France

Mistake of law in French criminal law

by Andrew Kirsch

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In the new Criminal Code issued by the French Parliament in 1992 (which came into force in March 1994), a few novelties appeared among the provisions pertaining to the general principles governing criminal liability. One was a new defence termed 'mistake of law'. It consists either in a lack of knowledge of legal provisions, or in their misinterpretation. It has become a ground which negatives criminal liability. According to art. 122-3:

'A person is not criminally liable where that person proves he [/she] *believed an act could be carried out lawfully, because of a mistake of law which he* [/she] *was not in a position to avoid.'*

Historically, in order to decide whether mistake of law could amount to a defence, Roman law distinguished offences against *jus naturale*, of which it was presumed no-one would be unaware. Otherwise, judges took into account the ignorance a person owed to his position: for example, the *rusticus* could enjoy diminished responsibility. Natural law later became widely influenced by Christian theology and a French medieval lawyer wrote that such precepts are 'engraved in the heart of every man'. On the other hand, however, it was accepted that some people – such as foreign travellers – could be forgiven for ignorance of minor rules.

In modern times foreign legislators have adopted diverse positions. The Norwegians, for example, accepted in their 1902 Criminal Code (art. 57) that a reasonable mistake of law can negative liability. The Swiss (art. 20), German (art. 17, 1975) and Austrian (art. 9) Criminal Codes also provide that a reasonable mistake of law is ground for a mitigated penalty or even an exemption. Belgian law which, like the French, mainly originated in the Napoleonic codes and therefore also rejected such a defence, finally accepted it through judge-made law. Articles 5 and 47(2) of the Italian Criminal Code provide that if a mistake concerns a civil, rather than criminal, provision, it amounts to a lack of *mens rea;* English law is similar in this respect.

English law has a rather rigid attitude concerning this question. In the great majority of cases, whether the accused knew his act was against the law is irrelevant. 'Ignorance of the law is no defence in crime,' said Lord Bridge (in *Grant v Borg* [1982] All ER 257 at 263, HL). An exception is provided where the accused made a mistake about the meaning of some legal concept used in the definition of the *actus reus* – but only if this concept belongs to civil and not criminal law (see, e.g. *R v Smith* [1974] 1 All ER 632, CA).

In France, this plea was completely abandoned at the time of the 1789 revolution. During the nineteenth century, Republican Law was regarded with great reverence; this is why an irrebuttable presumption of knowledge of the law was easily accepted by all lawyers. It was and still is expressed either in Latin (*nemo censetur ignorare legem*) or in French (*nul n'est censé ignorer la loi*): no-one is supposed to be unaware of the law.

None of the offences provided for in the 1810 Criminal Code could be committed without *mens rea*. A person who did not understand that he or she was infringing criminal provisions should therefore not have been considered an offender. But this logical argument was led astray by the presumption of knowledge of the law.

This principle is not inscribed in any statutory provision but nevertheless governs the entirety of French law (in which case law is supposed to be secondary). In these days of over-regulation, it can no longer be considered as founded on any sociological reality. More and more offences have no link with any moral standards. Many theoretical explanations were suggested, but the presumption is actually nothing but a useful fiction, springing from practical considerations.

French courts have been implacable, repeatedly claiming that 'pretending not to have known the criminal nature of the facts is not an excuse and has no influence on *mens rea'*. The presumption in itself is quite understandable; its irrebuttable nature is less so. Of course almost all offenders know that what they are doing is wrong. But what about those faced with insuperable obstacles to knowing about the legality of their actions? In some circumstances, such as war or natural disasters, communications are often cut off and it is impossible to know about any changes in the law. More often, the accused has sought information from qualified authorities such as, for example, the police, and acquired wrong information based on their mistaken belief. Should not the adage '*error communis facit jus*' then apply? Treating in the same way those who have genuinely tried to verify the legality of their acts and those who have been careless about this knowledge is inequitable and only encourages careless behaviour.

NEW DEFENCE

'A person is not criminally liable where that person proves he [/she] *believed an act could be carried out lawfully, because of a mistake of law which he* [/she] *was not in a position to avoid.'* (art. 122-3, French Criminal Code)

Of course a few limitations do exist. Many jurists have suggested other restrictions, depending on the nature of the law that was transgressed, the offender's circumstances, or else on the nature of the mistake. The latter was the basis of what was called the 'unavoidable mistake of law' theory (literally, in French, 'invincible mistake of law').

Although it did not prove very successful before the courts, it would seem that this theory was officially approved by Parliament in the 1992 Criminal Code. One of the legislator's official aims, when issuing this new code, was to adapt the law to the evolution of French society. It is often said that modern societies are built on appearances. One must not mistake appearances for reality, but they sometimes seem so credible that one should not be considered at fault for relying on them. This idea is probably the basis of art. 122-3. The offender acted because he thought that the act which he was about to carry out was legal: his behaviour appeared lawful to him.

A mistake of law amounts to a lack of *mens rea*. This argument, which can now be brought to a conclusion, has nevertheless been confined within strict limits. Not just any mistake will do and, even where the mistake is found to be legally effective, its consequences are still unclear.

THE MISTAKE

Whether the mistake relates to civil or criminal law is irrelevant. Article 122-3 is aimed at mistakes of law in general and where the legislator drew no distinction, nor should the judge. What is of the utmost importance is the origin of the mistake and its precise effect on the mind of the accused.

ORIGIN OF THE MISTAKE

Article 122-3 does not contain any provision relating to the origin of the 'insuperable' mistake made by the accused. Logically, the unavoidable nature of the mistake should mean that the accused will have a valid defence only where information was received concerning the legality of the action it was intended to undertake. This information should be objective and reliable. Such information can normally be secured by seeking advice from those who are in charge of enforcing the law, e.g. courts of law and civil services. A spontaneous mistake, therefore, should not usually be considered as sufficient.

Spontaneous mistake

To avoid making a mistake of law, it is necessary to know the law. It has been decided that many basic rules, e.g. the prohibition of carrying a flick-knife (CA Grenoble, 13 November 1996), are considered to be part of elementary civic awareness, of which no-one can be unaware). Fortunately for lawyers – and unfortunately for laymen – understanding the law is not always easy. The uninitiated citizen must sometimes be resigned to referring to a competent authority for advice. This should be done whenever an act is contemplated and he or she is not absolutely clear whether that act is lawful. If it is not done, the citizen will be at fault and, should the case arise, will be blamed for this spontaneous mistake. Whether or not he or she has legal knowledge does not alter matters if he or she misunderstands the law. What matters is that a mere citizen, whatever his or her legal skill might be, has no official authority to state the law. This is why his or her mistake cannot be regarded as an excuse. For example, a foreign driver cannot pretend that he does not know the speed limits in France (CA Douai, 26 October 1994); another court of appeal, however, decided that a director was not guilty for failing to refer to the company's work's council when he was required to do so, just because the law was not absolutely clear and could create uncertainties (CA Reims, 1 April 1994).

Two particular instances of spontaneous mistake should, however, be considered separately. In the first case, if it is accepted that one should seek advice if the lawfulness of an act is even only slightly uncertain, what happens if a law changes a rule that had always been accepted in everyday life? The offender will nevertheless probably be guilty of not having known about the change. These legal changes which affect everyday life nowadays receive huge coverage through the media. People who are genuinely unaware of these new rules, because they live like hermits, can still be considered at fault, for they cannot spurn with impunity the society that exists around them and to which they nevertheless belong.

The second case is that of a person who would like to enquire about the lawfulness of an act, but who is unable to do so (for instance, because they live in a remote village cut off from the surrounding world due to poor weather conditions). That person should, as far as possible, refrain from acting until more information can be received. But if it were necessary to act quickly and such a person thereby committed an offence, necessity, rather than mistake of law, could be used as a defence.

AN ABSOLUTE BELIEF

Absolute faith in the lawfulness of the act has to be demonstrated. Proving a state of mind is, of course, impossible. It therefore has to be inferred from evidence which shows that the offender had, prior to the act, gathered all the necessary information to bring about a reasonable belief that the act was legal.

Incorrect information

If it is necessary to think twice and, when in doubt, to seek advice before acting, it is useful to know where to apply. Lawyers such as advocates, legal advisers working in big firms and academics are meant to give advice to citizens as to their legal rights and duties, either directly or through the various books and articles they publish. But while their job is to teach or counsel, their duty is not to see to the law's proper enforcement. Furthermore, their opinion can always be regarded as subjective; often what one considers legal another may label an offence. If their advice were to be considered as a valid origin for a mistake of law, it would just be a matter of selecting that advice which most closely reflected the intended action. In fact, many professionals would agree, for a substantial fee, to testify that they told their client that his/her plans were lawful. Nevertheless, courts of appeal have accepted the defence of mistaken advice given by a lawyer; for instance in the case of a divorced father who had gone to see his children although not entitled to meet them (CA Douai, 26 September 1996). On the other hand, a divorced man who had entered his former house, which had been granted to his ex-wife, was found guilty although his lawyer had told him he was also entitled to use it (Cass Crim, 11 October 1995).

Public authorities in the field to which the inquiry relates are traditionally considered as having authority to supply legal consultations to citizens. As they are responsible for the enforcement of law in their field of competence, they can legitimately inform a citizen confronted with legal queries in this field. Competent public authorities alone enjoy a legitimacy and a presumption of objectivity sufficient to provide legal information which citizens need not question. If the accused has

followed such advice, although it was wrong, courts should nevertheless decide that there is a defence, because the mistake of law committed could not have been avoided.

Unstable law

Another authority, regarded as even more able to compel observance of the law, is the judiciary. But it is not part of a court's duty to act in an advisory capacity. In fact, a court's opinion can only be ascertained through its decisions and citizens should be able to rely on this case-law.

It is, of course, necessary to model one's behaviour on the obvious meaning of a line of precedent. Taking the liberty of making an analogy should be considered as negligent. The line of precedent should in any case be clear, consistent and emanate from sufficiently high-ranking courts. But if these conditions were fulfilled, and the accused's behaviour conformed to the law as set by such precedent, the accused should thereby not be deemed guilty, since it appeared that he/she would be acting legitimately.

The law of precedent is not as strong in French as in English law: the Cour de Cassation itself sometimes suddenly decides to change the law by putting an end to a long string of precedents. These changes, although often understandable from a social point of view (such as the decision in 1992 that a husband can be considered to have raped his wife), are legally inequitable. This is why a mistake of law that originates in a firm line of precedent deserves the protection of art. 122-3. On the other hand, where an offender was reckless as to the legality of his/her acts, or knew that he/she was committing an offence, the fact that other people thought that offender to be acting legally is irrelevant.

A MISTAKEN BELIEF

To establish that he/she is not guilty of what is materially an offence, the offender has to:

'prove that he[/she] *believed ... that he*[/she] *could lawfully accomplish the act.'* (art. 122-3)

This defence is thus based on a (mistaken) belief and this belief will have to be proved.

An absolute belief

Absolute faith in the lawfulness of the act has to be demonstrated. Proving a state of mind is, of course, impossible. It therefore has to be inferred from evidence which shows that the offender had, prior to the act, gathered all the necessary information to bring about a reasonable belief that the act was legal. But, as long as the offender legitimately believed in this legality, that offender could not be said to have had *mens rea*.

Regardless of whether the average good citizen would also have believed that such behaviour was legal, the judge should make an *in concreto* assessment. However, it will seldom be done, for it would not make sense. Where it appears that the origin of the belief was legitimate, this should be such that anyone would have believed it to be genuine. Otherwise it would be necessary to assume that a person concerned about the lawfulness of some act requested information from a high ranking authority and that, although the answer was that the act was indeed legal, that person still remained doubtful. That person should then be considered as having *mens rea*, for there is no requirement to give evidence of an authority's belief, but only of the offender's own belief. Other than in these circumstances, the offender should not be found guilty of having believed information from a source sufficiently legitimate to be trusted by anyone.

Proof of the belief

Nevertheless, this will have to be proved. The onus of proof indeed rests on the defendant. Of course, a defendant is presumed to be innocent until proved guilty. The prosecution must therefore 'prove all the elements of the offence as well as the lack of any element likely to make it disappear'. The public prosecution department should show evidence of *actus reus* and of *mens rea*. Of course, proving that the offender infringed what that offender knew was a legal rule is almost impossible. This is where the presumption of knowledge of the law comes in: it spares the prosecution the trouble of finding incorporeal evidence.

Since art. 122-3 was created, it has become a rebuttable presumption. The prosecution need not prove that the offender knew the provision infringed (the presumption remains) but the offender can prove the contrary (only as a rebuttable presumption). *'Reus in excipiendo fit actor'* applies here. Article 122-3 is in any case absolutely clear concerning this problem and confirms the above demonstration. On the other hand, the provision is rather vague as to the consequences of the mistake of law.

DOUBTS OVER 'OMISSION'

Statutes traditionally make it an offence to do something, but nowadays Parliament frequently makes it an offence to *omit* to do something. Article 122-3 can obviously apply in the first case. It is indeed meant to protect people who believed that they could 'accomplish the act'. But this wording is precisely what might sow doubt on the use of this provision when dealing with offences of omission: one can well wonder whether it applies to cases in which offenders mistakenly believed they could lawfully refrain from acting.

CONSEQUENCES OF THE MISTAKE

The wording of art. 122-3 is very comprehensive as far as the consequences of the mistake are concerned. It is, however, not certain that all offenders having committed a mistake will be found not guilty, even though their mistake was of the requisite kind. Defences apply differently, depending on the type of offence and on the part the offender played in the offence.

TYPES OF OFFENCE

Many classifications of offences exist in France. They are based on either ideological or technical criteria. Only those that are likely to have some relevance with regard to art. 122-3 will be mentioned here.

Serious and minor offences

The main classification reflects the seriousness of the various offences. It comprises three levels: *crimes, délits* and *contraventions*. It entails procedural consequences and also commands different rules within criminal law itself. *Crimes* necessarily imply intention. *Délits*, normally intentional, can, if the law so provides, stem from negligence or recklessness. *Mens rea* being

therefore part of the definition of these offences, art. 122-3 can apply here as a defence, for its purpose is to negate *mens rea*. *Contraventions*, on the other hand, are usually considered as offences of strict liability and courts have decided that, in such a case, 'material evidence of the act' is sufficient to find the offender criminally liable, irrespective of the proof of intention or negligence. It is however submitted that some moral wrong is always necessary to find a person guilty of an offence, including a *contravention*. Penalty loses its meaning if no moral wrong was committed (*nulla poena sine culpa*). If a (specific) *mens rea* is therefore also part of *contraventions*, then art. 122-3 should possibly apply here too.

Action and omission

Statutes traditionally make it an offence to do something, but nowadays Parliament frequently makes it an offence to *omit* to do something. Article 122-3 can obviously apply in the first case. It is indeed meant to protect people who believed that they could 'accomplish the act'. But this wording is precisely what might sow doubt on the use of this provision when dealing with offences of omission: one can well wonder whether it applies to cases in which offenders mistakenly believed they could lawfully refrain from acting.

Although art. 122-3 aims explicitly at active behaviour, a wide construction appears reasonable: such an interpretation is possible for provisions which operate as defences (*in favorem*). The offenders' impunity depends on their belief in the lawfulness of their behaviour; thus, whether the behaviour was active or passive does not matter.

Intention, recklessness and negligence

It goes without saying that the defence applies to offences that require intention as *mens rea*. In French law, intention means that offenders want to obtain a result that they know is illegal. But if they think that they can legitimately behave in such a way, it is because they do not know that it is illegal. If intention is lacking the act cannot be labelled an offence. All intentional offences are consequently likely to be struck down by a mistake of law.

Its use with other kinds of offences is more problematic. In such cases, offenders wilfully act in a given way, but without seeking what will be the outcome of their behaviour, either because they are reckless as to the outcome, or because they simply did not consider it. It is submitted that art. 122-3 is operative here too. To remain in the field of legality, an act can entail all sorts of consequences, as long as it does not infringe values protected by criminal law. This is where mistake of law can creep in. An individual might be unaware, because of a mistake of law, that a specific value is protected by law. That individual cannot be guilty of not having foreseen the consequences of his/her actions as regards such a value if he/she was not able to know that it enjoyed the protection of criminal law. When, because of an insuperable mistake of law, all the possible consequences of an act appeared legal to a person, that person is not guilty of not having taken precautions to avoid these consequences. This is why mistake of law should be accepted as a defence when faced with offences involving recklessness or negligence.

The wide range given to this defence is reassuring for the law-abiding citizen commiting an offence in spite of a desire to respect the law. The citizen's behaviour nevertheless is harmful and it is therefore necessary to punish those participants in the offence who may not be so easily excused.

PARTICIPANTS IN THE OFFENCE

Several people are often connected with the same crime. Their degree of involvement may vary and deciding who can actually be considered as an offender is not always straightforward. Depending on their role, they will be described as a principal or accomplice.

Principals

Sometimes there is more than one principal involved in the crime. However, to be considered as such, each one must have committed all the legal components of the offence: *actus reus* and *mens rea*. A defence such as mistake of law proceeds from individual idiosyncrasy. Therefore, it does not follow that because one of the principals can benefit from this defence, the others can too. If several people have participated in a crime, while only some of them believed, because of an insuperable mistake, that they could lawfully accomplish the act, only the latter will be excused.

Accomplices

French law, much as the common law of homicide used to, distinguishes between justification and excuse. Using this terminology, mistake of law would be considered as an excuse. The distinction notably affects the status of accomplices. If the offence is justified, it disappears *erga omnes*. But if it is excused, the excuse applies only to the accused whose personal circumstances (infancy, insanity or mistake) provide a specific excuse. The defence of art. 122-3 will hence not necessarily apply to the accomplice as well, unless the accomplice too can prove that he/she believed, because of an insuperable mistake of law, that the act was lawful. On the other hand, and subject to the same conditions, an accomplice can benefit from the defence, while the principal cannot.

ERRARE HUMANUM EST

The new defence created by the French Parliament in 1992 has an extremely wide scope as regards the offences likely to be excused, as well as the participants in the offence. Fortunately, the conditions required for a mistake of law to be accepted as a valid defence are extremely restrictive. If it were to be accepted too easily, it would turn bad faith into a defence. Considering the Cour de Cassation's position, the risk is rather, for the time being, that art. 122-3 might become a dead letter.

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