

Continental law with its traditional types of culpability has little to teach. It is based on largely obsolete psychology. Perhaps the culpability types under the Study Draft are more in tune with modern behavioural insights, at least in their core meaning if not in all details of definition. Thus, rather than attempting to present Continental doctrines of culpability, a few somewhat more specific observations of the draft's provisions concerning culpability will be made.

#### B. STABILITY VERSUS INSTABILITY OF THE MENTAL ELEMENT OFFENSES

In the view of a number of civil law lawyers, including this writer, the A.L.I. Model Penal Code has made an improvement over traditional Continental thought on the mental element in individual offenses. Its drafters realized that the mental element of a single offense may vary in regard to various definitional elements. (See comments to section 2.02 of the A.L.I. Model Penal Code.) If one can say that X desires to have intercourse with his sister (purpose as to intercourse) it is psychologically grotesque to say that he desires or wants her to be his sister. In incest cases it is knowledge that the woman is X's sister that suffices. If this writer reads section 302(3) (a) of the Study Draft correctly, the latter seems to have retained the conventional view that culpability requirements remain stable in regard to one offense.\* If this is so, the A.L.I. Model Penal Code approach would seem preferable.

#### C. "TRANSFERRED INTENT" AND "ABERRATIO ICTUS"

In medieval Continental decisions and scholarly opinion it was not required that intent be directed to a definite object. Rather "general intent" to cause harm sufficed. Under this view, in the "erroneous hit" (aberratio ictus) situations, X was guilty of intentional assault of B, if he intended to injure A but missed and hit B. It is settled in modern civil law that intent must be directed to a specific object as required by statutory definitions of offenses. Accordingly, "erroneous hit" situations are treated in the civil law exactly as under the draft. X is guilty of reckless assault on B and attempted assault of A.

#### D. PROVISIONS ON MISTAKE AND IGNORANCE<sup>9</sup>

Until recently, civil law systems have opposed the distinction between mistake of fact and mistake of law, but the distinction has of late either changed its meaning or come under serious criticism. We shall leave aside doctrines that would equate the two types of mistakes.<sup>10</sup> What remains is the changed meaning of the opposition of the two kinds of mistakes. Today the distinction is usually made between mistake about circumstances falling within definitional elements of an offense, and mistake about the fact that one's conduct is prohibited by

<sup>9</sup>The Final Report added "except that where the required culpability is intentionally, the culpability required as to an attendant circumstance is 'knowingly'" to study draft section 302(3) (a).

<sup>10</sup>For the sake of simplicity, mistake and ignorance are not distinguished in the following text.

<sup>11</sup>As an example of this radical and quite perceptive view in the common law world, see STRAZER, *supra* note 2, at 370.

law. The first type is called "mistake of fact description" (Tatbestand-sirrtum), the other "mistake regarding prohibition" (Verbotsirrtum). As regards mistake of fact description, it is irrelevant whether the error relates to fact perception or norm application. If an element of statutory crime description calls for a legal evaluation, erroneous norm application is treated just as an ordinary error of "factual" perception. This is the reason why the old labels "mistake of fact" and "mistake of law" may be misleading and are increasingly replaced by new terms. The Study Draft still refers to factual and legal mistake, but it is obvious that the actual opposition comes close to the new Continental distinction. (For example, section 304 recognizes legal error if warranted by a crime definition.)

Important differences between the Study Draft and civil law seem to follow from the draft's provisions on error concerning ordinary and affirmative defenses, inasmuch as justifications and excuses from Part A are concerned. For the sake of simplicity we must disregard important procedural differences stemming from the fact that Continental excuses and justifications are not defenses from a procedural point of view.<sup>11</sup> Remaining thus on purely substantive law grounds, differences still seem to be quite substantial. Under modern Continental law, mistake is treated equally no matter whether excuses, justifications or definitional elements of an offense are in issue.<sup>12</sup> Let us quote as an example the provision of section 20 of the 1962 West German Draft Penal Code:

Anybody who in committing an act mistakenly assumes a state of affairs which would justify or excuse that act, shall not be punished for intentional [in the Continental sense] commission. He will be punished for negligence [in the Continental sense] if he can be blamed for such mistake, provided that negligent commission is punishable at all.

Compare the wording of section 302(3) (d) of the Study Draft to the German Draft. Add the provision of section 303 of the Study Draft. The gap seems to be wide. Upon analysis, however, the two systems are not too far apart.

As regards ordinary defenses, section 609 of the Study Draft<sup>13</sup> makes the reasonable "mistake of fact" applicable to almost all Continental justification grounds. In view of this, the expression in section 302(3) (d) that "no culpability is required with respect to facts which establish that a defense [defined in Part A] does not exist" would probably be criticized by Continentals as confusing.

<sup>11</sup>Some consequences of ordinary defenses (for example, waiver) would be unacceptable to all Continental procedures, while affirmative defenses violate at least two basic postulates of Continental procedure. The principle of "active court" requires that all issues of relevance in the case be raised "motu proprio" by the court, while the presumption of innocence as understood by Continentals cannot be reconciled with the reversal of the burden of persuasion. Very dogmatic about these two principles, Continentals allow almost no exceptions to them in case of serious crime.

<sup>12</sup>This is again a slight oversimplification. True, some systems bar all distinctive treatment. (E.g., Alternative West German Draft Penal Code § 19 I (1968).) But often a differentiation is made among various types of "mistake of law." Thus, our statement in the text applies with precision only to "factual" mistake.

<sup>13</sup>Study Draft section 609 is Final Report section 608.

As regards situations classified as affirmative defenses, the actual difference is again not as pronounced as it might appear. Some situations (for example, section 1306(4) of the draft) would probably be regarded by Continentals as purely objective conditions for liability (see *supra*, I-A), and thus mistake would not excuse. Also, while under the draft mistake of law is in limited situations exonerating and is treated as an affirmative defense, in the majority of civil law jurisdictions mistake of law is no excuse at all. Mistake as to a duress situation would probably be declared to be an excuse by European scholars, but would hardly ever be recognized in actual cases.<sup>13</sup>

So far discussion has centered on mistake of fact. Mistake as to prohibition (mistake of law) is variously treated in the civil law. Most jurisdictions still cling to the maxim that "error of law is no excuse." But, while the mistake cannot lead to an outright acquittal, if justified it may cause reduction or even remission of sentence. (See article 5 of the Italian Penal Code, article 3, 233 of the Austrian Penal Code, article 19 of the Yugoslav Penal Code, French decisional law.) Almost everywhere scholarly opinion which criticizes this traditional view can be found. Even so, opposition to change is quite strong. More than anything else it is based on fears of the evidentiary difficulties which would arise if the excuse were admitted. The dogmatic rigor with which the presumption of innocence is interpreted in the area of burden of proof precludes the shifting of the burden of proof to the defendant on this specific issue.

Departures from conventional views can, however, be observed in Switzerland,<sup>14</sup> West Germany<sup>15</sup> and in Eastern European countries other than Yugoslavia. Leaving aside differences of detail, the idea as developed in the West is roughly as follows. If the defendant has mistakenly assumed that the conduct he engaged in is not prohibited and his mistake cannot be blamed on him, he must be acquitted. If, however, the mistake is due to his fault in not acquiring the necessary knowledge, he must be convicted and punished according to the degree of his fault (practically, negligence). The idea as developed in Eastern Europe is somewhat different. Here one of the prerequisites of criminality is that the conduct falling under the statutory crime definition be "socially dangerous." Unless it may be attributed to negligence, mistake as to "social dangerousness" of one's conduct excuses, while mistake as to the legal prohibition does not.<sup>16</sup>

Where does the Study Draft's solution to the "mistake of law" problem fall on the spectrum of these different solutions? While more "conservative" than, for example, West German ideas, the provision

<sup>13</sup> See JESCHECK, LEHRBUCH DES STRAFRECHTS, 335-336 (1960) [hereinafter cited as JESCHECK], with reference to court cases. Some jurisdictions (for example, Yugoslavia) have no provisions on duress in their legislation.

<sup>14</sup> See articles 19 and 29 of the Penal Code, as well as decisional law. See SCHWANDER, DES SCHWEIZERISCHE STR 93 (1965).

<sup>15</sup> This is, since 1952, the attitude of West German courts. It has been adopted by the 1962 Draft Penal Code.

<sup>16</sup> Soviet legislation is silent on the matter, but the view expressed in the text is that of prevailing opinion. Compare KIMONENKO, ZNACHENIE OSIBIEKI PO SOVETSKOMU UGOLOVNOMU PRAVU 85 (1952). This view has been adopted by some Eastern European legislation. See article 24(2) (3) of the 1961 Hungarian Penal Code.

of section 610\* of the Study Draft is still ahead of typical Continental jurisdictions which reject the excuse altogether. True, the reversal of the burden of proof in regard to mistake of law is without precedent on the Continent. But it may be argued that any defense is better than none.

#### E. LIABILITY OF CORPORATIONS AND OTHER ORGANIZATIONS

Since the Enlightenment in the eighteenth century the view has prevailed on the Continent that criminal law should not apply to legal entities. Arguments advanced in favor of this proposition are mostly dogmatic: corporations cannot act, they have no mind, whereas "conduct" and a "guilty mind" are prerequisites of criminality. The most often advanced pragmatic argument is that punishment falls on innocent members of the corporation. No matter what the value of these arguments, the principle still holds in civil law legislation from the Soviet Union to West Germany to Spain. Practical necessities, notably for misconduct in the field of economic life, have caused the relaxation of the principle in only a number of jurisdictions. Thus, for example, in France the maxim "societas delinquere non potest" is riddled with exceptions. Typically, Continental jurisdictions have chosen another approach to the practical need to punish organizations in some instances. Punishments are imposed for offenses which are not considered criminal. Such is, for example, the case in West Germany and Yugoslavia. The types of punishments (and "measures" in the civil law jargon) imposed for noncriminal offenses are numerous. Prominent, however, are stiff fines and giving publicity to the conviction.

#### V. DEFENSES<sup>17</sup>

##### A. THE USE OF DEADLY FORCE

Most modern civil law Codes have consolidated self-defense, defense of others, prevention of crime, protection of property and similar narrowly conceived defenses into a comprehensive, broadly couched defense. Special provisions are usually found in statutes dealing with use of force in law enforcement. This is the reason the use of deadly force is discussed by Continentals in terms which seem somewhat general to American lawyers. The issue on which Continental legislation is dissimilar is whether some kind of proportionality is required between the value protected against the attack and the damage caused by the protection. The minority view is best illustrated by West German law. There is an absolute right of defense, provided that the defense activity is the (least injurious) only way of protecting a value attacked. Thus, for example, deadly force may be used if there is no other way to prevent a man from carrying away your briefcase.<sup>18</sup> In most civil law jurisdictions, however, deadly force may be

\*Study Draft section 610 is Final Report section 609.

<sup>17</sup> Some defenses (such as mistake of law) have already been discussed in other contexts (see *supra*, IV, D).

<sup>18</sup> Compare Jeschke, *supra* note 13, at 230. This position seems to contradict article 2, IIa, of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1960). German lawyers maintain, however, that the Convention is binding only on government agencies, not on private persons.