Revista catalana de dret públic #61

www.rcdp.cat

REMAND IN SPAIN AND THE STATE'S LIABILITY: TWO REFORMS THAT REMAIN OUTSTANDING*

Pere Simón Castellano**

Abstract

This article examines the controversial measure of remand in Spain in the light of two striking facts: firstly, the ubiquity of this preventative measure in judicial practice (at the beginning of the year, 16% of the prison population were pre-trial detainees) and, secondly, a compensation system based on state liability that, in the case of acquittal, has proven ineffective since 1985 and that has recently been shaken to its core by judgements of the European Court of Human Rights and the declaration by Spain's own Constitutional Court of the unconstitutionality of a number of provisions of Article 294 of the country's Organic Law on Judicial Powers. In addition to reviewing the developments leading up to the current situation, the article sets out the parameters for the debate on how to properly tackle two legislative reforms that now appear more pressing than ever.

Key words: wrongful remand; remand; right to compensation; state liability; presumption of innocence.

LA PRESÓ PROVISIONAL I LA RESPONSABILITAT PATRIMONIAL DE L'ESTAT JUTGE: DUES REFORMES PENDENTS

Resum

Aquesta recerca examina la polèmica institució de la presó provisional a Espanya a l'albir de dues realitats punyents: d'una banda, l'omnipresència d'aquesta mesura cautelar com a pràctica judicial —a principis d'any, un 16% de la població reclusa es trobava en situació de presó preventiva—; de l'altra, un sistema d'indemnització, en cas d'absolució, per responsabilitat patrimonial de l'Estat jutge, que s'ha mostrat ineficaç des de 1985 i que recentment s'ha vist sacsejat en els seus fonaments per la intervenció del Tribunal Europeu de Drets Humans i la declaració, per part del Tribunal Constitucional, de la inconstitucionalitat de diferents qüestions de l'article 294 de la LOPJ. L'article planteja, més enllà del repàs del procés que ens ha portat fins a la situació actual, els termes del debat per poder afrontar amb garanties dues reformes legislatives, que s'intueixen més necessàries que mai.

Paraules clau: presó provisional indeguda; dret a una indemnització; responsabilitat patrimonial de l'Estat jutge; presumpció d'innocència.

---

* This article is a translation of an original version in Catalan.

** Pere Simón Castellano, associate professor specialising in digital law at the International University of La Rioja (UNIR), associate professor at the University of Girona (UdG) and lecturer at ESERP Business School. UNIR, av. de la Paz, 137, 26006 Logroño (Spain). pere.simon@unir.net, @Pere_Simon.

Article received 06.05.2020. Blind review: 12.05.2020 and 25.05.2020. Final version accepted: 02.06.2020.

Recommended citation: Simón Castellano, Pere. (2020). Remand in Spain and the State's liability: Two reforms that remain outstanding. *Revista Catalana de Dret Públic, 61*, 224-239. http://doi.org/10.2436/rcdp.i61.2020.3463.

Summary

1 Introduction

Remand,[1] a preventative security measure, is one of the most contentious and controversial of legal measures due to its very nature, which limits fundamental rights and procedural safeguards, including those as significant to legal protection as the freedom of the individual and the presumption of innocence.[2] This limitation, which must—according to Spain's Law on Criminal Proceedings, (*Ley de Enjuiciamiento Criminal*, "LECr")—be markedly exceptional in nature, is justified, basically, by utilitarian criteria and on the basis of the general public interest in the effective prosecution of crime.[3]

Recent years have seen certain events or milestones at a national level that call for an in-depth and very necessary review of remand in light of its impact upon fundamental rights and the demands of both society in general and legal practitioners. This article aims to tackle the most questionable aspects of this measure and does so on the basis of two hypotheses.

The first is related to the alleged pervasiveness of remand in judicial practice,[4] despite the markedly exceptional and subsidiary nature of the measure.[5] Recent years have seen a number of cases with great media coverage in which remand has been ordered, such as the recent trial of Catalan pro-independence leaders,[6] the case stemming from the *Operación Lezo* corruption case in Madrid[7] or in the latest involving banker Mario Conde,[8] to give just a few examples. Perhaps the most iconic example of the problems raised by the measure was the remand of former FC Barcelona President Sandro Rosell, who was acquitted after 643 days of incarceration without any temporary release whatsoever, not even for then co-defendant Joan Besolí, who was not granted a single extraordinary furlough to visit his son, who had just been made paraplegic due to a serious accident.[9]

Although remand benefits from specific and detailed legal regulations and much implementing jurisprudence, the fact is that pre-trail detainees are in a kind of limbo. They cannot benefit from ordinary temporary release furloughs, which are reserved for those prisoners who have, amongst other requirements, completed at least a quarter of their term. Additionally, they have no access to reintegration programmes and no priority

1 Translation note: Spain uses the terms *prisión provisional* (more commonly employed in the field of constitutional law) and *prisión preventiva* (more common in criminal law). Terms in the English-speaking world can also vary (pre-trial detention, remand, provisional detention, etc.). This article uses the term remand, but other alternatives shall be used when, for example, appearing in the title of works or legislation.

2 Freedom is a principle of greater value than the legal order (Art. 1.1 CE), in addition to being a fundamental right (Art. 17 CE), and its importance lies in the way it acts as a presupposition underlying the exercising of other fundamental freedoms and rights. Accordingly, any measures limiting freedom need to be exceptional and reasoned, and based on a legal provision. See, by way of paradigmatic examples, the Spanish Supreme Court judgements STC 140/1986, of 11 November, FJ 5 and 160/1986, of 16 December, FJ 4. See also De Urbano Castrillo (2005).

3 Doctrine has studied the legitimate ends pursued by pre-trial detention and has noted the importance of it being limited to the most serious cases, i.e. those in which there is a true risk to the desired progress of the criminal proceedings and the effective prosecution of the crime. See Dorrego de Carlos (2004) and Martínez Galindo (2005: 23-29).

4 Legal doctrine has traditionally discussed this measure to the point of classifying it as one of the main problems of the criminal jurisdiction, due to its use and misuse, which make it an "omnipresent mechanism" that would only be understandable within the context of "the inquisitorial system". See Morillas Cueva (2016: 4).

5 An interesting empirical study of the judicial decision-making process on the precautionary measure of pre-trial detention can be found in Guerra Pérez (2011), which studies 250 decisions on pre-trial decision made in the province of Malaga over the course of 2003 and 2004, giving one an idea of the impact of applying the 2003 legislative reform on the matter.

6 This refers to the trials of the Catalan political leaders who made Catalonia's unilateral declaration of independence, the majority of whom were convicted by Division II of the Supreme Court in its Judgement no. 459/2019, of 14 October. During the investigative stage of the proceedings, a large number of applications and appeals were made, perhaps the most paradigmatic of which was that regarding Oriol Junqueras, whose situation was examined and re-examined on no less than seven occasions. Of the 12 accused in these special proceedings, nine were imprisoned before and during the trial hearings, and only three attended them in a situation of freedom.

7 As part of this operation, Ignacio González, former Regional President of the Autonomous Community of Madrid, remained in pre-trial detention for a total of 201 days. See the ruling of the Central Court of Instruction no. 6, of 21 April 2017.

8 This case is fairly serious, since, after 67 days of pre-trial detention, an ruling ordered the dismissal of the case. It must be asked whether there was sufficient evidence of the existence of an offence and its commission by the accused, as the proceedings were halted just two months after the adoption of the precautionary measure. See the ruling of the Central Criminal Court of the First Instance no. 1, of 13 April 2016.

9 See, with regard to this fascinating matter, the article by Abadías Selma (2020), who examines the details of the Sandro Rosell case.

in accessing in-prison work schemes, activities, educational programmes, employment workshops and occupational activities available to other inmates.[10]

The second hypothesis is linked to the system for compensation for damages arising for wrongful remand, a mechanism that was recently shaken to its roots by the European Court of Human Rights ("ECHR") and the reluctant acceptance by Spain's courts of said Court's jurisprudential doctrine.

This article seeks to outline the main parameters of the debate on a measure that calls for consistent criteria both when considering its application in a given case and with regard to the entitlement to receive compensation (and the establishment of the amount thereof) in the case of the subsequent acquittal of the accused. With this in mind, I shall, firstly, analyse the key features and characteristics of remand in Spain, including its constitutional dimension, which will allow us to gauge whether they actually occur in practice, to permit the testing of the first of the two hypotheses raised. I shall then analyse the situation created by Constitutional Court Judgement (*Sentencia del Tribunal Constitucional*, "STC") 85/2019 and, more specifically, the way it impacts upon and changes the system of state liability for damages arising from wrongful remand.

2 Remand: is it really precautionary and exceptional?

In the Spanish legal system, remand is designed as a precautionary measure that must be ordered by means of a reasoned judicial ruling,[11] be provisional in nature and entail the incarceration of the—still legally innocent—defendant, who shall be at least accused of a very serious crime.[12]

2.1 Legal nature

Remand bears witness to the immense tension between two legitimate national goals: on the one hand, that of respecting the right to freedom and the presumption of innocence (both individual in nature) and, on the other, society's right to maintain law and order to ensure peaceful coexistence and the general public interest in the effective prosecution of crime. This measure clearly entails a restriction of fundamental rights, although one that is accepted as an exceptional sacrifice in the name of the general public interest. It therefore comes as no surprise that Spain's highest interpreter of the *norma normarum* has insisted on referring to remand as a sacrifice encompassing the ensuring of the successful conclusion of criminal proceedings, the protection of constitutional rights, entitlements and values and the effective exercising of the state's *ius puniendi*.[13]

More specifically, its relationship with legal and constitutional entitlements finds concrete form, firstly, in the limitation on the right to freedom contained in Article 17 to the Spanish Constitution (*Constitución Española*, "CE"), the presumption of innocence contained in its Article 24.2 and Article 14's principle of equality. And, secondly, it acts to ensure that the function of administrating justice, per Article 117 CE, is not undermined and may be successfully concluded.[14]

10 Article 104 of Spain's Penitentiary Regulations establishes that no proposal for initial classification of detainees shall be formulated whilst the situation of pre-trial detention remains in force. This, in practice, prevents any participation in training schemes or access to activities on the same footing as other prisoners.

11 In the sample analysed by Guerra Pérez (2011: 517), in a study on the situation a decade ago, the conclusion was that judges were not complying with their legally established obligations with regard to the adoption of pre-trial detention. Specifically, the author notes that this non-compliance stems more from the lack of sufficient reasoning than from substantive application-related aspects. As we shall see later on in this article, the figures point to a significant fall-off in the use of pre-trial detention over the course of the last ten years.

12 The reform of 2003, commented on below, lowered the threshold, permitting the adoption of this precautionary measure when the accused was faced with a potential maximum prison term in excess of two years. There is thus, in practice, no requirement for the crime to be "very serious". In our opinion, this regulation opens up the way, potentially, to this highly contentious measure being ordered in the great majority of cases.

13 See Ruling STC 47/2000, of 17 February, FJ 9.

14 These are the traditionally affected rights, although, in some circumstances, the effects of pre-trial detention may spread to encompass others, such as those of political participation. This is the case with the aforementioned trial of the Catalan pro-independence leaders, as some pre-trial detainees were elected in the elections to the Parliament of Catalonia of 21 December 2017, to the Spanish Parliament of 28 April 2018 and to the European Parliament of 26 May 2018. It is clear that any impact upon the rights of political participation must be analysed with great care, given the fact that the role that said rights play, both passively and actively, is of crucial importance in a democracy. One part of doctrine has, with regard to the Junqueras case, indicated that the right of political participation, which the Spanish law on elections recognises for those subject to pre-trial detention, was flatly dismissed when the Supreme Court invoked the risk of repeat offences without raising alternatives that might allow for the defence of all the

Given this, the deprivation of liberty in the form of incarceration is located within a "field of tension" (Moreno Catena, 2020: 203) between two partially conflicting state duties that call for both the effective prosecution of crime and the guaranteeing of the freedom and presumption of innocence of the accused. It could even be debated whether this precautionary measure places into doubt the equality of arms or the guarantee of the right to a fair trial, since it is true that the defence may be impacted if the accused is in prison, since he or she would not have the same opportunities as if they were free, all the more so in cases which are subject to a secrecy order.[15]

So it is that remand is an always controversial measure that is enacted after a consideration of its proportionality, taking into consideration the individual features and peculiarities of the case in question.

2.2 The features of remand in Spain

There are four basic elements to the decision or judicial ruling approving a precautionary measure of this nature: temporality, legality, exceptionality and grounds. Given that the measure places limitations on fundamental rights, it is subject to legality and requires sufficient justification or reasoning by the courts; its precautionary or temporary nature gives rise to considerations regarding its instrumentality and provisional nature. Finally, due to the gravity of its effects, two interrelated aspects are at play: exceptionality and subsidiarity.

With regard to temporality, we should note the stipulations of Article 504 LECr, which restricts the period exclusively to the "indispensable time" required for achieving any of the ends contemplated by the LECr and whilst the grounds justifying its adoption persist. For this very reason, the accused may demand a review of their situation as often as required,[16] as well as a new examination or judicial evaluation of the circumstances that have led them to be held in a penitentiary facility on a preventative basis. One part of doctrine has held that this lack of specificity has a negative effect, deeming that it leads to a situation of complete legal uncertainty unbecoming of the legal order of a social, democratic country under the rule of law (Abadías Selma, 2020).

Next comes the legality of the measure. As noted above, Article 17.1 CE establishes that nobody may be deprived of their freedom except in those cases and forms so permitted by law. So, application of the law in a literal sense is, here, of particular importance, in that it has to be applied and borne in mind every time that a court issues a ruling on the measure, be this to initially order remand, when a decision is made to maintain it or when it is extended.

This calls for an in-depth analysis of the requirements set by Article 503 LECr and the associated identification of evidence of the existence a crime, which normally stems from police investigations, victims' and the accused's statements, as well as any witness input, depending upon the case, and of the commission of an offence by the accused, with regard to his or her participation therein and responsibility therefor. Jurisprudential doctrine has stated that this evidence is "indispensable", that it cannot equate to "suspicions" or "conjecture", with there thus being a need for rationale and the probability of the subject's participation in the unlawful act, as well as external information that, reviewed by the court, permits the detection or sound envisaging, in line with experience, of the potential criminal responsibility of the accused.[17]

For its part, doctrine is unanimous (Cobo del Rosal, 2008) in affirming that exceptionality must be the prevailing keynote in the imposition of remand, since, otherwise, we would fall into a highly perverse and harmful situation for the fundamental rights of freedom and the presumption of innocence. The norm must therefore be that of the accused's freedom throughout the criminal proceedings and thus that the deprivation of liberty should be infrequent or uncommon. Also in play here are the concepts of *favor libertatis* and *in*

interests at stake (Moreno Catena, 2020: 222-230). Along the same lines were the dissenting votes of STC 155/2019, jointly signed by the Judges Valdés, Xiol and Balaguer, and the Judgement of the ECHR (Grand Chamber) of 19 December 2019, case C-502/19.

15 The adoption of this measure is difficult to justify if one does not know what the accusation is. A secrecy order also has its limits, and the accused cannot have his or her right to a defence prevented *sine die*. See, with regard to this obvious problem, the works of Gómez-Jara (2017) and Nuño Díez (2019).

16 A good example of this is the pre-trial detention of Oriol Junqueras, which was re-examined on no less than seven occasions in the aforementioned resolutions.

17 Supreme Court Ruling (ATS) of 18 June 1992. See also Hassemer (2003).

dubio pro libertate. This is a precautionary measure in the strictest sense, and not an advance punishment[18]: therefore, remand cannot serve any sanctioning purpose, particularly any exemplary one. Remand must be an *ultima ratio*, the last of any precautionary measures applied, as the Constitutional Court has repeatedly held since 1995.[19]

Turning to the grounds for the court's decision, Article 506.1 LECr establishes that rulings issued on the personal situation of the accused must set forth the grounds as to why the measure is regarded as necessary and proportionate with regard to the ends justifying its adoption.[20] There is a higher standard of grounds required due to the significant limiting of fundamental rights it entails. The ruling must set forth clearly and in a reasoned manner the legal reasons why remand has been ordered, with regard to the *fumus boni iuris* (literally, the appearance of good law and the existence of evidence of verisimilitude in the claims of the applicant party), to the *periculum in libertatis* (any dangers that may arise should the accused remain at liberty during the course of the proceedings), to the evaluation of its appropriateness (if it is likely to achieve the end justifying it), to necessity (there is no less harmful alternative or way) and to proportionality in the strictest sense (if it results in more benefit than harm, including for the general interest).[21]

2.3 Premises

The premises or objective criteria that must occur to be able to order this precautionary measure are very lax—or at least easy to fulfil—in the great majority of cases. Article 503 LECr provides for the measure in the prosecution of crimes for which Spain's Criminal Code contemplates a maximum penalty equal to or in excess of two years' prison and also in those cases in which the term is shorter, if the accused has a criminal record that is not expunged nor expungable arising from a conviction for an intentional crime. So, it can be seen that the LECr does not set the bar particularly high, and permits its use in cases that are not particularly "serious", provided that there are sufficient grounds for believing that the person in question is responsible for the crime (in terms of both the accused's criminal involvement and evidence of the actual commission of an offence) and some of the circumstances (constitutionally legitimate ends or purposes) listed in the same Article (and which shall be studied in the next section) arise.

2.4 Purposes

One of the purposes justifying the ordering of remand, recognised in the laws and jurisprudence in almost all Western legal systems, is that of guaranteeing or ensuring the physical presence of the accused during the trial proceedings. The disappearance or flight of an accused would prevent not only the future enforcement of any sentence, but also, prior thereto, the normal carrying on of the criminal proceedings themselves.[22]

There is also the risk of destroying evidence, mitigated by remand, which, before the 2003 reform, was also known as the objective of preventing the obstruction of justice.[23] Said precautionary measure also mitigates the risk of repeat offending, thereby fulfilling special prevention ends,[24] and may also be aimed at preventing the accused from acting against the victim, protecting the latter's legal assets, particularly in cases of gender violence.[25]

Any other purpose that may be attributed to remand would exceed its *ex lege* limits and objectives.

18 This is the theory, at least. The actual statistics show that things are quite different in reality, as we shall see in Section 2.5. Also see the criticisms of Nistal Martínez (2013).

19 Excellent examples are STC 60/2001, of 26 February, FJ 3 and 138/2002, of 3 June, FJ 4.

20 See the doctrine of the highest interpreter of the *lex superior* in this regard in the aforementioned STC 47/2000, FJ 9.

21 With regard to the principle of proportionality, see Asencio Mellado (2005).

22 See on this fairly uncontroversial point the position of De Urbano (2004: 153).

23 Constitutional Court Judgement STC 23/2002, of 28 January, FJ 3.

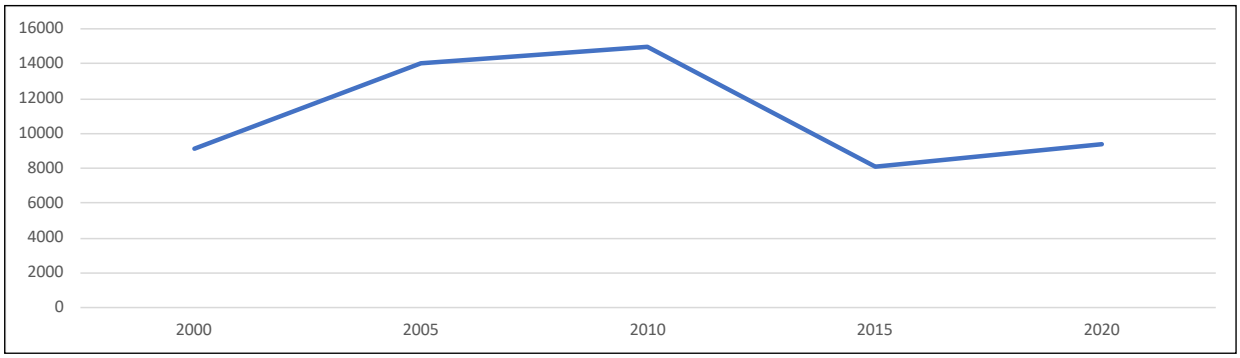
24 Although it has been criticised by some authors, such as Roxin (1976: 15-17).

25 See on this matter Gimeno Sendra and Díaz Martínez (2004).

2.5 The current situation

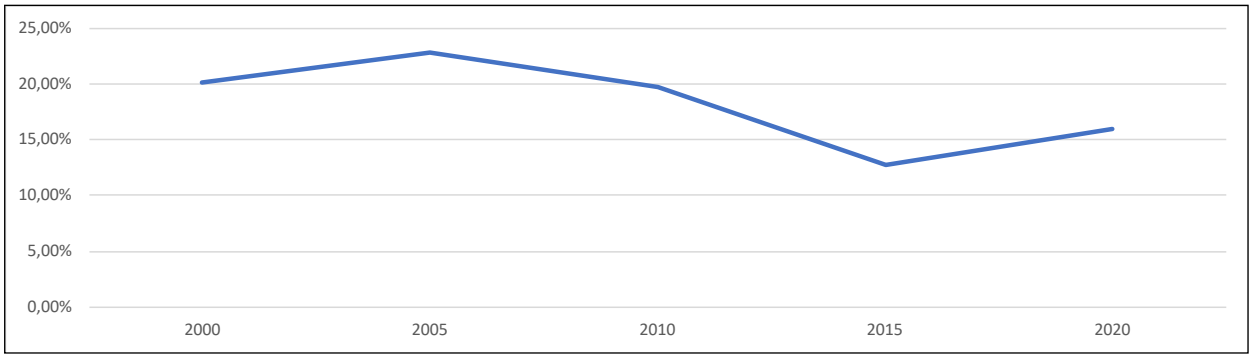
Over the course of the last two decades, we have witnessed an increase in the use of remand in numerous countries around the world. This is shown by the statistics and in the reports published by the International Centre for Prison Studies, which also warns that trends in prisoner numbers (both convicted and in remand) show a generalised and constant rise. A recent report (Walmsley, 2020), published in April this year, warns that the total number of people in remand has risen by 30% since 2000 and, more specifically, that this represents a five-point increase over the already significant growth in the overall population.

The trend in Spain over the last 20 years in the opposite (downward) direction, which may initially seem surprising, given the high media-profile cases in which this kind of "exceptional" measure is ordered. Let's look at trends in two graphs.[26]



Graph 1. Trend in total cases of remand. Source: own work based on Council of the Judiciary (*Consejo General del Poder Judicial*, "CGPJ") data.

As can be seen, the total figures for the Spanish courts' use of this precautionary measure increased significantly from 2000 to 2005, and this upward trend continued until 2010. There was then a marked decrease until 2015, whilst recent years have seen a slight uptick, with a total of 1,268 more cases.



Graph 2. Trends in pre-trial detainees as a percentage of the total prison population. Source: own work based on CGPJ data.

This second graph is much more revealing, as it shows the trend in pre-trial detainees as a percentage of the total prison population. Significant is the fact that 16% of this population in 2020 were pre-trial detainees. This permits quantification of "exceptionality" at 16%, a figure that does not seem to fit particularly well with the literal meaning of the word "exceptional".[27] However, we can see that the percentage changes were relatively insignificant from 2000 to 2010, when figures were fairly stable, whilst, on the other hand, there was a considerable drop from 2010 to 2015 and an important upswing of 3.3% in the last five years. So, the overall trend in the last decade is clearly downwards, albeit with a slight increase in the use of remand in the last five years.

26 These two graphs are my own work, based on figures and data taken from the reports on prison population statistics named Estadística penitenciaria and published by Spain's General Council of the Judiciary (consulted on 1 May 2020).

27 Nevertheless, most European countries have even higher figures for pre-trail detainees as a percentage of the total prison population (Walmsley, 2020): Italy, 31%; France, 25.6%; Belgium, 35.6%; Germany, 20.4%; Greece, 26.6%, to give just some examples.

To better understand these figures, it is important to remember that 2003 witnessed the passing of Organic Law 13/2003, on the reform of the LECr, whose Articles 503 and 504 saw significant changes in remand. This reform was the result, firstly, of the growing demand from doctrine[28] and, secondly, from STC 47/2000, of 17 March, in which said Court itself considered a self-submitted case on the wording of said articles. Since 2003, their content includes all the elements and features we have analysed in preceding sections, although the reform helped stress the required respect for constitutional principles and reinforced the need to expressly provide grounds, placing on record the ends pursued in the ruling adopting the measure.

Nevertheless, the reform was used by the legislature to introduce the possibility of applying remand as a tool for fighting to ensure law and order and, to do so, significantly watered down the requirements for adopting the measure, by reducing the required prison term threshold to two years, as critically analysed above, and also opened up the door to the possibility of ignoring this requirement if the accused had a criminal record.

We can see (in Graph 2) that the period from 2000 to 2010 saw a small increase, which could almost be called a levelling off, of pre-trial detainees as a percentage of the total prison population. So, we could—incorrectly—conclude that the reform had no notable impact upon this or that it was not noted: however, if we look at the total numbers in Graph 1, we can see that a highly significant increase occurred in the number of pre-trial detainees. The fact that said decade saw a parallel increase in the national crime rate does not mean we cannot assess the rise in the total figures caused by our courts. Obviously, the fact that the wording of Articles 503 and 504 LECr permits its use in cases the law classifies as "serious"—as questionable as that may be—in which the maximum term is two years of prison or in which the accused has a criminal record, paves the way for this precautionary measure to be used in the majority of cases heard before the criminal courts.

The sharp drop in both the total number and percentage occurring from 2010 to 2015 may have several causes. The global financial crisis, followed by a deep economic one, which had an effect on overall crime rates, might be one. Another could be the impact of the recommendations issued by the Council of Europe between 2006 and 2010,[29] or the Resolution of the European Parliament of 15 December 2001, on the conditions for the deprivation of liberty in the EU.[30] Nevertheless, from 2015 to 2020, we can once again see a slight increase in both the total number of cases and in the percentage of pre-trial detainees, to 16% of the prison population in 2020.

What is more, at the same time, crime policy studies show that remand levels are more influenced by political decisions than actual crime rates (Guerra Pérez, 2011: 494). It is not a case, solely, of the obvious expansion of criminal law, a tool that is increasingly being used to impose a solution upon almost all social and political conflicts. Many high-profile cases closely followed by a sector of public opinion have opted for this precautionary measure. Although the total figures and percentages show only a small upswing from 2015 to 2020, what is most worrying is the growing feeling in the public gallery that there is an abuse of this measure in cases with a high media profile, such as those involving Sandro Rosell or the Catalan pro-independence leaders.

The most illustrative examples of this issue come from cases of economic crimes, such as those of Francisco Correa, Pablo Crespo, Francisco Granados and Julián Muñoz, who were in remand for 1,217, 1,083, 954 and 819 days, respectively. One feature common to all these cases, and to the great majority of those involving economic offences, is that the precautionary measure ends up being ordered due to an alleged flight risk, although it is difficult to defend this reasoning as those accused of economic offences do not usually flee, and even less if they are publicly-known and identified figures who are easily locatable. The typical "white collar" criminal is a man with a public life, a businessman, civil servant, entrepreneur or someone with a normalised social life, and boasting a high social status. Furthermore, the complexity of the actions investigated in this

28 See Gimeno Sendra (2001) and Landrove Díaz (1997).

29 See, more specifically, the following Council of Europe Recommendation: the Recommendation on European Prison Rules (2006); that on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse (2006) and the Recommendation on the Council of Europe Probation Rules (2010).

30 In this, the Parliament demands that Member States guarantee that pre-trial detention be an exceptional measure, used under strict conditions of necessity and proportionality, and for a limited time, in compliance with the fundamental principal of the presumption of innocence and the right to freedom.

type of crime means that the accused and their attorney are in close contact and collaboration, which would immediately scotch any attempt at flight, as it would leave the former without the necessary legal assistance for their defence. Nevertheless, as we have already noted, remand is habitually used in economic crimes, leading one to wonder whether the concept of social alarm—expunged from the LECr by the 2003 reform—does not, in practice, live on, as a measure to alleviate the pressure from the media and prevent the accused's freedom from causing a reaction of public alarm, fear or widespread rejection.

3 The compensation system, at an impasse

The Spanish legal system governs the right to obtain compensation for unfair or wrongful remand in Article 294 of the country's Organic Law on Judicial Powers (*Ley Orgánica del Poder Judicial*, "LOPJ"). Until very recently[31], its wording stated that compensation was available to those who, after suffering remand, were acquitted due to the inexistence of the alleged offence or by means of an ruling for dismissal, provided that they had been caused unlawful harm or damage. As the literal interpretation of the text would indicate, such compensation was only available to those pre-trial detainees who are later acquitted under certain defined and specific circumstances.

The system or mechanism for obtaining compensation is initiated by the interested party, who must directly submit an application before the Ministry of Justice, which will process it pursuant to the rules governing state liability, as contemplated in Articles 293.2 and 294.3 LOPJ. A contentious-administrative appeal may be filed against the resulting resolution and the right to claim compensations lapses one year after the first date upon which it could be exercised. According to Article 294.2 LOPJ, the amount of the compensation shall be established based on the time in detention and the associated personal and family-related consequences.

The system for compensation for wrongful remand does not follow the traditional scheme for compensation, as it is not the result of wrongful or unlawful interference, but rather a requirement associated with a properly verified (i.e. lawful) intrusion. Compensation is normally an *a posteriori* remedy to make amends for something that, in itself, is contrary to the scope of powers conferred by an entitlement. However, in "sacrificial" cases, such as that of remand followed by acquittal,[32] compensation allows for the equidistribution of the cost of the common good and acts as a constitutional requirement of the very sacrificial act (Rodríguez Fernández, 2019).

Nevertheless, a literal interpretation of Article 294.1 LOPJ raised many problems that jurisprudential doctrine sought to resolve, under the premise of deeming that said Article actually implemented Article 121 CE, which establishes that compensation must be provided for harm caused by judicial error or the abnormal functioning of the judicial system.[33] There would be no sense in the non-coverage or non-inclusion, for purely practical or utilitarian purposes, of the subjective inexistence of the alleged offence. It was for this very reason that, at the beginning of 1989, the Supreme Court (*Tribunal Supremo*, "TS") equated the cases of objective and subjective inexistence of the alleged offence, whilst excluding cases of non-conviction due to the lack of or insufficient evidence.[34] In this way, the TS helped to establish different legal consequences that depended upon the type or class of the acquittal and the circumstances under which it arose, excluding cases in which it was due to a lack of sufficient evidence or the intrinsic demands of the law regarding the presumption of innocence and the standard of proof beyond all reasonable doubt.

31 The literal wording of said Article was that "the right to compensation shall be available to those who, after suffering pre-trial detention, are acquitted due to the inexistence of the alleged offence or when, on the same grounds, a ruling for dismissal has been issued, provided that harm has occurred". The Constitutional Court, in Judgement STC 85/2019, of 19 June, has ruled that the mentions of "inexistence of the alleged offence" and "on the same grounds" are unconstitutional, as we shall see below.

32 Some criminal law jurists have declared themselves radically opposed to the notion of a "sacrifice" as the starting point for compensation, decrying that resorting to terms such as "heroism" or a "mobilisation" as if in times of "war, disaster or epidemic" is unfitting of a social, democratic state under the rule of law. See Rodríguez Ramos (2019).

33 The Spanish state's liability for judicial error is, *stricto sensu*, governed in Article 293 LOPJ, which establishes that it must always be preceded by a judicial decision expressly acknowledging the error. Nevertheless, if our starting point is cases of legally ordered pre-trial detention, we cannot speak of judicial error nor of the abnormal functioning of the judicial system. We therefore need to turn to the procedure and method provided for in Article 294.

34 See Supreme Court Judgement STS no. 76/1989, of 27 January 1989.

The Supreme Court thus held that a judgement based on the lack of or insufficient evidence could not give rise to an entitlement to compensation, since it does not necessarily stem from a judicial error. Or, much the same, that the application in the strict sense of the principle of *in dubio pro reo* does not mean that there was not previously *prima facie* evidence of culpability and the outcome does not under any circumstances call into question the legality of the precautionary measure. In such cases, then, the accused has no alternative but to accept remand as a "sacrifice".[35]

The fact is that this "solution", shall we say, "discriminated" against the accused based on the circumstances of his or her acquittal and stretched the shadow of doubt cast over them by their potential guilt until the reaching of a decision—to grant or not the compensation—that lies in the hands of an administrative authority (the Spanish Ministry of Justice).

A few years later, in 1992, the Constitutional Court (*Tribunal Constitucional*, "TC") confirmed the above Supreme Court doctrine by stating that, from the standpoint of the law's end, the objective and subjective inexistence of the alleged offence are essentially the same and that, accordingly, they should receive the same treatment.[36]

Both these courts, the TS and TC, at this time, based themselves unwaveringly on the premise deeming that any decision taken by an administrative authority on whether or not to grant compensation had no influence or impact whatsoever on the presumption of innocence, as if the effects thereof found specific form solely within the framework of criminal proceedings.[37]

3.1 Misgivings in the reception given to the ECHR doctrine on the out-of-court dimension of the presumption of innocence

The above legal doctrine, which was being peacefully applied, was cut short in its prime with a jurisprudential decision from the Supreme Court[38] that was basically caused by its interpretation of the Judgement of the ECHR of 25 April 2006, in the case Puig Panella v. Spain. The doctrine of the TS and the TC with regard to the compensation system contemplated in Article 294 LOPJ was called into question by the criteria and reasonings of the ECHR, which has stated on numerous occasions[39] that the presumption of innocence—and nothing would make us think that the same would not be the case of personal freedom—also has force out of court. The Strasbourg court established that the distinction between the circumstances examined above deliberately failed to take account of the accused's prior acquittal, which should be respected by all authorities, judicial or otherwise, by virtue of Article 6.2 of the European Convention on Human Rights.

The TS reacted to the doctrine established by the ECHR by means of two judgements in November 2010,[40] and in a peculiar way, as it accepted the prohibition from making a distinction between circumstances, but allied this with the dangerous notion that Spain's legislature did not seek, with Article 294.1 LOPJ, to establish compensation for every case of remand followed by acquittal.[41] So, the conclusion it finally reached was that the use of Article 294.1 LOPJ must be limited to cases of objective inexistence of the alleged offence,[42] which would return those cases affected by subjective inexistence to the route of judicial error

35 It is precisely this which provides the grounds for the compensation: the interreference with the accused's right to freedom and the need to equitably distribute the cost of the common good or general public interest, which has been shouldered in its entirety by the accused. See Rodríguez Fernández (2019). This is something that has, as noted above, been criticised by Rodríguez Ramos (2019).

36 See STC 98/1992, of 22 June, FJ 2.

37 See Montañés (1999).

38 STS of 23 November 2010, which resolved the cassation appeals nos. 1908/2006 and 4288/2006.

39 See the Judgements of the ECHR of 25 April 2006, Puig Panella v. Spain, § 50, of 13 July 2010, Tendam v. Spian, § 36 and 16 February 2016, Vlieeland Boddy and Marcelo Lanni v. Spain, § 39.

40 STS of 23 November 2010, mentioned above.

41 This placed excessive restrictions on the possibility of compensation in cases of subjective inexistence, which, as with objective inexistence, is a case of proven innocence. See Díaz Fraile (2017).

42 This position has been the subject of severe criticism by some authors, who state the TS "obliterates the content of the fundamental right to the presumption of innocence" and forsakes the citizen "investigated, imprisoned, accused and subsequently acquitted", creating categories (of first and second-class acquittals) quite foreign to criminal proceedings and its safeguards. See Campaner Muñoz (2017: 5).

governed in Article 293.1 LOPJ, reasoning that the difference in treatment was purely procedural rather than substantive.[43]

However, the TC took little time to criticise this route,[44] in deeming that such a position would contribute to perpetuating the problem of differentiation prohibited by the right to the presumption of innocence, in its out-of-court dimension, required by the ECHR. This highest interpreter of Spain's constitution holds that retaining this difference between circumstances and limiting the application of Article 294.1 LOPJ solely to those of the objective inexistence of the alleged offence solves nothing, as a negative response to the application for compensation would continue to extend the shadow of a doubt as to the culpability of someone who has been acquitted following a criminal trial.

It is not acceptable, in the TC's view, to reject an application for compensation by sustaining suspicions as to the guilt of the applicant based on the circumstances of their acquittal.[45] In short, when establishing the justice administration's responsibility for wrongful pre-trail detention, no arguments related directly or indirectly to the applicant's presumption of innocence may be employed, and so the circumstances of the acquittal are irrelevant for these purposes.

Nevertheless, the TS has proved reluctant to apply the above doctrine. A good example of this is the progress of the case which STC 8/2017, of 19 January, sought to resolve. Following the retroaction of the proceedings, the TS again rejected the application for compensation by the affected party, arguing that the acquittal did not strictly fit with the legal circumstances contained in Article 294.1 LOPJ.[46] In other words, the TS dismissed the appeal, which ultimately meant that the affected party was not compensated for wrongful remand.

In response to a continued interpretation or literal application of Article 294 LOPJ by the TS that made the ECHR doctrine ineffective or emasculated, few remedies were available except for action on the part of the legislature, which is inherently slow, or a reaction by the TC as a "negative legislator". It was this latter route that was eventually taken, in the form of an internal self-submitted question on constitutionality.

3.2 The effects of Constitutional Court Judgement STC 85/2019, of 19 June

STC 85/2019, of 19 June, resolves the aforementioned internal question on unconstitutionality.[47] This is a reaction by the TC to the doctrine of the TS, expressed in, amongst other judgements, STS no. 2862/2017, of 12 July, which insisted on distinguishing between different circumstances and on providing cover for the refusal to grant compensation for wrongful remand based on the literal wording of Article 294 LOPJ. In the opinion of the highest interpreter of Spain's constitution, this was the only option available for complying with ECHR doctrine and guaranteeing the presumption of innocence for pre-trial detainees.

The outcome is a new TC doctrine that holds that the wording of Article 294.1 LOPJ is contrary to Articles 14 and 24.2 CE, in that it establishes an unjustified and disproportionate difference in treatment between the case of the objective inexistence of the alleged offence and other cases of acquittal. The phrasing of Article 294 LOPJ contemplating compensation "due to the inexistence of the alleged offence" and "for this same reason" lead us, in the TC's own words "to selecting compensatable cases" introducing "a difference between the cases of remand not followed by a conviction, contrary to Article 14 CE".[48] This difference in treatment is unjustifiable, in that it does not fit the objective of the compensation and leads to disproportionate results based on latent doubts as to the innocence of the compensation applicant, something that is incompatible with the requirements of Article 24.2 CE.

43 Which was the cause of strong doctrinal criticism. See Rodríguez Ramos (2016) and Martí (2011).

44 Via STC 8/2017 and 10/2017, that state that the circumstances of the acquittal should be completely irrelevant for the purposes of compensation.

45 It is important to remember that the ECHR had again ruled on this same point in 2016, with new judgements against the Spanish state. We refer here to the Judgements of 16 February 2016, Vlieeland Boddy and Marcelo Lanni v. Spain, mentioned previously. It is within this context that STC 8/2017 and 10/2017 were issued, after more than 10 years of ECHR judgements insisting upon the extension and effects of the presumption of innocence beyond criminal proceedings.

46 STS no. 2862/2017, of 12 July.

47 Constitutional Court ruling on a question of unconstitutionality 4314-2018, raised by the plenary session.

48 STC 85/2019, of 19 June, FJ 13.

The TC therefore declared these phrases unconstitutional, without reaching a decision as to any potential violation of the right to personal freedom, and qualified its ruling by stating that under no circumstances did the new wording of Article 294.1 LOPJ entail any "automatic" compensation for all cases of remand followed by acquittal,[49] but rather that said compensation must be established in accordance with the provisions of law and, in their absence, by applying the general theory of civil liability.

A new legal framework has therefore been created for applications or requests for compensation for wrongful remand, although doctrine is not unanimous on the effects of said judgement.[50] On the one hand, some (Medina Alcoz and Rodríguez Fernández, 2019) continue to argue that, in practice, a distinction can be made between cases for establishing the amount, albeit on the basis of the characteristic features of sacrificial-type harm, pursuant to the doctrine of objective civil responsibility and the general theory of fundamental rights.[51] On the other, a good few authors (Muñoz Carrasco, 2019 and Rodríguez Ramos, 2019) believe that the resulting situation necessarily entails direct, *de facto* or automatic compensation, despite the TC's reluctance to describe it in this way.[52]

The TS has already ruled on this issue and holds that the current system entails immediate compensation, since the exception of the cases in which no harm was caused is now indefensible, if one has been subject to remand.[53]

For its part, as we have seen above, the LOPJ provides no clear guidelines on how to establish the amount, beyond a general refence to the period of time in detention and to any personal and family-related consequences that may have arisen.[54] The TS has attempted to fill the legislative void with regard to the lack of uniformity, and has done so on the basis of the fact that it is the applicant or requester of the compensation that must justify the harm and damages alleged to be caused by the remand. If no information, evidence or concurrent circumstances are submitted to establish the damage actually caused, the responsibility lies with the applicant. Aside from the burden of proving and specifying the damage with specific information, the TS has drawn up a list of aspects to be evaluation when establishing the amount: (1) the non-material harm arising from the social stigma and isolation from one's surrounding environment, as well as the distress, anxiety, frustration or worry that this generally implies; (2) the compensation must increase in line with the amount of time in detention and this must be done at an increasing rate, and it must be progressive due to its continuation gradually exacerbating the harm; (3) assessment of circumstances such as age, health, civic behaviour, the alleged offences, criminal record, restoration of lost honour, the greater or lesser likelihood of being socially forgotten and the mark that imprisonment may have left on the detainee; (4) loss of income and economic impact; (5) the state of health, whether their physical and mental condition has worsened during detention; (6) the existence of dependants outside of the prison or minor children.

Whilst it is true that a large part of the jurisprudential criteria make a great deal of sense, they still fall short, since they do not sufficiently take into account the accused's reintegration and the effects that wrongful remand

49 *Ibidem*, FJ 13; an aspect that is vigorously reasserted in STC 125/2019, of 31 October, FJ 5.

50 The absence of stable criteria and the lack of consistency when establishing compensation for wrongful pre-trial detention have been criticised by doctrine. See Tapia Fernández (2018: 13-14).

51 Along the same lines, Edorta Mendazona (2019) is in favour of differentiating between circumstances, not for the purpose of deciding upon whether to grant compensation, but rather in establishing its amount. According to said author, we should avoid the temptation of a system of scales or automated compensations that could trivialise a harm as great as the loss of freedom, and the greatest compensation should be reserved for cases of material innocence compared with those of formal unlawfulness. So, individualising the circumstances of each case would, firstly, ensure respect for the out-of-court presumption of innocence, with compensation for all cases, and, secondly, respect the principle of equality, which also requires that equal treatment not be given to something different, taking into account the differences that may arise in the type of acquittal and that have appeared at the end of the criminal proceedings. Edorta Mendazona (2019: 40-41).

52 See, along these lines, in favour of the state's direct and objective liability in the case of (in the end) wrongful pre-trial detention, the work by Rodríguez Ramos (2016).

53 See STS no. 3121/2019, of 10 October 2019, FJ 8.

54 In the aforementioned case of STS 3121/2019, the Court ordered the justice administration to pay 3,000 euros compensation to a man who had been a pre-trial detainee for 351 days as the result of a criminal complaint for rape and bodily harm, of which he was subsequently acquitted. The only evidence submitted by the applicant to evaluate the harm was the fact of having spent 351 days in prison, the lack of any criminal record and his age (31), although the Court did also take into account another compensation payment of 6,000 euros for improper delays. All in all, it appears to us that the figure compensative for this sacrifice for the general public good is risibly small.

may have caused to their social relationships, job situation and, most especially, upon the free development of their personality in the future. The problems many ex-prisoners have in reintegrating into society are well-known, despite the availability of *ad hoc* programmes and plans. It must be remembered that pre-trial detainees are also not on an equal footing with other prisoners with regard to both release on ordinary or extraordinary licence and participation in reintegration programmes, meaning they suffer from discrimination compared with other inmates when choosing activities, employment workshops, etc. We believe that much more importance should be attached to this aspect when it comes to evaluating compensation, which should in any case be formulated within a minimal framework of dignity, something far removed from current practice.[55] There is also, in our view, a need to definitively exclude the "guilt" of the victim as a criterion, as the doctrine of both the ECHR and the TC is *de facto* incompatible with any reassessment of the victim's involvement (or otherwise) in the commission of the possible offence,[56] although doctrine is not unanimous on this last point.[57]

4 Concluding thoughts

One. Remand is, as a provisional and precautionary measure, a valid and necessary tool in criminal proceedings, and one that is worth retaining to meet the general public interest and effectively prosecute crime, although it needs to be improved. Its most recent reform took place with Spain's Organic Law 13/2003, reforming the LECr. This, on the one hand, significantly boosted the requirement and duty to diligently provide grounds for the rulings ordering this measure, introducing a series of delimited ends or purposes but also, on the other, reduced its threshold to the point that it could be adopted in the vast majority of criminal cases (those with a maximum penalty of two or more years of prison or when the accused has a criminal record), as a weapon in the fight for law and order.

Two. Over the course of this article, we have analysed prison figures and statistics, which point to two things. The first is that, in 2019, pre-trial detainees in Spain represented 16% of the total prison population, although this figure also includes convicts who have other criminal trials pending and so would not be officially classified and would be regarded as pre-trial detainees. It is difficult, if not impossible, to argue that this is an "exceptional" measure when, in practice, the statistics show that 16% of inmates currently in prison are there due to the application of this precautionary measure. This does not necessarily represent a substantive, fundamental criticism, but rather one of the use of terminology that is a poor fit with everyday practice, which shows that remand is more "occasional" in nature. It is also positive to note that this figure is not particularly large, all the more so bearing in mind other European countries, where it tends to be higher. The second is a considerable drop in the total number of pre-trial detainees over the course of the last decade, albeit with a slight uptick in total cases and in the relative percentage of pre-trial detainees in the last five years. What's more, this small increase has occurred alongside a growing use of remand in cases with a high media profile, which are closely followed by public opinion, particularly in cases of those involving economic offences. Crime policy studies show that remand levels are influenced more by political decisions than actual crime rates, and this is unacceptable. Criminal proceedings cannot be a tool of political crime policy and remand ought never to be used as a form of advance conviction.

Three. A new reform of the LECr should include criteria for reducing the use of remand in the so-called "*macrocausas*" (proceedings trying large-scale economic offences), a debate that is more pressing than ever, now that the Ministry of Justice has announced the creation of an expert committee to submit the preliminary draft of the new LECr before the end the year. To achieve this, there is a need to either set the bar higher in terms of the maximum penalty for the offence type investigated, or determine the types of cases in which this measure may be used. Both options are valid, although the former does not give rise to problems from the

55 The case mentioned in the preceding note sums up rather well the problems of a model lacking standardised criteria.

56 Guichot Reina (2019: 249) argues along the same lines.

57 On the other hand, Medina Alcoz and Rodríguez Fernández continue to argue that the guilt of the victim may play a decisive causal role, giving rise to the same effect of ruling out compensation. These authors hold that there is also a need to assess the behaviour at trial of the applicant, with an especial analysis of whether he or she caused the pre-trial detention by breaching his or her duties (e.g. by trying to flee or attempting to witness tamper or destroy evidence), if he or she was negligent or completely passive in fighting the decision on the precautionary imprisonment measure and if his or her own behaviour gave rise to a context of suspicion. See Medina Alcoz and Rodríguez Fernández (2019: 170-172 and 189).

perspective of the principle of equality and would permit use of the measure in the case of truly "serious" crimes. It will also be necessary to enable formulas and controls to ensure that judges and magistrates only use this precautionary measure after applying and respecting the applicable legal conditions, avoiding as far as possible the temptation to use it as a political tool. Specific training on this matter from the *Escuela Judicial*, Spain's professional academy for judges and magistrates, would probably be the most effective organisational option, although, at the same time, a new circular from the prosecutors' office calling for restraint could be of decisive help, as it must be remembered that judges cannot issue an ex-officio order for remand, with public prosecutors playing a key role in this area.

Four. The system for providing compensation for wrongful remand also finds itself at an impasse. Throughout this article, we have seen the twists and turns taken by jurisprudential doctrine, the dispute between the doctrines of the TC and the TS and, finally, the creation of a new, still unclear, framework with STC 85/2019, which has ruled certain aspects of Article 294 LOPJ unconstitutional. The TS has asserted that applications for compensation for wrongful remand must be accepted automatically, irrespective of the circumstances of the acquittal (objective or subjective inexistence of the alleged offence, dismissal, insufficient quality of proof, withdrawal of the accusation, etc.). Nevertheless, a legislative reform is required to provide consistent criteria, as well as to provide legal security, and encompassing the establishment of the amount, which is currently determined solely by the time spent in detention and a vague reference to personal and family circumstances. The TS has listed a series of criteria that should help to establish the amount, but, in practice, we continue to witness appalling cases, such as that in which compensation for 351 days in pre-trail detention was established in the sum of 3,000 euros.[58] In short, we have gone from one extreme to another, and now injustice can take on a new guise, in the dispensing of the same treatment for different cases. Compensation should be boosted in cases of material innocence, distinguishing them from acquittal due to formal unlawfulness, solely for the purposes of establishing the amount. It is not about providing compensation to some but not to others, although such an option is not completely ruled out by ECHR doctrine, but rather that there be rules that establish—with clarity and certainty—the procedure that permits its obtaining and under what conditions.

5 Reference list

Abadías Selma, Alfredo. (2020). ¿Uso o abuso de la prisión preventiva?: consideraciones en relación al caso Sandro Rosell. *La Ley Penal: Revista de Derecho Penal, Procesal y Penitenciario*, *145* (in print).

Asencio Mellado, José María. (2005). Reforma de la prisión provisional. El respeto a la excepcionalidad como garantía del derecho a la libertad. *La Ley: Revista Jurídica Española de Doctrina, Jurisprudencia y Bibliografía*, *2*, 1584-1595.

Barona Vilar, Silvia. (1988). *Prisión provisional y medidas alternativas*. Barcelona: Llibreria Bosch.

Campaner Muñoz, Jaime. (2017). La quimérica indemnización por el padecimiento de prisión preventiva seguida de pronunciamiento absolutorio en España: un problema propio del cierre de filas judicial a la luz de la experiencia italiana. *La Ley Penal: Revista de Derecho Penal, Procesal y Penitenciario*, *129*.

Cobo del Rosal, Manuel. (2008). *Tratado de Derecho Procesal Español*. Madrid: CESEJ.

Cobreros Mendazona, Edorta. (2019). El sistema de indemnización por prisión provisional indebida en la encrucijada. *Revista de Administración Pública*, *209*, 13-44.

De Urbano Castrillo, Eduardo. (2004). Presupuestos y fines de la prisión provisional. In Alberto Dorrego de Carlos (Coord.), *Régimen jurídico de la prisión provisional* (pp. 135-168). Madrid: Sepín Editorial Jurídica.

De Urbano Castrillo, Eduardo. (2003). *La necesaria reforma de la prisión provisional.* Madrid: UCM.

58 See Supreme Court Judgement STS 3121/2019, mentioned above.

Díaz Fraile, Francisco. (2017). *La presunción de inocencia y la indemnización por prisión preventiva. Crítica del Derecho español vigente*. Valencia: Tirant lo Blanch.

Dorrego de Carlos, Alberto (Coord.). (2004). *Régimen jurídico de la prisión provisional*. Madrid: Sepín Editorial Jurídica.

Gimeno Sendra, Vicente. (2001). La necesaria reforma de la prisión provisional. *La Ley Penal: Revista de Derecho Penal, Procesal y Penitenciario*, *7*, 1320-1327.

Gimeno Sendra, Vicente, & Díaz Martínez, Manuel. (2004). La prisión provisional y sus medidas alternativas. *Estudios de Derecho Judicial*, *58*, 49-83.

Gómez-Jara Díez, Carlos. (2017). Secreto de sumario, prisión provisional y derecho de acceso al expediente: a propósito del auto de la Audiencia Provincial de Madrid de 12 de abril de 2016 y otros desarrollos recientes. *Diario La Ley*, *8930*.

Guerra Pérez, Cristina. (2011). *La decisión judicial de prisión preventiva. Análisis jurídico y criminológico*. Valencia: Tirant lo Blanch.

Guichot Reina, Emilio. (2019). Responsabilidad administrativa. *Revista Española de Derecho Administrativo*, *201*, 231-250.

Hassemer, Winfried. (2003). *Crítica al Derecho penal de hoy: norma, interpretación, procedimiento: límites de la prisión preventiva.* Buenos Aires: Ad-hoc.

Martí Martí, Joaquim. (2011). La revisión de la doctrina del error judicial en los supuestos de prisión preventiva seguida de absolución. *Diario La Ley*, *7617*.

Martínez Galindo, Gema. (2005). La prisión provisional. *La Ley Penal: Revista de Derecho Penal, Procesal y Penitenciario*, *13*, 13-29.

Medina Alcoz, Luis, & Rodríguez Fernández, Ignacio. (2019). Razones para (no) indemnizar la prisión provisional seguida de absolución. Guía aplicativa del art. 294.1 LOPJ tras la STC 85/2019, de 19 de junio. *Revista Española de Derecho Administrativo, 200*, 147-190.

Montañés Pardo, Miguel Ángel. (1999). *La presunción de inocencia: análisis doctrinal y jurisprudencia*. Pamplona: Aranzadi.

Moreno Catena, Víctor. (2020). La prisión provisional de los condenados del "procés". *Teoría y Derecho: Revista de Pensamiento Jurídico*, *26*, 201-233.

Morillas Cueva, Lorenzo. (2016). Reflexiones sobre la prisión preventiva. *Anales de Derecho*, *34*, 1-38.

Muñoz Carrasco, Patricia. (2019). Los presos preventivos absueltos podrán ser indemnizados. *Diario La Ley*, *9481*.

Nistal Martínez, Javier. (2013). El ingreso provisional en prisión. Presunción de culpabilidad versus presunción de inocencia. *Diario La Ley*, *8122*.

Nuño Díez de la Lastra Martínez, Sergio. (2019). La incidencia del secreto de las actuaciones y la adopción de la medida cautelar de prisión provisional en el derecho de defensa. *Diario La Ley*, *9541*.

Rodríguez Fernández, Ignacio. (2019). La dimensión constitucional del daño sacrificial. *Revista General de Derecho Constitucional*, *29*.

Rodríguez Ramos, Luis. (2016). Apariencia y realidad en la responsabilidad patrimonial del Estado Juez (limitada vigencia del artículo 121 CE). *Teoría y Realidad Constitucional*, *38*.

Rodríguez Ramos, Luis. (2019). ¿Ciudadanos o súbditos del Estado-Juez? La STC 85/2019 de 19 de junio: sumarias loas y críticas. *Diario La Ley*, *9477*.

Roxin, Claus. (1976). *Problemas básicos del Derecho Penal*. Madrid: Editorial Reus.

Simón Castellano, Pere. (2020). Presunción de inocencia e indemnización por prisión provisional indebida (interrogantes tras la STC 85/2019). *La Ley Penal: Revista de Derecho Penal, Procesal y Penitenciario*, *143*.

Tapia Fernández, Isabel. (2018). La eficacia del derecho a la presunción de inocencia en los procedimientos seguidos para exigir responsabilidad patrimonial al estado por prisión preventiva según la doctrina del Tribunal Europeo de Derechos Humanos. *La Ley Penal: Revista de Derecho Penal, Procesal y Penitenciario*, *134*.

Walmsley, Roy. (2020). *World Pre-trial/Remand Imprisonment List*. London: International Centre for Prison Studies.