

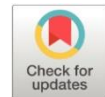


## Transgresión de principios procesales penales y derechos constitucionales por exceso de tiempo de prisión preventiva sin sentencias ejecutoriadas

*Transgression of criminal procedural principles and constitutional rights due to excessive preventive detention time without enforceable sentences*

- <sup>1</sup> David Alexander Oña Cumbal  <https://orcid.org/0009-0007-7402-9059>  
Master's Degree in Criminal Procedural Law and Oral Litigation, Catholic University of Cuenca, Cuenca, Ecuador.  
[daonac44@est.ucacue.edu.ec](mailto:daonac44@est.ucacue.edu.ec)
- <sup>2</sup> Ana Fabiola Zamora Vazquez  <https://orcid.org/0000-0002-1611-5801>  
Master's Degree in Criminal Procedural Law and Oral Litigation, Catholic University of Cuenca, Cuenca, Ecuador.  
[afzamorav@ucacue.edu.ec](mailto:afzamorav@ucacue.edu.ec)



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**Palabras clave:**

Sanción penal,  
derecho  
constitucional,  
sentencia judicial,  
norma jurídica,  
legislación.

**Resumen**

**Introducción:** La investigación se centra en la problemática del plazo razonable en casos de sentencias no ejecutoriadas, específicamente en el contexto de la caducidad. Se aborda el conflicto surgido entre dos criterios emitidos por las más altas cortes ecuatorianas: el Pleno de la Corte Nacional de Justicia y el Pleno de la Corte Constitucional del Ecuador. Este conflicto se ilustra en la sentencia No. 02-2023, emitida el 05 de enero de 2023 por la Corte Nacional de Justicia, y la resolución Nro. 112-14-JH, del 21 de julio de 2021, emitida por el Pleno de la Corte Constitucional. Aunque se presentan decisiones jurisdiccionales relacionadas con la caducidad, el foco no está en la legalidad, arbitrariedad o legitimidad de las circunstancias que llevaron al pronunciamiento sobre la medida cautelar de prisión preventiva, sino en el razonamiento constitucional más acorde a los derechos constitucionales y convencionales. **Objetivo:** El objetivo de la investigación es analizar las diferentes posturas adoptadas por la Corte Nacional de Justicia y la Corte Constitucional del Ecuador con respecto al plazo razonable y la caducidad en casos de sentencias no ejecutoriadas. Se busca determinar cuál de los dos enfoques se ajusta mejor a los principios constitucionales y convencionales de protección de derechos. **Metodología:** La metodología empleada en esta investigación consistió en un análisis exhaustivo de las sentencias y resoluciones emitidas por la Corte Nacional de Justicia y la Corte Constitucional del Ecuador relacionadas con la problemática del plazo razonable y la caducidad. Se realizó una revisión detallada de los fundamentos jurídicos utilizados en cada caso, así como un análisis comparativo de las posturas adoptadas por ambas instituciones. **Resultados:** Los resultados de la investigación revelan que existe un conflicto de interpretación entre la Corte Nacional de Justicia y la Corte Constitucional del Ecuador en lo que respecta al plazo razonable y la caducidad en casos de sentencias no ejecutoriadas. Mientras que la Corte Nacional adopta un enfoque más legalista y restrictivo en la aplicación de la normativa, la Corte Constitucional se inclina hacia una interpretación más constitucionalista, priorizando la protección de derechos fundamentales. **Conclusión:** En conclusión, la investigación pone de manifiesto la necesidad de armonizar las interpretaciones de la Corte Nacional de Justicia y la Corte

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Constitucional del Ecuador en relación con el plazo razonable y la caducidad en casos de sentencias no ejecutoriadas. Es fundamental que se encuentre un equilibrio entre los aspectos legales y constitucionales para garantizar una adecuada protección de los derechos de las personas involucradas en procesos judiciales. **Área de estudio general:** Derecho Procesal Penal. **Área de estudio específica:** Derecho Procesal Penal y Litigación Oral

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**Keywords:**

Criminal sanction, constitutional law, court judgment, legal standard, legislation.

**Abstract**

**Introduction:** The research focuses on the problem of the reasonable term in cases of non-executed judgments, specifically in the context of expiration. It addresses the conflict arising between two criteria issued by the highest Ecuadorian courts: the Plenary of the National Court of Justice and the Plenary of the Constitutional Court of Ecuador. This conflict is illustrated in Ruling No. 02-2023, issued on January 05, 2023 by the National Court of Justice, and Resolution No. 112-14-JH, dated July 21, 2021, issued by the Plenary of the Constitutional Court. Although jurisdictional decisions related to expiration are presented, the focus is not on the legality, arbitrariness or legitimacy of the circumstances that led to the pronouncement on the precautionary measure of preventive detention, but on the constitutional reasoning more in line with constitutional and conventional rights. **Objective:** The objective of the investigation is to analyze the different positions adopted by the National Court of Justice and the Constitutional Court of Ecuador with respect to the reasonable term and expiration in cases of non-executed sentences. The aim is to determine which of the two approaches is better adjusted to the constitutional and conventional principles of protection of rights. **Methodology:** The methodology used in this investigation consisted of an exhaustive analysis of the rulings and resolutions issued by the National Court of Justice and the Constitutional Court of Ecuador related to the issue of reasonable time and forfeiture. A detailed review of the legal grounds used in each case was carried out, as well as a comparative analysis of the positions adopted by both institutions. **Results:** The results of the investigation reveal that there is a conflict of interpretation between the National Court of Justice and the Constitutional

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Court of Ecuador reasonable time and expiration in cases of non-executed sentences. While the National Court adopts a more legalistic and restrictive approach in the application of the law, the Constitutional Court leans towards a more constitutionalist interpretation, prioritizing the protection of fundamental rights. Conclusion: In conclusion, the investigation shows the need to harmonize the interpretations of the National Court of Justice and the Constitutional Court of Ecuador in relation to the reasonable term and the expiration of time in cases of non-executed sentences. It is essential to find a balance between legal and constitutional aspects in order to guarantee adequate protection of the rights of persons involved in judicial proceeding.

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## Introduction

It is important to address the issue of precautionary measures within the Constitution of the Republic of Ecuador, hereinafter called CRE, due to the guaranteeing effects that all persons have as presumed suspects and defendants, whether through an administrative act, investigative phase such as fiscal instruction, until reaching the trial stage.

Through art. 522 of the Comprehensive Organic Criminal Code, hereinafter COIP, the modalities that can be adopted depending on their relevance are established, thus prevailing an adequate balance between efficiency and impunity, thus ensuring the presumption of innocence until proven otherwise. Practically respecting a fair trial.

Preventive detention, constituted as a measure of last resort, is of an exceptional nature and has been established by the American Convention on Human Rights in its article 7, paragraph 3 on the freedom of persons, which states, “No one may be subjected to arbitrary arrest or imprisonment.” (Organization of American States, 1978, p. 4)

The extract refers to the prohibition that people have of being subjected to unjustified imprisonment, this within the sphere of criminal and constitutional procedure that as an Ecuadorian jurisdiction we must faithfully abide by, in accordance with the provisions of art. 11. 3 of the CRE, which specifies the manner in which its application must be considered by the judge, this under the constitutional material aspect.

Likewise, there is a connection with the same article 7, numeral 5 of the infra-constitutional normative body of the American Convention on Human Rights, due to its

interpretation of the right of each individual to possess his freedom during the process, as long as he is complying with the rules of our sanctioning normative body COIP through art. 520, in harmony with the CRE, thus being our starting point.

In this way, the legal conflict would be resolved by filing an action of unconstitutionality before the CCE, so that the effects on the norm must be resolved and it declared invalid, due to the large number of sentences and constitutional articles that are not being analyzed in depth in the case, as established in number 2 of art. 436, which states:

To hear and resolve public actions of unconstitutionality, on the merits or on the form, against normative acts of a general nature issued by State bodies and authorities. The declaration of unconstitutionality will have the effect of invalidating the challenged normative act. (Constitution of the Republic of Ecuador, 2008)

In this way, the position is left to dictate a decisional line, regarding the application of this rule of expiration of preventive detention, establishing a single mandatory binding criterion to resolve this legal bias.

### **Theoretical framework**

It is essential to emphasize the nature of precautionary measures within our jurisdiction, in this case exclusively limiting them to preventive detention due to the object of the problem, which determines that they are preventive, simply and plainly due to the fact of safeguarding the development of a criminal process without delays. Within the COIP, through articles 519 and 520, they have regulated both the aspect of applicability, restrictions and the rules that will be followed.

Its purpose is to guarantee the appearance of both the suspect and the defendant at the trial, so as to avoid possible absences that would characterize the evasion of justice in the way a conviction is resolved, being essential to ensure a fair and effective trial under equal arms.

Likewise, the issue of personal precautionary measures (preventive detention) is related to the type of danger that the defendant may pose in the crime attributed to him, respecting the rights to social protection, crime prevention, as well as the inherent guarantees possessed by both suspects and defendants, under the parameters of the presumption of innocence.

The relevant point of the application of preventive detention is, in some circumstances, the restriction on the commission of new crimes while a preliminary investigation or instruction is in progress, depending on the case and the type of crime. It is important to highlight this aspect regarding personal precautionary measures, due to the development

in the resolutions issued by the judges in a proportionate manner, always evaluating the issue of suitability and necessity regarding the measure imposed, thus guaranteeing in a reasoned manner the limitations of rights and preventive restrictions without exceeding the balance regarding their applicability. The CCE has ruled on proportionality, in the sense of:

(...) the principle of proportionality constitutes one of the guarantees of due process that acts as a limit to the punitive power, both at the time of normative configuration of the different infractions and sanctions, and at the time of its application during the specific exercise of the sanctioning power. In this sense, proportionality requires that there be an adequate correspondence between the sanction and the conduct or category of conduct that is reproached, so that it is not excessive considering the seriousness of the infraction or unnecessary for the achievement of the purpose of general interest. (Rights to Defense, 2021, p. 36)

Proportionality develops both the element of suitability and the need to review whether the precautionary measures that are imposed by the judge are really relevant to safeguard the protection of the violated legal assets, as long as they do not exceed an arbitrary interposition.

The first element expresses the standard of protection of the rights of both the victim and society in general, which guarantees that the victim is not an imminent danger, emphasizing that he or she may also be a threat to the process attributed to him or her. While the second element analyzes the relevance of the approach of the selected measure with the rest, that is, attributing the least restrictive one as long as the suspect or defendant ensures alternative measures that he or she can comply with, whether he or she has a home set up, a stable job, relatives within a jurisdiction of his or her preference, among others.

It is important to note that both suitability and necessity, which are constituent elements of proportionality, are essential when determining a criminal precautionary measure, because the fundamental rights of the individual will be put into play, such as the principle of legality and the principle of proportionality, if you will pardon the redundancy.

Furthermore, these assessments must be made taking into account the individual circumstances of the case, especially under the principle of presumption of innocence until proven guilty, under the protection of the CRE and various international human rights treaties. In light of this, responsibility can also be determined through conduct, which will be proven beyond a reasonable doubt.

In the case of the victim, the necessary protection is guaranteed in the trial, and the evacuation of evidence will be better constituted, that is, it cannot be lost or manipulated, preserving its integrity, this in hypothetical cases where the suspect or defendant can

manipulate scenes, induce versions of witnesses, change relevant details at a crime scene, fraudulently alienate movable or immovable property, among others.

To safeguard the victim's integrity, they will be carried out under numeral 1 of art. 77 of the CRE, this is what we mentioned previously as the guarantee of appearance at the trial and ensuring compliance with the sentence, this may be provisional until a duly enforceable sentence is issued, thus respecting reasonable time frames and the motivation that it entails.

In accordance with art. 522, paragraph 6 of the COIP, in accordance with the constitutional precept indicated above, it leads us to the purpose that speaks about the constitution of sufficient elements of conviction to determine a crime, in light of which Jurist Roxin argues:

(...) all punishable conduct involves a typical, unlawful, culpable action that meets other possible requirements for punishability. Therefore, all punishable conduct presents four common elements (action, typicality, unlawfulness and culpability), to which in some cases a further requirement for punishability may be added.” (Roxin, 2003, pp. 193-194)

As referred to, the essential elements or doctrinally known as basic categories, have as a rule to establish the criminal responsibility of a person and therefore to attribute a precautionary measure according to the seriousness of the crime imposed against him. For a better analysis, it is necessary to explicitly develop this formula to determine the existence of a criminally relevant conduct or if it is a case that is exempt from criminal responsibility, described under the type of minimum criminal intervention. In view of this, the elements are described as follows:

**Table 1**

*Constituent elements of a criminal offence*

Action	Typicality	Unlawfulness	Culpability
Human behavior towards the world, through an activity, whether direct or by omission (conduct).	The result between the behavior produced and the adjusted criminal type. As provided for in the law.	It establishes the violation of the protected legal asset, contrary to law. Outside justification.	The volitional and cognitive understanding of the illicit acts that are carried out.

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With these precepts, connected with the issue of preventive detention under the concept of the presumption of innocence whenever it fits the case, for which, the CCE has ruled in judgment No. 2533-16-EP, which develops the restriction of freedom of movement, as:

Any measure that limits freedom of movement constitutes detention and, as such, requires compliance with and respect for the minimum guarantees<sup>41</sup> that derive from the right to personal freedom recognized both in the Constitution of the Republic and in international instruments. (Judgment 2533-16-EP /21, 2021)

In this way, it is required to comply with the standards of the principle of legality, presumption of innocence, necessity and proportionality, in order to develop a correct application of preventive detention. The degree of relevance and applicability will depend on both the criminal types and the sanction to which the person is subject during the process, from here the problem will evolve, the classification in the subject of preventive detention, typified in numeral 6 of art. 522 of the COIP.

Within the expiration period, we find several non-enforceable convictions, based on purely legalistic approaches, being immediately applicable, as guarantors under the constitutional ceiling. It is there where we find inconsistencies that must be absolved with an action of unconstitutionality that applies as a result a reform in the COIP, adapting a reasonable term with the purpose of respecting the rights of people in an ongoing criminal trial.

It is pertinent to address the issue of jurisdictional guarantees of Habeas Corpus Actions, because it is the most suitable and effective guarantee that is interposed by persons deprived of liberty in the face of this type of arbitrariness.

According to the parameters of the American Convention on Human Rights, hereinafter called ACHR, through art. 4, no. 1, it establishes that, “Every person has the right to have his or her life respected. This right shall be protected by law and, in general, from the moment of conception. No one may be arbitrarily deprived of life.” (Organization of American States, 1978, p. 2)

Its effect is the protection of the life of all persons from conception to death, without affecting their interests due to an erroneous interpretation, but it is necessary to indicate that freedom should not be granted without grounds under the precept of expiration, but rather that their basic and procedural guarantees should be respected within a legal and fair process.

Now, the ACHR, in art. 7, no. 2, states that, “No one may be deprived of his physical liberty, except for the reasons and under the conditions established in advance by the Political Constitutions of the States Parties or by the laws enacted pursuant to them”



(Organization of American States, 1978). For this reason, it is completely correct regarding the physical detention of a person under the conditions established in the CRE, due to the state of guarantees to which we are subject and the principles to which we rely, that is, of legality and proportionality.

Now, as a background for a better understanding, I express the following relevant case of violation of a reasonable period. Through the order dated June 17, 2020, which is issued by the Judge of the Criminal Judicial Unit based in the Pastaza Canton, within case No. 16281-2020-00293, the precautionary measure of preventive detention is initially ordered in a flagrant crime. The judge of this judicial action stated verbatim:

“...UNDER THE PRINCIPLE OF NECESSITY, I CONSIDER THAT PREVENTIVE IMPRISONMENT IS NECESSARY, UNDER THE ISSUE OF PROPORTIONALITY THE PENALTY FOR THIS CRIME IS MORE THAN 1 YEAR, ART. 520.4 OF THE COIP THERE ARE NO GUARANTEES OF IMMEDIATENESS OF THE DEFENDANT, THE PENALTY PROVIDED FOR THE CRIME OF MURDER IS FROM 22 TO 26 YEARS, THE PETITION OF THE PROSECUTOR’S OFFICE IS ACCEPTED AND PREVENTIVE IMPRISONMENT IS ORDERED AGAINST CHIMBO ALVARADO JOFFRE NIXON. ISSUE THE IMPRISONMENT WARRANTY...” (Preventive imprisonment order, 2020)

After this, on June 11, 2021, the Pastaza Criminal Court, in a sentencing judgment, ruled that the defendant Nixon Chimbo, hereinafter referred to as NCH, never intended to kill his father, but that there was preterintentionality, which through the jurist Cabanellas, expresses preterintentionality as: "The death caused to a person by someone who did not intend to inflict such serious harm on him." (Cabanellas de Torres, 1979)

Regardless of the theory of the case, the facts that Mr. NCH was being suffocated by his biological father who was completely intoxicated, and in self-defense he injured his father in the leg with the intention of getting him to let go, in view of which, they considered in the sentence the provisions specifically in numeral five, letter i), the following:

...that is to say, Jofre Chimbo Alvarado acted with awareness and will in the acts he was carrying out when he wounded his father Wilson Chimbo Alvarado in the groin and right thigh with the knife, without expecting that he would die from these wounds, that is to say, he caused a more serious result than the one he intended to cause, which makes applicable the provisions of Art. 26. - Fraud. - A person who, knowing the objective elements of the criminal type, voluntarily carries out the conduct acts with intent. A person who carries out an action or omission that produces a more serious result than the one he intended to cause is

liable for a preterintentional crime, and will be punished with two thirds of the sentence... (Condemnatory Sentence, 2021)

Thus, by determining that there was preterintention, the Pastaza Criminal Court resolved:

(...) ADMINISTERING JUSTICE, IN THE NAME OF THE SOVEREIGN PEOPLE OF ECUADOR, AND BY AUTHORITY OF THE CONSTITUTION AND LAWS OF THE REPUBLIC, liability is declared and a conviction is issued against citizen Jofre Nixon Chimbo Alvarado, for having committed the crime of murder typified and sanctioned in article 140, numeral 1 of the Comprehensive Organic Penal Code as a direct author as established in article 42, numeral 1, literal a), in relation to Art. 26, second paragraph of the ibidem preterintentional crime, imposing a prison sentence of FOURTEEN YEARS FOUR MONTHS, the time he has spent in detention for this cause must be imputed (...) (Condemnatory Sentence, 2021)

In view of this, in the resolution of the Appeal within the same case 16281-2020-00283, raised by NCH, issued by the Chamber of the Provincial Court of Justice of Pastaza, there being one dissenting vote and two majority votes, in summary, by majority it is resolved to ratify the sentence issued by the Criminal Guarantees Court of Pastaza dated June 11, 2021, at 5:51 p.m.

Despite the dissenting vote that partially accepts the appeal, the declaration of liability was filed and the conviction sentence was issued against NCH for having committed the crime of unintentional homicide, as defined and punished in article 144 of the COIP.

Now, the appeal is filed before the Specialized Chamber for Criminal, Military Criminal, Police Criminal, Traffic, Corruption and Organized Crime of the National Court of Justice, being since 2021 the aforementioned chamber, despite the fact that, on the part of Mr. NCH, he has insisted through writings that they call for the respective hearing in which his legal situation will be resolved, referring in proceedings dated May 31, 2022 at 11:26 a.m. and, September 21, 2022 at 3:59 p.m. that, "the aforementioned defendant is hereby informed that, in due time, the procedural subjects will be notified for the substantiation of the appeal filed in this case" (Condemnatory Sentence, 2021)

Thus, until September 20, 2023, without the corresponding hearing having been convened by the National Court of Justice Chamber, that is, in total legal uncertainty, since thirty-seven months have already been exceeded with a preventive detention that by constitutional and conventional mandate cannot exceed twelve months, equivalent to one year.

Through Art. 424 of the CRE, it guarantees the prevalence of the Constitution and International Treaties over biased or obscure sentences that contravene violated rights, in

this case the expiration of preventive detention without a final sentence, emphasizing the lack of effectiveness with the simple fact of not complying with its control standards, which will govern under a guarantee system.

Within the premise that I refer to, I emphasize the criteria adopted by judges in analogous cases linked to this problem, in Resolution No. 02-2023, of January 5, 2023, the Plenary of the National Court of Justice, hereinafter called PCNJ, resolves, recognizing that given the obscurity of the law on whether a sentence should or should not be enforceable, referencing the COIP in its art. 541.3, and establishing a pronouncement, "...Once the sentence is issued, these terms will be interrupted."

In it, they referenced the way in which the interruption of the expiration of preventive detention should be applied in a general way, from that perception the PCNJ indicated, "there is no doubt that the expiration of preventive detention is interrupted when the oral jurisdictional decision is issued in a trial hearing, which the law itself assimilates to a sentence...". It practically breaks the constitutional requirement provided in the CRE in its article 77.9, lacking the aspect of formality in notifying both a sentence and its execution, and with this transgression giving way to the interruption of the expiration period of preventive detention. A series of violated and recognized rights and principles, these are both due process, effective judicial protection and legal security that, by not being respected, are giving way to unconstitutional sentences.

There is an analysis of the jurisdictional guarantee of habeas corpus, in the sense of the current conditions under which a precautionary measure of preventive detention is maintained, in this regard it is stated:

At this point, it is necessary to clarify that the Constitutional Court has defined "deprivation of liberty" as a broad concept. In this sense, the Court has said that deprivation of liberty "is not limited only to the arrest warrant of a person", but rather "includes all the facts and conditions in which the person is found since there is an order aimed at preventing him from moving freely (...)" (Pozo, 2020, pp. 145-146)

The charge alleged within this constitutional guarantee being the non-conventionality of time without analyzing the control that it requires, in light of this, several jurists have referred to the control of conventionality for:

(...) interpret any national legal norm in cases subject to its jurisdiction (constitution, law, decree, regulation, jurisprudence, etc.) (iv) in accordance with the inter-American corpus iuris (mainly the American Convention and the jurisprudence of the IACHR), (v) and in case of manifest incompatibility, refrain from applying the national norm. (González, Reyes, & Zúñiga, 2016)

It is practically a strict manual for judges to follow so that they can make their decisions through a correct assessment of the facts, evidence and standards. It prioritizes human rights as an ideal, affirming the inherent dignity of each person.

For thirty-seven months, a precautionary measure of preventive detention has been maintained without a duly enforceable sentence. Article 11, paragraph 3, of the CRE determines that the rights enshrined in our Constitution and in international treaties will have direct and immediate application. Therefore, this measure cannot be conceived without adequate legal, constitutional and conventional justification.

That is to say, a measure that by its very nature must be temporary, with a maximum term of one year, cannot be kept in an indeterminate state. Therefore, the legislator in our constitution defines what is known as the reasonable term that a precautionary measure of preventive detention cannot exceed, since Art. 77, paragraph 9 of the CRE:

Under the responsibility of the judge hearing the case, pretrial detention may not exceed six months in cases involving crimes punishable by imprisonment, or one year in cases involving crimes punishable by imprisonment. If these periods are exceeded, the pretrial detention order will be void.

The order of preventive detention shall remain in force and the period of preventive detention shall be suspended ipso jure if, by any means, the accused has evaded, delayed, avoided or impeded his trial by means of acts aimed at causing its expiration. If the delay occurs during the process or causes the expiration, whether due to actions or omissions of judges, prosecutors, public defenders, experts or employees of auxiliary bodies, it shall be considered that they have incurred a very serious fault and must be sanctioned in accordance with the law.

In light of this, it is necessary to emphasize that within the substantiation of the case and without a summons, a jurisdictional action of habeas corpus is raised, this under what is expressed in Art. 35 of the CRE, which maintains that persons deprived of their liberty must receive priority attention.

In view of which, through article 43 of the Organic Law of Jurisdictional Guarantees and Constitutional Control, called from now on LOGJCC, which expresses the jurisdictional guarantee of habeas corpus as an object of protection of liberty, life, physical integrity and other related rights of both the person deprived of liberty or restricted thereof, whether by a public authority or by any person.

The type of habeas corpus is the transferable one, this is in accordance with the need of the accused and the burden of proof that motivates it, since protection is sought through the freedom of the accused, who is being affected exclusively by a lack of understanding of the judicial norm.

In this case, applying comparative law, the Constitutional Court of Peru ruled in the same sense regarding the arbitrariness of pretrial detention for exceeding the reasonable period, indicating that:

The transfer of habeas corpus is used to report delays in the judicial process or other serious violations of due process or effective judicial protection; that is, when the deprivation of a person's liberty is unduly maintained or the jurisdictional determination that resolves the personal situation of a detainee is delayed.

Similarly, the Inter-American Court of Human Rights, regarding the reasonable period and the precautionary measure of preventive detention in the judgment of *Suárez Rosero v. Ecuador* (1997), in which it has determined in the present analogous case, the following:

73. Based on the foregoing considerations, in carrying out an overall study of the domestic proceedings against Mr. Suárez Rosero, the Court notes that the proceedings lasted more than 50 months. In the Court's opinion, this period far exceeds the principle of a reasonable period of time enshrined in the American Convention.

74. The Court also considers that the fact that an Ecuadorian court found Mr. Suárez Rosero guilty of the crime of concealment does not justify his having been deprived of liberty for more than three years and ten months, when Ecuadorian law established a maximum sentence of two years for that crime.” (*Suárez Rosero v. Ecuador*, 1997)

The force that carries the action of habeas corpus is to protect the right to personal integrity, whether as the prohibition of torture and all types of cruel, inhuman and degrading treatment, and under that ideology the CCE through its ruling No. 365-18-JH/21, refers to the prevention of this type of violence, under this analysis:

(...) this Court deems it necessary to clarify that, when referring to “any form of torture”, it must be understood as serious forms of violations of personal integrity, whether physical, psychological, sexual or moral, regardless of whether they can be considered as torture or as cruel, inhuman or degrading treatment. The judges who hear the habeas corpus action must carefully examine the impact that the harassment has on the person deprived of liberty, depending on the condition of the person against whom it is violated and the particular circumstances of the specific case.” (Judgment No. 365-18-JH/21 and accumulated, 2021, p. 67)

Now returning to the specific case, the Habeas Corpus action was proposed against the judge of the Pastaza criminal unit, signed with No. 15111-2023-00013, in which the

judges of the Multicompetent Chamber of the Provincial Court of Napo, hereinafter called SCPN, deny the action under the following analysis:

(...) the precautionary measure of preventive detention expires; NOT because of the time elapsed between the order that issued it, in this case on June 17, 2020, until the date of filing the habeas corpus action, (September 20, 2023) but until the date on which the sentence was issued in the first instance, which occurred on June 11, 2021, when the Pastaza Criminal Guarantees Court issued a conviction sentence, imposing a prison sentence of fourteen years and four months; therefore, the legal situation of the person for whom the habeas corpus is requested is that of a sentenced person, who on the basis of the aforementioned is serving a sentence at the Archidona Canton Social Rehabilitation Center, but is not deprived of it by a preventive detention order as the plaintiff has alleged” (Habeas Corpus Action, 2023).

In the opinion of the SCPN, they do not value all the substantive evidence (in this case, interculturality, which was duly demonstrated with a report from the social expert and other documentation), and even the CCE in binding judgment no. 112-14-JH, indicates the importance of resolving a habeas corpus action by applying the principle of interculturality on a preventive detention measure in the specific case, where a person of indigenous nationality is involved, tacitly stating:

3.2.2 On the arbitrariness of the pre-trial detention order:

135. Regarding whether the pretrial detention order is arbitrary, this Court, following what was stated by the Inter-American Court of Human Rights (“IACHR”), has held that a deprivation of liberty is arbitrary “when it has been carried out using causes and methods that may be considered incompatible with respect for the human rights of the individual, even if it has been carried out in compliance with legal norms...” (Revista de Garantías, 2021, p. 30)

The SCPN analyses it superficially, arguing:

It is maliciously intended to make believe that this is not a resolution, but a criterion that contradicts the provisions of the Constitutional Court, in the judgment that is requested to be applied (No. 112-14-JH, of July 21, 2021), which is prior to the National Court Resolution No. 02-2023 of January 20, 2023, which we judges are obliged to apply by mandate of Art. 2 of said resolution, which literally states: "For the interruption of the expiration of preventive detention to operate, it is not necessary for there to be a final judgment." (Habeas Corpus Action, 2023)

Given the legal, constitutional and conventional background that has been shown, the need for a jurisdictional guarantee that adequately protects the rights of Mr. NCH, article 77, paragraph 1 of the CRE provides that deprivation of liberty will not be the general rule and with these precepts fully complied with, there will be no guarantee of the appearance of the person being prosecuted, which is evidently already more than guaranteed because it has already passed the two instances.

In turn, in the same article invoked in the previous section, it guarantees the right of the victims to, "... prompt, timely and undelayed justice..." (National Constituent Assembly, 2008). In this sense, the wife of the deceased, being an indirect victim, did not file a private accusation because she knows that her son acted in self-defense. To conclude the analysis of article 77.1 of the CRE, the fulfillment of the sentence will be ensured, which in reality does not exist as such a sentence imposed, since the current state of NCH is innocence, by constitutional mandate.

Thus, the constitutionally provided purpose for preventive detention is clear and is not related to early completion of the sentence, since the presumption of innocence prevents it, as referred to in the article referred to in the previous lines, because preventive detention will be ordered under a written judicial order and with explicit adherence to the cases, whether of the time and the formalities established by law.

Within the constitutional aspect, the CRE refers in its article 84 to the power that the organs of the State have, in this case the judges, to adjust the norms, guaranteeing the rights of the people within the explicit case mentioned and not attacking any precept.

Now, it is important to take into account as a premise the formal and material hierarchy referred to in the stated type, therefore, the Jurist Alfonso Ruiz has referred to it as:

(...) material constitution is all the regulations that govern the conditions of production of general norms, as is material law any general norm, while formal constitution or formal law is any norm approved with one or other characteristics and to which a certain force is attributed." (Ruiz, 1988, p. 144)

In this way, it is possible to identify a huge lack of syllogism between these two concepts, because they are in contrast between a general law (what was resolved by the CRE and CC), with the action that is less than the guarantee principles that govern us, (CNJ) apparently representing compliance with the law, before which it must be inferred by a consequence that looks after the interests of the people at all times.

Within a legal framework, its approach must be governed by a criterion of validity that explains the content of the rules, reaching the explicit, being allegations duly formulated and promulgated by a competent regulatory authority (CC). In this case, with the discrepancies of two Ecuadorian High Courts, one represented by a legal interpretation

and the other with an appropriately constitutional approach, they leave a dissatisfied response to the meritorious cases of applying an appropriate expiration.

The aim is not only to adapt a procedure to a problem, but rather to sow an axiology with a perspective that guarantees rights and principles. Referencing a philosophical aspect that addresses social, cultural and even public policy issues and that, within our jurisdiction with the conflict of positions between the CNJ and the CC, assessment criteria are applied.

In light of this, the philosopher Nietzsche has expressed himself harmoniously about these disciplines, saying, “When we speak of values, we speak under the inspiration, under the optics of life: life itself forces us to set values, life itself values through us when we set values” (Nietzsche, sf).

This brings us to a central point, both in philosophy and in the branch of law, values are immersed, being the essence of each individual, regardless of subjectivities or ambiguities that will surely be referred to through contrasts, currently it is in an indeterminate dispute for having an objective reasonableness. Since understanding the conduct of the person with the essence of being, requires a deep structuring.

With the above, it is necessary to indicate that the CRE has referred in its art. 66.4, which recognizes and guarantees people, “Right to formal equality, material equality and non-discrimination.” (Constitution of the Republic of Ecuador, 2008)

Both the formal and material aspects addressed are recognized in our Magna Carta, but not analyzed in detail in the CNJ ruling referred to above (Resolution No. 02-2023). And worse still, legal axiology has been considered as a solution by hierarchy, referring to two norms that are opposed, one having the value of a principle, while the other entails a norm, giving as an answer the prioritization of the highest normative power.

To better emphasize these positions, the jurist Dworkin (1989) through his research, stated:

Where some principles are binding, in the sense that the judge must take them into account, they cannot determine a particular outcome. This is a more difficult argument to evaluate, because it is not clear what it means for a rule to “determine” an outcome. (p. 89)

The coercive aspect must be broken, because within a formal aspect only the compliance of a resolution is investigated, regardless of whether it is fair or not. Now with the metaphor that what is fair is not always legal, our CRE speaks about legality in the sense of strict compliance, developing the law with justice under the precept of materiality, ensuring the guarantees that people have.



Faced with a purely legalistic concept, which establishes that just because it is a law it must be apparently fair, it would only be applied if the validity of the law is observed. But in light of this criterion, jurisprudential progress in Ecuador is once again set back, because it does not protect any social claim and would break practically all national and international standards.

Without a material approach, the legal becomes arbitrary, but with what has been indicated in the previous lines, the formal aspect should not be disregarded, it should only be taken into account to operate a balanced norm without delays, practically the one thing does not work without the other. Since an absolute formal aspect that has as a priority to overshadow the material area that seeks to direct the rights of people should not proceed.

Therefore, within axiology, the relevance of a good law has been demonstrated, due to the prevalence of the CRE by the context of the principles that govern the State, as well as international standards, one of the most relevant being the American Convention on Human Rights.

Likewise, the direct application of the CRE in this context implies that the judge must prioritize constitutional principles and values, leaving aside any rule or act that may be contradictory or limiting of fundamental rights. The judge's actions, even more so within a process of jurisdictional guarantee, must contribute to preserving the supremacy of the CRE and the pronouncements of the Inter-American Court of Human Rights, hereinafter called the IACHR, thus ensuring the protection of the right to freedom.

### Methodology

The development of this research applied the qualitative approach, since the bibliographic review of legal literature, jurisprudence that covers a series of sentences, doctrine in the sense of theoretically conceptualizing the different aspects that were developed, and analysis of own authorship with respect to the solution of the alleged criminal procedural problem, this on the violation of rights that prosecuted persons have due to the lack of a reasonable period of a precautionary measure, falling into an indeterminate preventive detention.

The deductive method was also applied, starting from general ideas on the subject of study, highlighting contrasts from different positions in the research being carried out. To complement the analytical method, providing ideas from the results as well as the conclusions, according to the initial approach. The legal dogmatic method was fundamental for the review of the formal part of the law. The technique was the bibliographic review and the indexing was its instrument.

### Results

Throughout the investigation, it was possible to identify different rights, principles and strict jurisprudential norms that resulted in the violation of what is inherent, the arbitrary deprivation of liberty of all persons, even more so with intercultural ethnicity, prosecuted without respecting a reasonable period, which was classified in different stages of the criminal process that is being developed.

And in turn, it was complemented with an analysis of the dogmatic bibliography compiled, deducing different deconstructions of conventional concepts, this with the purpose of breaking the ambiguous decisions that are taken into account to negatively resolve jurisdictional actions of habeas corpus, in reference to the practical case invoked (expiration for a reasonable period).

### Conclusions

- Given the problems that were raised throughout the investigation, a social indolence was evident due to the lack of respect of our CRE in the aspect of rights, for which, the issue of a State allied to international treaties must prevail before promulgating a resolution or a consultation absolute. These treaties were not carried out overnight; work was done over the years, both within the line of South American and American countries, to respect human rights through their conventions.
- Similarly, to better understand the channel of relevance in the applicability of international treaties and agreements, the control of conventionality must be conducted with the norm of both the CRE and the LOGJCC, to stop falling back on ordinary decisions that constitutionally lack law, only to get rid of a legal loophole that, through investigation, demonstrated direct and collateral damage to a person within a "fair" criminal process.
- Finally, strict compliance must be given to the mandatory precedents that the Inter-American Court of Human Rights itself has expressed, being of direct and immediate application, identified as explicit tools of constitutional judges who guarantee the constitutional mandate. In this way, it is possible to identify the violation of the violated rights (presumption of innocence and freedom of movement).
- These are rights that violate the deprivation of liberty, which was born in a legal form, but has become illegal, arbitrary and illegitimate in its validity. Therefore, this measure should not continue to be conceived without an appropriate legal, constitutional and conventional justification; that is, a measure that is logically temporary, with a maximum term of one year, referring to the case that was raised, in particular, cannot continue to be maintained in a "perpetual" state.

### Conflict of interest

There is no conflict of interest in relation to the submitted article.

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