

EL PRINCIPIO DE CULPABILIDAD (II): CAUSAS DE EXCLUSIÓN Y ATENUACIÓN, DOCTRINA DEL ERROR Y LAS ADVERTENCIAS.

THE PRINCIPLE OF CULPABILITY (II): CAUSES OF EXCLUSION AND MITIGATION, DOCTRINE OF ERROR AND WARNINGS.

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Resumen

En el segundo de los dos artículos en las que se aborda el principio de culpabilidad dentro del derecho administrativo sancionador y del disciplinario, se recogen los aspectos más ejemplificativos de su aplicación. Como eje central se encuentra la traslación de los principios y normas penales referidas a las causas de atenuación y exención de la culpabilidad al ámbito disciplinario, que han de realizarse con determinadas adaptaciones propias

del ámbito en el que se aplican y que en el caso del educativo añaden un marco contextual específico y propio.

Se está abriendo progresivamente una vía que exigirá, en primera instancia a las Administraciones públicas y posteriormente la cada vez mayor participación de las distintas instancias judiciales, un esfuerzo adicional, en el campo de la aplicación al régimen disciplinario de los empleados públicos del principio de culpabilidad. Desde este artículo se pretende aportar determinadas pautas que guíen y orienten nuestra labor en el ejercicio de dicha potestad adelantando ya que no es menor el papel que desde la inspección educativa, dado el gran número de recursos humanos en liza, puede realizar a dicha labor.

Palabras clave: *Ciencias jurídicas y derecho; Derecho Administrativo; Régimen disciplinario de los empleados públicos; principio de culpabilidad; dolo y culpa; imputabilidad; doctrina del error.*

Abstract

The second of the two articles addressing the principle of culpability within administrative sanctioning and disciplinary law presents the most illustrative aspects of its application. The central focus is transferring criminal law principles and norms related to mitigating and exonerating circumstances to the disciplinary sphere. This transfer must be implemented with certain adaptations specific to the field in which they are applied, and in the case of Education, these adaptations add a unique and specific contextual framework.

A new path is gradually opening up, that will require, both, initially from Public Administrations and, subsequently, with the increasing involvement from various judicial bodies, an additional effort in applying the principle of culpability to the disciplinary regime for public employees. This article aims to provide certain guidelines to inform and direct our work in exercising this

power, emphasizing the significant role that the Educational Inspectorates can play in this endeavor given the large number of human resources involved.

Keywords: *Legal sciences and law; Administrative Law; Disciplinary regime of public employees; principle of culpability; intent and negligence; imputability; doctrine of error.*

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1.- INTRODUCTION

As has been discussed in the first of the articles dealing with the principle of culpability¹, there has been a progressive transposition of criminal law principles to administrative sanctioning law, without forgetting that there are significant and evident differences between these two spheres of application of the State's punitive power, and therefore this transposition must be carried out with certain adaptations that are specific to the context, nature, and purpose of the exercise of disciplinary authority over public teaching staff.

Within this process is also the principle of culpability, as a basic structural principle of the different manifestations of the State's punitive power, namely criminal law and administrative sanctioning and disciplinary law. In the transposition of this principle, it must be borne in mind that the requirement of liability in administrative offenses is more flexible than in criminal law. One of the first consequences of this transposition, and of the evolution in the application of this principle, is that there is no liability without culpability or strict liability within the *ius puniendi* and the exercise of the sanctioning power, and this entails the need to determine the authorship of the act or omission giving rise to the sanction, that is, imputability together

¹ This section reflects some of the conclusions of CAMPAL MARTÍNEZ, ÁNGEL M. (2026), "*El principio de culpabilidad (I): Elements, Blameworthiness, Intent and Negligence, and the Burden of Proof.*" *Supervisión 21*, 2026, as a connecting element between the two articles.

with intent or negligence constitute the basic element of the offense. Another element to be taken into account in this process of adaptation lies in the quantitative distinction between these two fields, which leads to different forms of administering sanctions, criminal sanctions being subject to greater procedural safeguards and administrative sanctions being more expeditious, without overlooking the fact that both types of unlawful conduct must be covered by the same basic guarantees

Thus, according to the case law of the Supreme Court —hereinafter the SC— and as recognized by legal scholarship, the purpose of disciplinary authority is to correct, within the administrative sphere, those culpable acts which, because they constitute a significant infringement of legal rules, have been duly classified by the legislature as administrative offenses, so that not every breach of a legal rule constitutes sanctionable conduct, but only those that, because of their significance, have been regarded as such by the legislature, it also being essential that the offender be aware of the unlawful nature of the conduct attributed to them where different conduct could reasonably have been expected².

In this process, it must not be overlooked the impact that involvement in such proceedings has on the civil servant subject to disciplinary action, as well as the context in which we operate—the educational environment—which, by its very nature, is contingent upon the society in which it is embedded, thereby producing consequences extending beyond the strictly disciplinary sphere, particularly insofar as it may serve as a reference in matters of patrimonial liability. All these aspects must, in one way or another, be duly reflected in the report prepared by the Educational Inspector, whether as a basis for the initiation of disciplinary proceedings or within the framework

² GALLARDO CASTILLO, M.J. (2015), *Régimen disciplinario de los funcionarios públicos*. Editorial Aranzadi, Navarra, p.105.

of preliminary inquiries, including reserved investigations or prior fact-finding measures.

In this regard, it should be clearly understood that the element of culpability may be defined as a personal judgment of reproach directed at the author of an unlawful and typified act, which arises—albeit not exclusively—where an intentional or deliberate act (*dolus*) is established, that is, conduct purposefully or intentionally directed towards a result prohibited by law. These elements, namely awareness and voluntariness, are more than sufficient to constitute the minimum threshold required for the existence of culpability³.

From this delimitation, it is necessary to take into account the dual dimension encompassed by the principle of culpability. On the one hand, the material dimension, referring to the principles of subjective imputation or personal liability, and liability based on fault—thus excluding strict liability—and, on the other hand, the formal or procedural dimension, linked to the principle of the presumption of innocence, together with its corresponding implications for the burden of proof and the operation of *iuris tantum* presumptions.

Furthermore, the principle of culpability is expressly enshrined in the applicable legal framework governing the exercise of disciplinary powers (articles 94.2(d) of Royal Legislative Decree 5/2015, of 30 October, approving the consolidated text of the Basic Statute of Public Employees (TREBEP), and article 28.1 of Law 40/2015, of 1 October, on the Legal Regime of the Public Sector (hereinafter, LRJSP), particular importance being attached to the requirement that persons liable shall be so on the basis of intent (*dolus*) or negligence (*culpa*). Accordingly, this subjective liability may be incorporated within the subjective element of the offence and/or have consequences for the gradation of the applicable sanction—that is, within the framework of the

³ Ibidem.

principle of proportionality—courts even allowing, in exceptional circumstances, its application below the statutory minimum.

In this process of assessment, particular relevance must be attributed to the concept developed by the Supreme Court concerning the principle of culpability as a personal judgment of reproach directed at the author (whether by act or omission) of an unlawful and typified act, whereby it is required that the author be culpable; that is, that they must have acted with awareness and voluntariness, either on the basis of intent (*dolus*) or negligence (*culpa*). This latter aspect is of particular importance and is addressed in this second article through an analysis of the Court's case law relating to the causes of exclusion and mitigation of liability, followed by a conceptual delimitation, as well as an examination of the variants and consequences of the so-called doctrine of error and the role of warnings, without overlooking the mechanism of leniency by reporting, which substantially alters the outcomes of disciplinary activity.

In this context, it is essential to have a clear understanding of the concepts of intent (*dolus*), as an exceptional manifestation, and negligence (*culpa*), as the typical expression of culpability, as well as their respective forms—direct and indirect intent, and gross, slight and very slight negligence—set out in detail in the first of the articles together with the elements that define them. A proper understanding of these elements and their correct classification, either within the subjective element of the offence or within the principle of culpability itself, will determine upon whom the burden of proof falls.

2.- GROUNDS FOR THE EXCLUSION/MITIGATION OF CULPABILITY (YES) VS. (NO)

2.1.- CONTEXT

According to JUANES PECES, A. (2024), although the case law of the Supreme Court (TS), when consistently proclaiming the maxim that the principles of

criminal procedure are applicable to administrative sanctioning proceedings, it does not develop this doctrine in its full scope. This gives rise to logical uncertainties as to its practical applicability, for instance in the field of defenses under the Criminal Code, as has already been addressed in a specific manner by certain regional regulations⁴.

It is necessary to take into account, given its pedagogical value, the position set out on this matter in the Judgment of the High Court of Justice of Catalonia (STSJ CAT 4046/2024, 18 April 2024), according to which "the regulation of the disciplinary regime in the public service is insufficient, both in terms of the prevention of conduct by public employees derived from or related to their mental health condition, and in terms of the sanctioning of such conduct when irregular actions typified in disciplinary sanctioning rules have occurred. In light of these circumstances, we must assess the facts"; and thus, *"in administrative sanctioning law, in general, the causal link between the subject and the action typified in the rules may be excluded (fortuitous event and force majeure), or because there is no imputability (mental disorder, certain serious perceptual disturbances, minority), or because there is no culpability (good faith, error, insurmountable fear, subjective state of necessity)".* Accordingly, for this Court, "(...) if we take as a reference the principles and rules of criminal law—which are frequently relied upon in the application of the disciplinary regime—a distinction is to be drawn between causes of inculpability, in the strict sense (lack of imputability and mistake of law), and the so-called causes of exculpation (exculpatory state of necessity, insurmountable fear, excess in conduct). In general terms, without the need for further theoretical elaboration, in the former category there is an absence of any possibility of an alternative course of conduct on the part of the author

⁴ JUANES PECES, A., "Special features of the right to proceedings with safeguards in administrative sanctioning proceedings", LA LEY Penal, No. 170, Case law applied to practice section, September–October 2024, ISBN-ISSN: 2254-903X, LA LEY 27708/2024.

(the capacity to act otherwise), whereas in the latter category such an alternative does not disappear, but the law refrains from imposing a sanction on policy grounds related to criminal justice considerations". That is to say, "in other words, imputability is the mental capacity to be culpable"⁵.

As already indicated in the first of the articles, Law 1/2023, of 16 March, on the sanctioning powers of the Basque Public Administrations, seeks to shed light on this process. On the basis of its guiding principle that "in matters not provided for in the Basic Statute of Public Employees and in the laws governing public service and employment enacted in its development, the provisions of this Act shall extend, by way of supplementary law, to the exercise by public administrations of their disciplinary powers in respect of personnel in their service, irrespective of the legal nature of the employment relationship" (article 1.3), within the specific scope analyzed in this article and in relation to the principles and rules of integration laid down therein, it expressly provides as follows:

- "The sanctioning power shall be exercised in accordance with the principles established in the applicable basic State legislation, in this Act, in its implementing provisions and in the sectoral regulations establishing the various sanctioning regimes" (article 2.1);
- "Where the applicable basic State legislation, this Act, its implementing provisions or the sectoral regulations establishing the various sanctioning regimes do not allow a given issue arising in the exercise of the sanctioning power to be resolved, the corresponding provisions of the Criminal Code shall apply, provided that they are compatible with the nature of the offence and with the purpose of the provision under

⁵ STSJ CAT 4046/2024, Administrative Chamber, Seat: Barcelona, Section 4, of 18/04/2024, Appeal No.: 1591/2021, ECLI:ES:TSJCAT:2024:4046, in its Legal Ground 4.

which it is classified, or with the relevant sectoral substantive regulation" (article 2.2).

By virtue of all the foregoing, a pathway is progressively being opened which will require, in the first instance, an additional effort on the part of public administrations and, subsequently, an increasing degree of involvement from the various judicial bodies, particularly in the field of applying the principle of culpability within the disciplinary regime of public employees. This article seeks to provide certain guiding principles to inform and direct our work in the exercise of such powers, while already recognizing that the role to be played by the Educational Inspectorate—given the significant number of human resources involved—is far from insignificant.

In this regard, the aforementioned Act (LPSAPV) incorporates within its provisions aspects of particular relevance, including the following:

- It provides for grounds for exemption from liability, with the additional application—beyond those specific to this sanctioning regime—of those set out in the Criminal Code, provided that they are compatible with the nature of the infringement committed and with the relevant sectoral substantive regulation (article 6.1).
- It includes the concept of error in relation to an element of the offence or the unlawfulness of the act, addressing the circumstances in which such error is to be regarded as avoidable or unavoidable, as well as the consequences thereof for the liability of the author of the punishable act (article 6.2).
- It also establishes circumstances modifying liability, incorporating the mitigating factors provided for in the Criminal Code, and addressing the consequences arising from the intentional (*dolus*) commission of offences (article 7).

2.2.- GENERALLY ACCEPTED CAUSES COMMON TO CRIMINAL LAW AND OTHER SOURCES

According to LEÓN ACOSTA, M. (2019), the following are generally accepted as grounds for the exclusion of culpability, both in criminal law and in administrative sanctioning law⁶:

- 1.- The exculpatory state of necessity,
- 2.- A fortuitous event or force majeure, and
- 3.- Error of prohibition and error of fact (error of type).

In this regard, SÁNCHEZ MORÓN, M. (2023) also includes⁷:

1.- Legitimate expectation arising from positive conduct on the part of the Administration—rather than mere passivity or tolerance of previous conduct—which may give rise to the subject's conviction that they are acting lawfully (precedents, criteria expressed in consultations or official publications, etc.).

- 2.- Invincible mistake of fact and reasonable interpretation.

However, within the criminal law sphere, the following are commonly recognized in practice as grounds for exemption from liability (article 20 of Organic Law 10/1995, of 23 November, of the Criminal Code:

- 1.- When, due to a mental disorder or impairment, a person is unable to understand the wrongfulness of the act or to act in accordance with that understanding.

⁶ LEÓN ACOSTA, M., The liability of public employees in Spain. *Revista CES, Derecho*, Vol. 10, No. 2, July–December 2019, 605–640, loc. cit. p. 624.

⁷ SÁNCHEZ MORÓN, M., *Derecho Administrativo. Parte General*. Editorial Tecnos, 2023, p. 713

2.- A **temporary mental disorder** shall not exempt from liability where it has been brought about by the individual for the purpose of committing the offence, or where its commission was foreseen or ought to have been foreseen.

3.- **Full intoxication** due to the consumption of alcohol or drugs.

4.- Suffering from **perceptual disturbances** from birth or early childhood that seriously distort the perception of reality.

5.- **Acting in defense** of one's own person or rights, or those of others.

6.- Acting under the influence of **insurmountable fear**.

7.- Acting in **fulfilment of a duty** or in the lawful **exercise of a right**, profession or office.

Furthermore, within criminal law practice, the following are commonly recognized as mitigating circumstances (article 21 of the Criminal Code):

1.- **The circumstances set out in the preceding chapter, where not all the necessary** requirements are met to exempt from liability in each respective case.

2.- **Acting as a result of a serious addiction to the substances** referred to in paragraph 2 of the preceding article.

3.- **Acting under causes or stimuli of such intensity** as to produce a state of **passion, obfuscation** or another **comparable emotional** condition.

4.- **Where the offender, prior to becoming aware that judicial proceedings are being brought against them, has confessed the offence to the authorities.**

5.- Where the offender has taken steps to **repair the harm caused** to the victim, or to mitigate its effects, at any stage of the proceedings and prior to the holding of the oral trial.

6.- **Extraordinary and undue delay in the conduct of the proceedings**, provided that it is not attributable to the accused and is disproportionate to the complexity of the case.

7.- **Any other circumstance of analogous significance to those listed above.**

We shall now examine some of these grounds and their judicial treatment by way of illustration.

2.2.1.- STATE OF NECESSITY

The Supreme Court (Military Chamber), with regard to the concept of a state of necessity, has held that "(...) it is configured within our legal system as a situation in which there exists the risk of serious harm to a given legal interest, which may only be avoided by sacrificing other legal interests belonging to third parties. It therefore constitutes a situation of conflict between legal interests in which the infringement of one of them is regarded as lawful for the benefit of another, either due to the compulsive situation in which necessity places the individual, causing a serious disturbance of mind or creating a situation in which no alternative course of conduct can reasonably be required, or because, following a proper balancing of the competing interests, it is determined which interest is of lesser value, the sacrifice of which is permitted by the legal system in favor of the more valuable one."⁸.

⁸ STS, Fifth Chamber, Military Chamber, Judgment of 24 Sept. 1996, Appeal No. 28/1996, Legal Ground 3.

Its regulation is contained in article 20(5) of the Criminal Code, where its scope is defined and the requirements for its application are set out, namely: "A person who, acting in a state of necessity, in order to avoid harm to themselves or to another, infringes another person's legal interest or breaches a duty, provided that the following requirements are met:

First. That the harm caused is not greater than the harm sought to be avoided.

Second. That the situation of necessity has not been intentionally brought about by the subject.

Third. That the person in need is not under a duty, by reason of their office or position, to sacrifice themselves."

The courts apply this concept very restrictively in practice, even going so far as to impose additional requirements. Such is the case reflected in SAN 3424/2012, of 9 July, Administrative Chamber, in which the disciplined individual breached the rules on incompatibilities, thereby placing themselves in a situation of incompatibility by simultaneously holding several posts within the public sector⁹.

⁹ This Judgment of the National High Court states that "the liability inherent in the commission of the infringements found by the sanctioning authority cannot be regarded as extinguished by virtue of the extinguishing circumstance relied upon by the appellant. This is because it is not possible to find that all the requirements of a state of necessity [art. 20, Criminal Code] are satisfied, as a ground exempting liability applicable by analogy in the administrative sanctioning sphere, according to the judgment delivered by the Third Chamber of the Tribunal Supremo on 21 January 2009 in cassation appeal No. 1224/2006 [...the application of the state of necessity as a ground exempting criminal liability (and, by analogy, liability arising in the administrative sanctioning sphere),...]. For the requirements of that exempting circumstance are not met, in so far as this Chamber and Section had already held in its judgment of 3 May 1999 [Rec. 1068/1996], 'jurisprudential doctrine, (...) adds a further additional requirement for the existence of a state of necessity (inter alia, STS of 20 April 1985), namely that the agent must lack any other viable or less harmful means of dealing with the serious and imminent harm'", SAN 3424/2012, of 9 July, Administrative Chamber, Appeal No. 10/2012 – Legal Ground 4.3, ECLI:ES:AN:2012:3424.

Furthermore, and regarding the principle of culpability, this judgment (SAN 3424/2012) addresses several particularly relevant aspects, including the implications of the principle of culpability, the different behavioral elements of the sanctioned individual under examination, as well as the allocation of the burden of proof. Thus, "the principle of culpability requires the existence of conduct that is typified as constituting an administrative offence and which is attributable to its author on the basis of intent (*dolus*) or negligence (*culpa*)" (...) "It has already been stated that the individual subject to disciplinary proceedings carried out the conduct constituting the infringement provided for in article 95.2(n) (...) [Law 7/2007, of 12 April], in that he breached the rules on incompatibilities, thereby placing himself in a situation of incompatibility by simultaneously holding several posts within the public sector during the periods referred to in the disciplinary decision, without having obtained the necessary authorization and receiving remuneration which, when added to that obtained from the other posts held, exceeded the limits laid down in V 7 of Law 53/1984". "He did so being aware [...] that such conduct entailed a breach of those rules, and therefore the reproachability of his conduct is manifest from the perspective of the governing rules of the disciplinary regime applicable to public employees. Of particular significance in this regard is the fact that, in a document annexed to the 'Appointment as Substitute Medical Officer', dated 30 July 2007, the individual 'EXPRESSLY STATES, for the purposes of Law 53/1984 on Incompatibilities of Public Administration Personnel, that he does not carry out any other post or activity within the public sector', whereas in the application for authorization of compatibility itself he indicated that he was engaged in his principal activity as a Secondary Education teacher at the Teachers and Resources Centre of Melilla. Furthermore, the urgent necessity of providing healthcare services by means of the exercise of a secondary activity on the part of the individual subject to disciplinary proceedings remains unproven (...) "so that, had such a state of necessity been capable of being upheld, the appellant would have

been required to prove (which he has not done) that he—and no other person—was the only individual who necessarily had to provide such medical services (...)"¹⁰.

2.2.2.- ERROR OF FACT AND ERROR OF PROHIBITION

The first issue that must be addressed is whether the doctrine of error may be invoked within administrative sanctioning law. In this regard, the Constitutional Court is unequivocal: "if there is no strict liability, it is not necessary for a mistake of law to be expressly stated as a ground exempting from such liability (...). Precisely because the law makes such liability dependent upon prior culpable conduct, it is clear that a mistake of law—particularly an invincible mistake—may produce the exonerating or mitigating effects inherent thereto within a system of subjective liability, but the absence of its express provision in the rule does not constitute a defect of constitutionality"¹¹.

Once such possibility is acknowledged, it becomes necessary to define conceptually this circumstance, as well as its different types and degrees, in order to determine the possible consequences for the liability of the accused. GALLARDO CASTILLO, M.J. (2015) summarizes the concept of error by stating that "ultimately, in all cases it concerns a situation of ignorance or mistaken or erroneous belief in which the individual who commits an unlawful act finds themselves," emphasizing that "a person who acts under error does not act with malice. But what about negligence? (...) this will depend on certain variables, namely whether we are dealing with an avoidable or an invincible mistake, and whether the error is one of fact or one of prohibition."¹². This latter aspect is of particular importance, as the variables identified therein will

¹⁰ Ibidem, Legal Ground 4.3.

¹¹ STC 76/1990, of 26 April, Legal Ground 4.C (BOE 30/05/1990).

¹² GALLARDO CASTILLO, M.J. (2015), *Régimen disciplinario de los funcionarios públicos*. Editorial Aranzadi, Navarra, pp. 115, 116.

determine the various issues that we shall seek to clarify, it being anticipated at this stage that there remains considerable ground to be covered in the application of these grounds for the exclusion or mitigation of culpability within the framework of disciplinary liability.

Before proceeding to define the different types of error, it must not be overlooked that, as indicated by LEÓN ACOSTA, M. (2019), "in all these grounds—those relating to the exclusion of liability—the duty of diligence to which public employees are subject once again assumes particular relevance, rendering their application difficult". In this regard, reference must necessarily be made to the so-called error in the case of professionals, since "moreover, and particularly in the case of professionals, it will rarely be possible to attribute to them an invincible mistake concerning the content and scope of the rules governing the performance of their functions; this is because, where the infringement has been committed by a professional who is presumed to possess a certain level of knowledge by virtue of that status, it is not possible for them effectively to invoke the absence of such knowledge in order to exclude their culpability"¹³.

Without losing sight of these two considerations, we shall proceed to define the types of error and their nature, as well as their consequences for the liability of the accused.

Article 14 of the Criminal Code lays down the basic regulation of these types of error. Paragraphs 1 and 2 deal with *error de tipo*, whereas paragraph 3 addresses *error de prohibición*¹⁴. Nevertheless, in order to facilitate its

¹³ SAN 5598/2007, of 19 December, Administrative Chamber, Appeal No. 108/2006, ECLI:ES:AN:2007:5598, Legal Ground 5.

¹⁴ "Article 14. 1. "An unavoidable mistake as to a fact constituting the criminal offence shall exclude criminal liability. If the mistake, having regard to the circumstances of the act and the personal circumstances of the offender, were avoidable, the offence shall, where appropriate, be punished as a negligent offence".

understanding, academic doctrine clearly defines both types of error as follows:

- **Mistake of fact:** error understood as a false representation or mistaken belief regarding reality, affecting the elements of the legal definition of the offence (the conduct, the result, the characteristics of the author or the causal course), whereby the individual is unaware that they are engaging in conduct which corresponds to all the elements of the offence, such that, through their actions, they bring about the elements of the offence itself or any of its aggravating features¹⁵. The distinction lies in the fact that, in cases of mistake of fact, the person acts without knowing what is actually occurring; in other words, they commit an offence or unlawful act without being aware of it, since they believe that what they are doing does not constitute an offence, but rather the opposite¹⁶.
- **Mistake of law (prohibition):** error understood as a false representation or mistaken belief regarding reality, affecting the elements of the unlawfulness of the act or those constituting the grounds of justification. The individual is unaware that the conduct is prohibited within the legal system or mistakenly believes that it is justified.¹⁷.

2. A mistake as to a fact qualifying the offence or as to an aggravating circumstance shall preclude its being taken into account.

3. An unavoidable mistake as to the unlawfulness of the act constituting the criminal offence shall exclude criminal liability. If the mistake were avoidable, the penalty one or two degrees lower shall be imposed".

¹⁵ GALLARDO CASTILLO, M.J. (2015), *Régimen disciplinario de los funcionarios públicos*. Editorial Aranzadi, Navarra, pp. 115, 116.

¹⁶ BARQUÍN DE COZAR ROURA, L.C., Lawyer, Public Prosecutor and Substitute Judge, *Diario La Ley*, No. 9822, Tribuna section, 5 April 2021, Wolters Kluwer, LA LEY 3654/2021.

¹⁷ GALLARDO CASTILLO, M.J. (2015), *Régimen disciplinario de los funcionarios públicos*. Editorial Aranzadi, Navarra, pp. 115, 116.

Regarding mistake of law (prohibition), the person carrying out the act is fully aware of what they are doing and considers it to be lawful¹⁸.

Of particular interest is the reflection made by GALLARDO CASTILLO, M.J. (2015) on the fact that “a mistake of law—where the individual is unaware of the circumstances (the precise knowledge of the meaning of the concepts employed in the provision being immaterial) which the law has selected in order to define a particular unlawful act—may lead to a mistake of fact; and, conversely, a mistake of fact may lead to a mistake of law where the individual—erroneously—believes that, in their particular circumstances or in relation to their conduct, a ground of justification is present”¹⁹.

At this stage, it is necessary to take into account how the Supreme Court approaches this issue. Of particular relevance is the Judgment of the Supreme Court (Criminal Chamber), Judgment 930/2022 of 30 November 2022, which recognizes that “(...) the doctrine of error on the part of the offender is expressly acknowledged in criminal law, and article 14 of the Criminal Code sets out three possible approaches, namely:

1.- **An invincible mistake** as to a fact constituting a criminal offence: this **excludes criminal liability**.

2.- A **mistake classified as 'avoidable' (vencible)**, having regard to the circumstances of the act and to the personal circumstances of the author: this is **punishable as negligence**.

¹⁸ BARQUÍN DE COZAR ROURA, L.C., Lawyer, Public Prosecutor and Substitute Judge, *Diario La Ley*, No. 9822, Tribuna section, 5 April 2021, Wolters Kluwer, LA LEY 3654/2021.

¹⁹ GALLARDO CASTILLO, M.J. (2015), *Régimen disciplinario de los funcionarios públicos*. Editorial Aranzadi, Navarra, pp. 115, 116.

3.- **A mistake concerning a fact which qualifies the offence or an aggravating circumstance:** such qualification or aggravation shall not be applied.

4.- **An invincible mistake** as to the unlawfulness of the act constituting the offence: this **excludes liability** (...).

5.- **An avoidable mistake** as to such unlawfulness: the **penalty shall be reduced by one or two degrees**.²⁰.

In that same judgment, the different types of error are set out, distinguishing whether they are avoidable or invincible, together with the legal consequences attached to each of them. According to the Court, error may be of two types²¹:

1.- **Mistake of fact** (article 14(1) and (2) of the Criminal Code).

a.- It arises in relation to one of the constituent elements of the offence (relating to a fact constituting the criminal act).

b.- It affects the elements of typicity and unlawfulness. It operates upon the intent (*dolus*) of the author, eliminating intentional typicity.

c.- Invincible mistake: excludes criminal liability. Avoidable mistake: punishable as negligence.

d.- Avoidable mistake: it could have been prevented by applying the most basic standards of care. It eliminates intent, leaving negligent liability (*culpa*) (negligence).

²⁰ STS, Second Chamber, Criminal Chamber, Judgment 930/2022 of 30 Nov. 2022, Appeal No. 2811/2020, Legal Ground 4.

²¹ Ibidem. Legal Ground 4.

Invincible mistake: even by applying the most basic standards of due diligence, the result could not have been avoided.

e.- Forms:

1.- **Mistake as to the object.** The subject intends to direct the action towards a particular object but fails to do so, due to confusion affecting the execution.

2.- **Aberratio ictus.** This is an error in the execution or "error in the blow", which occurs when the author intends to carry out the act and directs it towards the intended object, but the action deviates.

3.- **Mistake in the causal process.** This involves *dolus generalis*, where the result occurs in a manner different from that initially envisaged by the subject (for instance, where a person is shot and believed to be dead and subsequently buried, but dies from suffocation rather than from the gunshot).

2.- **Mistake of law** (prohibition) (article 14(3) of the Criminal Code).

a.- There is a complete lack of awareness that the conduct is prohibited by the legal order.

b.- It operates upon culpability, either eliminating or mitigating it. It affects the knowledge of wrongfulness; it constitutes the counterpart to the awareness of unlawfulness, acting upon the understanding of the unlawful nature of the conduct.

c.- Invincible mistake: excludes criminal liability.

Avoidable mistake: punishable with a penalty reduced by one or two degrees.

d.- Avoidable mistake: does not affect intentional or negligent typicity. It results in diminished culpability (diminished blameworthiness), reducing the

author's reproachability and having consequences for the severity of the penalty (reduction by one or two degrees).

Invincible mistake: even with due diligence, the subject could not have understood the unlawfulness of the act. The commission of the offence could not have been avoided through the exercise of ordinary diligence.

e.- Forms:

1.- Mistake as to the unlawfulness of the conduct (**direct mistake of prohibition**), for example, where an individual from another cultural background believes that a certain practice is lawful in Spain because it is lawful in their country.

2.- Mistake as to the existence of grounds of justification (**indirect mistake of prohibition**), for instance, in the offence of breach of sentence, wrongly believing that the victim's consent excludes criminal liability.

It now remains to address the **proof of the grounds for the exclusion of culpability**. As stated by the Supreme Court, Criminal Chamber, Judgment 930/2022 of 30 November 2022 (Appeal No. 2811/2020, Legal Ground 4), "it is also important to highlight the aspect relating to the proof of error, which is fundamental in determining upon whom the burden of proof lies, namely the party alleging the error; although such error may be inferred from the specific circumstances of the case, it must be duly pleaded and the relevant circumstances set out so that the Court may establish its existence."

This is made even clearer in Supreme Court Judgment 1473/2004, Administrative Chamber, Section, of 4 March 2004 (Appeal No. 11282/1998, ECLI:ES:TS:2004:1473, Legal Ground 1), where it is held that "it is not correct to assert that the Administration must prove the culpability of the conduct of the appellant entity; rather, the Administration bears the burden of proving the failure to comply within the time limit (the objective element of the infringement), whereas it is for the appellant to prove that such omission was

justified by some ground excluding culpability (invincible mistake, defective drafting of the rule, doubts as to its interpretation, etc.)."

As to what must be proved, GALLARDO CASTILLO, M.J. (2015) states that "error must be proved both as to its existence and as to its invincible nature, and such proof must be provided through assertions that demonstrate or reveal it (...) recourse must be had, as far as possible, to objective indicators (...) and caution must be exercised when assessing the evidence submitted."²².

The importance of proving error in all its dimensions is addressed by the Supreme Court, which establishes, on the one hand, that "whilst it is true that an error concerning an essential element constituting the offence, or one which increases the penalty, excludes criminal liability or, where appropriate, the application of the aggravation (...), it must not be forgotten that, for this to occur, it is absolutely essential that such circumstance be duly demonstrated and substantiated by means of statements containing or evidencing it, set out in the judgment in question. In no case are the subjective and self-serving declarations of the offender sufficient to establish it where the proven facts demonstrate otherwise; for not every erroneous judgment constitutes an exception to intent (*dolus*), nor does every accidental misinterpretation exclude it, but only the absence of the necessary and correct knowledge (...)"²³; and, on the other hand, that "(...) the **error must be demonstrated in an unequivocal and manifest manner (...)**"; therefore, "it is **not sufficient merely to allege the existence of an error**, but rather it must be adequately substantiated. To this end, criteria are applied which essentially relate to the author's ability to obtain information about the law (...), such that, where such information is in any event readily accessible, the issue is no longer properly

²² GALLARDO CASTILLO, M.J. (2015), *Régimen disciplinario de los funcionarios públicos*. Editorial Aranzadi, Navarra, p. 133

²³ STS 4441/1988, Criminal Chamber, Section 1, of 10/06/1988, ECLI:ES:TS:1988:4441, Legal Ground 1.

one of whether the error is avoidable or invincible, but rather of questioning its very existence"²⁴.

The following section sets out, by way of illustration, the judicial criteria derived from various judgments concerning the **application of mistake of law** (prohibition) and its scope. It should, however, be emphasized— as previously noted and here it is reiterated that its application within the context of the exercise of disciplinary powers must be undertaken with the necessary qualifications and caution.

As acknowledged by the Supreme Court, "(...) it is necessary to consider whether it is possible to invoke error in light of the well-known maxim that ignorance of the law does not excuse compliance (...) the recognition of legal relevance to ignorance of the criminal law—beyond the historical debate surrounding the principle of *ignorantia iuris non excusat*—does not affect the validity of the rule, nor does it weaken the contours of material unlawfulness as defined by the legislature (...) In order to determine the scope of error and its impact—whether mitigating or exonerating—on the culpability of the accused, it is necessary to ascertain whether the distortion in the normative message of the rule (...) was avoidable or not (...) "²⁵. Are there **general parameters** as to what constitutes an avoidable or an invincible mistake, or as to the types of offences in respect of which error, in any of its forms, may be invoked? The Supreme Court itself answers this question as follows²⁶:

- "it is necessary to have regard to the circumstances of each case and of each individual,"

²⁴ STS, Second Chamber, Criminal Chamber, Judgment 930/2022 of 30 Nov. 2022, Appeal No. 2811/2020, Legal Ground 4.

²⁵ Ibidem.

²⁶ Ibidem.

- "to assess whether, within the specific context of the subject's conduct, there were indicators alerting them to the potential criminal nature of their behavior,"
- "where the subject acts in the belief that their conduct is lawful, it is not personally reproachable, even if it is unlawful,"
- "for a belief properly to be such, it must be firm, that is, free from doubt,"
- "suspicion that the conduct is, or may be, unlawful, or doubt, excludes error,"
- "error cannot be invoked where recourse is had to self-help measures or de facto actions unauthorized by the legal system, which are commonly known by all to be prohibited."

"And, once the existence of error has been established and it becomes necessary to determine whether it is avoidable or invincible, attention must be paid to:

- 1.- The objective circumstances of the act, and
- 2.- The subjective circumstances of the author."

"In relation to the author's circumstances, it is also necessary to assess:

- 1.- The psychological and cultural conditions of the agent.
- 2.- The possibilities available for obtaining instruction and advice.
- 3.- The ability to resort to means enabling the subject to understand the legal significance of their actions.
- 4.- The nature of the act (...), its characteristics and the extent to which it could reasonably be understood by the actor."

"However, in any event, the psychological and cultural conditions of the offender are of fundamental importance in determining the individual's genuine belief, in light of their technical, professional, legal and social knowledge."

"In the evaluative process undertaken by the court, having regard to the above elements and applying them to the specific case, it is necessary to take into account the conditions of the individual in comparison with those of what may be regarded as the reasonable person, thereby combining subjective and objective criteria."

That is to say:

Error cannot be invoked where the nature of the alleged unlawful act is evidenced through the execution of conduct whose unlawfulness is a matter of common knowledge.

As regards the degree of knowledge required for the purposes of error, it should be noted that, within the scope of mistake of law (prohibition) and in relation to awareness of unlawfulness as an element of the offence, it is not required:

- that there is specific knowledge of the provision governing and sanctioning the conduct in question, or
- that there is knowledge, in general terms, that the act is punishable as a criminal offence.

It is sufficient for the individual to understand, at a lay level, that the rules governing social coexistence (the law) prohibit the conduct in which they are engaging.

We may now consider specific cases in which ignorance of the law in matters of incompatibilities has been rejected as a ground for excluding the liability of a public employee.

a) In Judgment 4719/2023 of the Administrative Court of Toledo, of 5 June (Appeal No. 18/2022, ECLI:ES:JCA:2023:4719), "(...) Having established the above, we must analyze the grounds of appeal in respect of the first sanction, which are based on the fact that the appellant had sought information from the Medical Association regarding the opening of a private practice, without having been informed by that institution of the need to request compatibility authorization, and without having concealed the existence of the private activity. As **regards the alleged ignorance of the requirement to request such authorization**, it must be stated that the rules governing compatibility constitute legal regulations which the appellant had a duty to know, all the more so in view of his status as a trauma specialist. This reinforces the general principle that compliance with the law cannot be excused, as derived from article 6(1) of the Civil Code ('Ignorance of the law does not excuse compliance therewith') (...)'" (Legal Ground 3).

b) In Supreme Court Judgment 246/2021, of 27 January, Administrative Chamber, Madrid (Appeal No. 398/2019, ECLI:ES:TS:2021:246), "From the foregoing circumstances it may be concluded that the sanction imposed does not infringe the requirement of culpability, inasmuch as the appellant was aware that he could not commence teaching activities without first obtaining the requisite compatibility authorization" (Legal Ground 9).

We shall now proceed to analyze the grounds for exemption from or mitigation of liability/culpability.

2.2.3.- SERIOUS ILLNESS: GAPS AND “REASONABLE ADJUSTMENTS”

At times, it is the courts themselves that bring to light certain deficiencies within the field of administrative disciplinary law, as well as shortcomings in the actions undertaken by public administrations vis-à-vis their employees in this area. This is illustrated by the case addressed in the Judgment of the High Court of Justice of Catalonia (STSJ CAT 4046/2024, Administrative Chamber, Barcelona, Section 4, 18 April 2024, Appeal No. 1591/2021, ECLI:ES:TSJCAT:2024:4046), in whose Legal Ground 5 it is stated that: “It is not provided for, as we have already indicated, that, where in disciplinary proceedings indications arise of the non-imputability of a public employee, due to their mental health condition, there exists a procedural stage for determining such condition, as well as its total or partial impact at the time when the offences were committed; that is, whether they had the capacity to understand the unlawfulness of their conduct. Moreover, doubts may arise as to what culpability is (such doubts exist in criminal law doctrine) and how it should operate, in our case, within the disciplinary sphere”; and “Indeed, since, as we consider, the causes excluding culpability—derived from criminal law—are applicable within administrative disciplinary law, while in the criminal sphere there exists the possibility of imposing non-punitive measures, namely security measures (articles 95 et seq. of the Criminal Code), no provision exists for the corrective measures to be imposed upon public employees where an exemption from or reduction of culpability applies, save for what has been indicated in the Constitutional Court judgment to which we have referred,” that is, the “adoption of ‘reasonable adjustments’ in employment, which plays a fundamental role in combating discrimination on the grounds of disability prohibited by Article 14 of the Spanish Constitution”.

The last of the grounds relied upon is one of those circumstances which, on certain occasions, has consequences for the **gradation of the sanction**, resulting in its mitigation; however, in other instances, **the courts**

have criticized the failure of public administrations to act in this regard, going so far as to annul the sanction itself. This is exemplified by the case addressed in the Judgment of the High Court of Justice of Asturias (STSJ AS 1520/2023, Administrative Chamber, Oviedo, 25 April, Appeal No. 36/2023, ECLI:ES:TSJAS:2023:1520), where “as regards the substantive issue—namely, **whether the appellant may be held responsible for the offences typified—** we have already indicated that the judgment relied on the criteria established for determining the absence of liability and culpability in accordance with article 28.1 of Law 40/2015, **as can be inferred from the medical reports** provided, including the forensic report submitted in the voluntary jurisdiction proceedings relating to curatorship, as well as by the involuntary hospital admissions arising from the **appellant's psychiatric condition.** It was precisely that condition which led the appellant to act in the manner under review, and such conduct was incompatible with the performance of his duties. The fact that he was not permanently incapacitated for the performance of his duties, nor in a situation of temporary incapacity at the time when the facts in question occurred, does not prevent reaching that conclusion, given that he had no awareness of his illness, did not understand the need for treatment and, as a result, abandoned it and failed to attend medical check-ups of his own accord, leading to involuntary psychiatric admissions, one of which took place in March 2020. It is further established that he had discontinued treatment six months earlier and therefore within the periods under consideration. For these reasons, the assessment of the evidence carried out by the court of first instance must be upheld, which concluded that, in the absence of the element of culpability, the sanctions imposed must be annulled” (Legal Ground 5). In this case, **reports and statements from students were also submitted, and the High Court of Justice of Asturias** further held that “in light of such an evident psychiatric condition, the Administration cannot rely on ignorance of the appellant's situation prior to the initiation of the disciplinary

proceedings, nor claim the existence of any resulting procedural disadvantage" (Legal Ground 4).

What is being indicated to the Administration is that it should initiate the appropriate procedure—other than a disciplinary one—and not allow matters to reach this stage. In this same vein, and in specifying what the Administration ought to have done, reference may be made to the case addressed in the Judgment of the High Court of Justice of Galicia (STSJ GAL 3193/2017, Administrative Chamber, 2 May, Appeal No. 355/2016, ECLI:ES:TSJGAL:2017:3193), in whose Legal Ground 3 it is stated that "it is striking that one of the arguments relied upon by the Xunta de Galicia in appealing the first-instance judgment is that there is **not a single provision imposing upon the Administration an obligation to carry out, as a prior and mandatory step, a psychiatric examination of the civil servant** in respect of whom disciplinary proceedings are to be initiated. However, **since the sanctioning decision had been annulled for breach of the principle of culpability in terms of imputability** (...) and given that respect for this principle requires the Administration to ensure that the person concerned is imputable and responsible for the conduct attributed to them where, as in this case, doubts arise in that regard, the first-instance judgment does not criticize the Administration for having failed to conduct the **medical examination** prior to the decision to initiate proceedings, but rather for failing to carry it out at all, despite its necessity having been indicated, **even as a condition for the initiation of the disciplinary proceedings**. For all these reasons, the appeal lodged by the legal services of the Xunta de Galicia must be dismissed."

On other occasions, the existence of a serious illness, such as a **depressive disorder, has been recognized as a mitigating circumstance**. This is the case addressed in the Judgment of the High Court of Justice of Catalonia (STSJ CAT 11327/2005, Administrative Chamber, Barcelona, 19

December, Appeal No. 16/2002, ECLI:ES:TSJCAT:2005:11327), where "(...) it was decided to impose upon him the sanction of suspension from duties for two years, for the commission of a serious offence (...)" (Legal Ground 1), and "it is argued (...) that the claimant is exempt from liability, given that the medical conditions from which he suffers exclude his imputability (...), since the **appellant suffers from a depressive disorder, as evidenced by various medical reports**, which has given rise to an abnormal psychological and emotional condition, leading to severe pathological gambling and preventing him from understanding the unlawful nature of his actions. In this regard, it should be taken into account that the condition affecting the claimant, as evidenced by the various documents submitted during the evidentiary stage, and in particular by the expert report of Dr. (...), demonstrates the existence of an impairment but in no way of such a degree of non-imputability as would allow the Court to conclude that this is a ground for exemption from disciplinary liability, since, for such an exemption to apply, it is necessary that the individual suffer from a serious condition affecting consciousness and even rendering the performance of public duties impossible, which is not the case here (...)" (Legal Ground 3). Likewise, "It is also argued that the sanction imposed should have been reduced because the **principle of proportionality** had been infringed, since **mitigating** circumstances, such as the appellant's spontaneous remorse and mental illness, had not been taken into account. However, this is not the case. The decision expressly takes into consideration the personal and family circumstances of the respondent, making specific reference to the "personal and emotional situation of the official concerned and the absence of any prior disciplinary record," and therefore concludes that "it is appropriate to mitigate the conduct of the person concerned, without prejudice to the fact that responsibility for his actions is attributable to him (...)" (Legal Ground 4), "taking into account the facts, the personality of the respondent, the classification and characterization of the offense as serious, as well as the sanction to be imposed (...), and considering that the maximum

sanction that could have been imposed was a three-year suspension, the Court finds that the imposition of a two-year suspension is proportionate" (Legal Ground 6).

Along the same lines is the case of a person diagnosed with a **severe mental disorder involving delusions**, addressed in the Judgment of the High Court of Justice of Galicia (STSJ GAL 2251/2025, Administrative Chamber, A Coruña, 19 March, Appeal No. 59/2024, ECLI:ES:TSJGAL:2025:2251), where Legal Ground 6 states that "(...) at the request of the claimant, sufficient evidence has been produced to conclude that, at the time when the events giving rise to the disciplinary proceedings occurred, Mr. (...) was already suffering from a severe **mental disorder with delusional features**. Patterns of paranoid behavior have been identified, with perceptions of harm focused on his work environment. However, such conditions do not necessarily entail a finding of non-imputability (...) **Mental illness has, under our legal system, a dual component**—biological and psychological—such that, in addition to a psychiatric (pathological) substratum, it requires that such condition produce in the individual a severe incapacity to understand the scope of their acts or, in the wording of the law, that they are unable to understand the unlawfulness of the act or to act in accordance with that understanding. Nothing substantiates the existence of such incapacity to understand reality, and specifically its unlawfulness, at the time when the events under examination occurred." The Court concludes by stating that "(...) although we cannot accept the claimant's contention that the conditions constituting non-imputability or absence of culpability were present, **it is nevertheless possible to take into account that latent severe mental disorder solely for the purpose of tempering the severity of the sanction of suspension imposed, in light of its impact on imputability**, and accordingly the duration should be reduced to one month of suspension. Such mitigation falls within the application of the principle of proportionality, which plays a central role in administrative

sanctioning law—not merely as an abstract expression of the equitable application of the law, but because sanctions within our legal system are generally defined in highly flexible terms, such that the same conduct may give rise to very different sanctions within broad ranges, and which may therefore, in practice, result in sanctions of widely varying severity and duration”.

In a similar vein is the case of a public employee suffering from **bipolar disorder**, addressed in the Judgment of the National High Court (SAN 3162/2013, Administrative Chamber, 4 July, Appeal No. 506/2011, ECLI:ES:AN:2013:3162), where, following a detailed account of the determining features of the illness in accordance with the medical expert report²⁷, the Court concluded that “we must therefore **consider the degree of imputability of the sanctioned individual**, which is significantly reduced in light of the serious psychiatric illness from which he suffered and **which was decisive in his failure to attend to his duties**. In the present case, taking into account the circumstances at hand, this Court must conclude that the appropriate and proportionate sanction is that of suspension of duties for four years; the sanction imposed in the contested decision is not in accordance with the law insofar as it exceeds that period” (Legal Ground 5).

In other instances, where several disciplinary offences are involved, the courts may adopt a **differentiated approach depending on the nature of the conduct** under consideration. This is reflected in the Judgment of the High Court of Justice of Galicia (STSJ GAL 5385/2017, Administrative Chamber, A

²⁷ "The medico-legal conclusions of the forensic medical report referred to above are as follows: first, Mr. (...) has a psychiatric disorder known as bipolar disorder; second, the disorder is chronic and is characterized by periods of depression and periods of mania; third, there are no medical reports from his treating psychiatrist regarding his state of health at the time of the events; and fourth, based on the symptoms documented in the case file, it is possible that he was experiencing a manic episode at the time the events occurred."

Coruña, 19 July, Appeal No. 24/2017, ECLI:ES:TSJGAL:2017:5385), where “the evidence adduced in these proceedings shows that the individual subject to disciplinary proceedings suffers from a delusional personality disorder, which may have distorted her perception of reality (...). In fact, the trial court judgment draws a **clear distinction between the sanctions imposed** in relation to breaches of his strictly work-related duties (unauthorized absences, failure to comply with working hours, failure to follow instructions, or conduct unbecoming a public official), failure to comply with orders, or conduct improper for civil servants) and those with a sexual or racial or ethnic connotation. In this latter respect, the appeal must be upheld, leading to the partial setting aside of the judgment, maintaining non-imputability solely in respect of the conduct classified as sexual harassment, and consequently the annulment of the sanction must be limited to that conduct” (Legal Ground 7).

A more complex situation arises where **the disability of the individual derives from a permanent mental disorder**. This is examined in the Judgment of the High Court of Justice of Catalonia (STSJ CAT 4046/2024, Administrative Chamber, 18 April), which first addresses “the constitutional doctrine on the **allocation of the burden of proof** and its application to the administration. According to that doctrine, where the appellant alleges discrimination prohibited by Article 14 of the Constitution—under the terms set out, inter alia, in Constitutional Court Judgment 31/2014 of 24 February, Legal Ground 3—and provides reasonable indications of discrimination, the burden falls upon the employer to rebut such indications by demonstrating that its conduct was entirely justified. (...) This doctrine is applicable within the sphere of relations between public employees and the administration (...), and operates also in relation to any administrative action, whether discretionary or regulated, including disciplinary or sanctioning decisions such as those at issue here.” Thus, “(...) On the basis that, in the present case, we are therefore dealing with a disorder that may result in a mental disability, it is for the Court to determine

whether, as set out in the standard established in the preceding legal grounds, that disability should have led the Administration to provide, but did not provide, a series of reasonable accommodations in the workplace, and whether the absence of such accommodations may have resulted in the inability to comply with the employment obligations that gave rise to the initiation of the disciplinary proceedings whose consequences are challenged in the present appeal for constitutional protection²⁸."

On that basis, the High Court of Justice of Catalonia reaches particularly significant conclusions. First, "accordingly, considering that the facts underlying each of the three offences have been proven, it is appropriate to **impose the minimum sanction on account of the reduced culpability of (...) resulting from his permanent mental disorder**, manifested over time in the performance of his duties, albeit without entirely excluding his capacity to act otherwise, nor due to any total failure on the part of the Administration to adapt the post or adopt protective measures for persons with disabilities, or to take action in the field of occupational risk prevention, given the absence of proof in that regard." Secondly, "culpability admits of gradation and its effects range from reduction of the sanction within the statutory limits (as has been recognized in numerous judicial decisions) to, exceptionally, **even below the statutory minimum**, by direct application of the principle of proportionality established in Law 40/2015 of 1 October, in a manner analogous to the operation of incomplete defenses, mitigating and aggravating circumstances" (Legal Ground 4). Thus, a wide margin of discretion is afforded to the decision-maker in determining the appropriate sanction, even below the statutory minimum limits.

²⁸ Judgment of the High Court of Justice of Catalonia (Administrative Chamber), Barcelona, Section 4, No. 4046/2024, April 18, 2024, Appeal No. 1591/2021, ECLI:ES:TSJCAT:2024:4046.

On other occasions, such illness is not regarded as a ground for the exclusion or mitigation of liability/culpability. This is the case addressed in the Judgment of the High Court of Justice of Catalonia (STSJ CAT 10406/1999, 29 October), which examines **the impact on imputability of alcoholism undergoing treatment for rehabilitation with medication**²⁹. The High Court of Justice of Catalonia held, in light of the facts, that "consequently, the appellant's arguments seeking to **negate the imputability of his conduct by attributing everything** that occurred to the effects of intoxication combined with the medication prescribed as part of his alcohol dependence treatment cannot validly be upheld, **given his prior history, his full awareness that alcohol consumption was incompatible with the treatment**, at least while on duty, since this is prohibited by the disciplinary regulations governing the Corps, and **his awareness, based on previous occasions, of the consequences that alcohol consumption triggered in his conduct**. The facts have been fully established, are described in sufficient detail, as is the pattern of behavior he exhibited immediately after consuming alcohol while on duty (...)" (Legal Ground 4).

Quite apart from the various types of illnesses and addictions addressed, the courts have held that the intention of the sanctioned individual to return the money, and its subsequent reimbursement, does not exclude culpability³⁰.

²⁹ STSJ CAT 10406/1999, of 29 October, Administrative Chamber, Barcelona, Appeal No. 417/1995 (ECLI:ES:TSJCAT:1999:10406).

³⁰ This is the case addressed in STSJ CL 66/2017, Administrative Litigation Chamber, Burgos, Section 2, January 13, Appeal No: 80/2016 ECLI:ES:TSJCL:2017:66, FD.5º, which states that: "(...) under no circumstances may the person subject to disciplinary proceedings use for her own purposes public funds entrusted to her by reason of her office, even though —as she says— her intention was to replace the funds on 3 October, after the two days' leave granted, and after having used them for an inescapable family-related illness, and even though she attempted to justify this on the basis that the Bank cash machine would not dispense any more cash that day". "It is so because the sanctioning decision adequately sets out the factors

By contrast, we find situations involving **interpretative doubts, their complexity, and the existence of equally reasonable interpretative approaches**. In this regard, reference may be made to the Judgment of the High Court of Justice of Madrid (STSJ M 3831/2011, 17 January), which recognises that "(...) those defining characteristics (**awareness and voluntariness**) (...) are not, in the opinion of this Court, discernible in the conduct engaged in by Mr. (...) and on the basis of which the sanction under review was imposed, since the interpretative doubts that existed with regard to the issue, and which have been set out in the preceding legal grounds, together with its complexity and the possibility of different, yet equally reasonable, interpretations, constitute an additional reason for excluding any blameworthy conduct on the part of the appellant. Accordingly, in light of all the foregoing, the only possible legal consequence is that the appeal must be upheld, with the consequent annulment of the challenged decisions and of the sanction imposed (Legal Ground 4)³¹.

As has been recognized by the courts, "an act or omission cannot be regarded as constituting an infringement where, although it may formally fall

taken into account in order to impose the sanction for a period of seven months; and, as regards the plea concerning the lack of intention in the appellant's conduct when disposing of the sums in question, it is made clear that the fact that the events which occurred were not concealed in no way denotes an absence of intention, and that what has been sanctioned is an affront to the dignity of public servants or of the Public Administrations by carrying out an act lacking in example, namely disposing of sums belonging to the entity Bancorreos whilst serving as the manager of a bank branch. This was done voluntarily, since it involved diverting from its normal course money that had been entrusted to her; it was not an imprudent act consisting of a failure to exercise all due care, but went further, in that she acted contrary to what was required, namely not to remove the money from the cash desk, or to introduce it once it had been entrusted. Accordingly, the alleged lack of proportionality cannot be upheld, and it is concluded that the contested decision is lawful".

³¹Judgment of the High Court of Justice of Madrid, Administrative Chamber, Madrid, No. 3831/2011, January 17, Appeal No. 3775/2008, ECLI:ES:TSJM:2011:3831.

within the legal definition of the offence, it is **based on a reasonable interpretation of the provision which the Administration considers to have been breached by the sanctioned individual** (...)”³², since “(...), the **Supreme Court** has, in recent years, developed a consistent and well-established body of case law linking the culpability of the offender to the absence of a reasonable legal interpretation capable of justifying their conduct”³³.

Along the same lines, we encounter this issue when addressing, as a ground, that relating to the **knowledge, consent and tacit authorization** on the part of the Public Administration of the actions or omissions of the civil servant. The TS has recognized that “(...) the use, in such a situation of knowledge, consent and tacit authorization, of the sanctioning power **becomes inappropriate**, since the indispensable subjective element is lacking in such conduct, as this is imposed by the necessary concurrence of the culpability of the offender (...)”³⁴.

In similar terms, Supreme Court Judgment 7694/2005, of 8 November (Military Chamber), states that “(...) when interpreting the **duty of residence** in accordance with the social reality of the time in which the provision is to be applied, as indicated by article 3.1 of the Civil Code when setting out interpretative criteria, the appellant's immediate superiors did not act improperly in failing to take action in response to the change of residence, which they were aware of, consented to, and tacitly authorized” (Legal Ground 2)³⁵. Thus, “the existence of tacit authorization to reside outside the municipal

³² Judgment of the High Court of Justice of Madrid, Administrative Chamber, No. 14435/2015, December 11, Appeal No. 613/2014, ECLI:ES:TSJM:2015:14435, Legal Ground 5.

³³ STSJ M 15307/2021, Administrative Chamber, Madrid, of 30 December, Appeal No. 1542/2019 (ECLI:ES:TSJM:2021:15307), (Legal Ground 9).

³⁴ STS (Administrative Chamber) 628/2011, of 23 February, Section 5, Appeal No. 562/2008 (ECLI:ES:TS:2011:628), (Legal Ground 4).

³⁵ STS 7694/2005, 8 November, Military Chamber, Appeal No. 143/2004 (ECLI:ES:TS:2005:7694).

area renders it inexplicable that he should have been sanctioned for absence from his post for a period of less than twenty-four hours, given that, on the two occasions described in the findings of fact of the judgment, what the sanctioned individual was in fact doing was returning to his Unit from the municipality in which, with the knowledge and tacit authorization of his superiors, he had established his habitual residence. Accordingly, in the view of the Court, the act of reporting for duty from his place of residence cannot be subsumed within the legal definition of the offence" (Legal Ground 4).

All of the foregoing does **not imply that disciplinary reproachability** is absent where the conduct exhibits a pattern of habituality, since "(...) once conduct is deemed to involve disciplinary reproachability, it does not cease to do so merely because it is carried out on a **habitual basis**"³⁶.

A different outcome is reached where **absences from the workplace are not motivated by an intention to breach duties**. The Judgment of the High Court of Justice of the Balearic Islands (STSJ Illes Balears 485/2021, 9 September) addresses this situation, stating that "**the objective element of the infringement was present**, since neither party disputes that on those dates the individual did not attend work. However, it is disputed whether such absences were the result of a willful intention on the part of the appellant to breach his duties. In light of the foregoing considerations, this Court does not consider that **these absences from the workplace were motivated by an intention to breach obligations**; rather, it is established that the claimant was in such a state of anxiety and despondency due to the removal of duties that he had been experiencing since 2014, combined with uncertainty as to whether he was required to report to Lluçmajor or Felanitx on those days (the duty rosters making the location entirely unclear), that he ultimately failed to

³⁶ SJCA 4719/2023, Administrative Court, Toledo, of 5 June, Appeal No. 18/2022 (ECLI:ES:JCA:2023:4719), (Legal Ground 4).

attend, driven more by an **intention to escape from an environment that was adversely affecting his health** than by any deliberate refusal to comply with his professional obligations. Accordingly, **it is considered that the subjective element required for the commission of the infringement was not present**, and the appeal must therefore be upheld on this point, annulling the contested administrative decision, with all the legal consequences that follow" (Legal Ground 4)³⁷.

Finally, in cases where the **accused asserts disability arising from a permanent mental disorder**, the Judgment of the High Court of Justice of Catalonia (STSJ CAT 4046/2024, 18 April 2024) provides that "the constitutional doctrine on the **allocation of the burden of proof and its application to the administration** must be taken into account. According to this constitutional doctrine, where the appellant alleges discrimination prohibited by article 14 of the Spanish Constitution—in the terms set out, inter alia, in Constitutional Court Judgment 31/2014 of 24 February, Legal Ground 3—and **provides reasonable indications of discrimination**, the employer bears the burden of rebutting them by demonstrating that its conduct was entirely justified (...). This doctrine is applicable within the framework of the relationships between public employees and the administration (...). It also operates in the context of any administrative action, whether discretionary or regulated, such as the adoption of disciplinary or sanctioning decisions, as is the case here (...); and that "on the basis that, in this case, we are dealing with a disorder capable of giving rise to mental disability, it falls to the court to assess whether, in accordance with the standard set out in the preceding legal grounds, such disability ought to have prompted the administration—yet did not—to adopt a series of reasonable adjustments in the workplace, and whether the absence of such adjustments may have led to the inability to comply with the

³⁷ STSJ Illes Balears, Administrative Chamber, Section 1, Judgment 485/2021 of 9 Sept. 2021, Appeal No. 109/2021.

employment obligations that triggered the initiation of the disciplinary proceedings under challenge in the present appeal" (Legal Ground 4)³⁸.

Finally, we have examined the approach adopted by the courts in relation to various concurrent circumstances which may or may not affect the liability or culpability of the public official. In this instance, we shall consider how the Supreme Court has taken into account certain circumstances influencing the determination of the sanction, adapting it to the seriousness of the conduct assessed.

This is illustrated by the case addressed in Supreme Court Judgment 4654/2022, of 19 December, which states that "it is evident that (...) the Magistrate **could not but be directly aware of the accumulated delay and of her own inaction, which aggravated the situation**—factors rendering it incontrovertible that the individual concerned had full awareness that the mere passage of time, coupled with her inactivity, was exacerbating the delay, without even reacting by reporting her situation and requesting her leave from (...) ; **periods of recovery are noted, and even during such periods no sufficient reaction is observed on the part of the appellant, who, despite being aware of her illness and treatment, remained in charge of the court, with a serious deterioration in the administration of justice** and to the detriment of those seeking effective judicial protection; all of which clearly demonstrates negligent conduct deserving of disciplinary reproach. The necessary subjective element for the imposition of a sanction is therefore present and, as will be seen below, the appellant's illness has not been irrelevant for sanctioning purposes, **but has been taken into account in order**

³⁸ STSJ CAT 4046/2024, Administrative Chamber, Seat: Barcelona, Section 4, of 18/04/2024, Appeal No. 1591/2021, ECLI:ES:TSJCAT:2024:4046.

to ensure that the sanction imposed is proportionate to the seriousness of the conduct" (Legal Ground 4)³⁹.

3.- LIABILITY AND THE LENIENCY MECHANISM FOR REPORTING (LENIENCY BY DISCLOSURE).

The final circumstance addressed in this article concerns the concept of leniency by reporting and its impact on either the exemption from liability or the proportionality of the sanction to be imposed on the reporting party. As noted by SÁNCHEZ MORÓN, M. (2023), "it is now becoming widespread as a mechanism capable of facilitating the Administration's awareness or proof of infringements that are otherwise difficult to establish"⁴⁰.

Article 62.4 of Law 39/2015, of 1 October, on the Common Administrative Procedure of the Public Administrations, provides for this possibility in the initiation of proceedings following a report, such that "where the reporting party has participated in the commission of an infringement of this nature and there are other infringers, the authority competent to determine the proceedings **shall exempt the reporting party** from the payment of the fine that would otherwise be applicable, or from another form of non-pecuniary sanction, where they are the first to provide evidence enabling the initiation of the proceedings or the establishment of the infringement, provided that, at the time such evidence is submitted, the authority does not possess sufficient information to order such proceedings and that the damage caused is remedied"; and "the authority competent to determine the proceedings **shall reduce the amount of the fine payable or, where appropriate, the non-pecuniary sanction**, where, although not all the above conditions are met, the reporting party provides evidence which adds

³⁹ STS 4654/2022, of 19 December, Administrative Chamber, Decision No. 1690/2022 (ECLI:ES:TS:2022:4654).

⁴⁰ SÁNCHEZ MORÓN, M., *Derecho Administrativo. Parte General*. Editorial Tecnos, 2023, p. 716

significant value to that already available. In both cases, it shall be necessary for the reporting party to cease their participation in the infringement and not to have destroyed evidence relating to the subject matter of the report."

This State legislation is also reflected at the regional level, for example in Law 4/2021, of 16 April, on the Public Service of the Valencian Community, which provides that "where the **reporting individual has participated in the commission of the acts forming the subject of the alert or report and there are other persons involved**, the authority competent to **determine the proceedings shall**, upon express request, exempt the reporting public employee from the sanction that would otherwise be applicable, provided that:

a) **They are the first to report the facts** and to **provide evidence** enabling the initiation of proceedings or the establishment of the infringement.

b) At the time the evidence is provided, there is **insufficient information to proceed** with the processing of the case and the damage caused is remedied.

c) **They have not participated in the destruction of evidence** relating to the subject matter of the alert or report, nor, in obtaining such evidence, have they committed an infringement unrelated to the facts reported and liable to disciplinary action.

d) **They have ceased their participation in the unlawful or irregular** acts at the time of making the alert or report.

e) **They have not taken steps to compel other public employees to participate in the irregularity reported**,

f) **They cooperate fully, continuously and diligently with the Administration in clarifying the facts"** (article 78.7).

“Likewise, the competent authority **shall reduce** the sanction that would otherwise apply where, although not all the above conditions are met, the reporting individual provides evidence which adds significant value to that already available” (article 78.8).

4.- CONCLUSIONS

While the case law of the Supreme Court proclaims the maxim that the principles of criminal procedure are applicable to administrative sanctioning proceedings, it does not develop this doctrine in its full scope, thereby giving rise to legitimate doubts as to its applicability. This is all the more so where the courts themselves have acknowledged the inadequacy of the regulatory framework governing the disciplinary regime in the public service, particularly in relation to the prevention of conduct by public officials arising from their mental health condition, as well as the sanctioning of such conduct when acts or omissions classified as disciplinary offences are committed.

The application of the principles governing sanctioning powers—and, in particular, the principle of culpability—to the disciplinary sphere, together with the express reference by the courts and, in some instances, by regional legislation to the application of criminal law principles and rules in this field, requires, in the first instance, an additional effort on the part of public administrations and, subsequently, increasing involvement by the various judicial bodies. Such application must necessarily be carried out with the appropriate adaptations in light of the differing nature, purpose and context of disciplinary powers.

In this regard, the generally accepted grounds for the exclusion of culpability, both in criminal law and in administrative sanctioning law, include the exculpatory state of necessity, fortuitous event or force majeure, mistake of law (prohibition) and mistake of fact, although doctrine also extends this list to include legitimate expectation arising from positive administrative conduct, invincible mistake of fact and reasonable interpretation, as well as the grounds for exemption from liability provided for in article 20 of the Criminal Code. Likewise, the mitigating circumstances laid down in article 21 of the Criminal Code must also be taken into account. However, the application of these grounds depends on the specific circumstances of each case, and the allocation of the burden of proof is directly linked to them.

Within this process, it is the courts themselves that have highlighted certain deficiencies in the field of administrative disciplinary law, as well as in the actions undertaken by public administrations in this area in relation to their personnel. This is particularly evident where circumstances relating to the psychological or physical condition of a public employee subject to disciplinary proceedings—whether identified during the proceedings themselves or in prior investigations or preliminary inquiries—reveal indications of non-imputability or mitigation thereof. The absence of provisions for non-punitive corrective measures or security measures imposes an additional burden on the Administration where exemption from, or reduction of, culpability is present, and may, in certain cases, require that disciplinary proceedings not be initiated at all.

It is also necessary to emphasize the possibilities available to the Administration in cases of leniency by reporting and its impact on the proportionality of the sanction to be imposed upon the reporting party, ranging from mitigation to full exemption, provided that the requirements laid down, in each case, by the applicable State and regional legislation are satisfied.

By way of final reflection, I can do no more than reiterate and endorse the observations made by JUANES PECES, A. (2024), as there remains much to be said in relation to the application of the principle of culpability within the disciplinary sphere⁴¹. In this evolving process concerning the application of the principle of culpability and its adaptation to the sphere of the disciplinary regime applicable to public school civil servants, the role of the Educational Inspectorate becomes a particularly significant spearhead, enabling it to take up the challenge laid down by the courts and to assist in the proper and contextualized incorporation of the possibilities opened up by the application of criminal-law principles and rules.

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⁴¹ JUANES PECES, A., "Special features of the right to proceedings with safeguards in administrative sanctioning proceedings", *LA LEY Penal*, No. 170, Case law applied to practice section, September–October 2024, ISBN-ISSN: 2254-903X, LA LEY 27708/2024.

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