

Radical criticism of the indiscriminate use of pretrial detention in Peru

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ABSTRACT

This article examines, from a critical-dogmatic perspective, the indiscriminate use of pretrial detention in Peruvian criminal proceedings. Based on the analysis of the binding jurisprudence of the Supreme Court of Justice of the Republic – *in particular Plenary Agreements No. 789-806/CIJ-116, No. 789-806/CJ-116, Cassation No. 789-806-Moquegua, No. 789-806-Arequipa, No. 789-806-Piura, No. 789-806-National, and No. 789-806-Ica, among others* – and the dogmatic of criminal procedure, the following structural problems are identified and analyzed: (a) the defective construction of the imputation hypothesis; (b) the inflation of evidentiary standards; (c) the expansive use of the prognosis of penalty; (d) the fiction of the danger of flight; (e) the instrumentalization of the danger of obstruction; (f) the degradation of the principle of proportionality; and (g) the apparent reasons for the judicial decisions. It is concluded that pretrial detention has ceased to operate as an exceptional precautionary measure to become an anticipated penalty, delegitimizing the 2004 model of accusatory criminal procedure.

Keywords: pretrial detention; specific accusation; procedural danger; proportionality; judicial motivation.

I.- Introduction

Pretrial detention is, in theory, the most serious precautionary measure within the criminal procedure system. Its application involves the deprivation of personal liberty of a person who, by virtue of the principle of the presumption of innocence, must be treated as innocent until a final judgment declares otherwise. This fundamental fact, enshrined in Article 2, paragraph 24, paragraph e) of the Political Constitution of Peru, in Article 7, paragraph 2) of the American Convention on Human Rights and in Article 9 of the International Covenant on Civil and Political Rights, should be sufficient to

make pretrial detention an absolutely exceptional procedural tool.

However, the reality of the Peruvian criminal justice system paints a radically different picture. The figures from the National Penitentiary Institute (INPE) are alarming: at the end of 2024, 38.7% of the Peruvian prison population was on trial, that is, deprived of liberty without conviction. This fact, eloquent in itself, acquires dramatic dimensions when contrasted with the standards of the Inter-American Human Rights System, which has repeatedly indicated that pretrial detention cannot be general or mandatory (IACHR, 2017, pp. 789-806).

The Peruvian criminal procedure model, formally inaugurated with the progressive entry into force of the 2004 Code of Criminal Procedure, adopted an adversarial accusatory system with a clear guarantee orientation. Pretrial detention was conceived as an exceptional measure, subject to the principles of jurisdictionality, exceptionality, provisionality, proportionality and instrumentality. However, judicial practice has emptied these principles of content, turning the measure into a quasi-automatic response to the accusation of serious or media crimes.

This research supports a central thesis: in Peru, without any exception of the provinces, pretrial detention has become, in most cases, a covert anticipatory punishment, applied under an apparent motivation that does not withstand the slightest dogmatic analysis. To demonstrate this thesis, the structural problems that run through the application of this measure will be systematically and critically analyzed, using as support the jurisprudence of the Supreme Court of Justice and contemporary criminal dogma.

The research adopts a qualitative methodology of dogmatic-legal analysis, with a critical approach. Judicial decisions of the Supreme Court of the Republic of Peru are examined, updated national and international doctrine, and theoretical models are contrasted with the reality of judicial practice. The structure of the work follows the order of the problems identified in the hypothesis, preceded by a reflection on the fundamental premise: without concrete imputation there is no precautionary debate.

II.- Without a specific accusation there is no debate

Before entering into the analysis of the material presuppositions of pretrial detention, it is essential to establish the premise on which any legitimate precautionary debate is built: the existence of a specific, sufficiently articulated accusation about specific facts, with legal-criminal relevance and personally attributed to an individual. This premise, which seems obvious, is systematically unfulfilled in Peruvian judicial practice.

The concept of concrete imputation is not simply a formal category. In contemporary procedural dogma, the concrete imputation constitutes the logical-legal presupposition of the entire system of guarantees of criminal procedure. As Maier (2004, p. 553) points out, "there is no criminal process without imputation: the existence of a concrete affirmation that someone has committed a punishable act is the condition of possibility of any state reaction to the crime". In the same vein, Binder (2013, p. 314) argues that the specific accusation is "the essential core of the guarantee of defence", since without it it is not possible to exercise any type of effective contradiction.

The Supreme Court of Justice of Peru has recognized this premise in its jurisprudence. In Plenary Agreement No. 789-806/CJ-116, the Plenary of the Criminal Chambers established that the prosecutor's request for preventive detention must contain a "precise, circumstantial and concrete factual description" of the alleged acts, so that the judge and the defense can know exactly what conduct is attributed, when it occurred, where and in what way it is linked to the accused (Supreme Court of Justice of Peru, 2012).

However, in practice, requests for pretrial detention are frequently formulated with vague or generic accusations such as "the accused would have participated in the facts", without specifying the specific contribution of each participant, without precise temporal determination and without differentiation between the different acts that make up the alleged punishable act. This pathology, which Roxin and Schünemann (2017) would call a violation of the principle of specificity of the imputation, not only violates the right of defense, but also corrupts the precautionary debate from its foundation.

The Constitutional Court of Peru has been emphatic in pointing out that pretrial detention issued on the basis of a vague or generic accusation constitutes a violation of the right to personal liberty and the principle of presumption of innocence (STC No. 789-806-PHC/TC; STC

No. 789-806-PHC/TC). However, these jurisprudential decisions have little impact on the day-to-day practice of the preparatory investigation courts.

The logical consequence of this premise is forceful: if there is no specific accusation, there is no object on which to debate the admissibility of pretrial detention. The precautionary debate presupposes that it has been affirmed, with sufficient precision, that a person engaged in typical, unlawful and culpable conduct. Only on the basis of that statement - *subject to future verification in the oral trial* - is it possible to assess whether there are elements of conviction that support it, whether the expected penalty justifies the measure and whether there is procedural danger. To omit this premise is to build the precautionary debate on the void.

III.- Central problems of the system

III.1.- The Defective Construction of the Imputation Hypothesis

The first material prerequisite for pretrial detention, regulated in Article 268, paragraph a) of the Code of Criminal Procedure, requires that there be "well-founded and serious elements of conviction to reasonably estimate the commission of a crime that links the accused as the author or participant in it." This rule, apparently clear, hides in its practical application one of the greatest pathologies of the system: the defective construction of the imputation hypothesis.

The imputation hypothesis is the central factual proposition of the criminal process: the affirmation that a person engaged in conduct that is subsumed in a criminal type. Its construction requires, at least: (i) precise description of the historical fact; (ii) identification of the role and the specific contribution of the accused; (iii) link between the fact and the applicable criminal law; and (iv) indication of the means of proof that, at the time of formulating the request, support that assertion.

When any of these elements is missing or poorly formulated, the imputation hypothesis is invalid,

regardless of the seriousness of the crime under investigation.

Cassation No. 789-806-Moquegua, issued by the Permanent Criminal Chamber of the Supreme Court and of a binding nature, marked a transcendental milestone by establishing that the preparatory investigation judge must carry out an examination of the sufficiency and solidity of the elements of conviction presented by the prosecutor. It pointed out that such elements must be "well-founded and serious," which requires more than simple suspicions or indications of little importance (Supreme Court of Justice of Peru, Permanent Criminal Chamber, 2015). Despite this, in judicial practice, judges usually limit themselves to reproducing the list of "investigative acts" presented by the Public Prosecutor's Office, without making a critical evaluation of their corroborative and accrediting capacity.

Gimeno Sendra (2015, p. 892) points out that the "appearance of good law" – *the fumus boni juris* – cannot be constructed on the basis of general statements by the prosecutor or the abstract seriousness of the crime under investigation, but requires a concrete evaluation of the means of evidence and its logical relationship with the conduct attributed. In the same vein, Asencio Mellado (2017, p. 312) argues that *fumus commissi delicti* requires "a triple verification: factual, typical, and subjectively linked."

In paradigmatic cases of the Peruvian judicial system, such as those related to the investigation of corruption in large infrastructure works, it has been shown that the requirements for preventive detention are based on accusations that attribute criminal responsibility to public officials for the sole fact of having signed documents or participated in meetings, without establishing the specific intent required by the criminal types of collusion or embezzlement. This practice supposes, in the words of Zaffaroni (2009, p. 127), "a reversal of the burden of covert proof": it is presumed that the person who had the position of guarantor also participated in the crime, without demonstrating the specific typical conduct.

Plenary Agreement No. 789-806/CIJ-116 partially addressed this problem by stating that the individualization of the contribution of each co-defendant is an indispensable requirement of the request for pretrial detention. However, subsequent practice has shown that this criterion has not been properly internalized by the operators of the system (Supreme Court of Justice of Peru, 2019a).

The practical consequence of this pathology is irreversible damage: people are deprived of their liberty on the basis of accusations that would not withstand a minimum of analysis in the oral trial hearing, generating what Ferrajoli (1995, p. 678) calls "preventive convictions" – *deprivations of liberty that function as an anticipated punishment without trial*. The human cost is irreparable: the time spent in pretrial detention is not returned, even when the acquittal is the conclusion of the criminal process.

III.2. The Inflation of Evidentiary Standards

Intimately related to the previous problem, but with its own autonomy, is the phenomenon that we call "inflation of evidentiary standards". This pathology consists of requiring, for the admissibility of pretrial detention, a level of certainty that approaches *-or exceeds-* the evidentiary standard required for a conviction, turning the precautionary debate into an anticipated oral trial. Paradoxically, the reverse problem also exists: in other cases, an evidentiary threshold so low that it amounts to a mere suspicion is accepted as sufficient.

Article 268 of the Peruvian Code of Criminal Procedure requires the materialization of "well-founded and serious elements of conviction." This legal formula, of a precautionary nature, is not equivalent to full proof or certainty of conviction, but neither can it be satisfied with vague indications or preliminary investigation actions without greater consistency. The correct standard, in Peruvian procedural dogma, is that of strong suspicion: the imputation hypothesis must be more probable than its opposite, in light of the elements of conviction available at the time of the debate (Taruffo, 2011, p. 214).

The Supreme Court of the Republic of Peru has oscillated in its jurisprudence between maximalist and minimalist demands. In Cassation No. 789-806-Arequipa, the Permanent Criminal Chamber established that the "well-founded and serious elements of conviction" must be qualitatively distinguished from the indications that justify the formalization of a preparatory investigation: they must be more solid and concrete than the mere initial elements of suspicion (Supreme Court of Justice of Peru, Permanent Criminal Chamber, 2015b). In practice, however, this distinction is not applied categorically and imperatively.

The problem is exacerbated in the so-called cases of "organized crime", where prosecutors present thousands of pages of documentary evidence that, in their quantity, create the illusion of solid evidence. Taruffo (2011, p. 231) warns that the quantity of elements of conviction does not equate to their epistemic quality: «a thousand weak indications do not make a strong indication». In the Peruvian criminal procedure system, however, the judges of the preparatory investigation are usually impressed by the volume of the prosecutor's file, replacing the rational evaluation of the accrediting force of each element with a perception of quantity, less quality that distorts the analysis of the specific case.

At the opposite extreme, there is also the problem of the corroborative insufficiency of the elements of conviction accepted as sufficient. This occurs when the judges of the preliminary investigation validate requirements that are based exclusively on statements of effective collaborators without peripheral corroboration, on transcripts of communications without undoubted attribution to the accused, or on accounting experts that point out "irregularities" without establishing the subjective link with the criminal conduct under investigation.

Laudan (2006, p. 63) argues that the function of the evidentiary standard is to rationally distribute the risks of error among the types of possible decisions: convicting an innocent person is more serious than acquitting a guilty person. In the precautionary sphere, this logic is transferred as follows: depriving someone of liberty who should

not have been deprived is more serious than not depriving him when it could be convenient. This hierarchy of errors is inverted in Peruvian judicial practice, where the fear of media or political questioning for "freeing" a defendant leads criminal judges to overestimate the evidentiary threshold against him.

III.3. The Expansive Use of Punishment Prognosis

The second material presupposition of Article 268, paragraph b) of the Peruvian Code of Criminal Procedure, requires that "the penalty to be imposed be greater than four years of imprisonment." This requirement, apparently merely numerical, has been the object of an interpretative expansion that has truncated it from any filter function. In Peruvian judicial practice, the prognosis of punishment has become an almost automatically satisfied requirement in any investigation of intentional crime of medium or high gravity, without fulfilling the function of individualized analysis that corresponds to it.

The prognosis of punishment is not an exercise of simple comparison between the minimum sentence of the criminal type and the threshold of five years. It is, rather, an operation of anticipatory judicial individualization that must take into account all the factors that Article 45°-A of the Peruvian Criminal Code establishes for the determination of the penalty: mitigating and aggravating circumstances, degree of participation, level of culpability, personal situation of the accused, etc. (Prado Saldarriaga, 2016, pp. 789-806).

Cassation No. 789-806-Piura established, with binding character, that the prognosis of punishment must be made as an exercise of advance judicial determination and not as a mere verification that the crime has an abstract sentence of more than five years (Supreme Court of Justice of Peru, Permanent Criminal Chamber, 2016). This jurisprudential doctrine is correct but systematically ignored. The prosecutorial requirements are usually limited to indicating that the crime charged has a maximum sentence of X years, and the judges confirm this "analysis"

without further analysis of the dosage of the penalty.

The problem becomes more serious when one considers that the Peruvian system has experienced a legislative trend of punitive escalation: practically all corruption, organized crime and related crimes have broad criminal frameworks that far exceed the five-year threshold. This legislative criminal inflation has turned the second presupposition of pretrial detention into a dead letter as a real filter, since almost no person accused of serious crimes could argue that the expected sentence does not exceed five years.

Silva Sánchez (2011, p. 75) warns that the expansion of Criminal Law and the harshness of penalties have as a collateral effect the expansion of the space for the application of precautionary measures involving deprivation of liberty. In Peru, this relationship is direct: the punitive legislative inflation has been mechanically transferred to the inflation in the use of pretrial detention. The legislator raises penalties to indicate harshness in the face of crime, but does not measure the impact that this has on the precautionary sphere.

A correct application of the prognosis of punishment should consider, among other factors: whether the accused could benefit from any prison benefit; whether there is the possibility of an early termination of the process with a reduced sentence; if there are privileged mitigating circumstances (attempt, secondary complicity, etc.); and whether or not the specific penalty that would result from an individualized analysis exceeds the threshold of five years of effective sentence. Only this serious analysis would allow the second budget to fulfill its function as a material filter in the debate on pretrial detention.

III.4. The Fiction of the Danger of Flight

The procedural danger - *in its double dimension of danger of flight and danger of obstruction* - constitutes the most important presupposition of pretrial detention, since it is what gives the measure a precautionary function. Without procedural

danger, detention loses its instrumental justification and becomes an anticipated penalty. However, in Peruvian judicial practice, the danger of flight has been constructed on the basis of normative fictions that have little or no relation to the reality of the specific risk presented by the accused.

Article 269 of the Code of Criminal Procedure establishes the criteria for assessing the risk of flight: roots in the country (domicile, family, work), severity of the expected penalty, importance of the compensable damage, attitude of the accused towards the process, and membership of a criminal organization or recidivism. Plenary Agreement No. 789-806/CIJ-116 developed these criteria with the purpose of rationalizing their application, indicating that they should be evaluated as a whole and not as independent factors that are added arithmetically (Supreme Court of Justice of Peru, 2019a).

Judicial practice reveals that the danger of flight is often a fictitious construction. The prosecutors argue that there is a danger of flight because the defendant has money (which would supposedly facilitate the escape) and also when he does not have it (which would supposedly lead him to flee to avoid punishment). They argue that they are fleeing because they have family abroad and also when they do not have one. They argue that he is fleeing because he has a valid passport and also when he does not have one. This circular logic is denounced by Miranda Estrampes (2018, p. 156), who calls it "argumentative circularity of flight risk".

Particularly serious is the use of the severity of the penalty as an indicator of the danger of flight. The Supreme Court, in Cassation No. 789-806-Nacional, was emphatic in pointing out that the severity of the penalty cannot, by itself, prove the danger of flight, since this would imply that any person accused of a serious crime should be subjected to preventive detention, making the measure mandatory for certain criminal categories (Supreme Court of Justice of Peru, 2019b). This doctrine is correct and necessary, but its compliance in the lower instances is irregular.

The Inter-American Court of Human Rights (IACHR Court) has addressed this problem in the case of *Bayarri v. Argentina* (2008), pointing out that the risk of flight must be based on objective and concrete elements that allow it to be inferred that the accused will effectively evade the action of justice, and not on abstract presumptions derived from the nature of the crime. This inter-American standard is binding on Peru by virtue of the conventionality check, but it is rarely invoked in pretrial detention hearings.

Arraigo, which should be the main factor that rules out the danger of flight when it is duly accredited, is also subject to argumentative distortion. The operators of the system tend to relativize the arraigo – *family, known domicile, stable job, decades of residence in the country* – with arguments such as "despite the arraigo, the resources of the accused allow him to reorganize abroad." This type of reasoning is equivalent to eliminating arraigo as a factor of discarding, since any element that proves a link with the country is neutralized by the hypothesis that the accused could overcome it.

Riego (2017, p. 89) argues that the fictional use of the danger of flight is a manifestation of the broader phenomenon of the "political instrumentalization of pretrial detention": judges, pressured by public scrutiny in cases of high media exposure, use precautionary language to legitimize decisions that, in reality, obey logics of social control or the satisfaction of punitive demands of public opinion.

III.5. The Instrumentalization of the Danger of Obstruction

The danger of obstruction, regulated in Article 270 of the Code of Criminal Procedure, refers to the risk that the accused, when at large, destroys, conceals, suppresses or falsifies evidence, or influences co-defendants, witnesses or experts to give false information. Unlike the danger of flight – *which has a function of ensuring the presence of the accused in the process* – the danger of obstruction has a function of protecting the integrity of the evidentiary process.

This budget has been the object of a particularly pernicious instrumentalization in the Peruvian system. Its application has illegitimately expanded to scenarios that do not constitute, in real terms, a concrete risk to the integrity of the evidence, but rather serve as a formal justification for depriving defendants of liberty who do not present a flight risk.

Plenary Agreement No. 789-806/CJ-116 addressed the danger of hindrance with the intention of streamlining its application. It pointed out that the risk of obstruction must be concrete and current, not merely hypothetical or potential, and that it must be supported by objective elements that indicate that the accused will indeed carry out evidentiary interference actions (Supreme Court of Justice of Peru, 2021). However, as in the previous cases, the jurisprudential practice of the lower instances has not consistently internalized these criteria.

In practice, the danger of obstruction is invoked in a stereotypical way: prosecutors point out that the accused, because of his or her institutional position or personal relationships, could influence witnesses or destroy documentation. This argument is especially frequent in cases of public officials, where it is assumed that the accused, because of the position he holds or the one he held, has the capacity to influence people who could testify in the process. The paradox is that the greater the position and the greater the potential influence, the greater the danger of obstruction and, therefore, the greater the justification for pretrial detention.

This logic is denounced by Asencio Mellado (2017, p. 327), who points out that the danger of obstruction cannot serve as an argument for depriving people of their liberty who have the capacity for social influence, since this would mean that professional excellence and social success are factors that increase the risk of applying pretrial detention. Moreover, when the process is in the intermediate stage or oral trial and all the evidence has already been incorporated into the file, the danger of obstruction is completely devoid of purpose, since there is nothing to hinder.

Cassation No. 789-806-Ica had already indicated that the danger of obstruction ceases to be valid when the investigation has been concluded and the sources of evidence are secured, a criterion that should determine the lifting of the measure when this presupposition was the only or the main basis for pretrial detention (Supreme Court of Justice of Peru, 2013). However, in practice, the conclusion of the investigation stage rarely motivates an *ex officio* review of the precautionary measure.

III.6. The Degradation of the Principle of Proportionality

The principle of proportionality is the backbone of the entire system of precautionary measures. Made up of the sub-principles of suitability, necessity and proportionality in the strict sense, this principle requires that any measure that restricts fundamental rights must be:

- a) adequate to achieve the end it pursues;
- b) necessary, in the sense of being the least burdensome among the equally effective measures;
- c) proportional in the strict sense, insofar as the benefit obtained is greater than the cost in fundamental rights.

In the Peruvian criminal procedure system, the principle of proportionality has been downgraded to a rhetorical clause. The operators of the system mention proportionality in their resolutions without carrying out the analysis that it requires. Particularly serious is the failure to comply with the sub-principle of necessity: pretrial detention should be the last resort, applied only when no alternative measure – *appearance with restrictions, electronic surveillance, bail, impediment to leave the country* – is sufficient to avert the procedural danger identified.

Article 253, paragraph 3) of the Code of Criminal Procedure expressly establishes that measures that limit fundamental rights must be proportionate to the purpose they pursue, and Article 254 states that the judge of the preliminary investigation must prefer the least serious restrictive measure when it is equally effective.

Despite these express legal mandates, Peruvian judicial practice shows a systematic preference for pretrial detention over alternative measures, without there being a serious analysis of the sufficiency of the latter to neutralize the procedural danger.

Ferrajoli (1995, p. 692) calls this phenomenon the "principle of minimum interference with liberty": the State can only deprive a person of liberty before conviction when there is no equally effective and less restrictive alternative. This principle, which has been extensively developed in the jurisprudence of the European Court of Human Rights (ECtHR) – *particularly in the cases of Neumeister v. Austria (1968) and Wemhoff v. Germany (1968)* – is also recognized by inter-American jurisprudence, but its effective application in the Peruvian criminal procedure system is marginal.

Plenary Agreement No. 789-806/CIJ-116 attempted to strengthen the proportionality analysis, stating that the judge must expressly justify why alternative measures to pretrial detention are insufficient to neutralize the procedural danger identified (Supreme Court of Justice of Peru, 2019a). However, in practice, this justification is usually a generic paragraph that lists the alternative measures and concludes, without further analysis, that they are "insufficient".

The Peruvian Constitutional Court has also stressed this point. In STC No. 789-806-PHC/TC (Ollanta Humala and Nadine Heredia case), the Constitutional Court stated that the decision to impose pretrial detention must be preceded by a concrete analysis of the alternative measures and their reasons for insufficiency, an analysis that in the specific case it found deficient (Constitutional Court of Peru, 2017). This resolution, of high political visibility, highlighted the deficiencies of the proportionality analysis in cases of high media exposure.

III.7. The Apparent Motivation of Judicial Decisions

The last, but not least, of the structural problems identified is the apparent motivation of the resolutions ordering pretrial detention.

Reasoning is not a merely formal requirement: it is the guarantee that allows the rationality of the judicial decision to be controlled, both by the parties and by the higher instances and, ultimately, by society. A resolution without sufficient motivation is, in the words of the Peruvian Constitutional Court, equivalent to an arbitrary resolution (STC No. 789-806-PHC/TC).

The problem of apparent motivation in pretrial detention decisions is systemic in nature. Judicial decisions usually adopt the following structure: almost verbatim reproduction of the tax request; a generic mention of the legal premises of Article 268 of the Code of Criminal Procedure; a list of the "elements of conviction" presented by the prosecutor; and a conclusion that satisfies all the assumptions without an individualized analysis of each of them. This structure, which formally seems to be a motivation, is in fact a transcription of the tax requirement with minimal modifications.

The Peruvian Constitutional Court has systematized the defects of motivation in the well-known fivefold number of pathologies: lack of motivation, apparent motivation, insufficient motivation, incongruent motivation and deficient qualified motivation (STC No. 789-806-PHC/TC). The apparent motivation – *which is the most frequent in pretrial detention decisions* – consists of "giving the necessary reasons but which have no factual basis" (Constitutional Court of Peru, 2008), or invoking generic normative premises without linking them to the specific facts of the case.

The Supreme Court of the Republic of Peru has addressed this problem on multiple occasions. Plenary Agreement No. 789-806/CIJ-116 established that the resolution imposing pretrial detention must contain a reinforced motivation, which expressly and in detail justifies each of the assumptions of Article 268, as well as the proportionality analysis and the evaluation of alternative measures (Supreme Court of Justice of Peru, 2019a). Plenary Agreement No. 789-806/CJ-116 reinforced this requirement, adding that the motivation must be self-sufficient – *that*

is, that the reader should not resort to other documents in the file to understand the reasons for the decision – and that he or she should pronounce himself or herself in a concrete manner on the arguments of the defense (Supreme Court of Justice of Peru, 2021).

Colomer Hernández (2003, p. 189) proposes the concept of "reinforced motivation" for decisions that affect fundamental rights, pointing out that these require a greater argumentative density than ordinary decisions, since the cost in terms of rights is proportionally higher. This requirement of reinforced reasoning is today a consolidated standard in the jurisprudence of the ECtHR and the Inter-American Court. In the case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador (2007), the Inter-American Court of Human Rights stated that the reasons for the decisions ordering preventive detention must be "express" and account for the factual and legal elements that underpin each of the premises of the measure.

In the day-to-day reality of the Peruvian system, the motivation for pretrial detention decisions fulfills a rhetorical rather than an epistemic function: it legitimizes a previously adopted decision through the *post-hoc construction* (after the event) of reasons that appear to justify it. This phenomenon, referred to by Atienza (2017, p. 234) as "coverage motivation", is especially frequent in cases of high political or media visibility, where the judge decides first and reasons later.

IV. Pretrial detention as an anticipated penalty

The joint analysis of the seven problems identified in the previous section leads to a conclusion that cannot be avoided: in the Peruvian criminal procedure system, pretrial detention has ceased to be a precautionary measure and has become an anticipated penalty. This statement is not hyperbolic: it is supported by the most rigorous criminal dogma and by the available empirical evidence.

Ferrajoli (1995, p. 690) was the first to systematize this critique with theoretical rigor,

pointing out that any preventive detention that does not comply with the conditions of precautionary measures – *instrumentality, exceptionality and proportionality* – is, in reality, a penalty without trial. In Peru, pretrial detention rarely satisfies these three conditions simultaneously. Instrumentality is often fictional (procedural danger is built on the basis of stereotypes); exceptionality has been eroded by judicial practice; and proportionality is formally invoked but not materially applied.

The political dimension of this pathology cannot be ignored. Riego (2017) and Duce and Riego (2007) have documented, for the Latin American context, that the improper use of pretrial detention responds to logics that go beyond procedural rationality: media pressure, punitive demands from public opinion, research strategies that replace evidentiary activity with the pressure generated by deprivation of liberty, and, in some cases, political instrumentalization of the criminal process. Peru is no stranger to any of these dynamics.

Media pressure on judges who resolve cases of high public exposure is a documented factor. In cases such as those related to corruption in large public works, judges who deny requests for preventive detention are subjected to intense public scrutiny, labeled as accomplices or corrupt, and even disciplined investigations. This climate generates a perverse incentive towards overcaution: the reputational cost of not issuing pretrial detention is greater than the cost of improperly ordering it. The result is a system where pretrial detention functions as a resource for managing the institutional image of the justice system rather than as an instrument of procedural assurance.

The investigative instrumentalization of pretrial detention is another worrying phenomenon. In some cases, the Public Prosecutor's Office requests pretrial detention not to ensure the presence of the accused or the integrity of the evidence, but to generate the conditions of pressure that facilitate the accused's collaboration with the investigation – denunciation, confession, acquiescence at early termination. This practice,

which Llobet Rodríguez (2016, p. 213) calls "detention as an investigative tool", is incompatible with the principle of non-self-incrimination and with the guarantee of freedom of statement.

Zaffaroni (2009, p. 185) has called this dynamic "the penal system as a system of power": procedural institutions, formally designed to guarantee rights, are appropriated by logics of power – political, bureaucratic, media – that distort them in their real functioning. In Peru, pretrial detention is a paradigmatic example of this appropriation: designed as a guarantee exception, it operates as an instrument of social control and political management of crime.

The impact of this distortion on human rights is severe and measurable. The IACHR (2017, pp. 789-806) has pointed out that the excessive use of pretrial detention in Latin America generates a vicious circle: prison overcrowding, intramural violence, contact with organized crime during detention, and the social stigmatization generated by pre-conviction incarceration produce effects that increase the likelihood of recidivism. they undermine social reintegration and reproduce exclusion. In Peru, the overcrowding of prisons – *which exceeds 140% of their capacity according to INPE data from 2024* – is inseparable from the massive and improper use of pretrial detention.

V. Proposals for the rationalization of the precautionary process

The critical diagnosis developed in the previous sections would not be complete without a set of proposals aimed at the rationalization of the system. These proposals operate at three levels: normative, jurisprudential and institutional.

V.1. Normative Level

At the regulatory level, it is proposed:

- a) the express incorporation in the Code of Criminal Procedure of the prevailing probability standard as a threshold for the elements of conviction;
- b) the requirement that the prosecutor's request contain a specific section individualizing the contribution of each defendant;

- c) the regulation of electronic surveillance as an alternative measure of mandatory consideration before pretrial detention; y

- d) the maximum time limitation of pretrial detention to eighteen months in common crimes and thirty-six months in crimes of organized crime, with mandatory periodic review mechanisms.

V.2. Jurisprudential level

At the jurisprudential level, the Supreme Court must:

- a) systematize its jurisprudence on pretrial detention into a coherent doctrine that is accessible to the operators of the system;
- b) establishing clear criteria for the evaluation of arraigo that prevent its neutralization by hypothetical arguments;
- c) to specify that the danger of obstruction loses precautionary potential when the investigation has been concluded and the sources of evidence are secured; y
- d) to declare the nullity of the resolutions that contain apparent motivation, with an express pronouncement on the obligation of reinforced motivation.

V.3. Institutional Level

At the institutional level, it is proposed:

- a) the creation of a statistical monitoring system for pretrial detention to identify patterns of misuse;
- b) the continuous training of prosecutors and judges in the international human rights standards applicable to pretrial detention;
- c) the strengthening of public defense mechanisms to ensure that defendants without resources have quality technical assistance in pretrial detention hearings; y
- d) the implementation of disciplinary responsibility criteria for operators who request or order manifestly illegal or disproportionate preventive detentions.

VI. Discussion

The findings presented in the preceding sections allow us to open a space for critical discussion that articulates three analytical dimensions: the comparison with procedural systems of reference, the tension between the jurisprudential pronouncements of the Supreme Court and the reality of judicial practice, and the political-criminal implications of the phenomenon studied. This discussion does not intend to be exhaustive, but to point out the most relevant problematic knots and to situate the findings of this work in the contemporary academic debate.

VI.1. The Gap between Jurisprudential Doctrine and Judicial Practice

One of the most significant findings of this analysis is the persistent gap between the jurisprudential doctrine consolidated by the Supreme Court and its effective application in the lower instances of the system. This gap is not a new phenomenon or exclusive to the precautionary sphere, but in the matter of pretrial detention it acquires special seriousness due to the irreversibility of the damage it generates.

Plenary Agreements No. 789-806/CIJ-116 and No. 789-806/CJ-116, as well as the binding cassations analyzed above, constitute a solid and technically refined body of doctrine. Together, they establish a standard of analysis of pretrial detention that, if effectively applied, would significantly reduce the number of measures improperly ordered. The question that this diagnosis imposes is: why are the criteria of the Supreme Court not internalized in the lower instances?

Duce and Riego (2007, pp. 789-806) identify, for the Latin American context in general, three factors that explain this gap:

- a) the scarce culture of the binding nature of precedent in systems of Roman-Germanic tradition;
- b) the absence of oversight and feedback mechanisms that connect the jurisprudence of the Supreme Court with the daily practice of the courts; y

- c) the predominance of a residual inquisitorial culture that sees pretrial detention as an instrument of investigation rather than an exceptional precautionary measure. The three factors are perfectly identifiable in the Peruvian system.

To these three factors must be added one specific to the Peruvian context: the media and political pressure that operates on judges in cases of high public exposure. This pressure generates what Hendler (1996, p. 89) calls «decisional heteronomy»: the judge does not decide according to autonomous legal criteria, but is conditioned by factors external to the process that distort his analysis. In Peru, media coverage of cases of corruption, organized crime, and other crimes with a social impact creates a climate in which the denial of pretrial detention is perceived – *both by public opinion and by the system's own institutions* – as a sign of weakness, complicity, or corruption.

This decisional heteronomy has concrete consequences on the quality of the reasoning of the decisions. When the judge decides conditioned by factors external to the process, the motivation necessarily becomes apparent: it does not reflect the actual reasoning that led to the decision, but constructs *post-hoc* a legal justification for a conclusion previously determined by extra-legal factors. Atienza (2017, p. 245) warns that this type of motivation is doubly harmful: not only does it violate the right to due process of the accused, but it also corrodes the legitimacy of the judicial system as a whole.

The discussion of this gap cannot conclude without pointing out the institutional responsibility of the Supreme Court in overcoming it. If the Plenary Agreements and binding cassations are not effectively applied, this also reflects a deficiency in the dissemination, training and supervision mechanisms that the Supreme Court should implement. The production of correct jurisprudential doctrine is necessary but insufficient: its effectiveness depends on the existence of institutional mechanisms that ensure its circulation and application at all levels of the system.

VI.2. The Tension Between Security and Freedom: A False Dichotomy

A recurring argument in the defense of the extensive use of pretrial detention is that it is necessary to ensure public safety and the effectiveness of the criminal justice system. According to this logic, restricting the use of pretrial detention would be tantamount to putting society at risk, facilitating the escape of dangerous defendants or the destruction of evidence in highly complex cases.

This argument rests on a premise that must be radically challenged: the idea that there is a genuine tension between the protection of individual liberty and the effectiveness of the justice system. Ferrajoli (1995, p. 701) has demonstrated, with theoretical rigor, that this supposed tension is in fact a false dichotomy: respect for procedural guarantees does not weaken the effectiveness of the system, but rather reinforces it, by giving legitimacy to judicial decisions and strengthening citizen confidence in institutions. A system that deprives innocent people – *or presumed innocents* – of their liberty is not more effective, but more arbitrary.

Empirical evidence also does not support the thesis that the extensive use of pretrial detention contributes to reducing crime or improving the indicators of effectiveness of the justice system. Riego (2017, pp. 789-806) presents comparative data for several Latin American countries that show that countries with a higher rate of pretrial detention do not have better indicators of conviction or reduction in recidivism. The massive use of pretrial detention inflates detention indicators, but does not improve conviction indicators, suggesting that its real function is not to ensure the process but to satisfy demands for early punishment.

The IACHR (2017, pp. 789-806) has clearly indicated that the excessive use of pretrial detention in Latin America not only does not improve public security, but also deteriorates it: prison overcrowding generated by the mass incarceration of defendants creates conditions that favor the organization of intramural crime, the recruitment of people without criminal

records by criminal networks, and the reproduction of violence in prisons. In Peru, this phenomenon is perfectly documentable: INPE's own data show that overcrowding exceeds 140% of installed capacity, with the systemic consequences that this implies.

The discussion on the supposed tension between security and freedom must therefore be reframed. The real problem is not how to balance security and freedom, but how to build a system that respects freedom – *in its dimension as an inalienable fundamental right* – without sacrificing procedural efficiency. This reframing is possible: the procedural systems of Germany, Austria and the Nordic countries demonstrate that it is perfectly feasible to have low rates of pretrial detention and high levels of effectiveness in the prosecution and punishment of crime (Roxin & Schünemann, 2017, pp. 789-806).

VI.3. The Defective Construction of the Imputation and Comparative Jurisprudence

The defective construction of the imputation hypothesis is not a problem exclusive to the Peruvian system, but its manifestations in Peru have specific characteristics that deserve analysis. In continental European procedural systems – *which share the Roman-Germanic tradition with Peru* – charges in the context of pretrial detention are subject to stricter controls that make it difficult to formulate generic or imprecise charges.

In the German system, § 112 of the Criminal Procedure Ordinance (StPO) requires that the request for pre-trial detention specify precisely the alleged act, the applicable criminal offence and the evidence supporting the charge. The German Federal Constitutional Court (Bundesverfassungsgericht) has established that pre-trial detention is only admissible when the accusation has a high degree of probability of correction – *der dringende Tatverdacht* – that goes beyond mere well-founded suspicion (BVerfGE 19, 342, 347). This standard of "vehement suspicion" is significantly more demanding than that of "well-founded and serious elements of conviction" in Article 268 of the Peruvian Code of Criminal Procedure, although in practice the

operative difference may be smaller if Peruvian judges correctly apply the current legal standard.

In the Spanish system, the Constitutional Court has repeatedly pointed out that pre-trial detention requires the concurrence of rational indications of criminality - *indications that point to the participation of the accused in the punishable act with a sufficient degree of probability* - and not mere suspicions or conjectures (STC 128/1995, of 26 July; STC 207/2000, of 24 July). Gimeno Sendra (2015, p. 895) points out that this standard has been developed by the jurisprudence of the Spanish Supreme Court in a manner consistent with the criteria of the ECtHR, generating a doctrine of relatively uniform application.

A comparison with these systems shows that the Peruvian problem is not the absence of adequate normative standards, but the lack of a legal culture that rigorously applies them. The Peruvian Code of Criminal Procedure of 2004 contains, in its articulation of the presupposition of the elements of conviction, a standard that, correctly interpreted, is comparable to those in force in the reference systems. The deficit is of application, not of regulation.

VI.4. Procedural Danger as Normative Construction vs. Empirical Reality

The debate on procedural danger - *danger of flight and danger of obstruction* - is the terrain where the gap between normative construction and empirical reality is most pronounced. The legal criteria for the assessment of procedural danger are, in general terms, correct from a dogmatic perspective. The problem lies in how these criteria are operationalized by the system operators.

Miranda Estrampes (2018, p. 162) proposes a useful conceptual distinction between procedural danger as a normative category - *a set of legal criteria that structure risk analysis* - and procedural danger as an empirical category - *the real, measurable probability that the specific defendant will flee or destroy evidence*-. In Peruvian judicial practice, procedural danger operates almost exclusively as a normative category: judges verify whether the legal criteria are met, but rarely evaluate whether

those criteria, in the specific case, correspond to an empirically founded risk.

This distinction has immediate practical consequences. Home, family and work roots are an empirical indicator of the danger of flight: people with solid ties in the place of residence are statistically less likely to flee than those who do not. However, as noted in the previous section, system operators tend to neutralize rootedness through hypothetical reasoning that has no empirical basis. This procedure inverts the logic of risk analysis: instead of using empirical indicators to estimate the probability of flight, the desired conclusion - *that there is a danger of flight* - is used to neutralize the indicators that deny it.

Llobet Rodríguez (2016, p. 225) points out that this problem is structural in Latin American systems and responds to a misconception of procedural danger: instead of being understood as a concrete risk that must be demonstrated, it is understood as a presumption that it is up to the accused to disprove. This reversal of the burden of demonstrating procedural danger is incompatible with the principle of presumption of innocence and with the exceptional nature of pretrial detention, but it is deeply rooted in the procedural culture of the Peruvian system.

The Inter-American Court of Human Rights has addressed this problem in the case of López Álvarez v. Honduras (2006), pointing out that the burden of demonstrating procedural danger lies with the State and not with the accused: it is the prosecutor who must prove that there is a concrete risk of flight or obstruction, and not the accused who must prove that there is no such risk. This inter-American standard, binding on Peru, is systematically inverted in the practice of pretrial detention hearings, where the defense is the one who has to "prove" that his client is not going to flee.

VI.5. Proportionality and the Role of Alternative Measures

The discussion on the principle of proportionality in the field of pretrial detention reveals a structural paradox of the Peruvian system: alternative measures to pretrial detention

exist in the CPP – *appearance with restrictions, electronic surveillance, bail, impediment to leaving the country* – but they are systematically underused, not for reasons of material insufficiency but because of an institutional culture that perceives them as signs of weakness in the face of the crime.

This perception is profoundly wrong. Alternative measures to pretrial detention are not manifestations of permissiveness with crime, but instruments of procedural rationality. Its function is to guarantee the purposes of the process - *presence of the accused, integrity of the evidence* - through the least possible restriction of freedom. A system that discards alternative measures without serious analysis of their sufficiency is not harsher with the crime, but more arbitrary with the accused.

Electronic surveillance, in particular, represents a measure whose potential is being wasted in the Peruvian system. Law No. 29499 and its amendments regulate personal electronic surveillance as an alternative measure to pretrial detention, but its use is marginal. INPE data show that the number of people with electronic surveillance is negligible compared to the population of pretrial prisoners, despite the fact that technically the measure would effectively avert the danger of escape in a significant number of cases.

Ferrajoli (1995, p. 692) argues that the principle of minimum interference in freedom has constitutional status in any democratic State governed by the rule of law, since it derives directly from the principle of proportionality and the recognition of personal freedom as a fundamental value. In Peru, this principle is expressly enshrined in Article 253.3 of the CPP, but its effective application requires a change in institutional culture that goes beyond the written norm.

VI.6. Judicial Reasoning and the Right to Democratic Control of Decisions

The reasoning of judicial decisions is not only a technical requirement of the procedural system: it is the guarantee that makes possible the

democratic control of the decisions of the judiciary. A resolution that lacks sufficient motivation not only violates the right to due process of the accused, but also removes the judicial decision from citizen scrutiny, eroding the democratic legitimacy of the justice system.

This political dimension of the statement of reasons has been developed by Ferrajoli (1995, p. 623), who points out that the statement of reasons is "the main epistemic guarantee of the process": it makes it possible to verify whether the decision is rationally based on the facts and the law, or whether it responds to extra-legal considerations that cannot be publicly invoked. When the motivation is apparent, what is hidden is not only the real reason for the decision, but the arbitrary nature of the decision.

In the specific context of pretrial detention, the requirement of enhanced reasoning has an additional justification: the decision depriving a person of liberty before his or her conviction is the judicial decision with the greatest impact on the fundamental rights of the individual. Colomer Hernández (2003, p. 197) points out that, precisely for this reason, these decisions require a greater argumentative density than ordinary decisions: they must justify not only that the legal presuppositions are met, but that the decision is the only one rationally possible in the specific case.

The Peruvian Constitutional Court has developed a solid doctrine on the reasoning of judicial decisions, especially since STC No. 789-806-PHC/TC. However, the application of this doctrine in the specific area of pretrial detention has been inconsistent. The Humala-Heredia case (STC No. 789-806-PHC/TC) represented a moment of extraordinary visibility of this problem, when the Constitutional Court declared the insufficiency of the motivation of the resolution that issued the preventive detention in that case. The institutional response was, however, more political than technical: the debate focused on the identity of the accused and not on the motivation criteria that the Constitutional Court established as a control parameter.

The discussion on motivation cannot omit the role of the legal training of the system's operators. The construction of a sufficient and coherent motivation requires mastery of procedural dogma, capacity for logical-legal analysis and ability to articulate the facts of the case with the applicable normative categories. These skills are not automatically acquired with the title of lawyer or with entry into the judiciary: they require specific and continuous training. The Academy of the Magistracy has an institutional responsibility here that, according to the findings of this work, is not being fully assumed.

VI.7. Towards a Culture of Exceptionality

The foregoing discussion converges on a central point: the problem of the massive and improper use of pretrial detention in Peru is not, in the final analysis, a normative problem. The 2004 Code of Criminal Procedure contains the necessary tools for a rational and guaranteed application of the measure. The problem is cultural: an institutional culture that perceives pretrial detention as the natural and expected response to the accusation of serious crimes, and that sees in the requirement of its rigorous justification a threat to the effectiveness of the system rather than a guarantee of its legitimacy.

Building a culture of exceptionality in the area of pretrial detention is a long-term task that involves at least four simultaneous transformations:

- a) an epistemic transformation, which modifies the way in which system operators reason about evidence and procedural danger;
- b) an institutional transformation, which generates incentives for the rigorous application of precautionary budgets and disincentives for their automatic use;
- c) a pedagogical transformation, which incorporates international human rights standards as operational criteria and not as declarative rhetoric in the training of judges and prosecutors;
- d) a communicative transformation, which allows society to understand that respect for

procedural guarantees is not complicity with crime, but a condition of a genuine rule of law.

This transformation agenda is ambitious, but not utopian. Comparative experiences in countries such as Chile, which undertook a *profound criminal procedure reform starting in 2000*, show that it is possible to transform the institutional culture of the justice system within reasonable time frames, provided that there is political will, institutional resources, and academic leadership. Peru has the necessary regulatory instruments. What is missing is the collective decision to use them with the seriousness that human freedom demands.

VI.8.- Quantification of costs

Disproportion between instances. The second instance consumes 21.3 hours (57.6% of the total) compared to 15.7 hours in the first. This is explained by the fact that the Appeals Chamber must carry out an exhaustive review of the file, verify the subsistence of the legal presuppositions (following the *rebus sic stantibus* criterion established in Appeal No. 789-806 of the Supreme Court), and draft a duly reasoned annulment resolution.

Judicial vs. penitentiary cost. The direct judicial cost (S/ 4,995.90) is greater than the cost of imprisonment during the annulment period (S/ 3,600.00), but the human, social and reputational impact of unjustified imprisonment is incalculable. The Inter-American Court of Human Rights has established that pretrial detention constitutes an "anticipated sentence" that distorts the true meaning of precaution (Inter-American Court of Human Rights, cases cited in LP Derecho, 2024).

The Ombudsman's Office has warned that, despite the recommendation reports, the Judiciary "has not been able to implement standardized criteria of reasonableness" in the application of pretrial detention (Pérez et al., 2022, cited in Scielo, 2025). This gap between the normative standard (exceptionality of the PP) and its effective application generates direct and measurable economic costs.

Budgetary impact of INPE. INPE executed 96.5% of its budget of S/ 1,087.7 million in 2025

(Gestión, 2026). 43% of the intramural population are prosecuted, many of them with preventive detention that could be annulled in appeals. A 10% reduction in undue pretrial detentions would free up approximately S/ 48.8 million annually from the prison budget.

VII. Conclusions

1. Pretrial detention in the Peruvian criminal procedure system has lost its character as an exceptional precautionary measure and has become, in practice, a form of anticipatory punishment, applied under apparent motivation and based on the fictional construction of its material presuppositions.

2. Without a specific accusation - *precise, circumstantial and with a specific subjective link* - there is no legitimate object on which to debate the admissibility of pretrial detention. This fundamental premise is systematically not fulfilled in the prosecutorial requirements and rarely demanded by the judges of the preparatory investigation.

3. The seven structural problems identified – *defective construction of the imputation hypothesis, inflation of evidentiary standards, expansive use of the prognosis of punishment, fiction of the danger of flight, instrumentalization of the danger of obstruction, degradation of the principle of proportionality and apparent motivation* - are manifestations of a common phenomenon: the appropriation of the precautionary institution by logics of social control, media management and political pressure that are incompatible with the accusatory model of guarantees of the Code of Criminal Procedure.

4. The binding jurisprudence of the Supreme Court – *embodied in Plenary Agreements No. 789-806/CIJ-116 and No. 789-806/CJ-116, and in Cassations No. 789-806-Moquegua, 789-806-Arequipa, 789-806-Piura, 789-806-Nacional and 789-806-Ica, among others* – has established correct criteria for the rationalization of pretrial detention. The problem is not primarily one of normative regulation, but of implementation: the jurisprudential criteria of the Supreme Court are

not duly internalized by the operators of the system in the lower instances.

5. The rationalization of the use of pretrial detention in Peru requires simultaneous interventions at the normative, jurisprudential and institutional levels. None of these interventions will be effective on their own. The criminal procedure reform is not limited to the norm: it requires a transformation of the legal culture of the system's operators and of the incentives that structure their behavior.

6. The human cost of the massive and improper use of pretrial detention is irreparable. Every person deprived of liberty on the basis of an apparent motivation, a defective accusation or a fictitious procedural danger suffers damage that no subsequent reparation can fully restore. The seriousness of this damage requires that system operators adopt an attitude of critical rigor in the face of pretrial detention requirements, abandoning the comfort of automation and assuming the responsibility that comes with deciding on the freedom of a human being.

7. The analysis shows that pretrial detentions founded in the first instance and annulled in the second instance represent a significant economic cost for the Peruvian State, estimated at between S/ 38.4 and S/ 95.9 million per year (USD 10.4–25.9 million) only in judicial man-hours and imprisonment. Beyond the monetary cost, there is a systemic opportunity cost: thousands of hours of magistrates, prosecutors, and advocates are spent correcting first-instance decisions rather than advancing in the resolution of other pending cases.

8. The Supreme Court and the Constitutional Court have reiterated that pretrial detention must be exceptional and duly motivated. However, judicial practice – *documented by the Ombudsman's Office and reflected in the extensive annulment jurisprudence* – shows a persistent gap between the normative standard and its effective application. Bridging this gap not only protects the fundamental rights of defendants, but also optimizes the allocation of public resources in an already overburdened criminal justice system.

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