Italy

1. Introduction

The existing Italian Code of Criminal Procedure (the CPP - Codice di Procedura Penale), dates back to 1988. The 1988 Code has entered into force on 24 October 1989, and thereby replaced the Rocco Code of 1930. The Rocco Code, which was introduced under the fascist regime and was strongly inspired by the Napoleonic Code, reflected the inquisitorial character of the Italian criminal procedure. The introduction of the 1988 Code into the Italian criminal justice system has brought some significant changes to criminal procedure in Italy. The new Code, which was inspired by the Anglo-American adversarial system, tended to abandon the inquisitorial model by introducing an accusatorial model of criminal procedure. An essential feature of the accusatorial model is a strict separation between the investigative phase and the trial. As a consequence, the decision of the trial judge may only be based on the evidence presented at a public trial, granting the right of confrontation.[1]

The 1988 Code and its accusatorial nature was introduced in order to make the criminal trial more consistent with the democratic principles of orality, immediacy and publicity.[2] Some significant changes made by the 1988 reform are the introduction of a double dossier system and the abolition of the inquisitorial investigative judge. The primary investigatory responsibility was allocated to the public prosecutor and the responsibility to oversee the course of the investigation to the newly created judge for the preliminary investigations.[3] The evidence and testimony collected during the investigative stage was kept into one dossier. This information is not available to the trial judge, unless presented at court. Once the evidence and testimony has been presented at court, it becomes part of the second dossier used for the trial.[4] In conclusion, it can be stated that the double dossier system has shifted the responsibility of presenting evidence at trial to the public prosecutor and the defence counsel.

Since its enactment, the 1988 Code has been frequently amended. In 1995, the Code was significantly modified as regards the possibilities to impose preventive measures. In particular, Law no. 332 of 8 August 1995 was introduced as a reaction to the numerous complaints regarding the appropriate use of pre-trial detention.[5] This Law was meant to avoid the use of pre-trial detention as an instrument to obtain a confession or incriminating statements. Therefore, the possibility to adopt preventive measures was made stricter. In particular, the 1995 Law provided for some limits to the power of adopting pre-trial detention. For instance, the offences for which pre-trial detention may be imposed were aggravated and the judge has been prohibited to impose pre-trial detention whenever he thinks that a suspended sentence is likely to be imposed.[6]

This report analyses the current regulation(s) on pre-trial detention in Italy. In essence, attention will be paid to the notion of pre-trial detention, the grounds for pre-trial detention, the possibilities to review a decision to pre-trial, etc. Moreover, the practicalities regarding pre-trial detention will be discussed. In this regard, attention will be paid to the statistical development of pre-trial detainees in Italy and to the conditions of pre-trial detention in the Italian prisons.

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[1] G. Illuminati, 'The frustrated turn to adversarial procedure in Italy (Italian Criminal Procedure Code of 1988', *Social Science Research Network* 2005, pp. 3.
[2] C.M. Bradley (ed.), *Criminal procedure. A worldwide study,* Durham: Carolina Academic Press, 2007, pp. 303.
[3] C.M. Bradley (ed.), *Criminal procedure. A worldwide study,* Durham: Carolina Academic Press, 2007, pp. 303.
[4] C.M. Bradley (ed.), *Criminal procedure. A worldwide study,* Durham: Carolina Academic Press, 2007, pp. 303.
[5] The European Institute for Crime Prevention and Control, affiliated with the United Nations (HEUNI), *Criminal justice systems in Europe and North America. Italy*, Helsinki: Academic Bookstore 2002, pp. 23.
[6] See Article 4(1) and Article 7(1) of Law no. 332 of August 8, 1995.

2. Empirical background information

This chapter analyses the practice of pre-trial detention in Italy. In particular, attention will be paid to the development of the number of pre-trial detainees, as well as the development of the different groups of pre-trial detainees such as juveniles, women and foreigners. In order to give an overview of these developments, data has been collected from several sources, namely: the International Centre for Prison Studies (ICPS), the European Sourcebook, the Department of Penitentiary Administration of Italy and the National Statistic Institute (Istat) of Italy. The collected information will be discussed in the following sections.

2.1 Prison population according to legal status

The prison population of Italy consists of different groups of prisoners. In essence, a distinction can be drawn between 'imputati', 'condannati' and 'internati'. The category of 'imputati' resembles the group of pre-trial detainees in Italy. An 'imputato' is a person who has been deprived from his liberty, but has yet not received a final sentence.[7] Prisoners belonging to this category are prisoners awaiting trial and prisoners who have already been sentenced by the Court of first instance or appeal but are still waiting for the result of an appeal or an appeal in cassation. 'Condannati' are prisoners who are retained with final sentence and 'internati' are persons who are subjected safety measures (misure di sicurezza).

The above-mentioned categories of prisoners are held in three different facilities, namely: prisons (case di reclusione), remand prisons (case circondariali) and institutions for the execution of safety measures (istituti per l'esecuzione delle misure di sicurezza). Remand prisons are used for the placement of prisoners awaiting trial and prisoners sentenced to a maximum of three years' imprisonment. Prisoners sentenced to more than three years' imprisonment are placed in prisons, while persons subjected to a safety measure are placed in institutions for the execution of safety measures (e.g. labour camps, nursing homes and mental hospitals). Table 1 illustrates the number of prisoners who were held in these facilities on 30 June 2008. The information provided in table 1 has been collected from the Department of Penitentiary Administration of Italy (Dipartimento dell'Amministrazione penitenziaria).

Table 1: Prison population of Italy according to legal status

	Women	**Men**	**Total**
Prisons			
Sentenced prisoners	136	6.151	6.287
Pre-trial detainees	48	1.469	1.517
Prisoners subjected to safety measures	6	214	220
Rest-category*	-	3	3
Total	*190*	*7.837*	*8.027*
Remand prisons			
Sentenced prisoners	803	16.040	16.843
Pre-trial detainees	1.303	27.151	28.454
Prisoners subjected to safety measures	8	34	42
Rest-category*	6	231	237
Total	*2.120*	*43.456*	*45.576*
Institutions for the execution of safety measure			
Sentenced prisoners	5	108	113
Pre-trial detainees	12	56	68

[7] Note that this definition, which is given by the Istat, differs from the exact meaning of imputato according to law. According to Article 60 of the CPP, an imputato is a person against whom the public prosecutor has brought proceedings, whether or not this person is detained. To conclude, the word imputato also applies to suspects who are not held in custody. The latest is however not included in the national statistics registered by the Istat.

Prisoners subjected to safety measures	83	1.190	1.273
Total	*100*	*1.354*	*1.454*
Total number of prisoners	**2.410**	**52.647**	**55.057**
Sentenced prisoners	5	108	113
Source: Department of Penitentiary Administration * The rest-category consists of the number of prisoners whose legal status could not be determined.			

The numbers provided in table 1 illustrate the amount of adult prisoners in Italy. Juveniles are not included in these numbers but will be discussed separately beneath.

2.2 Pre-trial detainees as a percentage of the prison population

According to the information provided by the ICPS, the number of pre-trial detainees in Italy on 30 June 2007 amounted to 25.855 persons. In fact, this is 58.3% of the total prison population.[8] Table 2 shows the development of the adult pre-trial prison population over the years 2001 - 2008.

Table 2: Pre-trial detainees as a percentage of the prison population

Year	**Total prison population**	**Pre-trial detainees**	**Percentage of pre-trial detainees**
2001 (December, 31)	55.275	23.287	42%
2002 (December, 31)	55.670	21.682	39%
2003 (December, 31)	54.237	20.225	37%
2004 (December, 31)	56.068	20.036	36%
2005 (December, 31)	59.523	21.662	36%
2006 (December, 31)	39.005	22.145	57%
2007 (December, 31)	48.693	28.188	58%
2008 (June, 30)	55.057	30.039	55%
Source: Department of Penitentiary Administration			

It is remarkable that both the pre-trial prison population and the percentage of pre-trial detainees have been decreasing over the years 2001-2005, while the total prison population over these years has been increasing. The pre-trial prison population of Italy started to increase again in 2006. By contrast, the total prison population has decreased enormously. The latest can probably be attributed to the law of pardon which was passed by the Parliament in 2006. This law provided for a reduction of three years in sentences, precisely in order to make room in the Italian overcrowded prisons. The decreased prison population in 2006, together with the increased number of pre-trial detainees, resulted into an increase of the percentage of pre-trial detainees by 21%. As one can see, the total prison population increased again in 2007, and is in 2008again at the same point as before the law of pardon. Also the number of pre-trial detainees continued to increase over the years 2007 and 2008. By contrast, the percentage of pre-trial detainees over the year 2008 has decreased by 3%.

[8] R. Walmsley, World Pre-trial / Remand Imprisonment List (Pre-trial detainees and other remand prisoners in all five continents), London: International Centre for Prison Studies 2008, pp. 5.

2.3 Pre-trial prison population rates

The pre-trial prison population is also measurable in rates, i.e. the number of pre-trial detainees per 100.000 of the national population. Table 3 shows the pre-trial population rates over the years 2001 till 2008.

Table 3: Pre-trial detention rate

Year	National population	Pre-trial detainees	Pre-trial detention rate
2001 (December, 31)	-	23.287	-
2002 (December, 31)	57.321.070	21.682	38
2003 (December, 31)	57.888.245	20.225	35
2004 (December, 31)	58.462.375	20.036	34
2005 (December, 31)	58.751.711	21.662	37
2006 (December, 31)	59.131.287	22.145	37
2007 (December, 31)	59.619.290	28.188	47
2008 (June, 30)	59.829.710	30.039	50
Sources: Department of Penitentiary Administration and the Italian National Institute of Statistics (Istat)			

2.4 Pre-trial prison population according to different groups

Within the category of prisoners held in pre-trial detention, it is also possible to distinguish between different groups of pre-trial detainees. In this section, attention will be paid to the development of the following groups: juveniles, females and foreigners.

2.4.1 Juveniles in pre-trial detention

The number of juveniles kept in detention is registered separately by the Department of Juvenile Justice (Dipartimento per la giustizia minorile). In essence, a distinction can be drawn between two different groups of juvenile prisoners, namely those who are kept in detention after receiving a final sentence (soggetti in espiazione di pena), and those who are remand to pre-trial detention (soggetti in custodia cautelare). The group of pre-trial detainees includes juvenile prisoners who are awaiting trial and juvenile prisoners who are sentenced by the Court of first instance or appeal, but are still awaiting the result of an appeal or an appeal in cassation. Table 4 illustrates the number of juvenile prisoners in Italy according to legal status.

Table 4: Juvenile prison population according to legal status

Year	Juvenile prison population	Juveniles in pre-trial detention	Sentenced Juvenile offenders
2001 (December)	468	304	164
2002 (December)	452	292	160
2003 (December)	442	277	165
2004 (December)	462	298	164
2005 (December)	437	295	142
2006 (December)	343	313	30
2007 (June)	446	373	73
2008	-	-	-
Sources: Department of Penitentiary Administration and the Italian National Institute of Statistics (Istat)			

It seems like the juvenile prison population of Italy mainly consists of juveniles held in pre-trial detention. Table 5 shows that more than 50% of the juvenile prison population is pre-trial detainees. In 2006, the percentage of pre-trial detainees has even reached the amount of 91. The year 2007 shows a decrease of this percentage. However, the percentage of pre-trial detainees over the year 2007 remains above 50%.

Table 5: Pre-trial detainees as a percentage of the juvenile prison population

Year	Juvenile prison population	Juveniles in pre-trial detention	Percentage of Juveniles in pre-trial detention
2001 (December)	468	304	65%
2002 (December)	452	292	65%
2003 (December)	442	277	63%
2004 (December)	462	298	65%
2005 (December)	437	295	68%
2006 (December)	343	313	91%
2007 (June)	446	373	84%
2008	-	-	-

2.4.2 Females in pre-trial detention

The group of pre-trial detainees can also be divided according to gender (see table 6).

Table 6: Pre-trial prison population according to gender

Year	Pre-trial detainees	Male detainees	Female detainees
2001 (December, 31)	23.287	22.219	1068
2002 (December, 31)	21.682	20.689	993
2003 (December, 31)	20.225	19.215	1010
2004 (December, 31)	20.036	19.022	1014
2005 (December, 31)	21.662	20.506	1156
2006 (December, 31)	22.145	21.155	990
2007 (December, 31)	28.188	26.862	1326
2008 (June, 30)	30.039	28.676	1363
Source: Department of Penitentiary Administration			

It is clear that the number of male pre-trial detainees is much higher than the number of female pre-trial detainees. Table 7 shows that the number of females as a percentage of the pre-trial prison population has remained stable over the past years.

Table 7: Females as a percentage of the pre-trial prison population

Year	Pre-trial detainees	Female detainees	Percentage of females in pre-trial detention
2001 (December, 31)	23.287	1068	4.6%
2002 (December, 31)	21.682	993	4.6%
2003 (December, 31)	20.225	1010	5.0%
2004 (December, 31)	20.036	1014	5.1%
2005 (December, 31)	21.662	1156	5.3%
2006 (December, 31)	22.145	990	4.5%
2007 (December, 31)	28.188	1326	4.7%
2008 (June, 30)	30.039	1363	4.5%
Source: Department of Penitentiary Administration			

2.4.3 Foreigners in pre-trial detention

Next to gender and age, it is possible to distribute pre-trial prison population according to nationality. The most recent available information on the number of foreigners held in pre-trial

detention in Italy dates from 2007. At the end of June 2007, a number of 11.241 foreigners were held in pre-trial detention.[9] This number corresponds with 44% of the total pre-trial prison.[10] Compare to the year 2006, the number of foreign pre-trial detainees in 2007 has increased. At the end of September 2006, 9082 of the persons held in pre-trial detention were of foreign nationality. [11]

3. Legal basis: scope and notion of pre-trial detention

3.1 Definition of pre-trial detention

The legal basis for 'custodia cautelare', the Italian terminology for pre-trial detention (in broad sense), can be found in Article 13 of the Italian Constitution. The afore-mentioned Article primarily guarantees the personal liberty of individuals. Although Article 13 of the Italian Constitution explicitly states that the right to "personal liberty is inviolable",[12] it also makes clear that this right is not un-limitable. Therefore, it prescribes that "no one may be detained, […] nor otherwise restricted in personal liberty, except by order of the judiciary stating a reason and only in such cases and in such manner as provided by law"[13].

The CPP lays the foundation for restricting personal liberty by decreeing pre-trial detention of a person. In particular, it regulates the grounds for pre-trial detention, the length of pre-trial detention, the (procedural) rights of the accused, the authorities competent to decree pre-trial detention, and the possibilities for (judicial) review of the decision to pre-trial detention.[14] Although the CPP provides for the conditions for 'custodia cautelare', it does not define this term explicitly. Some indications of the exact meaning of 'custodia cautelare' can nonetheless be found in Article 285(1) of the CPP, which states that "when decreeing a court order to pre-trial detention, the judge issues an order to the competent authorities or police officials to apprehend the accused and to immediately put this person in a remand prison or at disposal of a judicial authority." 'Custodia cautelare' can thus be defined as deprivation of liberty following a court order. Moreover, also the legal provisions regulating pre-trial detention and the location of these provisions in the CPP reveal that 'custodia cautelare' can be defined as a 'misura cautelare personale coercitiva', i.e. a precautionary measure which may be imposed on the suspect himself and which restricts the personal freedom of the suspect.

3.2 Initial (police) detention versus detention following a judicial decision

The current Italian Code of Criminal Procedure distinguishes between three different forms of deprivation of liberty, namely: arrest (arresto) and detention of one suspected of a crime (fermo di indiziato di delitto), both types of provisional measures, and pre-trial or preventive detention (custodia cautelare). The provisional measures of 'arresto' and 'fermo' can both be categorised as initial police detention. In addition, it should be noted that fermo' is in principle ordered by the public prosecutor, while the police is permitted to adopt this measure only when the prosecutor has yet not taken charge of the investigation (Article 384(1) and (2) CPP). In contrast to 'arresto' and 'fermo', pre-trial detention may only be decreed by the court dealing with the case or by the judge for the preliminary investigations (giudice delle indagini preliminary), and moreover, solely upon request of the public prosecutor (Article 279 and 291 CPP).

In conclusion, it can be stated that the CPP draws a clear distinction between on the one hand detention following initial police arrest (Article 5(1)(c) ECHR), which may consist of 'arresto' or

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[9] Dipartimento dell'Amministrazione penitenziaria, *Rapporto mensile sulla popolazione detenuta. indagine al 30 giugno 2007.*

[10] By the end of June 2007, a totality of 25.514 prisoners were held pre-trial detention.

[11] Dipartimento dell'Amministrazione penitenziaria, *Dati statistici sulla polpolazione penitenziaria - Confronto detenuti in carcere al 31 luglio e al 30 settembre 2006.*

[12] See Article 13 (1) of the Italian Constitution, *Costituzione della Repubblica Italiana*. An English translation of the Constitution can be found on http://www.servat.unibe.ch/law/icl/it00000_.html

[13] See Article 13 (2) of the Italian Constitution.

[14] Articles 285-286bis CPP regulate the types of pre-trial detention. See also Articles 272-279 CPP for general provisions applicable to all types of *misure cauterlari personali*, and Articles 280-283 CPP for specific provisions applicable to all types of *misure cautelari personali coercitive*. Information about the length of pre-trial detention, the execution of pre-trial detention, and the possibilities for judicial review of pre-trial detention can be found in the Articles 291-331 of the CPP.

'fermo', and on the other hand detention following a judicial decision that a person should remain in custody (Article 5(3) ECHR), which consists of 'custodia cautelare'. Another significant distinction that should be drawn is that between 'arresto' and 'fermo'. Although both are types of initial police detention, it should be noted that 'arresto' may only take place, when the suspect is caught red-handed (in stato di flanganza).[15] Article 380 CPP regulates the situations in which 'arresto' by the police is mandatory, while Article 381 CPP regulates the situations in which the police is competent to arrest a suspect, yet arrest is not obligatory. The difference between mandatory arrest and a merely discretionary power to arrest lies in the seriousness of the offence that has been committed.[16]

In contrast to 'arresto', 'fermo' is permissible when the suspect is not caught red-handed and the requirements set out in Article 384 CPP are met. In particular, there must be a specific indication that the suspect poses flight risk, moreover, there must be a serious evidence of guilt (not mere suspicions) and finally, the committed offence must be a crime involving weapons or explosives or a crime of such a serious degree that the law sets a punishment of life imprisonment or imprisonment for no less than the minimum of two years and the maximum of six years.[17] Despite the different prerequisites, both 'arresto' and 'fermo' serve the same goals. These measures are used "either to protect the public safety or for investigative purposes. Therefore, an arrest or 'fermo' may be the first step in an effort to impose some form of preventive detention".[18] Regarding the afore-mentioned, it is not surprising that the proceedings following 'arresto' or 'fermo' are similar (see Articles 390-391 CPP). First of all, Article 386(3) of the CPP prescribes that the police must make the suspect available to the public prosecutor as soon as possible and in any case within 24 hours of the arrest or 'fermo'.[19] Subsequently, the public prosecutor must, within 48 hours, request the validation of the arrest or 'fermo' of this person by the judge for the preliminary investigations, unless he has ordered the immediate release of the suspect by virtue of Article 389 CPP (Article 390(1) CPP). An arrest or 'fermo' becomes ineffective if the requirements set out in Article 390(1) are not met (Article 390(3) CPP).

The validation hearing should be held by the judge within the following 48 hours (Article 390 (2) CPP). At this hearing, the suspect must be interrogated (Article 391(3) the CPP). According to Article 391 of the CPP, the judge must endorse the validity of the arrest or 'fermo' within 96 hours from the arrest or 'fermo', otherwise the person concerned must immediately be released. To this end, Article 391(7) of the CPP prescribes that the arrest or 'fermo' will lose its effect if the validation order has not been decreed within 48 hours after the suspect has been made available to the judge. The public prosecutor who has requested the validation of the arrest or 'fermo' may, at the same time, also request the judge for the preliminary investigations to order pre-trial detention (custodia cautelare) of the suspect (Articles 291and 391(5) CPP). If the judge has decided not to apply such a measure, he/she shall order the immediate release of the person concerned.

Initial detention by the police may thus endure for a maximum of 96 hours (four days), starting from the moment that the suspect has been arrested or 'fermato'. In addition, it should be noted that a person can also be placed in pre-trial detention on only written information. For instance, one can think of the situation in which a court order has been issued for pre-trial detention of a

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[15] Article 382 CPP defines what should actually be understood by being caught re-handed. According to this Article, a person is caught red-handed if he/she is in the process of committing a crime, or is pursued by the police immediately after the commission of a crime, or is caught in possession of objects or evidence indicating that he has just committed a crime (C.M. Bradley (ed.), *Criminal procedure. A worldwide study,* Durham: Carolina Academic Press, 2007, pp. 307).

[16] See S.C. Thaman, *Comparative criminal procedure. A casebook approach,* Durham: Carolina Academic Press 2008, pp.48: Article 380 CPP prescribes that arrest is mandatory, when the suspect is caught red-handed after a non-negligent completed or attempted crime, for which the law sets a punishment of life imprisonment or imprisonment for no less than a minimum of 5 years and a maximum of 20 years. Article 381 (1) CPP prescribes that the police is competent to arrest anyone caught red-handed after a non-negligent completed or attempted crime for which the law sets a punishment of imprisonment for a maximum of 3 years or for a negligent crime for which the law sets a punishment of imprisonment for a maximum of 5 years. Article 381 (2) CPP also lists specific offences for which arrest is permissible, although the prescribed sentence is different than that prescribed in Article 381 (1) CPP (See also C.M. Bradley (ed.), *Criminal procedure. A worldwide study,* Durham: Carolina Academic Press, 2007, pp. 306-307).

[17] See also C.M. Bradley (ed.), *Criminal procedure. A worldwide study,* Durham: Carolina Academic Press, 2007, pp. 307-308.

[18] C.M. Bradley (ed.), *Criminal procedure. A worldwide study,* Durham: Carolina Academic Press, 2007, pp. 306.

[19] M. Delmas-Marty & J.R. Spencer, *European criminal procedures*, Cambridge: Cambridge University Press 2002, pp. 402.

free person, i.e. who has previously not been arrested or 'fermato'. The judge is, in such a case, not obliged to see the suspect before issuing the detention order.[20] However, Article 294 of the CPP prescribes that the judge who authorises the detention of the suspect pending trial, and who he has not proceed to this act during the course of the validation hearing, must interrogate the person to whom the measure is applied within five days of the execution of the measure. If the time-limit of five days is not observed, the person must be immediately released.

3.3 Start and end of pre-trial detention

Pre-trial detention starts with a court order to detention. Once the judge has honoured the petition of the public prosecutor to decree pre-trial detention of the suspect (Article 291 CPP), he/she shall issue a court order for pre-trial detention (Article 292(1) CPP). The court order should, on pain of being null, satisfy the formal requirements listed in Article 292(2) of the CPP.

There are however several ways in which pre-trial detention may end. For instance, pre-trial detention ends when there is no longer a ground for (further) detention. However, it should be noted that if there are no longer grounds for pre-trial detention, detention will not end by operation of law. In addition, Article 299(1) of the CPP prescribes the immediate cancellation of pre-trial detention once the general terms stipulated in Article 273 of the CPP are no longer met or when the grounds for adopting such a measure (Article 274 CPP) cease to exist. Cancellation of pre-trial detention may be decreed on own initiative of the judge or upon request of either the public prosecutor or the accused. Subsequently, the judge should decide within five days of the request (Article 299(3) CPP).

Next to the instant cancellation of pre-trial detention in default of justifiable conditions, pre-trial detention may also end because of replacement by another precautionary measure. Article 299(2) of the CPP regulates the replacement of pre-trial detention by a less severe measure (reformatio in melius). In addition, pre-trial detention should be replaced by a less severe measure (or the conditions of detention should be softened) if the ground for detention has diminished, or if the measure is no longer appropriate or proportionate to the seriousness of the offences and the severity of sentence to be imposed.

Cancellation and replacement of pre-trial detention are both related to reasons of substantive nature: either because the terms for detention are no longer met or because the ground for detention has changed or ceased to exist. However, there are also some procedural acts which may put an end to pre-trial detention. For instance, pre-trial detention will end once a judgement has been delivered (Article 300 CPP). In addition, Article 300(1) of the CPP prescribes that a precautionary measure immediately loses effect if the measure has been ordered in relation to a particular criminal offence, though the public prosecutor, with leave of the judge, has dropped the case (Article 408-411 CPP), or the judge of the preliminary hearing has ruled that there are no grounds for prosecution (Article 425 CPP), or the trial judge has pronounced an acquittal (Article 529-532 CPP). A precautionary measure also loses effect when the judge has pronounced a convicting judgement, though a suspended sentence has been imposed or the imposed sentence must no more be served due to expiry of the time limits (Article 300(3) and 352(2) CPP). Furthermore, Article 300(4) of the CPP prescribes that although the pronounced judgement is still contestable, pre-trial detention will lose effect when a suspect is convicted, though the imposed sentence is equal or inferior to the period spent in pre-trial detention.

Another reason for ending pre-trial detention is that the court order for pre-trial detention has expired (Article 301 CPP). In addition, Article 301(1) prescribes that when pre-trial detention is imposed in order to avoid the tampering or destruction of evidence (Article 274 (1)(a) CPP), the measure will lose effect if the court order for detention has not been renewed before the fixed expiry date of pre-trial detention (Article 292 (2)(d) CPP).

Furthermore, pre-trial detention will end if the judge for the preliminary investigations did not proceed to the interrogation of the pre-trial detainee within the stipulated time (Article 302 CPP). To this end, Article 294 of the CPP prescribes that a person who is held in pre-trial detention during the preliminary investigations shall immediately be interrogated by the judge and, in any case, within five days after execution of pre-trial detention.

More generally, Article 301 of the CPP sets specific time limits for every single phase of the proceedings. As regards the preliminary investigations, the court order for pre-trial detention

expires if one of the following acts are not performed in the requisite time: the judge for the preliminary hearing (giudice di udienza preliminare) has issued a decree committing the defendant for trial or has issued an order permitting the case to be resolved either by means of an abbreviated trial (giudizio abbreviato) or by mutual consent of the parties to impose an agreed sentence (applicazione delle pena su richiesta delle parti).[21]

Pre-trial detention will, in any case, end when the maximum length of detention has been reached. To this end, Article 303 (1)(a) of the CPP prescribes that pre-trial detention becomes ineffective when the terms stipulated in this paragraph have expired and the defendant has not been committed for trial, neither has a court order been issued to proceed according to an abbreviated trial, nor has the case been resolved by mutual consent of the parties to impose an agreed sentence. In addition, it should be noted that when the defendant has been committed for trial, pre-trial detention will lose effect if the court of first instance has not decided the guilt or innocence of the defendant within the terms stipulated in Article 303 (1)(b) of the CPP.[22]

3.4 Principles underlying pre-trial detention

The institution of pre-trial detention allows for a person to be deprived of his liberty, even if the person is not yet facing formal charges. The aim of the detention is to avoid the concealment, alteration, or destruction of evidence by the accused or to prevent this person from committing a serious offence or fleeing after doing so.[23] When imposing the measure of pre-trial detention, there are, however, some essential legal principles which should be taken into account by the judge. These principles are for instance, the presumption of innocence, the principle of adequacy, the principle of proportionality and the principle of last resort.

Presumption of innocence means that everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law (Article 6 (2) ECHR). The presumption of innocence of is also codified in Article 27(2) of Italian Constitution, which states that "the defendant is not considered guilty until final judgement is passed". Although pre-trial detention requires a certain degree of suspicion, a suspect or defendant can yet not be seen as guilty to the offence under investigation. Therefore, their innocence should be presumed even if they have been convicted in the past.

When opting for a precautionary measure, the judge should determine whether each of the available measures is appropriate regarding the nature and the seriousness of the danger to be faced in the particular case (Article 275(1) CPP). Pre-trial detention should thus be appropriate and may in no case be disproportional to the seriousness of the offence and the likely sentence to be imposed (Article 275(2) CPP). Consequently, the judge cannot impose pre-trial detention if it is likely that the defendant could be granted a suspended sentence (Article 275 (2bis) CPP).

Because of its severity, the law prescribes that pre-trial detention should remain a last resort, i.e. a measure which may be ordered only when other lighter measures prove inadequate (Article 275 (3) CPP). Furthermore, the rights of a suspect or defendant should however be respected, even if the person is held in pre-trial detention. To this end, Article 277 of the CPP prescribes that the modality of execution of pre-trial detention should safeguard the rights of prisoners, unless these rights are incompatible with the grounds for detention. The following section deals with the procedural rights of a pre-trial detainee. The human rights aspects of pre-trial detention in Italy will be dealt with in chapter VII.

3.5 Procedural rights of the suspect or defendant

A suspect or defendant who is held in pre-trial detention is, as every defendant, entitled to the following procedural rights:

a. the right to be informed promptly and in a way that is understandable of the charges and the existing evidence against him (Article 65(1) CPP). The sources of evidence may also be revealed, as long as this does not endanger the criminal investigation (Article 65(1) CPP). In addition, it should be noted that a person who has been put in pre-trial detention must also be informed of the reasons for being deprived of his liberty. This obligation arises out of the

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[21] C.M. Bradley (ed.), *Criminal procedure. A worldwide study,* Durham: Carolina Academic Press, 2007, pp. 311-312.

[22] Subparagraphs (1)(c) and (1)(d) of Article 303 set out the deadlines for pre-trial detention pending an appeal to an intermediate appellate court and the Court of Cassation (Corte di Cassazione).

[23] See Article 274 CPP.

formal requisites that the court order decreeing pre-trial detention must contain the reasons and the grounds for applying the measures (Article 292(2)(c-bis) CPP), and that this order should be served to the person concerned (Article 293(2) CPP).

b. the right to remain silent (Article 64(3)(b) CPP): the accused cannot be obliged to answer the questions posed to him, unless the question relates to his identification;
c. the right not to incriminate himself or to confess guilt (Article 198(2) CPP);
d. the right to legal assistance from a lawyer of his own choosing or, if he has not chosen one, to be assigned a counsel (Article 104 and 293 CPP).[24] Note that the right to legal assistance is not affected by the title of the restriction of liberty; whether is 'arresto', 'fermo' or pre-trial detention. The lawyer must be immediately informed of the taken measures. A person placed in pre-trial detention has the right to confer with his lawyer from the beginning of his detention (104(1) CPP). The judge may however, upon request of the public prosecutor, invoke "exceptional and specific reasons of circumspection" to delay exercise of this right for up to five days (Article 104(3) CPP). Furthermore, the lawyer can attend the interview that the judge for the preliminary investigations is obliged to carry out during pre-trial detention (Article 294 CPP). He can also attend the proceeding for preservation of evidence (Article 393 CPP et seq).
e. the right to free assistance of an interpreter if he is does not know the Italian language (Article 143(1) CPP). The Court should also appoint an interpreter when it is necessary to translate a written document into a foreign language or dialect, or when a person who does not know Italian wants to or is obliged to make a statement (Article 143(1) CPP). In addition, it should be noted that "any Italian citizen belonging to a recognised linguistic minority may request interrogation or examination in his language, and that written proceedings should be translated for him (Article 109(2) CPP)".[25]
f. Right to judicial review. A suspect or defendant has the right to contest a court decision to pre-trial detention. Therefore, the following legal remedies are available: review (Article 309 CPP), appeal (Article 310 CPP) and appeal in cassation (Article 311 CPP). These remedies are further discussed in chapter V.

4. Grounds for pre-trial detention

This chapter analyses the prerequisites for pre-trial detention. For instance, pre-trial detention cannot be decreed if there is no specific risk of danger to be avoided. There must be thus a ground for pre-trial detention. Next to the existence of a ground, pre-trial detention requires that the suspect or defendant is charged with an offence of a certain degree of seriousness and that there is serious circumstantial evidence of guilt against him/her.

4.1 Grounds for detention

The grounds for detention are listed in Article 274 of the CPP. According to this Article, pre-trial detention is justifiable only in the following circumstances:

a. The process of investigation may be disrupted (Article 274(1)(a) CPP).
   Pre-trial detention may be decreed if, regarding the facts and circumstances of the case, there is a present and concrete risk of destruction or tampering of evidence. The mere fact that the defendant or suspect refuses to make a statement or to admit guilt does, however, not constitute such a risk.
b. Flight risk (Article 274(1)(b) CPP).
   A suspect or defendant may be placed in pre-trial detention when he/she has fled after committing an offence, or when there is a concrete danger that he/she will do so. Note that mere flight risk will not be sufficient for pre-trial detention, except in those situations in which the judge believes that the demanded sentence will be heavier than two years imprisonment.
c. Danger of re-offending (Article 274(1)(c) CPP).

[24] In case the conditions are met, the pre-trial detainee is also entitled to legal aid.

[25] M. Delmas-Marty & J.R. Spencer, *European criminal procedures*, Cambridge: Cambridge University Press 2002, pp. 297.

Pre-trial detention may be decreed when there is a concrete risk that the suspect or defendant will commit a serious offence using a weapon, another type of violent crime, a crime against the public order, or a crime similar to that under investigation. If it is feared that the suspect or defendant will commit a crime similar to that under investigation, pre-trial detention may only be decreed when both the crime under investigation and the one feared are punishable with a prison sentence equal or higher than the statutory maximum of four years. In order to determine whether there is risk of re-offending, the judge should consider the particular circumstances of the case, as well as the personality of the suspect.

4.2 Other prerequisites

4.2.1 Serious offence

As mentioned above, not all type of offences may justify pre-trial detention of the suspect or defendant. In fact, he/she should be charged with an offence of a certain serious degree. The limitation of pre-trial detention to a certain type of serious offences can be seen as a safeguard to the principle of proportionality.[26] In particular, pre-trial detention may only be decreed if the committed offence is punishable with life imprisonment (Article 280(1) CPP) or with prison sentence equal or higher than a statutory maximum of four years (Article 280(2) CPP). An exceptional situation is that in which the suspect or defendant has transgressed the provisions inherent to a non-custodial precautionary measure. Article 280(2) of the CPP is not applicable in such cases, meaning that pre-trial detention may be decreed if the committed offence is punishable with prison sentence higher than a statutory maximum of three years (Article 280 (1) and (3) CPP).

In addition, it should be noted that when calculating the amount of the statutory penalty for the offence (in order to meet the 3 or 4 years limit provided for in Article 280(1) and (2)), the increase due to recidivism and other aggravating circumstances should not be considered (Article 278 CPP).

4.2.2 Serious indications of guilt (gravi indizi di colpevolezza)

A suspect or defendant may be placed in pre-trial detention only when there is serious indication of guilt (Article 273(1) CPP). The indication of guilt required for pre-trial detention should at least establish probability of guilt.[27] However, it should not constitute the same degree of certainty required for determination of guilt at trial. In order to determine whether the existing evidence is serious enough to decree pre-trial detention, the judge should consider the (incriminating) evidence that has been presented. Article 273(1bis) of the CPP imposes some restrictions on the pieces of evidence that may be considered by the judge.

As a consequence, the judge evaluating a request for pre-trial detention may not always consider the hearsay evidence that has been presented. For instance, he "cannot consider the testimony of an individual who refuses or is unable to provide the person or source from whom or which the individual obtained the information (Article 195(7) CPP)."[28] However, in case of law enforcement officials, a judge cannot force the law enforcement official to reveal the name of an informant (Article 203(1) CPP). Consequently, the information provided by the informant cannot be admitted nor used by the judge, unless the informant himself is examined as a witness (Article 203(1) CPP).[29] Article 203(1bis) of the CPP explicitly states that this prohibition is also applicable in other phases then the trial, for instance, if the informant has not been interrogated or has not been provided summary information (sommarie informazioni). Moreover, when evaluating a request for pre-trial detention, the judge can neither consider the statement of a co-defendant to the same offence, unless the statement is corroborated by other evidence to confirm its reliability (Article 192(3) and (4) CPP).

Finally, Article 271(1) of the CPP restricts the possibility to consider evidence obtained as result of interceptions of conversations. In particular, a judge can "not consider the results of interceptions of conversations, if these have not been obtained in accordance with law".[30]

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[26] See chapter I, paragraph 4.

[27] See Cass. Sez. V, Battaglia, April 18, 2002 and Cass. Sez. VI, Salpietro, March 5, 2003.

[28] See, C.M. Bradley (ed.), *Criminal procedure. A worldwide study,* Durham: Carolina Academic Press, 2007, pp. 310-311.

[29] See, C.M. Bradley (ed.), *Criminal procedure. A worldwide study,* Durham: Carolina Academic Press, 2007, pp. 311.

[30] See, C.M. Bradley (ed.), *Criminal procedure. A worldwide study,* Durham: Carolina Academic Press, 2007, pp. 311.

5. Judicial review of pre-trial detention

This chapter deals with the possibilities for judicial review of a court order to pre-trial detention. First of all, it should be noted that under the current legal system, the court has no obligation to review a decision to pre-trial detention after a certain period of time. However, both the defendant (or his lawyer) and the public prosecutor are entitled to legal remedies against a court order to pre-trial detention. The legal remedies available to parties are: review, appeal and appeal in cassation.

5.1 Review (Article 309 CPP)

The defendant, his lawyer or the public prosecutor may submit a request to the so called Court of Freedom (Tribunale della libertà) for review of the initial decision to pre-trial detention, even on the merits of the case (Article 309(1) and (7) CPP). A request for review is not possible if the court order is issued on appeal of the public prosecutor (Article 309(1) CPP). A request for review should be filed within ten days of the notification or execution of the decision (Article 309(1) CPP) and may be grounded on any reason. Once a request is presented, the Court has ten days-counting from the moment that the acts have been sent to it-for taking a decision, otherwise the court order for detention expires (Article 309(100 CPP).

5.2 Appeal (Article 310 CPP)

An appeal against the initial decision to pre-trial detention may be lodged by the public prosecutor, the defendant or his lawyer (Article 310(1) CPP). The legal remedy of appeal is also available against a court order to extend pre-trial detention, once the order is issued during the course of the preliminary investigations (Article 305(2) CPP).

Appeal should be lodged within ten days of the notification or execution of the decision (Article 310(2) CPP) and may be grounded on any reason. However, the grounds for appeal should be mentioned explicitly (Article 310(1) CPP). The competent authority to hear the appeal is the Court of Freedom (Articles 309(7) and 310(2) CPP). A decision on appeal should be taken within 20 days after the appeal has been lodged. Exceeding this term will, however, not lead to expiration of the court order to pre-trial detention. Note that appeal is not possible if a request for review has already been filed (Article 310(1) CPP).

5.3 Appeal in cassation (Article 311 CPP)

Appeal in cassation can be filed against the orders issued by the Court of Freedom after review or appeal (Article 311(1) CPP). The legal remedy of appeal in cassation is available to the defendant, his lawyer, and the public prosecutor who has requested pre-trial detention (Article 311(1) CPP). Furthermore, a defendant or his lawyer may directly lodge an appeal in cassation against a court order to pre-trial detention, whenever appeal is in the interest of the law (Article 311 (2) CPP). Note that a request for review is no longer admissible if such an appeal is lodged by the defendant or his lawyer. The legal remedy of appeal in cassation is also available against a court order to extend pre-trial detention, once the order is issued during the course of the proceedings on merits (Article 305 (1) CPP).

An appeal in cassation should be submitted to the Court of Cassation (Corte di Cassazione) within ten days of the notification of the decision. As usually, the Court of Cassation only has jurisdiction when cassation is grounded on questions of law. These grounds should however be mentioned explicitly. Once an appeal in cassation is lodged, the Court of Cassation has 30 days to take a decision (Article 311 (5) CPP).

6. Length of pre-trial detention

6.1 Legal provisions

A suspect or defendant may only be subjected to a restricted period of pre-trial detention. These periods are stipulated in Article 303 of the CPP. First of all, it should be noted that the maximum

periods of pre-trial detention vary according to the phase of the criminal proceedings. In essence, the law divides the entire criminal proceedings into four different phases. The first phase includes the preliminary investigation and, where this is provided for, the preliminary hearing. The second phase consists of the proceedings in first instance and the third phase of the proceedings on appeal. The last phase includes the proceedings before the Court of Cassation. The maximum periods of pre-trial detention during each of these phases are determined in Article 303(1) of the CPP.

The maximum periods of pre-trial detention also vary according to the fixed sentence for the offence under investigation. In case of pre-trial detention during the course of the preliminary investigations, the period of detention cannot exceed the maximum of three months if the offence under investigation is punishable with a prison sentence not higher than the statutory maximum of six years (Article 303(1) (a)(1) CPP). However, if the offence under investigation is punishable with a prison sentence higher than the statutory maximum of six years, though not higher than the statutory maximum of 20 years, pre-trial detention may last for the maximum period of six months (Article 303(1)(a)(2) CPP). Finally, pre-trial detention may last for the maximum period of one year, if the offence under investigation is punishable with life imprisonment or prison sentence equal or higher than the statutory maximum of 20 years (Article 303(1)(a)(3) CPP). Pre-trial detention for the period of one year is also allowed if the offence under investigation is listed in Article 407 (2)(a) of the CPP and the prison sentence to be imposed is higher than the statutory maximum of six years (Article 303(1)(a)(3) CPP).

The maximum periods of pre-trial detention during the preliminary investigation are relatively short compared to the maximum periods of detention during the proceedings in first instance. Pre-trial detention during the proceedings in first instance may last for the maximum period of six months, if the offence under investigation is punishable with a prison sentence not higher than the statutory maximum of six years (Article 303(1)(b)(1) CPP), one year, if the prison sentence fixed for the offence under investigation is higher than the statutory maximum of six years, though not higher the statutory maximum of 20 years (Article 303(1)(b)(2), and one year and six months, if the offence under investigation is punishable with life imprisonment or a prison sentence higher than the statutory maximum of 20 years (Article 303(1)(b)(3) CPP).

The maximum periods of pre-trial detention during the proceedings on appeal are even longer than the maximum periods permissible during the former phases of the proceedings. For instance, pre-trial detention during the proceedings on appeal may last for a maximum period of nine months if the defendant has been sentenced to three years imprisonment or less (Article 303(1)(c)(1) CPP). However, if the defendant is sentenced to ten years imprisonment or less, pre-trial detention may last for the maximum period of one year (Article 303(1)(c)(2). Furthermore, pre-trial detention may last for the term of one year and six months, if the defendant has been sentenced to life imprisonment or to a prison sentence higher than 10 years (Article 303(1)(c)(3). The maximum periods of pre-trial detention during the proceedings before the Court of Cassation are the same as the terms stipulated for pre-trial detention during the proceedings on appeal (Article 303(1)(d) CPP).

Article 306(1) of the CPP prescribes that a suspect or defendant should be released once the maximum period of pre-trial detention has been reached. In order to calculate whether the maximum period of pre-trial has been reached, the judge should start counting from the moment the suspect was apprehended, arrested or 'fermato' (Article 297(1) CPP). To conclude, the time spent in police custody is also counted as time spent in pre-trial detention.

Note that the maximum periods of pre-trial detention stipulated in Article 303(1) may however be extended. Therefore, a distinction should be drawn between the possibility to extend pre-trial detention during the proceedings on merits (Article 305(1) CPP) and the possibility to extend pre-trial detention during the preliminary investigation (Article 305(2) CPP). Pre-trial detention may be extended during each stage of the proceedings on merits, upon request of the public prosecutor and by court order, when an expert's opinion on the mental condition of the detainee has been admitted, In such cases, pre-trial detention may only be extended with the time period assigned for the completion of the report (Article 305(1) CPP). Prolongation of pre-trial detention during the preliminary investigation is only possible if the term of detention is about to expire, though further detention is, regarding the particular complexity of the case and the serious precautionary needs, indispensable (Article 305(2) CPP).

The total length of pre-trial detention, including all phases and extensions, can however not exceed the time-limits stipulated in Article 303(4) of the CPP. If the offence under investigation is

punishable with a prison sentence not higher than the statutory maximum of six years, the total length of detention cannot exceed the time-limit of two years (Article 303(4)(a) CPP). However, the time-limit assigned for the total length of pre-trial detention is four years when the offence under investigation is punishable with prison sentence higher than the statutory maximum of six years, though not higher than the statutory maximum of 20 years (Article 303(4)(b) CPP). Finally, pre-trial detention cannot exceed the time-limit of six years if the offence under investigation is punishable with life imprisonment or prison sentence higher than the statutory maximum of 20 years (Article 303(4)(c) CPP).

7. Other relevant aspects

7.1 Relations between pre-trial detention and the outcome of the trial

7.1.1 Deduction on sentence

As regards the possibilities in Italy to deduct the time spent in pre-trial detention from the sentence to be served, it should be mentioned that according to Article 657(1) of the CPP, the public prosecutor, when determining the custodial sentence to be executed, shall take into account the time spent in pre-trial detention for the offence concerned or a different offence, even if pre-trial detention is still in course. The fourth paragraph of Article 657 of the CPP prescribes that the pre-trial detention suffered after the commission of the offence, for which the sentence must be determined, should, in any case, be taken into account. Furthermore, paragraph 3 of this provision provides for the possibility for the sentenced prisoner to request the public prosecutor to consider the time spent in pre-trial detention, when determining the fine or the substitute sanction to be executed.[31]

Article 285(3) of the CPP regulates the possibility of deducting pre-trial detention suffered abroad. In essence, this Article prescribes that when determining the sentence to be executed, the pre-trial detention suffered shall be taken into account according to Article 657 of the CPP, even if pre-trial detention was suffered abroad as a consequence of the request of extradition or, in case of a new trial, according to Article 11 of the Penal Code.

7.1.2 Compensation for unjust pre-trial detention

Articles 314 of the CPP provides for the possibility of compensation for the unjust period spent in pre-trial detention. In essence, a person acquitted by a conclusive decision is entitled to compensation when he/she is found not-guilty to the offence, or when the deed does not constitute a criminal offence, or is not classified as a criminal offence by law (Article 314(1) CPP). A right to compensation is also granted to a person acquitted for whichever cause and to a sentenced person who has been held in pre-trial detention, when it is decided by conclusive judgement that the court order to pre-trial detention was issued or upheld without meeting the prerequisites of Articles 273 and 280 of the CPP (Article 314(2) CPP). Paragraphs 1 and 2 of Article 314 are also applicable once the judge has dropped the case, or has ruled that there are no grounds for further prosecution (Article 314(3) CPP).

A request for compensation should, on pain of inadmissibility, be submitted within two years of the conclusive judgement (Article 315(1) CPP). According to Article 315(2) of the CPP, compensation cannot exceed the amount of 516,456 euros.

7.1.3 Alternatives to pre-trial detention

The CPP provides for a series of non-custodial coercive measures which may be imposed by the judge. The non-custodial coercive measures are pre-trial measures restricting the personal liberty other than being remanded in custody. Therefore, they may be used as an alternative to pre-trial detention. In particular, the following measures can be mentioned: prohibition to travel outside the country (Article 281 CPP), the obligation to report to a specific police office on specific days and at certain times (Article 282 CPP), the prohibition to access or stay at a specific place, or the

[31] Note that deduction is also possible in case of suspended sentence. However, if the sentence has not to be served because of the deduction, there is no reason to suspend it. On the other hand, suspension can only be granted once to a convicted person. As a consequence, the defence lawyer will most of the time request the public prosecutor (or the judge) not to suspend the sentence imposed.

obligation to remain within the boundaries of a specific town (Article 283 CPP), and house arrest (Article 284 CPP). In case of domestic violence, the judge may also issue a restraining order (Article 282-bis CPP). A restraining order entails an obligation for the defendant to stay away from the family home and is meant to protect the victims of domestic violence.

7.2 Execution of pre-trial detention; human rights aspects

7.2.1 Human rights provisions in national legislation

When executing pre-trial detention, there are some human rights aspects that should be taken into account. Pre-trial detention should not degenerate into an inhuman and degrading treatment of the accused. Therefore, the Italian Prison Act (Law no. 354 of July, 26 1975) grants some specific rights to those who are held in a prison institution, for instance, the right to comforts and possession (e.g. clothes and other supplies), the right to be visited by relatives, the right to correspond and to communicate with the outside world, the right not to be subjected to extraordinary security measures, and the right to file a complaint. Further information about the particular rights of prisoners can be found in the above-mentioned act.

7.3 CPT-findings on the conditions of (pre-trial) detention in Italy

The last visit paid to the detention places in Italy by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) took place in 2008. The report on this visit has however not been published yet. Previous visits to Italy were made in 2006, 2004, 2000, 1996, 1995 and 1992. This section deals with the CPT findings on the treatment of prisoners held in pre-trial detention during the visit in 2004. In addition, it should be mentioned that the CPT has focused its visit in 2006 on the conditions of detention in centres for the initial reception and the temporary holding and assistance of foreign nationals.[32] Detention centres for criminal offenders were however not visited. For this reason, the CPT findings during the visit in 2006 will not be discussed.

In 2004, the CPT has visited several establishments for the preventive detention of criminal offenders. Two of the visited establishments were remand prisons and four were establishments of law enforcement agencies (two police stations and two police headquarters). As regards the establishments of law enforcement agencies, the CPT could observe that in practice, the great majority of criminal suspects did not spend more than a few hours in custody (24 hours at most) but were speedily transferred to prison. Occasionally, persons were being held for more than 24 hours, in particular, when they had been apprehended at a weekend. [33] Moreover, almost no allegations were made of ill-treatment by law enforcement officials. Nevertheless, the CPT-delegation has received a number of allegations of physical ill-treatment and/or excessive use of force by officers of the State police and the 'Carabinieri' during the period of apprehension and, in some cases, to the subsequent questioning. Medical evidence sustaining these allegations was found in only few cases.[34]

The material conditions of detention in the majority of the visited establishments of law enforcement agencies were**,** to a large extent, satisfactory. However, some material conditions were still lacking. For instance, mattresses were hardly provided to persons held overnight. Moreover, the heating in some of the establishments was clearly insufficient in the detention area. Some cells were also dirty and not fitted with a call system. In one of the centres, the cleanliness and hygiene of the cells left much to be desired.[35]

The CPT has also paid attention to the safeguards against ill-treatment in these establishments. First of all, it has investigated whether the rights of detained persons are being safeguarded. In

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[32] *Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 16 au 23 juin 2006 , Strasbourg 2007.*

[33] Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 21 novembre au 3 décembre 2004, Strasbourg 2006, pp. 13.

[34] Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 21 novembre au 3 décembre 2004, Strasbourg 2006, pp. 14.

[35] Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 21 novembre au 3 décembre 2004, Strasbourg 2006, pp. 16.

particular, three rights of detained persons were emphasised, namely: the right to notify a close relative or another third party of the custody, the right to have access to a lawyer, and the right to have access to a doctor. In addition, it should be noted that the CPT has repeatedly stressed that these rights should apply from the very outset of deprivation of liberty, i.e. from the moment when the person is obliged to remain with a law enforcement agency. [36] Therefore, it is essential that persons detained by law enforcement agencies are informed without delay of their rights. During its visits, the CPT has noticed that the information provided to detained persons was unsatisfactory. In only one law enforcement establishment, detainees were provided with forms containing some relevant information on their rights. However, the distributed form was only available in Italian and did, moreover, not contain information on the right to notify a close relative or third person and the right to access to a doctor.[37]

As regards the right to notify a close relative or a third party, the CPT could observe that in practice, this right becomes effective only when a detained person was formally arrested (arrestato or fermato). The right to notify a close relative or a third party was thus not granted to criminal suspects from the very outset of deprivation of liberty. This was also the case for the right of access to a lawyer. Although the vast majority of detained persons were effectively able to access lawyer (of their own choice or appointed ex officio) during their custody, and to benefit from the presence of a lawyer during their interrogation, the right of access to a lawyer was granted only from the moment they were formally arrested (arrestato or fermato). Consequently, such persons were on occasion subjected to an "informal" questioning, prior to the formal arrest, without benefiting from the presence of a lawyer.[38]

Moreover, the CPT has expressed its concern about the possibility for competent judicial authorities to delay a detained person's access to a lawyer for up to five days (Article 104(3) and (4) CPP). Although the CPT acknowledges that in exceptional circumstances it may be necessary to delay access to a particular lawyer for a certain period, it also points out that the right to talk to a lawyer in private and to have a lawyer present during interrogations cannot be totally denied during this period. In such cases, access to another trustable and independent lawyer should be granted to the detained person.[39]

Furthermore, the CPT expressed its concern about the lack of a specific legal provision governing the right of access to a doctor. The right of access to a doctor for persons in custody is still not expressly provided for by law, and persons detained in establishments of law enforcement agencies are still not allowed to have access to a doctor of their own choice.[40] Moreover, the CPT could observe that, although it has repeatedly stressed the importance of inspections by judicial authorities for preventing ill-treatment of detainees, the visited establishments had actually not been inspected in recent times.[41]

Next to the detention facilities of law enforcement agencies, the CPT has also visited two remand prisons. First of all, the CPT has noted that both remand prisons were overcrowded.[42] The problem of overcrowding has had negative consequences for the material conditions in these

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[36] Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 21 novembre au 3 décembre 2004, Strasbourg 2006, pp. 17.

[37] Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 21 novembre au 3 décembre 2004, Strasbourg 2006, pp. 19.

[38] Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 21 novembre au 3 décembre 2004, Strasbourg 2006, pp. 17-18.

[39] Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 21 novembre au 3 décembre 2004, Strasbourg 2006, pp. 18.

[40] Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 21 novembre au 3 décembre 2004, Strasbourg 2006, pp. 18.

[41] Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 21 novembre au 3 décembre 2004, Strasbourg 2006, pp. 19.

[42] Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 21 novembre au 3 décembre 2004, Strasbourg 2006, pp. 36.

prisons. For instance, at both of the remand prisons, only a small proportion of prisoners were offered work or educational/vocational activities. For the vast majority of inmates, out-of-cell activities were limited to outdoor exercise and access to an association room.[43] The situation was further exacerbated by the lack of specialist staff, such as educators and social workers.[44] The lack of prisoners' staff in both establishments had reached such a level that the staff in post were not able to carry out, in an appropriate manner, the treatment objective (trattamento penitenziario) assigned to them. It also had a detrimental impact on security of both staff and prisoners.[45] However, no allegations were made of recent physical ill-treatment of prisoners by staff. Nonetheless, the frequent and serious inter-prisoner violence (involving mostly inmates of different nationalities) was very concerning.[46]

Moreover, the CPT could observe a lack of medical staff in both establishments. Although the presence of medical doctors was satisfactory, the nursing staff in both establishments was clearly insufficient to meet the needs of the prison population. Also the psychiatric and psychological services were under-resourced. Moreover, many complaints were received about long waiting periods for appointments with specialist doctors. The consultation of the specialist doctors' attendance books has also learned that a number of prisoners had not been seen by external specialists for prolonged periods after they had submitted a request for an appointment.[47] The lack of medical staff is, to a large extent, attributable to the severe cuts made in the prison health care budget. These cuts did not only affect the health-care staffing levels, but have also had serious repercussions on the supply of medicines. During its visit, the CPT-delegation was informed that in one of the remand prisons, medication which was usually prescribed to patients in the outside community was no longer available to ill prisoners.[48]

8. Vulnerable groups and groups of special interest (special regulations, practice)

8.1 Juveniles and old persons

Article 275(4) of the CPP prescribes that persons over the age of 70 cannot be put in pre-trial detention. By contrast, the law provides for pre-trial detention of juveniles who are being prosecuted. As juveniles are considered young persons who have reached the age of 14, though are younger than 18 years (Article 98 Penal Code). Persons under the age of 14 are not criminally prosecutable under the current law (Article 97 Penal Code). Those who have already reached the age of 18 may be prosecuted as adults, unless the offence has been committed before they completed 18 years (Article 98 Penal Code).

The provisions on pre-trial detention set out in the CPP are however not applicable to juveniles. In Italy, there is a special legislation for the criminal prosecution of juveniles, namely the Decree of the President of the Republic of 22 September 1988, no. 448 (DPR no. 448/1988). The possibility for pre-trial detention of juveniles is regulated in Article 23 of this Decree. In essence, pre-trial detention of juveniles is permissible when the offence under investigation is an intentional criminal act to which the law attaches a penalty of life imprisonment or of prison sentence higher

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[43] Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 21 novembre au 3 décembre 2004, Strasbourg 2006, pp. 46.

[44] Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 21 novembre au 3 décembre 2004, Strasbourg 2006, pp. 46.

[45] Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 21 novembre au 3 décembre 2004, Strasbourg 2006, pp. 53.

[46] Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 21 novembre au 3 décembre 2004, Strasbourg 2006, pp. 37.

[47] Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 21 novembre au 3 décembre 2004, Strasbourg 2006, pp. 48-49.

[48] Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 21 novembre au 3 décembre 2004, Strasbourg 2006, pp. 50-11.

than nine years (Article 23(1)). Moreover, pre-trial detention is also permissible if the offence under investigation is an attempted of completed rape, or an attempted or completed offence listed in Article 380 paragraph 2, under e, f, g, h of the CPP (Article 23 (1)).

The maximum periods of detention of juveniles are much shorter compared to adults. In essence, Article 23(3) of the DPR no. 448/1988 prescribes that in case of pre-trial detention of persons under the age of 18, the maximum periods of detention determined in Article 303 of the CPP shall be halved. However, if the juvenile is under the age of 16, the maximum terms of detention which may be imposed are two-third of the terms determined in Article 303 of the CPP.

Article 23(2) sets out the grounds for pre-trial detention. A juvenile may be put in pre-trial detention when there is a danger of serious disruption of the investigation process due to a present and concrete risk of destruction or tampering of evidence (Article 23 (2)(a)), or when there is a concrete risk that the juvenile will flee, or he/she has already fled after committing the offence (Article 23 (2)(b)), or when regarding the particular circumstances of the case and the personality of the juvenile, there is a concrete risk that the juvenile will commit a serious offence using a weapon, another type of violent crime, a crime against the public order, an organised crime, or a crime similar to that under investigation (Article 23 (2)(c)).

When determining whether to impose pre-trial detention, the judge should take into account both the safeguarding requirements of Article 275 of the CPP and the requirement not to interrupt a child's education (Article 19(2) DPR no. 448/1988).[49] Note that there are a series of non-custodial pre-trial measures which may be imposed on juveniles as an alternative to pre-trial detention, namely: court instruction orders (Article 20 DPR no. 448/1988), home restriction order (Article 21 DPR no. 448/1988), and community placement (Article 22 DPR no. 448/1988). These measures may be imposed when the juvenile is charged with an offence punishable with life imprisonment or prison sentence higher than the statutory maximum of five years (Article 19 (4) DPR no. 448/1988).

Under a court instruction order, the court may impose specific instructions on a minor in relation to study, work activities and/or other activities useful for his education, in order not to interrupt an on-going study or schooling programme. In case of serious and repeated violations of the instructions, the court may issue a home restriction order. A home restriction order is an order to remain in the family home or in another private dwelling place. However, the judge may issue a separate order permitting the minor to attend some other places apart from the home, for reasons of study, work or educational activities. Note that the court may also impose limits and prohibitions on the minor with respect to communications with persons other than those living in his home or providing assistance. If the obligations imposed on the minor are seriously and repeatedly violated, the judge may impose a community placement order.

Once a minor has been subjected to community placement, he/she will be entrusted to the care of a public or authorised community. At the same time, the judge may also impose specific instructions relating to study or work activities, or other activities useful for the minor's education. These instructions are meant to avoid the interruption of an on-going study or schooling programme. Should there be serious and repeated violations of the court's instructions or should the minor be absent from the community without justification, the court may remand the minor in pre-trial custody. In such cases, pre-trial detention cannot exceed the maximum of one month if the offence under investigation is punishable with imprisonment of at least five years (Article 22(4) DPR no. 448/1988).

8.2 Women

Currently, there are no special regulations on the pre-trial detention of women. The CPP contains only one specific provision which applies to pre-trial detention of pregnant women and single mothers. In essence, Article 275(4) of the CPP prescribes that pre-trial detention cannot be imposed on pregnant women and single mothers of children under the age of three, except when the grounds for detention are exceptionally serious. Single fathers of children under the age of three can neither be put in pre-trial detention if the mother of the child is deceased or is completely unable to take care of the child.

[49] Note that Article 275 (3)(2) of the CPP is not applicable (Article 19 (2) DPR no. 448/1988).

8.3 Foreigners
The CPP does not provide for special provisions regarding the pre-trial detention of foreigners. Moreover, according to the Italian Prison Act (Law no. 354 of July, 26 1975), there are no differences between Italian and foreign prisoners, neither concerning their stay in prison, nor in the serving of sentences in general and in the possibilities of re-insertion.[50]

8.4 Alleged terrorists
The CPP does not provide for special provisions regarding the pre-trial detention of terrorists. Once remanded to pre-trial detention, terrorists could however be subjected to the emergency measure provided for by Article 41-bis of the Prison Act (PA).[51] This Article allows for the following restrictions:

- limitation of out-of-cell activities to a total of four hours per day (two hours of outdoor exercise in small groups and two hours of indoor group activities, in a room inside the Unit specially equipped for cultural, leisure and sports activities). During these activities, prisoners are only allowed to associate in groups of up to five persons;
- limitation of visits by family members and/or companions to one or two visits per month and only under closed conditions. In practice it is, however, possible for prisoners to see their own children for ten minutes under open conditions, if the child is younger than the age of twelve;[52]
- restriction of the access to telephone in such a way that the access is granted once a month and for a maximum of ten minutes, provided that no visits are received during that month. However, access to telephone is only allowed after an initial waiting period of six months. Furthermore, telephone conversations are subjected to strict security conditions (e.g. the obligation of the other party to phone from a law enforcement establishment or prison, systematic recording of the conversations except those with the lawyer, etc.);
- application of strict regulations concerning transfers, supplementary food supplies, parcels, etc;
- prohibition to use tape recorders and CD players. The prohibition of the latter items are, however, not explicitly included in the Prison Act;[53]
- censored incoming and outgoing correspondence, exempt correspondence with members of Parliament and with European or national authorities having competence in the field of justice.

8.5 Seriously ill persons
According to Article 275(4bis) of the CPP, persons who are suffering from AIDS or from another particularly serious illness can not be put in pre-trial detention if their state of health is incompatible with the conditions of detention or if the treatment required for their disease cannot be provided in prison. As an alternative, these persons may be subjected to house-arrest or to detention in a health centre or in another facility for medical care (Article 275(4ter) CPP).

9. Summary

The legal basis for 'custodia cautelare', the Italian terminology for pre-trial detention (in broad sense), can be found in Article 13 of the Italian Constitution. The afore-mentioned Article primarily guarantees the personal liberty of individuals. Although Article 13 of the Italian

[50] A.M. van Kalmthout, F.B.A.M. Hofstee-van der Meulen, & F. Dünkel, (eds), *Foreigners in European Prisons*, Nijmegen: Wolf Legal Publishers, 2007, pp. 482.
[51] See Law no. 354 of July, 26 1975.
[52] Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 21 novembre au 3 décembre 2004, Strasbourg 2006, pp. 41.
[53] Rapport au Gouvernement de l'Italie relatif à la visite effectuée en Italie par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 21 novembre au 3 décembre 2004, Strasbourg 2006, pp. 41.

Constitution explicitly states that the right to "personal liberty is inviolable",[54] it also makes clear that this right is not un-limitable. Therefore, it prescribes that "no one may be detained, […] nor otherwise restricted in personal liberty, except by order of the judiciary stating a reason and only in such cases and in such manner as provided by law"[55].

The CPP lays the foundation for restricting personal liberty by decreeing pre-trial detention of a person. In particular, it regulates the grounds for pre-trial detention, the length of pre-trial detention, the (procedural) rights of the accused, the authorities competent to decree pre-trial detention, and the possibilities for (judicial) review of the decision to pre-trial detention.[56] Although the CPP provides for the conditions for 'custodia cautelare', it does not define this term explicitly. Some indications of the exact meaning of 'custodia cautelare' can nonetheless be found in Article 285(1) of the CPP, which states that "when decreeing a court order to pre-trial detention, the judge issues an order to the competent authorities or police officials to apprehend the accused and to immediately put this person in a remand prison or at disposal of a judicial authority."

The prerequisites for pre-trial detention can be found in Art. 273, 274 and 280 of the CPP. In essence, it can be stated that not all type of offences may justify pre-trial detention of the suspect or defendant. According to the CPP, pre-trial detention may only be decreed if the committed offence is punishable with life imprisonment (Article 280(1) CPP) or with prison sentence equal or higher than a statutory maximum of four years (Article 280(2) CPP). An exceptional situation is that in which the suspect or defendant has transgressed the provisions inherent to a non-custodial precautionary measure. Article 280(2) of the CPP is not applicable in such cases, meaning that pre-trial detention may be decreed if the committed offence is punishable with prison sentence higher than a statutory maximum of three years (Article 280 (1) and (3) CPP). Moreover, a suspect or defendant may be placed in pre-trial detention only when there is a serious indication of guilt (Article 273(1) CPP). The indication of guilt required for pre-trial detention should at least establish probability of guilt. Finally, pre-trial detention can only be applied if at least one of the following grounds is present:

- when, regarding the facts and circumstances of the case, there is a present and concrete risk of destruction or tampering of evidence (Article 274(1)(a) CPP);
- when the suspect has fled after committing an offence, or when there is a concrete danger that he/she will do so. Note that mere flight risk will not be sufficient for pre-trial detention, except in those situations in which the judge believes that the demanded sentence will be heavier than two years imprisonment (Article 274(1)(b) CPP);
- when there is a concrete risk that the suspect or defendant will commit a serious offence using a weapon, another type of violent crime, a crime against the public order, or a crime similar to that under investigation. If it is feared that the suspect or defendant will commit a crime similar to that under investigation, pre-trial detention may only be decreed when both the crime under investigation and the one feared are punishable with a prison sentence equal or higher than the statutory maximum of four years. In order to determine whether there is risk of re-offending, the judge should consider the particular circumstances of the case, as well as the personality of the suspect (Article 274(1)(c) CPP).

The maximum time limits for pre-trial detention are determined in Art. 303 of the CPP. When applying the measure of pre-trial detention, there are some essential legal principles which must be taken into account by the judge. These are for instance: the presumption of innocence (Art. 27(2) of Italian Constitution), the principle of adequacy (Article 275(1) CPP), the principle of proportionality (Article 275(2) CPP), the principle of last resort (Article 275 (3) CPP), and the principles of safeguarding basic (human) rights (Article 277 CPP).

If pre-trial detention proves to be unlawful or unjustifiable, the person who has suffered pre-trial detention has the right to claim compensation. The possibilities for compensation are regulated in Art. 314 and 315 of the CPP. Note that there also some possibilities to deduct the time

[54] See Article 13 (1) of the Italian Constitution, *Costituzione della Repubblica Italiana*. An English translation of the Constitution can be found on http://www.servat.unibe.ch/law/icl/it00000_.html

[55] See Article 13 (2) of the Italian Constitution.

[56] Articles 285-286bis CPP regulate the types of pre-trial detention. See also Articles 272-279 CPP for general provisions applicable to all types of *misure cauterlari personali*, and Articles 280-283 CPP for specific provisions applicable to all types of *misure cautelari personali coercitive.* Information about the length of pre-trial detention, the execution of pre-trial detention, and the possibilities for judicial review of pre-trial detention can be found in the Articles 291-331 of the CPP.

spent in pre-trial detention from the sentence to be served. To this end, Article 657(1) of the CPP prescribes that the public prosecutor, when determining the custodial sentence to be executed, shall take into account the time spent in pre-trial detention for the offence concerned or a different offence, even if pre-trial detention is still in course. The fourth paragraph of Article 657 of the CPP prescribes that the pre-trial detention suffered after the commission of the offence, for which the sentence must be determined, should, in any case, be taken into account. Furthermore, paragraph 3 of this provision provides for the possibility for the sentenced prisoner to request the public prosecutor to consider the time spent in pre-trial detention, when determining the fine or the substitute sanction to be executed. [57] Article 285(3) of the CPP regulates the possibility of deducting pre-trial detention suffered abroad. In essence, this Article prescribes that when determining the sentence to be executed, the pre-trial detention suffered shall be taken into account according to Article 657 of the CPP, even if pre-trial detention was suffered abroad as a consequence of the request of extradition or, in case of new trial, according to Article 11 of the Penal Code.

With respect to special groups such as juveniles, women, foreigners and alleged terrorists, it should be mentioned that there are no specific regulations for (the execution of) pre-trial detention of foreigners. A few special provisions can be found in both the CPP and Italian Prison Act (Law no. 354 of July, 26 1975) concerning pre-trial detention of women and terrorists. As regards juveniles, there is a special legislation for the criminal prosecution of juveniles, namely the Decree of the President of the Republic of 22 September 1988, no. 448 (DPR no. 448/1988). The possibility for pre-trial detention of juveniles is regulated in Article 23 of this Decree.

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[57] Note that deduction is also possible in case of suspended sentence. However, if the sentence has not to be served because of the deduction, there is no reason to suspend it. On the other hand, suspension can only be granted once to a convicted person. As a consequence, the defence lawyer will most of the time request the public prosecutor (or the judge) for not suspending the sentence imposed.

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