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DISCIPLINING THE IMPOSITION OF STATE SANCTIONS*

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Abstract
The article offers a reconstruction of the application of criminal guarentees to administrative sanctioning procedures. First, the emphasis on a contentious level of the discussion is criticized. The article shows that the problem is one of institutional design. From this perspective, the article offers a pragmatic formal solution, according to which the legislator must choose between at least three sanctioning regimes, disregarding some alternatives that affect people's rights in a particularly intense way.

Key words: *constitutional guarantees; Sanctioning Administrative Law; administrative sanctions; institutional design.*

I. INTRODUCTION

The question of whether criminal law constitutional guarantees are applicable in procedures imposing administrative sanctions has acquired special relevance in current legal reality, due to the increase of regulated areas that are subject to sanctions in the ordinary economy.[1] This is certainly visible not only in the number of publicly relevant cases in whose resolution this point was involved,[2] but also because of the large number of academic contributions referring to this issue.[3]

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1 In Chile, see Letelier (2017), pp. 625 ff.; Londoño (2014), pp. 148 ff.; Gómez González (2017), p. 102; Cordero (2014), pp. 400 ff.

2 In this regard, the most relevant cases discussed in Chile are probably the La Polar and Cascadas cases - two of the biggest corporate scandals of the last decade. Particularly, see the rulings of the Constitutional Court Rol 3684-17, 3575-17, 3542-17, 3014-16, 3000-16, 2922-15, 2896-15, all of them on Cascadas case; and the rulings 3054-16 (Constitutional Court) and 30,176-18 (Supreme Court), on La Polar case.

3 In Chile and, to some extent, in European literature, much of the attention has focused on the special problem of concurrent sanctioning regimes (applicability of ne bis in idem with respect

Usually, legal scholarship addresses the issue in relation to its potential use in litigation, as part of a set of arguments that are potentially available to a party – normally: for the defense of agents who are more or less important in ordinary economy, in claiming procedures against the application of administrative sanctions applied by administrative authorities - rather than as a problem of institutional design[4]. I.e.: the perspective that legal scholarship tends to naturally assume is that of the court which – when faced with defense arguments of an opaque constitutional source – must determine the validity of certain rules and which is their scope of application. Unlike judges, legal scholars certainly do commonly inquiry into the political justification of those guarantees. The interest lies, however, in the group of arguments arising from these considerations. Litigation considerations precede institutional design.[5]

Although this way of emphasizing the issue does not limit its comparative study – one can see, from a functionalist perspective, how different regimes face the same litigation problems –, it does create difficulties of generalization and comparability. Above all, as we shall see, it is a way of putting forward the design problems of sanctioning regimes where *the cart is put before the horse*: maybe certain litigious arguments are valuable when avoiding sanctioning consequences, but this makes sense only because of design considerations. Institutional design problems are probably common to every contemporary legal system; litigation arguments, on the other hand, are not. Both the comparative and local study of the problem of guarantees that are applicable to different sanctioning regimes lacks of reflexivity and exult rhetorical commonplaces (the natural principles of *ius puniendi*)[6] if we do not start by asking about the problem and the design options to which these arguments respond.

Instead, this article proposes to leave aside the litigation approach: the idea is not to discuss – as is usually the case - the scope of institutions that are assumed to exist, but to first put forward the question of the institutional conformation from which the

to concurrent criminal and administrative sanctions). In this regard, see Mañalich (2014), pp. 543-63; Ossandón (2018), pp. 952-1002; Gómez González (2017). Other discussions of "special" guarantees have been relevant in both case-law and doctrine. In case-law, proportionality of the sanction and applicability of the mandate for determination when typifying sanctions have been decisive. In the literature, some articles refer specifically to this point. See, for example, Londoño (2014), pp. 147-67.

4 As far as we can see, this is not the case in Letelier's recent article, Letelier (2017).

5 It is likely that certain meta-theoretical reasons contribute to this state of affairs. In particular, Hispanic legal culture generally conceives constitutional law from a static perspective, according to which its relevance is given by providing guarantees and determining potential contents (or mandates) of legal norms. In Chile see Durán (2011), pp. 145 ff.; Durán (2016), p. 276, from a criminal law perspective some criticize about the attitude underlying this approach that connects politics, law and constitution Gärditz (2010), pp. 332 ff.); Stuckenberg (2011), pp. 665 ff.; Appel (1996), pp. 303 ff.; Bäcker (2015), pp. 361 ff.

6 A classic critic in this regard is to be found in Nieto (1993), pp. 20 ff., 83 ff. See also Letelier (2017), pp. 627 ff.; Mañalich (2014), pp. 544 ff.

arguments are raised. This is a better starting point for asking how different regimes react in the face of the problems of institutional design of sanctioning practices.

Hereinafter, I will explore this way of constructing and analyzing the problem of constitutional guarantees in sanctioning areas, considering three lines. The first part focuses on the origin of the problem, namely, the coexistence of state sanctioning regimes with divergent constitutional conformations. Particularly, in the first part, I will explain the typically reasons argued for maintaining different types of sanctioning regimes and the problem arising from these decisions: a legal system with multiple sanctioning regimes requires in maintaining institutional boundaries, if only one of those regimes is subject to explicit institutional constraints. On this basis, in a shorter second part, I will present the idea of a minimum formal rational solution: the constitutional system must establish a rational trade-off between the use of the system with stronger constraints and alternative systems. Finally, in a third part, I will give an account of the different ways in which the design problem is approached in comparative practice

II. THE DESIGN PROBLEM

2.1 Existence of different punishment regimes

Although this aspect of the issue is known among us,[7] to understand how design decisions in the discussion on guarantees is reflected requires referring to said discussion: in modern states it is insufficient to have a univocal sanctioning regime. Particularly, the central sanctioning regime of modern states –criminal law– has limitations that have forced the adoption of concurrent regimes.

There are diverse reasons for this deficiency and for the adoption of concurrent regimes. In part, they reflect the very structure of law and criminal proceedings as an expression of a notion of responsibility. The imposition of security measures on persons who are unfit to be held liable by law is the answer to this logic: by definition, persons who are deemed unfit by law are not liable according to the categories of criminal law, but there is still need for some coercive intervention regarding them because a criminal conduct was committed.[8] These regimes may adopt a logic of social service (former juvenile services or health system), a non-punitive judicial logic (former juvenile courts), or a quasi-punitive logic (juvenile criminal justice or security measures imposed in criminal proceedings).[9] However, these are still regimes that are concurrent with the general criminal regime, and also suitable for imposing strong coercive measures.

7 See, for example, Londoño (2014), pp. 149 ff., referring to the different functions accomplished by rules and standards, or Letelier (2017), pp. 636 ff.

8 Precisely in this sense alternative security measures which substitute punishment show in a paradigmatic way the problems faced by an institutional design focused on the ideology of criminal law. On its evolution see only Frisch (2007), pp. 3 ff.

9 On the evolution of minors and adolescents control systems, see Feld (1993), pp. 200 ff.

Sometimes, the need for concurrent regimes arises by the very setting of internal limits to criminal law. This is the case of the 'preventive' expansion of coercive regimes: the traditional criminal system is limited to react only once a crime is committed (or an action – attempt – that is close to the commission) and it shall act only for a certain time considering the entity of the crime which generates limitations that may be perceived as counterproductive.[10] Mechanisms such as post-conviction[11] security custody respond to imposing control regimes beyond these limitations.

On other occasions, standards for determining punishable conduct are problematic because of the capacity of regulated subjects to adapt formally. This is the traditional case of high-level sanctioning administrative law.[12] The regulated subject's capacity of withstanding sanctions, their ability to apparently comply, the changes that may quickly take place in the area, and the high dependence on knowledge, especially about a market or industry, may lead to a deficiency of criminal law to adapt to regulation needs on organic structure and legal reasoning.

Finally, sometimes the high cost and burden of punishment may also make it necessary to generate concurrent regimes. This is the case of low-level sanctioning administrative law. Here, unlike high-level sanctioning law, the cost of imposition – for the administration – and the possible moral burden it may have for the convicted person are the main characteristics that explain the existence of the concurrent regime. In the face of minimal commercial transgressions (for example, not to pay certain discrete state services (non-payment of the fare in the train), low traffic violations, etc.) the need to impose the rules conflicts with the massiveness of transgressions and their trifle crime nature. In order to have a more efficient level of enforcement, legal systems tend to seek for solutions in less extensive procedures (on-site enforcement, summonses and imposition in absence, etc.).[13]

2.2 The problem of the use of discipline when utilizing sanctioning regimes

In positive constitutional systems, and despite having sanctioning regimes that concur with the general criminal regime, design requirements tend to address

10 This is the case with security measures that are complementary to the punishment. To know about the real commitment that its recognition meant in the dispute between the traditional understanding of criminal law and its intention to be reconfigured a bureaucracy for social control, see Frisch (2007), pp. 5 ff. For a critique on the recent preventive expansion of criminal law see Ramsay (2012); Silva Sánchez (2006).

11 On their constitutional status in German law, see two decisions of the Federal Constitutional Court (BVerfGE 109, 133, declaring this concrete practice compatible with the constitution, to subject a convicted person to deprivation of liberty for an indefinite period of time for security reasons; BVerfGE 128, 326, ordering certain compatibility measures after the Federal Republic was sentenced by the European Court of Human Rights.

12 In this regard, see Javier Wilenmann, 'El Derecho Frente a La Resistencia a La Criminalización', *Politica Criminal* (forthcoming), explaining the reasons why this resistance is produced.

13 Probably the most different experience at the international level is the German law on regulatory offenses, an administrative regime, which is equivalent to a codification, aimed precisely at reconciling interests by a general regime. On its development, see Tiedemann (1991), pp. 15 ff.

only the criminal system. This article does not discuss the content of these design (legality requirements) and functioning limitations of punitive practice (procedural guarantees). I am only interested in focusing on one point: the guarantees at issue tend to formally refer – as a matter of positive law – to the criminal system. One can think on the following passages taken from different positive constitutional or international human rights law bodies.

> **Punishment** shall not be extended to any person other than the criminal. (Art. 5.3 American Convention on Human Rights).
>
> **Punishments consisting of deprivation of liberty** shall have as an essential aim the reform and social re-adaptation of the prisoners. (Art. 5.6 American Convention on Human Rights)
>
> **Every person accused of a criminal offense** has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees (...) (Art. 8.2 American Convention on Human Rights)
>
> **Everyone charged** with a criminal offence shall be presumed innocent until proved guilty according to law. 3. Everyone **charged** with a criminal offence has the following minimum rights: (…). (Art. 6.2 and 6.3 European Convention on Human Rights).
>
> Excessive bail shall not be required, nor excessive fines imposed, nor **cruel and unusual punishments** inflicted. (Eighth Amendment to the U.S. Constitution)
>
> The law cannot presume de jure criminal liability.
>
> **No crime shall be subject to penalties other than** those prescribed for by a law enacted prior to the perpetration of the crime, except where a new legislation might favor the interested party.
>
> No law may establish **penalties** for crimes that have not been expressly described therein. (Art. 19, No. 3, subparagraphs 7 to 9 of the Chilean Political Constitution).[14]

All highlighted expressions show a formal reference to criminal law concepts. As a regime that is concurrent with the progressive implementation of the modern state, this fixation is easily understandable. But it creates an obvious problem: once sanctioning regimes other than the criminal system are accepted, discipline imposition problems arise when choosing the sanctioning regime.

Discipline imposition problems are of different kinds. The most obvious one is that the use of a limited regime, if other regimes can be used freely, is discouraged. Let's assume, for example, that in the face of a new criminal behavior (sexual harassment in the street), the legislator may decide whether to react through the criminal system or through a concurrent sanctioning regime. The use of the criminal system implies

14 All emphases have been added.

its own limitations: application only under certain procedural guarantees, legality in its different aspects, etc. If the same sanctions can be imposed without those limitations, there are important political incentives not to use such regime and to design a new ad-hoc one. This certainly does not mean that there is no incentive at all to use the criminal system: its symbolic burden can be politically attractive, and the use of a bureaucracy whose sole purpose is to enforce certain rules (state attorney offices and criminal courts) also offers some advantages.[15] But if what is relevant is to reach optimal efficiency when sanctioning, the use of the criminal system ceases to make sense – it is always convenient to use a less constrained regime. And yet, some constitutions express a will on submitting the imposition of certain sanctions to criminal guarantees.

A second problem, linked to the first, is the emergence of mislabeling behavior. If the ability to impose discipline in the design and operation of the sanctioning regime is concentrated in the *nomen iuris*, then the use of other labels to establish another system operating similarly – where even the same bodies participate – is even more attractive. Taken to the extreme, without discipline against mislabeling, the legislator may easily make the constitutional limitations at stake obsolete. It is enough to design any sanctioning regime without referring to any criminal concept.

Finally, a third problem is linked to the absence of special design regulations for sanctioning regimes that concur with the criminal system. This absence of a special constitutional design statute does not imply the absence of general constitutional regulation.[16] In particular, control based on how fundamental rights are affected (and its complement with the principle of proportionality) does not depend on the type of regulation used but simply on its effect on fundamental rights.[17] Although an option could be to simply control the design of other sanctioning regimes by means of controlling proportionality linked to the affectation of fundamental rights,[18] usually constitutional courts consider it insufficient. This is because at least the problem of mislabeling and use of discipline cannot be solved by this means when using sanctioning systems. This opens up a minimum regulation need.

2.3 The traditional Hispanic solution: mixing problems

In the face of this regulatory need, legal cultures where litigation arguments dominate tend to react in what could be considered an irrationally maximalist way.

15 See Hassemer (1973), pp. 164 ff. About the peculiarities of criminal law, see the classic presentation of Williams (1955), 107-30. In this regard, Horder, (2014), pp. 103-31.

16 Among us, the point is made by Letelier (2017), pp. 628 ff., who does not dwell especially on the potential application of general statutes of constitutional control.

17 This does not rule out dogmatic problems when using concurrent regimes. In general, constitutions recognize the 'criminal law' sanctioning system in relation to certain fundamental rights. This implies that it is only possible to rule by statute on criminal matters (*reserva de ley*). But regarding other sanctioning regimes, in general, there is not such limitation.

18 This point has been long discussed in recent German literature. In this regard, see for further details, Wilenmann (2017), pp. 389-445.

Essentially, the answer is to simply apply all or a significant part of the constitutional guarantees that constitutional texts make applicable in the criminal system to every sanctioning regime.

This is how the problem has been addressed in Spanish literature and case law and – through its influence – in Chile. The argument is simple and consists in essentially emphasizing that there is a 'state's power to punish' (*ius puniendi*). It is argued that written (positive) rules referring to the design of the criminal system derive from 'limitations to *ius puniendi*' and that is applicable to every way of sanctioning reaction by the state. Thus, the guarantees would also be applicable to all concurrent regimes.

Of course, taken to the extreme, this argument simply cannot be supported in practice.[19] The evolution of the Chilean Constitutional Court (TC) case-law illustrates this fact. In the decision that started with the idea of applying criminal guarantees to concurrent sanctioning proceedings,[20] the TC stated that the principles limiting criminal law must be applied to administrative sanctioning law. Later, and in a line that continues up to date, that position was literally nuanced.[21] According to its famous statement, criminal principles must be applied 'with nuances' in administrative matters.[22] That is: there is no point in applying the same rules, although some analogies might make sense according to the TC.[23]

The manner of discussion does not tend to be equivalent to the Hispanic tradition's reasoning in comparative practice – although results are not totally dissimilar. In the European Court of Human Rights' case-law the concept of *matière pénale* when determining the scope of application of guarantees relating to sanctioning matters plays a similar role and also leads to a different application. The most famous example of this differentiated application is the Oztürk case: while the Court was willing to apply the guarantee that a free interpret must be available to every defendant, as provided for in article 6 of the Convention regarding 'criminal matters', in order to impose a low sanction according to the German regime for

19 For a critique focusing on the inconsistency of this case-law trend, see Van Weezel (2017), pp. 1008-1017.

20 STC 244-96.

21 STC 479-06.

22 STC 479-06, whereas No. 8.

23 See Van Weezel (2017), pp. 997-1043, for a critique of the very analogy between the two sanctioning regimes. The fragility of the standard for the application of guarantees with nuances, is immediately noticed when reviewing the set of most relevant decisions of the late years on this topic, all of them linked to administrative sanctioning powers in the field of the stock market. In its decision of September 29, 2016, case 2922-15-INA, the TC declared that it was unconstitutional to impose a fine under Article 29 of Decree Law 3538, that creates the Chilean Securities and Insurance Commission was unconstitutional, because it violated guarantees applicable to sanctioning procedures under *ius puniendi* (here, in essence, determination). Shortly after the TC's decision, the Santiago Court of Appeals held that criminal and administrative sanctions could not be applied simultaneously or successively to the same act - something subsequently resisted by the Supreme Court (SCS (Supreme Court Decision) 30.176-17, *sentencias de casación y reemplazo*). All this has started a new field for litigation regarding, specifically, the possibility of imposing double sanction.

regulatory offenses, it did not consider that the aspect in which that regime most deviates from the required criminal design (the principle of judicial enforcement) to be problematic.[24] This can be seen as contradictory, leading to sometimes-fluctuating case law. But the starting point, unlike the Hispanic case, was not linked to an idea of an essential *ius puniendi*, but rather to directly confronting – with greater or lesser success – the problem of discipline.

Although we will review again the point on how other influential systems have reacted to the problem of discipline for these purposes in section 3 - discarding the maximalist solution – here I will refer to the obvious: it does not stand on its own terms. It simply makes no sense to fully apply the criminal law regime to concurrent sanctioning systems. Thus, giving content to the guarantees 'nuances' in non-criminal sanctioning systems tends to work as an exercise of intuitive decision making. To overcome this, it is necessary to return to the problem to which said intuition responds, namely the need to avoid mislabeling and to discipline in the choice of sanctioning systems.

IV. THE MINIMUM RATIONAL SOLUTION

3.1 Presentation

There are two problems related to the discussion on design limitations and guarantees of how sanctioning regimes concurring with the criminal system work. In general, there is a need for discipline when choosing sanctioning regimes, including the problem of mislabeling. Eventually, in systems without a recognized control dogmatic, based on how fundamental rights are affected/principle of proportionality, the lack of special regulation control in these areas may also be problematic. As this problem is secondary and contingent, I am interested here in briefly outlining a rational response to the primary design problems.

The outlines of a minimum rational response are obtained by combining two premises that should be easily acceptable: it is reasonable to have concurrent regimes and fewer design limitations than in the criminal system; but to avoid a bigger disciplinary problem (mislabeling), when choosing for the more or less limited regime there must be a controllable rational trade-off to offer.

We already reviewed at the beginning of the first part why it is reasonable to accept the first premise. Only the second step requires explanation, and the explanation is not particularly complex. If one can freely choose between two regimes that offer exactly the same when designing a system, but one has less design constraints than the other, there is no reason to prefer the more limited one (criminal law) over the less limited one (concurrent regimes). There are two requirements for overcoming this problem: first, establishing a trade-off between choosing the more intense but more limited system and the less intense but less limited one, on the one hand, and the possibility of control on the other.

24 *Oztürk v. Alemania* (CEDH, February 21, 1984).

3.2 First condition for the rational trade-off: the more restricted system must offer more than the less restricted system

The rational trade-off only occurs if at least one condition is met: it is necessary that the more limited regime (criminal) *allows* (*or produces*) *more* than the less limited regime (concurrent regimes).[25] That limited regime's 'plus' may be of different kinds. In general, criminal law has a stronger symbolic burden than any other regime. But said symbolic burden is contingent, according to its use in the most serious cases, which implies that it is not self-sufficient. The criminal system also offers the use of an already established bureaucratic apparatus. The use of some police powers – above all the power to detain – may be subject to links with the criminal system. Finally, this 'plus' tends to imply more intense sanctions. Therefore, to reserve the affectation of personal freedom to criminal law can thus fulfill this modeling role.

Then, the minimum first step towards solving the problem at stake consists of reserving important powers to the criminal system or to a regime with equal limitations.

3.3 Second condition for the rational trade-off: possibility of controlling the choice of regime

The second requirement is to establish modes of control of one or two classes for the choice of regime.

First, it is necessary for some entity to have the power to establish the unconstitutionality/inapplicability of the measures inserted into concurrent regimes and which are, however, reserved to the criminal system. The obvious case, but still problematic, focuses on the affectation of personal freedom, in the way of confinement and detention: some concurrent mechanisms function precisely with the aim of imposing coercive measures, what includes forms of confinement. This, as will be cleared, could make convenient to model established restrictions regarding sanctioning regimes in several steps.

The second way of control consists of giving some entity the power to materially determine that a type of sanction or apparently concurrent regime has, in reality, the same design requirements as the criminal regime and that, in this way, the guarantees established regarding punishments are to be applied. Thus, the supervisory entity has the power to determine, with relative independence from the legislator, which sanctioning regime operates in specific areas.

25 So does Van Weezel (2017), pp. 1025 ff., although certainly criticizing to structure more effective regimes. By the way, the argument assumes that the legislation will only have an instrumental focus in order to obtain relevant returns, instead of attending to other values (proportionality, justice). And that certainly may not happen in all cases, so the assumption may be problematic. There are two aspects that make that assumption make sense. First, political rationality. Under electoral pressure, politicians are likely to seek to show that any criminal reform has significant punitive returns. Second, what must (certainly but not exclusive) be controlled is precisely this expansive will in the sanctioning output. I am grateful to an anonymous evaluator for this argument and for the need to take it over.

Dangers in this form of control are relatively obvious. If guarantees depend on the forum, lawyers will obviously argue that guarantees apply *in toto* to any regime with high-level litigation. This is what has taken place among us. But even in comparative experience, it is difficult to find anything like a consistent criterion for identifying the material reasons for exercising this control. The third section discusses precisely this issue: Which consistent and effective criteria can be used to discipline the choice of sanctioning regimes?

None of these questions addresses directly the issues related to the standards of design and application of sanctioning regimes other than criminal, including the problem of concurrent sanctions between both regimes. In the absence of special rules, the most reasonable answer is simply to apply the general dogma of fundamental rights.

IV. WAYS OF LEGAL CODIFICATION OF THE PROBLEM: DISTRIBUTION OF PROCEDURAL RIGHTS, THE CONCEPT OF *MATIÈRE PÉNALE* OR THE NATURALIZATION OF *IUS PUNIENDI*

As we have seen, the problem of disciplining the use of sanctioning regimes – known under different names in different traditions – requires to establish a controllable trade-off: the state's choice for using the most intense mechanism must entail the application of more limitations, while choosing mechanisms that allow for less affectation may be subject to fewer limitations.

In comparative law, there are different solutions intending to achieve this end. In what follows, I intend to set out their general lines in the most influential versions of comparative law: the European Court of Human Rights' case law on *matière pénale*; and the United States Supreme Court's case law on distribution of procedural guarantees regarding the *punishment*.[26] In doing so, I intend to give an account of the issues that both case-law lines seek to solve. In the last section I will address the problems they face and how to rationally resolve these problems.

4.1 Comparative Constitutional Practices

Two comparative constitutional practices have an especially strong influence when addressing the problem at hand: American federal case law and the European human rights case-law.

In the United States, the line of argument on which its case law is constructed is relatively clear. Several legal provisions that distribute procedural rights refer to criminal law concepts. This is the case, for instance, of the concept of crime (Fifth

26 The German constitutional case-law has also some decisions on the point. As usual, its approach – mainly focusing the decision in the law on regulatory offenses (BVerfGE 27, 18) – is pragmatic, leaving room for its own action within a frame: legislative decisions regarding the sanctioning regime are binding, insofar as there is no interference in the core area of criminal law, which must be determined by means of overall assessments.

Amendment) or punishment (Eighth Amendment). By construing these concepts, the Court establishes the procedures to which the respective guarantees apply.

As is usually the case, the problem is mainly about sanctioning regimes that concur with the criminal regime. The Court has rightly assumed that if a normal criminal justice system is utilized, the guarantees shall obviously apply. Therefore, the question refers to those cases where a state imposes a sanction through other procedures. Should these regimes be considered as punishment in order to force such state to respect constitutional guarantees?

In the main case on this matter (*Kennedy v. Mendoza Martínez*),[27] the Court had to decide if to 'automatically' impose the deprivation of citizenship - for those who evade military conscription in times of war - should be considered punishment and thus, be subject to guarantees of due process. The Court considered that although neither bureaucracy nor criminal law labels were used, it was substantially a punishment, which therefore could only be imposed after due process. The standard, in order to substantially determine if that it was punishment, was the recognition of an intent to punish: punishment, for constitutional purposes, it is to impose a formal sanction intending to punish, even if the legislator does not declare it so.[28]

The core cases of the European Court of Human Rights have a similar structure – invoking partially similar structures that, however, lead to substantially different outcomes.

Thus, in *Engel v. The Netherlands*, the Court ruled that, for the purposes of applying the guarantees regarding criminal cases, three criteria should be met: formal classification under domestic law (criminal or otherwise); the type of regime at stake (sanctioning or otherwise); and the severity of the punishment.[29] This appears to be similar in the US case law (even: corrected) and to lead to application where there is an aim of substantial 'punishment'. In fact, however, the Court does not seem to consider in any relevant way the intensity of the sanction and, unlike the American case law, it has established a practice of differentiated application of guarantees.

Indeed, in *Oztürk v. Germany*, the Court considered that the guarantees of article 6 of the European Covenant on Human Rights, which relates to criminal matters, were applicable when imposing a fine for a traffic violation.[30] In the case, the Federal Republic of Germany punished a Turkish citizen by using the procedure for regulatory offenses, established in the 1968 General Ordinance, as amended in

27 *Kennedy v. Mendoza Martinez*, 372 U.S. 144 (1963).

28 *Kennedy v. Mendoza Martinez*, 372 U.S. 169 (1963). To see about later case-law evolution only Chiao (2018), pp. 189 ff. For a critic view on the Supreme Court's conception, see Ristroph (2008), pp. 1353–1406. This does not mean, of course, that with respect to other concurrent sanctioning regimes, the Court sometimes does not apply similar standards. In fact, this inconsistency in its own jurisprudence shows that the distribution of guarantees based only in recognizing the intention to punish is insufficient. I am grateful for this clarification from an anonymous reviewer.

29 *Engel and Others v. The Netherlands* (ECHR, June 8, 1976)

30 *Oztürk v. Alemania* (CEDH, February 21, 1984).

1974.[31] In accordance with this regime, which complements the criminal system, the sanctions are imposed in a much less costly manner and are not even imposed by the judiciary, but directly by the administration. *Oztürk* claimed, based on article 6, that the translation costs in the proceedings ought to be assumed by the state, arguing that the European Convention guarantees that in criminal matters translations are made free of charge for the defendant. The European Court, following its decision in the Engel case, considered that this was a criminal case and that *Oztürk* should therefore be reimbursed for the translation costs. However, it did not state that the German laws for regulatory offenses were contrary to the guarantees established for criminal proceedings, even though the basic guarantee - the punishment can only be imposed by a court (*Richtervorbehalt* – expressed in Art. 92 of the German Constitution) – was not applicable.[32]

Differences in legal culture in both areas are easily noticeable. The Supreme Court of the United States assumes that the object of its case-law on punishment is simply to determine when the procedural guarantees set out in the constitution are applicable – which as a matter of positive law – refers to concepts pertaining to criminal language. As can be seen, the Court thus responds to the first basic criterion of control we saw in the previous section - compelling judicial determination of *when* criminal guarantees apply. The European Court of Human Rights, on the other hand, has an approach that goes beyond this. The court does not only assume that it must determine when to recognize the application of criminal procedural guarantees *in toto*, beyond the will of the legislators. Furthermore, the European Court of Human Rights assumes its ability to fragment such guarantees and, thus, to construct a guarantees regime for sanctioning procedures regarding concurrent regimes.

In both cases, to recognize disciplinary needs is related to the control they exercise over relatively independent legal systems. This is especially obvious in the European case: its aggressiveness is explained, in part, by the need to establish common standards for a large number of legal systems that rest on very different legal and – above all – political cultures. The United States Supreme Court exercises constitutionality controls with similar goals too. But since they are part of a common legal and, to a lesser extent, political culture, these disciplinary needs are less relevant.

In that sense, the case of the U.S. Supreme Court is a better reflection of the needs with respect to a federal legal system dependent on a common culture or unitary systems, as is the general case in Latin America. By definition, in unitary systems there is no dispersion of treatment, whereas in federal systems dependent on a common legal culture, the pressure to disciplining is comparatively less than in pluralist political entities (as in the European Union). In these systems, the only problem that remains is the potential evasion when distributing individual guarantees and the imposition of legislative constraints when imposing criminal sanctions.

31 To learn more about the history of the General Ordinance, see Göhler, Gürtler & Seitz (2012) Einleitung. Nm. 1-14.

32 In this regard see Tiedemann (1991), pp. 15 ff.

Is the American solution – which consists of assuming control powers when verifying the existence of a will to punish – satisfactory in this respect? In the next section, I will criticize this standard. The last section, on the other hand, outlines a better solution.

4.2 Blind spots

There are two reasons to criticize the American solution. The first is known: it generates counter-intuitive consequences in relation to what is protected by more intense standards. But, in addition, it does not provide sufficient guidance to the legislator in the choice of means drawn from the minimally rational trade-off.

The counter-intuitive effects are easily perceived when comparing certain areas in which, according to the US Supreme Court, constitutional criminal guarantees are not applicable. Regarding administrative matters to which the Court does not attribute punishment intends, the US Supreme Court does not mandate the application of the procedural guarantees, regardless of the effect that the potential sanctions have on a person's life. Thus, issues such as compulsory detention and treatment, expulsion of immigrants, loss of custody of children or determination of the collateral effects of a sanction are not subject to the guarantees typically applicable to criminal cases. On the contrary, sanctioning processes aiming to punish big corporations are subject to this kind of limitations, what increases the possibility of success of such agents with great defense resources.[33] This counter-intuitive nature shows that distributing procedural guarantees without consideration of the effects of the processes to which they are assigned cannot be reasonable.

The lack of direct deference to regime choice and regime-associated guarantees implies, on the other hand, that the trade-off cannot be adequately modelled. Although there is jurisprudential development in American law regarding due process guarantees associated with criminal, administrative and civil proceedings, the setting of conditions under which one or the other proceeding should be applied is not consistent. The reason is simple: the condition of control that the most restricted system (criminal) be applied and not the less restricted (administrative) is linked to an ideological-political consideration (will to punish) and not to its effects. This generates a risk of indiscipline: whenever there is a desire to renounce (or to skillfully hide, as can happen in the case of immigrants) the ideological pretension of punishment, the possibility of making use of sanctioning regimes not subject to intense guarantees arises. It is not that the system allows doing more when it is more limited, but that it is limited when in presence of a specific will. This deforms the trade-off.

4.3 Towards a rational solution

A rational solution to the problem of discipline when choosing and designing sanctioning regimes requires at least three things: (a) the differentiation of at least two

33 See Chiao (2018), chap. 6.

design and operation standards in relation to sanctioning regimes; (b) every standard must be appropriate to the type of sanctioning practice they allow; (c) and the choice of one or another must be determined (although not necessarily exclusively) by the intensity of sanctioning impact allowed by the regime at stake. A system that meets these conditions can be called pragmatic formalist.

The pragmatic formalist system is based on two ideas. The first one – formalism – is the existence of formally differentiated classes of sanctioning regimes at the constitutional level.[34] Traditionally, a distinction has been made between criminal proceedings and others, but there is nothing to prevent further differentiation levels (guarantees of criminal regimes, regimes for regulatory offenses, preventive regimes, high-level administrative-sanctioning regimes, etc.). Of course, the greater the differentiation in a constitutional system, the greater the limitation on subsequent design possibilities – what entails a risk. And the more differentiated it is, the greater the level of complexity – meaning that adequate guarantees for each type of practice that each one reports must be contemplated. This does not prevent that, in our current conditions, it is probably better to recognize several formal levels (and leave some subsidiary level).

The second key element, is pragmatism, as proposed by Vincent Chiao, Talia Fischer and Issachar Rosen-Zvi in the United States.[35] It rests on the idea that pragmatic consequences should be those that define, at least partially, when a more restricted regime (= set of guarantees) should be used compulsively. That is: there should be a determining (but not excluding) and controllable criterion for graduating the applicable guarantees which must be that certain rights over others are affected. The traditional example refers to confinement: to affect it implies necessarily to choose a more constrained practice in its design, which does not depend on the will of punishing and the formal labels that may be used.

Of course, if one wants to combine formalism and the possibility of the legislator choosing between formal regimes, with pragmatism, the standards that must be used for the design and operation of the sanctioning practice should not be exclusively determined by how intense the affectation is.[36] Rather, certain regimes must be made exclusively applicable when extensive consequences (loss of liberty, custody, right to reside in a territory) can be expected, and others must be made available when that is not the case, offering trade-offs in all possible scenarios. If, for instance, the legislature wishes to establish a sanctioning regime with extensive consequences, it may choose between the regime with a greater symbolic burden and

34 This is the correct idea behind the, however, indeterminate German case law on the point initiated with BVerfGE 27, 18. It is similar among us, although explicitly arguing for a limited and specifically oriented administrative sanctioning system, Van Weezel (2017), pp. 1029 ff.

35 Chiao (2018), chap. 6; Rosen-Zvi & Fisher (2008), pp. 79–156.

36 In a context that rather focuses on judicial control, and less to legislative design control, this is however Chiao's proposal: that the courts distribute guarantees directly according to the degree of affectation that the regime in question entails. This betrays the idea of creating a rational trade-off and, along with it, the disciplining of legislative practice.

attribution of responsibility, while in other cases, he may prefer the most efficient regime with less symbolic burden and with a bureaucratic function that is not the criminal system, while respecting the minimum guarantees established at that level.

Here, for example, in order to explore a little, I can outline a good (though ambitious) constitutional configuration which could distinguish three levels of sanctioning regimes that could be designed. The criminal law regime should compulsorily shade light in any sanctioning practice intending to deprive of freedom for retrospective reasons – only in order to apply a sanction. Such a regime could distinguish levels and establish additional conditions in relation to certain classes of persons (e.g. adolescents). This same regime could be used for ideological reasons to create other kinds of sanctions (patrimonial, restriction of rights, etc.) – not making compulsory, at this respect, the choice of the level at stake.

A second regime could compulsorily regulate the preventive application of regimes depriving of liberty. This could include preventive security regulation (including issues such as security custody), with mandatory application if other rights are affected and another preventive regime regulation does not exist.

A third regime could subsidiary regulate administrative sanctioning practices exclusively affecting economic rights. The regulation at issue could distinguish between high-level sanctioning administrative justice and mass sanctioning administrative justice. Although this regime could be used whenever pecuniary or similar sanctions are to be imposed, the legislator could choose the criminal regime for convenience (somehow criminal bureaucracy is more useful) or symbolic reasons. To respect it is the minimum required for a sanctioning regime to work.

In each of these regimes, the combination of functions and sanctioning permissions – and to compulsively graduate their use – allows to combine the two main elements to the rational solution hereby proposed: the legislator is free to choose which regime to use, but only within limits that are fixed by the rights it may affect.

V. CONCLUSIONS

A central issue in constitutional criminal law, which has received little direct attention in the Spanish-language literature, relates to the determination of the scope of application of constitutional provisions regarding sanctioning in contexts with several sanctioning regimes. As we have seen, the existence of concurrent regimes has – at least in some cases – relevant justifications linked to the limitations of criminal law. But to recognize this multiplicity of regimes obviously creates problems of discipline in the design and put in practice of the regimes at stake.

In the article, I have defended a solution that I call pragmatic formalist, essentially based on three principles: constitutional law must distinguish at least three standards that shade light on the design and put in practice of sanctioning regimes, and the legislator may partially choose to use one or the other. Only if the rights are affected over a certain threshold (typically: freedom), the most intense regimes must be of compulsory application. In the rest of the cases, the rational trade-off given by choosing regimes that allow more but are more restricted and regimes that allow less but have fewer limitations should allow sufficient discipline.

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