

Official preventive prison in Mexico contravenes human rights recognized at the international level

La prisión preventiva oficiosa en México contraviene los derechos humanos reconocidos en el ámbito internacional

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Abstract

The main objective of this article is to analyze whether the precautionary measure of unofficial pretrial detention in Mexico contravenes internationally recognized human rights, based on the provisions of the Political Constitution of the United Mexican States, the American Convention on Human Rights, the International Covenant on Civil and Political Rights, and some rulings handed down by the Inter-American Court of Human Rights (*García Rodríguez et al. vs. Mexico, Tzompaxtle Tecpile and others vs. the Mexican State and Rosendo Radilla Pacheco vs. Mexico*), in which this topic is addressed, and in which the Mexican State has been ordered, among other things, to adapt its internal legal system on informal preventive detention. It will have a descriptive scope, since it is a non-experimental transectional design, of a dogmatic-legal type, since it will analyze whether the informal preventive detention established in articles 19 of the Constitution and 167, third paragraph, of the National Code of Criminal Procedures, violate human rights established in international treaties and in the Constitution itself.

Prison, Precautionary, Contravene, International, Sentences, Preventive, Treaties, Convention, International

Resumen

Este artículo tiene como objetivo principal analizar si la medida cautelar de prisión preventiva oficiosa en México contraviene los derechos humanos reconocidos en el ámbito internacional; esto, tomando como base lo establecido por la Constitución Política de los Estados Unidos Mexicanos, la Convención Americana Sobre Derechos Humanos, El Pacto Internacional de Derechos Civiles y Políticos, y algunas resoluciones pronunciadas por la Corte Interamericana de Derechos Humanos (*Caso García Rodríguez y otro Vs. México, Tzompaxtle Tecpile y otros vs el Estado Mexicano y Rosendo Radilla Pacheco vs México*), en las que se aborda dicho tópico, y en las que se ha ordenado al Estado Mexicano, entre otras cosas, adecuar su ordenamiento jurídico interno sobre prisión preventiva oficiosa. Tendrá un alcance descriptivo, pues se trata de un diseño no experimental transeccional, de tipo dogmático-jurídico, ya que se analizará si la prisión preventiva oficiosa establecida en los artículos 19 constitucional y 167, párrafo tercero, del Código Nacional de Procedimientos Penales, violan derechos humanos establecidos en los tratados internacionales y en la propia constitución.

Prisión, Cautelar, Contraviene, Internacional, Sentencias, Preventiva, Tratados, Convención, Internacional

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Introduction

The elimination of automatic pre-trial detention in Mexico has been the subject of debate among various justice operators such as the Supreme Court of Justice of the Nation, the LXV Legislature of the Senate of the Republic, human rights organisations, the Inter-American Court of Human Rights (IACHR Court) and jurisdictional bodies, as there are positions in favour and against its application, since the pro persona principle is the guiding principle between the Political Constitution and the International Human Rights Treaties to which Mexico is a party. Therefore, the purpose of this article is to analyse whether this figure contravenes the human rights norms established in international treaties.

The Inter-American Court of Human Rights has ordered Mexico to adapt or modify its legal system, including the constitutional provisions relating to informal pre-trial detention, so that this figure complies with the international human rights standards contained in the American Convention. On 10 June 2011, the Official Journal of the Federation published a constitutional reform on human rights, focused on creating a change in the culture of the legal system in Mexico, which establishes informal pre-trial detention, based on respect for the dignity of persons.

The aim of this article is to carry out an analysis of the application of informal pre-trial detention in Mexico, given that Article 19 of the Constitution, as well as Article 167 of the National Code of Criminal Procedure, establishes the automatic imposition of this precautionary measure for various crimes; However, the Inter-American Court of Human Rights condemned Mexico in its judgement published in November 2022 in the case of "Tzompaxtle Tecpile and others vs the Mexican State", and in April 2023 in the case of "García Rodríguez vs the Mexican State".

In both judgments, the Court established that the imposition of the precautionary measure of pre-trial detention will only be legitimate if it is justified, so that in order for this measure to be justified, the principle of proportionality must be taken into account, which derives both from the Political Constitution of the United Mexican States and from the National Code of Criminal Procedure, The Inter-American Court was clear in condemning the Mexican State with regard to the imposition of pre-trial detention *ex officio*, as well as in the various international treaties and instruments that protect human rights, and therefore, according to the aforementioned judgments, the Inter-American Court was clear in condemning the Mexican State with regard to the imposition of pre-trial detention *ex officio*; Concluding in the aforementioned rulings that the imposition of pre-trial detention should only obey two legitimate purposes, which are: In this regard, the Inter-American Court of Human Rights pointed out that there are two types of procedural risks, one of obstruction and the other of abduction, and that national legislation also adds the risk to the victim, witnesses or experts. 001 JP. 3^a issued by the Primer Tribunal de Alzada en Materia Penal de Tlalnepantla, published in the Periódico Oficial "Gaceta del Gobierno", section one, on 15 June 2023, under the heading: "Preventive measure of pre-trial detention. In this order of ideas, this criterion, in the main, exposes that the Mexican authorities must attend the provisions of Human Rights of national character, but also those of international character, as the 1st article of the Political Constitution of the United Mexican States constrains.

Constitutional supremacy

Constitutional supremacy is a principle of constitutional law that establishes that the Constitution is the supreme norm and that all other legal norms must be subordinated to it without being superimposed on it, since the guarantee that a law is not contradictory to the Constitution or does not exceed the limits established therein is essential for such law to have legal validity.

However, with regard to the issue at hand, throughout history, with the Constitutions of 1857 and 1917, as well as with the 2011 reform, article 1 of the Constitution established the hierarchy of norms, including international treaties within the national legal order. Therefore, at one point, treaties were placed on the same level as federal and state laws, and below the Constitution. Later, international treaties were placed below the Constitution, followed by federal and state laws, without the latter having binding force (SCJN, 2010). Consequently, with the constitutional reform of 2011, international human rights treaties are on the same hierarchical level as the Federal Constitution, but note that these are not all the treaties to which the Mexican state is a party, but only those that contain human rights norms.

Although it is true that there was a rivalry between constitutional supremacy and international conventional law in Mexican law, this occurred at the time when the regional system for the protection of human rights, of which Mexico is a part, emerged, which was adopted in the American Convention on Human Rights, Mexico resisted, as the interpretation given to the principle of national sovereignty and its congruence with the international policy of non-intervention until 2010 did not allow the Mexican state to adopt this regional system, despite having accepted the competence of the IACHR in December 1998 (Becerra, et al. , 2016).

Therefore, the international human rights treaties to which Mexico is a party and the Constitution, since the 2011 reform of article 1, are on the same level of hierarchy; of course, their applicability is guaranteed by the pro persona principle. Now, these treaties are analysed by the Mexican State before being accepted, in order to ensure that they are within the legal framework established by the Mexican Constitution, in order to accept them. Likewise, in the event of a contradiction between the Constitution and an international human rights treaty, the latter should prevail. In this way, an equal level is established between the Constitution and international treaty law with regard to human rights.

In accordance with the above, with respect to the control of conventionality, this obliges judges ex officio to analyse the norms or precepts of the law or treaty that could be detrimental to a fundamental right, and to attend to the pro persona principle (which binds judges to resolve each case in accordance with the interpretation most favourable to the individual, Article 1 of the Constitution), This is where it is assumed that the control of conventionality must be a hundred percent guarantee for the protection of fundamental rights, such as the presumption of innocence established in article 20, section B, section I, of the Constitution and the right to personal liberty established in article 7 of the American Convention on Human Rights.

In view of this constitutional supremacy, and given that Article 1 of the Federal Constitution states that: "In the United Mexican States all persons shall enjoy the human rights recognised in this Constitution and in the international treaties to which the Mexican State is a party..." (Constitución Política de los Estados Unidos Mexicanos, 2023), it can be interpreted that the constitution and international treaties on human rights have the same rank of applicability, and therefore both form a block of constitutionality in light of the article in question, which is why they must be respected, since at present these treaties are binding for the Mexican state and the operators of the judicial order. Nevertheless, Mexican judges refuse to inapply Article 19 of the Federal Constitution and declare unconstitutional the third paragraph of Article 167 of the National Code of Criminal Procedure, which establishes automatic or unofficial pre-trial detention, as to date this measure continues to be applied, with the result that it is the Constitution which does all the work of the Public Prosecutor's Office in terms of the justification for obtaining pre-trial detention for the offences established in Article 19, This avoids the fatigue of having to justify, even in a circumstantial manner, that the person being prosecuted committed the crime in question, so that they are automatically deprived of their liberty, making an advanced sentence, as stated by the Supreme Court Justice Arturo Zaldívar, in the plenary session of the Supreme Court of Justice of the Nation on the 25th of October 2022.

Control of conventionality

Currently, Mexican legislation, specifically article 19 of the Constitution, establishes a list of offences for which it is the obligation of the body imparting justice in criminal matters to automatically impose official pre-trial detention as a precautionary measure, taking into consideration that this provision is of a constitutional nature. On the other hand, as mentioned above, in June 2011, article one of the Political Constitution of the United Mexican States was reformed, establishing that in Mexico all persons shall enjoy the human rights recognised in the Constitution itself and in the international treaties to which the country is a party. This constitutional reform obliges all authorities to promote, respect, protect and guarantee human rights in accordance with the principles of universality, interdependence, indivisibility and progressiveness. Furthermore, the text of the aforementioned numeral establishes that the normative interpretation of human rights will be made in accordance with the constitution and international treaties, favouring at all times the broadest protection of persons.

Based on the above, it is considered that the precautionary measure of unofficial pre-trial detention, established in article 19 of the Mexican Constitution, is unconstitutional, in accordance with the provisions of various international instruments, which are recognised in article 1 of the Constitution, such as the American Convention on Human Rights, in article 7.5, and the International Covenant on Civil and Political Rights, in article 9, which since the aforementioned reform, the human rights recognised in these international instruments are considered to be constitutional. As well as various judgments of the Inter-American Court of Human Rights, which are binding on the Mexican State, given that Mexico recognised the contentious jurisdiction of this Jurisdictional Body in 1998, such as *Bayarri v. Argentina*, as well as the Judgment of the Case of *García Rodríguez and another v. Mexico*, issued in San José, Costa Rica. Mexico, issued in San José Costa Rica, on 12 April 2023, which declared "the State of Mexico is responsible for the violation of the rights to personal integrity, personal liberty, to judicial guarantees, to equality before the law and to judicial protection..." (Inter-American Court of Human Rights, Inter-American Court of Human Rights, 1998).

"(Inter-American Court of Human Rights, IACHR_CP-25/2023); also making it clear that pre-trial detention is a valid precautionary measure; however, it has said that it is a precautionary measure that can be imposed as long as it is proportional, necessary, exceptional, which cannot be determined by the type of crime and the seriousness of the conduct and cannot be used as an anticipatory punishment.

Hence, it is clear that in the Mexican constitutional framework there are norms that are on the same level, which establish, on the one hand, pre-trial detention and, on the other hand, that this precautionary measure should not be imposed automatically, that is, that its application should be exceptional, proportional and necessary, through an exercise of weighing up by the jurisdictional authority.

Thus, what happens when there are norms of the same level that conflict because they regulate a human right differently, as in this case, since on the one hand there is Article 19 of the Constitution that establishes the unofficial detention, contravening the principle of presumption of innocence, specifically in the possibility of continuing his trial in freedom, and on the other hand there are norms of the same system of constitutional rank, in accordance with Article 1 of the Constitution, such as the American Convention on Human Rights, The constituent, the reforming power of the constitution, foresaw this situation and determined that the way to resolve this type of conflict is through a principle called *pro homine* or *pro persona*. This principle obliges the jurisdictional authority, i.e. the judge, to examine this parameter in order to ask himself which of the two protects the person more? When does one of the norms of the parameter protect the person more, when it expands a human right or restricts the authority less to get involved with that human right?.

According to the scholar Carbonell, M. (2016), the Control of Conventionality is a virtual creation or legal creation of the Mexican Jurist, Sergio García Ramírez, Judge of the Inter-American Court of Human Rights, who in that capacity, for the first time in a vote, when resolving the case *Myrna Mack Chang vs. Guatemala*, proposed this concept of Control of Conventionality, which was developed in other individual opinions of the same Judge of the IACHR, finally adopted by this Body in 2006, when deciding the case of *Almonacid Arellano et al. v. Chile*, as in paragraph 124 of that judgment, the Court assumes this doctrine of Control of Conventionality, the Court assumes this doctrine of the Control of Conventionality, which with the passage of time is improving, shaping and extending, applying it also in cases against the Mexican State, as in the case of *Rosendo Radilla Pacheco v. Mexico*, when this judgment was issued, it left obligations for the Mexican State.

Carbonell, M. (2016), points out that the control of conventionality is similar to the control of constitutionality, since instead of taking the constitution as a parameter for the control of constitutionality in this case, international treaties and conventions to which Mexico has been a party, which contain human rights, are taken, since these instruments are the parameter for exercising the control of conventionality.

The first is that the Inter-American Court has pointed out that the control of conventionality is informal, since it derives from an objective duty of the state, having signed an international convention, the state must preserve that right even if the lawyers do not invoke it or request it. The second characteristic is that, according to the Inter-American Court, this control must be of a diffuse nature, i.e. it must be carried out by all judges.

Informal pre-trial detention

Informal pre-trial detention is a precautionary measure used to ensure the presence of the accused in the criminal proceedings and to prevent him from absconding or hindering the investigation, and to protect the victim, witnesses and experts (National Code of Criminal Procedure, 2022), which is applied automatically without an individualised analysis of the need for the measure. In particular, it has been pointed out that pre-trial detention violates the right to personal liberty, the presumption of innocence and due process of law.

The basis for informal pre-trial detention is established in Article 19 of the Constitution: "The judge shall order informal pre-trial detention, in cases of..." (Congreso de la Unión, Constitución Política de los Estados Unidos Mexicanos, 1917), establishing a catalogue of crimes for which the simple fact of a citizen being charged or prosecuted for one of the crimes listed in this article automatically obliges the judicial body, by constitutional mandate, to impose this precautionary measure; a situation which, in view of the control of conventionality and constitutional supremacy, is totally incongruent and in violation of international human rights and those set out in the Constitution of the United States of Mexico itself.

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Conclusions

After a thorough analysis of Articles 1, 19 and 20, paragraph B, Section I, of the Federal Constitution, Article 167 of the National Code of Criminal Procedure and the provisions of the American Convention on Human Rights, the International Covenant on Civil and Political Rights, various judgments issued by the Inter-American Court of Human Rights, as well as the criteria upheld by the Supreme Court of Justice of the Nation, in accordance with the principle of constitutional supremacy, the control of conventionality and the pro persona principle, we conclude that Mexico must change its legal system.

In view of the fact that international human rights treaties have constitutional rank in the light of Article 1 of the Political Constitution of the United Mexican States, they are binding for the Mexican authorities, judges and prosecutors, so much so that it has been established by the Constitution itself, and it is in this circumstance that these international treaties must be respected.

It is considered that the Constitution and the Treaties are clear and Mexico is obliged to comply with them. In addition, it is not proposed that the concept of pre-trial detention be completely eliminated, as only its officiousness with respect to certain crimes, since the concept of justified pre-trial detention would still be alive, in which it is the Public Prosecutor's Office, who is the investigating body of the crimes and who will have to justify the need for precautionary measures, In this way, the Public Prosecutor's Office, who is the body investigating the crimes, will have to justify the need for preventive detention, in order to be granted the precautionary measure of preventive detention, and not only for minor crimes, but also for major crimes, as with the informal measure, the judge by constitutional mandate must grant it automatically, and thus the Public Prosecutor's Office will have no choice but to do its job well and not remain in the comfort that the constitution gives it and start investigating, gathering the evidence necessary to justify the measure to be imposed.

In conclusion, it is considered that it is necessary to adapt the Mexican constitutional order and the norms that derive from it, and that regulate informal pre-trial detention, to international treaties, in order to protect the human rights of due process, the presumption of innocence and personal liberty, of the persons accused or prosecuted for a crime, as this figure transgresses these rights and contravenes the American Convention on Human Rights as well as the International Covenant on Civil and Political Rights, considering that this will strengthen due process and the progressiveness of human rights.

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