Centro Sur Vol. 8 No. 3- July– September - Revista Centro Sur - eISSN: 2600-5743

http://centrosureditorial.com/index.php/revista

Appeal against preventive detention in the evaluation and preparatorys

Recurso de apelación a la prisión preventiva en la etapa evaluatoria y preparatoria de juicio

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ABSTRACT

The legal issue of this investigation is to analyze whether the impossibility of filing an appeal against the resolution granting pretrial detention during the evaluation and preparatory stage of the trial violates the principle of procedural challenge guaranteed in the Constitution of Ecuador. Applying a qualitative approach through the hermeneutic method, involving the review of bibliographic materials from various scientific articles, inductive methods, exegesis, and doctrinal and jurisprudential review. Article 653, numeral 5 of the Ecuadorian Comprehensive Organic Penal Code violates the constitutional guarantee to appeal in the right to defense established in Article 76, numeral 7, letter m) of the Constitution of Ecuador and Article 5, numeral 6, of the COIP. After the applied analysis, it is evidenced that there is unconstitutionality regarding the appeal to

https://doi.org/10.37955/cs.v8i3.355
Received Febrary 11, 2024/ Approved May 05, 2024 Pages: 55 -78
eISSN: 2600-5743

pretrial detention since the exercise of the right to defense is not guaranteed, and the right to appeal is restricted, creating a contradiction between an ordinary norm and a constitutional norm. Additionally, there is no suitable recourse to challenge the order granting pretrial detention after the stage of fiscal instruction.

RESUMEN

El problema jurídico de esta investigación es analizar si la imposibilidad de presentar un recurso de apelación frente a la resolución que concede la prisión preventiva en la etapa de evaluación y preparatoria de juicio vulnera el principio de impugnación procesal garantizado en la constitución del Ecuador. Aplicando el enfoque cualitativo, mediante el método hermenéutico, que consiste en revisar materiales bibliográficos de diferentes artículos científicos, el método inductivo, la exegesis, la revisión doctrinaria y jurisprudencial. El Art. 653 numeral 5 del Código Orgánico Integral Penal ecuatoriano vulnera la garantía constitucional de recurrir en el derecho a la defensa establecida en el Art.76 numeral 7 literal m) de la Constitución de Ecuador y el Art 5 numeral 6 del COIP, ya que luego del análisis aplicado, se comprueba una inconstitucionalidad en cuanto a la apelación a la prisión preventiva, esto ya que no se garantiza el ejercicio del derecho a la defensa y se restringe el derecho a recurrir existiendo una contradicción de una norma ordinaria frente a una norma constitucional, así mismo ya que no existe un recurso idóneo para recurrir del auto que concede la prisión preventiva después de la etapa de instrucción fiscal.

Keywords / Palabras clave

Impugnation, Appeal, Preventive Detention, Evaluation and Preparatory Stage of Trial

Etapa evaluatoria y preparatoria de juicio, Recurso de Apelación, Prisión preventiva, Principio de impugnación procesal

Introduction

The appeal in Ecuador and in several legal systems is considered as the opportunity for a person to present an application to a higher court, in order to have the decision issued by a court annulled. It is described as an act of disagreement or rejection of the resolution adopted by the administration of justice. It is important to emphasise that the action of contesting, carried out by the defendant, is a voluntary choice, since,

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if he/she does not find grounds or justification to appeal, he/she may choose not to do so.

Professor Eugenio Raúl Zaffaroni argued in the prologue to the work of Domínguez, Virgolini and Annicchiarico that: "pre-trial detention is the clearest expression of repression of so-called conventional criminality, its blatant and even expressly punitive penal function means that the pre-trial detention order is in our reality the sentence of conviction and the final sentence fulfils the role of an appeal for review. (Beanatte and Olguín, 2007, p. 1).

It is essential to consider that pre-trial detention is one of the strictest and most severe measures, as it implies the deprivation of an individual's liberty, which is why the need for this research and its importance lies in guaranteeing constitutional rights relating to due process, as a lower hierarchy norm is possibly not in line with what the supreme norm provides, as well as taking into account that freedom of movement is one of the most important rights of each individual, below or on a par with the right to life.

It is also important to address another significant aspect, which is related to the persons who are deprived of their liberty through the imposition of this precautionary measure. In many cases, these persons do not have the necessary resources to hire a private lawyer, so they are forced to be represented by a public defender. In most situations, this happens, resulting in limited challenges to pre-trial detention. This lack of attention often means that the resources available for the legitimate defence of the defendant are not fully utilised.

The disproportionate increase in the number of people deprived of their liberty in Ecuador must be brought to the attention of all state institutions. A society is not safer because it imprisons more people; on the contrary, in some countries, a sort of perverse circle of insecurity has been established, where prisons are precisely one of its main links. (Krauth, 2018, p. 11)

The Constitution of the Republic of Ecuador, hereinafter CRE, identifies pre-trial detention as an extreme measure. Furthermore, in its article 76, numeral 7, it guarantees the right of all persons prosecuted to due process that entails fundamental guarantees. This includes the right to defence, allowing appeals against the judge's decisions in all proceedings related to their rights.

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Ecuador, being a constitutional state of rights and justice, follows a model of legal guarantee that effectively protects rights. In this sense, the judge not only administers justice, but also interprets the laws, as long as he or she does not interfere in the definition of crimes or penalties, as this would be an undue discretion on the part of the judge. This interpretation offers the possibility for the judge to interpret Article 653 of the Código Orgánico Integral Penal, hereinafter COIP, where it states the possibility of appealing a resolution that grants or denies the precautionary measure of pre-trial detention as long as it is taken during the formulation of charges or during the prosecutorial investigation.

In legal practice, it is observed that the appeal of pre-trial detention is only viable during the pre-trial investigation stage, excluding the trial preparation stage. The purpose of this legal study is to determine whether this situation is consistent with constitutional guarantees and with the principle of procedural challenges, which allows any person to appeal final decisions, regardless of the stage of the proceedings, in accordance with constitutional articles, international treaties and the Organic Integral Criminal Code itself.

To ensure compliance with due process, the fundamental guarantees established in the CRE must be respected. Pre-trial detention, in this sense, constitutes a personal restriction of an individual's liberty during the legal process. Moreover, it is an extreme measure that should only be applied when a valid justification is presented, supported by a sound evidentiary basis and a sufficient burden of proof.

This justification should include standards of credibility, encompassing elements such as plausibility, the existence of a precautionary risk and the severity of the potential penalty. Plausibility, in simple terms, refers to the available evidence and should include both the materiality of the facts and the responsibility of the individual being prosecuted.

With regard to pre-trial risk, it is essential to consider the possibility that the defendant may attempt to abscond, that he or she may interfere with the criminal investigation or that the conditions necessary for him or her to appear for trial cannot be guaranteed. In addition, in order to consider pre-trial detention, the potential penalty must be more than one year's imprisonment.

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Liberty can only be restricted in cases that are strictly necessary and indispensable to guarantee the common good, whose dimension presupposes the rights of others; liberty is a general rule and not an exception in a State of Law in accordance with the demands of civil society, in turn, it must be so if it wishes to sustain its status quo within spaces of freedom and tolerance sustained by the legal system against the invasion of individual conduct. (Sarabia,2021, p. 9).

Pre-trial detention is a precautionary measure that restricts the right to be free, however, personal liberty is a duty that must prevail in a state of rights and justice. When the factors for which pre-trial detention was imposed disappear, both the risk of absconding and the risk that the defendant will not serve his or her sentence, this measure should disappear. It is therefore important to give priority to procedural challenges at all stages of the proceedings, since doing so only before the evaluation and preparatory stage of the trial could be a restrictive legal norm that could be in contradiction with higher-ranking norms, such as constitutional norms.

Materials and Methods

The procedural system is an organised set of rules, regulations and principles that control the investigative, punitive and sanctioning activities of the Ecuadorian state. The COIP is the normative framework that governs the repressive authority of the State by establishing precisely the contraventions and crimes, as well as the procedures that must be complied with in terms of penalties, protected by principles, guarantees such as due process, the guarantee of effective judicial protection. At the core of this legal research is the concept of procedural challenges and the right of the persons involved in the process to challenge the decisions of the judiciary, whether these are resolutions, rulings or court orders.

In Ecuador, the procedural system is based on an accusatory model, which is distinguished by a clear division in the functions performed by each entity involved. Within the investigative process, the prosecution is responsible for gathering information, carrying out investigations and formulating accusations. The defence of the prosecuted party is responsible for rebutting the evidence presented by the prosecution and preparing a technical representation. Meanwhile, the administrator of justice, endowed with jurisdiction, competence and sound legal knowledge, evaluates all the proceedings of both the prosecution and the technical defence.

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This evaluation must be impartial, considering adherence to the law and the SRA, avoiding any infringement of human rights. The fundamental parties for the development of the different procedural stages are the prosecution, the defendant and the judge. If the prosecution is not present, there will be no indictment; if the defendant does not appear at the trial hearing, the penalty or sanction generated by the prosecution cannot be imposed. Finally, the judge plays the crucial role as the body in charge of administering timely, efficient and speedy justice.

The scientific community in the field of criminal law is aware of more than one hundred principles of due process in different countries, most of which have been constitutionalised. Among the most relevant principles of Criminal Law that have been reflected in Latin American legal texts are legality, equality, contradiction, minimal intervention, concentration, immediacy, doubt in favour of the defendant, no self-incrimination, effective judicial protection, favourability, non bis in idem, however, others such as the correlation between charges and sentence, recursive congruence, iura novit curia are not constitutionalised, and many of them are not regulated in the procedural codes either. (Durán-Chávez and Fuentes-Aguila, 2021, p. 10).

These authors state in their work that in the criminal field there are several principles that are expressly defined in the supreme legislation of each country. One of the most relevant is the principle of legality, which aims to punish an offence only when the conduct in question is clearly established as unlawful, and has been previously defined in the regulations. Another important principle is that of equality, which establishes that all persons are subject to the law on an equal footing in both formal and material terms.

In addition to these explicit principles, there are others that are not written down in text, such as, for example, the obligation of the judge to supply the law when the parties to the proceedings only state the facts. These principles, although not embodied in the Ecuadorian supreme law, are applied by the administrators of justice. In Ecuador, the figure of Iura Novit Curia is established in the Organic Code of the Judiciary.

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In the previous inquisitorial criminal system, the judge had the role of investigator, gathering elements of conviction and accuser, generating an erroneous conviction to a certain extent, since the impartiality that should be necessary in all criminal cases was non-existent. Likewise, it was contaminated due to its almost total intervention in the judicial process, in the same way, its work was carried out in strict reserve, which meant that the defendant could not enforce his legitimate right of defence.

The current legal system in Ecuador foresees the development of an accusatory procedural system, whose main change is the recognition of the defendant as a subject of rights, generating a limitation of the punitive power of the State. Today in Ecuador there are judicial bodies such as the prosecutor, who gathers evidence and accuses, and the administrators of justice, who evaluate the evidence and issue their rulings.

Orality in the accusatory penal system, which is based on a system of hearings in stages with the presence of a judge who is the guarantor of the law, and equity must prevail among the procedural subjects, excluding at the appropriate procedural moment any type of evidence that has been obtained in violation of the rights or formal requirements demanded by law, whereas in the inquisitorial system the written and integrated factor is predominant in an investigation file. (Hernández, 2017, p. 14).

Although the evidence for the prosecution and defence is a means to reach the truth, the administrator of justice must ensure that the means of evidence are legal and constitutional. That is, at the time it was obtained it did not violate due process. Legislation below the constitutional level, such as laws, decrees, agreements and all legal provisions, must be in conformity with the constitutional provisions in force in each country. This concordance becomes even more crucial when countries are committed to a constitutional state based on rights and justice.

When speaking of constitutionality, the emphasis is on the ability of regulations, whether ordinary, organic or any other provision issued by the competent authorities in the performance of their duties, to be in accordance with the values and rights enacted in the Ecuadorian constitution.

Unconstitutional norms are invalid, that is, they do not satisfy all the conditions that allow for the prediction of "validity" in their regard.

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eISSN: 2600-5743

This is because the constitution, as the highest-ranking norm within the legal order, establishes the requirements that lower-ranking norms must meet in order to be admitted as part of the law (Rodríguez et al., 2021, p.12).

In the above quote Rodriguez, argues that a legal provision that goes against what is established in the constitution is considered invalid. The Constitutional Court has the power to hear public actions of unconstitutionality, which can derive from flaws in the substantive content or in the form of the norm. The first type of failure refers to actions that contradict the precepts of the Ecuadorian constitutional norm. On the other hand, when unconstitutionality is mentioned in terms of form, reference is made to the process of creating the norm. In other words, an error has been made during the legislative procedure for the creation of the law.

The presumption of innocence is a basic guarantee of due process, and by imposing a precautionary measure that restricts liberty, this constitutional provision is being infringed, since subjecting the accused to being deprived of his or her liberty violates the presumption of innocence. Likewise, pre-trial detention can be appealed, as it is established as a guarantee inherent to the right to defence.

Results

Although the criminal process in Ecuador, regardless of how it is carried out, is governed by the principle of orality, a written report is required to initiate this process. This notification can come from a private complaint, a report from state control bodies or even from a ruling by a judge who has identified a crime in a case in which he or she has jurisdiction.

The preliminary investigation is a pre-procedural phase that does not constitute a stage within the ordinary Ecuadorian criminal procedure. The prosecutor, by investigating and obtaining evidence for and against, can decide whether to indict or not, based on indications of criminal responsibility and evidence. This means that not all complaints, reports or orders will result in an indictment. For offences that carry a custodial sentence of up to 5 years, the investigation will last one year, and for offences with more than 5 years, the preliminary investigation will last a maximum of 2 years.

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The COIP has established that there are 3 procedural stages within the ordinary procedure, the first is the prosecutorial investigation, the second is the stage of evaluation and preparation of the trial and finally the trial stage. It can be said that the first stage begins with the hearing for the formulation of charges, when the prosecutor has elements of conviction that support the accusation. The time limits for this stage are 90 days for crimes in which the person being prosecuted is arrested by means of a court order, 30 days in the case of apprehension in flagrante delicto and for traffic offences the investigation will last 45 days.

Only at the prosecutor's request can these times be extended, and only if there are new persons involved in the process in any of its qualities, or when there is a variation of the criminal type, as a result of the investigation carried out in the prosecutor's investigation and this does not fit in with the conduct that is to be imposed. In either of the two cases, an additional 30 days of prosecutorial instruction will be granted, however, this cannot contravene Article 592 of the COIP, third paragraph, which states the following: "In no case may a prosecutorial instruction last more than 120 days. In traffic offences it may not last more than seventy-five days and in flagrante delicto it may not last more than sixty days". (Código Orgánico Integral Penal, 2014)

In the pre-trial investigation, when the prosecutor has the necessary elements of conviction, he or she will ask the administrator of justice to set the day on which the indictment will take place. The judge has 24 hours to schedule it, which must take place within 5 days of the request. In the case of flagrante delicto, these deadlines will not be necessary, as the arraignment must take place immediately within 48 hours of the arrest or apprehension.

Within this hearing, the charges will be presented as long as the prosecutor is convinced of the commission of the unlawful act and the degree of participation of the defendant, whether as perpetrator, co-perpetrator or accomplice.

After this phase, the prosecutor will have the option of deciding to refrain from pressing charges or to proceed with the indictment by requesting the judge to schedule the evaluation and trial preparation hearing. The evaluation and trial preparation phase aims to address and resolve issues such as the merits of the case, possible pre-trial issues, the competence of the court, as well as the validation,

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evaluation and assessment of the evidence presented by the prosecution. In addition, the exclusion of illegally or unconstitutionally obtained evidence is contemplated, as well as the delineation of the arguments to be discussed during the trial and the presentation of planned evidence. Both the defendant and the prosecutor can reach agreements regarding the evidence.

During this hearing, the prosecution will substantiate its accusation, requesting the court to schedule a trial date and time. "The intermediate phase is based on the idea that trials should be conveniently prepared and should be reached after a responsible activity" (Martinez, 2016. p.4).

According to the author, the evaluation and trial preparation phase aims to confirm the application of procedural principles, legal guarantees, regulations relevant to the case and, above all, adherence to the provisions of the human rights convention.

When the prosecution brings charges, it must identify the person or persons involved, their role in the case, narrate the relevant facts, state the grounds for the accusation, indicate the criminal offence related to the conduct and announce the evidence to be presented. If there are witnesses, a list of them should be provided, in addition to requesting, confirming, modifying or withdrawing precautionary or protective measures.

After the interventions of the prosecutor, the complainant and the defendant's defence, the judge must issue his decision at the same hearing. By means of an order, the judge can dismiss the case if the prosecutor does not press charges, if the act does not constitute a typical, unlawful and culpable offence, if the prosecution lacks sufficient evidence to presume a crime, or if there are elements that exclude unlawfulness.

There are two possible outcomes: dismissal of the case or the defendant is called to trial. If the case is dismissed, the judge must justify whether the complaint was reckless or malicious. In the case of recklessness, procedural costs must be covered and, if necessary, compensation may be demanded from the complainant. If it is considered malicious, the accused previously prosecuted may initiate legal action against the complainant.

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According to the Ecuadorian Organic Integral Penal Code, the trial hearing is an essential stage, as the legal status of the defendant depends on it. This hearing is based on principles such as orality, immediacy, especially the presence of the accused, without whom this stage cannot take place.

If a witness or expert who is essential to clarify the facts is not present, the judge can be asked to postpone the hearing and resume it within a maximum of 10 days. If a complaint does not come from the prosecution, the absence at this hearing will be considered as an abandonment if he or she does not appear.

The hearing will be considered failed if the suspension is the fault of the administrators of justice or the prosecution. It begins with the initial presentation, evidence is presented and, if a crucial piece of evidence is excused, it may be requested to be added to the file. The parties make their final arguments before the judge's reasoned judgment, declaring the innocence or guilt of the accused.

The sentence issued by the court must be drafted within 10 days and requires the agreement of two judges to be valid. Following a conviction, a suspended sentence can be applied for within 24 hours.

Pre-trial detention is used as a last resort to ensure the defendant's appearance during the trial and the serving of the sentence. This is justified when the prosecutor has sufficient evidence to presume that a publicly actionable offence has been committed. It is essential that this evidence is clear, precise and demonstrates the involvement of the defendant in the illegal act.

In addition, it is necessary to show evidence that other alternative measures to pre-trial detention are not adequate, which leads to the need to apply this measure of deprivation of liberty. This measure ensures that the defendant is present at the trial stage, complying with the principle of immediacy. It is important to mention that the crime of public action that justifies this measure must have a custodial sentence of more than 1 year.

Article 11 of the Ecuadorian Constitution establishes principles for exercising rights both individually and collectively before the corresponding authorities. These authorities must guarantee the fulfilment of rights, being the guarantees framed in the Constitution and in international human rights treaties immediately enforceable by justice administrators and administrative authorities.

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Their application can be ex officio or at the request of a party, without requiring conditions not detailed in the Constitution. Moreover, no rule may restrict the content of constitutional rights and guarantees. Article 76 guarantees due process, defence and the possibility to appeal rulings or resolutions in proceedings related to rights.

In the Ecuadorian Organic Integral Criminal Code, specifically in Article 653, it is indicated that the resolution on pre-trial detention can be appealed, allowing both the defendant and the prosecutor to file this appeal. However, it establishes that it is only available at specific stages such as the formulation of charges or during the prosecutor's investigation, limiting its access in the second stage of the ordinary proceedings.

Despite the fact that the procedural principle of Article 5 of the COIP establishes procedural challenges as the right to appeal rulings or resolutions in all proceedings concerning rights, in accordance with the guarantee of appeal and international instruments. The appeal of pre-trial detention has limitations according to the stage of the process, denying its presentation in the evaluation and preparatory stage of trial and allowing its interposition during the prosecutorial instruction.

Consequently, it could be said that the legislator has omitted a constitutional mandate, specifically Article 76.7.m of the CRE, as there is a structural gap by omitting or partially failing to observe the provisions of the Ecuadorian supreme law. This omission on the part of the legislature is the failure to institutionalise a suitable remedy that guarantees due process through the exercise of the right to defence in the guarantee of appealing the resolution that grants or denies pre-trial detention after the pre-trial investigation stage.

In Ecuadorian criminal proceedings, during the substantiation of criminal offences regulated under the ordinary procedure, the prosecution has the power to request the applicability of pre-trial detention in two stages, that is, from the formulation of charges to the intermediate stage, however, due to the legislative configuration of Article 653 numeral 5 of the Organic Integral Criminal Code, the accused in the preparatory stage of trial cannot appeal the pre-trial detention ordered in the order to call for trial. This impossibility to appeal is typical of a closed appeal system that restricts the content of the constitutional right to appeal, constituting an obstacle to due

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criminal process in the face of the irrefutable existence of judicial decisions that may contain flaws or develop different criteria in the determination of the factual assumptions and the application of the normative assumptions (González, 2022. p.22). (González, 2022. p.22).

The author also emphasises the impossibility for the defendant to challenge pre-trial detention at the evaluation and preparatory trial stage, highlighting that the prosecutor's power to request pre-trial detention is not limited to the pre-trial investigation stage, in other words, that pre-trial detention can be requested at the intermediate stage. It also states that the administrators of justice can make mistakes in terms of their dispositions, which is why it is necessary to guarantee the right to appeal in all rulings or resolutions issued by the judge.

It is considered crucial to protect the rights of victims and other participants in the process, to ensure the appearance of the accused at trial, to comply with the possible penalty and to guarantee full reparation to the victim. In the Ecuadorian context, it is established that the measure of pre-trial detention will be applied if the defendant could obstruct the investigation by concealing or modifying documentary, testimonial or expert evidence.

The measure should be adopted as long as it is in adequate proportion to the danger it seeks to prevent, so if the risk to be protected or safeguarded is lower, the measure to be applied should also be of lesser intensity (Huerta and Farro 2021, p. 19-20).

The administrator of justice and his work involves assessing the danger that he is trying to foresee in relation to the right that he wants to protect, therefore, if the danger is minimal, the precautionary measure to be applied should also be less rigorous. Therefore, the prosecution must present sufficient elements to the administrator of justice to generate the full conviction that the only necessary, suitable measure is pre-trial detention.

When we talk about them we refer to appeal, cassation, review, clarification, these are established by Ecuadorian criminal law and are in line with international treaties, such as the International Covenant on Civil and Political Rights in Article 9, paragraph 4, which textually states the following:

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Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. (United Nations Human Rights Council, 1976)

Similarly with the principles of procedural challenges detailed in the Código Orgánico Integral Penal, which establishes:

Art. 5.- Procedural principles. - The right to due criminal process, without prejudice to others established in the Constitution of the Republic, international instruments ratified by the State or other legal norms, shall be governed by the following principles:

Procedural challenge: every person has the right to appeal against the final ruling, resolution or order in any process that is decided on his or her rights, in accordance with the provisions of the Constitution of the Republic, international human rights instruments and this Code. (National Assembly of Ecuador, 2014)

The remedies recognised in Ecuador are divided into horizontal and vertical categories. Horizontal remedies, such as amplification and clarification, are under the competence of the criminal court in charge of the proceedings. On the other hand, vertical appeals are subdivided into appeals of fact, which can be evaluated by both the Provincial Court and the National Court; appeals, which the Provincial Court is obliged to consider; cassation, which is under the exclusive competence of the National Court of Justice; and finally, appeals for review, which can be carried out by any ordinary or extraordinary court.

The Código Orgánico Integral Penal (COIP) uses the word impugnación, since it is "a broader term than the term recurso", its explanation is based on the fact that "every resource is a means of impugnation, but not every means of impugnation is a resource" (Proaño et al., 2021. p.2).

Article 5, paragraph 7 of the COIP makes eloquence to the impossibility of worsening the situation of the challenger, as long as this appeal or cassation is made by the defendant without the prosecutor joining the appeal or cassation. Therefore, the principle of non reformatio in peius may be applicable as long as the only appellant

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to any ordinary or extraordinary means of appeal is the defendant, otherwise the prohibition of worsening the sentence cannot be enforced.

In ruling number 768-15-EP/20 issued by the reporting judge Ramiro Ávila Santamaría, the prohibition on worsening the sentence of the appellant when he is the sole appellant has been expanded upon. A brief summary of the case is that the defendant appealed in cassation against the sentence issued by the provincial court in which he was sentenced to 6 months imprisonment, and in the national court he was sentenced to one year imprisonment without the public prosecutor having lodged an appeal in cassation.

This jurisprudential precedent makes it a mandatory rule that the prosecution must be a party to the appeal in order for the sentence to be worsened; it is not enough for the private prosecution in a public prosecution offence to join the appeal or cassation appeal filed by the defendant or to lodge the appeal itself.

There is no doubt about the basis of the new test. Judging is a human activity, in reality it is something more than that, it is the highest expression of the human spirit; in a way it is the act performed by man that comes closest to the divine task. Despite its importance, its relevance is contrasted by the fact that it is only a human act and therefore liable to error. This being so, it is necessary and essential that such an act can be reviewed by other human beings, theoretically in a better position to appreciate the goodness of the decision, whether to ratify or refute it. (Manrique, 2015. p.71).

In the above quote Manrique argues that the judicial exercise resembles, from a dogmatic-theological point of view, a representation close to divine power. This vision not only implies administering justice, but also becoming a judging entity on the earthly plane. However, throughout the course of history the human species has proven to be prone to mistakes, especially when deciding on the legal status of a person.

The judge, as a figure in the administration of justice, is subject to making mistakes. For this reason, it is crucial that decisions are reviewed through appeals, so that an entity with sufficient capacity can correct or confirm the decisions of courts or tribunals of first instance.

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When one hears the legal figure of appeal, it is believed that it is the non-conformity to a judicial sentence, however, the appeal proceeds in different assumptions, the COIP in its article 653 establishes when it is feasible to challenge by means of appeal, indicating the following

Article 653.- Proceeding. - An appeal may be lodged in the following cases: 1. from the decision declaring the prescription of the exercise of the action or penalty. (2) an order of nullity 3. of the order of dismissal, if there was a prosecutorial accusation. 4. of the sentences 5. Of the decision granting or denying pre-trial detention, provided that this decision has been issued during the filing of charges or during the prosecutorial investigation.

6. Of the denial of conditional suspension of the sentence. (National Assembly of Ecuador, 2014).

The Constitutional Court, in a consultation on the constitutionality of Article 653, determined that the right to due process was violated in the guarantee of appeal, so it conditioned and added the last case of appeal, i.e. the denial of conditional suspension of the sentence, and in 2020 established that it is not possible to appeal the annulment order.

The appeal is a challenge against a decision that is prejudicial to the appellant and which is resolved by a higher body that resolves it again, in a second decision that can declare the nullity or invalidity of the first one, for appreciating a procedural flaw, or it can modify the judgement of the lower body for considering it erroneous, even if the decision has been validly adopted; In other words, the appeal serves both to denounce defects in the procedural activity (means of impugnation) and to evidence and correct errors or deviations in the logical judgement (means of encumbrance). (Catena, 2017. p.15)

The appeal is a discretionary power exercised by one of the parties involved in the process who considers that a right has been violated in the sentence or order issued by the judge. This appeal takes the case to the provincial court of justice in Ecuador or an appellate court with jurisdiction to invalidate the sentence issued by the ordinary judge if procedural irregularities or an incorrect interpretation and application of the law are detected. The main objectives of the appeal are to point out procedural errors and correct them.

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The process for this appeal requires it to be filed within 3 days of the notification of the judgment or order. The administrator of justice also has 3 days to determine whether to accept the appeal. If the appeal has been filed against the dismissal order and the Provincial or National Court, as appropriate, does not issue a ruling on the appeal within 70 non-working days, the appeal is deemed to be upheld in its entirety. It is important to note that the Judiciary Council, the supervisory body in charge of overseeing the judicial function, has the power to initiate disciplinary proceedings against the judge in question for his or her failure to rule.

The appeal against pre-trial detention is a way of guaranteeing that due process guarantees are applied, however, the COIP explicitly limits this opportunity to a single procedural stage. According to Zurita in his postulate he states the following:

The unjustified restriction of the right to appeal against pre-trial detention dictated in the order to call for trial must be considered an unnecessary limitation. In the old Code of Criminal Procedure, this restriction did not exist, as article 343 numeral 3 allowed for an appeal against pre-trial detention even if it was ordered in the committal order. Therefore, this new limitation restricts the right to appeal and can be considered unjustified (Zurita et al., 2024. p.72).

What the authors in the previous quote have stated is important for the investigation, as their research is oriented towards appeals against the precautionary measure of pre-trial detention, indicating that there are no reasons to limit the right to appeal and that on the contrary, this limitation generates a lack of respect for constitutional precepts, violating rights and guarantees established in the supreme law. Likewise, the old Ecuadorian criminal law allowed for the possibility of appeal even when it had been ordered in the summons to trial.

In accordance with the constitution, international treaties such as the Universal Declaration of Human Rights establishes that "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law". (United Nations General Assembly, 1948)

One of the guarantees of both the Constitution and international treaties that form part of the Ecuadorian constitutional block is the right to appeal, this guarantee involves the right to double compliance. Ecuadorian jurisprudence has described the latter as the possibility for a convicted person to have a full analysis by a higher court, so that the

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decision taken in the first instance is confirmed, thus having two judicial instances that reach the same conclusion.

It should be noted that the purpose of the double instance is to correct any possible miscarriage of justice. This review involves two basic elements, the first being the existence of a court other than the one that issued the sentence condemning the defendant, and the second being the existence of an ordinary appeal, in other words, that it be timely, effective and accessible.

The double instance refers to the procedural stage itself, where at least in theory new evidence can be taken, and where the parties to the proceedings intervene in an oral and contradictory manner, in accordance with and under the same rules as in the first instance; while the double instance refers to the decision itself (which, although in human rights matters refers exclusively to conviction), must be confirmed by a second decision in order to be considered less likely to contain an error of fact or of law. (Dávila, 2019. p.51).

The right to double compliance has arisen after an extraordinary action for protection, which, through constitutional court ruling number 1965-18-EP/21, declared a violation of the right to double compliance, due to a structural loophole that was caused by an omission of the legislator.

The specific case consisted of a conviction issued in the second instance declaring the guilt of the defendant, when the appeal for cassation was lodged the challenge was rejected for not complying with the necessary grounds for its processing, the affected party filed an extraordinary action claiming that article 76 numeral 7 literal m had been violated. In effect, the Constitutional Court pointed out that the Organic Integral Penal Code does not have an effective means of guaranteeing due process, the right to defence and the right to appeal, since the extraordinary appeal for cassation has formalities and requirements that must be fulfilled, and when rejecting this appeal, it does not give the defendant the possibility of a review of the case by means of an appeal.

Currently, there is a draft Organic Reformatory Law of the Integral Organic Code on the special ordinary appeal of double conformity in which it is planned to be inserted into Ecuadorian legislation, however, the form of lodging the appeal, the competence, the procedure to be followed and the articles reformed, added or repealed have not been positively established to date.

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Something that must be made clear is that an appeal is not the same as double jeopardy. The appeal can be presented in various grounds that Article 653 of the COIP indicates, such as orders, resolutions, sentences and denials of conditional suspension of the sentence, while double jeopardy can only be presented in sentences or rulings that are issued in the second instance or in cassation for the first time.

The COIP establishes the purposes of precautionary and protective measures in criminal matters. These include ensuring the appearance of the defendant at the trial hearing, guaranteeing compliance with the possible sentence, comprehensive reparation, protecting the rights of victims and others involved in the criminal proceedings, and preventing the destruction of evidence or the disappearance of evidence.

It is important to highlight that, once the precautionary measure of pre-trial detention is imposed, even if it is challenged through an appeal, the measure must be executed.

According to article 521 of this regulation, the pre-trial detention measure can be substituted, revised, revoked or suspended at a hearing, whenever new facts are presented or facts that were not previously presented are justified. The parties involved may request the substitution of the precautionary measure that was denied. Likewise, if the original causes of the preventive measure disappear or the established time limit is reached, the judge may revoke or suspend it at the request of the parties or ex officio.

The appeal of pre-trial detention must be based on the lack of grounds in the prosecutor's request during the indictment hearing and the judge's decision during the same hearing. Arraigo, which can be of different types, such as social, family, personal, economic or work-related, is differentiated in terms of appeal with regard to its justification. Appealing the pre-trial detention order implies that the measure issued at the indictment hearing lacked due substantiation in relation to the elements of conviction of the publicly actionable offence.

This includes demonstrating the defendant's participation in any of the modalities of this offence, demonstrating the need to apply this precautionary measure due to the insufficiency of other non-custodial measures, and establishing that the offence is punishable by

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deprivation of liberty for more than one year. A distinction must be made between the concepts of appeal against pre-trial detention, revocation of pre-trial detention and substitution of this measure.

The appeal is based on a lack of motivation on the part of the administrator of justice, an event that occurred because the prosecutor did not pronounce in the hearing of the formulation of charges on the elements of conviction that he has both of the commission of the crime, the participation of the defendant and above all the lack of justification as to why another precautionary measure other than the deprivation of liberty is not sufficient.

The revocation occurs when the danger of absconding has dissipated, the risk that the defendant will not appear at the trial and serve the possible sentence has dissipated, or when the innocence of the defendant is ratified by means of a dismissal order, or when the pre-trial detention is declared null and void or the time limit expires, i.e. 6 months for crimes punishable by prison and 1 year for crimes punishable by imprisonment. Substitution, on the other hand, can be applied in crimes punishable by imprisonment of less than 5 years, imposing a personal precautionary measure other than imprisonment.

The review of the precautionary measure is a way in which pre-trial detention can be terminated, the COIP states the following:

Art. 521.- Hearing for substitution, review, revocation or suspension of a precautionary measure and protection. - When there are new facts that justify it or new evidence is obtained that proves previously unjustified facts, the prosecutor, public or private defence counsel, if they consider it appropriate, will request the judge to substitute the precautionary measures for others. In the same way, the judge shall order a measure previously denied. No request from the prosecutor is required in the case of protective measures.

However, the law states that the precautionary measure may be reviewed in the case of new facts, new evidence that proves events that were not justified, the purpose of the appeal to pre-trial detention is to verify that the order granting pre-trial detention has lacked motivation or that the request made by the prosecutor's office is not duly motivated.

The review is based on the changes and variations that have arisen with respect to the danger of absconding and the failure to appear at the trial hearing, compliance with the possible sentence and full

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reparation to the victim, while the appeal focuses on a lack of motivation for not complying with the requirements of necessity, suitability and proportionality of the precautionary measure.

The legal problem raised in this research is whether the impossibility of filing an appeal against a decision granting pre-trial detention at the evaluation and preparatory trial stage violates the principle of procedural challenges guaranteed in the Constitution of Ecuador. Ecuador's supreme law enshrines the right to due process, which entails basic guarantees, i.e. the right to defend oneself by appealing against the ruling or resolution issued by the administration of justice.

Ecuador, being a country that guarantees rights and having a block of constitutionality or conventionality, must be governed on the basis of the provisions of the highest law. The COIP also establishes the right to due criminal process, stating that the procedural challenge is the right to appeal against any ruling, resolution or final order, in accordance with the provisions of the CRE and international treaties.

The COIP itself expressly limits the possibility of the defendant to appeal, therefore, the motivation of this scientific research is to verify if the legal article 653, numeral five, of the COIP is harmonious with the CRE and the treaties ratified in Ecuador.

Legislators are susceptible to committing certain errors when enacting laws, and omitting the scope of a norm generates legal loopholes to the detriment of citizens. This was evidenced in the 1965-18-EP/21 ruling, which declared the existence of a structural loophole with respect to the right to double compliance, with this omission being the responsibility of the legislative function.

There are other mechanisms such as the revocation, substitution and review of pre-trial detention, but our analysis focuses on the appeal of the order granting pre-trial detention. In order for constitutional rights to be fully effective, mechanisms are needed to guarantee respect for and application of the provisions of Ecuador's supreme law. In addition, the revocation of a precautionary measure is presented in cases of expiration, dismissal, ratification of innocence, fading of the evidence that motivated the measure, review due to the existence of facts, new evidence that gives certainty of the appearance of the defendant at the trial hearing, compliance with the possible penalty and full reparation to the victim, while the appeal focuses on a lack of motivation for not meeting the requirements of necessity, suitability and proportionality of the precautionary measure.

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The rule does not prohibit appeals at this later stage, the use of the term 'always' suggests a limitation, generating uncertainty for both the parties involved and the administrators of justice. Courts have the power to interpret this regulation, as it does not establish a specific offence or penalty; however, the discretion may vary according to the judge or court.

This could lead to a violation of legal certainty in the absence of a clear, prior rule for appealing pre-trial detention at the stage of assessment and preparation for trial. It is noted that the general rule of appeal indicated in Art 652 numeral 1, which alludes to the principle of legality, can be limiting to the procedural principles that ensure due process, constitutional guarantees such as the right to appeal and international treaties and conventions ratified and applicable in Ecuador.

Conclusions

After an exhaustive analysis of the ordinary procedure, its phases, appeals, double jeopardy and pre-trial detention, its applicability and forms of challenge, it can be affirmed that Article 653, numeral 5, of the COIP is not in accordance with the principle of procedural challenge of the Ecuadorian Organic Integral Penal Code, nor is it in accordance with the provision of Article 76 numeral 7 literal m) of the Constitution of the Republic of Ecuador, Therefore, Article 653, numeral 5, of the COIP generates a violation of due process in the guarantee of the right to appeal established in the constitution as well as the procedural challenge established as a principle in criminal matters.

There is a legal vacuum in Article 653, numeral 5, of the COIP, since its limited wording allows challenging the precautionary measure that restricts liberty, as long as this decision is taken during the indictment hearing or during the prosecutorial investigation, excluding the stage of evaluation and preparation for trial.

Based on Art. 13 paragraphs 1 and 2 of the COIP, the interpretation of the administrator of justice in relation to this norm could be considered, given that it does not include offences or specific sanctions, which does not constitute a discretionary power of the judge. However, this alternative generates uncertainty in the protection of rights, since the interpretation of this regulation varies

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among different judges. The alternatives could be a constitutional control of the normative omissions established in Article 128 of the Organic Law on Jurisdictional Guarantees and Constitutional Control, given that the legislative body has omitted the duty to create regulations in relation to the constitutional precept, or a legislative reform to this norm, in which the possibility of appealing this precautionary measure is granted at any stage up to the pre-trial stage.

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