Measures of Prevention:
Dogmatic-Exegetic Aspects and Prospects of Reform

1. THE PRESENT STATE OF PREVENTIVE MEASURES

Preventive measures are defined as measures with a special preventive nature and are enforceable on certain categories of subjects considered socially dangerous, regardless of the actual commission of a crime.\(^\text{2}\)

The distinction between prevention *ante delictum* and criminal repression, prevention *stricto sensu*, has matured alongside criminal liberalism, because in this particular period the attention of the entire criminal apparatus has been concentrated on facts objectively prejudicial of a relevant legal interest whereas special prevention *ante* or *praeter delictum* has been delegated to additional criminal preventive or police measures (that is measures which are not enforced through judicial criminal proceedings but directly by the administrative authority responsible for public security).\(^\text{3}\)

In this way the branch of preventive law is created and given a complementary integrative function with regard to classical criminal law. This branch has the aim of monitoring the social dangerousness of certain categories of subjects, whereas classical criminal law has the task of sanctioning crime, on a case-by-case basis, which has already taken place.

The analogies found between safety measures and preventive measures concern their legislative progress, marked by the slow but unrelenting passage of the 'prevention area' from the police law, as a branch of administrative law, to criminal law. This is more evident and by now uncontestable in relation to safety measures, since, even though they are classified as administrative measures under the Rocco Code, they are in fact considered as coming under the criminal law.\(^\text{4}\)

It appears appropriate at this point to provide a short analysis of the relevant legislation starting from the T.U.L.P.S, since it is the predecessor of the general law of 1956. In 1926, the fascist regime issued a consolidation act of police laws containing rules on preventive

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measures clearly in tune with the authoritative and repressive policy of the regime, which was later followed (in 1931) by a new consolidation act providing for the police measures of warning, confinement and repatriation.5

Law No. 1423 of 1956 represents the first general law on the subject of preventive measures. It indicated five different categories of dangerousness centred entirely on 'typologies of criminals', to which five different types of preventive measures could be applied, of which three were to be imposed by a judicial authority. Legal scholarship and the case law have tried hard to solve the constitutional problems arising from such legislative intervention, with reference both to the subjective issue of dangerousness and to the preventive models proposed by such sets of rules.

It is important to emphasize that the Constitutional Court has shown a clear propensity towards accepting such measures and their relative legislative previsions as being in conformity with the Constitution6, particularly with reference to the principle of definitiveness, declaring all issues of legitimacy, raised in relation to Article 25 of the Constitution, groundless. Moreover, it has decreed, in general, the constitutional legitimacy of a limitation of personal freedom where this limitation has a preventive function.7

The scope of application of preventive measures has been enlarged by further legislative measures. In the first place, the law of 31 March 1965, No. 375, extended preventive measures, so that they would be applicable to 'suspects belonging to Mafia organizations'. The subjective typology consists only of the characteristic of being 'suspected of belonging to a Mafia organization': this represents a clear divergence from, and, at the same time, an attempt to circumvent law No. 1423/1956 which provides for the enforcement of these measures in cases of dangerousness described by Article 1 of this law. In the author's opinion, the circumvention consists of an attempt to abandon the former 'category of criminal' and to move closer, through evidence of membership to a group, towards the canons of a criminal law of the fact.8

The regulation under examination nevertheless bears a fundamental gap, since it fails to contain a precise and exhaustive definition of what we must consider as Mafia associations. Thus it appears evident that law No. 575/1965 was deprived of the 'legal support' that was to be provided later by the introduction of Article 416bis criminal code, if one leaves aside further criticism under the profile of 'reality', especially with respect to certain measures, such as the obligation to stay in a town different from the one in which one is resident. This has now been abolished and authoritatively defined as rather 'criminalistic' in nature, i.e., tending to focus on the source of criminality.8

The anti-mafia prevention system received a further reinforcement with the law of 13 September 1982, No. 646 (so-called 'Rognoni - La Torre' law) which partly modified the law

5. Previously, public security laws that provided for police measures such as measures of warning and of compulsory residence in an institution, had already been passed in 1865 and later modified in 1871: cf. Mantovani, op. cit. p. 884.
8. Confinement to certain towns has allowed the spread of mafia phenomena in places that were substantially immune; cf accordingly, albeit with reference to the subsequent law 646/82, but with considerations that also hold in relation to the previous law: Musco, 'Luci ed ombre della legge 'Rognoni-la Torre', in Legisl. pen., 1986, pp. 558 et seq. and at 5626.