



Analysis of the special remedy of double compliance and the protection of the right to due process in Ecuador

Análisis del recurso especial de doble conforme y la protección del derecho al debido proceso en el Ecuador

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ABSTRACT

The special remedy of double jeopardy is a legal input that has its origin in the right to a double instance, recognized in various international instruments such as the American Convention on Human Rights (ACHR), in its Art. 8, numeral 2, literal h. This principle seeks to guarantee that every person convicted of a crime has "the right to appeal the judgment to a higher judge or court" (American Convention on Human Rights, 1969, pp.10), thus ensuring an effective review of the sentence. In Ecuador, formal recognition of the special double jeopardy remedy has been a progressive process. Article 76 of the 2008 Constitution of the Republic of Ecuador establishes the right to due process and the possibility of challenging judicial decisions. Over the years, various jurisprudential pronouncements by the judiciary have consolidated this remedy as a special and fundamental procedural remedy.

RESUMEN

El recurso especial de doble conforme es un insumo jurídico que tiene su origen en el derecho a una doble instancia, reconocido en diversos instrumentos internacionales como la Convención Americana sobre Derechos Humanos (CADH), en su Art. 8, numeral 2, literal h. Este principio busca garantizar que toda persona condenada por un delito tenga “derecho de recurrir del fallo ante un juez o tribunal superior” (Convención Americana sobre Derechos Humanos, 1969, pp.10), asegurando así una revisión efectiva de la sentencia. En Ecuador, el reconocimiento formal del recurso especial de doble conforme ha sido un proceso progresivo. La Constitución de la República del Ecuador de 2008, en su artículo 76, establece el derecho al debido proceso y la posibilidad de impugnar decisiones judiciales. A lo largo de los años, diversos pronunciamientos jurisprudenciales por parte del órgano judicial, han ido consolidando este recurso como un recurso especial y procesal fundamental.

Keywords / Palabras clave

Special double action, due process, right to appeal, cassation, double instance.

Recurso especial de doble conforme, debido proceso, derecho a recurrir, casación, doble instancia

Introduction

The implementation and strengthening of the special remedy of double jeopardy in Ecuador is mainly justified by the protection of the right to due process, enshrined in Art. 76 of the 2008 Constitution of the Republic of Ecuador, as a fundamental pillar of the rule of law and an essential guarantee for justice. This remedy ensures that judicial decisions are reviewed, which contributes to the correction of possible judicial errors and respect for the rights of the accused. The possibility of a judicial decision being thoroughly reviewed a second time and by a higher instance minimizes the risk of arbitrary decisions and abuses of power, which results in strengthening the confidence of the procedural parties in the judicial system, becoming an additional avenue and offering clear and effective mechanisms for the review of sentences, thus ensuring that judicial decisions are fair and based on a correct application of the law.

Finally, Ecuador, as a State party to the American Convention on Human Rights, which has provided jurisprudence on double jeopardy, has the obligation to guarantee the right to an effective remedy that allows for the review of judgments. Adequate implementation of the double conformity remedy is a manifestation of this international commitment and a sign of the evolution and improvement of the domestic legal system.

"The principle of double conformity derives from the principle of double instance, which requires that at least two judges or two courts in successive instances examine and rule on a judicial case" (Pérez, 2024, 491). In the sentence that will be analyzed below, it is observed that the special appeal of double conformity arises on the basis of a judicial tool previously established in the legal system; which allows a follow-up of its conformation up to its regulation of form and procedure.

The special appeal of double conformity is a special criminal appeal that allows the first conviction issued in second instance or in cassation to be reviewed in full by a higher court (National Court of Justice) (Erazo, 2024). This resource has jurisprudential origin in Ruling 987-15EP/20 dated November 18, 2020, where it is recognized that:

"the right to double conformity is not guaranteed by the mere formal possibility of raising a challenge to the conviction, but rather that said remedy must be effective in the sense of being susceptible of allowing a comprehensive analysis of the conviction being challenged". (Constitutional Court of Ecuador, 2020).

This judgment sets a precedent, because it turns this remedy into a tool to apply a comprehensive review of a judgment, essentially differentiating it from other previously created remedies. The review of the procedure must be characterized, according to the judgment, as an effective review, which would include an analysis from beginning to end, with the purpose of verifying the correct procedural development of the case.

The recognition of the guarantee to appeal the decision is a fundamental step for the birth of the special appeal of double conformity, since said guarantee, immersed in Art. 76, numeral 7 of the Constitution of the Republic of Ecuador, establishes:

"the possibility that a given decision "[...] may be reviewed by the hierarchically superior body from which said decision emanated, in order to correct possible judicial errors or omissions that may have been committed, thus safeguarding the rights of the parties involved in the jurisdictional processes and above all the effective judicial protection" (Constitutional Court of Ecuador, Decision No 1270-14-EP/19, 2019, pp. 26-27).

It is important to note that this guarantee is also contemplated in international instruments such as the American Convention on Human Rights, which establishes:

"(h) [The] right to appeal the judgment to a higher judge or court". On the other hand, the International Covenant on Civil and Political Rights (hereinafter "ICCPR") recognizes the right to appeal in criminal matters in the following terms: "Article 14: [...] 5. Everyone convicted of a crime shall have the right to have his conviction and sentence reviewed by a higher tribunal according to law" (Constitutional Court of Ecuador, Judgment No. 987-15-EP/20, 2020).

However, the guarantee of recourse to the judgment is not essentially the same as the guarantee of double jeopardy, since even expressly, the latter is not contemplated in international law. Despite this, the IACHR Court has developed jurisprudence in this regard, in order to somehow recognize this special remedy.

In this sense, the formalities required for the double jeopardy appeal to be admitted must be minimal and must not constitute an obstacle for it to fulfill its purpose of examining and resolving the grievances sustained by the appellant, that is to say, it must seek results or responses to the purpose for which it was conceived. It should be understood that, regardless of the recourse regime or system adopted by the States Parties, and of the denomination given to the means of challenging the conviction, for it to be effective it must constitute an adequate means to seek the correction of an erroneous conviction. This requires that it be able to analyze the factual, evidentiary and legal issues on which the challenged sentence is based (emphasis added). *Gorigoitía v. Argentina Judgment*, (I/A Court H.R., 2019).

At the international level, the IACHR Court contemplates the remedy of double conformity in an abstract sense, since it singles out the essence of this remedy and its common properties, mentioning that regardless of how the States parties call it in their domestic legislation, not only specifying the analysis of the sentence, but a review of the

factual, evidentiary and legal aspects that paved the way for said decision, that is, the merits of the case and the form of the procedure that has been used; consequently, the integral analysis of the sentence that has been challenged. On the other hand, it states that: "The double judicial conformity, expressed through the full review of the conviction, confirms the basis and gives greater credibility to the jurisdictional act of the State, and at the same time provides greater security and protection of the rights of the convicted person" (IACHR Court, Judgment Case Barreto Leiva v. Venezuela, 2009). The jurisprudential development of the IACHR Court regarding double conformity opens the way for the Ecuadorian jurisdictional body to interpret the norm in a much broader manner.

It is for this reason that the Constitutional Court, based on this judgment, interprets the norm and takes into account that the provisions recognized in international treaties enjoy a privileged hierarchy, according to Article 424 of the Constitution, and are part of our block of constitutionality, and therefore concludes that, in criminal matters, the guarantee of the defendant to appeal the conviction implies the right to double jeopardy (emphasis added). In the domestic legal system, this right is instrumented through Article 76 paragraph 7 literal m) of the Constitution, which recognizes, in general terms, the right to appeal. Decision No. 987-15-EP/20 (Constitutional Court of Ecuador, 2020).

It is essential to analyze Ruling No. 987-15-EP/20, in order to understand the origin of this appeal, since it analyzes a case of violation of the right to defense. In this case, this violation has as a consequence, the limitation of the access to the double conformity and in its general perspective, to the right to appeal.

It is important to take into account the considerations made by Constitutional Judge Hernán Salgado Pesantes in his concurring vote, since he breaks down in a much more specific manner the characteristics that differentiate double compliance from the guarantee to appeal, stating the following:

The guarantee of recourse and the guarantee of double jeopardy have different characteristics despite their close relationship in the criminal field. The difference lies mainly in what each of them protects, since on the one hand the guarantee of appeal has a broad scope since it is related to the remedies provided for in the law and the claim of the applicant, all of them in turn in guarantee of the right to defense. On

the other hand, the guarantee of double compliance refers more particularly to the possibility of a comprehensive review of a conviction by means of a remedy provided for in the law (Ruling No. 987-15-EP/20 (Constitutional Court of Ecuador, 2020).

Judge Hernán Salgado, makes a succinct differentiation, since he establishes that the guarantee to appeal the judgment is contemplated, which can be exercised through the remedies established in the legal system. However, double compliance is essentially a "direct" remedy, which has a similar purpose to the guarantee to appeal the judgment, adding a comprehensive review, which, although it is not expressly set forth in the law, its development is beginning to emerge from national and international jurisprudence.

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Within this judgment, the special double jeopardy appeal begins to evolve in its structure, in addition to the fact that its origin in jurisprudence arises from the existence of a violation of the right to defense, this being a component of the fundamental right to due process.

Constitution of Basic Elements of the Special Double Conformity Appeal based on Ruling No. 1965-18-EP/21 of November 17, 2021.

The "Laguna Structural and Double Conformity Case" is a judgment that establishes the bases and elements that will serve as the basis for the constitution of the structure of the special double conformity remedy, since it is a precedent that establishes guarantees for the protection of the right to due process. In its judgment, the Court states:

The right to double jeopardy seeks to provide the convicted person in a criminal proceeding with an instance capable of correcting possible judicial errors, given the special gravity of criminal sanctions. To this end, the right to double jeopardy requires two basic elements. First, the existence of a court other than the one that issued the conviction with jurisdiction to review it, which must be of a higher organic hierarchy. And, secondly, a remedy -whatever its name may be- ordinary; that is, timely, effective and accessible to any person convicted in a criminal proceeding (Ruling No. 1965-18-EP/21 (Constitutional Court of Ecuador, 2021).

The author Guillén, B. (2023) cites the definitions of the Court with respect to each input, pointing out that the fact that the appeal is "timely" means that it can be filed prior to the execution of the conviction; effectiveness, on the other hand, allows the possibility for

the higher court to review the contested sentence in its entirety, including the interpretation and application of the law, as well as the evaluation of the evidence in the contested sentence; and lastly, accessibility, which means that the formalities for the appeal to be admitted are minimal.

The Constitutional Court in Ruling No. 1965-18-EP/21, established two key elements for the compliance and conformation of the double compliance recourse, and determined a term of two months for the National Court of Justice to make a provisional regulation through a resolution, in order to guarantee the right to double compliance for persons who are convicted for the first time in the second instance and to analyze their case in accordance with established parameters.

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In addition, within the pronouncements by the Constitutional Court, it is specified that: Appeals for cassation and review are not timely, effective and accessible do not guarantee double conformity after a first conviction and in second instance, therefore, those convicted for the first time...shall be entitled to an ordinary appeal that comprehensively reviews the conviction (S., No. 1965-18-EP/21, case 1965-18-EP. Of November 17, 2021)." (Pérez, 2021, p. 493).

It is important to mention that the cassation and review appeals are mechanisms that allow questioning a judicial sentence and examining it. The cassation appeal fulfills its function of correcting errors of misapplication, lack of application or erroneous interpretation of procedural rules, erroneous interpretation of legal precepts or substantive law rules (COGEP, 2015); on the other hand, on the other hand, the review appeal which is regulated in Art. 658 of the COIP, reveals that the review may only be declared under new evidence that demonstrates the factual error of the contested judgment, and other exceptional cases (COIP, 2014). (COIP, 2014). The Court's pronouncement criticizes these remedies, and suggests a change in legislation and judicial practice so that persons convicted in the first instance have access to an ordinary appeal that fully analyzes the sentence, both in factual and legal issues, which would ensure a thorough and fair review of the initial conviction.

Judgment No. 8-19-IN accumulated /21 on the inadequacy of the appeal in cassation, extraordinary action of protection and the right to double compliance.

Ruling 8-19-IN accumulated /21 becomes part of the jurisprudence issued by the Constitutional Court of Ecuador with respect to the

special appeal of double conformity. Said pronouncement resolves to declare unconstitutional by the form of Resolution No. 10-2015, issued by the Plenary of the CNJ, on July 5, 2015, and by connection, the unconstitutionality by omission of the COIP, for not providing for a remedy that guarantees the right to double compliance. In that same sentence, it was ordered that the National Court of Justice, use the powers granted in Art. 180, numeral 6 of the COFJ, to issue within two months from the notification of the sentence, a resolution with the force of law that regulates an ad hoc appeal, ensuring the right to double conformity for defendants who have received a conviction for the first time in cassation. (Pérez, 2024).

The importance of this Judgment covering the suitability of the double jeopardy remedy lies in the fact that it is not only a remedy, but a right, which is aimed at guaranteeing the status of freedom and innocence of persons, so it is a right that must always be guaranteed and consequently engenders for the legislator the obligation to protect it. Judgment No. 8-19-IN accumulated / 21 (Constitutional Court of Ecuador, 2020).

It is interesting to question the usefulness of the appeal in cassation in certain cases, since, as mentioned in the aforementioned Judgment, it is a formal appeal, but it must be filed within a term, and may be qualified as untimely and rejected out of time, limiting it to be filed only to the persons mentioned in the criminal law and the inadmissibility in cases where there are requests for review of the facts or for the assessment of new evidence. For this reason, the Court points out that "the nomofilactic nature of the criminal cassation appeal prevents it from being able to discuss the facts and evidence of the case again, as happens in ordinary appeals" (Constitutional Court of Ecuador, Judgment 8-19-IN accumulated / 21, 2021).

The inadequacy of the remedy of cassation to be applied in the cases presented is not perhaps an inefficiency in its nature, but an incompatibility to be applied when it refers to a case that requires the integral analysis of a criminal sentence, since, in addition to being configured as a formal remedy, it does not respond effectively to the right of the defendants to have an ordinary, direct, broad and non-formal remedy through which they can challenge a conviction that has been sentenced, In addition to being configured as a formal, nomophilactic and systematizing remedy, it does not effectively respond to the right of the accused to have an ordinary, direct, broad and non-formal remedy through which they can challenge a conviction

that has been handed down against them for the first time, regardless of the judicial instance or authority that issued it; and to receive a decision on the merits of the case. Judgment No. 8-19-IN accumulated / 21 (Constitutional Court of Ecuador, 2020).

The Constitutional Court expressed that "the judges of cassation can only evaluate the contravention of the law, the improper application or the erroneous interpretation, without evaluating the evidence because that may violate rights that constitute the subject matter of the extraordinary action of protection" (Villagómez, 2020, p. 89). (Villagómez, 2020, p. 89). As mentioned before, the cassation appeal is in charge of correcting errors of interpretation or misapplication of the law, in the specific cases established and is limited to the nature and object it has.

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However, it could be questionable, that if the extraordinary action of protection has in its nature the valuation of evidence, this guarantee should be used; but the doctrine is clear, and establishes that "the extraordinary action of protection is a residual jurisdictional guarantee that requires the exhaustion of all ordinary and extraordinary remedies, and of the autonomous actions of challenge that are appropriate to repair the alleged vice" (Guerrero del Pozo, 2017, p.63).

Therefore, if the cassation only addresses issues of normative and interpretative error, and the Organic Law of Jurisdictional Guarantees and Constitutional Control (2009) states that the purpose of the extraordinary action of protection is the protection of constitutional rights and due process in judgments, final orders, resolutions with the force of judgment, in which rights recognized in the Constitution have been violated by action or omission, to which in addition, its use can be made after the exhaustion of the aforementioned remedies, it is necessary a special remedy that provides a comprehensive review of both regulatory issues, formal and evaluation of evidence in order to ensure the right to legal certainty and due process.

For this reason, the Court once again reiterates the need to regulate a means of appeal to guarantee the right to double compliance, which should include the following characteristics:

(i) be of a minimally formal nature, that is, "the formalities required for the appeal to be admitted must be minimal and must not constitute an obstacle for the appeal to comply with its purpose of examining and resolving the grievances sustained by the appellant";

(ii) be ordinary, that is to say that it allows "the analysis of factual, evidentiary and legal issues on which the challenged judgment is based, since in the jurisdictional activity there is an interdependence between the factual determinations and the application of the law, in such a way that an erroneous determination of the facts implies an erroneous or improper application of the law";

(iii) be broad, consequently "the grounds on which an appeal may be filed must allow for a broad review of the contested aspects of the conviction"; and (iv) the grounds on which an appeal may be filed must allow for a broad review of the contested aspects of the conviction.

(iv) be direct, which is why it is not appropriate to impose more rigid requirements or prior stages than those required for other remedies already provided by the legal system to review the responsibility of the accused and the materiality of the crimes. Thus, in the Ecuadorian case it would be unfeasible for the remedy through which the right to double jeopardy is guaranteed to have a stricter structure than that established for the appeal, since, in the latter, the criminal procedural legislation does not impose requirements such as the written argumentation of the appeal or the existence of a formal phase of admission (Constitutional Court of Ecuador, Judgment 8-19-IN accumulated / 21, 2021).

Based on this determination, the Court ruled that, while the National Assembly prepares a reform of the Organic Integral Criminal Code, there must be a remedy to temporarily guarantee the right to double compliance, that is, through a resolution with force of law, which must be issued by the Plenary of the National Court of Justice, taking into account Art. 180 numeral 6 of the Organic Code of the Judicial Function, which grants it the powers to do so.

The Constitutional Court finally states that the Resolution used by the National Court must regulate the procedure, so that the appeal has a structure similar to that established for the appeal and the right to double conformity is guaranteed, the main purpose being that a higher court reviews the entire contested sentence, including the interpretation and application of the law and the evaluation of the evidence. Judgment No. 8-19-IN accumulated / 21 (Constitutional Court of Ecuador, 2020).

Resolution N.04-2022 of March 30, 2022 of the National Court of Justice that regulates the right to the special appeal for double compliance.

The National Court of Justice complies with the provision made by the Constitutional Court of Ecuador, which regulates the special appeal of double conformity, and establishes its application in cases only when there is a first conviction, eliminating the possibility of making use of it in cases where the person is found guilty in the first instance, ratifying his innocence on appeal and in cassation is declared guilty again, as the Court considers that in these cases, if the right to double conformity has been guaranteed.

The resolution begins by mentioning the jurisprudential development made by the Inter-American Court of Human Rights, ratifying the importance and application of conventionality control, which refers to the fact that the Ecuadorian jurisdictional body will not only observe the American Convention in the application and construction of the norms, but also the interpretation made by the IACHR Court on relevant issues. Likewise, it emphasizes Art. 76 numeral 7 and literal m) of the Constitution from which the right to appeal emerges and is guaranteed, as well as other norms of international law such as the International Covenant on Civil and Political Rights. Later on, mention is made of the Rulings previously analyzed in this document, such as Ruling No. 1965-18-EP/21, Ruling No. 8-19-IN accumulated/21 and Ruling No. 987-15-EP/20 and the precedents that encompass each one of them, among other normative bodies, with the purpose of issuing the norms that regulate the special appeal of double conformity.

The purpose of the right to double conformity is the comprehensive review of the convictions issued by the Courts of Appeal and by the Courts of Cassation of the competent Specialized Chambers of the National Court of Justice, when in such sentences the guilt of an accused person is declared for the first time; and it is established in the present Resolution and with the purpose that said provisions are of mandatory application until the National Assembly regulates said resource in the Organic Integral Penal Code (Resolution 04-2022, 2022), since the special resource of double conformity, is not expressly provided for in the Organic Integral Penal Code, unlike other resources such as appeal, mentioned in Art. 653, cassation in Art. 656, review in Art- 658, among others.

For First Instance Conviction Cases On Appeal

Said Resolution regulates in the first place, the cases of first conviction in an appeal instance, establishing as an active legitimated person "the

defendant who has been convicted for the first time in a sentence issued by a Court of Appeal of the Provincial Courts of Justice, for crimes whose exercise of criminal action is public or private and for contraventions" (Resolution 04-2022, 2022, p.8), and exclusive competence established for the Specialized Chamber for Criminal, Military Criminal, Police Criminal, Traffic, Corruption and Organized Crime of the National Court of Justice; and in cases where the judges of the aforementioned Chamber have been exhausted, the Specialized Chamber for the Family, Children, Adolescents and Adolescent Offenders will be competent, which will be considered as a related Chamber; and finally in case there are no competent judges in it, it will be drawn by lot among the other competent judges of the National Court of Justice.

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For the first cases, it is regulated on the basis of the following rules:

1.- It shall be filed in writing before the Court of the Provincial Court of Justice that issued the sentence of appeal, within three days of notification of the same.

The Court of Appeal of the Provincial Court of Justice shall decide on the granting of the special appeal within five days of its filing, for which purpose it shall verify that it is filed by the right holder and within the established term, otherwise it shall reject it outright.

3.- If the appeal is granted, the Court shall remit the process to the National Court of Justice within five days from the date on which the decision granting the appeal has become final.

4.- Once the file has been received, the respective Chamber of the National Court of Justice shall summon the parties to a hearing within five days following receipt of the file, in order for them to substantiate the appeal and state their claims. 5.- The appellant shall intervene first and then the opposing party. There shall be room for reply and counter-reply.

6. At the end of the debate, the Tribunal shall proceed to deliberation and, based on the grounds and allegations presented, shall announce its oral decision at the same hearing. 7.- The sentence or reasoned order shall be reduced to writing and notified within three days after being announced at the hearing. (Resolution 04-2022, 2022, p.9),

The Court affirms that in the event that the special appeal of double conformity is not filed within the established terms, the cassation

appeal may be filed. However, if an appeal in cassation is desired, it may be filed after the notification of the resolution of the special appeal previously filed.

For First Conviction Cases In Cassation Judgments

In Chapter III of Resolution 004-2022 a second special regulation is made for cases of first conviction in a cassation sentence, where the active standing is for "any person prosecuted who has been convicted for the first time in a sentence issued by a Cassation Court of the National Court of Justice, for crimes whose exercise of the criminal action is public or private." (Resolution 04-2022, 2022, p.10).

In the same way as in the cases of first conviction in appeal instance, the competence lies in the same criminal court mentioned above, this court will be the same that heard the cassation appeal and that will resolve the special appeal of double conformity; also in the cases in which the judges of said chamber are exhausted and in the absence of judges of the Family Chamber, the lot will be drawn according to the same procedure mentioned in Chapter II. The procedure to be carried out shall be in accordance with the following rules:

- 1.- It shall be filed in writing before the Court of the National Court of Justice that issued the sentence of cassation, within a term of three days of notification thereof.
- 2.- The Court of Cassation of the National Court of Justice shall rule on the granting of the special appeal within five days of its filing, for which purpose it shall verify that it is filed by the right holder and within the established term, otherwise it shall reject it outright.
- 3.- If the appeal is granted, the Court of Cassation shall send the case to the Specialized Chamber of the National Court of Justice within five days of the date on which the decision granting the special appeal has been executed.

Once the file has been received, the respective Tribunal of the National Court of Justice shall summon the parties to a hearing within five days of receipt of the file, so that they may substantiate the appeal and present their claims.

5. The appellant shall intervene first and then the opposing party. There shall be room for reply and counter-reply.

6. At the end of the debate, the Tribunal shall deliberate and, based on the grounds and arguments presented, shall announce its oral decision at the same hearing.

7.- The sentence or reasoned order must be reduced to writing and notified within three days after being announced at the hearing (Resolution 04-2022, 2022, p.9),

The rules that are carried out for these cases of first conviction in cassation sentence, have a similarity in the terms that determine the procedural actions of the cases of first conviction in appeal; its structure follows a basically equal order. Finally, with respect to the filing of appeals, the Court mentions that for the judgment that will resolve the special appeal of double conformity, only the appeals of clarification and amplification, which are horizontal appeals, will be applicable.

In Resolution 04-2022 the Constitutional Court also establishes the rules for cases in which the Provincial Court and National Court of Justice have jurisdiction, establishing that:

a) In the event of a first time conviction on appeal in cases under the jurisdiction of the Provincial Court of Justice, the jurisdiction for the hearing and resolution of the special appeal shall be of a Court of Conjunctions and Judges of the Specialized Criminal, Military Criminal, Police Criminal, Traffic, Corruption and Organized Crime Chamber of the National Court of Justice. If the judges of said Chamber have been exhausted, the judges of the Specialized Chamber of the Family, Children, Adolescents and Adolescent Offenders as a related Chamber will hear the case; if there are no judges of said Chamber, a lot will be drawn by lot among the other judges of the National Court of Justice.

b) In the event of a first-time conviction on appeal in cases under the jurisdiction of the National Court of Justice, the jurisdiction for hearing and resolving the special appeal shall be that of a Court of National Judges of the Specialized Criminal, Military Criminal, Police Criminal, Traffic, Corruption and Organized Crime Chamber. If the judges of said Chamber have been exhausted, the judges of the same Specialized Chamber will hear the case; if they have been exhausted, the judges of the Specialized Chamber for the Family, Children, Adolescents and Adolescent Offenders as a related Chamber will hear the case; if there are no judges available in said Chamber, a lot will be

drawn among the other judges of the National Court of Justice (Resolution 04-2022, 2022, p.11-12).

Likewise, it is important to mention that the Court makes a valuable contribution to the cases of adolescents in conflict with criminal law, since it provides for the application of the three chapters that make up the Resolution, also indicating specific rules regarding the competence of the person hearing the case. Pointing out that:

In the event of a conviction for the first time on appeal, the jurisdiction for the hearing and resolution of the special appeal will be of a Court of Conjunctions or Judges of the Specialized Chamber for the Family, Children, Adolescents and Adolescent Offenders of the National Court of Justice. If there are no more able Judges in said Chamber, the Judges of the Specialized Chamber of Criminal, Military Criminal, Police Criminal, Traffic, Corruption and Organized Crime as a related Chamber shall hear the case; if there are no able Judges in said Chamber, a lot shall be drawn among the other Judges of the National Court of Justice. b) In the event of a conviction for the first time in cassation, the jurisdiction for the hearing and resolution of the special appeal shall be of a Court of Judges of the Specialized Chamber for the Family, Children, Adolescents and Adolescent Offenders of the National Court of Justice different from the one that heard the cassation appeal. In case the number of able Judges of said Chamber has been exhausted, a Court of Judges of the same shall hear the case; in case they have been exhausted, the Judges of the Specialized Chamber of Criminal, Military Criminal, Police Criminal, Traffic, Corruption and Organized Crime as a related Chamber shall hear the case; and in their absence, a lot shall be drawn among the other able Judges of the National Court of Justice. (Resolution 04-2022, 2022, p.12-13).

This Resolution determines a complete structure of the object, purpose, competence, standing, procedure and procedural rules to be taken into account for a correct application of the right to double jeopardy, based on a pronouncement of the National Court with force of law. The regulation of this right in Ecuador is of great importance first because it is an input that has allowed the criminal procedural justice to evolve in order to guarantee human rights, and as a second point to highlight, it allows Ecuador as a Constitutional State of rights, to ratify its commitment to compliance with international standards, in this case, the American Convention on Human Rights, which

establishes the obligation for States parties to be guarantors of legal certainty and due process.

The Special Appeal of Double Conformity and Its Impact on the Protection of the Right to Due Process of Law

The above analysis allows us to take due importance in considering the antecedents in which the special double compliance recourse begins to emerge, in order to analyze which are the characteristics that link it to the right to due process.

The Inter-American Court of Human Rights (1990) in the case of Ruano Torres et al. vs. El Salvador, makes a determination of the concept of the right to due process as that set of requirements that must be observed in the procedural instances so that the persons who are identified as procedural parties may have the opportunity to adequately defend all their rights that by law correspond to them, before any act of the State, adopted by any public authority, whether administrative, legislative or judicial, which may be affected or harmed, therefore it is considered due process as that which is directly linked to the notion of justice, which refers to the following: 1.- Access to justice where equality is guaranteed. That a fair trial is developed, and 3. - That fair resolutions are issued where the rights and obligations of the parties are respected.

Article 76 paragraph 7 of the Constitution recognizes the right to defense as a component of due process and sets forth the minimum guarantees that comprise it in the following terms: Art. 76.- In all proceedings in which rights and obligations of any order are determined, the right to due process shall be ensured, which shall include the following basic guarantees: [...] 7.- The right of persons to a defense shall include the following guarantees: (a) No one may be deprived of the right to defense at any stage or level of the proceedings; [...] (c) To be heard in a timely manner and on equal terms; [...] (h) To present orally or in writing the reasons or arguments with which he believes he is assisted and to reply to the arguments of the other parties; to present evidence and contradict that which is presented against him; [...] (m) To appeal the ruling or resolution in all proceedings in which his rights are decided upon. (Ruling No. 987-15-EP/20).

The Court makes a pronouncement that the guarantees to the defense and to appeal have been constitutionally recognized autonomously in number 7 of Article 76, and although both converge, they must be

understood interdependently, since they are elements that safeguard the correct protection and proper exercise of the right to due process (Constitutional Court of Ecuador. Judgment No. 1306-13-EP/20 of February 21, 2020, para. 29).

The special remedy of double compliance has a significant impact on the protection of the right to due process in Ecuador, as it impacts several aspects and among these, also the right to appeal, which is found in the Constitution of the Republic of Ecuador, Art. 76 numeral 7 literal m) regarding the right to defense.

The right to appeal the ruling is considered an element of the right to defense, and consequently the right to defense is a component of the right to due process, so the importance of timely application of the special double jeopardy remedy will guarantee these rights that are triggered within the due process of criminal law.

Due process focuses on important aspects, among them is the right to defense, the equality of the parties in any field, and the issue of procedural guarantees and effectiveness, which are violated, since they are immersed in a total defenselessness once the right to due process is violated, which is considered as the mother axiom from which derives each and every one of the principles and guarantees that the State is obliged to protect (Prieto, 2016). (Tiche, 2023, p. 291).

The special appeal of double conformity, being an ordinary, broad, direct and minimally formal mechanism, which allows the integral review of the sentence, provides an additional protection of this right to due process, not only created as a tool, but by being regulated by Resolution 004-2022, it also guarantees the mechanism of what and how it will be carried out for its correct application.

The implementation of the special remedy of double jeopardy in Ecuadorian legislation represents a step forward in domestic justice, since, if the purpose is the comprehensive review of a judicial decision in order to correct judicial errors, this has the effect of reducing injustice and guaranteeing a fair trial.

Ruling 987-15-EP/20 mentions that: "The right to defense must be guaranteed in an integral manner during the processing of any proceeding in which rights and obligations are determined." (Constitutional Court of Ecuador, Ruling No. 987-15-EP/20, 2020). In this case, the special remedy of double conformity, contributes to the strengthening of the rule of law by ensuring that judicial decisions can

be reviewed and, if necessary, corrected, promoting confidence in the judicial system and its fair and transparent operation.

Materials and Methods

In this research on the special remedy of double compliance in the protection of the right to due process in Ecuador, the qualitative methodology has been chosen. This choice is based on the need to make an initial review of the literature. The authors Hernández-Sampieri & Mendoza (2018) mention that:

In this approach, phenomena are studied systematically. However, rather than starting with a theory and then "turning" to the empirical world to confirm whether it is supported by the data and results, the researcher begins the process by examining the facts themselves and reviewing previous studies, both simultaneously, in order to generate a theory that is consistent with what he or she is observing happening. (p.7)

The qualitative methodology for this study allows a detailed and contextualized analysis of legal phenomena, beyond what quantitative methods could offer, since here "logic or inductive reasoning predominates, moving from the particular to the general. First exploring and describing individualities, in order to subsequently generate theory." (Hernández-Sampieri & Mendoza, 2018, p. 9).

The qualitative approach is the most appropriate for this type of research, as it facilitates the exploration of the subjective and contextual dimensions of the phenomenon studied, which is done through literature review, and mainly through the analysis of jurisprudence and opinions of magistrates through their decisions and sentences. With this approach, it is expected to generate an enriched and holistic knowledge that will contribute to the academic discussion and the formulation of doctrine in the field of criminal justice in Ecuador.

Baptista, Fernández & Sampieri (2010), comment that the qualitative researcher uses techniques to collect data, such as unstructured observation, open interviews, document review. The characteristics of qualitative research in the fundamental process of the general research process such as literature review, allow justifying the approach and need for the study, as well as data collection, which emerge gradually in a relative number of cases, and within this research, the review of sentences, resolutions, judicial pronouncements and doctrine.

In all areas of knowledge, the primary sources most used to develop theoretical frameworks are books, scientific journal articles and papers or papers presented at conferences, symposia and similar events, among other reasons, because these sources are those that systematize information to a greater extent (Baptista, Fernández & Sampieri, 2010, p. 57). This is why, within the present research, the literature collected is scientific content containing an evaluation by expert editors, and in the case of judgments, by National and Constitutional Courts that have specialized judges and magistrates with a long history in the practice of the profession.

Results

The results and discussions obtained from the research are as follows:

Constitutional Basis

The special recourse of double conformity is included in the Constitution of the Republic of Ecuador in Article 76, paragraph 7, literal m), which guarantees the right to appeal the ruling or resolution in all judicial proceedings. This recourse has a conventional basis based on Art. 8, numeral 2, literal h of the American Convention on Human Rights. However, it is not established within procedural or penal normative bodies such as the General Organic Code of Proceedings or the Comprehensive Organic Penal Code, which constitutes a legal loophole and obliges the Constitutional Court and the National Court of Justice to develop jurisprudence and regulate the form and procedure, while the National Assembly prepares a bill to include this mechanism within the respective normative body.

Contributions of Ruling 987-15-EP/20

Ruling No. 987-15-EP/20 of the Constitutional Court of Ecuador is the first jurisprudential precedent that allowed the elaboration of questions regarding the special remedy of double compliance. The Court based its analysis on Art. 76, numeral 7 literal m) of the Constitution, International Covenant on Civil and Political Rights, Article 14(5), and the American Convention on Human Rights, Article 8(2)(h). Based on this, what was mainly studied was:

"the right to double conformity is not guaranteed by the mere formal possibility of raising a challenge to the conviction, but rather that said recourse must be effective in the sense of being susceptible of allowing

a comprehensive analysis of the conviction being challenged". (Constitutional Court of Ecuador, 2020).

The Court emphasizes that the remedy must be accessible and timely, allowing any convicted person to exercise his or her right without limitation, and, moreover, the effectiveness of the remedy lies in its ability to address both factual and legal issues. The ruling underscores the importance of double compliance as an essential guarantee of due process and an adequate defense, noting that this has prompted the State to ensure a more equitable justice system that respects human rights.

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Contributions of Ruling No. 1965-18-EP/21 of November 17, 2021

Ruling 1965-18-EP/21 develops the first two elements that make up the special double compliance recourse, which are as follows:

The existence of a court other than the one that issued the conviction with jurisdiction to review it, which must be of a higher organizational hierarchy.

An ordinary remedy, by whatever name it may be called, that is, one that is timely, effective and accessible to any person convicted in criminal proceedings.

Regarding the first element, it was found that the review of a conviction by a court that is not involved in the original decision is fundamental because it guarantees an impartial and objective analysis. It was also found that a higher court not only has more authority, but also generally has more experienced and trained judges, which increases the quality and depth of the review. On the other hand, the second input does not explicitly mention a specific name for such a remedy; however, it emphasizes the creation of a tool that is part of the standard judicial procedure and not an extraordinary one, that can be filed within reasonable timeframes that allow its effectiveness without causing undue delays, and finally within the reach of the defendant, regardless of his or her economic or social situation. This implies not only the absence of economic barriers, but also the existence of adequate legal support for those who cannot afford a private defense.

Contributions of Judgment No. 8-19-IN accumulated /21

Ruling No. 8-19-IN cumulative /21, marks the before and after for the formal structuring of the procedure of the special remedy of double conformity. The Constitutional Court, in its ruling, orders the National Court to adopt the necessary measures to ensure that all convicted persons in Ecuador have access to an effective double compliance remedy, through a Resolution with the force of law. This includes reviewing and, if necessary, modifying judicial norms and practices to bring them into line with constitutional and international human rights standards. In this Judgment it was observed that this remedy must have 4 elements: a minimum of formality, it must be ordinary, broad and direct.

It was observed during the investigation that there are resources such as cassation, appeal or extraordinary action of protection, which may be similar in their purposes, however each tool has a different functionality. In the case of the appeal, it was determined that this allows the review of judgments before higher courts; on the other hand, the cassation resource offers a specific review of errors of law; or finally the extraordinary action of protection, which allows its use as long as the ordinary channels are exhausted at first. This is why the effectiveness of these remedies is criticized, as it depends on factors such as procedural speed, purpose and different uses.

During the investigation, it was determined that the evolution of the special recourse of double compliance in Ecuadorian legislation has had to go through a process of composition to finally be regulated by a provision of the Constitutional Court to the National Court.

Conclusions

Ruling No. 8-19-IN cumulative /21 opened the way to the elaboration of Resolution 004-2022, which will be the one that is finally in force until today, and which is the document that guides the use of said resource. This work analyzed the nature and purpose of the special appeal, which is currently regulated in the aforementioned resolution. It also studied the standing, competence and procedure to be followed in the cases that arise, which are mainly two: cases of first conviction in appeal and cases of first conviction in cassation sentence; it was mentioned regarding the cases of provincial and national courts, as well as the cases of adolescents in conflict with the criminal law, but it was not studied in depth because it is not the main topic.

This analysis links the right to due process, which in turn triggers the right to defense and the right to appeal, which are legal rights protected by the Constitution. The research determined that the formal structuring through the Resolution allows an adequate protection of this right, in view of the fact that its implementation corrects judicial errors that have been committed in the decisions of judges.

Being a relatively new resource, it has evolved to become an ordinary, effective and accessible mechanism, which reinforces confidence in the judicial system, demonstrating that it is necessary to create doctrine, criticism, interpretations and knowledge within the community of jurists, in order to make proper use of its nature and be able to apply it in cases where the defendant has not been guaranteed an effective defense; as it is confirmed that its purpose is to guarantee the protection of the right to due process.

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