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The Abbreviated Criminal Procedure within the COIP: Analysis according to the procedural principle of prohibition of self-incrimination

El Procedimiento Penal Abreviado dentro del COIP: Una reflexión a partir del principio procesal de Prohibición de Autoincriminación

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ABSTRACT: As a consequence of the accumulation of criminal cases in the Ecuadorian criminal system, legislators have opted to implement an abbreviated procedure. It consists of an agreement between the prosecutor and the prosecuted person. Thus, the alleged offender is held responsible for committing the criminal offence, provided that the Integral Organic Criminal Code established the procedural requirements. However, this procedure may violate the accused's rights and guarantees, precisely the principle of non-self-incrimination. Therefore, this article aims to analyze whether there is a correct application of the procedural principle of prohibition of self-incrimination within the abbreviated procedure in Ecuadorian criminal legislation.

KEYWORDS: Legal procedure, legal principles, criminal law, administration of justice, due process.

RESUMEN: Debido a la acumulación de causas penales en el sistema penal ecuatoriano, los legisladores han optado por implementar un procedimiento abreviado el cual consiste en un acuerdo entre el fiscal y la persona procesada, para que el presunto infractor se declare responsable del cometimiento de la infracción penal, siempre y cuando se cumpla con los requisitos de procedibilidad establecidos en el Código Orgánico Integral Penal. Sin embargo, este procedimiento puede vulnerar derechos y garantías del procesado, específicamente el principio de no autoincriminación. Por ello, el presente artículo reflexiona entorno a la correcta aplicación del principio procesal de prohibición de autoincriminación dentro del procedimiento abreviado en la legislación penal ecuatoriana.

PALABRAS CLAVES: procedimiento legal, principios jurídicos, derecho penal, administración de justicia, debido proceso.

INTRODUCTION

This research addresses a study regarding applying the principle of prohibition of self-incrimination in the abbreviated criminal procedure provided in the Comprehensive Organic Criminal Code of the Ecuadorian system. Said analysis is established as a criminal principle due process of constitutional rank and recognized by international instruments. Therefore, its non-observance would violate the rights of the accused.

In the first section, the abbreviated criminal procedure guidelines will be established in the Comprehensive Organic Criminal Code, that is, all the procedural requirements to submit to the process and its development. Equalform, the purposes pursued by the abbreviated criminal procedure will be established to understand its existence within the Ecuadorian criminal system.

In the second section, the principle of non-self-incrimination will be indicated, in the Ecuadorian regulations and in the international treaties ratified by Ecuador, as a principle that must be observed and applied in a mandatory manner so that there are no violations of criminal due process or to the guarantees of the processed.

Finally, in the third section, an analysis will be carried out on whether or not there is a violation of the principle of non-self-incrimination at the time the defendant accepts the guilt of the criminal offence in order for the prosecutor to offer a reduction to the penalty provided within the criminal type.

1. ABBREVIATED CRIMINAL PROCEDURE

In the Comprehensive Organic Criminal Code (2014), various criminal procedures are established, among which are: direct procedure, expedited procedure, the procedure for the private exercise of criminal action, and abbreviated procedure. The latter was incorporated for the first time in Ecuador in 2000 within the Criminal Procedure Code. Within the Ecuadorian penal system, the abbreviated procedure is still in force, established from Article 635 to 639 of the Comprehensive Organic Criminal Code.

In both flagrant and non-flagrant offences, abbreviated criminal proceedings may be accessed as long as the procedural requirements established in the COIP are met. It is worth mentioning that the abbreviated procedure can only be accessed in the case of crimes punishable by imprisonment of up to 10 years, except the following crimes: kidnapping, against sexual and reproductive integrity, and those of sexual violence against women or some member of the family nucleus. Individuals will only be able to access the abbreviated procedure within the crimes of public exercise criminal action. The abbreviated procedure does not apply when it comes to crimes of private exercise of criminal action (COIP, 2014, art. 635).

For the defendant to access an abbreviated criminal procedure, the prosecutor, from the hearing for the formulation of charges to the evaluative and preparatory hearing for the trial, must present an agreement to the processed party in which the latter must expressly accept voluntarily. Their desire to access the procedure accepts the attribution of criminal acts and accepts the penalty proposed by the prosecutor (COIP, 2014, art. 636).

If the prosecutor orally proposes submission to the abbreviated procedure within the flagrante delicto qualification hearing, charge formulation hearing, or evaluative and preparatory trial hearing, the same audience may initiate the abbreviated procedure. On the other hand, if it is not proposed within the same hearing, the prosecutor must request the judge to submit to the shortened criminal procedure, so the latter will install a hearing in the following 24 hours, where the acceptance or rejection of it (COIP, 2014, art. 637).

Upon acceptance by the defendant, his defence must instruct the defendant regarding the effects of submitting to the abbreviated procedure. Once this has been done, the accused's will accept or not avail himself of said procedure. In the case of refusal, the case continues to be substantiated by the initial procedure. In the case of accepting, the defendant's defence will confirm that the latter agreed to submit to the procedure voluntarily, accepted the crime's attribution, accepted the penalty suggested by the prosecutor, and is aware of what this entails (COIP, 2014, art 636).

The penalty agreement proposed by the prosecutor may not be less than a third of the minimum penalty for the crime charged to the accused. For the prosecutor to determine the penalty, he performs an analysis between the facts accepted by the defendant and the mitigating factors established in the COIP, always respecting the established legal limit (COIP, 2014, art. 636).

Once the hearing is installed, the prosecutor will present the investigation's facts and their due legal basis. Subsequently, the judge must obligatorily consult the processed person if the procedure was accepted voluntarily and if the latter is aware of all that it entails undergoing the abbreviated procedure. Consequently, if the defendant accepts the abbreviated procedure, the judge must accept or deny the prosecutor and the defendant (COIP, 2014, art. 637).

If the judge accepts the agreement, it will issue a conviction to the accused. The accused will be punished with the agreed penalty, which under no circumstances may be greater than the penalty suggested by the prosecutor (COIP, 2014, art. 638).

On the other hand, the judge may reject the agreement when he considers that the processed person's rights are violated. If applicable, the judge orders that the case is carried out by ordinary procedure, without prejudice, because the agreement was made with the prosecutor. It is used as evidence within the ordinary procedure (COIP, 2014, art. 639).

1.2. Purposes of the Abbreviated Procedure

The abbreviated procedure has the purpose for the prosecutor to reach an agreement to reduce the sentence with the accused, as long as the latter admits the criminal offence commission. One of the purposes is speed, that is to say, that the abbreviated procedure decongests criminal proceedings since the said sentence was obtained in less time than in an ordinary procedure. Regarding speed in criminal matters, Caro Coria (2006) mentions that:

> It is a subjective constitutional right, which assists all subjects who have been part of a criminal procedure, autonomous, although instrumental in the right to guardianship, and which is addressed to the organs of the Judicial Power (even when in its exercise must be committed all other powers of the State), creating in them the obligation to act within a reasonable time the

> ius puniendi or to recognize and, where appropriate, immediately restore the right to liberty. (p. 1041)

In that order, the judicial function must resolve in a reasonable time the criminal proceedings of the users who go to the body of administration of justice, that is to say, that the process is finalized, either by declaring the accused guilty and establishing penalty imprisonment or declaring the accused innocent and ending the criminal process.

On the other hand, there is the purpose of the procedural economy within the abbreviated procedure. To better understand procedural economics, it is essential to analyse it as a principle. According to Scarparo (2010):

> When we speak of a procedural economy principle, we are on the deontic plane, which does not represent only that evaluative criterion. The principle is a norm that seeks support in other values reflected in the deontic field. This induces a correlation between the economy and the effectiveness, determining interference in taking advantage of the procedural acts or the powers of the judge. Thus, as the purposes of the process must be achieved in the least burdensome way for the State and the parties, the procedural economy acts in the distribution of power in the process, to endow the judge with powers of initiative, so that administer justice actively, quickly and profitably. (p. 500)

Therefore, criminal proceedings must be processed and concluded promptly so that neither the State nor the procedural parties are affected. The abbreviated procedure is a clear example of the procedural economy because it swiftly puts an end to the criminal process. Therefore, both the prosecutor and the judge (both public officials of the State) will continue attending and resolving the rest of the cases. Criminal.

Finally, it is worth mentioning that the abbreviated procedure, from a guarantee perspective, aims to reduce the state ius puniendi, that is, the State with its power to sanction

and establish a custodial sentence, decides to reduce said power and give the accused the option of being punished with a lesser penalty if the criminal offence is attributed.

One of the purposes of applying the procedure is to reduce the punitive power of the State against the processed person, that is, to provide a reduction of the sentence in order for the accused to attribute the criminal acts. However, the primary purpose of the abbreviated procedure is to solve criminal cases quickly so that judges and prosecutors can deal with other cases. Although this process is still in force within the Ecuadorian criminal system, it is essential to mention below the guarantees of mandatory observation that the defendants have when they are within a criminal procedure to observe if the submission to the abbreviated procedure could violate the guarantees of the processed.

2. DUE PROCESS

The origin of due process can be found in Anglo-Saxon law with the evolution of the principle of due process of law since the most crucial historical precedent dates back to the 13th century when the Norman barons forced King Juan Sin Tierra Urge the establishment of a constitution. The document called Magna Carta (1215), in its chapter 39, prohibits the arrest, detention, elimination, dispossession of property or disturbing any free person, except "legal prosecution and by the law of the land" (Agudelo Ramírez, 2005, p. 91).

Once the birth of due process has been established, Prieto Monroy (2003) has specified its concept as "the judicial activity ordered to resolve claims, which is developed a following and observance of principles, gathered in the concept of justice, and particularized in the rules of procedure and those of each process" (p. 817). In other words, due process implies a judicial authority that must ensure all the guarantees within the process for the parties involved in it.

It should be noted that due process is generally incorporated into the dogmatic part of the written Constitution of the recognized first-generation rights because it is part of a group of rights known as individual, civil and political rights as it is considered a superior fundamental right (Agudelo Ramírez, 2005, p. 90).

Regarding the development of Ibero-American procedural theories, the relationship between due process and adequate judicial protection is established since it is established that:

> The Due Process of Law is nothing other ... than the institution of Anglo-Saxon origin referred to the Due Process of Law, as a guarantee with a constitutional substrate of the judicial process, defined by a concept that arises from the jurisprudential order and justice that support the legitimacy of the certainty of the right finally determined in its result. (FixZamudio, 1987, n. p.) (cited by Gómez Lara, 2006, p. 345)

Then, we can establish the close relationship it has with judicial protection, since if due process is guaranteed, adequate judicial protection is being supported, which provides us with legal security, defined as the certainty of legal consequences.

In Ecuador, the guarantees of Due process are established in the Constitution of the Republic of Ecuador (2008, art. 76), in which several numerals and literals are established regarding the guarantees that must be fulfilled to observe due process. However, the guarantees that concern us in the present analysis collected in the said article will be mentioned in the following specific subtopic.

Also, it is fundamental to mention the definition that the Constitutional Court of Ecuador establishes regarding due processes, such as:

> On the set of guarantees with which it is intended that the development of activities in the judicial or administrative sphere is subject to minimum rules to

> protect the rights guaranteed by the constitutional norm, constituting this is a limit to the judges' discretionary action. (Judgment 0101-16-SEP-CC, 2016, p. 10)

In this line and by collecting the main elements of due process, we can define it as a series of fundamental guarantees designed to ensure that the procedures and their results are as close as possible to the ideal of justice stipulated in the constitutional text since these are obligations of the State in any judicial or administrative process.

2.1. Criminal due process and the principle of prohibition of self-incrimination

Ecuadorian criminal law, it should be emphasized, is regulated according to a guarantee system. That is, norms are established that observe the guarantees of both victims and those processed within a criminal process. The guarantees within criminal proceedings amount to a constitutional mandate since article 77 of the Constitution of the Republic of Ecuador (2008) establishes all those guarantees that will be mandatory to observe to respect the rights of the procedural parties.

The guarantees of criminal due process, as mentioned above, are established in the Constitution as mechanisms to, in some way, limit the ius puniendi (sanctioning power) of the State by not allowing the parties' rights to be arbitrarily undermined of the process, especially the defendant, since he has been accused of committing a crime and his responsibility must be determined without reasonable doubt, through evidence.

These mechanisms make it possible to determine the "legitimacy" of the State to continue with the criminal process and to sustain that said process has complied with validity parameters, thus observing the rights, guarantees and principles established in International Instruments, the Constitution and in the Special legislation reference to criminal cases, since in ignorance it would leave one of the parties defenceless and violate fundamental human rights established in national and international legislation.

One of the guarantees of the criminal process is the principle of the prohibition of self-incrimination. For the relevant purposes, we must mention what will be understood by self-incrimination since it is nothing more than the confession of the accused to facilitate the work of the prosecutor or judge, promote the "procedural speed" since mitigating circumstances are established, which allow certain highly debatable previous agreements to target criminal prosecution (Andrade Castillo, 2013, p. 136).

Then, it is essential to establish the definition of the principle. According to Avila Santamaría (2012):

> Robert Alexy argues that principles are optimization mandates. By saying that they are mandates, he reinforces the idea that the principles are legal norms and, as such, must be applied. Stating that they are optimization means that their purpose is to alter the legal system and reality. (...)
>
> The principle is an ambiguous, general and abstract rule. (...)
>
> The solutions derived from a case are multiple and can only be determined in the specific case, which is why Alexy affirms that the principles provide a range of possibilities for the person who interprets or applies the law. (p. 63)

Furthermore, we can determine that the principles are optimization mandates considered by legal norms. As such, it represents an obligation to give, do or not do. Also, it is applied through degrees regarding the optimisation aspect since it must be applied to the greatest extent possible depending on the specific case and the legal possibilities within it.

Furthermore, Avila Santamaría (2012) adds: "The principles, on the other hand, serve as parameters of interpretation. They help decisively to assess the legal system.

Thanks to the principles, we can identify contradictory norms (antinomies) and also the gaps in the legal system (anomalies)." (p. 64). This indicates that the principles help interpretation within the legal system. They provide guidelines so that there are no inconsistencies within the system, and if there are, the principles allow us to recognize existing antinomies and anomalies in the legislation.

Once the panorama regarding the principles and their application has been expanded, we move on to observe the principle of prohibition of self-incrimination that is part of the relevant judicial procedural guarantees because of the American Convention on Human Rights or also called the Pact of San José (1978) that in its article 8 regarding judicial guarantees, establishes that:

> Article 8.- Judicial Guarantees: (...)
>
> 2. Every person accused of a crime has the right to be presumed innocent until his guilt is legally established. During the process, everyone has the right, with full equality, to the following minimum guarantees: (...)
>
> g) the right not to be compelled to testify against himself or to plead guilty. (art. 8.2.g)

The International Covenant on Civil and Political Rights (1976) also mentions this principle: "Article 14.3. During the process, every person accused of a crime will have the right, with full equality, to the following minimum guarantees: (...) g) Not to be forced to testify against himself or to confess guilt. " (art. 14.3.g), which indicates its recognition in different International Instruments regarding human rights.

Regarding national legislation, in article 77, numeral 7, literal c of the Constitution of the Republic of Ecuador, it is established that: ''The right of every person to defence includes: (...) c) No one may be forced to declare against himself, on matters that may cause his criminal responsibility'' (CRE, 2008), it is worth mentioning that we can clarify the

existence of the principle of prohibition of self-incrimination with constitutional rank and with support in International Instruments.

The constitutional mandate to prohibit self-incrimination in the Comprehensive Organic Criminal Code as one of the most critical procedural principles for all criminal proceedings, which provides the following:

> The right to criminal due process, without prejudice to others established in the Constitution of the Republic, international instruments ratified by the State or other legal norms, will be governed by the following principles:
>
> 8. Prohibition of self-incrimination: no person may be forced to testify against himself in matters that may cause his criminal responsibility. (COIP, 2014, art. 5.8)

This principle of prohibition, as it has a mandatory and higher degree of compliance, due to the harmonization of the other norms with the Constitution and International Instruments (constitutional control), should not be violated under any circumstances, since it would be against express standard and guarantees, principles and fundamental rights of higher hierarchical rank.

Based on the previous, it is essential to consider that the principle of prohibition of self-incrimination is a mandate (obligation not to do) of optimization (it must be fulfilled to the highest degree possible) in which it is established that "no person may be forced to testify against herself in matters that may cause her criminal responsibility" (COIP, 2014, art. 5.8).

This principle is fundamental within a guarantee criminal system since a guarantee must be established in the legislation that allows fully respecting the rights of the defendants, since, and due to the interrelation between principles, "the innocence of every person, and will be treated as such, as long as their

responsibility is not declared by a final resolution or final judgment" (CRE, 2008, art. 76.2).

As mentioned, this principle is related to the presumption of innocence and also, as established in the Constitution of the Republic of Ecuador (2008), is part of the necessary guarantees of the right to defence (art. 76.7.c), For this reason, we consider that there should be no procedures that violate these guarantees intended to protect the accused within a process in which their criminal responsibility is determined.

3. ANALYSIS OF THE APPLICATION OF THE PRINCIPLE OF NON-SELF-CRIMINATION IN THE ABBREVIATED PROCEDURE

Under the assumption that in all criminal proceedings, the rights, principles and guarantees recognized by both international instruments and internal regulations must be observed, which attack the defendant at any stage of the criminal process, it is essential to analyse the application of the principle of prohibition of self-incrimination in abbreviated criminal proceedings, because, by its nature, it may incur a violation of rights.

In the abbreviated criminal procedure, the processed person has the power to decide whether or not to access said procedure. In case of access, the defendant must claim the criminal offence commission, and the prosecutor will offer a lesser custodial sentence for the defendant. Therefore, the defendant incriminates himself to obtain an arrangement with the prosecutor so that the latter gives the defendant the possibility of being punished with a custodial sentence more minor than that established within the criminal category.

Based on the aforementioned, Zavala Baquerizo (2004) establishes that: "From the moment the law authorizes the prosecutor to negotiate the penalty in exchange for the defendant's self-incrimination, the State declines its punitive power and leaves it to the will of the businessman procedural

that the prosecutor becomes" (n. p.). Therefore, powers are attributed to the prosecutor, of which only the judge has since he must have the ratio decidendi to impose a penalty on the person responsible and for this, there must be an assessment of the evidence since the judge's decision must go beyond a reasonable doubt.

Within the shortened criminal procedure, at the hearing of the same, it should be emphasized that only the prosecutor will present the results of his investigation. On the other hand, the defendant only declares the criminal offence commission. This is how the judge to issue a sentence only assesses the results of the prosecutor's investigation and the defendant's self-incrimination. Furthermore, due to the nature of the shortened criminal process, the defendant's defence cannot be pronounced. It is more than evident that the judge does not value the defendant's defence and is only guided by the agreement between the prosecutor and the defendant to issue a sentence.

In this context, we must refer to reasonable doubt, which is referred to in the North American jurisprudence in the case Commonwealth v. Costley (1875) indicates that:

> As applied to a judicial trial for the crime, the two phrases are synonymous and equivalent; eminent judges have used each to explain the other; and each signifies such proof as satisfies the judgment and consciences of the jury, as reasonable men, and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable possible conclusion. (p. 24)

As indicated, a reasonable certainty must be had based on the evidence presented to determine criminal responsibility. As mentioned previously, only what is presented by the prosecutor is valued, and the defendant does not present his defence. Therefore, the judge does not assess the evidence as such based on parameters of conviction.

Taruffo (2005) indicates that:

> The fundamental reason why a criminal system should adopt the standard of proof beyond any reasonable doubt is essential of an ethical or ethical-political nature. Thus, it is about ensuring that the criminal judge can convict the accused only when he has reached (at less in trend) the "certainty" of his guilt; while the accused must be acquitted every time, there are reasonable doubts, despite the evidence against him, that he is innocent. Therefore, the evidentiary standard in question is exceptionally high - and is much higher than the prevailing probability - because guarantees in favour of the accused come into play in criminal proceedings. (pp. 1305-1306)

The judge must be provided with evidence so that he, through sound criticism, issues a reasoned judicial decision and determines the specific case's procedural truth. This analysis carried out by the judge is very important, because if the decision indicates the guilt of the accused, it must be supported by a motivation, which we can define as a "rendering of accounts" of the judge, which indicates, through the legal syllogism, the reasons by which that conclusion was reached and promptly, the standards of conviction beyond a reasonable doubt.

It should be noted that what is at stake is the freedom of the defendant, which is why the latter must be in a fair criminal process in which all the guarantees and principles that the defendant has been compulsorily observed, since, although it is not the subject of discussion in this investigation, as an open secret it is known that "the prison is full of innocents."

Based on the preceding and finally, the violation of the prohibition of self-incrimination is evident since, in order for the defendant to be able to access the shortened criminal procedure, he must accept responsibility for the criminal act is, the defendant must incriminate himself with the objective that the prosecutor offers a lower penalty than that established in

the criminal type. Additionally, since the judge only observes the agreement, the judge will motivate his sentence based on the defendant's self-incrimination.

CONCLUSIONS

The abbreviated procedure is a criminal process used to conclude as many criminal cases as possible to decongest the judicial system. If the judge declares the defendant guilty, the criminal case ends and leaves the prosecutor and judge (both public officials) free so that they can act in other criminal proceedings.

To confirm the state of innocence or guilt, the judge analyses the prosecutor's investigation and the agreement between the prosecution and the defendant, the agreement being the main component on which the judge makes a decision and dictates the sentence. The judge does not apply the rules of sound criticism or certainty beyond a reasonable doubt since the conviction is a destructive element for his analysis since his decision is based on the defendant's self-incrimination, even though the prosecutor has announced the elements of conviction that he obtained through his investigation.

It can be considered that the defendant is forced to accept the agreement by admitting his participation in the criminal act and accessing the abbreviated procedure. However, the defendant will be deprived of his freedom and, therefore, the right to equality of the parties is violated because the individual who avails himself of the abbreviated procedure is persuaded to "negotiate" about his criminal responsibility since the prosecutor points out the risk of not accepting and obtaining a more significant penalty. It establishes the importance of applying the principle of prohibition of self-incrimination since the accused would not be rendered defenceless.

Also, this violation of the principle of prohibition of self-incrimination stalls due process because it does not follow its course, and the pursuit of the truth stops, thus

affecting the obtaining of a sentence based on the elements that demonstrate the guilty. It affects legal security since there is no certainty of applying other rights and principles, such as the right to defence, the principle of presumption of innocence, and criminal due process.

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