

3 Compensation for wrongful convictions in Italy*

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1 Miscarriages of justice and redress

Criminal procedure inevitably faces the risk that some of the key stages and the final outcome of a trial may be fallacious. Moreover, there is always some degree of error in any human judgment. But a shortcoming in the justice system is an intolerable eventuality, considering that its consequences are largely irreparable, especially when it has compromised the defendant's fundamental human rights to dignity and personal liberty. It is an eventuality to which the state must respond by eliminating, where still possible, the negative consequences that the victim of the error continues to suffer and by ensuring financial compensation in proportion to the damages suffered.

The Italian code of criminal procedure (hereinafter CCP)¹ outlines two different compensation schemes: one covering cases where the defendant has been placed under wrongful detention on remand during criminal proceedings, and the other where it is conclusively found that a person was wrongfully convicted by a final judgment.²

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1 The Italian code of criminal procedure was introduced by d.P.R. 22 September 1988, no. 447, and came into force in 1989.

2 With regard to miscarriages of justice, according to a traditional scholarship opinion, a distinction must be made between miscarriages of justice *stricto sensu* and *lato sensu*: the first describes cases of wrongful final convictions (Articles 643ff CCP); the second refers to cases of wrongful preventive detention (Articles 314ff CCP). A reference to this approach is made by Maria Lucia Di Bitonto, 'L'errore giudiziario nelle carte dei diritti fondamentali in Europa' in Luca Lupária Donati (ed), *L'errore giudiziario* (Giuffrè 2021), 65; Elga Turco, *L'equa riparazione tra errore giudiziario e ingiusta detenzione* (Giuffrè 2007), 2. The study of miscarriages of justice relating to a final judgment of conviction cannot disregard the detailed analyses of the matter by scholarship. In these terms, see *inter alia* C. Ronald Huff and Martin Killias (eds), *Wrongful convictions: international perspectives on miscarriages of justice* (Temple University Press 2008); C. Ronald Huff and Martin Killias (eds), *Wrongful convictions and miscarriages of justice. Causes and remedies in North American and European criminal justice systems* (Routledge 2013); David T. Johnson, *The culture of capital punishment in Japan* (Palgrave Macmillan 2020), 61ff; Geert-Jan Alexander Knoops, *Redressing miscarriages of justice: practice and procedure in national and international criminal law cases* (Brill 2007); Allison D. Redlich and John Petrla (eds), 'Special

The cases of wrongful detention on remand eligible for compensation are regulated by Article 314 CCP, which distinguishes between ‘material injustice’ in the first paragraph and ‘procedural injustice’ in the second paragraph. In the event of a material injustice, the right to compensation is triggered by a judgment of acquittal at the outcome of the proceedings, while in the case of a procedural injustice the right to compensation is triggered if, at the time detention on remand was ordered, the requirements set forth in Articles 273 and 280 CCP had not been met, regardless of the final outcome of the trial itself.

Compensation for miscarriages of justice in the strict sense – namely, the ones arising from an exoneration upon judicial review of a final judgment of conviction – is regulated by Articles 643ff CCP. Unlike the compensation scheme provided for wrongful detention on remand, the former necessarily depends on a favourable outcome of the judicial review requested by the person convicted.

The concept of ‘miscarriage of justice’ is therefore defined through different statutory provisions resting on different requirements. Nevertheless, their basic rationale represents a common thread that is based on the principles of inviolability of personal liberty (Article 13 Italian Constitution)³ and presumption of innocence (Article 27, paragraph 2 Italian Constitution).⁴ Said constitutional values guide the interpretation of Article 24, para 4 Constitution, which places on the legislator the burden of identifying the means of redress for miscarriages of justice in such a way as to remedy any damage suffered by a person within the sphere of his/her personal liberty.

In the Italian constitutional system, compensation for miscarriages of justice is to be understood as a solidaristic remedy, whereby the damage suffered by a person unlawfully detained or convicted (and later exonerated following judicial review) must be compensated by the state, so that the individual sacrifice is shared by the entire community.⁵ In accordance with Article 2 Constitution, in order to ensure the protection of inviolable human rights,⁶ the Italian Republic requires the fulfilment of the mandatory duties of political, economic and social solidarity.

issue: The age of innocence: Miscarriages of justice in the 21st Century’ (2009) 27 *Behav. Sci. & L.* 297.

- 3 The Italian Constitution was approved by the Constituent Assembly on 22 December 1947, promulgated by the Provisional Head of State Enrico De Nicola on the following 27 December and published on the same day in the *Official Gazette* no. 298, extraordinary edition. It entered into force on 1 January 1948.
- 4 Paolo Troisi, *L'errore giudiziario tra garanzie costituzionali e sistema processuale* (Cedam 2011), 103ff.
- 5 Corte cost, 11 June 2008 (entered 20 June 2008), no. 219, [2008] *Giur. cost.* 2456, with comment by Maria Grazia Coppetta, ‘Riparazione per l’ingiusta detenzione: una declaratoria di incostituzionalità dirompente?’, *ibid.* 2476, acknowledging, with reference to the provisions laid down for wrongful preventive detentions, the solidaristic purpose of the remedy. See also Antonio Balsamo, ‘Riparazione per ingiusta detenzione’ in Adolfo Scalfati (ed), *Prove e misure cautelari. Le misure cautelari*, in Giorgio Spangher (directed by), *Trattato di procedura penale* (vol. II, Utet 2008), 519.
- 6 Among which there is the right to personal liberty expressly defined in Article 13 Constitution as inviolable, thus falling among those rights enshrined in Article 2 Constitution. See Paolo Barile, *Diritti dell’uomo e libertà fondamentali* (Il Mulino 1984), 113.

Given this common constitutional framework, it must be said that the compensation scheme most frequently applied in practice is the one covered by Articles 314 and 315 CCP, namely for wrongful detention on remand. According to official data from the Ministry of Justice, in 2019 the total expenditure for compensation in cases of wrongful detention on remand amounted to approximately €43.5 million, while with reference to compensation for wrongful conviction under Article 643 CCP, the total amount incurred in 2019 was about €5.2 million.⁷ In total between 1992 and 2021, the number of cases of wrongful detention on remand amounted to 30,017, for a total public expenditure of approximately € 819 million, compared to 214 cases of wrongful conviction arising from judicial review, for a total of approximately €76 million.⁸

For the purposes of this volume, the present chapter will mainly, even if not exclusively, deal with the topic of miscarriages of justice *stricto sensu*. Firstly, the matter will be analysed in light of the relevant constitutional and supranational principles necessary to understand the different theories regarding the legal nature of the remedy; subsequently, a description of the provisions laid down in the Italian CCP on the compensation schemes for miscarriages of justice resulting from a wrongful final conviction will be provided, focusing on legislative requirements, bars to compensation, proceedings and criteria for compensation; finally, some concluding remarks will be made.

7 Corte dei conti, *Equa riparazione per ingiusta detenzione ed errori giudiziari* (Delib. n. 15/2021/G, 16 September 2021), 41ff. In 2019 compensation due to wrongful pre-trial detention accounted for 89 per cent of the total payments made (about €48.6 million). The data show that in 2020 the total amount spent due to miscarriages of justice decreased to approximately €44 million. According to the organisation Errorigiudiziari.com a sharp decline in both cases and spending was also registered in 2021 probably due (also) to fewer cases being considered by courts because of the pandemic. See Benedetto Lattanzi and Valentino Maimone, 'Errori giudiziari e ingiusta detenzione, tutti gli ultimi dati aggiornati' (*errorigiudiziari.com*, 25 March 2022) <www.errorigiudiziari.com> accessed 22 May 2022. With specific reference to compensation for wrongful detention on remand the latest data published by the Ministry of Justice show indeed a decrease in the total amount spent and in the number of orders issued: from €36.9 million (750 orders) in 2020 to €24.5 million (565 orders) in 2021. See Ministero della Giustizia, *Misure cautelari personali e riparazione per ingiusta detenzione: dati anno 2021. Relazione al Parlamento ex L. 16 aprile 2015, n. 47* (Update April 2022), 25ff, available at <www.giustizia.it> accessed 23 May 2022.

8 The data regarding cases of wrongful conviction arising from judicial review refer to the time period between 1991 and 2021. See Lattanzi and Maimone, 'Errori giudiziari e ingiusta detenzione, tutti gli ultimi dati aggiornati' (n 7). The same statistical survey, albeit updated to 2019, can also be found in Benedetto Lattanzi and Valentino Maimone, 'Ingiusta detenzione in Italia, un'analisi', in Lupària (n 2), 963ff; Benedetto Lattanzi and Valentino Maimone, 'Innocenti e invisibili: quante vittime della giustizia sfuggono alle statistiche' (*errorigiudiziari.com*, 4 October 2021) <www.errorigiudiziari.com> accessed 8 March 2022. It should be noted that the same authors consider these statistical data undervalued since the number of victims of miscarriages of justice in Italy over the past 30 years is estimated to amount to 50,000. This statistical discrepancy is the result of a large number of so-called 'invisible innocents' in the Italian justice system. On this matter, see also: Viviana Lanza, 'Ingiusta detenzione, ogni anno oltre duecento invisibili' (*Il Riformista*, 9 January 2022) <www.ilriformista.it> accessed 13 March 2022.

2 Miscarriages of justice eligible for compensation in light of constitutional and supranational principles

Before addressing the compensation regime laid out in the Italian CCP, it is worth briefly analysing the relevant constitutional and supranational principles.

In Italy, in Article 24, para 4, the Constitution places on the legislator the burden of establishing the conditions and procedures for redressing miscarriages of justice. Therefore, the constitutional text does not explicitly state the interested party's right to apply for compensation against miscarriages of justice but simply transfers to the legislator the duty to concretely identify the compensation scheme rules and eligibility conditions.

From the very start, the generic scope of Article 24 paved the way for a debate on its exact scope of application, namely whether the provision also covered cases of wrongful detention on remand. According to an initial interpretation,⁹ the miscarriage of justice covered by the constitutional rule strictly amounted to a wrongful final conviction found upon judicial review. Leaning on the programmatic nature of Article 24, para 4 Constitution – which, as mentioned, places on the legislator the burden of identifying the compensation scheme rules and eligibility conditions – the first legal commentators believed that this approach necessarily stemmed from the absence, in the Italian CCP in force at the time, of a specific rule regarding redress for wrongful detention on remand. In fact, the only statutory reference was deemed to be Article 571 CCP, which provided solely for compensation against a wrongful final conviction found upon judicial review.¹⁰

The constitutional conception of miscarriage of justice in the strict sense was, however, left behind with the entry into force of the new code of criminal procedure, which, as previously noted, in Articles 314 and 315 CCP, also provides for compensation in cases of wrongful detention on remand. With the new provisions, therefore, there remains no doubt that the wording of Article 24, para 4 Constitution should be construed as also covering wrongful preventive measures.¹¹ This new interpretation ought to also be supported on the basis of other joint constitutional standards binding the state – namely Articles 2, 3 and 13 Constitution – whereby the state has the duty to protect and guarantee inviolable human rights (Article 2

9 For a more detailed analysis of the matter see Troisi (n 4) 172ff; Turco (n 2) 41ff; *Dig. disc. pen.* (4th edn, 1997), vol XII, 330ff.

10 The narrow interpretation of the constitutional concept of 'miscarriage of justice' was also supported by the Constitutional Court. See Corte cost, 15 January 1969 (entered 24 January 1969), no. 1, in *Dejure*. Originally, the legal remedy envisaged in Article 571 of the former CCP was not based on the wrongfulness of the conviction, which had resulted in an infringement of the individual's liberty, but on the state of need of the unjustly convicted and the consequent intervention of the state took the form of a 'charitable action'. Later, Law 23 May 1960, no. 504, amended Articles 571–574 CCP and added Article 574 *bis* to the former CCP, recognising for the first time the compensation for judicial error as a subjective right. This approach has been maintained in the new CCP that came into force in 1989. See, on this, Marcello D'Aiuto, 'La riparazione dell'errore giudiziario', in Lupária (n 2) 726–727.

11 In these terms, Corte cost, 18 July 1996 (entered 25 July 1996), no. 310, [1996] Giur. cost. 2557. In this case, the Court held that Article 314 CCP constitutes a fulfilment of the constitutional provision.

Constitution), including personal liberty (Article 13 Constitution), and to redress any injury to a right that qualifies as inviolable.¹² The foregoing must also be read jointly with Article 27, para 2 Constitution, which enshrines the principle of presumption of innocence until final conviction.¹³

The constitutional guarantees thereby outlined, as a whole, impose: firstly, that any restrictions to personal liberty at the pre-trial stage be sought solely as an extreme remedy; and secondly, that monetary relief be awarded when, at the outcome of a trial, it is found that a preventive measure falls within the cases set forth in Article 314 CCP (material and procedural injustices).

At a supranational level – unlike the Italian constitutional framework – the matter of miscarriages of justice eligible for compensation is regulated by different provisions depending on whether the case regards a wrongful final conviction or a wrongful detention or arrest.¹⁴ Specifically, the ECHR, in Article 5 § 5, states that anyone who has been placed under arrest or detention in violation of the provisions of the precedent paragraphs of the same Article is entitled to claim compensation.¹⁵ While miscarriages of justice relating to a wrongful conviction are regulated by Article 3, Protocol No. 7 ECHR, which states a right to compensation when a final conviction is overturned in the light of new or newly discovered facts, provided that the non-disclosure of the new facts is not attributable to the accused.

The matter at hand is also regulated by the International Covenant on Civil and Political Rights: Article 9 § 5, in even broader terms compared to the ECHR provisions, provides for a right to compensation for any person who has been the victim of unlawful arrest or detention, while Article 14 § 6 – correspondingly to Article 3, Protocol No. 7 ECHR – provides for a right to compensation in the event of a wrongful conviction.

In light of the aforementioned constitutional and supranational principles, some significant discrepancies should be highlighted. Firstly, it can easily be observed that the supranational laws distinguish between the regulation of wrongful convictions and the regulation of unlawful detentions or arrests, while the Italian Constitution makes an explicit overall reference to both types of miscarriages of justice in Article 24, para 4 Constitution. In terms of nomenclature, the supranational regulations are formulated in such a way as to directly grant the individual a subjective right to compensation, whereas the wording of the Constitution places the burden of regulating the matter (including the eligibility requirements to apply for compensation) on the legislator.

12 Corte cost, 11 June 2008 (entered 20 June 2008), no. 219 (n 5).

13 See *Troisi* (n 4) 180–181 and *Balsamo* (n 5) 626; as well as *D’Aiuto* (n 10) 722, where the author highlights that the presumption of innocence principle covers criminal proceedings in their entirety, in the context of which the Court, by correctly applying the assessment criteria set forth by the law, must prevent miscarriages of justice.

14 *Di Bitonto* (n 2) 63ff.

15 More generally, Article 5, § 5 ECHR – protecting the right to liberty and security of person – details a number of exceptions to the prohibition to restrict the fundamental principle of personal liberty (Article 5, § 1 ECHR), as well as a number of procedural guarantees for the person placed under arrest or detention (Article 5, § 2, 3 and 4 ECHR). See also *Turco* (n 2) 46ff.

Furthermore, it is important to underline that, at a supranational level, the conduct of the interested party may constitute a bar to compensation only in cases of wrongful conviction (i.e. Articles 3, Protocol No. 7 ECHR and 14 § 6 of the International Covenant on Civil and Political Rights), while in the Italian CCP the accused's conduct is also taken into account in cases of wrongful detention on remand (Article 314, para 1 CCP). With specific reference to this last case, note should be taken of the broader scope of the supranational terminology ('arrest' and 'detention') compared to that of the Italian code, which only mentions 'preventive custodial detention measures'. This lexical difference inevitably redounds to the scope of application of the above rules: the conventional scope of application, as regulated, seems to cover a wider range of cases where personal liberty is in fact restricted.¹⁶

3 The legal basis of compensation for wrongful detention and wrongful conviction

In order to address the rules set forth by the Italian CCP we must first analyse the legal nature of the remedy. This issue does not merely have dogmatic relevance, but also practical consequences in relation to the criteria used for the attribution of liability for the injury suffered by the interested party. Hence, for example – as will be explained in further detail below – should compensation for miscarriages of justice be qualified as a remedy having the same nature as compensation for damages, then the criteria set forth in Article 2043 Italian civil code¹⁷ for civil wrongs should apply.

This matter has been subject to three main interpretations.¹⁸ In accordance with a first and more dated opinion,¹⁹ building on the unlawfulness of the judgment or order issued by the judiciary, compensation for miscarriages of justice would stem from a state liability for civil wrongs. In these terms, the remedy would have the same nature as the one underlying tort liability. This approach, however, does not seem convincing and, specifically, two points of criticism have been levelled at it. The first builds on the remedy's legal basis, which, unlike tort liability under Article 2043 Italian civil code, does not amount to a civil wrong: that is because the court's decision cannot be such. Rather, the remedy stems from the solidaristic principle expressed in Article 2 Constitution, whereby the state undertakes to protect – even by awarding redress – inviolable human rights.²⁰ The

16 Paola Spagnolo, 'La riparazione per ingiusta detenzione: verso una tutela sostanziale del diritto alla libertà personale' (2017) 11 *La legislazione penale* <www.la legislazione penale.eu> accessed 9 March 2022, 3.

17 The Italian civil code was enacted by Royal Decree no. 262 of 16 March 1942 and entered into force on 21 April of the same year.

18 For a detailed overview of the matter see Turco (n 2) 2ff; and more recently Elga Turco, 'Riparazione per l'ingiusta detenzione', in Angelo Giarda and Giorgio Spangher (eds), *Codice di procedura penale commentato* (Wolters Kluwer 2017), 3609ff.

19 For a review of the case law and scholarship in support of this theory, see once again Turco (n 2) 3.

20 See Balsamo (n 5) 638.

second point of criticism regards the subjective elements of tort liability, which, as known, require either the wilful misconduct or negligence of the tortfeasor. Based on this approach, however, the right to compensation should be excluded every time the court's 'error' was neither malicious nor negligent.

On the basis of these criticisms, another interpretation was developed, which tends to place the remedy within the context of compensation for a lawful act.²¹ In particular, this theory rests on the assumption that the interested party – given the harm caused to his/her personal liberty – has a personal public-law claim that the state has a duty to settle. Thus, the liability framework thereby invoked is the one of state liability for a lawful act.²² Once again, this position has not been immune to criticism.²³ The legal basis of the right to compensation for miscarriages of justice does not *necessarily* stem from a lawful act: in fact, Article 314, para 2 CCP – which regulates cases of procedural injustice – includes a number of orders issued against the law.²⁴ Furthermore, unlike compensation for lawful state action (e.g. expropriation for public interest), in redressing miscarriages of justice there is no divergence between the interest of the person seeking compensation for the injury suffered and that of the state. Indeed, the latter evidently has no interest in having the individual's personal liberty unlawfully restricted; on the contrary, the objective of the court is to adopt decisions that are compliant with the law and with constitutional guarantees.

The third and last interpretation more adequately supports the autonomous nature of the remedy, defined as a *tertium genus* (or third type) compared to the models of damages for civil wrongs and of compensation for lawful acts.²⁵ Based on this last interpretation the legal basis for compensation should be solely found in the solidaristic purpose of the remedy, which aims to balance out the prejudice incurred by the interested party. The state's obligation to settle the individual's subjective claim, in other words, would directly rest on the provisions set forth in Articles 2, 13, 24, para 4 and 27, para 2 Constitution,²⁶ which, as previously noted, impose on the state a duty to hold individuals harmless against an unlawful deprivation of their personal liberty.²⁷ From this perspective, by providing for a compensation regime, it seems that the legislator has decided to transfer the risk of ascertaining the miscarriage of justice from the individual to the entire community.²⁸

Having clarified what might be the legal basis of compensation for miscarriages of justice, we now look into the provisions laid out in the Italian code of criminal procedure.

21 See also Corte cost, 11 June 2008 (entered 20 June 2008), no. 219 (n 5). In approximately similar terms, Cass pen, sez. un., 30 October 2008 (entered 29 January 2009), no. 4187, [2009] Resp. civ. prev. 777. See also Turco (n 2) 9ff.

22 For a reference to this matter see Troisi (n 4) 252–253.

23 See Turco (n 2) 13–14.

24 *Dig. disc. pen.* (V aggiornamento, 2010), 489.

25 Supporting this theory Turco (n 2) 14ff.

26 *Dig. disc. pen.* (n 24) 489.

27 On this matter see also *Dig. disc. pen.* (n 9) 320.

28 Again *Dig. disc. pen.* (n 24) 489.

4 The relevant statutory framework: the provisions of the Italian code of criminal procedure

The Italian CCP, as noted, provides for two separate compensation schemes for wrongful convictions, on the one hand, and wrongful detention, on the other. The first case is regulated by Chapter IX of the code of criminal procedure on appeals and concerns miscarriages of justice found upon judicial review (Articles 643ff CCP); the second case – regarding detention on remand measures – is regulated by Chapter IV (Articles 314–315 CCP).

In the following sections, in line with the purpose of this volume, particular attention will be paid to the former compensation scheme, namely the one related to wrongful convictions.

4.1 Redressing wrongful convictions under Article 643 CCP

The original compensation regime for miscarriages of justice is the one currently regulated by Article 643 CCP,²⁹ whereby a person whose conviction has been quashed following judicial review is entitled to apply for compensation for the injury suffered, in proportion to the duration of any term of imprisonment³⁰ and to the impact of the wrongful conviction on the individual and his/her family.³¹

A mandatory requirement for the application of the above compensation scheme is *res judicata*: the judgment of conviction must be final. This requirement alone is, however, insufficient to trigger a right to compensation.

Indeed, it is also necessary that the judicial review³² on application by the interested party leads to the conviction being quashed.³³ Only at the outcome of the judicial review is the miscarriage of justice – albeit innate in the judgment of

29 On this matter see *Dig. disc. pen.* (n 9) 319ff, as well as D’Aiuto (n 10) 717ff.

30 It is not, however, necessary for the sentence to have been enforced; see Paolo Tonini, *Manuale di procedura penale* (Giuffrè 2019), 1005–1006.

31 On the criteria used to determine the compensation amount see below section 4.4.

32 Under Article 643, para 1 CCP the right to apply for the compensation derives from an acquittal coming from the legal remedy *ex* Article 630 CCP (judicial review). Under the latter article, the grounds for judicial review are established exhaustively and are all aimed at resolving the antinomy between the fact underlying an irrevocable judgment of conviction and the material content of new data that reveal the injustice of that sentence. Therefore, other legal remedies aimed at removing unfair judgments, i.e. the extraordinary appeal in cassation for error of fact (Article 625 *bis* CCP) and the so-called ‘European judicial review’ where concluded not with an acquittal but with a lighter sentence, seem to be excluded. See, *inter alia*, D’Aiuto (n 10) 727–728; with specific attention to the former legal remedy, see Mitja Gialuz, *Il ricorso straordinario per cassazione* (Giuffrè 2005), 390; with a different view Michele Caianiello, ‘La riapertura del processo ex art. 625 bis c.p.p. a seguito di condanna della Corte europea dei diritti dell’uomo’ (2009) *Cass. pen.* 1465, 1472.

33 Article 643 CCP does not require that the exoneration following judicial review be granted on a specific ground: it may be the result of an acquittal under Article 530 CCP or of a dismissal under Articles 529 and 531 CCP.

conviction – formally acknowledged by the judiciary, thereby making the person unlawfully convicted and later exonerated eligible for compensation.³⁴

Lastly, under paragraph 3 of Article 643 CCP, the right to compensation is excluded when the term of imprisonment has already been deducted from the sentence to be served for another crime. The reason behind this choice clearly resides in the intent to avoid the interested party from benefitting twice from the acknowledgement of a miscarriage of justice.³⁵

4.2 *The bars to compensation: malice and gross negligence*

The Italian code of criminal procedure establishes a bar to the right to compensation in case of wrongful conviction. In particular, the right to compensation is denied when the interested party, acting with malice or gross negligence, has caused the miscarriage of justice.³⁶

Regarding the definition of malice, according to the prevailing case law,³⁷ which supports a broader notion than the one typically applied in criminal law, the malicious intent is defined as conduct that is consciously and deliberately liable to create the ‘danger to community’ requirements.³⁸ What is considered relevant, therefore, is that the person deliberately engages in conduct that is concretely liable to mislead the court, such as in cases of false self-accusation, or of actions aimed at suborning a witness, expert or interpreter, or of a deliberate failure to self-defend against a slanderous accusation for unlawful purposes.³⁹

34 See D’Aiuto (n 10) 723–724 and Troisi (n 4) 109.

35 Turco (n 2) 254–255.

36 This limitation applies both to wrongful conviction and wrongful detention but with a different scope of application: it applies to the latter not only in the case where the interested party has directly caused the miscarriage of justice but also where he/she has *contributed* to causing it. In other words, the contribution – namely contribution to the miscarriage of justice – is deemed relevant solely in relation to wrongful detention, while Article 643 CCP only takes into account conduct that directly causes the miscarriage of justice. Said distinction, according to some authors, rests on the belief that the elements grounding preventive measures – gathered for the most part outside of the proceedings – are more liable to corruption than those that are put together during the course of the proceedings. See Alida Montaldi, ‘Riparazione per l’ingiusta detenzione’, in Mario Chiavario (coordinated by), *Commento al nuovo codice di procedure penale* (Utet 1990), 321; for a different opinion, see *Dig. disc. pen.* (n 9) 342.

37 See Balsamo (n 5) 673–674, addressing, by way of example, the case of a person who self-incriminates him/herself or fraudulently produces evidence against his/her defence.

38 *Ex multis* Cass pen, sez. un., 13 December 1995 (entered 9 February 1996), no. 43, [1996] Cass. pen. 2146, with comment by Paola Felicioni, ‘Condizioni ostative al diritto alla riparazione per ingiusta detenzione ed esercizio del diritto di difesa: spunti problematici’, *ibid.* 2156.

39 D’Aiuto (n 10) 734. The author affirms that the notion of malice intent established by case law is distinct from that set out in Article 43 of the Italian criminal code, in having great regard to the suitability of the conduct to mislead and not to the mere

With specific reference to the concept of negligence, the boundaries are traced by Article 43 Italian criminal code (hereinafter CC),⁴⁰ which describes the negligent psychological coefficient as the expectation, not the intention, to cause the event, which therefore takes place by reason of the negligent and reckless conduct of the person or by violation of laws, regulations, orders or rules.⁴¹ Negligence, by express provision of the law, must also be gross and thus amount to significantly negligent conduct.⁴² In case law this concept has been identified in the defendant's conduct at trial as being characterised by significant imprudence or, indeed, gross negligence, such as in the case of an inert or malicious defence or in the inactivity of the technical defence accompanied by a breach of the defendant's duty to supervise the defence counsel's work.⁴³

In addition, further attention should be paid to the temporal scope of application of the bars to compensation, so as to understand whether the personal conduct prior to the knowledge of the proceedings and, therefore, to the qualification as suspect/accused may be included therein. Even in this regard, the prevailing case law chooses to extend the scope of application of the bars to compensation: the Italian Court of Cassation has on several occasions stressed that 'gross negligence' also includes any conduct put in place before knowledge of the pending proceedings.⁴⁴

prediction and intention of the event. In this sense, a notion of intent deriving from contract law is applied.

40 The Italian criminal code was issued by Royal Decree 19 October 1930, no. 1398, and entered into force on 1 July 1931.

41 Cass pen, sez. un., 13 December 1995 (entered 9 February 1996), no. 43 (n 38).

42 *Ibid.*

43 D'Aiuto (n 10) 734–735. In this regard a case law trend to include in the concept of 'gross negligence' the choice made by the suspect to exercise his/her right to remain silent (or to refuse to answer questions or to answer by lying) during the interrogation of the suspect for the purpose of preventive measures should be noted. See, *inter alia*, Cass pen, sez. IV, 23 October 2015, no. 46423, Rv. 265287; Cass pen, sez. IV, 17 November 2011 (entered 23 February 2012), no. 7296, Rv. 251928; Cass pen, sez. IV, 10 June 2008 (entered 29 October 2008), no. 40291, Rv. 242755; Cass pen, sez. III, 17 February 2005 (entered 14 April 2005), no. 13714, [2006] Cass. pen. 3737; *contra*, more recently, Cass pen, sez. IV, 2 July 2021 (entered 16 September 2021), no. 34367, in *Dejure*. On this matter, see also Lattanzi and Maimone, 'Innocenti e invisibili: quante vittime della giustizia sfuggono alle statistiche' (n 8). The recent amendment of Article 314, para 1 CCP by Legislative decree 8 November 2021, no. 188, aims at hindering this judicial practice. In this sense, the first judgments seem promising. See, *inter alia*, Cass pen, sez. IV, 8 February 2022 (entered 15 March 2022), no. 8616, in *Dejure*.

44 D'Aiuto (n 10) 734–735. In these terms, see also Cass pen, sez. un., 26 June 2002 (entered 15 October 2002), no. 34559, [2003] Cass. pen. 57; Cass pen, sez. IV, 3 June 2010 (entered 24 September 2010), no. 34656, Rv. 248074; and Cass pen, sez. un., 28 November 2013 (entered 24 December 2013), no. 51779, [2014] Dir. giust. Of an opposite opinion see for all Turco (n 2) 241–242. Along the same lines Elizabeth M.T. Di Palma, 'Dolo e colpa grave, cause ostative al sorgere del diritto soggettivo alla riparazione per ingiusta detenzione' (1997) Cass. pen. 814, 817.

4.3 *Compensation proceedings*

Under Article 645, para 1 CCP, the court that has jurisdiction to take cognisance of the claim is the appellate court that overturned the conviction, whose jurisdiction is, in turn, determined on the basis of the criteria outlined in Article 11 CCP.⁴⁵

The application for compensation must be filed, under penalty of rejection, within two years of the judgment quashing the conviction (Article 645, para 1 CCP) becoming final or, in any case, within two years of when the judgment ordering the pre-trial dismissal of the charges is no longer subject to challenge or when the notice of discontinuance was served.

Furthermore, the application must be filed in writing and contain all documents deemed useful to prove eligibility for compensation. It may be filed in person by the interested party or by someone authorised through a power of attorney in accordance with Article 122 CCP.⁴⁶

Under Article 644, para 1 CCP, the persons that have a standing to apply for compensation, in the event of the death of the interested party, are also the spouse, a next of kin relative, an affine to the first degree and a lineal relative by adoption. In this case, the amount of compensation cannot in any case exceed the amount that would have been determined in favour of the interested party.⁴⁷

Once the application for compensation has been filed it must be notified, together with the order setting the date for the hearing, at least ten days before the hearing to the public prosecutor. It must also be notified, by the clerk's office, to the treasury secretary of the state legal advisory office of the district of the court having jurisdiction and served on all interested parties. According to the prevailing

45 See Article 633, para 1 CCP establishing that the court of jurisdiction over petitions for judicial review is determined under Article 11 CCP ('Jurisdiction for proceedings concerning magistrates'). In particular, the appellate court is identified on the basis of Article 11 CCP with respect to the district corresponding to the judge who issued the judgment on the merits that became final.

46 In the Italian legal system, when a personal act is to be performed in a criminal proceeding and the interested party cannot be present, the technical representation of the defence counsel is not sufficient. Indeed, it is necessary for the party to confer voluntary representation to the defence counsel or to another person of his/her trust, and this can only be done by means of a special power of attorney to perform a particular act.

47 This statutory provision – as expressly clarified by the Court of Cassation – also applies to cases of wrongful detention on remand by reference in Article 315, para 3 CCP to the rules on wrongful conviction. See, *ex plurimis*, Cass pen, sez. IV, 6 February 2019 (entered 15 May 2019), no. 20845, in *Dejure*. On this matter see also Corte cost, 13 December 2004 (entered 23 December 2004), no. 413, [2005] Cass. pen. 1551, which confirmed that the right to claim compensation in the case of the death of the suspect – against whom all charges have been dismissed – is transferred to the deceased suspect's heirs when, following the acquittal of any co-defendants, it is found that the deceased suspect would have also been acquitted had he/she been alive. On this matter see also Mariaivana Romano, 'Ambiti operativi della riparazione per ingiusta detenzione alla luce delle novità giurisprudenziali' (2010) *Dir. pen. proc.* 1496, 1500.

opinion, failure to give notice to the public prosecutor and to the treasury secretary is ground for application of the invalidity regime under Article 180 CCP (see Article 127, para 5 CCP), while the failure to notify the interested party – considered equivalent to the failure to serve summons to enter appearance on the defendant – is ground for absolute invalidity under Article 179, para 1 CCP.⁴⁸

The proceedings, under Article 645, para 1 CCP, are held in chambers in accordance with the methods set forth in Article 127 CCP. The interested parties can file briefs and documents up to five days prior to the hearing. The main characteristics of the hearing are that the appearance in court of the interested parties is merely optional and the hearing is conducted behind closed doors. On this latter issue, it should be noted that the European Court of Human Rights⁴⁹ has found a violation of Article 6 § 1 ECHR in the Italian statutory provision that denies the interested parties' right to request an open-court hearing. Within the framework of the Italian compensation regime – as highlighted by the European Court – there is no exceptional circumstance that may justify the preclusion of an open-court hearing. Nevertheless, by reason of the application of the procedural rules laid down in Article 127 CCP, the current statutory framework still provides for a closed hearing (Article 127, para 6 CCP).⁵⁰

During the preliminary investigation stage, the applicant has the burden of proving the grounds for his/her compensation claim; vice versa, the treasury secretary has the burden of proving any bars to compensation. Furthermore, should the documentary evidence adduced be insufficient, the court may, even *ex officio*, request the parties to supplement said documents for the purpose of deciding on the matter.⁵¹

Finally, the matter is decided upon by court order issued by the judging panel,⁵² whereby the application may either be: i) held inadmissible on lack of standing or non-compliance with the two-year time limit set forth in Article 645 CCP; ii) rejected as unfounded (for example in the presence of any of the aforementioned bars to compensation); or iii) admitted. In this last case, the court shall determine the amount of compensation to be awarded and, where the applicant is in need and unable to support him/herself financially, it may award interim compensation in the form of an allowance. The interim compensation is directly enforceable and is borne by the Ministry of Economy and Finance. If the application is admitted, court fees are borne by the losing party – i.e. the public administration. However, when the Ministry of Economy and Finance has not

48 Of this opinion, Turco (n 2) 304; Balsamo (n 5) 686.

49 *Lorenzetti v. Italy*, App no. 32075/09 (ECtHR, 10 April 2012), available at <www.hudoc.echr.coe.int> accessed 22 May 2022. On this matter see also Sofia Mirandola, 'Un'altra camera di consiglio destinata a schiudersi' (2013) Cass. pen. 4043.

50 On this matter the Constitutional Court was also called to rule but it declared the petition inadmissible on grounds of lack of relevance; see Corte cost, 3 July 2013 (entered 18 July 2013), no. 214, [2013] Cass. pen. 4394.

51 Armando Macrillò, 'La riparazione per l'ingiusta detenzione cautelare', in Lupária (n 2) 792.

52 The panel is composed of three judges.

entered an appearance or when, despite entering an appearance, it has not challenged the application it cannot be considered a losing party and, therefore, cannot be ordered to reimburse court fees.⁵³

Under Article 646, para 3 CCP, the court order must be notified to the public prosecutor and served on all interested parties, who, within 15 days of when the notice of entry of order was notified or served (Article 585, para 1, letter a) CCP), may lodge an appeal with the Court of Cassation. The decision of the Court of Cassation is final.

4.4 *The criteria for determining the amount of compensation*

The court order admitting the application for remedy, as noted, must also quantify the amount to be awarded by way of compensation in favour of the applicant⁵⁴ and specify the criteria used to calculate that amount.

The assessment of the judge – by reason of the difficulty in proving the precise *quantum* of the harm suffered by the person wrongfully detained or convicted – is not grounded on the objective criteria typically used to quantify compensation for damages. This approach rests on two arguments. The first concerns the nature of this type of remedy, the prevailing interpretation of which, as observed, tends to include it in the category of liability for lawful acts or, at the most, in a separate third category; it would, on the contrary, be difficult to include it in the category of liability for civil wrongs.⁵⁵ The second argument rests directly on the provisions of the Italian CCP on compensation for wrongful detention under Article 314, para 1 CCP, which expressly states that the interested person is entitled to equitable compensation, namely on the basis of equitable considerations, which take account, through a global evaluation, of all the elements necessary to assess the injury. This criterion – albeit expressly mentioned only in relation to cases of wrongful detention on remand – also applies to miscarriages of justice in the strict sense (Article 643 CCP),⁵⁶ coherently with the considerations underlying the preliminary project to the code of criminal procedure, whereby, despite a number of subsequent amendments, the criteria for the monetary quantification of the injury was in any case grounded on equitable principles.⁵⁷

53 See, *inter alia*, Cass pen, sez. IV, 21 December 2018 (entered 7 February 2019), no. 5923, in *Dejure*. At the same time, if the application for compensation is not admitted the public administration cannot obtain the reimbursement of court fees if it has not entered an appearance or challenged said application.

54 Under Article 643, para 2 CCP the state redresses by awarding an amount or, under some circumstances, by setting a life annuity plan. Also, the beneficiary may, at his/her request, be placed in an institution at the state's expenses (e.g. care home or hospital).

55 See above section 3.

56 In these terms Troisi (n 4) 291ff; D'Aiuto (n 10) 742. It seems that of a contrary opinion is Turco (n 2) 102.

57 See Ministero della Giustizia, *Relazioni al progetto preliminare e al testo definitivo del codice di procedura penale* (GU no. 250, Ordinary Supplement no. 93, 24 October 1998). Some have highlighted how the absence of an explicit reference to equitable

The necessary resort to an equitable assessment also allows the assertion that, with specific reference to wrongful detention on remand, the court must take into consideration – despite Article 314 CCP containing no mention thereof – the duration of the wrongful detention, together with any personal and family-related consequences suffered.⁵⁸ The latter element, on the contrary, is expressly provided for in Article 643 CCP together with the duration of the sentence served.⁵⁹ Therefore, the compensation for wrongful conviction aims, on the one hand, at compensating personal and family-related consequences suffered, namely the suffering caused by imprisonment, the moral suffering caused by the injustice of the sentence, the damage caused to reputation and social life and any mental illness of family members caused by the situation,⁶⁰ on the other hand, it aims at compensating the limitation of personal liberty caused by the wrongful conviction.⁶¹

In the end, the main criteria to be used by the court is equity, in such a way to make an overall assessment of the pecuniary⁶² and non-pecuniary⁶³ damage suffered by the interested party following an unlawful conviction, apart from a mere arithmetical calculation.⁶⁴ Clearly, the court shall provide an adequate and

compensation in the definitive wording of the CCP cannot be considered as a fortuity but as a specific legislative choice. Therefore, the *voluntas legis* would be aimed at differentiating the criteria for determining the amount of compensation, on the one hand, in the case of wrongful detention on the basis of the judge's *aequitas* and, on the other hand, in the case of wrongful conviction on the basis of objective assessment criteria typically used for the determination of pecuniary and non-pecuniary damages in the 'tort liability' model. See Troisi (n 4) 292ff; Elga Turco, 'Ingiusta detenzione e riparazione del danno esistenziale' (2008) Cass. pen. 4735, 4740.

58 This approach is validated by the generic reference in Article 315, para 3 CCP to the statutory rules on wrongful conviction, which must therefore be applied, *mutatis mutandis*, in their entirety.

59 See Balsamo (n 5) 691–692.

60 D'Aiuto (n 10) 741.

61 *Ibid.*, where the author underlines how the scope of compensation is extended to any judgment served: not only with regards to imprisonment but also in consideration of the duration of any accessory penalties or alternative measures to imprisonment and, by express legislative provision, to any form of internment, whether as an alternative to prison or as a security measure.

62 Actual loss (e.g. liability for damages, bankruptcy etc.) and loss of profits (e.g. failure to conclude contracts, disqualification from a profession or art, dismissal, loss of business or further prospects of career and study etc.).

63 Any type of moral, biological and existential damage resulting from the unfair conviction.

64 However, this does not mean that the court is prevented from resorting to compensatory criteria that limit its discretion. See Cass pen, sez. IV, 25 November 2003 (entered 22 January 2004), no. 2050, [2004] Giur. it. 1025. For further case law, see in general (even if referred to compensation for wrongful detention) Cass pen, sez. un., 9 May 2001 (entered 14 June 2001), no. 24287, [2001] Cass. pen. 2674; Cass pen, sez. III, 29 April 2003 (entered 2 July 2003), no. 28334, [2004] Cass. pen. 3329; and, more recently, Cass pen, sez. III, 1 April 2014 (entered 9 July 2014), no. 29965, in *Dejure*; Cass pen, sez. IV, 27 June 2019 (entered 12 July 2019), no. 30649, in *Dejure*.

logically congruous statement of reasons in relation to the specific case, as a corrective to the arbitrariness inherent in the judge's equitable intervention.⁶⁵

5 Conclusions

In the face of the inherently fallacious nature of judging, the Italian criminal legal system provides for two main remedies against miscarriages of justice *lato sensu*: one aiming at compensating someone who has been wrongfully detained during criminal proceedings, the other covering cases of wrongful conviction. Data show that 99.4 per cent of the total cases of miscarriage of justice and 89 per cent of the total incurred compensation costs for the state in 2019 concerned cases of wrongful detention on remand.⁶⁶ Nevertheless, the miscarriages of justice *stricto sensu*, even if not characterised by large numbers, cannot be disregarded. Accordingly, the irreparable consequences resulting from a wrongful conviction represent one of the main tragedies of our criminal justice system and affect citizens' trust in the administration of justice.

From this perspective, the analysis carried out has shown how this compensation scheme represents a *post iudicatum* remedy provided for in the Italian legal system to alleviate the consequences of a wrongful conviction and as a necessary reaction to the unjust violation of the fundamental rights to dignity and personal freedom.⁶⁷

In particular, on the basis of the constitutional and supranational principles examined, among the different theories developed on the legal nature of the remedy, the most appropriate one relies on its solidaristic purpose that is pursued through the transferral of the risk of ascertaining the miscarriage of justice from the individual to the entire community. This is particularly reflected in the approach adopted by case law with regard to the criteria for determining the amount of compensation, which, as examined, is mainly based on equity and entrusted to the court's overall assessment of damage – pecuniary and non-pecuniary – suffered by the wrongfully convicted individual.

Nevertheless, it is precisely in case law that the most problematic aspect of the right of compensation in the case of wrongful conviction has emerged. As observed, indeed, jurisprudence has adopted a broad notion of the concepts of malice and gross negligence, envisaged in the Italian criminal procedure code as bars to compensation for the wrongfully convicted, by including in the latter concept conduct committed before knowledge of a pending proceeding or covered by the right of defence. This case law approach risks seriously affecting the

65 See, *inter alia*, Cass pen, sez. III, 10 February 2004 (entered 18 May 2004), no. 23211, Rv. 229289; Cass pen, sez. IV, 3 June 1998 (entered 13 July 1998), no. 1744, Rv. 211646; more recently, on compensation for wrongful detention, Cass pen, sez. IV, 6 December 2016 (entered 10 February 2017), no. 6394, Rv. 269077; Cass pen, sez. IV, 2 July 2021 (entered 16 July 2021), no. 27474, Rv. 281513.

66 Lattanzi and Maimone, 'Ingiusta detenzione in Italia, un'analisi' (n 8) 963–964; Corte dei conti (n 7) 43.

67 D'Aiuto (n 10) 723.

concrete functioning of the legal institute with unacceptable consequences for people who have already been the victim of a wrongful conviction.

In this sense, the recent legislative intervention on Article 314 CCP goes in the right direction establishing that the defendant's exercise of his/her right to remain silent does not affect his/her right to compensation for wrongful detention on remand.⁶⁸ Accordingly, case law seems to have already correctly interpreted such new provision.⁶⁹

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