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CRITICISM

OF THE MANDATORY NATURE OF PREVENTIVE DETENTION FOR RECIDIVISTS IN ECUADOR

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CRITICISM

OF THE MANDATORY NATURE OF PREVENTIVE DETENTION FOR RECIDIVISTS IN ECUADOR

CRÍTICA AL CARÁCTER PRECEPTIVO DE LA PRISIÓN PREVENTIVA PARA REINCIDENTES EN ECUADOR

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ABSTRACT

Despite the fact that Ecuador has a Constitution that enshrines the principles of freedom, equality and minimal criminal intervention, with an express rule that prohibits discrimination based on "judicial past" and that the Constitutional Court and the National Court of Justice have insistently pronounced for the exceptional application of preventive detention, the Comprehensive Organic Criminal Code maintains unchanged the third paragraph of the article 536, which prohibits judges from substituting this precautionary measure for another of lesser rigor when lawbreakers are recidivists; this situation that has caused high rates of people deprived of liberty without conviction, around which a serious prison crisis has unfolded with at least 385 deaths in seventeen months. The study that is presented, carried out under a qualitative approach and the critical and reflective method has allowed to show the internal contradictions between the criminal legal norms; the principles that the Code itself states and the constitutional text, in addition to revealing the social need to adopt Urgent legal reforms around preventive detention to help to reduce the negative effects of violence in detention centers and comply with constitutional mandates.

Keywords:

Recidivism, precautionary measures, preventive detention, deprivation of liberty.

RESUMEN

A pesar de que Ecuador cuenta con una Constitución que consagra los principios de libertad, igualdad y mínima intervención penal, contando con norma expresa que prohíbe la discriminación en razón del "pasado judicial" y que la Corte Constitucional y la Corte Nacional de Justicia se han pronunciado insistentemente por la aplicación excepcional de la prisión preventiva, el Código Orgánico Integral Penal mantiene inmutable el tercer párrafo del artículo 536 que prohíbe a los jueces sustituir esta medida cautelar por otra de menor rigor cuando se trate de reincidentes, situación que entre otros factores, ha provocado, altos índices de personas privadas de libertad sin condena, alrededor de lo cual se ha desplegado una grave crisis penitenciaria con, al menos, 385 muertes en diecisiete meses. El estudio que se presenta, realizado bajo un enfoque cualitativo y el método crítico y reflexivo, ha permitido mostrar las contradicciones internas entre las normas jurídico penales, los principios que el propio Código enuncia y el texto constitucional, además de dejar en evidencia la necesidad social de adoptar urgentes reformas legales en torno a la prisión preventiva para contribuir a disminuir los efectos negativos de la violencia en los centros de privación de libertad y cumplir con los mandatos constitucionales.

Palabras clave:

Reincidencia, medidas cautelares, prisión preventiva, privación de libertad.

INTRODUCTION

The Ecuadorian Organic Integral Penal Code (COIP) constitutes a legal instrument that, despite having been reformed to integrate with democratic and progressive trends, many of its institutions do not comply with the requirements demanded by the social and constitutional order, as it is the case of the impossibility of substituting preventive detention for defendants who are recidivists or for crimes of embezzlement, overpricing in public procurement and other crimes of corruption in the private sector, which openly contradicts the constitutional principle of minimum intervention.

As a result of the abuse of preventive detention, at the end of 2021 more than 40% of those deprived of liberty were without a sentence which is a complex fact, given that these people are innocent and are in danger of death in the prisons of Ecuador where between the years 2021 and what has elapsed in 2022 "at least 385 people" deprived of liberty have been murdered in less than seventeen months, without being a direct person responsible for those deaths until now (Noroña, 2022).

Freire (2021), an Ecuadorian researcher, affirms that the number of prisoners have increased with the presence of the pandemic, whereas Sotalin (2021), assures that judges in Ecuador excessively impose the precautionary measure of preventive detention, instead of using other precautionary measures. Even though as of November and December 2021 some changes have been taking place in favor of placing limits on the abuse of the precautionary measure of pretrial detention, there are still mandatory regulations such as the one provided for in the third paragraph of article 536 of the COIP, deserving of criticism and reflection.

The essential purpose of this article is to analyze the unconstitutionality of article 536 of the COIP in relation to the impossibility of substituting preventive detention when the defendant is a person considered a repeat offender; since, although there are indications of exceptionality to apply preventive detention from international instruments and the Constitution, the criminal legal norm remains immutable.

Given the serious prison reality and the rigid Ecuadorian regulatory context, the following question arises: Will it be appropriate, from the constitutional order, to continue applying mandatory preventive detention when the defendant is a repeat offender, as provided in the third section of article 536 of the Code Organic Comprehensive Criminal?

The objective of this study was to substantiate the unconstitutionality of the third statement of article 536 of the COIP, which prohibits provision of a precautionary measure other than preventive detention for recidivists.

METHODOLOGY

The study carried out has a qualitative and descriptive scope in which the methods were used in a dialectical relationship: doctrinal, exegetical, analytical, historical and legal, which, together with documentary techniques, allowed extracting the necessary ideas from texts, national and international legal norms. international organizations to carry out the critical and reflective analysis that makes up this writing as the final text.

Logical deductive reasoning, the critical method and the systemic approach have made it possible to evaluate the legal norms as a whole and separately, analyzing the internal contradictions between the precepts that describe recidivism and the prohibition to replace preventive detention in cases of recidivism in the COIP and those that are presented between this legal body and other postulates of a higher hierarchy provided for in the Constitution of the Republic of Ecuador and international Human Rights instruments such as the right to freedom, equality, and non-discrimination.

DEVELOPMENT

As a recent background on the subject, the sentence issued by the Ecuadorian Constitutional Court (CCE in Spanish), dated August 18, 2021, can be delimited, when resolving the consultation fostered by the Judge Speaker Paola Campaña Terán of the case filed at No. 17282-2020-00210, in the Criminal Judicial Unit based in the Iñaquito Parish of the Metropolitan District of Quito; regarding the prohibition established in article 536 of the COIP to replace pretrial detention in offenses punishable with a custodial sentence of more than five years where the unconstitutionality of such limitation was declared (Ecuador. Corte Constitucional, 2021).

The Comprehensive Organic Criminal Code (Ecuador. Asamblea Nacional, 2014) added a note at the end of article 536 where it states that the phrase "in offenses punishable by imprisonment for more than five years" has been declared unconstitutional, however, the precept is still in force of the COIP states:

Art. 536.- Substitution. - There is no substitution in offenses punished by a custodial sentence of more than five years, nor in crimes of embezzlement, overpricing in public procurement or acts of corruption in the private sector.

If the substitute measure is breached, the judge will leave it without effect and in the same act will order the preventive detention of the defendant.

Nor may preventive detention be substituted by another precautionary measure in the case of a case of recidivism (Ecuador. Asamblea Nacional, 2014).

The National Court of Justice (Ecuador. Corte Nacional de Justicia, 2021) through Resolution No. 14 of December 15, 2021, carried out an analysis of the minimal requirements

to impose preventive detention and declared the exceptionality of this precautionary measure, making special reference to the sentence of the Constitutional Court (Ecuador. Corte Constitucional, 2021) No. 8-20-CN/21 cited above. Based on this disposition of the (CNJ) it is mandatory, both for judges and prosecutors, the obligation to demonstrate that there are no other alternative precautionary measures to preventive detention that insure the defendant, which must be substantiated in accordance with the principles of necessity, suitability and proportionality.

Resolution No. 14-2021 of the CNJ, with the force of law, establishes that preventive detention will be applicable as an ultima ratio measure; in this sense, whenever there is another less harmful for the defendant, it will be applied in preference to this detention measure, trying to fulfill the purpose of carrying out justice (Ecuador. Corte Nacional de Justicia, 2021).

Although in this study, reference is made to the three circumstances provided for in article 536 of the COIP concerning the prohibition of replacing preventive detention with other precautionary measures of lesser rigor, the attention center and the one to which it is dedicated, for the moment, The greatest criticism is the statement that expresses, *"Nor can preventive detention be replaced by another precautionary measure when it is a case of recidivism".* (Ecuador. Asamblea Nacional, 2014)

The controversial issue that this situation entails forces us to consider different topics, such as precautionary measures and their legal nature; pretrial detention, individual rights; the right to freedom and recidivism. All this will allow to reach conclusions regarding the need or inappropriateness of applying preventive detention as a precautionary measure in cases of recidivism.

Precautionary measures: background

The precautionary measures are nothing more than a set of actions aimed at guaranteeing goods or people to satisfy some future need, a provision that can be taken by any authority that has suspicions about the possible civil, criminal, administrative or labor responsibility of a person. natural or legal. In any case, it is a violation of some right based on a judge's criteria that, although it must be rationally justified, goes against the presumption of innocence in any type of process, jurisdictional or not. As stated by Morello & Vescovi (2005), that precautionary measures can be understood as the adoption of *"the necessary provisions to prevent the possibility of damage or danger when circumstances dictate it".*

Although it is difficult to verify the exact moment in which a precautionary measure was used for the first time, numerous antecedents with special importance to the present day can be cited, as is the case of Roman Law; These provided through interdictum, (an institution similar to precautionary measures about goods) that were nothing more than orders or prohibitions imposed by the magistrates at the request of an individual and, whose purpose was to achieve a prompt solution to the conflict and guarantee the satisfaction of the broken right.

For the analysis of the legal nature of this institution, it is essential to cite Calamandrei (2017), an important Italian jurist and proceduralist who developed the famous work "Introduction to the systematic study of precautionary measures". This author points out that these are those jurisdictional rulings that are provisional and not final in nature, since they are aimed at avoiding situations of danger or damage that may occur with respect to goods or persons during the conduct of a process, to which refers to the Latin locution periculum in mora, (translated into Spanish: danger in delay).

The periculum in mora not only requires the need to prevent a situation of danger or future damage that may be harmful, but also that, due to the imminence of such situations of danger or damage, it is urgent to take such measures, because in case of delay, the feared damage or danger could become effective and irremediable. It is a relationship between the categories prevention and urgency, which will inevitably have to be demonstrated. (Duran Silva, 2019)

The need for these measures arises precisely from the inefficiency in the administration of justice over time, that is, due to the delays that occur in the conduct of a process, of any nature at present. Despite the fact that there are various ways of resolving conflicts, which precisely seek to guarantee procedural speed, this is a pending task, which justifies the requirement to maintain precautionary measures as a form of procedural guarantee. However, these precautionary measures cannot be taken deliberately or arbitrarily, which imposes the need for them to be preceded by a series of activities aimed at guaranteeing their fairness and exceptional application, in an effort to guarantee procedural justice and the enjoyment of rights effectively.

In this regard, Calamandrei (2017), argues that precautionary measures require the presence of a legal interest that is necessary to protect from a situation of danger or latent damage, as a consequence of the delay in the production of a final resolution, at the same time that it alerts about the need to demonstrate the threat, for the feared damage to become effective, that is, to occur definitively, transforming itself into irreparable damage.

Morello & Vescovi (2005), refer to three minimal requirements, in any matter, to apply precautionary or preventive measures:

A. That the case or offense committed is of such seriousness that it warrants the need to impose the measure,

B. that the adoption of such a provision is urgent, because otherwise, a danger, damage or serious harm could be produced for the claimant.

C. that it be sought with the limitation imposed on the early sentenced, to avoid irreparable damage.

Having made the general references regarding the background of all types of precautionary measures in different matters, it is worth asking what is the legal nature of personal precautionary measures.

Legal nature of personal precautionary measures.

When talking about precautionary, preventative, or preventive measures and the analysis is transferred to the field of Criminal Law, the situation becomes much more complex, since property, labor or civil rights are no longer being limited; but, that the consequence for the individual has a greater transcendence, it is about freedom. In Criminal Law, such measures directly limit the right to self-determination, movement and transfer. In almost all the laws of the world, in one way or another, with more or less guarantees, this right is violated when pretrial detention is ordered without having proven the guilt of the person prosecuted. Although in some way, all personal precautionary measures constitute a limitation to the individual's right to freedom, preventive detention constitutes the most notable expression in this sense.

Freedom is a natural, human and constitutionally recognized right in the sixth Chapter (Rights of freedom) of the Constitution of the Republic of Ecuador (Ecuador. Asamblea Nacional Constituyente, 2008). Although freedom is a very broad concept, this article refers specifically to the concept of personal freedom, that is, to what is constitutionally provided for in article 66 numeral 29 and its literals, where it is stated that:

29. Freedom rights also include:

a. The recognition that all people are born free.

b. The prohibition of slavery, exploitation, servitude and trafficking and trafficking in human beings in all its forms. The State shall adopt measures for the prevention and eradication of human trafficking, and for the protection and social reintegration of victims of trafficking and other forms of violation of liberty.

c. That no person may be deprived of their liberty due to debts, costs, fines, taxes, or other obligations, except in the case of alimony.

d. That no person may be forced to do something prohibited or to stop doing something not prohibited by law (Ecuador. Asamblea Nacional Constituyente, 2008).

The right to freedom is an absolutely natural right that has been objectified from the constitutional order, therefore, it must not only be observed in a mandatory manner, but its manifest violations must be sanctioned. It constitutes a duty of the State to ensure those actions that could represent a violation of the right to liberty, which can occur in many cases in which the person is preventively deprived of liberty when they are still innocent.

The presumption of innocence is a conquest of humanity, inalienable and mandatory observance; but in addition, it is another right recognized in the Ecuadorian constitutional norm within the Rights of Protection (Chapter eighth), which has been provided as a guarantee of obligatory observance of due process, for this purpose article 76 literal 2, states that: "*It is The innocence of every person will be presumed and they will be treated as such, as long as their responsibility is not declared by means of a final resolution or enforceable sentence"* (Ecuador. Asamblea Nacional Constituyente, 2008). Reading these precepts, it would be understood that it would be impossible for the State to apply a precautionary measure of preventive detention to a subject who has not yet been sentenced; however, certain circumstances demonstrate the objective need to apply this measure.

The COIP itself regulates the budgets that must be given so that a person can be brought to trial. In this sense, it will be necessary that:

a. there are previous investigations, with objective results, on the existence of conduct that constitutes a crime and it is possible to determine a person as a suspect;

b. that from these investigations it is possible to determine, with concrete evidence or indications, that the person to be insured may be responsible for the crime under investigation and,

c. that the prosecution evidence is sufficient (this term is very open and relative), to support a pronouncement of a prior conviction.

In its essence, it is necessary to comply with the principle of objectivity to be able to make decisions that may put the freedom, morality and stability of a person at risk, which is not always achieved by the Prosecutor's Office. In this sense, Cáceres (2017), has expressed that non-compliance with it repeatedly causes delays in the issuance of sentences and in the closing or termination of trials. Even worse is that, without charges, the judges apply preventive detention, in some cases, because it is the easiest way to secure the defendant and in others, due to the limitations that the COIP imposes on the judge; not observing the presumption of innocence as a legal and universal principle.

Preventive detention consists of a precautionary deprivation of liberty, that is, a limitation of the right to personal liberty and a violation of the principle of innocence, since without having proven the guilt of the person subjected to the process, its affectation to the right to freedom is provided, however, sometimes the imposition of this precautionary measure is justified by society and the State provided that certain circumstances exist.

The precautionary measure consisting of preventive detention is of a personal nature, it affects the right to liberty

for a period of time and will only be applied when the other measures are insufficient to ensure the main objectives of the criminal procedure. When preventive detention is ordered, the defendant is forced to enter a detention center during the procedural investigation until the trial is held; therefore, it is stated as a method to prevent the defendant from escaping and should be the last option to be used, preferring to use some minor precautionary measure such as house arrest, the use of an electronic security device, a bond or surety, that allow to guarantee the presence of the person prosecuted in the court.

If the Ecuadorian constitutional norm is analyzed, preventive detention is a precautionary measure, which must be applied exceptionally in Ecuador, at least in this way it is described by the Constitution of the Republic in its article 77 numeral 1 as it reads:

The deprivation of liberty will not be the general rule and will be applied to guarantee the appearance of the accused or defendant in the process, the right of the victim of the crime to a prompt, opportune and without delay justice, and to ensure compliance with the sentence (Ecuador. Asamblea Nacional Constituyente, 2008).

From the Constitution, these would be the three purposes that would justify the application of a precautionary measure of preventive detention, in agreement with the COIP as stated in its article 534 that it will be applied to "***guarantee the presence of the person processed in the process and compliance of the sentence"*** (Ecuador. Asamblea Nacional, 2014). This article itself establishes the requirements that must be observed by judges when imposing the precautionary measure of preventive detention, these requirements are:

1. Sufficient elements of evidence on the existence of a crime of public exercise of the action.
2. Clear, precise and justified elements of conviction that the defendant is the author or accomplice of the offence. In any case, the mere existence of evidence of responsibility does not constitute sufficient reason to order preventive detention.
3. Indications from which it can be deduced that the non-custodial precautionary measures are insufficient and that preventive detention is necessary to ensure their presence at the trial hearing or the fulfillment of the sentence.

For this purpose, the prosecutor will demonstrate that personal precautionary measures other than preventive detention are not enough. In the case of ordering preventive detention, the judge will compulsorily motivate the decision and explain the reasons why the other precautionary measures are insufficient.

4. That it is an offense punishable by imprisonment for more than one year (Ecuador. Asamblea Nacional, 2014).

Regarding the enforceability of the requirements, it is worth mentioning the fumus boni iuris, a Latin phrase that literally translated means "smoke of good law" and constitutes one of the assumptions for the performance of certain judicial acts before the conviction of the defendant in various countries of Continental law (Bueno & Rodríguez, 2007). In the practical order, the fumus boni iuris requires a probability of success depending on the merits of the case, in order to request legal assistance from the judge, court orders or precautionary measures. Although the common nature of this institution is civil or administrative, it can be verified from sections 1 and 2 of article 534 of the COIP, the requirement of sufficient, clear, precise and justified elements that the accused is the author or accomplice of the infraction" which must be demonstrated by the Prosecutor, in order to demand a preventive detention measure.

On the other hand, there must be a risk of flight of the defendant to order pretrial detention. The periculum in mora institution used in Civil Law to justify precautionary measures in the face of danger in the delay of making timely decisions that avoid the impairment, deterioration, or alienation of assets, is applied in criminal matters, to justify the most rigorous precautionary measure before the risk of evasion of the presumed perpetrator of the crime. To assess this risk, the seriousness of the crime is taken into account and, consequently, the penalty delivered for it, which in the case of Ecuador must exceed one year of imprisonment, as stipulated in section 4 of article 534 of the COIP. In this way, a presumption is established, by virtue of which, the greater the penalty associated with the crime, the greater the risk of flight of the defendant.

The legal requirement related to the existence of evidence from which it can be deduced that the non-custodial measures are insufficient requires an analysis of whether the processed person has a known address, place of work, or personal references that might allow the proper location. Otherwise, it could also be argued that there is a flight risk. Article 534 numeral 3 expressly requires the Prosecutor's Office to demonstrate ***"th*** Ecuador. Asamblea Nacional, 2014), which is part of the principle of objectivity that guides the prosecutor's actions, with independence that in his material and technical defense the defendant may present evidence of his place of residence, workplace, among others that prove his roots.

The doctrine has developed other theories on the reasons that justify the imposition of the precautionary measure of preventive detention in the face of any damage or danger derived from the periculum in mora (Durán Silva, 2019). They are the following:

- The hindering of the evidentiary activity, while the defendant, in case of being the true author of the criminal act, if he remains free, he is able to access by himself or through third parties, the sources of evidence, being able to alter them, even hide or destroy them. It could

also influence other defendants or witnesses to hamper the criminal investigation.

- The prevention of new criminal acts, since the defendant could incur in new criminal behaviors that would be harmful to society. However, this would be an element on which the Prosecutor must work to convince the judge about how risky it is to keep the defendant free in accordance with the alleged offenses committed and the dangers of their repetition.
- The reparation of the rights of the victims, since the defendant could alienate himself from his social responsibility for reparation and since the victims are the real victims of the damage produced by the criminal offense, they have a full right to reparation as it corresponds each case.

As part of the procedural guarantees, the judge is obliged to motivate the resolution where preventive detention is ordered and explain the reasons why he considers that other precautionary measures are insufficient to guarantee the presence of the defendant during the process. This task that is required of the judge can contribute to reduce the excesses in the application of this more rigorous precautionary measure.

Individual rights and the right to liberty

It is not possible to talk about preventive detention without mentioning the right to freedom, which constitutes an inalienable, imprescriptible and unbreakable right of man in a Constitutional State of rights and social justice as it is in Ecuador. Freedom has been enshrined in various human rights instruments signed by Ecuador, such as the Universal Declaration of Human Rights; where the right to personal liberty is expressly recognized in its article number three, by stating "*every individual has the right to life, liberty and personal security" and in its article nine, "No one may be arbitrarily detained, imprisoned or exiled".* (United Nations, 1948)

In this regard, the Constitutional Court of Ecuador issued judgment No. 001-18-PJO-CC (case No. 0421-14-JH) that creates binding jurisprudence and was later cited by the CNJ in the recent Resolution 14-2021, by consigning: "*If we bear in mind the great importance of the right to personal liberty within civil and political rights and its recognition in the different international human rights instruments, it is necessary to recognize that any restriction or deprivation of liberty must be based on previously established reasons in the law and will only proceed when absolutely necessary. This humanist orientation and guarantee of the human rights of convicted persons configures an important element of distinction between an authoritarian State and a democratic State, because while the first uses its punitive power as a first measure to repress criminal conduct, the second ensures that the ius puniendi and custodial sentences be used only as a last resort, after it is fully established that the use of other mechanisms is insufficient to punish the most serious criminal conduct that affects legal resources of the highest importance".* (CEC;2014)

In the constitutional order, when referring to the right to personal liberty and the rights of protection of the citizen, the exceptionality of preventive detention is established, understood as a procedural situation that will be suffered, only when it is objectively demonstrated that there is no other less harmful way for the defendant to guarantee their presence at the oral trial. The human being is free by nature and this right is guaranteed by various legal standards nowadays. The principle of exceptionality in preventive detention is closely connected with other procedural and substantive principles, such as the principle of minimum intervention, subsidiarity, proportionality between the conduct allegedly committed and the necessary precautionary measures.

The National Court of Justice in its Resolution number 14-2021 (Ecuador. Corte Nacional de Justicia, 2021) has clearly established that:

Preventive detention is the most coercive measure and consequently, it must be applied under ultima ratio criteria, it must be subsidiary, that is, it will be imposed when it is considered that no other personal precautionary measure is useful and effective to ensure the appearance of the defendant. (p.2)

Recidivism

After having explained different necessary definitions regarding personal precautionary measures and their minimum requirements to apply preventive detention in advance of the demonstration of guilt, it is necessary to verify what recidivism in Ecuador is? And why does the Ecuadorian criminal law require that, in all cases in which the defendant is a repeat offender, he or she must be protected with preventive detention?

Recidivism is a legal situation presented by the defendant, who has repeated criminal behavior after having been sanctioned in a final conviction; in the Ecuadorian State, specifically, it is the reiteration of the conduct of the individual in the same criminal type or attacking the same legal right and that, therefore, will aggravate his or her sentence as long as there is an enforceable sentence for the crime previously committed. The previously sanctioned person is supposed to have been rehabilitated by complying with the sanction and, this implies, that he should not commit a crime again; when carrying out a new specific criminal behavior, he punishes himself more severely, in order to dissuade the offender from re-incurring in a punishable act in the future.

To make a critical analysis regarding its literal determination as a legal institution, article 57 of the Comprehensive Organic Criminal Code (Ecuador. Asamblea Nacional, 2014) is brought up, which is divided into its parts to finally synthesize or summarize the results.

Art. 57.- Recidivism. Recidivism is understood as the commission of a new crime by the person who was found guilty by means of an enforceable sentence.

Recidivism will only proceed when the same criminal offense is involved or when the same protected legal right has been attempted, in which case the same elements of intent or negligence must coincide.

If the person reoffends, the maximum penalty provided for in the criminal type will be imposed, increased by one third (Ecuador. Asamblea Nacional, 2014).

The first requirement refers to the guilt declared by an enforceable sentence against the person who has offended again. At the moment of taking the judicial decision of the case, his punitive situation will be aggravated and, therefore, he or she will be sentenced more severely for the act committed; taking into account the fact for which he has already served his sentence and his relationship with the one he or she is being convicted of. Here it could be considered, from the obligatory appreciation of recidivism, if we are dealing with a case of non bis in idem but this is not the essence of the object of study.

Although numerous penal doctrines have been developed regarding recidivism, giving it different treatment in other legislations, in Ecuador no distinction is made between recidivism and multiple recidivism, since it does not matter how many offenses the transgressor has previously committed, but rather that their offense will only be aggravated; situation when at least one crime has previously been committed; so, there is no difference between a multiple offender and one who has broken the law on a single previous occasion.

According to the literal interpretation of the second paragraph of article 57 of the COIP, only the person who has committed the same crime or attacked the same legal right will be considered a repeat offender, that is, the subject who commits several criminal offenses of different kinds, such as murder, rape or others, before the robbery, is not considered a habitual delinquent and his sentence is not aggravated for such circumstance; however, if he has infringed precepts of the same kind (for example, property, having committed crimes such as robbery, theft or extortion) he or she is considered a repeat offender.

Regarding the subjective element, it is inconsequential if it is about intentional or culpable crimes, which is completely contradictory with the traditional doctrinal considerations on the subject, where, in most cases, it is stated that recidivism only operates for intentional crimes that is, malicious. When considering a person as a repeat offender without taking into account the subjective element of the crime, that is, fraud or negligence, the COIP presents a new controversy, since it would not be fair to offer the same treatment to those who previously committed an intentional crime, which causes the increase in the penalty, than those who commit a culpable crime and had been guilty before for another act with which they did not have the intention or will to cause harm.

As for the last statement of article 57 (Ecuador. Asamblea Nacional, 2014) regarding the punitive consequence, it establishes the norm that the maximum limit established for the crime committed must be increased by one third in a mandatory manner, therefore, the defendant declared guilty will serve a sentence that is not only unfair in certain cases, but excessive and unjustified under certain circumstances. The prescriptive nature of the legal norm limits the possibility of adapting a less rigorous sanction.

In the doctrinal order, various grounds are offered to justify the punitive aggravation that recidivism entails for the defendant, such as: insufficiency of the previous sentence; greater dangerousness, criminal capacity, probability of committing a crime in the future and greater guilt based on the situation in which the subject finds himself due to his way of life (Serrano, 1976). It is easy to see that recidivism is based on the greater dangerousness of the agent and, when this situation is linked to the prohibition of substituting pretrial detention for repeat offenders, it contradicts the Ecuadorian constitutional text that is based on the principle of Criminal Law of the Act and not in the Criminal Law of Author. This means that when the Constitution states, in its article 22 that ***"a person may not be punished for issues of identity, dangerousness or personal characteristics"*** (Ecuador. Asamblea Nacional Constituyente, 2008) the circumstance of recidivism falls into crisis.

In this sense, Ecuadorian legislation took a step forward when it enshrined in its Magna Carta that a person may not be punished for being considered dangerous, but for the criminal act that he or she has specifically committed at a given moment, but its irradiation to the Law was stagnant when the COIP maintained recidivism as a circumstance that aggravates the situation of the defendant and makes the application of preventive detention mandatory. Appreciating the recidivism as a circumstance that aggravates the situation of the defendant, a subject who has not yet been even found guilty, is completely inappropriate.

Another legal reason for not punishing a person a priori through preventive detention, when guilt has not yet been determined, is the constitutional precept established in article number 11 section 2, second paragraph, specifically denoting that: "Nobody may be discriminated for reasons of…, judicial past". When preventive detention is applied to a subject for the sole condition of having been previously punished for a crime, he or she is being punished in advance for his or her judicial past and, therefore, it is about the fact of discriminating a citizen and disrespecting the first statement of article eleven section 2, where it is stated that: ***"All people are cereated equal and will have the same rights, duties and opportunities".*** (Ecuador. Asamblea Nacional Constituyente, 2008)

Linked to recidivism, the problem of the cancellation of criminal records arises, not provided for in the COIP. This causes that, many times, the condition of recidivist is made to depend on how diligent or expert about the procedure to cancel his judicial record is the convicted person. The Ministry of Government has made available to citizens the possibility of canceling or eliminating judicial and police records, based on sections 1 and 2 of article 11 above cited and article 3, literal 1, of the Constitution of the Republic of Ecuador, referring to the responsibility of the State to guarantee the exercise of rights without discrimination (Ecuador. Asamblea Nacional Constituyente, 2008) but this provision does not guarantee equality in people because not everyone knows this procedure to cancel their records.

In principle, any person could request the cancellation of their criminal record and police record, regardless of the crime committed, whether it was intentional or not, without taking into account the damage caused to society, nor the time elapsed between compliance and the request, which is contradictory to the mandatory nature of the COIP to order preventive detention against those who, for whatever reason, have not canceled their criminal records.

CONCLUSIONS

The study is about the possibility of practical application of recidivism as a legal institution that requires preventive detention, taking into account the current regulation of the COIP, reflects the contradictions that it maintains with the Constitution and international legal instruments of human rights, that provide for the non-discrimination of any person based on their judicial past.

In addition to being contradictory, the norm provided for in the third paragraph of article 536 of the COIP, which prohibits the provision of a precautionary measure other than preventive detention for the repeat offender, reflects the extremely punitive nature of the legal text that, with a mandatory nature, obliges judges to adopt this measure represents depriving an innocent person of liberty.

It constitutes an inconsistency in the Ecuadorian criminal legal system that the COIP regulates preventive detention for the repeat offender as a precautionary measure and, on the other hand, the Constitutional Court and the National Court of Justice of Ecuador order the exceptionality of preventive detention, following these bodies the goals established by the Minimum Criminal Law or principle of minimum criminal intervention.

The judicial past of a person should not be used to justify the application of the precautionary measure of preventive detention, since it constitutes a form of discrimination. In this sense, the judges must assess whether the person has carried out acts that show that he or she tries to evade the action of public criminal justice and not whether he has previously committed other crimes.

Preventive detention is a precautionary measure that has well-defined purposes in Ecuadorian Criminal Procedure Law, however, certain normative precepts provided for in the Comprehensive Organic Criminal Code prevent its exceptional application with flagrant violation of higher-ranking regulations.

This personal precautionary measure turns out to be the most invasive of the individual rights of the human being, going against the presumption of innocence and the right to personal liberty. For this reason, it should not be applied except as the last alternative after having exhausted all other precautionary possibilities, which guarantee the presence of the person processed in the oral trial.

Recidivism is a circumstance that occurs in the defendant who has been previously sanctioned, an institution that is in contradiction with the constitutional prohibition of discrimination by judicial past; For this reason, it should not be part of the body of criminal legal regulations in Ecuador, especially when criminal records are currently canceled without any other procedure than their request to government authorities.

Legal norms must be interpreted as a system. That is to say, seeking the harmony of the legal system and if it is about Criminal Law, the interpretation must lead to protecting the weakest in the process, which is, without any doubt, the defendant. In such a way that a State must take advantage of all the opportunities to offer spaces of freedom to its citizens, without failing to fulfill the basic objectives of guaranteeing security within society.

The study carried out is sufficient to support the unconstitutionality of the third statement of Article 536 of the COIP, which obliges the judge to order preventive detention in case of recidivism.

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