

Origin Of The Remunerations' Payment When The Dismissal Administrative Act Is Invalid Or Illegal

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ABSTRACT

Public servants whose administrative responsibility determination is dismissal may go before the Contentious-Administrative Court, so that the administrative act of dismissal is declared null or illegal and, consequently, they can be reinstated to their functions and the currency values they have not received are restored. However, in relation to the restitution of not received remunerations and other legal benefits, its origin, without any justification, is limited to the case of nullity, excluding this right in the case of illegality. Therefore, the objective of this research is to determine that the restitution of unreceived currency values is appropriate in all cases where the administrative act is revoked. This article is a bibliographic review, its approach is qualitative, supported by the deductive method and documentary analysis

As a result, it is established that the unpaid remunerations are part of the right to reparation and its origin is not limited to the declaration of nullity or illegality of the administrative act, since in both cases the dismissed public servant was obliged to bear omissions of public administration gravitating to their rights.

Keywords: Nullity, illegality, administrative act, administrative litigation.

INTRODUCTION

The administrative act is the unilateral declaration of will of the public administration producing legal effects, which determine both the birth, modification, or extinction of rights and obligations of the administered. This type of administrative action, by its nature, is regulated by public law and is therefore subject to the legal regime of administrative law.

With respect to the administrative act, several authors have formulated different concepts, which vary depending on the form of the administrative act, its content and, in others, its purpose. For Blanquer (2010), the administrative act is: "a declaration made by the Administration in the exercise of its powers" (p.315).

For Secaira (2004), the administrative act "is a declaration of will that creates direct and immediate legal effects on third parties" (p. 179).

The Organic Administrative Code (COA, 2017) states:

An administrative act is a unilateral declaration of will, made in the exercise of an administrative function, which produces individual or general legal effects, provided that

it is exhausted by its fulfilment and directly. It will be issued by any documentary, physical or digital means and will be recorded in the administrative file. (Art. 98)

For Gordillo (2013), an administrative act is "an administrative act is a unilateral declaration made in the exercise of the administrative function, which produces legal effects directly." (p.218).

Referring to administrative acts, Bermúdez Soto J. (2010) indicates that:

Fundamental within the concept of administrative act is the character of a decision or resolution. This means that through the administrative act, what the State Administration does is to make a decision to apply the legal system to a specific case in a certain way. In effect, what the public body does through the act is to resolve a certain way of applying or executing the public legal system to a particular case that may affect or favour a person, a group of people or even the community as a whole. (p.106)

From the above concepts, it can be deduced that the administrative act is a unilateral declaration of the administration, insofar as it is issued only by the administration and its content is effective and binding without the need for acceptance or consent of the administrated. It is carried out in the exercise of an administrative function since the law grants it the power. It produces legal effects because it creates, extinguishes or modifies subjective rights of the administered immediately and directly.

Professor Viteri Hernez (2012) considers the following elements to be indispensable for the validity of the administrative act: declaration of will, competence, object, cause or motives, purpose, motivation, form and formalities (cited in Bejarano, 2014, p. 121).

Dr. Patricio Secaira Durango, in his book *Curso Breve de Derecho Administrativo* (Short Course on Administrative Law), states that in addition to the elements of the administrative act already described, unilaterality, administrative exercise and immediate and direct legal effects are also the elements of the administrative act already described. (p. 180, 181)

Under these parameters, it is important to point out that the absence of the requirements for the validity of the administrative act entails its nullity. For Dromi (2008) nullity by operation of law "is the legal consequence corresponding to the serious defects of the administrative act, the null act is characterized by being irregular and only in principle has a presumption of legitimacy and enforceability" (p. 192)

In the chaos of Ecuadorian legislation, article 105 of the Organic Administrative Code determines that an administrative act is null and void when it is contrary to the Constitution and the law, violates the purposes for which the legal system has granted competence to the body or entity that issues it, when it lacks competence, determines some impossible action. originates in acts that constitute a criminal offence, or originate principally from an act of simple administration.

For Molina Mora, J. F., Zambrano Olvera, M. A., & Ronquillo Riera, O. (2021):

As a general rule, it is known that every administrative act, once issued, must be executed, because it is presumed to be legitimate, without also preterming the presumption of the principle of good faith within the public administration, with which public servants are invested in the exercise of their powers, rights and duties. (p. 470)

However, by virtue of the principle of legality of administrative acts, in order for it to be declared null and void, they may be revoked as a result of administrative self-protection, or failing that, their stability may be subject to a review of legality through administrative or

judicial remedies. For Rivas and Aguirrezabal (2022) "The right of appeal is inserted as a face of the right of access to jurisdiction" (p. 213)

In the case at hand, we will focus on jurisdictional remedies, specifically on the action of full jurisdiction or subjective, which aims to protect subjective rights allegedly unknown, denied or not recognized by the public administration in administrative acts or facts that produce legal effects. In relation to the action of full or subjective jurisdiction, Harris (2020) points out that "The action of full jurisdiction would include the remedy of nullity, since the fullness would mean annulling or modifying acts, but also reparation for damages." (p.183)

In this context, when an administrative person considers that an administrative act is detrimental to rights, he or she may challenge it before the Contentious Administrative Court, so that the latter, in the exercise of legality control, reviews its content and determines its legal status, that is, ratifies its legality, or failing that, declares it null and void or illegal.

In relation to these last two effects, a problem is identified, since through administrative judgments and jurisprudence it has been determined that, when an administrative act that resolves to dismiss a public servant from office is declared null and void, it is appropriate to order the payment of the remuneration and values not received. Whereas, when the act is declared illegal, no payment is due.

For this reason, it is important to make a distinction between nullity and illegality of the administrative act and to determine whether there is indeed a justified distinction that would limit the right of the dismissed public servant to have a full restoration of remuneration and other values not received between the time he was dismissed and the time the administrative act of cessation was revoked.

Under these parameters, the objective of the investigation is to determine that the reinstatement of remuneration and values not received is appropriate in all cases for the administrative act to be revoked, in order to guarantee the right to reparation and effective protection of those administered.

RESULTS

Public administration, being a service in favor of the community, is provided by people who are called public servants, since they act in the exercise of a public function, therefore, they must frame their activity to what is determined in the legal system.

Public administration is nothing more than a planned legal activity of the State whose purpose is to provide public services to the nation in an efficient, timely and technical manner in compliance with the legal order. Its purpose is the satisfaction of individual and collective needs, within a framework of security and whose goal is the common good. (Secaira, 2004, p. 41)

In this context, article 233 of the Constitution of Ecuador provides that no public servant shall be exempt from liability for acts carried out in the exercise of his or her functions or for omissions, and shall therefore be administratively, civilly and criminally liable.

In the light of the above-mentioned constitutional mandate, the principle of responsibility is established, which is a cornerstone of public affairs, since it urges all public servants to exercise their functions responsibly under the condition of punishment for failure to comply with their duties and obligations and for the commission of administrative offences provided for by law.

Such non-compliance entails an administrative sanction, the most serious of which is the dismissal of the public servant from his or her position, which is externalized through the

issuance of an administrative act. For Secaira (2004), the administrative act "is therefore always a declaration of will that creates direct and immediate legal effects on third parties" (p. 179)

Therefore, in order for the administrative act that dismisses a public servant to be valid and effective, it must meet all the requirements for the validity of the administrative act, that is, competence, purpose, will, procedure and reasoning; and, it must be notified to the public servant. In addition, such an act, since it is covered by the presumptions of legality, enforceability and enforceability, must be executed by the public administration and complied with by the public servant, even if it may contain defects.

However, in the latter situation, the dismissed public servant, in the exercise of his right to liberty and to appeal, may challenge the administrative act before the competent authority or court, so that, in the exercise of control of legality, its deficiencies may be determined, and, because it is vitiated by any cause of nullity or illegality, it may be revoked with the effects provided by law for each case.

Bermúdez Soto, J. (2010), regarding the presumption of legality, states that:

This is a purely legal presumption or rebuttable presumption, which allows it to be rebutted by challenging it in an administrative or contentious-administrative proceeding. Obviously, the burden will be on the person who alleges illegitimacy, however, the challenge and effective judicial protection will make it possible to control the actions of the State Administration, one of its consequences being the possible extinction of the administrative act due to the illegality of which it suffers. (p. 108)

In this vein, Gordillo (2013) points out that:

In any case, we must anticipate here that the characteristics of the administrative act are not the same depending on whether the act suffers from one or another kind of nullity: Specifically, we distinguish three categories of nullity of the administrative act, stipulated "voidability" (or relative nullity), "nullity" (absolute nullity, or null acts of absolute nullity) and "non-existence." (Either non-existent administrative acts, or administrative de facto channels, or non-existence of administrative acts.) (p. 244)

In this regard, Vargas (1996) states that:

The declaration of nullity of the administrative act falls within the jurisdiction of the contentious-administrative, and is the result of a lawsuit, the process that must be followed, reasons of fact and law provided by the plaintiff, to end with a ruling declaring or not the respective nullity. (p.5)

Regarding the legality of administrative acts, Bermúdez Soto J. (2010) states:

An unrestricted conception of the principle of legality leads to the conclusion that any defect in an element of the administrative act would entail a nullity and therefore the loss of effectiveness and extinction of the administrative act. By virtue of it, any defect in the administrative act leads inexorably to its extinction. However, only a very small part of the doctrine has seen it that way and, what is more important, in practical reality the principle of legality has never been understood in this way, much less applied in that way. (p.108)

Therefore, through the means of challenge available by law, administrative acts are subject to a legality review, where the administrative or judicial authority will determine whether or not the administrative action complies with the legality and legality, verifying whether the administrative act enjoys all the requirements of validity and effectiveness. and whether

it has been issued in accordance with the law, and not incurring in any cause of nullity or illegality.

However, always when filing the challenge of the administrative act to avoid its execution, or at least delay it, its lack of validity must be directly attacked, in order to obtain the nullity of the same, since once the nullity of the administrative act is declared, it is extinguished, since the nullity would be the product of the lack of legitimacy of the administrative act and that is a matter of law. (Molina Mora, J. F., Zambrano Olvera, M. A., & Ronquillo Riera, O., 2021, p 474)

With regard to jurisdiction, the Organic Code of the Judicial Function (2009) states that: "it consists of the public power to judge and enforce what has been judged, a power that corresponds to the judges established by the Constitution and the laws, and which is exercised according to the rules of jurisdiction." (Art. 150)

In this regard, Pérez (2019) points out that "Jurisdiction is the extent to which the aforementioned jurisdiction is distributed among the various courts and tribunals, by reason of territory, subject matter, persons and degrees. (p. 44)

In Ecuador, the adjudication of administrative disputes between citizens and the State is dealt with in the contentious-administrative jurisdiction. The different issues subject to this jurisdiction are listed in the COGEP and in excessive detail in the General Organic Code of Processes. (Pérez, 2019, p.53)

Consequently, the jurisdiction of the Administrative Courts to hear the challenge of the administrative acts of dismissal of public servants is given in accordance with the provisions of Articles 75 and 173 of the Constitution of the Republic, Article 217 (1) and 13 of the Organic Code of the Judicial Function, Articles 299, 307 and 326 paragraph 1 of the COGEP.

Once the possibility of challenging the admissible acts of dismissal and the competence of the Administrative Courts have been defined, it is necessary to identify the effects of such challenges in relation to the judgments issued by those courts and by the cassation chambers of the National Court of Justice.

According to repeated judgments of the Supreme Court of Justice, the National Court of Justice and the Contentious Administrative Courts, the effects of challenging an administrative act of dismissal of a public servant can be threefold: firstly, the legality of the challenged act is ratified, secondly, its illegality is declared or finally it is declared null and void.

With regard to the declaration of illegality and nullity of the administrative act, illegality implies the lack of subjection of administrative acts to legal norms, contrary in nature, while nullity implies the non-existence of the contested act, when the grounds for nullity provided for in the law are incurred. In this sense, it can be said that the nullity and illegality of an administrative act are contradictory and mutually exclusive.

The National Court of Justice, Specialized Chamber for Contentious Administrative Matters, (2012), with respect to nullity, states:

The doctrine of administrative acts establishes that the essential requirements of such acts, namely, are: the competence of the body, compliance with the factual requirements provided for in the law for the act to be issued, the lawful object and content, the total absence of the prior administrative procedure, compliance with the purposes provided for in the legal system and the statement of reasons. The absence or non-compliance of one of them, in accordance with the theories of nullity, would result in a radical or full absolute nullity of the act, which would cause the non-existence of the legal world of the act. (Appeal 554-2006, para. 3.6)

The National Court of Justice, Specialized Chamber for Contentious Administrative Matters, (2012), with respect to illegality, states:

The opposite would happen with the defects of the administrative act that generate relative nullity (voidability), which, as they are not serious, would be susceptible of being overcome through validations, thus avoiding the invalidity of the act. Illegality, on the other hand, is defined as the violation of prohibitive law. Failure to comply with mandatory law. (Appeal 554-2006, para. 3.6)

Likewise, the Contentious Administrative Chamber of the former Supreme Court of Justice, now the National Court of Justice, has maintained the following criterion:

This Court has long differentiated the concepts of "illegality" and "nullity" in relation to administrative acts. In fact, the relationship that exists between these two figures, in Administrative Law, is one of genus and species. A null and void act is an illegal act, in the specific cases provided for in the Law; That is to say, not every illegal act is a null and void act, the effect contemplated in the legislation is that things must be restored to the state in which they were before the nullity occurs, which, in the case of the economic benefits of public officials and employees, implies their payment, as if they had never been removed from their positions. – On the contrary, the effect of the declaration of mere illegality (that is to say, if legitimacy is not found within the group of those cases that the same law indicates as grounds for nullity), occurs only from the date of the declaration and, in the case of benefits that the public servant ceased to receive, There is no reason to order payment. (Appeals 45-2008 and 219-2010)

With regard to the effects and payment of the remuneration not received, the National Court of Justice, Specialized Chamber for Contentious Administrative Matters, (2014), Resolution 024-2014, Case 560-2010, has stated:

In conclusion, it is necessary to differentiate between the effects of illegality and nullity in the field of human resources: when the act is null and void, the affected party must be granted all the values that, by way of remuneration, he should have received during the period in which he did not remain in his functions, as a result of a non-existent act; whereas, in the case of illegality, the act ceases to exist, but has no capacity to produce legal effects with respect to the payment of remuneration. (p. 5,6)

Ecuadorian jurisprudence has determined that when the requirements of the administrative act suffer from defects contrary to rights, it is illegal, but if such requirements suffer from serious deficiencies, with respect to which no validation is possible, they are null and void.

Consequently, when the nullity of the administrative act of dismissal is declared, the same law establishes that the challenger is recognized for those unreceived remunerations that corresponded to him from his dismissal until his reinstatement, so it follows that with the nullity the challenged act never existed. On the other hand, when it comes to non-serious defects that have not given rise to absolute nullity, it is illegal, so that the contested act ceases to have effect from the moment it is declared, and therefore the payment of remuneration not received is not applicable.

However, this line is not unanimous, nor has it been maintained in all cases, while the National Court of Justice, in resolution 0186-2011, of July 7, 2011, in the sixth ordinal, stated:

Moreover, since the enactment of the Organic Law on Civil Service and Administrative Careers and on the Unification and Homologation of Public Sector Remuneration (Official Gazette No. 184 of 6 October 2003), there is no reason to

differentiate between the legal concepts of nullity and illegality of the contested administrative act. as to the rights of the public servant who obtains a favorable ruling from the respective Court and accepts the challenge made in his or her application; Article 47 of the current Codification of the Act provides that if the decision of the competent judge or court is favourable, declaring the act null and void for the dismissed public servant, he shall be restored to his duties within five days, and shall be entitled to receive the amounts he has ceased to receive, which shall be paid within a period of no more than thirty days from the date of reinstatement; therefore, since the appealed decision has been in favor of the servant, since the impugned Personnel Action has been declared illegal and her reinstatement to the position has been ordered, without further disquisition, it is appropriate to comply with the aforementioned legal mandate.

The same occurs in the judgment issued by the National Court of Justice on December 20, 2011, at 10:15 a.m., in case 211-2007, in which the fifth paragraph states:

... Since the appealed decision declared the contested administrative act illegal and ordered the municipal authority, within eight days, to reinstate the plaintiff to the position from which he had been removed, it is only necessary to comply with the provisions of Articles 25(h) and 46, second paragraph, of said Law, since the issuance of which there is no reason to differentiate between the legal concepts of nullity and illegality of the contested administrative act insofar as to the rights of the public servant who obtains a favorable ruling from the respective court, since the second cited provision establishes in a strict manner: "If the decision of the competent judge or court is favorable, declaring the act null and void for the dismissed public servant, he shall be reinstated to his functions within five days, having the right to receive the values that he did not receive. Payment shall be made within a period of no more than thirty days from the date of reinstatement." In view of the foregoing ADMINISTERING JUSTICE, IN THE NAME OF THE SOVEREIGN PEOPLE OF ECUADOR AND BY AUTHORITY OF THE CONSTITUTION AND THE LAWS OF THE REPUBLIC, accepting the appeal deduced by the plaintiff, the Chamber sets aside the impugned judgment and declares null and void Personnel Action No. 26-45 of February 17, 2005, ordering that, In addition to the reinstatement to the post ordered by the lower court, the plaintiff shall be paid the amounts not received within a period not exceeding thirty days from the date of reinstatement to the post.

From the foregoing, it can be deduced that the differentiation made for the purposes of declaring the administrative act of dismissal null and void or illegality is not a rule, since, in both cases, the payment of the remuneration not received is due, as will be evidenced below.

In addition, it is important to point out that, although there are differences between nullity and illegality that make them mutually exclusive, this does not imply that a different condition is generated at the time of repairing the rights of those who have been dismissed with an illegal or null act, since this would mean unequal treatment and consequently entail the violation of other constitutional rights.

The equivocal decision to distinguish between nullity and illegality at the time of repairing and reinstating the remuneration not even received has no legal basis and departs from the constitutional presuppositions and from the very purpose of the current constitutional model and even from the legal regulations.

For this reason, it is necessary to establish a single criterion in relation to this legal problem and, on the basis of the current legal system and in order to guarantee the rights of citizens, the State must respond in all cases for the damages caused.

DISCUSSION OF RESULTS

In accordance with the provisions of article 11, number 9 of the Constitution of Ecuador, the highest duty of the State is to respect and ensure respect for the rights guaranteed in the Constitution. and public employees in the performance of their duties. This is the strict liability of the State.

This constitutional maxim determines that the State is responsible for any action or omission of any public servant in the exercise of his functions, therefore, I will start by indicating that no public servant is under the legal obligation to endure any omission or action harmful to rights issued by a public servant in the exercise of his functions.

Under this premise, the line of jurisprudence maintained in certain cases by the Supreme Court of Justice and even by the National Court of Justice itself, with respect to a distinction of effects between the nullity and illegality of the administrative act of dismissal, does not have an adequate foundation, with respect to the reasoning that leads the Courts to decide that, In the case of nullity, the remuneration not received is applicable, while in the case of illegality, such payment is not applicable.

In this context, there are two types of effects and differences in the declaration of nullity and illegality, the first having to do with the existence and effects produced by the administrative act. Whereas, when the administrative act is declared null and void, the act is considered to be non-existent, while in the case of illegality the act does not produce legal effects. And the second effect has to do with what is related to the restitution of the values not received, because according to certain jurisprudence, when the act is null and void, the affected party must be granted all the values that, by remuneration and benefits of law, he should have received during the period of time in which he did not remain in his functions. for, he was dismissed by a non-existent act; whereas, in the case of illegality, the act exists, but does not have the possibility of producing legal effects with regard to the payment of remuneration.

However, it is necessary to point out that this last distinction is not correct in its entirety, since it does not contain a sufficient basis or argumentative burden, since making an unjustified distinction in relation to the payment of the remuneration not received and this mistake even leads to the violation of constitutional rights, including effective judicial protection. equality and work.

With regard to the first parameter of the right to effective judicial protection, it should be noted that this is a right through which citizens are guaranteed timely and, above all, effective access to justice, so that, in the submission of disputes to courts, their rights are protected in a neat manner, providing them with minimum guarantees to be observed during the substantiation of cases.

In this regard, effective judicial protection is provided for in article 75 of the Constitution of Ecuador, and the Constitutional Court of Ecuador has determined in its various jurisprudences - Judgment 0031-14-SEP-CC; Judgment 050-15-SEP-CC, case 1887-12-EP- that this right is composed of four essential aspects or parameters, these are access to the courts, due diligence of the courts, strict observance of the legal system and role of the judge and the execution of judicial decisions. Since the Contentious Administrative Tribunals in the case of nullity do order the payment of the remuneration not received and in the case of illegality they do not, without sufficient argument the rights of citizens are not effectively protected, all the more so since, in accordance with article 11, number 9 of the Constitution it states that the State will be liable for any violation of rights.

It is important to specify at this point that it is not appropriate to claim such assets through an action for strict liability of the State, since the effects of the administrative act and its stability are already discussed in the action of full jurisdiction or subjective.

In this context, if it was the State itself that, due to an omission, removed a public servant from his or her duties, he or she must respond and compensate for the damage caused, reverting the proceedings in the manner possible to the very moment of the violation of subjective rights, a fact that can only be achieved with adequate restoration and reparation. This is to say, by cancelling all the remuneration not received during the entire time that their cessation lasted until their effective reinstatement, plus the benefits of the law established by the labor law.

Since the State is not responsible for its omissions and since it is not responsible for the damages caused to the unlawfully dismissed public servant, the State would be benefiting from its own fraud, since it does not have to pay him anything in the light of a declaration of illegality, thus excluding its responsibility to repair the damages.

However, with regard to the differentiation made with respect to the payment of the remuneration not received due to the declaration of nullity and illegality of the administrative act, it is necessary to indicate that this distinction disrupts the right to equality, since it promulgates a differential treatment of persons, since it determines that in the case of nullity if the payment is appropriate, while the case of illegality is not admissible, thus inflicting an unequal, distinctive treatment, segregating a public servant who also had to endure an act harmful to rights and was dismissed from office.

By making this distinction, a public servant is marginalized and consequently deprived of a fundamental right, since his condition is the same, that is, having been dismissed by an administrative act contrary to the legal system, regardless of the quality of the revocation of the administrative act.

Likewise, when a differentiation is made in relation to the appropriateness of the payment of the remuneration not received in favour of the public servant dismissed by an illegal act, his constitutional right to work provided for in article 33 of the Constitution of Ecuador, a right that is conceived as essential for the realization of other human rights, is violated. Consequently, this right is enshrined as an inherent and inseparable part of human dignity, through which a dignified life is guaranteed. This right is made up of two parameters: the first inherent to remuneration and the second to social security, both aimed at social welfare and the coverage of needs.

When a judicial decision orders that the remuneration not received in favour of a public servant who has been dismissed as a result of an illegal act is not paid, his right to work is violated, since he was deprived of work due to an omission directly attributable to the public administration, and his responsibility is therefore not his responsibility. For the purposes of the payment of remuneration, it must be taken into account that either with an illegal act or with a null and void act, the dismissed public servant is prohibited from exercising his functions in his position, and consequently from receiving his remuneration and social benefits.

Consequently, judgments issued by the National Court of Justice in various cases such as 186-2011 and 211-2007, are correct in stating that there is no reason to be the questionable differentiation between the legal concepts of the nullity and illegality of the contested administrative act, in terms of the rights that correspond to the public servant who obtains a favorable ruling, since in both cases he is entitled to the payment of the remuneration not received.

So accurate is this proposition that the Organic Law of Public Service (LOSEP, 2010) determines that:

If the decision of the competent Chamber or judge is favourable, declaring the act null and void or illegal and the dismissed public servant being reinstated to his or her job, the procedure shall be taken in such a manner and immediately once the respective order has been enforced. If, in addition, the judgment or order provides

that the public servant is entitled to the payment of remuneration, the respective order or judgment shall establish the amounts that he or she ceased to receive with the corresponding interest, values to which the amounts received during the time he or she has served in another institution of the public administration during that period must be imputed and deducted. (art. 46)

Therefore, in both cases, whether of nullity or illegality, the payment of the remuneration not received in favor of the public servant who was dismissed is due.

In this context, such payment is obligatory in favor of the public servant who has obtained a favorable judgment from the contentious-administrative courts, and in order not to affect the public administration, the same rule has provided for the mechanism of repetition in favor of the State so that it may pursue a procedure against the public servant who issued the null or illegal act and in respect of whom the remuneration withheld must be paid. perceive.

In this regard, the Organic Law on Public Service (LOSEP, 2010) states that:

In the event of a favorable ruling for the server suspended and the act declared null and void or illegal, the unpaid amounts will be refunded. If the judgment determines that the suspension or dismissal was illegal or null and void, the authority, official or servant who caused the dismissal will be financially responsible for the amounts to be disbursed and, consequently, the State will exercise against him or her the right of repetition of the amounts paid, provided that it has been judicially declared that the servant has caused the damage through intent or gross negligence. The judgment will be notified to the Office of the Comptroller General of State for control purposes. (Art. 46)

However, this is a dead letter and this institution of repetition is almost never used, since the easiest thing for justice is to declare the illegality of the contested act and not give way to the payment of the remuneration not received, thus violating the rights of the appellants before the contentious-administrative court.

Finally, I must point out that the last paragraph of Article 313 of the General Organic Code of Procedure (2015) determines that in the event that the claim of the subject is admitted and the contested act is annulled, it will also be ordered that the amount paid unduly or in excess and what was duly paid be returned.

Therefore, what corresponds to the public servant who was dismissed must be paid in all cases, either with a null act or with an illegal act, in addition within the procedural and legal norm it does not establish as such a differentiation of effects, so being in a state that guarantees rights and eminently repaired damages, it must be ordered to pay the remuneration not received in both cases, in order to guarantee the rights of citizens who go to the court for the protection of rights.

CONCLUSIONS

The distinction that has been made with respect to the effects of nullity and illegality in relation to the payment of remuneration not received by an administrative act of dismissal is the result of a jurisprudential criterion born in the former Supreme Court of Justice of Ecuador, which has been issued before the entry into force of the Organic Law on Civil Service and Administrative Career and Unification and Homologation of Public Sector Remuneration and then of the Organic Law of Public Service, therefore, do not have a legal basis, since, as the Ecuadorian justice itself has pointed out, there is no reason to be the debatable differentiation between the legal figures of the nullity and illegality of the

contested administrative act, in terms of the rights that correspond to the public servant, This is an issue that has been overcome by the same jurisprudence and by the norm.

The decision of whether or not to pay the remuneration not received by the reinstated public servant transcends beyond nullity or illegality and becomes a kind of Russian roulette which depends on the chamber or court that wishes or not to order the payment of the remuneration not received.

As a result of the new constitutional regime, Ecuador is a State that guarantees rights and has as its central axis the application of the principle of responsibility, which not only implies subjective responsibility in determining the administrative responsibility of public servants, but also objective responsibility, which implies the obligation of the State to take responsibility for its actions and omissions that are detrimental to rights and to repair any damage or affectation caused to a person. citizen and activating the corresponding repetition mechanisms.

Allowing an unfounded distinction between nullity and illegality in relation to the appropriateness of the payment of unpaid remuneration implies that the organs of justice violate the right to effective judicial protection, since obstacles are being established for the exercise of rights and there is no detailed and effective attention on the part of justice operators; In addition, there is a clear state of inequality, since it is determined that the payment of unpaid remuneration is only appropriate for those who have deserved a favorable judgment with nullity, while for those who deserve a favorable judgment with illegality, payment is not appropriate; Finally, this action of segregation and differentiation causes a violation of the right to work in the areas of remuneration and social security, since the possibility of being compensated for the damage caused through the return of the remuneration not received is limited.

Eliminating this unfounded distinction will make it possible to guarantee a democratic State and, above all, a guarantor of the rights of citizens, the executor of its constitutional principles, respecting the principle of responsibility in all its dimensions, and above all it will oblige the public administration to act responsibly, guaranteeing the right to good administration, and not to issue acts harmful to rights against citizens.

The need for the payment of the remuneration not received in both cases, whether of nullity or illegality, would lie in repairing and restoring the subjective rights of the person concerned, to such an extent that he does not have to endure any act or omission that affects his subjective or constitutional rights.

The decisions of the National Court of Justice of Ecuador that make no distinction between nullity and illegality for the purpose of restitution of unpaid remuneration are correct and are aimed at guaranteeing the rights of those administered.

The exception to this is that in the event that the public servant during the time he was dismissed has worked as a public servant, in any of his forms of contracting in another State portfolio receiving his remuneration, the payment of the remuneration not received is not appropriate or, failing that, he is only entitled to the proportional remuneration of said remuneration until it is adjusted to the items that he should have received. in this particular case, these items will be deductible from the amount ordered to be paid in the judgment issued by the Contentious Administrative Tribunal or by the specialized chamber of the National Court of Justice.

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