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## The Violation of The Impartial Judge in The Direct Procedure La Vulneración De Juez Imparcial En El Procedimiento Directo

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### Abstract

*Based on the judgment within a direct procedure, a critical legal analysis has been conducted due to a clear breach of the guarantee of an impartial judge. Hence, the legal proposal is originated. According to the rules within the direct procedure, the defendants are apprehended and presented before the judge of the Criminal Guarantees Unit to conduct the hearing for the qualification of flagrancy. Subsequently, within twenty days, the same judge must carry out the trial hearing. Therefore, there is a prejudiced judge within the process because that judge is aware of the events and convictions revealed during the flagrancy hearing, and that judge has a formed opinion about the case, which violates the guarantee recognized in the 2008 Constitution of the Republic of Ecuador, specifically in Article 76, literal k. It is established that we all must be judged by an independent, impartial, and competent judge. Hence, within the direct procedure, there is a need to provide an alternative solution, and it is important to fulfill this guarantee by appointing another judge from the same Criminal Guarantees Unit to preside over the trial hearing.*

**Keywords:** Direct Procedure, Impartial Judge, Violation, Guarantee, Trial Hearing.

### Resumen

*En base al juzgamiento dentro de un procedimiento directo se ha realizado un análisis crítico jurídico, debido a la existencia de un claro quebrantamiento a la garantía del juez imparcial por lo cual nace la necesidad de proponer jurídicamente. En base a las reglas dentro del procedimiento directo los procesados son aprehendidos y presentados ante el juez o jueza de la Unidad de Garantías Penales para solventar la audiencia de calificación de flagrancia. Posterior a ello dentro de veinte días el mismo juez o jueza tiene que llevar a cabo la audiencia de juzgamiento. Por consiguiente, existe dentro del proceso un juez o jueza contaminado porque tiene conocimiento de los sucesos y acontecimientos de convicción que se dieron a conocer dentro de la audiencia de flagrancia y con respecto a ello, tiene un criterio formado de la causa lo cual vulnera la garantía reconocida dentro de la Constitución de la República del Ecuador del 2008 en su artículo 76 literal k; y por lo cual se ha establecido que todos debemos ser juzgados por una jueza o juez independiente, imparcial y competente. Por consiguiente, dentro del procedimiento directo existe la necesidad de cumplir con una alternativa jurídica y es importante para el cumplimiento de esta garantía de que avoque conocimiento para la audiencia de juzgamiento otro juez o jueza de la misma Unidad de Garantías Penales.*

**PalabrasClave:** Procedimiento Directo, Juez Imparcial, Vulneración, Garantía, Audiencia De Juzgamiento.

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## Introduction

In Ecuador, Criminal Law has undergone several changes regarding its system. Currently, an accusatory system is in place, which has brought significant innovations, including ending the workload that once burdened the criminal courts in the country, making it impossible for cases to be properly processed and tried. In the Organic Integral Penal Code published in Official Registry No. 180 on February 10, 2014, new special procedures were introduced, including the direct procedure. This procedure condenses all stages into a single hearing and is only applicable to crimes classified as flagrant offenses, with a maximum penalty of up to 5 years of imprisonment.

This mechanism is designed to swiftly conclude a criminal case through direct procedure, in the shortest time possible, as it can be resolved within 10 days, or in some situations, within 20 days. According to the general rules of this direct procedure, the trial hearing can only be postponed once, with a deadline not exceeding 15 days.

The importance of addressing this issue lies in the fact that the Organic Integral Penal Code contemplates the application of the direct procedure in Article 640, which has violated the right to due process. During the trial hearing in the direct procedure, there is a serious infringement of the principle of impartiality, as established in Article 76, literal k of the Constitution of the Republic of Ecuador. This violation of the principle of impartiality also gives rise to a legal gap, affecting not only this principle but also jeopardizing legal certainty, recognized in Article 82 of the Constitution of the Republic of Ecuador, and the right to due process, which is one of the most studied and significant principles in Criminal Procedural Law. It has acquired particular relevance because it guarantees the right to a defense and an impartial judge.

Regarding the direct procedure, the judge has the competence to preside over the flagrancy qualification hearing and subsequent trial hearing, allowing them to issue a conviction or a confirmation of innocence. The same judge handles the case from beginning to end. As a result, the judge becomes prejudiced when presiding over the trial hearing and ceases to be a natural judge because they took cognizance of the elements that served as evidence for the charges and even imposed precautionary measures, including pre-trial detention.

The procedural principles within the framework of criminal due process, as outlined in Article 5 of the Organic Integral Penal Code, are based on the principles of publicity, orality, contradiction, concentration, and immediacy. Therefore, the judge who presided over the flagrancy hearing had immediate involvement in the hearing and thus ceased to be an impartial third party detached from the dispute, as required by the rights of citizens in their legal proceedings and disputes within a legal context. This non-compliance with Ecuadorian legislation results in the absence of an impartial judge and a failure to adhere strictly to due process.

It is essential to recognize and address this flaw to safeguard due process and ensure an impartial judicial decision in the case at hand, presided over by a judge who is not tainted by information acquired during the initial hearing. This potential violation of human rights emphasizes the importance of involving a natural judge who presides over the trial hearing, ensuring the guarantee of an impartial judge and full compliance with due process, which is an equally crucial part of rights recognized in the Constitution of the Republic of Ecuador and its international agreements.

Given the importance of all that has been discussed, the objective of this research work is focused on determining the violation of the principle of an impartial judge, which is recognized as a guarantee throughout the criminal process, as established by the Ecuadorian constitutional norms.

It is important to provide a legal perspective with a comprehensive view of this issue for the generation of new legal knowledge, in order to propose a legal framework that benefits the administration of justice

when correctly applying and respecting due process as a constitutional guarantee and making it effective to be "judged by an independent, impartial, and competent judge".

For this reason, the correct application of all the principles recognized within the Constitution of the Republic of Ecuador, such as due process, is crucial in the current reality. This research contribution holds great significance because it offers practical value in the application of the direct procedure. Therefore, it provides a critical legal analysis that is interesting for the contribution it can make to criminal procedural law, based on principles of efficiency, transparency, and certainty, for the protection of individuals' rights recognized as constitutional guarantees.

The objective is based on being able to propose legal alternatives to this issue established within Article 640 of the Organic Integral Penal Code, which provides the possibility of using a direct procedure based on the corresponding provisions and what is established in Article 76, literal k. This article states that there must be an impartial judge, which becomes contradictory in a special direct procedure that does not guarantee this principle which is recognized in the constitutional context.

## **Methods**

In the present research, a qualitative research methodology was used because the research problem aimed to determine how the direct procedure constitutes an infringement on a relevant constitutional guarantee established in the Constitution of the Republic of Ecuador, Article 76, literal k, which states that individuals have the right to be judged by an independent, impartial, and competent judge, clearly showing a violation of due process.

The type of research applied is of a legal dogmatic nature because it allowed to identify a contradiction between the laws governing the country, which ultimately infringes on rights enshrined in the Constitution of the Republic of Ecuador 2008. When studying the social and institutional impacts of the norm in context, specifically how Article 640 of the Organic Integral Penal Code makes it impossible to safeguard what is established in Article 76, literal k.

The population involved in the research consists of all scientific contributions, documentary, jurisprudential, and doctrinal reviews, which allowed for the collection of qualitative data. Regarding the sampling, it is non-probabilistic with intentional selection that is tailored to the nature and objectives of this research. This approach enabled the selection of participants who best represent the population due to their significant contributions and optimal knowledge of the researched phenomenon.

The research employed a theoretical level of knowledge methodology because it allowed for the interpretation of empirical data, using an analysis-synthesis approach. This included a legal dogmatic analysis, which involved studying the current legislation, the Organic Integral Penal Code (COIP), and the Constitution of the Republic of Ecuador. The data collection technique used in this research was the study of legal activity products, enabling the analysis and interpretation of information obtained through qualitative methods, using the tool of document analysis.

## **Line Of Research**

The Ecuadorian legal system. Historical, theoretical, philosophical, and constitutional assumptions.

## **Results**

Based on the data obtained through the documentary bibliographic research process, it is important to mention that Ecuador forms a constitutional state of law and justice. Among its main features as a modern democratic state is ensuring not only compliance with the law but also absolute respect for

fundamental rights. (Ricci, 2011)

Since the approval of the Organic Integrated Penal Code and its subsequent enactment in 2014, new special procedures have been introduced. Among them is the direct procedure, which aims to ensure that the administration of justice fulfills its special task of evaluating alleged perpetrators when a person has been apprehended in the act, taken to an arraignment and penal qualification hearing, and when it has been determined that the committed crime is in flagrante delicto, and the defendant is responsible for the offense. This serves the purpose of implementing the direct procedure, as in the case of a public crime sanctioned with a maximum penalty of up to 5 years of imprisonment, a maximum period of 20 days is provided for a public, oral, and adversarial hearing in which the defense may announce evidence up to 3 days in advance.

However, the right to be judged by an independent, impartial, and competent judge (CRE, 2008) is enshrined and guaranteed within constitutional regulations, as well as recognized in international instruments and Human Rights ratified by the Ecuadorian state. It is stated in the Universal Declaration of Human Rights, which emphasizes that everyone has the right to an effective remedy by competent national tribunals for acts violating their fundamental rights recognized by the constitution or by law. (UNITED NATIONS)

Grijalva, when referring to the direct procedure, states that its objective is to group all the stages of the criminal process into a single hearing. After assessing the flagrancy hearing, a day and time are scheduled for the trial hearing within twenty days, mentioning that the time allocated for the process is extremely short to carry out all the necessary proceedings, including those related to the collection of evidence and elements required to render a judgment by the judge. Due to the time factor, certain constitutional rights and guarantees related to due process are violated. (JIMENEZ, 2011)

Based on what was previously stated, it is specific and mandatory that all parties be consolidated, meaning that in a single procedure, they must encompass the regular process, which includes investigation, pretrial preparation, and the trial, as indicated in numeral 1 of Article 640 of the Comprehensive Organic Penal Code. This procedure is characterized as one that has allowed for expediency, being a special process that has great importance for the state because it has enabled progress in criminal justice and prevented case congestion. This procedure has facilitated the resolution of cases in a shorter time, but, on the other hand, it has impacted the constitutional rights of the accused, such as the right to an impartial trial by a judge who is not tainted by prior knowledge of the case.

This procedure maintains an adversarial criminal justice system, which is the main foundation of the accusatory adversarial system. As a result, the process does not affect the accused until the trial hearing, where the judge of penal guarantees issues the verdict, which can confirm the state of innocence or result in a conviction. However, it is of vital importance to mention that it is the same judge who has presided over and qualified the flagrancy hearing who is responsible for concluding the process.

Article 8.1 of the American Convention on Human Rights establishes the right of a person to be heard with the due guarantees and within a reasonable time by a competent, independent, and impartial judge or tribunal, as prescribed by law in the substantiation of any criminal accusation against them. (American Convention on Human Rights (Pact of San José), 1978)

The Inter-American Court of Human Rights, as the supreme body for interpreting the American Convention, has outlined some details regarding the principle of impartiality, stating that it "requires that the judge involved in a particular dispute be close to the facts of the case and be subjectively free from any prejudice. Additionally, the judge must provide sufficient objective guarantees to dispel any doubts that the accused or the public may have about the lack of impartiality." (INTER-AMERICAN COURT OF HUMAN RIGHTS, 2016).

According to Ferrajoli, in the direct procedure, as well as in the entirety of the criminal process, the goal is to achieve a conceptual reconstruction of the facts, as closely aligned with the reality and circumstances of the case as possible, seeking harmony or alignment between what happened and what is known about it (Ferrajoli, 2006). Among possible human rights violations, it is unacceptable for the judge to be exposed to information presented during the initial hearing, such as the flagrancy qualification hearing, considering that the principle of concentration is applied through direct procedures with the principle of concentration.

The administration of justice is one of the most important functions of the State. "To give each their due", one of which is reflected in the rules defining the so-called impartiality principle as a guarantee of due process. Impartiality is a fundamental principle in the administration of justice to effectively protect the legal rights of the citizen and demand that the State appoint an impartial judge in the verdict, regardless of whether it is positive or negative to their claims, but in a fair manner. Otherwise, the judge violates this constitutional principle of impartiality when their judgment is biased.

This principle of impartiality is aimed at ensuring that the judge in the process does not have preconceived ideas that lead to a particular decision, meaning the judge should not be influenced by information or factors other than those relevant to the case. The judge should remain impartial throughout the process, and it is expected that they have no preconceived ideas or biases in favor of or against any of the parties. (Falconí, 2009)

The problem on which this research work is based arises at the moment of setting up the trial hearing in the direct procedure. As mentioned, this issue is due to the fact that the same judge who has acquired knowledge and qualified for the flagrancy hearing, as established in the Organic Integral Penal Code in Article 640, section 3, which states that "the judge of criminal guarantees will be competent to resolve this procedure." Following the rule set out in section 4, once the flagrancy is qualified, the judge will set a date and time for the direct trial hearing to take place within a maximum period of twenty days, during which the parties may request the prosecutor to carry out necessary investigations and actions. (COIP, 2014)

It has become evident that the application of the direct procedure results in various violations of constitutional guarantees. While this mechanism has allowed for the principles of expeditiousness, concentration, and optimization of stages as well as economic resources, the time for the fiscal investigation to gather evidence to clarify the facts of the case is too short for the procedure to substantiate itself adequately. The results of the procedure cannot guarantee the rights of the parties involved in the case within such a short period.

The direct procedure has also limited the ability to exercise effective technical defense, which contradicts the provisions of Ecuadorian constitutional law regarding legal certainty, the presumption of innocence, and due process, as it also violates the right to be judged by an impartial judge.

Alvarado Velloso argues that the procedural principle of impartiality actually has three applications: impartiality, meaning the judge should not be a party; impartiality based on the judge not having any subjective interest in resolving the dispute; and independence, as the judge should be able to act without hierarchical subordination to both parties (Alvarado Velloso, 2014). In other words, impartiality is considered independence from the parties and the subject matter of the process. It generates a guarantee, duty, and right of the judges toward the citizenry.

It is necessary to remember and mention that the main fundamental provisions in Article 4 of the Organic Code of the Judicial Function establish the principle of constitutional supremacy. It states that judges, administrative authorities, and employees of the Judicial Function must apply constitutional provisions without the need for further development in lower-ranking regulations (COFJ, 2009). This principle also prohibits the restriction, impairment, or disregard of its content in future decisions.

Therefore, it is considered important that constitutional supremacy prevails. It is necessary to recognize that, in the direct procedure, two judges from the same Criminal Guarantees Unit should be involved. One should handle the flagrancy qualification hearing, and the other judge should conduct the trial hearing. This ensures proper protection of rights. It is also important to consider what is stated in section 4, which might require an extension of the time established to comply with the trial hearing. This is because the current timeframe is causing a failure in the purpose of the law, which is to seek justice, as it does not allow for proper technical defense for both parties involved. The lack of time is clearly hindering the exercise of their rights within the constitutional framework.

## Discussion

In 2008, the Legal Constitutional Law enacted a new program that represents the highest stage in the concept of law. This program aims to guarantee social balance between the State and citizens to ensure harmonious coexistence in society, stemming from the current "constitutional state of rights and justice."

With the existence of the Comprehensive Organic Code, new special procedures have been incorporated, including the direct procedure. This is intended to ensure that the administration of justice is carried out with complete impartiality from the judges when a person has been apprehended in the act of a flagrant crime and is brought to a hearing for accusation and criminal qualification, determining that, based on the evidence, the defendant will be judged. The respective guarantee within the current legal framework protects the defendant from the penal machinery in the direct procedure, ensuring that the rights established in the Constitution of the Republic of Ecuador (CRE) are upheld. The defendant's right to defense and the fulfillment of due process are fundamental to these guarantees.

The administration of justice is one of the most important functions of the State. The so-called principle of justice, which calls for an impartial judge, is a guarantee of a fair trial and a fundamental principle in judicial work that ensures effective legal protection for citizens. For this reason, citizens have the right for the State to include an impartial judge in the verdict, regardless of whether the outcome is positive or negative, but it must be fair; otherwise, when the judge's verdict is favorable, it violates the constitutional principle of impartiality.

The use of the direct procedure in Ecuadorian legislation has proven to be a clear violation of the guarantees of an impartial judge, especially in flagrant offenses. In these cases, the same judge who orders preventive detention is the one who presides over the direct trial hearing, thus participating in the same hearing with a predetermined opinion. This is because they had prior knowledge of various elements and facts that compromised their objectivity and impartiality. It is proposed that the direct trial hearing should be presided over by a neutral judge who, only through the presentation of announced evidence, becomes informed about the facts and, based on that, grounds the verdict, whether it is a conviction or an exoneration.

In this way, the principle of impartiality of judges in direct proceedings is violated, which is a constitutional right and therefore must be immediately and effectively respected. Justice is one of the pillars for concluding criminal cases. Within the legal framework, Article 640 of the Comprehensive Organic Penal Code could have been understood to allow for the possibility that, even though the judge of penal guarantees is competent to resolve cases in the trial hearing, they may not be the same one who presided over the case in the flagrancy hearing and indictment. Additionally, within the Constitution of the Republic of Ecuador of 2008, Article 76, literal k, states that we should all be judged by an independent, impartial, and competent judge. Therefore, within the direct procedure, there is a need to provide an alternative that ensures the fulfillment of this guarantee, with another judge from the same Penal Guarantees Unit presiding over the trial hearing.



## Conclusions

Ecuador is a Constitutional State of Rights and Justice, which ensures the non-violation of rights by describing the impartiality of a judge within the criminal justice process. This is based on theory, jurisprudence, law, and the Constitution. It is understood that the direct procedure is a legal institution in criminal law that provides for the concentration of the direct procedure. In this hearing, the judge who presides over the direct procedure case and issues the verdict is the same judge who qualified the flagrant offense and, if applicable, ordered preventive detention, clearly demonstrating a violation of the impartiality guarantee.

Through the analysis of this scientific project, it was concluded that there is a violation of Article 76, literal k of the Constitution of the Republic of Ecuador by granting the same judge of the direct hearing procedure the authority when they have already presided over the qualification of the flagrant offense. This pre-existing perspective leads to a compromised objectivity and impartiality in delivering the verdict. Therefore, it is necessary and important to introduce a legal alternative to Article 640 of the Comprehensive Organic Penal Code concerning the direct procedure.

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