

The Error in Brazilian Criminal Law after the Finalist Reform introduced by Law No. 7,209, of July 11, 1984¹

O Erro no Direito Penal Brasileiro após a Reforma Finalista introduzida pela Lei nº 7.209, de 11 de julho de 1984

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Abstract

This article aims to investigate the theoretical bases of the dichotomy of the institute of error in criminal law, especially based on the changes introduced by the edition of Law No. 7,209, of July 11, 1984, which changed the entire General Part of Brazilian Penal Code, Decree-Law nº 2,848, of December 7, 1940. Through a bibliographical research, type error and prohibition error types, existing in Brazilian criminal law, are analyzed. It is concluded that the change in dichotomy in the treatment of error was not just a change in the nomenclature of the institute, as it changes the very substrate of error treatment, which in the error

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of fact-error of law dichotomy had as objects the fact and the law, respectively; and starts to have as its objects, in the prohibition error-type error dichotomy, the criminal type and the awareness of illegality.

Key words: Brazilian Penal Code; Prohibition Error; Type Error.

Resumo

O presente artigo tem por objetivo investigar as bases teóricas da dicotomia do instituto do erro no direito penal, especialmente, a partir das modificações introduzidas pela edição da Lei nº 7.209, de 11 de julho de 1984, que alterou toda a Parte Geral do Código Penal Brasileiro, Decreto-Lei nº 2.848, de 7 de dezembro de 1940. Por meio de uma pesquisa bibliográfica, analisa-se as espécies de erro de tipo e de erro de proibição existentes no direito penal brasileiro. Conclui-se que a mudança de dicotomia no tratamento do erro não foi apenas uma alteração na nomenclatura do instituto, pois transmuda o próprio substrato do tratamento do erro, que na dicotomia erro de fato-erro de direito tinha como objetos o fato e a lei, respectivamente; e passa a ter como objetos, na dicotomia erro de tipo-erro de proibição, o tipo penal e a consciência da ilicitude.

Palavras-chave: Código penal brasileiro; Erro de proibição; Erro de tipo.

Introduction

To begin the study of the error institute, it is essential to conceptualize it. However, to conceptualize what is an error in criminal law, it is necessary to understand, initially, that in a certain branch of law there is no distinction between error and ignorance, therefore the error is both the false understanding of a certain object as the lack of knowledge of it.⁴

⁴ According to Munhoz Netto, criminal law has no interest in separating error from ignorance, since both error and ignorance, in their essence, constitute states of cognitive nonconformity. Therefore, there is no obstacle in unifying error and ignorance into a single concept, in the specific context of criminal law, it should be emphasized, since the effects that refer to error and ignorance are also the same (MUNHOZ NETTO, Alcides. **A ignorância da antijuridicidade em matéria penal [Ignorance of antijuridicity in criminal matters]**. Rio de Janeiro: Forense, 1978, p. 03). Having observed that there is no harm, in criminal matters, in unifying the concepts of error and ignorance, it is important to mention that ignorance cannot be confused with doubt, because those who have doubts know, even if faintly, something. In this sense, Munhoz Netto states that "ignorance is not to be confused with doubt, because the former presupposes the absence of any representation and, in doubt, there is more than one representation, one of which conforms to reality. Doubt also dissociates from error, because the perplexity or uncertainty between the various predictions that characterize it is incompatible with the formation of a conviction in contrast to reality, which is of the essence of error. Moreover, contrary to what happens with error, doubt, as such, does not vitiate the will. If the conflict of images is resolved and the subject acquires the conviction that he is in the truth, he will no longer be in doubt, although he may make an error; if he does not acquire such persuasion, he remains in doubt, not in error; and acting in this psychological situation, he will have willed voluntarily, or through guilt, his own behavior."

Still, if one takes the teachings of ontology as a basis⁵, one will realize that *error* is the *false* understanding of a given object, while *ignorance* is its *lack* of knowledge.

From the concept of error, it can be inferred that knowledge and error are two antagonistic institutes since these states of mind are in a relation of logical exclusion. According to Juarez Cirino dos Santos, "[...] knowledge excludes error, and error indicates ignorance about any object."⁶

The study of the error institute can be carried out from the point of view of traditional⁷ dogmatics, adopted by the Penal Code of 1940, before the reform introduced by Law No. 7,209/84, which began to deal with the dichotomy from the finalist dogmatics⁸.

The causalist theory of action uses the dichotomy of error that dates to Roman law, error of fact / error of law (*error facti-error ius*), with slight modifications⁹. The dichotomy error of fact / error of law lasted as such until 1925, when Alexander Graf zu Dohna began to treat the theme of error from the

(MUNHOZ NETTO, Alcides. **A ignorância da antijuridicidade em matéria penal [Ignorance of antijuridicity in criminal matters]**. Rio de Janeiro: Forense, 1978, p. 04).

⁵ "[...] Ontology is a philosophy based on trust in the being, based on the principle that something 'is', that it exists independently of our thinking. It does not address to consciousness, but to the being, which, in principle, is *unavailable* and is available to man only to the extent that it respects laws implanted in the being (in 'nature'). It is understandable that such a philosophy, which rests on confidence in the being, which is guided by objective reality, is only possible in an age consistent in itself, based on stable foundations; that, above all, also has confidence in itself." (KAUFMANN, A. and HASSEMER, W. **Introdução à Filosofia do Direito e à Teoria do Direito Contemporâneas [Introduction to Contemporary Philosophy of Law and Legal Theory]**. Lisboa: Fundação Calouste Gulbenkian, 2002, p. 37-38).

⁶ SANTOS, Juarez Cirino dos. **A moderna teoria do fato punível [The modern theory of the punishable fact]**. Curitiba: Fórum, 2004, p.222.

⁷ The traditional dogmatics, mentioned here, is the one that adopts the causalist epistemological presupposition of action.

⁸ The error can also be studied in accordance with functionalist dogmatics, however, the analysis of this theory is beyond the objectives proposed in the present study, as it was not incorporated by Law No. 7.209/84, which modified the general part of the Penal Code.

⁹ "The first theory developed in relation to the treatment of error in general is linked to the distinction between error of fact and error of Law, as well as to the principle of ignorance of the law, not excuse or '*error iuris nocet*'.

This first explanation has its roots in Roman law and prevails in the following historical stages until the development of the theory of crime in the second half of the nineteenth century. (BARREALES, María A. Trapero. **El error en las Causas de Justificación [The Error in the Causes of Justification]**. Valencia: Tirant lo blanch, 2004, p. 48).

perspective of a new dichotomy, that is, type error / prohibition error.¹⁰¹¹ The advances of the studies developed by Graf zu Dohna on the error theory fall on the objects of the referred institute. Graf zu Dohna made it possible to modify the objects of the error institute, which were formerly fact *and* law, objects respectively of fact error and of law error, and became the *penal type* and the *consciousness of anti-juridicity*, respectively objects of type error and prohibition error.

The alteration in the objects of the error analysis, fact and law, to criminal type and anti-juridicity, are a consequence, according to Graf zu Dohna, of the difficulties, sometimes insurmountable, of identifying the hypotheses of fact error and law error.¹²

Nonetheless, it was up to the finalists, especially Hans Welzel, to develop and consolidate the type error / prohibition error dichotomy in criminal law. For this reason, the new dichotomy came to be called finalist. Moreover, the hypotheses previously treated as a fact error by the traditional dichotomy can, in the finalist dichotomy, be classified as a prohibition error; and, in the same way, hypotheses that were classified as a law error by the traditional dichotomy can,

¹⁰ DOHNA, Alexander Graf zu. **La estructura de la teoria del delito [The structure of the theory of crime]**. Buenos Aires: Abeledo-Perrot, 1958, p.76-81.

¹¹ Regarding the progress brought by Dohna, Lucio Herrera points out that: "In spite of the great advances in the science of Criminal Law at the end of the last century [meaning the 19th century] and the beginning of the present [meaning the 20th century], it is not unreasonable to affirm, although it may seem paradoxical, that the problem of error remained in a classical stagnation. Recently, thanks to the work of Graf zu Dohna, a new trend has emerged that signifies a step forward in the field [...]" (HERRERA, Lucio Eduardo. **El error en materia penal [Error in criminal matters]**. Buenos Aires: Abeledo-Perrot, 1971, p. 43).

¹² Regarding this topic, Fontán Balestra points out that: "[...] facts with legal significance are made up of both rules and facts; it is the whole that constitutes the facts with that significance. Therefore, the error about a man's life, about the existence of a rule, about the determination of the penalty for the act, etc., are all "legally relevant errors." Hence, Binding concludes, it follows that any error that is of legal interest, that is legally relevant, is an error of law. An error which relates only to the facts, without any legal change thereof, cannot be taken into consideration. This exposition seems to us to be correct, especially if one considers the difficulty, sometimes insurmountable, of determining when an error is one of fact or of law. All the more so when, in the face of legislation such as ours, which is precise in speaking only of error or ignorance of fact, the distinction cannot fail to be tempted. [...] Graf zu Dohna asserts that the classic distinction between error of fact and error of law can be replaced with technical benefit by the opposition between type error and antijuridicity error (Der Aufbau, etc., p. 52). Hans Welzel manifests similar understanding (Das deutsche Strafrecht in seinen Grundzügen, p. 81). (BALESTRA, Carlos Fontán. **El elemento subjetivo del delito [The subjective element of the crime]**. Buenos Aires: Desalma, 1957, p. 143-144).

in the finalist dichotomy, be classified as a type error. Thus, there is no correspondence between the traditional dichotomy and the finalist dichotomy.

In these terms, Welzel states that:

Fact error and law error, on the one hand, and type error and prohibition error, on the other, are therefore entirely different concepts. There are errors that are type errors; for example, the error about the normative circumstances of the act, such as the leniency of the thing; and there are fact errors that are prohibition errors: the error about the presupposed objectives of a ground of justification¹³¹⁴.

As specified by Jescheck, the actor's mistaken ideas – false representation about the object and lack of knowledge about the object –, in line with the finalist dichotomy of the error, affect punishability in different ways: they can exclude intent – a essential type error –, affect only culpability – a prohibition error – or even lack relevance for punishability – an accidental error¹⁵.

The dichotomy type error / prohibition error was adopted by the reform of the General Part of the Brazilian Penal Code, introduced by Law No. 7,209, of July 11, 1984, which can be observed in articles 20 and 21.

¹³ WELZEL, Hans. **Derecho penal alemán**: parte general. [German criminal law: general part]. Santiago: Editorial Jurídica de Chile, 1997. p. 197.

¹⁴On the incorrect correspondence between the type error and the error of fact, note the lessons of Zaffaroni and Pierangeli: "Some actors confuse the type error, to which we have referred, with the so-called 'error of fact' of the old distinction between 'error of fact' and 'error of law'. The identification is false, because if we take the traditional classification, as it is usually understood by the actors who adhere to it, the type error can be either an 'error of fact' or an 'error of law'. The hunter, who mistakes his companion and hunts for a bear, incurs a type error which is also an 'error of fact', but the error which falls on normative elements of the objective type is also a type error and, nevertheless, according to the traditional classification it is an 'error of law'. Thus, those who ignore that a postman is a 'public official', those who take a movable thing because they believe it is theirs for having paid for it, ignoring that it is a movable property subject to registration and that the transfer requires prior processing, those who violate seals affixed by a wine inspector because they believe that it is not an 'authority', etc., these are all hypotheses in which we find ourselves with errors of type that are 'errors of law'" (ZAFFARONI, Raúl Eugenio and PIERANGELI, José Henrique. **Manual de direito penal brasileiro**: parte geral [Brazilian Criminal Law Manual: General Part]. São Paulo: Revista dos Tribunais, 1999, p. 496).

¹⁵ JESCHECK, Hans-Heinrich, WEIGEND, Thomas. **Tratado de derecho penal**: parte general [Treatise on Criminal Law: General Part]. Granada: Comares, 2002, p. 328.

1. Type error

1.1 Concept and initial considerations

A type error is one that affects elements of an objective type, whether factual or normative¹⁶.

A person who acts in type error acts without malicious intent¹⁷. Consequently, it can be said that the type error is the opposite of the malicious intent of type, since the agent who makes the mistake lacks the representative image required for the malicious intent of type to be configured¹⁸. Therefore, it can be inferred that the type error is an exclusive cause of typicality since the agent lacks the intent to infringe a criminal type. According to the finalist conception of the action, the intent is allocated in typicality. Intent is the awareness and will to carry out the elements described in the criminal type. In this sense, there is an intellectual element (conscience) and a volitional element (will) verified within the intent. For the intent to be configured, then, the intellectual and volitional elements must be present, being certain that the intellectual moment precedes the volitional one, since no one can have the will to do something which they do not know.

Now, if a certain agent directs their conduct to the accomplishment of a lawful end, and, under a false understanding of the object, or by the absence of knowledge about that object, the conduct of that agent comes to fall within a penal type, that agent cannot be punished, if the error was unavoidable.

¹⁶ Likewise, Bitencourt states that "a *type error* is that which falls on a circumstance that constitutes an essential element of the type. It is the false perception of reality about an element of crime. It is the ignorance or the misrepresentation of any of the constituent elements of the penal type." (BITENCOURT, **Erro de tipo e erro de proibição: uma análise comparativa [Type error and prohibition error: a comparative analysis]**. São Paulo: Saraiva, 2003, p. 96). Still, Zaffaroni "[...] The *type error* falls on elements of the objective type, in all cases it eliminates fraud, leaving only the possibility of considering an eventual culpable typicality if it is a viable error – and whenever the typical structure for the crime in question is stipulated [...]." (ZAFFARONI, Raúl Eugenio; Alejandro Slokar; and Alejandro Alagia. **Manual de derecho penal: parte geral**. Buenos Aires: Edit, 2006, p. 413).

¹⁷ Internally, the type error can consist either in a lack of representation of the object or in its false representation, since, generically, the error means the non-coincidence between consciousness and reality (JESCHECK, Hans-Heinrich; WEIGEND, Thomas. **Treaty on criminal law: general part**. Granada: Comares, 2002, p. 329). According to Zaffaroni, the type error is nothing more than the lack of representation required by the intent (ZAFFARONI, Raúl Eugenio; Alejandro Slokar; and Alejandro Alagia. **Manual de direito penal: parte geral [Criminal Law Manual: General Part]**. Buenos Aires: Edit, 2006, p. 413).

¹⁸ WESSELS, Johannes. **Direito Penal: parte geral. [Criminal Law: general part]**. Porto Alegre: Sergio Antonio Fabris, 1976, p. 99.

The type error can consist either in a false representation of the object as in a lack of representation of it. Error thus means the non-coincidence between consciousness and reality¹⁹.

Hence, if the agent does not have the awareness and will to carry out the elements described in a criminal type, it cannot be said that there is intent. Typicality will then be excluded, due to a type error. And criminal liability will be rejected.

For Welzel,

type error is the ignorance of an objective circumstance of the fact belonging to the legal type, whether of a factual (descriptive) or normative nature. Type error is, then, not only the error about "facts" such as thing, body, causality, but also about the "lascivious nature" and the "otherness" of the thing, the "seizure" (in § 137), "document", "official". In this regard, knowledge in the sense of a parallel judgment in the actor's conscience is sufficient.²⁰

The Brazilian Penal Code, in its article 20²¹, *caput*, provides for the hypothesis in which even if the subject does not act with intent, they may be punished if they acted with guilt, in case there is a statutory provision for the culpable modality for the crime²².

¹⁹ JESCHECK, Hans-Heinrich, WEIGEND, Thomas. **Tratado de derecho penal**: parte general [**Treatise on Criminal Law**: General Part]. Granada: Comares, 2002, p.329.

²⁰ WELZEL, Hans. **Derecho penal alemán**: parte general [**German criminal law**: general part]. Santiago: Editorial Jurídica de Chile, 1997. p.197.

²¹ "Art. 20. The error on the constitutive element of the legal type of crime excludes intent, but allows punishment for culpable crime, if provided by law" The wording of the article 20 of the Brazilian Penal Code makes it clear that this statute adopted the epistemological presupposition of the action, considering that if the type error excludes intent, it is because intent is allocated to the criminal type, as proclaimed by the finalists, and is no longer found in culpability, according to the causalist theory of action (FLORÊNCIO FILHO, Marco Aurélio. **A teoria da ação na estrutura do crime** [**The theory of action in the structure of crime**]. In: BRANDÃO, Cláudio; ADEODATO, João Maurício. **Direito ao extremo** [**Right to the extreme**]. Rio de Janeiro: Forense, 2005, p. 213).

²² The error will be overcome when it was up to the actor to act observing the duty of care, while an invincible error the agent was unable to obtain knowledge about a given circumstance. "The invincible error was the one that could not be avoided, that was inevitable. Any other person in the actor's position and even acting with the utmost diligence would have made the same mistake. The actor neither knew nor was aware that he was engaging in the typical conduct, nor was he able to know. Therefore, the conduct carried out with a typological error cannot be considered either wilful or reckless. [...] A vincible error is one that could have been avoided if the actor had exercised due care. That is, the perpetrator did not know that he was engaging in typical conduct he could and should have known so, if he had acted with due care. For this reason, the type error when it is vincible excludes intent but leaves liability for imprudence safe (TAPIA, María Inmaculada Ramos. Delito de acción. La tipicidad (IV) [Crime of action. Typicality (IV)]. In:

The unavoidable type error excludes intent and imprudence, while the avoidable type error excludes only intent, retaining the liability for imprudence (guilt), if there is, it should be emphasized, an express legal provision.²³²⁴

This caveat is important when observing the wording of article 20, *caput*, of the Brazilian Penal Code, since this article states that the error on the constitutive element of the legal type of crime excludes intent. Error is the intellectual misrepresentation of intent, therefore error cannot affect malicious intent.

Consequently, the type error, being a defective representation in the intellectual formation of intent, only affects the elements of the criminal type²⁵. The type error can be classified into: 1) essential type error; 2) accidental type error (*error in personam* and *error in objecto*). The error in execution, *aberratio ictus*, provided for in article 73 of the Brazilian Penal Code²⁶, despite being an

ESPINAR, José M. Zugaldía; ALONSO, Esteban J. Pérez. **Derecho penal: parte general. [Criminal Law: General Part]**. Valencia: Tirant lo blanch, 2002, p. 519).

²³SANTOS, Juarez Cirino dos. **A moderna teoria do fato punível [The Modern Theory of the Punishable Act]**. Curitiba: Fórum, 2004, p.80.

²⁴ The subject, even if acting recklessly, will only be held criminally liable by way of guilt if there is an express legal provision for culpable punishment. This rule is expressed in article 20, *in fine*, of the Brazilian Penal Code, *in verbis*: "Art. 20. The error on a constitutive element of the legal type of crime excludes intent, **but allows punishment for a culpable crime, if provided by law**" (emphasis added). And this rule is provided for in the same Legal Diploma, in the sole paragraph of article 18, which reads as follows, *verbatim*: "Article 18 [...] Sole paragraph. Except in the cases expressly provided by law, no one shall be punished for an act foreseen as a crime, except when committed intentionally."

²⁵ In this sense, Juarez Cirino dos Santos states that "the object of the type error does not have the extent suggested by the criminal law: the legal type is a concept *made up of* subjective and objective elements, but the type error can only affect the objective *element of the legal type – a concept less comprehensive than* the constitutive element of the legal type, which includes the subjective dimension of the type. Thus, delimiting the problem, it can be said that the type error represents a defect in the intellectual formation of the deceit, which has as its object *the objective elements of the legal type [...]*" (SANTOS, Juarez Cirino dos. **A moderna teoria do fato punível [The Modern Theory of the Punishable Act]**. Curitiba: Fórum, 2004, p. 81). Certainly, what the actor wanted to mention here is that there can be no type error about intent and guilt, generic subjective elements, because error is precisely the defect in the intellectual formation of the agent. However, there is nothing to prevent the existence of a type error regarding the special subjective elements of the type, which are subjective elements that are part of the penal type, but do not concern the intellectual training for the performance of the conduct, but rather the special purpose of acting of the active subject, which is, of course, encompassed by the intellectual formation of the agent. It is simply a relation of containing (deceit) and is contained (special subjective element of the type).

²⁶ "Art. 73. When, by accident or error in the use of the means of execution, the agent, instead of hitting the person he intended to offend, hits another person, he responds as if he had committed the crime against that person, in compliance with the provisions of § 3 of article 20 of this Code. In the event that the person whom the agent intended to offend is also affected, the rule of article 70 of this Code applies."

accidental error type, is not an erroneous representation made by the agent, since the intended result is only not achieved due to the subject's incompetence. In the *aberratio ictus* there is not an error of representation, but rather an error in execution. Thus, we will not deal in this article with *aberratio ictus*.

1.2 Essential type error

The essential type error is one that affects the objective or normative circumstances described in a criminal type. These circumstances constitute the elements that describe the legal model of the incriminated conduct.

The essential type error may be excusable or inexcusable. An excusable essential type error is that which is invincible, and therefore excludes the agent's intent. It should also be noted that the agent cannot be punished by way of guilt when the error is invincible. On the other hand, this occurs in the case of an inexcusable essential type error, i.e., a vincible one. In this type of essential type error, whenever there is an express legal provision for the culpable modality, the active subject may be held liable for guilt, since the agent did not observe the duty of care; He did not "conquer" the error, when he should have conquered it.

Essential type error is expressly provided in the Brazilian Penal Code in its article 20. It is clear that the Law No. 7,209, of July 11, 1984, adopted the finalist theory of action, since article 20 of the Brazilian Penal Code infers that if the type error excludes intent, it is because intent is allocated to the criminal type and not to culpability, as stated by the causalists.

1.3 Accidental type error

The accidental type error, as a rule, does not remove the criminal character of the conduct since the intention of the agent is conjured in the practice of an abstract model of a prohibited conduct. Therefore, the accidental type error does not exclude intent, and the agent must be held criminally liable²⁷.

²⁷ In this sense, Cláudio Brandão states that the "accidental error is the one that does not eliminate the typical adequacy between the mental representation of the agent of reality and the object actually attacked" (BRANDÃO, Cláudio. **Teoria jurídica do crime [Legal theory of crime]**. Rio de Janeiro: Forense, 2002, p. 197).

In the case of accidental type error, the rule of object equivalence is considered. So, if the object that the agent intended to focus on is equivalent to the one that in the phenomenological world it was imposed, the error will not excuse the subject's responsibility. The equivalence between the objects is not material, but juridical. The agent errs as to the person or as to the object, hence we speak of *error in personam* (error as to the person) and *error in objecto* (error as to the object) as species of accidental type error.

The biggest difference between the essential type error, provided for in article 20 of the Brazilian Penal Code, and the accidental type error, lies not only in its excusable or inexcusable nature, but also in the mental representation made by the agent. In an essential type error, the agent intends to carry out a lawful conduct, and ends up practicing an unlawful conduct, due to a false understanding, or lack of knowledge, about the object. On the other hand, in the case of an accidental type error, the agent intends to achieve an unlawful purpose, that is, the active subject aims to violate a legal object, but errs on the material object. If the object struck by the agent is non-equivalent, their conduct remains as non-punishable, i.e., excusable. Thus, the accidental error can be excusable when the objects, idealized and achieved, are not equivalent. The equivalence between objects, it should be emphasized, is not material, but juridical, and it is possible, therefore, to exclude typicality, when, for example, a subject steals an object that belongs to them, thinking that they are subtracting something that belongs to others.²⁸ Certainly, in this case, the subject will not violate the legal patrimony, since the object, which is intended to be stolen, belongs to them. The Brazilian Penal Code states that the excusable accidental type error fits into the legal hypothesis of the impossible crime, provided for in its article 17²⁹.

²⁸ ZAFFARONI, Raúl Eugenio; Alejandro Slokar; and Alejandro Alagia. **Manual de derecho penal: parte general [Criminal Law Manual: General Part]**. Buenos Aires: Edit, 2006, p. 421.

²⁹ "Art. 17. An attempt is not punished when, because of the absolute inefficiency of the means or the absolute impropriety of the object, it is impossible to consummate the crime." According to Paulo José da Costa Junior, "article 17 contemplates two hypotheses of impossible crime: due to the absolute ineffectiveness of the means or the absolute impossibility of the object. It can be seen from the outset that the precept demanded the absolute (and not relative) inefficacy of the means employed by the agent, as well as the absolute (non-relative) impossibility of attaining the object. As for the ineffectiveness of the means, it will have to be investigated in concrete cases, case by case. This is because the means, which may appear to be abstractly unsuitable, put into

1.4 Error determined by a third party

The error caused by a third party is provided for in paragraph 2 of article 20 of the Brazilian Penal Code³⁰. In the present case, the agent engages in a conduct that is intended to constitute a criminal offence determined by a third party, by way of explanation, the error was caused by another person. The active subject is guilty of an essential type error, and the agent may be held liable for guilt, if there is an express legal provision. According to Cláudio Brandão,

(...) it is important to note that, if the type error is determined by a third party, the third party is liable for the crime, in light of the provisions of article 20, paragraph 2, of the Penal Code. On this subject, special mention should be made of the wording of the 1969 Draft Penal Code, which presents a standard of best technique, *in verbis*: "If the error is caused by a third party, the latter shall be liable for the crime, as a result of intent or guilt, as the case may be."³¹

1.5 Putative Discriminants

1.5.1 Preliminary considerations

The putative discriminants, also called error as to the causes of justification, deal with the case in which the person acts supposing the existence of a factual situation that, if true, would make his conduct legitimate. In the

practice, may prove to be suitable. For example, sugar, which is unsuitable for producing someone's death, can be transformed into a lethal substance as long as it is used against a diabetic. The same is true of a slight blow of a penknife, unsuitable for causing death, which may present itself as a skillful means to produce the lethal event, if applied against a hemophiliac. From the absolute suitability of the means put in place by the agent can be drawn the difference between the attempt and the impossible crime. Whereas in the former the means must be suitable by their nature, even if they are not so in the circumstances or manner in which they were used, in the impossible crime the means will always be of absolute suitability. For this very reason, in the attempt, when the conduct is initiated, the result is presented as possible to verify. In the unsuitable attempt (impossible crime), the *ab initio* event is shown to be impossible to achieve. As for the impropriety of the object aimed at by the agent, it will be absolute when it does not exist or when, in the circumstances of the fact, consummation is evident as impossible. It is customary to distinguish the actual non-existence from the merely occasional or occasional non-existence of the object of the action. And while the former would give rise to the impossible crime, the eventual non-existence would give rise to the attempt. The example of the pundit is offered, who tries to steal the wallet of others. If you perform the gesture and fail to hit the right one, because the victim forgot it at home, the impossibility is absolute. If, however, the agent does not achieve the expected success because the money is found in another pocket, the impossibility is relative, and the attempt is configured (COSTA JÚNIOR, Paulo José da. **Comentários ao código penal [Commentaries on the penal code]**. São Paulo: Saraiva, 2002, p. 65).

³⁰ "Art. 20. (...) § 2 The third party who determines the error is liable for the crime."

³¹ BRANDÃO, Cláudio. **Teoria jurídica do crime [Legal theory of crime]**. Rio de Janeiro: Forense, 2002, p.198.

Brazilian doctrine, the classification of error as to the causes of justification is not settled, and there are two well-defined doctrinal currents.

The adherents of the strict theory of culpability assert that the error about the causes of justification is a prohibition error hypothesis, while the adherents of the limited theory of culpability assert that the error about putative discriminants can be either a type error or a prohibition error, depending on the situation.

The matter arouses so much discussion that Bitencourt went so far as to state that "in fact, it would not be an exaggeration to say that the 'permissive type error' constitutes a *third kind of error*. It would be a mixture of type error and indirect prohibition error."³²

Supporters of the strict theory of culpability, believe that paragraph 1³³ of article 20 of the Brazilian Penal Code is incorrectly allocated as a type error hypothesis. Partisans of the strict theory of culpability, consider that the putative discriminators will always be a kind of prohibition error, as proclaimed, for example, by Bitencourt. On the other hand, for those who adopt the limited theory of culpability, the putative discriminants may represent a type error hypothesis, when the error refers to an existing cause of justification (state of necessity, legitimate defense, strict compliance with the legal duty and regular exercise of the right, provided for in article 24 of the Brazilian Penal Code). When the error is about a non-existent cause of justification or about the limits of an existing cause of justification, then the putative discriminators are a kind of prohibition error.

For the orthodox finalists, the error as to the causes of justification will always be a prohibition error hypothesis, excluding criminal culpability. According to Welzel,

prohibition error is an error about the illegality of the act, with full knowledge of the realization of the type (that is, with full intent of the type). "The actor knows what he is doing, but wrongly supposes that it

³² BITENCOURT, Cezar Roberto. **Erro de tipo e erro de proibição: uma análise comparativa. [Type error and prohibition error: a comparative analysis]**. São Paulo: Saraiva, 2003, p.106.

³³ "Art. 20. The error on the constitutive element of the legal type of crime excludes intent, but allows punishment for culpable crime, if provided by law.

§1 A person who, due to an error fully justified by the circumstances, supposes a factual situation that, if it existed, would make the action legitimate, is exempt from penalty. There is no exemption from punishment when the error derives from guilt and the fact is punishable as a culpable crime."

would be permissible" (BGH.); they do not know the rule of law or do not know it well (misinterprets it) or mistakenly assume that there is a cause of justification.³⁴

Although Bitencourt raises the hypothesis that putative discriminants are a third type of error, the author makes it very clear that the error about the causes of justification, in his understanding, is always a prohibition error hypothesis, when he states that "[...] *the error of permissive type* does not exclude the intent of type, which remains intact. It only rules out intentional culpability, if it is avoidable, as well as culpable, if it is unavoidable.³⁵ Bitencourt's position is in line with the strict or rigorous theory of culpability³⁶. Juarez Cirino dos Santos and Cláudio Brandão³⁷, on the other hand, affirm that putative discriminants can be type errors (when the error affects the factual situation, which, if true, would be covered by a cause of justification); or a prohibition error (when the error affects the limits or the existence of a cause of justification). As stated by Juarez Cirino dos Santos, "the Brazilian legislation regulates the *type error* (art. 20, PC), the *permissive type error* (art. 20, paragraph 1, PC) and the *prohibition error* (art. 21, PC) according to the criteria of the limited theory of culpability." ³⁸

Regarding paragraph 1 of article 20 of the Penal Code, it is understood that this paragraph is in its proper place, as it is in line with the limited theory of

³⁴ WELZEL, Hans. **Derecho penal alemán**: parte general [German criminal law: general part]. Santiago: Editorial Jurídica de Chile, 1997, p.196.

³⁵ BITENCOURT, Cezar Roberto. **Erro de tipo e erro de proibição**: uma análise comparativa. [Type error and prohibition error: a comparative analysis]. São Paulo: Saraiva, 2003, p. 106.

³⁶ In the same sense as Bitencourt, Paulo José da Costa Junior takes a position, for example, when he alludes that the indirect prohibition error was erroneously included among the types of type error (art. 20, §1) (COSTA JÚNIOR, Paulo José da. **Comentários ao código penal** [Commentaries on the penal code]. São Paulo: Saraiva, 2002.p. 90); Fernando Eleutério, when stating that "[...] It is concluded that the Putative Discriminations, although provided for in paragraph 1 of article 20 of the Penal Code – implying that it is a kind of error on elements of the type, in reality, are characterized as an anomalous or *sui generis* kind of indirect prohibition error." (ELEUTÉRIO, Fernando. **Erro no direito penal** [Error in criminal law]. Curitiba: Juruá, 2006, p. 109)

³⁷ According to Cláudio Brandão, "[...] in the limited theory of culpability, the error as to the putative discriminants, depending on the case, will be equated with the type error, excluding intent, or it will be an error of prohibition; excluding culpability. If the error is as to the limits of the cause of justification, we have an error of prohibition; if it is as to the existence of the justifying cause that actorizes the typical action, we have the equivalence to the type error" (BRANDÃO, Cláudio. **Teoria jurídica do crime** [Legal theory of crime]. Rio de Janeiro: Forense, 2002, p. 160).

³⁸ SANTOS, Juarez Cirino dos. **A moderna teoria do fato punível** [The Modern Theory of the Punishable Act]. Curitiba: Fórum, 2004, p. 227.

culpability³⁹. However, it should be noted that according to the technique used by the legislator in the drafting of other articles, for example, article 21 of the Brazilian Penal Code, which provides for the prohibition error, with consequent exclusion of culpability, the use of the expression "is exempt from punishment" was not correct, leading to some confusion. Bitencourt argues that the Brazilian legislator, by using the expression "is exempt from penalty", took the position that putative discriminants are a kind of prohibition error, *in verbis*:

Article 20, *caput*, of the Penal Code expressly determines that the error on the incriminating type *excludes intent*, while its paragraph 1 - which deals with the error that affects the factual assumptions of the putative discriminants - *is exempt from penalty*. As can be seen, our Penal Code, by regulating the *permissive type error* (art. 20, § 1), does not establish that its consequence is the exclusion of intent, as it does in relation to the *incriminating type error*, simply providing for the *exemption from penalty*. And, as everyone knows, in Brazilian law, *excluding intent* and *exempting from punishment* do not mean the same thing. The expression "exempt from punishment" is traditionally conceived by Brazilian legal scholars as referring to culpability and not to typicality or illegality⁴⁰.

We believe, on the other hand, that if the Brazilian legislator wanted to treat the permissive type error as excluding culpability, they would have inserted a paragraph in article 21, and not in article 20 of the Penal Code. Therefore, we understand that the matter is correctly included in the Brazilian Penal Code and, consequently, there was a preference on the part of the legislator to adopt the limited theory of culpability.

The consequences of the limited theory of culpability and the strict theory of culpability are different regarding the penalty's application. If the strict theory of culpability is adopted, the error as to the putative discriminants will always be a prohibition error hypothesis. Thus, according to article 21 of the Brazilian Penal Code, if the error is unavoidable, it will exempt the agent from punishment,

³⁹ On the other hand, Bitencourt understands that every case of putative discrimination is an error of prohibition (BITENCOURT, Cezar Roberto. **Erro de tipo e erro de proibição: uma análise comparativa**. [Type error and prohibition error: a comparative analysis]. São Paulo: Saraiva, 2003, p. 105-106). Roque de Brito Alves argues that the capitulation given to the permissive error by the Brazilian Penal Code was wrong, since the putative discriminants constitute an error of prohibition, not a type error (ALVES, Roque de Brito. **Direito penal: parte geral** [Criminal law: general part]. Recife: Intergraf, 2004, p. 236).

⁴⁰ BITENCOURT, Cezar Roberto. **Erro de tipo e erro de proibição: uma análise comparativa**. [Type error and prohibition error: a comparative analysis]. São Paulo: Saraiva, 2003, p. 105-106.

however, if the error is avoidable, the agent will only incur in a cause for reduction of sentence, which may be from one-sixth to one-third. The agent's intent, here, remains intact.

If the limited theory of culpability is adopted, however, the permissive type error will be a type error hypothesis. Thus, when the error is related to an existing cause of justification and is unavoidable, the agent will not be held criminally liable, and if the error is avoidable, they will only be held liable if there is, for the criminal type, the culpable provision.

1.5.2 Permissive Type Error

In the permissive type error, the agent intends to practice a fact following what the legal norm provides, that is, their mental representation coincides with the representation of the legislator, or with the existing objective law, however, they err on the respective factual assumptions – the truth of the facts.

Juarez Cirino dos Santos differentiates the treatment of putative discriminants based on objective criteria for valuing behavior:

(a) if the actual conduct of the perpetrator is guided by *criteria* equal to those of the legislature, the defects in the actor's representation may have as their object or the typical situation (*type error*) or the justifying situation (*permissive type error*): both hypotheses exclude intent and admit the possibility of punishment for imprudence; b) if the actual conduct of the perpetrator is guided by *unequal criteria* to those of the legislator, the defects in representation may have as their object *the general legal assessment* of the fact (*prohibition error*), with the effect of excluding or reducing the reprobation of culpability, according to the *inevitable or avoidable* nature of the error.⁴¹

In the error about the objective circumstances of a justification cause, the agent supposes the presence of an excluding cause of illegality (state of necessity, legitimate defense, strict compliance with the legal duty and regular exercise of the right), which is not verified.

The exclusionary grounds of anti-juridicity are provided for in Article 23 of the Penal Code⁴². In permissive type error, the exclusionary causes are putative,

⁴¹ SANTOS, Juarez Cirino dos. **A moderna teoria do fato punível [The Modern Theory of the Punishable Act]**. Curitiba: Fórum, 2004, p. 226.

⁴² "Art. 23. There is no crime when the agent commits the act: I – in a state of necessity; II – in self-defense; III – in strict compliance with the legal duty or in the regular exercise of a right."

which means there is the putative state of necessity, putative self-defense, putative strict compliance with the legal duty, and the putative regular exercise of law.

2. Prohibition error

2.1. Concept and initial considerations

Prohibition error is the lack of knowledge about the illegality of a fact or its false understanding. The prohibition error is, therefore, the error about the anti-juridicity of the fact⁴³.

There is an error about illegality when the agent does not know the prohibition rule⁴⁴ that concerns the fact, or, knowing it, considers it invalid, or, because of an erroneous interpretation, defectively represents its scope of validity, considering, as a result, their behavior as legally admissible.⁴⁵

When committing a prohibition type error, the agent has the present consciousness and the will to carry out the elements contained in the type, therefore the intent remains intact. The subject, however, does not have knowledge about the reproach of their conduct or misinterprets the reprehensibility of their behavior, thus ruling out culpability, due to lack of awareness of anti-juridicity, which, as it is known, for the finalists, is an autonomous element within the judgment of culpability.

The prohibition error differs from the type error, because in the latter the agent believes that they are performing an action different from that which is being performed. Still, it should be noted that the type error directly excludes the unlawful (at least the intentional unlawful, since in crimes in which there is a provision for the culpable modality, the agent may be held liable if they did not observe the legal duty of care), while the prohibition error will eliminate culpability

⁴³ In this sense, Jescheck affirms that "the error of prohibition is the mistake about the illegality of the act" (JESCHECK, Hans-Heinrich, WEIGEND, Thomas. **Tratado de derecho penal**: parte general [**Treatise on Criminal Law**: General Part]. Granada: Comares, 2002, p. 490).

⁴⁴ A prohibition norm or prohibitive norm is the representation of the legal valuation of the act carried out by the agent (ZAFFARONI, Raúl Eugenio; Alejandro Slokar; and Alejandro Alagia. **Tratado de derecho penal**: parte general [**Criminal Law Manual**: General Part]. Buenos Aires: Edit, 2006. p. 577).

⁴⁵ SERRA, Tereza. **Problemática do erro sobre a ilicitude** [**Problem of error on illegality**]. Coimbra: Almedina, 1991, p.67.

when unavoidable, unrelated to typicality, so that if the prohibition error is overcome, it can never generate a culpable typicality. The prohibition error only affects the reprehensibility of the unlawful. Thus, the only effect which a vincible prohibition error entails is the occurrence of a reduced reproach.⁴⁶

The awareness of anti-juridicity is not identified with the knowledge of the law, but with the social disapproval of the conduct. This notion of the consciousness of anti-juridicity is drawn from its material concept. Accordingly, it should be observed whether the agent was aware of the anti-sociality of the conduct⁴⁷. Welzel states in this respect,

The object of the consciousness of the unjust and of the prohibition error is the anti-juridicity of the (planned) conduct. The perpetrator must be able to be aware of the contradiction of their conduct with the order of the community, on which the criminal prohibition rests and which is revealed by the community. It is not necessary, however, for the perpetrator to know or to have been able to know the legal concept itself (meaning the criminal law), or even the imposition of a penalty. On the contrary, it is not sufficient to state that the perpetrator could have been aware of the mere immorality of his conduct. The foreigner in whose homeland simple homosexuality is not unlawful knows, of course, that their homosexual actions are immoral, but for this reason he does not yet know that the performance of such acts in Germany is regarded as an inadmissible infringement of the Community order. It is, therefore, a prohibition error.⁴⁸

This anti-sociality analysis of the action, in order to constitute the consciousness of anti-juridicity, has the scope of minimizing the consequences of the Roman principle that everyone should know the criminal law (*error jus nocet*).

The idea of anti-juridicity is formed by the values of a society, that is, the idea of illegality is constituted from the society in which the conduct's perpetrator is inserted.

It is true that anti-legality is a negative value judgment, or disvalue, that qualifies the conduct as contrary to the law. This negative value judgment about

⁴⁶ ZAFFARONI, Raúl Eugenio; Alejandro Slokar; and Alejandro Alagia. **Tratado de derecho penal: parte general** [**Criminal Law Manual: General Part**]. Buenos Aires: Edit, 2006, p. 568-569.

⁴⁷ BRANDÃO, Cláudio. **Teoria jurídica do crime** [**Legal theory of crime**]. Rio de Janeiro: Forense, 2002, p. 151

⁴⁸ WELZEL, Hans. **Derecho penal alemán: parte general**. [**German criminal law: general part**]. Santiago: Editorial Jurídica de Chile, 1997, p.202.

the conduct is formed precisely because the conduct carried out by the actor is not a conduct expected by the legal system. To achieve, then, the potential awareness of the illegality, the agent, based on the concepts extracted from the society in which they find themselves, seeks to create the concept of anti-sociality of the conduct.

The anti-sociality of conduct, consequently, is achieved through parallel valuation in the sphere of the profane. The awareness of the prohibition of a conduct is obtained through the concepts taken by the actor from the society in which they are inserted, from the culture of that society. According to Brandão,

The parallel valuation of the actor, about the awareness of anti-juridicity in the sphere of the profane, means an appreciation of it in relation to the thoughts of the individual person and in the actor's environment, which marches in the same sense and direction as the legal-judicial valuation.⁴⁹

The solution given by German dogmatics to the outdated principle of *ignorantia legis non excusat* was to formulate the concept of awareness of material anti-juridicity, and thus remove the criminal responsibility of the subject who is unaware of the illicit nature of their conduct, without corresponding to the ignorance of the law, formal anti-juridicity.

The awareness of illegality is no longer identified with the knowledge of the law, as it was identified before the studies of Graf zu Dohna, developed, certainly, by the finalists. As indicated by Munhoz Netto,

anti-juridicity ignorance is distinguished from law ignorance. This distinction is useful in preventing the political principle of *error iuris* from leading to the punishment of inculpable conduct. The difference lies in the fact that ignorance of the law is ignorance of the legislated provisions, while ignorance of anti-legality is ignorance that the action is contrary to the law. By ignoring the law, the perpetrator may be unaware of the legal classification, the amount of the penalty or the conditions of its applicability but may have a representation of the illegality of the behavior. Ignoring the anti-legality, they lack such representation.⁵⁰

⁴⁹ BRANDÃO, Cláudio. **Teoria jurídica do crime [Legal theory of crime]**. Rio de Janeiro: Forense, 2002, p.155.

⁵⁰ MUNHOZ NETTO, Alcides. **A ignorância da antijuridicidade em matéria penal [Ignorance of antijuridicity in criminal matters]**. Rio de Janeiro: Forense, 1978, p. 20.

However, the principle of *error ius nocet* is still verified in Brazilian criminal law. The first part of article 21 of the Brazilian Penal Code states that "ignorance of the law is inexcusable." This principle of legislative policy, which provides for the absolute presumption of laws by all citizens, cannot succeed in the form of a criminal law of culpability, which is based on the analysis of the agent, because, according to this principle, everyone must know the law. As stated by Zaffaroni,

The principle of culpability and its violation by the *error juris nocet* rule express the dialectic between the rule of law and the police state in the error theory. In favor of the *error juris nocet* rule, it was argued that criminal prohibitions were obvious to all. This is not sustainable in the face of current criminal legislation, which is no longer a limited catalogue of more or less well-known conduct, but a motley set of provisions without transparency. From the old Enlightenment illusion of a criminal law so clear that anyone could know it, we are now in a situation in which the law is known to almost no one and even those who interpret it technically have great difficulties.⁵¹

As such, it is not possible to demand the presumption of absolute knowledge of criminal laws by all citizens, since we are currently living in a moment of "legislative inflation", making it impossible to know the existence of the laws in force, even for jurists. In addition to the large number of the country's laws in force, the complexity of many of these laws should be highlighted, making them even more difficult to understand.⁵²

2.2 Excusable and inexcusable prohibition error

The awareness of illegality, the enforceability of a different conduct, and the imputability are elements that make up the judgment of culpability⁵³. It can also be seen that the judgment of culpability⁵⁴, based on the finalist

⁵¹ ZAFFARONI, Raúl Eugenio; SLOKAR, Alexander; e ALAGIA, Alejandro. **Manual de direito penal: parte geral [Criminal Law Manual: General Part]**. Buenos Aires: Edit, 2006, p. 567-568.

⁵² On the subject, read FLORÊNCIO FILHO, Marco Aurélio. **Culpabilidade**: crítica à presunção do conhecimento da lei penal [**Culpability**: criticism of the presumption of knowledge of criminal law]. Belo Horizonte-São Paulo: D'Plácido, 2023.

⁵³ The finalist theory of action was responsible for the elaboration of the pure normative theory of culpability, since it shifted the intent and guilt that were allocated in culpability (according to the causalist theory of action) to typicality, leaving only normative elements in culpability.

⁵⁴ Culpability is a judgment of personal reproach done by the actor of a typical and unlawful act because, being able to behave in accordance with the legal order, they freely choose to behave contrary to the legal order. With this in mind, Córdoba Roda states that, "[...] culpability appears conceived, according to a widely spread formulation, as a judgment of personal reproach that is

epistemological presupposition of the action, is a judgment that revolves around the fact's actor, the action's subject, unlike the judgments of typicality⁵⁵ and anti-juridicity⁵⁶, which are judgments that revolve around the fact.

Culpability, as it is the last condition for a formal offence to be constituted, will therefore be a prerequisite for the imposition of the penalty. If there is no culpability, there is no need to speak of punishment.

If the prohibition error excludes culpability, then the prohibition error is said to be excusable, or invincible. There is no fixed criterion to determine the excusability of the prohibition error, since in each specific case it is up to the judge to decide whether or not the subject was aware of the unlawfulness and, if the plaintiff did not have such awareness of the unlawfulness, whether it was possible to acquire it (hence the awareness of illegality is not actual, but potential). As explained by Brandão,

It is known that a crime, as a particular and human fact, will never be identical to another one. That is why it is not possible to fix the exact dividing line between excusable error and inexcusable error, but only to fix general lines. It must in fact remain in a nebulous area. The error will be excusable to the exact extent that the judgment of culpability must be excluded.⁵⁷

Unlike the excusable (invincible) prohibition error, the inexcusable (vincible) prohibition error does not eliminate the agent's liability, i.e., their reproach. It can be said, then, that the error is vincible, when the actor was requirable to avoid it. However, Zaffaroni affirms, this can only infer that the vincible error is reprehensible, which does not constitute any practical rule to individualize it, without overcoming what Cláudio Brandão called the "nebulous zone". The judging body must be cautious when analyzing the agent's awareness

addressed to the subject for the reason that, despite being able to comply with legal norms, they carried out an action constituting a criminal offense; in other words, given that they carried out conduct that was considered a crime even though they were in a position to act differently. The culpability appears, therefore, understood as a judgment of reproach which presupposition is the *ability* of the subject to adapt their conduct to the norms of the Law." (CÓRDOBA RODA, Juan. **Guilt and punishment**. Barcelona, Bosh, 1977, p. 23).

⁵⁵ Typicality is a judgment of adequacy of the fact to the legal norm of the criminal legal system.

⁵⁶ Anti-juridicity is a negative value judgment, or disvalue, that qualifies the fact as contrary to the criminal legal system.

⁵⁷ BRANDÃO, Cláudio. **Teoria jurídica do crime [Legal theory of crime]**. Rio de Janeiro: Forense, 2002, p. 210.

of anti-juridicity, which must be fully appreciated, that is, all the facts that constitute the agent's life must be investigated, namely, the customary, moral, religious, social precepts, in short, all the elements that form the agent's conviction. Zaffaroni points out that for a long time it was maintained that the inexcusable (vincible) prohibition error violated the "duty of legal information", however the truth is that this "general" duty does not exist and that, if it did, it would be important to ask what happens when this duty is ignored? Or rather, how can this general duty to provide information be achieved? In fact, the vincibility or invincibility of the prohibition error is a "limit of culpability", in other words, a limit of enforceability and, therefore, of the reprehensibility of the conduct⁵⁸.

Nowadays, it is common ground among scholars to recognize that the prohibition error, invincible (excusable) removes culpability, and, as a result, removes the criminal responsibility of the agent⁵⁹. This understanding is already provided for in our Brazilian Penal Code, since the reform introduced by Law No. 7,209/84, with the institution of the prohibition error, provided for in article 21 of the Brazilian Penal Code.

The inexcusable prohibition error, unlike the excusable prohibition error, assumes that the agent does not know the illegality of the fact, but would be able to inform themselves about it, thus raising greater doubts. According to Bitencourt, "due to their activity, the agent is obliged to, before carrying out certain conducts, inform themselves about the legality or illegality".⁶⁰⁶¹ However, the

⁵⁸ ZAFFARONI, Raúl Eugenio; SLOKAR, Alexander; e ALAGIA, Alejandro. **Manual de direito penal: parte geral [Criminal Law Manual: General Part]**. Buenos Aires: Edit, 2006, p. 569.

⁵⁹ As claimed by Stratenwerth, "a) For a long time the treatment of the prohibition error was extraordinarily discussed. In any case, as we explained at the beginning, in the years after the war there was unified comprehension that the *inevitable* prohibition error which deprives the actor of the possibility of behaving according to duty has the effect of excluding culpability, that is, of determining impunity (STRATENWERTH, Günter. **Derecho penal: parte geral. [Criminal law: general part]**. Caracas: Editoriales de Derecho Reunidas, 1982, p. 183).

⁶⁰ BITENCOURT, Cezar Roberto. **Erro de tipo e erro de proibição: uma análise comparativa [Type error and prohibition error: a comparative analysis]**. São Paulo: Saraiva, 2003, p. 115.

⁶¹ According to Cláudio Brandão, "It must be taken into account, in the analysis of the excusability of the prohibition error, whether or not any prudent subject, in the same intellectual and cultural conditions as the actor, would be able to understand the illicit nature of their actions. Thus, this duty of understanding should be made by a comparison, because, to the extent that it is possible for a subject, under equal conditions, to be aware of the anti-juridicity, the reprehensibility of the fact will be characterized and the prohibition error is said to be excusable" (BRANDÃO, Cláudio. **Teoria jurídica do crime [Legal theory of crime]**. Rio de Janeiro: Forense, 2002, p. 211).

question remains: what should be the criterion for obtaining this information? For Zaffaroni, the avoidability of understanding the criminality of the conduct must always be evaluated in relation to the concrete subject and their circumstances, which allows us to affirm that at least three essential aspects must be present its correct evaluation: 1) whether it was possible to make use of some suitable means of information; 2) whether the urgency in making the decision prevented them from informing themselves or reflecting on the conduct; and 3) whether it was necessary to imagine the criminality of their conduct, which is not the case when, according to their intellectual capacity, their education or training, they had no reason to presume it.⁶²⁶³

It is important to note that the expression "may reduce it" provided for in article 21 of the Penal Code, in *fine*, should be interpreted as "shall reduce it", since the agent must be punished within the limit of their culpability, according to what modern criminal law dictates.

Thus, those who were unaware of the unlawful nature of the conduct cannot be punished as though they knew it. The reduction of the sentence must therefore be mandatory, and not discretionary, and the magistrate is obliged to apply it at all times.

⁶² ZAFFARONI, Raúl Eugenio; SLOKAR, Alexander; e ALAGIA, Alejandro. **Manual de direito penal: parte geral [Criminal Law Manual: General Part]**. Buenos Aires: Edit, 2006, p. 570.

⁶³ "Like any limit of culpability or reproach, the vincibility of error must be determined according to the personal conditions of the agent and never according to a pretended objectivity that appeals to a figure of imagination (a juridical *homunculus* or *normal man*). It is always a specific person to be reproached, in specific situations and circumstances. Although the Argentine Code does not contain a general formula for imputability or diminished culpability, it does not mean that it does not recognize degrees of reprehensibility according to the person's mental capacity. This is a fact that the law cannot ignore or alter. The capacity for imagination, critical judgment, the level of abstract thought, attention, mnemonic fixation, sensory perception, etc., are functions that may be diminished in such a way as to make it impossible to require for the agent to imagine the criminality of their action, to deduce it by a reflective analysis of the available data, to understand its harmfulness, etc. For this reason, exculpatory error and imputability are not concepts that should be completely separated, but the degree of psychic capacity for culpability can affect the error's invincibility. In other words, it is possible that there are people who are not psychically incapable of culpability with respect to that particular wrongdoing, but that, due to their psychic characteristics, it is impossible to demand from them, in the concrete circumstance of the act, that they have overcome or avoided the error (ZAFFARONI, Raúl Eugenio; SLOKAR, Alexander; e ALAGIA, Alejandro. **Manual de direito penal: parte geral [Criminal Law Manual: General Part]**. Buenos Aires: Edit, 2006, p. 571).

2.3 Direct prohibition error

There is a direct prohibition error when the agent does not understand a prohibitive norm or misinterprets its observance. Prohibitive norm is not used here in the sense of law, but of anti-juridicity.⁶⁴

As stated by Wessels,

There is an error about the legal prohibition as such when the actor *does not recognize the prohibition rule directly referring to the fact, considers it invalid or, as a consequence of the wrong interpretation, arrives at false representations of its scope of validity* and for this reason considers their conduct as legally admissible (= *direct prohibition error*)^{65 66}

The direct error of prohibition thus relates to the existence and validity of the prohibitive provision. According to Juarez Cirino dos Santos, "*the direct error of prohibition can affect the existence, validity and meaning of the criminal law.*"⁶⁷

Juarez Cirino dos Santos adopts a very pertinent understanding when classifying the hypotheses of direct prohibition error, because instead of adopting the prohibitive norm as its object, this author adopts the criminal law itself as its object, with the clear purpose of removing the inadequate principle that knowledge of the criminal law is presumed.

The error about the existence of the prohibitive norm, or as mentioned by Cirino dos Santos, about the existence of the criminal law⁶⁸, is the most common type of prohibition error, which incidence is, as a rule, conditioned by the cultural level of the people, specifically, the lower the level of schooling, the greater the frequency of the error.

⁶⁴ BRANDÃO, Cláudio. **Teoria jurídica do crime [Legal theory of crime]**. Rio de Janeiro: Forense, 2002, p. 204.

⁶⁵ WESSELS, Johannes. **Direito Penal: parte geral. [Criminal Law: general part]**. Porto Alegre: Sergio Antonio Fabris, 1976, p. 103.

⁶⁶ Regarding the direct prohibition error, Tereza Serra states that: "this error occurs when the agent does not know – or, knowing it, considers it revoked or interprets it wrongly – the prohibitive norm that directly concerns the fact, taking their behavior as permitted and approved by the Law" (SERRA, Tereza. **Problem of error on illegality**. Coimbra: Almedina, 1991, p. 69).

⁶⁷ SANTOS, Juarez Cirino dos. **A moderna teoria do fato punível [The modern theory of the punishable fact]**. Curitiba: Fórum, 2004, p. 243.

⁶⁸ SANTOS, Juarez Cirino dos. **A moderna teoria do fato punível [The modern theory of the punishable fact]**. Curitiba: Fórum, 2004, p.243.

2.4 Indirect prohibition error

The indirect prohibition error, also known as permission error, is configured when the agent, even knowing the prohibition, believes that his conduct is regulated by an excluding cause of illegality. The agent errs as to the existence of a non-existent cause of justification or errs as to the limits of an existing cause of justification. As explained by Cirino dos Santos,

The *permission* error, or of *indirect prohibition*, has as its object the *existence* of a non-existent cause of justification, or the *legal limits* of a cause of justification not recognized by law (punishing other people's children for rudeness, in the supposed exercise of the right of correction); in the error about *legal limits* of existing justification, the actor assigns *different* limits to justification of those attributed by the legislator – in this aspect, it corresponds to the error about the existence of non-existent justification: when making an arrest in flagrante delicto, the common citizen produces serious bodily injury in the person of the prisoner.⁶⁹⁷⁰

The permission error follows the rules of the direct prohibition error, thus not excluding culpability, when the error is avoidable.⁷¹ In the permissive type error, on the other hand, the representation made by the actor coincides with the representation of the legislator, however the agent errs as to the truth of the fact, that is, the agent errs as to the existence of a factual circumstance, which, if existed, would make their action legitimate.

In the indirect prohibition error, the agent correctly understands the fact, but their representation of the right and the wrongful contradicts that of the legislator, since the agent creates a non-existent putative discrimination or errs as to its limits.⁷²

Examples of error as to the existence of a cause of justification are: when the agent bodily punishes the children of another, for mischief, thinking that there

⁶⁹ SANTOS, Juarez Cirino dos. **A moderna teoria do fato punível [The modern theory of the punishable fact]**. Curitiba: Forum, 2004. p. 244.

⁷⁰ Herein, Wessels asserts that "a mere permission error will exist when the plaintiff *is unaware of the legal limits of a recognized cause of justification or believes in the subsistence of a cause of justice not recognized by the legal order* (= indirect prohibition error)" (WESSELS, Johannes. **Direito Penal: parte geral. [Criminal Law: general part]**. Porto Alegre: Sergio Antonio Fabris, 1976. p. 105).

⁷¹ WESSELS, Johannes. **Direito Penal: parte geral. [Criminal Law: general part]**. Porto Alegre: Sergio Antonio Fabris, 1976. p. 106.

⁷² WESSELS, Johannes. **Direito Penal: parte geral. [Criminal Law: general part]**. Porto Alegre: Sergio Antonio Fabris, 1976. p. 106.

is an excluding cause of illegality for doing so, or when they sabotage military resources supposing that there is a right to promote world peace by authorizing them to do so⁷³.

In the error as to the limits of an existing ground of justification, the agent attributes to the exclusion of illegality different limits from those attributed by the legislature. As claimed by Roxin, "[...] those who fixate the limits of a cause of justification in a different way than the legislator also supposes, to that extent, a cause of justification that does not exist."⁷⁴

Conclusion

The contributions made by Law 7.209/84 were numerous, especially for the dichotomy of error, which overcame the old dichotomy of fact error / law error with the reception of the dichotomy type error / prohibition error, provided for in articles 20 and 21 of the Brazilian Penal Code.

The traditional dogmatics, structured under the aegis of the causalist theory of action, has maintained the dichotomy that dates back to the Roman period (*error facti* / *error ius*), with some changes. Regarding the law error, the causalists gave an absolute character to the principle of *error ius nocet*, precisely, that ignorance of the law does not remove the responsibility of the agent.

The fact error / law error dichotomy lasted until 1925, when Alexander Graf zu Dohna began to treat the subject from the perspective of a new dichotomy, namely, type error / prohibition error, which was consolidated by the finalists, especially Hans Welzel. In Brazil, the dichotomy fact error / law error lasted until the enactment of Law No. 7,209/84, which amended the General Part of the Penal Code, by treating the error institute in terms of the dichotomy type error / prohibition error, respectively, in articles 20 and 21 of the Penal Code.

The finalist theory of action was responsible for the systematization of the new dichotomy of the error institute. The change in dichotomy was not only in the nomenclature, but there was a change in the objects of the error institute, which

⁷³ ROXIN, Claus. **Derecho penal: parte general** [**Criminal Law: general part**]. Madrid: Civitas, 1997. p. 871.

⁷⁴ ROXIN, Claus. **Derecho penal: parte general** [**Criminal Law: general part**]. Madrid: Civitas, 1997, p. 872

in the traditional dichotomy were fact and law (respectively objects of fact error and of law error), and with the finalist dichotomy became the type and consciousness of illegality (respectively objects of type error of prohibition error).

A type error is one that affects the elements of the objective criminal type, whether factual or normative. The type error can be classified into: 1) essential type error; 2) accidental type error (*error in personam* and *error in objecto*).

An essential type error is one that affects the objective or normative circumstances described in a criminal type. These circumstances constitute the elements that describe the legal model of the incriminated conduct. Viewed in this way, it can be stated that the essential error is the one that deals with the elements of the abstract model of action or omission.

An essential type error may be excusable or inexcusable. An excusable essential type error is an invincible one and therefore excludes the agent's intent. It should also be noted that the agent cannot be punished by way of guilt when the error is invincible. On the other hand, it occurs in the case of an inexcusable essential type error, i.e., a vincible one.

The accidental type error, as a rule, does not remove the criminal character of the conduct since the intention of the agent is made up in the performance of a criminal type. Therefore, the accidental type error does not exclude deceit, and the agent must be held criminally liable.

In the accidental type error, the rule of object equivalence is considered. Thus, if the object that the agent intended to focus on is equivalent to the one that was affected in the factual world, the error does not excuse the agent's liability. It is of paramount importance to mention that the equivalence between the objects is not material, but juridical.

The putative discriminants, also called error as to the causes of justification, deal with the case in which the subject acts supposing the existence of a factual situation that, if true, would make their conduct legitimate.

Although the Brazilian doctrine is not unanimous regarding the classification of error on the causes of justification, it can be said that the Brazilian Penal Code structured the subject under the mold of the limited theory of culpability.

For the limited theory of culpability, the putative discriminants will be a kind of type error, when the error refers to a cause of justification that exists (state of necessity, legitimate defense, strict compliance with legal duty and regular exercise of the right). When the error is about a non-existent cause of justification or about the limits of a cause of justification, then in such cases the putative discriminators will be a kind of prohibition error.

There is a permissive type error when the agent practices a wrongful act, thinking that their conduct is covered by an exclusion of illegality provided for in article 23 of the Brazilian Penal Code. In the permissive type error, the agent intends to practice something according to what is provided for in the legal norm, that is to say, their mental representation coincides with the representation of the legislator, or with the existing objective right, however the subject errs on the respective factual assumptions.

The prohibition error is the lack of knowledge about the illegality of a fact or its false understanding. The prohibition error is, therefore, the error about the anti-juridicity of the fact.

The prohibition error differs from the type error, because in the latter the agent believes that they are performing an action different from that which they are performing. Still, it should be noted that the type error directly excludes the unlawful (at least the deceitful unlawful, since in crimes that have provision in the culpable modality the agent may be held liable if they did not observe the legal duty of care), while the prohibition error will eliminate culpability when unavoidable, without having any relation to typicality, so that if the prohibition error is overcome, it can never generate a culpable typicality. But a vincible type error can give rise to a culpable typicality, if there is, it should be repeated, a legal provision. The prohibition error only affects the reprehensibility of the unlawful. Thus, the only effect of a vincible prohibition error is to produce a reduced reproach.

If the prohibition error excludes culpability, then the prohibition error is said to be excusable, or invincible. There is no fixed criterion to determine the excusability of the prohibition error, since in each specific case it is up to the judge to decide whether or not the subject was aware of the unlawfulness and, if the

actor did not have such awareness of the unlawfulness, whether or not it was possible to acquire it (hence the awareness of illegality is not actual, but potential).

Unlike the excusable (invincible) prohibition error, the inexcusable (vincible) prohibition error does not eliminate the agent's liability, i.e., the reprehension of their conduct remains intact.

The prohibition error can also be direct, indirect, and mandatory.

There is a direct prohibition error when the agent does not understand a prohibitive norm or misinterprets its observance. Prohibitive norm is not used here in the sense of law, but of anti-juridicity.

The indirect prohibition error, also known as permission error, is configured when the agent, although knowing the prohibition, believes that their conduct is regulated by an excluding cause of illegality. The agent errs as to the existence of a non-existent cause of justification or errs as to the limits of an existing cause of justification.

In the direct prohibition error, the agent misunderstands or does not understand a prohibitive norm, whereas in the mandatory prohibition error, the understanding relation will be made with respect to an imperative norm.

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