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DEFENCE OF MISTAKE AND REASONABLE INQUIRY

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ABSTRACT

The objectives of this article are to *discuss the defence of mistake in the Indian laws, differentiate between mistake of law and mistake of fact, and to highlight the importance of the concept of "reasonable inquiry" in the defence of mistake of fact with respect to the Indian scenario*. The article discusses in detail what ingredients are necessary to establish the defence of mistake. It also focuses on the components that are indispensible when it comes to proving that reasonable inquiry had been conducted by the accused before committing the said act. The authors have also tried to cover the general exception of defence of mistake, discussing in detail the maxims "*ignorantia facti doth excusat"* and "*ignorantia juris non excusat"*, and the concept of reasonable inquiry- all in the Indian law context. However, the article doesn't cover the concept of reasonable inquiry as applicable in the English laws and the American laws. The scope of this article is limited *only to the Indian laws*. The pertinent question that the authors have focused on is that 'whether the element of reasonable inquiry receives the required consideration in the present criminal laws of India?'[3] The hypothesis of the authors is that 'the element of reasonable inquiry, though vital in establishing the defence of mistake of fact in a Court of Law, hasn't been given adequate importance and consideration in the Indian laws so far.'[4]

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[3] In this article, only secondary data has been used. Materials have been taken from books, articles and other web sources. A proper analysis of the said materials has been done in order to frame the research question and hypothesis.
[4] The mode of citation used in this article is 19th Edition Harvard Bluebook style.

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I. INTRODUCTION

The Indian Penal Code (45 of 1860) is an all-inclusive code which covers all substantial areas of criminal law. It consists of offences and punishments for the said offences to be given to the accused that are proved guilty. Apart from that, it also contains certain General Exceptions (Chapter IV) or "defences" that the accused can take in order to prove his innocence or to avoid the shackles of law. Chapter IV enlists a number of general exceptions which are accused-friendly in nature. The point to be noted here is that the onus of proof lies on the one taking the defence, i.e. the accused. One of such exceptions or defences that is often taken by the accused is the Defence of Mistake.

Sections 76 and 79 of the Code deal with the defence of mistake. Before diving further into the sections, it is important to note that the following principles form the bedrock of the defence of mistake-

- ***Ignorantia facti doth excusat***
- ***Ignorantia juris non excusat***

The literal meaning of the first principle is "ignorance of fact is excusable in a Court of Law". The second principle means that "ignorance of law is not excusable in a Court of Law". Hence, in Criminal Law, the ignorance of law cannot be used as a defence i.e. Defence of Mistake of Law is not applicable. However, in certain circumstances, Mistake of Fact may be warranted as a defence to the accused. In order to establish Mistake of Fact in a Court of Law, two elements are essential to be present-

- **Good Faith**
- **Reasonable Inquiry**

Reasonable inquiry can be defined as "… *the required steps taken to make necessary or reasonable enquiries regarding the facts of a certain case by the accused before he commits the said act in order to successfully plead the defence of mistake*". In this article, the element of reasonable inquiry with respect to the defence of mistake shall be discussed in detail. The focus shall be on the 'importance of the concept of reasonable inquiry in the successful establishment of the defence of mistake in a Court of Law'. It also covers the abovementioned maxims in detail and their relevance in the Indian Laws.

II. MISTAKE AS AN EXCUSE IN THE INDIAN PENAL CODE

Mistake as a mitigating factor implies a rule that when a person who is "ignorant of the existence of relevant facts or has mistaken them, does some wrongful act, he neither has intended nor foresaw the resulted unlawful consequences".[5] His trial, hence, proceeds based on the belief that the facts were as he had mistakenly believed them to be and not as they really were. Mistake

[5] K.I. Vibhute, P S A Pillai's Criminal Law 68 (12th ed. 2015).

negates the presence of *mens rea* in the mind of the accused. Mistake as an absolving factor allows a court to look into the mind's operation in a wrong doer.[6]

In order to establish mistake as a mitigating factor, the following elements are essential to prove:

- The "state of things believed to exist would, if true, have justified the act done"[7],
- The mistake in question ought to be reasonable, and
- The mistake ought to be a 'mistake of fact' and not a 'mistake of law'.

The nature of the said mistake must be such that had the supposed circumstances been real, they would have prevented the attachment of liability with the person accused. Therefore, it is no defence to a burglar, who breaks into, say, House X to show that he mistook the house for another house, say, House Y. In such circumstances, both the *actus reus* and *mens rea* would still have existed.

The second condition is that the mistake in question must be reasonable. Superstition is no defence. People who break the law as a result of a belief that they are following a 'divine command' have not been allowed to take the defence of mistake. There also have been successful prosecution of people in England for withholding medical help from their sick children.[8]

The provisions of the sections 76 and 79 of the IPC are not only primarily premised on these three provisions but have, in essence, also incorporated the principles derived therefrom. Mistake, under both the sections, ought to be in good faith. The term "Good Faith" as defined in Section 52 of the IPC makes it clear that the mistake of fact must be "bona fide, reasonable and must have been committed after taking due care and attention"[9].

III. IGNORANTIA JURIS NON EXCUSAT

[6] Jaswantrai Maniklal Akhaney v. State of Bombay, AIR 1956 SC 575.
[7] *Supra* note 5, at 3.
[8] R v. Downes, (1875) 1 QBD 25 CCR.
[9] Section 52, The Indian Penal Code (45 of 1860).

A plain reading of the sections 76 and 79 of IPC makes it clear that the protection of the sections applies only to mistake of fact and not mistake of law. The words in these sections "who by a reason of mistake of fact and not by reason of a mistake of law in good faith believes"[10], show *ignorantia juri non excusat*, i.e. mistake of law cannot be excused in any Court of Law.The principle that ignorance of law is not an excuse, which implies that "it is not open to a wrong doer to plead ignorance of law as a shield to avoid criminal liability, is based on the ground that everybody is presumed, rather duty bound to know the law".[11] A mistake of law, irrespective of its reasonableness, even in good faith, does not work as an exonerating factor. However, based on the Court's discretion, ignorance of law can be used as a mitigating factor.

This said rule extends to those situations wherein there was no feasibility or possibility of the "defendant knowing that the concerned law actually existed in India".[12] In the landmark case of *King v Tustipada Mandal*[13], certain guidelines were laid down by the Odisha High Court to determine situations where the principles of Mistake of Law or Mistake of Fact could be applied.The guidelines are enunciated as follows:

- That "when an act is in itself plainly criminal, and is more severely punishable if certain circumstances co-exist, ignorance of the existence of such circumstances is no answer to a charge for the aggravated offence"[14],
- That "where an act is not prima facie innocent and proper, unless certain circumstances co-exist, then ignorance of such circumstances is an answer to the charge"[15],
- That "the state of the accused person's mind must amount to absolute ignorance of the existence of the circumstance which alters the character of the act, or to a belief in its non-existence"[16],
- Where an act "which is in itself wrong i.e., under certain circumstances, criminal, a person who does the wrong act cannot set up as a defence that he was ignorant of the facts which turned the wrong into a crime"[17]

[10] Section 76, The Indian Penal Code (45 of 1860).
[11] *Supra*note 5.
[12] State of Maharashtra v M.H. George, AIR 1965 SC 722.
[13] AIR 1951 Ori 284.
[14] *Id*.
[15] *Supra* note 13, at 5.
[16] *Id*.
[17] *Supra* note 13, at 5.

- Where "a statute makes it penal to do an act under certain circumstances, it is a question upon the wording & object of the particular statute, whether the responsibility of ascertaining that the circumstances exist is thrown upon the person who does the act or not. In the former case his knowledge is immaterial".[18]

The reason why mistake of law isn't allowed to be taken by the accused is that it will be misused and every accused will try to avail the same. It will then become a herculean task for the prosecution to rebut such claims and prove affirmatively that the accused was well aware of the law. This will also increase the burden on the Courts as in the absence of evidence, they will have to test the veracity of such claims of the accused. It will also lead to endless complications making the administration of justice nearly impracticable and introducing an element of uncertainty in the administration of justice.[19]

There are, however, quite a few critiques of this maxim who believe that if mistake of fact is granted the status of a defence, then the mistake of law should also be taken as a defence. Glanville Williams observes that "The view that everyone is presumed to know law is not a true proposition of law, and even if it were, it would only be a legal fiction and not a moral justification".[20]

In India, "mistake of law takes into its ambit both mistake as to the existence of any law on a relevant subject as well as mistake as to what law is".[21]As held in the case of *State of Maharashtra v. MH George*[22] if a "statute provides that certain knowledge-involving elements of law on the part of the accused is an essential ingredient of the offence, mistake of law, in good faith, may be a good defence to a charge of a criminal offence".[23]

Whether mistake of law should be acknowledged as a defence is an entire topic of discussion in itself. A lot of factors like illiteracy and population etc. should be taken into consideration before jumping into conclusions. The researchers have limited their discussion to reasonable inquiry in this article.

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[18]Sarthak Pattnaik, Reasonable Inquiry in the Defence of Mistake, Imperial Journal of Interdisciplinary Research (IJIR) Vol-2, Issue-5, 2016 ISSN: 2454-1362, http://www.onlinejournal.in.
[19]*Supra* note 11, at 4.
[20] Glanville Williams, Criminal Law: The Second Part 289 (2nd ed. 1961).
[21] AIR 1951 Ori 284.
[22] AIR 1965 SC 722.
[23]*Id.*

IV. IGNORANTIA FACTI DOTH EXCUSAT

For a better understanding of the concept of the Mistake of Fact as a defence, we first need to understand what the term "defence" means. In common parlance, mistake is "an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract, or a belief in the present existence of a thing material to the contract, which does not exist; some intentional act, omission, or error arising from ignorance, surprise, imposition, or misplaced confidence; in a legal sense, the doing of an act under an erroneous conviction, which act, but for such conviction would not have been done".[24] The term "mistake of fact" means a mistake which has taken place when some facts which exist in actuality is not known by the person or, when a person believes that a certain fact is not present whereas in reality, it is present. The general rule that governs mistake of fact as a defence is that the "accused or the alleged offender must have acted in good faith under reasonable grounds that he believed to exist which led him to the doing of the alleged offence".[25]

Sections 76 and 79 of the Indian Penal Code deal with the concept of Mistake of Fact.Section 76 of the IPC deals with those mistakes which are "bound by law", i.e., "act done by a person bound, or by mistake of fact believing himself bound, by law"[26].It states that:

"Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law, in good faith believes himself to be, bound by law to do it".[27]

Section 79 of the IPC deals with those mistakes which are "justifiable by law", i.e. "act done by a person justified or by mistake of fact believing himself justified by law".[28] It states that:

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[24] Prajwal Poojary, *Difference between "Mistake of Fact" and "Mistake of Law" (Indian Penal Code)*, http://www.shareyouressays.com/115847/difference-between-mistake-of-fact-and-mistake-of-law-indian-penal-code, last accessed on April 14, 2020.
[25] R v. Tolson, (1889) 23 QBD 168.
[26] Section 76, The Indian Penal Code (45 of 1860).
[27] *Id.*
[28] Section 79, The Indian Penal Code (45 of 1860).

"Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes him to be justified by law, in doing it"[29].

Mistake of fact is "an excuse as it precludes the accused from forming the required *mens rea*".[30] In simple words, the existence of the defence of mistake of fact negates the existence of the *mens rea* in the defendant. One essential point to be noted here is the mistake must be pertaining to the material facts, i.e. facts that are essential to constitute the alleged offencesaid to be committed by the accused. He "must be absolutely ignorant of the real circumstances of the case which make his act an offence".[31]As per the Indian laws, an "accused can claim the defence of mistake of fact when he commits an honest and reasonable mistake, which can be justified or proved with respect to the circumstances pertaining to the case at hand".[32] However, an ignorance of a material fact of the case would make the act morally involuntary. An accused act must not be taken as his 'intention' when a fact is unknown to him. For instance, 'A' fires a bullet into a bush, thinking that there is a tiger hiding there. Unknown to him, 'B' was standing there and the bullet hit him and killed him.[33] Here, though 'A' has fired the bullet, he cannot be made liable for'B's' murder as he had not shot 'B' intentionally. However, if the act of the accused in itself is wrong, although not criminal, the ignorance on his part of the circumstances, which makes the act criminal, is no defence.[34]Under Section 79, IPC, "though an act is not justified by law, if it is done with the bona fide belief and in good faith that it is justified by law, then it will not be an offence".[35] So, when an accused, "Under a bona fide mistake of fact, mistook a human being for a wild animal in a jungle at night and killed the person, he was not held liable".[36]

The maxim *ignorantia facti doth excusat* is subject to two restrictions. First, mistake of fact "cannot be successfully pleaded when responsible inquiry elicited the true facts".[37] For example, 'A' abducts 'B', a girl under 18 years of age, out of guardianship of her father without his consent. He believes that she is above the age of 18, but does so without making any inquiry,

[29]*Id.*
[30]*Halsbury's Laws of England*, Vol 11, fourth edition, Butterworths, London.
[31] King Emperor v. Tustipada Mandal, AIR 1951 Ori 284.
[32]*Supra* note 30, at 7.
[33] Chirangi v. State of M.P., AIR 1952 Nag 282.
[34] King Emperor v. Tustipada Mandal, AIR 1952 (Ori) 284.
[35] Keso Sahu v. Saligram, (1977) Cr LJ 1725 (Ori).
[36] State of Orissa v. Khora Ghasi, (1978) Cr LJ 1305 (Ori).
[37]*Supra*note 5.

basing his belief on mere appearance. 'A' is guilty of kidnapping U/S 391, IPC.[38] Secondly, it "cannot be accepted as a plea, when an act is made reus without reference to *mens rea* of the doer".[39]

When it comes to Section 76, IPC, a person has to "show the existence of the facts which would justify his belief, in good faith, that he was bound by law to act, for the benefits of this section to be applicable".[40]Section 79, on the other hand,converts an offence to a non-offence. It was held in a landmark case that "… if any authority under its jurisdiction imposes sanctions upon something, then persons responsible for creating it cannot be held liable as they had bona fide belief that the act done by them in no way amounted to offence under the laws of the land".[41]Held in *R v. Prince*[42] that "If it can be prima facie established that if a wrongful act is committed under a mistaken belief and which is wrong in it and is prohibited by a statute or the laws of the land, then the defence of mistake of fact cannot be claimed by the accused".[43] Also, "Acts done with a bona fide belief that there was an existence of a certain situation that existed which was essential for committing a wrongful act, cannot be used a tool for prosecution against the person claiming mistake of fact as a defence".[44]

V. REASONABLE INQUIRY IN DEFENCE OF MISTAKE

The Indian Penal Code doesn't define the concept of Reasonable Inquiry in the defence of mistake of fact. However, a proper analysis of the features of the said concept enables us to come up with some workable definitions. In simple terms, it can be defined as the steps that the accused takes to establish the veracityof the given circumstances that he assumed to be true on the basis of which he committed the alleged offence.

The following elements need to be proved **beyond reasonable doubt** in any Court of Law in order to establish mistake of fact:

[38] Krishna Maharana v. Emperor, AIR 1929 Pat 651.
[39] (1848) 153 ER 907.
[40] Re Laftikhan, (1895) ILR 20 Bom 394.
[41] Raj Kapoor v. Laxman, AIR 1980 SC 605.
[42] (1875) LR 2 CCR 154.
[43] *Id.*
[44] AIR 1952 Nag 282.

- Good Faith
- Reasonable Inquiry

Reasonable inquiry, in simple terms, means that the accused had done an act owing to mistake of some material fact of the case, and before commission of such an act, he had done the necessary research and had made reasonable inquiries. Let us discuss the two landmark English cases on reasonable inquiry, namely, *R v. Tolson*[45] and *R v. Prince*[46].

R v. Tolson:

This was a landmark case pertaining bigamy. The accused Mrs. Tolson, was married to a Mr. Tolson. A few days after their marriage, Mr. Tolson went missing. After conducting reasonable inquiries and asking anyone who had any chance of knowing the whereabouts of her missing husband, she came to believe that her husband had drowned in the sea. However, she waited for seven years, awaiting her husband's return. After the wait, she assumed that her husband was actually dead and decided to re-marry. Mr. Tolson turned up11 months after her second marriage and accused her of bigamy. Mrs. Tolson took the defence of mistake of fact. The Court declared Mrs. Tolson not liable of bigamy and exonerated her. The reason was that "… She had reasonably inquired the whereabouts of her husband and had waited for a period seven years to find out where her husband was. The fact that she had tried her best to find out about her husband and had reasonable ground to believe that her husband was no more in this world proved that she had no scope for further inquiry. She had done everything that an ordinary prudent person could have done in the given circumstances and with the available resources. This also proves that she had no mens rea for the commission of bigamy. It was a genuine mistake of fact".[47] Hence, the defence was granted to her and she was exonerated.

R v. Prince:

Contrary to the previous case, here it was found that the accused had not conducted reasonable inquiry. The accused, Henry Prince,had allegedly taken an underage girl, Annie Phillips, from the lawful possession of her parents, without their consent.This was in violation of Section 55 of the Offences Against the Person Act, 1851.At Prince's trial, the jury observed that Phillips

[45] (1889) 23 QBD 168.
[46] L.R. 2 C.C.R. 154 (1875).
[47] *Supra* note 45, at 9.

looked much older than sixteen and found that she had told Prince that she was eighteen. Based on these two reasons, Prince had genuinely and reasonably believed her. Nevertheless, "the jury convicted Prince".[48] Prince, in his defence,had pleaded that "he was under the mistaken belief that Phillips was 18 years of age and had consented to come along with him".[49] However, the Court ruled against him because what he had doneviolated the afore-mentioned legal provision of the impugned Act. It held "… As per the facts and circumstances of this particular case, it was the duty of Prince to reasonably enquire about the age of the girl, as he was well aware about the fact that taking a girl below 16 years was prohibited under the law. But he made no reasonable inquiry, i.e. he took no necessary precautions or steps to ascertain as to whether the girl he was abducting was one who was below 16 years".[50]As a result, he was convicted of kidnapping of Phillips.

From the above cases, the following conclusions may be drawn:

- That, reasonable inquiry is an important component in the establishment of the defence of mistake of fact.
- That, reasonable inquiry doesn't mean that a person goes out of his way to make enquiries. The inquiry should be made in such a way that an ordinary reasonable prudent man would do in the given circumstances and with the available resources.
- That, reasonable inquiry is a subjective concept and varies in each case. It depends on two things- circumstances of the case and the resources available for making the inquiry.

It is to be noted that the impugned concept of reasonable inquiry as a component in the defence of mistake of fact under the Indian law isn't as developed as it is in the United Kingdom or the United States of America. The judicial trends in India in this regards show that the "law of India states that the defendants can get discharged of their liabilities provided they show, to a reasonable extent, that they had committed the act in good faith".[51]

[48] Regina v. Prince, https://www.quimbee.com/cases/regina-v-prince--2, last checked on April 14, 2020.
[49] *Id.*
[50] *Supra* note 48, at 10.
[51] Keso Sahu v. Saligram Shah, (1977) CriLJ1725 (Ori).

VI. CONCLUSION

The defence of mistake of fact is an often used and is an important general exception that a lot of accused takes in order to avoid penalisation. As we have already seen, mistake of law is not allowed in Indian laws. The concept of reasonable inquiry is still a grey area in the Indian criminal laws. This concept is well developed in the UK and the USA. Many scholars are of the opinion that reasonable inquiry in the defence of mistake is an absolutely important component- as important as the element of good faith. There can be no defence of mistake of fact unless good faith is established. Similarly, in order to eliminate the elements of negligence and recklessness, it is important that the defence counsel establishes the fact that reasonable inquiry had been conducted, owing to the given circumstances and available resources.

As we have already seen, there are not many cases in India that highlight the concept of reasonable inquiry. They haven't necessarily talked about the importance of the accused taking essential steps for believing that in the given circumstances of the case, there was a necessity of committing the said act. Though great importance is given to genuine and reasonable mistakes of fact committed by the accused in the worst of circumstances, on a judicial level, there hasn't been a lot of discussion regarding the need or importance of conducting "reasonable inquiry" by the accused. Thus, it won't be wrong in concluding that "Reasonable Inquiry" as a judicial trend or as an important element of defence of mistake of fact is still an area of criminal law which needs major consideration from judiciary of India in order to reasonably assess the authenticity of the mistake committed by the accused based on a certain beliefregarding a certain set of circumstances which necessitate the commission of such an act that was essential in the situations pertaining to the case.

A thorough assessment of the defence of mistake of fact and the component of "reasonable inquiry", can very well establish that this is one area of criminal law which requires more consideration i.e. it is a concept that has nowhere been explicitly defined. Rather, this is a concept which actually is quite subjective in nature i.e. it is a case of determining it on the basis of judicial trends. The establishment of "reasonable inquiry" by the defendant claiming the defence of mistake is one that can in no way be found out by virtue of a particular standard rule, it is one that is to be proved by the ascertainment of the facts and circumstances of each case

pertaining to the claim of mistake of defence made by the defendant before a court of law.A standard rule for determining what can exactly constitute “reasonable inquiry” by person claiming the defence needs to be established because determining it subjectively in each and every case is a tedious task.