Preliminary remarks

The international convention on Preventive Detention gives us a valuable occasion to confront with a topical and delicate theme in modern criminal policy, which puts freedom and security in direct competition.

Over the last decade, Western society has increasingly perceived the problem of security (terrorism, immigration, organized crime). Almost every country has revised and adapted its normative, police and judicial system to address growing security concerns. This has been done with the utmost haste and with the underlying fear that channels social anguish towards the demand of security, giving thus to politics a fortunate occasion in order to gain consensus.

The fight against crime is a traditional topic in election campaigns by now; however, at the core of the debate lies the prevention of crimes, rather than their repression, especially when it comes to particularly frightful forms of crimes, such as mafia or terrorism, which are a sort of modern version of the ancient delicta atrociissima.

A reflection on the legitimacy and opportunity of the multiple crime prevention strategies- both in civil and common law countries- is, therefore, useful. Different institutes, as we will see, can be gathered under the concept of Preventive Detention.

Some civil law countries use similar words to describe this concept. For example, the détention préventive in the French speaking systems, the prisòn (or detenciòn) preventiva in the Spanish ones, or the carcerazione preventiva in the former Italian Code of Criminal Procedure.
In this context, we make reference to procedural categories and, precisely, to precautionary measures limiting personal liberty.

The label *preventivo* has sometimes been abandoned: for example, in France, it has been replaced by *détention provisoire* since 1970; in Italy, after the reform of 1988, by *custodia cautelare in carcere*. These lexical corrections are appropriate and aim at avoiding the idea of a precautionary measure as an anticipation of the sentence, which would contrast with the presumption of innocence. In this context, therefore, “preventive” means “temporary”.

However, the meaning that Anglo-American legal practitioners give to this word is different and quite broader. For them, Preventive Detention justifies the refusal of bail and the imprisonment of the accused on the basis of his/her dangerousness.

The preventive purpose, here, has the same *raison d'être* of personal security measures, which are essentially aimed at preventing a second offence. In the Anglo-American vocabulary, “preventive” has a more precise meaning; it hints at the need of neutralizing the dangerousness of somebody. This is the sense that I intend to assign to the term.

As a matter of fact, the preventive purpose (in the above-mentioned meaning) not only characterizes personal precautionary measures but also other institutes that are present in many criminal systems of civil and common law.

One may think of some personal preventive measures *ante delictum*, or of the execution of the sentence with preventive modalities; finally, one may think of custodial security measures which are applicable, after the enforcement of the sentence, to people that are deemed particularly dangerous. Consequently, the notion of Preventive Detention can have a very broad sense, and can be used for all the measures limiting personal liberty aimed at neutralizing the dangerousness of the person concerned. However, the idea is not new.

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P. Nuvolone, in a 1976 essay, which deserves to be read again, had already included, among the preventive measures, both security measures and the punishment (according to the re-definition imposed by art. 27 paragraph 3 of the Constitution).

One can appreciate the usefulness of this conceptual openness by thinking that all kinds of preventive measures share a common feature—i.e., the aim at preventing future events—which poses similar problems for their legislative regulation. Different rules apply in the various stages of the proceedings, depending on the fact that the measure is adopted ante delictum, during the proceedings, during or after the enforcement of the sentence. However, the significant common features among different situations and, most importantly, the fact that personal liberty is at stake, engage scholars in the elaboration of minimum standards of guarantees applicable to every case.

**Types of Preventive Detentions**

Five types of Preventive Detention can be found in modern criminal systems. The first (detention ante delictum) has its best known example in the initiatives to contrast Islamic terrorism, which led to the approval of the Military Commission Act (2006), in which the “enemy combatant” takes the place of the accused. The privation of liberty does not occur on the basis of a charge, but on the basis of a personal status, given by a political decision aimed at labeling individuals as “socially dangerous”. To this category belong also the “Detentions of dangerous aliens” envisaged by the Community Protection Act (2006) for controlling immigration in the US. The same holds true for the numerous European regulations (including the Italian one) that envisage fenced detention centers for illegal immigrants. Formally, they speak of “restraint” (art. 14 d.lgs. 1998/286); however, what really matters besides the definitions is the substance, the real condition of detained immigrants: nobody can deny that

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people gathered there are deprived of their liberty without being accused of a crime. One may think of the unfortunate experience of the Identification and Expulsion Centers (CIE) in Italy. Other examples of detention ante delictum can be seen in those systems which allow police custody to last for many days (for instance, artt. 17-20 of the Polizeiaufgabengesetz of Land Bayern envisage a period of two weeks).

The second type of Preventive Detention consists of the precautionary measures aimed at preventing the commission of future crimes. Nowadays, almost every judicial system recognizes this purpose as legitimate. With reference to this, explicit rules are contained in § 112a of the German Strafprozessordnung, in art. 503 of the Spanish Ley de enjuiciamiento criminal, in art. 144 n. 6 of the French Code of Criminal Procedure and in art. 274 co. 1 lett. c of the Italian Code of Criminal Procedure. As far as the U.S. is concerned, the topic is dealt with, on the federal level, by a section of the Federal Bail Reform Act of 1984 (18 U.S.C.A. §§ 3141 ss.), after the pioneering experience of the District of Columbia at the beginning of the ’70s.

Even though the use of the precautionary custody for preventive functions shares the same aim as punishment and security measures, none of the legal systems have raised an issue of compatibility with the presumption of innocence. It is believed that the accused may be considered socially dangerous and, as such, has to be neutralized - even apart from the establishment of his/her guilt.

To the third type of Preventive Detention belong the security measures towards those who are not criminally chargeable, whose dangerousness is based on the commission of crimes in the past or by the fact of being strongly suspected of having done so. In this regard, some systems (such as Italy, Germany, Austria,

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The Netherlands, Poland and Hungary⁴)- applying the theory of the “double track”- preserve the retributive character of the punishment and attach to security measures the purpose of preventing social dangerousness; some other systems (such as the US, the UK and Sweden⁵) do not know this distinction, and therefore the prevention of social dangerousness is satisfied also by punishing those who are not criminally chargeable ⁶.

The fourth type of Preventive Detention, similar to the previous one, consists in enforcing the sentence with particular modalities, justified by the need of preventing the commission of some crimes. For example, to this category belongs the application of the “rigorous imprisonment” under art. 41bis of the Italian penitentiary system, or the “maximum security imprisonment” envisaged in Norway by the Execution Sentences Act of March 2002.

Finally, the fifth type is represented by the security measures imposed after imprisonment: for example, the act of taking into custody for safety reasons (Sicherungsverwahrung) under § 66a of the German StGB, according to which (a) the judge can extend the detention of the convicted person, who is still deemed dangerous, even though he/she has already served the sentence.

Standard minimum guarantees

In terms of Preventive Detention, guarantees have to be adapted to an establishment of facts, which have not yet occurred. This finding is difficult and risky, but not, as such, impossible or unlawful. Every modern constitution allows for limitations of personal liberty for security reasons or public safety, that is, based on a prognosis: one may look, for example, at art. 13 paragraph 2,

⁵ H.H. JESCHECK-TH. WEIGEND, loc. cit., p. 806.
14 paragraph 3, 16 paragraph 1, 17 paragraph 3 and 41 paragraph 2 of the Italian Constitution.

The Constitutions of Continental Europe, born as a reaction to the totalitarian experience of the first half of the XX Century, require formal conditions for the legitimacy of the measures limiting personal liberty. The law provides for cases and procedures of limitations, while magistrates have the power of enacting the measures, provided that they motivate their choice. In every case, personal dignity has to be respected during the execution of the measure.

That being stated, we can make a series of considerations regarding the fundamental principles to be respected in the regulation of the various forms of Preventive Detention. To be precise, the legality principle, the proportionality principle and the judicial review must be respected. These are cornerstones of the legal tradition of civil law; however, with the sole exception of the legality principle, they are also reflected in the thinking of common law jurists.

a) The Principle of Legality

The different forms of Preventive Detention, because of their aim of preventing future events, pose a unique challenge to the legislator: predicting the future. Dangerousness ratings must necessarily be drawn from facts and behaviors of the past, which are fraught with prognostic information. To this end, one has to use data of common experience validated by sociological, psychological and criminological theories. The notion of dangerousness does not necessarily have to be connected to the risk of the commission of a crime: modern constitutions allow for the limitation of individual liberty for reasons of security or public health even with respect to persons who have not been accused or convicted of a crime (for example, art. 11 Grundgesetz or art. 16 Italian Constitution). What matters is the fact that the safety (in its various declinations of social coexistence, environmental security, democratic security, etc.) appears to be so seriously in danger to justify the sacrifice of the individual right.
The task of the legislator is particularly difficult and potentially discriminatory when dangerousness ratings are derived from personal conditions (the status of illegal immigrant, the contiguity with a criminal environment, family relationships or friendships with people suspected of being part of mafia or terrorism associations). The use of general clauses such as “for the purpose of assuring public order or safety”, which leaves too much discretion to the interpreter, should also be avoided.

The task is less problematic, but still challenging, when the measure aims at preventing specific crimes and the dangerousness is inferred from the existence of significant indicators of criminal behaviors typically associated with the crime to be prevented. No matter how serious they are, these indicators obviously do not justify a deprivation of liberty on the same basis as the punishment; this sort of assumption would be in contrast to the presumption of innocence, the cornerstone principle of every demo-constitutional system.

The Italian experience shows that dangerousness cannot be inferred solely on the basis of the seriousness of the defendant's charges. The fear that the defendant, if released, could jeopardize primary goods such as life, health or personal safety, justifies the coercive measure. This fear, however, must be founded on elements other than the indicators of guilt; otherwise, we would fall back into a presumption of guilt.

The systems that apply the theory of the “double track” (like Italy and Germany), infer the dangerousness of people who are not criminally chargeable from the finding (even if not final) of illicit conducts and from the outcomes of psychiatric examinations.

Affiora qui il serio e annoso problema del trattamento più opportuno da riservare ai non imputabili destinati a quella forma di ruvida Preventive detention rappresentata dal ricovero in apposite case di cura.

In this respect, the serious and longstanding issue arises as to what is the most

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7 The reference is to decisions no. 268 of 2010, 164, 231 and 331 of 2011, which reckon such a presumption reasonable only with regard to persons accused to be part of mafia associations.
appropriate treatment for those persons who are not criminally chargeable and who will serve their Preventive Detention time in special nursing homes/mental health facilities (as a form of Preventive Detention). On this point, the Italian experience of forensic psychiatric hospitals has been so negative that, starting from February 2013, they will be replaced by treatment centers that will not have the features of prisons.

As for those who are condemned to rigorous imprisonment, the dangerousness ratings are inferred from the type of crime for which they have been definitively convicted. The experience shows that some offenders (mostly those connected to mafia or terrorism) are still capable of committing crimes even in captivity. The enforcement of the sentence with the prospect of rehabilitation could leave spaces for communications with the inmates and with the outside world that could be exploited for criminal purposes.

Hence, there remains the need of a special vigilance that necessarily entails a further reduction of freedom and results in an increase of the afflictive character of the punishment for preventive reasons.8

If - according to modern constitutions - personal liberty can be restricted only in such cases and in such manners as provided by the law, the same should apply to special restrictions that add to the ordinary penalty a surplus of sufferings.

It is thus important that the law accurately envisages the dangerousness ratings

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8 As a matter of fact, the Italian Constitutional Court denies that the “rigorous imprisonment” affects the quality of punishment or the degree of personal liberty of the detainee (sent. 349/1993 e 376/1997). It would rather be an enforcement of the ordinary sentence, whose modalities are devolved to the prison administration.

All the detainees are exposed to it due to their potential dangerousness, in particular those involved in mafia crimes, who are suspected of maintaining connections with their organization. By virtue of this argument (not entirely convincing), the practice of “rigorous imprisonment,” as such, is not objectionable from a constitutional perspective, since the further deprivation of liberty determined by preventive needs is already contained in the punishment imposed by the judge.

To the contrary, the Federal Court of Los Angeles, in a decision of September, 11th, 2007, denied the extradition of a convicted for mafia (Rosario Gambino), precisely in order to prevent him from being subject to the atypical punishment of “rigorous imprisonment”: on this point see M. PAVARINI, Il “cercere duro” tra efficacia e legittimità, in Criminalia 2007, 2008, p. 262-263.
according to which security custody has to be applied. The same holds true for custodial security measures that follow the execution of the sentence (as, for example, the aforementioned Sicherungsverwahrung of the German system).

b) The Principle of Proportionality

Respecting the Principle of Legality is not enough. In order to be lawful – in light of the criteria of practical rationality, according to which legislative choices that restrict individual rights must always be taken – the forms of Preventive Detention must also abide by the Principle of Proportionality, seen in its three components of suitability, strict proportionality and adequacy. Preventive measures must, therefore, be capable of preventing the danger feared, in order to avoid their erroneous use. Moreover, they must be adopted with the sole aim of preventing particularly serious risks (i.e., aggressions to life and health), and not to avoid the commission of any offense, nor for vague and unspecified security or public order reasons. In particular, however serious the danger to face may be and however solid the reasons justifying it are, Preventive Detention can never be executed in a manner that affects the irreducible core of human dignity. Even if detained, dangerous people must be granted the minimum margins of freedom and human relationships that are essential to their physical and mental health.9

Another aspect that falls within the Principle of Proportionality is the duration of preventive measures. Given the fact that they are related to future and uncertain events, determining their time limit in advance is impossible, unless the law imposes one, regardless of the duration of the danger faced. A temporary review by the public authority (even ex officio) on the persistence of

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9 This is a recurrent statement in the decisions of the Italian Constitutional Court in matter of “rigorous imprisonment”, according to which: “coercive measures that entail a treatment which is contrary to human dignity or would completely frustrate the rehabilitative purpose of punishment are forbidden” (decisions no. 376/1997; nr. 351/1996; n. 349/1993).
the grounds for the adoption of the measure is always possible and, indeed, necessary. The prevision of a maximum term should be the rule in cases of temporary detention (precautionary or administrative), in order to balance the need for security with the respect of personal liberty. In other words, with regard to the accused (towards whom the presumption of innocence applies) and to the persons deemed dangerous even in the absence of evidence of a crime, Preventive Detention – if it ever could be justified on the basis of criminal politics – should be contained within a reasonably brief time period. And that time period should be decided not by the duration of the asserted danger, but rather by the necessity to provide solutions to deal with the danger itself, even after the setting free of the person.

c) Judicial Review

Preventive Detention measures are sometimes adopted by administrative authorities. This is true not only for ante delictum measures, but also for those measures that are incorporated in the punishment (this is the case, for example, of the “rigorous imprisonment” in Italy, decided by the Minister of Justice). And yet, these are measures that limit personal liberty that, in the legal culture of modern constitutions, require the intervention of the judicial authority. In the Italian example, the power of disposing the “rigorous imprisonment” granted to the administrative authority is justified by denying the fact that it is a surplus of sufferings imposed to some specific offenders that are proven to be dangerous. It is considered, instead, a modality of punishment common to all the convicted, who are deemed socially dangerous10. This argument has its merit on a formal level, but we know that, in practice, “rigorous imprisonment” is reserved, almost exclusively, to a particular type of offender (the mafioso) and lends itself to being used as a sort of modern territio

10 See note 8.
to lead the convicted to cooperate with Justice.

Be that as it may, every measure of Preventive Detention, which is not within the scope of a judge’s power, should be at least subject to judicial review.\textsuperscript{11}. To this end, the dangerousness ratings deemed to be subsistent in the specific case must be accurately grounded, so that the measure can be appealed by whoever has been unjustly subjected to it.

\textsuperscript{11} The decision of the Minister that applies the “rigorous imprisonment” can be appealed before the Surveillance Court (art. 41\textit{bis comma 2quinquies} ord. pen.).