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**Certain dogmatic issues concerning mistake in
criminal law in the light of Hungarian case law**

PH.D. DISSERTATION THESES

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I. Brief summary of the research objective

The legal literature on mistake in criminal law is very poor, and the most extensive work on the subject in our country was published more than a century ago.¹ In view of the fact that it has long been a very poorly treated legal institution in the criminal law literature, I found the treatment of mistake to be an ideal subject for dogmatic examination, a new approach and further reflection.

Thus, as the title of the dissertation implies, my primary aim is to deal with the dogmatic issues of mistake in criminal law, on which a more in-depth and extensive analysis has long been published in our national literature. At the same time, I will endeavour to give similar weight to the application of this legal institution in Hungarian case law, to which the second part of the title refers. Therefore, both on the theoretical and the practical level, I will try to develop my own opinion. Thus, in both areas of inquiry, I express my agreement with the solutions which I continue to advocate in the form in which they are presented. Nevertheless, the formulation of observations must always be present as an intrinsic objective of research.

Consequently, in this dissertation, I strongly advocate my views that take a critical approach to the dogmatic or practical resolution of a sub-issue. In these cases, I will express my dissenting views and try to convincingly argue the case for them. Nevertheless, this does not mean in absolute terms a rigid rejection of the views of other thinkers, for I believe that better solutions can be found by a convergent process of argument and counter-argument. Indeed, scientific research is not an end in itself; we all do it because we all care about jurisprudence and its development. Thus, I trust that both theoreticians and practitioners will find the conclusions of this work useful and worthy of consideration when they need to explore the mistake in more depth in their work.

In my research, I will first deal with the legal-historical roots of the legal institution, as Francois Baudouin (Balduinus) pointed out in the 16th century: "Sine historia caeca est jurisprudentia."² For a legal institution that had its roots in Roman law deserves to be examined from a historical point of view. In addition, Balduinus' statement that legal history is necessary both to understand the dogmatic foundations of the mistake and to understand and draw the right conclusions from its codification is also valid. I will do the latter more closely at the beginning of the work, but I will also return to historical examination in several instances in relation to

¹ Bernolák Nándor: A tévedés tana a büntetőjogban. Kassa, 1910.

² Hamza Gábor: Comparative law and antiquity. Budapest, 1991, 41. English translation: jurisprudence is blind without its history.

the specific issues discussed. In doing so, I often draw attention to connections such as why, for example, error in objecto can be regarded as inherently *genus proximum* of error in persona, or why, for example, the Criminal Code makes a special provision for mistake of harmfulness to society to be based on ‘reasonable grounds’, when it does not do so in the case of the mistake of fact. I will then carry out a criminal law-specific analysis of the mistake and place it among the grounds for total exemption from criminal responsibility.

In this work, I will examine the method of identifying constitutive facts in the context of mistake of fact and the technique of relevance testing. This is essential for the application of the excusable mistake of fact. After the theoretical grounding, I will focus on case law and present a detailed analysis of court decisions, sometimes in the context of the irrelevance of the mistake and sometimes in the context of its relevance. In doing so, I will generally present cases that have gone through several instances of court, where discrepancies between the opinions of the courts of different instances are highlighted. I also repeatedly vote against the final decision in some cases, and point out, for example, practical dissonances where, although the grounds for the decision are based on the existence of a mistake, the acquittal is based on the act does not constitute a criminal offense and not on a ground for total exemption from criminal responsibility.

In discussing the named instances of mistake of fact, I will address several interesting questions. Thus, in addition to my concerns about the mistake in the number of victims, I will examine the actual relationship between *aberratio ictus* and the mistake. In addition to clarifying the relationship between error in objecto and error in persona, I develop detailed case variations on possible outcomes. In the context of *aberratio ictus*, I will engage in a further dogmatic reflection by presenting my own distinction between genuine and non-genuine *aberratio ictus*, while at the same time providing an analysis of *dolus generalis*.

In the context of mistake of law, I refer to its appearance in our domestic law as mistake of harmfulness to society and the relationship between the two. In addition to this, I will also place great emphasis on the question of the distinction between mistake of law and mistake of fact (in several cases analysing case law going back to the 19th century), and I will also carry out a relevant analysis of German legal literature in connection with this problem of interpretation. Thus, for the correct interpretation of the descriptive and normative elements of the facts, I will draw on the doctrine of “Parallelwertung in der Laiensphäre” and the German so-called “subsumption” mistake. In the excursus section, I will address the question of the factual knowledge mediated by the theoretical level of legal knowledge.

I will then discuss the domestic emergence of the concept of harmfulness to society and the interpretation of the mistake of harmfulness to society. In this way, I examine the relationship between consciousness of harmfulness to society and culpability, the formation of consciousness of harmfulness to society in the mind of the offender. I will then consider the mediating elements of the development of the mistake of harmfulness to society, such as the consciousness of the unlawfulness, immorality or dangerousness of the act, the conjunctive absence of which is necessary to invoke the mistake of harmfulness to society. In addition to critiques of the significance of these components, I will develop my own position and explore in more depth the 'reasonable grounds' of the mistake of harmfulness to society.

I will examine the mistake of harmfulness to society in the domestic application of the law in detail. I will concentrate on a detailed review of cases that have gone through several instances and will first try to classify them, on the basis of similar features, the facts of cases where the courts have not recognised the existence of the mistake of harmfulness to society. I will give the resulting case law sets a proper name.

The focus then turns to cases where judicial practice recognises the excusability of mistake of harmfulness to society, where I also aspire to concentrated set construction. At the same time, I will give examples of cases that demonstrate the volatility of jurisprudence, and I will criticise the sometimes excessively strict practical criteria, in particular the offender's knowledge of the complex background legislation or the guilt of a bona fide offender acting on the basis of a known practice of an authority. In addition, I will take a more detailed view in the context of an expansive interpretation of the practice of mistake of harmfulness to society and a more in-depth examination of the position of the perpetrator when the perpetrator's misconduct is based on the advice or decision of a person who is more professionally competent or acting on behalf of an authority.

As regards the interpretation of presumed grounds for exemption from criminal responsibility in the light of mistake, I take a minority position in favour of the proposed solution of presumed non-criminality by means of mistake of fact and point out that case law has not always been fully consistent as to which type of mistake applies in such cases, especially in the case of presumed justifiable defense.

I also examine the superior's order as a ground for total exemption from criminal responsibility, which is similar to mistake.

Finally, as regards the method of examination of mistake caused by negligent, I will highlight its partial difference from the examination of negligent commission of a crime and seek to examine more detailed case law. In doing so, I also expose the shortcoming of the jurisprudence that, in the often rigid rejection of the mistake of harmfulness to society, the court pays little attention to its possible negligence. As an excursus, I will discuss the case of praeterintention enclosed in a separate offense of negligence and the derivation of the distinction between negligence and accident from mistake.

In going around all these issues, I will try to draw conclusions that both theory and practice can usefully consider.

II. Brief description of the studies and analyses carried out, processing methods

After setting out the objectives, I will outline the methodological aspects of the thesis and the issues of structuring and the relationship between the topics analysed.

In my dissertation, I will try to provide a comprehensive treatment of the legal institution of mistake in criminal law within the framework of Hungarian criminal law. Therefore, as the title of my work indicates, my main focus will be on a dogmatic analysis. Thus, I will attempt to map and analyse the domestic literature as comprehensively as possible, presenting and analysing the opinions on mistake taken by the various authors and, where necessary, contrasting, agreeing with or criticising them.

Taking into account the fact that mistake promises to be a rewarding legal institution for dogmatic examination and further reflection, the dissertation is based on the doctrinal foundations of criminal law, but it is also emphatically practice-oriented. In itself, the formulation of dogmatic theses in the case of a legal institution that has also legal basis can only be of fuller benefit to jurisprudence if it also responds to problems of legal practice. In this way, the dissertation will develop a wide range of cases, in particular those which have been heard by several courts where possible. Nevertheless, the emphasis is qualitative rather than quantitative, so that the aim is not to present too many cases in an over-generalised way, but rather to examine in more detail fewer facts and related judicial decisions. In addition to the cases published in the Criminal Law Repository and the Criminal Law Digest, I will also study the case-law published in the High Court (Curia) decisions that have guided the case-law of the past decades and of the present day, thus concentrating on the practice of the highest judicial forum.

A doctoral thesis can only be a good summary of a topic if it only lists the views of different authors and extracts the practice. Thus, I will also make a special effort to synthesise the work, taking a position on both doctrinal and legal interpretation issues. My insights are sometimes individual dogmatic opinions or further dogmatic developments, sometimes reflections that raise practical concerns and suggest new perspectives. On several occasions I attempt to create new categories of classification.

At the same time, I will provide a brief justification as to why the dissertation lacks certain explorations of the topic.

The case-law analyses do not include a detailed analysis of the lower court case-law. Part of the reason for this is the limited scope, which is why I choose to do fewer but more in-depth analyses, preferably on judgments where the case has been heard in more than one forum. I consider this to be a reasonable consideration because the criteria for judging mistake are essentially the same in all cases from a theoretical point of view, so that further case law could perhaps colour the discussion in terms of the differences in the facts rather than in terms of the content.

In my work I focus on the domestic legal literature and practice, so I have not included a presentation of other national laws or a comparative analysis. The reason for this is also partly related to space constraints: the detailed examination of the domestic case law analysed alongside the detailed dogmatic analysis is of such a scale that an examination in the international context would also require a separate work. It is also negligible that if there has been no monographic treatment of the subject in the literature for a long time, it is more appropriate to turn the attention to a more detailed domestic analysis when dealing with it again. At the same time, I will also refer to foreign legal literature and case-law in support of certain findings, especially when it comes to the delimitation of mistakes of fact and law.

The doctoral thesis is structured in four parts on the subject of mistake in criminal law. The first part – shorter in proportion – deals with the legal history of mistake and the development of its codification in Hungary, as well as the essence and legal nature of mistake. It then devotes a larger part to a detailed dogmatic and practical analysis of mistake of fact, presenting the cases mentioned. The third and most extensive section deals with mistake of law, bearing in mind the traditional didactic view of the inseparable conceptual pair of mistake of law and fact, but clearly the predominant scope of this part is mistake of harmfulness to society. Bearing both types of mistake in mind, since the doctrinal considerations of negligent misconduct are similar, Part Four summarises its doctrines, with separate references to the types of mistake within.

The proportion of each section within the dissertation is also an intrinsic indicator of the depth and number of problems and issues related to each section. This also achieves the aim of the concept of proportionate coverage to the focus on the problem.

III. A brief summary of the academic results, their exploitation and potential for exploitation

The main objective of my doctoral thesis was to prepare a work on the subject of mistake in criminal law, which is essentially a work of criminal law dogmatics. At the same time, I have tried to place a similar emphasis mainly on the case law guidelines and case law decisions that shape the jurisprudence of today. In the course of this synthesis, I have formulated my own views, which are often contrary to the majority view or to recent case-law, but which I argue are more convincing. I have also tried to develop further legal dogmatic reflections and categorisations.

In its legal history of mistake in criminal law, I have pointed out that the roots of the legal institution can be traced back to ancient Eastern legal systems and Roman law, and were also present in later periods of legal history. In terms of domestic regulatory history, the regulation of the Csemegi Code was fundamentally reformed by the Act II of 1950 on the General Part of Criminal Code, adapting the *Schuldtheorie* in relation to the mistake of harmfulness to society. In relation to the latter, the Act V of 1961 on the Criminal Code adopted an interpretation similar to the *Vorsatztheorie*, and since then only minor formal changes have been made to the national regulation of mistake.

Then, in defining mistake, I pointed out that it includes, conceptually, ignorance. I explained that, in the old terminology, mistake was included in the system of obstacles of criminal prosecution as a ground for excluding imputability, but at the time imputability was only grammatically identified with criminal responsibility in the present sense, hence the seemingly dissonant classification criteria of our old jurists. At the same time, the old legal literature already adopted the correct view, which is still the guiding principle today, that mistake precludes culpability.

Constitutive facts are of importance in the examination of the relevance of mistake of fact, which may refer to facts contained in special or general provisions (for example a ground for total exemption from unlawfulness) and to facts which are only indirectly related to the facts, but they have in common that they are in concreto as criteria of the *actus reus*, in relation to

which we cannot expect apodictic knowledge from a logical point of view. I have developed a set of outcomes that can be addressed by the application of mistake of fact, in which I have considered six different categories of cases in which outcomes are given instead of a finding of intentional criminal offense. I then analysed the use of mistake of fact in recent case law through detailed examples.

In the context of the cases of mistake of fact, I have shown that error in objecto is originally the genus proximum of error in persona, i.e. it is to be understood that in the latter case the perpetrator is also mistaken in the object of the offense, taking into account the passive subject included in the concept of the object of the offense. In defining error in objecto or persona in a broad sense, I have also included cases where the conduct, the object and/or the perpetrator are only potential in a criminal law sense. In my thesis, I have therefore elaborated theoretical variations on this concept and their solutions in nine points. I pointed out the relevant jurisprudential problem, namely that, by mistake in the number of victims, a return to correct dogmatic propositions is necessary in the case law that objectifies and follows unstatedly practical criteria. In such cases, the perpetrator is mistaken about the number and identity of the victims, and ignoring this fact *contra legem* invalidates the justification for the mistake. I have shown that the unsuitable attempt ultimately implies a reverse mistake, since the perpetrator is unaware of the fact that the object, instrument or method is unsuitable to complete the criminal offense. I have further concluded that reverse mistake can theoretically give rise to an attempt to commit an offense on an unsuitable object if the offender commits the offense with mistaken knowledge of a fact which, if it existed, would be relevant.

In comparing error in objecto/persona and *aberratio ictus*, I pointed out that in the former the perpetrator is already in mistake when he starts the offence, but in the latter he is not and directs the offence to the specific object(s) he wishes to harm. In order to narrow the scope of the examination of *aberratio ictus*, I have proposed the introduction of genuine and nongenuine *aberratio ictus*, genuine *aberratio ictus* being when the offender injures, for a reason arising in the course of the commission of the offence, an object other than the object actually targeted, and where the offender's negligence at least extends to that object. I then proceeded to a more in-depth dogmatic discussion of the relationship between *aberratio ictus* and mistake – which, in my opinion, is overrated – during which I also pointed out the connection that there may be justification for an interpretation according to which, in terms of stages, the bridge between completion and attempt is served ontologically by a reverse mistake existing in the perpetrator's consciousness, since, if the facts he believes to be true exist, he expects to carry out his crime

to completion. This may also be true in cases where an external cause diverts the direction of the perpetrator's conduct in the opposite direction (quasi-negative *concausa*), contrary to the perpetrator's conception, which can be understood as a reverse mistake in the causal relationship. In discussing the cases mentioned above, I also examined *dolus generalis* in connection with the latter, but I focused on the relevant mistake of fact.

Mistake of law in our domestic law was interpreted in the Csemegi Code, where its irrelevance had to be interpreted to the provisions of the Criminal Code, all other mistake of law were treated as mistake of fact in our older practice. Today, mistake of law has lost much of its relevance in criminal law *per se*. From a criminal law perspective, it should be understood narrowly as a mistake in the criminal law and, in this context, as a mistake in the practice of interpreting the criminal law. The consequence is that the mistake in law thus correctly understood is mainly a mistake in the specific criminal law provision in the general or special part of the criminal law.

In distinguishing between mistake of law and mistake of fact, I have pointed out the following. In the recognition of descriptive and normative elements of fact, the former generally involves a sensory perception, while the latter involves a conceptual evaluation, which, according to the German doctrine of “*Parallelwertung in der Laiensphäre*”, must be interpreted as the perpetrator's recognition of the social and legal significance of the element of fact through the reality of life. Closely related to the latter is the mistake of subsumption, also of German origin, whereby the perpetrator, although recognising the factual elements of his acts, incorrectly subsumes them under a legal concept defined in the facts. In this regard, several levels of subsumption may arise. Namely, if the perpetrator does not subsume the passive subject with neutral qualifications into the conceptual circle of a police officer based on the reality of life, this is a mistake of fact. Nevertheless, if the perpetrator does not subsume the police officer into the conceptual circle of an public official, this is rather a mistake of law. In this context, I have highlighted the interesting situation in which, in my view, knowledge of the facts can be mediated by legal consciousness itself, especially in relation to facts whose actual factuality can be determined by means of complex procedures (for example, the white powder in the bag is acetorphine, which is also a drug). In this context, I have demonstrated by means of case-law examples that it is sometimes not even possible to determine clearly in judicial practice what kind of error is involved. In my view, this is of considerable importance, since different aspects have to be taken into account when examining whether the two mistakes are not excusable.

In the context of the present regulation of the mistake of harmfulness to society, I have indicated that it is impossible to avoid including in intentionality the consciousness of harmfulness to society, or more precisely the absence of this mistake as a negative element. The reason is that, without it, there is no element of the concept of crime which the mistake of being harmfulness to society would eliminate if it were due to reasonable grounds. In the current legislative context, I have advocated the interpretation of harmfulness to society as an explicit element of the concept of crime.

In the case of the elements mediating the formation of the consciousness of harmfulness to society, despite the various critical positions, I have advocated in this thesis the competence of both the consciousness of illegality, the consciousness of immorality (or typically the consciousness of social disapproval, condemnation, social harm), and the consciousness of dangerousness, the conjunctive absence of which is necessary for the successful invocation of the mistake of harmfulness to society. Given that the Act II of 1950 on the General Part of Criminal Code accepting the Schuldtheorie was that mistake of harmfulness to society was regulated, the “reasonable grounds” clause was introduced in order to distinguish, from a legal point of view, between mistake of harmfulness to society that was not at all attributable (due to reasonable grounds) and mistake of harmfulness to society that was attributable but arose from a justifiable circumstance (otherwise avoidable with due diligence and providing for unlimited reduction of penalty). In this way, a mistake harmfulness to society matters arising from reasonable grounds essentially coincided with a mistake harmfulness to society matters which could not be detected even with due diligence. Since the Vorsatztheorie has been accepted since the Act V of 1961 on the Criminal Code, it would be advisable, in the interests of didactic clarity and to dispel any anomaly of interpretation, for the legislature *de lege ferenda* either to remove the ‘reasonable grounds’ clause from the definition of mistake of harmfulness to society or, if it insists on retaining it, to include it in the definition of mistake of fact.

Based on the range of court decisions that have voted to dismiss the mistake of harmfulness to society, I have tried to establish categories of typical pleas. I have done the same, however, in the case of the judiciary's treatment of the excusability of this type of mistake. In the case of mistake caused by misinformation of public authorities and, according to recent practice, mistake caused by information provided by a person who is a professional legal adviser, I have concluded that, in so far as it is attributable to a specific person, the covert offender of the mistake by that person is not theoretically excluded. In my view, the extension of the scope of the reference in case-law to misinformation by a public authority to include information given

by a person entrusted with public functions in the specific sphere of their activity is a possible trend, whereas I consider that the mistake caused by misinformation given by a person providing legal advice may also be extended, at the same level, to include advice given by a person (for example, a tax expert) who is more experienced in the relevant legal context than a layman in a professional sense. In the case of a mistake of the detailed regulation of another legal norm filling the framework, the practice should show flexibility to erode the “ignorance of the law does not excuse” principle and to establish sufficient criminal liability for the perpetrator who regularly or ex officio deals with such legislation and who regularly carries out activities in the field regulated by such legislation. In the case of a mistake made in good faith and in the search for a way to comply with the law (study of the law, case-law), the case-law must assess the efforts made by the offender to avoid making a mistake which is mistake of harmfulness to society. In the case of presumed grounds for exemption from criminal responsibility, I have proposed, in line with the minority position, to solve the problem by mistake of fact, since, for example, in the case of presumed justifiable defense, the assault as a preliminary issue is a question of fact that must be embraced by the perpetrator's mind for the presumed justifiable defense to exist. As a corollary, I have not supported the current prevailing response of the jurisprudence, which has not consistently erred on this issue in the past, that mistake of harmfulness to society should be applied in such cases.

In the jurisprudence of mistake, the inconsistent tendency not to distinguish between the absence of harmfulness to society and mistake of harmfulness to society must be broken. The harmfulness to society of an act is an objective category in actus reus, independent of the perpetrator, and the mistake has no effect on it. A mistake can eliminate culpability on the subjective side, in mens rea, but it is still not the case that the offense cannot be established on the grounds of lack of harmfulness to society. Notwithstanding the existence of a mistake, the act is harmful to society and is punishable as a factual act, only in concreto is the offender not culpable. Consequently, if an act is not harmful to society, in theory it is not possible to establish a criminal offense by replacing the perpetrator with anyone else, but this is not the case for the mistake of harmfulness to society. Thus, I have drawn attention to the consequent prosecutorial consideration that, in the case of decisions derived from the logic of error, acquittal should be based on a ground for total exemption from criminal responsibility and not on the act does not constitute a criminal offense.

I pointed out that the superior's order – as a ground for total exemption from criminal responsibility – is a special case of mistake of law, since the subordinate is aware of the facts

but does not recognize the legal prohibition of the act committed on the basis of the order in the specific situation, nor the punishability of the act.

In the context of negligent mistake, I explained that it requires a different test from the negligence inherent in the facts. I have concluded that in the case of *praeterintentio* included in a separate offence of negligence, mistake could be used to exclude liability and that liability between negligence and accident could be inferred by the use of mistake in certain cases. My analysis of the case law shows that the courts rarely deal with the use of negligent mistake of harmfulness to society, although a fine-tuned dogmatic analysis of this issue could make the application of mistake more flexible.

Taking all these summarizing conclusions into account, I hope that the work will contribute to the treatment of mistake on a doctrinal local level and present arguments for the jurisprudence to consider.

IV. List of publications on the subject of the work

Gubis Philip: Az *error in objecto* és az *error in persona* egyes dogmatikai kérdései. *Ügyészek Lapja*. 2023/1. 37-49. o.

Gubis Philip: A büntetőjogi tévedés jogtörténeti áttekintése. In: Nagy Marianna – Fazekas Marianna (szerk.): *Jogi tanulmányok 2022. Jogtudományi előadások az Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Kar Doktori Iskolájának Konferenciáján*. ELTE Állam- és Jogtudományi Kar, Állam- és Jogtudományi Doktori Iskola. Budapest, 2022. 119-134. o. DOI: <https://doi.org/10.56966/2022.8.Gubis>

Gubis Philip: Az elkövetési tárgyban való tévedés a kábítószerrel kapcsolatos bűncselekmények körében. *Ügyészek Lapja*. 2021/6. 23-35. o.

Gubis Philip: A ténybeli tévedés elmélete és gyakorlata az élet, a testi épség és az egészség elleni bűncselekmények tekintetében. In: Molnár Dániel – Molnár Dóra (szerk.): *Tavaszi Szél 2021/Spring Wind 2021. Tanulmánykötet I. Doktoranduszok Országos Szövetsége (DOSZ)*. Budapest, 2021. 217-226. o.

Gubis Philip: A Kúria felülvizsgálati végzése a társadalomra veszélyességben való tévedésről. *Jogesetek Magyarázata*. 2020/3–4. 21-28. o.

Gubis Philip: A büntetőjogi tévedés nevesített eseteiről. In: Nagy Marianna (szerk.): Válogatott tanulmányok. Az ELTE Állam- és Jogtudományi Kar tudományos diákköreinek a XXXIV. OTDK-ra nevezett dolgozataiból. ELTE Eötvös Kiadó. Budapest, 2019. 93-102. o.