Chapter 13
Prison and Health Protection:
An Unsustainable Oxymoron at the Time of the COVID-19 Pandemic Emergency?

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ABSTRACT

Penitentiaries, since they are closed places and also extremely crowded, suffered a high risk of coronavirus infections. This chapter per the authors will analyze the policies adopted during the pandemic to face this health emergency. The right to health and the need for security involves a subtle balance between the right to health of the prisoner and the right-duty of the State to enforce the sentence. When a hard line prevailed, aimed at suspending any benefit ad libitum, determining, as it happened at the end of the first wave of the pandemic, it can cause strong repercussions on the rights of prisoners. The legislation on measures to cope with the epidemiological emergency from Covid-19 in prison seemed at times contradictory and insufficient to address the emergency situation of prisoners.

INTRODUCTION

The aim of my analysis is to investigate the problematic balance between prison space and the protection of prisoners' health during the pandemic. Closed places such as Rems (Residences for the Execution of Security Measures), RSAs (Health Care Residence), nursing homes, hospitals, immigration centers, and RSSAs (Residences for the Elderly) proved to be particularly fragile and more exposed to Covid-19 infections. However, being closed and highly crowded places, penitentiaries have a higher risk of coronavirus infection than other places, making them even more vulnerable.

The severe problems of the spread of the virus, detected since the first days, have challenged the political decision-maker that introduced measures aimed at restricting the right to the family interview (expressly protected by art. 18, c. 4 of law 354/75) (LUCIANI, 2020, CINTIOLI, 2020). The result was an abrupt compression of the fundamental right of affectivity (i.e., the right to protection of the personality, as stated in the Constitutional Court, no 26 of 1999). The result was a sudden compression of

DOI: 10.4018/978-1-6684-6044-3.ch013

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the fundamental right of affectivity (or instead of the right to protection of the personality, as stated in Constitutional Court sentence no. 26 of 1999) and, therefore, indirectly, of the psychological and physical well-being of the prisoners. The consequences of this hasty and precautionary policy have led to an "isolation within isolation" of the prisoners.

The legislation on measures to deal with the epidemiological emergency of Covid-19 in prisons seemed at times contradictory and insufficient to deal with the emergency situation of inmates. As a result, the supervisory magistrates have adopted in certain cases alternating measures, initially aimed at "freezing" the alternative measures, then implementing them, and finally returning to a more restrictive line. The alternative between prison and extra-custodial measures derived not only from the body of legislation on prison health (which turned out to be relatively meager) but above all from the balance made by the judge between the right to health and security needs. In the name of prison health, the judge considered it necessary to protect, first of all, the inmate's fundamental right to benefit from an alternative measure to detention, for humanitarian reasons (Constitutional Court judgment no. 264 of 2009), despite the inclusion of several provisions, which provided for foreclosures and obstacles, aimed at mitigating the number of beneficiaries. On the other hand, however, there was a pan-penalistic view of punishment by the judge, justified by the need for security and social order. Although the rate of prison crowding was significantly reduced due to the release of Covid-19 positive inmates or the reduction of offenses during the lockdown and the efforts of the probation judiciary in the quarter (December 2020-March 2021), the numbers have risen again, albeit slightly. This means that despite the spread of the virus and the numerous warnings from the Edu Court, there could be a return to the level of "systemic" overcrowding present in prisons before the Edu Court's "pilot" judgment, Torreggiani and Others v. Italy. The Italian anomaly consists precisely in the gradual increase in the rate of overcrowding of prisoners correlated to a decrease in the number of crimes, opening up disturbing scenarios on our system, which is still too anchored to a paternalistic and correctional conception of the deprivation of liberty (Chiola, 2020a). On the other hand, when the decisions of the judges lean excessively towards the solution contrary to extra-custodial measures, we can understand the seriousness of such an orientation, especially in the light of a cultural horizon to which the prison must tend, indicated not only by the recent constitutional jurisprudence (most recently, cf. Constitutional Court sentence no. 253 of 2019), which leaned towards a full recognition of the re-educational function of punishment but also by the European Convention on Human Rights, from which to derive the prohibition on subjecting prisoners to inhuman treatment.

In addition, there is a real risk that the drift caused by prison overcrowding will undermine fundamental rights and that social rights will be downgraded to the status of administratively managed interests and therefore destined to be canceled. We must not forget that the prison environment creates in many people substantial distress and some acute pathologies. In others, even the onset of the tendency to suicide (Buffa, 2012; Bianchetti, Buffa, & Montaruli, 2020) has strongly increased during the pandemic[1]. When a hard-line prevails aimed at suspending any benefit *ad libitum*, leading - as it happened at the end of the first wave of the pandemic - to a firm halt in the deflationary measures of the surveillance magistrates (in the name this time not of public health of international importance but national security), it provokes substantial repercussions on the rights of prisoners who are now more and more vulnerable to Covid infection-19 (Ministero Della Giustizia, 2021). If in regular times, before the sanitary emergency when the prison was the institution par excellence of the penitentiary system, it was challenging to work on the public opinion that considered the alternative measures of prison sentences even of inferior rank; we can easily understand, in the light of the "easy releases" of prisoners considered highly dangerous, the enormous difficulty of adopting a criminal policy of alleviation launched in the first waves of the

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