Genesis and History of 41 bis

Article 41-bis was introduced into the Prison Law in 1986 by the so-called 'Gozzini Law'. This law states in one of its paragraphs: "In exceptional cases of revolt or other serious emergency situations, the Minister of Grace and Justice has the power to suspend, in the institution concerned or in part of it, the application of the normal rules of treatment of prisoners and internees. The suspension must be justified by the need to restore order and security and shall be for the duration strictly necessary to achieve the aforementioned end'.

The provision was explicitly aimed at removing obstacles to the suppression of prison riots, thus constituting a measure of an exceptional nature. The political character of the provision was made all the more evident by the fact that the application of this extraordinary regime was ordered by the Minister of Justice, the political management body of the executive power, rather than by a judicial body. In 1992, in the context of the so-called 'mafia emergency', a second paragraph was added to Article 41-bis configuring the suspension of treatment rules as an extraordinary and provisional measure to be applied to prisoners for mafia offences.

The 'emergency' has always constituted the ideological cover that allows to justify derogations to fundamental legal principles, producing states of exception both on the subject of guarantees against repression in all its explicative spheres (police, tribunals, workplace repression etc..), and on the subject of 'environmental protection' (think only of the emergency management of the waste cycle in southern Italy, with the disappearance of rules on the disposal of hazardous waste and the militarisation of dumpsters and incinerators), and even of those market rules that are paradoxically at the basis of capitalist democracy itself (think for example of the after- earthquake reconstruction, with the disappearance of rules on public works contracts).

And the state of emergency always aims to become a permanent state of exception, only to stabilise and become ordinary administration.

After the first applications in '92 of the 'carcere duro' (lit. hard prison) regime, in fact, the provisional applicability of the 41-bis regime was repeatedly extended: until December 1999, then until December 2000, then until December 2002; finally in 2002, exploiting the false ideology of the fight against the Mafia (in fact, it was the tenth anniversary of Giovanni Falcone's death), it was definitively made a stable institution of the prison system, by Law Nr 279 of 2002 and extended to 'terrorism and subversion' offences.

The emergency did not end in 2002: the 'security package' (law No. 94 of 2009), due to the advancing crisis and an alleged spread of crime, introduced a series of repressive measures, among which (in addition to those introducing the crime of clandestinity, reintroducing contempt of a public official, etc.) stand out those aimed at tightening up the already very harsh 41-bis regime, providing for a lengthening of the minimum duration, increased solitary confinement, a reduction in visits and air time, etc. Moreover, since 2009, it is also the Minister of Internal affairs, the political body of general direction and command of the police, who can ask the Minister of Justice to apply this regime.

At present, the 41-bis regime, according to the latest changes made by the security package provides, in a nutshell:

-Exclusion from any 'reward benefit' provided by the law on the prison system (internal or external work, reward licenses, study activities, etc.) and more general suspension of the ordinary treatment rules.

-Single cell two by three metres.

-Location in institutes or sections apart from the others, preferably located in island areas, and in any case supervised by special and dedicated departments of the prison police (the famous GOMs of torture in the Bolzaneto police station at the G8 in Genoa in 2001).

-Maximum two hours of air per day (in many prisons one hour of air and one hour in the 'social spaces'), in groups of a maximum of four inmates in solitary confinement and with an absolute ban on speaking to any other person.

-Absolute prohibition of the passage of objects (food, books, newspapers, etc.) with other inmates.

-One visit per month only with family members, lasting one hour and subject to audio and video recording, with glass partition and exclusion of any physical contact.

Only after the first six months of application, subject to the authorisation of the supervisory magistrate, a monthly telephone call, in lieu of a monthly interview, with family members or cohabitants lasting a maximum of ten minutes. The relatives have to call from another prison and the call is recorded.

-Limitation of money, goods and objects that may be received from outside.

-The prisoners can have only 4 books per month, which can come only from the prison's library.

-Censorship of correspondence.

-Exclusion from prisoner representations.

-First application of the regime for the duration of four years, then extendable indefinitely two years at a time.

-The prisoner participates in trials only by videoconference.

What has just been outlined is a summary picture of the last decades, which does not allow us to fully grasp the scope and the reason for 41-bis, and more generally of prison isolation.

To do this we must go back a few more decades, limiting ourselves for now to the Italian legislation (and referring to the next pages for that of other countries) and taking into account the evolutions that have affected it both on the penitentiary level and on that of the so-called associative crimes.

In fact, if the connection between the 41-bis solitary confinement regime and crimes of "terrorism and subversion" has already been partly highlighted, we must now analyse (even if only partially) what Italian legislation means by terrorism and subversion, and how in relation to these crimes, even before 1986, the strategy of isolation was a constant.

The 1930 Criminal Code, signed by Mussolini-Rocco and still in force, originally provided in Article 270 for the offence entitled 'Subversive associations':

'*Whoever in the territory of the State promotes, constitutes, organises or directs associations aimed at violently establishing the dictatorship of a social class over others, or at violently suppressing a social class or, in any case, at violently subverting the economic and social order constituted in the State, shall be punished by imprisonment of five to twelve years. The same punishment shall apply to anyone who, in the territory of the State, promotes, sets up, organises or leads associations whose purpose is the violent suppression of any political and legal order of society. Anyone who participates in such associations shall be punished by imprisonment of one to three years*'.

Now let's comment this law with a few sentences set out in the 'ministerial report on the draft civil code:

"*[...]they are associations of the unpatriotic that creep especially into our factories [...]the State has the right to react*"; "*The text avoids referring directly to one or other category of associations, [...]but it is easy to deduce, from the first part of the article under consideration, the reference to communist or Bolshevik associations [...]*"; "*It is precisely to anarchist associations that the same article intends to refer [...]*".

Indeed, the reference to communists and anarchists is explicit in the first and second paragraphs respectively. Notwithstanding the precision in the identification of the enemy, however, the regulation introduces a case of 'presumed danger', where a criminal sanction is not envisaged for an offence, but for the danger represented in itself by the intentions of the individual: a danger that is unquestionable because it is presumed by the law in an absolute manner, regardless of any consideration of the number of associates, the suitability of the means available to achieve the purpose, and so on. Such an indefiniteness allows the widest possible political arbitrariness to be exercised, so as to implement, depending on the phase, the repressive fist needed on a case-by-case basis: nothing could be further from the ideology of a boasted rule of law: the crime of subversive association is configured as a case for the use of repression by the ruling class for the control of power.

An Article 270-bis was added to Article 270 of the Criminal Code by the Cossiga Decree Law (converted into Law No. 5 of 1980), which certainly did not improve the situation:

'Anyone who promotes, constitutes, organises or directs associations that propose the perpetration of acts of violence for the purpose of subverting the democratic order shall be punished by imprisonment of from seven to

fifteen years. Anyone who participates in such associations shall be punished by imprisonment of four to eight years'.

It was not until 2001 that, in the context of the 'international terrorism emergency', Article 270-bis was amended to reach its current formulation:

'Anyone who promotes, constitutes, organises, directs or finances associations that propose the perpetration of acts of violence for the purpose of terrorism or subversion of the democratic order shall be punished by imprisonment of from seven to fifteen years. Anyone who participates in such associations is liable to imprisonment for a term of five to ten years. For the purposes of criminal law, the purpose of terrorism also applies when the acts of violence are directed against a foreign State, an institution and an international organisation. With regard to the convicted person, it is always mandatory to confiscate the things that served or were intended to commit the offence and the things that are the price, the product, the profit or that constitute its use". (Associations with the purpose of terrorism, including international terrorism or subversion of the democratic order).

It was finally the 'Pisanu Law' decree that, in 2005, completed the work by adding to Articles 270 and 270-bis, the following 270-ter, quater, quinquies and sexies. The first three add the offences of 'assisting associates', 'enlisting in the association' and 'training for terrorist activities', respectively. The most interesting, however, is Article 270- sexies, which gives a definition of '**Conduct for the purposes of terrorism**': "*conduct which, by its nature or context, may cause serious damage to a country or an international organisation and is carried out for the purpose of intimidating the population or compelling public authorities or an international organisation to perform or abstain from performing any act or destabilising or destroying the fundamental political, constitutional, economic and social structures of a country or an international organisation, as well as other conduct defined as terrorist or committed for the purpose of terrorism by conventions or other rules of international law binding on Italy*". As it is easy to see, the penalties are not merely increased punctually, but there is a constant push towards an anticipation of criminal protection, through the formation of increasingly indeterminate and evanescent cases. The passage from the '*Anyone who promotes, constitutes, organises or directs associations aimed at establishing...suppressing...subverting...*' of the Fascist era, to the '*Anyone who promotes, constitutes, organises or directs associations aimed at carrying out...*' of the Cossiga-Berlusconi democratic era is very explanatory: the punishment of the purpose. The very definition of 'conduct with the purpose of terrorism' is so broad that it can include any intention to bring about real change in society. This highlights the paradox (not at all paradoxical, one could say) of a continuity between the fascist regime and the democratic order, and of a worsening tendency not only from a political point of view, but also from a merely juridical one. On the other hand, the period of strong advancement of the class struggle in the 1970s made it all the more urgent to prepare new instruments of protection for the capitalist state; the end of the season of armed struggle then made it necessary to consolidate the position achieved and increase its defence at the preventive level. It is no coincidence that in the meantime prison legislation was evolving along the same lines of class struggle for the preservation of the state, against revolutionary prisoners.

While in the 1970s a the state was busy repressing protesters flooding the squares, and the appropriate legislative instruments were being equipped to accompany truncheons, guns and bombing massacres (so-called Reale Law No. 152/1975, Law No. 110/1975, etc.), in 1975 the Prison Law was also approved. This law came after a long series of frequent uprisings by common prisoners and revolutionary prisoners, supported by solidarity movements from outside the prisons. In addition to introducing a general easing of prison conditions, it included the mechanism of reward control for common prisoners and isolated revolutionary prisoners in special prisons. The normative basis was Article 90 of the Prison Ordinance, the logical antecedent of 41-bis, with respect to which it is very difficult to discern any difference: "When serious and exceptional reasons of order and security occur, the Minister for Grace and Justice has the power to suspend, in whole or in part, the application in one or more prison establishments, for a determined period, strictly necessary, of the rules of treatment and the institutions provided for by the present law that may be in concrete contrast with the requirements of order and security."

The aim was to extinguish the revolutionary thrust coming from the prisons, through granting rewards to prisoners on the basis of good behaviour (with the intention of nurturing an individualistic perspective of the improvement of their conditions, instead of seeking an improvement for all prisoners), and through the isolation of those individuals who had indicated the prospect of change through struggle.

The special prison circuit, from 1977 onwards, was initially made up of special and isolated sections within normal prisons, while at the same time the construction of new prisons was undertaken, conceived, also architecturally, with the aim of breaking the links between the revolutionary prisoners and the detained proletariat, and between the revolutionary prisoners inside and outside: then, the Italian bourgeoisie did follow the example of West Germany. Islands were chosen to isolate political prisoners from their affections but also, and above all, from the rest of society as a whole, to break the inside-out link that had led to an incredible advance in solidarity movements. More generally, the detention regime in the special circuit, was structured according to a series of limitations and harassment that would later constitute those of the 41-bis (in terms of visits and phone calls, isolation from other inmates, reduction of yard time, restrictions on goods and objects that could be received from outside, censorship of correspondence and so on).

With the sharpening of the class struggle, the increase in revolutionary prisoners and the riots in special prisons (which will succeed in leading to the abolition of Article 90), the system of reward control is perfected and extended, with a series of laws introducing rewards for those who distance themselves and those who repent: the bourgeoisie's war strategy is refined and it moves from an almost purely military confrontation to the technique of abjuration under torture, reminiscent of the Catholic inquisition. These measures were first introduced by Cossiga's law No. 15/1980 (conversion of decree law No. 625/1979), followed by law no. 304/1982 and law No. 34 of 1987, which closes the circle after the abolition of Article 90 of the Penal Code and the introduction of Article 41-bis in the penitentiary system by the Gozzini law, and defines the 'dissociation conduct' for access to benefits: 'admission of the activities actually carried out, behaviour objectively and unequivocally incompatible with the continuation of the association bond, repudiation of violence as a method of political struggle'.

At this point, isolation is no longer just aimed at repressing the revolutionary drive coming from prisons, but becomes a weapon to destroy the prisoner's political identity and, consequently, erase the revolutionary ideology and perspective from the political horizon.

The same Cossiga law that introduced Article 270-bis of the criminal code in 1980, began to provide for a huge reduction of sentences and releases for political prisoners who distanced themselves from the armed struggle. The ideological operation is evident: on the one hand through the annihilation of political prisoners, the abjuration of the distanced and the denunciation of the repentant, and on the other through the introduction of a new article for the crime of subversive association that cancelled, compared to the clarity of the fascist precedent, the explicit reference to the typical enemy. The objective was the cancellation of ideology and the revolutionary perspective.

What is asserted, therefore, is that the class struggle no longer exists.

In conclusion, there is a further element of contextualisation on the political and reactionary genesis of the 41 bis. In the common imagination, the 41 bis, and more generally the solitary confinement regime, has always been linked to so-called mafia crimes. In reality, we have tried to show that prison isolation was born and perfected over the years as an instrument of repression against the social and political struggles carried out by militants of various antagonist organisations and against the more general 'terrorism emergency'. This element is inherent in the repressive strategies of many Western countries.

This is easily demonstrated if one analyses the international historical context. Since the 1960s, with peaks reached in the 1970s and 1980s, the detention regime of hard prison and solitary confinement has constituted a practice of imperialist countries, within which the so-called 'Mafia emergency' certainly did not constitute a problem on the agenda, or at least not as in Italy. It was the prevailing social and economic relations that came into crisis, thanks to the contribution of revolutionary movements.

Extract from "41 bis. Sistemi detentivi, carcere duro, isolamento carcerario", by Collettivo Studenti "Federico II", 2013 – updated at 2022