

BENESSERE E TUTELA SANITARIA NELLA LEGISLAZIONE PENITENZIARIA

WELL-BEING AND HEALTH PROTECTION IN PRISON LEGISLATION

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Abstract

Health protection in Penitentiary Institutions is a very topical issue, even more emphasized in this particular period of pandemic in which it needs to keep guaranteeing the right to health of people deprived of their personal freedom, by promoting their well-being.

This contribution aims to highlight how the right to health of prisoners at the time of the pandemic can be implemented through body-mediated activities, as fundamental therapeutic and educational treatment strategies in the promotion of the person’s psycho-physical-social well-being. Health education interventions based on movement within the prison environment guarantee the “right” to health of people with restricted freedom, allow prisoners to improve their well-being, benefiting from the positive effects on the body at a psychological, motor, emotional and relational level; in addition, they are a valuable tool through which the psycho-pedagogical value of the body contributes to promote those processes capable of triggering an existential change of people, for their future social reintegration.

Keywords

Right to Health, Well-being, Prison, Pandemic, Education, Corporeity.
Diritto Alla Salute, Benessere, Carcere, Pandemia, Istruzione, Corporeità.

Introduction

The World Health Organization (2012) has long asserted that health should be thought of and, above all, pursued as overall bio-psycho-social well-being, and should not be simply conceived as the absence of a disease (*WHO European health report 2012 - Charting the Way to Well-Being*).

This dynamic and ecological conception of health is closely linked to the influence of contexts and to the full realization of one's own potential in the various life contexts.

In the Constitution of the Italian Republic (1948), the right to health of the human person is qualified as fundamental by Art. 32: "The Republic shall safeguard health as a fundamental right of the individual and as a collective interest, and shall ensure free medical care to the indigent".

As well known, health is a "complex" good since its safeguard implies the realization of various conditions: it is necessary to guarantee the healthiness of the environment, the right to health services and the freedom to care, as well as to promote the person's psycho-physical well-being, in order to protect the ethical, psychological and "organic" profile of the human dimension (Caredda, 2015)

This commitment falls within the duty to ensure the individual's freedom-dignity as a supreme value of the system and guiding principle of the action of the State (Articles 2 and 3 of the Constitution of the Italian Republic, 1948), in which the essential core of the right to health is defined as the "inviolable sphere of human dignity".

The Prime Ministerial Decree dated 01/04/2008 sanctioned the passage of the functions of health care in prison from the Ministry of Justice to the Ministry of Health, paving the way for a new procedural line that involves penitentiary medicine both in terms of therapy and of education, overturning the concept of well-being as a possibility on which the person is able to intervene.

However, the living conditions and the particular organizational conditions within the Penitentiary Institutes, worsened by the constant phenomenon of overcrowding and promiscuity, represent a specific risk factor even more relevant to the health of inmates especially during the health emergency caused by Covid-19.

"Health is a non-restrictable resource". In other words, health cannot be balanced with any security reason or procedural requirement (Ruotolo, 2011)

Prisons and other places of detention are closed environments in which detained persons (including the staff working in them) live in close proximity. In addition, the overcrowding of penitentiary institutions is a long-standing issue in Italy, which, in the face of the spreading of the pandemic, has urgently re-emerged.

The risk of contagion, particularly high in prisons, has posed a difficult challenge: balancing in a well-proportional way the constitutional right to health - which must also be enjoyed by prisoners - with the protection of public safety, which could be put at risk by an excessively high number of releases.

Through a series of measures, the Italian government tried to cope with the contagion among the prison population (inmates and staff) by implementing a series of precautionary measures on the movement of prisoners and the access of family members to the facilities, further fueling their isolation and increasing the level of their total exclusion from the outside world; in addition, alternative solutions to detention, such as home detention or release, affecting the reduction of overcrowding - though not solving the problem - were implemented too.

The suspended time of the Covid-19 emergency brings back to a similar suspended time which is always existing in the prison and which, with the worsening of the opportunities to meet, relate to others and socialize, has produced a sense of alienation and melancholy that has worsened the psycho-emotional condition of inmates, leading to an increase in pathologies inherent to mental health and which could also end in episodes of brutal aggression, self-harm or suicide.

The centrality of the inmate's well-being highlights the importance of the educational and

treatment area, which is achieved through school and vocational education activities, as well as thanks to the cultural, recreational, and sports ones (De Vita, Donini, Iovino, 2019) provided for by art. 15 of Italian Law 354/1974 on penitentiary regulations. These activities, and in particular motor activity, represent a learning and educational opportunity for a future life project.

In order to cope with the organic, psychological, affective, relational and social deterioration to which a detainee is subjected, especially during the health emergency due to Covid-19, it is essential that the treatment proposals respond not only to a therapeutic need, but also to an educational one.

Starting from the consideration that the “places of detention” should not serve to hide the “deviance”, but to re-educate guilty subjects in a perspective of social reintegration, the safeguard of psycho-physical health is one of the essential prerequisites of any re-educational treatment for prisoners, aimed at the acquisition of the best practices useful for the promotion of a new perception of oneself and one’s own empowerment.

In accordance with these assumptions, the experiences lived through one’s own body and corporeity represent not only a useful tool to develop one’s own condition of physical and physiological performance, but also a valuable strategy to form one’s own identity and develop the skills to act in the world, offering both an opportunity for personal change and re-elaboration, and the possibility to increase motivation towards a better life condition.

1. Health as a fundamental right of prisoners and health protection

The issue of protecting the right to health of persons deprived of their personal freedom is among those which, in recent years, have received great attention particularly from supranational institutions.

At the international level, the protection of the right to health of persons deprived of their personal freedom is contemplated in the Universal Declaration of Human Rights approved by the General Assembly of the United Nations in 1948, playing a central role in the process of “humanization” of the punishment; its Art. 5 states that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.

In the European context, the requirements of prison treatment humanization have been reflected both within the European Convention for the Protection of Fundamental Rights and Freedoms (1950), through the work of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT, 1989), established within the European Council through its 1987 Convention, and in the specific activities promoted by the same European Council in the field of criminal law (Ruotolo, 2002).

The right to health, as a fundamental right in the constitutional traditions of European countries, is expressly recognized by the Charter of Fundamental Rights of the European Union, in Art. 35, of the European Court of Human Rights (E.C.H.R.).

Prison is an institution of punishment regulated by the Italian penitentiary system, all the measures provided are to be considered as a set of directives aimed at re-educating subjects and at achieving their social reintegration; in order to reach this goal, the State must recognize the respect of the prisoners’ dignity and fundamental rights, recognized to every human being.

In Art. 1 of the Italian Law No. 354 dated July 26, 1975, the legislator stated that: “Prison treatment shall conform to humanity and shall ensure respect for the dignity of the person. The treatment is based on absolute impartiality, without discrimination based on nationality, race, economic and social conditions, political opinions and religious beliefs. ...] Sentenced prisoners and internees shall be subjected to a re-educational treatment that tends, also through contacts with the outside environment, to their social reintegration. The treatment is implemented according to a criterion of individualization in relation to the specific conditions of the subjects”; in correlation to Article 27, paragraph 3, of the Constitution of the Italian Republic (1948).

Articles 27, paragraph 3, and 32 of the Italian Constitution, provide for the protection of the right to health of persons deprived of their personal freedom, as they respectively enshrine the principle of humanization of the sentence, and the solemn affirmation that the Republic protects

health as a fundamental right of the individual and as an interest of the community.

Art. 32 is the constitutional foundation of the right to health: connected with the provisions of Art. 2, the right to health assumes the role of instrumental prerogative and necessary prerequisite for the development of the individual personality. This is the only right qualified as “fundamental” by the Italian Constitution (Vitello, 1996).

Therefore, the State is called to provide structures, means and personnel suitable to ensure a condition of optimal health to each individual, as well as to implement an effective policy of prevention, care and intervention on the possible sources of disturbance of the psycho-physical balance of the population in general.

In the prison context, preventive medicine assumes an important role both by giving priority to those health interventions aimed at avoiding, as far as possible, the onset of disease itself, and by identifying a series of best practices and behaviors that the prison administration and users are invited to adopt so as to promote a healthier environment, such as avoiding, or at least reducing, harmful lifestyles and vices like smoking, drinking, being stressed, and so on.

The Prison Administration is called to take full responsibility for the prisoner’s psycho-physical health, and is obliged to ensure the best health care (within and outside the prison) to each person deprived of his or her personal freedom (Vitello, 1996).

The principle of humanization and the re-educative function of the sentence impose the pursuit of a full and effective protection of the right to health of the convicted person, because only a condition of psycho-physical well-being can pave the way to his or her recovery, and therefore to his or her social reintegration.

In accordance with international guidelines (European Penitentiary Rules: “*The organization of prison health care*”, Art. 40), with a reform introduced by Italian delegated law no. 419 of 1998, followed by Legislative Decree no. 230 of 1999 on the reorganization of penitentiary medicine, through the approval of the Italian Prime Ministerial Decree dated April 1, 2008, the ownership of the functions and the relative responsibilities in the provision of the service relating to penitentiary medicine were transferred from the Penitentiary Administration to the National Health Service, and the Regions and Local Health Authorities were given final responsibility.

The reform of penitentiary medicine is certainly a good start to ensure the right to health of prisoners, in accordance with the provisions of the Italian Constitution and the levels of dignity indicated by European and international institutions.

2. From the right to health to the “rights” to health

The concept of health can refer only to the physical or mental aspects, can be understood in its individual or relational dimension, and can be considered as the mere absence of disease or infirmity or as a condition of complete well-being.

Article 32 of the Italian Constitution fully captures the plurality of semantic nuances of the term, and therefore it is assumed that we can speak of “*rights*” to health rather than a “*right*” to health (Morana, 2015).

Within the scope of the protection of health enshrined in Article 32 it is included not only the biological dimension, but also the social, relational and environmental one.

The specific content of the right to health therefore depends on the meaning intended to be attached to the term “health”.

In accordance with the decisions of the Italian Constitutional Court (sentence 2007/21748), health can no longer be understood as the mere absence of a disease, but as a state of complete physical and mental well-being, which also involves the inner aspects of life as perceived and experienced by the individual.

Even the definition given by the World Health Organization (1946) refers to health as a “state of complete physical, mental and social well-being, and not simply the absence of disease” (Baccaro, 2003) which is also linked to what is stated in *The International Covenant on Economic, Social and Cultural Rights* (New York 1966) stating that health is a right of every

individual concerning both the physical, mental and relational life.

The concept of health as the full development of the human person is achieved through the close correlation between the individual and the external dimension with which he or she comes into contact.

Therefore, the dynamic dimension of health does not only refer to the protection of physical integrity, but also to the relational profiles and to the environment where the individual's personality is expressed.

The need to ensure the effective protection of the right to health in prison presupposes firstly the protection of the environmental context in which people deprived of their freedom are, is part of the broader concept of health protection (which is not limited to the treatment of diseases), and includes the quality of the environment too (De Ferrari, Romano, 2003).

Given the magnitude of the reconstructed concept, the right to health can take on different meanings in relation to the various subjective situations it protects, and in accordance with these rights, Italian Penitentiary Law provides a real body of rules (Fiorio, 2004) (in Art. 5-11 of Italian Penitentiary Law), aimed at ensuring essential environmental, food and hygiene conditions for the health of prisoners and inmates, in a purely preventive way.

3. Health in prison at the time of the pandemic

Health in prison at the time of the pandemic continues to pose the difficult balance between health and safety. These are potentially conflicting aspects, but both are fundamental: the first to protect the individual, the second to protect the community.

With the health emergency, a number of measures have been implemented to curb the phenomenon of contagion on the basis of the first Italian Department of Prison Administration circular (dated February 22, 2020), including the interruption of prisoner transfers from and to institutions located in the "red zones"; a ban on entry to institutions for anyone coming from the "red zones"; discretionary power of the prison management to apply limitations to interviews and activities deemed necessary and appropriate; possibility to replace interviews with family members with Skype or phone calls (Antigone, 2020), and temporary withdrawal of temporary licenses and semi-freedom regimes, thereby triggering the inevitable conflagration that led many prisons to riots and, in some cases, to tragedy.

The constant phenomenon of overcrowding and promiscuity have been worsening the living conditions inside Penitentiary Institutions for a long time, and constitute an important risk factor for the health of detained persons.

In addition, persons deprived of their freedom are likely to be more vulnerable to COVID-19 than the general population, because of the restrictive conditions they live in. In addition, they may suffer from poorer health status as they are more exposed to risk factors such as smoking, drug use, poor hygiene, mental and physical stress, poor diet, or previous infectious and chronic diseases. In indoor environments, the virus can spread and circulate among workplace staff, new entrants, or visiting family members (WHO/Europe, 2020).

As the Pandemic persisted, the Italian Government issued the "Cura Italia" decree (March 17, 2020), identifying alternative routes to detention. Article 123 identified home detention with electronic monitoring of all inmates, with a final sentence and a residual sentence to be completed between 6 and 18 months, as the main tool to reduce the prison population (Antigone, 2020). Finally, two decrees were subsequently approved (April 30, 2020, and May 10, 2020, respectively) containing rules on the release of prisoners involved in organized crime (Antigone, 2020).

As a question of legality and right to health, these interventions sought to contain contagion among the prison population, by reducing the crowding rate from 130.4% to 112.2% in two months and a half, while at the end of February 2020 there were 61,230 inmates against a regulatory capacity of 50,931 (with the presence of 10,229 more people than the regulatory capacity on May 15, 2020, there were 52,679 inmates).

Guaranteeing the right to health to those deprived of their freedom generates a paradox in

itself; in fact, the World Health Organization states that: “The concept of health undergoes a strong resizing when framed in the prison context”. Prison and health are antithetical because prison is the negation of health, understood as a state of psychophysical well-being.

The “pathogenic” effect of imprisonment as a “handicap factory” (Ruggiero, 2011) is well known since the early 1990s, when the French doctor Daniel Gonin studied the effects of detention in the prison of Lyon.

The distortion of time, on the one hand, and the interruption of communication, on the other, are the two factors that most influence the “imprisoned health”, producing various kinds of pathologies which are more or less visible. In short, it is the prison “environment” that causes a surplus of suffering, forcing penitentiary medicine to avoid any preventive intervention, focusing exclusively on reactive interventions limiting the consequences, once the pathology has occurred. (Ruggiero, 2011).

The detention condition imposes a necessary balance between the protection of fundamental rights and the security needs, unfortunately with unavoidable consequent criticalities related not only to the physical-mental health and the lifestyle maintained during detention, but also to the strong emotional impact of the detention experience involved, with the associated risk of a loss of self-identity (Caredda, 2015).

Health in prison before Covid-19 also suffered from an unsatisfactory service, for which one out of 4 inmates turned out to be in psychiatric therapy, and in some institutions this condition affected almost all of the prisoners. As far as mental health is concerned, the WHO also confirms mental disorder as the main pathology in prison. A mental disorder that is both the cause and the effect of detention. In Italy, in the 98 institutions visited, 27.6% of inmates on average were undergoing psychiatric treatment. All this with some records too, such as that of the prison of Spoleto where 97% of inmates were in therapy, or the 90% in Lucca, or even in Vercelli (86%). (Antigone, 2020).

In the lives of all of us, the sudden and very destabilizing advent of Covid-19 has caused a suspension - if not an interruption - of our affective, family, social and work contacts.

Before the health emergency, prisoners were already experiencing a suspension of the course of their existence: what happens in prisons now that the days are no longer marked by visits, cultural and sports activities, but by the fear of contagion?

The *lockdown* is forcing everyone into isolation, into increasing alienation, into “meeting” each other on digital platforms and being afraid of each other, and it is clear how critical levels can be reached in an environment such as the prison one, which is confined by definition. The perception of time inside and outside of prison now seems to be very similar, but for the prisoner, who is also prevented from having family conversations, melancholy leads to sadness with a relative increase in emotional stress, irritability, aggression and a possible propensity to suicide.

While living in very small spaces, the fear of contagion pushes to consider the other as someone to be afraid of and to stay away from, and therefore, in addition to the distancing and isolation imposed by prison regulations and the precautionary physical distance indicated by the safety regulations on Covid-19 contagion prevention, they avoid interacting with others, further depriving themselves of relationships, socialization and sense of sharing.

The absence of sports practice also prevents prisoners from improving their psycho-physical, physiological, emotional-relational and immuno-system conditions.

Motor, psycho-emotional, affective-relational and social support and recovery activities are of crucial importance for the improvement or restoration of the inmates’ overall well-being.

4. Health protection in prison: body and corporeity as therapeutic and educational strategy

The therapeutic process in penitentiary medicine is not just and strictly therapeutic, but it is also educational, since it aims at making the patient/inmate acquire a series of behaviors, habits and lifestyles aimed at managing his/her health problem.

The ultimate goal of the treatment process is therefore the assumption of behaviors aimed at healing or improving the disease, as well as promoting an overall process of knowledge, skills

and attitudes and *coping strategies empowerment*, necessary for the patient to learn to “take care of himself/herself” and to redesign his/her existence (Lopez, 2004).

Consequently, the state of well-being (or even disease) is determined by an articulated intertwining of factors requiring a holistic approach to the management of the patient’s care, which takes into account complex and interrelated variables, placing the person and his or her state of health at the heart of the care process in a comprehensive sense.

From an eco-systemic point of view, health and well-being do not depend only on the proper functioning of an organ or an apparatus, but on the correlation of all the systems that characterize the human beings and the balance between their many dimensions, be them physical, mental or social (Iavarone, 2002).

From the perspective of promoting health and “self-care” processes, the concept of well-being turns from a “condition” into a “possibility”, becoming an essential basis for the existential redesign of detained people, thanks to which people’s attitude towards their own existence changes into learning how to plan their own well-being by leveraging self-education and the self-management of their own health/disease condition.

To speak of health education means to focus on the concept of well-being understood as “the best possible condition” in which each individual, even in conditions of restriction of freedom, must necessarily live. The focus should therefore be on the best practices useful for the prevention and promotion of health, from which it is possible to activate change processes aimed at the prisoners’ well-being.

The educational action and intentionality, together with the training process, cannot do without methodologies that use the body as a mediator of experiences and understanding of oneself, others and the world around us, and as a tool through which to build one’s own identity and enhance the skills needed to act in the world.

Our mental processes develop and are modulated by corporeity. It is the body that, already from prenatal age, allows us the encounter with the world (Gallese, 2016) to *embody the experience* thanks to which “the more pleasant it will be, the more learning will be facilitated (Lucangeli, 2011).

The mind and the body are inseparable and, similarly, the body and the movement form a unit that sets up a deep degree of self-memory within a vital and situational pattern which responds to a corporeal, biological and material situativity (Damasio, 2000).

Each of us is situated within an environment, but indeed, *before anything else, we are situated in a body*: we are *our body*, which means that *we are characterized by a materiality and a biological specificity that define us and mark a fundamental condition of constraint to which all our possibilities are linked* (Damasio, 2000).

Therefore, our body is the primary constraint allowing us to act in any context - including prison - and to be in the world.

Existing through a body that acts in an environment, understood both as a physical place and as a socio-affective and cultural context, is therefore the necessary and fundamental condition allowing the individual to learn, to build knowledge, and to shape himself/herself. (Lo Presti, 2016)

The “lived body”, the *leib* (not the physical body), involves and stimulates all the dimensions of a person (from the psychological, motor, emotional, relational and spiritual point of view), producing useful changes to orient people towards health behaviors allowing them to change their lifestyle, improve their well-being and the quality of their personal, socio-relational and professional life (Rosa, De Vita, 2019).

Through the experience of corporeity, it is possible to generate those changes in prisoners which can encourage them to improve their general health condition; this leads them not only to take care of themselves, but also to lead them to acquire self-reflection, self-management and self-fulfillment tools, resulting in a condition of psycho-physical-social well-being consistent with health protection and responding to the right to health of people in restriction of freedom.

Conclusions

The cultural, recreational and sports activities are included by Italian Law 354/1974 (law on the penitentiary system) among the main elements of the treatment (art.15), along with education, work, religion, contacts with the outside world and with family members (Italian Ministry of Justice, 2018). The regulation groups three quite close but different areas: culture as an opportunity for personal growth and as a learning and knowledge experience; sports as a tool aimed at promoting well-being and psychophysical integrity, the acquisition of motor skills and the elimination of tensions induced by detention; recreational activities as opportunities for socialization and expression of creativity and personal skills. All useful opportunities to produce positive changes in the person, and to share rules and objectives with others (Italian Ministry of Justice, 2018).

Even Penitentiary Medicine conceives the performance of body-mediated activities in prison not just as a way to protect the right to health, but also as a tool through which to promote educability, inclusion, prosocial behaviors, and active/healthy lifestyles.

The purpose of re-education through body and corporeity is not only to improve motor skills and enhance physiological and performance skills, but also to promote *empowerment*, change, opportunity, learning, orientation, *problem-solving*, sharing, participation, dialogue, exchange, comparison, self-discovery and life project.

Addressing an issue such as that of life in prison during a pandemic means continuing to protect the overall well-being of those who are serving a prison sentence in order to preserve, even at a time of absolute urgency, the human dignity of prisoners and their right to health.

With respect for the right to health of the prisoners, in terms of learning (new knowledge), education (life skills), and well-being (health protection), body-mediated activities are among the methodological strategies perfectly applicable and adjustable to the prison context, and are to be considered indispensable, in compliance with safety and prevention regulations, even and especially during the covid-19 health emergency triggered by the pandemic.

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