



SIGMA

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FOUNDATIONS AND PROCEDURES ON DISCIPLINE OF CIVIL SERVANTS

Introduction

This paper aims to clarify the essential issues to be taken into account when regulating disciplinary provisions applicable to civil servants and public employees. It deals with the different categories of responsibility¹ which civil servants may incur, the rationale for establishing specific disciplinary legal regimes for civil servants, and the main principles the disciplinary procedure should abide by.

Categories of responsibility and the principle “*non bis in idem*”

Civil servants, whether in active service or retired, are to be held accountable for their actions and omissions when they represent a violation of the duties or obligations imposed on them by legislation². The responsibility which civil servants may incur can be grouped into two categories: penal (criminal) and administrative. Usually a penal responsibility also entails an administrative one. However, not all administrative faults represent a crime. A single fact can simultaneously be an administrative fault and a crime. Only a given number of administrative faults, those most serious or those affecting specifically important and protected public interests, are at the same time defined as crimes in the Penal Code. Therefore a single misdeed can be punished through a disciplinary punishment and through a criminal conviction because a single fact may simultaneously be an administrative fault and a criminal offence. Some criminal offences described in the penal code can only be committed by civil servants. Others are punished more severely if committed by civil servants, e.g. embezzlement, fraud, falsification of documents. The rationale is that when a misdeed is committed by a civil servant that misbehaviour negatively affects the public's trust in the administration, which is a specially protected public interest both by the criminal and administrative legal orders.

The legal principle known as “*non bis in idem*” whereby nobody is to be punished twice out of the same deed means that it is not possible to punish someone with two or more administrative penalties for the same deed and that it is not possible either to impose two criminal convictions for the same deed. However, such a principle does not prevent the imposing of two punishments, one disciplinary and the other criminal, for the same deed. The reason is that a single deed can and should bear legal consequences concerning two different legal orders, disciplinary and criminal if the whole legal system in a country is to be internally consistent. For example, a civil servant stealing public assets commits a crime of theft and deserves to be convicted within the criminal order with prison or whatever criminal punishment is established in the Penal Code. Such civil servant also commits an administrative fault and deserves to be

¹ The notion of responsibility is used here mainly in the sense of accountability or, more precisely, in the sense of a civil servant being subject to the obligation of accounting for his actions and omissions.

² We use the word ‘legislation’ here to mean both primary law (Act of Parliament) and secondary legislation adopted by the government to apply primary legislation, as both may impose obligations to civil servants. Administrative instructions may also be considered as legislation in certain cases, depending on the normative hierarchy established in a given country.

separated from the civil service according to what is established in the disciplinary provisions in the civil service legislation. In other words and to put it simply, for the crime the consequence is prison and for the administrative fault the consequence is dismissal from the civil service. Otherwise it might be that a civil servant who is convicted as a thief could automatically return to the civil service after serving his prison sentence or after being reprieved. This would make the legal system inconsistent. When the serving of the prison sentence is over the convict retrieves his freedom, not necessarily his right to re-join the civil service, a right that should have been annulled, usually for ever, by a disciplinary penalty.

Both penal and administrative responsibilities normally also imply economic or financial consequences that the wrongdoing civil servant must be confronted with. This is known as “patrimonial responsibility”. Damages inflicted on public assets or loss of property for the administration or for third parties as a consequence of a civil servant’s wrongdoing have to be compensated by the responsible civil servant. Damages on public assets are compensated directly by the civil servant through deductions from his salary or through other legally established means. Damages on the rights or property of third parties are compensated by the civil servant indirectly, as the responsible entity vis-à-vis third parties is the administration where the concerned civil servant works. In this case the administration compensates the third party’s damages as a surrogate (*vicarious liability* of the administration) and afterwards the administration extracts, from the civil servant’s salary, the amounts necessary to reimburse — totally or partly — the compensations advanced by the administration to that third party.

This patrimonial responsibility is almost never the single and principal one. Usually it is accessory to penal or administrative responsibility because it is usually a side effect of the principal, criminal or administrative, misdeed. If there is no criminal or administrative misdeed on the part of the civil servant, the patrimonial responsibility is the exclusive burden of the administration as such, without repercussions on any civil servant. This is known as the objective responsibility of the administration (*strict liability* of the administration). The French legal system, and others inspired by it, distinguishes between *faute de service* (strict liability of the administration) and *faute personnelle* (intentional or non-intentional fault of a civil servant) and an abusive tendency has been observed in France consisting of subsuming many *fautes personnelles* into *fautes de service* in order to pre-empting civil servants from facing personal consequences, this tendency being corrected by the *Conseil d’État*³.

The foundations of the disciplinary legal regime in the civil service

The first rationale for the “*ius puniendi*” of the administration is the need for it, as an organisation, to keep internal discipline and accountability by ensuring that its agents will comply with the obligations assigned to them. From this standpoint the disciplinary powers of the administration vis-à-vis its civil servants and employees is similar to that held by any employer in the private sector.

The differences with the private sector appear when administrative law, not labour law, regulates the civil service. Any public employee, either labour contractee or civil servant, has a number of obligations that do not affect employees in the private sector. A mere enumerative list of such obligations would include fidelity to the constitution and legal order of the country, stricter regulations on conflict of interests, impartiality, and a more demanding regulation on personal integrity and fairness in their deals with the public and with their superiors and colleagues. These are specific civil service-values and, by extension, public employees’ values and obligations too. These are obligations that transcend the sphere of the administration as an employer organisation and are connected to the general principles stemming from the constitutional order. Out of this, the procedural guarantees for imposing disciplinary sanctions are reinforced and more formalised within the civil service if compared with the guarantees allotted to

³ See rulings of the Tribunal des Conflits of 19-10-1998, 25-5-1998, Conseil d’État 17-12-1999 and 6-10-1999.

employees in the private sector vis-à-vis the sanction powers of their employer. This is why, for example, in countries such as Italy where the bulk of the civil service was transformed into labour contractees as of 1993, the regulation of the disciplinary measures and procedures for them continues to be governed by administrative law.

In addition to the general legal disciplinary regime for the civil service, there may be specific disciplinary provisions for groups of civil servants, which are usually regulated by specific statutes. For example, many provisions affecting discipline in the police, the military, judges, etc. may be specific and different from the general civil service. The foundations for these specific provisions derive from the specific nature of the functions and responsibilities legally assigned to these functionaries. One general rule is that the more the activity of civil servants impinges upon the fundamental rights of citizens, the more demanding is the behavioural standard imposed on them by regulations and harsher the corrective sanctions.

Principles governing the civil service disciplinary regime

The main legal principles governing discipline are:

1. *Principle of legality*: The legal definition of punishable behaviour in the civil service legislation is essential for the administration to exercise its punitive powers in a State ruled by law. It is more debatable whether or not a detailed description of misdeeds and the corresponding sanctions should be defined in the Civil Service Act passed by parliament (principle of the matter as being a “preserve of law”, as it is the case concerning criminal misdeeds) or it may be left to secondary legislation. Most civil service legislation in EU Member States (France, Germany, Spain) have opted for leaving the detailed description of punishable behaviours to secondary legislation. In this case the primary legislation (Act of Parliament) must contain sufficient direction and substantive content so as to make it possible for secondary legislation to be not only extremely faithful to the Act, but also not transgress the limits on punishable misdeeds and penalties beyond what is allowed by the Act.
2. *Principle of pre-definition of punishable behaviour and penalties (typification des fautes administratives)*: As a general rule, punishable misdeeds and correspondingly applicable sanctions should be defined in advance in legislation. It does not mean that all possible misdeeds and sanctions are to be exhaustively described in a detailed way in legislation, but it should be ensured that there is a *lex certa* applicable, meaning that it will be reasonably possible to predict what will be a punishable deed and which of the legal consequences (sanctions) will be applicable. This predictability of the illicit behaviour and its legal consequences is what the principle of legal pre-definition shall ensure. For the sake of consistency, there should be a clear link between punishable behaviour and obligations or duties imposed upon civil servants by the Civil Service Act. In principle, any action representing a breach of the legal obligations of civil servants should be punishable.
3. The regulations on discipline shall be *non-retroactive*, except if they are more beneficial for the person undergoing a disciplinary procedure. In general this principle applies only when the disciplinary procedure is ongoing and the applicable sanction has been not decided yet, but not to penalties which had been already imposed when the new more favourable regulation was published. However, this is debated also in legal doctrine. Courts are becoming more inclined to admit that a more favourable norm should also affect penalties already imposed and being serviced. The rationale for this is the analogy with criminal legislation, a field where this approach has been accepted for a long time.
4. *Principle of proportionality*: In this context it means that the penalty imposed shall be proportionate in relation to the misdeed committed and its surrounding circumstances, but it does not necessarily mean that the penalty imposed should be the lightest one among those legally possible. In order to make the

principle of proportionality possible it may be appropriate to establish a grading of misdeeds and applicable penalties to be imposed and that the Law ensures a sufficiently wide range of possible sanctions to punish misbehaviour. The principle of proportionality represents a limit both to lawmakers and administrative authorities in the exercise of their respective powers of defining misbehaviour and penalties and on using legal discretion in applying them on a case by case basis. This principle is most used by courts to control the way administrative authorities exercise their disciplinary powers. At times the courts tend to replace administrative discretion by judicial discretion by means of the principle of proportionality, which is not acceptable when the administration has scrupulously stayed within the appreciable limits imposed on it by law.

5. *Principle of culpability*: The principle that the illicit behaviour shall be intentional on the part of its author is also essential to the disciplinary regime and the intentional will needs to be proofed. However in the regulation of discipline for civil servants it should be noted that, unlike in the criminal regulations, a civil servant cannot allege a lack of knowledge or that he inadvertently did something punishable because the civil servant is obliged to be diligent and to pay attention to any aspect relevant to the problem he is dealing with. Therefore, the civil servant's explicit intention of causing a harmful or illicit result of his action is not always a precondition for imposing disciplinary sanctions. However, concerning the civil service this relatively weak importance of intentional misbehaviour is not tantamount to strict liability, as the personal responsibility of a civil servant is excluded when it becomes clear that the harmful result was a consequence of *force majeure* or when the harmful results were absolutely non-intended by the civil servant. This lies at the foundation of the French distinction between *faute de service* and *faute personnelle* as explained above. The proof of intentional misbehaviour in a particular case may prove to be difficult to establish when regulations are unclear or laws are inconsistent or conflict with others laws. Hence the importance of having well drafted regulations for manifold purposes, among them for enhancing the ability of the administration to demand accountability from its civil servants.

Essential procedural principles for imposing disciplinary sanctions

Administrative sanctions derived from administrative faults cannot be imposed without following a procedure, at least minimal for less serious misdeeds and more complex for serious misbehaviour. In any case the regulation of the disciplinary procedure should ensure a number of elements in order for it to be fair and respect and guarantee essential personal rights in democratic societies. These elements may be summarised as a number of principles, as follows:

1. *Adversarial principle*: The disciplinary authority must respect the right of civil servants to make their case in the procedure. This means that the civil servant has a right to defend himself against the charges being formulated against him and that the civil servant is allowed to submit his own version of the facts, his arguments, his proofs and to make use of professional legal advice according to his choice. A specific application of the adversarial principle, for instance, is that witnesses proposed by any of the parties in the procedure shall be subject to interrogation by any other parties
2. *Access to documents*: The adversarial principle cannot be fully realised if the civil servant or his defenders are not allowed to access the relevant documents which constitute the basis for the charges or, in a larger sense, to those documents and proofs that may be useful or relevant for his defence.
3. In any case, a hearing (either in oral or in writing) of the civil servant previous the resolution is issued by the disciplinary authority and once all evidence has been gathered, witnesses' deposition included, is an essential procedural right

4. Recourse in appeal to a court shall be allowed to any civil servant who has been disciplinary sanctioned and the notification of the sanction should contain precise indications of the terms and timing of the appeal. In some countries specialised administrative courts review administrative decisions on discipline, whereas in others are the general courts which deal with such revision.

Article 6-1 of the European Convention on Human Rights is applicable to the disciplinary sanctions in the civil service since the rulings of the European Court of Human Rights of 8 December 1999 (*Pellegrin*) and 23 February 2000 (*Hermitte*). Therefore administrative decisions on discipline can be appealed before that Court if a hearing has not been awarded or if essential procedural guarantees have been omitted. This appeal possibility is only applicable, however, to disciplinary sanctions of those civil servants and public employees not exerting functions of public authority or the so-called functions of public administration. In cases of civil servants invested of public authority their disciplinary punishments are not revisable by supranational courts.

Other procedural elements worth considering:

1. In some countries (e.g. France) there is a *consultation process* with some instance (*commission administrative paritaire*), which performs as a disciplinary council and gives its *avis* (opinion) in cases of possible serious sanctions being applicable. The civil servant is allowed to make his case before this consultative body, which issues non-binding opinions to the disciplinary authority.
2. It is obligatory in some countries and discretionary in others for the civil servant to have recourse within the administration before going to court against the disciplinary decision.

Suspension while under disciplinary procedure

The suspension of duties of the civil servant while a disciplinary procedure is being substantiated should be a decision awarded to the disciplinary authority to be taken on its discretion on a case by case basis. The rationale for the exercise of such discretion should only be the reasonable risk of pieces of evidence disappearing or if the presence of the incumbent civil servant in his position could significantly hamper the unfolding of the disciplinary procedure or be harmful for the reputation of the public service. In cases involving corrupt activities it is particularly recommendable to separate immediately the incumbent from his regular duties, as the corrupt liaisons should be severed at once. If the suspension is decided, then the Law on civil service should also contain certain provisions concerning salaries during the suspension period and the consequences in the case that eventually the civil servant is either acquitted or punished.

Typology of disciplinary sanctions

Civil Service Acts contain a rather wide range of disciplinary punishments that can be imposed upon civil servants. The principle of proportionality, as described above, requires that the scope of possible sanctions is broad in order to impose penalties that are as proportionate as possible to the misdeed committed, to the degree of intentional will on the part of its author and that are commensurate with the actual harm caused. It should also be born in mind that, as an accessory obligation, it should be imposed the restitution of the damages caused, as explained above, whenever it fits. Typically the range of sanctions is usually as follows⁴:

- Written warning or reprimand

⁴ These sanctions appear in French, German and Spanish civil service disciplinary regulations. Some of them appear only in one of these countries, as indicated in brackets.

- Suspension of career advancement rights and promotion for a given period of time (in France)
- Demotion to lower ranks (in France and Germany)
- Administrative fines (in Germany. In Spain it was abrogated in 1991. In France they are not possible either)
- Compulsory transfer with obligation to change residence (in France and Spain)
- Temporary exclusion from the public service (from 1 day to two years, for example) with either total or partial suspension of the right to salary
- Compulsory retirement (in France)
- Reduction or loss of pension rights to misbehaving retired civil servants (in Germany)
- Dismissal or definitive separation from the public service

Statute of Limitations

The ability of the administration to impose a sanction out of a disciplinary misdeed is limited to a certain period of time counted from the moment when the fault was either committed or known by the administration. This is known as statute of limitations. Given the complexity of the actions that may represent an administrative fault, usually the statute of limitations is rather long. Many misdeeds can only be known after a comprehensive audit exercise or when the effects are utterly manifest, often after a rather long period of time has elapsed. For example, in Spain, for serious infringements, the statute of limitations is six years since the fault was committed and the counting of time is suspended when the disciplinary procedure starts. For less serious infringements the statute of limitations is two years since commitment. For the smallest misbehaviours the limitation is one month. In Germany, the maximum statute of limitations is seven years for serious misbehaviour.

Expunging the sanction from the personal file

A disciplinary sanction, except the one of dismissal, is usually erased from the personal file after a given period of time has elapsed since it was imposed, or confirmed by courts if the penalty was appealed. The time period required differs from country to country, but in general is rather long. Up until six years in Spain, seven years in Germany and ten years in France. In Germany and Spain the expunging is automatic usually upon request of the interested civil servant. In France it is not automatic, but the erasing is accorded by the administration on condition that the interested civil servant has behaved in a way that deserves it. In other words, in Germany and Spain the expunging is a right of the civil servant, but in France is a grant from the administration.

Administrative sanctions can also be expunged from the personal file of the civil servant as a consequence of amnesty or reprieve. In these cases the terms of the expunging are delimited by the specific legal regulation awarding the amnesty or the reprieve.

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