MENS REA AND MISTAKE OF LAW IN CRIMINAL CASES: A LESSON FROM SOUTH AFRICA

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Mistake of law is generally not a defence to a criminal charge in the common law. However, in South Africa there is now a recognised defence of mistake of law in criminal matters. The genesis of this defence lies in the sophisticated concept of *mens rea* held in South Africa which includes knowledge of unlawfulness as its essential ingredient. This article briefly outlines the developments in South African criminal law that has led to this result and the author suggests that there is scope for similar reform in Australia.

I. INTRODUCTION

A general principle of criminal law is that a person cannot be guilty of an offence unless his or her mind is also guilty.[1] Historically, this guilty mind or *mens rea* was, if not based on, at least very closely related to moral wrong. Over the years the moral content of *mens rea* has been stripped away, and it is now accepted, even by leading writers on criminal law, that a person may "be acting with a perfectly clear conscience, believing his [or her] act to be morally, and *even legally, right*, and yet be held to have mens rea [emphasis added]".[2]

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1 This principle is embodied in the Latin maxim, *actus non facit reum, nisi mens sit rea.* See JC Smith, B Hogan, *Criminal Law*, Butterworths (7th ed, 1992) p 385.

2 *Ibid*, p 53.

One reason for this anomalous development where a person with a clear conscience and innocent intentions can be held to possess a guilty mind is the ancient maxim *ignorantia juris non excusat*, which means ignorance of the law is no excuse. This rule has been applied since its inception into the common law through the writings of Sir William Blackstone in his *Commentaries*.[3] The success and failure of this rule in the criminal law have been discussed elsewhere,[4] and the arguments shall not be repeated here. Suffice it to say that the rule's historical origin is uncertain,[5] its rationale for existence questionable,[6] and its application in the criminal law without certainty.[7] Academic, judicial, and legislative attempts to limit the application of this rule speak for the fact that the rule is more of a liability than an asset in the criminal law.[8] The existence of this rule has undermined a rational and conceptually sound development of our concept of *mens rea*. Proof of this assertion can be found through a comparative study of the South African experience in this area.

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3 "Ignorance or mistake is another defect of will when a man intending to do a lawful act does that which is unlawful. For here the deed and will acting separately there is not the conjunction between them, which is necessary to form a criminal act. But this must be an ignorance or mistake of fact and not an error in point of law...for a mistake in point of law, which every person of discretion not only may but is bound and presumed to know is in the criminal cases no sort of defence. *Ignorantia juris, quod quisque tenetur scire, neminem excusat.*": Sir William Blackstone, *Commentaries on the Laws of England Book 4*, Garland Publishing (1773) p 27.

4 See L Hall, S Seligman, "Mistake of Law" (1941) 8 *University of Chicago Law Review* 641; D O'Connor, "Mistake and Ignorance in Criminal Cases" [1970] *Criminal Law Review* 646.

5 The rule's origin has been attributed to Roman law but this has been proven to be incorrect. The rule's application in Roman law was limited to transactions of a civil nature. See ER Keedy, "Ignorance and Mistake in the Criminal Law" (1908) 22 *Harvard Law Review* 75. The point is also made in L Hall, S Seligman, *ibid* at 646 where the authors state, "Blackstone was in error in ascribing the origin of the *ignorantia* rule to the Roman Law".

6 The traditional rationale is provided by Blackstone who says that the rule exists because "every person is presumed and bound to know the law". This presumption is no longer held. Modern rationales include John Austin's theory that to permit a defence of mistake of law would "render the administration of justice next to impracticable" as the courts would be involved in "questions scarcely possible to solve": J Austin, *Lectures on Jurisprudence or The Philosophy of Positive Law*, John Murray (5th ed, 1972 - revised and edited by Robert Campbell) p 482; Oliver Wendell Holmes' theory is that "to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales": OW Holmes, *The Common Law*, Little, Brown (1881) p 48; Jerome Hall's theory that the rule is based on the principle of legality and to allow a defence of mistake of law would contradict the essentials of legal system where the law expresses objective meanings which are determined by certain people: J Hall, *General Principles of Criminal Law*, Bobbs-Merrill (2nd ed, 1960) pp 382-3.

7 The principal difficulty is the artificial distinction between mistake of fact and mistake of law.

8 See K Amirthalingam, "Mistake of Law: A Criminal Offence or a Reasonable Defence?" (1994) 18 *Criminal Law Journal* 271 and the references therein; DN Husak, "Ignorance of Law and Duties of Citizenship" (1994) 14 *Legal Studies* 105; WJ Brookbanks, "Officially Induced Error as a Defence to Crime" (1993) *Criminal Law Journal* 381; N Morgan, "Mistake" (1991) 15 *Criminal Law Journal* 128; G Williams, "The Draft Code and Reliance Upon Official Statements" (1989) 9 *Legal Studies* 177.

II. INTRODUCTION TO SOUTH AFRICAN CRIMINAL LAW

The main principle underlying South African criminal law is embodied in the maxim, *nulla poena sine culpa*; that is, there can be no punishment without culpability. The highly regarded criminal law commentators in South Africa, Burchell and Hunt,[9] in supporting this principle, have argued that to punish a person who engages in proscribed conduct neither intentionally nor negligently is unjust. Further, to label someone who is without moral fault as criminal would weaken respect for the law.[10]

Under the old South African criminal law, this principle was qualified by the *ignorantia juris* rule. However, the South African Appellate Division abolished this rule in 1977 in its landmark case of *S v De Blom*.[11] Rumpff CJ (in whose judgment Jansen JA, Rabie JA, Muller JA, and Joubert AJA concurred) laid the tombstone over the *ignorantia rule* when he stated:

> At this stage of our legal development it must be accepted that the cliché that 'every person is presumed to know the law' has no ground for its existence and that *the view that 'ignorance of the law is no excuse' is not legally applicable in the light of the present-day concept of mens rea in our law.* [emphasis added][12]

S v De Blom shall be discussed in detail later. In *S v Waglines (Pty) Ltd*,[13] Didcott J noted that the *De Blom* conclusion that ignorance of the law is an excuse arose from "the broader and more modern concept of *mens rea* developed locally, one emphasising individual blameworthiness and the consciousness of illegality".[14] A brief look at the history of South African criminal law and its concept of *mens rea* at this point would therefore be helpful.

A. Background to South African Criminal Law[15]

There were three distinct stages in the development of South African criminal law: the Dutch stage from 1652-1795; the English stage from 1795-1910; and the mixed South African stage from 1910 to present day. During the final stage, there has been a strong influence from contemporary German criminal theory.

The Dutch stage saw the introduction of Roman-Dutch law to South Africa. This legal system was imported into South Africa with the arrival of the Dutch East India Company in the Cape in 1652.[16] The English stage began in 1795 although did not really have effect until 1834. During the first few decades of this

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9 EM Burchell, PMA Hunt, *South African Criminal Law and Procedure I*, Juta and Co Ltd (2nd ed, 1983) p 64.

10 This sentiment is echoed in a different context by an American court in the case of *State v O'Neil* (1910) 126 NW 454 at 456 where McClain J said that "[r]espect for law which is the most cogent force in prompting orderly conduct in a civilised community is weakened, if men are punished for acts which according to the general consensus of opinion, they were justified in believing to be morally right and in accordance with law".

11 1977 (3) SA 513.

12 *Ibid* at 529 (H) (translation).

13 1986 (4) SA 1135 (N).

14 *Ibid* at 1145 (D)-(E).

15 See generally, EM Burchell, JRL Milton, *Principles of Criminal Law*, Juta and Co Ltd (1991, reprint, 1994) pp 5-28 and note 9 *supra*, pp 11-50.

16 See generally, note 9 *supra*, pp 28-30 and references therein at note 189.

stage, the British Government was reluctant to transpose the existing law with English law.[17] However, between 1834 and 1910, the influence of English law in South Africa was substantial. Thus, by 1910 South African criminal law was truly a mixed system, a compound of Roman-Dutch and English law.

In 1910, the Union of South Africa was born and the Appellate Division was created. The Appellate Division confirmed the mixed system of South Africa when, in 1925, Kotze JA said, "the point has...to be decided by *our* law and not by the rules of Roman-Dutch jurisprudence, which we only apply as subsidiary common law... [emphasis added]".[18] The legacies of the two systems that had influenced South African criminal law may be summarised thus: English law provided a sound system of defining and classifying the common law crimes, whilst Roman-Dutch law provided a framework of general principles of criminal liability, not least of which was the Roman law concept of *mens rea* which included *dolus* and *culpa*.

The first forty years from 1910 saw the South African courts experiencing a period of 'adjustment' where English law still continued to have substantial influence.[19] By the mid-twentieth century, the next major influence on South African criminal law - that of contemporary German criminal theory - emerged.

(i) Contemporary German Criminal Theory and Mens Rea

A significant aspect of modern German criminal theory is its differentiation between the concepts of *mens rea* and unlawfulness. Three periods of modern German criminal theory are significant. The first stage was based on the "classical theory" of criminal law which is primarily attributed to the work of Franz von Liszt[20] and Ernst Belling.[21] The second stage was based on the "normative theory" of criminal law developed by Reinhard Frank.[22] Finally, the third stage, upon which present German concepts of *mens rea* are founded, was based on the "*finalismus* theory" for which Hans Welzel[23] is almost completely responsible.

Prior to the modern criminal theory there was no distinction between *mens rea* and unlawfulness. All that was required was 'criminal imputation' which tied the criminal act to the accused. By the seventeenth century, owing largely to the work of Samuel Pufendorf,[24] a distinction between objective and subjective criminal imputation was recognised. Objective criminal imputation was related to the unlawful act, whilst subjective criminal imputation was related to the human will.

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17 In September 1826 Commissioner Bigge, one of two commissioners sent to the Cape in 1823 to investigate into the affairs of the colony reported that it would be undesirable to introduce English law suddenly. Rather it should be done gradually, beginning with procedural law: *Theal Records* XXVIII 1, cited in note 9 *supra*, p 32.

18 *R v Mlooi* 1925 AD 131 at 149.

19 This was mainly due to the great influence of the leading South African work on criminal law at that time which was FG Gardiner, CWH Landsdown, *South African Criminal Law and Procedure*, Juta and Co Ltd (1917). The authors accepted that although South African criminal law was a mixed system, it was more in line with English law (p 5).

20 (1851-1919).

21 (1860-1932).

22 (1860-1934).

23 (1904-1977).

24 (1632-1694).

This objective/subjective distinction later led to the distinction between unlawfulness (an objective element) and *mens rea* (a subjective element). Von Liszt and Belling were the first to apply this distinction to the criminal law.

Von Liszt and Belling treated unlawfulness as consisting of all external, objective, and causal elements of a crime, whilst the *mens rea* consisted of all internal, subjective, and psychological elements of a crime. Therefore, this formulation was known as the psychological concept of *mens rea*. The strength of this theory was that it accorded with the basic principles of the rule of law, such as those embodied in the maxim *nulla poena sine culpa* [25] and *actus non facit reum, nisi mens sit rea*.[26] The weakness of this theory was brought to light with the discovery of subjective elements of unlawfulness and the development of the normative concept of *mens rea*.[27] An example where unlawfulness includes subjective elements is theft, where there is a requirement of dishonesty before the offence can be committed. Thus, if the accused did not intend to permanently deprive the owner of the goods or was acting under a claim of right then the act is not unlawful.[28]

The second stage was dominated by the normative theory. The normative theory modified the psychological concept of *mens rea* by including a requirement of blameworthiness. Thus, *mens rea* no longer was the mere subjective state of mind of the accused, but rather it was the wrongful formation of the accused's will to act contrary to law. This concept could now explain the areas which could not be adequately explained by the psychological theory.[29] Most importantly, this theory could account for negligence as *mens rea*. This is because under the new approach, negligence was regarded not as the failure to foresee the consequences but rather as a blameworthy neglect of care by the accused.[30] Although this theory introduced a degree of objectivity in *mens rea*, ie a value judgment had to be made, it still retained the psychological factors of intention and negligence as elements of *mens rea*.

As mentioned, the third and final stage was shaped by the "finalismus theory".[31] The significance of this theory lies in its radical redefinition of a criminal act. Essentially, this theory defines every act of a person as purpose-oriented. It may be easier to explain this theory in the context of the orthodox concept of an act.

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25 No punishment without culpability.

26 An act on its face cannot be unlawful without the requisite guilty mind.

27 H-H Jescheck, "The Doctrine Of Mens Rea In German Criminal Law - Its Historical Background And Present State" (1975) 8 *Comparative and International Law Journal of Southern Africa* 112 at 115.

28 See also, E Mezger, "Die Subjektiven Unrechtselemente" (1924) 89 *Der Gerichtssaal* 207 cited in *ibid* at 116.

29 See, note 27 *supra* at 117 for illustrations.

30 *Ibid.*

31 The translation of this term into English has not been consistent by the writers in this area. Snyman uses the term "finalistic theory": CR Snyman, "The 'Finalistic' Theory Of An Act In Criminal Law (Part One)" (1979) 3 *South African Journal of Criminal Law and Criminology* 3, while Du Plessis uses the term "final theory": JR Du Plessis, "Hans Welzel's Final-conduct Doctrine - An Importation From Germany We Could Well Do Without" (1984) 101 *South African Law Journal* 301 at 306. Since both writers argue that this theory is to do with the end result, however that may be derived, and indeed the theory itself is concerned with cause and effect, the German terminology will be retained and the essence and implication of this doctrine will be discussed.

Under the orthodox view, an act is generally described as a bodily movement which brings about certain consequences.[32] This concept of an act excludes the intention or purpose of the accused. Intention is only relevant in the realm of *mens rea*. Thus under the orthodox view, criminal liability is composed of two distinct elements. The first is the act, which is the external manifestations of the accused and assessed objectively. The second element is the mental element, which is the internal manifestation of the accused and assessed subjectively. The principle of legality requires that only unlawful acts may be punished and this requirement of unlawfulness is accommodated within the concept of *actus reus*.

The finalismus theory of an act is the antithesis of the orthodox theory of an act. Under the orthodox theory all that is required to be established is the voluntariness of the act and a causal link. This process is essentially diagnostic. The finalismus theory, on the other hand, employs a prognostic approach. Because people acquire knowledge through experience with normal causal processes, they are thus able to anticipate the possible consequences of their conduct and can steer their actions towards achieving a particular outcome. This intentional directing of a person's conduct towards a particular end is the finalismus theory's concept of an act.[33] Thus, "[t]he backbone of the act is the human will...to select a goal in advance, and to direct his [or her] conduct towards achieving this goal".[34]

The radical quality of the finalismus theory now comes to the fore. According to proponents of this theory, this direction of the human will is "nothing else than [the accused's] intention".[35] Thus, intention is no longer part of *mens rea* but now belongs to the realm of *actus reus*. A similar argument, although not in the context of the finalismus theory, has been advanced by DA Botha.[36] He says:

> an appreciation and a willingness to accept that intention does not constitute mens rea is the first step towards dissipating the haze of confusion that surrounds the correct meaning of mens rea.[37]

Botha makes the point which is the basis of the finalismus theory when he says, "*[b]asically the error lies in equating intentionality with intention*" [emphasis in original].[38] His argument is that intention belongs to the requirement of a voluntary act. Thus, he states, "[a]n act cannot be laid at the door of an accused unless he [or she] willed such an act...".[39]

Having removed intention from *mens rea* and placed it within the *actus reus*, what is left of *mens rea* is knowledge of unlawfulness. This, along with criminal capacity, is *mens rea* under the finalismus theory. This concept of *mens rea* is

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32 CR Snyman *ibid* at 5; EM Burchell, JRL Milton, note 15 *supra*, p 82; J Austin, note 6 *supra*, pp 414-5; OW Holmes, note 6 *supra*, p 45.

33 CR Snyman *ibid* at 8.

34 *Ibid* citing H Welzel, *Das neue Bild des Strafrechtssystems*, Otto Schwarz (1961) p 1 and H-H Jescheck, *Lehrbuch des Strafrechts, allgemeiner Teil*, Dunker und Humblot (2nd ed, 1972) p 166.

35 CR Snyman *ibid* at 10 citing H-H Jescheck *ibid* at 161; R Busch, *Moderne Wnadlungen der Verbrechenslehre*, Mohr (1949) p 8; H Welzel in (1939) *Zeitschrift fur die gesamte Strafrechctswissenschaft* 491 at 505, *Um die finale Handlungslehre*, Mohr (1949) at 9, 22.

36 DA Botha, "What Precisely Does Constitute Mens Rea?" (1975) 92 *South African Law Journal* 380.

37 *Ibid* at 383.

38 *Ibid.*

39 *Ibid.*

almost exactly that of the normative theory, the only difference being that the finalismus theory has purged *mens rea* from any remnants of the psychological theory. The elements of criminal liability under the finalismus theory are an act (as defined by the finalismus theory), unlawfulness (an objective criteria and a requirement of the principle of legality), and *mens rea* (as defined by the normative theory).

From this brief introduction it is clear that South African criminal law has a rich and mixed heritage. Having established a hybrid system from Roman-Dutch and English law, its reception of German criminal theory has served to 'fine tune' South Africa's criminal law. Although the various theories of German criminal law have infiltrated South African criminal law at different stages, the authorities suggest that the accepted theory of *mens rea* is the psychological theory.[40] The influence of this theory in South African criminal law is largely credited to Professors JC de Wet and HL Swanepoel whose work *Strafreg*[41] placed great emphasis on German criminal theory which, at that time, was still dominated by the psychological theory. As a result, the psychological theory gained a firm foothold in South African criminal law and was vigorously applied by the Appellate Division in *mens rea* cases from the 1950s.[42]

(ii) Mens Rea and Knowledge of Unlawfulness

To avoid confusion it should be clarified that *mens rea* in South Africa has two distinct elements: one being objective *mens rea*, known as *culpa*, and the other being subjective *mens rea*, known as *dolus*.[43] As to what constitutes the essence of *mens rea*, Burchell and Hunt ask this question:

> Since unlawfulness is an essential element of every offence, the question arises as to whether the accused must have had intention in respect of this element, ie must the accused have known that his [or her] act was unlawful?[44]

Since *De Blom*, this question has been answered in the affirmative.

In *R v Mkize*[45] it was accepted that under the general modern theory, there are four requirements for criminal responsibility. First, the accused must have legal capacity; second the accused must do a voluntary act; third, that act must be unlawful; and finally, the accused must possess *mens rea*.

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40 See generally, EM Burchell, JRL Milton, note 15 *supra*, pp 283-4; CR Snyman, *Criminal Laws*, Butterworths (2nd ed, 1991) p 150.

41 JC de Wet, HL Swanepoel, *Strafreg*, Butterworths (1949).

42 *R v Mkize* 1951 (3) SA 28 (A) at 33; *R v Huebsch* 1953 (2) SA 561 (A) at 567; *R v Du Randt* 1954 (1) SA 313 (A) at 316-17; *R v Hercules* 1954 (3) SA 826 (A) at 831; *R v Bougarde* 1954 (2) SA 5 (C) at 8; *R v Nsele* 1955 (2) SA 145 (A) at 148.

43 *Dolus* and *culpa* are two bases of liability in South African criminal law. The precise meaning of these concepts are still the subject of debates. For our purposes, suffice it to say that *dolus* requires actual intention or foresight of probability or possibility, ie the accused 'consents' or 'takes it into the bargain', while *culpa* is a state of blameworthiness where the accused ought to have committed or omitted certain acts. It has been argued that it is a form of negligence. For further discussion on *dolus* and *culpa* see *1984 Annual Survey of South African Law*, Juta and Co Ltd at 446 and the references contained therein; *S v Mtshiza* 1970 (3) SA 747 (A) at 752 A-B, per Holmes JA; and *S v Swanepoel* 1983 (1) SA 434 (A) at 456, per Viljoen JA.

44 Note 9 *supra*, p 132.

45 *R v Mkize* 1959 (2) SA 260 (N) at 264 (D).

Botha, as mentioned above, argues that intention belongs to the requirement of a voluntary act and not to *mens rea*. Although this is not an accurate reflection of the present South African position, his ideas warrant some discussion.

Botha provides an illustration of his thesis using the facts in *R v Kumalo*.[46] This was an assault case in which the accused, a native headman, believed himself entitled to have the complainant whipped for contempt of his court. Schreiner JA decided, in effect, that knowledge of unlawfulness was irrelevant and that, "[n]o more elaborate mental element is required than an appreciation that one is applying force to the person of another who is not willing to receive it".[47] In Botha's view such a mental element also fits the case of a schoolmaster inflicting legitimate corporal punishment on an unwilling pupil. He argues that:

> [s]uch a mental element provides only the intentionality making up the voluntary act. For criminal responsibility there must be, in addition, unlawfulness of such act and *mens rea*, and the *mens rea* patently consists of nothing else but knowledge of unlawfulness.[48]

He goes on to say that "*the decision to proceed with an act known to be unlawful, reflects the meaning of mens rea in its manifestation of dolus* [emphasis in original]".[49] Thus, even though Botha's thesis, that intention does not form part of *mens rea*, is not part of the current law of South Africa, his conclusion, that knowledge of unlawfulness is an element of *mens rea*, accurately reflects the present conception of *mens rea* in South Africa.[50]

In general terms, the common law concept of *mens rea* does not include knowledge of unlawfulness. However, it is arguable that the common law concept of *mens rea* can and indeed should include knowledge of unlawfulness. A good starting point is the nineteenth century case of *Sherras v De Rutzen*[51] which is regarded as authority for the proposition that there is a rebuttable presumption that *mens rea* is an essential ingredient to every offence. In that case, Lord Wright described *mens rea* as "an evil intention, or a *knowledge of wrongfulness* of the act [emphasis added]".[52]

This meaning of *mens rea*, expressed either as evil intention or guilty mind or knowledge of wrongfulness has never been defined over the years and has resulted in a black hole in the law into which no one dares tread. Indeed Murphy J once commented, "I use the vague expression, 'guilty mind'...the history of which shows that the vagueness often conceals different or contradictory ideas".[53] It is lamentable that such a fundamental aspect of our law has never been conclusively addressed. In a significant High Court case, *The Queen v He Kaw Teh*, Gibbs CJ stated that "the expression 'mens rea' is ambiguous and imprecise".[54] This lack of

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46 1952 (1) SA 381 (AD).

47 *Ibid* at 387.

48 Note 36 *supra* at 385.

49 *Ibid.*

50 "...knowledge on the part of the accused of the unlawfulness of his [or her] conduct is now always a requirement of mens rea in the form of intention": see note 15 *supra*, p 272.

51 [1895] 1 QB 918.

52 *Ibid* at 921.

53 *Cameron v Holt* (1980) 142 CLR 342 at 350.

54 (1985) 157 CLR 523 at 530.

precision led to further ambiguity when, in *Wampfler*,[55] Street CJ summarised that one of the propositions for which *He Kaw Teh* is regarded as authority is that:

> mens rea will be presumed to be present unless and until material is advanced by the defence of the existence of honest and reasonable belief that the *conduct in question is not criminal*.[56] [emphasis added]

This led a judge of the New South Wales Court of Criminal Appeal, Abadee J, to comment that the statement by Street CJ was open to misunderstanding. According to Abadee J, when Street CJ referred to "a belief that the conduct in question is not criminal", he was "obviously not intending to refer to ignorance or mistake of law".[57] With respect to Abadee J, even though it may be obvious to His Honour and in accordance with the orthodox view of *mens rea*, there is no reason in principle why Chief Justice Street's statement could not be taken to refer to ignorance or mistake of law. Abadee J referred to *Von Lieven v Stewart*[58] and simply quoted Handley JA who stated, "[i]t is beyond argument that a reasonable but mistaken belief can only furnish an excuse where the mistake is one of fact".[59] With respect, there has not been sufficient argument to warrant such a conclusion. There has only been rhetoric that mistake or ignorance of law is no excuse.

Another Australian case of interest is that of *Ianella v French*.[60] The accused in this case owned a sub-standard house which was affected by the provisions of the *Housing Improvement Act* 1940-1965 (SA) (the Act) under which the maximum rental for that house was fixed. On 31 December 1962 the *Landlord and Tenant (Control of Rents) Act* 1942-1961 (SA) expired. This second Act did not affect the accused's house which was still governed by the *Housing Improvement Act*. The accused, relying on newspaper reports, mistakenly believed that all rent controls in South Australia had ceased and that he could charge rents as he pleased. The accused entered into an agreement with a new tenant at a new rental rate which exceeded the maximum amount set by the Act. Consequently the accused was charged under s 56a(1) of the Act for having "wilfully demanded or wilfully recovered" as rent an irrecoverable sum. The magistrate acquitted the accused and the case went on appeal up to the High Court. Although the High Court found in favour of the accused in a 4-1 majority decision, the judges were not in agreement on several key issues. In summary, all four judges held that the conviction by the Full Court of the Supreme Court of South Australia was bad for duplicity. What is of greater interest is their divergent views on the *mens rea* issue.

Barwick CJ held that the word "wilfully" connoted some sort of knowledge or intention which included some consciousness of wrongdoing. As he said:

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55 (1987) 11 NSWLR 541.
56 *Ibid* at 546.
57 *Australian Iron & Steel Pty Ltd v Environment Protection Authority* (1992) 29 NSWLR 497 at 508.
58 (1990) 21 NSWLR 52.
59 *Ibid* at 66-7.
60 (1968) 119 CLR 84.

> Mens rea may in some cases, depending...on the context and subject matter, require that the defendant should know that the act is unlawful. That element of the offence itself cannot be eliminated in such a case by saying that ignorance of the law is no excuse.[61]

Thus, there may be certain offences where an ingredient of the offence is knowledge of unlawfulness, and in such cases, the rule that ignorance of the law is no excuse must be overridden. Having so concluded, Barwick CJ decided it was not necessary to decide if the mistake here was one of fact or law, although he intimated that he would accept that it was a mistake of fact.[62] Taylor and Owen JJ held that it was a mistake of law and thus found no defence based on *mens rea*. However, they were of the opinion that the convictions were bad for duplicity and, on that ground, allowed the appeal. Windeyer J also found that the convictions were bad for duplicity and held that the mistake was one of fact. However, His Honour went on in his emphatic judgment to state that he agreed with Barwick CJ that the term "wilfully" in the context of this case included some knowledge of wrongfulness. McTiernan J, in his dissenting judgment, held that "wilfully" meant nothing more than mere intention, and the accused's mistake or ignorance was not relevant.

Notwithstanding the views presented above, it can be said that as far as Anglo-Australian common law is concerned, once the accused knows all the material facts of the offence - and because knowledge of unlawfulness is generally not a material fact, unless specifically required for the particular offence - *mens rea* is imputed to the accused. In other words, as soon as a voluntary act has been proved, *mens rea* is, by virtue of the *ignorantia juris* rule, irrefutably presumed. The question that Botha asks is: "Why bother with any requirement of guilt at all if guilt automatically follows as soon as a voluntary act has been proved?".[63]

Because knowledge of law is presumed, any violation of the law will be deemed to have been done with knowledge of unlawfulness. Thus, the mere (arguably even innocent) violation of the law creates a presumption of guilt. This is contrary to the fundamental notion of criminal law - ie the presumption of innocence. Thus, the paradoxical situation is created where knowledge of unlawfulness is required for guilt, but this knowledge is then presumed. South Africa, on the other hand, has recognised this paradox and remedied it by including knowledge of unlawfulness as an element of *mens rea* and consequently allowed mistake or ignorance of law to operate as a defence.

III. THE DEFENCE OF MISTAKE OF LAW IN SOUTH AFRICA

A. *S v De Blom* - A New Beginning

The facts in this case were that the appellant was attempting to leave South Africa with a large sum of money and some jewellery. At the airport, the appellant was searched for security reasons and police found a relatively large sum of

61 *Ibid* at 97.
62 *Ibid.*
63 Note 36 *supra* at 386.

American dollars in notes concealed in her luggage. The appellant was asked if she had permission to take the money out of the country, and she said that she did not have permission, whereupon she was arrested. Upon further questioning she revealed that she had more money concealed in her luggage as well as a substantial amount of jewellery on her which she claimed was her personal property. She was charged on two counts of contravening the *Exchange Control Regulations*.

The first count was one of contravening regulation 3(1)(a) by taking US$40 000 in banknotes out of the country without the necessary permission. The second count was one of contravening regulation 10(1)(b) by taking jewellery to the approximate value of R14 000 out of the country without the necessary permission. At the trial, the appellant said in evidence that she was unaware that she required permission to take the money or jewellery out of the country. Justice Van Winsen held that the accused's claim amounted to a plea of ignorance of law and convicted the accused on both counts.

On appeal to the Appellate Division, Rumpff CJ discussed the question of *mens rea*. Great reliance was placed on the writings of academics in the field of criminal law and *mens rea*.[64] Indeed, Rumpff CJ ignored most of the cases which firmly held that ignorance or mistake of law was not a defence and held that ignorance or mistake of law must be recognised as negativing criminal liability in the same way as ignorance or mistake of fact. His Honour went on to say that for crimes where *dolus* only suffices, the accused may rely on a defence of mistake of law if it can be reasonably inferred from the evidence as a whole that the accused honestly did not know that the act was unlawful. When *culpa* only and not *dolus* alone is required as *mens rea*, then the defence of mistake of law will succeed only if that mistake were reasonable.

In his reasoning, Rumpff CJ also stated the law in relation to onus of proof in such cases. He held that once the prosecution has led evidence that the prohibited act has been committed, an inference can be drawn, depending on the circumstances, that the accused willingly and knowingly (ie also with knowledge of unlawfulness) committed the act. The evidentiary burden is on the accused to raise a defence of mistake of law. The final burden of proof remains with the prosecution.[65] In this case, the appellant was found guilty on the first count. From the evidence, it was inferred that she did know that permission was required to take such money out of the country. However, with regard to the second count concerning the jewellery, it was held that it was reasonable that she did not in fact know that permission was required to take such jewellery out of South Africa. The conviction on the second count was thus quashed due to her ignorance of law.

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64 Among those cited by Rumpff CJ are: JC De Wet, HL Swanepoel, note 41 *supra*; JD Van der Vyver, "Knowledge of Wrongfulness and Criminal Liability" (1967) 30 *Tydsknt vir Hedendaagse Romeins-Hollandse Reg (THRHR)* 271; JCW Van Rooyen, "Error of Law and Dolus in Criminal Law" (1974) 37 *THRHR* 18 at 35; DA Botha, "Knowledge of Wrongfulness in Criminal Law" (PhD thesis, University of Pretoria, 1973); DA Botha, "Blameworthy Ignorance of the Law and Fault in the Form of Culpa" (1975) 38 *THRHR* 41.

65 Note 11 *supra* at 532 (translation).

In summary, the law in South Africa after *S v De Blom* is this:

1. The rule that ignorance of the law is no excuse no longer exists in the criminal law.
2. There is no distinction between mistake of fact and mistake of law.
3. For offences requiring *dolus*, any honest mistake would negative *mens rea*; for offences requiring *culpa* only an honest and reasonable mistake would negative *mens rea*.
4. The accused bears the evidentiary onus of raising a defence of mistake; the prosecution bears the final onus of proving the offence beyond a reasonable doubt.

B. Application of the *De Blom* Defence in South Africa

Since *De Blom* was decided there has been a line of cases supporting and endorsing its principles.[66] However, there are two main areas in which the *De Blom* principle is qualified. The first one concerns the kind of knowledge required whilst the second concerns a duty to know the law.

(i) Kind of Knowledge

In *S v Magidson* Ackermann J gave an indication as to what sort of knowledge was required. He indicated that it was not necessary that the accused must be aware that she or he is contravening a specific law. All that is required is that the accused be aware that she or he is doing something unlawful. His Honour also held that actual knowledge may not always be necessary and that imputed knowledge may be sufficient. As he said, "[i]t is sufficient if he [or she] realises that what he [or she] is doing may possibly be unlawful and reconciles himself [or herself] with this possibility".[67]

In *S v Hlomza* Corbett JA made a similar observation and stated:

> [t]he enquiry is whether the accused knew that what he [or she] was doing was, or might possibly be unlawful, irrespective of whether he [or she] knew what law was being contravened and what the precise provisions of the law might be.[68]

However, there must be some nexus between the appreciation of the accused that what the accused is doing is or might be unlawful, and the charge she or he is facing. Kannemeyer J in the same case from which this appeal arose observed that if a person steals a sealed parcel not knowing what it contains but knowing that stealing is unlawful, then, if unbeknown to the accused the parcel contained a prohibited drug, the accused's wrongful act of stealing could not supply the *mens rea* for a drug offence under s 2 of Act 41 of 1971.[69]

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66 *S v Dalindyebo* 1980 (3) SA 1049 (Tk SC) at 1054-5, per Munnik J; *S v Cleminshaw* 1981 (3) SA 685 (C) at 689-91, per Van den Heever J; *S v Hoffman* 1983 (4) SA 564 (T) at 566, per Gordon R; *S v Magidson* 1984 (3) SA 825 (T) at 828-31, per Ackermann J; *S v Speedy* 1985 (2) SA 782 (A) at 788, per Hefer AR; *S v Waglines (Pty) Ltd*, note 13 *supra* at 1145-6, per Didcott J.

67 *S v Magidson*, *ibid* at 830 (B)-(C).

68 1987 (1) SA 25 (A) at 32 (F).

69 *S v Hlomza* 1983 (4) SA 142 at 145.

(ii) Duty to Know the Law

There has also been a line of cases to the effect that in judging *mens rea* in respect of unlawfulness, consideration will be given to the fact that the accused has a duty to acquaint themselves with the law relating to any trade, occupation, or activity in which they are engaged. Failure to do so will mean that their ignorance or mistake of law will not be reasonable and will not negative *mens rea* in the form of *culpa*.[70] This rule was actually formulated by Rumpff CJ in *De Blom* as a control mechanism to the defence. However, it must be stressed that this rule, which we may call the specialised-activity rule, only applies to offences where *culpa* is the required *mens rea*. Where *dolus* is the required *mens rea* then any mistake or ignorance, as long as honest, will suffice.

C. Weakness of *De Blom*

There was some concern among legal academics and judges in South Africa during the period of change precipitated by the case of *De Blom* that such a move would invite a barrage of ignorance of law defences. However, history has shown that even where the defence was raised, very few were successful. The South African experience has certainly proven the floodgates argument to be groundless.[71]

The main difficulty with the South African approach to mistake of law is the ruling that even an unreasonable mistake of law will suffice to negative *mens rea* in the form of *dolus*. RC Whiting[72] argues in his article that this new approach is unsatisfactory for this reason. He says:

> [T]he principle adopted by the Appellate Division will have the effect in many cases of removing from the field of criminality conduct which it is suggested ought still to be regarded as criminal, and in other cases of reducing the criminality of conduct to an extent which it is suggested is unwarranted.[73]

Whiting uses the case of *Rex v Werner and another*[74] as an illustration. In this case the accused were German prisoners of war who, on the orders of one of their officers, put to death a fellow prisoner suspected of collaborating with the South African authorities. The Appellate Division sustained their conviction for murder, holding that their belief that they were obliged to obey the orders of their superior officer, being a mistake of law, was no defence. (NB: This case was before *De Blom).* On the new approach, the accused would lack the *dolus* required for murder but, because of the unreasonableness of their mistake, would be convicted

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70 *S v Sayed* 1981 (1) SA 982 (C) at 990-1, per Friedman J (publication of a statement of a banned person in contravention of the *Internal Security Act* 1950 (South Africa), s 11 (g) (a)); *S v Du Toit* 1981 (2) SA 33 (C) at 40B, per Baker J (transporting petrol in container in contravention of the regulations under the *Petroleum Products Act* 1977 (South Africa)); *S v Cleminshaw*, note 66 *supra* at 690-1, per Van den Heever J (possession of prohibited publications contrary to the *Publications Act* 1974 (South Africa), s 8(1)(d)); *S v Khotle* 1981 (3) SA 937 (C) at 938-9 per Van den Heever J (conveying persons for reward in contravention of the *Road Transportation Act* 1977 (South Africa), s 31(1)(a)).

71 In *1991 Annual Survey of South African Law*, Juta and Co Ltd, at 440 it is stated that "*De Blom's* case has not, in South Africa, led to a rash of cases where this defence has either been claimed or upheld".

72 RC Whiting, "Changing The Face of Mens Rea" (1978) 95 *South African Law Journal* 1.

73 *Ibid* at 6.

74 1947 (2) SA 828 (AD).

of manslaughter. However, if only reasonable mistake of law were admitted as a defence, then the accused would be convicted of murder, and the mistake would be regarded as an extenuating circumstance. Thus, the accused's conduct under the new approach would be reduced from murder with extenuating circumstances to manslaughter. This, according to Whiting, is an example of reducing the criminality of conduct to an unwarranted extent.

Whiting provides a further illustration by adapting the facts of *Werner*. Assuming the accused's attempt to kill the victim failed, then but for their mistake of law, they would be guilty of attempted murder. However, under the new approach, the mistake albeit unreasonable, is sufficient to exclude *dolus* or intention, leading to a complete acquittal. This, he says would be "regarded as repugnant to one's sense of justice".[75]

A series of recent cases has demonstrated that this fear is not unfounded. Snyman[76] has identified some of these cases and argued that the courts are now confusing the *De Blom* defence by applying the specialised-activity rule to *dolus* offences. The reason for this may be that courts are reluctant to allow a complete defence of mistake of law, preferring the narrower defence of reasonable mistake only.

The confusion that sometimes arises may also be attributed to inferential reasoning. When such inferential reasoning is employed, objective standards are inevitably involved. *De Blom* itself is a classic example. Although both the offences in *De Blom* required *dolus*, the court found the appellant guilty on one count but not on the other. This was because from all the evidence available, it found that it was reasonable that the appellant did not honestly know she required permission with regard to the second count. With respect to the first count, it was found on the facts that the appellant did in fact know she required permission. The confusion can be abated if it is remembered that the objective criteria attach only to the inductive reasoning process and not to the *mens rea* element.

IV. CONCLUSION

The most important and most valuable lesson that Australia can learn from the South African experience is its model of *mens rea* which includes knowledge of unlawfulness. Conceptually, this would be the ideal model of *mens rea*. Over the last century, the requirement of knowledge of wrongfulness has been gradually stripped from the common law concept of *mens rea*. It is time to reconstruct our concept of *mens rea* in a more sophisticated form in light of the developments in South Africa.

Recognising that knowledge of unlawfulness should be an element of *mens rea* is the first step. Whether negligence should be recognised as a part of *mens rea* is

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75 Note 72 *supra* at 7.

76 CR Snyman, "Confusion Concerning The Defence Of Ignorance Of Law" (1994) 111 *South African Law Journal* 1. See also K Amirthalingam, "Distinguishing Between Ignorance and Mistake in Defence of the *De Blom* Principle" (1995) 2 *South African Journal of Criminal Justice* 12, where the author has argued that these cases can be rationalised under the *De Blom* principle.

a separate issue. The extent to which knowledge of unlawfulness is relevant, and consequently, the scope of ignorance or mistake of law as a defence requires debate. Is honest ignorance or mistake sufficient or should we require an element of reasonableness as well? Should ignorance and mistake be distinguished and treated differently? These are difficult but important questions which should be addressed. The formulation of a coherent concept of *mens rea* based on legal principles depends on the resolution of these questions.