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Orders and Obedience in the Prison System

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ABSTRACT

The article examines the nature of orders and obedience in the Italian prison system, highlighting the ongoing tension between constitutional legality and informal practices. The author shows how the culture of prison staff and the strong influence of the Penitentiary Police Trade Unions have often legitimised practices far removed from constitutional principles, including instances of torture and violence. On a theoretical level, the study stresses the incompatibility between blind obedience and the principles of international and constitutional law.

KEYWORDS

Prison; Obedience; Torture; Constitutional legality; Penitentiary police.

Orders and obedience in the prison system

SUMMARY: 1. The socio-prison context – 2. The organisation of prison services, staff culture and power relations – 3. Torture and the legitimate use of force: between *esprit de corps* and special forces – 4. Obedience in the international, constitutional and prison contexts – 5. The paradigm shift brought about by the approval of the Security Decree Law – 6. Conclusion: regulations that follow practices.

1. The socio-prison context

Altiero Spinelli, who had experienced prison first-hand, describes it as a ‘cenobitic society founded on formal rules, power relations and practices that are reproduced over time’¹. Prison is a closed place, hidden from view, where social, political and judicial oversight of the legality and legitimacy of the orders issued is difficult (or sometimes deliberately made difficult). Life in prisons is meticulously regulated to ensure internal and external security. This is the formal justification for the detailed, not always sensible, regulation of life within a prison. A justification that forms part of a strategy aimed at governing and disciplining the behaviour of prisoners². In every prison officer, however, there must also be the awareness that confining

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¹ See A. SPINELLI, *Esperienza di prigionia*, in P. GONNELLA and D. IPPOLITO (eds.), *Bisogna aver visto. Il carcere nella riflessione degli antifascisti*, Edizioni dell’Asino, Rome 2019.

² An example of the meticulous, exasperating regulation of life in prison is reproduced by M. FOUCAULT, *Discipline and Punish: The Birth of Prison*, Vintage Books, New York 1995 (1975), pp.6–7, from Leon Faucher’s rules ‘for the House of young prisoners in Paris’: “Art. 17. The prisoners’ day will begin at six in the morning in winter and at five in summer. They will work for nine hours a day throughout the year. Two hours a day will be devoted to instruction. Work and the day will end at nine o’clock in winter and at eight in summer. Art. 18. *Rising*. At the first drum-roll, the prisoners must rise and dress in silence, as the supervisor opens the cell doors. At the second drum-roll, they must be dressed and make their beds. At the third, they must line up and proceed to the chapel for morning prayer. There is a five-minute interval between each drum-roll. Art. 19. The prayers are conducted by the chaplain and followed by a moral or religious reading. This exercise must not last more than half an hour. Art. 20. *Work*. At a quarter to six in the summer, a quarter to seven in winter, the prisoners go down into the courtyard where they must wash their hands and faces, and receive their first ration of bread. Immediately afterwards, they form into work-teams and go off to work, which must begin at six in summer and seven in winter. Art. 21. *Meal*. At ten o’clock the prisoners leave their work and go to the refectory; they wash their hands in their courtyards and assemble in divisions. After the dinner, there is recreation until twenty minutes to eleven. Art. 22.

a person to prison constitutes a rupture with their natural existential condition. Prison is a place, but it is also a syndrome that causes a fracture in the prisoner's psycho-physical integrity.

Since the late 1980s, international bodies have insisted on establishing forms of monitoring of living conditions within places of deprivation of liberty, in order to prevent instances of ill-treatment, abuse and torture. Reading the reports of inspection bodies at supranational or national level constitutes one of the most appropriate ways of understanding the reality of prison life³. It facilitates an understanding of the prison model and its capacity to adhere to the provisions of international norms and standards, or to disregard them more or less consciously. Indirectly, it offers us an opportunity to assess the quality of the orders governing prison life, their reasonableness, and their role as part of a disciplinary strategy.

Life in prison is constantly governed by orders, both within the staff and between prison officers and prisoners. Everything that takes place in a closed, hierarchical community operates within uncertain boundaries, not always defined by the rules. Much is determined by prevailing power relations, by emotional and career-related factors, by specific histories and biographies, by the prison and constitutional culture or subculture of prison staff, by the general climate that may steer practice in one direction rather than another, and by the strength of the relevant trade unions.

School. At twenty minutes to eleven, at the drum-roll, the prisoners form into ranks, and proceed in divisions to the school. The class lasts two hours and consists alternately of reading, writing, drawing and arithmetic. Art. 23. At twenty minutes to one, the prisoners leave the school, in divisions, and return to their courtyards for recreation. At five minutes to one, at the drum-roll, they form into work-teams. Art. 24. At one o'clock they must be back in the workshops: they work until four o'clock. Art. 2.5. At four o'clock the prisoners leave their workshops and go into the courtyards where they wash their hands and form into divisions for the refectory. Art. 2.6. Supper and the recreation that follows it last until five o'clock: the prisoners then return to the workshops. Art. 2.7. At seven o'clock in the summer, at eight in winter, work stops; bread is distributed for the last time in the workshops. For a quarter of an hour one of the prisoners or supervisors reads a passage from some instructive or uplifting work. This is followed by evening prayer. Art. 2.8. At half-past seven in summer, half-past eight in winter, the prisoners must be back in their cells after the washing of hands and the inspection of clothes in the courtyard; at the first drum-roll, they must undress, and at the second get into bed. The cell doors are closed and the supervisors go the rounds in the corridors, to ensure order and silence"

³ See in this regard the reports of the European Committee for the Prevention of Torture, which has powers to carry out unannounced inspections in all places of deprivation of liberty within the Council of Europe. On the website www.cpt-coe.it, it is possible to review the dialogue with the Member States, and their responses to the findings and recommendations of the European inspectors following their periodic or *ad hoc* visits. Much of this concerns the overarching issue of the profound disconnect between domestic law – which often moves in a direction consistent with international provisions – and prison practice, which deviates from such legislation, partly on the basis of administrative orders issued at various levels of the hierarchy. The CPT reports highlight how frequently it occurs in prisons that an order issued at a lower level overrides the legal one. At national level, there are the reports of the Authority for the Protection of Persons Deprived of Liberty. Those produced up to 2023 are significant for the clarity of their critical description of field observations. The Antigone association, too, although lacking institutional inspection powers, carries out monitoring activities which are incorporated into its periodic reports; the latest of these, entitled *Senza respiro (Breathless)*, can be consulted on the website www.antigone.it.

2. *The organisation of prison services, staff culture and power relations*

The first and only Prison Act in the history of the Republic is Law No. 354 of 1975. For almost three decades, our Constitution was forced to coexist with the 1931 Regulations on Penal Institutions⁴, which were clearly inspired by fascism. More so than in other areas of public life, the organisational and professional model chosen is key to understanding the actual function of the prison system. Article 27 of the Constitution, by setting absolute limits on the exercise of the power to punish (respect for human dignity) and by prescribing what the purpose of punishment should be (rehabilitation, in the social sense of the term)⁵, addresses all potential actors within the criminal justice and prison system, wherever they may be situated on the hierarchical ladder. There is perhaps no other sphere of public life where the mission of practitioners, at all levels and in all roles, is so clearly defined.

To understand the extent to which the regulatory framework, even at the highest level, has failed to establish a common and shared prison culture, one may read the bitter reflections of Mario Gozzini, who in the mid-1980s (see Law No. 663 of 1986, which bears his name), attempted—in vain, given the counter-reforms that followed—to innovate, humanise and reform the prison system⁶.

In 1990, with Law No. 395, the legislature, at the instigation of the then Director-General of Penitentiary Institutions, Niccolò Amato⁷, reorganised prison services along three axes: the demilitarisation of former prison guards, who were retrained as members of the Prison Police; the division of staff into distinct professional areas that were not hierarchically subordinate to one another, so as to free socio-educational professions from subordination to security personnel (a division of tasks that reached the peak of its expansion when, with the Prime Ministerial Decree of 1 April 2008, medical functions were separated from the Ministry of Justice and entrusted to the Local Health Authorities (ASL) in accordance with the principle of universal healthcare provision and in an attempt to free doctors from dependence on directors and police officers); the positioning of the director above the aforementioned areas, without integrating him into the police force, with the aim of preserving his role in balancing security needs and treatment prospects.

⁴ Royal Decree No. 787 of 1931.

⁵ See in this regard M. RUOTOLO, *Dignità e carcere*, Editoriale Scientifica, Naples 2014.

⁶ M. GOZZINI, *La giustizia in galera. Una storia italiana*, Editori Riuniti, Rome 1997.

⁷ The manifesto of his thinking can be found in N. AMATO, *Diritto, delitto, carcere*, Giuffrè, Milan 1987.

Since 1990, prison police staff have been part of a process of intense unionisation⁸, in particular by supporting independent trade unions more closely tied to a regressive, pre-modern model of incarceration and to a conception of the prison police officer who is certainly not a guarantor of constitutional treatment, but rather an enforcer of the punitive and repressive forces present within society. Over time, with increasing vigour, the prison police unions have demanded and secured professional status and career progression that call into question the *impartial* role of the prison governor. In the security/treatment balance, the pendulum has swung towards the former. Moreover, this prevalence has even been certified by government institutions in the past, during times of crisis in the prison administration⁹.

The Prison Police have thus adopted certain characteristics common to other police forces: *esprit de corps*; respect for formal hierarchies alongside an excessive regard for informal ones. Formal orders from the director and senior staff are carried out, but informal orders from senior colleagues, from those considered most authoritative on the ground, and from those most involved in the union (from whom one expects assistance in day-to-day work) are also taken into account.

Thus, a separate world is constructed, made up of informal orders—not necessarily legally grounded, arising not within the legislative framework but outside it—and comprehensible only by broadening one's perspective to include the power dynamics within the unions and the close ties with political forces.

3. Torture and the legitimate use of force: between esprit de corps and special forces

Torture is a paradigmatic field in which to investigate the major issue of the formal, informal or even criminal origins of orders within the chain of command of prison staff. In recent legal proceedings, we have seen how prison officers accused of the crime of torture under Article *613-bis* of the Criminal Code often enjoy extensive trade union and financial protection during the trial. Independent police unions provide legal assistance even in cases of offences

⁸ According to the most recent surveys, union membership among prison officers is almost universal. To understand the qualitative and quantitative dimensions of the phenomenon, Sappe (an autonomous, strongly corporatist trade union) has over five times the number of members in the CGIL's Public Service sector, namely 8,488 compared to 1,292, according to the most recent data from the end of 2021. There are also constant shifts of members between the various unions, and a significant number of dual memberships.

⁹ It was March 1999 when the then Minister of Justice, Oliviero Diliberto, relieved Judge Alessandro Margara of his post as Head of the Prison Service, stating, in response to a parliamentary question, that 'he was too inclined towards rehabilitation'. According to the minister, there was a need to restore security considerations, which were defined as taking priority over those of rehabilitation.

against the person committed by their members, provided they are up to date with their dues. The alleged victims of torture, on the other hand, often from vulnerable social backgrounds, lack adequate public protection and financial resources. They cannot afford to hire an experienced lawyer to assist them in lengthy and costly trials. They cannot afford defence investigations, which are also too expensive. The dynamics of trials for violence or torture against persons in custody reveal an asymmetry, in terms of formal and substantive guarantees, between the ordinary defendant and the police officer defendant, when the latter is accused of violent crimes committed in the course of their duties.

Corporate solidarity tends to prevail over the demands of justice and truth. The denial of individual responsibility by colleagues serves to save everyone. Indeed, were such responsibilities to be established, they would highlight an equal measure of collective and systemic responsibility, the result of a system of prison governance not founded on legal standards and orders, but on illegitimate practices and orders. The *esprit de corps*, a precursor to impunity, pervades all levels of the hierarchy, right up to the highest echelons, and aims to place the alleged torturers on a higher public plane than ordinary citizens. The arbitrary exercise of power within the prison by police officers constitutes the tangible and exemplary victory of punitive sovereignty over the law. Sometimes, however, the law prevails and the following vicious circle is broken: illegitimate order – guaranteed obedience – impunity. This happens when the political and cultural climate encourages prison staff to take courageous stands. It is always peculiar to have to describe as courageous those who enforce the law (which prohibits, for example, torture or the arbitrary use of force), thereby causing an internal short-circuit within the socio-criminal excesses of *esprit de corps*¹⁰.

Administrative impunity is a bad signal that legitimises a system founded on illegal orders. There have been cases and stories of people convicted of violent crimes committed against those in their custody who have suffered no repercussions in their careers. The message in such cases is devastating. It is an unequivocal message legitimising and encouraging the perpetration of illegal practices, sometimes even torture. A message that serves to highlight the unstoppable force of punitive power in the face of any yearning for democratic legality – a yearning defined as illusory and naive by the very protagonists of prison life themselves. In the

¹⁰ A breakdown occurred in Bari. In 2022, criminal proceedings were initiated regarding acts of violence committed by certain prison officers against an inmate suffering from mental health issues, a classic victim of abuse or injury due to his vulnerability. The case was brought by two women, the director and the ward commander, who thereby broke through that wall of silence which in prison is usually justified by references to *esprit de corps*. In the same trial, there was also another positive anomaly compared to the usual attempts to downplay, mislead, dismiss or justify: a police officer publicly apologised for the torture committed and consequently decided to undergo psychological therapy.

face of certain reactions from institutional leaders – public solidarity or impunity for torturers – one cannot correctly claim that torture is merely a matter of a few bad apples. Torture is never a matter of a few bad apples unless that esprit de corps – which flows from the bottom up and spreads from the individual police officer to the highest institutional offices – is broken. Torture and torturers take root where they find space and fertile ground, where the system allows them to thrive. Torture is possible if it encounters no institutional resistance, opposition, sanctions or public condemnation. The fight against torture requires, in addition to the criminalisation of the act itself, a state administration willing to sanction alleged torturers in all forums. It also requires police forces whose work is inspired not by machismo, but by social prevention. Finally, it requires the renunciation of the ‘spirit of corp’ and the disbandment of special units and forces. Crime, even the most ruthless, must be defeated within the law and using the ordinary instruments of the law. In February 1999, the Minister of Justice, Oliviero Diliberto, established the UGAP, the Office for Prison Security. It was an intelligence unit tasked with overseeing the security of prisons. General Enrico Ragosa, who came from SISDE and the special units of the prison police, was appointed to head it. The UGAP had the GOM under its command, a special unit of the prison police.

“GOM, or Mobile Operational Group, is a special prison police unit. Operating independently of any oversight, it is tasked with managing emergencies, specific cases and high-risk situations. And the Bolzaneto prison was one such situation. As were undoubtedly the prisons of Pianosa and Secondigliano in the past, where the GOM’s predecessor, the SCOPP (Central Operational Service of the Prison Police), was implicated in extremely serious investigations into systematic beatings. The name changes, but the substance and the people remain the same [...]. The GOMs, like all special units, do not follow the same rules as other police officers during missions; they operate under a specific mandate, a sense of corps spirit, which in itself negatively affects any militarily organised force as it fuels decisions based on self-defence and a lack of transparency, and is amplified to an extreme degree within special units. Closed units, ad hoc rules, work not subject to the same checks as for other officers, and therefore risks of impunity. Are these reasons sufficient for such units to be disbanded?”¹¹.

¹¹ Excerpt from an article by Stefano Anastasia and Patrizio Gonnella published in *Il Manifesto* on 28 July 2001, in the aftermath of the violence at the Bolzaneto barracks in Genoa during the G8 summit.

Special units give the impression that one can act freely and without constraints in the name and interest of the State. They are made up of the most determined individuals, those willing to do anything. They are places where there is greater camaraderie, a stronger esprit de corps, and less concern for legality. They are groups that focus on the substance, indifferent to the form. Respect for human dignity is, for them, reduced to a mere formality. The Operational Intervention Group (GIO) was recently established by the Department of Prison Administration (DAP) by decree of 14 May 2024. The GIO is a specialised unit of the Prison Police Corps organised into regional groups (GIR); it is designed as a riot control and rapid response unit within prisons, with specific objectives: to intervene in prison emergency situations that cannot be managed or addressed locally, such as riots, escapes and serious tensions; to support another special unit, the Mobile Operation Group (GOM), in high-security sections, including the *4I-bis section*, if necessary; to ensure a structured and trained presence to tackle complex crises with a focus on security, discipline and order within prison facilities. This creates the ‘super cop’, specialised in the use of force.

The risk is that of a definitive breakdown in the legal chain of command, which previously placed the prison director – who does not belong to the Police Force – at the unquestionable hierarchical and democratic apex. In this context, characterised by public statements that disregard international and constitutional law, as well as the presence of special units, the prison police officer is forced to operate in isolation, having to assess whether an order is lawful or not, criminal or necessary.

4. Obedience in the international, constitutional and prison contexts

“An order from a superior or a public authority cannot be invoked to justify torture”¹². Obedience can never be a justification. It was not a justification for the Nazis before the International Military Tribunal at Nuremberg¹³. Nor can it be a justification for the individual police officer who finds himself carrying out an order to torture that is clearly illegal.

¹² Article 2, paragraph 3, of the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

¹³ Article 8 of the Charter of the International Military Tribunal at Nuremberg, established by the Allied powers to try war crimes, crimes against peace and crimes against humanity committed by the Nazis: “The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires”.

The concept of obedience is linked to those of sovereignty, legitimacy and legality. For Hobbes, it is the sovereign who “must determine what is right and what is wrong”. Obedience has nothing to do with legality, and even less with the legitimacy of the order given. It is closely tied to punitive sovereignty. What matters is who issued the order, which takes precedence over the laws. Force is the foundation of power. The *Ley de la obediencia debida* (Law on Due Obedience)¹⁴, which came into force during Raúl Ricardo Alfonsín’s presidency of Argentina, was intended to exempt the military from any responsibility for the crimes committed by the Videla regime. The issue is none other than the Hobbesian one of the sovereign’s superiority over everything else: citizens, public officials, as well as domestic and international law.

Post-war international human rights law, however, has left no room for interpretation. From Nuremberg and Tokyo¹⁵ onwards, the absolute nature of the prohibition of torture and crimes against humanity has inevitably led to the concept of obedience being rendered inapplicable as a defence for individual officials. Obedience, as a ground for criminal justification, would nullify both individual responsibility and the freedom of citizens. A justice system that deems one who obeys a criminal superior order to be blameless disqualifies the torturer as a free man. A free man is one who knows how to say no to his superior, who knows how to face the full consequences of his actions. Vito Mancuso invokes the words of the Apostle James to mark the limits of personal responsibility: “Speak and act as people who are to be judged by a law of liberty” (James 2:12) ¹⁶. They who tortures by carrying out an order issued from above are nonetheless responsible for their actions, as he would have been free not to commit them.

Articles 13, 27 and 54 of the Constitution outline a model for the management of public order and security with explicit limits on the State’s punitive power. Between dignity and freedom on the one hand and blind obedience on the other, the constitutional pendulum swings unequivocally in the former direction. Article 13 outlines the limits on the use of force in the liberal legal tradition of *habeas corpus*. Throughout the entire Constitution, the verb ‘to punish’ is used only once, and that is in Article 13, paragraph 4, which states: “Any physical or moral violence against persons subject to restrictions on their liberty shall be punished”. Article 27 sets out, on the one hand, the absolute limits of punitive action and indicates, on the other, the purpose of punishment, without emphasising the centrality of the prison response. Finally, the subsequent Article 54 provides that: “All citizens have a duty to be loyal to the Republic and to

¹⁴ Law of 4 June 1987, declared unconstitutional on 14 June 2005.

¹⁵ Seats of the two international tribunals established after the Second World War.

¹⁶ V. MANCUSO, *Obbedienza e libertà*, Fazi Editore, Rome 2012.

observe its Constitution and laws. Citizens entrusted with public office have a duty to perform their duties with discipline and honour, taking an oath in the cases established by law". The conduct of prison staff, the organisation of services, chains of command and the nature of orders must operate within this framework of constitutional norms. Whilst the Prison Act No. 354 of 1975 sets out the limits and purposes of custodial action, the subsequent Act No. 395 of 1990, in Articles 9¹⁷ and 10¹⁸, defines the scope of a police officer's responsibilities. Therefore, the duty of obedience should cease in the face of orders that are unlawful or manifestly criminal or detrimental to the dignity of the persons to whom they are directed. These provisions are consistent with Article 51 of the Criminal Code, which includes, amongst the defences, the justification of the performance of duty. Only if the latter derives directly from a legal provision or from a legitimate order of a public authority will criminal liability be excluded.

It is important to have a clear understanding of the overall legal and regulatory framework within which individual prison officers operate, as they frequently find themselves at an ethical, legal and professional crossroads: what should they do in the face of a criminal or manifestly criminal order? Obey the constitutional law or obey the spirit of the corps? Prison, being an opaque place and generally closed to external scrutiny, can foster processes and actions that significantly deviate from regulatory standards. At the root of every illegal prison practice lies an order issued and subsequently carried out in the name of a cynical prison realism that prioritises hierarchical subordination over the duties imposed by international and constitutional law.

It is through the prism of the nature of orders and the duty of obedience that one can understand the reality of the prison system, its very essence. If we were to tally up all the orders and instructions issued in a single day within a prison by a superior to a subordinate officer, we

¹⁷ Article 9 of Law 395 of 1990, Duties of subordination: 1. Members of the Prison Police Corps have duties of hierarchical subordination towards: a) the Minister of Justice; b) the Under-Secretaries of State for Justice when they exercise, by delegation from the Minister, powers in prison matters; c) the Head of the Department of Prison Administration and the Head of the Department for Juvenile and Community Justice, limited to the assigned contingent; d) the Director-General of Personnel and Resources of the Department of Prison Administration and, limited to the contingent assigned to the Department of Juvenile and Community Justice, the Director-General of Personnel, Resources and Implementation of Juvenile Court Orders; e) the Regional Superintendent; f) the Director of the institution; g) their hierarchical superiors.

¹⁸ Art. 10 of Law 395 of 1990, Hierarchical Order and Functional Relationships: 1. A member of the Prison Police Corps is required to carry out orders issued by a superior. 2. Orders must relate to service or discipline, must not exceed the institution's remit, and must not infringe upon the personal dignity of those to whom they are addressed. 3. A member of the Corps to whom an order is addressed which he considers manifestly unlawful must bring this to the attention of the superior who issued it, stating the reasons; if the order is reiterated in writing, he is required to carry it out, and the superior who issued it shall be fully liable for it. In situations of danger and urgency, an order deemed manifestly unlawful must be carried out upon a renewed request, even verbal, from the superior, who is obliged to confirm it in writing at the end of the shift. 4. A member of the Corps who is given an order whose execution would clearly constitute a criminal offence shall not carry it out and shall immediately inform their superiors.

could count hundreds of them: orders arising from ministerial directives, from the director's service orders, from the provisions of the Prison Police unit commander, from external judicial authorities, from statutory and regulatory provisions, and from unforeseen circumstances that constantly arise in a community where hundreds or even thousands of people are forced to live together, often in adverse or tragic conditions¹⁹.

Faced with this mass of orders, a number of questions arise, each of which brings us back to the most obvious critical issues in the prison system: what is meant by an unlawful order? Who is responsible for determining its nature? When and in what circumstances is it unenforceable? How can an unlawful order be distinguished from a criminal one? What should be done in each of these situations? Current legislation (provisions contained in the 1930 Criminal Code, the 1975 Prison Regulations, and the 1990 Law on the Demilitarisation of the Prison Guard Corps) does not help in finding the correct answers to all these questions, although, in summary, it proposes a model that can be summarised as follows: the execution of an unlawful order does not exempt the person carrying it out from liability, even if they are in a subordinate position; it should be carried out, if clearly unlawful, provided it is reissued in writing; if the order clearly constitutes a criminal offence, it must never be carried out.

Let us look at some examples of orders issued in the prison context that may give rise to interpretative doubts: orders for unauthorised room-to-room surveillance in cells; orders to carry out cell searches or body searches that violate human dignity; orders requiring the use of force against prisoners. Obviously, there are thousands of other minor issues that are the subject of orders with unclear legal boundaries. How can one tell whether an order is unlawful or has crossed the line into the blatantly criminal? There is a grey area in which the role of the supervisory and trial courts is decisive in interpreting the rules, defining the boundaries of what is lawful, and determining the responsibilities of those carrying out the orders.

In April 2020, at the height of *the lockdown*, over a hundred prison officers, acting on orders from their superiors, stormed the prison in Santa Maria Capua Vetere, where a protest had taken place two days earlier – a protest that had already ended by the time of the raid. The supervisory magistrate managed to secure video footage of the police operation, which revealed brutal violence committed against defenceless prisoners. The trial is currently underway before a jury of the people. The crime with which most of the officers are charged is torture. All the top officials of the prison administration are involved, right up to the Superintendent who

¹⁹ The latest report by the Antigone association, *Senza respiro (Breathless)*, describes the dire material living conditions in prisons, as ascertained following the monitoring of around one hundred penal institutions visited in 2024. Available at www.antigone.it.

authorised the raid. This is a trial in which all the issues discussed so far have come to light, and in particular what the subculture of obedience means within a military-style or police organisation. The trial also addresses the implicit or explicit nature of the criminal order. How should the order to deploy a special unit comprising around 150 police officers from other institutions be understood? Does it in itself imply the unlawful use of force? Is the freedom of action of the police officers implicit in the deployment of such a unit? Is it necessary for the commanding authority to always specify that lawful means must be used to contain any protests? Does the absence of a protocol on the use of force render the latter arbitrary? Who is responsible for the violence committed during a group operation whose mandate was unclear from the outset? In defending one of the officers accused of torture, his lawyer explicitly stated: “The prison police is a militarily organised force and, therefore, orders from superiors cannot be questioned”. This is the central point of the arguments put forward by the officers’ lawyers. The violence was part of an implicitly unlawful, premeditated plan that could not have been questioned by the subordinate officer. It is a classic case of shifting the blame upwards (in this instance, to the Head of the Campania Prison Administration and the Commander of the officers at the Santa Maria Capua Vetere facility), arguing that in prison practice, the deployment of a team such as the one sent to the Santa Maria Capua Vetere prison has a single objective: to use force, however and wherever necessary. In the order imposing the precautionary measure, the judge writes: “Whilst it may be accepted that Mr X did not participate in the search operations, as he maintains, due to pressing official duties, it must nevertheless be noted that, at the moment the search was about to begin, he was well aware of the sensitive nature of the operation and of the fact that it could have exceeded the bounds of legality, given the large number of participants armed with shields and batons and the fact that the purpose of the search was evident”. Therefore, one is not exempt from liability if, despite having the power to break the illegal chain of arbitrary orders, one looks the other way so as not to be directly involved in an illegal operation, but does not explicitly disobey the illegitimate orders (received implicitly) in order not to discredit oneself professionally in the eyes of one’s superiors. In prison life, every officer knows they are living at the dangerous crossroads between implicit illegal formal orders and explicit legal formal orders.

Every single prison officer, throughout the chain of command, holds a position of responsibility under the law. At all levels, Article 40, paragraph 2, of the Criminal Code applies, which states: “Failing to prevent an event that one has a legal duty to prevent is equivalent to causing it”. We are not dealing here with a lawful order, but one that is clearly unjust. We are in the realm of the undefined and, in any case, potentially criminal order. Reality is always

nuanced. Criminal orders are not given by saying, for example, ‘go and beat them up’, but ‘go in riot gear and disguise yourselves with helmets’. The criminal order is sometimes formally legal, but clearly of a different nature based on past practical experience.

5. The paradigm shift brought about by the approval of the Security Decree Law

A paradigm shift occurred when Decree-Law No. 48 of 11 April 2025 was converted into Law No. 80 on 9 June 2025. The text introduces a new offence, Article *415-bis*, which provides as follows:

“Anyone who, within a prison, takes part in a riot through acts of violence or threats or resistance to the execution of orders issued for the maintenance of order and security, committed by three or more persons acting together, shall be punished with imprisonment for a term of one to five years. For the purposes of the preceding paragraph, acts of passive resistance which, having regard to the number of persons involved and the context, prevent the performance of acts necessary for the maintenance of order and security shall also constitute acts of resistance. Those who instigate, organise or lead the riot shall be punished with imprisonment for a term of between two and eight years”.

Very severe penalties are therefore imposed on anyone who, in a prison or a detention centre for repatriation, takes part in a riot involving violence, threats or passive resistance by disobeying the orders given. The term ‘riot’ is not defined, but those who take part in it are punished, even if they do not use any form of violence against people or property. Passive resistance is explicitly cited as an action aimed at obstructing orders intended to ensure order and security. This is a provision that not even Alfredo Rocco, a jurist of the fascist regime and author of the 1930 Penal Code, had envisaged²⁰. It is a provision that, first and foremost, lacks the principle of specificity regarding the material conduct constituting an offence: it is unclear which violent or non-violent actions constitute the offence of revolt. Every act of violence,

²⁰ For the reasons behind the opposition, see C. PASINI, *Il disegno di legge sicurezza e il nuovo reato di rivolta in carcere e in strutture di accoglienza e trattenimento per migranti*, in “Sistema Penale”, no. 5, 2024, available at <https://www.sistemapenale.it/it/scheda/pasini-il-reato-di-rivolta-in-carcere-e-in-reception-and-detention-facilities-for-migrants-in-the-new-draft-bill>, or Patrizio Gonnella in the daily newspaper *Il Manifesto*, available at <https://ilmanifesto.it/il-delitto-di-rivolta-del-governo-schiaffo-allo-stato-di-diritto>. More generally, see the OSCE’s opinion on Security Bill No. 1660, the contents of which have been incorporated into Decree-Law No. 48, available at <https://www.penaedp.it/wp-content/uploads/2024/11/OSCE.pdf>.

threat or active resistance is, in fact, already punishable under the Criminal Code. What transforms them into a riot? It is impossible to know. But it is also a provision that blatantly violates the principle of offensiveness, according to which offences can only be established if they harm constitutionally relevant rights or interests. It is unclear what right is infringed by a non-violent protest. Punishing those who, in a non-violent manner, disobey any order from an officer transforms the latter into a despot upon whom the prisoner's fate depends, turning him into an obedient man forced to walk with his head bowed, as in Van Gogh's 'The Prisoners' Round' or in the video footage of the alleged torture in 2020 at the prison in Santa Maria Capua Vetere. To transform those who protest, even peacefully, into rioters punishable by up to eight years in prison, not only means violating freedom of thought and the right to criticise, and subordinating such principles to generic demands for order and security, but above all it means allowing a potentially illegitimate order to degenerate into one whose non-compliance by a prisoner could constitute a serious criminal offence. Thus, a chain of orders, potentially unlawful, within the Prison Police Corps, provided they are justified on the basis of generic and unsubstantiated security grounds, could have significant criminal consequences for resistant or uncooperative prisoners.

The risks that could arise from the new regulation are enormous. Let me try to illustrate this. Case A: three young male prisoners refuse to leave their cell in response to an unmotivated request to be placed in solitary confinement for disciplinary reasons, even though these have not been formally contested. Case B: three prisoners refuse to eat or drink as part of a hunger or thirst strike. Case C: three prisoners protest by banging on the bars of their cell windows following an order they consider unjust. These are three instances of ordinary prison life which, from now on, will be transformed from requests for help or to be heard into offences for disobeying an order. Although legally improper, the reason that led the Government to introduce the new offence of disobedience for conduct already punishable under existing laws is not sociologically obscure: it is the explicit affirmation of the moral superiority of informal order over the law, of security over treatment. Prisoners must obey and keep their mouths shut. The regulatory framework in this case changes to accommodate prison practice

6. Conclusion: regulations that follow practices

To which orders must a prison officer answer? Every prison officer has their own hierarchy, both formal and informal. Faced with the paradigm shift brought about by the

Security Decree-Law and the introduction of the new offence of prison riot, every prison officer holds enormous power in their hands. To bring the prison system back within the bounds of constitutional legality, an anthropological revolution would be required, one that views every police officer as the constitutional guarantor of human dignity, even to the point of taking responsibility for failure to comply with unlawful orders. Proactively and with foresight, to restore the chain of command to the bounds of prison law, action must be taken on many fronts: rejecting the ethical superiority of the police force; fostering a shared culture of punishment across all levels and professions involved; changing the punitive-reward model of treatment towards prisoners (which inevitably encourages arbitrariness and irrational orders); promote staff career progression based on constitutional objectives achieved rather than on maintaining a peaceful prison environment; counter the de facto militarisation and unchecked unionisation of the Prison Service, which is incapable of acting in the general public interest; dismantle the informal hierarchies within the prison system; and re-establish the prison governor and the supervisory magistrate as the sole true custodians of internal legality.