# THE IMPACT OF CRIMINAL PROCEDURE REFORM ON THE USE OF PRETRIAL DETENTION IN LATIN AMERICA

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## I. INTRODUCTION

The purpose of this study is to describe regulations on pretrial detention and the practical application of this protective measure in reformed criminal procedure systems in Latin America since the 1990s. Our goal is to provide a comprehensive analysis of the situation and to identify the main trends that guide the operation of this institution in the region in order to promote discussion of its use and the measures that should be adopted in this area in the future.

As is well known, over the past two decades most countries in the region have undertaken structural reforms of their criminal trial systems in an effort to change aspects of their design and operation.[4] One of the areas in which this process has generated the greatest expectation is the increase in the basic rights and guarantees of individuals who are subject to criminal prosecution, particularly the rationalization of the use of imprisonment during the process. As we will see, this has been a longstanding issue related to the operation of the region's criminal justice systems. In this context, this study is designed to analyze whether or not the expectations regarding the use of pretrial detention that developed as a result of the reform movement have been satisfied and to provide a general overview of its current use. This information will allow for an informed discussion of greater technical quality regarding the decisions being made in this extremely complex and sensitive area, given the values that are put into play with its use.

It is not our intention to provide a detailed description and review of the situation of each country in the region. Though we did review the legislation of each Latin American country and all available statistical data, our intentions are to present a global vision and to identify key trends in this area at the regional level. As a result, some of the general comments or conclusions may not apply to all of the countries with the same degree of intensity. We are aware that each country's local reality presents many subtleties that tend to be left out of this type of study. The reader is asked to keep this in mind when reviewing the conclusions and opinions offered herein.

In order to meet the proposed objectives, this article is divided into four sections, the first of which is this introduction. Section II presents a brief overview of the situation that existed prior to the reforms.

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4 More information on the background and general results of this process is provided in the collection published by the Justice Studies Center of the Americas (henceforth JSCA) entitled the *Follow-up Project on Criminal Procedure Reform in Latin America.* See especially Juan Enrique Vargas (editor) and Cristián Riego (authors of the comparative reports), *Reformas Procesales Penales en América Latina: Resultados del Proyecto de Seguimiento*, JSCA, Santiago 2005, 229 p. and various authors, *Reformas Procesales Penales en América Latina: Resultados del Proyecto de Seguimiento IV Etapa*, JSCA, Santiago 2007, 362 p.

Its purpose is to allow the reader to appreciate the context in which the object of our study is situated. Section III is the main part of the study and is designed to demonstrate the reach of the changes that have taken place in the application of pretrial detention at the regulatory level and in practice, starting with the reform of criminal procedure systems. Section IV reviews the scope of a set of projects that form part of what we call the counter-reform process that have been undertaken in parallel in many countries over the past few years in order to strengthen the legal organization of pretrial detention. The study ends with a discussion of the conclusions that we have reached.

Before proceeding with our analysis, we would like to pause briefly to explain the sources that were utilized. First, we have reviewed criminal procedure legislation for the countries of Latin America as well as a set of sources that explain and analyze the reach of said regulations. Second, we gathered and analyzed available statistical data on the operation of pretrial detention. In this regard, one of the most serious challenges that we faced is a lack of data due to the fact that in some countries information on this area of the legal system is missing, incomplete, outdated, or inconsistent. In many cases the only data available is fragmented, difficult to use in comparisons, and presents a certain degree of fallibility. In view of this, we opted to utilize reliable, high-quality secondary sources. The first group of secondary sources is composed of Websites of the various countries that present statistical information. An effort was made to privilege official data in all cases. The Websites that were used include those of the judiciary, prosecutor's offices, public defender's offices, ministries of justice, attorney general's offices and, when they existed, prison administration and oversight agencies.

When the data was not found or was partial, we used the complete 2002-2003, 2004-2005 and 2006-2007 versions of the *Reporte del Estado de la Justicia de las Américas,*[5] biannual JSCA publications that provide an overview of the operation of the region's judicial systems. Another key source was the King's College of London *World Prison Brief*, which provides detailed and current information on prison systems around the world mainly based on official sources.[6] Finally, we used publications that offer data on and descriptions of the use of pretrial detention in the region.[7] In some cases, which will be identified as necessary, we could not obtain the information that we needed. Despite the challenges that we faced in the information gathering process, we believe that we have constructed an empirical image of the reality of the region that provides the reader with a reasonably reliable vision of the use of pretrial detention. Nonetheless, we also believe that there is an urgent need to improve the ability of national information systems to produce periodic and homogeneous statistics on this topic.

## II. A BRIEF OVERVIEW OF THE SITUATION PRIOR TO CRIMINAL PROCEDURE REFORM IN LATIN AMERICA

The regulation of pretrial detention may be the most controversial issue raised by the criminal justice reforms that were undertaken in practically every country in the region over the past 20 years. If we

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[5] This publication also was published in English as *Report on Judicial Systems in the Americas*. The original sources consulted are: JSCA, *Reporte sobre el Estado de la Justicia en las Américas 2002-2003*, second edition, Santiago, November 2003, 381 p.; JSCA, *Reporte sobre el Estado de la Justicia en las Américas* 2004-2005, Santiago 2006, 440 p.; and JSCA, *Reporte sobre la Justicia en las Américas* 2006-2007, Santiago 2008, 586 p.

[6] INTERNATIONAL CENTER FOR PRISON STUDIES, King's College of London, World Prison Brief, last visited 19 January 2009. See: http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/

[7] See INSTITUTO LATINOAMERICANO DE NACIONES UNIDAS PARA LA PREVENCIÓN DEL DELITO Y TRATAMIENTO DEL DELINCUENTE (ILANUD), *El Preso sin Condena en América Latina y el Caribe*, Primera edición, 1983, 303 p.; FACULTAD LATINOAMERICANA DE CIENCIAS SOCIALES (FLACSO), *La Cárcel: Problemas y Desafíos para las Américas*, Primera edición, Santiago, Chile, 2008, 177 p.

look at the situation that existed prior to the reforms, we can see that from a strictly legal perspective, most countries had some kind of mandatory sentencing system.[8] In other words, the law established that individuals charged with medium to highly serious crimes should – in general – remain in custody until the process was complete or at least for an important period of its development.[9]

Even when there were no mandatory sentences, the design of the region's inquisitorial systems favored broad use of this protective measure. The inquisitorial systems saw the criminal procedure as an instrument to be used to pressure the defendant into confessing, and were designed to facilitate the use of this type of evidence. In fact, confession was referred to as the "queen of evidence."[10] Operationally speaking, the inquisitorial system made it so that the more the defendant turned inward, the more rights and liberties he or she lost and the greater the structures that were applied by the system with the goal of extracting a confession. In daily practice, there was not a great deal of distance between the level of certainty required to detain someone and the level required to lay charges. In fact, when the defendant was charged, that is, when the system formalized its intent to investigate that person for the alleged commission of a crime, he or she was placed in pretrial detention and freedom was only provisional.

This dynamic created a situation in which the logic behind pretrial detention responded to the court's high level of certainty regarding the defendant's responsibility for the crime during the investigative stage, and the "plenary," or discussion, stage was used to confirm what the investigator and the court already knew. Pretrial detention thus functioned as an early sentence, with the probability of revocation reduced to the chance that the defendant could change the court's opinion, which had been maintained throughout the detention and indictment and had led to the charges in the first place.

The inquisitorial procedural context made pretrial detention the system's main response to crime, relegating the sentence to a secondary level. A study by the United Nations Latin American Institute for the Prevention of Crime and Treatment of Offenders (ILANUD) reported that in most Latin American countries the percentage of inmates awaiting sentencing was greater than that of sentenced inmates.[11] Table 1 summarizes the results of the ILANUD study of the period between 1978 and 1992.

**Table 1**

AVERAGE PERCENTAGE OF UNSENTENCED INMATES IN LATIN AMERICAN COUNTRIES 1978 - 1992

| Country | 1978-1992 |
|---|---|
| Argentina | 51 |

[8] Translator's note: In this context, mandatory sentencing refers to a system in which the defendant is required to complete the sentence in prison, rather than being released on bail or placed under house arrest. It does not refer to the application of specific minimum sentences for certain crimes.

[9] In effect, under mandatory sentencing and in situations that were discretional *ab initio* but in which pretrial detention was ordered, this decision could not be changed until sentencing according to the rules of criminal justice systems prior to the criminal procedure reforms. For example, in Bolivia, the criminal procedure system approved in 1973 established indefinite mandatory sentences for recidivists, habitual offenders, and professional criminals. Furthermore, provisional release could be applied only in cases involving crimes carrying a sentence of between two and four years. Pretrial detention was the only option for cases involving crimes that carried longer sentences.
Also, under El Salvador's 1979criminal procedure code (CPC), provisional release was applicable in cases in which the maximum sentence was no greater than three years. In Honduras, early release was allowed in cases in which the crimes merited prison sentences of three years of more only when the inmate was gravely ill or could not be cared for in prison.

[10] MAIER, Julio B.J., *Derecho Procesal Penal, Tomo I*, Fundamentos, Editores del Puerto s.r.l., segunda edición, enero de 1996, Buenos Aires, Argentina, p. 292 and following.

[11] ILANUD, "Sobrepoblación penitenciaria en América Latina y el Caribe: situación y respuestas posibles," CARRANZA, Elías, in *Justicia Penal y Sobrepoblación Penitenciaria,* 2001.

| | |
|---|---|
| Bolivia | 90 |
| Brazil | N/D |
| Colombia | 74 |
| Costa Rica | 47 |
| Chile | 52 |
| Dominican Republic | 80 |
| Ecuador | 64 |
| El Salvador | 83 |
| Guatemala | 54 |
| Haiti | N/D |
| Honduras | 58 |
| Mexico | 74 |
| Nicaragua | N/D |
| Panama | 67 |
| Paraguay | 94 |
| Peru | 71 |
| Uruguay | 77 |
| Venezuela | 74 |

According to Table 1, on average, unsentenced inmates represented 50% of the total prison population in every country in the region except Costa Rica. In 10 of these countries, over 70% of prisoners had not yet been sentenced. In practice, pretrial detention has been the general rule for the region's inmates regardless of regulatory aspects. It is important to note that the table lists averages taken over a 15-year period, which demonstrates the persistence of the phenomenon described under inquisitorial systems. This situation was analyzed by ILANUD in the 1983 study and has generated very strong criticism at the regional level from a human rights perspective.[12]

In addition, the figure of the examining judge (*juez de instrucción*) contributed to making pretrial detention common. Under the inquisitorial systems, a single official was responsible for the main functions of prosecution and the application of pretrial detention. This concentration of duties meant that

[12] See ILANUD, *El Preso sin Condena en América Latina y el Caribe*, op. cit. Another classic study that covers the entire region and presents very strong criticism of the use of pretrial detention is ZAFFARONI, Eugenio (coordinator), *Sistemas Penales y Derechos Humanos en América Latina (Informe Final)*, Instituto Inter-americano de Derechos Humanos, Ediciones Depalma, Buenos Aires 1986, 461 p. See especially pp. 142-150.

there were no incentives for this official to release the defendant even when he had the discretion to do so because this measure of imprisonment was a useful tool for his prosecution of the individual. This was even the case in the few countries that used prosecutors because they were responsible for the same two functions.[13]

There were other aspects of inquisitorial system that favored the situation described, particularly the formality of the written procedure and lack of operational limits to its duration, which contributed to the process being prolonged over periods during which applying a sentence did not seem like a real possibility. Moreover, as a result of the written and formal nature of the procedure, it was common for the imprisoned defendant to be deprived of a real defense. That is, the assignment of a defense attorney on paper (in the case file) did not mean that an effective defense was presented. In many cases, there was no minimum required level of contact between attorney and client.

An accurate analysis of the situation of pretrial detention under inquisitorial systems in Latin America would require a longer discussion, but we feel that in view of the scope of this article, the important thing is to keep in mind is its impact in terms of practical operation, which is evident when reviewing the data contained in Table 1.

## III. PRETRIAL DETENTION AND CRIMINAL PROCEDURE REFORM

Over the past 20 years, Latin America has undergone a criminal justice reform process that affected the countries of the region with varying degrees of intensity. The motivations for this reform process also vary. In general, they include the abuse of fundamental rights in the context of the inquisitorial criminal process and its lack of efficiency in the area of criminal prosecution. This reform process reached most countries in the region and generally moved in the same direction: towards the replacement of the various types of inquisitorial systems with adversarial ones. Table 2 lists the countries that have introduced these changes, the legal sources of the same, the year that they were passed, and the year that they entered into force.

**Table 2**

**CRIMINAL PROCEDURE REFORM BY COUNTRY, DATE, AND YEAR OF ENTRY INTO FORCE**

| Country | Normative Reference and Date |
|---|---|
| **Argentina**[14] | Law No.11922 – Criminal Procedure Code of the Province of Buenos Aires, in force since September 1998 |
| **Bolivia** | Law No. 1970 - Criminal Procedure Code 1999, in force since 2000 |
| **Chile** | Law No. 19.696, published 12 October 2000 in the *Official Gazette* and in force since |

[13] For example, in Colombia, under the 1991 Criminal Procedure Code and in Panama in accordance with Book III of the Judicial Code approved by Law 28 of 1984.

[14] The situation of Argentina is complex because it has a federal system and each province has autonomy over criminal procedure legislation. Reforms have been implemented in several provinces (such as Córdoba and Chubut). We chose the Province of Buenos Aires as an example because it has the largest population (around 15 million inhabitants) and its new criminal procedure has been in place for over ten years.

| | |
|---|---|
| | December of that year |
| **Colombia** | Law No. 906 - Criminal Procedure Code passed in 2004, in force since 2005 |
| **Costa Rica** | Law No. 7594 - Criminal Procedure Code of Costa Rica, dated 10 April 1996 and in force since 1998 |
| **Dominican Republic** | Law No. 76-02 – Criminal Procedure Code, of 2002, in force since 2004 |
| **Ecuador** | Law No. 000 RO/ Sup 360 dated 13 January 2000, in force since 2001 |
| **El Salvador** | Legislative Decree No. 904 of 1996, in force since 1998 |
| **Guatemala** | Decree No. 51-92 - Criminal Procedure Code of 1992, in force since 1994 |
| **Honduras** | Decree No. 9-99-E, which establishes the Criminal Procedure Code of 1999, fully entered into force in 2002 |
| **Mexico**[15] | Constitutional Reform dated 18 June 2008 |
| **Nicaragua** | Law No. 406 - Criminal Procedure Code of 2001, in force since 2002 |
| **Panama** | Law No. 63 – Criminal Procedure Code dated 2 July 2008, enters into force gradually starting 1 September 2009 |
| **Paraguay** | Law No. 1286/98- Criminal Procedure Code |
| **Peru** | Supreme Decree No. 005-2003-JUS, dated July 2004, in force since 2006 |
| **Venezuela** | Criminal Procedure Statute of 1998, in force since 1999 |

*Source: Prepared by the authors.*

With the exception of Uruguay and Brazil, every country in the region has reformed or is in the process of reforming criminal procedure legislation. The first reforms entered into force during the 1990s in countries like Guatemala and Costa Rica and the most recent have been implemented or are in the process of being implemented in Peru, Mexico, and Panama.

This criminal justice reform process involves radical changes to criminal procedures that profoundly alter their structure. For example, the reformed procedure systems established a clear difference between the roles of investigating, overseeing the development of the investigation, indicting, and determining criminal responsibility for a crime or crimes. As we have mentioned, the examining judge, or in some countries, the prosecutor, had been responsible for many or all of these duties. This practice brought with it a wide range of problems, including negative impacts on the right to be judged by an impartial court given that these figures' performance of multiple roles impeded them from executing

[15] Mexico also has a federal system with states that enjoy autonomy over their criminal procedure legislation. Several Mexican states have made progress over the past few years, including Chihuahua, Oaxaca, and Nuevo León. The constitutional reform makes the implementation of oral and adversarial systems mandatory within eight years of its approval for both the federal system and the states.

real oversight of the merit of the decisions that they were making. The reforms established the need to differentiate the roles and duties related to investigation, judgment, and criminal prosecution.

In several countries, this differentiation of roles led to the creation of new institutions that could take on these attributions. For example, in Chile and other nations, specific duties were assigned to the prosecutor and judge in order to ensure that these attributes were clearly distributed, and an effort was made to strengthen said institutions by increasing their budgets, human resources, and infrastructure.[16]

A figure that has been highlighted throughout the region in the context of the reforms emerged during the day-to-day operation of these criminal procedure systems: the investigation oversight or supervisory judge (*juez de control de la investigación* or *juez de garantía*). This official has been the practical solution to the duality of the roles of investigation and oversight of merits that were traditionally concentrated in the judge or prosecutor in the inquisitorial system. Today, the supervisory judge weighs the interests of the prosecution and the rights of the parties that take part in the criminal procedure.

At the same time, the criminal procedure reforms took steps to ensure that the oral, public, and adversarial trial had a leading role within the criminal procedure. The goal was to avoid the delegation of duties and to respect the progress being made in the area of due process as a fundamental right, concerns that were clearly addressed in the case law of international human rights agencies. In order for oral trial to have that central role, there was a need to explicitly establish it as the only legitimate instance for holding a person criminally responsible and to reduce the examining stage to a purely preparatory and administrative process.

The structural changes noted above allowed for the full enjoyment of the right to a legal defense, the right to be judged by an impartial court, and the right to counter the evidence presented by the prosecution. These changes were intended to make due process a reality in view of the fact that it is consecrated in multiple international human rights conventions, such as the International Covenant on Civil and Political Rights and the American Convention on Human Rights, which were signed by most of the countries in the region during the late 1980s and 1990s.

In order for this transformation to become a concrete result rather than merely an aspiration, very significant progress needed to be made towards the creation or strengthening of public defender's offices. These agencies presented a set of weaknesses and needs prior to the reforms, which meant that if serious progress were to be made in the provision of greater protection of due process, defendants had to be provided with high-quality and appropriate technical defenses. This is particularly important in this region given that most defendants are poor and cannot afford to hire specialized defense attorneys.

Criminal procedure reform also involved reform of the protective measures system. As we mentioned above, one of the most problematic aspects was the regulation and practical use of pretrial detention. Criticism of its extensive duration and use as an early sentence was common throughout the region.[17] As a result, one of the main concerns of the criminal justice reform processes was to change both regulations and the way in which pretrial detention was used in practice.

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[16] In regard to the emergence and role of the public prosecutor's office, see DUCE, Mauricio and RIEGO, Cristián, *Desafíos del Ministerio Público en América Latina*, JSCA, 2006, Santiago, Chile, 135 p. In regard to the area of legal defense, see JSCA AND UNITED NATIONS DEVELOPMENT PROGRAM (UNDP), *Manual de Defensoría Penal Pública para América Latina y el Caribe*, Santiago 2006, 85 p.

[17] See Section II.

## *1. The Paradigm Shift in Legal Regulation of Pretrial Detention*

The massive violations of fundamental rights that took place under the inquisitorial systems were one of the most important reasons for changing the legal paradigm of the regulation of pretrial detention in the new criminal procedure systems. The strategy was to move from the logic of early sentencing to a protective logic that was supported and shared by the case law of the inter-American human rights system.[18] This is an idea that must be developed further in order to elucidate its impact.

### *1.1. Protective Logic and Pretrial Detention*

When we state that pretrial detention should be governed by a protective logic, we mean that this criminal procedure institution looks to guarantee the successful realization of the trial and its consequences. In practical terms, this means that the criminal procedure could be carried out with reasonable expectations of obtaining a quality answer, that is, an acquittal or conviction.

This logic also assumes that in order for that quality response to develop and satisfy the standards of due process, the procedure system cannot and should not focus its entire apparatus on extracting a confession from the defendant, particularly in view of the recognition of the right to refrain from incriminating oneself and the right to be presumed innocent and treated accordingly.

These notions influenced the efforts of the criminal justice reform movement in regard to the regulation of pretrial detention in reformed codes with the explicit objective of altering its practical use and avoiding the problems mentioned above.

A review of the regulations contained in the reformed criminal procedure codes suggests that these systems established a procedure for imposing pretrial detention in a manner consistent with the protective logic mentioned above. On the one hand, by responding to the traditional categories of procedural law, reformed systems require material supposition, or *fumus bonus iure,* to order that a defendant be remanded prior to trial. In other words, a minimum amount of information regarding the existence of the crime and defendant's participation in it must be produced. This information is to be weighed by the judge on the basis of its "seriousness" and, in principle, can lead to pretrial detention only if it is found to be sufficient. The idea behind this requirement is consistent with the objective of ensuring that the trial was held. Before deciding whether or not to limit the defendant's rights in some way, there first should exist a reasonable and/or probable expectation that the criminal procedure will be implemented, and there is an expectation to protect in that assumption.

A second requirement was the need for protection or a sufficiently compelling procedural danger. The reasons or justifications for imposing pretrial detention were regulated under this same logic and this led some countries to establish new legal justifications for its use that were consistent with that

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[18] The inter-American system has taken up protective logic in numerous decisions, including: INTER-AMERICAN HUMAN RIGHTS COURT, Chaparro Álvarez and Lapo Íñiguez *v.* Ecuador, sentence dated 21 November 2007; López Álvarez *v.* Honduras, sentence dated 1 February 2006; Acosta Calderón *v.* Ecuador, sentence dated 24 June 2005, Instituto de Reeducación del Menor *v.* Paraguay, sentence dated 2 September 2004; and Suárez Rosero *v.* Ecuador, sentence dated 12 November 1997. A similar position is held by the Inter-American Commission on Human Rights, which has issued rulings on this topic on several occasions. For examples and a summary of the developments that have taken place in the international human rights protection system, see: INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Report No. 35/07 of 2007, Hermanos Peirano Basso v. Uruguay.

function.[19] In countries in which the inquisitorial procedures already regulated some of those causes, an effort was made to give the new versions of the procedures a different interpretation and scope that was consistent with the logic mentioned above.[20]

A review of the first versions of the reformed codes shows that most of them contained two justifications for ordering pretrial detention: flight risk and danger to the investigation or risk of obstruction. Both reasons are consistent with the protective logic and generally are considered to be compatible with international human rights agreements. In the case of flight risk, the objective to be protected was the system's expectation of judging the defendant. If he or she were to flee, the criminal procedure could only continue up to the oral trial and even in countries in which one can be judged *in ausencia*, the sentence could not be executed. This raises issues related to the right to defense and has a high impact on the system's image and its legitimacy. The same applies to defendants who are thought to pose a threat to the investigation or who may obstruct and alter that process, which could limit the system's effectiveness and thus the expectations of holding him or her responsible.

These two motives are present in various reformed codes, including the Criminal Procedure Code of El Salvador of 1996. Article 293 of said document states that pretrial detention will be applied "1) When the defendant fails to attend the first appearance without a legitimate motive or as the court deems necessary or 2) when the court believes that the defendant could obstruct a specific investigative action…. (*1) Cuando el imputado no comparezca sin motivo legítimo a la primera citación o cada vez que el tribunal lo estime necesario, o 2) Cuando se considere que el imputado pueda obstaculizar un acto concreto de investigación…*)." Article 233 of the Criminal Procedure Code of Bolivia of 2000 states that "Once the formal laying of charges has taken place, the judge may order the defendant into pretrial detention at the well-founded request of the prosecutor or complainant when the following requirements are met:… 2) Sufficient cause to believe that the defendant will not submit to the procedure or will obstruct the discovery of the truth (*Realizada la imputación formal, el juez podrá ordenar la detención preventiva del imputado, a pedido fundamentado del fiscal o del querellante, cuando concurran los siguientes requisitos (...): 2) La existencia de elementos de convicción suficientes de que el imputado no se someterá al proceso u obstaculizará la averiguación de la verdad*)." Article 239 of Costa Rica's 1996 Code makes mention of both reasons for the application of pretrial detention: "The court shall order the defendant into pretrial detention when the following circumstances are met… (b) Based on the circumstances of that specific case, there is a reasonable assumption that the individual will not submit to the procedure (flight risk) or will obstruct the investigation of the truth (risk of obstruction). (*El tribunal ordenará la prisión preventiva del imputado, siempre que concurran las siguientes circunstancias (...): b) Exista una presunción razonable, por apreciación de las circunstancias del caso particular, acerca de que aquel no se someterá al procedimiento (peligro de fuga); obstaculizará la averiguación de la verdad (peligro de obstaculización*)."

In addition to generally regulating this type of reason for applying pretrial detention, the judge is allowed to consider a wide range of criteria, which gives him or her some flexibility in making a ruling

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[19] In the case of Honduras, Article 178 of Decree 189-84, which established the 1985 Criminal Procedure Code, only identified material assumption as sufficient cause for the use of pretrial detention. Decree 9-99-E added flight risk or risk to the investigation to the list of justifications for the need for protection. Something similar occurred in Bolivia, where old article 194 of DL 10426 established that material assumption and recidivism were the only conditions necessary for the use of pretrial detention. The motives consistent with the protective logic were established in Law No. 1970 in 1999.

[20] Chile is one example. See DUCE, Mauricio and RIEGO, Cristián, *Proceso Penal*, Editorial Jurídica de Chile, Santiago, October 2007, p. 254 and following.

based on the information provided and weighing their concurrence. A clear example of this is Bolivia's Criminal Procedure Code. Its original version establishes the following:

Article 234.- The following circumstances will be considered when rendering a decision regarding flight risk:
1. That the defendant **does not have a regular domicile or residence nor family, business or work established in the country;**
2. **That the defendant has the means to flee the country or remain hidden;**
3. That there is evidence that the defendant is **preparing to flee;**
4. **That the defendant's behavior during the process or in a previous process indicates that he is not willing to submit to the same** (emphasis added).

(*Artículo 234.- Para decidir acerca del peligro de fuga se tendrá en cuenta las siguientes circunstancias:*

1. *Que el imputado* ***no tenga domicilio o residencia habitual, ni familia, negocios o trabajo asentados en el país****;*
2. ***Las facilidades para abandonar el país o permanecer oculto****;*
3. *La evidencia de que el imputado está realizando* ***actos preparatorios de fuga****;*
4. *El comportamiento del imputado durante el proceso o en otro anterior, en la medida que indique su voluntad de no someterse al mismo; (el destacado es nuestro*).[21]

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[21] Costa Rica's Criminal Procedure Code contains similar regulations:
ARTICLE No. 240
Flight risk. In order to make a decision regarding flight risk, the following circumstances must be taken into account:
a) Rootedness in the country, determined by domicile, habitual residence, family, business or employment and ease with which he or she could leave the country permanently or hide. Falsehood regarding, lack of information about or failure to update information on the defendant's domicile shall constitute presumption of flight.
b) The sentence that could be applied in the case.
c) The magnitude of the damage caused.
d) The defendant's behavior during the procedure or an earlier procedure to the extent that it is indicative of his or her willingness to submit to criminal prosecution.
(*ARTÍCULO Nro. 240.*
*Peligro de fuga. Para decidir acerca del peligro de fuga se tendrán en cuenta, especialmente, las siguientes circunstancias:*
*a) Arraigo en el país, determinado por el domicilio, residencia habitual, asiento de la familia, de sus negocios o trabajo y las facilidades para abandonar definitivamente el país o permanecer oculto. La falsedad, la falta de información o de actualización del domicilio del imputado constituirá presunción de fuga.*
*b) La pena que podría llegarse a imponer en el caso.*
*c) La magnitud del daño causado.*
*d) El comportamiento del imputado durante el procedimiento o en otro proceso anterior, en la medida que indique su voluntad de someterse a la persecución penal.)*
Paraguay's Criminal Procedure Code contains a similar stipulation:
ARTICLE NO. 243.
In order to rule on flight risk, the following circumstances will be taken into account:
1) The lack of rootedness in the country, which is determined by domicile, family base, business or employment and ease with which the defendant could leave the country permanently or hide;
2) The sentence that could be imposed as a result of the procedure;
3) The importance of the damage caused and defendant's attitude towards it; and
4) The defendant's behavior during the procedure or during a previous procedure that could lead one to infer, reasonably, a lack of willingness to subject him or herself to the investigation or to criminal prosecution.
These circumstances must be mentioned expressly in the decision to order pretrial detention.
*(ARTÍCULO° Nº 243.*
*Para decidir acerca del peligro de fuga, se tendrán en cuenta las siguientes circunstancias:*
*1) la falta de arraigo en el país, determinado por el domicilio, asiento de la familia, de sus negocios o trabajo y las facilidades para abandonar definitivamente el país o permanecer oculto;*
*2) la pena que podrá ser impuesta como resultado del procedimiento;*
*3) la importancia del perjuicio causado y la actitud que el imputado asume frente a él; y*

This legislative technique of providing judges with a wide range of criteria allows them to make a ruling based on the circumstances of the specific case and how well-established the defendant is in the country. It is important to note that the original versions of the regulations gave the same weight to all legal criteria. As a result, there were no legal limits that would force the judge to give more weight to one criterion or another, with the exception of the presumption of innocence. In this sense, protective regulation trusted the judge's experience and discretion, granting him or her sufficient parameters to make a ruling but not categorically insisting on a particular solution.

The general situation described must be qualified given that a reading of the various regulations on pretrial custody makes it clear that while the protective idea dominated in the beginning, it was not the only value that pretrial detention safeguarded. In fact, several reformed codes present a wide range of protective needs other than those discussed above. Table 3 presents a summary of this information.

**Table 3**

REASONS FOR THE APPLICATION OF PRETRIAL DETENTION OTHER THAN FLIGHT OR OBSTRUCTION RISK IN THE ORIGINAL VERSIONS OF THE NEW CRIMINAL PROCEDURE CODES

| Country | Other Reasons for Using Pretrial Detention |
|---|---|
| Chile | Danger to society or the offended party (Art. 140) |
| Colombia | Danger to society or the victim (Arts. 310 and 311) |
| Costa Rica | Will continue to engage in criminal activities (Art. 239 b) |
| El Salvador | Circumstances of the crime, social alarm produced by said crime or the frequency with which similar acts are committed, or whether the defendant is already subject to another protective measure. Also, when the defendant's behavior during the procedure or during previous procedures leads the judge to have grave concern that he will continue to commit crimes (Art. 292 No. 2) |
| Honduras | The risk that the defendant will return to the criminal organization that he is suspected of being part of and that he will use the means that it grants him to obstruct the investigation or facilitate the escape of other defendants is well-founded (Art. 178 No. 3) and danger that he will retaliate against his accuser or the complainant (Art. 178 No. 4) |
| Panama | The defendant represents a risk to the community because he belongs to criminal organizations, due to the nature of the crime or number of crimes committed, or because the defendant has sentences pending for other crimes (Art. 227 No. 3) and |

*4) el comportamiento del imputado durante el procedimiento o en otro anterior del que se pueda inferir, razonablemente, su falta de voluntad de sujetarse a la investigación o de someterse a la persecución penal.*
*Estas circunstancias deberán mencionarse expresamente en la decisión judicial que disponga la prisión preventiva.)*

| | |
|---|---|
| | when there are well-founded reasons for reaching the conclusion that he could attempt to harm the victim or his relatives (Art. 227 No. 4) (Criminal Procedure Code of 2008) |
| Nicaragua | Danger that the defendant will commit more crimes or continue to engage in criminal activities (Art. 173 Nr. 3 c) |

*Source: Prepared by the authors.*

As was mentioned above, Table 3 shows that along with the risks of flight and obstruction of the investigation, the legislation formally recognizes other reasons for using pretrial detention in an effort to protect several values. Examples include the regulations introduced in Chile, Colombia, Honduras and Panama, which mention the risk to the victim's safety. In these cases, the regulations combine various criminal justice policy objectives. First, they support the victim's new role in the process. Under the new criminal procedure systems, he/she is a procedural subject with rights rather than merely a means of obtaining evidence. The systems also offer protection to witnesses, who play an important role in securing a conviction. Finally, there are considerations linked to the operation of the criminal justice system, such as encouraging the filing of complaints and increasing the system's legitimacy. All in all, one can argue that these reasons continue to be consistent with the protective logic in that they protect the development of the process by allowing for and facilitating the victim's participation either as the prosecutor's key means of presenting evidence or by protecting his/her participation and offering the respect that he/she is owed as a new procedural subject with legitimate interests in the criminal process.

However, an analysis of the original texts shows that some criminal procedure codes contain reasons that respond to a different, much more questionable logic. For example, in Chile, Colombia, Costa Rica, El Salvador, Nicaragua, and Panama, the legislation identifies recidivism as a justification for pretrial detention or as a criterion for the judge to consider when evaluating the defendant's situation.

Chile's Criminal Procedure Code also established the cause of danger to society. This is an extremely generic cause with three possible interpretations in the doctrine and case law: flight risk, social alarm and danger of recidivism.[22] Specifically, Article 140, paragraph 3 directs the analysis to be completed by the judge in this area, noting that he/she should consider the seriousness of the sentence assigned to the crime, the number of crimes that the defendant is accused of committing, the existence of other pending cases, and whether or not the defendant is subject to another protective measure or is on parole, along with other matters. As is clear when reading the criteria that the legislator gave the judge in order to weigh the legitimacy of this reason, he/she is allowed to examine the likelihood that the defendant will escape as well as the likelihood of recidivism.

This issue is regulated with a more clarity in other countries. For example, paragraph b of Article 239 of Costa Rica's regulations state that the continuation of criminal activity can be used to justify the decision to order the defendant held in pretrial detention. Article 173 of Nicaragua's CPC is similar.

[22] We say 'used to' because the most recent reform, Law No. 20.053, the "Short Agenda Against Crime," introduced significant changes. For more information, see the Chile country report in the complete study on pretrial detention. For more on the original regulation, see Mauricio Duce and Cristián Riego, *Proceso Penal*, op. cit.

El Salvador's legislation addresses the issue of the social alarm that the acts committed may cause, which is directly related to the legitimacy of the criminal justice system.

These reasons clearly go beyond the protective logic and are a product of the effort that had to be made to combine the regulations on pretrial detention with various criminal-policy values in the system. Social alarm and recidivism are unrelated to ensuring the success of the criminal procedure from the perspective of making certain that the trial and investigation go forward and that the system provides a high-quality response. When social alarm is used to justify pretrial detention, there is really no danger to the development of the investigation or trial by the judicial agency. The issue at stake is instead the legitimacy of the system in the eyes of the people and is directly related to the phenomenon of citizen security, which has led countries throughout the continent to respond to calls for more security and harsher responses to criminal activity but in no way guarantees the development of an oral trial.

Recidivism also is linked to the notion of citizen security and is unrelated to the successful development of the criminal procedure. When reasons related to recidivism are incorporated either as an autonomous justification or as criteria that the judge is asked to consider when examining the issue of flight risk or obstruction of justice, the function of pretrial detention in the system goes beyond the strict logic of ensuring the success of the criminal process. The danger in this is the possibility that there will be a return to the logic associated with early sentencing or alarmist considerations. While this constitutes a value struggle within the criminal justice system that must be reviewed by every society, it is clear that the protective justifications lose their importance and begin to recede as other considerations come to the forefront. The problem is that the operation and objectives of pretrial detention are denaturalized, which has important practical consequences.

The normative and procedural structure of adversarial systems is constructed on a specific mechanism of the exceptional use of protective measures. The procedure necessary for its legitimacy, the requirement of information that allows one to reach the conclusion that the prosecutor has a good case at this early stage, and the deliberation of the judge are based on the idea of protecting the process. This also affects opportunities for transversal oversight available to system operators in order to question the legitimacy of the use of pretrial detention, specifically, to whom one must appeal, what information must be available when it is discussed, and how to "put together" the argument. This procedural structure is designed to operate with protective measures as such, and only with them is it capable of correctly articulating the different rights and goals of system operators.

When different reasons for applying pretrial detention are introduced, the pretrial detention oversight structure begins to fail. For example, adversarial systems establish procedures for reviewing decisions to use pretrial detention and requesting their revocation when the procedural danger has passed. But this process of review and possible revocation is not functional and is consistent with more alarmist criteria. When the system struggles with criteria like social alarm or recidivism, we know that there is no procedural danger as such, and the mechanism cannot control its legitimacy. In reformed systems, the judge's examination becomes the study of the circumstances that the defendant presents regarding his/her "rootedness" in the community or the real danger that he/she will obstruct the investigation. This basically involves reviewing very specific facts, such as whether or not the defendant has a stable job or a family. But when the questions to be asked are related to whether or not the crime produces alarm in the community or whether the defendant will commit more crimes, the judge must make a projection regarding future conduct that is eminently contrary to the right to be presumed innocent. The

protective measures system is not equipped, at least with a design that is functional for protective logic, to operate with causes that respond to such diverse interests.

In practice, the problem of these justifications for applying pretrial detention is that it is only possible to protect the values to which one responds through its use. Alternative protective measures do not provide enough guarantees, as they create concerns over additional crimes or social alarm. To what extent does the use of house arrest contribute to social calm? Hypothetically speaking, this could bring about two phenomena: on the one hand, the defendant stays in pretrial detention throughout the investigation and until he/she is acquitted and, on the other, this stage becomes the forum for discussing the defendant's innocence in order to convince the judge that he/she is not guilty and thus will not commit another crime. In either case, the trial stage loses its importance.

In spite of this, a comparison of these justifications for using pretrial detention and the first versions of the adversarial codes shows that (at least as normative federal regulations) they are present in only a few countries' legislation, with the protective logic clearly dominating.

*1.2. Time Limits on Pretrial Detention*

As we have mentioned, criticism of the use of pretrial detention prior to the reform process was focused on its legitimacy as a general rule and its duration. The new system was to incorporate time limits on pretrial detention in order to avoid abuse. First, new principles were established that clearly stated that pretrial detention would be the exception in adversarial procedures. In other words, it would not be applied automatically, and it was the responsibility of the public prosecutor's office or another prosecutorial entity to request it and justify the need to apply it. This also implied that pretrial detention could only be used after the specific situation had been analyzed and that the judicial agency would have to justify its decision to use it. Second, most legislation established time limits. Table 4 presents a detailed list of the limits established in the original adversarial codes.

**Table 4**

LIMITS ON THE USE OF PRETRIAL CUSTODY IN THE ORIGINAL VERSIONS OF THE NEW ADVERSARIAL CODES

| Country and Reference | Exceptional Nature of Pretrial Detention | Specific Time Limit |
|---|---|---|
| Province of Buenos Aires, Argentina, Law No. 11.922 | Yes | No |
| Bolivia, Law No. 1.970 | Yes | When its duration exceeds 18 months without the issuing of a sentence or 24 months without achievement of the status of *res judicata*. |
| Chile, Law No. 19.696 | Yes | No |
| Colombia, Law No. 906 | Yes | Within 60 days of the indictment if no charges are filed or the preclusion of the investigation is not requested. |
| Costa Rica, | Yes | When it exceeds 12 months. |

| | | |
|---|---|---|
| Law No. 7.594 | | |
| Ecuador, Law No. 000. RO/ Sup 360 | Yes | Pretrial detention may not exceed 6 months in cases involving crimes punishable with confinement or one year in the case of crimes punishable by incarceration. |
| El Salvador, Legislative Decree 904 of 1996 | Yes | It may not exceed the maximum sentence provided for in the law or 12 months for less serious crimes or 24 months for serious ones under penalty of incurring. |
| Guatemala, Decree No. 51-92 | Yes | One year; however, if a sentence was issued pending an appeal, it may last an additional 3 months. |
| Honduras, Degree 9-99-E. | Yes | The general rule is one year unless the crime is punishable with more than 6 years in prison, in which case the maximum is 2 years. This can be extended for up to 6 months by resolution of the Supreme Court. Definitive limit is half of the minimum sentence assigned to the crime. |
| Nicaragua, Law No. 406 | Yes | Pretrial detention must never exceed the punishment imposed by the contested sentence. If this occurs, the court that hears the appeal as part of the process or at the party's request shall order the immediate release of the detainee. |
| Paraguay, Law No. 1.286 of 1998 | Yes | Pretrial detention may not exceed the punishment assigned to the crime. |
| Peru, Supreme Decree No. 005-2003-JUS | Yes | Pretrial detention may not last more than nine months. In complex cases, pretrial custody shall not exceed 18 months. |
| Dominican Republic, Law No. 76-02 | Yes | Pretrial detention shall last no more than 12 months. In cases in which the conviction is appealed it may last for up to six more months. |
| Venezuela, Criminal Procedure Statute of 1998 | Yes | In no case shall pretrial detention exceed the minimum punishment established for each crime, nor shall it exceed a period of two years. |

*Source: Prepared by the authors.*

Most of the new codes explicitly set time limits on pretrial detention. However, a second reading of these limits raises doubts about their effectiveness and the real consensus that existed when the legislation was enacted.

The time periods allowed by reformed legislations are extensive if one takes into account the fact that the goal is to ensure that the defendant will appear at trial or protect the evidence (periods of 12, 18 and even 24 months are common). However, in practice, regulations that establish that pretrial detention cannot exceed half of the possible sentence allow for even longer periods of imprisonment prior to sentencing. These limits took a certain amount of power away from the principle of proportionality, allowing the system to take a fairly significant amount of time to investigate a crime

with the defendant detained. For example, if the defendant is accused of committing a crime that carries a maximum penalty of ten years, which is fairly common in the region, the criminal justice system has up to five years to terminate the case. During this time, the defendant can be detained without a sentence or effect subject to regulation.

This problem is even more serious if we consider the fact that most of the crimes that the systems investigate with any level of effectiveness involve cases in which the person is caught in the act. In other words, the defendant's identity is clear, and most of the evidence is present at the time of the arrest.[23] In these cases, time limits of 18 months to two years of pretrial custody were a sign of tolerance in simple cases that should take months, not years, to resolve. It seems that in practice these time limits were largely symbolic.

In addition to setting time limits, several countries' new legislation establishes automatic oversight in an effort to force the jurisdictional agency to review the need for pretrial detention (see Table 5).

**Table 5**

*EX OFICIO* REVIEW OF PRETRIAL DETENTION IN THE ORIGINAL VERSIONS OF REFORMED CRIMINAL PROCEDURE CODES

| Country | Law | *Ex Oficio* Review |
|---|---|---|
| Province of Buenos Aires | Law No. 11.922 | No |
| Bolivia | Law No. 1.970 | No. Legal limit proceeds immediately. |
| Chile | Law No. 19.696 | Yes, the court will schedule a hearing *ex oficio* six months after sentencing or six months after the last review (Art. 145). |
| Colombia | Law No. 906 | No. Legal limit proceeds immediately. |
| Costa Rica | Law No. 7.594 | Yes, the judge is to review *ex oficio* after three months and every three months (Art 253) under the threat of the application of the disciplinary regime. |
| Ecuador | Law No. 000. RO/ Sup 360 | No. |
| El Salvador | Legislative Decree No. 904 | Yes, every three months (Art. 307) |
| Guatemala | Decree No. 51-92 | No. |
| Honduras | Decree 9-99- | No. |

[23] JSCA's follow-up studies indicate that a very high percentage of the cases that reach oral trial (most in a good number of countries) are initiated in *flagrante delicto*. See *Reformas Procesales Penales en América Latina*, op. cit. p. 171.

| | | |
|---|---|---|
| | E. | |
| Nicaragua | Law No. 406 | Yes, monthly *ex oficio* review (Art.172). |
| Panama | Law No. 63 | No. |
| Paraguay | Law No. 1286 | Yes, every three months (Art. 250). |
| Peru | Supreme Decree 005-2003-JUS. | No. |
| Dominican Republic | | Yes, every three months (Art. 239). |
| Venezuela | | Yes, every three months (Art. 273). |

*Source: Prepared by the authors.*

The table shows that these *ex oficio* reviews were established in several countries (Chile, Costa Rica, the Dominican Republic, El Salvador, Nicaragua, Paraguay and Venezuela). In almost every case, they are to take place every three months (with the exception of Chile, where cases are reviewed every six months). As we have noted, this practice was intended to force the system to engage in a systematic review in order to determine whether or not the justifications for ordering that a defendant detained continue to hold true and if the use of pretrial detention is within established parameters according to the basic principles of exceptionality and proportionality.

*1.3. The Use of Alternative Measures*

In keeping with the principles of exceptionality and proportionality of pretrial detention, most of the reformed criminal procedure codes established a broad range of alternative protective measures designed to serve as a response that fits somewhere between incarceration and taking no action to protect the objectives of the process. Table 6 presents a summary of the alternatives to pretrial detention that are provided for in the new procedure codes.

**Table 6**

ALTERNATIVES TO PRETRIAL DETENTION IN REFORMED CRIMINAL PROCEDURE CODES

| Country | House arrest | Periodic reporting to official | Restriction order (may not leave country or region) | Prohibition from frequenting certain places | Bond | Other |
|---|---|---|---|---|---|---|
| Argentina Province of Buenos Aires | X | X | X | X | X | |
| Bolivia | X | X | X | X | X | -Prohibition from communicating with the victim |

| | | | | | | |
|---|---|---|---|---|---|---|
| Chile | X | X | X | X | X | - Official surveillance<br>- Prohibition from communicating with the victim<br>-Restraining order |
| Colombia | X | X | X | X | X | - Electronic surveillance<br>-Duty to observe good family conduct<br>- Prohibition from communicating with the victim |
| Costa Rica | X | X | X | X | X | - Required to leave the home due to domestic violence<br>- Suspension from official post due to criminal activity<br>- Supervision<br>- Prohibition from communicating with the victim<br>- Restraining order |
| Ecuador | X | X | X | | X | |
| El Salvador | X | X | X | X | X | - Prohibition from communicating with the victim |
| Honduras | X | X | X | X | X | - Prohibition from communicating with the victim<br>- Official surveillance<br>- Suspension from official post due to criminal activity |
| Nicaragua | X | X | X | X | X | - Required to submit to the care of another individual<br>- Prohibition from communicating with the victim<br>- Required to leave the home due to domestic violence<br>-Prohibited from firing or taking other action |

| | | | | | | |
|---|---|---|---|---|---|---|
| | | | | | | against the complainant in the case of sexual harassment<br>- Suspension from official post due to abuse of said position |
| Panama | X | X | X | X | X | - Order to immediately leave the home in case of domestic violence when the victim lives with the aggressor<br>- Prohibition from holding a public or private position<br>- Required to restrain from engaging in activity<br>- Use of electronic monitoring device |
| Paraguay | X | X | X | X | X | - Official surveillance |
| Peru | X | X | X | X | X | |
| Dominican Republic | X | X | X | X | X | - Official surveillance |
| Venezuela | X | X | X | X | X | - Prohibition from communicating with the victim<br>- Required to leave the home due to domestic violence |

*Source: Prepared by the authors.*

As the table indicates, the protective measures are similar in most countries. There are, however, some important differences, such as those between Ecuador (the most restrictive) and Costa Rica and Nicaragua (which offer more options).

These alternative measures can be ordered by the judge if he/she feels that the restriction of rights imposed by pretrial detention would be excessive based on the preliminary information presented or if he/she wants to replace a previous order of pretrial detention based on the hypothesis that the need for protection has become less intense. In general, the original versions of the adversarial codes did not establish structural limits of the use of other protective measures, and the judge was granted some latitude in this area. In fact, as the amount of time that the defendant could be held in pretrial detention increased, the system gave clear signals of favoring the use of a different protective measure. The

legislation that most clearly reflects this is Law No. 000 of Ecuador's Criminal Procedure Code, which states that the judge must replace pretrial detention with house arrest once the time limit has expired.

### *2. The Impact of the New Adversarial Codes on the Use of Pretrial Detention*

Most countries in the region have concluded their implementation processes, and some have had an adversarial system in place for over ten years. It is therefore time to ask whether the reform processes have achieved their objective regarding the use of pretrial detention, which was to modify its practical operation so as to make its use exceptional and proportional to the needs derived from due process.

Given that the new criminal procedure systems were implemented over a period of nearly 15 years (counting from the implementation of the system in Guatemala in 1994), the level of experience and consolidation of the reform processes is very diverse. In view of this and in order to provide a more complete analysis that allows us to identify common trends and factors that can influence the use of pretrial detention in the context of the new criminal procedure systems, we have decided to divide our analysis into two different sections. We first analyze the impact of the reform on pretrial custody during the early years and then turn to the cases in which the reform has been operating for a longer period of time. The idea is to observe whether or not the initial results are maintained and to identify any significant evolutions or reverses in the progress has been made.

#### *2.1. Pretrial Detention during the Early Years of the Adversarial Criminal Codes*

We will first consider whether or not the reform has led to a significant change in practices regarding the use of pretrial detention in the short-term. We have estimated that two or three years is sufficient time for a process to become established and for important changes to be observed.

Table 7 presents a summary of the results obtained in 13 countries in the region two or three years after the implementation of the reform and compares them with data from one of the years prior to the introduction of the new system. It does not include Peru or Panama because they have not completed the implementation process.[24][25][26][27]

**Table 7**

PERCENTAGE OF THE POPULATION IN PRETRIAL CUSTODY BEFORE AND TWO OR THREE YEARS AFTER THE CRIMINAL PROCEDURE REFORM IN LATIN AMERICAN NATIONS

| Country | Prior to Introduction | % | Two or Three Years | % |
|---|---|---|---|---|

[24] The information on the Buenos Aires system was taken from the annual reports of the Center for Legal and Social Research (*Centro de Estudios Legales y Sociales*, CELS). It is important to note that there were inconsistencies between the data presented in the 1997 report, which indicates that the total prison population in the penitentiary system and police stations was 11,537 by December of that year, and the 2008 report, which puts the total population at 14,292 in 1997. The calculation of the percentage of unsentenced inmates includes those held in police stations.

[25] Colombia ended its gradual implementation of the reform in 2008. This means that the system was not operational throughout the country when these results were taken.

[26] There are inconsistencies in the data for 1995 provided by different sources. The percentage shown is from *El Preso sin Condena en América Latina y el Caribe* (2001). Another publication puts the percentage of unsentenced prisoners at 20.6%. See GONZÁLEZ ÁLVAREZ, Daniel, "Informe Nacional – Costa Rica" in *Las Reformas Procesales Penales en América Latina* (MAIER and WOISCHNIK-Coordinators), AD-HOC, primera edición, octubre de 2000, Buenos Aires, p. 309.

[27] The data presented is from 17 April 1998, three days before the implementation of the CPC. See MEMBREÑO, José Ricardo, "Informe Nacional El Salvador" in *Las Reformas Procesales Penales en América Latina*, op. cit., p. 437.

| | of Reform | | After Reform | |
|---|---|---|---|---|
| Province of Buenos Aires | 1997 | 84.2[23] | 2001 | 87.1 |
| Bolivia | 1999 | 64 | 2002 | 70 |
| Chile | 1999 | 51 | 2007 | 24.6 |
| Colombia | 2004 | 42.9 | 2007[24] | 32.2 |
| Costa Rica | 1995 | 28[25] | 2000 | 30 |
| Dominican Republic | 2002 | 67.4 | 2006 | 57.5 |
| Ecuador | 1999 | 69.4 | 2003 | 65.2 |
| El Salvador | 1998 | 72[26] | 2002 | 48.9 |
| Guatemala | 1993 | N/D | 1996 | 64.2 |
| Honduras | 1999 | 88 | 2005 | 63.5 |
| Nicaragua | 1999 | 30.8 | 2004 | 17 |
| Paraguay | 1996 | 95 | 2002 | 75 |
| Venezuela | 1997 | 69 | 2000 | 57.5 |

*Source: Prepared by the authors based on data obtained from various sources.*[28]

At first glance, it might seem that there initially was a tendency for the percentage of unsentenced prisoners to decrease. With the exceptions of the Province of Buenos Aires (Argentina), Bolivia and Costa Rica, the reform processes produced said decreases within a fairly short period of time, some of them significant. The major reductions in numbers of unsentenced prisoners that were observed in countries that presented very high rates prior to the entry into force of the reform are noteworthy. For example, Honduras saw a decrease of 24.5%, Paraguay 20%, and Venezuela 11.5%. This effect also is appreciated in countries that did not have high rates prior to the reform, such as Chile, Colombia, and Nicaragua. The case of Chile is paradigmatic because just two years after the reform was fully implemented, the population in pretrial detention was nearly halved (as a percentage of the prison population). It is important to note that this took place in a context in which there was a gradual implementation process that provided up to seven years of experience in some areas of the country when those results were produced. The results for Nicaragua are similar; the percentage of unsentenced inmates dropped from 30.8% to 17%.

In contrast, the increases in the prevalence of pretrial detention were relatively marginal (less than 10% of the total number of unsentenced inmates, which does not allow us to reach definitive conclusions) except in the Province of Buenos Aires and Costa Rica.

From this perspective, the reform did have a rationalizing effect on the use of pretrial detention. This

[28] This data is taken from the JSCA Reports on Judicial Systems in the Americas (2002-2003, 2004-2005 and 2006-2007); King's College World Prison Brief, *Informe La Cárcel: problemas y desafíos para las Américas*-FLACSO, *Sobrepoblación penitenciaria en América Latina y el Caribe: situación y respuestas posibles*, by CARRANZA, and a review of the Websites of official penitentiary agencies in the countries, all of which have been cited earlier in this text.

finding is supported by studies of lesser reach that have been undertaken in the region.[29]

This is an initial positive indicator that should be complemented with additional studies in order to provide a more complete vision of a fairly complex reality. In order to provide a full picture of the situation, we feel that it is important to examine whether or not the decrease in the percentage of unsentenced inmates led to an effective decrease in the number of defendants that were subjected to this protective measure. Table 8 provides a summary of average daily number of defendants held in custody before and after the reform following the criteria indicated for the previous table.[3031323334]

**Table 8**

AVERAGE DAILY NUMBER OF DEFENDANTS IN PRETRIAL DETENTION BEFORE AND AFTER CRIMINAL PROCEDURE REFORM IN LATIN AMERICAN NATIONS

| Country | Prior to the Reform | Population | Two or Three Years After the Reform | Population |
|---|---|---|---|---|
| Province of Buenos Aires | 1997 | 9,719 | 2001 | 20,123 |
| Bolivia | 1999 | 4,766 | 2002 | 4,164 |
| Chile | 1999 | 15,675 | 2008 | 11,521 |
| Colombia | 2004 | 29,180 | 2007 | 19,429[29] |
| Costa Rica | 1995 | 1,164 | 2000 | 1,288[30] |
| Dominican Republic | 2002 | 11,090 | 2006 | 7,297 |
| Ecuador | 1999 | 5,688 | 2003 | 6,437 |
| El Salvador | 1998 | 6,634 | 2002 | 5,130 |
| Guatemala | 1993 | N/D | 1996 | 4,270 |
| Honduras | 1999 | 9,569 | 2005 | 7,359 |
| Nicaragua | 1999 | 2,217 | 2004 | 953 |
| Paraguay | 1996 | 3,360 | 2002 | 3,531 |
| Venezuela | 1997 | 17,647 | 2000 | 8,687 |

*Source: Prepared by the authors based on data from various sources (see the footnote for Table 7).*

In general, the data contained in the table support the previous assertion, though they introduce some

[29] See BHANSALI, Lisa and BIEBESHEIMER, Cristina, "Measuring the Impact of Criminal Justice Reform in Latin America" in *Promoting the Rule of Law Abroad in Search for Knowledge*, Thomas Carothers (Ed.), 2006, Washington DC.

[30] Data current through January 2007.

[31] Data current through December 2000.

[32] Data current through September 2002.

[33] Data current through December 2005.

[34] Data current through October 2004.

nuances. In the cases of the Province of Buenos Aires, Costa Rica, Ecuador, and Paraguay, there has been in increase in the total number of inmates in pretrial detention. The percentage of inmates who have not been sentenced has increased in only two systems (Province of Buenos Aires and Costa Rica). This means that the decrease in the percentage of unsentenced inmates that took place in Ecuador and Paraguay did not lead to a real reduction in the total average daily number of individuals held in pretrial detention. In some cases, the minor increases can be explained by the system's augmented prosecution capacity stemming from the new procedures.

In Chile, Colombia, Honduras, Nicaragua, and Venezuela, the decrease in the proportion of unsentenced inmates also is reflected in the total number of inmates in pretrial detention, which dropped the most in Chile, Colombia, and Venezuela. One year after the full implementation of the reform in Chile, there was a decrease of over 4,000 inmates. Colombia presented a decrease of nearly 10,000 unsentenced inmates and Venezuela, nearly 9,000. The number of unsentenced inmates in Honduras and Nicaragua dropped by 2,200 and nearly 1,270, respectively.

Adding this new variable into the equation shows that the introduction of reformed procedures tends to have a positive impact in the short term.

Considering the number of unsentenced inmates per 100,000 inhabitants adds another dimension to the analysis and facilitates comparisons among the various countries. Table 9 presents information on this aspect for the same time period.

**Table 9**

UNSENTENCED INMATES PER 100,000 INHABITANTS BEFORE AND AFTER CRIMINAL PROCEDURE REFORM[35]

| Country | Prior to the Reform | Inmates per 100,000 Inhabitants | Two or Three Years After the Reform | Inmates per 100,000 Inhabitants |
|---|---|---|---|---|
| Province of Buenos Aires | 1997 | 70.9[34] | 2001 | 156.7 |
| Bolivia | 1999 | 55 | 2002 | 44 |
| Chile | 1999 | 91.3 | 2007 | 75 |
| Colombia | 2004 | 65.2 | 2007 | 40.5 |
| Costa Rica | 1995 | 20.8 | 2000 | 57.9 |
| Dominican Republic | 2002 | 119.9 | 2006 | 75.9 |
| Ecuador | 1999 | 48.6 | 2003 | 48.2 |
| El Salvador | 1993 | 97.9 | 2002 | 73.4 |
| Guatemala | 1993 | N/D | 1996 | 37.2 |

[35] In order to calculate the rate of inmates per 100,000 inhabitants, we used the number of inmates held in prisons and police stations reported in 1997 by CELS and the projected total population of the Province of Buenos Aires for the same year.

| | | | | |
|---|---|---|---|---|
| Honduras | 1999 | 156.6 | 2005 | 102.2 |
| Nicaragua | 1999 | 44 | 2004 | 17 |
| Paraguay | 1996 | 66.5 | 2002 | 63.8 |
| Venezuela | 1997 | 76.6 | 2000 | 33.4 |

*Source: Prepared by the authors.*[36]

Again, these results confirm the previous findings. Only in the Province of Buenos Aires and Costa Rica do we find an increase in the total number of unsentenced inmates per 100,000 inhabitants. Even in Bolivia, where the percentage of unsentenced prisoners increased during the period in question, the rate of unsentenced inmates per 100,000 inhabitants decreased, which is consistent with the decrease in the daily average reflected in Table 8.

Interestingly, these countries present enormous differences in the use of pretrial detention. For example, in some countries, like Nicaragua, the number of unsentenced inmates per 100,000 inhabitants tends to be very low (17) in contrast to countries like Honduras, which has five times as many (102). The reasons for the differences require more detailed analysis than can be presented here.

Finally, the table below, which presents data on the total number of sentenced and unsentenced inmates per 100,000 inhabitants, provides a more complete vision of the operation of reformed systems. Table 10 presents a summary of these results for the period analyzed in the previous tables.

**Table 10**

TOTAL PRISON POPULATION PER 100,000 INHABITANTS

| Country | Prior to the Reform | Per 100,000 inhabitants | Two or Three Years After the Reform | Per 100,000 inhabitants |
|---|---|---|---|---|
| Province of Buenos Aires | 1997 | 84.6 | 2001 | 180 |
| Bolivia | 1998 | 86 | 2002 | 58 |
| Chile | 1999 | 179 | 2008 | 305 |
| Colombia | 2004 | 152 | 2007 | 135 |
| Costa Rica | 1995 | 123 | 2000 | 193 |
| Dominican Republic | 2001 | 178 | 2006 | 132 |

[36] No single source provides data on unsentenced inmates per 100,000 inhabitants for every country in the region. Given the usefulness of the information, we developed a calculation based on the percentage of prisoners awaiting sentencing and the total prison population per 100,000 inhabitants. The latter number is taken from the appendix of the FLASCO document *La cárcel: problemas y desafíos para las Américas*, specifically Table 4, "Evolución de Tasas de población penal cada 100 mil habitants," and based on data from the King's College *World Prison Brief*. The percentage of unsentenced prisoners was gathered from official sources. This methodological precaution is meant to warn the reader of a possible distortion that might undermine the results' exactness. Nonetheless, we feel that they are useful in that they provide a general overview.

| | | | | |
|---|---|---|---|---|
| Ecuador | 1999 | 70 | 2003 | 74 |
| El Salvador | 1998 | 136 | 2001 | 150 |
| Guatemala | 1992 | 56 | 1996 | 58 |
| Honduras | 1999 | 178 | 2005 | 161 |
| Nicaragua | 1999 | 143 | 2004 | 100 |
| Paraguay | 1996 | 70 | 2002 | 85 |
| Venezuela | 1997 | 111 | 2000 | 58 |

*Source: Prepared by the authors based on data from various sources (see footnote for Table 7).*

Very briefly, one can observe that it is difficult to draw a direct correlation between the entry into force of the criminal procedure reforms and the total number of inmates. Following the reforms, the rate per 100,000 inhabitants decreased in nearly half of the countries and increased in the other half. Each category also presents cases of increases or decreases and cases of significant changes. A discussion of the reasons for those variations goes beyond the scope of this paper, but we believe that this data is interesting to keep in mind given that the implementation of the new system clearly led a decrease in use of pretrial detention in the short-term in every case.

### *2.2. Medium-and Long-term Use of Pretrial Detention in Reformed Procedures*

The process of introducing adversarial criminal procedures began with Guatemala's first legal reform in 1994 and is still ongoing. Peru's reform began in 2006 and will conclude in 2012; Mexico's Constitution has established an eight-year implementation period for that country's 2008 reform; and the gradual implementation of the Panamanian adversarial system is scheduled to begin in September 2009.

We believe that one of the factors that may produce significant differences in the results obtained is that the reform processes being implemented around the region share the same basic principles but last for different periods of time. The previous section analyzed short-term results, which allowed us to compare processes over similar periods and explore whether or not they initially impacted the reality of unsentenced inmates. However, we must look at a different set of data in order to explore trends that emerge over time and gauge whether or not the initial impact is sustained.

In this section, we will review the most current results available. We will differentiate between processes that began during the 1990s and those that started during this century in order to analyze whether the reforms have achieved their goals and the differences that can be observed between the processes that have been operational for a longer period of time.

#### 2.2.1. The Use of Pretrial Detention in the Reform Processes of the 1990s

As is well known, a very vigorous process of criminal justice reform began in several Latin American nations during the 1990s. The countries that initiated this process include Argentina (the Provinces of Buenos Aires, Córdoba, and others), Costa Rica, El Salvador, Guatemala, and Venezuela. In general, the practical implementation of the system was not the main concern of the officials and institutions responsible for these processes and – in very broad strokes – the main agent was legal change. As

Binder has observed, the dominant approach was "normativist fetishism,"[37] that is, attributing an excessive amount of transformative power to regulatory change. As a result of this focus, the implementation of these adversarial procedures tended to lack clear and specific planning.

Below, we examine how these early reform processes have evolved over time. Table 11 presents the percentage of unsentenced inmates at the launch of the reform, in its tenth year of operation (where applicable), and in 2007 or 2008, depending on the data available.[38, 39, 40, 41, 42]

**Table 11**

EVOLUTION OF THE PERCENTAGE OF UNSENTENCED INMATES IN REFORMS THAT BEGAN IN THE 1990S

| Country | Launch of the Reform | Year 2 | Year 4 | Year 6 | Year 8 | Year 10 | Most Recent Data |
|---|---|---|---|---|---|---|---|
| Province of Buenos Aires | 1998 | 86.4 | 87.1 | 83.9 | 72.7 | N/A | 72.8[37] |
| Costa Rica | 1998 | 30 | N/D | 20.7 | 19.2 | N/A | 23.2[38] |
| El Salvador | 1998 | 76 | N/D | 48.97 | 39 | 36 | 39[39] |
| Guatemala | 1994 | 64.2 | 63.2 | 47.4 | 55.5 | 51.5 | 49.4[40] |
| Venezuela | 1999 | 57.5 | 26 | N/D | N/A | N/A | 33.4[41] |

*Source: Prepared by the authors based on data from several sources (see footnote for Table 7).*

In these five cases, it is clear that the initial impact of the reform was maintained and strengthened over time. However, there are some variations during the middle period. Even in the Province of Buenos Aires, one can see that the limitations of the initial impact have been reversed and that there is a significant decrease in the percentage of unsentenced inmates, even when the overall situation is extremely fragile.

Again, we feel that it is useful to complement this data with the daily average number of unsentenced inmates at different points in time. Table 12 presents a summary of that information.

**Table 12**

AVERAGE DAILY NUMBER OF UNSENTENCED INMATES IN REFORM PROCESSES BEGUN IN THE 1990S

| Country | Reform Launch | Year 2 | Year 4 | Year 6 | Year 8 | Year 10 | Most Recent Data[42] |
|---|---|---|---|---|---|---|---|
| Province of Buenos Aires | 1998 | 17,544 | 22,400 | 25,247 | 20,449 | N/A | 16,648 |
| Costa Rica | 1998 | 1,288 | N/D | 1,874 | 1,751 | N/A | 1,981 |

[37] JSCA, *Reformas Procesales Penales en América Latina: Resultados del Proyecto de Seguimiento*, 2005, p. 12.
[38] Data from 2007.
[39] Data through 31 December 2008.
[40] Data through September 2008.
[41] Data through 2008.
[42] Data through the first trimester of 2008.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| El Salvador | 1998 | 5,224 | N/D | 5,203 | 4,876 | 6,327 | 7,800 |
| Guatemala | 1994 | 4,270 | 5185 | 3,830 | 4,706 | 4,307 | 4,124 |
| Venezuela | 1999 | 8,687 | 5548 | N/D | N/A | N/A | 7,779 |

*Source: Prepared by the authors.*[43]

The results that this table presents are quite different than the previous ones. The variable of time makes it difficult to obtain very precise results given that the total population of a country can change significantly over a period of ten or more years. As a result, increases in the number of unsentenced inmates that may seem important are not relevant with regard to the rate per 100,000 inhabitants. Table 13 presents complementary data on the number of unsentenced inmates per 100,000 inhabitants two or three years after the launch of the reform and now (based on the most recent data available).

This new variable does not seem to alter the general findings. That is, over time there is a tendency for the percentage of unsentenced inmates and the total number of unsentenced inmates per 100,000 inhabitants to decrease. The exception is El Salvador, where there has been a significant increase in the number of unsentenced inmates per 100,000 inhabitants.[44]

**Table 13**

UNSENTENCED INMATES PER 100,000 INHABITANTS IN REFORM PROCESSES INITIATED IN THE 1990S

| Country | Launch of Reform | 2 or 3 Years After Launch of Reform | Most Recent Data[43] |
|---|---|---|---|
| Province of Buenos Aires | 1998 | 165.4 | 112 |
| Costa Rica | 1998 | 57.9 | 44.4 |
| El Salvador | 1998 | 85.1 | 113 |
| Guatemala | 1994 | 37.2 | 30.9 |
| Venezuela | 1999 | 33.4 | 28.3 |

*Source: Prepared by the authors.*[45]

Finally, Table 14 summarizes the evolution of the total prison population (sentenced and unsentenced inmates), which provides us with some perspective on the context.

**Table 14**

TOTAL PRISON POPULATION SINCE THE REFORM IN PROCESSES LAUNCHED IN THE 1990S

| Country | Launch of Reform | Year 2 | Year 4 | Year 6 | Year 8 | Year 10 | Most Recent Data[45] |
|---|---|---|---|---|---|---|---|
| Province | 1998 | 20,305 | 25,718 | 30,092 | 28,129 | N/A | 26,990 |

43 See Table 11.
44 See Table 11.
45 The methodology used to obtain the data presented in this table is described in footnote 29.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| of Buenos Aires | | | | | | | |
| Costa Rica | 1998 | 4,294 | N/D | 9,045 | 9,125 | N/A | 8,924 |
| El Salvador | 1998 | 6,868 | N/D | 10,476 | 12,221 | 17,577 | 19,800 |
| Guatemala | 1994 | 6,654 | 8,204 | 8,077 | 8,480 | 8,359 | 8,409 |
| Venezuela | 1999 | 15,107 | 21,342 | N/D | N/A | N/A | 23,299 |

*Source: Prepared by the authors.*[46]

To conclude this section, we return to our main finding. The analysis of the evolution of the use of pretrial detention in older reform processes shows the consolidation of the phenomenon that was produced in the short-term. That is, there is a sustained decrease in the percentage of inmates who have not been sentenced accompanied by a drop in the number of unsentenced inmates per 100,000 inhabitants. This is a fairly strong result given that it is a trend that has been sustained for ten or more years in most of the processes analyzed. Of course, this does not mean that it will not suffer changes in the future.

2.2.2. The Use of Pretrial Detention in Reform Processes Begun in the 21st Century

One of the great lessons of the reforms of the 1990s was that implementation processes based solely on legal reforms could not produce significant changes in past logics or meet their objectives. Experience had shown that management issues are important and that there must be an implementation plan that covers a wide range of aspects and produces a profound cultural change in the judicial arena.

Based on the experience accumulated and the lessons learned from past mistakes, reformers forecast that the processes launched during this century were more likely to succeed than earlier ones because their architects were able to correct mistakes and use more sophisticated tools to overcome difficulties.

While some reforms are still being implemented, which makes it difficult to reach definitive conclusions, they generally have a positive initial impact followed by stasis. One major difference between recent reforms and earlier processes is that the positive results have increased and been strengthened in this area in the latter.

Table 15 presents the evolution of the rate of unsentenced inmates in the eight countries under analysis.

**Table 15**

EVOLUTION OF THE PERCENTAGE OF UNSENTENCED INMATES IN REFORMS INITIATED IN THE 21ST CENTURY

| Country | Year Reform Began | Year 2 | Year 4 | Year 6 | Most Recent Data |
|---|---|---|---|---|---|
| Bolivia | 2000 | 70 | 77 | 74 | 75.7[46] |
| Chile | 2000 | 44.3 | 38.5 | 29.9 | 24.6[47] |
| Colombia | 2005 | 34.9 | N/A | N/A | 34.5[48] |

[46] See Table 11.

| | | | | | |
|---|---|---|---|---|---|
| Dominican Republic | 2004 | 57 | N/A | N/A | 61.2[51] |
| Ecuador | 2001 | 66.3 | 63.8 | 62.4 | 60.5[49] |
| Honduras | 2002 | 63.5 | N/A | N/A | 50.76[50] |
| Nicaragua | 2002 | 17 | 17 | N/A | 19.3[51] |
| Paraguay | 2000 | 75 | 77 | N/A | 75.7[52] |

*Source: Prepared by the authors based on data obtained from various sources (see footnote for Table 7).*[47,48,49,50,51,52,53,54]

This table provides more nuanced results than those presented on the reforms of the 1990s. In several systems – such as those of Bolivia, the Dominican Republic, and Nicaragua –, the tendency has been for the percentage of inmates in pretrial detention to increase over time while remaining lower than before the procedure reforms. The case of Colombia is different because the results mix data from the reformed system with data from the previous one due to the period of time covered.

In Ecuador, Paraguay, and Nicaragua, there is a tendency for the number to decrease over time, though in relatively minor percentages. The only countries in which there is a continuous trend towards relatively significant reductions in the percentage of unsentenced inmates are Honduras and Chile.

As in earlier sections of this study, we also consider daily averages of unsentenced prisoners so as to consider the number of people in pretrial detention (rather than percentages) and determine whether the trend identified is maintained. Table 16 presents a summary of the results.

**Table 16**

AVERAGE DAILY NUMBER OF UNSENTENCED INMATES SINCE THE LAUNCH OF THE REFORM IN COUNTRIES THAT INITIATED REFORM PROCESSES IN THE 21ST CENTURY

| Country | Year Reform Launched | Year 2 | Year 4 | Year 6 | Most Recent Data[54] |
|---|---|---|---|---|---|
| Bolivia | 2000 | 4,164 | 5,041 | 5,684 | 5,183 |
| Chile | 2000 | 15,467 | 14,004 | 11,802 | 11,521 |
| Colombia | 2005 | 22,183 | N/A | N/A | 23,768 |
| Dominican Republic | 2004 | 7,297 | N/A | N/A | 10,071 |

47 Data from 2007.
48 Data through 30 September 2008.
49 Data through August 2008.
50 Data through April 2008.
51 Data through July 2007.
52 Data through 30 August 2008.
53 Data for 2007.
54 Data for 2007.

| | | | | | |
|---|---|---|---|---|---|
| Ecuador | 2001 | 6,541 | 7,637 | 10,784 | 10,295 |
| Honduras | 2002 | 7,359 | N/A | N/A | 5,456 |
| Nicaragua | 2002 | 953 | 960 | N/A | 1,290 |
| Paraguay | 2000 | 4,164 | 5,041 | 5,684 | 5,183 |

*Source: Prepared by the authors.*[55]

The data presented in Table 16 tend to reproduce the earlier finding, more or less in the same terms explained above. We will not repeat the discussion here.

Table 17 provides data on the total average daily number of inmates during the period analyzed. Its purpose is to provide background information.

With the exception of Honduras, this process of stalled results emerges in a general context in which the use of imprisonment has increased in the new systems. This would partially explain the increase in the number of unsentenced inmates as a general product of the system's increased prosecution capacity. We will review some hypotheses about this finding in the next section.

**Table 17**

TOTAL AVERAGE DAILY PRISON POPULATION SINCE THE LAUNCH OF THE REFORM IN PROCESSES BEGUN IN THE 21ST CENTURY

| Country | Year Reform Launched | Year 2 | Year 4 | Year 6 | Most Recent Data[55] |
|---|---|---|---|---|---|
| Bolivia | 2000 | 5,949 | 6,547 | 7,682 | 6,840 |
| Chile | 2000 | 34,901 | 36,374 | 39,471 | 50,980 |
| Colombia | 2005 | 63,603 | N/A | N/A | 68,994 |
| Dominican Republic | 2004 | 12,725 | N/A | N/A | 16,457 |
| Ecuador | 2001 | 9,866 | 11,971 | 17,283 | 17,016 |
| Honduras | 2002 | 11,589 | N/A | N/A | 10,747 |
| Nicaragua | 2002 | 5,610 | 5,651 | N/A | 6,701 |
| Paraguay | 2000 | 4,705 | 6,513 | N/A | 5,943 |

*Source: Prepared by the authors.*[56]

Table 18 contains data on the rate of unsentenced inmates per 100,000 inhabitants two or three years after the launch of the reform and according to the most recent data available.

**Table 18**

RATE OF UNSENTENCED INMATES PER 100,000 INHABITANTS TWO OR THREE YEARS AFTER THE REFORM AND NOW IN REFORMS LAUNCHED IN THE 21ST CENTURY[57]

[55] In regard to this column, see Table 15.
[56] In regard to this column, see Table 15.
[57] In regard to this column, see Table 15.

| Country | Start of Reform | 2 or 3 Years After Reform | Most Recent Data[56] |
|---|---|---|---|
| Bolivia | 2000 | 44 | 62 |
| Chile | 2000 | 75 | 69.4 |
| Colombia | 2005 | 40.5 | 51.6 |
| Dominican Republic | 2004 | 75.9 | 103.3 |
| Ecuador | 2001 | 48.2 | 80.8 |
| Honduras | 2002 | 102.2 | 76.9 |
| Nicaragua | 2002 | 17 | 23 |
| Paraguay | 2000 | 63.8 | 67.2 |

*Source: Prepared by the authors.*

## IV. PRETRIAL DETENTION AND THE COUNTER-REFORM

As we mentioned at the beginning of this study, the new procedural statutes have been subjected to several types of reforms. One of the areas that have seen the greatest impact is the regulation of pretrial detention. Below, we review the reasons for these changes and the scope and contents of the same.

### *1. General Context*

The reformed procedure codes produced with high expectations. The elements that allowed for the development of political consensus in favor of change included the idea of providing greater protection for fundamental rights and the improvement of the systems' operation and effectiveness. As a result, the general public expected a great deal from the reforms. It is important to note that since the end of the 1980s, people around the region have perceived a sustained increase in crime and lack of responsiveness on the part of the criminal justice system. This was, in fact, one of the elements that legitimated the replacement of inquisitorial systems with adversarial ones.[58] Current discussions of the justice system and the agendas of governments and public institutions have been dominated by the idea that we are losing the "fight against crime," that our criminal justice systems cannot keep up, and that all of this impacts our quality of life.

Reformed procedural systems have been subjected to intense public scrutiny of their ability to respond to the perceived increase in crime and demands that the system be "tough on crime." The media has encouraged the idea that crime is on the rise and that the reformed systems which promised to end the problem have not done so. Some have argued that the increase in defendants' rights has facilitated the commission of crimes. To this we add the emergence of a movement which has demanded greater protection of witnesses and intervention on their behalf. All of this has contributed to the persistence of demands that new systems focus more on public safety while producing civil and political movements to reform the new systems in order to make them "harder" and increase their ability to provide

[58] See Mauricio Duce and Rogelio Pérez Perdomo, "Citizen Security and Reform of the Criminal Justice System in Latin America," in *Crime and Violence in Latin America: Citizen Security, Democracy, and the State*, (Hugo Früling and Joseph Tulchin, eds.), Woodrow Wilson Center Press and Johns Hopkins University Press, Washington, 2003, pp. 69-91.

solutions to the increase in criminal activity.

Several sources provide information on the phenomena described above. For example, the most recent report issued by Corporación Latinobarómetro shows that people identified crime as the most important social problem to be addressed in Mexico, Venezuela, Guatemala, Costa Rica, Panama, Honduras, Argentina, and El Salvador.[59] Poll respondents in Chile and the Dominican Republic identify crime and unemployment as the most important problems being faced by their country.

The media constantly monitors crime and the efficiency of the justice system. Public access to oral procedures, which provides the population with an opportunity to observe the operation and supposed "errors" of the justice system, has added a new dimension to its unceasing coverage of these issues. What is more, in some cases, judicial systems have made decisions that are worthy of criticism in high-impact cases, generating the sensation that they are not "tough on crime." Media coverage of these cases creates concern and the sensation of impunity, leading many to conclude that defendants should remain in pretrial detention. Decisions to release them have been met with dissatisfaction.

The attitudes of some justice system actors towards high-profile cases have reinforced these feelings. For example, in response to a judge's decision to replace pretrial detention with periodic reporting to the court in an October 2008 case involving massive land trafficking in Nicaragua, the Attorney General said, "Why doesn't he impart justice correctly? That creates impotence." He also stated that the judges who are hearing drug trafficking cases are picking and choosing the laws they apply to benefit one of the parties.[60] In Guayaquil, Ecuador, the lead prosecutor lamented the judges' June 2008 decision not to issue the protective measures requested by the prosecutor in a robbery case and went on to investigate the judges themselves. There is also evidence that the police are not satisfied with the judges' work.[61]

The responses have been stronger in the political arena. The mayor of the city of Buenos Aires strongly criticized the 2005 release of a businessman accused of fraud, saying, "We must do away with these 'protectionist' theories that have brought on a level of horrible permissiveness and hurt the victims."[62] In July 2007, a Chilean politician accused supervisory judges of "being responsible for the climate of insecurity in which we live."[63] Another argued that "some judges' sentences are making them a danger to society and that is unacceptable."[64] News of this kind circulates constantly in the region.

As we have noted, in a number of countries, this situation led to the development of movements for legislative change that we identify with the idea of counter-reform. We use the term 'counter-reform' to refer to the legal changes made in the area of pretrial detention following the entry into force of the reforms. We will not use the term 'reform' here, as 'counter-reform' points to the fact that in many cases the legislative changes move away from the ideas that originally inspired the protective measures system, incorporating criteria and regulations that aim to facilitate the application of pretrial detention,

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[59] Latinobarómetro 2008 Report, pp. 21-24.

[60] "Procurador Lara critica libertad para Vásquez," *La Prensa*, http://www.laprensa.com.ni/archivo/2008/octubre/08/noticias/nacionales/288152.shtml

[61] "Sistema de oralidad presenta 'fragilidad' durante el proceso," *El Universo*, Guayaquil, 23 de junio de 2008, http://www.eluniverso.com/2008/06/23/0001/18/945438B7548E4DFDBE43B2CD805F1C25.html

[62] "Macri le apuntó a los jueces 'garantistas' que liberaron a Chabán," *El Clarín*, http://www.clarin.com/diario/2005/05/14/um/m-976362.htm

[63] "Directora de asociación de jueces refuta teoría de la puerta giratoria," 25 de agosto de 2008, *El Mercurio*.cl, http://diario.elmercurio.cl/detalle/index.asp?id={3f32a0f5-b5f4-429f-bec2-2e2940512f96}

[64] "Las penas del Infierno. Qué hay tras de las críticas a los jueces de garantía," 15 de julio de 2007, diario *La Nación* online, http://www.lanacion.cl/prontus_noticias/site/artic/20070714/pags/20070714231347.html

direct the judge to use it, and, in some cases, require that certain defendants be held. The following section describes the counter-reform positions that governments and criminal justice system operators have adopted in regard to pretrial detention. These positions range from substantive legal counter-reform to changes that impact their day-to-day use.

### *2. Changes to Pretrial Detention Regulations*

The counter-reform trend first emerged in early 2000. Though the changes cover a range of aspects and vary in scope, all of the modified dispositions aim to strengthen criminal prosecution.

Notable changes have been made to the system that regulates the use of pretrial detention. Many of the counter-reform initiatives focused on this protective measure, and most of the changes that have been passed affect its application.

Table 19 presents a summary of the main legal changes made in the area of pretrial detention in countries with reformed systems.

**Table 19**

CHANGES MADE IN THE AREA OF PERSONAL PROTECTIVE MEASURES BY COUNTRY AND YEAR

| Country | Law | Year |
|---|---|---|
| Argentina – Province of Buenos Aires | Law 13.449 | 2006 |
| Bolivia | Law 2.494 | 2003 |
| Chile | Law 20.074 | 2005 |
| | Law 20.253 | 2008 |
| Colombia | Law 1.142 | 2007 |
| Costa Rica | Law 8.589 | 2007 |
| Ecuador | Law 23-101 | 2003 |
| El Salvador | Decree No. 752 | 1999 |
| | Legislative Decree No. 487 | 2001 |
| | Legislative Decree No. 458 | 2004 |
| | Legislative Decree No. 386 | 2007 |
| Guatemala | Decree No. 30 | 2001 |
| | Decree No. 51 | 2002 |
| Honduras | Decree 223 | 2004 |
| Paraguay | Law 2.493 | 2004 |
| Venezuela | Official Gazette | 2001 |

| | | |
|---|---|---|
| | No. 5558 | |

*Source: Prepared by JSCA.*

Leaving aside ongoing reform processes such as those of Peru, Mexico, and Panama, the great majority of countries that implemented reforms have made changes in this area. Ten countries have modified the use of pretrial detention, and several of them have introduced more than one change. Most of the legal changes were introduced after 2003, that is, in the past five years.

This strong tendency towards transforming pretrial detention is directly linked to the poor perception of the criminal justice system's performance that is held by the public and the political class. Most countries in the region have established oral, public and adversarial trial systems as the central and most visible instance in the criminal process, but reformed systems operate very slowly and cases take too long to reach trial and then conviction.[65] Decisions regarding the use of pretrial detention have become the only visible response to crime.

Paradoxically, when adversarial systems increase the speed and visibility of their decisions, they generate confusion because it seems that people are freed very quickly. This is due to the fact that the supervisory judge is mandated to hear preliminary arguments and render a decision regarding protective measures soon after arrest. This swift release of some defendants has generated the impression that those who are "captured" are immediately "freed," which undermines confidence in the system. The same occurs when defendants who are charged with minor offenses that do not carry a prison sentence are convicted very quickly or in which alternative outcomes such as provisional suspension of the process are adopted. In many countries, this has led to the idea that the system works like a "revolving door."

As we have mentioned, the media has focused on this as a sign of the inefficiency and impunity of the criminal justice system. We will review the scope of these counter-reform efforts in more detail in the following sections.

### *2.1. Mandatory Sentences*

The first trend that can be identified in the regulation of pretrial detention in Latin America is the establishment or attempts to establish mandatory sentences for certain crimes. As we noted earlier in this study, mandatory sentencing was common under inquisitorial systems. The counter-reforms are extreme in this sense because their goal is the suppression of the principles of the protective logic and the exceptional use of pretrial detention. Mandatory sentencing means that, in general, a person will be placed in pretrial detention as a result of the decision to prosecute him/her.

Below we will review cases in which some countries have returned to mandatory sentencing or have tried to move in this direction by introducing similar approaches. We will then examine the breadth of these efforts and the extent to which the reformed rules are applied. Table 20 presents a summary of the three countries in the region that have introduced reforms of this nature.

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[65] Data on the duration of procedures that reach oral trial can be found in JSCA, *Reformas Procesales en América Latina: Resultados del Proyecto de Seguimiento*, op. cit., p. 168.

**TABLE 20**

COUNTER-REFORMS WITH REGARD TO MANDATORY SENTENCES

| Country | Regulation that Establishes Mandatory Sentences | Year Reform Was Introduced |
|---|---|---|
| Colombia | Articles 310, 313 and 314 of the Criminal Procedure Code of 2004 | 2007 |
| Ecuador | Article 173 - A of the Criminal Procedure Code of 2000 | 2004 |
| Paraguay | Article 245 of the Criminal Procedure Code of 1998 | 2004 |

In Colombia, Articles 310, 313, and 314 of Law 906 (introduced in 2004) were modified by Law 1142 of 2007, which established mandatory pretrial detention for certain crimes and prohibited alternative measures in such cases. The final paragraph of Article 314[66] prohibits substitutions for pretrial detention for crimes involving human trafficking, rape, domestic violence, aggravated robbery, aggravated theft, the manufacture of or trafficking in arms or ammunition, bribery, repeated concealment of stolen goods, aggravated fraud, and other actions. It does not allow for exceptions.

The intent of the Colombian legislation, which has been questioned a great deal, is very clear here. The most important challenge to this legislation was based on its constitutionality, and the paragraph cited above was in fact struck by the Constitutional Court, which found as follows in sentence C-318-08:

*"6.5.5. A generalized and absolute exclusion of the possibility of substituting imprisonment with house arrest for a wide range of crimes and in regard to subjects that merit special protection under the sole criterion of the abstract seriousness of the crime and its potential for impacting citizen security leads*

[66] The original text of Article 314 is as follows: Pretrial detention in a prison facility may not be replaced with house arrest when the charge refers to the following crimes: those that fall under the jurisdiction of criminal trial judges in specialized circuits or the entities acting as such; trafficking of immigrants; carnal knowledge or forced sexual acts; domestic violence; aggravated robbery; aggravated theft; aggravated fraud; the use of false documents related to stolen vehicles; the manufacture, trafficking and carrying of firearms or ammunition for personal use when accompanied by the crime of conspiracy or where the defendants have current sentences against them for the same crimes; the manufacture, trafficking and carrying of arms and ammunition that are exclusively for the use of the armed forces; the manufacture, importation, trafficking, possession and use of chemical, biological, and nuclear weapons; embezzlement by appropriation in an amount greater than fifty (50) minimum legal monthly salaries; Conclusion: deliberate bribery; unintentional bribery; bribery through giving or offering; repeated, continual concealment; concealment by hiding or covering up the crime of aggravated robbery, concealment by hiding or covering up aggravated theft along with conspiracy to commit a crime; concealment involving a motor vehicle or its essential parts or the goods or fuel that they contain. (*No procederá la sustitución de la detención preventiva en establecimiento carcelario, por detención domiciliaria cuando la imputación se refiera a los siguientes delitos: Los de competencia de los jueces penales del circuito especializados o quien haga sus veces, Tráfico de migrantes; Acceso carnal o actos sexuales con incapaz de resistir; Violencia intrafamiliar; Hurto calificado; Hurto agravado; Estafa agravada; Uso de documentos falsos relacionados con medios motorizados hurtados; Fabricación, tráfico y porte de armas de fuego o municiones de uso personal, cuando concurra con el delito de concierto para delinquir, o los imputados registren sentencias condenatorias vigentes por los mismos delitos; Fabricación, tráfico y porte de armas y municiones de uso privativo de las fuerzas armadas; Fabricación, importación, tráfico, posesión y uso de armas químicas, biológicas y nucleares; Peculado por apropiación en cuantía superior a cincuenta (50) salarios mínimos legales mensuales; Concusión: Cohecho propio: Cohecho impropio; Cohecho por dar u ofrecer; Receptación repetida, continua; Receptación para ocultar o encubrir el delito de hurto calificado, la receptación para ocultar o encubrir el hurto calificado en concurso con el concierto para delinquir, receptación sobre medio motorizado o sus partes esenciales, o sobre mercancía o combustible que se lleve en ellos.*)

*to unjustifiable situations of inequity (Una exclusión generalizada y absoluta de la posibilidad de sustitución de la medida de detención en establecimiento carcelario por la domiciliaria, para un amplio catálogo de delitos, y en relación con éstos sujetos merecedores de especial protección, bajo el único criterio de la gravedad abstracta del delito y de su potencialidad de afectación de la seguridad ciudadana, conlleva a situaciones de inequidad injustificables).*"

However, this decision only affects numerals 2, 3, 4, and 5 of Article 314,[67] leaving numeral 1 in tact: "When house arrest is sufficient to meet the objectives for protection, which shall be proved by the person who requests the substitution and ruled on by the judge during the respective hearing based on the defendant's personal, professional, family, or social life. (*Cuando para el cumplimiento de los fines previstos para la medida de aseguramiento sea suficiente la reclusión en el lugar de residencia, aspecto que será fundamentado por quien solicite la sustitución y decidido por el juez en la respectiva audiencia de imposición, en atención a la vida personal, laboral, familiar o social del imputado).*"

Of the five cases in which Colombian judges originally had the power to use an alternative to pretrial detention, numeral 1 of Article 314 granted the greatest level of discretion. Specifically, it allowed the judge to make a specific projection regarding the defendant's situation and to order substitute protective measures without intervention by the legislator and with no legal limits.

In contrast, numerals 2 through 5 have a fairly limited application. Numeral 2 refers to defendants over the age of 65; numeral 3 refers to defendants who are about to give birth; numeral 4 refers to defendants who are ill; and numeral 5 applies heads of household who have a severely disabled child.

The prohibition is clearly fully in force in regard to cases in which the regulatory formulation gave the judge more room in which to exercise his/her discretion. In practice, it has stripped the judge of a great deal of his/her power to examine the specific circumstances of a case and use discretion. It has left only the option of introducing a substitution in specific cases in which the role of the judge is reduced to verifying that certain objective conditions are met.

In Ecuador, the figure of *detención en firme* was incorporated into the country's Procedure Code with the 2004 reform. While it was found unconstitutional by the Constitutional Court in 2006, we feel that it is important to review the figure because it was in force for two full years and is a clear example of the trend towards mandatory sentences.[68]

*Detención en firme* involved taking the defendant into custody as soon as charges were laid without exception. The judge was to follow the explicit mandate of the law and order pretrial detention *ex oficio* when issuing the summons to trial. In practice, this meant that once the judge made a ruling regarding the summons to trial, the defendant was remanded until a sentence was issued. The defendant was detained "at the disposition of justice" for as long as this process took and throughout the trial.

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[67] "6.5.8. As such, in these cases (numerals 2, 3, 4, 5 of Article 314 of the CPR), the absolution prohibition against substituting the protective measure that the paragraph of Article 27 of Law 1142 of 2007 introduces regarding the catalogue of crimes related therein cannot operate. (*De manera que frente a estos eventos (numerales 2, 3, 4, 5 del artículo 314 C.P.P.) no puede operar la prohibición absoluta de sustitución de la medida de aseguramiento que introduce el parágrafo del artículo 27 de la Ley 1142 de 2007 respecto del catálogo de delitos allí relacionado….*)"

[68] Constitutional Court of Ecuador, Sentence No. 0002-2005-TC, 26 September 2006, published in Official Record No. 382, dated 23 October of the same year.

The most concerning aspect of this institution, aside from the fact that it was mandatory and was to be decreed *ex oficio*, is the type of cases in which it was applied. It would be reasonable to think that such a serious restriction on the defendant's freedom would be reserved for the most serious of crimes. However, the only exceptions to this practice were cases involving individuals who were accused of being an accessory after the fact or of committing a crime that carried a sentence of less than one year.

Finally, in 2004, Law 2493 modified Article 245 of the Procedure Code of Paraguay, establishing that alternatives to pretrial detention were not admissible "when the act is typified as a crime that carries the weight of a person's integrity as the result of harmful conduct," (*cuando el hecho sea tipificado como crimen que lleve aparejado la ponderación de la vida una integridad de la persona como resultado de una conducta dolosa)* and when the defendant falls under Article 75 No. 3 of the Criminal Code, which is when "given his/her personality and the circumstances of the crime, he/she shows a tendency to commit serious crimes that result in serious psychological, physical or economic damages to the victim *(atendiendo a su personalidad y a las circunstancias del hecho, manifieste una tendencia a realizar hechos punibles de importancia, que conlleven para la víctima graves daños síquicos, físicos o económicos).*"

However, the regulation clearly states that no measure apart from pretrial detention can be applied and that it must be applied in cases involving the crimes mentioned above. The formula utilized by the legislation in this regulation is fairly broad in that it covers the various forms of homicide as well as acts that result in harm to the victim's integrity.

In addition, the original version of Nicaragua's Criminal Procedure Code included mandatory sentences. Article 173 of Law 406, which was passed 13 November 2001, states that material evidence and the need for protection must be established in order to apply pretrial detention. As we have already mentioned, this includes flight risk, threats of obstruction of the investigation, and danger of recidivism. However, the final paragraph of that article states that:

In any case, the judge **will order** the defendant held in pretrial detention **without the possibility of substituting any other protective measure** when the case involves serious crimes related to **the use or trafficking of stupefacient, psychotropic and other controlled substances or the laundering of money and assets procured through illicit activities.**
(*En todo caso el juez **decretará** la prisión preventiva, **sin que pueda ser sustituida por otra medida cautelar**, cuando se trate de delitos graves relacionados con el **consumo o tráfico de estupefacientes**, **sicotrópicos y otras sustancias controladas o con lavado de dinero y activos provenientes de actividades ilícitas.)***[69]

This regulation clearly indicates that there be no substitution for pretrial detention unless the judge "decrees it" in cases of drug trafficking and money laundering. In other words, there is a legal mandate that the defendants should be held in pretrial detention in cases involving such crimes.

*2.2. Prohibition against Substituting Other Measures for Pretrial Detention*

One of the consequences of the general principle of the proportionality of pretrial detention is the existence of measures that fall somewhere between imprisonment and release. As we have seen, the

[69] Article 173 final section, Criminal Procedure Code of Nicaragua, Law No. 406 of 2001. Emphasis added.

reformed legislation of these countries has moved in a similar direction in this regard.[70]

In several criminal justice systems, counter-reform efforts led to the introduction of changes that look to impede or limit the use of protective measures other than pretrial detention. In three countries, the legislation establishes that no substitutions are to be allowed in cases that involve certain crimes.

a) In El Salvador, Article 294 has been modified four times (in 1999, 2001, 2004, and 2007). The prohibition against substitutions for pretrial detention was added for crimes mentioned in the law on money laundering and drug-related crimes. The number of crimes for which there may be no substitution for pretrial detention has increased several times. The list is similar to Colombia's and is mainly composed of crimes against life and integrity, the integrity of public officials, and crimes against property involving violence. Article 294 mentions 13 types of crimes.

b) In Guatemala, the changes to the Criminal Procedure Code include Article 264, which establishes a general prohibition against substituting pretrial detention in trials involving recidivists or habitual criminals. It also identifies a total of ten crimes for which pretrial detention cannot be revoked and replaced with a different protective measure.[71]

c) Decree 9-99-E, which establishes the Criminal Procedure Code of 1999 of Honduras, was modified by Decree 223-2004, which entered into force on 20 January 2005. This legislation adds a paragraph to Article 184 stating that other protective measures may not be used in cases involving members of organized crime or other illicit associations.

Two criteria have been used to guide the selection of the types of crimes for which pretrial detention cannot be replaced by a different protective measure. On the one hand, they are crimes that carry a high sentence. For example, if we review the legislation listed above, we find that the prohibition includes crimes like homicide and rape. On the other, it covers common crimes that do not carry a significant sentence but have a high impact on public opinion, such as repeated concealment of stolen goods. The legitimacy of the criminal justice system is at risk in both cases, and legislators have made it clear that individuals who are charged with such crimes should remain in custody.

### *2.3. New Reasons for Applying Pretrial Detention*

As was noted in the introduction to this study, criminal procedure reform regulated the justifications for the use of pretrial detention from a protective perspective that is consistent with the idea of protecting and ensuring the results of the criminal procedure. In keeping with that notion, the reformed systems included reasons aimed at reinforcing that logic, such as flight risk and the risk of obstructing or representing a danger to the investigation.

However, the counter-reform movement has looked to alter and, to a certain degree, distort the

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[70] See supra, III 1.3.

[71] "None of the substitutive measures listed above may be granted in procedures involving repeat offenders or career criminals or in cases involving homicide, murder, parricide, aggravated rape, rape, rape of a minor under the age of 12, any type of kidnapping, sabotage, aggravated robbery, and aggravated theft. (*No podrá concederse ninguna de las medidas sustitutivas enumeradas anteriormente en procesos instruidos contra reincidentes o delincuentes habituales, o por delitos de homicidio doloso, asesinato, parricidio, violación agravada, violación calificada, violación de menor de doce años de edad, plagio o secuestro en todas sus formas, sabotaje, robo agravado y hurto agravado*.)"

regulation of pretrial detention, incorporating significant changes to the justifications for applying this protective measure that directed the judge's analysis with a clear tendency to facilitate the use of pretrial detention.

The issue of flight risk has undergone the most changes in criminal procedure legislation, including that of Bolivia, Chile, Colombia, Guatemala, and Venezuela. The counter-reforms have focused on increasing the likelihood that pretrial detention will be applied by turning the focus to the seriousness of the crime or crimes, the sentence, and the defendant's record.

In several countries, the legislation mandates the judge to consider the way in which the acts were committed and the sentence that the crime carries in an effort to restrict the judge's latitude. In Chile, this is exemplified by the "Short Agenda" (Law No. 20.235 of March 2008). Article 140 of the CPP establishes that "In order to decide whether or not the defendant's freedom poses a danger to society, the **court shall give special consideration to** the following circumstances: the seriousness of the sentence assigned to the crime; the number of crimes with which the defendant is charged and their nature; the existence of pending cases against the defendant; and whether or not he acted as part of a group or gang (*Para estimar si la libertad del imputado resulta o no peligrosa para la seguridad de la sociedad, el* ***tribunal deberá considerar especialmente*** *alguna de las siguientes circunstancias: la gravedad de la pena asignada al delito; el número de delitos que se le imputare y el carácter de los mismos; la existencia de procesos pendientes, y el hecho de haber actuado en grupo o pandilla*)."[72] This same concept appears in Colombia's criminal procedure legislation. Law 1.142 of 2007 expressly establishes that greater consideration should be given to the "seriousness and mode of conduct and applicable sentence (*la gravedad y modalidad de la conducta y la pena imponible*)."

The most extreme example of this is Venezuela's 2001 counter-reform of the Criminal Procedure Statute. The new statute establishes that pretrial detention should be ordered when there is a flight risk in cases involving a crime that carries a maximum sentence of ten years or more.[73] This brings this type of reforms much closer to the mandatory sentencing regime because it establishes that there is a need for protection in each trial of a case involving a crime that carries such a sentence.

In addition to broadening the application of pretrial detention by modifying the traditional reasons for its use, the counter-reform efforts have looked to incorporate criteria with ends that go beyond the protective logic, such as the danger posed by the defendant, which has been added in several countries. An example is the inclusion of the "danger to the community" justification that was introduced in the most recent reform of the Colombian Criminal Procedure Code in 2007. The legislation states that this reason for ordering a defendant to be held in pretrial detention will apply when "the seriousness and mode of the crime is sufficient"[74] and allows that the judge "could" consider other criteria.

In other cases, autonomous reasons that are more closely related to the responsible party than to the crime have been incorporated or recognized. This is the case of Article 234 ter of Bolivia's Criminal Procedure Code, which adds recidivism to the list of justifications for using this protective measure.[75]

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[72] In Chile, the danger that the defendant poses to the society allows for three possibilities (risk of recidivism, flight and social alarm). Based on this modification, flight risk was separated conceptually from danger to society. More detailed information on this point is provided in the Chile country report that forms part of this project.

[73] Article 251, paragraph 1, Criminal Procedure Statute of Venezuela.

[74] Article 310, Law No. 906 of 2004, modified in 2007.

[75] Article 234 ter of Law 1.970, incorporated by Law 2.494 of 2003.

Chile's reformed Criminal Procedure Code allowed for the possibility of considering the risk of recidivism as part of the danger to society justification for pretrial detention on the level of doctrine, but the last version of the most recent reform (2008) made it clear that this justification was to be considered legitimate. Using a questionable legislative technique, this counter-reform set out criteria for weighing each of these justifications with a marked tendency towards including the defendant's history in the decision-making process.

## V. FINAL CONSIDERATIONS

Despite the wide range of realities and contexts presented by the Latin American countries that we have considered in this study, we have been able to identify several common trends that point us towards some findings. We were able to show that pretrial detention was used widely prior to the reforms in keeping with the principles and logics of the inquisitorial systems, which were inspired by very similar ideas in all of the countries of the region. Pretrial detention was used as the first and main response to crime in many legal systems. This led to the statistics presented in Table 1, which indicate that unsentenced inmates represented the largest population within the region's prisons.

This situation generated intense criticism of the problematic use of incarceration. The criminal justice reforms that have been implemented over the past 20 years in Latin America focused in part on effecting radical change in use of and regulations regarding pretrial detention. An effort was made to change the operational logic in order to make it an institution that was respectful of human rights. The reformed legislation established the principle of the exceptional and proportional use of this protective measure as well as regulatory limits that were consistent with the objective of protecting the development of the trial and its outcomes, moving away from the dominant logic of the inquisitorial system. This generated a "commitment" on the part of reformed criminal procedure systems, which had to comply once they entered into force in their respective countries. The expectation was that the use of pretrial detention would drop to acceptable levels that reflected the obligations established in international human rights agreements once said judicial systems were implemented.

We have stated that in general the processes that were used to introduce adversarial systems in Latin America had similar objectives and guiding principles. Based on the information presented, we concluded that the impact of the criminal procedure reform on pretrial detention was generally positive in the beginning. This suggests that the reform's "commitment" in this area was fulfilled, at least partially. When the results are analyzed not as a general trend but with greater disaggregation, some significant differences between the countries can be observed. It is not our intention to present an exhaustive review of the reasons for those differences. In fact, we believe that there is no solid empirical data that would allow us to expand upon this point to a significant degree. We do believe that it is important to mention some factors that have had a very significant impact on the rationalization of the use of pretrial detention in our experience.

Diverse empirical evidence indicates that one of the variables that have had the greatest impact on the use of pretrial detention has to do with the capacity of the reform process to install a system of oral hearings at the investigation stage during which matters such as requests regarding personal protective measures are resolved. The criminal procedure reform was not capable (at least initially) of introducing oral pretrial stages in a significant number of countries. This significantly weakened the guarantee

function that was to be reinforced by creating the supervisory judge as a key actor in the new system.[76] The lack of oral procedures during the preliminary stages impeded the establishment of a strong litigation system in which in-depth discussions of the true need to establish personal protection measures could be held and where the decisions that were made could be publically justified. This facilitated the return to more or less automatic decision systems in which pretrial detention was a result of the existence of a process against a defendant if the crime involved was of a certain level of seriousness. The lack of hearings at the investigation stage leads to less quality control by the judge of the defendant's situation. The use of written procedures generates a lower-quality exchange in which situations such as the delegation of functions, formal or written defenses, and the logic of the inquisitorial system, which persisted in systems that used written procedures, render the judge's role almost nonexistent and subject the defendant to extensive periods of time in jail without a sentence.

On the other hand, over the past few years, several countries have started a very serious process of introducing oral procedures during preliminary stages as a way of expanding the adversarial logic in reformed processes and solving a set of problems that were generated in its practical operation, including the excessive use of pretrial detention. In all of these experiences, establishing that the discussion of personal protective measures should take place during a hearing has produced, in the short term, an effect of rationalizing the use of pretrial detention. JSCA has documented such experiences in the Province of Buenos Aires (Mar del Plata),[77] Costa Rica,[78] Guatemala,[79] and Ecuador.[80] Also, important decreases in the use of pretrial detention have been observed in countries like Colombia and Chile, where hearings have been used to facilitate the discussion of personal protective measures since the beginning of the reform.

We believe that the introduction of oral procedures during pretrial stages is one of the factors that have the greatest impact on the transformation of old practices in the area of pretrial detention. There is therefore a need to expand the implementation of hearings in places in which they are not systematically used in all cases. It is important to keep in mind that the establishment of hearings for the discussion of protective measures does not automatically lead to results in this area. The experience of all of the countries mentioned above is that, in addition to the hearing, the system must take on two parallel challenges: establishing management systems in the institutions that allow for the effective development of these hearings; and adequate training of the actors who take part in the hearings so that they can be effectively prepared in a manner that is consistent with their objective.

We feel that there is a second factor that is closely tied to the previous one that has a significant impact on the rationalization of the use of pretrial detention. This second factor is related to strengthening the work of the region's public defender's offices, not merely through an increase of human, material, and

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[76] See JSCA, *Reformas Procesales en América Latina: Resultados del Proyecto de Seguimiento*, op. cit. pp. 153-157.

[77] See Luciano Hazan and Cristián Riego, "La Oralidad en las Etapas Previas al Juicio: La Experiencia de Mar del Plata" in *Reformas Procesales en América Latina: Resultados del Proyecto de Seguimiento IV Etapa*, JSCA, Santiago 2007, pp. 257-294.

[78] See Mauricio Duce, "La Oralidad en las Etapas Previas al Juicio: La Experiencia del Circuito Judicial de Guanacaste, Costa Rica" in *Reformas Procesales en América Latina: Resultados del Proyecto de Seguimiento IV Etapa*, op.cit. pp. 295-314.

[79] See Mauricio Duce, "La Oralidad en las Etapas Previas al Juicio: La Experiencia de Quetzaltenango, Guatemala, in Reformas Procesales" in *América Latina: Resultados del Proyecto de Seguimiento IV Etapa*, op. cit., pp. 343-362.

[80] See Mauricio Duce, "La Oralidad en las Etapas Previas al Juicio: La Experiencia de Ciudad de Cuenca, Ecuador," in *Reformas Procesales en América Latina: Resultados del Proyecto de Seguimiento IV Etapa*, op. cit., pp. 315-361. See also Diego Zalamea, *La Reforma Procesal Penal en Ecuador: Experiencias de Innovación*, JSCA, Santiago, 2007, pp. 63-95.

budgetary resources, but fundamentally by improving public defenders' capacity to produce information and to litigate during protective measures hearings. As a result, a strengthening process does not necessarily involve more resources (though in some cases it may be necessary). Instead, it is a matter of designing more effective methodologies and training public defenders more effectively, particularly in regard to discussions of the applicability of pretrial detention.

Along with these positive factors, we have had the opportunity to observe the development of a trend towards the counter-reform of the legal regime of pretrial detention. This phenomenon could have a strong impact in terms of reversing some of the results that have been obtained in the region. This is a very recent process, and the available empirical data does not allow us to make very precise judgments regarding the real impact of the counter-reform efforts. We believe that specific studies can be conducted in the near future to measure the effects of these legal changes.

In addition, above and beyond legal reforms, a social environment has developed in most countries in the region in which judges' decisions regarding pretrial detention are closely scrutinized. The perception of impunity inspired by the release of defendants who have been arrested and identified by witnesses and the growing climate of insecurity generated in part by the same phenomenon have placed a great deal of pressure on judges to apply pretrial detention independent of the real danger that the defendant may pose to the process. This climate of keen observation and criticism of investigative judges' decisions regarding pretrial detention generates different kinds of pressure, making factors external to the law take on an important role for the decision that is to be made in a specific case.

Both the counter-reform and the context described represent a serious threat to the achievements that have been obtained in reformed procedures and to some of the positive experiences that we have described. We believe that the greatest challenge that reformed systems will face in the coming years will be to continue to move forward in an extremely complex social and political environment that forces them to find much more innovative ways of confronting the issue of pretrial detention that are more sensitive to citizens' demands. We do not feel that it will be possible to promote an agenda for rationalizing the use of pretrial detention if criminal procedure systems fail to demonstrate that they can effectively handle prosecution and the application of personal protection measures. One example of this shortcoming is the outcomes obtained in cases in which personal protective measures other than pretrial detention are applied. If our criminal justice systems are unable to endow said measures with effective oversight to ensure that their objectives will be met, we cannot expect them to be legitimated as true alternatives in the eyes of the community and thus as real substitutes for pretrial detention. Similarly, if our systems fail to generate increasingly trustworthy data when making decisions about people's freedom, there exist significant opportunities for those decisions to be adopted as a result of prejudices or pressures.

It is our hope that this work will contribute to a discussion of the use of pretrial detention in our countries that is based on empirical data that describes what is actually happening and that it introduces some reflections regarding future discussions that will develop in this area.