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The doctrine of *mens rea* in German criminal law – its historical background and present state*

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The presentation of my subject confronts two problems of a general character. First, we belong to different legal systems, yours being part of Roman-Dutch law, influenced in modern times mainly by English criminal law doctrine, mine being part of continental law, more precisely its German-speaking branch, which has developed under the strong influence of our own legal philosophy. Both systems, to be sure, have a common root in Roman law, but the modern conceptualistic evolution has proceeded in different directions. Secondly, my subject is the most sophisticated part of the criminal law doctrine of Germany, though one may well say that the doctrine of *mens rea* "is not a purely theoretical question: for the accused in a criminal trial it can mean the difference between liberty and jail, or even between life and death"[1]. In a more general sense we can also refer to Immanuel Kant's famous remark: "Nothing is more practical than a good theory". Let us now consider, how the theory of *mens rea* has developed in Germany and what its present state is like.

Present-day German criminal law theory appears confusing at first sight, even to the jurist trained in a civil law system. Its comprehension is made easier, and, for the foreigner trained in a different legal system, is only made possible by a study of the origins of modern criminal law theory as it

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[1]Cf Bertelsmann *The Essence of Mens Rea* Publications of the University of the North, Pietersburg, Series C No 31 (1974).

has developed over approximately the last 100 years. In doing so we must distinguish each of the successive stages of development, each of which is characterized by the fact that it has in turn sought to explain the basic concepts of criminal law, unlawfulness (*Rechtswidrigkeit*) and *mens rea* (*Schuld*), in a certain manner and to elaborate their relationship with one another.

The starting point of our consideration is the so-called "common law" theory of criminal law (*gemeinrechtliche Strafrechtslehre*) of the first half of the 19th century, in which the concepts of unlawfulness and *mens rea* were not yet differentiated. This period was followed by the beginning of the distinction of unlawfulness and *mens rea* in what we today call the "classical theory" of criminal law, particularly as it was developed by Franz von Liszt (1851–1919) and Ernst Beling (1860–1932). Following them, a completely different view was introduced by the normative concept of *mens rea* advanced by Reinhard Frank (1860–1934). The ultimate theoretical and practical consequences of the normative concept of *mens rea* were only developed, however, in the *Finalismus* theory[2], a doctrine elaborated by Hans Welzel (born 1904) and his school. On this last theory, or in any case on the legal scholarship emanating from this theory, the modern German concepts of *mens rea* have been built.

Based on the historical background, I wish to divide my discussion into five points. Commencing with the criminal law theory of the early 19th century, which did not yet understand the concept of *mens rea* as distinguished from the concept of unlawfulness, I shall then consider the origins of the distinction between unlawfulness and *mens rea*. Thereafter I will proceed to Reinhard Frank's normative concept of *mens rea* and subsequently discuss the *Finalismus* concept of *mens rea*, which has virtually completed the normative approach to guilt. Finally, I will explain the consequences of this development for the present-day state of the doctrine.[3]

1. In the criminal law doctrine of the 18th and the first half of the 19th century, the period of "gemeines Recht" or "common law", the concepts of unlawfulness and *mens rea* were as yet undifferentiated. The central idea was that of "criminal imputation" (*strafrechtliche Zurechnung*), which served to label the criminal act as a human deed, not caused by mere chance or the pure forces of nature. However, ever since the time of the great jurist Samuel Pufendorf (1632–1694) whose work dominated 17th century German jurisprudence, the difference between "objective" and "subjective" criminal imputation had been known. In this context "objective" criminal responsibility was the mere causation of a prohibited or "unlawful" result, "subjective" criminal responsibility was connected with the human will, which was presumed to be free and therefore potentially responsible under criminal law. As a result, in the first half of the 19th century, there were already authors such as Christoph Carl Stübel and Heinrich Luden, who distinguished between unlawfulness and *mens rea* in their text-books, depending on whether one dealt merely with causing injury to a legally protected interest, or with the sub-

[2] The key word *Finalismus* may be translated by "purpose-orientated theory of action".
[3] For detailed references see Jescheck *Lehrbuch des Strafrechts* Allgemeiner Teil 2 Aufl Berlin 1972, § 22 "Die Entwicklungsstufen der neueren Verbrechenslehre".

jective prerequisites of criminal responsibility. They were exceptions, however, and forerunners of future criminal law doctrine. The last consistent representative of the theory of undivided imputation in criminal law was Adolf Merkel (1836–1896), who, in his works *Kriminalistische Abhandlungen* of 1867 and *Lehrbuch des deutschen Strafrechts* of 1869, regarded lawfulness as the sum of the imperatives and prohibitions established by law and accordingly interpreted unlawfulness as being a human act contrary to these norms. However, as the law is merely a moral force which appeals to the citizen's intelligence and morality, its imperatives can only be related to the will of the responsible person. One can therefore only consider an act a violation of these legal imperatives in the case of an intelligent will (*intelligibler Willen*), as Merkel called this essential point of reference. According to this theory legal obligations only exist for the criminally responsible person, and are measured in relation to the extent and degree of his capacities. According to Merkel, the attribute of criminal responsibility was included in the definition of unlawfulness. Subjective criminal responsibility for the act (*actus reus*) became the essence of unlawfulness, and *mens rea* and unlawfulness were one. He did not regard the law as an objective order of values protected on behalf of the community against possible violations, but understood it, like morality, to be a pure incentive for human conduct. Law and morality were not yet clearly divided at that time. Other authors, too, living around the turn of the century and at the beginning of our own times, held the opinion that, from the view point of a norm as the injunction of the legislator, one could only understand unlawfulness as culpable unlawfulness. These writers were Hold von Ferneck, Kohlrausch, Graf zu Dohna, and especially Binding, whose greatness as a theoretician lies in a different area, namely in the study of illegality to which he gave a new direction through his theory of norms (*Normentheorie*).

2. The first scholar who developed the concept of "objective wrongfulness" in the domain of private law was Rudolf von Ihering. In his book *Das Schuldmoment im römischen Privatrecht*, published in 1867, he showed that the factor of culpability does not necessarily play a role in ascertaining the legal consequences arising from an unlawful act or situation. An example of this would be the liability to the owner of a person in good faith possession of another's property. With this discovery it was also possible for criminal law scholars in contrast to earlier theories, to distinguish between unlawfulness and *mens rea,* and on this differentiation von Liszt and Beling built their new criminal law system. Ihering himself, however, did not reject the theory of Merkel, that an irresponsible person cannot act unlawfully in criminal law, but limited his new idea to the domain of civil law.

In contrast to the objective and subjective imputation of an act advocated by the scholars of the "common law" period, Liszt in his classical *Lehrbuch* of 1881 proposed a three-sectional concept of a crime, the components of which, act, unlawfulness and *mens rea* were tied together in such a way that first there had to be an act, second that this act must be unlawful, and finally that the unlawful act must be characterized as culpable. Beling, in his work *Die Lehre vom Verbrechen*, published in 1906, also emphasized the separation of unlawfulness and *mens rea*. Through his main idea of the *actus reus* as a legal description of the definitional elements of a

specific type of crime, he arrived at a still further differentiated concept of crime. To him only that act was criminal which included all the descriptive elements of an offence, was unlawful, and was committed with *mens rea*.

For Liszt and Beling the criterion for differentiating between unlawfulness and *mens rea* was the purely formal separation of the objective and subjective elements of the criminal act. The *actus reus* and unlawfulness formed the objective part of the act, while all the subjective elements belonged to *mens rea*. The concept of fault itself was also regarded by both classical authors as being purely formal: it was composed of soundness of mind as a prerequisite for criminal responsibility or *mens rea*, and of intention and negligence as the two forms of *mens rea*, as well as of the absence of grounds for exculpation from *mens rea*, of which necessity was considered most important. In addition to these elements Beling already regarded knowledge of the unlawfulness of an act as an indispensable characteristic of *mens rea*. The substance of the concept of *mens rea*, however, had not yet been defined at that time. It was still sufficient to label the various elements of *mens rea* with the keyword "subjective", without being able to say in what they consisted and now they related to one another. The purely descriptive designation "psychological concept of *mens rea*" (*psychologischer Schuldbegriff*) became customary for this concept of *mens rea* in the classical criminal law doctrine, as all its elements had something to do with the psyche of the offender. The great advantage of this concept lay in its simplicity and in the fact that the elements of *mens rea* as thus defined were easily ascertainable. It thus met the basic requirement of the rule of law *nulla poena sine culpa* (*actus non facit reum, nisi mens sit rea*), accepted as a basic principle also in Roman-Dutch law. It also formed a strong counter-weight against the exaggerations of the modern school of criminal politics, which arose out of their demand that punishment should serve not to balance and compensate fault but rather to protect society without reference to the degree of personal culpability of the wrongdoer. For the development of criminal law theory in German it was important that the leading spirit of criminal law doctrine, Franz von Liszt, was simultaneously the head of the modern sociological school of criminal reform. It is for this reason that the demands of the modern school of criminal politics were never implemented to their full extent, but were always counter-balanced by the concept of *mens rea*, and in this way adapted to the requirements of the rule of law. The maxim "punishment neither without nor beyond culpability" became a bulwark of individual liberty and fair play in the administration of criminal law.

3. Liszt and Beling had considered all the external, objective and causal elements of crime as belonging to the realm of unlawfulness, while all the internal, subjective and psychic factors were attributed to *mens rea*. The shortcomings of this doctrine soon came to light by the discovery of the *subjective* elements of unlawfulness and by the development of the *normative* concept of *mens rea*. The notion of the purely objective character of unlawfulness was thereby shown to be as impossible as the conception that fault was defined by the whole of the inner thoughts, impulses and emotions of the offender.

The doctrine of the subjective elements of unlawfulness, which was best elaborated in a famous article by Edmund Mezger in 1924[4], proceeds, as did Liszt and Beling, from what we Germans denote as an objective and material concept of illegality. Illegality is said to be objective, on the one hand, because the law represents an objective order of life; thus unlawfulness as an infringement of this order must be equally of an objective nature. Illegality is said to be material, on the other hand, since the material content of the law consists of the protection of human interests; accordingly, the material content of unlawfulness consists of an infringement of these interests. A consideration of the positive law shows, however – and this is the gist of the theory of the subjective element of unlawfulness – that the objective and material content of unlawfulness cannot be defined independently of the subjective intention of the offender. The best examples for such a subjective element of unlawfulness in the description of a crime are offences requiring a specific intent, such as theft in the German criminal code. The same is true in South African law, according to which theft requires the intention to deprive the owner permanently of the full benefit of his ownership[5]. For instance, a student who, contrary to regulations, takes a book home when the university library closes at night, intending to return it the following morning, does not commit theft, because the intention to steal is lacking. We consider this, as you do, a mere *furtum usus* which is considered criminal only in specific cases, *eg*, those concerning motor vehicles. Adoption of a purely objective concept of theft, independent of the requirement of an intention to steal, would be senseless, as only he who intends to violate another's rights of ownership can be considered guilty of the wrong typical of theft. The discovery of the subjective element of unlawfulness showed that the initially persuasive categorization of unlawfulness as including everything "external", and guilt as including everything "internal", as had been proposed by Listz and Beling, could not be correct. Human conduct cannot be categorically divided into, and separately judged as, an external causal event and the internal will, but must be considered as interrelated. Moreover, the doctrine of the subjective elements of unlawfulness paved the way for the further insight, that the resolution to undertake an act in the case of a criminal attempt was nothing else than a subjective element of unlawfulness. Following this discovery, however, the fundamental question arose what the true relationship of intent is to the other elements of crime. The doctrine of the subjective elements of unlawfulness thus became the forerunner for a new analysis which reclassified intent as an element of unlawfulness and prepared the way for the development of the purely normative construction of *mens rea*.

But we are not so far in our account as that yet and must first consider the introduction of the *normative* concept of guilt (*normative Schuldlehre*). Reinhard Frank, the founder of the normative doctrine of *mens rea*, in his 1907 article, "Aufbau des Schuldbegriffs", succeeded in collecting, together the isolated elements of the psychological concept of *mens rea* using a new point of reference – blameworthiness (*Vorwerfbarkeit*) – thus showing

[4]Mezger, "Die subjektiven Unrechtselemente" *Der Gerichtssaal* vol 89 (1924) p 207.
[5]Cf Burchell and Hunt *South African Criminal Law and Procedure* vol II 1970 p 566.

their interrelation and rendering them comprehensible for the first time. He regarded *mens rea* not as consisting simply of all the subjective elements of the deed on the part of the offender, but rather as the wrongful formation of his will to act, for which he is subject to blame to the extent that might have formed a will in accordance with the law. The questions which had been left open by the psychological concept of *mens rea* could now be answered in the context of Frank's construction. *Mens rea* cannot exist, for example, in the case of mental insanity, despite the presence of an intentional act, because a mentally-ill person cannot be blamed for having failed to form a will according to law. *Mens rea* is furthermore excluded in the case of duress and necessity, despite the existence of both criminal responsibility and intention, because it is unreasonable to expect that a will in accordance with law can be formed in the case of immediate and unavoidable danger to life. The formation of an unlawful will under such circumstances does not appear blameworthy in criminal law, though it may perhaps be according to the high standard of ethics. Negligence as a form of *mens rea* could also be more easily explained now. The essence of *mens rea* in this case does not lie in the failure to foresee the consequences caused by inattention, but rather in the fact that the perpetrator neglected his duty of care, or was not sufficiently observant in complying with it.

4. The doctrine of *Finalismus,* which originated about 1930, is based on a new concept of the human act. According to the theory of Hans Welzel, its founder and leading exponent, the ability of man to regulate his behaviour by use of his will and imagination constitutes the essence of each human act, distinguishing it from every other event. The concept of the act as so understood became the cardinal point for the construction of a theory of criminal law by the supporters of the *Finalismus* doctrine. The principal result was, as I mentioned earlier, that intent in the sense of *dolus,* including *dolus eventualis,* as the focal point of the goal-determined act, was removed from the sphere of *mens rea.* Rather, it was considered as an element of unlawfulness, because, by its very nature, intent is a part of every human act, and therefore even of an unlawful one. With the elimination of intent as the last psychological factor from the concept of *mens rea*, the transition to the *purely* normative idea of *mens rea* was accomplished. According to this theory, *mens rea* was only composed of criminal responsibility, knowledge of unlawfulness, and grounds excluding culpability such as duress and necessity. Thus, knowledge of unlawfulness became the central factor in the concept of *mens rea,* since an offender is usually accused of having formed his will in a blameworthy manner, because he decided to act *despite* a knowledge of the unlawfulness of his act[4].

As a result of separating intent and knowledge of unlawfulness, it became necessary to reinterpret cases of *mistake* in a manner consistent with the new theory. This meant departing from the then-existing scheme

[4]The division between crimes *mala in se* and crimes "*mere prohibita*" advocated in this respect by Bertelsmann *The Essence of Mens Rea* p 14, is not applied by the knowledge-of-unlawfulness doctrine in Germany since the same rule governs both classes of unlawful conduct (see Art 17 of the new Criminal Code 1975 and Art 11 sect 2 of *Gesetz über Ordnungswidrigkeiten* 1968, amended in 1975).

of *error facti* and *error iuris*, which still seems to be the prevailing theory in South Africa[7]. According to the *Finalismus* doctrine, there is on the one hand mistake concerning the descriptive elements of the offence (including the legal ones, *eg*, an existing marriage in the case of bigamy), which excludes intent and thus liability for an intentional act. We call it "*Tatbestandsirrtum*", as distinguished from "*Tatsachenirrtum*", which is mistake of fact. Thus the defendant in the case of *R v Mbombela*, 1933 AD 269 who was convicted of murder by a jury, would not have been guilty of intentional homicide under the German theory of "*Tatbestandsirrtum*", since the defendant believed that the thing he beat to death in the hut with a hatchet was an evil spirit ("tikoloshe") and not a human being[8]. Nor would the final conviction of culpable homicide as upheld by the Supreme Court have been delivered by a German court, because of the subjective test of negligence of which we will speak later. On the other hand there is mistake concerning the unlawfulness of an act, which negates knowledge of unlawfulness, but does not however, affect the intent. As a consequence of recognizing mistake concerning unlawfulness as a negative element of *mens rea*, the question then arose how an avoidable mistake of this kind was to be treated. In answer to this question, Welzel developed a doctrine known as *Schuldtheorie*. According to this doctrine *mens rea* is only excluded in the case of unavoidable error (*error invincibilis*). In the case of avoidable mistake of law, the offender remains liable for his intentional act, albeit he should be punished more leniently because of the diminished degree of *mens rea*. This theory has been applied by the Federal Supreme Court in Karlsruhe since 1952. The situation seems to be different in South African law, where it appears to be the prevailing rule that ignorance or mistake of law, even unavoidable mistake, does not excuse criminal conduct[9]. On the other hand, since the early 1950's South African courts, like their German counterparts, have adopted a purely subjective test for ascertaining intention[10]. Under the *Schuldtheorie* the nature of negligence, the particular elements of which had hitherto remained masked behind the vague term *Schuldform* (type of culability), could also be given new meaning. The unlawfulness of negligence consists of violating the duty of due care demanded in human relations, and in thus causing an unlawful result, for example, the death of a person by negligent homicide. The *mens rea* of negligence, however, lies in the offender not adhering to the required standard of care and foresight, although he could to the extent of his personal capacity well have done so. Thus an objective "reasonable man"-test as well as a subjective "personal capacity"-test is applied in ascertaining negligence in German criminal law (unlike civil law). Mbombela would have probably been acquitted because he was an African of only 18 years, profoundly prejudiced by his belief in evil spirits which had been implanted in him by tribal tradition and authority[11].

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[7]Cf The discussion of the problem by Burchell and Hunt, vol I, 1970, p 132 *et seq*.

[8]Cf Burchell and Hunt, vol I 1970, p 256 *et seq*.

[9]Cf Burchell and Hunt *op cit* 138 *et seq*.

[10]Cf Burchell and Hunt *op cit* 120 *et seq*.

[11]On the purely objective test of negligence cf Burchell and Hunt, *op cit* 149 ff. In contrast to the prevailing opinion, a subjective test of negligence is advocated by De Wet and Swanepoel *Die Suid-Afrikaanse Strafreg* 2 ed 1960 p 139 *et seq*.

5. The consequences for the concept of *mens rea* derived from the doctrine of *Finalismus* can also be drawn other ways by those who do not adhere to the "finalistic act" doctrine because they do not accept its applicability, for instance, in cases of negligence or crimes of omission. By recourse to older theories it can be shown that legal norms prescribe legal duties, which are supposed to be guides for each person to maintain his will in accordance with law. The consequence of this last doctrine, which is known as the "theory of imperatives", is that the will to act represents the focal point of unlawful behaviour, because it is the human will not complying with its legal duty which negates the imperative contained in the legal norm. The concept of unlawfulness as including intent can further be substantiated by reference to the purpose of protection inherent in every norm, and is therefore not dependent on whether one proceeds from the "theory of imperatives". If the purpose of legal norms is to protect human interests which can be affected by human acts, then the nature and extent of the danger to the protected interest depends on the kind and seriousness of the infringement upon the norm – this however is mainly determined by the offender's will to act. The correlation of intent and unlawfulness may thus also be supported by appeal to the traditional, objectively-oriented doctrines of criminal law.

The consequences for the concept of *mens rea*, which were initially derived from *Finalismus*, or the theory of the "purpose-oriented act", are therefore accepted in present-day Germany by the legislator, the majority of the scholarly criminal law literature, and by the judiciary, even though the doctrine itself did not become prevalent. The new general part of the Criminal Code, which comes into effect on January 1, 1975, provides explicity for the first time that the criminally irresponsible person acts "without *mens rea*" (Art 20). The new code also differentiates between a mistake concerning the definitional elements of an offence (Art 16) and a mistake concerning the unlawfulness of an act (Art 17), and makes clear that the first excludes intent, whereas the second does not. Moreover, unavoidable mistake concerning the unlawfulness of an act is clearly characterized as a ground excluding *mens rea*, whereas avoidable mistake is merely a factor mitigating blame, while the liability for punishment remains. That the legislature regards intent as belonging to unlawfulness is further shown by the fact that for the crimes of incitement and aiding and abetting, an *intentionally* committed principal act is required (Art 26, 27). Necessity in criminal law is moreover, clearly designated as a ground excluding *mens rea* (Art 35). The new doctrine of *mens rea* also found its way into the provisions concerning criminal negligence in the 1962 draft of our new Criminal Code; however in the final text this particular rule was omitted as just too "textbook like" to be included in a general statute. Still, one can conclude from decisions of the Federal Supreme Court, that a defendant will be found criminally negligent only if, in addition to his responsibility for causing the injury, there was a lack of the objectively required duty of care due to his personal inattention[12], and if this lack of care was in fact the cause of the forbidden consequences[13].

[12]Decisions of the BGH in civil matters, Grosser Senat, vol 24, p 1.
[13]Decisions of the BGH in criminal cases, vol 11 p 1.

The concept of *mens rea* has undergone, as we have seen, a radical transformation in the course of the last 100 years. In the future, the basic ideas of the system will most likely remain unchanged, but they will probably be further refined. For instance, the dividing-line between *dolus eventualis* and gross negligence, the criteria for determining the avoidability of a mistake and the prerequisites of negligence will have to be more clearly developed. This will be primarily the duty of the courts, and so I wish to conclude my remarks with two cases which I recently had occasion to decide as a Judge on the Court of Appeal at Karlsruhe. In the first case[14] a workman was erecting tomb-stones at the cemetery, even though according to our legislation this activity is reserved to mastercraftsmen. The defendant claimed not to have known of this rule and to have acted in the belief that any kind of regular labour would be free from personal qualifications in Germany. In this case, the unlawfulness of the act on the part of the workman was regarded as avoidable, as he should have and could easily have consulted the relevant authority, and therefore his appeal was dismissed. In a similar case, *S v Tshwape* 1964 (4) SA 327, the Supreme Court of South Africa, Cape Provincial Division, held that the accused's lack of knowledge that a permit was required for the slaughter of a goat was not relevant to the question of *mens rea,* irrespective of the avoidability of the mistake[15]. In the other case which I had[16], a little boy was fatally injured when he ran from behind parked vehicles directly into the path of an oncoming car. The driver, to be sure, had exceeded the speed-limit by 10 miles per hour, but was nevertheless acquitted of a charge of negligent homicide, and only convicted of exceeding the speed-limit, as the accident could not have been avoided, even if the driver had adhered to the prescribed speed-limit. A quite similar view was voiced by the Supreme Court of South Africa, Appellate Division in *S v Haarmeyer* 1971 (3) SA 43.

As you have seen, nothing is more practical than a good theory – provided that it is really a good one.

[14]Gewerbe-Archiv 11/12 (1973) p 302.
[15]Cf the discussion of this case by Burchell and Hunt *op cit* 133 *et seq.*
[16]Goltdammer's Archiv 1970, p 313.