

Pre-trial detention and the exercise of judicial independence

A comparative analysis

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Pre-trial detention, a precautionary measure that may be imposed before a defendant is convicted or absolved of a crime, is a crucial area when it comes to the exercise of judicial independence. Both the prosecutor who chooses whether or not to request it, and the judge who rules to grant or deny that request, must evaluate the defendant's circumstances and decide whether the case meets the legal requirements for imposing pre-trial detention. This evaluation must be impartial, which means that the prosecutor and judge must be able to exercise due independence.

Independence is often defined in the negative, for example as the absence of pressures or interference that would preclude the judicial operator from acting according to their good judgment. The findings of this study suggest that independence should also be defined positively, as the presence of factors such as institutional safeguards to protect judges and prosecutors against pressures that interfere with their work and their ability to act impartially. Without such safeguards, prosecutors and judges do not have the support system they need to act independently and to deflect pressures that hamper their work.

This study examined factors both internal and external to the justice system that prevent judges and prosecutors from exercising independence in their decisions concerning the pre-trial detention of a defendant.

While not a formal prison sentence, from the defendant's standpoint pre-trial detention is tantamount to an anticipated sentence. Even though international human rights instruments—of which all four states included in the study are signatories—characterize pre-trial detention as an exceptional precautionary measure, the data compiled in the national case studies show that in practice, it is neither the exception, nor even uncommon.

Tens of thousands of people in each of the four countries studied are currently in pre-trial detention, awaiting a ruling on their guilt or innocence. Citizens in pre-trial detention are deprived of their liberty in advance of a sentence that has not yet been handed down and may or may not be the final outcome of the proceeding. Given the prison conditions in our countries, these prisoners find themselves in an especially harsh situation, since individuals in pre-trial detention are not housed separately from convicted offenders.

According to Article 9.3 of the International Covenant on Civil and Political Rights, “[i]t shall not be the general rule that persons awaiting trial shall be detained in custody.” Similarly the United Nations Standard Minimum Rules for Non-custodial Measures (known as the Tokyo rules) stipulate that “[p]re-trial detention shall be used as a means of last resort....” Beyond the elevated statistics, an examination of the process surrounding pre-trial detention suggests that, while it may not be the general rule, it is certainly not used as a last resort. Indeed in some cases it is the first.

In Latin America, the prosecutor and judge assigned to a case make presumptions early in the proceeding as to the liability of the accused and impose pre-trial detention for crimes of a certain severity—based on sentencing guidelines—and when the accused’s liability appears likely. In a criminal justice system where the backlog of cases threatens to overwhelm the capacity of the judicial apparatus, imposing pre-trial detention as a bureaucratic matter of course fills the prisons with inmates who have not been convicted and in most cases cannot afford to pay an attorney to activate their legal proceedings.

To a certain extent, this state of affairs is the result of the domestic laws of some countries, which fail to tailor the requirements for pre-trial detention to international law standards that limit its use to cases where freeing the accused could jeopardize the legal proceeding due to flight risk or result in tampering with evidence. According to Article 253(3) of the Criminal Procedures Code of Peru, for example, the purpose of the precautionary measure is to “prevent re-offending,” while the jurisprudence has emphasized the use of pre-trial detention to “ensure future penal execution.” Similarly, under Article 308 of Colombia’s criminal procedures code on the application of pre-trial detention stipulates that “the accused poses a danger to public safety or that of the victim.” While this language is vague and leaves much room for interpretation, the Constitutional Court has interpreted the requirements for imposing pre-trial detention more narrowly, that is, it must be an exceptional measure.

The main finding of the study,¹ however, is that in some cases pre-trial detention results from pressures brought to bear on prosecutors and judges that keep them from acting impartially and exercising the independence inherent to their positions.² These pressures come into play at two levels. The first is a climate—internal and external to the justice system—that favors the broad application of pre-trial detention and resists

¹ The cases examined were not chosen for their representativeness but rather the need to illustrate how pressures operate in high-profile cases. As a result, the findings are not intended to be generalized to all cases of pre-trial detention, but rather to exemplify how decisions about pre-trial detention are made, particularly in cases with social repercussions.

² Some of these pressures have legitimate grounds such as the exercise of freedom of expression. Others are patently illegitimate, such as that brought to bear by a government official or superior court judge over the judge of record in a particular case. This discussion addresses both types of pressure.

using it only as an exceptional measure. Second, that the justice system habitually discriminates against the most vulnerable while benefiting those with more means has a powerful influence on decision-making about pre-trial detention.³ As far as the latter, as noted in the Colombia report, the qualitative data gathered reveals “an unreasonable use of pre-trial detention, at least in specific cases where judicial officials find themselves under pressure.”

The discussion that follows aims to 1) explore this finding in light of the information gleaned from the national case studies; 2) examine the institutional weaknesses that hamper efforts to effectively counteract this climate and aberrant practices; and 3) explore areas where work needs to be done to surmount this problem.*

1. Climate and pressures in relation to pre-trial detention

Presumption of innocence vs. citizen insecurity

In the countries studied, prosecutors and judges operate in an atmosphere that frequently equates the status of defendant with that of detainee. This means that society has “naturalized” imprisonment as the inherent consequence when the police have accused someone of a crime, a prosecutor has asked that a case be opened, and a judge has accepted that request.

The mindset that naturalizes imprisonment in such circumstances leads police chiefs, editorialists and politicians to ask: Why did the judge release him if he was arrested because he committed a crime? It leaves no room for a presumption of innocence, in which no one is guilty until they have been convicted at trial—a basic due process guarantee. It would seem that, in the view of some sectors at least, the presumption of innocence ends upon arrest.

This perception triggers widespread social indignation when someone—usually police sources—say that the detainee was caught in flagrante delicto. This type of imputation—which the media takes as a proven fact—is enough to generate confusion, rejection, and even suspicion when the courts choose not to impose pre-trial detention. It is ironic that widespread public distrust of the justice system does not lead people to speculate that the police’s assertion concerning the case could be part of a set-up and even an attempt to benefit the actual perpetrator of the crime. The

³ Corruption could be one explanation for why pressures are brought to bear on the justice system. It would be improper and forced to regard bribing the judge of jurisdiction to decide on a case of pre-trial detention as a pressure. Therefore this issue falls outside the scope of this study.

* The author is grateful for the comments and suggestions from Katya Salazar, Leonor Arteaga, Gabriel Chávez-Tafur and Miguel de la Rota.

police need only accuse someone of guilt for it to be regarded as true and trigger demands for that person's detention.

This mindset feeds the social climate in which justice system operators must discharge their duties. Several factors contribute to it, perhaps the most important and persistent being growing citizen insecurity—and above all—a fast-growing *perception* of insecurity—as a result of rising crime in our countries.

The particular circumstances in this social climate can shift attention toward certain types of crime. As the case of the night watchmen of Espinar in the Peru illustrates, chance events can exacerbate a general sense of insecurity. While more entrenched social factors influence the cases that generally pass through the justice system, others linked to a specific circumstance—such as a repeat offender tied to several incidents or particular crime wave—have direct repercussions for the criminal case in question and possibly for future cases that are seen as similar.

Pernicious interference by the authorities and politicians

The way in which different stakeholders interpret events does more to fuel this social climate than the events themselves. According to the national studies, the authorities and the media are the most influential voices in this regard. Seeking to further their own particular interests, they insist on—and sometimes inflate—the enormity of the crime and insecurity and call for rigorous and harsh law enforcement. This discourse includes specific references to the need for a broader application of pre-trial detention:⁴

Demands that criminal systems take a tougher stance, and the resulting calls for broad application of pre-trial detention, frequently influence the independence of judges and prosecutors who must make decisions under intense social and political pressure.⁵

Although the political discourse—from the government and the opposition—has taken up the banner of insecurity and the attendant need for stronger law enforcement, politicians have been reluctant to address state policies that could have an impact on the social causes of crime. The use of pre-trial detention has been a centerpiece of this deliberately biased picture. As exemplified in the report on Argentina, opposition politicians position themselves as the voice of public sentiment about insecurity, while

⁴ In the Peruvian case, for example, see <http://peru21.pe/noticia/663416/exigen-detencion-inmediata-cacho>.

⁵ Due Process of Law Foundation, *Uso abusivo de la prisión preventiva en las Américas*. Report presented at the 146th regular session of the Inter-American Commission on Human Rights (Washington, D.C., November 1, 2012), p. 20.

government officials frequently shift the problem to the justice system in order to avoid their own direct responsibility in tackling the underlying causes of crime.

High level judicial officials often play an active role in creating and maintaining this climate. In their public statements, Supreme Court presidents and attorney generals, or their spokespeople, have referred to the “punitive populism” embraced by many politicians in the region, echoing calls for “strict enforcement” of the law which, it would appear, leaves no room for any precautionary measure other than pre-trial detention. With these messages appearing time and again in the media, the justice system need not hand down formal instructions or guidance from the highest levels.⁶ Judicial operators need only read the newspapers or watch the TV news to be put on notice as to what the highest authorities expect of them in this regard.

In Peru, the judicial branch’s Office of Internal Control (OCMA)—headed by a member of the Supreme Court who became its president in December 2012—has deliberately inflamed the social climate with constant announcements of disciplinary proceedings against judges who failed to impose pre-trial detention or have granted conditional release to the accused.⁷

Low approval levels

Do you have a favorable or unfavorable opinion of the Colombian judicial system? When Gallup Colombia put this question to its respondents in December 2012, just one in four (25%) of those interviewed said “favorable,” despite the fact that the approval level of the justice system in that country has been much higher than in previous years. According to a December 2012 survey by Ipsos Apoyo, public approval of the judiciary in Peru had remained static at 19%. Similarly, in February 2012, the Market polling company found that just 21% of respondents believed that the Ecuadoran justice system acted with independence. And in May 2012, the polling firm Ipsos Mora y Araujo posed the following question in Argentina *Do judges contribute a lot, some, or not at all, or are they detrimental to the country.* The combined response showed that over half of those surveyed had responded, “not at all” (39%) and “are detrimental” (12%).

Latinobarómetro conducts an annual poll on the level of public trust in the judiciary in the countries of the region. In 2010, 34% of respondents in Argentina and Colombia responded “a lot” or “some,” while that figure was 21% in Ecuador, and just 15% in Peru. Across the region, just 29% of those interviewed responded favorably to the same question, a slight drop relative to the regional average of 31% in 1996 and 2010. Significantly, since 1996 the regional average of favorable responses has never exceeded 36%. In short, at least two out of three Latin American citizens have no confidence in the justice system in their country.

⁶ Even so, as the Argentina case study indicates, the Office of the General Prosecutor of Buenos Aires Province felt compelled to issue Resolution 752/2000, which stipulates that prosecutors and judicial agents must exhaust legal remedies “with respect to the legal rulings granting the benefit of noncustodial measures, even in those cases that are based on the declaration of unconstitutionality of any of the precepts that govern it.”

⁷ See, for example: <http://peru21.pe/noticia/660655/investigaran-jueza-caso-cacho>.

As the Colombian case study suggests, high-level officials have lent their voices to demands for more rigorous law enforcement measures, driven perhaps, by their quest for social legitimation. Given the overall high levels of public dissatisfaction with the justice system's performance in the countries studied (despite individual variations), which is regularly evidenced in public opinion polls (see box), it should come as no surprise that the judicial authorities would attempt to appear sympathetic to popular sentiment in order to garner social acceptance and legitimation. While they are unlikely to achieve this goal, the collateral effect of this posture is felt in the justice system itself since the message they are conveying internally is inconsistent with the legal standards and principles that must guide the judge's actions.

Media interference

The media contribute to this social climate in two ways. First, they publicize the discourse of officials who espouse broad application of pre-trial detention. Second, they actively fuel this sentiment in the way they handle information and through editorials.

Columns and editorials on the problem of citizen insecurity routinely express indignation and criticism when a judge issues a summons to appear in a high profile case. But perhaps the crux of the problem lies in the way the news is produced. Sensational headlines, biased reporting of facts and judicial decisions, and the use of the victims or their relatives to inflame the reader are just some of the tools the media employ to expand their readership, while propagating the discourse calling for more rigorous law enforcement on the part of the criminal justice system (see box).

JUSTICE and the MEDIA: two versions

According to judicial officials, the media meddle in matters that should be reserved for the branch of government constitutionally vested with the power to resolve conflicts. Journalism, they assert, has encroached on this terrain through pressure or interference, rather than confining itself, as in the past, to the realm of reporting on the progress of a case as it moves through the justice system.

In this new role, the media pursue what in practice becomes a parallel process in cases that have attracted public attention and media coverage. They investigate the facts, question witnesses, weigh evidence, examine and debate hypotheses, and pronounce on guilt or innocence. In the course of these activities, media outlets are not always guided by the legitimate aim of reporting, but rather by other interests such as expanding circulation or furthering the economic and political interests of the owner. In other cases, corrupt journalists sell their services to anyone willing to pay for them.

Judicial officials frequently point to the serious consequences this type of journalistic behavior has for the administration of justice:

- The parallel process launched by the media includes no due process guarantees, beginning with the presumption of innocence. Citizens whose reputations are unfairly tarnished by libelous media reports have little recourse to public reparations.

- Cases are “tried” in the media by people who lack the technical expertise to professionally evaluate the facts, evidence, and the applicable law. The media disregard valid legal arguments in favor of lay criteria that may resonate at the level of common sense but are neither appropriate nor legitimate for solving the matter in question.
- Despite these serious problems, it is this parallel process, rather than the formal proceeding, that is taken up and debated at the level of public opinion. Hampered by the confidentiality of the investigation in some cases, and the tradition of judicial discretion in all cases, prosecutors and judges prosecute these cases aware that the media are simultaneously reporting a version that may be very different from the one they are dealing with. Meanwhile, the public image of the case evolves based on what the media is reporting, which may be far removed from what is actually occurring in the judicial proceeding itself.
- This contributes to a social climate in which the prosecutor and judge find it increasingly difficult to proceed with equanimity and independence. The media generate or fuel expectations and pressures in one direction or the other. When it comes time for the prosecutor or judge to make an important decision in a case that is playing out in the media, there is already an expectation—thanks to the climate created by the reporting that has taken place—as to what that decision should be.
- As a result, when the legal outcome of a case diverges from the conclusion reached in the parallel process, suspicions fall on the judge’s performance, even in cases where the media do not insinuate this directly. To the extent that the discrepancies between the two processes recur in cases that are a matter of public opinion whether because of their nature or the way the media has handled them, the judiciary becomes increasingly discredited.
- Aware of the dissatisfaction with the justice system, the media encourage public skepticism about its performance based on cases in which the judicial outcome differs from the conclusion reached in the parallel process. The premise is that in a context of pervasive distrust, if given the choice between two “verdicts,” the citizen will have less confidence in the judicial decision.

Social communicators have a radically different view of the situation. They argue—though perhaps not overtly—that justice systems from police to prison are open to criticism because they do not fulfill their stated purpose and are guided by criteria that bear little resemblance to the language of the law. From their perspective the lack of credibility of our judicial organs, which is clearly documented in every public opinion poll, is based on the public’s experience with the administration of justice rather than the image offered up in the media. Journalists see themselves as a mirror that merely reflects an unfortunate state of affairs rather than the source of the negative image of the justice system.

Social communicators believe that public opinion is particularly sensitive when it comes to government institutions in general and the justice system in particular. According to journalists, that public opinion—as consumer of the media—is what obliges the independent press to forge ahead in its criticism of the justice system in order to galvanize change. Of course this criticism does not play out on the editorial pages, but rather in the news, where the quality of judicial performance is evaluated based on specific cases.

Based on this argument, a press responsive to the concerns of the majority should pay close attention to the administration of justice and monitor the most important cases to make sure that their outcomes are socially desirable, or at least acceptable. This means that a socially reprehensible transgression should not go unpunished because of legalistic sophisms or arguments that are incomprehensible to the common citizen.

Many social communicators believe that, far from meddling, they are actually contributing to the proper administration of justice in no small way. They cite cases in our countries that have only gone to trial after an intensive media campaign to report and investigate them, and others where the media spearheaded a breakthrough when the judicial proceeding appeared to be stuck and likely to remain inconclusive. Many of these emblematic cases have to do with abuses of power in which intense media coverage led judges to reconsider their tendency to take a more lenient stance.

There is a kernel of truth in both viewpoints and arguments. Both sides have made undeniably valid claims inasmuch as they reflect legitimate concerns and are grounded in sound arguments. The conflict, therefore, is complicated and not easily solved.

As the Colombia case study shows, reforms to criminal procedures codes appear to have expanded the media's role in criminal cases. While the press has always covered criminal trials, the public and adversarial nature of the reformed proceedings creates fertile ground for the construction of conflicting versions of the facts that attract journalists interested in uncovering evidence, interviewing witnesses, and participating in a debate that, strictly speaking, should be aired in court.

Of particular note are the ties that have developed between the police and some media outlets. The relationship is reciprocal and lacking in transparency: police agents provide certain information to journalists, almost always in exchange for the opportunity to boost their image in the media, and the latter, in turn adopt the police's version of the events and those responsible. This relationship—which sometimes involves payments in exchange for “scoops” or “exclusives”—has also given rise to the notion of a “revolving door,” meaning that “the police arrest them and the judges turn around and release them.” Reinforced by the media, this message suggests negligence or corruption on the part of the judicial apparatus, steps up pressure on judges and prosecutors to impose pre-trial detention more widely, and contributes to public distrust of the justice system.

According to the national case studies, the media's role vis-à-vis pre-trial detention varies from country to country. In Argentina, the journalistic tactic of “hounding” judges and prosecutors who have the temerity to stray from the proposition of depriving the accused of their liberty influences the general social climate. The Peruvian media regularly feature OCMA's strategy of broadcasting the opening of internal disciplinary proceedings and imposition of sanctions. Also in Peru, the media use investigative journalism to undertake a parallel analysis of a court case and draw their own conclusions, which then become a platform of demands concerning the court's actions.⁸ In Colombia, the media rely on social networks to amplify the demand for pre-trial detention for the “alleged perpetrators” in high-profile cases.⁹

In Colombia, one eligible respondent was sufficiently explicit with regard to the way in which attorneys use the media: “What can't be achieved in court with legal arguments is achieved through the indignation and criticism levied at judges through the media.” In Ecuador, the public media have become the keystone of what the national report termed “a State policy” to reject any measures other than pre-trial detention, despite a constitutional provision stipulating that “the deprivation of liberty shall be applied exceptionally when it is necessary to ensure the court appearance or to ensure enforcement of the sentence” (art. 77. 1).

⁸ In Peru, the study found a television program that regularly allots air time to investigate and “solve” legal cases: <https://www.youtube.com/watch?feature=endscreen&v=m7Td1I8GGko&NR=1>

⁹ See, for example: <http://www.eltiempo.com/archivo/documento/CMS-9613450>

Weakening status of judges and prosecutors

As defenders of the public interest, judges, prosecutors, and other judicial operators in the countries studied seem to be sensitive to this social climate favoring the broad use of pre-trial detention. Judicial operators fear that they will be singled out and publicly censured for using measures other than pre-trial detention. Amplified in the media, these criticisms frequently convey a veiled—and sometimes not so veiled—insinuation that there must have been some nefarious reason behind the decision in question. No matter how reasonable the prosecutor or judge may find a decision favoring the liberty of the accused, there is always the unwelcome possibility that to do so will prompt social indignation channeled through the media. This creates an uneven playing field in which the detractors of a decision made in the exercise of judicial independence have access to resources that can easily become overwhelming.

Dealing with this reaction is no simple matter when the institutions of the justice system are already submersed in an endemic credibility crisis due mainly to their inefficiency and lack of impartiality. At the individual level, however, confronting public opinion—or what is presented as such in the media—is even less realistic for two additional reasons:

- Judges and prosecutors are often poorly trained and/or have been appointed based on their connections with the government in power. As shown in the Ecuador report, these judicial civil servants usually have little personal security in the discharge of their duties. It is not uncommon to find this situation of undermined public servants in the region.
- There is an expectation that the institution will not back the decision. In such cases, as a judicial operator interviewed in Peru explained, “It is everyone for themselves.” Moreover, a disciplinary proceeding could be brought against someone for making a decision that flies in the face of the “common wisdom” imposed by the general social climate.

Prosecutors and judges may be reluctant to impose measures other than pre-trial detention, especially in high-profile cases. They may find that their interests are best protected by doing what is expected of them, even though no one may have expressed this directly. The Argentina case study called this an “adaptive response” on the part of prosecutors or judges concerned about their tenure if they are temporary appointees, their career path, or about preserving a generally positive image in the media or among politicians who might someday influence on their careers. As the Argentina and Colombia reports point out, it is very important to maintain a strong position in this web of relations in a profession in which merit and performance are not always the

main criteria for achieving seniority. A judge or prosecutor who is not “well-positioned” and makes a decision that runs counter to expectations runs the risk of bureaucratic “punishment” imposed through informal rules and practices that he or she would be hard pressed to challenge.

As for justice system operators who personally believe that it is reasonable to apply pre-trial detention in accordance with the constitution and international human rights instruments, the social and institutional “climate” lets them know that regardless of their preferences, there may be risks associated with that approach. In other words, the social climate can exert pressure to the point that it is more costly for prosecutors and judges to exercise their autonomy than to apply pre-trial detention in keeping with the expectations of influential stakeholders.

There is indirect evidence of the prevalence of response adaptation: although disciplinary proceedings have been instituted for failure to apply pre-trial detention, there are no known cases of proceedings opened for the improper or arbitrary application of this measure. While the national studies did not yield disaggregated data on the grounds for which disciplinary proceedings were instituted, several people interviewed described the influence such proceedings have on the climate surrounding pre-trial detention in the administration of justice system.

The country reports revealed both the use and threat of sanctions. In an emblematic case from Colombia, a judge was penalized for failing to order pre-trial detention and, as one respondent noted, the intimidation factor was very powerful. In Ecuador, the President of the Republic publicly requested¹⁰ and succeeded in having proceedings instituted against eight judges who had ordered precautionary measures other than pre-trial detention that the president considered inappropriate. The mayor of Guayaquil publicly requested the removal of several judges on the same grounds.¹¹ Indeed, an indeterminate number of Ecuadoran judges have been placed in disciplinary proceedings and still others have been prosecuted. The role of OCMA in Peru was discussed earlier and the Argentina report describes “political trials” against certain judges, particularly those with less seniority. While few judges and prosecutors have actually been sanctioned—whether in administrative or criminal proceedings or political trials—the fact that cases have been opened against them for their failure to impose pre-trial detention creates a generally threatening atmosphere, over and above the burden imposed when a judicial official is personally subjected to unjustified criticism and must face the cost of mounting a defense.

¹⁰ See: <http://www.eluniverso.com/2012/05/13/1/1355/rafael-pide-judicatura-destituir-malos-jueces.html>. President Correa’s statements can be found at: <http://www.youtube.com/watch?v=lmliprc9mM>

¹¹ http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=16473&u_mt=alcalde_nebot_pide_destitucion_jueces

Bias in interpreting pre-trial detention

As the Ecuador case study notes, the social climate or “public mood” created by the diverse influences described earlier have prompted legislative reforms and changed the criteria for judicial interpretation of the applicability of pre-trial detention. The simplest and most common tactic is to narrow the grounds for ordering pre-trial detention to a single factor: the severity of the punishment, which the law usually includes as one of several concurrent factors. This approach eliminates “a genuinely individualized discussion of the specific needs in each case” along with “a lack of information concerning circumstances that would inform a more in-depth assessment of the risk to be prevented and potential alternatives to imprisonment that would address that risk.”¹²

As noted in the Argentina report, the simple fact that the accused could receive a sentence long enough to achieve effective compliance is the “necessary and sufficient condition” for applying pre-trial detention. Instead of “anticipated sentencing,” what happens at the pre-trial detention hearing as introduced in the criminal procedures reform is more of an “anticipated trial:” evaluating the flight risk based on the estimated sentence entails a prejudgment of the accused’s liability that should only be determined at trial. The Colombia report interprets this tendency as “possibly the result, at least in part, of the pressure the officials have received.”

In such cases, when a prosecutor requests the precautionary measure and a judge adopts it, they imagine themselves shielded from the risk of being censured for having based their assessment of procedural risk on the specific circumstances of the accused. The judge or prosecutor wins this “security” by distorting the concept of precautionary measures and sacrificing the independence inherent to their position.

Bias in judicial rulings on pre-trial detention persists even when, as is the case in Argentina, the entities theoretically responsible for developing jurisprudence—the Supreme Court and the Court of Cassation in that country—have marked a different course than that taken in current rulings. While they may have adhered to international and constitutional norms, they are powerless to require other forums to do so. This circumstance, which was observed to a certain degree in the other countries studied, suggests the utility of looking beyond legal texts and official jurisprudence for the root causes of bias in the interpretation of pre-trial detention.

A traditional legal culture

¹² Cristián Riego, “Una nueva agenda para la prisión preventiva en América Latina,” *Systems Judiciable*, a 7, nº 14, 2010, p. 9.

It has been argued that reforms aimed at increasing the use of pre-trial detention originate “outside the legal culture and imposed on it through legislative decisions,” in addition to pressure from political actors and the media.¹³ Underlying this conclusion is a concept of legal culture based solely on its theoretical components and doctrinal evolution, which overlooks the values, beliefs, and biases that, while perhaps not articulated conceptually, inform the behavior of the stakeholders involved. In a more accurate interpretation of the legal culture, as the substratum that upholds the customs and practices derived from individual beliefs (see box), the pressure exerted by the social climate is not surprising, nor does it contradict the traditional components of the prevailing legal culture.

Influence of the institutional legal culture

Our legal tradition is distilled into the ideas and beliefs, values and discourses, and attitudes and behaviors of the actors in the justice system. The notion of legal culture refers to a particular way of thinking, feeling, and acting in relation to the law that is unique to a given social group. The notions and representations that make up this legal culture are relevant to the extent that they guide and support behaviors. It is therefore impossible to conceive of changing institutions without considering their internal culture.

It is the legal culture, rather than the law itself, that assigns judges a relatively minor role in relation to the cases under their jurisdiction. Most of our prosecutors and judges are convinced that their role is confined to applying the rules created by others. This belief is perpetuated in the legal culture by systematically disregarding the discretionary powers vested in judges by law.

This feature of the legal culture of judges and prosecutors effectively relieves them of any responsibility for the consequences of their decisions. In other words it encourages them not to take responsibility for the way they discharge their duties, in the conviction that they are merely applying the laws that others create. When the duties of the justice system are understood in this way, it is not the best place for creative attorneys or would-be policy-makers.

The legal culture of judges and prosecutors is usually informed by a training process—including a legal education—that is limited at best. In this culture, the conflict is confused with the legal process. When the conflict between the parties is reduced to its procedural aspects and condensed in a case file, the judicial official obtains an extremely myopic view of its real causes or worse yet, has no interest in them.

The deferral or covering up of the real circumstances goes hand in hand with the legalism and formalism inherent to Latin American judicial institutions. Legalism tends to favor the procedural norm over any other consideration, whether legal, constitutional or values-related. Formalism prefers the ritualistic fulfillment of legal prescriptions with little regard for their original intent. The justice system has been practicing legalism and formalism in a way that is intended, in some cases, to exclude real life from its judicial version, preferring the “truth of the case file” to the one told by the facts.

It is the legal culture, which informs institutional tradition, that undermines the ability to adapt to new or changing circumstances or even to see the need to do so. The primary objective of justice reform, then, should be to change the institutional legal culture.

¹³ Cristián Riego, “Una nueva agenda para la prisión preventiva en América Latina,” *Sistemas Judiciales*, año 7, n° 14, 2010, p. 8.

Judges and prosecutors often welcome the pressures exerted by the social climate precisely because the legal culture in which they operate in Latin America leaves little room for human rights in general and the presumption of innocence in particular. This explains why justice operators may misuse pre-trial detention at their own initiative including, as the Colombia case study showed, by using it as a means to coerce confessions or induce an admission of guilt, which ensures a speedy conclusion of the case.

These kinds of practices are part of a series of informal rules and procedures, beyond the language of the law, which are deeply ingrained in the justice apparatus and influence case outcomes. They are often discriminatory, in other words, they operate to the detriment of the most vulnerable. In relation to pre-trial detention, a clear example of this is the way in which the concept of “roots” is interpreted in practice. Virtually always a legal prerequisite for granting non-custodial precautionary measures, it is very difficult to show that someone has roots when they are un- and under-employed or living in precarious housing situations. According to this extended interpretation, people with roots have formal and stable employment, are homeowners or long-term renters, are legally married, etc. Most Latin American citizens do not satisfy all of these conditions, much less the defendants in legal cases, who tend to come from more precarious social sectors. Other practices that influence pre-trial detention decisions work in favor of the wealthier, such as prestigious and influential attorneys or individuals with connections to the power elite. These factors carry a great deal of weight when prosecutors and judges are deciding between pre-trial detention and an alternative measure.

Interestingly, an inverse bias was observed in the cases examined in Colombia and Peru: the risk of arbitrary decisions against defendants from the middle and upper classes, based on a discourse of “no one is above the law.” An emblematic case involving a television personality in Peru suggested that being “rich and famous” could be a disadvantage in a pre-trial detention proceeding, when the matter being aired has prompted a strong public outcry against the accused. In such cases, the imposition of the precautionary measure is opportunistically presented by the authorities as a vindication of the system.

Generally speaking, People have a certain—and possibly not entirely conscious—rationale for a broader application of pre-trial detention. Our justice systems are called on to respond to social demands prompted by insecurity yet their inability to prosecute all incoming cases, coupled with serious gaps in their investigative capabilities, reduce the potential for successful prosecutions. The system, then, looks for a response that ultimately falls on those least able to defend themselves legally or socially, as reflected in the high percentage of detainees in pre-trial detention who use

the public defender system. The pre-trial detention of these defendants has a useful demonstration effect: it shows that the system is indeed working. If these defendants cannot be convicted later for lack of evidence, the image conveyed through the application of pre-trial detention, which would not otherwise have been achieved, at least created the appearance that something was being done. This manner of proceeding—which the Argentina and Colombian case studies spotlighted—is especially onerous in countries that have not established a legal time limit for pre-trial detention or whose legislatures have introduced “exceptions” based on the severity of the crime, making it mandatory for all defendants prosecuted for certain types of crimes.

Popular support for the “iron fist”

The widespread use of pre-trial detention in violation of domestic law and international human rights standards, then, is promoted by the government authorities, propagated by the media and, to a degree, welcomed by an indeterminate percentage of judicial operators. But this practice “enjoys enormous public support because it resonates with certain very basic intuitions shared by most citizens.”¹⁴ Without the backing derived from mainstream legal or civic culture and exacerbated by the prevailing insecurity, it would be difficult for the justice system to use pre-trial detention as it has.

One of the underlying reasons for public support for the widespread use of pre-trial detention is that a presumption of innocence is not deeply ingrained in the public psyche, nor is respect for human rights deemed a priority when it comes to fighting crime. Moreover, society is deeply suspicious of the justice system. It is common knowledge that trials are protected and unpredictable and offer no certainty about the outcome. In these circumstances, pre-trial detention is viewed as a sort of down payment on the sentence. Given the danger that no one will ever be convicted, it seems to be some consolation that punishment was meted out to someone in advance. This is especially true if the person is alleged to have been arrested in flagrante delicto. Since the prospect that the person ultimately will be found not guilty is considered unlikely given the limitations, biases and inefficiencies of the justice system, it tends not to be a very persuasive argument in the social sphere.

Use of pre-trial detention: an unwritten public policy

All of these factors have made the broad application of pre-trial detention an unwritten public policy. This means that justice system operators are working in an

¹⁴ Cristián Riego, “Una nueva agenda para la prisión preventiva en América Latina”, *Sistemas Judiciales*, año 7, nº 14, 2010, p. 8.

atmosphere that discourages them from applying pre-trial detention as an exceptional measure or last resort and, in specific cases, they find themselves under pressure to apply this measure arbitrarily. The Peru case study uncovered situations in which government officials had “direct conversations” with the prosecutor or judge assigned to a case. One emblematic case involved a high-level, highly publicized arrangement involving the president of the Republic, the president of the Supreme Court and the Attorney General that resulted in the transfer of a case to a venue other than the court of jurisdiction and an order for the pre-trial detention of the accused.

The study found conspicuous evidence of pressure brought to bear on prosecutors in specific cases in Colombia and in Buenos Aires province. Testimonies gathered during the field work described pressure, including threats of transfer and reassignment, against the prosecutor in a case that had attracted the attention of someone with enough power to mobilize those resources.

Without a doubt, however, the situation in Ecuador was unique among the national case studies. As noted earlier, the authorities, starting with the President of the Republic, have fueled the social climate that favors broader application of pre-trial detention,¹⁵ to the extreme of holding a public consultation, in 2011, on the constitutional reform of articles governing pre-trial detention¹⁶ and censuring judges who applied alternative precautionary measures.¹⁷ The authorities have employed unusual tactics in cases of interest to them, including sending ministers to attend court hearings or involving government evaluators at different stages of the proceedings in order to intimidate the judge. Disciplinary proceedings brought against judges who fail to order pre-trial detention have in some cases led to their removal. In light of these findings, the situation of pre-trial detention in Ecuador stood out as particularly serious.

2. Concurrent institutional weaknesses in the judicial apparatus

Judicial operators dealing with pre-trial detention face countless institutional weaknesses that the Colombia report went so far as to describe as tantamount to a

¹⁵ For President Correa’s statements concerning judges and pre-trial detention see, for example: http://elciudadano.gob.ec/index.php?option=com_content&view=article&id=31642:jueces-y-fiscales-que-propician-la-impunidad-seran-denunciados-publicamente&catid=40:actualidad&Itemid=63.

¹⁶ For a discussion of the 2011 public consultation in Ecuador, see Ramiro Ávila, *El Neoconstitucionalismo transformador*, Quito: Fundación Rosa Luxemburg, 2011, pp. 293-307. <http://www.rosalux.org.ec/es/mediateca/documentos/239-neoconstitucionalismo>.

¹⁷ <http://www.lahora.com.ec/index.php/noticias/show/1101320509/-Serrano%20advierte%20acciones%20penales%20contra%20jueces%20que%20se%20'burlan%20dando%20medidas%20sustitutivas'.html#.UVRZxBdE96E>; http://www.ecuadorinmediato.com/index.php?module=Noticias&func=news_user_view&id=167169&utm=ministro_del_interior_presenta_denuncia_por_prevaricato_en_contra_3_jueces_del_azuay.

hostile environment. For the purposes of this discussion, these weaknesses can be divided into two categories. The first is in the area of outreach. As a result of the system's inability to establish effective lines of communication, the public does not understand the processes taking place and is therefore more easily swayed by interested, and powerful, parties. The second is the lack of an adequate institutional support system and backing for justice operators, who are essentially left on their own to face difficult situations—concerning pre-trial detention and other thorny issues—that can lead to public censure and abuse.

The second weakness is exacerbated tangibly by the use of disciplinary proceedings as a punitive, or at least intimidator measure to compel judges and prosecutors to apply pre-trial detention in the way the general climate—encouraged by official declarations and reinforced by the media—expects.

Communication gaps

“Judges speak through their rulings,” a tenet as misguided as it is common. As the national studies demonstrated—and Argentina and Colombia in particular—one of the major shortcomings of court rulings and prosecutorial indictments in our countries is that they are poorly argued and poorly written. This is compounded by another traditional vice in the profession in the region: the abuse of legal jargon to the point that documents are rendered incomprehensible to the general public and certainly to the parties in the case.

Decisions regarding pre-trial detention—or any other issue for that matter—need to be explained in a way that is accessible to the everyday citizen. This is clearly demonstrated at pre-trial detention hearings where the principles—judge, prosecutor, defender—talk among themselves in a code language that leaves the defendant completely in the dark. This occurs even when the judge directs a question to the defendant, which then must be “translated” by the defense attorney before he or she can respond. At the end of the proceeding, defendants often find themselves asking the defense attorney to explain what happened right in front of them and what it means for them.

This pernicious habit results in explanations that are virtually incomprehensible to citizens attending the proceeding or communicators tasked with reporting on it. Judges and prosecutors often complain that journalists distort what they have said. Yet this should come as no surprise. While what is ultimately reported in the media may be deliberately manipulated in in some cases, it is important to recall that the communicator's task is to make events comprehensible to the public. In these cases,

however, journalists confront the difficult task of explaining what they did not understand in the first place.

Our justice systems must radically change their approach to communications—and not only with respect to pre-trial detention—based on the premise that the matter of justice is not just the purview of attorneys or those in the know. It is, rather, a matter of common interest and concern, starting with the individuals who find themselves sitting in the courtroom, whether as plaintiff, witness, or defendant. Everyone has the right to understand the process and why it takes one direction as opposed to another (see box). Our justice systems have not assumed their responsibility to guarantee this civil right. By adopting an insiders’ code for communicating proceedings and decisions, they fuel fears and suspicions and forfeit their credibility.

The right to understand

A modern justice system is one that the public is able to understand. [...]

[In Spain], 82% of citizens believe that legal language is excessively complicated and incomprehensible. [...] Those who appear in court often do not know why they have been summoned and leave without having understood the content or consequences of what transpired.

The rule of law requires that everyone understand legal proceedings and standards.

Clarity in the verbal and written statements of legal professionals strengthens legal security and ensures that people understand their rights and duties and how and before whom to exercise them. This enhances public trust and participation in the institutions.

Citizens constantly come into contact with judges, magistrates, prosecutors, legal secretaries and other officials in the administration of justice system, attorneys, notary publics, and graduate students. These professionals therefore have the responsibility to express themselves in plain language and make sure they are understood. The best jurists are able to strike the difficult balance between technical precision and clarity.

Legal professionals must make an effort to express themselves clearly and make themselves understood, just as health professionals, for example, adapt their language so that the patient and his or her support system can understand them. Yet studies conducted by this Commission confirm that sometimes the necessary specialization of legal language is confused with an opaque and archaic usage confined to formulaic expressions that render it incomprehensible. [...]

All professions use technical or specialized language and law professionals are no exception to this. Citizens often find the language employed by the latter particularly incomprehensible, obscure, and even cryptic.

Archaic language inherited from other eras and untranslated Latin expressions only reinforce this perception.

In order to improve clarity, legal professionals should explain or “translate” the terminology that appears time and again in forms, templates, legal rulings, contracts and other legal documents and where possible, replace it with plain language.

This Commission does not share the view that these linguistic forms are irreplaceable tools and a mark of distinction of the profession. [...] A comprehensible justice that also respects the need for proper legal procedure is possible.

Legal professionals should adopt a language governed by modern values like transparency and clarity. In short, they should alter their linguistic register appropriately depending on the person with whom they are interacting. If the latter is not a jurist, they should avoid obscure expressions and explain any technical terminology.

Improving the clarity of legal language strengthens the rule of law. Institutions play a key role in solidifying best practices among legal professionals, a task that involves both public policy-making and inter-institutional cooperation and coordination. [...] All of the institutions involved have a shared responsibility to uphold the right to understand.

Excerpt from the *Informe de la Comisión de Modernización del Lenguaje Jurídico* [Report of the Commission to Modernize Legal Language] Madrid, 2011.

Isolation of judges and prosecutors

The second institutional weakness that compromises the proper application of pre-trial detention is that prosecutors and judges are obliged to work in isolation. Judicial officials do not even have recourse to specialized staff to assist them. Similarly, courts with more than one judge assigned to them are the exception and most judges and prosecutors work alone. This becomes a disadvantage when the official must deal with matters that are particularly complicated due to the nature of the case or the social pressures and reactions it has prompted.

The justice system tends to distance itself from officials dealing with complicated situations, both before the difficult decision is made and afterward. Except where ties of friendship are involved—which is not very common in these institutional environments—the judge and prosecutor have no one with whom to share opinions, ask for input, or forecast a reaction. This is particularly onerous for a judicial official facing a hostile response played out in the media. The justice apparatus usually leaves the official to face the crowd as best he or she can. What is more, it has made no effort to improve and strengthen legal education and training programs which, broad and diverse as they might be, do not cover these sorts of topics.

Prosecutors or judges who find themselves embroiled in a publicly controversial case may turn out to be good or very poor communicators when it comes to explaining their positions. They may or may not be equipped with the skills they need to justify their decision in the face of harsh criticism. In these circumstances, which can become extremely serious, they are on their own. At the same time, the system seems to be alert to any moment in which, amid the turmoil, a punishable misstep is made. In this case, the system institutes a disciplinary proceeding against the same official it had previously refused to support.

While these institutional weaknesses undercut individual justice operators by exposing them to sometimes unwarranted and even malicious criticism, they also compromise

the institution as a whole. The justice apparatus is the real loser when the actions of a prosecutor or judge are subject to criticism or challenges that are not adequately addressed. The individual who has been maligned—for good or bad reasons—will probably suffer and may even lose his or her job. But this loss pales in comparison to the cracks in the credibility of the institution that remained indifferent to the compromising situation that one of its members was obliged to navigate.

This discussion is not intended to bemoan the fate of judicial officials who commit crimes in the discharge of their duties or to encourage a pernicious *esprit de corps* that is used as an excuse for tolerating or covering up irregular behaviors. Rather, it takes issue with the institutional failure to prepare judges and prosecutors to handle the complicated situations that arise in the discharge of their duties and to support them through outreach or other relevant support services.

Information gaps

The study identified a third institutional weakness that has even broader repercussions: the lack of information, or lack of access to information, where it exists. As discussed in the national case studies, the researchers constantly came up against data that either did not exist or, where it did, was not available to them. According to the study, disciplinary proceedings were the least transparent. In all four countries, it was impossible to ascertain how many disciplinary cases concerned pre-trial detention decisions.

Lack of information, or access to information, is not new in our justice systems and the launch of glitzy electronic portals and webpages has done little to address this problem in most parts of the region. The failure to adequately address this problem is tied to the institutional culture of a justice system that places scant importance on empirical data. The latter are not used to inform institutional policy decisions, which seem to emanate instead from the transient whims and composition of the powers that be. In this context, quantifiable data may even pose a threat if they reveal discrepancies, weaknesses or worse yet, specific procedural biases. Perhaps for this reason, judicial institutions tend to be wary of research and researchers. Instead of working with facts and figures, the system prefers to rely on formalized images of justice or take refuge in platitudes couched in the language of the law. In short, no effort is made to address the real issues facing the justice system, the preference being to offer a description that merely transcribes the legal mandate.

The fewer data the better seems to be the whispered slogan in many prosecutor's offices and courts. The researchers for this study ran into this roadblock time and again even after activating all of the resources at their disposal, including freedom of

information laws. Once ingrained, this pattern becomes a weakness in the justice apparatus because it precludes any possibility of self-awareness on the part of the institution and renders it incapable of detecting errors and developing policies aimed at reforming and improving the system.

3. Recommendations for change

The comparative analysis showed that the main problem in the way that pre-trial detention is applied lies not in the legal standards that need to be amended or improved. If it were merely a matter of laws, the language of international human rights norms, which take precedence over domestic law under the constitutions of all four countries, would suffice and justice operators would have to take them into account, at least in theory. If pre-trial detention is not being applied as an “exceptional measure” and a “last resort” in practice, this is mainly due not to gaps in the standards but rather to factors that interfere with the impartiality that prosecutors must show in requesting, and judges in granting, precautionary measures in a criminal case. In other words, the laws can and should be improved but even so, this interference could easily continue undermining the proper use of pre-trial detention.

The study focused on factors that interfere with judicial independence. It identified interference at two levels: 1) a social climate that hampers the use of alternatives to pre-trial detention, fueled by the authorities and propagated by the media; and 2) internal and external pressure in specific cases that is intended to sway the prosecutor or judge in one direction or the other.

The recommendations aim to counteract, or at least contain, these forms of interference, since it would be unrealistic to think they can be uprooted completely. As noted in the Colombia report, pressure is inevitable and in many cases legitimate, inasmuch as public opinions and demonstrations are part of the legitimate exercise of freedom of expression and freedom of information, which includes criticizing judicial performance.

Below we propose three areas where institutional measures are necessary and possible in order to counterbalance legitimate forms of pressure and, to the extent possible, neutralize illegitimate ones.

The first area is institutional support to safeguard prosecutors and judges.

- Judicial operators must be given proper training to handle highly controversial situations—whether they arise out of legitimate causes or are the result of media

manipulation by interested groups—in which they might come under pressure in making a decision and criticism afterward.

While this training—which should be hands-on and applied rather than conceptual and theoretical—will be useful in a general sense, it will have particular benefits in the area of pre-trial detention.

- Judicial institutions should design and implement consultation, dialogue and support mechanisms for officials facing particularly controversial cases with a high media profile.

While these mechanisms should not interfere with the independence of judges or prosecutors, they should have the support of other judicial operators and professionals such as psychologists, communicators, etc., who can help them solve the more pressing problems associated with these kinds of cases.

The second area relates to disciplinary proceedings which, as shown, are an important source of potential interference with judicial independence and lack transparency, further complicating the situation of prosecutors and judges.

- Disciplinary proceedings against prosecutors and judges must be made more transparent. In addition to clearly defining legal and regulatory infractions, the proceeding must refrain from a lack of transparency in relation to the judicial operator in question, who is under public scrutiny. The final decision must be rigorously substantiated and, as with other information associated with the proceedings, should be accessible to all interested parties.

- The arbitrary and unfounded use of pre-trial detention should be prosecuted and punished through disciplinary proceedings and, if warranted, criminal prosecutions.

NGOS and other civil society organizations engaged in oversight of the justice system have a particularly important role in this regard. They must report on prosecutors and judges who abuse pre-trial detention by distorting its legal nature as an exceptional measure and last resort.

- Authorities of the justice system should refrain from public statements on the decisions taken by prosecutors and judges, which are only subject to review by the relevant institution or in a disciplinary proceeding before the entity of jurisdiction. Neither superior institutions nor disciplinary entities should question, much less sanction, a judge or prosecutor for applying a particular jurisprudential principle. It is necessary to draw clear boundaries between the public ministry's superior authority—and the enforcement policies set out in general instructions—and respect for the judgment of the prosecutor in charge of the case.

The third set of recommendations has to do with the relationship between the justice system and the media. Unless these relationships change, judges and prosecutors will have difficulties exercising the independence inherent to their position in making decisions about pre-trial detention.

The problem of justice system-press relations has been well documented in recent years. On one side, the justice system has condemned the “parallel trials” in which the written press, radio and television investigate, “try” and attribute responsibility, even before the courts have had the chance to do their work. Conversely, the media have condemned unwarranted delays in proceedings. In several cases, media reports criticizing the justice system’s failure to act have served to activate it. Charges and accusations, including the ubiquitous corruption factor have flown back and forth. These exchanges have led to trainings for journalists who cover legal cases, which in general do not appear to have had made any significant inroads in addressing the problem. The justice system continues to have external relations difficulties, while media coverage of court cases is still rife with inaccuracies, often precipitous, and sometimes driven by ulterior motives.

The following proposals are intended to address this context of unproductive experiences, we propose:

- Develop an outreach policy in every judicial institution that considers using spokespeople for public communications—with a focus on judicial decisions—and also tackles the task of adapting the language used in cases and proceedings to make their significance and outcomes more accessible to the average citizen.
- Create communication mechanisms between judicial institutions and the media—or reorganize existing ones—so that strictly nonconfidential information on the administration of justice is clear and available to the public in a timely manner.
- Create a mechanism for regular dialogue between high-level justice officials and directors of the mainstream media to discuss the challenges on both sides, with a particular focus on the impact of issues such as pre-trial detention on human rights.
- Promote the establishment and expansion of forums to educate the public on the workings of the justice system, the proceedings involved in the most frequent cases, and the significance of each major phase. These forums should operate at many levels, from the school system to the mass media.