

## **VERIFICATION OF THE SPECIAL SUBJECTIVE ELEMENT OF COMMERCIALIZATION IN THE CRIME OF TRAFFICKING, MANUFACTURE OR POSSESSION OF NARCOTICS IN THE COLOMBIAN CRIMINAL CODE**

**HERBERTH LEAO PRECIADO MENDEZ<sup>1</sup>,  
JASON GEORGE PRECIADO MENDEZ<sup>2</sup>**

<sup>1</sup>UNIVERSIDAD LIBRE, ORCID: 0009-0002-8005-6815

<sup>2</sup>UNIVERSIDAD LIBRE, ORCID.0009-0005-8157-0404

herberthl.preciadam@unilibre.edu.co<sup>1</sup>

jasong.preciadam@unilibre.edu.co<sup>2</sup>

### **Summary**

The current article addresses the verification of the specific subjective aspect of commercialization in the crime of trafficking, production or possession of prohibited substances, as established in Article 376 of the Colombian Criminal Code. This study mixes a legal theoretical approach with a methodical review of the literature, using the PRISMA 2020 methodology, based on fourteen doctrinal and empirical investigations that are registered in Scopus and Web of Science between 2000 and 2025. From a normative perspective, Article 376 describes various main actions – introducing, carrying, storing, preserving, creating, selling, offering, acquiring, financing or providing – but recent jurisprudence has indicated that the existence of the crime requires an ulterior purpose of commercialization or trafficking, which has generated discussion about the compatibility of this interpretation with the principle of legality and the concept of closed criminality in Colombian criminal law. The findings of the review reveal a doctrinal agreement that holds that the intent to distribute or earn money adds a volitional component that separates punishable trafficking from simple possession or personal consumption. In addition, it is shown that the amount of the substance confiscated serves as a secondary indication, whose evaluation must be complemented with contextual factors and appropriate evidence.

It is concluded that the validation of the specific subjective aspect requires a comprehensive evaluation of the evidence, ensuring the presumption of innocence and preventing jurisprudence from assuming the responsibilities of the legislator. Finally, it is suggested that scientific production in the field of criminal law in the country be strengthened, establishing uniform criteria of proof that strengthen the coherence between legality, guilt and proportionality in drug-related crimes.

**Keywords:** Colombian criminal law; drug trafficking; special subjective element; commercialization; circumstantial evidence; Penal code.

### **1. Introduction**

The crime of trafficking, production or possession of psychoactive substances is one of the most significant and discussed crimes in the Colombian legal framework, due to its direct connection with the protection of public health and its influence on the country's criminal policy. This crime, stipulated in article 376 of the Penal Code, includes several actions such as introducing, transporting, carrying, storing, preserving, producing, selling, offering, acquiring, financing or providing drugs without the authorization of the competent authority. However, its application in practice has given rise to an intense legal debate on the need to demonstrate a particular subjective element related to marketing, i.e. the specific intention to sell or distribute the drug, which distinguishes punishable trafficking from simple possession or personal use.

In Colombia, the analysis of this subjective element has become more relevant as a result of the jurisprudential advances of the Supreme Court of Justice, which, in judgments such as SP-44997 of 2017, has stated that "what is really important when establishing criminality is the existence of an ulterior purpose, that is, the intention to market or

disperse the substance". This ruling, which expanded the concept of criminality to a subjective scope, reformulated the interpretation of the crime, introducing the need to demonstrate the intent to traffic or commercialize for the conduct to be considered typical, which suggests a significant change with respect to the literal text of Article 376.

From a doctrinal perspective, some experts have seen this interpretation as a constitutional safeguard, aimed at protecting consumers and dependents from disproportionate criminal punishments, in line with the principle of minimum intervention and the recognition of personal use as non-criminalized behavior according to constitutional jurisprudence (Constitutional Court, Sent. C-221 of 1994; C-574 of 2011). However, other academic and judicial sectors warn that this position could affect the principle of legality, by adding a subjective aspect to the criminal type that was not clearly foreseen by the legislator, thus assigning a rule-making role to the judge that corresponds to Congress. This tension between the protective interpretation and the legal reservation constitutes the problematic core of this research.

The evolution of jurisprudence on drug-related crime in Colombia also shows a shift from an extreme punitive vision – characteristic of Decree 1188 of 1974 – to a more balanced approach, which separates the trafficker from the consumer. Law 30 of 1986 made the first recognition of the idea of personal dose, which was later complemented by Legislative Act 02 of 2009, which modified Article 49 of the Constitution to prohibit the possession and use of drugs, except in cases of medical prescription, and at the same time imposed on the State the responsibility of providing treatment to people with addiction. This evolution, both normative and constitutional, has had a direct impact on the judicial interpretation of the crime, leading its application towards a more substantive consideration of illegality and a distinction between personal use and illegal trafficking. However, the implementation of this new jurisprudential approach—which requires demonstrating marketing intent—has had mixed results. On the one hand, it has made it possible to safeguard the right to free development of personality and combat consumer stigmatization; but, on the other hand, it has generated practical difficulties in terms of evidence and criminal effectiveness, since on many occasions the Prosecutor's Office fails to conclusively demonstrate the intention of commercialization, which leads to decisions to close cases, archive or acquittal. This has led to criticism of legal certainty and a possible increase in impunity, considering that many actions that affect the protected legal right go without an adequate criminal sanction.

In the international context, comparative criminal doctrine agrees that the *mens rea* or subjective element in drug trafficking crimes requires a specific intention to distribute or profit. Badar (2013) states that "the subjective element of crimes has always been a debated issue, but it remains fundamental to establish individual criminal responsibility". Similarly, the studies of Herrero (2001, 2003) and Álvarez (2005) in Spanish law emphasize that possession for the purpose of trafficking requires a volitional surplus, and cannot be assumed without sufficient evidence. This coincidence in doctrine reinforces the importance of the debate in Colombia, since it demonstrates that the need for a special subjective element is not alien to the comparative criminal tradition, although in other legal systems it is clearly defined by law.

In this context, the current research aims to analyze, from a legal and methodological perspective, the verification of the special subjective element of commercialization in the crime of trafficking, manufacture or possession of narcotics, using a qualitative and systematic approach based on the PRISMA 2020 methodology (Preferred Reporting Items for Systematic Reviews and Meta-Analyses). The study incorporates doctrinal, jurisprudential and comparative sources, with the aim of identifying the criteria used to

demonstrate the marketing purpose, as well as their repercussions on the principles of legality, proportionality and culpability.

## **2. General objective**

To analyze, by means of the PRISMA methodology, the doctrinal and jurisprudential criteria used to verify the special subjective element of commercialization in the crime of trafficking, manufacture or possession of narcotics contemplated in the Colombian Criminal Code.

## **3. Theoretical, normative and jurisprudential framework of the crime of trafficking, manufacture or possession of narcotics in Colombia**

The crime of drug trafficking, production or possession is defined in Article 376 of the Colombian Criminal Code, which is part of Title XIII, "Crimes against public health". This law punishes anyone who, without authorization from the competent authority, introduces, moves, maintains, manufactures, sells, offers, purchases, finances or provides narcotic, psychotropic or synthetic drugs on international control lists. Penalties range from 128 to 360 months in prison, depending on the amount and type of substance involved.

In its literal wording, the crime does not mention a clear commercial objective, since it is configured as an abstract risk crime: it is sufficient to carry out any of the actions described for the conduct to be considered to have taken place. However, judicial interpretation has been moving towards the need for a special subjective element, which is defined as the intention to traffic, sell or distribute, a requirement that is not found in the law but that the Supreme Court of Justice has determined as necessary to distinguish between possession for personal use and possession for the purpose of trafficking.

The Supreme Court of Justice, in its ruling SP-44997 of 2017, introduced the notion of "implicit subjective element", indicating that in order to establish criminality it is necessary to verify whether the person acted with the intention of distributing. According to the court, this interpretation ensures harmony with the principle of guilt and prevents sanctions for behaviors that do not generate social damage. However, this evolution has generated a debate in the doctrine, since it could be interpreted as the judicial invention of a normative requirement that the legislator did not contemplate, contrary to the principle of criminal legality established in Article 6 of the Criminal Code and Article 29 of the Constitution.

From the dogmatic perspective, any person can be the perpetrator of this crime, since no special qualification is required, while the passive subject is the State, representing the community, as public health is protected as the main legal right. In addition, this criminal type has a multi-offensive nature, since it involves other rights such as economic order, public security and the environment. Criminal conduct can be carried out through any of the verbs of article 376, and guilt can only be imputed under the concept of malice, without allowing the culpable form.

In terms of judicial evolution, legislation in Colombia has moved from a total punitive approach to one of differentiated treatment. Decree 1188 of 1974 punished any act of possession or possession of prohibited substances, regardless of their purpose. Later, Law 30 of 1986 included the figure of the personal dose, which refers to possession intended for personal consumption, which is outside the criminal sphere as long as there is no intention of trafficking. This advance was reaffirmed by the Constitutional Court in Judgment C-221 of 1994, where the free development of the personality was recognized as a limit to the punitive power of the State.

In 2009, Article 49 of the Constitution was amended by Legislative Act 02, which prohibited the possession and consumption of illicit substances unless there is a medical prescription, treating this action not as a crime, but as a health offence. This constitutional framework establishes that the State must offer medical care to those who are addicted, thus promoting a perspective of treatment rather than punishment for drug use. As a result, criminal jurisprudence has had to adapt the application of Article 376, making a clear distinction between possession for personal consumption (atypical) and possession for the purpose of sale (typical).

In practice, the Supreme Court has extended this doctrine to all forms of the crime, establishing that it is up to the Prosecutor's Office to prove the intention of trafficking through evidence that coincides, such as the fractionation of the drug, the presence of dosage instruments, the possession of large sums of money or the link to distribution networks. The absence of this evidence often results in decisions of preclusion or acquittal, which has led to discussions about the effectiveness of the penal system in the fight against drug trafficking.

This development in interpretation has created a constant tension between criminal theory and jurisprudence, since, although the requirement of the special subjective element protects fundamental rights, it can also limit the ability of the State to sanction dangerous acts that affect public health. From a criminal policy perspective, it is necessary to find a balance between the protection of the individual and the safeguarding of the common interest, ensuring that the principle of legality is not circumvented by discretion in the courts.

Finally, this theoretical and jurisprudential framework underscores the urgency of promoting scientific and doctrinal research related to the evidentiary criteria of the special subjective element, in order to establish uniform standards that allow decisions aligned with the principles of legality, proportionality and legal certainty. This doctrinal basis will serve as the foundation for the methodological analysis and systematic review that will be presented in the following sections.

#### **4. Methodology**

This research is framed in a qualitative approach, since it seeks to understand and interpret the theoretical, doctrinal and jurisprudential foundations related to the special subjective element of commercialization in the crime of trafficking, manufacture or possession of narcotics provided for in the Colombian Criminal Code. According to Hernández, Fernández, and Baptista (2015), qualitative approaches allow "understanding phenomena from the perspective of the participants and in their natural context" (p. 9), which is ideal for the interpretative analysis of legal discourse.

To this end, a systematic search for scientific information was carried out in the *Scopus* and *Web of Science* (WoS) databases, applying the terms "Drug trafficking" and "Penal Code" as keywords. This process made it possible to identify studies that addressed the subjective dimension of crime, the categories of mens rea, criminal typicity and evidentiary criteria related to commercialization.

##### **4.1 Research design**

The design adopted corresponds to a Systematic Review based on the PRISMA 2020 methodology (Preferred Reporting Items for Systematic Reviews and Meta-Analyses), which establishes a set of guidelines for the identification, selection, evaluation and synthesis of relevant literature. According to Page et al. (2021), PRISMA "provides a 27-

item checklist that ensures transparency, comprehensiveness, and accuracy in systematic review reporting" (p. 3).

The research process was developed in four phases: identification, selection, eligibility and inclusion, according to the PRISMA diagram. In the identification phase, the documents were located using the established keywords; subsequently, in the selection phase, duplicates were eliminated and those texts that were not directly related to the subject of study were excluded. Finally, 14 documents were obtained that met the criteria of thematic coherence, legal relevance and academic quality.

The study adopts a descriptive and analytical approach, since it examines how criminal doctrine and Colombian jurisprudence interpret the purpose of commercialization as a subjective element of the crime. According to Strauss and Corbin (2016), qualitative designs allow "understanding meanings and constructing theory based on the systematic analysis of data" (p. 24). In this sense, the revised texts were codified and categorized around three thematic axes: conceptualization of the special subjective element, evidentiary criteria of commercialization, and doctrinal divergences in the interpretation of article 376 of the Criminal Code.

In this way, the PRISMA methodology made it possible to rigorously integrate the indexed scientific literature and relevant jurisprudential developments, guaranteeing an exhaustive, transparent and replicable analysis that contributes to the consolidation of a solid interpretative framework on the verification of the special subjective element in drug crimes.

#### **4.2 PRISMA Procedure**

The systematic review procedure was organized according to the four stages of the PRISMA model: identification, selection, eligibility, and inclusion, following the guidelines proposed by Page et al. (2021).

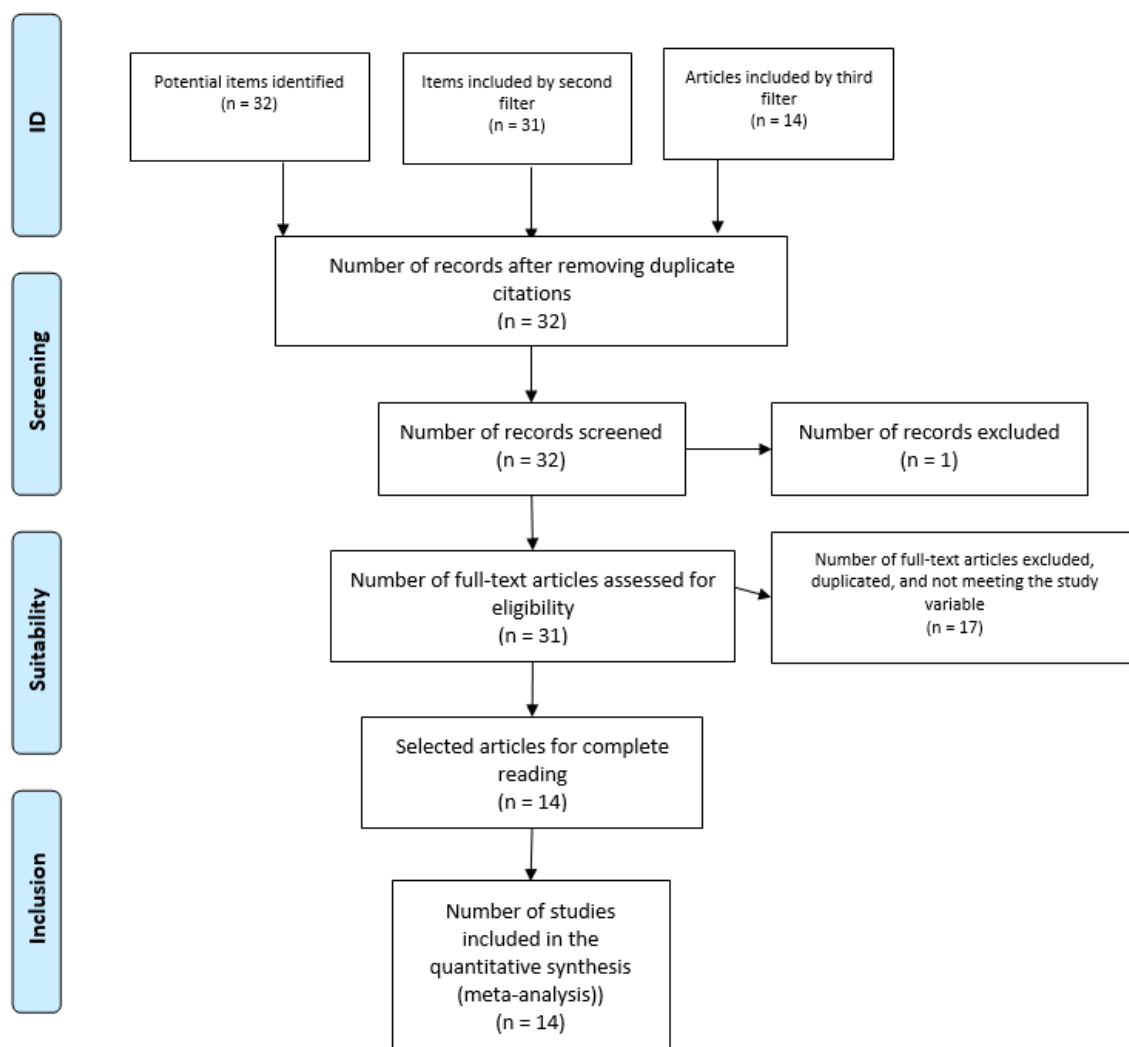
In the identification stage, a search was carried out in Scopus and WoS using the keywords "Drug trafficking" and "Penal Code". This combination of terms made it possible to find a total of 32 initial documents. Then, duplicates were removed, leading to a total of 29 unique texts.

During the selection stage, the titles, abstracts and keywords of the papers were examined to assess their thematic relevance. At this stage, 10 studies that were not directly related to the special subjective element of marketing were excluded, leaving 19 papers for full evaluation.

In the eligibility stage, the inclusion and exclusion criteria mentioned above were applied, considering the alignment between the objectives, the methodology and the doctrinal or jurisprudential contributions. A further 5 articles were discarded due to lack of sufficient information or little relationship with the criminal offence of drug trafficking.

Finally, in the inclusion phase, a final sample of 14 scientific articles was established, which were subjected to a process of thematic coding and qualitative analysis that sought to identify interpretative patterns on the verification of the special subjective element of commercialization.

The PRISMA flowchart (see Figure 1) presents a visual representation of this process, showing the stages of search, exclusion and final selection of the documentary sample.



**Figure 1.** Flowchart of a systematic review carried out under the PRISMA technique (Moher, Liberati, Tetzlaff, Altman, & Group, 2009)

**Source:** Authors; Based on the proposal of the Prisma Group (Moher, Liberati, Tetzlaff, Altman, & Group, 2009)

## 5. Results

Table 1 shows the results after applying the search filters related to the methodology proposed for this research, after recognizing the relevance of each of the referenced works.

No.	RESEARCH TITLE	AUTHOR/YEAR	COUNTRY	TYPE OF STUDY	INDEXING
1	<i>Heroin in the Spanish Penal Code; Heroin in Spanish criminal law</i>	Alvarez, S. H. (2005).	SPAIN	QUALITATIVE	SCOPUS



2	<i>Recreational drugs in the spanish penal code; Recreational drugs in Spanish criminal law</i>	Herrero, S. (2003).	SPAIN	QUALITATIVE	SCOPUS
3	<i>Cocaine in the Spanish Penal Code; Cocaine in Spanish Criminal Law</i>	Herrero Álvarez, S. (2001)	SPAIN	QUALITATIVE	SCOPUS
4	<i>Cannabis and its derivatives in Spanish penal law; El cannabis y sus derivados en el derecho penal espanol,</i>	Herrero, S. (2000)	SPAIN	QUALITATIVE	SCOPUS
5	<i>Law incentives for juvenile recruiting by drug trafficking gangs: empirical evidence from Rio de Janeiro</i>	Montolio, D., & Oliveira, C. (2025).	BRAZIL	QUANTITATIVE	WOS
6	<i>SERVING A SENTENCE IN A CIVIL PRISON OR A MILITARY PENITENTIARY? THE CONTROVERSY OF THE COMPETITION OF CRIMES IN THE MILITARY JURISDICTION REGARDING THE CRIME OF DRUG TRAFFICKING</i>	Monserrat, MR (2023)	SPAIN	QUALITATIVE	WOS
7	<i>Enablers of illicit drug trafficking by organised crime groups</i>	Morgan, A., & Dowling, C. (2023).	AUSTRALIA	QUALITATIVE	WOS

8	<i>Organized crime and drug trafficking</i>	Russo, G (2019)	ITALY	QUANTITATIVE/QUALITATIVE	WOS
9	<i>The reversion of the burden of proof underlying the extended confiscation: between the Penal Code and the Drugs Act</i>	Dias Cardoso, L. E. (2020)	BRAZIL	QUALITATIVE	WOS
10	<i>Three New Approaches to the Drug Trafficking Research Agenda in the 21st Century</i>	Niño, C., Acosta-Cajiao, C., & González, C. (2020).	ECUADOR	QUALITATIVE	WOS
11	<i>Classifying the Variety of Drug Trafficking Organizations</i>	Natarajan, M., Zanella, M., & Yu, C. (2015).	UNITED STATES	QUALITATIVE	WOS
12	<i>SQUEALER DEALERS: THE MARKET FOR INFORMATION IN FEDERAL DRUG TRAFFICKING PROSECUTIONS</i>	Nutting, A. W. (2015).	UNITED STATES	QUALITATIVE	WOS
13	<i>Drug Trafficking and Literature Dangerous Liaisons</i>	López Badano, C. (2014)	MEXICO	QUALITATIVE	WOS



14	<i>Collateral damage and the criminalisation of drug use</i>	Maher, L., & Dixon, T. C. (2017)	AUSTRALIA	QUALITATIVE	WOS
----	--	----------------------------------	-----------	-------------	-----

**Table 1.** List of articles analyzed  
**Source:** Own elaboration

The detailed examination of the fourteen selected articles facilitated the identification of the most relevant doctrinal and empirical approaches related to the verification of the special subjective element in the commercialization associated with the crime of drug trafficking, manufacture or possession. After applying the inclusion and exclusion criteria through the PRISMA 2020 protocol, the selection was composed of research from Spain, Brazil, Australia, Italy, the United States, Mexico and Ecuador, published between 2000 and 2025.

In terms of methodology, a strong inclination towards qualitative studies with a dogmatic approach was observed, which focused on the interpretation of the criminal type and the distinction between consumption and trafficking. Four Spanish investigations (Herrero, 2000; Herrero, 2001; Herrero, 2003; Álvarez, 2005) provided a robust doctrinal framework by examining, from the perspective of comparative criminal law, the structure of the criminal type and the importance of the intention of trafficking as a characteristic that differentiates the typical unjust. These documents agree that commercialization cannot be assumed, but must be verified by verifying an ulterior distribution objective, which is in line with the jurisprudential line in Colombia.

The work of Herrero (2000, 2001, 2003) argues that "possession for the purpose of trafficking implies an additional volitional impulse that goes beyond the simple control of the prohibited object", stressing that the intent must be accompanied by a particular intention of commercialization. In the same vein, Álvarez (2005) highlights that "the typicity of the crime of trafficking requires an aggregate intentionality that links the action with the illegal circulation of the substance", presenting a perspective similar to the Colombian requirement to demonstrate the special subjective element.

On the other hand, research from Brazil (Montolio & Oliveira, 2025; Cardoso, 2020) address the issue from a political-criminal and procedural perspective. Montolio and Oliveira (2025) showed that the legal structure and sanctions can motivate the participation of minors in trafficking networks, which represents an evidentiary challenge when determining the intention to commercialize. Cardoso (2020) focused, instead, on the change in the burden of proof in Brazilian legislation, concluding that "the presumption of lucrative purpose in trafficking crimes violates the principle of presumption of innocence and distorts the guarantee function of criminal law" (p. 212). This finding is directly relevant in the Colombian context, where the intention to commercialize cannot be deduced without sufficient evidence.

In the field of comparative criminology, studies by Morgan and Dowling (2023), Natarajan et al. (2015) and Russo (2019) investigated the structural factors that favour illegal trafficking. Morgan and Dowling (2023) indicated that "the existence of organized distribution networks is an empirical indicator of the presence of commercial sentiment

at lower levels of the market" (p. 77), while Natarajan et al. (2015) categorized trafficking organizations according to their degree of hierarchy, which allows us to deduce patterns of behavior that reflect the intention to commercialize.

The study conducted by Nutting (2015) offers a significant procedural insight: in federal trials in the United States, "the collaboration of the defendants and the obtaining of internal information are the primary sources of indirect evidence to establish the intention of distribution" (p. 145). This type of indirect evidence is similar to the Colombian model, in which the sale is demonstrated from reasonable inferences derived from behaviors and methods used, rather than through direct evidence.

On the other hand, Maher and Dixon (2017) examine this phenomenon from a sociological perspective, pointing out that "the generalized criminalization of consumption unjustifiably expands the scope of punishability, by equating use with trafficking" (p. 203). This approach underlines the importance of maintaining an interpretative criterion that respects the principle of proportionality and avoids a punitive application on conduct that does not seek to enrich or commercialize.

In addition, the collection of studies suggests that the quantity of drugs confiscated should not be considered an independent criterion of typicity, but rather acts as an indication that acquires relevance only in combination with other material or contextual elements. The comparative literature agrees that weight or volume has an evidentiary value that depends on how the product is presented, the presence of sales utensils, the repetition of behaviors or the relationship with distribution networks. This interpretation is in line with Colombian jurisprudence, which has indicated that quantity "is not decisive on its own, but can be an important indication of commercial intent" (Supreme Court of Justice, 2017, p. 6).

With regard to evidence, the findings of Cardoso (2020) and Nutting (2015) highlight the need for a mixed standard, in which reasoned and concordant circumstantial evidence is sufficient to demonstrate commercial intent, provided that there is a relationship between the material elements and the observed conducts. This approach is in line with national doctrine, which requires the accuser to prove not only possession, but also subjective intent to distribute the illegal substance.

Finally, the analysis that integrates the 14 articles reveals that the verification of the special subjective element is a common challenge of interpretation in the penal systems of continental tradition. All studies agree that the intention to commercialize represents an additional degree of intentionality that must be supported objectively and reasonably. As a result, Colombian criminal law could take advantage of comparative criteria to strengthen the coherence of its jurisprudence, defining more clearly the material and contextual indicators that allow the commercial purpose to be deduced without transgressing the principle of presumption of innocence.

## 6. Discussion

Careful analysis of the scientific and legal literature has revealed that the validation of the special subjective element in marketing is one of the most discussed issues in the practice of criminal law today. In Colombia, this issue takes on special relevance, since the jurisprudence of the Supreme Court has included, through interpretation, a subjective requirement that is not clearly defined by the legislator in Article 376 of the Criminal Code.

This circumstance causes a conflict between judicial interpretation and the principle of legality, since the judge, by requiring the demonstration of an ulterior intention in the commercialization, would be expanding the meaning of the criminal type beyond what the literal text suggests. From a dogmatic perspective, this practice is considered a mechanism for controlling material constitutionality, aimed at preventing the criminal system from punishing actions that lack true illegality. However, from a strictly positivist point of view, such an interpretation could be seen as a judicial creation of criminal norms, which invades the sphere of the legislator and creates legal uncertainty.

In this context, the comparative analysis shows that the requirement of an intention of profit or distribution is not only a Colombian issue. In the Spanish legal system, for example, the intention to traffic is clearly defined, which provides greater legal certainty. In contrast, in the Colombian system, this definition has been transferred to the jurisprudential sphere, which requires the Prosecutor's Office to demonstrate the purpose of commercialization through evidence that accumulates (such as the fraction of the substance, the unjustified possession of money, the connection with criminal networks, among others). This shift of the burden of proof creates practical problems, especially when there are no material elements to support the commercial intent.

The results of the systematic review indicate that, in most of the legal systems of continental tradition – such as Spain, Italy and Brazil – drug trafficking implies an intention towards circulation or profit, and that, without this intention, the conduct is considered atypical. However, unlike Colombia, in these legal frameworks the criminal law clearly mentions this requirement. Consequently, in the Colombian context, the special subjective element functions more as an interpretative mechanism than as a legal requirement, seeking to align criminal dogma with the constitutional principles of proportionality and culpability.

However, this development has also had unintended practical consequences. The difficulty in proving marketing intent has resulted in numerous cases being archived or closed, even in situations where the quantity of the substance and the circumstances of the event indicated an illegal intent. This phenomenon, although protectionist, has generated concerns about the possible ineffectiveness of the criminal system against drug trafficking, in addition to increasing the burden of proof of the Prosecutor's Office and the social perception of impunity.

From the point of view of criminal policy, this circumstance highlights the need to balance the protection of fundamental rights with the effectiveness of the punitive power of the State. Although the principle of minimum intervention prevents punishing personal use, it also requires that the State retain effective tools to combat illegal trafficking. In this context, the integration of the special subjective element in the case-law should be accompanied by consistent criteria for the evaluation of evidence, which make it possible to distinguish clearly between individual consumption and organised traffic without compromising legal certainty.

Similarly, the analysis of international studies—especially those conducted by Cardoso (2020) and Nutting (2015)—supports the idea that reversing the burden of proof or assuming the existence of profit present dangers to the presumption of innocence. Therefore, the answer should not be to eliminate the subjective requirement, but to establish rational rules of judicial inference, based on objective and verifiable evidence. In other words, the subjective nature of a crime must be demonstrated through the convergence of evidence, and not through automatic presumptions or broad interpretations.

From a theoretical perspective, the recognition of the special subjective element also reflects the influence of the doctrine of *mens rea*, which considers intention or knowledge as fundamental aspects for criminal imputation. This approach has facilitated the development of Colombian jurisprudence towards a model that guarantees more rights, in which malice is not presumed, but must be proven. However, as the doctrine of Muñoz Conde (2016) points out, "any guarantee model requires proportionality: to protect the individual without annulling the capacity of the State to sanction really harmful behavior."

Finally, the discussion highlights a structural fault: the lack of indexed national research that addresses, from theory and criminal evidence, the criteria for verifying the intention of commercialization. The systematic review indicates that most of the contributions come from jurisprudence, and not from academic theory, which restricts the progress of a coherent criminal theory in this regard. Therefore, it is crucial to promote Colombian scientific production in this area, aimed at developing a hybrid interpretative model that combines legal analysis, empirical evidence, and doctrinal coherence.

In short, the dialogue on the special subjective element in marketing should not be seen as a simple confrontation between the legislator and the judge, but as a process of adaptation of Colombian criminal law to the principles of the social rule of law. The challenge lies in ensuring that the requirement of a traffic intent does not weaken criminal action, but rather improves its legitimacy, guaranteeing that only those conducts that really harm the legal good of public health and that evidence a genuine intention of illegitimate commercialization are punished.

## 7. Conclusions

The study carried out has made it possible to verify that the evaluation of the particular subjective component in the commercialization within the crime of drug trafficking, manufacture or possession is a significant change in current Colombian criminal law. This requirement, which stems mainly from the judicial interpretation of the Supreme Court of Justice, has considerably transformed the application of article 376 of the Criminal Code, by requiring proof of a specific intention to distribute or benefit from the substance as a requirement of the subjective aspect of criminality.

From a doctrinal approach, this change represents a step towards a more protective model aligned with the constitution, which safeguards the basic rights of consumers and avoids penalizing behaviors that do not cause material damage. However, from the point of view of the principle of legality, the introduction of a subjective aspect not contemplated by the legislator creates a regulatory vacuum and may give rise to different interpretations, which impacts the legal stability and consistency of the criminal system.

The findings of the systematic review indicate a theoretical overlap at the international level: in traditional continental legal systems, the intention to traffic or profit is considered crucial to distinguish between consumption and illegal trade. However, in these systems, this requirement is clearly established in the criminal law, unlike in Colombia, where it is established through jurisprudence. This difference underlines the need for legislative harmonization to provide the domestic legal framework with a clear and uniform definition of the specific subjective component.

From a practical approach, the absence of consistent evidentiary criteria to demonstrate the intention of commercialization has led to inconsistent judicial decisions, an increase in files and preclusions, and a perception of impunity with respect to drug crime. Therefore, it is essential that the Attorney General's Office and criminal judges implement consistent evidentiary assessment standards, based on the convergence of objective and

contextual evidence, such as the fractionation of the substance, the existence of dosing tools, or the defendant's link to distribution networks.

In the theoretical field, the research shows that the verification of the special subjective component requires a model of logical inference, based on the logic of the evidence and the presumption of innocence. This means that commercial intent cannot be assumed from the amount of drug seized, but must be deduced from a coherent body of evidence. Thus, it is ensured that malice is demonstrated and not assumed, reaffirming the protective nature of Colombian criminal law.

From the perspective of criminal policy, the inclusion of this requirement should not be seen as a weakness of the punitive system, but as an opportunity to strengthen institutions. Strengthening the coherence between legality, proportionality and criminal effectiveness requires adjusting current legislation, establishing unified evidence protocols and promoting the training of prosecutors and judges in the analysis of evidence and the assessment of fraud. Only in this way will it be possible to balance the protection of individual rights with the effective safeguarding of the public interest in health.

Finally, the work highlights the urgency of strengthening the production of scientific knowledge in the criminal field in the country, especially with respect to the criteria of evidence of the special subjective element. The lack of indexed research on this topic prevents the formation of a criminal doctrine of its own that can guide jurisprudence and criminal policies. It is suggested to promote interdisciplinary studies that combine law, criminology and empirical analysis, with the aim of developing a Colombian interpretative model that adjusts to the principles of the social rule of law and best practices at the international level.

In conclusion, the challenge of criminal law in Colombia is not to choose between guarantees and effectiveness, but to integrate both dimensions within the same framework: a punitive system that is rational, based on the law and that respects human dignity, which punishes true criminality related to drug trafficking without criminalizing consumption or undermining justice.

### **Bibliographic references**

Álvarez, S. H. (2005). *Heroin in the Spanish Penal Code; Heroin in Spanish criminal law*.

Badar, M. E. (2013). The concept of *mens rea* in international criminal law: The case for a unified approach. *Journal of International Criminal Justice*, 11(4), 933–960. <https://doi.org/10.1093/jicj/mqt052>

Cardoso, L. E. D. (2020). *The reversion of the burden of proof underlying the extended confiscation: Between the Penal Code and the Drugs Act*.

Political Constitution of Colombia. (1991). *Article 49 (amended by Legislative Act 02 of 2009)*. Bogotá: Republic of Colombia.

Constitutional Court of Colombia. (1994). *Judgment C-221 of 1994*. M. P. Carlos Gaviria Díaz. Constitutional Court of Colombia. (2011). *Judgment C-574 of 2011*. M. P. María Victoria Calle Correa.

Supreme Court of Justice, Criminal Cassation Chamber. (2017). *Judgment SP9916-2017 (Rad. No. 48184)*. Bogotá, Colombia.

Supreme Court of Justice, Criminal Cassation Chamber. (2017). *Judgment SP-44997-2017*. Bogotá, Colombia.

Decree 1188 of 1974. *By which provisions on narcotics are issued*. Official Gazette of the Republic of Colombia.



- Dias Cardoso, L. E. (2020). *The reversion of the burden of proof underlying the extended confiscation: Between the Penal Code and the Drugs Act*.
- Hernández, R., Fernández, C., & Baptista, P. (2015). *Research Methodology* (6th ed.). McGraw-Hill Interamericana.
- Herrero, S. (2000). *Cannabis and its derivatives in Spanish penal law; El cannabis y sus derivados en el derecho penal español*.
- Herrero, S. (2003). *Recreational drugs in the Spanish Penal Code; Recreational drugs in Spanish criminal law*.
- Herrero Álvarez, S. (2001). *Cocaine in the Spanish Penal Code; Cocaine in Spanish criminal law*.
- Law 30 of 1986. *By which the National Narcotics Statute is adopted*. Official Gazette of the Republic of Colombia.
- Maher, L., & Dixon, T. C. (2017). *Collateral damage and the criminalisation of drug use*.
- Monserat, M. R. (2023). *Serving a sentence in a civil prison or a military penitentiary? The controversy of the competition of crimes in the military jurisdiction regarding the crime of drug trafficking*.
- Montolio, D., & Oliveira, C. (2025). Law incentives for juvenile recruiting by drug trafficking gangs: Empirical evidence from Rio de Janeiro.
- Morgan, A., & Dowling, C. (2023). Enablers of illicit drug trafficking by organised crime groups.
- Muñoz Conde, F. (2016). *Criminal law. General Part* (11th ed.). Tirant lo Blanch.
- Natarajan, M., Zanella, M., & Yu, C. (2015). Classifying the variety of drug trafficking organizations.
- Niño, C., Acosta-Cajiao, C., & González, C. (2020). Three new approaches to the drug trafficking research agenda in the 21st century.
- Nutting, A. W. (2015). Squealer dealers: The market for information in federal drug trafficking prosecutions.
- Page, M. J., McKenzie, J. E., Bossuyt, P. M., Boutron, I., Hoffmann, T. C., Mulrow, C. D., ... & Moher, D. (2021). The PRISMA 2020 statement: An updated guideline for reporting systematic reviews. *BMJ*, 372, n71. <https://doi.org/10.1136/bmj.n71>
- Russo, G. (2019). *Organized crime and drug trafficking*.
- Strauss, A., & Corbin, J. (2016). *Bases of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (3rd ed.). University of Antioquia.