CITATION PROCEDURE FOR DEFENDANTS WHOSE ADDRESS HAS NOT BEEN INDIVIDUALIZED

[1]ESPERANZA DEL PILAR ARAUJO ESCOBAR, [2]KAROL INDIRA ZÚÑIGA ARAUJO,[3]MILTON RODRIGO HIDALGO RUIZ

[1]Universidad Regional Autónoma de Los Andes Puyo. Ecuador.
up.esperanzadae48@uniandes.edu.ec
https://orcid.org/0000-0003-4456-2075
[2]Universidad Regional Autónoma de Los Andes Puyo. Ecuador.
karolazuniga09@gmail.com
https://orcid.org/0009-0004-8839-5963
[3]Universidad Regional Autónoma de Los Andes Puyo. Ecuador.
up.miltonhidalgo@uniandes.edu.ec
https://orcid.org/0000-0002-5832-6711

ABSTRACT

The purpose of the investigative work was to analyze the theoretical and legal foundations to comply with the constitutional guarantees in relation to the summons procedure for defendants whose address has not been individualized, for which the precepts of laws and regulations in force in the country were considered. , considering that the lack of summons with the demand, is causal for the nullity of the process, and is of transcendental importance in the processes in which protection actions are requested. The main bodies analyzed were the Constitution of the Republic of Ecuador, the Law of Jurisdictional Guarantees and Constitutional Control LGJCC and as a supplementary norm the General Organic Code of Processes COGEP, in addition to some sentences of the Constitutional Court that by jurisprudence become sources of Law. As part of the results, a proposal was made for the correct application of the principle of speed when managing the summons when the address of the defendant is unknown. It is concluded that it is necessary to act in accordance with the principles of speed and legal certainty when summoning the defendant to guarantee compliance with constitutional norms.

KEY WORDS: *Protection Action, Speed, Summons, Unknown Address,*

INTRODUCTION

The Constitution of the Republic of Ecuador (2008), has a guarantor essence that derives mainly from the change from a Liberal State with a constitutional model to a Constitutional State and Social Justice that results in a change in the legal culture that created a series of actions for the protection of Human Rights, including: The Protection Action established in Article 88 which provides:

The protection action shall have as its object the direct and effective protection of the rights recognized in the Constitution, and may be filed when there is a violation of constitutional rights, by acts or omissions of any non-judicial public authority; against public policies when they involve the deprivation of the enjoyment or exercise of constitutional rights; and when the violation comes from a private person, if the violation of law causes serious harm, if it provides improper public services, if it acts by delegation or concession, or if the affected person is in a state of subordination, defenselessness or discrimination. (Asamblea Nacional , 2008)

Article 39 of the Organic Law on Jurisdictional Guarantees and Constitutional Control defines that the object of the Protection Action is the direct and effective protection of the rights recognized in the Constitution and international treaties on Human Rights that are not protected by habeas corpus actions, access to public information, Habeas data, for non-compliance, extraordinary protection and extraordinary protection against decisions of indigenous justice.

However, having a constitutional action that protects human rights, contained in the Magna Carta in force, does not in itself constitute a satisfactory or sufficient response to guarantee its effectiveness, which depends on legal practice, political will and concrete or abstract control of the Constitution of the Republic, exercised by the Constitutional Court on a binding basis. The Inter-American Court of Human Rights, referring to the effectiveness of remedies, states that States are responsible for

the existence of norms, effective remedies and guarantees of due process; and that these resources must be able to produce for themselves, the results for which they were created.

Therefore, since the protection action is an instrument that provides direct and effective protection of the rights recognized in the Constitution, at the time of filing a claim for judicial guarantees, it can be presented by any person, individually or collectively, orally or in writing; it must comply with the formal requirements stipulated in art. 10 of the Organic Law of Jurisdictional Guarantees and Constitutional Control, and specifically in its numeral determines that it must contain *"The place where the person or entity acted can be made aware of the action",* to guarantee the right to defence, as stipulated in art. 76 of the Constitution, which enshrines the basic guarantees of any process. If the demand does not comply with these elements, it will be ordered that it be completed within three days, once this term has elapsed, if the demand is incomplete and the report shows that there is a serious violation, the judge must process it and correct the omission of requirements that are within his reach. (Asamblea Nacional del Ecuador , 2020)

Taking into account that it is known as active legitimacy to the persons, group of people, community, people or nationality that informs an authority, the existence of a violation of rights, the LOGJCC contemplates that, if the action has been filed, it must notify the affected person, who may appear at any time, modify the demand, desist, deduct the resources, even if he has not appeared before. Then an obligation of the legitimated active, indicate in the demand the place where it should be cited. But what happens if at the time of citing the lawsuit, as ordered by the First Level Judge at the time of admitting it for processing, the actuary is prevented from doing so because the address indicated does not correspond to the domicile? At this point it is necessary to propose a definition of domicile, the same that according to Larrea Holguín clarifies "It is not, therefore, the same residence as domicile. If to the residence (material element: "corpus") is added the intention to remain in it (international element: "animus"), then we have domicile (p. 78)". Therefore, the mood can not be known directly, but is known by external signs, hence if there is no express manifestation of the spirit to remain in a place, it is enough to stick to the circumstances that allow to presume said spirit.

Not having access to the information necessary to determine the domicile or residence of the defendant makes the claim impossible; and, by virtue of the fact that the lack of summons may have as a consequence the nullity of the process for leaving the defendant defenseless, and also for leaving the affected party defenseless when it is not the same person who sues because it is not possible to determine the individuality of the domicile; it is not enough to declare that it is unknown, but that it must be declared under oath that it has been impossible to determine it; If only the address is unknown and the summons is made by the press, such summons will be null and void. In view of the foregoing, it is established that by not being able to comply with what is determined in article 56 of the COGEP, the affected party and the defendant are left defenseless, after exhausting the investigations in institutions that administer the documents of public access, violating the principle of speed in the processing of claims. The final provision of the LOGJCC states:

Final Provision. - In all matters not expressly provided for in this Act, the supplementary provisions of its regulations, the Civil Code, the Code of Civil Procedure (repealed by the current COGEP), the Code of Criminal Procedure, and the Organic Law of the Office of the Attorney-General shall apply, insofar as they are applicable and compatible with constitutional law.

However, with the entry into force of the General Organic Code of Processes issued with Official Registration Supplement 506 of May 22, 2015, whose scope according to article 1: It regulates procedural activity in all matters, except constitutional, electoral and criminal, with strict observance of due process, it is observed that there is a conflict in the norms of lower hierarchy that are corrected from the principle of obligation to administer justice. constitutional. It is therefore necessary to recognize the general principles of law and equity, as well as those of unity and practical consistency, integrative effectiveness, normative force and adaptation, compiled in numerals 1, 5 and 8 of article 3 of the LOGJCC, in addition to the procedural principles of constitutional justice.

Once all the constitutional and normative provisions have been observed and exposed, as guarantor judges it is necessary to comply with and enforce the Constitution of the Republic and the legislation

in force, as well as the judgments of the Constitutional Court that have the character of binding. On the other hand, scientific articles, argumentative essays and other similar legal works have also been reviewed in the databases and institutional repositories, without finding similar investigative works that deal with or define the procedure when the domicile of the defendant could not be individualized and consequently cited with the demand, in such a way that the actuaries and judges fail to comply with the times established by the LOGJCC. delaying its processing, violating the principles of speed and legal certainty with which cases of violation of Human Rights must be addressed, so the proposal presents the design of a procedure based on a supplementary rule, which in this case will be the General Organic Code of Processes.

METHODS

This stage of the research reflects the methodological and systemic journey of how the research was developed. Therefore, epistemology is approached from the positivist paradigm. In this sense, the methodology works as the conceptual support that governs the way we apply the procedures in an investigation. Through it, the data collection process can be better oriented, which will then be applied to obtain answers.

A qualitative approach is used, as a tool to systematize and organize the knowledge acquired during the development of research through the use of scientific guidelines. This approach allowed to approach a research in the field of humanistic sciences focused on aspects that cannot be quantified, but rather interpreted.

The presentation of the results is based on legal research methods, particularly the doctrinal legal method that takes into account the systematic and multidimensional nature of this research and admits the systematic - conceptual analysis of the elements that allowed the recognition of the regulations and areas of application of the legal figure of the protection action, right to defense, among others. Zorrilla (2014) argues that this method *"directly alludes to Kelnesian thinking, which was interested in establishing a set of rules so that a lawyer could do his job without confusing legislators; so that a lawyer is a scientist, not a technician."*

Once the method used was exposed, the analysis of legal documents was proposed as a research technique, through which the review, study and analysis of the articles, comments, presentations, published in digital repositories or Judicial Gazettes that contributed to the accuracy of what was consulted as a topic of the research was carried out.

RESULTS

After analyzing the legal documents related to the subject of research, it can be said that the summons constitutes the primary procedural act to guarantee the rights enshrined in the Constitution of the Republic of Ecuador to access a protection action. By means of this instrument, the defendant is made aware of the claims made for the plaintiff, so that he can respond to the claim by exercising his right to defense within a reasonable time.

Since the summons is a substantial element so that no person is left defenseless, any demand must be made known through the summons to the defendant or defendants, guaranteeing their right to defense and thus determining the adversarial principle. Therefore, it would be understood as a summons to the call made to the defendant to exercise his right to defense, when fulfilling this procedural diligence, the defendant has the power to present evidence and exceptions to the demand proposed by the other party, without this stage basic rights and guarantees are violated.

With the above, the importance and legal scope of the correct fulfillment of the summons can be glimpsed. Article 53 of the General Organic Code of Proceedings provides a fairly accurate definition by mentioning that "it is the act by which the defendant is made aware of the content of the application or the request for a preparatory measure and of the orders relapsed in them. It will be done personally, through ballots or through the means of communication ordered by the judge.

As a result of the research it is important to highlight the following considerations:

In the first place, the General Organic Code of Processes establishes that the summons can be given through two forms: in person or by ballot; and that when it is impossible to summon the domicile,

the plaintiff must present proof of it. In this sense, article 56 of the same legislation establishes clear rules to proceed in those cases in which it is impossible to determine the domicile of the defendant:

If the person to be summoned is not found, he will be summoned by ballot left in the corresponding room, to any individual of his family or servant. The ballot shall state the content of the motion, the order or provision of the Judge, and the date on which the summons is made; and if not to whom to deliver it, it will be fixed on the doors of the aforementioned room, and the actuary or citator, will establish the corresponding diligence.

The person who receives the ballot will sign the diligence, and if he, for any reason does not do so, the respective official, will state the reason for the case and sign it.

The summons to a trader or the representative of a trading company may also be made at the respective trading establishment during working hours and whenever it is open. If the person to be summoned is not found, it will be done by ballot that will be delivered to any of his assistants or dependents.

DISCUSSION

However, there are cases in which it is not possible to determine the individuality of the domicile or residence of the defendant, for this reason the General Organic Code of Processes establishes:

The declaration that it is impossible to determine the individuality, domicile or residence of the defendant and that all the necessary steps have been taken to try to locate the person who is requested to be summoned in this way, such as going to the public access records, is made by the applicant under oath that is presented before the judge of the process by deprecatory to the judge of domicile or Residence of the actor.

This type of summons is only admissible when the plaintiff demonstrates that all possible instances to locate the address have been exhausted, such as public records: Internal Revenue Service, National Electoral Council, Civil Registry and even telephone directories and the evidence is attached to the process.

Referring to this appeal, the Constitutional Court No. 020-10-SEP-CC establishes that "*it proceeds when it has been impossible to determine the domicile, so that the budgets for its origin must be estimated with strictness and rigor*". In this virtue, the summons by the media is applied, in case of making the summons through a local newspaper it is only possible when it was not possible by any way to determine the individuality or residence of the defendant, even, an oath would be carried out before the judge who knows the cause, In the absence of this requirement, the judge has every disposition not to accept this kind of summons. In this sense, the correct application of the citation process is essential.

However, faced with the problems presented, in the first place, when opting for this route of summons it is important to exhaust all the steps to determine the domicile for which the summons is made by means of the general rule of summons in the domicile of the person suing, however, and in the face of this modality of summons of whom the domicile is not known, The plaintiff presents all the evidence of what has been done, the due documentation that proves that an exhaustive investigation is carried out to determine the domicile of the defendant.

Due process is a fundamental right, it is a set of procedural guarantees that exists in all proceedings regardless of the subject matter, the guarantees of due process are developed in article 76 of the Constitution of the Republic of Ecuador. In the same way, it is important to study the jurisprudence in this regard, judgment No. 17309-20121483 issued by the Provincial Court of Justice of Pichincha Civil and Commercial Chamber within its pertinent part indicates that *"the violations of the constitutional principles that occur due to bad judicial practices used in the summons by the press*", therefore, under this judicial analysis, a worrying conclusion is reached, because it considers that by granting the summons by the press a not so beneficial option, because, it is violating the rights of the other party, it violates in the first place basic rights and guarantees of the defendant such as the principle of speed and equality to intervene and act within a process.

Likewise, within the aforementioned judgment it carries out its analysis as to the action of the judge in the face of the problem, it is determined that the judge is the guarantor of due process, in this sense before ordering the summons by the press, or by media in general, demand the evidence from the plaintiff only thereby accepting and giving way to the summons in this way. What has been said is related to avoiding inconsistencies in the process, and, the procedural bad faith on the part of the plaintiff, without a doubt all the documentation presented by the plaintiff to be cited by the press is bureaucratic, that is where the principle of speed and procedural speed is breached.

In addition, it is important to elucidate, that an oath is given, that the plaintiff has not determined the domicile of the defendant and that in this sense he requests that the summons be made by the press before the judge, and if he does not comply with this the judge will not accept the summons by the press.

Once the summons has been defined, it is necessary to establish the procedure for summonses, it is essential to remember that access to the administration of justice is free and is, in addition to this, a public and fundamental service of the State. In this sense, the Regulation for the Management of Judicial Summonses (2020) clearly determines that, when the demand is qualified, or if it is the case of prior diligence, when the order is executed, the plaintiff provides three copies for the preparation of the ballots and send to summons of the respective judicial unit. Similarly, it is important to state that the person responsible for making the summons ballots is the secretary, these officials send when, the order of the qualification of the demand is executed, the secretary of the unit delivers the ballots to the person in charge of making the summons within a maximum period of 24 hours, as long as the law does not establish other deadlines, Once this first step has been executed, the plaintiff has three days term to deliver the copies for the diligence of the summons attached for it the form of delivery of copies for summons, this is registered in the SAJE system, the reason is felt by the secretary or secretary, where the date of receipt of the copies is indicated within a maximum term of one day after receiving the form.

The person in charge of the summonses, the summons or the judicial servant responsible for summonses receives the ballots daily from the clerks and reviews them for verification, in case of detecting that it is incomplete, he sends it back to the secretary in charge of the process within a day for its correction, in the same way the person in charge delivers to the summons within a day the ballots to fix the routes and carry out management. Similarly, the Regulation states that the summons has fifteen days to carry out the summons, it should be noted that the summonses of the judicial units sign the minutes of the respective summons and as an obligation within one day, as stated in Article 6 of the regulations set out above. With the above, the procedure for the correct management of summonses by judicial servants, subpoenas and other officials of the judicial function has been made known, but it should be emphasized again that the lack of speed or even the lack of knowledge of this legal body generates delay in the judicial office. which causes the abandonment of the cases, for this reason it is important to point out that to avoid unnecessary delays at all costs, since the only thing they do is hinder the process and thus affects the procedural principles established in the Constitution and in the General Organic Code of Processes.

Procedure and requirements for the summons of defendants within the jurisdictional guarantees.

In the specific case, in the absence of knowledge of the domicile of the defendant, it is cited by the rules established in the General Organic Code of Procedure, that is, by the press, through publications in the press with the largest circulation in the locality, and in the same way through a message in the radio station with the rules established in the law. It is affirmed that with an adequate process for the realization of summons by the press, it allows the validity and non-violation of the procedural principles by which COGEP is governed. With what has been said, it is concluded that the Constitution of the Republic of Ecuador indicates that one of the means to achieve the maximum value of justice is the correct judicial system, therefore, the summons of the defendant is acted under the constitutional principles and under the responsibility of judicial officials. Now, it is completely true that there is a possible risk when, a summons is made by the press, there has been a violation of legal principles of the country, at the same time the right to legal certainty and the effectiveness of

the processes would be violated, since it is necessary to detail that a non-summons, or the same does not, If it is carried out in accordance with the law, it leads to procedural invalidity.

In order for the summons to proceed by the media, it is necessary to describe the rules of article 56 of the General Organic Code of Processes, in this sense within numeral 1 of the aforementioned regulations, it is indicated that in the event that it is impossible to determine the domicile of a person, he will be cited through publications on different dates, In a newspaper of wide circulation of the place, in the same way within the legal provision previously manifested indicates the procedure when it is quoted through radio messages, in this sense these are transmitted on three different dates at least three times a day, by a local radio station, within a schedule of six to twenty-two hours, An excerpt from the complaint should be read. The General Organic Code of Processes within the same article in the second numeral indicates that the owner of the broadcaster will deliver a certificate where the dates on which the messages of the transmissions were issued are exposed, as well as deliver a copy of the audio, it is clear that this type of summons, is made only when the judge considers it, that is to say that this means of communication is of greater scope, in the same way when this is the means of more frequency by the people of the locality. It is not necessary to leave aside an indispensable requirement for the management of the summons by these means, a certification from the Ministry of Foreign Affairs is attached, stating that the person sued, is in the country or not. Therefore, here comes a new modality of summons, this because if it is verified that the person has left the country is in consular registry, it is cited by posters fixed in the consulate in which it is registered, it is worth mentioning that the judge does not have this form of summons if not, This requirement has been complied with, it is also important to mention that once this procedure has been carried out the judge motivates his decision, remember that the motivation is a basic guarantee of the right to due process, in this virtue it is essential that the principle of speed is ensured at all procedural times.

With the background exposed, the proposal is aimed at solving the problem raised during the development of this investigation, considering that the current approach generates defenselessness against an erroneous process of summons of the defendant, in the event that his domicile is unknown or has not been individualized. According to the rapporteur's opinion, one of the most important reforms to guarantee the principles of speed and legal certainty would be the reform of article 56 of the General Organic Code of Processes, since to comply with the requirement of exhausting the instances of investigation of the domicile, the process is exasperatedly long and fruitless, Because many of the offices issued to public institutions have a negative result, after a long wait product of a highly bureaucratic system that affects the judicial system of the country generating a high rate of abandonment of cases, and also has to take into account that if you do it by ballot, and by any of the media there is a waiting time (20 days after the last publication) for that Start running the time to answer the demand, of course in constitutional matters the demand is answered in the hearing itself, then after 20 days at the discretion of the person who writes this paper, the judge will indicate the date on which the hearing will take place, then, then, as we can show at the time of applying the supplementary rule in constitutional matters at least about two months will have elapsed For this diligence to be carried out, so it is worth asking: where was the principle of speed, and the simplicity of the process? .

With the above, the following reform is proposed to article 56 of the General Organic Code of Processes: The defendant or defendants whose individuality, domicile or residence is impossible to determine in matters of jurisdictional guarantees will follow the following procedure:

1. The judge will request the relevant information from public and private entities in order to obtain the domicile of the defendant or persons, once the plaintiff has declared with oath that it has been impossible for him to determine the place where he should be summoned, this in order to expedite the process and guarantee the principles of speed and legal certainty; if it is proven that the person has failed to tell the truth, the Prosecutor's Office will be informed so that it can initiate the investigation for perjury, as stipulated in article 270 of the Organic Integral Criminal Code.

2. The oath of ignorance of the domicile will be presented in the libel itself of the demand, so that the judge immediately orders the public or private entities to obtain the domicile of the defendant or defendants, entities that will be granted the term of 48 hours to respond, and so that the application can be cited and the hearing immediately convened. Entities that do not provide attention to the requirement within the established term, their highest authorities and human talent management officials will be subject to administrative sanction that would lead to dismissal for lack of collaboration with justice.
3. In the event that it has not been possible to establish the domicile of the defendant, and it corresponds to do so by the press or the broadcasters, they will be held on three different dates, with an interval of 1 day, and from the last publication within 48 hours the date on which the hearing will take place will be indicated.

CONCLUSIONS

- The legal and doctrinal basis allowed to analyze and elucidate on the main elements of the protection action and the application of the principles of celerity and legal certainty at the time of complying with the summons to the defendant when the domicile or residence is not known, or has not been individualized, determining the importance of adequately complying with this process to avoid a nullity, therefore, violation of other human rights, guaranteeing compliance with the rights established in the Constitution of the Republic.
- When analyzing the summons process in the case of unknown address, it was evident that there is a need to reform the current regulations, considering that the current application of article 56 of the General Organic Code of Processes as a supplementary norm limits and violates the speed in the processing and guarantee of human rights, so a reform proposal is proposed as part of the results of this investigative work.
- The legal criteria analyzed and proposed must be put into practice in relation to the summons of the defendant in cases in which the domicile has not been able to be individualized to speed up the process and solve the problem of summonses that cannot be made in a timely manner and cause damage to the parties and the judicial system.

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