

# PREVENTIVE HABEAS CORPUS AS A CONSTITUTIONAL GUARANTEE OF THE RIGHT TO LIBERTY IN LATIN AMERICAN LEGISLATION

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## ABSTRACT

*Jurisdictional guarantees are legal mechanisms that serve to enforce the enjoyment of human and constitutional rights. In Ecuador these guarantees are embodied by the Constitution of the Republic and the Organic Law of Jurisdictional Guarantees and Constitutional Control. One of these rights is the right to freedom, the right of every human being to act according to his will, respecting the law, values and the rights of others. Freedom is a very broad right that has several meanings that makes it difficult to establish a single definition of this right, however, to ensure the freedom of those citizens who are illegally, arbitrarily and unjustly detained, as well as to safeguard the life and personal integrity and other related rights of the detainee, the legislature has established habeas corpus, as a legal action that can be observed not only in Ecuadorian law but also in several countries. Some States have divided habeas corpus in order to broaden its scope and objective. The purpose of this article is to conduct a study of preventive habeas corpus in order to establish similarities and differences in this jurisdictional guarantee within the Latin American context.*

**Keywords:** Jurisdictional Guarantees, Habeas Corpus, Right to Liberty, Personal Integrity

## INTRODUCTION

The countries that make up Latin America are mostly located south of the American continent; others are in the places called the Caribbean. They are called Latin American countries because their language originates from Latin, they are states that at one time were colonies of European countries such as Spain, Portugal and France, there are more than 40 countries including Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Puerto Rico, Dominican Republic, Uruguay and Venezuela, each of these nations have their own characteristics, customs and traditions.

Access to justice in Latin America has different nuances, however, in most countries it has become an obstacle for the development of the people, the lack of credibility and the inadequate application of the norms causes the violation of fundamental, human and constitutional rights, rights that are dead letter, written in a document called Constitution.

In Ecuador, constitutionally, all Ecuadorians including foreigners legally residing in the country, without any discrimination have as a guarantee the full security that their rights enshrined in the Constitution and International Treaties are respected, for this to be effective, the citizens have legal mechanisms called jurisdictional guarantees, which "have as purpose the effective and

immediate protection of the rights recognized in the Constitution and in the International Instruments of human rights" (Constituent Assembly, Organic Law of Jurisdictional Guarantees and Constitutional Control, 2018), when for some circumstance those rights that by constitutional mandate are enjoyed by all persons in the Ecuadorian territory have not been respected or in turn have been undermined.

The violation of one of the rights by a public authority, judicial or common person, causes legal, social and economic effects that lead to legal actions that seek full reparation to the victim, up to the deprivation of liberty of the person who has incurred in that violation, despite this, according to Benavides & Chavez (2013), in Ecuador, there have been cases that have caused serious violations of human rights, such as the case of the Restrepo brothers, of Consuelo Benavidez, of the ten of Luluncoto, the Texaco case, the Sarayaku case, the cases of the states of exception, and lately the case of the 80 dead and decapitated in the prisons of Guayaquil, Cuenca and Latacunga, among others facts that have violated the rights of the victims, especially the right to life and liberty.

One of the rights protected at the national and international level, is the right to freedom, the same that, being polysemic, is complex to define; the right to freedom encompasses other rights such as: the right to "profess religious belief, the right to freedom of information, the right to freedom of expression, freedom of transit and residence" (Political Constitution of the United Mexican States, 2018), eminently human rights "considered as fundamental rights of persons" (Villanueva, 2011).

To talk about the right to freedom in Ecuador and in several countries in Latin America, it is important to refer to the jurisdictional action of habeas corpus, a guarantee that, in addition to being stipulated and regulated in the legislation, is guaranteed and enshrined in international treaties, considered as one of the oldest guarantees to protect various human rights, but especially the right to freedom that has been violated since the time of the kings until the era of democratic governments.

In this sense, to guarantee, the respect for the right to freedom specifically there is the jurisdictional guarantee of Habeas Corpus, which "aims to recover the freedom of anyone who is deprived of it illegally, arbitrarily or illegitimately, by order of public authority or any person, as well as to protect the life and physical integrity of persons deprived of liberty" (National Assembly, Constitution of the Republic of Ecuador, 2018), is a "protective instrument par excellence of the liberty and integrity of persons against undue detentions due to illegality or abuse of power" (Chiriboga & Salgado, 1995).

Habeas corpus is present in most of the constitutions of the countries of the world. The classification of habeas corpus in Latin America, indicate that "it does not have an identical evolution or the same characters, even when they keep similarities", for example, in several countries such as Argentina, Peru, Chile, to broaden the scope and objective of this guarantee of protection, they have made a division of habeas corpus that allows to observe the main or traditional habeas corpus, reparatory, restricted, corrective, corrective, prompt release, instructive, innovative, translational and preventive, each one of them with a specific purpose that gives sustainability to human and constitutional rights.

One of the strategies to avoid the violation of rights is prevention, in this case, the preventive habeas corpus, is "the right or guarantee that prevents a restriction or deprivation of the enjoyment of liberty, pursuing as its central objective, the elimination of the risk or danger that the injury takes place (Machado, 2010)", in other words, this type of habeas corpus, guarantees the accused the right that his freedom, life and personal integrity is not violated by the fact of considering that the accusation or accusation of a crime is illegal and arbitrary, as many cases that have occurred at the local level.

In the international legal system in which a person has been deprived of his or her liberty and after some time it has been demonstrated that the accused was innocent, a legal error that

causes irreparable damage, in order to avoid this type of judicial lightness, the preventive habeas corpus arises, a legal problem that is analyzed in this article.

## **THE JURISDICTIONAL GUARANTEES**

With the enactment of the Constitution of the Republic of Ecuador in 2008, Ecuador went from a Social State of Rights to a Constitutional State of Rights and Justice, a denomination that is not so easy to define, much less to achieve, because this new designation forces to radically change the educational, political, legal, economic, social and even ethical structure of the State, purposes that in the country instead of advancing has experienced serious setbacks that has caused the constant violation of human and constitutional rights, despite the existence of legal mechanisms that guarantee the effective enjoyment of the rights enshrined in international instruments and in the Magna Carta.

The legal mechanisms to guarantee the effective enjoyment of human and constitutional rights in Ecuador, according to the Constitution of the Republic are called jurisdictional guarantees and there are 6 of them (action for protection, habeas corpus, habeas data, action for access to public information, action for non-compliance and extraordinary action for protection), each of them with a specific objective and with a common goal, to guarantee and make effective the respect and fulfillment of rights.

Jurisdictional guarantees not only guarantee the protection of rights, but also ensure their fulfillment and prevent the infringement of one of them. The violation of a right enshrined in international human rights instruments or in the Constitution gives "rise to claims against the State in the event that such legal precepts of care and protection of the human being and his dignity have not been complied with" (Loor, 2020). For this reason, human rights organizations and the Ombudsman's office, urge the National Government to correct and punish those who are guilty of the recurrent prison crisis in Ecuador.

### **Principles Governing Jurisdictional Guarantees**

Jurisdictional guarantees are legal tools that are available to any national or foreign person to be used in order to enforce their rights enshrined in the Constitution. In the case of foreigners, the fundamental requirement to be able to make use of these legal mechanisms is to be legally residing in Ecuador. Jurisdictional guarantees in the Constitutional State of Rights and Justice are legal techniques of direct and immediate application, no conditions or requirements should be demanded that are not established in the Constitution or the law, they may be proposed orally or in writing, without formalities, and without the need to cite the rule infringed including the sponsorship of a lawyer will not be indispensable to propose the action. In this sense, the principles that support the jurisdictional guarantees "are the backbone of the entire legal system" (García, 2008). In the case of Ecuador this backbone is the supremacy of the constitutional rule over any other of the legal system.

The principles on which jurisdictional guarantees revolve in the country are embodied in Art. 4 of the Organic Law of Jurisdictional Guarantees and Constitutional Control, within these principles axiological propositions are observed that make the application of these regulations more flexible, with the objective of ensuring and guaranteeing constitutional rights. At the same time, they serve as a mechanism to interpret the rules written in the law and demand immediate compliance with the constitutional provisions, these principles are:

a) Due Process: it is considered as a general principle of law applicable in the development of any legal process, it is constituted in the "set of guarantees provided in the legal system, through which the protection of the individual is sought (...) so that during its processing

their rights are respected and the correct application of justice is achieved" (Ramirez, 2018). The objective of due process is to qualify the legality of a judicial proceeding and guarantee a transparent and integrated administration of justice, without delays, discriminations, where the principle of equality before the Law prevails and an impartial, fair and independent sentence is established. In order for this to be effective, due process as it grants constitutional and legal guarantees to the procedural parties, such as:

- Principle of legality and typicality,
- Presumption of innocence, the right to be judged in accordance with pre-existing law,
- The in dubio pro reo principle,
- The right to have evidence obtained or acted upon in violation of the Constitution or the law be invalid and without evidentiary value,
- Proportionality between offenses and criminal sanctions; and,
- The right to defense.

b) **Direct application of the Constitution:** This principle is a derivation of the new legal paradigm called Constitutional State. Its essence lies in the fact that the Constitution is the supreme rule and is consistently used directly when dealing with rights, guarantees and procedures, bringing with it legal effects that are procedurally valid because they are in harmony with the constitutional rule.

It can be inferred that the operators of justice, administrative authorities and public servants are the main parties obliged to comply with them; however, this exercise can also be carried out by the beneficiaries in order to establish the effectiveness of the regulations, this being one of the main principles within a judicial process.

c) **Free constitutional justice:** This principle states that any person may access the justice system at no cost, *i.e.*, the judicial procedure is free, therefore, no fee or value will be charged in the justice system. This provision obliges the State to pay for the access and service of the administration of constitutional justice to guarantee effective judicial protection and not to leave the parties in defenselessness, as determined by Art. 75 of the Constitution (2020), "Every person has the right to free access to justice and to the effective, impartial and expeditious protection of his rights and interests, subject to the principles of immediacy and celerity; in no case shall he be left in defenselessness. Failure to comply with judicial rulings shall be punished by law. The pro bono does not cover the payment of professional fees of private attorneys or experts, as well as the costs inherent to the technical defense, since these amounts must be paid by the parties to the proceeding.

d) **Initiation by party's demand:** This principle refers to the fact that the justice system is activated from the presentation of the petition (demand), signed by the alleged affected party through a public or private defender, which will be presented before the competent authority, who upon verifying the legal requirements will grant the corresponding judicial proceeding. Without this impulse, the justice system cannot be activated, hence the importance of the individual or collective presentation of the petition for the defense of constitutional rights.

e) **Ex officio impulse:** It constitutes a new role of the justice operator within the constitutional framework, where "(...) the judge, on his own initiative, adopts measures aimed at avoiding the paralysis of the process" (Sotomayor, 2016). In other words, the judge, without any pressure whatsoever, activates the judicial process through a series of procedural acts until it reaches its completion.

The purpose is to find a prompt solution that, if applicable, would eliminate the infringement of the petitioner's fundamental rights; and, in the event that the infringement of such rights is not demonstrated, the case will be dismissed.

f) Direction of the process: This principle determines that all operators of justice at the time of holding hearings, have the duty of control, *i.e.*, they are responsible for directing the judicial processes that are processed in their jurisdiction, having the great responsibility of installing the hearings, giving the floor to the plaintiff and the defendant, granting a prudent time for their allegations, asking clarifying questions and ending the respective hearing.

g) Conditional Formality: under the prescription that "constitutional justice may not be sacrificed by the mere omission of formalities" (Organic Law on Jurisdictional Guarantees and Constitutional Control, 2018), it is described in an obligatory manner that, justice operators have to adjust formalities to the legal system. The main objective is to protect the rights that govern the constitutional processes, with the main objective of obtaining justice.

h) Double instance: The legal basis of this principle is established in Art. 76 numeral 7 literal m) of the Constitution of the Republic of Ecuador, related to the right to defense and the right to challenge, which considers the possibility that a judicial decision of a judicial operator *a-quo*, be reviewed by a judge *ad-quem*, with the objective that such decision be modified by the existence of vices that affect the judicial decision; or, that it can be ratified to verify its legality.

i) Motivation: All judges are obliged to express the true reasons for their judicial decision, otherwise their judicial decision would be null and void. Taking into consideration that "there will be no motivation if the resolution does not state the legal rules or principles on which it is based and does not explain the relevance of its application to the factual background" (Constitution of the Republic of Ecuador, 2019). Hence the importance of this judicial duty in order to guarantee due process.

j) Effective comprehension: Although it is true that technical and legal terminologies are present in court rulings, they must be perceptible and understandable to the community, because when read they must be understandable to avoid confusion. This information always has a relationship between the factual and legal grounds, *i.e.*, there must be a connection in which the veracity of the judicial decision can be observed.

k) Procedural economy: According to the author, Sotomayor Rodríguez (2016), "the principle of procedural economy is defined as the application of a utilitarian criterion in the empirical realization of the process with the least possible wear and tear of the jurisdictional activity" (p. 168). By such virtue, this principle is related to three principles:

- a) Concentration, aimed at directing a greater number of judicial acts in the procedural stages, dedicating more time to the judicial case;
- b) Speed, where optimum results in less time prevail; and
- c) Sanitation, for the validation in omission of formalities.

l) Publicity: Constitutes one of the essential principles that governs within a Constitutional State, it is applied by means of the oral system in which the presence of the interested persons and procedural parties prevails in each of the judicial proceedings. In order to exempt the principle of publicity, it is important to consider the principle of privacy or the principle of security of the State, under the motivation of the case.

m) *Iura novit curia*: This principle presumes that the judge knows the law, because he is qualified for this purpose, therefore, it is considered that "(...) the constitutional judge from the activation of a jurisdictional guarantee is empowered to base his decision on constitutional provisions, even if the parties do not expressly invoke them" (Decision No. 010- 09-SEP-CC, 2009). Always under the conjecture that the procedural parties have the obligation to prove the facts sued and the justice operator is in charge of adjusting them to the law, leaving this great obligation in the hands of the justice operator.

n) **Subsidiarity:** This principle allows the use of other principles described in the Constitution of the Republic of Ecuador, as long as they are adjusted to the jurisdictional guarantees. In this way, it does not invade the process of constitutional justice, but rather seeks the use of other principles of a similar nature with the purpose of constituting a reinforcement mechanism in judicial decisions.

### **The Role of the Justice Operator within the Jurisdictional Guarantees**

Justice operators are all public officials and servants who "intervene in the justice systems and perform essential functions for the respect and guarantee of the rights of protection and due process" (OAS, 2013), among them are judges, public defenders, prosecutors, experts, sponsoring attorneys and others who have the function of preventing, investigating, prosecuting, punishing and repairing persons who violated and were subject to the violation of a human, constitutional and legal right.

In a Constitutional State of Rights and Justice, judges in all judicial proceedings and matters are obliged to apply directly and immediately the provisions established in the Constitution of the Republic of Ecuador, having a supremely guaranteeing role, in which they uphold the absolute validity of the rights, guarantees and fundamental principles enjoyed by all citizens. In this type of State, all justice operators are called judges of constitutional guarantees and are dressed to act with impartiality and independence, guaranteeing access to transparent, impartial, efficient, effective and integrated justice.

The hermeneutic function of constitutional judges is carried out through the methods and rules of interpretation set forth in Article 3 of the Organic Law of Jurisdictional Guarantees and Constitutional Control, which sets forth 8 provisions for the resolution of judicial proceedings, all of this under the theory of legal argumentation in order to support their judicial decisions under objective criteria, not subjective criteria, allowing the coherent explanation of its decisions under a natural and plausible language, which does not contradict what is stipulated in the Articles 424 and 425 of the Constitution of the Republic of Ecuador, which refers to the supremacy of the Constitution and the hierarchical order of laws.

Alexy (2000) points out that the role of the constitutional judge revolves around weighting, which estimates three steps to be said: degree of non-compliance or prejudice of a principle, verification of the importance of the realization of the contrary principle, and the importance of the realization of the contrary principle that justifies the prejudice or non-compliance of the other. In the country, the Constitution is the supreme rule that is above any other rule, except for the International Treaties and Conventions on Human Rights that have the same hierarchy as the Magna Carta. In this sense, the weighting is an interpretation technique to measure or counterbalance the principles of equal value, which are in conflict of law, with an optimization based on fundamental rights problems, therefore, the result, is a right that prevails and another that does not apply. In this regard, the ruling of the Constitutional Court, Ruling No. 146-14-SEP-CC, issued in case No. 1773-11-EP, states:

In such circumstances, constitutional judges, understood as guarantors of rights, have the constitutional obligation and duty to provide an effective constitutional guarantee to persons whose rights have been violated by any act or omission. To achieve this task, judges have an active role in the new Constitutional State of Rights and Justice, which is not limited to the substantiation of jurisdictional guarantees observing the conventional processes, but also to the establishment of parameters aimed at the entire social audience for the effective guarantee of the rights established in the Constitution, as the supreme rule that governs our entire legal system, (...). In this sense, the Constitutional Court has repeatedly pointed out that the operators of justice have the duty to carry

out a verification of the violation of constitutional rights and not to evade its responsibility of being the guarantor of rights, denying without any basis whatsoever this jurisdictional guarantee.

According to the above, judges are obliged to carry out a constitutional review and verify whether or not there is a violation of a constitutional right, the judge cannot become a mere spectator of the process, nor fail to apply the constitution, must be guarantor of rights and verify in all cases the violation or not of rights, that is, they are the main actors and the first called to ensure, protect and guarantee the effective enjoyment of citizens' rights, to make effective a harmonious society free of violence.

### **Jurisdictional Guarantees in the Ecuadorian Legal System**

Twentieth century constitutionalism allowed for a transcendental change, overthrowing the old dogma of the omnipotence of the legislator and generating a democratic sense of the rule of law. Jurisdictional guarantees constitute a mechanism to exercise the protection of fundamental rights, assigning "the jurisdiction a function of guaranteeing the citizen against violations of any level of legality by the public authorities" (Ferrajoli, 2010). The scholar Julio César Trujillo Vásquez (1994) describes that "legally, guarantees are mechanisms that the law makes available to the individual so that he can defend his rights, claim when they are in danger of being violated or unduly restricted and, finally, obtain redress when they are violated" (p. 10). Jurisdictional guarantees are techniques and legal instruments that the legislator set forth in the Constitution so that any person or group of persons may use them to enforce their rights; likewise, they are constitutional mandates that oblige the operators of justice to act in a transparent manner in order to ensure judicial equality and equity. In Ecuador these jurisdictional guarantees are 6.

**Protective Action.** - Protects and guarantees the violated rights that are not included in the action of habeas corpus, habeas data, access to public information, action for non-compliance and extraordinary protection. It is stipulated in Article 88 of the Constitution of the Republic of Ecuador and Articles 39, 40, 41 and 42 of the Organic Law of Jurisdictional Guarantees and Constitutional Control.

**Habeas Corpus Action.** - Protects the right to liberty, the right to life and physical integrity of individuals and persons deprived of liberty, including the rights related to these constitutional and human rights that have been affected by an authority or by individuals. It is determined in articles 89 and 90 of the Constitution of the Republic of Ecuador and articles 43, 44, 45, and 46 of the Organic Law of Jurisdictional Guarantees and Constitutional Control.

**Action for Access to Public Information.** - This legal mechanism guarantees access to public data that has been denied, incomplete or altered, except for confidential information. It is set forth in Art. 91 of the Constitution of the Republic of Ecuador and Articles 47 and 48 of the Organic Law of Jurisdictional and Constitutional Control Guarantees.

**Habeas Data Action.** - Guarantees access to personal data held in public institutions or contained in natural or legal persons. It is stated in Article 92 of the Constitution of the Republic of Ecuador and Articles 49, 50 and 51 of the Organic Law of Jurisdictional Guarantees and Constitutional Control.

**Action for Non-Compliance.** - Guarantees the application of norms of the legal system and mandatory compliance with judicial rulings or reports of justice operators, whether national or international. It is stipulated in Art. 93 of the Constitution of the Republic of Ecuador and Articles 52, 53, 54, 55, 56 and 57 of the Organic Law of Jurisdictional Guarantees and Constitutional Control.

**Extraordinary Action for Protection.** - It is a constitutional mechanism for the defense of constitutional rights violated in final judicial decisions or orders, provided that ordinary and

extraordinary remedies have been exhausted. It is set forth in Article 94 of the Constitution of the Republic of Ecuador and Articles 58, 59, 60, 61, 62, 63 and 64 of the Organic Law on Jurisdictional Guarantees and Constitutional Control.

### **THE RIGHTS OF FREEDOM**

Defining freedom and the rights of freedom is complex because of the polysemic level that the terminology assumes, however, when speaking of freedom is referring to the power that the person has to do or not to do in an autonomous and responsible way what he thinks. Everybody is free to decide, choose and do what is good and bad, it is clear that when we choose to do what is considered bad and unlawful, this conduct will bring community and judicial problems. Under these previous considerations, the rights of freedom, are rights that emanate from natural law that are inalienable, transferable and inalienable, in them predominates the self-determination of people, placing him as the owner of his existence, who has control over himself, thanks to the ability to decide, but under the criterion of responsibility over their actions. In the Constitutional State of Rights and Justice, the rights of a person end when the rights of the other person begin.

The Dictionary of the Royal Spanish Academy (2020) describes freedom as the "natural faculty that man has to act in one way or another, and not to act, so he is responsible for his actions" (p. 1). Locke said that freedom is "a state in which men are in perfect liberty to order their actions and dispose of their possessions as they see fit, within the limits imposed by the law of nature" (2010). In democratic systems, the objective is to guarantee freedom while respecting the right of the society in which it inhabits. The Constitutional Court of Ecuador (2015), when referring to the right to freedom, states:

A condition and characteristic attributable to every human being, by the fact of being such; the very essence of the person, which allows him/her to choose, direct and realize his/her life project, both in his/her intimate sphere and in a social context, with no other limitations than those established by the constitution, the law and the rights of others. Thus, freedom makes possible the personal self-determination, as well as the materialization of the will in the sense of when and where to go or stay; so much so that the State has to provide the necessary protection for its exercise. (p. 12).

Discernment that operates under a constitutional legal framework, attributable to individuals for the sake of their free development. However, it is necessary to indicate that there are individual freedoms such as: freedom of thought, mobility, privacy, expression, religion, among others; and, likewise, there are collective freedoms such as: free association, demonstration, assembly, etc., which are enshrined in the laws, mainly in the Constitution of each State.

### **The right to Freedom in International Conventions and Treaties**

International Human Rights Conventions and Treaties in Ecuador have the same hierarchy as the Constitution. As normative instruments, they state a series of obligations and rights for Ecuadorian citizens, state parties, in general, on rights referring to the international sphere, which is born through the voluntariness of the intervening parties and their commitment to the applicability of such instruments in the internal system of each country. It is for this reason that, at the international level, the right to liberty, as a fundamental right of each person, is embodied in various regulations, which have been signed and ratified by the Ecuadorian State, such as the Declaration of the Rights of Man and the Citizen, the Universal Declaration of Human Rights, American Convention on Human Rights, International Covenant on Civil and Political Rights, and the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.

## Personal Freedom

It should be noted that, "traditionally, the right to personal liberty has been understood from the perspective of physical liberty (freedom of movement). However, the Inter-American Court of Human Rights IACHR (2017), has given it a broad content, which is also associated with the possibility of self-determination" (p. 3). The right to personal freedom constitutes the power of each citizen to make his own decisions, without suffering, obstacles or interruptions, as long as his behavior is in accordance with one of the lawful conducts permitted by law. Each person has the positive capacity to direct his decisions within social coexistence.

Aristotle (2016), in his studies, states that freedom is based on the act of voluntariness and autonomy; that is, that man from his origin is free and acts rationally, through 3 fundamental actions "the freedom to act, the freedom to will and transcendent freedom" (p. 7). That is to say, that man develops without ties through a social arrangement, which allows his acceptance in the collectivity.

The right to personal liberty has a very important guarantee that is stipulated in Art. 77 numeral 2 of the Constitution of the Republic of Ecuador. However, this right, within the context of freedoms, is not applicable and used in a direct way by the beneficiaries, since represents one of the most violated rights, either by private individuals or by representatives of the justice system, who attempt to restrict it through a series of judicial mechanisms, such as the excessive and disproportionate use of pretrial detention and arrests.

## THE HABEAS CORPUS ACTION

Imperial Rome, undoubtedly, left a series of contributions to the classical model of law, because the inhabitants who were unjustly detained had the power to appear before the Praetor (magistrate of jurisdiction) to be heard and, if their argument was considered, to be released. However, the terminology of habeas corpus was first used in the 12th century, specifically in England, in various provisions such as: the Charters of Liberties and of the Church, the Magna Carta of John Landless and in the English Law. Transcending to the North American system in the XVIII century, and received by diverse systems of Latin America in the XIX century, with the ideal of stopping the abuses of the monarchy, enlivening the equality of all human beings and allowing the protection of the right of personal freedom against the abuse of the monarchy of arbitrary detentions.

In Latin America, the first country to include habeas corpus in its constitutional text was Argentina 1863, followed by Honduras, 1865; Chile, 1891; Peru, 1897; Cuba & Puerto Rico, 1898; Panama, 1904; Uruguay, 1918; Bolivia & Costa Rica, 1931; Venezuela, 1947; Colombia, 1964. In Ecuador, in the preliminary constitutional texts, they did not have the jurisdictional guarantee of habeas corpus, in the Political Constitution of March 26, 1929. This guarantee was incorporated when it was considered that a person was unduly detained, processed or imprisoned, context that was resolved by the Mayors. However, the transcendental advance of habeas corpus arose with the enactment of the Constitution of the Republic on September 28, 2008.

Etymologically, the Latin term habeas corpus means possess your body, giving the idea of recovering possession of the body of the person deprived of his liberty. It is an action of jurisdictional guarantee, which allows to exercise the control of legitimacy over the detention of a person deprived of liberty, considered illegal, arbitrary or illegitimate, and also applicable in case of violation of the right to personal integrity and life of the PPL, which is why the competent authorities must resolve in a mandatory and urgent manner, the legal situation of the persons who are being affected. In this regard, the Constitutional Court of Ecuador states:

As can be evidenced, according to what is determined in Article 89 of the Constitution of the Republic, at the national level, the scope of this guarantee is expanded with respect to what is established at the international level, to the extent that in addition to ensuring the legality of detention and the deprivation of liberty that begins with it, it protects the life and physical integrity of individuals deprived of liberty (Judgment No. 247-17SEP-CC, 2017).

While the Inter-American Court of Human Rights, in Advisory Opinion OC-8/87 - Habeas corpus under suspension of guarantees (Arts.27.2, 25.1 and 7.6 American Convention on Human Rights, states:

Habeas corpus, in order to fulfill its purpose of judicial verification of the legality of the deprivation of liberty, requires the presentation of the detainee before the competent judge or court under whose disposition the affected person is placed. In this sense, the function of habeas corpus is essential as a means to control respect for the life and integrity of the person, to prevent his disappearance or the indetermination of his place of detention, as well as to protect him against torture or other cruel, inhuman or degrading treatment or punishment (Inter-American Court of Human Rights, 1987).

Under these legal postulates, it is not necessary to comply with formalities or requirements of a complex nature, much less that it be filed by the person directly affected, but it can be filed by any person who knows of this affectation. It may be filed by any person who is aware of this affectation. It does not require the payment of fees, nor the legal sponsorship of a public or private attorney and it may be filed orally or in writing. The term for the filing of the habeas corpus petition does not operate, that is to say, that the habeas corpus can be filed during the time that the threat to the right to personal liberty, life and personal integrity lasts. For this reason, the only term is for the constitutional judge, who must resolve it in 24 hours maximum, with the purpose that the right of the affected person does not continue to be violated. Within this sphere and according to the provisions of Art. 89 and Art. 90 of the Constitution of the Republic of Ecuador, habeas corpus, contain 3 categories for its origin, which are detailed below:

a) Illegal, arbitrary or illegitimate detention, the Constitutional Court of Ecuador, as the highest organ of control, interpretation and administration of justice, has determined that:

In relation to illegal deprivation of liberty, this can be defined as that ordered or executed in contravention of the express mandates of the norms that make up the legal system. Arbitrary deprivation of liberty, on the other hand, is a deprivation of liberty ordered or maintained without any other basis than the will or whim of the person ordering or executing it. Lastly, illegitimate deprivation of liberty is that which is ordered or executed by one who has no power or competence to do so (Ruling No. 247-17-SEP-CC, 2017).

This makes it possible to differentiate between terminologies in order to avoid mistakes and consequently to be able to determine and specify in which of these detentions a person is deprived of his or her liberty.

b) Protect the life and physical integrity of persons deprived of liberty: The reality in the prison system is sad and critical; inside these centers of deprivation of liberty legal goods such as freedom, physical integrity and even life are affected, because "prison units are not characterized by respecting or enforcing respect for the rights of prisoners. On the contrary, they are controlled, punished, duties are omitted to be fulfilled by officials, they are domesticated" (Tebe, 2011). It is for this reason that habeas corpus operates for the protection of fundamental rights, allowing the PPL to comply with his sanction, since the fact of being deprived of his liberty is not a justifying cause for the irruption of his rights.

c) Disregard of the place of deprivation of liberty: cataloging it as a possible forced disappearance that requires and obliges the immediate location of the whereabouts of a missing person, with the purpose of preventing possible extrajudicial executions, being necessary the presence of the public force and the corresponding ministry, since it is understood that this disappearance has been the product of the negligent action of a state agent or in turn of a private individual under its acquiescence.

### **Purpose of Habeas Corpus**

Detention is an exceptional measure; however, when an arbitrary and unjustified detention occurs, habeas corpus operates with the primary objective of recovering the right to life and liberty of all persons, without distinction of any nature. Habeas corpus has three specific purposes:

a) Redress: since any person deprived of his or her liberty in an illegal, arbitrary or illegitimate manner may request an examination of the legitimacy of these aspects to regain their freedom.

b) Preventive: when the person is in imminent danger of being illegally deprived of his physical liberty, therefore, it is necessary to verify these circumstances that threaten the right to liberty, being pertinent a cessation of such restrictions.

c) Corrective: because it allows solving the violation of the right of personal freedom that has suffered the affectation and on other rights that come from the same.

Habeas corpus is characterized by a simple, fast and efficient procedure. This procedure follows the following sequence: filing of the petition, drawing of lots and designation of the competent judge, qualification, citation and designation of the day and time for the hearing, hearing to determine the factual and legal justification for the detention, oral sentence, and appeal before the Provincial Court of Justice or National Court.

### **Types of Habeas Corpus in the Latin American Legislation**

The analysis of Latin American doctrine and legislation allows to identify the following types of habeas corpus:

Classic: Also called traditional, which operates when any person or authority illegally or arbitrarily restricts the liberty of a person or when an attempt is made against the personal integrity of a person deprived of his or her liberty.

Collective: Also called generic, which is one that is brought by a plurality of persons.

Related: Proceeding against violations of rights related to the fundamental right of individual liberty or against situations that are not provided for in the other types of habeas corpus.

Corrective: Also referred to as improper, aimed at protecting the good treatment of persons deprived of their liberty, in accordance with the principle of human dignity.

Short-term: Also known as translative, the purpose of this action is to allow a person deprived of liberty to complain against the delay in the issuance of a judicial decision or report that may benefit the person deprived of liberty, generally, this action occurs in the appeals.

Clarifying: Also called instructive, it is applicable in the case of forced disappearance of persons in order to obtain information on the fate of the person and consequently grant his or her freedom.

Preventive: Aimed at preventing a certain and imminent threat of deprivation of liberty and that this would result in a violation of the constitutional norm.

**Reparatory:** This mechanism refers to that which is intended to "attack that detention or deprivation of liberty in an illegitimate manner, which has already been consummated or is in danger of being consummated" (López, 2011).

**Restricted:** also called as accessory or unlimited, has as its main objective "to prevent behaviors of any kind that are infringing on the right of freedom" (Castro, 2017), such as when a person or groups of people are monitored and persecuted by attacking their right to free mobility.

**Innovative:** It is the legal mechanism that is presented before the judicial authority so that the judge, in accordance with the law, punishes the agent who violated the right to liberty. "It is a request that, even when the violation of freedom has already ceased, as well as the threat, the conditions or situations that originated in the past such affectation, should not be repeated" (Espinoza, 2014).

**Translative:** This type of habeas "is mainly linked to the reasonable term that must be taken into consideration in any judicial process, being understood not only under substantive aspects in order to guarantee effective judicial protection" (Vivar, 2020; and that according to the doctrine must be assessed per specific case: "the complexity of the matter, the procedural activity of the interested party, the conduct of the judicial authorities and the affectation generated in the legal situation of the person involved in the process" (Gonzalez, 2017).

### **Habeas Corpus as a Guarantee of Animals' Right to Life and Liberty**

Life and liberty are two fundamental rights for the integral development of any living being that inhabits the earth. One of the significant advances that Ecuador has when considering itself as a Constitutional State of Rights and Justice, is the recognition of Nature not as an object but as a subject of rights, in this context, one of the rights that is constitutionally recognized to the Pachamama is the right to respect its existence integrally. In order for Nature to exist and develop integrally, it requires respect for its interrelation with all living beings (humans, flora and fauna). This interrelation obliges humans to respect the life and freedom of animals. In this sense, since the mistreatment and death of an animal is considered a crime, any person or group of persons can use habeas corpus to avoid this punishable action.

By recognizing that life is reproduced and realized in nature, it is accepted that every living being that develops in the Pachamama has rights related to life and freedom. In this sense, countries such as the United Kingdom, Austria, Croatia, Bosnia, Herzegovina, Bulgaria, Costa Rica, Israel, Singapore, Bolivia and Croatia, among others, prohibit the use and breeding of animals for industrial purposes. At countries such as the United States, Argentina, Colombia, Brazil, habeas corpus have been filed in favor of animals on the grounds that they are also rights holders; while nations such as France and Chile are proposing "to incorporate a new legal category for living beings of other species called sentient living beings" (Chible, 2015).

In Ecuador contraventions such as abandonment and minor animal abuse are punished with community activities and the crimes of abuse with injuries or that cause the death of the animal, zoophilia or dog fighting are punished with 2 months to one year in prison according to the Organic Integral Penal Code (2019). On the other hand, the Organic Environmental Code (2018) aims to guarantee people the right to live in a healthy and ecologically balanced environment, as well as the protection of the rights of Nature. Finally, by recognizing Pachamama as a subject of rights, all elements found within it, including flora and fauna, must be recognized and protected, which leads to express that "the rights of animals have an intimate relationship with the rights of nature developed in the Constitution of Ecuador" (Vaca, 2020). Under these factual and legal grounds, it is concluded that any person, community, people or nationality, including the *amicus curiae*, may file a habeas corpus to ensure the effective enjoyment of the right to life, liberty and integrity of animals

that are locked up in homes, circuses and zoos, and of course, preventive habeas corpus could be filed to prevent these unlawful and moral actions.

### PREVENTIVE HABEAS CORPUS

It is a constitutional action of English origin, whose purpose is to protect physical freedom from a certain threat of restriction that is about to be executed, in such a way, this type of habeas corpus, is appropriate when the capture or detention has not yet occurred, but there is a certain risk that this will occur, in this regard Rosales (2015), points out that the preventive habeas corpus proceeds when there is evidence "with certainty the existence of a well-founded fear that threatens the intention to deprive a person of his freedom" (p. 40). For his part, Araya Vega (2017) states that this legal mechanism "may be used in cases in which, although the deprivation of liberty has not materialized, there is a certain and imminent threat that it may occur" (p. 7).

In this sense, it is observed that the main requirement for the filing of preventive habeas corpus is that the person is not deprived of his liberty, on the other hand there must be a decision ordering the execution of the detention, *i.e.*, when there is an arrest warrant issued by the judges, which has not yet been enforced. On this issue the National Court of Justice has stated that: "a person may be restricted of his freedom and not deprived of it, in which case, if this restriction of his freedom has connotations of special gravity or dangerousness, it would give rise to habeas corpus in its typology of preventive habeas corpus; therefore, for habeas corpus to apply, it is not essential that the person is already effectively deprived of his freedom (Resolution No. 393- 2015, 2015). The Constitutional Court of the Republic of Colombia, says: "the possibility of exercising a preventive habeas corpus is contemplated, understood as the mechanism aimed at averting a certain threat of irregular deprivation of personal liberty which, however, has not yet materialized" (Sentence C-187/06, 2006), specifically preventive habeas corpus is applied when there is a real threat against physical liberty. Internationally, it is typified in Art.7.6 of the American Convention on Human Rights, which describes:

In those States Parties whose laws provide that any person who is threatened with deprivation of his liberty has the right to recourse to a competent court or tribunal for a decision on the lawfulness of such threat, such recourse may not be restricted or abolished. The remedies may be brought by himself or by another person (OAS General Secretariat, 1978).

In Ecuador, preventive habeas corpus is not specifically established in the current Constitution; however, upon reviewing Art. 43 of the Organic Law of Jurisdictional Guarantees and Constitutional Control, it is evident that habeas corpus is generally intended to protect any restriction of freedom, expanding the possibility of exercising the right to exercise the right of habeas corpus.

However, judges at the time of resolving this type of cases strictly adhere to the provisions of the Constitution, without observing the supremacy of the human rights law and reject the filing of preventive habeas corpus, an example of this reality is the case of the Isaías brothers and that according to Diario El Universo (2019), the Plenary of the Judiciary Council (CJ) resolved to dismiss the judges members of the Specialized Criminal Court of Guayas, for having made an inexcusable error by granting preventive habeas corpus to the defendants. In spite of this, several judges, taking refuge in "new internationally recognized legal doctrines, have accepted the preventive habeas corpus so that someone is not detained when it does not correspond, issuing rulings that exceed the textual interpretation of the laws and the Constitution itself" (López, 2019), other justice operators have accepted the preventive habeas corpus so that someone is not detained when it does not correspond, based on the block of constitutionality, which states that constitutional norms that do not appear directly in the constitutional text (preventive habeas corpus) can be applied as supra-legal norms.

The Constitution of the Republic is not a closed text, since it allows a reference to international human rights treaties and conventions ratified in Ecuador, which have the same hierarchy as the Magna Carta and are above any other legal norm or act of public power. In this sense, international norms have 3 effects: a) that the international instruments prevail over domestic legislation; b) that they can be considered as parameters of constitutionality; and c) that the internationally protected rights can be enforced, allowing to solve the aspect of internal hierarchy, as well as to harmonize horizontally the internal state law with the international human rights law. Thus, if the constitutional norms do not appear concisely in the constitutional text, as is the case of preventive habeas corpus, it is considered that it can be applied as supra-legal norms, because the Constitution allows a reference to international human rights treaties ratified by Ecuador. In such virtue, the operator of justice, before the knowledge of a preventive habeas corpus action, is obliged to base his decision taking into account the stipulated in the American Convention on Human Rights that welcomes the preventive habeas corpus. Likewise, it can be accepted alluding to the provisions of Art. 417 of the Constitution which indicates that international human rights instruments ratified by Ecuador, are part of the legal system, being applied under the principles pro human being, principle of non-restriction of rights, direct applicability and the principle of open clause, additional Art. 427, is clear in determining that the interpretation of constitutional norms, are adjusted in the most favorable sense to the rights and general principles of interpretation, in accordance with the duty of the Ecuadorian State to guarantee the effective enjoyment of the rights determined in the Constitution of the Republic, especially the rights considered as fundamental, human and constitutional such as the right to life, liberty and personal integrity.

## CONCLUSION

Preventive habeas corpus according to doctrine, jurisprudence and international standards, if it guarantees and prevents that person is detained illegally since with the application of a block of constitutionality there is no need to wait until a person is detained to enforce the guarantee of habeas corpus, especially if there are well-founded reasons to demonstrate that an order of deprivation of liberty is flawed and illegal.

The preventive habeas corpus guarantees the right to personal freedom, with the condition and particularity that the affected person has not been deprived of his freedom, therefore, this constitutional guarantee is activated when personal freedom is about to be broken, intrinsic right with which is born not only every human being but every non-human living being, being relevant its defense and protection through the appropriate judicial mechanisms, but now that the Organic Law of Jurisdictional Guarantees as well as the American Convention on Human Rights allows its applicability in Ecuadorian legislation.

The Constitution of the Republic of Ecuador, in accordance with the Organic Law of Jurisdictional Guarantees and Constitutional Control determines 6 jurisdictional guarantees, each of which serves as a legal mechanism to make effective the enjoyment and defense of a right that is guaranteed in the national legal system, as well as in international conventions and treaties; actions that will be resolved by means of the sound criticism of the judges who guarantee the fundamental rights of citizens and nature, legal criteria that must be in accordance with the law and observing the principle of supremacy of the norm.

## REFERENCES

- Alexy, R. (2002). Fundamental rights, weighting and rationality. *Ibero-American Journal of Constitutional Procedural Law*, 11, 3-1.
- Araya, A. (2017). How many types (typology) of habeas corpus may exist?

- National Assembly. (2020). Constitution of the Republic of Ecuador. Quito: Lexis.
- National Assembly. (2018). *Organic Law of Jurisdictional Guarantees and Constitutional control*. Quito: Lexis.
- Jhoanna, C. (2017). *Habeas Corpus as a mechanism for the protection of personal liberty in Ecuador*. Quito, Ecuador: Central University of Ecuador.
- Constitutional Court of Ecuador. Sentence No. 010-09-SEP-CC, 0171-09- EP. 2009. Quito, Inter-American Court of Human Rights. Case law booklets of the Inter-American Court of Human Rights No. 8: Personal Freedom. San José de Costa Rica, Costa Rica: Inter-American Court of Human Rights. 2017.
- Inter-American Court of Human Rights. (1987). Advisory Opinion OC-8/87. Habeas corpus under suspension of guarantees (Articles 27.2, 25.1 and 7.6 American Convention on Human Rights. San José, San José, Republic of Costa Rica: Inter-American Court of Human Rights.
- María, C. (2015). *Introduction to Animal Law*. Elements and perspectives in the development of a new area of Law. *Ius et Praxis Magazine*, 2, 2016, 373 – 414.
- Ferrajoli, L., & Derechos, G. (2010). *The Law of the weakest (7th edition)*. (P. Andrés, & A. Greppi, Trans.) Madrid: Trotta S.A.
- Espinoza, R.B. (2014). *The Innovative Habeas Corpus: To avoid the violation of freedom or related rights in the future*. Lima. constitutional Court.
- González, A. (2017). *The reasonable term in the judgments of the Inter-American Court in relation to Colombia*. *Saber, Ciencia y Libertad*, 46-67.
- Locke, J. (2010). The liberal social contract. *Coherence*, 7(13), 99-132.
- Diana, L.P. (2011). *Habeas Corpus: Fundamental law and constitutional guarantee*. Medellín, Colombia: University of Medellín.
- José, G.F. (2008). *The Constitutional court and the extraordinary protection action in the new political constitution of Ecuador, (1st Edition)*, Quito- Ecuador.
- Hoyos, A., Blacio, G. (2018). *Jurisdictional guarantees and principles procedural procedures of constitutional justice, in Ecuadorian legislation*. *Magazine Ámbito Jurídico* N° 172.
- López, S. (n.d). Discussed application of preventive habeas corpus.
- Loor, Y. (2020). Jurisdictional Guarantees in times of crisis.
- Machado, F. (2010). Habeas corpus: Right of rights. *Journal of Criminis Studies*, 39(4), 99-110.
- Organization of American States. (2018). *American convention on Human Rights*. San José de Costa Rica, Costa Rica: Secretary General of the OAS. 1978. Executive Branch. Political Constitution of the United Mexican States. Mexico D.F.
- Ramírez, L. (2018). *Due process: Fundamental right*. In Varios, L. Canales, E. Duarte, & S. Cuarezma (Edits.), *Due process as a human right* (352). Nicaragua: INEJ.
- Organization of American States. (2013). *Guarantees for the independence of justice operators*. Towards strengthening access to justice and the rule of law in the Americas. OAS.
- Rosales, P. (2015). *Effectiveness of habeas corpus in the case of addicts deprived of their liberty in the city of Cuenca, as of 2008*. Cuenca: University of Cuenca.
- Sotomayor, G. (2016). *Constitutional and legal principles and their applicability in criminal and constitutional legal practice*. Riobamba: INDUGRAF.
- Tebe, M. (2011). Preventive habeas corpus and prison unit. *Legal Review of the Center*, 1, 1-12.
- Trujillo, J. (1994). Theory of the State in Ecuador. *Study of Constitutional Law*. Quito: National Publishing Corporation.
- Roberto, V. (2020). Reforms to animal abuse in the Comprehensive Organic Penal Code.
- Vivar Álvarez, Juan. (2020). Jurisdictional scope of habeas corpus.