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PROCESO DE INCAPACITACIÓN PEDAGÓGICA

TEACHING DISQUALIFICATION PROCEDURE

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Resumen

El procedimiento de incapacitación para el ejercicio de la docencia al que está afecto el profesorado eventual de los centros públicos presenta, pese a algunas similitudes, notables diferencias y posibles interferencias con la aplicación del régimen disciplinario y sancionador de la función pública. A menudo se entrecruzan entre ambos cuestiones conceptuales, procedimentales y jurídicas que pueden comprometer el trabajo de la inspección de Educación, y que en algunas ocasiones concluyen en su eventual anulación en instancias superiores.

Pueden plantearse, además, conflictos de competencia al respecto de la potestad legal o de la prevalencia de prioridades educativas, laborales o jurídicas entre los diferentes agentes implicados y sobre ciertos derechos fundamentales.

En esta ponencia se intenta incidir en algunos de sus aspectos controversiales más comunes, en su diferenciación con respecto a otros procedimientos administrativos en cierto modo equiparables y en la fragilidad normativa de que a veces adolece, así como en propuestas para

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incrementar su seguridad jurídica y su efectividad al propósito que se pretende. Entre ellas, muy especialmente, la institución con carácter normativo del perfil competencial docente y el subsiguiente desarrollo legal de los sistemas ya previstos de evaluación de desempeño.

Palabras clave: *Inhabilitación para la docencia, dificultades y problemas, seguridad jurídica, potestad legal, competencias profesionales docentes.*

Abstract

Despite certain similarities, the procedure for disqualification from teaching to which temporary staff in public schools are subject presents notable differences and some possible collisions with the application of the sanctioning disciplinary regime of the civil service. Conceptual, procedural, and legal issues often overlap between both, which may compromise the work of the Education inspectorate and sometimes even lead to further invalidation at higher levels.

Conflicts of competence may also occur with respect to statutory power to act or the prevalence of educational, labour or legal priorities among the different stakeholders and over certain fundamental legal rights.

This paper is an attempt to highlight several of its most common controversial aspects, certain differences with other somehow similar administrative procedures and the reasons of the legal fragility it sometimes suffers from, as well as a few hints towards the strengthening of its legal support and effectiveness for the intended purpose. Among them, mostly, the institution by law of the teaching profile based on professional competences, as a mandatory basis for the subsequent legal development of the already foreseen systems for job-performance evaluation.

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Keywords: *Disqualification from teaching, difficulties and problems, legal certainty, legal authority, professional teaching competences.*

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1. INTRODUCTION.

I must admit first of all that my initial approach to this assignment was, as usual, to prepare an orthodox masterly exposition on legal, technical and procedural issues, in the purest academic tradition and the fondness in this type of event of the professor that we all seem to carry within us. I dismissed it immediately for two reasons: firstly, given the audience, because I am fully aware that anyone present here knows as much or more about this issue than I do and, therefore, it would be as redundant as it would be sterile, without contributing anything significant to the collective reflection that is intended. All the more so, since the intricacies of this procedure are precisely the subject of the next round table on the programme.

Secondly, some of you know me, I am overcome by my natural tendency for digression and alternative thinking, not as mere rhetorical polemic (far from my intention), but as constructive dialectical tools in the search for innovative solutions. It is a question, then, of focusing on the problems and of centring the debate not on what we already know, but on what raises doubts, on the most problematic or controversial aspects. And, from there, to promote shared reflection, the collaborative contrast of opinions around reasonable and effective operational proposals.

Experience has taught us that the two issues covered by this conference often confused or mistakenly mixed up: the disciplinary system and disqualification from the teaching activity. And this causes quite a few headaches: which of the two should really be initiated in each specific case, are the legal basis and the scope of application identical, and what are their effects? Why is it so difficult to identify, qualify, objectify and typify certain conducts, why do we often seem to lack the necessary legal certainty, what makes the concept of disqualification from teaching so tremendously slippery?

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This first presentation of the conference, simply by opening the debate, also offers me the privilege of being able to establish some of the initial parameters of the issue: I am already anticipating that I will propose more questions to open the reflection than certainties to close it, in the hope that the collective knowledge that follows will contribute to shed some light. The following speakers will be in charge of refining, amending and refuting, with every right and surely greater solvency, everything that may be necessary.

So, I would like to start by reading an extract from an actual disciplinary case[1], which may illustrate some relevant issues:

> "According to the educational sciences and numerous studies of irrefutable scientific-pedagogical solvency, it is unquestionable that teaching is a complex activity that involves the simultaneous mobilisation of very diverse competences, both professional and personal and social. Thus, although it is obviously basic and essential, it is not enough just to have an adequate academic mastery of the subject to be taught, but also requires the practical application of a series of knowledge of psychology and sociology, pedagogical strategies, didactic techniques, communication skills, social skills and emotional intelligence, as well as the mastery of certain ethical, moral and relational codes based on respect and integrity in interpersonal interactions.
>
> It also requires the deployment of a series of attitudes necessary to be able to adequately modulate all of the above, such as moral

[1] Identical arguments are contained in two proposals for the resolution of two different disciplinary proceedings, one against a teacher of religion with an employment contract and the other against an interim vocational training civil servant. As will be seen below, the contractual and administrative situation of both is not a minor detail for the purposes we are concerned with here. It should also be noted that the passage of time means that some of the regulatory references cited are now obsolete: thus, the 1989 Basque Civil Service Act was replaced at the end of 2022 by the new Basque Public Employment Act.

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ascendancy, empathy, coherence, responsibility, equanimity, fairness, adaptability to different types of people and situations, self-control, adaptation to different relational and communicative registers, commitment to collective projects, obedience to rules and superiors, personal and professional integrity, exemplarity, respect for people and institutions, adaptation to social customs and habits, etc. The concurrence of all of these, and always depending on the specific and changing context in which they must be exercised, determines the teaching competence or function and therefore defines the good professional practice of the teacher.

Thus, it is easy to see that the professional, personal and social competences, knowledge, skills, aptitudes, strategies, techniques, attitudes, values and code of conduct necessary for the performance of teaching practice may vary substantially in the different stages that make up the education system, in the different centres, in the different functions assigned to it, with the different pupils assigned to it, in the different responsibilities of management and didactic coordination, or in the essential interaction with the different agents involved in the educational process.

Having said that, however, it must be made absolutely clear at the outset that it is not the purpose of the present administrative procedure to settle any such questions. The application of the disciplinary regime for public teaching staff has nothing to do with an assessment of their professional, pedagogical or personal skills, which, moreover, is legally regulated in the case of temporary teaching staff by means of another procedure which is specific but distinct from this one: disqualification from teaching. In other words, no assessment of the alleged aptitude or suitability for teaching is the object of the sanctioning regime. Consequently, in the following proceedings, it is

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not appropriate to take a position on the teaching competence of the accused teacher in one or more of the aspects mentioned, but simply to try to determine the possible infringement of their legal obligations or, if this were the case, the infringement of the rights of third parties through one or more of his specific actions, these necessarily objective and objectifiable facts being the only ones that legally support the administrative application of the sanctioning regime in the field of the public teaching service.

Abundant jurisprudence[2], including from the highest courts such as the Constitutional Court (STC 18/1981, STC 120/1996, STC 70/2008, among others), states that administrative sanctioning law is part of the punitive order of the state, and therefore the same principles that inspire the criminal order apply to it, although not through a literal application, but "to the extent necessary to preserve the essential values".

In short, therefore, the ultimate purpose of applying disciplinary proceedings in the administrative sphere to this case must be limited to determining, within the strict legal framework applicable to it, whether any of the facts at issue can be objectively and undoubtedly substantiated in one or more of the conducts that Law 6/1989, of 6 July, of the *Función Pública Vasca* (Basque Civil Service), or other, in particular Royal Legislative Decree 5/2015, of 30 October, of the *Estatuto Básico del Empleado Público* (Basic Statute of the Public Employee), expressly include as misconduct in any of its types and degrees.

[2] STC 42/1987: the principle "*nullum crimen nulla poena sine lege*" translates into the imperative requirement of regulatory predetermination of unlawful conduct and applicable penalties. It requires *lex certa*: "in sanctioning law, open types or imprecise typifying formulas that allow the Administration excessive freedom when subsuming the facts into the legal type are not admitted". (See footnote 5 below)

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It is precisely this principle of legality and typicity which is one of the basic pillars of the legal system, both criminal and administrative sanctions, together with the others of non-retroactivity, proportionality, culpability and, most especially, the presumption of innocence[3]. In fact, the legal services of the Department of Education have repeatedly insisted on these issues: "The imposition of an administrative sanction in the exercise of disciplinary powers requires full proof by the administration of the reality of the conduct imputed to the defendant, capable of destroying the presumption of innocence guaranteed in matters of punitive law by article 24 of the Constitution, without prejudice to the peculiarities of the disciplinary regime. It follows that the first and fundamental requirement is the establishment and determination of the punishable act or acts, which must be duly identified and specified, as this is essential for assessing their reality and existence, determining their scope and content, assessing their legal significance, a specification that will allow the accused to defend himself adequately. This means that in sanctioning law it is not possible to start from presumptions and conjectures or to direct the sanctioning power against imprecise or undefined conduct that prevents the facts from being specified and consequently to delimit their classification and legal effects, hindering the interested party's right of defence"[4].

The first task of the investigation therefore consists of trying to determine the veracity of the specific facts alleged in relation to the professional practice of the teacher concerned, and to rule out anything that is not based on irrefutably demonstrable evidence. Because, ultimately, the possible resulting disciplinary sanction, the

[3] EBEP: article 94.2.e

[4] STSJ Catalonia of 3 April 2000, Sala de lo Contencioso-Administrativo, Sección 4ª. And communication (01/03/2016) from the Central Inspectorate of Education of the Basque Country, with transfer of the opinion (29/02/2016) of the *Dirección de Régimen Jurídico y Servicios* (Directorate of Legal Regime and Services).

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sole objective of any punitive procedure, may only be proposed in respect of "acts or conduct constituting a disciplinary offence", i.e. never on judgements, opinions, subjective appraisals, alleged intentions, forecasts, futures, conjectures, conjectures, personal assessments of attitudes or similar. And, in turn, such a disciplinary offence is only such insofar as it involves "failure to comply with one's own obligations and duties" (article 82 of Law 6/1989): It is therefore a question of demonstrating whether there has been an indubitable and objective fact on the part of the teacher, a harmful action or omission, which inevitably entails in a direct and verifiable cause-effect relationship the breach of any of their legally attributed duties and/or the infringement of the rights of third parties, and which, furthermore, deserves to be considered a punishable offence as it corresponds faithfully to one of the types of offences expressly defined in the legislation in question.

And in this sense, it is also necessary to distinguish between the teacher's own conduct and attitudes, since while the latter are, as has already been established, essential in the performance of the teaching function, they are not in themselves liable to result in misconduct, a consideration which only the former can merit, the only ones, therefore, which could result in a sanction. In other words, the lack, inadequacy or inappropriateness of certain professional, personal or social skills directly involved in the professional practice of teaching could be the object of reproach in the strictly educational sphere, based on didactic, pedagogical, methodological, social or ethical considerations, but never in the sphere of administrative sanctioning law if there has not been simultaneous involvement, as a consequence of the above or not, in some specific conduct objectively typified as a punishable offence".

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In summary, therefore, the main idea lies in the need to differentiate very clearly between the application of the disciplinary regime to public teaching staff and this other specific administrative procedure, which would fit much better into something closer to a performance assessment of their professional, didactic-pedagogical, personal or social competences, and in which the determination of serious deficiencies could finally lead to the intended disqualification from teaching.

In other words, it must be made quite clear from the outset that no assessment of the aptitude or suitability for teaching, of the greater or lesser professional competence (or incompetence) of the teaching profession can be the object of the sanctioning regime. And with this, the law strictly prohibits the slightest hint of creativity or flexibility both in the determination of the nature of the possible offences subject to sanction and in the interpretations of their classification, expressly banishing, moreover, the use of analogy. [5]

Both procedures respond to substantially different realities, legal grounds and areas of application, and also have different effects (much broader in one than in the other), although it is true that both may share a common "inspiring" and "generic" legal cause: article 178.k of the Basque Public Employment Act (also in the EBEP), when it establishes as a very serious misconduct "the notorious failure to perform the essential functions inherent to the job or the functions entrusted". However, legally speaking, the performance of duties and the capacity (or competence) to do so are substantially different issues

[5] Principle of typicity (article 27) of Law 40/2015, of 1 October, on the *Régimen Jurídico del Sector Público* (Legal Regime of the Public Sector): Only administrative offences are those provided for as such by a Law. Penalties may only be imposed for the commission of administrative offences, which are also defined by law. The implementing regulations may introduce specifications or gradations to the table of legally established infringements or penalties, but they may not constitute new infringements or penalties, nor alter the nature or limits of those provided for by law. The rules defining infringements and penalties may not be applied by analogy.

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It can be agreed that the normative support of the disciplinary regime, based on the exhaustive regulation of obligations, rights, codes of conduct, classification of offences, degrees, mitigating and aggravating factors, catalogue of sanctions, guarantees and administrative procedures of the civil service (not specifically teaching), is much more solidly defined and developed in laws and regulations[6] at the highest level, and therefore confers much greater legal certainty than what is currently a rather marginal administrative procedure, based solely on rules of a lower hierarchical rank[7] and affecting only temporary teaching staff in public schools, thus suffering from considerable legal weakness.

However, it cannot be overlooked that temporary staff are also subject to the general legislation on the civil service, including the disciplinary sanctioning regime for the same cases, in the same terms and with the same conditions and guarantees as career civil servants, so that the procedure of disqualification from teaching could be understood as a double supervision of their professional practice: on the one hand, they are subject, like the rest, to the possible sanctions deriving from the breach of their obligations (disciplinary regime), including removal from their post, and, on the other hand, to the consequences of the application of this other specific procedure (that of disqualification from interim teaching),

[6] Royal Decree 33/1986 of 10 January 1986, approving the *Reglamento de Régimen Disciplinario de los Funcionarios de la Administración del Estado* (Disciplinary Regulations for Civil Servants of the State Administration).

[7] In the Basque Country, Article 45 of the Order of 27 August 2012 of the Regional Minister of Education, Universities and Research, which approves the regulations on the management of the list of candidates for the coverage of temporary teaching staff needs in public schools, defines the protocol for determining the lack of competence to continue carrying out their duties, with express appeal to Article 25 of Law 2/1993, of 19 February 1993, on *Cuerpos Docentes de la Enseñanza no Universitaria de la CAPV* (Teaching Bodies in Non-University Education in the ACBC), section three of which contemplates the possible removal of civil servant staff for supervening causes, derived, among other reasons, from "lack of capacity for performance manifested by insufficient performance which prevents them from efficiently carrying out the functions attributed to the post entrusted". However, although they may have a certain relationship, performance or effectiveness are not the same as capacity or competence, nor do they have the same legal significance.

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particularly linked to the sole scrutiny of the, shall we say, "quality of performance" in their work[8]. That is to say, the possible suspension from employment and salary can come about in both ways: for having incurred in disciplinary misconduct and for determination of insufficient teaching ability. But part of the problem lies precisely in the fact that the simple concurrence this is not *per se* legally typified as a punishable offence, at least not in the absence of comorbidity with other conducts that are.

2. WHAT EXACTLY IS IT ABOUT?

To put the matter in its proper perspective, if we consider the possible consequences of these two administrative concepts, it appears that, although one is more forceful than the other, it is fact a suspension of the employment relationship, a contractual termination, i.e. a dismissal. With temporary teaching staff, this is a priori procedurally somewhat simpler, and less of a guarantee, than with career civil servants, due to the very legal nature of employment and labour relations within the civil service.

But it is in any case a suspension of functions (temporary or permanent) motivated by various possible causes, among which there may be several of an occupational, pedagogical-educational or even medical nature (with a certain prevalence here of psychiatric and mental health problems). And this considerably increases the complexity of the matter: while in the general labour sphere of other sectors (Workers' Statute and collective agreements, basically) the objective causes of dismissal are highly

[8] Law 11/2022, of 1 December, on Basque Public Employment, classifies as very serious misconduct (article 178) "the notorious failure to perform the essential functions inherent to the job or the functions entrusted" and serious misconduct (article 179) "the lack of diligence in the performance of their duties and the lack of performance that affects the normal functioning of the services and does not constitute very serious misconduct". Possible sanctions include, specifically for interim civil servants, revocation of appointment and removal from the employment exchange, as well as suspension of functions and remuneration (article 183) for a variable period of up to six years.

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regulated, the discrepancies of which are settled in the social jurisdiction (not in the contentious-administrative jurisdiction of the civil service), and medical incapacity is arbitrated in the health and social security sphere (inspection and medical courts), disqualification for didactic-pedagogical reasons is revealed as a much more diffuse and compromised matter: firstly, because the criteria involved are often more subjective than normative (pedagogy and didactics are social sciences subject to permanent debate) and, furthermore, because in order to be fully effective it will require the final ratification of one of the two previous bodies, which sometimes does not occur, generating conflicts of competences and between educational, administrative, labour and legal priorities.

Because, in the end, a social security decision of incapacity for work generates rights, either the recognition of certain social and tax benefits, or a more or less substantial pension depending on degrees and circumstances. But a disqualification from the exercise of teaching dictated by the personnel management simply deprives them of these rights[9]. Moreover, it is not legally binding on the social security or any other official public body. In reality, therefore, it is nothing more than a letter of dismissal subject to other legally competent bodies finally declaring it to be fair or unfair.

However, the problem to which it is intended to respond is very real and, in certain situations, it is a pressing one in the ordinary running of schools and, above all, in the guarantee of certain fundamental rights of third parties: What to do with a teacher who, for whatever reason, shows a clear incompetence in the correct performance of their professional duties, with the added effect of being able to seriously harm the fundamental right to education of the pupils and, on occasions, even endanger the well-being,

[9] There is also disqualification as a consequence of a final judicial decision for the commission of an offence defined in the criminal code that legally entails such an additional penalty, although this does not apply here, as it is simply a question of the transfer to the teaching profession of the superior mandate of a judicial order.

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integrity and physical, psychological, emotional and moral safety of minors under their guardianship?, What are the options for career civil servants, temporary civil servants, and in private education?

In this matter, it is common to see an alternation of significant terms and concepts. Thus, we speak indistinctly of incapacitation, disqualification and suspension, be it work-related, pedagogical, didactic or professional, and of ineptitude, lack of competence, lack of suitability, poor performance, inhibition, inadequacy, non-compliance, negligence... And despite the legally transcendent nuances between them, in all cases the end pursued is none other than the removal (precautionary, temporary or permanent) from the exercise of teaching practice. For this reason, it is perhaps clarifying to start at the beginning and go back to the origin: what does teacher training or authorisation consist of, how is it obtained, who has the legal power to grant it[10], and to withdraw it, under what circumstances, with what regulatory support, by means of what procedures, with respect for what guarantees?

First of all, it should be recalled that teaching is not a legally regulated profession in Spain, as are, among others, medicine, law or architecture. Not, at least, in all cases, nor in all cases equally: in general, the right to practice teaching as a profession is not legally and exclusively restricted to a specific university education, nor to other additional mechanisms of verification and control against intrusion and malpractice, such as professional membership. Thus, although with notable differences for socio-historical reasons between early childhood and primary education and secondary and special education, the teaching degree (previously a diploma) is much more directly attached to this legal training for teachers than the requirement of a university degree in any branch of knowledge together with a master's

[10] As far as the Education Inspectorate is concerned, none of its functions (LOE-LOMLOE: article 151) expressly confers on it the power to grant or withdraw teacher training, beyond "supervising teaching practice and collaborating in its improvement" (151.b). The pedagogical and organisational evaluation envisaged literally refers to schools, their projects and programmes (151.a).

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degree in teaching specialisation for secondary education teachers (previously a bachelor's degree or equivalent and *CAP* [Translator's note: The *CAP* (Curso de Aptitud Pedagógica) was a former postgraduate qualification in Spain required for secondary school teaching.])[11]. In the Basque Country (and, to some extent, also in Navarre), in addition, the accreditation of communicative competence in Basque.[12]

To a large extent, the atavistic conception that anyone who knows (or is supposed to know) something is simply qualified enough to teach it, that a certain level of knowledge is sufficient to teach any subject, still seems to persist as an underlying idea of the teaching profession. In short, it is still thought that anyone with a university degree can simply be a teacher. But it is well known that this is not true today, that it ceased to be true a long time ago: education, much more than just teaching, is an enormously complex professional activity, which involves many more requirements than just scientific-technical or academic knowledge.

But even ignoring the above and assuming that all active teachers have accredited the necessary professional training by passing their initial university studies, then the concept of disqualification from teaching can only be considered as a supervening necessity, promoted by circumstances that have occurred or, more often than not, become evident after the start of their teaching practice. In this sense, a distinction should be made between incapacity for work (partial, total or absolute) under the social security system, which we have already seen, and incapacity or, rather, professional disqualification, which we are concerned with here. But both basically

[11] Various national and international political bodies and educational institutions insist on the urgent need to modify and improve initial teacher education and the systems of first access to teaching. They propose, among other measures, the reform of education faculties and the creation of specific university centres for teacher education.

[12] However, the current severe shortage of teachers in certain subjects and specialisations is increasing, at least temporarily, exceptions, exemptions and practices which imply a significant relaxation of some or all of these academic, pedagogical and linguistic requirements.

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coincide, although with different motivation, legal framework and effects, in the deprivation or withdrawal of a condition that until then was taken for granted and well taken for granted.

In the first, the labour and social security authority has exclusive legal competence to determine whether a person continues to be physically or mentally capable of carrying out the job that they have been legitimately carrying out until then, due to disability caused by illness, deterioration, accident or similar[13]. This is an intervention based on medical, psychological, functional or sensory issues, which are relatively simple to objectively assess and evaluate.

In addition to the possible declaration of incapacity for work in its various degrees, the legal obligation of the company (and for these purposes the public education administration is also an employer) to adapt the job to the new conditions of health or disability of the worker may also apply here on occasions: The Workers' Statute, the Law on Occupational Risk Prevention, the EBEP, various directives and the Court of Justice of the European Union (CJEU) itself repeatedly state that in such situations it is the obligation of the company to adapt the job to the conditions and circumstances of the worker, and not the other way around, by means of work reorganisation, adaptation of functions, reduction of working hours, change of post or other equally appropriate formulas.

In the specific educational context, however, this often has a serious negative impact on schools, given the enormous difficulty, the practical impossibility of adapting most of the functions and tasks, since these are

[13] To this end, the *Instituto Nacional de la Seguridad Social* (National Social Security Institute) has a Vocational Assessment Guide which lists the competencies, tasks and requirements, in different areas and degrees, for the performance of the different occupations, including teachers at different stages and levels, which is used as a basic reference framework in cases of incapacity for work. It is organised around certain competences and tasks foreseen for each profession, the physical, sensory and mental requirements for their performance, and a forecast of the possible associated occupational risks and the occupational illnesses legally recognised as such for each case.

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essentially always the same, or of changing jobs, since those contained in the job descriptions are all teaching posts (there are no non-teaching posts to relocate someone who can no longer perform such a function). But it also raises another dilemma that is essential to what concerns us here: with what legitimacy could the education administration suspend someone from employment due to an alleged supervening incapacity when it is the administration itself that has the legal obligation to adapt the job to such a circumstance?

However, and apart from other disquisitions, it is the second hypothesis that really concerns us: the possibility withdrawing someone's teaching qualification after sometimes long years of teaching and after due accreditation of full compliance with the legal requirements of academic qualifications and didactic training at the time of their initial incorporation into the education system.

This and no other is the real Gordian knot: on the basis of what grounds and evidence, with what authority, in accordance with what law and with regard to what procedural guarantees is it legitimate to seek the *de facto* (but not *de jure*) annulment of a certificate of professional competence that was obtained and accredited legally at the time and, on that basis, to terminate the employment contract? How strong must the burden of proof be to overcome the risk of arbitrariness (and the consequent lack of defence, which often results in the annulment of these procedures), how robust and solid is the necessary legal support so that the decision cannot later be rectified in higher instances (or even, as has been the case, be accused of overreaching, abuse of law and of being based on mere "pedagogical vagaries" not supported by law[14])? and could this not also lead

[14] Based on the provisions of article 27 of Law 40/2015, of 1 October, on the Legal Regime of the Public Sector on the very restrictive interpretation of the basic principle of typicality (see note 5 above), no type of disciplinary sanction could be sustained for lack of sufficient teaching qualifications, as it is not expressly classified as such (nor is it susceptible to

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to questioning (at least morally and rationally) the validity of the previous teaching, assessment or qualification proposal actions of such a teacher throughout their previous tenure and, therefore, appeal to the possible subsidiary responsibility of the education administration that has kept them in a post for which it now determines that they were not properly qualified?

The training required to start teaching (the legally prescribed professional qualification) is provided by the corresponding university faculties, and is obtained after passing an initial training that includes an academic curriculum and an internship programme. In some cases, the degree itself includes pedagogical-didactic training, in others this is obtained with a separate specialised master's degree.

The public teaching service is accessed by passing a selection procedure strictly regulated by the competitive examination system[15], which also includes a tutored and evaluated internship phase. The competition also requires prior accreditation of the requirements of higher academic qualifications and, where applicable (secondary education), of specific pedagogical-didactic training.

So, how can these accreditations of capacity and competence be suspended *a posteriori*, with the minimum guarantees of legal security, and for the sole purpose of professional performance (never for the validity of the academic qualification itself, which is not annulled), can an administrative body contradict in this way another academic body, distinct and prior, which has the exclusive legal authority to grant these accreditations (the university)?

analogy with "lack of performance" and, furthermore, analogy is also expressly prohibited). And, of course, there can be no sanction outside the disciplinary regime.

[15] Royal Decree 276/2007, of 23 February, approving the Regulations on entry, access and acquisition of new specialisations in teaching bodies. Currently under revision.

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But, on the other hand, and this could open up a possible solution, education laws also include provisions for the establishment of a teacher performance evaluation system, albeit only for public education and still with very little regulatory development[16]. The LOMLOE even foresees, in its novel Forty-eighth Additional Provision, that "teaching staff who show a manifest lack of conditions to occupy a teaching post or a notorious lack of performance that does not entail inhibition, may be removed from their post and carry out other tasks that do not require direct attention to students"[17].

Note here the relevance of the fact that for the first time in the normative framework at the highest level (organic law), the "lack of conditions for occupying a teaching post", i.e. professional teaching competence, is expressly mentioned. Should this be the most logical and effective way, so why has it not yet been developed normatively?

Both the application of the disciplinary regime to civil servant teachers and the disqualification of temporary teaching staff from teaching are purely reactive punitive mechanisms, in one case for breach of their own obligations or infringement of the rights of third parties, in the other for determination of manifest incompetence. And both require, by their very nature and the rights they affect, reinforced legal solidity. In both cases, the ultimate aim to protect a legal right that goes beyond the employment

[16] LOMLOE: article 106.

[17] The crux of the matter lies in the "manifest lack of conditions for occupying a teaching post", and in the "notorious lack of performance", since the "inhibition" cited below constitutes per se an expressly typified disciplinary offence. But it should also be noted that "negligence in the performance of the public employee's duties does not fit into the lack of performance, without prejudice to the fact that negligence could constitute a different offence" (SJCA Madrid 235/2027). Thus, negligence is the lack of attention and care in the performance of a task (doing something wrong), while inhibition consists of the non-assumption of a due obligation (not doing), and the lack of diligence in the unjustified delay of a job or compliance with a deadline (doing late). And for the concurrence as a fault of any of them, it would be necessary to determine, in addition, intentionality or bad faith on the part of the actor. Not to mention that the foreseen consequence of the change of functions to others that do not require direct teaching may certainly be paradoxical: in some cases, it could be understood more as a reward than a sanction. But this is another debate...

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rights of the teacher himself: the effective protection of the fundamental universal right to education with guarantees of quality and respect for the rights of pupils, who are minors in most cases. And this is basically what must underpin the investigation of any of these proceedings. But, together with this, and due to the guaranteeing nature of the law itself, it must be done with sufficient evidential strength to destroy the presumption of innocence, which in this case would be, more than a simple presumption, prior and reliable accreditation of capacity[18].

A number of other interesting considerations should also be made. It has already been established that the procedure for disqualification from teaching is currently only envisaged for temporary teaching staff at public schools. So, what happens when the person who manifests this alleged lack or loss of capacity is a career civil servant (even if they are not at fault for breach of duty, which would entail the application of the disciplinary regime), what other legal options are available in response to a similar situation, and if they are employed teaching staff, does this also apply to career civil servants (even if they are not at fault for breach of duty, which would entail the application of the disciplinary regime), and what other legal options are available in response to a similar situation? Is it also valid for teachers in privately owned schools (in the Basque Autonomous Community they teach half of all pupils in compulsory education)? Why is it that in the legal system of education and the teaching profession there is no common frame of reference at the highest legal level which clearly defines precisely what this teaching competence consists of, what tasks it comprises, what requirements it needs (beyond the generalities of article 91 of the LOE), and which can thus be applied to all teaching staff, in all centres, regardless of the particular contractual relationship or ownership?

[18] It also ensures that the measure finally adopted is strictly in line with another basic legal principle: that of proportionality.

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And this is precisely where I wanted to come, not to lament the arduous and often fruitless nature of our work as a result of such loopholes or lack of regulatory development, but to encourage our policy makers to fill them quickly and effectively.

3. PERFORMANCE ASSESSMENT: CATALOGUE OF PROFESSIONAL TEACHING COMPETENCES (TEACHING PROFILE) AND MONOGRAPH OF FUNCTIONS AND TASKS OF TEACHING POSTS

It is paradoxical to note that all the most recent educational laws and curricular decrees (royal decrees at national level) structure the teaching-learning process around the student's exit profile, with a precise definition of this based on an exhaustive catalogue of competences, knowledge, standards, indicators, descriptors, levels, etc., while practically nothing is specified with regard to the competence profile required of teachers in order to make all of this feasible.

Recently, it is true, there have been some notable developments in this respect. Thus, the new curriculum decrees of the Basque Country include an article (20, 24 and 17, respectively, in decrees 77 for Basic Education, 76 for Baccalaureate and 75/2023 for Pre-school Education) on this issue: " teachers must have a competence profile that enables them to assume in optimum conditions the responsibilities inherent to their different functions and, especially, those linked to facilitating the achievement of the competences of the pupils' exit profile", although they establish that this "will be defined by the department responsible for education by means of the corresponding regulatory provisions"[19] and that it will constitute the main objective of in-service teacher training.

[19] Of the three, only the last one defines more clearly a total of eleven aspects, although more linked to the functions and tasks of the job at that educational stage than to a real catalogue of professional competences.

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In other words, in addition to not developing the specifics of this competence profile in the regulations, it is inferred that it will have to be perfected in the context of professional performance, through ordinary practice in the teaching post itself, no longer as a necessary requirement for access to it, nor for permanence in it: the competence deficits detected in the teaching staff based on the needs of each teaching centre will have to be corrected through the implementation of in-service training activities[20]. Curiously, this last provision could well serve as an argument to delegitimise (or at least weaken) disqualification for teaching reasons, since it is tacitly assumed that the response to an alleged lack of sufficient capacity or competence should be training, not suspension of employment. And this is with the added consideration that in-service training is legally both a right and an obligation of teachers, but (and here is the relevant nuance) the responsibility of the education administration.

In any case, to date we lack a firm and unappealable regulatory framework to regulate the catalogue of professional teaching competences. And, without it, we lack the essential legal basis for the implementation and development of any procedure for the evaluation of teaching performance and, consequently, for the objective assessment of possible training or incapacity for professional practice, which generates great legal uncertainty and makes it easily open to questioning, refutation and invalidation. Because, in short, what it is understood that any teacher has to know and do, how they should act, what aptitudes and attitudes to mobilise, what personal and social skills to deploy or what qualities to bring together, are thus left at the mercy of subjective interpretations by the parties, on which no administrative decision of this type can legally be supported with the minimum required solidity, even less so with serious employment effects that it entails.

[20] Jean-Paul Sartre: "each man is what he makes of what is made of him".

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In fact, reality sometimes shows that not only are several of these decisions of disqualification from teaching challenged and even finally annulled, but also that their actual practical effects can be quite limited. In the best of cases, it entails only a brief removal from the teaching post, a temporary exclusion from the lists of candidates for substitution (until a final court decision or, sometimes, even before, on appeal, and with the obligation, in the case of an upheld decision, to compensate the salaries not received), because, in the absence of a more consistent regulatory framework and more effective mechanisms, as long as their professional qualifications and training accreditations remain intact, as legal requirements for access to teaching, they can continue to teach without any legal impediment whatsoever in a privately owned centre or in another autonomous community, register again at the next opening of lists (in another speciality or occasionally, through certain bureaucratic loopholes, in the same one), and even freely take part in competitive examinations and obtain a permanent post[21].

At present, as has already been pointed out, the only legal text of maximum importance that serves in any way to delimit the teaching profession is article 91 of the LOE-LOMLOE on the functions of teachers: twelve generic tasks (programming, evaluation, tutoring and guidance, coexistence, information, coordination...), common and not differentiated by type of teaching, speciality, stage, level or post, and exclusively referring (in a rather unspecific way) to "what" a teacher should do, but not to "how" they should do it or to "what skills" are required to do it. Nothing to do, therefore,

[21] It is a striking paradox that someone previously declared unfit as a result of an administrative decision of this type can, without further legal impediment, pass a competitive examination whose declared purpose is none other than to demonstrate his teaching competence, and finally obtain a post as a career civil servant despite having previously been disqualified as an interim civil servant. And that is if he does not acquire that status by means of an extraordinary stabilisation procedure, without taking a single test or appearing before an examining board.

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with a real teaching profile, with a real catalogue of professional competences for the educational field.

In the same vein, it is also shocking that, among all the jobs in the entire civil service sector, teachers are among the few for whom there is no official monograph of tasks, attributions and specific jobs. It is very significant, and sometimes problematic, that while the janitor in a public secondary school has one with a notable level of specificity, none of the teachers working in the same school have one: it is thus quite easy to legally objectify what is required of the job performance of one, but not of the others.

In conclusion, the simultaneous absence, on the one hand, of a regulation of good standing that clearly defines the catalogue of professional teaching competences with sufficient legal solidity and, on the other, of a monograph or list of the specific tasks assigned to each educational post (obviously necessarily very different in early childhood education or in a language school, in a secondary school educational guidance post or a vocational training specialisation course) poses serious difficulties in the current protocols of disqualification from teaching: in the absence of a legal definition of what someone has to do, it would be difficult to reproach them for not doing it, or for doing it incorrectly. And even less so could any consequences be derived from this.

It seems, however, that some incipient steps are being taken here too. As far as is known, at the end of last year the Ministry (with the participation of all the Autonomous Communities) completed a report with a concrete and well-developed proposal for a framework of professional teaching competences. In the Basque Country[22] there is already a detailed proposal

[22] In 2021 there was already a previous document with quite detailed reference to a list of areas, dimensions and aspects, which would make up proposed teacher profile for our education system.

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for its own teaching profile based also on a catalogue of competences. And likewise in Catalonia, all of them aligned with the European competence framework. While awaiting its final regulatory treatment, it seems that this framework of professional teaching competences could become the basic reference necessary to redefine and update such substantial aspects of the teaching profession as initial teacher training (university training and professional qualification process), the start of teaching (new teachers and first steps), the systems of access to the public teaching service (competitive examinations), tutoring in the internship phase (monitoring, evaluation and training), the design of official in-service training plans based on the diagnosis of shortages and needs, better definition of posts and greater adequacy in the processes of provision and assignment of posts (awards and transfer competitions), and professional development in teaching (performance assessment and professional career), among others.[23]

And, of course, such an instrument would be very useful in the processing of all procedures for the disqualification of temporary teaching staff and also, surely, of some disciplinary proceedings against teaching staff for breach of certain obligations (those of a more didactic-pedagogical nature), providing them with a greater guarantee of typicity and legal certainty. It could even be used in private schools for the subsidiary interpretation of certain aspects of the disciplinary regime contemplated in their own collective agreements. Not to mention its contribution to improving planning, organisation and distribution of staff, governance, transparency and accountability in the management of the entire education system.

[23] The European Commission (2018) states that the framework of professional teacher competences should serve as a reference for teacher training, assessment and continuous improvement. And it allows setting quality standards aligned with the needs and the real educational context.

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This is not, of course, the time to analyse in detail how these catalogues of competences are articulated. Nor is it the time either to expand on the good results of comparable, fairly consolidated experiences in the assessment of the management function, of the inspection function, of secondments for certain posts or of trainee civil servants, all equally built on registers of scientific-technical (knowing), methodological (knowing how to do), personal (being), social (knowing how to be), attitudinal (wanting to do) and other skills, abilities, aptitudes and attitudes that together make up professional competence.

But we must insist on the urgency of giving it the necessary regulatory status to ensure its real effectiveness. At the same time, we must also proceed to the coherent and detailed definition of the monographs of the different teaching posts, by virtue of their particular characteristics in the different stages, teachings, specialisations and levels.

Just as the EBEP provides, with regard to the code of conduct and ethical principles (Chapter VI), that "the principles and rules set out in this chapter shall inform the interpretation and application of the disciplinary regime for public employees" (article 52), it would be expected that the elevation of these two catalogues to the rank of standard would serve, at least in the same way, for their application as *lex certa*. And, furthermore, the regulation of the evaluation of teaching practice should also include its precise professional, administrative, training and employment consequences.

In other words as long as teaching competence is not precisely substantiated in the legal framework and lack of competence is not expressly included among the offences typified within the disciplinary regime itself, or as long as, failing this or in parallel, the system of evaluation of teaching practice and its effects are not legally developed, the administrative protocols of disqualification from teaching will continue to

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suffer from the serious legal weaknesses that afflict them today, being as problematic and controversial as they are now, and generating contradictions, limited effects and annulment orders identical to those they are currently causing.

4. EPILOGUE.

To conclude, taking up the initial idea of constitutional jurisprudence that administrative sanctioning law must apply the same principles that inspire criminal law, not through their literal application, but "to the extent necessary to preserve essential values", I would like to briefly quote Oliver Wendell Holmes Jr. (1841-1935), considered the most relevant jurist in American history and one of the pillars of modern American law. In one of the first sentences of his treatise The Common Law he says that "the life of the law has not been logic; it has been experience", and that "law is not something that emanates from an omniscient intelligence that contemplates the world from on high", but must function to respond to real social needs, above the "vortex of intentions, intuitions, assumptions and beliefs of those who apply it", and always in coherence with the behaviours that society itself wishes to promote in each socio-historical context for its general welfare.

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