Legislative benchmarking applied to the direct procedure of the ecuadorian penal system

Iyo Alexis Cruz Piza[1], Leonardo Ivan Barahona Tapia[2], Rosa Leonor Maldonado Manzano[3]

Abstract

In Ecuador, the direct procedure is a legal norm that predominates in Ecuadorian criminal legislation, which allows processes to be developed more efficiently and quickly. However, its application presents difficulties and it incurs the violation of certain constitutional rights. Therefore, it is necessary to analyze this provision. The above becomes a problematic situation that requires analysis;therefore, it is proposed to apply the benchmarking technique in the legislative field to reveal opportunities for improvement and thus enhance the Direct Procedure in the Comprehensive Organic Penal Code (COIP), which becomes the objective of this article. The tendency to carry out research at the comparative law level allows for observing diverse formations of law institutions in parallel. Therefore, it is enriching for legal science in the criminal field. A study of related procedures in Chilean and Argentinean legislation is carried out. In the following, the research is presented in several headings where the methods used, the results, the conclusions, and finally, the bibliographical references are stated

Key Words: Direct procedure, benchmarking, Chilean legislation, Argentine legislation.

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Introduction

In Ecuador, the direct procedure is a legal regulation that predominates in Ecuadorian criminal legislation, which allows processes to be developed more efficiently and quickly. According to Guillermo Cabanellas, quoted in (SizaIbadango, 2015) the abbreviated procedure is defined as a "way of proceeding in justice, performance of judicial or administrative procedures; that is, it is the set of diligent acts and resolutions that comprise the initiation, instruction, development, ruling and execution in a cause" (p. 6) and Juan Antonio Garrido (cited in SizaIbadango, 2015) defines it as "Legal figure as the trial that is made to a defendant where a penalty is imposed for the commission of a criminal act, regardless of orality, contradiction, publicity and production of evidence, before the agreement between the Public Prosecutor's Office and the defendant (p. 7).

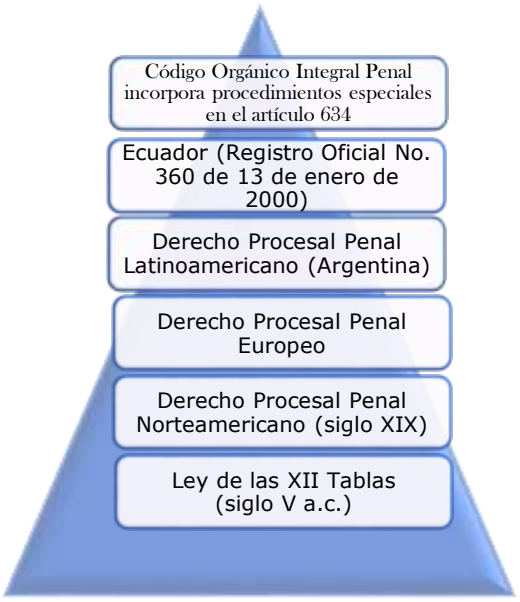

Figure 1. Background of the direct process.
Source: Own elaboration.

Address: [1]Unversidad Regional Autónoma de Los Andes, Ecuador; [2]Unversidad Regional Autónoma de Los Andes, Ecuador; [3]Unversidad Regional Autónoma de Los Andes, Ecuador.
E-mail: ub.iyocruz@uniandes.edu.ec, ub.leonardobarahona@uniandes.edu.ec, ub.c.derecho@uniandes.edu.ec

This process benefits not only the plaintiff but also those under investigation, and in this way, this procedure is intended to expedite the processing of certain cases, respecting, of course, the basic guarantees that regulate the process. At the same time, losses of State resources are avoided. The crisis of the criminal system and the recurrent criticism regarding the delay in the substantiation of criminal trials have forced to gradually give preference to any mechanism aimed at obtaining a quick solution to criminal conflicts so that the abbreviated procedure is truly an instrument through which positive and effective results can be obtained both for society and the country (SizaIbadango, 2015).

It can be said that it was created to provide a response through an alternative justice system that seeks quick, efficient, and effective solutions to problems that are not very transcendental, thus being incorporated in the Organic Integral Penal Code "Special Procedures", within them the direct one. It is created under a model of Justice Management, which prioritizes the principles of speed and procedural economy. Currently in Ecuador, the initial intention of this procedure has been compromised, since there has been a tendency to violate the rights to defense of the defendant when this type of procedure is applied within the adversarial justice system (Ecuador National Constituent Assembly, 2014) (Miguel Angel Medina, 2020).

The need for the analysis of this constitutional provision that regulates the due process and the legislations of the named countries is given because according to critics there is the possibility that people who have not committed a crime are willing to accept or admit responsibility for them. This conflicts with the Ecuadorian reforms introduced to improve the exercise of the legitimate right of defense of the accused, for example, Article 76 of the Constitution of the Republic (Ecuador National Constituent Assembly, 2008).

The above becomes a problematic situation that requires analysis, which is why it is proposed to apply the benchmarking technique in the legislative field to reveal opportunities for improvement and thus improve the Direct Procedure in the Comprehensive Organic Criminal Code (COIP), which becomes the objective of this article. The tendency to conduct research at the comparative law level allows for observing diverse formations of law institutions in parallel. Therefore, it is enriching for legal science in the criminal field (Del Giorgio Sofa, 2011). A study is made of related procedures in Chilean and Argentinean legislation. In the following, the research is presented in several headings where the methods used, the results, the conclusions, and finally, the bibliographical references are stated.

Methods

The research was carried out based on documentary analysis and bibliographic review of different sources and criminal procedural legislation of the countries mentioned. This work was based on empirical-qualitative and explorative research, based on different sources and criminal procedural legislation of the mentioned countries.

For the collection of information, they used scientific research by several authors (Avila, 2013; Bidart, 2004; Bobbio, 1992; Bovino, 2005; Horvitz & Lopez, 2002, 2005; M. & Lopez, 2004; Maier, 2003; Obando, 2013; Riego, 2000; Salgado, 2012; Vergara, 2015). In addition, the legislation of Argentina and Chile was reviewed on the experience of the direct procedure or similar procedures applied within the context of the criminal procedural system and the appreciation of jurists on the effectiveness of the current Ecuadorian legal procedure was analyzed.

Results

To begin the statement of the results obtained, the starting point is the fact that there are similar and specific procedures in the three legislations mentioned. Table 1 summarizes the aspects of interest as an introduction to the analysis.

Table 1. Aspects of initial interest

Country	Ecuador	Chile	Argentina
Name	Direct procedure	Simplified procedure	Simplified or correctional procedure
Legal body	Article 635 of the Organic Integral Penal Code	Article 393 of the Code of Criminal Procedure	Article 292 of the Code of Criminal Procedure of the Nation.
Main actor	Judge	Prosecutor	Prosecutor

Applies only to persons caught in flagrante delicto	Yes	Yes	No (all)
Prosecution	When a person caught in flagrante delicto is immediately taken to the judge of criminal guarantees for the corresponding hearing of flagrant crime.	The prosecutor orders that the defendant is placed before the judge to be notified of the commencement of the trial.	Proceeds for all crimes, as decided by the parties, are mandatory for punishable conduct whose penalties do not exceed three years of imprisonment.

Source: Own elaboration.

These procedures are governed by general rules established in their respective codes, which are intended to expedite the process in the case of minor proceedings, concentrating some stages in a single hearing. Their application proceeds in a particular manner as follows:

- Ecuador:

○ It shall apply to crimes classified as flagrant crimes punishable with a maximum penalty of deprivation of liberty of up to five years and crimes against property whose amount does not exceed thirty unified basic salaries of the worker in general classified as flagrant, that is, a value of up to twelve thousand US dollars.

○ Offenses against the efficient public administration, crimes against the inviolability of life and personal integrity and personal liberty resulting in death, against sexual and reproductive integrity, and crimes of violence against women or members of the family nucleus are excluded.

○ The judge in charge of criminal guarantees has the competence to substantiate and resolve through this procedure, who, once the flagrancy is qualified, will set a date and time for the direct trial hearing within twenty days, within which the parties may request the prosecutor to perform the necessary diligences or actions.

○ The parties may announce evidence in writing up to three days before the hearing. Unless the defendant has evidence that evidences his innocence and that he could not know it or reproduce it because he did not have access to it, he may present it at the time of the hearing.

○ In this type of proceeding, the deferral of the hearing is not applicable. At the request of the party or ex officio, the judge may suspend the course of the hearing for one time, indicating the day and time for its continuation, which shall not exceed fifteen days from the date of its commencement.

- Argentina:

○ If the prosecution considers the imposition of a custodial sentence of fewer than 6 years, or a non-custodial sentence even if it is appropriate in conjunction with such sentence, it may request, when formulating the request for elevation to trial, that the case be tried according to an abbreviated trial. In such a case, the defendant must expressly request the penalty.

○ For the request to be admissible, it must be accompanied by the agreement of the accused, assisted by his defense counsel, on the existence of the act and the participation of the accused, as described in the request for elevation to trial, and the legal qualification. For this article and at any stage of the proceedings, but as soon as the appointed defense counsel accepts the position, the prosecutor may receive the defendant and his defense counsel in a hearing, which shall be recorded in a simple record.

○ The judge submits the request and the conformity given, without any further action, to the trial court, which takes cognizance of the accused and hears him if he wishes to make any statement. If the court does not reject the request, arguing the need for a better knowledge of the facts or its well-founded disagreement with the admitted legal qualification, it calls the case for judgment, which must be rendered within a maximum period of 10 days. If there is a plaintiff, before the adoption of any of these decisions, he is asked for his opinion, but his decision is not obligatory.

○ If the trial court rejects the abbreviated trial agreement, it proceeds according to the rules of the common procedure, referring the case to the court next in turn.

○ In such a case, the conformity given by the accused and his defense counsel shall not be taken as an indication against him, nor shall the request for a sentence be binding on the prosecutor acting in the debate.

- The sentence must be based on the evidence received during the investigation and, if applicable, on the admission referred to in point 2, and may not impose a higher or more severe penalty than that requested by the prosecutor's office.
- An appeal in cassation shall be admissible against the sentence.
- The civil action is not resolved in this proceeding by summary judgment, unless there is an agreement between the parties to that effect, although it may be deducted in the civil venue. However, those who were admitted as civil parties may file an appeal in cassation to the extent that the judgment may influence the outcome of a subsequent civil claim.
- When there are several defendants in the case, the abbreviated trial can only be applied if all of them agree to it.
- If there is a plaintiff in the proceedings, he/she shall be heard without his/her opinion being binding for the court, and the penalty imposed shall not exceed the one requested by the prosecution.

- Chile

- It is applied due to the existence of misdemeanors, to give the prosecutor the responsibility of this procedure so that their sentences can be negotiated, except in Ecuador, where this negotiation occurs in the abbreviated procedure, Article 635 of the COIP. This procedure is contemplated in Article 388 and follows the Chilean Code of Criminal Procedure and applies to a penalty that does not exceed imprisonment or reclusion in its minimum degree.
- Once the prosecutor's request has been received, the court shall order the defendant to be notified and shall summon all those involved to the trial, which may not take place before twenty or after forty days from the date of the resolution. The defendant must be summoned at least ten days before the date of the hearing, the summons of the defendant shall be accompanied by copies of the request and the complaint if any.
- Once the brief report of the injunction and the complaint have been made, the court will ask the defendant if he/she admits responsibility for the facts contained in the injunction, or if on the contrary he/she requests the trial to be held.
- Two similar characteristics are found in the different codes of criminal procedure, both procedures judge the defendant in an oral trial (Ecuador and Chile), but if the defendant admits his responsibility, he automatically receives a conviction by the court in the simplified procedure.

During the review of the legislation, it was possible to find differences between the provisions of Argentina and Chile against Ecuador. The following is explained below:

Agreements between the parties:

The person who has committed a flagrant crime accepts the act attributed to him and negotiates the imposition of the sentence with the public prosecutor's office. In turn, the accused may appear during the trial hearing, and both the prosecution and the victim may reach an agreement with the defendant and the prosecutor proposes to the judge that the proceedings be suspended because an agreement has been reached between the parties, with the judge terminating the proceedings.

In Ecuador, this type of agreement does not correspond to the direct procedure, but it would be considered important to incorporate it in the legislation by reforming a reparatory agreement to compensate for the damage caused.

The immediacy of sentencing

Once the court, after asking the accused whether he pleads not guilty or guilty of the facts with which he is charged, he pleads guilty, and the sentence imposed must not exceed that requested by the prosecutor. In the case of a plea of not guilty, the procedure is processed.

In Ecuadorian legislation, within the procedural principles, the guarantee of the principle of innocence prevails, a status that does not change even if the person incriminates himself, but by the decision of the judge using an enforceable sentence. When the person accused of the acts committed is declared innocent, the simplified procedure will take place, a hearing will be convened after five days of the first flagrante delicto hearing and the declaration of responsibility or not of the accused. The Integral Organic Criminal Code does not contemplate the declaration of innocence as decisive in the procedure; it continues with the presentation of the case by the prosecutor and technical defenders, the evidence, the final arguments, and the judge's decision. The direct trial hearing may not be deferred unless the parties request the judge to suspend it, and it is resumed fifteen days after the date of its commencement.

In the same way, the particularities of each procedure were found as follows:

- Chile: In the case of the hearing, it may only be extended if the expert has previously requested that it be postponed, with an extension of no more than five days, and the hearing may be resumed with or without the expert. The Chilean procedural code contemplates the repetition of misdemeanors and the suspension of the imposition of the sentence, indicated in articles 397 and 398, referring if there has been the repetition of the commission of the same type of crime, considering it as aggravated. However, if the defendant has a favorable record "that does not make it advisable to impose the sentence on the defendant, the judge may issue a sentence and order the suspension of the sentence and its effects for six months", declaring the case definitively dismissed as long as the defendant has not been the subject of a new request by the court.
- Argentina: In this country, this type of trial proceeds for all crimes, as decided by the parties, being mandatory for punishable conducts whose penalties do not exceed three years of imprisonment; it should be noted that in this nation it does not necessarily have to be a flagrant crime, that is why it is considered a simplified procedure, since there is no mention of deadlines to carry out the trials, nor the mention of some rules to be followed. It is stated in the special procedures that the direct trial is an agreement reached by the parties and must be made during the formalization of the preparatory investigation; a request in which the prosecutor must detail the reasons for carrying out this trial.
- Ecuador: before the prosecutor's accusation (opening plea), the judge must resolve any procedural flaws that may affect the validity of the process, according to articles 601 and 604 numeral two of the Integral Organic Criminal Code; and this is the procedural moment for the prosecutor, if he does not have sufficient evidence, to refrain from accusing and, as a consequence, the trial does not continue and the judge may dismiss the accused.

It has been shown that Ecuadorian legislation is more similar to Chilean legislation than to Argentinean legislation, therefore, the aspects that are considered relevant to be taken as an example for the improvement proposal are presented. This proposal is based on the following ideas:

- Some characteristics could be implemented through a reform to the Organic Integral Penal Code for the direct procedure, this would be taken from the Chilean Procedural Code, that the victim through the Prosecutor's Office (guarantees the rights of the victim) can reach an agreement with the defendant to suspend the trial procedure under conditions that must be met within a certain period, and once this period expires and the conditions are met, the judge will extinguish the criminal action, that is, a kind of conditional suspension of the procedure, which already existed in the 2000 Code of Criminal Procedure.
- In each country, the application of these procedures has worked to save resources, decongest criminal cases and allow the punitive power of the State to deploy its coercive apparatus with greater emphasis on serious and execrable punishable conduct. In Chile and Argentina, it has been a way out of the oral trial. In Ecuador, it must also be substantiated in a hearing, even if the accused pleads guilty to the crime committed, which is a common requirement for it to proceed, and the conformity of the defendant must be express, absolute, simple, formal, voluntary and very personal since it would be a transaction.

- The existence of a violation of the principles of due process is evident in the legislations of Chile and Argentina, by the mere fact of renouncing the trial, the right to a defense, forcing the defendant to testify against himself, renouncing the right to a just sentence. On the other hand, in Ecuador, with the direct procedure, the defendant is guaranteed due process because, in the direct trial hearing, he has the right to contradict the evidence presented and practiced by the prosecution.

Discussion

The advances that have revolutionized criminal justice in various countries, and prior analysis of the legislation taken for the development of this research; within the Chilean procedural norm, it is incorporated as a special form of mitigation and those crimes that can be negotiated with the victim. This form of negotiation is plea bargaining, where the accused recognizes his criminal responsibility and seeks to reduce his sentence by accepting the criminal act committed; in this mechanism, the State intervenes through the judge, the prosecutor, the victim, and the victimizer, accused or aggrieved, who must repair the damage caused to the victim.

To carry out this type of procedure, the accused must confess that he is responsible for the acts attributed to him, in exchange for a minimum penalty or some other offer by the prosecutor. Based on this sine quat non-requirement, the criminal system is in a position to issue a sentence

without the need for a trial hearing, a sentence that will be a conviction, since the basis of these procedures does not require the presentation of evidence, giving absolute control to the judges to conclude a criminal case. Agreeing with (Roach, 2010) in this logic, judges have little power to control the evidence or background effectively available in the case. This creates the risk that they are very vulnerable to the possibility of making erroneous decisions if the confession made by the accused was false, thus increasing the likelihood of convicting innocent people.

The improvement of the legislation would directly influence, from a theoretical point of view, the achievement of the precepts established by the Due Process. This is the one in charge of finding out the truth about the crime that has been committed, as long as each of the constitutional guarantees to which the persons who have been called to trial are entitled is respected. This definition indicates that due process is in charge of watching over all the rights and guarantees of the persons who are part of a constitutional State of rights and justice of Article 1 of the Constitution of the Republic and who are in judicial conflicts. In other words, due process seeks to safeguard the freedom of the persons who participate in a legal dispute, taking into account that they enjoy all the guarantees that the law establishes for this type of case(Siza Ibadango, 2015).

Likewise, fundamental rights as a principle and end in the defense of the defendant must be the inspiring criteria of legal interpretation and application in the States, in the normative structure of Articles 75 and 76 of the Constitution of the Republic, taking precedence over the other adjective rights that complement life in society, where the rules that guarantee the Due Process in all stages or phases until the culmination of the process will be applied; and the principles of presumption of innocence, immediacy, contradiction, right to defense, equal opportunities of the procedural parties, the impartiality of the judge and reasoning of the rulings shall be respected (SizaIbadango, 2015).

Within the scope of its application, the Public Prosecutor's Office, the Attorney General's Office, will apply to simple crimes that require a penalty, for Chile "does not exceed imprisonment or reclusion, in its minimum degree-61 to 540 days-except that the knowledge and judgment of simple crimes corresponds to the Abbreviated Procedure"; and for Ecuador "shall proceed only in crimes classified as flagrant punishable with imprisonment of up to five years and not exceeding thirty unified basic salaries of the worker", as described in Article 640, paragraph 2 of the COIP (Asamblea Nacional de Ecuador, 2014)

Conclusions

The analysis of the legislation of the countries proposed for this research has allowed us to learn about the different criminal procedures applied according to the needs of the societies of Ecuador, Chile, and Argentina. The acceptance of the commission of the crime by the accused is common. In both the simplified procedure (Chile), correctional (Argentina), and direct (Ecuador), the objective is to provide a quick solution to a criminal case, the judge criminal guarantees, hears, and rules in oral, brief, and concentrated form, crimes that can be aired by this type of procedures.

The experience and similar dynamics of the procedures applied to increase the risk of having the right to a fair trial, to defend oneself, by incriminating oneself, would be violating due process. It is unlikely that the objective of concentrating all the stages of the process in a single hearing will result in a fair sentence; these procedures based on negotiation with acknowledgment of criminal responsibility only save the State resources.

With the procedures applied in the penal system, the procedural parties must be convinced at the moment of requesting and executing these types of procedures, especially the accused must be duly advised by the technical defense on the violation of the voluntary acceptance of self-incrimination and submission with the risk of obtaining erroneous sentences. A reform of the Organic Integral Penal Code should be implemented concerning the direct procedure, incorporating the conditional suspension of the procedure when the victim has reached a reparation agreement with the defendant.

In Ecuador, the agreements of other legislations do not exist in the direct procedure, but it would be considered important to incorporate them in the legislation by reforming a reparatory agreement that compensates for the damage caused.

It was also learned that Ecuador and Chile share two similar characteristics: both procedures judge the defendant in an oral trial and if the defendant admits responsibility, he/she automatically receives a conviction by the court in the simplified procedure. In addition, Ecuadorian legislation shares common links with both but is more similar

to Chilean legislation. Therefore, we have chosen to analyze in depth the aspects of greatest interest as a proposal to be inserted into the Ecuadorian legislation.

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