PRECAUTIONARY MEASURE AGAINST INDIGENOUS PERSONS IN ECUADOR: AN ANALYSIS OF ITS CULTURAL AND LEGAL APPROPRIATENESS

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ABSTRACT

Objective: This article analyzes the appropriateness of pretrial detention when used as a precautionary measure in criminal procedures against Indigenous persons in Ecuador.

Theoretical structure: The theoretical framework is based on the doctrine of criminal guarantees and the conventional obligations of the Ecuadorian state, mainly from inter-American jurisprudence. The discussion is complemented by a critical analysis of positivism and the persistence of the colonialist vision in the institutionality of the criminal justice system.

Method: A doctrinal and jurisprudential approach is carried out, which is complemented with an analysis based on the ethnographic approach and interpretation of the normative as discourse.

Conclusion: With regard to pretrial detention, Inter-American law has developed standards that will be analyzed in the framework of cultural diversity, seeking to establish a few guidelines for an intercultural interpretation, in which Indigenous authorities may participate in the precautionary guarantees. Therefore, the Constitutional Court of Ecuador has rendered many judgments that adhere to intercultural guidelines for cases and trials against Indigenous peoples and nationalities.

Keywords: legal pluralism, interculturality, pretrial detention, legal anthropology.

MEDIDA PRECAUCIONAL CONTRA OS INDÍGENAS NO EQUADOR: UMA ANÁLISE DE SUA ADEQUAÇÃO CULTURAL E JURÍDICA

RESUMO

Objetivo: Este artigo analisa a adequação da prisão preventiva quando utilizada como medida cautelar em processos penais contra pessoas indígenas no Equador.

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Estrutura teórica: O referencial teórico baseia-se na doutrina das garantias penais e das obrigações convencionais do Estado equatoriano, principalmente da jurisprudência interamericana. A discussão é complementada por uma análise crítica do positivismo e da persistência da visão colonialista na institucionalidade do sistema de justiça criminal.

Método: É realizada uma abordagem doutrinária e jurisprudencial, que é complementada com uma análise baseada na abordagem etnográfica e na interpretação do normativo como discurso.

Conclusão: No que diz respeito à prisão preventiva, o direito interamericano desenvolveu normas que serão analisadas no âmbito da diversidade cultural, buscando estabelecer algumas diretrizes para uma interpretação intercultural, na qual as autoridades indígenas possam participar nas garantias cautelares. Portanto, o Tribunal Constitucional do Equador proferiu muitas sentenças que seguem as diretrizes interculturais para casos e julgamentos contra povos e nacionalidades indígenas.

Palavras-chave: pluralismo jurídico, interculturalidade, prisão preventiva, antropologia jurídica.

1 INTRODUCTION

In 1998, the Constitution of Ecuador incorporated two principles that acknowledged the cultural diversity present in the country: pluri-culturality and multiethnicity (Ecuador, 2008). As opposed to Ecuador being a dominant and homogenizing national culture, this version of the Constitution, in fact, captured the spirit
of diversity, as well as identity whose composition was defined by its cultural singularities, as evidenced by the aforementioned principles as they revealed diversity and the identities, institutions, and collective rights associated with it (Grijalva, 2008; Velasco Gómez, 2004).

In light of the pluri-national and intercultural nature of the nation, the 2008 Constitution incorporated diversity, allowing for the exercise of collective rights to be substantiated by propositions that seek to reclaim the exercise of said rights. The basis for the conceptual framework of this article establishes that pluri-nationality acts as a challenge to the current notion that Ecuador is **mono-national**. Therefore, this article aims for a model proposal for a political organization in favor of decolonization (Walsh, 2009). Interculturality is thought of as the strengthening of the relationship between different individuals, which is necessary to foster respectful interaction and promote Ecuador as a more inclusive nation. Such a thought is akin to an egalitarian concept of citizenry.

Thus, because both the existence and coexistence of the plurality of Indigenous peoples, nationalities, and nations within the territory of the country are acknowledged, the possibility for the construction of intercultural dialogue spaces as the mechanism to implement a pluri-national State has opened.

The principle of pluri-nationality challenges the notion that Ecuador is a mono-national and monocultural nation. However, in fact, it favors a model for a political reorganization that promotes decolonization, thus creating a rupture within the structures that have consolidated the current model. As a social analysis of the cultural diversity performed by researchers concluded, the Mexican experience demonstrated that in order for different cultural systems to be maintained (Bartolomé, 1997; Clavero, 2008; Díaz Polanco, 1981, 2006), they must give each other the “necessary conditions which stems from various doctrinal approaches that are “comprehensive and allow individuals to construct different views of the world, of the different purposes of their existence and concepts of what, for each individual constitutes a good life.” (Díaz Polanco, 2006, p. 17). Thus, these conditions would allow a necessary coexistence to occur.

Furthermore, interculturality necessitates the construction of a nation whose sociopolitical institutions are recast under laws that discern and confront “coloniality, racism and racialization, as well as inequality and the belief that Ecuador is merely a
single, monocultural nation” (Walsh, 2009, p. 27), that is, it seeks to make deep changes in the sociopolitical institutionality of the country.

This article aims to analyze the relevance of using preventive detention as a precautionary measure in criminal proceedings against indigenous peoples and nationalities; to do so, an approach will be made from a legal anthropology perspective, arguing the legal and jurisprudential aspects related to this measure, and, from the anthropological point of view, with the disturbance in the lives of people from indigenous peoples and nationalities.

With this, the cultural aspects involved in the social dynamics of cultural diversity will be discussed, for which, it is necessary to address this conceptual basis of discussion because incorporating an “ethical dimension” (Díaz Polanco, 1981) is pertinent to the analysis of the implementation of pluri-nationality and interculturality, above all in the realm of justice, where the enforcement of the Indigenous justice systems is limited (Cervone, 2009), and the national legislation still has a void in the coordination between the ordinary and the Indigenous justice systems.

Moreover, judicial matters show disparities in the acceptance of Indigenous authorities, traditional behaviors, differential penalties for detention, and economic, social, cultural characteristics. The foregoing clearly demonstrates a hierarchical relationship where the ordinary justice system’s positivist law prevails over the Indigenous justice system.

Within the limits to interculturality, procedures of the ordinary justice system such as pretrial detention reveal not only a gap in constitutional enforcement over the justice systems affiliated with Indigenous peoples and nationalities, but also the State's inclination toward punitivism.

The contribution of this article will be to raise the need to analyze the cultural elements of cultural diversity, in its context, where the expressions of the judicial system come to build punitive gaps for a real exercise of interculturality.
2 THEORETICAL FRAMEWORK

2.1 PRETRIAL DETENTION AND SENTENCING

In the doctrine of criminal law, pretrial detention is a precautionary measure that aims to achieve many goals: investigation; securing the development of trial; immediacy; and guaranteeing access to justice, which is the product of a tradition wherein punishment has been equated with the deprivation of freedom (Mir Puig, 2015, Nursaliyeva et al., 2023); also, it aims to guarantee a possible reparation financial or non-financial. Such justice is not considered a form of punishment, but rather a precautionary manner of denying the right to freedom; that is to say, a need to deprive the Indigenous peoples of their freedom with the intent of guaranteeing that the judicial process can take place with the due considerations of the right to defense, immediacy, and the right to a speedy trial, among others.

For Mir Puig, as it is an exceptional alternative, this recourse to this penalty should weigh the possibility of making reparations towards those who have been declared innocent after being wrongfully convicted after the criminal procedure or if there should be a dismissal, thus raising a need for compensation from the State due to “inflicted damage.” (Mir Puig, 2015, p. 725); although, in the practice this never happens.

Roxin suggests pre-trial detention as a recourse to those whose objective is to ensure the hearing process, or the criminal enforcement, be completed in full (Roxin, 1997), that is, to know the historical truth once the judgment in the judicial process has been rendered, and that the defendant, once convicted, shall serve the imposed sentence. In this sense, pre-trial detention allows for the development of the investigation to find the evidence by which the truth is constituted.

Although pretrial detention is a recourse of ultima ratio, its function has been in doubt, given the frequency in which it is imposed. Zaffroni challenges the punitive system established by the states of Ecuador because this has been enforced from the moment in which “a suspicion of crime is detected or assumed to be detected until a sentence is imposed and a sentence is therefore enforced” (Roxin, 1997, p. 31). If that is the case, then pretrial would not be an exceptional recourse, but rather the rule. Zaffroni views pretrial detention as a form of early sentencing, and because of it, it should be imposed only in cases where it is necessary to “interrupt a course of criminal conduct, disrupt a
criminal organization, when the suspect may tamper with evidence or threaten witnesses and when the nature of the crime is severe” (Wagner, n). In this analysis, limiting the suspect of their liberty and erodes the right to the principle of innocence and due process.

As it was mentioned, pretrial detention is a recourse that should be applicable only when there do not exist methods to guarantee the appearance of the defendant within the proceedings so that an effective trial may be conducted (A. N. C. Ecuador, 2008 Art. 77.1). Pretrial detention superimposes itself on many principles: proportionality to the crime; necessity; the right to counsel; the right to be considered innocent before a judicial sentence. The Ecuadorian Organic Criminal Code (OCC) establishes that the defendant does not have the obligation to present evidence that confirms their innocence (Andifitriiono et al., 2023); rather, it is the judicial authorities who “have to demonstrate guilt in the trial.” (Krauth, 2018, p. 10); due to the legal Ecuadorian framework which is an accusatory system and not an inquisitive one.

The OCC establishes many stipulations, beginning with there being “a sufficient amount of evidence” (Ecuador, 2014 Art. 534) for crimes that are subject to public prosecution and that they involve the person for whom detention is ordered), also, elements that indicate that other precautionary measures would not be effective in guaranteeing the defendant’s appearance in the trial, and in the event of serving the sentence. It is also considered in accordance with the type of crime, in this case the committed offense shall have a criminal penalty of more than one year of incarceration. By this, prosecutor has the obligation to demonstrate to the judge why the other precautionary measures are not efficient enough.

Pretrial detention has grounds for suspension: 1) when the circumstantial evidence or evidential elements that led to its imposition disappear; 2) when there is a dismissal or a ratification of the defendant’s innocence; 3) when the period of detention expires, or by declaration of nullity (Ecuador, 2014 Art. 535).

In this way, pretrial detention can be carried out by house arrest, or the use of an electronic surveillance device, when the investigated person is a pregnant woman, a senior citizen, or a person with either an incurable disease at its terminal stage, a severe disability, or a catastrophic illness, and others. Once the existence of one or more of the parameters stipulated above has been verified, the judge shall be able to revoke it.

Being so, pretrial detention is ratified as a precautionary measure, and, as it is one of the means of assuring the presence of a defendant at a judicial procedure, it must
be secondarily established, the most urgent situations being established in article 522 of the COCC: prohibition from leaving the country, periodic presentation before a trial judge, house arrest, and the use of an electronic surveillance device. That way, pretrial detention does not convert into rule, but rather it remains more precautionary than punitive.

2.2 PRETRIAL DETENTION, HUMAN RIGHTS, AND COLLECTIVE RIGHTS

In both the Constitution and international human rights treaties, the fundamental principle of innocence is established, and preventive detention is considered in the framework of a trial in a reasonable period of time (Conferencia Especializada Interamericana sobre Derechos Humanos, 1969). It is further established that pretrial detention is used to separate one person from other inmates, along with different treatment, during the time which the individual is not yet convicted (ONU Asamblea General, 1966).

In this sense, the international human rights treaties approach pretrial detention as a last recourse, given that it affects an important legal property such as liberty. Therefore, the aforementioned documents establish various requirements so pretrial detention can be considered an option, without ceasing to emphasize that it should be of ultima ratio.

It is necessary to emphasize that the principle of innocence is always the starting point, and because of it, the jurisprudence of the Inter-American Court has been emphatic in various cases such as Suárez Rosero v. Ecuador (Corte Interamericana de Derechos Humanos, 1997), López Álvarez v. Ecuador (Corte Interamericana de Derechos Humanos, n.d.), Chaparro Álvarez v. Ecuador (Corte Interamericana de Derechos Humanos, 2007), where it determined that pretrial detention should have limits on its legality, on the presumption of innocence, on its necessity and its proportionality (Corte Interamericana de Derechos Humanos, 2010).

For example, in Suárez Rosero v. Ecuador, pretrial detention exceeded the time of detainment predetermined by the sentence that was ordered to be served by the plaintiff. For this reason, the Inter-American court deemed such a series of events to be a situation of extreme severity due to the irreparability of the damages suffered by the plaintiff. The particularity of López Álvarez was the illegal detainment and the continuation of pretrial detention, and the absence of any evaluation and contradiction of
the evidence that would justify the plaintiff’s detainment. Thus, the Inter-American Court of Human Rights clearly established the following:

Pretrial detention is a precautionary measure, not a punitive one. When a person has been deprived of their freedom for an excessively prolonged period of time and criminal liability has not been established, which thus demonstrates the disproportionality in said case, the Convention is therefore breached. This equates to early sentencing.

(Corte Interamericana de Derechos Humanos, p. 77)

In Barreto Leiva v. Venezuela, the Inter-American Court established that the application of pretrial detention “should have an exceptional character, limited to the principles of legality, presumption of innocence, necessity, and proportionality.”

(Corte Interamericana de Derechos Humanos, 2009). In the judgment of Norín Catrimán et al. v. Chile (Corte Interamericana de Derechos Humanos, 2014), the Inter-American Court found that the victims were subjected to arbitrary pretrial detention whose effects limited the capacity of subsistence of the family nucleus, affecting their economic situation, given that the cultural particularity of the victims was that the father was the provider of the family.

Additionally, in relation to the guarantees to the rights that are in favor of the Indigenous as culturally diverse groups, in their judgment regarding Yakye Axa v. Paraguay, the Inter-American Court states that:

[...] to effectively guarantee these rights by interpreting and applying their internal regulations, the states of Ecuador must take into consideration the characteristics that differentiate the members of Indigenous peoples from the general public and indeed compose their cultural identity.

(Corte Interamericana de Derechos Humanos, 2005a).

As it can be seen, there exists a sufficient amount of Inter-American jurisprudence that addresses the different element that must be considered in analyzing the appropriateness of pretrial detention for members of Indigenous peoples.

As it has been developed up until this very moment, pretrial detention is a precautionary measure and not a punitive one. “When a person has been deprived of their freedom for an excessively prolonged period of time and criminal liability has not been established, which thus demonstrates the disproportionality in said case, the Convention is therefore infringed. This equates to early sentencing.
So, on this basis regarding the limits established by the Inter-American Court interculturality, legality, the presumption of innocence, necessity, proportionality, and exceptionality, it is important to address the collective rights of Indigenous peoples and nationalities. The principal sources that advocate and stipulate these rights are the following: 1) Convention 169 of the International Labor Organization (ILO), 2) the United Nations, and 3) Article 57 of the Constitution of Ecuador.

Collective rights are aimed at promoting and protecting the interests of the constituents of a collective. The constituents’ particularities must be weighed in, given that not only does the collective aspect of an individual construct the guarantees for their reproduction, but also the other aspects that facilitate their cultural continuity. Thus, in the absence of these guarantees, the development of the individual would diminish, and, therefore, would put them in a state of vulnerability. And so it is imperative that the states of Ecuador afford guarantees for the exercise of said collective rights.

One may conclude from the foregoing that guarantees are required as to not to adversely affect the sociocultural environment of an ethnic group. If the guarantees were to, the livelihood of an individual would be jeopardized, potentially destroying their bonds with others, for example. Thus, the ordinary penal system comes into direct conflict with the considerations and guarantees that should exist for the sake of cultural diversity.

Convention 169 establishes considerations for the customs, consuetudinary law, and institutions characteristic of the Indigenous peoples’, provided that they “are not compatible with the national legal system.”(Convenio 169 OIT, 1991 Arts. 8.1 y 8.2) Hence, the Constitution of Ecuador acknowledges the Indigenous justice systems (Ecuador, 2008 Art. 171), and, for that reason, it should allow for Indigenous peoples and nationalities to be prosecuted via justice systems pertinent to their own culture.

### 3 METHODOLOGY

This article carries out an analysis based on the normative and legal elements related to pretrial detention, referring to the dogmatic discussions of criminal law related to pretrial detention, and develops the discussion from a legal ethnographic experience, product of the authors' participation in the criminal justice field, both from litigation and from anthropological expertise in judicial processes. Thus, and given that the ethnographic method constitutes an important research tool to delve into the turbulent
socio-cultural scenarios that occur in criminal judicial processes, it allows for the development of a discussion regarding legal positivism and the constitutional principles of plurinationality and interculturality. In this way, the intercultural approach contributes to the understanding not only of the existence of normative elements and inter-American jurisprudence regarding preventive detention, but also to the discussion regarding the manifestations of culturally-based behaviors, which deserve to be considered by the judicial process so that the judicial action does not violate rights, but above all, allows the exercise of the constitutional principles of interculturality and plurinationality.

Although the dogmatic analysis and the existing inter-American jurisprudence expose the normative framework, it is necessary that this be developed also considering an analysis of the discourse, which is expressed through sentences and resolutions, and the conceptual burdens that they carry with them.

Thus, the discursive elements build domains of knowledge, for which reason, the ethnographic method in the theoretical field linked to the analysis from the dogmatic, has in social anthropology a space for the understanding of the discourse, and analyzing the interactions between the penal system and the cultural reality of diversity. Therefore, ethnographic analysis becomes a critical response to the use of positivist methods for legal analysis.

4 RESULTATS AND DISCUSSION

4.1 CRIMINAL GUARANTEES, CULTURAL DIVERSITY AND THE NEED FOR AN INTERCULTURAL APPROACH

The aforesaid notwithstanding, the non-Indigenous justice system imposed a limitation onto Indigenous justice, its jurisdiction, and over crimes against the person (Corte Constitucional, 2014). In other words, the non-Indigenous justice system, whether or not it enforces justice outside or within Indigenous territory, has influence on both Indigenous and non-Indigenous persons alike. Consequently, both the subordination of the Indigenous justice system to the ordinary justice system and the lack of guarantees for Indigenous peoples and nationalities to their collective rights of people are made evident (Díaz Polanco, 2006; Narváez Collaguazo, 2022a; Narváez Collaguazo, 2024,
Collaguazo, R., E., N., & Ortiz, M., M., G. (2024). PRECAUTIONARY MEASURE AGAINST INDIGENOUS PERSONS IN ECUADOR: AN ANALYSIS OF ITS CULTURAL AND LEGAL APPROPRIATENESS


Although Article 10 of Convention establishes non-incarcerative sanctions when there does not exist a conviction. This feels more forceful since the measure of deprivation of liberty is supposed to function as a preventive method (Convenio 169 OIT, 1991 Arts. 10.1 y 10.2).

Per court decision 113-14-SEP-CC, the Constitutional Court of Ecuador points out the obligatory nature of considering cultural diversity in all phases of the judicial proceedings, and that sanctions different from incarceration should be considered, a precept reinforced in Convention 169 of the ILO.

Furthermore, court decisions SAN-CC and 004-14-SNC-CC which were handed down in Amawtay Wasi University v. Ecuador and in Waorani v. Ecuador (Corte Constitucional, 2013, 2014a, 2014b), respectively, developed in great depth various guidelines to be adhered to in judicial proceedings against members of Indigenous peoples and nationalities.

The aforementioned court decisions recognize cultural diversity and, consequently, cultural particularities. Moreover, they also recognize that social groups, both whose special characteristics and aspects that must be known, exist in order to administer justice and guarantee the groups’ right to cultural diversity. The principle of pluri-nationality will hereby be executed once cultural diversity is recognized, and interculturality will be enforced when seeking understanding of that difference and the characteristic, cultural features germane to them.

Notwithstanding the foregoing, during the prosecutorial investigation stage, that is, once the arraignment hearing is held, the prosecutor's office requests pretrial detention for members of Indigenous peoples. In the several cases in which the author, Roberto Narváez, as an expert in forensic cultural anthropology, pretrial detention has been upheld against Indigenous persons in the absence of court orders to restrict their movement outside jurisdiction either due to these individuals’ inability to prove they have property on which to live or because their place of residence is located far from urban centers. In these cases, the monocultural vision is evident, but above all, the fact that neither conventionality nor the rulings of the Constitutional Court are considered in prescribing alternative measures to pretrial detention, which demonstrates the persistent gaps in the justice system with respect to interculturality.
The Constitutional Court indeed made a “development in progressive rights” (Corte Constitucional del Ecuador, 2014, p. 169) in the aforementioned cases. However, in this case, it also questioned the reason for why the authorities and institutions failed to enforce Convention 169, “bringing forth an evident incongruence in the legal life of the country.” By doing so, the court established the need for an intercultural perspective in judicial cases that are resolved here in Ecuador. The Amawtay Wasi ruling establishes standards for “all cases involve Indigenous individuals and or communities, which require parameters to be enforced through an intercultural perspective.” (Corte Constitucional del Ecuador, 2014, p. 172). These standards are historical continuity, cultural diversity, interculturality, and intercultural interpretation, which are the same ones that are related to the guidelines set forth by Convention 169.

With respect to the standard of historical continuity, even in the context of both colonization and a historical process wherein the states have violated the rights of the Indigenous populace, this parameter considers their identity as well as their cultural characteristics to be preserved in their totality or in part. Moreover, these cultural characteristics include, but are not limited to, their customs, language, social organization systems, traditions, worldview, and means of self-governance that distinguish them from the traditions of mainstream society.

Regarding cultural diversity, it is an acknowledgement of pluri-nationality as a principle wherein the different cultures present in the national territory are respected, including the various Indigenous peoples and nationalities, as well as their institutions and differences, which coexist with one another, possessing the same rights to live on the same territory.

The standard for interculturality refers to the constitutional principle of promoting relations and coexistence between the diverse cultural entities. The judgment of Amawtay Wasi v. Ecuador suggests the need to promote an “epistemic dialogue among the diverse cultural groups on the basis of equality.” (Corte Constitucional, 2013) Such a promotion is necessary in all procedures that involve either Indigenous individuals or collective groups. Thus, a conciliatory space of dialogue is then instituted among “the respective fundamental principles of the value systems of each culture. That is to say, these principles imply a relationship of correspondence between the different cultural positions, preventing the hegemonic perspective from transgressing the necessary equality.”
Reinforcing the preceding idea, this idea is derived from Boaventura de Sousa’s approach regarding diatopic hermeneutics (De Sousa Santos, 2002), wherein he establishes the incompleteness of the cultures and the desire that must exist to strengthen the concepts of dignity, whereby absolute values should be broken to find those gaps to be sustained from the open intercultural relationship.

Lastly, the standard for intercultural interpretation the court decision in question has done the establishing invokes an interpretive understanding of the reality through a lens that includes cultural diversity.

The principle of intercultural interpretation suggests the possibility of strategically using the recourses of consuetudinary law to ensure the function of justice for the Indigenous individual or collective group, considering the cultural differences and looking to reconcile them with the hegemonic majoritarian culture to which state law responds. (Ecuador, Corte Constitucional, 2013)

This judgment establishes rules to interpret the conceptual differences and assess value-based conflicts of dissimilar legal orders, the same ones that this judgment derives from the Colombian Constitutional Court; some rules are thereby configured with which to categorize the peoples and nationalities that may be subject to their own customs and those that should be regulated by state law.

The first rule refers to the prevalence of the Constitution and the laws over all individuals of the nation, with rights and guarantees such as material limits to the principle of ethnic and cultural diversity and limit to the value codes unique to that diversity. The second rule establishes an intangible scope of pluralism and of diversity that cannot be addressed by law, given that this would incur an attack on its rights and jurisdiction, without sacrificing protection of higher constitutional values. As the third rule, the impossibility of superimposing any law over one’s own customs without initially making an intercultural interpretation of the predominant value systems in cultural happiness. These rules establish both an intercultural and legal framework analysis, valuing the constitutional principles of both legality and diversity.

Following what has been established by the Inter-American Court, and from the directives for the eradication of pretrial detention as a form of early sentencing, a judicial authority should make a decision based on the “individualization of the defendants” (CIDH, 2017, p. 13); that is, they must identify the particularities of the defendant’s environment and the guarantees in order to ensure due process. But, above all, the judicial
authority must establish the cultural context of each case from an “exhaustive analysis, and not merely a formal one.” (Ibídem). Thus, a resolution can be made in a reasoned manner with sufficient elements for due deliberation.

From this both normative and conventional perspective, the Amawtay Wasi ruling, which recognizes a systematic infringement on the rights of the members of Indigenous peoples, “causing an evident incongruence in the legal life of the country,” as pronounced in court decision T-188/93 of the Colombian Constitutional Court, is unsurprising. (Colombia, Corte Constitucional, 1993).

Thus, via studies performed by experts specialized in this matter, cultural anthropology’s contribution takes the form of the development of the particular values (Geertz, 1996) that are implicit in the Indigenous justice systems. These values are linked to their means of social order and economic reproduction (Alcalde, 2017), as well as their connection to the natural environment. Additionally, these values start from their vision of the world, its symbolic aspects, daily profound rituals, found in everyday and domestic spaces, as well as sacred ones.

Fundamentally, and beyond the normative and conventional aspects, in general, for the Indigenous peoples, the break with their own means of social order and self-determination in the enforcement of their justice systems affects their internal dynamics by weakening the jurisdiction that the Indigenous authorities possess, even imperiling their persistence as societies, as their fundamental structures are family groups (Narváez Collaguazo, 2024, Narváez Collaguazo, 2020), and it is within or around them where conflicts occur.

Due to the foregoing, when there does not exist a resolution within the framework of their culture, the conflicts will remain and can give rise to fractures in the social structures, in kinship ties, in peoples’ own forms of alliances, or in other spaces, and especially, in the ability to self-determine and self-govern, affecting the constitutional principle of pluri-nationality (Narváez, 2018).

4.2 USE OF PRETRIAL DETENTION ON INDIGENOUS PEOPLES AND NATIONALITIES

Per the standards developed by the Inter-American Court of Human Rights, on the basis of both Convention 169 of the ILO and the United Nations Declaration on the Rights
of Indigenous Peoples, the Constitutional Court of Ecuador established in court decision 004-14-SCN-CC that pretrial detention must be of *ultima ratio*. In this case, said Court reasoned via an intercultural analysis that the matter of incorporating members of Indigenous peoples, whether they were in recent contact with the outside world or remain in isolation, affects their relationship with their communities. Hence, the Court states the following: “It is concluded that the use of deprivation of liberty as a sanction is not a suitable method to resolve existing conflicts between Indigenous communities that either have had recent contact from the outside “world” or have had no contact whatsoever (Corte Constitucional del Ecuador, 2014, p. 178).

Although the rulings issued by the Constitutional Court rely upon law, they incorporate analysis from the conventional analysis, therefore promoting an intercultural interpretation. However, they do not develop an analysis concerning the following: 1) the existing notions in Indigenous peoples and nationalities with respect to the deprivation of liberty, 2) the overall goal of sentencing; nor 3) the capacity of Indigenous authorities to manage their own social order. In this sense, the development of a jurisprudence is required that incorporates not only rights, but also cultural diversity, wherein one’s own authorities are acknowledged as well as their justice systems, and jurisdictional capacity, along with cultural measures for the punishment of sanction against the rupture of own’s social order.

Just as Nash (Nash, 2004) points out, the Inter-American system understands the legal pluralism present in the law of the Indigenous peoples by incorporating “cultural identity as a principle of legal rehabilitation that will be the basis for deep examination of the matters relative to the notion of people as individuals and as a collective subject, a framework that is characteristic of the Indigenous and tribal communities.” (Corte Interamericana de Derechos Humanos, 2005b). Henceforth, this extension leaves open the enforcement of the Indigenous jurisdiction as a guarantee that must be provisioned by the states of Ecuador. In addition, in Bámaca Velásquez v. Guatemala (Corte Interamericana de Derechos Humanos, 2000), the Inter-American system values the Indigenous worldview in order to comprehend and weigh the cultural consequences of a violation of rights beyond the direct or indirect repercussions that are individually considered.

Additionally, concerning the rights of the Indigenous peoples, one of the aspects established by the jurisprudence of the Inter-American Court for Human Rights sets forth
that as a guarantee vested by the nation, the Indigenous peoples must have their rights expressed in their own languages (Ruiz-Chiriboga & Donoso, 2014). The López Álvarez v. Honduras explicitly states that language is “one of the most important elements of identity of a people. Therefore, it guarantees the expression, diffusion, and transmission of their culture.” (Corte Interamericana de Derechos Humanos, p. 174) For these reasons, the use of one’s own language must be guaranteed in all stages of judicial proceedings. Therefore, the court should readily provide a translator or interpreter can who transfer information between the national language and the culturally diverse languages of the Indigenous peoples spoken at a given time, mediating the cultural differences during the process.

These elements are fundamental because, above all, they are gradually designing a series of standards based on the jurisprudence of both international standards for human rights and that developed by the Constitutional Court. Even though the ruling on Waorani v. Ecuador refers to members of peoples that were either in recent contact from the outside world or in complete isolation, in fact, said ruling sheds light on the purposes of the analysis of pretrial detention. In particular, based on a consultation remitted by the Orellana Court of Criminal Guarantees, legal enforcement and doctrine, said ruling establishes that a norm consultation serves to carry out an abstract control of constitutionality by jurisdiction, and therefore their interpretations are precedent, as they are legal norms that have a general, abstract, and obligatory scope.

Per the foregoing, in its abstraction, the Constitutional Court determined that the ruling has a general reach to Indigenous peoples and nationalities and establishes that the deprivation of liberty is not an ideal method. And so, as a result, due to the cultural particularity, its application was not appropriate.

In this regard, the ruling on Waorani v. Ecuador promotes intercultural analysis in cases where the Indigenous peoples are involved, in a way that this vision identifies the impact on communal life by separating an individual from their social environment in case of which a sanction of deprivation of liberty is determined. This ruling establishes four ways to “readapt the material nature of equality through principles, rights, and constitutional guarantees (Viteri, 2014), and that they are taken from the ruling of Amawtay Wasi v. Ecuador.

An identical treatment that shields the subjects of rights from the same circumstances; a treatment totally distinguishable to those who do not adapt
themselves to similar situations; equal treatment when the likenesses are superior to the differences; and a treatment differentiated that is configured when the divergences are more relevant than the similarities. (Ecuador, Corte Constitucional, 2013).

This way, various standards are constructed: although the Inter-American Human Rights System developed these standards to address pretrial detention, the jurisprudence of the Constitutional Court, however, wherein the necessity for an exercise in hermeneutics is established, seeks to understand cultural diversity and the need for an intercultural analysis based on four aspects: historical continuity, cultural diversity, interculturality, and intercultural analysis.

This, added to the guidelines for the materiality of equality, gives us some basic elements for the judicial authorities to consider an assessment beyond the formal at the time of deciding the deprivation of liberty of members of Indigenous peoples and nationalities.

The ordinary justice system should consider measures other than pretrial detention, precisely because the deprivation of liberty and the social rehabilitation centers ignore the particularities and the cultural diversity of the country. As a result, the cultural singularities that the Indigenous people embody in a homogenizing framework will cause their very identity to be ruptured.

Thus, pretrial detention does not consider the cultural particularities of an Indigenous person under investigation, as it exercises a systematic process of acculturation by confining said person in social rehabilitation centers that are managed in the framework of a dominant, mestizo culture. By doing so, pretrial detention quashes the Indigenous detainee’s sense of belonging and ethnic identity, isolating them from their own social patterns, and severing them from their community as well as from their own cultural percepts (Ávila Santamaría, 2008; Baratta, 2004; Narváez Collaguazo, 2020).

The framework of the Indigenous justice systems responds to their own necessities for investigation, sanction, and their own rehabilitation, under the principles of harmony, integrality, forgiveness, and rehabilitation, reconciliation and coexistence, restoration, balance, dialogue, spirituality, trust, truth and reparation, essential elements in the social construction and in the scaffolding of the social relationships (Encalada Falconí, 2013, 2016; Masapanta, 2009; Sánchez Botero, 2010; Sánchez Zorrilla & Zavaleta Chimbor, 2017)s. Hence, that is why the breakdown of these relationships actually harms the very dynamics of sociocultural reproduction.
Due to the foregoing, employing pretrial detention is not appropriate for members of Indigenous peoples and nationalities. From the start of the process, it is necessary that this be affected, for which a judicial authority must consider the criterions of: historical continuity, cultural diversity, interculturality, and intercultural interpretation. And, understanding this intercultural interpretation, via the material nature of the principle of equality, treatment in virtue of the existing conceptual differences and understanding; all of it over the basis formed from the opinions of anthropologists and sociologists that will provide the judicial authority the necessary elements to justify its decision.

It is important that the presence of the defendant during the development of the judicial proceedings be ensured. It is necessary that the authorities of Indigenous peoples and nationalities, communes and communities are incorporated with the objective that these be the ones who guarantee the presence of the prosecuted within the procedures, with other precautionary measures different from pretrial detention thereby establishing that they consider an intercultural action.

And so, it is necessary that spaces for interculturality be constructed, wherein the judicial authorities of the ordinary justice system converge along with the authorities of Indigenous peoples and nationalities. Therefore, following the constitutional precepts, it is necessary that a law that allows cooperation between the ordinary and Indigenous justice systems to be developed.

4.3 CHALLENGES IN THE FRAMEWORK OF AN INTERCULTURAL STATE

In 2021, the Constitutional Court of Ecuador issued Judgment No. 112-14-JH/21 (Ecuador, Corte Constitucional, 2021), which promotes the effective protection of the rights of the nationalities and indigenous peoples of Ecuador, and of their members. The judgment considers it essential to carry out an intercultural interpretation in two areas: on the one hand, of rights, and on the other, of guarantees.

The judgment analyzes the context of discrimination, inequality and exclusion, as expressions of a colonial system still in force; in the face of which, it promotes an equal relationship, in the field of justice, and respectful between the State and cultural diversity, through intercultural interpretation.

Thus, intercultural dialogue must consider a space for construction, either from cultural diversity and its own normative systems, or from the field of ordinary justice.
Therefore, from cultural diversity, the space for dialogue must be directed towards an interpretation of the norms, approaching the aspects related to the constitutional principles and guarantees, and those that come from the conventional field, such as international human rights treaties. On the other hand, from ordinary justice, this space must tend towards an understanding of the facts, of the conduct implicit in them, and of the cultural context in which these occurred.

In the case addressed in this article, and related to pretrial detention, this must also consider an intercultural interpretation, so as to reach an understanding regarding the risks and vulnerabilities of cultural diversity in relation to deprivation of liberty, and the social and cultural continuity aspects that could be put at risk if an analysis of cultural particularities is not carried out.

For this reason, it is important that the judicial authorities, following the guidelines established by Sentence 112/14/JH, incorporate into the evaluation process the spaces for intercultural dialogue established as standards.

The Court establishes two types of spaces that contribute to the construction of dialogue, the direct ones, which constitute on-site visits, hearings in the territory, or dialogue tables; and indirect ones, such as amicus curiae, translations or expert reports, with the aim of constituting a contribution to understanding between cultures.

Under these precepts, intercultural dialogue is proposed for the resolution of legal problems, where both individual constitutional rights and collective rights of the parties involved in a judicial conflict are considered; where equality prevails.

In an analysis of the relevance of pretrial detention for members of nationalities and indigenous peoples, it is necessary to consider collective rights, but also to carry out an intercultural analysis that allows for the identification of possible vulnerability in social and community dynamics, as well as possible ruptures with the territory and the concepts surrounding it, which could cause a socio-cultural impact, affectations to the traditional social dynamics and forms, and historical and cultural continuity of the person being prosecuted.

Therefore, it is necessary for the State institutions, in the area of justice, to carry out an exercise of intercultural analysis, which leads to the understanding of the cultural particularities of the social environment of the person being prosecuted. Thus, in these different notions between traditional indigenous thought and Western mestizo thought, an epistemic exercise is necessary, to which Sentence 112/14/JH invites us, in order to
identify the institutions of cultural diversity, which allow the solution of the conflict, within the framework of collective rights, and which ensure the participation of the authorities, both for the guarantee of appearance in the judicial process, as well as for the development of a process marked by an intercultural intervention.

5 CONCLUSIONS

The repressive actions of the State against antilegal actions committed by members of cultural diversity evince politics of homogenizing criminalization. Such politics are defended in the argument for equality before the law. Thus, as a precautionary recourse, pretrial detention exposes a repressive apparatus within the State, which must be replaced by an intercultural space that allows the authorities of the Indigenous peoples and nationalities to participate in the specific analysis and resolution of each case, seeking the enforcement of justice.

The need for an intercultural analysis opens the possibility of constructing an effective solution, or, at least, a different one, for the resolution of conflicts, where the punitive, discriminatory outlook does not take precedence and said solution will resolve on the basis of a new and dialogic model.

Although there exist important contributions in the decisions rendered by the Constitutional Court, these are not obligatory jurisprudence because they are only judgments with spillover effects, which do not regulate beyond the impugned relationship. Besides, these rulings do not deepen the construction of intercultural spaces, and above all, pluri-nationality, wherein the Indigenous jurisdiction is not subordinate to the ordinary justice system and has the enforcement capacity of its own justice systems, guaranteeing all those elements previously developed like those that aim to guarantee cultural continuity via interculturality and an intercultural analysis of each case.

Pretrial detention for members of Indigenous peoples and nationalities does not comply with cultural appropriateness. Rather, it violates the rights established by both the Constitution and international human rights treaties, and, above all, it breaks their own cultural forms, the social order systems of Indigenous peoples and nationalities, and the dynamics of relationship within the community. This understanding requires expertise from anthropologists and sociologists that that share an interpretation of the natural forms
of social order and conflicts that the irruption of the ordinary justice system creates within the communities.

It follows that, by acknowledging one’s own justice systems, one also considers that the Indigenous authorities are able to resolve internal conflicts on the basis of their traditions and impose measures that tend to sanction or punish those who disrupt the social order, under terms accepted and respected by members of the region or nationality. As a result, this breach still has not been closed by the nation of Ecuador, and moreover, it is identified as being maintained.

Although the Constitution of 2008 intends to promote open-mindedness regarding the diversities that exist in Ecuador, the enforcement of pluri-nationality and interculturality requires a procedure of changes in the structure of the nation. Hence, it is imperative that this procedure tend towards a social transformation that will serve to construct an Ecuador that allows for diversity to coexist with the exercise of one’s rights.

A gap the enforcement of full interculturality still persists, leaving the need to continue with the creation of equitable and non-subordinate spaces of interculturality, where equality will be what permits an open and full discussion for compliance with constitutional norms that are currently in effect.

Interculturality involves harmonizing or sustaining a bridge of communication between the mainstream society and the plurality of cultures that diversify the nation, based on a mutual, simultaneous, and respectful rapprochement with a positive interaction that establishes an open and transparent dialogue.

The types of conduct referred to as “criminal” must be analyzed in their particular cultural contexts, where the differences and an understanding of said differences are considered, acknowledging the diverse forms of the Indigenous peoples, communities, and nationalities.

The full enforcement of interculturality requires changes in the structure of the State. Because of that, the current Constitution is not the end of the road, but rather, its beginning, for which even deeper discussions that avoid the simple incorporation of “ethnic considerations” (Clavero, 2008) within the State and incline towards a social transformation are required. Indubitably, the construction of a State that permits cohabitation in diversity and the exercise of the rights of the native sociocultural groups, breaking any possibility that that convivence is converted into a “hybrid and mutually untranslatable cohabitation.” (Zizek, 1997).
Furthermore, judgment 112/14/JH invites us to analyze and consider the risk of a violation of rights, which may affect the cultural and historical continuity of the sociocultural context of the person or persons prosecuted belonging to indigenous peoples and nationalities, making it mandatory to consider the standards established therein.
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