IGNORANTIA JURIS NON EXCUSAT

Ignorance of Law is no Excuse

*R. L. Narasimham**

THE ROMAN MAXIM that ignorance of law is no excuse seems to hold morally innocent persons criminally liable relying on an obvious that everyone is presumed to know the law. The ludicrous nature of this fiction will be apparent in the well-known observations of Lord Mansfield : "It would be hard upon the profession (*i.e.* legal profession) if the law was so certain that everybody knew it"[1] Eminent jurists have therefore, discarded this fiction and stated that the true rule is not that everyone is presumed to know law but that ignorance of law will not be permitted as an excuse. The relentless rigour with which this maxim has been generally applied in all criminal proceeding has been justified by well know writers on jurisprudence on three grounds :

(1) Law, in theory, at any rate, is definite and knowable. Hence innocent and inevitable ignorance of law is impossible.

(2) The ground of necessity—if this maxim is relaxed every accused will take the plea that he did not know the law and it will be almost impossible for the prosecution to show affirmatively that he knew the law in question. Hence for the sake of any benefit derivable from a relaxation of this maxim it is not advisable to weaken the administration of justice by making liability dependent on well nigh inscrutable conditions touching knowledge or means of knowledge of the law.

(3) Criminal law rests on certain moral principles and hence when a person breaks the law though he may be ignorant of the provisions of law he knows very well that he is breaking the rule of right.[1]

(4) Though these grounds are undoubtedly valid and weighty nevertheless modern jurists recognise

> that they do not constitute an altogether sufficient basis for so stringent and severe rule.[2]

Thus, the principle that law is definite and knowable is so far-fetched in modern conditions as to be quixotic.[3] Again, the difficulty of affirmatively proving the knowledge of law on the part of the accused may be surmounted

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* Member, Law Commission, formerly Chief Justice of the Orissa High Court and the Patna High Court.

1. *Jones* v. *Randal* [1774] 98 E.R. 956.
2. *Salmond on Jurisprudence* 395 (12th edn.).
3. *Id.*

by providing that the accused should bear the burden of establishing non-negligent ignorance. Thirdly, the concept that criminal law is based on certain moral principles will be wholly inapplicable for certain regulatory offences especially of a technical nature. As pointed out by Salmond

> that he who breaks the law of the land disregards at the same time the principles of justice and honest, is in many instances far from the truth. In a complex legal system a man requires other guidance than that of common-sense and a good conscience.[4]

Salmond therefore, points out (in the latest edition) that there is no sufficient justification for applying the maxim in its full extent with uncompromising rigidity and that certain exceptions to it are in course of being developed.

European scholars have therefore, re-examined the problem arising out of the rigorous application of the maxim and have suggested relaxations in special circumstances. In England, the subject has been dealt with at great length by Glanville Williams in his book on Criminal Law.[5] The learned author observes :

> A more specific way of resolving the problem, which is gaining most favour among critics of the present rule, is that a distinction should be drawn between crimes resting upon immemorial ideas of right and wrong, where it is the business of the citizen to know what he may legally do, and mordern regulatory offences of which the citizen would not normally know unless there is something to put him on enquiry.[6]

As no comprehensive codified penal law exists in England, judges have some discretion to relax the rigour of this maxim in exceptional cases. Thus in the well-known case of *Wilson* v. *Inyang*,[7] an African who had lived in England for two years began to practise as a naturopath physician declaring himself to be "N.D., M.R.D.P." though he was not a registered medical practitioneer. The High Court acquitted him of the offence under section 40 of the Medical Act on the ground that he was within his right in so practising. Smith and Hogan while commenting on this decision observe :

> The mistake which Inyang made seems to have been a mistake of law for he knew all the facts and the question whether he was entitled to describe himself as he did was one of law.[8]

Thus, in England any serious injustice that may arise out of the strict application of the maxim is avoided by the development of case law. Nevertheless, recently the English Law Commission (which is engaged in

4. Hall, *General Principles of Criminal Law* 378 (2nd edn.).

5. Salmond *Op. cit. supra* note at 55, Glanville Williams, *Criminal Law* ch. 8 (2nd edn.).

6. *Id.* at 292.

7. [1951] 2 All E.R. 237.

8. Smith and Hogan, *Criminal law* 130 (2nd edn.).

codifying the criminal law) has taken up this subject and in its working paper has formulated certain questions for eliciting opinion.

In the United States of America the "due process clause" gives relief to an innocent accused. Thus in the case of *Lambert* v. *California*,[9] the United States Supreme Court held that the due process clause of the Constitution prevented the conviction of a person for an omission in breach of a statutory rule which he neither knew nor would have known. Jerome Hall[10] and Perkins[11] have described in detail the various circumstances where the maxim was not strictly applied. Thus,

> Where the offence charged is violation of which forbids the doing of certain things without securing the permits from a specified commission or department the *bona fide* reliance upon advise received from that very Commission or Department to the effect that contemplated action falls without the scope of the statute and hence requires no permit has been held to bar conviction.[12]

It has also been held that where a mistaken belief as to the law was based upon a decision of a lower court, prior to the contrary determination of a higher court such a plea was a good defence. Again, "where specific intent is essential to crime, ignorance of law may negative the existence of such intent."[13] Where special mental element is required for guilt such as the doing of a thing maliciously, corruptly, wilfully or knowingly, ignorance of law may in certain cases negative the existence of such intent. Hall, after reviewing the entire subject, has pointed out the necessity of legislation with a view to relax the rigour of this maxim for minor offences especially those of a regulatory nature. To quote his own words:

> Since the questions requiring determination, in order to demark the exact area within which ignorance of the law is a defense, are beyond the provided of the judicial function, the need for legislation is clear. A likely area would include recent mis-demanors punishable only by small fines, various ordinance and technical regulations of administrative boards Here actual knowledge of the illegality should be required. It seems necessary to retain the presumption that there was such knowledge, allowing the defendant to introduce evidence tending to prove his ignorance or mistake of the law, but placing the final burden of proving mens rea, in the above sense, upon the State.[14]

The American Model Penal Code contains the following provisions on the subject ;

> (1) ignorance or mistake as to a matter of fact or law is a defence if :
> (*a*) the ignorance or mistake negatives the purpose, knowledge, belief,

9. (1957) 355 U.S. 225.
10. Hall *Op. cit., supra* note ch. 11.
11. Perkins, *Criminal Law* ch. 9 (1957).
12. *Id.* at 813-14.
13. *Id.* at 816.
14. Hall *Op. cit., supra* note at 404.

recklessness or negligence required to establish a material element of the offense ; or

(*b*) the law provides that the state of mind established by such ignorance or mistake constitutes a defence.

(2) Although ignorance or mistake would otherwise afford a defence to the offense charged, the defense is not available if the defendants would be guilty of another offence had the situation been as he)supposed. In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offence of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed.

(3) A belief that conduct does not constitute an offence is a defense to a prosecution for that offence based upon such conduct, when :

(a) the statute or other enactment defining the offence is not known to the actor and has not been published or otherwise reasonably made available to him prior to the conduct alleged ; or

(b) he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment ; (iii) a judicial decision, opinion or judgment, (iii) in administrative order or grant of permission ; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offence.

(4) The defendant must prove a defense arising under sub-section (3) of this section by a preponderance of the evidence.[15]

In those countries where penal law has been codified, there is a tendency in recent times to make express provisions dealing with mistakes of law.[16]

The revised Swiss Penal Code (1951) explicitly provides that article 18, (on mens rea) is applicable to contraventions (offences susceptible of fines

15. The proposed Official Draft (1962).

16. The Draft German Penal Code, 1962, art. 21 says :

> Error about the Prohibition.—Anybody who in commiting the act erroneously assumes that he is not acting unlawfully, acts without guilt *if he cannot be blamed for the error.* If he can be blamed for the error, the punisnment may be mitigated in accordance with Article 64, paragraph 1.

Draft Japanese Penal Code, 1961, Art. 20(2) says :

> A person who acts without knowing that his acts are not permitted by law shall not be punished, *if there is adequate reason for his ignorance.*

In the Norwegian Penal Code, (corrected upto 1961), § 57 is as follows :

> If a person was ignorant of the illegal nature of an act at the time of its commission, the court may reduce the punishment to less than the minimum provided for such an act, and to a milder form of punishment, provided the court does not decide to acquit him for this reason.

The Columbian Penal Code, 1936, art. 28(2) is as follows :

> There is no liability when the deed is committed in full good faith under *insuperable ignorance* or through assential mistake of the fact or of law not due to negligence.

The Austrian Penal Code, 1966 Section 2(e), in as follows ;

> Hence an act or omission is not to be regarded as a felony its such an error occurred as ro prevent *recognition of the felonious character of the act.*

or arrest but not prison sentences) and that at least criminal negligence is required for a conviction based on other federal law (public welfare offences article 333-3). In Netherlands a theory of culpability similar to that prevailing in Switzerland has been introduced in 1952. In Belgium also after 1940, invincible mistake of law is a good defence for any offence.

> No punishment without guilt, no guilt without fault, the author of an act is convicted because when acting he knew or could have known that he acted unlawfully.[17]

In these countries, the theory of Simon and Von Liszt advocated by the Fourth International Congress of Comparative Criminal Law seems to have been substantially adopted. According to this theory :

The well-known Norwegian jurist, J. Andenaes[18] has pointed out the elasticity of section 56 of Norwegian Penal Code and referred to various circumstances where an accused may be completely acquitted for mistake committed in ignorance of law.[19]

It may, therefore, be stated broadly that whereever the Penal Code has been recently revised or in the process of revision, efforts have been made to relax the rigour of this maxim and to provide (in the Code itself) for exceptional circumstances where mistake of law may be a good defence. The language of the statutes is so framed as to cast this burden on the accused thereby making the maxim, as it were, a mere rebuttable presumption. Even in those countries, where there is no comprehensive Penal Code, as in England and the United States, judges have had no hesitation in acquitting the accused in exceptional cases where ignorance of law would be a good defence. Even in those countries codification of penal law has been taken up and the authorities concerned are carefully considering how this provisions should be drafted.

In India, the Penal Code of Lord Macaulay, by express provision (in sections 76 and 79) excludes mistake of law from the scope of the exceptions. The maxim is therefore, applied in all its rigour; but as no minimum

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17. Muller-Rappard, "The Mistake of law as a defence," 36 *Temple Law Quarterly* 261 (288)

18. J. Andenaes "Ignorantia Legis in Scandinavian Criminal Law" in *Essays in Criminal Science* ch. 8 2nd edn. Gerhard O.W. Muller ed.

19. Jerome Hall ed., *Criminal Law and Procedure, Cases and Readings* 593 (2nd edn).

It may be interesting to refer to Corpus Juris Canonici, promulgeted by Pope Benedict, XV in 1917.

Canon 2202, 1.=Violatio legis ignorantae nullatenus imputatur, si ignorantia fuerit inculpabilis.

This principle, simply stated, means that ignorance of the law is an excuse if the ignorance is not the fault of the agent.

The imputability of a crime committed through ignorance is determined by the degree of culpability in the ignorance,

punishment is provided in the penal laws of India as a general rule, the court has considerable discretion in passing nominal or lenient sentences, where there is non-negligent invincible mistake of law. But it any proposal for penal law reform in India this question has to be grappled adequately bearing in mind the trend in other countries. The conservative view will perhaps be to the effect that the existing provisions should be left undisturbed, and that where there is exceptional hardship it may be left either to the discretion of the court to pass a nominal sentence or to the executiue to exercise their prerogative of pardon or remission of sentence.

The reformer, however, may not be satisfied with such a negative approach to the whole question. Once it is found that the basic grounds on which the maxim is based are no longer applicable for all classes of offences, legislature must intervene with a view to provide for complete acquittal in proper cases. Hall has referred to some cases where though the offence of bigamy was committed due to mistake of law, the courts passed a nominal sentence of one days imprisonment or one week's imprisonments.[20] But this provoked an interesting query from a New Zealand judge "why then should the Legislature be held to have wished to subject him to punishment at all."[21] This observation is strengthened if it is remembered that the conviction in a criminal case is itself a serious stigma on a person, add a mere reduction or sentence may not be sufficient for his complete rehabilitation. Thus, under explanation 2 to section 54 of the Evidence Act the conviction is evidence of bad character and may be used against an ex-convict throughout his life. Hence, though the courts' discretion to pass nominal sentences in appropriate cases should remain in tact, nevertheless in any proposal for reform of the penal code to suit modern ideas of crime and punishment it seems necessary to make an express provision for the complete acquittal of the accused on the ground of mistake of law in exceptional circumstances.

According to Hall,

> Recent misdemeanours punishable with fines, ordinances and technical regulations of an administrative Board should be separately classified and actual knowledge of the illegality may be insisted upon. The burden of proving ignorance or mistake of law should however rest with the accused.[22]

The broad principle of classification is worth adopting in India also. It has also been suggested by Glanville Williams.[23] The main test for the purposes of classification of offences for this purpose may be the test of "knowability" of the penal provision and not necessarily the actual knowledge of the same.

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20. Hall, *Op. cit.*, *supra* note 3 at 398-99.
21. *Id.* at 399.
22. *Id.* at 404.
23. See *supra*.

In India there is a marked difference between Acts of legislature on the one hand and the mass of legislation known as "subsidiary legislation", on the other. Acts of legislature are generally introduced in the form of bills, discussed in the legislatures, widely advertised in the press and even after being passed by the legislatures are generally available as priced publications from various book-sellers. Anyone, who is vigilant and diligent can without much difficulty know the relevant provisions of the law. The test of knowability, may, therefore, be said to be fully satisfied in respect of Acts of legislature.

On the other hand, "subsidiary legislation" will not satisfy the test of "knowability". Rules, orders, bye-laws and notifications made under parent Acts are generally published in the gazette and are not easily available. Even authorized do not have uptodate copies of the same. The government also do dot publish uptodate copies of statutory rules, orders and notifications. Some of the notifications are not issued by the government but by the subordinate authorities. For instance, unauthorized possession of any excisable commodity *ganja*, opium, *Bhang*, liquor *etc.*) above the maximum permissible limit is made an offence under the Excise Acts. But the maximum limit of permissible possession is fixed from time to time by the board of revenue by notifications and the limit may vary from district to district. Hence a person in unauthorized possession above the limit, contravenes the notification, though he is punishable under the parent Act. Similarly, bye-laws are issued and amended from time to time by local authorities and the contravention of the bye-laws is punishable under the parent Act. Again, some of the notifications issued under the Foreign Exchange Regulations and the Sea Customs Act are neither known nor easily knowable. It is not unusual to find even the departments in charge of administration of a statute not being fully aware of the latest amendments to some of the notifications, especially where these are changed with lightning rapidity and the amendments are so drafted as to be unintelligible without a careful scrutiny of the original provisions. Perhaps, a research scholar digging into ancient gazette notifications and exhuming an old rule, bye-law or order may be in a position to know the latest law on a subject. But it will be quite unrealistic to expect even an ordinary prudent and vigilant citizen to reach that standard. There are also some reported decisions where even High Courts have been misled by omission of the counsel for the government (due to his owni gnorance) to place before the court the latest notification on a subject. Thus, when judged in the light of the test of "knowability". subsidiary legislation in India can be reasonably classified and separated from the Acts of legislatures for the purpose of relaxing the rigour of the maxim. It appears that the test of "knowability" was considered very important even in Roman times and hence minors, women, farmers and soldiers were exempted from the operation of the maxim.

It is true that ultimately the offence committed would be punishable under the parent statute but where the essence of the offence consists of contravention of a rule, order, bye-law or notification, the law should permit the accused to show that he could not even with due diligence have been aware of those provisions. By thus casting the burden on the accused the ground of necessity[24] for retention of the maxim will still be maintained in its effectiveness.

The main advantage of such a law reform may be put in the words of Glaville Williams as follows:

> To recognise this defence would have the considerable advantage of compelling the departments of Government to make a oontinuous effort to bring regulations to the notice of those affected. It would probably have a beneficial effect on the clearity with whieh rules are drafted, the frequency with which they are revised in the light of judicial interpretations and the general effectiveness of legal regulations.[25]

These observations would apply with equal force in India. If this suggestion is accepted, the authority concerned will be compelled to produce revised editions of the subsidiary legislation frequently and make them easily available to the public as priced publications.

The following draft is suggested for this purpose :

> 79A. Notwithstanding anything contained in sections 76 and 79, nothing is an offence where the act alleged against an accused is contravention of a provision of a rule, by-law, order or notification made under an Act of Legislature, if at the time of such contravention the accused could not have with due diligence been aware of the said provision.

As to what will be "due diligence", no general rule can be stated and it should be left for case law to clarify the position. The accused's status in society, his educational and mental abilities, the recent nature of the rule, the fact that the accused is a stranger and the fact that the law is so ambiguous as to render its meaning doubtful may all amount to due diligence. Once the Code is amended as suggested above, the High Court and Supreme Court will in due course lay down certain tests for this purpose.

A radical law reformer may perhaps be not satisfied with the aforesaid proposal on the ground that it does not go far enough. He may prefer a comprehensive provisions in the lines of the American Model Penal Code (para 6) laying down in greater detail, the various circumstances in which mistake of law will be a good defence. But his proposal is open to the objection that it will be impossible to be exhaustive in the enumeration of the details and that considerable discretion should be left

24. See *supra* at
25. Glanville Williams, *Op. cit.*, *supra* note 5 at.

with the courts. In some of the foreign codes, this has been achieved by using phrases such as : "if he cannot be blamed for the error;" "if there is adequate reason for his ignorance;" "insuperable ignorance of law not due to negligence;" "ignorance for which he is not responsible;" "where his mistake is based on reasonable grounds."

Thus, if sections 76 and 79 are to be amended, what should be the nature and extent of law reform is for the jurists to answer this question.