

Chapter 1

1 Introduction

«Freedom is like air: you only realise how valuable it is when it starts running out»¹. Pietro Calamandrei, eminent Italian jurist and patriot, could not have found better words to express the value liberty has in a free society.

This evocative image of air growing thin fits also perfectly in the sensation experienced by an innocent person suddenly deprived of his or her liberty. It is the power of this metaphor that prompted the writing of this work. The core business of criminal law and criminal procedure is regulating the way the State can perform its most sensitive function: restricting personal liberties. Among the various modalities in which the State can do so, there is one particularly more delicate: pretrial detention. It is more delicate because it happens before the trial, in a situation in which everyone is still presumed innocent.

For this reason, criminal procedural codes and regulations describe meticulously the methods in which this deprivation of liberties can be carried out. Nonetheless, it may still happen that all the safeguards are not enough to prevent someone from being deprived of his or her liberty undeservedly. The fact that errors have an inherent inevitability and are often nobody's fault, does not mean that their redress should not be focused on. Instead, the impression is that, due to the latter justification, insufficient attention is paid to the topic of unjust detention and its compensation.

The present research moves from these premises. Its aim is giving a complete overview of the phenomenon of unjust detention. It does so while adopting a comparative perspective, deemed suitable for the purpose of fostering a contrast-based understanding experience. Prior to that, the essay does not hesitate to provide an in-depth theoretical discussion, accompanied by a necessary clarification on the problem of legal translation. Then, it proceeds with a brief passage on pretrial detention, since a look at the big picture is beneficial.

The essence of the comparative activity starts with providing the legal framework governing the issue in a considerable number of legal systems around Europe. The Italian legal system is used as a starting point and comes up repeatedly, because it is the system for which the most data is available. In this part, it has been purposely foreseen to reproduce the "law and economics" perspective, as if it was an additional legal system.

The actual comparison is carried out intentionally emphasising specific aspects of the compensation mechanisms for unjust detention, for which it appears more logical.

Undoubtedly, the work could not cover every aspect of unjust detention and its compensation: a precise selection was made to shed light on the most intellectually stimulating legal aspects.

¹ Indire, Piero Calamandrei - Discorso sulla Costituzione, 26 gennaio 1955, <https://formazione.indire.it/paths/piero-calamandrei-discorso-sulla-costituzione-26-gennaio-1955>, [30.04.2026].

1.1 Research question

Framing the research question at stake is by no means an easy task. Regardless of the mere definitional issues related to labels – that will be dealt with in the next sections – contextualising the topic is of utmost importance, as it will be shortly clear.

The research in question focuses on a comparative overview of the definitions and mechanisms in place in various jurisdictions to deal with the problem of persons suffering – for whichever reason – a pretrial detention measure that later turns out to be – again for various reasons – unjust. These situations for the sake of the research will be broadly defined as “unjust detentions”.

This first framework is obviously not sufficient to properly define the content of the analysis. A primarily problematic aspect comes at first sight and goes back to the most classical dichotomy between legal theory and philosophy. It concerns the concept of unjustness related to pretrial detention, and whether, for instance, it encompasses the concept of unlawfulness. It is significant – but at the same time self-evident – to clarify that the idea of unjustness goes beyond unlawfulness, since something could be perfectly lawful and still unjust – which was, and currently is – the underlying rationale of the need for the Equity system in the Common Law.

This gets more manifest in the case of pretrial detention, which is in some cases an indispensable tool in the context of the investigative phase of criminal proceedings. But even when the strict legal criteria provided basically in every legal system for such a restriction of the most fundamental right – personal freedom – are respected, the outcome may still be unjust: an innocent person suffering incarceration for a certain period.

This is the core of the research question which needs to be refined. In fact, even on the concept of innocence there is plenty of room for argument. Is it by the simple fact that a person is not convicted at the end of the proceedings that he/she is deemed innocent? According to the fundamental principle of the presumption of innocence, enshrined in every constitution and international treaty, the answer would be affirmative. But is this sufficient to declare that the pretrial detention suffered by the same individual is unjust? States have historically been more cautious on this, but it will be seen that a general trend can be traced that goes in a more permissive direction.

From the legal and practical perspective, the research begins from art. 314 of the Italian *Codice di Procedura Penale*, which defines the so-called “*ingiusta detenzione*” to later contrast it with legal regimes addressing the same issue, those theoretically discussed above, with the same or different tools. The comparative approach adopted is useful not only in the logic of “understanding by contrast”, but also in underlining common criticalities – which will be separately examined in depth – and pointing out at legal systems that have gone further in granting protection – and compensation – to individuals who have unjustly suffered a detention measure.

In this sense, a broader look at the international and regional legal framework and case law is certainly useful. In general, the fact that there is a common tendency of states to afford more integral protection to this situation is something that it will be attempted to demonstrate throughout the research. In

this sense, it seems reasonable to start illustrating how the matter is regulated in many systems. This task is not that straightforward, since not always states have decided to entrust their codes with this goal, leaving it to very scattered special legislation.

Only after that it makes sense to go through an actual comparison of the most comprehensive and protective approaches towards the most delicate aspects. A major obstacle towards this objective is posed by the absence of an institutionalised mechanism comparable to that designed by art. 314 cpp in the Anglo-American tradition. This does not impede to analyse the topic from the Common law point of view but rather entails additional considerations of particular interest.

Moreover, the concept of unjust detention is inextricably related to its compensation, even further: the concept of unjust detention is itself defined by the requirements for its compensation. Is the detention unjust and so needs compensation or vice versa? This side of the problem imposes an assessment which considers why it is not only just, but also appropriate and even convenient to compensate for unjust detention. The latter point involves a more empirical evaluation which transcends law and brings numbers to the discussion. Numbers that will be helpful to understand the overall proportion of the phenomenon and of its frequency in each system.

1.2 Academic relevance of the debate on unjust detention

It is worth noting the reason why it is increasingly relevant discussing unjust detention today. While there is a growing interest towards the topic of wrongful convictions and, more broadly, judicial errors, generally, less attention is paid to individuals being detained and later acquitted still within the ordinary judicial proceedings at later stages.

This is presumably because mistakes are physiological within a machinery which deals with such delicate matters. And so, mistakes are seen as something impossible to completely eradicate, which entails that research is confined to design antibodies to prevent them². This is even more remarked in the context of unjust detention, where there is a natural imbalance towards the accusatorial hypothesis. This is coherent with a pretrial phase in which the defence, depending on the system, has little or no role at all. It follows that the fact that an unfounded accusation is consolidated at this early stage is conceivable in the logic of the procedure.

What has a far less degree of “excusability”, and urges quite more attention, is the fact of unjustly depriving a person of his personal freedom. Within the framework of *Habeas corpus*, that of personal liberty and security has historically been a sensible matter. It has been so at least since the enactment of the *Magna Charta* in 1215, especially concerning short time police – or generically administrative – detention. The point is that unjust pretrial – or remand – detention, although different in scope, purpose and nature, should be regarded as equally afflictive – or even more, considering that it can last for a longer period – since it relates to the same substance: an innocent person in jail.

² Luparia Donati, Luca: Un “viaggio al termine della giustizia”. Alla ricerca di anticorpi per la condanna dell’innocente, in Luparia Donati, Luca (ed.): “L’errore giudiziario” Milan 2021, XXIII-XXX at XXIII.

Moreover, leaving aside for a moment the fundamental issue of the inviolable rights of the accused persons, the rate of unjustly pretrial detained persons is a noticeable indicator of the overall efficacy and fairness of a criminal justice system in its entirety. More precisely, as Gian Domenico Caiazza – Enzo Tortora’s lawyer in the most famous judicial error in Italian history – rightly points out, looking at unjust detentions is the most effective thermometer to measure the health status of a criminal justice system³.

Similarly, the lack of an extensive comparative and international debate on unjust detention could be explained by a fact that complicates the picture. Namely, the lack of a full-fledged mechanism of recognition and reparation of unjust detention on remand in the Anglo-American tradition. As already made clear, there is not such a thing as the legal regime provided, among others, by articles 314-315 of the Italian Code of Criminal Procedure in the United Kingdom or in the United States. The reasons for that could be manifold and will be analysed in-depth in section 3.2.7. What is useful to grasp here is that such an absence makes, a fortiori, more academically relevant to debate the topic.

Evidently, the typical dichotomy between common law and civil law could not be so helpful in this case. Nevertheless, the most pressing issue which accounts for a more comprehensive debate on unjust detention cuts across the two categories.

With the expanding boundaries of crime and criminalization, together with a rise in the adherence to the doctrine of incapacitation⁴, the recourse and the boundaries of pretrial detention have expanded. Consequently, the risk of abuse and unfavourable outcomes increase too. In the same way, this is true for common law systems: it is clear looking at the Bail Act of 1976, which regulated right to liberty before trial in England. That right is taken as a default rule, but the provision has been progressively amended adding multiple exceptions to the right to bail⁵. Thus, a counterbalance is needed to equilibrate the systems to better guarantee the final aim of a criminal justice system: that of punishing the guilty, while also protecting the innocent.

³ Caiazza, Gian Domenico: Prefazione, in: Lattanzi, Benedetto/Maimone, Valentino (eds.): *Innocenti. Il libro bianco dell'ingiusta detenzione in Italia*, Torino 2025, XI-XIV at XI.

⁴ See generally Malsch, Marijke/Duker, Marius: *Incapacitation. Trends and new perspectives*, Amsterdam 2012.

⁵ Lattanzi, Benedetto/Maimone, Valentino: *L'erba del vicino* in Lattanzi, Benedetto/Maimone, Valentino (eds.): *Innocenti. Il libro bianco dell'ingiusta detenzione in Italia*, Torino 2025, 73-84 at 75.

Chapter 2

2 Comparative definition of unjust detention

Finding a univocal and unequivocal definition of the chosen expression “unjust detention” is anything but simple. The use of this term rather than another one must consider the paramount elephant in the room of comparative law: the problem of legal translation. With this aim in mind, it is appropriate to clearly define once again the object of the research and its boundaries. Only at a second stage will be explained how the label “unjust detention” was selected and, therefore, deemed comprehensive of the whole intended meaning.

As previously illustrated, the goal of the research is analysing the way in which innocent persons held in pretrial detention are safeguarded and, eventually, compensated across various jurisdictions. This goes further than the mere assessment of unlawfulness, so a detention imposed without the necessary legal basis or with insufficient grounds or generically against the law. It refers to a pretrial detention which later turned out to be unfair contrasted with a final judgement of acquittal or – more broadly – in absence of a judgement of conviction. Following a logical approach, labelling this kind of situations as “unjust detention” seems then to encompass the whole concept. This presents an opportunity to discuss the distinction between “formal” or “substantial unjustness”, as posed by Armando Macrillò⁶, which is instrumental for the sake of the comparative analysis of the definitions as well.

“Formal unjustness” is *in re ipsa*. It relates to the fact that a given custodial measure is illegitimate because it does not respect the prerequisites foreseen by the law for its imposition. This is so regardless of the outcome of the proceedings, since it implies an evaluation on the merits of the judicial measure. For instance, in Italian criminal procedure, this entails a lack of respect for the criteria to impose a coercive measure, as enshrined in art. 273, delineating the threshold in terms of degree of suspicion, and art. 280 cpp, defining its material scope. Similar provisions with equivalent content are found, for example, in Germany in Section 112 of the *Strafprozessordnung*⁷ and in the Netherlands, in Section 67 of the Dutch Code of Criminal Procedure⁸. Their breach would theoretically conform to a “formal unjustness”, with variable consequences depending on the system. To these situations, a bare minimum level of protection and redress is granted roughly everywhere, even in the common law countries, via some actions targeted directly towards the public officials who circumvented the law. As will be expanded in section 3.1, international covenants start from there to grant protection.

On the other hand, “Substantial unjustness” is evaluated *ex post*. It does not deal with the merits of the custodial measure imposed nor with its technical

⁶ Macrillò, Armando: La riparazione per ingiusta detenzione, in: L'errore giudiziario, 751-810 at 756.

⁷ Federal Ministry of Justice and Consumer Protection & Federal Office of Justice, German Code of Criminal Procedure, *Strafprozessordnung* (StPO), https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html, [12.03.2026].

⁸ United Nations Office on Drugs and Crime, Dutch Code of Criminal Procedure, https://www.unodc.org/cld/uploads/res/document/nld/1921/criminal_procedure_code_of_the_netherlands_html/Code_of_Criminal_Procedure_incorporating_amendments_up_to_October_2012.pdf, [12.03.2026].

correctness. The mere existence of a subsequent sentence which declares the accused person not guilty – and this could be potentially limited to encompass just certain formulas of acquittal – renders the detention unjust. The label “unjust detention”, as employed here, aims to include both the circumstances of formal and substantial unjustness, without just stopping at the first one, and including also the latter. It is so in Italy, among others, where art. 314 cpp encompasses in its first comma the cases of “substantial unjustness”, while in its second comma those of “formal unjustness”, and both could be grounds for reparation.

But it is only following a comparative literal approach that the choice made appears to be the most rational. “Unjust detention” is the literal translation of the Italian locution *ingiusta detenzione* as described in art. 314-5 cpp, which has been used as a starting point for the discussion. The expression “unjust detention” fits properly with the literal translation of *détentions provisoires à tort*, as used in the annual report on the statistics of the French judicial system issued in 2024 by the French Ministry of Justice⁹. The only difference is that the French label additionally specifies the type of detention – provisional detention. The same holds true for the Spanish legal system, where the same concept can be addressed with the expression *prisión preventiva injusta*¹⁰, although at times the term *indebida* is used instead of *injusta*, as clarified by Spanish Constitutional Court¹¹.

Substantially more arduous is finding a satisfactory label in the Anglo-American tradition, due to the above-mentioned critical issue of the absence of an institutionalised mechanism of recognition and compensation of unjust detention, as understood here. At any rate, given the universal relevance of the matter, common law scholars have, nonetheless, dedicated a substantial body of academic literature to the problem of innocent persons in pretrial custody – most of all, in case of bail ineligibility – and their compensation.

Scholars have not agreed on a uniform way to call it and the same holds true for European ones who engaged in a comparative assessment. As is often the case in legal translation and comparative law, it must be noted that using a unique label, here “unjust detention”, does not imply referring to the very same legal mechanism. In this sense, a complete picture of the various nuances in each legal system will be provided in section 3.2.

In reinforcing the case of using “unjust detention” as an overarching definition, comes one of the most comprehensive volumes on the topic of

⁹ Ministère de la Justice: Les chiffres clés de la Justice 2024, <https://www.justice.gouv.fr/documentation/etudes-et-statistiques/chiffres-cles-justice-2024>, [07.03.2026].

¹⁰ Domínguez Ruiz, Lidia: Indemnización por prisión preventiva injusta: Evolución del artículo 294.1 de la LOPJ a la luz de la jurisprudencia nacional y europea, in *Justicia* (2020^{2nd}), 309-341 at 309, [https://repositorio.ual.es/bitstream/handle/10835/14773/Indemnizaciónporprisiónpreventiva injusta.Evolución del artículo 294.1 de la LOPJ a la luz de la jurisprudencia nacional y europea.pdf?sequence=3&isAllowed=y](https://repositorio.ual.es/bitstream/handle/10835/14773/Indemnizaciónporprisiónpreventiva%20injusta.Evolución%20del%20artículo%20294.1%20de%20la%20LOPJ%20a%20la%20luz%20de%20la%20jurisprudencia%20nacional%20y%20europea.pdf?sequence=3&isAllowed=y), [08.03.2026].

¹¹ See Tribunal Constitucional. (2019, June 19). Sentencia 85/2019. «lo que determina que estos supuestos de prisión no seguida de condena sean supuestos de prisión legal, que en ocasiones se han denominado de “prisión preventiva indebida” o “injusta”, pero que se apartan en todo caso del concepto general de error judicial» Available at <https://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/25972>.

wrongful convictions¹² – the difference from which will be addressed in the next section – in a comparative perspective. In analysing the mechanism of compensation across multiple European jurisdictions, the text refers to «unjust detention on remand»¹³ to designate the cases of damages granted to persons unjustly incarcerated before trial.

To maintain a more coherent adherence to the Italian model of art. 314 cpp, here the specification “on remand” will not be added and simply “unjust detention” is preferred, which can potentially lead to a confusion between pretrial detention and short-term police detention. In the substance, this has little impact. Upon reflection, the definition of unjust detention exists only as inferred from the instances in which it is compensated. Thus, it will be shown how in some countries even 24 hours of custody – but even 10 minutes¹⁴ – can be enough to grant compensation. On the other hand, it is also true – as will be clearer in section 5 – that among the various reasons for compensation, that for pretrial detention, as Italian data reveals¹⁵, is by far the most recurring – not necessarily because it is more easily awarded.

2.1 The difference between unjust detention and wrongful conviction

As pointed out in section 1.2, academic literature, but also literature in general, is usually concerned more on the problem of wrongful convictions, that is to say, miscarriages of justice in its proper and stricter sense.

As noted, that is so in the mass culture as well, in Italy as much as in the rest of the world. In popular literature, timeless masterpieces like *Storia della colonna infame*, by Alessandro Manzoni, or *Der Prozess*, by Franz Kafka, have shaped the collective imagination on the matter. Less attention is paid to the topic of unjust detention, not just because it is less susceptible to mythologisation, but also since it is less rare and more understandable in the logic of the criminal proceedings. Nonetheless, if seen from the perspective of the victim, the gist is fundamentally the same: an innocent person suffering the hardness of imprisonment and the stigma associated with it.

Not by chance, when it comes to their compensation, wrongful convictions and unjust detentions are treated in the same manner, although usually wrongful convictions are treated as more serious when it comes to monetary appreciation. As a matter of fact, art. 315(3) cpp in Italy envisages the application of the more detailed provisions on wrongful convictions (arts. 643-647 cpp) to unjust detentions as well, as far as they are compatible. *Inter alia*, some legal systems provide the same module to be filled in to request compensation for the days spent in prison, although the ground is an unjust detention or a wrongful

¹² See generally Jasiński, Wojciech/Kremens, Karolina (eds.): “Compensation for wrongful convictions”. A comparative perspective, Routledge, Oxon 2023.

¹³ Czerwińska, Dorota/Kowalczyk, Artur: Compensation for wrongful conviction in Poland, in: Compensation for wrongful convictions, 137-160 at 151, <https://archive.org/details/oopen-20.500.12657-62228/mode/1up>, [08.03.2026].

¹⁴ Maimone/Lattanzi: L'erba del vicino, at 79.

¹⁵ Ministero della Giustizia, Dipartimento per gli Affari di Giustizia, Direzione Generale degli Affari Interni, Misure cautelari personali e riparazione per ingiusta detenzione: Dati anno 2024, gennaio 2025, https://www.giustizia.it/cmsresources/cms/documents/misure_cautelari_personali_2024_aggiornamento_gennaio2025.pdf, [08.03.2026].

conviction. This occurs, for instance, in Spain where the person requesting the compensation must tick a box specifying whether he or she suffered *error judicial* or *prisión preventiva* among the options in the section *modalidades de responsabilidad patrimonial a cargo del estado*¹⁶ (forms of state liability for compensation).

Unjust detention and wrongful conviction are even more interconnected from a theoretical perspective, if considered that the root origin of the wrongful conviction could be traced back to preliminary investigation¹⁷. In a certain sense, an unjust detention could be conceived as the seed of a potential wrongful conviction that was corrected during the trial and not recurring to revision mechanisms. It is no coincidence that the two phenomena could be caused by the same cognitive biases, such as the confirmation bias¹⁸ or the tunnel vision¹⁹ of the accusers – and possibly of the defence – but also, *ex multis*, the overuse and misuse of interception mechanisms.

Nonetheless, for the sake of the analysis, reparation for unjust detention and wrongful conviction must be taken separately and distinguished following the model designed by the Italian Code of Criminal Procedure, respectively in arts. 314-315 for unjust detention and in arts. 643-647 for wrongful conviction.

Doctrinally speaking, taking as a reference the two separate regimes for their definition and right to compensation, what is called “*errore giudiziario*” – and in US would be referred to as “exoneration” – occurs in Italy when a final judgement of conviction, in theory irrevocable, is overturned through extraordinary remedies and a process of revision²⁰. This revision procedure is by no means easy to obtain, since, as outlined by art. 630 cpp, it can only be accessed in light of (1) another final sentence with a content irreconcilable with that of the sentence of which revision is requested – this often brings the claimant of the revision and his lawyer to privately investigate to find another guilty person, (2) the emergence of new elements of proof different from those evaluated in the ordinary trial – defining what is new in concrete and whether it is relevant is another complex task – that indicates the potential innocence of the convicted person, (3) the concurrence of criminal offences which had consequences on the sentence of conviction contested. No such an onerous burden of proof is

¹⁶ Ministerio de la presidencia, justicia y relaciones con las cortes, Solicitud de indemnización por responsabilidad patrimonial de la administración de la justicia, https://www.mjusticia.gob.es/es/Ciudadano/TramitesGestiones/Documents/1292428016883-Solicitud_de_Indemnizacion_por_Responsabilidad_Patrimonial.PDF, [09.03.2026].

¹⁷ Tondi, Veronica: *Errore giudiziario e indagini preliminari* in: *L'errore giudiziario*, 325-368 at 325.

¹⁸ See generally Ask, Karl/Granhag, Pär Anders: Motivational sources of confirmation bias in criminal investigations: the need for cognitive closure, in *Journal of investigative psychology and offender profiling* 2 (2005), 43-63, <https://doi.org/10.1002/jip.19>, [09.03.2026].

¹⁹ See generally Elaad, Eitan: Tunnel vision and confirmation bias among police investigators and laypeople in hypothetical criminal contexts, in: *SAGE Open* 12(2) (2022), <https://doi.org/10.1177/21582440221095022>, [09.03.2026].

²⁰ Bisogni, Marco: Errori giudiziari e ingiuste detenzioni: Cosa dice davvero la “comparazione internazionale”, in Bisogni, Marco/Monaco Crea, Daniela/Cassaniti, Sebastiano (eds.): *Referendum sulla riforma costituzionale della magistratura. Numeri, fatti e comparazioni per decidere in modo consapevole*, Rome 2026, 35-37 at 35, <https://www.dirittogiustiziaecostituzione.it/referendum-sulla-riforma-costituzionale-della-magistratura-numeri-fatti-e-comparazioni-per-decidere-in-modo-consapevole-di-marco-bisogni-daniela-monaco-crea-sebastiano-cassaniti/>, [12.03.2026].