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Preventive detention and the presumption of innocence: A legal paradox in Peruvian criminal law?

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Abstract

This study examines the legal paradox between preventive detention and the presumption of innocence in Peruvian criminal law. Preventive detention is a precautionary measure of last resort, regulated by the New Code of Criminal Procedure (NCPP), designed to ensure the proper development of the criminal process. However, its frequent and sometimes arbitrary application raises concerns about its impact on fundamental rights. A qualitative research design was adopted, incorporating case law analysis, judicial files, and semi-structured interviews with 500 judges, prosecutors, trial lawyers, and detainees. The study focuses on preventive detention cases in Peru between 2018 and 2024, emphasizing high-profile cases and jurisprudential developments. The results reveal that while preventive detention does not inherently violate the presumption of innocence, its excessive or arbitrary use may turn it into a form of anticipated punishment. Factors such as media pressure, the perception of impunity, and the lack of alternative precautionary measures contribute to its recurrent application. Compared to other legal systems, Peru applies preventive detention for prolonged periods, exceeding international standards. The findings indicate that judicial reforms are necessary to ensure that preventive detention remains an exceptional measure, strictly adhering to proportionality and due process principles. Strengthening judicial safeguards and promoting alternative precautionary measures are crucial to upholding the presumption of innocence. The study provides valuable insights for policymakers, legal practitioners, and judicial authorities in refining preventive detention regulations, advocating for procedural reforms that balance public security concerns with human rights protections to guarantee the fair and proportional use of preventive detention in criminal proceedings.

Keywords: Criminal law, due process, new criminal procedure code, presumption of innocence, preventive detention.

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1. Introduction

Preventive detention is considered an exceptional coercive measure, the purpose of which is to deprive a defendant of liberty for a specific period. Its main purpose is to prevent the accused from evading justice or interfering in the development of the criminal process. This measure is regulated in article 268 of the New Peruvian Criminal Procedure Code (NCPP). In this context, various doctrinaires and specialists in criminal law have questioned its application, arguing that it is a burdensome measure that directly violates the right to freedom of movement and the presumption of innocence, considered a fundamental pillar of due process.

Thus Castro [1] maintains that preventive detention is the most serious coercive measure of the procedural system, by depriving the accused of the most important right, which is that of personal freedom and directly affects the presumption of innocence. Likewise, in the case of Corte Interamericana de Derechos Humanos [2] emphasized that preventive detention must be an exceptional measure and cannot be based on mere suspicions or subjective perceptions, otherwise sensu, the presumption of innocence would be violated. Along the same lines, in the case of Inter -American Court of Human Rights [3] The Court also pointed out that preventive detention must be based on sufficient evidence that allows the person's criminal conduct to be reasonably assumed and must be strictly necessary, otherwise it is considered arbitrary and contrary to fundamental rights. Finally, the European Court of Human Rights (ECTHR) in the case of European Court of Human Rights [4] maintains that preventive detention must be based on relevant and sufficient reasons and that the courts must act with special diligence in the conduct of criminal proceedings.

In this sense, the core objective of this research is to analyze the application of preventive detention in Peruvian criminal law and its possible contradiction with the principle of presumption of innocence, evaluating whether its use responds to criteria of exceptionality or if, on the contrary, it has become a recurring practice that violates fundamental rights. For the correct preparation of the investigation, a qualitative approach was adopted, based on the analysis of files from the Public Ministry and the study of jurisprudence issued by the Superior Courts in criminal matters, which were selected based on the following criteria: i) Cases where preventive detention was applied between 2018 and 2024. ii) Criminal processes with high media impact or that have generated debate in legal doctrine. iii) Rulings of the Supreme Court and the Constitutional Court on preventive detention.

Likewise, 500 semi-structured interviews were carried out with judges, prosecutors and trial lawyers, using the following criteria: i) 100 criminal judges with experience in the application of precautionary measures. ii) 100 prosecutors specialized in organized crime and high-impact crimes. iii) 100 trial lawyers with experience in defending defendants subject to preventive detention. iv) 100 people deprived of liberty who have been under preventive detention, in order to know their perception of its application.

The results of the investigation indicate that preventive detention, in itself, does not directly violate the principle of presumption of innocence, as long as its application is carried out in a proportional, exceptional manner and based on the criteria established by the New Code of Criminal Procedure (NCPP) and national and international jurisprudence.

However, the study also showed that in Peruvian judicial practice there are cases where this measure is used excessively or arbitrarily, which generates a negative impact on the fundamental rights of the accused. In particular, it was identified that the application of preventive detention without due motivation or under extremely dangerous criteria can transform it into a form of anticipated punishment, distorting its precautionary nature and affecting the presumption of innocence (due process).

Likewise, the analysis of files and interviews with judges, prosecutors and trial lawyers made it possible to detect factors that influence the recurrent use of this measure, such as media pressure, the perception of impunity in crimes with high social impact and the lack of effective procedural alternatives to guarantee the presence of the accused at trial.

These findings highlight the need to strengthen judicial controls in the application of preventive detention, promoting unrestricted respect for the presumption of innocence and the use of less burdensome precautionary measures when the circumstances of the case allow it.

Table 1.
Methodological design with a detailed and well-founded analysis of the problem of preventive detention and its relationship with the presumption of innocence in Peruvian criminal law.

Aspect	Description
Approach	Qualitative, based on the analysis of jurisprudence, judicial files and interviews with key actors in the criminal justice system.
Study type	Descriptive and analytical, with the purpose of examining the application of preventive detention and its impact on the presumption of innocence.
Sample	- 500 semi-structured interviews with judges, prosecutors, trial lawyers and people deprived of liberty. - Analysis of judicial files on preventive detention (2018-2024). - Study of relevant jurisprudence of the Supreme Court, Constitutional Court and Inter-American Court of Human Rights.

Selection criteria	- Preventive detention cases applied between 2018 and 2024. - Criminal proceedings with high media impact. - Sentences that address the constitutionality and proportionality of the measure.
Collection instruments	- Document review of national and international regulations. - Semi-structured interviews with justice system operators. - Analysis of statistics on preventive detention in Peru.
Analysis techniques	- Content analysis of jurisprudence and regulations. - Categorization of patterns in the application of preventive detention. - Comparison with legal systems of other countries to identify good practices.
Limitations	Possible bias in the responses of interviewees due to the sensitivity of the topic. Restricted access to certain classified court files.
Ethics	The confidentiality of those interviewed and the responsible use of the judicial information collected are guaranteed.

2. Methodology

2.1. Definition of Preventive Detention

The word 'prison' has its etymological origin in the Latin 'prehensio, prehensionis,' which means 'the action of catching or seizing.' Along these lines, the Royal Spanish Academy (RAE) defines this term as 'a prison or place where prisoners are locked up and secured.'

On the other hand, the word 'preventive' derives from the etymology 'prevention', which finds its root in the Latin 'praeventio', meaning 'preparation for something or to avoid a risk.'In this context, placing ourselves in the legal field and intertwining both terms, it can be concluded in the words of Arana and Velásquez Rivera [5] that prison is the place where people who have been apprehended, taken or seized are locked up and in contrast to preventive prison, its core function is precautionary and is aimed at guaranteeing the proper development of the judicial process by preventing risks such as the escape of the accused or interference in the preparatory investigation.

For Loza Avalos [6] preventive detention is a measure of personal coercion that restricts the fundamental right to freedom of the accused or defendant for a certain time, as long as there is a need to subject them to the process. Likewise, for Ewards [7] preventive detention is a measure of personal coercion imposed on the accused with the essentially precautionary purpose: that the accused does not evade the action of justice. Along the same lines, Guard [8] maintains that preventive detention is a precautionary measure that can only be ordered when they are essential or necessary to guarantee the objectives of the criminal process, in cases of "serious crimes" and when there is a procedural risk on the part of the accused.

2.2. Is Preventive Detention a More Serious Precautionary Measure of a Personal Nature?

One of the fundamental rights universally recognized is that of personal freedom (ambulatory freedom), guaranteed in the Political Constitution of Peru, specifically in article 2, paragraph 24, literal b. This establishes that “No form of restriction of personal freedom is permitted, except in cases provided for by law.” Along the same lines, the American Convention on Human Rights (ACHR), in its article 7.2, also protects this right by stating that “every person has the right to personal liberty and security. No one can be deprived of his physical freedom, except for the causes and under the conditions established in advance by the Political Constitutions of the States Parties or by the laws enacted in accordance with them” and finally the International Covenant on Civil and Political Rights prescribes in its article 9.1. “Every individual has the right to personal liberty and security. No one may be subjected to arbitrary arrest or imprisonment. No one may be deprived of his liberty, except for the causes established by law and in accordance with the procedure established therein."

Following the previous precepts, we will answer the question asked: if preventive detention as a precautionary measure is the most burdensome?

Thus, note that (cassation No. 353-2019, foundation 2), establishes that within the national legal system, preventive detention stands as the most serious precautionary measure of a personal nature, along those same lines, Plenary Agreement No. 05-2018/CJ-116, in its recital 49, emphasizes this nature by pointing out that preventive detention constitutes the most burdensome measure, because it directly and severely restricts the right to the freedom of the accused.

Likewise, File No. 7-2018, foundation 9, emphasizes that preventive detention deeply affects personal freedom, constituting an extreme measure that should be applied only in cases where it is strictly necessary and proportionate. For this reason, its application is conditioned to comply with strict standards, such as the principle of proportionality, the assessment of the seriousness of the crime, the need to ensure the criminal process and the procedural danger that the accused may represent.

In international matters in the case of Barreto Leiva vs. Venezuela, the Inter-American Court, held the following: preventive detention also constitutes the most severe measure that can be imposed on the accused.

Now, some doctrinaires such as Gavilano [9] maintain that preventive detention is the most serious of all judicial measures that can be adopted in a criminal process, because it truncates the right to freedom. Depriving the freedom of a person who has not yet been convicted is a very serious measure that must be implemented with great caution. Likewise, Cabrera [10] points out that preventive detention is a very severe measure of personal coercion and the most burdensome in the legal system.

In that same line of argument, Vargas [11] citing Carnelutti, maintains that preventive detention is considered a manifestation of the vulnerability of the accused, since, although he is considered innocent by law, in practice he serves a sentence as if he were a convicted person, even if there is no sentence.

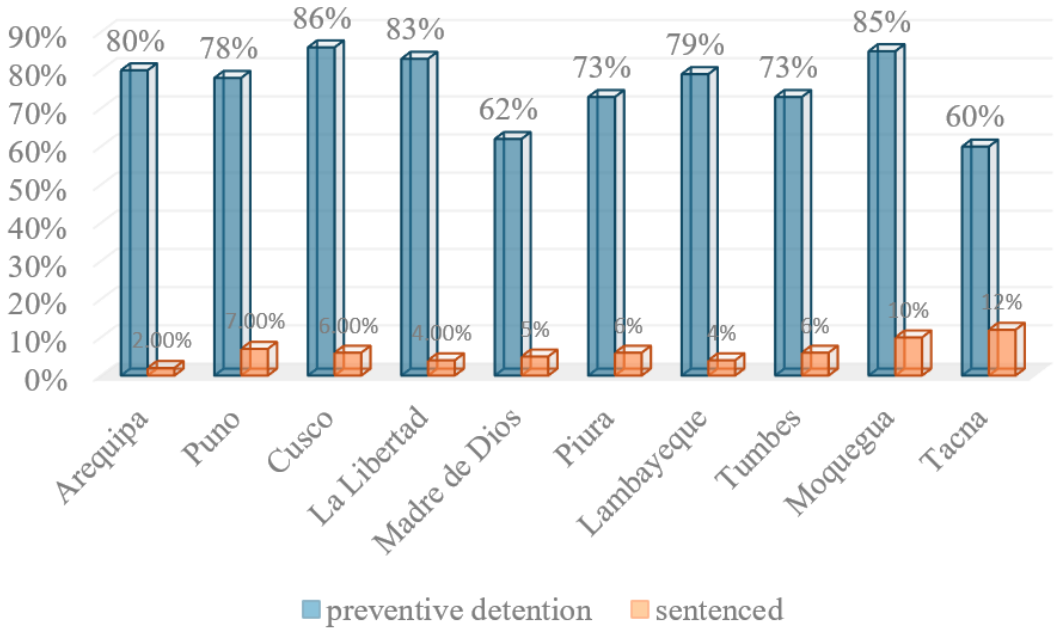

Figure 1.
Preventive detention and its application in the departments of Peru.

Table 2.
Evolution of people imprisoned for preventive detention and sentences.

	2017	2018	2019	2020	2021	2022	2023	2024
Preventive detention.	35. 191	35. 717	34. 879	29. 254	32. 405	34. 071	35. 040	36.193
Sentenced.	50. 620	55. 217	80. 669	57. 701	54. 840	55. 806	59. 719	60.612

2.3. Comparative Legislation on Preventive Detention with Other Countries

Preventive detention in Peru is characterized by its long duration, which distinguishes it from regulations in other countries. Therefore, it is essential to analyze how this measure is applied in different legal systems, since it allows a more precise evaluation of our own procedural framework. Comparing international regulations not only helps to identify good practices, but also provides elements for possible reforms that guarantee a balance between the need for caution and respect for fundamental rights.

Table 3.
The extension of preventive detention in other penal systems.

Country	Law	Extension of preventive detention
México	Political Constitution of the Mexican States. Art. 20 literal b section IX	Preventive detention may not exceed the maximum penalty time established by law for the crime that motivated the trial and in no case shall it exceed two years, unless its extension is due to the exercise of the accused's right to defense. If after this period no sentence has been pronounced, the accused will be immediately released while the process continues, without this preventing the imposition of other precautionary measures. In any prison sentence that imposes a sentence, the time of detention will be counted.
Argentina	Law 24,390, art. 1	Preventive detention may not exceed two years, without a sentence having been issued. However, when the number of crimes attributed to the defendant or the evident complexity of the case have prevented the issuance of the same within the indicated period, it may be extended for one more year, by a well-founded resolution, which must

		be immediately communicated to the corresponding higher court, for its due control.
Ecuador	Political Constitution, numeral 9 of article 77.	Under the responsibility of the judge hearing the process, preventive detention may not exceed six months in cases of crimes punishable by imprisonment, nor one year in cases of crimes punishable by imprisonment. If these deadlines are exceeded, the preventive detention order will be void.
Venezuela	Organic Code of Criminal Procedure. Art. 244	In no case may it exceed the minimum penalty provided for each crime, nor exceed the period of two years. Exceptionally, the Public Prosecutor's Office or the complainant may request from the Control Judge an extension, which may not exceed the minimum penalty provided for the crime, for the maintenance of personal coercion measures that are close to their expiration, when there are serious causes that justify it, which must be duly motivated by the Prosecutor or the complainant.
Honduras	Criminal Procedure Code, Article 181.	When the penalty applicable to the crime is greater than six (6) years, preventive detention may last up to two (2) years. Exceptionally, and taking into account the degree of difficulty, dispersion or breadth of the evidence that must be given, the Supreme Court of Justice may extend the deadlines referred to in this article for up to six (6) months, at the well-founded request of the Public Ministry. If the process has not come to an end after the deadline has expired, the accused will be provisionally released and subject to any of the precautionary measures provided for in article 173, without prejudice to the continuation of the process, until the sentence becomes final.
Chile	Criminal Procedure Code art. 152	In any case, when the duration of preventive detention has reached half of the custodial sentence that could be expected in the event of a conviction, or that which would have been imposed with pending appeals, the court will ex officio summon a hearing, in order to consider its cessation or extension.
Guatemala	Criminal Procedure Code art. 268	When its duration exceeds one year; but if a conviction had been issued pending appeal, it may last three more months. The Supreme Court of Justice, ex officio, or at the request of the court or the Public Ministry, may authorize the above deadlines to be extended as many times as necessary, setting the specific time of the extensions. In this case, you may indicate the necessary measures to speed up the processing of the procedure and will be in charge of the prison examination.

2.4. Justification of Preventive Detention

Cabrera [10] maintains that preventive detention is an exceptional measure; therefore, for its implementation, the so-called fumus boni iuris is required as an extreme presupposition, along with sufficient probative demonstration of the perpetration of a crime that warrants a custodial sentence. It must also be considered in terms of a degree of serious or strong suspicion.

Likewise, the American Convention on Human Rights highlights that preventive detention is based on safeguarding the effective and correct development of the criminal process. Along the same lines, Umasi [12] argues that the application of preventive detention is due to the need to guarantee the presence and subjection of the accused to the process and is justified, as long as the crime charged is serious and there is a procedural danger such as escape. Now, the Constitutional Court maintains that the purpose of preventive detention is to ensure the success of the process, thus the core objective of this measure is to safeguard the full efficiency of the jurisdictional work. Following the same line, the Supreme Court establishes that the purpose of preventive detention is to ensure i) the correct development of the procedure, thus preventing the accused from hindering the investigations ii) the execution of the sentence that may eventually be imposed.

Avalos, argues that due to our national legal system, preventive detention stands as the most serious precautionary measure of a personal nature, its purpose underlies its imposition and must be related to ensuring the purposes of the criminal process.

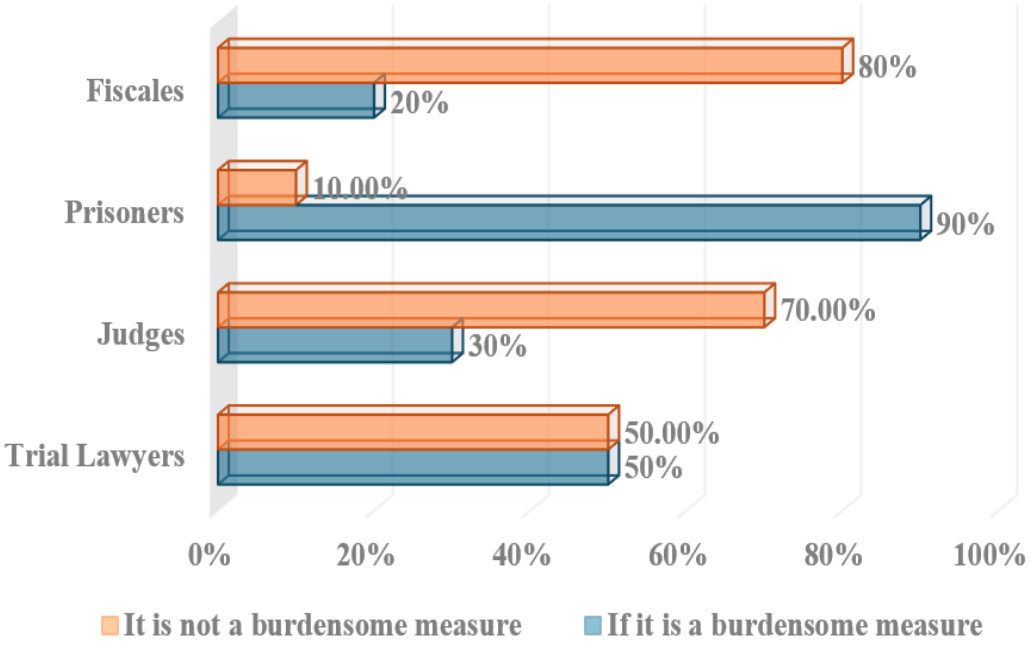

Figure 2.
Survey of trial lawyers, judges and people deprived of liberty to evaluate the perception of preventive detention as a severe measure.

2.5. The Presumption of Innocence as a Contradiction to Preventive Detention

The presumption of innocence is a fundamental principle enshrined in the Political Constitution of Peru. In this sense, Article 2, paragraph 24, literal e) establishes that every person must be considered innocent until their responsibility has been judicially declared. Likewise, Article II of the preliminary title of the New Criminal Procedure Code establishes that any person accused of committing a punishable act is considered innocent and must be treated as such until the contrary is proven and his or her responsibility has been declared by a duly reasoned final judgment. For these purposes, sufficient evidentiary activity is required, obtained, and acted upon with due procedural guarantees. Now, this principle is not only recognized at the national level but is also supported in various international human rights instruments. For example, Article 8.2 of the American Convention on Human Rights (ACHR) guarantees that every person accused of a crime has the right to be presumed innocent until legally proven guilty.

Similarly, the Universal Declaration of Human Rights, in its article 11.1, states “that every person accused of a crime has the right to the presumption of innocence until his guilt has been proven according to the law, in a public trial and with all the guarantees necessary for his defense.” Likewise, the International Covenant on Civil and Political Rights, in its article 14, paragraph 2, reaffirms this principle by stating that "every person accused of a crime shall have the right to be presumed innocent until proven guilty."

Continuing with the ideas above, some doctrinaires such as Sánchez [13] emphasize that the presumption of innocence is not only a constitutional guarantee of due process (art. 139 Const.), but is a fundamental right within the Peruvian legal system. Ferrajoli [14] maintains that the presumption of innocence is an essential pillar of the rule of law, since it implies that no person should be treated as guilty before a final sentence. Furthermore, it mentions that the application of preventive detention is derived as an anticipated punishment, affecting the right to freedom of the accused without a prior conviction.

Likewise, Carnelutti [15] points out that preventive detention, although formally a precautionary measure, in practice can translate into a hidden punishment, which shows a contradiction with the principle of innocence.

2.6. Relevant Cases on Preventive Detention

Preventive detention is, without a doubt, the most applied precautionary measure in Peru, according to the latest statistical data from the Public Ministry. Next, some of the most emblematic cases that have contributed to defining the criteria for its application will be analyzed, evidencing both its legitimate use to guarantee the development of the criminal process and the abuses that can lead to arbitrary detentions.

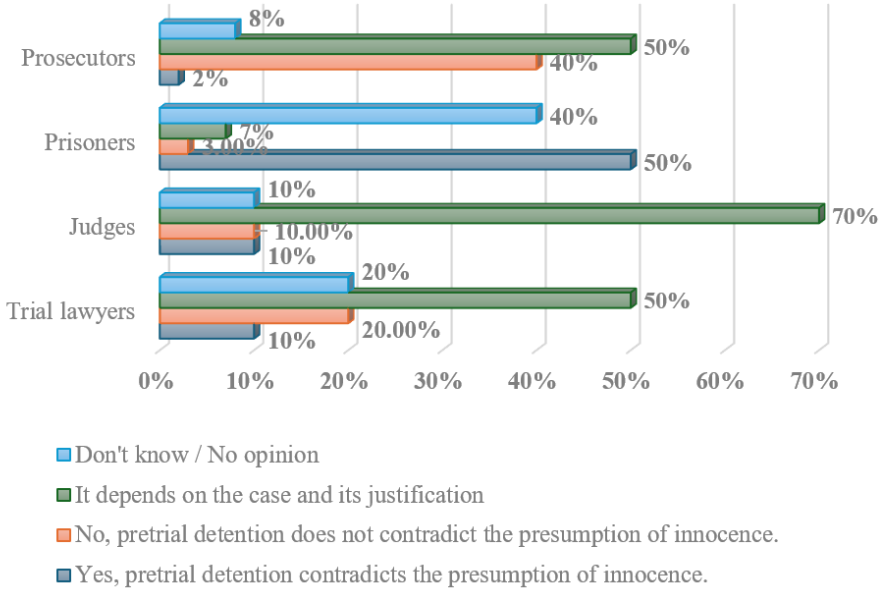

Figure 3.
Survey on preventive detention and its relationship with the presumption of innocence.

Table 4.
Relevant cases of preventive detention in Peru.

Cases	Crime	Preventive detention order
Former President of Peru, Pedro Castillo Terrones.	rebellion and abuse of authority.	More than 36 months
Alejandro Toledo Manrique	Collusion, money laundering and alleged bribes received from the construction company Odebrecht to award section 4 of the South Interoceanic Highway.	36 months
Nicanor Boluarte Zegarra	Corruption crime.	36 months
Sergio Tarache Parra	Femicide.	23 months
Andres Hurtado	Fraud and money laundering crimes.	27 months

3. Discussion

The present investigation has revealed a complex scenario regarding the application of preventive detention in Peruvian criminal law. Although it is normatively established as a measure of last ratio, its frequent use in judicial practice generates evident tensions with the principle of presumption of innocence, which has been the subject of repeated criticism both in the doctrinal field and in the resolutions of national and international courts.

Table 5.
Perception of preventive detention and presumption of innocence, as well as its conclusion.

Author	On preventive detention and presumption of innocence	Conclusion
Espinoza [17]	The author points out that the fact that a person can be detained while a process is being carried out to determine his responsibility for a crime has led some experts to conclude that this measure is always equivalent to an early sanction.	It concludes that preventive detention, without adequate justification, ends up being arbitrary and contrary to the presumption of innocence.
Flores [18]	The author argues that there is a serious contradiction between the constitutional guarantee of the presumption of innocence and judicial preventive detention, that is, they are incompatible with each other, since the existence of the first should not allow the second.	Given the seriousness of this measure, it is essential to respect international standards, which establish that every person is innocent until a conviction proves otherwise. Furthermore, the deprivation of liberty can generate serious consequences, which reinforces the importance of its application with due caution.
Beltrán [19]	The author argues that one of the limits of preventive detention is determined by the presumption of innocence as a fundamental principle of procedural treatment. This rule regulates the way in which any individual who is accused in a criminal proceeding must be treated.	It concludes that preventive detention has limits, which the jurisdictional body must weigh.

Castro 2016 [20]	The author maintains that, for the Court, the suspicion must be based on facts that are clear and articulated in words, that is, not on mere conjectures or abstract intuitions. From this, it follows that the State should not detain and then investigate; on the contrary, it is only authorized to deprive a person of liberty when it has sufficient knowledge to be able to bring them to justice.	The author concludes by pointing out that preventive detention without proper motivation could be burdensome.
Cas. No. 626-2013 Moquegua	The cassation indicates that the preventive detention ordered by the judge must be supported by serious suspicions and elements of conviction of the commission of a crime, linked to the accused either as the author or participant.	It concludes that if it is not within the established parameters that the norm dictates on preventive detention, it becomes arbitrary.
Inter-American Commission on Human Rights (IACHR) [16]	The Inter-American Commission maintains that its use to justify prolonged imprisonment prior to sentencing has the effect of distorting the purpose of the precautionary measure, practically converting it into a substitute for the custodial sentence.	It concludes that with respect to the severity of the sentence, the judge should not automatically order preventive detention, but should do so with reasonability and proportionality, respecting fundamental rights.

4. Results

The final results of this investigation indicate:

1. Preventive detention, according to the New Code of Criminal Procedure (NCPP), must be applied in an exceptional, proportional and well-founded manner. However, the analysis of files and interviews carried out showed that, in many cases, this measure is applied routinely and without proper motivation, which can turn it into an anticipated penalty.
2. Factors Influencing Recurrent Use:
   - Media pressure: Cases of high social impact usually lead to the application of preventive detention in response to public opinion.
   - Perception of impunity: Distrust in the justice system drives judges to opt for this measure to ensure the appearance of the accused.
   - Lack of alternative measures: The lack of effective precautionary options contributes to the excessive use of preventive detention.
3. Impact on Fundamental Rights: The investigation confirms that, although preventive detention does not per se violate the presumption of innocence, its disproportionate application seriously affects fundamental rights, especially personal freedom and due process.
4. Prolonged Duration of Preventive Detention: Compared to other countries, Peru stands out for keeping defendants under preventive detention for prolonged periods, which intensifies the risk of turning this measure into an early punishment.
5. Need for Reforms: The findings highlight the urgency of strengthening judicial controls, promoting the use of less burdensome precautionary measures and training justice operators to guarantee respect for the principle of presumption of innocence.

Table 6.
Interview with judges, prosecutors, trial lawyers and prisoners, about whether do you consider that preventive detention in Peru is used as an early sentence?

Category	Sí (%)	No (%)	It depends on the case (%)	Does not respond (%)
Judges	25	60	10	5
Prosecutors	30	50	15	5
Lawyers	20	50	10	20
Prisoners	85	5	8	2
Total	66.25	18.75	10.75	4.25

5. Conclusions

The investigation concludes that preventive detention, although designed as an exceptional precautionary measure, has become a recurring practice that negatively affects the presumption of innocence in Peruvian criminal law. It is necessary to establish clear and rigorous criteria for its application, ensuring that it is only used when strictly essential. Likewise, a procedural reform is required that strengthens judicial controls, encourages the use of less harmful alternatives, and guarantees that fundamental rights are not sacrificed for the sake of procedural efficiency. As experts, we affirm that the balance between procedural security and human rights must be the fundamental pillar of any democratic criminal system.

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