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Preventive detention in flagrante delicto in the Metropolitan District of Quito during the second half of 2019

La prisión preventiva en el delito flagrante en el Distrito Metropolitano de Quito durante el segundo semestre de 2019

Cynthia Mishel Gudiño Flores
Independent legal researcher
City: Ibarra
Country: Ecuador

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ABSTRACT: Precautionary measures are mechanisms of criminal procedural assurance established by the State in order to protect the rights of the victim and the effectiveness of the process. They imply strict respect for principles and normative parameters because they constitute restrictions on the rights of a person being prosecuted, before being recognized as guilty. Given the complexity of the topic, in this paper has been intended to identify the form of application of pre-trial detention in the Flagrancy Units of Quito Metropolitan District in the second semester of 2019. Therefore, analytical and deductive research methods and field and documentary investigative techniques have been used, mainly related to jurisprudence, doctrine, legislation, interviews and files of the Flagrancy Units. As a result, it has been concluded that the application of pre-trial detention, in practice, does not have an exceptional character. It is imposed indiscriminately, without respecting the principles of proportionality nor the proper guarantees of motivation, and it generates a reversal of the burden of proof

that directly undermines the right to legal certainty enshrined in the Constitution.

KEY WORDS: Criminal Law, prison, criminal sanction, precautionary measures, pre-trial detention detention.

RESUMEN: Las medidas cautelares son mecanismos de aseguramiento procesal penal, establecidos por el Estado con la finalidad de resguardar los derechos de la víctima y la eficacia del proceso. Requieren del estricto respeto de principios y parámetros normativos porque constituyen restricciones de derechos del sujeto procesado, antes que sea reconocido como culpable. Dada la complejidad del tema, en el presente artículo de investigación se ha pretendido identificar la forma de aplicación de prisión preventiva en las Unidades de Flagrancia del Distrito Metropolitano de Quito durante el segundo semestre de 2019. Para ello, se han utilizado los métodos de investigación analítico y deductivo, y las técnicas investigativas documentales y de campo, relacionadas principalmente con jurisprudencia, doctrina, legislación, entrevistas y expedientes de las Unidades de Flagrancia mencionadas. Como resultado, se ha concluido que la aplicación de prisión preventiva, en la práctica, no tiene carácter excepcional. Además, es impuesta indistintamente sin respetar los principios de proporcionalidad ni las debidas garantías de motivación, y genera una inversión de la carga probatoria que menoscaba directamente el derecho a la seguridad jurídica consagrado en la Constitución.

PALABRAS CLAVE: Derecho Penal, prisión, sanción penal, medidas cautelares, prisión preventiva.

INTRODUCTION

At the national level, criminal legislation provides mechanisms aimed at ensuring the proper development of the process and the optimal enforcement of the sentence through the principle of immediacy. These mechanisms are known as precautionary measures and can be of two types: personal and real, depending on the subject or objects on which they fall, respectively.

The imposition of precautionary measures is requested by the prosecutor to the judge, as they are mechanisms that imply limitations of rights. They can only be ordered after a careful analysis that leads the justice operator to order them. Thus, at the legislative level, legal parameters authorise their application and provide for their inadmissibility.

This research work analyses both the regulatory background and the practical situation of applying precautionary measures, specifically those of a personal nature, and among them, pre-trial detention. In particular, due to its exceptional nature, it represents the imprisonment of a person who has not yet been recognised as guilty through a sentence issued by the competent jurisdictional body. Given that pre-trial detention can be ordered for any publicly actionable offence, among other requirements, provided that it carries a custodial sentence of more than one year, its scope of application is comprehensive. Consequently, its study is limited to flagrante delicto, a crime that occurs in the presence of one or more persons or is discovered as soon as it is committed.

Whether in flagrante delicto or not, it is essential to be clear that, normatively, personal precautionary measures other than pre-trial detention should always be prioritised, under Article 77, numeral 11 of the Constitution of Ecuador (CRE) and Article 534, numeral 3 of the Comprehensive Organic

Criminal Code (COIP), which emphasise the exceptional nature of the deprivation of liberty and the adequacy of alternative measures to safeguard the process and ensure the appearance of the person being prosecuted.

However, in the investigation carried out in the Flagrancy Units of the Metropolitan District of Quito, it would seem that pre-trial detention is the first option to be considered, before the prohibition to leave the country, house arrest, the obligation to report periodically to an authority or the electronic monitoring device. In addition, a problem of justification of its necessity, suitability and proportionality has been reflected. In other words, it is not common practice for the prosecutor to justify his or her request for pre-trial detention and for the judge to argue his or her decision to impose it. In this context, one could speak of a routine, massive and indiscriminate application of pre-trial detention, which does not respect the purposes, characteristics and principles of pre-trial detention but is ordered formally.

Intending to provide a clear answer as to whether or not its application amounts to a systematic violation of the right to the legal security of the accused, this study focuses on identifying how this precautionary measure is used in the Flagrancy Units. Therefore, it is a doctrinal, empirical and interdisciplinary investigation in which a considerable number of prosecutorial files are analysed to determine common elements embodied in the jurisdictional decisions of pre-trial detention, closely related to Criminal and Constitutional Law.

In the development of this article, analytical and deductive research methods are applied, as concepts, principles, and general laws are analysed in the specific area of pre-trial detention in flagrante delicto. Additionally, this research is developed under a mixed and explanatory approach

because through the analysis and collection of quantitative and qualitative data. It is possible to expose the reality of the application of pre-trial detention. The research methods used are dogmatic legal and normative legal due to the reference to doctrine, principles and laws. The research techniques used are documentary and field-based, based mainly on jurisprudence, doctrine, legislation and files from the Flagrancy Units in Quito.

Finally, this research is divided into three main chapters. The first chapter studies pre-trial detention and flagrante delicto. On the one hand, it offers an overview of the precautionary measures provided for in Ecuadorian legislation, developing their characteristics, principles and purposes, and delving into the legal nature of pre-trial detention and its legal requirements. On the other hand, it also covers the particularities of flagrante delicto and its process in the Flagrancy Units created for this purpose.

The second chapter develops the results of a field investigation carried out in the Flagrancy Units of Quito (Quitumbe and Mariscal) regarding the reality of requests and orders for pre-trial detention between July and December 2019. In order to assess compliance with constitutional and legal requirements, four specific variables are analysed: proportionality variable, to determine whether the pre-trial detention ordered respects the necessary suitability, necessity and proportionality; variable of the existence of a procedural danger of absconding, which the prosecutor must accredit; variable of social roots, as sometimes the burden of proof of the procedural danger of absconding is reversed and it is the prosecuted subject who must demonstrate their willingness to appear at the trial; and variable of sufficient evidence of the existence of a crime of public prosecution.

Finally, the third chapter is devoted to the most important conclusions of the whole research work. The abuse of pre-trial detention must be immediately addressed because it produces undesirable consequences in several respects, including in detention centres. In Ecuador, it is already a significant reason for prison overcrowding.

1. PRE-TRIAL DETENTION IN FLAGRANTE DELICTO

1.1 Precautionary measures

1.1.1 Generalities of interim measures

1.1.1.1 Concept

The very nature of criminal law, which offers as a potential option the deprivation of liberty in prisons, motivates different reactions on the part of citizens who have committed offences. While some are freely willing - or resigned - to submit to the state's ius puniendi, others are entirely willing to evade or circumvent it. However, the state, which needs to demand that its justice is ideally carried out, does not want to be uncertain about the prosecuted subject's attitude. Precisely from this need, precautionary measures are born.

At the doctrinal level, precautionary measures are:

> Legal authorisations can be used in criminal proceedings to limit or restrict rights, generally of the accused, and concerning third parties, with the sole objective of guaranteeing the discovery of the absolute truth and applying the criminal law in the specific case. (Clariá Olmedo, 1998, 476) According to the criteria of Gimeno Sendra, Cortéz and Moreno (1996), precautionary measures are understood as follows:

The reasoned decisions of the court, which may be adopted against the alleged perpetrator of the criminal action, as a consequence, on the one hand, of the emergence of his status as a defendant and, on the other, of the well-founded probability of his personal or financial concealment in the course of criminal proceedings, by which his freedom or the free disposal of his assets is provisionally limited in order to guarantee the effects, criminal and civil, of the sentence. (390) Finally, José Maza Martín (2007), argues that:

> Precautionary measures are those jurisdictional actions carried out within the proceedings, restricting certain rights of those allegedly responsible for the facts under investigation or prosecution, which seek to ensure the correct holding of the trial and the effectiveness of the final decision. (17)

Under all the definitions mentioned above, it is proposed that precautionary measures are properly motivated jurisdictional provisions, addressed to the prosecuted subject to temporarily restrict his rights, whose primary function is to ensure the correct resolution of the criminal proceedings, without being frustrated by the possible absence of the passive subject of the punitive power of the State.

1.1.1.2 Preconditions for interim measures

Considering that precautionary measures constitute an undeniable invasion of the public power in the personal dimension of the passive subjects of criminal proceedings, before the existence of a jurisdictional resolution that determines their responsibility, the doctrine has developed two assumptions that must be satisfied in order to enable their imposition.

1.1.1.3 Fumus boni iuris, fumus delicti commisi or appearance of good law

"It is the first presupposition for the adoption of any precautionary measure" (Gutiérrez de Cabiedes, 2004, 125). It is accredited in criminal proceedings through solid indications that become rational and sufficient elements of conviction of the commission of criminal conduct (Rifá Soler, Richard González and Riaño Brun, 2006).

That is to say, the appearance of good law represents the adjustability of the object of criminal proceedings under the figure of an offence for which an individual is potentially responsible.

1.1.1.4. Periculum in mora or danger in delay

It is the legal basis for any precautionary measure. It requires accrediting a concrete danger that may affect the correct development of the administration of justice, either because the subject of the process will try to flee, hide, eliminate or alter evidence; or commit new criminal acts (Gascón, 2019).

In other words, periculum in mora requires a real and dangerous possibility of affecting the optimal development of the criminal process through undesirable conduct on the part of the accused.

In short, it is not possible to dictate any precautionary measure unless the commission of conduct is qualified as criminal, the individual being prosecuted appears as a real passive subject of the ius puniendi of the State (as a potential perpetrator), and some indications allow us to deduce that he/she will refuse to collaborate or allow the optimal development of the criminal process. Otherwise, the imposition of these measures would be arbitrary.

1.1.1.5 Legal nature, characteristics and principles

Precautionary measures also called provisional measures of precaution or conservation, and provisional security measures, are mechanisms of a preventive nature, ordered by a jurisdictional body before the issuance of the final judgment that condemns or ratifies the innocence of the person being prosecuted because there is a proven danger of non-compliance with the jurisdictional decision (Martínez Botos, 1994).

The very precautionary nature of these procedural measures is evident in the possibility they offer of anticipating specific effects of a conviction (such as the deprivation of liberty of the defendant) to safeguard the process. Thus, they are designed to protect and prevent the smooth running of criminal proceedings.

On the one hand, the characteristics of interim measures are:

a) Temporariness

They have a specific, determined and reasonable duration. For no reason can they be extended beyond the duration of the criminal proceedings? They are revoked, modified or altered by jurisdictional decision, either because the circumstances that led to their imposition have changed, or because the requirements for their substitution have been met (Escuela Nacional de la Judicatura de la República Dominicana, 2007).

b) Restrictiveness and exceptionality

Precautionary measures can only be requested and ordered in crimes with a custodial sentence of more than one year (COIP, 2014, art. 534) and only when they are necessarily necessary to guarantee the defendant's appearance.

c) Jurisdiction

Precautionary measures, being resolutions that restrict individual rights, can only be ordered by competent justice operators, as they are the ones who hold the public power to judge and enforce what has been judged. No other authority has the power to order them. It should be clarified that the judge does not have the power to order precautionary measures ex officio, but requires a prior, substantiated and reasoned request from the prosecutor (COIP, 2014).

d) Instrumentality or accessoriness

All precautionary measures are dependent on a process. That is to say, only within the process is it possible to order specific security mechanisms that do not have an end in themselves but are means to achieve procedural ends and neutralise the dangers that may disturb them (Cafferata Nores, 1992).

Having already reviewed the characteristics of precautionary measures, on the other hand, the principles governing their imposition are:

e) Principle of speed

It provides for the diligent processing of the process within the established timeframe to achieve an efficient jurisdictional resolution (Garzón, 2008). It constitutes an incentive to resolve the conflict in the best possible way while having the appropriate mechanisms that facilitate its resolution and guarantee compliance with the decision.

f) Principle of legality

It prohibits the imposition of precautionary measures other than those expressly stipulated in the law (COIP, 2014). Consequently, only the measures provided for in the legal

system can be applied, in a conventional manner, under the indicated requirements and the expressly stipulated conditions.

g) Immediacy principle

It entails a direct bilateral communication of the judge: on the one hand, with the evidence that allows him/her to reach a decision and, on the other hand, with the procedural parties (Garzón, 2008a). In national law, the existence of the principle of immediacy is justified to the extent that the procedural system is understood as a means for the realisation of justice, in which the judge requires the presence of the parties to the proceedings in order to hold the hearing, examine the existing evidence and carry out the other necessary procedural acts (COIP, 2014, art. 5 num.17).

h) Principle of proportionality

It seeks a congruence between the ends of the process and the means used to achieve them. In other words, it seeks a balance between the measure ordered, its degree of violence and its precautionary nature. It also seeks to avoid, as far as possible, affecting the fundamental rights and guarantees of the defendant, precisely for this reason: because he or she is still being prosecuted and cannot receive a measure that is more severe than the criminal sanction itself (Garzón, 2008a).

The principle of proportionality is closely related to the principle of innocence. It provides that every person accused of a crime has the right to be presumed innocent until proven guilty in a trial that provides all the basic guarantees for their defence (San Martín Castro, 2004). Consequently, it places the burden of proving both the guilt of the accused and the need for precautionary measures to ensure a correct resolution of the criminal proceedings on the state.

Finally, in addition to all the legal principles already mentioned, the importance of the procedural legal principle of due process should also be recalled. This is materialised in the actions of the judge, the prosecutor and the defendant's defence, creating a kind of tripartite responsibility between them to guarantee a fair trial that respects all the rights of the procedural parties (Gozaíni, 2002) and prevents the existence of problems related to arbitrariness or excessive use of these mechanisms.

1.1.1.6 Types of interim measures and the purposes for which they are used

On the one hand, precautionary measures can be of two well-defined types, according to their effect on the defendant's assets (objective precautionary measures) or his or her liberty (personal precautionary measures). However, in this research article, only personal precautionary measures will be dealt with in-depth, specifically pre-trial detention, as this is the main topic to be developed.

Personal precautionary measures, which are aimed exclusively at natural persons, tend to ensure the accused's presence in the entire criminal case and compliance with the sentence and full reparation for the victim, based on the principle of immediacy described above. National legislation, through the COIP, contemplates the following types of personal precautionary measures, which will only be mentioned here as the main focus of this article is pre-trial detention:

1. Ban on leaving the country
2. Obligation to report periodically to a specified authority
3. House arrest
4. Use of an electronic monitoring device

5. Detention
6. Remand in custody

On the other hand, the purposes to which precautionary measures respond also delimit their legitimate application, which is why, in addition to verifying respect for their principles and assumptions, it is crucial to verify that the purposes behind them are legitimate and congruent with their precautionary nature.

In general terms, precautionary mechanisms are legally envisaged to protect victims' rights, guaranteeing the proper conduct of criminal proceedings, holding the trial, and the effectiveness of the sentence handed down (Flors, 2010). Hence, they are measures that restrict the defendant's rights, mainly linked to their free disposal of property or freedom of movement.

In the international framework, the Rome Statute of the International Criminal Court (1998) authorises the provision of the necessary measures to avoid the disruption of the proceedings, whether through the adequate collection and preservation of evidence, the impossibility of the defendant's escape, or other mechanisms. Likewise, the Statute of the International Court of Justice (1945) contemplates the jurisdictional power to order provisional measures for the sole purpose of safeguarding the rights of the parties.

In the national framework, there is harmony with international provisions. The special criminal legislation embodied in the COIP (2014) clearly states the purposes foreseen for the application of precautionary measures (art. 519):

1. Protecting the rights of victims and other participants in criminal proceedings
2. Guaranteeing the presence of the defendant in criminal proceedings, the serving of sentences and full reparations
3. Preventing the destruction or obstruction of evidence that would lead to the disappearance of elements of conviction
4. Guaranteeing full reparation to victims

Moreover, precautionary measures allow for the permanent linking of the defendant and the effective enforcement of a sentence that aims to compensate the victim comprehensively, trying, as far as possible, to return things to the state they were in before the offence. To better understand the dimension of pre-trial detention, the following sub-chapter analyses the specificities of this precautionary measure, which is the most serious one to be applied by the state court.

1.1.2 Particularities of pre-trial detention as a personal precautionary measure

1.1.2.1 Concept

In the doctrinal sphere, authors such as Roxin (2000) have pointed out that pre-trial detention is the deprivation of liberty of the person charged or prosecuted, intending to guarantee that the process of knowledge or the execution of the sentence, and the investigation of the facts can be carried out in the best possible way.

In the same vein, pre-trial detention has also been defined as a unique precautionary mechanism that can only be used through a reasoned jurisdictional decision that justifies the inexistence of other, less burdensome alternative measures

to protect the purposes of the criminal proceedings (Escuela Nacional de la Judicatura de la República Dominicana, 2007a).

In short, pre-trial detention is a mechanism of procedural security, which is ordered as a means of effectively developing the proceedings and as a guarantee of the real enforcement of the sentence. Due to its specific characteristics, which are immediately analysed, it cannot be dictated indiscriminately but is subject to specific requirements or presuppositions containing the state's punitive power.

1.1.3.2 Characteristics and principles

The personal criminal precautionary measure that most affects the rights of the subject on whom it falls is mainly:

a) *ultima ratio and exceptional*

Because of the peculiarity of pre-trial detention and the direct effect it produces, it should only be used in strictly necessary situations. According to Maier (2004), the exceptional nature of pre-trial detention has its raison d'être in the absence of a previous regular process that would produce a final sentence imposing such a penalty.

In the international framework, the Tokyo Rules (1990) emphasise the need to apply this measure as a last resort, giving priority to alternative measures. They even impose an obligation on States to introduce non-custodial measures in their legal systems, which allow the judge to handle various options and reduce the application of imprisonment.

In addition to this, the Inter-American Court of Human Rights (IACtHR) has stressed that "pre-trial detention is the most severe measure that can be applied to the accused of a crime, which is why its application should be exceptional" (Case of Tibi v. Ecuador, Series C No. 114, 2004, para. 106).

The excessive use of this personal precautionary measure contravenes the very purpose of the State: the protection of rights, which in no way is respected if there are arbitrary and disproportionate detention orders.

In the national framework, temporary deprivation of liberty has the same legal treatment as international. The Constitution of the Republic of Ecuador (2008), within the fundamental guarantees of a trial, provides judges' obligation to apply, as a priority, alternative precautionary measures. It also makes it clear that deprivation of liberty is never the rule but the exception.

Therefore, the exceptional nature of pre-trial detention is evident and entails its use as a measure of last resort to not illegitimately affect the right to freedom of movement of the person being prosecuted.

b) Temporary

Pre-trial detention is strictly temporary, and, doctrinally, the reasonableness of the time a person is affected by this precautionary measure is evaluated concerning the fact for which he is being detained (La Rosa, n. d.).

At the international level, the IACHR has pointed out that time limits on pre-trial detention are essential to restrict the State's powers to ensure the purposes of the process through this precautionary measure (Case of Barreto Leiva v. Venezuela, Series C No. 206, 2009, para. 119). Mainly, if preventive detention were permanent, the State's punitive power would overflow without limit, since the adequate justifications regarding the need for the personal precautionary mechanism would disappear due to the excess of time and turn it into an arbitrary and illegitimate measure.

At the national level, pre-trial detention has a precise duration depending on the custodial sentence foreseen for the crimes: if the sanction is from 1 to 5 years, the precautionary measure lasts for a maximum of 6 months; and if it is extended, it lasts for one year. The time limit for the expiry of this measure is counted from the date on which the preventive detention order became effective, which, once expired, is without effect, and the judge must order the immediate release of the defendant (COIP, 2014).

Following the temporary nature of the precautionary measure, it should be emphasised that pre-trial detention should not necessarily be extended for the entire legally established period but should be limited to the strict need to obtain evidence, for example, if the person detained could endanger the gathering of evidence. Furthermore, since pre-trial detention is not indefinite, it can be revoked, substituted and suspended in specific situations. In other words, it also enjoys the characteristic of variability.

Pre-trial detention may be revoked, in addition to expiry, if the evidence or elements of conviction that motivated its application no longer exist, if the subject on whom it was applied has been confirmed innocent or dismissed, or if there is any declaration of nullity that affects him or her (COIP, 2014, art. 535).

Likewise, it can be substituted by alternative precautionary measures, as long as they have not been ordered in a crime punishable by a prison sentence of more than five years, under the condition that they are rescinded in case of non-compliance (COIP, 2014, art. 536).

Finally, the precautionary measure understudy can be suspended if the defendant provides security (COIP, 2014, art. 538). Suppose he/she hands over money or assets of his/her

own or a guarantor to certify his/her presence at the trial. In case of absence of the defendant at the trial hearing, the bail given is executed, and the judge orders preventive detention against him/her (COIP, 2014, art. 547).

c) Restrictive

Pre-trial detention can only be ordered for specific procedural purposes and is subject to a restrictive interpretation since the provisions of the criminal law, following the principle above legality, cannot be extended beyond what is mentioned in the law.

In this regard, pre-trial detention

is only admissible following the grounds laid down by law and following the procedure laid down therein (International Covenant on Civil and Political Rights, 1966)? Conceptual or analogical extensions in the criminal field, specifically in pre-trial detention, are not possible because they violate the principle of legality and unjustly affect the exercise of rights.

Having analysed the characteristics of pre-trial detention, it is now essential to examine in more detail the cross-cutting principle of this precautionary measure: the principle of proportionality. The principle of proportionality encompasses three sub-principles at the same time:

d) Adequacy

Pre-trial detention must be the objectively most suitable mechanism to assist the legitimate purpose of the proceedings and to counteract most effectively the procedural danger or risk that is being sought to be avoided (Sánchez, 1997). Therefore, this sub-principle complements the fundamental characteristic

of instrumentality or accessoriness of precautionary measures, analysed previously, related to the satisfactory fulfilment of the procedural purpose.

e) Need

Pre-trial detention can only be imposed insofar as it is indispensable to satisfy the legally established objectives, being the only means to ensure the process (la Rosa, n.d.). Therefore, it requires a preliminary search for less burdensome mechanisms that allow for the optimal development of the criminal process without necessarily affecting the fundamental right to freedom of movement (González, 2013). In other words, it requires the prior verification of the insufficiency of the different alternatives offered - or should be offered - by the legal system in order to be applied finally.

1.1.3.3 Proportionality per se or prohibition on excess

This sub-principle should be understood as "the equivalence between the intensity of the coercive measure and the magnitude of the procedural danger" (Oré, 2006) or between the rights of the procedural parties and the ends pursued in the process.

It requires consideration and analysis of the seriousness of the possible criminal consequence of the specific case, in such a way that the anticipated loss of liberty - resulting from the imposition of pre-trial detention - is only possible if a prison sentence is foreseeable (Sánchez, 1997). Otherwise, this precautionary mechanism would be excessive and unjustifiable because it would imply the early imprisonment of a person who would not deserve such a sanction even if guilty.

Finally, because of the above, it can be concluded that the rule to be applied in criminal proceedings is liberty. In other words, defendants should be able to defend themselves in the entire exercise of their right to freedom of movement and, exceptionally, they should be temporarily deprived of it to safeguard the effectiveness of the jurisdictional decision.

In order to properly understand the criteria under which it is possible, suitable and appropriate to request, order and accept pre-trial detention of a person without a conviction, the following section is devoted exclusively to a detailed analysis of this issue.

1.1.3 Presuppositions enabling preventive deprivation of liberty

On the one hand, judges of criminal guarantees should not forget that the risk presented by a prison, in all senses, should only be experienced by those who still enjoy their presumption of innocence, only when the presupposition of the existence of a risk of flight or concealment of evidence of other crimes is met (Beccaria, 2015).

Doctrinally, the existence of a risk of absconding a certain intensity is essential to allow the judge to order pre-trial detention (Rojo, 2016). In other words, only a comprehensive assessment of the particular circumstances of the case, which encourage the defendant to be absent during the judicial proceedings, can lead to the defendant not having the possibility of defending himself at liberty.

According to Pérez (2014), the accreditation of the procedural danger of absconding should not focus on subjective considerations but concrete and proven aspects of the case.

The starting point for assessing the procedural risk are the indications (provided by the prosecutor) that constitute fully demonstrable facts that justify the pre-trial detention order and support the (sufficiently probable) danger of absconding of the defendant (Krauth, 2018).

Even though, theoretically, it is up to the Prosecutor's Office to prove the admissibility of pre-trial detention, in judicial practice, the legal ghost of social roots weakens this burden of proof (Krauth, 2019). Completely contravening the principle of legality, the danger of absconding is not accredited. However, instead, it is distorted by the defendant's defence, through documents that attempt to demonstrate the existence of permanent links between the accused and the community, to guarantee - or pretend to guarantee - that there is no danger of evasion of justice and that, therefore, the defendant will behave in a responsible way so that there is a certainty that he or she will appear throughout the criminal proceedings against him or her (Monroy, 2016).

On the other hand, in order to have more normative assumptions that indicate the analysis that must be carried out for a preventive detention measure to be considered timely and legitimate, in addition to the risk of flight, the criminal act must have been proven in the world of phenomena, the sanction foreseen for the criminal type must be more significant than one year and the person linked to the crime must be a perpetrator or accomplice (Ramírez, 2014).

All these assumptions, which are entirely applicable to the Ecuadorian legal reality, will be analysed in detail under the consideration that the national legal framework establishes a kind of distinction, not always perceived, between

the assumptions for requesting and proceeding with pre-trial detention. The former corresponds to the prosecutor and the latter to the judge.

1.1.4 Requirements for an application for pre-trial detention

Article 534 of the Comprehensive Organic Criminal Code (2014) establishes the legal requirements for pre-trial detention to be adequately requested and to fulfil the purposes for which it was intended. Below, the requirements set out in the law are outlined, and a descriptive analysis of each of them is made.

1. Sufficient evidence of the existence of an offence of public prosecution.

It is the equivalent of the analysed fumus boni iuris or appearance of good law. The prosecutor must effectively demonstrate that a publicly actionable offence has been committed.

2. Clear and precise elements of conviction that the defendant is the perpetrator or accomplice of the offence The prosecutor must present sufficient elements to enable the judge to have a precise conviction that the person who is to be remanded in custody is the one who committed the offence or who collaborated in the commission of the offence.

3. Evidence showing that non-custodial pre-trial measures are insufficient and that pre-trial detention is necessary to ensure their presence at trial or the serving of sentence

This is the equivalent of the periculum as mentioned above in mora or danger in delay. The prosecutor is obliged to present elements that allow the judge to

believe that the person being prosecuted will absent himself from the process unless he is kept in detention. That is to say, for example, he must present evidence that the electronic surveillance device (which allows us to know where the person is at all times) will be insufficient, together with the house arrest and the prohibition to leave the country, to ensure the procedural principle of immediacy.

4. The offence is punishable by a custodial sentence of more than one year.

This requirement is the easiest to comply with since the prosecutor only has to refer to the corresponding legislation, which is the COIP, and indicate the custodial sentence imposed for the offence for which he or she intends to prosecute a person. If it is longer than one year, the requirement is automatically fulfilled.

In addition to complying with all these requirements, it is essential that the request is duly substantiated, in which the prosecutor must explain all the facts of the case that will allow the judge to deduce the lawfulness of the personal precautionary measure being processed and enable it to proceed.

It should be borne in mind that the prosecutor's obligation to state reasons mirrors that of the judicial operator. If, on the one hand, the prosecution must present all the facts that allow a specific legal conclusion to be drawn, the court or single judge must also give reasons why he or she considers pre-trial detention to be a proportional, necessary, appropriate and suitable measure. Only in this way are the guarantees of due process respected.

1.1.5. Whether pre-trial detention is appropriate

Although the national legal system does not include the same list of requirements for an appropriate pre-trial detention order, it is understood that the judge will verify compliance with all the requirements in the prosecutor's request, and then must apply the principles governing precautionary measures, with particular emphasis on the principle of proportionality, in order for the ordered measure to be legitimate. Above all, because the principles operate as basic parameters that, by guiding the development of the judicial process and the actions of the procedural subjects (Giacomette Ferrer, 2003), avoid an overflow of the state's ius puniendi, materialised in arbitrariness and abuses in the decisions of jurisdictional bodies.

According to domestic legislation, before imposing pre-trial detention, the judicial operator must also evaluate non-compliance or compliance with alternative measures if they have been previously granted (COIP, 2014). If they were ordered by the judge and not complied with by the defendant, they could not be used again.

The Comprehensive Organic Criminal Code provides for situations in which pre-trial detention is inappropriate, according to which pre-trial detention is inappropriate in crimes of private prosecution, misdemeanours and crimes with sentences of less than one year's imprisonment. This is justified to the extent that the balance between the imputed act and the state violence exercised as a means of coercion would never be justified in these cases (Rojo, 2016), as it is disproportionate and excessive.

In addition, the accreditation of social roots is also occasionally understood as a ground for the inadmissibility of pre-trial detention in Ecuador. This figure, which contravenes the principle of legality, is particularly relevant in the area

of flagrant crimes, where there is minimal time to obtain documents that allow its accreditation, among others, due to the speed with which the hearing that resolves the legal situation of the apprehended person must be held (Krauth, 2018). Therefore, this is the area where there may be the most significant violations of due process.

In order to comprehensively understand the handling of the application of pre-trial detention in flagrante delicto, the following sub-chapter is devoted to it.

2. FLAGRANTE DELICTO

2.1 Particularities of flagrante delicto

At the doctrinal level, flagrante delicto has three fundamental constituent characteristics. Firstly, in order for it to exist, it must be consummated. In other words, the punishable action or omission must have been objectively manifested in reality as an effect of the perpetrator's intention (Maier, 2011).

Doctrinally, the mere attempt is not sufficient for a person to be apprehended under the criterion of flagrante delicto. It is worth mentioning, however, that on this point, there is a discordance with domestic legislation and practice since, in this area, the consummation of the act is not necessary, which is why crimes committed in the form of an attempt are also processed in flagrante delicto proceedings, without there being an actual visible result of the criminal offence (COIP, 2014).

Secondly, in flagrante delicto, direct or indirect identification of the perpetrator is essential, which means recognising the individual who committed the offence

moments before. It is a direct identification of the person who has apprehended the perpetrator has observed with his senses the commission of the crime, and it is an indirect identification if the perpetrator can be identified through the version of the people who witnessed the crime (Ortega, 2013).

Thirdly, flagrante delicto requires that the offence was committed in the presence of one or more persons and that the perpetrator was discovered immediately. Immediacy presupposes a brief period, which, if not complied with, means that the offence does not qualify as such (Donna, 2011) mainly because it erases the traces of the offence and consequently produces an incomplete certainty in the judge (Albán, 2003) that makes him consider the apprehended person as a suspect and not as the perpetrator.

The criminal procedure doctrine distinguishes between temporal and personal immediacy. The former implies the commission of the crime at the exact moment or moments before, pursuing and finding the perpetrator immediately after the commission of the offence (Espinoza, 2016). The second refers to the fact that the active subject of the punishable conduct must be found at the scene of the crime or, at least, nearby so that it is possible to infer his or her participation (Palomino, 2008).

Because of this distinction of immediacy, criminal procedure doctrine proposes three types of flagrancy:

a) Flagrancy in the strict sense

It is configured if the subject is caught in the commission of the crime (Manzini, 1996). The temporal and personal immediacy are precise and current.

b) Improper flagrante delicto or quasi-flagrante delicto

It exists while the perpetrator of the offence is being pursued from the scene by the person who observed him committing the offence (Clariá Olmedo, 1998). It can be said that the subject is found just after having committed the offence so that the temporal and personal immediacy is "immediately subsequent".

c) Presumption of flagrancy

The subject has not been found committing the offence or fleeing from the place where it was committed. However, he has evidence (objects, traces) that allow us to infer the recent commission of the prohibited conduct and his link to the action (Clariá Olmedo, 1998). Therefore, it is possible to consider him as a participant in the criminal act even without current temporal or personal immediacy.

Finally, because the COIP (2014) understands that a person is in flagrancia if

Commits the offence in the presence of one or more persons or when discovered immediately after its alleged commission, provided that there is an uninterrupted pursuit from the time of the alleged commission until the apprehension, also when found with weapons, instruments, the proceeds of the offence, traces or documents relating to the offence just committed. (Art.527)

The concept of flagrante delicto and flagrante delicto provided for in Ecuadorian law includes the three types of flagrante delicto analysed and corresponds to all of the above, except for the duly stated exceptions.

2. 2 In flagrante delicto proceedings in the Ecuadorian criminal procedure system

At the national level, the Comprehensive Organic Criminal Code (2014) provides that in cases of flagrant offences, an oral hearing must be held before a competent judge within 24 hours of the subject's apprehension to determine the legality of the apprehension. In this same hearing, the corresponding process is determined, and, if necessary, the prosecutor formulates charges and requests the relevant precautionary measures.

Consequently, criminal proceedings for flagrante delicto begin with a flagrante delicto hearing. In this hearing, a judge of criminal guarantees verifies several aspects: that the act committed that motivated the apprehension is typified in the law as an offence, that the apprehension has been carried out within the established 24 hours, that no more than 24 hours have passed from the detention of the subject until the hearing, that the detainee has been informed of his rights and that he has not been the victim of cruel, inhuman or degrading treatment during his apprehension (Haro, 2015). If all these circumstances are not proven, the judge orders the detainee's release, without prejudice, to the continuation of the process through ordinary channels.

Subsequently, once the flagrancy and legality of the arrest have been established, the prosecutor presents the case based on the Report made by the national police officers, which details the circumstances of the apprehension and the evidence found in possession of the apprehended person to justify the initiation of the prosecutor's investigation. If necessary, the representative of the Public Prosecutor's Office requests

precautionary measures, following all the legal rules (explained above) and the judge rules on them, after hearing the victim (if it is present), the police officers (if deemed necessary) and the detainee directly or through the public or private defence counsel (Haro, 2015). Finally, the hearing concludes, and the parties to the proceedings are notified.

In any flagrant offence, the prosecutorial investigation lasts 30 days, a maximum of 60 days if there is a link to the investigation or reformulation of charges (COIP, 2014, art. 592 num.2).

Flagrante delicto is processed exclusively in Flagrancy Units, which operate full-time, under a fast and expeditious system that applies special procedures and alternative solutions to the criminal conflict to speed up jurisdictional decisions (Touma, 2017). Their primary purpose is to avoid the expiration of the detention of persons apprehended in flagrante delicto, mainly through direct and abbreviated procedures that prioritise the principles of judicial efficiency and speed, since the State intends to respond, to a large extent, to the social conception of the effectiveness of the criminal system, directly dependent on the immediacy of the penalty (Zalamea, 2012).

In the case of flagrante delicto, by its very nature, it seems possible to speak of a tendency to presume the guilt of the accused and requirements and presuppositions - automatically fulfilled - which motivate the use of, among all the precautionary measures, pre-trial detention. According to Llobet (2001), in practice, it is expected that as soon as criminal proceedings are initiated against a person, the presumption of innocence changes to a presumption of guilt and, consequently, the State orders preliminary deprivations of liberty to ensure that justice is done.

However, dogmatically and normatively, even the subject caught in flagrante delicto is legally innocent until a final judgment contradicts him (Llobet, 2001). Therefore, it is indisputable that in the Flagrante delicto Units, justice operators must be conscientious so that the prioritised principles are achieved, but without abusively sacrificing the rights of the accused.

Otherwise, the general predilection for pre-trial detention would produce disproportionate, illegitimate and unnecessary pretrial detention orders, whereby several people would be in prison, in the words of Zaffaroni (2014), "for nothing and nothing". (3)

In order to understand what happens in Ecuadorian judicial practice, the following chapter carries out field research in the Flagrancy Units of the Metropolitan District of Quito.

3. THE APPLICATION OF PRE-TRIAL DETENTION IN FLAGRANTE DELICTO IN THE PERIOD JULY-DECEMBER 2019, IN THE METROPOLITAN DISTRICT OF QUITO.

In order to understand the practical application of pre-trial detention, in this specific part of the research, a quantitative and qualitative study is carried out through a statistical analysis of the existing processes in the Flagrancy Units of Quito (both in Quitumbe and La Mariscal) in the period from July to December 2019, and the results it yields.

In order to achieve this purpose, four study variables have been established: the proportionality variable, the procedural danger of absconding variable, the social roots variable and the sufficiency of evidence variable.

Before explaining each of the variables mentioned, it should be noted that according to the Flagrancy System of the National Directorate of Legal Studies (DNEJEJ, 2020), 799 cases were filed in flagrante delicto during the period mentioned above. In all of these, precautionary measures were imposed without exception, and, specifically in 415 cases, pre-trial detention was ordered.

The selection criteria to be applied in order to carry out the aforementioned statistical study are as follows:

1. Cases filed in the Flagrancy Units of Quito (La Mariscal and Quitumbe).

2. Cases in which precautionary measures were issued in the period from July to December 2019.

3. Cases in which pre-trial detention was ordered in the period July to December 2019.

After applying the selection criteria to the entire study universe, the population is reduced to 415 cases. Subsequently, to perform the relevant statistical analysis, the following mathematical equation is applied to determine population proportions:

Then, the resulting sample size is 94 cases, which will be chosen under the random selection method. The confidence level of the results will be 92%, and the margin of error 8%.

The analysis results on the statistical sample determined will be beneficial to know with certainty the form of application of pre-trial detention and the similarity or difference between the provisions of the legal body (COIP) and judicial practice. Each of the study mentioned above variables is developed below:

Proportionality variable

The purpose of this variable is to determine respect for the principle of proportionality, a fundamental pillar that should guide the imposition of pre-trial detention. It, therefore, evaluates three specific parameters: the appropriateness, necessity and proportionality of the most personal severe precautionary measure imposed by the judge in each specific case. Thus, this variable makes it possible to study the existence of a balance between the rights of the parties and the ends of the proceedings and the strict necessity of this measure - and no other alternative - to achieve the end sought.

Variable for the existence of a danger of absconding from the proceedings

This variable studies the demonstration of the possibility that the prosecuted individual will not attend criminal proceedings. It is closely linked to the length of the custodial sentence to be received for the offence committed; therefore, the explanation for this is already given in analysing the proportionality variable. The purpose of this section is to analyse whether or not the requirement of demonstrating the danger of absconding has been met, which is in the hands of the State, specifically of

Prosecutor's Office

The accreditation of this procedural danger represents one of the requirements of the request for pre-trial detention, which must necessarily be fulfilled in order to enable the imposition of the precautionary measure by the justice operator, among others because no alternative precautionary measure could ensure the appearance of the subject involved in the process.

Social embeddedness variable

Arraigo social is closely linked to the danger of absconding. However, it is not accredited by the State (which will deprive a citizen of a fundamental right: freedom), but by the defendant himself, as a kind of mechanism to avoid the imposition of pre-trial detention to motivate the judge to order alternative measures. This variable studies whether the social roots, that accumulation of permanent links between the accused and the community, has been demonstrated in order to ensure that the person will appear for the whole of the criminal proceedings against him/her.

Sufficiency of evidence variable

This variable identifies the existence of sufficient, clear and precise elements of conviction, provided by the Prosecutor's Office, to allow the judge to be sure of the accused's authorship or complicity. In particular, because without such evidence, it would not be legitimate to impose any precautionary measure, especially pre-trial detention.

3.1 Main findings from the practical application of pre-trial detention for flagrante delicto offences

In the context of the effectiveness and suitability of pre-trial detention, the analysis of cases carried out in the Flagrancia Units in Quito has shown that prosecutors, judicial officers and even prison officers play a significant role in the correct application and effectiveness of this precautionary measure. The following are the main situations produced by these actors, which lead to the violation of rights.

Non-compliance with the principles and elements of pre-trial detention

The principle of proportionality between the offence committed and the precautionary measure granted governs the application of pre-trial detention, the distinctive feature of which is the exceptional nature of its imposition due to the deprivation of liberty it causes in a subject who has not yet been recognised as guilty. However, according to the case study results, pre-trial detention was imposed in more than half of all cases initiated in flagrante delicto. Indeed, out of the total of 799 cases of flagrante delicto, only 384 were ordered alternatives to pre-trial detention, such as a ban on leaving the country, the obligation to report periodically to the competent authority, electronic surveillance and house arrest.

Pre-trial detention was imposed in 415 cases and, in at least 96% of these, the parameters of proportionality were not met, mainly because in flagrante delicto, most of the cases filed are for robbery, a custodial sentence of around two years is imposed, and, in the abstract, the defendant can request a conditional suspension of his sentence. In this sense, given the possibility that the person does not have to be deprived of liberty (even if he is recognised as guilty), it would be disproportionate to imprison him before knowing his involvement in the criminal conduct. Alternative measures would be sufficient.

Consequently, even though, on the one hand, Article 534 of the COIP establishes the requirements that the prosecutor must meet in order to request pre-trial detention: to prove sufficient evidence to support the existence of a crime and the perpetration or complicity of the accused, that the offence is punishable by more than one year of imprisonment

and that there are indications of insufficient alternative measures to ensure the prosecution. On the other hand, it is the operator of justice who must supervise compliance with all these requirements, in addition to assessing the grounds for the inappropriateness of pretrial detention, its exceptional nature, its necessity, proportionality and suitability, concerning the specific case (COIP, 2014, art. 520 num.4). In practice, the first option to be considered and imposed is always pre-trial detention.

Likewise, despite the constitutional provision (CRE, 2008, art.76), which requires both the prosecutor and the judge to substantiate the request and the ruling ordering pre-trial detention, respectively, it is expected that in flagrante delicto hearings, the judicial operator considers legal requirements to be satisfactorily fulfilled which are not adequately substantiated by the prosecutor. This practise is so common that 91% of the pre-trial detentions imposed are based on simple normative statements, without any additional explanation or justification that would allow the defendant for having the necessary means to understand why he cannot defend himself in freedom.

3.2 Reversal of the burden of proof

In criminal procedural law, the burden of proof does not represent an obligation that, when not complied with, entails a sanction but instead allows the parties to present all the evidence and arguments that they believe they have in order to exercise their right to defence in optimal conditions (Herrera, 2012).

The burden of proof rests on the person pursuing specific legal effects that he intends to satisfy through the facts on which his claim is based since the fundamental general rule

is that he who asserts must prove it (Zalamea, 2012). In this sense, on the specific issue of pre-trial detention, the burden of proof of the concurrence of all the legal requirements for requesting the application of the most severe personal precautionary measure falls on the Prosecutor's Office (COIP, 2014, art.5 num.13).

Thus, the prosecutor is assisted by the reasons or grounds from which the need for this precautionary mechanism arises, and it is the information and facts of the specific case that must support his or her request.

At the international level, the Inter-American Court of Human Rights has established that the State must substantiate and accredit, in a clear and reasoned manner, in the specific case, the existence of all the valid requirements for pre-trial detention (Case of Usón Ramírez v. Venezuela, Series C No. 207, 2009, para. 144).

At the national level, Article 534 of the COIP (2014) also provides for this. However, from the field study carried out, it has been concluded that there is a severe lack of prosecutorial diligence since, occasionally, there is a reversal of the burden of proof of the third requirement of the article in question, referring to the indications of insufficiency of non-custodial precautionary measures.

In this sense, although the national law is clear in stating that it is the prosecutor who has this burden of proof, in the Flagrancy Units analysed, the defendant is given this obligation on certain occasions. Consequently, to avoid the burden of a pre-trial detention order, at least 19% of the individuals prosecuted present documents for justifying their

future appearance. However, there is no foreseeable judicial opinion on the assessment of these documents.

Precisely, the lack of uniformity in the validity given to social roots generates violations of rights. However, the Constitution of Ecuador includes the principle of equality before the law in Article 11, which provides for the same rights and opportunities for all, in practice, the vast degree of discretion and subjectivity that exists concerning "arraigo social" places those subject to prosecution in a situation of total inequality before the law. For this reason, a person's freedom of movement is respected or restricted, not according to the established rules, but according to the judge's criteria regarding the validity of social roots.

As a result, the constitutional right to legal certainty, provided for in Article 82 of the same body of law, which provides for the existence of prior rules and respect for constitutional provisions, is also violated. The practical application of the "arraigo social" produces legal uncertainty on both sides of the proceedings, both for the victim and the defendant, as it prevents the existence of foreseeable rulings on the grounds for the imposition of pre-trial detention.

3.3 Ineffectiveness of pre-trial detention

It should not be forgotten that one of the most severe problems faced by pre-trial detention orders is the uselessness that they reflect in some cases. Mainly because they fail to achieve the purpose they are intended to safeguard the criminal process by ensuring the defendant's appearance.

In 6% of the cases analysed in the second chapter, it was found that prison officers, who should be responsible for

transporting the detainee to all the respective hearings, failed to do so despite being adequately notified.

Consequently, on the one hand, they violate the rights of the individual being prosecuted, who is forced to remain in prison - longer than necessary - to resolve his or her legal situation, without any basis whatsoever and due to a simple act of negligence in the fulfilment of his or her duties. On the other hand, they also violate the victim's rights, who do not receive a prompt or timely response from the State, but rather justice is postponed and delayed, with unnecessary and unjustifiable delays.

Before concluding, it should be made clear that the problem of the indiscriminate application of pre-trial detention does not end with its use, but that in addition to generating rights violations, it is also a direct cause of prison overcrowding.

In Ecuador, more than a third of persons deprived of liberty does not have a conviction. That is, they are being prosecuted and cannot defend themselves in freedom, even though statistics show that the majority of human beings do not manage to emerge victorious from the system and that the negative consequences that it produces anchor them decisively to a stigmatised lifestyle (Rojo, 2016).

The national service for the comprehensive care of adults deprived of their liberty and adolescent offenders (SNAI) has published the following statistics in this regard:

Table 1: Average monthly prison population 2020

Reporting month	Average ppl sentenced	Average ppl processed	Average ppl per offence	Average ppl total	Effective installed capacity	Missing places	% Overcrowding
January	23.449	14.370	37.819	39.180	29.463	29.463	32,98%
February	23.553	14.554	38.107	39.526	29.463	9.667	34,16%
March	23.777	14.786	38.563	39.778	29.463	9.668	35,01%
April	23.552	14.947	38.498	39.087	29.463	9.665	32,66%
May	23.332	14.386	37.718	38.102	29.463	9.659	29,32%
Annual Average	**23.533**	**14.625**	**38.158**	**39.132**	**29.463**	**9.668**	**32,82%**

Elaboration: Directorate of Planning, Investment, Monitoring, Plans, Programmes and Projects - Statistics Unit.

Source: Administrative registers of the centres of deprivation of liberty.

According to the table above, of the total number of persons deprived of liberty for crimes, up to May 2020, which were 37,718 (100%), at least 14,386 (38%) did not have a conviction but were deprived of liberty due to a pre-trial detention order, which contributed to the 29.32% of existing prison overcrowding. Precisely because, according to the Report on the Use of Pretrial Detention in the Americas (IACHR, 2013), prison overcrowding is due, among others, to the massification of the application of this personal precautionary measure and increases due to judicial delay in resolving cases within a reasonable time which, as stated above, can occur due to the non-transfer of the processed subjects to the hearing that allows their legal situation to be resolved.

4. CONCLUSIONS

Precautionary measures are mechanisms for securing criminal proceedings that limit the persons allegedly responsible for the criminal conduct. Their primary purpose is to avoid procedural risks that could frustrate the process and the effectiveness of the jurisdictional resolution. They can only be imposed if two conditions are duly accredited: fumus boni iuris and periculum in mora. The former refers to the appropriateness of the conduct carried out under the offence, and the latter concerns the existence of a substantial danger that prevents the correct development of the criminal proceedings.

These procedural safeguards are measures of a strictly precautionary nature. They apply to a legally innocent person (as there is not yet a conviction against him/her) for the sole purpose of safeguarding the proceedings. They are also temporary, restrictive, exceptional and instrumental, which means that they only operate within a certain period, subject to compliance with the relevant legal requirements and that they do not have an end in themselves, but are a means to ensure the effectiveness of the criminal proceedings. In addition, they must always be imposed by a competent judicial officer as they represent limitations on the person's rights to whom they apply. Thus, they are mechanisms of state interference that are limited and sustained under the principles of legality, immediacy, celerity and proportionality.

There are two types of precautionary measures: real and personal. The former applies to the assets of the defendant, and the latter applies directly to the defendant. Given that the object of the present investigation falls within the second class of measures, it should be pointed out that, at the legislative level, six

different personal precautionary mechanisms can be imposed to guarantee efficient and effective criminal proceedings. Their fundamental purpose is to protect the victim's rights, the process and the serving of the sentence, primarily by ensuring the defendant's presence, the preservation and collection of evidence and a guarantee of full reparation.

The intensity with which personal precautionary measures diminish rights is different in each of them, especially if one compares the prohibition to leave the country, the obligation to report periodically to an authority, house arrest and the electronic monitoring device pre-trial detention.

Precisely, concerning the central theme of this research, pre-trial detention consists of the anticipated deprivation of liberty of a legally innocent person and is, therefore, the most severe personal precautionary measure. For this reason, it must be applied exceptionally, as a measure of ultima ratio, for a specifically determined period and exclusively in the situations provided for by law, obeying the principle of proportionality and the sub principles of appropriateness, necessity and proportionality in the strict sense, indispensable in order primarily not to excessively or illegitimately affect the fundamental right to liberty of the subject on whom it is applied.

The risk of absconding is one of the conditions for the imposition of pre-trial detention and must be accredited by the Public Prosecutor's Office in the request to apply this precautionary measure. The burden of proof rests with the Prosecutor's Office since it is the entity that asserts the need for pre-trial detention and the insufficiency of alternative measures to achieve the same end. Prosecutors must present

sufficient arguments and grounds to support their request and that, subsequently, the operators of justice must provide adequate motivation in the judicial order that provides for this precautionary mechanism.

While it is true that pre-trial detention can be imposed, in general terms, in any publicly actionable offence with a penalty of more than one year's imprisonment, this article has focused primarily on flagrante delicto. This allows for the immediate arrest of the person who has committed the criminal conduct because he has been discovered while executing it or immediately afterwards. Consequently, there is a tendency to think that the requirements to enable the most severe precautionary mechanism are satisfactorily fulfilled in flagrante delicto.

It is important to emphasise that, in the country, flagrante delicto is processed only in Flagrancy Units, institutions that work 24 hours a day, every day of the year, to avoid exceeding the maximum time the detained person can be held without trial (24 hours). The process begins with a hearing to qualify the flagrante delicto and the legality of the detention, to corroborate, among other things, that it is indeed a flagrante delicto and that the subject has not been detained for more than 24 hours. In this same hearing, the issue of precautionary measures is dealt with and, due to the principles of judicial efficiency and speed, special procedures can be applied.

In practice, in the Flagrancy Units of the Metropolitan District of Quito, the personal precautionary measure of pre-trial detention is imposed in more than half of all cases, making it clear that day-to-day basis, it is not a measure of last resort. From the analysis of procedural cases in the second period of 2019, it has been concluded that the prosecutor rarely

demonstrates the risk of absconding and that, on occasions, it is the defendant who is - incorrectly - given the burden of proof of his or her permanence and future appearance at trial. Consequently, in practice, the absence of documents proving social roots is automatically understood, by some of the public officials involved, as a factor that enables the judge to impose pre-trial detention.

Likewise, it is mainly evident that the precautionary measure is useless on certain occasions because the person deprived of liberty is not transferred to the hearings. Furthermore, there is no adequate justification for the request and the order of this precautionary mechanism, but simply a textual reference to the specific article of the relevant legal body.

Because of the above, it is clear that the current application of pre-trial detention is far from the legal mandates and does not receive exceptional treatment. In addition to violating the right to legal security, by demanding obligations that do not exist in law (social roots) which place the defendant in total uncertainty and do not allow him/her to expect a predictable ruling, mainly because each judge evaluates the documents of social roots at his/her discretion; it also violates the right of the victim to prompt and timely justice, under unjustified absences of the defendant deprived of liberty, which is due to a lack of control of the centres where he/she is being detained.

The social arraigo should be used, but not in the way it is currently used: by inverting the burden of proof, violating the principle of legality and the right to defence and legal security of the accused. Only through an impartial body, materialised in

the form of a Pre-Trial Services Unit, for example, which does not provide inputs to the prosecution in order to massively imprison pre-trial detainees, nor which collaborates with the defence to encourage escape and impunity, but instead verifies the information obtained and can also supervise compliance with alternative measures in cases where they have been imposed, is it possible to better guarantee their accurate compliance, encourage their application and reduce the use of pre-trial detention. Through this Unit and properly trained judges, prosecutors and public defenders, the problem of pre-trial detention could be significantly reduced.

It should always be borne in mind that the possibility of defending oneself at liberty is the rule in all criminal proceedings and that, therefore, the precautionary mechanisms that limit the rights of the individual being prosecuted to a lesser degree should be given priority over those that limit them to a greater degree, because deprivation of liberty is the exception. It is not possible in daily practice to deprive a person of liberty to know whether they should be deprived of liberty. In other words, the request for pre-trial detention cannot be spontaneous but must be sensible, reasonable and well-founded, as must the order for its imposition. Otherwise, rights are violated, and the use of the most severe precautionary mechanism becomes disproportionate and unnecessary, as has already been exemplified throughout this research article.

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Cynthia Mishel Gudiño Flores
Independent legal researcher
Email: cynthigf98@gmail.com
City: Ibarra
Country: Ecuador
ORCID: https://orcid.org/0000-0002-8109-7275