The doppio binario in Italian criminal law

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1. Purpose

Italy was the first country that experienced a so called “double track” (“doppio binario”) sentencing system, i.e. a system that provided penalties for offenders with criminal capacity and also measures of prevention (“misure di sicurezza”) for dangerous offenders. This system proved to be particularly harsh against persons with full or diminished criminal capacity, since both criminal sanctions are provided to be jointly applied to them (normally first the penalty and then the preventive measure).

Italy is also the country that experienced a crisis and a transformation of such a sentencing system based on a double track.

The aim of my report is to explain the reasons of the deep crisis of the Italian double track system, which raises problems of compatibility with constitutional rights and with the European Convention on Human Rights provisions, especially after the European Court of Human Rights’ decisions about German preventive detention (Sicherungsverwahrung) were pronounced.

However we will see that the crisis of the double track system did not encompass a crisis of the idea of a criminal control of dangerous persons. From a double track system we ended up, indeed, into a system of a plurality of preventive tracks, where the aim of prevention is accomplished through a plurality of devices working inside and outside the penalty.

2. The double track logic and its crisis

It is especially in relation to offenders with full or diminished criminal capacity that the research of strategic solutions for an efficient prevention of recidivism raised more problems of compatibility with personal rights and dogmatic principles. If, in fact, in relation to offenders
without criminal capacity for mental disease reasons, the risk of recidivism was however controlled through forms of internment also outside the criminal system (here the discussion, raising complex dogmatic profiles, was rather about the inclusion of such a control inside the criminal system), in relation to offenders with capacity, who were already inside the criminal control system, it was necessary to reconcile the purposes of punishment with the prevention of their dangerousness.

Through the double track sentencing system, the Italian criminal code Rocco (1930) attempted to reconcile the principles of the classic school of criminal law with those of the positive school: on the one hand, the idea of a free and responsible man to be punished by a retributive penalty; on the other hand, the idea of a dangerous man, influenced by a plurality of social, environmental, pathological factors to be put under control through preventive measures.

The Italian legislator was unable to envisage a single penalty accomplishing many purposes (retribution, general and special deterrence), such as -to contrary- Franz von Liszt did, elaborating his model of penalty in the seminal essay “The Concept of Purpose within the Criminal Law”. From the point of view of the drafters of the Italian Criminal Code, retribution and prevention were to be considered as irreconcilable functions, that purported different sanctions, not only in name and purpose, but also in their regulation:

a) on one hand, retributive penalties had to have fixed terms proportionate with the seriousness of the offence and to the culpability of the offender;

b) on the other hand, measures aimed at prevention and social defense (farmer settlement or workhouse; care and custody house; probation) had to be proportionate to the dangerousness of the offender and had to lack a fixed length, since they were supposed to persist as long as the social dangerousness of the person, periodically checked, was persisting. We are here in front of a very flexible system, maximally undetermined, maximally unguaranteed.

I will point out some of the basic elements of the Italian sentencing system in order to make it more understandable:

- the condition for the application of the preventive measure (“misura di sicurezza”) is the social dangerousness of the offender, that is the probability that a person, who has just committed a crime, will commit further crimes in the future (art. 203 c.p.); since 1986 this condition is always to be ascertained by the judge, whilst in the original version of the Italian criminal code it was statutory presumed in relation to some subjects (for example offenders with mental disorders; habitual offenders; professional offenders; offenders with criminal tendency);

- preventive measures have a minimum mandatory term in relation to different measures and to the gravity of the offence, but the judge today can decide to interrupt their execution also before the term is elapsed, when the dangerousness is proved to be terminated;
- Preventive measures do not have a predetermined duration, since their length depends from the periodic checks on the offender’s social dangerousness;

- Preventive measures do have retroactive effect, in contrast to the general prohibition of a criminal law retroactivity (see the difference between art. 2 and 200 c.p.): it is an application of the principle that in relation to instruments aimed at preventing the commission of further crimes, citizens have no right to foresee the consequence of their acts. The law of the time of the measures execution is thus applicable, even if it is harsher than the one in force at the time of the crime commission. The double track system was therefore particularly harsh against people sentenced to both sanctions. It was however perfectly in tune with the demands of rigor of the criminal policy of Fascism, that mixed the severity of the penalties (that had very high statutory determination) with a flexible apparatus of preventive measures, which were indeterminate in relation to both the social dangerousness requirement and the duration.

However, the original regulation of the Rocco criminal code gradually got into a crisis following the Constitution enactment and the refinement of the Italian legal culture in relation to individual rights.

The reasons for the crisis can be so synthesized.

a) Preventive measures’ application was reduced as a consequence of the abolition of the statutory presumption of the social dangerousness. That was initially due to some decisions of our Constitutional Court and finally to the choice of the legislator, who in 1986 provided that all preventive measures could be applied only after a judicial ascertainment of the offender’s social dangerousness. It must be said that in Italy the statutory presumption abolition of social dangerousness was the result of those psychiatric schools of thought, that broke the link between mental illness and dangerousness: a pair that was at the foundation of the old mental hospital order (abolished in 1978).

b) The rigid dichotomy of purposes between penalties and preventive measures weakened: penalties started to perform preventive functions and preventive measures showed also a punishing content.

This loss of specificity of both sanctions and the progressive osmosis in their purposes are the result of a number of factors operating on different levels: legal, cultural and in the practice.

b.1. Legal level. The Constitution refers as much to penalties (art., 25, paragraph 2; art. 27, paragraph 3) as to preventive measures (art. 25, paragraph 3) not in order to constitutionalize the
double track system, but simply for the sake of ensuring the principle of legality also in relation to preventive measures.

The Constitution takes expressly position on the special prevention function of the penalties, according to art. 27, paragraph 3: “the penalties can not consist in treatments contrary to human dignity and must tend to the rehabilitation of the sentenced”. The penalty ceases to be only retribution and the special prevention is no longer just a purpose of preventive measures.

b.2. Doctrine level. In the main Italian doctrine – with the exception of some authors related to the old catholic thought – the idea of retribution was progressively waned in the knowledge that in a secular State punishment can only perform functions of general and special deterrence. This awareness is joined to the observation that the security measures are the dead branch of Italian sentencing system as confirmed by the same reform projects of the Criminal Code (projects Pagliaro, Grosso, Nordio, Pisapia), that since the nineties of the last century have steadily proposed a drastic reduction of preventive measures: these measures should be applied only to offenders with no criminal capacity (through more rights than now, for example providing maximal terms), while capable offenders should have only penalties and, if they have diminished capacity, have to be submitted to a particular regulation in prison that can reconcile defense and care needs.

b.3. Practice level. The idea that preventive measures have only a preventive purpose, with exclusion of afflictive elements, represents a pure mystification, because the deprivation of freedom has always an afflicting component, present in the practical application: preventive measure for capable offenders (farmer settlement or workhouse) is executed in prison structures; structures for offender with mental disorder (hospital order for not responsible ones and care and custody house for diminished capable ones), are often in such conditions that do not provide the minimal respect for personal dignity of inmates, closed in alienating spaces where priority is given not to the rehabilitation but to social defense and neutralization. This dramatic picture emerged from the results of the inquiry of the Commission presided over by Senator Ignazio Marino about the conditions of the six Italian judicial mental hospitals (20 July 2011).

In fact, custodial preventive measures have become instruments of social defense and of neutralization more than places of re-education and rehabilitation.

However today the effectiveness of the criminal control of social dangerousness is no more played in Italy on the ground of preventive measures, finding a limited application, but on the penalties one, in order to control the social dangerousness.
3. Marginal recourse to the security measures: the confirmation of statistical data

If now from the theoretical considerations we consider the statistical data, we will see that the use of preventive measures is extremely limited.

On a population of 66897 prisoners (reported data to the 31.12.2011), only 74 are submitted to the security measure provided for capable offenders (farmer settlement or workhouse).

More consisting it is the number of the inmates in judicial psychiatric hospital, including inmates in cure and custody house in consequence of diminished capacity for mental disease, abuse of alcoholic or narcotic substances, deaf-mutism (the two measures are executed in the same institutes, but in different units).

The data on hand, coming from the surveys, sent on 6.7.2011 from the judicial psychiatric hospitals to the Parliament Inquiry Commission, are the following: 803 inmates, 514 of whom in execution of judicial psychiatric hospital and 289 in execution of care and custody house (these data refer exclusively to the persons who such measures are definitively applied to).

More consisting is the use of not custodial measure of “freedom under supervision” (libertà vigilata), a kind of probation: on 31.12.2011 3038 executions of this measure were in use.

These data show that Italian judges marginally apply preventive measures, first of all in relation to capable offenders. Measures are applied in relation to offenders with mental disease, that guarantees a base to the prognostic judgment of dangerousness: but also in this field a new law has provided new forms of execution of the measures through less guard and more rehabilitation outside criminal system (l. 17.2.2012, n. 9).

This recession in the use of custodial preventive measures in Italian criminal system has two effects.

In relation to persons with capacity, the check of social dangerousness is due to the judge, who cannot make use of psychiatric examination, that the criminal procedure expressly forbids (art. 220 criminal procedure), and he can only use the criminal career of the offender.

In relation to persons with a mental disease, the reform of 1978 about treatment of mental disorder, that ended with the close of psychiatric hospitals, has broken the binomial mental disease-social dangerousness, son of the asylum law of 1904, with the effect to privilege the adoption of not custodial measures also for mentally diseased offenders. This explains the trend in direction of closing also the judicial psychiatric hospital.

It is possible, therefore, to say that in Italian sentencing system security measures, although they are present and in detail ruled, constitute the extrema ratio of preventive criminal policy both
because of decisions of Constitutional Court and because of statutory choice and marginal reply in the practice.

4. The rediscovery of the potentialities of the double track in other European systems

These considerations on the Italian system appear in countenendency regarding the developments in other European criminal systems in preventing dangerous offender through a renaissance in the use of custodial preventive measures: in Germany and Switzerland, countries with traditional double track system, security measures have been enlarged; in France, traditionally outside the logic of the double track, criminal control of the dangerous offender was realized through the introduction of a new preventive custodial measure (retention de sûreté) and through the movement from the administrative control to the criminal one of not capable offenders (law 25.2.2008, n. 2008-174).

Therefore I see a of diametrically opposite trend of criminal politics to those ones present in Italy.

These criminal systems have strengthened instruments of prevention of the dangerousness capable offenders in strict connection to the development of the security criminal policy, supported by criminological thoughts that look at the offender of a crime like to a “other”, “different” person, moving the attention from the offence of the crime to the dangerousness of the person.

In the risk-society a “social risk” gets not only the probability to commit a crime, but also the probability of being victim of a crime: in the first case, the accent is placed on the risk to get offender, in the second case the victimization-risk prevails. Hence the activation of preventive strategies, developing the use of the preventive measures, representing an instrument of flexible control, flexible as the prognostic judgment necessary for their application in substitution or addition to the penalties.

This rediscovery of the potentialities of the double track presents homogeneous criminal policy guidelines.

In the first instance, the strengthening of the instruments of crime prevention is carried out not only through the aggravation of penalties for the fact, but also through the introduction of new preventive measures, in order to neutralize the dangerousness of the offender. This trend interests not only custodial preventive measures, but also non custodial personal measures, analogous to our freedom under supervision, a less invasive instrument in controlling the social dangerousness, but able to guarantee, in case of violation of the provided prescriptions, the transformation of the not custodial measure in a custodial one.
A second element in common to these systems regards receivers of preventive measures, who are statutory described through figures of specific dangerousness based on two conditions:

- objectively, the measures are destined to serious crimes offenders, involving serious aggressions through violence or sex-crimes (these same crimes are object of the prognostic judgment too; so there is homogeneity between presupposition-crimes and waited crimes);

- subjectively, the committed crime must be expression of a personal disease, not excluding capacity (otherwise, the specific therapeutic measures provided by law would be applied). We assist to the “pathologisation” of the capable offender in order to guarantee a preventive control of offenders considered mentally capable by science. In the new preventive measures, the personality disease is at the basis of the social dangerousness, but the function of these measures seems to be more a social defense than a therapeutic support.

A last common element of the criminal policies in the countries developing the preventive measures is the reason for the approval of new statutes. In Germany, France and Switzerland the triggering factor was constituted by brutal crimes that had wide resonance in the report and in the public opinion, inducing the legislator to approve new statutes in order to satisfy the demands for more security.

5. The regulation of doppio binario in Italy to the light of the jurisprudence of the Constitutional Court and of the European Court of Human Right

What possible development can Italian “doppio binario” system have according to the decisions of the Constitutional Court and of European Court of Human Right? In particular, how can European Court judgements influence Italian law, in particular in relation to the decisions that in these last years have interested directly the German regulation of preventive detention (Sicherungsverwahrung)? Does custodial preventive measures regulation risk to be over such as Germany?

I immediately clear that the marginal application of custodial security measures for offenders with criminal capacity does not make less visible profiles of incompatibility with the European Convention of Human Right and, hence, with the art. 117 Constitution, that imposes to Italian statutes the respect of the international conventions.

In accordance with the jurisprudence of the European Court (13 gennaio 2011, n. 17792/07, Kallweit v. Germany; n. 20008/07, Mateus v. Germany; n. 27360/04 e 42225/07, Schummer v. Germany) preventive measures with indeterminate term to control the social dangerousness can be legitimized in two cases:
a) in presence of a mental disease (art. 5, let. e): this case can include preventive measures for offender without criminal capacity or with diminished criminal capacity;

b) in presence of a link of causation between the sentenced fact und the custodial preventive measures (art. 5 lett. a): this case can legitimate preventive measures for offender with criminal capacity. The crime is not only a requirements for the application of preventive measures, but also a limit against the preventive strategy. That - so I think - shows that the prognostic judgement of social dangerousness must find its own base on the committed crime in a double sense: on one hand, every preventive measure, deeply reducing freedom, can be applied only in relation to very serious crimes; on the other hand, the prognosis must be referred to equally serious crimes whose risk of commission is based on just committed crimes (that shows also the necessity of homogeneity between committed crimes and waited crimes). Principle of proportion must be valued also from the point of view of the European Court.

At the same time, according to the European Court, the application of a custodial preventive measure cannot be justified only in order to preventive purpose, if then its execution in the facts does not differ from that of a penalty. Really because preventive measures have afflictive character too (especially in relation of their indeterminate term), it is necessary to provide different executive ways, thus to guarantee the rehabilitation and re-socialisaizion in order to let the offender to interrupt the measure execution.

Now, the regulation of preventive measure in Italian system appears completely inadequate. If the European Court insists in the fundamenta l importance of the proportion principle, imposing custodial preventive measures only as ultima ratio instruments in controlling social dangerousness in a State of right, then the same condition for the application of these measures turns out to be excessive wide and indeterminate in Italy: the art. 203 criminal code gives a generic notion of social dangerousness, meant such as mere probability to commit crimes, therefore any sort of crime. De iure condendo, if the double track system will be maintained, it will be necessary to limit the application of custodial preventive measures through two requirements: defining the presupposed crime, that can justify the application of measures; giving a new notion of social dangerousness, based on the prognosis of the commission of serious crimes (crimes with violence, sex crimes). Only in such a way the preventive measure could be justified. But, de iure condito, I think that, just now, the proportion principle obliges the judge to apply custodial security measures only in presence of the high probability of further serious crimes.

In the same way I see a contrast with the principles provided by the European Court in the absence of the vicarious principle in the Italian criminal code. If, in according to the Court, also preventive measures have afflictive character, the period passed in execution of the custodial
measure, before the execution of the penalty, should be deducted from the term of the penalty. Therefore the regulation in art. 220 criminal code is absurd: the law provides for the possibility to execute, before the penalty, the security measure of care and custody house, but, once the measure is over because the inmate is no more dangerous, it is necessary to execute the penalty. In consequence of this regulation a not dangerous inmate risks to become a dangerous prisoner!

This regulation is the effect of the strict dichotomy of purposes between penalty and security measures in the 1930 Italian criminal code that is not in accordance with afflictive character of both sanctions, recognized also by European Court of Human Rights. And it fights with the principles, asserted by our Constitutional Court in 2003 (decision 18 July 2003, n. 253) in relation to preventive measures for offender with mental disease: these measures must be finalized to guarantee «at the same time…these purposes, connected and not separated (see sentence n. 139 of 1982), of cure and protection of the patient and of control of its social dangerousness. A system that answered only to one of these purposes (control of the “dangerous” patient), and not to the other, could not be constitutionally admissible. Moreover, the demand of society protection could never justify such measures to give harm, rather than advantage, to the health of the patient».

The Italian situation is also inadequate in relation to the praxis. The execution of preventive measures is fundamentally not different from penalty, like in German system in relation to the preventive detention called *Sicherungsverwahrung*; also for the inmate with no or diminished criminal capacity the situation of the institutes, where the measures are executed, is so compromised that the Parliament has passed a law (n. 9/2012) to close the existing judicial psychiatric hospital, imposing to regional sanitary structures the care of inmates within March 2013 (an engagement that risks to remain only on paper, if the regions will be unable to organize with the necessary structures). In front of the European Court Italian regulation of the custodial security measures risks, therefore, to have the same end of the German preventive custody (in my opinion not a risk, but a certainty).

6. The changes of the logics of control of dangerous offenders: from the double track to the plurality of track

In Italy the sunset of the double track didn’t mean sunset of the preventive idea, because the strategy of the double track, through penalty and preventive measure, has left the place to the strategy of the plurality of tracks in order to preventive purposes. The preventive tracks are much more articulated and they are placed partly inside the penalty, partly before the penalty and partly outside the penalty.
6.1. *Plurality of tracks inside the penalty*

In Italian system the requirements of control of the dangerous offender are best fit inside the penalty through the regulation of recidivism and the plurality of penitentiary lanes.

For recidivism, by act n. 251/2005, the legislator has aggravated the penalty treatment for recidivists, that is for those who have committed an intentional crime after a conviction for another intentional crime (art. 99 criminal code): heavier increase of penalty, limits in the relevance of mitigating factors, limits in the access to the penitentiary benefits; the effects of the recidivism are still heavier for those who commit another crime after they have been declared by judge as recidivist (so called reiterated recidivist).

Doctrine and jurisprudence argue about the reason of the aggravated penalty for recidivist: higher culpability of the offender, who commits a crime after a past conviction; or more serious dangerousness, of which crime is a symptom. Also the Constitutional Court considers recidivism the expression «of the most emphasized culpability and of greater dangerousness» of the offender. Therefore prevention against dangerous offenders is dealt inside the penalty, with determined terms, and not through security measures with no fixed terms, in strict connection to the inmate persisting dangerousness.

But there is another important profile in relation to preventive strategies. For a long time the requirements of deterrence and dangerousness control have been valued also through the plurality of penitentiary lanes inside the penalty execution, where specific tracks give the penalty a different weight and different depth.

These guidelines developed especially in the fields of crime connotated by serious social dangerousness and by high social alarm, that is in fields where also preventive measures could have been strengthened:

a) the answer to the organized crime developed according to a double strategy through, on one side, the aggravation of the penalty (increase of the statutory penalty; stricter regulation about aggravating and mitigating factors, so that mitigating ones cannot prevail to aggravating ones) and on the other side in providing for penitentiary lane: the possibility of external alternative measures to the detention is given only if the prisoner collaborates with the justice, avoiding the further continuation of the crime and its consequences or helping in concrete terms police or persecutor in finding decisive elements for the reconstruction of the facts or for the capture of the other offenders (art. 4-bis, paragraph 1, penitentiary law). The law provides also for a stricter penitentiary
regulation (so called “hard prison”, art. 41-bis penitentiary law) in order to prevent the contacts between the prisoner and the criminal organization;

b) the answer to the sexual crimes provides for a specific penitentiary regulation, different from the answer given in the countries, where security measures were developed: the Act 15 July 2009, n. 94 introduced a new paragraph (1-quarter) in art. 4-bis penitentiary law: the external alternative measures to the detention can be granted to the prisoners or inmates sentenced for sexual crimes (articles 609-bis, 609-ter, 609-quater and 609-octies criminal code) only through a scientific observation of his personality for at least one year. Also in this case, we find inside the penalty a special penitentiary regulation that avoids temporarily external measures, which can be given only if the scientific observation of the personality excludes the risk of further crimes commission.

In all these cases, the needs of social defense are, therefore, satisfied inside the penalty, whose maximum limit guarantees a guarantee against the preventive demands of criminal politics.

6.2. Tracks plurality before the penalty

The prevention of the social dangerousness can be also carried out from pretrial detention, because of the deterrence need to prevent the commission of similar crimes to those just committed ones. Also, regarding the pretrial detention the legislator has provided a plurality of preventive tracks.

For some crimes art. 275 code of criminal procedure provides for a double presumption: existence of the preventive requirements is given for granted, when the judge does not ascertain its lack (relative presumption); in the same way art. 275 provides for the automatic choice of preventive detention considered as the only measure to face the preventive requirements (absolute presumption). This provision has passed the scrutiny of the Constitutional Court and Strasbourg Judge as to the organized crime, regarding which the absolute presumption of adequacy of pretrial detention has been considered reasonable in order to neutralize the connections between the accused and the organization.

On the contrary both these Court didn’t consider reasonable the mentioned presumption for other crimes: as conspiracy finalized to drug traffic, homicide and clandestine immigration, art. 275 code of criminal procedure has been declared unconstitutional in the part in which it does not provides for the opportunity for the judge to chose another measure, different from the pretrial detention, when, evaluating the concrete specific situation, he finds out that these measures are able to satisfy the preventive requirements.
I’d like to underline that the Constitutional Court (decision n. 265/2010) has denounced the misuse of the pretrial detention, not as an instrument to prevent the dangerousness of the offender (in this way of thinking it will be justified under the provision of art. 5, lett. c) ECHR), but as a tool to mitigate social alarm, determined by the commission of the crime: the preventive measure is applied not in order to prevent the commission of further crimes, but to face a diminish of social insecurity, arisen from penalty executed too far from the moment of the commission of the crime and so unable to satisfy the needs of just deserts.

6.3. *Tracks plurality outside the penalty*

But prevention strategy of the social dangerousness has moved beyond the horizon of the penalty by instruments controlling dangerous offenders also through measures, different from penalty, but with a substantially afflictive content.

a) First of all, a strengthening of the personal preventive measures ante delictum has been based upon the social dangerousness apart from the commission of a crime and upon the suspicion that the offender committed a crime or is going to commit one. It is up to the head of police administration to apply preventive measures of the binding sheet of way and the oral warning to those who are presumed, on the base of elements of fact, to live on criminal traffics or habitually to live, also partly, with the proceeds of criminal activities or to live on the commission of crimes that offend or put in danger the physical or moral integrity of minors, health, security or public peace. It is up instead to the judge applying the heaviest measure of the special police supervision (sorveglianza speciale di pubblica sicurezza), eventually adding the prohibition to stay in one or more municipalities or provinces or adding the due to reside in the residence municipality, when there are suspects of a series of crimes relating to common or political organized crime, or to the suspects of neofascismus crimes, genocide (see artt. 1-6 d. lgs. 6 september 2011, n. 159, so called code antimafia code).

Preventive measures have been extended as instrument of control against politic crimes already in 1975 (Act 22 May 1975, n. 152) and now they are ruled in the so called “Antimafia code”: preventive measures are also applied to those who prepare the subversion of the State order or who prepare the re-formation of the dissolved fascist party.

Prevention measures ante delictum became the privileged instrument to contrast the violence in the stages since 1989 too: statute law provides that with regard to people, who are denounced or convicted in order to have taken active part to fact of violence on persons or things during or
because sport events, who have urged, exalted or induced to the violence in the same circumstances, the police can prohibit to entry places where sport events are carried out (art. 6, Act 13 Decembers 1989, n. 401). The art. 4 lett. i) Antimafia code provides that to the people, suspected to have facilitated groups or persons, implicated in more than once in sport violence, the preventive measure of the special police supervision can be applied.

b) Preventive strategy is present also in the deprivation of personal freedom as administrative measure regarding irregular no-European Union citizens (art. 13 legislative decree n. 286/1998 and successive modifications): the measure has a preventive purpose against the illegal permanence on the State territory. Now, if the permanence in the special Identification and Exclusion Centres can be extended up to 18 months, while for crime of illegal permanence in the State is only provided a fine (art. 10-bis legislative decree n. 286/1998), the more gravity of the administrative measure regarding the criminal sanction appears obvious: it is the consequence of preventive logic, because it is not interest of the State to punish irregular foreigners for a crime, but to prevent their dangerousness due to their illegal permanence on the Italian territory. Italian criminal-administrative regulation of the immigration moves from the criminal law against facts to the criminal law against the offender; therefore the sanctions must be fit to this change of view, from punishment of an offence to prevention of the dangerousness.

7. The dangerous offender in the State of prevention

In Italy, therefore, in front of an over and over downtrend in the application of custodial preventive measures there was the strengthening of the dangerous offender control through a plurality of other preventive instruments. This development reflects the preventive trends of the criminal law in the modern society. The increase of penal instruments showed these last years a strong tendency to anticipate the penal control: through risk crimes and conspiracy; through the strengthening of preventive purpose of the criminal sanction against dangerous offender. Criminal law is less and less based upon crimes and it becomes more and more criminal law against the offender.

What future can have penalty-preventive measure double track system in Italian criminal law? Personally I am not convinced about criminal systems with indeterminated sentence, because they harsh excessively personal guarantees, considered that freedom deprivation depends from a prognostic judgement on social dangerousness, that will be always ontologically uncertain, even if
it can be delimited by law: in a State of right the guarantee inborn in determinated penalties is unavoidable.

However, more realistically according to Italian Constitutional Court and European Court decisions, no reasons justify the abolition tout court of the preventive detention, but there are many and founded reasons to justify the control of dangerousness in the limits of extrema ratio, according to the proportion principle developed in the decisions of the European Court too and expressly written in the German criminal code (§ 62 German criminal code). Unfortunately this principle lacks in the Italian criminal law. Therefore, proportion principle should strongly reduce the use of custodial measures in order to prevent dangerousness:

- delimitation of social dangerousness judgement only in case of risk of serious offences;
- presence of mental diseases that, apart from their incidence on the criminal capacity, can give foundation to the prognostic judgment about social dangerousness;
- periodic re-examination of the social dangerousness and tightening judgments when the execution persists;
  - provision of the maximum limit of duration of preventive measure, but for exceptional needs to protect the society;
  - provision of a “vicarial” system in the relationship between penalty and security measures;
  - increasing of rehabilitation instruments of the offender in accordance to art. 27, paragraph 3 Constitution (the penalty must to the re-education of the sentenced), that cannot be limited only to the penalty, but it has to be referred to all the sanction with an afflictive content, such as preventive measures.

Outside these principles, the application of undetermined deprivation of freedom represents an unacceptable wound to freedom spheres and it risks to start a dangerous spiral of development of the preventive control, that deprives or reduces freedom in an abnormal dimension of “Bigbrotherisation” of criminal law and social control. On these developments the doctrine must remain alert, because preventive demands are such as communicating vessels: not satisfied from the apparatus of the security measures, they are otherwise assured through other instruments, inside and outside the penalty. Also here the proportion principle can constitute a bank to spreading of preventive demands, that can be more dangerous for the existence of the State of right than the dangerousness of the offender, that the criminal law wants to control.