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The Prescription of Penalties in Constitutional Jurisprudence and the Perspective of Comparative Law

La Prescripción De La Pena En La Jurisprudencia Constitucional Y La Perspectiva Del Derecho Comparado

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Abstract

This paper constitutes an examination of the Ecuadorian Adversarial Criminal Accusatory System, focusing specifically on the prescription of custodial sentences as defined in the Comprehensive Organic Penal Code (COIP). Over time, this institution has given rise to a new legal concept: the prescription of custodial sentences, which requires the passage of a significant period, an essential condition for the emergence of this legal right. The most recent modification made by the Constitutional Court has shifted the focus towards the moment of the convicting sentence. Upon reflective analysis, this study delves into how this concept has been integrated into Ecuadorian legal norms and compares it with other legal systems. The overall objective of this research is to demonstrate, through a legal report, the jurisprudential and doctrinal dimensions of sentence prescription in Ecuador and Comparative Law. To achieve this, a reflective analysis of doctrinal and legislative documents is employed, utilizing a methodology grounded in Comparative Law principles. It is worth noting that the prescription period for custodial sentences should be equal to that determined in the respective convicting sentence, thus affirming the right to prescription for those who have faced unfortunate circumstances.

Keywords: Penalty Prescription, Comparative Law, Time, Condemning Sentence.

Resumen

El presente trabajo es un estudio del sistema Acusatorio Adversarial Penal ecuatoriano, específicamente de la prescripción de la pena restrictiva de libertad; tipificado en el Código Orgánico Integral Penal (COIP). Institución que por el tiempo transcurrido; surge un nuevo derecho; y que es necesario para que se dé la figura jurídica de la prescripción de las penas restrictivas de libertad, transcurra un tiempo, mismo que es radical y sin el cual no puede dar nacimiento a este derecho. La última modificatoria realizada por parte de la Corte Constitucional, orientó a un nuevo sentido, visto que será desde la sentencia condenatoria, haciendo un análisis reflexivo se reveló cómo se ha presentado en nuestra normativa ecuatoriana y con otras legislaciones. En este orden de ideas, el objetivo general de la presente investigación es demostrar mediante un informe jurídico los alcances jurisprudenciales y doctrinarios de la prescripción de la pena en Ecuador y el Derecho Comparado. Por lo que, se emplea el método del análisis reflexivo de documentos doctrinarios y legislativos, empleando metodología del derecho comparado, teniendo en cuenta que la prescripción de la pena restrictiva de libertad; debe ser igual a lo establecido en su respectiva sentencia condenatoria. Evidenciando o reafirmando el derecho a la prescripción de aquel que se encontró en desgracia.

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Introduction

This research aims to analyze the legal concept of the prescription of custodial sentences, as enshrined in the Comprehensive Organic Penal Code (COIP) of Ecuador, specifically in Book One, Title II, Chapter III, Article 75, Paragraph 1. It is essential to emphasize the current situation surrounding this theme, particularly due to the declaration of unconstitutionality by the Constitutional Court of Ecuador in its ruling No. 11-20-CN/21. Consequently, this recent jurisprudential development leads to a different application of this legal concept compared to what was specified in the COIP. In this sense, it will apply from the convicting sentence to all cases where it is favorable to the convicted person according to the established rules.

The research primarily hinges on the natural factor of time, which is an undeniable part of the legal field, especially in criminal law. This study focuses on the legal aspect of custodial sentence prescription, specifically within the context of custodial penalties. It stems from the aforementioned jurisprudential novelty, where the Constitutional Court's decision altered Article 75, Paragraph 1 of the COIP, which sets the necessary context for custodial penalties. The original text read:

1. "Custodial penalties shall prescribe within the maximum time of the custodial sentence provided in the criminal type plus fifty percent." (National, COIP, 2014)

The Constitutional Court's ruling, declaring the terms "maximum" and "criminal type" as unconstitutional, established a new perspective on the prescription of custodial penalties, regarding the required time. Analyzing the respective jurisprudence indicates that, with this declaration of unconstitutionality, the prescription period will be calculated from the convicting sentence plus fifty percent, making the sentence prescribed as such. (The Proportionality and Equality in Penalty Prescription, 2021).

For this legal concept to be applicable, it must be required and verified in cases that arise. Article 75 of the COIP, in its final paragraph, outlines the general exceptions where the prescription is not applicable, such as offenses of aggression, genocide, crimes against humanity, war crimes, forced disappearance of persons, crimes of aggression against a state, embezzlement, bribery, extortion, illicit enrichment, environmental damage, and crimes against the sexual and reproductive integrity of children, girls, and adolescents. (National, COIP, 2014)

In light of these circumstances, a concentrated study is conducted, examining this situation based on the COIP, considering the aforementioned jurisprudence, and comparing it with other legislations. This is done to understand the necessary time, referred to as a "fatal time," for this legal concept to take effect.

Before delving into the analysis of the above-mentioned topic, it is essential to begin with the conceptualization of the most relevant terms for a better understanding of the subject, namely "penalty" and "prescription." According to the Encyclopedic Dictionary of Usual Law, a "penalty" is defined as a "sanction, previously established by law, for anyone who commits a crime or offense, also specified" (Cabanellas, 1981). In this sense, the penalty represents the relationship among members of society in response to a violation of moral order.

Professor Doctor Simón Bolívar Gallegos defines prescription as "a legal institution by which the passage of time results in the consolidation of factual situations, allowing for the extinction of rights or the acquisition of others." (Gallegos, 2018). In the context of this research, it is understood that prescription is a specific situation that can be extinguished after a certain period of time has passed.

Therefore, when conceptualizing the prescription of the penalty, it is defined as "the extinction of criminal responsibility, due to the passage of time legally established, calculated from the date of the final judgment, or the breach of the sentence (if it has started to be served), without the sentence having been executed, preventing the subsequent imposition of such penalty." (ESPAÑOLA, 2020). Understanding that the prescription of the penalty refers to the existence of a convicting sentence and represents a waiver by the State, the power to review the punitive claim arising from the crime and legitimized by a sentence after a certain period of time has passed.

According to a study conducted by the University of Barcelona, the prescription of the penalty is defined as "the time that elapses from the date of the final judgment (or from the breach of the sentence), during which the imposed penalty is not executed, and the prescription period is not suspended." (Montraveta, 2019)

In this regard, it's important to clarify that this analysis focuses solely on the prescription of custodial sentences, a crucial issue that pertains to the deprivation of liberty. Miguel Ángel Lugo defines a custodial sentence in his work, "Manual of General Criminal Law," as a "form of punishment or retribution imposed by legitimate authority on a person in response to unlawful conduct. In countries that do not apply the death penalty or corporal punishment, imprisonment constitutes the most severe punishment" (Lugo, 2019).

With the necessary terminology now defined for understanding the topic, it's important to start with the jurisprudential novelty No. 11-20-CN issued by the Constitutional Court of Ecuador. In this decision, a change was made to the provisions in the COIP as outlined in Article 75 (1) because it was considered that there was a violation of the constitutional principles of proportionality and equality in that article. When defining the aforementioned principles, it's understood that the principle of proportionality, as defined by Alberto Santillán, is "a legal statement in which the sanction must be related to the resulting infraction, taking into account that it must fulfill the objective of rehabilitating the agent, respecting their rights, and exporting their skills to be reintegrated into society as a useful member of it" (Molina, 2018). Therefore, the principle of proportionality is a concept based on the need perceived by constitutional doctrine for there to be rationality in public authority interventions in the sphere of rights, even in their non-fulfillment due to legitimately authorized limitations. Its influence has a significant impact on the decision-making process in the administration of justice.

As for the principle of equality, Juan Carlos Cassagne explains that it "is part of the broader principle of human dignity, and the legal character attributed to it always has physical or legal persons as its direct or indirect objects, respectively" (Cassagne, 2016). Therefore, in essence, it is a set of rights that individuals have, allowing them to have equal opportunities and conditions in terms of societal development and before the law.

In the mentioned judgment, it was determined that if a person is sentenced to the minimum penalty, the prescription period is six times longer than their sentence. If a person is sentenced to the maximum penalty, the prescription period is half the penalty plus 50%. For this reason, it is understood that by applying the current COIP, the situation becomes identical for two individuals who are in different circumstances. This can lead to a worsening of the situation for the person with a lesser sentence and favor the person with a longer sentence, potentially affecting the principle and right to equality. As a result, in accordance with the principle of favorability, the judgment will have retroactive effects to benefit those convicted.

Contributing to the aforesaid, according to a study published in the "Sociedad y Tecnología" journal, it can be agreed that "the principle of favorability has conventional, constitutional, and legal status; it has substantive, procedural, and executive content; and it applies retroactively and ultra-actively" (Arévalo, 2021). The principle of favorability implies that future rules in criminal matters of a general nature will be applied retroactively whenever they benefit the convicted or prosecuted person. In this sense, the judgment has retroactive effects on applicable cases.

Before this jurisprudential novelty, a significant study was conducted by David Gonzalo Villalva Fonseca and Manuel Mesías Caiza Bonilla. They argued that the provisions of Article 75 (1) of the COIP could be presumed to be unconstitutional because it would violate the principle of proportionality recognized in the Constitution of the Republic. Analyzing the norm was imperative to define legal criteria for discussing these arguments, which would be of great importance for the state's punitive order and society. (Villalva Fonseca & Caiza Bonilla, 2022)

The Constitution of the Republic of Ecuador enshrines rights and obligations of any kind, including the right to due process, which includes certain basic guarantees specifically mentioned in Article 76.6. This article states that "The law shall establish the due proportionality between offenses and penal, administrative, or other types of sanctions" (National, Constitution of the Republic of Ecuador, 2021). In this sense, the Constitutional Court of Ecuador issued the aforementioned judgment, in adherence to what is enshrined in our Constitution of the Republic, referring to the requirement of due proportionality in the guarantee system of why a sanction is imposed on someone who has adapted their conduct to the criminal type described by law.

The decision taken by the Constitutional Court will have the effect as established in Article 95 of the Organic Law on Jurisdictional Guarantees and Constitutional Control, which mentions that, in the exercise of abstract constitutional control, they have the effect of *res judicata* and produce general effects for the future (National, LOGJCC, 2020). In accordance with Article 139 of the same law, it states that as a general rule, in the declaration of unconstitutionality, it will have effects regarding the future in relation to normative and administrative acts. Currently, the dynamics of the prescription of restrictive penalties have changed. This analysis is conducted while taking into account other legislations to have a clearer and more reflective idea of what concerns the prescription of restrictive penalties.

Based on the reports presented above, it has motivated an investigation into the prescription of restrictive penalties from the perspective of Comparative Law. This is done to analyze the situation in other legislations for a better understanding. This study examined the Argentine legislation, specifically its Penal Code, Law 11.179, Book One, Title X, regarding the extinction of actions and penalties. Article 65 states that penalties prescribe in accordance with the penalty of imprisonment and life imprisonment, both of which prescribe after 20 years. However, penalties of imprisonment or temporary imprisonment are governed by a time equal to what is established in their sentence. (Argentina, 1984)

In Chilean legislation, specifically in its Penal Code, Book One, Title Five, on the extinction of criminal responsibility, Article 97 establishes, in a general sense, that sentences rendered by final judgment prescribe. Perpetual penalties of imprisonment, reclusion, and relegation will be prescribed in fifteen years (Santiago, 1874).

Concerning Colombian legislation, in its Penal Code, Law 599 of 2000, under Book One, Chapter Five, on the extinction of actions and criminal sanctions, Article 89 states that the term for the prescription of a custodial sentence will be based on what is established in the sentence or what remains to be executed of that sentence, with the condition that it will, in no case, be less than 5 years (Colombia, 2000).

Analyzing this situation from the perspective of Comparative Law, the Penal Codes of the mentioned legislations are based on a calculation system with maximum timeframes that do not exceed 20 years. In Argentina, it sets the prescription time for temporary imprisonment to be equal to the sentence. Therefore, it is clear that the COIP (Ecuador's Penal Code) initially established a very stringent timeframe for the prescription of restrictive penalties. However, with the current context and the jurisprudence issued by the Constitutional Court of Ecuador, a notable change has occurred due to the declaration of unconstitutionality given to the aforementioned legal body. Therefore, the objective of

this research is to provide a reflective study of the doctrinal and jurisprudential aspects of sentence prescription in Ecuador and Comparative Law, under the legal framework outlined in Article 75, numeral 1 of the COIP, and other legislations. It is essential to note that the contribution of this research is to highlight the reality that exists under this legal concept, considering the new perspective within the Ecuadorian penal system regarding the timeframe for the prescription of restrictive penalties.

Line of Research

Challenges, Perspectives, and Improvement of Legal Sciences in Ecuador.

✓ Technical and doctrinal foundations of criminal sciences in Ecuador. Trends and Perspectives (Gómez Armijos, et al., 2017)

Materials and Methods

To carry out this research, a mixed qualitative-quantitative approach was applied, allowing for an investigative focus that encompassed the theoretical foundations of the concept of prescription in the context of custodial sentences within the legal framework, jurisprudence, and other legislations. This approach involved a reflective analysis based on both Ecuadorian normative and jurisprudential legislation and a comparative study with legislations from countries such as Colombia, Argentina, and Chile. This approach contributed to creating a consistent and logical structure for the obtained information, making a significant contribution to the development of this research.

Documentary analysis was employed for the quantitative approach. Information was gathered from the Judicial Council, specifically related to crimes and offenses where custodial sentences had been prescribed between 2020 and 2022 in the province of Santo Domingo de los Tsáchilas. Additionally, statistics from the National Institute of Statistics and Censuses (INEC) were considered, focusing on the most notable crimes during 2021. The study was based on the prescribed penalty, without considering aggravating or mitigating factors, with the minimum sentence being the imposed sanction. This approach aimed to estimate the time required for the sentence to prescribe.

The inductive-deductive method was applied as the research started from a general premise, which is the prescription of custodial sentences, and proceeded to a particular premise, considering the crimes and offenses in which the prescription was declared. The analytical-synthetic method was employed to break down the theoretical information from sources such as the Constitution of Ecuador, the Comprehensive Organic Penal Code, the Organic Law on Jurisdictional Guarantees and Constitutional Control, and the Penal Codes of Colombia, Chile, and Argentina into main ideas and specific content related to the prescription of custodial sentences. The exegetical method allowed for the study of legal norms in their literal sense and practical significance regarding the topic at hand.

As a research technique, interviews were conducted with judges from the Judicial Unit for Criminal and Traffic Matters in Santo Domingo de los Tsáchilas. These experienced professionals provided highly relevant information, drawing on their empirical and scientific knowledge acquired through their roles as administrators of justice.

Results

From the documentary review, it was possible to identify the number of cases that have been resolved in crimes and offenses by the Court of Penal Guarantees, Judicial Unit for Criminal and Traffic Matters

in Santo Domingo de los Tsáchilas during 2020-2022, in which custodial sentences were declared as prescribed. This study has been documented in the following table:

Table 1: Cases resolved for the prescription of custodial sentences in the Court of Penal Guarantees, Judicial Unit for Criminal and Traffic Matters in Santo Domingo de los Tsáchilas during 2020-2022.

	Solved cases		
	2020	2021	2022
Crimes	5	2	--
Contraventions	2	4	8

Source: Automatic System of Judicial Procedures (SATJE)

Authorship: Own elaboration.

By analyzing the information extracted from the website of the National Institute of Statistics and Censuses, statistical data on the most prominent crimes that occurred in Ecuador in 2021 was obtained. This information was considered for the hypothetical scenario of estimating the time required for the prescription of custodial sentences, in accordance with the provisions of the COIP and the perspective of recent jurisprudential developments. It's important to note that no aggravating or mitigating factors were considered, only the imposition of the minimum sentence. The information has been summarized in the following table:

Table 2: Prescription of Custodial Sentences for the Most Prominent Crimes During 2021.

Crime	Sentence Time According to COIP	Prescription Time According to COIP	Prescription Time According to Jurisprudence (Minimum Conviction)
Intentional Homicides	Murder	22 to 26 years	39 years
	Contract killing	22 to 26 years	39 years
	Femicide	22 to 26 years	39 years
	Homicide	10 to 13 years	20 years and 6 months
Personal theft	5 to 7 years	10 years and 6 months	7 years and 6 months
Burglary	3 to 5 years	7 years and 6 months	4 years and 6 months
Business theft	3 to 5 years	7 years and 6 months	4 years and 6 months
Motorcycle theft	3 to 5 years	7 years and 6 months	4 years and 6 months
Car theft	3 to 5 years	7 years and 6 months	4 years and 6 months

* Time imposed without considering aggravating or mitigating factors in each specific case.

Source: Statistical data extracted from the website of the National Institute of Statistics and Censuses (INEC, 2021).

Authorship: Own elaboration.

The findings obtained from the bibliographical review of the legal regulations in countries such as Chile, Argentina, and Colombia allowed us to gather information in a more condensed manner in a table that details how the prescription of custodial sentences is presented in their penal codes, as follows:

Table 3: Comparison of the Prescription of Custodial Sentences from the Perspective of Comparative Law.

	TIME
Chile (Penal Code 12-Nov-1874. Last modification: 03-Feb-2021 - Law 21310)	Penalties of perpetual imprisonment, reclusion, and relegation prescribe in fifteen years.
Argentina (Penal Code, Law 179 updated)	Penalties of reclusion and life imprisonment prescribe after twenty years. Penalties of reclusion or temporary imprisonment prescribe in a time equal to the sentence.
Colombia (Penal Code Law 599 of 2000)	Prescribes within the time established for it in the sentence or the remaining time for execution, but in no case can be less than five years from the date the corresponding sentence becomes final.

Source: Penal Codes of Chile, Argentina and Colombia

Authorship: Own elaboration

Interview results

In this section, the results of in-depth interviews are reflected. These interviews were conducted with Dr. José Luis Alvarado and Dr. Carlos Ludeña, Judges of the Judicial Criminal and Traffic Unit in Santo Domingo de los Tsáchilas.

Interview with Dr. José Luis Alvarado, Judge of the Judicial Criminal and Traffic Unit in Santo Domingo.

What is your assessment of the legal concept of prescription as a means of extinguishing custodial sentences?

The prescription of custodial sentences is a legal institution that exists in all legal systems worldwide and, in essence, aims to establish timeframes to provide sentenced individuals the possibility of resolving their legal status over time.

In your opinion, do the principles of equality and proportionality relate to the prescription of custodial sentences?

Regarding equality, not really, because from a formal perspective, the law does not distinguish between prescriptions for women or men. The principle of legal equality establishes legal precepts for everyone. In terms of proportionality, he believes they are interconnected because, in a process where mitigating or aggravating factors are determined, the lack of justification for either can influence this legal institution. It must be in line with the judgment or court decision, meaning the prescription must be proportional to the sentence.

Do you think that in the COIP, according to Article 75, numeral 1, concerning the prescription of custodial sentences, the rights of the sentenced individual are violated due to the lack of proportionality if they receive a minimum sentence?

Yes, the rights of the sentenced individual are violated due to the lack of proportionality. This is because if the sentenced individual justifies the existence of mitigating factors and a sentence is imposed according to the COIP, in the context where they will prescribe at the maximum time plus 50%, there would be a lack of proportionality.

Do you consider that applying the same prescription period for custodial sentences to one individual with the maximum sentence and the other with the minimum sentence, affects the situation of the one with the minimum sentence?

Yes, it affects their situation because if someone is sentenced to a minimum sentence, the prescription time should be in line with what is established for it.

Do you believe that with the declaration of unconstitutionality by the Constitutional Court in Judgment

No. 11-20-CN/21, which modified Article 75, numeral 1 of the COIP, the lack of proportionality and equality in the prescription time of custodial sentences has been corrected?

Yes, it has been corrected because they analyze the legal precept itself and also aim to ensure that the rights of the sentenced individual are not violated.

Interview with Dr. Carlos Ludeña, Judge of the Judicial Criminal and Traffic Unit in Santo Domingo.

What is your opinion about the legal concept of prescription as a means of extinguishing custodial sentences?

It is a legal concept established by the COIP, considering it as a means that legislation uses to regulate compliance. In other words, it marks the beginning or end of any offense. In this case, when a sentence is issued, there is a set time for it to be fulfilled.

From your perspective, do the principles of equality and proportionality relate to the prescription of custodial sentences?

The interrelation suggested in this context is indifferent because proportionality in the prescription of custodial sentences must consider the sentence. Therefore, it does not apply to equality since each situation is independent and takes into account mitigating and aggravating factors.

Do you think that in the COIP, according to Article 75, numeral 1, regarding the prescription of custodial sentences, the rights of the sentenced individual are violated due to the lack of proportionality if they receive a minimum sentence?

Yes, since each situation is independent, taking into account the mitigating factors that have been demonstrated.

Do you consider that applying the same prescription period for custodial sentences to one individual with the maximum sentence and the other with the minimum sentence, affects the situation of the one with the minimum sentence?

Yes, it affects their situation because the individual who received the minimum sentence while demonstrating mitigating factors would have the same prescription time for the custodial sentence, unlike the one with the maximum sentence who did not demonstrate any mitigating factors.

Do you believe that with the declaration of unconstitutionality by the Constitutional Court in Judgment No. 11-20-CN/21, which modified Article 75, numeral 1 of the COIP, the lack of proportionality and equality in the prescription time of custodial sentences has been corrected?

In a way, yes, it has been corrected. This is because setting the prescription time for custodial sentences is independent of the situation of each of the sentenced individuals, and that is why the analysis carried out by the Constitutional Court is correct because it applies the sentence as it is.

Discussion

This research provides insights into the doctrinal and jurisprudential aspects of the prescription of custodial sentences in Ecuador and Comparative Law. It examines the legal framework established in Article 75, numeral 1 of the COIP (Integrated Organic Penal Code) and other legislations, highlighting the new perspective in the Ecuadorian criminal justice system concerning the timeframes for the prescription of custodial sentences. To support this research, statistical results from the Automatic Judicial Proceedings System (SATJE) for the years 2020 and 2022 were used. It is deduced that in the Santo Domingo canton, there is a low rate of custodial sentence prescriptions. In the case of crimes, seven cases were found to

have been prescribed, and in misdemeanors, there has been a noticeable increase, although not highly significant, in recent years, with up to eight cases prescribed (Judicatura, 2022).

Through a review of statistical data from the National Institute of Statistics and Censuses (INEC, 2021), the research reveals the timeframes for the prescription of custodial sentences for the most prominent crimes during 2021, particularly for minimum sentences. This allows us to infer that the timeframes for the prescription of custodial sentences under the COIP, before and after the amendment, position this legal concept with a new, less punitive timeframe compared to what was established in the original legislative framework.

From a Comparative Law perspective, the study presents a table highlighting the legal classification of countries such as Chile, Argentina, and Colombia in their respective penal codes. This comparison illustrates the variations in the timeframes for the prescription of custodial sentences, indicating that they do not exceed 20 years, and the Argentine legislation sets the prescription time for temporary imprisonment to be equal to the sentence.

Interviews were conducted with legal professionals experienced in criminal law, with extensive professional careers. These professionals have acquired both empirical and scientific knowledge over the years while playing the role of administrators of justice. They unanimously regarded the prescription of custodial sentences as a legal concept that establishes a specific period to conclude a procedure. This period starts when a sentence is handed down, and the sentenced individual is not yet serving their sentence. It is the responsibility of the State, through its auxiliary bodies, to ensure the enforcement of the imposed sentence.

The professionals shared the view that the prescription timeframes for custodial sentences established in the COIP, before the amendment, were very strict for minimum offenses, resulting in a situation of disproportionality. Therefore, the study found that the jurisprudence of the Constitutional Court, through its rulings, directed that a new approach be taken. This new approach should be more in line with the reality of the situation for sentenced individuals who can demonstrate mitigating factors or present aggravating circumstances.

As a result, this research work determined that the prescription of custodial sentences in the Ecuadorian criminal justice system has taken on a new meaning due to the jurisprudence of the Constitutional Court, which modified the article that established the prescription timeframes. Consequently, this research work provides a reflective analysis of how this legal concept is currently applied in our legal framework and takes into account other legislations. It also highlights how this jurisprudential novelty is currently affecting the situation of sentenced individuals.

Conclusions

- The prescription of custodial sentences is understood as a legal institution by which the situation of a sentenced individual is resolved, allowing them to avoid serving their sentence in a detention center. Over time, as determined by the law, this situation is resolved.
- It has been determined that the COIP originally established a very excessive timeframe for the prescription of custodial sentences, and the modification made by the Constitutional Court has addressed this legal situation by reducing the previously severe timeframes.
- The perspective of Comparative Law establishes a guideline very similar to the penal typology of our Ecuadorian system. When calculating the necessary time for the prescription of custodial sentences, the time established in the sentencing decision is taken as the basis.

- The resolution of the court represents a more humanitarian legal adaptation, benefiting social aspects and the reintegration of the sentenced individual into society.

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