SYSTEMATIC REVIEW OF PRETRIAL DETENTION AND THE RIGHT TO LIBERTY: SYSTEMATIC REVIEW OF THE LITERATURE

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Abstract

The right to due motivation of judicial decisions is a guarantee of the defendant against judicial arbitrariness and guarantees that the decisions are not justified by the mere whim of the magistrates, but rather by objective data provided by the legal system or those that are derive from the case. However, not all or any error that a judicial resolution eventually incurs automatically constitutes a violation of the constitutionally protected content of the right to the motivation of judicial resolutions, the judges, when imposing the exceptional measure of preventive detention, lack foundations by not there must be evidence that contains objective data that demonstrate sufficient reason to be able to confirm that the crime has been committed and that therefore the right to freedom is violated. The objective was to investigate how the due motivation in the case of judicial decisions violates the right to freedom of the person, affecting the locomotive freedom of it, which is necessary to evaluate for a correct administration of justice. The methodology was a structured bibliographic review of a qualitative approach, with a phenomenographic multimodal design from 20 articles from the open Access databases of Scielo, Scopus, Wos, performing a search from the prism method using the inductive deductive hybrid method, the sampling was non-probabilistic with criteria of inclusion and exclusion from a systematic review of articles found in the database of scientifically rigorous indexed journals. It is concluded that the lack of motivation of the judicial resolutions is considered as a principle of due motivation where the litigants are responsible for motivating their resolutions, which attributes a degree of value to the principle of legality that the judges at the time of resolving do not apply properly. such a principle.

Keywords: Due motivation; right to freedom; right of defense

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1. Introduction

The right to liberty, being constitutionally recognized, in recent years it has been perceived that it has been rigorously affected by one of the precautionary measures established by the legal system; being the preventive imprisonment the measure that affects this right by the excessive use in its application and for not determining rigorously if it is necessary or not the preventive imprisonment seeks to avoid that there is escape by the defendant, which generates that this type of measure ensures the process and consequently that the penalty is fulfilled, providing security to the other party and to society; However, pretrial detention is used as a means to avoid a criminal reiteration, that is to say that the defendant does not commit other crimes again, usually based on his background and the level of danger shown by the defendant, even when this type of crime has caused a social danger and is exposed to pressure from the press. In general, this measure is executed as a security measure, but not as the exceptional precautionary measure that it is therefore, in Chilean justice it is believed that preventive imprisonment is developed as a kind of anticipated sanction to what is condemned, which is imposed more by the sentence than imposed as a precautionary measure.

General Objective

To analyze from a bibliometric approach, the characteristics in the volume of scientific production related to pretrial detention and the right to freedom, registered in Scopus during the period 2017-2022 by Latin American institutions.

2. Methodology

This article is carried out through research with a mixed orientation that combines quantitative and qualitative methods. Where it is chosen to write a systematic review article from a qualitative approach with a phenomenological multimodal design and case study of non-probabilistic and intentional sampling with qualitative techniques of analysis of documentary sources and contributions of key informants with expertise in the subject, conducting a search with the prism method. The present research is of qualitative approach, of basic research type, which serves as observational support as a case study, from the inductive method (Bunge, 2015).

Regarding materials and methods, documentary material of first instance resolutions and articles published in virtual journals on the subject have been used. In addition, jurisprudence material from the Peruvian Constitutional Court was used. In the process of information analysis, a register of information has been instrumentalized from meta-search engines in open Access such as Myloft, collecting articles from indexed journals such as Scielo, Redalyc, Latindex 2.0, Scopus, WOS, collecting their dogmatic content as well as keywords and descriptors, based on the categories developed, with a narrative of the articles selected under the inclusion and exclusion criteria.

From the inclusion and exclusion criteria for homogeneity, 15 articles were left, which have direct incidence in the interpretation of results and discussion warning a legal and polemic position, 10 articles were excluded for not having a direct relation. The trends from an analysis of the state of the question progressively reflect a significant increase in the last two years in the imposition of pretrial detention, which could even contradict valid acts to the detriment of the investigated if the assumptions established in the NCPP are not met. A search was carried out through Scopus, Cielo, the sampling

was non-probabilistic, intentional and by saturation, with inclusion and exclusion criteria.

According to the bibliographic review, it can be noted that the legal regulations have been modified over time, providing effective regulations regarding the assessment of the assumptions for the imposition of pretrial detention.

Methodological Design

Figure 1. Methodological design

Source: Own elaboration

Phase 1: Data collection

The data collection was executed from the Scopus web page search tool, where 384 publications were obtained from the choice of the following filters:

Your query : (TITLE(*La Libertad*) AND (EXCLUDE (PUBYEAR,2018) OR EXCLUDE (PUBYEAR,2017) OR EXCLUDE (PUBYEAR,2016) OR EXCLUDE (PUBYEAR,2015) OR EXCLUDE (PUBYEAR,2014)) AND (EXCLUDE (PUBYEAR,2013) OR EXCLUDE (PUBYEAR,2012) OR EXCLUDE (PUBYEAR,2011) OR EXCLUDE (PUBYEAR,2010) OR EXCLUDE (PUBYEAR,2009) OR EXCLUDE (PUBYEAR,2008) OR EXCLUDE (PUBYEAR,2007) OR EXCLUDE (PUBYEAR,2006) OR EXCLUDE (PUBYEAR,2005) OR EXCLUDE (PUBYEAR,2004) OR EXCLUDE (PUBYEAR,2003) OR EXCLUDE (PUBYEAR,2002) OR EXCLUDE (PUBYEAR,2001) OR EXCLUDE (PUBYEAR,2000) OR EXCLUDE (PUBYEAR,1998) OR EXCLUDE (PUBYEAR,1991) OR EXCLUDE (PUBYEAR,1990) OR EXCLUDE (PUBYEAR,1989) OR EXCLUDE (PUBYEAR,1985) OR EXCLUDE (PUBYEAR,1984) OR EXCLUDE (PUBYEAR,1983) OR EXCLUDE (PUBYEAR,1981) OR EXCLUDE (PUBYEAR,1980) OR EXCLUDE (PUBYEAR,1979) OR EXCLUDE (PUBYEAR,1978) OR EXCLUDE (PUBYEAR,1977) OR EXCLUDE (PUBYEAR,1974) OR EXCLUDE (PUBYEAR,1973) OR EXCLUDE (PUBYEAR,1972) OR EXCLUDE (PUBYEAR,1969) OR EXCLUDE (PUBYEAR,1955)))

- Published papers whose study variables are related to the study of pretrial detention and the right to liberty.
- Papers published in journals indexed in Scopus during the period 2019-2022.
- Limited to Latin American countries.
- No distinction in areas of knowledge.
- No distinction in type of publication.

Phase 2: Construction of analysis material

The information collected in Scopus during the previous phase is organized for subsequent classification by means of graphs, figures and tables as follows:

- Word Cooccurrence.
- Year of publication.
- Country of origin of publication.
- Area of knowledge.
- Type of publication.

Phase 3: Drafting of conclusions and final document.

In this phase, we proceed with the analysis of the results obtained previously, resulting in the determination of conclusions and, consequently, the final document.

3. Development And Discussion

In relation to the requirements taxatively regulated by the Peruvian Code of Criminal Procedure that must be met for the imposition of a preventive detention order, the case of Chaparro Álvarez and Lapo Íñiguez vs. Ecuador has established that, in order to restrict the right to personal liberty through measures such as pretrial detention, it is necessary the existence of "sufficient evidence -strong indirect evidence- to reasonably assume that the person under trial has participated in the crime under investigation", a legal standard that must be interpreted in harmonious correlation with Article 268 lit. a) of the Peruvian Code of Criminal Procedure referring to the founded and serious elements of conviction, and the Casación-626-2013-Moquegua, famous in Peru, which establishes that "it must be accredited by objective data that each one of the aspects of the accusation has a possibility of being true". In the same line, it is required that there is a high degree of probability of the occurrence of the facts, higher than that which would be obtained by formalizing the preparatory investigation. Thus, Plenary Agreement 01-2019/CIJ-116 -issued after the preceding jurisprudential reasons- raises the evidentiary standard by establishing that it is "an essential prerequisite for pretrial detention, the evidentiary standard of serious suspicion in order to determine the merits of the prosecutor's claim", therefore, "the degree of conviction that pretrial detention requires, must go beyond reasonable doubt".

According to Vanhaesebrouck et., al (2022) refers that the high frequency of suicide events in pretrial detention could play an increased role in the occurrence of suicides. Comparative studies are needed to further explore the temporal association between events and suicide in prison, so it is important a correct assessment of the proper motivation to establish the prison and not impede the right to freedom.

On the other hand, Avoyan (2022) considers that in flagrante delicto detention and pretrial detention are perceived as the "original sin" of the Mexican criminal justice system. However, empirical research on the relationship between them and their procedural consequences is scarce. That is, little is known in Latin America about whether detention predicts pretrial detention and about the specific impact of each of them on the outcome of a criminal process. The purpose of this article is to argue the need to consider the proportionality test and the due motivation of prosecutorial decisions as the rule, and imprisonment as the exception, a path that will be based on a unified Inter-American legal standard and supported by the control of conventionality, which will raise the bar required for the imposition of a preventive detention order in accordance with the provisions of the American Convention on Human Rights (Moscoso Becerra, 2021). Guardia López & Posada Segura, (2020) consider that the conditions of violation of human rights in Colombian national prisons are well denounced and known, however, this is not the only existing deprivation of liberty, since, for example, there are municipal prisons where it is also important to account for this "other face" of prison. It

is therefore relevant to define which fundamental rights are compromised or affected by the execution of the deprivation of liberty and also to show the state of guarantee or not of each of them in municipal prisons. documentary.

Farias (2020) sets out to make a paradox between this precautionary measure and the constitutional principle of presumption of innocence, and finally criticize the most discretionary, vague and, therefore, the most used by the courts in its decree, which is the guarantee of public order. Because it is analyzed and applied in different ways, this topic has many controversies in the legal and social sphere. Trying to understand the way in which the guarantee of public order is used as a guiding principle for the enactment of a remand. Thus, a critique of the application of public order was made using doctrinal and jurisprudential sources. From the most varied bases in the application of the public order guarantee, all loaded with subjective values, adopted according to the ideological criterion of each Magistrate, were verified. The analysis of the precautionary measure of preventive detention is based on a more detailed description of its concept, hypothesis, requirements and foundations, and then a counterpoint between it and the principle of presumption of innocence. For only after studying important points of these institutes, enter into the guarantee of public order, the most subjective and vulgarized, the basis of this measure that by many is considered the most painful of the precautionary measures. Galarza et, al. (2021) refers that the perspective of society, jurists and authorities, conceives that the application of preventive detention is arbitrary, many feel that the laws are not adequate for the efficient delivery of justice, but rather favors those who violate it, a number of positions have been developed on the subject, but no one has taken into account the control of conventionality that should be exercised due to the application of this measure. One of the most relevant is that, even when preventive detention is dictated under the legal framework, it can be arbitrary because it is not compatible with the respect of fundamental rights, since it does not comply with elements of reasonableness, foreseeability and proportionality, In this sense, the configuration of the internal law in harmony with the international instruments is essential so that an arbitrary act is not configured, that is why the IACHR Court establishes that arbitrariness should not be understood as a breach of the law but as an act incompatible with fundamental rights. By not taking into account the effective and uniform application of international instruments, referring to the standards issued by the IACHR Court, the application of this measure has become arbitrary.

Callau Dalmau (2016) provides a reflection on the relevant and questioned institution of pre-trial detention, which, due to its primary effect at the beginning of the criminal process on such an important value for the guaranteeing positions as freedom, implies an inflection of the fundamental right to freedom of a citizen who at the time of its application still enjoys the presumption of innocence. This leads to a slippery conflict between the so-called collective interests of society whose objective is to achieve safe, if not utilitarian, responses to criminality and those of the individual under investigation, among which his own personal freedom stands out. In any case, pretrial detention as a legal tool in criminal proceedings must be based on an initial understanding of exceptionality. This is the perspective from which its study is approached, systematically delimited by an approach to the concept, nature and legitimacy, by the analysis of the informing principles in this regard and by the programmatic statements together with the empirical realities.

Reyes (2022) refers that the claims for compensation of those who have suffered legally ordered preventive detention and are

later acquitted, including among the reasons for acquittal the presumption of innocence, have generated in Spain and Colombia recent judicial decisions with opposite effects. In the first country, because of the stock 85/2019 Ruling, there has been a tendency towards compensation, described by some as automatic. In the second country, on the contrary, after Ruling SU 46947 of 2018 of the Council of State, the tendency to indemnification seems to be reduced. The truth is that both extremes can generate problems. On the one hand, automation may lead to downplay the general theory of liability and, on the other hand, the restriction may lead to fail to compensate unfair damage assumptions.

Arrest in flagrante delicto and pretrial detention are perceived as the "original sin" of the Mexican criminal justice system. However, empirical research on the relationship between them and their procedural consequences is scarce. That is, little is known in Latin America about whether detention predicts pretrial detention and about the specific impact of each on the outcome of a criminal process. Pretrial detention also predicts a higher probability of conviction at trial. This reveals a more complex picture than the one presented about in flagrante delicto and pretrial detention. Cruelty in criminal punishment, prison overcrowding, the abuse of pretrial detention and a selection of the prison population from the areas of greatest social marginalization are characteristic notes of what has been called, in the contemporary debate, the era of mass incarceration that not only European countries and the United States, but also Latin American countries are experiencing (Patricia & Holguín, 2021): the first is a model of argumentation based on the law, within which the PP is requested and granted with respect to one - or two - of the procedural risks required by the Code of Criminal Procedure(Kostenwein, 2014).

The right to personal freedom in the 2011 Constitution is included in a generic way in art. 6, when it determines as an aim of the public authorities the establishment of "the conditions that allow the generalization of the effectiveness of freedom" of citizens; then, more specifically, art. 24 in fine recognizes the right to freedom of movement or freedom of movement. In addition, Art. 23 includes the guarantees of personal liberty, i.e., the prohibition of being detained outside the cases and in the manner provided by law, the prohibition of arbitrary or secret detention and forced disappearances, and also, in terms of the rights of the detainee in the strict sense: the right to be informed immediately and in a comprehensible manner of the causes of detention, (A. O. D. E. L. O. S. Reyes, n.d.). The conditions of violation of human rights in Colombian national prisons are well denounced and well known, however, this is not the only deprivation of liberty in our country, since, for example, there are municipal prisons where it is also important to account for this "other face" of prison. It is therefore relevant to define, from the academic point of view, which are the fundamental rights that are compromised or affected by the execution of the deprivation of liberty and also to show the state of guarantee or not of each one of them in municipal prisons. (Guardia López & Posada Segura, 2020).

The principle of proportionality, as a technique of interpretation, aims to protect fundamental rights in the best possible way, which is achieved by expanding their scope of protection as much as possible, provided that such an expansion is possible (Vázquez Arellano, 2022). Personal integrity and respect for the human dignity of persons deprived of their liberty is today one of the human rights on which most pressure is exerted in the world. This has been denounced in recent reports by international organizations such as Amnesty International and the United Nations Committee of Experts Against Torture. In

international human rights law, torture and cruel, inhuman, and degrading treatment or punishment are absolutely prohibited (Of & Rights, 2021). This article draws on these data to describe the administration of justice from its practical and public point of view, and to identify more broadly and systematically the factors that explain the variation in the treatment of defendants and the legal provisions to which they are subject.

Cooccurrence of Words

Figure 2 shows the Cooccurrence of keywords found in the publications identified in the Scopus database.

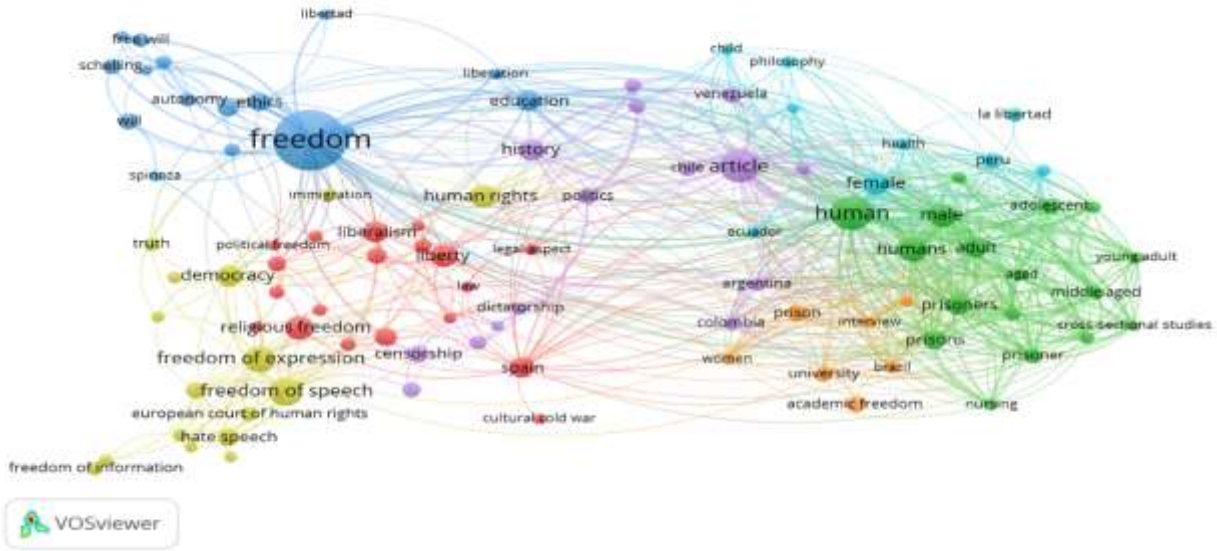

Figure 2. Cooccurrence of words

Source: Own elaboration (2023); based on data exported from Scopus.

Distribution of scientific production by year of publication

Figure 3: shows the distribution of scientific production by year of publication.

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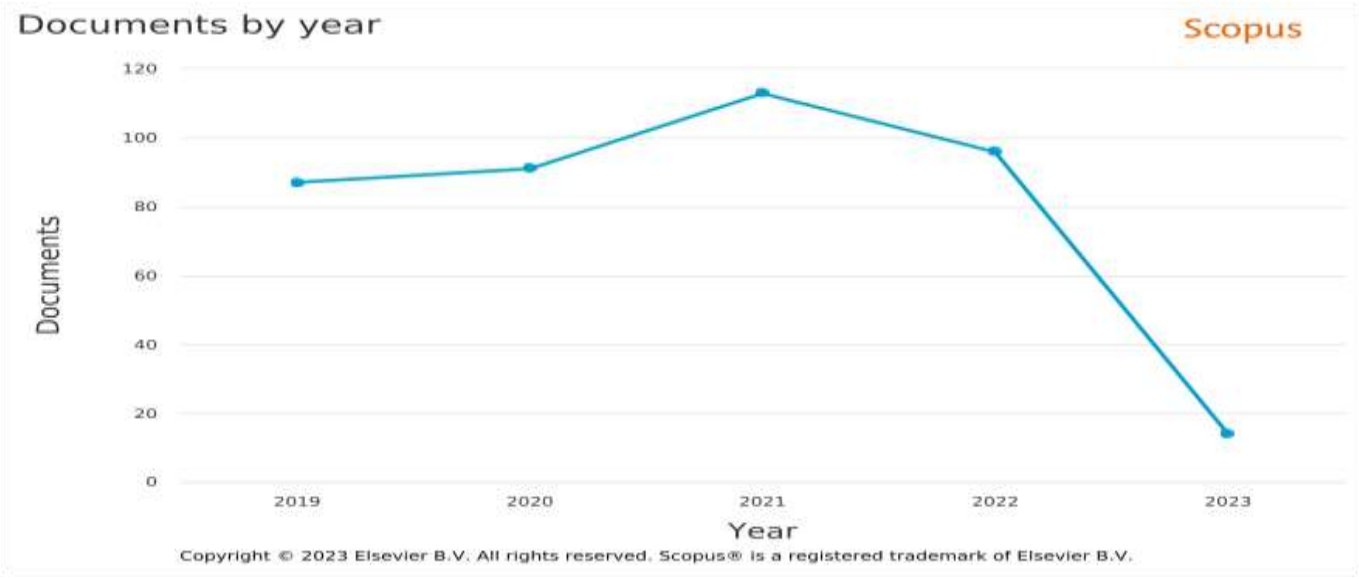
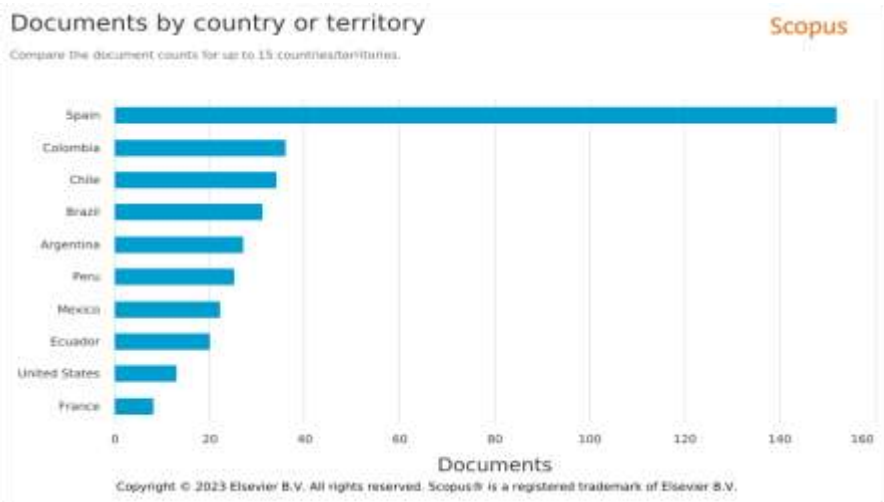


Source: Own elaboration (2023); based on data exported from Scopus.

Distribution of scientific production by country of origin.

Figure 4 shows how scientific production is distributed according to the nationality of the authors.

Figure 4. Distribution of scientific production by country of origin.



Source: Own elaboration (2023); based on data provided by Scopus.

Type of publication

The following graph shows the distribution of the bibliographic findings according to the type of publication made by each of the authors found in Scopus.

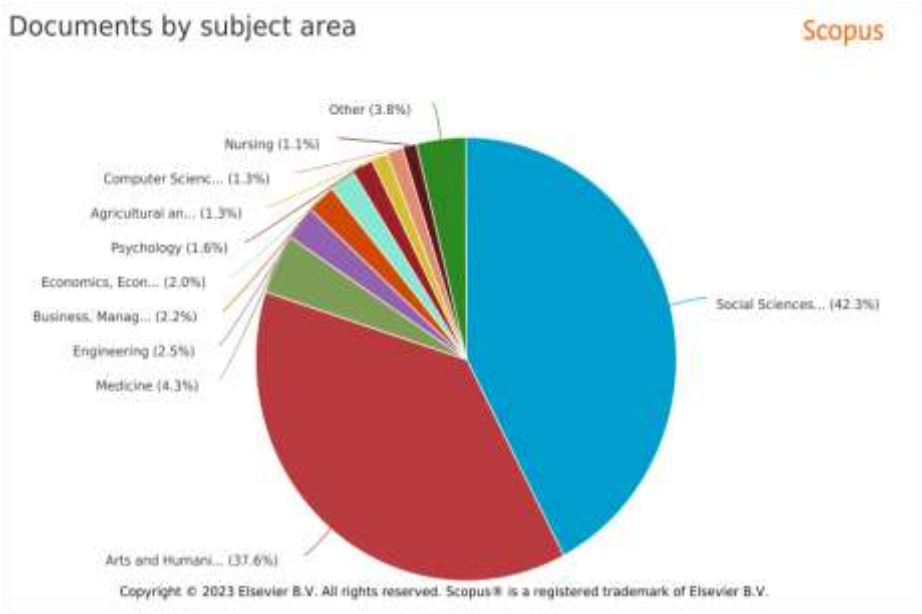


Figure 5. Type of publication.

Source: Own elaboration (2023); based on data provided by Scopus.

4. Conclusion

The imposition of a pre-trial detention order is composed of two specific principles, the first referring to the proportionality of the measure and the second to the due motivation of the judicial decisions, this in the extreme of considering as a basis personal liberty, which constitutes a human and fundamental right that can only be limited by a judicial or prosecutorial decision that has a high level of detail and motivation regarding the charges that are intended to impute to the investigated person. In this sense, through the bibliometric analysis carried out in this research work, it was possible to establish that Spain was the country with the largest number of published records on the variables of pretrial detention and the right to freedom with a total of 229 publications in the Scopus database. The systematic review of pretrial detention and the right to liberty has concluded that pretrial detention is often overused and unnecessary. Many people are detained before trial, with long periods of detention, even when they do not pose a risk to society or have committed minor offenses. Rule 5.1 of the UN Standard Minimum Rules for the Treatment of Prisoners states that the length of pre-trial detention should not exceed what is necessary to achieve its objectives. The review found that pretrial detention is often used as a default option, rather than being reserved for exceptional cases where it is truly necessary.

As such, the review recommends that pre-trial detention be used only when necessary and that alternatives be explored and implemented. The review also found that pretrial detention can have negative consequences for the defendant and society as a whole. Prolonged pretrial detention can lead to loss of employment, housing, and social connections, which can make it difficult for individuals to reintegrate into society after release. In addition, pretrial detention can lead to overcrowding in prisons, resulting in inhumane conditions and an increased risk of disease transmission. Therefore, the review suggests that pretrial detention should be avoided whenever possible.

The review recommends exploring and implementing alternatives to pretrial detention. Alternatives such as electronic monitoring, bail and community supervision have proven to be effective in ensuring that individuals appear for trial and do not pose a risk to society. These alternatives can also help individuals maintain employment, housing, and social connections, which can help them reintegrate into society after release. The review suggests that alternatives to pretrial detention should be considered and implemented to ensure that the right to liberty is respected and to reduce the negative consequences of pretrial detention for individuals and society.

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