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BAIL OR NOT BAIL: THE PROBLEM OF THE DEFENDANT AND OF HIS RIGHTS

SUMMARY: 1. Personal freedom: principle or exception? – 2. Preliminary ruling between the parties and the statement of reasons. – 3. The legitimacy of Constitutional Jurisprudence. – 4. ECHR's Jurisprudence and Court of Cassation. – 5. Bail in Italian civil law: a new defensive guarantee? – 6. The American case. – 7. Conclusion.

1. *Personal freedom: principle or exception?*

The issue of the restriction of personal freedoms is the most debated in Italian criminal and procedural doctrine[1] . The articles involved are many: art. 5 of the ECHR (*European Court of Human Rights*) and art. 9 of the I*nternational Covenant of Civil and Political Rights*. However, article 13 of the Italian Constitution (Cost.) provides two exceptions to the inviolability of personal freedom established by paragraph 1. More precisely, paragraph 2 introduces a judicial reservation excluding the restriction of personal freedom unless by reasoned act of the judicial authority in the only cases and methods provided by law. On the other hand paragraph 3, provides another exception for cases of urgency and necessity, strictly indicated by law[2]. In fact the public security authority can take provisional measures that must be communicated within 48 hours to the judicial authority and, if this does not validate them in the next 48 hours, are intended to be revoked and they remain without any effect[3]. This

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[1] See P. BARILE, *Diritti dell'uomo e libertà fondamentali*, Bologna, 1984, p. 41 ss.; F. MODUGNO, *I nuovi diritti nella giurisprudenza costituzionale,* Torino, 1995, p. 10 ss.; G.A. DE FRANCESCO, *Diritto penale, I, I fondamenti,* Torino, 2011, p. 101 ss.; D. PULITANÒ, *Appunti su democrazia penale, scienza giuridica, poteri del giudice, in Riserva di legge e democrazia penale,* a cura di G. Insolera, Bologna, 2005, p. 57 ss; S. BARTOLE, B. CONFORTI, G. RAIMONDI, *Commentario alla Convenzione europea per la tutela dei diritti dell'uomo e delle libertà fondamentali,* Padova, 2001, p. 290 ss.; L. FERRAJOLI, *Costituzionalismo principialista e costituzionalismo garantista*, in *Giurisprudenza costituzionale*, 2010, 55, p. 2771 ss.; M. KUMM, *Constitutional rights as principles: On the structure and domain of constitutional justice,* in *International Journal of Constitutional Law*, 2004, 2, pp. 576-578; G. FIANDACA, E. MUSCO, *Diritto penale. Parte generale*, 2008, pp. 51-54; P.M. CORSO, V. GREVI, *La nuova disciplina della libertà personale nel processo penale*, Padova 1985, p. 65 ss.; M. CHIAVARIO *Problemi attuali della libertà personale tra emergenze e quotidiano della giustizia penale*, Milano 1985, p. 24 ss.; AA.VV. *Le fragili garanzie della libertà personale*, Milano 2014, p. 32 ss.; A. DE CARO, *Libertà personale e sistema processuale penale*, Napoli, 2000, p. 45 ss.

[2] See M. DANIELE, *Habeas corpus: manipolazioni di una garanzia*, Torino, 2017, p. 35 ss.

[3] *Ibidem*, p. 55 ss.

provision is linked to the adoption of the *misure pre-cautelari*[4] which are very different from the pre-trial measures (*misure cautelari)*. It emerges from the analysis of the reference to an important principle of criminal law, the reservation of law that is linked to the more general rule of law or principle of legality. Therefore, pre-trial measures are applied for the purposes of evidential investigation or early assessments of the defendant's guilt. They are principles that can be seen in the judgement n. 223/2004 of the Italian Constitutional Court (C. C.), which reiterates that such measures should be applied only for procedural purposes in a way to justify balancing interests worthy of protection, the temporary sacrifice of personal freedom in view of the intervention of the judicial authority.

The main guarantees deriving from art. 13 Cost. concern:

- the presumption of innocence of the defendant, who is not found guilty until final judgment (art. 27.2 Cost). This principle responds to two fundamental requirements: to affirm the presumption of innocence and to provide for pre-trial detention before the definitive judgement. In fact, the defendant is not assimilated to the guilty until the final conviction of the Judge. This entails the prohibition to anticipate the judgement, while allowing the application of pre-trial measures[5] ;

- the right to appeal to the Court of Cassation against all measures relating to personal liberty in accordance with art. 111.7 Cost. It therefore also includes protective orders. According to art. 111, paragraph 7 Cost. following the inclusion of the appeal to the pre-trial detention , would coexist two souls of the appeal in Cassation: one regarding the "*nomofilachia*"[6] function of the appeal; the other, the fundamental right protected by art. 13 Cost, therefore, to the profile of the appeal as a merely individual guarantee[7] . In fact, the structure of the constitutional provision is unitary, insofar as it refers to both hypotheses of measures, the principle of generality of the use of the instrument of control and the delimitation of the grounds for appeal to violations of law only. Rather, some perplexity deserves to be expressed with regard to those approaches for which the implicit presupposition of the provision on appeal in Cassation would be constituted by the functions of *nomofilachia* already recognized in the judicial system to the Court of Cassation[8]. The article 111 paragraph 7 Cost. , can give an answer to those who want to see in the Court of Cassation the Supreme Judge called to intervene exclusively, or however, predominantly, in the presence of juridical questions that take on importance, beyond the specific procedural event from which they emerged[9].

The article 13 Cost. is the starting point of the investigation[10]. The pre-trial measure's order is issued pursuant to art. 291.1 cpp (Italian criminal procedure code) by the Judge proceeding, (usually it is the Judge for preliminary Investigation, *Giudice per le indagini preliminari,* GIP), at the request of the Public Prosecutor (*Pubblico Ministero*,PM), but the particularity lies in the fact that the measure is issued de plano[11] (without debate between

[4] They are ordered before the Judge's discretion by the Public Prosecutor.

[5] O. MAZZA, *Presunzione d'innocenza e diritto di difesa*, in *Dir. pen. proc.*, 2014, p. 1404 ss.

[6] This function is commonly understood as the task of "ensuring the exact observance and uniform interpretation of the law, the unity of objective national law" that art. 65 of the law on the judicial system (Regio Decreto 30 January 1941 n. 12), attributes to the Court of Cassation

[7] F.M. IACOVIELLO, *La motivazione della sentenza penale e il suo controllo in Cassazione*, Milano, 1997, p**.** 114 ss.

[8] *Ibidem*, p. 125 ss.

[9] AA.VV. *Commentario alla Costituzione*,Torino 2006, p. 323 ss.

[10] See A. ALBIANI, S. MARINELLI, *Misure cautelari in materia di libertà personale e sequestro penale: casi, questioni, orientamenti giurisprudenziali,* Milano, 2007, p. 120 ss.

[11] Without the general scheme of adversarial system.

parties). However it is, , with the *interrogatorio di garanzia (* the interrogation by the Judge after the pre-trial measure's order; and not the *interrogatorio* of the Public prosecutor during the Preliminary investigation)[12], that the first form of adversarial system is manifested. In this case the judge may order the revocation or replacement of the pre-trial measure. The participation of the Public Prosecutor and the lawyer is necessary. The purpose of such interrogation is to ensure the validity of the measure issued *de plano*. The judgment of the ECHR *Torreggiani* denounces the abuse of pre-trial detention in prison[13] and the L. 47/2015 has introduced the strengthening of the reasoning of the pre-trial measure's order through an independent evaluation of the evidence of guilty and the precautionary needs in support of measure (article 292 cpp)[14] .

The crux of the matter lies in repeatedly seeking to identify the pre-trial measure's conditions: article 274 of the CPP (Italian criminal procedure) and the pre-trial measure's requirements such as the escape, the pollution of evidence, the commission of certain serious crimes. This leads to the illusion of eliminating the degree of discretion which distinguishes their assessment. The actual dangers must derive from specific and binding requirements, from specific modalities and circumstances, from behaviors or concrete actions. The real problem lies in the fact that a restriction of freedom imposed by the GIP isn't arbitrary, but on the basis of the reasons copied from the P.M., which are unambiguously identifiable and sufficiently on solid grounds. It isn't a problem of autonomous reasons (even if according to art. 292 c.p.p. are required under penalty of nullity of the pre-trial measure's order) but of those insufficient, contradictory and illogical. In fact the danger of committing serious crimes provided for by art. 274 lett. c) c.p.p., is induced by an abstract and hypothetical index of danger, as a procedural behavior of the suspect, the existence of other criminal proceedings in progress or conduct dating back to time[15] .

The lack of motivation is treated as a *vitium in procedendo*[16] despite it is an *error in iudicando*[17] to be corrected by repeated judgment when challenging the order. But there is a paradox here. If it is found that there isn't independent statement of reasons, the pre-trial measure's order must be annulled, if it presents the independent but weak statement of reasons, that is to say, a much worse defect, could be supplemented by the *Tribunale del Riesame* (Court of First Instance of the Review), since the appeal pursuant to art. 309 c.p.p. This can be seen from art. 309, paragraph 9, cpp as the *Court* can confirm the measure also for reasons other than those in the statement of reasons. The problem of the flaws of relative alternative pre-trial measures in the future may be aggravated through the assessment of the *pericula libertatis* entrusted to predictive computer algorithms[18].

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[12] Art. 64 cpp , Art. 375 cpp.

[13] The judgment ECHR 8 January 2013, *Torreggiani and others* v *Italy*, which not only condemned Italy for the inhuman and degrading treatment of prisoners in violation of art. 3 of the ECHR, but recommended the adoption of structural interventions that provide, in particular, the application of punitive measures not involving deprivation of liberty as an alternative to prison ones and the minimization of the use of pre-trial detention in prison.

[14] See D. CHINNICI, *Le misure cautelari nella strategia del «minimo sacrificio necessario»*, Roma 2015, p. 15 ss.

[15] Cass. pen, III, 1783/2017, Cass pen I, 5787/2015 principio di attualità è nella concretezza ed entrambe nella condizione necessaria per applicazione misure cautelari ai sensi 274 lett. c) c.p.p.

[16] See C. VALENTINI, *La prova decisiva*, Padova, 2004, p. 12 ss.

[17] *Ibidem*, p. 13 ss.

[18] S. QUATTROCOLO, *Artificial intelligence, Computational modelling and Criminal Proceedings. A Framework for A European Legal Discussion*, Cham, 2020, p. 13-34 .

These considerations lead us to believe that the constitutional nature of the pre-trial measure's issue involves five pillars:

- the principle of inviolability of personal freedom (art. 13, paragraph 1, Const.): like any other right of freedom, is a natural human right that the system simply recognizes, because there isn't the need to authorize it. It is substantiated on the right not to be subjected to impositions both by other subjects (see, art. 41 Cost.) and by the public authority (see the art. 77 Cost.), both in a physical and moral dimension. Personal freedom is also guaranteed by art. 6 of the ECHR, according to which «everyone has the right to liberty and security». It represents the most important fundamental right and consists essentially in the right of the individual not to be subjected to coercion, physical restrictions or arrest. It therefore translates first of all into protection against abuse by the Public and Judicial Authority and constitutes the indispensable condition for enjoying the autonomy and independence necessary for the exercise of the other fundamental rights[19];

- the rule of law or reservation of the law, which requires the typification of cases and modes, as well as times of limitation of that freedom (art. 25 Cost); the absolute reservation of the law, i.e. the exclusive competence of ordinary legislation to regulate the inviolability of personal freedom[20];

- the reservation of jurisdiction, which always requires a motivated act of the judge (art. 13, paragraphs 2 and 5, Cost.); since only the judicial authority can issue restrictive measures (habeas corpus) with the duty of motivation, which must necessarily accompany any measure restricting personal freedom. Proclaiming the inviolability of personal freedom, the limitation of this freedom by reasoned act of the judicial authority is therefore allowed only in the cases and in the ways according to law[21];

- the presumption of innocence (art. 27, paragraph 2, Const.), according to which the accused is not considered guilty until he is finally convicted. According to the Italian Constitutional Court (judgment no. 124/1972) this provision is to be interpreted in the sense that the accused is to be considered neither innocent nor guilty, but only "accused", "defendant". This rule is further specified in art. 6 of the ECHR, according to which «everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law». Based on this principle, the burden of proving the guilt of the defendant lies with the prosecution, while the defense has the task of proving the existence of facts favorable to the defendant[22];

- the principle of proportionality-appropriateness[23] according to which: «every measure must be proportionate to the extent of the fact and the sanction that has been or is believed to be imposed» (art. 275, paragraph 2, c.p.p.) without automatisms or presumptions.

The system of pre-trial measures is characterized by the need to implement the principles set out in art. 3 Cost., in art. 13 Cost and in art. 27 Cost., which converge towards the exclusion of any automatism in the assessment of pre-trial measure's requirements, both

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[19] M.L. FERRANTE, *Principio di libertà personale e sistema penale italiano*, Napoli, 2014, p. 23 ss.; C. PIERGALLINI, *I delitti contro la persona, libertà personale, sessuale e morale, domicilio e segreti,* Padova 2015, p.57 ss.

[20] F. PERCHINUNNO, *La libertà personale in trasformazione*, Bari, 2020; J. MARSHALL, *Human Rights Law and Personal identity*, Abingdon – New York, 2016, p. 43 ss.

[21] S. TALINI, *La privazione della libertà personale. Metamorfosi normative, apporti giurisprudenziali, applicazioni amministrative*, Napoli, 2018, p. 125 ss.

[22] L. ELIA, M CHIAVARIO, *La libertà personale*, Torino 1978, p. 63 ss.; A. ALVARES *Libertà personale e presunzioni cautelari in Italia: la tutela dell'imputato nel Belpaese*, Chisinau, 2014, p. 97 ss.

[23] See G. LEO, *Sulle presunzioni di adeguatezza esclusiva della custodia cautelare in carcere,* in *Diritto penale e processo*, 2011, p. 959 ss.

in terms of proportionality and adequacy. According to the logic of the minimum sacrifice necessary, the pre-trial measure's system is structured according to specific parameters on the needs configurable in individual cases.

Therefore, the principle of adequacy is reflected in a specific obligation to state reasons, sanctioned under penalty of nullity (art. 292, paragraph 2, lett. c, c.p.p.), and further specified with regard to the pre-trial measure (art. 292, paragraph 2, letter c-*bis*, c.p.p.). In point of absolute presumptions, it has also been proposed a constitutionally oriented interpretation of the presumption of exclusive adequacy of pre-trial detention in prison provided for the crime of external competition with mafia-type association. A possible solution is that the measure can be graduated (as the Constitutional Court has already stated for crimes aggravated by the mafia method or for crimes with the purpose of facilitating mafia-style association)[24].

The Constitutional Court underlines in judgment n. 265/2010 until n. 232/2013 that the judge of merit generally operates an individualization of the pre-trial measures in relation to the needs of the specific case[25]; this need is not always followed in practice, in so far as the measures are not accompanied by an appropriate statement of reasons, except where it is considered implicit in the description of the fact and its modalities[26]. The role of the Public Prosecutor in this system is essential, for the purpose of a correct approach of limitations to personal freedom. In this sense, the guarantee profiles deriving from the exercise of an effective function of guidance of the Public Prosecutor both with regard to the *Polizia Giudiziaria* (*Judicial Police*, PG) and with regard to the deputy attorneys (*Sostituti Procuratori*) have been enhanced, also with a view to establishing uniform practices inside the office of the Public Prosecutor, through: -directives of the Prosecutor to the PG in the matter of optional and mandatory arrest (*arresto in flagranza)*, in order to reach an assessment of the P.M. that orients the P.G. before the pre-trial measure, without arriving at the application of the articles 389 c.p.p. and 121 disp. att. c.p.p. (*Provisions implementing the Code of Criminal procedure)*;

- circulars on interpretations of new rules, such as those on combating gender-based violence, which provide a basis for establishing uniform practices between deputy attorneys; to base investigations on criteria of exhaustiveness and completeness, especially for physiological absence of the debate between parties, at this stage.

The circumstantial fact is resolved in a «proof of the state of the proceedings»[27] which is assessed by the judge when the formation of the evidential material is still under development and has not been submitted to the examination of the adversarial party. Ergo is the procedural moment of the evaluation (placed within the preliminary investigations, the preliminary hearing or the hearing in progress) to qualify the precautionary evidence and its intrinsic prognostic nature with respect to the determination of guilt, making it, of course,

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[24] See S. TALINI, *Il tentativo del funambolo. Le presunzioni di adeguatezza della custodia cautelare in carcere tra Corte costituzionale e giudici, commento a Corte cost., sent. n. 110 del 2012,* in *Giur. It.*, 2013, 523 ss.

[25] The system of absolute presumption of necessity of pre-trial detention in prison outlined by art. 275, paragraph 3, c.p.p. has been repeatedly declared unconstitutional (cfr. Corte cost., sent., 21.7.2010, n. 265; Corte cost., sent., 12.5.2011, n. 164; Corte cost., sent., 22.7.2011, n. 231; Corte cost., sent., 3.5.2012, n. 110; Corte cost., sent., 29.3.2013, n. 57). The interventions of the Constitutional Court have restored a system that provides a presumption (relative) adequacy of custody in prison, which can be overcome by evidence to the contrary

[26] Corte cost., 21 luglio 2010, n. 265, in *Cass. pen.*, 2011, p. 148 ss.

[27] Cass. pen VI, 13864/2017, Cass pen, IV, 22461/2015 "explicit sufficient references in whole or in part to the other procedural acts, to the criteria adopted by the judge of the precautionary principle of the judgement".

for this reason, exclude the ability to constitute a legitimate basis for a judgment[28] . The problem is the balance between the urgency of the pre-trial measure whose early treatment affects the progression of the investigation. The partial nature and state of the proceedings of the substantive judgment is aggravated by the principle of legality. Regarding this problem is added that of the lack of motivation of the judge of the merits, also in point of precautionary needs and that of the prognosis about the outcome of the judgment with the obvious consequences of the judgments of reparation for unfair detention[29] .

The burden of motivation as social and judicial control on the discretionary choices of the judge of caution must allow the control, in terms of legitimacy and merit, of the choices made in the awareness that the «substantive rightness» of a measure does not apply to its own legitimacy. And the verification must concern each of the many passages that the judge performs, more or less thoughtfully, to reach the adoption of a pre-trial measure. The reasoning is the real and effective instrument of guarantee, both in terms of social control of the work of the judge, both in terms of full implementation of the fair trial, guaranteeing the suspect the right to defend himself both at the stage of application of the measure, and in subsequent appeals against the order. The motivation, having to be linked to concrete and current precautionary needs and not to a judgment of anticipation of punishment, is also a tool to contain the phenomenon of prison overcrowding.

2. *Preliminary ruling between the parties and the statement of reasons*

When the adoption of the pre-trial measure requires a relationship between two parties (those who request it and those who must decide on the request), there is inevitably a need for a motivational development that responds to the request and gives account of the reasons for acceptance or rejection[30] . When an instrument of appeal is introduced as to the merits of the assessment of the protective measure, there is a need on the part of the body deciding to respond to the appeal must order under appeal, to evaluate, interpret and sometimes, where appropriate, supplement it.

The same applies to the judgment of the Court of Cassation which is inevitably affected by this development procedure already determined on the basis of the original request of the PM[31]. Moreover, the pre-trial judgment, in addition to the request for a measure, concerns the regime of the measure itself, its variations or modifications, the terms, etc., so it concerns all the orders that concern the pre-trial measure's issue (also subject to the Tribunale del Riesame's control). It follows that the motivation of the pre-trial measure is specifically reflected in the Constitution to art.13, paragraph 2, the value of which is also reinforced by the fact that all judicial measures for the Constitution (art.111, paragraph 6) must be motivated[32] .

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[28] Cass pen, VI, 29807/2017, Cass. pen, II, 9203/2016 the principle of the obligation of independent evaluation to be excluded in the case of rejection of caution then overturned on appeal to the Court of Freedom *Tribunale di libertà (Tribunale del Riesame)*

[29] Cass pen II, 18744/2016 actuality as continuity *periculum libertatis* based on recent facts and appropriate elements on the concrete risks that caution must neutralize

[30] See M. CHIAVARIO, *Commento al nuovo codice di procedura penale,* vol. III, Padova, 1990, p. 75 ss.

[31] F.M. IACOVIELLO, *La Cassazione penale: fatto, diritto e motivazione*, Milano 2013, p. 589 ss.

[32] See M. DOGLIANI, *I diritti fondamentali,* in a cura di M. Fioravanti*, Il valore della Costituzione,* Bari, 2009, 53 ss.

In the Code of Criminal Procedure this attention is manifested with the general norm of art.125 cpp (the orders must be motivated under the penalty of nullity) and more specifically:

- Article 292, paragraph 2, lett. c) c.p.p., which establishes the entire argumentative logical course that the judge must set out in the order, taking into account any elements provided by the defence and the reasons for which the custodial prison measure was to be applied[33] ;

- paragraph 2-ter c.p.p., which states that, under penalty of nullity, the order's lack of motivation as regards the assessment of the elements against and in favor of the accused person. The obvious result has been a real sub-procedure within the process with its own rules, which has led to the formation of a sectoral case law on measures that assume more and more characteristics of specificity, detail, articulation, similar to a measure defining the procedural stage[34].

Of course, the system also sets limits. The pre-trial judgment is governed by the principle of the application of the P.M., for which the judge cannot go *ultra petita*[35]. The P.M. holds the power of selectively adduction of the acts in support of the request (the Prosecutor does not have a discovery obligation) and as a result there is the absence of an additional power on the part of the Judge to make up for cognitive deficiencies in the evidence compendium submitted to his attention. This also makes it perfectly distinguishable the subject of the precautionary procedure with respect to the trial, whose request gives to the judge all the evidence acquired by the P.M., except the integration activity, allowing him to activate all his powers of supplementary investigation: art. 422, art. 441, art. 507 c.p.p., etc[36].

The judgement of the Constitutional Court, n.121/ 2009 declared the constitutional illegitimacy of art.405 paragraph 1-*bis* c.p.p., and stressed with broad arguments the difference between the pre-trial judgment and the trial judgment (defining this second impermeable to the first). However, there is no doubt, that all this may limit the motivational development of the pre-trial measure[37].

If one looks at the assessment of the appropriate factual indices to determine the issue of the protective measure, it should be noted that their demonstrative effectiveness - as regards the verification of the fact and its concrete attribution to the accused - must be such as to reasonably assume, in the current state of knowledge, a high probability of conviction, so, the formula of the serious evidence of culpability stops[38]. The effectiveness of the adversarial procedure takes place with the fixing of the interrogation of the guarantee pursuant to art. 294 c.p.p. after a few hours from the execution of the order, but does not reach its entirety, as it is only a formality dictated by the code of rite that does not provide a

[33] See P. TONINI, *La carcerazione cautelare per gravi delitti: dalle logiche dell'allarme sociale alla gestione in chiave probatoria, in Le fragili garanzie della libertà personale. Per una effettiva tutela dei principi costituzionali,* Milano, 2014, 65 ss.

[34] See G. CANZIO, *La tutela della vittima nel sistema delle garanzie processuali: le misure cautelari e la testimonianza "vulnerabile"*, in *Dir. pen. proc.*, 2010, 987 ss.

[35] See M. GIALUZ, *Gli automatismi cautelari tra legalità costituzionale e garanzie convenzionali*, in *Proc. pen. giust.*, 6/2013 , 110 ss.

[36] See V. GREVI, *Le garanzie di libertà personale dell'imputato nel progetto preliminare: il sistema delle misure cautelari,* in Giustizia penale, 1988, p. 489 ss

[37] See E. MARZADURI , *Misure cautelari personali (principi generali e disciplina)*, in *Dig. Pen.*, vol. VIII, 1994, p.72 ss.

[38] See P. BRONZO, *Profili critici delle misure cautelari "a tutela dell'offeso"*, in *Cass. pen.*, 2012, p. 3472 ss.

complete guarantee to the suspect[39] . The totality is reached by a connection between the exercise of the right of defence, the effectiveness of the adversarial and the stability of the dispute. For technical defence, therefore:

- it is materially impossible to examine carefully the dense file of proceedings in order to highlight the elements against his client in the investigative proceedings;

- it is impossible to have an understanding of facts and circumstances often dating back many months without being able to give an explanation to his lawyer and assess the defensive line to be taken in the interrogation of warranty. The only weapon available is the exercise of the right not to respond to the objections raised in the order applying the pre-trial measure.

However, the effectiveness of the adversarial procedure could be achieved through the provision of the deferred interrogation (*interrogatorio di garanzia)* at the request of the suspect. A procedural mechanism may be set up whereby, at the request of the person concerned, he may be heard, for example, within a maximum of 15 days, and in that period of time he may - with his lawyer - take cognizance of the acts and answer questions in such a way as to allow the judge to validate the provisional accusatory hypothesis or to revoke it immediately without waiting for the result of review or appeal to the Tribunal of the Review (*Tribunale del riesame*)[40]. Another useful and complementary tool to the guarantee of effectiveness of the adversarial is the obligatory presence of the Prosecutor in the interrogation of the guarantee, so that he immediately becomes aware of the keeping of the accusatory implant and can request (being also a body of justice, ex art. 358 c.p.p.) immediately the replacement of the pre-trial measure in place or even the revocation of the same[41]. If it is true, in fact, that in the pre-trial measure's phase we speak of provisional imputation, it remains undeniable the need to present to the suspect not only the picture of the elements collected against him, but also where the Prosecutor wants to get both in terms of the final objective of the investigation, both in terms of stabilizing the legal qualification of the facts. Therefore, the pre-trial judgment must assess the elements of preliminary investigation acquired, a judgment in the state of the proceedings, with a view to plausibility (high probability) of the conviction so that the circumstantial severity lies in the pre-trial measure's requirements as the criminal responsibility lies in the determination of the judgement[42] .The identification of the measure most suited to the specific case is a characteristic that has been acquired in the pre-trial measure, since the measures now have a more personal character, more aimed to avoid the typical effect of the crime directed towards a specific victim[43].

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[39] See V. GREVI, *Libertà personale dell'imputato e Costituzione,* Milano, 1976, 49. See E. MARZADURI, *Disciplina delle misure cautelari personali e presunzioni di pericolosità: un passo avanti nella direzione di una soluzione costituzionalmente accettabile,* in *La legislazione penale*, 2010, p. 497 ss.

[40] See N. LA ROCCA, *Il riesame delle misure cautelari personali,* Milano, 2012, p. 201 ss.
See D. NEGRI, *Le misure cautelari a tutela della vittima: dietro il paradigma flessibile, il rischio di una incontrollata prevenzione*, in *Giur. it*., 2012, p. 470 ss

[41] See M. BONTEMPELLI, *Novità nelle procedure di revoca e sostituzione, in Misure cautelari* ad personam *triennio di riforme,* (a cura di Diddi, Geraci), Torino 2015, 145 ss.; D. Potetti, *Riesame, appello e revoca in tema di misure cautelari: una convivenza difficile,* in *Cass. Pen*,1994, p. 2929 ss

[42] See E. MARZADURI, *op cit*., 2010, p. 499 ss.

[43] See D. NEGRI, *Le misure cautelari a tutela della vittima: dietro il paradigma flessibile, il rischio di una incontrollata prevenzione*, in *Giur. it*., 2012, p. 470 ss.

3. *The legitimacy of Constitutional Jurisprudence*

The constitutional jurisprudence defines with sufficient details the characteristics of the principle of reasonableness limited to the determination and proportionality of pre-trial detention in prison, and guides the exercise of legislative discretion in defining individual criminal policy purposes[44].

On the other hand, as regards relations between the Constitutional Court and the Court of First Instance, the judgments in question confer on the referring court particularly extensive powers of interpretation, particularly as regards the application of individual protective measures, on the premise that the court should be better placed to respond more effectively to the needs of the individual case, with regard to the protection of the individual rights guaranteed by the legislator[45].

In fact, according to the Constitutional Court, the choice of the legislator to identify in a particular way the "point of balance between the different requirements of the least possible restriction of personal freedom and the effective guarantee of interests of constitutional importance" is inspired by the particular nature of mafia-type associative crimes, in relation to which the particular organizational connotation of the elimination or reduction of social alarm caused by sexual offences and their spread, cannot constitute either one of the ontological purposes of preventive custody or one of its principal functions[46].

Therefore, within this interpretation, the constitutional judge affirms, the absolute ineptitude of a generalized climate of social danger to justify the adoption of pre-trial measures capable of affecting the personal freedom of the accused, before the final determination of criminal liability has been properly carried out[47]. The overall rewriting of art. 275, paragraph 3, second and third periods of the c.p.p., continues in line with judgment 164/2011, which extends the addition initially made by the Court for some crimes with a sexual background to the hypothesis of voluntary murder, assuming also in this case as a point of comparison the discipline dictated for crimes of mafia nature referred to in art. 5, paragraph 1, L. 332/1995[48] . In the Court's view, the criminological structure of the murder presents characteristics such that, despite the indisputable gravity of the fact, the absolute presumption at issue cannot be considered to correspond to a generalised experiential fact, linked to the nature of the criminal figure. The crime in question could well present itself as a purely individual fact, often able to find its own genetic matrix in occasional and momentary

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[44] See Cort. Cost. n. 450/1995, C. Cost., 265/2010 C. Cost.,164/2011 C. Cost., 231/2011, C. Cost., 331/2011, C. Cost., 110/2012C. Cost., 57/2013 C. Cost., 213/2013 C. Cost., 232/2013 C. Cost., 45/2014 C. Cost., 48/2015, C. Cost., 233/2016 C. Cost., 180/2018; and judgement ECHR. 6 november 2003 (*Pantano* v *Italy*). Both judges underline the specificity of mafia-type crimes, whose abstract structural connotation as associative crimes within a context of organized crime or, alternatively, as crimes connected to it, was worth making reasonable the presumption of adequacy of prison custody alone, since it is the most suitable measure to neutralize the periculum libertatis connected to the likely continuation of contacts between the accused and the association.

[45] See E. LAMARQUE, *Corte costituzionale e giudici nell'Italia repubblicana*, Bari, 2012, p. 39 ss.

[46] See F. CORDERO, *Procedura penale*, IX ed., Milano, 2012, p. 469 ss.

[47] M. DANIELE, *Il palliativo del nuovo art. 275 co. 2 bis c.p.p. contro l'abuso della custodia cautelare*, in *www.penalecontemporaneo.it*, access on 10th February 2021).

[48] See M. VESSICHELLI, S*ull'applicabilità dell'art. 275, comma 3, c.p.p. nuovo testo ai soggetti posti agli arresti domiciliari*, in *Cassazione penale*, 1992, p. 2060 ss.

drives[49]. Consequently, in a far from marginal number of cases, the pre-trial measure's requirements proposed by the legislator could nevertheless be satisfied by means of pre-trial measures other than prison detention, that are equally valid to neutralize the triggering factor or to prevent its repetition, separating the defendant from the particular context that gave rise to the crime. In this perspective, the first profile of interest relating to the case-law in question undoubtedly concerns the indications given to the legislator regarding the overall structure of the supervision system, with regard to the mechanisms of preventive detention[50]. First, in order to ensure that the restrictions on the personal freedom of the suspect resulting from the application of any pre-trial measure of a detention nature are compatible with the presumption of innocence referred to in art. 27, paragraph 2, Cost., the Court imposes on the legislative power the burden of clearly differentiating the characteristics of the relevant discipline from the structural characteristics typical of the penalty, which can only be applied after the final determination of liability. The constitutional principle of not guilty represents, an insuperable barrier to any possible hypothesis of assimilation between protective coercion and coercion definitively, despite the plurality of elements that unite the two cases from the point of view of the distressing content of the penalty[51]. It follows from such a conceptual distinction, on the one hand, that the application of pre-trial measures must under no circumstances be given its exclusive legal standing in an early judgment of guilt, on the other hand, that the remedy taken in the supervision departs, directly or indirectly, from the aims proper to the criminal sanction[52] . In the discretionary typing of cases connected with the modalities of deprivation of personal liberty, the ordinary legislator is therefore obliged to identify within the process needs other than those that anticipate the penalty that can abstractly justify the application of the pre-trial measure. At the same time, it cannot be excluded that the legislator can also interpret a possible sharpening of the feeling of social reprobation against certain forms of crime, perceived by the generality of the associates as particularly reprehensible. However, in order to achieve these objectives, they should only use appropriate penalties, to be imposed on those who have been found responsible for those crimes, following a proper trial, and not by the undue anticipation of the judicial decision even before a final judgment[53].

4. *ECHR's Jurisprudence and Court of Cassation*

The recent jurisprudence of both the ECHR[54] and the Court of Cassation, in the matter of appeals against pre-trial measures, is characterized by an accentuation of the protection profiles of the individual suspect. A number of decisions of the European Court of Human

[49] See G. MANTOVANI, *Dalla Corte europea una legittimazione alla presunzione relativa di pericolosità degli indiziati per mafia,* in *La legislazione penale*, 2004, p. 514 ss.
[50] See F. FIORENTIN, *Sul carcere preventivo si guarda alla pena irrogata*, in *Guida al diritto*, 36/2014, p. 51 ss.
[51] See E. MARZADURI, *Ancora ristretto il campo di operatività della presunzione assoluta di adeguatezza della custodia cautelare in carcere*, in *La legislazione penale*, 2011, 702 ss.
[52] See F. ZACCHÈ, *Il detenuto in attesa di giudizio: profili di una riforma incompiuta*, in *Archivio Penale*, 2014, p. 374 ss.
[53] See O. MAZZA, *Le persone pericolose (in difesa della presunzione d'innocenza),* in *Dir. pen. cont.*, 13/2012.
[54] See ECHR, *Pantano* v *Italy,* 6 Nov 2003; ECHR, *Bigovic* v *Montenegro* 19 March 2019; ECHR, *Alparslan Altan* v *Turkey*, 16 Apr 2019; ECHR, *Rizzotto* v *Italy,* 5 Sept 2019;, ECHR, *I.E.* v *Republic of Moldavia* 26 May 2020; ECHR, *Dimo Dimov* v *Bulgaria*, 07 July 2020; ECHR , *Yanusov e Yanusovia v Azerbaijan,* 16 July 2020 ECHR, *Azizov et Novruzulu* v *Azerbaijan,* 18 feb 2021; ECHR, *Manzano* v *Belgium,* 18 may 2021

Rights which stated that failure to notify the suspect and his lawyer of the date of the hearing before the Court of Cassation following an action brought by the Public Ministry against the order issued by the Court of First Instance during the review, violates the principles of adversarial and equality of the parties and constitutes a violation of art. 5, paragraph 4, ECHR[55].

Consequently, the decision of the Court of First Instance that the refusal to authorize the personal appearance of the detainee before the Chamber of Charges during the examination of the request for release deprives him of the opportunity and the right to defend himself in the appropriate manner, and specifically contesting the extension of his detention, and therefore, constitutes a violation of art. 5, paragraph 4, ECHR[56] .

The Court of Cassation in some decisions has decided to extend the possibilities for the suspect to exercise his right to appeal against pre-trial measures concerning him, so that 'the interest of the suspect in the appeal remains even if, pending the *de libertate* incidental proceedings, the measure of pre-trial detention in prison is replaced with that of the prohibition of residence, provided that the application of the original measure may be a precondition for the right of the person concerned to equitable reparation in respect of custody wrongly taken[57], having been the coercive order issued or maintained without the conditions of applicability were provided for by art. 273 and 280 c.p.p.[58]. Precisely in view of this orientation of European case law and the abovementioned decision of the Court of Cassation, the persons entitled can apply for appeal against the order and the reasoned decree that provide for the preservation and preventive seizure. This also includes the lawyer of the person suspected or accused. In fact it is established that for the location of the term for the proposition from the lawyer of the request of review about the order of seizure it is necessary to make reference to the date of execution of the pre-trial measure or eventually from the different effective date knowledge, without noticing the eventual notification of the non-compulsory fulfilment of the notice of deposit of the measure[59]. As a result of the decision of the United Sections, the jurisprudential statement is confirmed where the moment of effective knowledge of the execution of the actual supervision measure is different for the defendant and his lawyer, since no provision requires the notification of the seizure order to the lawyer of the suspect, in this case the discipline of art. 585, co.3, c.p.p., but the deadline to appeal and necessarily unitary and coincides with that valid for the defendant, the only subject that must be brought to formal knowledge of the measure[60] .

European Court of Human Rights has highlighted as an essential requirement to consider legitimate and justifiable this pre-trial restriction of personal freedom and that this condition is temporally limited, with the consequence that the delays in the measures of release supplement violation of art. 5, par. 1, ECHR.[61] In the wake of this approach, the reasonable duration of detention is also highlighted in accordance with the decision of the United Sections which reaffirms that for the purpose of taking pre-trial measures, statements made by the co-defendant of the same offence or a suspect or accused person in a related proceeding may constitute serious evidence of guilt, pursuant to art. 273, co. 1 *bis*, c.p., only

[55] ECHR ,*Fodale* v *Italy,* 1 June 2006,
[56] ECHR., *Serifis* v *Greece*, 2 Nov 2006
[57] F.M. IACOVIELLO, *La Cassazione penale: fatto, diritto e motivazione*, op.cit., p. 347 ss.
[58] C. Cassation, 28.3.2006, *Prisco*, in *Mass. Uff.*, 234268.
[59] C. Cassation, 11.7.2006, *Marseglia*, 2006, 35, 52.
[60] C. Cassation , Sez. II, 26.6.2003, *Urbini*, 2005, 3059.
[61] ECHR, 8.8.2006, *Huseyn Esen* v. *Turkey; ECHR*, 18.1.2007, *Rashid* v *Bulgaria*,ECHR, 23.5.2006, *Ceylan* v *Turkey*.

if, in addition to being intrinsically reliable, they are supported by internal individualizing feedback, so to assume demonstrative suitability in relation to the attribution of the fact of crime to the person receiving the pre-trial measure, on the understanding that the relevant assessment, taking place in the incidental context of the proceedings *de libertate*, and therefore in the state of the acts, that is on the basis of cognitive material still in progress, must be oriented to acquire not certainty, but the high probability of caller's guilt[62]. Despite the apparent clarity of the current formulation of the cited art. 273 c.p.p. as amended by L. 1.3.2001, n. 63 - which should exclude any uncertainty about the consistency, the degree of specificity` and the object of the external findings necessary to give importance to the call in correlation` in the supervision, numerous judgements were attested on the thesis contrary to that made proper from the Cassation. The 'decision' does justice to the previous uncertainties of the Court of Cassation, providing on the one hand a logical and agreeable interpretation of the new formulation (indeed unequivocal) of art. 273 c.p.p., and on the other hand - also through a reconstruction of the events that occurred from the entry into force of the new rite code until the reform of art. 273 c.p.p. dating back to 2001 - highlighting the now increasingly significant approval of the criteria for assessing the cognitive data that the judge must take in the supervision and in the definition of the *regiudicanda*. The Court of Cassation has excluded the possibility of having a simultaneous application to the same subject of relative alternative pre-trial measures, with the exception of the mandatory hypotheses provided for by art. 276, paragraph 1.,c.p.p. and 307 paragraph 1-bis, c.p.p.

The decision of the Court is based on an express appreciation, in the pre-trial measure's matter, of the principle of legality dictated by art. 272 c.p.p. From this provision - which represents the transposition at the level of ordinary law of the dictate of art. 13 Cost. The Supreme Court infers the assertion that the Criminal procedure code knows (and allows the application of) a little number of measures limiting personal freedom, so that the issue of pre-trial measures that refer to more types of restriction of freedom of the suspect would represent a unique in the regulatory system, giving rise to a new form of personal coercion[63] . It must also be considered how, in the present case, the Court of Cassation correctly considers that it is closely linked to compliance with the principle of legality` respect for the typical nature of the pre-trial measures applicable in criminal proceedings. In fact, only where the pre-trial measure provides for a restriction of freedom specifically regulated by the art. 281 c.p.p (and following) it is possible to make use of the control mechanisms against the pre-trial measure adopted, while the use of a composite method of limiting the freedom of others would give rise to a grave vulnus to the same reservation of jurisdiction, enabling the judge a manipulative operation that circumvents the strict mechanism of the cpp, because it is based on discretionary assessments without certain benchmarks for comparison and control[64].

5. *Bail in Italian civil law: a new defensive guarantee?*

[62] C. Cass., 30.5.2006, *Spennato*, 2006, 44, 50

[63] See E. APRILE, *Le misure cautelari nel processo penale: articoli 272-325 del codice di procedura penale,* Milano 2003, p. 37 ss.

[64] See, C. Cass., 24.9.2004, *Mignacca*, in *Mass. Uff.*, 231111; C. Cass. 11.5.2004, *Zini*, in *Mass. Uff.*, 229552; C. Cass. 21.1.2003, *Formigli*, 2003, 3484; C. Cass., 30.5.2006, *La Stella*, 2006, 3971.

Pre-trial measures have always been a serious problem that criminal procedural doctrine has repeatedly tried to solve. These measures are found in Book IV of the cpp in the so-called "static part". Well there is an article in particular art. 319 cpp which gives much thought to the need to change the way of challenging such measures, which may therefore be of a nature limiting personal freedom (i.e.. pre-trial detention in prison or relative alternative measures) or real property relating to the seizure of property belonging to the suspect/accused person. The limitation of personal freedom or of any object or property may compromise the rights and freedoms of the person, if it is adopted in advance (before an irrevocable judgment). In order to avoid a danger of the defendant escaping or a danger of recurrence of the fact of a crime or other crime, it constitutes a form of guarantee granted to the legal system to maintain stable social security and the correctness of the process. The presence of the defendant is a necessary condition together with the presence of the Prosecutor and the Judge for a trial to exist. In the event of the defendant's absence, problems apparently are resolved in the hypotheses of art. 420-*bis* and ss. In this regard, art. 5, paragraph 3, of the ECHR, provides for release subject to a guarantee that the person will be present at the hearing. Therefore, the first requirement of the precautionary measure is justified: the danger of escape. This principle is compromised by the bail, that is to obtain freedom by paying or having a sum of money paid to guarantee the presence in the process.

The doctrine criticizes the use of bail because freedom shouldn't be tied to money and those who have more, but freedom is a principle of equality. However, in our legal system the art. 319 c.p.p. in conjunction with art. 316 c.p.p., provides for bail, which only appears in the case of application of actual protective measures (e.g. attachment, seizure). It would seem a contradiction, in that things are people's projection and the law not only protects physical freedom, but in general freedoms and things are often the way and the means by which the subject expresses the rights recognized by the law[65]. So why not extend bail for pre-trial measures? The Italian legal system prefers other forms of protection and appeals against the pre-trial measures *de libertate* such as appeal review and appeal to the Supreme Court. However, the data are not comforting: most appeals are not accepted or are accepted gradually. *Ergo*, a protection only abstract and formal, little concrete. One solution would be to quantify, on the basis of the charge and the pre-trial measure applied, a security as another safeguard clause, that is, an alternative route to the appeals mentioned above. The doctrine harshly criticizes this reasoning because freedom is not bought, but in this case you are in a procedure parallel to the criminal trial which absolutely does not interfere with the principles of presumption of innocence so as to meet all the conditions that justify a trial always present in accordance with to the canons established by art. 111 Cost. relying on the potentially discriminatory nature of the security. As for the first profile, the analysis of the bail in the English system and the jurisprudence of the Commission first, and of the ECHR then, clearly show the functional vocation of the deposit as "caution", having the precise finalization, of «ensure not the reparation of the damage, but the presence of the accused at the hearing»[66]. Hence the need to proportion the entity in relation to the interested party, its resources and its links with the people called to lend malleveria. In this perspective, it is difficult to imagine the coexistence of bail-bail with the trial in absentia, since it would exhaust its primary identity, inevitably exposing itself to criticism. It's hard not to share the assumption that 'absentia tends to be incompatible with the accusatory system, which, consistent with the

[65] See G. SPANGHER, *Ragionamenti sul processo penale,* Milano, 2018 p. 42 ss.
[66] See G. ROMEO, *Le Sezioni Unite sul regime intertemporale della presunzione di adeguatezza della custodia cautelare: un revirement giurisprudenziale,* in *www.dirittopenalecontemporaneo.it*, 2011, access on 11th February 2021.

active position of the accused, imposes on him the burden of participating in the trial; as a corollary it would be the defendant's obligation to appear in court, and if you fail to comply with the possibility of being coerced: in common law countries, as well as in Germany, the possibility of arresting the defendant at the trial and bail is the consistent consequence[67]. It should be remembered as a strong endorsement of what the most accredited doctrine indicates as the «abolitionist perspective of the trial in absence[68]».

The remand faces the second critical profile: assuming the deposit as an alternative ab initio, it would be appropriate to remedy the need for an anticipation of the remand, along the lines of the provisions of art. 289 paragraph 2 c.p.p. in the matter of suspension from the exercise of a public office or service, also and above all because it is the burden of the interested party to provide information in this regard to allow the judge to assess "upstream" any indication useful to quantify the amount of the "bail-out bail". The embarrassing proportion of people in pre-trial detention would advise that bail (and *malleveria*) be reintroduced as autonomous pre-trial measures, suitable to cover - possibly in combination with other measures - the wide scope of supervision between alternative pre-trial measures and the prohibition or obligation to stay. What are the spaces for the introduction of the bail? Pending solutions to the debate on the contradictory anticipated, the introduction of an art. 283-bis c.p.p., in which bail is used as an autonomous pre-trial measure, with the object of depositing a sum of money, even in instalments, commensurate with the gravity of the fact and the economic conditions of the accused. Along the lines of tradition (but also of art. 49, D.Lgs n. 231/2001) they could also be equated to the sum of money of mortgage or suretyship guarantees, reserving to the judge the verification of the suitability of guarantors. Objective exclusions, based on the title of crime (e.g.: mafia terrorism) and subjective exclusions (recidivism, tendency to crime), could be assumed. In order to strengthen the capital guarantee, one could conceive, going beyond the current orientation of the United Sections, of the hypotheses of precautionary cumulation: on the basis of the Anglo-American experience, proportionally to the degree of the pre-trial measures' requirements, in addition to the security, an electronic bracelet or an obligation to present it to the judicial police could be applied. With reference to the precautionary events, the transgression to the imposed prescriptions would involve the revocation of the concession order, activating the applicability of art. 276 c.p.p. The revocation, moreover, would constitute "title" for the confiscation of the sum or for the expropriation of the mortgaged assets. On the contrary, in other cases and regardless of the outcome of the process, the sum is repaid, the mortgage is cancelled, the guarantee is paid off.

The parameterization of the quantum to the economic capabilities of the individual defendant and the possibility of installment of the deposit would overcome any doubts of constitutional legitimacy in relation to art. 3 Cost., allowing the court to determine the amount of the sum to an extremely small extent or, vice versa, to an extremely high extent, depending on the possibilities of the defendant, through a graduation undoubtedly suited to dealing with the most diverse personal situations[69]. However, in terms of the needs of the community, the possibility of applying other precautions together (electronic bracelet) would allow to reinforce the pre-trial measures' system without necessarily having to resort to pre-trial detention. Part of the population in pre-trial detention is investigated for crimes referred

[67] See G. ILLUMINATI, *Verso il ripristino della cultura delle garanzie in tema di libertà personale dell'imputato,* in *Riv. it. dir. e proc. pen.*, 2015, pp. 1138-1148.
[68] See G. UBERTIS, *Sistema di procedura penale, I, Principi generali, III ed.*, Padova, 2013, p. 87 ss.
[69] See G. AMATO, *Individuo e autorità nella disciplina della libertà personale,* Milano, 1976, p. 380.

to D.P.R. (Decree of Italian Republic President) n. 309/1990 or against the assets and bail will be impossible and the guarantee, perhaps, dangerous.

Nevertheless, even if a small part of them could benefit from precautionary alternatives, the livability of the prison institution would improve for those who have no way out.

6. *The American case*

In common law, bail reconciles the accused's right to liberty, before and during the trial, and the State's interest in securing the accused's presence at the trial, creating a dilemma over the presumption of innocence, that is to say, that intermediate status whereby the accused must be considered innocent but his guilt cannot be ruled out outlines the treatment to be given to a person who must be considered innocent, when it must not be excluded that he may also be guilty[70]. Take, for example, an emblematic American case. After the accusations filed against someone, a judge or magistrate first determines whether to imprison the person without the possibility of being released until the judgement[71]. In most jurisdictions, a person can be detained before the trial only if there is a high risk that the person will not appear in court or that the person will be a danger to the community before the trial[72]. The Supreme Court warned that «in American society, freedom is the norm, and pre-trial detention or without trial is the carefully limited exception»[73].

A judge may then decide to release the suspects or defendants if they promise to return to court (issue on personal recognition), conditionally release the person, or release the person on bail. With conditional release, a person must meet conditions such as check-in with pre-trial pharmacological testing services or electronic monitoring[74]. With the deposit, a person can be issued on a guaranteed or unsecured bond[75]. For an unsecured bond, the defendant does not have to pay anything in advance, but will owe the court money if he does not show up at the court set. " Cash deposit" almost always refers to covered bonds[76]. For a guaranteed bail, the defendant will be released from prison only if he pays the amount of the bonds to the court.

Many jurisdictions allocate to the defendant a predetermined amount of bail based on criminal imputation, without an assessment of his ability to pay[77]. When the defendant arrives at a later date, the court will return the money to the guarantor for bail, which retains the defendant's fee as profit. If someone is unable to pay bail or unable to pay a bail fee, the state will send him to prison until the end of their case or the payment of the bond[78]. Bail means excessive detention, discrimination based on wealth and race, and high costs for taxpayers

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[70] See C. SANTORIELLO, G. SPANGHER (a cura di), *Le misure cautelari personali*, Torino, 2009, p. 70 ss.
[71] W. J. STUNTZ, *The Pathological Politics of Criminal Law*, in *Mich. L. Rev.*, 505, 509–10 (2001).
[72] L. I. APPLEMAN, *Justice in the Shadowlands: Pretrial Detention, Punish-ment, & the Sixth Amendment,* in *Wash. & Lee L. Rev.* 1297, 1330 (2012)
[73] *United States* v *Salerno*, 481 U.S. 739, 755 (1987)
[74] P. HEATON, *The Downstream Consequences of Misdemeanor Pretrial Detention*, in *Stanf. L. Rev.* 711, 714–16 (2017)
[75] S. R. WISEMAN, *Fixing Bail*, in *George Wash. L. Rev.* 417, 419 (2016).
[76] S. R.WISEMAN, *op. cit.*, 2016, p. 414 ss.
[77] See C. S. YANG, *Toward an Optimal Bail System*, in *N.Y.U. L. Rev.*, 1399 (2017).
[78] See S. G. MAYSON, *Bail Reform and Restraint for Dangerousness: Are Defendants a Special Case?* in *Yale Law Journal*, (2018).

and communities. The Supreme Court noted that the person subject to a protective measure until the trial «is hampered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense». Innocent people who sometimes have to accept plea bargains because pleading guilty allows them to return home, while maintaining their innocence would require them to remain in prison for months or years on hold fostering suicidal instincts, the leading cause of death in American prisons[79].

The American Bar officially supports bail reform such as the adoption of valuation tools that use algorithms to predict the risk of danger to the defendant. According to a developer of a risk assessment tool, adopting a system «where judges have access to scientific and objective risk assessment tools could help our core objectives to increase public safety, reduce crime and effectively, equitably and efficiently use public resources». The most popular (algorithmic) risk assessment tool is Public Safety Assessment (PSA)[80]. It is also uncertain whether algorithms will produce more transparency than the black box of a judge's mind[81]. The complexity of big data poses the risk of concealing racial bias[82]. The concepts of objective data and computer algorithms can give false guarantees of neutrality[83]. Risk assessment tools are just that: tools. Tools can be used for justice or injustice. Jurisdictions without a commitment to equality and decarceration could use risk assessment and set risk thresholds at levels that allow retention levels to remain constant or rise. Intentionally or not, these places could protect over-incarceration and inequality behind the rhetoric of algorithms and big data[84].

7. *Conclusion*

In summary, the structure of the criminal process frequently calls for the use of a pre-trial measure which lengthens investigation times by limiting the time limits for preliminary investigations, the non-availability of preliminary investigation findings in the hearing with the need to redo all investigation activity at that stage of the evidence collection process, such as the preliminary hearing which may allow further elements of investigation to be examined even when the shortened trial is being held (with the addition of official evidence and the request for a shortened trial, new terms of pre-trial detention apply) and then three degrees of judgment before the final judgment; all in the presence of the obligatory prosecution.

If this happens, it is clear that the pre-trial measure's requirements of the danger of evidence pollution and the recurrence of crimes widen as a result of the distance from the moment of actual collection of evidence with respect to preliminary investigations and deferment to the last degree of the final judgment permitting enforcement of the sentence; if the requirements are increased as a result of the procedural mechanism which lengthens the time of the trial, the possibility of pre-trial detention and almost the need to resort to it inevitably increases. The effects are: a strong structuring of the pre-trial measure objective

[79] C. S. YANG, *op. cit.*, 2017, p. 1397 ss.
[80] See A. TESTAGUZZA, *Digital forensics. Informatica giuridica e processo penale*, Padova, 2014, p. 47 ss.
[81] S. QUATTROCOLO *Quesiti nuovi e soluzioni antiche? Consolidati paradigmi normativi vs rischi e paure della giustizia "predittiva",* in *Cassazione Penale* n. 4/2019, pp. 1755 ss.
[82] S. QUATTROCOLO, *The impact of AI on criminal law a, and its twofold procedures* in BARFIELD W., PAGALLO U., *ResearchHandbook on the Law of Artificial Intelligence,* Cheltenham, 2018, pp. 392 ss.
[83] S. QUATTROCOLO, *Artificial intelligence*, cit. p. 212 ss.
[84] S. QUATTROCOLO, *Equo processo penale e sfide della società algoritmica,* in *Biolaw Journal*, 2019, pp.139 ss.

and subjective and an increase in the use of pre-trial measures and therefore more reasons with the relative complexity.

The following conclusions can be drawn from the above topics. In this sense, the prospects of reform that are moving towards the identification of a collegial judge competent for the decision on supervision measures can be welcomed, so as to anticipate the protection of the Tribunal's review in terms of collegiality, but with the possibility of appeal in court. The collegiate judge has the advantage of always having the colleague who gives him the "elbow". The monocrat judge, which doesn't benefit from this precious assistance, can be overwhelmed by haste and not reread what he wrote. However, pre-trial detention in prison pursues the purpose of an early penalty in contrast with the presumption of innocence provided for in article 27 Cost. One remedy may be the transfiguration of the pre-trial procedure into the substantive proceedings. More delicate is the issue of anticipation of the adversarial before the decision (in our system provided only for *arresto in flagranza* and the arrest). The interpretation of the law in accordance with the Constitution aims to ensure the coherence of the legal system, which «must now be sought at the constitutional level». The deferred warranty interrogation at the request of the interested party and the obligatory participation of P.M. in the warranty interrogation pursuant to art. 294 c.p.p. would lead to a significant improvement in the quality of the judicial activity in this delicate pre-trial phase in a way to raise the degree of effectiveness of the adversarial and the level of exercise of the right of defence. The bail for pre-trial measure, although a good solution to avoid prison overcrowding, is not sufficiently harmonised with the constitutional principles of fair trial.