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The Right to Mental Health for Prisoners according to the Recent Constitutional Report of the Council

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ABSTRACT

In the context of people's health protection, the management of profiles related to the mental health of prisoners is particularly critical. Since as the health protection is an human and constitutional right, we need to give no difference in management of both free and prisoners. Mental health of prisoners is compromised by restrictions During detention because rights exercised every day are strongly limited. In order to protect the mental health of prisoners, we need to propose a model based by clinical care of Psychiatric disorders outside of prison, as well as it occurs for not-detained people. Based on these findings, to preserve Dignity of such persons, the sentence of Constitutional Court about home detention plays a crucial role. It is considered an efficient tool for reducing discomfort in health-compromised subjects under detention and for improving their quality of life.

Keywords: Dignity of the person; protection of human rights, prisoners

The dignity of the person: the essential core of fundamental rights

Within the framework of civic rights and fundamental values placed in the protection of the human person, the contribution offered by the Constitutional Charters in contemporary legal systems is an impregnable stronghold, full of "timeless" principles and guarantees. If the foundation of the liberal Constitutions was to be found in the binomial property-freedom of the citizen, in the constitutional state of the Second World War it is increasingly found in the binomial dignity-freedom of the person. It has been pointed out that fundamental rights are based on human dignity and that it is not correct to derive human dignity from the recognition of inviolable rights[1]. This is in view of the fact that dignity, as a right of the person, cannot be subject to a balancing judgment with other rights.[2]

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[1 So, A.] BARBERA, A *modern "Habeas Corpus"?,* in www.*forumcostituzionale.it*, 27 June 2013. The consecration of the "personalist" principle, according to the Author, involved the reconfiguration of the rights of freedom, since, while the classical rights of freedom remained anchored to specific cases (freedom to manifest a thought, to meet, to associate), the new rights of the person have espoused the technique of "principles" compared to that of "analytical rules". In this sense, the values of the person are assumed according to an "open scheme", since personalism can never be seen as an accomplished system, going in itself beyond any possible definitive arrangement. For a classification of inviolable rights, see A. BALDASSARRE*, Diritti inviolabili*, in *Enc. giur.* , vol. XI, Roma, p.10 ss. ; P. BARILE, *Le libertà nella Costituzione, Cedam*, Padova, 1966; Id., *Human* rights and fundamental freedoms, Il Mulino, Bologna, 1984;S. *Rodotà, Diritti* e libertà nella storia d'Italia. Conquests and conflicts. 1861-2011*, Rome, Donzelli, 2017;* R. *NANIA, P. RIDOLA, (edited by), I* diritti costituzionale, vol. 2, II ed., Torino, 2006; M. *AINIS-T. MARTINES,* Constitutional *Code, Ed. Laterza, Bari, 2001, p.1-994; P. F. GROSSI,* Constitutional law between principles of freedom and institutions, Cedam, Padova, 2005, p.1 ss.

[2] For an examination of the constitutional profiles of the concept of dignity, cf. P. F. GROSSI, Dignity *in the* Italian Constitution, in Dir. Soc., I, *p. 32 sqq. ; A.* Ruggeri, DIGNITÀ DELL'UOMO E GIURISPRUDENZA COSTITUZIONALE (PRIME NOTAZIONI), IN *coll. with A. Spadaro, Intervention at the Seminar on "Freedom and Constitutional Jurisprudence", Ferrara June 21, 1991, edited by V. Angiolini, Giappichelli, Torino 1992, p. 221 ss. ; Id.* Human dignity and the right to have rights (problematic and reconstructive profiles), in *www.consulta.org, 2018, extract II fasc. ; V. BALDINI,* Il paradosso della dignità umana e la cultura costituzionale (in riferimento all'ermeneutica giurisprudenza), in *Il certo* alla prova del vero il vero alla del del certo - certezza e diritto in discussione, edited by *G. Limone, Milano, Giuffrè, 2008; Id.* Human dignity between theoretical approaches and interpretative experiences, in *Rivista AIC*, 2013*, fasc. 2; pp. 1-10; Id., recently,* Human *dignity and emergency* legislation: (in)observance of a formal paradigm or (guilty...) circumvention of a parameter (also) substantial? Problematic aspects of a difficult balance, *in this Magazine, 2/2020; P. F. GROSSI,* La dignità nella Costituzione italiana, in *Dir.*

Since the work of the Constituent Assembly, the need to characterize the Constitutional Charter for an unavoidable "sense of humanity" has been highlighted in the debate. In the conventionally oriented work of the Constituent Fathers, man acted as a standardizing criterion and a coordinating principle, succeeding in agreeing even diametrically opposed conceptions, but all aware of the period of atrocious suffering that had struck the heart of man in his personal freedoms, in his family, in all his right to a dignified life.[3]

The Constitutional Charter affirms itself as the product and interpreter of the prevailing aspirations of our nation, so that it could not disregard the deep aversion to any form of state capable of once again affecting the sphere of the natural rights of the human person; premises that led to the elaboration of a project all imbued with a human vision of life, a project that should in time rise to a true and proper "Charter of Man". The charm that exudes from the simple reading of our Fundamental Charter, at the peak of our order and the system of sources for strong cogency and full effectiveness of its principles, can be particularly appreciated in the richness of its principles and values and in the high expression of extraordinary legal technique. The innovative spirit that characterized the burdensome and laborious work of the Constituent Fathers is appreciated in the choice to attribute the role of true "protagonist" to the People, elevated to the rank of "constitutional body" and holder of that "sovereignty" that exercises its "in the forms and limits indicated by the Constitution itself".

The consecration of the rights of the person within the constitutional framework, characterized by the principle of maximum expansion of fundamental freedoms and rights, is enriched by the choice of providing a range of general and particular limits, explicitly laid down by the same rules of constitutional status. In this context, Art. 2 Cost. represents the matrix and the guarantee of fundamental rights, understood as the[4] norm "in open case[5]", considering that the structure of the constitutional norms in general is so flexible, even in its perceptive rigour, to adapt continuously to the transformations of the times and to make possible new interpretations and new applications. The harmony that distinguishes the constitutional provisions is well combined with the interpretative work of our Constitutional Charter and has facilitated the constitutionalist doctrine that has worked to resolve, also using the criterion "systematic", the apparent lack - in terms of literal prediction - of values rooted in the essence of the human person, first of all the "right to life".

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soc. 2008*, I, p. 32 ss. ; G. ALPA,* Personal *dignity and fundamental rights, in* Riv. *trim. dir. and proc. civ. , p.*21 sqq. ; F. POLITI, *Respect for human dignity in the European legal system, in S*. MANGIAMELI (edited by), The *European* legal system, vol. 1, Principles of the Union*,* Giuffrè, Milan, 2006, p. 43-87; V. TONDI DELLA MURA, *Solidarity between ethics and aesthetics. Tracce per una ricerca,* in Scritti in onore di Angelo Mattioni, Vita e Pensiero, Milano, 2011, p. 657- 674; A. OCCHIPINTI., Protection of life and human dignity, Utet, Turin, 2008.

[3] See, Session of the Constituent Assembly of 5 March 1947 (general discussion of the draft Constitution of the Italian Republic).

[4] As you know, the debate on the legal framework of Art. 2 Cost. was very heated, animated by opposing views. The first, of an "extensive" nature, according to which the rule does not exhaust its potential with the reference only to human rights expressly provided for in the Constitutional Charter, having to be interpreted with an "open clause" potentially attributable to any situation of freedom placed to the protection of the human person. The other, diametrically opposite, of "reductive" type, according to which art. 2 would constitute a summary rule of the rights of freedom contained in the constitutional dictate and would be characterized by a "closing clause" which becomes an obstacle to an interpretation of the rule, as a "container" of many other natural rights that have not been included in the constitutional text. The opinion that prevailed was the "extensive" one, expected that "considering art. 2 an open and flexible clause is possible to give space to the new rights of which the physical construction allows the emergence". Particularly incisive was the contribution of Augusto Barbera in the sense of considering the existence of a provision in open case, "a principle which does not end in the freedoms expressly guaranteed but which is *capable of encompassing all the new demands for freedom which are adopted by the social conscience and progressively recognized through the action of the jurisprudence or the legislator ordinary", cf. A. BARBERA*, F. COCOZZA, G. *CORSO,* Le libertà dei singoli e delle formazioni sociali. The principle of equality, *in G. AMATO-A. BARBERA (edited by), Il Mulino, Bologna, 1986, spec. p. 207. See also A. BARBERA, Commento* all'art. 2 Cost., in G. *BRANCA (edited by), Commentario* della Costituzione, Bologna-*Roma,* 1975, p. 50 sqq. ; P. F. GROSSI, Introduction to a study on inviolable rights in the Italian Constitution, Cedam, Padua, 1972; R. G. RODIO, Judicial defence and constitutional order, Cedam, Padova, 1990, spec. 9.

[5]On the complex and repeated balancing work performed by the Court, cf. A. Morrone, *Balancing (constitutional justice)*, in Enc. *dir.,* Annals, vol. II, Volume II, Giuffré, Milan, 2008, pp. 185-204;*Id., Rights against rights in the jurisprudence of the Constitutional Court,* L. CALIFANO (edited by), *Fundamental rights in the constitutional jurisprudence*, Giappichelli, Turin, pp. 89-107; cf. also, A. BARBERA, *Le basi filosofiche del constitutizionalismo*, Ed. Laterza, Bari, 2019; A. BALDASSARRE, *Le ideologie costituzionale dei diritti di libertà, in* Dem. *dir., 1976*, 291 sqq. ; A. RUGGERI, *Giurisprudenza costituzionale e valori*, (Intervention at the Seminar on Effectiveness and Modification of Constitutional Values, organized by the Club of Jurists), Rome May 9, 1997*,* in *Dir. pubbl.* , 1/1998, 1 ss. ; O. CHESSA, Well tempered balance or external union of reasonableness? Notes on inviolable rights as a parameter of the judgment of constitutionality, in the Constitutional Court and political decision processes, Atti del Seminario (Otranto, 4-5 June 2004), by V. Tondi Della Mura, M. Carducci, R. G. Rodio (edited by), Giappichelli, Torino, 2005.

Nevertheless, the contribution of constitutional jurisprudence to consolidating the guarantees of the fundamental rights of the person, by virtue of their effectiveness and multilevel protection, which has proved to be decisive over time, cannot be overlooked, awaiting the difficulty which the Constitutional Court has had to face in balancing the[6] values expressed in the Constitutional Charter.

On the occasion of the recurrent landings operated by the Council, in fact, a definition of the dignity of the human person was offered as "constitutional value that permeates of itself the positive right" and which must necessarily affect the interpretative work of any normative precept that evokes the "common feeling of morality". The Court has reiterated, on many occasions, the obligation to keep up the barriers against violations of the personalistic principle and the «solidarity-social»[7] principle, affirming that the Constitution puts the fundamental rights of the human person in the foreground, to be preserved in its dignity and in its condition of juridical equality from every possible instrumentalization, even if aimed at the affirmation of constitutionally appreciable interests. One of the fundamental rights of the person is undoubtedly that of health (Art. 32 Cost.). Among the application profiles, priority should be given to ensuring decent and human rights conditions in prisons, in accordance with the aforementioned constitutional values and international obligations to ensure detention conditions respectful of human dignity and to preserve restricted persons from inhumane treatment and punishment. The system of guarantees outlined by the above sources implies that the custodial sanction constitutes a restriction, but not the deprivation of the freedom rights of the person, so that, even during the execution of a measure restricting freedom, the dignity of the person must be protected. If it can be accepted that, for security reasons, restrictions on personal freedom are in place, it can never be accepted that the value and dignity of the person as a whole can be diminished by the effect of restriction in prison, Even more so by invoking, as a foundation, the disvalour of criminal acts carried out by the prisoner. [8]

It must be clearly stated that any form of elimination or compression of the dignity of a subject strongly affects his quality as a human person.

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[6]For an in-depth investigation into the jurisprudence legacy of the Consulta, see, A. Morrone, *Constitutional law in jurisprudence,* Cedam, Padova, 2018, p.1-374; A. LOIODICE, *La Corte costituzionale fra tecnica giuridica e contatti con la politica*, in *La Costituzione tra interpretazioni e istituzioni*, (edited by) A. LOIODICE, P. GIOCOLI NACCI, Cacucci, Bari, 2004; R. G. RODIO, *The evolution of the Constitutional Court, especially in the last fifteen years of regional experience*, in BARTOLE, SQUIRE AND LOIODICE (edited by), *Regions and Constitutional Court*, Franco Angeli Ed., Milan, 1988, p. 255 sqq. ; S. MANGIAMELI, *The contribution of the Italian constitutional experience to the European framework for the protection of fundamental rights*, in *the Constitutional* Court and constitutional process, in the experience of the journal «Giurisprudenza costituzionale» for the fiftieth anniversary, Giuffrè, *Milan, 2006; A. LOIODICE - P. GIOCOLI NACCI,* Costituzione italiana *(Annotata con indicazioni bibliografiche e giurisprudenza della Corte Costituzionale), Cacucci, Bari, 1991; V. TONDI DELLA MURA,* Classification WORK OF THE BIBLIOGRAPHY AND OF THE JUDGMENTS OF THE CONSTITUTIONAL COURT FOR THE DRAFTING OF THE ITALIAN CONSTITUTION ANNOTATED WITH BIBLIOGRAPHICAL INDICATIONS AND JURISPRUDENCE OF the Constitutional Court*, (edited by)* Loiodice - *Giocoli Nacci*, Cacucci, Bari, 1991; M. LUCIANI, *Diritti sociali e diritti di libertà nella tradizione del costituzionalismo, in La* tutela dei *diritti fondamentali davanti alle Corti costituzionale, edited by* R. ROMBOLI, Giappichelli, Torino, 1994, p. 90 sqq. ; F. POLITI, Del concetto di Costituzione e dei principi fondamentali della costituzione repubblicana, in Scritti in onore di Michele Scudiero, Jovene, Napoli, 2008.

[7]For all, C. cost. *,* sent. 17 July 2000, n. 293, in Giur. cost. 2000, p. 2239 ss. With regard to art. 21, sixth paragraph, Cost., the Court stated that "only when the threshold of attention of the civil community is adversely affected, and offended, by the publications of writings or images with impressive or gruesome details, detrimental to the dignity of every human being, and therefore perceivable by the whole community, the reaction of the ordering". Freedom of thought, like other freedoms, must be conceived as a safeguard of the fundamental good of human dignity.

[8]Particular interest aroused the judgment: C. cost. , 9 May 2013, n. 85, in Giur. *cost.* , 2013, 1478 sqq. To comment on the pronunciation, see: R. Bin, Jurisdiction *or Administration, who should prevent environmental crimes? Note to the judgment "Ilva"*, ibid., pp. 1505 ff. All fundamental rights protected by the Constitution are linked to mutual integration and it is therefore not possible to identify one of them which has absolute primacy over the others. The protection must always be «systemic and not divided into a series of uncoordinated rules and in potential conflict between them» (judgment no. 264 of 2012). The risk, in the Court's view, would lead to an unlimited expansion of one of the rights, "which would become "tyrant" in relation to the other constitutionally recognised and protected legal situations which constitute, as a whole, expression of the dignity of the person". According to the Author, the Constitutional Court, in this judgment, argues that the balance between competing interests of constitutional importance, is the projection, in terms of fundamental rights, of the possible overlapping of functions assigned to different bodies that, as they perceive the risk of an infringement of rights or property constitutionally and criminally protected, they provide for their precautionary preservation.

Protection of the right to health of prisoners

As mentioned above, certain critical aspects emerge in the context of the legal protection of the person in prison, since this is a condition that objectively deprives or reduces the scope of the application of the rights of freedom, while retaining their ownership. But the separation of the prison universe and the need for a "just punishment" cannot lead, for the prison population, the loss of the ability to exercise their rights or the simple maintenance of their ownership without safeguarding the necessary individual capacities to pursue it.[9]

The framework of constitutional principles outlined in the foreword and in particular the aforementioned art. 2, in one with the constitutional importance of the "dignity of the human person" and with the complex and articulated structure of art.13 Cost., prevent the prison structure from being considered as a place where there is a regime of extraterritoriality with respect to the fundamental guarantees guaranteed by the State. These guarantees relate to fundamental aspects of detention and are also expressly protected in a number of resolutions and recommendations adopted by the Council of Europe, in particular in the European prison rules; These are, however, principles which are not legally directly binding on the Member States, so that, in practice, it is the national laws and judgments of the European Court of Human Rights that direct the Member States in the matter of deprivation of liberty.[10][11]

As mentioned, the difficult balance between the protection of the sick and the prison sentence is in the work of balancing between the right to the health of the condemned and the right - the duty of the state to make him atone for the sentence. This is an interpretative work made complex and burdensome by the dichotomy between the principles enshrined in Articles 27 and 32 of the Constitution; on the one hand it must be noted that "the penalties cannot consist in treatments contrary to the sense of humanity and must tend to the rehabilitation of the condemned" and "the Republic protects health as a fundamental right of the individual" on the other,

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[9]In the past*, the Judges of the Council*, discussing the dictate of art. 27, third co. Cost. ("the penalties cannot consist in treatments *contrary to the* sense of humanity *and must tend to the* reeducation of the condemned") *have* highlighted that *the same* were statements of principle that result not only in mandatory rules and directives addressed to the organisation and action of prison *institutions, but also in the rights of those who are in them restricted. In this sense, <<<the* execution of the sentence and the re-education that is its purpose - in compliance with the essential needs of order and discipline - can never consist in "prison treatments" that entail conditions incompatible with the recognition of the subjectivity of those who are in the restriction of their freedom>>. The dignity of the person, the Court added, <<<whose distinctive feature is the precariousness of individuals, resulting from the lack of freedom, in conditions of environment by their nature intended to separate from civil society - and the Constitution protected through the baggage of the inviolable human rights that the prisoner also carries with him throughout the course of the criminal execution>>. This is the general guideline that the legislator has intended to affirm (starting from the art. 1, first paragraph, of the law n. 354 of 1975) in the entire discipline of the penitentiary system. These are the statements referred to in the note pronunciation 11 febbraio 1999, n. 26, in Giur. cost. , 1999, p. 176 ss. On the subject, see G. CONSO, Manuale di diritto penitenziario, Giuffrè, Milano; L. FILIPPI - G. SPANGHER, Manuale di diritto penitenziario, Giuffrè, Milano, 2011; M. CANEPA - S. MERLO, Manuale di diritto penitenziario, Giuffrè, Milano, 2010.

[10] Referring to another location the more detailed examination of art.13, in systematic correlation with art. 27 and 32 Costs., just to reiterate that the freedom of the person is the logical and legal prerequisite for the exercise of all other freedoms guaranteed by the Constitution and represents the first and essential condition for the individual to enjoy autonomy and independence necessary to exercise any other right of freedom. The polyvalent nature of the notion of this freedom, considered as an "open scheme" case, has been highlighted on several occasions.

[11] In implementation of Legislative Decree no. 123 of 2 October 2018, the role of the National Health Service within the institutions is enhanced, enhancing assistance within the prisons and ensuring timely benefits to prisoners, Medical examination of the detainee at the entrance to the institution and continuity of ongoing medical treatment.

Art. 11 of Law 354/1975 (Penitentiary System) amended by d.l. 2 October 2018, n. 123:

• Reiterates that prisoners and internees are entitled to health benefits (prevention, diagnosis, treatment and rehabilitation) equal to those of all citizens in implementation of Legislative Decree no. 230 of 22 June 1999 (transfer of prison medicine to the National Health Service);

• provides that the bill of health services adopted by the local health company is made available to prisoners

• defines the jurisdiction of judges who may decide on any transfer to external healthcare facilities or authorise visits at their own expense by trusted professionals;

• states that, in the medical examination, which must be carried out on arrival in prison, the doctor must note in the medical record signs that may be signs of violence or ill-treatment and must inform the director and magistrate;

• ensures continuity of treatment for prisoners who are transferred.

The health activity must:

• in addition to responding to the health needs of prisoners, it must also be proactive, anticipating their needs;

• ensure daily visits to sick prisoners and those who request them on the basis of criteria of clinical appropriateness;

• perform their duties without time limits.

Article 3 Cost., states that "all citizens have equal social dignity and[12] are equal before the law" so that all those who suffer a sentence, have the duty to serve it and the State to execute it.

Our legal system, marked by the primacy of the law, has appreciable spaces of coexistence between legality and guaranty, if you think of the faculty - for health reasons - to allow postponement in the execution of the sentence and admission to restrictive measures alternative to detention in prison. In this sense, two articles of the Penal Code are aligned, art.146 (subject to the amendment made by law n.231/99) and art.147. Specifically, Article 146 provides for the "mandatory postponement of the execution of the sentence" when the convict is suffering from A.I.D.S. full name, or serious immune deficiency, or other particularly serious illness as a result of which his state of health is incompatible with his state of detention. The incompatibility hypothesis exists when the person is in a phase of the disease so advanced that he no longer responds (according to the certifications of the Penitentiary Health Service or the external one) to the therapeutic treatments practiced in prison. Art.147 also provides for the "optional postponement of the execution of the sentence" for "those who are in conditions of serious physical infirmity".

In the absence of explicit provisions on the exact scope of the concept of "serious physical infirmity", the contribution of jurisprudence has been used, often imbued with contradictory elements. On the spot, this condition has been identified in the hypothesis of the disease that leads the person to death, without possibility of treatment; whereas the presence of a "chronic irreversible disease" has not been considered sufficient on its own, since the physical condition of the patient must be such as to rule out the danger. On the other hand, other rulings have linked the granting of deferment to the possibility of regression of the disease, as an effect of therapeutic treatments practiced in a state of freedom. An interpretation of the above-mentioned rule with a sense of greater humanity has considered to include among the elements suitable to determine the actual gravity of the physical conditions, in addition to the aforementioned "risk of death", also that of the disease that "causes other significant harmful consequences".[13]

A deep furrow of humanity was drawn by another ruling of the Supreme Court that in 1994 ruled that "the[14] healthiness or reversibility of the disease are not required by current legislation on the deferment of the execution of the sentence, for which it is sufficient that the infirmity be of such importance that the atonement appear in contrast with the sense of humanity referred to in Article 27 of the Constitution".

The exegetical work no doubt more arduous - marked by a greater restriction of the application of the benefit of suspension in the execution of the sentence - must be recorded in the hypotheses of psychic infirmity. It has been assumed that the difference with the hypotheses of physical infirmity is based on the presumption that the physical illness, weakening a person, constitutes less danger for the social security than the mental one. From a procedural point of view, the request for mandatory or optional referral of the sentence must be forwarded to the Supervisory Court and is appealable before the Court of Cassation.

Looking at the Italian penitentiary system and the regulatory apparatus that regulates the discipline of prison institutions and their organization, it is necessary to highlight, since Article 1, the nature and purpose of penitentiary treatments, inspired by a humanitarian spirit, respecting the dignity of the person, in full impartiality and without any discrimination of any kind; Fundamental rights and their effectiveness must always be guaranteed to every person deprived of his or her freedom.[15]

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[12]See, on the principle under consideration, A. BONOMI, The *right/duty to re-education of the convicted prisoner and freedom of self-determination: encounter or confrontation? in this* Magazine, fasc. 1/2019, 3 March 2019, pp. 1-13; Id. A. BONOMI, *Status of the prisoner and constitutional order. Balancing techniques in the jurisprudence of the judge of the laws,* in Profiles *of innovation*, coll. directed by R.G. RODIO AND V. TONDI DELLA MURA, Bari, Cacucci, 2019.

[13] Cass. Pen., Sez. VI, Judgment No. 1361 of 27 September 1986.

[14] Cass. pen. Sez. I, judgment No 2080 of 7 July 1994.

[15]Art. 1 of the law of 26 July 1975 n. 354 (published in the Official Gazette of 9 August 1975 n. 12, S.O.) reads as follows:

1. Prison treatment shall be humane and shall ensure respect for the dignity of the person. It shall be characterised by absolute impartiality, without discrimination as to sex, gender identity, sexual orientation, race, nationality, economic and social conditions, political opinions and religious beliefs, and shall conform to models which promote autonomy, responsibility, socialization and integration.

2. Treatment shall aim, including through contacts with the external environment, at social reintegration and shall be implemented on an individualisation basis in relation to the specific conditions of the persons concerned.

3. Fundamental rights shall be guaranteed to all persons deprived of their liberty; Any physical and moral violence against him is prohibited.

4. In institutions, order and discipline shall be maintained in compliance with the rights of persons deprived of liberty.

5. Restrictions which cannot be justified by the need to maintain order and discipline and which are not indispensable to the judiciary shall not be imposed on the accused.

The attention of the Constitutional Court has recently focused on the category of jurisdictional measures called "alternative measures to[16] detention" - governed by Chapter VI of the Penitentiary Law - with particular regard to the measure of "home detention". The Constitutional Court, in fact, in several rulings has recalled the existence of a series of limits which, linked to the protection of values of constitutional importance, may conflict with the aforementioned rights of freedom of persons subject to restrictions; This has made the desired need for a balanced balance between fundamental rights and freedoms of a constitutional nature difficult to implement.

Particular attention has been paid to the problem of the onset of a serious psychiatric illness in prison, with particular regard to the granting of benefits and alternative measures to detention. On this point, recently the Judges of the Council, noted the persistent inertia of the Legislator with respect to the warning issued[17] by the

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6. Detainees and internees shall be called or identified by their names.

7. The treatment of the accused shall be strictly informed in accordance with the principle that they shall not be considered guilty until their final conviction. See, D. VALIA, *The Rights of the Recluse,* in Rass. *penit. crim. ,* 1999, III, p.1-64; G. SCARDACCIONE, *Some criminological considerations on treatment as provided for by law 26 July 1975, n. 354,* in Rass. *Studi Pen.*, 1978, p. 359.

[16]They note, among *the interventions made by the constitutional jurisprudence having as* object the review of constitutional legitimacy of art. 47-ter (*home* detention), *judgment of* 19 November 1991*, n.414, in Giur.* cost. , 1991*, p. 3540, by* which the Court declared the said article *constitutional* illegitimacy*, in so* far *as "does not provide for military imprisonment to* be expiated IN HOUSE detention WHEN DEALING WITH A PERSON IN PARTICULARLY SERIOUS HEALTH CONDITIONS THAT REQUIRE CONSTANT CONTACT WITH TERRITORIAL HEALTH RESORTS". BY JUDGMENT OF *12 June 2009 n. 177, in* Giur. cost. *, 2009, 1977, the constitutional illegitimacy of art. 47-ter, paragraphs 1, letter a), second part and 8, L. 26 luglio 1975, n. 354. With reference to the declaration of the above-mentioned paragraph 8), the Court has identified profiles of constitutional illegitimacy in that part in which the provision did not limit the punishability, pursuant to art. 385 cod. pen. , to the single expulsion greater than twelve hours, as established by art. 47-sexies, co. 2, of the same L. 354/1975, on the assumption, (referred to by art. 47-quinquies, co.1) that there is no real danger of further crimes being committed. Similarly*, the ruling of *22* November 2018, *n. 211, declared* the constitutional illegitimacy of art. 47-ter, paragraph 1, letter b), and 8, in so far as it *does not limit the punishability, pursuant to art. 385 cod. pen. , the only removal that lasts for more than twelve hours, as established by art.* 47-sexies, paragraphs 2 and 4, of the above, on *the assumption, referred to in art.* 47-QUINQUIES, PARAGRAPH 1, THAT THERE IS no real danger of commission of further crimes. Among the copious literature on the subject, v. for all, R. G. RODIO, II CONSTITUTIONAL FOUNDATION OF THE RIGHT TO HEALTH, *in Quaderni* forensi, 1/2000, P. 12 SS. ; A. MORRONE - F. MINNI, The right to health in the jurisprudence of the Italian Constitutional Court*, in* Rivista A.I.C., N.3/2013; F. FERRARI, *Salute (*diritto alla), *Dig. pubbl.* , XIII, Utet, Torino, 1997, p. 513 ss. , F. DE FERRARI - *C.* Romano*, Sistema penale e tutela della salute,* Giuffrè, Milano; 2003; B. CARAVITA DI TORITTO, *La disciplina costituzionale della salute*, in *Dir. soc*. 1984, p. 22 ss. ; F. POLITI, I DIRITTI SOCIALI, in R. NANIA - P. RIDOLA (edited by), I DIRITTI COSTITUZIONALE*, Giappichelli, Torino, 2006, vol. III. pp. 1019-1050; Id,* Social *rights and human dignity in the Republican Constitution, Giappichelli*, Turin, 2018; V. Verdolini, LA SALUTE INCARCERATA: ANALISI COMPARATA DI MODELLI DI SANITÀ PENITENZIARIA, IN *M. Esposito* (a cura *di), Malati* in carcere: analisi dello stato di salute delle persone inmate, Franco ANGELI ED., MILANO, 2007; A. D. *Vincenzi,* Tutela della salute e libertà individuale, in *Giur.* cost. 1982*, I, p. 2479; M.* Peacock, *Prison and right to health*, in Human Rights, I, p. 18 sqq. ; S. MANGIAMELI, Reorganization of local, regional and state administration between new legislative powers, regulatory autonomy and consultation requirements, in the administrative system after the reform of Title V of the Constitution, by G. Berti G. - G. C. De Martin, Rome, 2002, 183; G. Inzerillo, In search of a right balance between protection of the health of the accused in vinculis and precautionary requirements, in Giur. it. , 1999, p. 1469 sqq. ; B. Magliona - M. Pastore, Tutela della salute dell'imputato e potere cautelare: dalla nozione di incompatibilità al concetto di intrinseca gravità, in Rass. en. crim. 1992, II, p.103; G. V. Giusti, The severity of the state of health of the detainee pending trial in relation to the possibility of granting provisional release: medical legal aspects, in Rev. en. med. leg. 1981, n.3, p. 709; E. SANTORO, The Prison Community, in Carcere e società liberale, Giappichelli, Torino, 1997.

[17] It is the judgment, C. cost. sent. 12 April 1996, n. 111. In the category of "warning judgments" or "paralegislative" or even "delegation" are those rulings in which the Constitutional Court, in accepting or rejecting a question of constitutional legitimacy, indicates to the legislator the criteria to be taken into account in proceeding with a new or, as appropriate, more correct legislative wording. Such rulings are one of the most sensitive aspects of the Constitutional Court-Parliament relationship, as has been pointed out by the doctrine which doubts the legitimacy and appropriateness of the use of rulings which have the effect of limiting or, in any event, to direct the legislator's free appreciation of the situations on which to intervene. Cfr., per tutti, A. RUGGERI, A. SPADARO, *Lineamenti di giustizia costituzionale*, Giappichelli, Torino, 2019 V. CRISAFULLI, *Giustizia costituzionale e potere legislativo,* in Aspetti *e tendenze del diritto costituzionale,* Scritti in onore di Costantino Mortati, Giuffrè, Milano, 1977, Vol. 4, pp. 129-147; A. LOIODICE, *The Constitutional Court between legal technique and contacts with politics*, in V. TONDI DELLA MURA, M. CARDUCCI, R. G. RODIO (edited by), op. cit. ;MODUGNO, F., THE *complementary legislative function of the Constitutional Court,* in Giur. *cost.* 1981, p. 1646 sqq. ; Id. *Constitutional* Court and Legislative Power, *in P. Barile, E. Cheli, S. Grassi (edited by),* Constitutional COURT AND DEVELOPMENT OF THE FORM OF GOVERNMENT IN ITALY, *IL MULINO, BOLOGNA, 1982; G. Zagrebelsky,* La Corte *costituzionale e il legislatore,* in Corte costituzionale e sviluppo della forma di governo in italia, EDITED BY P. BARILE, E. CHELI, S. GRASSI, *IL MULINO, BOLOGNA, PP. 103-157; P. Franceschi - G. Zagrebelski,* The colegislator *and the Parliament,* IN QUAD. cost. , 1981, *pp. 164 ff.* ;L. MEZZETTI, Legittimazione *democratica e tecniche interpretative della Corte Costituzionale italiana,* in Pensamiento

same Court in judgment no.111 of 1996, in order to find a balanced legislative solution to ensure that persons convicted of and suffering from mental illnesses have the necessary mental health care (art.32 Cost.), without however circumventing criminal treatment, with the judgment of 19 April 2019 n. 99, They considered that home detention "in derogation" should also be extended to prisoners suffering from serious mental illness, which occurred during the execution of the sentence.

This decision, which is characterized by a degree of unquestionable innovation and a strong humanitarian spirit, will enable the judge to order that the prisoner suffering from a serious mental illness be treated outside the prison and, Even when the remaining sentence exceeds four years, the alternative measure of "humanitarian" home detention, or "in derogation", may be granted to the prisoner, as was already the case for serious physical diseases.

First of all, it should be pointed out that the above-mentioned decision is an attempt to fill a gap in the effective protection of the fundamental right to health and, from this perspective, it seems worthy of a more analytical examination of the reasoned part. In fact, the absence of a legal provision legitimizing the court, in the granting of home detention, even in the cases of serious mental illness which occurred during the execution of the sentence, resulted in inhuman and degrading treatment in all cases in which the detainee suffered such severe suffering that, combined with the ordinary affliction of deprivation of liberty, it generated in the penalty a range contrasting with the sense of humanity, which may further affect the health of the same detainee.

It does not appear coincidental that the decision is to be placed in a temporal period immediately following a reform intervention of the prison system (D. lgs. 2 October 2018, n.123 and n. 124) which represented, for the same Legislator, the umpteenth opportunity to fill, as stated above, that void of effective protection of the fundamental right to health; between the objectives, evidently, that to orient itself and to address towards the total comparison between physical and psychic illness, evidencing profiles of incompatibility of the latter with the state of detention, until the preview of the suspension or the deferment of the sentence.[18]

It cannot be denied, however, that in the light of the judgment n.99/2019, undoubtedly delicate will be the task of the judge, who will have to assess whether the psychological illness is compatible with the detention of the prisoner, or requires its transfer to external places (housing or public places of care, assistance or reception), in a way that ensures health, but always compatible with the collective interest in safety. The decision must be based on an assessment of the clinical picture of the prisoner, of his danger, of his social and family conditions, of the facilities and services offered by the prison, the need to protect other prisoners and all staff working in the prison, in addition to the aforementioned need to safeguard collective security.[19]

The new report of the Council: the peculiar features of the judgment n.99/2019

As judge *at the court, the Court of Cassation, first criminal chamber, by order of 22 March 2018, raised the question of constitutional legitimacy, in reference to art. 2, 3, 27, 32 and 117, first paragraph, of the Constitution, the latter in relation to art*. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), art. 47-ter,

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CONSTITUCIONAL, VOL. *14, issue 14, Pontificia Universidad Catolica del Peru, Santiago del Cile, 2008;M. C. GRISOLIA,* Some remarks on the "commandment sentences", or the "monitory power» of the Constitutional Court*", in* Giur. COST. , 1982*, p. 926 sqq. ; A. Cervati,* Types of judgments and types of reasons in the cross-judgment of constitutionality of laws, in Strumenti *e tecniche di giudizio della Corte costituzionale, atti del convegno di Trieste, 26-28 maggio 1986, Giuffrè, Milano, 1988; L. MEZZETTI,* La giustizia costituzionale: storia, modelli, teoria, in L. MEZZETTI M. BELLETTI E. D'ORLANDO E. FERIOLI, La giustizia costituzionale, Cedam, Padova, 2007.

[18]The legislative *appendix consists of L. 26 luglio* 1975 n.354, "Norme sull'ordinamento penitenziario e sull'esecuzione delle misure privative e limitative della libertà", published in G.U. 9 agosto 1975, n.212. D.Lgs. 22 giugno 1999, n.230, "Reorganization of prison medicine according to article 5, of the law 30 novembre 1998, n.419", published in the G.U. n.165 of 16 luglio 1999 - Suppl. Ord. n.132. D.P.R. 30 June 2000, n.230, "Regolamento recante norme sull'ordinamento penitenziario e sulle misure privative e limitative della libertà", pubblicato sulla G.U. n.195 del 22-08-2000. D.c.d.m. April 1, 2008, "Modalities and criteria for the transfer to the S.S.N. of health functions, employment relationships, financial resources and equipment and capital goods in the field of penitentiary health", published in G.U. n. 126 of 30-5-2008.

[19]For a detailed examination, cf. V. GREVI, Diritti *dei detenuti e trattamento penitenziario,* il Mulino, Bologna, 1981; M. RUOTOLO, *Rights of prisoners and constitution*, Turin: Giappichelli, p.19-22; A. MANNA, *The punitive treatment of the criminally criminally insane and the prospects of reform,* in Rass. *it. crim.* , 1994, p. 269 sqq. ; V. BALDINI, *Security and freedom in the rule of law in transformation, Giappichelli*, Turin, 2005; Id. *Security and rule of law. Constitutional issues*, in *Coll. Studi archeol. , artistici, fil. e storici*, edited by V. Baldini, University of Cassino, 2005; A. MANACORDA, *Mental* infirmity, custody and care in the light of recent constitutional jurisprudence, in Foro *it.* , 1983*, I, p. 293 ff. ; R. SPEZIALE BAGLIACCA,* Matti da imprigionare*, in* Difesa penale*, 1984, III, suppl. n. 5, p. 59; G. RUSSO,* Treatment of the criminally offender mental patient, *in Riv.* it. med. leg. , 1989, XI, 525.

paragraph 1-ter, of the law of 26 July 1975, n. 354 (Norms on the penitentiary system and on the execution of the privative and limiting measures of liberty), «in the part in which that provision *of the law does not provide for the application of home detention even in the cases of serious mental illness occurred during the execution of the sentence». The genetic issue of the remittance order, had as its object the appeal for Cassation formulated by a prisoner, convicted for conspiracy to commit aggravated robbery, against an order made by the Rome Supervisory Court that had not granted its request for deferment of the sentence for serious* infirmity pursuant to art. 147 of the Penal Code, considering that this benefit applies only to cases of[20] serious physical infirmity, but not extendable also to the hypothesis of serious mixed personality disorder, with predominant border line organization at the stage of psychopathological disorder ascertained, in the present case, as a result of serious self-injurious behavior.

The *referring court*, in its order of referral, stated that this was a serious and time-bound condition, for which detention results in treatment contrary to the sense of humanity, confirming its constant restrictive orientation, already recalled by the decision of the Supervisory Court of refusal, According to which the prisoner who carries an exclusively mental illness upon conviction cannot access neither the institutions of compulsory or optional deferral of the penalty provided for by art. 146 and 147 cod. pen. nor to the so-called "derogating" home detention referred to in the contested provision, since in the text of that provision only the conditions of physical infirmity referred to in art. 146 and 147 cod. pen. and not also those related to psychic infirmity referred to in the text of art. 148 cod. pen.

In the opinion of the Court, the current legal system would treat differently the subject with a mental illness such as to exclude the ability to understand or to wish at the time of the commission of the fact - which, where there is social danger, it is subjected to rehabilitative treatment at the REMS, facilities with exclusive health management - compared to the subject in execution of punishment bearer of psychological pathology supervened, that remains in custody and where possible is allocated to one of the joints for the protection of mental health placed within the prison circuit.

But precisely in the absence of alternatives to detention for convicts suffering from serious psychological pathology, in the opinion of the Court remitting, it was possible to find a sufficient reason to activate the incident of constitutionality. The impossibility of access to the alternative measure of home detention "in derogation" (art. 47-ter, paragraph 1-ter, ordains. penit.) determines, in fact, a clear contrast with many principles both constitutional and conventional, It was therefore necessary to re-evaluate the content of previous constitutional decisions on the subject, with particular reference to judgment no. 111 of 1996. The Court, in its earlier ruling, had highlighted the unsatisfactory treatment of the serious mental illness which has arisen, particularly where it is incompatible with the single type of custodial structure, referring to the Legislator the invitation to find a balanced solution that also guarantees to these convicted mental health care (according to the provisions of art. 32 Cost.), without circumventing the criminal treatment. The warning expressed by the Council to the legislator, in the following years, seemed to have found only partial acceptance, if one thinks of the introduction of art. 47-ter, paragraph 1, letter c), ordin. penit. ; it is, however, a provision which meets the limits of applicability related to the nature of the crime and the amount of the residual penalty and which did not, in any event, provide for the condition of those persons suffering from psychological pathology, not eligible for "ordinary home detention" (for the limits of applicability of the provision), or to that "in derogation".

The same constitutional jurisprudence, moreover, had indicated some parameters of conformity with constitutional principles, elaborating some guidelines on the system of criminal execution. Think of the test, in concrete terms, the pathological condition and the provision of legal instruments to reconcile the values involved to allow the suspension of the execution or the improvement of the conditions of the individual in the event of relapse of the disease such as to expose the primary good of individual health compromised, in such a way as to give effect - in the case of maintenance of the detention condition - to treatment contrary to the sense of humanity (art. 27, co. 3 Cost.) or inhuman or degrading (with potential violation of art[21]. 3 of the ECHR).

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[20]On this point, v. M. Cesa BIANCHI - M. BELLONI, *Profili di intervento dello psicologo nell'esecuzione penitenziaria,* in Alternative *alla detenzione e riforma penitenziaria,* (edited by) V. GREVI, ZANICHELLI, *Bologna, 1982; p. 260 ss. Ib.: V*. Grevi, Inquiries into the activity of the expert in the prison institution in relation to the observation of the prisoners' personality, p. 93 sqq.

[21]For all, see: C. cost. 18.10.1995 n. 438 of 1995, in Giur. *cost.* 1995, 3455; C. cost. 3.3.1994 n.70, *ivi,* 1994, 745 and C. cost. 2.7.1990 n. 313, *ivi,* 1990, 1981. In doctrine, cf. CONSO G. (edited by), The *criminal procedural law in constitutional jurisprudence*, Naples, 2008; ELIA L., *Libertà personale e misure di prevenzione, Milan*, Giuffrè, 1962; Id., *The preventive measures between art. 13 and art. 25 of the Constitution, in Juror. constitutional*", 1964, IX, p. 938 sqq. ;L. ELIA*, M. CHIAVARIO (edited by), La* libertà personale, Torino *1972; VASSALLI G.,* Personal *liberty of the accused and protection of the community, in Giust*. pen. , 1978, LXXXIII, coll. , p. 1 sqq.

The observations made by the referring *court* on the current legal framework aimed at maintaining the detention condition of the person suffering from mental illness and the entrustment to the health service rendered in the penitentiary, have highlighted a compromise framework of the above-mentioned need to reconcile the values at stake and the full jurisdiction of the intervention itself. So, even in the acclaimed finding of inadequacy of such treatment, it would not be allowed to suspend the execution, nor the landing to house detention "in derogation" in cases where the ordinary one is not applicable.

The constitutional parameters evoked by the Court of Cassation in the question raised are based on the alleged violation of Articles. 2, 3, 27, 32 and 117 Cost.

The violation by art. 47b, paragraph 1b, orders. penit. of the order referred to in art. 117, first paragraph, Cost. - in relation to art. 3 of the ECHR - it focused on the fact that the above-mentioned rule, while being the only internal provision able to offer - in the event of an emerging mental illness - access to conflict resolution in terms of the protection of fundamental guarantees, did not appear to be in conformity with constitutional principles and conventionally oriented. In this sense, the permanence of the subject suffering from serious mental illness in detention would in fact have[22] materialized, as well as a treatment contrary to the sense of humanity, prohibited by art. 27 Cost., also a violation of the prohibition of inhuman or degrading treatment provided by art. 3 of the ECHR, in a legal context such as that of Italy which has recently elevated this prohibition as a rule underlying the system of protection of the rights of persons detained.

In support of the above-mentioned order, the Court of Justice offered an analytical reconstruction of the guidelines of the European Court of Human Rights, to highlight the absolute nature of the prohibition of torture or inhuman or degrading treatment or punishment (Art. 3 of the ECHR); It is a prohibition that is, in fact, a mandatory obligation "positive" for the State, which would be the obligation to provide for the interruption of detention in the presence of inhuman or degrading treatment. In particular, according to the above-mentioned jurisprudence, the lack of adequate medical care and, more generally, the detention of a sick person in inadequate conditions, could in principle constitute treatment contrary to art. 3 ECHR. So, in the framework of protection of prisoners and carriers of heightened vulnerability as suffering from psychological pathology, Allocation to a prison psychiatric ward may also give rise to degrading treatment where treatment is not appropriate and detention lasts for a significant period of time.

The aforementioned constitutional provisions were allegedly deemed violated by the law in question, pending the impossibility of arranging the placement of the prisoner suffering from serious psychological pathology outside the prison; with regard to internal constitutional parameters, a treatment contrary to the sense of humanity and detrimental to the inviolable right to the health of the detainee has been configured (art. 2, 27, third co. and 32 Cost.) and, with reference to the conventional parameter, inhuman and degrading treatment[23].

As for the alleged breaches of Article 3 Cost., in the order for referral, in addition, the difference in treatment between the hypotheses under consideration and those submitted to persons with a psychological disability such as to exclude the ability to understand or want at the time of the fact - where there is social danger - for which the law provides rehabilitation treatment outside the prison at the residences for the execution of security measures (REMS). A similar profile of disparity, according to the Court of Justice, has been identified with regard to persons convicted with a similar amount of punishment, but suffering from serious physical infirmity, which, on the other hand, can have access to both the optional postponement of the execution of the sentence (art. 147 cod.pen.), both to the home detention referred to in the provision submitted to censorship[24].

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[22] The call is to artt. 35-bis and 35-ter ordin. penit.

[23] The breach profile pertains, as mentioned, to the order referred to in art. 117, first paragraph, Cost., in relation to art. 3 ECHR, as interpreted by the above-mentioned case law of the European Court of Human Rights. On this point, cf. A. PENNISI, *Rights of the prisoner and judicial protection*, Giappichelli, Turin, 2002.

[24] In the most recent jurisprudence, this Court has repeatedly held that, in the face of the violation of constitutional rights, the absence of a single solution to "obligatory rhymes" cannot be an obstacle to examining the substance of the question of constitutional legitimacy to bring the legal system back to compliance with the Constitution. Precisely in criminal matters, this Court has on several occasions examined the merits of the questions brought to its attention if existing solutions, although not constitutionally required, are found in the legal system, suitable to «remedy immediately the vulnus found», without prejudice to the legislator's right to intervene with different choices (thus the judgment n. 222 of 2018; but see also, similarly, in a context close to that considered here, the judgment n. 41 of 2018, as well as the judgment n. 236 of 2016). The admissibility of questions of constitutional legitimacy is therefore conditioned not so much by the existence of a single constitutionally binding solution as by the presence in the legal system of one or more constitutionally appropriate solutions, that fit into the regulatory fabric in line with the logic pursued by the legislator (judgments no. 40 of 2019 and no. 233 of 2018). In fact, it is necessary to avoid that the legal system has free zones which are immune to the review of constitutional

The question, so represented, passed the screening of admissibility, was evaluated on the merits by the Council, with the main objective of censoring art. 47-ter, paragraph 1-ter, order. penit. , in so far as it does not allow the extension of home detention "by way of derogation", also to prisoners suffering from psychiatric diseases so serious as to render the expiation of the sentence in prison a sanctioning treatment contrary to the sense of humanity, as well as violating the right to health.

Conclusive reflections

Among the reasons underlying the decision, the Judge of the laws first highlighted the full sharing with respect to the reconstruction of the regulatory framework in force, as operated by the Court of Cassation and in this sense it is to be considered the loss of the scope by art. 148, first paragraph, cod. pen. , (hypothesis of psychic infirmity occurred for the condemned) as a result of the legislative reforms that followed. The aforementioned provision, in fact, provides that the judge can order the suspension or deferment of the sentence and the simultaneous hospitalization in a judicial psychiatric hospital, in a nursing home and custody or, in certain cases, in a civil psychiatric hospital, in cases of mental illness after the sentence that are of such gravity as to prevent the execution of the sentence in prison. This rule reflects an approach to mental illness typical of the time in which it was written, based on the internment and the possibility that the mentally ill prisoners could be removed from prison due to the difficulties that cohabitation with other prisoners, to be confined elsewhere, along with other similarly ill people and with no prospect of re-entry into social life. Although in the absence of a proper repeal, all the institutions to which the standard refers having changed the cultural and scientific model in the treatment of mental health have been disregarded and have become obsolete, If we think of the closure of civil psychiatric hospitals and the law 13 May 1978, n. 180 (Basaglia Law, with "Voluntary and mandatory health assessments and treatments"). [25]. The same fate followed the judicial psychiatric hospitals (OPG) and the care and custody houses, considered unfit to ensure the mental health of those who were hospitalized[26].

While in 2017 the definitive divestment of the OPG took place, the legislator established the residences for the implementation of security measures (REMS), on a regional basis and with exclusive health management, structures, however, not intended to accommodate the convicts in which the mental illness manifests itself subsequently, for which only the inclusion in special «special sections» for persons suffering from physical or mental disabilities or infirmities remained (art. 65 ordering. penit.).

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legitimacy, especially in areas such as criminal law, where the need to ensure effective protection of fundamental rights is most urgent, affected by the choices of the legislator. This is all the more so in a situation such as that which the Court is now being called upon to deal with, which highlights the effectiveness of the constitutional guarantees of persons who are not only deprived of their personal freedom but who are also seriously ill and, therefore, they are in a condition of double vulnerability. In the present case, the referring court considers that the legislation does not offer in the State, an alternative to the execution of the sentence in prison for the detainees suffering from serious mental illnesses that have occurred at the commission of the crime that are in the situation of the applicant prisoner. This is due to an evolution of the legal system that has in fact emptied of all content art.148 cod. pen. , dedicated precisely to the cases of «psychic infirmity which has occurred to the condemned», as the rubric of the same reads. For serious mental patients, imprisonment would be a way of executing the penalty contrary to the sense of humanity and therefore injurious to art. 2, 27, third paragraph, and 32 Costs., in addition to art. 3 of the ECHR which prohibits inhuman or degrading treatment and, therefore, art. 117, first paragraph, Cost. The Court referred to the institution of home detention referred to in art. 47- ter, paragraph 1-ter, orders. penit. an answer already present in the system for prisoners suffering from serious physical disabilities, which, due to the way in which it can be articulated, is constitutionally adequate and suitable to remedy the reported violations, in so far as it would also enable the mentally ill to atone for their sentences outside prison in conditions which would allow the requirements of health protection to be reconciled with those of safety. This is "humanitarian" or "derogatory" home detention, so called because it can also be ordered against prisoners who still have to serve a residual sentence of more than four years (as in the case in point), the limit provided for by art. 47-ter, paragraph 1, orders. penit. as a general requirement to be able to benefit, instead, of "ordinary" home detention.

[25] The opinion of the National Bioethics Committee, «Mental health and psychiatric care in prison», of 22 March 2019, is expressed in this sense.

[26] On the point, C. cost. sentence n.186 of 2015, in Giur. Cost. 2015. Judicial psychiatric hospitals and care and custody houses have been expunged from the legal system (as of 31 March 2015), following a long and cumbersome legislative itinerary, initiated by Article 5 of the Decree of the President of the Council of Ministers 1 April 2008, continued with the art.3-ter of the d.l. 22 December 2011, n.211, converted, with modifications, in the law 17 February 2012, n.9; continued WITH ART. 1, PARAGRAPH 1, LETTER A, DEL D.L. 25 MARZO 2013, N.*24, converted, with modifications, in the law 23 may 2013*, n.57, and terminated with art. *1 del d.l. 31 marzo 2014*, n.52, converted, with modifications, in the law 30 maggio 2014, *n.81. For a preliminary classification of* the theme, cf. , A. *Bernasconi, Request for* revocation of pre-trial detention in prison for health reasons and medical examination regime, in Cass. pen. , 1999, p.3099 sqq. ; G. PIERRO, Institutes of Prevention, in Enc. giur. 1989, I, Rome, p. 3 sqq.

The introduction of REMS in the system did not fill the gap resulting from the closure of OPG, bearing in mind that REMS, as clearly indicated by their very name, are the[27] only recipients of psychiatric patients who have been found not to be liable to criminal proceedings or who have been subjected to a safety measure when convicted of a non-ineffectual crime for a reduced sentence on the grounds of mental illness. The Court, on this point, considered that it could exclude a purely interpretative intervention in order to supplement the provisions of this regulation; also considering the provision of the Delegation Law which provides for the use of REMS, as a matter of priority, for those persons for whom the state of infirmity was definitively established at the time of the commission of the fact from which the judgment of social danger was derived, and in the case of persons for whom the incapacity occurred during the execution of the sentence, of defendants subject to provisional security measures and of all persons for whom it is necessary to ascertain their mental condition, if the sections of the penitentiary to which they are destined are not suitable, in fact, to guarantee the therapeutic-rehabilitative treatments. (art. 1, codicil 16, letter d, of the law n. 103/2017).

The framework provided by the legislation in question has, therefore, led to serious deficiencies and inequalities with clear repercussions on the situation of prisoners suffering from mental illness, having neither the same access to REMS nor to other measures alternative to[28] prison, if they have a remaining sentence of more than four years, such as the applicant prisoner, compared to all prisoners with a remaining sentence of less than four years and who are seriously ill, regardless of the type of physical or mental illness.

The above-mentioned reasons put forward by the Judges of the Council are at the basis of the declaration of unconstitutionality of the rule censured, since, the absence of alternative solutions to prison detention for prisoners suffering from serious psychological illness, constituted a clear violation of the constitutional principles invoked in the remittance order.

With reference to the constitutional provision of art. 32 Cost. and to the related fundamental right to health, no doubt has been raised[29] about the extension of the scope of application of the above-mentioned law also to the hypotheses of psychological as well as physical illnesses, with the consequence that the order is held, in this respect, to provide an identical level of protection and to provide adequate means to ensure that it is effective. On this point, in the reasoned part, the Court has drawn attention to the well-founded risk that mental illnesses may be exacerbated or aggravated precisely because of the prison detention regime, the suffering of which may result, in extreme cases, a real incompatibility between prison and mental disorder; in the most sensitive cases, detention may constitute "inhuman or degrading" treatment for persons suffering from severe mental illness and treatment contrary to the sense of humanity, in full dystonia with the normative dictate of art. 27, third paragraph, Cost..[30]

In the opinion of the Court, the above-mentioned terms clearly contradict Articles 2, 3, 27, third paragraph, 32 and 117, first paragraph, COST. The Court has already stated that the Commission is not in a position to take action. is substantiated precisely in the absence of an alternative to prison which prevents the judge from ordering that the sentence be carried out outside detention institutions, in all cases of psychological suffering incompatible with the ordinary affliction of the prison; Otherwise, a serious violation of the "sense of humanity" and "dignity" would have continued, in the terms mentioned in the introduction.[31]

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[27] This is what art. 3-ter, codicil 2, of the d.l. n. 211 of 2011, introduced from the law of conversion n.9 of 2012 and successively put into effect with decree of the Minister of the health adopted of concert with the Minister of justice 1 October 2012, bearing "Structural, technological and organizational requirements of residential facilities designed to accommodate persons to whom the security measures of admission to a judicial psychiatric hospital and assignment to a nursing home and custody are applied". F. P. C. IOVINO, On the hospitalization of the prisoner in an external place of care, in Cass. pen. 1997, p. 1562; C. VALITUTTI, Il ricovero psichiatrico in carcere: analisi di un'esperienza, in *Il reo e il folle*, nº 4, p. 260.

[28] GIUSTI G., THE *severity of the state of health of the detainee pending trial in relation to the possibility of granting provisional release: medical legal aspects, in Rev. en. med.* leg. *1981, n.3, p.* 709 ff. ; G. GIUSTI, M. BACCI*, Pathology of the prisoner and prison incompatibility, Giuffrè*, Milan, 1991; G. GIUSTI G. - F. FERRACUTI*, Condizioni psichiche dell'imputato e compatibilità carceraria, in* Riv. *it. med. leg. , 1989*, XI, p. 590 ss.

[29] See, to this effect, the judgments C. cost. n.169 of 2017, n.162 of 2014, n.251 of 2008, n.359 of 2003, n.282 of 2002 and n.167 of 1999.

[30]In the language of art.3 of the ECHR, inhuman or degrading treatment.As is also clear from the case law of the European Court of Human Rights (among others, ECHR, Second Chamber, Judgment of 17 November 2015, Bamouhammad v Belgium, paragraph 119, and ECHR, Grand Chamber, judgment of 26 April 2016, Murray v Netherlands, paragraph 105)

[31]On this point, G. Vassalli, Funzioni della pena, in Principi *fondamentali di Medicina Penitenziaria,* 1988, n.2, p.857; M. A. CATTANEO, *Right* penalty and human dignity. Essay on the philosophy of criminal law, GIAPPICHELLI, TURIN, 1998; F. BALDASSARELLI*,* Funzione rieducativa della pena e nuovo processo penale*, in* Riv. pen. *1993, p. 490 ss. ; L. SOLIVETTI,* Società e risocializzazione: il ruolo degli esperti nelle attività di trattamento rieducativo, in Rass. penit. crim. , 1983, p. 259 sqq.

Laconically, the Court also noted that there had been no effect on the warning issued in judgment No 111/1996 that a balanced legislative solution would be found to ensure that persons convicted of and suffering from mental illness the necessary mental health care protected by Article 32 of the Constitution, without necessarily circumventing criminal treatment. In spite of this, the Court did not intend to refrain from intervening in order to remedy the abovementioned breach of constitutional principles. The decision reached by the Court has therefore set itself the objective of ensuring the restoration of a necessary balance between the requirements of[32] public safety and the protection of the right to health of prisoners and to ensure, Also, that no convict is ever forced to serve his sentence in conditions contrary to the sense of humanity, least of all a sick prisoner. In the current legal framework, that of "humanitarian" or "derogatory" home detention, is an alternative measure that can both safeguard the fundamental right to the health of the prisoner - in cases of incompatibility with prison affliction - is to ensure, at the same time, the protection of the needs of the community, from the potential danger of people with certain psychiatric diseases.[33]

The judge will have to make a thorough assessment, case by case and moment by moment, of the individual situation; he or she will have to carry out a check to decide whether the convicted person suffering from a serious mental illness is in a condition to remain in prison or must be sent to an external place, without circumventing public security requirements.[34]

The decision-making measure made by the Council, in line with the wide treatment made in the reasoned part, has oriented itself towards the declaration of constitutional illegitimacy of art. 47-ter, paragraph 1-ter, of the law of 26 July 1975, n. 354, in the part in which it did not provide that, in the case of serious mental illness occurred, the supervisory court could order the application to the sentenced of home detention also in derogation from the limits referred to in paragraph 1 of the same art. 47- ter.

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[32]Per una esame approfondita del diritto alla salute, C. Mortati, *La tutela della salute nella Costituzione italiana,* in Raccolta *di scritti,* III, Giuffrè, Milano, 1972; A. MORRONE - F. MINNI., The right to health in the jurisprudence of the Italian Constitutional Court, op. cit. ; D. MORRANA, *Health in the Italian Constitution*, Giuffrè, Milan, 2002;P. PERLINGIERI - P. PISACANE*, sub art. 32 Cost.*, in P. Perlingieri (a cura di), *Commento alla Costituzione italiana*, Esi, Napoli, 2001, p. 203 ss. ; L. CARLASSARE, *Art. 32 of the Constitution and its meaning,* in The *Health Administration*, by R. ALESSI, Neri Pozza, Vicenza, 1967; M. BOTTARI, *Constitutional* principles and health care, Giuffrè, Milan, 1991.

[33] Introduced by Law no. 663 of 10 October 1986 (Amendments to the Law on the Penitentiary System and on the Execution of Privative and Restrictive Measures), the home detention has been extended over time as to the scope and partially redesigned in its purpose, both by interventions of the legislature and by decisions of the Court itself responding to a unified and indivisible logic (Judgments No 211 of 2018 and No 177 of 2009). It constitutes "not an alternative measure to the penalty", but an alternative penalty to detention or, if you want, a method of execution of the penalty", and is accompanied by "prescriptions limiting freedom, under the supervision of the supervisory magistrate and with the intervention of the social service" (Ordinance No 327 of 1989), thus differing from the simple release of the prisoner that follows the postponement of the execution of the sentence ordered on the basis of art. 146 and 147 cod. pen. It does not, therefore, simply mean a return home or even less a return to freedom, being always accompanied by severe limitations of personal freedom (think of the conditions and modalities of development decided by the judge who identifies the place of detention, also different from his own home. In addition, there will be a check at any time on compliance with the requirements imposed and interventions of the social service. In the MATTER OF PERSONAL FREEDOM, CF. A. BARBERA*, Constitutional* principles OF PERSONAL FREEDOM, GIUFFRÈ, *Milan, 1967; P. F.* Grossi, *Constitutional law between principles of freedom and institutions, Cedam*, Padova, 2005, p. 1 ss. ; G. AMATO, Individual and authority in the discipline of personal freedom, Milan, 1967; Id., *Comment on art. 13 Cost.,* in Comm. *Cost.* Branca, Bologna, 1977; P. CARETTI, *Libertà personale, in* Dig. *disc. pubbl. , Torino* 1994, pp. 231 ss. ; Id., *The discipline of personal freedom in the most recent legislative developments, in New* dimensions in the *rights of freedom. Written in honour of P. Barile*, Padua, 1990, pp. 235 ff. ; A. PACE, *Libertà personale (diritto costituzionale), in Enc.* dir.*, vol.* XXIV, Milano, 1974, pp. 287 sqq. ; G. VASSALLI, *La libertà personale nel sistema delle libertà costituzionale, in Scritti GIURIDICI IN* memoria di P. Calamandrei*, Padova 1958*, pp. 363 sqq. ; Id., *Personal* liberty of the accused and protection of the community, in Giust. *pen. 1978,* LXXXIII, p.1 ss. ; G. CONSO, *La libertà provvisoria a confronto con le esigenze di tutela della collectività, ovvero la 'legge Reale' tra politica e diritto, in Giur.* cost. *1980, XXV*, pp. 470 ff. ; A. DE CARO, *Libertà personale (profili costituzionale), in Dig.* disc. *pen. , 2005*, Agg., vol. III, Utet, Torino, 2005; L. ELIA, M. CHIAVARIO, (edited by), *La libertà personale, Utet*, Torino 1972; C. FIORIO, Freedom and right to health, Cedam, Padova, 2002, p. 9-10.

[34] In conclusion, it should be stressed that, also in the light of the most recent jurisprudence of legitimacy, the "humanitarian" home detention offers the judge a possibility to activate when conditions allow it, on the basis of an overall assessment which cannot be disregarded by the judgement of danger impeding extra-masonry treatments, appropriately renewed and updated in parallel with the evolution of the health and personal condition of the prisoner (Cf. Corte di cassazione, sezione prima penale, sentenza 28 novembre 2018-4 marzo 2019, n. 9410). On the subject, v. SICA G., CICCONI P.M.*, Funzioni sanitari e trattamentali nell'ambito delle istituzioni penitenziarie*, in *Principi fondamentali di Medicina Penitenziaria*, n.19, p.36;PANUNZIO S. P., Mandatory Health Treatments and Constitution, in *Dir. soc.* 1979, p. 875 sqq.

The person shall be an inseparable union of body and spirit and any situation of extreme physical constraint, lack of effective protection and recognition of essential goods shall result in a serious breach of the human dignity which he or she generates in the person who suffers him or her, feelings of revenge and contempt for society, thus breaking the principle of the re-education of punishment and undermining the necessary process of social reintegration. Brief concluding considerations certainly lead us to grasp the positive profiles in the pronunciation under consideration, this is an opportunity well received by the Constitutional Court to eliminate the undue inequality of treatment between the prisoner with a physical illness and that affected by the onset of a mental illness. It is undeniable that the prison itself is a producer of suffering and mental illness, if we consider the enormous use of psychopharmaceuticals that is recorded in prison, A place where there are many prisoners with a certified mental illness who could finally be treated appropriately, outside of such a highrisk environment for psycho-physical health. From the sentence comes also indirectly a warning to improve the conditions of detention and the entire offer of health within the prisons, being there a very close link between the quality of life in the institutions and the onset of psychic suffering.

With extreme objectivity, on the other hand, it must be pointed out, however, that the decision itself can only be a starting point, with unresolved issues that integrate unequal treatment and blatant violations of constitutional precepts. Among the criticisms that still remain - reiterating that the pronunciation represents an unquestionable indication of strengthening in the protection of the mental health of the detained - we merely point out that in the final part of the reasoned part, the Court, highlighting the obligations of the common judge to carry out a rigorous evaluation of the clinical picture of the prisoner suffering from mental illnesses, always entrusts the judge with the assessment of the prevalence of "public safety requirements" in relation to the above-mentioned pathological psychic picture, even if it is ascertained in its severity. So, if the home detention is not considered by the judge sufficiently adequate to contain the danger of the prisoner, the conclusion that the Court has reached laconically appears to be resigned to the permanence of the subject in a state of prison restriction.

The doubt remains, object of endless interpretative disputes also consequential to some jurisprudential pronouncements, whether it is legitimate and reasonable to strike a balance between the right to health and other fundamental rights that are worthy of protection, and whether solutions can be found which even result in the former being sacrificed to others[35].

It is, therefore, only a first step, aware of how far there is to go, certain that the dignity of the person must always be assured that "archidemic point" of the entire constitutional system of rights and powers and that[36] that role of "Metadiritto" and the North Star that guides the recognition of new fundamental rights.[37]

[35]An accurate analysis on the criterion of reasonableness, in A. MORRONE, The *guardian of reasonableness,* Giuffrè, Milan, 2001; A. RUGGERI., *Interpretazione costituzionale e ragionevolezza,* in Poteri*, garanzie e diritti a sessanta anni dalla Costituzione*, Scritti per G. Grottanelli De' Santi, edited by A. PISANESCHI -L. VIOLINI, Giuffrè, Milano, 2007.

[36]The expression is by G. Silvestri, LA DIGNITÀ *umana dentro le mura del carcere, in Rivista* AIC, *2014, fasc.* 2, p. 1.

[37]The definition is by A. Ruggeri, LA DIGNITÀ *dell'uomo e il diritto ad avere diritti (profili problematici e ricostruttivi), op. cit.* p. 1 ss.