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MISTAKE IN THE CRIMINAL LAW OF THE REPUBLIC OF SERBIA

ABSTRACT: The paper presents the institution of mistake (*error*) in our criminal law, focusing on its legal regulation as a ground for exculpation. The fact that mistake is a psychological and legal concept whose meaning includes several substantial elements is acknowledged. The legal relevance of mistake contributes to its various treatment in legislation. Given that criminal law, as a branch of legislation, deeply engages with human rights, mistake becomes a crucial institution for excluding the guilt of a perpetrator.

Depending on the type of mistake, and the legal and situational circumstances in which it is considered, two main categories can be recognized: mistake of fact (*error facti*) and mistake of law (*error iuris*). Their effect must be evaluated in the contest of a specific criminal case. This paper will elucidate the general term and types of mistakes, exploring their effects on the culpability of the perpetrator of the criminal act.

Keywords: *criminal law, mistake of fact, mistake of law, culpability.*

1. Introduction

Error is a wrong, false or unrealistic understanding in a person in relation to various kinds of objects, people, situational circumstances, legal regulations, etc. In order to fully understand it, the situation must be observed through a wider spectrum which would purposefully situate the

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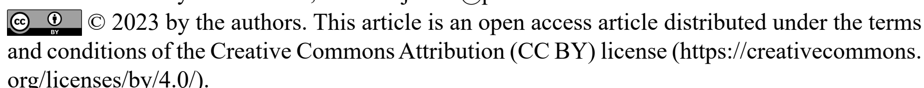
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previously formed misconception in the context in which it occurred. In legal nomenclature, mistake is considered in the context of its legal significance. Depending on the type of legal relationship, delusion may be present in civil, criminal, economic, misdemeanor or other branches of law. There are numerous examples in practice when a person commits a mistake while concluding a contract, committing a criminal act, concluding an economic contract, committing a misdemeanor, etc. If the existence of a mistake in these cases is proven, the legal transaction is considered null and void, and thus cannot produce a legal effect.

A mistake in criminal law is one of the grounds for exculpation for the perpetrator of the crime. Therefore, a mistake is considered to be a wrong, faulty or unrealistic understanding of someone or something that has significance for criminal law. Its presence leads to the exclusion of guilt as a statutory element of a criminal offense. The existence of a wrongful or faulty understanding (awareness) can refer to the circumstances related to the commission of a criminal offense, or, on the other hand, to the prohibition of a certain criminal offense. In accordance with the aforementioned, we can distinguish two types of mistakes in criminal law: mistake of fact (*error facti*) and mistake of law (*error iuris*). Both types of mistakes exist in our criminal legislation, but they are treated differently in criminal law.

2. Mistake of fact (error facti)

2.1. Basic forms of mistake of fact

Mistake of fact (error) means the existence of wrong or faulty idea about a circumstance. There are two types of mistakes in criminal law that can have legal significance: mistake of fact and mistake of law. Mistake of fact (*error facti*) is a misrepresentation of a real circumstance that refers to the very nature of the criminal act or the reasons excluding illegality. Accordingly, mistake of fact appears in two forms.

The first form is mistake in the narrow sense, or mistake regarding the essence of the criminal act. Here, the perpetrator has wrong or faulty idea regarding some real circumstance that is a feature of the criminal offense. This means the absence of conscious action by the perpetrator, which indicates the lack of an intellectual element of intent. Hence, this form of mistake of fact is a negation of the perpetrator's intent. This practically means that this form of mistake exists when the perpetrator had a wrongful understanding

of any constitutive element of the criminal act, including its basic, possibly privileged or qualified forms (Srzentić, Stajić & Lazarević, 1998, p. 278).

An unrealistic representation of an element that is not a constitutive part of a criminal offense does not constitute a mistake of fact in the narrow sense. This means that the existence of mistake of fact is irrelevant in relation to the form in which one of the elements of the criminal offense can be realized. Thus, for example, the criminal offense of Theft (Article 203 of the Criminal Code) exists regardless of whether the perpetrator was mistaken when taking personal property of one person, thinking that it was another person (Criminal Code, 2005). This form of mistake of fact exists when the perpetrator was mistaken regarding certain circumstances that are part of the legal features of a specific criminal offense. Such is the case with the criminal offense of Preventing Opposition to the Enemy (Article 420 of the Criminal Code), that can only be committed during war or armed conflict. When a special characteristic of the victim is foreseen in a criminal act as its feature, then the delusion about the circumstance is relevant under criminal law. Such is the case with one of the forms of criminal offense of Aggravated Murder (Article 114 of the Criminal Code), where the death of a child or a pregnant woman was caused (para. 9). In the example given, the special feature of the victim is related to the age (child) or the special condition (pregnancy).

The second form is mistake in the broader sense, or mistake regarding the reasons for excluding the illegality of a criminal act. In this form, the subject of mistake is the circumstance that, had it existed at the time of the action, would have rendered such an act permissible. Namely, the perpetrator here is aware of the legal characteristics of the criminal offense but is unaware of the outside circumstances related to it, which can be the reason for exculpation. In literature, cases of putative necessary defense and putative necessity are cited as examples of this form of mistake of fact.

a) Putative necessary defense exists when the perpetrator is mistaken due to wrongly believing that another person has committed an unlawful attack against them. This is the case when person A mistakenly thinks that they have been attacked by person B and therefore takes an action by which they take the life or injure person B, believing to be repelling an unlawful attack. Considering that this is an imaginary and not a real threat of attack, it constitutes putative necessary self-defense. Accordingly, a wrong or false misconception of an attack constitutes mistake of fact regarding the circumstances that, had they actually existed, would have been the reason for exculpation.

b) Putative necessity exists when the perpetrator is mistaken due to falsely believing that danger is imminent, that it has occurred and that it is still ongoing. In this case, the danger is not real but imagined, which points to the fact that the perpetrator is truly mistaken in terms of the circumstances (danger) that would, had it existed, be the reason for exculpation. In such circumstances, the perpetrator is attempting to protect their own asset by removing the danger. Such is the case when person A mistakenly or faultily believes that someone (person B) is calling for help from a closed space (apartment), so they break into the apartment in order to rescue person B.

2.2. Special forms of mistake of fact

In criminal law, in addition to the basic forms of mistake of fact, its special forms are also known. These include: mistake regarding object, person, or causation. These forms are based on a misrepresentation of a fact that is not criminally relevant. Their presence, in a specific criminal case, does not exclude guilt, meaning that they do not produce an effect in criminal law.

Mistake of object (*error in objecto*) exists when the perpetrator has a wrong or faulty idea about the object on which the crime is committed. This form of mistake of fact exists in practice when, for example, the perpetrator steals someone else's wristwatch thinking it is a prestigious brand, and it is in fact an ordinary watch of little value. The fact that the perpetrator intended to steal an expensive item, and instead stole an ordinary wristwatch, does not affect the existence of the criminal offense of theft (in both cases, it is someone else's personal property). Here, the perpetrator was not mistaken in regard to the essential features of the criminal act, but in relation to the type of object, which is irrelevant for the existence of mistake of fact.

Mistake of person (error in persona) exists when the perpetrator has wrong or fauly idea about the person against whom they have committed the crime. Thus, the perpetrator thinks that they have committed a crime against person A, but in fact the crime was committed against person B. As in the previous case, this form of mistake of fact is not criminally relevant either. This means that, as in the previously mentioned examples, the crime of theft exists regardless of the fact that the perpetrator had intended to steal a watch from one person, and instead has stolen it from someone else. In criminal law, mistake regarding a person is considered a special form of mistake about the subject of a criminal offense.

The prevailing understanding in criminal law, which denies the relevance of mistake of fact regarding an object or person, is not without exception. This

is the case when special characteristics of an object or a person constitute an essential element of a certain criminal act. Thus, for example, the criminal offense of Assassination of the Highest Government Officials (Article 310 of the Criminal Code), has as its legal feature the special characteristic of the person against whom the criminal offense was committed (President of the Republic, member of Parliament, Prime Minister, member of the Government , President of the Constitutional Court, etc.) If the intent of the perpetrator was focused on committing the above-mentioned criminal act, and instead of these persons, he mistakenly (error in persona) murders a person who does not belong to the circle of representatives of the highest government authorities, the perpetrator will be responsible for the criminal offense of Murder. Therefore, in this case, the existence of a mistake of fact about a person is relevant in criminal law, as the essence of this offense is included among the legal features of a specific criminal offense.

Mistake of causation exists when the perpetrator envisioned for the course of the offending act to happen one way, but in a specific case it happened in another way. This means that the unlawful consequence occurred in an unplanned manner or differently than envisioned. Depending on the degree and nature of the deviation of the cause-and-effect relationship, the relevance of the mistake of causation is assessed. Therefore, if the deviations are significant, this is a case of mistake that excludes intent in relation to the consequence (Babić & Marković, 2013, p. 261).

In criminal law, a special type of mistake of fact regarding causation that is better known in literature as a missed hit or missed shot (*aberratio ictus*). This means a real situation in which the perpetrator aims and shoots at one person but hits a completely different person. According to the prevailing opinion, this case contains the ideal confluence of criminal acts, namely: one that the perpetrator attempted with intent, and another that they negligently committed. In criminal doctrine, there is an opinion that, in the truest sense, this is not mistake of fact but a deviation in performance of the action, a deflection of the blow, the wrong course of action because it was poorly executed and had missed the desired goal (Bačić, 1998, 262).

2.3. The effect of mistake of fact on the culpability of the perpetrator

The effect of mistake of fact on the perpetrator's culpability is not uniformly regulated in the Criminal Code. Namely, mistake of fact in the narrower sense (mistake regarding the nature of the criminal act) and mistake of fact in the broader sense (delusion regarding the reasons for exculpation)

always exclude intent on the part of the perpetrator of the criminal act. In this sense, mistake of fact represents a complete negation of intent. Regarding the effect of mistake of fact, in the case of negligent actions of the perpetrator, it is necessary to start by separating it into: compelling and avoidable. This division is fully in the spirit of the legal provisions that regulate the institute of mistake of fact in our criminal law (Article 28 of the Criminal Code).

A compelling mistake of fact completely excludes the guilt of the perpetrator of the criminal offense. This means that this type of mistake excludes both intent and negligence as possible forms of culpability. In our criminal law, it si prescribed that *an act done out of a compelling mistake of fact is not to be considered a criminal offense* (Article 28, paragraph 1 of the Criminal Code). This means that a compelling mistake of fact in the narrower sense (mistake regarding the essence of criminal offense) and the broader sense (delusion about the reasons for exculpation) excludes guilt. In this sense our legislator declares that *a compelling mistake of fact exists where the perpetrator was not required or could not avoid a mistake about particular circumstance, which is a statutory element of the criminal offense, or about particular circumstance, which, had it existed, would have rendered such act permissible*. (Article 28, paragraph 2 of the Criminal Code).

An avoidable mistake of fact exists when the perpetrator had a wrong or faulty idea regarding the legal features of a criminal offense or the grounds for exculpation, despite being obliged to be informed or having an accurate idea regarding the circumstances of a specific criminal act. This is the case of a careless perpetrator, as a result of which he or she had misled him/herself and committed a criminal act. It is the stance of our legislator that an avoidable mistake of fact does not exclude negligence. In this sense, it is stipulated that *if the perpetrator's mistake was due to negligence, he shall be guilty of criminal offence committed by negligence, if such offence is provided by law* (Article 28, paragraph 3 of the Criminal Code).

Finally, mistake refers only to the actual circumstances that are a feature of a criminal act. With regard to other circumstances, which are outside the concept or nature of the criminal offense, it has no significance for criminal law (Tahović, 1962, p. 67).

3. Mistake of Law (error iuris)

3.1. Definition and forms of mistake of law

Mistake of law is a wrong or faulty idea regarding the prohibition of a criminal act. A person who commits a mistake of law mistakenly believes that their actions or non-actions are legally permissible, without knowing that they are committing a criminal act. The lack of awareness of the perpetrator regarding the prohibition of the act can be the result of direct or indirect mistake of law. *Direct mistake of law* exists when the perpetrator has the wrong idea that the actions undertaken do not constitute a criminal offense. This type of mistake of law exists when the perpetrator knows about the existence of legal norm, but misunderstands it and believes that it does not include their behaviour. We can come across numerous examples of direct mistake of law in practice. For example, a person does not know that they are committing the criminal offense of evasion if they misappropriate the higher sum of money mistakenly given by a bank clerk (Stojanović, 2007, p. 148). *Indirect mistake of law* exists when the perpetrator is under a misconception regarding one of the grounds for exculpation (act of minor importance, necessary defence and necessity). This is the case when the perpetrator mistakenly believes that the actions undertaken are permissible due to the small importance of the criminal offense or when the perpetrator mistakenly believes that a necessary defense is legally allowed.

The aforementioned types of mistake of law are connected by the lack of awareness of the prohibition of the act on the part of the perpetrator. In this sense, the lack of awareness in the perpetrator excludes their culpability. However, one should be careful when dealing with a criminal offense where there was no awareness of the perpetrator regarding its unlawfulness. There are criminal acts that are recognizable to every person as they have a long tradition and harm individual and societal interests. Such is the case with the criminal offense of murder, theft, robbery, etc. With regard to these crimes there is little chance that the perpetrator can successfully prove the existence of mistake of law. In addition, these criminal acts simultaneously violate social norms, which leads to the condemnation by the environment where the perpetrator lives and works. The second group includes more recent criminal acts. They affect certain spheres of social and personal relationships, and, as such, are unknown to the general public and laymen.

This is, for example, the case with the criminal offense of Violation of the Right to be Informed on the State of the Environment (article 268 of the

Criminal Code), which is unknown not only to most of the general public but also to the people dealing with law. In addition, there is a large number of criminal offenses in the field of computer data security, foreign exchange business, health, etc., that significantly differ from commonly known criminal offenses with a much longer tradition. With regard to these criminal acts, the perpetrator may act in mistake of law, i.e. can prove its existence in a specific criminal case.

3.2. The effect of mistake of law on the culpability of the perpetrator

Mistake of law was given varying legal significance in criminal law. In older criminal theory and legal monuments, the well-known principle of *ignorantia iuris nocet* (ignorance of the law is harmful), i.e. *ignorantia legis non excusat* (ignorance of the law is no excuse) was strictly applied. This means that a person could not refer to their own ignorance of legal regulations in which certain behavior is considered a crime. Disregarding mistake of law as a basis that exculpates the perpetrator of a criminal act has long the prevailing opinion in criminal theory. It was based on the psychological theory of guilt which has become obsolete in European and our criminal law. Newer psychological and normative theories of guilt show a radical turn in relation to the previous purely psychological understanding of guilt. On the basis of these theories, the existence of culpability requires the awareness of illegality of the criminal act on the part of the perpetrator. The understanding of mistake of law in the Criminal Code is based on psychological and normative theories of guilt.[1]

The effect of mistake of law on the culpability of the perpetrator is not uniformly regulated in our criminal law. It is possible to distinguish between two types of mistake of law: a compelling mistake of law and an avoidable mistake of law. This division is fully in the spirit of the legal provisions regulating the institute of mistake of law (Article 29 of the Criminal Code).

A compelling mistake of law exists where the perpetrator was not required or could not be aware that this act was prohibited (Article 29, paragraph 2 of the Criminal Code). Therefore, this is a perpetrator whose guilt is excluded because he could not have known that what he was doing was a criminal

[1] In criminal doctrine, the acceptance of a mistake of law is justified by the expansion of punishments for the purpose of introducing completely new incriminations. In addition, the acceptance of the normative-psychological understanding of guilt contributes to this treatment of mistake of law in criminal law (Lazarević, 2011, pp. 153-154).

act. Given that guilt is a legal element of a criminal act, its absence, by the actions of the perpetrator, negates the nature of the criminal act. In this sense, our legislator states that *an act shall not be considered a criminal offense if it was done out of a compelling mistake of law* (Article 29, paragraph 1 of the Criminal Code). This legal solution is classified as a modern comparative legal solution.[2] For the existence of a compelling legal mistake it is necessary to establish in a specific legal case that the perpetrator was not obliged and could not have known that this act was prohibited. Otherwise, there is *rebuttable* legal presumption that the perpetrator was aware of the illegality of the criminal act.[3]

An avoidable mistake of law exists in the case of a perpetrator who was unaware that an act was prohibited, but should and could have known (Article 29, paragraph 3 of the Criminal Code). In the case of an avoidable mistake of law the guilt of the perpetrator is not excluded, nor the possible awareness of the illegality of the criminal act. Therefore, an avoidable mistake of law does not lead to exculpation of a criminal offense, but may be punished leniently (Article 29, paragraph 3 of the Criminal Code).

The issue of mistake of law in international criminal law is regulated in a completely different way. Namely, the Rome Statute of the International Criminal Court understands legal error in the light of psychological theories of guilt (Act on Ratification of the Rome Statute of the International Criminal Court, 2001). According to the provisions of Article 32, paragraph 2 of the Rome Statute, ignorance of the illegality of the act, provided in the provisions of a certain legal document, as a criminal offense under the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. However, in specific cases, the possibility is foreseen that a mistake of law can exclude the criminal responsibility of the perpetrator if, in the specific case, the mental

[2] It is interesting to note that in Italy, the Constitutional Court, despite valid legal regulations, accepted the modern point of view that a compelling mistake of law excludes guilt (Vrhovšek, 2007, p. 20).

[3] The Decission of the Higher (District) Court in Subotica adopted the following position in regards to compulsive mistake of law: Bearing in mind that the defendant represented himself in the proceedings and that he was neither aware nor obliged and could have been aware of the prohibition of the criminal act in question, which consitutes a compulsive mistake of law, the first-instance court had the obligation to check the defense of the defendant in detail and to determine in a safe and reliable way whether it is founded or unfounded. This is due to the reason that a compulstive mistake of law from Article 29, para. 1 and 2 of the CC is one of the bases for the exclusion of guilt as one of the constitutive elements of the general concept of a criminal offense, and thus also the criminal offense the defendant is charged with (Decision of the District Court in Subotica, Kž. 458/07 of November 2007).

element of the criminal offense is excluded. Therefore, in exceptional cases, a mistake of law can be a ground for excluding the criminal responsibility of the perpetrator. Such are the cases where a subordinate person (Article 33, paragraph 1, point b. and c. of the Rome Statute):

- did not know that the order was unlawful and
- the order was not manifestly unlawful.

The provision of paragraph 2 stipulates that any order to commit the crime or genocide or a crime against humanity is considered manifestly unlawful. Therefore, the Rome Statue classifies genocide and crimes against humanity in the group of generally known criminal acts (mala in se), which excludes the possibility of the perpetrator's ignorance, and therefore the existence of legal error.[4]

4. Conclusion

The existence of wrong, unrealistic or imagined false understanding in a person leads to various external reactions. They can range from milder forms of unlawful behavior to the most serious crimes. Since mistake is a psychological and legal term, its meaning must be determined in a broader sense. This practically means that mistake is an institute that goes beyond the framework of legal norms as it is a pert of everyday interaction and communication between people. Hence, mistake has a different legal treatment in comparative criminal law.

In our country, the normative-psychological theory of guilt was adopted, which radically departs from its earlier, purely psychological treatment. This produced repercussions in the field of mistake as a basis for exculpation. A solution was adopted according to which an compelling mistake of fact and of law excludes the existence of a criminal offense, while an avoidable mistake can be the basis for leniency. Such a solution to the issue of mistake is a positive step forward, which brings our criminal legislature on the same level as modern European legislatures.

[4] The International Criminal Tribunal for the former Yugoslavia dealt witht he issue of mistake of law in Lubanga case. Reference to mistake of law should be added to this, in the case of contempt of fourt, by Florence Hartmann (Banović & Bejatović, 2011,p. 147).

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ZABLUDA U KRIVIČNOM PRAVU REPUBLIKE SRBIJE

REZIME: U radu je predstavljen institut zablude (error) u našem krivičnom pravu. Polazišnu osnovu čini zakonsko uređenje zablude kao jednog od osnova isključenja krivice. Uvažena je činjenica da zabluda predstavlja psihološko-pravni pojam čije značenje obuhvata više supstancijalnih elemenata. Pravna relevantnost zablude doprinosi njenom različitom tretmanu u zakonodavstvu. S obzirom da krivično pravo predstavlja granu zakonodavstva kojom se najdublje zadire u prava čoveka zabluda predstavlja važan institut kojim se može isključiti krivica učinioca krivičnog dela. U zavisnosti od vrste zablude, pravnih i situacionih okolnosti u kojima se razmatraju, moguće je izdvojiti: stvarnu zabludu (error facti) i pravnu zabludu (error iuris). Njihovo dejstvo je neophodno ceniti u kontekstu određenog krivičnog slučaja. Sledstveno tome, autor će u radu ukazati na opšti pojam i vrste zablude uključujući njeno dejstvo na krivicu učinioca krivičnog dela.

Ključne reči: *krivično pravo, stvarna zabluda, pravna zabluda, krivica.*

References

1. Bačić, F. (1998). *Kazneno pravo – opći dio* [*Criminal law – general part*]. Zagreb: Informator
2. Banović, B. & Bejatović, S. (2011*). Osnovi međunarodnog krivičnog prava* [*Basics of international criminal law*]. Kragujevac: Pravni fakultet
3. Babić, M., & Marković, M. (2013). *Krivično pravo – posebni dio* [*Criminal law – special part*]. Banja Luka: Pravni fakultet
4. Vrhovšek, M. (2007). Novo rešenje pravne zablude u Krivičnom zakoniku Srbije [A new solution to the legal error in the Criminal Code of Serbia]. *Pravo – teorija i praksa, 24*(11-12), pp. 10-21

5. Lazarević, Lj. (2011). *Komentar Krivičnog zakonika* [*Commentary on the Criminal Code*]. Beograd: Pravni fakultet Univerziteta Union
6. Srzentić, N., Stajić, A., & Lazarević, Lj. (1998). *Krivično pravo Jugoslavije – opšti deo* [*Criminal law of Yugoslavia – general part*]. Beograd: Savremena administracija
7. Stojanović, Z. (2007). *Komentar Krivičnog zakonika* [*Commentary on the Criminal Code*]. Beograd: Službeni glasnik
8. Tahović, J. (1962). *Komentar Krivičnog zakonika* [*Commentary on the Criminal Code*]. Beograd: Savremena administracija
9. Krivični zakonik [Criminal Code]. *Službeni glasnik RS*, br. 85/05, 88/05 – ispr., 107/05 – ispr., 72/09, 111/09, 121/12, 104/13, 108/14, 94/16 i 35/19
10. Zakon o potvrđivanju Rimskog statuta Međunarodnog krivičnog suda [Law on the Ratification of the Rome Statute of the International Criminal Court]. *Službeni list SRJ – Međunarodni ugovori*, br. 5/01