

## Avoidability of the prohibition error: dichotomy between Spanish jurisprudence and doctrine

*Evitabilidad del error de prohibición: dicotomía entre jurisprudencia española y la doctrina*

**Jorge Luis Chiriboga Estupiñán**

Independent legal researcher

**City:** Quito

**Country:** Ecuador

Original article (research)

RFJ, No. 9, 2021, pp. 67-91, ISSN: 2588-0837

**ABSTRACT:** The doctrine approaches the avoidability of the mistake of law or prohibition from markedly antagonistic theories. From there, a broad spectrum of interpretations is obtained by the judges when admitting this figure in a judicial decision. Then, depending on each theory, the effects of the mistake of law or prohibition can be different. It is also to be considered the different criteria that that jurisprudence has formed, especially in countries such as Germany and Spain. These countries regularly apply the figure of the mistake of law or prohibition, primarily in cultural conditioning cases, due to the strong migratory phenomenon they have faced in recent decades. Therefore, various criteria are set out and must be considered for each particular case when defining the person's degree of guilt.

**KEY WORDS:** Criminal law, legal principle, conduct, law enforcement, administration of justice.

**RESUMEN:** La evitabilidad o vencibilidad del error de prohibición ha sido abordada por la doctrina desde teorías marcadamente antagónicas; de allí se obtiene un amplio espectro

de interpretaciones que realizan los juzgadores al momento de admitir esta figura en una decisión judicial. Según cada teoría los efectos del error de prohibición en un ser humano pueden ser distintos y a ello se suma también los diferentes criterios que la jurisprudencia ha ido formando, sobre todo en países como en Alemania y España; los cuales aplican con regularidad la figura del error de prohibición, esencialmente en casos de condicionamiento cultural debido al fuerte fenómeno migratorio que afronta en las últimas décadas. En este sentido, se exponen diversos criterios que deben ser considerados para cada caso en particular al momento de definir el grado de culpabilidad en un proceso penal.

**PALABRAS CLAVE:** Derecho penal, principio jurídico, conducta, aplicación de la ley, administración de justicia.

## INTRODUCTION

The theory of error is an essential issue at the dogmatic-criminal level and in the criminal policy of each country. Due to its incredible relevance over the last decades, it has been a subject that has been widely studied by jurists of great intellectual renown worldwide. However, today there are still many questions about the theory of error that the doctrine has not solved. As such, this article proposes to analyze one of the most relevant edges of the prohibition error.

The main topic discussed in the following pages is the expirability of the ban error. The lack of doctrinal development on this specific point constitutes one of the obstacles that limit the application of this figure to a greater extent. If the legal operators had specific elements of analysis when deciding on the degree of expirability of the error, it would undoubtedly greatly facilitate the task of guaranteeing the legal certainty of the persons who are part of a criminal process against them. Likewise, this would also prevent jurisdictional activity from falling into the immense abyss of excessive subjectivity and, therefore, injustice.

## **1. BETWEEN PSYCHOLOGISM AND NORMATIVIZATION**

The neuralgic point of the discussion of the prohibition error lies precisely in the legal effects that derive from its application. The mitigation or elimination of criminal culpability will be addressed in this article, mainly concerning the criteria that the doctrine has developed as mechanisms for determining the degree of expiration of the prohibition error.

The main theses that allow us to form our criteria are set out below and, for this, it is appropriate to point out that the jurisprudence of the Spanish Supreme Court (TS) has not been entirely consistent with the doctrine, because despite reinforcing specific doctrinal criteria of Determination of the avoidability of the error, has also been quite restrictive in the admission of the error, especially of an inevitable nature. Throughout the text, various jurisprudential criteria will be set out in this regard.

A first aspect that is fundamental about avoidability is that its doctrinal development has had two major stages. Psychologicalism ruled first and regulation has gradually taken a wide place.<sup>1</sup>of personal accusation or guilt. This situation must be understood as a political-criminal process. However, this development does not ignore the need for the avoidability judgment to be governed by the search for personal criteria on the ability of an individual to overcome the error.

This means that the study of each case of avoidability always requires the personal analysis of the individual in order to make it compatible with the principle of guilt; For this, the concept of enforceability has been strengthened (Rusconi, 2009). This last concept is the basis on which the different methods that determine the position of the human being are built in the face of the knowledge of the prohibition of their

---

1 The concepts of psychologism and normativization will be explained at the time that its main ideas are developed.

conduct.

Accepting the postulate that the avoidability judgment must be based on personal criteria, as far as possible by subjective criteria, the expiration must be understood as: "(...) the possibility by the author of having come to the knowledge of unlawfulness" (Olaizola, 2007, p. 155). Therefore, the key is to assimilate said possibility of obtaining knowledge with the potential that the subject has for this purpose (Spanish Supreme Court, STS 835, 2017)<sup>2</sup>. What characterizes potential knowledge is the possibility of reproaching the author for being in that circumstance (Olaizola, 2007).

In such virtue, the expirability of the prohibition error and its legal consequence of attenuation of the sentence are analyzed from the point of view of "capacity" as a determining aspect of the motivation by the norm. Moreover, the perpetrator of a crime has an attenuated level of guilt, even without being aware of the unlawfulness, when he has not made use of his ability to know the illegality of the conduct. Therefore, the analysis of the subjective criteria of the individual tries to illustrate the circumstances in which a subject has that capacity or, on the contrary, if the error is inevitable.

In determining avoidability, there has been a doctrinal struggle regarding the ability to know since it has often been understood as a duty to know the norm. Olaizola (2017) points out that the German jurisprudence and also a part of the Spanish Supreme Court has been favourable to this postulate, pointing out that the error of the expirable prohibition is produced by the injury of a legal duty from which the obligation of citizens to inform themselves about of legal norms.

---

2 Likewise, Sentence 3981/2015 of the Spanish Supreme Court (2015, p. 23). In the same sense, it establishes that the mechanisms that converge in a specific situation and serve to dispel doubts cannot be omitted in the analysis of the legality carried out by an individual, and such omission would be sufficient to inadmiss an error.

The duty to know, imposed as a legal norm, is questioned by this author by several arguments. The most important is that such a precept violates the individualization mentioned above that the analysis of knowledge capacity must cover (Olaizola, 2007).

But the issue goes further, Rusconi (2009) questions the legitimacy that a State would have to impose a legal duty of such magnitude. This author understands that there is no such legitimacy and that, therefore: “(...) duty of information as a recommendation to the good citizen, in no way can turn its violation into a relevant legal fact either in itself, nor -much less- as a presupposition for the imputation of a non-guilty unlawful act” (p. 478).

In this order of ideas, the idea that the potentiality of knowledge is based on an individual capacity of the human being is fully acceptable - according to the dogmatic construction that is sustained. This means that the verification of said prior condition must be based on the capacity of that individual in their specific situation and not on a requirement of the legal system (Neck, 2002).

However, the discussion goes a little further, as it concerns substantive political and legal criteria. In a democratic state and governed by law, it is unthinkable to establish citizens as a legal obligation to inform themselves about all legal prohibitions (Cobos Gómez, 1987). However, there are certain moments in which a person may be asked to know the legal-criminal norms that regulate a specific activity in which they are immersed, an issue that will be analyzed later. But this does not mean that the sentence should be based on an omission of information attributable without exception to an individual.

Now, following the line of argument based on the democratic State and the Law, it is appropriate to consider that one of the guiding principles is that of equality of human beings. For Nieto Martín (1999), the recognition and application of the

principle of equality supposes a two-way requirement for the principle of guilt. On the one hand, the distinction between imputable and unimputable persons; and, on the other hand, the greatest possible individualization at the time of determining the exirability of the error, taking into account subjective aspects of the person.

The basis for such an equalization is that the lack of motivation in a subject is decisive when there are diseases or disorders that make a person unimpeachable and, consequently, their reproach of guilt suffers repercussions. The same happens with the avoidability judgment, since several criteria must be taken into account, for example, intellectual capacity, social and professional level, possibility of accessing enough information to clear the error and, finally, cultural conditioning.

The use of all these parameters allows individualization to oppose generalizing criteria such as that of the “average man.” Although it is necessary to clarify that, in jurisprudence, despite the doctrinal criticisms that proclaim the need for subjective criteria, this criterion is still used, thus the Supreme Court’s Ruling 567/2018 (2018) indicates: “The analysis (...) it must be carried out on the specific case, taking into account the conditions of the subject in relation to those of what could be considered an average man, thus combining subjective and objective criteria”<sup>3</sup> (p. 7).

For the dogmatic criterion of avoidability that is proposed, the approaches on individualization in the analysis of the prohibition error are congruent and take into account the capacity of the human being as a support for the different motives that lie in the formation of knowledge. As such, the need for a person to require a reason to consider a scenario of lawfulness or illegality of their conduct is totally admissible. These grounds offer administrators of justice the reasonable limit to determine the avoidability or inevitability of the error.

---

3 In this sense, it can also be seen that the Supreme Court Judgment 302/2003 (2003), there is exposed in similar words the use of the “average man” as a parameter for measuring error.

The foregoing, according to Olaizola (2007): “(...) supposes that, although there are objective possibilities for the author to recognize the irregularity of his behavior, it will be necessary for the author to have a reason that makes him avail himself of said objective possibilities” (p. 162). However, in the doctrine there is no unanimity of criteria on the various motives. The positions are antagonistic; therefore, it is plausible to succinctly expose their main postulates in order to determine which are the applicable precepts that make the application of the prohibition error feasible in various situations. The dominant positions are represented by psychologism and normativism, although there are several very interesting nuances that are related to a coherent development of avoidability.

The first position has two fundamental postulates, developed by Olaizola. On the one hand, the perpetrator of a crime needs to obtain a reason to think that his conduct may be illegal, in turn, this motive is materialized as a doubt. Therefore, once the person represents a doubt, it serves as a stimulus for him to make whatever efforts are possible to clear his concern and thus exclude the error. On the other hand, it must be taken into account that this effort to put aside the doubt must be valued by the courts, in such a way that, if the subject, despite the effort made with the available means, did not obtain knowledge of the unlawfulness, he would not be guilty of incurring an inevitable error in the subject (Olaizola, 2007).

In this order of ideas, according to this theory, knowledge can only be obtained when the subject, internally, is capable of representing a reason for doing so. This correlation can happen in two ways. First, spontaneously, understood as a coincidence in which a person feels a stimulus, until that moment unknown, which determines it as a sufficient reason to know something (Córdoba, 2012).

The second way is learning, this happens in a subject whose experience allows him to link a stimulus in his daily life to a circumstance about which he has minimal doubt as to its

unlawful nature. Thus, these possible motives are the basis for an action to arise to obtain knowledge (Córdoba, 2012).

### **1.1. Criticism of psychology**

Now, the psychologist position has significantly been discredited by a broad doctrinal sector. The main criticisms are based on the drawbacks of such a radical position; the incompatibility of structural, practical and criminal political order makes it inapplicable today. However, it is essential to clarify that not adopting this position does not mean a contradiction with what was stated above about the particularization of the analysis of guilt and avoidability, since, as Córdoba (2012) points out: “Guilt would be determined, then, certainly according to the individual capacities of the concrete author, but, partially, also according to some established normatively” (p. 57).

One of the strongest criticisms of the psychologist’s position is that made by Roxin. This author focuses on the disadvantage of structural order since the application of Horn’s postulates would imply leaving aside the theory of guilt and returning to the legal effects of the theory of fraud. This arises because the error of prohibition would be considered inevitable in any case in which a person had no doubts about the unjust nature of the conduct (Roxin, 2008, p. 885).

As such, the reasons for knowing the unlawfulness must not only be limited to the doubt, at least slight, that an individual may have but other independent factors must be examined in a specific situation. . On the other hand, in the practical matter, if any error in which a subject has not had doubts regarding the unjust, is considered as inevitable, Olaizola (2007) highlights “(...) the careless author who does not repair in the circumstances could be privileged that should have led him to question the unlawfulness of his behaviour” (p. 165).



Finally, in the political-criminal issue, the reproach to the psychologist position, whose leading exponent is Horn (n. d.) (cited by Roxin, 2008), has to do with the restriction that it supposes to the avoidable prohibition error, which occurs because a person, having a doubt, would be applicable the postulates of eventual knowledge, which in most cases excludes error. Otherwise, in the opposite circumstance, that is, when there is no doubt, the invincible prohibition error would be the rule (Olaizola, 2007). In conclusion, it should be emphasized that the usefulness and possibility of applying the expiration would be inexcusably restricted. Therefore, the exclusive criterion of doubt as a reason to overcome the expirability of the error is too limiting.

## **1.2. Distinction of crimes according to the jurisprudence of the Supreme Court**

As the next point of analysis, it is essential to study what the doctrine proposes as an intermediate current that, although it is born from the psychologist postulates, also adds some exciting parameters useful in judicial and procedural activity in cases of avoidable prohibition error. One of the most relevant consists of the recognition of a particular demand for knowledge of the illegality in specific circumstances; furthermore, on this point, it is necessary to analyze the proposals of Nieto Martín.

As a first aspect, this author proposes to distinguish two criteria. On the one hand, nuclear and artificial or secondary crimes are different subjective avoidability criterion for laypeople and professionals (Nieto Martín, 1999). The division has an exciting political criminal purpose. This qualification bases its argument on recognising a criterion of avoidability based on the knowledge that a person must have when they belong to a field regulated by law. However, it is not a determining question either, since for there to be potential knowledge, the motive must be formed by belonging to the legally regulated sector and by a doubt about the unlawfulness of their conduct.

The Spanish High Court has ruled on the distinction that exists between crimes. If it is a “notorious wrongfulness” crime, it will be tough for a citizen to make an invincible error. For example, in crimes of a sexual nature in which a 13-year-old person participates, the knowledge could have been obtained by the actor of the crime since:

(...) The notorious illegality of sexual conduct with minors in our cultural sphere [has been] widely disseminated by the media, with extraordinary incidence regarding the reform introduced in 2015, precisely due to the lack of consensus over the age limit, being, consequently, easily knowable by the generality of citizens. (Spanish Supreme Court, STS 633, 2019, p. 4)

However, despite the nuclear nature of certain crimes, other personal factors are also considered. Among them, the nationality of the perpetrator of the crime, his age, and general knowledge, being these factors that would allow access to knowledge (Spanish Supreme Court, STS 633, 2019). For this reason, a prohibition error that falls into a crime of this nature will not always be avoidable, as there are exceptions that address very particular circumstances that can make it inevitable.

This is the analysis carried out by the Supreme Court in the case of two Ecuadorian citizens residing in Spain who had a dating relationship and also of a sexual nature. The man was 29 years old and the woman 15 when they began to have sexual relations in May 2015. Coinciding with the time of penal reforms in which the chronological threshold for the provision of consent of minors was changed from 14 to 16 years. Therefore, at the beginning of the relationship, there was no illicit conduct<sup>4</sup>.

The reasoning of the Spanish Supreme Court focuses on the fact that, despite being a “natural or material” crime, the discussion must go further, since the central problem is to define the possibility that the subject had of knowing the unlawfulness of his conduct, which was the product of a legislative reform

<sup>4</sup> Lawfulness comes from the free and voluntary nature of sexual relations.

in the months after the beginning of the relationship. In view of this circumstance, any duty to inform that may have been attributed to the author is set aside, as that would mean an obligation:

(...) Of periodic consultation of the official gazettes in which the legislative reforms are published, in order to rule out that a change in criminal policy has turned him into a sex offender. [And the TS exposes its criteria]. It is a non-enforceable conduct that, therefore, exceeds the limits of the beatable error of prohibition and generates, due to its invincibility, the full exclusion of guilt. (Spanish Supreme Court, STS 782, 2016, pp. 7-8)

In such virtue, the social context of the individual is also taken into account, considering in the particular case, that the subject develops his activities in a group composed only of Ecuadorian citizens; Therefore, it dispenses with legal knowledge that would allow it to effectively know the imperative of the criminal law to which it would have had to resort by consulting the Official Gazette of the Spanish State BOE. Thus, this ruling allows exceptions to the legal consequences of the error according to the class of crimes in which it is admitted.

### **1.3. Relevance of internal aspects of the human being**

But the issue does not end there, as this current gives broad importance to the legal right that corresponds to the conduct, because: "(...) the correct treatment of the expirability of the error in this area cannot be carried out without taking into account the different levels of commitment that, in relation to the legal right correspond to each of these authors" (Nieto, 1999, p. 185). Consequently, for the laypersons of the specifically regulated activity who do not exercise, but by chance, the conduct could only be reprehensible when there is full knowledge of the unlawfulness and not merely potential.

Thus, the justification lies in the fact that the protection of the legal right does not justify equal treatment for lay people and professionals. Well, the level of demand could never be compared to that of a professional who is constantly developing in a specific field and that the legal norm will be more apprehensible to him.

The political-criminal justification to which Nieto Martín (1999) above is that the aforementioned distinction allows the rational application of the principle of equality or social solidarity, thus facilitating that avoidability responds to a criterion of proportionality of the sentence. Additionally, the undesirable damage that may be caused to the lay person who for any circumstance becomes doubtful is remedied, in front of the carefree professional who makes no effort to verify the legality of his conduct. This was one of the main criticisms of psychologism, therefore, with the qualification set out, said legal consequence is corrected.

It is appropriate to highlight that the different level of demand that must govern between lay people and professionals who are developing an activity in a field regulated by law should not set aside an internal distinction parameter. Well, it is not fair that all lay people and all professionals are measured with the same parameter. Precisely the avoidability tries to individually verify the possibility of knowledge and the actions carried out by each individual to clear the error. The internal difference between laymen who act differently, whether scrupulously or carelessly, also implies a different assessment by the administration of justice, which could even be decided by an invincible error.

At this point, we return to the fundamental premise on avoidability, certainly the differences between the same sector of society must be analyzed to determine the criminal sanction. Those differences should guide the assessment of individualizing internal aspects of the human being. To this end, other circumstances that are useful for measuring expiry are set forth below.

Once the psychologist position is overcome, it is time to review the contributions of normativism, in order to determine its possible harmonization with the present investigation. Its main exponent is Jakobs, who poses a vision antagonistic to Horn's.

For normativism it is essential that guilt has a function with respect to the end of the sentence. That is, guilt to the extent that it may be attributable to the avoidability of a prohibition error will have as a further purpose the reaffirmation of confidence in the criminal law. Therefore, ignorance is a stage that must be standardized according to explicit criteria that empower the administration of justice to decide whether to tolerate it or not, in such a way that avoidability arises when the author may be responsible for it. (Olaizola, 2007)

The avoidability of the error does not constitute, in this current, a psychological problem but a normative one (Jakobs, 1997), a situation that makes it possible to dispense with the individual and his individual analysis and thus form the criterion of attributing to people the task of knowing the rules in virtue of being accredited as a true citizen of the Law. (Córdoba, 2012)

The measure of the judgment of reproach in this current implies an assignment of a role to the members of society. By virtue of this role: "(...) the task of procuring for himself reasons is imposed on the individual so that it is preferable for him to know and follow the rules" (Córdoba, 2012, p. 80). This task is precisely fidelity to the legal system. Therefore, for Jakobs (1992), avoidability: "(...) is determined individually, that is, depending on whether the specific author would have been able to perform the behavior corresponding to the standard of his role if he had made enough effort". (p. 1067)

In this vein, it is clear that the concept of avoidability would be immersed in guilt, thus the prevention objective pursued by guilt makes the motive for finding out about the

illegality of a conduct falls on the individual according to the imposed role.

Due to the dogmatic construction, it is not convenient to apply such a radical position to avoidability, since the political-criminal considerations that will take place in the application of the prohibition error reduce its possibility of application, at least in a general way. Although there are also certain nuances<sup>5</sup>, perhaps a little more marked when compared with psychology, and that outline considerations to make the avoidable prohibition error viable. The most important position that arises at this point is that proposed by authors such as Rudolphi, Roxin, among others; that, although it is still normative, it has several aspects in which it disagrees, without placing itself at the extreme of psychologism.

The criterion that the vencibility of the error is the result of an interrelation between psychic aspects and normative provisions is correct. Therefore, the level of avoidability must be based on the doubt, understood as a reason, in the subject who may know the unlawfulness.

Now, this doubt allows to configure the potentiality and generate an expectation of knowledge in a person, here a normative aspect that establishes this requirement already intervenes. Cobos Gómez de Linares (1987) exposed several decades ago some criteria that were developed by Rudolphi at the time and have been useful to establish the winnability of a prohibition error. The first of these is the possibility for a person to obtain reliable information to determine their behavior. The second criterion is that it may be required to take advantage of this possibility of obtaining knowledge. Finally, it proposes that the author have the opportunity to represent the doubts, in order to be able to clarify them with the two previous means.

---

5 As in psychologism, intermediate doctrinal positions have also developed that systematically distance themselves from radical criteria.

#### **1.4. Reasons for knowing the unlawfulness**

The criteria presented above show an interesting connection between the two theories previously exposed, the first two normative criteria are the most important and are also collected, with some variations in Roxin's thesis. This author begins by stating that, in order to overcome the defeatability of an error, an extreme effort is not required on the part of the subject to know the unlawfulness, since such demand considerably reduces the elimination of guilt in practice. Well, so that the administration of justice cannot impose this requirement, three requirements are proposed that are concatenated among themselves, forming a single structure of exirability.

The first is the need for a reason that allows a subject to reflect; This criterion can be seen in various circumstances. For example, if there is already a reason, the subject must not have made a sufficient effort to clear his doubt; or if the subject makes an effort, but not enough to know the illegality of his conduct (Roxin, 2008). In this context, the close relationship between Roxin and Rudolphi can be appreciated, a matter on which the Spanish Supreme Court (2019) has also ruled:

It is often reasoned that a doubt, even a slight one, about the lawfulness of the conduct is sufficient to integrate the first aspect. Moreover, this standard is mitigated with normative criteria: it is enough to be aware of circumstances that would advise verifying the legality of the conduct. With this qualification we want to avoid giving priority to those who, due to their attitude of indifference towards the Law, do not even consider whether their conduct is lawful or not (the subject does not doubt anything because the law is indifferent to him). (STS 261, p. 15)

The reason for knowing the unlawfulness must arise on the initiative of the individual himself. This is basically the psychologist thesis, which has also been accepted in this

current. Then, if the subject must carry out activities in a field that has specific criminal regulations, said knowledge becomes a normative expectation whose purpose is for the person to make efforts to know the criminal regulations. For example: “Whoever opens a bank or a grocery store, who intends to operate a hotel business or drive a truck on the road knows that there are legal precepts for the exercise of these activities” (Roxin, 2008, p. 886).

In this sense, Spanish jurisprudence has also tended to recognize these differences. Thus, the Spanish Supreme Court (2001) has indicated that: “(...) a person normally educated to do business is practically impossible to ignore the illegality of obtaining undue money by deception” (p. 7). In this statement we can see the importance of rejecting the error, both the preparation of the subject, and the area in which they develop their work activities. Regarding the specific regulations for a work activity, the jurisprudence stands out, in Sentence 318/2019 of the Spanish Supreme Court (2019) regarding a case of sexual crimes with a minor who:

(...) The accused appears as a volunteer to train minors, which requires him to have an exquisite diligence in dealing with minors, which at least must materialize in informing himself before starting his activity; either individually or by the person in charge of the Sports Center that hires him; of certain regulations regarding the relationship of adults with minors. (p. 6)

The second criterion allows establishing a limit to the effort that a subject must make to obtain knowledge. This effort can only be triggered by those who, as a precondition, have obtained a reason in the terms already indicated. Here the preventability of an error can be overcome in several cases. One of the most common examples is the consultation that a citizen makes to a person versed in Law. The fact that a legal consultation has been carried out already implies a high level of interest in knowing the legality of the conduct. Therefore, this limit would



have to be sufficient without, normatively, being able to require other kinds of verifications to a lay person in law.

The radical normative thesis of Jakobs (1996) disagrees with this criterion, since it states: “If the determining source is not reliable for reasons for which the author is responsible - the lawyer is obviously distracted or recommends circumventing the law through gross machinations - (...) the author is not exonerated” (p. 680). Following this line, the error produced by the incorrect information provided by a lawyer, would remain the responsibility of the author of the fact. For his obligation was to overcome the lack of knowledge to a greater degree.

Such normative consideration is inapplicable for a person who does not know the Law, since it is not possible to demand to be in the appropriate conditions to refute or contradict a legal criterion without being able to understand that there are contradictory positions on a subject. In addition, this person most likely will not be able to understand technical-legal aspects that support a position contrary to the criteria of his lawyer.

In this sense, Roxin (2008) rightly points out: “It would be going too far by demanding that those seeking advice must verify the general ability or specific technical knowledge of a lawyer” (p. 888). This criterion is based on a principle of trust, which is generated in a lay citizen regarding the response of a lawyer. Thus, it is pertinent to constitute a limit to the information requirement. Therefore, when there is a reason for doubt and the person does not make the effort to consult an expert in Law, the error will be beatable and therefore guilty, although to a lesser degree.

However, if the subject tries to overcome ignorance through such consultation, the error is transferred to the field of invincibility and therefore there is no guilt. The intention of a person to overcome ignorance by consulting a legal professional has been accepted by jurisprudence as

an important criterion in determining expirability; clearly, provided that real possibilities to do so have converged (Spanish Supreme Court, STS 302, 2018).

However, exceptional circumstances may arise in which an individual, despite the information received from his lawyer, continues to have doubts, either because he knows of the existence of discrepant criteria at the doctrinal or jurisprudential level, the correct thing would be to make an additional effort to meet your requirement for certainty. However, these cases will hardly happen in a subject who does not have legal training, but the scenario is more likely when the same lawyer or official body that issues the information also highlights the existence of discrepant criteria at the judicial or scientific level. Such a situation entails an expectation towards the subject to obtain a second opinion that allows him to decide with greater argument for one or another behavior.

Finally, the third criterion is a necessary consequence of the above, when the subject makes efforts to ensure the legality of his conduct, but these are inefficient, the following alternative is proposed. If an individual tries to form a legal criterion self-taught and its result is the same as what a lawyer would have told him, the error would also have exceeded the criteria of expiration and therefore the subject would not be guilty (Roxin, 2008).

At this point, it is necessary to be inclined to accept Roxin's thesis for the central theme. This is due to the great practicality and political-criminal convenience, since it allows an analysis of the avoidability of the error that considers the normal activities of the human being, maintaining the normal channels of daily life. Without leaving aside, of course certain expectations that are legally formed so that criminal law is not overwhelmed and overloaded in its judicial stage.

## 1.5. External factors

But the issue of avoidability does not end in determining the existence of motives to seek knowledge of unlawfulness and not in the limits for such search. Rather, there are several external factors that are very useful to support a judgment of avoidability. Some of them - those that acquire more influence - will be studied below. For example, the weather, the person's state of mind, the social conditions in which he operates, and cultural conditioning.

In the daily life of a person diverse external factors converge that can condition or, at least, influence, the possibility of knowing a criminal norm. Until now, the analysis of internal and subjective issues has been deepened; but one should not forget the aspects that are independent and are outside the reach or control of the members of a society. Likewise, the jurisprudence highlights that there are no general parameters that allow determining avoidability, but that:

(...) It will be necessary to appeal to the circumstances of each case and of each subject, (...). What is involved, as it is accepted, is to assess whether the subject, in the specific context of his behavior, had indicators that warned him of the eventuality of the criminal nature of his conduct. For this reason, it is not possible to objectify behaviors in terms of the requirement of the duty to examine one's duty under the Law, and to the contrary it is not acceptable to carry out a maximum subjectivization that makes the injustice of the crime depend on the "perception of the author". conduct. (Spanish Supreme Court, STS 684, 2018, p. 28)

In order to determine whether the possibility or potential knowledge of criminal unlawfulness existed, time must be taken into account. This is a determining factor for a subject, because the performance of some action may depend on it to determine the adequacy of the conduct to the legal-criminal order. The

importance of the time factor in the study of avoidability must be considered from two different points of view.

First, the time in which a subject has been able to have knowledge of a certain criminal norm must be appreciated. For example, faced with the migratory phenomenon, it is an essential factor that should be assessed, since depending on the time that a subject has been in a territory with a new legal system, the possibility that he had to access knowledge could be determined. However, the analysis of avoidability should not be satisfied with the time factor but consider other criteria together.

As another point of view, the time must be considered at the time of commission of a crime, that is, taking into account the lapse between the moment that an individual may consider the need to know about the illegality of his action and the moment in which it is carried out. Córdoba (2012) proposes the following example: “(...) in situations of legitimate defense or state of necessity, but also in situations of vehicular traffic that cannot be stopped (...). These are, as can be seen, situations in which the need to act is imposed” (p. 97). In extreme situations, a person does not have the possibility of knowing the illegality of their conduct or, at least, this possibility may be conditioned by circumstances dependent on factors, both internal and external.

Such situations are impossible to consider in crimes that involve prior preparation, in which, at the very least, it is possible to think about their unlawfulness. This issue has also been warned by jurisprudence when it indicates in a crime of distribution of narcotic substances, that: “(...) there was no urgency to decide and act. It was a decision by its own nature that could be postponed” (Spanish Supreme Court, STS 3981, 2015, p. 23), referring to the possibility of overcoming the ignorance of the unlawfulness because the commission of the crime required advance preparation and does not imply -as happens in extreme situations- the lack of time to take the pertinent actions.

Another aspect that must be taken into account to determine the avoidability of the error is the social integration of the person. This includes multiple edges<sup>6</sup>, for example, age, language, education, etc. From the assessment made by the administrators of justice regarding these circumstances, the real potential for access to knowledge of the illegality can be determined with greater accuracy. For example, a person who works, who speaks the same language as the country to which the legal norm is applicable, who has access to the Internet, etc.; will be very prone to access the knowledge of a criminal law. It could not be compared to the situation of a subject that in his concrete reality the mentioned circumstances are unfavorable to him, because in that case, it is most likely that his ignorance is inevitable.

## CONCLUSIONS

The error of prohibition is a figure that cannot be limited to certain types of crimes. That is, it cannot be applied in some criminal types and not in others. A specific doctrinal sector has proposed that distinction based on categorising “common” or “notorious wrongdoing” crimes and those that are very specific and little known by the majority of the population. Assuming this classification as correct is quite risky since it allows arbitrariness in jurisprudence.

The prohibition error is a figure that goes far beyond the crime committed. Its legal nature does not focus on the violated norm or protected legal right but criminally prosecuted. The guilt or personal imputation is the ideal place within the dogmatic construction of the crime. In previous pages, two cases that substantiate this position were analyzed, both related to sexual crimes; in one of them, the prohibition error is admitted and in the other not. This shows that it depends on the individual’s circumstances and the context in which the unlawful act occurs, not of the criminal type committed.

---

6 In this sense, Sentence 318/2019 of the Spanish Supreme Court (2009) can be seen. It takes as relevant aspects of expirability the age of the subject, as well as their academic training and nationality.

The parameters that must be analyzed to determine the avoidability or inevitability of the error are a) The person's academic preparation depends on whether they have a professional degree. It is also incumbent on what type of profession it is since the knowledge of unlawfulness is not the same as that of a layperson in law as that of a jurist; b) The intention to obtain information that a subject has either self-study or through consultation with a legal professional; c) The work activity carried out in a specific field and whether it is permanent or temporary. With these parameters, it can be determined whether a person could have known the legal norms that regulate his activity or, on the contrary, if such knowledge was not required; d) The time in the two scenarios presented in the investigation is decisive. The administration of justice must take into account this parameter in which specific circumstances of the criminal act and complex aspects such as the migratory phenomenon converge; e) Social integration is an aspect that jurisprudence considers in all its decisions, within this, there are several aspects such as the social circle of the individual, their work activity and the possibility of accessing information by electronic means.

The individualization of the avoidability analysis is transcendental so that the prohibition error is admitted and guarantees that the criminal sanction is proportional and fair to the degree of guilt of the individual. Then, the individualization of guilt results from the analysis carried out by the justice administrator regarding various issues. The jurisprudential analysis provides a broad perspective on certain essential aspects that must be taken into account for the resolution of each case.

**REFERENCES**

- Cobos Gómez de Linares, M. A. (1987). *Presupuestos del error sobre la prohibición*. Madrid: Editoriales de Derecho Reunidas.
- Córdoba, F. J. (2012). *La evitabilidad del error de prohibición*. Madrid: Ed. Marcial Pons.
- Cuello Contreras, J. (2002). *El Derecho Penal español- Parte General, Nociones introductorias. Teoría del Delito*, 3th edition. Madrid: Editorial Dykinson.
- Jakobs, G. (1997). *Derecho Penal. Parte General. Fundamentos y teoría de la imputación*. (Trad. Cuello Contreras, J./ Serrano González de Murillo, J.), 2d edition. Madrid: Ed. Marcial Pons.
- Jakobs, G. (1992). El principio de culpabilidad, (Trad. Cancio Meliá, M.). *Anuario de Derecho Penal y Ciencias Penales*, T. XLV (III).
- Nieto Martín, A. (1999). *El conocimiento del Derecho. Un estudio sobre la vencibilidad del error de prohibición*. Barcelona: Ed. Atelier.
- Olaizola Nogales, I. (2007). *El error de prohibición. Especial atención a los criterios para su apreciación y para la determinación de su vencibilidad e invencibilidad*. Madrid: Ed. La Ley.
- Roxin, C. (2008). *Derecho Penal. Parte General, Tomo I. Fundamentos. La estructura de la teoría del delito*, (Trad. and notes de Luzón Peña, D.M./ Díaz y García Conlledo, M./ de Vicente Remesal, J.). Madrid: Ed. Civitas.
- Rusconi, M. (2009). *Derecho Penal. Parte General*, 2d edition. Buenos Aires: Ed. Ad-Hoc.

**Jurisprudential Sources**

Spanish Supreme Court, Criminal Chamber, Section 1. (June 20, 2001). Sentence no. 1197/2001.

Spanish Supreme Court, Criminal Chamber, Section 1. (February 27, 2003). Sentence no. 302/2003.

Spanish Supreme Court, Criminal Chamber, Section 1. (May 30, 2007). Sentence no. 482/2007.

Spanish Supreme Court, Criminal Chamber, Section 1. (October 1, 2016). Sentence no. 782/2016.

Spanish Supreme Court, Criminal Chamber, Section 1. (December 19, 2017). Sentence no. 835/2017.

Spanish Supreme Court, Criminal Chamber, Section 1. (June 20, 2018). Sentence no. 302/2018.

Spanish Supreme Court, Criminal Chamber, Section 1. (November 21, 2018). Sentence no. 567/2018.

Spanish Supreme Court, Criminal Chamber, Section 1. (December 20, 2018). Sentence no. 684/2018.

Spanish Supreme Court, Criminal Chamber, Section 1. (January 24, 2019). Sentence no. 318/2019.

Spanish Supreme Court, Criminal Chamber, Section 1. (May 24, 2019). Sentence no. 261/2019.

Spanish Supreme Court, Criminal Chamber, Section 1. (June 06, 2019). Sentence no. 633/2019.



**Received:** 01/04/2020

**Approved:** 03/11/2020

**Jorge Luis Chiriboga Estupiñán:** Independent legal researcher

**Email:** jorgechiribogach@hotmail.com

**City:** Quito

**Country:** Ecuador

**ORCID:** <https://orcid.org/0000-0001-6211-5549>

