The Principle of Opportunity as a Mechanism for Extinguishing the Exercise of Public Criminal Action

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Abstract

Since the entry into force of the Constitution of the Republic of Ecuador (2008), Ecuador becomes a constitutional State of rights and justice, which brings the State into a neo-constitutionalist current, where criminal guarantees obligate the respect and guarantee of constitutional rights, especially within the penal system. In this sense, article 195 of the constitutional charter contemplates the principles that regulate the powers of the State Attorney General's Office as head of public criminal action, these principles are: minimum intervention and the principle of opportunity. This research specifically analyzes the application of the principle of opportunity in Ecuador, as a means to achieve the long-awaited criminal guarantee. Which generates the main finding that, despite being expressly contained in the constitutional charter and current legislation, this principle is not applied correctly or in the amount that should be done according to the different actions investigated by the Attorney General's Office. State.

Keywords: Principle of opportunity, Criminal Guarantee, Rights, Due Process.

1. Introduction

Ecuador's 2008 Constitution introduced the principle of Opportunity as an alternative to resolve minor criminal conflicts and decongest the judicial system. This principle was incorporated into the Comprehensive Organic Criminal Code (COIP) of 2014, assigning its application exclusively to the Public Prosecutor's Office. This change reflected a move towards an accusatory criminal system, where the prosecutor, following objective guidelines, investigates and brings charges before an impartial judge, who guarantees compliance with constitutional rights.

However, the implementation of the Opportunity principle has created challenges. The lack of training and doctrinal guidance in the Attorney General's Office has led to erroneous or non-existent applications of the principle, resulting in criminal investigations that do not advance adequately and overload the judicial system. This has caused petty crimes to fill prisons, contributing to prison overcrowding and the lack of effective rehabilitation of offenders.

In addition, doctrinal conflicts arise as to whether the principle of opportunity violates the principles of due process and equality before the law. Some argue that it does not, while others argue otherwise, creating uncertainty in the Prosecutor's Office by applying the principle consistently.

To address these problems, a research study is proposed to clarify the ambiguities around the principle of Opportunity and provide guidance to the Public Prosecutor's Office in its application, resolving doctrinal conflicts and guaranteeing a fair and efficient administration of criminal justice in Ecuador.

2. Results

Origin and evolution of the Principle of Opportunity

In order to locate the origin of the principle of opportunity within the history and evolution of criminal law and criminal procedure, it is pertinent to start from antiquity and analyze the accusatory principle, but to have a better perspective than this system it would be necessary to analyze it in conjunction with the inquisitorial system, a system that was the predecessor of the accusatory system. Starting from the premise raised in the previous paragraph, in order to analyze the inquisitorial system in the first instance, it is pertinent to quote what the jurist Ferrajoli, (2011) mentions:

… any procedural system in which the judge proceeds ex officio to search, collect and evaluate evidence, arriving at the trial after a written and secret instruction from which the contradiction and the rights of the defense are excluded or, in any case, limited" (p. 564).

From what has been cited above, it can be deduced that the functions of investigation, accusation and judgment were framed only in the judge, thus generating a conflict of interest since the process was biased. The judge was the one who gathered the evidence he thought pertinent, leaving objectivity aside and contaminating his performance. In order to investigate his subjectivity he clung to the point of accusing, as a result of which, his being was contaminated with the struggle to imprison the suspect, thus causing the defense of the suspect to be weak, since in vain was the attempt to defend himself with a judge who is focused on an objective, that of blaming the legitimate passive within the criminal action. Therefore, analyzing what was mentioned in the previous paragraph, the judge became an arbitral entity, which executes the procedural steps that satisfy its need and that lead it to fulfill its objective, violating in itself with this attitude the human and fundamental rights that are guaranteed to a being that is part of a duly constituted society.

In conclusion, it can be said that the accusatory principle focused the entire investigative and trial process on a Judge, the same one who became a Hercules judge, because he administered justice to his liking, sometimes becoming the subjective will of the administrator or judge. On the other hand, quoting again the teacher Ferrajoli, (2011), who points out the accusatory system as:

… Any procedural system that conceives the judge as a passive subject rigidly separated from the parties and the trial as a dispute between equals initiated by the prosecution, which bears the burden of proof, confronted with the defense in an adversarial trial, oral and public and resolved by the judge according to his free conviction, can be called accusatory. (p. 564).

From the above, the turn that this criminal procedure system takes is evident, since it is evident that the judge or judge is framed as a rigid and passive entity around the process or rather the collection of evidence, that is, in this system the judge cannot be the one who gathers the evidence to bring the defendant to an accusation and therefore to a trial. In the same way, this system proposes procedural parts separate from the impartiality of the judge, who will have the obligation within the process; the accuser, to generate the necessary evidence to bring the opposing party to an accusation and trial, based on the system of probation.

So the accusatory system implants a holder of the public criminal action, who will be the prosecutor, the same who will have the mission of pursuing and promoting the action in crimes of public interest, with this background, the offended party if he wishes to intervene within the public criminal action will do so through a private accusation, which makes him part of the public action. but not indispensable in it. This system thus denotes a clear role for the prosecutor's office in criminal proceedings, which contributes to respecting both human and fundamental rights, to seeking the prevalence of the principle of objectivity and the recognition of the innocence of the accused until there is a conviction against him. In short, the accusatory system can be defined according to Huertas (2020) as a "system of guarantees that seeks to subsume within its due process the fulfillment of all the guarantees inherent to a human being" (p. 15), separating the investigative part from the judge, in a process with procedural subjects to whom the current regulations grant rights and obligations.

It is with this accusatory system that the current criminal legislation embraces that the principle of opportunity is brought up, whose origins date back to the Anglo-Saxon American system in the 70s. So, once we can discern which system encompassed this principle, it is then necessary to be able to define it before inserting ourselves in its historical evolution, this in order to understand the different regulations that embrace it without losing the common thread of its conception and purpose.

Minimum Criminal Law and the Principle of Opportunity

Part of the theory of guarantees so developed by the teacher Luigi Ferrajoli, is subsumed in establishing the basic guarantees that protect the defenseless at the time of activating the punitive system that is exercised by the state through the institutions indicated for this purpose. But so ambiguous has been the interpretation of this expression, minimum criminal law, that even several jurists today cannot specify its definition, which is why we believe it is pertinent to begin to explain the relationship of minimum criminal law with opportunity, to define minimum criminal law for a better understanding of what has been investigated. That is why we believe it is necessary to cite what the jurist has said so many times about guaranteeism, that is, to cite what Luigi Ferrajoli (2006) mentioned as a definition of minimum criminal law:

We understand by it, in accordance with the Enlightenment tradition, essentially two things: above all a meta-theoretical paradigm of justification of criminal law and, secondly, a theoretical and normative model of criminal law. As a meta-theoretical paradigm, the expression "minimum criminal law" designates a doctrine that justifies criminal law if and only if it can achieve two objectives: the negative prevention or, at least, the minimization of attacks on fundamental goods and rights, and the prevention and minimization of arbitrary penalties; in a word, if and only if it is an instrument of minimization of the violence and arbitrariness that would occur in its absence (p. 55).

As a normative model of criminal law, the expression designates the appropriate system of guarantees – criminal and procedural – to satisfy these two purposes, that is, to rationalize prohibitions, penalties and processes leading them to the double protection of fundamental goods and rights: "of those belonging to the subjects harmed against the damage caused by crimes and of the accused, as well as, subsequently, of the detainees, against police and judicial discretion and against the excesses and abuses of the prison authorities." (p.55,56)

From the two paradigms pointed out by the master in his work Penal Guarantees and which we have cited in previous lines, we can conclude that the minimum criminal law itself is the criminal and procedural norms that help the punitive system to guarantee due process to the weak, safeguarding arbitrariness in the imposition of penalties and other coercive measures exhaustively indicated in the penal code. If we can say that within the minimum criminal law then a constitutional principle is subsumed that must be applied in order to give good results to the guarantism and the principle of legality that we have talked about and pointed out so much within this research.

So it is worth falling back on a rhetorical question when pointing out: If the prosecutor omits the application of the principle of opportunity, does he violate the minimum criminal law? From the above definition it is easy to reach a conclusion using a premise system, this conclusion being that or rather the answer to the question made positive. Ferrajoli pointed out that in the two theories indicated that the minimum criminal law aims to regulate arbitrations and protect the weakest depending on the pre-procedural or procedural state of the case. When mentioning arbitrations using reasonableness, we can understand it as the whim of the prosecutor or judge about whether or not to apply the principle of opportunity, arbitrariness that can currently be evidenced by certain officials of the State Attorney General's Office.

Definition of the Principle of Opportunity

With the passage of time, several jurists have provided conceptualizations of the principle that we study within this research work, they have tried to consolidate or specify as clearly as possible the notion and purpose of this principle, but due to the normative differences in how the principle is typified in their legislations, they have caused confusion in the readers, That is why the definitions most in line with our current Ecuadorian criminal legislation will be indicated.

To this end, it is pertinent to take into account the definitions in which the principle is typified in accordance with Ecuadorian legislation, that is, definitions in which the monopolization of the prosecutor's office, the regulated system for the application of the principle and the end of the

same are indicated, for them we consider bringing up the following jurists and teachers of the branch of criminal law. Gimeno Sendra (1987), a prominent Spanish jurist, defines the principle of opportunity as (1987): "The power that the holder of the action has, to dispose, under certain conditions, of its exercise and regardless of whether the existence of a punishable act against a specific perpetrator has been proven". (p. 350).

Its definition, although ambiguous, determines the essence of German legislation, since it only considers the Public Prosecutor's Office as legitimate, which shows the monopolization of this principle. For his part, Claus Roxin, (2014) argues that: "... authorizes the Prosecutor's Office to decide between the formulation of the accusation and the dismissal of the proceedings, even when the investigations lead, with probability bordering on certainty, to the result that the accused has committed a punishable act." (p. 65).

More specific definition of the purpose of the principle; the jurist pointed out in a favorable way to the holder that he can request said constitutional principle, without fear that the monopoly will be abused under the pretext of defending the principle of legality, since as explained in the previous paragraph the German legislation has achieved the perfect balance so that the use of the principle of opportunity is not considered an abuse of the principle of equal, as well as a transgression of the principle of legality. This balance has been based on the study and preparation of the individuals who represent the public prosecutor's office within their legislation.

In the same vein, Góngora Mera (2000) points out that: "it consists of the disposition of criminal action at the discretion of the state entity that entrusts itself with criminal prosecution, taking into account the best interest of justice and the usefulness or convenience of the exercise of the action" (p.534). Its definition once again shows what the majority of the legislations analyzed have prescribed in their codes of criminal procedure, the privilege of dominating criminal action and the application of the principle by the state or fiscal entity, at its discretion; although it is true that this somewhat ambiguous definition highlights the legal problem that is subsumed in Ecuadorian legislation, since the criterion of the Attorney General's Office is sometimes to impose the principle of legality using the maximum criminal law for the most trifle crime that is being sustained, monopolization that has led to the achievement of crimes that go against the administration of justice such as bribery. The purpose then would be to be a prosecutor, full of an accusatory (quantitative) record and not of a history of application of the citizen's right (qualitative).

Thus, Luis Chang Pizarro, (2000), for his part, makes a more technical definition when he says that the principle of opportunity is: "discretionary power granted to the body requesting criminal prosecution, in those cases expressly provided for by the same law, under the formal control of the competent jurisdictional body" (p.57). Finally, it focuses more on the control process and the grounds for this principle to be applied, as well as pointing to the requesting body, this conception is made as the jurist himself mentions, taking into account the pateggiamient , developed in Italian legislation where this principle can be requested by both the public prosecutor and the offender, individually or jointly, that is why it tries to leave an ambiguity around the applicant, which not many jurists have dared to study and strengthen.

Once the different doctrinal definitions have been cited, it is pertinent to bring up the history around the institutionalization of this principle in the different regulations of the world, with this we will be able to understand its origins and the process of evolution that it has had doctrinally and theoretically, that is why we must start with the Anglo-Saxon American legislation, To then move on to European criminal legislation and to end up in South American legislation, this path that we trace will allow us to witness its chronological consecration in the space of world law.

North America

Some States that are part of the United States of America that are subject to the commodity law call the principle of opportunity plea-bargaining, which is used so that some adolescents who have broken the law and who would have a custodial sentence do not submit to it. This legal figure then tries to prevent them from becoming more dangerous entities for society, so the Public Prosecutor's Office can request the dismissal. The Anglo-Saxon American system adopts this figure in order to prevent criminogenic effects from prevailing in adolescents deprived of liberty and from becoming highly dangerous criminals. This adoption caused the judicial apparatus to spontaneously decongest, as well as helping to avoid the harmful effect of prisons on them. It is for this reason that European legislation seeks its institutionalization.

Germany

Articles 153 and 154 of the Strafprozebordung (STPO or German Code of Criminal Procedure) introduced the principle of expediency in a regulated manner, making it possible, in accordance with the exhaustiveness of the rule and in the cases provided for, to dismiss the case for reasons of expediency. It can be deduced and several doctrinaires have said that by reason of opportunity taking into account the human sense and the right to freedom of a person, a right that is not only fundamental since it has a human character as it is recognized in the block of constitutionality of the German State.

This reason of opportunity that the STPO points out focuses on granting the suspect or defendant a wild card so that he can regenerate his life after having committed the crime, an end that criminal policy has; regeneration that would not only help in the life of the suspect or defendant but also the State by helping in the resolution of criminal cases in a quick and timely manner, with which the State-justice expenditure would be considerably reduced, an opportunity that is even given to the victim because he or she can achieve the purpose sought by the criminal criminal policy, which is the integral reparation of it.

What has been stated in previous lines is in line with what Roxin, (2014), the German legislator despite the reform he made in the STPO (German Code of Criminal Procedure) on December 9, 1974; where the Public Prosecutor's Office monopolized public criminal action by giving greater preponderance to the principle of legality, scrutinized the way that this principle does not clash with the principle of opportunity, based on two presuppositions: the scant social damage produced by the commission of a crime and the lack of public interest in criminal prosecution, with the imposition of these presuppositions the legislator is careful not to confront the two principles of equal constitutional hierarchy such as that of legality and opportunity. It carefully protects the monopoly of public criminal action, as well as the monopoly of the principle of

opportunity, presuming the whim that the Public Prosecutor's Office may have when deciding whether or not to apply the aforementioned principle.

This produces a total judicial decongestion by eliminating infractions that do not have a great social upheaval within society. We can see, then, that the German criminal system clearly dominated the monopolization of the principle studied in this article by imposing on the Public Prosecutor's Office the immediate application in the case of offences that meet the requirements established in the previous lines. A monopoly that in Ecuador has not been able to be resolved in a comprehensive manner, causing it to remain a dead letter within this legislation as will be analyzed in the following lines.

Similarly, analysing the STPO (German Code of Criminal Procedure), it raises specific assumptions by means of which the principle of opportunity has not been violated, these being:

When the reproach for the act is insignificant and there is no interest in criminal prosecution;

When priority state interests are opposed to him; or

When the offended party can carry out the criminal prosecution on his or her own.

These assumptions, which are framed by the STPO (German Code of Criminal Procedure), leave open the inclusion of the offended party so that he can exercise criminal action by himself and thus even implement the methods of conflict resolution, which leaves open the avenue in which the accused requests, complying with the last paragraph and requesting the victim to extinguish the criminal action.

Italy

Known as pateggiamiento, this principle was established in the Code of Criminal Procedure (Code of Criminal Procedure), in order to avoid the criminological effects of short custodial sentences, effects that consist of crowding the bodies in charge of criminal investigation of processes or trifle cases in the interest of the State and society. as well as the overcrowding of prisons with individuals serving short sentences. It is set out in Article 444 of the Italian Code of Criminal Procedure, hereinafter CPP, by which the non-recidivist accused could request the judge, after agreement with the Public Prosecutor's Office, to apply an alternative penalty to deprivation of liberty. It is evident then that within Italian legislation the procedure for the application of the principle of opportunity is better developed, using the richest figure that allows the defendants within the criminal process to claim for the imposition of the constitutional principle, it is clear then that within Italian criminal legislation the suspect individually or jointly can request the application of the principle to the judge of guarantees, this is mentioned by Bovino, (1985), which differs from the STPO that was analyzed in the previous paragraph where only the prosecutor monopolized this principle.

The openness around the legitimated parties who can request the application of this principle causes a guarantee judge to analyze whether or not it complies with the established requirements and leaves aside the possible erroneous application of the principle of legality that prevails in the reasoning of the Public Prosecutor's Office. A principle that is erroneously applied due to the

lack of knowledge of the official who holds the position of Public Prosecutor, since an official with a guarantee basis and with respect for the axioms of criminal guarantees, which Ferrajoli, (2014) has explained, would apply without fear of opposition to the principle of legality.

Another novelty that must be highlighted within Italian criminal legislation dates from the assumptions that prevail for the application of the constitutional principle of opportunity, adding recidivism, which other legislations do not take into account, since in Italy a recidivist could not claim the application of the principle. Concluding that the CPPI becomes rigid around the application budgets.

Spain

The antithesis of the legislations analyzed above according to Roxin, (2010), is held by the criminal legislation of Spain, since they manage their penal system with the draconian current in 1789 (2010, p.19.), they seek with a mandatory character that the application of the principle of legality prevails, so both courts and jurists have flatly rejected the institutionalization of this principle of opportunity within their legislation, basing his arguments on the opinion traditionally defending the maximum criminal law in all circumstances. Therefore, the attempts that Spanish jurists such as Gómez Orbaneja, Giménez de Asúa, Aguilera de Paz and Serra Domínguez have proposed to Spanish legislators in order to institutionalize the principle of opportunity have been flatly rejected.

It is therefore evident that he always weighed the defence of legality against a closed conception of applying custodial sentences to offences of all kinds, including trifle offences that occur in the legal order, even arguing that the institutionalisation of this principle is only a way of trying to offload the procedural burden from the bodies in charge of public criminal action.

South America

Analyzing the institutionalization of the principle of opportunity within the legislations of South America will also lead to revealing several facts that lead to conflicts that this principle can generate, which is why it will begin with Paraguay, where the principle of legality and officiality is enshrined through the Paraguayan penal code, where according to it criminal prosecution will be mandatory except in the facts that are insignificant and that the need and the nature of the penalty are insignificant, thus typifying the principle of opportunity.

Bolivia also establishes the application of the principle of opportunity by applying the conditional suspension of the process and the conversion of the process from public to private, which generated the feasibility of availing itself of alternative methods of conflict resolution.

Venezuela maintains the traditional system of the principle of opportunity, that is, the prosecutor will be responsible for requesting the judge the opportunity to dispense with the exercise of criminal action, in whole or in part.

In Colombia, the principle of opportunity was introduced in the 1980s, and it was done as an exception to the principle of obligatory criminal action. we see then that all the countries that are part of South America introduce the principle of opportunity in order to see results around the

decongestion of prosecutors' offices and courts, but the lack of knowledge and the antitheses generated by the lack of knowledge have caused this principle to be demonized on certain occasions, as Yépez (2010) points out.

Ecuador

In Ecuador, there is no constitutional or legal precedent for the principle of opportunity, since neither the dismissal of the complaint on the grounds that the offence exists or because of procedural obstacles, such as pre-trial proceedings, nor the provisional or definitive archiving, nor the non-accusatory prosecutor's opinion, once the investigation stage has been concluded, meets the conditions required for the application of this principle. such as the presence of elements constituting a crime and the presumption of responsibility of the participants. Currently, the Constitution of the Republic of Ecuador of 2008 introduces for the first time the principle of opportunity in criminal proceedings in the terms contained in Article 195 of the aforementioned legal body.

Effects of the principle of opportunity

Several masters of criminal law have agreed and have been concretized in a single doctrinal line when pointing out that the principle of opportunity has the effect of improving the operational efficiency of the prosecutor's office, through its application and the resolution of cases that would have a delaying tendency in the investigative stage. But this is not only the effect of the principle that we study within the present research, but we can also find those cited by Yépez, (2010).

Impose the organization of prosecutors' offices because they must direct their resources, based on criteria of rationality to decide on the provisional archiving of cases, considering those that cannot be investigated or that would not generate effective results in order to initiate a process, to continue it or, ultimately, for criminal prosecution to be successful (p.70).

This first effect pointed out by Dr. Mariana Yépez indicates an effect produced by the overload of work in the offices of the Public Prosecutor's Office, a problem that can be remedied with the application of the principle of opportunity. There is disagreement with Yepéz's statement regarding the fact that the principle of opportunity is intended to decide the provisional archiving of cases, since its purpose is clear, and as we have already indicated in previous paragraphs, its goal is to extinguish public criminal action or criminal prosecution. We agree with the others, because the prosecutor's office should discern the two presuppositions established in this first mentioned effect, that is, that the investigations do not generate effective results and that the prosecution generates successful results. This discernment would help to decongest investigations and fruitless instructions that are stalled in the Attorney General's Office.

Another effect that the aforementioned teacher points out is: "To allow decongestion of the courts, tribunals, tribunals, so that their efforts are directed to cases of transcendence and not only by the waiver of the action, but also by the suspension and interpretation of criminal prosecution." (p.23). It is relevant to emphasize the notion that carries the aforementioned effect, since the analysis carried out by the jurist tends to see that at the time of applying the constitutional principle of opportunity, it would end with public criminal prosecution, putting an

end to the different remedies that can be applied to final orders and sentences. These would activate the competence of the different bodies that are part of the judicial function, this would cause the state to stop spending time and money on resources that are sometimes even briefly founded.

This is more so taking as an example the cassation, an extraordinary appeal that, generally in the national court, which is competent to sustain it in most cases is rejected for lack of compliance in its exhaustive appeals. Having discernment and discretion is another duty that the prosecutor has at the time of the institutionalization of the principle of opportunity in Ecuadorian legislation, as Yépez mentions when he points out:

To guide the selection of cases, which is entrusted to the prosecutors or the Public Prosecutor's Office; discretion that must be linked to the principle of proportionality, therefore, the selection of cases will be based on the seriousness of the crimes, their complexity and the impact on the victims, and on society. (p.34).

There would then be three assumptions that the representative of the prosecutor's office would have to discern in order to know the opportune moment to apply the principle of opportunity in a criminal type that meets the requirements that the criminal legislation in force requires. To see the seriousness of the crime around the social commotion it generated; would resolve the first assumption indicated, the complexity surrounding the investigative process, as well as the constituent elements of the crime under investigation to discern, if it is convenient to continue with the investigation, which would help to resolve the second assumption, and determine the effect that the conduct or act had against the protected legal right in order to determine the amount of the comprehensive reparation would be the concise solution of the third budget, The analysis carried out in a recondite way of these assumptions would help the Public Prosecutor's Office to know effectively and concisely when to apply this constitutional principle.

Opportunity as the antithesis of legality

Darío Bazzani (2006, p. 212) has pointed out in his book Reflections on the New Criminal Procedure System, that there are three main conceptions by which the Public Prosecutor's Office considers that the principle of opportunity is opposed to the principle of legality, pointing out a) that they are opposed, b) that it is an exception; and, c) that it is complementary. It is pertinent then to subsume ourselves in the aforementioned assumptions in order to clarify the ambiguities that have been generated in the first problem under analysis.

That they are opposites.

Those who defend this theory mention that the principle of opportunity is opposed to the principle of legality, and cling to defend it by relying on the exercise of criminal action, focusing their criterion on the fact that this exercise is unavailable and mandatory, to this effect it is pertinent to point out that the principle of legality is the one that subsumes the principle of opportunity. In this context and to understand this premise, let us define the principle of legality.

To better understand this principle, let us cite Dr. Sotomayor, who defines the principle of legality as follows:

The principle of legality or rule of law is a principle of public law according to which all exercise of public power should be subject to the will of the law of its jurisdiction and not to the will of the people, for this reason it is said that the principle of legality ensures legal certainty. (2016, p.65).

The definition cited in previous lines is specific to help understand that the principle of legality is to abide by the expression of what the law typifies, that is, to faithfully comply with the norm that prevails in the current legal system. Starting from this premise, we can then logically conclude that the principle of opportunity is subsumed within the principle of legality because it is the criminal law in force that typifies and regulates it so that it can be applied in the exercise of public criminal action without there being a conflict between opportunity and legality. concluding then that legality gives life to opportunity, so vague would be the antithesis consisting of opportunity being opposed to legality.

Opportunity cannot be considered as an exception or dilatory or even less peremptory to public criminal action, since that is not its purpose and the law has not typified it with that effect. If we analyze the effects of the principle of opportunity, which have already been explained and pointed out in previous lines, we can see that it does not seek to delay the process, on the contrary, it seeks to extinguish it definitively without there being the opportunity for another one to be initiated for the same fact. Treating it as an exception would even allow another action to be initiated against the suspect or defendant, a fact that has no relation to the principle of opportunity.

That it is complementary.

This conception is one that resembles the reality of the principle, but taking into account from the point of view already explained about the counterposition of legality and opportunity. As we have already seen, the constitutional principle of opportunity is not opposed to the principle of legality, on the contrary, it is complementary because opportunity goes hand in hand with legality, without the existence of legality there will be no opportunity.

Finally, it has been briefly demonstrated that the antithesis between opportunity and legality and the conceptions that derive from it have no reliable support. The same regulations and doctrinal analysis derive that the opportunity must be applied without there being a direct violation of legality, even acting on the basis of the guarantee theory pointed out by Ferrajoli, in his 10 axioms of criminal law: "nullum crimen sine poena, nulla poena sine lege" (there is no crime or punishment if there is no law).

Opportunity and equality.

This theory deserves a more concentrated study because we believe that it is the main antithesis that causes the representatives of the prosecutor's office to look for the easiest way around the analysis of when to apply the principle and therefore reject the application of it, causing that currently the prisons in the center of the country are overcrowded, especially with prisoners with a sentence ranging from 1 to 5 years of imprisonment. imprisonment.

Let us then analyze this antithesis, just as the antithesis of opportunity with legality has been analyzed in the previous paragraph. To this end, we begin to define equality, for which Dr. Sotomayor (2016) is brought up again, who defines equality as:

… the one that establishes equal treatment, and equal opportunities in terms of rights and obligations, in the processing of trials, on the one hand the different types of plaintiff and defendant and the attitudes adopted in the procedure or derived from passivity and or absence. Provisionally, the uniformity of criteria in terms of passive obligations and rights, without class, racial, sex, religious belief, political or trade union ideas. (p. 104).

From the above, it can be deduced that equality or the principle of equality focuses on giving all individuals who appear before the organs of administration of justice, in this case before the judges, courts and criminal courts, must receive equally the same opportunities in the process, taking into account the same rights and obligations that they acquire as complainants and defendants.

It is then that a concern must be raised that we must resolve in order to solve the antithesis analyzed in this paragraph, does applying the principle of opportunity in a case of abuse of trust by the prosecutor's office oblige it to apply the principle in all cases of breach of trust in which it must investigate so as not to violate the principle of equality? Those who defend this erroneous theory state that applying it in one case of investigation and in another does not jeopardize the equality that the parties to the proceedings have within a criminal action, since an individual prosecuted for the same criminal type, with the same penalty and the same constituent elements of the crime would be benefiting or favoring through the principle of opportunity not to serve a custodial sentence and another would serve the penalty. This analysis is the factual foundation of those who support this argument.

Bazzani then points out that in order for the principle of opportunity not to be opposed to the principle of equality, the prosecutor, who is the owner of the public criminal action, must be supported by differentiating situations of those investigated or accused, so that there is no conflict between these constitutional principles, To this end, even the Public Prosecutor's Office must use interpretative and argumentative techniques such as weighting and proportionality. These techniques will allow him to give logical reasons without falling into a syllogism his request for the application of the constitutional principle of opportunity and his decision not to apply the aforementioned principle in another case.

Another aspect that must be analyzed by the prosecutor in order not to damage the fragility of the principle of equality is not to make distinctions based on sex, beliefs, religion, social status. To make these distinctions would be a direct violation of the principle of equality. Another point in favor of the thesis that we defend in this paragraph regarding the non-violation of the principle of equality by opportunity is because of what is expressed in Article 195 of the Constitution of the Republic of Ecuador, which states that the prosecutor must act based on the principle of opportunity and minimum criminal intervention. that is, the main function of the prosecutor should be to apply this principle after having carried out a weighing in the case at hand. From the foregoing, it is evident that a public official with sufficient training would never generate a

violation of equality undermined through the principle of opportunity, on the contrary, its analysis would generate a factual basis that can be shared in order to ensure in the nucleus in which it develops a source of consultation for other officials of equal rank.

Ecuadorian Institutionalization.

In order to analyze the principle of opportunity as a legal concept instituted in the Ecuadorian State, it is necessary to refer to the 1998 Constitution, a constitutional text that recognizes guarantees of due process, alternative methods of conflict resolution, respect for human rights and the application and jurisprudential evaluation of international instruments. From this constitution Ecuador became a social state of law, that is, the intrinsic constitutional rights of the individual who is part of the Ecuadorian state were recognized.

It is in this constitution where the principle of favorability typified in Article 24 numeral 2 is established, on the other hand, it also gives the opening for the procedural law to establish alternative sanctions to custodial sentences, thus generating legislation on the principle of opportunity. That is to say, the first steps are beginning to be taken in the institutionalization of the principle of opportunity, but despite what is typified in the constitution of the criminal procedure law of 2001, it never typified the principle of opportunity, so the representative of the Attorney General's Office should continue to adhere to the principle of legality and inalienability of public criminal action. which caused the agglomeration of investigations in the prosecutor's offices, without there being agile responses to the suspect and even less to the victim, also causing expenses to the State for each process that is active without any response.

With the continuity of a clearly draconian penal structure, an oral system with an accusatory (mixed) tendency that continued until 2008, the year in which the Constituent Assembly issued the current constitution, a constitution that framed a pure guarantee, granting human and fundamental rights to the people who are part of the State. Among the constitutional novelties that were subsumed in the constitutional regulations, it was enshrined in Article 195 within the functions of the prosecutor, an article that prescribes:

The prosecutor shall direct, ex officio or at the request of a party, the pre-trial and criminal procedural investigation during the process, shall exercise public criminal action subject to the principles of opportunity and minimum criminal intervention, with special attention to the public interest and the rights of the victims... (p.55).

The legislator saw the need to typify the opportunity in order to give more prominence to the functions performed by the prosecutor's office, to recover its institutional purpose so that it is an entity for the prosecution of crime and a key element of a system of administration of justice, an element of assistance to the judicial bodies. By seeing the State Attorney General's Office as a key element of the administration of justice, we place ourselves in the mission that this body helps to carry out justice when it must be applied and therefore to decongest the judicial apparatuses such as Units and Courts that sustain the criminal field.

3. Discussion

These facts would then be possible as long as the legislator implements alternative methods of conflict resolution in the criminal branch as prosecutorial weapons in the substantiation and exercise of public criminal action. That is why the principle of opportunity is typified in the same way in the Comprehensive Organic Criminal Code, in Article 412, which typifies: "The prosecutor may refrain from initiating the criminal investigation or desist from the one already initiated...". The power is then given to the Public Prosecutor's Office to be able to extinguish the exercise of criminal action through two premises, to abstain from the criminal investigation; and, desist from the one already started.

These two assumptions with simple logic are easy to interpret, abstaining from the criminal investigation, the legislator gave the way to the prosecutor who, once he knows the criminal news, uses discretion, weighting and objectivity to be able to determine whether to initiate the preliminary investigation within a conflictive assumption that comes to his knowledge. Withdrawing from the investigation already initiated does not lead to understanding that the legislator empowers the prosecutor once the investigation has already begun and when he does not find sufficient elements of conviction to desist from it and thus help to decongest the apparatus of administration of justice.

Application budgets.

In addition to the two moments of application of the opportunity explained above, there are prerequisites that must be complied with and legally controlled by the relevant entity so that there is no violation of principles and rights, including the principles of legality and equality that we have already analyzed in the previous paragraphs. These assumptions are typified in the same way in Article 412 in two numerals and in a paragraph that clearly indicates the refusal of when not to apply it. Thus, it typifies:

In the case of an offence punishable by imprisonment for up to five years, with the exception of offences that seriously compromise the public interest and do not infringe the interests of the State. In those culpable offences in which the investigated or prosecuted person suffers serious physical harm that makes it impossible for him or her to lead a normal life.

The prosecutor may not refrain from initiating criminal investigations in cases of crimes for serious violations of human rights and crimes against international humanitarian law, crimes against sexual and reproductive integrity, organized crime, violence against women or members of the nuclear family, trafficking in persons, smuggling of migrants, hate crimes, of substances classified as subject to control and crimes against the structure of the constitutional state of rights and justice.

Paragraphs 1 and 2 indicate in general the cases in which the principle of opportunity can be applied, pointing out intrinsic characteristics that are evident in each criminal type, these characteristics such as the penalty and the protected legal rights that are infringed must be discerned by the Attorney General's Office in order to determine whether or not the principle can

be applied. This control must be mandatory because the judge will be the one who has the last word in the hearing to substantiate the principle.

Similarly, the final paragraph of the aforementioned article indicates when the Attorney General's Office may not refrain from exercising public criminal action, thus detailing the different criminal types in which the prosecutor is tied in carrying out the application of the constitutional principle. In whether article 412 subsumes the cases in which the principle studied within this research can or cannot be applied, as well as the time in which it can be applied, distinguishing two before it is initiated and after it has begun.

Processing of the principle of opportunity.

Likewise, the legislator has indicated the due process that must comply with the principle of opportunity so that its application is not violated any type of substantial or formal requirement, so we can stratify the procedure as follows:

It must begin with the request of the prosecutor, a request that must be addressed to the competent judge in the present case, that is, to the judge of criminal guarantees.

Once the judge has taken cognizance, he must designate an opportune day and time within which the respective hearing is held, so that he may carry out a control of legality and, if appropriate, apply the principle.

If the judge finds that the prosecutor has not demonstrated the requirements established in the law, he will de facto reject the application of the principle and within 3 days will send it to a superior prosecutor to ratify or revoke the decision. The superior prosecutor will have a period of 10 days to deliver his decision duly motivated. This procedure is similar to the procedure for requesting archiving, but it should be emphasized that they are two different procedures corresponding to different criminal legal figures and with another purpose.

If the superior prosecutor revokes the decision, the application of the principle of opportunity may not be requested again. That is why within the present investigation, an attempt has been made to resolve the different ambiguities that may arise within the opportunity in order to avoid this fact that could seriously compromise the interest of the suspect or defendant.

If the judge ratifies the decision to apply the principle of opportunity, it will be immediately referred to the judge in order to extinguish the exercise of the public criminal action.

Within the detail that was made, it is pertinent to mention that the notification to the victim is necessary, but she may or may not attend said hearing. This also guarantees the collection of full reparation from the victim, but through the corresponding channel, that is, the civil route. This problem should be remedied in the opinion of the undersigned investigator, because if the exercise of criminal action is extinguished, the provisions of Article 1 of the Comprehensive Organic Criminal Code should also be guaranteed, regarding the purpose of the same, which is to compensate the victim. By indicating that the victim can request comprehensive reparation by separate rope, the objective of the normative body would not be fulfilled, violating the victim's right in itself.

Discretion of the prosecutor in the principle of opportunity.

To speak of discretion is to speak in itself of the power that the prosecutor has to apply the methods or principles that the law grants him. In this regard, and in order to better understand discretion in the principle of opportunity, it is necessary to paraphrase what definition is given to discretion.

The dictionary of the Royal Spanish Academy has defined discretion as that which is not subject to a rule, but to the criteria of a person, that is, the Royal Spanish Academy interferes with another terminology that would be necessary to analyze to be clear about the context of discretionality, this is the criterion. In the same way, the Royal Spanish Academy defines the criterion as an opinion, judgment or decision that is adopted about a thing, in itself it would be a subjective aspect in which the full knowledge of the individual intervenes. In short, we could say that it is the power granted to the prosecutor to use extra-punitive means to solve conflicting issues quickly and effectively in compliance with the assumptions determined by law.

4. Conclusions

From the research carried out and the analysis of the different methodological means used to support the hypothesis within the present one, it has been found:

The Public Prosecutor's Office, despite there being a turn around the penal system that governs our penal system, continues with a mixed system, which aims to bring the suspect or defendant to the trial stage without applying alternative principles and methods of conflict resolution, which causes the principle of opportunity for a career prosecutor to be seen as the antithesis of the principle of legality.

The lack of knowledge about this principle, as well as the relevant training that prosecutorial representatives must have, causes that

this principle is not applied and that cases remain unresolved in the tax hangers, causing procedural congestion and timely attention to the user.

In order to analyze the way in which the principle of opportunity is applied, it was necessary to take as a space the Office of the Attorney General of the State based in the canton of Ambato, the space in which the investigation was carried out was chosen due to the evident lack of application of the principle of opportunity by the prosecutors. An assertion that is lived through lawyers in free practice.

The time chosen in the same way was the period 2014-2018, which was chosen in order to observe from the year that the comprehensive organic criminal code came into force, and with it brought with it the typification of the opportunity in all investigations that have applied the aforementioned principle. This resulted in a total of 279 cases in the period of 4 years.

In order to demonstrate the general objective, as well as the specific objectives of the present research aimed at the principle of opportunity, it was necessary to apply qualitative and

quantitative scientific methods. It was necessary to analyze the qualities of the requests for application made by the prosecutors, which demonstrate a clear lack of discernment of them, as well as a lack of doctrinal knowledge about the principle of opportunity. Similarly, the number of cases in which the principle of opportunity was applied was essential to carry out, which yielded as a resounding result that 2.02% was the application of the principle in the period 2014-2018, this being a low figure taking into account the purpose and objectives of the principle of opportunity.

Similarly, in the cases analyzed, it was evident that most of the principle of opportunity was applied in order to archive the files that were

in the investigation stage, as well as the application of this principle was adduced, but pointing out the premises of conciliation. This even shows shortcomings in the control of legality that is the mission of the judges of criminal guarantees.

An extensive study of the principle of opportunity in two points such as the application of an unregulated principle of opportunity, as well as a reform around the application of the same as long as the damage to the protected legal right has been corrected to the victim would be the edges that should be analyzed by legal professionals. Likewise, a reform around the request for the principle so that it is not monopolized only by the prosecutor's office, but that it can be requested by the suspect or the victim would help it to have a greater application in the criminal legal field and would avoid crimes of concussion in public officials who exercise the prosecutorial career.

WORKS CITED

Andrade y Asociados, Fondo Editorial. Quito. p.49.
BECCANIA, Cessare. (1987). De los Delitos y Penas. Carlos III University of Madrid. p. 19. Madrid.
BOVINO, Albert. (1985). Criminal Law. Buenos Aires.p.353.
CABANELLAS, Guillermo. (1993). Diccionario Jurídico Elemental. (p.305).
CHANG PIZARRO, Luis Antonio. (2000). Criteria of opportunity in the Civil Criminal Code. (p.57). Ediitorial Continental. San José.
Code of Criminal Procedure (1871). Legislative Branch. Berlin-Germany. Code of Criminal Procedure (1988). Legislative Body, Rome-Italy.
Comprehensive Organic Criminal Code (2014). Corporation of Studies and Publications.
Penal Code of the Argentine Nation (1922). Legislative Branch. Buenos Aires- Argentina.
Constitution of the Republic of Ecuador (2008). COMAGA, Quito-Ecuador.
Editorial Heliasta. Madrid.
FERRAJOLI, Luigi, (2014). Law and Reason. Editorial Trotta. Argentina
GONGORA MERA, Manuel Eduardo. (2000). The principle of opportunity in the Code of Criminal Procedure of Colombia. (p.534) Editores del Puerto. Colombia.
MAIER, Julio. (2004). Criminal Procedural Law. University of Puerto Rico press.
MERINO SANCHEZ, Wilson. (2013). Constitutionalization of Ecuadorian Criminal Law. Revista Ensayos Penales, Issue No. 1 of February. Ecuador.
P.834. Puerto Rico.
Quito. Art. 412.
Royal Spanish Academy, p. 1102, volume 7. Madrid. Royal Spanish Academy, p. 1244 volume 8. Madrid.
LEGAL REFERENCES

ROXIN, Claus. (2014). Criminal Procedure Law. Editors of the Port. Argentina.
SENDRA, Gimeno J.v. (1987). The books procedures Simplified penalties. (p. 350). Editorial Trotta. Madrid.
SOTOMAYOR, George Ermel. (2016). Constitutional and Legal Principles and their Applicability in Criminal and Constitutional Legal Practice. Editorial INDUGRAF. Riobamba.
YÉPEZ, Mariana. (2010). Principle of Opportunity in Ecuador. 1st edition.
ZAMBRANO PASQUEL, Alfonso. (2000). Introductory Study to the Reforms of the Code of Criminal Procedure. (p.7). Editorial Corporación de Estudios y Publicaciones. Quito.
ZAVALA EGAS, Jorge. (2010). Constitutional Law, Neoconstitutionalism and Legal Argumentation. Edilex. Guayaquil. P.273.