

# The Accusatory Criminal Process and Human Rights: An Analysis on the Unconventionality of Arraigo in México

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The Mexican constitutional reform carried out with the purpose of implementing an accusatory criminal process of a right-based type, where priority is given to the protection of human rights, revealed a contradiction regarding a legal figure called arraigo (preventive detention), since this constitutes a limitation to the human rights and such situation has been controversial in the doctrine and in the resolutions of the highest Court of Mexico.

*Keywords:* Human rights, presumption of innocence, unconventionality, arraigo, Accusatory Criminal Process

## Introduction

The Mexican constitutional reform on June 18, 2008, by means of which various legal provisions were renovated, created a new system of criminal justice founded on a right-based process, to protect human rights, both of the accused and the victim. However, the explanatory statement that gave rise to the aforementioned reform, excluded persons involved in offenses, such as organized crime or serious crimes from some guarantees, which, in the end, is a contradiction to the object of the criminal justice process, as mentioned in Article 20 paragraph “A”, which says: “The criminal proceedings shall serve to clarify the facts, protect the innocent, to ensure that the offender does not go unpunished and to repair damage caused by the offense”.

Because of the above, it is evident that to clarify the facts is important in the process and this implies that evidence provided shows that a person participated in the punishable act, then if it is not duly demonstrated, the person is innocent of the crime charged and must be protected, regardless of the kind of crime that are attributed to him or her. This is understood as the so-called principle of presumption of innocence, because a person should be considered innocent until there is a ruling which determines that he or she committed the crime for which he or she is accused; the presumption of innocence is a guarantee that every person must have in the criminal justice process.

The presumption of innocence, according to Miguel Ángel Aguilar López (2015, p. 29), “should not only be a procedural guarantee, but a principle of democratic systems that limit the legitimate monopoly of force, where their criminal systems must guarantee defense mechanisms that allow to demonstrate the innocence of the accused”.

Another constitutional amendment that was considered important is with regard to the Article 1, where human rights are recognized in the Constitution, and thus, begins a fundamental stage in the legal field in Mexico. However, in our view, they are still legal figures in open contradiction to human rights as it is the arraigo in the adversarial criminal process.

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### The Human Rights in Mexico

The postmodern law and the implications of its characteristics have in the new constitutional paradigm of human rights in Mexico, converged with other tensions that jeopardize consistency, validity, and integrity of the legal system. For example, the case of express restrictions on the exercise of human rights, jurisprudential criteria derived from the “contradiction of 293/2011 thesis” of the Supreme Court of Justice of the nation, which brought as a consequence, a tension between human rights from international source and constitutional source, as they decided that:

[...] human rights standards, regardless of its source, do not relate hierarchically, meaning that, derived from the final part of the first paragraph of the said article 1., **when in the Constitution there is an express restriction on the exercise of the human rights, it must adhere to what indicates the constitutional norm;** [...] What it has evolved as a result of constitutional reforms, here commented, is the configuration of the set of legal rules which can be said of the supremacy in the Mexican legal system. This transformation is explained by the extension of the catalogue of human rights laid down in the political Constitution of the United Mexican States, which obviously qualify as part of the regulatory cluster that have constitutional supremacy. In this sense, human rights, as a whole, are the regular constitutional control parameter, according to which the validity of the regulations and acts that are part of the Mexican legal order should be analysed (Underline and bold added). (Contradiction of thesis 293/2011, 2014b)

This reasoning of the Supreme Court of Justice of the Nation produces several issues that deserve further reflection, such as: a) the hierarchy of international treaties on human rights in relation to the Constitution; and b) the binding nature of the jurisprudence of the Inter-American Court of Human Rights, however, since it will not be the subject of this study, we will only analyze in particular the effects of restrictions on the exercise of human rights that they have on the constitutional paradigm.

However, this jurisprudence of the Supreme Court of Justice of the Nation five years after its publication has not yet seen a signal of readjustment of the criterion, leaving ambivalent positions in this complex balance relationship between the actual practical validity of constitutional restrictions; and the validity of the normative principles and contents of international human rights law. That is why this position of the Supreme Court of Justice of the Nation contains a high degree of contemporaneity (Gadamer, 1994),<sup>1</sup> since this reasoning becomes valid with the circumstance of the past, with the possibilities of meaning and scope that imply our current legal reality. Therefore, we consider that this criterion of the Supreme Court of Justice of the nation has been the most important and significant ruling of the Mexican neo-constitutionalism (De Giorgi, 2015).<sup>2</sup>

### Arraigo in Mexico

Restrictions on human rights should be observed from two areas:

First, it is undisputed that, based on this criterion of the Supreme Court of Justice of the nation, if the human rights recognized in international treaties and of the Inter-American Court of human rights case law criteria loses normative force, validity, and efficiency by going against any constitutional restrictions, it will result in a backward step to the process of harmonization between national law and international law. Having the Constitution, as the sole source of legislation to restrict or legitimately intervene human rights, is separated from the parameters of validity and protection of human rights based on the pro-person principle. Secondly, it breaks

<sup>1</sup> According to Hans Gadamer, *contemporaneity*, is: In its presentation, this particular thing that presents itself to us achieves full presence, however, remotes its origin may be. Thus *contemporaneity* is not a mode of givenness in consciousness, but a task for consciousness and an achievement that is demanded of it.

<sup>2</sup> Raffaele De Giorgi said that the so called neoconstitucionalism is not a theory of the Constitution, or a philosophy of law or politics, but an horizon, a line that separates what is seen from what is not, a perspective from which contributions from different directions are collected, contributions which have in common a compulsion to repeat the evil to build the good in the future.

with the hermeneutic circle, i.e., it cannot be divided into exclusive binomial and interpretation-application; the application of a rule of interpretation in both forming a unitary process of understanding cannot be separated.

The most notorious case, regarding the existence of an express restriction to the exercise of human rights in the Constitution to make it prevail over an international norm of a more favorable nature, is undoubtedly the figure of arraigo<sup>3</sup>, which has gone through three legal statuses in Mexico.

First: in 2006, the Supreme Court of Justice of the Nation ruled on this measure, considering it as a violation of rights, such as personal freedom and freedom of movement. This was established in the thesis: P XXII/2006; That is about the particular points: Penal arraigo (preventive detention) “Article 122 bis of the Code of Criminal Proceedings in the State of Chihuahua, violates the right of personal freedom as established by Articles 16, 18, 19, 20, and 21 of the Federal Constitution”.

The Constitution of the Mexican United States, allows, exceptionally, the affectation of the personal liberties of the citizens, upon the following conditions and terms: a) In the event of flagrante delicto, it obliges whoever performs the “detention” of the suspect, to bring him, without delay, to the immediate authority and this one to the public prosecutor, who will perform the detention; b) in urgent cases, such as felonies and the founded risks that the suspect may evade justice and it may not be able to come before a judge, the prosecutors can perform detention under their responsibility, in that case it will have to, usually within 48 hours, bring the detainee to the judicial authority, which will immediately ratify the arrest or order his freedom; c) by warrant issued by a judicial authority, the executing authority is forced to bring the accused at the disposal of the judge, without delay and under its strict responsibility; d) by virtue of formal prison ordered by the judge, within the non-extendable term of 72 hours after the suspect is placed at their disposal; and e) in case of infractions or violations to governmental regulations and police, the arrest is allowed up to 36 hours. As noted, in any action by the authority that results in the deprivation of personal liberty, short deadlines, including hours, are provided for the suspect to be immediately available to the Judge of the case and this determines his legal situation. Now, Article 122 bis of the Code of Criminal Procedures of the State of Chihuahua, when establishing the legal status of criminal arraigo, which although has the dual purpose of facilitating the integration of the preliminary investigation and preventing the impossibility of compliance with the eventual arrest warrant that would be issued, violates the right of personal freedom established in articles 16, 18, 19, 20 and 21 of the Political Constitution of the United Mexican States, because although the inquiry still does not yield data that lead to establish that the person has probable criminal responsibility, the deprivation of their personal liberty is ordered up to a period of 30 days, without justifying such detention with a formal prison sentence in which they are established the details of the crime that is imputed to him, nor the opportunity to offer evidence to disclaim his responsibility. (emphasis added)<sup>4</sup>

<sup>3</sup> Penal arraigo (preventive detention) I. It is the precautionary measure that aims to ensure the availability of the accused in the preliminary investigation or during the criminal process, regarding imprudent crimes or those in which preventive detention does not proceed ... IV. In federal matters, the provision of Article 133 bis is more concise, as it provides, in general terms, that when, in the course of a preliminary investigation, the prosecution deems necessary the arraigo, according to the characteristics of the contested act and the personal circumstances of the accused, shall request such action to the respective judge, who, hearing the alleged perpetrator, ordered the arraigo with vigilance by the prosecution and its auxiliaries. Arraigo in federal matters will be extended by the time strictly necessary for the proper integration of the investigation, shall not exceed thirty day, extendable for the same period at the request of the prosecution. The judge will resolve by listening to the prosecutors and the detained on the subsistence or the lifting of the arraigo. V. With regard to the precautionary measure during the process, the Articles 301 of the code of criminal procedures and 205 of the Federal Code of criminal procedure, provides that when by the nature of the crime or of the applicable penalty, the accused should not be interned in pre-trial detention, but there are elements to suppose that he can evade the process of Justice, prosecutors may request the judge, in duly form, or the judge have ex officio, having heard the accused, the arraigo; with the characteristics and by the time the judge indicated, in no case the term may exceed the time in which the process should be resolved. The aforementioned Article 205 of the code of criminal procedure further provides, which arraigos cannot be extended beyond the period established during the investigation by Article 133 bis of the same law, i.e., 30 days extendable by the same time; but in the process, must be adhered to deadlines, i.e., four months in the case of offenses punished with imprisonment not exceeding two years, and within a year, when corporal punishment exceeds constitutional (Article 20, VIII Constitutional). Diccionario Jurídico Mexicano. Instituto de Investigaciones Jurídicas. Editorial Porrúa, tomo A-C, pp. 260-261.

<sup>4</sup> Thesis: P. XXII/2006, Supreme Court of Justice of the Nation, *Judicial Weekly of the Federation and its Gazette*; XXIII, February 2006, p. 1170.

In 2008, this thesis is reversed and the figure of the arraigo had a new twist by introducing it in the Federal Constitution and granting its constitutional rank, under the argument that it is needed to prevent the accused from escaping from the authorities, or else, that hinder the success of investigations when dealing solely and exclusively for crimes of organized crime, thus allowing to restrict personal freedom under certain requirements indicated in the text of Article 16, paragraph eight as follows:

Art. 16. (...) The judicial authority, at the request of the public prosecution and being crimes of organized delinquency, will be able to decree the arraigo of a person, with the modalities of place and time that the law indicates, for no more than forty days, whenever it is necessary for the success of the investigation, the protection of people or legally protected interests, or when there is founded risk that the accused would evade the action of justice. This period may be extended, provided that the Public prosecution proves that the causes still exist. In any case, the total duration of the arraigo may not exceed eighty days.

The 11th transitory provision corresponding to the Decree published in the *Official Journal of the Federation* on June 18, 2008, says:

As long as the accusatory procedural system enters into force, the agents of the Public Prosecutor's Office determined by law may request the judge to take custody of the indicted person in the case of serious crimes and up to a maximum of forty days. [...] This measure will be legitimate whenever it is needed for the success of the research, the protection of persons or legal property, or when there is a founded risk that the accused will evade the action of justice.

Such provisions can be inferred that the judicial authorities on charges of organized crime or for serious offences, as the case may be, may issue the arraigo of a person as a precautionary measure, with the modalities of place and time designate by law, for a period of 40 days extendable to 80 days, for the success of the research, the protection of persons, or legal property, or when there is a founded risk that the accused will evade the action of Justice. Also, the transitory disposition establishes that the preventive measure in its modality of domiciliary arraigo, is extended for the cases of serious crimes, meanwhile the accusatory procedural system will be in full effect in 2016 or when the local legislatures so determine it.

An important note, which is inferred from the constitutional text, is that it does not mention a specific way or how this precautionary measure must be implemented; it only mentions that the arraigo will take place, invariably in a detention center or "detention house", which means in a building administered by the State for this purpose; in such a way, that it is the legislator who determines the modalities of place and time to execute it. Therefore, a fundamental note regarding the faculty of the Ministry public to request the corresponding judge the "domicile arraigo" of the suspect; It is that the judge must interpret the word "domicile" on the basis of the principle pro-homine, which means that it applies the most extensive interpretation, i.e., which most effectively protects the person; because it is a precautionary measures that restricts the personal liberty, the "domicile" shall be interpreted as the place where the accused resides habitually.<sup>5</sup> So that if the arraigo of a person is executed in a building different from his "domicile", such as a "center of arraigo", we confirm that this is another characteristic of its unconventionality.

On this specific issue, the Inter-American Court of Human Rights has established that:

[...] article 7.2 of the Convention provides that "no one may be deprived of his physical liberty, except for the reasons and under the conditions laid down in advance by the policies of the State parties' constitutions or by laws dictated in accordance with them". The reservation of law must necessarily be accompanied by the principle of TYPICALITY, which obliges States to establish, as specifically as possible and "in advance", the "causes" and "conditions" of the deprivation of physical liberty. Thus, article 7.2 of the Convention automatically forwards to the internal rules. Therefore, any

<sup>5</sup> Vid; Amparo 257/2011, cit., para. 68-69.

requirement, laid down in the national law, which is not fulfilled when depriving a person of his liberty, will turn such deprivation illegal and contrary to the Convention.<sup>6</sup>

In addition, the figure of arraigo is not only recognized in previously referred provisions, but also in national legislation as in Article 12 of the Federal law against organized crime<sup>7</sup>, which on the matter states that:

The judge may order the arraigo, at the request of the Public Ministry of the Federation, in the cases provided in Article 2 of this Law and with the modalities of place, time, form and means indicated in the application; whenever it is necessary for the success of the investigation, for the protection of persons, of legal rights or when there is a well-founded risk that the accused may evade the action of justice; this measure can not exceed forty days and shall be carried out with the supervision of the authority, which shall be exercised by the Federal Public Prosecutor's Office and the Police in charge of the investigation. The duration of the arraigo may be extended as long as the Public Prosecutor's Office proves that the causes remain, without the total duration of this precautionary measure exceeding eighty days.

The foregoing confirms the dimension of the legal recognition of the figure of the arraigo as a precautionary measure. Therefore, this makes us think that this measure, because of the mere fact of being found in the Constitution, or in a legal norm, is valid, and consequently, it does not restrict the guarantees and human rights of the detainee. Our position is that this meta-constitutional precautionary measure is over-imposed in absolute terms, to the essential content of the human rights, and guarantees, such as personal freedom and the pre-trial hearing; as well as the following principles: pro-homine, presumption of innocence, legal certainty, prohibition of arbitrary detention, due process, and effective judicial protection. These rights and principles are recognized in international treaties and in Articles 7<sup>8</sup> and 8<sup>9</sup> of the American Convention on

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<sup>6</sup> Inter-American Court of Human Rights, *Case of Torres Millacura and Others v. Argentina*, Judgment of August 26, 2011, para. 74.

<sup>7</sup> Federal law against organized crime, published in the *Official Journal of the Federation* on 7 November 1996.

<sup>8</sup> Article 7. Right to personal freedom. 1. Every person has the right to personal liberty and security. 2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto. 3. No one shall be subject to arbitrary arrest or imprisonment. 4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him. 5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial. 6. Anyone who is deprived of his liberty shall be entitled to appeal to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies. 7. Nobody can be detained because of debts. This principle shall not limit the orders of a competent judicial authority issued for non-fulfillment of duties of child support.

<sup>9</sup> Article 8. Judicial guarantees. 1. Everyone has the right to a fair hearing, and within a reasonable time, by a competent, independent and impartial judge or court, previously established by law, in the substantiation of any criminal charge against him/her or the determination of its rights and obligations of a civil, labor, fiscal or any other nature. 2. Every person charged with a crime has the right to be presumed innocent until his or her guilt is legally established. During the process, everyone is entitled, in full equality, to the following minimum guarantees: a) the right of the accused to be assisted for free by the translator or interpreter, if he does not understand or speak the language of the court; b) prior and detailed communication to the accused of the accusation made; c) grant of time and adequate means for the preparation of his/her defense; d) right of the defendant to defend himself/herself or to be assisted by a defender of his/her choice and to communicate freely and privately with his/her lawyer; e) an inalienable right to be assisted by an attorney provided by the State, paid or not according to domestic law, if the investigated party does not defend himself/herself or appoints a lawyer within the period established by law; f) the right of the defense to question the witnesses present in the court and to obtain the appearance, as witnesses or experts, of other persons who can shed light on the facts; g) right to not be forced to testify against himself/herself or to plead guilty, and h) right to appeal against a ruling before a higher court or tribunal. 3. The confession of the accused is only valid if it is made without coercion of any nature. 4. The accused acquitted by a final judgment cannot be retried for the same facts. 5. The criminal process must be public, except in what is necessary to preserve the interests of justice.

human rights, 9<sup>10</sup> of the International Covenant on Civil and political rights and 3<sup>11</sup>, and 9<sup>12</sup> of the Universal Declaration of human rights; so as it can be seen, this figure has gone from the unconstitutionality, through the constitutionality, to the unconventionality.

For example, we see how in the Amparo 908/2011-V in San Luis Potosí, the Third District Judge, grants the amparo and protection of federal justice against the issuance of an arrest warrant, and/or arraigo issued by the Eighth Judge of the Criminal Branch of that State, based on Article 168 of the Code of Criminal Procedures for the State of San Luis Potosí that established the imposition of said precautionary measure, which was repealed on August 27 of 2013, considering this rule unconventional to contravene therefore the guarantees that in the field of human rights found in Articles 7.5, 8.2, and 22.1 of the American Convention on Human Rights.

We quote, in support of this consideration, the following thesis: I. 4o. A.2 K (10A.) “Legal persons: They are incumbent of human rights compatible with their nature”.

The preamble and the content of the American Convention on Human Rights warns, in principle, that the rights it recognizes are only those inherent to the human person, since it refers expressly to the “essential rights of man”, and the Article 1, numeral 2, of the order itself, provides that person is every human being. on the other hand, the reform to article 10 of the political Constitution of the Mexican United States, published in the official journal of the Federation on June 10, 2011, represents a paradigm shift in the national legal order, because said precept now rules that all persons shall enjoy the rights recognized in the Fundamental norm and in the international treaties which the Mexican State is a party, which means recognizing the referred human rights treaties a particular nature, comparable to constitutional norms, and so creating a new block of constitutionality, in so far as those norms become part of the content of the Constitution, integrating a compulsory and enforceable unit to all the acts or omissions that it may be detrimental to fundamental rights. [...] This reinforces the fact that from the new wording of article 10 constitutional and the ruling handed down by the plenum of the Supreme Court of Justice on the occasion of the compliance ordered in the Radilla Pacheco case, registered under the number 912/2010, which is published in the Judicial Weekly of the Federation and its Gazette, tenth time, book I, volume 1, October 2011, page 313, rules concerning human rights should be interpreted as the most beneficial to the person, implying that there is not necessarily a hierarchy between them, they shall be applied those which provide more extensive protection; “to this extent, if various international instruments foresee legal persons as holders of rights, it must follow this broad interpretation and guarantees in Mexican jurisprudence”. (emphasized added)<sup>13</sup>

However, in addition to the clear incompatibility of the figure of the arraigo with the integrated “constitutional block”, it is important to note that this figure extends the possibilities for a person to be subjected to acts of torture, cruel, inhuman, and degrading treatment, so it must disappear from our legal framework; this is based on the principle pro-homine as principle of the interpretation and application of legal standards, in that which prevails or provides greater protection to the human rights of the human person regardless of the place it occupies within the normative hierarchy (Acción de Inconstitucionalidad 22/2013, 2014a). It is evident that the

<sup>10</sup> Article 9b. 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment. 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

<sup>11</sup> Article 3. Every individual has the right to life, liberty and security of person.

<sup>12</sup> Article 9. No one shall be subjected to arbitrary arrest, detention or exile.

<sup>13</sup> Vid; Thesis: I.4o.A.2 K (10A.) Fourth Collegiate Court on Administrative Matters of the First Circuit, Judicial Weekly of the Federation and its Gazette Book XI, August 2012, Volume 2, p. 1875.

systematic violations of human rights related to the use of arraigo has led several international organizations to make accusations and recommendations aimed at condemning this practice at the federal and local levels.<sup>14</sup>

The Human Rights Committee of the International Covenant on Civil and Political Rights in relation to the fifth periodic report presented by Mexico and analyzed on March 8 and 9, 2010, stated in point 15 of its Annual Report A/65/40 of October 11, 2010 that:

(15) The Committee expresses its concern regarding the legality of the use of “arraigo penal” (short-term detention) in the context of combating organized crime, which allows the possibility of holding an individual without charge for up to 80 days, without bringing him before a judge and without the necessary legal safeguards as prescribed by article 14 of the Covenant. It regrets the lack of clarification regarding the level of evidence needed for an “arraigo” order. The Committee emphasises that persons detained under “arraigo” are exposed to ill-treatment (arts. 9 and 14 of the Covenant).

In the light of the 2005 decision of the Supreme Court regarding the unconstitutionality of “arraigo penal” and its classification as arbitrary detention by the Working Group on Arbitrary Detention, the State party should take all necessary measures to remove “arraigo” detention from legislation and practice at both federal and state levels. (emphasis added)<sup>15</sup>

### **The Unconventionality of the Arraigo in the Accusatory criminal Process**

As a worrying note regarding the unconventionality of the arraigo in the adversarial criminal proceedings, there are cases of torture which are carried out in the centres of detention and arraigo. The acts of torture continue to be practiced on detained people, although this precautionary measure has been imposed, certain restrictions, such as reducing the temporality of its application; its origin only when there is evidence of the existence of sufficient evidence to link the person with the crimes to which they are accused; as well as the faculty to the public organisms of protection of human rights to appear before the centers of arraigo without previous warning with the purpose of watching that in the application of this type of measures do not appear violations to the human rights of the people arrested. The National Commission of Human Rights announced that between 2008 and 2011 there were 405 complaints of human rights violations related to arraigo, of which 41% referred to torture and ill-treatment; the Subcommittee for the Prevention of Torture noted, after his visit to Mexico, that about 50% of the people under arraigo showed signs of torture;<sup>16</sup> nevertheless, and in spite of the aforementioned, this figure has not completely disappeared from the criminal procedure, it still exists in the federal sphere.<sup>17</sup>

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<sup>14</sup> Working group on arbitrary detention, 2002, para. 50; Committee against torture, 2007, para. 15; Subcommittee on prevention of torture, 2009, para. 238; HRC Universal periodic review, 2009; Human Rights Committee, 2010, para. 15; Special Rapporteur on the independence of judges and lawyers, 2010, para. 92-94; Working Group on enforced or involuntary disappearances, 2011, para. 88; Committee Against Torture, 2012, para. 11.

<sup>15</sup> Report of the Human Rights Committee, Sixty-fifth Session, Supplement No. 40 (A/65/40) Vol. I. United Nations, New York, 2010, p. 54.

<sup>16</sup> Report on the visit to Mexico of the Subcommittee for the prevention of torture and other inhuman or degrading cruel, inhuman or degrading treatment or punishment following its visit to Mexico in 2009, para. 225. Similarly, other United Nations mechanisms have been pronounced, such as: the Human Rights Committee, the Working Group on Enforced or Involuntary Disappearances, and the Special Rapporteur on the Independence of Judges and Lawyers, who in their reports have recommended the Mexican State to suppress this measure as it constitutes a serious violation of personal freedom and the human rights of the people. About the impact in Mexico on the figure of the arraigo see: <http://cmdpdh.org/wp-content/uploads/2013/03/Informe-CIDH-sobre-the-impact-in-e%C3%ACxico-of-the-figure-of-arraigo-pena-l-en-los-derechos-humanos-FINAL.pdf> (page consulted on June 15, 2014).

<sup>17</sup> The Supreme Court has invalidated its application at the local level derived from two actions of unconstitutionality presented by the National Human Rights Commission (29/2012 and 22/2013) in which the constitutionality of their incorporation into the new procedural codes of Aguascalientes and Hidalgo. Published in *Official Gazette of the Federation* on 05/22/2014. See the Judgment issued by the Full Court at: [http://www.dof.gob.mx/nota\\_detalle.php?codigo=5345740&fecha=22/05/2014](http://www.dof.gob.mx/nota_detalle.php?codigo=5345740&fecha=22/05/2014) (page consulted on June 16, 2014).

In this regard, on the subject of torture, the Inter-American Court of human rights, in the case *García Cabrera and Montiel Flores vs. Mexico*, has established:

[...] that the infringement of the right to physical and mental integrity of persons is a kind of violation that has different connotations of grade, and ranging from torture to other types of harassment or cruel, inhuman or degrading treatment or punishment whose physical consequences and Psychic vary in intensity according to the endogenous and exogenous factors (duration of treatment, age, sex, health, context, vulnerability, among others), that must be demonstrated on each specific situation. In addition, the Court has indicated that any use of force that is not strictly necessary due to the behavior of the detained person constitutes an attack on human dignity in violation of Article 5 of the American Convention. (emphasis added)<sup>18</sup>

Likewise, the Human Rights Committee, in the 17th session, presented its Report of the Special Rapporteur on the Independence of Magistrates and Lawyers, where it makes reference to the legal figure of the arraigo indicating that:

C) The legal figure of the arraigo

60. Preventive custody (arraigo) is a precautionary measure that is used to make sure that a suspect remains available during the criminal investigation stage. An article providing for preventive custody was incorporated into the Constitution in 2008, after the Supreme Court had ruled that such detention was unconstitutional in 2006.

61. The decision to elevate to constitutional rank the legal figure of the arraigo would have been tied to the governmental need to have an instrument that is appropriate to the situation of exceptional violence caused by the organized crime. Nevertheless, the most frequent justification of the existence of the arraigo is that it serves essentially in cases of flagrancia, when it is assumed that the person could be linked with some other crime within the context of the organized crime, but still there are insufficient elements to prove it.

62. In these cases, as a general rule, public prosecutors, instead of asking that people be prosecuted for the crime in flagrante delicto, they prefer to ask these people to be provisionally detained—even if there are insufficient elements to accuse them of any other crime serious. This is also because prosecutors usually prefer to have such people available for questioning rather than having them brought before a judge.

63. These considerations simply confirm the arbitrary nature of preventive custody and its incompatibility with the principle of the presumption of innocence and the right to personal liberty. Cases of preventive custody were found to be a form of arbitrary detention by the Working Group on Arbitrary Detention of the Human Rights Council following its visit to Mexico. Furthermore, this figure is intrinsically contrary to the oral accusatory model that Mexico has approved for its criminal procedure system.

64. The figure of arraigo allows a detention to investigate, whereas the appropriate and correct course of action would be to swiftly undertake an effective investigation and then proceed to make an arrest. The use of preventive custody is the outgrowth of a poorly functioning system for investigation and the administration of justice. It creates incentives that go against the enhancement of judicial authorities' investigative capacity and may be conducive to other human rights violations. The Special Rapporteur therefore considers that the legal institution of preventive custody should be expunged from Mexico's criminal justice system. (emphasis added)<sup>19</sup>

From the above transcript, we can notice that the concern of these international organizations regarding the application of this figure of the arraigo, leads to a series of human rights violations, as well as acts of torture, cruel, inhuman, and degrading treatment of people who are detained under this precautionary measure. Similarly, this figure violates the principle of presumption of innocence and represents an incongruence with the new paradigm of accusatory oral criminal justice that is being adopted in Mexico.

<sup>18</sup> Inter-American Court of human rights, case *García Cabrera and Montiel Flores vs. Mexico*, ruling of 26 November 2010, para. 133.

<sup>19</sup> Report of the Special Rapporteur on the Independence of Magistrates and Lawyers, seventeenth session of April 18, 2011, Human Rights Council of the United Nations.



On the other hand, as an alternative proposal for the implementation of the arraigo, we can mention the implementation of other measures that can be achieved in the same way the success of investigations, the protection of persons or legal property, or eliminate the founded danger that the accused may evade the action of justice; such as:

- a) The placement of a bracelet on ankle or wrist with a GPS Tracker or satellite locator device;
- b) The removal of the passport;
- c) The communication with the embassies in the country regarding the name of the detained person, as well as the conditions of the person, that is to say, their duration, purpose, motive, et cetera; therefore, periodically report the status of the detention, as well as its extension or conclusion;
- d) The control of the banking movements of the accounts, investments or credits of the detainee, owned by himself or as a member of a company, without implying its immobilization, but only the revision of the withdrawals, transfers or charges, during the time in which the precautionary measure in question subsists;
- e) Surveillance, in the terms and with the scopes described in the preceding paragraph, of the registers of real estate and personal property of the detainee—Public Registries of Property and Commerce; Secretaries of Finance or Taxes;
- f) The obligation to appear, without delay, each week before the authority that ordered the arraigo to sign with his own signature an attendance list and to inform the authorities of the reasons for their absence from their place of residence or changing their residence, or, their daily routine, so that with the help of the locator their immediate location is established;
- g) The prohibition to abandon a city, town, municipality or state, guaranteeing compliance with the placement of a sufficient bond, at the discretion of the respective authority.<sup>20</sup>

Although the limitations imposed on the figure of the arraigo are only one step to control its application, we believe that in order to completely eradicate this practice, the precautionary measures proposed would help the Attorney General, through the granting of this measure, to collect the necessary evidence to decide whether or not exercise criminal procedures, without fearing that the accused may evade the implementation of the action of justice and without being so limited or restrict the obligation of the Public Prosecutor's Office. The staff in charge may verify, protect, and observe the compliance of the measures targeted and the location of the detainee, in order to impose and guarantee the precautionary measures aforementioned, while safeguarding the principle of the presumption of innocence, the right to personal freedom, the movement or residence, or any other right.

### Conclusions

In above lines, the figure of the arraigo has been described as an antidemocratic practice derived from the criminal reform of 2008. It consists of a preventive measure to deprive of liberty those persons suspected of being part of organized crime or serious crimes.

It is considered that arraigo should be used as a means of investigation, but in practice, it is being used as a form of public surveillance that allows more time for the authorities to establish the culpability of the suspect. This measure is a form of arbitrary detention clearly contrary to Mexico's human rights obligations, and mainly violates the rights to personal freedom, as well as the principle of legality, the presumption of innocence, due process, and judicial review.

The use of arraigo has a direct impact on the right to the presumption of innocence, since the person is detained without having built any case to prove his culpability, as established by the principles of an accusatory criminal justice system. In cases of arraigo, a penalty is imposed in advance, whether the person is innocent or

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<sup>20</sup> Ruling of June 19, 2012 derived from Amparo 257/2011. Auxiliary 188/2012, párr. 48-55. Carlos A. Soto Morales, Sixth District Judge of the Auxiliary Center of the Second Region, San Andrés Cholula, Puebla.

guilty, as he/she is condemned from the moment a criminal investigation file is started. In addition, arraigo increases the chances of a person being tortured, since legal and judicial controls are practically null.

As a final notion, faced with the reality of the factual application of the figure of the arraigo in Mexico, it is important to point out that the detainees who are taken to the detention centers (administered by authorities of the executive power) are totally unprotected, because there are not any internal regulation that guarantee human treatment and respect for their rights and dignity; which is why this circumstance arises the possibility that the police authorities may act in a discretionary and arbitrary manner, transgressing the human rights of detainees. Therefore, though we consider that arraigo is an unconventional measure, in this situation, it is recommended the creation of a law for the protection of all persons subjected and deprived of their liberty by the issuance of an arrest warrant or arraigo issued by a judicial authority.

In short, we believe that the Supreme Court has an opportunity to study background parameters and conventional and constitutional validity criteria which will have to abide the Mexican judges over the figure of arraigo in house or, security house or detention centre, as well as the effects of this measure for human rights, and focus on the analysis of the figure of arraigo and its relationship with the application of the clause of conforming interpretation, the principle pro-homine, and control of conventionality to resolve such cases.

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