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Revista Penal

Julio 2023

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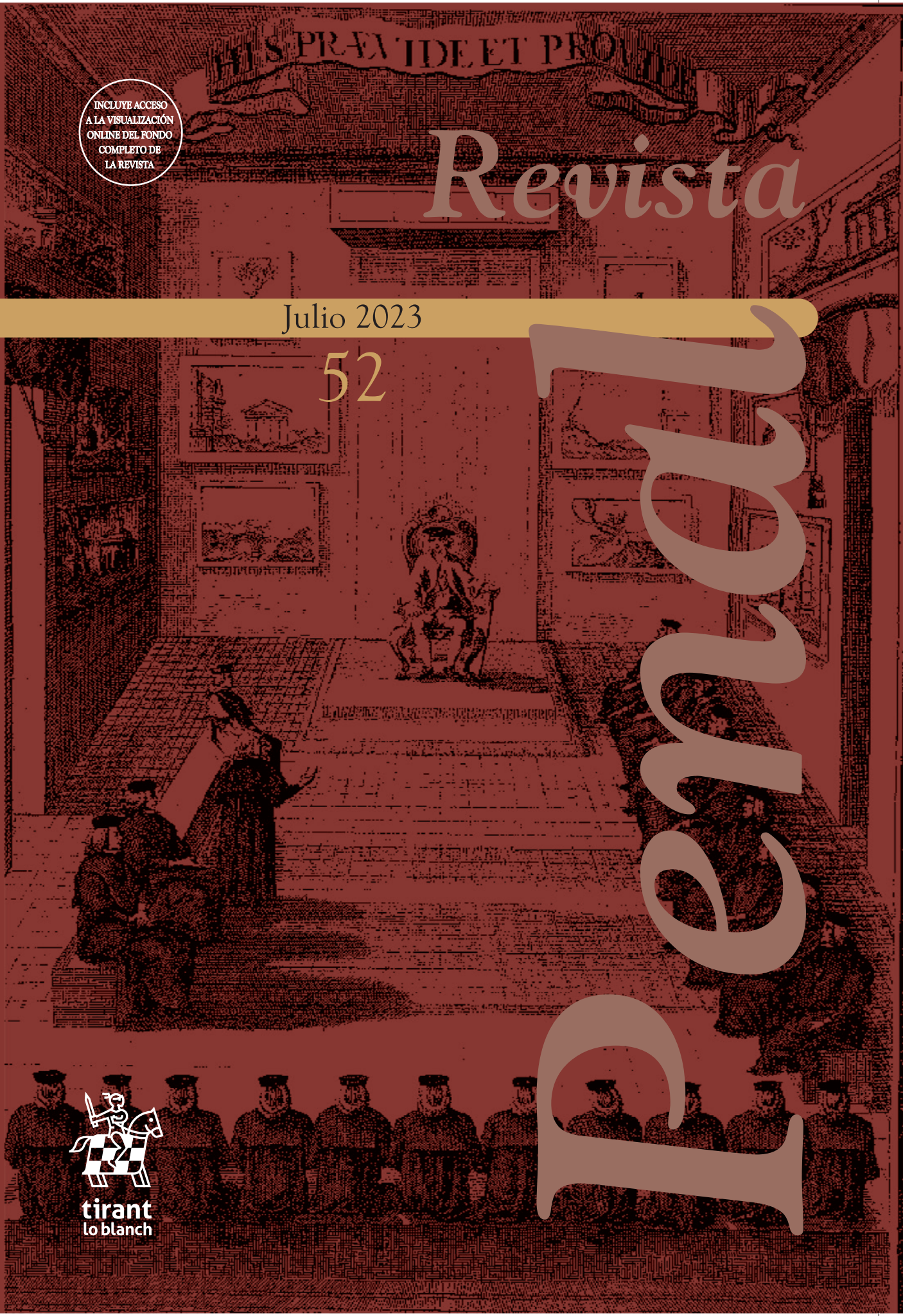

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Revista Penal

Julio 2023

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Revista Penal

Número 52

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Doctrina:

* *Los primeros 25 números de la Revista Penal están recogidos en el repositorio institucional científico de la Universidad de Huelva Arias Montano:* http://rabida.uhu.es/dspace/handle/10272/11778

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Publicación semestral editada en colaboración con las Universidades de Huelva, Salamanca, Castilla-La Mancha, y Pablo Olavide de Sevilla

www.revistapenal.com

EDITA: TIRANT LO BLANCH
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http://www.tirant.com
Librería virtual: http://www.tirant.es
DEPÓSITO LEGAL: B-28940-1997
ISSN.: 1138-9168
MAQUETA: Tink Factoría de Color

COVID-19 emergency, overcrowding and the right to health also of the prisoner subjected to the regime pursuant to article 41-bis of the Italian Penitentiary System

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Revista Penal, n.º 52 - Julio 2023

Ficha Técnica

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Título: Emergencia COVID-19, hacinamiento y derecho a la salud del preso sometido al régimen del artículo 41bis del Sistema Penitenciario Italiano

Resumen: La primera fase de la emergencia sanitaria vinculada al Coronavirus se caracterizó, en materia penal, por una "gran confusión legislativa". No fue una excepción la legislación sobre la fase de ejecución de la pena y la exigua interpolación del sistema penitenciario que tuvo un súbito sobresalto legislativo tras las 'discutidas' concesiones de prisión domiciliaria 'humanitaria' a los presos sometidos al riguroso trato previsto por el art. 41-bis o.p., y la sentida necesidad de intervenir aquí parcialmente. Dado que "la emergencia carcelaria no es un incendio al otro lado del río", era necesario (y necesario) actuar de inmediato. El difícil papel de sustituto que el poder judicial de control estaba llamado a desempeñar, se materializó en el otorgamiento de medidas de vaciado de prisiones para aliviar la presión penitenciaria, por diversas vías. Una jurisprudencia de vigilancia 'valiente' ha utilizado algunas instituciones ya presentes en el sistema penitenciario, releyendo los requisitos de aplicación relacionados: en primer lugar, el perjuicio grave de la prolongación del estado de detención, previsto en los artículos 47, apartado 4 y 47-ter, párrafo 1-quater o.p. para la aplicación provisional de la libertad condicional la adscripción a los servicios sociales y el internamiento domiciliario. Un problema aparte se refiere a los presos con problemas de salud. En algunos casos, se les garantizó la excarcelación en la primera fase de emergencia mediante el aplazamiento facultativo de la pena (art. 147 inc. 1 n. 2 del código penal), acompañado de prisión domiciliaria 'como excepción' o 'en subrogación'. ' o 'humanitaria' ' (ya que no está sujeta a los límites legales en caso de enfermedad física y mental grave, que también puede concederse a los reclusos por infracciones impedimento según el artículo 4-bis o.p., incluso si están sujetos al régimen conforme a al artículo 41-bis o.p. y a los que en el pasado hayan sufrido la revocación de medidas alternativas) ante la presencia de un cuadro clínico grave, aunque los médicos lo consideren no incompatible con el régimen penitenciario.
Palabras clave: COVID, legislación de emergencia; Reforma de Cartabia

Abstract: The first phase of the health emergency linked to the Coronavirus was characterized, as far as criminal matters are concerned, by a "great legislative confusion". No exception was the legislation on the execution phase of the sentence and the meager interpolation of the penitentiary system which had a sudden legislative jolt after the 'discussed' concessions of 'humanitarian' home detention to prisoners subjected to the rigorous treatment provided for by art. 41-

bis o.p., and the felt need to partially intervene here. Since "the prison emergency is not a fire across the river", it was necessary (and necessary) to act immediately. The difficult role of substitute which the supervisory judiciary was called upon to play, took the form of granting prison-emptying measures to ease prison pressure, along various paths. A 'courageous' surveillance jurisprudence has used some institutions already present in the penitentiary system, rereading the related application requirements: first of all the serious prejudice of the protraction of the status detentionis, provided for by articles 47, paragraph 4 and 47-ter, paragraph 1-quater o.p. for the provisional application of probation assignment to social services and home detention. A separate issue concerns convicts with health problems. In some cases, these were guaranteed release from prison in the first emergency phase through the optional deferment of the sentence (art. 147 paragraph 1 n. 2 of the criminal code), accompanied by home detention 'as an exception' or 'in subrogation' or 'humanitarian' ' (as it is not bound by statutory limits in the event of serious physical and mental illness, which can also be granted to prisoners for impedimental offenses pursuant to article 4-bis o.p., even if subjected to the regime pursuant to article 41-bis o.p. and to those who in the past have suffered the revocation of alternative measures) in the presence of a serious clinical picture, even if considered by the doctors not incompatible with the prison regime.
Key words: COVID, emergency legislation; Cartabia reform.

Rec.: 11-12-2022 **Fav.:** 01-02-2023

I. PREMISE

Although a new coronavirus (SARS-CoV-2) had already been identified in China in December 2019 as the causative agent of a respiratory disease later called COVID-19[1], and despite the fact that at the end of January 2020 the World Health Organization (WHO) had declared the outbreak in China as an international health emergency, only in February 2020, WHO itself declared the coronavirus outbreak as a global health threat of very high level, and on March 11th, 2020, WHO qualified the spread of COVID-19 no longer as an epidemic confined to some geographical areas, but a global pandemic affecting the planet as a whole[2].

With these premises, on 31 January 2020 the Italian government adopted the first precautionary measures by proclaiming a state of emergency.

With the occurrence of the first COVID-19 cases in Italy and Europe and following the pandemic declaration in March, the WHO Regional Office for Europe elaborated the first indications for the prevention and control of COVID-19 in prisons and in other places of detention, these being the places with the greatest concentration of people and therefore potential centres of infection, amplification and spread of infectious diseases[3].

Also at the level of the Council of Europe, the European Committee for the Prevention of Torture (CPT), in March 2020, formulated recommendations addressed to the authorities of the member States, so that, in the emergency context, they would pay particular attention to people deprived, for various reasons, of personal freedom, not only in prisons, but also in places for temporary detention in police structures, in detention centres for immigrants, in psychiatric hospitals and in *REMS* in the Italian legal system, and thus also in relation to those who work there, pursuant to art. 3 of the ECHR[4], in compliance with the principles relating to

1 Source *Istituto Superiore della Sanità*: The coronavirus disease (COVID-19) is an infectious disease caused by a new type of coronavirus that is transmitted by the respiratory route by the emanation of droplets ("drops"). Coronaviruses (CoV) are a large family of respiratory viruses that can cause mild to moderate illnesses, ranging from the common cold to respiratory syndromes such as SARS (severe acute respiratory syndrome). They are named so because of the crown-shaped spikes that are present on their surface.

2 Source Ministry of Health - www.salute.gov.it/portale/nuovocoronavirus.

3 WHO Regional Office for Europe - COVID-19 preparedness, prevention, and control in prisons and other places of detention - Italian translation of the Swiss Centre of Expertise in the Enforcement of Criminal Sanctions, March 15th, 2020.

4 Given that the art. 3 of the European Convention essentially refers to art. 5 of the Universal Declaration, it is specified that this article, according to the reading offered by European jurisprudence, imposes on the State the positive obligation to ensure that «*ogni prigioniero sia detenuto in condizioni compatibili con il rispetto della dignità umana, che le modalità di esecuzione della misura non sottopongano l'interessato ad uno stato di sconforto né ad una prova d'intensità che ecceda l'inevitabile livello di sofferenza inerente alla detenzione e che, tenuto conto delle esigenze pratiche della reclusione, la salute e il benessere del detenuto siano assicurati adeguatamente*» Thus, literally, ECtHR, judgement of January 8th 2013, *Torreggiani v. Italy.*

the prohibition of torture and inhuman and degrading treatment[5].

A further alarm on the high risk of contagion in prisons was launched by the Council of Europe Commissioner for Human rights in April 2020, urging the Member States to adopt all available alternatives to intra-mural detention and to guarantee, towards those who remain in detention, human rights by respecting the needs of the most vulnerable detainees, persons with disabilities, pregnant women and child detainees, and by adopting non-discriminatory means[6].

Based on the experience of Italian doctors and with their collaboration, the WHO Regional Office for Europe promulgated, already in May 2020, the guidelines for penitentiary institutions, aimed at safeguarding not only prisoners but also staff of the penitentiary police and the health workers posted there[7]. The rapid spread of the COVID-19 virus had therefore placed the States in front of the difficult management of the health of the prison population; this, in particular, by urgently re-presenting the age-old problem of overcrowding (*prison overcrowding*) which, in the specific case of the risk of spreading the coronavirus, had to be tackled vigorously. It should be remembered that at the beginning of 2020 the European average of prison overcrowding was 96%, with extremely high peaks in Eastern European countries and with Italy settling at 120%, second only to Belgium.

In the exceptional context of the pandemic emergency that hit our country, therefore, the overcrowding phenomenon[8] risked exponentially increasing the risk of contagion from Covid-19, given that the chronic insufficiency of spaces compared to the number of confined subjects and the conditions the often precarious hygiene conditions of penitentiary institutes made the path of social distancing and 'sanitization of environments' almost impracticable, as minimum precautions to avoid the spread of the virus[9].

II. THE EMERGENCY LEGISLATION IN THE PENITENTIARY SYSTEM

Based on the declaration of the state of emergency, determined by the resolution of the Council of Ministers of January 31st, 2020, pursuant to art. 7, paragraph 1, lett. c) of the legislative decree n. 1 of 2018 (Civil Protection Code)[10], the Italian legislator took the first steps towards the neutralisation of the Covid-19 health emergency by adopting measures to reduce the contagion starting from February 2020, with emergency decrees and *DPCMs*, in order to kick off a phase of real emergency legislation, aimed at strengthening containment measures in an attempt to slow down and reduce the spread of the infection.

Among the first measures are three circulars from the Department of Penitentiary Administration (D.A.P.).

5 The European Committee for the Prevention of Torture and Inhuman and Degrading Treatment and Punishment of the Council of Europe is introduced in chapter 1 at § 1.3 - *Statement of principles relating to the treatment of persons deprived of their liberty in the context of the coronavirus disease* (COVID-19) pandemic CPT/Inf(2020)13 – March 20th 2020.

6 Statement Commissioner of the European Council for Human Rights - Dunja Mijatović -Translation by G. Perna, Section III *Relazioni Internazionali e Progetti Europei*, Ufficio V Coordination of institutional cooperation relations in *www.rassegnapenitenziaria.com*, 2020.

7 WHO European Regional Office *Experience of health professionals, police staff and prisoners in Italy informs World Health Organization* COVID-19 *guidelines for prisons*, 2020.

8 Among the various legislative interventions aimed at contrasting prison overcrowding are the decree-law July 1st, 2013, n. 78, converted, with amendments, into law August 9th, 2013, n. 94 and entitled « *Disposizioni urgenti in materia di esecuzione della pena*», in *www.dirittopenaleuomo.it*, as well as the decree-law of December 23rd, 2013, n. 146, entitled " *Misure urgenti in tema di tutela dei diritti fondamentali dei detenuti e di riduzione controllata della popolazione carceraria* ", *ibidem*, which moves on two levels: on the a first level, there are the functional interventions to reduce the number of attendance in prison, through the reduction of the flow of incoming prisoners and the expansion of that of outgoing prisoners; on the other hand, functional interventions to strengthen the protection of the rights of prisoners and, in particular, to ensure the *justiciability* of the rights violated by overcrowding, as required by the *Torreggiani* sentence, are placed on a second level.

9 Source Ministry of Justice *www.giustizia.it*, 2020.

10 legislative decree n.1 of January 2nd, 2018, Civil Protection Code, published in the Official Journal n. 17 of January 22nd, 2018, entry into force of the provision February 6th, 2018, art. 7, paragraph 1, *Tipologia degli eventi emergenziali di protezione civile (Articolo 2, legge 225/1992)1. Ai fini dello svolgimento delle attività di cui all'articolo 2, gli eventi emergenziali di protezione civile si distinguono in: a) emergenze connesse con eventi calamitosi di origine naturale o derivanti dall'attività dell'uomo che possono essere fronteggiati; mediante interventi attuabili, dai singoli enti e amministrazioni competenti in via ordinaria; b) emergenze connesse con eventi calamitosi di origine naturale o derivanti dall'attività dell'uomo che per loro natura o estensione; comportano l'intervento coordinato di più enti o amministrazioni e debbono essere fronteggiati con mezzi e poteri straordinari da impiegare durante limitati e predefiniti periodi di tempo, disciplinati dalle Regioni e dalle Province autonome di Trento e di Bolzano nell'esercizio della rispettiva potestà legislativa; c) emergenze di rilievo nazionale connesse con eventi calamitosi di origine naturale o derivanti dall'attività dell'uomo che in ragione della loro intensità o estensione debbono, con immediatezza d'intervento, essere fronteggiate con mezzi e poteri straordinari da impiegare durante limitati e predefiniti periodi di tempo ai sensi dell'articolo 24.*

The first circular[11], dated February 22nd, 2021, n.611554, contained provisions exclusively for residents or for the people in any case finding themselves in the municipalities of the so-called. "red zone"[12] and ordered the exemption from service for prison workers residing in the municipalities of the "red zone" at their respective offices and the prohibition of access to the institute for external staff (teachers, volunteers, family members) as well as the suspension of movements of prisoners to and from penitentiary institutes falling within the competence of the superintendency of Turin, Milan, Padua, Bologna and Florence; the excluded movements were those due to displacements, assignments, transfers on request or for security reasons, limited to the places most affected by the first phase of the Covid-19 emergency, with the exception of movements for justice reasons. It also envisaged the establishment of a crisis unit at the Directorate General of Prisoners and Treatment of the D.A.P. " *per assicurare il costante monitoraggio dell'andamento del fenomeno e delle informazioni relative ai casi sospetti o conclamati, nonché per l'adozione tempestiva delle conseguenti iniziative* ".

On February 25th, 2020, the Department issued a second circular n. 65630[13] with which it issued instructions to supervisors, directors, applicants and staff in service, in relation to the contents of a circular issued by the Ministry of Health on the previous February 22nd[14]. In the circumstance the D.A.P. indicated the protective measures to be taken for the collection of tests, to prepare spaces in which to place prisoners for the sanitary isolation phase in cases of suspected contagion, to carry out checks on the cc.dd. "new arrivals" (also using a *pre-triage* space in small tensile structures), for the classification of prisoners into three different categories based on the expected medical treatment[15]. Not only that: it invited the Superintendents to report the need for health facilities (PPE) and to quantify the number of mobile structures to be installed in the various prisons in order to report the overall figure to the Civil Protection Operations Committee; it also established the obligation of self-declaration for access to penitentiary facilities and for visits from the outside (obligation also extended to supplies and supplies); formulated warnings of a general nature on the healthiness of the workplace and on the protection of the health of the personnel; it required the support of videoconferencing to guarantee the presence of the detainee, instead of movements for reasons of justice.

The next day, February 26th, 2020, n. 4492, the D.A.P. finally, it issued a third circular with which, in addition to reiterating the hygiene measures to be adopted in order to prevent and contain the contagion (frequent ventilation, daily disinfection of environments, etc.), it requested the launch of a specific information and awareness-raising activity of the prison population[16].

Furthermore, in consideration of the worsening situation and the high rate of transmissibility of the virus by airways, the Department ordered the adoption of the following measures: the suspension of treatment activities, for which access to the external community was foreseen; the containment of external and internal work activities that involved the presence of people from outside; the replacement of face conversations with family members or third parties, other than defence attorney, with remote conversations using the equipment supplied to penitentiary institutions (Skype and, subsequently, cell phones) and with telephone correspondence, to be authorized without limits; the need to speak with the judicial bodies to evaluate the possibility, case by case, of temporarily suspending the permits and concessions of semi-freedom.

In terms similar to the aforementioned circulars of the D.A.P., the decree-law of March 2nd, 2020, n. 9[17], provided for "remote" interviews for prisons located in Lombardy and Veneto until 31 March 2020.

The *D.P.C.M.* March 8th 2020[18], in regulating the "*lockdown*" methods in all sectors, with reference to prisons, in art. 2, letter u) provided: "*tenuto conto delle indicazioni fornite dal Ministero della salute, d'intesa con il coordinatore degli interventi per il superamento dell'emergenza coronavirus, le articolazioni territoriali del Servizio sanitario nazionale assicurano al Ministero della giustizia idoneo supporto per il contenimen-*

11 Circular D.A.P "*Raccomandazioni organizzative per la prevenzione del contagio del coronavirus*" of February 22nd, 2020.

12 Codogno, Castiglione d'Adda, Casalpusterlengo, Fombio, Maleo, Somaglia, Bertonico, Terranova dei Passerini, Castelgerundo and San Fiorano.

13 Circular D.A.P. "*Ulteriori indicazioni per la prevenzione del contagio da coronavirus"* del febbraio, 25th, 2020.

14 Circular of the Ministry of Health n. 000543 of February 22nd, 2020..

15 Symptomatic prisoner; paucisymptomatic-close contact prisoner tested negative; inmate tested positive for the swab for COVID-19 and currently asymptomatic.

16 Circular D.A.P. " *Indicazioni per la prevenzione della diffusione del contagio da Coronavirus (Covid 19) presso le sedi del Dipartimento dell'Amministrazione penitenziaria*" of February 26th, 2020.

17 Concerning *Misure urgenti di sostegno per famiglie, lavoratori e imprese connesse all'emergenza epidemiologica da COVID-19*. Published in the Official Journal, General Series n.53 of March 2nd, 2020.

18 *Ulteriori disposizioni attuative del decreto-legge 23 febbraio 2020, n. 6, recante misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19*. Published in the Official Journal March 8th, 2020, n. 59, extraordinary edition.

to della diffusione del contagio del COVID-19, anche mediante adeguati presidi idonei a garantire, secondo i protocolli sanitari elaborati dalla Direzione generale della prevenzione sanitaria del Ministero della salute, i nuovi ingressi negli istituti penitenziari e negli istituti penali per minorenni. I casi sintomatici dei nuovi ingressi sono posti in condizione di isolamento dagli altri detenuti, raccomandando di valutare la possibilità di misure alternative di detenzione domiciliare. I colloqui visivi si svolgono in modalità telefonica o video, anche in deroga alla durata attualmente prevista dalle disposizioni vigenti. In casi eccezionali può essere autorizzato il colloquio personale, a condizione che si garantisca in modo assoluto una distanza pari a due metri. Si raccomanda di limitare i permessi e la libertà vigilata o di modificare i relativi regimi in modo da evitare l'uscita e il rientro dalle carceri, valutando la possibilità di misure alternative di detenzione domiciliare"[19].

These provisions were taken up in the decree-law of March 8th, 2020, n. 11[20] which, in art. 2, paragraph 8, extended until March 22nd, 2020, the same discipline to penitentiary institutions and penal institutions for minors throughout the national territory. It reiterated that interviews with relatives or with other persons to whom condemned, interned and accused persons are entitled "*sono svolti a distanza, mediante, ove possibile, apparecchiature e collegamenti di cui dispone l'amministrazione penitenziaria e minorile o mediante corrispondenza telefonica, che può essere autorizzata oltre i limiti di cui all'articolo 39, comma 2, del predetto decreto del Presidente della Repubblica n. 230 del 2000 e all'articolo 19, comma 1, del decreto legislativo n. 121 del 2018*". The Government had also provided, in paragraph 9, that the Supervisory Judges, on the basis of " *le evidenze rappresentate dall'autorità sanitaria* ", could suspend the granting of premium permits and semi-liberty until May 31st, 2020, in order to avoid the risk of contagion for other inmates upon return to prison.

Furthermore, again until May 31, 2020, participation in any hearing of persons detained, interned or in pre-trial detention was ensured, where possible, by videoconferences or remote connections identified and regulated by provision of the Director General of information and automated systems of the Ministry of Justice.

Following these first preventive measures, there were reactions from the prison population with violent protests involving 49 penitentiary facilities starting from that of Salerno on March 7th, 2020 and extending like a spot from north to south throughout the national territory in the following days[21].

Therefore, with the decree-law March 17th, 2020 n. 18 (the so-called "*Cura Italia* decree")[22] the legislator has adopted, with the articles 123 and 124, further measures aimed at preventing the onset of new epidemic outbreaks within prisons through the adoption of deflationary measures to alleviate the conditions of the overcrowding phenomenon which has represented[23] and still represents, indeed, a structural and endemic to

19 Article 2 of the DPCM of March 8th, 2020 contains " *Misure per il contrasto e il contenimento sull'intero territorio nazionale del diffondersi del virus COVID-19*".

20 " *Misure straordinarie ed urgenti per contrastare l'emergenza epidemiologica da COVID-19 e contenere gli effetti negativi sullo svolgimento dell'attività giudiziaria*", Official Journal n. 60 of March 8th, 2020; the heading of the art. 2 reads " *Misure urgenti per contrastare l'emergenza epidemiologica da COVID-19 e contenerne gli effetti in materia di giustizia* ".

21 The protests concerned the institutes of Naples Poggioreale, Salerno, Santa Maria Capua Vetere, Aversa, Avellino, Rebibbia N.C., Regina Coeli, Frosinone, Velletri, Rieti, Chieti, Isernia, Pescara, Viterbo, Larino, Campobasso, Teramo, Prato, Pisa, Livorno, Modena, Ferrara, Bologna, Ascoli Piceno, Pavia, Bergamo, Milan Opera, San Vittore, Como, Padua, Treviso, Rovigo, Verona, Ivrea, Trieste, Venice S.M.M., Vicenza, Alessandria San Michele, Turin, Genoa Marassi, Aosta, Foggia, Matera, Bari, Trani, Turi, Potenza, Melfi, Altamura, Lucera, San Severo, Syracuse, Palermo Pagliarelli, Trapani, Messina, Termini Imerese, Palermo Ucciardone, Castelvetrano, Enna, Castrovillari and Nuoro.

22 The d.l. March 17th, 2020 n. 18 is converted with amendments into law April 24th, 2020 n. 27, published in the Official Gazette on April 29, 2020 General Series n. 110. In doctrine, E. Dolcini - G. L. Gatta, "*Carcere, coronavirus, decreto """Cura Italia""": a mali estremi, timidi rimedi*", in «Sistema penali», March, 20th, 2020, report that current statistics indicate a overcrowding rate of 120%, with approximately 10,299 prisoners in excess of the capacity of Italian prisons.

23 For a complete overview of the phenomenon of prison overcrowding in Italy v. R. Del Coco, *Il sovraffollamento carcerario e l'ultimatum di Strasburgo*, in R. Del Coco-L. Marafioti-N. Pisani (edited by), *Emergenza carceri. Radici remote e recenti soluzioni normative. Atti del Convegno* (Teramo, March 6th, 2014), Torino, 2014, p. 15; E. M. Mancuso, *Sovraffollamento carcerario e misure d'urgenza: un intervento su più fronti per avviare un nuovo corso*, in C. Conti - A. Marandola - G. Varraso (edited by), *Le nuove norme sulla giustizia penale. Liberazione anticipata, stupefacenti, traduzione degli atti, irreperibili, messa alla prova, deleghe in tema di pene detentive non carcerarie e di riforma del sistema sanzionatorio*, Padova, 2014, pp. 49 et seq.; G. Mantovani, *La detenzione domiciliare e la semilibertà*, in F. Caprioli – L. Scomparin (edited by), *Sovraffollamento carcerario e diritti dei detenuti, le recenti riforme in materia di esecuzione della pena*, Torino, 2015, p. 103 et seq.; G. Lattanzi, *Una situazione carceraria intollerabile*, in *Cass. pen*., 2011, p. 3290; A. Pulvirenti, *La quarta edizione dell'ordinamento penitenziario commentato: un "buon viatico" per una (auspicata) riforma del sistema sanzionatorio penale*, in *Cass., pen*., 2012, p. 3145, who describes the causes of the «*ormai cronica disfunzione rappresentata dal sovraffollamento penitenziario, che nel nostro Paese è cagionata dall'eccesso di penalità e dal massivo ricorso alla misura detentiva (sia in sede cautelare che in sede esecutiva), e al*

the Italian system, in contrast with the prohibition of inhuman and degrading treatment established by art. 3 of the ECHR, although innumerable measures had already taken place starting from the ruling of the Court of Strasbourg, *Sulejmanovic v. Italy*[24], to find, then, confirmation in the more famous *Torreggiani v. Italy*[25].

With the art. 123 of the aforesaid decree it is (was) provided, in fact, that *sino al 30 giugno 2020, la pena detentiva è eseguita, su istanza del detenuto, presso l'abitazione domiciliare del medesimo o in altro luogo pubblico o privato di cura o di accoglienza quando la pena non è superiore ai diciotto mesi, anche se risultante da parte residua di maggior pena. Previo consenso della persona interessata viene istituito l'uso del braccialetto elettronico o altro dispositivo tecnico di controllo tranne per i minorenni e per i detenuti con pena da scontare inferiore ai 6 mesi*. This new type of home detention, regulated along the lines of the prison deflation measure pursuant to art. 1, law 199/2010[26], however it was not permitted for those convicted of crimes related to organized crime, subversive crime or terrorism (art. 4-*bis* O.P.)[27], for ill-treatment of family members (art. 572 criminal code), or for persecutory acts (art. 612-bis criminal code) (paragraph 1 letter a) of the aforementioned art. 123), as well as for habitual offenders (articles 102, 105 and 108 of the criminal code) (article 123 paragraph 1 letter b)) and for prisoners subjected to a special surveillance regime (article 14-*bis* O.P.) (article 123 paragraph 1 letter c). Not only.

The regulatory provision introduces (introduced) two new causes preventing the granting of emergency home detention. Reference is made, in particular, to letters d) and e) which provide for the exclusion, from the list of beneficiaries of home detention, of all prisoners against whom disciplinary reports have been drawn up for riots and riots as of from March 7th 2020[28], and who, in the

conseguente dovere del legislatore di introdurre soluzioni strutturali e non di mero "contenimento", la possibilità di disporre di un testo rigorosamente ricostruttivo di tutto il formante dottrinale e giurisprudenziale sull'ordinamento penitenziario costituisce una "base di partenza" davvero irrinunciabile»; G. Giostra, *Sovraffollamento carceri: una proposta per affrontare l'emergenza*, in *Riv. it. dir. proc. pen*., 2013, p. 55; P. Corvi, *Sovraffollamento carcerario e tutela dei diritti del detenuto: il ripristino della legalità*, in *Riv. it. dir. proc. pen*, 2013, p. 1796; E. Amodio, *Inviolabilità della libertà personale e coercizione cautelare minima,* in *Cass. pen*., 2014, p. 12 et seq., che, with particular reference to the resonance of the *Torreggiani* sentence on the side of pre-trial detainees, defines overcrowding *come una manifestazione patologica estesa e congenita* del nostro sistema penitenziario; E. Dolcini, *La "questione penitenziaria", nella prospettiva del penalista: un provvisorio bilancio*, in *Riv. it. dir. e proc. pen*., 2015, p. 1655; P. Sechi, *Contrasto al sovraffollamento carcerario e misure alternative alla detenzione: un primo bilancio*, in *Riv. it. dir. e proc. pen*, 2015, p. 199; A. Pugiotto, *La parabola del sovraffollamento carcerario e i suoi insegnamenti costituzionalistici*, in *Riv. it. dir. e proc. pen*, 2016, p. 1204; E. Dolcini, *Superare il primato del carcere: il possibile contributo della pena pecuniaria*, *Riv. it. dir. e proc. pen*, 2018, p. 397 e ss; M. Trapani, *La rieducazione del condannato tra "ideologia correzionalistica" del trattamento e "garanzie" costituzionali di legalità e sicurezza*, in *Riv. it. dir. e proc. pen*, 2018, p. 1693, which, with reference to alternative measures to detention, speaks of a real "*fuga dalla pena detentiva", portata avanti negli ultimi decenni dal legislatore italiano altresì come mezzo di "deflazione penitenziaria" destinato a fronteggiare quel fenomeno di rilevanza politica primaria costituito dall'endemico problema, ormai strutturale, del "sovraffollamento carcerario*".

24 ECtHR, sent. July 16th, 2009, *Sulemajnovic v. Italy*, in the *Cass. pen*., 2009., 2009, p. 4927, with note by N. Plastina *L'Italia condannata dalla Corte europea dei diritti dell'uomo per l'insufficienza temporanea dello spazio individuale nella cella assegnata a un detenuto nel carcere di Rebibbia nel 2003, ma assolta per la gestione, in quel contesto, della sovrappopolazione carceraria*, and by L. Eusebi, *Ripensare le modalità della risposta ai reati traendo spunto da c. eur. dir. uomo 19 giugno 2009, Sulejmanovic c. Italia.*

25 sent. January 8th, 2013, *Torreggiani v. Italy*, in *Dir. pen. cont*, January 9th, 2013, with a note by F. Viganò, *Sentenza pilota della Corte EDU sul sovraffollamento delle carceri italiane: il nostro paese chiamato all'adozione di rimedi strutturali entro il termine di un anno*. Also, on the subject, cf. M. Pelissero, *La crisi del sistema sanzionatorio e la dignità negata: il silenzio della politica, i compiti della dottrina*, in *Dir. pen. proc.,* 2013, p. 261 et seq.; G. Tamburino, *La sentenza Torreggiani ed altri della Corte di Strasburgo*, in *Cass. pen*., 2013, p. 11.

26 The existence of a special relationship between the two disciplines is immediately confirmed by the introduction of art. 123 of the aforementioned decree, which arises «in derogation from the provisions of paragraphs 1, 2 and 4 of article 1 of the law of November 26th, 2010, n. 199», as provided by the art. 123, d.l.18/2020, in https://www.gazzettaufficiale.it, as well as by paragraph 8 of the same provision which maintains «without prejudice to the further provisions of article 1 of the law of November 26th, 2010, n. 199, where compatible».

27 Furthermore, it is believed that the exclusion from the alternative measure in question, by virtue of the reference to art. 4-*bis* O.P., of the subjects who had been convicted of crimes against the public administration for facts committed before the entry into force of the law of January 9th, 2019 n. 3 (the so-called *'spazza corrotti'*), is in contrast with the judgment of the Constitutional Court n. 32 of February 12th, 2020 in which the unconstitutionality was generally affirmed, with reference to alternative measures to detention, conditional release and the prohibition of suspension of the prison order following the conviction sentence, of the interpretation according to which the pejorative changes of the legislation on alternative measures to detention can be applied retroactively.

28 The disciplinary relationship relevant for the purposes of letter e and of the art. 123, paragraph 1, decree-law 18/2020, must be drawn up pursuant to art. 81 presidential decree 230 of 2000, or rather «*allorché un operatore penitenziario constata direttamente o viene a conoscenza che una infrazione è stata commessa, redige rapporto, indicando in esso tutte le circostanze del fatto. Il rapporto viene trasmesso al direttore per via gerarchica*». Wanting, then, to deepen the reflection on the interpretation of the provision in question, it would be appropriate to observe that, unlike what happens with the disciplinary sanction, issued following a pseudo-contradictory, the disciplinary report excludes the possibility of the prisoner of defend himself against the charge made against him.

last year, have been sanctioned for certain disciplinary infractions, such as - for example - participation in unrest and riots or the promotion of the same, evasion, facts established by law as a crime, committed to the detriment of companions, prison workers or visitors[29].

With reference to the categories of people expressly identified as not deserving of the benefit in question, it should then be noted that art. 123, paragraph 2, of the legislative decree 18/2020 remits (remitted), through a sort of safeguard clause, to the Supervisory Judge the assessment relating to the adoption of *detenzione domiciliare dell'emergenza*, if it deems *gravi motivi ostativi alla concessione della misura*.

To complete the descriptive framework of the newly introduced alternative measure, there is the fact that the discipline, dictated by the "*Cura Italia*" decree, made the activation of the procedure, aimed at admission to home detention, subject to a request by one of the parties. This resulted in the automatic exclusion, from the list of beneficiaries of the alternative measure in question, of all the interested parties who had not personally (or through a lawyer) taken action in this sense even if the proceeding did not exclude the possibility that the public prosecutor was the holder of this right[30].

A non-negligible aspect is the peculiar procedure for controlling the measure pursuant to art. 123 d.l. 18/2020, which took place, pursuant to paragraph 3, "*mediante mezzi elettronici o altri strumenti tecnici resi disponibili per i singoli istituti penitenziari*" whenever the sentence, even residual, to be carried out did not exceed six months[31].

With the art. 124 of the aforementioned legislative decree 18/2020, extraordinary award leaves[32] were also granted for prisoners on semi-freedom pursuant to art. 52 O.P., which, unlike the maximum overall duration of 45 days per year established, could last until June 30th, 2020, unless the Supervisory Judge identified serious impediments.

The initial security approach expressed in the first legislative decree 11/2020 is therefore soon abandoned[33] in favour of interventions aimed at decreasing overcrowding through premium licenses of exceptional duration and the expansion of the possibilities of home detention for those subjects whose sentence is limited. However, from the expansion of the category of crimes considered impediments and of subjects excluded from the scope of application of the benefit *de quo* and due to the insufficient[34] availability of electronic means of control, it is clearly possible to grasp a weak and inadequate legislative intervention immune from criticisms[35] that, instead of favouring the primary purpose of the decree-law, i.e. the prison deflation made nece-

29 These are the provisions of art. 77, paragraph 1, numbers 18, 19, 20 and 21 of the decree of the President of the Republic June 30th, 2000, n. 230, recalled by the letter d, paragraph 1, art. 123 of decree-law 18/2020.

30 In fact, even these, after all, could have had an interest in accepting the application aimed at protecting collective health. This is the orientation expressed in the Document of the Attorney General of the Cassation (April 1st, 2020), in " Sistema penale ", April 3rd, 2020, with the subject " *pubblico ministero e riduzione della presenza carceraria durante l'emergenza coronavirus* ", which, among the other things, contains detailed suggestions regarding the concrete implementation of the promotion of applications pursuant to art. 123 by the public prosecutor: «*ogni istituto penitenziario potrebbe inviare al p.m. l'elenco dei detenuti che posseggono i requisiti indicati dalla norma e che non hanno ancora presentato istanza di ammissione alla misura emergenziale, onde consentirgli di investire il magistrato di Sorveglianza*». In doctrine, see S. Moccia, *Riflessioni di un penalista ai tempi del coronavirus*, in *Riv. Penale Diritto e Procedura,* 2020, n.1, p. 5.

31 The number of electronic bracelets to be made available is periodically updated with a specific provision by the head of the D.A.P. in agreement with the Chief of Police according to the financial resources (paragraph 5 of the aforementioned art. 123). The deactivation of the control devices for sentences of less than 30 days is introduced in paragraph 5 of the legislative decree 18/2020 during the conversion into l. April 24th, 2020 n. 27.

32 Prize permits are regulated by art. 52 O.P.: The sentenced person admitted to the semi-liberty regime (art. 48 O.P.) can be granted (art. 57 O.P.) as a reward one or more permits with a total duration not exceeding forty-five days per year

33 With the. April 24th, 2020 n. 27 is also repealed the d.l. of March 8th, 2020 n.11. G. Giostra, *L'emergenza carceraria non è un incendio al di là del fiume*, in *Dirittodifesa*, 28 March 2020, p. 3, speaks of a real «prison-centric obsession».

34 According to G. Spangher, *Pochi braccialetti e innocenti in cella. La beffa di Bonafede aizzerà la rivolta*, in *IlRiformista*, 2020, p. 4, these are subjects not only presumed innocent but for whom acquittal is not excluded, as the statistical data show, with reparation costs borne by the State.

35 Specifically, some authors suggest raising the minimum sentence limit to at least two years for accessing home detention, so as to broaden the pool of recipients of the provision, and making the fulfillment relating to the 'electronic bracelet' optional, in the same way as what happens in the case referred to in art. 58-*quinques* O.P. These are some of the requests made by E. Dolcini - G. L. Gatta, *Carcere, coronavirus, decreto 'Cura Italia': a mali estremi, timidi rimedi*, cit., to which is added. L. Malavasi, *Detenzione domiciliare ex art. 123 del d.l. 17/2020*, in *Dirittodidifesa,* 2020, p. 6, with the audacious suggestion to the legislator to eliminate, or at least contain only some serious crimes included in the art. 4 *bis* O.P., automatisms of foreclosures to access to the measure of home detention, leaving the verification, case by case, of the deserving of the benefit on the part of the convict to the Supervisory Judges, and A. Giordano, *L'emergenza nelle carceri e la strada creativa indicata da Papa Francesco*, in *IlMessaggero*, 2020, who proposes to introduce a new measure, *Freedom by Reparation*, designed for prisoners with a sentence, even residual, of no more than two years, and who are not already in situations of impediment provided for by prison legislation, in order to convert each day of prison sentence into a day of work performed in the service of

ssary by the health emergency from Covid-19, appears more inclined to enhance the worthiness of the convict, as a condition for accessing the measure in line with the prison-centric politics of recent years[36]. In fact, the amendments to the conversion law n. 27 of 24 April 2020 to the "*Cura Italia*" decree prove it: the first concerns the last paragraph of paragraph 5, which provides that «*nel caso in cui la pena residua non superi di trenta giorni la pena per la quale è imposta l'applicazione delle procedure di controllo mediante mezzi elettronici o altri strumenti tecnici, questi non sono attivati*»; the second change concerns the introduction of paragraph 8-*bis*, which definitively sanctions the temporariness of the new form of home detention, to be applied only to prisoners who «mature the conditions for the application of the measure by June 30th, 2020[37].

Moreover. In the norm, there is no mention of the health management of prisoners[38] in pre-trial detention[39] thus revealing differences in treatment between permanent prisoners and in pre-trial detention, completely unreasonable and therefore already relevant pursuant to art. 3 of the Constitution, a *lacuna* that has raised more than one perplexity in both the doctrine[40] and the Judiciary[41], resulting in a series of suggestions to the legislator on the opportunity to reduce the pressure of unnecessary presences in penitentiary institutions also in light of the extrema ratio role that the pre-trial detention in prison holds - or, better, should hold - in accordance with the combined reading of paragraphs 3 and 3-*bis* of art. 275 c.p.p.

Part of the doctrine, in fact, has underlined the contradictory nature of the legislative choice to start *emptying prisons* starting from convicted prisoners, for whom guilt has already been ascertained with a final sentence, rather than from restricted subjects by virtue of pre-trial detention - an *extensive and congenital pathological manifestation* of the Italian penitentiary system[42] - who represent a consistent percentage of the presences in penal institutions, whose procedural legal position is still protected by the presumption of innocence[43].

This position was strengthened by the Attorney General at the Court of Cassation[44] who suggested including the epidemic risk among the criteria for choosing pre-trial detention in prison, as a presumed element of the case; *al ricorrere del quale si presume l'inadeguatezza della misura custodiale, salvo sussistano esigen-*

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the community. Despite the multiple interventions and suggestions of the doctrine, «of a minimal nature», as defined by A. Manna, *Coronavirus, emergenza carceraria ed il ruolo della magistratura di Sorveglianza*, in *Dirittodidifesa,* 2020, p. 7..

36 A. Lorenzetti, *Il carcere ai tempi dell'emergenza Covid-19*, in *Riv. Associazione Italiana Costituzionalisti*, 2020, n. 3, p. 60.

37 G. Spangher, *COVID-19: nel disastro si vede chiaro*, in *Riv. Penale Diritto e Procedura*, 2020, n. 1, p. 9.

38 Fiorio C., *Salute del condannato e strumenti di tutela*, in *Giurisdizione di sorveglianza e tutela dei diritti*, Scalfati A. (edited by), Padova, 2004; Id., Fiorio C., *Misure coercitive e diritto alla salute, in Studi sul processo penale*, A. Gaito – P. Paolozzi – P. Voena (a cura di), Padova, 1996.

39 A. Scalfati, *La custodia cautelare durante l'emergenza sanitaria: leggi confuse e illiberali*, in *Arch. pen*., 2020, n. 2, p. 3, according to which "*la manovra legislativa è sorda alle tutele fondamentali: diritto alla salute e libertà personale, quest'ultima, anche in rapporto alla presunzione di non colpevolezza*".

40 G. Spangher, G. Spangher, *Pochi braccialetti e innocenti in cella. La beffa di Bonafede aizzerà la rivolta*, in *IlRiformista*, p. 4; Documento dell'Associazione tra gli studiosi del processo penale: *Emergenza covid-19 e custodia in carcere: perplessità e proposte, anche in vista della conversione del d.l. n. 18/2020*, 2020. Previously on this point, see Court of Cassation, united sections, April 28th, 2016, n. 20769, in CED Cassation, rv. 266651, which, called to pronounce itself on the correct exegesis of art. 275-*bis* c.p.p., excluded any automatism between the unavailability of control tools and the rejection of the application for house arrest, with the result of leaving it to the discretion of the judging body, once the unavailability of the electronic device has been ascertained, «*una rivalutazione della fattispecie concreta, alla luce dei principi di adeguatezza e proporzionalità di ciascuna delle misure, in relazione alle esigenze cautelari da soddisfare nel caso concreto*».

41 In this sense, the Document of the Attorney General of the Cassation (April 1, 2020) is emblematic.

42 E. Amodio, *Inviolabilità della libertà personale e coercizione cautelare minima,* in *Cass. pen*., 2014, p. 12.

43 According to G. Spangher, *Pochi braccialetti e innocenti in cella. La beffa di Bonafede aizzerà la rivolta*, cit., p. 4, these are subjects not only presumed innocent but for whom acquittal is not excluded, as the statistical data show, with reparation costs borne by the State. It is also obvious that the new institute will be unlikely to be applied to those subjects who belong to the area of "social marginality" (think, for example, of non-EU citizens) who often do not have the availability of a suitable domicile

44 Document of the Attorney General of the Cassation (April 1st, 2020), which also explores other aspects of prison deflation, such as the suspension of the execution order, pursuant to art. 656 of the Code of Criminal Procedure, and the new alternative measure to detention introduced by decree-law 18/2020. The document is the result of in-depth and articulated reflections carried out in an online meeting together with the general prosecutors of the courts of appeal and of discussions held within the Attorney General of the Cassation and the offices of first instance. As can be read in the introduction, these were reflections concerning the pre-trial detention measures in prison still to be issued, those already issued, the definitive penalties for which expiation should begin, and those already in progress. The Office provided, for each of these categories, indications related to the emergency in progress; and therefore so that custody in prison was limited to strictly necessary, the execution of definitive sentences for low penalties was postponed, and in the execution phase already underway, alternative measures to detention were facilitated, first and foremost probation with the social service. The intervention of the Attorney General of the Cassation aimed at the use of existing institutions to the maximum extent.

ze cautelari di eccezionale rilevanza. In essence, it was a question of converting - from exception to rule - the discipline referred to in paragraph 4 of art. 275 c.p.p., in order to burden the public prosecutor with proof of the exceptional relevance of the precautionary requirements (or pre-trial exigencies) of the concrete case and, consequently, aggravate the motivational burden of the judge with regard to their existence[45].

III. THE DIFFICULT BALANCE BETWEEN HEALTH PROTECTION AND SAFETY NEEDS

In this context, after the approval of the "*Cura Italia*" decree on March 21st, 2020, the D.A.P. proceeded to issue circular n. 95907 " *segnalazione all'autorità giudiziaria* " sent to all supervisors and directors of penitentiary institutions, with which the recipients were asked to draw up a list of inmates with certain pathologies as well as inmates older than 70 years (regardless of whether or not they were affected by any pathologies), to be communicated " *con solerzia all'Autorità giudiziaria, per le eventuali determinazioni di competenza* "; this document produced the most discussed and controversial debate that developed regarding the effects of the pandemic on the Italian prison reality and in particular on the management of prisoners subjected to the prison regime provided for by art. 41-*bis* O.P.

In fact, with note/circular April 24th, 2020 n. 136587, the D.A.P. has ordered that "*le direzioni degli istituti penitenziari, oltre alle informazioni già indicate nella nota 21 marzo 2020, n. 95907, provvedano tempestivamente a trasmettere direttamente alla Procura Nazionale Antimafia e Antiterrorismo copia delle segnalazioni/istanze concernenti ristretti sottoposti al regime di cui all'art. 41-bis, co.* 2 *O.P., o assegnati al circuito alta sicurezza*". Then, with provision of June 16th, 2020 n. 0209709, the *D.A.P.* proceeded to suspend the document since not only the letter cc) of Article 1, paragraph 1 of the *d.P.C.M.* of May 17th, 2020, as amended by Article 1 of the *d.P.C.M.* of May 18th, 2020, " *non contiene più riferimenti alla raccomandazione di valutare la possibilità di misure alternative di detenzione domiciliare* ", but also because "*il numero dei ristretti positivi al Covid -19, pari oggi a 66 persone su poco più di 53.000 detenuti, è in costante diminuzione e negli istituti penitenziari risultano in atto protocolli di prevenzione dal rischio di diffusione del contagio*".

In particular, the critical issues of the circular were the incomprehensible reasons why the D.A.P., in ordering the obligation of the aforementioned reporting, did not make any distinction between the prisoners object of the communication itself, where the art. 123 of the aforementioned "*Cura Italia*" decree excluded from the possibility of executing the remaining prison sentence at home various categories of convicts considered particularly dangerous, and among them those who had been convicted of organized crime offences.

In this legislative confusion in the fight against the danger of contagion from Covid-19, in addition to the institution of home detention, pursuant to art. 123 decree-law 18/2020, the Surveillance Judges deemed it appropriate to also resort to the instruments already established by the legislator for the protection of the prisoner's right to health[46] in compliance with the constitutional principles of protection of health[47] and humanity of the treatment by applying the institutions of deferment - mandatory or optional - the execution of the sen-

45 Reference is made here to both the telematic development of criminal justice pursuant to art. 83 decree-law 2020/18 - See Resolution of the Superior Council of the Judiciary of 26 March 2020, on the possible extension of the application of art. 123 to subjects with a sentence of more than 18 months.

46 A. Scalfati, *Giurisdizione di sorveglianza e tutela dei diritti*, Padova, 2004.

47 The debate has opened in doctrine and in jurisprudence about the possibility of extending the protection provided for the prisoner suffering from physical pathology, also to convicts in a state of supervening mental illness, not destined, therefore, for the treatment offered by the REMS. In this sense, expressed. Massaro, *L'assistenza sanitaria in ambito penitenziario*, in P. Bronzo-F. Siracusano-D. Vicoli (edited by), *La riforma penitenziaria: novità e omissioni del nuovo "garantismo carcerario". Commento ai d.lgs. n. 123 e 124 del 2018*, Torino, 2019, p. 96 et seq., according to which the right to health «*presenta un volto necessariamente e inderogabilmente unitario*», so that there would be no reason to ask the question about the applicability of the institutions responsible for safeguarding the prisoner's health only with specific reference to physical illness and not also psychic, even if supervening. The same tendency to identify a 'unitary soul' of the prisoner's right to health can be found in the jurisprudence of the Constitutional Court, which has recently ruled in the judgment of constitutional legitimacy of art. 47-ter, paragraph 1-*ter*, O.P., in the following terms: «*pur consapevole che incombe sul legislatore il dovere di portare a termine nel modo migliore la già avviata riforma dell'ordinamento penitenziario nell'ambito della salute mentale, con la previsione di apposite strutture interne ed esterne al carcere, questa Corte non può esimersi dall'intervenire per rimediare alla violazione dei principi costituzionali denunciata dal giudice rimettente, di modo che sia da subito ripristinato un adeguato bilanciamento tra le esigenze della sicurezza della collettività e la necessità di garantire il diritto alla salute dei detenuti (art. 32 Cost.) e di assicurare che nessun condannato sia mai costretto a scontare la pena in condizioni contrarie al senso di umanità (art. 27 comma 3 Cost.), meno che mai un detenuto malato*». see, Constitutional Court, sentence February 20th, 2019, n. 99. In implementation of the *novum* introduced by the quoted judgment of the Constitutional Court, the Court of Cassation considered humanitarian home detention possible or in derogation even for prisoners subjected to the differentiated regime pursuant to art. 41 *bis* O.P., carriers of a supervened serious mental illness. On this point, Cass. Pen., Section I, May 7th, 2019, n. 29488.

tence pursuant to articles 146 and 147 of the criminal code, also in the form of «*surrogatory*»[48] home detention pursuant to art. 47-*ter*, paragraph 1-*ter*, O.P., according to which « *quando potrebbe essere disposto il rinvio obbligatorio o facoltativo della esecuzione della pena ai sensi degli articoli 146 e 147 del codice penale, il tribunale di Sorveglianza, anche se la pena supera il limite di cui al comma 1, può disporre la applicazione della detenzione domiciliare*».

Precisely this latter case, also known as humanitarian home detention in accordance with the rights constitutionally protected by articles 27, paragraph 3, and 32 of the Constitution, represented an effective solution for the Supervisory Judges for the management of the Covid-19 emergency in prisons, since the same is authentically qualified not as an alternative measure to the sentence but as an alternative to detention or, if you prefer, a method of executing the sentence intself, which can be modelled by the judge in such a way as to safeguard the prisoner's fundamental right to health, if it is incompatible with a stay in prison and, at the same time, the needs of defence of the community, which must be protected from the potential danger of those affected by certain types of psychiatric pathology.

And it is precisely on the concept of incompatibility between the state of health[49] of the convict and the intramural execution of the sentence that the health emergency has had important repercussions, since the Covid-19 infection for prisoners suffering from previous pathologies constituted (and constitutes) a danger *quoad vitam* such as to integrate the status of incompatibility required for the acceptance of the request proposed pursuant to art. 47-*ter*, paragraph 1-*ter*, O.P. In fact, for the acceptance of an application for optional deferment of the prison sentence for serious health reasons, an absolute incompatibility between the pathology and the state of imprisonment is not necessary, but it is still required that the illness or the disease is such as to involve a serious danger to life; since the protection of the prisoner's right to health must also be declined in terms of prevention, as clarified by art. 1 of the legislative decree June 22nd, 1999, n. 230, containing provisions on the "Reorganization of penitentiary medicine", according to which «i detenuti e gli internati hanno diritto, al pari dei cittadini in stato di libertà, alla erogazione delle prestazioni di prevenzione, diagnosi, cura e riabilitazione».

The result is an unprecedented expansion of the operational scope of the alternative measure in question and a relativisation of the judgment of incompatibility, such that a situation of illness, in itself not incompatible with prison, becomes so as potentially aggravated by the danger of contracting the virus, higher due to the living conditions ensured within prisons.

Yet, despite the supposed suitability to deal with the health emergency, the legal arrangement provided for by art. 47-*ter*, paragraph 1-ter, O.P., has raised some uncertainties with specific regard to prisoners subjected to the regime pursuant to art. 41-*bis* O.P., also being able to benefit from humanitarian home detention[50].

The pronouncements that have aroused the most clamour are those issued by the Supervisory Judge of Milan and the Supervisory Court of Sassari, with which the optional deferment of the sentence was granted pursuant to art. 147 of the criminal code, in the form of the 'humanitarian' home measure, to subjects convicted of the crimes referred to in art. 416-*bis* of the criminal code and subjected to the regime pursuant to art. 41-*bis* O.P[51].. What emerges from the motivational process of both judgments is the certainly acceptable need not to harm the fundamental right to health and the prohibition of treatments contrary to the sense of humanity provided respectively by articles 3 and 27[52] of the Constitution[53] not even in cases of subjection of the prisoner to the differentiated regime pursuant to art. 41-*bis* OP; this need, therefore, does not tolerate bal-

48 Thus, L. Cesaris, *Sub art. 47-ter*, in F. Della Casa – G. Giostra (a cura di), *Ordinamento penitenziario commentato*, Padova, 2019, p. 670.

49 L. Chieffi, *Il diritto alla salute alle soglie del terzo millennio*, Torino, 2004.

50 Indeed, as is known, this measure, being aimed at protecting the mandatory right of the prisoner to health and the humanity of treatment, lacks any foreclosure of access. L. Cesaris, *Sub art. 47-ter*, cit., p. 671, underlines that «*la disposizione è caratterizzata da intenti assistenziali, essendo diretta a soggetti deboli ritenuti meritevoli di un trattamento più favorevole*»

51 Respectively, Uff. Sorv. Milano, Arpil 20th, 2020, in *Dirittopenaleeuomo*, 2020, with a note by S. Raffaele, *Dal 41-bis ai domiciliari: l'ordinanza Bonura*, as well as Trib. Sorv. Sassari, 23 aprile 2020, in *Giurisprudenzapenaleweb*,2020, with a note by G. Stampanoni Bassi, *Il differimento dell'esecuzione della pena nei confronti di Pasquale Zagaria: spunti in tema di bilanciamento tra diritto alla salute del detenuto (anche se dotato di "caratura criminale") e interesse pubblico alla sicurezza sociale*.

52 Baldassarre P., *Diritti della persona e valori costituzionali,* Torino, 1997;

53 In the *Zagaria* case, the Court also referred to art. 3 of the ECHR regarding the prohibition of inhuman treatment and the rules governing the treatment of detainees starting from the UN Standard Minimum Rules for the Treatment of Prisoners, i.e. the "Nelson Mandela Rules" Resolution A/RES/70. The second official name in honor of the President of South Africa who spent 27 years in prison for defending human rights.

ancing, not even in the face of the need to protect other interests of an objective nature such as public safety[54].

IV. GOVERNMENT REMEDIES

The great media coverage of the provisions of application of the home detention measure to prisoners subjected to the regime pursuant to art. 41-*bis* O.P. has aroused strong reactions both in the world of public opinion and in politics[55], so much so that the legislator, again resorting to the emergency decree, introduced with legislative decree April 30th, 2020 n. 28[56] the *disposizioni urgenti in materia di detenzione domiciliare e permessi* which recognize the need and urgency to integrate the discipline of the penitentiary system in relation to the deferment of the sentence in home detention and with regard to permits in the case of prisoners charged of serious crimes or crimes subject to the regime pursuant to art. 41-*bis* O.P.

In fact, the art. 2 of the aforementioned decree-law, in amending the art. 30-*bis* O.P[57]., adds to paragraph 1, that, in the event that applications for permits are presented in the interest of prisoners for mafia or terrorism crimes[58], the competent authority, before making a ruling, must also ask the opinion of the Public Prosecutor at the court that issued the sentence and, in the case of prisoners subjected to the 41-bis O.P. regime, also that of the National Anti-Mafia and Anti-Terrorism Prosecutor with regard to the relevance of links with organized crime and the dangerousness of the subject. It is also clarified that unless there are needs of exceptionally motivated urgency, the permit cannot be granted before 24 hours from the request for opinions[59].

Furthermore, in art. 30 *bis* O.P. paragraph 9 is replaced by a more precise norm relating to the provision that the Attorney General at the Court of Appeal is informed quarterly on the outcome of the permits granted by the judicial authorities who issued them and, for the permits granted for crimes envisaged by art. 51 paragraphs 3-*bis* and 3-*quater* of the Code of Criminal Procedure, he communicates it to the Public Prosecutor at the Court that issued the sentence and, for prisoners subjected to the detention regime pursuant to art. 41-*bis* O.P., also to the National Anti-Mafia and Anti-Terrorism prosecutor. However, this last provision seems to limit, for no particular reason, sharing with one or the other prosecutor's office: district or national.

The decree-law 28/2020[60] also introduces in the art. 47-*ter* O.P., paragraph 1-*quinquies* in which, for the application of home detention to prisoners for mafia and terrorism crimes, it is established that the opinions on the existence of connections with organized crime and the dangerousness of the subjects are issued both by the Public Prosecutor at the Court that issued the sentence and by both the National Anti-Mafia and Anti-Terrorism Prosecutor[61]; only in cases of justified exceptional urgency can the Judge and the Supervisory Court proceed even in the absence of the opinions themselves. It is understood, therefore, that the legislator in the decree-law 28/2020 tends to fill previous gaps in the pronunciation method of the competent authorities with prudential provisions precisely in relation to the controversies triggered by the release of prisoners with a high criminal profile but little pertinent to the health emergency and therefore to the protection of the prisoner's health. It should also be noted that detainees in special regimes, the so-called "High security"[62] circuits, if not declassified, are still to be considered with a high risk profile for social security and therefore any acceptance of the application for home detention would

54 L. Baccaro, *Carcere e salute*, Padova, Edizioni Sapere, 2003; V. Centonze, *L'esecuzione della pena detentiva e la ricostruzione sistematica della nozione di gravità delle condizioni di salute del detenuto*, in *Rass. penit e crim.,* III, 2006.

55 G. Stamponi Bassi, *Scarcerazioni di detenuti al 41-bis: tra tutela della salute e esigenze di sicurezza. Le opinioni di un procuratore antimafia e di un magistrato di Sorveglianza sul decreto-legge 30 2020, n. 28,* in *Giurisprudenza Penale Web*, 2020.

56 The d.l. 2020/28 published in the O.J. General Series n. 111 on April 30th, enters into force on May 1st, 2020 and is converted into l. 70 of 25 June 2020 with amendments including the introduction of articles 2-*bis*, 2-*ter*, 2-*quater*, 2-*quinquies* and 2-*sexies*.

57 The art. 30-*bis* O.P. concerns the measures and complaints regarding permits

58 Proceedings for crimes envisaged by art. 51 paragraphs 3-*bis* (criminal association and mafia) and 3-*quater* (terrorism) c.p.p

59 The opinions do not appear to be related to the granting of the permit but rather interpreted as requests for knowledge by the judicial authority on the personality of the applicant. On the subject, F. Giafilippi, *Emergenza sanitaria in carcere, provvedimenti a tutela di diritti fondamentali delle persone detenute e pareri sui collegamenti con la criminalità organizzata nell'art. 2 del dl 30 aprile 2020 n. 28*, in *Giurisprudenza Penale Web*, *www.giurisprudenzapenale.com*, 2020.

60 Thus, the art. 2 decree-law 28/2020, which has been the subject of various criticisms, including, also the denunciation of a possible unconstitutionality by P. Gentilucci, *L'art. 2 del Decreto-Legge 30 aprile 2020, n. 28. Un argine forse incostituzionale*, in *Giurisprudenzapenaleweb*, May 10th, 2020. On the other hand, the opportunity for the regulatory intervention *de quo* is supported by F. Gianfilippi, *Emergenza sanitaria in carcere, provvedimenti a tutela di diritti fondamentali delle persone detenute e pareri sui collegamenti con la criminalità organizzata nell'art. 2 del dl 30 aprile 2020 n. 28*, *ivi*, 2020.

61 These opinions must be provided to the Supervisory Magistrate and to the Supervisory Court respectively within two days and fifteen days of the request.

62 The "high security" regime is defined in the circular of the D.A.P. 3619/6069 of April 21st, 2009.

imply that the need to subject subjects to such regimes is not adequately monitored.

The legislator, therefore, realizing that from the literal interpretation of the art. 2 the limitations related only to the disciplinary measure replacing the deferment of the sentence in the form of home detention, and not instead to the deferment of the sentence which would leave the judge free to order, without waiting for the opinion, any deferment of the sentence pursuant to art. 147 of the criminal code, restoring full freedom to the convict, albeit provisional, intervenes again in penitentiary matters to further stem the media and political controversies with the decree-law 29 of May 10th[63], 2020 containing urgent measures for the containment and management of the epidemiological emergency from COVID-19 regarding the granting of home detention or the deferment of sentences to prisoners belonging to organized crime. The art. 1 of the aforementioned decree-law intervenes on the art. 47-*ter*, paragraph 7, of the Criminal Code, introducing among the revocations of home detention, not only the cases in which the conditions under paragraphs 1 and 1-*bis* are lacking, but also those contemplated by paragraph 1-*ter*, which provides for the adoption of home detention as an alternative to the mandatory or optional postponement of the execution of the sentence pursuant to articles 146 and 147 c.p[64]..

With this article, the Supervisory Judge acquires the right to revoke the concession of alternative home detention which was not previously contemplated. Not only. Art. 2 paragraph 1 of the d.l. 29/2020, introduces a mechanism for reassessing the orders granting home detention or deferring the execution of the sentence for reasons related to the COVID-19 emergency, with verification fifteen days after the adoption of the provision, and then on a monthly basis, of the permanence of the subjects who use it. Prisoners referred to in art. 2 are those convicted of subversive associations (art. 270 of the criminal code), of associations (art. 270-*bis* c.p.) or conduct (art. 270-*sexies* c.p.) for the purpose of terrorism, of mafia-type association (art. 416-*bis* c.p.), for association aimed at drug trafficking (art. 74, paragraph 1, presidential decree n. 309 of October 9th, 1990), as well as convicts or internees subjected to the special regime pursuant to art. 41-*bis* O.P.

The evaluation by the Supervisory Judge or the Supervisory Tribunal in the case of convicts subjected to the 41-*bis* O.P. must take place after obtaining the opinion of the District Anti-Mafia Prosecutor and the National Anti-Mafia and Anti-Terrorism Prosecutor and, in the event that the D.A.P. " *fornisca la disponibilità di strutture penitenziarie o reparti di medicina protetta adeguati alle condizioni di salute del detenuto, la valutazione può avvenire anche prima dei termini indicati* ". With the new d.l. 29/2020 we see the attempt by the legislator to remedy the uncertainties created with the previous decrees, introducing periodic reviews of the decisions adopted by the Supervisory Judges at very short intervals[65],. However, the reassessment specifically concerns the situation of the health emergency from COVID-19, from which it could be deduced that the measures adopted for health conditions incompatible with detention, which do not involve the pandemic or do not mention it, are not subject to the mechanism of control introduced with the d.l. 2020/29. Furthermore, the list of crimes mentioned is not the same as in art. 51 paragraph 3-*bis* of the Code of Criminal Procedure to which the previous d.l. 28/2020 refers, thus placing implicitly evidence that the legislator wanted above all to aim at the concession measures that sparked the media controversy, restoring execution of sentence in prison[66]. The forecast of the short-term revaluation also appears questionable (within 15 days from the measure) of the Judge who must take into account the communication of the D.A.P. of any other penitentiary facilities (or protected medical centres) suitable for the health of the prisoner, since the necessary preliminary investigation already provides for such an action by the Magistrate before the adoption of the measure. In the transitional provisions (art. 5) it is explicit that the revaluations apply retroactively also to measures adopted for the COVID-19 emergency starting from February 23rd, 2020, the date on which, given the *d.p.c.m.* of February 25th, 2020, health facilities are available for new entries

63 The decree-law 29 of May 10th, 2020, published in the Official Journal General Series n. 119, enters into force on May 11th, 2020 and is repealed with Law June 29th, 2020 n. 70, which introduces in the articles 2-*bis*, 2-*ter*, 2-*quater*, the provisions of articles 2, 3, 4 of the d.l. 29/2020.

64 Paragraph 7 of the art. 47-*ter* O.P. established that the concession of home detention is revoked when the conditions set out in paragraphs 1 and 1-*bis* cease to exist.

65 An important aspect reported in paragraph 2 of the aforementioned article provides that the judicial authority, first hearing the President of the Region on the local health situation and the D.A.P. regarding the availability of adequate facilities. Paragraph 3 then establishes that the judicial authority proceeds by assessing whether the reasons that justified the adoption of home detention or the deferment of the sentence still remain and the possible availability of other penitentiary facilities or protected medicine departments suitable for avoiding the prejudice for the health of the prisoner. In the case of revocation of home detention or deferment of the sentence, the provision is immediately enforceable. The d.l. 2020/29 in the art. 3 also applies the same evaluation methodology for the defendants for the same crimes reported in art. 2 who benefit from house arrest for reasons connected to the COVID-19 emergency in place of pre-trial detention.

66 Cesaris L., *Il d.l. n.29 del 2020: un inutile e farraginoso meccanismo di controllo*, in *Giurisprudenza Penale Web*, 2020.

into penitentiary institutions and therefore, implicitly, the health emergency is declared also in prisons. This provision shows a further compression of previous concessions and, perhaps, according to some, the insinuation of some doubts about the work of the judiciary. With these measures, the protection of the prisoner's health appears to be placed in the background compared to the need to dampen the heated controversies of that period.

The regulatory framework is subsequently changed in June with the conversion of the decree-law 28/2020 in the law 70 of June 28, 2020, which repeals the decree-law 29 of May 10th, 2020, but transfuses the art. 2 of the aforementioned legislative decree repealed without changes in the art. 2-*bis* of law 70/2020, which also includes the retroactive nature of the control[67]. Furthermore, the articles 3, 4 of the legislative decree 29/2020 are transfused with modifications in the law 70/2020 respectively in the articles 2-*ter*[68] and 2-*quater*[69]. Furthermore, art. 2-*sexies* modifies art. 41-*bis* O.P. introducing after paragraph 2-*quater* of the aforementioned art. 41-*bis* O.P., some provisions regarding guarantors of prisoners and specifically 2-*quater*.1 which provides for face-to-face visits to the penitentiary facilities of the National Guarantor with visual interviews in the absence of video-recording with prisoners under special regimes, the 2-*quater*.2 which provides for visits in the presence of regional guarantors with video-recorded visual interviews with prisoners subjected to special regimes and 2-*quater*.3 which provides for visits by municipal, provincial and metropolitan area guarantors without visual interviews in order to verify the living conditions of prisoners in the special regime. The provisions of art. 2-*sexies* are based on international human rights protocols against torture and cruel, inhuman or degrading treatment or punishment[70]. It can be understood that this introduction was dictated by the consequent provisions which translated back into prison prisoners under special regimes who had been granted home detention for serious health reasons in order to guarantee the monitoring of the conditions of the prisoners in the light of the COVID-19 emergency[71]. However, it has also been noted that the provisions formulated in this way have, in reality, little effectiveness, given that the local guarantors are not granted the possibility of direct interviews with the detainees and [72] therefore of intervening more quickly than the regional or national guarantor. The art. 2 of the legislative decree 29/2020 (therefore 2-*bis* of law 70/2020) has been the subject of debated discussions due to the unusual method of ensuring the continuous monitoring of the decisions to grant home detention or the deferment of the sentence for prisoners or internees for serious crimes.

Some Supervisory Judges[73] have in fact revised the unconstitutionality of the aforementioned art. 2, in the part in which it provides for a re-evaluation of the provision for admission to home detention or the deferment of the sentence for reasons connected to the COVID-19 emergency, for violation of articles 3, 24 paragraph 2 and 111 paragraph 2 of the Constitution. In fact, the provision does not expressly refer to the need to involve the defence and the convict in the revocation procedure. Furthermore, the Supervisory Court of Sassari, in the *Zagaria* case, raises the unconstitutionality not only of Article 2 of decree-law 29/2020, in the part

67 The retroactive nature is introduced in paragraph 5 of the art. 2-*bis* and refers to the measures adopted after February 23rd, 2020 establishing that for the revocation measures the term of 30 days is foreseen from the date of entry into force of the law.

68 The art. 2-*ter* provides for the measure of house arrest in place of pre-trial detention and unlike the previous legislative decree determines a period of fifteen days for the evaluation of the measure

69 The art. 4 of the repealed decree-law, is introduced and amended with articles 2-*quater* and 2-*quinquies* in l. 70/2020. The first provides that interviews with relatives or other persons to whom the convicted are entitled are carried out remotely using equipment available to the penitentiary structure or telephone correspondence, beyond the limits of the previous provisions of once a week for adult prisoners (art. 39 of presidential decree 2000/39) and at least twice a week for minors (art. 19 of legislative decree 2018/121). Face-to-face interviews are scheduled for minors at least once a month. The art. 2-*quinquies* also provides for the granting of authorization for telephone correspondence beyond the limits for urgent or relevant reasons and once a day when the relative or family member is hospitalized or in the case of minors or adults with disabilities.

70 The United Nations Optional Protocol to the Convention Against Torture approved in 2006, to which Italy adhered in 2012, establishes an independent national mechanism to monitor, with visits and access to documents, places of deprivation of liberty in order to prevent treatments contrary to human dignity. Source: *www.garantenazionaleprivatiliberta.it*

71 Following the new provisions introduced with the d.l. 2020/29 the *Bonura* and *Zagaria* were reintroduced into penitentiary detention in June 2020 after the identification of suitable structures at hospitals in Lazio for the *Bonura* and at the OperaMilano penitentiary institute, the latter equipped with an adequate medical facility.

72 Cesaris L., *La conversione in legge del d.l. n.28 del 2020 con legge n.70 del 2020 non elide i dubbi e le perplessità sulle scelte del legislatore*, in *Giurisprudenza Penale Web*, 2020.

73 Orders of suspension and remission to the Constitutional Court of Magistrates: of Spoleto of May 26th, 2020, n.1380/2020; of Avellino of June 3rd, 2020 and of Sassari of June 9th, 2020, n. 645. On this point, widely, Della Torre J., *Il magistrato di Sorveglianza di Spoleto non demorde: il dl scarcerazioni di nuovo alla Consulta*, in *Sistema Penale Web*, 2020.

in which it provides that the re-evaluation of the permanence of the reasons related to the COVID-19 emergency is carried out within fifteen days of the adoption of the measure and subsequently on a monthly basis, but also of the article 5 of the aforementioned d.l., in the part that provides for the retroactivity of the provisions of art. 2 starting from February 23rd, 2020, also for violation of articles 32, 27 paragraph 3, 102 paragraph 1 and 104 paragraph 1 of the Constitution.

In this case, the Court observes that the obligation to reassess home detention in such a short period of time would inevitably force an invasion of the sphere of competence of the judicial authority, violating the principle of separation of powers especially with the application of retroactivity (articles 102 and 104 of the Constitution). Furthermore, the tight timing would lead to a limitation of the preliminary investigation framework, jeopardizing the delicate balance between the prisoner's right to health and the humanization of the sentence and the safety needs of the community (articles 32 and 27 of the Constitution). With regard to the health of the prisoner, the art. 2 of the legislative decree 29/2020 explicitly mentions the fact that the judicial authority hears the President of the Region regarding the health situation due to the COVID-19 epidemic, but makes no reference to the need to verify the health conditions of the sick prisoner. The Judges therefore issued referring orders to the Constitutional Court on the points in which the emergency legislation, dictated by the need to deal with the COVID-19 epidemic, puts the protection of fundamental human rights to the test[74]. The unconstitutionality of the art. 2 of the d.l. 29/2020, objected to by the Supervisory Judges was, with the regulatory *novum* introduced by law n. 70/2020, declared unfounded by the Constitutional Court, since paragraph 4 establishes the obligation for the Supervisory Judge to immediately transmit the documents to the Supervisory Court, which, in the event of revocation of the provision previously granted by the Judge himself, is required to adopt the definitive decision on the admission of the measure within the following thirty days, under penalty of loss of effectiveness of the same revocation measure. This entails, unlike the previous d.l. 29/2020, that the detainee has the right to be fully heard and therefore there is no existence of the violation of the right to defence with full implementation of the principle of equality[75]. With regard to the protection of the prisoner's health, the Constitutional Court does not share the assumption since the reassessments with close periodic intervals of the granting of home detention or deferment of the sentence for the COVID-19 emergency are carried out on the basis of the imposition to acquire the documentation necessary to evaluate the balance between the need to protect the prisoner's health and the reasons for protecting public safety. With a single sentence[76], the Court then returns the documents to the judges, who will have to re-evaluate whether the constitutional rights are adequately guaranteed. With the application of the new legislation, although strongly debated, the majority (three out of four) of the prisoners placed in the special regime 41-*bis* O.P. who had been granted home detention for reasons connected to their state of health and the concomitant coronavirus emergency, returned to penitentiary facilities equipped for the necessary therapies or hospitals with protected medicine wings.

V. THE "*RISTORI* DECREE"

The application of the emergency measures provided for by the law of April 24th, 2020 n. 27 ("*Cura Italia*" decree) remained in force until June 30th, 2020. The decree-law October 28th, 2020, n. 137 (the so-called "*Ristori* Decree", hereinafter "*Ristori* Decree"), converted into law n. 176 of December 18th, 2020[77], intervened on the rules of the prison system, with solutions that re-propose, at least in part, the emergency measures experimented during the first epidemic "wave", to lighten the condition of prison overcrowding and to limit the risk of new infections in prisons, by inmates already admitted to extramural benefits.

The rules on prison matters are contained in articles 28, 29 and 30 of the *Ristori* Decree, with limited validity until January 31st, 2021[78], then extended, with

74 M. Gialuz, *Il d.l. antiscarcerazioni alla Consulta: c'è spazio per rimediare ai profili di legittimità costituzionale in sede di conversione*, in *Sistema Penale Web*, 2020.

75 Questions of legitimacy of the mechanism for re-evaluating releases for COVID: in the light of l. 70/2020, the *Consulta* returns the documents to the court of Spoleto, in *Sistema Penale Web*, 23 July 2020.

76 The Constitutional Court expresses in a single sentence the judgment on the three suspension orders by the Magistrates of Spoleto, Avellino and Sassari with sentence n. 245 of November 24th, 2020, *www.cortecostituzionale.it*

77 O.J. General Series n.319 of December 24th, 2020 - Suppl. Ordinary n. 43. The provision, in addition to converting the so-called Ristori decree (d.l. n. 137/2020), expressly repeals the Ristori decrees *bis* (d.l. n. 149/2020), Ristori *ter* (d.l. n. 154/2020) and Ristori *quater* (d.l. n. 157/2020), without prejudice to the acts and measures adopted, as well as of the effects produced and of the juridical relationships which arose, in the meantime, on the basis of the same.

78 See Art. 1 of d.l. October 7th, 2020, n. 125, (in the Official Journal of October 7th, 2020, n. 248), coordinated with the conversion law of November 27th, 2020, n. 159 (in this same Official Journal on page 1), stating: «*Misure urgenti connesse con la proroga della dichiarazione dello stato di emergenza epidemiologica da COVID-19, per il differimento di consultazioni elettorali per l'anno 2020 e per la continuità*

the decree-law of December 24th, 2021, n. 221, converted with amendments by law February 18th, 2022, n. 11, until March 31st, 2022[79]. Starting from the special leaves for "semi-free" convicts provided for by article 28 of the decree, it is possible to note that there, substantially unchanged, the provision already contained in the """"*Cura Italia*"""""[80] decree-law, in force in the first emergency phase, with which it was established the possibility of granting to convicts admitted to the alternative measure of semi-liberty licenses for a duration exceeding the limit of 45 days per year established by art. 52, paragraph 1 O.P.

Comparing the two provisions, it emerges that, while the """"*Cura Italia*""""" decree established that, subject to «*gravi motivi ostativi [...] al condannato ammesso al regime di semilibertà sono concesse licenze con durata sino al 30 giugno 2020*»[81], the "*Ristori* Decree" provides that «*ai detenuti semiliberi possono essere concesse licenze con durata superiore*» than those ordinarily provided for by the penitentiary law[82]. The provision of the Supervisory Judge is, in any case, issued where the legal conditions exist and there are no impediments.

The second measure concerns the possibility for prisoners «*cui siano stati già concessi i permessi di cui all'art. 30-*ter *della legge 26 luglio 1975, n. 354 e che siano stati già assegnati al lavoro all'esterno ai sensi dell'art. 21*» of the same law and to the education or training activities that are assimilated to it[83], to obtain prize permits pursuant to art. 30-*ter* O.P. notwithstanding the ordinary time limits. Reward permits can therefore be granted for a duration of more than fifteen days which, cumulatively, can also be more than forty-five days for each year of expiation. For convicted minors, the prize permits can have a duration of more than thirty days and, overall, more than one hundred days in the space of each year of expiation.

However, there are some restrictions.

Firstly, the law expressly excludes convicted prisoners for "impedimental" crimes included in the list pursuant to art. 4-*bis* O.P. and for the crimes of abuse in the family (art. 572 criminal code) and persecutory acts (art. 612-bis criminal code). Secondly, a new, unprecedented, impediment because of connection is established for the perpetrators of certain serious crimes[84], against whom an accumulation of sentences is being executed which includes, in addition to the aforementioned crimes, also "common" crimes. In this case, the art. 29 of the "*Ristori* Decree" establishes that, if the judge of cognition or execution has ascertained the connection, pursuant to art. 12, paragraph 1, lett. b) or c), c.p.p., between the two crimes object of the accumulation, the convicted person cannot invoke the reward benefit and this even if he has already fully expiated the part of the sentence relating to the "impedimental" crime and has, in abstract, matured the conditions to request prize permits. In short, in cases of connection pursuant to art. 12, lett. b), c.p.p. it would not be permitted to proceed with the dissolution of the "juridical aggregation" during the execution of the sentences[85]; likewise, in cases of "teleological" connection pursuant to art. 12, lett. c), c.p.p. the impedimental effect of the art. 4-*bis* would always find application also for "common" crimes.

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operativa del sistema di allerta COVID, nonché per l'attuazione della direttiva (UE) 2020/739 del 3 giugno 2020, e disposizioni urgenti in materia di riscossione esattoriale»..

79 Official Journal of December, 25th 2021 "*Proroga dello stato di emergenza nazionale e ulteriori misure per il contenimento della diffusione dell'epidemia da Covid-19*", Art. 1, paragraph 1, *Dichiarazione dello stato di emergenza nazionale 1. In considerazione del rischio sanitario connesso al protrarsi della diffusione degli agenti virali da COVID-19, lo stato di emergenza dichiarato con deliberazione del Consiglio dei ministri del 31 gennaio 2020 è ulteriormente prorogato fino al 31 marzo 2022*. Previously, the state of health emergency declared with the resolutions of the Council of ministers of January 31st, 2020, July 29th, 2020, October 7th, 2020, January 13th, 2021 and April 21st, 2021, and extended with article 1, paragraph 1, of decree-law July 23rd, 2021, n. 105, converted, with amendments, by law September 16th, 2021, n. 126.

80 See, Art. 124, d.l. March 17th, 2018, n. 18.

81 Thus, the art. 124, paragraph 1, d.l. March 17th, 2018, n. 18.

82 It should be noted, incidentally, that the wording of the provision in question, contained in the *Ristori* decree, almost faithfully follows the text of the homologous provision of d.l. "*Cura Italia*" which, however, was modified upon conversion into law. See Art. 1, paragraph 1, law April 24th, 2020, n. 27.

83 article 18 of legislative decree October 2nd, 2018, n. 12.

84 Reference is made to some "first level" crimes referred to in paragraph 1, art. 4-*bis* O.P. and, in particular, of the crimes of mafia association or committed making use of the conditions set forth in art. 416-*bis* of the criminal code or in order to facilitate terrorist association and associations aiming to the subversion of the democratic order. They remain outside the foreclosure "by connection" established by art. 29, paragraph 2, *Ristori* decree, on the other hand, the other crimes not expressly mentioned by the law.

85 The jurisprudential principle of the "dissolution of the juridical aggregation" allows (derogating from article 73 of the criminal code) to restore autonomy, during execution, to the individual sentences fictitiously unified with the executive provision and to bring the individual " sentence quotas" back to the pertinent prison regime. By virtue of the *favor rei* principle, the "impedimental" offense must be charged to the first period of sentence served. Under the latter profile see, for all, Cass. united sections, 30 June 1999, n. 14.

On this point, the Court of Cassation is constant in deeming that, in the presence of a provision for the unification of concurrent penalties pursuant to art. 663 c.p.p., it is possible to proceed with the dissolution of the "aggregation" during the execution, when it is necessary to proceed with the judgment on the admissibility of the application for the granting of a prison benefit which finds an obstacle in the presence of an "impedimental" crime pursuant to art.. 4-*bis* O.P[86].

The regulatory provision therefore seems to be in open contrast with the principle which intends the aggregation of sentences as a benefit for the convict from which, according to the *favor rei* principle, no prejudicial effects in terms of sanctions can derive.

The risk of a dangerous "dragnet" effect capable of indirectly extending the impediment regimes of art. 4-*bis* O.P. even to "connected" crimes. In this way, the legislator ends up expanding the already heterogeneous and overabundant catalogue of crimes considered "impedimental" in penitentiary matters.

The art. 30 of the "*Ristori* Decree", entitled " *Disposizioni in materia di detenzione domiciliare*", completes the emergency measures in prison matters provided for in the document. With the provision in question, the particular discipline of home detention reserved for short-term prison sentences, which had already been tested with the "*Cura Italia*" decree, comes back into force. Also in this case, the effectiveness *ratione tempore* of the benefit was extended to March 31st, 2022 with the dutiful clarification the benefit is accessible to prisoners who have completed the legal requirements by that date[87]. The discipline contained in the art. 30 refers, in general, to the "mother" measure pursuant to art. 1, law 199/2010, the provisions of which apply to the newly introduced one "as compatible" (paragraph 8, art. 30), with the exception of paragraphs 1, 2 and 4[88].

The preliminary investigation and the application procedure are further simplified. Given that the application for the granting of the measure is primarily the responsibility of the prisoner, but that the initiative can also be taken by the management of the prison or by the public prosecutor, paragraph 4 of article 30 of the "*Ristori* Decree" entrusts the prison management with a central role in the context of the (albeit limited) investigation activity.

With a view to speeding up the authorization procedure, art. 30 establishes that, unlike the provisions of art. 1, paragraph 4, law 199/2010, the management can omit the transmission to the Supervisory Judge of the behavioural report on the conduct of the convict during detention.

The management, on the other hand, is required to carry out a preventive verification of the legal conditions established for the benefit and to send the Supervisory Judge an information note concerning the prisoner, which certifies the extent of the residual sentence (necessarily less than 18 months), the absence of the impeding conditions strictly indicated in paragraph 1, art. 30, as well as the acquisition of the consent of the sentenced to activate the electronic bracelet (when mandatory).

The proceeding assumes, at least in part, different cadences when the measure is applied to a subject in state of freedom. In such cases, the Supervisory Judge provides, following the suspension of the prison order ordered by the public prosecutor pursuant to art. 1, paragraph 3, law 199/2010.

Once the procedure has been initiated before the Supervisory Judge, the latter proceeds on the application with the simplified forms established by art. 69-*bis* O.P. (but the term for acquiring the opinion of the public prosecutor is reduced to 5 days). The decision is an order issued in council chamber without the presence of the parties[89].

Competence therefore belongs to the monocratic jurisdictional body - on a par with the provisions of art. 1, the. 199/2010 - unlike the general criterion of attribution to the court of decisions regarding the granting of alternative measures[90].

In accordance with paragraph 2, art. 30 of the decree, the judge, having verified the legal conditions, grants the execution of the sentence at the home, unless he recognizes "serious impediments" indicated in letters d) and e) of paragraph 1 (*infra*).

86 The legal principle is contained, ***ex multis***, in the Constitutional Court, sentence of July 27th, 1994, n. 361; Court of Cassation, united sections, June 30th, 1999, n. 14; Court of Cassation, section I, December 3rd, 2013, n. 2285. Finally, the. Cassation, section I, February 21st, 2020, n. 12554, reaffirmed the consolidated principle of law and with an argument ***a contrario***, excluded the possibility of dissolving the aggregation in the presence of a provision for the unification of concurrent sentences which exclusively includes sentences for crimes impeding the granting of prison benefits.

87 See art. 30, paragraph 9, "*Ristori* decree".

88 See art. 30, paragraph 1, "*Ristori* decree".

89 The procedural model is the one provided for by art. 69-*bis* O.P. in the matter of early release in which the hearing is only possible and deferred, the parties being able to lodge a complaint with the Supervisory Court within 10 days of communication or notification of the order.

90 An element that reinforces the thesis according to which the home measure in question cannot be qualified as an alternative measure.

The execution methods of the home measure coincide, in general, with those typical of the "traditional" hypotheses of home detention and the place where the sentence is carried out, in concrete terms, can coincide in the home of the convicted person or "*in altro luogo pubblico o privato di cura, assistenza e accoglienza*"[91].

The quasi-automation that governs the concession of extraordinary home detention has been balanced by the legislator with the provision of generalized recourse to control procedures by electronic means (the so-called electronic bracelet)[92] for all prisoners admitted to serve their sentences at home, with the exception of convicts with a residual sentence of less than 6 months (but, in fact, 7 months)[93] and convicted minors[94].

The use of the electronic bracelet, which always requires the consent of the interested party, must be understood as a necessary condition for the granting of the measure, despite the notorious lack of such tools[95].

Finally, as regards the application conditions of the institute in question, the "*Ristori* Decree" confirms the maximum sentence limit in 18 months, to be expiated *ab initio* or as a residual of a greater penalty, to access the benefit[96].

Paragraph 2, however, introduces a large list of foreclosures which, in part common to those of law n. 199/2010, partially autonomous, exclude from the area of operation of the legal arrangement in question certain categories of convicts deemed, for various reasons, dangerous and in any case not deserving of the benefit.

First of all, those convicted of crimes pursuant to art. 4-*bis* O.P., as already foreseen by law n. 199/2010, to which are now added those convicted of the crimes of "mistreatment against family members or cohabitants" (572 criminal code) and "persecuting acts" (art. 612-*bis* criminal code).

As mentioned, the dissolution of the aggregation of sentences for the most serious impedimental crimes and the "common" crimes connected to them pursuant to art. 12, lett. b) and c), c.p.p. is prohibited, foreclosure introduced ex novo by the *Ristori* Decree, not present in the "*Cura Italia*" decree.

On the other hand, the exclusion from the benefit of home detention of other categories of prisoners is confirmed, already considered by the general regulation of 2010, among which are the socially dangerous convicts and declared habitual offenders (art. 102 criminal code), professional (art. 105 c.p.) or by tendency (art. 108 c.p.) and those deemed dangerous for the internal order of penitentiary institutions so much as to be subjected to the particular surveillance regime pursuant to art. 41-*bis* O.P.

Compared to the version launched in the spring, there is a reduction of the so-called "disciplinary" foreclosures. Indeed, the explicit reference to the unrests and riots that occurred in various prisons in the early days of the COVID-19 emergency disappears, and remains in paragraph 1, lett. d), the generic reference to prisoners who in the last year have been disciplinarily sanctioned for the infractions of " *partecipazione o promozione di disordini o sommosse* ", "*evasione*" or "*fatti previsti dalla legge come reato, commessi in danno di compagni, di operatori penitenziari o di visitatori*"[97].

Finally, a clear deterrent purpose must be recognized for the provision contained in lett. e), which excludes from the benefit the subjects against whom, starting from the entry into force of the Decree, even only a "disciplinary report" (Article 81, paragraph 1) will be drawn up because they are considered promoters or participants in riots or unrest. The reference to the simple disciplinary "report", instead of the "sanction", undeniably lowers the level of guarantees placed to protect the prisoner, in consideration of the fact that what is contained in the report drawn up by the prison operators could also prove to be groundless at the end of the disciplinary procedure or, in any case, could not lead to the imposition of the sanction. Even in the face of these critical issues, the reasons for expeditiousness pursued by the legislator are understood so that the foreclosure of the benefit operates effectively, without delay and,

91 See art. 30, paragraph 1, "*Ristori* decree".

92 Please note that "Electronic Surveillance" was introduced by law n. 4/2001 with a new paragraph inserted in the art. 47-*ter* (paragraph 4-*bis*) and, recently, relocated to an *ad hoc* provision, art. 58-*quinquies*, by the law 10/2014.

93 Paragraph 5, art. 30, "*Ristori* decree", last sentence, in fact establishes that the control tools are not activated in the event that the residual sentence to be expiated does not exceed the sentence for which the application of the electronic bracelet is imposed by 30 days. The tool will therefore have to be activated only for adult prisoners who have to serve a residual sentence of, at least, 7 months and 1 day in prison.

94 See art. 30, paragraph 3, "*Ristori* decree".

95 On the one hand, it should be noted that the *Ristori* decree has not re-proposed the "financial invariance clause" present, however, in art. 123, paragraph 9 of the "*Cura Italia*" decree; on the other hand, it must be noted that among the "financial provisions", contained in art. 34, decree, there are no items of expenditure dedicated to the implementation of the newly introduced prison measures.

96 Having regard to the analogous measure contained in the d.l. 18/2020 judged «*incomprensibile la scelta di conservare il limite di diciotto mesi previsto dalla disciplina generale del 2010, in un momento in cui la misura va adattata ad una situazione di assoluta emergenza*»; so E. Dolcini, G.L. cat op. cit., p. 3.

97 Artt. 18, 19, 20 and 21 Reg. es. O.P.

therefore, without waiting for the entire disciplinary procedure to be carried out.

It is evident that the emergency legislative provisions aimed at stemming the spread of the COVID-19 epidemic have placed the entire penitentiary system in a considerable state of "stress" both for the subjects restricted to detention, and for the prison staff and for the health professionals operating there, and for the Supervisory Judges called to continuously monitor the situation in prison facilities.

VI. THE *CARTABIA* REFORM: OVERCROWDING AND POSSIBLE SOLUTIONS

That prison overcrowding was the Gordian knot of the Italian penitentiary system was clear from before[98] the danger of contagion of the Covid-19 virus crept inside prisons, with the threat of exploding outside.

With the legislative decree n. 150 of October 10th, 2022[99] implementing the enabling law of September 27th, 2021 n. 134, which delegates to the Government for the efficiency of the criminal process as well as in the field of restorative justice and provisions for the rapid definition of judicial proceedings, the legislator[100] has tried to definitively overcome the often referred to "prison-centric vision" of the penitentiary system[101], revolutionizing the catalogue of the penalties provided for by the *Rocco* Code of 1931, still in force in Italy today. In fact, to the classic penalties known by the system are added those of the *Cartabia* reform identified with alternative measures to detention, i.e. fines, public service work, home detention and semi-liberty: criminal penalties that can be imposed directly by the trial judge and no longer, as up to foreseen today, by the Supervisory Judge in terms of alternative methods to prison detention.

The reform provides that the judge, in pronouncing the sentence of conviction or the plea bargain sentence, "*quando ritenga di dover determinare la durata della pena detentiva entro il limite di quattro anni, possa sostituire tale pena con quelle della semilibertà o della detenzione domiciliare*". The prison sentence imposed within the limit of 4 years can be replaced with semi-liberty or with home detention; that inflicted within the limit of 3 years, even with community service work, if the convict does not object; that inflicted within the limit of 1 year also with the monetary penalty. The substitute sentences cannot be suspended

98 In detail, on the problems of overcrowding, in the period preceding the Covid-19 emergency, see, F. Caprioli -L. Scomparin *Sovraffollamento carcerario e diritti dei detenuti. Le recenti riforme in materia di esecuzione della pena*, Torino, 2015, pp. 63-121; G. Pugliotto, *Il volto Costituzionale della pena e i suoi sfregi*, in *Rivista Aic*, 2014, pp. 12-14; G. Della Bella, *Un nuovo decreto-legge sull'emergenza carceri: un secondo passo, non ancora risolutivo, per sconfiggere il sovraffollamento*, in *Diritto Penale Contemporaneo*, 2014, p. 3.

99 For a detailed examination of the reform, see AA. VV. *La riforma Cartabia*, G. Spangher (edited by), Pacini Giuridica, 2022. Article 6 of the decree-law of October 31st, 2022, n. 162, postpones the entry into force of the criminal justice reform (*Cartabia* reform) to December 30th, 2022. The technical-normative choice to intervene directly on the text of legislative decree n. 150/2022 implies the possibility that amendments to the same modified regulatory text are presented during conversion. Amendments whose admissibility will certainly have to be examined according to the parliamentary regulations. The fact remains that the complex construction site of the criminal justice reform is reopened with a *coup de theatre* by the new government, taking advantage of the circumstance that the short-term *vacatio legis* of legislative decree n. 150/2022, which began to take effect before the new government took office, would take place tomorrow. An hour before midnight the legislative decree n. 162/2022, which in art. 6 introduces in legislative decree n. 150/2022 an art. 99-*bis* with the following tenor: "this decree enters into force on December 30th, 2022". On this point, G G.L. Gatta, *Rinvio della riforma Cartabia: una scelta discutibile e di dubbia legittimità costituzionale. E l'Europa?*, in *Sistema penale*, 2022.

100 Previously, the *Giostra* Commission intervened on the changes to the penitentiary system (Text of the reform of the penitentiary system elaborated by the Commission set up with ministerial decree of July 19th, 2017 merged into the delegated law of June 23rd, 2017). In doctrine, F. Siracusano, *Cronaca di una morte annunciata: l'insopprimibile fascino degli automatismi preclusivi penitenziari e le linee portanti della "riforma tradita*", in *Archivio Penale*, 2018, pp. 15-17.

101 The process of the recent penitentiary reform was characterized by an overlapping of various regulatory interventions: first the Orlando1 draft delegation law and the delegation law (law June 23rd, 2017, n. 103), then the draft legislative decree of January 2018, followed by another scheme presented in March 2018, the so-called "*Gentiloni* scheme", and finally, following the approval of a new scheme by the Conte Government (legislative decree scheme of August 3rd, 2018, A.G. n. 39, containing « *Riforma dell'ordinamento penitenziario in attuazione della delega di cui all'art. I, co. 82, 83 e 85, lett. a), d), i), l), m), o), r), t) e u), legge 23 giugno 2017, n. 103*»), the procedure for exercising the proxy was concluded with the legislative decree of October 2nd, 2018, n. 1235. The decree of October 2nd, 2018, n. 1246, on the other hand, still dates back to the draft decree on prison life and prison work of the *Gentiloni* Government (Scheme of legislative decree of 7 March 2018, A.G. n. 16, containing «*Riforma dell'ordinamento penitenziario in materia di vita detentiva e lavoro penitenziario in attuazione della delega di cui all'art. I, co. 82, 83 e 85, lett. g), h) e r), legge 23 giugno 2017, n. 103*».), then modified and definitively adopted by the current governing body. On May 24th, 2021, the " *Relazione finale e proposte di emendamenti al D.D.L. A.C. 2435*", result of the great work of the Study Commission, established with D.M. March 16th, 2021, aimed at drawing up proposals for the reform of the criminal trial and sanctioning system, as well as on the subject of the statute of limitations, through the formulation of amendments to the aforementioned D.D.L. B.C. 2435, containing the Delegation to the Government for the efficiency of the criminal trial and provisions for the rapid settlement of judicial proceedings pending before the Courts of Appeal.

conditionally and can be applied only when they favor the re-education of the convict and there is no danger of recidivism. Therefore, the reform expanded and implemented the substitute sanctions for short prison sentences, leaving, however, the probation excluded, limiting itself to reformulating the scope of applicability of the substitute sanctions and to restore new life to the latter. However, from this choice, effects of unreasonable difference in treatment between convicts could probably derive, with the risk of more afflictive consequences for the convicts deemed worthy of the substitute sentence - therefore less dangerous - and contextual frustration of the aim of lightening the process of cognition from the burden of appeals against substitute penalties. On the other hand, the reform provides for the increase of the statutory limits for the application of the deflationary institutions of the dispute such as the probation pursuant to art. 464-*quater* of the Code of Criminal Procedure and the exclusion of punishment due to the particular tenuity of the fact pursuant to article 131-*bis*, as well as what is included in the significant provisions on restorative justice, the real flagship of this reform. Despite the innovative reformist premises, the strategy implemented has not however left the proposals exempt from criticism, as the system is in any case anchored to the idea of punishment as the first remedy, differently from what is imposed by the re-educational paradigms contained in the Constitution and in the Italian system[102].

In fact, one can certainly appreciate the deflationary intentions as regards the strengthening of alternative sanctions, as well as the various modifications proposed regarding the improvement of the quality of life of prisoners in our prisons, aspects of fundamental importance for the progressive approach of the sentence towards the rehabilitation purposes referred to in art. 27 of our Constitution. One wonders whether the system can actually benefit from the proposed dualism between alternative measures to detention and provisions on alternative sanctions, or whether the latter are not resolved in mere regulatory additions.

Moreover.

Applying a measure does not only mean facilitating escape from prison, but planning that *re-education-resocialization-rehabilitation* that keeps people away from prison. The construction of that path requires information and knowledge that not even the Supervisory Judge, institutionally dedicated to that task, sometimes manages to put together. With the reform, the task appears even heavier for the judge of cognition, who in his *imprinting* retains (and must retain) an aptitude for knowing, through the cross-examination, precise facts, snapshots of a person's life and who, in any case, it is likely to believe that he devotes a greater effort to the scrutiny of the most alarming crimes, punishable by a non-substitutable prison sentence. The lack of information, therefore, in addition to implying the risk of producing measures poor in content, could reverberate in a defensive attitude of conceding substi-

102 As far as the serious situation of Italian prisons is concerned, the work carried out by the so-called *Ruotolo* Commission (The Commission for the innovation of the prison system (ministerial decree September 13th. 2021 - President Prof. Marco Ruotolo), which was mainly involved in proposing a series of functional implementations to improve the quality of life within prisons, in such a way as to finally align the standards of efficiency and safety with requests from the EU. In the final report it is possible to trace only two modification proposals concerning alternative measures to detention, concerning the expansion of the scope of applicability of special home detention pursuant to art 47 *quinquies* and the creation of a new type of home detention governed by article 47 *septies*, applicable to persons with mental illness. With regard to article 47 *quinquies*, the Commission proposed the amendment of paragraph 1 of article 47 *quinquies* with the addition of the wording or of "children with serious disabilities pursuant to art. 3, paragraph 3, of the law of February 5th, 1992, n. 104" implementing the content of the sentence of the Constitutional Court n. 18 of February 2nd, 2020 which declared the constitutional illegitimacy of the art. 47 *quinquies* O.P. in the part in which it did not provide for the possibility of accessing home detention for detained parents of children with disabilities over ten years of age. Further amendments were then proposed for the subsequent paragraphs, in relation to the elimination of the phrase "Except that in relation to mothers convicted of any of the crimes indicated in art. 4-*bis*" in compliance with the sentence of the Constitutional Court n. 76 of Aprile 12th, 2017 which declared the constitutional illegitimacy of the art. 47 *quinquies*, paragraph 1-*bis*, limited to the aforementioned words, thus allowing the possibility of access to the special regime also for mothers or fathers convicted of impeding crimes pursuant to art. 4-*bis* of law 354 of July 26th, 1975. Within the special home detention, a final modification is envisaged, relating to the insertion of paragraph 2-bis in article 47 *quinquies*, which would allow the possibility of presenting the application provisionally directly to the Supervisory Magistrate in the event that the continuation of detention causes serious damage to the detainee, as already envisaged for other types of alternative measures to detention. It is easy to understand how the above proposed amendments substantially constitute the implementation of the new jurisprudential guidelines outlined by the Constitutional Court on special home detention and protection of minors. Therefore, although the intentions are certainly commendable and prodromal to the deflation of overcrowding, no new elements can be found in the regulation of other alternative measures to detention. The proposal of the *Ruotolo* Commission transfused into the new art. 47 *septies*, which provides for the introduction of an alternative measure of a special nature, called "Probation assignment of convicts with mental illness", which would contain the innovative provision of an alternative path for a series of subjects who are in particular conditions of mental health, thus making possible an alternative to home detention in cases of particularly low social danger, functional to the reintegration of the most fragile subjects.

tutive punishments with the dropper or of prejudicial choice of more containing measures.

The hope, once again, is that starting from this reform, the foundations will finally be laid for the overthrow of the old punitive system centred on imprisonment, which will have to be counterbalanced by the progressive creation of a new Penitentiary System in line with the prescriptions imposed by Europe on Italy, especially in terms of human rights.

VII. Conclusions

Penitentiary Institutes have the task of ensuring the custody of people available to the Judicial Authority and of people stopped or arrested by the Public Security Authority or by the Judicial Police bodies, and to allow the expiation of the sentence and the recovery of the prisoner through observation and re-educational treatment for its re-socialization.

In the context of this function, articles 27 and 32 of the Constitution support the obligation according to which the State is required to guarantee the protection of the health of the prison population; a protection that is not only a right of the subject, but is also aimed at stimulating the prisoner to consider himself not excluded from the social community.

The maintenance and conservation of health therefore represent an indispensable condition for being able to operate on rehabilitative treatment, and also in this sense the health activities in prison are placed among the institutional threads entrusted to the Penitentiary Administration and are inserted, antithetical as it may seem, in a constant dialogue with order and security.

Prison facilities contain, however, a population of inmates or internees who, from the time they enter the penitentiary institute, bring with them their personal experience of discomfort which brings about the concentration of physical, mental and behavioural diseases in a single environment.

The rules governing the care and assistance interventions necessary for prisoners suffering from pathologies have as their main reference the art. 11 O.P., which regulates the organization of the health service in prisons, also reformed with legislative decree 123/2018. The health matter has been supplemented by numerous regulatory provisions which contemplate the intervention of the National Health Service (SSN)[103], an intervention which still today presents numerous problems. The art. 11 O.P. current establishes that the SSN operates in penitentiary institutions in compliance with the discipline on the reorganization of penitentiary medicine (paragraph 1) and guarantees each institution a health service corresponding to the prophylactic and health care needs of prisoners (paragraph 2). The prison health service is understood as an organization of all medical or paramedical interventions as regulated by art. 17 of the Executive Regulation, which also provides for the location of clinical and surgical departments throughout the country.

It should be mentioned that already in 1999 the D.A.P. divided the penitentiary institutions into three levels in order to appropriately allocate financial resources and arrive at a differentiated but uniform offer of welfare services on the Italian territory[104]. Subsequently, and following the multiple joint conferences of the Government, Regions, Provinces and Municipalities, then, in 2015, an articulated system of health services was created which make up the national network for prison health care[105].

The complex organization provides for an organizational model on the part of the Local Health Authorities (ASL) based on different types of services, such as the basic medical service, an integrated multi-professional medical service with specialized sections, sections for prisoners with infectious diseases, for prisoners with mental disorders, for drug addicts[106] and sections for intensive care (S.A.I.), the latter for prisoners who need continuous treatment and therapy[107]. It is therefore clear that the proper functioning of the prison health service must be based on the adequacy of the health and clinical services provided by the SSN.

The art. 11 O.P. Paragraph 7 contemplates that, upon entry into the prison, the prisoner undergoes a general medical examination and is informed of his health conditions by the doctor who draws up the prison medical record. If the inmate visited is suspected or affected by contagious diseases (art. 11 O.P. paragraph 11), control measures are put in place to avoid the spread, including isolation, and according to art. 73 paragraph 1 of the

103 It should be remembered that the establishment of the SSN was subsequent to the enactment of law 354/75.

104 Circular D.A.P. n. 576109/2 spec. Gen. of January 15th, 1999 in B. Brunetti, *La tutela della salute in carcere. Organizzazione del servizio sanitario penitenziario. Evoluzione normativa*, in *www.ristretti.it*, 2004.

105 The Joint Conference of January 22nd, 2015, published in the Official Journal March 18th, 2015, n. 64, defines the planning of the network of health services on the national territory.

106 The latest report of the higher institute of national health 2019/22 reports that mental disorders affect 33.6% of the prison population compared to 11.6% of the general free population, therefore they represent the greatest problem, followed by disorders of digestive system with 25%, from osteo-muscular and cardiovascular disorders both at 11% followed by infectious diseases (HIV, Hepatitis B and C) with 3%.

107 The previous penitentiary clinical centres, also called Diagnostic and Therapeutic Centers (CDT), were converted into dedicated and specialized Intensive Care Sections (S.A.I.) following the joint conference of 2015.

Executive Regulations is directed to special rooms in the infirmary or clinical departments.

During the period of stay in prison, health care is provided with periodic checks, and paragraph 8 establishes daily visits to sick prisoners and, if there is no danger of escape, the transfer of prisoners to external health facilities for diagnosis or treatment without the need for surveillance (paragraph 5).

Furthermore, the art. 23 paragraph 2 of the Executive Regulation, provides that if the health checks show that the prisoner is in one of the conditions set forth in articles 146 and 147 of the Criminal Code, the management of the penitentiary institute must inform the Magistrate and the Supervisory Court for the measures to be taken or, if he has drug addiction problems, (paragraph 3 of the Regulation), this must be reported to the Drug Addiction Service (*Ser.T*) of the prison.

Paragraph 12 of the art. 11 O.P. also provides for the possibility of requesting visits by a trusted doctor at one's own expense and also includes the possibility of authorization to benefit from specific treatments carried out by trusted doctors in infirmaries or in clinical or surgical departments within institutes, subject to agreement with the competent ASL.

From the provisions referred to above, it can be seen that, on the one hand, the prisoner does not have a free choice of place of treatment and, on the other, that the freedom of choice for visits or treatments by the attending physician depends on the individual's financial means. While the possibility of choosing a trusted physician derives from the constitutional recognition of health as a fundamental right, the practical implementation is subject both to the financial means of the individual and to the state in which the person in question finds himself, in consideration of the fact that he is a defendant after the first instance sentence, whose authorization is granted by the proceeding Magistrate, or a convicted prisoner who is authorized by the director of the facility.

Furthermore, the art. 11 O.P. in paragraph 3 establishes that each ASL, in which the penitentiary institution is located, adopts the charter of health services for prisoners and makes it available so that this information tool may contribute further to the protection of the health of prisoners. This tool presents the activities and services ensured by health professionals and sets out the methods of accessing the services themselves.

The prisoner, therefore, is registered with the SSN during the entire period of detention, and receives health assistance according to the principles established by the Essential Levels of Assistance (L.E.A.)[108], which guarantee all citizens the activities, services and health benefits with public resources made available to the SSN and therefore also to prisoners.

However, it should be noted that the process towards an effective application of the provisions has often clashed with the different approaches that characterize the health personnel in charge, which are essentially of the "performance" type, instead of translating into attitudes of "taking charge" of the prisoner who, due to his prison status, often presents pathologies related to the state of deprivation of liberty[109].

Furthermore, the different levels of healthcare services from Region to Region have exacerbated the problems associated with continuity of care, which often involved transfers independent of the will of the prisoner to other structures throughout the country, even if the principle of continuity on which the care itself should have been determined by the effectiveness of the care interventions[110].

The figure of the prisoner is difficult to place, since very often the limitations are dictated by the *status detentionis* and therefore by needs related to security reasons, often dictated by the consolidated practice of the penitentiary institution. The numerous cases of denials of treatment or delays in granting it are tangible[111], which harm the right to continuity of care, as already illustrated in 2013 by the National Bioethics Committee[112].

With the reformed art. 11 O.P. of 2018, the legislator, to adapt to the penitentiary health reform of legislative decree 230/1999[113], therefore defines the division of responsibilities, also regulating the methods for issuing authorizations in arranging hospitalization in external structures, which, as mentioned, have caused in the past delays and inefficiencies[114]. Despite the enormous

108 Ministry of Health *www.salute.gov.it/portale/lea/homeLea.jsp*

109 Report to the Ministry of Justice of the Ministerial Commission for penitentiary matters (*Palma* Commission, named after the President) to elaborate proposals for interventions in penitentiary matters June 13th, 2013 *www.giustizia.it*

110 E. Tranquilli, *L'evoluzione del servizio sanitario all'interno delle carceri italiane*, in *Salvis Juribus*, June 3rd, 2019.

111 See, for all, ECtHR judgment of March 28th, 2000 – Appeal n.35995/97 *Cara-Damiani v. Italy* and ECtHR Judgment of July 17th, 2012, *Scoppola v. Italy* no. 4, rec. no. 65050/09. In doctrine, L. Cesaris, *Nuovi interventi della Corte Europea dei diritti dell'uomo a tutela della salute delle persone detenute*, in *Rass. Penit. Crim*., 2012, p. 215..

112 National Bioethics Committee, Health inside the walls, September 27th, 2013 *www.bioetica.governo.it.*

113 . Starnini, *Il passaggio della medicina penitenziaria al servizio sanitario nazionale*, in *Autonomie locali e servizi sociali*, I, Bologna, 2009.

114 M. Bortolato, *Luci e ombre di una riforma a metà: i decreti legislativi 123 e 124 del 2 ottobre 201*8, in *Questione Giustizia*, 2018.

efforts to effectively achieve the objectives of the prison health reform, we are still far from this objective, as recently reported by the higher institute of national health (ISSN)[115].

However, there is no doubt that the state of detention cannot constitute a limiting element of the right to health, since this right must, on the contrary, be guaranteed in the catalogue of fundamental rights connected to the state of detention.

This would result, in general terms and without prejudice to the current instruments of the Supervisory Judges, the need to build an *autonomous penitentiary health system* - through the establishment of medical, nursing, technical-medical auxiliary, specialized personnel (also for languages such as that Arabic language), capable of overcoming the current dependence on the various regional health realities and of the autonomous provinces which can, from within the prison administration, balance the *health services* for prisoners and internees. In this regard, it should be remembered that medical/health personnel are called to participate in a series of social-health, care and rehabilitation activities included in the "treatment" of the prisoner; tasks which, associated with purely welfare ones, make penitentiary healthcare unique and not comparable to that provided for by the SSN.

Moreover.

For subjects restricted to the prison regime provided for by art. 41-*bis* O.P., for particular caution and safety, targeted health detention wards could be envisaged, where elderly subjects and/or afflicted by pathologies, could be transferred there for health reasons, since the current clinical centres of the SAI sections (Intensive Care Service, for people with serious health problems) and the Crupi section (for paraplegic prisoners) of the relative prison structures are insufficient[116].

Furthermore, one could imagine for all prisoners who need assistance for the treatment of pathologies in the acute phase which require in-depth therapeutic interventions not otherwise possible in a penitentiary environment, the reopening, even partial, of the 200 hospitals closed due to cuts in SSN[117], and the recovery of *ghost* hospital[118] structures never completed, with the sole construction of the Departments of Protected Medicine[119].

Furthermore, to overcome the logistical-organizational critical issues that have always characterized healthcare assistance in penal institutions, one could proceed, for example, through the PNRR funds, with the preparation of fixed-term contracts for students of Specialization Schools or Training Courses in Medicine, the digitization of the prisoner's health record, as well as the implementation of telemedicine, without forgetting the need for a *restructuring* of prisons, aimed

115 Report of the higher institute of national health ISTISAN 2019/22 by R. Mancinelli, M. Chiarotti, S. Libianchi, *Salute nella polis carceraria: evoluzione della medicina penitenziaria e nuovi modelli operativi*, Rome: higher institute of national health, 2019. In doctrine, extensively, L L. Chieffi, *La tutela del diritto alla salute tra prospettive di regionalismo differenziato e persistenti divari territoriali,* in *Nomos*, 2020; Id, in *Equità nella salute e nei servizi sanitari tra politiche europee e interventi statali*, in *Corti Supreme e Salute*, 2022 states that the recent, and still ongoing, health crisis has further confirmed the fragility and structural weakness, qualitative and quantitative, of the systems responsible, especially in the South, for the provision of essential public services such as to "negatively characterize living conditions". On this point, also see Opinion on Bioethical guidelines for health equity, May 2001, cit., which takes up an orientation clearly expressed by the same constitutional judge in some rulings (see sentence n. 309 of 1999 and n. 203/2016) in the part in which it specifies how «the needs of public finance cannot assume, in the balance of the legislator, such a preponderant weight as to compress the irreducible core of the right to health», or (sent. n. 275/2016) that «it is the guarantee of incompressible rights that affects the budget, and not the balance of the same that conditions its due disbursement».

116 For example, see The "black" list of 41 *bis* in the Parma prison where the clinical center explodes, in *www.ildubbio.it*, 2021. It should be noted that the Parma institute has a considerable complexity of circuits, being present High Security inmates (AS3 and AS1) and 41-*bis* O.P. (67 inmates as of 2021), as well as sections for Medium Security (MS) and a health department divided into an SAI section (Intensive Care Service, for people with serious health problems) with only 29 beds and a Crupi section (for paraplegic prisoners).

117 See Fassari L., "*Tra il 2007 e il 2017 il nostro Servizio sanitario nazionale ha subito una drastica dieta: in 10 anni sono stati chiusi circa 200 ospedali, tagliati 45 mila posti letto, ridotto di 10 mila unità il personale medico (tra ospedalieri e convenzionati) e di 11 mila quello infermieristico*", in *Il lento declino del Ssn. In 10 anni tagliati 200 ospedali, 45 mila letti, 10 mila medici e 11 mila infermieri. In Terapia intensiva un leggero aumento ma i posti letto sono poco più di 5.200*, in *www.quotidianosanità.it*, 2022.

118 In Italy there are 132 *ghost* hospitals that have never been completed. Among these cathedrals in the desert, the oldest of all is that of San Pio in San Bartolomeo in Galdo, in the province of Benevento (1957).

119 The protected medicine departments find their legal basis in art. 7 of law August 12th, 1993 n. 296 (Official Journal n. 188 of August 12th, 1993. ("*Conversione in legge, con modificazioni, del decreto-legge 14 giugno 1993, n. 187 recante nuove misure in materia di trattamento penitenziario, nonché sull'espulsione dei cittadini stranieri*"). They are hospital operating units, structurally and functionally autonomous within the context of the hospital to which they belong, with their own medical, nursing, technical-sanitary auxiliary staff, intended exclusively to accommodate prisoners who need hospitalization in an external place of care. Security and order are ensured 24 hours a day by a specifically proposed stable and specialized nucleus of penitentiary police, normally assigned to the penitentiary institute of territorial belonging. These structures are able to offer hospitalized prisoners all the specialized services present in the hospital, through the collaboration of the other U.U.O.O. of the hospital to which they belong, in conditions of high safety..

at improving a place where prisoners must be deprived of personal liberty and not of dignity[120]; conversely, for prison staff, the prison must be a safe workplace since, it is known, the prison system is characterized by a continuous interaction between social and environmental factors that influence the perception of the work experience[121].

120 In 2022 the dramatic phenomenon of suicides in prison is registering a significant increase compared to the same period last year. The Department of Penitentiary Administration with the Circular n. 3695/6145 of August 8th, 2022, launched the guidelines for a *continuous intervention*, through which " *il Dipartimento, i Provveditorati regionali e gli Istituti penitenziari siano tutti coinvolti, in una prospettiva di rete, per la prevenzione delle condotte suicidarie delle persone detenute*". In the circular, the D.A.P. established some lines of action to be implemented in each institution, also called to verify the status of the regional and local prevention plans and their compliance with the National Plan for the prevention of suicidal behavior in the adult penitentiary system published on July 27th, 2017 by the Presidency of the Council, Joint Conference. Furthermore, in said document it was highlighted that the prevention and monitoring activities must be carried out with the indispensable involvement of the health institutions, whose organization and activity falls within the direct competence of the Ministry of Health and above all of the Regions, "I*stituzioni sanitarie che, nella quotidianità penitenziaria, rappresentano degli attori imprescindibili, investiti di fondamentali responsabilità nel processo istituzionale di presa in carico delle persone detenute*. Pertanto, *gli staff saranno multidisciplinari – composti da direttore, comandante, educatore, medico e psicologo –e svolgeranno in ogni istituto l'analisi congiunta delle situazioni a rischio, al fine di individuare dei protocolli operativi in grado di far emergere i cosiddetti 'eventi sentinella', quei fatti o quelle specifiche circostanze indicative della condizione di marcato disagio della persona detenuta che*" - as stated in the circular - "*possono essere intercettati dai componenti dell'Ufficio matricola, dai funzionari giuridico-pedagogici, dal personale di Polizia Penitenziaria operante nei reparti detentivi, dagli assistenti volontari, dagli insegnanti" ed essere rivelatori del rischio di un successivo possibile gesto estremo*".

121 On this point, the Superintendency of the Penitentiary Administration of the Campania Region, in the months of October and November 2022, as part of the Annual Regional Training Plan, promoted the *BENEesse-ESSEREbene* project for Prison Staff held at the Sant' Angelo de Lombardi District Prison and at the Nisida Institute for Minors.

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