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Regarding the principle of specialty and competence in the action of protection, in Ecuadorian legislation

A cerca del principio de especialidad y la competencia en la accion de proteccion, en la legislacion ecuatoriana

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ABSTRACT

The study of the principle of specialty and competence, as entities that compose the process in the constitutional field, related to the action of protection, awakens a certain debate, since there is no clear complementation between what is established in this regard in the Constitution of the Republic, with what is regulated by the special laws. In fact, we highlighted in our research about the need for our legislation to have the proper judges specialized in constitutional matters so that their resolutions are the resultant for a proper guarantee of fundamental rights in Ecuadorian society.

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RESUMEN

El estudio del principio de especialidad y competencia, como entes que componen el proceso en el ámbito constitucional, relativo a la acción de protección, despierta un cierto debate, toda vez que no existe una clara complementación entre lo establecido al respecto en la Constitución de la República, con lo regulado por las leyes especiales. En efecto, resaltamos en nuestra investigación a cerca de la necesidad que nuestra legislación cuente con los debidos jueces especializados en asuntos constitucionales a efectos de que sus resoluciones sean el resultante para una garantía debida de los derechos fundamentales en la sociedad ecuatoriana.

Keywords / Palabras clave

Principio de especialidad, competencia, acción de protección.

Specialty principle, jurisdiction, protective action.

Introduction

Through the present research, we will refer to a not minor issue within the context of the processing of the so-called protection action; a matter that has been observed from different angles in the Ecuadorian criticism and doctrine, highlighting in some aspects the lack of complementation between what the Constitution itself and the Law indicate. We refer specifically to the principle of specialty of the Judge to know and resolve issues concerning the guarantee of fundamental rights; an issue that is closely related to the competence that the respective operator of justice must have.

With the purpose of having a complete result in its study, we will also focus a brief reference to what the Comparative Legislation is oriented in this respect.

the evolution of the legal regulations, only as a consequence of the social development, is not something to highlight; rather, it is the expected result due to the essence and role that it plays in the social order. Therefore, in the jurisdictional sphere, this maxim is also foreseen as something that must occur sooner or later.

This is due to the fact that -referring to the constitutional jurisdictional field-, this is no exception to the aforementioned rule; that is to say, such logical action should also be reflected here, as it already happens,

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with similar functioning of all the legal-regulatory figures and institutions that regulate this specific sector.

From the point of view of the purpose of establishing a legal figure from a perspective (whether procedural or judicial), it will justify the constant variations of these.

In the specific case, before whom an action for protection can be filed, as the competent judge, is of great relevance, since this will contribute to optimize -among other aspects- the expected results, which in turn will be the most optimal and accepted by the social conglomerate.

BRIEF HISTORICAL REFERENCES ON THE ACTION OF PROTECTION IN ECUADOR.

As it has been gathered by the writers of the study of the different scenarios that have taken place in this field, what today is called action of protection had a series of facets, which without going into the analysis of the respective details have helped to establish what today is the aforementioned constitutional action:

In Ecuadorian legislation, the Constitutional Amparo despite being constitutionally enshrined in 1967, did not have the due application, since they never issued the corresponding regulations that regulate it, due to the political situations that the country was going through at that time, in the seventies, but which contemplated that " (. ...) the State guarantees: The right to sue for judicial protection without prejudice to the duty incumbent upon the Public Power to ensure the observance of the Constitution and the laws".

The 1978-1979 Constitution, which reestablished the democratic period of the country, did not consecrate the amparo, demonstrating the disinterest of the rulers of that time. The constitutional reforms of 1983 sought to reintroduce this guarantee, but remaining simply in the procedural statute, being a faculty of the Tribunal of Constitutional Guarantees, before this body any natural or legal person could file complaints, when the rights guaranteed in the constitution were not fulfilled. "The Court of Constitutional Guarantees was empowered to hear complaints... for violations of the Constitution that violate the rights and freedoms guaranteed by the Constitution...", which was referred to as a complaint, not as an amparo.

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Subsequently, attempts and stages were made, such as in 1993 with the draft of the Political Constitution prepared by the Supreme Court, now the National Court, which deals with the Constitutional Amparo.

In the Transitory Statute of Constitutional Control, the Executive Amparo was regulated, in the Project of Constitutional Reforms of December 1994, product of a Commission of Jurists appointed by the President of the Republic of that time, the institution of the amparo conceived in 1967 was reestablished, but with a more advanced orientation and as an autonomous guarantee. Reforms that were approved in 1996, when the Congress approved a block of reforms to the Constitution, which were included in Art. 31 of the codification in force until August 10, 1998, which includes the constitutional action of amparo, with slight modifications, contemplated in Art. 9533, in force until October 20, 2008.

THE ACTION OF PROTECTION: JURISDICTION AND COMPETENCE

1. Jurisdiction:

- It has been said that it is the set of attributions of an authority; for example: “this is the jurisdiction of the policeman or this is the jurisdiction of the governor”.
- It has also been said that it is a territorial or spatial demarcation over which a function is exercised: “this is the jurisdiction of Cañas or the jurisdiction of San José”.
- It has been given the synonym of competence; without going too far, some authors (Cabanellas) when defining jurisdiction speak of administrative, civil, contentious, criminal, penal, etc.
- Finally, as equivalent to jurisdictional power, which is technically correct.

In recent times, a more or less unitary definition of what is to be understood by jurisdiction has been maintained. Couture appears in the maturity of his career and manages to affirm, rightly, that it is the public function of doing justice. This function is achieved, in the words of Rocco, Chiovenda and many others, through the realization of the law, that is, the application of the law always considering the parameters of justice. An unavoidable contribution is that of Liebman by adding the best seasoning, which is the realization of the law, but with the authority of res judicata, which means that the mandate arising from the judgment cannot be altered or changed.

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2. Jurisdiction

Jurisdiction is the distribution of jurisdiction among different organs of the jurisdiction, since it is not possible that a single court or very few of them can be in charge, for example, of all matters, in all parts of the country. Or, that in a single court there are two instances, one lower and one higher.

Véscovi (1984: 155) states that, "by virtue of different factors or actors, such as territorial extension, the number of cases, etc., there are various courts (judicial bodies) among which the processes are distributed. That is to say, there are judges who must intervene in some matters and not in others; they are said to be competent for the former and incompetent for the latter". Theoretically, Véscovi continues, this refers to the capacity or incapacity of the court or judge to hear certain proceedings. All judges exercise jurisdiction, but some of them can hear certain cases and others cannot. This is competence.

Jurisdiction is the capacity of a judge or a court to hear a matter, a certain amount, a territory or by degree.

Both procedural figures (whichever judicial proceeding it may be), in the first place, must be duly regulated, and in turn, establish who is legally indicated for its knowledge and subsequent resolution; hence its importance.

On the other hand, a very different issue is who will be those who, as authorized, will hear and resolve a specific case, and this is what this judicial institution called competence refers to. This fact is what the different legal systems have debated in order to subsequently establish a system of competence that is the most optimal in terms of results and credibility on the part of society. Hence, the various options chosen.

In this context, it is important to bear in mind that although there is a series of alternatives that the doctrine itself is responsible for establishing in order to have a good jurisdictional system of competence in the case of who will hear and resolve an action for protection, this is a factor although not a determining factor, it is a contributing factor if we consider that a legal regulation that guarantees a good system of jurisdiction and competence, guarantees - in an action for protection - respect for the rights protected in the Constitution, while in the procedural sphere, that justice is applied.

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THE PRINCIPLE OF SPECIALITY AND COMPETENCE

When we refer to specialty and competence as legal principles, we are referring to two different issues, each with its own meaning, since the competence of the judge to hear and resolve something specific is regulated by law, while in the case of specialty, it is what the judge must be prepared to exercise his responsibilities.

The rule of the principle of judicial competence is not specific to a particular legislation in the world, nor to a particular historical period.

The fact that currently the institution has taken root that each judge is assigned to hear and resolve a particular matter, fulfilling -among others- the condition of having exclusive knowledge related to the type of resolution to be issued, is only the consequence of the inevitable social progress. Precisely, this is the sine-qua non requirement that must be met by whoever is going to be the established judge in a protection action. The procedural institution called competence is based on this reference.

It thus allows that in the jurisdictional sphere and specifically, in order to hear and rule on an action for protection, the judges called upon are specialized judges in the constitutional sphere. The result is that, from a strictly technical sentence, taking into account the factual and legal means, it will enjoy social credibility, guaranteeing the fundamental rights of the appellants, without taking into consideration that this will also contribute to the accumulation of unresolved processes, by the justice operator.

Finally, we must bear in mind that the principle of specialization, at all times acts as a contributory factor to guarantee what is established in the Constitution, therefore, the right to legal certainty.

THE PRINCIPLE OF SPECIALIZATION AND THE SCOPE OF THE ACTION OF PROTECTION IN ECUADOR.

Everything concerning the action of protection, starting from the procedure to be used to resolve these issues, is duly regulated, being the Constitution itself the one that indicates who are the competent to hear and resolve these cases:

Political Constitution of the State

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Art. 86.- Jurisdictional guarantees shall be governed, in general, by the following provisions:
.....

2.The judge of the place where the act or omission originates or where its effects are produced shall be competent, and the following procedural rules shall be applicable.

Organic Code of the Judiciary

Art. 11.- Principle of specialty. - Jurisdictional power shall be exercised by judges in a specialized manner, according to the different areas of competence. However, in places with a small population of users or in view of the procedural burden, a judge may exercise several or all of the specializations in accordance with the provisions of this Code.
Organic Law on Jurisdictional Guarantees and Constitutional Control
Art. 7.- Jurisdiction. - In the first instance, the specialized constitutional judge of the place where the act or omission originates or where its effects are produced shall have jurisdiction. When in the same territorial district there are several competent specialized constitutional judges, the lawsuit shall be drawn by lot among them. These actions shall be drawn by lot in an appropriate, preferential and immediate manner. In the event that the claim is presented orally, the lot shall be drawn by lot only with personal identification. In the actions of habeas data and access to public information, the provisions of this law shall apply.

The judge who, by the rules provided in the Constitution and this law, is incompetent to hear the actions provided in this title shall dismiss the claim by order, which may be appealed to the Specialized Constitutional Chamber of the competent Provincial Court. The judge who, despite being incompetent, admits and resolves a jurisdictional guarantee, shall be administratively and criminally liable.
The specialized constitutional judge who, being competent, must hear the actions provided for in this title may not disqualify himself or herself, without prejudice to the excuse or recusal that may be applicable. The specialized constitutional judge on duty shall have jurisdiction when an action is filed on holidays or outside the business hours of the other courts.

As with any procedure, the legal institutions that compose it do no more than shape a way of acting, in this case, a procedural mechanism

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tending to a purpose marked by legal designs. The action for protection is no exception to this rule.

However, when analyzing these different institutions, although they have their basis in the custom of the societies, the legal doctrine, etc., we become aware of their operation, which at the discretion of the various writers or scholars of the subject may be acceptable or inadequate.

In the Ecuadorian case, observing such maxims, the procedural mechanism, as it refers to the processing of the action of protection, has its own guidelines that, according to its legislator, tends to guarantee the fundamental rights of the citizens that develop in society.

THE ACTION FOR PROTECTION IN COMPARATIVE LAW.

According to what we have been expressing in the content of this research, not only our legislation, but in its majority, as far as our subject of study is concerned, its respective regulations are framed with doctrinal aspects and/or with the customs and internal needs of each society. Proof of this is that Chilean legislation, in terms of who has jurisdiction to hear matters of fundamental rights through actions (resources), is the court of second instance, called Court of Appeals: (Recurso de protección)

“It is the action that the Constitution grants to all persons who, as a result of arbitrary or illegal acts or omissions, suffer deprivation, disturbance or threat to their constitutional rights and guarantees. The recourse for protection must be filed before the Court of Appeals in whose jurisdiction the act was committed or the arbitrary or illegal omission that caused the violation occurred.

Methodology

The research developed through these guidelines is of the deductive order, which within the qualitative field has allowed us to make a general analysis of the principle of specialty, directly related to the procedural figure of competence within the scope of fundamental rights and whose guarantee is required by the Constitution of the Republic. Its use has been appropriate to establish the need -in the case of our legislation- for a complementation between the essential principles alluded to in the highest law, which should be seconded by specific laws.

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Results

It is important to remember that within a legal system there must be an obligatory hierarchical relationship between the different laws with respect to the general constitutional guidelines. When this does not happen, the result may be that, when the secondary law is applied, it will not achieve the purposes proposed by society as a whole. Precisely, the analysis of the principle of specialty, together with the figure of the competence of the judge, at the time of hearing and resolving on issues related to the safeguarding of fundamental rights at risk of their non-observance, has allowed us to evidence them, which of course, is a reason for convergence of various points of view, which coincide in the need for a system that clearly ensures the guarantee of individual fundamental rights.

Discussion

The realization of the present study on the action of protection, focused from the perspective of the principle of specialty and competence, has made it possible to visualize an existing distance, from what has been unanimously pointed out by the different doctrinal positions, with the legal regulation in this matter in Ecuador; Since the participation of any judge of first instance is allowed by the scope of competence to hear and resolve a specific case in a breach of fundamental rights, such action is not related to the principle of specialty, which, as we must remember, advocates -necessarily- as a requirement, the appropriate knowledge of the operator of justice, in specific matters of fundamental rights.

If followed according to these guidelines, it is clear that all this does not contribute to guarantee the observance of the fundamental rights of individuals, through sentences that should also contribute to the satisfaction of society as a whole.

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