

ANÁLISIS DE LA SENTENCIA 2006-18-EP/24 COMO PRECEDENTE ERRÓNEO EN CONFLICTOS LABORALES PÚBLICOS EN EL ECUADOR

ANALYSIS OF JUDGMENT 2006-18-EP/24 AS AN ERRONEOUS PRECEDENT IN PUBLIC LABOR DISPUTES IN ECUADOR

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RESUMEN: La sentencia 2006-18-EP/24 de la Corte Constitucional del Ecuador ha incidido directamente en la forma de encauzar los conflictos laborales entre el Estado y sus servidoras y servidores públicos, especialmente cuando se impugnan actos administrativos vinculados con terminación de contratos de servicios ocasionales, finalización de nombramientos provisionales, homologación salarial, supresión de partidas y procesos de liquidación. La relevancia del tema se justifica por el riesgo de retroceso en la tutela de derechos laborales que puede derivarse de la regla general fijada en el párrafo 42, al privilegiar la jurisdicción contencioso-administrativa y reducir el uso de la acción de protección como vía expedita y garantista. El objetivo del estudio fue analizar críticamente la argumentación interpretativa empleada en dicho párrafo, contrastándola con el principio de progresividad y con precedentes constitucionales sobre tutela judicial efectiva. La investigación adoptó un enfoque cualitativo, de tipo teórico-jurisprudencial, con revisión normativa y documental (Constitución, LOSEP, LOEP, COFJ), análisis de la sentencia y consulta de literatura especializada sobre argumentación jurídica, utilizando métodos analítico-sintético e inductivo-deductivo. Entre los principales resultados se identificó una motivación insuficiente para restringir la acción de protección, la confusión de regímenes laborales al pretender un “trato igualitario” con el personal de empresas públicas y la falta de una atribución expresa en la normativa para que lo contencioso-administrativo conozca conflictos laborales con enfoque de derechos. Se concluye que la decisión constituye un precedente erróneo y potencialmente regresivo, que debilita la seguridad jurídica, la estabilidad laboral y el acceso a una tutela judicial efectiva para el servidor público.

Palabras clave: *Conflictos laborales, servicio público, acción de protección, jurisdicción contencioso-administrativa, tutela judicial efectiva*

ABSTRACT: The Constitutional Court of Ecuador's Judgment 2006-18-EP/24 has reshaped how labor disputes between the State and public servants are channeled, particularly when administrative acts are challenged in cases involving the termination of temporary service contracts, the end of provisional appointments, salary standardization, the elimination of budget positions, and liquidation processes. The relevance of this topic lies in the risk of a setback in the protection of labor rights stemming from the general rule set out in paragraph 42, which prioritizes contentious-administrative jurisdiction and limits the use of the writ of protection as an expedited,

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rights-based remedy. This study aims to critically examine the interpretive reasoning adopted in that paragraph, in light of the principle of progressivity and constitutional precedents on effective judicial protection. A qualitative, theoretical-jurisprudential design was used, combining a regulatory and documentary review (Constitution, LOSEP, LOEP, COFJ), an analysis of the judgment, and specialized literature on legal argumentation, through analytical-synthetic and inductive-deductive methods. The main findings show insufficient justification for restricting the writ of protection, a conflation of labor regimes under the rationale of “equal treatment” with employees of public enterprises, and the absence of an explicit legal basis empowering administrative courts to adjudicate labor disputes under a rights-based approach. The study concludes that the judgment constitutes an erroneous and potentially regressive precedent, weakening legal certainty, job stability, and access to effective judicial protection for public servants.

Keywords: *Labor disputes, public service, writ of protection, contentious-administrative jurisdiction, effective judicial protection*

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INTRODUCTION

Article 229 of the Constitution of the Republic of Ecuador determines, in its first paragraph, that public servants shall be the persons who act by virtue of a state power and who shall exercise solely the competencies and faculties attributed in the Constitution and the law; regarding the workers of the public sector, these shall be subject to the Labor Code (1).

On its part, Article 228 of the Constitution of the Republic of Ecuador disposes that the entry into the public service, the promotion and the advancement in the administrative career shall be realized by means of a contest of merits and opposition, in the form that the law determines (1).

Since the issuance of the Organic Law of the Public Service (LOSEP) in 2009, whose finality is to regulate the administration of human talent in the public sector, the public entities have established labor relations with the public servants by means of permanent appointments, provisional appointments, contracts of occasional services, contracts of provision of professional services, among others, with the purpose of attending institutional requirements and, in certain cases, covering definitive vacancies (2).

During the labor relation between the public entities and the public servants multiple conflicts have been generated, among them the unilateral termination of contracts of occasional services, the finalization of provisional appointments, the salary homogenization, the suppression of positions and the processes of liquidation. These controversies have led many public servants to resort to the constitutional jurisdiction as mechanism to tutelage their rights facing administrative decisions that, in numerous cases, result arbitrary.

Judgment 2006-18-EP/24, issued by the Constitutional Court of Ecuador, has generated diverse opinions and analyses, in particular for what is signaled in paragraph 42: when administrative acts linked with labor conflicts between the State and its public servants are challenged —termination of contracts of occasional services, finalization of provisional appointments, salary homogenization, suppression of positions, liquidation, among others—, the knowledge of the controversy, by general rule, shall be submitted to the contentious-administrative jurisdiction (3).

In the criterion of the authors, the decision of equating these conflicts with those that arise in the public enterprises whose labor controversies, by their nature, are known by labor judges ignores the substantial differences between the regime applicable to the public servants protected by the LOSEP and that which governs for the personnel of the public enterprises. This equation compromises the adequate tutelage of the labor rights of those who are found under the regime of the public service (4,5).

The present article has as finality to analyze the interpretive argumentation adopted by the Constitutional Court of Ecuador upon sustaining that, by general rule, the contentious-administrative jurisdiction would be the adequate path to resolve labor conflicts between the State and its public servants. This posture results questionable if the existence of precedents is considered in which constitutional judges have recognized and protected labor rights by means of actions of protection, particularly in cases of unilateral termination of contracts of occasional services, finalization of provisional appointments, salary homogenization, suppression of budgetary positions and processes of liquidation, which evidences tensions with the previous jurisprudential line (3).

This work adopts a qualitative approach and is oriented to the analysis of the interpretive argumentation contained in paragraph 42 of Judgment 2006-18-EP/24, in light of the principle of progressivity of the labor rights and of the right to the effective judicial tutelage in the ambit of the public service. Without seeking statistical generalizations, the study centers on understanding the interpretive method employed by the Constitutional Court, considering the context of decisions issued by constitutional judges who have tutelaged these rights. In the criterion of the authors, the general rule fixed in said judgment generates tensions with precedents oriented to guarantee an effective protection facing violations in the public employment (3).

MATERIALS AND METHODS

In this investigation a methodology of qualitative approach was adopted, characteristic of the social sciences such as Law, with the finality of analyzing the interpretive argumentation employed in paragraph 42 of Judgment 2006-18-EP/24 facing the principle of progressivity of rights, the protection of the labor rights of the public servants in the conflicts with the State and the implications of deriving these controversies to the contentious-administrative jurisdiction under a supposed equal treatment (13).

This investigation was developed from a study of theoretical and jurisprudential character of the law, addressed from the perspective of the investigators and sustained through a qualitative approach, oriented to understand and interpret the legal norms in their context.

A theoretical review was realized on authors and types of argumentation utilized in judicial decisions, with the finality of examining the interpretive argumentation employed by the Constitutional Court in Judgment 2006-18-EP/24 (10,11,12,14,15,16).

The investigation considered a theoretical sample of 10 authors, proper of this type of qualitative studies. Regarding the methods, the analytical-synthetic and inductive-deductive methods were employed, with the aim of identifying and describing the types of argumentation present in judicial decisions.

This investigation was initiated with a doctrinaire review and of the normative framework of the Ecuadorian State, from the analysis of information available in the portal of the Constitutional Court and in the Official Registry. This review permitted identifying the legal dispositions directly related with the labor conflicts between the State and its public servants, especially those linked with the termination of contracts of occasional services, the finalization of provisional appointments, the salary homogenization, the suppression of budgetary positions and the processes of liquidation, as well as the jurisdictional criteria applied for the resolution of this type of controversies (3).

As part of the phase of specialized documentary review, a systematic search of academic literature composed of scientific articles, books and legal essays related with Judgment 2006-18-EP/24 and with the derivation of the labor conflicts between the Ecuadorian State and the public servants toward the contentious-administrative jurisdiction was effected. This review permitted identifying previous doctrinaire contributions, contrasting interpretive approaches and situating the research problem within the contemporary legal debate. In a complementary manner, publications elaborated both by academics and by professionals of Law in free exercise were incorporated, to the extent that they offered critical analyses useful for a multidimensional and updated comprehension of the object of study (19).

The qualitative investigation was structured in successive phases. In a first phase, the delimitation of the legal problem and of the categories of analysis was realized, centered on the interpretive argumentation of Judgment 2006-18-EP/24, the principle of progressivity of the labor rights, the effective judicial tutelage and the jurisdictional competence in labor conflicts of the public service. In a second phase, the search and compilation of normative and jurisprudential sources in the portal of the Constitutional Court of Ecuador and in the Official Registry was developed. For this, keywords and thematic combinations such as "2006-18-EP/24", "acción de protección", "conflictos laborales", "servidores públicos", "jurisdicción contencioso-administrativa", "LOSEP", "LOEP", "nombramientos provisionales", "contratos de servicios ocasionales", "supresión de partidas" and "homologación salarial" were employed as search criteria.

As inclusion criteria sentences, regulation and doctrinaire documents directly linked with the investigated problem and with the legal regime of the public employment were considered; documents without direct thematic relation, duplicates or lacking of argumentative relevance for the analysis were excluded.

In a third phase, the analytical reading, classification and contrast of the compiled material was proceeded to, with emphasis on the identification of the legal foundations utilized by the Constitutional Court and on the critical evaluation of the consistency of its argumentation. Finally, in a fourth phase, the doctrinaire, normative

and jurisprudential findings were integrated by means of a legal-interpretive analysis, which permitted valuing in an integral manner the derivation of these controversies to the contentious-administrative jurisdiction and examining the argumentative solidity employed to justify said transfer. This methodological procedure seeks to assure the traceability of the investigative process and strengthen the replicability of the jurisprudential analysis (3,13).

RESULTS

Judgment 2006-18-EP/24 permitted identifying that the Constitutional Court adopted a restrictive posture regarding the use of the action of protection in labor conflicts between the State and its public servants. Pursuant to paragraph 42, a general rule was fixed according to which this type of controversies must be known by the contentious-administrative jurisdiction, which supposes a relevant limitation to the access to an effective judicial tutelage, to the extent that it reduces the practical reach of the action of protection (3).

One of the most controversial aspects of the judgment is the idea of generating an “equal treatment” between the public servants governed by the Organic Law of the Public Service (LOSEP) and those linked to public enterprises, governed by the Labor Code and the Organic Law of Public Enterprises (LOEP). Nevertheless, this “equal treatment” ignores structural differences between both regimes. While the labor relations in the framework of the LOEP have an eminently entrepreneurial and flexible nature, the relations under the LOSEP are sustained on principles such as the administrative career, the labor stability, the development of the human talent and the permanent improvement of the efficiency, efficacy, quality and productivity of the State and of its institutions (2,4,5).

Likewise, it was evidenced that the Court did not develop a solid argumentation that justifies the restriction of the use of the action of protection in these cases, omitting an analysis of the principle of progressivity of the labor rights. This principle, of constitutional rank, demands that the State guarantee the advance in the protection of rights, impeding unjustified setbacks. The decision adopted in this judgment, upon restricting the access to the constitutional justice as mechanism for the effective protection of rights, can be understood as a setback in the level of tutelage that had been consolidated in the labor relation between the State and the public servants (1,3).

As a relevant aspect the reach of the attributions of the tribunals of the contentious-administrative can be highlighted. Thus, from the analysis of Article 217 of the Organic Code of the Judicial Function it is derived that said organs possess competence to know impugnations of administrative acts; however, an express habilitation to resolve conflicts of labor nature between the State and its servants is not noticed. This normative absence permits inferring that this jurisdiction was not conceived to address such controversies from a logic centrally oriented to the reparation of rights, which weakens the consistency of the argumentative line sustained in the examined judgment (6).

The judicial practice evidences that the actions of protection have constituted the principal instrument utilized by the public servants to confront arbitrary disconnections, suppressions of positions, contractual terminations and other

administrative decisions that impact directly on their labor stability, registering in numerous cases favorable decisions to the tutelage of their rights, ordering the reintegration of the servants to their functions and the payment of the remunerations left to perceive, consolidating a standard of protection that now runs the risk of being weakened by the application of the precedent of paragraph 42 of Judgment 2006-18-EP/24, whose impact could be translated into a reduction of the effective judicial tutelage and into an additional obstacle for the full exercise of the labor rights in the public sector (7).

The State and the labor relation with the public servants

The Ecuadorian State recognizes the right to work in all its forms as a social and economic duty, as well as a source of personal realization and base of the economy. Regarding the labor relation in the public sector, the Constitution of 2008 established a specific regime and, subsequently, the LOSEP and its General Regulation were issued as legal instruments that regulate the linking of personnel in the different public institutions (1,2).

The LOSEP and its General Regulation regulate the linking of the persons with the public sector through permanent appointments, provisional appointments, contracts of occasional services and contracts of professional services. These modalities have been utilized, throughout the years, both to cover institutional needs in an adequate manner and, in certain cases, in an abusive form, generating precariousness during the labor relation (2).

Labor conflicts between the State and its public servants

The LOSEP, in its Article 47, contemplates the causes by which the public servants shall cease definitively in their functions; among them are found the suppression of positions and the purchase of resignation with indemnification (2).

Further ahead in Article 58 of the Organic Law of the Public Service the contract of occasional services is regulated as a modality of occasional contracting for the execution of non-permanent activities, establishing the time of up to one year for its use and signaling that this type of contracts does not generate stability (2).

On the other hand, the General Regulation to the LOSEP establishes, in its Article 17, the classes of appointments. In that framework, it defines the provisional appointments as those granted to occupy temporarily the posts determined in literal b) of Article 17 of the LOSEP, and it precises that they do not generate right to stability for the servant. In turn, Article 18, literal c), of the same legal body disposes, in an exceptional form, the cases in which a provisional appointment may be issued, among them, to occupy a post whose position were vacant until obtaining the winner of the contest of merits and opposition.

The majority of labor conflicts between the State and its public servants has its origin in disconnections executed under the cited figures. These decisions, illegal and attentatory against labor rights, have obliged to interpose actions of protection against the State. In determined cases the reintegration to the post of work and the payment of remunerations left to perceive for the time of disconnection has been achieved; in others, the former public servants have not recovered their charges.

It is precise to emphasize that, throughout the last years, the labor conflicts between the State and its public servants have been resolved by means of actions of protection, which have demonstrated to be an efficacious mechanism to guarantee the tutelage of rights facing arbitrary, illegal and lacking of motivation administrative acts. These actions not only have permitted the reestablishment of violated rights —such as the reincorporation to the post of work or the payment of remunerations left to perceive—, but in addition have generated precedents that have been utilized as reference to resolve similar cases in distinct jurisdictions of the country (3).

The action of protection has strengthened the framework of protection of the labor rights of the public servants in the public institutions, precisely for the transgressions committed by state authorities in processes of disconnection, suppression of positions or termination of contracts. In that sense, it has functioned as a true “constitutional mechanism of protection of rights”, permitting the public servants to access an agile, effective judicial path oriented to the immediate restitution of their rights (3).

Deriving the labor conflicts between the State and its public servants to the contentious-administrative jurisdiction, pursuant to the general rule established in paragraph 42 of Judgment 2006-18-EP/24, represents a serious affectation to the principle of progressivity of the rights, upon weakening the advances achieved by the constitutional justice in the construction of an institutional culture based on the respect, the stability and the protection of the work in the public sector (1,3,7).

Equal treatment toward the public servants regarding the labor conflicts generated by the employees subject to the Labor Code and to the Organic Law of Public Enterprises

The Organic Law of Public Enterprises was issued as a regulation that permits the public enterprises created by the State to count with competitive possibilities similar to those of a private enterprise, with the aim of adapting to the commercial dynamics and to the versatility of the market, and adopting necessary decisions to fulfill entrepreneurial and business objectives (4,17).

With the validity of the Organic Law of Public Enterprises a “new type” of servant is incorporated in the Ecuadorian public service, alien to the dispositions of the LOSEP and submitted to the Labor Code, as Article 32 of the LOEP disposes: “Art. 32.- Solution of controversies.- The controversies that originate from the labor relations between the public enterprises and their career servants or workers, shall be resolved by the labor authority or the competent labor judges, who for the effect shall observe the special dispositions provided in this Title”. This disposition confirms that the labor relation with the personnel of the public enterprises is governed by a logic of entrepreneurial management, with greater flexibility than the regime of career of the public service (4,5).

Precisely the Organic Law of Public Enterprises enables that the public enterprises can terminate unilaterally the labor relation by part of the employer, with the obligation to indemnify in the private sector, legal figure accepted in our legislation, with exceptions to groups considered of special attention. It is for this that in Article 30 numeral 4 of the LOEP, it enables the employer to “separate its servants” always and when the payment of an indemnification is guaranteed, but not the restitution of the post of

work, as happens with the private enterprise. The ILO, on the figure of dismissal has accepted it, always that the payment of an indemnification is guaranteed in a prior form (4,5).

Now, the labor relation between the State and the public servant who provides services in a public enterprise, under the regime of the Labor Code, cannot be equated to the relation that the State maintains with the public servants of the institutions subject to the regime of the Organic Law of the Public Service (LOSEP). The public enterprises, by their own nature, are oriented to function under criteria of competitiveness similar to those of the private sector, which implies that the employer must conserve the faculty to reorganize its personnel to guarantee the sustainability and efficiency of the entrepreneurial activity (4,5,17,18).

In change, the public institutions have as finality the provision of services to the citizenship, and the LOSEP establishes a regime oriented to the consolidation of an administrative career that promotes the professional, technical and ethical development of the public servant. This model seeks to assure the continuous improvement in the quality, efficiency and efficacy of the public institution, by means of the conformation and strengthening of the human talent, sustained on principles such as the equality of rights, the equity in the access to opportunities and the non-discrimination (2).

With the aim of evidencing in a more precise manner the substantial differences between both legal regimes, a comparative table is presented below that contrasts the rights and guarantees proper of the regime of the LOSEP facing the flexibility characteristic of the LOEP. This comparison permits noticing that the equation realized by the Constitutional Court in Judgment 2006-18-EP/24 omits relevant normative distinctions to determine the adequate jurisdictional path in the labor conflicts of the public sector (2,4,5).

Table 1. Substantial differences between the LOSEP regime and the LOEP regime

Compared criterion	LOSEP regime	LOEP regime	Relevance for the interpretive error
Nature of the labor relation	It is sustained on the administrative career, on the organization of the human talent and on principles of stability, professionalization and service to the citizenship. (2)	It responds to an entrepreneurial and competitive logic, linked to criteria of flexible management proper of the public enterprises. (4,17)	The Court does not distinguish between a statutory relation of public service and a labor relation with entrepreneurial orientation, despite the fact that this difference conditions the applicable legal protection.
Finality of the regime	It seeks to guarantee institutional continuity, administrative efficiency, professional development and strengthening of the public service. (2)	It seeks to endow the public enterprises with competitive tools similar to those of the private sector to fulfill business ends and sustainability. (4,17)	The equation between both regimes ignores that their normative objectives are distinct, for which a same jurisdictional response cannot be assumed as general rule.
Stability and disconnection	Although modalities without full stability exist, the regime is inserted in a structure of guarantees of the public employment and reinforced control over administrative decisions that affect rights. (2,3)	Article 30 of the LOEP permits separating career servants or workers with payment of indemnification, reflecting a greater flexibility in the termination of the labor relation. (4,5)	The Court omits that the greater flexibility of disconnection provided in the LOEP is not transferable without more to the LOSEP regime, where the affectation of rights may require immediate constitutional tutelage.
Competent organ for labor controversies	The conflicts usually involve administrative acts and, when there exists violation of rights, have been known by means of action of protection as suitable path of tutelage. (3,7)	Article 32 of the LOEP disposes expressly that the labor controversies of the public enterprises shall be resolved by the labor authority or by competent labor judges. (4,5)	The existence of an express rule in the LOEP evidences that the legislator differentiated both regimes; therefore, extrapolating that logic to the LOSEP constitutes an interpretive inference insufficiently justified.

Type of predominant protection	A reinforced protection of the link with the public service predominates, especially when rights such as stability, due process, equality and effective judicial tutelage are compromised. (1,2,3,7)	A logic of reparation and indemnification compatible with the entrepreneurial dynamics and with the solution of controversies in the ordinary labor jurisdiction predominates. (4,5)	The decision of the Court reduces unduly the protective specificity of the LOSEP regime upon assimilating it to a more flexible model designed for public enterprises.
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Source: Own elaboration based on the LOSEP, the LOEP, the Labor Code, Judgment No. 2006-18-EP/24 and specialized doctrine. (2,3,4,5,17,18)

The preceding comparison shows that the LOSEP and the LOEP not only regulate distinct labor relations, but in addition respond to divergent normative finalities and mechanisms of protection. In particular, Articles 30 and 32 of the LOEP confirm that the legislator provided for the public enterprises a scheme of greater flexibility in the disconnection and a solution of controversies before the ordinary labor jurisdiction, elements that cannot be transferred automatically to the statutory regime of the public service. For this, the interpretation of the Constitutional Court incurs in an error upon constructing an “equal treatment” that disattends substantial differences and weakens the reinforced tutelage that corresponds to the servants subject to the LOSEP (2,3,4,5).

In definitive, the Constitutional Court incurs in an interpretive error upon pretending to establish an equal treatment between the labor conflicts that involve public servants subject to the regime of the Organic Law of the Public Service (LOSEP) and those that correspond to workers of public enterprises regulated by the Organic Law of Public Enterprises (LOEP). Deriving both types of controversies to the same contentious-administrative jurisdiction —without attending to the differences between the legal regimes that govern them— denaturalizes the labor link of career and guaranteeist character provided in the LOSEP, facing the contractual, flexible and oriented to the entrepreneurial performance logic proper of the public enterprises; in addition, it tensions the principle of progressivity of rights and limits the use of the actions of protection (2,4,5).

Legal foundations of Judgment 2006-18-EP/24 and its application in labor conflicts between the State and its public servants

Article 217 of the Organic Code of the Judicial Function establishes in an express manner the attributions and duties of the tribunals of the administrative contentious. Among these competencies is found that of knowing and resolving the controversies that arise between the public administration and the particulars, when there exists a possible violation of legal norms or of individual rights; as well as knowing and resolving the impugnations interposed against regulations, resolutions and other normative acts of rank inferior to the law, in non-tributary matter. In equal manner, the tribunals have competence to resolve demands presented against acts, contracts or non-tributary administrative facts, emanated from the institutions of the State, always that said acts affect interests or subjective rights of natural or legal persons (6,20).

These attributions and duties demonstrate that the principal function of the tribunals of the contentious-administrative is to exercise control of legality over the administrative acts of the public institutions; however, in no case is it established in an express form that they are competent to know labor conflicts between the State and its public servants. This lack of precision evidences that the conflicts of labor character,

especially those related with the stability and the protection of fundamental rights, require an effective judicial tutelage that transcends the formal control of legality that characterizes this jurisdiction (6).

One of the principal legal foundations that is noticed in paragraph 42 of Judgment 2006-18-EP/24 is the application of the principle of specialty, pursuant to which the administrative acts dictated by public authorities must be challenged before the contentious-administrative jurisdiction. In this point, the Court considers that, upon treating of acts emanated from entities of the public sector, it corresponds to the judges of the contentious-administrative to resolve them, without that, in the criterion of the Court, there exists a direct violation of constitutional rights that justifies the use of the action of protection (3,6).

Nevertheless, this legal interpretation omits an integral valuation of the principle of progressivity of the labor rights, consecrated in Article 11 of the Constitution, as well as the principle of effective judicial tutelage provided in Article 75 of the same constitutional text and Judgment No. 307-10-EP/19 issued by the same Constitutional Court upon signaling that: (1,7)

“this Court considers that the legal nature of the act does not determine the competence of the judges upon knowing an action of protection, but that the foundation of the demand is the existence of a violation of constitutional rights (...)” (7).

Paragraph 42 of Judgment 2006-18-EP/24 does not develop with sufficient depth the distinction between the labor regime applicable to the public servants subject to the LOSEP and that corresponding to the workers of public enterprises under the LOEP, whose labor relations are regulated by the Labor Code and, in consequence, submitted to the ordinary justice.

In synthesis, although paragraph 42 of Judgment 2006-18-EP/24 finds its legal foundations in the Organic Law of the Public Service, the Organic Law of Public Enterprises and the principle of specialty, this general rule can represent a restrictive interpretation and limit the guarantee of rights by part of the judges who know actions of protection in case of labor conflicts (2,3,4).

Interpretive argumentation employed in paragraph 42 of Judgment 2006-18-EP/24 facing the principle of progressivity of rights

The legal argumentation consists in exposing founded reasons with the purpose of persuading regarding a determined legal question. It is a technique that requires both theoretical formation and specialized practical abilities (10,11,12,14,15,19).

The interpretive argumentation, according to Carlos Alberto Etala in his Legal Dictionary of Interpretation and Argumentation, seeks to determine in the most rational form possible the solution of controversial questions in which different interpretive results are possible among which it is necessary to choose (2016, 26) (8).

The exercise of the jurisdictional function demands of the judge the fulfillment of three essential activities:

- a) The procedural activity, consisting in that the procedure to settle the litigation is substantiated pursuant to the procedural legal norms. Only thus the resolutive decision of the litigation will be procedurally pursuant to the law.
- b) The decisory activity, which consists in dictating a decision that resolves the litigation. To fulfill the obligation of judging, that decision can be any decision, however absurd it may be. But, to fulfill the jurisdictional obligation, said decision has to be a decision that says the law. Only in this case the decision will be materially pursuant to the law.
- c) The justificatory activity, which is the action of motivating the dictated decision.

According to Rafael Hernández, in his book Reasoning in the Judicial Sentence, he signals that of these three obligations, that of motivating is the one that has received more attention by part of the theoreticians and it is for this cause that the opinions about the motivation of the judicial decisions are so numerous and disparate (2013: 100) (9).

From this perspective, the analysis of Judgment 2006-18-EP/24, in particular of paragraph 42, evidences that the Constitutional Court opted for an interpretive argumentation of restrictive cut. Instead of examining the bottom of the labor conflicts between the State and its public servants in light of the constitutional principles — especially the principle of progressivity of the rights and the right to the effective judicial tutelage—, the Court established a general rule that limits the access to the constitutional justice in this type of cases. This decision, upon deriving in an automatic form the labor conflicts to the ambit of the contentious-administrative jurisdiction, not only reduces the standard of protection previously reached, but also ignores the guaranteeist function of the action of protection (3,16).

What is worrying of this argumentative line is that it starts from a formal conception of the law, in which the nature of the administrative act prevails over the possible violation of fundamental rights. This posture results incompatible with other precedents of the own Constitutional Court, in which it has been sustained that the activation of the constitutional competence does not depend on the formal nature of the challenged act, but on the effective existence of a violation to rights recognized in the Constitution. The motivation developed in the judgment object of analysis evidences a restrictive interpretation that departs from an evolutionary and guaranteeist reading of the constitutional law, generating regressive effects in the protection of the labor rights of the public servants and affecting the standard of tutelage previously consolidated (7).

From a critical perspective, the limitation imposed to the action of protection results problematic, since it tensions the principle of progressivity of the constitutional rights upon not offering a solid justification that explains why the transfer of the labor conflicts to the contentious-administrative jurisdiction would guarantee a more adequate tutelage. Far from strengthening the protection of the rights, this restriction ignores that, in the practice, the action of protection has been an efficacious mechanism to confront arbitrary administrative decisions in the public employment, permitting the reestablishment of violated rights. In that sense, reducing its reach weakens the means of defense of the public servants and compromises the coherence and efficacy of the system of constitutional justice.

DISCUSSION

Judgment 2006-18-EP/24 marks a relevant moment in the interpretation of the labor conflicts between the State and its public servants. However, the critical examination of its content permits noticing substantial questionings regarding the reach and the consistency of the argumentation developed by the Constitutional Court, in particular in relation with the principle of progressivity of the rights and with the coherence of this decision facing its own previous jurisprudential line (3).

One of the principal aspects observed in the analysis is that the Court founds its reasoning on the idea of establishing a supposed “equal treatment” in matter of jurisdictional competence between the distinct labor regimes. Nevertheless, said equation results legally problematic if the structural differences that characterize each one of these regimes are considered. In the case of the public enterprises, the Organic Law of Public Enterprises establishes in an express manner that the labor conflicts must be known by labor judges, in attention to that these relations are governed by the Labor Code and respond to an entrepreneurial, flexible logic oriented to criteria of competitiveness (4,5).

The labor relations regulated by the Organic Law of the Public Service present a distinct nature, sustained on principles such as the administrative career, the stability, the professionalization of the human talent, and the fulfillment of institutional objectives linked with the efficiency, the quality and the continuous improvement of the state management. (2) These differences reflect that it does not result adequate to transfer automatically jurisdictional criteria from one regime to another without a substantive analysis of its impact on the protection of rights.

It results especially worrying that the Court has opted for restricting the procedence of the action of protection in this type of controversies, transferring the competence to the contentious-administrative jurisdiction without a deep examination of the consequences that this general decision on the rights of the public servants. Although it is true that the contentious-administrative tribunals fulfill a central function of control of legality, also it is that their procedural design does not offer the same guarantees of celerity nor is oriented, in a priority manner, to the integral reparation of rights, as occurs in the ambit of the constitutional justice (6,7).

The discussion must be situated, then, in the relation between the precedent fixed by the Court and the procedural reality that the public servants face at the moment of seeking the tutelage of their rights. The action of protection has demonstrated to be an efficacious tool facing the administrative acts that, despite their appearance of legality, conceal arbitrariness, deficiencies of motivation or disproportionate decisions. The remission of these cases to the contentious-administrative jurisdiction not only prolongs the processes, but reduces the possibilities of an effective restitution, especially when the judges lack specialized formation in labor rights of the public sector.

To this is added the contradiction with criteria previously sustained by the same Constitutional Court, as the exposed in Judgment No. 307-10-EP/19, in which it was affirmed with clarity that what is determinant to fix the competence is not the formal nature of the administrative act, but the real existence of a violation of constitutional

rights. This lack of internal consistency weakens the legal security and generates a scenario of uncertainty for those who seek an adequate and expedite path for the defense of their rights facing the State (7).

The argumentation adopted in Judgment No. 2006-18-EP/2024 reflects an interpretation that, far from strengthening the framework of protection of the rights of the public servants, introduces restrictions based on formal criteria that can obstruct the access to a timely and effective justice. The developed analysis does not pursue to delegitimize the role of the Constitutional Court, but to highlight the necessity of reviewing critically this precedent with the aim of reinforcing a coherent, guaranteeist constitutional interpretation and in accordance with the principles that sustain the constitutional State of rights and justice (3,16).

CONCLUSIONS

The study evidences that the general rule established in paragraph 42 of Judgment 2006-18-EP/24 configures a precedent that, under a formalist approach, transfers the labor conflicts between the State and its public servants to the contentious-administrative jurisdiction. This decision is sustained on a supposed “equal treatment” with the personnel of public enterprises; however, said equation ignores the structural differences between the regime of the LOSEP oriented to the administrative career, the stability and the strengthening of the human talent and the regime of the LOEP/Labor Code, of entrepreneurial logic and greater flexibility. In consequence, the jurisdictional solution proposed by the Court results conceptually imprecise and normatively insufficient to respond to the specificity of the public employment and to the conflicts derived from disconnections, suppression of positions, finalization of provisional appointments or other administrative decisions.

It is concluded that the argumentation utilized to restrict, by general rule, the action of protection lacks a reinforced motivation facing constitutional standards such as the effective judicial tutelage (art. 75) and the principle of progressivity (art. 11.8). The analysis shows that the Court privileges the nature of the administrative act over the verification of a possible violation of rights, in tension with the jurisprudential line that recognizes that the constitutional competence is activated by the affectation to rights and not by the label of the act. In the praxis, the actions of protection have operated as a suitable mechanism to repair violations linked with stability, due process, equality and legal security, especially in scenarios of arbitrariness or lack of motivation. In that sense, paragraph 42 breaks with that jurisprudential line and elevates barriers of access to an expedite path, which can be translated into an unjustified setback of the level of protection reached for the public servant (7).

Finally, it is determined that the contentious-administrative jurisdiction, pursuant to the attributions provided in the COFJ, is oriented principally to the control of legality of the administrative act and was not designed to provide, in a priority manner, a constitutional and reparatory response facing labor conflicts of the public service. The absence of an express habilitation to know this type of controversies with approach of rights, added to the lesser procedural celerity, can weaken the efficacy of the tutelage and affect in a direct form the labor stability, the timely reestablishment of rights and the legal security. In that framework, the article sustains that the precedent must be

interpreted with caution and in a form compatible with the Constitution: the action of protection must be maintained available when there exist violations of constitutional rights in the public labor ambit, avoiding that the general rule operates as an automatic exclusion that denaturalizes the guarantist character of the constitutional State of rights and justice (3).

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