

APLICACIÓN DE LOS PRINCIPIOS MATERIALES DE LA POTESTAD SANCIONADORA EN LA INSTRUCCIÓN DE PROCEDIMIENTOS DISCIPLINARIOS A FUNCIONARIOS DOCENTES.

APPLICATION OF THE MATERIAL PRINCIPLES OF SANCTIONING AUTHORITY IN THE INSTRUCTION OF DISCIPLINARY PROCEDURES FOR TEACHING STAFF.

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Resumen

La potestad punitiva de la Administración, a través del procedimiento disciplinario sancionador, supone la voluntad de los poderes públicos para preservar el correcto funcionamiento de sus servicios, la confianza del administrado en que se van a proteger sus intereses y la tutela de los derechos humanos fundamentales. El principio de legalidad es esencial

para adecuar la sanción a las circunstancias concurrentes atendiendo al daño al interés público.

La atención a los principios materiales que rigen la potestad sancionadora supone la aplicación de un criterio de razonabilidad al concepto teleológico que da sentido a un procedimiento instructor sancionador y contribuye a proteger los bienes jurídicos de la Administración.

El procedimiento disciplinario sancionador está sometido a los principios de derecho materiales de legalidad, tipicidad, antijuricidad, culpabilidad y punibilidad. Otro de los principios de derecho es la imposibilidad de sancionar a un ciudadano dos veces por lo mismo si existe identidad de sujeto, hecho y fundamento jurídico.

Palabras clave. *ius puniendi, procedimiento administrativo sancionador, principio de legalidad, de culpabilidad, de proporcionalidad, principio de oportunidad, sanción administrativa.*

Abstract

The punitive authority of the Administration, exercised through disciplinary sanctioning procedures, reflects the public authorities' intent to preserve the proper functioning of their services, maintain the citizen's trust that their interests will be protected, and safeguard fundamental human rights. The principle of legality is essential to ensure that sanctions are proportionate to the circumstances, taking into account the harm caused to the public interest.

Upholding the substantive principles that govern the sanctioning authority implies applying a standard of reasonableness to the teleological concept that gives meaning to a disciplinary sanctioning procedure and helps protect the legal interests of the Administration.

The disciplinary sanctioning procedure is subject to the substantive legal principles of legality, classification of offenses (tipicidad), unlawfulness (antijuricidad), culpability, and punishability. Another fundamental legal principle is the prohibition of penalizing a citizen twice for the same act when there is identity of subject, act, and legal basis.

Keywords: : *ius puniendi, administrative sanctioning procedure, principle of legality, principle of guilt, principle of proportionality, principle of opportunity, administrative sanction.*

Introduction.

The sanctioning power of the Administration is configured as an instrument that guarantees the protection of the general interests entrusted to it, through the legitimate exercise of its sanctioning power: the correct functioning of public services, the confidence of the individuals subject to administrative authority that their interests will be protected and the rights of those individuals are the main legal assets protected under the protection of the general interest of the Administration.

Through this study, we will understand the material principles of the sanctioning power within the so-called administrative sanctioning law.

1. Concept of administrative infringement.

Article 25.1 of the Law 40/2015 (LRJSP)¹ states that the sanctioning power of the Public Administrations will be exercised when it has been expressly recognised by a regulation with the status of law, a principle in line with article 25.1 of the Spanish Constitution, which establishes the principle of legality within the framework of the *ius puniendi* of the public authorities.

Case law has delimited the differences and similarities between a criminal offence and an administrative offence, understanding that both involve a violation of the legal system that may give rise to one or more sanctions and defining a sanction as an unfavourable legal consequence imposed by a competent authority.

Criminal offences and administrative offences do not differ in nature, as the progressive, analytical and material definition of the offence, conceived as a typical, unlawful, culpable and punishable action, is fully

¹ Law 40/2015, of 1 October, on the Legal Regime of the Public Sector.

applicable in the context of administrative offences (Gómez Tomillo & Sanz Rubiales, 2017, p. 282) .

Their distinction lies in the authority imposing the reproach, the punitive consequences, their purpose and legal regime.

The most obvious distinction between offence and unlawful act is based on the authority of those who impose the reproach: the criminal courts in relation to offences and the administration in relation to administrative unlawful acts. In the latter case, the judge would only intervene once the administrative route has been exhausted and through the contentious-administrative appeal.

The punitive consequences between an offence and an unlawful act are the main difference, given that the sanctions that can be imposed in the administrative sanctioning sphere in application of Royal Decree 33/1986 (RRDFAE)² are limited to measures such as warnings, suspension from duty, removal from service (only for very serious sanctions), transfer with change of residence, i.e., never custodial sentences. Deprivation of liberty is a sanction reserved exclusively for criminal law.

Another substantial separation is found in the teleological aspect of both reproaches, in accordance with the thesis of Eduardo García de Enterría and Tomás-Ramón Fernández, in Volume II of the *Curso de Derecho Administrativo* (1998), as the purpose of judicial penalties and administrative sanctions is different.

Penalties associated with crimes are oriented towards re-education and social reintegration by constitutional mandate, as stipulated in article 25.2 of the Spanish Constitution.

² Royal Decree 33/1986, of 10 January 1986, approving the Regulations on the Disciplinary Regime for civil servants in the State Administration.

Administrative sanctions seek a pragmatic repressive purpose that may arise from the objective responsibility of the offender (García de Enterría & Fernández Rodríguez, 1998, p. 164) .

It is clear that criminal law offers certain satisfactory solutions to administrative sanctioning law, which is really useful and clarifying in the framework of an administrative sanctioning procedure, in fact, the knowledge of criminal law for an instructor of disciplinary proceedings is of great use for the criminalisation practice.

Manuel Gómez Tomillo, in the article "*La distinción entre la infracción administrativa y el delito*", points out the reasonable relevance of applying certain positive criteria of criminal law, such as the error of prohibition, the rules on the real, medial or ideal competition of the offence (Gómez Tomillo, 2025, p. 67) . 67), to which can be added the definition of *the offence of activity or result*, the assessment of unity of action in the offence and the typifying technique or method by which the legislator defines and delimits the conducts that constitute offences or crimes within the legal system, which allows the conducts to be included in the type when all the components are fulfilled.

In the analysis of an administrative offence, therefore, the principles enshrined in article 25.1 of the Spanish Constitution, by virtue of the *ius puniendi* in the sphere of administrative sanctions, which sustains the analysis under the principles of criminality, unlawfulness, imputability, culpability and punishability under criminal law, with the specificities of the administrative procedure, according to the case law of the Supreme Court and the Constitutional Court (STS 24 December 1990, SSTC 276/2000 and 312/2000). "The sanction provided for can only be attached to conduct which meets all the elements of the type described and which can be objectively prosecuted ". (STC 75/84, 27 June).

The study of these elements common to all administrative reproaches implies a guarantee of legal certainty, discarding the decision by which a punishable offence is attributed to the subjectivity, emotionality or intuition of the applicator of the law (Gómez Tomillo & Sanz Rubiales, 2017, p. 283) .

The sanctionable reproach protects the major legal assets of the Administration, which makes the sanctioning action a necessity of service that responds to the principle *nulla poena sine necessitate*, i.e. disciplinary sanctions are not imposed for formalism, but to protect fundamental values of the Public Administration: legality, efficiency, citizens' trust and respect for fundamental rights.

Legal assets justify that a behaviour be considered punishable, therefore, the sanction is not an end in itself, but an instrument at the service of the administration to preserve its proper functioning. The sanction, therefore, must be proportionate and justified by a need to protect the public interest.

Alejandro Nieto (1994) points out that the interests protected by the sanctioning rules do not refer to individual assets, for which there is the institute of patrimonial liability, but to collective, general and public interests. (Nieto, 1994, p. 36).

In short, what do crime and tort have in common? In the first place, both produce a legal responsibility that arises from the typicity and unlawfulness of the action or omission; secondly, they provoke a consequence, that is, a reproach or sanction; thirdly, they contravene a rule that clearly defines the reproachable conduct and the associated reproach.

It is necessary to bear in mind that the application of procedural guarantees to the administrative sanctioning procedure is not established in the strict sense, but in a sense of principle, that is to say, of application of the

constitutional principles that inspire criminal procedural laws, but not of their rules (García Dorado & Íñigo Fernandez & de Vargas Cascales & Guijarro Belda..., 2023, p. 7).

2. The sanctioning power of the administration.

The *ius puniendi* or punitive power is instituted in the legitimacy to impose sanctions or punishments on those who infringe or hold an action liable to reproach, for which reason its purpose is the protection and tutelage of a legal good.

Administrative sanctioning powers are configured as a power to impose on another a positive (to do) or negative (not to do) conduct characterised, as opposed to subjective rights, by the following distinctions in their legal nature (Aparicio de Lázaro & Fernández-Montalvo García, 2023, p. 5) :

Firstly, the origin of the sanctioning power comes from a legal norm that establishes for the power the exercise of legitimacy and the principle of competence. The law confers on the administration the power to impose penalties, and the fruit of legality are the legal powers that enable this power to be exercised. Legitimacy cannot be waived.

Secondly, the power has a generic object that produces legal or material effects on a subject or group of subjects (Aparicio de Lázaro & Fernández-Montalvo García, 2023, p. 6) .

Finally, it should be pointed out that the power is exercised, not in its own interest, but in the public interest, given that the public administration objectively serves the general interest with full submission to the law and the law. Therefore, its third characteristic is its fiduciary nature (Aparicio de Lázaro & Fernández-Montalvo García, 2023, p. 7) .

3. Principles of the sanctioning power of the Administration

The principles governing the sanctioning procedure are traditionally divided into material principles, i.e. principles that determine the substantive content of the sanctioning power, and formal principles, or those principles that underpin the way it is exercised procedurally. "Compliance with the constitutional requirements of formal legality and typicity must always be demanded in the field of administrative sanctions (there is no doubt in the criminal field) as a guarantee of the security of the citizen ". (STC of 29 March 1990).

The main material principle is the principle of legality articulated in the aphorism of *lex scripta, lex previa, and lex certa* and also instituted from the concept of legal reserve.

The principle of legality is essential in general sanctioning law and therefore fundamental for the sanctioning power of the administration.

The legislator must include and define the punishable reproach in a formally enacted law, the law must exist before the offence is committed and the law must be clear, precise and unambiguous (Fernández Cruz, 1998, p. 141) .

Another material principle is the principle *non bis in idem*, whereby the same thing cannot be punished twice, as long as there is identity of fact, subject and legal basis.

The other material principles are the principle of guilt and, finally, the principle of proportionality.

Formal principles are the principles of presumption of innocence, the right of defence, the right to remain silent, the right not to plead guilty and the right not to testify against oneself (Gómez Tomillo, 2025, p. 63) .

4. The principle of legality in the sanctioning procedure.

The administrative sanctioning regime responds to the principle of legality, thereby adopting a substantive principle of criminal law. Legality and prior judgement are instituted in the material element of punitive power in the rule of law, *nullum crimen, nulla poena sine lege: nulla poena sine legale iudicium*.

This principle is included in article 11.2 of the Universal Declaration of Human Rights, whose positive value in our law results from the application of article 25.1 of the Spanish Constitution, which includes the principle of legality, since, "no one may be convicted or punished for actions or omissions which at the time of their occurrence did not constitute a crime, misdemeanour or administrative offence, according to the legislation in force at the time". The LRJSP [Translator's note: The abbreviation LRJSP refers to Spain's Law 40/2015 of 1 October on the Legal Regime of the Public Sector (Ley 40/2015, de 1 de octubre, de Régimen Jurídico del Sector Público)] includes this principle in article 26, establishing that sanctions may only be imposed for the commission of administrative offences classified as such in a regulation with the status of law prior to the facts constituting the offence.

The principle of legality in the sanctioning sphere is articulated through a double guarantee: the material guarantee through the double mandate of taxation and typicity, and the formal guarantee, through the legal reserve. "The first, of a material nature and absolute scope, reflects the special transcendence of the principle of legal certainty in these areas limiting individual freedom and translates into the imperative requirement of regulatory predetermination of unlawful conduct and the corresponding penalties (*lex scripta et lex praevia*). The second, of a formal nature, refers to the necessary rank of the rules typifying those conducts and regulating such

sanctions, insofar as the term "legislation in force" contained in article 25.1 is expressive of a reservation of law in matters of sanctioning SSTC 42/1987 and 305/1993, among many others" (STS 6/1994 of 17 January).

5. Material guarantee: taxation and typicity.

Extending the concept of material guarantee, the principle of taxation is addressed to both the legislator and the regulatory power, "requiring them, in accordance with the principle of legal certainty proclaimed in article 9.3 of the Spanish Constitution, to make the maximum possible effort in defining the types of offences by enacting specific, precise, clear and intelligible rules, which cannot constitutionally admit such open formulations, which due to their breadth, vagueness or lack of definition, that their effectiveness depends on a practically free and arbitrary decision of the interpreter and judge". (STC 145/2013 of 11 June 2013) (Vázquez Forno & Álvarez Barbeito, 2021, p. 334) .

The undoubted and indubitable reference to the harmful or damaging conduct is called typicality and this concept is linked to the guiding principle of criminal and administrative sanctioning legislation.

It should be borne in mind that, in accordance with the principle of taxation, indeterminate and imprecise legal concepts may be included in the offence. "...does not prohibit the use of indeterminate legal concepts, although their compatibility with article 25.1 is subordinated to the possibility that their specification is reasonably feasible by virtue of logical, technical or experience criteria, in such a way as to make it possible to foresee, with sufficient certainty, the nature and essential characteristics of the conducts constituting the offence defined" (Constitutional Court Ruling 151.1). (Sentencia del Tribunal Constitucional 151/1997, de 29 de septiembre de 1997) (Vázquez Forno & Álvarez Barbeito, 2021, p. 335) .

Typicity is the legal description of a specific conduct to which an administrative sanction will be connected³. General or indeterminate infringement clauses are not allowed, as this would give the sanctioning body an excessive margin of discretion, which could lead to arbitrary or unequal decisions. "(General clauses) would allow the sanctioning body to act with excessive arbitrariness and not with the prudent and reasonable discretion that would be allowed by a normative specification". (STC of 29 March 1990) (García de Enterría & Fernández Rodríguez, 1998, p. 175) .

The ruling of the Constitutional Court of 15 November 1990, which confirms another of 27 June 1984, denies the constitutional possibility of a sanction tied to a generic legal type "failure to comply with the duties and obligations of a civil servant " on the grounds that article 25.1 of the Constitution "does not tolerate the analogical application *in peius* of criminal law and demands a rigorous application... to conduct which meets all the elements of the type described and is objectively prosecutable ". (García de Enterría & Fernández Rodríguez, 1998, p. 169) .

6. Formal guarantee: legal reserve.

The second guarantee, the formal guarantee, is instituted in the concept of legal reserve and refers to the necessary rank of the rules typifying reprehensible conduct and sanctions. Punitive power can only be articulated by means of a law. "...since punitive laws delimit the scope of the punishable offence and therefore the boundaries of fundamental rights, this major effect on social life cannot be left to a regulatory rule" (STS of 19 May 1982).

This thesis of absolute legal reserve has been declared by the Constitutional Court in numerous rulings (Judgment of 3 October 1983, 23

³ <https://vlex.es/vid/principio-tipicidad-procedimiento-sancionador-427619938>

February 1984...) (García de Enterría & Fernández Rodríguez, 1998, p. 169). This establishes that the sanctioning power of the Administration will only be exercised when it has been expressly attributed by a regulation with the status of law, as regulations may not define offences.

But this proscription is not absolute in the administrative sphere; in fact, it is impossible to qualify all the punishable conducts that can be reproached within the framework of the administration.

The Supreme Court and subsequently the Constitutional Court have qualified the possibility of regulatory collaboration, suffice it to mention the well-known STS of 10 November 1986, cited in numerous rulings: "...what is prohibited by article 25.1 of the Constitution prohibits referral to regulations that make possible independent regulation that is not clearly subordinate to the law, but not regulatory collaboration in sanctioning regulations", since "...the scope of the legal reserve cannot be as rigorous as it is with reference to criminal offences and penalties in the strict sense, both for reasons relating to the constitutional model of distribution of public powers and to the somewhat non-suppressible nature of the regulatory power in certain matters, as well as, finally, for reasons of prudence or expediency". (Taken up in FJ 19 of STC 34/2013 of 14 February 2013).

This doctrine of collaborating regulations is defined as the doctrine of the indispensable complement, and responds to the definitional impossibility of the Administration to delimit with meridian precision all the reprehensible conduct that occurs within it, imbued by the specificity of the civil service post. Regulatory collaboration contributes to defining, completing, specifying, specifying and determining the type of sanction.

The formal guarantee, therefore, is relative and not absolute in the administrative sanctioning sphere and in the classification of offences, it is

necessary for the collaborating regulation. The jurisprudence of the Supreme Court recognises the relative extension of the formal guarantee: "it has a relative or limited effectiveness in the administrative sanctioning sphere, since it is not possible to exclude regulatory collaboration in the very task of classifying offences and assigning the corresponding sanctions, although it is necessary to exclude the possibility that such referrals make possible an independent regulation which is not clearly subordinated to the law" (...) "...the absolute material requirement of normative predetermination of the conducts and the corresponding penalties affects the classification of the offences, the graduation and scale of the penalties and the correlation between them, in such a way that... the set of applicable rules makes it possible to predict, with a sufficient degree of certainty, the type and degree of penalty likely to be imposed". (STC of 29 March 1990).

The administrative types, i.e. the reproaches punishable by law, are instituted as a blank law or blank type.

The blank law is a legal category devised by the German criminal lawyer Karl Binding in 1872 (Binding, 1872, p. 74) . This dogmatic term coming from criminal law establishes that there are laws or types that refer to the collaborating regulation or indispensable complement in order to be completed. "...blank criminal laws should be understood as those which only contain a criminal threat for the infringement of another rule to which they refer" (STS 849/1995, 7 July 1995).

Alejandro Nieto (1994) points out that regulatory collaboration is not an exception to the reserve of law but a modality of its exercise. Sanctioning rules are limited to describing some types or some common and essential elements to all types, referring implicitly and explicitly to a regulation to complete the description. The blank law is an incomplete law that entrusts

the regulation with the task of completing them, hence the term collaboration, not substitution. (Nieto, 1994, p. 264).

In short, a blank law or type is one that uses a disciplinary type of sanctionable type of extensive qualification with the aim of being able to be tied in with an open number of conducts that fit in with the defining delimitation of the collaborating regulations. However, once qualified, the components of the offence must fit into the qualifying rule by constitutional mandate, as they must meet all the elements of the described offence and be objectively prosecutable.

An enlightening example is provided by the analysis of the Ruling of Provincial Court of Burgos of 1 February 2017, Rec. 7/2017. In this case, an attempt was made to charge a crime of attack on authority to teaching staff at a subsidised private school, with the Court considering that the type indicated could not be charged as inappropriate, as the type that defines attack on authority requires that this authority be a public official and the teachers at subsidised private schools do not have this status, therefore not fulfilling all the components of the type. (Article 550.1 of the Penal Code establishes that acts of aggression are considered to be those committed against teaching officials who are in the exercise of their duties, or on the occasion of their duties).

The Court warns that criminal offences do not admit analogical or extensive interpretations *in mala partem*, i.e. to extend their scope of punishment to cases other than those envisaged in them, in accordance with article 4.1 of the Criminal Code, " ...it is true, as the Public Prosecutor's Office points out, that the technique of blank criminal laws allows the typical description to be completed with other rules from areas other than criminal law. But for this to be appropriate, case law requires a series of requirements to be met".

In order to be constitutionally acceptable, blank criminal laws require "the following requirements to be met: that the normative referral is express and justified in terms of the legal right protected by the criminal law; that the law, in addition to indicating the penalty, contains the essential nucleus of the prohibition and that the requirement of certainty is satisfied or, as stated in [.....STC 122/1987, there must be sufficient specification, so that the conduct classified as criminal is sufficiently specified with the indispensable complement of the rule to which the criminal law refers, and in this way the function of guaranteeing the type is safeguarded with the possibility of knowledge of the criminally punishable conduct" (STC 127/1990, of 5 July 1990).

The referral from the collaborating regulation to the disciplinary type included in the blank law is indispensable in order to fit the conduct conveniently into the type, linking all its elements." ...the requirement of certainty is satisfied, that is to say, that there is the necessary specification so that the conduct described as criminal is sufficiently specified with the indispensable complement of the rule to which the criminal law refers, thus safeguarding the guarantee function of the offence with the possibility of knowledge of the criminally punishable action" (STS 1664/2002, 28 March 2002). This precept is fully applicable to administrative offences.

As an example, it is convenient to apply the principle of legality to investigative practice with a common type that occurs when a teaching official is charged with a lack of performance, thereby affecting the functioning of public services.

In order to be able to confirm that in the proven and imputed conduct, the objective and subjective elements of the disciplinary type set out in

section i) of article 7.1 of RD 33/1986 (RRDFAE)⁴, which considers a misconduct classified as serious the "lack of performance that affects the normal functioning of the services and does not constitute a very serious misconduct", it is necessary to demonstrate the existence of the aforementioned elements in said conduct by analysing the lack of performance in the specific case of the teaching official.

A first approach to the global meaning can be provided by semantics, a branch that can be useful for an instructor of disciplinary proceedings. The dictionary of the Royal Spanish Academy defines "performance" in its first two meanings as "product or utility that someone or something yields or gives" and "proportion between the product or result obtained and the means used".

We must bear in mind that the lack of performance is an indeterminate legal concept with an important margin of appreciation that arises from the principle of probity and diligence in the fulfilment of the tasks entrusted to the teacher and that can be quantifiable by the significance offered by the other limit, which is the right to full education of the pupil, as a fundamental right provided for in article 27 of the Spanish Constitution, which enshrines the right *erga omnes*.

Through regulatory collaboration, we must first start from the code of ethics set out in RDL 5/2015 (TREBEP).⁵

Article 52 requires employees to diligently perform the tasks assigned to them, acting under the principle of probity, dedication to public service and efficiency, which translates into respect for the ethical principles of diligently performing the tasks assigned to them or entrusted to them, in

⁴ Royal Decree 33/1986 of 10 January 1986, approving the Disciplinary Regulations.

⁵ Royal Legislative Decree 5/2015, of 30 October, approving the revised text of the Law on the Basic Statute of the Public Employee.

accordance with article 53.10, and exercising their powers with dedication to public service (article 53.11). Article 54(2) includes the diligent performance of the duties corresponding to the post held.

As for the consideration of normal or average performance, it is up to the Administration to determine this average or standard through rules, instructions, the practice of the activity and, in view of this unlawfulness, it must be assumed that the normal functioning of the services is affected.

Continuing with the collaborating regulation, the functions of a teaching official are those set out in Organic Law 2/2006, of 3 May, on Education, modified by Organic Law 3/2020, article 91 of which sets out the functions of the teaching staff.

Being a teaching staff member means carrying out the teaching programme entrusted to them, assessing the student learning process and also the teaching processes, tutoring students, directing and guiding their learning, supporting them in their educational process in collaboration with their families, directing the educational, academic and professional guidance of their students, contributing to their intellectual, social and moral development. It must also promote and participate in complementary activities, inside or outside the school grounds, encouraging all school activities to take place in a climate of respect and participation in order to foster the values of democratic citizenship and a culture of peace in pupils. They must inform families about the learning process of their children, coordinate teaching activities, work as a team with the rest of the professionals and must maintain their ongoing training through research and experimentation, always with the aim of continuously improving teaching processes.⁶

⁶ Article 91 of the LOE.

These functions, completed and structured by regional regulations, constitute a key framework in the performance of the work and a framework of suitability for the post to be filled.

Once the lack of performance has been analysed through the regulations that apply to this civil servant post, it must be included in the type, bearing in mind that the post has two limits: the lack of performance in the exercise of its functions and that this lack of performance affects the normal functioning of public services, and that this does not qualify as very serious. Moreover, from the subjective point of view, this type of offence does not require malice on the part of the offending official, but rather guilt, as could not be otherwise.

Case law has established terminology such as the following: minimum performance, normal performance, reasonable normal performance, performance in accordance with the norm... in this concept we can see that there are common features that are met in the unlawful act. Three issues are presupposed: firstly, that the attributions and tasks assigned to the post, specific to its category and function, have been clearly assigned; secondly, to determine the performance required for the attributed functions, which is assigned by the institution; and finally, to compare what has been achieved with what is to be expected.

The difficulty of this type of disciplinary action lies in the fact that the instructor must construct, through the collaborating regulations, the expected standard of teaching performance and compare what has been achieved with what is expected in order to prove the lack of performance of the civil servant, that this limit causes damage to public services and, finally, to establish a typical dosimetry with more serious types, indicating, with reasons, that it does not constitute a very serious misconduct.

7. Application or non-application of the *non bis in idem* precept.

Article 10.2 of the LOPJ [Translator's note: LOPJ refers to Spain's Organic Law 6/1985 of 1 July on the Judiciary (*Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial*)] establishes the automatic suspensive effect of the suspensive effect of pre-judicial criminal proceedings on other proceedings in cases where a ruling is necessary, establishing on the one hand the primacy of the criminal judge and on the other the suspension of the proceedings. In turn, article 22.1.g) LPACAP [Translator's note: LPACAP stands for Spain's Law 39/2015 of 1 October on the Common Administrative Procedure of Public Authorities (*Ley 39/2015, de 1 de octubre, del Procedimiento Administrativo Común de las Administraciones Públicas*)] regulates the possibility of the administrative rule to suspend the maximum time limit for a decision, establishing, as a cause, the obtaining of a prior pronouncement by a jurisdictional body for the resolution of the procedure.

When the same facts may be subject to both criminal and administrative sanctions, preference must always be given to the criminal jurisdiction.

Preference that translates into the obligation (provided for by law) to paralyse any sanctioning procedure until the issue is resolved in the criminal jurisdiction (STC 77/1983) (Álvares Vinagre & Bal Francés, 2019, p. 82).

Determining whether an offence under criminal jurisdiction coincides with the administrative reproach or whether, on the contrary, they are institutions of a different nature and, therefore, punishable at the administrative level, involves analysing whether the active subject, the fact and the legal basis coincide (STC 2/2003, 48/2007).

This assessment has consequences in the legal reality of an administrative sanctioning procedure, as the principle of *non bis in idem* is

instituted in a fundamental right enshrined in article 25.1 EC, which prohibits punishing twice for the same thing.⁷

If it is accepted that both sanctions are substantially identical, i.e. that there is no ontological difference between criminal and administrative sanctions, it must be accepted that the *non bis in idem* principle applies (Salat Paisal, 2019, p. 3) .

The consequence would be to close the proceedings in application of article 31.1 of the LRJSP, which establishes with regard to the concurrence of sanctions that facts that have been punished criminally or administratively may not be sanctioned, in cases in which the identity of the subject, fact and basis can be appreciated, in line with constitutional law.⁸

Otherwise, if there is a disparity with the legal basis, i.e. if the protected legal interest does not coincide, it must be accepted that the offence and the infringement may be punished jointly. The protected legal interest is the public value protected by the punishable offence.

The doctrine of the Constitutional Court, for example STC 234/1991 of 10 December 1991, maintains that "for the duality of sanctions (criminal and administrative) to be constitutionally admissible, it is necessary that the regulations imposing them can be justified because they contemplate the same facts from the perspective of a different legally protected interest and this supposes, therefore, that there is a different legal relationship which avoids the *non bis in idem* circumstance. "In order for a disciplinary sanction imposed for conduct that has already been the subject of a criminal conviction to be legally admissible, it is also essential that the legally

⁷ Legal Dictionary of the Royal Spanish Academy. <https://dpej.rae.es/lema/non-bis-in-idem>

⁸ Article 31.1 LRJSP.

protected interest is different and that the sanction is proportionate to that protection" (Fundamento Jurídico 2º).

As can be seen, case law admits that, although the *non bis in idem* principle proscribes duplicity of penalties when the triple basis (subject, fact and basis) concur, this would not apply in the case of a special relationship of subjection such as that which links public officials and the Administration if one of the three elements does not coincide.

In these cases, therefore, the exercise of *ius puniendi* by the courts and in turn the sanctioning power of the administration would be justified if the same legal basis does not exist (SSTC 2/1981; 50/1983) (Álvares Vinagre & Bal Francés, 2019, p. 95) .

8. Material principle of culpability.

The structure of the administrative offence is characterised by the presence of the material culpability of the offender, not only must the sanction be unlawful, but also culpable.

Guilt constitutes an individual element of the sanctioning law, by virtue of which the judgement of reproachability or punishability of the offender's conduct is formulated.

Article 29.3 a) of the LRJSP is unequivocal in establishing that in the graduation of the sanction, the degree of culpability must be taken into account, from which it follows that, in its absence, no sanction is possible (Gómez Tomillo & Sanz Rubiales, 2017, p. 432) .

A punishable reproach implies a legal censure or disapproval, i.e. the criteria for assessing the condition of the conduct are legal, never ethical. It

is forbidden in the cataloguing of a punishable act to apply the parameters of what is morally acceptable or unacceptable in order to determine guilt.

We can define guilt as a subjective factual imputation made up of a framework of individual, voluntary factors, in which the awareness of unlawfulness must be present and on which the legal assessment of the disciplinary procedure instructor is based. (Gómez Tomillo & Sanz Rubiales, 2017, p. 435).

The case law of the Supreme Court points out that the reprehensible conduct arises because the offender should have acted differently from the way they did. Moreover, it is necessary to individualise the reproach in order for guilt to be imputed. "For the imposition of a sanction and the consequences derived from an administrative offence, it is not enough that the sanction is typified and sanctioned, but it is necessary that the element or category known as culpability is appreciated in the offender. Guilt is the reproach made against a person because he should have acted differently from the way he did". (Legal ground 2, STS of 27 May 1999).

Therefore, the analysis of culpability involves a judgement of reproach directed at the perpetrator of an offence because he could have behaved in accordance with the law but did not do so (Gómez Tomillo & Sanz Rubiales, 2017, p. 435) .

Following the thesis of Manuel Gómez Tomillo and Íñigo Sanz Rubiales (2017), in order to assess culpability, there should be no grounds for excluding culpability (state of necessity, insurmountable fear or invincible error of prohibition).

Currently, the dogmatic tendency rejects that intention or guilt are integral elements of the judgement of guilt (Gómez Tomillo & Sanz Rubiales, 2017, p. 435) .

This is because contemporary doctrine tends to separate the analysis of intent and guilt (which are located within the subjective imputation of the act) from the true judgement of guilt in the strict sense, which focuses on the personal reproachability of the act already committed.

9. The principle of proportionality

The principle of proportionality implies that, as the sanctioning activity of the Administration is a typically legal activity, the factors that must govern its application must be based on the provisions of the legal system and, in particular, on the concurrent circumstances. *"It is precisely in this sphere that the reasoning of the specific administrative sanctioning act plays an extraordinarily clarifying role, insofar as it must define not only the circumstances modifying liability, but also the specific reason which the Administration considers to exist in order to impose a specific sanction, within the margins granted by the law".* (STSJ of Castilla y León de Burgos, 3/2017 of 13 January 2017).

The principle of proportionality is a constitutional criterion that requires that in the sanctioning measures adopted there are certain limits imposed on the actions of the Administration.

The main of these, established in article 29.1 of the LRJSP, imposes that administrative sanctions may in no case imply, directly or subsidiarily, deprivation of liberty.

On the other hand, the exclusive concept that disciplinary action will be triggered when a public interest is at stake, not a private or interpersonal interest, since the disciplinary power of the Administration is aimed at preserving the proper functioning of the public service.

The sanctioning power may only be put into practice when it is strictly necessary, suitable and proportionate to obtain the objectives pursued by it (Garberí Llobregat, 1994, p. 124).

Lastly, if the intercession of malice serves to define the type of sanctionable offence, its application to weigh the sanction as an aggravating circumstance is excluded. Contentious-administrative case law has been clear in this respect, "... the same factual or normative circumstance cannot integrate, at the same time, a constituent element of the type of offence and an aggravating circumstance". (STS of 17 April 1998).

In short, it is required that the sanctioning Administration sufficiently motivates the reasons for which the sanction in question is graded, explaining the concurrent circumstances that occurred in the specific case, an issue that is certainly complex due to the indeterminate nature of the sanctions imposed by the regulations and the absence of a punitive dosimetry guide." ... the principle of proportionality plays a key role in the field of administrative law on penalties, not only as an expression of abstract powers of application of the law in terms of fairness, but also because the penalties to be imposed are defined in our legal system, in general, in an extremely flexible way, in such a way that the same conduct may merit the imposition of different sanctions or even sanctions that move within very wide margins and which, for the same reason, may result, in practice, in extraordinarily diverse amounts and periods" (FD 6º STSJ of Extremadura 191/1996 of 21 February 1996).

José Garberí Llobregat (1994) points out that the gradation of penalties only obliges the nature of the repression of administrative offences to be appropriate to the nature of the unlawful conduct, and specifically imposes a duty to specify the size of the penalty in accordance with the seriousness of the act (Garberí Llobregat, 1994, p. 135) .

Is it a punitive dosimetry or a discretionary criterion to establish one sanction or another, or the length of time the civil servant must remain sanctioned when suspension from duty is proposed?

There is no rule that assumes the criteria of proportionality with one or the other duration, for example, in the suspension of the civil servant's functions, other than the usual up to three years if it is serious or up to six years if it is very serious.⁹

The instructor proposing the sanction (let us not forget that it is the competent body that decides) can weigh up using judicial pronouncements of similar cases and adapting it to the circumstances of each case, for example, with the precautions, nuances and exclusivity of analysis that must be applied by the instructor of disciplinary proceedings, the following example: "... the sanction of suspension from duty for one year (which could have been for up to three years) is appropriate and proportionate to the nature of the offence, since in this case, the lack of performance, resulting from the failure to carry out the duties of the teaching service, was final and derived from an absolutely passive attitude in dealing with these obligations, There are therefore subjective elements (as this passive attitude could only be due to manifest negligence bordering on conscious will), and objective elements (the evident disruption to the public teaching service) which duly justify the imposition of the sanction to the extent agreed" (Legal Ground 7 of the STSJ of the Canary Islands of 26 June 1998). (Gutiérrez Llamazares, 2007, p. 1229) .

Another question that may be asked by an instructor of disciplinary proceedings against teaching staff is whether there is the possibility of

⁹ Article 16, paragraph 2 of the RRDFAE: *The sanction of suspension of functions imposed for very serious misconduct may not exceed six years or be less than three years. If imposed for serious misconduct, it shall not exceed three years* .

reducing the sanction to less time than the time indicated in the calculation that marks the suspension of the official's functions (up to three years for serious misconduct and up to six years for very serious misconduct) and choosing a less severe measure.

This possibility is permitted by law, as article 29.4 of the LRJSP states that, when justified by the due adaptation of the sanction to be applied to the seriousness of the act constituting the infringement and the circumstances of the case, the body competent to decide may impose the sanction in the lesser degree. *"The principle of proportionality, as stated in the STS of 2 June 2003, tends to adapt the sanction, by establishing its specific graduation within the possible margins, to the seriousness of the act constituting the infringement, both in its unlawfulness and culpability aspects, weighing up the objective and subjective circumstances that make up the budget of the punishable act"* STS of 3 December 2008 (Rec. 6602/2004).

In short, the analysis of proportionality implies, on the one hand, assuming a reasoned reflection of what the Constitutional Court calls "judgement of necessity, suitability and balance, which is nothing more than the application of a criterion of reasonableness to the teleological concept that gives meaning to an investigative sanctioning procedure". (SSTC 66/1995, 55/1996, 207/1996).

On the other hand, the criterion of proportionality is indispensable for the graduation of the sanction. Given the reasons set out in constitutional jurisprudence, protected in article 29.3 of the LRJSP and TREBEP in article 96.3.

In the principle of proportionality, in accordance with the doctrine of the Constitutional Court and the aforementioned regulatory precepts, it applies the adequacy of three principles that must be weighed up and

which define the proposed sanction as proportionate in its broad sense: a) that of suitability or adequacy; b) that of necessity or indispensability, and c) balance:

The suitability or judgement of appropriateness. It is understood that the sanction is useful and appropriate to the end pursued, which is, on the one hand, the protection of a legal asset which is a public interest and, on the other hand, the necessary respect for the principles of exemplarity, efficiency, respect, consideration and attention to the general interests of citizens linked to the principle of action of public officials set out in article 103 of the Spanish Constitution. The necessary observance of the rights of those in administration must be valued, for example, to receive adequate educational attention, to ensure that their integrity is not endangered; but also to obey the instructions given, to treat colleagues or superiors with respect and deference.... It is peremptory, therefore, to define the legal right that is protected in the formulation of the offence and it is convenient to review, understanding the conception of the social sphere of Education, the damage done to the trust that citizens place in the good performance of the public services and in the fact that their rights will be respected by the Administration. " ...the purpose of the rule is fulfilled, in principle, by linking the act committed to the correlative sanction, since the harm to the public interest is implicit in the fact that the Law has criminalised the conduct in question" ... (STS 14243/1991 of 30 April 1991).

The judgement of indispensability or necessity. A civil servant is, in our system, a professional who occupies a post or employment in the public administration and must be subject to the regulatory principles that underpin the civil service. Article 8 of the TREBEP states that a civil servant is a public employee who performs paid functions in public administrations in

the service of the general interest¹⁰, i.e. a person who provides professional services in a public administration or institution by virtue of a statutory relationship under administrative law. This statutory relationship is based on those immanent deontological concepts that oblige a way of behaving and directing this public service. The administration proscribes and must sanction those behaviours that violate the principles that regulate civil service actions, as stated in articles 52, 53 and 54 of the aforementioned regulation.

The public interest or general interest is the name of an essential concept in the practice of civil servants that is identified with the common good of society as a whole, understood as a social body, and not so much with private interests, taking into account that public education is part of the general interest and that this social body is the educational community to which a civil servant teacher owe their duty.

The level or degree to which the legality and public interest (Article 29.3 c) of the LRJSP) and the discrediting of the educational institution must be assessed.

Balance. The least onerous sanctioning option for the offending official should always be chosen from among the possible sanctions. However, the possibilities must be evaluated and reasons must be given as to why the one chosen is the most appropriate. A sanction is considered to be balanced and appropriate if it is useful to the end pursued, which is none other than the effectiveness of administrative action, without which it would be impossible to provide the public services entrusted to it efficiently. Aggravating and mitigating factors must be assessed, taking into account the degree of intentionality, carelessness or negligence revealed in the

¹⁰ Article 8. TREBEP

conduct. In application of article 29.4 of the LRJSP and having analysed the seriousness of the fact constituting the infringement and the concurrent circumstances, it may be proposed to the body competent to decide, to impose the sanction in the lowest degree, allowing a sanction of less than three years for a very serious misdemeanour.

Conclusions.

The punitive power of the State is reflected in the penal order as a *prima ratio* and also in the punitive power of the Administration as a guarantor of the defence of the general interests of citizens by constitutional mandate.

A disciplinary sanctioning procedure carried out against a civil servant implies a procedure in which there is due separation between the investigative phase and the sanctioning phase, which will be entrusted to different bodies¹¹. This separation is a guarantee for the whole procedure and aims to ensure the final objectivity of the decision (Guijarro, 2025, p. 5).

It is also a reflection of the legality and legal certainty of the administration in the reproach of conduct contrary to the legal system.

These reproaches, instituted in disciplinary types, protect the administration's major legal assets: the trust of the individuals subject to administrative authority in the administration to protect their rights and the correct functioning of public services.

The instructor of disciplinary sanctioning procedures provides a proposed resolution after carrying out the investigation in strict compliance with its phases, as set out in the RRDFAE.

¹¹ Article 63.1 of Law 39/2015, of 1 October, on the Common Administrative Procedure of Public Administrations.

As a regulated investigation procedure and under the sanctioning power, it must comply with the principles of legal certainty, which is why the analysis of proportionality is evidence of this, involving an analysis of the practical reasonableness of the sanctioning decision.

The principle of legality imposes two spheres with regard to the conduct of proceedings: one material and the other formal.

The substantive principle imposes that the principle of typicity or taxation must be respected, whereby disciplinary offences must be described with sufficient material clarity and with a defining character that leaves no room for confusion.

The applicable law must be formally adopted before the offence or unlawful act is committed.

In this sense, the application of the law in the administrative sanctioning sphere has a relative effectiveness, given that the sanctioning norm is instituted in a blank law or blank types with a wide margin of appreciation that must be completed and specified by collaborating regulations, this is due to the impossibility of collecting all the punishable conducts in the administrative sphere, after which the conducts must be knotted in the punishable type to be considered a typical conduct.

Another material principle is the principle of *non bis in idem*, which is applied exclusively to persons subject to a special subjection, such as civil servants.

Once they have been prosecuted by the criminal jurisdiction, the facts declared final are binding on the administration.

The administrative sanctioning law can act by means of disciplinary proceedings by attending to and analysing the identity of the fact, subject

and legal basis. If all three elements coincide, the proceedings must be closed due to the effect of the *non bis in idem* principle.

Continuing with the list of material principles, the administrative offence is characterised by the presence of the material guilt of the offender, not only must the sanction be unlawful, but also guilty, and guilt must be an individual element from which the reproach is born. It is understood that the analysis of malice and guilt (which are located within the subjective imputation of the act) must be separated from the true judgement of guilt which focuses on the personal reproachability of the act already committed, that is to say, linked to the legal institute of punishability or that the conduct is worthy of reproach.

Finally, the principle of proportionality, whereby sufficient reasons must be given as to why the sanction is graded, explaining the concurrent circumstances in the specific case, the damage to the public interest, recidivism, and being able to establish a punitive dosimetry that is appropriate to the seriousness of the facts. Proportionality must be sufficiently reasoned.

In short, the material principles governing the sanctioning power of the Administration are essential to guarantee a legitimate and proportional exercise of its punitive power. Principles such as legality, proportionality, etc., seek to balance the need to sanction infringements with the protection of citizens' rights, avoiding arbitrariness and ensuring a fair and transparent framework for action.

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