ANALYSIS OF THE ADMINISTRATIVE SANCTIONING PROCESS AND ITS INFLUENCE ON THE GUARANTEE OF DUE PROCESS

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ABSTRACT

The objective of this paper is to analyze the sanctioning administrative process and its influence on the guarantee of due process, in order to establish compliance with the basic principles of each of the phases of the procedure.

It was applied as a theoretical method to the inductive one, which allows to obtain the analysis of the situation of the procedure and the application between special and general norm. At the same time, the rationale and errors of the pronouncement will be studied in everything related to the interpretation of the representative against the sanctioning procedure and the consequence that it has caused to the Organic Administrative Code.

Key words: *Sanctioning Procedure, Organic Administrative Code, Administrative Act, Rule.*

- **INTRODUCTION.**

Administrative sanctioning procedure is understood as all actions aimed at determining the presence of administrative responsibility, that is, the commission of an infraction and the consequent application of the sanction. This procedure is also a basic guarantee and a channel through which citizens accused of a crime can assert their basic rights in public administration.

Its importance is bidirectional, since, on the one hand, it is the ideal mechanism available to the public administration to achieve public ends, and, on the other hand, it constitutes the means through which the government can grant necessary guarantees for the respect of their fundamental rights.

Administrative sanctions procedures can be said to be the *Sword of Damocles* in the government's relations with taxpayers. The procedure constantly resides on everyone's lips, since, apparently, it reflects the impression that these actions begin with a clear collection interest on the part of the administrations.

To analyze the sanctioning procedure, it is important to define it as a procedure that is carried out by the public administration in the event that a possible illicit act by a person is observed and this entails a sanction. The Organic Administrative Code known as (COA) entered into force in 2018, which establishes the sanctioning procedure, which tells us that, in the case of advancing due process against responsibility for the performance of illegal acts related to the law. Those who exercise managerial functions in the organizations that make up the public sector

It is defined, in turn, as a set of facts in respect of which the administration exercises the power to punish the perpetrators. In other words, it stores a set of proceedings that the Administration has the capacity to sanction. It also regulates the arrangements between the Administration and the administered, and certifies the rights of the latter.

The procedure is subject to the principle of legality according to which no administrative authority can arbitrarily affect the rights of the administered, which is repeated in article 18 of the COA, which establishes the principle of prohibition of arbitrariness, by which public officials in the exercise of a function must regulate their actions in accordance with the principles of law and equality with the

express prohibition of interpretations and obligations. arbitrary actions that sustain their actions, demonstrating the rationality on which they are based.

In this regard, the Comprehensive Organic Criminal Code constitutes a guarantee for the procedure, according to art. 248 where it refers that the alleged offender must be informed of the facts that he has caused, the infringements that may constitute and the sanctions that may be imposed, if any, as well as the identity of the supervisor, to the corresponding authority in order to apply the sanction and the rule that accuses such competence.

The purpose of this procedure is reflected in the specification of the exercise of the right to sanction. However, in order to verify the commission of the infringements and the application of the corresponding sanctions, it is necessary that, if the citizen is proven his administrative responsibility, they are already subject to an administrative procedure.

The research will be carried out with national and international information, as well as in the norms and legal bodies that deal with the matter, information on publications made in indexed journals, master's and doctoral theses will also be included. At the same time, as a theoretical method, we have the inductive method, which allows us to analyze the state of the procedure and the application between general or special regulations. At the same time, the foundation and falsity of the claim will be investigated in everything related to the agent's interpretation of the sanctioning action and its consequences for the COA.

- **METHODS.**

In this scientific article the following methods will be used:

The present work has a **qualitative** analysis in its study, it is evidenced to an **inductive - deductive** analysis, this method has been used in order to express certain observations and particular knowledge, which gives us to know, the proper application of the sanctioning administrative procedure, its purpose and principles.

Analytical - Synthetic. -This method has been used with the purpose of analyzing in a more in-depth way the sanctioning administrative law, the sanctioning administrative procedure, knowing its phases and the correct application of the procedure.

- **RESULTS.**

The next part of the article deals with the results obtained when analyzing the theoretical bases on this topic:

GENERALITIES OF THE SANCTIONING ADMINISTRATIVE LAW

In order to understand where administrative sanctioning law comes from, it is essential to know where administrative law comes from, which as mentioned. Administrative law comes from the first civilizations, coming to define it as follows: "Administrative law itself is a set of rules that govern the relations between the State and each individual", of which it can be said that it is born with the birth of the state. (Gordillo, 2013)(pág. 41)

The study of administrative law awakens in every jurist the interest to know how the development of norms and principles occurs in a continuous process of formation with a constant speed and formula, which he considers immutable. And to achieve its objective, which is to achieve a legal framework for the organization and functioning of public administration and administrative activity, as organs of the Judiciary and Parliament, to strive for future development, will also include the study of the activities carried out by public officials of the State, whose conduct may be regulated by the rules of executive law.(Patiño, 2016)

Administrative Sanctioning Law

Administrative criminal law is the result of all doctrinal and jurisprudential debate that has arisen from the theoretical approach of administrative criminal law emerged in Germany in the early twentieth century, in Spain, the debate has defended the identity of crime and administrative infraction. and the preservation or return to the judicial authorities of the rights, in this regard, attributed to the public administration. (Patiño, 2016, pág. 259)

The law of administrative sanctions has its starting point with the Constitution of Cádiz of 1812, according to which it is desired to achieve the separation of judicial and administrative powers, and the adaptation to the legal system, in article 172 of the Constitution it said that the king was prohibited, in the sense that it was limited to not being able to impose it on any individual or impose punishment. This aims to provide a constitutional basis for the original intentions to limit the power of government, starting with the chief executive; However, this objective was not achieved due to the need to comply with the requirements of the legal system. (Patiño, 2016, pág. 261)

In order to facilitate the attainment of executive objectives, the power to impose sanctions has been established for the holders of bodies other than the judiciary; These powers originally came from Chapter III, Article 1, of the decree of June 23, 1813, which granted the approval of the directive to the economic and political administration of the provinces. Through these rules, the government is not only in a position to enforce the sentences imposed by the police and good governance, but also to punish precisely those who disobey or disrespect, and those who disturb public order or calm. (Quinzacara, 2012)

Administrative Sanctions as a Historical Reality

The power to punish is in the hands of the Administration, which has gone through several political changes and several historical moments, managing to sustain the classic principles of the liberal revolution in search of legalized criminal law. the crime of nullum, nulla poena sin lege; nulla poena sine legale iudicium. (Quinzacara, 2012)

Among the various factors existing for the existence and development of the sanctioning power in the hands of the authorities, is the timely and effective intervention of state agencies through the government in the face of each risk and dangers faced by a more complex situation. It is involved and society is able to act and, if necessary, create a dangerous situation unimaginable in the history of civilization. Thus, it is not only the dispersion of certain rules inherited from the old regime that gives the Administration these punitive powers. It corresponds to the growing need, in the face of an overburdened justice system, to guarantee the prompt action of public authorities in the face of acts unleashed in society. (Quinzacara, 2012)

In turn, among the external factors that allow segregation, we can mention the following:

a) The body that applies it, in this case the State Administration;

(b) Diminishment of moral and social value caused by these conducts;

(c) Severity of the penalty.

From the point of view of state law, one can consider the functions and tasks assigned to it by the legal system, as well as the tools necessary to carry out this function. And the position of the State vis-à-vis the people, the obligation to promote the common good and the harmonious integration of all its components, requires the State to adopt all measures and exercise the powers assigned to it by the legal system. It is destined to fulfill a role of social structure such as that which corresponds to these constitutional goods and values. (Andrade, 2021)

These needs have reached an exponential growth in the face of a society that has become more complex since the industrial revolution, reaching the so-called modern society of risk and government intervention through prompt and effective action, which is often not the case. It is found in the nature, dynamics and principle of judicial processes and therefore implies assuming such a function through its administrative bodies, leaving jurisdictional control for a second stage. (Andrade, 2021)

ADMINISTRATIVE SANCTIONING PROCESS

Definition. -

This type of procedure, which is the administrative sanctioning, has a formal characteristic, since it is exercised thanks to the power that the State grants to determine a citizen's conduct, as appropriate to be applied a sanction. That is why all actions that are executed through the public administration and any process that applies sanctions must be based on both principles and guarantees.

With the purpose that at the time of the application of this process it is safe and meets all the necessary requirements, since the application of this process is a guarantee for the defense. The purpose of the administrative sanctioning procedure is that the public administration can establish

the application of the sanction on a citizen. For this procedure to be valid, it is necessary that, in accordance with the Constitution of the Republic and other laws, the appropriate principles are applied, with this security is provided in the way of acting of the administered against the conduct of the citizen. (Yancha, 2020)

Purpose. -

The purpose of this procedure has two sections, the first; is that it is considered as a special procedure that aims to exercise the power of public institutions granted by the State to sanction, this as a result of a private person has carried out some conduct that carries with it a sanction, but this so that said citizen finds it mandatory and at the same time necessary to go to mechanisms that allow him to enforce his rights but guaranteeing that such mechanisms are easily accessible. An important feature to apply the process is that the responsibility of the citizen has been verified, so that the sanction is adequate and in proportion to what was done.. (Yancha, 2020)

Principles

- **Typicity**

The principle of typicity is annexed to the principle of legality since in administrative law and specifically in the sanctioner, both a lex previa and a lex certa are required, this means that, if the sanction must be previously established in the law, but also by the principle of typicity the prohibitions must be delimited in a concrete way. This refers to the fact that a person's way of acting should be limited only by a legal norm that prohibits certain behaviors. This principle makes it possible to know how far a citizen can exercise his right to freedom and at the moment in which his limits are already born. (Cardenas, 2020)

Within the Organic Administrative Code, [COA]. Art. 29. July 7, 2017 (Ecuador). "Administrative infractions are the actions or omissions provided for by law. Each administrative offence is subject to an administrative penalty. The rules providing for infringements and penalties are not susceptible of analogous application, nor of extensive interpretation. " (Código Orgánico Administrativo, 2017)

- **Principle of guilt**

This principle is linked to the principle of responsibility, since it is understood that a guilty person is responsible for certain conduct. The responsibility within this type of process must be analyzed from a subjective way, with this it is intended to say that it is required to prove fraud or guilt. To determine in this matter specifically, that a citizen is guilty, it is required in case of having committed an infraction to prove that it could have been carried out in another way, complying in this way with the norm and connected to the action that is going to be reproached. (Cardenas, 2020)

- **Principle of non-retroactivity of the law**

This principle has been recognized both as the Constitution of the Republic and also at the infra-constitutional level, which establishes that the law will only apply to what is next or to come.

It is established in the Organic Administrative Code, [COA]. Art. 30. July 7, 2017 (Ecuador). "Acts constituting an administrative offence shall be punished in accordance with the provisions of the provisions in force at the time they occurred. The penalty provisions have retroactive effect insofar as they favour the alleged infringer." (Código Orgánico Administrativo, 2017)

- **Prohibition of concurrence of sanctions**

This principle of prohibition of concurrence of sanctions, is related to the principle of non bis in idem, which we find in the Constitution of the Republic of Ecuador and considers it as a guarantee of due process, also aims to prevent a person from being punished for the same cause twice. For this principle to be established, a triple identity is required that must be fulfilled, which are subject, facts and foundation. (Guerra, 2018)

Therefore, the prohibition of concurrence of sanctions also aims to prevent administrative sanctions from being imposed twice for the same conduct. This principle generally serves a dual function; On the one hand, avoiding double punishment for the same reason and, on the other hand, it seeks to avoid initiating a new procedure on an issue that has already been resolved previously.

6.2.4. Procedure

For the exercise of the administrative sanctioning procedure certain guarantees must be considered, within the COA we find 4 of these. In art. 248 of the above-mentioned code determines the following: As a first guarantee, we find that it is arranged to separate the investigative function from the sanctioning function, which corresponds to the different public servants. The investigative function is responsible for carrying out all the investigation opportunity to determine the responsibility susceptible to a certain sanction.

The second guarantee is that no sanction will be imposed without the necessary procedure, since it is important to follow due process so that the person who is going to be sanctioned can also exercise his right to defense and, in addition, so that the public administration has security to apply said sanction.

The next guarantee is that the citizen who is allegedly responsible for the infringing conduct must be notified, detailing the facts for which he will be sanctioned, that is, he must be given all the necessary information to know why and how he is being processed administratively.

And the last guarantee establishes that every person is innocent and therefore must be treated as such, until the contrary is resolved through a firm administrative act. And the state of innocence is also typified in article 76, numeral 2 of the Republic of Ecuador. "Every person shall be presumed innocent and shall be treated as such until his responsibility is declared by a final decision or an enforceable judgement." (Constitución de la República, 2008)

6.2.5. Limitation of penalties

One issue that is important to know is the statute of limitations for sanctions. This topic is stipulated in art. 246 of the Organic Administrative Code; These sanctions prescribe in the same way as in the period of expiration of the sanctioning power, and also when with the passage of time since the state has been caused with the administrative act.

Therefore, the expiration period is within the COA, in Art. 245. The exercise of this power prescribes, for minor infringements per year, prescribes after three years for serious infringements and for very serious infringements after five years and all the infringements established for each period respectively. The term is counted from the day following the commission of the fact. If it is a continuous infraction the term is counted from the cessation of the facts that constituted the infraction and if it is a hidden infraction the count will begin since the administration knows of the fact. .(Código Orgánico Administrativo, 2017)

PHASES OF THE ADMINISTRATIVE SANCTIONING PROCEDURE

There are 4 conforming phases of the procedure and one prior to the start of the procedure.

- **Previous Actions**

The competent bodies carry out preliminary actions to determine whether the events that occurred motivate the initiation of an administrative sanctioning procedure.

- **Initiation of the administrative sanctioning procedure**

The first step in opening the process is to notify the alleged infringer.

Sanctioning proceedings are always initiated ex officio for the following reasons:

Own initiative: the body that has the power to initiate the procedure acts upon knowledge of a fact that could constitute an infringement.

Higher Order: whoever has the competence of realization receives an order from a higher organ. It expresses possible infringers, facts and details related to the infringement.

Reasoned request: in this case, a request from another administrative body without competence to initiate the procedure is collected.

Complaint: any person who has knowledge of a fact that could constitute an infringement submits a complaint to the Administration. The offender and data linked to the infringement are indicated (Yancha, 2020).

- **Instruction**

In the investigative part of the administrative sanctioning procedure lies in the actions that tend to prove the facts. All the substantiations of the parties and corresponding means of proof are provided. A trial period can be agreed within a period of no more than 30 days and no less than 10 days.

It depends on the norm for example in the case of the council of the judiciary lasts 5 days.

- **Resolution of the administrative sanctioning procedure**

The tests practiced are valued and it is the completion of the procedure. The resolution establishes the facts, those responsible, the typified infractions and their appropriate sanctions.

The resolution phase is enforceable and may include precautionary measures deemed necessary. When the offender expresses his intention to appeal the decision, there is a precautionary suspension (Izquierdo, 2016).

DISCUSSION

In the Ecuadorian legal system, the extent to which administrative abuses are dealt with is certainly a matter reserved for the law. From the beginning, the Constitution of Montecristi framed it as a guarantee of due process when it stated that no person could be prosecuted or punished for an act or omission that was at the time of committing. It is not currently subject to criminal law.

If the penalty is first and foremost a penalty, then it cannot be disproportionate, that is, when the act is specific, the State must punish the means that least violates the rights of citizens, according to several criteria vary in severity of the crime and interests to be protected.

In the most concentrated states, these would be monopolies and municipalities directly dependent on the central government, with agencies empowered to sanction. But this is clearly a state monopoly, the state punishes in the form of administrative sanctions, for example, those who fail to comply with the rules on the circulation of motor vehicles, in financial matters, in environmental matters, in urban matters.

Upon receipt of the alleged facts or after the ten-day period has elapsed, the investigating authority shall remove the admitted evidence until the end of the period of investigation.

The facts established by judicial decisions are certainly binding on the public administration body in relation to the sanctioning procedures with which it deals.

The facts were observed by public officials and formalized in a public document respecting the legal requirements in the matter, presiding in effect any evidence that the accused may denounce or present to protect their respective rights or interests. Similar value has the acts of the subjects designated by the management bodies of the State to coordinate in matters of inspection, audit, control and investigation, even if they are not public documents in accordance with the provisions of the law.

At the defendant's request, the necessary evidence shall be provided to establish the facts and liability. Only factual evidence that cannot alter the final decision in favour of the alleged perpetrator may be declared inadmissible.

CONCLUSION

- We have been able to conclude that with regard to the exercise of the sanctioning power which is recognized in the Organic Administrative Code, for the establishment of sanctions for certain behaviors the application of proportionality is fundamental, since the sanction may not be excessive, nor superior to the action for which it is being sanctioned, in turn it is one of the fundamental principles which allows to avoid the excess or abuse of power by the State, since ancient times there was already an administration, but there was no proportional penalty, so there is an abuse of power, being so that today it is essential to carry out a previous analysis and if there is a violation of rights with the imposition of a disproportionate penalty must be rectified and to ensure that the security and integrity of each person is protected without an abuse of power.
- The administrative sanctioning procedure proceeds to impose as its name indicates sanctions to certain infractions committed by citizens, that is, this capacity has the public administration, due to the power granted by the State. There are certain principles that allow several rights to be exercised and none to be violated at the time a citizen is prosecuted administratively. Finally, it is necessary to recognize that sanctions are time-barred and that there are certain time limits depending on the intensity of the sanctions.

- The Administration, in its dealings with citizens, has to make use on some occasions of its sanctioning power in administrative matters, practicing this through the administrative sanctioning procedure, it is a process that sanctions the infractions made in the treatment between the administered and the administration, respecting and guaranteeing the rights at any time and establishing principles that they fully follow and maintain in each of the phases.

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