

CRIMINAL PREVENTION IN ITALY

From the “Pica Act” to the “Anti-Mafia Code”

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INTRODUCTION

“Preventive measures entail considerable limitations to fundamental rights enshrined in the Constitution”; but “these limitations are based on the need to guarantee the orderly and peaceful course of social relations, not only through a body of legislation penalizing unlawful acts, but also through provisions intended to prevent the commission of such acts”. “And this is a requirement and a fundamental principle of every democratic legal system, accepted and recognized by our Constitution” (Constitutional Court, judgment no. 27 of 1959).

“Security means that citizens can carry out their lawful activities without being threatened by physical and moral offenses; it is the orderly civilized living, that is certainly the goal of a free and democratic State based on the rule of law”; security is a “situation in which citizens are ensured, as far as possible, the peaceful exercise of those fundamental rights of freedom that the Constitution guarantees so forcefully” (Constitutional Court, judgment n. 2 of 1956).

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The Italian legal system envisages several types of preventive measures aimed at protecting fundamental rights and interests (such as public order and the safety of persons) in a phase prior to (and regardless of) the commission of a crime.

Examples include: i) the prohibition to access places where sporting events take place, imposed by the head of the police (“questore”), in order to prevent the phenomenon of violence in stadiums (article 6 law 13 December 1989, n. 401); ii) the “admonition” (ammonimento) imposed by the head of the police (“questore”) to individuals reported for the conduct of “stalking” (article 8 of legislative decree 23 February 2009 no. 11) aimed at protecting the physical and moral safety of vulnerable persons and at preventing violence against women; iii) the measures provided for by article 75-bis of the consolidated text on drugs and psychotropic substances, imposed by the judicial authority to those who have committed administrative offences relating to the possession of drugs for personal use, aimed at protecting public safety and public health; iv) the expulsion of foreigners against whom there are reasonable grounds to believe that their stay in the territory of the State can in any way help organizations or terrorist activities, including international ones, provided for by Law Decree of 27 July 2005 n. 144, converted with amendments into the Law of 31 July 2005 n. 155 containing: "Urgent measures to combat international terrorism", aimed at protecting the public safety.

This presentation will focus on that particular system of preventive measures aimed at fighting mafia and terrorism, today governed by the anti-mafia Code (Legislative Decree of 6 September 2011 n. 159), as subsequently amended.

The theme of crime prevention in Italy will be addressed from a historical perspective, so as to better understand the complexity of such normative apparatus and explain its evolution over time, from instrument of repression based on mere suspicion to an indispensable tool for combating organized crime in its most dangerous expressions such as mafia and terrorism.

1. THE ORIGIN OF THE CRIME PREVENTION IN ITALY: THE "PICA ACT"

The crime prevention system in Italy was established by law 15 August 1863 no. 1409, also known as “Pica Act”, named after the deputy who proposed it.

The law sets forth a “procedure for the suppression of brigandage and ‘*camorristi*’² in “infected provinces” and was the first special law of the unitary Italian State.

Article 5 of the “Pica Act” gave the Government the power to inflict the punishment of “*forced confinement*” (“*domicilio coatto*”) to “*idlers, vagrants, camorristi and to suspicious people*”.

A board composed of the Mayor, the president of the Court, the public prosecutor and two provincial councillors was entitled to apply these measures.

It was of primary importance for the protection of public order and security.

2. THE FASCIST PERIOD

During the Fascist period (1922-1943)³, the crime prevention system was governed by the laws on public security approved by royal decree of 6 November 1926 n. 184, which introduced the measure of the “admonition” (“*ammonizione*”).

2 The “Camorra” is an Italian Mafia-type organization that originated in the region of Campania and its capital Naples. It is one of the oldest and largest criminal organizations in Italy, dating back to the 16th century.

3 During the “Fascist period” the Italian government was led by a dictator having complete power, forcibly suppressing opposition and criticism, regimenting all industry, commerce and economic activities and emphasizing an aggressive nationalism and often racism.

Subsequently, the royal decree of 18 June 1931 n. 773 (“consolidated text of laws of public security”) provided the measurement of “*confinement*”.

These measures make clear the intent of the fascist regime to extend the application of prevention measures to persons opposing the fascist ideology (preventive measures as an instrument of repression of dissent).

Moreover, the Executive was the only competent authority for the application of prevention measures with no participation of the judiciary.

Preventive measures concerning property were also an instrument of the regime to combat dissidents: the royal decree n. 773/1931 introduced the confiscation of assets of associations, organizations and institutions conducting activities contrary to the fascist ideology.

It follows that during the fascist dictatorship the concept of “crime prevention” was strongly linked to that one of public order and contained political and ideological aspects.

Political dissent was considered a public order issue and preventive measures were instruments of the regime for the repression of opinions dissenting with the established order.

In that political context, the only result to be achieved with preventive measures – both against person and property – was to ensure the maintenance of the *status quo*, as opposed to focusing on the origin and causes of social problems like those of the “mafia”.

3. THE ENTRY INTO FORCE OF THE REPUBLICAN CONSTITUTION: THE ENFORCEMENT OF THE PRINCIPLES OF PERSONAL CRIMINAL RESPONSIBILITY, PRESUMPTION OF INNOCENCE, FREE, PRIVATE ECONOMIC INITIATIVE, AND THE RIGHT TO PRIVATE PROPERTY

On 1 January 1948 the Constitution of the Italian Republic entered into force.

The issue of the compatibility of prevention measures with the new system of constitutional guarantees was immediately raised by both scholars and representatives of the democratic institution.

There was a heated debate between scholars who supported the thesis of unconstitutionality of preventive measures and others that affirmed the compatibility of the preventive system with the guarantees of the democratic state.

Advocates of the **thesis of unconstitutionality** – (among others ELIA, FIANDACA, MUSCO, AMODIO, BRICOLA) – highlighted that preventive measures were inconsistent with constitutional provisions enshrining the principle of inviolability of personal freedom⁴,

4 Art. 13 of the Italian Constitution

Personal liberty is inviolable.

No one may be detained, inspected, or searched nor otherwise subjected to any restriction of personal liberty except by order of the Judiciary stating a reason and only in such cases and in such manner as provided by the law.

In exceptional circumstances and under such conditions of necessity and urgency as shall conclusively be defined by the law, the police may take provisional measures that shall be referred within 48 hours to the Judiciary for validation and which, in default of such validation in the following 48 hours, shall be revoked and considered null and void.

Any act of physical and moral violence against a person subjected to restriction of personal liberty shall be punished.

The law shall establish the maximum duration of preventive detention.

the legality of punishment (*nulla poena sine lege*)⁵, the presumption of innocence⁶, the freedom of economic initiative⁷ and the protection of private property⁸.

The main issue is that, in the crime prevention system, personal freedom of individuals can be restricted on the basis of presumptions and independently of the commission of a crime, by imposing orders aimed at facilitating the control and supervision of the organs responsible for protecting public safety. Such orders may include the seizure and the confiscation of the property of persons who, albeit not suspected of belonging to a mafia-type association, are nonetheless presumed to be partners of criminal activities in the capacity of fictitious nominee of assets ("*intestataro fittizio*"), so as to allow others to circumvent the rules on preventive measures related to property.

Some scholars, thus, still today accuse the whole anti-mafia prevention system of constitutional illegality for violation of the principles of presumption of innocence and personal responsibility (FILIPPI).

Furthermore, some scholars highlight that preventive measures are tools that can be used for purposes of social defence at the expense of personal liberty, especially when they are exempted from the control and guarantees of the courts and are applied directly by the police authorities.

Advocates of the **thesis of constitutionality** of preventive measures (among others MANTOVANI, NUVOLONE, MORTATI) claim that such measures find a legal basis in many provisions of the Constitution. First, article 2 of the Constitution, which recognizes the inviolable rights of the individual and mandates the Government to protect them not only after they have been violated, but also before. Second, article 41 of the Constitution, guaranteeing the freedom of private economic initiative, and providing that the latter cannot be in contradiction with social utility, or damage the safety, liberty and dignity of human-beings. Finally, article 42, that protects private property rights but also provides that the property may be subject to limits in order to guarantee its social function.

In light of these constitutional principles, some scholars argue that "*mafia management of economic activities disrupts the conditions that ensure the freedom of the market and of*

5 Art. 25 of the Italian Constitution

No case may be removed from the court seized with it as established by law.

No punishment may be inflicted except by virtue of a law in force at the time the offence was committed.

No restriction may be placed on a person's liberty save for as provided by law.

6 Art. 27 of the Italian Constitution

Criminal responsibility is personal.

A defendant shall be considered not guilty until a final sentence has been passed.

Punishments may not be inhuman and shall aim at re-educating the convicted.

Death penalty is prohibited (1).

7 Art. 41 of the Italian Constitution

Private economic enterprise is free. It may not be carried out against the common good or in such a manner that could damage safety, liberty and human dignity. The law shall provide for appropriate programmes and controls so that public and private-sector economic activity may be oriented and co-ordinated for social purposes.

8 Art. 42 of the Italian Constitution

Property is public or private. Economic assets may belong to the State, to public bodies or to private persons.

Private property is recognised and guaranteed by the law, which prescribes the ways it is acquired, enjoyed and its limitations so as to ensure its social function and make it accessible to all.

In the cases provided for by the law and with provisions for compensation, private property may be expropriated for reasons of general interest.

The law establishes the regulations and limits of legitimate and testamentary inheritance and the rights of the State in matters of inheritance.

economic initiative and the social function of private property, thus violating articles 41 and 42 of Constitution” (CASSANO).

In addition, article 27 of the Constitution assigns to the punishment a rehabilitative function and thus introduces into the criminal system the “prevention” as part of the penalty. By so doing, it breaks the necessary correlation between “punishment” and “the commission of a crime”.

In other words, prevention and repression form an integral part of the criminal justice system, based on the preventive and punitive function of the penalty.

Nevertheless, such doctrine highlights that the crime prevention system, in order to be compatible with the Republican Constitution, should comply with the principle of the inviolability of personal freedom; in particular, article 13 of the Constitution requires that any restriction to personal freedom be based on legally certain statutory provisions, and imposes that restriction to liberty be applied in the context of court proceedings with jurisdictional guarantees (requirements that are met through the “judicialization” of proceedings relating to preventive measures).

3.1 The judgments of the Constitutional Court.

The Italian Constitutional Court contributed to the debate with some important judgments which established the core principles of the current prevention system.

With the first judgment (no. 2 of 1956), the Constitutional Court declared the constitutional illegality of article 157 of the consolidated text of the laws of public security concerning the expulsion order (“*foglio di via obbligatorio*”) and the warning not to come back without prior approval of the public security authorities in the municipality from which the expulsion had been ordered (“*diffida a non ritornare senza previa autorizzazione dell’autorità di pubblica sicurezza nel Comune dal quale era stato disposto l’allontanamento*”).

In that judgment, the Constitutional Court set out a number of fundamental principles:

- (a) preventive measures limiting **personal freedom** are allowed within the limits imposed by article 13 of the Constitution;
- (b) preventive measures restrictive of **freedom of movement** can be applied by the administrative authority for reasons of public security in the cases prescribed by law, subject to subsequent judicial review;
- (c) such measures, properly motivated, must be based on **facts (and not suspicions)** and must be issued in the respect of the judicial guarantees.

4. PERSONAL PREVENTION. FROM "DANGEROUS PERSON" TO "SUSPECTS OF BELONGING TO MAFIA-TYPE ASSOCIATIONS"

The legal vacuum resulting from the decision of the Constitutional Court was quickly filled by *Law 27 December 1956 n. 1423 (“Preventive measures against persons who are a danger to public security and morality”)* (the “1956 Act”), that reorganized the entire crime prevention system with the intent to identify more precisely the categories of ‘dangerous persons’ and provide for some defence guarantees.

“The 1956 Act” introduced, at least in the crucial steps, some jurisdictional guarantees in the procedure concerning preventive measures, so far largely remitted to the discretion of public security authorities.

With regard to the conditions of application, article 1 of the 1956 Act identified **five categories** of dangerous persons, who “*may be warned by the head of the Police*”:

- 1) *idlers and habitual vagrants who are fit to work;*
- 2) *anyone who is regularly and notoriously involved in illicit activities;*
- 3) *individuals whose behaviour and standard of living (tenore di vita) show that they habitually live of the profits of criminal activities or complicity therein (con il favoreggiamento), or whose conduct gives good reason to believe that they have criminal tendencies (che, per le manifestazioni cui abbiano dato luogo, diano fondato motivo di ritenere che siano proclivi a delinquere);*
- 4) *individuals who, by reasons of their behaviour, must be considered as abettors of prostitution, women’s trafficking, minors’ corruption, smuggling, and illicit drug trafficking;*
- 5) *those who usually engage other activities contrary to public morality”.*

The law introduced two main categories of preventive measures:

(a) Measures applied by police authorities (in particular by the Chief of Police: “Questore”):

- ‘expulsion order’ (“*foglio di via obbligatorio*”): applicable to individuals who are a threat to security in a place other than their place of residence; the police authority orders the return in the place of residence.
- ‘oral notice/warning’ by police authorities (“*avviso orale*”): applicable to individuals suspected of committing a crime; the public security authority may order the person to keep a lawful conduct in accordance with prescriptions.

(b) Measures applied by the judicial authority (The District court for preventive measures⁹):

- ‘**special police supervision**’ (“*sorveglianza speciale di pubblica sicurezza*”); if need be, this may be combined either with either a prohibition on residence (“*divieto di soggiorno*”) in one or more identified municipalities or provinces or, in the case of particularly dangerous persons (“*particolare pericolosità*”), with an order of compulsory residence in a specified municipality (“*obbligo del soggiorno in un determinato comune*”).

In case of non-compliance with an ‘oral notice’ (*avviso orale*), the District Court may impose further measures (such as prohibition to associate with persons convicted of criminal offences or subject to preventive or security measures; obligation to return to their residence by a certain time in the evening or prohibition to leave their residence before a certain time in the morning, except in case of necessity and after having given notice in due time to the authorities; prohibition to possess or carry firearms, to enter bars or night-clubs and to attend public meetings, etc.); the violation of these provisions is an offence punishable with imprisonment.

The District Court for preventive measures (Tribunal based on the Court of Appeal district) is the only competent authority to order these measures; it shall do so pursuant to the application of the public security authority; the District Court shall issue a reasoned decision (*decreto motivato*) in chambers within thirty days. It will first hear the Public prosecutor and the person concerned, the latter being entitled to submit written motions and to be assisted by a lawyer.

The Prosecutor and the person concerned may appeal the decision, within ten days. The appeal does not have suspensive effect; the Court of Appeal shall issue a reasoned decision (*decreto motivato*) in chambers within thirty days. That decision may be further be subject to

⁹ The jurisdiction is attributed to the District court where the person lives (article 5 paragraph 1 of the “Anti-Mafia Code”).

appeal before the Court of cassation on the same conditions. The Court of cassation shall deliver its ruling in chambers within thirty days.

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Preventive measures have been constantly subjected to review of constitutional legality under the democratic Constitution even after the entry into force of the “1956 Act”.

Constitutional Court, judgment of 5 May 1959 n. 27: the Constitutional Court ruled that preventive measures entail considerable limitations to fundamental rights enshrined in the Constitution; but *“these limitations are based on the need to guarantee the orderly and peaceful course of social relations, not only through a legislation penalizing unlawful acts, but also through provisions intended to prevent the commission of such acts”*. *“And this is a requirement and a fundamental principle of every democratic legal system, accepted and recognized by our Constitution”*.

“Accordingly, article 13 of the Constitution by stating that restrictions on personal freedom can be prescribed only through motivated act of the judicial authority and only in the cases and manners provided by the law, recognizes the possibility of such restrictions in principle; in case of necessity and urgency, interim measures can be applied by administrative authorities”.

Constitutional Court, judgement of 30 June 1964 n. 68: *“The public administration, in carrying out its tasks, adopts several acts affecting the freedom and dignity of the person: acts concerning disqualification, resignation, prohibitions, administrative sanctions, including disciplinary ones, which can entail the dismissal of civil servants and radiation from professional associations.*

It is not mandatory that such acts be within the competence of the judicial authority, provided that they are adopted in compliance with the constitutional guarantees and that there is a judicial review of their legitimacy”.

Basically, the Constitutional Court ruled that *“the restrictions of personal liberty under Article 13 of the Constitution (i.e. restrictions that can be imposed only by order of the Judiciary) are only those that infringe upon human dignity to the point of violating the principle of “habeas corpus”*.

In another important judgment (n. 23 of 4 March 1964), the Constitutional Court affirmed another fundamental principle: *“preventive measures cannot be adopted on the basis of mere suspicions, but only on the basis of an objective assessment of the facts showing the habitual conduct and standard of living of the person. Such objective evaluation serves as a safeguard against uncontrollable and purely subjective assessments by those who promote or apply preventive measures”*.

In 1980, the Constitutional Court ruled again on the topic (**judgment of 16 December 1980, n. 177**). It highlighted the inconsistency with the principle of legality of article 1.3 of the “1956 Act” in that *“it does not describe one or more conducts that can be the object of a judicial assessment”*; the concept of *“criminal proclivity do not have any conceptual autonomy in the court’s assessment itself”*. **“Due to its vagueness, such legal formula offers to operators an area of incontrollable discretion”**.

Law of 3 August 1988 n. 327 (“1988 Act”) amended Article 1 of the “1956 Act” in line with the Constitutional Court’s guidelines; Article 1 of 1956 Act (**current Article 1 of the New Anti-mafia Code**) provides as follows:

1. “individuals who, **on the basis of factual elements**, may be regarded as habitually engaged in criminal activities”;
2. “individuals who, by reason of their behaviour and standard of living (*tenore di vita*), and **on the basis of factual elements**, may be considered as habitually living of the profits of crime (even in part)”
3. “individuals who, by reasons of their behaviour and **on the basis of factual elements**, may **be considered** as being prone to the commission of crimes that offend or endanger the physical or moral integrity of minors, health, safety or public tranquillity”.

4.1 The introduction of “qualified dangerousness”. Preventive measures as instrument for combating mafia

Nine years after the “1956 Act”, the Italian Parliament adopted an important Law (**the Law 31 May 1965 n. 575**) containing “provisions against the mafia”: the preventive measures are applied also to **persons suspected of belonging to the mafia-type associations**.

This law introduces, in addition to the notion of “common dangerousness”, a “special dangerousness” qualified by belonging to the mafia.

Preventive measures, thus, become instrument for combating mafia.

Subsequently, with the law 22 May 1975 n. 172 containing “provisions for the protection of public order” (also known as the “Reale Act”, named after the member of Parliament who proposed it), preventive measures were extended to other categories of dangerous individuals and to new types of offences envisaged by law (such as armed gang, kidnapping for ransom, etc.)¹⁰.

The structure of this law is based on the “*commission of preparatory acts*”, with the aim of preventing subversive phenomena of the democratic order including preparatory acts intended to rebuild the fascist party. The law, thus, introduced a concept of “political dangerousness”.

5. THE MAFIA-TYPE ASSOCIATION AND THE CONTRAST AGAINST MAFIA’S ASSETS. THE ENTRY INTO FORCE OF THE LAW “ROGNONI-LA TORRE”

The law 13 September 1982 n. 646 regulating “*Mafia-type criminal association and provisions on preventive measures concerning property*” (known as the “Rognoni-La Torre Act” from the names of the parliamentarians that proposed it) marks **a turning point in the fight against organised crime**.

¹⁰ The article 18, paragraph 1 of the law 152/1975 is so formulated: “the provisions of the law 31 May 31 1965 n. 575, also applies to those who:

1) operating in groups or individually, are pursuing preparatory acts, objectively relevant, aimed at subverting the form of Government, with the Commission of an offence provided for by title IV, chapter I of title II of the Penal Code or articles 284 , 285, 286, 306, 438, 439, 605 and 630 of the same code;

2) have been part of political associations dissolved pursuant to law 20 June 1952, n. 645 and in respect of which should be considered, for their subsequent behavior, that they continue to carry out a similar activity to the previous one;

3) pursue preparatory acts, objectively relevant, directed at the reconstitution of the fascist party in accordance with article 1 of the law No. 645 of 1952, in particular with the exaltation or practice of violence; 4) have been convicted for any of the offences provided for in the law 2 October, 1967, n. 895, and articles 8 and following of the law 14 October 1974, n. 497, and subsequent amendments, when should be considered, for their subsequent behavior, they are apt to commit a crime of the same species with the purpose indicated in the previous n. 1 ”.

The article 19, paragraph 1 of the law 152/1975 provides: “the provisions of the law 31 May 31, 1965, n. 575, also apply to persons referred to in article 1, numbers 2), 3) and 4) of the 1956 Act”.

The article 416 bis, governing the crime of mafia-type criminal association, was introduced into the criminal code.

This is a special form of criminal association whose main characteristics are:

- its members use the intimidating power of the organization and the resulting code of silence and intimidation, regardless of the commission of acts of violence or threat.
- Participants of the mafia-type association make use of such intimidating power in order to:
 1. commit crimes;
 2. acquire (directly or indirectly) the management, or other forms of control, of economic activities, licences, permits, public contracts or services or gain unfair advantages or profits for its members or other persons
 3. prevent or hinder the free exercise of the right to vote, or secure votes for its members or other persons in elections.

The above legal definition of the mafia-type organization draws upon sociological notions and clearly shows the **economic and political dimension of this type of criminal association**.

In fact, organized crime can be regarded (and it is actually regarded by Italian legal practice) as a particular kind of economic crime. We know that the expression “economic crime” is traditionally intended as equivalent to white-collar crime, i.e. a criminal conduct being committed only through a mere misuse of the legal economy (which is not the case of the usual organized crime).

However, and in spite of the traditional terminology, the notion of ‘economic crime’ has constantly been expanded to cover activities carried out by those involved in organized crime, since these individuals create their own criminal economy, which is supported by a great number of illegal profit-oriented activities.

Organized crime is a general category to which specific and sectorial organized criminal groups (including the mafia-type ones) belong. As such, organized crime can be regarded as a complex phenomenon. This diversified category, however, appears to be unified by a constant and unfailing feature: the **entrepreneurial and potentially transnational dimension** characterising every criminal organization. These characteristics are always present, regardless of the existence of a mafia-type force of intimidation behind the group, and irrespective of the type of illegal market dealt with by the organization.

Indeed, in the current age of global economy, the profit-oriented dimension and the transnational dimension of organized crime are deeply and evidently interconnected.

With particular regard to Mafia, Article 416-bis, of the Italian criminal code regards it as a particular kind of organized crime, characterized by a very peculiar force of intimidation and a deep-rooted code of silence. By so doing, the Italian legal system takes into account that a mafia group is an organized criminal group with a long-standing history of violence and intimidation. Such criminal ‘history’, which is well known by the affected communities, carries a strong threatening potential. As a result, the criminal group can easily acquire unlawful advantages simply by exploiting people’s fear, and usually without the need of resorting to further threats.

The recourse to this peculiar force of intimidation and to the relevant code of silence constitute the so-called ‘mafia method’.

A further consequence of such a criminal ‘method’ is that Mafia easily controls markets and territories, somehow putting itself in competition with governmental institutions. At the same time, it has a strong tendency to corrupt public officers, taint public institutions and even taint the political life of the affected area.

Through the unlawful privileges derived from all this, mafia-type organized crime is in a position to acquire an ever stronger economic power and prominent international dimension,

since its money-laundering activities move without frontiers taking advantage of the international financial system. In this respect, its strong code of silence and intimidation is a very powerful tool¹¹.

In order to counter the economic interests of the mafia, the “Rognoni-La Torre Act” introduced the **anti-mafia seizure and confiscation**.

The elements that characterize such Law can be summarized as follows: on the one hand, the introduction of preventive measures concerning property, on the other hand, the isolation of the economic system of the suspect, accomplished through the revocation or suspension of licenses, registrations and authorizations.

The “Rognoni- La Torre Act” creates a roster of the institutions and administrations entitled to issue licenses, registrations and authorizations, who are obliged to interrupt any relationship with whomever is subjected to preventive measures.

In addition to defining the scope of the Law 575/1965¹², the “Rognoni – La Torre Act” introduces articles 2bis, 2ter and 2quater into the latter.

These additions radically change the contrast strategy against Mafia, which now hinges on the fight against the illicit assets.

The innovations can be summarised as follows: it is established a **link between preventive measures against persons and preventive measures related to property**. Accordingly, *“the public prosecutor and the Chief of the police competent for requesting the application of preventive measures, shall, even with the assistance of the tax police (“Guardia di Finanza”), conduct investigations on the person’s standard of living (“tenore di vita”), financial resources and assets, in order to determine their origin”*¹³. Such investigations are extended to the family members of the person suspected of belonging to the mafia-type organization.

But the major changes introduced by the “Rognoni-La Torre Act” of 1982 concern the criteria assessed in the prevention related to property: that of “sufficient evidence” and that of “evidence of legitimate origin of property”.

Article 2 *ter* of the “Rognoni-La Torre Act” also provides that the District Court orders *ex officio* the seizure of goods of which the person suspected of belonging to the mafia may directly or indirectly dispose of, on the basis of sufficient evidence (such as the considerable gap between the living standards and the level of incomes, apparent or declared), and therefore there is reason to believe to be the result of illegal activities or constitute its reuse.

Subsequently, if the legitimate provenance of the seized assets is not demonstrated, the District Court orders the definitive measure of confiscation¹⁴.

These provisions gave important results and the confiscated assets increased consistently after 1982. Therefore, the need arose for a legislation governing the “after-confiscation” process.

Indeed, the previous legislation did not satisfactorily deal with the administration and management of seized and confiscated assets.

11 TURONE G., *Il delitto di associazione mafiosa*, ed. Giuffrè.

12 Providing that: *“This Act applies to suspects of belonging to mafia-type associations, the camorra or in other associations, however locally called, that pursue or act in ways that match those of mafia-type associations”*.

13 Article 2bis paragraph 1 of the Law n. 575/1965 introduced by the article 14 of the Law 646/1982 “Rognoni-La Torre Act”.

14 Article 2ter paragraph 3, Act 575/1965 introduced by article 14 of Rognoni – La Torre Act of 1982.

To this end, the Government issued the law decree of 14 June 1989 n. 230, converted with amendments into the Law of 4 August 1989 no. 282, containing: “*urgent provisions for the administration and destination of goods seized under the Law of 31 May 1965 n. 575*”.

The legislative decree n. 230/1989 included a series of provisions to prepare an initial management strategy of assets seized and confiscated from organized crime.

Article 1 of legislative decree n. 230/1989 provided that assets confiscated from the mafia shall be donated to the State; the most important innovation is the introduction of a court-appointed administrator (“*amministratore giudiziario*”) who is responsible for the custody, conservation and administration of the seized assets in order to increase, when possible, their productivity and re-entry into society.

Subsequently, the law of 19 March 1990 n. 55 (“*New rules for the prevention of mafia-related crimes and other serious forms of manifestation of social dangerousness*”), extended the system of preventive measures to others crimes such as extortion, kidnapping for ransom, money laundering, smuggling, drug trafficking and usury.

5.1 The Anti-mafia Pool and the “Cosa Nostra” Maxi Trial

The innovations introduced by the “Rognoni-La Torre Act” were crucial for the investigation carried out by the Anti-mafia pool of Palermo composed of the judges Antonino Caponnetto, Leonardo Guarnotta, Giuseppe Di Lello, Paolo Borsellino and Giovanni Falcone¹⁵.

The Pool prepared the “Maxi trial” against the leaders of “Cosa Nostra” of Sicily (“Our Thing”)¹⁶, the most important trial in the history of the country, which started on 10 February 1986 with approximately 475 defendants.

The Maxi-trial ended on 16 December 1987, with the issuance of 19 life sentences and 2665 years imprisonment inflicted and fines for about 11 milliards of Italian liras (about 5.681.025,89 euro).

Despite the murder of Judge Antonio Scopelliti, who should have been appointed as public prosecutor before the Supreme Court of Cassation in the Maxi-trial appellate proceedings, on 30 of January 1992 the Court of Cassation confirmed the life-sentences of the “Maxi trial”.

5.2 The mafia massacres of the early 90s

In the years 1992-1993 the Sicilian Mafia organization called “*cosa nostra*” (“our thing”) strongly reacted to the sentences inflicted by the Court of appeal of Palermo and upheld by the Supreme Court of Cassation.

In the Capaci massacre of 23 May 1992, judge Giovanni Falcone, his wife judge Francesca Morvillo and his bodyguards (police agents Vito Schifani, Rocco Dicillo and Antonio Montinaro) were killed. After only 57 days, on 19 July 1992, in the massacre of via D’Amelio in Palermo, judge Paolo Borsellino and his bodyguards (police agents Emanuela

¹⁵ The Anti-mafia pool, was a group of [investigating magistrates](#) at the Prosecuting Office of [Palermo \(Sicily\)](#) who closely worked together sharing information and developing new investigative and prosecutorial strategies against the [Sicilian Mafia](#). An informal pool had been created by Judge [Rocco Chinnici](#) in the early 1980s following the example of anti-terrorism judges in Northern Italy in the 1970s. Most important, they assumed collective responsibility for carrying Mafia prosecutions forward: all the members of the pool signed prosecutorial orders to avoid exposing any one of them to particular risk. In July 1983, [Rocco Chinnici](#) was killed by the Mafia. His place as head of the ‘Office of Instruction’ (Ufficio istruzione), the investigative branch of the Prosecution Office of Palermo, was taken by [Antonino Caponnetto](#), who formalized the pool. Next to [Giovanni Falcone](#), the group included [Paolo Borsellino](#), Giuseppe Di Lello and Leonardo Guarnotta.

¹⁶ The Sicilian Mafia, also known as Cosa Nostra (“our thing”), is the mafia-type organization based in Sicily, Italy. It has a pyramidal structure; the basic group is known as a “family”; families are grouped in “mandamenti” and “mandamenti” are grouped in “province”. Each group exercise “sovereignty” over a territory, in which it operates its rackets and others illicit activities.

Loi, Vincenzo Li Muli, Walter Eddie Cosina and Claudio Traina) lost their lives; such grave massacres, which constituted an attack to the heart of the democratic institutions, pushed the Government to approve the legislative decree 8 June 1992 n. 306¹⁷ converted into law of 7 August 1992, n. 356 (“*urgent changes to the new code of criminal procedure and measures to combat mafia crime*”).

These laws strengthened the repressive system of organised crime.

The conversion law includes a number of provisions: the tightening of the prison regime with the prohibition of granting benefits to members of organized crime (article 15 D.L. 306/1992 converted to Law 356/1992), the introduction of new measures to protect those who collaborate with justice, the introduction of changes in the measures on financial prevention.

Others changes were introduced by the legislative decree of 20 June 1994 n. 399 converted, with amendments, into the Law 8 August 1994 n. 501.

Article 2 of this law introduces the category of the so-called “extended confiscation” (Article 12sexies of the legislative decree n. 306/1992). The law provides specific hypotheses of confiscation in cases of conviction or request under article 444 of the code of criminal procedure¹⁸ for certain offences¹⁹.

In these cases “*it is always ordered the confiscation of assets, money or other utilities owned by or in the disposal of the convicted person (even through intermediaries), when the person cannot justify their origin because their value is disproportionate to the income, declared for the purposes of income taxes, or to his economic activity*”²⁰.

Others Mafia’s intimidations and massacres followed.

On 27 May 1993, five people were killed in the massacre occurred in via “dei Georgofili” in Florence; on 27 July 1993, five people were killed in the massacre occurred in via Palestro in Milan.

On 14 May 1993, there was another failed attack in via Fauro in Rome; on 28 July 1993, a failed attack at St John Lateran in Rome, and on 23 January 1994 at the Olympic Stadium in Rome.

5.3 The response of civil society. The Association "Libera" and the law of the social reuse of goods confiscated from mafia

During the fight against mafia undertaken by the judiciary, in which dozens of men of the institutions were killed, the civil society started to react.

17 In particular the Law Decree 306/1992 introduces articles 3quater and 3quinquies in the Law 575/65 which provide respectively: a) further investigation to be undertaken by the Guardia di Finanza, and suspension of the administration of goods, where there exist elements to believe that certain economic activities are also directly or indirectly subject to the conditions of intimidatory power under art. 416 bis of the penal code.; b) being the suspension a temporary injunction, the Tribunal must, after 15 days revoke the suspensive measures or order the confiscation of the assets which are believed to be the result of illegal activities or constitute the reuse of its profits.

18 A shortened form of procedure whereby, at the request of the public prosecutor’s office or, as in the present case, of the defendant, the court imposes a sentence agreed on by the public prosecutor’s office and the defendant.

19 The crimes listed in article 12-sexies of Decree 306/1992 are those provided for by art. 416 bis (mafia type organization), 629 (extortion), 630 (kidnapping for ransom), 644 (usury), 648 (receiving stolen goods), 648bis (money laundering), 648ter (self-laundering) of the Penal Code as well as by art. 12 *quinquies*, paragraph 1, (entitled fraudulent conveyance of values) of the legislative decree n. 306 cited above, and offences provided for by articles 73 and 74 of Act laws regarding drugs and psychotropic (drug trafficking and association aimed at drug trafficking).

20 Article 12sexies law decree 306/1992

In 1995, the anti-mafia association "Libera" was founded with the aim to encourage civil society in the fight against mafia, and promote the rule of law and justice.

The Association "Libera" promoted a collection of signatures for the adoption of a law of citizens' initiative concerning the discipline of confiscated assets.

The Law 7 March 1996 n. 109 ("provisions on the management of assets seized or confiscated") established that the confiscated assets are acquired by the State that administers them through a State-own authority (the "National Authority for the administration of the assets seized and confiscated from organised crime" set up by the legislative decree of 4 February 2010 n. 4).

6. THE MEASURES INTRODUCED DURING THE XVI LEGISLATURE. THE NATIONAL AUTHORITY, THE "SECURITY PACKAGE" AND THE CODE OF ANTI-MAFIA LEGISLATION. THE INTRODUCTION OF THE "PRINCIPLE OF DISJOINT APPLICATION".

The Legislative decree of 4 February 2010 n. 4 (converted by Law of 31 March 2010 n. 50: "Establishment of the National Authority for administration and destination of assets seized and confiscated from organised crime") governs the management phase of the confiscated assets with the goal of improving the administration of seized and confiscated assets and of making their destination more profitable.

It is clear that the fight against the mafia is also conducted through the effective administration of the confiscated assets, which must be kept productive.

The financial preventive measures are strengthened with the so called "security packages" approved between 2008 and 2009.

In particular, it is worth mentioning the Law decree of 23 May 2008 n. 92 (containing "urgent measures concerning public security" converted by Law of 24 July 2008 n. 125) because it introduces **the principle of disjoint application of prevention measures** related to property (or financial) and prevention measures against persons. The law provides that:

- **personal and financial preventive measures can be applied separately;**
- **financial preventive measures can be applied even in the event of the death of the person concerned;**
- **in case the death of the person occurs during the proceedings, it continues against the heirs or successors.**

7. THE NEW "ANTIMAFIA CODE"

The law of 13 August 2010 n. 136 ("*Special plan against the mafia and delegation to the Government on anti-mafia legislation*") delegates the Government to adopt a code of anti-mafia laws and preventive measures, pursuant to a three-staged procedure:

- a) collection of the anti-mafia legislation contained in the various bodies of laws (criminal, procedural and administrative law), including the provisions already contained in the criminal code and in the code of criminal procedure);
- b) harmonisation of the legislation referred to in letter a);
- c) coordination of the legislation referred to in letter a) with the provisions introduced by law 136;
- d) finally, the adaptation of the Italian legislation to the European Union law.

The following characteristic features emerge from the analysis of the law:

- possibility to **dissociate the personal prevention from the financial prevention;**

- **separation of financial prevention from the previous assessment of social dangerousness;**
- possibility of **holding a public hearing (as opposed to a hearing in closed session) upon request** of the person concerned;
- more attention to **third parties** who are involved in the proceedings of prevention measures related to property.

The law in discussion, in fact, imposes guidelines to regulate in detail third parties' relationships with the prevention procedure and third parties' rights over assets that are subjected to seizure and confiscation.

With the Legislative Decree of 6 September 2011 n. 159 ("*Anti-mafia laws Code and preventive measures as well as new arrangements for anti-mafia documentation*"), **the so-called Anti-Mafia Code entered into force**. It maintains the existing partition of preventive measures into the two above-mentioned categories:

A) Personal preventive measures

A.1 Measures applied by police authorities (The Chief of Police: "*Questore*"):

- **expulsion order** ("*foglio di via obbligatorio*"): applicable to individuals who are a threat to security in a place other than their place of residence; the police authority orders the return in the place of residence with a motivated decision; the prohibition does not last more than three years; during such term the individual cannot come back in that place without the authorization of the Police authority.
- **notice by police authorities** ("*avviso orale*"): applicable to individuals suspected of committing a crime; the public security authority may order the person to keep a lawful conduct in accordance with prescriptions.

A.2 Measures applied by the judicial authority (The District Court for preventive measures):

- **special police supervision** ("*sorveglianza speciale di pubblica sicurezza*"): the judicial authority can order dangerous people, who have not complied with an 'oral notice' (*avviso orale*), to keep a lawful conduct; not to give cause of suspicion; not to associate with persons convicted for criminal offences or subjected to preventive or security measures; to return to their residence by a certain time in the evening or to not leave their residence before a certain time in the morning, except in case of necessity and after having given notice in due time to the authorities; not to own or carry fire arms; not to enter bars or night-clubs; not to take part in public meetings; if need be, this may be combined either with a **prohibition on residence** ("*divieto di soggiorno*") in one or more given municipalities or provinces or, in the case of particularly dangerous persons ("*particolare pericolosità*"), with an order for **compulsory residence** in a specified municipality ("*obbligo del soggiorno in un determinato comune*").

The violation of these provisions is an offence punishable with imprisonment.

The District Court for preventive measures (based on the Court of Appeal district) is the only competent authority to order these measures; it shall do so on the basis of a reasoned application by the public security authority; the District Court shall issue a reasoned decision ("*decreto motivato*") in chambers within thirty days. It will first hear the Public prosecutor and the person concerned, who is entitled to submit written pleadings and to be assisted by a lawyer.

The Prosecutor and the person concerned may, within ten days, lodge an appeal, which does not have suspensive effect; the Court of Appeal shall issue a reasoned decision ("*decreto motivato*") in chambers within thirty days. That decision may further be appealed on the

same conditions before the Court of cassation, which shall decide in chambers within thirty days.

B) Financial preventive measures or related to property

b.1. seizure: the District Court for preventive measures orders, even *ex officio*, by a reasoned decision, the seizure of assets of which the person concerned appears to be, directly or indirectly, the possessor, when their value is disproportionate to the declared income or with their business or where, on the base on sufficient circumstantial evidence, there is reason to believe that they are the result of illegal activities or constitute their reuse (article 20 Anti-Mafia Code).

b.2. confiscation: the District Court for preventive measures order the confiscation of the property owned or in the disposal of the person (even thorough an intermediary), when the person cannot justify the legitimate origin of such property and when its value is disproportionate to the person's income (article 24 Anti-Mafia Code).

8. THE RECENT AMENDING LEGISLATION

The category of dangerousness listed in article 4 of Anti-Mafia Code has recently been extended.

The law decree 22 August 2014 n. 119, converted by law 17 October 2014 n. 146, has extended the scope of the danger resulting from sports violence (Article 4 (i) Anti-Mafia Code).

The law decree 18 February 2015 n. 7, converted by law 17 April 2015 n. 43 (anti-terrorism decree), inserted in art. 4 of the Anti-Mafia Code the letter (d) the potential so called "foreign fighters": "*those who, working in groups or individually, are engaging in preparatory acts, objectively relevant, directed to take part in a conflict in foreign territory in support of a terrorist organization which pursues the aims laid down in article 270-sexies of the criminal code*".

In addition, the decree n. 7/2015 has amended article 17, paragraph 1, of the Anti-Mafia Code, including the national anti-mafia Prosecutor (who, until then, could only request the application of personal preventive measures) among the authorities that are competent to request the application of financial preventive measures. The national anti-mafia Prosecutor can exercise this power over the whole territory of the State.

From a practical perspective, the attribution of the jurisdiction to the national anti-mafia Prosecutor serves to overcome problems resulting from the difficulties in locating and selecting the competent territorial jurisdiction.

In preventive measures, the local jurisdiction is based on the place where the dangerous behavior occurred; when the latter occurs in different places, the erroneous determination of such jurisdiction determines the invalidity of the proceedings with effects of particular relevance on the validity of the seizure²¹.

8.1. THE PROTECTION OF THIRD PARTIES IN PREVENTIVE CONFISCATION.

The issue of the protection of third parties in the event of seizure and confiscation of assets, has been regulated only recently with the Anti-Mafia Code and with the law 24 December 2012 n. 228.

It is a very complex issue that would deserve a longer discussion.

²¹ Court of Cassation, united sections, 29 May 2014, n. 33451; Court of Cassation, 20 February 2015, n. 12564.

Here it should briefly be recalled that the practical difficulties in the application of the new provisions called for the intervention of the Constitutional Court, which issued two decisions²².

From the reasoning of the Constitutional Court can be deduced that the system of protection of third parties introduced by the Code Anti-Mafia and from Act no. 228/2012 provides for a reasonable balance between protection of third parties and confiscation.

The Constitutional Court, in the judgment of 28 May 2015 n. 94, declared the constitutional illegitimacy of article 1, paragraph 198, of the Act n. 228/2012, insofar as it does not include among creditors who are to be satisfied within the limits and in the manner indicated therein also the holders of credits from employment.

The Constitutional Court affirms that the lack of protection for claims that do not fall within those protectable pursuant to art. 1, paragraph 198, Act 228/2012, is in contrast to article 36 of the Constitution because it “*prejudices the right, granted to the worker by the first paragraph of that provision, to a remuneration proportional to the quantity and quality of his work, and in any case sufficient to ensure a free and dignified existence for him and his family*”.

Given the general prohibition to start or continue enforcement actions on the confiscated property, set out in art. 1, paragraph 194, Act 228/2012, the worker may not be able to act for the payment of his credits, both when his debtor’s assets are insufficient to satisfy his claim, and in the event of confiscation of the entire estate of the employer.

According to Constitutional Court, the sacrifice of the creditor-worker does not have a reasonable justification in the balance between the interests underlying prevention measures, and therefore is in violation of article 36 of the Constitution.

The judgment affirms some general principles useful to resolve some issues related to the protection of third party creditors.

The system designed by the Anti-Mafia Code is in conformity with the Constitution ‘as a whole’ because it is based on a reasonable balance of interests.

The legal framework in force is the result of the balance between two interests that oppose each other: on the one hand, the interests of the creditors of the persons subjected to a financial measure not to suddenly lose their right to have their claims satisfied; on the other hand, the public interest to ensure the effectiveness of financial measures and the achievement of its purposes, consisting in depriving the individual of profits of illegal activities.

The Constitutional Court, by a decision of 5 June 2015 n. 101, declared the manifest inadmissibility of the issue of constitutionality raised for violation of articles 3, 24 and 41 of the Constitution²³ and, therefore, affirmed the compliance with the Constitution of third party creditors’ protection system introduced by the Anti-Mafia Code, with specific reference to the provisions aimed at ensuring adequate certainty as to the substance of the claim and its priority with respect to the preventive measure.

9. THE LEGAL NATURE OF PREVENTION MEASURES

9.1. The “*ratio*” of preventive measures in general

Criminal law protects goods and interests worthy of strong protection and implies that authorities adopt suitable remedies to prevent offense to these interests.

²² Judgment of 28 May 2015 n. 94; decision of 5 June, 2015 n. 101.

²³ With reference to: 1) to the entire rules provided for in chapter I and II of title IV of the part. I of Anti-Mafia Code, and, in particular, in article 52, paragraph 1.

Some scholars (NUVOLONE) argue that prevention (in its various forms of general and special prevention) is inherent to the criminal law.

In other words, the aim of prevention is to integrate the criminal system; the basic idea is that the protection of fundamental interests cannot be delegated exclusively to the repressive function of the penalty, in that the latter also carries a deterrent function, especially in reference to the commission of further offences.

Crime prevention is an essential task of the State, and acts at an earlier stage than crime repression.

This approach can be considered as the foundation of all the security measures, and has also been confirmed by the guidelines of the Constitutional Court, which define security as a: *“situation in which citizens are ensured, as far as possible, the peaceful exercise of those rights of freedom that the Constitution guarantees so forcefully”*. *“Security means that citizens can carry out their lawful activities without being threatened by physical and moral offenses; it is the orderly civilized living, that is certainly the goal of a free and democratic State based on the rule of law”*²⁴.

The Constitutional Court has held that the legal basis for the preventive measures is *“the need to guarantee the orderly and peaceful course of social relations, not only through a body of legislation penalizing unlawful acts, but also through provisions intended to prevent the commission of such acts”*²⁵.

Preventive measures are therefore effective legislative remedies for implementing the constitutional purposes of the State.

In a democratic constitutional system, crime prevention is an essential and irrefutable task, which must be weighed against fundamental rights (such as personal freedom), in that the sole repressive action is inadequate to satisfy the need of security that constitute a legitimate claim of every citizen.

9.2 The distinction between preventive measures and punishments

The main difference between punishments and preventive measures is that, while preventive measures are applied irrespective of the commission of a criminal offence, criminal punishments apply in response to the commission of a crime.

The principle of legality is one of the fundamental principles of criminal law. According to it, no one shall be accused or convicted for an act or omission which did not constitute a criminal offence under national or international law at the time it was committed; nor may a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed.

In the view of some scholars, the system of preventive measures does not comply with the principle of legality.

While the application of a criminal punishment follows an investigation over a conduct criminalised by the law, the application of a preventive measure is based on a finding of *“symptoms of dangerousness”* that can only be generally described by the law (NUVOLONE).

In brief, these are the main positions taken by the Italian doctrine²⁶:

24 Constitutional Court, 14 June 1956 n. 2.

25 Constitutional Court, 5 May 1959, n. 27

26 cfr. P.V. MOLINARI – U. PAPADIA, *Le misure di prevenzione nella legge fondamentale, nelle leggi antimafia e nella legge antiviolenza nelle manifestazioni sportive*, GIUFFRÈ, 2002.

- **Mortati**, who expressed such opinion before the entry into force of the law 327/1988: even though preventive measures are consistent with the principle of the inviolability of personal freedom, they are in contrast with the constitutional system due to the excessive discretion in the determination of the conditions for their application.
- **Mantovani**, who also expressed such opinion before the entry into force of the law 327/1988: prevention *ante delictum* is constitutionally legitimate and necessary because, faced by modern criminal associations, the State cannot deprive itself of preventive measures, even though they restrict freedom; he however pointed out that "*the problem is to identify measures that are scientifically and technically suitable and constitutionally correct*", in order to avoid that the prevention system becomes "*a punitive law of suspicion*".
- Fiandaca**, warns that even those who assert the constitutional legality of the preventive system, underline their problematic nature; he further notes that the lack of constitutionality would not even be counterbalanced by a verified suitability of the preventive measures to achieve the goals envisaged by the preventive system.
- Nuvolone**, while supporting the need of crime prevention, notes that article 1 of the Law 1423/1956 provides for some conditions that refer to conducts which constitutes criminal offences, but which are very difficult to prove beyond reasonable doubt. He stresses, however, that the rule of law is guaranteed by some requirement:
 - the applicable measures are provided for by the law;
 - situations of subjective dangerousness' are based on elements strictly specified by the law;
 - the measures are applied in judicial proceedings.

The Constitutional Court, in an important judgment²⁷, ruled on the issue of compatibility of the criminal system of prevention measures with the principle of legality stating that: "*the general criteria for the application of prevention measures, inferable from the provisions laid down in articles from 1 to 4 of the "1956 Act", are consistent with the principle of legality enshrined in the Article 13 of the Constitution that affirms that restrictions of personal liberty can be imposed only by a motivated order of the Judiciary*".

Indeed, preventive measures limiting personal freedom are adopted by the judicial authority, in conformity with the basic principles of criminal procedure: the prosecution, the exercise of the right of defence, the judicial review of first instance's decisions, the prohibition of "*reformatio in peius*" in the absence of an appeal by the public prosecutor's office.

With another important judgment, the Constitutional Court²⁸ confirmed that the constitutional legality of preventive measures derives from the respect of the principle of legality (being such measures provided by law) and from the respect of judicial guarantees in the court's proceedings.

This implies that the application of prevention measures, albeit founded on a prognostic assessment, is based on the categories of dangerousness strictly described by law. It cannot be doubted that **the prognostic assessment is based on the facts provided by law and therefore subject to judicial determination.**

The main problem is, then, the sufficient or insufficient certainty of the legal description of the categories of dangerousness.

Taking into account the very nature of prevention measures, the Court stressed that "*in the description of the legal requirements of preventive measures the law can normally use criteria other than those used in determining the elements of crimes, and may also refer to presumptive elements as long as objectively identifiable*"²⁹.

27 Constitutional Court, 9 January 1974 n. 3.

28 Constitutional Court, 22 December 1980 n. 177.

29 See also Constitutional Court, decision 12 March 1976 n. 64.

9.3 The distinction between prevention measures and security measures

Both security measures and preventive measures have a preventive purpose.

Security measures (referred to in articles 199-240 of the penal code) can be applied only against socially dangerous persons who have committed a crime (*post delictum*).

Preventive measures can also apply regardless of the commission of a crime (*ante delictum*).

10. SOCIAL DANGEROUSNESS UNDER THE CRIMINAL CODE AND UNDER LAW N. 575/1965

A comparison between security measures and preventive measures can be made even starting from the description of the categories of social dangerousness envisaged by the criminal code and by “1956 Act”.

The criminal code identifies three categories of dangerousness: “habitual”, “professional” and that of “proclivity” to commit crimes (“*delinquente per tendenza*”). These categories are based on the frequency of the criminal conduct.

It follows, as an immediate consequence, that security measures shall respect the principle of legality because they are based on the previous commission of an offence.

As for preventive measures, it must be clarified that, although they apply regardless of the commission of a criminal offence, the law provides for a description of social dangerousness.

The “1956 Act”, as amended by law n. 327/1988 (and now reproduced in the Anti-Mafia Code), provides – as already mentioned above - three specific categories of persons who may be subject to the application of prevention measures.

According to the law, a socially dangerous person is the one that, on the basis of a prognostic assessment, will probably commit a criminal offence against the security and the public morality. The broad definition of “*legal interest worthy of protection*” is based on the need of **not reducing the concept of security to that of physical safety of persons**.

Given that the Italian Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where **human personality** is expressed, the term “security” necessarily means “*situation in which the citizens are ensured, as far as possible, the peaceful exercise of those rights of freedom that the Constitution guarantees so forcefully*”³⁰.

The “socially dangerous individual” is the one who, with his/her acts, is likely to endanger the legal interests worthy of protection.

Such acts are both the ones constituting crimes and conducts that can infringe the sexual freedom and sexual honour, which will involve acts contrary to safety and the public health.

Those individuals that “are dangerous to public safety or public morality” are persons to whom personal prevention measures may be applied.

It follows that the “social dangerousness” in preventive measures is derived from a comprehensive analysis that involves both the tendency to commit crimes (*la conduzione di una presunta vita delittuosa*) and the sphere of the moral conduct of an individual.

The District Court, therefore, is called to examine the whole category of antisocial behaviour on the basis of detectors of dangerousness that enable the judicial authorities to justify the need for a particular control by the police authorities.

Since the entry into force of the amendments introduced by the “1988 Act”, social dangerousness is assessed “*on the basis of factual elements*”.

³⁰ Constitutional Court, 14 June 1956, n. 2

Such wording certainly excludes crime prevention in case of mere “suspicion”, which was so harshly criticized by academics; nevertheless, it has been subject to criticism insofar as the introduction of the assessment of the “facts” has been branded as a mere legislative indication and purely theoretical (NUVOLONE).

This part of the doctrine argues that the strict observance of the wording of the new article 1 of the Law 1423/1956 would force the judge to assess so many facts that a criminal penalty would then be necessary.

Another strand of literature (GALLO) opposes this view and claims the existence of a middle ground between the mere suspicion and the finding of criminal responsibility.

These scholars hold that such a ‘grey zone’ is neither a mere suspicion (not verifiable against objective standards) nor a full judicial finding of criminal responsibility beyond reasonable doubt.

This doctrine claims the existence of an intermediate step between the purely subjective and discretionary assessment (suspect), and the full assessment of the criminal responsibility beyond any reasonable doubt.

Such intermediate step consists in the evaluation of “circumstantial evidences” (“*circostanze indizianti*”) which - although not “*serious, precise and consistent*” - and therefore not allowing a ruling on criminal responsibility – are “factual elements, objective and controllable, unable to demonstrate the commission of a crime but sufficient to establish reasonable opinions on situations described in numbers from 1 to 3 of the new article 1 of the “1956 Act”.

Therefore, on the one hand, the social dangerousness, subjective requirement of security measures, is that of an individual, author of a criminal offence, which is likely to commit new criminal offences. On the other hand, the social dangerousness, subjective requirement for the application of preventive measures, is that of individuals who are likely to commit criminal offences.

Such prognostic assessment is based on factual elements, which allow the judge to believe that a subject is dangerous to public safety or public morality.

It seems evident the importance of the prior assessment of the so-called subjective requirements of application of preventive measures, that represent the cornerstone around which the entire prevention system orbits.

Judicial authorities are then called to scrupulously assess the requirement of the on-going existence (“*requisito dell’attualità*”) of such elements.

These are the guarantees that surround the application of personal preventive measures.

On one side, the precise legal definitions of the requirements of social dangerousness of the individuals belonging to one of the categories provided for in article 1 of the “1956 Act”; on the other, the obligation incumbent on the judicial authority to assess the requirement of the on-going existence (“*requisito dell’attualità*”) of such elements.

In fact, preventive measure cannot be applied if the social dangerousness is not current, because, in that case, there is no conduct to be prohibited or controlled.

The principle of current existence of social dangerousness is imposed by the Law³¹, which also states that the preventive measure is revoked when the cause that has determined the social dangerousness stops. District Courts are very strict in the application of this principle and require the proof of the current existence of social dangerousness as a prerequisite of the application of preventive measures.

Subsequently, the Court of Cassation affirmed that the retroactive cessation of the preventive measure entails, where the subject is charged with a criminal offence related to the violation

31 Article 7, paragraph 2 of “1956 Act” now Article 11 of the “Anti- Mafia Code”.

of such measure, the immediate acquittal on the ground that the alleged offence has never occurred (*perché il fatto non sussiste*)³².

In many judgments the Court of Cassation reiterated that “*social dangerousness is a prerequisite for the application of preventive measures and it must be concrete, since it is evident that the previous manifestations of social dangerousness would be irrelevant unless, at the time of application of the measure, symptoms of persistent anti-social behaviour still exist, requiring particular vigilance*”³³.

In a subsequent judgement, the Court of cassation, reiterated that “*for the purposes of the application or maintenance of preventive measures, the requirement of social dangerousness must be current; it cannot therefore be inferred from facts, even if they are accompanied by relevant information of law enforcement officials, when such information does not highlight other, specific elements suitable for demonstrating the existence of that condition*”³⁴.

11. SOCIAL QUALIFIED DANGEROUSNESS UNDER ANTI-MAFIA LEGISLATION

The preventive measures applied by the judicial authority (District court for preventive measures) also target persons suspected of belonging to mafia-type associations (such as the “*camorra*”³⁵, the “*n’drangheta*”³⁶ or other associations, however denominated), and of any of the offences referred to in article 51, paragraph 3*bis*, of the code of criminal procedure³⁷, or of the offence of fraudulent transfer of money, goods or other benefits³⁸.

It is therefore defined as “qualified dangerousness” because it is based on the circumstantial evidence of belonging to mafia-type organizations (e.g. “mafia” or associations aimed at drug trafficking or at trafficking of foreign tobacco products) or of committing crimes aimed at the realization of objectives typical of mafia associations (e.g. kidnapping for ransom, trafficking in human beings, enslavement).

11.1 The concepts of “belonging” and of “participation” to mafia-type association

The Court of cassation distinguishes between “belonging” to organized crime and “participating” in it.

32 Court of Cassation, 1 December 2008 n. 44601 (article 129 of the code of criminal procedure in relation to the article 609, paragraph 2, of the code of criminal procedure).

33 Court of Cassation, 11 November 1991 n. 3866.

34 Court of Cassation, 16 March 1992, n. 499.

35 The Camorra is an Italian Mafia-type criminal organization that originated in the region of Campania and its capital Naples. It is one of the oldest and largest criminal organizations in Italy, dating back to the 16th century. Unlike the pyramidal structure of the Sicilian Mafia, the Camorra's organizational structure is more horizontal than vertical. Consequently, individual Camorra clans act independently of each other, and are more prone to feuding among themselves.

36 The 'N'drangheta is a Mafia-type criminal organization based in the region of Calabria. Despite not being as famous abroad as the Sicilian Cosa Nostra, and having been considered more rural compared to the Neapolitan Camorra and the Apulian Sacra Corona Unita, the 'N'drangheta became the most powerful crime association of Italy in the late 1990s and early 2000s and has now spread towards the northern part of Italy and worldwide.

37 This Article lists particularly serious crimes within the jurisdiction of anti-mafia District Attorney; that includes for example: crimes of aggravated criminal association, or committed for the purpose of committing crimes of infringement of trademarks and copyrights, enslavement, trafficking in human beings, purchase and sale of slaves, mafia-type association, kidnapping for ransom, the crime of drug trafficking and smuggling of foreign manufactured tobacco, crimes committed by taking advantage of the conditions laid down in article 416 bis of Penal Code (the so-called “mafia-method”).

38 “*Trasferimento fraudolento di valori*”: article 12 *quinquies* of the law decree 8 June 1992 n. 306 converted with amendments into the law 7 august 1992 n. 356.

“Belonging”, unlike “participation”, does not integrate the typical conduct of the crime of mafia-type organization and, therefore, also applies to people who aid and abet the organization from the outside (the so called “*concorrenti esterni*” to the mafia-type organization); it is demonstrative of social dangerousness because it implies a latent and continuing dangerousness of the individual which ends only with the acquisition of the rigorous evidence of the withdrawal from the criminal group³⁹.

12. THE LEGAL NATURE OF THE “ANTIMAFIA SEIZURE”

In Italian doctrine, the legal nature of the “anti-mafia seizure”⁴⁰ is a very controversial issue. According to a part of the doctrine (MACRI³⁹), it is a conservative interim measure whose purpose is to “*prevent dispersion of the assets of suspect and subtraction to subsequent confiscation*”.

This view is based on the formulation of the Law⁴¹ which, as regards the seizure’s implementing rules, refers to the formalities required by the code of civil procedure.

In civil procedure law, there are two types of conservative interim measures: judicial seizure (art. 670 code of civil procedure) and conservative seizure (in art. 671 code of civil procedure).

According to some scholars (RUGGIERO), anti-mafia seizure is a judicial seizure, in that its aim is to subtract movable and immovable assets, whose ownership or possession is controversial, from the person’s availability, and it is necessary to provide for the temporary storage and management of such assets

In fact, through the anti-mafia seizure, some assets are subtracted to individuals suspected of belonging to mafia-type organizations because the possessory title is controversial. It must be ascertained whether the assets are of illegal origin, whether they are the result of the use of illicit profits, if they are owned by the person from whom they are seized or if he is just a fictitious nominee (“*intestataro fittizio*”).

According to other scholars (SIRACUSANO), the anti-mafia seizure has the same nature of the conservative seizure (article 671 code of civil procedure) because it has the same characteristics of the civil interim measures.

The condition of *prima facie* case (“*fumus boni iuris*”) is given by the existence of circumstantial elements for which the assets are of illegal origin; the danger (“*periculum in mora*”) is given by the risk that goods could elude confiscation. Then it is an interim measure and instrumental to the subsequent confiscation.

The main inadequacy of this approach is that the seizure governed by the code of civil procedure aims to ensure the satisfaction of credits, whereas the anti-mafia seizure is aimed at the confiscation of property and at the definitive acquisition by the State of assets of which has not been proven the legitimate origin.

And indeed other part of the doctrine differs totally from the theoretical approach that tends to bring the anti-mafia seizure under the discipline of the code of civil procedure.

This doctrine (MONTELEONE) considers that the legal nature of the preventive seizure should be identified taking into account its purpose which is to subtract from the mafia the material possession of certain assets in the view of the future confiscation of which it constitutes an anticipatory and instrumental stage.

39 Court of Cassation, 20 October 1993 n. 3268, Court of Cassation 11 October 2005 n. 44326; Court of Cassation 5 July 2013 n. 29478.

40 Originally regulated by article 2 bis of Law 575/1965, today by the articles articles 20, 21 and 22 of the “anti-mafia Code.

41 Article 2 quater of the Law 575/1965, today article 21 of anti-mafia Code.

13. THE LEGAL NATURE OF THE “ANTIMAFIA”-CONFISCATION

13.1 The Italian doctrine.

The legal nature of the anti-mafia confiscation must be analysed taking into account the legal definition of confiscation in the criminal code.

According to the wording of article 240 § 1 of the criminal code “*in the event of conviction, the judge may order the confiscation of things which had served or were designed for committing the offence and of things which are the product or the profit of the offence*”.

The definition of confiscation as security measure is provided for by article 240, paragraph 2 of the criminal code, which reads as follows: “*...It is always ordered the confiscation of the things that are the price of an offence, of things whose production, use, possession or alienation constitute an offence even if no conviction has been pronounced ...*”.

Therefore, criminal confiscation, as defined in the article 240 § 1 of the criminal code, has the legal nature of a criminal penalty that affects things that represented the means through which the offence was committed and whose possession was possible only due to the commission of an offence.

The best Italian doctrine (CARNELUTTI) qualifies the confiscation as “*a repressive sanction, although administrative in nature, of which the seizure is the essential interim measure*”⁴².

Another part of the doctrine disagrees on this point.

Some believe that confiscation is a real criminal penalty, the maximum financial penalty applied for a conduct that is considered contrary to the interests of the community, applied outside the procedure relating to the assessment of whether an offence has been committed (NUVOLONE).

According to other scholars, anti-mafia confiscation is a new financial preventive measure.

When applied in combination with a personal measure, the confiscation has the function of breaking the link between the individual and his/her assets. Since the latter have been obtained unlawfully, they are themselves a manifestation of dangerousness (MACRI’).

Other scholars (COMUCCI), on the other hand, believe that a “double track” has been established in the prevention system, in the sense that there are repressive measures and measures of preventive nature.

According to this view, in fact, the goal of prevention would be achieved by personal measures while the repression would be achieved through the employ of financial measures, which would necessarily have a repressive nature.

Other scholars (BERTONI) believe that the legal nature of the penalty of preventive confiscation measures is to be found in the legal definition provided for by the criminal code (the above mentioned article 240 § 1 of the penal code). Therefore, the anti-mafia confiscation (article 24 of the anti-mafia code) would also have a substantially afflictive nature.

Others (SIRACUSANO) believe that the anti-mafia confiscation has the same nature of the confiscation provided for by the criminal code (in article 240 § 2). It is, therefore, a security measure related to property, differentiating only for its mandatory character.

13.2 The thesis of the Court of Cassation until 2008.

⁴² “*a repressive, although administrative sanction, of which the seizure constitutes the indispensable interim measure*” (CARNELUTTI, *Teoria generale del diritto*, ed Foro it., 1951).

The united sections of the Supreme Court of Cassation ruled on the legal nature of the preventive confiscation in an important judgment⁴³ and affirmed that it is not a criminal sanction nor a “preventive” measure. To the contrary, such confiscation falls within a third category (“*tertium genus*”) and consists of an administrative penalty. As such, it is comparable - as to its content and effects - to the security measures provided for by article 240, paragraph 2 of the criminal code (which reads as follows: “...*It is always ordered the confiscation of the things that are the price of an offence, of things whose production, use, possession or alienation constitute an offence even if no conviction has been pronounced*”).

This approach is confirmed by others judgments of the Court of cassation, which justify the confiscation of the property of a person after his/her death, on the basis of the above definition of the legal nature of the preventive confiscation.

In this respect, the Court of Cassation hold that “confiscation affects assets of unlawful origin which are thus dangerous in themselves”; “*the preventive confiscation has neither the character of a sanction nor the character of a preventive measure, but rather falls within the third category of the security measures under paragraph 2 of the article 240 of the criminal code. As a consequence, it shall be applied in consequence of the death of the person concerned, irrespective of the fact that the death occurred prior to the issuance of the confiscation order*”.

13.3 The new debate following the introduction of the principle of the “disjoint application”

After the introduction of the principle of “disjoint application” of personal and financial measures in 2008, a new debate has developed about the legal nature of the preventive confiscation.

As mentioned above, the thesis of the “third category” was developed by the Court of Cassation in order to “justify” the possibility to confiscate assets in the event of the death of the person concerned during the proceedings, whereas the financial measure could be applied only in connection with a personal prevention measure.

Pursuant to this approach, in case a person died in the course of the proceedings against him/her, the latter could continue for the sole purpose of confiscation, which, being an “atypical” security measure, could be adopted “*in order to permanently subtract illicit goods from the economic circuit, so as to insert them into other circuits free from criminal influence*”.

The practical need of such a theory ends when the reform of 2008 introduces the principle of disjoint application.

Today, in fact, the possibility to apply the confiscation in case of the death of the subject during the proceedings is expressly provided by law.

According to a thesis, the choice of untangling confiscation from the requisite of dangerousness of the subject has demonstrated its afflictive nature⁴⁴.

According to another thesis, the preventive confiscation is preventive in nature.

The issue was therefore remitted to the united sections of the Court of Cassation that, on 26 June 2014, pronounced the judgment n. 4880 (in the case against Spinelli).

It is a very important judgment that includes a complete history of confiscation and represents the position of the Italian jurisprudence today.

The Court of Cassation affirms that, following the introduction of the principle of disjoint application, and despite the fact that confiscation can now be ordered regardless of the

43 United sections, 3 of July 3 1996 n.18 (in the case against Simonelli).

44 Court of Cassation, 13 November 2012 n. 14044 (in the case against Occhipinti).

“current” dangerousness of the subject, the confiscation does not have the legal nature of a criminal sanction (and therefore can be applied retroactively).

In brief these are the arguments on which the Court of cassation bases its reasoning:

- the dangerousness of the subject concerned remains the essential condition for ordering the confiscation, since the latter can now be applied even in the absence of an assessment of whether the dangerousness still exist. So, practically, the dangerousness remains essential, regardless of the time of its manifestation;

- however, the dangerousness of the person must still be assessed at the time of the acquisition of the assets;

- in this regard, the Court of Cassation affirms that *“with respect to personal prevention, the requirement of the current dangerousness continues to have a reason to exist, since it would be absurd to apply a preventive measure to a person who is no longer socially dangerous”*;

Conversely, when it comes to financial prevention, **the connotation of dangerousness is inherent in the asset (the “res”), due to its unlawful acquisition, and it pertains to it “genetically”, on a permanent basis and, potentially, indissoluble;**

- the fact that financial preventive measures shall be released from the requirement of the current dangerousness of the individual reflects the phenomenal reality, having regard to the ontological-naturalistic difference between personal and material reality; while, in fact, the very essence of a “person” postulates an inherent dynamism, which is nothing but the expression of the evolution of the human being, the idea of “object” expresses its structural immobility that, beyond possible erosion related to age and to atmospheric agents, maintains its objective consistency.

Subsequently, the Court of Cassation highlights the dichotomy between "dynamism" of the person and "immobility" of the *res confiscanda*, and affirms that the assets are mostly “neutral”, in that they are able to acquire the connotation of dangerousness only by virtue of an outside force caused by the human action.

Therefore, the Court of Cassation clarifies that **the social dangerousness of the person reverberates on goods purchased in a dynamic projection, based on the objective dangerousness of keeping things in the hands of those who are deemed to belong – or have belonged to a subjective category of dangerousness provided for by the law.**

The above mentioned reverberation results in a particular “attribute” or “quality” of goods and assets, which can affect their legal status.

This is evident in the event of the death of the owner, whom had already been deemed dangerous, or in case of **formal transfer or fictitious nominees and in case of confiscation of assets that have been acquired by heirs.**

In such cases, because the asset has become “objectively dangerous”, it should be removed from the legal system of circulation.

In fact, in the presence of goods and assets that are indelibly marked by their illicit origin, the only solution is their *“definitive acquisition to the State due to confiscation, capable of changing, permanently, their nature and the legal regime by equating them to State-owned assets”*.

The Court of Cassation concludes that the confiscation has preventive nature and that its primary essence is deterring the person concerned from the commission of further offences and from lifestyles contrary to the rules of civil society.

This enables the Supreme Court to affirm that the preventive confiscation has a preventive rather than criminal nature and, therefore, is not subject to the principle of non-retroactivity mentioned in article 25 of the Constitution.

The Court of Cassation specifies that the terms used by the Law cannot be given a decisive importance. Indeed, confiscation may serve various purposes, and this assume the nature of penalty, security measure, civil or administrative measure; there is, therefore, *“not an*

abstract and generic type of confiscation, but the confiscation according to a certain law". "This has been confirmed by the Constitutional Court, in the judgment n. 29/1961 and by the European Court of Human Rights, that assesses the legal nature of a law instrument on the basis of its substantial characteristics and not merely on the basis of its classification in domestic law"⁴⁵.

The Court reached that conclusion by emphasizing the introduction in 2008 of the "disjoint application" principle under which what matters is the dangerousness of the person "at the time of purchase of the goods" rather than his/her social dangerousness as such.

It follows the preventive nature of confiscation as aimed at preventing further criminal conducts through the deterrent efficacy of deprivation of illicit property.

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The main criticism to the judgment of the Court of Cassation regards the point where it states that "*the primary essence of the confiscation is to deter the person concerned from the commission of further offences and from lifestyles contrary to the rules of civil society*".

Indeed, once every link between current dangerousness and prevention is dismissed, it is not clear in what consists the function of deterring the person from the commission of further offences in case the person is not dangerous (anymore); and this dissuasive function is even more difficult to understand in the case of confiscation of property of a dead person (confiscation *post mortem*).

The Court of Cassation affirms that confiscated assets and goods, "*since they are the result of illicit acquisition, contain a negative connotation, which imposes their mandatory acquisition by the State*".

According to some scholars, this part of the judgment shows the criminal nature of the preventive confiscation; indeed, the confiscation of assets or goods of a person who is no longer dangerous, and even against her/his heirs and successors, does not affect a person who was part of the mafia in order to prevent him/her to commit other offences, but targets the person only because he/she was part of the mafia.

Consequently, preventive confiscation seems to have a double nature; in so far as it is imposed to a person currently dangerous, it seems to have essentially preventive purposes; if, on the other hand, it may be imposed to a person who is not dangerous (anymore), it can be justified only in light of the penal sanctions. This, however, would open wider and more serious scenarios about the possibility of applying such a "financial penalty" in the absence of a typical criminal conduct: "a punishment without crime".

13.4 Consequences of the "preventive" nature of the anti-mafia confiscation: -The "retroactivity" of the confiscation.

The preventive nature of the preventive confiscation confirms its "retroactivity", which means that it is applicable according to the law in force at the time of adoption of the measure.

Therefore, it is applicable the principle of retroactivity concerning security measures (which are laid down in article 200 c. p. invoked by art. 236 c. p.) which is recognized by the Constitution (article 25 paragraph 3 of the Constitution of the Italian Republic).

This approach corresponds to the function of the confiscation which is that of the definitive removal from the market of goods and assets illicitly acquired which can acquire a lawful character solely through their purchase by the State or by *bona fide* third parties.

13.5 The temporal correlation between personal dangerousness and confiscation

⁴⁵ *Engel and Others v. the Netherlands*, 8 June 1976, Series A no. 22.

The united sections of the Court of Cassation have reaffirmed the need of the temporal correlation between personal dangerousness and confiscation, resulting from the preventive nature of confiscation.

The conclusion is proposed without uncertainties for the so called “generic dangerousness” resulting *“from the appreciation of the same condition of application of preventive confiscation, that is the reasonable presumption that the property was purchased with the profits of illegal activities (and thus it suffers from “genetic” unlawfulness) and is, therefore, fully consistent with the preventive nature of the measure”*.

“Otherwise, if it were possible to attack a person’s properties indiscriminately, regardless of any connection with the personal dangerousness, the confiscation would, inevitably, assume the features of a real criminal sanction. Such a measure would, thus, be hardly compatible with the constitutional parameters regarding protection of economic initiative and private property, referred to in articles 41 and 42 of the Italian Constitution, as well as with conventional principles referred to in article 1, Protocol 1 to the European Convention of Human Rights”.

As for the so called “qualified dangerousness” the Court of Cassation, while reaffirming the general principle of temporal correlation, introduces some “mitigations” in finding the “time frame” of manifestation of dangerousness which normally invests the whole life of an individual; so it would be *“fully legitimate to confiscate all the goods and assets, whose lawful origin cannot be proved”*.

However the person has *“the right to demonstrate the legitimacy of the purchases with licit sources of income”*.

Finally, *“where the starting point and the final date of social dangerousness is known, the confiscation will concern only goods and assets purchased in the aforesaid time frame”*.

14. PRELIMINARY INVESTIGATIONS FUNCTIONAL TO THE PROPOSAL (JURIDICAL NATURE)

Financial investigations concerning assets today are regulated by article 19 of the legislative decree n. 159/2011 (so called “Anti-Mafia Code”) which incorporates the mechanism introduced by the “Rognoni-La Torre Act”.

Article 19 cited above regulates the persons in charge to carry out investigations, investigative powers, functional to the proposition of the application of the financial preventive measure.

Investigations concerning assets, because of their complexity, are held in two phases.

The first one is carried out by the holders of the power of proposal.

Therefore the investigation takes place in a time prior to the institution of prevention proceedings before the District court for preventive measures.

A second phase of the investigation takes place during the proceedings before the Tribunal. In this phase, the investigative powers are attributed to the District court itself that have *ex officio* powers to carry out the investigation.

15. THE LEGAL NATURE OF THE INVESTIGATIONS CONCERNING ASSETS.

There is no agreement in doctrine on the legal nature of the investigations.

For the purposes of identifying the legal nature of the preliminary investigation, one must distinguish between investigations carried out on the initiative of the head of the Police (“Questore”) or the Director of the anti-mafia investigative directorate, and investigations

prompted by the public prosecutor or of the District court during the proceedings for the application of prevention measures.

In fact, part of the doctrine considers that when the initiative is taken by the head of Police or by the Director of the anti-mafia investigative directorate, asset investigations do not have a jurisdictional nature.

Article 20 of law 152/1975 provides that the defensive guarantees shall be respected only in cases where the initiative is taken by the Prosecutor, while this is not explicitly stated if the initiative is taken by the head of Police or by the Director of the anti-mafia investigative directorate (FORTUNA, TAORMINA).

The Court of Cassation has taken a clear position on the legal nature of the asset investigation and has affirmed that the prevention proceedings have a jurisdictional nature, even at the stage of the investigation.

However, given the peculiar characteristics of prevention proceedings, only some of the procedural guarantees of the preliminary investigations will apply⁴⁶.

The Court of cassation, therefore, asserts the full autonomy of prevention with respect to criminal proceedings, while confirming the judicial nature of the prevention procedure.

Criminal proceedings have different purposes compared to prevention proceedings; consequently, the two procedures are autonomous and have different evidentiary standards. The first requires solid evidence to prove criminal responsibility for a crime beyond reasonable doubt; the second is independent from a finding of criminal liability and, having as a precondition the social dangerousness, must be based on elements of lesser evidential force.

The autonomy of the two procedures is based on the Law: preventive action can indeed be exercised regardless of the prosecution (Article 29 of the "Anti-Mafia Code").

16. THE HOLDERS OF THE POWER OF INVESTIGATION AND OF PROPOSAL: INVESTIGATIVE BODIES

Article 17 of the Anti-Mafia Code identifies the holders of the power to propose the application of preventive measures ("*power of proposal*") and of the power to carry out the necessary preliminary investigations, in order to find the elements on the basis of which such proposal can be made to the District court for preventive measures.

The holders of the power to make the proposal are the public prosecutor appointed to the District Court where the person resides, the head of the Police ("Questore"), the Director of the anti-mafia investigative directorate⁴⁷ and the National Anti-Mafia Prosecutor.

Such persons perform their functions in the first of the two phases of investigation provided for by law. This phase is also referred to as "mandatory" because financial investigations take place necessarily before the proposal and are required for that purpose.

Financial investigations are carried out through a succession of typical acts and have not time limits.

Such investigation, however, even if they are conducted through some specific investigative acts (request for information and copies of documents; seizure of documentation, which must be authorized by the public prosecutor or the judge concerned, to be identified in the District court for preventive measures), are investigative activities with no formalities.

⁴⁶ Court of Cassation, 29 November 1985 n. 2970; Court of Cassation, 27 February 1990 n. 496.

⁴⁷At this regard some changes have occurred following the approval of the so-called "security package" of 2008 who concentrated "on the district Anti – Mafia prosecutor the power of proposal of preventive measures, referred to in Act 575/1965.

Asset investigations can be carried out directly by the holders of the power of proposal or by delegation from the Tax and Finance Police (“*Guardia di Finanza*”) or by the judicial police. The powers of the investigative bodies at the investigation stage include “*the right to request any relevant information or document to the public administration, to any institution and enterprise, company deemed useful for the purpose of investigations*”.

When the investigations are conducted by the judicial police delegated by the public prosecutor, the investigative powers include the power to seize documentation, correspondence and to conduct seizure at banks.

Economic and financial investigations are not subject to any time limit; the law provides the time limit of five years only if the investigations are carried out in respect of the spouse, children and those who have lived with the person concerned (article 19, paragraph 3 of the Anti-Mafia Code)⁴⁸.

17. THE SOURCES OF EVIDENCE THAT CAN BE USED IN THE PREVENTION’S PROCEEDINGS AND THE MEANS OF PROOF

It should be noted that in the prevention procedure, significant investigative findings can be achieved only on the basis of a set of means of proof and means of research of proof wider than that provided for the criminal trial.

Indeed, it must be taken into account the particular economic and financial reality, which is characterized by a high degree of camouflage and concealment of resources.

As for the “means of proof”, it should be noted that it is “a thing, a document, a person who can offer the judge elements that are useful for the decision to be taken”; among the means of proof that can be used in the context of prevention proceedings there are “*criminal records, recent criminal complaint lodged for serious crimes, the style of life, the association with persons convicted of criminal offences or subject to preventive or security measures, and other conducts objectively contrary to public safety,*” “*information acquired by public security organs, findings of previous criminal proceedings*”.

In the reasoning of the District courts for preventive measures, both the social dangerousness and the illegal origin of goods are assessed on the basis of **pre-trial detention orders or sentences and seizure previously issued**.

As regards, in particular, the evaluation of the results of previous criminal proceedings against the person proposed for the application of a preventive measure, the District courts for preventive measures must carry out a comprehensive assessment even if it goes in the opposite direction to the criminal responsibility of the person concerned.

In that regard, the Court of Cassation stated that “*it responds to an irrepressible logic need, even before than legal, that in the event that the person proposed has been irrevocably acquitted for the offences, the judge of preventive measures comparatively examines all the evidence which led criminal courts to acquit the accused, in order to establish whether the lesser probative value system of prevention procedure allows to assess the existence of circumstantial elements to support the social dangerousness of the person concerned*”⁴⁹.

Additional means of proof useful to demonstrating the direct or indirect availability of assets are the **tax return, the tax registry office’s computer database, the National Social Security Institute’s computer database, the indirect participations in companies’ capital through the fictitious registration on other persons** (relatives or persons who cohabited with the person concerned during the last five years) who do not have any source of incomes. A very important source of information is the identification of **bank information** from which often can be discovered banks loans without any guarantee.

48 Court of Cassation, 22 April 2009 n. 20906.

49 Court of Cassation, 8 November 1995 n. 2553.

As regards **interception of conversations and communications**, it should be noted that, unlike criminal proceedings, the preliminary investigation stage of preventive proceedings, does not foresee a judicial evaluation of the requirements, laid down by law, to authorize wiretapping requests by the public prosecutor. And indeed, in the prevention procedure, judges use the results of wiretapping authorized in other criminal proceedings on the basis of which it can be demonstrated the “link” of the person concerned to mafia circles and his/her “qualified” dangerousness.

The set of means of evidence that can be used at the stage of preliminary investigations for the proposed application of a preventive measure is very wide.

In this regard, part of the doctrine believes that the scope of the investigative instruments in the prevention procedure is in contrast with the **adversarial principle**, in that it allows the judges to order the seizure and the confiscation on the basis of evidence and information that would not be admissible in criminal proceedings (FILIPPI).

The main accusation that is raised by the doctrine more hostile to the prevention system is that evidence are not assessed according to the **principle of fair trial**, as required by article 111 of the Italian Constitution.

In this respect, it should be observed that the District courts for the preventive measures take into account the adversarial principle within the chamber hearing; and indeed, the notice of the hearing (article 7 paragraph 2 Anti-Mafia Code), for example, is not only a means of *vocatio in iudicium* of the person proposed but it also serves the function of informing the person of the facts in relation to which he/she is called to defend himself/herself.

And indeed, the practice of the courts is in the sense that the principle of the adversarial process in the formation and assessment of evidence must be applied also to the prevention procedure.

Article 111 of the Italian Constitution (concerning the principle of “fair trial”), introduces a general principle, which necessarily applies also in prevention proceedings. However, the adversarial principle, which was developed in the context of the criminal trial, cannot be mechanically transposed in prevention proceedings (see the aforementioned principle of independence between criminal proceedings and prevention proceedings).

In the prevention system, then, the adversarial principle does not preclude the use of evidence formed unilaterally, for the purpose of establishing the preconditions for the application of preventive measures that are based on a situation of dangerousness that does not involve a finding of criminal responsibility.

As mentioned above, it must be taken into account that the prevention system is aimed at countering a particular economic reality, characterized by the concealment of assets and often by their fictitious registration; therefore it is clear that significant investigative results can be achieved only on the basis of means of proof which are wider than that provided for under criminal procedure.

Finally, in addition to the adversarial principle, in the sense specified above, in the prevention proceedings are also applied other safeguards of criminal procedure. For example, illegally acquired information cannot be used as means of proof according to a general principle valid in every phase of the proceedings⁵⁰.

18. CIRCUMSTANTIAL EVIDENCE

The preventive measures are adopted on the basis of circumstantial evidence⁵¹.

⁵⁰ Court of Cassation, 27 October 2010 n. 3687.

⁵¹ The art. 4 of d.lgs. 159/2011, of Anti-Mafia Code recall the "suspects of belonging to associations mentioned in art. 416bis of the penal code; in article 20 the law provides that the Tribunal orders the seizure of assets even when "on the basis of sufficient circumstantial evidence", there is reason to believe that they are the result of

Therefore, the judicial authority does not have to reach the evidence of criminal responsibility but circumstantial evidence, as condition of application of preventive measures.

For example, the Court of cassation stated that *“in order to apply a preventive measure, the District court shall not find the evidence of the affiliation to a mafia-type association, but will collect circumstantial elements unequivocally indicative of the person’s dangerousness”*⁵².

The “clue” must also not be eligible under art. 192 of the code of criminal procedure, which requires, in assessing the evidence, that the existence of a fact can be inferred from clues provided that these are *“serious, precise and consistent”*.

It should be noted that the above mentioned legal provision refers to the criminal procedure which is aimed at establishing the criminal responsibility.

Therefore, it is clear that in prevention proceedings, the “circumstantial evidence” does not have the same evidentiary value that it has in the criminal trial.

In other words, the assessment of dangerousness must be based on circumstantial elements that not necessarily have the characters of gravity, accuracy and consistency required in order to establish the criminal liability beyond a reasonable doubt.

As regards more specifically financial prevention, the law refers to “sufficient circumstantial evidence” (article 20 of the Anti-Mafia Code) on the basis of which there is reason to believe that the assets or goods are the result of illegal activities or constitute their reuse.

In practice, the decisions of the courts whether there is sufficient circumstantial evidence that some assets are the result of illegal activities or constitute their reuse are founded on concrete facts: for example, when the income declared by the subject may be hardly enough to satisfy the basic needs of his family, the ownership of movable and immovable property must necessarily be connected to illegal activity; in other cases, sufficient circumstantial evidence has been considered the standard of living considerably higher than the incomes declared or apparent; therefore the assets and goods must be traced back to illicit incomes, originating from profitable business as are those of mafia-type organizations⁵³.

19. THE ISSUE OF THE REVERSAL OF THE BURDEN OF PROOF

In proceedings concerning financial preventive measures, the District court orders the seizure of properties and goods if there is sufficient circumstantial evidence, which gives reason to believe that they are the result of illegal activities and constitute the re-use of their profits (article 20 Anti-mafia code).

The law provides that the court orders the confiscation of the seized property of which the person cannot justify a legitimate origin and of which appears to be the owner or to have the availability when the value of such property is disproportionate to the person’s income declared for the purpose of income taxes.

The definitive confiscation is based on elements analogous to those which justified the seizure, but requires a higher standard of proof, which the case-law of the Court of Cassation has referred to as “double evidentiary test”⁵⁴.

Part of the doctrine (FILIPPI) denounces an unacceptable reversal of the burden of proof, under which it is for the individual concerned to prove the legitimate origin of property affected by a prevention measure.

This view is not endorsed by the case-law of the Court of Cassation. Although it is true that the person is given the right to oppose elements affecting the probative force of the elements offered by the prosecution, the judges must refer to the facts showing that certain assets

illegal activities or constitute their reuse.

52 Court of Cassation, 27 May 1997, n. 2148.

53 Court of Cassation 23 January 1996 n. 398 (in the case against Brusca and others).

54 Court of Cassation 9 May 1988 n. 1365.

(formally registered to third parties) are in the availability of the person, or indicating that the value of the assets does not match the income or the economic activity declared by the person. Moreover, it must gather “sufficient” evidence showing that these assets are the result of illegal activities or constitute the reuse of their profits.

It follows that, for the purposes of confiscation, it is for the judges to “prove” that the proposed person has full availability of goods apparently belonging to different people or that their value is disproportionate to the declared income.

In other words, “*the burden of proving the illicit origin of property rests primarily on the prosecution, while the person concerned has the burden of “allegation” finalized to counter the evidentiary situation against him*”⁵⁵.

Authoritative doctrine said that “*the burden of allegation of the person concerned does not differ greatly from the rules of a normal procedural dialectics, being perfectly natural that the defense should strive to counter the evidences given by the prosecution*” (FIANDACA, MAIELLO).

Moreover, in the decision which provides for the confiscation, the court should not base its reasoning on the lack of demonstration by the party concerned of the legitimate origin of the property, but must specifically indicate the factual elements on the basis of which it considers that the property is of illegal origin.

The thesis of the prevalent doctrine was taken up by the Supreme Court which in a recent judgment (Cassation United Sections’ judgment 26 June 2014, n. 4880) stated that “*the assumption of the illicit origin of the assets must be the result of a process of demonstration, which also takes advantage of presumptions and circumstantial elements provided that they are characterized by accuracy and consistency*”.

Therefore, the judicial authority proponent has the burden of proving the disproportion between assets and earnings capacity and their illicit origin even on the basis of presumptions, whereas the person concerned may offer elements finalized to neutralize the evidence against him/her through the allegation of the legitimate origin of property.

20. CHAMBER HEARING IN THE PREVENTION PROCEEDINGS

The application of preventive measures takes place in the context of chamber hearing.

The court, within thirty days from the proposal of application of a preventive measure, shall schedule the hearing and shall give notice of the hearing to the person concerned.

As already mentioned, the notice of the hearing (article 7 paragraph 2 Anti-Mafia Code) is not only an order to appear in court (*vocatio in iudicium*), but is also meant to inform the person of the facts in relation to which he/she is called to defend himself/herself.

In fact, the notice of the hearing shall contain, under the penalty of nullity, detectable at every stage of the proceedings, “*the indication of the measure proposed and the facts on the basis of which the proposal for the application of the preventive measure is based*”⁵⁶.

Consequently, in the prevention procedure applies the principle of correlation between the facts complained of and the judicial decision, which cannot impose a stricter measure than the one contained in the notice of the hearing.

The Court of cassation has clarified that, for the principle of *favor rei*, is possible a *reformatio pro reo*, and therefore to qualify as a common dangerousness the one initially suggested as “qualified”⁵⁷.

55 Court of Cassation 21 April 1987 n. 1486; 22 February 1993 n. 746; 5 May 1995 n. 2755.

56 Court of Cassation 24 October 1988 n. 2341.

57 Court of Cassation 28 June 2006, n. 25701.

21. THE INVESTIGATIVE POWERS OF THE DISTRICT COURT FOR PREVENTIVE MEASURES

As already mentioned, the Anti-Mafia Code endows the judges with broad *ex officio* investigative powers, with the only limit of compliance with the principle of adversarial proceedings.

The Court of Cassation clarified the scope of these investigative powers and ruled that “*judges have the power to ask the competent authorities for relevant documents and information, with the only limit of the respect of the adversarial principle*” (see article 7 of the Anti-Mafia Code)⁵⁸. Judges, in assuming evidences, proceed without any particular formality even in the examination of witnesses or in consultation of technical expertise.

The rules of evidence are consistent with the requirements of the particular features of the socio-economic context in which the preventive measures have to be applied.

Financial prevention measures, in fact, represent legal instruments committed to counter a criminal economic reality characterized by very sophisticated instruments of concealment of wealth; for example, complex corporate structures and fictitious registration of property that require equally sophisticated and effective investigation tools.

22. OTHERS PROCEDURAL GUARANTEES

Principle of immutability of judges: absolute nullity of the hearing in case the conclusions of the parties are submitted to a panel of judges other than the one which takes the decision.

Mandatory presence of the Prosecutor and defence counsel: the Court of Cassation has considered invalid the hearing in chambers held without the presence of defence counsel and without evaluating the request for adjourning of the hearing for the legitimate impediment of defence counsel⁵⁹.

The individual can request that the hearing be conducted in public and not in chamber (Article 7 Anti-mafia Code “*the President orders that the proceedings be conducted in public hearing when the person concerned so requests*”)⁶⁰.

23. THE APPEAL

In the appellate proceedings the same defensive guarantees of first instance proceedings apply. For example, the person concerned may request a public hearing.

Article 27, paragraph 1 of the Anti-Mafia Code provides that the individual can appeal orders of confiscation and seizure.

The measures for revocation of licenses, concessions or inscriptions can also be appealed⁶¹.

The persons legitimate to appeal⁶² are “*the public prosecutor, the public prosecutor appointed to the court of appeal and the individual concerned*”.

Appellate proceedings respect the adversarial principle, since the presence of the Prosecutor and the defence counsel is mandatory and the individual concerned has the right to be heard by the judges, if he/she so request.

The Court of Appeal may review the merits of the decision of the judge of first instance.

58 Court of Cassation, 30 September 2009, n. 40153.

59 Court of Cassation, 29 July 1997 n. 1288.

60 *Bocellari and Rizza v. Italy*, no. 399/02, 13 November 2007.

61 Paragraph 3 under article 68 of the Anti-Mafia code, which recalls the discipline contained in article 27, paragraph 1 and 2, of Anti-mafia code.

62 Article 10, paragraph 1 of the Anti-Mafia code.

The decision of the Court of Appeal is taken not only on the basis of the findings contained in the documents filed with the judgment of first instance, but also on the basis of new facts emerged and acquisitions of evidence conducted in the course of appellate proceedings.

The decision of the Court of Appeal can be appealed by the public prosecutor and the person concerned before the Court of Cassation (without suspensive effect), within ten days of the communication or notification of the filing of the decision⁶³. The appeal can be made only on points of law.

The appeal for inadequate reasoning is not expressly provided for in the law; however, the case law has affirmed that appeal is permitted in cases where “*the motivation, although formally present, is vitiated by errors so grave that the reasons for the decision are unintelligible*”.

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63 Article 10, paragraph 4, Anti-Mafia Code, which reproduce the article 4, paragraph 11, of the “1956 Act”.

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