JUDGMENT NO. 122 YEAR 2017

In this case the Court heard a referral order from a Supervisory Judge (the functions of whom in part coincide with those of a Parole Board in the United Kingdom's and the United States' criminal justice systems) questioning the constitutionality of a legislative provision that allowed prison administrations to prohibit prisoners from exchanging books and other print publications (such as magazines, newspapers, and journals) with persons outside the prison. The provision allowed prison administrations to adopt this measure as one of the many measures that could apply to prisoners subject to special, more stringent prison rules intended to sever ties between them and criminal organizations. It was intended specifically to prevent prisoners subject to the special rules from exchanging secret messages with people on the outside by hiding the messages in the printed texts. The referring judge alleged that this was unconstitutional for three reasons: first, it bypassed the reserve to the judiciary to order restrictions on prisoner correspondence; second, it compromised prisoners' rights to information and study; and, third, it violated international rules forbidding inhuman or degrading treatment and vouchsafing the right to respect for family life and correspondence.

The Court accepted the question, holding that the formation of a "living law" had taken place through rulings of the Supreme Court of Cassation on this topic, according to which prison administrations were legally authorized to forbid prisoners subject to the special rules to send and receive print publications, and that the referring judge was, therefore, not bound to form a different interpretation that was more closely aligned with constitutional principles, but was free to refer the constitutional question.

Then the Court ruled that the questions were unfounded. The Court held that the transmission of books and other printed materials could not be classified as "correspondence" and that the right to correspondence was adequately protected by the allowable methods for corresponding, understandably limited according to the reasonable limits associated with incarceration. It also rejected the argument that the prisoners' rights to information and study were compromised, holding that the Constitution guarantees prisoners a right to choose and acquire texts by which to inform and educate themselves, but that the means of acquiring such texts are not dictated by constitutional rights. The challenged rule did not restrict the rights of prisoners to receive publications of their choice, but obliged them to obtain such material through the prison system rather than from friends and relatives.

The Court rejected the referring judge's allegations based on international law, holding that the absolute ban on inhuman or degrading treatment could not be circumvented even by judicial order, and so such an allegation was clearly incongruous with the referring judge's conclusion that the measure would be valid if ordered by a judge. The Court also observed that even more restrictive measures had been ruled allowable and reasonable by international courts interpreting the conventional rule on inhuman and degrading treatment. With regard to the international rule guaranteeing respect for private and family life, home, and correspondence, the Court ruled that the three conditions required by international law for restricting these rights were met in the case of the challenged measure.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 41-*bis*(2-*quater*)(a) and (c) of law no. 354 of 26 July 1975 (Regulations concerning the prison system and the execution of measures that restrict or deny freedom), initiated by the Supervisory Judge [*Magistrato di*

sorveglianza] of Spoleto, during supervision of the execution of the sentence of E.C., with a referral order of 29 April 2016, registered as no. 108 of the Register of Referral Orders 2016 and published in the Official Journal of the Republic no. 22, first special series, of 2016.
Considering the entry in appearance of the President of the Council of Ministers;
having heard from Judge Rapporteur Franco Modugno in chambers on 8 February 2017.

[omitted]

Conclusions on points of law

1. – The Supervisory Judge of Spoleto questions the constitutionality of Article 41-*bis*(2-*quater*)(a) and (c) of law no. 354 of 26 July 1975 (Provisions concerning the prison system and the execution of measures that restrict or deny freedom) (hereinafter *ord. pen.*), in the part in which – according to the "living law" – "it allows the prison administration to adopt, among the measures for elevated internal and external security intended to prevent the prisoner subject to special rules from having contacts with the criminal organization to which he or she belongs or currently refers, the prohibition upon receiving from outside or sending to the outside books or print publications."

In the opinion of the referring judge, the challenged rule violates Article 15 of the Constitution, which reserves the establishment of any restrictions to the freedom and confidentiality of correspondence and every other form of communication to laws and acts having the force of law and to the judiciary. Indeed, the restriction under review is justified not by the contents of the printed texts intended for general readership, but in light of the possibility that books and print publications may be used as vehicles for illicit communications between the prisoner and the criminal organization to which he or she belongs. As a result, the restriction in question allegedly cannot be imposed without close examination by the judicial authority, under Article 18-*ter* of the *ord. pen*., for purposes of restricting and controlling correspondence.

The challenged provision allegedly also violates Articles 21, 33, and 34 of the Constitution, since the prohibition on receiving publications from outside, making them harder to obtain, would compromise the rights of the prisoner to information and study, without there being a corresponding appreciable increase in the protection of the countervening requirements of order and safety, which would already be adequately protected by the more flexible mechanism outlined by the aforementioned Article 18-*ter ord. pen*.

Finally, the referring judge alleges the violation of Article 117(1) of the Constitution, in reference to Articles 3 and 8 of the European Convention on Human Rights done in Rome on 4 November 1950, ratified and made executive with Law no. 848 of 4 August 1955 (hereinafter ECHR), which respectively forbid inhuman or degrading treatment and guarantee to every person the right to respect for private and family life and correspondence. In the referring judge's view, the possibility to receive books and print publications from outside, particularly from one's relatives, and to send such material to them is, for a prisoner subjected to the onerous restrictive regime prescribed by Article 41-*bis ord. pen*., a particularly precious tool for maintaining social relationships and bonds of affection, the denial of which would be, for the reasons described, disproportionate to the very aims of the special rules themselves.

2. –The questions under this Court's review pertain to the ways in which restrictions upon the acquisition and circulations of books, print publications, and printed materials in general may be established with regard to prisoners under the special regime of suspension of the rules of treatment, provided for by the Ministry of Justice under Article 41-*bis*(2) *ord. pen*.

2.1.– This regime is intended to address needs pertaining to the protection of order and safety outside the prison and connected with the fight against organized, terroristic, and conspiracy-related crimes by inhibiting, in particular, the bonds between prisoners who belong to criminal organizations and between these prisoners and the members of these organizations who are outside. These bonds could manifest themselves through contacts with the outside world, which the prison system generally encourages as tools for reinsertion into the fabric of

society (Judgment no. 376 of 1997; Orders no. 417 of 2004 and 192 of 1998). The intention is, above all, to prevent incarcerated members of an organization from exploiting the ordinary prison rules in order to "continue to issue instructions to affiliates who are not in prison, thereby maintaining control over the criminal activities of the organisation also from prison" (Judgment no. 143 of 2013).

In light of this, section 2-*quater* of Article 41-*bis ord. pen.* – in the text updated by Law no. 94 of 15 July 2009 (Provisions on public safety) – after having provided in general terms that the special rules involve "the adoption of measures of heightened security both internal and external," chiefly intended to "prevent contacts with criminal organizations of membership or current reference" of the prisoner or inmate, as well as "clashes with members of rival organizations and interaction with other prisoners or inmates who belong to the same organization or other organizations that are allied with it" (letter a), the section lists a series of specific measures representing the typical and necessary contents of the rules themselves. In particular, the list includes drastic restrictions on face-to-face conversations (limited to once a month, with only relatives and members of the same household, except in exceptional cases, in settings organized so as to prevent the exchange of objects) and telephone conversations (limited to one per month with relatives and members of the same household lasting no more than ten minutes, only for inmates who do not have face-to-face visits), with auditory and videotape surveillance in both cases (letter b). It also includes the "limitation of the quantities, the goods, and the objects that may be received from the outside" (letter c); the submission of correspondence to censorship (letter e); and the adoption of measures that assure "the absolute impossibility to communicate between inmates belonging to different social groups" (letter f).

2.2. – The facts that gave rise to the constitutional question under review fit into this framework.

For the stated purpose of "protecting the preventative needs that underlie the [different] set of rules," the Prison Administration Department of the Ministry of Justice issued a circular on 6 November 2011 (with identification number 8845/2011), containing a set of provisions concerning the entry, circulation, and seizure of printed materials within the sections of prison institutions dealing with prison inmates to whom the special rules apply. According to the circular's introduction, the initiative was sparked by the discovery that a certain inmate had succeeded in avoiding censorship of his correspondence by exchanging books, print publications, and voluminous legal documents containing encrypted messages with family members. These messages were difficult for authorized personnel to check, not least of all on account of the sheer quantity of text to verify. To avoid that such episodes should recur, the central administration urged prison administrators to conform to a set of rules, including the one that has become the focus of the referring judge's complaint: that is, it established that any kind of authorized printed material (newspapers, magazines, books) could be acquired by inmates subject to the special rules only within the prison, through the maintenance staff or personnel delegated by the administrators. At the same time, the reception of books and print publications coming from outside was forbidden, in particular from family members, both through the mail and through delivery during visits, as well as the transmission of these materials from the inmate to the outside.

2.3.– Some supervisory judges, in response to complaints, have ceased the application of the ministry's circular here described.

According to a portion of their decisions, the provisions allegedly violate the prisoners' rights to study and have access to information, establishing punishing obstacles to the acquisition of the texts necessary for the exercise of these rights.

Relying on other grounds – to which the referring judge also calls attention – they allege that the circular impacts the freedom of correspondence, enshrined in Article 15 of the Constitution, thus invading an area that falls under the guarantee of reservation to the judicial authority. Reasoning in this way, the restrictions in question should not have been established

in a general way by the prison administration, but only by judicial authorities, and for individual cases, in conformity with the provisions of Article 18-*ter ord. pen*., which implement the aforementioned constitutional guarantee within the prison context. The provision mentioned, introduced by Article 1 of Law no. 95 of 8 April 2004 (New provisions for the inspection of prisoner correspondence), provides, in particular, under the heading "Restriction and inspection of correspondence," that "[f]or reasons relating to investigatory or preventative inquiries concerning convicts, or for reasons of security and order in the institution," the judicial authority indicated in section 3 of Article 18-*ter ord. pen*. may order, with regard to individual prisoners, and for set time periods (which may be extended), three kinds of measures: restrictions on written and telegraph correspondence and on the reception of printed materials (letter a); subjection of correspondence to the inspection and stamp procedure (letter b); and, finally, inspection of the contents of the envelopes that contain correspondence, without, however, reading them (letter c). It also falls under the jurisdiction of the judicial authority to order the potential holding of correspondence and printed materials that the authorities determine, after inspection, to be inappropriate for delivery or for sending to the intended recipient (Article 18-*ter*(5) *ord. pen*.).
2.4.– However, the provisions of disapplication of the Ministry's circular were systematically annulled by the Supreme Court of Cassation.
Ruling solely on points of law, that Court observed that the particular restrictions that apply to prisoners under the special rules are provided by the prison system and defined by the ministerial decree that orders the special rules, subject to judicial review, under Article 41-*bis*(2-*sexies*) *ord. pen*. Nevertheless, a "regulatory power" would remain for the prison administration to carry out the concrete application of the restrictions: a power it must exercise with respect for the general principles of the legal system, without rendering the prisoners' special treatment unnecessarily burdensome and without unnecessarily compromising the constitutional rights that are guaranteed even to prisoners (for all, see Supreme Court of Cassation, First Criminal Section, Judgment no. 41760 of 22 September-7 October 2014 and Supreme Court of Cassation, First Criminal Section, Judgment no. 46783 of 23 September-22 November 2013).
The Court held that the ministry circular stayed within these guidelines, in that it merely gave effect to the restrictions provided for by law and by ministry provisions (Supreme Court of Cassation, First Criminal Section, Judgment no. 50158 of 16 October-1 December 2014) and is consistent with the purposes of the special rules (Supreme Court of Cassation, First Criminal Section, Judgment no. 314 of 17 December 2014-8 January 2015).

The Court maintained that the measures adopted by the Prison Administration were justified in light of a fact emerging from the "long-term experience of the concrete incidences within the specific sector:" that is, that "books, newspapers, and printed material in general [are] very often used by prisoners to carry out illegal communications with the outside, […] receiving or sending encoded messages […] which, on the one hand, do not interrupt (and can also foster) criminal-type communications, and, on the other, constitute concrete dangers for the internal order of the institutions." Such a phenomenon is capable of undermining the basic functions of the special rules of incarceration (Supreme Court of Cassation, First Criminal Section, Judgment no. 6889 of 16 October 2014-17 February 2015; Supreme Court of Cassation, First Criminal Section, Judgment no. 42902 of 27 September-18 October 2013).
Moreover, the Court said that the equitable balancing of constitutional values was not damaged. The ministerial provisions, it stated, do not significantly prejudice the prisoner's right to study and have access to information through reading texts: indeed, they do not provide any restrictions on the reception of such materials, but limit only the way in which they are sent and received. Leaving untouched the prisoners' freedom to choose books and print publications, it requires that these be acquired through "secure channels" (the

maintenance staff or the personnel delegated by the prison administrators), so as to prevent them from being used as a way of circumventing the restrictions associated with the special rules, particularly by exchanging encrypted messages not easily identified by the personnel authorized to carry out inspections (Supreme Court of Cassation, First Criminal Section, Judgment no. 32469 of 7 April-23 July 2015); Supreme Court of Cassation, First Criminal Section, Judgment no. 50156 of 16 October-1 December 2014), in part because of the sheer quantity of material to check and the wide variety of techniques that may be used for the purpose (not only adding notes, but also underlining key words, adding modified pages printed by compliant typographers, and so on).

The Court of Cassation also held that the prisoners' freedom of correspondence was not compromised. Even for those prisoners subject to the special rules, restrictions on their correspondence – including subjecting it to inspection and censorship, as provided by Article 41-*bis*(2-*quater*)(e) *ord. pen*.) – must be ordered according to the forms indicated by Article 18-*ter ord. pen*. and, therefore, only by the judicial authority (see, among others, Supreme Court of Cassation, First Criminal Section, Judgment no. 43522 of 20 June-17 October 2014). Nevertheless, the reception and exchange of printed materials cannot be placed within the concept of "correspondence" (strictly construed). Indeed, Articles 18 and 18-*ter ord. pen*. clearly distinguish between prisoners' right to have letter and telegraph correspondence and their right to receive and keep printed materials (Supreme Court of Cassation, First Criminal Section, Judgment no. 19204 of 3 March-8 May 2015); Supreme Court of Cassation, First Criminal Section, Judgment no. 6889 of 16 October 2014-17 February 2015). Rather, the ordinary notion of "correspondence" addressed by the legislator evokes a form of communication of one's own thought addressed to specific people through writing, which takes the place of verbal and instrumental communication in maintaining interpersonal and emotional relationships, which has been defined as "inviolable" at the supranational level, even with regard to the most severe restrictions of personal freedom. This notion, the Court said, does not, therefore, include the reception of publications – such as books and journals – from the outside via the postal service, which contain the thoughts of third parties, which would fall outside the guarantee contained in Article 15 of the Constitution and belong to another of the prisoner's abilities, that of informing and instructing him- or herself (Supreme Court of Cassation, First Criminal Section, Judgment no. 1774 of 29 September 2014-15 January 2015).

Nor, under this reading, would it be valid to object that Article 18-*ter* (1)(a) *ord. pen*. requires the intervention of judicial authorities when it comes to restrictions on the reception of printed materials. This would not exclude other kinds of restrictions ensuing from the application of the special rules under Article 41-*bis ord. pen*., which, in this context, would take on the significance of a special, exceptional rule. The highest level of dangerousness of a prisoner, sanctioned by ministerial measures adopting the special rules (subject to judicial oversight), justifies the measures contained in section 2-*quater* of Article 41-*bis*, which include those geared to prevent contacts with the criminal organization to which the prisoner belongs (letter a) and those that deal with restricting the "objects" that may be received from the outside (letter c). The Court held that the category of "objects" would undoubtedly include books, print publications, and daily newspapers (Supreme Court of Cassation, First Criminal Section, Judgment no. 1774 of 29 September 2014-15 January 2015).

The Supreme Court of Cassation also pointed out that refusing to deliver mail packages containing books or print publications sent to prisoners from the outside also does not amount to "withholding" printed materials, which Article 10-*ter*(5) *ord. pen*. refers to judicial authorities, in any case. Unlike withholding, the refusal to deliver the items does not remove the printed materials from either the sender or the intended recipient, but merely has the effect of not allowing books and print publications to enter into the institution, leaving in place the sender's ability to reclaim and recover the materials at any time. According to the Court,

therefore, this amounts to a simple "rejection" (Supreme Court of Cassation, First Criminal Section, Judgment no. 50158 of 3 October 2013-27 February 2014), similar to that which the prison administration may order in general when a mail package or the objects contained therein do not conform to the prison system rules or to the provisions of the internal rules of that institution.

In conclusion, the Supreme Court of Cassation held that the ministry circular falls within the powers conferred by law upon the prison administration and exercises them according to "a systematic and opportunity-based logic" which could not fall within the jurisdiction of ordinary judges "without invading – […] impermissibly – the sphere of […] discretion of the Public Administration" (Supreme Court of Cassation, First Criminal Section, Judgment no. 42902 of 27 September-18 October 2013).

In view of the emergence of the trajectory taken by the Court mentioned above, the Prison Administration Department issued a new circular on 11 February 2014, reinstating the provisions of the circular the non-application of which had been ordered, and giving rise to the complaint being heard by the referring judge in the underlying proceedings.

3.– In light of the above, the State General Counsel's objection that the questions are inadmissible on the grounds that they aim to "circumvent" the trajectory of the case law on legitimacy that go against the non-application of the circular is clearly not founded.

In reality, the referring judge notes the consolidation of this trajectory and, for that very reason, raises questions concerning the constitutionality of the rule on the basis of which the circular itself was adopted.

According to what this Court has held time and again, where a consolidated trajectory of cases exists, the referring judge – although free to not conform to it and to propose a different interpretation of the rule, since the "livingness" of a rule is, by definition, not settled, all the more so when it is a matter of adapting the meaning to constitutional precepts – alternatively has the ability to assume the challenged interpretation in terms of "living law" and to request, on that presumption, review of its compatibility with constitutional parameters (see, among others, Judgment no. 242 of 2014 and Order no. 191 of 2013; similarly, see Judgments no. 200 of 2016 and 126 of 2015).

In the case under review, considering the number and the unanimity of the decisions by the Supreme Court of Cassation on the topic, it cannot be denied that – in line with what the referring judge claims – the formation of a "living law" has taken place, according to which Article 41-*bis ord. pen*., and, in particular section 2-*quater*(a) and (c) thereof, permits the prison administration to forbid prisoners under the special rules to send and receive books and print publications to and from the outside. As a result the idea that the referring judge should have opted for a different interpretation, which would better adhere to the constitutional parameters invoked, must be rejected (an interpretation that the referring judge had, moreover, already and unsuccessfully attempted in the past), since this duty only exists in the absence of a contrary "living right" (Judgment no. 113 of 2015).

4.– With regard to the merit of the questions, the overall tenor of the referral order clearly reveals that the referring judge does not doubt the possibility to introduce, for reasons of order and security, restrictions on the acquisition and exchange of books and print publications on the part of the prisoners under the special rules. The constitutional questions regard – in relation to all the constitutional parameters invoked, not just Article 15 of the Constitution – the way in which the restrictions are applied. In the referring judge's view, these cannot be ordered by the prison administration, but only by the judge with an intervention adapted to individual cases, according to the timeframes outlined by Article 18-*ter ord. pen.*

Considering this, nevertheless, the questions are not founded.

5.– The unfoundedness of the referring judge's theory is immediately apparent with regard to the alleged violations of the freedom of expression of thought (Article 21 of the Constitution), understood in its passive meaning as the right to be informed (see, among many, Judgments

no. 112 of 1993, 826 of 1988, and 148 of 1981), and the right to study (Articles 33 and 34 of the Constitution): issues that, for convenience of the analysis, it is fitting to address first.
Within the prison regulations, the constitutional guarantee found under Article 21 of the Constitution is specifically implemented (with regard to printed materials) in the provisions of Article 18(6) *ord. pen.*, which authorizes prisoners "to keep with them the daily newspapers, periodicals, and books that are freely sold on the outside," and the closely related contents of Article 18-*ter*(1)(a) *ord. pen.*, by virtue of which restrictions "on the reception of printed materials" may be ordered only by the judicial authority, for the reasons and according to the ways indicated. In this way, the administrative authority is forbidden to institute a ban on printed materials, preventing prisoners from accessing certain publications for reasons of their contents: an operation that would compromise the inmates' right – which is unimpeded by their incarcerated state – to freely know the expressions of thought that are circulating in society outside. The protection – which is as constitutional as it is legislative – therefore, refers to the prisoner's ability to freely choose the texts with which to be informed, while the means by which the prisoner is guaranteed the right to acquire the desired publications remain immaterial.
A similar reasoning, *mutatis mutandis*, clearly applies to the right to study, which is also explicitly recognized by the prison system rules, as a primary component of the rehabilitative process (Article 19 *ord. pen.*, Articles 41 et seq. of d.P.R. no. 230 of 30 June 2000, entitled "Regulations concerning the prison system and the execution of measures that restrict or deny freedom," hereinafter *reg. esec.*).
In line with the Court of Cassation's case law on legitimacy, the measure that, according to the "living law," may be adopted by the prison administration on the basis of the challenged rule does not restrict the right of prisoners subject to the special rules to receive and keep publications of their choice, but rather only affects the means through which such publications may be acquired. Prisoners are not prevented from accessing their preferred reading material and its contents, but are obliged to make use of the prison institution to acquire them, with an aim to avoid that – as has happened in past experience – a book or magazine is transformed into a vehicle for hidden communications with the outside, which are difficult for the authorized personnel to identify.

Moreover, a constitutionally acceptable compromise of the rights in question cannot derive (as the referring judge assumes) from indirect (and marginal) effects connected with the "bureaucratization" of the channels for furnishing publications, such as blocking the use of out-of-print books or photocopied printed materials, or for considerations tied to the impossibility of making costs savings by purchasing used books (which the designated personnel could not go looking for). These inconveniences, real though they may be, would in any case be reasonably justified in light of the requirements of the special rules.
It also still stands that the measure under review, in its concrete application, must not become a surreptitious denial of the right. At the same time that it obliges prisoners to avail themselves exclusively of the prison institution to acquire printed materials, the administration takes on the duty to provide an efficient service, avoiding undue delays and "de facto barriers," which, in substance, frustrate the prisoner's legitimate expectations. The Supreme Court of Cassation has already clearly expressed its affirmation of this: books and print publications – all books and all print publications – must reach the prisoners who have requested them within a reasonable time; this is a matter over which a Supervisory Judge may exercise its oversight function (Supreme Court of Cassation, First Criminal Section, Judgment no. 6889 of 16 October 2014-17 February 2015). In any case, potential damage to the rights of the prisoner may derive not from the rule, but from improper behavior on the part of the prison administration that is called upon to apply it, therefore falling outside the scope of constitutional review.

6.– The challenge based on an alleged violation of the freedom of correspondence (Article 15 of the Constitution) is equally unfounded.

The challenge turns upon the assumption that, contrary to what the Supreme Court of Cassation has held, the transmission of books and reviews would come under the constitutionally relevant concept of "correspondence." The referring judge does not argue that books and print publications, despite containing concrete expressions of ideas or written narration of news events, amount to "correspondence" as such, or, more broadly, forms of "communication" under Article 15 of the Constitution. Indeed, it is well-settled that the communications protected by the cited constitutional norm – of which "correspondence" is one type, as the use of the undefined adjective "other" denotes ("The freedom and confidentiality of correspondence and of every other form of communication are inviolable") – consist in the transmission of ideas, feelings, and news from one person to one or more other specific people. If the recipients are non-specific – as is the case for books and print publications, which are addressed to an unspecified collectivity of potential readers – it falls under a different sphere of constitutional protection: that of the free expression of thought (Article 21 of the Constitution).

Nevertheless, the referring judge objects that the sending (or the passage from hand to hand) of a publication may serve not (only) as a tool for spreading the thought of its author (who is a third party with respect to the directly interested persons), but (also) as a vehicle of communication of an idea belonging to the sender, which is directed specifically and exclusively to the recipient. By sending a book or magazine, people may indeed express feelings of closeness, affection, or support for the prisoner; messages both hidden and clear may be found in the printed text, of various types, legal and illegal. The ban established by the Ministry circular is, indeed, justified precisely by the possibility that books and print publications serve as tools for communication between the prisoner and the outside world. This gives rise to the purported need, with deference to the reservation not only of law, but also of jurisdiction, under Article 15 of the Constitution in relation to restrictions on the freedom of correspondence, that the denial of that "communication flow" be ordered by the judicial authority in the forms and with the requirements provided for by Article 18-*ter ord. pen*.

The impossibility of adopting the referring judge's hypothesis is clear from the simple observation that, if it were well-founded, one would also need to recognize, in the name of freedom of correspondence, that the prisoner has the right to exchange with the outside world, with no restrictions whatsoever unless there is a specific, restrictive order coming from the judicial authority, not only books and print publications, but any form of object. The supposed suitability to act as vehicles of communication of ideas, feelings, and news between the sender and the recipient is not at all an exclusive characteristic of printed publications; any object may abstractly lend itself to assume – by virtue of a prior agreement, because of its inherent symbolic value, or simply because of the interpersonal relationship between the parties – a specific communicative meaning, when not also to act as an "anomalous" substitute for the usual paper format for setting down messages, or as a container for concealing them inside. And since the possibility that such a purpose cannot be on the whole ruled out *a priori* – just as in the case of printed materials – a indiscriminate freedom of circulation of goods between the prison and the outside world would necessarily derive from it.

Also recognizing, moreover, that, in light of the broad formula found in Article 15 of the Constitution, communications fall under the protection of the constitutional rule irrespective of the material means used for the transmission of ideas – and, therefore, even if they are carried out "in real form," that is through an exchange of "meaningful" objects – one cannot avoid considering the particular conditions of an incarcerated person.

In this regard, it bears reiterating the well-established position taken by this Court's case law, according to which legitimate restrictions of personal freedom, to which incarcerated persons are subject, in no way cancels out the constitutional protection of their fundamental rights. A person in an incarcerated state, although deprived of most of his or her freedom, always keeps a remainder thereof, which is all the more precious in that it constitutes the final sphere in which his or her individual freedom may expand (Judgments no. 20 of 2017 and 349 of 1993), and the exercise of which cannot, for this very reason, be relegated to the discretion of the administrative authority in charge of carrying out the prison sentence (Judgments no. 26 of 1999 and 212 of 1997).

The protection of prisoners' constitutional rights, nevertheless, operates "with the restrictions that, as is obvious, the state of imprisonment necessarily involves" (Judgment no. 349 of 1993). The legitimate restriction of personal freedom to which the incarcerated person is subject, and which is undergirded by a jurisdictional provision, has an inevitable impact (be it more or less significant) on the ways in which the other freedoms constitutionally connected with the first may be exercised. This is also true for freedom of communication, which, under the current appraisal, represents – like the freedom of the home (Article 14 of the Constitution) – a supplement to and specification of the fundamental principle of the inviolability of the person, under Article 13 of the Constitution, as an expression of the "sociability" of the human being, that is of the natural human aspiration to form spiritual connections with their counterparts.

Thus, it is clear that the state of incarceration has a bearing in restrictive sense on prisoners' ability to engage in direct conversations with persons outside the prison environment: conversations that, as communications between present parties, certainly fall within the sphere of protection under Article 15 of the Constitution. As a matter of necessity, prisoners' personal conversations "are subject to limitation and regulation on the part of the prison system" (Articles 18 *ord. pen*. and 37 *reg. esec*.) (Judgment no. 20 of 2017) and it is the prison authority that, in the concrete, establishes (particularly through the internal rules of the institution: Article 36(2)(f) *reg. esec*.) the places, the days, and the hours in which they may take place, without this amounting to a violation of the constitutional rule invoked.

It is irrefutable that the highlighted restrictions on direct conversations – which become extremely pronounced for prisoners subject to the special rules – enhance the importance of the long-distance forms of communication, or "between absent parties," as the tool for maintaining the interpersonal and emotional relationship of prisoners, in order to avoid turning imprisonment into absolute isolation from the outside world and, in this way, into inhuman treatment (Article 27(3) of the Constitution). Nevertheless, the means by which the freedom to communicate with the outside world is exercised – a freedom that is not eliminated by imprisonment but that must, on the contrary, be necessarily and adequately guaranteed – are also affected by imprisonment.

Most directly on account of organizational and logistical requirements, even more than those of order and security, placement in a prison institution necessarily involves the denial of a prisoner's unlimited freedom to receive and exchange objects. The law of the prison system and the rules of carrying out sentences effectively dictate – in the name of the needs mentioned above, in addition to that of assuring the equality of the living conditions of prisoners (Article 3 *ord. pen*.) – rigorous quantitative and qualitative restrictions on the objects that may be received from outside, acquired, and kept in the possession of the incarcerated individuals (objects the detailed description of which is then delegated to the internal rules of the individual institutions), as well as the number, frequency, and content of packages sent by mail or delivered to these individuals during face-to-face meetings (Articles 7 and 8 *ord. pen*., Articles 8, 9, 10, 14 and 40 *reg. esec*.).

Relatedly, it is natural that freedom of correspondence be recognized to prisoners inasmuch as it is carried out through the ordinary tools of communication, and not in the unusual forms of

direct exchange or by mailing of objects that have a conventional meaning, or are extemporaneous substitutes for the usual paper method.
The prison system allows, in particular and among other things, for prisoners to have correspondence by letter, except for the restrictions connected with the need to rely upon the prison administration to sort the mail (Judgment no. 20 of 2017): the same goes for prisoners subject to the special rules, except as prescribed in accordance with the inspection stamp procedure. In line with the positive obligation that, according to the European Court of Human Rights (hereinafter ECtHR), derives from Article 8 of the ECHR (ECtHR *Gagiu v. Romania*, 24 February 2009, and *Cotlet v. Romania*, 3 June 2003), the prison administration is also obliged to provide the necessary tools – in particular writing materials and postage – to those who are without them (Article 18(1) and (4) *ord. pen*., Art. 38 *reg. esec*.).
The concurrent recognition, through Articles 18 and 18-*ter ord. pen*., of prisoners' right to receive (including by mail) and keep printed materials freely sold on the outside is clearly unrelated. As already stated above, this recognition does not derive from the fact that printed materials amounts to (or better, may amount to) a form of correspondence in the sense that the referring judge suggests, but derives rather from the consideration that books, print publications, and newspapers represent the tool for the exercise of different prisoners' rights, those of information and study: rights that, as we have seen, cannot be considered to be compromised in a constitutionally significant way – referring to prisoners subject to the special rules – by the introduction of restrictive rules that deal with the channels through which the material may be accessed.
We must, therefore, conclude, in accordance with the case law on legitimacy, that the rules under discussion do not bear on prisoners' right of correspondence, which is recognized – in terms consistent, under the profile being considered, with the condition of restricted personal freedom in which the prisoner lives and, therefore, not in contrast with the provisions of Article 15 of the Constitution – of the law of the prison system.
7. – It is already implicit in the above that the final challenge according to which Article 117(1) of the Constitution has been violated with reference to Articles 3 and 8 ECHR is not founded.
The reference to Article 3 ECHR is clearly incongruous with respect to the referring judge's perspective (which, as we have seen, does not contest the admissibility of the limitations in question, but only complains of their mode of application). The ban on inhuman or degrading treatment, enshrined in the cited conventional rule, is absolute in nature, so – if this hypothesis were to be adopted – not even the intervention of a judge would be able to make the measures in question legitimate under the ECHR. Moreover, it is clear that – given that the freedom of mail correspondence and to choose the texts with which one wishes to inform oneself and learn remains unaltered – the mere fact that the prisoner is obliged to make use of the prison institution to acquire printed materials, and cannot transmit them to the outside, does not determine levels of suffering and degradation of his or her person sufficient to trigger the paradigm targeted by the conventional rule cited.
With regard to the second interposed rule cited, Article 8 of the ECHR, paragraph 1 recognizes each person's "right to respect for his private and family life, his home and his correspondence." In this case, the right is not absolute: paragraph 2 of the same article, indeed, allows for interference by a "public authority" (not necessarily the judicial authority) in its exercise, where three conditions are met. First, the interference must be "in accordance with the law:" a formula which, according to the well-established case law of the ECtHR, must be understood, at the level of sources, as including not only written law, but also the application and interpretation of legal provisions by case law and, at the level of "quality" of the law, as expressive of the need for adequate accessibility and sufficient precision of the rules that allow for the interference, so as to furnish adequate protection against arbitrary acts. Secondly, the interference must pursue one of the legitimate aims indicated by paragraph 2

("national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"). Lastly, the interference must be "necessary," "in a democratic society," in order to reach the goals listed above: a requirement that, as indicated by the ECtHR, requires that the sacrifice of the right be proportional to the legitimately pursued aim (for all, see ECtHR, *Olsson v. Sweden*, 24 March 1988).

In light of this, a comparison between the ban on exchanging books and print publications with the outside, and particularly with family members, by means of the postal service [on one hand] and the submission of prisoner correspondence to the inspection and stamp process [on the other], as the referring judge suggests, must be rejected. The national legal framework governing the inspection stamp procedure has been repeatedly censored by the ECtHR (*ex plurimis*, ECtHR *Natoli v. Italy*, 9 January 2001; ECtHR *Domenichini v. Italy*, 15 November 1996; and, more recently, ECtHR *Paolello v. Italy*, 1 September 2015; ECtHR, Grand Chamber, *Enea v. Italy*, 17 September 2009; ECtHR, Grand Chamber, *Annunziata v. Italy*, 7 July 2009).

Restricting the channels by which printed material may be received and banning its transmission to the outside not only do not impinge in any way (quite obviously) on the secrecy of prisoners' correspondence (unlike inspection and stamping), but also, in light of the considerations above, do not compromise the freedom of correspondence by mail already recognized by national law, consistent with the condition of legitimate restriction of personal freedom in which the prisoner lives. The freedom of correspondence via mail is still able to be expressed, in all its fullness, through ordinary written correspondence. By means of it a prisoner may continue to maintain his or her emotional ties with relatives.

Moreover, even the idea put forward by the referring judge that, under the Convention, the restrictions in question amount in any case to interferences, if not with the right to correspondence then with that to respect for the prisoners' family life, does not alter the conclusion.

In this regard, it is worth recalling that the cited judgments by the ECtHR were based on the idea that, until Law no. 95 of 2004 entered into force, the only legal basis for applying the inspection stamp procedure to prisoner correspondence, even under the special rules, had to be identified – in light of the interpretation offered by this Court in Judgment no. 349 of 1993 – in the provision of the then-valid Article 18 *ord. pen*. That rule, while transferring the adoption of the measure to the judicial authority, regulated neither its duration nor the reasons that could justify it, and did not indicate with sufficient clarity the breadth and way of exercising the discretional power of the competent authorities in the relevant field. This leads to the ECtHR's conclusion that the measure cannot be considered to be "in accordance with the law" as required under Article 8(2) of the ECHR for the purposes of possible interference of a public authority in the exercise of the right of correspondence, and the resulting intervention by the national legislator, which regulated the area *ex novo* with the enactment of Article 18-*ter ord. pen.*

In the case at bar, on the contrary, in light of a well-settled trend in the case law on legitimacy, the power of the prison administration to order the measures in question finds its legal basis in the combined provisions of letters (a) and (c) of Article 42-*bis*(2-*quater*) *ord. pen.* The reasons for which said power may be exercised are indicated in letter (a) in more specific terms than those found in Article 18-*ter ord. pen*. (introduced for the purpose of bringing the national system into conformity with European cases on the inspection stamp procedure). Indeed, as mentioned above, this latter provision recalls the "needs related to the investigatory or preventative inquiry into crimes" and "reasons pertaining to security and order within the institution:" formulations that are certainly broader than the precise reference, found in the first provision, to the need to prevent contacts between particularly dangerous prisoners and the criminal organizations they belong to or currently refer to, clashes with

members of rival organizations, and interactions with other prisoners belonging to the same organization or to allied organizations.
Nor, on the other hand, with regard to the provision of letter (c) of Article 41-*bis* (2-*quater*) *ord. pen.*, can the national legislator be accused of not having adopted a more detailed rule in terms of the "goods" and the "goals" for which, according to the reasoning above, the reception of things from outside may be denied to prisoners under the special rules, since the legislator's decision not to proceed with a minute and detailed list seems anything but unreasonable, since it would in any case be open to the risk of gaps.
The ECtHR, moreover, did not neglect to emphasize, precisely in relation to the area under review, that, "while a law which confers a discretion must indicate the scope of that discretion, it is impossible to attain absolute certainty in the framing of the law, and the likely outcome of any search for certainty would be excessive rigidity" (ECtHR, *Domenichini v. Italy*, 15 November 1996).
The duration of the restrictive measure is modeled – just as for the others – on the one proper to the special rules it comes under (established by Article 41-*bis*(2-*bis*) *ord. pen.*).
For the remainder, it is undeniable that the measure's intended aims fall under the category of legitimate goals provided for by Article 8(2) of the ECHR and that, contrary to what the referring judge assumes, the required proportionality exists with respect to the aims. To this end, it suffices to observe how the ECtHR has considered restrictions connected with the special incarceration rules that are significantly more invasive than those under review today to be opportune and proportional – and thus compatible with the aforementioned Article 8(2) ECHR – with respect to the legitimate aim of maintaining public order and security, cutting ties between the individuals concerned and their original criminal circle, for example the severe limitations as to the number and manner of face-to-face conversations with relatives (for all, see ECtHR, *Montani v. Italy*, 19 January 2010; ECtHR, Grand Chamber, *Enea v. Italy*, 17 September 2009).
8. – In light of the above considerations, the questions must be declared unfounded.

ON THESE GROUNDS
THE CONSTITUTIONAL COURT

declares the questions concerning the constitutionality of Article 41-*bis*(2-*quater*)(a) and (c) of Law no. 354 of 26 July 1975 ((Regulations concerning the prison system and the execution of measures that restrict or deny freedom), raised in reference to Articles 15, 21, 33, 34, and 117(1) of the Constitution, this last one in relation to Articles 3 and 8 of the European Convention on Human Rights, done in Rome on 4 November 1950, ratified and executed with Law no. 848 of 4 August 1955, by the Supervisory Judge of Spoleto with the referral order indicated in the headnote to be unfounded.
Decided in Rome at the seat of the Constitutional Court, Palazzo della Consulta, on 8 February 2017.