

APPLYING THE CONDITIONAL SUSPENSION OF SENTENCE AND NON-OBSERVANCE OF PRINCIPLES AND VIOLATION OF RIGHTS TO LIBERTY AND CONSTITUTIONAL PROTECTION

Liliana Elizabeth Laica Tasinchana¹, Enrique Eugenio Pozo-Cabrera²

¹Universidad Católica de Cuenca, Cuenca – Ecuador,
liliana.laica.02@est.ucacue.edu.ec

²Universidad Católica de Cuenca, Cuenca Ecuador,
epozo@ucacue.edu.ec

Abstract

The objective of this research is to explain the importance of regulating two paragraphs of the Art. 630 of the Organic Integral Penal Code (COIP) on the conditional suspension of the sentence through the review of scientific data and theoretical basis, in order to ensure the principles and rights of constitutional protection. The research had an approach and level, analytical-synthetic, comparative-deductive, dogmatic, and legal, which helped to compare the legal precepts of a country, and analyze the norm of the conditional suspension of the sentence and its infringement on the constitution. Applying the technique of the interview, professionals of trajectory and important characteristics for the research. The results show that the second and third paragraphs of Art. 630 of the COIP, under the principle of legality the judicial past, undermines the non-observance of constitutional principles, likewise, manifested as another ongoing process, Ecuadorian law is clear, a person is innocent until proven guilty, matching the above to the existence of an ongoing process which means that the judicial future is uncertain, there is no decisive sentence, in the best case can be declared his innocence, but would lose his right to benefit from the benefit of conditional suspension of sentence, hereinafter SCP (Suspensión Condicional de la Pena). It was found that the personal background expressly stated in the application of the benefit does not comply with constitutional principles established in Art. 11, numeral 2 of the CRE (Constitution of the Republic of Ecuador), and that there is discrimination against the sentenced person due to his or her judicial background. It concludes by stressing that it is necessary to reform Art. 630 of the COIP, numeral 2 and 3, so that there is no non-observance of constitutional principles and violation of constitutional rights.

Keywords: Rule of law, sovereignty, equal opportunity, judicial judgment.

INTRODUCTION

The present research work is fundamental because it allows to know from a constitutionalist vision the non-observance of principles of application of the rights indicated in Art. 11.2; and, the violation of the rights of freedom consecrated in Art. 66.4 of the Constitution of the Republic of Ecuador 2008, at the moment of taking advantage of the benefit of the SCP indicated in Art. 630 of the Organic Integral Penal Code, by the requirement of the second and third requisite.

The enjoyment of rights are principles established in each Constitution, thus, in its legal body of 1998, the state guaranteed access to justice to all its inhabitants, without any discrimination, in Art. 17. A decade later, it can be observed with the change of Constitution that this principle specifies in its Art. 11.2, that no one may be discriminated against because of their judicial past (...).

In the Criminal Procedure Code of 2000, there was the benefit of conditional suspension of proceedings, establishing basic requirements for its application, unlike the Organic Integral Criminal Code, which mentions several requirements that from the constitutional point of view do not observe principles and violate rights.

The central problem of the present issue is the application of the legal figure of the SCP, whose requirements according to No. 2 of the COIP, require that the sentenced person does not have another sentence or process in progress, or has benefited by an alternative solution in another case, being understood as a violation of the rights of freedom and constitutional protection, and non-observance of the procedural principle of innocence.

Finally, numeral 3 of the same normative body states that the personal, social and family background, as well as the modality and severity of the conduct, are indicative that there is no need for the execution of the sentence, but it does not comply with the principle of application of the rights established in Article 11.2 of the Constitution, which states that all persons are equal and shall enjoy the same rights and duties, no one may be discriminated against for reasons of judicial background.

In this line, the present study is based on the question: Does the lack of regulation of the conditional suspension of the sentence affect the non-observance of constitutional principles and violation of the rights of freedom and constitutional protection? The general objective is to explain the importance of reforming two paragraphs of Art. 630 of the COIP, on the SCP through the review of scientific data and theoretical basis to ensure the principles and rights of constitutional freedom.

In the first part of the research article, the SCP, the background, legal and doctrinal nature of principles and rights of constitutional freedom in Ecuadorian and Latin American legislation are theoretically founded. In a second section, the importance of regulating two requirements for the application of Art. 630 of the COIP is alluded to, through scientific data and theoretical foundation. Finally, the need to reform two requirements contained in the SCP in order to guarantee the principles and rights of freedom and constitutional protection will be determined.

The present article results in the non-observance of constitutional principles established in Art. 11.2, at the moment of applying the benefit of the SCP. In addition, there is a violation of the constitutional rights of liberty Art. 66 numeral 4, rights of protection Art. 76.2, when interposing as requirements that the sentenced person does not have another process in progress; that the personal, social and family background, as well as the modality and seriousness of the conduct, are indicative that there is no need for the execution of the sentence, being mandatory the reform of Art. 630 of the Organic Integral Penal Code for the essential protection of fundamental rights, guaranteeing human rights and constitutional supremacy.

FRAME OF REFERENCE

American Convention on Human Rights

The states that are part of the American Convention on Human Rights must comply with the international commitments acquired such as advisory opinions, judgments, reports, and agreements issued by the Inter-American Court of Human Rights, respecting the rights and freedoms recognized therein, in order to avoid serious violations of human rights. As mentioned in the following articles.

The States Parties to this Convention undertake to respect the rights and free-doms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition (Convención Americana de Derechos Humanos, 1969)

One of the judicial guarantees states that “Everyone charged with a crime has the right to be presumed innocent until his guilt has been legally established; during the trial, everyone has the right, on an equal footing” (Convención Americana de Derechos Humanos, 1969).

As can be seen in the provisions described above, the member states must comply with and adapt their legislation in accordance with international standards, guaranteeing universal rights such as the right to defense in criminal proceedings, observing minimum guarantees of

equality, with the implementation of principles such as the presumption of innocence, among others.

Constitutional supremacy

The Constitution undoubtedly encompasses constitutional principles and rights, in this regard Oyarte (2021) states as follows:

It is the sovereign people who, in the exercise of their constituent power, establish the constitution in which the power of the State is organized to achieve its ultimate purpose of serving the people and promoting the common good. That is the political reason why the Constitution has supremacy over the power of the State and the positive legal order emanating from it. In short, the constitution is the foundation of the power of the state and of its normative system.

According to the aforementioned, the supreme norm whose purpose is to maintain superior legal norms and precepts of the rest of the internal ordering system. The effective application of the Constitution will contribute to the resolution of the empowerment of the state in a more social application. The Magna Carta is the source of the creation of the rest of the legal norms, which guarantee fundamental rights. According to Montoya (2017):

This means that even the constitutional norms themselves must be interpreted in accordance with the criteria that allow the broadest protection of human rights, going to the extreme of not applying those norms of constitutional rank that violate human rights (p.141).

Constitutional supremacy is one of the principles of a constitutional state of justice and law, in Judgment No. 155-14-SEP-CC implies compliance with rules, which obliges the public power to maintain conformity with the constitution, its non-observance will result in a result of legal ineffectiveness.

This principle of constitutional supremacy is closely related to the control of constitutionality and the control of conventionality, which aims to ensure that the decisions made by administrators of justice are made in strict compliance with current legislation and the protection of human rights.

Control of conventionality

It is a tool that intends that public officials (judges) and jurisdictional organs of justice administration apply their sentences in direct application of the American Convention on Human Rights. According to Rojas (2022):

Conventionality control consists of a legal mechanism that allows all legal operators and, as regards judicial control, both constitutional judges and ordinary judges, to contrast the domestic law of the States - including its interpretation and application - with international human

rights law and with the judgments and advisory opinions of the Inter-American Court of Human Rights (p.7).

In other words, the control of conventionality is nothing more than the verification of compliance with the norms and jurisprudence of the American Court of Human Rights and the internal legal system of its member countries, which makes it possible to verify the judicial actions of each state when they have violated human rights.

Constitutional principles

Canons imposed in the constitution that expresses or mandates, taking into account the essence, the sense of the function of the rights in order to make prevail the constitutional supremacy. The constitutional principles contribute to the application of the rights in an essential way. In the Ecuadorian state, as shown in the following table, the principles have undoubtedly been developing in favor of the citizens.

Table 1 Constitutional principles 1998 Vs. Constitutional principles 2008

Constitution of the Republic of Ecuador	
1998	2008
“Art. 17 The State shall guarantee to all its inhabitants, without any discrimination whatsoever, the free and effective exercise and enjoyment of the following rights (...)”	“Art. 11 No. 2 All persons are equal and shall enjoy the same rights and duties. No one may be discriminated against by reason of past legal proceedings”.

Source: (Constitución de la República del Ecuador [Const], 11 de Agosto de 1998)

(Constitución de la República del Ecuador [Const], 20 de octubre de 2008)

Prepared by: The author

Undoubtedly, the clarifications made in the current Constitution help to ensure that there should be no confusion that taking into account a person's judicial past is considered discrimination. Fundamental values and principles as the basis for the supremacy of the Constitution.

A Constitution lacking in principles generates disproportionate injustices, it is necessary not only to guarantee the competence and attribution of judges, but also the observance and adjustment to the fundamental principles. Constitutional systems coexist in addition to values and principles, social, cultural and ideological plurality, therefore, it is essential to provide elements that guarantee the application of rules for the benefit of citizens. (del Rosario-Rodríguez, 2011).

Equality and non-discrimination rights

An analysis carried out by the Constitutional Court with concurring vote analyzes that equality constitutes a principle *erga omnes* and *ius cogens*, contemplated in Article 11.2 of the Constitution of the Republic of Ecuador. That is, the right to equality implies the presumption that all persons in the same situation receive identical treatment; and, on the other hand, the prohibition of arbitrary treatment and discrimination.

Presumption of innocence

According to the Constitutional Court of Ecuador in Ruling No. 14-15-CN/19, the presumption of innocence is a fundamental right that assumes the guilt or innocence of persons. This principle helps to protect the arbitrary use of the punitive power of the State since throughout history there have been repeated violations of human rights.

On the other hand, in another judgment No. 53-20-IN/21, it departs from the general idea of the presumption of innocence, deepening that this principle is maintained “after” the criminal proceeding, even if there is a conviction, since other review remedies may be exercised afterward.

Conditional suspension of sentence

In the criminal legal system, both at the national and international level, there is the figure called conditional suspension of the sentence or suspension of the execution of the custodial sentence, among other appellatives, whose objective is to modify the form of compliance. The following is the criterion of several authors who state that:

One of the most commonly used legal instruments to interrupt the defendant's sentence is the conditional suspension of the sentence used in several legislations, whose procedure is based on the fact that the judge, once the defendant has been sentenced to a custodial sentence, suspends its execution. During this time the convicted person must comply with a series of conditions whose fulfillment will depend on the sentence not being executed (González Tascón, 2007).

As mentioned above, the SCP is subject to the fulfillment of several conditions that must be fulfilled, and as a result of its non-compliance, the sentenced person must serve the sentence in a social rehabilitation center.

It is a practice already implemented in several European countries, the adoption of which derives directly from the personal circumstances of the subject, with no prior record being a prerequisite. It should be specified that it would not be a matter of eliminating or leaving in the background the traditional notion of suspension and replacing it with the penalty, but that the latter would constitute another tool to impose on the offender the penalty and measures likely to promote his reeducation and social reintegration (Lafarge Turpín, 2019, p.45).

It is stated that in order to access the conditional suspension of the sentence it is not necessary as a requirement not to have a criminal record or a judicial past, because the purpose of this legal figure is to provide an early judicial opportunity for the reintegration of the sentenced person and not to impose custodial sentences that do not constitute a contribution to the Ecuadorian prison system, emphasizing that these prisons are saturated and that it also constitutes an expense for the state.

The SCP is a benefit “(...) that exists at the time of deciding on the suspension, either at the time of sentencing or subsequently in a reasoned order. Without prejudice to the fact that the rules most favorable to the defendant must always be taken into account as an essential principle of criminal law” (2017). From this point of view, the SCP was created in order to guarantee human rights for the benefit of persons whose sentence is interrupted by this legal figure.

Purpose of the conditional suspension of sentence

According to Álvarez (as cited in Muñoz Ruíz, 2014) “a reading of the benefit of conditional suspension of the sentence that limits its purpose to that of preventing certain persons, in the case of short sentences, from entering a penitentiary center due to the personal connotations that it implies” (p.469).

Meanwhile, other authors state that the purpose of the benefit of suspension is to help citizens who commit crimes for the first time, as long as the punishable act inflicted does not merit corporal punishment (Mejía Blanco, 1998). From the above, it is clear that the purpose of the conditional suspension of the sentence is to avoid the deprivation of liberty of the convicted person, to protect the individual from possible discrimination and social stigma and to protect human rights.

Conditional suspension of sentences, and its legislation in other countries

A criminal benefit granted by several Ibero-American legislations to sentenced persons is the serving of the sentence without interrupting their freedom (Rojas et al., 2021). According to this, the purpose is to prevent the sentenced person from suffering social stigmas as a result of the deprivation of liberty.

At the international level, this benefit is not homogeneous in Latin American countries. The various criminal laws provide for different sentences to be applied. The following are some examples: In Spain, it is established as shown in Table 2.

Table 2 Suspension of the execution of a custodial sentence

Legislation	Article 80 of the Criminal Code
Redaction	<p>N.2</p> <p>“1st That the convicted person has committed a crime for the first time. For this purpose, previous convictions for imprudent or minor offenses will not be taken into account, nor will criminal records that have been expunged, or should have been expunged in accordance with the provisions of Article 136.</p> <p>Nor shall any criminal record corresponding to crimes which, due to their nature or circumstances, lack relevance for assessing the likelihood of committing future crimes shall be taken into account”</p> <p>“3. Exceptionally, even if conditions 1 and 2 of the preceding paragraph are not met, and provided that they are not habitual offenders, a suspension of prison sentences not exceeding two years may be granted when the personal circumstances of the offender, the nature of the act, his conduct and, in particular, the effort to repair the damage caused, make it advisable to do so”.</p>
Difference/ Ecuador	<p>The judicial past is taken into account, unlike Spanish legislation, which does not take into account whether it is for minor offenses, or expunged criminal records. Etc.</p>

Source: (Spanish Penal Code, 2015)

Prepared by: The author

In Colombia, the legislative wording is as follows:

Table 3 Conditional suspension of the execution of the sentence.

Legislation	Article 63 of the Criminal Code
Redaction	<p>“The execution of a sentence of imprisonment imposed in a sentence of first, second or sole instance shall be suspended for a period of two (2) to</p>

	five (5) years, (...)”.
	“2. If the convicted person has no criminal record and it is not one of the crimes contained in paragraph 2 of Article 68A of Law 599 of 2000, the trial judge shall grant the measure based only on the objective requirement outlined in Paragraph 1 of this Article”
	“3. If the convicted person has a criminal record for an intentional crime within the previous five (5) years, the judge may grant the measure when the personal, social and family background of the convicted person indicates that there is no need for the execution of the sentence”.
Difference/ Ecuador	In Ecuadorian legislation, the legal figure can be filed in the first instance, and when it is not against the following crimes: sexual and reproductive apparatus, violence against women or members of the nuclear family or in the crimes of obstruction of justice, embezzlement, illicit enrichment, bribery, extortion, influence peddling, influence peddling, frontman, overpricing in public contracting; and acts of corruption in the private sector.

Source: (Botero, 2000)

Prepared by: The author

Regulation in Ecuador

Below, emphasis is placed on the numerals that are the object of study of this research topic, as contemplated in Article 630 of the Organic Integral Penal Code, linking them to the rights presumably violated established in the Constitution of the Republic (2008).

Table 4 Conditional suspension of sentence

Legislation	Article 630 of the Organic Integral Penal Code
Redaction	2. That the sentenced person does not have another sentence or process in force or has not been

benefited by an alternative exit in another case.

3. That the personal, social and family background of the sentenced person, as well as the modality and seriousness of the conduct indicate that there is no need for the execution of the sentence

Source: (Código Orgánico Integral Penal [Coip], February 17, 2021)

Prepared by: The author

Personal background, modality and severity of the conduct.

Martínez Ramírez (2019) states the following:

And speaking of the modality and seriousness of the conduct in accordance with the above, it can be said that the seriousness of the conduct must take into account the intensity of the actual or potential damage caused to the victim(s), focusing on the intensity of intent, premeditation or guilt (p.14).

This requirement presupposes precedents that violate the constitutional rights of the person who chooses the SCP. The mere fact that the personal, social and family background of the sentenced person is a mandatory requirement would observe principles and violate constitutional rights: Discrimination, liberty, freedom of movement, and the right to freedom of movement.

Table 5 Alleged non-observance of principles and violations of constitutional rights in the application of Art. 630 of the COIP.

COIP Art.630	Constitution of the Republic of Ecuador 2008
The execution of the sentence of deprivation of liberty imposed in the first instance sentence (...). “That the sentenced person does not have another sentence or process in force or has not been benefited by an alternative exit in another case”.	Violation of the right to equal justice, effective protection, due process. Inobservance of constitutional principles of application of rights art. 11.2, no one may be discriminated against because of his judicial past; violation of the rights of protection art. 76.2, every person shall be presumed innocent; inobservance of the guarantees and guiding principles of the criminal process art.5.4 innocence.

3.- That the personal, social and family background of the sentenced person, as well as the modality and seriousness of the conduct indicate that there is no need for the execution of the sentence.

Failure to observe constitutional principles of application of rights Art. 11.2, no one may be discriminated against on the basis of his or her judicial background Violation of the rights to liberty Art. 66 N. 4, right to formal and material equality and non-discrimination.

Source: (Código Orgánico Integral Penal [Coip], February 17, 2021).

Prepared by: The author

METHODOLOGICAL FRAMEWORK

Research approach and level

The research work on the application of the SCP and the non-observance of principles and transgression of constitutional freedom rights, was carried out through a qualitative approach by virtue of the fact that interviews were conducted with judges, prosecutors of the canton and professionals in free practice in criminal law. For the research level, exploratory research was used since there are no studies from a constitutional point of view on the subject.

Research methods, techniques and instruments

The research methods applied were the analytical-synthetic method that allowed the analysis of the SCP, principles and constitutional protection rights. In addition, the comparative-deductive method was used to compare the legal precepts of a country that has been effective in the application of the suspension with Ecuador, in addition to an analysis of violated rights from lower standards to the constitution. The dogmatic legal method that allowed analyzing the norm of the SCP and its injury to the constitution.

Therefore, the research technique used were interviews, which will allow gathering relevant information; and bibliographic review that will help in the conceptualization of issues, obtaining the support of the information.

Table 6 Professionals who use the conditional suspension of sentences.

Number	Position
1	Prosecutor's Office
2	Multicompetent Judge
3	Professional 1

Source: Own elaboration.

Prepared by: The author

DISCUSSION

In this research, to determine the importance of regulating two paragraphs of Art. 630 of the COIP on conditional suspension of the sentence, so that it observes the principles and guarantees the rights of constitutional protection when: “it is about repeat offenders who have committed offenses punished with short sentences, it should not replace the custodial sentences and apply other measures”, because for people who commit major or minor offenses in the legal parameter, there are benefits such as the SCP that has been addressed throughout the article, figure of conciliation, the abbreviated procedure framing the recidivist person within these legal institutions.

More benefits to a person who has committed a crime is not prudent, but other forms of rehabilitation such as community service. In the same way, it is established that the prosecution of a citizen in Ecuadorian territory involves a large amount of resources, it would be helpful to change the penal figure of serving the sentence for another alternative.

With reference to the second paragraph of Art. 630 of the COIP, it establishes as a requirement that the sentenced person does not have another sentence or process in force or has not been benefited by an alternative exit to another case, it does not observe constitutional principles because Art. 11 No. 2 of the CRE establishes that the exercise of rights is governed because all persons are equal, no one may be discriminated against for reasons of judicial past. In this sense, the result was that the provision is that the prosecuted person does not migrate to recidivism, but within the pure issue of the recognition of the right, the judicial past does undermine the legal situation of a citizen in a given criminal proceeding.

In the second paragraph of Art. 630, there is a violation of constitutional rights, in its first part it is stated in detail, the sentenced person who has another sentence in force, or process in progress, can no longer access the benefit of the conditional suspension of the sentence, it is necessary reform to that part of the paragraph, since a person is innocent until proven otherwise while there is no enforceable conviction, and the existence of an ongoing process is an uncertain future, innocent or guilty and there is also the possibility of declaring the nullity, prejudicing the rights of persons sentenced or prosecuted, and the possibility that the sentence may be annulled, thus affecting the rights of those who have been sentenced or prosecuted.

That is to say, the person has the possibility of availing himself of the aforementioned benefit, but if he has an ongoing process, he would no longer be the object of the benefit.

With reference to the third paragraph of Art. 630 of the COIP, establishes that to request the SCP the personal and family background, modality or seriousness of the conduct, are indicative that there is no need for the execution of the sentence, these requirements do not violate the right to the family and labor relationship, because a person to commit a criminal act and be sentenced there was a due process, in which without any discrimination he was sentenced, and since there are benefits and alternative exits, when the person is sentenced for his acts, social and family background must be verified because every citizen with conscience and will when committing an infraction knows the legal repercussions for which he must receive a sanction.

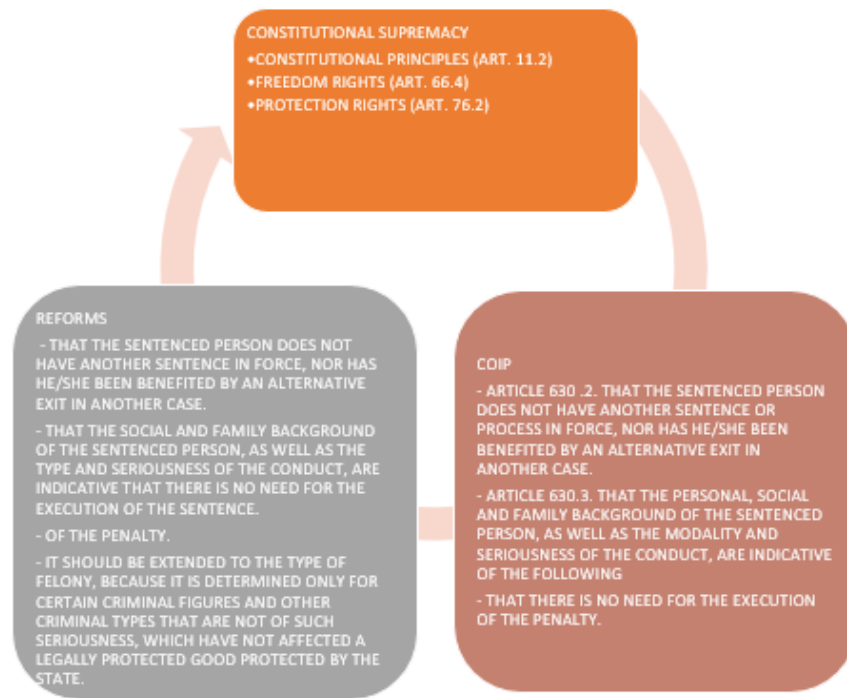
Now, if it violates the rights of the sentenced person, since by requesting as a requirement to verify their judicial record, it would violate the principle established in Art. 11 paragraph 2 of the CRE, which states that no one may be discriminated against for reasons of judicial background, moreover, it has nothing to do with the social and family background because the COIP establishes that there are sentenced persons who will be deprived of liberty or punished in one way or another.

By establishing this requirement, the jurisdictional body seeks to modulate in some way the behavior of the person in conflict with the law, it is not the same to grant the benefit subject of investigation to a person who has committed the crime of theft as to a person who has committed a crime of robbery, the modality of the offense is not the same, the seriousness of the legal property protected by the Ecuadorian state is not the same, then the degree and modality of participation must be established.

In view of the above, the hypothesis is accepted that the correct regulation of the two paragraphs of Art. 630 of the COIP would help to effectively comply with the principles and rights of protection and constitutional rights, as stated in Arts. 11 and 76 of the CRE: “2. No one may be discriminated against for reasons (...), past judicial. The law shall punish all forms of discrimination”; and, “2. All persons shall be presumed innocent and shall be treated as such until their responsibility is declared by a final decision or executed sentence respectively, preventing judges from violating the rights of the accused and issuing unjust convictions.”

In this sense, under the above mentioned and upon analyzing these results, it is confirmed that there is non-observance of constitutional principles and violation of rights of constitutional protection, at the time of applying two paragraphs of Art. 630 of the COIP, so it is necessary to correct the shortcomings of the two requirements mentioned above.

Figure 1 Proposal



Source: Own elaboration

CONCLUSION

The Constitution of the Republic of Ecuador establishes several constitutional principles and rights which, at the time of conducting the theoretical study and analysis of scientific data, were shown to be disregarded and violated at the time of applying the SCP established in Article 630 of the Organic Integral Penal Code, such as formal equality, discrimination, right to innocence, whose non-compliance triggers the violation of rights.

The domestic legislation is in controversy with international norms and jurisprudence of the American Convention on Human Rights; in addition, there is no specific control of constitutionality because for the application of the benefit of the suspension by requiring that the person does not have another sentence in force, it opposes the principle of non-discrimination for his judicial past and violates the rights of protection, relevant to the text that mentions, if he is in an ongoing process, because the person is being tried, and does not yet have an enforceable sentence that can prove innocence or guilt, including filing appeals for review.

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