DECISION NO. 18 YEAR 2022

The Court was called upon to examine a provision contained in Article 41-*bis* of the prison law, which – according to the case law of the Court of Cassation – provided for mandatory censorship of the correspondence between prisoners placed under the enhanced surveillance regime envisaged therein and their lawyers.

The provision was found to be incompatible with the rights of defense enshrined in Article 24 of the Constitution, and, therefore, unconstitutional.

The judgment notes that, according to the settled case law of the Constitutional Court and the ECtHR, the rights of defense include the right to communicate in confidence with one's own lawyer, and stresses that detainees serving a custodial sentence also enjoy this right. This is necessary, *inter alia*, in order to ensure effective protection for the prisoners against any abuses committed by the prison authorities.

This right is not absolute and may be restricted, insofar as this proves to be reasonable and necessary in situations in which other constitutional rights are at stake, and provided that it does not make the rights of defense ineffective.

Moreover, prisoners to whom the Article 41-*bis* regime applies are ordinarily subject to far-reaching restrictions on their fundamental rights in order to prevent any contact between them and their respective criminal organizations.

However, the Court holds that the censorship of correspondence between a prisoner and his or her lawyer is not an appropriate instrument for achieving this aim, and thus unreasonably impairs the detainee's rights of defense.

First of all, a prisoner is entitled to speak in private with his or her lawyer at any time, whenever he or she considers it necessary, by virtue of this Court's Judgment No. 143 of 2013. Since these meetings may not be monitored by the prison authorities, and a prisoner can already pass any information to his or her lawyer, censorship on their correspondence cannot be deemed a suitable means to prevent the exchange of information between the prisoner and the criminal organization to which he or she belongs. Second, the provision under review provides that the censorship should occur automatically, even where there are no specific grounds to suspect any unlawful conduct on the part of the lawyer.

According to the Court, the challenged provision reflects a "general and untenable presumption of collusion between defense council and criminal groups […]. This assumption casts suspicion upon the essential role the legal profession performs in protecting not only the fundamental rights of prisoners, but also the rule of law as a whole."

Therefore, the Court held that the rule under examination did not reflect an appropriate balance between the competing interests at stake and had, therefore, to be struck down.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 41-*bis*, paragraph 2-*quater*, letter *e*) of Law No. 354 of 26 July 1975 (Provisions regulating the prison system and the execution of measures involving deprivation and limitation of liberty), initiated by

the First Criminal Division of the Supreme Court of Cassation during the criminal trial of G.J., with a referral order of 21 May 2021, registered at No. 96 of the 2021 Register of Referral Orders, and published in the *Official Journal* of the Republic, No. 27, first special series of 2021.

After hearing from Judge Rapporteur Francesco Viganò in chambers on 1 December 2021;

After deliberations in chambers on 2 December 2021.

[…]

Conclusions on points of law

1.– The First Criminal Division of the Supreme Court of Cassation, with the referral order indicated in the Headnote, raises questions, on its own motion, as to the constitutionality of Article 41-*bis*, paragraph 2-*quater*, letter *e*), of Law No. 354 of 26 July 1975 […] in reference to Articles 3, 15, 24, 111, and 117(1) of the Constitution, this last provision in relation to Article 6 of the European Convention on Human Rights (ECHR), to the extent that it provides that the correspondence of detainees subject to the special regime described in Article 41-*bis*, paragraphs 2 *et seq.* shall be censored, including that addressed to their defense attorneys.

In essence, the referring court asserts that the general rule of censoring the correspondence of detainees subject to the special regime under Article 41-*bis* of the Criminal Code with their own lawyers constitutes an unreasonable restriction not only of their right to free and secret correspondence, but also, and above all, of their rights of defense and due process, as guaranteed by the Constitution and the ECHR.

[…]

4.– The question as to constitutionality raised in reference to Article 24 of the Constitution is well founded.

4.1.– This Court has long recognized that the constitutional guarantee of the right of defense, a "supreme principle" under the constitutional system (Judgments No. 238 of 2014, 232 of 1989, and 18 of 1982), includes the right, which is instrumental to it, of conferring with one's defense counsel (Judgment No. 216 of 1996), "for purposes of laying out the defense and deciding defensive strategies, and, even more fundamentally, for purposes of knowing one's rights and the possibilities the system offers to protect them and to avoid or attenuate the adverse consequences to which one is exposed" (Judgment No. 212 of 1997). This Court has also underscored that this right "has a special significance for detainees, who have only limited opportunity for direct inter-personal contact with the outside, and are, therefore, in an inherently weaker position as regards the exercise of their rights to a defense" (Judgment No. 143 of 2013).

4.2.– These principles correspond exactly to those set by international human rights law.

In the European context, the European Court of Human Rights [ECtHR] has held that the right to the privacy of one's communications – itself protected by Article 8 ECHR (Judgment of 25 March 1992, *Campbell v. United Kingdom*, paragraph 54, as well as, more recently, that of 24 May 2018, *Laurent v. France*, paragraph 49) – is instrumental to the right to counsel, which is enshrined in Article 6(3)(*c*) ECHR and applies to anyone accused of a crime. Exercising this right entails the possibility to communicate freely with counsel (Judgment of 20 June 1988, *Schönenberger and Durmaz v. Switzerland*, paragraph 29 and, prior to that, that of 21 February 1975, *Golder v. United Kingdom*, paragraph 45). The American Convention on Human

Rights, in another human rights protection context, also expressly recognizes this at Article 8(2)(*d*).

With particular reference to conversations between detainees and their defense counsel, the Strasbourg Court has pointed out that, if lawyers were unable to confer with their clients and receive confidential instructions from them without surveillance, legal assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective (Judgment of 28 November 1991, *S. v. Switzerland*, paragraph 48; similarly, and more recently, see the Judgment of 27 November 2007, *Zagaria v. Italy*, paragraph 36; Grand Chamber Judgment of 12 May 2005, *Öcalan v. Turkey*, paragraphs 133 and 135). This is also true with respect to the need to ensure that detainees are protected against potential abuses by the prison authorities (Judgments of 30 January 2007, *Ekinci and Akalin v. Turkey*, paragraph 47, and of 25 March 1992, *Campbell*, paragraph 47).

Moreover, as this Court has recently reiterated, "the right of prisoners to confer with their defense lawyer has been expressly recognized under supranational law, including Recommendation R (2006)2 of the Council of Europe on the 'European Prison Rules,' adopted by the Committee of Ministers on 11 January 2006, which refers separately to the rights of both 'prisoners' (rule 23) and 'untried prisoners' (rule 98)" (Judgment No. 143 of 2013).

Finally, an identical recommendation is contained in Rule 61 of the *United Nations Standard Minimum Rules for the Treatment of Prisoners* (or so-called "Mandela Rules"), adopted by the General Assembly of the United Nations on 17 December 2015, which stresses the need for detainees (without distinction between accused and convicted prisoners) to be assured the possibility to communicate and consult with a legal advisor of their own choice or a legal aid provider "without delay, interception or censorship and in full confidentiality." It goes on to specify that consultations may be within the sight, but not the hearing, of prison staff.

4.3.– There is no doubt that subjecting correspondence with one's own defense counsel to censorship under the challenged provision amounts to a limitation of the right at issue. Indeed, the censorship procedure entails the judicial authorities or delegated prison administration opening the correspondence, reading it in full, and potentially "withholding" it from its addressee, be that person the defense lawyer or the detainee. In every case, the procedure not only entails delays in the delivery of correspondence, but undermines its confidentiality and can even break off communications entirely, at the sole discretion of the monitoring authorities. .

This Court has held that the right to free and secret communications with defense counsel is not absolute, and may be balanced against other constitutionally guaranteed interests, within the limits of reasonableness and proportionality, provided that the effectiveness of the right is not impaired (Judgment No. 143 of 2013, point 6 of the *Conclusions on points of law*, as well as the other rulings cited therein, in reference to different aspects of the right of defense). Similarly, the ECtHR considers limitations on this right to be admissible in principle, provided that they have an appropriate legal basis and are proportionate to the legitimate ends pursued by the legislator (for all points see *Ekinci and Akalin v. Turkey*, and *Campbell*, paragraph 34).

Now, concerning the restrictions of fundamental rights imposed on detainees subject to the special regime under Article 41-*bis* of the Prison Law, this Court has consistently held that such restrictions – which are significantly more burdensome than the ones normally imposed on "ordinary" detainees – are compatible with the

Constitution only insofar as they *(i)* serve the sole purpose of the special regime in question, which aims not to punish the authors of particularly serious crimes more severely, bur merely to prevent individual detainees from continuing to present a danger, by "in particular, inhibiting ties between inmates who belong to criminal organizations, and between these inmates and the [other] members of their criminal organizations who are free" (Judgment No. 97 of 2020, point 6 of the *Conclusions on points of law*); and *(ii)* are not disproportionate, that is, they do not exceed the legitimate purpose of the special regime, are not unreasonably burdensome with respect to the fundamental rights still enjoyed by detainees subject to the special regime under Article 41-*bis* of the Prison Law, and do not entirely undermine the rehabilitative purpose of punishment. Furthermore, they must not amount to inhumane treatment (Judgment No. 97 of 2020; see also Judgments No. 197 of 2021, 186 of 2018, 376 of 1997, and 351 of 1996).

4.4.– The constitutionality of the challenged provision's limitation on the right to free and confidential communication with one's defense counsel, which applies to detainees subject to the special regime under Article 41-*bis* of the Prison Law, must be assessed on the basis of these principles.

4.4.1.– Some years ago this Court struck down a provision of Law No. 94 of 2009 that placed strict weekly limits on the number of meetings detainees subject to the special regime could have with their lawyers under Article 41-*bis* of the Prison Law, finding it incompatible with Article 24 of the Constitution. The Court held that the rule lowered the protection of a fundamental right (the right of defense) to an unreasonable degree, with no corresponding increase in the protection of another interest of equal importance (that of safeguarding good public order and safety). Indeed, since meetings with defense counsel – unlike those with relatives, partners, or other persons – are not monitored or recorded, legal limits on their frequency and duration are liable to penalize the defense, while doing nothing to "prevent – even in part – the feared transfer of instructions and information between the prison and the outside, or restrict in a genuinely significant manner the quantity and nature of the messages which it is feared may be exchanged through defense lawyers as part of criminal conspiracies." The decision also pointed out that, while it "cannot be excluded *ex ante* with certainty" that persons "who are members of professional associations (such as lawyers), who are required to abide by a code of conduct with specific regard to their dealings with the justice system and who are subject to the disciplinary rules of their professional societies" would agree to act as intermediaries between a prisoner and the members of a criminal organization, "it cannot however be presumed to be the case as a general rule of thumb and subsequently transposed into legislation. This is because the situation here is significantly different from that applicable to discussions with persons associated with the prisoner by family ties or friendship, or with unspecified third parties" (Judgment No. 143 of 2013).

4.4.2.– The same conclusions apply to the provision at issue.

Like most of the provisions of Article 41-*bis*(2-*quater*) of the Prison Law, the censorship of correspondence provision envisaged by letter *e*) essentially aims to prevent prisoners or detainees from maintaining ongoing relationships with the criminal organization to which they belong, and from using these means to keep up an active role in the organization, particularly by imparting or receiving orders or instructions addressed to or coming from fellow members of the criminal group.

It cannot be entirely ruled out that orders or instructions of this kind could be transferred in ways including the intermediation of a defense lawyer. In this sense, the extension of the censorship procedure to communications with defense council could be considered, in theory, to reduce the risk of that happening.

However, considered in the context of the other measures envisaged by paragraph 2-*quater* of Article 41-*bis* of the Prison Law, the provision under review is entirely unsuitable for this purpose, given that the feared exchange of information between defense lawyers and inmates could take place anyway, during one of the unlimited number of in-person or telephone interviews that inmates are currently permitted to have with their defense lawyers, the contents of which cannot be monitored in any way.

The provision at issue here has an even greater impact on the prisoner or detainee's fundamental rights than the one struck down in Judgment No. 143 of 2013. Rather than merely imposing quantitative limits on communications, it can actually prevent them from reaching their addressee at all. It also clearly exceeds its stated purpose, since it subjects all communications between the prisoner and his or her defense lawyer to preventive surveillance, in the absence of any concrete reason to suspect that the lawyer is engaged in illegal conduct.

As the *amicus curiae* brief argues, the challenged provision is based upon the same general and untenable presumption of collusion between defense council and criminal groups condemned by Judgment No. 143 of 2013. It casts suspicion upon the essential role the legal profession performs in protecting not only the fundamental rights of prisoners, but also the rule of law as a whole. This role can only be effective if, as a rule, detainees are able to freely and unreservedly communicate any and all information that may be relevant for their defense to their lawyer, including their treatment in prison as well as any statutory or regulatory violations that may potentially occur there.

The breach of the right to a defense is particularly clear in the case of inmates with few financial resources. If a prisoner is transferred to a facility far from the offices of their defense counsel, written correspondence could become their chief means of communicating with their lawyer. By contrast, inmates with access to greater financial resources, holding top positions in their criminal organizations, can much more easily afford to pay for travel expenses and obtain in-person meetings with their attorneys.

4.5.– For all these reasons, the challenged provision is unconstitutional due to its breach of Article 24 of the Constitution, insofar as it fails to provide an exemption from the censorship procedure for correspondence between inmates and their defense lawyers.

5.– The other challenges are absorbed in this ruling.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares that Article 41-*bis*(2-*quater*)(*e*) of Law No. 354 of 26 July 1975 (Provisions regulating the prison system and the execution of measures involving deprivation and limitation of liberty) is unconstitutional insofar as it fails to provide an exemption from the censorship procedure for correspondence between inmates and their defense counsel.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, 2 December 2021.

Signed by:

Giancarlo CORAGGIO, President

Francesco VIGANÒ, Author of the Judgment