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## The Right to Freedom of the Defendant Under the Precautionary Measure of Preventive Custody

### El Derecho a La Libertad Del Procesado En La Medida Cautelar De Prisión Preventiva

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#### **Abstract**

*The precautionary measure of preventive custody is an order issued when there are serious risks of the defendant fleeing, as defined by legal doctrine. However, in various legal systems, including the Ecuadorian, different criteria have been used to determine the deprivation of liberty. The overall objective of the research was to legally analyze the right to freedom of the defendant under the precautionary measure of preventive custody. The research was conducted from a quantitative perspective and framed within a documentary-bibliographic design. This involved the investigation, collection, and critical analysis of documentary and bibliographic references, based on a methodical, rigorous, and in-depth exploration of various documentary sources such as scientific research, articles, and peer-reviewed works, among others. It is concluded that preventive custody in the national criminal justice system is often applied solely in accordance with the law without verifying the fundamental rights recognized by the Constitution. Therefore, it should be applied with consideration to these rights. However, the main problem arises due to the lack of motivation when ordering such a measure.*

**Keywords:** Justice administration; prisoner; freedom.

#### **Resumen**

*La medida cautelar de prisión preventiva es una medida la cual se ordena cuando existen serios peligros de fuga que tiene el procesado, es así como lo ha definido la doctrina, sin embargo, en varias legislaciones y en la nuestra se ha tomado distintos parámetros para establecer la privación de la libertad. El objetivo general de la investigación fue analizar jurídicamente el derecho a la libertad del procesado en la medida cautelar de prisión preventiva. La investigación se desarrolló desde el paradigma cuantitativo, además se enmarcó desde un diseño documental-bibliográfico, mediante la indagación, recolección y análisis crítico documental y referencial bibliográfico, basándose en la exploración metódica, rigurosa y profunda de diversas fuentes documentales tales como investigaciones científicas, artículos y trabajos arbitrados, entre otros. Se concluye que, la prisión preventiva en el ordenamiento penal nacional muchas veces es aplicada de acuerdo con lo que determina únicamente la norma sin verificar los derechos fundamentales que se encuentran reconocidos por la carta magna en atención a ello debería aplicarse, sin embargo, el mayor problema se genera debido a la falta de motivación cuando se ordena dicha medida.*

**Palabras Clave:** Administración de justicia; prisionero; libertad.

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## Introduction

The precautionary measure of preventive custody is a measure that is ordered when there are serious risks of the accused fleeing, as defined by legal doctrine. However, in various legal systems, including the Ecuadorian, different parameters have been used to establish the deprivation of liberty. This is done in such a fraudulent manner that it leaves the right to freedom of the individual unprotected, which is entirely detrimental to the aforementioned protected legal interest. It is important to mention that in the Constitution of the Republic of Ecuador (2008), it is stated that the State must take affirmative actions to protect human rights.

Article. 11.- The exercise of rights will be governed by the following principles:

2. All individuals are equal and shall enjoy the same rights, duties, and opportunities. No one may be discriminated against based on ethnicity, place of birth, age, sex, gender identity, cultural identity, marital status, language, religion, ideology, political affiliation, criminal record, socio-economic status, migratory status, sexual orientation, health status, HIV, disability, physical differences, or any other personal or collective, temporary or permanent distinction, intended to diminish or nullify the recognition, enjoyment, or exercise of rights. The law will punish all forms of discrimination.

The State shall adopt affirmative action measures that promote real equality in favor of the rights holders who are in situations of inequality.

In another context, preventive custody constitutes a means of ensuring the presence of the defendant at trial. However, it is important to note that there are other different or alternative measures for the deprivation of liberty that the legislator has provided for. This is done to substantially regulate the punitive power of the state and not fill the country's prisons with innocent individuals. Ordering this measure would already violate the presumption of innocence, which is regulated within Ecuadorian legislation. Furthermore, the observance of human rights regarding the deprivation of liberty must be given primary consideration.

Therefore, it is important to indicate that the Comprehensive Organic Penal Code (2014) is noticeably clear on this matter. Article 534 specifies the purpose and requirements of preventive detention. Its primary purpose is to ensure the fulfillment of the sentence of an accused person, as well as the fulfillment of comprehensive reparation. It is necessary to establish the existence of a flight risk concerning the individual because preventive detention is precisely determined for that purpose. This corresponds to the appropriate measures for ensuring the appearance at trial of the accused, in addition to the requirements set forth by national criminal legislation.

To guarantee the accused person's appearance in the process and the fulfillment of the sentence, the prosecutor may request, with proper justification, that the judge order preventive detention, provided the following requirements are met, according to Ferrer (2013):

Under the current accusatory process, when issuing the order for binding over to trial, the judge must refrain from ruling on preventive detention because it should be requested separately by the Public Ministry when its granting is not done *ex officio* or violates rights. (p. 75)

It is important to mention that the precautionary measure of preventive custody must be applied *ex officio* when it is aimed at ensuring the comprehensive reparation of another right. However, on many occasions, this measure is imposed without verifying the actual

prerequisites set forth by legal doctrine and human rights. Specifically, it should entail a real flight risk. It is important to note that this measure is extraordinary in its application because, in most cases, it is simply decreed without considering the legal effects it subsequently has on the process and the person who is in the status of the accused.

In particular, the recommendations that are monitored, according to the Organization of American States (2017), pertain to the following areas:

- a) General policies of the State.
- b) Elimination of preventive detention as a premature punishment or a tool of social control.
- c) Public defense.
- d) Use of alternative measures to preventive custody.
- e) Expediency in legal proceedings and the correction of procedural delays (p. 17).

In this regard, a set of international rules is regulated to order preventive detention. It must be considered based on the principle of reasonableness. It should be considered that preventive detention should not function as a premature punishment. For this reason, the punitive power of the state regarding the regulation of this precautionary measure should be established only when there is no other measure to ensure the accused's presence in a criminal proceeding and ensure the fulfillment of comprehensive reparation.

Therefore, the constitutional principles of the presumption of innocence and proportionality require limiting the use of preventive custody to the most exceptional cases, only in very special circumstances, so that preventive detention is not the common rule but an extremely exceptional exception. Furthermore, it should be considered as indicated in the Comprehensive Organic Penal Code (2014), specifically in Article 534, which deals with the application of the precautionary measure of preventive custody.

It is important to mention that all those properly applied procedural principles will establish an objective accusation. In addition, it is worth referring to the two new trends in the national legal system, such as the error of prohibition, which regulates punitive and sanctioning power, advocating against inequality, which leads to a gross violation of the basic rights and guarantees of the citizens involved in a criminal offense. Therefore, it is important to observe these principles and what the treaties on Human Rights stipulate.

Regarding this, author Benavides (2019) states the following:

The principle of minimal penal intervention can be defined as the reduction of the punitive power of the State compared to conflict resolution through less aggressive means against the freedom of citizens, which eliminates unnecessary and of little criminal significance offenses. (p. 115).

Due to this, it can be determined that when a subject is denied another precautionary measure and mainly subjected to the precautionary measure of preventive custody, it infringes upon the protected legal interest of freedom. Furthermore, it does not align with the principle of minimal penal intervention, given the existence of other suitable mechanisms and the failure to verify the main parameters established for ordering preventive detention, rather than assessing dangerousness and the years of the sentence stipulated by the criminal offense.

It is important to state that preventive custody should be solely geared towards fulfilling the sentence of the accused, as well as providing comprehensive reparations to the victim. This should be determined as a necessary and imperative measure in which the judge must primarily

consider the risk of flight but should not prematurely anticipate based on the dangerousness and gravity of the criminal offense committed.

In this regard, generally, as author Krauth (2018) expresses the following:

The prosecutor effortlessly requests custody, and the judge orders preventive detention without the required legal foundation, lacking coherence in the request, lacking motivation in the ruling, and without considering the exceptional nature and proportionality of the measure, that is, its suitability, necessity, and strict proportionality (p.3).

It is important to analyze what Article 77 of the Constitution of the Republic of Ecuador (2008), in its numeral 9, determines. This article establishes certain substantial parameters for the duration of preventive detention, which must be considered both when ordering it and when applying it. Additionally, the principle of minimal penal intervention, a procedural principle stipulated in Article 3 of the Comprehensive Organic Penal Code (2014), should be considered. Moreover, without conducting a thorough examination, the prosecuting attorney in charge of the case requests preventive custody without reasoning that the measures inherent to criminal law are a last resort, meaning there is a rationale for requesting it. This rationale is analyzed by the judge, who examines the case based on the considerations provided by the prosecuting attorney and uses their own sound judgment to decide whether to order it. If they do not find it necessary, they should not order it, as the motivation for doing so is essential.

In light of this reality, the following question arises: Does the legal right to the freedom of the defendant get violated in the application of this precautionary measure? Violation of rights can occur because this measure has an extraordinary character, as it involves deciding on a person's freedom, especially when this right represents a human right for the accused individual. If their innocence is proven, it would mean that an innocent person was sentenced, as they would have already served a sentence without having received a verdict. Depriving someone of a right as significant as freedom is a critical matter. Following the presented arguments, the general objective of the research is to legally analyze the right to freedom of the defendant in the precautionary measure of preventive custody.

## **Method**

The research is conducted within the quantitative paradigm. It is also framed within a documentary-bibliographic design, involving inquiry, collection, and critical documentary analysis, as well as bibliographic reference analysis. This process is based on methodical, rigorous, and in-depth exploration of various documentary sources, such as scientific research, articles, and peer-reviewed works, among others. Describing the findings allows for the development of the theoretical framework related to the study topic. In this sense, documentary research is a process grounded in the investigation, retrieval, examination, critique, and interpretation of secondary data (Arias, 2012).

## **Results**

The results obtained are presented below, after the development of the proposed method.

### **The Right to Freedom of the Defendant in General Aspects of Criminal Procedural Law**

The right to freedom is a right that is established both in the national constitutional legal framework and in international treaties. When determining human rights, these treaties take

precedence even over national legislation. The right to freedom cannot be limited in any way. It is understood that this right should only be deprived in exceptional cases, especially when it is guaranteed by both national and international legal systems. Therefore, this measure should be applied only when it is necessary to protect another right and thereby prioritize the public interest over individual interest.

In this regard, according to the author Ferrajoli (2016), the following is proposed:

As long as punitive treatments and institutional prevention techniques that go against the rights and freedoms of citizens exist, they must always be supported by all the guarantees of the rule of law, even in a perfect society of the future, in which crime does not exist or is not perceived in any way (p. 25).

So, punitive power must be regulated as such, as the Comprehensive Organic Penal Code (2014) states one of its purposes precisely as that: regulating state punitive power. It is understood that it is not necessary to impose harsher penalties to reintegrate a person into society. Instead, it should be established that the penalty should not be anticipated. That is why preventive detention must be regulated as an exceptional measure, and the only parameter for ordering it should be the risk of flight. Often, preventive detention is ordered without proper justification.

It is important to note that Article 76, paragraph 2 of the Constitution of the Republic of Ecuador (2008) establishes the presumption of innocence for every person, and they shall be treated as such until their responsibility is determined under a final and enforceable conviction. This is the only parameter that undermines the presumption of innocence. However, before this determination is made, many individuals already have an anticipated penalty that restricts their legitimate right to freedom.

### **The Right to Freedom in Doctrine**

It has been determined that the right to freedom is a protected legal interest. This has been evidenced throughout history to safeguard this right to freedom, which is one of the most important rights that human beings are born with and is to be respected without restrictions. Therefore, when depriving a person of their freedom, many considerations must be considered. The principles of reasonableness and proportionality must also be considered to determine whether it is appropriate to order such a measure, which aims to ensure the presence of the accused at trial.

Author López Betancourt (2018) describes the following:

The human rights protected within the criminal process, formerly known as criminal guarantees in the Mexican constitutional regime, have traditionally been those of the person who directly experiences the intervention of criminal justice in aspects such as being subject to investigation, being detained, and having their freedom restricted, and finally in the case of a sentence when they are convicted to a penalty. (p. 27)

It is important to consider the legal principles that allow for this. The right to freedom is part of human rights, and the Comprehensive Organic Penal Code (2014) establishes this in Article 5, paragraph 4, which states that the right to innocence must be respected. In a criminal case, the defendant must maintain his status of innocence until there is a sentence that determines otherwise. This sentence must be motivated. Therefore, the lack of motivation when ordering preventive detention constitutes a violation of this fundamental right.

## **Guarantee of Motivation Regarding the Precautionary Measure of Preventive Custody**

It is explicitly established that every legal act must be duly motivated. Even more so, to order this exceptional measure, the imminent risk of flight must be justified. However, this justification must be properly substantiated by the prosecution. It has been observed that many prosecutors simply request preventive detention based on the seriousness of the crime. This is not considered an important parameter to verify because the judge must motivate their decision, and they must have a substantial legal basis that does not violate a fundamental right like freedom.

In this context, author Cortés (2018) highlights the following:

The principle of publicity, seen as an indispensable instrument for the realization of due process, entails the requirement to issue decisions duly motivated in matters of fact and law. It also imposes the duty to make them known to different procedural parties with a legal interest in participating through the communication mechanisms established by law. (p. 23)

It is important to consider what is stipulated in Article 76, paragraph 7, literal i), of the Constitution of the Republic of Ecuador (2008), which establishes that resolutions of public authorities must be motivated. Motivation will not exist if the resolution does not state the legal norms or principles on which it is based and does not explain the relevance of its application to the facts. Administrative acts, resolutions, or judgments that are not duly motivated will be considered invalid. Therefore, it is essential to take this into account. Based on the statements made, it is established that when ordering a precautionary measure like preventive detention, this act must be fully motivated. As determined by constitutional regulations in the aforementioned article, it is evident that it is a legal requirement that this normative act be motivated because if it is not properly motivated, it cannot be valid, and therefore lacks all legal effectiveness for its application.

### **Definition of Motivation**

Motivation arises from circumstances that determine a fact that clears any doubts, especially when it involves an action that directly contradicts the protection of a legally safeguarded interest. In this sense, motivation can be defined as the basis for a decision made by a justice administrator. It indicates that the factual grounds of each party involved will be examined, followed by the verification of the evidence at hand. Then, the legal aspects are imposed based on such considerations to conduct an analysis starting precisely from the stated motivational precepts.

In this regard, Sodi (2018) specifies:

With the intervention of the Judicial authority in terms of the Constitution, the International Treaties that are signed in this regard, and the regulatory laws. In these cases, the Judge's order to execute the requisition shall be sufficient to justify detention for up to sixty natural days. (p. 37)

Therefore, the indicated principles regarding motivation and its parameters should be considered because they can vary in terms of the analysis carried out by a justice administrator. This analysis will be based on their sound judgment, which will be influenced by their knowledge and expertise as the judge. It is important to mention that, in addition to national legal aspects, supranational norms that better protect a right must also be observed.

### **Characteristics of Motivation**

Motivation is established as a norm that serves as the basis for a predisposed thesis. However, it is essential to mention certain fundamental and specific parameters. In the national legal framework, motivation is envisioned as the foundation for the proposed thesis. Consequently, it is related to the factual and legal grounds, as well as the evidence that can be presented. Following this, the legal analysis is conducted, based on specific knowledge of the subject presented in the case.

Author Binder (2018) suggests:

According to the Factual and Legal Foundation of Judicial Resolutions, the obligation exists in a modern democratic state to require judges to motivate their resolutions. This is because motivation serves as the democratic legitimacy of judicial action and allows for the control of judicial decisions. (p. 7)

It is determined that motivation, in addition to being a judicial guarantee, must always be considered as part of judicial proceedings. This allows the objective of the resolution, which is to have control based on the recognition of norms and rights assigned by law to the national legal framework. It must be verified in terms of its conformity with the typification of norms that are consistent with the protection of legally safeguarded interests.

### **Motivation for Ordering Preventive Detention**

The motivation for ordering preventive detention should be that it is ordered exceptionally, which means that there is no other practicable means by which a person can be brought to a judicial process. However, this is not fulfilled, and by not complying with this, the guarantee of motivation that each of the state's resolutions must contain is nullified. It is essential to respect this right to freedom and limit it in such a way that no other practicable method exists. Once all of this has been considered, preventive detention can be determined. Therefore, author Gómez (2018) emphasizes:

Furthermore, the judge can only order preventive detention *ex officio* strictly: only in cases of organized crime, intentional homicide, rape, kidnapping, human trafficking, crimes committed with violent means such as weapons and explosives, as well as serious crimes determined by law against the security of the nation, the free development of personality, and health. (p. 47)

Reference should be made to what is stipulated in Article 38, paragraph 7 of the Constitution of the Republic of Ecuador, which indicates that for the enforcement of measures that deprive individuals of their liberty, some alternatives must be sought, and these alternatives must be entirely sufficient to ensure the defendant's presence at trial. This is an aspect that must be taken into consideration in accordance with the rules of constitutional law.

### **Discussion**

The application of preventive detention measures should be exceptionally applied, as there are other applicable measures according to what is stipulated in the Comprehensive Organic Penal Code (2014). The parameters that must be taken into consideration are the risk of flight, not the dangerousness of the processed individual, and certainly not the sentence that the subject will receive. This would be an anticipatory attribution of guilt, as arbitrarily depriving someone of their freedom without having a final sentence in place.

In this regard, author Pazmiño (2018) states:

The study has identified that, generally, the prosecutor effortlessly requests detention, and the judge orders preventive detention without the required legal basis, without coherence in the request, without the motivation of the court order, and without considering the exceptionality and proportionality of the measure, that is, its suitability, necessity, and strict proportionality. (p.25)

Preventive detention is a personal precautionary measure applied to ensure the investigation of a crime, maintaining immediacy in the criminal process, considering that people enjoy the presumption of innocence, as well as the right to legitimate defense on equal terms. It also considers the right to legal security, which states that rules are clear, prior, and enforceable. Therefore, under the principle of legality, the last resort principle should govern the application of this measure.

In this sense, Article 534 of the Organic Integrated Penal Code sets the parameters for ordering preventive detention. In this context, the Constitution of the Republic has determined that the right to freedom must be respected to ensure that measures are not ordered arbitrarily, in violation of specific legal provisions. It is crucial to analyze Article 9 of the Universal Declaration of Human Rights, which states that no one shall be subjected to arbitrary arrest, detention, or exile. Furthermore, it underscores that motivation should encompass facts, legal norms, and evidence.

Therefore, once the current state of the determination and application of this precautionary measure has been examined in this research, it becomes evident that there is a violation of the right to freedom when motivation is not applied at the time of ordering such a measure. It has been established that this measure should only be applied when there is a genuine risk of flight; otherwise, other measures contained in Article 522 of the Organic Integrated Penal Code must be applied to avoid the deprivation of the right to freedom. This right is fundamental and irrevocable.

## Conclusions

Preventive detention in the national criminal system is often applied solely in accordance with what the law prescribes, without considering the fundamental rights recognized by the Constitution. It should be applied with respect to these rights; however, the major problem arises due to the lack of motivation when ordering this measure. Motivation, therefore, is both a guarantee and an obligation for all institutions within the state's authority. As a result, all decisions made by judicial authorities must be adequately motivated. In the case described, the lack of motivation consequently results in a violation of the right to freedom because it is considered an arbitrary act when a fundamental right, particularly the right to freedom, is undermined.

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