressed. Art. 41 bis was in fact an effective instrument of contrast since, in the face of pervasive criminal phenomena that are not extraneous to the internal organization of the company, the repressive action must involve all the agencies involved in the control, including the prison. It was not possible to continue to ensure that the prison itself became

an instrument of continuation if not of confirmation of the criminal phenomenon of the mafia type. In fact, the differentiated prison regime has contributed not only to preventing prisoners from continuing to maintain contact with the criminal organization, but also to allowing the identification of other members of the organization and bringing them to justice. The phenomenon of pentitism, also favored by the 41 bis, albeit with its lights and shadows, has in fact allowed the discovery of various mafia cells and the capture of prominent members of the criminal organization. The fundamental problem is therefore not so much the infringement of constitutional principles, although there have been abuses on which the Court of Strasbourg itself has expressed itself, due to the lack of access to the treatment regime reserved for all prisoners, but the moral repercussions that this exclusion leads. If the instrumental objective has certainly been achieved, the exclusion from treatment opportunities in cases in which the differentiated regime has never been revoked, has led to the foreclosure of the convicted person from starting a process of recognition of the gravity of his own history and of the entity. of the damage done aimed at that moral reform of the person to which we must always strive. The establishment of the High Security Section and the recent ministerial proposals have opened a window towards a fight against the phenomena of organized crime which, while not renouncing just punishment and control, does not neglect, perhaps utopistically, also the change of motivations and orientations in the personal dimension.

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