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Preventive Detention as a Personal Preventive Measure in Criminal Law of Chile

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Two decades ago, Chile took action and started a process that modified its entire criminal system, a process that did not commence in Chile alone, but in the majority of South American countries who followed the same path; in Chile, the adversarial system was gradually implemented, and since 2005 it remains in force in every part of the country. Perhaps, the most important objective and/or effect that this change brought to the Chile's criminal law was to ensure the complete respect towards the fundamental rights of those who were under investigation in the criminal system, overcoming the problems and obstacles that the previous inquisitorial system presented.

Thereby, one of the aspects that this new criminal system improved was granting the authority to judges to issue a preventive detention as a personal preventive measure during the aftermath of the criminal process, whilst such measure was applied in a massive and general manner within the previous system. This article aims to present the main impacts that the application of this new system of criminal procedure has introduced in Chile, regarding the use of the preventive detention as a personal preventive measure during the development of the criminal processes. The author intends to examine whether the overhaul of the criminal procedure system in Chile has been a useful tool to streamline the use of the preventive detention measure in the criminal process, namely, if such change has been able to create a conduct consistent with the internationally recognized values and that should guide the use of this preventive measure, especially regarding its exceptional nature and the right to be considered innocent before trial.

To comply with the previously stated purpose, this article is divided into two sections. The first one, beyond analysing the context of the preventive detention during the Chilean inquisitive system in the scope of the changes at a normative level that the new criminal procedure system proposes, is also used as a baseline for contrasting the outcomes obtained after implementation of these changes. The second section is dedicated to analysing the impact of the overhaul of the criminal procedure system with regard to applying the preventive detention in Chile and the series of changes that have been implemented.

Keywords: preventive detention, criminal process, overhaul of the criminal procedure system, fundamental rights.

Contents

Introduction

Chile, after retaining the Criminal Process Code in force for 140 years and following previous discussions in the parliament, modified this code and applied an Inquisitorial Criminal System for the criminal process and modified it once more for a Criminal Procedure Code that respects the fundamental rights of people, becoming an accusatory or adversarial Chilean criminal procedure.

This new reality caused multiple alterations in Chile's criminal justice, among them some of the most relevant, from the author's point of view, was the necessary means, requirements, period and standard to deliver or maintain the preventive detention of those who were accused of a certain crime while waiting for the investigation to be concluded and subsequent conviction.

This article aims to analyse the modifications of Chile's criminal justice regarding the preventive detention brought by the transition from an inquisitorial procedure to an adversarial one and the consequences thereof. Firstly, the relevant aspects of the preventive detention within the inquisitorial system will be analysed. Thus, we can clearly observe the extent of the changes that came with the enforcement of an adversarial system.

Further on, the article will more meticulously explore the characteristics of the adversarial system in Chile, following the objective – analysis of the preventive detention as a preventive measure in Chilean law. Thereby, we will reflect upon its requirements, its treatment and the standard that the Chilean judge needs to issue or maintain one.

The readers will be given all the judgmental elements to enable understanding the changes applied to Chilean system of justice in this context and bringing to attention the question of whether these are coherent with the extent of the established legislative changes.

Finally, the author will provide his thoughts as to whether such changes have achieved the expected outcomes after the modifications have been applied to the criminal process. This study is supported by figures obtained through Chile's National Gendarmerie for the purpose of the proposed analysis.

1. Preventive Detention in the Inquisitorial System in Chile

The application of the preventive detention during the development of the inquisitorial system was not completely homogenous in Chile, therefore, since the beginning of the XX century and until 1976 there was incarceration system that impeded the release of the accused, and representing the wide range of crimes that were considered as serious by the legislator. Thereupon, it was established that the preventive detention measure was absolutely imperative and, in consequence, the judge had not the authority to lift it and, instead, issue a probation for the accused. Naturally, a high percentage of people undergoing a criminal process (in case of severe cases, all of them) were under preventive detention during the period of the process.

In 1976, the Constitutional Act Number three, for the first time, enabled judges to order a provisional release in all the cases. This was later reaffirmed by the Constitution of 1980; since then, the Constitution established a system based on three legal foundations that a legitimate issue of a preventive detention by a judge concerns three purposes: a) victim's protection, b) protection of the investigation; and c) preventing a public security threat.[1]

With this new design, it was expected that imposition of the preventive detention as a preventive measure would no longer be an automatic response of the system, but instead, the judge would have the task to evaluate every case to identify compliance with the three constitutional assumptions that justify the issue of a preventive detention. However, this new design did not bring the expected effects and the preventive detention measure continued to be applied in a general manner, especially with the most severe cases.

During 1992 and 1994, the Law School of the Universidad Diego Portales carried out an empirical study that gathered a random sample of 180 files acquired from six criminal courthouses of the city of Santiago, all of those concluded with a definitive sentence. The aforesaid study shows that in a 100 % of the cases the accused were under preventive detention at some point during the development of the process, overlooking that 14 % of those cases were closed with an absolutory sentence.[2]

During 2001, the Foundation Paz Ciudadana conducted a study about the inquisitorial system in Chile, which consisted of a review of 2990 cases closed with a condemnatory sentence in four regions of the country, and considered within the seven categories of crimes with the highest social impact: robbery, theft, drug trafficking, homicide, rape, sexual abuse and injuries[3], a wider study than the previous one, but limited to the most severe crimes of the system. However, if we analyse how the preventive detention measure works in those cases, the results are consistent with the previous study and the percentage of people who were under a preventive detention at some point of the process represent almost 100 % of those who were sentenced, with the exception of injuries (a crime that, in Chile, may be adjudged other types of sentences than

[1] Constitution of Chile, (11.03.1980), Article 19, No. 3. Available: https://www.leychile.cl/Navegar?idNorma=242302 [last viewed 24.04.2020].

[2] *Jiménez, M. A.* El Proceso Penal Chileno y los Derechos Humanos: Vol. II Estudios Empíricos, Legal Analysis Notebook, special issue No. 4, Law School of Diego Portales University, Santiago, 1994, 276 p.

[3] *Hurtado, P., Jûnemann, F.* Estudio Empírico de Penas en Chile. Foundation Paz Ciudadana, Santiago, 2001, 276 p.

incarceration). The previous outcomes reveal the generalized use given to the preventive detention as a preventive measure.

Both studies perceive that, within the inquisitorial system in Chile, regarding severe and less severe crimes (for example, theft), the accused had already spent a long period under preventive detention by the time the sentence was issued, an aspect that also highlighted the fact that sometimes the length of the sentence had been mostly completed in the time spent in prison during the prevention detention period. Likewise, this situation has made it very difficult to achieve an absolutory sentence, as it was difficult for the judge to justify these long periods of incarceration, if the accused was subsequently found not guilty. Without limiting the foregoing, a 14 % of the file samples were the cases where the accused was found not guilty[4], as presented in the study carried out by Diego Portales University.

The figures indicated reflect a press statement published during the period while the inquisitorial system was in force in 1998, according to which, in Chile, 32 % of all the accused, in all types of crimes, were under preventive detention.[5] In addition, this also allowed to anticipate that a much higher level than the total of the accused was indeed under a preventive detention at some point of the criminal process.

The second problem in the use of the preventive detention within the inquisitorial system in Chile relates to the length of this measure. The study developed by the foundation *Paz Ciudadana*, previously stated, includes information about the length of the preventive detention during such period and, according to these results, it is possible to appreciate that the length of the preventive detention exceeded relevant periods of time, which increased if they belonged to the most severe crimes (homicide and trafficking of drugs). Most of the crimes involved preventive detention that would last between 6 months to a year, a period that decreased for less severe crimes, for example, for criminal injury 54 % of those who were under preventive detention were incarcerated for less than 30 days. The use of the preventive measure for such short periods of time makes it difficult to examine whether it has ensured accurate results for the process in cases where the incarceration would last ten times longer[6], which showed that this measure was applied with a purpose not related to the presence of the accused during trial.

Finally, an additional critique of the use of the preventive measure in the inquisitorial system has to do with a different punitive use and distance from the very purposes of this preventive measure. Its extended use for short periods of time (as mentioned before) is an indicator of this situation. During 2004, a study conducted by the Public Prosecution Office of Chile and the Vera Institute of Justice[7] allows us to underscore this conclusion, given that the study within 15 months tracked 1 900 cases admitted in two criminal courthouses of the city of Santiago between January and February of 2002. According to the results, it was stablished that 14.5 % of the cases commenced with a person

[4] *Jiménez, M. A.*, op. cit., p. 109

[5] Two out of three defendants are free. *La Tercera Journal*, 29 July 1998.

[6] *Duce, M., Riego, C.* La Reforma Procesal Penal en Chile. Proceso Penal en América Latina y Alemania, Konrad Adenauer, Caracas, 1994, p. 160.

[7] Public Prosecution Office and Vera Institute of Justice, Analizando la Reforma a la Justicia Criminal en Chile: Un estudio comparativo entre el nuevo y el antiguo sistema penal. Lom, Santiago, 2004, 28 p.

under arrest, whereas only 6.9 % of the total had been sentenced to fifteen months from the beginning, most of which were convicted for other motives[8]. In other words, the criminal sanction applied by the system, effectively, was the period of confinement on the grounds of the arrest and the preventive detention.

2. Preventive Detention in the New Adversarial System in Chile

One of the main objectives set by the new adversarial system regarding the individual guarantees, is streamlining the use of the personal preventive measures and especially the preventive detention measure. To achieve that objective, it was decided that the preventive measure would be applied only in those cases where this measure is essential to comply with the specific preventive needs of the criminal process. Such objective specifically addresses the use of the preventive detention, which constitutes the most severe personal preventive measure, or contributes a higher level of restrictions to the individual rights of people. Thereby, streamlining application of these measures would enable compliance with the principle of exceptionality, which must encourage a preventive system in a criminal process that respects individual rights and, mainly, the right to be considered innocent before trial.

This purpose arises as a reaction to a highly critical assessment about the extensive use of the preventive detention in the inquisitorial system in Chile, which constituted the main preventive measure of this system. Consistently, we can indicate that the message sent by the executive authority to the Congress regarding the new Criminal Procedure Code, as one of its objectives explicitly presents overcoming the poor situation created by the extensive use of the preventive measure within the previous inquisitorial system.[9]

2.1. Modifications of the Adversarial System to Criminal Justice in Chile

The new criminal procedure system introduced different modifications, not only concerning the design or structure of the system, but also regarding the norms that regulate the institution itself. With the aim to streamline the use of the preventive measure, we will review some of the main changes proposed in order to provide a contextual information that allows the reader to understand the strategy followed and the tools designed for it.

a) **Change of paradigm:** in the system of the new Criminal Procedure Code of Chile, the preventive measures are no longer an automatic effect of the bill of indictment, which disappears, and constitutes exceptional measures regarding an accused protected by the right to be considered innocent before trial, which must be pleaded and certified by the prosecutor[10]. Hence, preventive measures are discussed concerning a precise accusation, in the context of a hearing where the prosecutor must present the criminal records that justify the criminal assumptions that authorize the requested measures. Meanwhile, if the prosecutor makes an accusation but does not substantiate or justify the origin of the criminal assumptions for

[8] Public Prosecution Office and Vera Institute of Justice, Analizando la Reforma a la Justicia Criminal en Chile: Un estudio comparativo entre el nuevo y el antiguo sistema penal. Lom, Santiago, 2004, p. 19.

[9] Message No. 110-331 of S. E. the President issues a New Project Law that stablishes a new Criminal Procedure Code. Santiago, 9 June 1995.

[10] Criminal Procedure Code of Chile, Articles 122 and 139 respectively.

the preventive detention (independently from the accusation itself), the person under investigation, at first, will be released without any restrictions.

b) **Segregation of duties:** a second structural change under the logic of the new adversarial system arises from the fact that this new system has presented a clear segregation of the duties between the body responsible of the criminal prosecution (in charge of the assessing its necessity and, then, request the personal preventive measures), and the jurisdictional body (in charge of issuing these measures). The fact that the new adversarial system had created the institution of the public prosecutors, with the responsibility of continuing the prosecution process with a specific, clear role, has allowed judges to find themselves in an institutional position that much better ensures its objectivity and neutrality for resolving the origin of the preventive measures. In this sense, a great advantage or guarantee of this new criminal outline, is the fact that the judge is not compromised with the concerns of the criminal prosecution and, hence, judges find themselves much less restrained in rejecting the requests for preventive detentions presented by the prosecutor that do not meet the needs stablished by the law.

c) **Restrictions to the hypothesis of origin:** as a preliminary review of the general rules that establish the legal basis for a preventive detention as a preventive measure, it can be concluded that it has been maintained, generally, in a same manner as in the previous inquisitorial system. This is a consequence of the inability to bring constitutional change forward due to the lack of consensus. That said, as no changes were introduced to the norms of the constitution, the legal text had to maintain the logic of a system of relatively open measures and with implications that go beyond of the pure necessity to ensure the presence of the accused within the process. In this manner, the Criminal Procedure Code, under the Article 140 (c), strictly stipulates (following the Chilean constitutional text under the Article 19, 7 (e) what are the procedural aspects that might require protection. which are the criminal objectives that can be under protection. In other words, the Code formulates the legal grounds for requesting personal preventive measures. In this context, the question is in what sense, from the point of view of the legal basis underlying a preventive measure, this overhaul meant a restriction towards what happened in the old system. The answer is that such measure was given an opportunity by delivering a specific content to each legal basis restraining the scope traditionally applied in the case law of the old system and, therefore, reducing its use.

d) **Alternative response system:** a relevant change is that the newly established system focuses on the regulation of a catalogue of personal preventive measures that differ from the preventive detention (regulated by the Article 155 of the Code) with the objective to employ less severe mechanisms regarding the individual freedom than the preventive measure, but equally appropriate to ensure the purposes of the procedure. The idea was that the criminal prosecution could appeal to these mechanisms instead of the preventive detention in cases, where restrictions of rights are considered to ensure the purposes of the proceeding, but without

demanding a restriction as severe for the person under investigation. In this manner, the new system's idea was to avoid the use of the preventive detention in those cases, where the objective can be achieved by less severe means since these alternative preventive measures had to be use in preference to the preventive detention when the objective pursued can be reasonably achieved with less severe restrictions of freedom.

e) **Principle of proportionality and time limits on use of preventive detention:** it was clear that the preventive detention period had to be limited in time, and with this in mind the principle of proportionality was established. This brought two particular consequences: on the one hand, the preventive measures in general, or one in particular, must be excluded when they pertain to the processes of less severe crimes that, most of the time, end up with a minor sentence than the assigned measure. On the other hand, the length of the preventive measures must be always limited, considering the duration of the possible sentence that the accused could receive, considering not only that the length of the measure should not exceed the sentence's length, but also that the duration of detention should not even approach that period because, otherwise, the sentence would lack relevance and sense.

2.2. The Impact of Adversarial System Regarding Use of Preventive Detention

The criminal procedure overhaul in Chile was implemented systematically during a five-year-process and one of the main effects was the reduction in the use of the preventive detention as a personal preventive measure issued by judges. The data of the new adversarial system in Chile reveal that only a low proportion of the total of the accused who are under an investigation go through this preventive measure, as concluded by the studies carried out on the first[11] and second[12] year since the new system is in force. The figures delivered by the Public Prosecution Office of Chile[13] exhibit that the proportion of accused under a preventive detention measure in the adversarial system is 11.4 % compared with the total of accused under investigation. Logically, it was expected that through a minor use of this measure the average of the daily percentage of people under preventive detention within a Chilean prison would have a significant fall and, consequently, would increase the percentage of accused. The figures of National Gendarmerie of Chile[14] display a progressive decrease in the percentage of incarcerated accused under preventive detention in all prison facilities in Chile, which rectifies perception of impact of the system regarding the penitentiary flow. Thus, in 2010, a 48.5 % of the total of incarcerated people in Chilean prisons were under the preventive detention measure and the 51.5 % were the people sentenced

[11] *Baytelman, A.* Evaluación de la Reforma Procesal Penal Chilena, Law School of Universidad Diego Portales and Universidad de Chile, Santiago 2002, p. 95.

[12] *Baytelman, A., Duce, M.* Evaluación de la Reforma Procesal Penal: Estado de una Reforma en Marcha. Law School of Universidad Diego Portales and the Justice Studies Center of the Americas, Santiago, 2003, pp. 187–201; and *Ritter, A.* Evaluación de la Reforma Procesal Penal Chilena desde la perspectiva del Sistema Alemán. German Corporation for International Cooperation (GTZ), Santiago, 2003, pp. 58 and 59.

[13] Public Prosecution Office, Statistics Newsletter 2016, pp. 43 and 44; Statistics Newsletter 2017, pp. 34 and 35; Statistics Newsletter, First Semester of 2018, pp. 19, 20, 42, 43.

[14] *Gendarmería de Chile* is the public service in charge of the prison facilities. It is a militarized entity ruled by the Executive Authority, specifically, by the Ministry of Justice.

for a certain crime. Meanwhile, in 2017, 24.0 % of incarcerated people in Chilean prisons were under preventive detention and 76 % were sentenced for a certain crime.[15]

Against the above background, it seems possible to conclude that the new adversarial system in Chile is, indeed, producing a streamlining effect in the use of the preventive detention such as it was expected during its design stages. However, this streamlining effect may not have been developed equally with regard to all types of crimes, it can be noted[16] that it is imperative to distinguish thereof. Firstly, preventive detention practically disappears in less severe crimes, especially concerning an accused that does not have a previous criminal background or has so far committed minor felonies; the second group of crimes, where there was a decrease in the use of the preventive detention, containing a certain group of crimes or cases that could be considered as intermediate in terms of its severity, in other words, that could be sanctioned with time in prison equal or above three years, yet they are not considered as minor crimes and, finally, the most severe cases of the system, which are the cases with sentences exceeding five years in prison had not achieved a significant decrease in the use of the preventive detention as a preventive measure within the adversarial system.

2.3. The Use of Other Diverse Preventive Measures of Preventive Detention

One of the aspects that has made an important contribution to reducing the use of the preventive detention is the application of alternative measures to preventive detention. One of the main objectives of creating a preventive measure system that differs from the preventive detention is to present the possibility to the State criminal prosecution to use tools to ensure the total compliance of the criminal process, but without as severe an impact upon the individual rights of the accused.

The figures[17] provided by the Public Prosecution Office of Chile clearly show that the numbers are in average four times greater than the preventive detentions. A study conducted by Baytelman and Duce concluded that there was a vast consensus between the system agents about the effectiveness of these preventive measures, it was estimated that only between a 10 % and a 20 % of the cases there would reveal problems with the compliancy and that the majority of the problematic cases are related to the accused with a previous experience of colliding with criminal justice. It was determined, however, as a concern regarding the increasing concentration of preventive measures of this kind that could be construed as a decrease in its effectiveness, as long as it lacks of a more systematic organization to control the compliance thereof.[18]

3. Convincing Proof Standard to Issue a Preventive Detention

Chilean law holds no stipulations regarding a convincing proof standard to issue personal preventive measures (in contrast to the regulation of the final

[15] *Álvarez, P., Marangunic, A. and Herrera, R.* Impacto de la Reforma Procesal Penal en la Población Carcelaria del País. *Estudios Criminológicos y Penitenciarios Magazine*, Gendarmerie of Chile, p. 122.

[16] *Baytelman, A., Duce, M.* op. cit., pp. 188 and 189.

[17] Public Prosecution Office of Chile, Statistics Newsletter, 2018, pp. 20 and 43.

[18] *Baytelman, A., Duce, M.* op. cit., pp. 197 to 201.

sentence). In this regard, Oliver, G.[19] has gathered different dogmatic opinions that aim to clarify this overlooked standard, indicating that "some conclude that we need to ensure that the proof allows to foresee a trial, with a high probability to get a conviction, where the evidence will be examined in detail and accounted for the final sentence"[20]. Similarly, he indicates that "other demand proof to enable a high level of certainty regarding the existence of the crime and the participation of the accused in such crime"[21]. Lastly, other authors note that "through the acknowledgment of a committed crime, the law demands that the proof justify it, while when it refers to the participation of the accused it is require that the proof shows that is well-founded, that the standard would be higher when it refers to the act and not the participation"[22]. As the legislation does not include any objective proof standard as a requirement for every decision, and especially the decisions regarding the issue of preventive measures, we will have to pursue a possible and objective, convincing proof system. For that purpose, it is necessary to make a clear distinction between the material assumptions and the need of preventive measures, as in essence both have to meet their own, unique requirements to certify the issue of preventive measures.

Indeed, the convincing level that must be met by one or the other assumption has and must be assessed differently. Therefore, a different convincing proof standard can exist for each assumption, each having to be levelled up to be considered as a whole and in each case detected if the standards have met. This proposal will result in the judge having to deny the request of a preventive measure in those cases were the material assumptions could meet the requested convincing level, but at the same time, the requested convincing level for a preventive measure does not overweigh the beyond a reasonable doubt standard.

3.1. Optimal Standard for Material Assumptions

The material assumption, also known as "*fumus boni iuris*"[23] (the smoke of good law), "…means the probability that a punishable act has taken place and that the accused has been involved", Beltrán warns that "over such factual structure it is not possible to determine the reasonable doubt threshold. This happens because, despite having a founded, but preliminary proof, strictly, is not possible to have a complete certainty of the facts"[24].

On the contrary, a low convincing proof standard would allow to easily restrict the freedom of the accused without a previous trial, keeping the accused in jail without a legal conviction, lacking well-founded grounds. Moreover, from a mistakes distribution point of view, a low standard (despite being reasonable), as a prevailing possibility, shows the existence of a relatively high proportion of cases, where the probability of an act used as an argument to make a decision

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[19] *Oliver, G.* Apuntes de Derecho Procesal Penal 1. Valparaíso, Pontificia Universidad Católica of Valparaíso Law School, 2015.

[20] *Duce, M. & Riego, C.* Proceso penal. Santiago, Legal Publishing House of Chile, 2007, p. 252.

[21] *Castro Jofré, J.* Introducción al derecho procesal penal chileno. 2º edition, Santiago, Legal Publishing, 2008, p. 294.

[22] *Horvitz, M. & López, J.* Derecho. Volume I, cit. No. 108, p. 401; *Maturana, M. C., & Montero López, R.* Derecho. Volume I, cit. No. 137, p. 372.

[23] *Guillermo, O.* Currently, this requirement is expressed in Latin *fumus comissi delicti*. *Oliver, G.* Apuntes, cit. (n. 119), p. 113.

[24] *Beltrán, R.* Estándares de prueba y su aplicación sobre el elemento material de la prisión preventiva en Chile. *Polít. Crim.* Vol. 7, No. 14, Art. 6, 2012, pp. 454–479.

being incorrect is lower than the probability for it to be correct, even when it is considered as significant[25].

In addition, concerning the convincing level that must be met regarding the material assumption of the preventive detention and the other personal preventive measures, it is appropriate to conclude that it is impossible to establish a very high standard at the early stage of the penal process and, in contrast, demanding an inferior standard is not acceptable in a system that protects the fundamental rights because it would expressly tolerate high probabilities of wrongfully sending people to jail, the people that should be considered innocent in the first place. Personal preventive measures, because they are an exception within the system, must be interpreted as congruent as possible with that general norm. So, if possible, the convincing proof standard for the material assumption to issue a preventive measure must be the same requested for the final sentence. However, because of the its material aspect, it is impossible, from a procedural point of view, to use such elevated convincing level, hence, there must be demanded and used the standard that reaches an accurate level, which is known as "clear and convincing proof" or "high probability of the facts".

3.2. Optimal Standard for the Need of Preventive Measures

The need of preventive measures or *periculum in mora* (danger in delay) lies in "the threat that the accused could obstruct the purposes of the process"[26].

Preventive measures are required due to a current danger that corresponds to one of the assumptions previously established by the Chilean norm; therefore, as the material assumptions relate with past facts, the need of preventive measures relates to a present and actual danger clearly seen by the judge, even when its foundation lies directly on the same arguments used for the material assumption. Hence, I believe that the reasonable doubt is the accurate standard on which to base the decision regarding the need for preventive measures, substantiating the legitimacy of incarceration, which, in a system that respects the fundamental rights is allowed only under the condition of a proper process which, through use of a beyond a reasonable doubt standard, clearly expresses the convincing standard regarding the responsibility and guilt of an accused in a punishable, criminal act. In this manner, personal preventive measures should demand to be as close as possible to this standard, because it is perfectly feasible for the need of prevention, an aspect that contrasts in terms of the material assumptions in which the beyond reasonable doubt standard is not considered. It is imperative to bear in mind that, in case of the involvement of a fundamental right, according to professor Aldunate[27], for it to be legally eligible, firstly, it must be examined regarding its legal basis (constitutional or legal authorization); then, whether there is a public interest in this involvement or in the purpose of the norm, and finally, the accurate proportion in a wider sense and within its three main elements that constitute its pertinence, necessity and proportion in a strict sense.

The consequences of implementing a convincing proof standard as a requirement to issue preventive measures, particularly the preventive detention, which is the most severe measure in the Chilean system, would depend upon

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[25] *Tarufo, M.* Conocimiento científico y estándares de la prueba judicial. *Comparative Legal Mexican Newsletter,* No. 114, 2005, pp. 1285–1312.

[26] *Belrán, R.* cit. No. 24, p. 468.

[27] *Aldunate, E.* Derechos Fundamentales. Santiago, Legal Publishing, 2008.

a greater control over the judge's decision. Thereby, both parties of the penal process would detect if there is a lack of legal argument, as previously stipulated by the standard, on the legal judgement, and could identify the accurate arguments that would justify an appellate procedure in such cases.

Summary

The above analysis clearly shows that Chile has taken a relevant step regarding the guarantees and fundamental rights of people, the progress towards an adversarial criminal process has meant, among a lot of things, an diverse approach of the personal preventive measures and, particularly, with the preventive detention, which progressed from the most used measure in the criminal process within the inquisitorial system to a preventive measure that, at least with minor and medium felonies, has meant a significant fall in its application by Chilean judges. Therefore, the use of the preventive detention measure within the system has dropped substantially, which we can consider as an accomplishment that must be perpetuated in the future.

On the other hand, no major transformations have taken place with regard to severe crimes, and the prevention detention remains a preventive measure extensively applied by Chilean judges. This tendency, perhaps, has become more pronounced due to legal changes introduced a few years ago, as well as the public pressure that comes along with those crimes with sentences above five years in prison, which are considered as the most severe sentences by the system.

In the context of an adversarial system, the described situation can create new problems that deserve a further identification and investigation. One of those is the possibility that this situation can create incentives for prosecutors to attribute more severe crimes aiming to obtain the preventive detention measure against the accused.

Without limiting the foregoing, so far, the figures endorse the decision of the State and the adversarial system has shown a respect for people's rights that the Chilean criminal system never had in 140 years of its history.

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