PROSECUTOR GENERAL'S OFFICE

at the Supreme Court

Rome, 1 April 2020

To the Prosecutors General

at the Courts of Appeal

MAIN OFFICES

Re: the Public Prosecutor and the decrease in prison population during the coronavirus pandemic

During the WEB meeting of 23 March the issue of the options that prosecutors are given to reduce the number of prisoners held for pre-trial measures or serving their sentences in prison, stood out with a particular emphasis, in order to give a contribution to a better prevention of the coronavirus infection risk during the emergency stage.

The issues discussed here are based on a debate within our National General Office and the Prosecutors General of Appeal' offices, extended to the experiences of first instance Prosecutors.

These reflections are useful for the day-to-day choices to be made and their possible practical solutions, without any claim of being mandatory, as guidelines. However, they can represent a common working basis.

1. Pre-trial detention in prison

The coronavirus crisis represents an element of assessment in the application of all the legislation in force as well an assumption needed for its interpretation. The situation provoked by the health emergency is certainly exceptional but, as such, it entails the recourse to evaluation parameters which are equally exceptional in the application and/or replacement of the restriction of personal freedom.

Even from a strictly technical perspective, it should be considered how 'subjective' situations not to enforce restrictive measures are outlined in the residual area of application of pre-trial detention in prison - which has already been limited by the Law No. 415/2015. Age, family situations and health should be considered in evaluating what kind of measure be enforced; only exceptional precautionary reasons allow to overcome such provision. The epidemic risk is nowadays present and real and it does not leave time to personalized assessments. In many cases it can represent the 'objectification' of the inapplicability of detention in prison to safeguard public health, following to the same criteria that are laid down for the population to stop the virus from spreading.

We must recall more than ever that in our legal system detention in prison represents the *extrema ratio*.

Therefore, it must be encouraged the decision to resort to 'alternative measures' aimed at relieving the pressure caused by the presence in the prisons of a unnecessary number of inmates: such options are excluded for serious crimes, very dangerous people and with the further exception of the so-called 'red code' crimes[1].

[1] Stalking, violent or sexual crimes against women, juvenal and persons in disadvantaged conditions are labelled as *Red Crimes*

The same attention must be given to the non-custodial measure of "police reporting" (*obbligo di presentazione alla polizia giudiziaria*), thus clashing with the compelling movement restrictions imposed by emergency rules.

In fact, although this is a graduated measure, its enforcement not only leads to more contacts for the subjected person (and eventually for the people he meets on the way), but also for the police officers, facing the same limitations due to the lack of personnel and the need for distancing.

At this particular time, the issue of how to manage the pre-trial stage is to be addressed from a dual perspective:

A. Beforehand by *containing* the request or the enforcement of risky precautionary measures, even after the adoption of pre-precautionary measures;
B. Afterwards by postponing the enforcement of the same precautionary measure that the judge has already imposed.

A.1. The adoption of pre-precautionary measures

- With reference to **preventive detention for fugitive suspect of crime** (*fermo*[2]), a positive practice within the Prosecution Offices consists in making a selection of crimes for which a pre-precautionary measure needs to be imposed, by balancing them with existing health requirements, as well as making a serious assessment on the real flight risk by comparing it to emergency movement restrictions;

- Public Prosecutors give the same consideration, within their own powers, coping with **arrest in flagrancy of crime** (*arresto in flagranza*[3]). They seriously evaluate the conditions set out in Article 382 Code of criminal procedure (hereinafter c.p.p.) and

[2] The order is issued by a police officer o the prosecutor when, in serious crime cases, there is probable cause of flight; the detention must be upheld by a judge within 48 hours.
[3] The arrest is operated by a police officer and must be upheld by the judge within 48 hours, but the prosecutor can have the person released immediately.

even more carefully the conditions set out in Article 381 c.p.p.[4], in case of optional arrest. They may exercise the powers indicated in Article 121 regulatory provisions to c.p.p. and Article 381 c.p.p. with all the dutiful care imposed by the present situation. The present crisis has also imposed to prefer the detention of an apprehended person in his domicile as a common practice, under Article 558, par. 4 bis c.p.p., or in suitable premises that are available to the judicial police under Article 558 par. 4 ter c.p.p., considering detention in prison as the further alternative of last resort.

Seeking to reduce the period of time that an apprehended person might spend in prison or in a holding cell, preference would be given to immediate trial of the detained defendant (*giudizio direttissimo*)[5], so that the case may be closed quickly (even with plea bargaining or other summary trials).

Steady contacts and preliminary consultation with the Judicial Police are recommended, as they turned out to be essential to carefully select the cases where a pre-precautionary measure is to be adopted. This does not mean to stop considering the need for a prompt and severe response to the emerging phenomena directly resulting from the situation of emergency (e.g.: robberies to drugstores or food markets).

A.2. Request for precautionary measures

The prosecutor offices would give particular consideration to the formulation of request of a precautionary measure; they should consider with renewed sensitivity the binding nature of legal rules, as mentioned in paragraph 3 of Article 275 c.p.p.[6], stating that «*a detention measure can only be imposed when other coercive measures or restraining orders turn out to be inadequate, although they are imposed as aggregated measures',* and as mentioned in paragraph 5 of the same article, stating

[4] See note 2.

[5] In the *giudizio direttissmo – fast track trial*, the arrested defendant is immediately presented to the judge for trial and sentencing. The Court can be a single or a three judges' panel.

[6] See note 2.

that *'when a judge imposes pre-trial detention in prison, he shall underline the specific reasons why in the present case he believes it inadequate to impose the measure of house arrest with the control procedures indicated in Article 275 bis par. 1».*

Today, these provisions have to be interpreted even in the light of the coronavirus crisis and the legal and practical situation deriving from it for all citizens (with special reference to the prohibition of leaving home, the prohibition of gathering and, as a result, the complete estrangement from social contact areas). The situation is really stopping delinquency, as it is proved by the decrease in crimes (according to some statistical data, it amounts to 75 %).

Therefore, a more up-to-date approach to these provisions should lead to a larger sensitivity from Prosecution Offices either when a request for a custodial measure is submitted or when an original request – not yet decided by the GIP[7] - might be modified *in melius* or on account of a more targeted choice.

Therefore, unless we are dealing with very serious or totally resilient to other less afflictive measures cases, house arrest should be preferred to detention in prison, where necessary even by using electronic bracelets, if available. If they are not available, case law of the Supreme Court holds that different factors must be weighed, among them the balancing between the safeguard of individual and collective health is particularly relevant.

With reference to the obligation to report to the judicial police and the resulting risks of infection, considering that some police office found it difficult to face the number of accesses, it seems more convenient to opt for the obligation to stay at home (*obbligo di dimora*), which is also in line with emergency measures.

I would also like to mention the phenomenon of juvenile delinquency which decreased in the first stages of COVID-19 emergency too.

[7] GIP: judge of the preliminary investigation

House stay (*permanenza domiciliare)* or prescriptions to respect specific rules while not restricted (*prescrizioni in libertà*) have always been given preference. Nevertheless, they compel minors to stay longer at their own domicile, so that the usual practices of implementation do not need to be changed in consideration of the situation of emergency.

If house stay (*permanenza domiciliare*) cannot be imposed, the order of living in a community (*collocamento in comunità)* and even more rarely the cases of application of detention in prison must be checked by adopting precautions for the new entries, with reference to "social distancing". This may occur even in the form of quarantine, eventually with swab takings, that is not a critical issue because juvenile correctional institutions do not suffer from overcrowding.

Public Prosecutors have to conduct a thorough scrutiny of the opportunity to postpone the submission of requests for precautionary measures for events going back in time or recessive, when they weigh the interests protected by the incriminating rules and the health emergency.

A.3. Withdrawal or mitigation of the measures that have already been imposed

Even in this regard the experiences we have been through in these days seem to point to one-way directions.

With respect to measures of detention in prison that have already been enforced, it is convenient to steadily check the grounds for enforceability of the provision under Article 299 paragraph 3 c.p.p. ruling that «*except as required by Article 275 paragraph 3 c.p.p, when precautionary measures are mitigated or an enforced measure does not appear to be proportional to the seriousness of crime or the punishment that is supposed to be imposed, the judge shall replace this measure by a less serious measure or order its implementation with less severe conditions».*

Therefore, the overcrowding in a number of prisons might increase infections, hence a special care in monitoring detentions. All this leads to an evaluation on whether the mitigation of precautionary requirements and/or the prisoners' health conditions (they suffer from identified diseases that haven't been inconsistent with detention between walls until now, but these illnesses could now lead to deadly complications or be anyway very harmful for their health) could encourage the replacement of this measure by house arrest (*arresti domiciliari*) in all cases where an accommodation is available, with the application of electronic bracelets, if available (the above indications are still valid even here). It is obvious that this evaluation has to be supported by individual and distinctive arguments for each prisoner to avoid '*dangerous precedents'* that could open a *vulnus* in the system.

B1. The second point, the **enforcement of precautionary measures** that have already been imposed, is no less important.

Even in this case we should recommend an approach – at least as a trend - aiming at the overall suspension or anyway the postponement of the enforcement stage. This approach is grounded in the principle and the *ratio* resulting from the general provisions laid down by the Decree-Law No. 18/2020, whereby a general mechanism for the suspension of terms in all procedural activities has been introduced.

Anyhow, in this respect we cannot bypass a non-secondary aspect, i.e. the management of resources of Judicial Police in charge of the enforcement of precautionary measures. In this stage their employment has to be very carefully considered by Public Prosecutors, according to priority criteria (keeping in mind the rules of social distancing and reduction of personnel on duty).

In the event that an immediate enforcement may be needed, it seems then appropriate to call for a dialogue with the DAP[8] - Prisoners' Directorate- to receive special indications about the prisons that may accept new entries in safety conditions.

B2. The enforcement of sentences

The issue at stake is whether and to what extent the emergency legislation (d.l. No. 18/2020) may allow the suspension of an order of imprisonment under Article 656 c.p.p., although it does not expressly mention it.

There are no health risks for prisoners already under custody or prison staff, in the event of persons who are already serving detention in prison, and for whom the sentence shall be imposed without interruption, with respect to pre-trial detention.

Besides, the current and concrete custodial requirements concerning the above people (in particular if there are special-preemptive[9] requirements) make it clear that there is a need for maintaining their *status* of prisoners and for a prompt enforcement, considering that there are no drawbacks for the health of the sentenced persons and the prison population.

The absence of additional health risks allows us to follow the same reasoning for the persons detained for another reason, e.g. serving a different sentence.

Instead, with reference to the persons who are not presently detained, detention or an eventual request for an alternative measure presume that an arrest warrant was made, hence this solution has to be compared with an unequivocal rule and equally unequivocal interpretations that I wish to briefly challenge here, even in the light of the views emerged from the debate within the Prosecutor General's Offices.

[8] DAP: Department of Prison administration

[9] That means the need for avoiding reiteration of crimes by a sentenced person.

On one hand, the question arises whether the expression «*then all procedural terms shall be understood as suspended for the same period*», as given by paragraph 2 of Article 83 of the d.l. No. 18/2020, can be also referred to the enforcement order for a custodial sentence, in consideration of its administrative nature, according to prevailing case law, and in consideration of the fact that the a court order is enforced because it results from a final judgment, as stated by Article 650 paragraph 1 c.p.p.[10].

On the other hand, even if the reference to procedural terms concerns all terms during the enforcement stage, a further question arises whether the suspension may be applied to the term of 30 days from the issue of the enforcement order within which this order must be notified to the sentenced person's lawyer (either a Court-appointed lawyer or his own personal lawyer).

Indeed, if the emergency rules of suspension of the procedural terms are considered even to the enforcement order, as a result it would start or re-start running from 16 April 2020. If the conditions whereby «*a judgment of conviction for a custodial sentence shall be enforced*» (paragraph 1 of Article 656 c.p.p.) are satisfied in the above period, a shifting of the starting date of the above 30 days term would occur '*ope legis*' until 15 April 2020.

This interpretation might endanger the correct timing provided by law, whereby the *delivery* of a copy of an imprisonment order to the sentenced person, not yet detained, must be followed by its *service* on the sentenced person's lawyer within a term of 30 days from the issue of the order, failing which it is void. This means that if the suspension of the term for serving is not matched by the following shifting of the delivery of the enforcement order to the person concerned, this would entail an additional disconnection in time (with respect to the timing of 30 days indicated by law) between the entry into prison and the lawyer's control on

[10] See above.

the order. This control aims at allowing the exercise of defence rights before the Execution Judge (*Giudice dell'Esecuzione*), where appropriate. With a view to avoid such disconnection, a shifting in the order *delivery* to the sentenced person might be envisaged, together with the postponement of the *service* of a copy of this order on his lawyer, as a result of the above suspension.

I can't hide that some doubts are cast by this interpretation, which would clearly affect the enforcement of all custodial sentences, even those imposed for crimes whereby a prompt enforcement is indeed required, for example in case of relapse or flight risk.

Caution in the interpretation and practical reasons linked to the problems of servicing on the lawyer within such a deadline, recommend a solution with reference to the suspension under the mentioned Article 83 paragraph 2, as a circumstance of the enforcement stage where further procedural terms are provided.

From this point of view, the sentence «*then all procedural terms shall be understood as suspended …. in general for the same period*», included in emergency rules, is to be referred to:

1. the date mentioned at paragraph 5 of Article 656 c.p.p., that is at the end of 30 days from servicing the enforcement order and suspension order relating to the custodial sentence, within which the sentenced person and/or his lawyer can submit a request for «*obtaining one of the alternative measures to detention*». Therefore, if the remaining sentence to be served is less than a term of four years – as increased by the well-known Constitutional Court judgment No. 4172018 – in the event that the sentenced person is free and the other conditions laid down by Article 656 paragraph 5 c.p.p. are satisfied and the enforcement order has been issued, the same order shall remain

frozen until the envisaged term of 30 days has been reached. This term starts to run again or begins to run after April 15th, 2020. With respect to the circumstances mentioned at paragraph 5 of Article 656 c.p.p., however, there are apparently no grounds for emergency in issuing the enforcement order during the emergency stage, considering that the concurrent suspension is mandatory, except in special circumstances to be assessed on a case-to-case basis;

2. the terms relating to the supervisory procedure which is initiated by the transmission of documents under Article 656 paragraph 10 c.p.p., after the suspension of the enforcement order. This happens when the sentenced person is in house arrest for the offence whose punishment he still has to serve and the remaining sentence to be served – that is established according to paragraph 4 bis – does not overcome the limits indicated in paragraph 5. Even in this case the rule of the concurrent suspension of the order of imprisonment made by the Public Prosecutor has in general no legal grounds for calling for emergency reasons to initiate the procedure under Article 656 c.p.p, except in special circumstances to be assessed on a case-to-case basis.

When we speak of issuing an order of imprisonment against free persons for sentences of more than four years and offences that are not liable to obtain a suspended sentence (*reati ostativi),* as prescribed by Article 4-bis O.P. (Prison Rules - *Ordinamento Penitenziario)*, the above caution in the interpretation and the practical reasons make it possible to carry out a 'reasoned' delay of enforcement orders. Anyhow, the need for preventing infection risks in prisoners can be skipped whereas the execution concerns extremely serious offences for the society or situations where the sentenced person may endanger the life, safety and security of people (for example persons sentenced for mistreatment of family members and life partners or harassment - the latter

often and inevitably committed within the family - or habitual offenders, professional offenders or potential offenders).

These exceptions to a 'reasoned' delay of enforcement orders for sentences of more than four years and offences that are not liable to obtain a suspended sentence (*reati ostativi*) under Article 4-bis O.P. do not seem to be considered in relation to individuals in house arrest (*arresti domiciliari),* unless there is a special evaluation of their social danger, i.e. flight risk and/or relapse risk, based on the evaluation that court judges and/or judges in charge of precautionary measures have already made.

B3. The penitentiary stage

The emergency legislation has initially faced the issue of how to prevent the coronavirus contagion by referring to Article 2 paragraphs 8-9 of the d.l. (Decree Law) No. 11/2020, with the purposes of closing prisons to prevent the risks of infection from the outside (by establishing that prisoners' interviews are made through phone or distant calls and the leave of absence bonuses and semi-liberty[11] can be suspended until 31 May 2020).

Later on, Articles 123 and 124 of the d.l. (Decree Law) No. 11/2020 have somehow tried to open the prisons' doors from the inside and close them to new prisoners' entries by resorting to alternative measures (house detention and semi-liberty). They are based on different assumptions and simplified procedures in comparison to ordinary procedures to reduce the number of prisoners in a short time.

The 'emergency' house detention has been clearly identified as the main instrument, neither does the amendment of 27 March 2020 seem to include

[11] *Semi-libertà*: semi-liberty, i.e. being free during part of the day and spending the night in prison.

any special provisions on the management of prisoners and the subsequent measures to reduce their presence in jail.

Therefore, we have to start reasoning about the new legal instruments, as well as the already existing prison rules, in the light of an extensive interpretation, due to the situation of emergency.

The alternatives measures to detention included in the prison rules are imposed upon request of the person concerned and not upon the Public Prosecutor's. As a consequence, the P.M. (Public Prosecutor) can only be proactive, in relation to a possible extensive interpretation, upon request of the party concerned, during the hearing of both parties before the Surveillance Judge (*Giudice di Sorveglianza*[12]) .

We can presume that the Public Prosecutor can act independently in the application of 'emergency' house detention, as provided for in Article 123 of the d.l. (Decree Law) No. 11/2020.

This law prescribes that a custodial sentence shall be enforced «*upon request … in the sentenced person's house or in another public or private place of care, assistance and refuge*», without identification of the person responsible for its submission. Since it is an 'exceptional' rule dictated by emergency, the legislator supposedly believes that all parties may submit this request, among them a public prosecutor with jurisdiction over the area of the prison's location. This conclusion must be reached by taking into account an objective fact: this request is not intended to re-socialize a prisoner and find an adequate measure for his personality (as it happens in the ordinary requests for alternative measures), but to safeguard his individual health as well as the prisoners' community health.

[12] *Giudice di Sorveglianza or Magistrato di Sorveglianza:* judge taking decisions on the enforcement of the sentence. He may apply alternative measures to detention.

Moreover, if a Public Prosecutor wishes to submit a request for house detention to the Surveillance Judge (*Magistrato di Sorveglianza*[13]), (as per paragraph 2 of Article 123), he is supposed to know prison population data within his territory (meaning that he is supposed to know which prisoners are serving a sentence within the time range established by the legislator -18 months – and he can identify a house where they may go or some family willing to have them as a guests; we obviously must exclude here the prisoners for whom the legislator has already mandatorily excluded the application of this measure).

There are two ways to make these data available to Public Prosecutors:

1.the D.A.P.[14] could make a quick census of prisoners with the requirements set out by the law (especially the term to be served) and point out the real prison population size enjoying the benefits (with the precise legal positions) to the Offices having territorial jurisdiction; this might allow Public Prosecutors to refer the cases to the Surveillance Judge (*Magistrato di Sorveglianza*[15]).;

2. each prison could send a list to a Public Prosecutor including the names of prisoners who satisfy the requirements set out by the law and haven't submitted a request for this emergency measure yet, hence he may be allowed to ask the Surveillance Judge (*Magistrato di Sorveglianza*[16]) to take charge.

I would like to express the following further considerations on the two set by the emergency legislation.

'Emergency' house detention, as per Article 123 of the d.l. (Decree Law) no. 18/2020, is expected to be difficult to implement, due to the limited availability of electronic bracelets.

[13] See above.
[14] D.A.P.: Department for Prison Organization and Personnel.
[15] *See above.*
[16] *See above.*

With a view to overcoming this limitation, a recourse to the merely optional monitoring stated by Article 58 –*quinquies* O.P. (Prison Rules) should not be allowed. Although this rule also concerns persons sentenced to more than eighteen-month-imprisonment, it requires that the benefit of house detention, as per Article 47-*ter,* paragraph 1-*bis* of Prison Rules, shall be considered suitable in relation to the likelihood of recurrence of similar criminal acts.

According to Article 123 of the d.l. (Decree Law) No. 18/2020 instead, the Surveillance Judge (*Magistrato di Sorveglianza*) adopts a measure whereby the sentence shall be enforced at one's domicile, unless he finds any serious impeding reason against granting this measure.

In this emergency situation, it could be and would be desirable to carry out an interpretation by analogy of pre-trial detention rules, especially Article 275 –*bis* c.p.p.[17], following the case law standards in interpretation which were established in relation to the unavailability of electronic bracelets, whereas «*the judge receiving a request for enforcing a measure of house arrest with the so-called electronic bracelet or replacing pre-trial detention in prison with the above measure shall previously ask the Judicial Police whether an electronic device may be available. If it is not, he shall acknowledge that he cannot adopt this control mode and consider if any measure may be suitable, adequate and proportional specific to the precautionary requirements that need to be satisfied in a particular case» (Sez. Un.[18], No 200769/2016);* and by mostly recalling herein that «*the ruling of the Court of Review* (*Tribunale del Riesame*[19]) *on the unsuitability of house arrest to limit the likelihood of recurrence of criminal activities, because of its nature of absorbing and prejudicial evaluation, implies that the employment of one of the electronic devices for*

[17] C.P.P.: Code of criminal procedure
[18] *Sez. Un.*: Italian Supreme Court sitting in Joint Chambers.
[19] *Tribunale del Riesame*: Court ruling as second instance Court on decisions concerning personal freedom.

distance control is inappropriate, as per Article 275-bis of the Code of criminal procedure» (Sec. II, No. 43402/2019, RV.277762-01). In stating the reasons for its decision, the Supreme Court points out that there is no obligation to establish the grounds for absolute proportionality of the measure of detention when the suitability of the voluntary precautionary scheme ordinarily based on electronic bracelets is to be excluded in the first place.

In short, provided that the sentenced person accepts the application of electronic means and devices, which is an unfailing prerequisite, a 'simple' house detention may be applied (when they are scarce). A prisoner will have to be checked through ordinary means until any control device may be applied, unless there are some severe impeding reasons against the granting of this measure.

Besides, Article 124 of the same d.l. (Decree Law), 'Exceptional leave of absence bonuses for prisoners in semi-liberty regime' sets forth that these leave of absence bonuses can last until 30 June 2020, by way of derogation from Article 52 of Prison Rules.

Although this measure is certainly useful to relieve the pressure of prisons, it is not likely to lead to a significant decrease in prison population (the yearly number of individuals in semi-liberty must be just a little more than one thousand).

Considering that the two exceptional instruments introduced by the emergency legislation can hardly meet the immediate need for remedying prison overcrowding it should be useful to look for an interpretation 'adequate to the emergency case' of already existing the rules of prison law.

Without prejudice to the limitations represented by impending rules, as set out by the law (and mentioned above) and not eliminated by the emergency legislation, not even through temporary rules, in this time of history it should

be recommended to resort more and more to the provisional application of alternative measures as precautionary measures.

In this respect, the application of Article 47 of Prison rules (probation) by the Surveillance Judge (*Magistrato di Sorveglianza*) could be very useful to grant the sentenced person a status outside prison, as long as he has a house available and he is under severe restrictions, even if he does not follow a satisfactory rehabilitation program: By the way, it would be difficult to implement it in these days (and there is concern that the same thing may happen in a close or far away future).

This wider interpretation is justified by the present situation of emergency, but it can find an endorsement in case law in the light of the legal principle stated by the Supreme Court. The Supreme Court has held that 'work' is not an indispensable requirement for having access to the measure, but it is just one of the elements apt to take part to a favorable prognostic judgment for the social reintegration of the sentenced person. In normal times the inability to work due to age or health conditions is not an impending reason against granting the measure (SC. Sec. I, No. 1023/2019 , Rv. 274869-01). As a consequence, since health conditions must not only be considered subjective today but also objective (with reference to the danger for public health), this alternative measure could be applied by analogy.

On the other hand, in the event that a prison may register a Covid-19 case, the rules provided for in Article 47 *ter* par. 1 letter c) of Prison Rules – within the statutory limitation of no more than four years for the sentence to be served – do not seem to be applicable to a person who came into contact with another prisoner tested positive for the virus.

In fact, case law teaches us that for the purposes of granting house detention for serious health problems, an assessment on the consistency of prison regime

with a prisoner's conditions needs to be made by a trial judge who takes the multiple purposes of punishment into account. In each individual case he has to compare a person's overall health conditions and the adequacy of medical care provided in prison or in hospitals where he can be treated (SC. Sec. I No. 36322/2015, Rv. 264468-01). For the purposes of an assessment on the inconsistency between the prison regime and a prisoner's health conditions, or the inhuman and degrading treatment that he may face if he stays on, a judge must make sure that a prisoner's health conditions can be adequately ensured in prison or in any other custodial clinics, after a specific thorough examination of his conditions. He must also verify whether they are consistent with the re-educational purposes of punishment, in line with a treatment that is respectful of sense of humanity and watchful of the duration of the punishment and the age of the sentenced person, in comparison with his social dangerousness (SC. Sec. I, No. 53166/2018, Rv. 274879-01).

The set of rules under examination are characterized by a strictly individual assessment on the consistency of the health conditions of each person, one at a time, with the *status detentionis*, even in relation to the prison's capacity to ensure the necessary care in its medical centers and eventually some treatment with due regard for dignity and sense of humanity (in the present emergency situation this means voluntary confinement and health control if he has contacts with a COVID 19 infected person).

In the event of infection inside the prison, it is up to the Prison Administration to take the necessary steps in the light of the present legislation, since these organizational issues cannot be solved, *de iure conditio*, by the judicature's intervention through the rule in question.

With respect to the provisional application of the so-called therapeutic custody[20] provided for in Article 94 paragraph 2 of the T.U. (Consolidated Text) on Drugs, the relevance of the rehabilitation program is mandatory. During the health emergency, perhaps only a rehabilitation program in a rehab community does seem to be really useful for an individual. Even if these measures may be necessary to avoid overcrowding, it is also essential to make reference to how these facilities are organized and if they can safely accommodate guests who are treated on a voluntary basis.

Speaking of semi-liberty, the present situation certainly makes it difficult (or impossible) to make new concessions, since this measure necessarily requires a working activity outside prison.

We may finally consider, *de iure condendo*, the introduction of rules similar to the special leave for prisoners in semi-liberty, as provided for in Article 124 of the d.l. (Decree Law) No. 18/2020, for those who have benefited from several leave of absence bonuses and complied with rules and requirements (the so-called 'tried-and-tested' leave of absence recipients).

In such a case, a legislative intervention should be necessary, as this rule cannot be applied by analogy because the two sets of rules are different.

Finally, special attention should be given to an effective implementation of the regulatory provision (Article 123, paragraph 1, letter e, of the d.l. -Decree Law- No. 18/2020, with reference to Article 81 of the DPR-Presidential Decree- No. 230/2000) whereby the persons under disciplinary action for their participation to last weeks' turmoil are excluded from emergency benefits.

THE PROSECUTOR GENERAL

Mr. Giovanni Salvi

[20] *affidamento terapeutico:* therapeutic custody