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Rony Rosales Lossley

Torture of the Innocent

Pretrial Detention in Guatemala from a Human Rights Perspective

LATMA, Master's Programme in Human Rights and Democratisation in Latin America and the Caribbean

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— Rosales Lossley, Rony, *Torture of the Innocent. Pretrial Detention in Guatemala from a Human Rights Perspective.* Supervisors: Francisco Javier Urizar Pérez, Rafael Landivar University (Guatemala). Master's Programme in Human Rights and Democratisation in Latin American and the Caribbean (LATMA), coordinated by National University of San Martin (Argentina).

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Biography

Lawyer and Public Notary graduated from San Carlos University of Guatemala, with studies in International Law and International Human Rights Law. Master in Human Rights and Democratisation in Latin America and the Caribbean in 2022, with a fellowship in Inter-American Court of Human Rights. Experienced in international litigation before the Inter-American Commission on Human Rights and Inter American Court of Human Rights.

Abstract

Kafka's novel Trial tells the story of Josef K after being arrested and prosecuted without knowing the reason. This book details the torture experienced by the character to get his freedom. The reality of pretrial detention in Guatemala is not far from the vision of the Czech writer. By the year 2022, 48.3% of prison inmates were pretrial prisoners, that means, innocent people.

On this matter, the Political Constitution of the Republic of Guatemala and the new Criminal Procedure Code established limits to the state on the use of pretrial detention, principally the respect of human rights. Additionally, the international treaties of human rights and judgments of its organs contributed to providing greater protection tools to the person. However, during all this time, the legal reforms that were carried out were far from the standards, exacerbating the crisis.

For this reason, it is necessary to study the way in which pretrial detention is currently used in Guatemala. This with the objective of identifying if its use implies human rights violations, and to determine the existing good practices, as alternatives to address this problem.

Keywords: *Pretrial detention, human rights, personal liberty.*

Acknowledgments

I would like to dedicate this thesis to my wife Ilse Alejandra Morales de Valle, the love of my life. I am eternally grateful for your love, support and words of encouragement for always pushing me to do my best. This triumph is yours as much as mine.

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Finally, I dedicate this thesis to all the innocent people who have suffered because of the use of pretrial detention. For all of them, I hope that this text will be a small light in the search for justice.

Ad Astra!

Table of Abbreviations

ACHR	American Convention on Human Rights
CAIS	Central American Integration System
CC	Constitutional Court of Guatemala
CCPG	Criminal Procedure Code of Guatemala
CICIG	International Commission Against Impunity in Guatemala
HRC	Human Rights Council
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IAHRS	Inter-American Human Rights System
ICCPR	International Covenant on Civil and Political Rights
OAS	Organization of American States
OCAS	Organization of Central American States
UN	United Nations
UNODC	United Nations Office on Drugs and Crime

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Introduction

Pretrial detention is the most severe measure that can be used in criminal proceedings, as it involves depriving a person of liberty without a final conviction. Therefore, it is a priority for the authorities to guarantee respect for the human dignity of the accused. Theoretical models of pretrial detention can be divided into two categories: substantialist and proceduralist.

In inquisitorial systems, the criminal process is often seen as an end in itself, equating its effects to punishment and incorporating subjective and ambiguous elements as prerequisites for proceeding, encouraging its informal use. However, accusatory systems and human rights protection standards follow the proceduralist trend, where the freedom of the accused is the rule, and any restriction is exceptional. The provisional and precautionary nature of pretrial detention is recognised, making its use legitimate only after objectively verifiable material requirements and procedural dangers have been established, and the proportionality test has been passed.

Although they represent opposing and contradictory views, in the normative field, codes of criminal procedure tend to conflate them. On one hand, they acknowledge the exceptional nature of pretrial detention, but on the other hand, they accept the use of subjective or ambiguous criteria to justify it. It is therefore necessary to analyse the legislation from a human rights perspective, based on the provisions of international standards, taking into account that the priority is the protection of the individual.

At the international level, the International Covenant on Civil and Political Rights (ICCPR)[1] and the American Convention on Human Rights (ACHR)[2] provide general guidelines for handling of pretrial detention. The Human Rights Committee, the Inter-American Court of Human Rights (IACtHR) and the Inter-American Commission on Human Rights (IACHR) have established standards for protecting personal liberty, presumption of innocence, defence and other guarantees related to the use of coercive measures. Treaty bodies conventional dispositions and decisions are binding and mandatory for states parties under the principle of *pacta sunt servanda,* and in the inter-American case, also via conventionality control.

In Guatemala, pretrial detention has been shaped by two significant events. The first was the adoption of the Political Constitution of the Republic on 14 January 1986, which marked the beginning of modern democratic life in the country and made the protection of human rights one of the state's objectives. One of the most important aspects of this constitution was the inclusion of article 13, which legitimised pretrial detention and established clear limits on its use.

The approval in 1992 of Act 51-92, the new Criminal Procedure Code, marked a significant change in the organisation of criminal justice in Guatemala. The outdated inquisitorial model was replaced with an accusatorial model based on guarantees. Regarding pretrial detention, it conditioned that it shall only be used with respect for personal liberty, presumption of innocence, right to defence, reasonable time limits and other relevant factors. The act recognised it as well as a precautionary and exceptional measure.

Since then, amendments to regulate pretrial detention have been made to the legal system, particularly to the Criminal Procedure Code. These amendments aimed to provide greater protection and increase alternatives to reduce its use. Nonetheless, many regulations also set at including substantive elements, such as restricting access to a substituting measure based on the capacity of

[1] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[2] American Convention on Human Rights (OAS) (adopted 22 November 1969, entered into force 18 July 1978) (ACHR).

the accused or the offense committed and formalising its unjustified prolongation. Jurisprudence of the Constitutional Court, in general, has not effectively abolished this type of regulation but has instead focused on legitimising it.

The purpose of this thesis research is to investigate the recognition and implementation of inter-American standards for protecting human rights in relation to the current regulation of pretrial detention in Guatemala in 2022.

To achieve this goal the present study is divided into four specific objectives. The first objective is to analyse the concept of pretrial detention. The second one is to define the international standards of human rights protection applicable to pretrial detention. The mentioned objectives were included in Chapter 1. Chapter 2 covers the third objective, which describes the regulations and best practices used by El Salvador, Honduras and Costa Rica regarding pretrial detention, considering the similarities in their existing regulations. Chapter 3 examines whether the current regulation of pretrial detention in Guatemala for the year 2022 recognises and applies inter-American standards for the protection of rights. The chapter concludes with final considerations and a list of references.

The research methodology employs a qualitative approach, focusing on the study of national and international norms, as well as the review of reports, resolutions and decisions of treaty bodies. Additionally, an expert on criminal law will be interviewed to provide insight on relevant issues related to this research. The study of Chapter 2 uses a comparative methodology to establish legal figures of the normative systems under examination.

1. Human rights standards and pretrial detention

1.1 Introduction

This chapter provides a general analysis of the mechanisms and standards for protecting human rights, to determine current guidelines related to the use of pretrial detention. As a result, it will establish the importance of protecting personal liberty, the right to defence and the presumption of innocence, also including other factors such as the duration of pretrial detention. The final section of the chapter will address the operationalisation of alternative measures in criminal proceedings and the issue of remedies for unlawful and arbitrary deprivation of liberty.

1.2 Mechanisms for protecting human rights

Human rights protection mechanisms took shape after the experiences suffered during World War II, reflecting a change in thinking concerning to the level of responsibility of the international community before violations committed within the states. This shift was based on the conviction of constructing a collective security model that prioritises peace, international security and conflict resolution through peaceful means. This model formalised with the adoption of the United Nations (UN) Charter in 1945.[3] The configuration of this new system prioritises a human rights agenda as the key point for the consolidation of fairer regimes.

[3] United Nations Charter (adopted 24 October 1945) 1 UNTS XVI.

The initial significant accomplishment of this emerging international organisation was the establishment of the UN Commission on Human Rights in 1946. Its mandate was to address human rights issues at the universal system.[4] The Commission operated until 2006, when the General Assembly replaced it with the Human Rights Council (HRC). The HRC is responsible for conducting the universal periodic review of UN state parties. Additionally, the UN bureaucratic structure includes committees responsible for overseeing state party compliance with the treaties that established each of them. Some of these committees are also authorised to address human rights individual communications or complaints.

The universal human rights protection system poses challenges that complicate its adaptation to the internal situation of countries. For instance, to apply it a hermeneutic exercise must be conducted that integrates the UN Treaty Collection (UNTC), specifically the principles of good faith and *pacta sunt servanda*,[5] in addition to the obligations arising from the involved treaties. Furthermore, the national margin of appreciation grants states significant discretion in deciding how to incorporate the decisions of UN committees and other bodies into their constitutional law, as these bodies lack their own methodology.

By contrast, at the American level, there is an incorporation method for international law through the adoption and entry into force of the ACHR, which gave rise to the inter-American human rights system (IAHRS) as 'mecanismo regional encargado de promover y proteger los derechos humanos en América'[6] [a regional mechanism for the promotion and protection of human rights in the Americas]. This system comprises inter-American human rights treaties, complaint supervision and monitoring mechanisms, and it is governed by its two key organs: the IACHR and the IACtHR.

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4 United Nations Human Rights Council, 'Introduction' (*OHCHR*) <www.ohchr.org/es/hr-bodies/chr/commission-on-human-rights> accessed 19 March 2024.

5 Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 26.

6 Manuel Ventura, 'El Sistema Interamericano de Protección de los Derechos Humanos' (2014) 14(14) Instituto Brasilero de Direitos Humanos Journal 257 <https://revista.ibdh.org.br/index.php/ibdh/article/view/275/274> accessed 18 March 2024.

The strengthening of the IAHRS has been characterised in recent decades with states constitutionalising international human rights law, based on the block of constitutionality. This being possible by the opening clauses provided in the constitutions of each country, that set the guidelines for interpretation and hierarchical position enjoyed by the inter-American *corpus iuris*.[7] The block of constitutionality invocation is not just referential. On the contrary, due to its constitutional acceptance, its content is binding in domestic law and could generate normative, jurisprudential or practical transformations.

As previously mentioned, the scope of the block of constitutionality extends beyond the normative field. This tool could support the development of a transformative constitutionalism, which could prevent violations, bring significant changes in society and address social exclusion and institutional weakening.[8] The main objective is to identify the method of interpretation that makes its application viable. This depends exclusively on identifying the rule that will establish the ultimate meaning given to a situation. Therefore, the control of constitutionality and conventionality arise as efforts to answer this question.

The control of constitutionality is based on the traditional concept of constitution supremacy, understanding it as the fundamental regulation that establishes the boundaries within the normative system and state actions must operate. In this framework, the interaction with international human rights law presumes to be harmonious; considering that any contravention to a treaty could be grounds for abolishing or waiving any rule or practice that conflicts with it. This would be justified based on the pre-eminence of the constitution.

The limitations of constitutional review become evident in cases where the ACHR and the constitution conflict. This approach risks reducing conventional content to the level of an ordinary norm. This scenario could potentially distort the true scope

[7] Manuel Góngora, 'La difusión del bloque de constitucionalidad en la jurisprudencia latinoamericana y su potencial en la construcción del ius constitutionale comune latinoamericano' in Armin Von Bogdandy (ed), *Ius constitutionale commune en América Latina. Rasgos, potencialidades y desafíos* (UNAM, Instituto de Investigaciones Jurídicas 2016) 301-27.

[8] Armin von Bogdandy, *Por un derecho común para América Latina. Como fortalecer las democracias frágiles y desiguales* (Siglo Veintiuno 2020).

of the inter-American standards for human rights protection, legitimising any violation that may arise from an overly legalistic or nationalistic interpretation. This puts at risk vulnerable individuals, such as those deprived of their liberty.

In response, the IACtHR developed the conventionality control doctrine to ensure the supremacy of the ACHR over domestic law. Judge Sergio Ramirez used this term for the first time in his concurring opinion in the *Myrna Mack v Guatemala* case. He stated that international responsibility is general for the state, understanding it as a single unit and that none of its constituent parts can be exempt from this control.[9] The legal basis for this notion are the principles of *pacta sunt servanda*, *effet utile* and article 26 of the Vienna Convention on the Law of Treaties and articles 1.1, 2 and 29 of the ACHR.[10]

It was until 2006, with the case of *Almonacid Arellano et al v Chile*, that the IACtHR established that the judiciary must conduct a review between domestic law applicable in specific cases and the ACHR, and also considering the court's interpretation of it.[11] This obligation imposes to all courts in the country if the decision falls within their area. In addition, judicial work can be performed ex *officio* to provide the greatest possible protection for individuals.

It is important to note that conventionality control operates in two ways: one at the inter-American level, and the other at the domestic level. The first mentioned is exclusively entrusted to the IACtHR, as it is competent to hear any matter relating to the interpretation and application of the ACHR, which operates as the main parameter of control. This prevents the IACtHR from declaring the incompatibility, waiver, or abolition of any domestic rule respect to the conventional guidelines.[12] Its only power is to order the state to adapt the domestic norm, through internal mechanisms including the constitution, to the conventional guidelines.

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9 IACtHR *Case of Myrna Mack Chang v Guatemala* Reasoned Concurring Opinion of Judge Sergio García Ramírez to Judgment (25 November 2003).

10 IACtHR *Case of Herzog et al v Brazil* Preliminary Objections, Merits, Reparations and Costs, Judgment (15 March 2018).

11 IACtHR *Case of Almonacid Arellano et al v Chile* Preliminary Objections, Merits, Reparations and Costs, Judgment (26 September 2006).

12 Luis-Miguel Gutiérrez Ramirez, 'Control de constitucionalidad y control de convencionalidad: interacción, confusión y autonomía. Reflexiones desde la experiencia francesa' (2016) 64 Revista IIDH 239 <www.iidh.ed.cr/images/Publicaciones/RevistaIIDH/revista-iidh64.pdf> accessed 18 March 2024.

All authorities of the state parties to the ACHR must fulfil the second obligation that involves examining the compatibility of national legislation and acts of public authorities with the ACHR, other inter-American instruments and the jurisprudence of the IACtHR.[13] The IACtHR has specified that this control is necessary:

> convierte al juez nacional en juez interamericano: en un primer y auténtico guardián de la Convención Americana, de sus Protocolos adicionales (eventualmente de otros instrumentos internacionales) y de la jurisprudencia de la IACtHR que interpreta dicha normatividad. Tienen los jueces y órganos de impartición de justicia nacionales la importante misión de salvaguardar no sólo los derechos fundamentales previstos en el ámbito interno, sino también el conjunto de valores, principios y derechos humanos que el Estado ha reconocido en los instrumentos internacionales y cuyo compromiso internacional asumió. Los jueces nacionales se convierten en los primeros intérpretes de la normatividad internacional, si se considera el carácter subsidiario, complementario y coadyuvante de los órganos interamericanos con respecto a los previstos en el ámbito interno de los OAS y la nueva 'misión' que ahora tienen para salvaguardar el corpus juris interamericano a través de este nuevo 'control'[14] [The national judge becomes an inter-American judge, serving as the first and primary guardian of the American Convention, its Additional Protocols, and other relevant international instruments. Upheld the jurisprudence of the Inter-American Court of Human Rights, which interprets these norms. Domestic judges and judicial bodies have the important mis-

[13] Laura Camarillo Govea and Elizabeth Rosas Rabago, 'El control de convencionalidad como consecuencia de las decisiones judiciales de la Corte Interamericana de Derechos' (2016) 64 Revista IIDH 127 <www.iidh.ed.cr/images/Publicaciones/RevistaIIDH/revista-iidh64.pdf> accessed 18 March 2024.

[14] IACtHR *Case of Cabrera García and Montiel Flores v Mexico* Preliminary Objection, Merits, Reparations and Costs, Judgment (26 November 2010) 24.

sion of safeguarding not only fundamental rights provided in the domestic sphere, but also the values, principles and human rights recognised and assumed in international instruments by the state. The national judges are the first interpreters of international norms, considering the subsidiary, complementary and adjuvant character of the inter-American organs in relation to those provided in the domestic sphere of the OAS state parties. They now have a new mission, to safeguard the inter-American *corpus juris* through this new control].

The approach of conventionality control, when transferred to the field of pretrial detention, can be conceived from a dual perspective. First, in the legislative sphere, through cases where the norm includes contrary dispositions to inter-American standards, for example, justifying the coercive measure in terms of the crime charged or for subjective reasons, such as social defence or degree of danger. Under this criterion, the main task of the court is to abolish or waive this rule for being contrary to the convention, according to the guidelines of each control system.

The second setting occurs during the criminal proceedings itself. The judge is responsible either prior to deciding to apply pretrial detention or when reviewing the coercive measure, for verifying the existence of procedural dangers and conducting an examination of proportionality, by integrating the applicable standards to establish the legality and legitimacy of the deprivation of liberty.

Similarly, this prerogative also extends to higher courts, that review decisions of lower judges regarding provisional detention. Therefore, entitled to amend the decision taken and immediately order the release of the person if it does not overcome the test. The main objective is always to guarantee individual liberty, presumption of innocence and defence of the person without unreasonably delaying the processing of legal remedies.

Hence, conventionality control prioritises the protection of human rights. In the context of criminal proceedings, it has been set as an effective limit to the punitive power of the state, functioning as an indispensable tool to address the main causes of the indiscriminate use of pretrial detention. For this reason, it is essential that the convention prevails over domestic norms or practices, even if it forces a constitutional reform.

1.3 Pretrial detention: Substantivism and proceduralism

According to the UN Office on Drugs and Crime (UNODC), in 2019, approximately 11.7 million individuals were deprived of their liberty worldwide, with one in three being held without a sentence.[15] Additionally, the prison population in Central America[16] has increased by 77% since 2000.[17] In Guatemala, 47.9% of the total prison population is in pretrial detention, 53.7% in Honduras, 23.1% in El Salvador[18] and only 19.9% in Costa Rica.[19]

The use of pretrial detention in Guatemala, Honduras and El Salvador is widespread and standardised which is contradictory, notwithstanding Central America opened to democracy in the 1980s and adopted their constitutions that placed human rights at the centre of public agendas. During the 1990s and early 2000s, these countries implemented significant reforms to their criminal procedure codes, aiming to replace the old inquisitorial model with an accusatorial system. However, the lack of clarity on how to regulate pretrial detention within a protective context is a major issue. This ambiguity opens the door to the inclusion of substantialist criteria, which result in serious human rights violations.

Pretrial detention is a measure used exclusively in criminal proceedings that involves depriving liberty to a person without a conviction.[20] Meaning that its use should be limited to the strictly necessary and it must comply with specific rules and

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15 United Nations Office on Drugs and Crime, '1 Los Datos Importan' (*UNODC*, 2021) <www.unodc.org/documents/data-and-analysis/statistics/Data_Matters_1_prison_spanish.pdf> accessed 19 March 2024.

16 For the purposes of this research, any reference to Central America, Central American countries, states or any other allusion to the region only includes Guatemala, El Salvador, Honduras and Costa Rica. These countries are the objects of study in comparative law due to their legal identities.

17 Penal Reform International, '*Global Prison Trends 2022' (Panel Reform International, 2022)* <https://cdn.penalreform.org/wp-content/uploads/2022/05/GPT2022.pdf> accessed 19 March 2024.

18 The figures available for El Salvador are from 2021, prior to the anti-gang measures promoted by the government of that country. These measures will be analysed in the following chapter.

19 *World Prison Brief, 'World prison brief data'* (*WPB*) <www.prisonstudies.org/map/central-america> accessed 19 March 2024.

20 Ezequiel Kostenwein, 'La cuestión cautelar. El uso de la prisión preventiva en la provincia de Buenos Aires a partir de la ley 11.922 (1998-2013)' (PhD thesis, National University of la Plata 2015).

requirements to prevent arbitrary confinement and considering the series of rights that intersect and are at risk. The doctrine around this concept is based on two different currents: substantialist and proceduralist.

Substantialism typically characterises inquisitorial systems, involving secrecy, formalism and limited intervention by the defence. In this context, pretrial detention serves as an end of the criminal process, as it is assigned the same functions as punishment, using it as a form of prior sanction.[21] Following this logic, imprisonment becomes the norm, and constantly appeals to *iure et de iure* (that does not allow proof to the contrary) eliminating any possibility for the accused to challenge it.

The persistence of the substantialist trend in accusatory criminal procedure codes is evident. Since in these systems pretrial detention may be applied based on the crime charged, the subjective qualities of the accused person (such as being a recidivist, terrorist, gang member or other), defence of social order, protection of the victim or any other ambiguous criterion, as if it were a security measure. This position does not require the judge to provide reasons for their decision. It is only necessary to make a general reference to one of the acceptable grounds. The accused's state of defencelessness is significant due to the categorisation describe on procedural law, which makes it impossible to access any alternative measures. This renders available judicial resources useless. Additionally, this condition will follow the accused throughout the trial, making it highly likely to be subject to a conviction based on such subjectivities.

By contrast, the proceduralist criterion aims to address the issues above listed, starting from the premise that the deprivation of liberty is exceptional. Rejecting any attempt to equate it to an anticipated penalty. The characteristic feature of this criterion is the recognition of pretrial detention as a means of eliminating procedural dangers, guaranteeing the presence of the accused and ensuring the proper development of the trial.[22] A criminal procedure code demonstrates the consistency with this vision from two perspectives. Firstly, the *iuris tantum* interpretation (which admits

[21] Instituto de Estudios Comparados en Ciencias Penales y Sociales, *El Estado de la Prisión Preventiva en Argentina. Situación actual y propuestas de cambio* (INCEP 2012) <https://inecip.org/wp-content/uploads/INECIP-Prisi%C3%B3n-Preventiva.pdf> accessed 19 March 2024.

[22] ibid.

proof to the contrary) must be viable, meaning that it should not contain clauses that make it impossible to apply a substitute measure. Secondly, in the design of the articles on the code the articles on pretrial detention should be found after the regulation related to alternative measures.

The proceduralist position limits the use of pretrial detention to specific objective criteria, namely, risk of flight and/or risk of obstruction of justice. This model requires to prove both procedural risks, a task that is direct responsibility of the prosecution. During the oral hearing, the prosecutor must begin by discussing the appropriateness of alternative measures. Only if these measures are insufficient to offset procedural risks, the prosecutor might request pretrial detention. The judge must also carefully analyse the inadmissibility of other alternatives before declaring the pretrial detention.

The judge's interpretation when deciding on pretrial detention should follow a proportional, restrictive, gradual, subsidiary and exceptional approach of the measure of deprivation of liberty. Under this scheme, conventionality control allows a greater margin in favour of the person´s liberty. This legitimises the ability of the judge of waiving any rule of substantive content to the specific case, through the integration of inter-American standards of human rights protection. This integration not meaning a modification in the nature of the process or misuse of the judge´s powers.

1.4 Protecting personal freedom

The use of pretrial detention is a main risk to personal liberty. Since applying it engages its full force, it is important to ensure that this action complies with the requirements of legality and legitimacy. In the accusatory system, there should be no serious issues as the criminal procedure law are in line with the protection standards. Despite the path can become complex when the codes from a state incorporate substantialist criteria or fail to adequately incorporate the proceduralist current.

According to articles 9 and 7 of the ICCPR and the ACHR respectively, personal liberty must be interpreted broadly. In principle, states cannot deprive liberty to any person unless there is a justified and verifiable cause. In the case of pretrial detention, it is imperative to demonstrate the legality and legitimacy of such detention; otherwise, the confinement is arbitrary.

The ICCPR specifically references to pretrial detention, recognising its exceptional nature and the presence of the accused throughout the whole trial (article 9.3). Furthermore, the ACHR provides extensive general protection, recognising the right 'a no ser privado de la libertad arbitrariamente (artículo 7.3), al control judicial de la privación de la libertad y la razonabilidad del plazo de la prisión preventiva (artículo 7.5), a ser oído (artículo 8.1) y a la presunción de inocencia (artículo 8.2)'[23] [not be arbitrarily deprived of liberty (article 7.3), the right to judicial control of the deprivation of liberty and the reasonableness on the pretrial detention term (article 7.5), the right to be heard (article 8.1) and the right to presumption of innocence (article 8.2)].

The concept of arbitrary deprivation is a recurring theme in both texts. When discussing pretrial detention, this concept depends on two elements: legality and legitimacy. Legality refers to the requirement that the decision to apply pretrial detention must be based on the constitution or ordinary laws, more specifically the criminal procedure codes. Also, the notion of legality is closely connected to the rules of due process foreseen in article 8 of the ACHR. This measure must be decided by a pre-established court, in presence of the accused and their defence counsel, respecting presumption of innocence and within a reasonable period.

The concept of legality in pretrial detention is focused on identify formal aspects, determining whether the decision is under law and in accordance with due process. When the legal requirement is met, it is possible to analyse the legitimacy of the precautionary deprivation of liberty to determine whether it was arbitrary or not. According to the proceduralist doctrine and current standards, pretrial detention must be based on purely objective and procedural criteria with the sole purpose of ensuring the presence of the accused throughout the trial. This approach

[23] IACtHR *Case of García Rodríguez et al v Mexico* Preliminary Objections, Merits, Reparations and Costs, Judgment (25 January 2023) 151.

applies not only during the hearing where the measure is implemented but also throughout the criminal proceedings. Its purpose is to determine if whether over time, the grounds originally stated keep existing, but also considering reasonable time.

Demonstrating the conventionality of the deprivation of liberty becomes more complex when legislation prioritises pretrial detention over other alternative measures, highlighting a prevailing prison culture in the system. Justice operators should demonstrate why other measures are insufficient to neutralise procedural risks before resorting to pretrial detention. All these factors contribute to create a legal culture that prioritises imprisonment, leading to the excessive use of this measure.

Additionally, the presence of substantialist criteria in criminal procedure codes that appear accusatory becomes problematic in terms of potential arbitrariness. The main issue lies in the confusion between legality and legitimacy, particularly in cases where procedural law permits or mandates pretrial detention based on ambiguous subjective criteria or the subjective characteristics of the accused. Merely because it is believed that by adjusting a specific case to the normative presupposition there is compliance with the standard, this without a thorough analysis of the procedural risks or the consideration of other options.

In the context of international human rights law, reparation is the logical consequence of any violation. In cases of arbitrary deprivation of liberty, the individual should be able to regain freedom without significant obstacles. However, when discussing pretrial detention, the issue takes on a particular nuance. The effectiveness of judicial remedies can be compromised in systems that blend substantive and procedural notions. This can occur when it is impossible to reverse the coercive measure or there is an unreasonably delay in processing the measure. As a result, criminal proceedings get delayed, and the person´s confinement is extended.

In scenarios related to judicial remedies, priority must be given to requests for reviewing coercive measures. If the judge decides to grant a non-custodial measure when reviewing the legitimacy of the deprivation of liberty, its execution should not be suspended if the other party appeals the decision. Accordingly, the accused would only be subject to pretrial detention until the court of appeal makes a final decision. It is important to keep a

balanced approach and avoid biased language. This is necessary to uphold the principle of *favor libertatis*. Without this measure, the accused would be in an arbitrarily deprivation of freedom while waiting for the final decision.

Regarding the availability of judicial remedies, in addition to those typically accessible in criminal proceedings, *habeas corpus* may become a viable alternative to regain freedom of people in pretrial detention cases where arbitrariness is evident. It is important to note that *habeas corpus* is a simple and effective remedy to challenge the continued confinement of the accused, consistent with article 25 of the ACHR.

Therefore, the protection and preservation of personal liberty should be a top priority for criminal procedure codes. These codes must adjust their regulations on pretrial detention with international human rights standards and proceduralist principles. Nonetheless, reviewing these instruments requires more than just superficial statements. The review must be aimed at eliminating legal guidelines that support the use of substantialist criteria, to remove incentives that encourage its excessive use and prevent the justice system from responding to arbitrary deprivations of liberty.

1.5 Defence and pretrial detention

The shift to an accusatory and guarantee-based system has made the right to defence a central axis of criminal proceedings. The paradigm of this guarantee emphasises a greater intervention degree and participation of the accused throughout the criminal proceedings, including the stages developed previously. In the context of pretrial detention, it requires a specific analysis to determine its scope and effectiveness. The particularities of the coercive measure can jeopardise the effectiveness of pretrial detention.

In the conventional field, article 14 of the ICCPR and article 8 of the ACHR establish that every person has the right to defend themselves during criminal proceedings. Soft law standards complement these articles, such as the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems which forces states to ensure the right to legal aid at all stages of criminal

proceedings.[24] Additionally, the Principles and Guidelines on Public Defense in the Americas, developed by the Inter-American Juridical Committee, focus on the role of public defenders and their importance in strengthening access to justice and democracy.[25]

Operating this guarantee is not unilateral. Instead, normative presuppositions impose liabilities on states to preserve its effectiveness. Under this bilateral logic, national authorities must ensure that their constitution and criminal procedure code recognise elements that strengthen the effectiveness of the right of defence. These elements include procedural equality; availability of interpreters or translators; access to the proceedings file; no restrictions to the counsel practice and the ability to provide public defenders.

Pretrial detention places the accused at a disadvantage compared to the prosecution and other parties involved. This vulnerability increases with prolonged detention, limiting their ability to access and obtain evidence to discredit the thesis of the prosecutor´s office.[26] Moreover, due to the restrained action range within the detention centre, it is impossible for this person to engage in economic activities and acquire resources to pay defence services. While a public defender may be available, their role is limited to the hearings and it is the accused who is the one who must provide the necessary resources to assist their own defence.

For a criminal justice system to comply with international human rights standards regarding pretrial detention, it is essential that domestic legislation expressly recognises the right to legal aid. A second aspect is that the criminal procedure code should grant access to the proceedings file and allow enough time to prepare a defence. To achieve this, elimination of substantive regulations is necessary as well as promotion of the proceduralist vision so the use of pretrial detention becomes exceptional and all incentives that could compromise this principle are eliminated. Furthermore, the law must include accountability mechanisms for officials who do not comply with this prerogative.

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[24] United Nations Office on Drugs and Crime, 'United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems' UN Doc A/67/458 (2013) <www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidlines_on_access_to_legal_aid.pdf> accessed 19 March 2024.

[25] The Inter-American Juridical Committee, Principles and Guidelines On Public Defense In The Americas (13 October 2016).

[26] IACHR, 'Report on the Use of Pretrial Detention in the Americas' (2013).

Another important aspect refers to the shift on the conceptualisation of pretrial detention, particularly the grounds for it. Criminal procedural legislation legitimises the use of pretrial detention based on criteria such as the crime charged, categories of the accused and other elements. However, the inclusion of subjective criteria such as social defence, dangerousness of the accused and protection of the victim, renders useless any action by the defence to avoid provisional confinement or request of alternative measures. This implicitly denies the right of access to suitable and effective judicial remedies.

1.6 Presumption of innocence

In constitutional systems that abide by the rule of law, the punitive power of the state is not absolute. Instead, due to respect for human rights it is restricted. One of the guarantees that limits state action is the presumption of innocence. This principle protects every person and ensures the innocence of the person until a final conviction stating the contrary is delivered. The transition to an accusatorial system means that the prosecution is compelled to prove the guilt of the accused, rather than in the inquisitorial model where the accused ones had to prove their innocence. The IACtHR has established four requirements that pretrial detention measures must meet to not infringe this right:

a) se presenten presupuestos materiales relacionados con la existencia de un hecho ilícito y con la vinculación de la persona procesada a ese hecho; b) esas medidas cumplan con los cuatro elementos del 'test de proporcionalidad', es decir con la finalidad de la medida que debe ser legítima (compatible con la Convención Americana) idónea para cumplir con el fin que se persigue, necesaria y proporcional, estrictamente y c) la decisión que las impone contenga una motivación suficiente que señaladas permita evaluar si se ajusta a las condiciones[27] [presenting material assumptions related to the existence of an unlawful act and the accused person connection to that act. Measures taken must comply with the four elements of the 'proportionality test': legitimacy (compatible with the American Convention), suitability to comply with

[27] IACtHR *Case of Tzompaxtle Tecpile et al v Mexico* Preliminary Objection, Merits, Reparations and Costs, Judgment (7 November 2022) 97.

the purpose pursued, necessity and strict proportionality. The decision imposing them must contain sufficient motivation to allow an assessment of whether they comply with the conditions of the 'proportionality test'].

Compliance with this standard can be challenging in situations where the law allows pretrial detention based on criteria that contradicts the proceduralist perspective. Persistent substantivism is evident in the enabling assumptions of informal pretrial detention or ambiguous situations that exempt judges from their obligation to develop an examination of proportionality justifying the conventionality of the imprisonment. This reduces the possibility of accessing alternative measures and there is uncertainty about whether it was used with procedural justification or if it was, indeed, a security measure or early punishment that would compromise presumption of innocence of the accused.

Similarly, the preservation of the presumption of innocence depends on the duration of pretrial detention. If the detention is unreasonably extended, judicial authorities perceive the accused as guilty, potentially leading to an unfair trial and conviction. For this reason, the restriction and the exceptionality of its use play a crucial role in avoiding the stigma of guilt towards the accused and preserving the legal protection of the innocence for this person.

The treatment of the presumption of innocence is not limited to criminal proceedings and the relation between the parties involved but extends to society. To achieve this goal, authorities should avoid spreading messages that measure the success of an investigation based on the use of pretrial detention. Likewise, individuals in pretrial detention should not be presented to the media in restraints, such as shackles or handcuffs, as this may lead the public to believe that they are already convicted. So, if released on an alternative measure, they may face social stigma and would be treated as if they are guilty in all aspects of their lives.

1.7 Reasonable time

The reasonable time standard mandates that pretrial detention should only last as long as necessary to achieve procedural goals, such as ensuring the presence of the accused during the proceedings and/or preventing obstruction of justice. It is

important to always apply the least restrictive measure that effectively eliminates these procedural risks. The understanding of the temporality of pretrial detention is different from the one used to measure criminal proceedings in general, as it has its own unique characteristics.

To determine whether the length of pretrial detention is compatible with article 7.5 of the ACHR, IACHR analysis divides in two parts. The first establishes whether the provisional deprivation of liberty is based on objective criteria. If it proves so, the second part determines whether the authorities proceeded with due diligence.[28] The IACHR statement creates uncertainty regarding the definition of objective criteria for measuring the time limit. This is due to the inclusion of substantive principles in the articles of criminal procedure law.

To ensure objectivity, it is important to focus solely on eliminating procedural risks and guaranteeing the presence of the accused during the proceedings. However, these principles must always be subordinated to the achievement of the desired goals within an acceptable and proportional time. Therefore, there should be a conventional criterion for measuring the time that a person may remain in pretrial detention, without it constituting an arbitrary deprivation of liberty. Clarifying that point would avoid authorities using the due diligence standard to justify unnecessary time extension.

At the inter-American level, there is no unified formula for establishing on how to understand reasonable time. Supplementary to the duration of criminal proceedings in general, the IACtHR has identified four elements applicable to pretrial detention: (i) consider the complexity of the matter, including evidence issues, multiple subjects or victims, time elapsed since the matter was known, characteristics of the remedy and the context of the facts; (ii) evaluate the procedural activity of the interested party and the reasonably required interventions; (iii) assess the conduct of the judicial authorities in directing and conducting the proceedings and (iv) examine the impact on the legal situation of the accused.[29]

[28] IACHR, 'Case 11.245 Report No 12/96' (1996).
[29] IACtHR *Case of García Rodríguez et al v Mexico* (n 23).

To ensure a reasonable time limit, it is ideal for criminal procedure codes to include maximum time limits. However, it is important to note that the existence of such time limits does not necessarily mean that a person remains deprived of liberty during all the proceedings. Instead, the duration of the deprivation should be determined on a case-by-case basis and after passing the proportionality test. In consequence, the time may be much less than the limit established in the norm. Similarly, a person should not be in pretrial detention for a duration similar or higher to the expected sentence, as this would result in them being treated equally or worse than a convicted prisoner. Therefore, after the period for pretrial detention determined by the judge has ended, a more thorough analysis of the grounds must be conducted to confirm the presence of procedural risks that justify confinement. If such risks are not present, immediate release must be ordered, and alternative measures should be considered.

1.8 The use of alternative measures

The accusatory system prioritises the freedom of the accused during the proceedings development and, therefore, alternative measures must prevail over placing the detainee in a vulnerable situation.[30] The pro-freedom stance in legislation is evident by the position it has in the text of the criminal procedure codes, always regulating pretrial detention as a last resort.

In 1990, in the universal system, the UN adopted the Standard Minimum Rules for Non-custodial Measures (Tokyo Rules). These rules clearly state that pretrial detention should be a last resort (principle 6.1) and that the application of alternative measures should be as soon as possible (principle 6.2).[31] At the regional level, the IACHR issued the Principles and Best Practices on the

[30] General Assembly, 'Torture and other cruel, inhuman or degrading treatment or punishment' UN Doc A/64/215 (3 August 2009) <www2.ohchr.org/english/issues/torture/rapporteur/docs/A-64-215.pdf> accessed 19 March 2024.

[31] United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) UNGA Res 45/110 (14 December 1990).

Protection of Persons Deprived of Liberty. The document advocates that Organization of American States (OAS) member states incorporate a range of alternative or substitute measures for deprivation of liberty into their legislation (principle III.2).[32]

The range of alternative measures is not restrictive; instead, states have complete flexibility in creating a list of available measures, if they are effective in achieving the goals of the proceedings and do not undermine the right of victims to access justice. Alternatives to provisional confinement include the simple promise of the accused, payment of a financial guarantee or bail, surveillance by the authorities, periodic presentation, ban to leave the country and limitation on movement, retention of travel documents, impossibility to maintain contact with certain persons or to approach certain places, the use of electronic devices or house arrest.[33]

The main concern is not the types of measures available, but rather the development of mechanisms to guarantee their widespread use by judicial authorities. As previously mentioned, the first point pertains to the priority order in legislation related to pretrial detention. The second obligation pertains to the prosecutor and the judge, who must plead within their competencies, the suitability of each measure. If none of the measures are viable, provisional imprisonment should be used as last resort.

The assessment of the benefit of using alternative measures to eliminate procedural risks is a crucial matter. It raises questions such as who should provide information on their suitability and effectiveness for the specific case, how to ensure the objectivity of the information and what mechanisms are appropriate for monitoring compliance. In general, it is not advisable for the prosecution service to oversee these tasks due to the risk of subjective and non-technical actions. The main objective of the prosecutor´s office is to obtain a conviction and imprisonment, which may lead to promoting pretrial detention as a factor to measure the success of the investigation, eliminating any possibility of requesting alternative measures. Neither it is appropriate that this task befalls on the judge, as it would exceed and undermine their role within an accusatory system.

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[32] IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008).

[33] IACHR, 'Report on the Use of Pretrial Detention in the Americas' (n 26).

Therefore, it is essential to establish offices of alternative or substitute measures as independent bodies responsible 'de producir la información necesaria al momento de la detención, para que las partes puedan alegar en forma adecuada qué medida resulta más conveniente y, a su vez, supervisarlas'[34] [of providing the necessary information at the time of the detention, this will enable the parties to plea adequately which measure is more appropriate and meanwhile, supervise them]. There is debate over whether to place these offices within the judicial branch, the public prosecutor's office or the ministry of the interior, or to establish them as independent agencies with their own legal identity to maintain their objectivity. To achieve effectiveness, these offices must focus on the following elements: no subordination to the prosecutor´s office criteria, meaning that their analysis should not be influenced or restricted by the prosecutor position; selecting technical personnel and professionalising public officials; ensuring availability of resources and accountability mechanisms.

In a criminal proceeding, it would be the duty of these offices to inform the judge about the alternative measures that could be applied in the specific case, demonstrating that these measures can eliminate the procedural risks. It is essential to make the participation of these entities in the procedure compulsory, and that the reports they produce were legally binding for judicial officers. Failure to comply would result in allegations of due process violations. Their duty will comprise all phases of the proceedings, so during requests of judicial review of the coercive measure, their work will focus on informing the judge about the convenience of the non-custodial measure.

Additionally, they would play a relevant role in supervising compliance with alternative measures and accountability. These offices would be responsible of verifying that the beneficiary complies with the terms ordered by the judge. The prosecutor and the judge will always supervise this task. Accountability is meant within or outside the criminal proceedings. In the former position, officials must periodically report to the prosecutor´s office and the judge on the fulfilment of the decision. In the latter case, accountability must follow civil service and administrative procedures, as well as civil and criminal liability.

[34] Instituto de Estudios Comparados en Ciencias Penales y Sociales (n 21) 107.

1.9 Retrieving freedom as the primary reparation

The logical consequence of a violation of human rights is that the state should compensate the victim for the damage caused and ensure 'la plena restitución (restitutio in integrum), lo que incluye el restablecimiento de la situación anterior y la reparación de las consecuencias que la infracción produjo y el pago de una indemnización'[35] [full restitution (*restitutio in integrum*), which includes the restoration of the previous situation and reparation for the consequences of the violation and the payment of compensation]. In the specific case of pretrial detention, the main form of reparation is the immediate restoration of liberty, without prejudice to any other form of reparation that the legislation of each country may recognise.

The termination of pretrial detention and obtaining personal liberty seems to be a speedy procedure with immediate effect, although there is a danger that criminal procedure codes inspired by a substantialist vision, will follow a completely opposite path. In criminal proceedings, after the judge decides to reverse pretrial detention and imposes an alternative measure, the logical consequence would be the person being released in the shortest possible time and the Office for the Control of Measures should be responsible for monitoring compliance. However, this axiom is not fulfilled when the remedy against such decision has a suspensive effect and prevents the execution of the release order, since the effectiveness of the judicial remedy would be useless, and the detention would be unreasonably extended.

In view of all the above, it is undeniable that the review of the decision imposing preventive detention must be guaranteed by criminal procedure codes. But it is also essential that the effects of the judicial decision to be immediate and not suspended by the filing of remedies. Otherwise, the duration of the preventive measure would be unreasonably extended, constituting it an arbitrary deprivation of liberty, which would be contrary to international standards for the protection of human rights, and would result in liability for the officials involved.

[35] IACtHR, Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89 (14 July 1989) 26.

1.10 Conclusion

Pretrial detention imposes as the most oppressive measure in criminal proceedings since it involves the deprivation of liberty of an innocent person. In this sense, its use should be limited to procedural purposes and for ensuring the appearance of the accused throughout the trial, preventing it from becoming illegal or illegitimate and violating other human rights. In this order of ideas, it is imperative that the normative system prioritises alternative measures, not only by regulating them but by creating real institutional mechanisms to ensure their widespread use by judges. The following chapter will show how these elements are present in the legislation of El Salvador, Honduras and Costa Rica.

2. Comparative analysis of regulations and good practices related to pretrial detention in El Salvador, Honduras and Costa Rica

2.1 Introduction

Chapter 2 begins with a methodological clarification of the comparative law used in the study of pretrial detention legislation and best practices developed in El Salvador, Honduras and Costa Rica. Then it contextualises the relation between these three countries and Guatemala to determine the regulatory similarities, especially the one regarding pretrial detention. Finally, the chapter includes an analysis on the relative regulation of custodial measures from a human rights perspective, with an emphasis on the alternative measures available in each of the systems.

2.2 Methodological clarification of comparative law

El Salvador, Honduras, Costa Rica and Guatemala generally share a legal identity marked by a common history. These points of connection, both legal and extralegal, allow a comparative analysis of the legal systems of the countries, making it possible to identify the style of their normative systems, especially about human rights and the regulation of pretrial detention, including those practices used to address challenges in the use of pretrial detention.

The best way to achieve this goal is by using comparative law, which allows the comparison of the legal systems of Central America.[36] It is important to note that this chapter is not simply describing how pretrial detention is regulated, but rather is using comparative law to analyse and understand these national regulations objectively. The goal is to identify the style of each system, and under a functionalist approach,[37] [38] detail the practices used by each to address the issue of pretrial detention. Subsequently, it will be determined how these practices can be applied to the Guatemalan context.

2.3 Central America: Comparing contexts

During the period of Spanish rule, the Captaincy General of Guatemala administered the territory of present-day Guatemala, El Salvador, Honduras and Costa Rica, and it reported directly to the crown.[39] This resulted in the establishment of common institutions and norms for the region, including the inquisitorial model of the criminal procedure system, which remained in force in Central America until the end of the 20th century.

After gaining independence from the Kingdom of Spain, the Provinces of Central America decided to join the Mexican Empire on 5 January 1822, by signing the Act of Union of the Provinces of Central America to the Mexican Empire. This union ended on 19 July 1823, with the adoption of the Act of Absolute Independence

[36] Gloria Morán, 'El derecho comparado como disciplina jurídica: la importancia de la investigación y la docencia del derecho comparado y la utilidad del método comparado en el ámbito jurídico' (2002) 6 Anuario da Facultade de Dereito da Universidade da Coruña <https://ruc.udc.es/dspace/handle/2183/2179> accessed 18 March 2024.

[37] Functionalism establishes that comparative law research should start with questions formulated in factual and not conceptual terms, focusing on individualising the technical-legal solutions adopted by the countries studied with respect to the point under analysis.

[38] Alessandro Somma, *Introducción al derecho comparado* (Figuerola Institute of Social Science History 2015) <www.corteidh.or.cr/tablas/r34961.pdf> accessed 19 March 2024.

[39] Enrique Noriega, *La Independencia Su bicentenario (1821-2021)* (Editorial Cultura 2021) <https://mcd.gob.gt/wp-content/uploads/2022/05/21-Enrique-Noriega-La-independencia-su-bicentenario-1821-2021-Lecturas-Bicentenarias.pdf> accessed 18 March 2024.

of the Provinces of Central America.[40] From then on, a genuine process of Central American independence started and the idea of building a federal republic that would include the countries of the region arose. However, the vision and understanding of the criminal justice persisted.

In 1824, the Constitution of the Federal Republic of Central America was promulgated, marking the beginning of the Federation of Central America.[41] Its design was inspired by the US federalist model and recognised that it was composed by the states of Guatemala, El Salvador, Honduras, Costa Rica and Nicaragua.[42] The federation established a federal government, but also recognised that each nation was free to form its own government and administration.

Unfortunately, the process failed in the mid-19th century due to multiple internal conflicts and strong differences among national elites. However, the current constitutions of Guatemala, El Salvador, Honduras and Costa Rica prioritise relations between Central American countries and provide privileges to their nationals, especially in matters of nationality, considering the 'lazos históricos, culturales y espirituales mucho más estrechos'[43] [close historical, cultural and spiritual ties].

The bonds between Guatemala, El Salvador, Honduras and Costa Rica are strong due to a historical process of over two centuries. This has led to the development of regulatory systems based on common elements. The regulation of criminal justice is not exempt from historical dynamics as in all four countries, the criminal process was based on the inquisitorial system, a direct legacy of the Spanish Crown. This system advocated for excessively formalistic and secret trials, where preventive detention became the norm, and the rights of the accused were minimised. The criminal

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40 Guillermo Vásquez, ´Nacimiento y ocaso de la Federación de Centro América: entre la realidad y el deseo ´ *(2012) 37 Revista Complutense de Historia de América* <www.researchgate.net/publication/272646132_Nacimiento_y_ocaso_de_la_Federacion_de_Centro_America_entre_la_realidad_y_el_deseo_Born_and_decline_of_Federacion_de_Centro_America_beetwen_reality_and_desire> accessed 19 March 2024.

41 ibid.

42 The reference to Nicaragua is included for historical and descriptive purposes only. It will not be used as a subject of study in this chapter due to the non-democratic regime in power, which would make comparative analysis difficult.

43 IACtHR, Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 (19 January 1984) 60.

procedural reforms were carried out during the same period due to the strong relationship between the nations. Therefore, it is evident that the institutions included in their legislations are also common.

2.3.1 The Central American integration process and democratic security

In 1951, the governments of Guatemala, El Salvador, Honduras, Costa Rica and Nicaragua signed the Organization of Central American States (OCAS) Charter with the aim of strengthening the union and maintaining peaceful coexistence in the region.[44] The charter remained in force for ten years until it was replaced by the Charter of San Salvador in 1962. The OCAS Charter focused on creating new bodies, such as the Central American Court of Justice and the Defense Council.[45] Although an important step, the new system was designed to strengthen the economic integration of the region without explicitly mentioning institutional strengthening or respect for human rights.

The Central American Integration System (CAIS) was created in 1991 with the adoption of the Tegucigalpa Protocol, which reformed the OCAS Charter and established 'como un nuevo marco jurídico-político. Para todos los niveles y ámbitos ... como los aspectos económicos, sociales, culturales, políticos y ecológicos que permitieran visualizar un desarrollo integral para la región'[46] [a new legal and political framework. The CAIS aims to promote integral development for the region in all levels and areas, including economic, social, cultural, political and ecological aspects]. The significance of this new instrument lies in its incorporation of democracy, freedom, development, peace and respect for human rights as the organisation's key objectives. This was particularly relevant at the time as several Central American countries were undergoing a democratic transition, making this a top priority for the region.

In accordance with this new vision of CAIS, the governments of Guatemala, El Salvador, Honduras, Costa Rica, Nicaragua and Panama signed the Framework Treaty on Democratic Security in Central America. This treaty created the Central American Model

[44] Charter of the Organization of Central American States (14 June 1951).
[45] Charter of the Organization of Central American States (12 December 1962).
[46] Central American Integration System, 'Reseña histórica del SICA' (CAIS) <www.sica.int/sica/resena_sica.aspx> accessed 19 March 2024.

of Democratic Security, which is based on democracy, the rule of law and respect for human rights.[47] This treaty formalises the consensus among Guatemala, El Salvador, Honduras and Costa Rica that civilian power must be strengthened, and that the fight against crime must be conducted with strict respect for human dignity and a guaranteeing vision.

The treaty emphasises the importance of the concept of democratic security, which must be integral, indivisible and respectful of human dignity. In terms of pretrial detention, this Central American notion implies that the punitive power of the state is limited by law and respect for human rights. Therefore, criminal procedural systems must be based on an accusatory model and regulate this coercive measure within a proceduralist scheme.

It is undeniable that there is a connection between Guatemala, El Salvador, Honduras and Costa Rica regarding their approach and understanding of pretrial detention within a democratic security scheme and under a protective accusatory system. Thus, dealing with this coercive measure within each of the countries requires consistency with the values and principles of the Central American security model, where respect for human rights is a constant and obligatory requirement.

2.3.2 Normative comparison of pretrial detention

From a general perspective, the first commonality among the legal systems of three of the countries chosen is their structure within the civil law tradition. This implies the existence of a written constitution that recognises human rights of the citizens and the form of political and administrative organisation. Similarly, the regulation of pretrial detention is primarily contained in codes and laws approved by the legislative body, which are complemented by secondary or administrative norms.

El Salvador, Honduras and Costa Rica have ratified the ICCPR and its optional protocol[48] at the universal protection system level. This means that they recognise the competence of the Human Rights Committee to hear communications alleging violations of human rights under the ICCPR. Therefore, the recommendations issued by that treaty body regarding personal liberty and pretrial

[47] Framework Treaty on Democratic Security in Central America (15 December 1995).
[48] Office of the High Commissioner, 'Status of ratification interactive dashboard' (*United Nations Human Rights*) <https://indicators.ohchr.org/> accessed 19 March 2024.

detention are applicable to them. Likewise, in the inter-American sphere, countries are bound by the ACHR and acknowledge the interdependence of the IACHR and the contentious jurisdiction of the IACtHR.[49] They are forced to uphold the protection standards and ensure compliance with the principle of conventionality.

Thus, the three Central American countries, plus Guatemala, also share that all four underwent a criminal procedure reform process simultaneously, transitioning from an inquisitorial model to an accusatory one. Guatemala was the first country to adapt its domestic law with the entry into force of the Criminal Procedure Code of Guatemala (CCPG) – Act 51-92 – in 1994. This was followed by Costa Rica and El Salvador through Law 7594 and Legislative Act No 904 respectively. Finally, in Honduras, Act 9-99-E came into force in 2002.[50] For this reason, it is evident that protecting personal liberty is a top priority in the criminal process, and any measure that deprives it must be exceptional. Therefore, it is essential to consider their actions related to respect of personal liberty, to compare them to the Guatemalan context.

2.4 Guarantee setback of the rule of law in El Salvador

El Salvador shares a similar constitutional history with Guatemala. In 1982, a National Constituent Assembly was convened to draft a new constitution that respected human dignity.[51] Finally, in 1983, the Political Constitution of the Republic of El Salvador was approved, which made the protection of human rights a central issue on the public agenda of the Central American country.

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49 IACtHR, 'ABC Inter-American Court of Human Rights What, How, When, Where and Why of the Inter-American Court of Human Rights: Frequently Asked Questions' (*IACtHR* 2020) <www.corteidh.or.cr/sitios/libros/todos/docs/ABCCorteIDH_2020_eng.pdf> accessed 19 March 2024.

50 Centro de Estudios de Justicia de las América, *Prisión preventiva en América Latina, enfoques para profundizar el debate* (Centro de Estudios de Justicia de las América 2013).

51 Supreme Court of Justice of El Salvador, 'La Historia de las Constituciones Políticas de El Salvador **La Constitución de 1983' (*Supreme Court of Justicia of El Salvador*, 16 December 2020)** <www.csj.gob.sv/la-historia-de-las-constituciones-politicas-de-el-salvador-2/> accessed 19 March 2024.

The new constitution implementation needed the reform of the criminal justice system to meet the new standards of protection, this including pretrial detention. In 1992, the percentage of individuals detained without conviction was as high as 83%.[52] Thus, after a criminal procedure reform process in 1996, the country approved the new Criminal Procedure Code (act number 904) based on the Model Criminal Procedure Code for Ibero-America, as well as the Criminal Procedure Codes. The new code established a mixed system.[53]

The newly implemented code acknowledged that the temporary deprivation of liberty must be proportionate to the anticipated sentence and should never surpass it (article 6). This aligned with a more protective and respectful approach on human rights. In addition, it stated that pretrial detention was appropriate in cases where there was sufficient evidence of criminal participation (article 292.1), that the crime punishment established a prison sentence of three or more years (article 292.2), obstruction of the investigation (article 293.3) or danger of flight (article 303) placing this act on the proceduralist field.[54] However, articles 292, 293 and 204 included substantialist grounds such as social alarm, frequency of committing similar acts, suspicion of committing crimes or the impossibility of accessing an alternative measure based on the crime charged. These situations can be ambiguous and tend to rely on subjective criteria, potentially distorting the meaning of the coercive measure.

Similarly, this legislation included good practices, such as regulating alternative measures separately from pretrial detention to ensure its proportional use in criminal proceedings. It also banned imposing disproportionate financial guarantees on people in poverty;[55] suspending during the appeal the decision that declared the alternative measure (article 304), the periodic *ex officio* review of pretrial detention and the obligation to set the hearing for the review of measures within 48 hours of being requested (article 307). All these were positive aspects that contributed to the reduction of the measure of confinement.

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[52] Centro de Estudios de Justicia de las América, *Prisión preventiva en América Latina, enfoques para profundizar el debate* (n 50).

[53] Sandoval Rommel, 'El Proceso Penal Adversativo: La Decisión Político-Criminal Del Constituyente' (2005) <https://e-archivo.uc3m.es/bitstream/handle/10016/19203/FCI-2004-10-sandoval.pdf?sequence=1&isAllowed=y> accessed 19 March 2024.

[54] Act 904 1996.

[55] ibid art 294.

Thus, it can be concluded that the regulation of pretrial detention in this criminal justice system was compatible with proceduralist trends and international human rights standards, as it recognised pretrial detention as an exceptional measure created to meet procedural purposes and ensured that the person deprived of liberty had access to judicial remedies to request a review or challenge the measure. The effectiveness of sound legislative practices was demonstrated when the percentage of individuals in pretrial detention reduced from 54.3% in 2001 to 26.9% in 2015.[56]

In 2008, the Legislative Assembly repealed Act 904 and replaced it with a new Criminal Procedure Code, Act 733. The purpose of this change was to harmonise multiple legislative reforms, increase the efficiency of investigating and prosecuting criminal acts, systematise the punitive power of the state, democratise criminal action and guarantee the protection of human rights.[57] The purpose of this law was to advance regulatory adaptation from an accusatory perspective. However, modifications around pretrial detention deviated from this purpose and aligned more with a substantive logic.

The text of the new code maintains the principle that provisional deprivation of liberty must be proportional to the expected penalty and adheres security measures as a parameter. It also stipulates that pretrial detention could not exceed the maximum penalties or measures set by law, and neither a 12 months or 24 months period for less serious or more serious crimes, respectively.[58] Article 329 of the new code removes as grounds for this measure, subjective elements, such as social alarm and the frequency of similar acts.

[56] World Prison Brief, 'El Salvador Pretrial/remand prison population: tren' (WPB) <www.prisonstudies.org/country/el-salvador> accessed 19 March 2024.

[57] Act 733 2008.

[58] ibid art 8.

The new Criminal Procedure Code appears to contradict its proceduralist and accusatory purpose by adopting a substantialist approach. This is evident in its restriction of applying alternative measures to the catalogue of crimes listed in article 331,[59] endorsing informal pretrial detention. Additionally, article 8 eliminates the 12 or 24 months period, depending on the type of crime,[60] as maximum duration of the measure, and extends it until the sentence is final. The IACHR has exposed and expressed concern about this situation:

[59] Artículo 331 del Decreto 733 los delitos 'HOMICIDIO SIMPLE, HOMICIDIO AGRAVADO, SECUESTRO, DELITOS CONTRA LA LIBERTAD SEXUAL, ROBO AGRAVADO, EXTORSIÓN, DEFRAUDACIÓN A LA ECONOMÍA PÚBLICA, COMERCIO DE PERSONAS, TRÁFICO ILEGAL DE PERSONAS, TRATA DE PERSONAS, DESÓRDENES PÚBLICOS, DELITOS CONTEMPLADOS EN LA LEY REGULADORA DE LAS ACTIVIDADES RELATIVAS A LAS DROGAS, LOS DELITOS CONTEMPLADOS EN LA LEY CONTRA EL LAVADO DE DINERO Y DE ACTIVOS; Y DELITOS COMETIDOS POR MIEMBROS DE GRUPOS TERRORISTAS, MARAS, PANDILLAS O CUALQUIER OTRA AGRUPACIÓN CRIMINAL A LAS QUE SE REFIERE EL ARTÍCULO 1 DE LA LEY DE PROSCRIPCIÓN DE MARAS, PANDILLAS, AGRUPACIONES, ASOCIACIONES Y ORGANIZACIONES DE NATURALEZA CRIMINAL' (capitalisation from the original text) [Article 331 of Act 733 lists several crimes, including simple homicide, aggravated homicide, kidnapping, crimes against sexual freedom, aggravated robbery, extortion, fraud against the public economy, trade in persons, illegal trafficking of persons, trafficking in persons, public disorder, crimes contemplated in the law regulating activities related to drugs, and crimes contemplated in the law against money laundering and asset laundering; crimes committed by members of terrorist groups, gangs or any other criminal group referred to in article 1 of the Law on Proscription of *Maras, Pandillas*, Groups, Associations and Organisations of Criminal Nature].

[60] Artículo 8 del Decreto 733 los delitos son 'HOMICIDIO, HOMICIDIO AGRAVADO, EXTORSIÓN, EXTORSIÓN AGRAVADA, PROPOSICIÓN Y CONSPIRACIÓN PARA COMETER DICHOS DELITOS, ASÍ COMO LOS DELITOS DE AGRUPACIONES ILÍCITAS, ORGANIZACIONES TERRORISTAS Y LOS CONTEMPLADOS EN LA LEY REGULADORA DE LAS ACTIVIDADES RELATIVAS A LAS DROGAS, Y EN GENERAL CUALQUIER DELITO COMETIDO POR MIEMBROS DE GRUPOS TERRORISTAS, MARAS, PANDILLAS O CUALQUIER OTRA AGRUPACIÓN CRIMINAL A LAS QUE SE REFIERE EL ARTÍCULO 1 DE LA LEY DE PROSCRIPCIÓN DE MARAS, PANDILLAS, AGRUPACIONES, ASOCIACIONES Y ORGANIZACIONES DE NATURALEZA CRIMINAL' (capitalisation from the original text) [According to article 8 of Act 733, the crimes listed include homicide, aggravated homicide, extortion, aggravated extortion, proposition, and conspiracy to commit such crimes, as well as the crimes of illicit groups, terrorist organizations, and those contemplated in the law regulating drug-related activities. Any crime committed by members of terrorist groups, gangs, or any other criminal group referred to in article 1 of the Law on Proscription of *Maras, Pandillas*, Groups, Associations and Organisations of a Criminal Nature].

> The IACHR recalls that the mandatory imposition of pretrial detention based on the type of offense is not only a violation of the right to personal liberty as enshrined in Article 7.3 of the American Convention, but also amounts to a kind of anticipated sentence, and constitutes an illegitimate interference by legislators in the powers of judicial authorities to analyze the case.[61]

The two normative premises of articles 8 and 331 are known to contradict human rights protection standards. First, they allow the unreasonably prolongation of the coercive measure, which can lead to arbitrary deprivation of liberty. Second, they violate the presumption of innocence by feeding prejudice and stigma of the judge towards the possible guilt of the accused. Third, it eliminates the capacity of defence of the accused since there are no suitable and effective judicial remedies capable of reversing the situation. Additionally, it exempts the judge from substantiating the decision that supports the provisional confinement.

Another negative aspect of this code is the elimination of the informal and periodic review of pretrial detention and the extension of the period for holding the review hearing from 48 hours to three days (article 344). Finally, article 341 indirectly contemplates the legality of extended detention, since in cases where the judge's decision to reverse the provisional detention is appealed, it will have a suspensive effect and the person would remain in detention until the higher court solves the appeal.[62]

Therefore, the regulation of pretrial detention in the new criminal procedure code represents a regressive trend, as it imposes substantive aspects that deviate from the accusatory and proceduralist ideology and the general trend of building criminal justice systems that respect and protect human rights. It is worth noting that this normative scenario is not a coincidence, but rather the outcome of public safety policies that promote the excessive use of pretrial detention and undermine human dignity of those who are undergoing criminal proceedings. This deviates from the guidelines established by international protection standards, making it a negative state practice to fight crime.

[61] IACHR, 'Situation of Human Rights in El Salvador' (2021) 136.
[62] Act 733 (n 57).

2.5 Honduras: Similar realities

The Honduran Criminal Procedure Code was issued by the National Congress through Act 9-99-E and came into force in 2002. This new law brought about a significant change in the criminal justice model, transitioning from an inquisitorial logic to an accusatory system with guarantees. Regarding the issue of pretrial detention, this new legislation recognises that its use should be exceptional, consistent with respect for human rights and aims to ensure the presence of the accused while eliminates procedural risks.

2.5.1 Implications of criminal procedure reform

Prior to Act 9-99-E, the criminal process was governed by the 1984 Criminal Procedures Code. It is important to note that the previous model legal guidelines for pretrial detention were incompatible with international human rights standards. This was because pretrial detention was imposed *ex officio* by the judge, without the presence of the parties, preventing the accused from adequately exercising their right to defence. Furthermore, since it was a formal, written and secret act, it evaded the responsibility of the judicial officer to analyse the procedural risks and motivate the decision. The only alternative measure available was economic bail, only if the crime had a custodial sentence of five or more years.[63]

The new Criminal Procedure Code, also inspired by the Model Criminal Procedure Code for Ibero-America, establishes the exceptional nature of pretrial detention, determining that it will only be applied if procedural risks, such as reasonable indications of participation, danger of flight or obstruction, are verified, and if it is useful for guaranteeing the effectiveness of the criminal proceeding, by ensuring the presence of the accused, and regulating evidence collecting.[64] This prevents the risk of this measure being transformed into an anticipated penalty, or using subjective

[63] Centro de Estudios de Justicia de las América, *Prisión Preventiva y Reforma Procesal Penal en América Latina: Evaluación y Perspectivas* (Centro de Estudios de Justicia de las América 2009)

[64] Act 9-99-E 1999.

criteria leading to a violation of the presumption of innocence of the accused. However, it still tends to limit the use of non-custodial measures based on the severity of the crime,[65] which contradicts the goal of safeguarding personal freedom.

The protective spirit on this procedural law is notorious as it establishes objective values for the qualification of the concepts of danger of flight (article 179) and obstruction (article 180). For the former, its use is allowed until the end of the debate, considering it unnecessary beyond that point, thus preserving the procedural essence of provisional confinement. The judge must conduct a proportional examination of the specific case to identify if any of the elements described in the norm applies to it. This way the judge ensures the decision is founded, avoiding arbitrary, ambiguous, or subjective reasoning.

Another important consideration is the general rule of limiting pretrial detention in cases where the sentence would be less to five years; or the accused is over 70 years of age, pregnant or nursing women; and those with terminal illnesses.[66] The purpose of these safeguards is to maintain the proportionality and procedural nature of the measure, and protecting with this, the personal integrity of the accused and preventing them from being subjected to torture, humiliation, or abuses due to their vulnerable condition.

Regarding non-custodial coercive measures, the range of alternatives has been expanded. Bail is no longer the sole option for the accused. The judge now can perform *ex officio* control to replace or reverse pretrial detention with another measure (articles 184 and 188). Additionally, periodic review is mandatory to verify the existence or variation of the grounds of the measure (article 186).[67] It also incorporates the requirement to hold a hearing for reviewing the measures within 48 hours is included. This is positive because it prevents unjustified extension of confinement, which could lead to arbitrary deprivation of liberty. It guarantees the right to access judicial review in a timely manner (article 187).

[65] Act 9-99-E (n 64). According to art 184 of the Criminal Procedure Code, substitute measures will not be applied in cases of drug trafficking, special rape, arms trafficking or crimes related to criminal groups known as 'maras' or gangs.

[66] ibid.

[67] ibid.

Article 181 of the code[68] stipulates that pretrial detention should not exceed one year. However, if the penalty for the crime is greater than six years, it may be extended up to two years. In exceptional cases, a final extension of six months is permitted for reasons of difficulty, dispersion or evidence amplitude. It is important to note that the measure should not exceed half of the minimum sentence duration. If a conviction is made, the person may be detained during the appeal proceedings for up to half of the imposed sentence.

Related to this, it is necessary to consider two specific aspects. Firstly, the regulation on the duration of pretrial detention with respect to half of the minimum sentence or conviction must be calculated in accordance with the one-two years limit. Secondly, it is important to consider during the appeal proceedings whether the person was deprived of liberty during the criminal proceedings of first instance. If so, there is a risk that the delay in the resolution of the appeal may unreasonably extend the imprisonment, resulting in an arbitrary deprivation of liberty.

The Procedural Code states that officials or employees who cause a delay in the proceedings beyond the legal maximums, whether culpable, negligent or malicious, will be held legally liable. This provision helps to discourage the excessive use of pretrial detention and ensures accountability, making it a good regulatory practice.

Finally, if there is an appeal against a decision that issues, modifies or declares a precautionary measure without merit, the appeal will not have a suspensive effect on the execution of the judicial decision. The parties will be summoned within 24 hours, and the court of appeals must decide within three days.[69] The suspension of enforcement of a measure is valuable when a person has been granted an alternative measure, as they remain at liberty during the appeal proceedings. However, if the opposite scenario occurs, prompt resolution of the appeal is a priority to prevent unreasonably extended deprivation of liberty due to delay.

The criminal procedure reform had a significant impact. In 2001, the year before the new code was implemented, the number of people in pretrial detention accounted for 85% of the total prison population. However, in 2007, the number decreased to 49%,

[68] Act 9-99-E (n 64).
[69] ibid.

marking a 36% drop.[70] Unfortunately, by 2020, the trend had reversed, and the number of people provisionally deprived of their liberty increased to 53.7%.[71] Therefore, the first good practice a state may apply to reduce the use of pretrial detention is the regulatory adaptation to the accusatory system of international human rights protection standards, and the proceduralist model. Yet, this alone is not a sufficient guarantee, as other positive actions are required to contribute to this objective.

2.5.2 The use of the electronic monitoring system and measure monitoring

Honduras has implemented several best practices to address the issue of pretrial detention, including the use of technology. In 2017, the National Congress reformed the Criminal Procedure Code and the National Penitentiary System Law to regulate the use of personal electronic surveillance as a means of monitoring compliance with conditional suspensions of criminal prosecution and non-custodial precautionary measures. The National Penitentiary Institute is responsible for ensuring their execution and implementation.

Electronic surveillance control was implemented to ensure compliance with measures such as house arrest, surveillance by a person or institution, periodic court appearances, prohibition from leaving a certain territory and restrictions on attending certain places or communicating with certain persons.[72] Therefore, utilising technology to enforce mandated measures is a beneficial practice for the government. However, it is crucial to consider the following.

The first aspect is that the electronic surveillance system imposes an increased responsibility on the state to acquire the necessary resources for its implementation and widespread use. This is due to the urgency of safeguarding personal liberty, presumption of innocence, defence and other guarantees of individuals subjected to pretrial detention. As of March 2023, authorities were

[70] Centro de Estudios de Justicia de las América, *Prisión Preventiva y Reforma Procesal Penal en América Latina: Evaluación y Perspectivas* (n 63).

[71] World Prison Brief, 'Honduras Pretrial/remand prison population: trend' (WPB) <www.prisonstudies.org/country/honduras> accessed 19 March 2024.

[72] Act 9-99-E (n 64).

considering the acquisition of electronic shackles.[73] Therefore, any legislative change must be accompanied by immediate positive actions to comply not only with the norm but also to align state conduct with international human rights protection standards. Failure to do so could be considered a violation of international obligations assumed by the countries.

2.6 Costa Rica and the protective paradigm in the region

The case of Costa Rica presents several distinctive features that set it apart from other Central American countries. Firstly, its current constitution has been in force since 8 November 1949. Notably, this document prioritises the respect, defence and guarantee of human rights by the state. Article 37 of the Constitution of the Republic of Costa Rica states that no one may be detained unless there is verifiable evidence of the commission of a crime, issuance of a court order and the person is brought before a competent judge.[74] [75]

On this constitutional basis, in 1973 a Criminal Procedure Code was approved, inspired by that of the Province of Córdoba, Argentina, which implemented oral proceedings in criminal justice, also recognising the Public Prosecutor's Office and the Judicial Police as independent institutions of the judiciary, although attached to the Judicial Branch.[76] On the specific issue of pretrial detention, in general terms, such regulation was consistent with the proceduralist vision by specifying that it could be applied due to danger of flight and/or obstruction.[77]

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[73] La Prensa, 'Honduras considera la compra de grilletes electrónico para reos' (*La Prensa*, 24 March 2023) <www.laprensa.hn/honduras/honduras-considera-compra-grilletes-electronicos-reos-carceles-secretaria-seguridad-FN12797929> accessed 19 March 2024.

[74] Constitution of Costa Rica (1949).

[75] ibid 'ARTÍCULO 37.- Nadie podrá ser detenido sin un indicio comprobado de haber cometido delito, y sin mandato escrito de juez o autoridad encargada del orden público, excepto cuando se tratare de reo prófugo o delincuente infraganti; pero en todo caso deberá ser puesto a disposición de juez competente dentro del término perentorio de veinticuatro horas' [ARTICLE 37 - No one may be detained without a proven indication of having committed a crime and without a written order from a judge or authority in charge of public order, except in the case of a fugitive or an offender in *flagrante delicto*. However, in any case, the individual must be brought before a competent judge within 24 hours].

[76] Daniel González, 'La aplicación del nuevo código procesal penal en Costa Rica' (1997) 9(14) Ciencias Penales. Revista de la Assiación de Ciencas Penales de Costa Rica 105.

[77] Act 5377 1973.

One might assume that pretrial detention regulations back then were enough to protect the personal liberty of the accused. However, between 1972 and 1992, 47% of the prison population was in pretrial detention. It is worth noting that this was lower than the average of over 50% registered in the continent. By 1995, the number dropped to 28%.[78] Therefore, despite the decrease in the data, it was necessary for the criminal proceedings to adopt an accusatorial system. This system ensures respect for human rights of the accused and offers greater alternatives to imprisonment during proceedings.

In 1996, the Legislative Assembly approved Law 7594, which introduced the new Criminal Procedure Code. This new code completely repealed its predecessor, Law 5377, and went into force in 1998. The new accusatory criminal justice model was established thanks to this code. This code introduced to the newly born system an intermediate stage where the judge ensures due process and regulates alternatives to resolve criminal conflicts. The Public Prosecutor's Office was entrusted with the task of investigation.[79] Separating these features and duties during the proceeding aimed to maintain the objectivity of the judge and impartiality. It also ensured active participation of the accused and their defence looking to protect their fundamental rights.

Regarding pretrial detention, the principle is that this measure should be used sparingly, always prioritising the freedom of the accused. In line with this principle, the 1996 Criminal Procedure Code stipulates that pretrial detention is only appropriate when there are reasonable indicators of participation, the penalty involves deprivation of liberty or there is danger of flight or obstruction.[80] This normative construction has an eminently proceduralist vision, as it incorporates objective elements that serve procedural purposes, and limits action to ensure the presence of the accused during the process.

However, the analysis becomes challenging when the law includes grounds that are not directly related to the basic meaning of pretrial detention. For instance, articles 239 b) and 239 bis include grounds for proceedings, such as the continuation

[78] Centro de Estudios de Justicia de las América, *Prisión preventiva en América Latina, enfoques para profundizar el debate* (n 50).
[79] González (n 76).
[80] Act 7594 1996.

of criminal activity, cases of *flagrante delicto* in certain crimes,[81] when the accused has been subjected to criminal proceedings at least twice, are repeat offenders or relating to organised crime. This statement undermines the objective nature of the measure of deprivation of liberty and places it in a substantialist field where subjective and ambiguous premises are used, as if it were a security measure. The main objective is to determine whether this type of regulation has implemented good practices to preserve the human rights of the accused and reduce the use of pretrial detention in the criminal justice system.

2.6.1 Adequate regulation of pretrial detention

In Central America, Costa Rica has the lowest percentage of pretrial detainees in relation to its whole prison population. In 1995, 28% of inmates were subject to pretrial detention, but this has steadily decreased to 19.9% in 2021.[82] Thus, it is evident that Costa Rican authorities have taken affirmative actions to decrease the use of this measure in criminal proceedings. This situation has persisted since the Criminal Procedure Code came into force in 1998.

It is important to note that the regulation of alternative measures is contained in article 244 of the Code, separated from pretrial detention dispositions which are covered in article 239. While it would have been preferable an inverted order of said dispositions, this bifurcation ensures a distinct approach. The normative premise of article 244 is noteworthy because the alternative measures are decided *ex officio*, highlighting the protecting scope of the law.

In addition, the Criminal Procedure Code stipulates that pretrial detention may be reviewed *ex officio* by the court. Failure to comply with this obligation may result in the application of disciplinary measures against the judge.[83] *Ex officio* control by the jurisdictional organ can be a suitable mechanism to ensure conventionality control and safeguard of the human rights of the accused, preventing unreasonably extension of confinement and stopping it of becoming an arbitrary deprivation.

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[81] Act 9-99-E (n 64) article 239 bis a) defines crimes as those against life, sexual crimes, crimes against property involving violence against persons or force against things, and crimes related to narcotics, psychotropic substances, drugs of unauthorized use, money laundering and related activities.

[82] World Prison Brief, 'Costa Rica Pretrial/remand prison population: trend' (*WPB*) <www.prisonstudies.org/country/costa-rica> accessed 19 March 2024.

[83] Act 7594 (n 80) art 253.

Furthermore, judges may prioritise the judicial review of a measure due to the potential disciplinary actions that they may face if they fail to adhere to procedural regulations. However, it is important to act cautiously to ensure that this informal review fulfils its intended purpose and does not become a mere formality where there does not exist a strict analysis of whether the initial circumstances that resulted in the implementation of pretrial detention still exist or they have changed.

2.6.2 Electronic control of alternative measures

The Legislative Assembly passed Law 9271, which allows the use of electronic monitoring mechanisms as an alternative to pretrial detention for criminal matters.[84] The General Board of Social Adaptation of the Ministry of Justice and Peace, through the Unit of Attention to Persons Subject to Monitoring with Electronic Devices,[85] is responsible for supervising and overseeing compliance with the institutional framework and meeting the beneficiaries of this electronic mechanisms. This body ensures objectivity in the use of electronic mechanisms, which is a relevant point since it is a different institution from the prosecution and the judge.

The implementation of this regulation began in 2017, with eight people benefiting from alternative measures. By 2020, the Ministry of Justice and Peace had signed a contract with an English firm to maintain an inventory of 500 devices and 750 chargers.[86] This demonstrates that mere regulation is insufficient to address the issue of pretrial detention. On the other hand, a proactive role

[84] Act 9271 2014.

[85] Regulation 40849-JP 2018 'Artículo 416.- Unidad de Atención a Personas Sujetas a Monitoreo con Dispositivos Electrónicos. La atención de las personas usuarias de un mecanismo electrónico es competencia de la Unidad de Atención a Personas Sujetas a Monitoreo con Dispositivos Electrónicos de la Dirección General de Adaptación Social. Para ello, la Administración dotará a dicha unidad del personal profesional, técnico y administrativo necesario' [Article 416 - Unit of Attention to Persons Subject to Monitoring with Electronic Devices. The General Board of Social Adaptation is responsible for the attention of users of electronic monitoring devices. The Administration shall provide the necessary professional, technical, and administrative personnel to the Unit of Attention to Persons Subject to Monitoring with Electronic Devices].

[86] Ministry of Justice and Peace of Costa Rica, 'Nueva tecnología en brazaletes electrónicos mejorará seguridad y generará al país ahorro anual de más de $2,7 millones' (*Ministry of Justice and Peace of Costa Rica*, 22 June 2020) <https://presidencia.gobiernocarlosalvarado.cr/comunicados/2020/05/nueva-tecnologia-en-brazaletes-electronicos-mejorara-seguridad-y-generara-al-pais-ahorro-anual-de-mas-de-27-millones/> accessed 19 March 2024.

of the state is necessary to strengthen the institutional framework and to provide resources to the electronic control mechanism to ensure its effective application, thereby preserving the personal liberty of the individuals.

However, it is important to note that Law 9271 applies not only to those in pretrial detention but also to convicted individuals. This could potentially create a significant issue as the available electronic equipment may not be enough to meet the needs of individuals deprived of their liberty without a conviction. As a result, many people may be excluded from accessing alternative measures to provisional imprisonment.

Similarly, relying solely on electronic mechanisms to solve the problem of excessive pretrial detention is not advisable. This because when issues such as lack of resources or equipment arise, judges may be encouraged to deny access to alternative measures. Therefore, electronic means can help address the problem, but they are not a comprehensive solution. Criminal justice systems must implement additional mechanisms to provide more tools for protecting the personal liberty of the accused.

2.6.3 Costa Rican restorative justice programme: a comprehensive alternative

Attention to the issue of pretrial detention demands a comprehensive approach that results in a paradigm shift in the way how criminal justice is perceived. Restorative justice[87] is an important tool that allows parting from the traditional retributive approach of criminal law. It enables states to provide an evolving response to crime while upholding the dignity and equality of all parties involved. This approach promotes understanding and social harmony by facilitating the recovery of offenders, victims and communities.[88]

In 2011, the General Council of the Judiciary of Costa Rica approved the restorative justice programme that focuses on three major thematic areas: criminal, juvenile criminal and drug treatment programmes under judicial supervision. The programme

[87] Note the following chapter will develop the concept of restorative justice.

[88] Economic and Social Council, 'Restorative justice Report of the Secretary-General Addendum Report of the meeting of the Group of Experts on Restorative Justice' UN Doc E/CN.15/2002/5/Add.1 (2002) <www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_11/E-CN15-2002-05-Add1/E-CN15-2002-5-Add1_S.pdf> accessed 19 March 2024.

implementation has been positive, with 1,491 registered cases by 2015 and 1,937 cases by 2016, representing a 29.91% increase. Results related to concluded cases show that in 2015, there were 1,437 terminated cases, while in 2016, the number increased to 1,978 cases, representing a 37.65% increase.[89] This demonstrates the positive impact of this tool on the criminal justice system by providing greater protection for the fundamental rights of the individuals, particularly ensuring their personal liberty, and preventing them from being subjected to coercive measures.

In 2018, the Costa Rican Legislative Assembly approved Act 9582, which made the restorative justice procedure applicable at any stage of the proceedings, according to its article 14.[90] This mechanism applies to the substantiation of preparatory and intermediate stages in the criminal process. For example, if a person is in pretrial detention, the judge may suspend the trial on probation and apply an alternative measure, such as a non-custodial one, to ensure the individual complies to the set conditions.

Restorative justice is a good practice of the Costa Rican state to address the issue of pretrial detention. Its objective is to reduce the duration of criminal proceedings, preventing a long deprivation of liberty for the accused, avoiding its unreasonably and arbitrary extension. Furthermore, the justice system upholds the right to personal freedom by applying the *favor libertatis* principle, in line with human rights protection standards.

The restorative justice model is a recommended approach to address pretrial detention issues due to its normative system and strong multidisciplinary institutional structure. Secondly, by ensuring greater participation of both the victim and the accused in the proceedings, allowing for a more efficient and comprehensive resolution of the conflict, it thereby makes it unnecessary for the accused to remain in pretrial detention. Additionally, it ensures that the use of non-custodial alternatives to imprisonment has a wider scope, benefiting a larger number of people, as it does not depend on specific circumstances such as the availability of electronic devices.

[89] Judiciary of Costa Rica, *Programa de justicia restaurativa a través del Diálogo se hace Justicia Sus orígenes 2012-2016* (Programa de Justicia Restaurativa Poder Judicial, Costa Rica 2018).

[90] Act 9582 2018.

2.6.4 Compensation for the use of pretrial detention

In the field of international human rights law, when a violation occurs, a state is obligated to provide full reparation for the damage caused. This obligation is also reflected in Law 7594, which grants compensation to individuals who have been unduly subjected to pretrial detention, due to arbitrary or guilty conduct of an official, or has been dismissed with full demonstration of innocence. This can be found in the text of article 271 which states:

> ARTICULO 271 – Deber de indemnización. El Estado deberá indemnizar a la persona que haya sido sometida, indebidamente, a una medida cautelar por un funcionario público que actuó arbitrariamente o con culpa grave, en los términos del artículo 199 de la Ley General de la Administración Pública. En este caso, el funcionario será solidariamente responsable con el Estado. También procederá la indemnización, sólo a cargo del Estado, cuando una persona haya sido sometida a prisión preventiva y luego es sobreseída o absuelta, con plena demostración de inocencia[91] [ARTICLE 271 – Duty to compensate. The state is forced to compensate any person who has been subjected to a precautionary measure by a public official who acted arbitrarily or with major negligence, as outlined in article 199 of the General Law of Public Administration. In such cases, the official will be held liable jointly with the state. Compensation shall only be payable by the state when a person has been placed in pretrial detention and is later dismissed with full proof of innocence].

The above article discusses two cases in which compensation may be claimed. The first case pertains to shared liability between the state and the official. The second scenario pertains to cases where the person was subject to pretrial detention, and their trial was dismissed, or they were dismissed with full proof of innocence. Thus, the judge's role is centred on objective responsibility for ensuring respect for human rights of the individuals.

It is important to consider the scope of the concept of 'full demonstration of innocence' in Costa Rican legislation. This concept may suggest that there are different categories of innocent people or unjustified privileges that could be interpreted as

[91] Act 7594 (n 80) art 271.

discriminatory. The Constitutional Chamber clarified this issue and solved that pretrial detention may only be used when there is verifiable evidence of criminal participation and objective reasons to support it. Compensation for pretrial detention is only appropriate in cases where the person has been detained in an arbitrary or unfair manner.[92]

Thus, it is evident that the legislator intention is not to deny or restrict the application of pretrial detention. On the contrary, the purpose of article 271 is to remind the judicial officers to use it in accordance with due process and objective and procedural criteria, in line with international standards of protection. Therefore, including compensation serves as a double guarantee. Firstly, it allows the state and the judge to be held responsible. Secondly, it recognises reparation for the victim of an arbitrary and unjust deprivation, which is a good practice.

2.7 Conclusions

It is evident that criminal procedure codes generally acknowledge the significance of safeguarding the rights and dignity of the accused. Additionally, they view pretrial detention as a procedural and exceptional measure that aligns with the accusatory and proceduralist approach. However, there are still substantial elements regarding its application, like non-custodial crimes or the subjectivity of the grounds presented, that may conflict with the guidelines set in international protection instruments.

El Salvador is a paradigmatic case. The approval of the Criminal Procedure Code in 1996 made the criminal justice model consistent with respect for human rights for the following reasons: i) it recognised the precautionary, provisional and exceptional nature of pretrial detention, ii) it demanded the verification of objective procedural dangers as *sine qua non* requirements and iii) it established the periodic informal review of the measure. This led to a decrease in the percentage of individuals affected by this measure. However, Act 904 introduced a substantialist perspective by including security measures as a variable to qualify proportionality, expanding the catalogue of non-custodial offenses, and

[92] Constitutional Chamber of Costa Rica, 5 March 2013, Case Nº 02992 – 2013, 10-006789-0007-CO.

eliminating the maximum duration for certain types of criminal offenses. As a result, there has been a noticeable setback in the use of preventive detention, which serves as an example of bad practices.

Honduras was also involved in the procedural reform process in the 1990s, although its Criminal Procedure Code was the last to enter into force among the three countries. This code also acknowledges the exceptional use of pretrial detention to ensure the presence of the accused and eliminate procedural risks. It is worth noting that this coercive measure cannot be applied in cases where there is not a custodial sentence for the crime or a particular condition of the accused. Judges are obligated to conduct periodic *ex officio* reviews in compliance with standards. Regarding the time element, the maximum limit is determined by the duration of the sentence in both first and second instances. Nonetheless, delaying the latter may violate the principle of reasonable time. Additionally, since 2017, the use of personal electronic surveillance systems as control mechanisms for measures has been legislated, although as of 2022, the authorities have not yet implemented it, likewise in Guatemala.

Costa Rica has the lowest rates of pretrial detention among the three countries studied. This is attributed to its constitution, which has prioritised respect for human rights since 1949. Additionally, its previous Criminal Procedural Code of 1973 was consistent with a proceduralist vision, in contrast to the substantialist perspective prevalent in the other states. Law 7594 of 1996 maintains the tradition of respecting human dignity while also establishing precise limits related to the grounds for using pretrial detention. Good practices have been identified, including the implementation of electronic monitoring, the development of a restorative justice model and the right to compensation as a form of reparation.

3. Inter-American standards for the protection of human rights in the regulation of pretrial detention in Guatemala

3.1 Introduction

This chapter examines the compatibility of current pretrial detention legislation in Guatemala with the ACHR. Likewise, it approaches an analysis of inter-American protection standards for human rights regarding the use of this measure and how they are respected by domestic law, taking into consideration the decisions taken by the IACtHR, IACHR and the Constitutional Court of Guatemala (CC).

3.2 Procedural reform in Guatemala

The rising of modern democracy in Guatemala occurred amidst a context of repression, military regimes, coups d'état, electoral frauds and human rights violations. As a result, it was crucial to establish a political and legal system that prioritised the consolidation of the rule of law. Consequently, on 31 May 1985, the National Constituent Assembly ratified a new constitution[93] that made the respect, guarantee and protection of human rights a top priority on the public agenda of Guatemala. This shift in paradigm also needed the reform of the criminal justice system.

During that time, the criminal process was regulated by the previous Criminal Procedure Code, Act number 52-73, which was approved during the military government of Carlos Manuel Arana Osorio. This legislation was based in the inquisitorial model, which is characterised by a written, secret and formal procedure. In this model, the judge could interfere in the investigation

[93] The Constitution of Guatemala entered into force on 14 January 1986.

of public action crimes, confessions were accepted as evidence, resolutions had to be ratified by appeals chambers and the defence of poor people was entrusted to students.[94] The accused intervention was minimal, but their guarantees and human rights were not fully ensured, placing them in a disadvantageous and unequal position.

Pretrial detention might be applied if material presumptions were verified, and investigations showed the existence of a crime and the possible participation of the accused. In addition, the duration of the measure could be extended throughout the process, as there was no maximum term, unless it was reversed or reformed. Regarding alternative measures, house arrest might be used for offenses with fines or sentences less than three years and provisional release. The former could take two forms: recognisances, when there were not sufficient grounds to apply pretrial detention but other means of conviction could be obtained to force its use; and bail, which was restricted to be applied according to the crime pointed.[95]

Accordingly, pretrial detention was commonly used in criminal proceedings, limiting the number of non-custodial alternatives. From a human rights perspective, its frequent use meant that it was often seen as an anticipated punishment and violated the presumption of innocence, which was in clear contravention of article 14 of the 1986 Constitution. Furthermore, the absence of submission of procedural risks, such as the danger of flight or obstruction of justice, and its unreasonably extension throughout the proceedings, rendered the deprivation of liberty arbitrary.

Guatemala modified its legislation in the 1990s as part of a reformist trend in the region. In 1992, the Congress of the Republic approved the new CCPG, which became effective on 1 July 1994. This code completely repealed the previous Act 52-73 and adopted an accusatory model that is consistent with the democratic constitutional system and respects the fundamental rights of the accused. Since then, the criminal process has been governed by the principles of orality, contradiction and equality. Regarding pretrial detention, it is recognised as a measure of procedural and exceptional nature. Maximum terms of its duration are established,

[94] Centro de Estudios de Justicia de las América, *Prisión Preventiva y Reforma Procesal Penal en América Latina: Evaluación y Perspectivas* (Centro de Estudios de Justicia de las América 2009).

[95] ibid.

and the elements of flight risk and obstruction of justice are incorporated as legitimate procedural risks for its imposition. Additionally, the catalogue of alternative measures to provisional confinement are also expanded.

3.3 Current context of pretrial detention

The regulation and use of pretrial detention must be analysed in four different periods: i) prior to the entry into force of the CCPG; ii) from 1994 to 1999; iii) between 2000 and 2014 and iv) from 2015 to 2022.[96] For the first period, in 1989, 73% of the total number of persons deprived of liberty were in pretrial detention, recalling that an inquisitorial criminal process was in force at that time. In the second stage, following the implementation of the CCPG,[97] the percentage decreased to 64% of the total number of individuals who were deprived of their liberty. The downward trend persisted in 1996 and by 1999, it reached 63%.[98]

The new code had a positive initial impact, considering the justice system's long-standing prison tradition. During the first period, the construction and establishment of the institutional structure responsible of implementing the new accusatory system began. The recognition of the independence and autonomy of the Public Prosecutor's Office in the exercise of prosecution and the conduct of investigations was a significant change. This process began with its separation from the Solicitor General's Office after the constitutional reforms of 1993[99]and later included in the CCPG. Finally, in 1994, the Organic Law of the Public Ministry was approved by Act 40-94.

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96 The selected criteria aim to segment the study into specific historical moments. Regarding periods i) and ii) they aim to provide context for the early years of the new Criminal Procedure Code. Meanwhile, within period iii), important reforms were made to pretrial detention. Finally, from 2015 to 2022, it is discussed the reform of the justice sector and the mentioned measure of deprivation of liberty.

97 CCPG came into force on 1 July 1994.

98 Luis Ramírez, Jorge Rolón and Rocío Cano, *La prisión preventiva, estudio exploratorio Guatemala y Paraguay* (COMJIB 2018).

99 In 1993, the constitution was amended to separate the functions of the Solicitor General's Office and the Public Prosecutor's Office. This was done because the latter was previously integrated with the former.

Another relevant entity that emerged during that decade was the Criminal Public Defense Institute. Initially known as the Public Criminal Defense Service and under the jurisdiction of the Supreme Court of Justice, its responsibility was to ensure the right to defence of the accused.[100] In 1997, Act 129-97 approved the Public Criminal Defense Service Act, granting it functional autonomy and technical independence. Its main objective is to provide free legal assistance to low-income individuals.[101]

During those years the Congress approved two reforms to the CCPG. The first was established by Act 32-96, which guarantees home arrest for traffic offenses. However, it also limits the possibility of granting alternative measures to recidivists, habitual offenders or those charged with certain crimes.[102] This opened the door to unofficial pretrial detention, a situation that will be analysed below. The second reform came through Act 79-97 that modified the mechanisms for alternative conflict resolution, including opportunity criteria, conditional suspension of criminal prosecution and abbreviated procedure. But the most significant change was the reduction of the preparatory phase from six to three months[103] in cases where the person was in pretrial detention. This change helps to avoid unnecessary extension of the measure.

The third period of this study began at the turn of the millennium, during which the percentage of people in pretrial detention dropped to 58.7% in 2001. This decline upheld until 2005, when the percentage decreased to 43.9%. However, the trend reversed, and the number of people in pretrial detention increased to 54.4% of the total population deprived of liberty in 2010. By 2015, the number had decreased to 48.6%.[104] During the past 15 years, there have been numerous reforms aimed at addressing the issue of pretrial detention. However, few of these reforms were approached from a human rights perspective.

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100 Ruling 12-94 1994.
101 Act 129-97 1997.
102 Act 32-96 1996.
103 Act 129-97 (n 101).
104 World Prison Brief, 'Guatemala Pretrial/remand prison population: trend' (*WPB*) <www.prisonstudies.org/country/guatemala> accessed 19 March 2024.

Percentage table of individuals in pretrial detention[105]

Year	Percentage of individuals in pretrial detention
1989	73%
1996	64%
1999	63%
2001	58.7%
2005	43.9%
2010	54.4 %
2015	48.6%
2016	46%
2018	47.5%
2022	48.3%

During the past 15 years, significant changes have been made to the Criminal Procedure Code. These changes include expanding the competence of peace judges to hear criminal proceedings, which now includes the ability to decide on aspects related to pretrial detention and alternative measures. Additionally, some non-judicial measures have been updated, but the catalogue of non-release crimes also expanded. The most detrimental change to the human rights of the accused was the ability of a Chamber of

[105] The author prepared this text using public information from the Ministry of the Interior of Guatemala and the World Prison Brief portal, as well as the following texts.: i) Human Rights Ombudsman, 'La Aplicación de la Prisión Preventiva en Guatemala: un problema de derechos humanos' (2016); ii) Centro de Investigaciones Económicas Nacionales, 'La prisión preventiva en Guatemala' (*Centro de Investigaciones Económicas Nacionales*, 2018) <https://cien.org.gt/wp-content/uploads/2018/12/Estudio-Prisio%CC%81n-Preventiva-Versio%CC%81n-Final.pdf> accessed 19 March 2024; iii) Centro de Estudios de Justicia de las América, *Prisión Preventiva y Reforma Procesal Penal en América Latina: Evaluación y Perspectivas* (Centro de Estudios de Justicia de las América 2009) and iv) Ramírez, Rolón and Cano (n 98).

the Court of Appeals or the Supreme Court of Justice to repeatedly extend the term of preventive detention (Act 30-2001, 2001; Act 19-2002, 2002; Act 25-2002, 2002; Act 51-2002, 2002; Act 22-2008, 2008; Act 28-2011 and Act 6-2013, 2013).

Finally, the last stage of analysis occurred between 2015 and 2022 and was marked by a general discussion regarding the need to reform the justice sector, including pretrial detention. To provide context, the percentage of people subjected to such a custodial measure was 46% in 2016, 47.5% in 2018 and 48.3% in 2022.[106] Based on the available data for this period, it is evident that the use and exceptional nature of coercive measures has not been properly regulated, leading to a violation of the human rights of individuals who are deprived of their liberty.

During this period, there were debates about the need to align the normative framework of pretrial detention to a human rights approach. The Judicial Observatory of the Criminal Justice System[107] was created to 'identificar las principales necesidades o nudos problemáticos que existen en el sistema de justicia penal, con la intención de proponer soluciones concretas'[108] [identify the main needs and issues in the criminal justice system and propose concrete solutions]. Additionally, technical roundtables were established, primarily consisting of the Public Prosecutor's Office, the judiciary, the Human Rights Ombudsman's Office and the Institute of Public Criminal Defense. Proposals for legislative reforms were also presented to the Congress of the Republic.[109]

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106 Human Rights Ombudsman (n 105); Centro de Investigaciones Económicas Nacionales (n 105); Public Information Office of the Ministry of the Interior of Guatemala, Resolution 002148 (2022).

107 The initiative was formed by the Judicial Branch, the law schools of the Universities of San Carlos de Guatemala and Rafael Landívar, and the German Agency for Cooperation and Development GIZ and CICIG. However, the project ended in 2020.

108 Observatorio Judicial del Sistema de Justicia Penal en Guatemala, 'Primer informe del Observatorio Judicial del Sistema de Justicia Penal en Guatemala' (Organismo Judicial, La Universidad de San Carlos de Guatemala y Universidad Rafael Landívar, a través de sus Facultades de Ciencias Jurídicas y Sociales 2018) 5 <http://186.151.197.121/assets/files/Primer%20Informe%20Observatorio%20Judicial%20Guatemala-2018.pdf> accessed 18 March 2024.

109 International Commission Against Impunity in Guatemala, 'Presentación de propuesta al congreso de la república de reformas al código procesal penal en materia de prisión preventiva' (*CICIG*, 28 November 2018) <www.cicig.org/noticias_2018/presentacion-de-propuesta-de-reformas-en-materia-de-prision-preventiva/> accessed 19 March 2024; Hedy Quino, 'Mesa Técnica avanza con análisis de prisión preventiva' (*Diario la Hora*, 7 December 2018) <https://lahora.gt/nacionales/wpcomvip/2018/12/07/mesa-tecnica-avanza-con-analisis-de-prision-preventiva/> accessed 19 March 2024; Karla Herrera, 'Instalarán mesa técnica que analice la prisión preventiva en Guatemala. Congreso de la República' (*Congress of Guatemala*, 20 May 2021) <www.congreso.gob.gt/noticias_congreso/6383/2021/3> accessed 19 March 2024.

The proposals that emerged from these processes focused on preserving the exceptional, proportional and reasonable nature of pretrial detention. They also aimed to expand the catalogue of alternative measures, provide grounds for release due to illness, old age or other reasons, use of technology, termination of confinement at the end of the procedural phase, eliminate unreasonably extension of the measure and set a deadline for granting a hearing for periodic review of the measures, among others. The purpose of these proposals is to align the legal system with human rights protection standards.

3.4 Guatemala´s obligations and compliance with international law

The 1986 Constitution enabled the legal system to open to the world and incorporate international law. Article 44 recognises any right inherent to the human person, even if it is not expressly provided in its text. Additionally, article 46 establishes the precedence of international treaties and conventions on human rights over domestic law.[110] This opening clause legitimises the block of constitutionality and enables the use of control of constitutionality and conventionality. Nevertheless, article 149 of the constitution provides the basis for the state to comply its international human rights obligations. This article stipulates:

[110] Constitution of Guatemala 1985.

> ARTICULO 149. De las relaciones internacionales. Guatemala normará sus relaciones con otros Estados, de conformidad con los principios, reglas y prácticas internacionales con el propósito de contribuir al mantenimiento de la paz y la libertad, al respeto y defensa de los derechos humanos, al fortalecimiento de los procesos democráticos e instituciones internacionales que garanticen el beneficio mutuo y equitativo entre los Estados[111] [Guatemala will regulate its relations with other states accordingly with the principles, rules and international practice with the purpose of contributing to peacekeeping liberty, defence and respect of human rights, strengthening of democratic processes and international organs].

Under the normative presumption mentioned above, the CC has recognised the imperative – *ius cogens* – and binding nature of international human rights law as they are expressions of objective values extended throughout the concert of nations. Therefore, the non-compliance of its precepts generates international responsibility for Guatemala.[112] Consequently, it is possible to state that the content of the ACHR, the jurisprudence of the IACtHR and the entire inter-American *corpus juris* are binding and mandatory for the state.

3.5 Conventionality control in Guatemala

The constitutional clause provided in article 46 alludes the pre-eminence of international human rights treaties and conventions over domestic law. Under this logic, the constitution legitimises the existence of the block of constitutionality, also establishing the hierarchical level of this type of instruments and the way in which they must be interpreted to achieve the greatest possible protection. On these grounds, the use of conventionality control to measure the degree of compatibility of domestic law with the ACHR and the rest of the inter-American *corpus iuris* turns binding.

[111] Constitution of Guatemala (n 110) art 149.
[112] Constitutional Court of Guatemala (8 November 2016) Case 3438-2016.

The jurisprudential development of the CC has marked the domestic use of conventionality control. In 1987, Justice Fernando Barillas Monzón in a dissenting opinion accepted the possibility of using the ACHR as a parameter to measure the constitutionality of pretrial detention. However, in 1995, the CC decided not to use international human rights treaties, specifically the ACHR, as parameters of constitutionality.[113] The sustained criterion rejects the autonomous nature of control, always subordinating it to the principle of constitutional supremacy.

Nevertheless, in the case of *Almonacid Arellano et al v Chile*, the IACtHR served as a starting point, as it established the scope of conventionality control in both its concentrated and diffuse aspects. In 2012, the CC issued a relevant judgment, ruling that ordinary legislation must comply with the parameters of international human rights law. The CC also clarified that international human rights law can only be used as a parameter for the control of constitutionality.[114] The main issue is the lack of recognition that when a law contradicts the IAHRS guidelines it could be declared unconstitutional. This is particularly relevant in cases where domestic law allows informal pretrial detention or indefinite extension of the measure.

3.6 Legitimacy of pretrial detention in Guatemala

According to the Guatemalan normative model, pretrial detention is constitutionally legitimate as stated in article 13:

> No podrá dictarse auto de prisión, sin que preceda información de haberse cometido un delito y sin que concurran motivos racionales suficientes para creer que la persona detenida lo ha cometido o participado en él[115] [detention cannot be ordered without prior information that a crime has been committed and sufficient rational grounds to believe that the detained person has committed or participated in it].

[113] Constitutional Court of Guatemala (26 March 1996) Case 334-95.
[114] Constitutional Court of Guatemala (17 July 2012) Case 1822-2011.
[115] Constitution of Guatemala (n 110) art 13.

This requirement ensures that pretrial detention is exceptional, rational and proportional. Furthermore, the constitution guarantees the presumption of innocence (article 14) and bans arbitrary deprivation of liberty (article 6). This adds to the premises included in articles 44, 46 and 149 of the constitution.

The regulatory structuring of pretrial detention originated from the constitutional legitimacy demands that all the legislation must harmonise to both the constitution and international human rights treaties, preserving the procedural purpose of the measure and granting respect to the dignity of the accused. It is important to note that mere inclusion is not enough as with the limits and restrictions on the use of pretrial detention in criminal proceedings, there still exists regulatory scenarios that distort its purpose and are contrary to the protection standards.

3.7 Right to personal liberty of the accused and pretrial detention

The concept of personal liberty under article 7 of the ACHR must be approached from both a general and specific perspective. The first perspective, located in paragraph 1, refers to the right of every person to not do anything that is unlawfully prohibited.[116] The specific perspective contemplates safeguards to avoid arbitrary deprivation and regulates the guarantees entitled to a person in the framework of a criminal proceedings, including pretrial detention. The IACtHR has provided clear specifications about the meaning that each conventional premise in this category should receive.

Este artículo tiene dos tipos de regulaciones bien diferenciadas entre sí, una general y otra específica. La general se encuentra en el primer numeral: '[t]oda persona tiene el derecho a la libertad y a la seguridad personales'. Mientras que la específica está compuesta por una serie de garantías que protegen el derecho a no ser privado de la libertad ilegalmente (artículo 7.2) o arbitrariamente (artículo 7.3), a conocer las razones de la detención y los cargos formulados en contra del detenido (artículo 7.4), al control judicial de la privación de la libertad y la razonabilidad del plazo

[116] IACtHR *Case of Chaparro Álvarez and Lapo Íñiguez v Ecuador* Preliminary Objections, Merits, Reparations and Costs, Judgment (21 November 2007).

de la prisión preventiva (artículo 7.5), a impugnar la legalidad de la detención (artículo 7.6) ... Cualquier violación de los numerales 2 al 7 del artículo 7 de la Convención acarreará necesariamente la violación del artículo 7.1 de la misma[117] [This article outlines two types of regulations: general and specific. The general regulation stated in the first paragraph affirms that every person has the right to personal liberty and security. The specific regulation consists of a series of guarantees that protect the right to not being deprived of liberty illegally (article 7.2), or arbitrarily (article 7.3), and the right to know the reasons for the detention and the charges brought against the detainee (article 7.4), the right to judicial control of the deprivation of liberty and the reasonableness of the period of pretrial detention (article 7.5), and the right to challenge the legality of the detention (article 7.6) ... Any violation of article 7.2 to 7 of the convention will necessarily entail the violation of article 7.1 of the same convention].

For this reason, cases in which the accused is subject to pretrial detention ensure greater protection of personal liberty. Conventional obligations primarily address towards the state, which is also required to adapt its legal system in accordance with article 2 of the ACHR. Article 7 provides broad protection, considering that the provisional restriction of liberty is the most serious imposed measure against a person. Thus, it is essential to determine whether Guatemalan domestic law adheres to these standards, as it will be demonstrated below.

3.8 The legality of pretrial detention and the first statement hearing

The concept of legality under article 7(2) of the ACHR requires pretrial detention be used in accordance with the constitution and the legal system. It is important to note that this notion implies the principle of reserve of law. From a human rights perspective, the term 'law' refers to 'actos normativos enderezados al bien común, emanados del Poder Legislativo democráticamente elegido y promulgados por el Poder Ejecutivo'[118] [normative

[117] IACtHR *Case of Manuela et al v El Salvador* Preliminary Objections, Merits, Reparations and Costs, Judgment (2 November 2021) 97.

[118] IACtHR, 'The Word "Laws" in Article 30 of the American Convention on Human Rights' Advisory Opinion OC-6/86 (9 May 1986) 35.

acts aimed to common good, which are issued by the democratically elected Legislative Power and enacted by the Executive Power]. With this rule the use of administrative regulations to deprive a person of liberty is not permitted. Therefore, as the CCPG was issued in accordance with the legislative process outlined in the constitution, it meets the conventional requirement.

The conventional requirement of legality for pretrial detention to be legal also demands verifying both material and formal aspects in domestic law. The first component requires the legislation to be clear, concise and specific about the grounds for pretrial detention, in accordance with the principles of legal reserve and criminalisation. The formal element ensures that the coercive measure is applied strictly in compliance with the procedures objectively defined by domestic law.[119]

According to Guatemalan domestic law, the constitution[120] mandates that all individuals must be promptly notified of their detention (article 7), as article 7.4 of the ACHR demands. Regarding the process of deprivation of liberty, the same *Magna Carta* stipulates that once an individual is detained, they must be presented before a competent judge within six hours (article 6) and they must provide their initial statement within the following 24 hours. The CCPG[121] regulates in article 82 everything related to that first hearing, which addresses the legal situation of the accused, the possibility of binding them to criminal proceedings[122] and the type of coercive measure to be used, such as pretrial detention or a substitute measure.

From a normative perspective, it appears that the requirement of legality is met since the first statement must be held within the constitutional time limits. However, a concerning practice has been identified where hearings are divided into two parts held on different dates. During the first hearing, only the reason for the arrest is reported without a decision on the legal situation of the accused. It is only during the second part of the hearing that a decision is made on whether the accused should be brought to trial and what coercive measures should be applied, in accordance with

[119] IACtHR *Case of Montesinos Mejía v Ecuador* Preliminary Objections, Merits, Reparations and Costs, Judgment (27 January 2020).
[120] Constitution of Guatemala (n 110).
[121] Act 51-92 1992.
[122] During the hearing of the first statement, the judge may decide not to link the statement to the criminal proceedings. In this case, the judge will solve the lack of merit, and it will not be necessary for the judge to consider applying any coercive measures.

article 82 of the Criminal Procedure Code.[123] In this initial hearing, the objective is to fulfil article 7.4 of the ACHR. It is important to note that during this two-session hearing the person in question is being deprived of their liberty without being bound to any criminal proceedings or a pretrial detention decision.

The problem becomes serious because of the waiting period between these two sessions. During this period, the person remains deprived of their liberty through the application of a kind of *sui generis* pretrial detention that does not require the prior clarification of his legal situation or the concurrence of procedural risks, since simple detention deems sufficient. All this is clearly contrary to the inter-American human rights protection standards, and the deprivation of liberty becomes illegal, also violating the presumption of innocence and the right to defence.

According to articles 1.1 and 2 of the ACHR, it is necessary for the State of Guatemala to take the necessary measures to address this problem. In this sense, according to Juan Francisco Sandoval, a criminal lawyer and former prosecutor who was interviewed for this thesis,[124] a good practice would be to regulate that if the accused legal situation has not been solved in a determined period, the detainee release should be ordered. However, it is also necessary that, at the judicial level, the courts, through conventionality control, proceed to order the release of people being victims of this type of *sui generis* provisional detention, which also violates the presumption of innocence and the right of defence of the accused. Otherwise, there would be international responsibility for Guatemala due to such violations of the ACHR.

3.9 The principles of compatibility and non-arbitrariness regarding the limitation of alternative measures

The examination of legality is the first step in determining the conventionality of the deprivation of personal liberty. Once this element has been satisfied, it is imperative to determine whether it is compatible with the ACHR and whether the detention falls into the category of arbitrary in the light of article 7(3). The purpose of

[123] Act 51-92 (n 121).

[124] Interview with Juan Francisco Sandoval Alfaro, criminal lawyer and former attorney of Prosecutor's Office, conducted by Rony Rosales Lossley (via video call, 11 June 2023).

this second examination is to determine whether pretrial detention, even when applied in accordance with the formalities of the law, complies with the guidelines and standards contained in the inter-American *corpus juris* and the jurisprudence of the IACtHR, in order not to be considered arbitrary.[125]

The examination of the compatibility and non-arbitrariness of the coercive measure must account three aspects: i) the existence of material presumptions, ie evidence that gives rise to a reasonable suspicion of the person criminal participation and if justifies the initiation of criminal proceedings; ii) the concurrence of procedural risks and iii) the proportionality of the measure.[126] The determination of whether a deprivation of liberty is arbitrary under article 7(3) of the ACHR is done in the context of the specific case.

From a general perspective, arbitrary deprivation of liberty can be said to occur in those contexts where the law restricts the intellectual space of the judge, preventing him from evaluating the circumstances and material premises of each case, and forcing him to impose pretrial detention *ex officio*. This occurs in cases where the law is strict, making it impossible to apply an alternative measure due to some subjective qualities of the accused or in relation to the crime charged. Therefore, the study of normative design becomes relevant because it is the basis as for how the preventive detention is used in criminal proceedings. Regarding this topic, the aspects discussed below should be considered.

From a general perspective, the CCPG[127] provides that pretrial detention is appropriate when: i) there are sufficient reasonable grounds of criminal participation (article 259); ii) there are objective procedural risks, in particular the danger of flight (article 262) or obstruction of justice (article 263) and iii) the crime is not punishable by imprisonment or is expected to be so (article 261). Thus, the normative requirements support the proceduralist view of the coercive measure and recognise its precautionary and procedural nature. In addition, it guarantees the independence of the

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125 Nelson Pessoa, *Prisión preventiva. Doctrina y jurisprudencia de la Corte y de la Comisión Interamericana de Derechos Humanos y de la CSJN* (Editorial Rubinzal-Culzoni 2023).

126 IACtHR *Case of Jenkins v Argentina* Preliminary Objections, Merits, Reparations and Costs, Judgment (26 November 2019).

127 Act 51-92 (n 121).

judge regarding the measure to be applied, but also imposes the obligation to give reasons of their decision for applying it in cases where it is impossible to eliminate the procedural risks and it is necessary to ensure the presence of the accused.

On the contrary, the same CCPG contradicts itself, because in its article 264 it legalises the intervention of the legislator in the judicial function, by limiting the possibility of applying an alternative measure in criminal proceedings against repeat offenders, or due to the crimes charged.[128] This substantialist tendency to deny access to this benefit is also contained in the Criminal Code – Act 17-73[129] – (articles 348 and 349),[130] Decrees 22-2008, Law Against Femicide and Other Forms of Violence Against Women (article 6), Act 19-2002, Law of Banks and Financial Groups (article 96), Act 25-2002, Law of Insurance Activity, Guatemala (article 93) and Act 17-2009, Law of Strengthening the Criminal Prosecution (article 27).[131]

What is serious about this type of regulation is its mere incorporation into domestic law. But so are the contradictory criteria that the CC has maintained about its constitutionality. In 1987, before the entry into force of the current CCPG, the CC stated that the intellectual substitution of the judge by a legal presumption is unconstitutional, since it is the judge who controls the legality of the deprivation and verifies the existence of the objective and subjective presumptions.[132] However, in a later ruling, it adopted a contrary criterion, legitimising this level of intervention and indicating that the autonomous exercise of the judge is not diminished because he can always declare the lack of merit, so that this type of legislation is not unconstitutional.[133]

About this last point, it is worth pointing out the erroneous reasoning of the CC when it compared the decisions of binding to trial with the imposition of a coercive measure. According to the CCPG, two situations are resolved in the first statement hearing:

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128 Act 51-92 (n 121).

129 Act 17-73 1973.

130 The restriction of access to a substitute measure contained in arts 348 and 349 of the Criminal Code was declared unconstitutional by the CC in its decision of 29 November 2023, in case 4123-2022. However, since it is outside the time limit set for this investigation, it will not be considered.

131 The restrictions on substitution measures in Acts 19-2002, 25-2002 and 17-2009 were declared unconstitutional by the CC.

132 Constitutional Court of Guatemala (21 May 1987) Accumulated Cases 69-87 and 70-87.

133 Constitutional Court of Guatemala (16 December 1999) Case 105-99.

the possibility of binding a person to trial and the application of preventive detention or any other alternative. In the first case, the legal qualification of the crimes and the possible criminal participation of the accused are evaluated to bind them to the trial. On the other hand, in the case of preventive or substitute detention, the motivation is different since the procedural risks are also analysed. For this reason, to say that both decisions have the same effect lacks support and only shows an absurd way of justifying substantivism.

In the years that followed, the same CC, as a result of the unconstitutionality actions brought against Acts 19-2002, 25-2002 and 17-2009, stated that the informal imposition of pretrial detention suppresses the judge's power to assess the particular circumstances of the case and verify the concurrence of procedural risks (danger of flight and obstruction of the truth), acting contrary to the mandate of article 13 of the constitution.[134] In view of what has been said, it is undeniable that the impossibility of access to a substitute measure distorts the precautionary and provisional nature of pretrial detention.

Regarding the above, it is necessary to make the following observations. It is positive that the CC has taken a step forward by declaring unconstitutional the legislative interference in the judicial function regarding the imposition of pretrial detention, thus confirming its procedural, exceptional, rational and proportionate purpose. In addition, by excluding these normative presumptions, it prevents the arbitrary deprivation of liberty, at least in the first phase of the proceedings and guarantees the presumption of innocence and the right to defence of the accused.

The second aspect to be evaluated is that, if the CC were consistent with its precedents, it should also declare unconstitutional article 264 of the Criminal Code and article 6 of Decree 22-008. However, the presumption that limits the possibility of access to an alternative measure for those who belong to the category of recidivists, habitual offenders or by function of the crime listed therein, remains in force. It is therefore possible to speak of a *prima facie* arbitrary deprivation of liberty in cases where the person falls into one of the regulated categories. It is hence necessary to

[134] Constitutional Court of Guatemala (7 February 2011) Case 1994-2009; Constitutional Court of Guatemala (9 February 2021) Case 7282-2019; Constitutional Court of Guatemala (21 May 2015) Case 23-2011.

carry an adequate control of the conventionality, both by the Congress and by the courts, in order to reform, waive or abolish this type of regulation for violating the convention, in particular articles 7.3 and 8.2.

3.10 Reasonable period of pretrial detention

The concept of reasonable time for pretrial detention is relevant, as it is an essential element in identifying possible human rights violations and the compatibility of domestic legislation with protection standards. As a preliminary point, it should be noted that the scope and time limits of the coercive measure are aimed at determining its reasonableness.[135] This differs from the criterion applicable to criminal proceedings in general, where, in accordance with article 8 of the convention, other factors, such as the complexity of the case, the attitude of the accused and the authorities conduct, are analysed to justify the extension. For this reason, the approach to the duration of pretrial detention is based on article 7(5) of the ACHR.

The main purpose of reasonable term is to impose limits on the state and to ensure that its eminently procedural purpose is respected.[136] It is also intended to prevent it from being unreasonably extended and making it a form of early punishment, which would constitute an arbitrary deprivation of personal liberty of the accused and a violation of the presumption of innocence, in accordance with article 8(2) of the ACHR. In this sense, the importance of establishing time limits is that when the maximum allowed is reached, pretrial detention must be immediately terminated and replaced by another alternative measure, even if the procedural risks remain.

Regarding the appropriate term, the CCPG[137] establishes that pretrial detention shall have a maximum duration of one year (article 268), similar to Costa Rica[138] and even more protective than the Codes of Honduras[139] and El Salvador,[140] since those do not

135 IACHR, 'Case 12.553 Report No 86/09' (2009).
136 IACHR, 'Report on the Use of Pretrial Detention in the Americas' (2013).
137 Act 51-92 (n 121).
138 Act 7594 1996 art 257.
139 Act 9-99-E 1999 art 181.
140 Act 733 2008 art 8.

establish different periods depending on the type of crime. However, the same article 268 recognises that if a conviction is pending appeal, the measure may be extended for another three months, but in the case of special appeals,[141] it will be extended for the duration of its processing and resolution.

The problem with the time condition for the special appeal is its ambiguity in the absence of clear limits. Ideally, appeals proceedings should have an average duration of 34 to 40 working days or 60 calendar days, but in 2018 the actual time was 262 days.[142] If we add to this to the period that the person has remained deprived of their liberty until the sentence was pronounced, which in 2018[143] amounted to an average of 414 days, it is clear that the legal maximum of one year was exceeded, making this an unreasonably extended pretrial detention – a situation contrary to the standard of reasonableness – and turning it into an arbitrary deprivation of liberty, violating articles 7 and 8.2 of the ACHR.

Another unconventional aspect of article 268 of the CCPG is that it grants the Supreme Court of Justice or any Chamber of the Court of Appeals, the possibility, depending on the cases that fall into their jurisdiction, of extending the pretrial detention as many times as necessary. The incompatibility of this rule with the ACHR relies on that it legalises the imposition of an excessive and indefinite period for the measure, distorting the provisional nature of the figure.[144] In addition, it relieves the judge of his duty to carry out a proportionality test that justifies the force of the procedural risks. All this places the accused in a situation of vulnerability and lack of protection, because i) the extended continuation of the measure violates the standard of reasonable time, so that the deprivation of liberty becomes illegitimate, arbitrary and unreasonably and ii) this extension of the detention turns it into a form of early punishment, violating the presumption of innocence.

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141 Act 51-92 (n 121) 'Art 415. Apelación especial "… se podrá interponer el recurso de la apelación especial contra la sentencia del tribunal de sentencia o contra la resolución de ese tribunal y el de la ejecución que ponga fin a la acción, a la pena a una medida de seguridad y corrección, imposibilite que ellas continúen, impida el ejercicio de la acción, o deniegue la extinción, conmutación o suspensión de la pena" [Special appeal '… a special appeal may be lodged against the sentence of tribunal or against the decision of that court and the one of the court of enforcement that terminates the action, the sentence or a measure of security and correction, or makes them impossible to continue, prevents the exercise of the action, or denies the extinction, commutation or suspension of the sentence´].

142 Observatorio Judicial del Sistema de Justicia Penal en Guatemala (n 108).

143 Centro de Investigaciones Económicas Nacionales (n 105).

144 Pessoa (n 125).

For this reason, the adaptation of article 268 of the Criminal Procedure Code to the standards of reasonable time becomes an imperative need for the state. This would allow the legislation to be framed within a proceduralist vision of pretrial detention and respect for human rights, especially personal liberty, the presumption of innocence and defence. Otherwise, the conventionality control should be applied to abolish this type of regulation from the legal system or waive it in specific cases, due to its manifest violations of articles 2, 7 and 8.2 of the ACHR.

3.11 Judicial review in the light of article 7(5) of the ACHR and pretrial detention

Another of the guarantees article 7.5 of the ACHR promotes is the fact that once a person is detained, they must be brought before a judge so an immediate judicial review of the legality of the deprivation of liberty takes places. According to the constitution, the time for bringing the person before a competent judge may not exceed six hours and the first statement must be made within the following 24 hours. However, the excess of time between the constitutional term and the actual holding of the hearing opens the door to what is known as provisional detention, which forces the system to transfer the person to a detention centre pending the resolution of their situation.[145]

The seriousness of this figure lies in the fact that, during the waiting period, the person is not subject to criminal proceedings and there is no preventive detention order proving the concurrence of procedural risks. This makes the detention illegal and even arbitrary, in violation of article 7, paragraphs 2 and 3 of the ACHR. From a legal point of view, this form of deprivation of liberty limits the effective exercise of the right of defence, since there is no certainty as to the effectiveness of the remedies that could be used against the accused, not to mention the effect on the presumption of innocence.

[145] María Peláez, 'Casi todo lo que te han dicho sobre la prisión provisional es mentira. Guatemala' (*Diálogos*, 7 February 2023) <https://dialogos.org.gt/2023/02/07/casi-todo-lo-que-te-han-dicho-sobre-la-prision-provisional-es-mentira/> accessed 19 March 2024.

At a statistical level, between the years 2008 and 2018 the average number of days waiting for the first statement was 8.6 for the rural area and 7.6 for the urban area. In addition, during that decade, 84% of the detainees remained waiting between 1 and 15 days.[146] Likewise, in 2018 the number of subjects affected by this measure amounted to 12,467[147]. This crisis is a product of the lack of specific regulation on it, except for some superfluous mentions in article 10 of the constitution and article 75 of the CCPG. But it is also due to the structural shortcomings of the justice system in terms of availability of courts and designation of competencies to judges on duty to solve the legal situation of persons within the constitutional time limits.

For this reason, initiatives have been proposed to regulate the handling of cases with numerous defendants or special conditions, as well as the application of temporary non-custodial coercive measures before the first hearing.[148] Consequently, the lack of immediate attention to this phenomenon would aggravate the situation and increase the level of violation of individuals.

3.12 Review of pretrial detention, a guarantee of personal liberty

Article 7.6 of the ACHR guarantees the right to go before a judge to have analysed the legality of the preventive detention and to be released if it is found to be illegal. The purpose of this requirement is to preserve the preventive purpose of the coercive measure and to verify the maintenance of the procedural risks. It should be noted that this control is not limited to the moment when it is first imposed but it should be performed at all stages of the criminal proceedings until the final sentence. For this reason, the standard establishes periodic review and the right to appeal as a right of the accused and an obligation of the state.

146 Peláez (n 145).

147 Diálogos'¿por qué es importante analizar los datos del sistema de justicia? Privados de libertad. Guatemala: La balanza Datos y Acceso a la Justicia en Guatemala' (*La Balanza, 19 march 2024*) <https://labalanza.gt/datosyjusticia/> accessed 19 March 2024.

148 Peláez (n 145).

The purpose of the periodic review of pretrial detention is for making national judges from time to time examine whether the original conditions which led to its imposition still exist or have changed, in order to safeguard the personal freedom of the accused, avoiding an unreasonably extension of the measure and preventing it from becoming an early punishment.[149] The general rule is that such a review is carried out *ex officio* by the judicial authorities, who must always ensure to perform a conventionality control over the measure. However, it is also accepted that the accused himself appears before court.

About the review, unlike the procedural codes of Honduras and Costa Rica, the CCPG does not establish the liability to perform a periodic review of pretrial detention at a specific time, only stating that 'El auto que imponga una medida de coerción o la rechace es revocable o reformable, aún de oficio'[150] [the decision that imposes or rejects a coercive measure may be reversed or reformed, even *ex officio*]. In this sense, at the jurisprudential level, the CC supports the possibility of *ex officio control*,[151] but the lack of a fixed term reduces the effectiveness of the measure.

The lack of clarity on the level of relevance and the regularity with which such review should be practiced, makes the mechanism ineffective. In 2016, the Human Rights Ombudsman recommended the implementation of a periodic review mechanism and the establishment of a specific group of judges in charge of reviewing cases that register an excessive duration.[152] However, as of 2022, the proposed changes have not been implemented. Thus, persons subject to pretrial detention have three possibilities to request the review of the coercive measure: review of the measures, amendment of the decision and appeal remedy.

The first alternative is the hearing for the review of coercive measures provided in article 277 of the CCPG. In this hearing, it is the accused and his defence counsel who request the judge to review the measure at any time during the proceedings, and the judge must decide immediately in the presence of the parties. This procedure is appropriate because the purpose of the hearing is to

[149] IACtHR *Case of Jenkins v Argentina* (n 126); IACtHR *Case of Usón Ramírez v Venezuela* Preliminary Objection, Merits, Reparations and Costs. Judgment (20 November 2009).
[150] Act 51-92 (n 121) art 276.
[151] Constitutional Court of Guatemala (11 December 2020) Case 2800-2020 and 2960-2020; Constitutional Court of Guatemala (8 November 2016) (n 112).
[152] Human Rights Ombudsman (n 105).

assess the persistence of procedural risks to justify the continuation of the custodial measure or order an alternative measure. From this point of view, the legislation does not limit the number of times it can be requested, which is positive.

The other way is the reform of the decision according to article 320 of the CCPG. However, according to the jurisprudence of the CC, it would be effective in cases of repeat offenders, habitual offenders or depending on the crime. This path is not appropriate, first, because it would not discuss the procedural risks, but the possible change of the crime, as discussed above; and second, in the case of repeat or habitual offenders, this path is ineffective because the change of the crime charged does not change its subjective quality. Finally, there is the appeal (article 404), although this is a challenge and not a review *per se,* as required by the standards.

Another remedy is the *amparo* action as a means of alleging possible human rights violations. In 2015, the CC, in an *amparo* appeal decision, established that criminal proceedings initiated for one of the crimes listed as non-custodial in article 264 of the Criminal Procedure Code are susceptible to the application of a substitute measure, if it exceeds the maximum duration of one year (article 268.3).[153] It seems that this decision is a step towards a more proceduralist vision, but it conditions the possibility of access to this benefit to a time factor, and the *amparo* court does not perform an examination of the existence of procedural risks, so it is not a review *per se* in accordance with the standards of protection.

In this sense, the absence of a time limit for the informal periodic review in Guatemalan domestic law violates the standard of article 7, paragraph 6 of the ACHR, since it exempts the judicial officer from reviewing the proportionality of the coercive measure within determined time limits; it reduces the possibility to perform a of judicial review to prevent the unjustified and indefinite extension of pretrial detention; and it lacks appropriate remedies and effects for cases of recidivists, habitual offenders or for the crime charged.

[153] Constitutional Court of Guatemala (7 April 2015) Case 4844-2014 and 4853-2014.

3.13 Limitation of alternative measures and presumption of innocence

The presumption of innocence is an inherent quality of the person in all criminal proceedings. In the specific case of pretrial detention, it acts as a limit and aims to ensure that the deprivation of liberty is not used for punitive purposes, or it gets extended beyond a reasonable period. In addition, it is necessary to emphasise that the state's obligation is to ensure that its legislation is concise in requiring objective verification of the material requirements and procedural risks – danger of flight or obstruction of justice[154] – rejecting in that way, any normative imposition of a substantialist nature.

The main factor in determining the compatibility of the CCPG with presumption of innocence is the binding of procedural risks. According to the inter-American protection standards, the mere verification of the material requirements 'no constituye per se una finalidad legítima para la adopción de la medida de prisión preventiva, pues esto constituiría un juicio anticipado sobre la culpabilidad de la persona'[155] [does not in itself constitute a legitimate purpose for the adoption of the measure of pretrial detention since this would constitute an anticipated judgment on the guilt of the person]. For this reason, it is essential to demonstrate the existence of procedural risks to ensure the presence of the accused at the trial and that it does not influence its development. In this regard, the IACHR has found that:

[154] IACtHR *Case of García Rodríguez et al v Mexico* Preliminary Objections, Merits, Reparations and Costs, Judgment (25 January 2023) 151.

[155] IACtHR *Case of Hernández v Argentina* Preliminary Objection, Merits, Reparations and Costs, Judgment (22 November 2019) 116.

> [C]orresponde fijar la existencia del riesgo procesal que se pretende mitigar con la detención preventiva durante el juicio: i) el riesgo de fuga; o ii) la interferencia en las investigaciones. Dichos fines deben estar fundados en circunstancias objetivas por lo que la mera invocación o enunciación de las causales de procedencia, sin la consideración y análisis de las circunstancias del caso, no satisface este requisito[156] [It is necessary to establish the existence of the procedural risk that pretrial detention is intended to mitigate during the trial: (i) the danger of flight; or (ii) interference with the investigation. Such purposes must be based on objective circumstances, so that the mere invocation or enunciation of the grounds for proceedings, without consideration and analysis of the circumstances of the case, does not satisfy this requirement].

These procedural risks cannot be presumed; on the contrary, they must be proven in a hearing before a competent judge, so if any judicial decision on the application of pretrial detention fails to assess them, it turns incompatible with the standards. According to Juan Francisco Sandoval, in his experience as a public prosecutor, liberty has always been the rule, and if the Public Prosecutor's Office[157] considered that there are procedural risks – risk of flight or obstruction of the investigation of the truth – this must be proven and demonstrated in the corresponding hearing, otherwise the most appropriate alternative measure was directly analysed, confirming in this sense that the rule has been complied.

The inclusion of absolute presumptions of procedural risk contradicts the purpose of the measure and violates the presumption of innocence, as they are based on the personal circumstances of the accused and/or the crime charged. Thus, the exceptional and proportionate nature of pretrial detention is distorted by giving it an informal character that limits any possibility of access to an alternative measure. When examining the CCPG,[158] article 264 expressly bans the possibility of access to an alternative measure in criminal proceedings against repeat offenders, habitual offenders or due to any of the listed crimes (including article 6 of Act

[156] IACHR, 'Case 12.931 Report No 328/21' (2021) 42.
[157] Interview with Juan Francisco Sandoval Alfaro (n 124).
[158] Act 51-92 (n 121).

22-2008). From a legal point of view and in accordance with current standards, this type of regulation creates different categories of defendants to whom discriminatory criteria based on subjective and unjustified situations are applied.

The line of jurisprudence established by the CC has been to legitimise the constitutionality of this type of regulation, which includes absolute presumptions, by affirming that the assessment about pretrial detention is done in the indictment. The serious aspect of this criterion is the confusion between the scope of the indictment and pretrial detention as the imposition of preventive detention must be based on the verification of the material presumptions – knowledge of a criminal act and reasonable belief of criminal participation – but also on the procedural dangers. However, by equating the two decisions, the judge is exempted of performing this second analysis, which is contrary to the IACtHR standards.

Thus, the inclusion of absolute conditions for the assessment of procedural risks violates the State of Guatemala obligation to respect human rights on an equal basis and to adapt its regulations in accordance with articles 1.1 and 2 of the ACHR. In addition, it creates different categories of defendants, which constitutes a *de jure* discriminatory treatment, violating equality before the law and distorts the precautionary purpose of pretrial detention, transforming it into an early punishment. It is therefore obvious that the presumption of innocence is not guaranteed.

3.14 Alternative measures

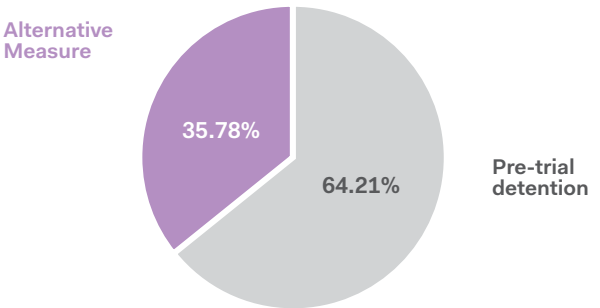
As in El Salvador and Costa Rica, the CCPG separately regulates alternative measures to pretrial detention. It also includes a wide range of alternatives, which, according to its article 264, may be: house arrest, submission to the guard or supervision of a person or institution, regular presence before court, prohibition to leave the country or a certain geographical area, restriction to go to certain places or communicate with certain persons and economic bail. A good practice of the CCPG is found in articles 264

bis and 265[159] and refers to the possibility that, in the case of traffic accidents, the person may be released under house arrest simply by signing a document in which people undertake to appear before the competent judge without being deprived of their liberty.

Despite the high number of people in pretrial detention compared to the total population deprived of liberty, the scenario changes respect the judicial system. According to the data of the Judicial Branch for the year 2022, 29,775 persons were subject to criminal proceedings, of which 64.21% – equivalent to 19,120 people – were benefited with some alternative measure and the remaining 35.78% – 10,655 persons – are subject to pretrial detention.[160] Similarly, the Public Prosecutor's Office reported that from 1 December to 31 December 2022, 881 persons were in pretrial detention and 1,370 were benefited with some type of alternative measure.[161] Also, according to the Institute of Public Criminal Defense, out of the 99,005 cases and consultations provided during the same period,[162] only 6.1% – 6,063 people – corresponded to pretrial detention situations, while 24.1% –23,827 people – were beneficiaries of some alternative measure.[163]

People subject to criminal proceedings in Guatemala in 2002

Source: Public Information Office of the Judiciary of Guatemala



159 Act 51-92 (n 121).
160 Public Information Office of the Judiciary of Guatemala, UNIP 2955-2023 (2023).
161 Public Information Office of the Prosecutor's Office, Resolution UDIP/G 2023-003597/bglpda (2023).
162 Note: According to the available data, the Institute of Public Criminal Defense handled a total of 99,005 cases and recommendations in 2022, of which 45,359 (45.8%) were new criminal cases. Therefore, the percentages for pretrial detention and alternative measures were calculated based on the total number of cases, without specifying which were new and which were from previous years.
163 Public Information Office of Institute of Public Criminal Defense, Case 09-2023 (2023).

In this sense in relation to the total number of criminal proceedings, the percentage of alternative measures is higher than that of pretrial detention, a situation that is positive in terms of progress in compliance with protection standards. On the contrary, regarding the total number of persons deprived of their liberty, the data is worrying, since in 2022, 48.3% were subject to such coercive measures. It is therefore necessary for the State of Guatemala to adopt measures aimed to reduce these figures. For this reason, some good practices are described below.

3.14.1 Non-judicial measures: an alternative to pretrial detention

In an effort to respond to the saturation of the criminal justice system and to provide accessible and quick alternatives to criminal prosecution, the CCPG provides non-judicial measures, which can be defined as a way of quickly resolving criminal disputes that, based on the circumstances and conditions of each case, it is determined that a crime has no social impact and that an agreement between the parties would be of greater social benefit than rather imposing a sentence.[164] Thus, within this category are the criterion of opportunity (article 25), mediation (article 25 quarter), conversion (article 26), conditional suspension of prosecution (articles 27 to 31 and 287), abbreviated procedure (articles 464 and 465) and the procedure for less serious crimes (articles 465 and 466).

To demonstrate the increase in its use, according to data from the Judicial Branch, in 2015 the first instance courts granted 972 conditional suspensions of criminal prosecution, but in 2022 this figure increased to 2428.[165] Meanwhile, the Institute of Public Criminal Defense reported that, of the cases handled by said entity, in 2019 the courts issued 5,115 resolutions granting opportunity criteria, and in 2022 the reported number was 7,237.[166]

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164 Constitutional Court of Guatemala (7 August 2003) Case 1477-2003.

165 Public Information Office of the Judiciary of Guatemala (n 160).

166 Institute of Public Criminal Defense, 'Boletín estadístico. Casos atendidos por los defensores públicos, durante el periodo de enero a diciembre del año 2019' (*Institute of Public Defense of Guatemala*, 2019) <www.idpp.gob.gt/index.php/biblioteca-virtual-idpp/publicaciones-institucionales/72-boletines-estadisticos/224-boletines-estadisticos-2019> accessed 19 March 2024; Institute of Public Criminal Defense, 'Boletín estadístico. Casos atendidos por los defensores públicas, durante el período de enero a diciembre del año 2022' (*Institute of Public Defense of Guatemala*, 2022) <www.idpp.gob.gt/index.php/biblioteca-virtual-idpp/publicaciones-institucionales/72-boletines-estadisticos/228-boletin-estadistico-2022> accessed 19 March 2024.

Although it is a good practice, it is necessary to emphasise that the requirements for the non-judicial measures are not applicable to all cases. Therefore, it cannot be said that these measures are the perfect solution to the problem of the use of pretrial detention. It must also be considered that its use must be proportionate, to avoid it of becoming a means of relieving the Public Prosecutor's Office of its obligation to conduct a thorough investigation, denying victims access to justice, a situation that would entail liability for the state.

3.14.2 Use of technology: telematics control

Technology is an essential tool to address the problem of excessive use of pretrial detention. In comparative law, Honduras and Costa Rica have regulated its use, although only the latter has implemented it. In the case of Guatemala, in 2016, Act 49-2016, Law for the Implementation of Telematic Control in Criminal Proceedings, was approved to regulate its use in criminal proceedings and implement a mechanism to monitor compliance of said measures. It should be noted that the judge in charge of the case is competent to decide on its use and has the task of explaining to the beneficiary, in a general manner, its operation, the conditions established and the consequences of non-compliance.

Regarding the economic issue, this law stipulates: 'El dispositivo de control telemático será financiado por el sindicado, sancionado o condenado, salvo criterio del juez competente'[167] [The telematic control device shall be financed by the accused, sanctioned, or convicted person, except at the discretion of the competent judge]. On this point, the IACHR has expressed that the cost of using this service may constitute a restriction on access to a substitute measure, recalling Guatemala its obligation to guarantee its use on criteria of material equality.[168] About this point, it is not possible to analyse the degree of compliance with the recommendation given, since the mechanism was not implemented until 2022. However, in May 2023, the Supreme Court of Justice ruled that the judge must request a socio-economic study from a social worker working for the court,[169] a practice that can be evaluated positively.

[167] Act 49-2016 2016 art 7.
[168] IACHR, 'Situation of Human Rights in Guatemala' (2017).
[169] Ruling 30-2023 of the Supreme Court of Justicia of Guatemala (2023).

Likewise, Decree 49-2016 establishes that the Telematic Control Center 'estará a cargo del Ministerio de Gobernación, a través de la Unidad de Control Telemático, la que deberá crearse'[170] [will be under the responsibility of the Ministry of the Interior, through the Telematic Control Unit which would be created]. Accordingly, in 2022, the Telematic Control Unit was established by Government Agreement 68-2022 and became part of the hierarchical structure of said Ministry. In 2023, this unit was allocated a budget of 28 million quetzales,[171] equivalent to 3,500,000 US dollars.[172]

At the level of implementation and equipment acquisition, on 18 April 2023, following an open bidding process, the Ministry of the Interior approved the service contract for the implementation of the Telematic Control Pilot Plan for 110,367,144 quetzales (13,795,893 US dollars), to lease the equipment for the new unit and the telematic control devices, accounting a total of 2,000 anklets.[173]

In this sense, the delay of almost five years in the implementation of the objectives of this law is criticised, although having the inputs and resources to make it work in this initial phase it's a significant progress. Facing all, three central points can be concluded: i) its operationalisation will contribute to addressing the pretrial detention crisis and will allow more people to benefit from an alternative measure; ii) the authorities should continue in this direction and expand the capacity of attention, taking into account the percentage of people deprived of their liberty; and, iii) try to ensure equal access and that the cost of its use does not become a barrier to access these alternative measures.

3.14.3 Restorative justice

Restorative justice proposes a new approach to criminal justice that replaces the classic retributive vision. Within this new model, the aim is to establish a methodology for conflict resolution that always seeks the involvement of victims, offenders, social

[170] Act 49-2016 (n 167) art 12.
[171] Public Information Office of the Ministry of the Interior of Guatemala, Resolution 000885 (2023).
[172] An exchange rate of 8 quetzales to 1 US dollar is used in this study.
[173] Public Information Office of the Ministry of the Interior of Guatemala, Resolution 000885 (n 171).

bonds, institutions and the community.[174] Thus, its priority is not to respond to a punitive vision in which punishment is the rule, but rather offer alternatives to society that are more accessible, legitimate and quick, contributing to reduce the caseload in courts. As such, the concept of restorative justice responds to a more social, human and integral dynamic, where the priority is:

> [R]restaurar el lazo social dañado por la acción criminal ... Cuestiona la abstracción del modelo jurídico y apela al conocimiento y resolución de los conflictos entre sujetos concretos de comunidades concretas. Da un papel fundamental a la víctima a quien se repara el daño y responsabiliza al ofensor, además de darle la oportunidad de deshacer el daño y reconciliarse con la sociedad[175] [Restore the damaged social bond by the criminal action. It questions the abstraction of the legal model and appeals to the knowledge and resolution of conflicts between concrete subjects of concrete communities. It gives a fundamental role to the victim, to whom the damage is repaired, and holds the offender responsible, in addition to giving they the opportunity to undo the damage and reconcile with society].

In the comparative law of Central America, it was found that only Costa Rica has implemented programmes aimed at implementing this model. In the case of Guatemala, in 2013 the Supreme Court of Justice issued Agreement 4-2013, which implements a regime of conditional suspension of criminal prosecution, that is, restorative justice. The objective of this regime is to reduce the period of pretrial detention, and that the person is subject to a probationary regime for a certain period and can overcome the circumstances that led to his criminal behaviour.[176] It should be emphasised that its scope is broad because it allows this benefit to be granted even when the accused is not on trial.

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[174] United Nations Office on Drugs and Crime, *Handbook on Restorative justice programmes* (United Nations 2006) <www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf> accessed 19 March 2024.

[175] Instituto de Estudios Comparados en Ciencias Penales de Guatemala, *Aproximación a las prácticas de justicia restaurativa en el sistema de justicia penal juvenil guatemalteco* (Instituto de Estudios Comparados en Ciencias Penales de Guatemala 2015) 16.

[176] Ruling 4-2013 of the Supreme Court of Justicia of Guatemala (2013).

In this regard, the IACHR stated that this programme is an advance in the application of alternative dispute resolution methods since it allows the person subject to pretrial detention to solve the conflict through non-punitive measures. However, it is not widely used and is not adequately monitored by judicial authorities.[177] In this sense, it is possible to affirm that the regulation of this figure is positive, although the impossibility to measure the level of compliance and application allows the conclusion that it has not been adequately used by the judiciary, although it is an important tool to provide comprehensive solutions to the problem of provisional deprivation of liberty.

[177] IACHR, 'Report on Measures Aimed at Reducing the Use of Pretrial Detention in the Americas' (2017).

Conclusion

The transition to democratic models and accusatory criminal systems has brought about a paradigm shift in the treatment of accused individuals. As a result, pretrial detention is now considered a precautionary measure, with emphasis placed on preserving its exceptional nature and respecting human rights. The study of Guatemala's migration towards a protective model is relevant for two reasons. Firstly, it began in 1994 with the implementation of the new Criminal Procedure Code. Secondly, it is important to determine whether the legislation is consistent with inter-American standards of protection by 2022. Before addressing this issue, specific aspects must be considered.

There is a widely accepted view that pretrial detention is only justifiable in the context of criminal proceedings. Its usage, however, varies depending on the perspective from which it is approached. Substantialism and proceduralism are the two spectrums that form the basis for understanding it. The first is typical of inquisitorial systems. In those, the coercive measures become the rule and a means of the criminal process, responding to a punitive vision which equates it to a punishment.

On the other hand, the proceduralist current limits the grounds for pretrial detention and emphasises the importance of personal liberty. Thus, the legitimacy of a measure is determined by analysing whether the legislation requires objective verification of procedural dangers, and it is used solely to ensure the presence of the accused at trial and/or to avoid hindrances in investigations. This perspective forms the basis for the concepts outlined in accusatory Criminal Procedural Codes.

The postulates of both schools may appear to be mutually exclusive and irreconcilable. However, in the present investigation, it was found that the procedural codes, particularly the Guatemalan, incorporate substantialist elements with respect to pretrial detention. This tendency turns evident for example in normative guidelines that allow for its informal application based on the attributes of the accused, the crime committed, or the lack of clear limits regarding the duration of the measure. This creates a situation of vulnerability, so it is necessary to verify the compatibility of such regulation with the ACHR and human rights protection standards.

In the context of international human rights law, the use of pretrial detention is subject to a set of standards. The first of these is personal liberty, as stated in article 7 of the ACHR. This article requires that any deprivation of liberty must comply with the principles of legality and legitimacy. The first analysis examines the form of the decision, specifically determining whether the principles of law reserve, criminality, and if the decision was taken in accordance with pre-established domestic procedures. The examination of legitimacy delves into the merits of the decision and focuses on determining its compatibility with the ACHR. Any restriction that is found to be incompatible is considered arbitrary, and the logical consequence of such contravention is the immediate release of the person.

Article 7 of the ACHR guarantees personal liberty, but it also includes a series of guarantees focused in providing a major protection to the person. Among those, right to know the reasons for detention, judicial control of deprivation of liberty, reasonable timeframe and the right to challenge the decision ordering the confinement. These concepts are evaluated in the context of a specific criminal proceeding. However, the regulation of pretrial detention is a crucial factor, particularly in situations where the law restricts access to periodic reviews, allows unreasonably extensions of the measure or renders legal remedies ineffective. Following this reasoning, the state can be held accountable for violating the inter-American guidelines.

The protection of the presumption of innocence is a fundamental principle that must govern the use of pretrial detention. Therefore, this measure should not be used as an early punishment, and the presumption of innocence should be maintained until the conviction becomes final. The right is guaranteed

through the requirement to conduct a proportionality examination and evaluate two specific aspects: (i) the material presumptions, which refer to the possible execution of the crime and the existence of rational motives for criminal participation; and (ii) the objective verification of procedural dangers.

To preserve the presumption of innocence, for procedural dangers the standards establish two specific clauses. First, only objective risks qualify as conventional, such as those aimed at ensuring the presence of the accused in the proceedings (ie the danger of flight) and avoiding hindering or obstructing the investigation. According to the second guideline, any potential dangers must be proven. Absolute presumptions regarding the subjective qualities of the accused or based on the crime should be rejected, as they relieve the judge from analysing and verifying their existence. This implies that pretrial detention takes on the character of an early punishment.

It has been confirmed that the temporal element is a crucial factor in determining the compatibility of legislation with the ACHR. The concept of reasonable time differs from that one applicable to criminal proceedings. In the case of pretrial detention, its duration is limited to ensure the purposes of the process and eliminate procedural dangers. Therefore, it is important to set maximum terms, but the decision should always be proportionate to the specific circumstances. If the limit is exceeded, alternative measures must be taken to benefit the person, even if procedural risks persist.

In accordance with the principle of freedom, the need of judicial control over pretrial detention becomes imperative. Therefore, it is important to highlight the following aspects. The standard mandates that such review should not only be conducted at the first hearing but should be practiced throughout the entire legal process until the sentence becomes final. In addition, the court must carry out periodic reviews of the measure *ex officio* to evaluate the legality and legitimacy of the deprivation of liberty, assess the existence or variation of procedural dangers, prevent unreasonably extension, and avoid it becoming an early punishment.

After clarifying the above points, it is worth reflecting on the findings in comparative law. El Salvador, Honduras, Costa Rica and Guatemala share a legal identity due to their shared history and simultaneous reforms to their criminal procedure codes in the 1990s. These codes clearly recognise that the criminal

proceedings are governed by the principles of orality, proximity, equality and contradiction, as well as for respect of human rights. These elements are embedded in the domestic law of the four countries.

Regarding pretrial detention, Central American legislation establishes personal liberty as a rule, and the use of this coercive measure is only exceptional, reserved solely to ensure procedural purposes in general terms. Similarly, only Honduras and Costa Rica codes consider conducting regular informal reviews by 2022, which is a commendable practice. However, the procedural codes of all three countries have not fully embraced the proceduralist approach, as they allow the use of pretrial detention based on subjective factors, personal characteristics of the accused or the nature of the offense. This situation exemplifies the punitive nature of this measure in the region, which results in significant violations of human rights, particularly about personal liberty and the presumption of innocence.

The three countries analysed provide a wide range of alternative measures to pretrial detention, recognising the primacy of personal liberty. Additionally, they recognise the possibility of using technology as a mechanism for monitoring compliance, with Costa Rica being the only country to make progress in its implementation. Another relevant aspect is compensation as reparation and restorative justice, particularly in Costa Rica. The proposal of a paradigm shift in the Costa Rican justice system is noteworthy as it presents comprehensive solutions that help reduce the use of custodial measures.

Then, it is necessary to examine the specific case of Guatemala. As previously explained, the Criminal Procedure Code came into effect in 1994, replacing the old inquisitorial system with an accusatory-guaranteed model. Regarding pretrial detention, the principle is to safeguard the personal liberty of the accused. Its use is exceptional and serves the purpose of eliminating procedural risks, specifically the danger of flight and obstructing justice. The maximum duration of pretrial detention is limited, and if exceeded, the measure must be terminated.

The impact analysis of the regulation reform was conducted in four historical stages. The first stage was the period before the Criminal Procedure Code came into force. During this period, 73% of the total number of persons deprived of liberty were subject to pretrial detention. During the second stage, which began

with the implementation of the CCPG and continued until 1999, the number of individuals subject to this measure decreased. Significant reforms were also implemented, including the introduction of house arrest for traffic offenses and the reduction from six to three months of the preparatory phase for individuals deprived of their liberty. The Public Prosecutor's Office and the Institute of Public Criminal Defense, fundamental institutions in this new model, were also recognised with autonomy and independence.

However, there were also setbacks, particularly due to the reforms implemented in 1996. These reforms limited the possibility of accessing a substitute measure in criminal proceedings against repeat or habitual offenders, or depending on the severity of the crime for which they were charged. This opened the doors to unofficial pretrial detention. Similarly, during the third stage from 2000 to 2015, there was a substantialist and punitive trend in pretrial detention. This trend allowed the Supreme Court of Justice or a Chamber of the Court of Appeals to extend pretrial detention as many times as deemed necessary. This change contradicts the reasonable time standard and undermines personal liberty and presumption of innocence.

In the final stage, there was a widespread debate focused on reducing the use of pretrial detention. The main proposals aimed to preserve the exceptional, proportional and reasonable nature of the subject, as to allow alternative measures for reasons of illness or old age. The proposals also emphasised the need to use technology, suppress unreasonable extension and establish time limits for periodic review. It is important to note that telematic control was regulated during this time, but as of 2022, it has not been implemented.

This thesis reveals two serious human rights situations. The first one is the existence of unofficial pretrial detention due to restrictions on access to a substitute measure in criminal proceedings against repeat or habitual offenders, or the crime charged. This scenario exempts the judge from examining the proportionality of the measure and the existence of procedural dangers. It concerns the jurisprudential line of the CC because it has failed to apply adequate conventionality control. Instead, it has focused on legitimising interference of the legislator in the jurisdictional function and has confused the scope of the indictment and pretrial detention orders.

Thus, the normative premises that tolerate the informal use of pretrial detention constitute an arbitrary deprivation of liberty *ab initio* because they limit the analysis of procedural risks and distort the procedural purpose of the measure. Moreover, pretrial detention takes the form of an early punishment because of the impossibility of reversing the decision, violating presumption of innocence. Hence, it is necessary to eliminate this type of regulation from the Guatemalan legal system, otherwise it would generate responsibility for the state due to clear violations of the ACHR.

The second aspect is the so-called provisional detention, which occurs during the time between the arrest and the first statement hearing, which exceeds the constitutional period, and the accused remains deprived of his liberty. The main point is that the person is in a situation of vulnerability because his legal situation has not been solved and they are not bound to the criminal proceedings but are sent to a detention centre. This prevents the accused from having access to any of the remedies provided in the Criminal Procedure Code. In addition, no case law has been found to demonstrate the suitability and effectiveness of a*mparo* and *habeas corpus* in these cases. In view of this, it would be a good practice to implement a release system for those pending trial and strengthen the response capacity of the judiciary.

For all that, the need to adapt the regulation of pretrial detention in the Criminal Procedure Code to the ACHR must be emphasised, eliminating all those dispositions that are based on substantialist criteria, such as the possibility of indefinite extension of the measure or its informal use, but also to take positive measures aimed to solve the crisis of pretrial detention. To this end, the responsibility is shared between the Congress of the Republic of Guatemala, which must carry the legislative changes that make would make quick and effective alternatives viable, but it is also necessary that the courts exercise an adequate conventionality control.

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