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# La justicia indígena como alternativa legal frente a la situación de hacinamiento carcelario en Ecuador

*Indigenous justice as a legal alternative to prison overcrowding in Ecuador*

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**Resumen**

**Introducción.** En el Ecuador contemporáneo, el hacinamiento carcelario ha emergido como un desafío crítico en el sistema de justicia penal. Ante esta problemática, la justicia indígena se vislumbra como una alternativa prometedora dentro del paradigma de la justicia restaurativa. Esta investigación se enfoca en explorar la viabilidad y los efectos de la implementación de la justicia indígena como respuesta al hacinamiento en las cárceles ecuatorianas. **Objetivo.** El objetivo principal de esta investigación es examinar la relación entre el hacinamiento carcelario en Ecuador y los resultados potenciales de la justicia restaurativa, específicamente mediante la aplicación de principios de la justicia indígena. Se busca contextualizar ambos fenómenos dentro del marco del pluralismo jurídico, con el fin de identificar oportunidades para la integración efectiva de enfoques alternativos en el sistema de justicia. **Metodología.** Este artículo se basó en un enfoque cualitativo que involucró la revisión sistemática de la literatura relacionada con el hacinamiento carcelario en Ecuador, las prácticas y resultados de la justicia restaurativa en el país, y el contexto del pluralismo jurídico. Se recopilaron y analizaron datos relevantes para evaluar la magnitud, causas y consecuencias del hacinamiento, así como las posibles ventajas de la justicia restaurativa, especialmente en el marco de la diversidad jurídica. **Resultados.** Los resultados revelan la urgente necesidad de adoptar enfoques alternativos, como la justicia restaurativa, para abordar el hacinamiento carcelario en Ecuador. Se identifican beneficios potenciales en la aplicación de principios de la justicia indígena, particularmente en términos de reducción de la reincidencia delictiva, fortalecimiento de la cohesión social y respeto a la diversidad cultural. **Conclusión.** Se respalda la adopción de la justicia restaurativa, en consonancia con el pluralismo jurídico, como una alternativa viable al hacinamiento carcelario en Ecuador. Se enfatiza la importancia de considerar enfoques holísticos y culturalmente sensibles para abordar los desafíos del sistema de justicia penal, reconociendo la diversidad de perspectivas y prácticas legales en el país. La implementación de la justicia indígena representa un paso significativo hacia la transformación del sistema de justicia en beneficio de la sociedad ecuatoriana en su conjunto. **Área de**

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**Abstract**

**Introduction.**In contemporary Ecuador, prison overcrowding has emerged as a critical challenge in the criminal justice system. In the face of this problem, indigenous justice is seen as a promising alternative within the restorative justice paradigm. This research focuses on exploring the feasibility and effects of implementing indigenous justice as a response to overcrowding in Ecuadorian prisons. objective. The main objective of this research is to examine the relationship between prison overcrowding in Ecuador and the potential outcomes of restorative justice, specifically through the application of indigenous justice principles. It seeks to contextualize both phenomena within the framework of legal pluralism in order to identify opportunities for the effective integration of alternative approaches in the justice system. Methodology. This article was based on a qualitative approach that involved the systematic review of literature related to prison overcrowding in Ecuador, restorative justice practices and outcomes in the country, and the context of legal pluralism. Relevant data were collected and analyzed to assess the magnitude, causes and consequences of overcrowding, as well as the potential advantages of restorative justice, especially in the context of legal diversity. Results. The results reveal the urgent need to adopt alternative approaches, such as restorative justice, to address prison overcrowding in Ecuador. Potential benefits are identified in the application of indigenous justice principles, particularly in terms of reducing recidivism, strengthening social cohesion and respecting cultural diversity. Conclusion. The adoption of restorative justice, in line with legal pluralism, is supported as a viable alternative to prison overcrowding in Ecuador. The importance of considering holistic and culturally sensitive approaches to address the challenges of the criminal justice system is emphasized, recognizing the diversity of legal perspectives and practices in the country. The implementation of indigenous justice represents a significant step towards the transformation of the justice system for the benefit of Ecuadorian society as a whole.

## Introduction

This research article deals with indigenous justice as a legal alternative to restorative justice in the face of the serious prison crisis that the Ecuadorian State is going through; which, since 2018, until now, has generated a series of inconveniences and problems, due to the great overcrowding and the lack of the proper and necessary security standards within the aforementioned centers, wrongly called social rehabilitation centers.

Since Ecuador is an intercultural and plurinational state, the idea of the existence of legal pluralism is implied; which leads to the coexistence of diverse legal systems in the same state. With the entry into force of the Constitution of the Republic of Ecuador in 2008, the administration of indigenous justice is recognized to indigenous communities, peoples and nationalities, allowing them to create, develop and apply their customary law, based on their ancestral traditions and their own law.(Legislative, 2008).

From the worldview of indigenous justice, physical punishment and forgiveness from the community serve as a deterrent tool that translates into true rehabilitation. For them, ordinary justice does not generate true rehabilitation or reintegration processes for people who are deprived of their freedom, as their ancestral justice does.

This research was developed based on the current reality that Ecuador is going through, through the review of various bibliographic sources, from sources of the different official channels of the Ministries of Government, Ministry of the Interior, of the Ecuadorian State; in order to obtain relevant information and an objective result of the topic raised.

Furthermore, the issue is of relevant importance because the increase in the prison population and the deficient penitentiary system have caused society to not trust the Ecuadorian justice administration system. Since, in the last two decades, there has been evidence of a growth in the prison population of 469.29%. Because, in the year 2000 this population was 8,029 people deprived of liberty, and in October 2021 a prison population of 37,679 people deprived of liberty was recorded.(Pinto & Salustio, 2022).

This increase is essentially due to the implementation of punitive policies, increasing penalties and creating new types of crimes, as a response to the insecurity experienced daily in Ecuador.(Pinto & Salustio, 2022)Therefore, this research is based on the following question: How can the administration of indigenous justice as a legal alternative to restorative justice contribute to reducing prison overcrowding in Ecuador?

In this context, the general objective is to examine the relationship between prison overcrowding in Ecuador and the results of restorative justice, contextualizing both aspects within the framework of legal pluralism.

In this scientific article, the first section will attempt to describe the magnitude, causes and consequences of prison overcrowding in the main prisons in Ecuador. The second section will focus on analyzing the practices and results of restorative justice in Ecuador, paying attention to its integration and effectiveness within a context of legal pluralism. It will culminate in a third section, where a comparative analysis will be carried out between the effects of prison overcrowding and those of restorative justice, to identify synergies or contradictions within the framework of legal pluralism in Ecuador.

In this context, research has determined the importance of applying restorative indigenous justice as a legal alternative to prison overcrowding in Ecuador, with the aim of promoting true social rehabilitation of the offender without the need for him to pay for the crime committed in an Ecuadorian prison.

## Theoretical Framework

### Magnitude, causes and consequences of prison overcrowding in Ecuador's main prisons

Prison overcrowding is a problem that affects not only the Ecuadorian State, but also many other countries around the world, creating a major obstacle to the proper social rehabilitation of people deprived of their liberty, and their subsequent reintegration into society.

From the beginning, detention centres have been closely linked to the punitive power of the state, since deprivation of liberty is the main response to different situations of violation of the legal system, which goes hand in hand with the idea of prevention. As a result, according to this criterion, alternative measures to deprivation of liberty are ineffective, the general rule being the confinement and isolation of the person.(Verdugo Lazo, 2023).

The crisis in the Ecuadorian penitentiary system has been present for several years. Therefore, an accelerated growth of the prison population has been evident at a national level, unleashing an uncontrollable overcrowding in all the prisons of the country; registering overcrowding rates that reach three times the capacity of said centers.(Ombudsman of Ecuador, 2020).

In 2019, prison overcrowding in Ecuador exceeded 40%; that is, more than 40,000 prisoners. By 2020, prison overcrowding was reduced to 27.5%, with 37,770 people deprived of liberty.(The Telegraph, 2020); and by October 2021, a prison population of 37,679 people deprived of liberty was recorded(Moreira Ferrín et al., 2022).

Between 2021 and 2022, a bloody war broke out between different criminal groups fighting for control of prisons and drug trafficking.

This great wave of violence inside the prisons was generated as a result of the murder of José Luis Zambrano, alias Rasquiña, who led the criminal group of the Choneros. This criminal organization had certain allies such as: the criminal group of the Lobos, the Tiguerones and the Chone Killers, who upon learning of the death of their top leader, wanted to take control of the prisons and drug trafficking, ordering multiple attacks and riots against the Choneros, in four Ecuadorian prisons; leaving a balance, by February 23, 2021, of 79 murders.(Firsts, 2022).

Below is a table showing the number of people deprived of liberty from 1997 to 2021.

***Table 1***

*Annual average of people deprived of liberty*

| Year | Persons Deprived of Liberty |
|---|---|
| 1997 | 9506 |
| 2001 | 7586 |
| 2002 | 8723 |
| 2007 | 18167 |
| 2008 | 17426 |
| 2010 | 16100 |
| 2011 | 16704 |
| 2016 | 32019 |
| 2019 | 40096 |
| 2020 | 37770 |
| 2021 | 37679 |

Source: Ombudsman of Ecuador

Own elaboration.

Based on the information contained in the preceding graph, it can be seen that the prison population has been growing gradually over the years; a large increase has been noted since 2007; the year in which the number of people deprived of liberty doubled compared to previous years; likewise, it can be seen that in 2019 there was a very accelerated growth in the number of people deprived of liberty, reaching its maximum level of 40,096 deprived of liberty.

According to the Inter-American Commission on Human Rights(2022), in its report issued after the working visit to the Ecuadorian State, in order to verify and monitor the serious crisis that Ecuador's detention centers are going through; points out that the main causes of the increase in prisons are due to:

> (…) weakening of the institutionality of the prison system; increase in sentences and in the catalogue of crimes that favour imprisonment; the anti-drug policy; excessive use of pretrial detention; legal and administrative obstacles to the granting of benefits and pardons; and deplorable conditions of detention. (p. 10)

The magnitude of prison overcrowding in the Ecuadorian State and the crisis that arises from it, stem from the lack of space in prisons, due to the high demand of the prison population, which exceeds the institutional capacity of these centers; the causes that generate prison overcrowding according to Macheno Salazar et al.(2022), is: "the excessive use of preventive detention" (p. 500).

For his part Guevara Villarreal(2022), when referring to the causes that generate prison overcrowding, has indicated that they are: "(…) a) the inconsistency of the public policies adopted in criminal and penitentiary matters; b) deficiencies in the normative order; and c) deficiencies in the administration of justice" (p. 30).

From the quotes mentioned above, it can be seen that the authors agree on the causes of prison overcrowding in Ecuador; pointing out that they are generated by the lack of public penal and penitentiary policies, the increase in new criminal types, the increase in sentences and the abuse in the application of preventive detention.

The causes mentioned above, which contribute to the increase in prison overcrowding and the penitentiary crisis in Ecuador, lead to consequences that affect not only the people deprived of liberty, but also the entire society.

Among the main consequences of prison overcrowding, Ortiz and López(2023)They point out:

> (…) lack of access to clean water, sanitation and medical care are factors that directly influence the current problem. These conditions can lead to health problems for prisoners and can also create an environment conducive to violence and other forms of abuse. The internal organization of prisons has been legally compromised in recent years and this has been exposed through the development of riots, riots and mass murders. (p.70)

It has been shown that prison overcrowding leads to several negative consequences for both the persons deprived of liberty and the justice system; consequences such as inhumane conditions, violence, health problems, violation of human rights, economic costs for the justice system and for society in general, since prison overcrowding results in the need to find more resources to maintain and manage the different penitentiary facilities.

From the concurring vote of Constitutional Judge Ramiro Ávila Santamaría, when resolving a consultation on the norm, it is shown that, due to the overcrowding and prison massacres that have occurred in recent years, subjecting a person to a prison sentence entails subjecting him to a "penalty that implies death, being subjected to a violent environment and having insufficient basic public services, such as food or health care."(Constitutional Court of Ecuador, 2021c).

On the other hand, the opinion issued by the Constitutional Court of Ecuador indicates that, due to the serious penitentiary crisis that the Ecuadorian State is going through, and the consequences of prison overcrowding, the rights of persons deprived of liberty and of prison officials have been put in constant risk and danger.(Constitutional Court of Ecuador, 2021b).

Concluding this section, it is worth highlighting what Ávila Santamaría points out(2014), referring to the consequences of deprivation of liberty and prison overcrowding in Ecuador:

> Locked-up people lose emotional ties, feel loneliness, boredom and rejection from the "free" community. Locked-up people cannot choose what they can or cannot do, who they live with, who they socialize with, or the ways they express their convictions. (p. 9)

**Practices and results of restorative justice in Ecuador within the context of legal pluralism**

Restorative justice, understood as an alternative to the punitive and repressive power of criminal law, seeks the reintegration of the offender into society, by means of compensating the victim for the damage caused; as Morocho states(2024)"restorative justice focuses on restoring harmony" (p. 62), which involves comprehensive reparation and community forgiveness.

According to the Manual on Restorative Justice Programs(2006), issued by the United Nations, which was specifically drafted for the United Nations Office on Drugs and Crime (UNODC); has indicated that restorative justice is a model that helps to alleviate the procedural burden of criminal systems, providing alternative solutions to the punitive and sanctioning power of states.(United Nations, 2006).

In the same sense, Pesqueira(2014), maintains that restorative justice refers to: "the satisfaction of the needs of the victims by trying to return things to their previous state, the rehabilitation of the perpetrator and the recognition of their responsibilities towards the victims as well as towards society" (p. 156).

On the other hand, the Constitutional Court of Ecuador has pointed out that restorative justice meets three requirements: first, that the offender is aware of his responsibility for the harm caused; second, it seeks a rapprochement between the victim and the offender; and third, it enables comprehensive reparation to the victim for the damage caused.(Constitutional Court of Ecuador, 2019)

The delay in the administration of justice, the mistakes in the creation of public policies, the deficiency of the judicial system, have caused society to lose confidence in the ordinary system of justice; therefore, it has become necessary to seek alternatives that guarantee the restoration of harmony within societies, and the satisfactory reparation of the victim and the forgiveness of the offender by the community.

For this reason, different methods of conflict resolution have been chosen, among which, according to Guevara, we can point out:(2022)"a) victim-offender mediation; b) community and family group conferences; c) circle sentencing; and, d) restorative probation and community boards and panels" (p. 52).

Within the Ecuadorian framework, restorative justice has not been implemented in a general way; but it is recognized in different normative bodies; among the most outstanding, starting with the Constitution of the Republic of Ecuador.(2008), which prescribes: "Arbitration, mediation and other alternative procedures for conflict resolution are recognized. (…)" (art. 190).

For its part, the Comprehensive Organic Criminal Code(2014), in the area of juvenile offenders, has pointed out that: "Mediation allows for the exchange of opinions between the victim and the adolescent, during the process, so that they can confront their points of view and manage to resolve the conflict they have. (…)" (art. 348 a).

This shows that restorative justice, although not under that name, is guaranteed and recognized within Ecuadorian legislation as an alternative means of resolving conflicts, without the need to obtain a conviction for the offender.

The institution of restorative justice, within the Ecuadorian legal framework, can be compared to the figure of conditional suspension of the sentence, established in the penal norm of Ecuador; by virtue of which the offender must fulfill certain conditions to be entitled to his freedom; among them is: "Repair the damages or pay a certain sum to the victim as full reparation or duly guarantee its payment" (Comprehensive Organic Penal Code, 2014, art. 631, no. 7).

From which it can be deduced that the legal figure transcribed is very similar to restorative justice; since instead of sanctioning the offender with a prison sentence; prior to compensation for the damage caused, he is allowed to continue developing his life normally, interacting with society.

In the Fifth Section, which deals with the prosecution and punishment of crimes of violence against women or members of the family nucleus; the Comprehensive Organic Criminal Code(2014), has briefly outlined the parties that must intervene in a restorative justice process, indicating that: "The parties involved in the restorative phase process are: victim or victims, immediate family or persons who are in charge of the victim, sentenced person, local community and judicial institutions; (…)" (art. 651.6, no. 1).

Now, according to the transcribed norms, within the Ecuadorian context, the application and development of restorative justice is viable; moreover, within the indigenous towns, communes, communities and nationalities, this type of justice has been applied; since the ends pursued by restorative justice are the same as those pursued by indigenous justice; which are, the compensation of the victim, the restoration of harmony in the community and the forgiveness of the offender by the community.

When referring to restorative justice, it must be emphasized that it has its origins in ancient indigenous peoples, since their worldview is centered on repairing the damage caused; but it does not seek to impose a retributive sanction (to give one evil for another evil). Rather, restorative justice, from the indigenous conception, seeks to repair the damage caused integrally, ensuring that harmony is safeguarded between the offender, the victim and the members of the community.(Delgado & Placencia, 2022).

Within the Ecuadorian State, throughout history and with the recognition of the rights of indigenous communities, towns and nationalities, restorative justice has been practiced by ancient peoples; this is what Guevara affirms.(2022), referring to the practice of this justice in Ecuador, and states that:

> (…), a restorative justice model may well be applied in Ecuador, in fact, it is already applied in the field of indigenous justice, since the purposes of punishment in the judicial process of ordinary justice are similar to those pursued in restorative justice models (…). (p. 58)

From what the authors have stated, it is clear that the application of restorative justice dates back many years; that it was and continues to be practiced by indigenous peoples, in accordance with their customs and their own law, always looking out for the common good, and seeking the reintegration and rehabilitation of the offender within the community, repairing the harm caused.

Within Ecuadorian legal pluralism, when referring to restorative justice, we can compare it to indigenous justice, since the practices of indigenous jurisdiction recognized to ancestral peoples seek to heal the offender and restore peace within the community.

It should be emphasized that restorative justice (indigenous justice) within the framework of legal pluralism has been recognized by international human rights organizations,

ratified by the Ecuadorian State; as well as this right of ancient and ancestral peoples, is guaranteed in the Ecuadorian Supreme Law.

Legal pluralism implies the idea that within a single state there are various systems of administration of justice; Ecuador is no stranger to this, by virtue of the intercultural richness that it boasts and the recognition of the administration of indigenous justice to indigenous peoples, communities, communes and nationalities.

As a brief background, it should be noted that legal pluralism (indigenous justice) has been recognized for many years at the level of the various international human rights treaties, such as the Universal Declaration of Human Rights adopted by the United Nations in 1948, which briefly prescribes the guidelines for the rights of ancient peoples; also, the Charter of the Organization of American States, which calls upon the Inter-American Commission on Human Rights to safeguard the rights of people without discrimination based on race, nationality, creed or sex.(Padilla et al., 2020).

For its part, and placing greater emphasis on the recognition of the administration of indigenous justice, the United Nations Declaration on the Rights of Indigenous Peoples recognizes that: “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, (…)” (art. 4).

Without detracting from what has been noted in the preceding paragraphs, it should be noted that the most relevant precedent of the recognition of legal pluralism at the level of international law is Convention 169 of the International Labour Organization of 1991, which prescribes:

To the extent compatible with the national legal system and with internationally recognized human rights, the methods traditionally used by the peoples concerned to suppress crimes committed by their members must be respected. (Article 9, No. 1)

In this context, the Ecuadorian State, in its Supreme Law, also recognizes legal pluralism within its legal system, by determining itself, among other names, as a plurinational and intercultural state, recognizing the ancestral peoples' power to administer justice.

As a result of that, the Constitution of the Republic of Ecuador(2008), establishes that: “The authorities of the indigenous communities, peoples and nationalities will exercise jurisdictional functions, based on their ancestral traditions and their own law, (…)” (Art. 171). For its part, the Organic Law of Jurisdictional Guarantees and Constitutional Control(2009), prescribes: “The Ecuadorian State recognizes, protects and guarantees the coexistence and development of the normative systems, uses and customs of the nationalities, indigenous peoples and communities in accordance with the plurinational, pluriethnic and pluricultural character of the State” (art. 66, no. 2).

In the same sense, the Organic Code of the Judicial Function(2009), regarding legal pluralism, has determined that: “The authorities of indigenous communities, peoples and nationalities will exercise the jurisdictional functions that are recognized to them by the Constitution and the law” (art. 7, inc. 2).

From the above, it is clear that legal pluralism is recognized both internationally and within the Ecuadorian State, which leads to the existence of an alternative system of conflict resolution, very different from that of ordinary justice, which, as reflected in later reflections, has obtained greater and better results, guaranteeing the reintegration of the offender, comprehensive reparation to the victim and the forgiveness of the community.

Through the application of indigenous justice in the different communes, communities, towns and nationalities, the restoration of social relations and the resolution of conflicts within the community has been achieved, reestablishing harmony and social cohesion within their territories.

From what has been noted in previous reflections, the solution to prison overcrowding exists, and that alternative is the daily practice of justice of many indigenous peoples around the world; in the case of Ecuador, since legal pluralism is recognized, there are two ways to punish the commission of a crime or infraction; the first is prison, with the consequences that were developed previously, including prison overcrowding. On the other hand, there is the alternative practiced by certain indigenous nationalities, which provides restoration as a form of solution.(Avila Santamaria, 2014).

Faced with situations of insecurity and the proliferation of certain crimes in indigenous communities, and the impossibility and lack of speed in controlling certain conflicts generated, "such as cattle rustling, drug use and sale, the formation of gangs, injuries, robberies and migrant trafficking or coyoteism"(Peñafiel Contreras, 2017, p.36), has been mitigated and eradicated from the majority of indigenous communities.

Through the practice of indigenous justice administration, favorable results have been obtained in contrast to the application of ordinary justice; in this sense; it must be noted that, the purpose of punishment in ordinary justice is the retribution and isolation of the offender; therefore, the solution is jail. While for indigenous justice the purpose of punishment is the restoration of peace and harmony in the community; and the alternative is the healing of the offender, through the use of water, the whip, the nettle, sacred and healing instruments, managing to persuade other members of the community not to commit infractions.

On the other hand, indigenous justice practices have managed to minimize the time taken for investigations and sanctions; since the maximum time taken in a case submitted to indigenous jurisdiction is 14 days; while in ordinary justice it could take a time equal to

or greater than 3 years.(Avila Santamaria, 2014); within which the offender may be subject to preventive detention, generating the prison overcrowding that is seen today in Ecuadorian prisons.

The above confirms what Mathiensen said.(2014), when he states that: "The prison solution is not, first of all, in solidarity with either the victim or the perpetrator; secondly, it is not compensatory for either the victim or the perpetrator." (p. 231)

This raises the question of whether the solution is to continue to toughen penalties, to create new types of crimes, to respond to the insecurity experienced daily in Ecuador; or, if necessary, to opt for an alternative measure that meets the condition of reintegration, social rehabilitation of the offender and compensation and reparation to the victim.

As a result, indigenous justice can be seen as an alternative to prison overcrowding, since, instead of sending the offender to prison, it has restorative purposes and provides compensation to the victim for the harm caused. However, the administration of indigenous justice has been the subject of very controversial debates and great criticism in Ecuador, due to the lack of a restorative scope of this; since the authorities in power have focused on toughening sentences and creating new criminal types, as an alternative to the current criminal crisis, leading to the collapse of the prison system; completely ignoring the ancestral justice of communities, peoples and nationalities as an alternative to the deprivation of liberty and to avoid prison overcrowding.

There has been much criticism of the way this ancestral justice is carried out, including claims that the methods used are savage and violate the human rights of the alleged offenders. These criticisms are due to a lack of knowledge of what the administration of indigenous justice really entails; since, from this worldview, physical punishment and forgiveness from the community serve as a deterrent that translates into true rehabilitation. For them, ordinary justice does not generate true rehabilitation or reintegration processes for people who are deprived of their freedom, as their ancestral justice does.

Based on these assertions, in order to understand a little more in depth what the administration of indigenous justice entails, it is necessary to determine the principles by which it is governed; for which the following explanatory table is developed:.

***Table 2***

*Principles governing the administration of indigenous justice*

| Beginning | Meaning |
|---|---|
| Love Killa | Don't be lazy |
| Love Llulla | Don't lie |

| | |
|---|---|
| Love Shua | Do not steal |

Source: Andrade, Narváez, Erazo and Pozo (2020)

Own elaboration.

Principles that promote work and sincerity in interpersonal relationships within the community; as well as reinforce the importance of truth and honesty in people's actions and words; on the other hand, it highlights the value of honesty and justice, as well as respect for the property of others. Principles that are intended to guide behavior in the community, directed toward harmonious coexistence that is respectful of the natural and social environment.

These principles have been present throughout the history of indigenous peoples and nationalities, who have their own law, a customary law, which has managed to maintain the development and control of society within the community; it should be noted that it is not a written law, where the principle of orality eminently prevails, which has its own authorities that are responsible for resolving conflicts that arise within the community.(Ilaquiche, 2001).

It is clear that the purpose of criminal law is punishment, which implies a custodial sentence, causing the prison overcrowding that is seen today in Ecuadorian prisons. On the other hand, restorative justice, understood from legal pluralism, "indigenous justice", seeks to resolve conflicts in a peaceful manner in which the beneficiaries are the victim, the offender and the community.

The solution to prison overcrowding exists, and we found it, according to Peñafiel(2017), "(…) in the practice of indigenous justice, where there is no confinement, there is no prison sentence" (p. 11). What is sought with this alternative justice is; and as has been said in previous lines, and even if it sounds redundant, the compensation of the victim, the sincere repentance of the offender, the forgiveness of the community and above all the restoration of harmony within it.

**Comparative analysis between the effects of prison overcrowding and those of restorative justice**

Prison overcrowding and restorative justice are two important issues in the context of the administration of justice in Ecuador, taking into consideration that in the present academic effort, restorative justice is focused on from the worldview of ancient and ancestral peoples; who seek the healing of the offender, compensation for the victim, forgiveness from society and restoration of harmony in the community.

From the analysis of the effects of prison overcrowding, discussed in the first section, it has been possible to determine that they are eminently negative effects, which include violations of the human rights of persons deprived of liberty, an increase in violence

within prisons and mass massacres has been evidenced; which implies that there is no true rehabilitation and subsequent reintegration of the convicted person into society.

On the contrary, restorative justice in general has mainly positive effects, since it seeks the reintegration of the offender into society, by means of compensating the victim for the damage caused; involving society as an essential part of the offender's rehabilitation; and the commitment of the offender to fully compensate the victim, noting his repentance in order to achieve the forgiveness of the community. In addition, it finds alternative and peaceful solutions to conflicts, strengthening the harmony and unity of the community.

In this virtue; the Highest Constitutional Control Body in Ecuador has stated that: "Restorative justice is a methodology that seeks to repair the social fabric, resolve and mitigate the negative consequences of an offense with the active participation of the parties to the conflict and with the community."(Constitutional Court of Ecuador, 2021a).

Restorative justice is based on the idea that not only the law is violated, nor is it only the victim that is offended; but also the community is offended, since harmony within it has been broken; that is why in this type of alternative justice, reconciliation between society, the victim and the offender is sought, through dialogue; always focusing on the offender assuming his responsibility and the corresponding reparation of the damage caused.

This type of justice promotes peaceful conflict resolution with community participation, where dialogue, mediation and reparation of damages prevail. By promoting reparation of damages and seeking and solving the causes that motivated the commission of the crime, it contributes to reducing recidivism rates by giving offenders the opportunity to assume responsibility for their actions and change their behavior.

In the practice of restorative justice, as already mentioned, it involves the active participation of the community in the conflict resolution process, which strengthens community ties and promotes a sense and culture of shared responsibility in the prevention of crime and the rehabilitation of offenders. In addition to offering the victim the opportunity to express their needs, concerns and desires for reparation, which contributes to their healing and recovery process.

This type of alternative justice has been applied within indigenous towns, communes, communities and nationalities, since the goals pursued by restorative justice are the same as those pursued by indigenous justice, which are compensation for the victim, restoring harmony within society and the forgiveness of the offender by the community.

On the contrary, the same Constitutional Court of Ecuador has stated in relation to prison overcrowding that:

> (…) In this country, depriving a person of their freedom, by ordering a precautionary measure or a custodial sentence, (…), means subjecting them to the risk of a measure or sentence that involves death, being subjected to a violent environment and having insufficient basic public services, such as food or health care.(Constitutional Court of Ecuador, 2021c).

According to the Court, prison overcrowding has generated serious circumstances within the administration of prisons, since persons deprived of liberty are subjected to inhuman and degrading conditions, violating their fundamental rights. This includes the spread of diseases, which represents a risk and danger for prisoners, prison staff and even society itself.

Likewise, overcrowding conditions contribute to increased violence among inmates, which goes hand in hand with the feeling of tension between inmates and prison officials, which makes it difficult to effectively implement rehabilitation and social reintegration programs, limiting the possibilities for freed persons, once they have served their sentence, to reintegrate positively into society.

Following the conflicts that have been generated within prisons, the Ecuadorian State points to a growing interest in promoting alternative approaches to mitigate prison overcrowding, among which is restorative justice, in order to address the challenges associated with prison overcrowding and improve the justice system in general.

Below is an explanatory table outlining the main differences between ordinary justice and restorative justice, from the framework of legal pluralism, known as indigenous justice.

***Table 3***

*Main differences between ordinary justice and restorative justice (indigenous justice)*

| | Ordinary Justice | Restorative Justice |
|---|---|---|
| End of the sentence | Retribution, rejection | Restoration, harmony |
| Result | Sentence, prison | Council, compensation |
| Social control | Repressive system | Community system |
| Sign of the infringement | Crime, individual fault | Misfortune, broken harmony |
| Grief | Prison, confinement | Restitution, cleanup |
| Effects on the offender | Psychological damage | Spiritual healing |
| Effects on society | Prejudice, pointing out | Community forgiveness |
| Relationship, judge-actors | There is no link | Community participation |
| Procedure | Bureaucratic, obstacles | Community, fast |

Source: Avila Santamaria (2014)

Own elaboration.

Therefore, according to the comparative table, it is shown that the effects of ordinary justice are eminently negative; since the ultimate goal pursued by the ordinary legal framework is repression and punishment, through and as a rule, the deprivation of liberty, causing the serious prison crisis that can be seen today in Ecuador. Considering crime as an individual fault, causing society's rejection of the offender, creating prejudice and resentment among the victim, offender and society.

On the contrary, restorative justice, understood from the worldview of the ancient peoples that form part of the Ecuadorian State, has generated a new alternative to the solution of the controversies that arise in society, and to prison overcrowding, because, in its practices of administration of justice, there is no confinement of the offender. What it seeks is to reestablish the broken harmony within the community through the advice of the elders, family members and the community, since they see crime not as an individual evil, but as a community evil, which must be healed in some way.

As for the trial procedure, in ordinary justice it can take years to issue a sentence; since, according to the Ecuadorian penal norm, the preliminary investigation phase can last between one to two years depending on the penalty of the crime being investigated; continuing with the instruction phase, which will not exceed ninety days, with the exceptions indicated by the law, it can be extended up to one hundred and eighty days; after that, the evaluation and preparatory phase of the trial takes place, and the trial phase. After that comes the challenge phase before the higher justice bodies in which the process can last years, without achieving a speedy resolution of the case.(Comprehensive Organic Criminal Code, 2014)

On the contrary, the type of procedure used by ancient peoples is faster, simpler and more effective; starting with the complaint (willachina) presented to the indigenous authorities; continuing with the inquiries (tapuykuna) to determine what the conflict consists of; with these elements, it is decided to call an assembly in which confrontations will take place between those involved; this stage is called hearing (chimbapurana).(Zulay, 2022).

After the previous stages have been carried out, the phase of establishing sanctions (killpichina) continues, culminating in the execution of the imposed sanctions (paktachina). It must be emphasized that in this practice of ancestral justice there is an important intervention of women, since they are an essential part in the imposition and execution of the sanctions imposed on the offender, which seeks to restore harmony in the community and full reparation to the victim.(Zulay, 2022)

The sanctions imposed once the indigenous justice administration process is completed are fines, return of stolen goods, community service, healing and purification with a cold water bath using a whip and nettle. In exceptional cases and due to the magnitude of the

crime committed in the community, they decide to expel the offender from the community as a sanction.(Padilla et al., 2020).

## Methodology

The methodology used in this research combined inductive and deductive approaches to analyse prison overcrowding in Ecuador, as well as national and international legislation related to indigenous and restorative justice. An analytical-synthetic method was applied to examine the problem from different perspectives, focusing on the context of legal pluralism. In addition, a dogmatic-legal approach was used to address the formal and positive part of the relevant Ecuadorian legislation.

The study is based on a qualitative approach, which involved the analysis of concepts and an exhaustive review of specialized bibliography on prison overcrowding, restorative justice and legal pluralism in Ecuador. Various sources were consulted, such as international human rights treaties, the Constitution of the Republic of Ecuador, organic laws, legislative codes, rulings of the Ecuadorian Constitutional Court and scientific articles from indexed journals.

In terms of scope, this work adopted a descriptive-explanatory approach, based on theories developed by different authors in relation to prison overcrowding and restorative justice in Ecuador. An explanatory level was used to identify and thoroughly analyze the research problem posed..

## Results

With the information obtained from the analysis of the situation faced by the prisons in Ecuador for several years, it has been shown that there is an unprecedented increase in the prison population, since in 1997 this population ranged between 9,506 people deprived of liberty; while, by 2021, it reached 37,679 inmates. It is noted that in 2019 there was a very accelerated growth in the number of people deprived of liberty, reaching its maximum level of 40,096 inmates in the different prison centers of the Ecuadorian State.

With this same information base, it has been shown that, with the government in power in 2018, conflicts began to arise between prisoners, causing deaths and riots within Ecuadorian prisons; however, between 2021 and 2022, large massacres were generated within these centers of deprivation of liberty, motivated by the death of its top leader, alias Rasquiña, who led the criminal group of the Choneros, which had other criminal groups under its command such as the Lobos, the Tiguerones and the Chone Killers.

Criminal groups that, upon learning of the death of their leader, decided to take control of the prisons, but individually and based on their interests, fighting for control of the

drug trafficking business. They ordered widespread attacks on all of Ecuador's prisons, attacks against the criminal group Los Choneros, resulting in 79 murders, dismemberments, decapitations, in short, violence never before seen in Ecuadorian state prisons in February 2023.

From the contributions of different authors on the problems of the prison system in Ecuador, it has been possible to determine, as a result of this research, that among the main causes that generate prison overcrowding are the weakening of the institutionality of the prison system, increase in sentences and the catalogue of crimes that favour imprisonment, the drug control policy, excessive use of preventive detention, legal and administrative obstacles to the granting of benefits and pardons and deplorable conditions of detention; which have caused society to not trust the ordinary administration of justice.

Several authors have expressed their concern about this issue that is overwhelming the Ecuadorian State; since, from the review of official sources from the different ministries, the consequences generated by prison overcrowding affect the entire society and not only those deprived of liberty, taking into consideration the latest reprisals that have been taken by criminal groups against the civilian population, such as attacks, kidnappings, extortions, among others.

Given the negative results obtained by using prison as an alternative to crime, it has become evident that the Ecuadorian State has shown its growing interest in promoting alternative approaches to mitigate prison overcrowding, among which is restorative justice, in order to address the challenges associated with prison overcrowding and improve the justice system in general.

From the Ecuadorian constitutional and infra-constitutional regulations analyzed in this academic effort, it has been possible to observe that restorative justice is, to a certain extent, sporadically recognized; since mediation, arbitration and other means that can put an end to a controversy have been pointed out as alternative solutions to the punitive and repressive power of the state.

Based on what was noted in the previous paragraph, it has been demonstrated that the application and normative development of restorative justice in Ecuador is viable; furthermore, this type of justice has been applied within indigenous peoples, communes, communities and nationalities; since the ends pursued by restorative justice are the same as those pursued by indigenous justice; which are, the compensation of the victim, the restoration of harmony in society and the forgiveness of the offender by the community.

## Conclusions

- This study has focused on an exhaustive analysis of the causes, effects and consequences of the worrying phenomenon of prison overcrowding in Ecuador.

In recent years, an alarming growth of the prison population has been observed at a national level, which has triggered a situation of uncontrolled overcrowding in all detention centers in the country, with overcrowding rates that triple the capacity of these establishments.

- Our findings indicate that restorative justice practices and outcomes in Ecuador, within the context of legal pluralism, have generated positive impacts on society, victims and offenders. This approach seeks comprehensive reparation for victims, restoration of harmony in the community and forgiveness of offenders for the harm caused. In contrast, confinement in so-called "social rehabilitation centres" has been shown to generate detrimental effects due to overcrowding, which leads to an increase in violence among inmates and hinders the effective implementation of rehabilitation and social reintegration programmes.
- The initial objective of our research was to examine the relationship between prison overcrowding in Ecuador and the results of restorative justice, within the framework of legal pluralism, with the aim of offering a legal alternative that more effectively addresses this problem. This alternative is not based on the deprivation of liberty as a general rule, but on the search for the purification of the individual, the compensation for the damage caused and the forgiveness of the community, through the application of the justice of ancient peoples.
- The results obtained from our research support the idea that prison overcrowding in Ecuador is due to the weakening of the institutionality of the prison system, the increase in sentences and the catalogue of crimes that prioritize incarceration, among other factors. It is evident that society has lost confidence in the administration of ordinary justice.
- In this regard, we emphasize the need for the Ecuadorian State to promote alternative approaches to mitigate prison overcrowding, such as the development and implementation of restorative justice, in line with legal pluralism. This alternative justice does not consider prison as a solution, but rather seeks compensation for the victim, sincere repentance from the offender, forgiveness from the community and, above all, the restoration of harmony within it.

## Conflict of interest

The authors declare no conflict of interest.

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