# Right to Defense in the Application of the Content of Art. 534 # 3 of the COIP, in Flagrant Crimes

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**Abstract.** In the present work, the content of article 534, numeral 3 of the Organic Comprehensive Criminal Code, was examined on its application, effectiveness, and in the event of a possible violation of the right to defense. The social roots presented or not by the defendant, where its content and the possibility of obtaining it within 24 hours were also considered; international regulations, the Constitution of Ecuador, criminal doctrine, judgments and criteria of the Constitutional Court, National Court of Justice, as well as the national legal system and scientific journals were used, information that resulted in the existence of a violation of the right to defense of those prosecuted. In addition, the lack of clarity of this legal provision emerges, which, being of a subjective nature, generates discretion without control, equal arbitrariness, and sometimes abuses of the regime in power; therefore, we would be facing effects on the rights of freedom, legal security, due process and before a latent criminalization of poverty. Also, concluding that it is necessary to have a unified criterion on the "indications," which would be efficient or sufficient and the eradication.
**Keywords:** indication, flagrante delicto, criminalization, social roots.

## 1 Introduction

This research thoroughly addresses the right to defense taking into account the content of article 534 number 3 of the Organic Comprehensive Criminal Code (COIP) [1], a legal precept that is vital importance considered, its study due to its daily use, large number of interpretations that are created in each case and the lack of consensus that have a notorious impact on a due criminal process, even more so as the Ecuadorian that is constitutionalized in all its phases and does not allow violations of rights to the procedural parties.

This research also seeks to provide information which will be very useful to the entire legal world, both judges, prosecutors and lawyers in free practice to train and improve legal knowledge about problem's magnitude of COIP'S article 534 number 3, as well such as the social roots of defendant in flagrante delicto hearings and, in turn, the way in which we can face said conflict between the norm and social reality.

It is important to add that research's article 8 theme is mainly related to American Convention on Human Rights', also called San José Pact, where judicial guarantees are stipulated, and brings with it essential notions about right to defense and due process, with guiding purpose to all participants in a process, be it criminal, civil, administrative or any other characteristic in which incurs in a basic and mandatory guideline that delimits actions and behaviors before a process that will have of ratifying innocence consequence state or in matter hereof, incriminate a citizen of a criminal offense.

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As for literal c, number two of article 8, it supra, it specifies that a "concession to the accused of time and adequate means for his defense preparation" must be given (Organization of American States, 1978) [2], a situation that is not considered, as far as it could be, in a flagrancy scenario in Ecuador, by criminal action head (prosecutor) since within 24 hours, acting public servant would not have enough time to find "relevant evidence" in his investigation, and furthermore, defendant being detained, it would also be impossible for him to find adequate documentation to provide an appropriate defense, that breaks the "indications"; At the same time, the country's bureaucratic system makes it impossible to request essential information, since the responses from public institutions, in cases that do not have digital platforms, would take more than the actions within 24 hours.

In COIP, as constitutionalized criminal law's central axis, it obliges judges, prosecutors, defenders and any person to participate to adopt necessary measures to respect right to defense, for which article 4 of the aforementioned rule states that:

> …the men and women involved in criminal proceedings are holders of human rights recognized by Constitution of the Republic and international instruments. Liberty deprived liberty persons retain ownership of their human rights with liberty deprivation limitations of deprivation and will be treated with respect for their dignity as human beings [1].

In Ecuador, one of the COIP'S applications errors is the excessive and irrational request for preventive detention by criminal action holder, with "indications" that do not contribute anything to criminal law; the acceptance without due motivation by judges in criminal matters, added to supposed social roots' scarcity by people without resources, or even with resources, but without time enough and poor argumentation of "indications " provided by the prosecution produces that a personal precautionary measure weighs on several people, such as preventive detention, leaving aside the rights of freedom, legal certainty, right to defense, consistency principle, due diligence, motivation, everything this, by simple arbitrary impressions, without being reasoned end up imposing the status quo's will.

Constitutionalizing of criminal law has changed the form and manner in which the state's punitive power has to act against a person who has apparently broken social coexistence and has presumably adapted his conduct to a criminal type previously established by criminal law; However, despite the great advances in criminal procedure, related to evidence as a protection mechanism and the basic guarantee of defense right, there has been a notable increase in unnecessary judicial decisions, poorly motivated and totally contrary to social reality, over the general rule of indubio pro reo, principle of innocence and sufficient time to prepare an adequate defense, in relation to criminal weakest part of proceedings, the accused, in consideration if to apply or not preventive detention, having as support "indications" which has had a significant impact on backwardness in criminal matters, the constitutional guarantees deterioration and the large number of rights' violations, which ends in a large number of people's liberty provisionally deprived and prisons unnecessarily full.

Being an issue which directly affects the weakest part of criminal law, the accused, and the lack of legal part's interest on and law academic world in providing defense tools for the accused, this research is essential for freelance lawyers' day to day; as well as for the judges and prosecutors who routinely have cases, for which it would benefit to achieve a better norm's understanding and the each ones' role plays in society over any criminal populism or media that on many occasions direct judges' rulings for media issues and where the great ally is "indications" discretion.

## 2. Method

For this scientific essay, a documentary study was mainly used, since all the information that could be obtained comes from the sources of law, such as laws, international treaties, doctrine and jurisprudence, which has allowed to enrich the theme and find viable legal situations in each case proposed for analysis, which will undoubtedly be of great help to the legal world, each of the results found and the different and uniform visualization of the application of the regulations from another perspective, a more guarantor and guardian of rights.

The analysis of documents was of vital importance to achieve a sophisticated legal investigation; the violation of the right of defense in the application of article 534 number 3 of the COIP is a misused "legal institution" and that the lack of uniformity of criteria on the problem, promotes that we find a number of inaccuracies and discrepancies between decisions of judges, prosecutors actions and actions of lawyer in free exercise. The information has had a qualitative treatment, in order to have investigation results, since it is based on the norm observation in its literal tenor, the legislator's vision when translating this legal result and the effects that emanate from the application of this article based on the objective reality considering the inquiry arguments. As mentioned by Molina Benavides et. To the:

Qualitative research begins in sociology and anthropology, to later become empowered in other scientific disciplines as one of its main models, useful for understanding the world, but above all useful for understanding the social sciences (Molina Benavides, et. al, 2017) [23].

Knowing the history, as well as the meanings of these legal figures, it is the application of logical historical methods and synthesis analysis that is launched in this essay, since the information extraction leads us to the use of a precept's legal evaluation, brought to the procedural reality that Ecuador lives.

We are facing an investigation line on the procedure that is being taken into consideration by prosecutors and judges and the one that should be applied in a timely manner, since the daily processes and the great violations of human rights require it.

## 3. Result and Discussion

The right to defense is a legal protection tool, which efficiently and effectively protects any individual who is immersed in a process, be it criminal, civil, administrative or any other branch, where rights, obligations and responsibilities that may directly and indirectly affect a specific legal situation that attempts to obtain the annulment or detriment of a protected legal right, through competent judges or courts, administrative authorities or persons selected by indigenous justice; protection that includes being heard, having enough time to prepare your defense, having a translator in case you do not know official country language, knowing reasons for your detention, having a privately sponsored attorney and, if you do not have sufficient resources, having the State provide a public defender, have clear, precise and prior regulations in legal system, the evidence obtained without violating law be presented, among others.

In relation to evidence, which is essential information in any process to demonstrate, prove and achieve full judges' conviction of the allegations raised in processes, since primitive era, the judicial evidence is taken into consideration to deal with interests' conflicts in society, in these times, it was normal to distinguish behaviors according to each group in formation, but without a doubt we can consider visual and auditory personal impressions as defense mechanisms in these rudimentary procedural systems, hence with the passing Over the years they adapted to historical contexts that emerged according to social achievements. The following procedural evolution phases and evidence system would be the religious, the legal,

the sentimental, and the scientific. Rome and Greece would have a leading role in the tests' development; all this occurred in ancient Europe.

Devis Echandía mentions that:

> …the last four evolution concept phases of evidence and of the initial evidentiary systems are more or less defined in European history, from the Roman Empire's, due to the existence of a fundamental break in legal civilization and social that Rome had taken to high levels, which meant that for many years a mixture of barbarism and religious fanaticism prevailed, leading to absurd judicial procedures [3].

In Rome, at the beginning of its empire, the proof development was magnificent, to the point that the device principle, of the proof burden, is maintained today, and people immersed in the discussions had to demonstrate their claims and claim them before a judge, through resources that evidence consisted, such testimonials as the oath.

At Roman Empire time, both in its initial processes, during the empire as such and in the period of Justinian, several legal institutions were created, which mentioned the proof burden, as well as the judge's role, of passive to active in the resolutions that he expressed orally; finishing all these transformations that built the logic test through the canon law that took force.

All subject to the discretion and direct people's intervention who assumed positions, in Roman times there are three defined times, first where the testimony reigned, through the sophisticated word and natural gestures, it was called "legis actions"; the formulary era brought with it certain special recognitions to documents, which perhaps without formalities could directly or indirectly involve a person and the oath gains strength, because the means to pressure people were various, beyond social stigmatization, they were seen almost compelled by their conscience to tell the truth. As a third period we have the "cognition extra orders", where the parties' plays questioning a preponderant role, since a judge could, according to the allegations, see who bore the proof's burden.

Timeline, at a legal level that was impressive, and that is not lost, as Valeria Susana Guerra points out, who visualized the Roman judicial system and its sentences and summarizes that:

> …. the process, its structure, the judge's functions, the judicial decisions' force and their foundation in the imperium and in the jurisdiction, have been the greatest interest arguments in legal elaborations, both romantics and law science. procedural law [4].

The systems advance and the law follows its course, and it is in the canonical period, that the line was forged so that the judge decides, no longer arbitrarily but through a formalities series, that the "church" would put in stands. As Duran, Dimas and Rodríguez point out:

> …other contributions that are due to canon law were the abolition of irrational means of proof and the introduction in the procedure of trial's logic, through the so-called presumptions theory, which allowed adhering to the most probable truth [5].

Already entering the Middle Ages' last days, the proof has to be provided by the actor and in certain cases by the defendant or defendant, with the canonical process guidelines, in such a way that arbitrariness is abolished, at least in theory, for the substantiation by evidentiary means that place the judge in the possibility of judging guilt or not.

In modern times, as Duran, Dimas and Rodríguez point out:

> … another fact with which it is intended to extinguish its legal effects or modify them, ... the Napoleon's Code, a classic example of unusual boom in codification that the French revolution brought centuries later (1789), included in its article 1315 a similar principle, which is accepted by various legislations (Colombian civil code, art. 1757; Chilean civil code, art. 1968; Italian civil code of 1865, art. 1312; Spanish civil code, art 1315). Although these texts literally contemplate the obligations proof, the modern doctrine agrees that they have a general meaning, that is, that it corresponds to prove the constitutive facts to the one who affirms them, and whoever opposes must prove it [5].

Taking into consideration that the proof and the proof burden were already completely structured in the modern age, it is no less true than in contemporary procedural law as mentioned by Ramírez that:

> "A change of era means a break in paradigms, a change in ideas and also in perspectives. But a time change is slow and is accompanied by a large gray area, the closest example was experienced when the Middle Ages entered the Renaissance, after the enlightenment to finally be born the modern age or the reason age. In this evolutionary line, the law constitutionalizing from the post- war material constitutions adoption, the recognition of legal plurality as the various coexistence systems that interact, the common law rapprochement and civil law, and the fusion forms that they are beginning to materialize from naturalist jus - positivist jus theories, they are a clear symptom that we are currently experiencing a era change [6].

At present, a constitutionalized procedural law reigns, which observes evidence as a key point in that triad judge, prosecutor, defendant, since through these elements to the process contributed any unfounded claim, threat to physical integrity and psychological or failing that breaks the innocence state that we all enjoy; The test purpose in current processes is to lead the judge, who over reasonable or healthy doubt criticizes in certain cases, to idealize an objectively proven position, away from external comments, and decide correctly and in accordance with the law, motivating each one of their actions.

In Ecuador, it is important to mention the procedural law progress, the new tools that justice has in criminal matters, which allows trying to achieve new objectives towards a criminal law with fewer errors and with more guarantees; Having had the country several codifications and reforms to expired laws that did not advance as society progressed, was a fundamental pillar for evaluating the compiling possibility of criminal laws in the same regulatory body, in order not to have scattered rules in criminal matters nor err in the several laws application that were notoriously contradictory, both in principles and in legality.

Situation that had repercussions for the entry into Organic Comprehensive Criminal Code force, in 2014; legal body that in its articles professes the intention to modernize criminal law, being a "barrier" or "legal filter" through which vital legal situations for human beings are crossed, among these, evidence legalities, obtaining evidence according to the norm suppresses, due process, limited actions of justice operators and principles that are the new boom in Ecuadorian criminal law.

The prosecutor's office in this new Ecuadorian penal model that imposes both the Ecuador's Constitution, as well as the Comprehensive Organic Penal Code, has a Powers number, but also a large number of limitations, with the purpose that it is not only that judicial server that holds the greatest "advantages" over the procedural subjects, since it invests a whole judicial apparatus to achieve its objectives, but now it must limit itself to looking for charge elements and also of discharge, use all the means that are within its reach to seek both

guilt or to seek a innocence ratification state, the Ecuador National Court of Justice, in its Criteria book on the law intelligence and law application (2017) points out that the evidence must justify "the two basic criminal process presuppositions, this is to prove both the material infraction existence and responsibility" [7].

According to Dr. Merck Benavides Benalcázar:

> … due process and the criminal procedure system can be defined as the set of successive ordered principles and procedures, within which a crime is investigated, whose fundamental purpose is to seek the truth of an act called a crime, but always respecting acussed-acussed's rights [8].

In the same way the Ab. Rosana Castro Arroyo, Msc. notes that:

> …the right to a due judicial process: it is a component of effective judicial protection, that is why it is promoted through it. The due process, in turn, is guarantees made up set forth and developed in article 76 CRE. When the due process guarantees are violated, such as motivation, defense, compliance with regulations or the right to appeal; it is said that effective judicial protection is violated [9].

The due process is of vital importance for the procedural parties, even more so, considering the haste with which the flagrante delicto hearings and the charges formation are carried out, and the way in which, within 24 hours after the arrest, at stake are many legal situations that promote the state protection and alleged suspect's neglect. Therefore, it is of vital importance to fully comply, literally, with the constitutional and legal provisions, and if in case it favors more the human's validity rights, the judicia's discretionary criteria and police apparatus.

**3.1 Social roots**

In relation to social roots, history has given us strong evidence of how people's life quality has evolved; Progress has been made in rights terms, but not in terms of living conditions, which continue to mark a mismatch in social gaps. In the timeline we find the slaves who, beyond not having rights, had obligations that ended their lives on several occasions, due to excessive work and unpaid humiliation; Over the years we passed to the gleba's serf, who were considered semi- slaves, because they lived on their land, but were forced to work it, without any kind of reward, only the legal guarantee that the masters granted for their permanence in the same plots. Then came the labor exploitation and social segregation, which caused total workers violations, who work more than 12 hours a day and their pay was a pittance, and on the other hand, racism and people separation according to their skin color, ethnicity and social status. For all these people it was very difficult to get property, they simply either lived excluded or worked to barely survive.

In current years the gap between people is the social classes, wealthy people, who cover most of the resources, compared to people who have absolutely nothing, even live in a legal irregularity, despite the fact that they are citizens. As Lizama (2018) [10] mentions:

> … the legal irregularity entails a loss or restriction of social rights linked to access to certain services, such as education, health, housing, social services; at the same time as a participation impossibility and social citizenship. Its implications in the personal sphere are marked by insecurity feelings, fear, instability, inferiority, loss of identity, low self-esteem and rootlessness [10].

In the country, with a 2020 cutoff, according to technical bulletin No. 02-2021-enemdu (2021), "in December 2020 income poverty at the national level is 32.4%. in the same period, at the urban level it is 25.1% and in the rural area 47.9%." (National Institute of Statistics and Censuses - INEC, 2021) [11], which shows that this group of people currently

lives in a complex situation, call it that, not having their own home, not having children registered in the civil registry, not having income or to cover adequate daily food, they do not have connectivity or technology, which aggravates these people's situation by wanting to obtain defense mechanisms, to justify social roots; therefore, they will be seen in most cases, due to the lack of income to work with public defenders without having sufficient elements.
The same technical bulletin n° 02-2021-enemdu (2021):

> …in relation to extreme poverty, at the national level, it is 14.9% in December 2020. In the urban area the extreme poverty incidence is 9.0% and at the rural level 27.5%" (National Institute of Statistics and Census - INEC, 2021), with these results, if the poverty situation is complex, the opportunity to demonstrate adequate social roots, by people who do not have a normal life quality, and live with nothing in extreme poverty is impossible. The word social roots have several meanings, ranging from protecting the accused's proper presence in the process, to becoming a situation that must be shown as private, without the state intervention, in which it is intervening in a criminal process for their own livelihoods, and thus show before the judge and the prosecutor that they live under adequate conditions for society. In criminal proceedings in Ecuador, according to the particular situation, the defendant has a way out, before the precautionary measure possible issuance of a; however, let us take into consideration what Mestanza mentions:
>
> …it is clear that for the judge to opt for one or more of the first five measures, he has to analyze that the infraction does not carry so much danger; that the defendant demonstrates social and labor roots; that his family, his assets and reasons not to leave the country have, capable of convincing the judge that the defendant is going to be linked to the process for the consequent legal purposes [12].

Situation that sounds simple, but in reality, becomes something complex.

### 3.2 References of social roots

The social proof roots are an element that every defendant, despite the fact that there is no provision for that, must present before the judge in order to demonstrate, persuade, to capture the attention of a good citizen, who in a certain way meets requirements. minimum to live in society, who lives surrounded by a system to which she adapts adequately in circumstances such as work, interpersonal communication, links with state institutions, and others, with the purpose that a measure is not issued against her precautionary as preventive detention or house arrest.

When we enter a criminal process, we are invested with the universal innocence principle of, which, as stipulated in the American Convention on Human Rights signed at the Inter-American Specialized Conference on Human Rights, in Costa Rica, in the year 1979, in its article 8 " Every person accused of a crime has the right to be presumed innocent until his guilt is legally established" (Organization of American States, 1978) [2]. Of which, the legal world agrees with the aforementioned norm, because as long as there is no final judgment that weighs against any person, they must have the necessary tools to present themselves to a criminal proceeding, without being persecuted, frowned upon or Despite an incensory prejudgment, but also, it is no less true that the prosecution is in charge of dismantling that quality that we all hold through clear and reliable evidence.

Reyes, Jaramillo, Jayo, Merlyn, & Martos-Méndez (2018) [13], point out that "social roots are conditioned to a satisfaction perception in the bond with the host society". It is feasible to materialize an idealization of social roots with the upper or middle classes, since there are many possibilities at hand to achieve any kind of roots, be it work, economic, family,

social, sports, educational, which is not the same in lower classes or extreme poverty, where informality reigns and the lack of accreditation with an inefficient state with this sector aggravates the situation.

Within the judicial guarantees contemplated in this second chapter of civil and political rights of the American Convention on Human Rights signed at the Inter-American Specialized Conference on Human Rights, which was previously cited, it does not mention that the defendant or suspect has the obligation to present evidence , although it is true that he must prepare an adequate defense, with the defender he chooses, it does not establish that a person must prove absolutely anything, since based on the principle of innocence, the citizen would not be guilty until proven otherwise. .

In Chile, the innocence principle as such is not found in a constitutionalized form, but as Molina stipulates, in innocence presumption and proof standard in criminal proceedings: reflections on the Chilean case:

> …concludes then that the innocence presumption becomes a fundamental right whose origin is found in the constitutional rights block in accordance with the mandate stipulated in art. 5th inc. 2 of the cpr, understanding by this, the set of rights of the person guaranteed by constitutional source or international human rights law way [14].

In Ecuador, it is notorious that the universal innocence principle presumption, as well as the equality principles before the test, indubio pro reo and non-discrimination are always disrupted by the social reality that country lives; It is a martyrdom, in a country like ours, to justify something that cannot be documented due to the lack of free, fast and freely accessible services. Estefan Crauth, on preventive detention in Ecuador, says that

> … the so-called social roots, although it is not a factual assumption of the COIP (and not even a legal concept), has a preliminary role to play in the hearings. In the end, the management of the so-called "social roots" ends in the discrimination of those who live and work in informal conditions, since they cannot "verify" their home or work roots through respective contracts [15].

The Ecuadorian economic and social system disrupts any "plan" or intention attached to the law that wants to carry out the weakest part of criminal process with its social roots, due to the scarcity of elements and the system's selfishness to deliver them; and it seems that in addition to the poverty or scarcity in which they live, the suspected person must bear the state's weight against him, and with a stealthy weapon covered by this same fictitious institution (state) that, as mentioned (Palacios, 2017) [16] "do not live in the past, forget the bad, even the good, overcome everything you did yesterday because it is simply worthless, always look ahead and try to make fewer mistakes than yesterday" ; puts as "paradise" a system of social rehabilitation that once the sentence is over, served, will expose the true results of what was generated by criminalizing poverty and not putting the impartiality principle first, with or without social roots, since the accused he is not called upon to prove anything, except that his innocence be ratified if this has not been distorted by the head of the criminal action. Education plays an important role in this game of appearances; a person who has had the opportunity to study could present documents that prove their intention to excel academically, or perhaps they would be one step forward from not falling into preventive detention just for being illiterate or studying to a certain degree in high school, therefore, as Clery Aguirre mentions, 2016:

As education is the instrument that enables individuals to understand and assign meanings to the elements that make up reality, it must be understood that every educational process positively affects the population's capacity to carry out productive activity;

Consequently, the democratization of education and socioeconomic development are strongly related. Therefore, it is fair to recognize that the educational level of the population is a relevant and explicit indicator of the living conditions and quality of life in the population. (Clery, 2015) [17].

As a specific issue, social roots do not exist in works expressly carried out to reveal the benefits and problems that this legal concept brings to the country. Several writers have touched on the subject, but superficially, since they speak of preventive detention, or precautionary measures; other works, on the innocence right and some on the burden of proof, but not exactly; According to Krauth:

> "Surprisingly, in Ecuador, there is a widespread custom regarding preventive detention that is radically opposed to the law and the Inter-American Court of Human Rights 'sentences. It is surprising, because the law leaves no room for divergent interpretation. However, judges tend to assign the defense the obligation to present evidence of the so-called "social roots" [15].

It is mentioned that a "social roots" must be demonstrated when in theory we would be going against international provisions.

### 3.3 Principle of impartiality

It is important to point out a pillar principle in the good decisions that could be made in the flagrante delicto hearings and the formulation of charges in Ecuador by the judges, in addition to delimiting the fiscal actions, which would cause a fairer and more reasonable treatment with what it is at hand and not, under the pretext of fulfilling its role, distort facts with "indications" that do not contribute anything to the true ius puniendi's intention; the criminal process and state power's action have to hide behind this principle so that their presence on the bench is treated in the best way. The impartiality principle, which according to Durán Chávez and Henriquez Jiménez maintain that:

> …it is concluded that the impartiality principle constitutes a true protection with respect to the guarantee of the right to defense, without which a fair decision, in accordance with the law, would not be obtained, since its violation would result in the full due process violation, and more specifically, the right to defense [18].

### 3.4 Hint

It is also necessary to previously know the meaning of the word "indication". According to the dictionary of the Royal Academy of the Spanish language, it is a "phenomenon that allows knowing or inferring the existence of another unperceived" which also suggests that it may be the case of entering into more conflicts with something clear and forceful. The article art. 534 # 3 of the Organic Comprehensive Criminal Code indicates "indications from which it can be deduced that the precautionary measures that are not custodial are insufficient and that preventive detention is necessary to ensure their presence at the trial hearing or compliance with the sentence. From this legal precept, it follows the discretion with which it could act and also the ease with which responsibilities can be determined, since the legislator has left the door open for it to be beneficial for the tax claims as well as for the good defense allegation. technique, if any.

Article 534 of the Comprehensive Criminal Organic Code, brings a tool to comply with the perfect criminal process idealization, that is, that there is an adequate prior process, so that guilt degrees or not can be ruled, of any citizen who has broken social coexistence, adapting their behavior to a previously prescribed criminal type. But in order for preventive detention to be made effective, which is the provision to which we refer, the legislator has

foreseen four circumstances that must be fulfilled so that it can be granted, the same ones that range from the clarity of an alleged crime, where they can be detached adequate conviction elements that beyond the police part, which is purely referential, can direct the judge's judgment; In addition, these same elements must be exact from the legal perspective that allow specifying the authorship's degree or complicity with which the accused acted and that the custodial sentence that is typified in the criminal type must necessarily be no less than one year.

The main inconvenience is found in the third numeral of the treated article, since the legislator has not been clear, in specifying certain words that in reality are distorted creating uncertainty in the criminal process, which is not its purpose, remembered that they must if there are clear and precise rules, transparent procedures to be able to exercise the right to defense.

**3.5 Precautionary Measures**

Precautionary measures are necessary legal options in criminal proceedings, since their gradualness and procedural intention is an ideal ally for the process's purposes to be fulfilled until the moment a final judgment is reached; having to protect the people's rights who have been allegedly victims and at the same time bring, if possible by force, the alleged culprit to act actively in the process, generates confidence in the system, allows evidence to be recovered as well as visualize possible reparations integrals.

As the Royal Spanish Academy points out, the precautionary measure is:

> Procedural instrument of a precautionary nature adopted by the court, ex officio or at the parties´ request, in order to guarantee the judicial effectiveness decision through the conservation, prevention or assurance of the rights and interests that must be elucidated in the process [19].

The COIP, in its article 522, prescribes precautionary measures and empowers the Judge to impute one or more of them to the accused, which according to the normative body are: "1. Prohibition of leaving the country; 2 Obligation to appear periodically before the judge who knows the process or before the authority or institution designated; 3 house arrest; electronic monitoring device; detention and preventive detention" [1].

At first glance it follows that there are several precautionary measures at the hand of the Judge to impose or impose them, the most intense are those that deprive freedom, thus generating a latent concern when receiving them, so it is not the same, to defend oneself in freedom than having a preventive detention. Not all cases deserve periodic presentation before the competent authority and not all of them should end up in pretrial detention, as it seems, the courts are full of these decisions and the prisons do not allow their criteria to change.

As prescribed by Resolution No.14-2021 of the National Court of Justice, which:

> … when speaking of the principle of exceptionality, we must relate to the fact that, as a general rule, people are individually free, therefore, all precautionary measures that limit freedom are exceptional and must be administered with a restricted meaning insofar as they affect a constitutional right. The exceptionality is closely related to the principle of minimal criminal intervention, in relation to the measures proportionality that have the effect of restricting the persons freedom prosecuted [20].

If, as stated by the National Court of Justice in its Resolution No.14 – 2021 that:

> … the criminal trial is in no way an instrument to combat any social phenomenon, the criminal trial is, instead, the place to determine the criminal responsibility of a person accused of having committed a crime or a misdemeanor. There is no criminal

> policy with the criminal trial, as in other aspects with substantive criminal law, it is not possible to resolve social phenomena that must be kept absolutely outside criminal law [20].

Within the mandatory precedent issued by the Constitutional Court of Ecuador in its judgment No. 001-18-PJO-CC, case No. 0421-14-JH, it states that:

> In a constitutional State of rights and justice, respect for human rights constitutes a fundamental pillar, therefore, it is the obligation of the State to refrain from intervening arbitrarily and unnecessarily in the rights and freedoms of citizens, as well as guaranteeing their full effectiveness... In this sense, if we bear in mind the great importance of the right to personal liberty within civil and political rights and its recognition in the different international human rights instruments, it is necessary to recognize that any restriction or deprivation of liberty must be based on grounds previously established by law and will only proceed when absolutely necessary. This humanist orientation and guarantor of the human rights of sentenced persons configures an important element of distinction between an authoritarian State and a democratic State, because while the former uses its punitive power as a first measure to repress criminal conduct, the latter ensures that that the ius puniendi and custodial sentences be used only as a last resort, after it is fully established that the use of other mechanisms are insufficient to punish the most serious criminal conduct that affects legal rights of the highest importance [21].

Therefore, the state must limit itself to acting in a congruent manner and putting before the stereotypes and daily practices that disadvantage the most vulnerable people, due to their condition, and limit itself to acting taking as a fundamental pillar, respect for human rights such as life, freedom, association, health, physical and emotional, economic, status of innocence, congruence and legality.

## 4. Conclusions

Finding ourselves with a large number of judicial decisions, in which it is reliably established that certain indications have been sufficient to achieve preventive detention or it has not been possible to justify social roots by part of the process, it has resulted in a number of people with the strongest precautionary measure in the criminal process, which are, due to the threat degree to rights, preventive detention, house arrest and placement of the electronic surveillance device, which has caused a direct violation of the accused defense rights; On the other coin’s side, it follows that when the necessary documentation is available and it is well exposed in the respective hearing by the defendant, the judge is able to dictate precautionary measures of a lower rank at the level of restriction of rights as they are the periodic presentation before the competent authority and the prohibition to leave the country; all this brings as a domino effect, an exclusive interest, and that was approached in a very simple way, in knowing what are the legal arguments used and common in which the judges take hold from their point of view to make their decisions, as well as the motivations prosecutors to "attack" the weakest criminal process part and technical defense response to overcome the tilted court in a criminal process in their favor.We affirm, after the investigation that there is no figure of "social roots" in the COIP, what we can find in this normative body is that the criminal action head is the prosecution, and that it is in charge of looking for not only elements of charge but of discharge, notwithstanding the foregoing, it is attributed to those under investigation to prove their social roots, breaking the criminal concordance system itself that we live in and that is, the oral accusatory system, which as its name he says it, it is accusatory, therefore the prosecutor is the person in charge of breaking with the social roots of

that person, with sufficient, real and demonstrable evidence; and not mere expectations. The Ecuadorean guidelines justice, are suitable in intention terms to cover all right sectors to defense, since the criminal law of principle, guarantees and humanism is shielded, so that in the public arena the qualitative type's information decisions and actions that are outside the law margin, due to their arbitrariness, are widely committed, causing an offense to criminal practice, since at present there are no investigations on what we call evidence, or what the evidence would be most suitable or the accused's social roots; This is why it is vital to put this problem into practice and lay the foundations for a new criminal law that complies with the parameters set forth by the Constitution itself and international treaties and that does not violate the right to defense in the articles. studied, by simple discretion covered by bad motivation.

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