WHY DOESN'T *IGNORANTIA JURIS* EXCUSE? - A STUDY OF THE LAW RELATING TO MISTAKES

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INTRODUCTION

The functions of criminal law are two fold in nature. Primarily, it aims at the imposition of corrective measures to prevent the occurrence of criminal acts. Subsidiarily it aims at correction in relation to the mental state of the person or persons responsible for the criminal act. If the aim of criminal law were only the former, it would serve to punish the act itself, irrespective of whether it was done unconsciously, negligently or intentionally. However, the law aims at punishing those responsible for the act, and responsibility appears to imply a certain mental state - in this context, a guilty mind. The maxim *"actus non facit reum nisi mensit rea"* has acquired an imposing presence in criminal jurisprudence. It is by virtue of this maxim that the idea of mistake as an excuse has come to be accepted.

The general principle is that a person is presumed to know and intend the natural consequences of his act and is, therefore, held responsible for it. However, there are certain exceptions to this general rule, wherein a person may be excused of his crime.

The absence of *mens rea* is one such excuse. The excuse of mistake is based on the ground that a person who is mistaken or ignorant about the existence of a fact cannot form the requisite intention to constitute the crime and is therefore not responsible in law for his deeds. This has been incorporated in the common law principle *"ignorantia facit doth excusat, ignorantia juris non excusat"* (ignorance of fact excuses, ignorance of law does not excuse).[1]

The long application of this principle is apparent from the seventeenth century case of *R. v. Levett*,[2] where an accused was acquitted on this ground. After this, there has been considerable development in the law relating to mistake, in spite of which incoherence continues regarding the exact scope of this defence. Added to this, the jurisprudence and statutes behind this defence continue to vary from country to country, making it vital to examine the comparative position in various countries. The principal issues that surround the question of mistake as a defence relate to the presence of any additional requirements or qualifications

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1 K.D. Gaur, *Indian Penal Code* 93 (1992).

2 79 ER 1064, where the accused killed a woman, who was hiding behind a curtain in his house, mistakenly believing her to be a burglar.

other than a mere mistake. These could include reasonableness, absence of negligence, etc.

Another important issue is the application of mistake as a defence in strict liability offences. The question of greatest importance (which forms the principal focus of this article) is that of the presence or absence of the defence of "mistake of law". The maxim *"Ignorantia juris non excusat"* is under challenge by a number of emerging developments and it, therefore, becomes vital to examine the precise scope of this defence, and to study if these developments can be applied in the Indian context.

MISTAKE UNDER INDIAN LAW

The defence of mistake in Indian law falls under the category of general exceptions to criminal liability in the Indian Penal Code. Specifically, it is incorporated in Ss. 76-79 of the Code. The justification for exemption on the ground of mistake of fact, as mentioned earlier, is the principle that such a mistake would negative the requisite intention. Thus, a *bona fide* belief of the existence of facts which, if true, would have made the act innocent in law, is an excuse. However, mistake of law is not a defence, because every man is presumed to know the law and is to be held responsible in case of its breach.[3]

Thus, S.76 deals with persons who consider themselves bound to perform certain acts, and as long as this belief is founded on a mistake of fact and not a mistake of law, such an act is not an offence. S.79 deals with acts that a person considers himself justified in performing because of a mistake of fact and not a mistake of law.[4] The distinction between the two sections lies in the difference between legal compulsion and legal justification. Courts in India, following English decisions, have acknowledged mistake of fact as a defence in the case of bigamy and other statutory offences.[5] Further, in *Keso Sahu v. Saligram*,[6] it was held that to bring a case under S. 79, it was sufficient to show to a reasonable extent that the belief as to the fact was in good faith.

The defence of mistake of law is of no value in India. This is made clear by its specific exclusion in S.76 as well as S.79. The justification for this is that the

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3 *State of Maharashtra v. M.H. George*, AIR 1965 SC 722.

4 In *Raj Kapoor v. Laxman* (1980) 2 SCC 175, it was held that "if the act was done by one who by reason of a mistake of fact in good faith believes himself to be justified by law in doing it, then the exception operates, and the bona fide belief, although mistaken, eliminates the culpability. If the offender can irrefutably establish that he entertained a mistake of fact and in good faith believed that he was justified by law in committing the act, then the weapon of S.79 demolishes the prosecution."

5 In *Kohu M.K. Ismail v. Mohammed K. Umma*, AIR 1959 Ker 151, the accused was charged with bigamy under S.494 of the IPC for contracting a second marriage during the continuance of the first marriage. She was acquitted on the grounds that she honestly and on reasonable grounds believed that she had obtained a divorce from the complainant, although the divorce was unauthorised.

6 1977 Cri LJ 1725 (Ori).

operation of a provision is supposed to be independent of its being known to everybody. If this were not the case, great difficulty would be experienced in the enforcement of the law.[7] The burden of proof to show the existence of a mistake lies on the defence, and it has been held that the defence must discharge such burden on a balance of probabilities.[8]

Sections 76 and 79 require that any mistake of fact be made with due care. S.52 defines an act done in good faith as done with "due care and attention". The phrase "due care and attention" implies genuine effort to reach the truth and not the ready acceptance of an ill-natured belief.[9]

When a question arises as to whether a person did an act in good faith, it devolves upon him to show not merely that he had a good intention, but also that he exercised such care and skill as the duty reasonably demanded for its due discharge.[10] Moreover, the Courts have also held that reasonableness is a prerequisite of good faith.[11] In this regard, it appears that a new element has been introduced. Reasonableness is a component of non-negligence. The implications of this inclusion would be that an honest mistake, negligently made, would not provide an excuse, in spite of the fact that there was no guilty mind on the part of the accused. The requirement of reasonableness has been dispensed within Common Law.[12] It is therefore submitted that good faith is a level distinct from reasonableness. Therefore, to equate the two is, it is submitted, erroneous. Further proof of this is found in the definition of good faith that in the General Clauses Act, which states that an act is done in good faith if it is done honestly, whether done negligently or not.

THEORY OF MISTAKE

The question of mistake arises in the case of a conflict between objective existent facts and subjective impressions of those facts on the part of a person. Traditionally, mistakes have been classified into mistakes of fact and law, i.e.,

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7 *Law Commission of India, 42nd Report*, 1971, pp. 83-85. Thus in *State of Maharashtra v. M.H. George*, AIR 1965 SC 722, the Supreme Court, while refusing to accept a plea of ignorance of a Reserve Bank notification, the Court held that for an Indian law to operate and be effective within the territory of India, it is not necessary that it should either be published, or be made known outside the country.

8 In *Harbhajan Singh v. State of Punjab*, AIR 1961 Punj 215, the court held that "under S. 105, if an accused person claims the benefit of exceptions, the burden of proving his plea that his case falls under the exceptions lies on the accused. Where the burden of an issue lies upon the accused, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt... In such cases, law treats the onus as discharged if the accused succeeds in proving a preponderance of probabilities.

9 Hidayatullah and Manohar (Ed.), *Ratanlal and Dhirajlal in the Indian Penal Code* 41 (1996).

10 *Gaya Din*, (1934) 9 Luck 517. Again, in *Damodar Shenoi v. Public Prosecutor*, 1989 Cri LJ 2398, it was held that the accused would also have to show that there was no malice on his part.

11 *Id.*

12 *D.P.P. v. Morgan* [1975] 1 All ER 8.

mistakes that result out of a misconception of facts as they exist, and those because of a mistake in the existing legal position. However, a more appropriate classification has been made by George Fletcher,[13] who classifies them on the basis of legal outcomes. Thus, by his method, there are three kinds of mistakes:

- Mistakes barring liability altogether.[14]
- Mistakes barring liability only if the making of the mistake is free from culpability.[15]
- The mistake might have no effect on the outcome of the case.[16]

It is in third category that, at present, mistakes of law would appear to fall.

Mens rea can be loosely translated as guilty mind.[17] It can occur in a number of forms, such as intention, knowledge, negligence, etc. Any offence, if it is not a strict liability offence, requires a certain mental element. This mental element forms the *mens rea* of the offence. The evidence of a genuine mistake of fact, therefore, which, if the facts existed as the offender believed them to, would make his act innocent, would, on principle, negative the *mens rea* and result in acquittal.[18] A mistake of fact which negates an intention to cause a consequence prohibited by law is a defence because a person must intend to cause all the consequences which he has in fact caused if he is to be held criminally responsible for causing these consequences.[19] As regards a mistake of law, it is submitted that the present position not allowing it as a defence requires reconsideration. The same principle applies as in the case of mistake of fact, i.e. the person did not intend the consequences to occur, in terms of the fact that he did not wish to breach the law. It is therefore submitted that at least a reasonable mistake of law should be allowed as a defence.

In common law, the law in this regard has been laid down by the decision of *D.P.P. v. Morgan*,[20] which made it clear that where the offence required intention or recklessness as part of its ingredients, a mistake of fact which

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13 Fletcher, *Rethinking Criminal Law* 687 (1978).

14 The first bases itself on the presumption that every offence requires a certain *mens rea*. Thus in the Indian context, murder requires an intention to cause death. If there exist a mistake which obviates such intention, a person cannot be punished for it.

15 In the second category, would fall mistakes such as those, which exempt the person only if they are reasonable. Thus, if we consider S. 304A of the IPC, it would require the accused to have made a mistake, which does not seem to be negligent. Only then can he claim exemption from culpability.

16 As regards the third kind of mistake, this kind has no exculpatory effect. Here no question of a defence arises, whether the mistake is reasonable or not.

17 Smith and Hogan, *Criminal Law* 53 (1992).

18 Don Stuart, *Mens Rea* 15 Crim LQ 176 (1972-73).

19 R.W. Thompson, *The Criminal Act, an Analysis* 18 Crim LQ 78 (1975-76).

20 [1975] 2 All ER 347.

precludes both states of mind will excuse, irrespective of whether the mistake is reasonable or not.

As regards mistake of law, it is submitted that here it would be appropriate to use reasonableness as a criterion. Thus, a person who had used all reasonable means to ascertain the law, and had still remained under a misconception, is certainly less culpable than an offender who, without any semblance of care, performs actions without ascertaining their legality. Such a limited use of mistake of law would serve the purpose. As regards the Indian law, the position reflected in the IPC (that of requiring mistakes to be performed in good faith) is ideal. This enables a compromise between reasonableness and reckless mistakes.

DISTINCTIONS BETWEEN MISTAKES OF FACT AND LAW

Considerable controversy has, of late, erupted over this area. The distinction between mistakes of fact and law lie primarily in their capacity as defences; As a result, there are often attempts to project a certain mistake as one of fact and not of law.[21] In *Thomas v. The King*,[22] it was held that "a mistake as to the existence of a compound event consisting of law and fact is in general one of fact and not one of law". This is also supported by Glanville Williams.[23] However, in *R. v. Cunningham*,[22a] it was held that an accused who speeds cannot claim a defence of having misread the speed limit sign, as this was a mistake of law. It is submitted that this decision goes against the views expressed earlier.

The solution to this quandary lies in allowing a reasonable mistake of law as a defence. This would remove the necessity of distinguishing between mistakes of fact and law, for, in both the cases, if the mistake is reasonable, the defence exists. In the alternative, a much wider interpretation must be given to mistakes of fact so as to incorporate cases of mixed mistakes.

THE COMPARATIVE POSITIONS ABROAD

Common Law

The land mark decision of *D.P.P. v. Morgan*[24] settled the law in this regard. A mistake, whether reasonable or not, will excuse criminal liability if it precludes the requisite state of mind. In case the law requires negligence alone, then only

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21 Thus, in *R v. Prue, R v. Basil*, (1979) 46 CCC (2ed) 257, the court held that lack of knowledge as to the suspension of licenses constituted a defence to the charge, *mens rea* being an essential part of the offence. The majority held the mistake to be one of fact.

22 (1937) 59 CLR 279.

22a[1957] 2 All ER 412.

23 Glanville Williams, *Criminal Law - The Second Part* 568 (1961), where the author states that if a mistake contains any element of mistake of fact, then it must be governed by the rules as to mistake of fact and is none the less a defence on that ground because accompanied by an interwoven mistake of law.

24 [1975] 2 All ER 347.

a reasonable mistake will serve as an excuse.[25] In case of a strict liability offence, no mistake would serve to excuse.

Mistake of law, however, is no excuse,[26] for knowledge of the act being forbidden is not part of the *mens rea* but in case the *mens rea* requires a legal concept, then it may serve as an excuse.[27] In the case of *R v. Tolson*,[28] the court held that a woman who believed her husband was dead and therefore remarried was not guilty of bigamy, because her belief was reasonable. However, the decision in *Morgan's case*, settled the fact that a mistake in offences which do not demand non-negligence, does not necessarily need to be reasonable. It was held in *Barrett and Barrett*[29] that an honest belief in a certain state of things does offer a defence, including an honest though mistaken belief about legal rights.

The applicability of the defence depends upon the *mens rea* required by the crime. A mistake negating *mens rea* as to some element in the *actus reus* is no defence if the law does not require *mens rea* as to that element. If the definition of *actus reus* contains some legal concept as to which a mistake has occurred, then the definition could operate. It has no application, however, if the law has fixed a standard different from that believed by the defendant.[30]

In essence, English law is almost identical to the Indian position, except that the Indian law imposes a standard of reasonableness unlike Common law.

Australia

In *He Kaw Teh v. The King*[31] it was summarised "either the accused has a guilty mind or not : and if an honest belief, whether reasonable or not, points to the absence of the required intention, then the prosecution fails to prove its case." It can be clearly seen from the above, that Australian criminal jurisprudence recognises mistake as a defence which negatives *mens rea* irrespective of its reasonableness.

As regards the question of burden of proof, *He Kaw Teh* is clear on the point, stating "the accused does not have the onus of proving honest and reasonable mistake, provided there is evidence raising the question, the prosecution must establish the absence of honest and reasonable mistake." A limitation to this was, however, placed in *Proudman v. Dayman*[32] which held that defences like this must be a mistaken belief rather than a mere ignorance of facts. It is therefore

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25 Smith, *supra* n. 17 at 216.

26 *Id.*

27 *Id.*

28 (1889) 23 QBD 168.

29 (1980) 72 Cr App Rep 121.

30 Smith *supra* n. 17 at 85.

31 (1985) 157 CLR 523.

32 (1941) 67 CLR 536.

clear that the factor that removes *mens rea* is not merely the absence of knowledge of facts, but a mistaken belief which precludes the very presence of such a mental element; i.e., it is a positive affirmation of the absence of *mens rea*. *Proudman* introduced a further aspect regarding mistake in the context of strict liability offences. "A statute which appears to impose strict responsibility may nevertheless be understood as allowing the defence that the accused held an honest and reasonable belief in the existence of circumstances that would make innocent the act with which he or she was charged."

In other words, mistake of fact has been recognised as a defence in even strict liability cases. It is submitted that this is the correct position. The presence of a mistake of fact negates the question of the accused intending to commit the act mentioned in the statute. Therefore, such an interpretation is in conformity with the rationale behind strict liability.

MISTAKE AND STRICT LIABILITY

Strict liability crimes have been defined[33] as crimes which do not require intention, recklessness or even negligence as to one or more elements in the offences. Thus in regard to a certain element in the *actus reus*, no *mens rea* need be proved.[34] If a certain element of an offence is described as falling within the ambit of strict liability, a reasonable mistake as to that particular fact is not a defence. A mistake as to other circumstances may well allow a defence. This was illustrated in *R. v. Prince*,[35] where the accused was convicted under s.20 of the Sexual Offences Act, 1956, although he had made a reasonable mistake about the age of the girl he was taking. However, a substantial mental element was required - this was demonstrated when the majority stated that the accused must have intended to take the girl out of possession of the guardian - i. e., the mental element of intent. If a mistake had been made as to that particular element, it would have served as a defence.

Thus, an offence of strict liability only partially does away with the mental element. Again, in *State of Maharashtra v. M.H. George*,[36] the Supreme Court stated that the accused was guilty because he intended to bring a particular item into India.

One of the prominent arguments brought forward by some authorities[37] regarding the justification for dismissal of mistake as a defence in strict liability offences, is that wrongdoers take the risk of their act turning out worse then they

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33 Hogan *supra* n. 17 at 99.

34 *Whitehouse v. Gay News Ltd*, [1979] 1 All E R 898.

35 (1875) LR 2 CCR 154.

36 AIR 1965 SC 722.

37 *See*, Fletcher, *supra* n. 13 at 723.

expect. Thus, in *U.S. v. Feola*,[38] the Court reasoned that an offender takes the victim as he finds him and is correspondingly liable, even if circumstances of which he was ignorant, make his act more serious than he intended. In *Prince*, Bramwell, J, stated that the accused had committed a wrong by taking a girl of such tender years out of the possession of her father. The trouble with this argument is that it ignores the requirement of proportionality of punishment. Its application would cause a person who commits a statutory offence with full *mens rea* to be punished as much as one who by virtue of a mistake of fact committed a magnified offence, although his intent might have been to commit a much smaller offence.

STRICT LIABILITY AND MISTAKES OF LAW

It is now well settled that ignorance of the law is not an excuse. As a result, there is occasioned an occurrence of strict liability, in that whenever there is a mistake as to law, regardless of culpability, the offender is punished. The issue was examined in *Hopkins v. State*[39] where a person was convicted for an offence although he had been advised by the Attorney General that his actions did not constitute an offence. The question is whether it is just to convict a person who acts reasonably and yet suffers from a mistake of law. Maintaining a policy that every person is presumed to know the law, may be appropriate for natural offences like murder, rape, etc. but with regard to areas where laws are complex and subject to change such a presumption would not be just.

It has been argued[40] that in the absence of the presumption, ignorance of the law would be encouraged and it is in the larger interests of justice must be sacrificed. Such an argument, however, detracts from the principle of not punishing any innocent person, even if guilty ones may escape. The utilitarian principle advocated by Justice Holmes would go against this. Moreover, these arguments ignore the fact that no culpability can be attached to a person who has made a reasonable mistake of law. Law seeks to punish those who are accountable for their offences but in the case of a person who has made a reasonable mistake of law, the person can no longer be held liable.

In view of the above, it is submitted that the imposition of strict liability, in the context of mistake of law, especially those which are reasonable, is not justified.

MISTAKE OF LAW AND THE DEFENCE OF OFFICIALLY INDUCED ERROR

The defence of officially induced error is of relatively recent origin, and it is necessary to identify its constituents. The beginning of this defence can be

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38 420 US 671.

39 193 Md 489.

40 Justice Holmes, *c.f.* Fletcher, *supra* n.13 at 732.

traced to the considerable confusion prevailing over the distinction between mistakes of fact and law. The hardship that often resulted because of the absence of any defence in mistake of law has played an important role in the development of this defence.[41] Its beginnings can be seen in an Ontario decision, where the Court held that if a public official charged with responsibility in a matter led a defendant to believe that the act was lawful, the defendant may have a defence if he was subsequently charged with doing that act.[42] Further, in *R v. Macdougall*,[43] the Supreme Court of Canada left this defence open, to an extent approving the decision of the Court of Appeal, which had stated that while it had yet to be expressly sanctioned, it was in accordance with the needs of society. In the dissenting opinion, however, it was stated that ignorance of the law cannot be an excuse, no matter how induced.

This defence has been subjected to a number of restrictions most of which were laid down in *R v. Robertson*.[44] These requirements would serve to ensure the absence of any form of mal-intent on the part of the accused. As a result, they would allow the defence of mistake of law to operate under controlled circumstances and within reasonable limits.

There are other unresolved issues as well, as for example, what if the erroneous advice of a lawyer is relied upon by his clients? And what if people rely on judicial decisions that are later held to be erroneous?[45] In England, mistake of law is still not regarded as an excuse.[46] In America, however, mistake of law is a defence when the defendant was assured by the Government agency having general jurisdiction in the matter that his act was legal, and it later emerges that this advice was wrong.[47] The American Law Institute, in its Model Penal Code[48] proposes a mistake of law if the mistake negatives *mens rea*, or the law specifically provides for such a defence.

It is submitted that this particular defence would serve the purpose of providing a limited defence of mistake of law, in situations where a citizen has

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41 Nancy Kaster, *Mistake of Law and the Defence of Officially Induced Error* 28 Crim LQ 308 (1985-86).

42 *R v. Walker and Somma*, (1980) 1 CCC (2d) 423 (Ont C.A.).

43 (1981) 60 CCC (2d) 137.

44 (1984) 43 CR (3d) 39. The court laid down the following conditions: The actor must advert to his legal position; The actor must seek advice from an official; The official must be one who is involved in the administration of the law in question; The official must give erroneous advice; The erroneous advice must be apparently reasonable; The error of law must arise out of the erroneous advice; The actor must act in good faith and without reason to believe that the advice is erroneous; The actor's error of law must be apparently reasonable; The actor must, while seeking advice, act in good faith and take reasonable care to give accurate information to the official whose advice he solicits.

45 As in the case of *R v. Campbell and Mlyancheck*, (1972) 10 CCC (2d) 26.

46 A.J.L. Ashworth, *Excusable Mistake of Law*, (1974) Cri L Rev 652.

47 Williams, *supra* n. 23 at 151.

48 Model Penal Code, S. 2.04.

behaved perfectly and in accordance with rules. Punishment in these cases would be pointless and against all principles of justice.

CONCLUSION

It is clear from the above discussion, that the present jurisprudence relating to mistake tends to give a great deal more importance to a mistake of fact than to a mistake of law. This is to the extent that a mistake of fact, whether reasonable or not, acts as an excuse, while a mistake of law does not amount to one under any circumstances. While the rationale behind this seems to be, simply, that every man is expected to know the law, it is submitted that such an assumption is too broad. The reason for which mistake as a defence is simply that it does away with the *mens rea* necessary for the offence. However, it is submitted that the same is applicable to a mistake of law as well. There too, the offender does not intend to commit the offence. The maxim *"ignorantia juris non excusat"* should not operate when the person does not even know that his actions constitute an offence.

No doubt, doing away entirely with the ongoing presumption of every man knowing the law would act as an incentive to develop ignorance; however, if a person has used all possible means to ascertain the law, and still operates under a mistake of law, it would be manifest injustice to punish him. He cannot be held responsible for not knowing the law. It is in these cases that mistake of law must operate as a defence. If an unreasonable mistake of fact is accepted as a defence, it is implicit that the person is being excused for his stupidity and/or negligence. In the case of a reasonable mistake of law, a person has fulfilled the criteria demanded by law, i.e. he has behaved like a reasonable man. Nor does he have any culpable mental element. It is submitted that the focus must always be whether the mental element of the accused corresponds to the mental element envisaged by the offence. If it matches, as must the *actus reus*, then no doubt he is liable, and must be punished, But if it does not, then irrespective of whether it is a mistake of fact or law, it must exonerate the accused.

An unreasonable mistake of law, however, need not be an excuse. This is not because the guilty mind is present, but because, if a person is reckless or negligent in determining what the law is, he cannot claim this as an excuse to commit the crime.

In conclusion, therefore, the recommended position is as follows. In the Indian context, any mistake of fact, in order to operate as an exculpation, must conform to the requirement of good faith. Mistakes of law, however, must be allowed as a defence only if reasonable. The above arrangement, it is submitted, would best serve the ends of justice.