



Motivation of Pretrial Detention Orders issued by the Judges of the Criminal Unit in Santo Domingo 2022

Tuqueres Romero Miryan Patricia

Universidad Regional Autónoma de los Andes "Uniandes"; Santo Domingo,
Ecuador

Email: tuquerespaty@gmail.com

<https://orcid.org/0000-0002-8624-131X>

Benavides Salazar Cristian Fernando

Universidad Regional Autónoma de los Andes "Uniandes"; Santo Domingo,
Ecuador; Magister en Derecho Constitucional

Email: us.cristianbenavides@uniandes.edu.ec

<https://orcid.org/0000-0002-4326-2137>

Ned Vito Quevedo Arnaiz

Universidad Regional Autónoma de los Andes "Uniandes"; Santo Domingo,
Ecuador; Doctor en Ciencias pedagógicas

Email: us.nedquevedo@uniandes.edu.ec

<http://orcid.org/0000-0003-3391-0572>

Gallegos Gallegos Simón Bolívar

Universidad Regional Autónoma de los Andes "Uniandes"; Santo Domingo,
Ecuador; Magister en Derecho Procesal Mención Derecho Penal

Email: us.simongallegos@uniandes.edu.ec

<https://orcid.org/0000-0002-3432-8907>

Received: December 11, 2022; reviews: 2; accepted: January 16, 2023

Abstract

It is important that the judges abide by the constitutional and legal provisions on an adequate motivation and foundation of the sentences, enunciate the norms or principles that govern the legal argumentation and the principles of reasonableness, logic and understandability established by the Constitutional Court of Ecuador. It is of transcendence and importance of due process, since in light of the constitutional state of rights and justice; provides legal certainty. The work has been motivated by the publication of the work "Current approach to the motivation of sentences" by Gastón Fernando Valenzuela Pirotto

2020; problems of our community and the legal society; The objective of legally analyzing compliance with the principle of motivation was fulfilled, as a guarantee of due process in the issuance of orders by the Judges of the Penal Unit of the Santo Domingo Canton, to order preventive detention. The investigation analyzed records and sentences, a mixed approach was carried out, its methods used have been exegetical, deductive and analytical - synthetic, having a documentary-bibliographical and field character with the purpose of collecting expert criteria in constitutional law. and criminal procedural law, with the execution of semi-structured interviews, as well as to analyze judicial files on preventive detention in the Criminal Judicial Unit of Santo Domingo.

Keywords

Preventive prison, habeas corpus, motivation, due process, providence.

Introduction

It is imperative that judges abide by the constitutional and legal provisions on adequate reasoning and substantiation of judgments, enunciate the rules or principles governing legal argumentation and the principles of reasonableness, logic and comprehensibility established by the Constitutional Court of Ecuador; The investigation dealt with due process, a right initiated to the principle of reasoning and its observance in the issuance of preventive detention orders. In this vein, the present topic has been chosen considering the importance of the motivation regarding the validity of the constitutional state of rights and justice, in strict applicability of this principle, the different jurisdictional acts, such is the case of preventive detention orders, which must meet formal and substantive requirements in accordance with the Organic Integral Criminal Code.

In 2022, Álvarez Gómez, Leyva Vázquez, and Estupiñán Ricardo conducted an analysis of the application of open government in the Ecuadorian judicial system using Neutrosophy. One of the main aspects of open government is transparency in the decision-making process, which is crucial in the criminal justice system. In Santo Domingo, Carrión Hurtado, Salas Espín, Benalcázar Paladines, and Moreira Rosales (2020) analyzed the impact of Venezuelan migration on the economic development of the city using a neutrosophic cognitive map approach. The influx of migrants has put a strain on the criminal justice system, leading to pretrial detention orders being issued by judges in the criminal unit. Peñafiel Palacios, Estupiñán Ricardo, Cruz Piza, and España Herrería (2021) used phenomenological hermeneutics and neutrosophic cognitive maps to analyze transgressions against people experiencing homelessness. The motivation behind pretrial detention orders issued by judges in the criminal unit in Santo Domingo in 2022 may be influenced by factors such as the influx of migrants and the need for transparency in the decision-making process.

The principle of motivation as stipulated in the Ecuadorian Constitution, in article 76.7 letter I) must be motivated resolutions, whether public, judicial or

administrative, the mere omission or fault, of this principle, causes the nullity. One of the resolutions that must be motivated, are the judicial orders, this in criminal matters, gives rise to the magistrates to resolve the legal situation of a person prosecuted, this pronouncement is supported by the judges, in accordance with article 88 of the (Constitution of the Republic of Ecuador, 2008) General Organic Code of Processes, judicial orders, preventive detention orders, which is the object of study,

To select this topic, the institutional repository of Uniandes University was previously reviewed, where no equal or similar topics were found, so it was decided to investigate it, taking into account that the problem explained above is characterized by having a practical and theoretical approach, in light of the constitutional state of rights and justice. This study responds to the need to demonstrate the importance of the principle of motivation, as a basic guarantee of due process, commitment of the judicial authorities at the time of issuing resolutions.

In criminal matters, the orders and judicial judgments must be reasoned under penalty of nullity, this implies the presentation of a justified and reasoned decision in relation to the legal and factual bases object of the litigation. In response to the request for preventive detention, the Organic Integral Penal Code establishes that the application, revocation, substitution, suspension or revision of this will be adopted by the judge in an oral, public and adversarial hearing in a reasoned manner, thus guaranteeing at the infra-constitutional level, the right to receive and be notified of the order of preventive detention in a reasoned manner.

Article 76.7(l) of the Constitution of the Republic of Ecuador states that the reasons for judicial decisions issued by the various judges are constitutionally imperative, they may be removed from the ratio decidendi (the reason or reason for decision) taken by a public servant of whatever rank, on the basis of the unavailability of the duty to give reasons, becoming the unique genesis of knowledge and control of the decision. Motivation is fundamental in the (Judgment No. 1158-17-EP/21, 2021) administration of justice, especially in criminal matters, which is where the right to liberty is debated, and in preventive detention orders.

"Motivating is nothing more than justifying the judicial decision taken, providing a convincing argument and indicating the well-founded decisions that the judge makes (Nieto Garcia, 1998)." In this context, Ferrer Beltrán says; The justification of the ruling, of the decision contained in the judgment, will now depend on the premises formulated in the judicial document itself. Among them, we will have factual premises, relating to the facts of the case and normative, relating to the applicable rules. (Ferrer Beltrán, 2011) "Therefore, the motivation is related to the right to due process, effective judicial protection and legal certainty (Oyarte, 2006)."

Motivating means offering a justification, not an explanation of the decision in question, that is, what the motivation seeks is to support the decision in conducive and reasonable legal precepts. This motivation must then be coherent,

consistent, non-contradictory and unequivocal. There is then an obvious relationship between the statement of reasons and judicial activity. Motivation is an internal activity of the judge, which requires that a rational argumentative framework be provided to the judicial decision, where all legal justification has an internal justification. (Atienza, 2018)(De la Rúa, 2016) (Ferrajoli, Bobbio, & Ibáñez, 1995)(Taruffo, 2011)

For Gastón Fernando Valenzuela Piroto, who states in his work "Current approach to the motivation of sentences". It divides the vices of motivation into three, the first of them the absence or lack of motivation; the second, the defect of motivation; and the third the excess of motivation, the defects have the character of substantial, refer to the content and not to the procedure or form that establishes for the realization of the motivation. That is, it complies with all the presuppositions of the content of the motivation imposed on the judge, but one of these content requirements is defective or inadequate Valenzuela, P. (2020). Current approach to the motivation of judgments. Its analysis as a component of due process. *Revista de Derecho* n.º 21, 73-90.

With the above in lines and considering the importance and need to observe in judicial decisions the motivation; That as we saw, it is a basic guarantee of due process, and this right under the paradigm of the constitutional state of rights and justice, values such as motivation, "are of legal importance and strict observance by the administrators of justice, all the more so, if we analyze that preventive detention is the exception to the rule and should be the last criminal mechanism adopted, this being of ultima ratio". (Judgment No. 8-20-CN/21, 2021)

In fact, in this situation lies the problem of the investigation carried out, since it was determined that the judges of the Criminal Judicial Unit of the Santo Domingo canton do not justify the orders granting preventive detention. The scope of this study is descriptive, with which it has been possible to base the problem, at a theoretical and conceptual level, on the basis of a documentary investigation of the different sources of law and the application mainly of the analytical-synthetic and exegetical method. For its part, the main objective was to analyze compliance with the principle of motivation as a guarantee of due process in the issuance of orders by the Judges of the Criminal Unit to order preventive detention in Santo Domingo.

Materials and methods

The present study has been characterized by a mixed approach. In this sense, at a qualitative level, the central axis of the research has been investigated through the bibliographic review found in this regard and at the quantitative level, the data and information contained in the results section have been collected. For this purpose, the independent variable has been operationalized: (Gomez, et al., 2017) motivation as a guarantee of due process and the dependent variable: judicial orders of preventive detention issued by the Criminal Judicial Unit. The methods used have been exegetical, deductive and analytical-synthetic.

The research has been documentary-bibliographic and field. In this order of ideas, the object of study has been described on the basis of the relevant sources of law, as well as research and studies found in this regard in scientific search engines. Field research has made it possible to collect information at the scene. Therefore, this type of research was applied in order to collect criteria from experts in constitutional and criminal law with the execution of a semi-structured interview, as well as to analyze judicial files on preventive detention in the Criminal Judicial Unit of Santo Domingo.

Results

Results of the interviews

The interview was applied to two experts in constitutional law and two experts in criminal law, whose criteria will serve to substantiate this topic. In total, the interviewees correspond to four individuals, classified as follows: two masters in constitutional law who hold the dignities of a Criminal Judge, and a Public Defender; and two master's degrees in criminal law who are a Public Prosecutor and a Criminal Judge, to whom the same instrument was applied under the following questions.

From your point of view, what do you consider to be the importance of motivation, as a basic guarantee of due process?

The interviewees agree that motivation can be analyzed as a principle and as a right. In this context, they agree that the importance of the motivation is evident and is related to the validity of the constitutional state of rights and justice and in this way ensures that the acts and resolutions are legally justified whether they are judicial or administrative.

In your opinion, do the preventive detention orders issued by the judges of the Criminal Judicial Unit of Santo Domingo comply with the guarantee of motivation?

The answers due to the diversity of interviewees resulted in several edges that are exposed below:

The Criminal Judges, experts in criminal and constitutional matters, agreed that any decision of a court in criminal matters is duly reasoned, reaching the minimum parameters established by the National Court of Justice regarding the motivation of preventive detention orders; in addition to the motivation test established by the Constitutional Court, however, in the face of dissatisfaction on the part of the procedural subjects, they resort to constitutional channels, in which these claims are rarely accepted.

On the part of the representative of the Prosecutor's Office, he states that it is an obligation for both judges and prosecutors, the duty to motivate, and even more so when it comes to the legal good freedom of people. That the Prosecutor's Office fully complies orally in arguing/motivating its request for preventive detention so that the criminal judges proceed to qualify and therefore accept said request, this due to the dispositive principle and consistency.

The Public Defender, from the perspective of defense of the accused, drew attention to the fact that in flagrante delicto hearings as a general rule, because of the time, criminal judges do not reasonably motivate when they accept measures such as preventive detention, causing a feeling of dissatisfaction and injustice towards the defendant and his relatives, since there are other measures that allow him to appear at trial. It also indicates that preventive detention orders are sometimes not limited to the purpose established in the COIP, and are guided by public calamity, dangerousness, criminal record or political influence.

What is the legal effect of a pre-trial detention order not being reasoned?

Accordingly, judges, prosecutors and public defenders respond that, since the preventive detention order is not motivated, it is invalid and, as a logical consequence, its nullity. They cite article 76.7 letter L of the Constitution that establishes this legal effect.

What actions could be proposed, against preventive detention orders that are not motivated?

The constitutional experts specified that the appropriate and appropriate way to guarantee respect for due process to have a reasoned decision, and with the right to liberty at stake, is habeas corpus.

In turn, experts in criminal matters agree in the same way with the constitutional route when the defendant is violated his rights to liberty, life, integrity, and other related rights. However, they emphasize that the COIP establishes vertical appeals such as appeals to the order of preventive detention, and even the request for review, substitution, of precautionary measures when the situation that was the basis for the imposition of pretrial detention as a precautionary measure changes. And even the possibility of bail is given, depending on the particular case.

Do you know cases where the judges of the Criminal Judicial Unit of Santo Domingo have not motivated their preventive detention orders?

The interviewees comment that thanks to the jurisprudential activity of the Constitutional Court, it has been possible to develop pro homine criteria for the guarantee of habeas corpus, giving as an example, the situation of catastrophic

diseases, older adults and so on when there is vulnerability or double vulnerability. However, criminal judges indicate that it is very rare that preventive detention orders are reviewed by constitutional means, since they take care to ensure that they are reasoned. For their part, the Prosecutor's Office and Public Defender, are right to state that if they know cases in which the Provincial Court of Justice of Santo Domingo, and even courts of other provinces have entered into the examination of the orders of preventive detention issued by criminal judges of this canton, and have proceeded to determine that they suffer from lack of motivation, ordering the immediate release of its petitioners or switching to other precautionary measures.

Case analysis result

Constitutional files have been collected and 15 habeas corpus cases have been found, in which various Judges of the Criminal Judicial Units of the Santo Domingo Canton, since their creation as Judicial Units according to Resolution 076-2013 of the plenary session of the Council of the Judiciary, have been legitimized passive because the preventive detention orders suffered from a lack of motivation. Being the following:

In case No. 23112-2022-00070; Judge, judgment handed down on October 3, 2022, at 11:26 a.m. In the main part of the habeas corpus action, it is necessary to review whether the deprivation of liberty was adopted in a reasoned manner; and, the absence of motivation determines the arbitrariness of the deprivation of liberty, and habeas corpus must be accepted. This procedural exercise, in the manner reasoned by the first-level judge, makes pretrial detention arbitrary; since, in order to issue it, the constitutional parameters of necessity, proportionality and usefulness must be considered and, with respect to its application, the exercise of the reasons enshrined and guaranteed in art. 76 number 7 letter I) of the Constitution of the Republic of Ecuador. In the present case, it is observed that, at the hearing for the review of precautionary measures, held before the First Level Judge, it was alleged that the situation of the defendant had changed, since documents were presented with which it was demonstrated that the defendant is a consumer of narcotic substances, which would justify the amount of substances found in his possession; therefore, the Prosecutor's Office did not oppose the change of precautionary measure of preventive detention.

Case No. 17297-2022-01137; Judge, sentence issued on August 10, 2022, at 11:02 a.m., in which the Provincial Court of Justice of Pichincha indicates that the review of the case shows that the prosecutor's request is reduced to indicating that those investigated at the time proceeded with an illegal collection of funds, while the imputation of the crime is made based on a different criminal type such as the money laundering, therefore the decision of the trial judge is not clear when determining whether or not the requirements of article 534 of the COIP have been met with respect to one criminal type or another. The Court concludes that in the present case, the preventive detention ordered did not comply with the normative

provisions determined in the binding resolution 14-2021 issued by the National Court of Justice, and therefore becomes illegal.

Case No.23112-2022-00050; Judge, judgment issued on Tuesday, July 12, 2022, at 12:06 p.m. The Provincial Court of Justice indicates that in the alleged crime of reception for which criminal proceedings are being initiated against the plaintiff, Rosa García and her possible failure to appear at trial, does not entail any procedural risk for preventive detention to have been ordered, without considering the evidence proposed by the Prosecutor's Office. From which, it follows that alternative measures to pretrial detention are insufficient. This procedural exercise, as reasoned by the first-level judge, makes pretrial detention arbitrary; To issue it, the constitutional parameters of necessity, proportionality and usefulness must be considered, since the crime of reception, in the case of a conviction, may be the object of the procedural benefit of the conditional suspension of the sentence.

Case No. 23112-2022-00047; Judge, judgment issued on Wednesday, June 29, 2022, at 4:10 p.m., in which the plaintiffs in the grounds of their constitutional action, have requested that the Provincial Court of Justice of Santo Domingo qualify the responsibility of the judge activated by departing from the dispositive principle, by refusing to replace the preventive detention, which weighs against him, In the context of the analysis, the Provincial Court has considered that maintaining preventive detention affects the inadequate motivation to it, making it arbitrary, therefore it is the competence of the Council of the Judiciary to analyze whether its action is framed in a disciplinary infraction, in which the Prosecutor of the Cause must also be included, who would not have motivated his petition as asserted by the judge and thus can auscultate this constitutional court, of his allegation outlined in the hearing of review of precautionary measures, Dr. Galo Luzuriga Guerrero disagrees with this criterion.

Case No. 23112-2020-00028 Judge, sentence issued on June 4, 2020, at 10:32 a.m., that in the facts of the case it can be seen that the police raided the plaintiff's home, inside the house they did not find any illicit act, that what they found were three envelopes of powder (presumably cocaine) with a gross weight of three grams, In the pockets of his client's trousers, outside the home, it was later determined that the net weight was 1.5 grams of cocaine and that these were the circumstances for which he was deprived of liberty, but this detention becomes illegal because the resolution is not duly motivated, In addition to the fact that the plaintiff is considered a consumer and that according to CONSEP up to two grams can be considered as such, consequently there is no indication of the crime due to the number of grams found, and that in these circumstances alternative measures to preventive detention should have been considered.

Case No. 23112-2019-00034 Judge, sentence issued on August 7, 2019, at 2:40 p.m., the Court of Constitutional Judges concluded that within the order of preventive detention, nor of the file of the judiciary there is no evidence of the facts referred to by the prosecution or by the Judge, not even in the oral and public hearing held in this Court, By virtue of this, the detention of the plaintiff in the

circumstances described above is illegitimate, and therefore the proposed constitutional action is admissible.

Case No.23112-2017-00021; Judge, sentence issued on May 16, 2017, at 3:34 p.m., the Court comes to determine that the defendant is not satisfied with the order of preventive detention, because he is deprived of his liberty even though he has previously informed the Judge of origin of his disability of 50%, likewise the certificate of CONADIS was presented to this Chamber, This act was also carried out with Judge Aquo, despite this preventive detention has been ordered. The Court, after hearing the parties to the proceedings, has reviewed the file, noting that if it is true that on the part of the Prosecutor's Office, the provisions of Article 588, of the COIP, this report being necessary to initiate the Fiscal Investigation, so it was wrong to deprive him of liberty. When, moreover, it is well known that this measure of a personal nature [Preventive Detention], is of ultima ratio and exceptional.

Case No. 23112-2017-00019; Judge, judgment handed down on May 17, 2017. At 4:41 p.m., in which it is emphasized that on April 19, 2017, at 3:30 p.m., the hearing to hear and resolve the habeas corpus action is held in the Provincial Court, Dr. Oscar S. has appeared on behalf of the plaintiff, who in the core refers that the right to liberty has been violated because the Judge orders preventive detention without comply with the legal requirements, violating the right to defense, the Prosecutor's Office states that it notified the box of the Public Defender Dr. Marco Melo and a cell phone number, the Judge based on this and without any motivation dictates preventive detention because there are testimonies of third parties and a police report, the defendant was not notified with the beginning of the fiscal instruction, He was not given a chance to defend himself.

Case No. 23112-2017-0001; Judge, sentence issued on January 18, 2017, at 4:57 p.m., the Provincial Court of Justice states that having issued an Order or Order of Preventive Detention, arbitrary; when it has been executed by Judge Aquo, without having support in a legal provision, that is, without meeting the requirements of Arts.- 41 and 534 of the Organic Integral Criminal Code, and illegitimate, because it violates in a contumacious way, the fundamental right to freedom of the investigated gentleman.

Case No. 23112-2016-00028; Judge, sentence issued on June 28, 2016, at 10:09 a.m., the Provincial Court of Justice indicates that the preventive detention did not conform to the parameters of motivation established in Art. 76.7 letter I), of the Constitution. That the case should be analyzed in accordance with the four presuppositions contained in Art. 534 of the COIP, determining the reason for a decision taken, its relevance of this with the regulations and the elements of conviction that are presented to it, moreover, when assuming a restrictive measure, it is necessary to weigh rights such as that of freedom that will always be of last resort, with respect to the rights of the victim of the traffic accident, it must be established in the decision, the reason for the extreme necessity of the application of said measure, and why it does not apply the exceptionality, it is not

enough to enunciate the rule of application, as in the case, the Judge A quo has noted, which obviously makes arbitrary, the issuance of the precautionary measure of last ratio.

Case No. 23112-2016-00024; Judge, judgment handed down on June 7, 2016, at 2:36 p.m. The constitutional court constituted by the provincial judges come to observe that the preventive detention issued against Mr. Romel Patricio Costa Alulima, in criminal case No. 23331-2016-01218 exceeds the limits of legality, since the budget of numeral 1 of Article 1 is not met. 534 of the Organic Integral Penal Code. In this regard, the appellant states that pretrial detention lacks motivation, does not consider the principle of exceptionality, invoking the rule of art. 522 and 534 of the COIP, but there is no reasoned reason, the relevance of the elements of conviction with respect to legal norms, treaties and international conventions, given that preventive detention is a measure of last resort, nor is it based, on the extreme necessity of the measure, which is contradicted by the judge acted.

Case No. 23112-2015-00018; Judge, sentence issued on April 17, 2015, at 09h02, the Judge in his argument before the Provincial Court of Justice, gives reasons why preventive detention was issued against the citizen Brayan Perez.- With the annotated it should be noted that the crime for which the flagrante delicto was carried out and qualified was by article 220 of the Organic Integral Criminal Code, and that for the amount that the plaintiff is said to have in his possession (23 grams), the minimum scale corresponded, provided for in paragraph a) of numeral 1 of the aforementioned body, with a penalty of two to six months, and for preventive detention to operate in accordance with article 434 *ibid.*, four requirements must be met, among them No. 4. That it is an offense punishable by deprivation of liberty MORE THAN ONE YEAR. In view of the foregoing antecedents, it must be that the preventive detention order that has been ordered by the competent judge, does not comply with the requirements of article 534 of the COIP, is illegal and there is a violation of constitutional rights and guarantees, reasons why the Constitutional Court of Justice must accept the habeas corpus action deduced.

Case No. 23112-2014-0412; Judge, judgment handed down on November 6, 2014, at 3:48 p.m., in which the Provincial Court must analyze the obligation of the Prosecutor to substantiate the request for the preventive detention order based on compliance with all the aforementioned requirements, however, after listening to the audio of the flagrante delicto hearing held in the first level judiciary, it can be inferred that the Prosecutor, Ab. Paúl Tenorio Gonzales, when asked about the substantiation based on art. 534 of the COIP, states that if it carried out the same on the basis of three of the four numerals contained in that article, that is, that it did not comply with the provisions of said law, therefore Judge Aquo should not have taken into account and denied such request, because the Prosecutor had not complied with the provisions of art. 76 paragraph 7 literal l) of the Constitution of the Republic.

Case No. 23112-2014-0411; Judge, judgment handed down on November 14, 2014, at 3:27 p.m., in which the Provincial Court states that it is observed that there is no adequate motivation, on the part of the Prosecutor's Office when requesting the precautionary measure, it is not enough to establish that the requirements of Article 2014 are met. 167 of the Code of Criminal Procedure, but to establish the need for caution and the circumstances specific to each act, and that may lead to accreditation of a precautionary measure such as preventive detention.

Case No. 17761-2014-0199; Judge judgment issued on October 17, 2014, at 4:55 p.m., in which the Provincial Court states that in the sub judice case, the approach of the official of the Prosecutor's Office at the time of requesting the judge of criminal guarantees, the personal measure of preventive detention, does not conform to the legal requirement of motivation, pursuant to art. innumerable after 167 of the C.P.P., since it is not demonstrated how the other precautionary measures and that constitute the general rule, are ineffective or insufficient for the circumstances of the current plaintiffs of the constitutional guarantee. The prosecutor limits herself to stating that if preventive detention is not ordered, the defendants will escape, even if they have instruments that prove roots, without delivering any argument that forces the request, unless it demonstrates the assertion made by her.

Discussion

According to the results obtained in the present study, it has been possible to determine in the first place the importance of the principle of motivation as a guarantee of due process and therefore its observance in the administration of criminal justice, such is the case in the issuance of preventive detention orders, where a plus arises that is the fact that the right to liberty is debated. In this way, the decision of the Ecuadorian constituent to enshrine it as such in the constitutional text and thus take on it of importance at the normative level was a success.

For Gastón Fernando Valenzuela Piroto, He divides the vices of motivation into three, the first of them the absence or lack of motivation; the second, the defect of motivation; and the third the excess of motivation, the defects have the character of substantial, refer to the content and not to the procedure or form that establishes for the realization of the motivation. That is, it complies with all the presuppositions of the content of the motivation imposed on the judge, but one of these content requirements is defective or inadequate *Valenzuela, P. (2020)*. Current approach to the motivation of judgments. Its analysis as a component of due process. *Revista de Derecho* n.º 21, 73-90.

Secondly, it was found that there are specific cases where criminal judges do not meet the requirements to issue the order of preventive detention, so they do not comply with the principle of motivation, which obliges them to justify on the basis of the requirements of law, the deprivation of liberty as a precautionary

measure of preventive detention. In this regard, Jaramillo(2018) affirms that preventive detention cannot be ordered in an improvised manner and to comply with an act of ritualism requested by the prosecutor, but that the requirements established in the Organic Integral Penal Code must be complied with.

At this point, it should be noted that not only must the requirements of the Comprehensive Organic Criminal Code be complied with, but that criminal judges must also observe the provisions of the Constitution of the Republic, such as the principle of minimum criminal intervention, that is, the judge must ask himself whether it is absolutely necessary to lock up a person and that there are not sufficient or alternative mechanisms to deprivation of liberty. Villamil says that within any legal system the motivation of judicial decisions is necessary, since this in itself implies an adequate solution that will delimit the existence of an apparently fair sentence, without implying that it is a decision product of chance. (2005)

In the cases studied, it was learned that in order to determine whether a preventive detention order is motivated, a review of the requirements of article 534 of the Organic Integral Criminal Code must be carried out, which establishes that the prosecutor will be competent to request the judge, in a reasoned manner, to order preventive detention against the person prosecuted when compliance with the following assumptions is verified:

1. Sufficient elements of conviction on the existence of a crime of public exercise of the action.

2. Clear, precise and justified elements of conviction that the defendant is the author or accomplice of the offense. In any event, the mere existence of indications of responsibility does not constitute sufficient grounds for ordering pretrial detention.

3. Indications from which it appears that non-custodial precautionary measures are insufficient and that pretrial detention is necessary to ensure their presence at the trial hearing or the execution of the sentence. To this end, the prosecutor shall demonstrate that personal precautionary measures other than pretrial detention are not sufficient. In the case of ordering preventive detention, the judge will obligatorily justify his or her decision and explain the reasons why the other precautionary measures are insufficient.

4. That it is an offense punishable by deprivation of liberty for more than one year. (Organic Integral Penal Code, 2014)

From this we can extract two issues of extreme relevance, first, that it is up to the prosecutors to raise the request for preventive detention in a reasoned manner and on the other hand that it is up to the judge to order compliance with this measure. Then we can conclude that there is a double control and a double responsibility on the arbitrary application that may arise over this precautionary measure, a control of the prosecutor who must justify his request and a judicial control, to review whether the presuppositions of article 534 *ibid*.

Therefore, it is imperative to say that in the hearings where the imposition or not of a precautionary measure of a personal nature of preventive detention is

going to be debated, only the Prosecutor's Office will be obliged to present those elements that will eventually become evidence to justify the need for the issuance of preventive detention. but not the person prosecuted, who must not present rooted-up elements, both out of respect for the principle of presumption of innocence, and for the fact that there is no such obligation in the law for this purpose.

The principle of motivation, in addition to being recognized at the constitutional level, is also enshrined in the Organic Code of the Judicial Function as one of the jurisdictional powers of judges in its article 130, which establishes that it is an essential power of judges to exercise jurisdictional powers in accordance with the Constitution. International human rights instruments and laws must give due reasons for their decisions. (Organic Code of the Judicial Function, 2009)

From constitutional jurisprudence and doctrine, different criteria have been issued to determine that this motivation is met. The current Constitutional Court explicitly distanced itself from the so-called "motivation test" established by the previous magistracy, which considered that reasonableness, logical and understandable as considered in the . In this sense, the current Constitutional Court, establishes that all legal argumentation must have a minimally complete structure, these guidelines also incorporate certain vices: i) Non-existence, ii) Insufficiency, iii) Appearance: When at first sight it seems sufficient, but in reality it is not, because it incurs in vices that affect its sufficiency .- What it implies, in that it must be understood that these vices must be avoided; they may be lack of motivation; Defective, apparent, insufficient, overmotivated motivation.- (Judgment 181-14-SEP-CC, 2014)(Judgment No. 1158-17-EP/21, 2021)

For its part, the Inter-American Court of Human Rights has ruled on the motivation, so for example the support of an adequate motivation in the resolutions must be clearly expressed to allow a duly reasoned conclusion. Similarly, it has stated that the decisions adopted by the internal organs must be duly founded, otherwise they would be considered arbitrary.(Case of Chinchilla Sandoval v. Guatemala, 2016)(Case of Chaparro Álvarez and Lapo Iñiguez v. Ecuador, 2007)

The right to state reasons is related to the method of legal argumentation. "According to the constitutional judge in the constitutional State such as Ecuador, there is an indissoluble link, practically, even, an equivalence, between legal argumentation and justice." On this basis, it has been considered that for a given decision to be correctly reasoned, it is necessary that the authority that takes the decision explains the reasons that the law offers to adopt it. (Lozada Prado, 2015)(Aguirre Castro, 2019)

In this regard, the National Court of Justice, Specialized Criminal Chamber, in judgment No. 08101-2021-00044, indicated that the habeas corpus action takes up an important aspect within the context of criminal judicial proceedings since the resolution issued by a judge to deprive a person of liberty is subject to constitutional control. therefore, it is the competence of the constitutional magistrates to

examine whether the process in which a coercive measure of liberty was issued complied with the requirements previously determined by law, or to verify whether there was an irregularity in the criminal process that affects the basic guarantees constitutionally enshrined.

Therefore, it has been possible to identify that it is necessary that there be a control in the motivation both in the request for preventive detention by the prosecution and in the judge's decision when applying this measure. Because by not adopting the provisions of international treaties, international court resolutions, the Ecuadorian Constitution and the law there can be serious violations of rights, especially the presumption of innocence.

Conclusions

1. From the interviews carried out as well as the analysis of cases carried out in the judicial proceedings for habeas corpus against the preventive detention orders issued, it was possible to verify that the majority of the criminal judges of the Santo Domingo canton, since the creation of these judicial units in 2013, have been activated by the lack of motivation in the files in question.
2. The lack of motivation for the order of preventive detention has resulted in the fact that the judges of the Provincial Court of Justice of both Santo Domingo and Pichincha, in exceptional cases, have proceeded to annul the deprivation of liberty of the accused, recovering their immediate freedom or granting other personal precautionary measures.
3. The correct application of the principle of motivation in relation to preventive detention and compliance with the parameters of reasonableness, logic and comprehensibility draws the attention of the judges of the criminal judicial units of the Santo Domingo canton, since they are facts that have occurred uninterruptedly from 2013 to 2022, despite the jurisprudential development of both the National Court of Justice and the Constitutional Court of Ecuador, which establishes minimum parameters to be followed before the imposition of preventive detention.
4. Although our legal system is in accordance with a correct application of pretrial detention, in practice we have found that its request and subsequent application often becomes arbitrary, since subjective situations are analyzed and when granted by the judge results in an early sentence.

References

- Aguirre Castro, P. (2019). *The constitutional precedent: The transformation of the sources of the legal system*. Quito, Ecuador: Corporación de Estudios y Publicaciones.
- Álvarez Gómez, G. A., Leyva Vázquez, M. Y., & Estupiñán Ricardo, J. (2022). *Application of Neutrosophy to the Analysis of Open Government, its*

- Implementation and Contribution to the Ecuadorian Judicial System. *Neutrosophic Sets and Systems*, 52, 213-222. DOI: 10.5281/zenodo.7374277
- Atienza, M. (2018). *Law as argumentation* (3rd ed.). Alicante, Spain: University of Alicante.
- Case of Chaparro Álvarez and Lapo Iñiguez v. Ecuador, Preliminary Objections, Merits, Reparations and Costs (Inter-American Court of Human Rights, November 21, 2007).
- Case of Chinchilla Sandoval v. Guatemala, Preliminary Objection, Merits, Reparations and Costs (Inter-American Court of Human Rights, February 29, 2016).
- Carrión Hurtado, L. H., Salas Espín, W. R., Benalcázar Paladines, M., & Moreira Rosales, L. (2020). Analysis of the Venezuelan migratory impact on the economic development of Santo Domingo city, a neutrosophic cognitive map approach. *Neutrosophic Sets and Systems*, 34, 135-142. DOI: 10.5281/zenodo.3843575
- Organic Code of the Judicial Function. (9 March 2009). Official Register No. 544 . Quito, Ecuador: Corporación de Estudios y Publicaciones.
- General Organic Code of Processes. (May 22, 2015). Official Register No. 506. Quito, Ecuador: Corporación de Estudios y Publicaciones.
- Organic Integral Penal Code. (February 10, 2014). Official Register No. 180. Quito, Ecuador: Corporación de Estudios y Publicaciones.
- Peñafiel Palacios, A. J., Estupiñán Ricardo, J., Cruz Piza, I. A., & España Herrería, M. E. (2021). Phenomenological Hermeneutical Method and Neutrosophic Cognitive Maps in the Causal Analysis of Transgressions against the Homeless. *Neutrosophic Sets and Systems*, 44, 147-156. DOI: 10.5281/zenodo.5162704
- Constitution of the Republic of Ecuador. (20 October 2008). Official Register No. 449 . Quito, Ecuador: Corporación de Estudios y Publicaciones.
- De la Rúa, F. (2016). *General Theory of Process* (3rd ed.). Buenos Aires, Argentina: Depalma.
- Ferrajoli, L., Bobbio, N., & Ibañez, A. (1995). *Law and reason: Theory of penal guarantee* (1st edition ed.). Madrid, Spain: Trotta.
- Ferrer Beltrán, J. (2011). Notes on the concept of motivation of judicial decisions. *Isonomía Magazine*(34), 87-107. Retrieved from: <http://www.scielo.org.mx/pdf/is/n34/n34a4.pdf>.
- Gomez, C., Alvarez, G., Romero, A., Castro, F., Vega, V., Comas, R., & Velasquez, M. (2017). *Scientific Research and Titling Forms*. Quito: Editorial Juridica del Ecuador .
- Jaramillo, S. (April 23, 2018). Reasons for pretrial detention orders. Obtained from Law Ecuador: <https://derechoecuador.com/motivacion-de-los-autos-de-prision-preventiva/>
- Lozada Prado, A. (2015). *Manual of constitutional argumentation: Proposal of a*

- method. Quito, Ecuador: Centro de Estudios y Difusión del Derecho Constitucional.
- Nieto García, A. (1998). *The art of making sentences or Theory of Judicial Resolution*. Madrid, Spain: Universidad Complutense.
- Oyarte, R. (2006). *La acción de amparo constitucional* (Second ed.). Quito, Ecuador: Fundación Andrade & Asociados.
- Sentence 181-14-SEP-CC, Case No. 0602-14-EP (Constitutional Court of Ecuador October 22, 2014).
- Decision No. 1158-17-EP/21 (Constitutional Court of Ecuador October 20, 2021).
- Decision No. 1158-17-EP/21 (Constitutional Court of Ecuador October 20, 2021).
- Decision No. 8-20-CN/21 (Constitutional Court of Ecuador August 18, 2021).
- Taruffo, M. (2011). *The reasons for the civil judgment*. Madrid, Spain: Editorial Trotta.
- Villamil, E. (2005). *Structure of the court judgment*. Bogotá, Colombia: Consejo Superior de la Judicatura.