HABEAS CORPUS AND SAFEGUARDS
By Federica Resta

Focus on facts.

a. Personal freedom, rule of law and dignity

"The prime matrix of all other constitutionally protected rights of the person". This was how the Constitutional Court (Judgement 238/1996) defined personal freedom – an "unfailing and essential core of the individual" – in its interpretation of the function and significance of one of the cardinal rules of the entire constitutional system: Section 13 of the Constitution. In its first and quintessential meaning, the rule specifically protects individual freedom in its historically accepted sense and in its indispensable essence: "freedom from arrest", asserted as far back as in 1215 in the Magna Charta and later in the Habeas Corpus Act of 1679. In this "basic" meaning, the rule protects, first and foremost, the freedom of the "body" from any form of coercion. Most notably, it guarantees the individual from arrest by the police and from the enforcement of measures restricting personal freedom by judicial authorities, in criminal proceedings.
As the Constitutional Court clarified, the regulation has a broader meaning. Not only does it protect physical freedom from arbitrary coercive measures, it also protects moral freedom, from measures that would be prejudicial to the dignity of the individual and reduce its judicial status.
While not codifying an autonomous right to moral freedom, the Constitution certainly assumes such a right as the foundation and pre-condition of dignity. It also views this right as a specific component of personal freedom, protected by Section 13 from any coercive power and any form of subjection of the person to the power of others. It prohibits, inter alia, "moral" violence against persons subjected to measures restricting their freedom (Constitutional Court,

judgements 11/1956; 68/1964; 144/1970; 30/1962; and 210/1995.) The protection offered by Section 13 of the Constitution includes moral freedom, as freedom of self-determination, according to the Court of Cassation, Division 4, of 11 July 2001, including with respect to medical treatment: Court of Cassation, Division 3, no. 5444 of 14 March 2006, and no. 14638 of 30 July 2004.

Moreover, as a fundamental right of the person (and not just of the citizen), the right to personal freedom cannot be qualified in the case of foreign nationals, simply by reason of their citizenship. The inviolable rights apply "to individuals – not as members of a given political community, but as human beings" (Constitutional Court, judgements 105/2001; 249/2010; and 245/2011).

The wide-ranging scope of the notion of personal freedom corresponds, moreover, to the degree of protection afforded. Section 13 envisages a double protection for the inviolable status of personal freedom from undue restrictions by the administrative authorities: namely, the principle of legality and the right to judicial redress.

It thus envisages that the prerequisites for and modes of application of measures restricting freedom and the authorisation of the use of coercion shall be determined by, respectively, Parliament as the direct representative of popular sovereignty and judicial authorities. These are prime guarantees, on the other hand, to be systematically interpreted, in order to point out the general principle underlying our constitution, i.e. the favor libertatis [literally, priority given to freedom].

As to the principle of legality, more notably, this principle does not solely rule out any room for administrative discretion in implementing legal provisions, but it also imposes a strict reasonableness test in assessing legitimacy and proportionality of the measures restricting personal freedom, however allowed for by the legislator, according to the minimisation principle (see for instance the case law on assessing adequacy of pre-trial detention or remand in custody under Section 275, paragraph 3, criminal code; Constitutional Court, judgement 265/2010; 164/2011231/2011; 110/2012; 57 and 213/2013). In other words, restriction of personal freedom of the person under

investigation or accused is to be maintained within certain limits, thus meeting the precautionary requirements typical of the specific case.

Restrictions placed on personal freedom, in short, cannot be allowed solely by reason of the provisions of the law. They must, rather, pass the test of strict proportionality, where the restriction of such a fundamental right is justified by the need to protect a legal asset deserving special protection and measures entailing a lesser restriction of freedom would be ineffective in achieving this objective. This accords with the parameter of "less restrictive means" used by Anglo-Saxon case law and to which, for example, judgement 309/2003 of the Constitutional Court has recourse, with reference to precautionary measures.

The principle of effective judicial control, on the other hand, provides a means for the judicial authorities to evaluate and ensure that the measure is in fact legitimate and applicable, on the basis that the conditions envisaged by law (and for which grounds must be given) do indeed exist. At the same time, measures restricting freedom which the public prosecutor – a judicial authority but discharging non-jurisdictional functions – may not just propose but also adopt directly, are necessarily provisional in nature. They require judicial validation, in the context of a proceeding that ensures equality of arms in order to protect the right of defence and ensure an adequate system of appeal, including direct recourse to the Court of Cassation (Constitutional Court, judgement 419/1994).

These two guarantees (the principles of legality and effective judicial control) must be observed even in exceptional circumstances of necessity and urgency. In such circumstances, Section 13(3) of the Constitution envisages the adoption by the police of provisional measures that shall be revoked and considered null and void if not validated by the Judiciary within 48 hours of their notice. Notice of such measures must be given no later than 48 hours after their adoption.

Such is the degree of protection afforded to personal freedom that, even with respect to the measures limiting personal freedom as

required for a criminal proceeding, the Constitution imposes specific guarantees. The last paragraph of Section 13, which contains a specially enhanced version of the principle of legality, states that the legislator shall establish the maximum duration of pre-trial custody. It thus clarifies the difference between pre-trial custody (in terms of its function, conditions and requirements for legitimacy) and custodial measures imposed as punishments. It implicitly requires reasonable terms to be established that are in keeping with the principles of adequacy (with respect to precautionary measures, which are also designed to protect the community from the danger posed by the accused) and proportionality (between duration of custody, progress of the judicial proceeding and seriousness of the charges). Such terms should be such, in effect, as not to turn pre-trial custody into a punishment. (Constitutional Court, judgement. 15/1982; 29271998; 529/2000; 243/2003; 299/2005; EHRC, judgement 5.4.2005, Nevmerzhitsky vs. Ukraine and 10.7.2001, Marshall vs. United Kingdom).

Similarly, paragraph 3 of Section 25 of the Constitution requires compliance with the principle of legality as regards security measures, some of which may entail significant restrictions on the liberty of the perpetrators of crimes (or quasi-crimes) deemed to be socially dangerous, even if charges cannot be brought.

But paragraph 4, in particular, of Section 13 requires the legislator to ensure that any measures limiting personal freedom, even if legitimately applied, are enforced with due respect for the dignity of the person. It envisages a specific obligation of indictment (the only one in the Constitution!) for "any act of physical and moral violence against a person subjected to restrictions to their personal liberty". It is significant than the authors of the Constitution ruled out the imposition of any sanctions less severe than criminal ones to protect the individual from violent acts perpetrated through abuse of a power that should be exercised in the name of the state and which, if wrongly used, betrays the essential principles of that State insofar as it may be called a democratic one. The ban on torture is in fact the strongest intrinsic limit to the state's monopoly on

legitimate violence. Punitive power is exercised legitimately only if and insofar as it does not become an abuse of the condition of deprivation of liberty experienced by the citizen in his relations with the public authorities. Torture is the limit neither a penalty nor the interrogation by public officials may come close to – otherwise they are transformed into pure violence, thus turning a measure restricting freedom – albeit one legitimately laid down – into the most substantial injury to personal dignity.

b. Restrictions on personal freedom in the criminal system

Compared with the primacy afforded in the Constitution to personal freedom, the legislator – especially in recent times – has significantly increased the use of measures restricting personal freedom (in both qualitative and quantitative terms), starting with those of a criminal nature or in any case relating to criminal trials.

First, there has been a significant expansion of the criminal system (it is estimated that there are as many as 35,000 criminal offences defined in the law), so that criminal sanctions (notably custodial ones) have become the first rather than the last resort measures; this has resulted into imprisonment measures being applied on a large scale, partly due to the ban - applied from time to time to the offences perceived as generating most social alarm – introduced on measures mitigating imprisonment and/or on alternative measures for some perpetrators of crimes, and has in turn prevented judges in charge of enforcement measures from applying penalties other than imprisonment.

Second, there has been an expansion of the measures restricting personal freedom that are closely instrumental to procedural requirements (such as precautionary and pre-trial measures) in terms of their scope and the possible addressees. As was the case of the so called obligatory pre-trial custody, they have even been "imposed"- for specific perpetrators of crime qualified as "foes"- on the basis of a rationale intended to deprive the judge of whatever discretion in assessing the need for such measures in the case at hand.

However, the application sphere of both precautionary measures and the statutory obstacles to non-custodial measures was limited via recent legislation, most notably Legislative Decrees 211/2011 and 78/2013. Such cases, however, are rare and limited in terms of their scope. Significantly, the steps in question were taken on an emergency basis, via decrees, resulting from the need to limit prison overcrowding (as also urged by the European Court of Human Rights: see the Sulejmanovic and Torreggiani judgements in 2009 and 2013) rather than – it would appear – from the endorsement of a totally different criminal policy.

Anyhow, a drastic reduction in the sphere of application of custodial measures (whether as punishments or as precautionary measures) is bound to be achieved also in view of the warning addressed by the Constitutional court to the legislator in its order No. 279/2013 – namely, to "prevent a custodial treatment that is contrary to humanity from being applied." Furthermore, the order states that "the lawmaker's inaction in respect of this serious issue could not be tolerated for much longer."

Similarly, on 9 October 2013 the President of the Republic, in a message to Parliament, warned that the "stringent need for deeply changing the conditions of prisons in Italy" is not only a juridical and political must, but actually it is imperative from an ethical standpoint. He pointed out that this objective pertains to the protection "of those levels of civilization and dignity that should not be undermined in our country by unjustifiable distortions and omissions of political decision-makers."

To this effect, the Head of State had indicated some essential lines of reform of the sanctioning system that were functionally related to prison overcrowding and concerned some of the main criticalities of criminal law policies for the past few years.

The need for substantial decriminalisation measures; the introduction of probation as a mechanism to prevent imprisonment from being applied to those who deserve access to social rehabilitation programmes; the introduction of non-custodial penalties however limiting one's personal freedom; the reduction of the scope of

application of pre-trial custody and the mitigation of the impact produced by recidivism as an obstacle to the adoption of alternative non-custodial measures are, in fact, key actions not only to reduce prison overcrowding but also to bring our criminal system in line with the constitutional principles that are vital for any State grounded in the rule of law - from *favor libertatis* to the residual nature of the criminal sanction, from the principles of assessing the prejudicial effects produced by a crime to the focus on the rehabilitative purpose of any punishment.

c. Restrictions on personal freedom outside the criminal system

From another perspective, the recent tendency in the law has been to extend measures restricting personal freedom that are (only) formally administrative in nature so as to avoid application of the safeguards envisaged for criminal trials (and criminal law) and thus resort to such measures even without proof that an offence has been committed.

A significant example is provided in this respect by the measures entailing personal disqualifications or other restrictions: in spite of the many doubts raised by their legitimacy in constitutional terms – exactly because they are such as to entail restrictions on personal freedom, even substantial ones, when there is no proof that an offence has been committed – they were reiterated even by the latest legislative instrument in this area (anti-mafia code: Legislative Decree 159/2011). However, immigration is the legislative sector where restrictions on personal freedom outside the criminal system are most cherished. Highly peculiar measures are envisaged for both security and preventive purposes depending on the applicable preconditions - such as expulsion – along with a veritable form of administrative "detention" that is utterly unrelated to the commission of criminal offences and is only subject to validation by the judge (in fact, a non-professional judge) whilst it is liable to last for as many as 18 months.

Discrimination and violence

To be effective, the right to personal freedom therefore requires, above all, that the legislator recognises and abides by the principle that measures restricting freedom must be marginal in nature. Such measures should be envisaged only to punish offences against legal interests that deserve an equal degree of protection.
Similarly, in the absence of a final verification of criminal liability, it should not be possible, *a fortiori*, to allow restrictions of freedom that are not strictly necessary to address risks that could not otherwise be averted.

2012- 2013 Data on prison population

- However, the current regulatory framework points out that the legislator often infringes the duty of limiting the use of restrictive measures on freedom, with a growing tendency to apply custodial sanctions even for offences not causing harm to third parties, with the ensuing result of a skyrocketing increase in the number of prison inmates. According to the estimates of the Ministry, they shifted from 35,469 in June 1991 (with 15.13% being non-nationals) to 55,275 in 2001 (with 29,5 % being non-nationals), to 65,886 in May 2013 (with 31.4% of non-nationals); their number was slightly reduced on August 31st (64,835), probably due to the deflationary measures contained in Legislative Decree 78/2013, which had meanwhile entered into force.
- The only significant reductions in terms of presence occur (rarely) when clemency provisions are issued (following the "partial pardon" as per Law No 207/2003 there was a 2.57% drop, whereas as a result of the pardon granted via Law No 241/2006 a 34.5% slashing was registered) – or else on account of regulations intended to limit the recourse to pre-trial custody (with the enforcement of the so-called Biondi law, Law No 332/95, an 8.3% reduction was experienced. Surely less

important but equally remarkable was the deflationary impact of regulations intended to extend the scope of application of house arrest and non-custodial measures as per Law No 190/2010 and decree 201/2011, which triggered a cutback of 1.57% and 1.79% in terms of the number of prison inmates.) In this regard, it will be interesting to observe, most notably, the variation in the number of inmates that the enforcement of Legislative Decree 78/2013 will be able to determine, in particular as the latter reduced , albeit to a minimal extent, the sphere of application of custodial measures.

- An analysis of the current data shows that out of 64,835 prison inmates, only 39,571 are serving final sentences; 12,226 are not serving final sentences, i.e. they are presumably innocent, and 11,785 actually are awaiting trial, whereas 1,204 are inmates of non-prison institutions and 22,878 are non-nationals. It should be noted that prison facilities should not accommodate more than 47,040 inmates.
  The ratio between inmates awaiting trial and inmates serving final sentences is 37% - among the highest ones in Europe, where it is on average 25%. This ratio dwindled substantially in the period at issue due to provisions introduced by Legislative Decree 211/2011 to limit the "revolving doors" phenomenon - in other words the 3/5- day transit in prison of individuals awaiting trial- which fell from 27% in 2009 to 13% on 31 October 2012.

2012–2013 House arrest, permits for good behaviour and alternative measures

- In addition to the aforementioned figures, one should take account of those who, on the same date, were under house arrest, that is 10,670 individuals, out of whom almost one third (2,894) were placed under house arrest following Law No 199/2010 which extended from 12 to 18 months the time to be still served as allowing the alternative measure to be

enforced. The scope of application of probation is worthy of note. In the first half of 2013 it concerned 11,212 individuals convicted of crimes, out of whom 59 affected by HIV and 3,334 drug- and alcohol-addicted. Conversely, the application scope of the "open prison" regime [semilibertà] is more limited. It concerned only 912 individuals in the identified period, most of them (853) being prison inmates whilst only in 59 cases was the "open prison" regime the primary enforcement mechanism of a sentence. There is no doubt that one should enhance the resort to such alternative measures, some of which should be transformed into primary sanctions susceptible of being imposed directly by the trial court - as envisaged by the bill on out-of-prison custodial penalties (AS 925) that is currently under examination by Parliament.

- Furthermore, there are very few permissions for good behaviour granted to prisoners: in 2012 they were barely 25,275, whereas these benefits qualify as the "first step back into society" and therefore not only as veritable prerequisite for legitimacy of punishments, but also as the necessary precondition to prevent recidivism.
- The same goes for those sanctions replacing brief custodial penalties: only 10 applications for "semidetenzione" [custodial sentence entailing the obligation to spend at least 10 hours daily in prison] were recorded and 191 for parole (respectively 17 and 314 in the first semester of 2013 and 8 and 164 in 2012). There is a wider recourse to socially useful work, consisting in the performance of unpaid work for the community, replacing detention (or house arrest inflicted by the justice of the peace) or pecuniary penalties; the latter option is limited however to driving under the influence of alcohol. Application of this regime following breaches of the road traffic legislation accounts for the overwhelming majority of cases: 4,052 compared to only 284 for the remainder (offences under the jurisdiction of the Justice of Peace or infringements of the consolidated Statute on drugs).

2013 Imprisonment per category of offence

- If we then examine the statistics for the prison population by category of offence, we see that most prison sentences concern offences that do not entail any real harm to third parties. They relate to offences giving rise to danger (as in the case of crimes of association) or to non-compliance offences as related to the status of perpetrators (most notably, aliens staying in Italy illegally). This demonstrates the "imprisonment-generating" potential of certain provisions, most notably those concerning immigration and drugs, the violation of which is the main cause of imprisonment in our country. (On this point, the mitigation of the penalties envisaged for lesser drug-related offences envisaged by Legislative Decree 164/2013 is to be welcomed).

2103 Unlawful application of measures restricting freedom

- Contrary to the above and as can be evidenced from the chapter on the rights of persons deprived of their personal liberty, practices and enforcement rules regulating the adoption of measures restricting freedom have often proved to be illegal. There have been various physical and moral abuses perpetrated against prisoners (and inmates of non-prison facilities), which on various occasions have been lethal (more or less directly). An improvement, albeit slight, in the enforcement mechanisms of punishments can be noted thanks to the adoption of the so-called "dynamic surveillance", being a particular management system of living conditions in prisons able to "guarantee order inside the facilities without hampering the enforcement of custodial measures". This system is based on the customisation of security requirements and a wider use of direct surveillance so as to make it easier for prisoners to leave their cells and embrace the concept of "open prison" enshrined in section 6 of Law No 354/1975 (see, the circular letter of the Prison Administration Department dated 18.7.13).
- According to the guidelines of the 2006 Recommendation by

the Council of Ministers of the Council of Europe, "security measures applied to individual prisoners shall be" in fact " the minimum necessary to achieve their secure custody." "The security which is provided by physical barriers and other technical means shall be complemented by the dynamic security provided by an alert staff who know the prisoners who are under their control." Hence, the recalled need for "knowledge of the prisoner to be considered as the base for any kind of adequate management or security action." Therefore, it will be useful to assess whether the implementation of these principles will allow for a diminished use of coercive security measures, able to effectively promote the educational content of the punishment.

- As to the illegal nature of imprisonment (i.e. as to the *an* rather than to the *quomodo* of imprisonment), a survey by Eurispes and the Criminal Bar Association reported a yearly average of about 2,500 claims for damages due to unjustified imprisonment, out of which almost one third (800) on average are granted. However there are no specific data regarding compensation as a result of illegal detention.

2013 Administrative security measures

- As for restrictions on personal freedom applied as "administrative security measures" (pursuant to the definition to be found in our criminal code), apart from the 1,204 inmates of non-prison facilities, the only non-custodial security measure applied would appear to be parole (in other words the most restrictive one: 3,786 cases in the first semester of 2013, almost 1,000 more than in the previous year), which is not infrequently applied at the end of imprisonment as if it were a continuation of the latter.

- As the Report by the Senate's Commission of Enquiry into the National Health Service shows, the inmates of non-prison facilities are often restrained without justification. This occurs,

moreover, in the absence of specific provisions governing the relevant prerequisites, limits, conditions for admissibility and guarantees (including judicial review).

2013 Measures restricting freedom of movement

- Of particular significance is the sphere of application of the measures restricting freedom of movement of individuals, which were enforced in as many as 394 cases in the first six months of 2012 alone (according to the latest figures available). Of these, 367 took the form of special surveillance with mandatory residence and only 27 that of simple special surveillance. However, these data do not take into consideration the peculiar measure restricting freedom of movement solely of foreign or EU citizens (in the form of expulsion or removal from the State's territory, respectively, as adopted where circumstances point to an individual's being socially dangerous) which is enforced all but infrequently.

  Of particular significance are the data related to 2008-2012. A general increase in the adoption of measures restricting freedom of movement was observed - from 781 in 2008 to 859 in 2009, to 871 in 2011 up to the 394 cases in the first semester of 2012 alone.

Legislation and policies

a. Background

Section 13 of the Constitution, therefore, does enshrine the main guarantee of the citizen against unlawful restrictions on personal freedom by public authorities - in other words, the core of the Habeas Corpus which has ever been the foundation of any other freedom right. Its function of guarantee – grounded in the principles of legality and effective judicial control as well as in the minimisation of the measures restricting personal freedom - runs the risk of being

weakened by a law-making approach that is aimed, on the one hand, at expanding the sphere of application of the measures restricting personal freedom that are "typical" or anyhow conventionally received in criminal law and, on the other hand, at enlarging the mechanisms and procedures limiting freedom – which in some cases are turned into administrative measures and placed outside the scope of judicial procedures.

As to the former issue, reference should be made to the expansion of the concept of "*flagrante delicto*", the so-called mandatory pre-trial custody (remand in custody), and the qualification of punishment as "segregation-oriented" (rather than rehabilitation-oriented).

The latter issue refers in particular to measures restricting personal freedoms that are only instrumentally qualified as administrative - such as detention in identification and expulsion centres and the coercive deportation of aliens as well as the significant expansion of security measures and preventive measures limiting freedom of movement.

b. Pre-trial precautionary measures and police powers

Turning to pre-trial precautionary measures, the recent trend in law-making is characterised by a significant expansion in the scope of obligatory arrest and, most notably, of persons not caught "in the act"; this points to a significant extension of the powers vested in the police, who apply said measures. First, reference should be made to the expansion of the category of offences for which arrest is obligatory (with particular regard to offences committed for the purposes of terrorism or subversion of the constitutional order, as referred to in Legislative Decree 144/2005) or optional.

This stepwise increase in the cases where obligatory arrest is envisaged (often connected with summary proceedings, which have greater symbolic impact) has actually resulted, quite frequently, in losing sight of the linkage between this pre-trial precautionary measure and custody, since obligatory arrest has been envisaged

even for offences for which no remand in custody is permitted. This criminal policy trend was criticised by the Constitutional Court, most notably in judgement no. 223 of 2004. The Court declared that obligatory arrest was not legitimate in respect of an offence – such as that of failing to comply with an expulsion order – for which precautionary measures may not be applied, as one would otherwise break the link between urgent measures restricting personal freedom and precautionary measures - unless the intention is to turn obligatory arrest of a person caught in the act into an "exemplary measure" only to be applied as an end in itself.

Second, the category of offences for which arrest is allowed in cases where the alleged perpetrator is not caught in the act has gradually been extended. This was originally envisaged (albeit as an option, therefore subject to evaluation of the appropriateness of the measure in the case concerned) for offences involving failure to comply with special surveillance measures including an obligation to stay (or not to stay) in a given place or else following escape from prison. Obligatory arrest, by contrast, even outside *flagrante delicto* cases, is now envisaged for the offences of exploiting or abetting illegal immigration, thus dodging the safeguards arising from the necessary link between police's power to restrict personal freedom and exceptional circumstances of necessity and urgency.

The concept of "deferred *flagrante delicto* cases" was also introduced for "stadium-related" offences. This term refers to offences entailing violence against persons or property occurring during or as a result of sports events, and offences involving the throwing of dangerous or other objects in places where sporting events take place. It also refers to failure to comply with the DASPO ban imposed by the Questore (the Italian acronym D.A.SPO. stands for Divieto di Accedere alle manifestazioni sportive, i.e. the ban to take part in any sports events as a spectator).

Accordingly any individual who, "on the basis of video-photographic documents or other objective evidence showing the fact unambiguously is found to be the perpetrator, as long as the arrest takes place by no later than what is necessary for him to be identified and, in any case, no later than 36 hours" (later increased to 48) is considered to be caught in the act.

Here, the discrepancy with respect to the concepts of *flagrante delicto* or *quasi flagrante delicto* envisaged by the Code of Criminal Procedure does not only stem from the different timescale, as it also concerns the different role played by the criminal investigation police in enforcing a measure restricting personal freedom not at the time the facts take place, but following an investigation, essential as this may be, to trace the persons to be questioned.

c. *Periculum libertatis and presumption of innocence in the provisions governing coercive precautionary measures*

The trend in law-making pertaining to pre-trial custody is equally worthy of note. This, probably more than any other, is a token of the relationship between individual freedom and collective security; accordingly, it is liable to be relied upon also in breach of the principles of strict procedural necessity, gradualness, adequacy and proportionality that ought to underlie the relevant regulations – which should also set forth the maximum duration of such custody (section 13, last paragraph, of the Constitution) [1].

As the Constitutional Court affirmed in its judgement No. 64/1970, which concerned the procedural rules previously in force but sets out principles that remain fully applicable, "pre-trial custody (…) should be regulated in such a way as not to clash with one of the fundamental guarantees of citizens' freedom: namely, that the defendant is presumed to be not guilty until the contrary is proven", so that it is only to be permitted "to meet precautionary requirements or those strictly related to the trial".

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1 As to the relationship between personal freedom and coercive powers by the State, see GIUL. AMATO, *Individuo e autorità nella disciplina della libertà personale,* Milan, 1967, 200 et seq..

In view of the above, *a fortiori,* the recent expansion of the category of offences this measure may be applied to has caused some perplexity, because such measure has now taken on, factually, the substantive features of a sentencing measure. This has been achieved either by adjusting the statutory requirements so as to permit its enforcement or, conversely, by explicitly excluding the offences considered to be socially most dangerous from the list of those for which house arrest is contemplated. In this regard, it is quite significant to note what happened when decree 78/2013 was converted into a Law - namely, the scope of application of pre-trial custody was reduced by adjusting the sentencing-related thresholds , but, in order to enable application of pre-trial custody to stalking and unlawful funding of political parties, the Law increased, on the one hand, the statutory maximum penalty provided for regarding the former and, on the other hand, it excluded the latter from the sphere of application of house arrest. This sort of mechanical assumption almost excludes the factual appreciation of the specific circumstances and the actual existence of *periculum libertatis,* i.e. of those strictly procedural requirements that, alone, justify such a decisive restriction on freedom of an individual, who is ultimately presumed to be innocent.

c.1. Obligatory pre-trial custody

Recent criminal justice policy has also significantly extended the sphere of application of the criminal procedure measure that, perhaps more than any other, clashes with the principle of minimising restrictions on personal freedom. Reference is made here to the presumption that pre-trial custodial measures are adequate, based solely on the statutory offence at issue and – as was the case under the Valpreda law – on the equation basically made between being a defendant and being guilty.

With Decree 11/2009 (known as Maroni Decree), the so called

obligatory pre-trial custody, initially intended only for mafia-type crimes, was even extended so as to include crimes perpetrated by a single individual, which- however serious they may be- lack an essential feature- i.e. the existence of a criminal organisation, which enabled both the Constitutional Court and the EHRC (Pantano case in 2003) to rule out that such a measure was unlawful. In fact, the new regulatory framework was basically dismantled by the Constitutional Court via a set of judgements -from 265/2010 to 213/2013- that found it to be illegitimate. This concerns most notably the provisions whereby pre-trial custody in prison is to be applied when substantial circumstantial evidence points to the guiltiness of the defendant with regard to the offences considered from time to time, except for those cases where no precautionary requirements exist, insofar as such provisions fail to leave unprejudiced the cases where specific elements are available showing that the precautionary requirements may be met via other measures. Therefore the Court has found that as far as the new category of offences is concerned, there are no exceptional requirements such as those related to mafia-type organised crimes that allow derogating from the principle of the lesser necessary evil underlying the pre-trial custody regulations. In fact, a mechanical assumption is made which ends up excluding the necessary factual appreciation of those strictly procedural requirements that - unlike what is the case with the sentencing system – underlie the recourse to pre-trial custody .

The trend to expand the scope of pre-trial custody (be it obligatory or not) is however partly mitigated as of now, due to the need to limit prison overcrowding rather than to the endorsement of a different approach to punishments. However, it is worth noting that starting from Decree 211/2011 up to decree 78/2013, a gradual containment of the cases of eligibility to pre-trial custody in prison took place. In particular, the former decree provided for the residual nature of this measure (except for especially socially dangerous crimes) by giving preference to house arrest or detention in security areas – which is also in line with the circular letter issued by the Public Prosecutor

at the Court of Milan in 2013, urging the recourse to non-custodial measures both in the pre-trial and in the sentence enforcement phase. The latter decree, instead, introduced a more structural change by extending the statutory maximum penalty for the offences in whose respect pre-trial custody may be ordered from 4 to 5 years.

d. "Non-liable to rehabilitation"

From another perspective, recent criminal legislation has seen a progressive expansion of the categories of offence for which the granting of prison benefits and the suspension of the order of enforcement of the penalty are not envisaged. This reduces the penalty solely to a means for defending society (or a means for segregation) and deprives it of its legitimising function of social rehabilitation. Most notably, the political need to show "zero tolerance" towards whichever offences are being portrayed as the cause of greatest social alarm has often led the legislator to rule out access to alternative measures for the perpetrators of such offences. This is in contrast to the fundamental principle whereby, for the social rehabilitation of the offender to be achieved, the penalty must be enforced in an individualised manner defined on a case-by-case basis, in accordance with the offender's conduct and the way it evolves. It thus requires the discretionary evaluation of the judge, without the impediment of abstract legislative assumptions based merely on the type of offence committed or on the "type of perpetrator", as in the case of repeat offenders. Furthermore, even if one follows a merely practical approach, the rigid enforcement of the penalty served in a cell does not reduce, but paradoxically increases the risk of recidivism compared to the granting of alternative measures – which goes to show how prison is "an unjustifiable reality in the name of security, which is being undermined rather than guaranteed" to refer to the words uttered by President Giorgio Napolitano.

The legislator, aware of this conflicting purposes, or probably driven by the need to limit prison overcrowding as urged also by the ECHR, recently softened, albeit in part, the rigidity of these regulations by reducing the scope of application both of the ban on suspending enforcement of the penalty and of the conditions preventing mitigation of prison regimes - while maintaining repeat offenders in the category of those "non-liable to rehabilitation" (Legislative Decree 78/2013) and extending the sphere of application of house arrest via decrees 199/2010, 211/2011 and 146/2013; the latter, in particular, introduces house arrest as a standard measure to serve the final portion of one's sentence, expands the scope of application of referrals to welfare services to include convicts serving residual sentences of four years' duration and enhances the recourse to "special" early release besides softening sanctions for drug-related minor offences.

It is then especially significant that the offences for which no ban on enforcement of sentences and no mitigation of the prison regime are envisaged are basically superimposable with those for which, regarding precautionary and pre-trial measures, mandatory pre-trial custody (and arrest) are envisaged[2]. Such a synergy of preclusions and assumptions results into placing certain offenders qualified as "public foes" into a special subset of criminal law (the so-called enemy's criminal law), characterised by important derogations from guarantees that are generally applicable to the defendant - here seen as a "un-person", a source of danger to be neutralised rather than a citizen to be socially reintegrated via an adequate customised program.

e. Treatment or sanction? Functions and limits of measures

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This circumstance has a partial impact on the possibility, for the accused that have perpetrated the same types of offence as per Section 4-bis, paragraph 1, first period, of Law No. 354/1975, to be subjected to the Article 41-bis prison regime, as further exacerbated by Law No 94/2009.

[3]

However implementation has to be monitored to avoid that the individuals concerned suffer from two-fold institutionalisation, both as perpetrators of crime and as individuals affected by mental disorders.

limiting freedom of movement

Obviously, this form of neutralization of the aforementioned "public foes", considered as being most dangerous from a social viewpoint, is not limited to criminal punishments and proceedings, as it is also achieved by way of measures restricting personal freedom subject to less stringent safeguards.

In this regard, measures limiting freedom of movement, in particular custodial measures of this type, are especially significant. Indeed, given the envisaged and needed abolition of judicial psychiatric hospitals[3], a restrictive approach can be observed vis-à-vis the individuals considered to be criminally chargeable, who are qualified as socially dangerous sometimes based on abstract preconditions. In these cases, in fact, they are increasingly paroled after serving most of the respective sentences, which entails the continuation of the restrictions placed on their personal freedom following conviction - for an indefinite period, except where social danger is no longer an issue - merely to meet social protection requirements. Conversely, the restriction on personal freedom resulting from such measures should be traced back to the scope and purposes of the relevant punishment, especially regarding the individuals qualified as criminally chargeable, who otherwise are subjected coercively to a custodial measure that is useless as it is unable to educate them. Furthermore, they are subjected to measures restricting their freedom of movement that risk extending over time, exactly due to the basic ineffectiveness of the punishment imposed on them in terms of their rehabilitation.

f. Freedom, body and dignity. Obligatory medical treatment and physical restraint

In envisaging the – admittedly necessary – closure of "psychiatric judicial hospitals" and their replacement with more markedly treatment-oriented facilities, the legislator should have reviewed

the regulations on obligatory medical treatment as introduced by the "Basaglia Law" (Law No. 180/1978). The framework for such a review should have been a broader re-thinking of the provisions on measures to restrict personal freedom as applied to persons suffering from psychological conditions. The obligatory medical treatment was introduced to make it possible to administer, coercively, tests and treatment to persons with particularly serious mental diseases "with due respect for the dignity of the person and his civil and political rights, including as far as possible the right to freely choose his doctor and place of treatment." Such tests and treatments must be accompanied by "initiatives to ensure the consent and participation of those obliged to submit to them." The treatments in question are solely aimed at protecting the patient's health, unlike what was provided for in the previous legislation (Law No. 36/1904, on "lunatic asylums and on mentally unsound persons") regarding "coercive admission" to lunatic asylums as applying to individuals deemed dangerous "to themselves and others" or otherwise likely to cause "public scandal". The obligatory medical treatment is ordered by the Mayor of the municipality in which the patient is to be found, based on a reasoned proposal by a doctor and validated by a physician belonging to a public facility where hospitalisation is envisaged. The hospitalisation-based obligatory medical treatment should also be approved by the guardianship judge, on whom the order shall be notified within 48 hours from hospitalisation. The approval must be granted within the subsequent 48 hours.

Today it would be especially appropriate to attribute a more incisive role to the guardianship judge than the one specified under Law No. 180 when validating the in-hospital obligatory medical treatment, by extending judicial scrutiny to include out-of-hospital obligatory treatments that are nevertheless such as to restrict personal freedom. In this respect, it would also be appropriate to initiate a major overhaul of the regulations (currently incomplete) of the physical restraint applicable to psychiatric patients (whether inmates of ad-

hoc facilities, subject to in-hospital medical treatment or otherwise), considering in the first place whether to ban it outright or possibly limit it to cases of marked aggressive individuals that cannot otherwise be contained or where there is a risk of suicide.[3] The only regulations that apply today with regard to the use of physical force are in fact the ones under Law No. 354/1975 and its implementing regulations but only limited to prisoners and inmates of non-prison institutions - pursuant to a framework which follows that of the Mental Health Act of 1904 and the related regulations, whose implicit repeal by Law No. 180 is still controversial. Therefore, if one accepts the implied repeal hypothesis, any form of physical restraint in respect of non-inmates would be illegal today because it would be applied in the absence of an adequate legal basis. If, therefore, the use of restraint is considered inevitable - which today is anything but uncommon, as shown by the inspection activity carried out by the Senate Commission of Inquiry into the National Health Service in the last parliament - it should be properly regulated in accordance with the principle of legality set forth in Sections 13 and 32 of the Constitution and with the judicial review requirement provided for in Section 13 thereof. At all events, it should be provided that such types of restraint may only be applied as a last resort measure in cases of proven serious risk to the safety of the patient and others, and where other less invasive measures are ineffective. In any case, being a restriction placed on personal freedom, the use of physical restraints should only be allowed after judicial approval and in accordance with a procedure that envisages a judicial review addressing the substance of the case at hand along with effective guarantees of the right of defence. The opportunity might be also be seized to achieve the effective implementation of Decree 201/2011, in the part ordering the shutting down of judicial psychiatric hospitals.

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3 [4] The belief in the inevitability of physical restraint, at least in some cases, appears, for example, from the Recommendation on preventing acts of violence against health-care practitioners issued by the Ministry of Health (2007) and by having regard to medical and nursing codes of conduct.

g. *Before the offence. Preventive measures and "appropriate enemies"*

Like security measures, preventive measures aim to neutralise the social danger posed by individuals. In this case, however, they apply – following the principle of *ne peccetur* (and not *quia peccatum est*) [not because a sin has been committed but that it might not be committed] – to individuals only suspected of having the potential to offend in the future. Or, alternatively, to individuals implicated by insufficient evidence to stand as proof that offences have been committed and, therefore, leaving aside any investigation into criminal liability. Furthermore, unlike security measures, preventive measures are more markedly administrative in nature. This is because they are issued by administrative authorities and merely validated by the judge or, where they have an impact on personal freedom proper, by the court, on the basis of a special proceeding that inevitably reduces the guarantees available to the defence.

The recent legislative trend has contributed to extending the 'suspicious circumstances' that justify the application of these measures, which have actually been expanded in scope, invoking from time to time the need for early protection of legal assets deemed to have priority over the mere possibility of their harm, according to a legal policy perspective also permitted by the Constitutional Court since judgement no. 27/1958 - and yet interpreted extensively for reasons of social control or repression of political dissent (as in the case of the Reale Law) to encompass truants and vagabonds, foreigners and hooligans.

With Legislative Decree 159/2011 (anti-mafia Code), which systematised the matter, we missed the chance for a thorough review of the rules governing measures restricting freedom of movement of individuals so as to limit their scope to only those cases really needed for the a priori protection of primary legal interests and

anyhow in the presence of circumstances such as to point to the factual risk of harm being caused to such interests - by reason of the confirmed dangerousness of the individual that could not be reduced otherwise. Parliament has instead chosen to retain the traditional personal qualifications pointing to the existence of danger (individuals suspected of belonging to mafia associations, persons involved in criminal activities, etc.) alongside those introduced more recently by way of legislation (individuals suspected of having assisted persons involved in violence at sporting events). The procedure for the application of preventive measures restricting personal freedom was regulated in such a way as to ensure greater 'judicial scrutiny'-with the court being given powers to issue rulings and not just to validate administrative measures - and, therefore, more effective guarantees of the right of defence. It was actually a change dictated by the Constitutional Court, which has repeatedly held the regulations on preventive measures restricting personal freedom to be illegitimate to the extent they impacted excessively on the right of defence (see, in particular, judgement 144/1997).

However, Parliament lacked the courage to strike them out or even just to impose any effective limitation on such measures by having regard to those cases in which this a priori protection of legal assets is considered to be really essential.

Such a choice would actually be a must in a legal system like ours, where the primary protection afforded to personal freedom admits of limitations only after establishing the commission of an offence and culpability for the offence committed (and not for one's life-style: see sections 25 and 27 of the Constitution) or else, for limited periods, in the context of criminal proceedings (Section 13, last paragraph, of the Constitution), or to counter the social dangerousness posed by an individual that has committed a criminal offence (or a quasi-crime) (pursuant to section 25(3) of the Constitution, affirming compliance with the principle of legality as a prerequisite for regulating security measures) .

The absence of any link with the commission of an offence (these are actually measures taken *sine* (without) or *praeter* (irrespective of) the commission of an offence, rather than *ante delictum*) is then reflected in the nature of the procedure for their application, which is characterized by the almost total absence of predetermined forms and therefore run largely in a discretionary manner.

There are no specific rules on the taking and evaluation of evidence and the procedure is based on the submission of purely circumstantial elements that are not only well below the standard required in a criminal trial for sentencing, but also below the standards for adopting precautionary measures – with the attending consequences in terms of limitations placed on the right of defence.

The structurally circumstantial nature of the preconditions for applying preventive measures, however, is amplified because of the virtually evanescent features of the 'suspect' as defined by law, which acts as the substitute for criminal offences that are difficult to prove.

To the extent evidence is missing for the predicate offence, preventive measures are therefore more properly measures taken *praeter probationem delicti* (irrespective of proof of the commission of a crime) rather than *praeter delictum* (irrespective of the commission of a crime); they are penalties imposed on a suspect on the ground of mere clues that are not liable to be investigated further, and as such they are appropriate to circumvent the guarantees underlying criminal procedure – which is even less acceptable when one considers the number of limitations, direct and indirect, they place on the freedoms and fundamental rights of the person involved.

Indeed, apart from the content of the individual measure (which is particularly high-impact in the case of special supervision with a prohibition or obligation of residence from one to five years, as recognized by the ECHR itself in the Labita vs. Italy case of 2000), they produce effects (some of them also concerning cohabiting persons!) limiting constitutionally protected civil or political rights

such as the prohibition to obtain licenses, permits, authorizations; the revocation of driving licenses or the prohibition to perform any electoral canvassing. Subjection to such measures also allows - if necessary for reasons of prevention, in fact - the police to carry out, upon the mere authorisation granted by the Public Prosecutor, 'preventive' interceptions whose results cannot be used in court. Furthermore, the application of these measures entails "indirect incarceration" effects - with imprisonment being provided for following any violation of the instructions given to the person (also those of a very general nature, to live honestly and abide by the law) – along with further tightening of the penalties envisaged, as the fact of being the subject of preventive measures is regarded as a special aggravating circumstance for certain offences.

Regarding the offences committed at sports events and in violation of DASPO (prohibition of accessing places where sporting events take place), admissibility of pre-trial custody has additionally been provided for, albeit on a temporary basis, by derogating from the punishment threshold set out in the Code of Procedure.

According to a trend that has been confirmed throughout legislatures, whenever the principles of exclusivity, legality, legal scrutiny in criminal matters have been depicted as obstacles rather than as guarantees, in order to circumvent the procedural safeguards applying to defendant, recourse has been had to measures restricting freedom of movement of individuals - whose history dates back to the combating of vagrants in sixteenth century England or to the preventive measures against 'bandits' and political dissidents issued by Crispi's government at the end of the 19th century in Italy.

h. Freedom of borders. The special sub-system of non-citizens

h.1. Expulsion as a preventive measure

Immigration is a prime area for preventive measures limiting

freedom of movement. Such measures feature the recourse to the expulsion (or deportation) of individuals deemed to be dangerous on the basis of mere circumstantial evidence or suspicions. Only consider, for example, expulsion by the Prefect as referred to in Section 13, paragraphs 1 and 2(c) of Legislative Decree 286/1998. This provision applies to migrants belonging to "some of the categories" cited in Laws No. 1423/1956 and 575/1965 (persons engaged in illegal trafficking; persons living on the proceeds of crime; and persons habitually committing certain crimes). These provisions refer to cases where, in the absence of proof of their guilt, a suspect (generally by reason of lifestyle or status) is punished (with varying degrees of severity).

Moreover, Section 3 of Decree 144/2005 extended the scope of application of the administrative expulsion to migrants *suspected of facilitating, in any way,* activities or organisations for purposes of terrorism, including international terrorism (regarding the expulsion of EU citizens for "mandatory reasons of public security", see Section 20 of Legislative Decree 30/2007).

For the purpose of adopting an administrative measure of removal, it is not necessary for the individual to have been convicted of prior offences or to demonstrate that the individual poses a danger to society ; in fact, these requirements (as well the fact that the individual in question belongs to the categories pursuant to Section 1 of Laws No. 1423/1956 and 575/1965) are mere indicators the administrative authority may take into account as part of its discretionary assessment. Regardless of the traditional remedies provided by appeals, the intervention of the judge (justice of the peace, who is certainly not the "judge pre-determined by law" as for personal freedom) is limited to validating immediately enforceable expulsion orders only. This, as we know, is a summary judgment that merely examines the legitimacy of the provision.

Judicial review was, however, excluded - albeit temporarily - for the deportation applied - as a preventive measure - by the Minister of the Interior or, when acting on his behalf, the prefect, against foreigners

who have committed acts preparatory to terrorism-related offences or that are suspected may assist terrorist organizations or activities. The vagueness and wide-ranging nature of the preconditions for applying this measure, together with the fact that it may be enforced (again, only on a temporary basis) even though the information underlying the adoption of the measure is not immediately to be disclosed, for confidentiality reasons (procedural or informative), and coupled with the exclusion of judicial validation (contrary to the nature of the measure, which is restrictive of personal freedom as recognized by the Constitutional Court via judgement 222/2004 regarding coercive deportation) show the differential and derogatory nature of the provisions adopted also in this case in the field of immigration.

Equally unjustifiable is expulsion (or deportation) enforced as a security measure, which is envisaged for foreigners on the sole ground that they have been *convicted* of offences of a medium-low gravity (such as offences carrying imprisonment for a period in excess of *two years*) and in the absence of any express requirement for ascertaining the social danger posed by the person in question.

And if it is true that the need for such an ascertainment may be inferred from an interpretation of the law that is mindful of constitutional principles (the Constitutional Court having upheld the illegitimacy of any presumption of social dangerousness), it is also true that the lawmaker's intention (*voluntas legis*), at least for the past, would appear to be different, as is clear from the preparatory work that led to the amendments.

h.2. Administrative "detention"? Detention in identification and expulsion centres

The immigration-related legislation also includes a measure depriving of personal freedom that is formally defined as administrative in

nature – because it is uncoupled from the commission of offences or the opening of a criminal proceeding – but is no less punitive than a criminal penalty. This measure has been applied, most notably, since Decree Law 89/2011 [4] increased the maximum period of detention in identification and expulsion centres to the limit of 18 months allowed by Directive 2008/115/EC. This period is thus even longer, in other words, than the one envisaged for serious offences. And it is being applied for the sole fact (which does not always depend on the intentions of the person concerned) that it is not possible to proceed with the repatriation.

The contrast between Section 13 of the Constitution and a form of detention – supported by a judicial validation that is little more than formal in nature – that is completely unrelated to the commission of offences, or to an evaluation of those requirements of investigation, prevention or social protection on which precautionary measures are based, is therefore all the more evident. After all, Section 13 also applies to foreign nationals as it is intended to uphold the fundamental and inviolable freedom of habeas corpus: see, for example, judgements 105/2001; 222 and 223/2004.It seems, in short, that detention measures "exploit the non-criminal dimension only to neutralise the substantive and procedural guarantees of the criminal system, since they are based, in reality, on coercive measures restricting personal freedom which in the criminal system are absolutely exceptional in nature" (A. Caputo).

It is true that the Constitutional Court considered the questions raised over the constitutional legitimacy of the provisions governing detention in (at that time) temporary stay centres, under Section 13 of the Constitution, to be unfounded. In the Court's view, the fact that the validation concerns an administrative provision issued by the public security authorities and at the same time represents the prerequisite for further detention up to the limit envisaged by law, does not violate the judicial control condition referred to in Section

4 [5] Which, however, introduced – as required by the Directive – alternative measures to detention in identification and expulsion centres to ensure that the foreign national is removed from the country.

13, since the detention would in any case be based on (and legitimised by) a judicial provision. It is, however, equally true that this is still debatable (and therefore legislative clarification is needed on) how one may attribute to a decision issued in a judicial proceeding the decision to extend the detention period until the deadline provided for by law. However, the Court will soon decide on a further request for assessing constitutional legitimacy of the detention in question, lodged in relation to Section 13 of the Constitution by a justice of the peace in Rome via the order dated 6 October 2013. Similarly, it would also seem necessary - partly in the light of the factual reality of these centres – to introduce procedures and mechanisms in order to monitor the conditions of detention, as a sort of parallel approach to what is stipulated by Law 354/1975 for prisons.

In should also be recalled, in general terms, that the Court of Justice, in its El Dridi judgement, stated that the use of the detention measure - or the "the measure most restrictive of personal freedom that the directive allows in a case of coercive removal " - is regulated expressly by Directive 2008/115/EC, "particularly in order to ensure respect for the fundamental rights of the third country citizens concerned,"; in fact, the Court noted that the fixing of a binding maximum period of detention has "the purpose of limiting the deprivation of liberty of citizens from third countries in a situation of coercive removal", and on the basis of ECHR case law, that the detention of foreigners during the administrative procedure of expulsion must be for the shortest period possible, and may never extend beyond the time necessary to achieve the purpose of removal. Any restriction of personal freedom and any coercive treatment at centres other than the identification and expulsion ones (such as initial reception centres) should be expressly excluded whenever the law does not expressly provide for coercive detention. On the other hand, the whole system of penalties provided for by the consolidated text would require a complex revision in the light of the subsidiarity

principle of criminal law, so that the restriction of personal freedom of *illegal* aliens really represents a last resort (and not the rule, as is currently the case) and the coercive intervention of the police does not represent the rule but is instead - as stated in the third paragraph of Section 13 of the Constitution - limited to "exceptional cases of necessity and urgency."

Recommendations

1. Fostering in-depth decriminalization with particular regard to drug- and immigration-related activities, which are the main reasons for the increase in prison population.
2. Limiting custodial punishments to the most serious crimes that are prejudicial to primary legal assets as per the hierarchy outlined by the Constitution and only with regard to those individuals for whom it can be shown that there is a substantial dangerousness potential.
3. Expanding the type and scope of alternatives to imprisonment, with provision also being made for their transformation (at least partially) into principal penalties (which may thus be imposed directly by the trial court), whilst also extending the scope of application of prohibition measures so as to turn them into principal sanctions as well.
4. Reducing the recourse to remand in custody and eliminating arrest under "deferred flagrante delicto" conditions, by limiting mandatory arrest to especially serious statutory offences.
5. Ruling out imprisonment for mothers (and fathers, if the mother is unable to assist children) with (at least) pre-school age children and allowing deprivation of their liberty in locations other than their homes exclusively under exceptional circumstances; such locations should consist in any case in structures such as ICAM or sheltered homes and be outside correctional facilities, and they should be managed by welfare bodies. Further, the applicable security measures should preferably be non-recognisable as

such by children.

6. Excluding persons (partly) liable to be indicted from the scope of application of the measures limiting freedom of movement, so as to ascribe the special preventive functions of such measures back to the scope of the enforcement of sentences, thereby enhancing their effectiveness with a view to rehabilitation.
7. Extending judicial validation to non-hospital obligatory medical treatment that impacts personal freedom, following attribution to the judge of enhanced powers of assessment; limiting and providing for the stepwise elimination of resort to physical restraint regarding the mentally ill.
8. Markedly reducing preventive measures limiting freedom of movement by eliminating, or at least limiting, their indirect consequences (bans, sanctions etc.).
9. Limiting the recourse to deportation as a preventive measure and subjecting it in any case to more in-depth judicial review. Against this backdrop, the use of deportation as a security measure should be limited to cases where the person has been convicted of particularly serious crimes and has been shown to be a danger to society.
10. Pending the overhauling of the system based on Identification and Expulsion Centres (IECs), reducing the maximum permissible duration of detention for aliens to 40 days with a possible 20-day extension if no transportation means is provisionally available. At all events, judicial review of the relevant measures should not be limited to the assessment of formal compliance with the law and provisions should be made to ensure that detention is allowed as a last resort measure. Procedures and mechanisms should also be introduced in order to monitor the conditions of detention.