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20 Years from Aedo v. Fisco: Is There Still Something of the Old Public Law Nullity?

A 20 años de Aedo con Fisco: ¿Aún queda algo de la vieja nulidad de derecho público?

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Abstract

On November 27, 2000, the Supreme Court decided the case "Aedo v Fisco", which set an important precedent regarding the understanding that traditional doctrine and case law had regarding public law nullity and its scope. After two decades, the question arises regarding the validity of this line of cases. Based on the examination of ten subsequent cases, a brief analysis of the new contours that the Supreme Court has set out regarding the general regime of the action for public law annulment is presented. In light of the evidence provided by the rulings, the author questions the validity of this action as a general mechanism for protecting the rights of the administered, noting the troublesome state of national administrative litigation.

Keywords: *Administrative Law; Supreme Court; Administrative Litigation; Case law; Public Law Nullity; Administrative Justice; Aedo v Treasury.*

Resumen

El 27 de noviembre del 2000, la Excma. Corte Suprema falló el caso "Aedo con Fisco", el cual sentó un precedente importante en el entendimiento que la doctrina y jurisprudencia tradicionales tenían sobre la nulidad de derecho público y sus alcances. Transcurridas dos décadas, surge la pregunta por la vigencia de esta línea jurisprudencial. A partir del examen de diez casos posteriores, se presenta un breve análisis de los nuevos contornos que la Corte Suprema ha delineado sobre el régimen general impugnatorio de la

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acción de nulidad de derecho público. A la luz de la evidencia que arrojan los fallos, el autor cuestiona la vigencia de esta acción como mecanismo general de protección de los derechos de los administrados, constatando el preocupante estado de la cuestión contenciosa administrativa nacional.

Palabras clave: *Derecho Administrativo; Corte Suprema; Contencioso Administrativo; Jurisprudencia; Nulidad de Derecho Público; Justicia Administrativa; Aedo con Fisco*.

I. INTRODUCTION: DETERMINING THE ISSUE TO BE ADDRESSED

1.1 Notes on public law nullity and "administrative litigation"

The "action of nullity", "action of administrative nullity", "nullity of the administrative act", "constitutional action of nullity" and "action of public law nullity" have been, among others, the names that all refer to the same institution: an action not enshrined (at least not expressly[1]) in the positive legislation that imposes a sanction for the illegal action of the State Administration. It is originally a doctrinal creation and was later recognized in the case law, and that for decades has been the subject of the most heated discussions in national public law.[2]

The Supreme Court has traditionally defined the public action for annulment as: The action that is exercised to obtain the sanction of legal ineffectiveness of State organs' acts in which some of the requirements that the law establishes for their existence and validity are missing.

This statement clearly demonstrates the role that is played within our legal system by public law nullity as an institution designed to guarantee the validity of the principle of legality, according to which the organs of the State must submit to the provisions of the Political Constitution of the Republic and the laws issued in accordance with it.[3]

This action is framed in (and, probably, explained by) a dispersed panorama of contentious-administrative litigation in Chile, the action system of which is composed of nearly two hundred special actions, all different from each other,[4] being different courts

[1] In this regard, the Supreme Court has indicated that the only recognition that exists of the existence of this action is in article 3 of the Organic Law of the State Defense Council in *Nahuel Quintana v Municipality of Corral* (2020).

[2] Although the case law of the Supreme Court recognizes that public law nullity may be challenged both by way of action and exception, see *Lewin Lindstrand v Empresa de Correos* (2003), the emphasis has been placed on the action of public law nullity itself.

[3] *Covarrubias Rodríguez v DOM de Quilpué* (2013).

[4] These differences ranges from their names, processing, filing deadlines and evidence rules, among others. See FERRADA (2011), p. 266.

competent regarding specific matters.[5] Without going any further, despite very exceptional dissent,[6] this panorama has been classified as qualitatively deficient, disfavoring access to justice,[7] inorganic,[8] segmented and unsystematic,[9] and rightly discriminatory.[10]

In this somewhat bleak context, the main importance of the action for public law nullity lies in the fact that it is one of the two general jurisdictional actions that the Chilean legal system contemplates for the control of administrative activity, together with the Protection Action,[11] thus constituting a way of challenging administrative impunity.[12] Therefore, its relevance during the last decades as an action for challenging administrative acts in Chile is undeniable.

Indeed, by its power, the most varied range of administrative acts have been annulled, such as dismissals of officials,[13] termination of administrative contracts,[14] municipal agreements,[15] contracts for the sale of municipal real estate,[16] revocations of

[5] As an example, in the area of public procurement, Law 19.886 (2003) created the Public Procurement Tribunal; in electrical matters, Law 19.940 (2004) created the Panel of Experts; in tax matters, Law 20,322 (2009) created the Tax and Customs Courts; and in environmental matters, Law 20,600 (2012) created the Environmental Courts.

[6] VERGARA (2014), pp. 269-292. He has praised it as an expression of a desirable model of jurisdictional hyper-specialization.

[7] ARÓSTICA (2008), p. 103.

[8] CORDERO (2016).

[9] JARA (2018), p. 60.

[10] FERRADA (2011), p. 251.

[11] This phenomenon – somewhat crude – is so evident that the Supreme Court itself has established that in the absence of a general contentious-administrative procedure, control can and must necessarily carried out by means of the action of protection; see *Sociedad Educacional Alcántara Ltda. and others v Seremi de Educación* (2016). However, a relevant issue should not be overlooked: the protection action is far from meeting the minimum conditions that robust administrative litigation should have. FERRADA *et al* (2003), pp. 67-81.

[12] BERMÚDEZ (2010), p. 114.

[13] *Sweep v Treasury* (2020).

[14] *Corvalán Correa v Serviu* (2020).

[15] *Abato Segura v Municipality of Chillán* (2020).

[16] *Nahuel v Municipality of Corral* (2020).

acts declaring rights,[17] building permits,[18] territorial planning instruments,[19] aquaculture authorizations[20] and countless other administrative sanctions.[21]

1.2 The origins and evolution of public law nullity

Although the first national author to refer to it was Jorge Huneeus[22] in the late nineteenth century and Mario Bernaschina[23] and Patricio Aylwin[24] in the mid-twentieth century, this institution arrived at its canonical version with the drafting of the Constitution of 1980, and hand in hand with the postulates of Eduardo Soto Kloss and Gustavo Fiamma the late 1980s and early 1990s, set forth in different academic articles and presentations.[25]

The hegemonic position came from the idea that articles 6 and 7 of the Constitution established a real public law nullity action, a true sanction of ineffectiveness, which stood as the "cornerstone" of the order, since it implied that all norms issued in contravention to the legal system were null and void. And this sanction had certain peculiar characteristics, namely, it would occur *ipso jure*, for any transgression of a validity requirement established in the Constitution, giving way to an action of constitutional nature, with broad active standing, practically a popular action, which was, moreover, irremediable and had no statute of limitations.[26]

In 1993, Pedro Pierry, describing the state of national public law at the time, stated:

> In the current Chilean public law, the issue of nullity is absolutely marked by the position of the Administrative Law course of the University of Chile, in particular by the position of professors Eduardo Soto Kloss and Gustavo Fiamma, who, through their articles, have exerted an enormous influence on case law.[27]

[17] *Guajardo Miranda v Fisco de Chile* (2019).

[18] *Correa Ruiz v Municipal Works Directorate of Viña del Mar* (2008).

[19] *Citizen Council of Lago Ranco v Municipality of Lago Ranco* (2013).

[20] *Agrícola Santa Carmencita Limitada v Hacienda de Chile* (2021).

[21] For an exceptional study on the topic, see JARA (2018), pp. 59-91.

[22] HUNEEUS (1890).

[23] BERNASCHINA (1949), pp. 548-559.

[24] AYLWIN and AZÓCAR (1996).

[25] By way of example, SOTO KLOSS (1990), pp. 16-30; SOTO KLOSS (1988); FIAMMA (1989), pp. 123-128; FIAMMA (1990), pp.7-12.

[26] See FIAMMA (1990), pp.7-12 and SOTO KLOSS (1991), p. 419.

[27] PIERRY (1993), p. 197.

The hegemony of this position was not limited to the field of ideas, but, as Pierry pointed out, it had permeated the courts of justice, highlighting judgments of the Supreme Court and the Constitutional Court that expressly agreed with it since the late 1980s[28]. Thus, Bermúdez argued that, in the nineties and the beginning of this century, public law nullity lived its "moment of glory",[29] being accepted without counterarguments both by doctrine and by the courts.

Twelve years after his initial finding, Pierry, in 2005, pointed out that the theory proposed by Soto Kloss and Fiamma could easily be contested, and warned of its debilitated situation.[30]

It is not trivial that the author of these phrases would be appointed to the Supreme Court only a year later, in 2006, and that since then he has had a fundamental role in the development of Public Law as part of the Third Chamber of the highest court, to such an extent that his presence in the Court has been cataloged by doctrine as the "*Pierry factor*".[31] Without going any further, Soto Kloss himself recognizes – not without some anger – that the drastic change of case law in matters such as public law nullity is simply due to the "*Pierry factor*" and his persuasion of the rest of the Justices[32].

These words were influenced, no doubt, by the turn that the Supreme Court had taken a few years earlier in "Aedo v Fisco".

The fact that the construction of this action of public law nullity has been carried out without any normative support,[33] and having been created by courts, we will give a brief account of its legal operationalization, and in particular of its most debated aspects, selecting, within a universe of more than a hundred judgments on the matter, 10 rulings of the Supreme Court handed down between 2001 and 2020, which are essential in understanding the future of this action, and analyzing them critically. The guiding criterion used to select these cases is to identify judgments that implied an alteration of the prevailing case law and/or set a precedent in some of the most controversial aspects of public law nullity, succinctly exposing the change and the importance they had in the growth and development of this action.

These cases will be analyzed separately, and organized around five topics: (i) operation *ipso facto*, (ii) statute of limitations of the action (or actions), (iii) standing to

[28] PIERRY (1993), pp. 201-204.

[29] BERMÚDEZ (2010), pp. 103-123.

[30] PIERRY (2005), p. 236.

[31] See CORDERO VEGA (2016).

[32] In SOTO KLOSS (2015), pp. 73-92.

[33] As must be evident already, unlike the civil regime, in public law there is no systematic and extensive regulation of nullity. This, incidentally, makes it necessary to discuss the age-old question of the extrapolation of private-law institutions to public law. See the outstanding work of VERGARA (2010).

present an action, (iv) compatibility with special actions and, finally, (v) causes of origin, limitations and irremediability.

The foregoing will show how the action of public law nullity in its current version becomes unrecognizable with respect to the main qualities with which it was characterized in its beginnings by traditional doctrine[34], having been consistently limited in its field of action by the Supreme Court.

II. BRIEF ACCOUNT OF CASE LAW: HOW DID WE GET TO AEDO V. FISCO? (1990-2000)

While it is true that there was doctrine that advocated for its existence, and there was case law which accepted it dating back to the 1970s,[35] it is the consecration of articles 6 and 7[36] in the Political Constitution of 1980 that gives shape to a new doctrine, which began to appear in judicial decisions in the 1990s and reaches the Supreme Court in the second half. of the decade.

As Jara points out, initially these actions were limited to an almost exclusive theme: the administrative confiscation of property during the military dictatorship under Decree Law No. 77 of 1973,[37] an area that was progressively expanded by the superior courts of justice to the most extensive range of administrative acts.

Already in 1998, in *Bellolio v Distribuidora Chilectra Metropolitana S.A*. the Supreme Court described the "basic characteristics" of the action, endorsing the main characteristics with which the traditional doctrine described public law nullity: retroactive, irremediable and without statute of limitations, it cannot be validated, it produces *erga omnes* consequences, and must be declared *ex officio* by the courts[38]. The thesis set forth by the Supreme Court was followed in a series of rulings of the highest court[39] until the year 2000 with the abrupt change brought about by *Aedo v Fisco*.

[34]Again, the mantra of the canonical version with which Soto Kloss and Fiamma characterized this action: a constitutional action, which operates as of right or *ipso iure,* which is irremediable and has no statute of limitations.

[35] SOTO KLOSS (2015), p. 76.

[36] It should be remembered that the current article 7 of the Political Constitution of 1980 has its antecedent in article 4 of the Constitution of 1925 and previously in article 160 of the Constitution of 1833.

[37] JARA (2004), p. 16.

[38] *Bellolio v. Distribuidora Chilectra Metropolitana S.A*. (1998).

[39] Between 1998 and 2000, it is possible to find more than a dozen cases in which the Supreme Court followed the precedent, considering the action as having no statute of limitations. By way of example, *Baltra Moreno v Fisco* (1998); *Bussi Soto v Fisco* (1998); *Cantero Prado v Fisco (1999), and Cademartori Invernizzi v Fisco (1999), among others*.

Paulina Aedo owned a property that was requisitioned by the Military Junta and registered in favor of the Treasury, through decrees of 1978, of the Ministry of the Interior, on the basis of the provisions of Decree Law No. 77 of the Ministry of the Interior, which transferred the assets of political parties to the Chilean Treasury. Aedo filed an action of public law annulment. Both the first instance ruling and that of the Santiago Court of Appeals declared the decrees of the Ministry of the Interior null and void, decrees by which her property had been confiscated, giving rise to the claim for the price of the property and compensatory damages.

For its part, the Supreme Court -in a decision written by Enrique Barros Bourie- differentiated the acts of public bodies where there is overreach of personal actions that have as their object the restitution and compensation that has an antecedent in public law nullity. Following this logic, the highest court applied the Civil Code declaring the patrimonial actions extinguished after more than 16 years had passed until the filing of the lawsuit and more than 25 years until the judgment of the Supreme Court.[40]

Thus, *Aedo v Fisco*'s great legacy is that it breaks with the previous case law of the Supreme Court that the statute of limitations was not applicable to public law nullity, including its monetary effects. This break with past case law is built by introducing the conceptual distinction between an action of public law annulment, which may be declared at any time and, therefore, not subject to the general statute of limitations of private law, and an action of patrimonial content that is subject to the Civil Code. In short, the Supreme Court separates the declaration of nullity from its patrimonial or economic effects.

The relevance of this ruling follows from the fact that it was undoubtedly transformed into *the leading case* in the matter, and being quickly followed in two subsequent rulings.[41]

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[40] "(...) acts performed by any of them (public bodies) exceeding the powers conferred on them by hierarchically superior norms have no legal value, which may be declared at any time by the competent court, which in making such a declaration merely affirms the principle of the hierarchical superiority of the Constitution and the laws over acts of State Administration, without the general rules of private law on the statute of limitations being applicable in this matter;

That, on the contrary, the personal actions that seek to have the person who ceased to possess return the price of the object, and the compensation for damages also sought by the plaintiff, the antecedent of which is public law nullity referred to in the preceding paragraph, and which are the subject of the first and last chapters of cassation, are of obvious patrimonial content, since they refer to the restitutions and reparations of economic value that the plaintiff seeks to obtain by virtue of such a declaration of nullity. It follows from the foregoing that its fate is conditioned by the statute of limitations established by the Civil Code, norms, moreover, that the plaintiff herself invokes to sustain such actions", *Aedo v Fisco* (2000).

[41] For example, *Robles v Fisco (2003)* and *La voz del Sur v Fisco* (2004).

With *Aedo v Fisco*, the Supreme Court inaugurates the new century with case law that demolishes the central element of the traditional doctrine of public law nullity and, in passing, discards countless actions of patrimonial content filed after public law nullity[42]. It was to be expected that it would bother traditional doctrine, who described this ruling as "an excessively blatant farce".[43]

III. MAIN TOPICS: WHAT HAPPENED AFTER AEDO V FISCO?

As proposed in the introduction, the cases will be analyzed separately within the limits derived from the canonical conception of public law nullity.

3.1 Does public law nullity operate ipso facto? Back to the general principles

An old desire of the traditional doctrine was the recognition that this sanction occurred *ipso jure*, so in the first stage they indicated that it did not require judicial declaration[44] and in the second stage recognized the convenience of a declaration in pursuit of legal certainty, but limited to the verification of the null act. This claim has clear relevance, since its *ipso jure* status would logically follow from the fact that the statute of limitations does not apply. However, that desire was quickly set aside in 2003.

3.1.1 Henry Ríos v Universidad de Atacama (2003)

Edgardo Henry Ríos was a Professor of Spanish Grammar and Linguistics at the University of Atacama until 1993, when he was dismissed by virtue of a decree that set at seventy years the age of forced retirement for university staff, which was declared illegal by the Regional Comptroller of Atacama, but was not invalidated by the university authorities. Henry Ríos filed a claim for compensation for damages resulting from the damage caused by losing his monthly remuneration and forcing him to process his pension at a much lower amount.

Faced with the rejection of the lawsuit in the first and second instance, Henry Ríos appealed to the Supreme Court arguing that it was not necessary to request the annulment of said decree because it was public law nullity, which occurred *ipso jure* and had no statute of limitations for purposes of claiming loss of profits and moral damage.

The Supreme Court, in a ruling drafted by Justice Urbano Marín, first found that an important part of Chilean doctrine discards this thesis. Then, it reviews the history of the current article 7 of the 1980 Constitution, returning to its origins, and ends up

[42] CORDERO QUINZACARA (2013).

[43] See SOTO KLOSS (2000). pp. 13 et seq.

[44] SOTO KLOSS (1997).

reviewing the history of constitutional acts, dismissing the *ipso jure* effectiveness of that sanction.[45]

By virtue of the foregoing, the action of non-contractual liability is rejected as it is not appropriate to base a claim on an act whose annulment was not judicially requested, as it should have been.

The relevance of this ruling is that the Supreme Court for the first time discredits traditional doctrine regarding the characteristics of public law nullity. Although the Supreme Court had previously warned of the inconsistency that would occur if ipso jure[46] operation was accepted, it had not fully entered into reasoning regarding the origin of its consecration and its conditions of operation, rejecting the arguments of the traditional doctrine.

In this sense, the Supreme Court early on discarded the admissibility of nullity *ipso jure* – which for traditional doctrine constituted a true "dogma", undisputed and immovable[47]-and accepted the doctrine that categorically denied this possibility. Indeed, a decade earlier Pierry argued that "the judge does not find any nullity: the judge has to annul the act. The act exists, the judge annuls it, he does not find it",[48] while Jara classified it as a "legal myth".[49]

This line of reasoning in case law has been invariably maintained until today[50], it being unquestionable that the action for public law annulment must be invoked. This construction seems coherent and logical, considering the general principles of law, the administrative tradition of the General Comptroller of the Republic ("CGR"), the difference between nullity and annullability[51] and, moreover, considering the consecration of articles 3 and 13 of the LBPA.

[45] *Henry Ríos v Universidad de Atacama* (2003)

[46] See *Robles v Fisco* (2003) and *La voz del Sur v Fisco* (2004).

[47] JARA (2004), p. 23.

[48] PIERRY (1993) in PIERRY (2017), p. 197.

[49] JARA (2004), p. 47.

[50]The foregoing despite the existence of a ruling in 2017 that accepted the thesis of the non-existence of the administrative act as an effect of public law nullity in *Astaburuaga Suárez v the Ministry of Public Works* (2017) and another ruling in 2018 where the Supreme Court was close to revisiting the canonical conception of the nullity of public law, that is its irreparability and the non application of the statute of limitations in *Sweet Delano v Armada de Chile* (2018).

[51] CORDERO QUINZACARA (2013), pp. 194-195.

3.2 Does the statute of limitation apply to public law nullity? Time does matter in public law[52]

3.2.1 Eyzaguirre Cid v Fisco (2007)

Despite the fact that a handful of decisions handed down by courts previously had made a distinction between nullity actions and *ipso jure* actions,[53] it was in 2007 that the Court began analyzing this new criterion and its consequences in depth.

This case has its origins in a lawsuit presented at an ordinary trial by German Eyzaguirre Cid against the Chilean Treasury[54] to have a supreme decree of the Ministry of National Assets of the year 2003 declared null, which established new demarcations and considerably reduced the size of the land he owned, requesting that the existence of damages caused by this administrative act be declared.

The Supreme Court, following *Aedo v Fisco*, warns us that there were two claims in the lawsuit, one consisting of the nullity of the supreme decree and another consequential of patrimonial content regarding the existence of damages. However, it goes further and maintains:

> (...) leads to leaving a necessary distinction formulated between actions aimed solely at obtaining the annulment of an administrative act and those that seek to obtain some right in favor of an individual.
>
> The former may be filed by anyone who has any interest, they present the particularity of making the administrative act disappear with general effects, 'erga omnes' and require an express law that creates them, as is the case with article 140 of Law No° 18,695, Constitutional Organic Law of Municipalities, which institutes the claim of illegality against illegal resolutions or omissions of municipal bodies. On the other hand, the latter present the characteristic of being declarative of rights. The one that has been filed in the proceedings belongs to this class, in which the nullity of the administrative act is pursued with the purpose of obtaining the declaration of a right in favor of the plaintiff, specifically compensation for damages;
>
> These declarative actions of rights, of clear pecuniary content, produce relative effects, limited to the trial in which the annulment was pronounced, and are subject, with regards to the statute of limitations, to the general rules of said institution, contemplated in the Civil Code, among others, to the provisions of articles 2332, 2497, 2514 and 2515.[55]

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[52] Títle extracted from Jara's conclusions, JARA (2004), pp. 240 y ss.

[53] BERMÚDEZ (2010). p. 117. According to JARA, the first case cited in the cases registered is the decision made in the case *Sociedad Von Teuber v. Municipalidad de Santiago* (2004).

[54] *Eyzaguirre Cid v Fisco* (2007)

[55] SOTO KLOSS (2015), pp. 80-81.

That is, the highest court requalifies the plaintiff's claim, affirming the distinction between nullity actions as such and declaratory actions of rights, following French doctrine. Thus, it gives certain characteristics to the action of nullity itself, that is, that for the active legitimation an interest is required, that its disappearance would occur with general effects and finally that an express law would be required to establish it.

Soto Kloss, criticizing the ruling, argued that this distinction was an invention, pure and simple, of the supreme justice, which modified the Constitution itself.[56] It should be noted that Pierry formed part of the Third Chamber of the Court that decided the ruling. Pierry, the same justice that in 2010 in the case *Somontur Hotels v Municipality of Chillán*[57] would explain for the first time the origin of this classification, noting that these actions in French law are called "actions for excess of power" and "actions for full jurisdiction", setting out its main characteristics and, above all, its requirements, in the light of the necessary standing.

From *Eyzaguirre Cid v Fisco*, the use of this classification scheme of actions became the basis on which the Supreme Court faces the question of public law nullity, reproducing, in many cases, its reasons verbatim,[58] and it is imperative to analyze a series of key issues.

Mainly, the question that is formulated on a case-by-case basis is whether the action attempted is a genuine action for annulment or whether it truly hides a patrimonial action, which is of the utmost relevance to, among other things, determine whether the action attempted is time-barred or not.

Probably the first case where this definition was the *crux* of the matter was the 2012 case *Ovalle Lecaros v Fisco*. In this case, the Treasury and the Housing and Urbanization Service were sued to declare the expropriation agreement of the Agrarian Reform Council of 1971 null and void under public law, since the corresponding compensation had not been paid in full. The Supreme Court concluded that, in reality, due to its characteristics and effects, the action formulated had a patrimonial character, and therefore applied the Civil Code and thus declared that the statute of limitations had run out. From this ruling on, the Supreme Court began to qualify, on a regular basis, as patrimonial certain actions that simply sought the nullity of administrative acts.

Subsequently, in 2013 in the case *Corvacho Butrón v Ministry of National Assets*, in which public law nullity of regularization of possessions of rural properties in accordance with Decree Law No. 2695 was sought, requesting that the registrations be canceled and restored, the Supreme Court returns to this point in a ruling drafted by Justice Pierry

[56] *Somontur Hotels v Municipality of Chillán* (2010).

[57] See, for example, *Leroy v Esval S.A.* (2009); *Empresa Eléctrica Puhuenche v Empresa Eléctrica Atacama (2010), Droguett Inarejo v Ejercito de Chile (2013); Flores Martínez v Instituto de Normalization Previsional* (2014); *Pinto Villablanca v Fisco* (2015); *Pesquera B and B Limitada v Hacienda de Chile* (2019), and *Herman v Municipalidad de Recoleta (*2020).

[58] *Ovalle Lecaros v Fisco* (2012).

and states that when an action of nullity of right is exercised in conjunction with an action of a patrimonial nature, it mutates into an action of rights, and therefore the statute of limitations applies.[59.]

The question of the validity of the act would then follow the fate of the issue of responsibility.[60] Likewise, the highest court dusts off and uses the concept of the "functional use" of the annulment action with no statute of limitations for the purposes of presenting a patrimonial action,[61] which it will repeat in subsequent rulings.[62]

The culmination of this expansive phenomenon of the "patrimoniality" of the action of public law nullity came with the case *Vio Graepp v Fisco*.

3.2.2 Vio Graepp v Fisco (2016)

Víctor Vio Graepp filed an application for public law annulment against the decision issued by the Plenary of the Supreme Court on March 16, 2007, by virtue of which the plaintiff's request for authorization to practice as a lawyer in Chile with a professional degree granted in Ecuador was rejected.

The Supreme Court, after making the distinction between actions, noted:

> It should be noted that with respect to the main action, although the petition limits itself to requesting the declaration of public law nullity of the resolution adopted by the Plenary of this Court on March 16, 2007, the truth is that, as the judgments refer, a declaratory action of clear patrimonial content is exercised, as the intention is to obtain the declaration of a subjective right (...) to be in a position to obtain the authorization to practice law (...) In these conditions it is clear that the action presented is subject to the general rules of the statute of limitations contained in the Civil Code (...).[63]

Thus, the Supreme Court declared the action time-barred after the term of five years as ordinary actions had elapsed, under article 2514 of the Civil Code.

From the cited paragraph it is possible to infer that the highest court has a fairly extensive understanding of what a patrimonial action is, since in this case there is no claim for compensation, but merely a recognition of a professional degree. Thus, the

[59] *Corvacho Butron v Ministry of National Assets* (2013). In this regard, see CORDERO QUINZACARA (2013).

[60] However, as Valdivia Olivares warns, the Supreme Court has sometimes held that, given the nature of full jurisdiction of the action, the non-contractual liability derived from an illegal act does not require the prior or contemporaneous declaration of nullity. On vacillations in the case-law on this matter, see the commentary of VALDIVIA (2009), pp. 603 et seq. and VALDIVIA (2017), p. 403.

[61] This is not a new thesis. It has its origins in *Reyes Zamora v Fisco* (1998).

[62] See, among others, *Gardilic Harasic v Fisco* (2013) and *Moya Candia v Fisco* (2020).

[63] *Vio Graepp v Fisco* (2016).

Supreme Court seems to understand that from the mere expectation of being able to generate (or being able to generate more) income with a profession, the patrimoniality of the action follows.

From the breadth of the criterion of the patrimoniality of the actions adopted by the Supreme Court, it follows that there are few actions that could be strictly qualified as actions for annulment "*and nothing more*".[64] It seems then that the settled doctrine of the Supreme Court has emptied of content the action of public law nullity, since it has lost much of its exceptionality as an action for which the passage of time was anecdotal, being today inadmissible to challenge a wide range of administrative acts whose annulment necessarily entails patrimonial effects[65].

3.3 Who is entitled to bring an action for public law annulment before the courts? The transition from objective to subjective standing

The importance of standing is important when considered a "substantive requirement linked to the right of action",[66] a substantive presupposition for its interposition, in such a way that "there is no action without legitimation or standing". Thus, the determination of standing in cases of public law nullity is a *sine qua non* requirement for its admissibility, so that, if this substantive presupposition of origin is not present, the action must be rejected[67] and even declared inadmissible *ex officio* by the court, despite the fact that the parties have not requested it.[68]

Although in *Aedo v Fisco* the conceptual distinction between an action for public law annulment and a patrimonial action had been established, the notion remained that standing to pursue the nullity of an illegal administrative act was broad. This was

[64] As Harris points out, "[t]he patrimonial nature of the rights has allowed nullity to be reclassified as a full jurisdiction action (subject to the statute of limitations) in various areas, such as the regularization of a property, the non-granting of a pension for one's own benefit or that of a deceased spouse and the alienation of homes". HARRIS (2020).

[65] The foregoing despite the continuous minority vote of Justice Muñoz, who opposes the imposition of the statute of limitations of the Civil Code in public law, since the "application of rules of Private Law mean the denial of the discipline of Administrative Law". For a good summary of his extensive justification and an epistemological exchange with Pierry, see *Moya Candia v Fisco* (2020).

[66] ROMERO (2007), pp. 23-24.

[67] For example, see *Sociedad Agrícola Frindt y Juica Ltda. v Neumann Fiebig (2015) and* Brotec Inmobiliaria SpA v Cifuentes *(2017).*

[68] As an example, see *Canal Las Mercedes Association v Executive Director of the Environmental Assessment Service* (2018).

influenced by the old postulate that the action of public law nullity was, in short, a popular action, as Fiamma claimed.[69]

In fact, in 2005 the Supreme Court had heard the controversial case "AGES Youth Center with Public Health Institute", in which the resolution of the Institute, which allowed the marketing of the drug Postinor-2, a contraceptive method, was challenged. In it, they expressly cited Fiamma to affirm that standing was justified by the right of every citizen to live under the rule of law and, therefore, to be able to demand compliance from the organs of the administration, which, in other words, transformed it into a popular action.[70]

However, there were already well-founded doctrinal criticisms regarding the idea of "objective active standing" and that of classifying the action of public law nullity as a popular action.[71] This dissident doctrine will be reflected in the change in the case law, just one year later.

3.3.1 Miranda Salazar v Fisco (2006)

Héctor Miranda Salazar, on behalf of the "Corporación de Retornados", filed an application against the Ministry of National Planning and the Banco del Estado de Chile, requesting that the Agreement concluded on 26 October 1990 between the Government of Chile and the Federal Republic of Germany be declared null and void under public law. The purpose of this agreement was to promote the economic and social reintegration of Chilean exiles that had returned. The reason for the action was that the formalities provided for in the Constitution had not been observed.

The Supreme Court endorses the argument that legal standing for jurisdictional claims against acts of the Administration is enshrined in article 38, paragraph 2, of the Political Constitution, which requires an infringement of rights.[72] Since the plaintiffs failed to establish any damage to their rights under the Convention, the highest court rejected the claim.

From then on, the Supreme Court would recognize that the main rule for all administrative litigation, including public law nullity – and not only for responsibility litigation, as is the usual doctrine[73] – is in article 38, paragraph 2 of the Constitution, which requires an infringement of rights to satisfy standing, abandoning the idea that the action of public law nullity is a popular action.

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[69] FIAMMA (1990), pp. 7 et seq.

[70] *AGES Youth Center v Institute of Public Health* (2005)

[71] JARA (2004), p. 219.

[72] *Miranda Salazar v Fisco* (2006).

[73] VERGARA (2017).

In this sense, the Supreme Court again blurs the canonical version, now in terms of standing to file it.

After *Miranda Salazar v Fisco* in 2006, the highest court heard a series of cases[74] where it returned to the issue of standing. This series of cases is emphasized, at the same time, as a necessary correlate of the conceptual distinction made in 2007 in *Eyzaguirre v Fisco*, a milestone starting from which we must answer the question regarding standing required for each action, both that of excess of power and that of full jurisdiction. This criterion ends up being enshrined in the case *Sky Service v Fisco,* decision which was written by Pierry.

3.3.2 Sky Service v Fisco (2009)

Sky Service S.A., a national aeronautical company, demanded the public law annulment of the agreement adopted on November 17, 2004 by the Council of the Board of Civil Aeronautics that considered Aerolíneas Austral Chile S.A. as a Chilean air navigation company for all legal purposes.

Sky argued that this incorporated company was merely the formal instrument which Aerolineas Argentinas and/or its Spanish owner Air Comet S.A. sought to use in order to be able to commence its cabotage and international transport activities in Chile as a Chilean air navigation undertaking, thereby removing itself from the legal status applicable to foreign air navigation undertakings in Chile, in particular, the requirement of reciprocity required of the Carrier's country of origin.

The Supreme Court, distinguishing between the concept of interested party, contemplated in Article 21 of the LBPA, and the requirement of standing for the purposes of filing an action of public law annulment, stated:

> In effect, the interested parties referred to in Article 21 of Law No. 19,880 correspond to those persons who may be affected by individual or collective rights or interests, and which in themselves may be legitimate interests, but not necessarily personal and direct interests protected by the legal system which affect the personal sphere of the actor in a direct and decisive manner damaging a right. As indicated in article 38, second paragraph, of the Political Constitution (...), said interest must be of such magnitude that it may be considered that the act that is challenged infringes a right (...).[75]

[74] *Junta de Vecinos Bosques de Montemar v Ilustre Municipalidad de Viña del Mar* (2007); *Agrícola Forestal Reñihue Limitada v Cubillos Casanova y Fisco (2008), Sociedad Visal Ltda. v Empresa Portuaria de Arica (*2008). We can also mention the cases *Eyzaguirre Cid v Fisco* (2007) and *Leroy v Esval S.A.* (2009), where the Court emphasizes the need to justify standing.

[75] *Sky Service S.A v Fisco* (2009).

Subsequently, the highest court analyzing whether there was a legal interest considered that Sky had not been injured in its rights, but had a mere expectation of entering foreign markets and, therefore, lacked legal standing[76].

In 2008, in *Sociedad Visal Ltda. con Empresa Portuaria de Arica*,[77] in which a company that provided dock services actioned demanding public law nullity of a public tender for port concessions in which it did not participate. The Supreme Court had already rejected the lawsuit maintaining that interest should be qualified, that is, legitimate, personal and direct, and must affect the actor in his personal sphere in a direct and decisive way. For its part, in *Sky Service v Fisco* it delves into the fact that it must be of such magnitude that it may be considered as affecting a right, that is, their qualification acquires an entity such that, in practice, it resembles rights, identifying them materially.[78]

As Ferrada points out,[79] the requirement of a subjective right of patrimonial and present nature would explain the decision of the Supreme Court to reject standing in *Miranda Salazar*, *Junta de Vecinos Bosques de Montemar*[80] or *Sky Service*, cases in which plaintiffs evidently had a direct relationship with the contested administrative acts and with the result of the trial.

3.3.3 Herman v Municipality of Recoleta (2020)

From 2009 with the ruling *Sky Service v Fisco* until 2020, the Supreme Court heard several contentious administrative cases that deepened the criterion set forth in that judgment. However, in others it added new concepts.

In 2010, in the famous case *Libertades Públicas v Municipality of Huechuraba*[81] where, through a claim of illegality, an organization whose purpose was the promotion, defense and respect of the fundamental rights of people, challenged a municipal ordinance that contemplated jail sentences for parents of students who had unjustified absences from classes, and the Supreme Court resorted to the "theory of interest circles" to determine standing in the annulment, stating that being part of the city would be the minimum interest necessary to bring forth a claim of municipal illegality.

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[76] *Sky Service S.A v Fisco* (2009).

[77] *Sociedad Visal Ltda. v Empresa Portuaria de Arica* (2008).

[78] FERRADA (2010), p. 196.

[79] FERRADA (2010), pp. 200-201.

[80] *Junta de Vecinos Bosques de Montemar v Illustrious Municipality of Viña del Mar* (2007). In this case, a neighborhood council demanded the nullity of contracts for the sale of real estate entered into by the Municipality of Viña del Mar and the Supreme Court points out that there is an absence of interest from neighbors because, if the declaration were accepted, the beneficiary would have been the Municipality of Viña del Mar.

[81] *Public Liberties v the Municipality of Huechuraba* (2013). The same in *Jerez Atenas v Municipality of Melipilla* (2016).

Under this logic, the Supreme Court rejects the standing of an organization - domiciled in another city- whose object is the defense and protection of fundamental rights, for not having established another link with the community affected by said ordinance.

The same criterion of territorial proximity was followed by the Supreme Court in 2016, in the case *Air Federation of Chile v Fisco*[82], in which said Federation challenged the environmental qualification resolution of the modification of the Metropolitan Regulatory Plan of Santiago 100 that eliminated the protection zone of Cerrillos airport. There, the Supreme Court – to reject the action of nullity – adds the concept of "degree of connection with the zone".

In this context, the case *Herman v Municipality of Recoleta* decided in 2020, comes to evidence the clear evolution of case law in nullity litigation.

Patricio Herman is an urban consultant who chairs the "Defendamos la Ciudad" Foundation, whose objective is "to make transparent the public and private investment decisions that affect the city, defend the historical heritage of urban identity". Holding this status, he brought forth an action for public law annulment against a series of administrative acts linked to a building permit for an educational and real estate project located in the neighborhood of Bellavista, commune of Recoleta, alleging a legitimate interest of the Foundation in the architectural and urban heritage of the city of Santiago and, especially, in an iconic neighborhood such as the Bellavista neighborhood.

The Supreme Court began with the analysis of the standing required to act in the binomial action of excess of power – full jurisdiction action. While the latter requires a subjective right infringed as such, the former requires an intermediate situation, that is, something more than a simple legitimate interest, a direct concern to the subject who challenges it by reason of the alleged illegalities. In the words of the highest court, "a degree of connection" between the interest of the plaintiff and the illegalities claimed.

The Supreme Court concludes:

> (...) as indicated by the lower court judge, the plaintiff Patricio Herman Pacheco appears in a personal capacity, without having a domicile in the commune of Recoleta (...) In this scenario, it is evident that he lacks standing, since the latter cannot be built on the basis of the supposed condition of being an urban consultant (...).[83]

By not proving his status of president of the "Defendamos La Ciudad" Foundation, the Supreme Court only considered his standing as a natural person, in his capacity as an urban consultant. Following this logic, the Supreme Court was categorical in rejecting the plaintiff's profession as a sufficient argument to determine his legitimate

[82] *Chilean Air Federation v Fisco* (2016).

[83] *Herman v Municipality of Recoleta* (2020).

interest. It is worth noting that the highest court revisits the criterion of territorial proximity in order to determine a direct legitimate interest.

The qualification of standing has not been peaceful. In comparative law, specifically in French law, the action of excess of power has traditionally been configured on the basis of a fairly broad legitimacy, given the underlying issue is compliance with objective legality.[84] This has not been the case in Chile, and there has been a tendency to make an increasingly demanding examination of standing with respect to the qualified interest required, which, of course, has generated opposite reactions amongst authors as some criticize it[85] and others praise it.[86]

From reviewing the case law we can see that the Supreme Court progressively hardened the standards for determining standing, demanding that a specific legal interest affect the plaintiff, in such a way as to distance the action from being a popular action, almost assimilating it to an infringement of rights[87] action, and the existence of a subjective right in the case of the action of full jurisdiction.[88] This is even so in cases in which the plaintiff is the Administration against acts dictated by itself.[89] This tendency has been deepened in recent years with a doctrine tending to territorial proximity as a sufficient and necessary cause for standing.

In short, the transition from objective active standing to subjective active standing has narrowed the scope of application of public law nullity.

[84] CORDERO (2015), p. 618. For his part, FERRADA, using the Spanish example, states: "In this context, current Spanish doctrine has considerably expanded interest as a procedural category to enable the challenge of an act or omission of the Administration, understanding that this interest can be material or moral; economic, social, cultural or political; direct or indirect; current or future; in short, personal or collective"; in FERRADA (2010), p. 197.

[85] VALDIVIA (2017), p. 406 submits that, if, by definition, that action does not seek the protection of subjective rights, there is no justification for restricting the circle of potential claimants solely to the holders of those rights.

[86] VERGARA (2017). He argues that the Supreme Court's demanding trend is healthy, as it would prevent all unbridled litigation and promote legal certainty.

[87] See *Pedro de Valdivia Norte Limitada Service Station v Fisco* (2012).

[88] Where this distinction is established in a more didactic way is in *Somontur Hotels v the Municipality of Chillán* (2010).

[89] *Municipality of Arauco v Varela Fuentes* (2011); and *Municipality of Renca v Fernández Chaparro (*2011).

3.4 How is the action of public law nullity compatible with special administrative contentious actions? What is its role in this new scheme? The action for annulment of public law as a generic and supplementary action

The regime of compatibility with other special contentious actions or "sum of actions" is probably the aspect that has taken away the greatest capacity from public law nullity.

There were some courts that in the early 2000s said that the existence of jurisdictional procedures to claim the illegality of certain administrative acts did not prevent the individual from presenting an ordinary action for public law annulment[90]. However, the Supreme Court faced this dilemma in 2006 and hinted at a change in the case law.

3.4.1 Compañia Salmonifera v Fisco (2006)

The company Salmonífera Dalcahue presented a public law nullity action of a resolution of the Subsecretary of Fisheries of 1995, since it would allegedly not have remedied in full the effects of the invalidated act, which is why it would not have been able to act in accordance with article 67 of the General Law of Fisheries and Aquaculture against a new resolution of the Subsecretary of Fisheries and Aquaculture within the period of thirty days contemplated in this rule.

The Supreme Court, making an analysis of the special action contemplated in the General Law of Fisheries and Aquaculture and the general action of public law nullity holds:

> (…) what actually happened is that the plaintiff did not timely exercise her right to a claim, and such omission cannot be corrected by the present action for public law annulment of an administrative act, Resolution No. 41 of the Subsecretary of Fisheries (...).[91]

The Supreme Court conducted an interesting analysis of the relationship between special and general challenge mechanisms. It stated that, once the period of special claim (in this case thirty days) had expired, it could not be remedied by the exercise of public law nullity, a general action.

This, as we shall see, is the germ of a doctrine that the Supreme Court will develop more in depth.

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[90] For example, see *Shell Chile S.A v Municipality of Santiago* (1999).

[91] *Compañía Salmonífera Dalcahue v Fisco* (2006).

3.4.2 Martínez Sandoval Community v Fisco (2011)

In mid-2011 the Supreme Court decided, in a period of less than a year, four cases[92] that delved into the relationship between public law nullity and special claims, of which "Comunidad Martínez v Fisco" is the one that best highlights the criteria that the highest court would use from then on.

The Martínez Sandoval Community sued the State of Chile in order to have public law nullity declared of a Resolution of the Regional Ministerial Secretariat of National Assets of the Bío-Bío Region of 1987, by which the definitive possession of a property of 293 hectares in favor of a Company was recognized.

According to the applicant, this was because it was regularized without complying with the requirements established in Decree Law No. 2695 of 1979.

The Supreme Court, in a judgment drafted by Pierry, pointed out that "since there are specific means of recurring against the contested act, these procedures must prevail before the exercise of the generic action for public law annulment".[93]

Since it is an action that seeks to challenge the validity of a decision provided for in Decree Law No. 2695, the rights enshrined by the legislator in that legal body to challenge the application or registration in the name of the petitioner must be respected and not a generic action filed.

Through this ruling, the Supreme Court consolidates the criterion that the highest court timidly outlined in 2006. Thus, this ruling marks an unprecedented milestone in the development of public law nullity, becoming the *leading case* in terms of its compatibility with special actions, a precedent that will be followed by other similar rulings.[94] Indeed, only two months later, in a similar case, the Supreme Court added:

> That such rules (limitation periods for special actions), for reasons of legal certainty, prevent an extinguishing period of the right to act against an administrative action, in such a way that when these norms are not invoked and this general action for nullity is chosen, once that term has expired —as happened in this case —, it has been done when there has been preclusion for non-exercise of the right, a situation that cannot be reversed in the way that has been attempted.[95]

The practical consequence that the consolidation of this criterion of the Supreme Court brings for the potential challenge of the nullity of public law is undeniable.

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[92] *Díaz Guajardo v Fisco* (2011); *Complejo Manufacturero de Equipos Telefónicas S.A.C.I. v the Ministry of Transport and Telecommunications* (2012) and *González Vergara v Essbio (*2011).

[93] *Martínez Sandoval Community v Fisco* (2011).

[94] *Vásquez Encina César v Municipalidad de La Reina and Simonetti Inmobiliaria S.A* (2012)*;* and *Inmobiliaria Las Delicias S.A. v Baez Subiabre* (2014).

[95] *Díaz Guajardo v Fisco* (2011).

3.4.3 Aguas Araucanía S.A v Fisco (2017)

Aguas Araucanía S.A. claimed the annulment of public law against a decision of the Regional Ministerial Secretariat of Health of the Region of La Araucanía that imposed on the applicant a fine of ten monthly tax units. The applicant argued that the Secretariat lacked jurisdiction to impose the fine, as the power was vested exclusively in the Superintendence of Health Services.

The Supreme Court stated in this regard:

> That articles 6 and 7 of the Constitution do not establish a specific procedural action aimed at obtaining the annulment of administrative acts. What they constitute is the principle of legality that governs the actions of the Administration, which necessarily entails the possibility of appealing to the courts of justice to obtain the annulment of acts contrary to law.
>
> The 'action for public law annulment' which is named as such by doctrine and accepted by case law, is any contentious-administrative action aimed at obtaining, by a court of the Republic, the annulment of an administrative act. This contentious-administrative action, or contentious-administrative actions, may be established by the legislator for specific situations and with respect to specific matters – as is the case of the almost two hundred complaint procedures against the application of administrative sanctions – as well as the one contemplated in article 171 of the Sanitary Code, called "challenge of sanitary fines", which establishes a complaint procedure against fines imposed by the health authority. When there is a contentious administrative action such as 'public law nullity" contemplated in the law, this is the one applied with the procedure established therein, and no other. However, if the law does not provide for any special procedure or action to challenge the administrative act requesting its annulment, the ordinary procedure may be used.[96]

The Supreme Court in this case went even further. In effect, it begins to take on a more pedagogical look with regards to public law nullity, and establishes its supplementation character in an absolute way.

Since 2006, the Supreme Court has invariably maintained this line of reasoning, cataloging this action as "generic and subsidiary",[97] despite dissents from Justice Muñoz, who advocates for the recognition of a "right of option" of the administered to opt for the impugning regime.[98]

By virtue of this established line of reasoning in the case law, in the event of a contentious action of public law annulment established by the law, and not having been

[96] *Aguas Araucanía S.A v Fisco* (2017).

[97] See *Sociedad Constructora e Inmobiliaria Andalién S.A. v Municipalidad de Arica* (2018) and *Carrasco Romero v Ministerio de Bienes Nacionales* (2020).

[98] As an example, see his minority vote in *Aguas Araucanía S.A v Fisco* (2017). See also *Inversiones e Inmobiliaria Mos Limitada v Ilustre Municipalidad de Coronel* (2021).

challenged by this mechanism, that right precluded, and this action cannot be revived through the use of the residual public law nullity processed under the ordinary trial procedure, case in which the exception of incompetence in attention to the matter would be configured[99]. On the other hand, if the special contentious action was filed, the nullity dispute has already been exercised, so that, if the residual public law nullity is subsequently claimed, the exception of *res judicata* proceeds.[100]

As we have already said, in a model of administrative law such as the national one where the tendency -in the absence of a general action- has been the creation of more than two hundred special litigation procedures with short statute of limitations (usually fifteen or thirty days), this decision is colossal, since it deprives the public law nullity action practically of all of its performance capacity.

By way of example, according to the doctrine established by the Supreme Court, no administrative authorization of any municipal official may be challenged[101] through an action for public law annulment, since there is a special administrative dispute procedure for claims of municipal illegality. Therefore, once the thirty days for bringing this action have elapsed, that period could never be revived by bringing an action for public law annulment.

In short, at present in the panorama of administrative litigation in Chile, the action of public law nullity, which in previous decades had a grand role, today is nothing more than a generic and subsidiary or supplementary action to the (literally) hundreds of special administrative contentious actions.

3.5 Is public law nullity really insurmountable? The new limitations on actions for public law annulment

In analyzing the issue of limitations, some preliminary considerations need to be borne in mind. In the first place, the case-law early affirmed that nullity is appropriate exclusively in the face of administrative acts, thus confirming its inadmissibility with respect to legislative and jurisdictional acts.[102]

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[99] *Ramírez Fuentes v Municipality of Coyhaique* (2019). Despite the fact that in 2021 the Supreme Court – rejecting an action of *ultra petita* – pointed out that "no exception of incompetence had to oppose the effect for the sentencers to carry out this examination" (of rejecting nullity) in *Inmobiliaria Mos Limitada v Ilustre Municipalidad de Coronel* (2021).

[100] *Moreno v Fisco* (2019).

[101] See *Vásquez Encina César v Municipalidad de La Reina and Simonetti Inmobiliaria S.A.* (2012), *Ciudad Viva v Municipality of Recoleta (2020),* and *Inversiones e Inmobiliaria Mos Limitada v Municipality of Coronel* (2021).

[102] In this regard, see JARA (2004), pp. 87-91. Against this restrictive interpretation, see BOCKSANG (2013), pp. 49-75. The discussion regarding whether it may be presented to challenge legislative acts was recently refloated with regards to the possibility of declaring the nullity of Law 20,657, the "Fisheries Law".

Secondly, it is necessary to point out that, although there was hesitation in the aforementioned case *Camacho Santibáñez v Fisco*,[103] we may see that at least since 2010 with *Benito Taladriz v Fisco*,[104] a consistent case law has treated the grounds for requiring public law nullity, as a tributary to French doctrine and case law.[105]

Despite this apparent uniformity regarding the (broad) grounds for annulment inaugurated in 2010, a new actor has come into play, grouped in the genre of "limitations to public law nullity".

For the traditional doctrine, the impossibility of reparation was part of the canonical equation of public law nullity, from which it followed that any type of vice originated nullity, making it impossible to repair it *a posteriori,* since the act simply would not exist. No matter the entity of the vice, there were no gradations, and it was enough to be faced with an illegality and in a uniform, radical and direct way the sanction was only one: nullity of full right.[106] However, this was progressively mitigated by the Supreme Court through the development of "limitations" to nullity (or invalidation).

Thus, from the authentic revolution for public law which was the enactment of the Law of Bases of Administrative Procedures ("LBPA") in 2003, the doctrine that – even before its consecration – advocated a more complete analysis of the limitations of public law nullity (and of the powers of review of the Administration in general),[107] began to notice that there was an express recognition of the idea that not every defect entailed the invalidity of an act.[108] Thus, a part of the doctrine finished developing a theory of the "principle of conservation of the administrative act".

3.5.1 Soquimich v Sernageomin (2010)

Sociedad Química y Minera de Chile S.A ("Soquimich") filed a lawsuit against the National Service of Geology and Mining ("Sernageomin") seeking the annulment of three administrative acts, from 1999, 2004 and 2005, for a breach of legal duties in accepting the voluntary contribution of UTM coordinates that were provided by other

[103] *Camacho Santibáñez v Fisco* (2006). For an analysis of this case and its subsequent change, see BOCKSANG (2012), pp. 299-314.

[104] See *Benito Taladriz v Fisco* (2010). In the same sense, *Gonzalez Vergara v Essbio* (2011); *Ovalle Lecaros v Fisco* (2012); *Emcoser S.A v Ojeda Vildoso* (2014); *Klein González v Fisco* (2015); and *Transportes Línea Azul Limitada v Seremi de Transportes de Ñuble* (2020), among others.

[105] CORDERO QUINZACARA (2019), p. 306.

[106] CORDERO QUINZACARA (2013), pp. 189-207.

[107] In this regard, see JARA (2004), pp. 182 et seq.

[108] See, for example, VERGARA (2013), pp. 267-284.

mining companies for the purpose of specifying the location of land subject to concession mining, specifically, nitrate offices.

The Supreme Court rejected the action for public law annulment stating:

> (...) This institute is governed by principles such as transcendence and conservation, according to which the procedural or formal defect only affects the validity of the administrative act when it entails some essential requirement of the same, either by nature or by mandate of the legal system and generates damage to the interested party (article 9 Law 19,880). Indeed, given the importance of administrative action, nullity takes on the character of an exceptional remedy against illegality, operating only if the fault is of real importance.[109]

In this case, the Supreme Court for the first time refers directly to the limitations of public law nullity and specifically to the nature of the defects that would give rise to this sanction. In effect, it expressly states that this case does not meet the gravity and entity that are the standard of the institute of the nullity of the administrative act.

This thesis breaks the insurmountable character with which the traditional doctrine characterized the vices that give rise to nullity. It also adduces two criteria that will henceforth be decisive for the development of that theory, the principles of transcendence and conservation, pointing out, copulatively that, given the importance of administrative activity, the nullity of that activity takes on the character of an exceptional remedy.

After *Soquimich v Sernageomin* the highest court reiterated, in successive rulings,[110] the incipient doctrine regarding the limitations to the scope of public law nullity. However, at the beginning of 2013 it pronounces two rulings that will deepen the scope and set a precedent that remains in force to date.

The first of them is *Covarrubias Rodríguez v DOM Quilpué*,[111] in which the plaintiff demanded the nullity of two resolutions of a Municipal Works Directorate that approved and rectified a subdivision of a neighboring property, adjacent to his, for allegedly containing errors and resulting in a total area considerably greater than that which corresponded to him according to his titles. The Supreme Court adds to the exceptionality of the nullity the fact that "underlying this principle of conservation are other general principles of law such as the legitimate expectation that the act produces, the good faith of third parties, respect for acquired rights and legal certainty. Indeed,

[109] *Sociedad Química y Minera de Chile S.A v Servicio Nacional de Geología y Minería* (2010).

[110] *Servicios y Equipos Ltda.* v Internal Revenue Service (2011) and *Zepeda Chirgwin v Regional Director of the Internal Revenue Service* (2011).

[111] Only the first one is discussed here. The second one, decided only twenty days later, is *Mosso y Compañía Limitada v Fisco* (2013).

not any irregularity or defect justifies the declaration of nullity, until said anomaly violates the guarantees of the administered parties".[112]

This criterion of the principle of preservation and non-essential or invalidating defects would be used by the Supreme Court in three more cases within the same year.[113] In particular, in the case *National Committee for the Defense of Fauna and Flora of Chile v Fisco*, the Supreme Court went further, pointing out that, by virtue of the principle of transcendence that governs nullity, this declaration cannot exist without damage, and the damage suffered must be certain, concrete and real.[114] Likewise, in *Hernández Hernández v Municipalidad de Lago Ranco*, faced with the nullity petition filed against the modification of the Ranco Communal Regulatory Plan due to procedural defects in the notices and notifications, the Supreme Court indicated that the defects had to be serious and manifest.[115]

In this sense, the Supreme Court introduced qualifiers to the type of vice and the damages with abstract and indeterminate legal concepts such as "serious", "essential" and "manifest" defect, giving the judge ample discretion[116] and making the admissibility of public law nullity even more demanding and limited.

In short, public law nullity would be limited to being (i) an exceptional remedy compared to the general rule represented by the principle of preservation, good faith, legitimate expectations, legal certainty and acquired rights, (ii) appropriate only when the act has caused real damage to the plaintiff and (iii) must be a serious and essential defect by virtue of the principle of transcendence.

Thus, the thesis according to which not all illegality causes invalidity or "non-invalidating vices" – contrary to what the traditional doctrine once postulated – is (happily) deeply rooted in the case law of the Supreme Court of the last decade.

IV. CONCLUSIONS

In the words of the highest court, public law nullity "is an unquestioned reality, whose action has been admitted by case law and doctrine as the basis of our rule of law."[117] However, from the review of the case law analyzed, it is undeniable that this "unquestioned reality" does not have the vigor or integrity that it used to have.

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[112] *Covarrubias Rodríguez v Dirección de Obras Municipales de Quilpué* (2013). This same recital will become a regular recital of the Supreme Court when dealing with the issue of public law nullity. See, for example, *Pinto Villablanca v Fisco* (2015).

[113] See *Aguilera Vega v Municipality of La Unión (2013); Hernández Hernández v Municipality of Lago Ranco* (2013); and *Comité Nacional Pro Defensa de la Fauna y Flora de Chile v Fisco* (2014).

[114] *National Committee for the Defense of Fauna and Flora of Chile v Fisco* (2014).

[115] *Hernández Hernández v Municipality of Lago Ranco* (2013).

[116] See the critique of SOTO KLOSS (2015), pp. 84-85.

[117] *Astaburuaga Suárez v Ministry of Public Works* (2017).

As we saw at the beginning, the canonical conception of public law nullity conceptualized it as a sanction of peculiar characteristics, namely, it operated as of right or *ipso jure,* for any transgression of a validity requirement established in the Constitution, arising of an action of a constitutional nature, with broad active standing, practically a popular action, being in addition, this nullity, perpetual, not bound by the statute of limitations and finally, insurmountable, that is, not susceptible of validation or correction of any kind.

However, the Supreme Court over the last two decades has defined the main characteristics of the action of public law nullity. Then, the first observation that must be made is that, from the case law of the Supreme Court, it is now possible to deduce a more or less certain statute of public law nullity.

Indeed, it is possible to conclude that the public law annulment action (i) is not established in articles 6 and 7 of the Political Constitution, which are simply limited to enshrining principles, (ii) does not operate as of right, (iii) is subject to a statute of limitations, at least in its patrimonial effects, (iv) to present it, active standing is required consisting of a subjective right or a (very) qualified interest, (v) it is supplementary and, therefore, cannot be filed when there are special contentious actions, (vi) its processing -in the absence of contentious-administrative courts- is substantiated before the civil courts,[118] through the ordinary procedure of "mayor cuantía"[119] vii) only proceeds against serious and essential defects and (viii) being an exceptional sanction, it has limits outlined basically by the principle of conservation of the act, good faith and legitimate expectations.

In this way, the Supreme Court has created a more flexible system of nullity under public law, which takes into account the seriousness of the defect as a guiding criterion, the general rule of voidability (and non-nullity) of vitiated administrative acts and the presumption of legality of acts, finally accepting the idea of non-invalidating defects. Likewise, it relegates it to the background in public law nullity, only to a supplementary function *vis a vis* special litigation actions.

This new system, with the growing restrictions that the Supreme Court has placed on public law nullity, is not configured by mere theoretical doctrinal speculations, but rather judicial decisions that have practical effect: actions of public law nullity that seek to challenge administrative acts are usually rejected in the courts, thus leaving these acts firm. This, of course, can be healthy in the face of reckless litigation, but it is not positive

[118] See the case of *Pronova Technologies v Fisco de Chile* (2021) in which the Supreme Court stated that the Public Procurement Tribunal is not competent to hear the action for public law annulment.

[119] As an example, see *J.P.C v Municipality of Las Condes* (2015) where the Supreme Court states that "(...) As far as the procedure is concerned, in the absence of the administrative courts, it is for the civil courts to hear such an action, through the ordinary procedure of "*mayor cuantía*".

in the absence of systematic and well-regulated mechanisms for challenging and protecting flawed administrative acts.[120]

The foregoing is not a very encouraging picture for the protection of citizens' rights despite the fact that there is a fairly broad consensus that administrative litigation is an essential part of the democratic order and the rule of law in general, insofar as it adequately safeguards the principle of legality and, consequently, the democratic principle.[121]

Now, and as Cordero Vega warns,[122] perhaps this is not just about the limitations that the Supreme Court has set to public law nullity, but simply the performance capacity of public law nullity, with a non-existent normative regulation, and with multiple loose ends, seems to have reached its ceiling. It is high time we realize its limitations, perhaps the time has come to rethink the way in which administrative litigation is configured in general.

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[120] For a warning of its risks, see BERMÚDEZ (2010), p. 122.

[121] VERGARA (2014), p. 272.

[122] CORDERO (2015).

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Decreto Ley N° 2695 de 1979