Vergelijkend onderzoek Italiaans 41-bis detentieregime

Sanne Struijk

Sonja Meijer

Pieter Verrest

Francesco Calderoni

m.m.v. Francesca Anzovino

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Summary

Preface

Lately, there has been a great deal of attention – in the media, politics and practice – for tackling organized crime in the Netherlands. Specifically for the prison system, this is reflected in policy to prevent or combat continued criminal activity in detention (*voortgezet crimineel handelen in detentie*, hereinafter: VCHD). This was mainly due to the arrest of several persons, suspected or convicted of serious crimes, who, because of their power and resources and the criminal organizations of which they are part, are (or may be) more dangerous than other detainees. It represents a new challenge for the judiciary and the prison system to prevent such prisoners from abusing the freedoms offered by the penitentiary legal framework during their trial and detention phase in order to continue their criminal activities. An indication that this continuing criminal behavior actually takes place can be found in the criminal case in which it has now been established by the court that a lawyer took messages in connection with criminal activities from an inmate in the Extra Secure Institution (*Extra Beveiligde Inrichting*, hereinafter: EBI) in the prison of Vught. The arrest of this lawyer in October 2021 is not an isolated case. Together with the murders concerning a crown witness, the threats of legal practitioners and the existence of death lists with names of employees of the Department of Correctional Institutions (*Dienst Justitiële Inrichtingen*, hereinafter: DJI), the consequences of organized crime on both the rule of law and the prison system have become more visible.

Against this background, there is a need to strengthen existing measures, laws and regulations regarding the approach to VCHD. In this context, there is increasing interest in the fight against the mafia in Italy. More specifically for the prison system, attention is focused on an Italian anti-mafia detention regime. This regime is based on Article 41-bis of the Italian Prison Law. It is also known as '*carcere duro*' (harsh detention regime), as this is the most severe detention regime in Italy. The Dutch interest in the Italian anti-mafia approach, with this specific detention regime, has also recently been translated into action. First through the coalition agreement of the current cabinet and then on to a subsequent parliamentary letter from both the former and the current minister for Legal Protection. As a result, the EBI regime has already been effectively adapted and legislative change is in the making. In parallel, the current Minister for Legal Protection, also on behalf of the Minister of Justice and Security, notes in a letter to Parliament dated 29 March 2022 that knowledge of Italian penitentiary law and its embedding in the broader Italian legal system is necessary to make a meaningful comparison with the Dutch EBI regime and detention policy. The political commitment by the Minister to ask the WODC to investigate working elements of the 41-bis regime that could usefully complement the existing EBI regime was the specific reason for the present research project, carried out commissioned by the WODC.

Problem statement, main research questions and research methods

Given the above background and purpose of the research, the following problem statement was used:

> What does the Italian 41-bis regime entail, what function does it fulfil within Italian criminal law, how does it work in practice, how does it relate to the applicable framework of legal guarantees in a national and international context, and what would be parts of the 41-bis regime in comparison with the EBI regime in force in the

Netherlands that could strengthen the Dutch EBI detention system in tackling continued criminal activity?

This problem statement is formulated from the following four main research questions:

1. What is the detention regime of Article 41-bis, what is its objective and how is it embedded in the Italian penitentiary and criminal justice system?
2. How does the Italian detention regime of Article 41-bis work in practice?
3. Have there been any relevant (legal) developments and/or changes in the Italian legislation in relation to the main questions under 1 and 2, why did they take place and what consequences did they have in relation to the original scheme?
4. Which elements of the 41-bis regime could – all things considered – be used in the Netherlands to reduce the chance of VCHD in the EBI?

All main questions consist of sub-research questions, a total of 33. To answer the research questions, a combination of the following research methods was used: in addition to conducting legislative, literature and jurisprudence research, interviews were conducted with both Dutch and Italian professionals and finally comparative legal research was carried out, both 'horizontally' between the Dutch and Italian detention regime, as 'vertically' regarding the relationship of the two regimes to European and international law standards.

Below a brief description is provided of both the content and the main findings for each chapter of the report.

Chapter 2

Chapter 2 outlines the developments that have taken place in the Netherlands in recent years in both regulations and policy in the field of combating (serious forms of) VCHD. As said, these developments form the background against which this research has been carried out and serve more specifically to answer the fourth main research question. In summary, we can say that from the beginning of the intensive focus on combating severe VCHD in the autumn of 2021, a lot has changed in policy and regulations within a short period of time. Several things stand out. Firstly, that many of the measures that have been implemented seem to be clearly inspired by elements of the Italian 41-bis regime, without citing this as a source. Secondly, there appears to be a strong interaction between motions of the House of Representatives and the policy changes that the government is implementing. And finally, a paradigm shift can be observed. In addition to tightening the EBI regime, more and more attention has gradually emerged for the broader category of prisoners with a flight or social risk (hereinafter: GVM) and the broader role that the new intensive supervision departments (*Afdelingen Intensief Toezicht*, hereinafter: AITs) in prisons could play in combating VCHD. Moreover, there seems to be a change of perspective from an initial focus on countering VCHD to countering organized crime in or out of detention.

Based on the observation that there is political interest in the Italian 41-bis regime and with the main research questions in mind, we asked ourselves in which parts of the Italian regime the Dutch practitioners would be particularly interested. After having done a preliminary legislative and literature research on the 41-bis regime, interviews were held with representatives of DJI and the prison in Vught, of the National Public Prosecutor's Office, of the association of Dutch lawyers (*Nederlandse Orde van Advocaten*, hereinafter: NovA) and of the advisory department of a criminal justice council (*Raad voor Strafrechtstoepassing en Jeugdbescherming*, hereinafter: RSJ). In summary, five points of interest have emerged which,

according to almost all respondents, deserve special attention when examining the practice of the 41-bis regime. The five points concern, in turn, the placement in and extension of the regime, the restrictive measures for both detainees, families and lawyers in the 41-bis regime, the legal position of the 41-bis detainee and the legal remedies available to him, the way in which an intelligence function is provided in Italy during and in detention, and finally, the existence of an exit strategy for the 41-bis regime.

Chapter 3

From chapter 3 onwards, the focus in the report switches to the situation in Italy. The third chapter broadly deals with the sociological and criminological context of the 41-bis regime and its place in the penitentiary system on the one hand and in the fight against the mafia in Italy on the other. This chapter was written by an Italian expert, in the person of Professor Francesco Calderoni. The chapter written in English serves to answer (parts of) the first and second main research questions. One of the main findings is that the 41-bis regime is regarded as a crucial but not uncontroversial element of the Italian anti-mafia approach. The scheme has undergone considerable development over the past 30 years, influenced by the case law of the Italian Constitutional Court and the ECtHR. The official justification for the application of the 41-bis regime, as confirmed by constitutional jurisprudence, is to address serious problems related to public order and security, and to prevent the continuation of links with criminal (mafia) organizations. This is important as there is little doubt that detained mafia bosses and members are trying to manage and continue the criminal activities from detention. However, in addition to the preventive goal of preventing this, the 41-bis regime also seems to be attributed a retributive function as a result of the particularly drastic prison regime, as if it were a punishment. Moreover, the regime can also have a general deterrent function by showing mafia bosses and members that they can face strict conditions of detention. Finally, the 41-bis regime also seems to encourage cooperation with the judiciary.

These additional functions of the 41-bis to the preventive objective are certainly more controversial, as they may call into question the constitutional rules for the imposition and enforcement of criminal sanctions in Italy. Because of these concerns, the additional features are often denied or overlooked in the official debate. These functions are not, in principle, incompatible with the official main objective of the 41-bis regime, but they should be recognized and discussed in a more transparent manner and, moreover, provided with empirical research into the effects of the regime, which is unfortunately lacking so far.

A final finding in this chapter is that the 41-bis regime has taken on symbolic significance in the political and media landscape, making it challenging to adopt changes from a political point of view. Over the years, the regime has been associated with a crackdown on (mafia) crime and terrorism, and any attempt to change or abolish the regime can therefore be seen as a sign of weakness or complacency towards criminals. Politicians and policymakers may be reluctant to propose or support changes to the 41-bis regime for fear of public opinion, political opposition or possible criticism that they will take a soft approach to (mafia) crime. Consequently, the symbolic value of the 41-bis regime may overshadow pragmatic and humane considerations, making it difficult to change the system.

Chapter

Chapter 4 provides a detailed description of the background, purpose and content of the 41-bis regime. This core chapter serves to answer many sub-questions of the first, second and third main research questions.

The placement in the 41-bis regime, which is intended as a preventive measure, is at the request of the public prosecutor by decision of the Minister of Justice. It may also be at the request of the Minister of Internal Affairs. In preparing the decision, the *Dipartimento dell'Amministrazione Penitenziaria* (DAP) involves the opinion of the prosecutor or examining magistrate conducting the investigation, and also of the *Direzione Nazionale Antimafia e Antiterrorismo* (DNAA), the *Direzioni Distrettuali Antimafia* (DDA), the central police departments and the *Direzione Investigativa Antimafia* (DIA).

The ministerial decree suspends the application of the regular prison rules. Placement in the 41-bis regime is for a period of four years and is possible when there are "serious reasons of public order and security". Two conditions apply to the determination of the threat to public order and security. The first, objective condition relates to the offence for which the detainee is suspected or has been convicted. The regime may be applied to suspects or convicts of alleged terrorist offences, crimes aimed at undermining the democratic rule of law or crimes committed by a mafia organization or facilitating a mafia organization. Although the scope of application is quite broad according to the law, in practice the 41-bis regime is applied almost exclusively to suspects of or convicts of mafia-related crimes. The second, cumulative condition concretizes the danger of the existence of ties to the criminal organization by requiring an individual consideration of the presence of "elements suggesting the existence of links to a criminal, terrorist, and subversive organization".

The 41-bis regime gives rise to many restrictive measures aimed at preventing any contact with the criminal organization behind it. The most striking restriction is the placement of prisoners in a so-called social group of four people. Communication between detainees belonging to different social groups is prohibited. The composition of the group can be further limited to two persons, in so-called *aree riservate*, special departments within the 41-bis regime intended for the leaders of criminal organizations. The 41-bis detainees are allowed to spend two hours a day outside their cell, in the open air, or in a communal (recreational) area. Some detainees are allowed to spend an extra hour, i.e. three hours a day, outside their cell. However, due to the individual effect of the relevant court decisions, this only applies to detainees who have appealed against the interpretation of this restrictive measure. Furthermore, visits are limited to once a month one hour of visits from a maximum of three family members. Instead of such a visit, telephone contact with family members may be allowed for a period of ten minutes, provided that at least six months have passed since the person was placed in the 41-bis regime. Counsel visits are unlimited in frequency and duration and can take place without restrictions. The same applies to telephone conversations between counsel and the 41-bis detainee, but in practice telephone contact sometimes encounters practical obstacles. The initiative for a telephone call always originates from the detainee and is location-specific, in the sense that the lawyer must go to a nearby prison to call his client from there on a secure line. Transferring money, sending and receiving goods and objects is also limited. In addition, the detainee may not be appointed to or participate in representative bodies of detainees within the institution. In principle, correspondence is only possible with family members. All outgoing and incoming correspondence is checked, except for correspondence with privileged persons or bodies, including the lawyer.

An extension of the regime is possible for two years at a time by ministerial decree. For the purposes of the decision, the *DAP* informs the *DNAA*, *DDA* and *DIA* whether there is any information that justifies the extension. The yardstick for extension is that it must be shown that the detainee's ability to maintain criminal links with the criminal or terrorist organization has not ceased to exist. The extension should be based on up-to-date information on the threat

to public order and security. The mere passage of time is not sufficient to assume that the ability to maintain links with the criminal organization is no longer present, or that the criminal organization is no longer active.

The application of the 41-bis regime is terminated if the minister does not take a decision to extend the application of the regime, in the event of a change in the legal status of the detainee, such as a change in the charges or an acquittal, in the event of a well-founded appeal by the detainee against the placement decision, if the detainee has served his temporary sentence or in case of cooperation with law enforcement.

With regard to the legal status of the detainee, all detainees, including 41-bis detainees, may be assisted by two lawyers. The 41-bis detainees do not receive legal aid compensation. There is no organization that oversees lawyers assisting 41-bis detainees, nor is resilience training given to lawyers. A detainee has the possibility to appeal to the *Tribunale di Sorveglianza* in Rome against the ministerial decree, the application of the 41-bis regime and its extension. There is no possibility to appeal against placement in an *area riservata*. A detainee can also file complaints and requests with the local supervisory judge about the material conditions of the regime and its explanation.

Participation in court cases by the 41-bis detainee is in principle only possible via a videoconferencing system that allows a secure connection between the prison and the courtroom. An exception to this can be made if a court is located in the prison, which seems to occur in two prisons. The detainee's lawyer has the choice of being present in the courtroom or participating in the proceedings from the prison, in addition to his client. If the lawyer and the detainee are not present in the same room, they can maintain telephone contact with each other.

Chapter 5

Chapter 5 is an empirical follow-up to the study of the Italian 41-bis regime. In this chapter, statistics on the practice of the 41-bis regime are presented first, followed by the findings of the interviews and more informal conversations conducted with Italian professionals. This chapter provides an answer to various sub-questions of the first, second and third main research questions.

The statistics suggest that the 41-bis regime generally applies mainly to mafia-related offenders, in line with the regime's original design. Over the years, it has been more specifically applied to detainees who have been irrevocably convicted of *leading* a mafia organization. The vast majority of 41-bis prisoners are Italian men in late adulthood, and many of them are serving long sentences, if not life imprisonment (current number of 204). Importantly, to date, there is no specific research into the criminal careers of 41-bis detainees, nor any research into the situation of those removed from the 41-bis regime.

The findings of the interviews conducted with the Italian professionals are structured in Chapter 5 on the basis of the same five points of interested as presented in Chapter 2. With regard to the first point of the placement and extension of the regime, the interviews have given the impression that the placement decision is provided with a detailed justification, focusing on the danger that a person poses in terms of the potential to continue his role in the activity of a mafia organization. That substantiation is also provided to the parties. The extension decision is the subject of (broad) criticism. The impression is shared that it is very difficult to demonstrate that application of the 41-bis regime is no longer necessary. To do this, the person concerned must more or less prove that the organization is no longer active, or that

he no longer has any contact with the organization (including financial relations between his family and the organization).

Regarding the second point of interest concerning regime restrictions, an important finding is that according to all respondents the 41-bis regime can only work if it is implemented consistently and if rules are always and strictly followed. Everything is aimed at a uniform, stringent execution. The fact that this makes any kind of individual adjustment – customization – impossible, is seen by many respondents as inherent to the preventive objective of the 41-bis regime. There is criticism, however, of the high level of detail of the 41-bis scheme. In practice, it is (cautiously) questioned whether this is necessary and contributes to achieving this preventive objective. Especially for detainees who have been under the 41-bis regime for a very long time, the restrictions appear to have physical and psychological consequences in conjunction. In practice, the standard use of videoconferencing in legal proceedings concerning 41-bis detainees is not much criticized; it seems obvious to do so and, moreover, the connection and equipment seem to work without problems. The restrictions on contact with lawyers have been somewhat eased in recent years because of national case law. Neither counsel's visit nor telephone contact is limited in number and duration. The visit of the counsel takes place without a glass partition, but with camera surveillance. The impression is widely shared that this is not subject to auditory supervision. The restriction that the 41-bis detainee is entitled to a maximum of two lawyers is not disputed in practice, since this restriction also applies to all other detainees in Italy.

The third point of interest, that of the legal position and remedies available to the 41-bis detainee, has also been extensively addressed during the Italian interviews. It confirms that there are two procedures for the 41-bis detainee to guarantee their rights. Firstly, the appeal procedure against the individual application and extension of the 41-bis regime, on which the *Tribunale di Sorveglianza* in Rome has exclusive jurisdiction to decide, followed by the possibility of cassation. It is important to note that the processing times of decisions of the Tribunale are very long, which detracts from the effective availability of a legal remedy. Secondly, the procedure of complaints against individual imposition of restrictions or other aspects of the implementation of the 41-bis regime (in three legal proceedings). In both procedures, the ruling judge can ask a question to the Constitutional Court – *Corte costituzionale* – about the constitutionality of the regulations he or she applies. In recent years, national case law has proved important in removing a few sharp edges from the 41-bis regime. However, a substantial disadvantage for the development of the 41-bis regime is that the judgments by the Court of Cassation only concern the case of the individual complainant and therefore do not have a general effect for the entire 41-bis population. In practice, due to this individual effect, there are major differences. A different solution than bringing proceedings individually is the generic amendment of the implementing regulation, which has been delayed for years.

The fourth point of interest – the intelligence function during and in detention – is regarded in Italian practice as an essential and indispensable element of the 41-bis system. More broadly than just the application of 41-bis, the Italian prison system has invested heavily in setting up the intelligence function, to monitor the detection of VCHD as well as more generally the question 'what do prisoners do and with whom do they have contact'. In this respect, two dimensions can be distinguished. Firstly, an internal dimension by the comprehensive presence of the *Polizia penitenziaria*, with the *Nucleo Investigativo Centrale* (NIC) investigating criminal offences in detention and the *Gruppo Operativo Mobile* (GOM) which is specifically responsible for executing the 41-bis regime. This makes it possible to maintain a

fairly complete picture of detainees. Secondly, an external dimension can be distinguished, since the *Polizia penitenziaria* has been participating in the *DIA* since 2012. This consortium brings together all police forces involved in combating mafia organizations, exchanges information and has access to police registers. Linking the two dimensions mentioned is seen in practice as very valuable for obtaining a complete picture of the activity of mafia organizations, including the possible continuing role of the leaders and members in detention. It might be a logical conclusion to assume that the intelligence function described would also provide comprehensive, up-to-date information on the position of 41-bis detainees in the context of decision-making on extending the application of the regime. However, the interviews show that those involved put this into perspective or even dispute it.

The fifth and final point concerns the existence of an exit strategy for the 41-bis regime. All the interviews showed that the Italian authorities do not have an exit strategy in place. In practice, it appears to be difficult for detainees to get out of the 41-bis regime, other than by acquittal for that crime part of the charge on which placement in the 41-bis regime is based, or if the duration of the temporary prison sentence of the detainee has ended, or by cooperating with the Justice Department. The latter effect contradicts the legitimate preventive objective of the 41-bis regime. Nevertheless, some respondents see it as a positive side effect of the 41-bis regime that it apparently encourages detainees to cooperate with the Justice Department. Other respondents criticize this effect and state that the regime is not and should not be intended for this. There is also no exit strategy in the light of rehabilitation. For those temporarily punished who stay in the 41-bis regime, there is no step-by-step work towards returning to society. It is the rule rather than the exception that they are kept in the extraordinarily strict 41-bis regime until the last day of their sentence. Because of all the restrictions inherent to the regime, that are strictly applied, the possibilities of resocialization are non-existent. The 41-bis detainees are not allowed to work and have no possibility of leave.

At the end of the interviews, we asked the respondents for their opinion on the last part of the central research question: which parts of the 41-bis regime would be recommended to be adopted in the Netherlands? Most respondents honestly indicated that this was difficult to estimate. What was striking in the discussions, though, was that none of the respondents advocated an integral adoption of the 41-bis regime. Rather, the tenor was that while the preventive objective is necessary and presumed effective in preventing mafia bosses and other leadings members from maintaining ties with the organization during their detention, it should not necessarily be done in the manner of the 41-bis system. The message from various respondents was therefore for other countries such as the Netherlands to be creative and to look for ways to cut off the communication possibilities of high-risk prisoners from their own legal system and with an eye for the social and legal sociological context, or to monitor the permitted communication integrally with the help of new technology. In this way, the essential objective can be achieved, without imposing unnecessary, serious restrictions on human aspects and human rights. Respondents also stressed that such an extremely strict supervision regime, with the highest degree of control of detainees, should (continue to) be considered something exceptional, and that its application to a detainee is of a temporary nature.

Chapter 6

All in all, the aforementioned three 'Italian' chapters answered the first three main research questions. After this, we returned to the Dutch situation. As a prelude to comparative law Chapter 7, Chapter 6 contains a brief overview of the policy and implementation practice of

the Dutch EBI regime. This does not serve to answer an independent research question, but is, in our view, indispensable for the purpose of comparative law with the Italian 41-bis detention regime.

The development of the EBI can be described quite clearly in the concise sense as done in this chapter. Since its actual start in 1997, the EBI has been characterized by the primary objective of preventing the escape of extremely flight-risk detainees or detainees with extreme social risk, for whom a less secure detention regime is not sufficient. This ratio is anchored not only in the category of prisoners who can be placed in the EBI, but also in the building design, the security measures and its regime. Everything is aimed at preventing the risky contacts of the detainees both inside and outside the EBI as much as possible and in any case monitoring these contacts together with implementing security measures. This typical detention policy has existed virtually unchanged for more than twenty years. The regime has only been adapted under the influence of European law and national jurisprudence where it clearly interfered with the human rights perspective, namely the systematic visitation practice. Regardless of the preceding character of the EBI regime, an internal policy of humane treatment and relational security is seen as paramount. The effectiveness of the EBI in achieving its primary goal is undisputed: not a single detainee has escaped from it. However, a fundamental change has recently been made to (the application of) the EBI regime. In 2018, this was done by introducing a c-placement ground and then at the end of 2022 by expanding that ground and by introducing a new d-placement ground. Both additional grounds do not relate at all to the flight risk or a flight risk-related social risk of a detainee but relate to an unacceptable social risk of a detainee due to the suspicion of common danger due to severe VCHD or the commonality of a detainee due to his role or position in a particular criminal network that would require an additional secure regime. Coupled with these two new, broad grounds for placement, detainees staying on such grounds in the EBI are subject to additional tightened security and regime measures. The original a and b placement grounds still apply in full, as does the original regime, but a new atypical component has very clearly been added.

Chapter 7

In this chapter, in order to answer the fourth main research question, the outcomes of a horizontal comparison between the Dutch EBI and the Italian 41-bis regime are presented. In terms of classification, this comparison follows the aforementioned five points of interest.

As regards the placement and extension of the regime, it has been found that since 2018 the EBI placement grounds are more diverse than in the Italian 41-bis system. This fact is a possible complicating factor in the design and uniform application of the EBI regime. The difference in terms of the order of magnitude is also important. Unlike the total of 24 available cells in the one EBI that our country (for the time being) has, in Italy there are usually about 750 prisoners placed in the 41-bis regime, divided over twelve prisons. This, of course, offers many more opportunities to rotate both detainees and the institution staff. Another important difference in the comparison concerns the duration of the initial placement. This is four years for the application of the 41-bis regime and twelve months for the application of the EBI regime. The Italian rationale for this lies in the enduring nature of (the links with) most mafia organizations, certainly of the Cosa Nostra, 'Ndrangheta and Camorra. This also applies to the period of successive renewal decisions, which is two years in Italy instead of twelve months in the Netherlands. It is important to note that the Italian renewal procedure is not without criticism in practice and is described by some as automatic. Although an investigation is taking place, if the mafia organization to which the detainee belongs still exists and the

person concerned does not cooperate with the Justice Department, this seems to be sufficient to renew the placement. This is different in the Netherlands and the same approach as in Italy does not seem to be in order.

Regarding the regime restrictions, the 41-bis regime and the EBI regime have in common that they are regimes with the most stringent security measures and restrictive detention conditions in place in the country. However, these measures and restrictions differ in detail and in execution. In a general sense, the very detailed definition and execution of the 41-bis regime, combined with its strict implementation and compliance in practice, is striking. There seems to be little to no room for customization. Unlike the EBI, where there is some discretionary room for the director to exercise customization, where appropriate and possible. The rationale for this lies in being able to ensure humane detention despite all restrictions and, as a result, to ensure relational safety within the prison. The latter ratio or objective does not appear to exist in Italy. More specifically, detainees in both regimes have the right to enjoy airing and recreation and/or sports activities, of which the total number of hours per week is more or less the same and where the group size of the fellow detainees with whom you can spend this time is limited in both regimes. Apart from the aforementioned activities, additional possibilities apply for staying outside the cell, such as the contact possibilities with family / relations, lawyer, and spiritual or psychological counsellors. These possibilities seem to exist more in the EBI than in the 41-bis regime.

With regard to the possibilities of visiting and telephone contact with persons from outside the prison, the 41-bis regime is stricter in terms of possibilities and frequency than the EBI regime. An important difference is also that in the Italian regime these contact possibilities are limited to family members, while in the EBI regime this is in principle also allowed for screened persons other than family members. The number of visitors at a time is the same in both regimes, namely a maximum of three people. Although in the Italian regime this is limited to family members, the great importance attached to family in Italian society implies that these ties are interpreted more broadly than for the EBI regime. Moreover, unlike in the EBI, standard contact during the visit moment with a (grand)child under the age of twelve may take place without the glass partition, whereby physical contact is also permitted without restrictions. The security measures surrounding family visits are also less strict in parts of the 41-bis regime than in the EBI.

In both regimes, the contact between detainee and lawyer is – for the time being – subject to as few restrictions as possible as a result of European law standards. In principle, the frequency of contact is unlimited. However, the contact in Italy is location-specific by default, i.e. the lawyer can only call the 41-bis detainee from the lawyers' room in a prison that has been communicated in advance, not being the 41-bis institution. There is no further auditory or visual supervision of the telephone contact and there is only visual camera surveillance during a visit by the lawyer. Furthermore, in Italy, the number of preferred lawyers that all detainees, including a 41-bis detainee, may have, is limited to two.

With regard to the third point of interest of the legal position and remedies, it is important that the legal position against placement and renewal in both systems has a well-defined and uniform procedure: appeal to the *Tribunale di Sorveglianza* and appeal to the *Corte di Cassazione* on the one hand, and objection to the selection officer and appeal to the RSJ on the other. In Italy, due to the size of the 41-bis population, this uniform procedure in enforcement practice has a substantial disadvantage for the implementation of the legal position: the proceedings take very long and even such that the country has been convicted by the ECtHR for violation of the right to an effective remedy (Art. 13 ECHR) and for violation

of the right of access to justice (Art. 6 ECHR). The implementation practice of both the 41-bis regime and the EBI regime have in common that it is difficult to effectuate the legal position, yet for a different reason. In the Netherlands, this concerns the problematic fact for the detainee that often secret information forms the basis of a placement or renewal decision against which it is difficult to defend himself. In Italy, although the information underlying legal decisions is provided to the detainee, it is difficult for the detainee to contradict the presumption underlying the renewal decision that he is still in contact with the mafia organization.

With regard to the fourth point of the intelligence function, a substantial difference has been observed in the implementation practice of both regimes. This concerns the type of personnel working in the relevant departments and their tasks. In Italy, a deliberate decision was made to assign an intelligence function to the GOM personnel specifically designated for the 41-bis prisons. All information collected about 41-bis detainees is then shared with other (police) services involved in the fight against mafia organizations. To date, the Netherlands lacks such an institutionalized intelligence function, which is embedded in the prison system and in which detention execution and investigation are strongly intertwined. In our country, it was deliberately chosen to keep the two objectives separate. However, there seems to be something of a turnaround in this respect in recent years.

Regarding the comparison on the last point of interest, the exit strategy, there does not seem to be a satisfactory answer in both regimes to the question of how a detainee can get out of this highest-security regime. It is difficult for detainees to get out of the 41-bis regime, especially since the passage of time and the increase in the length of stay in the 41-bis regime does not play a significant role in the renewal decision and as such does not constitute an independent exit strategy. In the case of the EBI regime, the passage of time does play a role in the assessment of the RSJ on renewal decisions and the underlying up-to-date information. Moreover, in our country the legally standardized principle of minimum restrictions seems to play a stronger role in the assessment of the (increasing) severity of regime restrictions. Whether that also applies to the new c- and d-placement grounds, however, will have to be seen in the future. Furthermore, inherent in both regimes is that the rehabilitation possibilities are limited. Unlike in the EBI regime, these possibilities in the 41-bis regime even seem to be non-existent. In recent years, it has become the rule rather than the exception that the 41-bis detainees are kept in this regime until the last day of the period of detention to be served. Although a good exit strategy is not yet available in the Dutch situation, unlike in the Italian system, the possibilities for this seem to be fundamentally present.

In addition to the above-mentioned horizontal comparative law findings, Chapter 7 also contains a vertical comparative law, comparing Dutch and Italian penitentiary law with international standards. The general impression is that the ECHR and the case law of the ECtHR do not provide a strict, concrete assessment framework. The European Court does not consider the strict 41-bis regime with many hours a day in the cell and with minimal contact possibilities as such to be contrary to the ECHR. Italy has been condemned in parts by the European Court, but it has never been ruled that the regime is inhumane in itself. The minimum level of seriousness to fall within the scope of Article 3 ECHR will also not be reached quickly. The European Court sees the need for such a strict regime and takes into account the specific nature of crime (mafia-related crimes) in which family relationships play a central role. This fact seems relevant to the Dutch situation where the question arises whether the type of crime is comparable to the Italian situation. The regime has only been

found to be contrary to the ECHR on a limited number of specific points (decision-making on appeals, reasoning of the renewal decision). These condemnations of the Italian State have now led to adjustments to the regime and its application in practice. For the time being, the question remains how the ECtHR views the Italian practice of the substantial number of life sentences in the 41-bis regime in relation to its own standards on the legitimate application of life imprisonment.

Chapter 8

In the final chapter 8, the remaining part of the fourth main research question has been answered, focusing on the efficacy of the Italian 41-bis regime for the Netherlands. This, in the knowledge that several elements of the 41-bis regime which, on the basis of the results of our research, could be considered for inclusion in the EBI system, have already been introduced in policy regulation or whose introduction has already been concretely proposed in a bill to that effect. In any case, the elements of the 41-bis system which have not yet been introduced into the Dutch context are interesting to the all-encompassing role of a single penitentiary authority, the GOM. As a separate part of the *Polizia Penitenziaria*, this staff not only supervises the detention execution of the 41-bis detainees, but also the consistent monitoring of them and the gathering of intelligence and detection of VCHD activities or signals. Another element which has aroused our interest is the investment in the intelligence function in detention chosen in Italy based on the conviction that this is extremely important for an effective fight against mafia crime. The automatic use of videoconferencing for cases where 41-bis detainees have to appear in court is another element that deserves attention. The use of videoconferencing raises little criticism in Italian practice: it already has long experience and is not considered an insurmountable infringement of defense rights.

The measures taken in the Netherlands from the autumn of 2022 to combat severe VCHD seem to be inspired by the Italian 41-bis regime, or at least are part of it. The speed with which the measures have been introduced or proposed is perhaps the reason why the considerations that have taken place in the preparation of the amended legislation regarding the usefulness, necessity and effectiveness of the measures do not seem complete. There is certainly a justification where the reason for applying the measures is concerned and therefore there is an initial picture of usefulness and necessity: a threat from the hardening of organized crime that has consequences for the detention practice. This reason is also broadly endorsed in this study by respondents in Dutch practice. But other than that, much remains uncertain. One of the most important findings of our research into Italian legislation and practice of the 41-bis regime is precisely that the effects are far-reaching, and that adjustments to the system at a later date prove difficult, especially when it comes to relaxation, or the possibility of flexibility and customization.

What do we know about the functioning of the new Dutch measures concerning the EBI aimed at combating (serious) VCHD? How can we ensure that they have the desired effect (by providing flanking policy, by guaranteeing proper implementation)? How can we prevent unwanted side effects? These are actually questions that need to be asked and answered prior to the introduction of this type of measure. According to our research, the absence of an answer to these questions causes some inconvenience in Dutch practice. Our research into the historical development of the 41-bis regime, its content and the experiences with its operation now provides important starting points for this.

Of importance in this context is the absence of possibilities for customization because of a strict, uniform application of the 41-bis regime. This seems to be at odds with the

principles of the Dutch prison system, also in the EBI, of humane treatment, relational safety and resocialization. Attention should also be paid to the observation that the totality of the 41-bis regime restrictions appears to have physical and psychological consequences in conjunction. This is all the more true now that an exit strategy for how to get out of the 41-bis regime is not available in Italy. For those temporarily punished who stay in the 41-bis regime, there is no step-by-step work towards returning to society. It is the rule rather than the exception that they remain in the extraordinarily strict 41-bis regime until the last day of the detention they are serving, in which the possibilities for rehabilitation are practically nil. Moreover, since the passage of time does not play a decisive role in the extension, which is reflected in the fact that prisoners (whether or not sentenced to life imprisonment) remain in the regime for a very long time (decades), we believe that this is legally the Achilles heel of the 41-bis regime, given the ECtHR's standardization of Article 3 ECHR.

Can it be done differently: can the system be adjusted? This is not easy, at least in the Italian situation; this is an important outcome of our research for comparison with the EBI regime. Even if such is desired, the aim of innovation, more customization and flexibility in the application of the 41-bis regime seems difficult to achieve in practice. Administrators, practitioners, and detainees have all become entangled in the system. Against this background, a number of our Italian respondents indicated, when asked, that they would advise – with the disclaimer that they said they were not in a position to properly assess the Dutch situation regarding VCHD – that, above all, with creativity and possibly with the use of technological developments for monitoring communication, alternatives should be sought to the adoption of the highly restrictive measures from the 41-bis regime. Alternatives that restrict communication with the outside world but do not reduce the human contact of detainees to a vulnerable minimum.

The important lesson from Italy, in our view, is in this regard: if at the outset the opportunity is not taken to shape all aspects of such an extra-secure regime for a specific group of detainees who pose a threat in view of their role and position in a criminal network – not just the placement and the restrictions, but also the possibilities for relocation – and if the possibility of adapting measures is not guaranteed, then changes are made in the Dutch penitentiary system in an almost irreversible way. Exactly at this decisive moment we seem to be in the Netherlands. Especially in view of the current c- and d-placement grounds of Article 6 RSPOG and the scope of the AIT regime under development, which was not part of the remit of this study. The broader policy to combat severe VCHD, including the AIT and EBI regimes, can still be shaped with care and reason. By being creative without unnecessarily encroaching on a humane detention in the ways in which risky contact with the outside world can be monitored even better to contain the risks. By safeguarding the temporary nature of such a very drastic detention regime. By continuing to base the renewal procedures on an individual analysis, based on up-to-date, concrete, and reliable information about threats, possibly supplemented by a risk assessment tool, as is currently the case with detainees placed in the Terrorist Departments within prison. By developing a clear, foreseeable exit strategy, surrounded by defined, requirements, in order to offer the detainees a perspective on leaving the strict regime (in phases). By guaranteeing the Dutch penitentiary principles of humane detention and relational safety. And finally, by not making the policy too detailed and keeping its feasibility in mind. General improvements or individual adjustments should remain possible and not be due to overly rigid application or lack of capacity.

This leads to the conclusion that, in our view, restraint is called for. Many of the elements of the Italian 41-bis system are closely related to the Italian context in terms of their effectiveness: the legal system, society, and the composition and size of the prisoner population. Much is meanwhile unknown about the usefulness, necessity and effects of the measures that have been (overly) introduced in the Netherlands, largely inspired by the Italian system, and additional measures that are still pending in parliament. What is the exit strategy? How do we maintain the premise of individually customized detention? What are expected effects for detainees, their families and for prison staff? With creativity and innovative thinking, can an alternative be found to the rigid and highly restrictive measures in the 41-bis regime? It is recommended that this (among other things) is explored now before additional measures to combat VCHD are considered. We hope that the results of this study on the experiences with the 41-bis regime in Italy will be helpful in that reflection.