Vegueta. Anuario de la Facultad de Geografía e Historia
22 (9), 2022
eISSN: 2341-1112
DOI: 10.5281/zenodo.7178245

INFRINGEMENT OF DUE PROCESS AND LACK OF EFFICIENCY IN THE SUBSTANTIATION OF THE ADMINISTRATIVE SUMMARY

Dr. Diego Fernando Trelles Vicuña
Universidad Católica de Cuenca, Ecuador
dtrelles@ucacue.edu.ec, https://orcid.org/0000-0002-8466-7165

Abg. Ana Zamora Vázquez
Universidad Católica de Cuenca, Ecuador
afzamorav@ucacue.edu.ec, https://orcid.org/0000-0003-3196-1616

Abstract
This research work conducted a study on the hearing of administrative summaries, to demonstrate the affection of due process. This situation is exacerbated when agreement N° MDT-2019-007 of the Technical Standard for the substantiation of Administrative Summaries is amended by agreement N° MDT-2019-081, regarding the guiding principles stated and the lack of concordance with the single hearing for the substantiation of the administrative summary. This article used the qualitative approach, with a descriptive level of depth, with the application of the inductive - deductive, analytical - synthetic and legal dogmatic methods, which allowed the gathering of relevant information on the subject of study. The results obtained allowed evidence that the procedural principles and therefore due process is violated by holding the hearings in the city of Quito or transferring the substantiating personnel to the different Provincial Delegations. However, the analysis shows the lack of deconcentration and simplification of the procedure, constituting the need to adapt the article of the hearing of administrative summaries of the Technical Standard to comply with a due process that is in harmony with the constitutional and legal principles, instituting support to guarantee the rights of public servants.
Keywords: due process, administrative summary, rights, public servant, public servant.

Resumen
Este trabajo de investigación realizó un estudio sobre la audiencia de los sumarios administrativos, con la finalidad demostrar la afección del debido proceso. Esta situación se agudiza cuando se reforma el acuerdo Nro. MDT-2019-007 de la Norma Técnica para la sustanciación de los Sumarios Administrativos, por el acuerdo Nro. MDT-2019-081 respecto a los principios rectores enunciados y la falta de concordancia con la audiencia única para la sustanciación del sumario administrativo. Este artículo utilizó el enfoque cualitativo, con un nivel de profundidad descriptivo, con la aplicación de los métodos inductivo – deductivo, analítico – sintético y dogmático jurídico, que han permitido recabar información relevante sobre el tema de estudio. Los resultados obtenidos han permitido evidenciar que se vulneran los principios procesales; y, por ende, el debido proceso al disponer la realización de las audiencias en la ciudad de Quito o de trasladar el personal sustanciador a las diferentes Delegaciones Provinciales; sin embargo, con el análisis realizado se demuestra la falta de

**Autora de correspondencia / Corresponding author.*

desconcentración y simplificación del procedimiento, constituyendo la necesidad de adecuar el artículo de la audiencia de los sumarios administrativos de la Norma Técnica a cumplir con un debido proceso que guarde armonía con los principios constitucionales y legales; instituyendo un soporte para garantizar los derechos de los servidores públicos.
Palabras clave: debido proceso, sumario administrativo, derechos, servidor público.

Introduction

This paper addresses the issue of the administrative summary, concerning the single hearing, which through the Technical Standard of agreement N° MDT-2019-007, reformed by agreement N° MDT-2019-081, is where the problem is evidenced.

The interest of this article lies in the fact that the hearing for public servants is held in the offices of the Ministry of Labor in the city of Quito. In case of not being able to attend, it can be done through video conference in the Provincial Directorates of Labor or Public Service or its delegations, and even offers to move the substantiations to the corresponding Directorates, thus violating the due process. The same technical regulation establishes the guiding principles that support the administrative summary proceeding; however, they are not under the provision that regulates the execution of the hearing.

The first part of this article refers to the background of the administrative summary within the Ecuadorian legislation; secondly, an analysis is made of the affection of the due process concerning the single hearing and the violation of the due process. In addition, it explains the lack of concordance of the hearing with the guiding principles outlined in the Technical Standard for administrative summary proceedings, which are not enforced; on the contrary, they restrict the rights of the public servant.

The results of the work show the need to adapt the technical standard for the hearing, to comply with the due process effectively, making the principles of the administrative summary effective.

The research problem is based on the question: does the reform of the technical norm for the substantiation of administrative summary proceedings concerning the single hearing violate due process? The general objective is to analyze the single hearing for the substantiation of administrative summary proceedings, through the law, doctrine and theoretical basis, to determine the violation of due process.

Background of the administrative summary in Ecuadorian legislation

Article 226 of the Constitution of the Republic of Ecuador provides as follows:

> The institutions of the State, its agencies, dependencies, public servants and persons acting under a State power shall exercise only the competencies and powers attributed to them by the Constitution and the law. They shall have the duty to coordinate actions for the fulfillment of their purposes and to enforce the enjoyment and exercise of the rights recognized in the Constitution.

For the aforementioned article, it establishes the favorable competence of public servants, as well as of persons performing their functions under the authority of the State, who may only perform the powers granted by the supreme norm and the law.

Article 44 of the Public Service Organic Law (2010) on the administrative summary provides as follows:

> It is the administrative, oral and reasoned process by which the Ministry of Labor will determine whether or not serious administrative offenses established in this Law have been committed by a public

servant of a public institution and will impose the corresponding disciplinary sanction. Its procedure shall be regulated through the Agreement issued by the Ministry of Labor for such purpose.

The LOSEP establishes the rights, duties and prohibitions of public servants; however, the law is clear that only serious misconduct is grounds for an administrative summary. Therefore, this applies if a public servant has committed an administrative offense in the exercise of his duties.

The doctrine regarding the administrative summary states: "Fast and summarized administrative procedure, which dispenses with some formalities contemplated in criminal and civil proceedings; aimed at punishing public servants, for faults and improprieties committed" (Jaramillo Ordoñez, 2013, p. 186).

Now, the administrative summary is a tool within the Ecuadorian legal system that aims to promote the disciplinary authority against public servants, applying relevant principles such as the presumption of innocence, effective judicial protection and due process.

The General Regulations to the Organic Law of Public Service (2011) hereinafter RG-LOSEP in its section III which deals with "Administrative Summary Procedure" in its Article 90 refers that the authority may order the substantiation of the administrative summary and impose the corresponding sanction within ninety days. Article 91 ibidem, regarding the prior actions to initiate the administrative summary, in its numeral 1, states:

> When an authority, official or civil servant becomes aware of the presumption of the commission of a serious disciplinary offense by a civil servant of the institution, such information shall be sent to the UATH for the study and analysis of the alleged facts.

From the above, it can be deduced that the aforementioned article refers that the administrative summary is used to sanction the disciplinary offenses found in Article 42 of the LOSEP, whose purpose is to apply sanctions for the infractions established in the same regulation.

Likewise, Article 80 of the RG-LOSEP in its first paragraph states: "All disciplinary sanctions determined in Article 43 of the LOSEP, shall be imposed by the appointing authority or its delegate, and executed by the UATH, after compliance with the procedure established in these General Regulations."

In this regard, it is necessary to clarify that although the cited article does not directly allude to the administrative summary, the RG-LOSEP has it as the only disciplinary procedure. However, in Articles 81, 82, 83 and 84 of the Regulations, reference is made to minor offenses, as well as verbal and written reprimands and administrative fines. In other words, there is no mention of administrative summary proceedings; however, in the contents of articles 85 to 89 of the RG-LOSEP, there is an express provision to deal with the administrative summary to sanction serious misconduct such as suspension and dismissal.

The purpose of the administrative summary is to determine whether a public servant has performed irregular acts in the performance of his duties. "The summary tends to the inquiry of certain facts and the participation of the interested party in its discussion and appreciation so that the public administration can then decide whether or not to apply any sanction" (Gordillo, 2016, p. 248).

Likewise, it is necessary to define the word summary as: "brief, summarized, abridged. Name of certain trials in which some formalities are dispensed with and are processed faster (...)" (Diccionario Jurídico Elemental, 2022, p. 322). Regarding the word administrative, it is manifested as: "The general or special decision that, in the exercise of its functions, is taken by the administrative authority, and that affects rights, duties and interests of individuals or public entities" (Diccionario Jurídico Elemental, 2022, p. 14). Therefore,

they are processes of a brief nature exercised by an administrative authority.

Analysis of due process in the administrative summary

Article 76 of the Constitution of the Republic (2008) states: "In any process in which rights and obligations of any order are determined, the right to due process shall be ensured". Due process must make effective the rights of individuals, in this case, of public servants.

Within the sanctioning procedure, such as the administrative summary, it must ensure the right to defense, which in the Supreme Norm is found in Article 67 paragraph 7 literal a), "No one may be deprived of the right to defense at any stage or level of the procedure".

Therefore, no person may be sanctioned without being previously heard. This is presented as the right to a hearing, which is the basis of due process and must be applied in the administrative summary procedure. The public servant has the right to have the support of a defense attorney, to guarantee the right to defense, effectiveness and suitability and apply the principle of contradiction.

Thus, the public servant has the right to contradict and guarantee the parties equal conditions for their confrontation within the administrative summary proceeding, to verify the factual and legal grounds, making known the positions of each party, presenting the necessary evidence and that may be accepted or objected.

Therefore, within this procedure, rights in favor of the accused public servant must be ensured, so that he/she may object to the responsibilities that are intended to be determined. The principle of contradiction is included in numeral 7 literal h) of article 76 of the supreme law, which provides: "(...) to reply to the arguments of the other parties; to present evidence and contradict the evidence presented against him".

Davis Echandía (1997) states that the right of contradiction is based on the principles of procedural law such as the equality of the parties, the need to hear the person subject to the process, contradiction, impartiality, bilateral hearing and respect for individual freedom.

Regarding the due process, García Chávarri (2009) refers "it is not limited only to the process but to all actions of those who hold an authority or power, which reaches not only the judicial field but also the administrative field" (p. 45). Due process must have the necessary elements to be fair, that is, the public servant must be able to contradict, be heard, present evidence, challenge, etc.

Concomitantly, for an objective due process to be complied with, the investigator, judge or person in charge of resolving the administrative summary must decide by applying what is most favorable to the public servant (*pro homine* principle).

In this regard, Article 76, paragraph 5 of the Constitution states: "(...) In case of doubt about a rule containing sanctions, it shall be applied in the sense most favorable to the offender". It may be mentioned that by complying with the principles immersed in due process, arbitrariness on the part of the public administration may be avoided.

Another right that must be guaranteed in this administrative sanctioning procedure is "to be heard", allowing the public servant to support his arguments, and discuss legal aspects, among others. This is stated in paragraph c), numeral 7 of Article 76 of the Supra Norm, which reads: "To be heard at the appropriate time and under equal conditions".

In this regard, Bustamante (2001) mentions as a minimum but necessary element for a procedure to be considered fair the opportunity to be heard, to contradict, to produce evidence and to challenge, etc., and he even adds that these rights apply not only to jurisdictional processes but to all types of procedures, including

administrative ones.

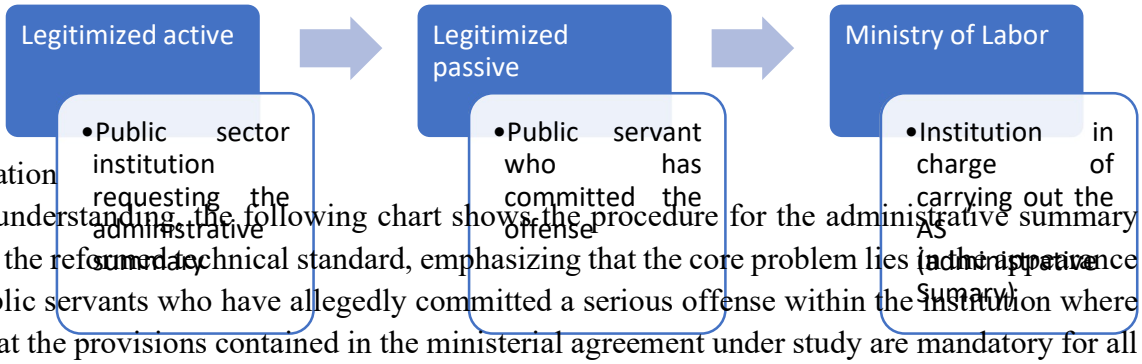
Article 8 of the American Convention on Human Rights (1976) refers to due process, which allows understanding some of its elements when it states the following:

> Everyone is entitled to a fair and prompt hearing within a reasonable time by a competent, independent and impartial tribunal, previously established by law, in the determination of any criminal charge against him, or his rights and obligations of a civil, labor, fiscal or any other nature.

The aforementioned provision refers to the fact that the investigator must be apt and suitable and comply with the elements mentioned in any type of process, to guarantee the rights of the persons, in the case of the administrative summary of public servants. It is important to disclose the parties involved in the Administrative Summary, information that is shown in Figure 1.

Figure 1

Participants in the administrative summary process

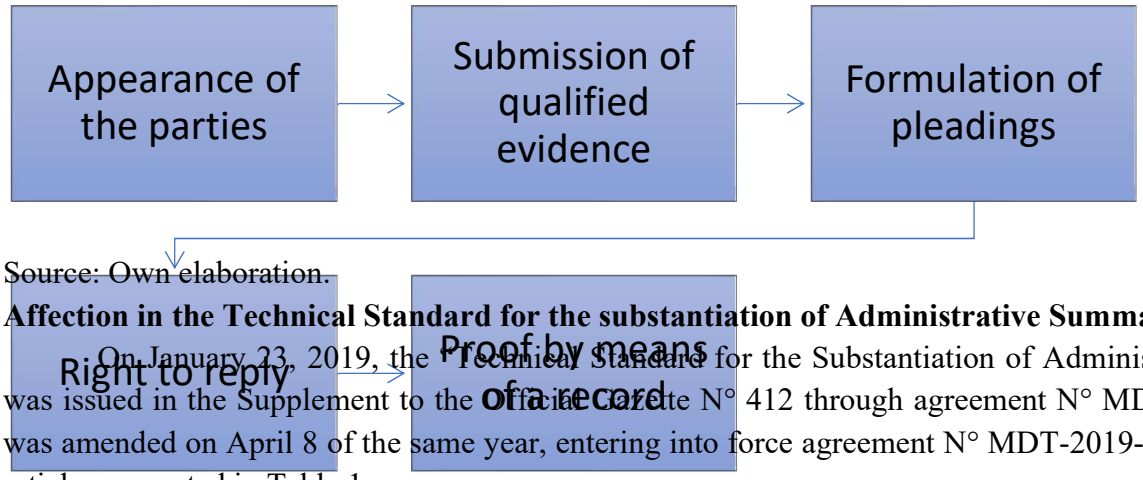


Source: Own elaboration

For a better understanding, the following chart shows the procedure for the administrative summary hearing contained in the reformed technical standard, emphasizing that the core problem lies in the appearance at the hearing of public servants who have allegedly committed a serious offense within the institution where they work, noting that the provisions contained in the ministerial agreement under study are mandatory for all State institutions that are included in the LOSEP.

Figure 2

Administrative Summary Hearing - Technical Standard



Source: Own elaboration.

Affection in the Technical Standard for the substantiation of Administrative Summaries

On January 23, 2019, the "Technical Standard for the Substantiation of Administrative Summaries" was issued in the Supplement to the Official Gazette N° 412 through agreement N° MDT-2019-007, which was amended on April 8 of the same year, entering into force agreement N° MDT-2019-081 that amends the articles presented in Table 1.

Table 1

Reforms to the Technical Standard for the Substantiation of Administrative Summaries

Agreement Nº. MDT-2019-	Agreement Nº. MDT-2019-007.

081	
Article 1	Replace by article 3
Article 2	Replace by article 7
Article 3	To amend paragraphs d), g) and m) of article 13.
Article 4	To replace article 15
Article 5	To amend the second and third paragraphs of article 16.
Article 6	To replace article 17
Article 7	To replace article 18
Article 8	To replace article 20
Article 9	To amend the third paragraph of article 22
Article 10	To replace article 23
Article 11	To incorporate in article 24 subparagraphs
Article 12	To amend the second paragraph of article 29

Source: Own elaboration

Article 11 of Agreement Nº MDT-2019-081 states that the following shall be incorporated in article 24, paragraph seven of the technical standard:

> Since the investigators have jurisdiction throughout the national territory and their headquarters will be in the Metropolitan District of Quito, the single Administrative Summary hearings will be held at Av. República de El Salvador N 34 183 and Suiza, fourth floor, in any of the hearing rooms that will be previously determined.

The aforementioned paragraph establishes that those who analyze the administrative file have nationwide powers and their headquarters are located in the capital of the republic, where the single hearings of administrative summary proceedings will be held. In addition to this, the same article states in the following subsection:

> If both the plaintiff and the defendant are unable to attend the domicile of the investigators and justify it, the hearing may be held by video conference at any of the Regional Labor and Public Service Directorates nationwide or their Delegations, or, failing that, the investigators may be transferred to each of the relevant Regional Directorates (ACUERDO N° MDT-2019-081, 2019).

This provision transgresses the due process regarding the effective judicial protection within the administrative sphere since, by conducting the hearing in the offices located in the city of Quito, the right of the person to attend in person is limited, contradicting the principles contained in the reform through agreement N° MDT-2019-081, which in Article 1 mentions a bilateral hearing, immediacy, application of the most favorable to the public servant, celerity, among others.

In addition, due process is a fundamental right contemplated within the Constitution (2008) to guarantee effective judicial protection, constituting a fundamental part of the rule of law. However, following everything stated in previous paragraphs regarding compliance with due process, the rule on the substantiation of administrative summary proceedings violates it conclusively. It should be noted that it is a centralized process, concentrated in one place by the public administration, which makes it difficult for the public servant to attend the hearing.

Consequently, the hearing of administrative summary proceedings contradicts the provisions of the supreme norm regarding due process. An allusion is made to hold the hearing through video conference but under the circumstance of carrying it out "in any of the Regional Directorates of Labor and Public Service at the national level or its Delegations, or in its absence the transfer of the substantiators to each of the relevant Regional Directorates" situation that calls into question principles that are part of due process such as effective judicial protection, immediacy, contradiction, etc. The lack of effectiveness of the norm is evidenced since the processes should be based on the *indubio pro actione* and with this reform of the technical norm, it is the opposite.

The circumstances that are required through the provision to attend the city of Quito, to hold a video conference in the Directorates or Delegations or to transfer the substantive investigators, only complicates and hinder the procedure of the single hearing. Furthermore, under no circumstances does the administrative summary hearing established in the technical standard guarantee the most favorable to the server, due to the lack of efficiency, centralization, concentration, lack of procedural speed and limited options given by the public administration regarding the hearing.

Therefore, it would be optimal and following the provisions of Article 11 of agreement MDT-2019-081 "the substanciators have jurisdiction throughout the national territory", that the hearings can be carried out in the Provincial Delegations, to guarantee the rights of public servants and make the due process effective. The administrative summary procedure cannot be separated from the procedural guarantees, to safeguard the effectiveness of the rights of the public servants.

The Ministry of Labor has a deconcentrated level that starts from the Regional Labor and Public Service Directorate and lands in the Provincial Delegations; despite this, the procedures are centralized when better efficiency can be achieved with administrative decentralization. Therefore, it is necessary to decentralize functions to guarantee due process, complying with the principles and above all acting in virtue of the rights most favorable to the public servant. Regarding decentralization, Suing (2013) states that:

> (…) is understood as the transfer of competencies and powers from the central level to subnational levels or the central government's institutional framework at its subordinate levels, to improve the conditions for the provision of services or the management of state competencies (p.106).

For the above, it can be deduced that there is no decentralization for carrying out administrative summary hearings, despite the existence of directorates and delegations, there is a concentration of functions since the competence in this specific case lies with the Ministry of Labor in the city of Quito.

The processes must be transferred, and delegated, as established in Article 227 of the Constitution: "Public administration constitutes a service to the community that is governed by the principles of effectiveness, efficiency, quality, hierarchy, deconcentration, decentralization, coordination, participation, planning, transparency and evaluation". However, the principles outlined in the aforementioned article are not complied with according to what is established in the Technical Standard for the substantiation of administrative summaries, especially for the hearing. On the contrary, this procedure has not been decentralized or deconcentrated.

In this sense, there is a clear violation of procedural celerity, to such an extent that, if the hearing is not held in the capital city, it will be held by video conference, and if it is not held by this telematic means, the investigators will travel to the corresponding place. Therefore, under the circumstances described, there is no

deconcentration of functions that would allow a procedure to be carried out in a timely way, especially when it is a matter of sanctioning a serious offense in which the result is to suspend or dismiss a public servant.

Along the same lines, for the procedural system, Article 169 of the Supreme Decree states: "it is a means for the realization of justice. The procedural rules shall enshrine the principles of simplification, uniformity, efficiency, immediacy, celerity and procedural economy, and shall make them effective". Under no circumstances can it be established that the content of the technical regulation regarding the hearing complies with the principles outlined in the aforementioned article, in no way does it simplify the process, much less when the public servant has to carry out a transfer with his technical defense, the procedural speed and economy cannot be effective according to the structure that consists to carry out the hearing of the administrative summary.

At the same time, these principles are also outlined in Article 75 ibidem, which states: "Every person has the right to free access to justice and the effective, impartial and expeditious protection of his rights and interests, subject to the principles of immediacy and celerity; in no case shall he be left defenseless". In this context, there is no effective protection for the public servant, since the principles outlined in the above regulation, the LOSEP in Article 1 and the technical regulation in force in Article 3 are not complied with.

For the above, due process is essential within the administrative summary, the public servant must be safeguarded from any type of arbitrariness in order not to frustrate his right to defend himself from accusations against him and at the same time to avoid abuses of power by the administrative authority.

Persons who are linked to the institutions that belong to the administration by a relationship of dependence as a public servant, may not be removed from office, nor be punished through disciplinary measures, but through what is determined by law.

All sanctioning procedures must respect due process and comply with the provisions of the law. Although the Ministry of Labor is indeed in charge of conducting the hearing of administrative summaries of public servants, it must establish pertinent mechanisms that collaborate to make the due administrative process effective.

Methodology

This research work was carried out through a qualitative approach, using the review of law, doctrine and scientific databases, based on descriptive and interpretative data, which provided relevant information regarding the administrative summary.

The level of knowledge or depth within this article is descriptive to specify the important characteristics of the subject for its analysis. In addition, it is basic since it managed to develop theories regarding the violation of due process for the administrative summary hearing.

The methods applied are inductive - deductive, which goes from the particular to the general and vice versa. The inductive "consists of a reasoning that goes from the observation of phenomena to a general law for all phenomena of the same genre" (Baena, 2015, p. 45). In contrast, deduction lies in general ideas implying certainty.

The analytical-synthetic method is also used, emphasizing that they are opposed. While in the analysis the decomposition or dissolution of the information found was performed. In the synthesis, the integration of the important elements into a single whole is performed. Another method applied in this work is the legal dogmatic method, which allows the systematic construction of positive law, it is the formal part and does not

admit subjectivities.

Discussion

The main discussion is generated since, being Ecuador a state of law and justice, and with the reform of the technical standard for the substantiation of administrative summary proceedings, especially for the hearing, due process is violated.

Under this context, it is necessary to adapt the hearing of this procedure to the rights established in the Constitution and the law, to also apply the principle most favorable to public servants. Even more so, when according to the law, the administrative summary is applied for having committed serious misconduct and the sanctions are suspension or dismissal from office.

Another situation that can be identified is the lack of decentralization of functions in the Ministry of Labor, which leads to the violation of constitutional principles since there is no decentralization of the procedure of the single hearing and this has repercussions in the affection of the due process.

Therefore, it is important to make up for this deficiency in the technical standard regarding the hearing to comply with an effective due process. The proposal of this article is based on suggesting an urgent reform to the article on the administrative summary hearing.

Conclusions

The administrative summary is a procedure that aims to punish serious misconduct of public servants that may end with a suspension or dismissal of the public servant. The analysis of this work focuses on the hearing of the administrative summary that is included in the reform of the technical standard, which must be carried out in the city of Quito, under different circumstances by video conference from the provincial delegations or by transferring the substantive staff to them, this generates a lack of consistency with the guiding principles established in the technical standard and the violation of due process.

This provision, instead of simplifying the procedure and seeking the most favorable for the worker, has complicated it, due to all that it implies for the public servant and the substantiators.

References

Asamblea Nacional. (2011). *Reglamento General a la Ley Orgánica de Servicio Público.* Suplemento del Registro Oficial N° 418 .

Asamblea Nacional Constituyente. (2008). *Constitución de la República.* Montecristi: Registro Oficial 449.

Asamblea Nacional del Ecuador. (2010). *Ley Orgánica de Servicio Público.* Suplemento del Registro Oficial No.294.

Baena, G. (2015). *Metodología de la investigación.* Patria.

Bustamante Alarcón, R. (2001). *Derechos Fundamentales y Proceso Justo.* Lima: Ara.

Cassagne, J. C. (1977). La revisión de la discrecionalidad administrativa por el poder judicial. *Revista de Derecho Administrativo*(3).

Convención Americana de Derechos Humanos. (1976). *Pacto de San José de Costa Rica.* Recuperado el 07 de 09 de 2020, de https://www.oas.org/dil/esp/tratados_b-32_convencion_americana_sobre_derechos_humanos.htm

Devis Echandía, H. (1997). *Teoría General del Proceso,.* Buenos Aires: Universidad.

Diccionario Jurídico Elemental. (27 de 07 de 2022). Obtenido de http://www.unae.edu.py/biblio/libros/Diccionario-Juridico.pdf

García Chávarri, A. (2009). El derecho fundamental a un debido proceso: Alcances sobre sus dimensiones de aplicación desde la jurisprudencia constitucional. En C. M. Ernesto Álvarez Miranda, *Constitución y proceso: Libro homenaje a Juan Vergara Gotelli.* Jurista.

Gordillo, A. (2016). *Tratado de Derecho Administrativo* (1 ed.). Fundación de Derecho Administrativo.

Jaramillo Ordoñez, H. (2013). *La actividad jurídica de la administración.* Loja: Editorial Universitaria.

Ministro del Trabajo. (2019). *ACUERDO N° MDT-2019-007.* Suplemento del Registro Oficial 463, 8-IV-2019.

Suing, J. (2013). El estado de la descentralización fiscal en el Ecuador. *Foro - Revista de Derecho*(20).