



# CAMMINO DIRITTO

Rivista di informazione giuridica



## JUSTICE AND WELFARE: NON-RESTRICTIVE SAFETY MEASURES AND SOCIAL INCLUSION POLICIES

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*The implementation of social inclusion policies must be aimed at promoting decent living conditions as well as a system of satisfactory relationships with people with psychological difficulties, so that they are included and not excluded: attention should be paid to the person in his or her social dimension.*

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1. The long and difficult legislative and jurisprudential process that led to the closure of the Judicial Psychiatric Hospitals began with the judgments of the Constitutional Court nn. **253/2003** and **367/2004**: with them, the illegality of art. 222 BC in so far as it imposes on the court the imposition of the measure of admissibility in OPG, **in any case** of commission of unpunished crimes, is punished with imprisonment not less than two years maximum. With such premises, **the principle of residuality** of the application of the security measure of custody and **no longer its automatism** has been affirmed.

From a regulatory point of view, however, the DPCM of 1 April 2008 represents the first turning point, transferring the health functions of the OPGs located in their territories through the LSUs to the regions. The *intentio legis* was to bring the internship's health management closer to the regions of origin, that is, to distribute the interns so that they would be admitted to OPGs located in the regions of origin of the internships (so-called **regionalization**).

However, two years beyond the decree, the Parliamentary Commission of Inquiry "Marino", appointed specifically to monitor the effectiveness and efficiency of the National Health Service, has started inspections in all of Italy OPGs, noting a state of extreme deterioration and abandonment uncivilized. The final report has indicated some lines of action: first, the undeniable implementation of the DPCM of 2008; *in secundis*, the creation of intermediate shelter facilities between the OPG and the supervised freedom (that is, the new **Rems**, an acronym for residences for the execution of security measures); finally, new ways of assessing social danger. The report of the so-called "Marino Commission" has therefore laid the foundations for the definitive overcoming of OPGs, encouraging the legislator to adopt Law no. 9/2012 that, to art. 3-ter, set the deadline for the final closure of the OPGs until March 31, 2013 (however, this term will not be respected, with two extensions until the dead end date of March 31, 2015).

2. This state of art, which has almost completed the process of overcoming the OPG issue, while at the same time urging the attention of doctrine and operators, involved in some aspects that concern, firstly, respect for constitutional guarantees.

Indeed, tackling the issue of social inclusion means putting the issue of recognition to all

citizens of that fundamental rights complex that represents the hard core of a civil society: more specifically, talking about social inclusion policies means empowering the society towards overcoming any form of marginalization of the weaker. In respect and consideration of the diversity of people with mental illness, the *focus* of the interventions had (and still must) be focused on identifying and removing social obstacles to the full realization of the principle of substantial equality, of which at the art-3, second paragraph.

If, for *welfare state*, is "welfare state" (or, better, "state of well-being"), then the implementation of social inclusion policies must be aimed at promoting decent living conditions as well as a system of relationships, satisfactory for people with psychological difficulties, so that they are included and not excluded: attention should not be addressed only to the person, but to the social dimension.

3. Besides, it is just the consideration of the person's mind to inspire the methods of treatment that are implemented within the Rems that, at least in the legislator's intentions, would represent an inclusive instrument of marginalized people.

If you look at both care needs and social defence (not secondary to the early ones), there are not many critical considerations that the introduction of healthcare facilities entails the custody of men with mental disorders.

It is dread, the risk that Rems can over time become a surrogate of small-scale OPGs, unable to provide adequate care and rehabilitation paths. Furthermore, the humanitarian crowd that has accompanied the reform could paradoxically lead to the total cessation of security custody measures, while neglecting the demands of social protection - which are reiterated - are on a non-secondary level with respect to those Of treatment and rehabilitation of the convicted.

Secondly, it points to the problem of **training** of healthcare staff responsible for assisting interns. On the point, important suggestions come from the case-law of law which has established "the existence of a general power/duty to monitor them, in order to prevent the patient's self or etherological actions, subject to specific conditions objectively and subjectively appreciable, capable of establishing, in that sense, a foreseeable risk.

It is not secondary, the **reticence of judges** to comply with the legislator's intentions to rupture much of the powers of the penitentiary administration to attribute it to the sanitary one. The data that are being recorded and the presence of a large number of convicted persons, who are the recipients of security arrest measures, say that the **judiciary is not operating in compliance with law no. 81 of 2014**, just one of the cornerstones of legislation, the principle of sending Rems as an *extrema ratio*, which is not being applied through post-reform judgments as a response to the evolved path.

4. Concerns about the fact that legislative reform is based on a mere change of denomination of OPGs and that both the legislator and society are not keeping pace with the progress of psychiatry - reiterating the same negative (and not resolving) experience of the Sir, Rehabilitation facilities for mental health patients, albeit not socially vulnerable, are also justified by a political and administrative disengagement that has often resulted in poor social health care and serious gaps in illness until deteriorating situations.

4.1. It is sadly noteworthy that the story of Sir Gregory the Great, which took place in the night between 15 and 16 December 2001, in which **19 interns lost their lives in the structure**. In addition, to providing a precise description of the state of prefabrication and identifying subjective responsibilities, a special parliamentary commission of inquiry had already raised the issue of how to implement the legislative provisions on the authorization and security regime of Surveillance powers. The parliamentary and criminal investigations then highlighted the absolute superficiality of the bodies responsible for authorizations and the assessment of the minimum requirements in interpreting the norm, realizing the same, ineffective interventions at the time of the pyre, as well as major deficiencies in the vocational training of staff employed within the facility, both with regard to the care of disabled persons and the ability to intervene in exceptional events such as those occurring.

5. In the light of these criticisms, we are still far from innovative and efficient realities, such as those at the time of health reform by Franco Basaglia in 1978, which aimed at shifting the centre of attention from social care to mindful of their reintegration (precisely, inclusion), through the activation of territorial services.

Today, the most feared fear is that both rehabilitation communities and Rems, both healthcare facilities, are nothing more than **social exclusion boxes**.

However, the predisposition of a valid system of territorial care services must go hand in hand with raising the **awareness of the society to the reception and education of the mentally ill**, in order to overcome fears and discriminating attitudes: it is not enough. In fact, an ostentatious and widespread goodwill, if no distrust, is won and it continues to look at mental illness like a Damocles sword hanging on the head of the psychic disability, even more if it has become the author of a crime case. It is the task of a national country to teach its citizens equality and inclusion by promoting information actions and ensuring a good quality of mental health services.

6. Therefore, confrontation with the international scene can certainly be a valid reflection point and a comparison term that commasures the advances of our country, both from a legislative and from a medical-psychiatric point of view, finally, from a social point of view.

It is observed, first, the participation of 19 European countries, including Italy, in the project called "**Long-Term Forensic Psychiatric Care**" with the aim of developing effective policies in forensic and practical psychiatric services based on long-term treatments, optimizing the quality of life of patients who may need continuous care throughout their life.

6.1 In detail, however, in the German reality, men with mental disorders are subject to 1933 legislation, which differentiates the treatment according to the risk of relapse. Psychosocial offenders, who are estimated to be unable to fall into the crime, are being admitted to psychiatric hospitals. Where, however, it is believed that the person may be relapsed, he is hospitalized in psychiatric hospitals. In 2007, was introduced a legislation that provides for the possibility of issuing "therapy orders", which oblige perpetrators of mental, psychological, psycho-pharmacological, psychotherapeutic or socio-therapeutic treatment to appear for regular medical checks, (Where the failure to submit to the controls constitutes an indication of poor adherence to the treatment and violation of the measure).

However, since 2011, the case of Gustl Mollath - convicted of injuries and seizures committed against his wife, but whose inability to understand and want because of serious paranoid disorders - as well as serious judiciary errors, has triggered a lively debate on the issue of placement in psychiatric hospitals.

It is, in October 2015, that the Federal Cabinet has submitted a draft law on "Amendments to the law on placement in a psychiatric hospital under art 63 of the Penal Code and other amendments", mainly intended to "make effective" the principle of proportionality of placements.

Placements in a psychiatric hospital (art 63 of the Penal Code) have in many cases been shown to be disproportionate, both at the level of the measure adopted by the court and in the context of enforcement, particularly as regards the period of detention. By 2015, in fact, there are more than 7,000 people in a psychiatric hospital in Germany, and the trend is steadily rising, though not as fast as in the last 20 years; The average placement period is estimated at 8 years.

The reform, however, also faces a crucial aspect: the role of forensic psychiatry and its legitimate exponents to give judgment on the dangers of the subjects being treated, during periodic checks (initially every 3 years, after 6 years, and finally every 2 years) on the mental state of the interned patient. So, the bill provides that judgments must be obtained from external experts, verifying, in concrete terms, the degree of knowledge and experience of experts called for periodic audits, as the "Mollath case" has also taught that the most experienced prepared do not necessarily protect victims from mistakes that could prove fatal.

6.2 The most interesting thing, however, is that of **the Netherlands**, where the perpetrators of crimes with personality disorders, assessed as a serious threat to society and with limited responsibility for the offense committed, are, during a first period, of the imprisonment measure in prison and, subsequently, of treatment in a judicial hospitals with the obligation to comply with the prescriptions. The system pursues the dual goal of protecting society and rehabilitating the perpetrator by imposing treatment for a period of 2 years, which can be extended up to 4 years. The Dutch judicial hospice, which has high security departments and also provides extracurricular assistance and supervision over

the territory, has so far given good results in terms of reducing recidivism, as it can rely on a company prepared to receive and to accommodate those who emerge from the circuit, given the possibility of social inclusion far more concrete than we can expect.

6.3 In **the United States**, however, there is a change of perspective. The judicial system, which seemed to be only interested in assessing the culprit of the defendant, is gradually becoming aware of the lack of therapeutic and rehabilitative supports. Indeed, many states have instituted Courts based on a "**therapeutic jurisprudence**" whose purpose is to promote a more civil and equitable society, starting from the law as a therapeutic agent, where **judges are actively involved in solving problems**.

7. Finally, since every legal experience differs by history, tradition, and events that have characterized the life of that particular country, the common denominator seems to be that of primary, or parental care in relation to custody. Only a therapeutic and non-punitive approach to the mental illness of the perpetrator of a crime allows the full realization of the re-education function of the punishment, a function that cannot be differentiated according to the psychic characteristics of the offender, avoiding in a decisive way any Relinquish to a - no more admissible - lombrosian conception.

Focusing in particular on our country, one of the cornerstones of a civil society (i.e. the re-education principle, referred to in Article 27 of the Constitution) must be the fil rouge linking any consequences of sanction to the A crime offense. Though sanitation of the penalty, with reference to the "weird rei", has marginalized the Law, this does not necessarily correspond to its own deregulation. Remains vigilant in the exercise of a control function on the emerging structures and the rehabilitation function attributed to them, because the closure of OPGs does not rely on another "label scam" and, with a new and young aesthetic appearance, corresponds to a logic of social inclusion according to the dictates of the Constitution: there is not only the future of hundreds of people involved, but also the **reputation** of an entire society.